



Settlement in Criminal Proceedings

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Jonathan Tickner¹
Peters & Peters Solicitors LLP
15 Fetter Lane, London
United Kingdom EC4A 1BW
020 7822 7777
jtickner@petersandpeters.com

<p>Karin Graf Wenger Plattner Seestrasse 39, Goldbach-Center, P.O. Box, 8700 Küsnacht- Zürich +41 43 222 38 00 karin.graf@wenger-plattner.ch</p>	<p>Maïte Ottes Van Doorne Jachthavenweg 121, 1081 KM Amsterdam, Nederland +31 (0) 20 6789 493 ottes@vandoorne.com</p>	<p>Dr. Alexander von Saucken Roxin Rechtsanwaelte LLP Martin-Luther-Platz 28, 40212 Düsseldorf, Deutschland +49 (0) 211 86 32 75 00 saucken@roxin.de</p>
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¹ With the invaluable assistance of Nicholas Queree, trainee solicitor at Peters & Peters.

3. Settlement in criminal proceedings

3.1. Introduction

3.1.1. Whilst ‘settlement’ as a legal term is not explicitly adopted in the practice of the criminal courts of England and Wales, there is an increasing practice under criminal law and the rules of criminal procedure to recognise, albeit in limited circumstances, individual agreements which could be collectively described as “settlement agreements”. Settlements for these purposes would mean an agreement between the prosecution and the defendant pursuant to which the accused undertakes to comply with conditions as agreed between the parties in exchange for the prosecutor discontinuing the prosecution, or in return for an agreed sanction. Even then, notwithstanding the agreement of both parties (i.e. the prosecution and the defence) settlement agreements will invariably still be subject to the scrutiny and / or approval of the English criminal courts.²

3.1.2. There are a number of different schemes available to suspects / defendants who are subject to a criminal investigation or criminal proceedings and wish to agree a settlement with an investigator or prosecutor. These schemes vary in their application between individual and corporate defendants,³ and in relation to the nature and gravity of the particular offence in question. Of particular note is that in recent years policymakers have reacted to the perceived difficulties of prosecuting both individual and corporates accused of having committed serious fraud and other complex economic crime, and as a consequence have developed specific schemes to encourage settlements between prosecutors and such defendants.

3.2. Out of court disposals

3.2.1. Out of court disposals include (but are not limited to) fixed penalty notices for disorder,⁴ simple cautions⁵ and conditional cautions.⁶ Through these schemes,

² Whether by the court of its own motion, or by some other interested party including advocacy and campaigning groups. As to the former, see the sentencing remarks of Thomas LJ in *R v Innospec* (26 March 2010, available at <http://www.judiciary.gov.uk/Resources/JCO/Documents/Judgments/sentencing-remarks-thomas-lj-innospec.pdf> (last accessed 1 April 2014)) where the Judge was highly critical of a plea agreement struck between the defendant company and the Serious Fraud Office (‘SFO’) and US Department of Justice. As to the latter, see by way of illustration *R (On The Application of Corner House Research and Others) v Director of The Serious Fraud Office* [2008] UKHL 60 (available at <http://www.publications.parliament.uk/pa/ld200708/ldjudgmt/jd080730/corner-1.htm> (last accessed 1 April 2014)), where the applicant sought a judicial review of the SFO’s decision to discontinue its investigation into alleged bribery and corruption of the part of BAE Systems plc.

³ Similarly to the US, corporate entities such as limited companies and limited liability partnerships enjoy distinct legal personality in English and Welsh law, and so may commit criminal offences independently of their members and / or officers: see the leading case of *Tesco Supermarkets Limited v Natrass* [1972] AC 153.

⁴ See sections 1 to 11 of the Criminal Justice and Police Act 2001 (as amended).

⁵ Ministry of Justice *Simple Cautions for Adult Offenders* (14 November 2013, available at <http://www.justice.gov.uk/downloads/oecd/adult-simple-caution-guidance-oecd.pdf> (last accessed 1 April 2014)).

suspects who have committed offences including but not limited to road traffic offences, public order offences, low value theft and criminal damage may avoid prosecution and, importantly, the risk of a criminal record, by admitting guilt at an early stage and agreeing to pay a fine, to not commit further offences, and / or to various additional conditions that may be agreed between the parties in the case of the conditional caution scheme. These are the most prevalent form of settlement agreement in the English and Welsh justice system, although they are not that common as a consequence of criticism by politicians and victims' groups. The most recent data available from the UK Ministry of Justice suggests that in one year there were some 386,900 out of court disposals in England and Wales.⁷

3.3. Plea Bargaining

3.3.1. Introduction

3.3.1.1. In some cases, a defendant will wish to agree to plead guilty either to a lesser offence, which carries a lower maximum sentence, or agree a 'basis of plea' with prosecutors setting out an agreed statement of facts for the court to conduct the sentencing exercise.

3.3.2. Procedural matters

3.3.2.1. The process by which such agreements are made is largely informal, and has yet to be codified by statute.⁸ In contrast to civil proceedings, criminal law and procedure in England and Wales does not admit of the concept of 'without prejudice' correspondence, meaning that any negotiations between the defendant's lawyers and the prosecution could, in theory, be adduced in evidence at the criminal trial.⁹

3.3.3. Matters of complex and serious fraud

3.3.3.1. In matters of serious fraud, negotiations in respect of any plea are to be conducted in accordance with HM Attorney General's *Guidelines on Plea Discussions in Cases of*

⁶ Ministry of Justice *Code of Practice for Adult Conditional Cautions* (8 April 2013, available at <http://www.justice.gov.uk/downloads/oecd/code-practice-adult-conditional-cautions-oecd.pdf> (last accessed 1 April 2014)).

⁷ See Ministry of Justice website (available at <https://www.justice.gov.uk/statistics/criminal-justice/criminal-justice-statistics> (last accessed 1 April 2014)).

⁸ Although some guidance can be found in the UK Attorney General's guidance on *The acceptance of pleas and the prosecutor's role in the sentencing exercise* (2009) (available at <https://www.gov.uk/the-acceptance-of-pleas-and-the-prosecutors-role-in-the-sentencing-exercise> (last accessed 1 April 2014)).

⁹ Unless the prosecutor's conduct was such that to admit the evidence would be unfair and so ought to be excluded: see, e.g., section 78 of the Police and Criminal Evidence Act 1984 (as amended). To rely on evidence so obtained may also be an abuse of the court's process.

Complex and Serious Fraud (the ‘Guidelines’).¹⁰ The Guidelines apply to matters which share two or more of the following characteristics:¹¹

- The amount obtained or intended to be obtained is alleged to exceed £500,000;
- There is a significant international dimension;
- The case requires specialised knowledge of financial, commercial, fiscal or regulatory matters such as the operation of markets, banking systems, trusts or tax regimes;
- The case involves allegations of fraudulent activity against numerous victims;
- The case involves an allegation of substantial and significant fraud on a public body;
- The case is likely to be of widespread public concern;
- The alleged misconduct endangered the economic well-being of the United Kingdom, for example by undermining confidence in financial markets.

3.3.3.2. An invitation to enter into discussions under the Guidelines will be made in writing by the prosecutor. If the invitation is accepted, formal terms for the negotiations will be agreed between the parties. These terms will usually include cross-undertakings to keep matters discussed during the course of negotiations confidential. Importantly, to encourage an open discussion, the prosecutor will undertake not to rely upon the fact that the defendant has taken part in the plea discussions, or any information provided by the defendant in the course of the discussions, as evidence in any prosecution of that defendant for the offences under investigation, should the discussions fail.¹²

3.3.3.3. Plea discussions may take place before or after the formal institution of proceedings (i.e. before or after the suspect / defendant has been charged or summonsed). Where plea discussions take place prior to the commencement of proceedings, the charges brought by the prosecutor will reflect those agreed, rather than those that the prosecutor would necessarily have preferred if no agreement had been reached.¹³

3.3.4. **Agreements as to sentence to be imposed**

3.3.4.1. It is a constitutional principle that nothing agreed between the prosecution and the defence can (or, at least, should) fetter the discretion of the court in relation to sentence.¹⁴ This issue arose in *R v Innospec Limited*. In that case the defendant,

¹⁰ 18 March 2009 (available at https://www.sfo.gov.uk/media/111905/ag_s_guidelines_on_plea_discussions_in_cases_of_serious_or_complex_fraud.pdf (last accessed 1 April 2014)).

¹¹ *Ibid*, paragraph A2.

¹² *Ibid*, paragraph C8.

¹³ *Ibid*, paragraph A7.

¹⁴ See the Consolidated Criminal Practice Direction [2013] EWCA Crim 1631 (as amended) (available at <http://www.judiciary.gov.uk/publications-and-reports/practice-directions/criminal-practice-directions> (last accessed 1 April 2014)) paragraphs B7 to B10; and see further *R v Underwood* [2004] EWCA Crim 2256. The court may, in some rare instances, look behind and discount the factual matters agreed in the basis of plea.

along with its US parent company, had been subject to a multi-jurisdictional investigation into alleged bribery and corruption. In a deal agreed with the Serious Fraud Office and US Department of Justice, both the UK and US entities agreed to plead guilty to certain matters. As part of that deal, a “global settlement” figure was agreed of \$40m, of which the defendant, Innospec Limited, agreed to pay some \$12.7m.

- 3.3.4.2. The sentencing judge, Thomas LJ, “reluctantly” agreed to impose the level of fine agreed between the defendant and the SFO. He was, however, highly critical of this approach, noting that:

*“Principles of transparent and open justice require a court sitting in public itself first to determine by a hearing in open court the extent of the criminal conduct on which the offender has entered the plea and then, on the basis of its determination as to the conduct, the appropriate sentence. It is in the public interest, particularly in relation to the crime of corruption, that although, in accordance with the Practice Direction, there may be discussion and agreement as to the basis of plea, a court must rigorously scrutinise in open court in the interests of transparency and good governance the basis of that plea and to see whether it reflects the public interest”.*¹⁵

- 3.3.4.3. Civil litigants wishing to rely on a guilty plea by a defendant may avail themselves of section 11 of the Civil Evidence Act 1968 (as amended). Section 11 provides that in any civil proceedings the fact that a person has been convicted of an offence by or before any court in the United Kingdom shall be admissible in evidence for the purpose of proving, where to do so is relevant to any issue in those proceedings, that he committed that offence.

3.4. Agreements under section of the Serious Police and Crime Act 2005

3.4.1. Introduction

- 3.4.1.1. A defendant (whether individual or corporate) may seek to obtain immunity from prosecution or receive special leniency in relation to sentence through providing meaningful cooperation with the authorities against other suspects. Formerly known as giving ‘Queen’s evidence’ the procedure for so cooperating has now been put on a statutory footing through the enactment of sections 71 to 75 of the Serious Police and Crime Act 2005 (‘SOCPA’).

3.4.2. Procedural matters

- 3.4.3. Neither SOCPA itself nor the Crown Prosecution Service guidance on the use of these so-called ‘SOCPA agreements’ sets down any procedural rules concerning when and how an approach can be made, and by whom. The police could offer a suspect immunity before proceedings have commenced in return for that suspect giving evidence against a co-conspirator. Equally, a convicted defendant could approach the police in return for an agreement whereby the sentencing court would

¹⁵ See *infra*, fn1, at paragraph 27.

review any sentence already past in light of the assistance given by the defendant to the relevant authorities.

- 3.4.4. The agreement itself and any documents recording negotiation between the parties will be confidential. Such agreements would normally be disclosable to other defendants facing criminal proceedings, subject to any application that the prosecution might make for disclosure to be withheld on the grounds of public interest immunity.
- 3.4.5. SOCPA agreements are only available to “specified prosecutors” within the meaning of the Act.¹⁶ Save for one important exception, the criminal cartel offence under section 188 of the Enterprise Act 2002, SOCPA agreements are not limited to any particular offences. Whilst the legislation was originally contemplated to deal with informants in matters of serious organised crime, they are equally applicable to fraud and other economic offences.
- 3.4.6. For example, in 2010 the Financial Services Authority (at that time the UK’s financial services regulator) entered into a SOCPA agreement with hedge fund trader Anjam Saeed Ahmad. In return for his cooperation, on pleading guilty to one count of conspiracy to commit insider dealing Ahmad received a suspended sentence of imprisonment from the court. The sentencing judge, HHJ Rivlin QC, noted that it was Ahmad’s “*swift and timely admissions to the FSA and other matters such as the SOCPA agreement that saves [him] from immediate imprisonment today*”.

3.5. Civil Recovery Orders under Part 5 of the Proceeds of Crime Act 2002

3.5.1. Introduction

- 3.5.1.1. Part 5 of the Proceeds of Crime Act 2002 (‘POCA’) established in the UK a quasi-criminal system of non-conviction based forfeiture. Under Part 5 of POCA, prosecutors were given the power to pursue criminal property *in rem*. Rather than need to establish a principal’s liability in relation to some predicate offence to the criminal standard of proof, under Part 5 prosecutors need only demonstrate on the balance of probabilities (the civil standard) that the property in question represents the proceeds of crime.
- 3.5.1.2. During the tenure of the previous Director of the SFO, Robert Alderman, the SFO increasingly made use of agreements under Part 5 to recover profits obtained by corporates through participation in bribery and corruption of overseas public officials. This was explicable by reference to the following factors:

¹⁶ See section 71(4) SOCPA. Specified prosecutors include the Director of Public Prosecutions; the Director of Revenue and Customs Prosecutions; the Director of the Serious Fraud Office and the Director of Public Prosecutions for Northern Ireland. Note that this list does not include either the Competition and Markets Authority (or its predecessor the Office of Fair Trading), with responsibility for investigation and prosecution the UK’s criminal cartel offence.

- Perceived difficulties for the authorities in the UK in prosecuting corporate entities;¹⁷
- Avoiding complex jurisdictional issues in relation to overseas criminal conduct, and any related issues of the admissibility of evidence obtained overseas;¹⁸
- Incentivising corporations to self-report where fraud and / or other economic offences had occurred;
- The desire of corporates suspected of committing economic offences to avoid the litigation risk and negative publicity which would inevitably follow any prosecution.

3.5.2. Procedural matters

3.5.2.1. Proceedings under Part 5 of POCA are for all intents and purposes treated as civil proceedings, notwithstanding the fact that they are only available to designated prosecutors¹⁹ and were enacted with a view to recovering the proceeds of crime. Indeed, challenges to the Part 5 regime on the grounds that Part 5 proceedings attract safeguards akin to those for defendants in typical criminal matters have been rejected by the UK Supreme Court.²⁰

3.5.2.2. Part 5 proceedings are brought in the High Court, and are instituted by the service of a Claim Form as in the case of ordinarily civil litigation. The Civil Procedure Rules (“CPR”) which govern procedural matters in relation to civil litigation apply. Settlement discussions may be instituted by either party, including offers to settle which may, if rejected, carry adverse costs consequences (offers made pursuant to Part 36 of the CPR). Although any settlement agreement will be endorsed by a Judge, the court will not in practice subject the agreement to any particular analysis or review.

3.5.2.3. The admissibility of a Part 5 settlement agreement in associated civil proceedings is unclear. Often, Part 5 settlements are structured to avoid any admission of liability on the defendant’s part, and Part 5 settlements have attracted criticism on that basis:

¹⁷ Unlike the US, where the *respondeat superior* doctrine in Federal law provides that a corporation will, in effect, be vicariously liable for the criminal acts of its employees, prosecutors in this jurisdiction are required to identify a directing mind of the company as holding the requisite criminal (this is the ‘identification doctrine’: see *Tesco Supermarkets Limited v Natrass, infra*, at fn 2).

¹⁸ See, for example, the settlement agreement reached with Oxford Publishing Limited (“OPL”), a wholly-owned subsidiary of Oxford University Press (“OUP”), dated whereby OPL to pay £1,895,435 to the SFO plus prosecution costs. One key factor for the SFO was that key material obtained through the investigation would not have been admissible as evidence in criminal proceedings, and many of the relevant witnesses were located overseas and thus were thought to be unlikely to cooperate with a UK investigation. See the SFO press release dated 3 July 2012 (available at <http://www.sfo.gov.uk/press-room/latest-press-releases/press-releases-2012/oxford-publishing-ltd-to-pay-almost-19-million-as-settlement-after-admitting-unlawful-conduct-in-its-east-african-operations.aspx> (last accessed 1 April 2014)).

¹⁹ Including the Director of Public Prosecutions, the Director of the National Crime Agency and the Director of the Serious Fraud Office.

²⁰ See *Gale and another v serious Organised Crime Agency* [2011] UKSC 49.

3.6. Deferred Prosecution Agreements

3.6.1. Introduction

- 3.6.1.1. The most recent addition to the limited number is the new Deferred Prosecution Agreement ('DPA') scheme established by the Crime and Court Act 2013. DPAs, a direct import from the US, are agreements whereby a prosecution against a corporate is deferred (i.e. not proceeded with) in return for the defendant complying with a number of pre-agreed conditions.
- 3.6.1.2. Used by American prosecutors in the corporate context since the 1990s, DPAs recognise some of the problems inherent in prosecuting corporates. For the state, such proceedings are likely to be fraught with difficulty. They are lengthy, complex, and carry a significant litigation risk. A conviction may also cause collateral damage, harming innocent employees, shareholders, and shaking wider market confidence. For corporates, a criminal trial poses the risk of conviction and disbarment from public contracts, as well as reputational harm. DPAs recognise that in some (but not all) instances of corporate offending, a consensual resolution will be more appropriate.²¹
- 3.6.1.3. One aspect of the DPA scheme which has proved attractive to commentators in the UK is that a DPA is, ultimately, a criminal disposal (notwithstanding the corporate avoiding prosecution or a guilty plea).

3.6.2. Procedural matters

- 3.6.2.1. Where a corporate is suspected of economic wrongdoing, the prosecutor²² will decide whether, if there is sufficient evidence to bring criminal proceedings against the company, it is in the public interest to invite the suspect corporation into negotiations over a DPA instead. Only a corporate entity may enter into a DPA.²³
- 3.6.2.2. The prosecutor's decision will be made by reference to criteria set out in a recently published Code of Practice promulgated jointly by the Director of Public Prosecutions and Director of the SFO.²⁴ The decision is entirely one for the

²¹ For a more detailed discussion of the history of corporate Deferred Prosecution Agreements and the policy arguments behind their development see the Peters & Peters Solicitors LLP response to the UK Ministry of Justice *Consultation on a new enforcement tool to deal with economic crime committed by commercial organizations: Deferred Prosecution Agreements* (<http://www.petersandpeters.com/sites/default/files/news-documents/DPA%20Consultation%20Response%20Final.pdf>) (last accessed 1 April 2014).

²² Prosecutors empowered to enter into DPA negotiations are limited to, at present, the Director of Public Prosecutions and the Director of the Serious Fraud Office: see Crime and Courts Act 2013, Schedule 19, paragraph 3(1). The Secretary of State for Justice may designate further prosecutors at his or her discretion, which may in future include the Financial Conduct Authority and / or the Competition and Markets Authority.

²³ *Ibid*, paragraph 4.

²⁴ *Deferred Prosecution Agreements Code of Practice* (available at <http://www.sfo.gov.uk/media/264623/deferred%20prosecution%20agreements%20cop.pdf>) (last accessed 1 April 2014).

prosecutor: the suspect organisation has no right to be invited to enter into negotiations.

- 3.6.2.3. The prosecutor and the suspect corporation will then proceed to negotiate the terms of an agreement. This must contain a statement of facts relating to the alleged offence, which may include admissions made by the corporate.²⁵ The agreement will also specify an expiry date. If, by that time, there has been no breach of the agreement by the corporate, the deferred proceedings will be formally discontinued.²⁶
- 3.6.2.4. The conditions with which the corporate must comply may include (without limitation) the following:
- (a) to pay to the prosecutor a financial penalty;
 - (b) to compensate victims of the alleged offence;
 - (c) to donate money to a charity or other third party;
 - (d) to disgorge any profits made by the corporate from the alleged offence;
 - (e) to implement a compliance programme or make changes to an existing compliance programme relating to P's policies or to the training of P's employees or both;
 - (f) to co-operate in any investigation related to the alleged offence;
 - (g) to pay any reasonable costs of the prosecutor in relation to the alleged offence or the DPA.
- 3.6.2.5. Judicial oversight is central to the UK DPA scheme. Once the terms of the agreement have been agreed in principle between the parties, the prosecutor will make an application in chambers (in private) for judicial approval of the terms. The judge will consider whether entering into a DPA is likely to be in the interests of justice, and if the proposed terms of the DPA are fair, reasonable and proportionate.²⁷ Following any further revisions, if any, a further application will be made to the court in public for the terms of the DPA to be formally confirmed.²⁸
- 3.6.2.6. In the event that a corporate breaches a DPA, it will be open to the prosecutor to apply to the court for a declaration that the corporate is in breach.²⁹ If so proven, the court may invite the prosecutor to agree a variation in the terms of the DPA (to include, for example, an additional financial penalty and / or an extension of the duration of the DPA).³⁰ Alternatively, the court may terminate the DPA. In that case

²⁵ *Ibid*, paragraph 5.

²⁶ *Ibid*.

²⁷ *Ibid*, paragraph 7.

²⁸ *Ibid*, paragraph 8.

²⁹ *Ibid*, paragraph 9.

³⁰ *Ibid*.

the prosecution will be entitled to use the agreed statement of facts against the corporate in any subsequent proceedings.³¹

- 3.6.2.7. Questions remain as to the admissibility status of a DPA in any associated civil proceedings. It is submitted that this will prove a fertile ground for future litigation, as it has proven in the US.

3.7. Leniency under the Enterprise Act 2002

3.7.1. Introduction

- 3.7.1.1. In response to the perceived difficulties of investigating and prosecuting cartels, the UK competition authorities (the Competition and Markets Authority (“CMA”), formerly the Office of Fair Trading) have developed a discrete settlement mechanism applicable to individuals who may have committed an offence under section 188 of the 2002 Act.³² It is important to note that companies are not liable to prosecution for the cartel offence under the 2002 Act, and so have no need for any criminal settlement regime. Companies may instead be made subject to administrative fines.³³

3.7.2. Procedural matters

- 3.7.2.1. The CMA offers leniency to undertakings that are willing to confess their involvement in a cartel (by granting either immunity from fines or reductions in the level of fine imposed). Where an undertaking provides information in relation to a cartel where the CMA has not yet opened an investigation, that undertaking will receive A immunity. Where the CMA has opened an investigation, but no other leniency applicant has come forward, at the CMA’s discretion that undertaking will be granted B immunity. An offer of A or B immunity will automatic result in blanket immunity for all the undertaking’s present and former employees. This will take the form of a written notice (termed a no-action letter), which will prevent an individual from being prosecuted so long as he continues to cooperate with the CMA.³⁴
- 3.7.2.2. Importantly, the grant of leniency and / or immunity from prosecution does not preclude an undertaking or individual from being held responsible for breaches of competition law and / or other wrongful conduct.

³¹ *Ibid.*

³² This standalone scheme explains why corporate and individual defendants are specifically excluded for the provisions of SOPCA (see above).

³³ In the UK, under the Competition Act 1998.

³⁴ See the OFT’s revised guidance on *Applications for leniency and no-action in cartel cases* (8 July 2013, available at http://www.of.gov.uk/shared_of/reports/comp_policy/OFT1495.pdf (last accessed 1 April 2014)).