Detecting Money Laundering – the role of Financial Institutions and Designated Non- Financial Businesses and Professions

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1. **On 14th September 2009 at Manchester Crown Court the respondent, whom we shall call "C", faced an indictment containing six counts. The trial Judge, HHJ Steiger QC, upheld an application made on C's behalf that the indictment should be stayed as to proceed would be an abuse of the process of the Court. This is an application by the prosecution for leave to appeal the Judge's ruling under section 58 Criminal Justice Act 2003 and rule 67.4 of the Criminal Procedure Rules.**

2. **It is first necessary to consider the background to the prosecution. C is a solicitor and equity partner in a firm of solicitors. At the relevant times he was the firm's nominated anti-money laundering officer. An effect of that position was that each month the firm's client account reconciliation reports would be submitted to him for approval. C's professional obligation was to report to the National Criminal Intelligence Service or other appropriate authority any transactions through the firm's client account which gave rise to suspicion that the use to which the account was being put was money laundering. No such reports were made by C during the period 2001 to 2004.**

3. **The prosecution case is that a client of the firm, Amer Munir, committed a VAT acquisition tax fraud using a company called Talkland Telecom Limited. In November 2001 the company purported to buy and sell £40m pounds worth of mobile telephones. The VAT payable was some £6.5m. No VAT was ever paid.**

4. **Munir's brother-in-law was C's partner in the firm. C had introduced him. Munir's sister, Shamaila, was employed as a conveyancing clerk. The prosecution asserts that the firm was used by Munir to launder money fraudulently obtained from the VAT fraud through the firm's client account for the purpose both of acquiring property and of transferring money between companies in which Munir had an interest.**

From RCPO v. C [2010] EWCA Crim 97

Introduction

One of the most important principles in the criminal justice system is the presumption of innocence. A lawyer who is asked to represent a person alleged to have committed a criminal offence bears this in mind when defending the client. It is not for the lawyer to judge whether the accused is guilty or not guilty. The lawyer's job is to represent the client competently and according to the law. However which lawyer representing a client in an armed robbery case or a serious fraud where the money was never recovered, will not wonder whether he or she is being paid out of proceeds of crime? Exactly when is that dark fleeting thought a reasonable suspicion that one is receiving proceeds of crime under section 69 of the Proceeds of Crime Act, and when does a lawyer or an accountant or an estate agent cross the threshold for reporting a suspicious transaction under the Financial Transactions Reporting Act? This paper addresses the need for vigilance in the handling of trust account transactions, client relationships and conveyencing risks for financial institutions under the Financial Transactions Reporting Act and the Proceeds of Crime Act for financial institutions and designated non-financial businesses and professions in Fiji.

The Law

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. The Reserve Bank Act gave to the Reserve Bank general powers 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."

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 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 now 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 defined 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;
(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."

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 orders. 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. 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 case on the basis that the property itself was tainted although no trial had been conducted. Eventually a trail was conducted, and the defendants were convicted.

Another useful provision in the Act 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. 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 Turtle Island case was probably the most significant case in Fiji involving a charge of money laundering. That case was one that was preceded by a civil forfeiture order the first ever in Fiji to be filed in the civil jurisdiction of the High Court. Since that case other civil forfeiture orders have been made. 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 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."

These guidelines have since been followed in a number of money laundering cases before the courts. In most such cases the accused persons were related to bank staff that assisted in the laundering operation.

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.

The role of professionals in reporting suspicious transactions

There has been one prosecution of a money exchange institution in Fiji, of a man who facilitated the transfer of money abroad in sums which were just below the limit on reporting under the Financial Transactions Reporting Act[1]. However in other jurisdictions, the offices of estate agents, mortgage brokers and solicitors have been the subject of prosecution for some time. Banks of course are the logical recipients of dirty money and how effective their internal systems are in detecting suspicious transactions differs from bank to bank. As far as banks are concerned, a real Achilles heel seems to be the relatives of bank staff, who manage to persuade the staff to cooperate in illegal activity in relation to bank accounts. In some such cases, the bankers were prosecuted. In others, an enduring question is asked about the effectiveness of a supervision system which allows large sums of money to be cashed with no questions asked by the bank[2], or allows false bank accounts to be opened under the name of fictitious companies[3]. As far as financial institutions are concerned, the combination of the FTR Act, the Proceeds of Crime Act and the Crimes Decree, call for greater supervision, better internal supervision of bank staff and a Crimes Decree aware human resource development of the institutions. All banks must for

[1] **State v Syed Raza**

[2] **State v Doreen Singh** HAC 86 of 2009 and **State v Monika Monita Arora** HAC 125 of 2007

[3] **State v Salendra Sen Sinha** HAC 046 of 2008

instance ask themselves the following questions when scrutinising their HR and internal governance manuals;

1. Has the bank or financial institution identified the high risk offences for the institution?
2. Do the manuals say that there is to be zero tolerance of these offences, and have the offences been defined according to the law?
3. Is there a sanction specified (or a range of them) which will the consequence of offending? Does this include reporting to the police?
4. Is there a whistle blowing procedure for financial integrity? If there is, is there an internal committee made up of different levels of management which scrutinises every complaint? Who decides what will give rise to investigation? Is there scrutiny over that decision maker? Is a whistle blowing report made to the Bank Board? Is there a procedure if a Board member is the subject of complaint? Is there a guarantee of non-victimisation and of the anonymity of the whistle blower?
5. Has the bank kept records of all complaints of suspicious transactions and all disciplinary action taken of staff members who have offended? Were the sanctions uniformly applied?
6. Is there on-going monitoring and supervision of all high risk banking activities, especially international transactions, opening of company accounts and multiple account holders?

These guidelines will help to protect banks and financial institutions from prosecution when their employees, officers or agents have offended under the FTR Act or Proceeds of Crime Act.

I now turn to designated financial institutions, named in the first schedule to the FTR Act and subject to a legal duty to report suspicious transactions. There have been no prosecutions of solicitors and estate agents in Fiji, but other jurisdictions have experienced an abundance of cases under their money laundering law regimes. These cases give us an idea of where solicitors and estate agents will be most at risk of prosecution.

The United Kingdom has different anti-money laundering from ours, with its finacial transaction reporting regime and proceeds of crime offences placed under one statutory framework, the Proceeds of Crime Act and the Money Laundering Regulations. Maximum penalties also differ from our maximum penalties. However the elements of the offence of money laundering are similar.

In **Fitzpatrick and Others v Police Commissioner of the Metropolis**[4] the police commenced an operation called Operation Tarsal, into the corrupt relationship between a police officer Mark Bohannan and a drug dealer Syed Imtiaz Ahmad. Both were later convicted of conspiring to commit an offence of misconduct in public office. In May 2007 authorisation was given to the place to search and probe Ahmad's car. As a result, it was discovered that Ahmad had a sale and purchase agreement for the sale of a penthouse apartment in Cyprus to a man called Filugelli. Both Filugelli and Ahmad were clients of a firm of solicitors called Thomas Boyd Whyte. Ahamad

[4] **[2012] EWHC 12 (QB)** http://www.bailii.org/ew/cases/EWHC/QB/2012/12.html

was interviewed under caution and he was represented by a solicitor from the same law firm. He chose to remain silent. However during the interview it was alleged that Ahmed owed Filugelli money for drugs. A result of the police probe of Ahmed's car was a conversation he had with Filugelli that he owed Filugelli £500,000 for drugs. The solicitors knew this since after arrest the result of the probe had been disclosed to them. The solicitors suspected money laundering and reported the matter to the Serious and Organised Crime Agency as a suspicious transaction. Subsequently, Ahmed instructed other solicitors. However Filugelli them instructed the same solicitors to proceed with transactions in relation to the property in Cyprus, and asked the solicitors to recover some £300,000 from Ahmed in relation to which there was no supporting paperwork. By this time, there was already a restraining order issued in relation to Ahmed's property and assets. Without enquiring about the source of the money and about whether the Cyprus property was subject to the retaining order, the solicitors then prepared a power of attorney for Ahmed (who was then in prison) and drove to Wormwood Scrubs to deliver it to Ahmed for the purpose of getting his signature. They did not inform his new lawyers. The power of attorney was in favour of Ahmed's father. The solicitor was arrested as she left the prison, and the firm's offices were searched by the police. The solicitors later claimed that they were about to report the activity as a suspicious one but that the arrest pre-empted the report. Eventually the solicitors were not charged. However they brought a civil action against the police for the arrest and the search of the offices. While the court was not required to decide whether the solicitors had in fact entered into or become concerned in an arrangement to facilitate money laundering, it did conclude that there was sufficient information to give rise to a reasonable suspicion that the solicitors were becoming concerned in an arrangement contrary to s328[5] of the Proceeds of Crime Act. On this basis it was held that appropriate for the police to arrest them and to obtain a search warrant for their premises. The court cautioned against a too legalistic approach to what constitutes preparatory steps in transactional work and what constitutes actually becoming a party to an arrangement.

In **Dare v Crown Prosecution Service[6],** in October 2010, a Hyundai car was stolen from the roadside in Oxfordshire. It was found two days later with the accused's fingerprints in it or on it. The accused was charged with money laundering under section 328 of the Proceeds of Crime Act. The judgment of the High Court (on appeal from the magistrate's court) stated the facts in this way;

"The appellant's account -- and the Justices had nothing but the appellant's account in interview and in evidence to go on -- was that a car trader from the travelling community in Oxfordshire whom the appellant knew as Mick offered to sell him the car for £800. Mr Dare admitted that he knew Mick as someone who had been involved with missing and stolen cars in the past. The appellant's plan was to buy a car at this bargain price, with a view not to keeping it, but to re-selling it. He believed he could have sold it for £3,500. He took it for a test drive, an exercise in respect of which he was charged with and pleaded guilty to driving without insurance. He asked Mick for a few days to see what money he could raise.

[5] Which provides; "A person commits an offence if he enters into, or becomes concerned in an arrangement which he knows or suspects facilitates (by whatever means) the acquisition, retention, use or control of criminal property by or on behalf of another person."

[6] [2012] EWHC 2074 (Admin)

He managed to raise £500 or very close to it. In interview he said that Mick told him he would accept £500. In evidence, however, the appellant said only that he believed that Mick would sell it to him at a reduced price. What is clear is that the sale never went ahead presumably because either the owner or the police or somebody acting legitimately had recovered the car before the transaction could go through."

The case was decided on the meaning of the word "arrangement" and whether actions preparatory to purchase could fall into the meaning. That decision is of little relevance in |Fiji, because the words used in section 69 of the Proceeds of Crime Act are "engage in" which are arguably broader than the word "enters into an arrangement" in the English Act. The decision on appeal was that simply making arrangements for the purchase of the car was merely preparatory to the offence and that the accused should be acquitted. Had the arrangements been completed the offence would have been committed. In Fiji, with its broader definition, it is arguable that as soon as a solicitor arranges for or agrees to the deposit of tainted money knowing or having reasonable grounds to believe the money is tainted, the offence of money laundering is complete.

An interesting issue which is now likely to arise is whether the reporting of suspicious transactions in relation to client money is in breach of section 24 of the 2013 Constitution – on the right of privacy. Such an argument was raised in a recent case before the European Court of Human Rights[7] which held that there was no such breach and that the requirement was proportionate to the social need of detecting money laundering. The case was brought by a French member of the Paris Bar who argued that the obligation to report suspicions was incompatible with the principles of protection of lawyer-client relations and respect for professional confidentiality. Although the case relates specifically to French lawyers, it is more broadly relevant as it stressed the importance of confidentiality and of legal professional privilege. At the same time, the court considered the obligation to report suspicions was necessary in pursuit of the legitimate aim of prevention of disorder or crime, since it was intended to combat money laundering. The court gave careful consideration to the European money laundering directives, article 8 of the European Convention on Human Rights and the importance of the confidentiality of lawyer-client relations and of legal professional privilege. The court held that the obligation to report, as implemented in France, did not interfere disproportionately with legal professional privilege since lawyers were not subject to the requirement when defending litigants and there is a filter put in place by the legislation ensuring that the lawyers submit their reports to the president of their Bar Association and not to the authorities.

The same cannot be said of the law in England and Fiji, so it will be interesting to see how similar objections might develop in Fiji.

[7] **AFFAIRE MICHAUD c. FRANCE** *(Requête no 12323/11)* STRASBOURG 6 décembre 2012
http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-115055#{"itemid":["001-115055"]}

The Law Society of England and Wales has issued a directive to all solicitors which guide them on their reporting duties. We do not have such directives or guidelines here, and this might be a useful project in the future for the Chief Registrar, the legal profession and the FIU. The practice note has been referred to with approval by the English courts. The word "note" is deceptive because it covers a number of chapters. However, I refer in particular to Chapter 11[8] which sets out the warning signs for solicitors who are vigilant about money laundering and suspicious transactions. They are of equal relevance in Fiji, and I set out the signs briefly below;

1. **Secretive clients**
2. **Unusual instructions**
3. **Changing instructions**
4. **Unusual retainers**
5. **Use of client accounts for unusual purposes**
6. **Suspect territory or countries which have no or loose anti money laundering laws**
7. **When administering an estate: where estate assets have been earned in a foreign jurisdiction, be aware of the wide definition of criminal conduct in POCA and the provisions relating to overseas criminal conduct; or where estate assets have been earned or are located in a suspect territory, you may need to make further checks about the source of those funds.**

8. **Trusts - Trusts can be used as a money laundering vehicle. The key risk period for trusts is when the trust is set up, as if the funds going into the trust are clean, it is only by the trustees using them for criminal purposes that they may form the proceeds of crime.**

   When setting up a trust, be aware of general money laundering warning signs and consider whether the purpose of the trust could be to launder criminal property. Information about the purpose of the trust, including why any unusual structure or jurisdiction has been used, can help allay concerns.

9. **Charities**
   In common with trusts, while the majority of charities are used for legitimate reasons, they can be used as money laundering/terrorist financing vehicles. If you are acting for a charity, consider its purpose and the organisations it is aligned with. If you are receiving money on the charity's behalf from an individual or a company donor, or a bequest from an estate, be alert to unusual circumstances including large sums of money. There is growing concern about the use of charities for terrorist funding.

10. **Powers of attorney/deputyship**
    Whether acting as, or on behalf of, an attorney or deputy, you should remain alert to money laundering risks.

[8] http://www.lawsociety.org.uk/advice/practice-notes/aml/money-laundering-warning-signs/

If you are acting as an attorney you may learn financial information about the donor relating, for example, to non-payment of tax or wrongful receipt of benefits.

11. **Property work**

Ownership issues

Properties owned by nominee companies or multiple owners may be used as money laundering vehicles to disguise the true owner and/or confuse the audit trail.

Be alert to sudden or unexplained changes in ownership. One form of laundering, known as flipping, involves a property purchase, often using someone else's identity. The property is then quickly sold for a much higher price to the same buyer using another identity. The proceeds of crime are mixed with mortgage funds for the purchase. This process may be repeated several times.

Another potential cause for concern is where a third party is providing the funding for a purchase, but the property is being registered in someone else's name. There may be legitimate reasons for this, such as a family arrangement, but you should be alert to the possibility of being misled about the true ownership of the property.

Methods of funding

Many properties are bought with a combination of deposit, mortgage and/or equity from a current property. Usually, as a solicitor, you will have information about how your client intends to fund the transaction, and will expect to be updated if those details change, for example if a mortgage falls through and new funding is obtained.

This is a sensible risk assessment measure which should help you decide whether you need to know more about the transaction.

Private funding

Usually purchase funds comprise some private funding, with the majority of the purchase price being provided via a mortgage. Transactions that do not involve a mortgage have a higher risk of being fraudulent.

Look out for: large payments from private funds, especially if your client has a low income, and payments from a number of individuals or sources.

If you are concerned: ask your client to explain the source of the funds. Assess whether you think their explanation is valid – for example, the money may have been received from an inheritance or from the sale of another property, consider whether the beneficial owners were involved in the transaction. Remember that payments made through the mainstream banking system are not guaranteed to be clean.

Funds from a third party

Third parties often assist with purchases, for example relatives often assist first time home buyers. You may be asked to receive funds directly from those third parties. You will need to decide whether, and to what extent, you need to undertake any measures in relation to the third parties.

Consider whether there are any obvious warning signs and what you know about: your client, the third party, their relationship and the proportion of the funding being provided by the third party.

Consider your obligations to the lender in these circumstances – you are normally required to advise lenders if the buyers are not funding the balance of the price from their own resources.

Direct payments between buyers and sellers

You may discover or suspect that cash has changed hands directly, between a seller and a buyer, for example at a rural auction. If you are asked to bank the cash in your client account, this presents a problem because the source of the cash is not your client and so checks on the source of the funding can be more difficult. The auction house may be able to assist because of checks they must make under the regulations. However, you may decide to decline the request.

If you suspect that there has been a direct payment between a seller and a buyer, consider whether there are any reasons for concern (for example, an attempt to involve you in tax evasion) or whether the documentation will include the true purchase price. A client may tell you that money is changing hands directly when this is not the case. This could be to encourage a mortgage lender to lend more than they would otherwise, because they believe that private funds will contribute to the purchase. In this situation, consider your duties to the lender.

Valuing

An unusual sale price can be an indicator of money laundering. While you are not required to get independent valuations, if you become aware of a significant discrepancy between the sale price and what you would reasonably expect such a property to sell for, consider asking more questions. Properties may also be sold below the market value to an associate, with a view to obscuring the title to the property while the original owner still maintains beneficial ownership.

Lender issues

You may discover or suspect that a client is attempting to mislead a lender client to improperly inflate a mortgage advance – for example, by misrepresenting the borrower's income or because the seller and buyer

are conspiring to overstate the sale price. Transactions which are not at arms length may warrant particularly close consideration.

However, until the improperly obtained mortgage advance is received there is not any criminal property for the purposes of disclosure obligations under POCA. If you suspect that your client is making a misrepresentation to a mortgagee you must either dissuade them from doing so or consider the ethical implications of continuing with the retainer. Even if you no longer act for the client you may still be under a duty to advise the mortgage company. If you discover or suspect that a mortgage advance has already been improperly obtained, consider advising the mortgage lender.

There is much more in the way of warnings and guidance, and concerned solicitors should read and be guided by the practice note. Such guidelines are also helpful to accountants and estate agents, and in my view a good project for each of these professional groups is to devise guidelines to assist accountants and estate agents to identify high risk activity in their work.

Conclusion

The law on money laundering in Fiji is seriously enforced. There have been a number of prosecutions against individuals who handle the proceeds of crime and just as many applications for retraining and forfeiture orders. The professional and the non-finance financial institutions have a role in preventing their client accounts from being used to launder the proceeds of crime, sadly many are not aware of the law on laundering and suspicious transactions. I see an important role for the FIU in the future (and this conference is the beginning of recognising that role) to educate and guide those professions which have so far not been the focus of investigations and prosecutions under the FTR Act and the Proceeds of Crime Act to ensure that this happy state continues. After all a prosecution under either Act would have serious consequences on a professional's ability to continue to practise.

Nazhat Shameem

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