
THE
INTERNATIONAL
INVESTIGATIONS
REVIEW

SIXTH EDITION

EDITOR
NICOLAS BOURTIN

LAW BUSINESS RESEARCH

THE INTERNATIONAL INVESTIGATIONS REVIEW

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Sixth Edition

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EDITOR'S PREFACE

In the United States, it continues to be a rare day when newspaper headlines do not announce criminal or regulatory investigations or prosecutions of major financial institutions and other corporations. Foreign corruption. Financial fraud. Tax evasion. Price fixing. Manipulation of benchmark interest rates and foreign exchange trading. Export controls and other trade sanctions. US and non-US corporations alike, for the past several years, have faced increasing scrutiny from US authorities, and their conduct, when deemed to run afoul of the law, continues to be punished severely by ever-increasing, record-breaking fines and the prosecution of corporate employees. And while in past years many corporate criminal investigations were resolved through deferred or non-prosecution agreements, the US Department of Justice recently has increasingly sought and obtained guilty pleas from corporate defendants.

This trend has by no means been limited to the United States; while the US government continues to lead the movement to globalise the prosecution of corporations, a number of non-US authorities appear determined to adopt the US model. Parallel corporate investigations in multiple countries increasingly compound the problems for companies, as conflicting statutes, regulations and rules of procedure and evidence make the path to compliance a treacherous one. What is more, government authorities forge their own prosecutorial alliances and share evidence, further complicating a company's defence. These trends show no sign of abating.

As a result, corporate counsel around the world are increasingly called upon to advise their clients on the implications of criminal and regulatory investigations outside their own jurisdictions. This can be a daunting task, as the practice of criminal law – particularly corporate criminal law – is notorious for following unwritten rules and practices that cannot be gleaned from a simple review of a country's criminal code. And while nothing can replace the considered advice of an expert local practitioner, a comprehensive review of the corporate investigation practices around the world will find a wide and grateful readership.

The authors of this volume are acknowledged experts in the field of corporate investigations and leaders of the bars of their respective countries. We have attempted to distil their wisdom, experience and insight around the most common questions and concerns that corporate counsel face in guiding their clients through criminal or regulatory investigations. Under what circumstances can the corporate entity itself be charged with

a crime? What are the possible penalties? Under what circumstances should a corporation voluntarily self-report potential misconduct on the part of its employees? Is it a realistic option for a corporation to defend itself at trial against a government agency? And how does a corporation manage the delicate interactions with the employees whose conduct is at issue? *The International Investigations Review* answers these questions and many more and will serve as an indispensable guide when your clients face criminal or regulatory scrutiny in a country other than your own. And while it will not qualify you to practise criminal law in a foreign country, it will highlight the major issues and critical characteristics of a given country's legal system and will serve as an invaluable aid in engaging, advising and directing local counsel in that jurisdiction. We are proud that, in its sixth edition, this volume covers 21 jurisdictions.

This volume is the product of exceptional collaboration. I wish to commend and thank our publisher and all the contributors for their extraordinary gift of time and thought. The subject matter is broad and the issues raised deep, and a concise synthesis of a country's legal framework and practice was in each case challenging.

Nicolas Bourtin

Sullivan & Cromwell LLP

New York

July 2016

Chapter 1

THE ROLE OF FORENSIC ACCOUNTANTS IN INTERNATIONAL INVESTIGATIONS

Gavin Williamson and Stephen Peters¹

I INTRODUCTION

As the number and scale of international investigations has multiplied over the last few years, forensic accountants have been used by corporations and their legal counsel to fulfil a wide range of investigative roles outside purely technical financial analysis. A forensic accounting practice will now typically offer forensic technology and e-disclosure services, large-scale document review capability, corporate intelligence skills and the ability to undertake general investigation including interviewing of witnesses and suspects.

This diversification in the role of the forensic accountant is at least in part a response to globalisation, and the increasingly international nature of corporations, regulatory scrutiny and thus investigations. A large accounting firm will have professionals based in most countries of the world, and therefore offers UK or US based organisations and legal counsel the ability to deploy local resources quickly. It also represents recognition on the part of legal counsel that aspects of large international investigations are heavily process-driven and that their skills and experience may be better focused on strategy and litigation.

The involvement of the forensic accountant in international investigation follows a typical arc; investigating the facts and circumstances around the matter through the analysis of financial records and interviews, supporting the document review and disclosure process, tracing the destination of any misappropriated funds or assets, and supporting recovery efforts. The size and diversity of offerings found in the larger accounting firms also allows an investigation team to, for instance, bring in specific sector specialisms, or harness the skills of insolvency practitioners and valuation experts to support recovery efforts. Indeed the modern 'investigative' forensic accountant may be defined as much by his or her armoury of tools and techniques that he or she can bring to a matter, as by his or her traditional core

¹ Gavin Williamson and Stephen Peters are partners at BDO LLP.

set of accountancy skills; understanding the principles of asset tracing in equity or predictive coding in e-disclosure is as important now as an appreciation of the workings of a balance sheet.

II FORENSIC ACCOUNTING

The traditional role of the forensic accountant in investigations has been focused on the analysis of financial and accounting records. Most forms of fraud, bribery and general financial misconduct can be identified in, and evidenced through, the financial and accounting records of an organisation. While a payment, loss or unauthorised transaction may be disguised or hidden, its existence must often be recognised in the accounts, an absence producing an imbalance or reconciliation error and a 'red flag' for management and auditors.

The focus of forensic financial analysis and extent to which it is required depends on the nature of the subject of the investigation. The direct cost of bribes to an organisation may be recorded in the accounts payable ledger, employee expenses, commissions or accounts receivable ledger as discounts. The direct cost of procurement fraud may be recorded in the accounts payable ledger and aggressive revenue recognition will be reflected in the accounts receivable ledger and sales records. Even where a fraud is entirely 'off the books' as in the case of business diversion schemes where neither revenues nor any costs of sales are recognised in an organisation's books and records, forensic analysis may be able to identify likely loss of profits from analysis of failed growth forecasts and other indicators such as falling market share.

Accounting treatments, the technicalities of their underlying transactions and even terminology and jargon vary significantly between industry sectors, geographically, and from the smallest to largest organisations. Having the right mix of forensic accounting and sector-specific knowledge and experience in the investigation team is essential; it may for instance be necessary to include project accounting experience for an engineering firm investigation, or specific forex or derivative valuation experience for a banking investigation.

i Investigative interviewing

Interviews are a key component of a forensic accountant's work. The analysis of accounting records without the context and direction provided by witness and suspect interviews may become simply an intellectual exercise and fail to progress an investigation. The most effective accounting records analysis is performed with a full understanding of how the specific operations of the organisation in question relate to the underlying accounting records and suspected misconduct. While the interview process may be led by legal counsel, where a fraud or its concealment involves even moderately complex accounting treatment, it is likely to be beneficial to include forensic accountants in the relevant interviews.

III ELECTRONIC DOCUMENT REVIEW & EDISCLOSURE

Computers, phones and mobile devices are features of our modern existence, and inevitably nowadays a large proportion of our personal and corporate records exist in electronic format. The volume of records that we hold has exploded: a single computer can hold several million documents; a typical electronic mailbox may hold fifty to a hundred thousand emails. The volume of potentially relevant records of a large company involved in an international

investigation may therefore number in the hundreds of millions. And technology is also revolutionising the mechanisms by which people, even within traditional organisations, communicate with each other. It is increasingly our ability to collect and review such diverse communications as instant messaging, Skype, text messaging and mobile phone applications such as WhatsApp and Facebook Messenger, that is the key to identifying wrongdoing and those colluding in it.

In a post-Snowden environment, encryption is becoming more widely adopted by business and the public alike. Advances in encryption technology, however, are often matched by advances in forensic technology. A recent example saw the developers of WhatsApp, an instant messaging mobile phone application, publicly announce end-to-end encryption for all communications. Within a single month the leading provider of mobile phone forensic software had developed a solution to decrypt WhatsApp data and rolled out the software fix to all its licence holders. As a result, the use of encryption has not yet become sufficiently widespread or effective to significantly limit the volume of potentially relevant data becoming available for review.

Conventional document review methodologies allow hundreds of millions of documents to be automatically filtered down to mere tens of thousands for manual review with the application of suitable search terms. With a reliable internet connection, reviewers can be sourced from and based anywhere in the world allowing legal teams, forensic accountants and specialist language reviewers to combine across jurisdictions. This process of electronic document review and disclosure is now well established, and such is its ease, effectiveness and speed of use that physical documents are generally best scanned and reviewed electronically. Manual review of large numbers of documents remains costly, however, and as data volumes and disclosure exercises in international investigations continue to grow, simple keyword filtering may be beginning to reach the end of its utility. This has encouraged increased adoption of two connected forms of advanced technology: concept searching and predictive coding.

i Concept searching

Even the simplest modern e-disclosure software now has the functionality to perform concept searches based on powerful statistical algorithms. A concept search identifies all documents containing the search term and goes further, identifying additional documents relevant to the idea of the search term; searching for 'Christmas' may also identify documents relating to gift ideas or turkey recipes; searching for 'football' may also identify documents relating to different teams, stadia or sponsors. In this way concept searching enables a more complete and intelligent inquiry allowing the reviewer to get quickly to a fuller set of relevant information, and used carefully can minimise the number false positives presented for manual review.

ii Predictive coding

Predictive coding, which was approved for use in an English court this year for the first time in *Pyrrho Investments v. MWB Property*, offers even greater opportunities for improvement in efficiency and cost savings. Sometimes called 'technology assisted review', predictive coding relies on e-disclosure software to identify relevant documents based on a limited but representative 'seed set' of manually reviewed documents. The software identifies concepts within documents manually identified as relevant within the seed set to return all similar documents from the overall data population. A further limited set of documents returned is then selected and another manual review performed, and the software uses the results of the

quality review to refine its understanding of relevance. With each iteration, the computer learns to distinguish what is relevant and each iteration produces a smaller and smaller set of ever more relevant documents. Most importantly it significantly reduces the number of irrelevant documents ever subject to manual review and thus the overall cost of document review and disclosure process. As Master Matthews states in *Pyrrho Investments v. MWB Property*: ‘This technology saves time and reduces cost. Moreover, unlike with human review, the cost does not increase at the same rate as the number of documents to review increases. So doubling the number of documents does not double the cost.’

The use of predictive coding is more advanced in the US and there again, cost has been the major factor in its use. In addition, there is growing evidence that properly conducted, the failure rate of predictive coding can actually be lower than that of a manual review team. There is every indication therefore that electronic document review and thus large-scale international investigation is becoming more effective, less expensive and significantly faster.

IV ASSET TRACING

The nature of international investigations is such that we are commonly dealing with financially astute fraudsters who are able to take significant steps to move and hide their stolen proceeds, and frustrate recovery attempts by legitimate owners. Assets are transferred between accounts, moved outside the jurisdiction in which they were stolen, divided up and dissipated, and placed within and behind various corporate devices and trusts as a means of disguising the link between the fraudster, the stolen assets and those seeking legitimate recovery. Due to its fungibility and speed of movement, tracing cash is difficult, and while real property can be easier to locate, its ownership can be disguised through the use of offshore companies, trusts and *Anstalten* and other corporate devices.

Victims of this type of crime and their legal advisers must embark upon an often lengthy and complex process of asset tracing to determine the location of the assets and to link identified assets to the crime and the offender. Every asset tracing exercise has its unique complexities, but inevitably include a more or less iterative process of gathering and analysing evidence of asset movement, securing and freezing identified assets, and applying legal remedies such as search and third-party disclosure orders to obtain further evidence of asset movement. A division of labour between legal counsel and the forensic accountant very quickly establishes itself, with the latter focusing on the messy and complex business of analysing financial, corporate and banking records to ‘follow the money’.

Banking records in particular are the bread and butter of a forensic tracing exercise, representing an accurate and reliable source of evidence. Indeed, frequently the only record of a flow of assets will be held by the financial institution facilitating the transaction.

It is important to note that asset tracing, while governed by the ‘rules’ of both common law and to a greater extent, equity, is not a legal end in itself. Lord Millet described it as ‘neither a claim nor a remedy. It is merely a process by which a claimant demonstrates what has happened to his property, identifies its proceeds and the persons who have handled or received them, and justifies his claim that the proceeds can properly be regarded as representing his property.’ (*Foskett v. McKeown*, [2001]).

Traditionally tracing has been an almost entirely linear process: following an asset as it is moved or substituted for another and thereafter another and so on. While assets may be split and recombined, and mixed with other funds, the tracing exercise moves in an essentially chronological progression. It has also been restricted by the ‘lowest intermediate

balance' principle where a claimant's ability to trace funds into a bank account is limited to the lowest balance held between the date of misappropriation and the date on which the claim is brought, even if funds were subsequently paid into the bank account so as to restore the balance.

A simple application of these tracing rules is susceptible to being defeated by a sophisticated money launderer. Where, for instance, a loan has been taken to pay for a property and misappropriated funds used to later pay off the loan, the beneficiary's property could be said to have been dissipated (i.e., used to discharge a liability). However, in two recent cases, English courts have demonstrated significant flexibility in the application of these tracing rules.

i 'Backwards' tracing

In *Relfo Ltd (in liq) v. Varsani* [2014], the court accepted the principle that if a payment is made by one intermediate party in advance of receiving reimbursement from traceable funds, that is sufficient to trace a flow of funds or substitute property to its ultimate destination. This is often described as 'backwards tracing' and in certain circumstances allows a claimant's property to be traced to an asset already in the possession of the defendant.

In *Federal Republic of Brazil v. Durant International Corporation (Jersey)* [2015], the Privy Council also accepted the use of backwards tracing where past payments could be demonstrated to be linked to the expectation of reimbursement from traceable funds:

The development of increasingly sophisticated and elaborate methods of money laundering, often involving a web of credits and debits between intermediaries, makes it particularly important that a court should not allow a camouflage of interconnected transactions to obscure its vision of their true overall purpose and effect. If the court is satisfied that the various steps are part of a coordinated scheme, it should not matter that, either as a deliberate part of the choreography or possibly because of the incidents of the banking system, a debit appears in the bank account of an intermediary before a reciprocal credit entry.

V ASSET RECOVERY

Tracing the assets, however, is only the start. Arguably the most important aspect is recovery; in this regard the value of the assets is crucial – this must be weighed up against the costs of physical recovery and realisation where appropriate. The value of any underlying assets is often surrounded by uncertainty, particularly in cases where funds have been secured from third parties based upon spurious asset values: these assets consist of properties, businesses, shareholdings or entities that can be located in far-flung countries; consequently, they can prove to be extremely difficult to value. Once again, the sophisticated forensic accountant will be able to turn to specialists in his or her team who will be experienced in undertaking valuations of these assets with their associated complications.

In the case of both conventional assets and those of a more unusual nature, it needs to be established that it makes sense economically to pursue recovery. Once this appears to be the case, the method of doing so should be determined. There are a number of approaches that can be used to recover assets: the most usual route is by way of conventional litigation, albeit that this is often complicated by the need to litigate in a number of countries and different legal systems. The role of the forensic accountant then shifts to providing litigation support, feeding into various particulars of claim and witness statements, etc.

A less common, albeit potentially effective, route is to use the formal powers of insolvency practitioners to take control and ultimately realise the assets. Most insolvency practitioners in the UK are accountants or insolvency experts working in firms of chartered accountants. Upon formal appointment, an insolvency practitioner takes on certain powers and responsibilities that can prove particularly helpful in gaining control of assets that would otherwise require an unwieldy and ultimately costly legal process to achieve the same end result. It is helpful that many of the offshore jurisdictions where control of such assets ultimately rests adopt the English legal system or variations thereof. The insolvency practitioner, once appointed, is able to utilise his or her powers, often across borders, to control assets and ultimately realise them for the benefit of creditors (which, where there is fraud or misappropriation of assets, will likely include the victim).

In respect of insolvent entities, potential recoverable assets could be unconventional in their nature. For example, there may be outstanding litigation against certain parties or, indeed, claims that arise as a consequence of the insolvency itself. This may include such matters as professional negligence claims against advisers. This would likely involve the skills and expertise of a forensic accountant, this time not from a pure investigative capacity but as an adviser on quantum. The forensic accountant would assist the insolvency practitioner (and his or her legal advisers) in quantifying the losses suffered and assisting with formulating the damages claim. The forensic accountant or (with independence in mind) another forensic accountant may ultimately be required to act as an expert under CPR35 should the matter proceed to litigation.

Appendix 1

ABOUT THE AUTHORS

GAVIN WILLIAMSON

BDO LLP

Gavin is a partner in BDO's UK forensic practice based in London. He is a chartered accountant and certified fraud examiner, specialising exclusively in forensic accounting investigations on behalf of corporate and institutional clients. His practice ranges from the investigation of white-collar crime, financial fraud, theft and bribery, to wider forms of employee and institutional misconduct such as confidentiality breaches and conflicts of interest.

Gavin is based in London but works extensively overseas. He has conducted major investigations in Switzerland, Spain, Turkey, Ireland, the Middle East/North Africa, eastern Europe, and Central and East Asia. Gavin has supported organisations in a wide range of industry sectors, from not-for-profit to retail, and from energy and resources to construction, property and manufacturing. Gavin has also worked extensively for clients in the financial services sector; insurance companies, hedge funds, banks and sovereign wealth funds. His financial services experience encompasses sanctions, anti-money laundering, and fraud investigations. He has reported to US prosecutors and law enforcement agencies on behalf of banks and other organisations.

Gavin has a special interest in the use of technology in the investigation of fraud and corruption, and asset tracing. He has presented widely on innovations in forensic technology and their practical application to investigation and disclosure.

Gavin has an honours degree from the Queen's University of Belfast and a doctorate from the University of Dundee, both in civil engineering. He is a fellow of the Institute of Accountants in England and Wales and a member of the Fraud Advisory Panel.

STEPHEN PETERS

BDO LLP

Stephen is a forensic accounting partner at BDO. He is an experienced forensic accountant with nearly 20 years of diverse experience in litigation matters, international arbitration and investigations. Stephen graduated with honours with a BSc degree in civil engineering from

Aston University, Birmingham. He is a fellow of the Institute of Chartered Accountants in England and Wales and has a postgraduate certificate in fraud risk management from John Moores University, Liverpool.

Much of Stephen's experience involves cross-border disputes and investigations and he has worked throughout the world. He has been involved in expert witness assignments in the areas of breach of contract and loss of profits, acquisitions and disposals disputes, minority shareholder and joint venture disputes, insurance claims, valuations, accounts interpretation, directors' disqualifications and intellectual property matters.

Stephen leads the forensic accounting group's contentious insolvency specialism and has worked alongside insolvency practitioners in a number of roles: as expert accountant; advisor; undertaking investigations to follow cash; and tracing and recovery of assets.

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