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Dependency of Police Prosecution on Private Examinations of Financial Crime Suspicion: The Case of Langemyhr Investigation in Norway

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Abstract

The purpose of this article is to present a case study of evidence failure in private investigations. Fraud examiners, financial crime specialists and counter fraud specialists are in the business of private internal investigations for their clients. If they detect evidence of serious financial crime, they are expected to report their findings to the police. This article presents a case where private investigators handed over their report to the police. The police prosecuted the suspect, but the court dismissed the case. Later, the prosecuted suspect received a financial replacement, while at the same time experiencing that his lifework had fallen in ruins. This article discusses potential causes of failures during the course of seven years. The article is based on a contents analysis of court documents, media reports as well as presence at court hearings. The article is limited by being a single case study, but it does nevertheless have implications related to the role of private investigators and the relationship between public and private investigators.

Keywords: Private Investigation, Internal Investigation, Fraud Examiners, Financial Crime Specialists.

Introduction

Fraud examiners, financial crime specialists and counter fraud specialists are in the business of private internal investigations for their clients. If they detect evidence of serious financial crime, they are expected to report their findings to the police, although there are no specific guidelines for this procedure. The increased role of the private sector in crime control and order maintenance as reported by Kempa et al. (2009) and Schneider (2006), makes public sector law enforcement more dependent on the private sector. Societies have to rely on the rule of law by creating communication and cooperation between public and private policing.

This situation is indeed problematic. In democratic societies, the rule of law and law enforcement is supposed to be the sole responsibility of government authorities. A number

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of issues, dilemmas, problems and challenges in private investigations are important to explore in order to understand the business of financial crime specialists. Their hidden world is problematic. It was Williams (2005) and Schneider (2006), who first described and discussed problems related to privatizing economic crime enforcement and governance of private policing of financial crime. Since their research one decade ago, few of the problems they identified have been solved. Rather, the forensic accounting and corporate investigation industry has grown rapidly without any signs of regulations. Exceptions include the emergence of the counter fraud specialist in the United Kingdom (Button et al., 2007a, 2007b; Button and Gee, 2013) and the works of voluntary organizations such as ACFE (2014) and CFCS (2014), who are both educating their members on a continuous basis.

In this article, a case study from Norway is presented, where a construction firm was suspected of fraud. The case study illustrates the problematic dependency of police prosecution on private examinations of financial crime.

Private Investigators

Private investigators examine facts, causes and responsibilities for negative incidents. Their inquiries include fact finding, causality study, change proposals and suspect identification. Recent years have seen an increasing use of investigation in terms of the assessment of financial irregularities. The inquiry form – which primarily takes place in public and private companies – aims to uncover failing internal controls and any financial incidents such as corruption, embezzlement, tax evasion and other forms of economic crime (ACFE, 2014; Button et al., 2007a, 2007b; Button and Gee, 2013; CFCS, 2014; Machen & Richards, 2004; Markopolos, 2010; Morgan & Nix, 2003; Schneider, 2006; Tunley et al., 2014; Wells, 2003, 2007; Williams, 2005).

Criminal investigation is a procedure or method for reconstructing the past. It is the work of creating an account of what has happened, how it happened, and who did what to make it happen. Negative events and incidents have happened in the past that need to be studied. Therefore, past events and sequence of events need to be reconstructed (Osterburg & Ward, 2014).

Private investigators do not have the same powers as the police, but they do have liberty to work as per their convenience or discretion. Therefore, it is an interesting research endeavor to evaluate the work of private examiners in financial crime investigations. Three relevant theories are suited for such an evaluation. First, the blame game hypothesis suggests that investigators may be misled in their search for suspects (Eberly et al., 2011; Lee & Robinson, 2000). Second, the rotten apple hypothesis versus the systems failure hypothesis stating about misled investigators in either searching for one guilty person or searching for cultural deviance in the client organization (Ashforth et al., 2008; Punch, 2003). Finally, the stakeholder theory may imply that private investigators tend to ignore all others but the client, since the client is paying their bill (James, 2014; Matwijken & Matwijken, 2010; Verbeke & Tung, 2013).

Description of the Langemyhr Investigation

On Wednesday, March 5, 2008, the Norwegian Labor Inspection Authority (Arbeidstilsynet) carried out an audit at construction company HaraldLangemyhr Inc. They did it at two selected construction sites, Økern nursing home and Sinsen nursery, respectively. The reason for the audit was that the Labor Inspection Authority had

received two anonymous letters. During the audit at Langemyhr sites, allegations of violations of the Working Environment Act (Arbeidsmiljøloven) emerged, as well as allegations of possible misconduct. Construction Company HaraldLangemyhr Inc. was main contractor at both sites. Employer was Oslo City's department for care buildings (Omsorgsbygg). Construction management was taken care of by a management firm. City authorities stopped work on the sites after the inspection audit report was published on April 18, 2008. To examine all facts of the case, there was a need to conduct an independent investigation of possible misconduct.

The mandate for PwC's investigation was to disconfirm or confirm those allegations concerning misconduct that had been presented in connection with works by Construction Company HaraldLangemyhr Inc. at Økern Nursing Home and Sinsen nursery. The following allegations were to be investigated: (i) over billing, (ii) use of manpower as "stats" in work paid by the hour, (iii) theft of material from construction sites, and (iv) other allegations. This was the mandate for private investigator Helge Kvamme and his team. In addition, investigators were asked to look into issues related to safety and health issues as well as working conditions generally at the building sites.

Financial crime specialist Helge Kvamme was heading the investigation. He works for law firm Selmer in Oslo, Norway, as a private investigator. In 2008, when he conducted the Langemyhr investigation, he worked for auditing firm PricewaterhouseCoopers (PwC, 2008a) in Oslo. Before joining PwC, Kvamme worked in law enforcement serving at Økokrim (the National Authority for Investigation and Prosecution of Economic and Environmental Crime) in Norway. The team at PwC (2008a) investigating the case of Langemyhr consisted of Helge Kvamme (responsible partner), Jan Erik Gran Olsen (director), Tore Sætrum (manager), Ole Jacob Øglænd (senior manager), MadsBlomfeldt (manager), and CathrineSletten (senior associate).

The investigating team initially prepared a detailed work plan divided into the following main parts:

- Administration and management, including work meeting and status meetings with the client
- Collection and analysis of documentation
- Background checks of persons and businesses
- Taking interviews
- Regular contact and meetings with project management firms; and
- Reporting

A total of 26 interviews were carried out, which were documented in minutes. 11 of the interviews were conducted in Krakow in Poland because many of the workers on the construction sites came from Poland. All the interviews were sound recorded and some were interviewed several times to enable reconstruction of the past. Several of the interviews were conducted using authorized interpreters from Oslo city's interpretation service. Minutes from the most important interviews were sent to the interviewees for perusal, with the opportunity to contribute corrections and additions. The following assumptions were applied for the implementation of interviews:

- The interviewed person was made aware of the mandate for the investigation
- The interviewed person was informed that the interview was voluntary
- The interviewed person was informed that sound recording was voluntary.

HaraldLangemyhr received minutes from the interview with him on May 7, 2008, through his lawyer Pål Jensen. In an email dated May 27, Langemyhr informed that he disagreed with the minutes, and asked for a 14 days extension to come up with his comments. After discussion with the client, no second interview was conducted with HaraldLangemyhr.

Investigators obtained large numbers of accounting documentation including supplier payable accounts from Construction Company HaraldLangemyhr Inc., invoices, timesheets, forms for building control, contracts, wage lists and more. The documentation was obtained from Omsorgsbygg of Oslo city, project management firm, as well as Construction Company HaraldLangemyhr Inc.

The investigation showed that Construction Company HaraldLangemyhr Inc. had billed Oslo City's Omsorgsbygg a total of 27 million Norwegian kroner (about 4 million US dollars) for three hourly-based projects at Økern nursing home. Opak, an independent construction management firm, estimated that normal resources for the equivalent hourly work in the same market should be priced at 5 million Norwegian kroner, which is less than 1 million US dollars. The deviation amounted to 22 million NOK, which represent more than fifty-six thousand hours.

Therefore, investigators concluded in their report that there is a likely over billing of 22 million NOK from Construction Company HaraldLangemyhr Inc. to Oslo City's Omsorgsbygg. When this conclusion was drawn by investigators in their report, Omsorgsbygg had already paid the construction company a total of 23 million NOK. The difference between Opak costing and Omsorgsbygg's payment thus amounted to 18 million NOK.

In addition to the investigation finding of likely over billing, investigators also learned about a number of other circumstances during their inquiries. For example, the construction company had probably manipulated the recording of working hours that led to the over billing. Indications included:

- Same tasks were performed several times to haul out time. This was ordered by the work foreman.
- Use of Polish workers as extras or statists, which means that people who were present at the construction site were listed as workers, but they did not perform the work, and the purpose was only to increase the number of hours on reporting sheets.
- Tasks were given that would fill a workday, but that could have been done in significantly less time.
- Work was pulled out in time, and workers were prohibited from working too quickly at the building sites.
- Tools were lacking to be able to employ all workers.
- Several workers have reported that they had no work to do, so that they had to use a gas burner to keep warm in the winter time.
- A warning system was established for notification of building control, so it was not revealed that workers were not working, despite the fact that they were assigned to hourly work according to work lists.
- Workers have testified that they worked on HaraldLangemyhr's private residence in Karlsvik road in the city of Tønsberg, while hours were charged to the project of Oslo City's Omsorgsbygg.

- Workers who have performed work on contractual fixed price projects have at the same time registered working hours on projects that were paid by the hour.

The investigation sought to identify relevant facts in relationship to the responsibility for such alleged over billing. Interviewed workers referred investigators to foreman and executives at the construction company to answer questions concerning instruction and management of the way work was performed. The foreman testified that he could not make decisions regarding the use of resources without agreement from the project manager. Investigators found out that the foreman wrote the final time sheets for workers that were delivered to the construction management office.

In the areas of security and health, Polish workers told investigators that no training was provided. Investigators found no evidence of theft of material from construction sites.

Court Trial of Langemyhr Case

Oslo City's Omsorgsbygg decided to give the PwC (2008a) to the department for economic crime in Oslo police district. The police investigated the matter further and decided on an indictment of Harald Langemyhr. The indictment of the Oslo police alleges that Langemyhr has enticed Oslo municipality to pay 29 million NOK for work worth 17 million NOK. The indictment thus reduced the alleged fraud amount from 22 to 12 million NOK.

The verdict from Oslo District Court (Oslo tingrett, 2012) is 75 pages long. The court acquitted Langemyhr for indictment on financial crime, but was found guilty of violating the Working Environment Act.

“The court will emphasize that in order to judge anyone for fraud, the court must find proven beyond any reasonable doubt that the defendant in the intent to acquire for himself or others an improper gain by indicting, enhancing or exploiting an aberration, willfully has misled someone to an action that caused the danger of loss” (page 40 in the verdict). The court found no such evidence of fraud.

What seemed obvious to investigators, a fraud of estimated 22 million NOK, was not at all obvious to either the police or the court. Rather, the police found out that it might be a fraud of estimated 12 million NOK, and prosecuted Langemyhr for this amount. But the fraud as such was not at all obvious to the judge. In the aftermath of developments from 2008 to 2012, could it be that the police put too much trust in the private investigation and the financial crime specialists at PricewaterhouseCoopers? And therefore only contributed a recalculation of the alleged fraud amount, rather than posing the fundamental question: Do we believe that Langemyhr is guilty? And if so, are we able to prove it in court? Did the police prematurely lock themselves up to conclusions in the private investigation report?

The only piece of evidence for PwC (2008a) was Opak's estimation. At the website www.opak.no, they say about themselves: “Opak is a knowledge firm that provides multidisciplinary consultancy with high expertise to the building, construction and property markets.”

Investigators got one single estimate from Opak and passed it on to the police. The police found it to be too low, and adjusted it slightly. Is this what might be called independent, objective and professional work by financial crime specialists?

From 2008 to 2012, Harald Langemyhr's life broke down. His construction company went bankrupt, and he was steadily reminded in the media that he was prosecuted for white-collar crime and fraud against the City of Oslo.

Harald Langemyhr is educated builder from 1997 and started his construction company in 2001. He was born in 1965, and thus was 43 years old when he was investigated. When he was 47 years old, he was acquitted of all charges.

The case started with public inspection, continued with a PwC (2008a) investigation and a police investigation, and ended in Oslo District Court. An investigation report of 27 pages may have triggered a judicial process that lasted for four years and ruined Langemyhr's life.

Judge Thorleif Waaler in Oslo District Court criticized in unusual terms the prosecution by police lawyers Anne Glade Allum and Frank Grimstad Jensen. Langemyhr and his construction company were defended by attorneys Ellen Holager Andenæs, Søren Olsen and Bjørn Stordrange.

Rafal Garan, another accused who also was acquitted, was defended by attorneys Nadia Christina Hall Ostby-Deglum and Thomas Berge. Garan worked for Langemyhr. Oslo police district decided not to appeal the case to the Court of Appeal. Langemyhr was convicted for violation of the Labor Environment Act.

Discussion of the Langemyhr Investigation

There remain at least four possible explanations why things went wrong in this case:

Financial crime specialists did a poor job. They should have found better coverage for alleging fraud, such as fake invoices. They should have asked more than one expert firm to estimate the work costs, and they should have scrutinized how the credibility of such firms be assured before opting them for investigation purpose. They should have tried to disprove the suspicion. They should have reported suspicion of financial crime less assertively. However, the mandate for investigators was to confirm or deny suspected misconduct. The investigation had no objective of finding concrete evidence that could be used in legal proceedings. Rather, the investigation report was to serve as a basis for assessing whether the City of Oslo should proceed with their suspicion into concrete action. As stated in the report, there had been ongoing dialogue with the client during the investigation. Langemyhr disagreed with conclusions in the report, but investigators chose not to interview him again, and he was implicitly disconnected from the possibility of contradiction, i.e., the possibility to present his version.

Oslo Municipality as the client did a poor job. Rather than making up their own minds about affairs, they simply passed the private investigation report over to the police. An investigation report should not be the only document on which the client bases decisions. Rather, ahead of an investigation, during an investigation, as well as after an investigation, the client has an independent responsibility of keeping track of events, find explanations for events, and draw their own conclusions. For example, city officials might have found out that the city had done a poor job in formulating the construction contract with Langemyhr, and that Langemyhr was only exploiting the contract without doing anything illegal. An investigation report is just like another piece of consulting advice that the client should study carefully and apply causally. When an organization hires a consultant, the consultants work represents advice based on findings, that can supplement the clients own documentation for decision-making. A one-source decision foundation is not sufficient. Especially in matters related to suspicions of crime, the City of Oslo has an obligation to

evaluate what they receive from private investigators before eventually handing the report over to the police.

The police did a poor job. They should have found more convincing evidence for fraud allegations or waived the indictment. The police should place less confidence in conclusions from private investigators. The police should have conducted an investigation independent of the report from financial crime specialists. Since the police failed in reaching their goal of getting Langemyhr convicted of fraud, it must be argued that they did a poor job. The goal was to get a conviction; otherwise they would not have chosen to prosecute him. The police might have been more open-minded in looking for evidence that proved Langemyhr's innocence. In this case, police prosecutors failed to convince the judge of Langemyhr's guilt. Instead, they were explicitly criticized by the judge for having presented a poorly prepared case. There is also a question why police prosecutors did not appeal the dismissal sentence at Oslo District Court to a Court of Appeals.

The judge did a poor job. The judge was assisted by two experts from the construction industry. He should have sentenced Langemyhr to prison by trusting the judgment of the police and private investigators. He should have opened the court to more convincing evidence that Langemyhr was guilty of fraud. Perhaps the judge missed the point. The judge might have looked a little more sympathetic at the evidence that was presented, and not just criticize the police for their preparatory work. However, it is the sole responsibility of a judge to evaluate all evidence presented in court in a criminal case, and make a decision whether or not presented evidence are solid enough so that no doubt exists that what happened was a criminal act according to the Penalty Law. In this case, the judge did not find evidence presented convincing. Then the judge correctly dismissed the case. There is no person-focus on judges in Norwegian media. When can a judge be criticized for poor work? Is it when a higher court comes to a different – sometimes opposite – conclusion? This question is illustrated in the figure below.

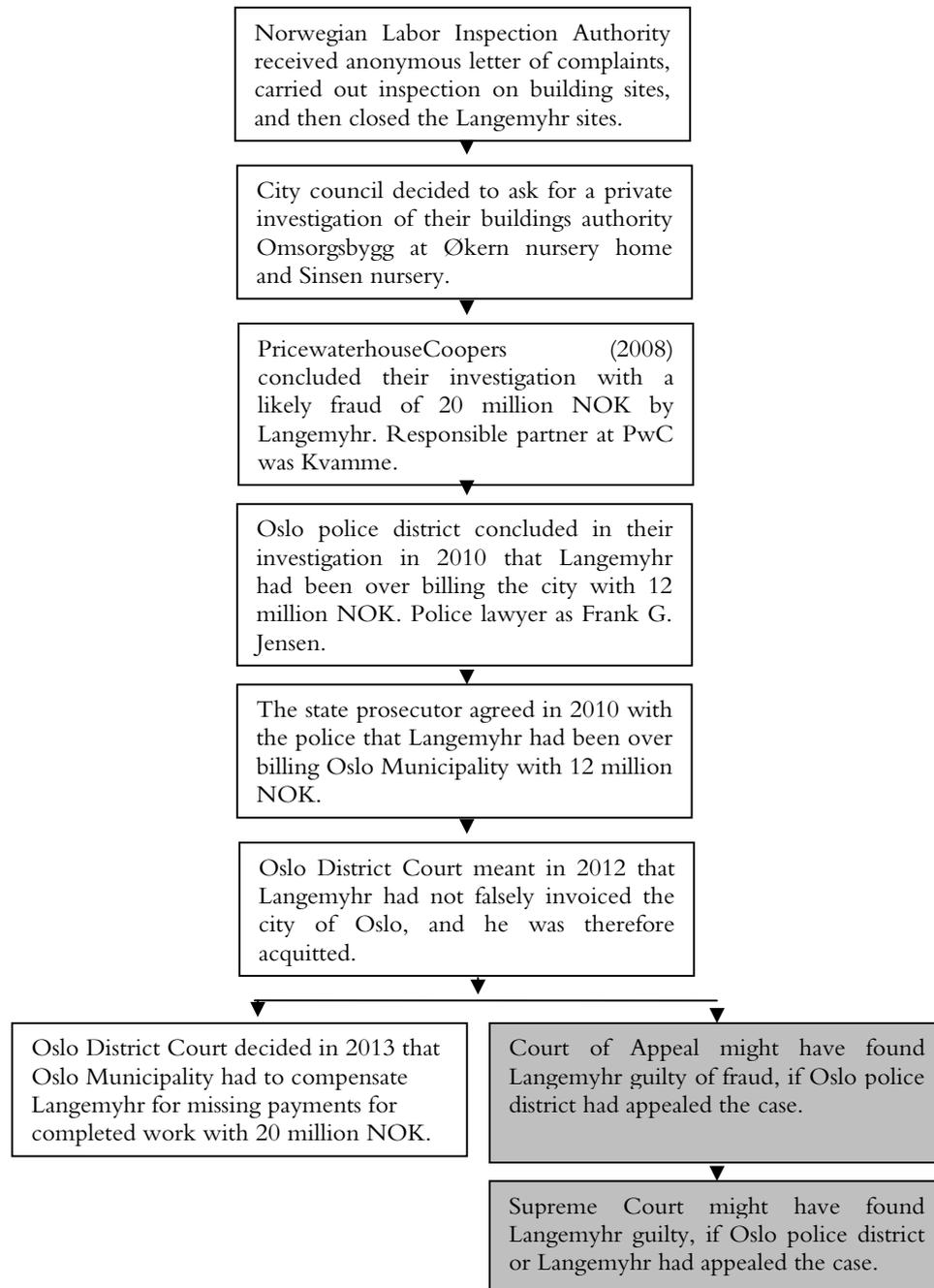
Perhaps both private investigators and police investigators did a poor job. Therefore, Langemyhr had to be acquitted in court. For sure, private investigator Helge Kvamme should have acquired estimates from more than one firm. The police should have secured conclusive evidence concerning what was brought forward in the private investigation report. If the police was unable to do so, they should have dropped the case without bringing it to court. If the police felt that the judge misunderstood, they should certainly have appealed the Langemyhr case to the Court of Appeals. But they did not do that.

It seems that investigators did a good job by interviewing Langemyhr's workers, including those in Poland. There was no doubt among Polish workers concerning Langemyhr's reprehensible practice. The question is whether the testimony of a Polish craftsman is worth less than that of a Norwegian craftsman in Norwegian court. What poor Polish artisans are thinking about this type of crime may have been considered less relevant.

Maybe the defense lawyers did an excellent job in Oslo District Court by helping their client to exoneration and later compensation. Both attorneys Andenæs and Storange are famous white-collar crime defense lawyers (Gottschalk, 2014c). Maybe the police prosecutors were only second class, while the defense lawyers were first class. Often in court, there is rivalry concerning both facts and statutory, creating a free space of interpretation for knowledge workers such as white-collar defense lawyers.

Figure 1 illustrates the process in this case, from the labor inspectorate triggered shutdown at building sites in 2008, to Oslo District Court's decision in 2013 to award a compensation to Langemyhr of 20 million NOK for work performed.

Figure 1. What could the outcome of the Langemyhr case have been?



Perhaps stakeholder theory might help elucidate this process. Stakeholder theory implies that you do as the dominant stakeholder prioritizes (Freeman & Phillips, 2002; Verbeke and Tung, 2013). For PwC (2008a) in their investigation, the City of Oslo was the dominating stakeholder as client and principal for the investigation. The labor inspectorate had already placed strong suspicions of misconduct and crime linked to Langemyhr, and politicians in Oslo Municipality had prestige attached to pursuing the builder. So it was perhaps difficult for investigators to conclude anything other than fraud.

An alternative conclusion could for example have been that the contract was so bad that Langemyhr had an opportunity to exploit it for his own good without violating it. This would be perceived as a criminal act, but it is not punishable, if the builder did it by utilizing the contract to a maximum. However, by concluding that the city had done a poor job in formulating the contract, investigators would put the blame on the city rather than the construction company, which would probably make the client unhappy with the investigation result and the following political debate.

Stakeholder theory can also explain the police and the police prosecutor's behavior. Oslo Municipality expected simply that Oslo police district would press charges against HaraldLangemyhr. Observers of the case started to call it the "hengemyr"-case rather than the "langemyr"-case. Hengemyr means a quagmire, which is a turf mat that floats on water, and quagmire means figuratively an unfortunate and difficult situation that is complicated to get out of. A possible explanation of the quagmire-perspective is that the court case simply was not between equals. As suggested above, defense lawyers belong to class A, while police prosecutors possibly belong to class B in terms of knowledge workers.

One of the possible mistakes made by the prosecutor was that he argued there were too many lawyers on the defense side. Attorney Ellen HolagerAndenæs was surprised that the prosecutor expressed an opinion about this, and the judge ignored the complaint from the prosecutor.

Ending the Langemyhr Case

In 2013, when HaraldLangemyhr was 48 years old, he received compensation by court order from Oslo District Court. Neither the City of Oslo nor construction master HaraldLangemyhr appealed the verdict in the compensation case in Oslo District Court in the end of October that year. Therefore, the City of Oslo had to pay Langemyhr 20 million NOK, which is close to 3 million US dollars. In court, Langemyhr argued that Oslo Municipality made a serious mistake when they reported him to the police for fraud and closed his construction sites.

Earlier that year, Langemyhr with his attorney Stordrange sued Oslo Municipality and asked for 27 million NOK plus 10 million NOK for delays in payments for work completed several years ago. The court decided that Oslo Municipality had to pay him a compensation of 14 million plus 6 million in interest payments. A large part of the total sum of 20 million is payment for work completed at Økern nursing home and Sinsen nursery. Oslo City's industry council, Mr. HallsteinBjercke, said the city would not appeal (Wilden, 2013):

-Langemyhr has driven social dumping and carried out serious of the Working Environment Act. This is why we terminated the contract. We won in court that breaches of the Working Environment Act constituted fundamental violations of

the contract, but the court concluded that Langemyhr should have been given the opportunity to correct deficiencies. In this we disagree. Nevertheless, the city council finds no reason to appeal. Bjercke says this is an overall assessment.

-We think we have received pursuant to the main points of the judgment. Builder Langemyhr demanded 240 million because we terminated the contract based on social dumping. He was successful in five percent of his demands, and we prevailed in 95 percent of our demands.

Langemyhr said he would not appeal, although his claims were initially far greater (Wilden, 2013):

-Langemyhr is happy and relieved that Oslo Municipality does not appeal, says one of Langemyhr's lawyers Irene Lund Eker. She says Langemyhr is ready to put the matter behind him after almost six years and that he is satisfied with 20 million NOK.

Discussion

Ever since Schneider (2006) wrote his classic article on the privatizing economic crime enforcement, the threat to criminal justice from private rather than public investigation, prosecution and sentencing of individuals in white-collar crime cases has steadily increased. In our context of private investigations, we apply the term private policing to capture similarities and differences with law enforcement. Private policing of economic crime can be detrimental to an open and democratic society where the rule of law is to be transparent. Privatization of law enforcement and criminal justice, as is currently a trend in many countries, represents a threat to democratic societies as all powers towards citizens in a state should be organized and managed by public authorities under democratic government control, and not by private business firms.

Private investigations are of concern because they involve a privatization of police investigations of potential punishable acts. Formal authorities and agencies in the criminal justice system should always be in charge of settlement between the suspect and the nation. The government cannot accept a privatization of such settlement procedure. Privatization of settlement between offender and community is unfortunate, not least because the company does not believe they will benefit its business if they report a person to the police who eventually finds his way to prison.

Nevertheless, privatization of criminal justice seems not uncommon in Norway. Offenses are not reported to the police. In the Norwegian survey, 40% of respondents agreed with the statement that crime is not reported because companies have decided to treat such matters internally.

A typical example of privatization is mentioned by Williams (2005, p.195):

Barring an informal resolution in which the suspect voluntarily agrees to leave the company based on specific conditions, such as repayment of misappropriated assets, one of the most common legal avenues pursued in these cases is termination with cause. This falls under the auspices of employment and labor relations law.

As long as such a case is privatized, criminal laws are not applied. This course of action allows clients to stop the bleeding while protecting themselves from wrongful dismissal suits (Williams, 2005).

In some cases, there has become an overlap between public and private investigations, which has caused potential loss of evidence. In other instances, however, there has been constructive cooperation between private and public sector in combating white-collar crime. The latter avenue is important to pursue for financial crime specialists. They have to understand that police investigations have priority in society, and that their own role is limited by and should be supportive of police investigations.

Schneider (2006) argues that the walls that obstruct communication and mistrust and rivalries that thwart cooperation between government and the private sector policing agencies in combating crime must be torn down. The increased role of the private sector in crime control and order maintenance is not the beginning of the decline for public law enforcement. Rather, society has to rely on public resources for the rule of law in democratic societies.

Brooks and Button (2011) suggest a hybrid solution between private investigators and the police. If a suspect in a private investigation does not cooperate with private fraud examiners and the suspicion and evidence of white-collar crime is overwhelming, then the matter is turned over to the police.

Conclusion

The case study has illustrated how the private and public sector created a situation where a suspect of financial crime became the victim of an unprofessional process. There is a need for governance of the private investigation industry; as well as rules and regulations on how the evidence collected in private investigations represents potential raw material in police investigations. The possibility of industry reform inevitably suffers from the secrecy and low visibility of private investigations and their existence in the shadow of the law. This is in sharp contrast to the public's access to court proceedings, where everything is open and shared.

A more suitable scenario where private and government investigations find synergies requires clarification of roles and relationships. Government investigations must always play the main role in the criminal justice system, where private investigations have to adapt to government investigations. Private investigators have to supply government investigators with evidence of white-collar crime. In return, government investigators may disclose case information to private investigators if this is mutually beneficial.

There are several avenues for future research based on this article. First, the interplay between private and public investigators needs further inquiry. Next, the evidence requirements in private investigations versus court hearings need clarification. Finally, the legal status of private investigation reports in different legislations is of importance to understand the growing investigation business on a global scale.

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