'Companies need to understand: we will not let go' - SFO's David Green gets serious about fraud

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Barclays. GlaxoSmithKline. Tesco. Add in Rolls-Royce, G4S/Serco, ENRC and Alstom, and you have the nucleus of a diversified investment portfolio. But this is not the buy list of a City fund manager: these blue chip companies are all currently under investigation by Britain's Serious Fraud Office (SFO).

An independent government department, the SFO is responsible for investigating and prosecuting serious and complex fraud and corruption. David Green QC is the man charged with supervising its operations: as SFO director, he reports directly to the attorney general, Jeremy Wright.

"The best way of defining what we do is cases that undermine financial and commercial UK plc in general, and the City of London in particular," says Green. "The best definition is offered by looking at the cases themselves: Rolls-Royce, GlaxoSmithKline, Barclays. All of our cases have significant profile."

Unable to discuss specific details, he suggests that other big names, not yet in the public domain, may follow. "For operational reasons, we don't necessarily publish all of our investigations," he explains. "But more whistleblowers are always welcome."

Green took up his four-year appointment as SFO director in 2012, and it has not been an easy ride. From his office overlooking Trafalgar Square, he has had to deal with a legacy that – without hyperbole – can only be described as calamitous, and a set of challenges that are, in any view, considerable.

The home secretary, Theresa May, has been widely reported as wanting to shut down the SFO and transfer its operations into her new FBI-style national crime force, the National Crime Agency. But to date no plan has materialised. For his part, Green has yet to meet the new justice secretary. "I'd like to have a discussion with Michael Gove – I never have," he says, ruefully.

Despite the critical invective from assorted politicians, journalists and even judges for previous blunders, he has done the job well. Nevertheless, he remains puzzled by what he terms the "extraordinary media interest" in the SFO, and confesses to being mildly irritated by the label of 'Serious Farce Office' – as perpetuated by Private Eye.

Mojo recovered

In rediscovering its mojo, as Green calls it, he suggests that public perception of the SFO lags reality by at least three years. "It takes a while to percolate through," he says with a courteous smile, adding that, while memories linger of past mistakes, the current reality is very

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different.

“We, the new team here, with everyone’s buy-in, have built the SFO and redirected it to the sort of work and function which it was designed for – namely the top tier of serious and complex fraud and bribery,” enthuses Green. “As a result of that, we have recovered our corporate self-respect.”

That self-respect had been severely damaged over time by serial errors, failed prosecutions and critical independent reports, culminating last July in a combined payment of damages and costs totalling £7.5m by the SFO to the property developers Vincent and Robert Tchenguiz.
The Tchenguiz brothers had been arrested in March 2011 as part of a flawed SFO investigation – then its biggest fraud inquiry – into the 2008 collapse of Icelandic banks. In 2012 Lord Justice Thomas accused the SFO of acting with “sheer incompetence” and a High Court judge later ruled that the warrants obtained to search their offices and homes were unlawful.

From this catalogue of failure a story of success is fast emerging. The SFO’s conviction rate – “because we don’t do that many cases it can be slightly deceptive”, explains Green – varies between 78% and 92% at any one time. “Not bad at all,” he says. “Being judged by results is inevitable.”

And sentences can be long. In January 2015 hedge fund manager Magnus Peterson received 13 years in prison after being convicted of fraud relating to the collapse of Weavering Capital.

Green, however, is frustrated by “comparisons between the SFO’s performance against corporates and the supposed performance of the Department of Justice (DoJ) in Washington”. He cites three reasons: “First, the difference in prosecutorial power between the US and the UK. The US prosecutor can get someone in and put things to them rather strongly. Second, the difference in the sentence in the States if you plead guilty and the sentence you get after a contested trial is extraordinary. Here the difference is about one third – the difference in the US is between two years’ probation and 25 years in prison. It’s mind-boggling.”

And third: “Companies in the US have vicarious liability whereas the UK has the identification principle, which is far more difficult. In the US companies are, prima facie, liable for the conduct of their employees. Here, we have to prove that the controlling mind at board level was aware and complicit in the criminality. This is very hard to do.”

It is only at the prosecution stage that SFO investigations automatically become public. “If we’re investigating a company they have to make an announcement to the market. We always tell the company and do our standard one-line press release and then coordinate the timing,” says Green.

Whereas the average SFO investigative team per case ranges between six and 12 staff, the manipulation of Libor investigation has 80. On Libor they work closely with the Financial Conduct Authority and the DoJ. To date 13 individuals from various financial institutions have been charged in the UK. More will follow, cautions Green. To meet the significant growth in demand from Libor and other large investigations, he has recruited in earnest. Alongside a significant expansion of temporary staff, permanent numbers have also ballooned since his arrival – from 265 to more than 450.

Blockbuster funding

For 2014-15 the SFO’s annual budget was £33.2m with additional levels of blockbuster funding available, as Green explains: “If an investigation is likely to cost more than a certain percentage of a baseline of our budget, we have access to the Treasury, which then provides blockbuster funds. Otherwise, we couldn’t do things like Libor.”

In October 2014 Green sought an extra £26.5m blockbuster funding from the Treasury for its investigations into Libor, Barclays’ Qatari fundraising and alleged bribery at Rolls-Royce.

Nevertheless, at least one major company currently being investigated is believed to have already spent more than the SFO’s entire annual budget on advisers’ fees relating to its investigation by the SFO.

Lawyers comprise much of the increase in SFO staff numbers, with City law firms being a primary target. “We’re getting very good calibre candidates,” says Green. “We have several people here who, on the absolute verge of partnership in a City firm where they would be paid at least six times what I could pay them when they start, prefer to come here because of the range and type of work that we give them.”

Green points to several lawyers who have recently joined the SFO having left magic circle, top City and other leading law firms. “I don’t see working at the SFO as necessarily being a lifelong career – it isn’t,” he explains. “If I can keep a good person for three, four, five years then that’s fantastic. It’s good for me, it’s good for the SFO, it’s good for the casework and it’s good for the individual. As in the States, working for a major investigator/prosecutor is a great addition to a CV.”

His recruitment pitch has substance. To young City lawyers who might be considering a step out of practice, he recommends that “they come and talk to those who are already here”.

On offer at the SFO are intellectual challenge, greater levels of responsibility and, potentially, much more interesting work.
So does Green appeal to a sense of public service and altruism? “There are some who are motivated by that. I don’t really care about their motivation, I just want them to be good!” he responds. “These are people who, in practical terms, I can pay £60k a year. You can imagine what they would be earning, even as a senior associate, in a City firm. It’s the quality of work that attracts them.”

And a potential stepping stone. “For some, it’s a job for life. For others, it is a stepping stone, and a very good one. We’ve got a lot of people who’ve worked here and are now at US firms in the City.”

Several prominent examples stand out. Robert Amaee, previously SFO divisional head, is now a Covington & Burling partner, while another former SFO divisional head, Kathleen Harris, is a partner at Arnold & Porter. The first SFO general counsel (2009-11), Vivian Robinson QC, is a partner at McGuireWoods and former SFO prosecutor Matthew Cowie is of counsel at Skadden Arps Slate Meagher & Flom.

Among UK firms, Graham More, formerly a partner at Herbert Smith Freehills (HSF), left to join the SFO as assistant director before returning to HSF as a consultant, while Anne-Marie Ottaway left the SFO to join Pinsent Masons as a senior associate.

Fighting a battle

Green, however, concedes that the SFO is often “fighting a battle” against well-armed opponents: “The people and the companies that we investigate –and, if appropriate, prosecute – are lawyered up and have enormous resources. So it requires a certain determination on our part. And a certain resilience to see a case through. To see any prosecution through to trial and conviction is, from a professional standpoint, very satisfying.”

So does Green feel like an underdog? “I’m tempted to say ‘yes’ because everyone loves the underdog. But actually no, I don’t. If you’re right about something, no matter what obstacles the other side might throw in the way, you are – given determination and resilience – going to get there. That’s what we’re doing.“

Rather that prosecute, part of the future solution to deal with fraud may lie with deferred prosecution agreements (DPAs) – these became available in February 2013 as an alternative to conviction. But there has been widespread concern at their potential impact. “On the one hand, you have the perception that DPAs are an opportunity for companies to buy their way out of trouble,” Green explains. “On the other, you have DPAs as an American model, adapted for use in this country with particular conditions, particularly judicial permission and supervision, which in the right case can be a sound mechanism for avoiding the collateral damage that can go with a corporate conviction.”

By collateral damage, he means innocent parties: employees, shareholders and pensioners.

“The trouble is we – the SFO, the Bribery Act industry and the City white collar fraud industry – need to build up some precedent so that everyone understands what the offer is. I

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anticipate at least two DPAs before the end of this year. This will enable people to see what the offer is. I don't think people yet realise just how high the bar is."

He reveals how DPAs will work in practice. "The norm is prosecution. But if a company chooses to self-report three things are required: cooperation, cooperation, cooperation. Then we will be favourably disposed in the right case to a DPA – where the company has self-reported, it has got rid of the people who have caused the problem in the first place, it has made adjustments to its internal governance, cooperated with us and agreed with the various internal conditions that would be attached to a DPA.

"The reason that cooperation is so important is that, in the unusual circumstance of a DPA, in our adversarial system, both parties, led by the prosecution, will be litigating and advocating for the same outcome. So it puts the judge in an unusual position. They are going to be probing, testing and questioning our submissions to ensure that we really have got to the bottom of it and that the extent of the criminality has been properly summarised in the statement of facts.

"So it's not a pushover. It's not as in the US system, where the prosecutor says: what about a DPA? And puts it before a judge who, except in one or two circumstances, basically rubber stamps it. Here, they will see the transparency of the system. They will see there has to be a statement of facts. They will see the level of fines that are attached as conditions. Once we get some precedent established, everyone will be much more confident."

Bribery Act

Like the use of DPAs, the Bribery Act 2010 emulates parallel legislation in the US: the Foreign Corrupt Practices Act 1977 (FCPA). The SFO achieved its first convictions under the Bribery Act last December.

"The FCPA was enacted as result of Watergate," says Green. "Nothing really happened on it until the early 1990s, and nothing serious until this century. It's a very effective tool. The Bribery Act will also become a very effective tool over time. It's already had a huge effect in terms of instilling a culture of compliance within companies, at least in terms of their compliance budgets."

To companies that argue that they can't do the business without paying bribes, the answer has to be: don't do the business, says Green.
"Bribery and fraud go together because they are two species of the same thing. If you have bribery, you usually have fraud to cover up the source of the funds. If you have fraud that might involve bribery."

He makes a moral case: "Ultimately, a decision has been made internationally at the UN level, nationally in our Bribery Act and in the US through the FCPA, and there is an acknowledgment and understanding at last of the kind of damage that bribery does. It keeps kleptocracies in power. The losers are always the poorest: somehow that cycle has got to be broken. That's why the tired old arguments of 'this is the price of doing business' just can't be allowed to wash."

Green argues that he is not in the business of giving advice to companies or their lawyers about how they should prevent fraud and bribery. But he wryly observes: "The longer a compliance tome is, the less likely it is to be obeyed. It's one thing to have a glossy compliance manual, quite another to ensure that the company is imbued with it and everybody, from top to bottom, lives by it."

And to companies "that through their lawyers throw every available obstacle in our path", he delivers the following warning: "We cannot reward that sort of behavior by going away or with a DPA. We have to keep on when our teeth are in their softer parts and we're not going to let go. They need to understand: we will not let go."

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