The Crusade Against Money Laundering – Time to Think!

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A. Introduction

Crusades, jihads, call them what you will, have invariably served rather better the underlying agenda of their convenors, than their overt and popular justifications. While history does record that at least some stalwarts of the massacres, that have taken place in the name of God, actually did believe that they were doing the will of the Almighty, it is equally clear that the rather more sinister motives governed the actions of many. In truth, as human nature and the institutions of humanity appear to have changed little, it might well be that some of our modern crusades need to be evaluated and their justifications tested, if future generations are not to charge us with hypocrisy or worse.

Few countries have experienced or been keen to recognize the dangers of organized crime. While it is true, that for many decades groups of smugglers and what today we might identify as organized criminals have operated around the Mediterranean and then in the 'New World', it was not until the development of highly profitable trading in illicit drugs, that organized crime became more than a local problem. The menace created by this trade has been recognized and has probably impacted more on the richer consumer countries, such as the US, than anywhere else. Consequently, these rich and powerful countries have been well able to launch their own crusades against what by all standards is a most serious social, economic and political problem. While there were those, in the 1970s, who advocated asset forfeiture as one weapon that had not been used in the war against the drug cartels, it is only in the last decade that the importance of attacking criminal enterprises by removing or interdicting the proceeds of their illicit activity has become widely appreciated, and today is pursued by many governments and international organizations with the enthusiasm and single mindedness of the most ardent zealot.

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The notion that convicted or declared criminals should forfeit the fruits of their crime is not new. It is a simple principle which aptly reflects the view that a wrongdoer should not be allowed to benefit from their unlawful actions. Of course, in certain systems of law at different times the process of forfeiture has been extended to permit the confiscature of all the property of the criminal. Thus, in English law, until the Forfeiture Act 1870, the personal property of convicted felons, and in the case of treason even real property, could be seized by the Crown. Indeed, the concept of felony is traceable to the Saxon obligation to pay for a crime in yielding up in chattels or land the price of the wrong committed. While the early law was rather more concerned with providing 'compensation' for those harmed or wronged by a crime, in the feudal period, forfeiture effectively removed the wrongdoer, in some cases his family, from the feudal system and thus, the ability to perpetrate further wrongs. Furthermore, the forfeiture of property and the use that the Crown could make of a felon's land, served as a tax on crime. The law also allowed the Crown and then the victim to seize the chattel that caused an unlawful death, the idea being that this article was in some measure participant in the unlawful act. In other situations, history records the imposition of fines and other monetary charges on individuals or communities, seemingly for the purpose of disabling them from pursuing a certain course of action. Therefore, it is possible to identify examples in earlier systems of criminal justice designed to achieve much the same objectives as the panoply of measures that today are being ordained, and implemented around the world, to take the profit out of serious criminal activity and in particular organized crime.

Over the last decade, governments, international and regional organizations and law enforcement agencies have increasingly recognized that by interdicting the proceeds of crime, the very motive behind many serious criminal enterprises may be undermined. Furthermore, effective interception of the proceeds of crime may prevent its reinvestment back into the criminal enterprise and thereby cause significant liquidity problems for criminal organizations. Thus, today around the world governments are busy ensuring that appropriate legislation is passed and systems erected to enable the state to track, freeze and then eventually seize the proceeds of crime. Although the imperative behind this pervasive approach to serious crime was control of the illicit trade in drugs and narcotics, most countries recognize that the same principles apply with equal force to all criminal or subversive activity which is motivated by economic gain. With the globalization of trade and the rapid movement of persons, money and property around the world, there is an obvious need to provide for effective international mutual assistance. In most cases this can only be achieved if the relevant law, allowing for the interdiction of the proceeds of crime, is internationally pervasive. Hence, the significance that in particular Western states have given to ensuring that laws are put in place in countries throughout the world, upon which mutual assistance can be based. As a result, virtually every jurisdiction today is concerned with enacting laws or amending its existing provisions, to provide for the identification, freezing and seizure of the proceeds of serious crime, whether that activity has occurred within its own jurisdiction or elsewhere. Although in practice these laws have so far had little effect,

if judged on the basis of how much money has been removed from the criminal pipeline, the impact of in particular the regulatory and compliance requirements that need to be put on any one who handles another's wealth, is profound. The development of such obligations on financial intermediaries and their professional advisers has had serious implications for the way in which business can be properly conducted. Furthermore, the threat that the proceeds of crime may be confiscated, has given in particular organized crime another incentive to launder and hide its ill-gotten gains.

In determining how legislative and regulatory devices are to be fashioned and operated in the fight against money laundering and the international enterprises that are able to generate vast amounts of wealth through their criminal activities, it is appropriate to consider rather more carefully the real nature of the problem. Given the pace of developments, particularly within the G7 countries, OECD, United Nations and European Union (the EU),[1] it is arguable that many states have not had the opportunity to determine whether the almost standard model of legislation that has been ordained by these powerful organizations, is appropriate or not for their own circumstances. Little if any thought has been given to the suitability of essentially US orientated experience to a small state with a transitional economy, let alone a 'Third World' economy. For example, as we shall explore in rather more detail later on, the more significant problem facing transitional and developing economies is the outflow of funds that may well be associated with corruption or misappropriation. Given the essential instability of many of these societies and the status of those involved in the criminal or abusive conduct, it is most unlikely that the wealth will return to the country in question. Consequently, the typical money laundering cycle, upon which so much of the US approach to 'taking the profit out of crime' is absent and therefore it is appropriate to question whether the sort of rules and procedures designed in the West are wholly relevant.[2] Developing states are rather more concerned, once the facts come to light, invariably only after a change in leadership, about recovering at least part of the wealth that has been ripped out of or diverted from the national economy. Of course, much of this will gravitate to the stable 'end deposit' countries in the West, most of whom have no legal ability to

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[1] *See* The 1988 United Nations Convention Against Illicit Traffic in Narcotic Drugs and Psychotropic Substances, adopted by the Conference at its 6th Plenary Meeting 19 December 1988; the 1990 Council of Europe Convention on Laundering, Search, Seizure and Confiscation of the Proceeds of Crime; European Communities Council Directive of 10 June 1994 on Prevention of the use of the financial system for the purposes of money laundering (Council Directive 91/308). *See generally*, F. Baldwin and R. Munro (eds.)), *Money Laundering, Asset Forfeiture and International Financial Crimes* (Oceana 1991) (3 volumes) and T.M. Ashe and B. Rider (eds.)), *International Tracing of Assets* (Sweet & Maxwell 1998) (2 volumes).

[2] For a similar argument in regard to financial regulation *see* B. Rider 'Blindman's Bluff – A Model for securities Regulation?' in *Emerging Financial Markets and the Role of International Financial Organizations* (J. Norton and M. Andenas (eds.)) (Kluwer 1996).

return it, and probably even lesser political will to do so. For these and many other reasons, it is appropriate to consider whether the sort of legislation and the morass of regulation that rides on its back, that is being peddled by no doubt well meaning representatives of such bodies as the EU, Commonwealth Secretariat, UN, Financial Action Task Force (FATF), OECD and the like are as appropriate as they are made out to be.

B. Laundering of Wealth

The acquisition of and control over wealth is the motivation for most serious crimes involving premeditation.[3] This is all the more so when the criminal activity resembles an enterprise which inevitably requires capital to operate and with which to lubricate its aspirations.[4] Money, or rather wealth, in its disposable form, is therefore not only the goal of criminal enterprises, but the life blood of the enterprise. Therefore, until the profits of crime are taken away from subversive and criminal factions, we stand little chance of effectively discouraging criminal and abusive conduct which produces great wealth or, through its profits, allows power and prestige to be acquired. As soon as the state devises methods for the tracing and seizure of such funds, there is an obvious and compelling incentive for the criminal to hide the source of his ill-gotten gains, in other words to engage in money laundering.

Like most social, let alone economic evils, money laundering is nothing new. It is as old as is the need to hide one's wealth from prying eyes and jealous hands, and concern about the uses and misuses of hidden money is not just an issue in our century. Of course, the modern money launderer will no doubt adopt rather more sophisticated techniques than the gem carriers of India or the Knights Templar, but his objectives and essential *modus operandi* will be the same. The objectives will be to obscure the source and, thus, the nature of the wealth in question and the *modus operandi* will inevitably involve resort to transactions, real or imagined, which will be designed to confuse the onlooker and confound the inquirer.

It is not surprising that those who are tasked to follow the wealth in question whether for the purpose of taxation, restitution or confiscature,[5] will require the assistance of those who knowingly or otherwise facilitate the processes of laundering. Therefore, in recent years an increasing burden has been placed on those who handle

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[3] *See generally* B. Rider 'Combating International Commercial Crime' (1985) 6 *Lloyd's Maritime and Commercial Law Quarterly,* at p. 27.

[4] *See* B. Rider *Report on Organized Crime in the UK* (1993) Home Affairs Select Committee, HMSO and B. Rider and T.M. Ashe (eds.), *Money Laundering Control* (Sweet & Maxwell 1996) Ch 3.

[5] *See generally* T.M. Ashe and B. Rider, 'International Tracing of Assets' (1997) Vol. 1 FT Law & Tax.

other peoples' money and wealth to record transactions and even in some measure inquire into the provenance of funds and even the nature and integrity of a specific transfer. The legal and administrative burdens that have been cast upon bankers and other intermediaries are onerous and may well involve serious legal and other liabilities for non or deficient compliance. The growth of this particular form of 'facilitator' liability, has to be viewed in the wider context of policing objectionable financial transactions, whether such are merely designed to obscure the source of wealth or are fraudulent and abusive in themselves.

C. Why Launder?

The reasons why an individual, not to mention an organization, would wish to hide the source of money, or transmit it in a manner which obscures its ownership or character are legion. While a great deal of attention has been given to the vast profits that are being generated by the illicit trade in narcotics, it is dangerously misconceived to assume that the processes involved in money laundering cannot be, and are not, deployed just as effectively to wash and covertly transfer funds produced by other types of crime, or even activities which would not be generally considered criminal, but to which a certain amount of opprobrium might attach. There are pressing needs for 'secret money' not only in the underworld of organized and syndicated crime, but to service intelligence and security networks and to facilitate if not 'ordinary' commercial and banking transactions, at least activities which are not necessarily abusive. There are needs for 'unaccountable funds' in many situations and the processes which are involved in washing money can and are efficiently employed to create hidden reserves or secret money, and are then utilized to service and transmit such according to the requirements of those who desire them.

It must also be remembered that the purposes for which money is required, will influence, if not dictate, the transactions which are used to hide its true character and the way in which it is permitted to move. For example, those involved in facilitating the flow of capital from developing nations, in violation of currency and fiscal controls, may be able to operate with impunity and no embarrassment in other jurisdictions, especially those receiving the money in question. Therefore, there will be little need to ensure that the money surfaces covertly and there will be no requirement that the money should appear to have a legitimate origin. Indeed, when the money is escaping from a country which is seeking to expropriate wealth, whether pursuant to a programme of so called 'indiginization' or otherwise, those involved in such financial operations may even be held, by those whom they service and those outside the country in question, in high esteem. Furthermore, it must be remembered that although an economic embargo may well be considered an appropriate device to employ against a country that is considered to be in breach of

its international obligations, the perception in that country may be very different.[6] State endorsed, and even employed, 'sanction busters', Mr Ian Smith's Rhodesia, or 'Apartheid South Africa', let alone Saddam Hussein's Iraq, employ all the techniques of the money launderer.

However, where the funds are the result of criminal activity it will be necessary to ensure that each material element in the laundering process is covert and the money must appear seemingly clear, when it finally emerges from the pipeline. The purpose to which such funds are to be applied will also, to some degree, influence the processes involved. If money is to be reinvested in other criminal or subversive operations it will be important that the transactions which establish it, are not referable to other risk activity, but the money need not appear to those who receive it to be from a legitimate source. Where, however, the money is being used to penetrate an institution or organization, then it will have to not only be unconnected to the activity which generated it, but also be apparently acceptable to those in control of the relevant body. It should be obvious that the somewhat simplistic notions of money laundering that have been preferred in a number of recent reports and publications presuppose a clarity and simplicity of purpose that rarely exist.

It is not uncommon to find indictments by politicians, law enforcement officers and the media, of those who are thought to be involved in money laundering. It may well be a useful device, for those engaged in fighting serious crime, to persuade, at least those whose job it is to handle other people's wealth, that those who are prepared to assist criminals and terrorists to retain their ill-gotten gains and further their illicit enterprises are no better than the crooks they serve. Of course, when the money is the product of drug trafficking, or even a bank robbery, then the opprobrium that can attach to those who assist in the laundering process is justly deserved. However, it is important to remember that those most actively involved in providing such services may never transgress the law and in many cases the laundering may well involve funds that are not referable to a crime or other form of misconduct. The popular press has been wont to ignore this when criticizing the apparent failure of regulatory authorities to take effective steps to interdict what are assumed to be money laundering operations. Whether it was appreciated that the Bank of Credit and Commerce International and its various offshoots, were engaged in laundering monies which were not necessarily the proceeds of serious criminal offences or not, will in all probability remain a matter of debate for many years yet to come. However, it is often forgotten that the relevant authorities, even if they had such information in a reliable form, would have been hard pressed to have curtailed such operations through legal and coercive processes. Laundering the proceeds of drug trafficking is one thing, but merely assisting a leader of a developing country to

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[6] *See* B. Rider, *The Promotion of Co-operation in Combating International Economic Crime in the Commonwealth* (1980) Report to the Commonwealth Law Ministers' Meeting, Barbados 1980; Commonwealth Secretariat.

retain his wealth on a confidential basis outside his country, may be a very different issue. To say that even the knowing facilitation of such an individual's acquisition of wealth, by covert movements of substantial amounts of wealth, is an unsound banking practice where no specific crime is involved, is a statement that few central bankers would be prepared to support. Responsible banking is a vague concept, even in a wholly domestic environment. In an international context it is nebulous and is an entirely different issue than that of soundness.

D. Legal Prostitution?

Some countries have courted money and wealth on the basis that their legal systems will throw over its owners and their transactions a cloak of secrecy thicker and rather more impenetrable than the traditional rules relating to professional confidentiality. In some instances, an assurance of absolute secrecy has been marketed as a privilege which can be bought for either a relatively small registration fee or for the cost of opening a deposit. The original justifications for laws which extend the more traditional privilege between a banker and his customer, were no doubt acceptable. It is hard to find fault with any attempt to protect those who are being slaughtered by an oppressive and evil regime. However, other countries have not been slow to perceive the benefits of becoming a depository for not only fugitive and flight capital, but also dirty money. Countries in and around Africa, Latin America and increasingly South East Asia and the Pacific have been prepared to extend the privilege of secrecy not only to their oppressed, but also to their very rich neighbours. It is easy to criticize the naivety and worse of such countries, but prostitution says rather more about the state of society and its values, than the morality of the prostitute. There are countries which have become so isolated from conventional sources of development finance that their leaders, even assuming them to be men of honour, have but little alternative to seeking funds from those who require discretion. The laundering of money, in varying states of cleanliness, through national treasuries and government sponsored projects is nothing new. Some, such as the Government of the Seychelles, would appear to have made a decision to do rather more than stand on street corners! At perhaps a slightly less egregious level, the same pragmatic arguments can be made in support of raising revenue and expanding the economy, by offering the legal and other inducements to attract uncensored offshore business. Of course, some countries which have attracted perhaps rather more than their fair share of criticism and have got relatively fat on servicing secret accounts and the like, have in recent years shown signs of contrition. A cynic might well observe that the catalyst in the conversion, if not the reason, was the extent to which the bankers were themselves being exposed to frauds both as the victim and increasingly, in foreign jurisdictions, as the more or less innocent abettor.

This is not the place to enter upon a discussion of the economics, let alone the

morality, of secret money in all its manifestations. Such may, with confidence, be left to the economists and theologians. Instead we seek here to discuss only dirty money, where the issues are relatively clear, although far from settled. Dirty money is money, or some other forms of wealth, that is derived from a crime or other wrong. Of course even such a simple and 'unlawyerly' definition opens a Pandora's box. First, even if we can determine a reasonably clear definition of money the notion of wealth is much wider. It is not difficult to perceive the ramifications of a concept of wealth, broad and ingenious enough to encompass the various products and derivations which may in a certain place at a particular time have a peculiar value of their own, or at least signify such a value to specific individuals. For example, there have been cases where inside information was used as a valuable commodity, within what was in essence a money laundering operation, to purchase cocaine. Those who have encountered the various underground banking systems, which will be referred to later, will be aware that tokens, ranging from simple passwords to coloured sugar lumps and marked bank notes can be used to facilitate the transfer of money. Such tokens, at the relevant time, within the processes of the particular 'banking' systems will often represent and for all intents and purposes be, great wealth.

Perhaps from a lawyer's, not to mention a policemen's standpoint an even more vexing issue is when an item of wealth, presupposing that it is capable of being satisfactorily itemized or appropriated to a particular transaction, is the product of an act or series of acts, or even, in the case of some generous legal systems, a continuing enterprise? To some degree the issue is not just one of tracing, but rather referencing. The wealth in question may not necessarily be produced by the relevant conduct or crime, it may be sufficient that it is associated with such conduct to acquire the sufficient degree of taint. The legal process will generally require a much higher standard of relationship than might be acceptable at the level of, for example, an intelligence operation. Even if we pass over this very difficult matter of relationship and causation, we must enter into an even more controversial area. That of determining what sort of conduct will be sufficient to justify describing the money as 'dirty'. Moral values are not necessarily uniform and attitudes will change from one society to another.

It might well be that although the conduct giving rise to the funds is regarded as a criminal offence in the country concerned, the same conduct would not be regarded as even improper elsewhere, and certainly not in the country where the money comes to rest. It is hardly necessary to descend into examples, as a moment's thought will throw up scenarios involving religious and racial activities which whilst amounting to criminal offences in a particular state, would not generally be considered improper.

The importance of this issue should be obvious when one considers the vast amounts of money that were made by the Cosa Nostra during Prohibition in the United States. If such laws existed today in the US, and such funds were transferred to foreign banks would this amount to laundering dirty money? Perhaps viewed from the perspective of the US legal system the answer would be yes, but a different view would surely be taken in most other countries. Even when the wealth in question is

the proceeds of what might be considered an ordinary criminal offence, is it appropriate to designate it as dirty in all cases, and if so, for how long and to what state of derivation? Common sense, no matter what the economists let alone the moralists, might argue, indicates there must come a point in time when the taint that attaches to the money loses its relevance.

Even when those responsible for the crime that created the profits, or those who are charged with laundering it, are unsuccessful in giving it an aura of legitimacy, there must come a time when longevity or complexity of its history, accords *de facto* legitimacy. Indeed, given the vast sums of money that we are told are at any point in time passing through the laundering pipeline, it is perhaps good for society that most criminals, and certainly those with greater sophistication, evidently yearn to become or at least appear to be, legitimate and thus, support our own value system and financial structures. While wealth can to some extent assume respectability, there is an obvious incentive for those desiring such status, to bring 'dirty money' back into the conventional and lawful economy. Therefore, it can be argued that procedures and laws which inhibit this repatriation of wealth to the lawful economy, by perpetuating the taint that attaches to the proceeds of crime, are disadvantageous.

The simple definition, which we have adopted for dirty money is broad enough to encompass money that is in some way referable to a civil wrong. It is true that the proceeds of every imaginable civil wrong could not be considered to be 'dirty'. Such money may, to use another epithet, be 'hot' but it will not be considered dirty. There are, however, situations where the proceeds of a civil wrong can, and should be regarded as dirty. While it is difficult to be specific, it is submitted that it is appropriate to regard funds that are the proceeds of a civil wrong involving a degree of dishonesty as worthy of attracting the designation 'dirty'. It is not in every such case that the conduct would amount to a criminal offence. However, where the funds have been created by conduct lacking probity, it would not seem unjustified to regard them as dirty. Although perhaps little other than institutional attitudes are influenced by such designations, there are practical considerations in not distinguishing too sharply between the proceeds of a specific crime and something which may only give rise to a claim in the civil courts.

E. How to do it!

So far we have avoided attempting to set out what money laundering involves. We have spoken often in the same breath of money laundering, secret money and dirty money, without attempting to establish the interface between the process and the product. Definitions of money laundering range from the authoritative language of statutes to the punchy comments of judges. For our present purposes, and at the risk of adding yet another to the lists, it amounts to a process which obscures the origin of money and its source. Of course, this is a wide approach which would encompass

transactions designed to hide money as well as wash dirty money into clean. It is the processes of transfer and misrepresentation which constitutes the *modus operandi* of washing and secreting wealth. Unfortunately, because of the attention that has been given, understandably, to the fight against drug cartels, the topic of money laundering has become linked if not captured by the debate on tracing and confiscature of the profits from the illicit narcotics trade. Consequently, most discussions of money laundering focuses almost exclusively on this, and ignore the wider issues. The author has deliberately attempted to avoid placing emphasis on the drug related aspects of the subject, although from the standpoint of statutory law and in particular systems for international co-operation, it is in this area that most, if not all, significant steps have been taken.

Discussion of the processes involved in money laundering has been limited and derivative, outside the US. Few have recognized that even the now traditional process of laundering involves a series of actions and not a seamless process. Perhaps this is understandable given our experience in Great Britain with regard to other areas of asset recovery and tracing. While establishing the derivation of property pursuant to a tracing claim is nothing exceptional, such cases rarely involve the structuring of transactions solely for the purpose of avoiding investigation. Obviously, there are cases in which considerable care has been taken to frustrate inquiry, particularly where the funds in question have been created or diverted by systematic fraud. However, in Great Britain, at least, until comparatively recently, the need to examine deliberate and sophisticated attempts to obscure ownership and control were rarely encountered, by lawyers and for that matter policemen. Thus, we still tend to a somewhat simplistic notion of the laundering process, even in the case of narcotics trafficking. Laundering will involve a series of stages and different legal and enforcement considerations will naturally be applicable to each.

Many forms of crime and misappropriation, will produce quantities of cash in relatively low denominations. This will need to be consolidated into a form of wealth which can be more easily transported, particularly out of the jurisdiction. The methods of achieving this are limited only by the ingenuity of the launderer. Of course, high turnover and relatively low investment enterprises which can be used to facilitate such a process will be especially attractive, particularly if they are outside the conventional banking system. Those involved in consolidating cash at this stage of the laundering cycle will be most concerned to avoid the creation of any external record which could be used to initiate an audit or paper trail leading to subsequent stages or layers of the operation.

Once the money has been converted into a form which can be transferred or smuggled, it will often be moved offshore. This has a number of practical advantages. First, it will often place the funds beyond the legal reach of the authorities in the jurisdiction where the activity giving rise to the profits occurred. Even if the relevant laws are capable of application on an extra-territorial basis, and very few are, by involving another jurisdiction significant practical barriers are placed in the path of investigators in obtaining and securing evidence which would be admissible before a court. As has already been mentioned, certain jurisdictions are

willing to offer banking and other facilities on the basis that secrecy will be assured. Sadly, there are countries which have been prepared to facilitate the receipt of money no matter what its source. Once the money has been taken offshore it can then enter either directly, or more likely, indirectly into the conventional banking system. Obviously, the more discreet this process is, the better for the launderer. Hence the attraction of jurisdictions that offer either secrecy or in which the level of corruption is sufficient to ensure effective non co-operation with foreign agencies.

Once the money has entered the conventional banking system it can move through usual channels. The launderer's objective will be to create a complex web of transactions, often involving a multitude of parties, with various legal statuses in as many different jurisdictions as possible, through which the money will be washed on a wave of spurious or misleading transactions. The purpose of this is to confuse even the most dedicated and well resourced investigator and to defeat any attempt to reconstruct a money trail. Given the ease with which companies and other legal entities may be created in countries throughout the world, the launderer's only constraint is likely to be financial or the time at his disposal.

On the other hand it must be remembered that the laundering of money is a cost and both he and his principals will only wish to expend what is necessary and prudent to ensure the relevant funds remain beyond the reach of law enforcement agencies or others interested in locating them. Obviously, the amount of effort and expense that will be required for laundering, for example the profits of a major drugs operation, would be rather more than that required for frustrating a regulatory authority, investigating a case of suspected insider dealing. It must also be remembered that while the money is in the pipeline it is unlikely to be fully usable. Consequently, most launderers are not only mindful of the costs involved in the actual process, but the length of time that will be involved in washing the money. Given the importance of ensuring the unreliability or preferably the unavailability of records, upon which an audit trail can be based, there is an increasing tendency, for those involved in money laundering to resort to the old practice of cash transfers and bulk movement of currency. Containerization has provided the launderer with a relatively cheap and statistically reliable means of moving large amounts of money around the world without having to risk the creation of conventional records. Thus, the circumstances will to some extent influence the extent of the laundering process and its sophistication. Laundering operations will range from the most simple manipulation of accounts to structures involving hundreds of companies, with thousands of bank accounts. However, it must always be remembered that the larger the organization that is employed to launder the money the greater the costs and the higher the risk of detection or of something going wrong.

The transactions which are used to obscure the source of the relevant funds will be structured in such a manner as to render it almost impossible for admissible evidence to be obtained, which would allow a court to establish the derivation of the money. Law enforcement agencies often refer to this process as layering, but this rather implies that with diligence the true facts may be uncovered through a progressive investigation. While there have been cases where dedicated, extremely lucky, and

well resourced investigators have been able to peel off a series of layers to reveal what in fact took place, in the case of the more sophisticated structures, the concept of layering is too simplistic. Certain operations are structured in a manner which resembles a mosaic or kaleidoscope rather than a layer-cake. Transactions will not be progressive, but parallel, establishing mutual obligations which can be married or crossed, often on a contingent basis, and which would not be substantiated to the satisfaction of a court applying conventional legal rules. It is, however, true, that in so far as the notion of layering is often used to conjure up a picture of a stone gradually dropping to the bottom of a pond, the longer money remains in the system the more difficult it is to follow and identify it. Furthermore such an analogy makes the important point that the money in flight, will be most noticeable when it first 'splashes' into the pool. It is at this point of entry into the conventional banking system that regulations designed to create an 'audit trail' are likely to be most effective.

In recent years there has been much discussion about the impact of technology on the processes of money laundering. There can be little doubt that criminal organizations have been and are as well placed as anyone else to take full advantage of developments in technology and in particular communications technology. The advent of cellular telephones which have the capacity to reach around the world afford to criminal organizations a communications system that few could have dreamed would exist today, a decade ago. Added to this, the development of electronic systems which facilitate and greatly speed up transactions, the ever increasing significance of the Internet, and the meaninglessness of traditional notions of transaction in the realm of cyberspace, all serve to exacerbate the profound problems confronted by those seeking to establish the providence of wealth.

Once the money has been agitated, to the satisfaction of the launderer, it will be necessary to place it in an 'end deposit'. Of course, the nature of this 'end deposit' will depend upon a variety of factors. However, in many cases it will be desirable to return the money to the jurisdiction in which it was first generated. Those responsible for making such profits will often wish to enjoy at least part of the fruits of their endeavour, and frequently, where there is a continuing enterprise some money will be necessary to fund it. Therefore, the launderer may well be required to ensure that at least a proportion of the money is repatriated to the country of origin. Thus, it will be necessary for him to create a transaction, or more likely a series of transactions, which will bring the 'clean' money back home. This can be achieved in a number of ways, but it will be desirable to achieve the repatriation in a manner which can be explained and which will justify the surfacing of the wealth in the hands, or under the control, of the relevant principal.

A technique which has been employed to some effect is the incorporation of essentially shell companies which can then 'sell' their securities to 'overseas investors'. The 'overseas investors' will be the money launderer puppets. The purchase of such securities, which will be properly documented, will provide a vehicle through which the cleansed money can flow back into the control of those who established the issue. It is important to recognize the use that such companies

may be put to in the context of money laundering operations. There have been cases where the existence of operations such as this have been mistaken for high pressure selling frauds or 'boiler room' scams. Although the *modus operandi* may be somewhat similar, especially at the early stages, the purpose and implications of the operation are very different.

It must be appreciated that money laundering involves a series of stages and each stage will have its own characteristics. Those charged with the detection and investigation of such matters need to be alerted to the implications of a process which will have been carefully designed and structured with the objective of minimizing exposure and, thus, the risk of interference. Sadly, legislators have often failed to appreciate the complexity of money laundering, both in terms of its character and objectives. They have taken for granted a somewhat stylized model which rarely conforms to reality. The deficiencies of essentially Western crafted legislation are, perhaps, best shown in this regard in the context of underground banking systems.

F. Going Underground

Underground banking systems have developed to a level in some societies, where they rival in terms of efficiency and capability the conventional banking system. While many such systems have developed within ethnic societies because of distrust for the host country's institutions, many have a history that is rather more complex and reflects rather more indigenous social and cultural factors. The importance of underground banking systems on money laundering operations has become more widely appreciated in recent years and, given the dispersal of certain ethnic communities, there is today little doubt that such systems exist on an international basis and play a not insignificant role in the laundering of dirty money. Given the involvement of certain ethnic groups in highly profitable crimes, such as drug trafficking, the significance of these traditional banking systems and more recent adaptations and imitations, should not be underestimated. Further, as governments are increasingly recognizing, given the distorting effect that the underground banking system can have on money flows, it cannot be ignored by those who operate wholly within the conventional banking system. Most underground systems will also, at some stage, have to interface with conventional financial or banking institutions. There are innumerable types of underground banking ranging from highly sophisticated structures operated by overseas Chinese groups to relatively informal barter and smuggling based operations in Africa. Most systems do not involve the movement of cash and depend for their efficacy on tokens. The Chinese 'Chit' or 'Chop' system and the Indian Hawalah operate primarily within defined racial groups, often with some additional bond of a tribal or geographical nature. They rarely involve the physical movement of cash, or for that matter anything other

than tokens which are regarded within the special structure of the system as the equivalent in value to the relevant cash sums. The Hawalah system is rather more a system of compensation through related transactions, but given the facility for aggregation, actual payments between those 'funding' the systems are kept to the minimum. The efficiency of a paperless and practically recordless banking system which is capable of transferring substantial amounts of wealth is obviously an attraction for those involved in money laundering. Money launderers have emulated the underground systems to some extent, and have shown an increasing willingness to make use of existing systems on a commercial basis. Laws and enforcement policies which have been fashioned to address money laundering through conventional banking systems are of little practical relevance in the case of such underground systems.

If the picture that many have of money laundering is a little misconceived, it is probable that so is the general conception of the type of individual engaged in money laundering. Since the days of Meyer Lansky there have been individuals who are prepared, for a fee or part of the action, to provide their services to whoever may wish to have their money hidden or laundered. Recent investigations have identified individuals who have been prepared to service the financial interests of terrorists in Northern Ireland, bank robbers in England, drug dealers in Miami and fraudsters in Hong Kong, through the same offshore bank in the Caribbean. One such person at the material time had diplomatic status. Many of these individuals are experts in financial and corporate matters and have created a network of corporate and other entities in jurisdictions not known for their willingness or ability to promote financial integrity. In a number of investigations, such individuals have shown not just a willingness to become involved in laundering hot and dirty money, but also to facilitate other dubious financial and commercial transactions. In particular, they have been prepared to utilize their corporate identities and offshore banking facilities to front or give credibility to those engaged in advance fee frauds and the like. Thus, the modern money launderer is unlikely to be involved as a member of a criminal organization, he is much more likely to be on the periphery of the financial services or banking industry or a professional adviser, such as a lawyer or accountant, who is prepared to make his services available to whoever is willing to pay.

G. The Law Steps In!

Given the justifiable concern of the US and other Western states about the implications of the illicit trade in narcotics, and the elevation of their fight against organized crime to a matter of national security, it is not surprising that there is no shortage of legislation seeking to inhibit the laundering of the proceeds of crime. Much of this is related to laws which seek to confiscate and forfeit wealth that can be shown to be derived, directly or indirectly from serious criminal activity. Indeed as

we have already pointed out, the existence of such provisions, affords criminals with an incentive to resort to what is often a relatively expensive and risky laundering process. Of course, there are other devices within the legal system to deprive criminals of the benefits of their illicit enterprise, ranging from taxation to the imposition of fines. It is, however, the fear, rarely the reality, of confiscation under these relatively new laws that is thought to have increased the quantity of money laundering activity. Whether this perception is true or not is questionable, it might well be as simplistic and naive as so many other perceptions in this area of law enforcement.

The determination as to how successful confiscature laws are, anywhere in the world, is an extraordinarily difficult analysis. The application and administration of a legal procedure can be tested and found to be efficient or otherwise, but the assessment as to what impact it makes on the global activity against which it is directed, presupposes an ability to quantify the extent of the relevant activity. Although various agencies and organizations have sought to estimate the value of illicit narcotics these tend towards being little more than guesstimates. This is even more the case with regard to the amounts of money that are likely to be derived from other criminal and anti-social activity. What is clear is that many countries, particularly in the developing world and economies that are making a transition from a collectivist system to a market based structure, have very significant underground and shadow economies. This tends to further obscure the analysis, and renders the quantification of the 'total problem' largely one of speculation. What is tolerably clear is that the various initiatives in Britain have not been particularly effective, judged against any measure. It has been publicly stated by a former senior official of the British intelligence services[7] that in recent years over £200 billion of crime related money passes through the financial institutions of the City of London each year. Whether this is accurate or not, the present writer has no means of knowing, but cast alongside similar statements from senior US officials, it appears to be reasonably credible. However, for the sake of argument let us discount the suggested figure by half. This would mean that since the introduction of confiscature laws in Britain in 1986, on this analysis, well over £1,000 billion sterling have been 'laundered'. The amount of money 'interdicted' during this period is in the region of £40 million. In very rough terms this means that the British state has been able to take out, 0.0004 per cent of the criminal money that has flowed through London. Of course, if the former senior official from the intelligence services is correct, the percentage is closer to 0.002 per cent. Not bad odds! If you look at the picture from an international perspective, the belief that confiscature of the proceeds of crime can play the sort of role that the Americans and the various international agencies contend, is seen to be ridiculous. Although accurate statistics are hard to come by

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[7] '£200bn in drugs cash heads for London markets' in (1995) 19 November *The Sunday Times*.

and in many countries do not exist, as a calculated guess, in 1997 in the region of £250 million was confiscated around the world, most of it in the US. Various representatives of the US Government have estimated the annual global amount of money associated with criminal activity as being not far short of £2000 billion.

This is not, however, the place to discuss the many national, regional and international initiatives against the profits of crime. Suffice it to record that there are few countries that today have not enacted laws, or which are not in the course of enacting laws, which provide for the tracing, seizure and confiscature of at least the proceeds of drug related crime, if not other forms of serious crime, and which do not at least to some extent criminalize attempts to launder the proceeds of such criminal activity. These laws have been represented, primarily by the West and those international agencies and organizations which tend to reflect the priorities of the developed world, as vital instruments in protecting society against the ravages of the international criminal and organized crime. Even assuming that those who propagate such laws actually believe this, the evidence clearly shows that such laws have had little impact on either individual criminals or their organizations.

Specifically in regard to money laundering, the laws that have been peddled around the world operate at three levels. First, most impose obligations on those who manage other peoples' money to record and report transactions over a certain value to the authorities. Such laws are aimed at photographing the 'splash' to which we have already referred, when the money in question enters or moves within the conventional financial system. Secondly, there are laws making it a criminal offence to do anything in furtherance of the laundering process, knowing or suspecting that the property in question is the proceeds of the crime. Thirdly, there are various compliance type obligations imposed upon those who regularly handle other people's money. Typically, these impose obligations to know who the relevant customer is, record transactions and to a greater or lesser degree satisfy oneself that the transaction in question is proper. Of course, as has already been pointed out these laws are invariably supported by other provisions both in legal and regulatory terms. Indeed, it is important to look at the specific laws designed to address money laundering in the wider context of the general criminal law and in particular the regulatory system pertaining to financial and banking institutions.

Together with determined and on the whole relatively enthusiastic domestic initiatives against money laundering, there have been a host of programmes designed to promote and facilitate investigation of financial transactions and in particular international mutual assistance. In many cases these have manifested themselves, domestically, in new laws allowing the use of exceptional powers of investigation and other forms of legal coercion to be exercised on behalf of other states. In fact, it is the international crusade against the illicit trafficking in drugs and thus, the laundering of the proceeds of such crimes, that has been the catalyst if not the *raison d'être* for the many and very significant developments that have taken place in recent years, politically, institutionally and legally in regard to international mutual assistance in criminal matters.

Nevertheless, according to the most informed sources, and increasingly the

intelligence agencies which are beginning to emerge as important players in the game, the war is still being lost. The fact is, whether we like it or not, the traditional criminal justice system which is in effect what all these initiatives is built upon, has in virtually every country failed to deliver with the predictability and frequency, so as to justify public confidence in its efficacy. We need only consider the seeming inability of the ordinary criminal law and its agencies, including the courts, to deal effectively let alone economically with serious financial crimes. The problems involved in dealing with a serious case of money laundering are likely to be even greater. The reality is that the records clearly indicate that our crusade has failed and will, if judged according to traditional criteria, continue to do so. Even though it is manifest that our weapons are practically ineffective, there is a widespread failure in law enforcement circles to acknowledge this, at least publicly, and there are sadly so many in the system who have a vested (often personal) career interest in not speaking out. The situation is made worse by the inability of the media to appreciate other than the most obvious sensational issues, the short-termism of politicians and the paucity of in depth work in academia. All this hardly comports with the bellicose statements we increasingly hear from politicians and statesmen.

In the US and one or two other jurisdictions, reliance is not placed wholly on the criminal law, and civil as well as administrative procedures have been utilized to take away the proceeds of crime. There have even been attempts to use the civil law to improve enforcement of anti-money laundering laws and in particular reporting obligations. While it is clear that these initiatives have achieved some results in the context of the US legal system, it is far from certain that they can be transported with any real prospect of success to other common law systems, let alone civilian legal systems. By the same token, reliance on administrative and regulatory procedures produces patchy results and the indications are that these, no matter how appealing intellectually, are little more than inhibitions or additional costs to the launderer. Of course, this is not to say that measures designed to make it more expensive to launder money will not have a discouraging and adverse effect on those desirous of using a particular jurisdiction to launder money. However, the result will in the ultimate analysis be merely that we move next door.

Given the nature of the practices we have been discussing and in particular the complexity of the financial and commercial systems in which much money laundering takes place, it is not surprising that increasingly those who handle other peoples' money have been placed in the forefront of attacks on money laundering. To some extent this was foreshadowed by strategies adopted in the US to deal with matters such as unfair trading practices and fraud in the financial services industry, over 30 years ago. Putting the bankers in the front rank is nothing new. Of course, it is a very unpleasant place to be, particularly if you are ill-prepared, ill-advised, unsupported and probably entirely sacrificial.

Therefore, whether through notions of conspiracy, aiding and abettor law or facility liability we have increasingly exposed those who handle other peoples' money to liability. In the main this has so far been civil, administrative or disciplinary, but there are instances where the full force of the criminal law has been applied. Given

the limitations of time and space, here we will deal only with a series of cases that have been decided mainly by the English courts, imposing civil liability on those who facilitate transactions which we would readily identify as laundering. It is important to appreciate, that most Commonwealth jurisdictions and for that matter other common law jurisdictions would find this development of the law at least persuasive and there are indications that even countries that adhere to civilian law would also follow suit.

H. Shifting Responsibility

It is possible to conceive of a number of scenarios where civil liability for, for example, conspiracy or fraud, might be a risk in a money laundering operation. However, it is the developments which have taken place in the law relating to constructive trusts that have placed those who handle other peoples money in real jeopardy. A significant proportion of cases before the Chancery Courts today involve attempts by persons who have been defrauded by another, to impose liability on others, such as bankers or financial intermediaries, who in some way or another facilitated the fraud. There are clear advantages in pursuing the facilitators of transactions who are often relatively well funded, more susceptible in practical terms to the jurisdiction of the court, and often because they are regulated or at least subject to some kind of professional supervision, bound to keep and maintain records. In other words, they are easy and relatively wealthy targets who are almost certainly not going to adopt the tactics of a 'real' fraudster.

The recent flood of cases seeking to impose civil liability on those, which might broadly be described as 'fiduciary facilitators' are based on a principle of law most clearly set out by Ungoed Thomas J in *Selangor United Rubber Estates v. Cradock.*[8] In this case, the learned judge referred to an established principle of equity, that where a person knowingly participates in another's breach of trust, he will be regarded as standing in the same place as the trustee. While there has been much discussion in the books and cases as to the exact nature of this liability, and whether in all cases it is properly considered a constructive trust relationship, suffice it to say in this context, there would appear to be only two problems in fashioning this rule to become a most effective weapon against the money launderer.

The first question relates to the sort of misconduct on the part of a fiduciary which will have to be identified in order to bring the principle into play. Most of the cases have involved either a conventional trust relationship, or at least something so close as to make little practical difference. It would seem, however, that the property diverted or misappropriated by the trustee must be capable of sustaining a proprietary or tracing claim. This point arose in the interesting case of *Nanus Asia*

[8] [1968] 1 WLR 1555.

Co. Inc. v. Standard Chartered Bank.[9] Although the circumstances of the case are somewhat complex, it is sufficient to point out here, that the Hong Kong Court was required to determine whether the Standard Chartered Bank was in a position analogous to that of a constructive trustee in regard to profits from insider dealing in the US made by a Taiwanese who with an employee of Morgan Stanley had misappropriated price sensitive information from Morgan Stanley, and then traded on it on the New York Stock Exchange. There was no problem in this case in regard to the bank's state of knowledge as it had already been joined in civil enforcement proceedings in New York.

The Hong Kong Court held that proceeds of the abuse of inside information were 'held' by the Standard and Chartered Bank on trust for the US authorities and various other claimants in the US. At the time, some thought this decision, although welcome, went somewhat further than the English law, as it was not thought that the misuse of confidential information let alone mere inside information was capable of sustaining a trust relationship, which was thought to be a prerequisite for a viable tracing claim in equity. The matter was before the Court of Appeal in Singapore, in *Sumitomo Bank Ltd. v. Kartika Ratna Thahir.*[10] This case involved monies held in a bank account in Singapore which, it was alleged, were the proceeds of corruption in Indonesia, a jurisdiction which incidentally does not have trust law as such. The Singapore Court of Appeal had no difficulty in rejecting the English decision which was thought to rule out a tracing claim for bribes and imposed a constructive trust. This case was followed by the Privy Council in the dramatic case of *Attorney General for Hong Kong v. Reid.*[11] In this case, the Hong Kong Government attempted to recover property in New Zealand which had been laundered by Warrick Reid, the corrupt former head of the Commercial Crime Unit in Hong Kong. The Privy Council endorsed the approach of the Singapore judges and, on the basis that equity regards that which should be done as already done, permitted a tracing claim. In the contemplation of equity, the monies that Reid owed, by way of an accounting, to the Hong Kong Government were already 'owned' by Hong Kong and could therefore be recovered through a tracing order. Lord Templeman stated in no uncertain terms, the law must prevent 'the proceeds being whisked away to some Shangri-La which hides bribes and other corrupt monies in numbered bank accounts'. Subsequent English decisions have tended to follow this approach, such as Laddie J's decision in *Nelson v. Rye.*[12] The Australian Courts have allowed a tracing claim where there is use of assets, including opportunity, by a person in a fiduciary position, although not where there is a mere breach of the duty of loyalty.[13]

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[9] [1990] 1 HKLR 320.
[10] [1993] 1 SLR 735.
[11] [1994] 1 All ER 1.
[12] [1996] 2 All ER 186.
[13] *Warman International Ltd. v. Dwyer* [1995] 69 ALR 201.

There has been considerable discussion as to the requisite state of knowledge for liability. The cases have indicated two basic standards, one requiring subjective knowledge, and the other a rather more objective or constructive standard. It was thought that the distinction could be justified in terms of whether the third party who facilitates the breach of trust, comes into possession of the relevant property, or simply facilitates its control or retention by another. In the first case a more objective standard was considered appropriate, and knowledge of facts which would put a reasonable man on notice that something dishonest was afoot would be sufficient to justify liability akin to that of a trustee. On the other hand, where the participation of the third party does not extend to possession of the property, it was thought that the requisite degree of scienter should be actual knowledge. In view of recent cases, it would seem that the question of knowledge is rather more bound up with the nature of liability that is being imposed. Where the third party does not come into possession of the trust property or its proceeds, it is difficult to conceive of him as a constructive trustee, or for that mater as having any status which would involve a proprietary nexus. The liability of such a person for participating in the breach of trust will be personal. In *AGIP (Africa) Ltd. v. Jackson,* the Court of Appeal[14] found no difficulty in regarding a chartered accountant who had facilitated the laundering of proceeds of a fraud, by incorporating companies and opening bank accounts in the names of these companies, liable as if he was a constructive trustee and thereby holding him personally liable to restore the funds in question. Of course, in such cases the liability is personal to the defendant and does not involve a proprietary liability. In this case, the court found that the persons concerned had acted dishonestly. He knew of facts which in the circumstances made him suspicious, but he then deliberately refrained from making the inquiries which an honest man would have made and which would have easily uncovered the fraud. Although the cases do indicate varying qualities of knowledge, it would seem the better view today that before a third party can be held liable as a facilitator the court will have to be shown that he knew the facts or deliberately turned a blind eye and then acted with a lack of probity. The Privy Council in *Royal Brunei Airlines Sdn Bhd v. Philip Tan Kok Ming*[15] handed down an opinion which does bring some clarity to this area of the law. The Privy Council emphasized that the liability of a person who assists, or procures a breach of trust, but who does not himself actually receive the property in question, is based on his dishonesty. The Privy Council considered it matters not whether the trustee has himself been dishonest or not. Furthermore, the probity of the facilitator is to be judged, in the opinion of the Privy Council, on an objective basis. The test was whether he had acted in a way otherwise than an honest man would have in the circumstances. This would invariably involve conscious impropriety on the part of the facilitator, rather than mere negligence let alone

[14] [1991] 3 WLR 116.
[15] [1995] 2 AC 278.

simple inadvertence. However, a person might well be considered to be acting dishonestly for the purpose of imposing liability, where he recklessly disregarded the rights of others. The Privy Council underlined that in determining whether a facilitator had acted dishonestly his actual knowledge at the relevant time had to be considered by the court and this was a subjective issue. What might have been known by a reasonable man in the position of the facilitator might be probative but was not conclusive. Furthermore, the personal and professional attributes of the facilitator must also be considered, in determining what he did and for what reason. Thus, the prospect that a banker or financial intermediary could be held personally liable in the civil law for negligently participating in money laundering operations appears to be receding. However, the position is still not entirely certain, and the courts are plainly unsympathetic to those who become involved in such operations. Speaking of the defendants in, *AGIP v. Jackson*, Millet J observed: '[T]hey made no enquiries because they thought that it was none of their business. That is not honest behaviour. The sooner that those who provide the services of nominee companies for the purpose of enabling their clients to keep their activities secret realize it the better.'

The inter-relationship between the obligations of due diligence cast upon those who handle other people's money and the willingness of the courts to impose liability for knowing participation in breaches of trust, has yet to be addressed. Obviously, the more information that intermediaries are required to obtain and test, the more onerous will be their responsibilities, not only in regard to compliance with the civil law, but also in regard to their duties under the criminal law. The more that an intermediary is bound to know about its client, the greater will be the obligation; for example, in the context of financial services law, to ensure that financial advice is not only carefully given and researched, but is suitable to the circumstances of that particular client. By the same token, the more information is required according to due diligence and compliance procedures the more difficult it will be for an intermediary to resist allegations that it did know, or at best turned a blind eye, to its involvement in a breach of trust. Intermediaries and professional advisers are placed on the horns of dilemma, they are pressured from a variety of irresistible sources to create more information which will fix them with greater knowledge on the one side, and yet on the other they are being required to assume almost responsibility for the integrity of transactions, on the basis they had knowledge or should have had knowledge of the relevant facts. It is not at all clear that even the creation of internal barriers to the communication of information, within an organization, such as a Chinese Wall, would be effective in all situations. The courts have not been sympathetic to such devices,[16] and in any case the liability of the institution as a whole may be unaffected by such arrangements. The courts have shown a willingness to attribute knowledge on the part of an official to the organization as an entity[17]

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[16] *See Lee (David) & Co. (Lincoln) Ltd. v. Coward Chance* [1991] Ch 259 and *Re a Firm of Solicitors* [1992] 1 All ER 353.

[17] *See El Ajou v. Dollar Land Holdings Plc* [1994] 2 All ER 685.

and in a recent case[18] the House of Lords went very far in attributing the mind of a relatively junior employee acting outside any vestige of authority to his employer.[19]

It is also unclear as to what the relationship is between the civil law and the mechanisms established under the relevant provisions in the criminal law relating to the reporting of suspicions to the authorities. It is certainly arguable that the reporting of a suspicious fact to the police or even perhaps an internal compliance officer would be sufficient to bring into play the civil law relating to knowing receipt, if not knowing assistance in the breach of trust. It would be difficult for a banker who considers it appropriate to report his suspicions to the police, to argue that he did not have a sufficient basis for suspicion in the civil law particularly after the opinion of the Privy Council in *Royal Brunei Airlines Sdn Bhd v. Philip Zan Kok Ming*. While the consent of the police to continue with a particular transaction might well be a good defence to a subsequent charge of money laundering, it is not at all clear that it would be an answer to a civil claim. As we have seen the statutory provisions giving immunity from civil liability for reporting a suspicion to the authorities, only relates to liability that is consequent upon a breach of contract or violation of a duty of confidentiality. They do not address the issue of breach of trust. In *Finers (a Firm) v. Miro,*[20] both Mummery J at first instance and the Court of Appeal thought that the most appropriate course for a solicitor who was worried that he might find himself in the same position as the accountant in the *AGIP* case, was to seek out and inform those who he considered might be beneficially entitled to the money in question of his suspicions. Full and frank disclosure is generally the best means of avoiding a conflict of interest and there can be little doubt that a person fearful that he may be a prospective constructive trustee would be well advised to appraise the beneficiary of the circumstances. Of course, in the context of money laundering this may not always be a particularly practical or sensible approach. Furthermore, there is a real danger that a prospective constructive trustee in such circumstances may be accused of tipping off the beneficiary that an investigation into a possible offence is under way or is about to be initiated. It is thought by some that the best course of action for a person who has received funds or who may be a facilitator is to apply to the High Court for instructions, under Order 85 of The Rules of the Supreme Court 1965, before making a report of his suspicions to the authorities. It is hard to see that an application to the Court would be considered 'tipping off' whether a report has been made or not, unless the application was a sham. It is tolerably clear that an intermediary cannot refuse to comply with an instruction given by his client, even if he suspects him of being a money launderer, unless he has firm evidence of misfeasance or breach of trust.[21]

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[18] *Director General of Fair Trading v. Pioneer Cement* [1995] 1 All ER 135.

[19] *See also Meridian Global Funds Management Asia Ltd. v. New Zealand Securities Commission* [1995] 3 All ER 918 and also *R v. Rozeik* [1996] 1 BCLC 380.

[20] [1991] 1 WLR 35.

[21] *See TTS International v. Cantrade Private Bank* (1995) Royal Court of Jersey.

Nonetheless, it is to be regretted that intermediaries and others are placed in such a dilemma. It is clear that the British Government did not give adequate attention to the interplay between the civil and criminal law when it was framing the anti-money laundering law and despite expressions of concern subsequently, and attempts to address some of the problems in the Notes of Guidance, the uncertainty remains. Those jurisdictions that have similar legal traditions and who have based their own provisions on the English law should be warned.

As has already been pointed out, it is not only the judges that have been prepared to expand and apply devices in the civil law to deprive fraudsters of their ill-gotten gains and promote 'good stewardship' on the part of those who manage or handle their funds. Various regulatory authorities have also shown a willingness to hit those responsible for fraud and abuse in their pockets and extend civil liability to professional advisers and others who knowingly assist them in their dishonest designs.[22]

There are cases which indicate that the authorities do have *locus standi* to initiate civil proceedings to seize property that is the proceeds of a fraud or theft, on behalf of those who may have a claim to it. This has been taken much further in an important decision of the Court of Appeal, *Attorney General v. Blake* (*Jonathan Cape*).[23] In this case the Court of Appeal considered that in appropriate cases the Attorney-General had jurisdiction to bring a civil action in the public interest to reinforce the criminal law and deprive criminals of the benefits of their crime. The Court of Appeal also thought that even where there was semblance of a fiduciary relationship or fiduciary accountability was impractical, provided there was a contractual relationship between the parties a claim might be brought for a restitutionary measure of damages. This is an extremely important development in the law and one which may significantly extend the scope of the civil law as a weapon against fraud and abuse.

It must also be remembered that the civil courts have created a panoply of orders and procedures which can be used, often on the basis of an *ex parte* application, to identify and trace property, and then seize it. Although such procedures are obviously most effective within the domestic jurisdiction, in appropriate cases the courts have been willing to make orders which pertain to property and persons outside the UK. Of course, in such cases the obligation is *in personam* rather than *in rem*, but the effect should not be underestimated. Furthermore, it is important to remember that the civil law has a developed system for seeking assistance from other jurisdictions and for the recognition and enforcement of judgments out of jurisdiction.

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[22] *See* e.g., *SIB v. Pantell SA* [1990] 1 Ch 426 and also [1993] Ch 526 and also *SIB v. Scandex Capital Management A/S* [1998] 1 All ER 514.

[23] [1998] 1 All ER 833.

I. Opening Another Front

It is the view of the present writer, that the various initiatives against money laundering that depend for their effect primarily on the traditional criminal justice system and its agencies, will not achieve the results in terms of convictions and orders, which is necessary to substantially impede the operations of major criminal enterprises. The civil law, as it is today applied, almost in desperation by the judges, has results which are at best *ad hoc* and possibly impose to great a burden or rather risk on those who are engaged in acceptable banking and commercial practices. Obviously, much would be achieved by more thought being given to the integration of the civil and criminal law and also by a more thoughtful and robust use by law enforcement agencies of all the weapons available in the legal armory. However, there are few if any signs of this happening. At present it is hard to escape the view that a great deal of ignorance and myth has blinded those more directly involved in dealing with the issues and thus in their dealings with those who are capable of developing strategy.

Laws and procedures which ultimately depend upon being able to prove a clear relationship between the crime and property in question, are bound to fail. There is not, and will never be, the resources in the criminal justice system to devote to establishing the *nexus* to the standard that we have come to expect in the courts. Even if resources are available there are other, even more intractable problems which in practice renders this a more or less hopeless strategy on its own. As a weapon in the armory these laws are fine and desirable, but their effectiveness has to be recognized as being limited. It is all very well to contend that notwithstanding the problems of enforceability, the intelligence value of such procedures is advantageous. This may or may not be so. It is, however, instructive that the advice that Scotland Yard received from its own officers and intelligence officers prior to enactment of the laws, was that intelligence would be harder to obtain, as the more traditional policing was applied to the problem, the further underground money laundering would be driven. It is certainly arguable, that the formalization of procedures for international co-operation, through such devices as memoranda of understanding and even mutual legal assistance treaties has not resulted in better co-operation. There may be far more people running around talking about international co-operation but the perception of many is that all this effort and expense has produced little in the way of real and tangible results.

The present writer is convinced that a new strategy is required, and this should draw upon the experience that has long existed in regard to anti-corruption laws, such as those encountered in Hong Kong, Malaysia and other former parts of the British Empire. In these laws, provisions will be found that impose upon those, in certain offices, an obligation to explain and justify property that is in their possession over and above what they could have earned from known sources of remuneration. Of course, this approach is similar to the intelligence procedures long operated by taxation authorities based on net worth analysis. The Proceeds of Crime Act 1995 in

the UK introduces what to some may well appear a very draconian principle. In essence, two convictions for a serious offence within six years, will justify a presumption that unaccountable wealth is the product of criminal activity and the burden moves on to the defendant to resist confiscature, by showing where in fact he obtained these assets. It is perhaps surprising that such a significant piece of legislation, which is reinforced by far ranging provisions for financial investigation, was passed through Parliament as a Private Members' Bill and has attracted virtually no comment in the legal literature in Britain. It is, however, as the judges have intimated in *Attorney General v. Blake*[24] the portent of things to come. Notwithstanding constitutional issues, the present author remains convinced that it is only by extending such reverse presumptions to the accumulation of wealth by persons in selected jobs or offices, such as bankers and other intermediaries, that a substantial victory may be expected in the war against international crime. Obviously, this has profound implications for the way in which we think about wealth and its creation and would need refinement in those societies with economies in transition. If we are not prepared to take such steps, then our most realistic hope for the future is that the robber barons and drug dealers of today, will through the process of legitimization, become our rulers in the future! Is this not exactly what we are seeing and the West is promoting in Central and Eastern Europe!

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[24] *See supra* at note 23.