Editorial

A privilege or a curse!

In the pages of this journal, we have often discussed the impact, often unintended, of measures taken to address the threat of economically motivated crime on third parties. In this context, over the years, we have witnessed the ever-increasing burdens imposed by law, regulation or just best conduct, on those who mind other people's wealth in the ordinary course of their business to be fully aware for whom they act and the circumstances and derivation of any relevant property. Indeed, in editorials in this and the *Journal of Money Laundering Control* we have often commented on the appropriateness of measures designed to inhibit the laundering of criminal property and other suspect wealth, when balanced against the risks and responsibilities and therefore costs imposed on banks, other financial institutions and increasingly professional advisers. The obligation to report suspicions that wealth is the proceeds of crime or related to terrorist activity has resulted in arguably the great burden on intermediaries and their advisers. There are jurisdictions in which there is a broad obligation to report to the authorities almost all serious crime, but in Britain, this has long been thought unjustified and unacceptable. Having said this, there are, of course, exceptions and the one that is perhaps most pervasive relates to suspicion that property constitutes or represents a benefit derived from criminal conduct.

Partly as a result of EU directives, the obligation on those who by way of business handle other people's wealth to disclose their suspicions as to its status has been cast over an increasingly wider group of people. In many countries, broadening this obligation so as to include lawyers has been controversial. This in large measure is a result of the confidential relationship that may well exist between a client, including someone "in house" and a legal adviser. However, there is a more fundamental concern, which relates to the protection of individuals and the efficacy of the legal system. This is the question of privilege, which in many jurisdictions is more or less absolute. It has long been the case in English law that while a client is entitled to expect confidentiality in all his or her dealings, where litigation is a possibility or where the advice relates to a legal issue, the relationship is subsumed by the much stronger obligation of legal professional privilege (Balabel v. Air India (1988) 1 Ch 317). Many consider this a vital element in the rule of law. For example, Lord Hoffmann in R v. Special Commissioners of Income Tax (2003) 1 AC 563 stated:

> Legal professional privilege is a fundamental human right long established in the common law. It is a necessary corollary of the right of any person to obtain skilled advice about the law. Such advice cannot be effectively obtained unless the client is able to put all the facts before the adviser without fear that they may be afterwards disclosed and used to his prejudice.

On the other hand, it was long eloquently put by Lord Denning MR that there can be no privilege to do iniquity. So, the privilege would not arise where the lawyer participates in a crime, such as the facilitation of money laundering. Nor would it arise where the lawyer steps beyond the proper relationship of a lawyer and acts, for example, as a business consultant or tax adviser (see Lord Scott, Three Rivers District Council v. Governor of the Bank of England (No 6) (2004) 3 WLR 1274). It is also generally the case that lawyers may be properly remunerated in so far as they act in good faith and provide services. Albeit this is by no means true in all jurisdictions including the USA. In a recent case before the Supreme Court of Jamaica (The Jamaican Bar Association v. the Attorney General of Jamaica (2017) JMFC 2), the legality of regulations extending the obligation to report suspicious transactions to lawyers was considered along with issues as to confidentiality and privacy

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in interlocutory proceedings. In particular, it was contended by the Bar that to place such an obligation of lawyers placed them in a conflict of interest with their clients. The Supreme Court in upholding the decision at first instance by Sykes J. placed considerable emphasis on the Jamaican law which requires the person concerned to know or believe or have reasonable grounds to know or believe that the transaction relates to money laundering. Furthermore, that knowledge or belief must arise in the course of acting as a lawyer. It should be noted that in the UK the offence only requires knowledge or a suspicion (see R v. DaSilva (2007) 1 WLR 303), which the Jamaican Supreme Court considered to be a significantly lower threshold. Indeed, it was largely on this basis that the Jamaican Supreme Court upheld the constitutionality of the obligation. If a lawyer knew or believed that a money laundering operation was afoot then his conduct would fall outside the scope of the privilege – as the Court observed:

> On our analysis where a STR is required to be made Legal Professional Privilege would either not apply or be ousted based on the nature of the circumstances which would point to the operation of the crime exception [. . .] there is no privilege protection when the information/communication is with the intention of furthering a criminal purpose or when there is crime, fraud or iniquity.

The decision of the Jamaican Supreme Court has obviously to be seen in the context of Jamaica's legal system and Charter of Fundamental Rights and Freedoms Act 2011 and is currently on appeal to the Privy Council. However, the judges were particularly mindful of the strong public interest in promoting the flow of information particularly in the fight against organised crime. Similar sentiments have been evident in the English cases such as Bowman v. Fels (2005) EWCA Civ 226. However, it was of particular note that at a conference held in Jamaica in June 2017, judges and others were disquieted by the lack of evidence that the information provided by such reports could be adequately processed and translated into meaningful intelligence. One senior judge, actually involved in the case, who has subsequently conducted his own research was singularly unimpressed with the available results in other jurisdictions. The issue of proportionality may not be one upon which at this stage, the outcome can properly be determined, but it is certainly one that is likely to feature in discussion of what actually is in the public interest. A debate which has not yet taken off in the UK and, of course, is unlikely to do so while we are informed that all this intelligence is vital ammunition in the war against terror, corruption, tax evasion and so on.

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