(b) Where agreement is reached as to pleas, the parties should discuss the appropriate sentence with a view to presenting a joint written submission to the court. This document should list the aggravating and mitigating features arising from the agreed facts, set out any personal mitigation available to the defendant, and refer to any relevant sentencing guidelines or authorities. In the light of all of these factors, it should make submissions as to the applicable sentencing range in the relevant guidelines (D9)…in the course of the plea discussion the prosecutor must make it clear to the defence that the joint submission as to sentence (including confiscation) is not binding on the court (D12).

(c)…The prosecution should send the court sufficient material to allow the judge…to assess whether the plea agreement is fair and in the interests of justice, and to decide the appropriate sentence. It will then be for the court to decide how to deal with the plea agreement. In particular, the court retains an absolute discretion as to whether or not its sentences in accordance with the joint submission from the parties" (E4 and E5).

21. It is equally clear that no such agreement is in contemplation in ss71-75 of the Serious Organised Crime and Police Act 2005, where the statutory framework which formalised the well established common law principles relating to the advantages to a defendant who turned, in the old fashioned phrase, "Queen's Evidence".

> "There never has been, and never will be, much enthusiasm about a process by which criminals receive lower sentences than they otherwise deserve because they have informed on or given evidence against those who participated in the same or linked crimes, or in relation to crimes in which they have no personal involvement, but about which they have provided useful information…however, like the process which provides for a reduced sentence following a guilty plea, this is a long-standing and entirely pragmatic convention. The stark reality is that without it major criminals who should be convicted and sentenced for offences of the utmost seriousness might, and in many cases, certainly would escape justice…the solitary incentive to encourage co-operation is provided by a reduced sentence, and the common law, and now statute, have accepted that this is a price worth paying to achieve the overwhelming and recurring public interest that major criminals in particular, should be caught and prosecuted to conviction".

What the defendant has earned by participating in the written agreement system is an appropriate reward for the assistance provided to the administration of justice, and to encourage others to do the same. The reward takes the form of a reduced or lesser sentence from that which would otherwise be appropriate. (see *R v P*; *R v Blackburn* [2007] EWCA Crim 2290 at paragraph 22 and 41.)

22. It remains open to the defendant to seek the judge's view of sentence in accordance with *R v Goodyear* [2005] 2 CAR 20 and the guidelines subsequently laid down for such indications to be given in the Practice Direction (Criminal Proceedings: Consolidation) [2002] 1 WLR 2070 paras IV. 45.29-IV.45.33 (as inserted by the Practice Direction) Criminal Proceedings: Substituted and Additional Provisions [2009] 1WLR 1396. But the essential feature of that process is that the judge is

expressing his view. It is also open to the parties to reach an agreement about the factual basis on which the defendant will plead guilty. This is often known as the "agreed basis of plea". However the agreed basis of plea is always subject to the approval of the court, and the judge is not bound by the agreement (IV.45.10 – IV.45.12). Neither of these processes involves an agreement between the parties about sentence.

23. Accordingly, although the prosecution should be involved in the process by which the sentencing court is fully informed about any matters arising from the evidence which may reflect on the defendant's criminality and culpability (including, of course, matters of mitigation) and of any positive assistance given to the investigating authorities by him, this process does not involve an agreement about the level of sentence. Indeed, look where we may, in our criminal justice structure, agreements between the prosecution and the defence about the sentence to be imposed on a defendant are not countenanced.

24. These principles were summarised in *R v Innospec Limited* in the sentencing remarks of Thomas LJ at Southwark Crown Court on 26 March 2010. He observed:

> "It is clear, therefore that the SFO cannot enter into agreement under the laws of England and Wales with an offender as to the penalty in respect of the offence charged…although the sentencing submission proceeded to put forward a specific proposal as opposed to the range as set out in the authorities, that must have been because the provisions of the consolidated criminal practice direction had not been fully appreciated (para 26)
>
> The Practice Direction reflects the constitutional principle that, save in minor matters such as motoring offences, the imposition of a sentence is a matter for the judiciary. 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, the 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 (para 27)
>
> This has always been the position under the law of England and Wales. Agreements and submissions of the type put forward in this case can have no effect…" (para 28)

25. These observations accurately encapsulate the true constitutional position. Responsibility for the sentencing decision in cases of fraud or corruption is vested exclusively in the sentencing court (or on appeal, from that court, to the Court of Appeal Criminal Division). There are no circumstances in which it may be displaced.

26. We acknowledge that when the plea agreement in this case was concluded the Director of the Serious Fraud Office did not have the advantage of the observations made by Thomas LJ in *R v Innospec* Limited, and that when the case was opened before Bean J, Mr. Kelsey-Fry immediately acknowledged that, in effect, the terms of

the plea agreement had gone further than they should. Nevertheless we must highlight the kind of feature of the plea agreement which caused us concern. Paragraph 20 reads:

> "The procedure laid down in the Guidelines is a new procedure and involves the parties presenting a joint submission as to sentence. As already observed the decision as to sentence is for the Court to make. In doing so, the Court is invited to give considerable weight to the following:-
>
> 1. The Director of the SFO recognises the value of this defendant's admissions resulting in a speedy conviction with considerable savings to the public purse as well as his considerable assistance to the SFO's and other authorities' continuing investigations. The Director recognises the public importance of persons admitting guilt at an early stage and assisting the authorities both here and abroad in these complex, multi-jurisdictional and often lengthy investigations into corporate corruption. Mr Dougall's approach in this regard is in marked contrast to others that have been interviewed as part of the SFO and DOJ investigations.
>
> 2. This is the first overseas corruption case in which an individual has cooperated with the SFO in this way. As is known by the Court, in the USA – all things being equal – the first person co cooperate with the investigating authority by entering into a plea agreement has a legitimate expectation as to the most favourable sentencing outcome particularly in a case whereas here the crime is conducted with corporate knowledge and for corporate advantage.
>
> 3. The Director respectfully invites the Court to consider a similar approach. It is the Director's position that there is a strong public interest in the Court giving and being seen to give these factors the fullest effect in determining the appropriate sentence."

27. To put it bluntly, this is advocacy, and would do credit to an accomplished advocate, advancing submissions in mitigation on behalf of the defendant. It does not simply and objectively draw the attention of the court to matters of potential mitigation.

28. At the very end of the document (para 42) it is recorded that

> "The court may conclude that, whilst the custody threshold is crossed, an immediate custodial sentence is not appropriate. In particular, the court would act wholly within its discretion by imposing a suspended sentence of imprisonment".

Paragraph 43 completes the text:

> "The Director of the SFO submits that such an outcome would be wholly consistent with the considerations of public policy attaching to this case, as outlined in this document.

29. That is as near as telling the court not only that a suspended sentence should be imposed, but, bearing in mind that the Director must know perfectly well that a

suspended sentence involves a sentence of imprisonment of 12 months or less, and cannot be applied to a sentence of 13 months' or longer, it is remote from submissions about the *range* of possible sentences. The consequent problem is that the appellant himself knew what was being advanced by the Director and, as it seemed to us and was confirmed during the submission, this created an inevitable impression on him that the view expressed by the Director would carry far more weight than it would if it had come simply as a submission from his own advocate, with the inevitable consequent expectation that the court would be likely to accept it.

30. As it is, paragraph 20(1), 20(2) and 20(3) simply raise matters which would be treated by the court as matters of mitigation. The value of the defendant's early admissions of guilt, the considerable assistance given by him to the authorities investigating complex multi-jurisdictional corruption, and the public interest in bringing these cases to justice, as well as the contribution the defendant may already have made and intends to continue to make to that process is obvious. There is no objection to these matters being recorded, if appropriate in considerable detail, in the plea agreement: matters of aggravation and mitigation should be recorded, but they do not require advocacy. We believe that since this issue was addressed by Thomas LJ in *R v Innospec Limited* this will not recur.

31. We do however add this: in our jurisdiction there is no principle of any legitimate expectation to be enjoyed by the first person to co-operate with an investigating authority, that he (or she) will be the beneficiary of the most favourable sentencing outcome. Such conduct will, of course, normally provide substantial mitigation. But like all features of mitigation it has to be seen in the overall context of the case, the defendant's criminality and the level of his culpability, the circumstances in which he came to co-operate and the extent of his co-operation. The answer to the question, "who first co-operated?" does not answer the separate question of the appropriate level of sentence discount for that defendant.

32. The other troublesome feature of the case arises in the context of the written submission in support of the appeal. It is said to raise a short but important point of sentencing principle.

> "…In complex multi-jurisdictional financial investigations is the important public interest in encouraging putative defendants to co-operate fully with the prosecuting authorities and to give evidence for them sufficiently recognised by the reduction of the length of a prison sentence according to the guidelines laid down in *R v P and Derek Stephen Blackburn* [2007] EWCA Crim 2290, or does it, in appropriate cases, warrant the suspension of a sentence of imprisonment?"

A little later the written submission continues

> "…Unless a "white-collar" defendant, in an appropriate case, has the prospect of avoiding an immediate custodial sentence by fully co-operating with the authorities the important public interest in him doing so will not be secured. For such a defendant it is the fact of being sent to prison that matters, not the length of the sentence…"

33. Towards the end of the written submission we find that the court was invited

> "To apply the pragmatism that has driven sentencing policy in cases where the offender has provided full co-operation to the authorities and has given, or has agreed to give, evidence for them and recognise that in cases of multi-jurisdictional fraud or corruption where putative defendants are normally businessmen of good character the only realistic incentive for such a person entering into a section 73 SOCPA agreement is where, in an appropriate case, it will be open to the court to suspend the sentence of imprisonment that the offending warrants. "

The submission ends:

> "The only pragmatic way in which to secure the public interest is to recognise that what really matters to a "white-collar" offender is the chance to avoid an immediate custodial sentence rather than to mitigate the length of it..."

34. Asking the question whether "in appropriate cases", the suspension of sentence of imprisonment may be warranted, as the skeleton argument does, creates no difficulties, but it begs the essential question. If it is appropriate for a sentence to be suspended, then that is appropriate: if it is not appropriate, then it is not. The implication of the submission is that unless this appellant's sentence is suspended, cooperation from the criminal defendants in the SOCPA process will diminish virtually to extinction. It therefore follows that in a case where after making all due allowance for a guilty plea, and full co-operation by the defendant in accordance with a SOCPA agreement a sentence of 12 months' imprisonment is appropriate, the sentence must be suspended. We disagree. No sentence follows more or less automatically. The suspended sentence should only be imposed where there are particular features of the appellant's involvement in the crime, including the matters of mitigation, which justify it. That is fact specific.

35. As the argument developed before us we recognised that it was more attractive than it had seemed on first reading. In effect it arises from the relatively low maximum available sentence. On the view adopted in this case, following a guilty plea, the sentence would have been 2 years' imprisonment. The defendant would then have to serve no longer than 12 months, and might well have been subject to (fluctuating) early release and similar provisions. The allowance for him entering into the SOCPA agreement, and taking on the considerable burdens involved in it, led to a halving of the sentence appropriate after the guilty plea. We recognise that this is not a fixed tariff, and that there may be cases where the discount would be rather larger. The effect, however, is that the appellant, ordered to serve 12 months, must be released after he has served 6 months in custody, and again the early release provisions would apply. What then is the difference in practice between the defendant who pleads guilty at the first available opportunity, but does not give the co-operation and assistance involved in the SOCPA agreement, and the defendant who takes on the full burdens involved in being a party to such an agreement? There will still be a prison sentence, but no more than an additional few months, say 4-5 months, in actual custody. The consequence is that the reward for the full co-operation involved in the SOCPA agreement is relatively small, while the burdens taken on are substantial. From the point of view of the defendant it has nothing like the impact of a reduction in sentence

from a 20 year sentence of imprisonment to, say, 6½ years, so that instead of serving 10 years he will in the end serve a little over 3 years. In these circumstances Mr Winter submitted that the reward which a defendant at the lower level of criminality in the context of major crimes of fraud and deception, after co-operating to the extent that the present appellant has co-operated, should not be an immediately effective automatic sentence.

36. In order to provide guidance to sentencing courts, we acknowledge that it would be unrealistic to ignore these considerations. We are not to be misunderstood as saying that in circumstances like those we have outlined here, a suspended sentence must always be ordered. What we indicate is that where the appropriate sentence for a defendant whose level of criminality, and features of mitigation, combined with a guilty plea, and full co-operation with the authorities investigating a major crime involving fraud or corruption, with all the consequent burdens of complying with his part of the SOCPA agreement, would be 12 months' imprisonment or less, the argument that the sentence should be suspended is very powerful. This result will normally follow. This seems to us to face the practical realities and produce a pragmatic answer to the problem.

37. We emphasise the importance attached to the fact that this court has spelled out the appropriate guidance in cases where the appropriate sentence is 12 months or less. It has nothing to do with any sentencing agreement between the prosecution and the defence. It stems from our conclusion about the appropriate way in which sentences in this type of case, and in the circumstances we have outlined, should be approached. That preserves the proper constitutional position.

38. Standing back and addressing the facts of this case in the light of the guidance we have just promulgated, we concluded that given all the circumstances this was an appropriate case for the sentence of 12 months' imprisonment on the defendant to be suspended. We shall attach a supervision requirement, and quite apart from attending appointments as directed, the appellant will also be required to attend the Serious Fraud Office, as and when directed, in order to fulfil the SOCPA agreement.