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Q&A: International investigations and asset tracing



July 2015 Issue

July 2015 | SPECIAL REPORT: WHITE-COLLAR CRIME

Financier Worldwide Magazine

FW moderates a discussion on international investigations and asset tracing between Jon Barclay at Bedell Cristin Guernsey Partnership, Tamlyn Edmonds at Edmonds Marshall McMahon, George McKillop at Haymarket Risk Management Ltd, and Emma Ruane at Peters & Peters.

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Bedell Cristin



FW: What factors have driven demand for worldwide asset tracing and recovery services in recent years?

George McKillop

Barclay: Over the past six years the world has seen the exposure of two of the largest pyramid fraud schemes in history and the upheaval of the Arab Spring. Both of these continue to be major drivers behind the continuing demand for tracing and recovery services. The efforts to trace and repatriate the fraudulently obtained assets of both *Madoff*

Haymarket Risk Management Ltd

Emma Ruane

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and *Stanford* continue to provide demand in this sector due to the complexity and scale of their pyramid schemes. The Arab Spring has also provided substantial opportunities to the tracing and recovery sector as new governments have attempted to trace and recover misappropriated assets and corrupt payments from members of previous administrations. The demand for more stringent regulatory requirements following the global economic downturn have also, seemingly, led to more fraudulent enterprises being discovered and action taken to trace and recover misappropriated assets. Moreover, corporate transparency and accountability are current issues which are under renewed scrutiny by national and international regulatory authorities.

Ruane: Regime changes across the globe, combined with a willingness on the part of developed nations to assist in repatriating illicit financial outflows, have kept corruption at the top of the international agenda. The US in particular has emphasised its willingness to assist countries in repatriating assets embezzled by corrupt officials. As well as its investigation into the FIFA scandal, among other things, in the last two years the US has required the Vice President of Equatorial Guinea to sell his Malibu mansion, a Ferrari and items from his Michael Jackson collection located in the US. It has also actively taken measures, using civil and criminal legislation, to restrain assets in the UK which it considered to represent the proceeds of corrupt misappropriations carried out by the former President of Nigeria, General Abacha, and a number of his relatives.

McKillop: The financial crash brought with it exposure of fraudulent activity that, without it, would have continued undetected. This accelerated the then existing shift in corporate thinking away from the 'we know our staff, fraud cannot happen to us' mindset to an ever-increasing acceptance that, without proper controls, fraud is not just a possibility in organisations, but is actually a probability. This reality acceptance has seen an increased demand for effective private-sector fraud investigation with a corresponding need for asset tracing and recovery. There has also been an increased realisation that tracing assets is the logical first step and that the legal recovery process – including freezing orders and Norwich Pharmacal orders, for example – should only be initiated once it is clear there are assets of value to recover. The reality is that fraudsters will do everything to keep their ill-gotten gains and are unlikely to disclose undiscovered assets in response to a court order to do so.

Edmonds: In our opinion, criminals are becoming far more adept at hiding assets in different jurisdictions via complex structures. Even an unsophisticated fraudster understands that it is better to have money offshore. Furthermore, there are more firms which assist with setting up complex structures – it is easier to do now than ever before. The complexity of asset tracing has increased as the places available to put assets have increased; many developing countries, perhaps with less restrictive regulatory bodies, now understand that dealing with money is a business in itself. As our approach becomes more global and technology becomes more advanced, having a number of interlinking structures and accounts is easy to set up and control from anywhere in the world. Asset tracing is no longer a matter of finding cars and houses in England. Every victim that wants to get his or her money back has to find out where that money is, and these days it is not as easy to locate as it once was.

Peters & Peters

White-collar crime

FORUM: Third party
 corruption and
 fraud

Recent actions
 confirm FinCEN's
 aggressive anti-
 money laundering
 enforcement
 agenda

The SEC's renewed
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The SEC is looking at
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“Regime changes across the globe, combined with a willingness on the part of developed nations to assist in repatriating illicit financial outflows, have kept corruption at the top of the international agenda.”

— Emma Ruane

Information sharing
 between securities
 regulators

Q&A: International
 investigations and
 asset tracing

FW: What trends are you seeing in insolvency-related asset tracing and recovery processes?

McKillop: In our experience, we have seen, too often, insolvency practitioners put their own fees at the head of their priority list. In one case, this meant junior staff at the insolvency practitioner being used to carry out investigative research when they had neither the experience nor the requisite research facilities. Worse still, because it was a large multinational practice, the fee rates of their junior staff far exceeded that of experienced external investigative researchers who were available. So any money that was left for creditors was being rapidly swallowed up. In another case, where there were clear indications that evidence of offshore assets existed on the computer hard drives of the insolvent company, the practitioner was adamant there was nothing to be gained in forensically examining the hard drives. Only with a court order did imaging and analysis take place, and this resulted in recoverable assets being successfully traced.

Edmonds: We still continue to see shadow directorships, offshore companies and complex banking and corporate structures. However, we have noticed that shadow directors and those with board level involvement in shady enterprises are feeling a little more aware of the might of the regulatory bodies and prosecutors – be it in the US, particularly, or the UK. We are also noticing that courts around the world appear to be becoming more open to enforcing foreign judgements. However, jurisdiction is often crucial – Panama, for example, remains extremely difficult.

Ruane: Use of insolvency legislation to attack assets in a trust is becoming ever more frequent. The latest example we have encountered is in the context of freezing orders. The claimant asserted that the defendant had deposited certain funds in a discretionary trust, managed by professional trustees, in order to make those funds judgment-proof. The claimants asserted that this constituted a transaction at an undervalue and therefore, if a judgment was obtained against the defendant, the claimants could seek to have the transaction reversed in accordance with the Insolvency Act 1986, s.423. The argument did not, in the event, succeed as it had not properly been advanced on evidence, but the judge found it ‘promising’ so we wouldn’t be surprised to see this point repeated in other cases.

Barclay: There has been a marked increase in actions being brought against directors and officers and their predecessors of corporate structures. Particularly where the company has been defrauded by an employee and the directors have come under scrutiny for failing to ensure appropriate checks and balances were implemented. This has inevitably brought a renewed focus on what will fall within the scope of directors’ duties and the extent that they will be accountable for the losses suffered by the company.

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FW: What legal challenges or impediments can potentially arise when seeking or obtaining information about assets and enforcing their recovery?

Ruane: When instigating asset recovery proceedings, perhaps the most important weapon in a litigator's armoury is a freezing order, which prevents a defendant from dissipating or moving funds pending judgment. There are equivalent orders in other jurisdictions but, unsurprisingly, the requirements for obtaining such orders can vary and it is important to know what you can get and what you can't. An indicative example is an order attaching assets in Switzerland. Unlike England and Wales, where a freezing order applies to all of a named individual's assets, an order attaching assets in Switzerland applies only to identified assets, which must therefore be described as precisely as possible in any application.

Barclay: Classic investment fraud and Ponzi schemes will require a different strategic approach than breach of fiduciary duties or an action for breach of trust. When undertaking a multinational tracing and recovery operation, understanding the laws and customs governing the individual jurisdictions is imperative. The choice of jurisdiction for seeking recovery can often be a significant weapon in the victim's arsenal. By way of an example, the successful tracing and recovery of fraudulently appropriated assets relies upon operational secrecy, so knowing which jurisdictions are more receptive to *ex parte* applications and no-say orders can provide real advantage. Such knowledge, along with strong links to international and national law enforcement organisations, can greatly increase the chances of recovery.

Edmonds: One must be extremely careful about how to navigate investigations in different jurisdictions. For example, it is almost impossible to privately investigate at all in Switzerland, as you are not permitted to take witness or party depositions or gather documentary evidence, such activities being incumbent on a judge, prosecutor or administrative investigator. In Germany, it is illegal to record conversations without the other party's permission. In some countries, investigators will routinely provide illegally obtained information despite instructions to the contrary. This can have negative consequences, especially if the evidence is required for asset tracing in criminal confiscation proceedings as the evidence is likely to be excluded. If a lawyer is dealing with asset recovery where typically an investigation is required, it is important to understand the limits, and indeed possibilities, of information gathering in different jurisdictions.

McKillop: The major obstacle we have encountered in recent years is the failure of those organisations which hold data, often crucial to asset tracing – most notably telecoms companies – to properly apply the exemption which enables them to disclose information to third parties, under Section 29(3) of the Data Protection Act, for the prevention and detection of crime. Such organisations will often only disclose to the police, which is not the intention of the exemption. The Information Commissioner has advised "the exemption does not specify who can make such requests; it is the purpose for which the disclosure will be made that is crucial in determining if the exemption applies" but many choose to ignore the advice. The paradox is that in many cases the police won't investigate, and will not make the request and so vital information remains undisclosed. It is a catch-22 situation which plays directly into the hands of the fraudster and does nothing to help the victim.

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“If a lawyer is dealing with asset recovery where typically an investigation is required, it is important to understand the limits, and indeed possibilities, of information gathering in different jurisdictions.”

— Tamlyn Edmonds

FW: To what extent are technological advances and the globalisation of business processes making it easier for criminals to commit financial fraud?

Edmonds: The move away from face-to face business and the availability of instant communication from anywhere in the world, of the same quality as if in the UK, means that fraud can be carried out from anywhere – indeed, a multitude of places. The police are territorially based and are rarely a match for the global and mobile nature of a fraud. Where the fraudulent actions and the outcome are found in different locations, the police of a particular location will often seek to disown on the basis that no loss occurred there or the fraud took place abroad. Where the fraud has been carried out in a multitude of places, no force may be sufficiently interested. The availability of communications, ready international financial movements and the ease of international movements of people means that the fraud is far easier, as there are few barriers. However, its investigation by the police is largely still ‘analogue’.

McKillop: There is no doubt that technological advances and the globalisation of business processes aid the fraudster as much as they do the investigator. For example, with careful planning, the sophisticated fraudster can mimic a legitimate business and insert themselves into a business deal in a ‘man in the middle’ position, receiving payments by wire transfer sometimes running into hundreds of millions of pounds. Having achieved the heist, the fraudster can then, at the touch of a button, splinter the money via feeder accounts to myriad dedicated sub-accounts across the world. Such a scenario can seriously complicate the tracing of stolen funds. Keyboard loggers and other intrusive devices are also deployed by the determined fraudster who will bribe parties, such as cleaning contractors, with internal access to plant the bugs and retrieve the gathered information. The flip side is that, when deployed for nefarious reasons, high technology leaves an evidential footprint, which is gold dust for the savvy forensic investigator.

Ruane: Electronic payments are increasing year on year. The speed of transfers made across borders and through multiple accounts can mean that, even if an investigator can follow the money, by the time its destination has been ascertained the funds have been dissipated. Obtaining account opening information and statements in order to identify wrongdoers is often possible but comes with no guarantee either that a recovery will be made or that law enforcement authorities in the relevant jurisdiction will take the necessary action against the individuals concerned. Further digitisation of banking is inevitable, and that development, whilst advantageous for consumers, is unlikely to solve this problem.

Barclay: The ever increasing popularity of online banking and the growing trend towards the use of banking apps and web based payment platforms, has created a virtual environment for organised

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crime to thrive exponentially. Coupled with the continuing propensity of technological hacking, botnets, phishing and malware scams, the globalisation of business and centralisation of computer systems in multinational companies are making it easier to commit financial fraud where companies are not constantly vigilant. With the advent of emerging quasi-currencies such as Bitcoin, a new and complex dimension is added to asset tracing and recovery efforts. When combined with darknet technological advances such as TOR, Bitcoin can allow criminals to convert and conceal assets with near impunity; such transactions having an added complexity and requiring specific expertise to trace.

FW: What issues need to be taken into account when determining if the value of the assets being traced are worth the resources required to locate them?

McKillop: In most cases where assets have been stolen through fraud or other similar crime, the approximate value of the asset is already known and it is a simple matter to assess whether it is worth allocating resources to enable recovery. For example, tracing and recovering £50,000 which has been stolen and concealed offshore will almost certainly cost more than the asset itself. It is then a judgment as to whether to seek recovery as a matter of principle. In another case, a sum of £1m or more will always merit the tracing and recovery investment. What is most important, however, is not to put the cart before the horse. In other words, it is wise to first establish where assets have been concealed, whether they are recoverable and at what likely cost, before investing in hefty legal fees in order to obtain the requisite orders that may enable recovery. So, tracing is the first logical step of the recovery process.

Barclay: Identifying whether the asset is capable of recovery will often be the crucial starting point and time critical. It becomes infinitely more difficult if it is tangible property that has been fenced out of the jurisdiction. Intergovernmental cooperation will be imperative, especially when assets are traced overseas which give rise to a multijurisdictional complex of logistic, financial and legal issues. Depending on the client, high net worth or corporate, the repercussions of negative publicity and the possible impact on their reputation may be another important consideration. While it is necessary to consider the political, environmental, social and legal implications to determine whether the recovery of an asset is worth the pursuit, fundamentally the decision is likely to be a commercial one. Even for the most capitalised client the cost of investigative and legal fees incurred may only achieve a pyrrhic victory.

Edmonds: The purpose of the asset tracing is a key consideration. In criminal confiscation cases we need to point to assets held, whether in this jurisdiction or outside of it, in order to demonstrate the criminal benefit the defendant has obtained. This asset does not necessarily have to be realised, as unless the defendant can show that he or she has acquired the asset legitimately, in criminal lifestyle cases for the purposes of the Proceeds of Crime Act 2002, the prosecutor will argue that the asset goes toward the overall benefit figure. It is up to the defendant to then find the means or to liquidate the asset in order to satisfy the confiscation order. However, that being said, if the cost of tracing that asset far exceeds the anticipated confiscation order amount or amount expected in compensation, a cost benefit analysis would be required with the client.

Ruane: It's important for anyone seeking to trace assets to be realistic about whether a recovery is likely to be made. This uncertainty also

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needs to be balanced against other motivations – for example, a business needs to demonstrate to the market or to employees that fraud will not be tolerated. A useful approach is to identify any straightforward recoveries which can be made, which can be used to form a ‘fighting fund’ to carry out a more detailed investigation as to the location of assets. A more informed cost-benefit analysis can then be undertaken for each stage of the tracing process. Although this analysis is vital, a claimant will often have to make decisions on the basis of incomplete information and based on its appetite for risk.

“There is no doubt that technological advances and the globalisation of business processes aid the fraudster as much as they do the investigator.”

— George McKillop

FW: Misappropriated assets are often converted into real property to obscure their true ownership. In your experience, what tactics are most effective in following this trail?

Ruane: A Transparency International report found that 40,725 property titles in London are held by foreign companies and, of those, 89 percent are companies incorporated in jurisdictions where local legislation grants confidentiality in respect of beneficial ownership, otherwise known as ‘secrecy jurisdictions’. In a civil case, where asset recovery is sought, you may obtain confirmation of a property’s ownership as a result of a disclosure order against a defendant. Alternatively, through third party disclosure orders, you may, by following money through accounts, come to expenditure on a property at which point inferences may be drawn and relevant questions asked. It is a misconception that properties held in the names of companies incorporated in secrecy jurisdictions are invulnerable and the courts of those jurisdictions are often more than willing to grant assistance to defrauded claimants, particularly in restraining the assets concerned pending judgment and in identifying the true beneficial owner.

Edmonds: Obtaining the fullest financial picture of the target, ensuring it is properly evidenced to prevent false claims of origin, is essential. Prior to criminal proceedings being issued in the form of a private prosecution, it is possible to obtain disclosure orders in certain jurisdictions to follow the trail. Thereafter, with proceedings on foot, if the real property is identified in this jurisdiction, it is possible to obtain witness summons in the criminal courts to require disclosure of specified information and, if available, criminal restraint orders can be obtained to both safeguard the property itself and to require disclosure as to proof of its origins and other property.

McKillop: Anti-money laundering regulations have seen an end to the day when a suitcase full of cash could be used to buy property. This does not, however, deter the sophisticated fraudster who will seek to launder ill-gotten gains, usually through cash businesses such as restaurants or mini-cab companies. Once laundered, the ‘legitimised’ money can be used to invest as the fraudster wishes, often in property in rising markets. It is not easy for the property seller to distinguish between genuinely clean money and laundered funds, and in many cases they will not care anyway. However, the golden rule that must always be applied when investigating financial fraud is to follow the

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money trail from the point it disappeared. Had Lord Fraser applied this rule when he investigated an alleged £400m overspend on the Scottish Parliament building, he may well have found that money was siphoned off through substantial overpayments to subcontractors with the proceeds ending up in property investment.

Barclay: Where possible, engage professionals across the financial, technological, investigative and legal spectrum to form a multi-disciplinary team tasked with combining their respective expertise to assess and develop an asset recovery strategy. Forensic IT specialists are best positioned to piece together deleted or corrupt files, interpret coding and recover metadata from servers and devices to follow the digital footprints. A Norwich Pharmacal order remains an effective means of ascertaining crucial information from financial institutions, though it can prove a greater hardship to obtain in certain jurisdictions where a Fort Knox approach to banking and secrecy laws exists. Social media has created a platform to access a plethora of sensitive personal data. This is an inexpensive means of compiling soft intelligence relating to an individual's habits, interests, behavioural patterns and known associates. These include features such as facial recognition and geo-tagging which are uploaded in real time. Enquiry agents have proven to be an alternative avenue to gather pertinent data covertly.

“The chances of recovery can be said to be directly proportionate to the determination, skill and resources available.”

— Jon Barclay

FW: How should investigators overcome the jurisdictional issues that are often associated with asset tracing? What particular challenges are often encountered?

Barclay: The chances of recovery can be said to be directly proportionate to the determination, skill and resources available. Wherever possible, early and comprehensive engagement with international and national law enforcement agencies, the financial institutions and legal advisers in both home and target jurisdictions should be prioritised to 'hold the ring' and limit any further dissipation of the assets.

Ruane: The best possible advice for anyone seeking to commence a multijurisdictional asset tracing exercise is to retain the best team for the job. As noted, each jurisdiction's legal system will have its own subtleties, and it's important to appoint specialists who understand what is required and any issues that may arise. Experience is invaluable, not only of a system's legal system, but also of its culture – in many jurisdictions, knowledge of how to obtain and serve an order quickly is as important as obtaining the order in the first instance and navigating bureaucracy is often a fine art. As with other instances where teamwork is required, it's an absolute necessity to establish a leadership role and for someone to coordinate other members of the team to ensure that everyone is singing from the same hymn sheet.

Edmonds: There are various jurisdictional challenges encountered by investigators in relation to asset tracing, which is why it is important that investigators themselves have local knowledge specific to that area or are able to instruct people who do. It is also important that they are aware of the legal issues that may arise in that jurisdiction to avoid any

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illegal action being taken. Many jurisdictions where assets are hidden often have strict privacy laws and it will therefore be necessary to instruct local counsel to navigate the legal system. Usually, good investigators will first ascertain what information they themselves can obtain legally by using publically available registers in that jurisdiction, for example land registry or company registers, or speaking to individuals who may be potential witnesses and who can often be a great source of information. Again, it is important to be fully aware of the legalities involved in taking witness statements in that particular jurisdiction. Once this information has been gathered, it may then be necessary to obtain disclosure orders in that particular jurisdiction against financial institutions or others, and for this purpose a reputable law firm will be required.

McKillop: One challenge is the variation in law from country to country and even between states in a federal environment. So the investigator must ensure that the techniques they deploy, while tracing assets internationally, remain legitimate. For example, covert recording may be legitimate in one jurisdiction but not in another. Same with undercover or pretext approaches. Another is the difficulties that can be encountered in secretive offshore jurisdictions where nominee directors and shareholders will conceal the identities of beneficial owners. The use of bearer bonds, whereby no records are kept of the owner, or the transactions involving ownership, also present difficulties. On the plus side, one of the advantages of private sector asset tracing is that, with client approval, the investigator can move quickly between international jurisdictions without the form-filling requests and authorisations that can hamper and delay public sector investigations. As is always the case, the right contacts, in the right places in difficult jurisdictions, are all important.

Jon Barclay is of counsel at Bedell Cristin Guernsey Partnership where his expertise includes litigation, international private client, regulatory and compliance, contentious trust and probate, fraud and asset tracking, shareholder disputes and funds. Mr Barclay advises institutions, law firms and in-house teams worldwide across the range of international financial services and international private client matters. He has a close interest in cross-border enforcement and asset recovery and has received particular recognition for his work in the fraud arena. He can be contacted on +44 (0) 1481 812 818 or by email: jon.barclay@bedellgroup.com.

Tamlyn Edmonds is one of the founding partners of Edmonds Marshall McMahon – the first and only specialist private prosecution law firm in the UK. Ms Edmonds is an experienced prosecutor specialising in high value fraud and counterfeiting. She commonly advises companies on strategies to tackle fraud where the police or CPS have refused to investigate and prosecute. She can be contacted on +44 (0)20 7583 8392 or by email: tamlynedmonds@emmllegal.com.

George McKillop is the founder and chief executive officer of Haymarket Risk Management Ltd, the City of London based corporate fraud consultancy. In a 30 year career, Mr McKillop has managed dozens of investigations into complex corporate fraud and has personally managed asset tracing assignments in the UK, and internationally in mainland Europe, the Far East, Australia, North and South America, and Africa. He can be contacted on +44 (0)20 7801 2400 or by email: gwm@haymarketrisk.com.

Emma Ruane is an associate at Peters & Peters. Ms Ruane has gained extensive experience of the interaction between civil and criminal law in high value fraud and competition cases sometimes spanning multiple



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