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Offences concerning directors and officers of a company

Fraud and corruption in the United Kingdom – the present and the future

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Abstract

Purpose – The purpose of this paper is to consider the present and possible future nature of the legal regime regulating and seeking to control fraud and corruption on the part of directors and officers of companies in the UK.

Design/methodology/approach – This paper outlines aspects in the present and future fight against fraud and corruption on the part of directors and officers of companies, particularly with regard to public and listed companies in the UK.

Findings – The paper emphasises the need for the UK Government to secure adequate resources for the investigating and enforcement authorities to ensure that the law of fraud and corruption is effectively enforced, rather than pursue a policy of constant enactment of new legislation which is increasingly complex and ineffective.

Originality/value – The paper considers the creation of a new generic offence to supplement the new generic offences created under the Fraud Act 2006, based on the established principle of the fiduciary duty, a duty owed by all directors and officers to their companies. These offences could form the central core of a future legal regime regulating the conduct of directors and officers.

Keywords Fraud, Corruption, United Kingdom, Organizations

Paper type Research paper

Introduction

This paper will consider how the law relating to fraud and corruption may evolve in England and Wales as a means of counteracting dishonest and corrupt conduct on the part of directors and officers of companies. In doing so, the paper will also consider how conduct which amounts on the part of such individuals to a serious breach of duty with regard to their company may form the basis of a proposed generic offence[1]. In addressing these issues, consideration will first be given to the policies which have shaped the present law governing fraudulent and corrupt activity on the part of directors and company officers both substantive and procedural.

The legislative obsession

Perhaps, the most consistent policy of successive British Governments over the past 20 years which has shaped this area of the law, has been an obsession with enacting

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legislation to deal with the fraudulent and corrupt activities of both organised crime, terrorists and those who are the directing minds of companies, particularly with regard to public and listed companies[2]. This obsession has led to a plethora of statutory provisions which has been indifferently or unsuccessfully enforced on the part of the relevant enforcement authorities[3]. Failure of any legislation to counteract a particular area of criminal activity merely results in government proposals for further legislation, rather than an increase in resources allocated to the relevant enforcement agencies so that these agencies may be in a position to enforce the present legislative regime with vigour and some confidence of success.

The perception of the success of the fight against fraud and corruption

This approach to the problem of fraud and corruption on the part of the UK Government has led to a perception by the public that the law proscribing the activities of organised crime, and terrorists in the UK is ineffective. This perception is even more pronounced in the case of the law which seeks to regulate the financial services industry, and the directors and officers of public and listed companies, with the public firmly convinced that the law relating to the regulation of public and listed companies is particularly under resourced, given little priority by the UK Government, which is regarded as too intimately associated with the interests of the city, and consequentially ineffective[4]. Furthermore, there is a public perception, repeatedly confirmed by the financial press that the relevant authorities in the UK given the task of the enforcement of the law regulating fraud and corruption are toothless, both with regard to the city and with respect to public companies and their officers[5], and that the relevant authorities are incompetent and outgunned by the legal teams which defend those accused of such offences[6]. Furthermore, the government as legislator in this field is at best seen as indecisive and at worst interested in producing legislation dealing with fraud and corruption as an aspect of gesture politics, in order to score over the opposition or attract favourable press coverage[7]. The recent sniping between the government and opposition over the need for further legislation to deal with the threat of terrorism is a prime example of such activity and brings all the parties involved into disrepute.

The fight against fraud and corruption – an inadequate response

The public perception therefore is that the UK enforcement authorities as agents in the fight against fraud and corruption are inadequate organs when investigating and prosecuting those involved in serious and complex fraud or corrupt activity[8].

Sentencing policy

Even when enforcement of the laws relating to fraud and corruption by the UK authorities is successfully achieved and individuals are prosecuted and convicted, the consequential sentences imposed upon those convicted of serious fraud or corruption offences are often regarded, and are perceived as inadequate[9].

The future

These matters are serious and need to be addressed by the UK Government in the future if the UK is to keep its financial services industry and its corporate enterprises, particularly its public and listed companies properly and effectively regulated.

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The UK needs to be realistic in the resources it will need to expend in order to provide its enforcement agencies with the ability to intervene effectively against those involved in serious and complex fraud or corrupt practices. This reluctance to provide adequate resources in the fight against fraud and corruption to the relevant enforcement authorities is but one aspect of a more general problem. There is a clear need to imbue the authorities in the UK charged with dealing with these problems with real teeth and power, rather than a plethora of unenforceable and ineffective statutory provisions, many of which are created by a government obsessed with being seen to be doing something, so long as it does not cost anything either economically or politically.

The need to regulate the activities of directors and officers of companies

One of the problems for the UK Government in seeking to combat fraudulent and corrupt activity on the part of directors and company officers, particularly in the case of public and listed companies and those involved in the provision of financial services, is determining the degree to which the financial services sector of the UK, the business world and the city should be formally regulated. The formal regulation of the equivalent industry and business enterprises in the USA is both extensive and detailed. The UK rather seeks to rely on less direct and detailed regulation and there is still a fervent belief in the power and effectiveness of self regulation and voluntary codes, albeit overseen by the enforcement authorities. In part this "light touch" approach[10] to the "business of business" with the comparative light regulation and investigation of fraudulent and corrupt practices is justified by the UK Government on the basis of the central role of the financial services industry and the city to the UK economy. It is thought that over extensive or detailed regulation of those involved in the financial services industry or the city in particular[11] would have a deleterious effect on those investing in the UK or those seeking to use the services of the City of London. Rather, the current approach in the UK to dealing with fraud and corruption with respect to companies, is to provide for a series of overlapping offences regulating an aspect of the economic or business activity of these forms of business enterprise, with a general offence to deal with particularly serious or complex organised criminal activity, including that of company directors and officers of financial institutions. Until recently, the offence fulfilling this role in cases of serious and complex fraud was the offence of conspiracy to defraud. More recently the law has created a statutory general offence of fraud. The paper should briefly consider the history of this offence, its nature and ambit, and its possible future use.

The law of fraud and the creation of the general offence of fraud prescribed under the Fraud Act 2006

The law of fraud has undergone both review and reform in the recent past[12]. The offence of fraud as created by the Fraud Act 2006 will be considered briefly in so far as it may apply to directors and officers of companies and other officers involved in the management of financial institutions. The Act came into force on the 15 January 2007, and abolished the deception offences prescribed under the Theft Acts 1968, 1978 and under the Theft (Amendment) Act 1996. It creates a general offence of fraud which requires dishonesty on the part of the perpetrator as an essential constituent element[13]. Liability under S1 of the Act may arise by commission of a number of acts, either:

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- by making false representations under s2 of the Act;
- by failing to disclose information under s3 of the Act; or
- by abusing a position of financial trust under s4 of the Act.

In addition, the offence of fraudulent trading prescribed under s458 of the Companies Act 1985 is extended under s9 of the 2006 Act to unincorporated businesses. These provisions of the Act are the most relevant to company directors and officers.

The Act therefore provides prosecutors with a broad range offence of fraud which is dishonesty based[14] and which can be committed in a number of ways, and which would seem to be well suited to regulating the activities of company directors and officers.

Conspiracy to defraud

Prior to the enactment of the Fraud Act 2006, the principal generic offence used by prosecuting authorities against those individuals involved in complex or serious fraud was the offence of conspiracy to defraud. This offence had a long history. The offence has proven to be a useful tool in the hands of prosecuting authorities in dealing with breaches of duty of directors and officers of a company and in combating generally dishonest and corrupt conduct on the part of these individuals or bodies[15]. The concept of conspiracy is well understood in English Law if not in virtually all developed legal systems. The element of defrauding was considered in the case of *Scott* v *Metropolitan Police Commissioner*[16]. The appellant had agreed with the employees of cinema owners that, in return for payment, they would temporarily abstract films without the consent of their employers or of the owners of the copyright in the respective films, in order that the appellant might make copies infringing the copyright and distribute them for profit. The House of Lords held that the appellant was guilty of the common law offence of conspiracy to defraud. The decision was based on the narrow ground that in the case of a charge of conspiracy to defraud it was immaterial whether anyone was deceived. Nevertheless, during the course of his speech, Viscount Dilhorne defined the offence of conspiracy to defraud in general terms. He said[17]:

> . . . it is clearly the law that an agreement by two or more by dishonesty to deprive a person of something which is his[18] or to which he is or would be or might be entitled and an agreement by two or more by dishonesty to injure some proprietary right of his, suffices to constitute the offence of conspiracy to defraud.

A director or officer of a company may be a party to such an agreement so as to injure the proprietary interests of their company.

Viscount Dilhorne also sought to examine the nature of both fraud and dishonesty as distinct, but nevertheless related concepts. His Lordship traced the meaning of the words "fraud" "fraudulently" and "defraud" back to the old offence of larceny as well as the Common Law offence of conspiracy to defraud[19]. His Lordship concluded that[20]:

> . . . words take colour from the context in which they are used, but the words "fraudulently" and "defraud" must ordinarily have a very similar meaning. If, as I think, and as the Criminal Law Revision Committee appears to have thought, "fraudulently" means "dishonestly" then to "defraud" ordinarily means in my opinion to deprive a person dishonestly of something which is his or of something to which he is or would or might be but for the perpetration of the fraud be entitled.

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Thus, a dishonest act is not necessarily a fraudulent one, but all fraudulent acts by which a person or a company is deprived of his/her or their proprietary rights must by being a fraudulent act also be a dishonest one.

The present day role of the offence of conspiracy to defraud

Despite the Law Commission's deliberations on the issue of the law of fraud and the role of dishonesty in offences involving fraud and its initial rejection of a "general offence of fraud" such as is provided in the offence of conspiracy to defraud, the offence of conspiracy to defraud is regarded by the prosecuting authorities as an essential means or tool in the fight against corporate corruption and dishonesty. An agreement between a director or officer of a company and an outsider, irrespective of the payment of a bribe, which could result in the transfer of a proprietary interest of the company, causing loss to the latter, will if fraudulent in the sense considered in the *Scott* case constitute the offence of conspiracy to defraud. The offence is therefore clearly defined and certain, both as regards the external constituent elements, and the required mental element on the part of the accused. The offence of conspiracy to defraud as a general charge in cases involving dishonest or corrupt conduct on the part of the directors or officers of a company is capable of being understood both by an accused, and by a jury. Its continued use is therefore it is suggested in accordance with the terms of the European Convention on Human Rights[21]. Furthermore, despite criticism by both academic commentators and by the Law Commission of the offence of conspiracy to defraud support for the offence can be found in the unpublished Rose Report. Furthermore, the Attorney General has confirmed to the Joint Parliamentary Committee that there was no evidence to the effect that the offence is being misused by the prosecuting authorities[22]. The Attorney General is charged with issuing guidelines as to the use of the offence in the future.

The future role of the offence of conspiracy to defraud

It is likely therefore that in the future the offence of conspiracy to defraud will continue to play an important role in combating fraudulent and corrupt conduct on the part of directors and officers of companies and is a valuable addition to the armoury of the UK prosecuting authorities, being fully complementary to the offence of fraud set out in the 2006 Act. Consideration should now be given to the future role of an offence of corruption as a further means of combating improper conduct on the part of the directors and officers of a company and those involved in the financial services industry. The history of the offence and its present nature and ambit must first be addressed.

Corruption at common law and by statute

The law relating to corrupt practices on the part of those involved in the private as well as the public sector was comprehensively reviewed by Law Commission in its report on the law of corruption, as a prelude to its proposed extensive reform[23]. The Law Commission was of the opinion that the present law of corruption suffered from numerous defects. These were stated as being (Law Commission, 1997):

> First, it is drawn from a multiplicity of sources. Corruption offences are to be found in at least 11 statutes[24], the principal of which are the Prevention of Corruption Acts 1889 to 1916.

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The Commission was further of the view that (Law Commission, 1997):

> Much of that legislation was impulsive, prompted by contemporary problems or fears [25] and as a consequence, it is neither comprehensive nor consistent. In addition there are many overlapping common law offences[26], and specific bribery offences.

In fact, virtually all the offences considered above combine bribery with corruption as their constituent elements.

The definition of corruption

The *Oxford English Dictionary* defines corruption as:

> To destroy or pervert the integrity or fidelity of (a person) in his discharge of duty; to induce to act dishonestly or unfaithfully; to make venal; to bribe[27].

It is not in doubt that many of the offences relating to corruption have at least some of these aspects as constituent elements. However, corruption according to case law does not inevitably or by necessity involve dishonesty, but purposely doing an act which the law forbids as tending to corrupt[28]. The Law Commission (1997, para. 1.26) in its Consultation Paper did not entirely share this view of the nature of corruption, but nevertheless provisionally concluded that corruption is not in essence, and should not be treated as, an offence of dishonesty or fraud (Law Commission, 1997, para. 1.28). Such an approach to a new form of corruption offence could have a number of advantages, particularly when applied to the conduct of directors and officers of a company[29]. One of the reasons for this view on the possible nature of a new offence of corruption was that the Law Commission was at that time in the course of concluding in a separate Consultation Paper that the offence of theft and the concept of fraud[30] themselves should not require the element of dishonesty[31]. Of course, this approach to the new fraud offence was eventually abandoned by the Law Commission. However, this does not mean that any new offence of corruption should require any aspect of dishonesty to form a constituent element of the offence.

The ambit of the present law of corruption – public bodies and their agents

Despite the above, case law which has considered the nature of offences relating to corruption has on occasion required dishonesty as a constituent element of certain corruption offences. Thus, in the case of *Lindley*[32] the defendant was charged under the Prevention of Corruption Act 1906 with bribing the servants of a company as an inducement or reward for setting up a contract involving the company for the supply of peas. Pearce J. regarded and defined corruption as requiring a dishonest intention "to weaken the loyalty of the servants to their master and to transfer that loyalty from the master to the giver".

In the later case of *Calland*[33] the defendant, an inspector of a life assurance company was charged under the 1906 Act with rewarding an agent of the Ministry of Social Security for keeping him informed about the names and addresses of the parents of new-born children, information which would be invaluable to his company's business, and which would give his company a significant advantage over its competitors.

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Bribery and corruption in the public sector

The case of *Calland* illustrates one of the ways in which a director or officer of a company could be charged with an offence of corruption under the present law, that is by bribing an official of a public body[34] so as to secure a commercial advantage for his company and in the words of Vaisey J. in the *Calland* case "to wheedle an agent[35] away from his loyalty to his employer". Prosecutions in cases involving the corruption of officers or agents of government bodies such as local authorities may be undertaken under the aegis of the 1889 Public Bodies Corrupt Practices Act.

Prosecutions for corruption in the public sector – evidential issues

Furthermore, in cases involving the bribery and corruption of officers or agents of government bodies, that is cases involving corruption in the public sector the law is amended as regards the law of evidence and procedure. By virtue of the Prevention of Corruption Act 1916 s2, any payment made by a party such as a company director to a person in the employment of a public body is presumed to have been made corruptly. The reversal of the normal burden of proof in criminal cases makes this an offence difficult if not impossible to defend.

Bribery and corruption in the private sector

However, a director may be a party to an act of corruption, or perhaps more accurately an offence of bribery and corruption under s1 of the Prevention of Corruption Act 1906, as the principal perpetrator of the act of corruption[36]. By this provision any agent, which includes a director or officer of a company *Salomon* v. *A. Salomon & Co. Ltd* (1897) who corruptly accepts, or agrees to accept a bribe, or attempts to obtain, from any person, for himself, or any other person[37] a bribe as an inducement or reward for doing or forbearing to do any act in relation to his principal's affairs[38] or business commits an offence.

Thus, the payment of a bribe to a director of say a public company by a third party so as to ensure that that party or another receives the benefits of a contract made with the company is potentially an offence of corruption under the provisions of the 1906 Act. It is this form of the offence with amendment and modification which could form the model for a new generic offence of corruption applicable to those involved in the running of companies, particularly public and listed companies and those involved in the financial services sector of the economy[39].

Prosecutions for bribery and corruption in the private sector

That prosecutions for bribery and corruption involving the private sector are intended to be a rare event, even in circumstances such as those set out above is made evident by s2 of the 1906 Act, which provides that no prosecution for such an offence under the Act may be instituted without the consent of the Attorney General. The provision thus ensures that prosecutions under the 1906 Act will only take place where the act of corruption involving the private sector is significant, usually measured or determined in monetary terms. Furthermore, a distinction between this form of "private sector" corruption and the form of corruption noted above instituted under the 1889 Act concerning the bribery and corruption of a public official, is that s2 of the 1916 Act does not apply to cases of bribery and corruption involving the "private sector"[40] and

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it is for the prosecution to prove beyond reasonable doubt that the payment received has been received corruptly and is therefore a bribe.

A review of the current law – public and private sector corruption

The Law Commission in its Consultation Paper on Corruption posed the question whether the substantive and procedural differences that exist when prosecuting the different forms of corruption which constitute "public sector" and "private sector" corruption could be justified in the modern world. It noted the argument (Law Commission, 1997, para 6.22) that public bodies are more vulnerable to corruption than private. It also noted the views of the earlier Redcliffe-Maud Committee that (Law Commission, 1997, para 6.24):

> It is common practice in the commercial world for the transaction of business to be accompanied by the giving of personal gifts or benefits ranging from the Christmas bottle of whisky to much more elaborate and lavish provision. Public life requires a standard of its own: and those entering public office for the first time must be made aware of this at the outset[41].

It is suggested that there is some force in the above citation, although the effects that certain public and listed companies may have on the operation of the financial services sector, or on the economy in general, and therefore their impact as potential agents or engines for fraud and corruption, may be even greater than government bodies in certain circumstances, and this fact may have diminished the "truth" of the above statement in the modern world[42]. Neither can the political "fallout" following a financial scandal involving a large and successful UK public or listed company be discounted[43]. Nevertheless, the implicit recognition of the essential differences between the conducting of affairs or business in which public officials and bodies are involved in their official capacities, as opposed to situations where the parties to an affair or transaction are both in the private sector is generally sound in principle and in law. There is, it is suggested an implicit recognition that the law of corruption deals differently with these cases, and that it is as a general principle essentially right to do so. This view could well have a significant influence on the creation of a new "generic" law of corruption, which will be considered below. Albeit that, this paper concentrates on the issue of corruption in the private sector, involving directors and officers of companies.

The Law Commission however, came to a provisional view as to the issue of public and private sector corruption in the following precise and concise terms (Law Commission, 1997, para 6.20):

> We agree that, other things being equal, corruption on the part of a public servant is likely to be more damaging to the public interest, and therefore a more serious offence, than corruption in the private sector. However, we do not accept that this is an adequate justification for a rigid distinction between the two. Some private sector corruption is very serious indeed; some public sector corruption is comparatively trivial. To apply different rules to the two environments is, in our view, to try to achieve through the rules of criminal law[44] what should properly be left to the sentencing stage.

It is with this view in mind that the paper considers a possible form of corruption offence that could be applied solely to directors and officers of a company.

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Critique of the present law – is a corruption charge the right approach to dealing with "corrupt acts of company directors and officers?"

In the current legislative climate, it is unlikely that the proposals of the Law Commission[45] with regard to reform of the law of corruption will be enacted, at least in the form in which the Law Commission intended. It may therefore be opportune to consider whether the present law of corruption as set out, in particular in the 1906 Act is an appropriate way of dealing with corrupt directors and officers in the private sector, or whether the law could adopt a different model of corruption, based in part on existing principles of the civil law, and thus constitute a more effective means of dealing with corruption in the private sector[46]. This issue will now be considered.

A possible future approach – the breach of duty as an offence

If we consider a possible form of generic offence of corruption similar in concept to that set out in the Fraud Act 2006, and which is formulated so as to regulate the activities of directors and officers of a company, and which is intended to be a less serious offence than the new statutory offence of fraud, but which is nevertheless also intended to supplement and support the more serious offence set out in the 2006 Act, it could be constituted on the following lines. First, the concepts of dishonesty and the need to show that a form of bribery had taken place could be abandoned as aspects of such an offence. The proposed generic offence could use as its foundation the central definition of corruption contained in the *Oxford English Dictionary* and which was noted above namely:

> To destroy or pervert the integrity or fidelity of (a person) in his discharge of duty.

The breach of duty as a factor in the destruction or perversion of a director's or officer's integrity

The proposed offence of corruption applicable to directors and officers of a company through the destruction or perversion of their integrity could be based or founded on the concept of the fiduciary duty. This is a long established and clearly defined equitable principle, namely that a director or officer of a company owes to that entity a duty to conduct the affairs of the company with the utmost good faith and to preserve absolutely the interests and integrity of the company. Any act on the part of the director or officer which compromises that duty of good faith and which consequently effects the interests or integrity[47] of the company, thereby potentially causing loss[48] to the company could constitute the basis of a new corruption offence. It remains to consider these general concepts in more detail and to give the proposed offence some definite form and substance to demonstrate its potential practicality.

If the proposed generic offence of corruption were based on the central concept of the breach by a director or officer of the fiduciary duty owed to the company its constituent elements could be defined as follows.

The constituent elements of the proposed offence

Breach of duty

A director or officer of a company must by his/her or its conduct breach the duty of utmost good faith owed to the company. That is the breach must constitute a breach of fiduciary duty to the company.

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Integrity of director
As a consequence, of that breach the director's or officer's integrity or fidelity in the discharge of his duties to the company is compromised.

Integrity of company
As a consequence, the integrity of the company is also compromised[49].

Loss
The loss of integrity both on the part of the director or officer of the company and the company could render the company liable to suffer loss.

Thus, the compromising of the integrity of the company need only have the potential to cause loss to the company[50].

The above elements could constitute the *actus reus* of the offence.

If when the director or officer of the company at the time he/she or it acted in breach of their duty to the company either believed, or was recklessly indifferent as to whether their conduct could compromise their integrity[51], and thereby the integrity of the company then the offence is made out. This would constitute the *mens rea* of the offence.

Definitions

The constituent elements or central concepts of the proposed offence as set out above could be defined with little difficulty. The concept of the fiduciary duty, that is the duty of utmost good faith owed by a director or officer of a company to the company is fully developed in English law[52]. It could therefore be applied as a central concept in the proposed new offence.

The concept of integrity is easily understood and could encompass any situation where the fidelity or independence of the director or officer of the company could be called into question by the relevant improper conduct. Proof of breach of the duty of utmost good faith on the part of a director or officer with regard to their company must by the very nature of that concept impugn the integrity of the recalcitrant director or officer. This in turn must affect the perception of the integrity of the company in the eyes of persons such as investors or creditors and therefore the actual integrity of the company.

Loss is a concept used in the Fraud Act 2006, with little by way of definition, any diminution of the assets of the company, or its credit worthiness would therefore constitute a loss for the purposes of the proposed offence. The activities of a corrupt director could result in the company being liable to suffer direct loss, such as the loss of an asset or a reduction in value of the company's assets[53]. Furthermore, it is clear that a director or officer's conduct which constitutes a breach of duty also impugns their integrity and therefore the integrity of the company. Such a situation could render the company subject to criminal sanction or civil claim and therefore liable to suffer loss[54].

In view of the above consideration should now be given of examples of how the proposed offence could be committed by a director or officer of a company.

Examples of how the proposed offence could be committed

If a director of a company is approached by an outsider requesting confidential information in possession of the company, the disclosure of that information to the

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outsider breaches the duty of utmost good faith owed by the director to the company. That breach of utmost good faith compromises the integrity of the director. It also compromises the integrity of the company. If the proposed offence is committed by the director of a public or listed company in the manner described above, the public disclosure of the fact that a director has acted in that way compromises his integrity, and this must affect the integrity of the company[55], making investors less comfortable in investing in the company, or affecting the price of the company's shares. Accordingly, the company has potentially suffered loss[56].

If at the time of the imparting of the confidential information to the outsider the director believed or was recklessly indifferent as to whether his conduct could compromise not only his own position as director, but also compromise the integrity of the company, then it is suggested the constituent elements of the proposed offence would be established. The fact that the outsider may have offered a bribe in seeking to obtain the confidential information, or offered expressly or impliedly to the director the prospect of future advantage are matters of evidence supporting the offence but are not substantively relevant, neither is the question of any benefit secured by the director relevant to the substantive elements of the proposed offence.

If consideration is given to the converse situation to that mooted above, namely that of a director approaching a third party, requesting confidential information from that party[57] so as to secure an advantage for himself and/or a possible indirect benefit for his company, as was the situation in the case of *Calland* which was considered above, then it is suggested the constituent elements of the proposed offence are present. The director in seeking to secure an advantage for himself, albeit that the company may indirectly benefit from his conduct is breaching his duty of utmost good faith to the company. In doing so the director has compromised his integrity as regards the company, and also compromised the integrity of the company. The consequential loss of integrity on the part of the company could potentially cause loss to the company, not only in an indirect commercial sense, since the value of a public and particularly a listed company is affected by news that one of its directors has acted improperly, but that the behaviour of the director will have constituted an unlawful act, rendering both him and the company liable to possible criminal or regulatory sanction or civil action[58]. This constitutes potential loss to the company as a consequence of the director's conduct. If at the time the director breached his duty of utmost good faith to the company, he was aware or recklessly indifferent as to whether his conduct could compromise his integrity and that of the company, the constituent elements of the proposed offence would, it is suggested be established.

Conclusion

The proposed offence of corruption as it applies to directors and officers of a company would be intended to supplement the generic offence of fraud created by the Fraud Act 2006. It would be a less serious offence than fraud and would carry a lesser maximum term of imprisonment. Nevertheless, it could prove a useful tool in the fight against fraud and corruption by constituting an offence which could more easily be proven then fraud and yet still carry a sufficient maximum sentence to provide some form of deterrent[59]. Furthermore, any conviction under the proposed offence could be regarded as supplying sufficient evidence against the convicted director or officer, so to allow any party who has suffered loss as a consequence of the conduct of

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the convicted individual concerned, to initiate a civil claim against the recalcitrant director or officer. Such proof would be established by the issuing of a certificate by the criminal court confirming the fact of conviction[60]. The claimants in such cases could include shareholders or directors pursuing actions on behalf of the company, or investors undertaking claims in their personal capacities. The only matter a claimant in possession of a certificate would need to prove in any civil claim in order to secure a judgment against the recalcitrant director or officer, would be that he or she or it has suffered loss as a consequence of the criminal conduct of the director or officer, or where the claim is a derivative one instituted by directors or shareholder of the company, that the company has suffered loss as a result of the offending conduct on the part of the convicted director or officer. Such a judgment would not be subject to any limitation period, but could be enforced on application to the court at any time in the future[61]. Accordingly, an application for enforcement of a judgment so obtained could be made by the applicant, if the convicted company director or officer had no assets at the time of conviction but on serving a sentence of imprisonment, began at some time in the future to accumulate substantial wealth, which could therefore be used to satisfy any outstanding judgments against that party. Such a provision may constitute more of a deterrent against improper conduct on the part of directors and officers of companies than any conviction or prison sentence[62].

Notes

1. Which would supplement and support the present generic offence of fraud as prescribed under the Fraud Act 2006.
2. Yet, with a reluctance to legislate decisively when there is a perceived lacuna in the law. A prime example being the present government's reluctance to legislate so as to allow the admission of evidence against organised crime and terrorists secured through electronic surveillance.
3. The failure of the Asset Recovery Agency springs to mind here.
4. The so-called "light touch" to the regulation of the city and Financial institutions may be said to be one of the "achievements" of the labour government, as proof of Labour's pro-business policy and the recognition of the importance of the City of London to the economy of the UK. This situation contrasts with the position of the USA where regulation of the finance industry and the conduct of officers of corporations remains extensive and severe for transgressors, *Enron* and the recent trial of *Conrad Black* being but two examples of the approach of the USA to the question of fraud and corruption in the business world.
5. A recent article in the satirical magazine *Private Eye*, "*Private Eye* No. 1190 3-16 August 2007 In the City p. 29 notes the following: "But the downside of that pro- business approach... (of the Labour Government see Fn 5 above) ... has been a failure to regulate. Harvard Professor Howell E. Jackson has produced a dispiriting compare-and-contrast exercise of the FSA (Financial Services Authority), with the SEC ... (Securities and Exchange Commission) ... and other US regulators. This showed that in the period 2002 to2004, while US regulators commenced an average of 3,624 enforcement actions a year, the figure for the FSA was just 72. And when it came to punishing ... where it really hurts, while the total US sanctions were more than £2.5.bn a year, the FSA figures were £13.5 m. No wonder those it regulates see FSA fines as merely the cost of doing business in London." Even given the disparity in the relative sizes of the two economies, the response of the UK to the question of regulation of the financial services industry and the City of London fails to impress.

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6. This latter perception may not be entirely fair. It is a source of frustration for the UK enforcement authorities that they find that those accused of serious and complex fraud or corruption can utilise the services of ex-enforcement authorities employees, who are attracted to act as advisers for such individuals and bodies because of the financial rewards they are offered, which are very attractive when compared to the salaries that can be earned by those in public service.
7. No apologies are made for one further reference to the English satirical magazine *Private Eye* which is regularly dismissive of the UK's regulatory authorities, the old Department of Trade and Industry was constantly referred to in the magazine as the Department of Trade and Inactivity, the Serious Fraud Office as the Serious Farce office and the Financial Services Authority as the Fundamentally Supine Authority. This is a view that the public would not disagree with.
8. An aspect of what may be defined as the British disease, purported ambitious aims supported by totally inadequate resources and lack of resolve. This situation is seemingly readily accepted by the government and enforcement authorities in respect of the fight against terrorism.
9. The failure of the UK courts to have imposed an immediate custodial sentence on any party convicted of the offence of insider dealing, is perhaps one of the reasons why this offence has proven to be ineffective and little used in the UK. This example is starkly contrasted with regard to sentencing policy in the USA, for example in the *Enron* case. The perception again in the UK is that the judiciary regard those convicted of fraudulent conduct particularly in the financial services industry as somehow not truly criminal (Scanlan, 2006).
10. See Fn 5 above for a consideration of this concept as a policy of the UK Government when dealing with the problems of fraud and corruption in the financial services industry.
11. And of course, the directors and officers of public and particularly listed companies.
12. See Law Commission Consultation Paper No. 155, Law Commission Final Report No. 276. See also Ormerod 'The Fraud Act 2006 – Criminalising Lying' [2007] Crim. L.R. 193 and the articles cited there.
13. See S1 Fraud Act 2006.
14. That is dishonesty which may be found by a jury following a direction given in accordance with the case of *Ghosh* [1982] QB 1053.
15. Since, under English law, both directors and secretaries of companies can themselves be companies.
16. AC 819.
17. AC 819 at p 840.
18. Including a company.
19. In doing so, his Lordship referred to Stephen (1883, p. 553), and the Criminal Law Revision Committee's 8th Report on Theft and Related Offences Cmnd 2977, particularly para. 33.
20. AC 819 at p 839.
21. The criticism that the offence is too wide ranging can be refuted by an examination of the way in which the offence is used by the UK prosecuting authorities (Kiernan and Scanlan, 2003). The words of Peter Kirenan in the article should be noted here "if one utilises the common law offence of conspiracy to defraud, this is inevitably prosecuted by reference to highly specific allegations or particulars. Indeed it is the very potential flexibility of conspiracy to defraud that makes the prosecutor very carefully consider exactly what evidence he will adduce and how the case will be put to the court."

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22. See Ormerod fn 13 above. The Attorney General further informed the Committee that only 7 per cent of all defendants in fraud cases have been prosecuted under the offence.
23. Law Commission (1997, 2002). See also Rider (2003) and Brown JFC 11(3) 217.
24. These include the Sale of Offices Act 1551, Sale of Offices Act 1809, Public Bodies Corrupt Practices Act 1889, Prevention of Corruption Act 1906, Prevention of Corruption Act 1916.
25. Such as the 1916 Prevention of Corruption Act, which was a hurried response to the corruption and bribery of Ministry of War Officers in the securing of lucrative war contracts.
26. These include offences such as misconduct in public office (*R* v. Llewellyn- Jones, 1968).
27. The nature and ambit of this definition will be considered below within the context of the discussion of fiduciary duties as the basis for a proposed new generic offence of corruption which will form the conclusion of this paper.
28. See *Cooper* v. *Slade* (1857), *R v Welburn* 69 Cr. App. R. 254.
29. And particularly when there is now a generic fraud offence under the 2006 Act which has as one of its central elements the requirement of dishonesty.
30. If it was to form the basis of a new generic statutory offence.
31. Ostensibly on the ground that offences such as theft and fraud offences should not require that the defendant act with dishonest intent. See Law Commission (1999, 2002) with an appended draft Bill. This Bill was the basis of the Fraud Act 2006.
32. Crim LR 321.
33. Crim LR 236.
34. The definition of a public body for these purposes is wide and would include "local and public authorities of all descriptions," and on the enactment of s194(1) and Sched 11 para. 3 of the Local Government and Housing Act 1989 any companies under the control of one or more local authorities. See also s68 of the same Act.
35. In the actual case, an officer of a public body.
36. As opposed to being the instigator of the act of corruption, by offering to bribe an officer of a public body to act in breach of their public duty, as has been considered above.
37. For example, a fellow director or officer of the company.
38. The principal of course in respect of a director or officer of the company being the company itself.
39. Albeit that, the bribery of the director or officer would not form an aspect of the offence, see below.
40. Which it is recalled reverses the burden of proof with respect to payments made by third parties to public officials, by providing that where the provision applies it is presumed that the payment was made corruptly, and it is for the defendant to prove otherwise.
41. At para 76 of the Report. A rather naive view given the present state of conduct in the public sector in the UK.
42. It may be said that so-called private companies as engines or agents for fraud and corruption although potentially great is not legislated for under current English law and not even recognised. The continued "de-regulation" of private companies can only exacerbate this situation.
43. The BAE bribery allegations involving senior Saudi figures springs to mind here.
44. And, given the implications of the distinction, for the presumption under the 1916 Act that a payment made to a party in the public sector has been made and received corruptly, the rules of criminal evidence.

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45. As encapsulated in its Final Report and appended draft Bill.
46. In this regard, consideration should also be given to the general approach of the Law Commission that the present law of corruption is too complex and new legislation dealing with corruption should be more accessible. Perhaps, it is more important that legislation prescribing offences is effective and understood by those who administer it, and those who are called upon to defend those charged with such offences than it simply be accessible.
47. This concept will be considered further below.
48. The concept of loss will also be considered below.
49. On the basis that the conduct of the director or officer of the company can be ascribed to the company on the basis of the doctrine of identification, or on the basis that the compromising of the integrity of such a senior figure as the director of a company by association compromises the integrity of the company.
50. An actual loss to the company would not therefore need to be established. This would not form an element of the proposed offence, albeit that in most cases where the company's integrity as defined above was compromised an appreciable and measurable loss would occur.
51. In cases where the director or officer is itself a company, the mental state of the party acting on behalf of the director or officer company would be ascribed to the company.
52. The possible objection to the adoption of this definitional element as an aspect of the proposed offence, namely that criminal offences should not import "difficult" civil law concepts such as the concept of the fiduciary duty as constituent elements in criminal offences as was suggested by the case of Attorney General's Reference (No 1 of 1985) [1986] QB 491, with regard to importing civil law concepts of proprietary rights or interests into the offence of theft, is it is submitted a barely credible or a supportable doctrine, and should be rejected as a general approach when considering the nature of both present and future criminal offences. The balance of this paper and space prevents a further discussion of this viewpoint.
53. Or for the company to suffer an indirect loss by failing to secure a valuable contract, such a situation is just as clear a loss as a direct loss of assets of the company.
54. That the concept of loss as an aspect of the new statutory offence of fraud is meant to be construed and to be given a purposive construction can be seen by the definition of the term adopted in s5 of the 2006 Act which states that loss: ". . .includes a loss by not getting what one might get, as well as by parting with what one has".
55. Either through the doctrine of identification or association.
56. No doubt in such cases actual loss to the company would almost inevitably follow.
57. Whether that confidential information is in the possession of the third party as an agent or employee of another party.
58. Certainly, if the third party as an employee has acted in a way that has compromised the position of his employer (such as in the circumstances noted in the main body of the text above), the employer may have a right of claim against both the director and the company, such claims may arise in respect of the imparting of know how or sensitive information from the third party to the director and the company. Claims arising under the law of intellectual property could be maintained on a number of grounds in these circumstances.
59. This would be dependent on a change in the attitude of the judiciary, who are it is suggested reluctant to stigmatise or punish so-called "white-collar" criminals with appropriate custodial sentences. This would however, also constitute a problem with respect to the new offence of fraud. Perhaps, the lesser offence would at least increase the chances of the prosecuting authorities securing more convictions for "inappropriate" conduct on the part of directors and officers of public and listed companies.

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60. On the same principles set out originally in the Civil Evidence Act 1968 S11, so that a claimant could seek a certificate from the criminal courts confirming the fact of conviction of a director or officer of the offence of corruption. The certificate would constitute evidence which would establish, unless the contrary could be proven, that for the purposes of any civil action that the director or officer had acted in breach of their duty of utmost good faith to the company, and by such conduct had compromised their integrity and had also caused the integrity of the company to be compromised. And that as a consequence of the above matters that loss had been sustained by the company or by third parties including shareholders of the company.
61. Judgments under the Civil Procedure Rules (CPR) should be enforced within a prescribed period, but can on application to the court, and in the discretion of the court be enforced outside that period, but only if the applicant can show good cause for any delay in not enforcing the judgment within the prescribed period. When the reason for not enforcing the judgment within the prescribed period is that the defendant prior to the moment of the application had no assets upon which the judgment could be satisfied, but now has sufficient assets, is a strong, if not compelling argument in favour of the court exercising its discretion and allowing the applicant to enforce the judgment.
62. Space and the balance of the paper precludes consideration of the role of the Company Directors Disqualification Act 1986 in this context.

References

Cooper v. *Slade* (1857), *Cooper* v. *Slade*, 6 H.L. Cas 746.

Kiernan, P. and Scanlan, G. (2003), "Fraud and the Law Commission", *The Journal of Financial Crime*, Vol. 10 No. 3, p. 199.

Law Commission (1997), Law Commission Consultation Paper No. 145 at para 1.3.

Law Commission (1999), The Law Commission's Consultation Paper on Fraud No. 155.

Law Commission (2002), Law Commission Final Report and Draft Bill No. 248.

Law Commission (2002), The Law Commission's Final Report No. 276.

R v. Llewellyn- Jones (1968), 1 QB 429, *R* v. Llewellyn- Jones.

Rider, A. (2003), "Murky world", *Comp Law*, Vol. 24 No. 7, p. 193.

Salomon v. *A. Salomon & Co. Ltd* (1897), AC 22, *Salomon* v. *A. Salomon & Co. Ltd.*

Scanlan (2006), "Scanlan the enterprise of crime and terror – the implication for good business: looking to the future –old and new threats", *The Journal of Financial Crime*, Vol. 13 No. 2, p. 164.

Stephen, J. (1883), *History of the Criminal Law of England*, Vol. 2, Macmillan, London, p. 553.

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