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Fiji's Legal Framework for Anti- Money Laundering

Paper presented by Nazhat Shameem

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Introduction

In 1931 Al Capone was convicted and sentenced for tax evasion. However his real business involved money laundering. Indeed he is said to be the pioneer of modern money laundering, although many famous houses and inheritances in the United Kingdom and the United States can trace their wealth to the origin of human trafficking – the slave trade. Al Capone had a “legitimate” business. He ran laundromats. Coin operated laundromats are a very good way to hide the illegal origin of money, He is said to have laundered more than \$1 billion in this way.

And this was only the beginning. Meyer Lansky, the mafia accountant, and a contemporary of Al Capone is said to have siphoned off millions of dollars from illegal business into casinos and thence to bank accounts in the Caribbean, Hong Kong, and South America. He was never convicted and died in 1983, a rich man, said to be worth \$100 million.

Pablo Escobar was one of the world's richest men. His income was from the cocaine trade. In 1989 his wealth was estimated at \$9 billion. He was so wealthy he spent \$1000 a week on rubber bands used to tie up his bundles of cash. He died in a gun battle with the Columbian authorities. One of his most famous sayings was;

“You bribe someone here, you bribe someone there, and you pay a friendly banker to help you bring the money back”.

The BCCI scandal, about a bank which used its services to fund terrorist activities and the drug trade, and which had customers ranging from Manuel Noriega, to Saddam Hussein, and the Afghan Mujahedeen, revealed massive money laundering activity. The bank was at its peak, the seventh largest bank in the world.

Between 1996 and 2002, the Bank of New York laundered money for the Russian mafia through its Benex Worldwide accounts. It was suspected that between \$7 to \$9 billion was laundered through the bank, to European companies and back to Russia.

The history of money laundering shows that there is a close connection between money laundering and tax evasion, drugs, human trafficking and corruption. In 2011, this remains the case. In Fiji, we can no longer say that the law has failed to keep up with the criminal actions of those who choose to get involved in crime and to launder the proceeds of crime. The Proceeds of Crime Act, the Financial Transactions Reporting Act, the Mutual Assistance Act, the Bribery Promulgation, and the Crimes

Decree all create a legal framework which makes laundering unlawful. They also give enough teeth to law enforcement agencies to lay charges, ask for forfeiture orders before a trial, apply for restraining orders to freeze assets, and prosecute with appropriate charges which are similar to these in the English Theft Act.

The Nature of Money Laundering

Money laundering is said to comprise of three steps, placement, layering and integration. Placement is the moving of the funds into a financial institution. The institution does not have to be a bank, but it often is. It can also be a casino or an insurance company. The transfer can be done in a cash deposit, or electronic transfer or a cheque deposit, and is the step which is most likely to lead to investigation and prosecution. This is because most countries now have laws requiring financial institutions to report suspicious activity. The next step is layering. This is a set of financial activity designed to conceal the true nature of the money. It often involves the mingling of sources of funds. The next step is integration. This involves using procedures to account for the additional funds. As an example, if a company imports goods and issues invoices for amounts higher than the sum actually paid, the money can be legitimately accounted for by the cost of the imports. In effect, the money gets “cleaned”.

An effective enforcement process must be able to identify each step, be able to prosecute for each step, and be able to identify the purpose of the whole scheme as one intended to hide the proceeds of crime in order to benefit from it. Sadly, money laundering is often accompanied by corruption within national boundaries. Thus money laundering and fraud laws must be accompanied by good corruption laws.

Fiji's Laws

Effective national laws must target money laundering at all three levels, and must criminalise activity at all three levels. Placement, the moving of funds into a financial institution, must be controlled by the nation's banking laws. These laws were not adequate in relation to placement, prior to the Financial Transactions Reporting Act. The Reserve Bank Act gave to the Reserve Bank general powers¹ to require banks to provide information about their banking business, but defined “financial institutions” and “banks” very narrowly, and in accordance with the Banking Act 1995. The Banking Act defines “financial institution” as “any company doing banking business”. “Banking business” is defined as;

“(a) the business of accepting deposits of money from the public or members thereof, withdrawable or payable upon demand or after a fixed period or after notice, or any similar operation through the sales or placement of bonds, certificates, notes or securities, and the use of such funds either in whole or in part, for loans or investments for the accounts, and at the risk of the person doing such business;

(b) Any other activity recognised by the Reserve Bank as customary banking practice which a licensed financial institution engaging in the activities described in paragraph (a), may additionally be authorised to do by the Reserve Bank.”

¹ Sections 45 and 46 of the Reserve Bank Act

This very narrow definition of “financial institution” and “banking business”, failed to give the Reserve Bank any supervisory role over the institutions which might lend themselves to the illicit depositing and movement of funds. In effect, the Reserve Bank Act was largely ineffective in dealing with proceeds of crime.

The Financial Transactions Reporting Act 2004 transformed the legal obligations of financial institutions to report the movement of cash above the value of \$10,000. In addition, there is a duty to report all international remittance transactions conducted by commercial banks as well as remittance service providers such as Western Union and MoneyGram; and most importantly all suspicious transaction reports.

Section 2 contains some very wide and useful interpretations. For instance the word “account” is defined as;

“Any facility or arrangement by which a financial institution does one or more of the following:

(a) Accepts deposits of currency;

(b) Allows withdrawals of currency; or

(c) Pays cheques or payment orders drawn on the financial institution, or collects cheques or payment orders on behalf of a person other than the financial institution;

and includes any facility or arrangement for a safety deposit box or for any other form of safe deposit.”

“Financial institution” is defined as any person carrying out the business or activity set out in Schedule 1. Schedule 1 includes banks, but it also includes trustee companies, insurance companies, casinos, and legal practitioners managing client money and client property. It includes real estate agents and credit corporations. This definition has the capacity to cover the activities of people and organisations which might be prone to laundering money. The Act also created the FIU, the Financial Intelligence Unit. The FIU is not accountable to the Reserve Bank; it is accountable to the Minister. However the Director is a member of the Anti Money Laundering Council which is established under section 35. The members of the Council are;

1. The Permanent Secretary for Justice (Chairperson).
2. The Director of the FIU.
3. The DPP.
4. The Commissioner of Police.
5. The Governor of the Reserve Bank.
6. The CEO of FIRCA.
7. (Co-opted member) The Director of Immigration.

The role of the FIU is to receive reports under the Act, collect, assess, and analyse information, obtain information from financial institutions, compile statistics, issue guidelines for financial institutions on the reporting of financial institutions, conduct due diligence tests, conduct training

and awareness programmes, educate the public, and exchange information with similar units overseas.

Section 25(2) contains a useful power in addition to the restraining order regime in the Proceeds of Crime Act. The section provides;

“If the Unit has reasonable grounds to suspect that a transaction or attempted transaction may:

- (a) Involve the proceeds of a serious crime, a money laundering offence or an offence of the financing of terrorism; or***
- (b) Be preparatory to an offence of the financing of terrorism;***

To allow the Unit time to make inquiries or to consult or advise relevant law enforcement agencies, the Attorney-General may apply ex parte to a judge of the High Court for an order, and if the judge is satisfied that there are reasonable grounds to suspect that a transaction or attempted transaction may involve the proceeds of such an offence or may be preparatory to the offence of the financing of terrorism, the judge may grant an order that the financial institution refrain for a specified period from carrying out the transaction or the attempted transaction or any other transaction in respect of the funds affected by that transaction.”

Section 28 contains very wide powers to enter premises of a financial institution without a warrant, seize documents, copy documents, access computer records, and transmit any information gathered to overseas financial intelligence units. Any person who refuses to grant access to the unit, or who obstructs the Unit, commits a criminal offence under the Act. The Act requires all financial institutions to report financial transactions which constitute suspicious transactions under section 15, and constitute information about the financing of terrorism under section 16. The word “terrorist act” under the Financial Transactions Reporting Act has an interesting meaning:

- “ (a) an act or omission in or outside the Fiji Islands which constitutes an offence within the meaning of a counter-terrorism convention;***
- (b) An act or threat of action in or outside the Fiji Islands which***
 - (i) Involves serious bodily harm to a person;***
 - (ii) Involves serious damage to property;***
 - (iii) Endangers a person’s life;***
 - (iv) Creates a serious risk to the health or safety of the public or a section of the public;***
 - (v) Involves the use of firearms or explosives;***
 - (vi) Involves releasing into the environment or any part thereof or distributing or exposing the public or any part thereof to any dangerous, hazardous, radioactive or harmful substance, any toxic chemical, or any microbial or other biological agent or toxin;***
 - (vii) Is designed or intended to disrupt any computer system or the provision of services directly related to communications infrastructure, banking or***

- financial services, utilities, transportation, or other essential infrastructure;*
- (viii) Is designed or is intended to disrupt the provision of essential emergency services such as police, civil defence or medical services; or*
- (ix) Involves prejudice to national security or public safety*

And is intended, or by its nature and context may reasonably be regarded as being intended to;

- (A) Intimidate the public or a section of the public; or*
- (B) Compel a government or an international organisation to do or refrain from doing any act; or*
- (C) Seriously destabilise or destroy the fundamental political, constitutional, economic or social structures of a country or an international organisation;*

But does not include an act which disrupts any services, and is committed in pursuance of a protest, demonstration or stoppage of work if the act is not intended to result in any harm referred to in subparagraphs (i) (ii) (iii) or (iv)."

Ultimately the Unit is not a prosecutorial body. Indeed, it is arguable that it is not the sort of investigative body we are used to with the police force and FICAC. The end product of the Unit's work is not necessarily prosecution. It is an intelligence gathering Unit, intended to protect Fiji's financial integrity. As I said earlier, given the complexities of the three stages of the money laundering process, the establishment of the FIU as a "watchdog" over the financial transactions is an important one. The FIU analyses volumes of information and translates them into useful intelligence. For investigation of individual cases, and the prosecution of them, the Unit must rely on the traditional powers of the police force and the DPP's office.

I come to Fiji's capacity for enforcing money laundering laws later in this paper. For the present, I turn to the Proceeds of Crime Act 1997 as amended by the Proceeds of Crime (Amendment) Act 2004. It is one of a threesome, with the Mutual Assistance in Criminal Matters Act 1997 (and amended in 2005) and the Extradition Act 2003.

The Proceeds of Crime Act is intended to give to law enforcement authorities the power to request that the profit be taken out of crime. It is also intended to cover all three stages of laundering money, placement, layering and integration. It is intended to introduce a regime of pre-emptive restraint and forfeiture, or restraint and forfeiture post-trial, and of forfeiture even if there is no one to be tried.

In order for the powers of the court to be mobilised, the money in respect of which orders are to be made, must be "tainted property". This is defined² as follows;

"Tainted property' in relation to a serious offence or a foreign serious offence means –

- (a) Property used in, or in connection with, the commission of the offence;*

² Section 3 of the Proceeds of Crime Act as amended by section 2 of the Proceeds of Crime Amendment Act 2005

- (b) Property intended to be used in, or in connection with, the commission of the offence;**
- (c) Proceeds of crime.”**

A serious offence is defined as;

“An offence of which the maximum penalty prescribed by law is death, or imprisonment for not less than 6 months or a fine of not less than \$500.”³

Section 4(1A) defines the term “proceeds of crime” as follows;

“...proceeds of crime means property or benefit that is:

- (a) Wholly or partly derived or realised directly or indirectly by any person from the commission of a serious offence or a foreign serious offence;**
- (b) Wholly or partly derived or realised from a disposal or other dealing with proceeds of a serious crime or a foreign serious offence; or**
- (c) Wholly or partly acquired proceeds of a serious offence or a foreign serious offence,**

And includes, on a proportional basis property into which any property derived or realised directly from the serious offence is later converted, transformed or intermingled, and any income, capital or other economic gains derived or realised from the property at any time after the offence.”

The Act provides the legal basis for applying for restraining orders, forfeiture orders, and pecuniary penalty orders⁴. Forfeiture orders after trial will be made by the DPP after conviction. Pecuniary penalty orders are also made after trial, but are relevant in cases where the money has in effect been spent or dispersed beyond the ability of the court to trace it, but where the cost of benefit to the accused can be assessed. The civil forfeiture order can be made with or without a conviction and trial.⁵ The evidential basis of such an order is whether **“there are reasonable grounds to suspect that any property is property in respect of which a forfeiture order may be made under section 19E or 19H.....”** and section 19E provides that the court must be satisfied **“...on a balance of probabilities that the property is tainted property...”** before it can order that the property must be forfeited to the State. Such an order was made by the High Court in Lautoka in the Turtle Island case⁶ on the basis that the property itself was tainted although no trial had been conducted. Eventually a trial was conducted, and the defendants were convicted.

Another useful provision in the Act⁷ is the power of the police to request a person to disclose a property tracking document, and to obtain a monitoring order directing a financial institution to give information to the DPP.⁸

³ This definition covers all fraud offences under the Crimes Decree. It also covers corruption, theft, robbery, receiving stolen property and burglary.

⁴ Sections 5,6,7,8 and 9

⁵ Section 19A

⁶ **State v. Anand Kumar Prasad** Case No. 024 of 2010, Per Madigan J

⁷ Section 50

However, central to the Act is section 69, which defines the offence of money laundering. I set out the section in full.

“(1) In this section:

“Transaction” includes the receiving or making of a gift.

(2) A person who after the commencement of this Act, engages in money laundering commits an offence and is liable on conviction, to

(a) if the offender is a natural person – a fine not exceeding 4120,000 or imprisonment for a term not exceeding 20 years, or both; or

(b) If the offender is a body corporate – a fine not exceeding \$600,000.

(3) A person shall be taken to engage in money laundering if and only if,

(a) The person engages, directly or indirectly in a transaction that involves money, or other property, that is proceeds of crime, or

(b) the person receives, possesses, conceals, uses, disposes of, or brings into Fiji any money, or other property, that are proceeds of crime, or

(c) the person converts or transfers money or other property derived directly or indirectly from a serious offence or a foreign serious offence, with the aim of concealing or disguising the illicit origin of that money, or other property, or of aiding any person involved in the commission of the offence to evade the legal consequences thereof, or

(d) the person conceals or disguises the true nature, origin, location, disposition, movement, or ownership of the money or other property derived directly or indirectly from a serious offence or a foreign serious offence, or

(e) The person renders assistance to a person falling within paragraph (a) (b) (c) or (d),

And the person knows or ought reasonably to know that the money or other property is derived or realised, directly or indirectly, from some form of unlawful activity.

(4) The offence of money laundering is not predicated on proof of the commission of a serious offence or foreign serious offence”

Section 70 creates an offence with a lower evidential threshold, of laundering money ***“that may reasonably be suspected of being proceeds of crime”***. The threshold is lower because the test of the fault element is wholly objective and not partially subjective as it is under section 69.

The judicial response to section 69 was at first, regrettably weak, with the Court of Appeal in **Timothy Aaron O’Keefe v State**⁹ reducing a sentence of 5 years imprisonment to 3 ½ years on the

⁸ Section 57

⁹ [2007] AAU0029/07 per Ward, Ellis and Penlington JJ

erroneous basis that the sentence for money laundering had to be proportionate to the sentence imposed for the “substantive” offence of obtaining by false pretences. The Court failed to consider the meaning of section 69(4) which provides that proof of the commission of a serious offence is not necessary to prove a money laundering offence. In short, the offence of money laundering is not a side show. It can be the main feature, and sentence should be delivered on that basis.

The more recent cases show that the High Court has become aware that this was the intention of the legislation but is bound by the O’Keefe decision.

In **State v. Salendra Sen Sinha**¹⁰ the accused was convicted of two counts of causing payment of money by virtue of forged instrument and one count of money laundering after a trial. The maximum sentence for the forgery offences was 14 years imprisonment under the Penal Code. The facts were that the accused obtained a total of \$272,219.57 by lodging false VAT returns with FIRCA. After depositing this sum into his bank accounts, he withdrew money by writing cash cheques. Although the judge relied on the Court of Appeal decision in **O’Keefe** (which bound the High Court) the judge did not refer to the fraud counts as the substantive offences. Instead he treated all offences as being founded on the same facts, and sentenced the accused to a total of two years imprisonment with a non-parole period of 18 months. There was also an order that the remaining sum of \$85,000 should be restored to FIRCA. It is not obvious from the facts, whether the State tried to apply for a pecuniary penalty order.

The Turtle Island case was the next case involving a charge of money laundering.¹¹ I am very pleased to see that this case will be discussed at length later this morning by officials from the FIU, Police and the DPPs Office. That case was one that was preceded by a civil forfeiture order¹² the first ever in Fiji to be filed in the civil jurisdiction of the High Court. The order attached to the property obtained in the course of the fraud, without determining who was responsible for the fraud. The same judge then heard the trial, and was asked to recuse himself on the ground that he had already made the forfeiture orders and had therefore pre-judged the issues at trial. Correctly, in my view, the trial judge refused the application¹³ saying that ***“the Court found on a balance of probabilities that the property she was in possession of was tainted. This was not a finding that she had with the necessary criminal intent come into the property fraudulently. That is a finding of fact for the assessors.”***

The trial proceeded and the accused were convicted of conspiracy to defraud, multiple counts of forgery, uttering and obtaining on forged documents, and money laundering. The facts were that Richard Evanson the owner of Turtle Island resort employed the 1st accused as his accountant on the recommendation of his banker the 5th accused. In fact she was the 1st accused’s sister. Whilst in the employ of the resort, the 1st accused forged 84 cheques to the total value of \$840,000 by putting his own name or the name of family members as the payees on the cheques. He then forged the

¹⁰ Criminal Case no HAC 046 of 2008, per Goundar J

¹¹ **State v. Anand Kumar Prasad and Others**, Criminal Case No 024 of 2010, per Madigan J, Lautoka High Court.

¹² Civil Action No HBM 03 of 2010 per Madigan J

¹³ Recusal Ruling Criminal Case No 024 of 2010, per Madigan J

signature of his employer and banked the proceeds in two bank accounts in his own name and into the accounts of the 2nd and 3rd accused who were his friends.

In a comprehensive sentence the judge analysed the sentencing principles for each offence, saying in relation to money laundering that;

“There is no real precedent in Fiji for the offence of money laundering an offence which carries a maximum penalty of 20 years. Were the offence to be charged alone, that is without being charged in conjunction with other offences that generate the money sought to be laundered, it is probable that the offence could attract sentences in the range of eight to twelve years, however this Court is bound by the decision of the Fiji Court of Appeal in O’Keefe v. The State [2007] AAU 0029.2007. In that case the appellant was appealing a sentence passed on him in the magistracy after the High Court had dismissed his appeal. Mr O’Keefe had entered a plea of guilty in the Magistrates Court to several counts of forgery and false pretences for which he was sentenced to concurrent terms of 2 years and then also one offence of money laundering for which he was sentenced to five years imprisonment.....Having passed strong sentences on the first accused for his fraud offences, I will not additionally punish him for the money laundering offences, despite the fact that there are very serious offences indeed. I sentence the 1st accused to a term of six years for each money laundering offence he has been convicted of. Each of these sentences is to be served concurrently with each other and concurrently to the conspiracy sentence.”

I make no criticism of the High Court in adopting this approach. The High Court is bound to follow the Court of Appeal even where the Court of Appeal has chosen the wrong railway line to get to its destination. The trouble with the law of precedent is that having chosen the wrong railway line, we are forever destined to turn up at the wrong destination until the Court of Appeal or Supreme Court changes the train schedule. The trouble with the O’Keefe approach is that if the accused has not been prosecuted for any other offence, and is charged only with money laundering, he or she is likely to receive a much heavier sentence than an accused who has committed other offences as well. This makes no sense at all. In fact the charge of money laundering should have its own tariff, (similar to the one suggested by Madigan J in the Turtle Island case) and that tariff should apply whether or not the accused has been charged with other offences. If the sentencing judge then feels that the total sentence, if served consecutively, is disproportionate to the totality of the offending, the judge can order concurrent sentences. That is an issue for individual sentences. Perhaps a future Court of Appeal will re visit the **O’Keefe** decision, thus adopting a more logical approach to sentencing under section 69 of the Proceeds of Crime Act. A positive step however is that after Turtle Island, the tariff has increased for money laundering.

This paper does not allow enough time for the relationship between the Proceeds of Crime Act, the Extradition Act¹⁴ and the Mutual Assistance Act. However, the Proceeds of Crime Act will be ineffective without the ability of Fiji to pursue money and property across borders. Thus far, money laundering offences have not featured cross-border movement of money. To what extent mutual

¹⁴ For a recent extradition ruling involving charges of money laundering and fraud see **State v Aneal Maharaj** Suva High Court September 22nd 2011, per Goundar J

assistance arrangements will work to freeze assets abroad, and to implement forfeiture orders in relation to foreign property will be a challenge for the effectiveness of our laws and law enforcement processes.

Another important statutory provision is the Crimes Decree 2009, and its provisions on fraud, theft, and corruption. In particular the corruption offences have changed our approach to gifts in the public sector, corporate hospitality in the business world, and the relationship between custom and corruption. Our corruption laws together with the new Bribery Act in the United Kingdom, and the Bribery laws in Hong Kong, are arguably amongst the toughest in the world. Money laundering, corruption, and fraud have a symbiotic relationship.

Proceeds of Crime enforcement in the United Kingdom

Time does not permit me to compare our legal processes with all other comparable jurisdictions. However the English example is an interesting one for comparison, because their laws were made at about the same time, in 2002¹⁵. In that Act “money laundering” is defined as follows;

“the process by which the proceeds of crime are converted into assets which appear to have a legitimate origin, so that they can be retained permanently or recycled into further criminal enterprises.”¹⁶

The Act places under one umbrella all three phases of laundering; the offences of money laundering themselves with a maximum penalty of 14 years imprisonment, the obligation to report suspicious transactions, and under the Money Laundering Regulations 2007, requirements placed on the financial, legal, accounting and other professions to put in place systems to prevent the use of their services for money laundering or terrorist financing.¹⁷

As a result of the Act and the reporting obligations, guidelines have been issued by the financial services¹⁸ the Law Society¹⁹, the Bar Council, and the Institute of Chartered Accountants.

In short, the English Act combines the provisions of our Proceeds of Crime provisions with the Financial Transactions Reporting provisions, under one umbrella. Each of the offences of money laundering requires proof that the conduct concerned “criminal property”, and section 340(3) provides that property is criminal property if it constitutes a person’s benefit from criminal conduct or it represents such a benefit (in whole or in part and whether directly or indirectly) and the alleged offender knows or suspects that it constitutes such a benefit. The evidential threshold appears to be higher for the prosecution in the United Kingdom. The mens rea requirement is subjective (suspicion

¹⁵ Proceeds of Crime Act (UK) 2002

¹⁶ Explanatory notes Proceeds of Crime Act UK

¹⁷ Sections 327 to 329 of the POC Act UK, sections 330 to 332 and 333A of the POC Act UK

¹⁸ Joint Money Laundering Steering Group Guidance notes www.jmlsg.org.uk

¹⁹ The obligations of lawyers and financial transaction was considered in **Bowman v. Fels** [2005] 2 Cr App R 19, CA (Civ Div).

does not have to be reasonable). There have been several significant prosecutions under this Act in the United Kingdom. Many of these have been in relation to the laundering of the proceeds of drug trafficking²⁰ but some were in relation to the reporting obligations of legal practitioners and bankers. In **Bowman v. Fels**²¹ it was held that where lawyers took steps in the ordinary course of litigation for the securing of an injunction for clients, and for the securing of legal rights for clients, they were not dealing in criminal property for the purposes of the Act even if they suspected that the property was acquired unlawfully. It was also held that the obligation to report did not override solicitor-client privilege and confidentiality as long as the transactions were all part of the conduct of ordinary litigation.

In **Squirrel Ltd v. National Westminster Bank**²² it was held that a bank had an obligation to report a transaction, once the bank suspected that a customer's account contained criminal property. Further the bank could not permit any transactions in relation to the account. If it did then it could be prosecuted with money laundering, as well as for failure to report a suspicious transaction. It was no defence to a charge that a bank is contractually obliged to follow a client's instructions. However where a bank received a transfer of which the bank had suspicion, it could receive the transfer but was obliged to immediately report it to the authorities. Such reporting would protect the bank from prosecution.²³

Other cases in the United Kingdom discuss the mens rea component of the money laundering offences. In **R v. Gabriel**²⁴ (Note) it was held that where a person fails to declare income on legitimate income, that did not render the property "criminal" for the purposes of the Act, but in **R v K(I)**²⁵ it was held that a person cheats the revenue by under-declaring the profits of a legitimate business, he obtains a pecuniary advantage in the form of the tax avoided, and, by virtue of section 340(1), he is taken to have obtained an advantage equal to the sum defrauded,. He is therefore considered to have benefitted from his conduct such that the offence of money laundering can be made out.

In **R v. Rose, R v. Whitwan**²⁶ it was held that stolen goods in the hands of the thief or receiver were "criminal property" for the purpose of the Proceeds of Crime Act. As to whether the prosecution should lay a money laundering charge in addition to, or in substitution for a theft charge was a matter for the prosecution. However the prosecution should ensure that the Proceeds of Crime Act should be used appropriately.

²⁰ See **R v. Middleton and Rourke** unreported January 31 2008 CA EWCA Crim 233

²¹ Ibid at 19

²² [2005]2 ALL ER 784

²³ **Tayeb v. HSBC plc** [2004] 4 ALL ER 1024

²⁴ [2007] 1 WLR 2272

²⁵ [2007]2 Cr App R10

²⁶ [2008] 2 Cr App R 15

In relation to sentence, the Proceeds of Crime Act in the United Kingdom provides that the maximum sentence on summary conviction is 6 months imprisonment and/or a fine at level 5, and on conviction on indictment, to a maximum of 14 years imprisonment. In the United Kingdom, the idea of setting the sentence for money laundering by reference to the other charges against the accused has been specifically disapproved by the Court of Appeal. In **R v. Gonzalez and Sarmiento** [2003] 2 Cr App R (s) 9, the Court of Appeal said that to say that those who launder money “are nearly as bad” as those who commit the antecedent offence, is not appropriate because often those who launder money have no idea what the antecedent offence is. In **R v. El-Delbi**²⁷ the Court of Appeal said there should be no direct arithmetical relationship between the sentence and the sum laundered, but sentences close to the maximum should be reserved for cases of large scale laundering. In **R v. Monfries**²⁸ it was held that the relationship between the laundering and the antecedent offence was the offender’s knowledge of the nature of the antecedent offence and the amount laundered. In other words, knowledge of the antecedent offence is an aggravating factor. The Fiji approach in O’Keefe is therefore inconsistent with this decision.

In **R v. Griffiths and Pattison**²⁹ it was said of offences of entering into a money laundering arrangement and of acquiring criminal property, that the organising of an arrangement will be considered very seriously by the courts, and that custodial sentences will be inevitable in almost every case, but that a “one-off” attempt to conceal assets subject to a confiscation order did not fall into the serious category of other money laundering offences. The court reduced the sentence of 36 months to 27 months imprisonment, for an estate agent who approached a drug dealer and purchased his house at an under market value. In **R v. Duff**³⁰ the Court of Appeal reduced a 15 month term of imprisonment to 6 months for a solicitor who had carried out the conveyance of the house at an under value.

In considering these sentences, it should however be borne in mind that the maximum sentence for money laundering in Fiji is 20 years imprisonment and much higher than the 14 years maximum term in the United Kingdom.

Even in the United Kingdom, the Proceeds of Crime Act appears to have been used sparingly by the prosecution. Resources have instead been spent on educating financial institutions about money laundering offences, and the legal obligation to report suspicious transactions. The professions have taken responsibility for educating their own members and providing adequate guidelines on reporting. Nevertheless there have been cases of prosecutions of lawyers for failing to report suspicious transactions, and of tax evaders for laundering money. The cases in Fiji seem to centre on fraud cases, and money laundering charges seem to be almost incidental to the main fraud. There have been no prosecutions of financial institutions under the Financial Transactions Reporting Act.

²⁷ (2003) 147 S.J 784

²⁸ [2004] 2 Cr App R (s) 3

²⁹ [2007] 1 Cr App R (S) 95

³⁰ [2003] 1 Cr App R (S) 88

Conclusion

The nature of money laundering is such that law enforcement is especially challenging. Firstly it is a crime of the rich, and usually of the powerful. Much as we are all told that everyone believes in the rule of the law, the rich and powerful often believe themselves to be exempt from the law. Secondly, money laundering is often centred on fraud, corruption and drug offending, which are themselves difficult to investigate and prosecute. They require special expertise which is not always available. Thirdly, persuading police officers, prosecutors and the judiciary that money laundering is an offence in itself, which requires separate treatment, and not just incidental treatment to the other antecedent offences, requires an attitudinal change which is not easy to effect. Conferences such as this one can help to change those attitudes. Fourthly, effective law enforcement targets placement, layering and integration. It must cover reporting, identifying the process of the mingling of funds, and the tracing of assets to enable freezing and forfeiture. Fiji certainly has the statutory teeth to enable effective enforcement. . The role of “financial institutions” and the FIU and how they contribute to the detection, investigation and prosecutions of money laundering is an important one. Arguably, our model is better than the United Kingdom model, for instance. However, the scarcity of prosecutions suggests that in the implementation of the laws, there are existing challenges.

The business community in Fiji often expresses the view that our fraud laws have no teeth, that they allow employees and business rivals to commit offences, with no fear of the enforcement of the law. There are complaints of the lack of necessary expertise in law enforcement agencies, and of the delay in processing fraud cases. Indeed many suspects drag out cases in court, as a deliberate strategy. The effective enforcement of the Proceeds of Crime Act, and the use of restraining orders and forfeiture orders, designed to freeze and forfeit proceeds of crime, could push court prosecutions to quick resolution. Delay costs money. If there is no money, delay becomes an unattractive strategy.

There is nothing new about money laundering. For all we know there are still business people in Fiji and elsewhere who spend a lot of money buying rubber bands to tie up bundles of ill-gotten cash. What is new is our statutory framework. Although part of our laws since 1997, and 2002, we are still to see an effective use of the laws, and an effective enforcement of them in our court system.