CROSS-BORDER INVESTIGATIONS

Legal Business
April 2015

The clean-up crew

The emergence of cross-border investigation teams at international law firms has been a key feature of the post-crisis landscape. *Legal Business* teamed up with McCann FitzGerald to debate the challenges for disputes practices

MARK McATEER

If there is one area of work for law firms that has taken off in the aftermath of the global financial crisis, it is advising clients on large-scale investigations by regulators at home and abroad. This is why cross-border investigations was the subject of the sixth annual *Legal Business* round table with leading Dublin law firm McCann FitzGerald.

The roll call of major investigations to embroil multinationals is extensive: LIBOR, Rolls-Royce, Barclays/Qatar, ENRC, Alstom and G4S/Serco trip off the tongue easily. At the time of writing, HSBC finds itself at the centre of controversy over alleged tax evasion and enquiries by MPs in the UK in what has been a string of investigations launched against the bank by various international regulatory authorities.

As a result, the timing could not have been better to gather together senior disputes, employment and regulatory specialists from the UK's leading firms to discuss the practicalities of running cross-border investigations on behalf of key clients and how some of the challenges that these investigations bring can best be tackled.

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Mark McAteer, Legal Business: How has the nature of investigations and the role of those working on cross-border investigations changed in recent years?

John Cronin, McCann FitzGerald: It may be to do with the fact that Ireland now has ▶

Photographs DANIEL THISTLETHWAITE

Tim House, Allen & Overy: It's hard to advise on the outcome of an investigation when the punishment often doesn't fit the crime

▶ some of the biggest corporate names in the world – such as Microsoft, Intel, Google, Dropbox, Facebook – but we have certainly seen a great upsurge in the scale, scope and nature of investigations since the financial crisis. There have been an awful lot of financial/regulatory matters, obviously, many corporate governance queries, and a considerable amount of concern or pre-emptive work done in terms of dawn raids and such like.

Tim House, Allen & Overy: If you wound back ten years, most of what I was doing was probably litigating. Most of that litigation would have had big international elements to it, but it probably would not have been project managing or marshalling worldwide activities. It is true of the banking and finance litigation practice, which is largely where I sit. It has probably moved to 60-70% being financial services/regulatory enforcement or investigation work at the moment, with litigation components or elements to it.

Christa Band, Linklaters: It is a big mistake to assume that all regulators react in the same way and that the same approach is appropriate for all. One of the key things that has changed over recent years is that issues are now truly global. So you are dealing with one set of facts, which can have repercussions in a number of different countries, being looked at by several different regulators.

Susannah Cogman, Herbert Smith Freehills: It really depends on a regulator-by-regulator and jurisdiction-by-jurisdiction basis. One cannot even generalise, really, in Europe or Asia. To some extent, you get similar themes in similar regions, but in each case you need to have the right people – whether that is your office or in some cases a firm with whom you have a relationship – to provide that local advice on the particular issues that arise in that particular jurisdiction.

Caroline Stroud, Freshfields Bruckhaus Deringer: One of the important things to work out is which of a number of regulators you need to prioritise. Unless you know the local way of dealing with a regulator, you might come unstuck – if perhaps you have not appreciated which regulator is the dominant regulator or has an international perspective, or which regulator has a more local focus.

Roger Best, Clifford Chance: One of the difficulties, however, is that, in some jurisdictions, the authorities – this is particularly a feature in the US – do not really say what it is they are investigating. Here, if the Financial Conduct Authority (FCA) starts an investigation, there is a scope document. It might set out a wide scope, but you know the scope – whereas with quite a lot of the US authorities, it is a question of: 'We are interested in issues in this business.' As a corporate, you say: 'We will investigate those issues,' but you are not really sure what you are looking for.

Tim House: The other change that has affected the market is now you are dealing with regulators who you believe are probably pretty well informed by another entity in the sector, which has already either gone in for leniency under an antitrust regime or has self-reported something and is presenting a tremendous amount of information. Five years ago, one used to be largely dealing with investigations where you felt that the regulator had a hunch or a theory – or possibly a whistleblower – but not necessarily that they would have had a competitor institution disgorging large quantities of information, potentially including your own data. That has changed the dynamic in all sorts of ways.

'Banks know the drill; they know they need an internal investigation and they know what that entails. For corporates it often comes as a complete shock.' Christa Band, Linklaters

Terence McCrann, McCann FitzGerald: The stakes are enormously high for global organisations. Such organisations have very sophisticated compliance mechanisms. However, there is a difference when an unexpected issue confronts them in a multi-faceted, multi-jurisdictional, highly complex

Susannah Cogman, Herbert Smith Freehills: Witnesses may not see full co-operation as being in their best interests

Christa Band, Linklaters: Individuals often want their own lawyers, but it is often better for them to stick with the team

way and frequently with a very immediate public media focus. They must hit the ground running in the vitally important immediate 48 hours with critical decisions that a global organisation has to make.

John Cronin: Are UK and international corporates setting up risk mechanisms and structures so that, if something comes up, within 24 hours they are pretty well prepared?

Christa Band: For banks, it is unfortunately such a well-trodden path. Any bank at any one time will have a number of internal reviews of varying degrees of seriousness. Banks know the drill; they know that they need an internal investigation and they know what that entails. For corporates it often comes as a complete shock, because the events come out of nowhere. Much of our work in the early stages is not so much legal analysis as crisis management.

Tim House: It can be a challenge to establish who within an organisation should own an investigation. It was described to me not by a lawyer in a bank but by a chief executive. They said to me: 'Actually, when you are dealing with a nuclear leak, the first and most important thing to do is to find out what the actual problem is, where it is, how extensive the contamination is and how the hell you stop it.' None of those three things are probably a lawyer's job and they are not a compliance job, and they are quite possibly not internal audit, but they are the job of somebody who knows the business inside out. That is the priority.

Although we are often first on the scene or early on the scene, maybe we sometimes slightly overestimate whether this is a fully legal-driven issue, because there are sometimes business survival questions that should take precedence over privilege and dealing with the regulator.

Roger Best: The corporates have different levels of sophistication. A lot of the big US corporates, which have had issues around financial statements for years, and Foreign Corrupt Practices Act issues, have investigation manuals and clear lines of responsibility. You can also see that with some of the major UK multinationals. But sometimes when you go to the continental corporates, their style is very different because they do not have the same concept of legal privilege investigations and will be led much more by internal audit.

John Cronin: When a big corporate or big international bank seeks advice from its lawyers and says 'we have a real problem', how do the participant firms sit down and plan it out?

Roger Best: The first thing is to get a sub-committee of the board to oversee the investigation if it poses a major reputational risk. Make sure you have one or two people on it who are not likely to be in the firing line.

John Cronin: It obviously depends on the subject matter and context. Is the report for a regulator? Does it or will it have a political dimension? Is it a forensic report? Who did what and why they do it? And were they in the wrong?

Terence McCrann: That is the real point: you do not know where it is going to end up. In truth, you are doing the equivalent of an archaeological dig in each region/area and seeking to ascertain the extent of the problem. Is it confined to certain individuals in a region/area or more systemic activity across the entire organisation? At the outset, it is vital to understand existing governance structures and how this ▶

Caroline Stroud, Freshfields Bruckhaus Deringer: Regulators are increasingly questioning internal investigation methods

Terence McCrann, McCann FitzGerald: An investigation is an 'archaeological dig' – you don't know what you'll find

▶ investigation will follow or deviate from established systems.

Jonathan Marks, Slaughter and May: If you have something with a big US element and you are facing civil procedures, privilege is really going to be a driver in what you do. You might not actually want a written report. You might want to rely on oral reports. If you then go to another jurisdiction – Japan is an example – the idea of not having written reports that people can very carefully consider is anathema, culturally. It is about trying to get that balance of what is required in which constituency.

Karyn Harty, McCann FitzGerald: We have found that privilege has become a really burning issue now in the context of these investigations. Different regulators will take different approaches. It is a constitutional issue in Ireland and it is a matter of firmly setting down boundaries with some regulators. You have other enforcement agencies that are very serious about it; they respect it, because there are statutory requirements and it is a problem for them to have privileged documents.

Roger Best: The real elephant in the room in these investigations is privilege – in our system here, the question is whether there is privilege. The situation is that neither the authorities nor the clients want to test the point in court, so we play this dance all the time of saying: 'We maintain that this is privileged, but we are happy to share it with you under a limited waiver.' And the authorities say: 'We do not accept it is privileged, but we recognise that you are sharing it and if it is privileged then it is shared under a limited waiver.'

Caroline Stroud: One of the trends I have seen is that regulators are now interested in the methodology of the investigation and the decisions made during it. They ask very focused questions such as: 'Why did you choose that pool of people to interview? When you had interviewed them and written your report, why did you discipline these people and not these people?' They are chipping away at the ethos and methodology of the investigation – and that is new.

Terence McCrann: Can I raise whistleblowing as a topic? A recent survey of 60 executives responsible for managing their organisation's cross-border investigations, indicates that 32% of cross-border investigations were triggered by a formal whistleblowing mechanism and 45% from employee tip offs. This is clearly a very significant issue in itself.

Tim House: Whether it is the original source of the investigation, it seems to be an almost inevitable consequence of finding that an employee has behaved in a less than perfect fashion that the investigation will then be accompanied by a whistleblowing report. This means you normally have to investigate the chief executive or someone who is running the organisation, which will cause maximum disruption.

In many situations it is the origin of the case, but it is hard to get through an investigation without triggering the whistleblowing regime.

Jonathan Marks: They can knock on to corporate transactions. I had one instance earlier in the year where, shortly before closing, there was a whistleblower who had fallen out with their employer in part of the business. Suddenly, they are talking to the SEC and they are coming with their lawyers. Then you have to work out what to do with the transaction. Can you close? Do you need an indemnity first? What about reports?

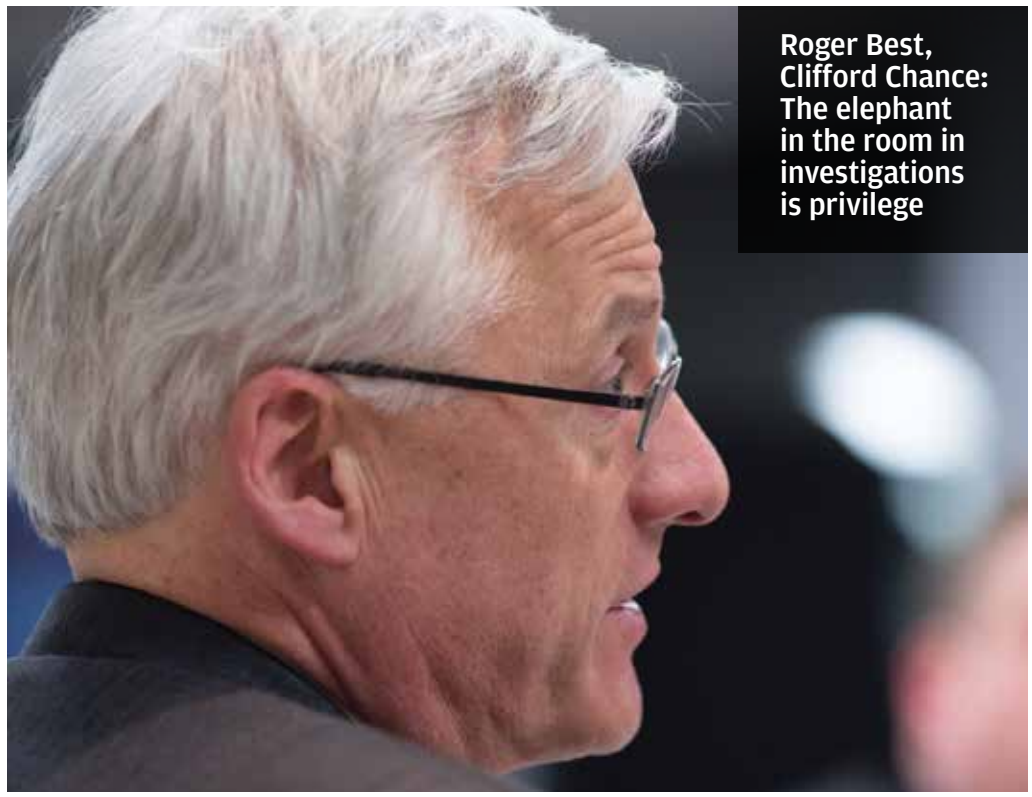
Roger Best: I am a bit more of a cynic about whistleblowing. There are a lot of good whistleblowers, but if a company announces a headcount reduction, I would be pretty confident that the whistleblowing reports go up. Secondly, on some of the biggest issues I have dealt with, when the person or people who are at the centre of it have felt the heat getting near them, they have claimed whistleblower status to try to get employment protection.

Mark McAteer: What happens when a senior executive who is involved in instructing the firm then becomes a focus of the investigation?

Susannah Cogman: Witnesses in some cases quite properly want to take independent advice and will not always see it as being in their interests to co-operate perhaps in a way the company would have found helpful. There are also issues for the company in terms of funding and arranging the advice, and what is appropriate to do in relation to witnesses.

Caroline Stroud: It is a very sensitive subject. In the past, there have often been requests from employees for legal advice when they are being interviewed as part of an investigation by the company. On the whole, in the past people said: 'You do not really have the right to legal advice,' which is quite correct. But there have been quite a few instances recently where employees have pushed the request for legal representation at an investigation interview really strongly because of the consequences of being taped and that tape transcript being provided to the US regulator, etc.

Terence McCrann: It was mentioned at the beginning about the need to create a truly independent governance structure, with a sub-board committee of directors, not touched by the issues under investigation, because, in truth, the chief executive, chief financial officer and other senior executives at the helm are potentially the very people in the line of fire. As a result, individuals increasingly seek legal representation during an investigation process and independence in the investigation is key to ensuring the integrity of the process.



Roger Best, Clifford Chance: The elephant in the room in investigations is privilege

Roger Best: A very big growth area in the London market at the moment is acting for individuals in these investigations.

Christa Band: It is a growing trend that everybody wants their own lawyer. Often, actually, at the beginning it is not the best advice for an individual. Except where separate representation is a necessity, individuals stand a better chance of being kept calm and reassured if they are part of the team, and benefiting from the advice being given to the institution as a whole.

'The report from the accountants will not be privileged. Their view on the case can be rather unhelpful, actually.'
Jonathan Marks, Slaughter and May

If there are lawyers representing individuals, they often feel that they have to make a point and, in order for that to add value, it has to be different from the points being made by someone else. So you can spend a lot of time, and expense, trying to manage that operation, which could obviously be better directed.

Mark McAteer: Are law firms better at understanding the approach of regulators than the accountants?

John Cronin: Certainly in Ireland, we would see the big four as being a step ahead of us because they have the processes for internal audit. They perhaps have better government contacts. Their product is, ostensibly, quite impressive, but we are never quite convinced of its substance.

Christa Band: It depends on the underlying issue and also depends very much on whether the problem is identified through internal audit or whether it comes up through legal. Lawyers tend to speak to lawyers and internal audit talk to accountants. Often a combination of skills is best.

Terence McCrann: In some instances, the tendency is to rush to do a 'forensic' ▶

Karyn Harty, McCann FitzGerald: Costs can get out of hand when there are multiple regulators involved

▶ review and investigation in order to gather the information required to identify what precisely the extent of the issue is. However, there are significant implications for issues such as maintaining privilege and so there are consequences as to how such information is gathered, managed and used. In a cross-border context, differences in approaches to data protection and privilege do need to be considered.

Caroline Stroud: There has to be an analysis of the legal risk at the beginning of the investigation in order to scope out what a forensic investigation might add. Sometimes, the initial forensic instruction is too broad. You could end up creating a report that is unhelpful in respect of all sorts of things like third-party liability before you have really thought about how you want to structure the result of the investigation and what you need to find out.

Jonathan Marks: The report from the accountants will not be privileged and you do not want them commenting on their view of the legal case. You do find that with internal as well as external audits. Their view on the case can be rather unhelpful, actually, written down and available for anybody to look at.

Roger Best: There are some interesting areas where we look to accountants. If you are looking for the facts, the lawyer's traditional way of finding facts is to go through words, whereas sometimes it may be better to find hotspots through data, through analysing numbers, etc. That is an area where accountants can add real value, so we have an in-house forensic team. We use them for the number crunching, but for massive data crunching we use a big four firm.

John Cronin: An important question we all have to ask ourselves is: do we as firms sit down after a large investigation and reflect why it was that we structured the investigation in a particular way?

Caroline Stroud: We definitely do that as teams, because every investigation is different and there is always something to learn. That is why it is difficult to say: 'These are the rules and you should always follow this protocol,' because it might be wrong in one investigation to take one route and not another, and you might cause damage.

John Cronin: Finally, what are the biggest challenges you are facing in cross-border investigations?

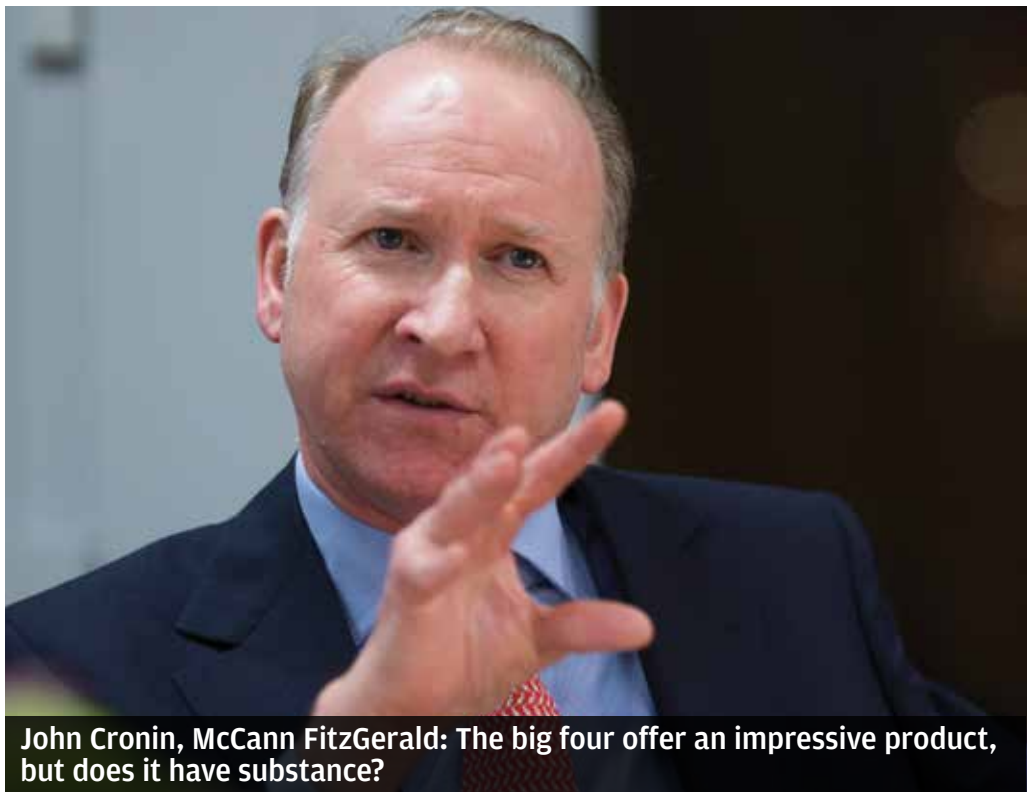
Caroline Stroud: One of the things I get asked about all the time is the transfer of personal data across jurisdictions out of the EU. US regulators asking for data in a wide-ranging request – voluntary or not – is an issue that comes up again and again and again.

There is also a new European data protection directive that is being considered at the moment, which is intended to be a one-stop-shop for data regulation, so if you are an employer, you do not have different data protection agencies. One of the things being discussed is fines for personal data breaches – fines of up to 5% of the revenue of the company that has breached the personal data regime.

When that kind of fine is introduced, you are going to have a real conflict between US regulators asking for data and European employers saying: 'We cannot give it to you.' That is one of the big issues for the future. It is going to get much more complicated.

Susannah Cogman: One of the key challenges for the client is that it can be difficult to reach the right disciplinary outcome without unduly prejudicing the company's position in either enforcement action or litigation, and indeed while trying to treat employees fairly. Equally, not taking appropriate action can itself prejudice enforcement outcomes.

'We are facing a form of legalised extortion in relation to a number of things, which makes it very difficult to advise on – "How high will the next one go?"' Tim House, Allen & Overy



John Cronin, McCann FitzGerald: The big four offer an impressive product, but does it have substance?

THE PANELLISTS

- **Christa Band** Partner, Linklaters
- **Roger Best** Partner, Clifford Chance
- **Susannah Cogman** Partner, Herbert Smith Freehills
- **John Cronin** Chair, McCann FitzGerald
- **Karyn Harty** Partner, McCann FitzGerald
- **Tim House** Global head of disputes, Allen & Overy
- **Jonathan Marks** Partner, Slaughter and May
- **Mark McAteer** Managing editor, *Legal Business*
- **Terence McCrann** Partner and head of the employment group, McCann FitzGerald
- **Caroline Stroud** Global practice group leader - employment, pensions and benefits, Freshfields Bruckhaus Deringer

Christa Band: Working out what to do in an internal investigation in the context of regulatory enforcement is a very different exercise to determining what work is required to prepare for civil litigation. For any bank or corporate undertaking an internal investigation, there is a real challenge in determining a sensible and appropriate scope, and accordingly a reasonable budget.

It is important that the institution understands the causes and consequences of significant failures, but that does not automatically mean that you need a doorstep of a report in each and every case.

Karyn Harty: One of the things we have experienced is where there are various regulators requiring things to be done, the client may have no control over the cost. It cost hundreds of thousands of euros to review 18,000 audio calls, which all had to be reviewed at very short notice, urgently, of which something like 200 proved to be relevant. They all had to be listened to in real time – technology can assist, but it does not always meet legal standards.

Jonathan Marks: It is a fact of life now. How do you get an outcome that is seen as successful even if it is very sensitive and difficult? It is not just for us lawyers, but there is the question around whether you can change the culture of a place to stop this happening. If you asked people in the real world, what would they say? 'Why is there this succession of scandals? It is very lucrative for all the advisers, but can the culture be changed?'

Certainly in the UK, organisations like the FCA are latching on to this point: that culture is very important. Maybe that is a challenge in terms of the culture of businesses: to try to minimise the risk of getting into that sort of territory.

Tim House: It is becoming increasingly difficult to establish the correlation between the punishment that is imposed and the activity that has gone on. To be absolutely honest, I think we are facing a form of legalised extortion in relation to a number of things, which makes it very difficult to advise on – 'How high will the next one go?'

Terence McCrann: In many cases, it is all about active damage limitation, but in some, if issues are addressed early enough, damage avoidance. A law firm works with the client in helping the organisation demonstrate that they have addressed an issue, they have investigated it properly and they can come out of that issue having identified what might be described as 'a historical legacy issue', and move on as an organisation and a business, having comprehensively limited the damage.

In terms of a client outcome, that is the best one can seek to achieve. It is all about damage limitation and reputation, for the organisation and individuals working in it, in what has become an increasingly complex, regulated and litigious world. **LB**

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