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FROM DOLEIROS IN JANEIROS TO LONDON'S REAL ESTATE

Lawyers must break the chain of financial crime, Stephen Baker and Jessica Henson say

The wrongdoing surrounding the Brazilian state-owned oil producer, Petrobras, has all the hallmarks of a paradigmatic political corruption scandal. A construction cartel; millions of dollars in bribes and kickbacks; the involvement of more than 80 politicians and members of the business elite; human mules smuggling shrink-wrapped cash across multiple borders; and, of course, all this televised in its own Netflix series.

Having launched a full-scale investigation in 2014, authorities in Brazil and other financial centres across the globe continue to trace the proceeds of crime emanating from this vast and intricate web of political and corporate racketeering.

One such thread has led to the courts in London where the Serious Fraud Office (SFO) has launched its own civil recovery investigation in relation to Brazilian national Julio Faerman – and specifically, the Holland Park property he purchased in 2013.

Faerman has admitted bribery charges in Brazil but as matters stand, the SFO is yet to prove that the proceeds of his crimes were used to purchase the property.

On the one hand, the SFO's case reflects the UK's zero tolerance attitude towards the laundering of criminal proceeds. This has been a key priority for successive governments who have introduced waves of legislation to equip agencies such as the SFO and the National Crime Agency (NCA) with an armoury of statutory weapons to wage war on financial crime.

On the other hand, if – as the SFO alleges – Faerman has invested his ill-gotten gains in the London property market, then this case would bear testament to a failure on the part of (at least) the conveyancing solicitors who facilitated the purchase.

In any event, what this case exposes is that legal professionals, as gatekeepers to legitimate, regulated financial activity, often represent the first line of defence in the battle against money laundering and other forms of financial crime.

THE SCANDAL

The continuing story of the wrongdoing surrounding the Petrobras scandal is both disturbing and instructive.

In 2014, there was a more or less routine federal investigation into the current activities

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of doleiros and nothing of any great novelty was discovered, until it emerged that certain of them – whose activities centred on a small carwash business – were working on behalf of a senior executive at Petrobras. Having inadvertently tweaked the tail, the investigators tugged it until the tiger appeared. Operation carwash uncovered every stripe of commercial and political corruption to the tune of billions of dollars.

The spotlight on the Petrobras investigations has moved closer to home as a result of the SFO's investigations into Faerman, who worked as an agent for a Dutch firm winning contracts from Petrobras. Proceedings against him by the Brazilian prosecuting authorities were brought to a close in 2016 when he struck a plea bargain and agreed to repay US$54m.

By this time, however, the Brazilian authorities had already sought the assistance of the SFO in the identity and recovery of Faerman's assets in the UK, including the property in Holland Park estimated to have a value in the region of £5m. The SFO has been investigating the Swiss bank accounts which, through a series of offshore companies and other accounts, are believed to have received some of the proceeds of Faerman's criminal activity.

Following foiled attempts to gain information voluntarily from his lawyers, the SFO sought and obtained both a freezing order and a disclosure order in respect of the property in January 2019 (under the Proceeds of Crime Act (POCA) 2002). The disclosure order was intended to establish conclusively the ultimate source of the funds used to purchase the property and, specifically, the extent to which they could be traced to the known repositories of the proceeds of Faerman's unlawful conduct.

Following a technical challenge (on the basis of material non-disclosure by the SFO), Mrs Justice Cutts DBE upheld the disclosure order in her judgment of 10 July 2020. An SFO spokesperson said: "This judgment makes clear that there is a clear and compelling public interest in maintaining this disclosure order. We are committed to preventing those who bribe, cheat and steal from enjoying their ill-gotten gains in this country."

The SFO will now rely on the disclosure order to serve notices on financial institutions and professional advisors – particularly lawyers – to complete their tracing exercise.

In these corruption cases civil forfeiture, available both in England and in Jersey (but by no means every international finance centre), is a potent means of parting the wrongdoer from their criminal proceeds. By statute, if there is reasonable suspicion against the individual, they must prove the legitimacy of the assets – the usual burden of proof is reversed. As the Faerman case demonstrates, when a request is made in proper form, this weapon for good can be effectively deployed in receiving jurisdictions like Jersey or England.

In earlier years, the prospect of corrupt politicians being brought resolutely to book in Brazil, and then corrupt assets originating from their illegal activity assiduously pursued across the world, would have been unthinkable. However, the Petrobras matter has been a fulcrum for change. New measures included, for the first time in Brazil, plea bargaining: prosecutors could now make deals with suspects, reducing their sentences in return for information that could lead to the arrest of more important figures.

As a result, senior entrepreneurial and business figures and politicians have been imprisoned and made to remain there. The message, for once, has been that no one is above the law.

THE WIDER PICTURE

That it has been necessary for the SFO to take these actions in Faerman's case is concerning. It remains to be seen how, and to what extent, lawyers in England and other jurisdictions have facilitated the clandestine movement of his funds. But more concerning is that this is just one isolated example of what appears to be a wider trend.

In October 2019, Transparency International UK called for a radical overhaul of the UK's anti-money laundering supervisory regime, after its latest research found that at least £325bn of 'suspect' funds had flowed through the UK. It said nearly 600 UK individuals, institutions and businesses – including 81 law firms – "helped corrupt individuals, unwittingly or otherwise, obtain, move and defend their ill-gotten gains".

Similarly, the recent Russia report by parliament's Intelligence and Security Committee warns that lawyers are part of an "industry of enablers". Commenting on the use of unexplained wealth orders under the Criminal Finances Act, the committee says that: "Whilst the orders appear to provide the National Crime Agency with more clout, the reality is that it is highly probable that the oligarchy will have the financial means to ensure that lawyers… find ways to circumvent this legislation."

A responsive statement from the Law Society notes that the UK has one of the strictest anti-money laundering regimes in the world. It said: "Solicitors are highly regulated and – in line with their obligations – are all too

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aware of the dangers posed by international criminals. They remain vigilant across all aspects of practice for warning signs of money laundering."

This may be true for the most part, but the statistics confirm that this is not the case across the board. Last year, the Office for Professional Body Anti-Money Laundering Supervision (OPBAS) completed its first-year assessment of each of the professional bodies that it supervises, including the Solicitors Regulation Authority (SRA). It found that 80 per cent of 'professional body supervisors' lacked appropriate governance arrangements, as well as appropriate staff competence and training, while 91 per cent were not fully applying an appropriate risk-based approach.

The investigation further revealed a lack of understanding of key tenets of the regulations, such as the distinction between 'source of funds' and 'source of wealth'. Some firms did not have a firm wide risk assessment in place or could not produce evidence that they had carried out appropriate client due diligence or training on beneficial ownership.

It might be tempting to think that criticism should be reserved for firms that have not invested the necessary time and resource to develop a robust anti-money laundering programme. Certainly, this is part of the picture, but this is also a matter of individual accountability. Indeed, there is a danger that individuals operating in larger firms abdicate personal responsibility in the context of overarching firm wide systems, policies, procedures and controls.

It is easy, among the acronyms and tick box exercises, to lose sight of the exercise at hand: a common sense, risk-based assessment of our clients and their transactions. Fundamentally, it is vital that we identify our clients, understand the basis for their transactions and the provenance of the funds involved.

GATEKEEPERS

In the private client industry, lawyers are familiar with the use of trusts, offshore companies and nominees for legitimate purposes – succession planning, family privacy and so on. Against that context, it is easy to become frustrated by the due diligence required in respect of families they know well and structures that are market standard to the private client professional.

But such professionals must remember that, unfortunately, these are the very vehicles used by criminals and terrorists. Such familiarity must not lead to complacency, nor should there be cause for embarrassment when broaching a client's source of wealth. These are questions that must be asked as a matter of routine.

If this crucial compliance role is not fulfilled, private client lawyers risk losing their status as the 'gatekeepers' between private clients and the financial markets in which they operate. As private client advisors, industry professionals should think of themselves both as guardians of clients' private financial affairs and, simultaneously, compliance agents of the state – a vital 'go between', allowing clients to be audited while preserving their privacy.

But recent interventionist legislation in the UK demonstrates that the government does not consider the compliance role performed by lawyers (and other professionals) to represent sufficient safeguards.

Since 2015, the UK has introduced various waves of intersecting, but not necessarily consistent, legislation encouraging greater transparency surrounding the beneficial ownership of entities. The motivation behind such legislation is admirable: the need for transparency of information in order to address money laundering, tax evasion and terrorist financing. But such transparency comes at the cost of private clients' privacy and, potentially, their security.

The Fifth EU Money Laundering Directive (given effect under UK law this year, in spite of Brexit) introduces yet broader access to information on beneficial ownership of companies and trusts.

The government has given assurances that it recognises the importance of ensuring that such information should not be shared where doing so would create a disproportionate risk of fraud, kidnapping, blackmail, extortion, harassment, violence or intimidation; or where the beneficial owner is a minor or otherwise legally incapable. It remains to be seen how this will be addressed in practice, but private clients are understandably concerned about the treatment of such information.

From our perspective, it would be a shame for the UK government and other authorities to resort to increasingly invasive disclosure regimes when lawyers could, and should, be relied upon to audit their clients and their funds.

Such an approach penalises innocent private clients who are concerned to protect their privacy and their security. For that reason, it is incumbent upon lawyers – particularly private client lawyers – to demonstrate that they can be relied upon by government authorities to break the chain of financial crime and continue to act as credible gatekeepers to the world's financial systems. SJ

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