DEALING WITH THE DARK SIDE OF BUSINESS – THE WAY AHEAD!

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A caveat!

The art of prediction is not one that is held in much esteem in the law schools with which I have been associated over the years. Lawyers, particularly academic lawyers whose statements tend to be better documented than the ponderings of practitioners, do not like making predictions, or at least one that they will be held to. Indeed, the common law tradition has generally taken against holding those who make, even, rash predictions accountable to those who rely upon them. The common law has been hesitant to open the door to litigation in such circumstances for a variety of reasons – not least, that as a general rule one can only misrepresent a statement of existing fact. Many other systems of law including Islamic law take much the same view. It was therefore, relatively recently that the law got round to imposing liability for profit forecasts and the like and then generally only on the basis of statutory intervention. Consequently as a mere lawyer I approach the topic of ‘looking ahead’ particularly in regard to the control of fraud and abuse with some trepidation. I do so purely on the basis of my own subjective views.

My first problem is that I am not very sure where we should be going. Obviously we would all like to see less fraud, corruption and dishonest self-dealing. This I suspect is self-evident in all societies. However, we do not wish to stifle the zeal of entrepreneurs and there are profound weaknesses in a society that wishes to live free of risk. Indeed, one of the reasons why the English courts were so pragmatic and perhaps lax in the duties they set for directors during the heyday of British trade expansion in the Nineteenth and Twentieth centuries was not to inhibit the taking of socially acceptable chances with other people’s money. Of course, recent experience would indicate that perhaps the time has come to reassess what is an acceptable risk – but we do have to appreciate that in defining this, there are no bright lines and attitudes will change over time with the benefit of experience – and of course, hindsight!. A particularly dynamic example of a society going through this is China consequent on the opening of its economy.

Whether we like or not, one of the prime drivers of enterprise and certainly the mixed capitalism that pervades the world today is greed and the persistent desire to acquire more and more – both as individuals and as collective societies. Of course, it remains to be seen if this is a sustainable model in a world that is in the process of running out of most things. There are – unless we reach literally for the stars (and seemingly fewer of us can afford to do so these days), limits to the extent that technology and ingenuity can replace the raw materials of existence. As a simple lawyer, I fear these rather bigger, but ever pressing and more obvious issues are somewhat beyond both my immediate remit – and probably competence.

What follows is a chronicle of a number of not necessarily particularly connected issues which to a greater or lesser degree are, in my opinion, pertinent to achieving a better understanding of the issues that need to be addressed in more efficiently and effectively controlling – whether by prevention, intervention or interdiction financial crime. I should perhaps apologise for not attempting, within the confines of this paper, to seek to define my terminology and in particular what I mean by financial crime. As will, hopefully be clear, I am not given to precision or for that matter definition. What I am concerned about in the following somewhat discursive ramble is activity which has the character of crime and either operates within the financial environment, or and this is a much wider, notion is perpetrated for economic advantage.

Culpability

So in the result, we do not want to undermine enterprise – we want people to take risks – even with other peoples money, provided those risks are recognised – as best we can, and those who are at risk, are willing participants. Where we draw the line is dishonesty and that peculiar state between objective negligence and what has been somewhat confusingly described as culpable negligence. We are satisfied that reckless conduct should be punished – possibly through the criminal law and should give rise to viable claims for compensation. The problem is when we have (or can only sensibly, and perhaps fairly, allege) mere negligence. Of course, there is always the danger that things look somewhat more obvious and certain once they have occurred. Hind sight is a great virtue and enables us to explain so much of what has occurred! The problem is in fairly determining, with any certitude, what was a reasonable expectation before hand. This is a particular issue in the financial markets and business and the courts have naturally been reluctant to set retrospectively, standards which might stifle enterprise in the future.

In my opinion one of the best tools for distinguishing those cases of negligence which we treat in the ordinary run of things – possibly by compensation and even in certain cases disciplinary action - but generally not through the public law, and cases where we properly wish to take a more robust approach, is that of self-dealing. One of our more perceptive and controversial English judges, Lord Templeman, when sitting as a High Court judge, in the case of *Daniels v. Daniels* (1978) 2 WLR 73) identified this factor. He distinguished between the mere negligence of a director and negligence which allowed that director to make a substantial personal profit for himself and his wife. The self-interest while not fraudulent in the conventional sense, gave rise to a whiff of dishonesty which justified the court in treating what was alleged as mere negligence, as a culpable wrong – in that case cutting through the traditional reluctance of courts to allow minority shareholders to sue directors for wrongs done to the company (the so called rule in Foss v. Harbottle).

I have long argued that it is the willingness of judges to sniff our facts which indicate a lack of good faith and then take an imaginative and robust approach to the law, which explains so many of the older cases on directors duties. Taken at face value some appear to espouse contradictory principles of which many of my academic colleagues have pondered over - for many years without producing, with respect, any greater clarity (See B. Rider *'Amiable lunatics and the Rule in Foss v. Harbottle'* (1978) CLJ 270).Of course, in most systems of law, alleging fraud and dishonesty is a serious and expensive step and in commerce one does so at one's peril in terms of costs, so it is entirely understandable that those, while brave enough to become embroiled in litigation, exercise circumspection.

Consequently, I advocate in fashioning not only our rules and regulations, but also in the way we handle specific cases, we develop procedures which allow us better to discover and discern where there has been self-interested breaches of duty, whether of care or compliance, and then characterise these as something different and deserving of greater examination and possibly intervention, whether through the civil, criminal or some other legal process. Self-interested breaches of duty - in the words of the old English Chancery cases – 'smack of fraud' – at least in the some what more imaginative way that Chancery judges regarded equitable fraud. This, while not providing a bright line in the sense that has been advocated by bodies such as the Financial Services Authority in the UK and the US Securities and Exchange Commission, does allow us to bring home accountability to those who deserve to pay – and by their acts often have the money to do so – or at least know someone else who does! And, in this regard I feel that we need greater clarity in regard to what may reasonably be claimed on Director and Officer insurance policies. Generally speaking such policies and more general indemnities provided by companies and third parties are allowed to cover negligence, but not fraud, on the grounds of public policy. Where we find self-interested negligence in the sense that we have been discussing, then there is much to be said for regarding this as in the case of fraud and depriving errant directors and others the protection and comfort of passing on their liability to insurers and thus to the business community at large.

Making them pay!

Reinforcing this approach, I commend the developments that have taken place in many common law legal systems over the last couple of decades in fashioning civil restitution claims that allow the tracing and interdiction of the proceeds of many types of misconduct and also, perhaps in practice more importantly, the ability to hold those who participate and facilitate the laundering of these proceeds liable to compensate those who have suffered loss. The liability is based on the exploitation of a fiduciary relationship.

However, it is a matter of regret that, at least in England, the vitality of these new weapons has been blunted, to some degree, by the courts requiring proof of dishonesty in the more traditional sense. We are, in the main dealing with professionals, such as bankers and other financial intermediaries, who are in the business of facilitation and therefore should bear the responsibility, for which they can often charge, of making sure that they are not compromised. Those that hold themselves out as providing a professional service should be under an obligation to take more care – and therefore there is a strong argument, in my opinion for imposing liability, at least to make restitution on the basis of traditional negligence. It is not without interest that in at least one leading case, before the English Court of Appeal, the then Lord Chief Justice showed relatively little sympathy for a bank that had taken a commercial

decision to conduct business in a manner which placed it on the 'horns of dilemma'. This is something to which we will return.

Given the significance and relative novelty of this body of law and the impact that it has on the way in which business is in fact carried out in the financial sector and the potential impact on foreign intermediaries, it is perhaps worth discussing, albeit briefly, how the English courts have utilised the principles of restitution. It should also be noted that courts in common law jurisdictions around the world have had no difficulty in applying these principles to wealth within their own domestic jurisdiction, even if the relevant conduct took place in other jurisdictions and, most importantly, not with standing that the trust is not known in that other place. For example, a Singapore Appellate Court imposed fiduciary obligations on persons in Singapore in regard to the proceeds of bribes paid in Indonesia, albeit Indonesian law knows nothing or the traditional trust. There have been numerous other such examples, covering misconduct in countries as diverse as South Africa, Taiwan, Haiti, Saudi Arabia and Turkey.

While many jurisdictions around the world, such as Japan, have enacted laws introducing essentially English trust law into their legal systems, this is largely to facilitate the holding and division of proprietary rights. In other words it is concerned primarily with the trust as an institution or vehicle for holding property and not as a remedial device. In systems of law that do not know the trust, such as the Civilian and Roman Dutch traditions and in particular the Shari'ah, there lawyers will some times contend that none the less, their law recognises many of the obligations, which in the common law tradition we would characterise as fiduciary. In most cases these stem from the law of agency or where the law recognises exceptional vulnerability. It is, however, a matter of real doubt whether these obligations have the vitality and robustness of the traditional fiduciary law in being able to reach out and impose over-aching obligations of loyalty and accountability.

While every breach of trust will amount to a breach of fiduciary duty not every breach of a fiduciary relationship will amount to a breach of trust. Trusts, even remedial constructive trusts, involve property and rights in property. The relationship between the trust and the trustee is a proprietary relationship. It is upon this basis that trustees are under a strict obligation that does not depend upon culpability or a state of mind, to replace property that has been improperly removed or diverted from the trust (See *Clough v. Bond* (1838) 3 My & C 490, *Target Holdings v. Redferns* (1996) 1 AC 421 and *Attorney General for Hong Kong v. Reid* (1994) 1 AC 324). Trustees are also held to the general and strict fiduciary obligations to avoid all conflicts of interest, to act in good faith in the best interests of their beneficiaries and to act with prudence and diligence. They have an over all obligation of loyalty and fair dealing. While the obligations of a trustee are expressed in proprietary terms many of the obligations are also personal and the remedies that are applied may well be compensatory.

One area which has caused difficulty is the situation where a person receiving property, including rights in or to property, does not appreciate that it is being transferred to him in breach of trust. Generally speaking in terms of priorities a *bona fide* purchaser of such property, without actual knowledge, will be able to take the property unencumbered. The original owner's rights in the property, which are equitable, will be defeated by the stronger right of the so called 'equity's darling' – a *bona fide* purchaser for value without notice. The position may be different if the 'original' owner has been able to re-establish his legal ownership in the property. For example, in cases of theft where ownership does not move, or fraud where there has been an effective rescission of the contract, the legal ownership remains in or reverts in full, to the owner and even 'equity's darling' will, save in exceptional

circumstances, in most common law jurisdictions, have no right to the property against the owner. Of course, in such cases as well as where the original owner's equitable interest is defeated, the remedy will be in damages against the fraudster – who sadly is likely to have disappeared.

Where a third party takes property with knowledge of a breach of trust, then in many legal systems of the common law tradition, he will become a constructive trustee and hold the property on much the same terms as the trustee in breach. There are cases which indicate that in such circumstances, actual knowledge of the breach does not need to be established. Knowledge of facts that would put a reasonable man on inquiry would be sufficient to create the obligation of trustee. Reckless indifference to the rights of another would be enough, but whether negligence is an appropriate standard has been questioned – as we have already noted. Deliberately refusing to make inquiries in circumstances where you are suspicious, may well place on you, the risk of what you might have found - had you made proper and reasonable inquiry. Of course, if the person who takes the transfer is a volunteer, that is, does not provide consideration, then he will not be considered a *bona fide* purchaser and the issue of knowledge is irrelevant. He will not be able to resist a claim by the beneficial owner and may well be considered to possess the property as a constructive trustee. While the common law courts as a matter of contract law generally do not consider the adequacy of consideration, in cases such as we are discussing, a wholly inadequate consideration might not be considered as dealing in good faith.

The circumstances where a fiduciary obligation is imposed are not fixed. The courts may be prepared to find that in the circumstances of a case, a person has stepped into a fiduciary relationship and is, thus subject to fiduciary obligations. There are many factors influencing the courts in this regard, but issues such as a reposing confidence in another and reasonably expecting fairness and good faith, play a role. As do the deliberate taking advantage of an imbalance of opportunity in unfair circumstances. Having said this, given the onerous obligations attaching to fiduciary status, the courts do not find such a relationship easily – particularly in the world of commerce. Where a person is a fiduciary, however, then the obligations are strict and remedies generally do not depend upon the state of mind of the fiduciary in breach. If a fiduciary enters into a conflict of interest or takes a secret profit he will be liable irrespective of whether he was dishonest or not. His breach of stewardship is sufficient harm and justification for a remedy. The state of mind of the fiduciary may, however, have an impact on the way in which the court deals with him and in regard to such issues as ratification, indemnity and interest. The more dishonest a person is the less easy will it be for him to persuade a court that there has been agreement to or authorisation of his conduct let alone he should be indemnified.

Mention has been made of the liability that equity has developed for those who assist others in the breach of their fiduciary obligations. Where the trust property is actually transferred to the third party, then it is often appropriate to talk in terms of liability based on a constructive or resulting trust, as we have just seen. There is a proprietary relationship. Of course, there are issues as to what can be considered trust property for the purposes of imposing or rather finding, a trust relationship. In equity it seems that confidential information and opportunities to profit - such as by virtue of an embryo contract, may be considered, unlike in the criminal law in England, to be a form of property (See *Boardman v. Phipps* (1967) 2 AC 46 and *Cook v. Deeks* (1916) 1 AC 554). In certain circumstances secret profits and bribes may be considered to amount to trust property on the basis that equity looks as done that which should be done and will therefore look to the point in time, after which the fiduciary has been

ordered to account for the illicit benefit (*Attorney General for Hong Kong v. Reid* (1994) 1 All ER 1). However, what is the position of a third person who does not actually receive into their control or possession, property that can be the basis of a tracing claim, but none the less assists the fiduciary to breach his duties or launder the proceeds of such? It is misleading to describe such a person as coming into a constructive trust relationship with the ultimate beneficiary as there is no proprietary nexus – there is no property upon which equity can focus. Imaginative lawyers and occasionally sympathetic judges – who do not like to see fraudsters retaining their ill-gotten gains, invent arguments by which rights to call to account or even sue, are transmuted into something resembling a right in property. However, this is not really good law and creates uncertainty and potential unfairness, particularly for relatively innocent third parties and in particular intermediaries.

Rather than bend property law, in many common law jurisdictions the courts have found liability for culpable third parties on the basis of their dishonest assistance in the breach of another. This form of accessory liability is based purely on their dishonesty and not upon notions of property or for that matter the viability of a tracing claim. In a number of cases the civil courts in many Commonwealth and even some non-common law jurisdictions, have imposed personal liability on those who dishonestly assist others to breach their fiduciary duties including the laundering of the proceeds of such. In providing assistance it is not necessary that the accessory has at any time control over or possession of the illicit wealth. On the other hand, the assistance must be material. There has been debate as to the state of knowledge that the accessory must be proved to have to justify his personal liability. Actual knowledge of the facts relating to the breach of duty by the fiduciary is obviously sufficient. It has also been held that the reckless disregard of the rights of another might well be sufficient (*Royal Brunei Airlines v. Tan* (1995) 1AC 378 and *Selangor v. Cradock (No3)* (1968) 1WLR 1555). It is on this level of knowledge that dishonesty can be found. Of course, unlike in the criminal law, the test is in civil cases objective (But it has been held that the defendant must realise that his actions would be considered dishonest by ordinary reasonable people, see *Twinsectra Ltd v. Yardley* (2002)2 All ER 377.). Thus, the defendant will be taken to know or appreciate what a person in his position, with his knowledge and skill, would appreciate. It has, for example, been held that an accountant who refrains from asking why his client wants companies registered in England with bank accounts, might well be taken to know the facts that would have come out if he had received answers (*AGIP(Africa) v. Jackson* (1990) Ch 265). By not asking he deliberately put himself in a position of ignorance. He had what has been termed 'Nelsonian' knowledge. When Admiral Nelson was asked at the Battle of Copenhagen if he saw his commander's flag signals requiring that he withdraw from the engagement he held his spyglass to his bad eye and asserted he saw nothing!

Few laws can or do operate in a legal vacuum and the inter-relationship of rules is not always predictable or produces desirable results. A serious problem, in many jurisdictions, is that those laws relating to the imposition of criminal and increasingly, what might be described as administrative, penalties for misconduct, impact on the way quite legitimate business is conducted. The laws facilitating and controlling business and in particular financial business may not adequately or comfortably interface with these essentially criminal laws. A good example is the obligation not to reveal, to anyone other than the appropriate public authority, one's suspicion of money laundering. In the United Kingdom, as in many other jurisdictions, the unauthorised disclosure of this information may well amount to the serious crime of 'tipping off'. While this offence is intended to facilitate effective law enforcement by allowing the secret monitoring of transactions by the authorities, the relationship of this crime with the obligations occasionally imposed under the civil law were not sufficiently

recognised. For example, there are situations where a person, in a fiduciary relationship or in a position which may result in the imposition of fiduciary obligations, is under a duty, in the proper discharge of those fiduciary responsibilities, to search out and inform those who may, in line with the suspicions that he has properly formed, have a claim against the property in question,(See for example, *Finers v. Miro* (1991) 1 WLR 35. See generally *Banking on Corruption, The Legal Responsibilities of those who Handle the Proceeds of Corruption* (Sir Richard Scott and Lord Steel of Aikwood, 2000), Society of Advanced Legal Studies).

There are other situations, in which, there would be a duty in the civil law, to take steps to protect the relevant property, which might have the effect of 'tipping off' those under suspicion.(See for example *Bank of Scotland v. A. Ltd* (2001) EWCA Civ 52 and see in particular *Shah v. HSBC Private Bank,* (2010) EWCA Civ 31). The Courts have been required to consider such situations, but have not always found it possible to provide much in the way of guidance, let alone protection, that would meet the needs of those engaged in legitimate business. In the Bank of Scotland case, Lord Chief Justice Woolf recognised that the bank had arguably placed itself in the position of a constructive trustee in regard to those who might have a claim to monies in one of its client's accounts. The civil law obligations to those who might assert such a claim could be at variance with the obligations imposed by the criminal law. However, as we have already noted, the English Court of Appeal took the view that this was essentially a commercial risk – the price that the bank would have to pay for being a bank! (See also *C.v.S.* (1999) 2 All ER 343, *Amalagamated Metal Trading Ltd v. City of London Police Financial Investigation Unit* (2003) EWHC 703 Com and *Hosni Tayeb v. HSBC and Al Farsan International* (2004) EWHC 1529 Comm).

Again, while it is clear, under the relevant statutory provisions, that liability for breach of contract or disclosure of confidential information, when reporting a *bona fide* suspicion to the proper authorities, is unlikely, although in certain cases not entirely unthinkable, there are real and unresolved issues in the law of defamation. Therefore, in seeking to comply and ensure proper compliance, with these laws and the various rules they have spawned, care needs to be taken in regard to the general law as well. It is often the case that compliance systems and advice focus almost exclusively on the criminal and regulatory laws and ignore the legal environment within which the relevant transactions or conduct occur. This is particularly important in the context of corporate life given the many relationships that, for example, a director will find himself in, both to his company and others. This is not a simple or straight forward area of law.

Mens Rea

It is perhaps useful and instructive before leaving this important area to briefly consider in the context of the criminal law what the prosecution needs to prove, beyond a reasonable doubt, in the case of a prosecution under the relevant statutory provisions applying to money laundering offences. I will take the liberty in this regard of addressing the English provisions and cases. Most of the substantive offences relating to money laundering require either knowledge or suspicion although in the case of certain of the offences relating to terrorist finance it will suffice to prove that the accused has reasonable cause to suspect. In other words an ordinary reasonable man, in the position, of the accused would have formed a suspicion. Of course, it has to be proved even under this objective standard, that the accused knew such facts as would have properly grounded such a suspicion. In the case of handling charges, under section 22 of the Theft Act, it is necessary to prove that the accused knew or believed that the relevant goods were stolen or the proceeds of fraud. Some of the

commentaries on the anti-money laundering provisions refer to belief as suspicion. This is certainly wrong in the criminal law and probably misleading in the civil law.

Knowledge in the criminal law is certain knowledge of the relevant facts. Belief is something less than certain knowledge. Belief is, for example, when a person might say to himself: 'I cannot say I know for certain that those goods are stolen, but there can be no other reasonable conclusion in the light of all the circumstances, in the light of all that I have heard and seen.' (*R v. Hall* (1985) 81 Cr App Rep 260). A suspicion would not be sufficient. However, it has been accepted, that willful blindness, that is deliberately not acquiring knowledge, is sufficient to establish a belief (*R. v. Moys* (1984) 79 Cr App Rep 72 and see also in regard to a 'great suspicion' and a refusal to believe, R. v. Forsyth (1997) 2 Cr App Rep 299). Suspicion is defined in the *Oxford Dictionary* to include, an impression of the existence pr presence of; belief tentatively without clear grounds; being inclined to think; being inclined to mentally accuse or doubt innocence and to doubt the genuineness or truth of a suspected person. In *R.v. Da Silva* , the Court of Appeal, in regard to an earlier provision thought that the accused must be shown to think that there is a 'possibility, which is more than fanciful, that the relevant facts exist' and that the resulting suspicion should be of a 'settled nature' (2006) EWCA Crim 1654). However, in *Squirrell Ltd v. National Westminster Bank plc*, Laddie J rather unhelpfully noted that there was no direct authority on what 'suspect' means under the anti-money laundering provisions ((2005) EWHC 664 and also *K. Ltd v. National Westminster Bank* (2006) EWCA Civ 1039. In *Hussein v. Chong Fook Kam* (1970) AC 942, Lord Devlin, observed 'suspicion in its ordinary meaning is a state of conjecture or surmise where proof is lacking.' He also added that suspicion did not require admissible evidence or for that matter evidence. He did recognize that there is no need for the suspicion to be reasonable. In practice, it may well be possible to establish the requisite state of mind from circumstantial evidence, although this is problematic. The conduct of the accused may well indicate, beyond a reasonable doubt, that he was in fact suspicious. It is clear that negligence is not sufficient. While culpable and gross negligence are terms that rather distort the criminal law, it may well be that self-interested negligence, may be a sufficient basis. Willfully shutting one's eyes, to what would have been obvious (See for example Millett J.'s comments in *AGIP (Africa) v. Jackson* (1990) Ch 265, affirmed (1991) Ch 547), would be sufficient in most cases. An accused who deliberately prevented himself acquiring certain knowledge, would, in the vast majority of situations, be doing so because he suspected the truth. Having said all this, the notion of suspicion is a difficult one, especially for the criminal law. While the courts generally take the view that it is wrong to try and define concepts such as knowledge and belief for juries (see *R. v. Harris* (1986) 84 Cr App Rep 75 and in particular *R. v. Smith* (1976) 64 Cr App Rep 217), 'where much reference is made to suspicion, it will be prudent to give (a direction)' to the jury, *R.v. Toor* (1986) 85 Cr App Rep 116).

Attribution of knowledge

Another highly relevant area of the law in practice is that of attribution of knowledge. Again the English courts have taken quite a robust line which has served the interests of justice in placing responsibility not only upon those who have actually benefited by virtue of the wrong doing, but who in terms of deep pocket theories are best able to pay for the harm caused and in any case are in the strongest position to promote effective compliance. The issue of attribution of a state of mind is particularly important when a remedy is being sort against a company or other legal person that does not have in any real sense a physical mind.

There are situations where, to establish the requisite state of mind for liability under the civil and criminal law, it will be necessary to attribute knowledge from one person to another. Where companies are involved this involves a number of issues. A similar problem arises in fixing a company with a culpable intention. In *R v Rozeik* [1996] 1 BCLC 380)the Court of Appeal, referring to the earlier case of *El Ajou v Dollar Land Holdings plc* [1994] 2 All ER 685) accepted that whether a company is fixed with the knowledge acquired by an employee or officer will depend on the circumstances and it is necessary to identify whether the individual in question has the requisite status and authority in relation to the particular act or omission. Therefore, it does not follow that information in the possession of even a relatively senior official will be attributed to the company if that employee is not empowered to act in relation to the transaction in question. On the other hand, as was dramatically illustrated in the House of Lord's decision in *Re Supply of Ready Mixed Concrete (No 2)*, [1995] 1 AC 456 an employee who acts for the company within the scope of his employment, even if against the express instructions of his employer, may well bind the company as he is the company for the purpose of the transaction in question. A similar view was expressed by the Privy Council in *Meridian Global Funds Management Asia Ltd v Securities Commission* [1995] 2 AC 500.

As the decision of their Lordships in *Ready Mixed Concrete* clearly shows, a company may be liable to third parties or be guilty of the commission of an offence even though the relevant employee was acting dishonestly and/or in breach of his contract of service or even against the interests of the company. In that case, the House of Lords accepted that the management had gone to considerable lengths to ensure compliance with their instructions, but once a transaction had been entered into by an employee who had the power to deliver on behalf of the company, such considerations went merely to the issue of mitigation. While the Privy Council recognized in *Meridian Global Funds Management* that it is a matter of interpretation as to whether a particular statute seeks to 'fashion a special rule of attribution for the particular substantive rule,' both the Privy Council and the House of Lords were quite prepared to adopt this notion of 'merger' of minds in the case of restrictive trade practices law and securities regulation, given the discerned public policy in avoiding a result which might defeat the purpose of the legislature.

Where the employee in question is perpetrating a fraud against his employer, then it is obviously inappropriate to take his knowledge of the fraud as being that of the victim company. This much is clear from *Re A-G's Reference (No 2 of 1982)*[1984] 2 All ER 216. See also generally Cheong-Ann Png, *Corporate Liability* (2001, Kluwer). In such situations, the employee cannot be both a party to the deception and represent the company for the purpose of it being deceived. When the company is the victim, the person or persons who may be taken to represent its state of mind may well differ from those whose state of mind will be attributed to the company in cases where it is the company that is charged with an offence. In *Rozeik*, the Court of Appeal thought that in this latter situation such persons are more likely to represent what Viscount Haldane called 'the directing mind and will of the corporation (*Lennard's Carrying Co Ltd v Asiatic Petroleum Co Ltd* [1915] AC 705).

Control responsibility

Another issue which commends itself as having practical importance in the control of fraud and other forms of misconduct is that of 'control liability'. This involve placing those who are by virtue of their business or profession in a position to exercise supervisory control over those who actually engage in abusive conduct, at risk if there is a demonstrable failure of 'control'. Whether this is through legal, regulatory or disciplinary procedures is a matter for

discussion. The approach in the USA over many years has been to provide, by statute, that in certain defined situations, those who are in a supervisory role may be subjected to the same enforcement procedures, usually of a civil nature, where they fail to take such steps as are reasonable in the circumstances to discourage, prevent and control such misconduct. A similar approach was recommended in Britain by the English Law Commission in regard to responsibility for overseas corrupt payments, although the relevant provisions in the Bribery Act 2010 adopt a different approach imposing almost strict liability on the commercial organization unless it can establish that it had taken reasonable steps to prevent the offence being committed by a person associated with it.

Those in control and those who, in the nature of their business or profession, facilitate the commission of crimes and other misconduct are, in my opinion, worthy candidates for responsibility and thus, liability. Of course, the nature of this liability will appropriately vary. This not only places additional costs, hurdles and risks in the path of criminals, but assists detection and investigation. Institutions and professionals who are utilized in the commission of financial crimes present relatively easy and therefore accessible and amendable targets for law enforcement, where there should be a reasonable expectation of co-operation in the pursuit of the primary criminal activity. Of course, there are proper issues relating to fairness, proportionality, cost and, indeed, human rights. However, a balance can be struck.

Detection

Associated with this are the vital issues of promoting whistle blowing and the protection of material witnesses. These are deep and highly significant issues of real practical importance in the detection of especially money laundering, insider dealing, corruption and fraud. Experience in many countries has shown that many types of financial crime and corruption are best exposed by colleagues and associates of the wrong doer 'blowing the whistle' anonymously or otherwise. For example, in the USA a significant proportion of the cases that have been successfully brought before the courts in regard to insider dealing and related securities frauds have first been exposed by associates of the wrongdoer. These often include individuals who are either jealous of the wrongdoer's lifestyle or who are simply being vindictive. In the USA law enforcement and regulatory agencies often make payments to such persons where their co-operation contributes to the identification and resolution of serious misconduct. Indeed, under a number of statutes in the USA there is specific provision for the payment of bounties and rewards and in legislative proposals currently before the US Congress in cases of foreign corrupt payments informants will be able to recover up to thirty per cent of the amount in issue. While the payment of such bounties has been rejected in the United Kingdom, at least by a Select Committee of the House of Commons, this approach is not in fact uncommon in many other countries in regard to drugs, customs and fiscal offences. Even in Britain limited payments are made to informants. Of course, a variation on this is where prosecutors seek to do a deal with a co-accused to give evidence against perhaps a more serious participant in a course of criminal activity. This is particularly important where organized crime is involved. The difficulty in court is that the evidence may appear to be tainted thus, impacting on its credibility or, in some cases, its admissibility.

Compliance systems have an important role to play in fostering effective management of complaints and alerts, and as we have seen in the context of money laundering, the law is not always as clear and as protective as it might be. In reality in most jurisdictions the protection that is in fact provided to those, who for whatever reason, do expose fraud and the serious crimes, is relatively weak and unpredictable. The development of other mechanisms-+ for

preventing and controlling fraud and abuse is obviously of great significance. Related to this, but of much wider significance, is the role of intelligence and in particular the profiling of risk and pertinent vulnerabilities.

Corruption

In practice it is not always sensible or practical to draw a line between the control of corrupt practices and other areas of financially motivated crime. However, in policing serious criminal activity the effective control of, at least, certain forms of corruption is of considerable practical significance. For example, it has rightly be recognized that organized crime 'survives on fear and corruption' and organized criminal conduct will inevitably involve corrupt practices as its seeks to obtain immunity from the legal system and protect and further its monopolistic practices. It has also, with justification, been said that the 'badge of fraud is secrecy' and while a fraud or similar criminal activity – such as laundering operation, endures there will be significant incentives for criminals to ensure it remains undiscovered and corruption is an effective tool in doing this. Consequently there is a lot to be said in vigorous enforcement of effective anti-corruption laws. Having said this, the practical problems are legion. Suffice it here to commend one approach that, while not without its critics, has had some effect.

In a number of Commonwealth anti-bribery laws, harkening the juristic experiments of Empire, there are provisions which create a rebuttable presumption that wealth in the hands of public officials that cannot be justified by their public emoluments, are the proceeds of misconduct. A similar provision is found in article 20 of the United Nation's Convention against Corruption 2006. Under some provisions, such as section 10 of the Hong Kong Bribery Ordinance, such sums in the hands of the official, his family and or close associates may be recovered by the state. While to be commended as an effective control device, targeting unexplained increases in net worth, these provisions may well throw up information that can be utilized for other legitimate compliance purposes. Indeed, it may well be appropriate, in some cases, to require similar obligations of key staff under suitably drafted provisions in contracts of employment.

Indeed, in jurisdictions where neither the constitution nor human rights laws present an obstacle, a similar approach has been applied to dealing generally with profitable crime. Thus, in the United Kingdom in certain circumstances those who are living above such income as can be lawfully explained might be subjected to civil procedures by the authorities and in the case of convicted criminals such additional wealth may be confiscated under the criminal law. Of course, in many societies the revenue authorities have long adopted similar tactics in identifying targets for special assessment.

Regulatory offences – a soft option?

A related issue, at least in terms of detection, is the practical importance of effective and efficient policing of disclosure and reporting requirements. Particularly in the case of corporate fraud and misconduct one of the first tell-tale signs that something is wrong will be a miss or late filing of accounts or other required statement. Of course, traditional law enforcement agencies are not generally keen on expending scarce resources in policing corporate disclosure requirements and in many countries compliance is little more than a civil

or administrative issues. However, placing adequate surveillance and policing at this level will assist significantly in the identification of many abuses which in time mature into situations which may well result in insolvency and worse. Investment at this level of the legal and regulatory system makes a great deal of sense. The same is equally true in regard to the robust monitoring of other disclosure, recording and reporting devices and their audit, preferably by inspection.

Prosecution deals and the like!

Over the last fifteen or so years there has been increasing interest in many jurisdictions in regard to the use that can be made of the civil law in enforcing essentially public law and regulatory obligations. In the USA the Securities and Exchange Commission has over many years developed a sophisticated set of procedures within the realm of the civil law by which it polices the US Federal Securities laws. While there has been statutory intervention, historically these procedures were based on the SEC seeking the imposition of an injunction for breach of the law. However, the courts have shown flexibility in attaching to such orders obligations to disgorge illicit profits. These developments are largely a result of the US Constitution which denies prosecutorial authority to a body such as the SEC, not with standing that it has an enforcement mandate. The US courts have on the whole been receptive to the use of civil enforcement actions not only by the SEC but also other regulatory and supervisory authorities. Of course, in the US much greater resort is made to civil litigation in vindicating investor's rights and the US legal system in many ways fosters the efficacy of such suits. It is also the case that for a variety of reasons in the USA defendants are given considerable incentives to settle claims and agree to the imposition of penalties and other obligations which may range from restructuring compliance to the imposition of independent monitors.

The use of civil enforcement procedures has been tried in a number of other jurisdictions on the basis of what is perceived to be success in the USA. However, the differences in the US system are such that in many cases the potential to fashion these procedures into an effective weapon against wrongdoing has not been fully realized. In Britain the Financial Services Act 2000 introduced a series of civil offences for market abuse. The Financial Services Authority was relatively eager to pursue these through its statutory civil enforcement powers. However, on the whole this has not been a happy experience (but see *Winterflood Securities Ltd v. The Financial Services Authority* (2010) EWCA Civ 423 (22 April 2010). The record of the UK authorities in seeking to use civil procedures against the proceeds of crime has also been unimpressive. There are many reasons for this, but one has been the reluctance of the courts to accept lesser standards of proof and protection for those essentially accused of criminal charges than would be required in a criminal prosecution. Consequently, in Britain the FSA has almost abandoned the civil offences in cases such as insider dealing and now relies on the criminal law.

More recently in Britain the Serious Fraud Office in cases of bribery has adopted a stance not too dissimilar from the US practice of agreeing 'consent injunctions'. In several cases the FSA has agreed to stay criminal proceedings on the basis that the accused company voluntarily agrees to pay a penalty and undertakes other appropriate steps including the implementation of revised compliance procedures and the appointment of monitors. It has also in close co-operation with the US authorities and in particular the Department of Justice brokered international settlements. These arrangements do leave open a number of serious legal issues and while the ingenuity of the Serious Fraud Office is to be congratulated there

are real concerns. These came to the fore in a recent case in Southwark Crown Court (*R. v. Innospec Ltd*, 26th March 2010, (2010) Crim LR 665) where exceptionally a Lord Justice of Appeal sat. Lord Justice Thomas censured the SFO for failing to adhere to the rule of law. In his remarks on sentencing the learned judge stated ‘it is clear that the SFO cannot enter into an agreement under the laws of England with an offender as to the penalty in respect of the offence charged’. He emphasized that such deals had no effect and, indeed, in a subsequent case Bean J., also sitting in Southwark Crown Court (April 2010) specifically rejected the recommendation of the SFO for a suspended sentence, which the SFO has agreed on the basis that the accused had co-operated fully and had done a ‘deal’ with the UK and US authorities to assist in the investigation of other offences. While the Court of Appeal subsequently reduced the sentence, it did so firmly on the basis of its own view as to the mitigating circumstances and not on the basis of the SFO’s undertakings (see *R. v. Dougall* (2010) EWCA Crim 1048). In the *Innospec case* Thomas LJ considered that a traditional fine was the appropriate financial penalty and emphasized that there should be no difference, given the seriousness of the offence of corruption, between the UK and USA. In previous cases the SFO had settled a much smaller financial penalty than the millions imposed, albeit also by settlement, in the USA. Thomas LJ thought that ‘if the penalties in one state are lower than in another, businesses in the state with lower penalties will not be deterred so effectively from engaging in corruption in foreign states whilst businesses in states where the penalties are higher may complain that they are disadvantaged in foreign states’. He also noted the very considerable fines that were imposed for in cases involving allegations of wrongdoing under competition law and made the point that corruption could have an even more serious impact on trade and business. He was not impressed by the argument that the SFO and US has brokered their deal because they did not want to put the business out of business. In his opinion if the business was corrupt it should be sanctioned. Indeed, Thomas LJ stated that it was improper for the SFO to try and do deals with the American authorities.

The SFO had also introduced a new procedure whereby companies and others can by a process of self-accusation draw to the attention of the Serious Fraud Office possible offences. However, now that the SFO has been so dramatically deprived by the English judiciary of any power to extend favorable treatment under the criminal law for such discretion, it remains to be seen what the real advantages for a potential defendant in self-accusation remain. Of course, the position remains very different in the USA and in many Commonwealth jurisdictions it is quite common for financial offences to be compounded. Perhaps the most serious mistake that the SFO made was to ignore the very different systems for prosecution that exist in the two countries. Indeed, to some degree the new Director had foisted on him a report by a former New York prosecutor which was critical of the way in which the SFO had acted in the past, but which manifestly did not give proper weight – according to Thomas LJ the English view of the rule of law! A lesson perhaps, for all international experts ‘parachuted in’ to sort out other people’s problems!

Privatization

Another issue that is likely to come to the fore in fighting financial crime is the privatization of enforcement. Of course, many agencies – including the UK’s Financial Services Authority stand outside government and resort to the private sector for assistance in policing their law. However, what we are contemplating here is private parties taking the initiative themselves in bringing civil actions (or in some cases private prosecutions) for breaches of the criminal and regulatory law. Of course, it is only in rather special circumstances that private parties would have *locus standi*. However, in the USA and some other jurisdictions, under statute, it is

possible in certain cases for private individuals to bring actions in the civil courts effectively to enforce public law obligations. There are obvious cost and resource advantages to government. The extent to which this could be extended and the enforcement of much of the law that we have been discussing left in the hands of essentially bounty hunters is a moot issues. However, the importance that has been attached, not least in the United Nations Convention against Corruption, to asset recovery in cases of corruption and the STAR initiative of the World Bank do point to the future. Already there are organizations, including some sponsored by governments, which operate more or less as bounty hunters. I suspect we will see rather more of this. Of course, there are a number of very real issues that go beyond those relating merely to resources.

International co-operation – myth or reality?

When King Henry 11 of England was asked how far his writ (i.e. his authority) ran, he responded as far as my arrows reach. While the jurisprudence of jurisdiction has not kept up with developments in ballistic technology, the importance of the ability to sanction is still relevant. Criminals have long recognised the advantages of operating beyond the reach of effective authority. While history records examples of essentially extra-legal action against those operating from beyond the territorial jurisdiction, it was only when states developed to a point, that in the exercise of their own authority, they recognised the need to assist, in appropriate circumstances, others, that we start to see mutual legal assistance. It was in the self interest of a state to assist another, because in like circumstances it might reasonably expect the same degree of assistance. In practice, mutual self-interest was and remains a limited argument for effective international co-operation in fighting crime. This is particularly so of economically motivated crime. Indeed, it might be the case that states have an interest in retaining the benefits of financial piracy. It is certainly the case that such community of interest that existed among states, until the development of problems associated with drugs and terror, was generally focussed on ordinary crimes and was relatively uninterested in those that had purely financial implications (see for example article 3 of the ICPO-Interpol Constitution). As we have seen states have always been reluctant to assist other states in the collection of taxes. While the controversy today is not as great as it was concerning the so called ‘tax haven’ jurisdictions, it is still an issue – particularly for the US, Europe and increasingly Japan.

Of course, there have been examples of the development of laws that can operate at the international level, albeit effectively applied by individual states, against what are perceived to be either self-evident wrongs, such as genocide, or crimes that impede the common good, such as maritime piracy and the desire to protect trade. While some refer to crimes that are committed in more than one jurisdiction as international crime this is misleading. There are crimes that must still be dealt with within the domestic jurisdiction of a particular state. The offences which are recognised by international law as crimes are a very limited number. Most do not involve financial activity or for that matter economic activity. Given what is generally thought to be the constructive role of the newly established International Criminal Court and the contribution of special International Courts to deal with specific criminal matters, it is probable the role of international law will expand and develop into new areas. However, it would be fanciful to think that in the foreseeable future a series of international crimes relating to the aspects of financial crime that we are concerned with, will be created.

What has changed much in recent years in dealing with many forms of financial crime, is the developments that have taken place in international co-operation. These are still firmly based

on the recognition of individual State sovereignty. Many of these developments are expressed in international instruments, such as treaties and conventions, which place an obligation in international law on the state to enact domestic laws, implementing specific measures, such as the criminalisation of money laundering or the funding of terror. Thus, international law has certainly had a significant role to play in this area. It is important to understand, however, that the obligation that international law imposes is on governments and this is to implement and police laws to which they have freely signed up to. We are not talking about the creation of new international crimes.

The first significant step in promoting meaningful co-operation between states specifically in regard to economic crime was the establishment in Barbados in 1980 by all Commonwealth Governments of the Commonwealth initiative against financial crime. At a meeting of Commonwealth Law Ministers in 1976 in Accra it was recognised that merely 'police force to police force' co-operation – essentially that offered by the ICPO-Interpol network, was not sufficient. It was incapable of protecting the developing and smaller and more fragile economies, from in particular economic organised crime. A report commissioned from the present author, setting out proposals was unanimously accepted by Commonwealth Law Ministers in 1980 and a Commonwealth Fraud Liaison Service established. This later became the Commonwealth Commercial Crime Unit. Based in London, although working through liaison officers and agents in every Commonwealth jurisdiction and many other countries, including the USA, in the first ten years it processed well in excess of 4,000 requests for assistance and provided investigative and intelligence support itself in at least 1,000 of these. The CCCU unlike ICPO-Interpol Secretariat, then in Paris, was not confined by its constitution to working with or through purely police authorities or dealing only with 'ordinary criminal law offences.' The CCCU was able to take effective and disruptive action against economic crime, with the assistance of all agencies of the relevant governments. Indeed, Malaysia was one of the most enthusiastic partners and supplied the Unit with police and other investigators.

In many ways the CCCU was a precursor to the Financial Intelligence Units of today. However, unlike the FIUs it was not confined to purely intelligence or even a technical assistance role. In appropriate cases it took action itself. At a meeting of Commonwealth Law Ministers in Sri Lanka in 1983 the mandate of the Unit was extended specifically to organised crime and in 1986 at a similar meeting in Harare, Zimbabwe specifically to the interdiction of money laundering, whether in regard to criminal or subversive activity. While many countries, including some outside the Commonwealth, such as the USA, Indonesia, the Philippines and Taiwan, strongly supported the work of the CCCU and especially its ability to get things done, if necessary by going in and doing it itself, many of its targets were persons highly placed in governments or close to politically influential persons. This problem manifested itself dramatically in regard to the Unit's work in relation to the BCCI scandal. There were allegations that even then Commonwealth Secretary General had received a favourable loan from the BCCI. Sadly, the effectiveness of the Unit was its downfall and it became to some a political embarrassment. In the result its operational mandate ceased, its resources were transferred and it became little more than a facility for technical assistance. However, as a precedent it is unique and may yet serve to point the way ahead in fighting serious financial crime.

The work and support of the CCCU was of material assistance to the General Secretariat of ICPO-Interpol in its modernisation under its first non-French Secretary General, Mr Raymond Kendall, a British police officer. Until the mid-1980s ICPO-Interpol was seen by

many as little more than a 'club' of police forces dominated by the Europeans and in particular the French and Germans. It was not attentive to the concerns of the developing world, or for that matter the USA. Indeed, the FBI did not become directly involved in the work of Interpol until this time. The membership of Taiwan was than still favoured over than of the People's Republic of China. Since then, however, and largely as a result of the meaningful engagement of the US, ICPO-Interpol has developed and become rather more in tune with international concerns. However, there is little doubt that during the period that the French police dominated the Secretariat and refused to let the General Secretariat operate as a truly inter-governmental organisation, much damage was done. While an effective and secure communications network, ICPO-Interpol has in some respects been overshadowed, at least within Europe by EUROPOL, and the 'War against Terror' has resulted in essentially non-policing security and intelligence agencies taking the initiative at an international level. In specific area ICPO-Interpol has effectively been superseded by other organisations. This has long been the case in regard to co-operation between customs authorities, but also financial market regulation and more recently corruption. What must not be overlooked, however, is that ICPO-Interpol was one of the first international organisations to recognise the significance of fighting economic crime and in particular money laundering. This was long before the United Nations became engaged in the issues.

While early initiatives were taken by the Council of Europe on a wide range of matters, including mutual legal assistance in criminal matters, bribery and corruption and money laundering, it is in recent years the United Nations and European Union that have contributed most to advancing legal and other mechanism and procedures for combating serious crime and in particular financial crime. The United Nations has produced a number of international instruments in regard to combating the trade in illicit narcotics and psychotropic substances and organised crime. It produced a convention seeking to outlaw the funding of terrorist organisations in 1999 and since 9/11 has played a major role in co-ordinating, at many levels, the fight against international terrorist activity. More recently the United Nations has focussed on corruption and mention has already been made of its important convention on this issues. The United Nations has also concerned itself with many other significant issues ranging from computer crime to maritime fraud. In many of these international instruments there are provisions fostering effective mutual assistance and in particular focussing on the interdiction of the proceeds of crime and money laundering. The various agencies of the United Nations have not simply facilitated and supported the production of numerous instruments obligating those that sign up, to modify their domestic laws. It has also provided a great deal of technical assistance and aid. Having said this, there is still a widespread view that the United Nations could do a lot more. In many countries merely changing the law and sending officials to seminars achieves very little. Given the political sensitivities within the United Nations, the suspicions and in some cases opposition of some of its major donors and the corruption and incompetence of some of its actions, there is reluctance to see it get involved in real issues at a grass roots level. While there have been important developments, under the Security Council, in regard to combating terror and the organisation's involvement in peace keeping, its record in engaging in issues of criminal justice is thin and unconvincing.

The European Union is, of course, a very different proposition constitutionally and politically from the United Nations. In the pursuit of its political, social and economic objectives, the European Union has been very concerned to address serious crime and in particular economic organised crime. There have been numerous legal instruments issued by the institutions of the European Union, with the objective of bringing the relevant laws and procedures of the ever expanding member countries, into a state of substantial equivalence or approximation.

These have addressed most of the substantive issues in controlling financial crime and range from computer assisted and related crime, to insider dealing and money laundering. In regard to many substantive financial crimes most members of the European Union have very similar laws and procedures. While there are, of course, still differences of detail, in promoting the stability, integrity and efficiency of the financial markets and their institutions, there is substantial equivalence throughout the Union. The same is true in regard to computer crime, money laundering, public procurement, unfair trade practices, the protection of intellectual property and many corporate law issues. Considerable advances have also been made in the approximation of legal and other processes in the member states. While there are obviously differences in the effectiveness and form of enforcement, these are invariably far less marked than in regard to countries outside the Union. There is also effectively a common approach to issues of human rights.

The level of co-operation between certain European countries in fighting serious crime has often been impressive. Indeed, arrangements existed for the issues of arrest and other warrants that were enforceable in France, Belgium and Luxembourg from the mid 1950s. The efforts of the Council of Europe and in particular the Commission of the European Union have, however, resulted in an impressive level of mutual legal assistance, in regard to criminal, administrative and civil matters within the Union and in some cases, by virtue of the Council's wider membership, beyond. Meaningful co-operation extends across the whole gambit of the legal process from the passing of information through to the surrender of prisoners. While it always remains possible that a legal technicality will be found and exploited to disrupt the proper and efficient working of this system, it represents the best example of trans-national legal co-operation in the world. Indeed, pursuant to the Schengren Convention 1990, those countries that have agreed have in effect a common legal jurisdiction in regard to criminal matters.

Many institutions have been created to foster collaboration within the Union. For example a host of directives and other instruments provide for co-ordination in regard to financial regulation and the European Central Bank plays a significant role in promoting stabilisation. In regard to criminal justice matters there has long been close collaboration within Europe between governments and this has fostered the establishment of EUROPOL and EUROJUST. EURPOPOL is constituted very differently from the ICPO-Interpol and is able to handle directly intelligence and actions that would not normally be trusted to ICPO-Interpol. It is able to co-ordinate and in some respects 'conduct' trans-national investigations and plays a significant role in the analysis and deployment of intelligence. Organised crime and serious financial crime are priority areas. EUROJUST provides a similar service in regard to the prosecution of cases. Through its network, judicial and prosecutorial actions can be initiated and co-ordinated at an international level. In regard to frauds and similar crimes committed against the institutions of the Union, the Union has its own 'police agency' – UCLAF. This elite organisation has authority throughout the Union to investigate and pursue those who have engaged in frauds against the Union or misused Union funds. Of course there are numerous other agencies and institutions, such as the Court of Auditors and Conduct Committee of the European Parliament that have a real interest in matters relating to integrity.

The Organisation for Economic Co-operation and Development (OECD) and the meetings of the governments of the most powerful industrial nations (G7/8) have also been concerned about threats to stability presented by organised crime, terrorism and serious financial crime and in particular corruption. The OECD has undertaken a considerable amount of work in regard to corruption and related issues. It has also taken a robust stand against those countries

that operate as tax havens and refuse to provide assistance to the revenue authorities of other countries. The OECD has also been concerned with money laundering and the financial activities of organised crime groups. Indeed, it was the OECD and the G7 that established the Financial Action Task Force (FATF) in 1990. While still a very small organisation with extremely limited resources, it has served as a model for the establishment of numerous other regional initiatives, in the Caribbean, South America, East Africa and Southern Africa, the Middle East and the Asia Pacific Region. FATF promulgated the Forty Recommendations addressing money laundering of the proceeds of crime and a further nine in regard to terrorist finance. These have become the international standard for policing money laundering and terrorist finance. The FATF and various regional organisations conduct regular audits of their member countries' compliance with these standards and certain other statements of good practice. With the other work and in particular its studies in regard to typologies of money laundering the FATF and its regional counterparts have made a very significant contribution to standardising the law, procedures and institutional responses to money laundering across the world. This when put with the network of Financial Intelligence Units (FIUs) within the Egmont Group, constitutes the most important initiative ever undertaken by governments against serious crime and its wealth.

The OECD has also provided a powerful political momentum for governments to take these issues as serious threats to world stability and security. These matters have become associated with the concern of many developed countries to better assist the developing world and in particular address issues relating to Third World Debt. From this concern, a number of important initiatives have developed and been supported. These are primarily concerned with financial stability and security. It is not without interest that in the pursuit of its Social Policy Agenda, NATO has become directly interested in the impact of organised crime activity and in particular criminal wealth and money laundering. Other regional security organisations, including the European Security Organisation have taken a similar interest in these issues.

The various international and regional institutions concerned with the financial system recognised in the potential impact of money laundering and especially the risks that action, particularly by the USA against the proceeds of crime might entail for the banking system. The International Bank of Settlement's Basle Group of banking regulators issued guidelines in 1988. The World Bank and International Monetary Fund, become publicly interested in money laundering rather later. While aware of the issues relating to stability, there was a reluctance in the World Bank Organisation to get involved with issues relating to law enforcement in country. Attitudes changed when the World Bank decided to take a very public and aggressive stand against corruption. Until then, even the various regional developments banks, such as the European Bank for Reconstruction and Development and the Asian Development Bank, were cautious in being seen to get involved in such controversial issues. The International Monetary Fund in 2000 went as far as to commission a study on model laws and enforcement procedures for addressing insider dealing and conflicts of interest. Since then, all members of the World Bank family have been very concerned with issues relating to financial crime, corruption and especially money laundering. They see the ability of countries to address these issues as a vital factor in their stability and thus, 'creditworthiness'. Consequently they have initiated an ongoing programme, rather like than run by FATF to assess countries' compliance with accepted standards in dealing with serious financial crime, corruption and money laundering.

Mention has already been made of the country assessment programme to determine the level of compliance with its principles, run by the FATF and the various regional organisations.

While there is some debate as to exactly what these achieve given the resources involved in conducting and responding to the assessment process, there can be no doubt that it has encouraged virtually all countries to take these issues seriously and have in place laws and systems outlaw the laundering of the proceeds of crime and the funding of terror. The failure of some countries to enact adequate laws and put in place sufficiently resourced systems for detection and interdiction, resulted in the creation of a 'Black List'. Countries on this were increasingly frozen out of the world financial system and in particular the US financial system. This was though by some to unfairly target small states operating as international financial centres and some developing and transition economies. The consequences of not being compliant with the FATF standards became all the more serious after 9/11 in both political and legal terms. The US PATRIOT Act essentially forbad US financial institutions having direct or even indirect connections with such jurisdictions. Controversy has been further caused by the development of other 'Black Lists' and not all lists being identical. For example, the OECD had another list for countries that were considered to operate harmful tax policies. In other words, tax havens that would not willingly supply tax related information to the revenue authorities of the members of the OECD and in particular G7. The USA also has a list of countries drawn up by the US State Department and there are various United Nations and European Community lists concerned with economic embargoes. Of course, some argue that penalising a whole economy is a very blunt instrument and it forces activity into the underground financial systems which by definition are opaque.

It is also necessary to mention here the many other initiatives often at a regional level that have been taken, often encouraged by the USA or inter-governmental organisation, concerned to address, in one way or another, the issues that we are here considering. Indeed, fighting money laundering and corruption has become almost a 'job creation scheme' for retired civil servants and police officers. It is not uncommon to find individuals who in their own countries would be considered to have relatively little expertise in these issues, advising the central banks of major countries, including China. What many developing countries might do well to remember is that this is a relatively new science and the results such as they are in many countries, including most European countries, have not been impressive.

The most recent financial crisis has, perhaps inevitably, brought regulators and in particular supervisory authorities much closer together. Of course, in many jurisdictions – and not least the USA and UK there have been significant changes in the arrangement of supervision and further major developments are in the course of taking place. The development at both supra-national and domestic levels in fostering meaningful co-operation and collaboration in addressing issues related to financial stability and in particular capital adequacy, are commendable. What has not been so evident is a similar increase in concern about addressing the problems of dealing with financial crime at an international level. Where there has been movement in this regard it has tended to focus on the financial resources of those suspected of assisting terrorists or fallen tyrants. In both cases the focus has tended also to be on the Islamic world and very much within the realm of security/intelligence than that of traditional law enforcement.

Disruption or intervention!

The legal and practical difficulties that have confronted law enforcement agencies around the world in securing convictions for serious and complex financial crime have resulted in a shift in the objectives of the criminal justice system. Traditionally law enforcement was concerned

with the detection, investigation and prosecution of cases before the ordinary law courts. Today most agencies will emphasise the importance of disruption rather than this traditional and largely failed process. Of course, a successful prosecution of the principal offender or more likely a facilitator or associate will have a disruptive impact on in particular continuing criminal enterprises, but in many ways this approach will be seen as a luxury. The problem with disruption as a strategy is that it is largely ill-defined and relatively unaccountable. Disruption has long been the primary objective of defence and security organisations often operating at the intelligence level, where evidence is not generally a prerequisite to effective intervention. As will be appreciated, there is from the lawyer's perspective a gulf between mere intelligence – no matter how credible, and evidence that would be admissible before an ordinary criminal law court. Indeed, it is perhaps because admissible evidence is so difficult to obtain and costly in the case of such cases and those particularly involving organised crime and terrorism that even traditional law enforcement agencies have moved into this rather uncharted realm.

Without doubt it makes a great deal of sense to attempt to close down a continuing criminal enterprise or at least inhibit its operations. Thus, actions designed to create liquidity problems especially for criminal businesses that survive on cash dealings, may well have a desirable result. Indeed, such may result on cracks developing within what might otherwise be cohesive and closely knit criminal supply chains. Action based on strict compliance with what might otherwise be considered merely technical and administrative requirements – such as under company law to which reference has already been made, may well serve to disrupt a continuing fraud where silence and obscurity are critical elements. Robust policing of immigration requirements can have a similar impact. Indeed, an agency adopting a strategy of disruption might well utilise all the weaponry of the legal system. Intelligent police and other law enforcement officers have always been rightfully resourceful in combating serious crime.

Difficulties arise, however, when what is involved in achieving effective disruption almost inevitably necessitates acting or encouraging another person to act outside the law, or without clear legal authority. Pressure brought to bear on bankers and other intermediaries to co-operate with law enforcement, particularly where this involves a breach in the contractual and other legal relationships with clients and third parties is objectionable. Not only may such conduct, if revealed, expose the banker to civil liability bit also law enforcement agencies. If evidence results from such actions, this may itself not be admissible in court. Indeed, there have been cases where enthusiastic law enforcement agencies have gone much further and themselves engaged in criminal acts or persuaded others to do so. The tactics of disruption can easily place bankers, intermediaries and their professional advisers in exceedingly difficult situations, both legally and in some cases in terms of their own personal safety. Where there is not a clear legal mandate reinforced with appropriate legal protections and possibly immunities, those who engage in disruption of criminal activities do so at their peril. The situation is exacerbated by the problems that arise associated with accountability and the evaluation of such activity. Indeed, when placed in an international context the problems become all the more difficult. For example, in one recent case involving a trial in the Cayman Islands of individuals charged with very serious crimes the Chief Justice found he had no alternative but to dismiss the case, as it transpired that the one of the police witnesses – the director of the financial intelligence unit had been recruited by the British intelligence services and the possibility arose that the evidence had been manipulated or at least tainted.

The fact that so much law enforcement related activity and in particular intelligence exists today outside traditional police agencies and police force to police force systems, no doubt

contributes to a sense of unease. The seeming failure of traditional police agencies to be able to deal effectively with serious organised crime and their apparent inability to inhibit international terror structures, has resulted in a shift of responsibility to agencies that have traditionally been rather more concerned with state security and specialised areas of public interest and protection. This is potentially a matter for some concern in terms of the traditional values often associated with notions of the rule of law. Indeed, one leading British Victorian jurist – Dicey considered that the fact that in Britain criminal law issues were firmly and solely in the hands of local police forces, set us apart from the continental systems with their secret police and inquisitorial processes! He would presumably be horrified by the way things are done today in modern Britain!

Legal and regulatory risk

Some what related to the issues canvassed above, is the significant shift of legal and regulatory risk on to, in particular, those who in the ordinary course of their business mind other people's wealth. We have already noted that most systems of law now place heavy monitoring and reporting obligations on those who suspect that money laundering is taking place or terrorist related property is being processed. Indeed, the impact of such laws and in particular the obligations that are imposed to know one's client and his or her business, have had profound impacts on the way in which business is done, especially in the financial sector, and the cost of doing that business. It is arguable that the enhanced obligations of bankers and others as a result of 9/11 particularly under the US Patriot Act and its equivalents has placed a significant financial (and risk) wall around western banking. In the result many western banks will not deal with financial institutions let alone individuals in certain jurisdictions or will only do so as such a premium as to render conventional commerce unacceptable. To some degree the financial crisis in western banking has reduced the impact that these measures would have had, but the fact remains that many in the developing world consider that they are both disproportionate and anti-competitive.

Parallel to the shift of responsibility onto financial intermediaries to stand in the front line against criminals and terrorists – at least as far as their financial activities are concerned, is the emphasis that this now placed on disruption of criminal and subversive networks rather than their interdiction through the traditional operation of the criminal justice system. We have already noted that such an approach may well result in placing new and real legal risks on those who are required, willingly or otherwise, to co-operate in such tactics. The difficulties facing those who handle other people's wealth are made worse by the approach taken by financial and other regulators who increasingly place responsibility on persons in control positions to exercise supervision and even intervention over their subordinates, associates and clients. In some instances these obligations, which are often onerous and expensive in terms of structure and administration, may well result in criminal sanctions or penalties which closely resemble such. Thus, in a very real sense we have turned those who particularly in the course of their business or profession mind other people's wealth into if not policemen – police informers. In many cases, there is inadequate legal and regulatory protection, invariably as a result of a failure to realise the risks that arise – particularly through the operation of the civil law. Those charged with responsibility for designing and implementing such strategies, while invariably acting with the best motives, are ignorant as to the way in which acceptable business is conducted, the relevant law and especially the implications of their actions. In most legal systems there is not a happy interface between the

operation of the traditional civil and criminal law, let alone these novel provisions, such as anti-money laundering laws, and the operation of regulatory systems.

It is sometimes said that ensuing a proper and relatively risk free relationship between these obligations, which can seemingly be at variance with each other, is the proper role for compliance. While effective and efficient compliance may well resolve or at least mitigate many problems it is not a complete answer. Indeed, in Britain the Supreme Court has held that where a breach of the law occurs, even good compliance cannot be more than a consideration in mitigation, for the simple reason that compliance has obviously failed. Indeed, there are very real tensions between enforcement and compliance, given that the first becomes relevant only on the failure of the second.

Research

An issue which has rarely been taken, but which to some degree colours much of what we have discussed is the limited amount of thought let alone scholarship that has been devoted to the concerns that we have averted to. In part this is due, no doubt, to the fact that most involve multi-disciplinary factors and most academic institutions are intellectually and structurally unwelcoming to multi-disciplinary analysis. This is particularly the case in the United Kingdom. No law faculty has any real interest in such matters and the few business schools that have ventured into the dark side have done so timorously and unconvincingly. Criminologists have largely ignored the area and practitioners have been singularly uninterested. In the result there is little learning and even less evidence and convincing analysis.

One would like to think that the situation is different in other countries. However, with one or two exceptions it appears, at least to the present writer, that sadly it is not. It remains to be seen whether things will change. However, not with standing the fall out from 9/11 and the financial crisis there appears, even in the international dimension, fewer academics interested in these concerns than before they became topical – in real terms. While this comment is subjective it is worth perhaps placing it in the context that the author has had the privilege of running a international symposium in Cambridge for the last thirty years and editing a number of relevant journals. The real interest exhibited in these vehicles from conventional universities and research institutions has declined both in qualitative and quantitative terms. Indeed, last July letters to the deans and heads of department to over 600 law schools and business schools in Europe offering free places to faculty and graduate students at a week long conference in the University of Cambridge, at no charge – on the regulatory and legal implications of the financial crisis – from the perspective of the 'dark side' resulted in three requests for information, one of which related to meals. In the result one student turned up from Palermo!

The way ahead!

I have attempted in this paper to point to a number of issues – ranging across the spectrum, that I consider are likely to remain significant in the future in fighting serious fraud and financial crime. There are two issues of real significance that I have not mentioned, however. The institutional arrangements for the detection, investigation and prosecution of financial crime are of considerable practical importance. While there are lessons to be learnt the

experience of countries is not necessarily uniform or for that matter relevant. Much will depend upon the resources, priorities and problems – actual and perceived in each jurisdiction. As a general proposition, however, there will continue to be a tendency for more specialisation and the creation of initiatives outside the traditional criminal justice system. We have elsewhere noted the significance that is now attached to disruption as both a strategic and tactical device in dealing with systems of crime. It is also the case that the emphasis that is now placed on the economic aspects of serious crime and terror and in particular the importance of financial intelligence, places many of the real issues outside the competence – both in legal and practical terms of conventional police agencies. However, in my opinion there are very real dangers in too much specialisation and in particular the creation of agencies outside the traditional criminal justice system. The record, particularly in this region has been mixed. Elite investigative and prosecutorial units in many countries have, for whatever reason, strayed from the law and in a few but dramatic cases persons in positions of authority have become corrupted. One need only think of the nightmare of Warwick Reid's misconduct as head of the Attorney General's Commercial Crime Unit in Hong Kong which did so much damage (see *Attorney General for Hong Kong v. Reid* (1994) 1 All ER 1.)

The second, issue that I do not propose to deal with here, other than to emphasise its significance, is that of technology – which in our current deliberations, is very much a two edged sword. To some extent the ability to exploit technology in protecting our economies is bound up with the institutional issues to which I have referred. There is, however, not the time to discuss this complex topic here today – indeed, it probably justifies a conference of its own.

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