

SFO must swallow its medicine after falling short in NHS price-fixing case

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Pitchford J's ruling has called the government agency's role into question

The collapse of one of the longest and most expensive Serious Fraud Office (SFO) prosecutions has raised serious questions about the future direction of the government department.

As reported on TheLawyer.com (11 July), Mr Justice Pitchford threw out a price-fixing case – referred to variously as Goldshield and Operation Holbein – against five drug companies, leaving an eight-year investigation in tatters.

While the SFO accused the drug companies and a number of individuals of conspiring to defraud the NHS through an alleged pharmaceutical cartel, its original indictment related only to price-fixing. But as price-fixing alone is not an offence, and as Pitchford J refused permission to alter the indictment, the case has been abandoned.

This is embarrassing for the SFO to say the least. Predictably, the department is considering an appeal, but the blow comes after the SFO already had to contend with an appeal over the BAE - fiasco, a scathing review by former New York City prosecutor Jessica de Grazia and the departure of four senior prosecutors (The Lawyer, 23 June).

According to Hill Dickinson criminal fraud head Edward de la Billiere, who was not involved in the case, this latest disaster for the SFO should force the organisation to rethink its strategy.

"There are serious questions that need to be asked about the whole set-up of how complex fraud is dealt with," he says. "We've seen several mergers because of difficulties within investigating and prosecuting agencies, and there's been allegations of failure within Soca [the Serious Organised Crime Agency] too. Any new government after the next election should look at going back to the drawing board to bring all these agencies together and streamline investigations and prosecutions."

De la Billiere adds that, in the short term, SFO director Richard Alderman, who has been in the post for three months, is in a perfect position to throw away the current SFO handbook and start afresh.

"Radical changes need to be made, but losing this case shouldn't lead to a knee-jerk reaction of all the de Grazia recommendations being taken on board," says de la Billiere. "Just because it's being done in America doesn't mean it will fit our market."

That said, Pannone partner Tim Hayes, who represented Kent Pharmaceuticals executive John Clarke, who was named in Holbein, says the de Grazia report made great recommendations that need to be followed up.

"Jessica de Grazia talks about the SFO having a skills shortage and a need for a renewal of strong leadership. Holbein – the SFO's flagship case – shows, no doubt about it, that changes need to be made," Hayes insists.

own experience over the past 12 months to highlight why his to points Hayes he believes the SFO's management needs to be revamped. "I've had two SFO cases – this one and one the SFO brought against the 1990s menswear chain Citterio – and both have been kicked out of court," explains Hayes.

"To stop this happening it might be better for the SFO director to get some senior Treasury counsel in near the very start to assess whether the case is worth it.

"Paying a £1.5m retainer to Treasury counsel for a set time may have stopped tens of millions of pounds being spent on a case [Goldshield] that had no legs, especially because it was before the Enterprise Act [2003] came in."

The act outlawed price-fixing in the UK, while earlier this year the House of Lords ruled that price-fixing in itself is not capable of being a criminal conspiracy to defraud.

The Holbein criminal case might have folded, but the Department of Health (DoH), on behalf of the NHS, appears to be successfully recovering money from the pharmaceutical companies involved.

Peters & Peters partner Jonathan Tickner, representing the DoH, stresses that the civil proceedings are unconnected to the SFO case, adding: "The obvious success of the civil proceedings, which the Department of Health continues to pursue against the remaining defendants – including Kent Pharmaceuticals – speaks for itself, and on behalf of the Department of Health we fully expect further substantial recoveries to be made."

The implication of Tickner's comment is clear. The DoH, which has so far secured £34m from the drugmakers, has succeeded where the SFO failed.

A source close to the DoH case told The Lawyer that the civil proceedings were simple because the drug firms did not have a case, but could settle without accepting liability. "For the SFO the situation was different. There was a grey area as to whether price-fixing was criminal, so it had to go all the way to the House of Lords," says the insider. "If they hadn't pursued it, justice wouldn't have been seen to be done, which is a crucial deterrent."

So the SFO does have some support for taking Holbein forward, even though the unit's director Alderman is the first to admit that there is a debate raging about the role of his department.

"There's some who believe the SFO should only do a small number of very, very large complex cases, but I've already challenged that," says Alderman. "There's a radical agenda for the SFO, which is taking us far away from just doing small numbers of very, very large cases."

Alderman's vision will see the SFO looking to protect the public from fraud through raising awareness. By stepping slightly on Soca's toes, it will also look to trace would-be fraudsters to cut them off before they actually commit crimes.

"It's a radical departure from what's expected from the SFO, but I feel that being able to stop fraudsters before getting to litigation is the way forward," he says.

Alderman adds that he is also sensitive to concerns that the SFO will just take the de Grazia report and implement it fully. "I'm interested in good ideas," he says, "so I'm interested in New York and Washington [DC], but we need to look at other jurisdictions to see how we can improve here and ensure it works in our environment."

He dismisses the suggestion that the SFO should be wound down so that one individual department can deal with complex fraud.

in partnerships with other agencies, as doing something interested more "I'm through joined-up partnerships and getting results is what's of the utmost "These other suggestions are a huge distraction." importance," he explains.

Distraction or not, the rumours will continue until a concrete plan is in place for the SFO. The unit's new general counsel role, for which applications open in September, will be a crucial post in getting the department back on its feet. Although with Alderman apparently willing to tear up the SFO handbook, it looks as if his role will also be key.

Operation Holbein timeline

- 2000: The Serious Fraud Office (SFO) launches a probe into price-fixing by pharmaceutical companies supplying generic drugs to the NHS between 1996 and 2000. Dubbed Operation Holbein, the investigation was launched following a tip-off from a whistleblower at one of the

accused companies.

- April 2002: More than 30 offices and premises are raided, including those of drug companies and the homes of pharma companies' senior management.
- December 2002: Civil proceedings brought by the Department of Health (DoH) begin against several pharma companies over the supply of generic drugs. Manufacturers implicated include Ranbaxy UK, Generics UK, Norton Healthcare, Goldshield Group and Kent Pharmaceuticals.
- April 2005: Ranbaxy is first to reach a settlement in the civil case with the NHS, paying out £4.5m in compensation, while German drugs companies Merck and Generics agree to pay £12m each. The companies do not admit liability.
- April 2006: Five companies, as above, and nine executives are charged with conspiracy to defraud the DoH. In the same month, US healthcare giant Norton does not admit liability, but pays £13.5m in - compensation to the NHS.
- June 2007: Goldshield agrees to pay the NHS £4m while maintaining that it is not legally responsible.
- January 2008: The House of Lords hears arguments from the pharma companies, including Goldshield and Ranbaxy, that price-fixing cannot be prosecuted under the common law offence of conspiracy to defraud. The hearing takes place alongside that of former Morgan Crucible chief executive Ian Norris, who the US was trying to extradite in connection with a separate price-fixing cartel.
- March 2008: The House of Lords rules in favour of Norris and the drug firms.
- July 2008: Mr Justice Pitchford quashes the indictment against the five companies and nine - executives charged. The SFO considers applying for leave to appeal.

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Author: 96234

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