

“Is the law getting to grips with bribery?”

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***Law in Action* presenter Clive Coleman and guests examine the proposed reforms of the UK’s bribery laws. Recent cases, like the BAE Systems settlement, and key issues around the (anti) Bribery Bill are discussed. As the Bill makes its way through Parliament, Clive Coleman asks whether it will really make a difference.**

Law in Action
Clive Coleman

The UK’s recent history of investigating allegations of bribery has been a source of international embarrassment. As recently as 2008, the Organisation for Economic Cooperation and Development, the OECD, said that it was disappointed and seriously concerned with the UK’s implementation of the Anti-Bribery Convention. The decision by the Serious Fraud Office to stop the investigation into the Al Yamamah arms deal between BAE Systems and Saudi Arabia also raised questions about how robust our anti-corruption laws were.

The response has been a new bribery bill, designed to update our antiquated legislation and ensure British industries’ fair dealing.

Today we devote the whole of the programme to the issue of bribery. And later we ask an expert panel including the former Attorney General Lord Goldsmith if the new Bill will work. But we begin with a report from Wesley Stevenson, which starts with a recent investigation into BAE’s dealings in Tanzania.

Mwanaidi Sinare Maajar
Tanzanian High Commissioner

The effect of taking away 30 million dollars from the revenue of the government of Tanzania is denying the social services that the government of Tanzania must deliver including education, including health, including poverty reduction. The fact that no one is being prosecuted here [London, UK], if it was happening in a place like our country, there would be an outcry.

Law in Action
Wesley Stevenson

Mwanaidi Maajar is the Tanzanian High Commissioner to London, angry about the deal made with BAE Systems by the Serious Fraud Office last month over the sale of an air traffic control system to the country. It was a plea bargain. BAE wouldn’t be charged with bribery and corruption if they agreed to plead guilty to a lesser charge and pay a 30 million pound fine. They were also fined in the United States in relation to other deals. But there the figure was much higher: 255 million pounds.

Gary di Bianco coordinates corporate investigations for the City law firm, Skadden, Arps.

Gary di Bianco
Skadden, Arps

In the United Kingdom, BAE agreed to plead guilty to one charge of breach of duty to keep accounting records and those records related to payments to former marketing adviser in Tanzania. Looking at the underlying conduct, one could see that there was probably evidence of an improper payment to secure business. But the charge that BAE admitted to in the UK was a breach of duty charge and not a bribery charge, and that's very important to BAE because there is a strict European Union Directive that prohibits participation in public tenders when a corporate has been convicted of a bribery offence per se.

In the United States, the company pled guilty to one count of making false statements to the US Department of Defense and Department of State, and in particular BAE had represented to the US government in the year 2000 that it was implementing a rigorous anti-bribery programme. The US settlement papers then describe that BAE did not in fact implement the anti-corruption programme with the level of rigorousness that it had represented that it would, and the papers charged that this was an important factor in awarding contracts in the United States to BAE.

So again, BAE paid a significant fine, but they were able to negotiate a resolution that did not involve a charge of bribery.

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Wesley Stevenson

BAE say they've now made the necessary changes to clean up the company. The 30 million pound settlement in the UK is some way off the reported 500 million pounds the SFO was seeking. The settlement is the subject of a judicial review application, and has temporarily at least been put on hold by the High Court.

One of the campaign groups who've brought the application is Corner House. Their spokesperson is Nicholas Hildyard.

Nicholas Hildyard
The Corner House

. . . and there are real questions about the rule of law, the nature of our commitment to fighting corruption when very serious charges of corruption are dropped in favour of much lesser charges – false accounting – and when charges that are related to corruption are thrown out when all that's been pleaded to is a completely different offence.

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Wesley Stevenson

The SFO were hoping the recent fine for the Tanzanian deal would be the end of a long investigation into BAE, which has a chequered past.

It didn't start in Africa, but with a deal to sell jets to Saudi Arabia. In 2004, the investigation began after claims that BAE ran a slush fund that offered sweeteners to Saudi royals and their intermediaries in return for lucrative contracts, including the infamous 43 billion pound Al-Yamamah deal. The case surrounding these deals was dropped in 2006 amidst allegations of political pressure. Robert Wardle was the head of the SFO between 2003 and 2008.

Robert Wardle

Serious Fraud Office Director 2003-2008

There was obviously pressure, of course there was. The position was that the national security position was being threatened as a result of the continuing investigation, and that was the pressure that came. I obviously had to decide whether it was right to continue the investigation in the public interest.

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Wesley Stevenson

But do you think there was political interference in that decision?

Robert Wardle

Serious Fraud Office Director 2003-2008

In terms of the intelligence and other information, I was satisfied as far as I could be that the Saudis would withdraw cooperation and I was quite satisfied that the effect of that could be very serious.

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Wesley Stevenson

The halting of this investigation was a crucial turning point for tackling of bribery by UK companies. Gary di Bianco was working in the US at the time.

Gary di Bianco

Skadden, Arps

It was really the stopping of the investigation that brought a focus on the enforcement here [US] and to some degree prompted the US regulators to step up their efforts with regard to BAE as well. The perception in the US was that the SFO was not exercising a sufficiently independent level of pursuit in this investigation.

Law in Action

Wesley Stevenson

The whole episode was an embarrassment to the UK, and it became clear it needed to catch up with the rest of the world when it came to tackling corruption. Back in the late 90s, the Organisation for Economic Cooperation and Development, or OECD, drew up a Convention with legally binding standards to criminalise bribery of foreign public officials in international business transactions. The UK signed up to this in 1999 but, save some tinkering with the law in 2002, there has been little progress towards new legislation, until now.

Following the halting of the Saudi investigation, the UK had a visit from OECD inspectors. Peter Alldridge is professor of law at Queen Mary University.

Peter Alldridge
Professor of Law
Queen Mary, University of London

The OECD site visit at that time was extremely irritated at the view of the government that it could somehow go away, perhaps on some national security ground . . . and increasing pressure was brought to bear upon the UK government. You know, this is an obligation, which the UK government undertook under the treaty and it really had to sort it out. And that meant having in place effective sanctions against companies, not just against individuals. The English law of corporate criminal liability is such that it was always going to be extremely difficult to prove that a company had the mental state which would have satisfied a jury of its guilt on a charge, either under the preceding legislation or under this legislation.

Law in Action
Wesley Stevenson

The UK's current laws relating to bribery date back to the late 19th and early 20th centuries. Compare that to the US, which has had the Foreign and Corrupt Practices Act since 1977. They also have a good record in bringing companies to book, including giants such as Siemens and Halliburton. According to many critics, the contrast between the fines issued to BAE in the US and those in the UK and the fact that the US was able to bring a prosecution over the Saudi deal all show the huge gulf between the two countries.

Former head of the SFO, Robert Wardle, says you've got to put the UK's record into context.

Robert Wardle
Serious Fraud Office Director 2003-2008

We had real difficulties with this. Bear in mind that bribery of overseas public officials in business transactions only became an issue after 2002 when the law was amended. And it was then that we started getting cases being referred. And it's quite true that we had difficulties with the legislation as it then applied, the 1906 Prevention of Corruption Act and also difficulties in obtaining the evidence.

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Wesley Stevenson

It's not that there weren't bribery laws in place beforehand, is it? Like you mention the 1906 Corruption Act, there was common law as well. Why couldn't you have used those laws in order to bring people to book?

Robert Wardle
Serious Fraud Office Director 2003-2008

Well, you could try using them, but I want . . . the point I'm making is this: I don't think it was an issue until after 2002, 2003. These sort of cases weren't

being reported, weren't coming forward. Certainly with the OECD pressure, I think we woke up to the fact that there may be a problem. No body was really interested in them before that.

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Wesley Stevenson

In the UK, the SFO has only managed to bring home four cases in relation to overseas bribery, and these have all been since 2008 – after the Al Yamamah investigation was stopped. The recent flurry of cases have come in part as a result of the Proceeds of Crime Act 2002, whereby any money made as a result of a criminal activity can be recovered.

The main difference, though, is more down to a change of culture, both in the SFO and British industry. In 2009, a bridge building company called Mabey and Johnson was the first to plead guilty to foreign bribery. Gary di Bianco says this was a significant case.

Gary di Bianco

Skadden, Arps

It's certainly important from the perspective of identifying that you could have a corporate that came in to the Serious Fraud Office to disclose particular conduct that an investigation of that conduct ensued, and that the SFO identified a structural way to resolve the case with an admission by the company and at the same time a recognition of the cooperation that the company provided. Because I do think it's important to go back culturally to the idea that in the UK and in the European systems, there's really very little history of companies investigating themselves and voluntarily disclosing the contents of their investigation to regulators.

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Coming forward and confessing, or self-reporting as it's known, has huge advantages for both sides. The company increase their chances of a plea bargain; the SFO gain because they get a confession and a prosecution, albeit on a lesser charge. But crucially, a lot of the investigating has already been done by the company themselves, thereby cutting down the expensive legwork.

Professor Peter Alldridge points to the new harsher obligations being put in place by the Bribery Bill, which will make it even more likely that companies will come forward.

Peter Alldridge

Professor of Law

Queen Mary, University of London

It makes more conduct criminal, and it's a consequence of the fact that it makes more conduct criminal that there is more possibility of the operation of civil recovery in respect of property that is acquired as a consequence of that crime.

Voice of Jack Straw

I beg to move that the Bribery Bill be read for a Second Time. Mr. Speaker, modernising and strengthening the law on bribery . . .

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Wesley Stephenson

The Bill had its Second Reading in the House of Commons last week, and it's now a race against time to get it passed before the General Election. It creates two new laws: one, of specifically bribing a foreign public official, and a second, of not putting in place adequate procedures to stop bribery taking place. This will make prosecutions easier, according to the Bill's supporters.

But why should we care? Some businesses claim that you can't get contracts in certain countries without offering bribes. Paul Collier, Professor of Economics at Oxford University, was an expert witness in the Mabey and Johnson case. He says you've got to look at where the money goes.

Paul Collier

Professor of Economics

University of Oxford

That money was paid to a guy who was initially just a sort of middle level official [in Jamaica]. But a lot of money was paid to him. Now, he didn't use that money just for buying champagne. He used it to launch himself on a political career. By the time this case came to court, he was the minister responsible for a multi-million dollar budget. Now, if you're asking: Does it matter? My God, it matters. Think of the huge amounts of money the infrastructure projects for which he had power of decision in that position. He can do huge damage.

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Clive Coleman

Professor Paul Collier ending that report by Wesley Stephenson. And to discuss the issues raised in it, I invited to the studio three distinguished experts:

- the solicitor Monty Raphael is regarded as the doyenne of corporate fraud lawyers and is a director of the campaign group, Transparency International.
- Bill Waite is a former Serious Fraud Office prosecutor and CEO of the Risk Advisory group, which advises private and public companies on their legal obligations when doing business abroad.
- and Lord Goldsmith is the former Attorney General whose period in office coincided with the cancelling of the Al Yamamah investigation.

I began by asking him why there had been so few prosecutions of UK companies for bribery in recent years.

Lord Goldsmith

Attorney General 2001-2007

The focus on corruption perhaps worldwide has increased enormously. I think that Robert Wardle is right to say that certainly the view that the Serious Fraud Office took was that overseas corruption probably wasn't an offence. It took

an amendment to the 2001 Anti-Terrorism, Crime and Security Act in order to achieve that, and there's a question about whether there was enough focus on it as well.

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Were we taking it seriously enough? Because from 1999, we had the OECD regulations which we were signed up to.

Lord Goldsmith
Attorney General 2001-2007

Yes, but I don't think that's really the point. I think that so far as overseas was concerned, it needed the change to the legislation. But also there's a question of whether there was – and I accept this – whether there was enough focus on the harm that corruption does, and it undoubtedly does do, not just for the reason that you might end up with a bad person in a government position, but simply because it distorts competition, you don't have a level playing field, and it means that people don't get the goods and services which are best on their merits, but simply because somebody is being bribed in order to place that contract.

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Bill Waite, how much did the dropping of the Al Yamamah case damage us internationally?

Bill Waite
Former SFO case controller

I think the whole handling of that case was misconceived from its initiation. The SFO's got a responsibility to review potential cases to see whether they think that there's a reasonable prospect of investigating the case to prosecution at a very early stage. I find it very difficult as a former prosecutor to look at a case that was more than 20 years old, that had government to government relationships, whether significant issues over which witnesses would be called to prove what, whether significant issues over the nature of the law against which you would be prosecuting a case to say that there was a reasonable prospect in relation to that case. Having accepted it and having spent a lot of time, effort and energy on it, of course it was difficult and the way it was dropped was mishandled by the SFO.

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We are where we are, Monty Raphael, and we've got a sparkly new bribery bill making its way through Parliament at the moment. Will that change things? Would that, for instance, if we had another Al Yamamah case, would it make a real difference? Would it be prosecuted successfully?

Monty Raphael
Fraud lawyer & a TI Director

Well, we don't know. Everyone in this room and outside is concerned that we should have a credible anti-bribery law. We're equally concerned that it should be enforced in whatever way is appropriate – not just by prosecution, it might be enforced in different ways. But we're all keen to see that companies up their ethical acts and we're all keen to see that the law should be clear and modern. Only then could anyone possibly answer any question about any forthcoming inquiry.

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Lord Goldsmith, just explain to me how it's really going to bite in the situation that perhaps nationally we found embarrassing when British companies have been involved in the bribing of officials in Third World countries? What machinery is it going to give us to clamp down on that?

Lord Goldsmith

Attorney General 2001-2007

I think we should look at this more broadly. I think you've got to look at what's wrong with the present law, and it is antiquated, it's outdated, and we need a bribery law that's fit for the 21st century. And there were a number of defects with the previous law. Therefore, the new bill, if it comes through, it's going to get rid of the distinction between public and private, which has been problematic. It's going to deal with some of the difficult definitions. The old law talked about 'corruptly', but didn't define what 'corruptly' was, and there were differences between the judges, and importantly, as your package noted, it was very difficult to prosecute a company, because the system under English law is you've got to find someone who's the 'controlling mind'. What that means is that if the top people in a company were able to say: We didn't know what was going on, we didn't hear about it, then it was very difficult to deal with the company and indeed them. And the new Bill, if it becomes law, will change that.

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Bill Waite, does that mean we're going to see more prosecutions?

Bill Waite

Former SFO case controller

Possibly. I mean, there's the statutory defence, which reverses the burden on companies effectively to prove that they have effective systems and controls is a significant risk for any corporate to take on against the background of the consequences of a conviction. So I think that one might see more deals. I don't think one will necessarily see more prosecutions.

The regulatory impact assessment for this Bill suggested that there'd be an additional 1.3 prosecutions a year, and it would cost British industry 2.1 million pounds – that's clearly wrong on any analysis.

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Clive Coleman

Just explain the nature of corporate responsibility for people who are perhaps not expert in this area. Under this new bill, is it effectively strict liability: if you don't have the right systems in place to show that, you know, you've done everything you can do to stop bribery and corruption?

Bill Waite

Former SFO case controller

That's entirely right. The difficulty with the new Bill is that it extends the liability across an entire chain so if anybody does something as your agent across the whole spectrum, you can eventually have liability for that at a corporate level. I think that, just taking a step back for a moment, there seems to be a presumption around the shattering classes that English corporates are corrupt. They are not by definition generically corrupt. So the presumption should not be that all English businesses are corrupt and therefore need a criminal offence to stop them being corrupt. I would agree that the law needs to be changed to catch those that are endemically corrupt.

Lord Goldsmith

Attorney General 2001-2007

I think that picks up, Clive, why your question is actually too narrow. You're asking: Is this going to mean more prosecutions? That's not the sole purpose of this act at all. Part of its purpose is to mean . . . make culture better

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Clean up British industry?

Lord Goldsmith

Attorney General 2001-2007

Well, I don't know whether clean up British industry is the right thing to say. But I think it is right to point out that the new offence, if it becomes law, will put an onus on companies to have in place, in the words of the Bill, 'adequate procedures', they'll have to think hard about what those are. But the consequence will be that they won't be able to say: we didn't know about this. In the future, ignorance will not be bliss.

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Monty Raphael, do you see this as a step change from a time when perhaps, you know, bribery was almost an acceptable part of business, and we're going to be moving away from that. It sounds almost too good to be true.

Monty Raphael

Fraud lawyer & a TI Director

I don't believe it's going to be a step change myself. I think what will happen is that we'll have a clear law, we'll have a culture of introducing clear and enforced codes of practice, ethical codes of practice. Everyone will feel much more comfortable about it. The great advantage of this Act, it will enable companies, when they're approached by agents, by local partners, by government officials to do something which they'd rather not do, this Act will

become a shield. They will be able to say: we can't even enter into a negotiation on this basis. It's illegal in our country and that's an end of the matter. We're not going to see a large number of new prosecutions. What we may do, we may have found, is more self-reporting, the SFO needs to have clearer guidelines about what they can offer and what they can't offer.

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I just want to focus in on this whole idea of self-referral, because some people find it actually repugnant that by, you know, owning up as it were, you don't get prosecuted. Isn't it almost admitting defeat on behalf of our prosecution services?

Lord Goldsmith

Attorney General 2001-2007

Well, I don't think, nobody says that. It may happen in certain cases that someone says, You've owned up, the nature of the offence is such that, coupled with your contrition, coupled with what you're promising to do for the future, the steps you've taken to get your house in order, you don't deserve prosecution. But what self-reporting will actually much more likely do is it will mitigate the penalty. That's what's happened in the States, for example, in many big cases. And that's what we do in every day life. Naughty children who own up are punished less severely, I can't see anything wrong with that at all. On the contrary, it's an incentive for people to come forward for things which often aren't discovered at all otherwise.

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Bill Waite, will people come forward?

Bill Waite

Former SFO case controller

There are two points. Firstly, in competition law, we already have a process whereby if you're the first through the door, you may well get immunity from prosecution for competition authority offences. The wider point, though, is that in many of these situations, we're prosecuting or looking at conduct that was 8, 10, 12 years ago. To impose significant sanction on a new leadership of a new business, which has introduced all sorts of systems and controls, changed a culture, would be demonstrably wrong.

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Monty Raphael, do we need to make self-referral a legal requirement because as I understand it, it isn't a legal requirement under the Bill?

Monty Raphael

Fraud lawyer & a TI Director

Large swathes of English commercial life are regulated, and they have an obligation on learning of suspicious activity to report it in any event. That is, that's a positive obligation now, punishable by five years imprisonment if you

default. It's a carrot and stick situation. We already have the stick in the Proceeds of Crime Act, this is a carrot now, encouraging. But what I want to say is this, that I think it's great credit to the profession, all the self-reporting cases have come to public notice in the last year or two have come about because there's been no doubt that the responsible and clear and early legal advice that these corporations have had is: Go in, 'fess up and face the consequences of it. You've got to do it, you know, it'll be cathartic for you as a corporation. You'll improve your procedures and you'll put this behind you. And I think that's now being seen as a very positive way of going forward from a corporate governance point of view.

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Clive Coleman

I want to come onto plea bargains. One of the things that people worry about is that, if there's a plea bargain, justice isn't done. You know, if you plead to the lesser account of false accounting, you get off the bribery charge. Do we have a machinery to protect against that?

Bill Waite

Former SFO case controller

We had a debate recently with the SFO, and one of the issues was the lack of transparency around the settlements that they came to and the reasons why they came to those settlements. There is a clear need when the Serious Fraud Office reaches a resolution with a party, that the thought process behind that resolution is made public.

Lord Goldsmith

Attorney General 2001-2007

We had a fraud review. Plea bargaining of a sort was recommended as one of the ways of dealing more effectively in particular with fraud and economic crime. It was then the subject of a detailed review by a working party, which included, as I recall, judges and prosecutors, and defence lawyers and others. It's then resulted in detailed guidance from the Attorney General, which sets out what needs to be done in terms of the procedures to be followed and the responsibilities on the prosecutor. So the safeguards are there. There's no doubt over a period of time because it's a relatively new system, it'll turn out that it needs to be tweaked and changes need to be made to it. But this is something which has been thought through very carefully.

Monty Raphael

Fraud lawyer & a TI Director

At the moment, I don't believe that we have an entirely coherent plea bargaining system upon which we can predict outcomes with sufficient certainty or clarity for corporations. That's the first point. It's a procedure in transition and it needs to be matured, and possibly receive some judicial attention.

Bill Waite

Former SFO case controller

There's a presumption in your question about plea bargaining that it isn't a bargain. It is a bargain in the sense that when a prosecutor goes to court, it knows the relative strengths and weaknesses of its case. The fact that a prosecutor may be prepared to take a plea to a lesser count reflects a view that the prosecutor takes that perhaps they're vulnerable in terms of an element of the crime, a piece of evidence that they need that they're not confident of securing during the course of the criminal process, which may result in an acquittal. So this is a bargain, it is a realistic appreciation of a prosecution's case and a realistic appreciation of a defendant's case, and that's why in some circumstances, you may get somebody who's charged with murder, with the prosecution accepting a plea to manslaughter.

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Clive Coleman

Monty Raphael, from a business point of view, how tough and effective is this new bill going to be? In many countries in the world, whether you call it an introduction fee, a facilitation fee, business is done by the passing of money from one party to an intermediary and then the deal is done. Where does bribery begin and an introduction fee end?

Monty Raphael

Fraud lawyer & a TI Director

That's a very difficult question. The United States, which has been lauded as a model of anti-corruption legislation and regulation, ducked this question when they introduced the Foreign and Corrupt Practices Act. They still permit a certain level of what are called 'grease payments', facilitation payments. The OECD, which largely modelled itself on the FCPA, also tolerated some degree of facilitation payments. We in this country, I think to our great credit, set our face against what's called soft or low level bribery. But the truth of the matter is this: we're not going to get English companies who have had to pay a customs official to clear some tomatoes or bananas off a dock in high temperatures, we're not going to find them being prosecuted or companies who need to have a telephone installed or a computer linked up and who are told, well, you can have it in six months' time and discover if they leave 50 dollars on a desk, it arrives that afternoon. Yes, it's lamentable and we shouldn't have to do that and it does subvert local ethics, and I'm not advocating that people should do that. But nor do I believe that any responsible prosecutor in this country would persecute English business for low-level things. And the same applies to hospitality and marketing.

Bill Waite

Former SFO case controller

I'm not sure I entirely agree with what's been said about what prosecutors will and won't do. But I think the question that you're raising is critically important. It's precisely those areas – hospitality, introduction fees, facilitation payments, records of payments, how you deal with overseas agents – companies will have to have in place procedures and companies will therefore have to settle down with their advisers, do it themselves and work out, what are the procedures that they're going to have in place so that they're reasonably protected against suddenly discovering one of their guys has gone

off on a frolic of his own and taken the view that he's going to get some business by making a payment.

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Clive Coleman

Lord Goldsmith, Monty Raphael, and Bill Waite. And if you'd like to comment on any of the issues we've covered in the programme, we'd like to hear from you. You can email us at lawinaction@bbc.co.uk

(Transcribed by The Corner House)