

CHANCERY BAR ASSOCIATION
MONEY LAUNDERING
EXPLANATORY NOTE
PART 1 SUBSTANTIVE LAW

Paul Marshall*

CONTENTS

	Paragraph
Introduction	1
Principal sources	16
Guidance	17
Policy background	18
Key concepts under PoCA	21
Amendment and revised terminology	22
PoCA s 327 concealing the proceeds of criminal conduct	28
Disclosure as a defence	30
PoCA s 328 becoming ‘concerned in an arrangement’	34
“Facilitates” - Dare v CPS	42
Disclosure as a defence	44
The Shah v HSBC litigation	51
Implying a term in the contract of mandate	56
PoCA s 329 the acquisition, use and possession of the proceeds of crime	66
Disclosure as a defence	67
PoCA s 330 the ‘regulated sector’ - reporting suspicion	71
PoCA s 340(11) the extended money laundering offences	82
Legal professional privilege	84
Extra-territorial issues: PoCA s 340(2)(b) and s 340(11)(d)	94
Legal certainty	99
PoCA s 333 disclosure offences	103
Tipping-off	106
Prejudicing investigations	109
Permitted disclosures	116
Legal adviser protection	118
SARs - data protection and privacy	111

* Barrister, No5 Chambers

Introduction

- 1 This note is separate from guidance on the Money Laundering Regulations 2007 and is an outline of the substantive UK law of money laundering under the Proceeds of Crime Act 2002 (PoCA) (as amended). It is drafted with a view to be a practical *vade mecum* for barristers in practice at the Chancery Bar. (No consideration is given to Counter Terrorist Finance or 'CTF' - though money laundering and CTF share some common characteristics and some AML provisions under PoCA have their origin in CTF legislation.)
- 2 Dirty or tainted money is less valuable than clean money. "Money laundering" is the process by which dirty money is transformed into money having the appearance of legitimacy or of being 'clean'. The substance of the activity of laundering is thus the disguise of the origin of funds. Money laundering is a process entirely separate from the underlying (criminal) conduct from which tainted property is derived (conventionally referred to as the 'predicate' conduct or offence). The essence of money laundering is the *dealing with* property that is derived from underlying criminal conduct. It follows that almost any transaction in any market that involves holding or transferring property is capable of being used to launder criminal property.¹ Further, for criminal liability for money laundering it is quite unnecessary that there be any *intent* to launder, all that is necessary is that it be known or *suspected* by the person concerned that the property in question is criminal property (as this is defined) – though it must be criminal property (below). This is just one instance of where the legislation in the United Kingdom goes beyond what has hitherto been required under the (existing) EU Money Laundering Directives by which a money laundering offence is committed where it is intended to launder criminal property. Further, in specific circumstances, for those working in the 'regulated sector' (to which laundering is considered to present a particular risk) the existence of requisite suspicion may be determined *objectively* whether or not a person in fact had suspicion, that is to say, on what is in effect a negligence test. (Suspicion as sufficient for criminal liability is again an instance of super-equivalence of the UK legislation compared with the Directive.) (The threshold for criminal liability for money laundering is therefore lower, for example, than for liability for dishonest assistance in breach of trust² because there is no requirement for dishonesty.) The ambit of the offences is wide³ and the penalties intentionally draconian.⁴
- 3 At the outset it may be convenient to summarise some issues of central importance and of general application for members of the Association in practice at the independent Bar. (Money laundering for the (limited) purposes of this summary and this Note may be taken to be materially equivalent to terrorist funding where the same points apply, the property being variously 'criminal property' or 'terrorist property'⁵ under the relevant statutory definitions.)
 - (a) The three principal money laundering offences (ss 237-239) under the PoCA all concern prohibited acts in connection with criminal property. If suspicion exists that the property in question is laundered property (*i.e.* may be criminal property (as defined)), in practice the only means of avoiding committing an offence,⁶ if it turns out that the property is as suspected, is to make a disclosure to the Serious Organised Crime Agency (SOCA), either directly or by ensuring that the instructing solicitor does so. It may be added that, subsequently, a challenge may be made to the existence and nature of the suspicion by the subject of the report (see further **Shah v HSBC Private Bank**, below).
 - (b) The obligation to report suspicion of money laundering has got nothing to do with whether the barrister is in practice in the "regulated sector" as defined under the PoCA and subject to the regulatory requirements laid down in the Money Laundering Regulations 2007.

- (c) A barrister in independent practice will only be obliged to comply with the (extensive) statutory requirements in relation to customer (*viz* client) due diligence, including identification, verification and record keeping, prescribed by the Money Laundering Regulations 2007 if the work in which they are engaged falls within that of being “an independent legal professional” which, as defined, is likely to be restricted to those whose work is as a tax adviser, or otherwise within reg. 3(9)(a) or (e) of the Regulations. (Reference should be made to the ChBA AML Note under Part 2.) This is subject to the important caveat that those undertaking licensed or direct access work may undertake work covered by other provisions under reg. 3(9).
- (d) The new, onerous, and far-reaching obligation to report to the Serious Organised Crime Agency (“SOCA” – from October 2013 to be replaced by the National Crime Agency or NCA) any suspicion (whether objectively or subjectively held) that another person is involved in money laundering pursuant to s. 330 of the Proceeds of Crime Act 2002 (irrespective of whether an ‘act’ is in contemplation as in (1) above), and the criminal offence of failing to do so, only applies to those who are within the “regulated sector” as defined by the PoCA, being the same persons as a “relevant person” for the purposes of the ML Regulations, and thereby subject to those Regulations.
- (e) It is very important that while compliance with the 2007 ML Regulations, for those subject to these (which will not include very many barristers – see separate note), is required on a ‘risk-sensitive’ basis, the statutory obligation to report suspicion of money laundering under the PoCA imposed by ss 327-329 and s 330 (and by s 340(11) – inchoate and accessory offences) is not subject to any such limitation or qualification.
- (f) Since the decision of the Court of Appeal in **Bowman v Fels** [2005] 1 WLR 3083 (below) it is most unlikely that the *ordinary* conduct of litigation will give rise to money laundering issues. The same goes for the compromise of litigation and contemplated litigation (or disputes that might reasonably be expected to give rise to litigation).
- (g) A difficult issue that is likely to confront members of the Association is in the context of acting for or advising in relation to the planning or execution of a transaction where the circumstances are such as to give rise to suspicion of money laundering and where the information on which that suspicion is based is received in circumstances where, as is likely, legal professional privilege would ordinarily exist (below).

4 In practice, it is statistically unlikely that members of the Chancery Bar Association will be involved in making a suspicious activity report (SAR) to the SOCA. Only 4 SARs were made by barristers in 2011 and no consent SARs at all were made by barristers (*i.e.* ‘authorised disclosures’).⁷ In contrast, 4,255 SARs were made by solicitors in 2011 of which 77% were consent SARs, that is to say where the reporter was concerned about a transaction. The European Commission recently released a report by Deloitte that observed that the legal profession in the UK is the legal profession in the EU most likely, by a fair margin, to comply with the requirements of the Directive (under the Regulations) by making an SAR.⁸ This may perhaps be attributable to the fact that the AML regime in the UK has adopted a high degree of super equivalence in transposition of the EU ML Directives and is unique in making transactions suspected of involving money laundering subject to supervening statutory illegality in the absence of consent from law enforcement agencies (*i.e.* the ‘consent regime’ – below). The strikingly high level of solicitor reporting represents 25% of all consent SARs for the year.

5 Should it become necessary for a member of the Association to make a report to SOCA (a circumstance most likely to arise in connection with licensed or direct access work (because otherwise it will be sensible for the solicitor to make the relevant report) the means and forms for doing so are provided on the SOCA

website: <http://www.soca.gov.uk/about-soca/the-uk-financial-intelligence-unit/completing-a-suspicious-activity-report-sar>

- 6 The circumstances in which the members of the Chancery Bar are most likely to engage with the money laundering regime are when advising (or otherwise ‘acting’⁹) in connection with tax and with financial and other property transactions, corporate transactions, and trusts.¹⁰
- 7 The provisions of PoCA that are most likely to affect barristers in private practice are those under PoCA s 328 and, where otherwise subject to the ML Regulations 2007, s 330. In reality, where an individual’s practice is apt to engage the provisions under s 328 it is very likely that the individual will be providing legal services of a kind such as to bring them within the term “relevant person” for the purposes of the ML Regulations and within the “regulated sector” under PoCA. (As noted above, the ML Regulations 2007 and the reporting obligation under s 330 of PoCA only apply to those carrying out regulated activities for the purposes of the Regulations.¹¹) On the other hand, the obligation to make a SAR to the SOCA, as a defence to criminal liability for money laundering under PoCA ss 327-329 where the relevant knowledge or suspicion exists, arises wholly independently of the duties imposed by the ML Regulations.
- 8 Domestic legislation, EU legislation and international treaties have sought to address the problem presented by money laundering in three main ways: first by criminalising the activity of money laundering; second by providing for the confiscation of the proceeds of crime (until as recently as 1986 convicted drug traffickers in the United Kingdom were able to retain the profits from their crimes); and third, by imposing upon those involved in the provision of services relating to financial and other property transactions statutory obligations that are intended to deny the financial system (and related services) to would-be launderers. Sometimes the first two functions are described as ‘suppressive’ and the third ‘regulatory’. In the United Kingdom the first two of these functions are provided by PoCA as amended by the Serious Organised Crime and Police Act 2005 (SOCPA), the third, principally by the Money Laundering Regulations 2007¹² and also by s 330 of PoCA. The 2007 Regulations are considered under a separate Note in Part 2.
- 9 While the AML regime applies to all, in some circumstances it may be necessary for members of the Bar take steps to ensure that clerks as their employees are alive to the risks of money laundering and receive appropriate training (see further Part 2). The Guidance issued by the Bar Council (further below) at paragraph 40 provides:
- “All barristers and sets of chambers must ensure that they have in place and operate such general systems and procedures for ensuring compliance with the Regulations as may be appropriate to their areas of practice having regard to the likelihood that the barrister or a member of chambers will be instructed to carry out work that falls within the scope of the Regulations. Where no general procedure or system is adopted then barristers must always bear the requirements of the Regulations in mind and give consideration to whether any particular instruction is or may be caught by the Regulations.”
- 10 Compliance with the Regulations, where a member of the Association has a practice that falls within the activities covered, includes the implementation of risk-sensitive policies and procedures for the purpose of preventing activities related to money laundering and terrorist financing (reg. 20) and also requires that relevant employees (clerks) be made aware of the law relating to money laundering and terrorist financing and that they are given regular training (reg. 21).

- 11 Since the introduction of PoCA in February 2003 there has been a change of emphasis and approach by the government in the application of the money laundering regime to those affected in the ordinary course of their (legitimate) business.¹³ Initially the regime was extraordinarily expensive (on some assessments, the most expensive anti-money laundering (AML) regime in the world), and was considered to have potential effects on the UK's competitiveness.¹⁴ It also, not perhaps surprisingly, gave rise to a defensive response by those affected with the result that an enormous number of transactions were reported as suspicious which overwhelmed law enforcement agencies with mostly irrelevant and insufficient information. There was very little feedback as to the effect or utility of reports that were made. In recent years there has been a marked shift, by amendment to the legislation and also, in particular, by the introduction of the 'risk-based' less prescriptive approach (below) under the 2007 Regulations under which the resources devoted to AML procedures should be matched *proportionately* to a properly evaluated perception of risk to a person's or firm's business. Similarly, there is increasing recognition on the part of the government that co-operation from and engagement with those affected by the AML regime is likely to be more effective in combating crime than mere defensiveness. An important practical consequence of this shift is that it is expected that a large part of the criminal penalties for infringement against the requirements under the 2007 ML Regulations will be removed in next version of the ML Regulations following the recent completion of the Financial Action Task Force Review.
- 12 The European Commission on 11 April 2012 released its Report on the operation of the Third ML Directive¹⁵ that provides a clear explanation and statement of the present perception of the effectiveness of the implementation of the Directive and areas in which further development is to be anticipated (see Part 2). So far as lawyers are concerned, it appears that not much change is to be expected from Europe.
- 13 The Commission published a proposed draft of a fourth EU money laundering Directive on 5 February 2013¹⁶ together with a separate draft regulation on information requirements relating to funds transfers.¹⁷
- 14 Following the Financial Action Task Force¹⁸ (FATF) report and Revised 40 Recommendations of February 2012¹⁹ the Commission has recommended that governments impose more extensive obligations to identify the beneficial ownership of both companies and trust property. The reason for this is that one of the biggest problems with the existing AML system is that financial institutions, designated non-financial businesses and professions (DNFBPs), law enforcement and other interested parties, find it difficult and in some cases impossible to identify the beneficial owner of legal persons and arrangements.²⁰ Company, trust or similar structures are commonly used in money laundering as part of the 'layering' process (the process, frequently involving a series of steps, by which funds are moved through the financial system so as to distance the funds from their source and 'placement' (the point at which they initially enter the system)).
- 15 The draft fourth Directive implements much of the FATF Revised Recommendations and in some respects goes further. Key features, for present purposes, include:
- greater emphasis on the 'risk based' approach and a move away from third country equivalence, a revised list of circumstances where simplified due diligence will be appropriate. Conversely examples of transactions where enhanced due diligence will be required.

- Proposals intended to increase transparency by requiring companies and trust to hold information on beneficial ownership and to make this available to supervisors and parties conducting due diligence. Further clarification on how beneficial ownership is to be identified.
- For other jurisdictions where tax evasion and fiscal offences have not been predicate offences for money laundering proposals to add revenue offences to the list of predicate offences.
- Recognition (some may say late) of the need to strike a balance between allowing robust systems and controls and preventative measures against money laundering and terrorist financing and protecting the rights of data subjects.

Additionally, the draft wire transfer regulation is directed towards increasing traceability of payments by requiring inclusion of information relating to payees. It will introduce requirements for payment service providers to verify the identities of beneficiaries of payments exceeding €1,000.

Principal sources

16 The main sources of the UK anti money laundering (AML) and counter terrorist funding (CTF) framework are:

International

- (i) [Draft February 2013] EU Commission Proposal for a (fourth) Directive of the European Parliament and Council on the Prevention of the use of the financial system for the purpose of money laundering and terrorist financing.²¹
- (ii) Financial Action Task Force Forty Recommendations (Revised February 2012)²² (Note that the Revised 40 Recommendations now absorb the former additional 9 Special Recommendations on Terrorist Financing and the Recommendations have been re-numbered).
- (iii) Third Money Laundering Directive 2005/60/EC The Third AML Directive, which covers most of the 40 FATF Recommendations and some of the 9 FATF Special Recommendations.
- (iv) Regulation (EC) No 1781/2006 of 15 November 2006 on information on the payer accompanying transfers of funds, which implements FATF SR VII on wire transfers.
- (v) Regulation (EC) No 1889/2005 of 26 October 2005 on controls of cash entering or leaving the Community, which implements FATF SR IX on cash couriers.
- (vi) Directive 2007/64/EC of 13 December 2007 on payment services in the internal market (Payment Services Directive) which, in combination with the Third AMLD, implements FATF SR VI on alternative remittance.
- (vii) Implementing Measures Directive 2006/70/EC.
- (viii) Regulation (EC) No 2580/2001 of 27 December 2001 on specific restrictive measures directed against certain persons and entities with a view to combating terrorism which, together with Regulation (EC) No 881/2002 of 27 May 2002 implementing UN Al Qai'da and Taliban sanctions,

implements part of FATF SR III on freezing terrorist assets.

Domestic

- (ix) Financial Services and Markets Act (FSMA) 2000
- (x) PoCA (as amended, in particular by the Serious Organised Crime and Police Act 2005 (SOCPA))
- (xi) Terrorism Act 2000 (as amended by the Anti-terrorism, Crime and Security Act 2001)
- (xii) Money Laundering Regulations 2007
- (xiii) Financial Sanctions by HM Treasury Sanctions Notices and News Releases (The United Nations and the EU have sanctions in place to deny a range of named individuals and organisations, as well as nationals from certain countries, access to the financial services sector. In the UK, HM Treasury issues sanctions notices whenever a new name is added to the list, or when any details are amended.)
- (xiv) For those regulated by the FCA, the FCA Handbook.

Guidance

17

Further detailed guidance is to be found:

- (i) Bar Council (January 2008):
<http://www.barcouncil.org.uk/for-the-bar/practice-updates-and-guidance/guidance-on-the-professional-conduct-of-barristers/proceeds-of-crime-act-2002/>
- (ii) Joint Money Laundering Steering Group (JMLSG) guidance for the financial services industry (updated for Part 2 in December 2011). This is Treasury approved guidance:
<http://www.jmlsg.org.uk/industry-guidance/article/further-amendments-to-2007-guidance-20-december-2011> (sic)
- (iii) The Law Society Practice Note (October 2012). This is Treasury approved guidance:
<http://www.lawsociety.org.uk/advice/practice-notes/aml/>
- (iv) Other professional associations issue their own guidance, for example the Consultative Committee of Accountancy Bodies. This is Treasury approved guidance:
<http://www.icaew.com/en/members/regulations-standards-and-guidance/practice-management/anti-money-laundering-guidance>

Policy background

18

By some estimates cross-border transfers of illicit funds rank third by value after oil and foreign exchange trading. The IMF has expressed the view that money laundering may represent between 3-5% of all global economic activity. The UK AML/CTF strategy document 'The financial challenge to crime and terrorism'²³ issued jointly by HM Treasury, Home Office, SOCA and the Foreign Office sets out why it is important to combat money laundering and terrorist financing. The strategy document states that the Government's objectives are to use financial measures to:

- (i) **deter** crime and terrorism in the first place - by increasing the risk and lowering the reward faced by perpetrators;
- (ii) **detect** the criminal or terrorist abuse of the financial system;
- (iii) **disrupt** criminal and terrorist activity - to save lives and hold the guilty to account.

19 In order to deliver these objectives successfully, the government believes that action in this area must be underpinned by the three key organising principles that were first set out in the 2004 AML Strategy:²⁴

- (i) **effectiveness** - making maximum impact on the criminal and terrorist threat:
 - build knowledge of criminal and terrorist threats to drive continuous improvement;
 - make the best use of the financial tools we have, by making sure that all stakeholders make the maximum use of the opportunities provided by financial tools, including those to recover criminal assets.
- (ii) **proportionality** - so that the benefits of intervention are justified and that they outweigh the costs:
 - entrench the risk-based approach;²⁵
 - reduce the burdens on citizens and business created by crime and security measures to the minimum required to protect their security.
- (iii) **engagement** - so that all stakeholders in government and the private sector, at home and abroad, work collaboratively in partnership:
 - across the AML/CTF community including to share data to reduce harm;
 - engage international partners to deliver a global solution to a global problem.

20 The PoCA is an extensive piece of legislation the greater part of which is concerned with the recovery of criminal property (asset recovery, both civil and criminal). The money laundering provisions in Part 7 (ss. 327-340) that came into force in February 2003, now extensively amended (below), are largely²⁶ derived from the Criminal Justice Act 1988 and the Drug Trafficking Act 1994. PoCA Part 7 to that extent (and in other respects) is a consolidating statute.²⁷ In some respects, however, PoCA represents a departure from the previous legislation. In particular, this applied to the change to include *any offence* as sufficient to support money laundering. Hitherto under previous legislation predicate offences from which criminal property was derived for the purposes of money laundering were generally indictable offences (the Third Directive was addressed, specifically, to serious offences). The FATF, however, has expressly endorsed 'all crime' AML measures (see, for an example, **Dare v CPS** (2012) below). Further before PoCA, extra-territorial aspects of the CJA were expressly disappplied for those in the regulated sector by the 1993 Money Laundering Regulations.²⁸ These circumstances resulted in few suspicious activity reports being made by banks, lawyers and accountants prior to the introduction of PoCA. Apart from the complexity of having two separate regimes for laundering relating to drug offences and for other offences under the DTA and CJA 1988, the Abacha fraud and BCCI provided additional incentives for change.

Key concepts under PoCA

21 Save where otherwise provided under the relevant sections of Part 7, the definitional provisions are at

PoCA s 340. Key concepts²⁹ include:

Money laundering

Though analogous offences existed under the Criminal Justice Act 1988 (as amended) and the Drug Trafficking Act 1994, PoCA for the first time introduced money laundering as a nominate offence. Money laundering is defined under PoCA s 340(11) as an act that constitutes an offence under ss 327, 328, or 329 or an attempt, conspiracy, or incitement to commit any of those offences, or aiding, abetting, counselling, or procuring their commission.

Importantly, by PoCA ss 340(2)(b), (and by s 340(11)(d) introducing further complexity by the offences of conspiracy, incitement, or aiding and abetting etc) the predicate conduct (offence) giving rise to the criminal property does not need to have been committed in the UK, nor must it be a criminal offence in the jurisdiction in which it took place, provided that it would be an offence in the UK if it had been committed in the UK (further below).

Knowledge or suspicion

Knowledge or suspicion is an essential requirement for liability under each of the offences under PoCA ss 327, 328, and 329. Thus, where a person neither knows nor suspects that the property in question is the proceeds of criminal conduct, even if in fact it is, they will not be liable for a money laundering offence. The requisite knowledge or suspicion is therefore the *mens rea* for the principal money laundering offences under ss 327-329.³⁰ It is to be noted that it is knowledge or suspicion of the illegitimacy of the property that is essential, as distinct from knowledge or suspicion of the activities of the individual in question. There is no requirement for a nexus between the individual and the property because *it is immaterial who carried out the original criminal conduct or who benefited*. The fact that the criminal conduct occurred prior to the introduction of PoCA in February 2003 is irrelevant.

“Suspicion”

The Court of Appeal (Longmore LJ) has held that the meaning of 'suspicion' under the CJA 1988³¹ (the predecessor of the PoCA) is that “the defendant must have thought that there was a possibility, which was more than fanciful, that the other person was or had been engaged in or had benefited from criminal conduct. A vague feeling of unease would not suffice.³² This is subject, in an appropriate case, to the further requirement that the suspicion so formed should be of a settled nature”: **R v Da Silva** [2006] EWCA Crim 1654. The same meaning is to be adopted in civil proceedings that arise out of the money laundering provisions under Part 7 of the PoCA: **K Ltd v National Westminster Bank Plc** [2007] 1 WLR 311 (again, Longmore LJ giving the judgment with which the other members of the court concurred).³³ It is to be noted that there is no requirement for suspicion to be reasonable. (As against this, see the position in relation to the requirements to displace legal privilege, (below).)

Property

Is widely defined to include all forms of property wherever situated and in whatever form, including money, real or personal property, things in action,

and other tangible or incorporeal property.

An individual will have obtained property if they acquire an interest in it, including an equitable interest or power in relation to land in England and Wales, or a right (including a right to possession) in relation to property other than land: PoCA ss 340(9), (10).

Possession

The possession of property is widely defined as including doing any act in relation to it.

Criminal property

Again by PoCA s 340(3) this widely defined: ‘Property is criminal property if it constitutes a person’s benefit from criminal conduct or it represents such a benefit, *and the alleged offender knows or suspects that it constitutes or represents such a benefit*. The benefit may be direct or indirect or in whole or in part’: see **Loizou and Others** [2005] EWCA Crim 1579. The leading case on the means by which the Crown can establish that property is derived from criminal conduct is **R v Anwoir** [2008] 4 All ER 582 (CCA).³⁴

Criminal conduct

By PoCA s 340(2) this extends to any³⁵ activity that constitutes an offence in any part of the UK or would constitute an offence in any part of the UK if it occurred there. Thus the definition will include criminal conduct that occurred abroad but the proceeds of which come into the UK. The “any crime” aspect of the UK AML regime is another instance of gold plating or super equivalence. Under the EU MR Directives money laundering offences are in connection with *serious* predicate offences.

Benefit from criminal conduct

By PoCA 340(5) a person is deemed to have benefited from conduct if he obtains property as *a result of or in connection with* the conduct in question. This is wide enough to include payments or other rewards for criminal conduct as well as property which is criminal property as such.

Disclosure

Used in three main ways, the first two normally occurring by submission of a SAR:

Authorised disclosure A disclosure (in general terms) required to be made before the ‘prohibited act’ that is necessary to protect against criminal liability for money laundering: PoCA s 338. (The disclosure will be a ‘Suspicious Activity Report’ or SAR – known as a ‘consent SAR’.)

Protected disclosure A disclosure of suspicion of money laundering required to be made pursuant to PoCA s 330 by a person in the ‘regulated sector’ as defined by PoCA Sched. 9. Note that the ‘protection’ is limited: PoCA s 337 and does not extend to protection against damages for negligence or

breach of contract. (The disclosure will be a ‘Suspicious Activity Report’ or SAR.) The protection is not materially different than exists at common law.

<u>Permitted disclosure</u>	One of the exceptions to the disclosure offences under PoCA s. 333.
Disclosure offence	Previously known as tipping-off. The original offences gave rise to endless problems. Effectively now restricted to those in the regulated sector. Disclosing that an investigation into a money laundering offence is underway or contemplated and the disclosure is known or suspected to be likely to prejudice the investigation.
The ‘consent regime’	The regime or structure put in place by PoCA (formerly under the CJA 1988 and DTA 1994), unique to the United Kingdom, under which once a consent SAR is made it is a criminal offence to proceed with a transaction (the ‘prohibited act’) until SOCA has given its (express or implied) consent – <i>i.e.</i> statutory frustration.
‘Notice period’	The period of 7 days following the making of an SAR where a person making an SAR must not proceed with a transaction regardless of whether or not the SOCA has responded to the report: PoCA s 335(5). If notice is not received from SOCA refusing consent a transaction may proceed.
‘Moratorium period’	The period of 31 days following the making of an SAR that has been acknowledged by SOCA from the date where consent to proceed is refused by SOCA: PoCA s 335(6). The person making the report is not to proceed with a transaction (so the moratorium takes effect as supervening statutory illegality frustrating further performance of contractual obligations).
Regulated sector	Those who undertake the activities specified under Sched. 9 to PoCA, being now the same activities as engage the Money Laundering Regulations 2007 (by amendment in 2007). One important consequence is that those in the regulated sector (PoCA) and those who are “relevant persons” for the purposes of the ML Regulations (being the same) are subject to the extensive reporting obligation under s 330 of the PoCA: s 330(3)(b).
Suspicious Activity Report	or ‘SAR’. Typically reports constituting an “authorised disclosure” (main laundering offences) or “protected disclosure” (regulated sector, PoCA s. 330) being a report made to SOCA (formerly NCIS and from the end of 2013 to the NCA) by a person having suspicion of money laundering.

Amendment and revised terminology

22 Since introduction in February 2003, the money laundering provisions under Part 7 of PoCA has been extensively revised, notably by the SOCPA 2005 and the Serious Crime Act 2007. By SOCPA ss 102-109

and Sched. 17, Part 2 the provisions under PoCA ss 327-332, 339, and 340 were amended.³⁶

- 23 Further, by PoCA ss 327-332 there was introduced a defence to the money laundering and failing to report (s. 330) offences where the relevant predicate conduct occurred overseas and is lawful under the law of the place where that conduct took place. This reflected a (limited) requirement for ‘double criminality’ – a much criticised omission under the original text of the legislation,³⁷ notably in relation to ‘technical’ strict liability offences (e.g. prospectus requirements under FSMA and other, commonly regulatory, offences). The amendments provide for a defence to those offences where the person ‘knows, or believes on reasonable grounds, that the relevant criminal conduct occurred overseas, and where the conduct is legal under local law’. That qualification and defence is nevertheless subject to the exception that the activity in question, lawful in the relevant foreign jurisdiction, would not be subject to a penalty on conviction in the UK, had the conduct in question occurred here, of a term of imprisonment of a period of 12 months or more (other than an offence under the Gaming Act 1968, the Lotteries and Amusements Act 1976, and the Financial Services and Markets Act 2000). It follows that a reasonably high level of knowledge of criminal law is thus required to evaluate whether or not the defence might be available.
- 24 By SOCPA s 103 amendments are made for banks and other deposit-taking bodies³⁸ for threshold amounts. A new s 339A was introduced into PoCA that sets the threshold amount at £250 unless a higher amount is specified under the provisions by an officer of HMRC or a constable.³⁹ By PoCA s 327 a bank or other deposit-taking body would otherwise require to make a disclosure to obtain consent before proceeding with *any* transaction suspected of involving criminal property, otherwise they may commit an offence under s 327(l)(d). The amendment enables banks and other deposit taking bodies to process transfers below the threshold amount without the need to obtain consent (and which had been a source of considerable difficulty): PoCA s 327(2C).⁴⁰
- 25 In 2007 the “regulated sector” as this is defined under PoCA Sched. 9 was made materially identical to “relevant persons” in the Money Laundering Regulations 2007. (When PoCA was first introduced, lawyers, other than those regulated by the FSA, were not within the “regulated sector” and thus did not fall within the provisions of PoCA s 330.)
- 26 Apart from extensive revision to the statutory provisions, from 2004 there has been a more or less continual process of change in the name and function of a variety of law enforcement agencies. The Serious Organised Crime Agency (SOCA) was introduced under the SOCPA 2005 and the National Criminal Intelligence Service (NCIS) and the National Crime Squad abolished. The main law enforcement agency for the investigation of money laundering and the seizure of criminal assets is SOCA. In 2008 the Assets Recovery Agency was abolished and its functions transferred to the SOCA. Most recently, in June 2011, the government announced plans to subsume the functions of SOCA and other law enforcement agencies into a newly created National Crime Agency (NCA) from October 2013.
- 27 For the time being, until the NCA is established, it is to the SOCA that Suspicious Activity Reports (SARs) are made, these being ‘authorised’ or ‘protected’ disclosures under PoCA. Accordingly, it is the SOCA that grants or refuses consent to proceed with transactions that have been reported (commonly referred to as the ‘consent regime’).

Concealing the proceeds of criminal conduct: PoCA s 327

- 28 The substantive money laundering offence under PoCA s 327 can be committed in five separately listed

ways, although it must be recognized that there may be some overlap between them, most obviously between the concept of concealment and disguise. A person commits an offence if he:

- conceals; or
- disguises or
- converts or
- transfers or
- removes

criminal property from England and Wales or from Scotland or from Northern Ireland.

It is worth noting that the UK money laundering legislation represents significant (permitted) 'gold plating' or 'super-equivalence. It may be noted that: (a) a principal money laundering offence can be committed in the UK on the basis that you merely "suspect" that there is criminal property in a transaction. Under the Directive suspicion is only relevant to the requirement to report; a principal money laundering offence requires knowledge. Similarly, (b) in the UK you commit a money laundering offence if you simply convert or transfer criminal property, while under the Directive the offence is only committed if, in order to conceal or disguise the criminal property, you convert or transfer it.

- 29 It is necessary for the prosecution to establish that the property is derived from criminal conduct and that the accused knew or suspected it to be so. Concealing and disguising criminal property are defined further at s 327(3) as including 'concealing or disguising its nature, source, location, disposition, movement or ownership or any rights with respect to it'. By the definitional provisions, it is immaterial who committed the particular criminal act or when they did it. It will be seen that the provision is very broad and capable of catching persons several stages removed from the original crime and offender. The requisite knowledge or suspicion coupled with any relevant act exposes a person to liability whoever they are and in whatever circumstances the property originally came into their possession.

Disclosure as a defence

- 30 Criminal liability for the offence is avoided by making disclosure to the relevant law enforcement agency (invariably but not necessarily SOCA) *before acting*, or where a reasonable excuse exists for not having done so. These provisions are included within PoCA s 327 itself and, additionally, under s 338. Under s 327(2), where the individual, who would otherwise have committed an offence under s 327, makes an 'authorised disclosure' under s 338 of the Act, and obtains the appropriate consent, he does not commit an offence. The PoCA ss 327(2)(b) and (c) provide further protection if the person intended to make such a disclosure but has a reasonable excuse for not doing so.
- 31 It is to be noted that if an SAR is made to SOCA and there is no response from SOCA within 7 days, the transaction may proceed: PoCA s 335(2). Similarly, if a transaction is refused consent within 7 days but the moratorium period of 31 days has expired and an order of the court restraining the transaction has not been obtained the transaction may proceed: s 335(2). In each case consent is deemed to have been given.
- 32 Further, by (SOCPA) an additional defence was provided under PoCA s 327(2A), namely, that a person does not commit an offence if:
- (1) he knows or believes on reasonable grounds that the relevant criminal conduct

occurred in a particular country or territory outside the UK; and

- (2) the relevant criminal conduct:
- (i) was not, at the time it occurred, unlawful under the criminal law then applying to that country or territory,
 - (ii) is not of a description prescribed by an order made by the Secretary of State.
- (3) An exception is prescribed by PoCA (Money Laundering: Exceptions to Overseas Conduct Defence) Order 2006, SI 2006/1070 that excludes conduct abroad that, had it occurred in the UK would attract a sentence upon conviction for the offence of 12 months' imprisonment or more.

33 Some of the difficulty and uncertainty created by the extra-territorial 'foreign conduct' provision under PoCA s 340(2)(b) and the problematic conceptual issue of 'transposition' is considered, in outline, below.

Becoming 'concerned in an arrangement': PoCA s 328

34 The offence under PoCA s 328 is derived from s 50 of the DTA 1994 and s 93A of the CJA 1988 which were to similar effect. The offence will be committed where a person enters into or becomes concerned in an arrangement which he knows or suspects facilitates (by whatever means) the acquisition, retention, use, or control of criminal property by or on behalf of another person. (The meaning of "facilitates" in this context is now the subject of Bean J's decision in **Dare v CPS** [2012] EWHC 2074 considered below.)

35 As with PoCA s 327, no offence is committed if a disclosure pursuant to PoCA s 338 is made in respect of the criminal property before acting, and the appropriate consent is given by SOCA, or if the person intended to make such a disclosure but had a reasonable excuse for not doing so.

36 Consent is deemed to have been given in the absence of a response from SOCA within the relevant periods in the same way as under s 327.

37 The expression 'becomes concerned in an arrangement' is an expression that appears to be intentionally wide in its scope. Some assistance is to be derived from the Money Laundering Regulations in connection with the definition of an independent legal practitioner under reg. 3(9) as a person who by way of business provides legal services when "participating in" a real property or financial transaction. Regulation 3(9) provides that: "For these purposes a person *participates in a transaction* by assisting in the planning or execution of the transaction or otherwise acting for or on behalf of a client in the transaction" (emphasis supplied). See *e.g. R v Afolabi* [2009] EWCA Crim 2879⁴¹ that concerned a conveyancing solicitor. For present purposes it would seem likely that a member of the Association will be taken to be concerned in an arrangement, most obviously, where he assists in the planning or execution or otherwise acts in connection with a real property or financial transaction by providing advice in connection with it. (The expression 'real property' should probably be given its usual English law meaning rather than any extended meaning – as to which see Part 2.) It would follow that in these circumstances the barrister in question would be a relevant person for the purposes of the 2007 Regulations and thus within the 'regulated sector' for the purposes of PoCA s 330.

- 38 It is not necessary that the person under s 328 was involved from the start of the arrangement or transaction. It is sufficient that he becomes concerned in the relevant arrangement at some stage.
- 39 The assistance must be known or suspected by the person P to facilitate retention or control of the criminal property by or on behalf of A, whether by concealment, removal from the jurisdiction, transfer to third persons, or otherwise or else to enable A to have access to his criminal property or be used by him for his benefit to acquire other property. As noted, the property need not be (and commonly will not be) the product of criminal conduct by A himself but may arise from the criminal activity of a third party.
- 40 To establish criminal liability for the offence under PoCA s 328, it must be proved that the defendant:
- (a) knew or suspected that the arrangement related to any person's proceeds of criminal conduct; and
 - (b) knew or suspected that by the arrangement the defendant was facilitating the retention or control by A or access to or use by, or for the benefit of A (see **Dare v CPS** below);
 - (c) did not make an authorised disclosure to SOCA as soon as practicable about the arrangement and has no reasonable excuse for not doing so; or
 - (d) if a disclosure (*i.e.* SAR) was made, he did the prohibited act without first having obtained the requisite consent: s 328(2)(a).
- 41 A critical consideration is whether the property in question is 'criminal' and when it became so. In **R v Geary** [2011] 1 Cr App R 8, Moore-Bick LJ said:

“In our view the natural and ordinary meaning of s 328(1) was that the arrangement to which it referred had to be one which related to property which was criminal property at the time when the arrangement began to operate on it. To say that it extended to property which was originally legitimate but became criminal only as a result of carrying out the arrangement was to stretch the language of the section beyond its proper limits.”

The Court of Appeal applied that reasoning in the bribery case **Kensington International Ltd v Republic of Congo** [2008] 1 WLR 1144 and recently in **Abida Amir & Urfan Akhtar** [2011] EWCA Crim 146, the last in a series of appeals that concerned the ambit of s 328 and the necessity for the *property to be criminal in an independent freestanding sense*, as opposed to becoming criminal property by the arrangement itself.

“Facilitates” **Dare v CPS**

- 42 The judgment of Bean J in the Administrative Court decision in **Dare v CPS** [2012] EWHC 2074 provides welcome clarification of what was becoming perceived in some circles as a ‘catch all’ provision under PoCA s. 328. A received from B, a member of the travelling community in Oxfordshire, C’s car, that had been removed from the roadside. A knew that B was not always honest in his dealing with motor vehicles. A received the car having taken the view that he might sell it for around £3,500. B offered to sell it for £800. A took the car for a test drive and asked B if he could have it for a while to see what money he could raise. B agreed. A managed to raise around £500. A’s evidence before the magistrates was that he hoped B would accept a reduced price. No sale took place because the car was recovered by the police who found A’s fingerprints on or in it. A was charged under PoCA s. 328. An offence is committed by a person if he enters into or becomes concerned in an arrangement which he knows or suspects facilitates (by whatever means) the acquisition, retention, use or control of criminal property by

or on behalf of another person. The findings of the magistrates included that A knew or suspected that the vehicle was stolen (as it plainly was at the time) and, further, that:

- (a) After test driving the vehicle A indicated his interest in purchasing it to B, and asked for time to raise the money. Once A had the money he then arranged to meet B for a second time with a view to completing the transaction, albeit for a reduced price.
- (b) In doing so A 'entered into an arrangement' with B within the meaning of PoCA s. 328(1).
- (c) A's intention was to sell the vehicle on to another person at a profit. In arranging to purchase the vehicle with that intention, A knew that he was facilitating the acquisition of criminal property by or on behalf of another person.

43 The findings of fact were not open to challenge but Bean J rejected the legal conclusions under (b) and the second sentence under (c) above. The judge applied the observations of the Court of Appeal in **R v Geary** (above) that criminal legislation of this kind should be given a natural (not strained) interpretation. He went on to point out that the arrangement found by the justices was not even a contract of sale, but, rather, an arrangement to meet to negotiate a price. Even had a price been agreed and the car handed over, that would have facilitated, *in the future*, the acquisition of the car by somebody else. With refreshing directness the judge at paragraph [10] held:

“But the section says that the arrangement must be one which the defendant knows or suspects “facilitates” the acquisition by or on behalf of another person. It does not say “will facilitate”, still less “will probably facilitate” or “may facilitate”. It envisages a snapshot being taken at the moment of the arrangement being concluded so that one can say at that moment that it facilitates (present tense) the acquisition by or on behalf of another person, and therefore that that other person must be identified or at least [be] identifiable.”

The conviction was quashed on grounds of error of law. It might be that a good number of consent SARs might not have been made had Bean J's analysis been understood and borne in mind.

Disclosure as a defence

44 For members of the Bar the question will in almost every case arise as to whether the information that has been received that gives rise to suspicion has been received in privileged circumstances. So far as legal professional privilege is concerned, if this would ordinarily apply to the circumstances in which the information is received so as to make that information privileged material, *prima facie* evidence is required to displace this so as to make the information disclosable: **O'Rourke v Darbishire** [1920] AC 581 (see further below). The principle applies in connection with suspicion that exists for the purposes of ss 328 and 329 (below) based upon material that is received in privileged circumstances. Privilege is considered in a little more detail below. This gives rise to a dilemma because no privilege will attach if that which is suspected obtains in fact.

45 In practice, if the circumstances give rise to suspicion of money laundering it is likely that both the solicitor and barrister will discuss the position and form a view. As noted, in doing so a key issue will be whether *prima facie* evidence exists of money laundering. At one time a widely expressed view was “if in doubt report it”. That view is almost certainly incorrect so far as lawyers are concerned. First, issues of legal professional privilege will arise and it is not the intention of the PoCA to abrogate the general law on privilege (generally: **Bowman v Fels** at paragraph [63], **Morgan Grenfell v Special Commissioner of**

Income Tax [2003] 1 AC 563, **Three Rivers District Council v Governor and Company of the Bank of England** (No. 5) [2003]). Secondly, in some circumstances the subject of a report may challenge the basis upon which it was made and claim damages for losses suffered as the result of a report not properly made (see further **Shah v HSBC Private Bank**, below).

46 Apart from the position in relation to privileged material and the requirement for privilege to be displaced, once the relevant knowledge or suspicion exists, the mechanism for avoiding liability, as with PoCA s 327 is by authorised disclosure made under PoCA s 338, or if the person intended to make such a disclosure but had a reasonable excuse for not doing so. In **R v Duff** [2003] 1 Cr App R (S) 466 a sentence of six months' imprisonment was imposed on a solicitor acting for a client in respect of two money transactions two years prior to the client's arrest in respect of an alleged cocaine conspiracy. The solicitor failed to make any report as to these transactions at the time or once he was aware of his client's predicament, *although he had sought advice*. He was convicted of *facilitating the retention* of funds.

47 As is suggested by the statistics, ordinarily it may be expected that it will be the instructing solicitor who makes the appropriate SAR to SOCA where money laundering is suspected and the view held that the grounds are such as to displace privilege where otherwise it would apply. It goes without saying that, in such circumstances, it is essential that no further step (*i.e.* "prohibited act") whatever is taken in connection with the transaction or arrangement until authorisation to do so is received from SOCA.

48 In practice consent to transactions is typically given by SOCA within a few days of a report being made. Further, very few SARs in practice result in SOCA refusing consent. Nevertheless, the position between the making of a report and the giving of consent, however short this period may be, is that further participation in the transaction in question (*i.e.* the provision of professional services) is rendered illegal: PoCA s 328(2)(a). If consent is refused then a further period of suspension arises lasting 31 days (*i.e.* 'the moratorium period').

49 In the event that consent is refused by SOCA it appears that it remains under a duty to review the position. **UMBS Online Ltd v SOCA** [2008] 1 All ER 465 concerned PoCA s 328 in a banking context. The Court of Appeal identified a requirement on the part of SOCA to review and revisit its refusal to grant consent where a protected disclosure (*i.e.* s 330) had been made with the result that the client was unable to operate the account. The court held, additionally, that SOCA should conduct a review if requested to do so by the person, such as the bank account holder, about whom a bank made an initial disclosure and who is affected by the refusal of consent. (**UMBS Online** is an important decision also in connection with the reporting and tipping-off provisions (below)).

50 The issue of whether a person the subject of a SAR may challenge the basis of the report has been the subject of an apparent change in view by the Court of Appeal.⁴² In **K Ltd v National Westminster Bank** [2007] 1 WLR 311 Longmore LJ giving a judgment with which the other member of the court concurred said:

"There is, moreover, no mechanism whereby any officer of the bank can be required to attend for cross-examination since there is no provision enabling the relevant person to give evidence of his suspicion.

'This is not surprising. It may well have been the intention of the statute to protect those having a suspicion and reporting that suspicion to the authorities from being

identified, since it is notorious that those concerned in money laundering are no respecters of persons who report them to the authorities. This conclusion is bolstered by the further consideration that any cross-examination of a bank employee would, in fact, be almost as pointless as cross-examination of a bank's solicitor. Once the employee confirmed that he had a suspicion, any judge would be highly likely to find that he did indeed have that suspicion. *Any cross-examination would be bound to decline into an argument whether what the employee thought could amount in law to a suspicion, which is not a proper matter for cross-examination at all.*"⁴³

The Shah v HSBC litigation

51 That view must now be read as subject to the more recent decisions in **Shah v HSBC Private Bank** [2010] EWCA Civ 31 and the subsequent decision at trial ([2012] EWHC 2183 (below)). HSBC suspected the claimant of money laundering and filed a SAR under PoCA s 330 asking for permission to carry out the transactions in accordance with its instructions. SOCA provided consent and each transaction was effected the following business day. During this process the Reserve Bank of Zimbabwe required S to explain what investigations into his affairs were occurring, but he was unable to provide them with the required detailed information. HSBC told S that there had been an investigation into his affairs but it had been concluded. No other details were provided to him. S alleged that because he was unable to provide relevant information, the Zimbabwe bank authorities unilaterally moved his investments from high yield to low yield treasury bonds. S then asked HSBC to execute additional transactions which it declined to do. HSBC made a further SAR. S's solicitors subsequently asked HSBC to provide an explanation of the investigations. This was declined (understandably, given the tipping-off provisions under PoCA – below). The Zimbabwe authorities allegedly seized S's assets. SOCA ultimately informed S that he had not been under criminal investigation. HSBC nevertheless still refused to provide details of their communications with SOCA. S issued a claim against HSBC claiming very substantial damages said to have been caused by the bank's failure to execute instructions. HSBC obtained summary judgment from Hamblen J. S appealed.

52 The Court of Appeal allowed S's appeal holding that *S had the right to put HSBC to proof* on its case as to 'suspicion' and the basis for making the SARs to SOCA.⁴⁴ Longmore LJ said:

"It does not at all follow that, if the customer institutes ordinary (non-summary) proceedings against the bank, the bank should be able to obtain (reverse) summary relief against the customer merely by authorising its solicitor to make a witness statement that various unidentified people in the bank entertained a suspicion. By the time of any trial the dust will have settled and it is most unlikely that the tipping-off provision will continue to be relevant."

He continued:

"But it is, in my judgment, too strong for the court to say now that the bank would be bound to win any trial and should, therefore, now be entitled to summary judgment."

The judge also made the following observation, that has caused widespread consternation:

"any claim by a customer that his bank has not executed his instructions is, on the

face of it, a strong claim if the instructions have not, in fact, been executed. It will seldom, if ever, be contradicted by the documentary evidence on which it is founded. It is only when the bank says that it suspects the customer was money-laundering that any defence to the claim begins to emerge. That may not, of itself, make the claim a complex claim but there is no reason why the bank should not be required to prove the important fact of suspicion in the ordinary way at trial by first making relevant disclosure and then calling either primary or secondary evidence from relevant witnesses.”

- 53 Longmore LJ explained the reason for the difference in the approach from **K Ltd** which, naturally, the bank relied upon. The implications for those who report suspicion are nevertheless far-reaching. The impact of this decision on banks and other regulated bodies is significant because it opens up the prospect of those making SARs having to justify this by evidence of the grounds for the suspicion that gave rise to the report/disclosure. Those grounds may then be tested by cross-examination. Despite the apparent change of position, the court has declined to require the identity of the person who originally entertained suspicion to be disclosed: **Shah v HSBC Private Bank** [2011] EWCA Civ 1154.
- 54 Though the circumstances (and more especially the level of losses alleged) were unusual, **Shah v HSBC** establishes that real care must be taken in making a SAR. In due course it may be necessary for a person making a SAR to demonstrate that suspicion was genuinely held. To that end it is of considerable importance that the circumstances giving rise to suspicion are carefully and fully recorded and documented. Further, no protection is provided under PoCA against liability for private claims arising out of a SAR that was not properly made and which is shown to have caused loss. Further, the protection afforded to those in the regulated sector (*i.e.* those subject to the provisions of the ML Laundering Regulations 2007) under s 330 for ‘protected disclosures’ is limited to protection against breach of any restriction on the disclosure of information however imposed.⁴⁵ It is right nonetheless to observe that there has not been a noticeable rash of litigation encouraged by the decision in **Shah**.
- 55 Perhaps more widely, **Shah v HSBC** reveals a real difficulty with the consent regime itself.⁴⁶ The underlying problem is that transactions that may be (and are statistically very likely to be) entirely legitimate are suspended and private contractual obligations become automatically illegal to perform as the consequence of suspicion, that need not be reasonable, but must be more than fanciful or mere misgivings. (The problem is exacerbated by the continuing uncertainty for banks about the fungible nature of accounts and the continuing uncertainty as whether a suspected deposit has the effect of tainting a whole account.) It is perhaps a little surprising that a bank or other person in the regulated sector should be confronted with, on the one hand draconian criminal penalties if they fail to report suspicion, where some grounds for it exist, but on the other hand should be exposed to a claim for damages if suspicion is reported but without proper, or with insufficient, grounds and where the damage is the consequence of supervening statutory illegality as a result of a report made under ss 327-329.

Implying a term in the contract of mandate

- 56 Mr Shah’s claim was ultimately dismissed and by Supperstone J at [2012] EWHC 2183.⁴⁷ The judgment, which caused little surprise, amounts to a vindication of HSBC’s original position. The judge accepted the contention that the bank was conscientiously seeking to apply the reporting

requirements under the PoCA. An interesting feature of the judgment is that the grounds for suspicion were fairly tenuous and what was suspected was quickly established not to be the case. The legal issue that is of interest is the way the judge addressed the conundrum that, however much a transaction is suspected of being tainted, it is not unlawful to proceed with a contract suspected of facilitating the acquisition, retention etc. of criminal property, if the transaction is in fact untainted: **R v Geary** [2011] 1 Cr App R 8 [2010] EWCA Crim 1925. The point is fundamental and was applied again by the CA in **Abida Amir & Urfan Akhtar** [2011] EWCA Crim 146. It is a remarkable omission that there is no statutory defence provided under the legislation for a reporter who makes an SAR where a transaction is untainted and accordingly, on the face of it, in breach of contract declines to proceed in the absence of consent (*c.f.* the position on 'protected disclosures' under s. 330). S's case was that since the transaction was not in fact tainted and unlawful (as was soon established) HSBC acted unlawfully and in breach of contract in not complying with the mandate. In response, HSBC contended for the existence of an obvious or necessary contractual term to be implied in the contract of mandate to the effect that the bank was entitled to refuse to execute payment instructions in the absence of appropriate consent from SOCA where it suspected the transaction in question constituted money laundering. Supperstone J concluded:

"...I am led to the conclusion that the term for which the Defendant contends is to be implied by reason of the statutory provisions. In my judgment the "precise and workable balance of conflicting interests" in PoCA [.....] requires the implication of this term in the contract between a banker and his customer."

It was common ground that there was no precedent for implying a term to this effect. Supperstone J's analysis of the implied term rests upon the supposed balancing of interests that PoCA represents. That is a statement derived from Longmore LJ's judgment in **K Ltd v Natwest** when, upon examination of the legislative history, it may not bear the freight that it is required to carry (though an issue beyond the scope of this Note).

- 57 The outcome is of comfort to banks and solicitors conscientiously seeking to apply the AML legislation. Until such time as the Court of Appeal considers the issue, it can be said that where a contractual relationship exists, including a solicitor's retainer, a term is likely to be implied (as a matter of fact) to the effect that the person making a SAR is relieved of further performance obligations pending consent being given for the transaction to proceed by law enforcement authorities. The precise scope of the term, however, arguably remains uncertain. But the downside for customers and clients is that anyone who suffers loss damage or expense as a result of a SAR having been made that turns out to be incorrect (i.e. the transaction legitimate) is unlikely to have any remedy for suspension of the transaction so long as the reporter can establish that suspicion (however modest) was *in fact* entertained at the time when the report was made. It is precisely that absence of relief for what may be potentially catastrophic harm that the CA expressed concern about in **UMBS Online**.
- 58 The overseas conduct defence is included in the same way as under PoCA s 327.
- 59 Of particular importance to the Bar are the circumstances in which the provision of legal services may involve an 'arrangement' that facilitates the acquisition, retention, use, or control of criminal property (and the appropriate knowledge or suspicion exists). Some clarification was provided by the Court of Appeal in **Bowman v Fels** [2005] 1 WLR 3083. (The meaning of "facilitates" in this context has been judicially considered in **Dare v CPS** (para 42 above).) The Bar Council and Law Society appeared as

intervenor together with the (then) National Criminal Intelligence Service (NCIS). The court considered the parliamentary intention behind the POCA and Directive 2001/97/EC (the second ML Directive) and formulated the broad issue:

“Whether s 328 applies to the ordinary conduct of legal proceedings or any aspect of such conduct—including, in particular, any step taken to pursue proceedings and the obtaining of a judgment . . . whether the section applies to any consensual steps taken or settlement reached during legal proceedings.”

60 The second, narrower, issue considered by the court was that if PoCA s 328 *did* apply to the conduct of ordinary legal proceedings, did this, on the true interpretation of the statute, have the effect of overriding legal professional privilege and the terms on which lawyers are permitted to have access to documents disclosed in the litigation process.

61 On the wider issue, Brooke L.J., giving the judgment of the court, at [15] said:

“.. we conclude that the proper interpretation of s 328 is that it is not intended to cover or affect the ordinary⁴⁸ conduct of litigation by legal professionals. That includes any step taken by them in litigation from the issue of proceedings and the securing of injunctive relief or a freezing order up to its final disposal by judgment. We do not consider that either the European or the United Kingdom legislator can have intended that proceedings or steps taken by lawyers in order to determine or secure legal rights and remedies for their clients should involve them in 'becoming concerned in an arrangement which . . . facilitates the acquisition, retention, use or control of criminal property.”

62 On the narrower issue (notwithstanding the conclusion on the wider issue) the court held [89]- [90] that:

“We are of the firm opinion that it would require much clearer language than is contained in s 328 and its ancillary sections before a Parliamentary intention could be gleaned to the effect that a party's solicitor is obliged, in breach of this implied duty to the court, and in breach of the duty of confidence he owes to his own client as his litigation solicitor, to disclose to NCIS [SOCA] a suspicion he may have that documents disclosed under compulsion by the other party evidence one of the matters referred to in s 328.

It follows that on this narrower issue we are satisfied that even if, contrary to our primary view, s 328 is to be interpreted as including legal proceedings within its purview, it cannot be interpreted as meaning either that legal professional privilege is to be overridden or that a lawyer is to breach his duty to the court by disclosing to a third party external to the litigation documents revealed to him through the disclosure processes.”

63 As to the compromise of litigation the court concluded, [99]:

“The consensual resolution of issues is an integral part of the conduct of ordinary civil litigation. If, as we consider, article 7 was intended to leave unaffected the ordinary conduct of litigation, then it seems implausible to suggest that it was intended to apply

to legal professionals negotiating or implementing a consensual resolution of issues in a litigious context. It cannot have been thought that they would thereby be 'carrying out [a] transaction' within the meaning of article 7. Similar considerations apply with regard to s 328 of the 2002 Act, despite the different terminology ('enters into or becomes concerned in an arrangement'). It would be a strange policy which treated the ordinary conduct of litigation as outside the scope of s 328, but only to the extent that the parties refrained from agreeing on any step involved in its conduct and/or from agreeing to resolve any of the issues arising by settlement rather than by litigation to judgment.

... But we do not consider that it can have been contemplated that taking such a step in the context of civil litigation would amount to 'becoming concerned in an arrangement which ... facilitates the acquisition, retention, use or control of criminal property' within the meaning of s 328. Rather it is another ordinary feature of the conduct of civil litigation, facilitating the resolution of a legal dispute and of the parties' legal rights and duties according to law in a manner which is a valuable alternative to the court-imposed solution of litigation to judgment."

- 64 It follows from the foregoing that, unless circumstances are other than the *ordinary* conduct of litigation or settlement of disputes in which litigation is reasonably in prospect, the duty to report suspicion of money laundering, even if in fact held, will have no application. The position will be otherwise if a view is formed that the litigation or dispute itself is an artificial construct intended to facilitate money laundering by purporting to legitimize the transfer (etc) of criminal property.
- 65 The Court of Appeal was not concerned in **Bowman v Fels** with the position in relation to legal professional privilege (*i.e.* advice privilege) which is considered further below.

The acquisition, use and possession of the proceeds of crime: PoCA s 329

- 66 PoCA s 329 replaces both s 51 of the DTA 1994 and s 93B of the CJA 1988 with a unified provision dealing with those who acquire, use, or come into possession of property representing the proceeds of crime. As with ss 327 and 328, the sanction only applies to those who have the requisite subjective knowledge or suspicion as to the provenance of the property concerned. A person who is in possession of property without the requisite knowledge or suspicion is not guilty if the property in their possession is *in fact* the proceeds of crime. Further, the property in question is not 'criminal property' as defined under the Act because the accused did not know or suspect that it constituted the benefit from criminal conduct.

Disclosure as a defence

- 67 The same provisions apply as under ss 327 and 328. Additionally, by PoCA s 329(2)(c), a person does not commit an offence if they acquired, used, or had possession of the property for 'adequate consideration'. This provision seeks to protect those such as retailers who may be paid for ordinary consumer goods with funds they are suspicious of; the provision only bites where the person acquired or used or had possession of the property for less than 'adequate consideration'. The adequacy or otherwise of the 'consideration' at issue is to be evaluated by reference to the criteria under s 329(3) (*e.g.* s 329(3)(a) provides that: 'a person acquires property for inadequate consideration if the value of the consideration is significantly less than the value of the property').

- 68 The overseas conduct defence also applies by PoCA s 329 (2)(A).
- 69 For members of the Association, the PoCA s 329 is most likely to be engaged in connection with the payment of fees for the provision of legal services where a legal adviser forms the requisite knowledge or belief as to the provenance of the funds. It is likely that the 'adequate consideration' provision would be relied upon. Reference should be made the Part of this guidance dealing with the Money Laundering Regulations (Part 2) and to the Bar Council Guidance. If appropriate further advice should be sought including, as appropriate, from the BSB/Bar Council.
- 70 So far as transfers and receipts of payments are concerned, an issue that remains unresolved, of particular concern to banks, arises as a result of the fungible nature of money: whether an entire fund becomes tainted as a result of a (a possibly modest) payment into that account or fund and which (payment) is believed to be tainted. Until this issue is authoritatively determined, prudence suggests that out of caution the entire fund be treated as tainted as a result of the suspected payment or deposit. To proceed on the basis of a 'first in first out' approach may represent significant risk if it turns out that the suspicion in connection with the particular payment was justified and the property in question 'criminal property' as defined.

Reporting suspicion – the 'regulated sector': PoCA s 330

- 71 PoCA s 330, derived from amendments made under s 21A of the Terrorism Act 2000 following 9/11, introduces a wide-ranging obligation imposed on those in the 'regulated sector'. The obligation is imposed upon a person in the regulated sector to report to SOCA suspicion that another person is engaged in money laundering where that suspicion arises, and the material upon which it is based, arises in the context of the persons work in the regulated sector. The scope of s330 extends to the inchoate offences of attempt and conspiracy. The maximum penalty on conviction on indictment, perhaps surprisingly, is the same as under the Terrorism Act, five years imprisonment and a fine on conviction.
- 72 The regulated sector is defined under PoCA Sched. 9. The relevant provisions that will prospectively engage members of the Association are Sched. 9(1)(m) and (n) which are in substance identical to reg. 3(8) and (9) of the Money Laundering Regulations 2007 (by amendment to Sched. 9 by The Proceeds of Crime Act 2002 (Business in the Regulated Sector and Supervisory Authorities) Order 2007 SI 2007/3287:

“(1)

- (m) the provision of advice about the tax affairs of other persons by a firm or sole practitioner who by way of business provides advice about the tax affairs of other persons;
- (n) the participation in financial or real property transactions concerning—
 - (i) the buying and selling of real property (or, in Scotland, heritable property) or business entities;
 - (ii) the managing of client money, securities or other assets;

- (iii) the opening or management of bank, savings or securities accounts;
- (iv) the organisation of contributions necessary for the creation, operation or management of companies; or
- (v) the creation, operation or management of trusts, companies or similar services by a firm or sole practitioner who by way of business provides legal or notarial services to other persons;

....”

73 “Participation” in financial or real property transactions is defined under the 2007 ML Regulations (reg. 3(9)) which provides the same definition for a “relevant person” subject to the Regulations: “for this purpose, a person participates in a transaction by assisting in the planning or execution of the transaction or otherwise acting for or on behalf of a client in the transaction.” (Emphasis supplied) ‘Real property’ should probably be given its usual, rather than an extended meaning. Reference should be made to Part 2.

74 An offence under s 330 will be committed where four 'conditions' are satisfied:

- (a) The person: knows or suspects, or has reasonable grounds for knowing or suspecting, that another person is engaged in money laundering; and
- (b) the information or other matter on which their knowledge or suspicion is based, or which gives reasonable grounds for such knowledge or suspicion, came to them in the course of a business in the regulated sector; and
- (c) they can identify the other person known or suspected to be to (i) be engaged in money laundering; or (ii) he believes, or it is reasonable to expect him to believe, that the information or other matter will or may assist in identifying that other person or the whereabouts of the property; and
- (d) they do not make the required disclosure to a nominated officer or person authorised by the Director General of SOCA as soon as is practicable after the information or other matter came to him.

75 The knowledge or suspicion can arise in three ways:

- (i) where the person knows that another person is engaged in money laundering; or
- (ii) where the person suspects that another person is engaged in money laundering; or
- (iii) where the person has *reasonable grounds* for knowing or suspecting that another person is engaged in money laundering even if they do not know or suspect this.

76 Thus the relevant *mens rea* may exist not only subjectively but also *objectively* from the material then

available.

- 77 As to the requirement to be able to demonstrate proper grounds for suspicion (but not thereby necessarily 'reasonable' grounds), should the subject of an SAR claim that they have suffered loss as a consequence, see the decisions in **Shah v HSBC Private Bank** (referred to in the context of PoCA s 328 above).
- 78 Further exceptions are provided by ss 330(6), (7A), and (7B). If these apply no offence will be committed. For present purposes these exceptions are where:
- (a) the person has a reasonable excuse for not disclosing the matter;
 - (b) a professional legal adviser fails to disclose any information or matter which came to him in privileged circumstances;
 - (c) the money laundering occurred outside the UK and is not unlawful in that country and is not of a description prescribed by Order.
- 79 The ambit of this protection is restricted by s 330(10) and specifically excludes disclosures made with a view to furthering a criminal purpose (*i.e.* a statutory embodiment of what is sometimes referred to the crime/fraud exception to privilege, below). The protection will cover are circumstances where the information or matter was given:
- (i) by a client or by a representative of a client in connection with the legal adviser giving legal advice to the client;
 - (ii) by a person or by a representative of a person seeking legal advice from a legal adviser;
 - (iii) by a person or by a representative of a person in connection with legal proceedings or contemplated legal proceedings.
- 80 In the absence of one of the exceptions applying, a person must make disclosure of the information to SOCA as soon as reasonably practicable after it comes to his attention.
- 81 Limited protection against liability is provided where an employee has been provided within inadequate training. That is not likely to apply and is not considered further here. (Failure to provide relevant training where this is required is, in any event, an offence under the ML Regulations.)

The extended money laundering offences – PoCA s 340(11)

- 82 Money laundering is not exhaustively defined under ss 327-329. In addition there are the offences of attempt, conspiracy or incitement to commit those offences under s 340(11)(b) and aiding abetting counselling or procuring those offences under s 340(11)(c) where the relevant act either occurs in the United Kingdom or where it would constitute those offences if done here.
- 83 Thus it is necessary, as a matter of completeness, to consider whether the primary liability money laundering offences might be committed, not only directly but whether one of the indirect offences might be committed, whether or not the conduct in question occurs here. Detailed consideration of these

additional (inchoate/accessory liability) offences is beyond the scope of this Note. The necessary mental element of the offence of conspiracy to commit money laundering offences (POCA section 340(11)(b)) was explained by the House of Lords in **R v Saik**. [2006] 2 WLR 993. (The actual issue in the appeal was conspiring to contravene section 93C(2) of the CJA 1988.) The law of accessory criminal liability was clarified by the Court of Criminal Appeal in **R v Bryce** [2004] 2 Cr App R 35. Both the inchoate and accessory offences give rise to considerable difficulty in analysis, more especially where the underlying predicate conduct will have occurred in another jurisdiction.

Legal professional privilege

- 84 As has already been considered, the Court of Appeal in **Bowman v Fels** held that PoCA was not intended to abrogate the ordinary rules on litigation privilege.
- 85 There is nothing in PoCA to suggest that upon its proper interpretation it is intended to abrogate the law in respect of legal privilege more generally. In the context of the European legislation this has been made explicitly clear by the European Court of Justice in **Ordre des barreaux francophones et germanophone and Ordre français des avocats du barreau de Bruxelles** Case 305/05 (June 2007) (see further under Part 2) in which the disclosure obligation imposed on lawyers and safeguards under the Directive was held to be consistent and compatible with Article 6 rights. More recently, the European Commission in its Report dated 11 April 2012 has emphasised the importance of privilege and the requirement for clear national rules in the context of AML/CTF disclosure obligations.
- 86 It is elementary that all communications between a lawyer and their client relating to a transaction in which the lawyer has been instructed for the purpose of obtaining legal advice are covered by legal advice privilege. This is the case despite the fact that the communications do not contain advice on matters of law or construction so long as the communications are directly related to the performance by the lawyer of his professional duty as legal adviser.
- 87 Legal professional privilege protects advice given to a client on avoiding committing a crime (**Bullivant v Attorney-General of Victoria** [1901] AC 196) or warning a client that proposed actions could give rise to risk of prosecution: **Butler v Board of Trade** [1971] Ch 680.
- 88 Privilege will not exist to communications or documents which themselves form part of a criminal or fraudulent act, or communications for the purpose of obtaining advice with the intention of carrying out an offence. Sometimes called the crime/fraud exception to privilege it is not in truth an exception because there is no privilege in iniquity: **R v Cox & Railton** (1884) 14 QBD 153. The usual rationale for the rule is that a person consulting a lawyer in furtherance of a criminal purpose is not consulting a lawyer in their professional capacity. The dividing line may however be difficult: **Barclays Bank v Eustice** [1995] 4 All ER 511, a borderline case.
- 89 Of particular importance in the context of money laundering is the fact that it is irrelevant whether or not a person knows that the communication, believed to be privileged, is being used for a criminal purpose: **Banque Keyser Ullman v Skandia** [1986] 1 Lloyd's Rep 336. Thus there will be no privilege where such a purpose exists, *whether or not the legal adviser is aware of it*. Further, it is not only the immediate client's intention (which for the Bar will ordinarily be a solicitor in the absence of direct access arrangements) that is relevant for the purpose of ascertaining whether information was communicated for the furtherance of a criminal purpose. It is sufficient that a third party intends the lawyer-client

communication to be made with that purpose: **R v Central Criminal Court ex p Francis & Francis** [1989] 1 AC 346.

- 90 It follows from the foregoing discussion that suspicion may or may not be justified. If suspicion is justified (*i.e.* the suspicion that the relevant act constitutes money laundering) there can be no privilege. If the suspicion is unjustified and the information is communicated in circumstances that ordinarily would give rise to legal professional privilege, it is necessary that there be *prima facie* evidence before the privilege can be displaced: **O'Rourke v Darbishire** [1920] AC 581. If necessary directions from the court may be sought: **Finers v Miro** [1991] 1 W.L.R. 35.
- 91 The Crown Prosecution Service guidance for prosecutors indicates that if a solicitor forms a genuine, but mistaken, belief that privilege applies the solicitor will be able to rely on the reasonable excuse defence. It is considered likely that a similar approach would be taken with respect to a genuine, but mistaken, belief that legal professional privilege applies.⁴⁹
- 92 The Law Society Guidance (October 2012) includes the following statement: "We believe you should not make a disclosure unless you know of *prima facie* evidence that you are being used in the furtherance of a crime." That view is in accordance with **O'Rourke** (above). Inevitably what constitutes *prima facie* evidence will be highly fact specific and may entail a difficult judgment having to be made.
- 93 It follows from the foregoing, necessarily brief, summary that the position in connection with reports to the SOCA in relation to matters that on the face of it are covered by legal professional privilege are likely to give rise to serious difficulty for members of the Bar. If suspicion is entertained, but arises in privileged circumstances, it is foreseeable that if a report is not made to SOCA and the suspicion turns out to be correct so that the circumstances, as suspected, did involve money laundering, the only defence to criminal liability may be the reasonableness of the view taken of the privileged circumstances at the time. That is not a statutory defence to the offence and prosecution will turn on the prosecutorial discretion. The balancing of the risk of prosecution against the duty to maintain client privilege and the assessment of whether there is *prima facie* evidence of money laundering so as to displace privilege, is, to say the least, invidious. In such circumstances prudence suggests that the issue be raised at the earliest opportunity with the BSB, which will not entail infringing against privilege where it exists.

Extra-territorial issues PoCA s 340(2)(b), s 340(11)(d)

- 94 The Criminal Justice Act 1988 by amendment by the CJA 1993 included some of the earliest developments in the extra-territorial reach of the criminal law. Some of these were the product of many years of careful deliberation by the Law Commission. Other extra-territorial provisions were introduced as a result of EC legislation (the 1993 Directive).⁵⁰ These received limited scrutiny. Those provisions are those which eventually became PoCA ss 340(2)(b) and 340(11)(d). The difficulty confronting the draftsman of the AML legislation is that money laundering is notoriously an international offence for the obvious reason that severing the jurisdictional connection between the underlying criminal act and the location of the property derived from it is commonly an effective device in disguising its origin – the ultimate objective of laundering. The way in which this problem is addressed is by the deeming provision under PoCA s 340(2)(b) (and the related provision for inchoate/accessory offences under 340(11)(d)) (derived from the CJA 1988⁵¹) that provides that criminal conduct is either conduct which is an offence in any part of the United Kingdom *or else would constitute an offence if the conduct in question occurred here*. The meaning and application of the deeming provision (statutory hypothesis/fiction) is the crucial issue in

circumstances where the relevant predicate conduct occurs overseas.

- 95 It follows from the provisions under PoCA s 340(2)(b) and s 340(9) that the underlying predicate conduct (offence) need not have occurred in the United Kingdom, nor is it necessary that the property be situated in the United Kingdom. All that is required to found jurisdiction of the criminal courts is that the defendant himself be within the jurisdiction.
- 96 While the policy reasons for the PoCA's transposing of actions are reasonably clear, the legal consequences are rather less so. The difficulty with PoCA s 340(2)(b) and the statutory hypothesis that criminal conduct is conduct which, if it occurred within the United Kingdom, would constitute an offence here is that acts are infinitely variable and the nature of wrongdoing in any particular case may be *more or less connected with and tied to the place in which such wrongdoing takes place*. Extreme examples include murder or piracy on the one hand, in which locality is almost entirely irrelevant and, at the other extreme, regulatory offences. Most regulatory offences are closely tied to the jurisdiction where they occur. Thus the consideration of whether conduct in a particular jurisdiction would constitute an offence were it to occur in the United Kingdom can quickly give rise to conceptual difficulties, possible artificiality, and consequent uncertainty depending on the level of connectedness with the place where the relevant conduct occurred. This is of obvious importance because it is a fundamental requirement of the criminal law is that it be certain.
- 97 The problem of statutory 'transposition' was considered in **Cox v Army Council** [1963] AC 48, 71-72.⁵² Lord Radcliffe observed that there must be some acts or omissions punishable if done in England which cannot be reproduced by any equivalent occurrence taking place outside this country, and there must be some acts or omissions occurring outside England which are so much identified with their locality that they cannot be translated into any equivalent offence. He went on to describe translations of conduct in one place to hypothetical conduct in another:
- “the problem is to find a fair and proper equivalent, since there cannot be literal reproduction. Secondly, the occurrence that is said to constitute the offence is always the actual occurrence itself as it took place outside England and that means importing into the hypothetical English occurrence *the circumstances and conditions that prevailed at the place where and the time when the thing that is complained of was done or omitted*.⁵³ The difficult question, as I see it, is to decide in any particular case how far those circumstances and conditions are an essential element of the act which it is said would have constituted an offence if committed in England, and how far the English offence is capable of being applied to the non-English occurrence.”
- 98 There are two issues which are related and combine to give rise to cumulative difficulty in analysis:
- (a) whether the act in respect of which suspicion may be entertained, is an act, which had it occurred here, would have constituted an offence in any part of the United Kingdom;
 - (d) for any person to be engaged in money laundering it is necessary that the person in question (*i.e.* the alleged offender) themselves know or suspect that the property in question represents a person's benefit from criminal conduct. If they do not do so the *mens rea* for the offence does not exist.

Legal certainty

- 99 In practice the application of the deeming provision under s 340(2)(b) (and in particular 340(11)(d)) may give rise to serious, and possibly insuperable, conceptual difficulties in transposition. These difficulties will be the greater the more closely the predicate conduct is connected with the place where it occurred. A high level of connectedness will commonly apply to regulatory and, for example, environmental offences. It might be thought unsatisfactory that criminal liability may depend upon issues of fact and degree and this, in turn, may engage issues of legal certainty.
- 100 As to the requirement for legal certainty, Lord Bingham restated the general effect of the common law in **R v Rimmington** [2006] 1 AC 459, [33]: “[t]here are two guiding principles: no one should be punished under a law unless it is sufficiently clear and certain to enable him to know what conduct is forbidden before he does it; and no one should be punished for any act which was not clearly and ascertainably punishable when the act was done.” The test then adopted by the House of Lords, of great importance in the present discussion, was: (a) was the offence clear, precise, adequately defined and based on discernable rational principle; and (b) would a legal adviser asked to give his opinion in advance be able to do so with confidence.”⁵⁴
- 101 Legal certainty is, similarly, a core-principle of Community law. “The [ECJ] has consistently held ... that the principles of legal certainty and protection of individuals require, in areas covered by Community law, that the Member States’ legal rules should be worded unequivocally so as to give the persons concerned a clear and precise understanding of their rights and obligations and enable national courts to ensure that those rights and obligations are observed.”⁵⁵ Further, it is a well settled principle of Community law that “[a] penalty, even of a non-criminal nature, cannot be imposed unless it rests on a clear and unambiguous legal basis.”⁵⁶ This requires certainty in domestic legislation governed by Community law. According to established case law, in areas covered by Community law, national rules must be worded unequivocally so as to give persons concerned a clear and precise understanding of their obligations and enable national courts to ensure that those obligations are observed.⁵⁷
- 102 The extent to which the offences under ss 327-330, where these engage the deeming provisions under s. 340(2)(b) and 340(11)(d), satisfies this requirement is a difficult question that is beyond the scope of this Note.

Disclosure offences: PoCA s 333

- 103 The original provisions under s 333 of the POCA 2002 were repealed upon the introduction in December 2007 of the Terrorism Act 2000 and Proceeds of Crime Act 2002 (Amendment) Regulations 2007. Sched. 2 provides for ss 333A to 333E which correspond with ss 21D to 21H of the Terrorism Act in relation the funding of terrorism.
- 104 Under PoCA s 333 as originally drafted the offences of tipping-off (and prejudicing an investigation) applied to any person. By the amendments referred to the tipping-off offences are now confined to those in the regulated sector as defined. It follows that only those members of the Association who are otherwise subject to the provisions of the Money Laundering Regulations will be at risk of committing a tipping-off offence.
- 105 There are two offences, tipping-off and prejudicing investigations (previously under PoCA s 342).

Tipping-off

- 106 For those in the regulated sector, it is an offence to disclose to a third person that a SAR has been made by any person to the police, HMRC, SOCA or a nominated officer, if that disclosure might prejudice *any* (not necessarily criminal) investigation that might be carried out as a result of the SAR and the information on which the SAR was based came to the person in the course of their business in the regulated sector: PoCA s 333A(1). Self-evidently this offence can only be committed *after* a disclosure to SOCA and if it is known or suspected that by disclosing this information an investigation related to that SAR is likely to be prejudiced. It is not, therefore, tipping-off to tell a client that it is considered necessary to make a SAR. For the Bar, the offence is in practical terms limited to external reports because there will not be an internal reporting structure to a nominated officer (i.e. money laundering reporting officer or MLRO).
- 107 For the offence of tipping off to be committed it is required that the person knows or suspects that the disclosure is likely to have the effect of prejudicing an investigation: s. 333D(3). Thus to commit the offence of tipping-off it is necessary both that prejudice to an investigation is likely and secondly that the discloser knows or suspects this to be the case.
- 108 At a practical level, it is worth noting that, historically, the tipping-off provisions have given rise to perhaps more difficulty than might have been warranted. The fact that a person who has made a report, and thereafter is unable to comply with the client's instructions, with the consequence that the client may infer that a report has been made does not of itself constitute tipping-off. It is necessary for both the offences of tipping off and prejudicing an investigation that an unlawful disclosure is made. Not complying with instructions is not a disclosure for that purpose.

Prejudicing investigations

- 109 Further, it is an offence to disclose that an investigation into *a money laundering offence* is being contemplated or carried out if that disclosure is likely to prejudice that investigation: PoCA s 333A(3). As with the previous offence under s 333A(1) that offence can only be committed if the information on which the disclosure is based came to the person in the course of business in the regulated sector. It appears that the offence can be committed even where it is not known that an SAR has been made. The offence is narrower and applies only to a money laundering investigation and only where such an investigation is contemplated or is underway.
- 110 For the offence of prejudicing an investigation to be committed it is required that the person knows or suspects that the disclosure is likely to have the effect of prejudicing an actual or prospective investigation: s. 333D(4).
- 111 Each of the foregoing offences carry a maximum penalty of a fine and two years' imprisonment (reduced from five years under the original s 333).
- 112 PoCA s 333D protects disclosures made to the person's supervisory authority for the purposes of the Money Laundering Regulations 2007. Thus a disclosure to the BSB will not give rise to the tipping-off offence.
- 113 The tipping-off offences can give rise to serious difficulties in balancing the competing interests of the

investigating authorities, the subjects of investigation, and others. This most obviously applies to banks, for example: **Squirrel Ltd v National Westminster Bank & HM Customs & Excise** [2005] EWHC 664 (Ch). Natwest had frozen its client's account without explanation because of suspicion of S's business activities (trading in mobile telephones). S applied to the court to unfreeze the account. The bank argued that for it to have given any warning or explanation to its customer would have contravened the tipping-off provisions. Further, to have continued facilitating the operation of the customer's account would, Natwest contended, infringe against PoCA s 328. Laddie J sympathised with the bank's position and adverted to the potential for grave injustice arising from the interrelation between s 328 and (the then) s 333.

114 Previously, the Court of Appeal decision in **C v S** [1999] 1 WLR 1551 had led to a Practice Note dealing with the situation arising where the subject of a money laundering investigation sought disclosure of documents which might have revealed the existence of ongoing enquiries by NCIS (now SOCA and from October 2013 NCA). The purpose of the application was an attempt to trace sums of money that a company alleged had been misappropriated. A bank had earlier made a disclosure to the NCIS of suspicious transactions and was concerned that disclosure of the documents might breach the previous tipping-off provisions under s 93D of the CJA 1988. The Court of Appeal gave the following guidance for circumstances that is of continuing application: ('SOCA' being substituted for NCIS):

- (a) As soon as a financial institution (or other regulated body) is aware of an application for disclosure by an investigated subject, SOCA should be informed and the material identified.
- (b) Where SOCA is not concerned with the subject being aware of the investigation it may simply require an undertaking to be provided that the disclosed material should be kept confidential.
- (c) Where partial disclosure is possible without disclosing the existence of an investigation then this should be made. If this does not satisfy the applicant then he should be advised that application will have to be made to the court. Whether any explanation for partial disclosure is provided will be conditioned by advice from SOCA.
- (d) Where the application is to be pursued before the court, then the way in which the proceedings are dealt with will be determined by the particular circumstances and may be on an application to set aside a (without notice) order or for directions. In any event, the court should be warned in advance of the difficulties by way of a sealed letter to the judge in charge of the court and/or by provision of a skeleton argument.
- (e) The degree to which the subject of the investigation can be involved, and whether or not proceedings can be conducted in open court, will also depend on the particular circumstances of the case. However, the general approach should be that ordinary principles will apply to the extent that this is possible. A transcript of any such hearing should be made available to the subject as soon as possible once the need for secrecy has ended.
- (f) The court will decide what evidence it requires, if any, from the investigating agency and may require its attendance, if necessary by making the SOCA or the relevant

agency a party to the proceedings.

- (g) The *onus* will be on the investigating agency to persuade the court that, were disclosure to be made, there would be a real likelihood of prejudice to the investigation. If cooperation from the agency was not received, or the court was not so persuaded, then the disclosure order would be made and the institution would not be at any risk of prosecution.
- (h) The court must recognize its responsibility to protect the interests of absent applicants and must have material upon which to act if an applicant is to be deprived of his normal rights. The court may consider in many cases that a partial order is better than no order at all.

115 In **Governor and Company of the Bank of Scotland v A Ltd** [2001] 1 WLR 751 the police advised the bank that money laundering investigations were being carried out into the activities of the company and asked the bank not to reveal the information to the company. Bank of Scotland was concerned that it might be liable in damages to its customer if it declined to pay out money but might be liable as constructive trustee if it did. The Court of Appeal said that the proper approach for a bank faced with that sort of dilemma was for the bank to seek an interim declaration under CPR 25.1(l)(b), joining the Serious Fraud Office as defendant.

Permitted disclosures

- 116 There are a series of exceptions provided under ss 333B - 333D to the disclosure offences in PoCA s 333A derived from Arts. 2-6 of the Third EU ML Directive. The exceptions complicated and quite narrow. In outline, the following are permitted:
- (a) disclosures to an employee officer or partner in the same undertaking: PoCA s 333B(1);
 - (b) disclosures within an undertaking or group, including disclosures to a professional legal adviser or relevant professional adviser: PoCA s 333B;
 - (c) disclosures between institutions, including disclosures from a professional legal adviser to another professional legal adviser: PoCA s 333C (but these disclosures are only permitted in defined circumstances and for the purpose of preventing an offence);
 - (d) disclosures to a supervisory authority (and for law enforcement purposes): PoCA s 333D;
 - (e) disclosures made by professional legal advisers to their clients for the purpose of dissuading them from engaging in criminal conduct: PoCA s 333D(2).

Legal adviser protection

- 117 There is some protection given to lawyers in some limited circumstances analogous to the circumstances referred to above under paragraph 87 above.
- (a) It is a defence to an offence under PoCA s 342(1) that a disclosure is made by a legal adviser to a client, or a client's representative, in connection with the giving of legal advice or to any person in connection with legal proceedings or contemplated legal proceedings. Such a disclosure will of course not be exempt if it is made with the intention of furthering a criminal purpose: PoCA s 342(5). (The importance of privilege in protecting Article 6 rights and the requirement for establishing clear rules for where

it applies in the context of the AML/CTF regime has been emphasised by the European Commission under its report of April 2012.)

- (b) Under PoCA s 333D(2), legal advisers avoid liability for disclosing to their client if the disclosure is made 'for the purpose of dissuading the client from engaging in conduct amounting to an offence'.

SARs - data protection and privacy

- 118 SARs are kept by SOCA on a database known as the ELMER database (shortly to be replaced by a new database called ARENA). It will be apparent that in a large number of cases subjects of SARs will not know that they have been subject to an SAR and no further action will be taken. At the beginning of 2011 the database held about 1.5 million records. The retention and processing of data by law enforcement agencies gives rise to issues, including under the Data Protection Act 1988. While beyond the scope of this Note it may be of assistance if some of those issues, in outline, are adverted to. In 2011 these were subject to consideration by the House of Lords European Union Committee that received a report by the Information Commissioner.
- 119 In **S and Marper v The United Kingdom** (Application Nos 30562/04 and 30566/04, 2008) the European Court of Human Rights found that "the blanket and indiscriminate nature of the powers of retention of the fingerprints, cellular samples and DNA profiles of persons suspected but not convicted of offences, as applied in the case of the ...applicants, fail[ed] to strike a fair balance between the competing public and private interests...". The Court established that the retention constituted "a disproportionate interference with the applicants' right to respect for private life and [could not] be regarded as necessary in a democratic society". Accordingly, the Court found the UK to be acting in violation of Article 8 of the European Convention of Human Rights.
- 120 There are several aspects of the operation of ELMER which gave rise to concern about compliance with the DPA. The first data protection principle requires that personal data shall be processed fairly and lawfully. Central to this is the requirement that individuals have an understanding of how their personal information will be processed by those who hold it.
- 121 In a detailed letter to the European Union Committee in 2011 the Information Commissioner expressed concern whether the fair processing requirements were being met in those cases of no concern retained on a system indefinitely without the knowledge of those individuals to whom those reports relate. The third data protection principle requires that personal data shall be adequate, relevant and not excessive. The fifth principle requires that personal data should not be kept for longer than is necessary. The Information Commissioner expressed the view that that the arrangements governing the retention of records, particularly those records that raise no concerns, may not comply with these requirements.
- 122 The first data protection principle requires consideration of whether the processing of SARs is compliant with other legal duties. SOCA is required to comply with the provisions of the Human Rights Act 1998 which gives effect in the UK to the European Convention on Human Rights. Article 8 of that Convention is engaged by the processing of SARs and its provisions together with the jurisprudence of the European Court of Human Rights. The Commissioner retention of data on the ELMER database engages concerns about whether this is an unjustified interference with an individuals' right to respect for their private and family life, particular taking into account the judgment of the European Court of Human Rights in

Marper.

- 123 As a result of the concern expressed by the Commissioner, a large number of SARs held by SOCA on the ELMER database were deleted and retention procedures, including the period of retention, revised.
- 124 Though beyond the scope of this note, the SARs regime self-evidently is concerned with the provision of information to law enforcement agencies and the holding and processing of that information (for intelligence purposes). Accordingly, it should be borne in mind that the dissemination and use of SARs engage wider legal issues of data protection and privacy.
- 125 In June 2011, the European Working Party on Data Protection issued its "Opinion14/2011". The Opinion addressed the interaction between AML and personal data protection provisions and calls for more detailed consideration of data protection issues in the AML/CFT legislation to provide for effective data protection compliance. In particular the Opinion calls for 'push' data sharing schemes, privacy assessments of the model of global risk management, and introduction of data protection officers by different entities involved in AML/CFT. It also calls for the establishment of clear and precise data retention periods in the AML/CFT legislation. Some elements of the opinion are reflected in the recently published proposals to update the EU's Data Protection legislation.
- 126 The European Commission, in its April 2012 Report, has said that consideration may be given to introducing, in the next (fourth) Directive, clear and balanced rules which set out how personal data should be handled in order to enable effective AML/CFT compliance while respecting fundamental rights. In line with the developments in the data protection field, more detailed provisions might be needed to take into account, among other things, the principles for personal data processing, to grant a legal basis both for such processing and for the proportionate restriction of the rights of the data subject when necessary to achieve the goals of the AML/CFT directive, provided there are adequate safeguards and that there is consistency with data protection *acquis*. In addition, further consideration may be given to fostering further interaction between AML regulators and data protection supervisory authorities to reach a balanced application of the rules. A measure of protection for data subjects appears to be conferred under Articles 52 and 53 of the draft fourth EU Directive.

§§§

¹ Texts. The best analytical overview, despite being comparatively old, is *Money Laundering Law* Prof. Peter Alldrige Hart Publishing (2003). Other useful short texts include *Blackstone's Guide to the Proceeds of Crime Act 2002*, Rees Fisher and Thomas (4th Ed. 2011) and *Money Laundering Law and Regulation* Booth, Farrell, Bastable and Yeo (Oxford 2011). Mitchell Taylor and Talbot on *Confiscation and the Proceeds of Crime* (Sweet & Maxwell 3rd Ed. 2013) is the fullest treatment of the subject and especially in relation to recovery. For a critique of the international regime, see Sharman, *The Money Laundry* Cornell University Press 2011. Additionally: *A Practitioner's Guide to UK Money Laundering Law and Regulation* Ed. Fox, Kingsley, City & Financial Publishing, (2nd Ed.) (to which the writer made a modest contribution).

² **Twinsectra v Yardley** [2002] 2 AC 164.

³ And arguably, in some circumstances, both too wide and uncertain. See, for example, the report at *Issue 69* of

the Bank of England Financial Markets Law Committee. (Some of the issues raised in FMLC *Issue 69*, but by no means all, have been addressed under amendments by the SOCPA 2005.)

4 On conviction on indictment for the substantive money laundering offences under ss 327-329 a maximum term of imprisonment of 14 years: PoCA s 334.

5 Terrorism Act 2000 s 14(1). It should be noted that in fact the typologies of money laundering and terrorist financing and their modalities are quite different. Money laundering by its nature is an end in itself whereas this is not of course the case with terrorist funds.

6 On the assumption that the barrister in question is required to *do something* (i.e. an act) in relation to the property, e.g., most obviously, advise.

7 See the annual SARs Report by the SOCA November 2011: http://www.soca.gov.uk/about-soca/library/cat_view/82-library

8 http://ec.europa.eu/internal_market/company/docs/financial-crime/20110124_study_amld_en.pdf

9 See further below for this expression and PoCA Sched. 9 and reg. 3(9) of the ML Regulations 2007.

10 In connection with both corporate structures and trusts, it may be noted that it is likely that the focus of future international development and cooperation in AML will be in the area of further transparency of beneficial ownership of both companies and trusts (see generally FATF publications and see FATF Recommendations 33 and 34).

11 See ML Regulations 2007 reg. 3(9) and this money laundering guidance under Part 2.

12 Likely to be replaced by new regulations following the present review by the Financial Action Task Force.

13 See 'engagement' as an organising principle at paragraph 16 below.

14 Review by the Corporation of London in conjunction with the ICAEW

http://www.zyen.com/PDF/AMLR_FULLL.pdf See also the later 2006 SARs Review by Sir Stephen Lander.

15 http://ec.europa.eu/internal_market/company/docs/financial-crime/20120411_report_en.pdf

16 <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=COM:2013:0045:FIN:EN:PDF>

17 <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=COM:2013:0044:FIN:EN:PDF>

18 The existing international AML structure exists substantially in response to the 'Recommendations' of the FATF established by the G7 in 1989. Currently FATF has membership of 32 countries and two regional organisations.

19 [http://www.fatf-](http://www.fatf-gafi.org/topics/fatfrecommendations/documents/internationalstandardsoncombatingmoneylaunderingandthefinancingofterrorismproliferation-thefatfrecommendations.html)

[gafi.org/topics/fatfrecommendations/documents/internationalstandardsoncombatingmoneylaunderingandthefinancingofterrorismproliferation-thefatfrecommendations.html](http://www.fatf-gafi.org/topics/fatfrecommendations/documents/internationalstandardsoncombatingmoneylaunderingandthefinancingofterrorismproliferation-thefatfrecommendations.html)

20 a point emphasised by the government as a view expressed by SOCA in the June 2011 report following the consultation by the government on the implementation and effectiveness of the Money Laundering Regulations 2007:

http://www.hm-treasury.gov.uk/d/consult_money_launder_regs2007_gov_response.pdf

21 <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=COM:2013:0045:FIN:EN:PDF>

23 [http://webarchive.nationalarchives.gov.uk/+http://www.hm-](http://webarchive.nationalarchives.gov.uk/+http://www.hm-treasury.gov.uk/media/C/B/financialchallenge_crime_280207.pdf)

[treasury.gov.uk/media/C/B/financialchallenge_crime_280207.pdf](http://webarchive.nationalarchives.gov.uk/+http://www.hm-treasury.gov.uk/media/C/B/financialchallenge_crime_280207.pdf)

24 www.hm-treasury.uov.uk/media/D57/97/D579755E-BCDC-D4B3-19632628BD485787.pdf

25 Under a risk-based approach, those subject to the AML regime start from the premise that most clients are not money launderers or terrorist financiers. However, there should be in place mechanisms and systems designed to highlight clients who, on criteria established by the person subject to the regime, may indicate that they present a higher risk. The systems and procedures should be proportionate to the risks involved, and should be cost-effective.

26 Though not wholly, see, in particular, the new and important reporting obligation under s 330 that owes its origin to amendments to the Terrorism Act 2000.

27 The policy background is set out in the Cabinet Office PIU report of June 2000

<http://webarchive.nationalarchives.gov.uk/+http://www.cabinetoffice.gov.uk/media/cabinetoffice/strategy/asets/crime.pdf> the policy that that report reflects can be seen to have undergone a substantial change

following the reports, including, in particular, the Lander Report, on the working of the consent (SARs)

regime. The outworking of this change is likely to be reflected in amendments to be expected under the next set of ML regulations.

28 So as to require the conduct in the place where it occurred, if not the United Kingdom, to be a criminal offence
 in the place where it occurred: 1993 ML Regulations reg. 2(4).

29 See further the definitional section at PoCA s 340.

30 It is to be noted that under PoCA s 330 (the duty to report suspicion that another person is engaged in money
 laundering) there is an objective element introduced so that liability will be established where a person *ought*
to have known or suspected that another was engaged in money laundering even if in fact they did not know or
 suspect.

31 The immediate issue was ‘suspicion’ within the meaning of s 93A(1)(a) of the CJA 1988.

32 Contrary to submissions for the Crown and a view at the time expressed in some of the commentary on the
 PoCA.

33 The issue was the bank’s refusal to comply with a customer’s request to make payment out of their account.
 The bank made an authorised disclosure under s 338 of PoCA 2002 in order to obtain the appropriate consent
 of the SOCA, thereby protecting themselves from prosecution under s 328 of the Act (below).

34 There are two ways in which the Crown can prove the property derives from crime: (a) by showing that it
 derives from conduct of a particular kind or kinds and that conduct of that kind or those kinds is unlawful, or
 by (b) evidence of the circumstances in which the property is handled which are such as to give rise to the
 irresistible inference that it can only be derived from crime. The decision has been criticised and, although it
 was certified as raising a question of law of general importance, there was no appeal to the Supreme Court.

35 Regarding the “All Crimes regime” in the United Kingdom: see House of Lords Session 2008-09: European
 Union Committee - Nineteenth Report Money laundering and the financing of terrorism:
<http://www.publications.parliament.uk/pa/ld200809/ldselect/lddeucom/132/13207.htm>

36 Providing for PoCA ss 327(2A), (2B) and ss 328(3), and 329(2A).

37 Proceeds of Crime Act 2002 (Money Laundering: Exceptions to Overseas Conduct Defence) Order 2006, SI
 2006/1070.

38 Defined by new PoCA s 340(14) as a business which engages in the activity of accepting deposits or the
 National Savings Bank.

39 *Sic* an anachronistic reference not to be attributed its literal meaning. In practice SOCA.

40 But this is itself qualified: PoCA 338(2A) by amendment under s 106(5) of the SOCPA.

41 A decision that concerned PoCA s 328 in the context of a solicitor undertaking conveyancing of real property
 purchased with the proceeds of crime. The CCA considered the interrelation with the other money
 laundering offences under PoCA ss 327 and 329, the defence afforded by s 329(2)(c), and the effect of a *bona*
fide purchaser.

42 The expression ‘apparent’ is intentional. See the reasoning in **Shah** (below) where **K Ltd** was adverted to and
 distinguished by Longmore LJ. The reasons for this are beyond the scope of this Note, but the serious disquiet
 expressed by the court in **UMBS Online** about the apparent absence of remedy other than the limited and
 uncertain remedy afforded by judicial review may well have been a factor.

43 Emphasis supplied.

44 The case is instructive as to the apparent care, level and nature of the consideration given to the materials
 giving rise to suspicion.

45 *i.e.* a statutory version of the principle in **Tournier v National Provincial and Union Bank of England**
 [1924] 1 KB 461.

46 For a discussion of the problem from the perspective of banks, *Does Shah v HSBC Private Bank Ltd Make the*
Anti-money Laundering Consent Regime Unworkable? 5 JIBFL (2010) 287 – now to be read subject to the decision
 of Supperstone J (below n 47).

47 *Shah v HSBC Private Bank (UK) Ltd filling the legislative gaps* 7 JIBFL (2012) 407.

48 Ordinary litigation would not include claims where the purpose of the litigation (or reference to arbitration)
 itself was to launder funds through that process.

49 Law Practice Note on Money Laundering (Oct 2012) at para 6.4.5.

50 The domestic and European aspects had different sponsoring departments, namely the Home Office and
 Treasury respectively.

51 CJA s 93A(7) introduced in response to the First EC Money Laundering Directive.

52 An appeal that considered s 70 of the Army Act 1955 which made it an offence for a soldier (subject to military

law) serving abroad to do any act which would constitute an offence if done in England and Wales.

53 Emphasis supplied.

54 **Forthergill v Monarch Airlines Ltd** [1981] AC 251, at p 279.

55 Case 257/86 **Commission v Italy** [1988] ECR 3249 [12].

56 *Ibid.*

57 See, e.g. **Commission v Germany** [1985] ER CR 1661; **Commission v Denmark** [1985] ECR 427. **Commission v Italy** [1987] ECR 1733; same [1991] ECR I-621; same [1994] ECR I-393.