

MONEY LAUNDERING

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The Proceeds of Crime Act 2002 came into force on 24th February 2003. Under this Act, solicitors, accountants, financial institutions and others (including estate agents, auctioneers and any dealers in high value goods) may commit an offence if they are involved in a transaction they suspect is being used to launder money and do not report it to the National Criminal Intelligence Service (NCIS). The offence carries a term of imprisonment of up to 14 years. Once reported the advisor or dealer in question can only continue to act with the consent of NCIS and is prohibited from advising the reported party that a report has been made. Such "tipping-off" is an offence carrying a term of imprisonment of up to 5 years.

OVERVIEW

Purpose is to disrupt the ease with which tainted funds and assets may be negotiated. This aim is achieved by:

1. penalising assistance rendered to those individuals;
2. enforcing disclosure of suspicious transactions;
3. facilitating investigations by avoiding money launderers being warned – tipping off;

MAIN OFFENCES

- (a) concealing, disguising, converting or transferring criminal property or removing it from jurisdiction;
- (b) making arrangements to facilitate acquisition retention use or control by another person;
- (c) acquiring using or having possession of criminal property;
- (d) failure to disclose knowledge or suspicion of ML applicable to professionals within financial sector – objective test because assumption as to greater degree of diligence

Avoiding liability through “authorised disclosure”

Need to do so as soon as practicable to nominated officer – NCIS

Knows or suspects or has reason for knowing or suspecting

Information coming to his attention in course of trade/business

Reporting procedure – protected disclosures – overrides usual client confidentiality

TIPPING OFF

Offence of making disclosure likely to prejudice a ML investigation

LAUNDERING IN LITIGATION

The perception that law firms may be taking a more relaxed approach to due diligence and scrutiny of their client's conduct in litigation matters may be one reason for this shift in criminal activity.

Debt recovery is an area of increasing concern for money laundering. With banks and money service bureaux tightening their approach to accepting large amounts of cash, criminals are seeking alternative methods to get the cash generated from criminal activity into the financial system.

Setting up a cash intensive business is one such method. The criminal monies can be mingled with legitimate monies and make their way into the business's bank account without raising suspicion.

To transfer the funds from this cover business back to other parts of the criminal enterprise, documents are created to suggest that a debt is owed. A solicitor is approached to recover what they are told is a legitimate debt, the debtor agrees to make the payment, the funds are passed through the solicitor's account and back to the client.

While not always an easy methodology to spot, there are some emerging trends which highlight known warning signs that money laundering may be occurring in this context. These include:

- non face-to-face client, who is often quite a distance from the firm
- the debtor may also be quite a distance from the firm

- scant paperwork supporting the alleged debt
- the debt is settled very quickly, sometimes even before the first letter of demand
- the client is willing to pay your fees even though you have done very little work
- fees are overpaid and paid in advance, sometimes in cash and other times by fraudulent cheques
- the client requests the funds recovered or the overpaid part of the fees to be paid to a third party.

To help offer protection law firms should consider:

- advising litigators of this methodology and the warning signs they should be alert to
- asking questions of the client, particularly the questions of why they are instructing the firm and why should these funds be paid to a third party
- protecting the client account details by limiting their provision to clients
- undertaking some due diligence on litigation clients and, on a risk-sensitive basis, making searches for an ownership or other connection between the debtor and the client
- only making payments against cleared funds.

Where firms suspect that criminal property may be involved in a litigation retainer, and there is prima-facie evidence that the firm is being used to commit a crime or a fraud, legal professional privilege will not apply and the firm will need to consider making a report to the Serious Organised Crime Agency (SOCA) under the Proceeds of Crime Act.

MONEY LAUNDERING PROCEDURES – CLIENT GUIDE

New government regulations mean you must prove who you are if you are a new client or if your solicitor has not taken instructions from you for some time.

- Current signed passport
- Photo-card driving licence
- Benefit book
- And a recent gas, electricity or other household bill

RECENT CASE LAW: SHAH V HMRC

This case involves a claim for loss and damage by a high profile businessman as a result of a report made to the Serious Organised Crime Agency (SOCA) where the report(s) have not given rise to any action being taken. Mr Shah therefore believes his affairs have been damaged and is seeking to recover his loss.

The Court of Appeal has overturned a summary judgment in favour of the bank. In essence matters now stand as follows:-

-those who owe a duty of care to report have a duty to make the report promptly – delay in making reports can cause loss by delaying the various time limits which operate to restrict SOCA;

- the suspicion giving rise to the report does not have to be a reasonable one but it must be more than “fanciful”. COA overturned previous court finding that the bank customer had no right to know what was reported about him. Practice point – following a professional’s report and completion of report client may well be entitled to be given information about report made in respect of him to the relevant authority. This runs counter to general understanding from reassurance as to confidentiality set out on SOCA’s website.

Summary – as matters stand prompt reporting is essential and the nature of the report and the way it is couched, must be considered in view of the possibility of a wider audience (i.e own client).

Risk Evaluation

CASE LAW: RESTRAINT ORDERS & SOLICITORS' FEES

The Court of Appeal considered whether the movement of fees from the client account to the office account would be a breach of a criminal restraint order, in the case of *Irwin Mitchell (a Firm) v Revenue and Customs Prosecutions Office and Another*, Times 27 August 2008 (CA Crim).

The firm was acting on behalf of Mr Allad who was facing investigation for VAT evasion, cheating the revenue and money laundering. Mr Allad paid £5000 into the client account in anticipation of legal fees. Five days later Revenue and Customs Prosecution Office obtained a restraint order over Mr Allad's assets. A further eight days later RCPO served Mr Allad with the restraint order and it came to the notice of the firm. By this time, the firm's

costs had exceeded the amount already paid. The firm sent Mr Allad their bill and notified RCPO that they would transfer the money into the office account in accordance with the Solicitors Account Rules. RCPO objected to this transfer on the basis that this was prohibited by the restraint order.

The court held that it was not the purpose of a criminal restraint order to prevent third parties from enforcing civil rights against a defendant if those rights would be unaffected by a confiscation order which might be made against the defendant at the end of criminal proceedings against him. Payment of solicitors' fees would not deplete the true value of the defendant's assets or frustrate the purpose of the restraint order and the solicitors were entitled to utilise the fund in payment of their fees.

SENTENCING

Very harsh

Principal offences – 14 years
and/or a fine

Failure to disclose/tipping off – 5
years max

CASH SEIZURE

If reasonable grounds for suspecting cash is:

- a. recoverable property;
- b. intended for use in unlawful conduct.

Detention of cash - Time limit for initial seizure, max 3 month extensions, up to max. of 2 years

Application for release/forfeiture

Evidential considerations – cultural/international

Costs/compensation, tactical considerations

Potential travelling difficulties, international authorities

Principle