Trust Design, Tax Planning and Money Laundering:

Parts 1 and 2

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Private client advisers need to be aware of their exposure to charges of money laundering.

Part 1

Any self respecting trust adviser or tax planner would react to the suggestion that he might become involved in money laundering with horror. He would know full well that he must not assist his client either in breaking the criminal law or in committing frauds against third parties. He would not dream of participating in money laundering activity and it would be quite wrong to have to monitor his clients to see whether they were doing so. In any event, so long as those clients' activities remain off-shore they are no concern of the English authorities, still less the United Kingdom criminal law, so that he can rest at ease. Or can he? Since the Criminal Justice Act 1993 trust advisers and tax planners must reassess the whole question of their potential involvement in money laundering, and do so radically.

I. The Criminal Justice Act 1993

The Drug Trafficking Offences Act 1986 introduced stringent laws affecting any persons involved, whether directly or directly in drug trafficking. Stringent though these laws were, however, they did relate solely to drug trafficking, and had no major relevance to the trust or tax practitioner. Sections 29 to 31 of the Criminal Justice Act 1993 introduced three new offences under the heading “money laundering and other offences”. The three offences now take their place as sections 93A, 93B and 93C of the Criminal Justice Act 1988, within Part VI of that Act, a part dealing with compensation orders covering all indictable offences (other than drug trafficking offences).

The effect of this is potentially misleading. The new offences do not just deal with money-laundering as it would generally be understood, but are wider in application. The new provisions create offences of assisting others in the retention of the benefit of criminal conduct, acquiring, possessing or using the proceeds of criminal conduct and concealing or transferring the proceeds of criminal conduct. The key to all this is the definition of “criminal conduct”. Because these offences are positioned in Part VI of the 1988 Act, “criminal conduct” has the meaning which it generally has in that Part, ie. all indictable offences (other than drug trafficking offences). This means that the three new offences have a wider ambit than may ever have been intended. It is worth noting that the legislation derives from the E.C. Money Laundering Directive (Council Directive 91/308/EEC) which is concerned with what one would generally describe as money laundering. The United Kingdom legislation goes well beyond money laundering in that sense, and it is not arguable that the legislation can be read as impliedly restricted by reference to the scope of the Directive. Not only is there no general principle that an Act of Parliament should be construed no wider than necessary to give effect to Directives on which they are based,

but Article 15 of the relevant Directive specifically permits Member States to adopt stricter provisions than the Directive itself demands.

The new offences therefore cover a wide ambit. Particularly dangerous is the new section 93A, which provides as follows:

“(1) Subject to sub-section (3) below, if a person enters into or is otherwise concerned in an arrangement whereby-

(a) the retention or control by or on behalf of another (‘A’) of A’s proceeds of criminal conduct is facilitated (whether by concealment, removal from the jurisdiction, transfer to nominees or otherwise); or

(b) A’s proceeds of criminal conduct

(i) are used to secure that funds are placed at A’s disposal; or

(ii) are used for A’s benefit to acquire property by way of investment, knowing or suspecting that A is a person who is or has been engaged in criminal conduct or has benefited from criminal conduct, he is guilty of an offence.

(2) In this section, references to any person’s proceeds of criminal conduct include a reference to any property which in whole or in part directly or indirectly represents in his hands his proceeds of criminal conduct.

(3) Where a person discloses to a Constable a suspicion or belief that any funds or investments are derived from or used in connection with criminal conduct or discloses to a Constable any matter on which such a suspicion or belief is based-

(a) the disclosure shall not be treated as a breach of any restriction upon the disclosure of information imposed by statute or otherwise; and

(b) if he does any act in contravention of sub-section (1) above and the disclosure relates to the arrangement concerned, he does not commit an offence under this section if-

(i) the disclosure is made before he does the act concerned and the act is done with the consent of the Constable; or

(ii) the disclosure is made after he does the act, but is made on his initiative and as soon as it is reasonable for him to make it.

(4) In proceedings against the person for an offence under this section, it is a defence to prove-

(a) that he did not know or suspect that the arrangement related to any person's proceeds of criminal conduct;

(b) that he did not know or suspect that by the arrangement the retention or control by or on behalf of A of any property was facilitated or, as the case may be, that by the arrangement any property was used, as mentioned in sub-section (1) above; or

(c) that-

(i) he intended to disclose to a Constable such a suspicion, belief or matter as is mentioned in sub-section (3) above in relation to the arrangement; but

(ii) there is reasonable excuse for his failure to make disclosure in accordance with subsection (3)(b) above."

Fiscal offences

The effect of this is that any professional who knows or suspects that his client is engaged in or has benefited from anything constituting an Indictable offence and is in any way concerned with assisting in the making of arrangements to retain or dispose of any proceeds of such activity is guilty of a criminal offence unless he can establish the defences at sub-sections (3) and/or (4). This must include fiscal offences, although it

is dubious whether the legislature intended that fiscal offences should be covered. Thus, any professional who knows or suspects that his client is involved in tax evasion may be criminally liable if in any way he assists, including by the giving of advice, the success of any such evasion. This provision goes a long way towards undermining the principle of English law (which has existed since the abolition of the offence of misprision of felony), that there is no obligation to report a crime. That may still be the case, but if a person plays any part whatsoever in the chain of events which leads to the crime being accomplished, he may fall within the ambit of the new offence.

Some relief might be sought by reference to the concept of "proceeds of criminal conduct". It might be argued that this concept does not extend to monies retained (for instance) as a result of non-disclosure to or fraud of tax authorities. It is true that as a matter of ordinary language "proceeds" does connote something obtained rather than something retained, but this avenue of argument is closed off by section 29(2) of the 1993 Act, which provides as follows:-

"'Proceeds of criminal conduct', in relation to any person who has benefitted from criminal conduct, means that benefit."

This must be read with section 71(4) and 71(5) of the 1988 Act, which define "benefit" for the purposes of Part VI of that Act. Whilst section 71 (4) does echo the concept of obtaining property, sub-section (5) clearly extends the concept of "benefit" to any pecuniary advantage obtained from or in connection with criminal conduct. This is a very wide definition and it seems to me to be inconsistent with any limitation of the definition of "proceeds" to sums of money obtained as a result of criminal activity. If a tax payer gets away with the retention of monies which he ought to pay in tax, he has clearly obtained a pecuniary advantage as a result of his crime, or in connection with it, and the wording of the statute is clearly satisfied.

There may yet be scope for some limitation of the apparent scope of this offence. Even on the wide definition of “proceeds of criminal conduct” it must be possible for the prosecution to say in relation to a particular sum of money that it does derive from the criminal conduct in question. If one takes an example of a bank account, it may be wholly unclear to a bank whether certain monies of its customer represent the pecuniary advantage obtained from a tax fraud or not. In general, a taxpayer is not obliged to pay his tax from any particular fund, provided that he pays it. Thus, a professional who is involved in the flow of money belonging to his client may be able to argue that certain monies cannot be identified as the “proceeds of criminal conduct” even if that professional suspects that his client is engaged in criminal conduct. Whilst there is force of this argument, it cannot be taken too far. One must remember that Parliament has chosen to treat the concept of “proceeds of criminal conduct” as the same as the concept which applies for the purposes of confiscatory or compensatory orders, in respect of which no concept of tracing or the like arises. If it is clear, in any given case, that money standing to the credit of a particular bank account is money which represents the pecuniary advantage which the account holder had derived by reason of a fiscal offence, then it seems to me that the requirements of the statute are satisfied.

It may help to take an example (Case Study 1). A professional man advising an individual may know that the individual’s employer is paying money in contravention of PAYE Regulations, which is neither being declared for tax nor being deducted at source from the employee’s remuneration. On this assumption, the professional knows that the employee is being paid money which ought to be declared and paid to the Revenue, but is not being declared or paid. In order to complete the picture, let it be assumed that the professional knows that all the sums paid to the employee as remuneration are paid away, as soon is received, to off-shore accounts in the Cayman Islands. Here the position presented to the professional is as clear as can be. He knows full well that an employer and employee are engaged in a fraud on the Revenue, and that monies passing

through his hands include sums which ought to have been deducted at source and paid to the Revenue and are in every possible sense the benefit of or a pecuniary advantage flowing from the tax fraud in question. In such a case, all the requirements of section 93A of the 1988 Act are satisfied. The adviser would be under a duty to report the criminal conduct and he would have no defence under section 93A(4). It does not seem to me to be possible to contend in such a situation that the sums flowing through the professional's hands were not "proceeds of criminal conduct". Where there might be some room for genuine argument is as to the meaning of the requirement of "suspicion" contained in section 93A, as to which I say more below.

Offshore activities

As if this is not all bad enough, section 93A(7) of the 1988 Act then proceeds to extend the definition of "criminal conduct" so as to include not only conduct which constitutes an offence under Part VI of the 1988 Act, but also "would constitute such an offence if it had occurred in England and Wales or (as the case may be) Scotland". Thus, the professional adviser is not concerned simply with United Kingdom activities, but is at risk in relation to off-shore activities as well. It is the effect of this provision that causes particular difficulties to those who give advice spanning more than one jurisdiction. The immediate question is whether this means that the professional needs concern himself with the substantive criminal law of foreign jurisdictions. Is the United Kingdom legislature passing enactments to assist foreign governments in policing breaches of their own criminal law, including tax and exchange control?

It seems to me that the statute does not go that far. It does not define criminal conduct so as to include, or even make relevant, any foreign

criminal legal code at all. Rather, section 93A(7) is concerned with the place where the conduct takes place, not the law by reference to which it takes place, which remains at all times English (or where relevant Scottish) law. Therefore, if a professional becomes involved in his client's activities, where the only possible criminal law to be infringed is the substantive criminal law of a foreign country, and that activity would not be criminal in England if committed in England, then the professional need have no fear, at least in respect of English criminal law. There is no need for all solicitors and accountants specialising in trust or tax work to take a crash course on international and comparative tax laws.

Reassuring though that message may be, section 93A(7) still has a very significant effect. It requires professionals to ignore the place where conduct occurs and to treat everything (for relevant purposes) as if it had actually taken place in England. The purpose of this provision is to overcome the jurisdictional difficulties which English criminal law has often faced in relation to activities, typically conspiracies, which take place abroad, albeit with a view to achieving some fraudulent purpose effective within England. In order to eliminate any such argument, section 93A(7) asserts jurisdiction over criminal activity for the purposes of section 93A wherever that activity actually occurs.

But the effect of the provision is much wider than that. It includes activities which may have nothing to do with England or the United Kingdom at all. A conspiracy between A and B, hatched in Paris to rob a German bank, ought to have nothing to do with English criminal law. However, if C, an accountant practising in London, who acts as A's adviser, has any suspicion of a conspiracy and plays any role whatsoever in facilitating the obtaining by A of the proceeds of the conspiracy, he risks being guilty of a criminal offence under section 93A. Even this may be thought acceptable in the international context in which the Directive was produced, especially where the focus is on money-laundering and international fraud. The position is much more uncomfortable when one applies it to fiscal offences. Where the professional, C, knows or suspects

that his client, A, is engaged in a course of conduct which involves infringement of French revenue law, then (as stated above) he is not concerned with breaches of French law as such. However, frequently the conduct in question would, if it had all taken place in England, have infringed parallel provisions of English revenue law. In such a case, section 93A will apply, or at least would seem prima facie to apply. At this point, however, it seems to me that the position becomes more complex.

In a case where A is evading French revenue law, the mere translation of the geographical location of his activities to England will not create an offence under English revenue law. Section 29(2) only translates to England the physical place where the conduct occurs. This will cover a conspiracy between A and B actually hatched in Paris which would be indictable as a conspiracy if it had been physically hatched in London, but it does not seem to me that it is so easy to translate evasion of revenue law in the same way. More is involved here than the locality in which the evasive conduct takes place. Even if that conduct is notionally moved to England, section 29(2) does not provide that the victim of the criminal conduct, viz. the French revenue authorities, should notionally be replaced by the English revenue authorities. At this stage, it seems to me that the principle in the decision in Government of India v. Taylor [19551 A.C. 491 comes into effect. That decision is a clear statement of a well established principle of English law, namely that the English Courts will not enforce foreign revenue laws. Whilst there are some exceptions to this principle, none is relevant for present purposes. In R. v. Chief Metropolitan Stipendiary Magistrate ex p. Secretary of State for Home Affairs (The Times, June 9, 1988) a specific treaty existed between the United Kingdom and Norway which derogated from the general principle in the Government of India case. This, however, is the exception which proves the rule. Courts are generally vigilant to prevent foreign revenue laws from being enforced through the English Courts.

It seems to me that an English Judge would come to the construction of section 93A(7) with this principle in mind. There would be a natural

aversion to the indirect enforcement of French revenue law by reference to the geographical deeming provision in sub-section (7). Conduct which is directed towards the defrauding of a foreign revenue authority cannot be treated as if it was directed towards defrauding the United Kingdom revenue authorities, irrespective of the place where criminal conduct may or may not have actually occurred. I therefore do not think that the conclusion stated above, namely that a professional need not be concerned for the purposes of English criminal law with breaches of foreign revenue statues is undermined by the definition of "criminal conduct" in section 93A(7) of the 1993 Act.

The criminal law in general

The real problem seems to me to be not that of a deemed breach of United Kingdom revenue laws but rather the breach of general English criminal law as a result of the notional translation of the occurrence of criminal conduct provided by section 93A(7) of the 1993 Act. In many cases of foreign tax evasion, the conduct in question is deceptive and fraudulent in the broad sense. By treating such conduct, if in fact taking place abroad, as notionally taking place in England, then even if one does not replace the French revenue authorities with the English revenue authorities, one may well have the elements of an offence under English law, quite irrespective of English tax law as such. In particular, there may well be a case disclosed of false accounting, the obtaining of money by deception, or a conspiracy to defraud, which does not depend on the commission of a substantive offence other than the fraudulent conspiracy (i.e. agreement) itself.

How does the Government of India principle apply here? It seems to me that it may well still apply, for example, to a case of conspiracy to defraud, where the defrauded party is the foreign revenue authority. The refusal to enforce French revenue law seems to me also to extend, as a matter of

principle, to a case where the foreign revenue authority might dress up its complaint as a conspiracy to defraud it, i.e. the revenue authority itself. But foreign tax evasion may often involve third parties and not just the taxpayer and the foreign revenue authority themselves.

It seems to me that where off shore activity designed to defraud a foreign revenue authority is something more than simply a denial of revenue to that authority, then Section 93A of the 1993 Act may well apply. False accounting may be the easiest case. Tax evasion, as opposed to tax avoidance, frequently involves false accounting. If such activity occurs in France, albeit as part of an attempt to deprive the French authorities of revenue, then section 93A(7) treats such activity as if it had physically taken place in England. If it had physically taken place in England, then irrespective of any tax offences, the offence of false accounting would have been disclosed. It is hard to see any way round this.

Conspiracy to defraud is more complicated but is dangerous from the point of view of the professional. If the dishonest conduct has the effect not only of defrauding the foreign revenue authority but also some other party, for instance the taxpayer’s wife or business partner, then there is nothing in the Government of India principle which would prevent section 93A(7) from making such activity criminal, even if all relevant acts took place abroad. Had they taken place in England, they would have constituted the common law offence of conspiracy to defraud. Provided that this is not a back door way of enforcing foreign revenue laws, there is no reason why the wording in the 1993 Act should not be given full force. Tax fraud is sometimes accompanied by other frauds and a professional who is forced to admit that he knew that his client was engaged in tax fraud is in a difficult position if it turns out that the fraud was not only on the tax authorities but on others.

An interesting counter-example is exchange control. Professionals often find themselves advising clients who are seeking to circumvent, and sometimes to evade foreign exchange control regulations. It might be thought that such activity would come within section 93A of the 1993 Act, but that is clearly not the case. Since 1980 exchange control has not existed in the United Kingdom, and it has therefore not been possible for acts, wherever they might physically be conducted, to constitute criminal conduct in England by virtue of the circumvention or evasion of exchange control regulations. Thus, however blatant the activity may be, if all the professional's client is seeking to do is to evade foreign exchange control, and there is no other element to his activity, the professional cannot become liable under the criminal law by virtue of the provisions of the 1993 Act.

Two other situations might be dealt with briefly. In some foreign jurisdictions, there are rules providing for community of property or other similar property regimes between husband and wife. These rules may be infringed by arrangements in which professionals are asked to assist. However, since there are no such rules in the United Kingdom, it seems to me that this respect must be similar to that which obtained the case of exchange control. In England, dispositions may be set aside if they adversely affect the rights of a wife against her former husband, but such activity would not be criminal. The same is probably true, and indeed more clearly true in relation to foreign forced heirship rules such as are frequently found in foreign jurisdictions. A professional may be asked to assist an individual to evade mandatory provisions of a foreign law whereby certain fixed proportions of the individual's estate must pass to particular relatives. This sort of activity, however, could not be criminal in England and Wales (although Scotland may here be somewhat different) since the only similar provision of English law is the Inheritance (Provision for Family and Dependants) Act 1975 which enables a Court to order financial provision from an estate where reasonable financial provision has not been made for a particular relative or dependent. Again, however, this is nothing to do with criminal law. Attempts by an individual during his lifetime to prefer certain prospective beneficiaries to close family members is not criminal conduct.

The most likely practical situation in which a professional might find himself embroiled in section 93A as a result of advising or assisting in relation to purely off-shore activities seems to me to relate to the offence of false accounting. Many of the activities discussed above, including attempts to evade foreign revenue legislation, will involve activity which, if it took place physically in England, would amount to false accounting as defined in the Theft Act 1968. A professional who assists his client in such activity, even if he thinks that the activity has got nothing whatsoever to do with England or indeed the United Kingdom, could find himself ensnared by section 93A. This may be beyond anything which the legislature intended to enact when it brought in provisions to deal with money laundering and similar matters. Nonetheless it seems to me that it is clear that the provisions under consideration do have an effect much wider than the popular concept of money laundering, and that off-shore activity of the sort discussed above does come within the ambit of the 1993 Act and the 1988 Act into which the relevant provisions have been inserted.

It might be helpful to end this discussion with an example (Case Study 2), perhaps in part to reassure professional practitioners, but also to illustrate the scope of false accounting under English law. Suppose that a manufacturing company in a high-tax jurisdiction manufactures plastic containers which it sells to a company in a low-tax jurisdiction such as the Cayman Islands at an undervalue. The company in Cayman then sells the items on to a third party at their full market value. As a consequence, the profit will have largely been derived by the company in the low-tax jurisdiction. The accounts of each company will reflect the price actually received or paid for the merchandise. It seems to me that in such a case, although there has been a sale at "an undervalue" there has not been any relevant criminal conduct. The relevance of an "undervalue" primarily arises in the event of insolvency (as to which see in particular section 238 of the Insolvency Act 1986). The mere sale at an undervalue does not involve criminal conduct. There is no false accounting, because the accounts of each company truly reflect the transaction which has occurred. As the manufacturing company becomes insolvent, there may well be

claims against the Cayman company arising out of the sale at an undervalue, but if the two companies are in the same group and it can be said that the overall transaction was beneficial to the group and does not constitute impropriety, then no criminal conduct is disclosed. The crucial point is whether or not there is a dishonest or false statement in the records of the companies or individuals involved in such transactions. In many cases of tax fraud, even fraud of authority, there will be dishonest documentation. The presence or absence of such false documentation will often be critical as to whether section 93A of the 1993 Act applies or not.

"Knowing or suspecting"

Insofar as the new legislation applies to persons who actually know the relevant facts, it may be thought that despite the stringency and wide ambit of the new offences, they are only fair and reasonable. A professional adviser who actually knows that his client is involved in dishonest activity, even if that is conducted off-shore as part of an attempt to evade foreign income tax, may be thought by many to be legitimately at risk of being implicated in that dishonest activity, perhaps even by the commission of a criminal offence. But what of "suspecting"? Section 93A talks of "knowing or suspecting that A is a person who is or has been engaged in criminal conduct or has benefited from criminal conduct". This is potentially very worrying for professionals involved in trust estate or tax planning work. Such professionals frequently suspect or have cause to suspect the transactions on which they are asked to advise are not 100 per cent above board. The client will not usually tell the adviser more than he needs to know, and the adviser who deliberately sets about effecting a dishonest purpose does not deserve much sympathy. What, however, of the ordinary practitioner who puts into effect arrangements which are not on their face illegal or even dishonest, but where there is suspicion that the client is involved either in attempts to evade tax, or exchange control or possibly to defeat the interests of other persons in the property?

Much will depend on how strict the Courts are in interpreting the concept of “suspecting” in this context. It does not seem to me that the Courts are likely to regard this phrase as including simply the worldly cynicism of the experienced tax adviser. In order for somebody to suspect something he must have solid grounds for that suspicion. Something more than a bad smell is required and the client is entitled to the benefit of the assumption that he is not involved in criminal conduct unless there is reason to believe that he is so involved.

A further point is available to be made by the professional adviser in this context. Section 93A makes it clear that it is a defence for a person to prove that he did not know or suspect that the arrangement in question related to any person’s proceeds of criminal conduct. In other words, even if there was a suspicion that A was involved in criminal conduct, the professional will not be liable if he did not suspect that the arrangement of which the professional was involved related to “the proceeds of criminal conduct”.

To return to the example of the client who receives off-shore the emoluments from an employment where there has been no deduction of tax at source in accordance with PAYE regulations (Case Study 1 above). Assume that a professional suspects that such activity has occurred. His client maintains considerable funds off shore, only some of which come from his United Kingdom employer. If the professional becomes involved in making arrangements for the investment or disposal of such monies, how is he to know what part if any of those funds represents the proceeds of criminal conduct? In the first place the money is mixed, but more importantly it does not follow from the fact that the client may have been involved in tax evasion that the sums accruing off-shore, even if deriving directly from the United Kingdom employment, necessarily constitute the “proceeds” of United Kingdom tax evasion. In other words, although the “proceeds of criminal conduct” can include sums retained as a result of fraud on tax authorities and is not limited to monies obtained from a fraud,

the fact that the obligation to pay tax is not in general fund-specific does have a relevance to the extent to which the professional can contend that he did not have reasonable cause to suspect that particular monies passing through his hands represented the proceeds of criminal conduct. They may in fact do so, but from the point of view of the professional he will often have no idea whether or not the client is accounting for the tax due out of other funds (whether or not the PAYE regulations have been infringed).

It seems to me that the Courts will be vigilant to require that if the professional is to be found guilty under section 93A, he must not only suspect criminal activity, but have solid grounds for suspecting that particular funds with which he is dealing represent monies deriving from the client's criminal conduct. In a case where a professional is privy only to a small part of an individual's financial affairs, this point seems to me to be of importance. Conversely, if the professional is fully versed in all aspects of the client's financial affairs, it will be difficult for him to maintain a defence under section 93A(4) where he knows or suspects that monies he is being asked to invest or dispose of represent monies which the client has in hand as the benefit of criminal conduct which he has perpetrated or is in the course of perpetrating.

Much here will depend on the meaning which the Courts give to the word "suspecting". If analogy with the law of constructive trusts is legitimate (which may be debatable) then there is likely to be some reluctance on the parts of the Courts to hold professionals liable, especially in the criminal context, on the basis of facts which in a sense they ought to know or of which they are "on notice": see the case law as now summarised by the Privy Council in Royal Brunei Airlines v. Tan [1995] 3 W.L.R. 64. Whilst suspicion obviously falls short of knowledge, any criminal case must be proved beyond reasonable doubt, and no one is likely to be convicted unless it can be clearly shown that objective facts existed giving rise to a situation where an honest man would have concrete grounds for his suspicion. It may be that the Courts would bear in mind in seeking to judge a professional man both (a) the probability that Parliament did not really

intend to focus on fiscal offences and related matters at all, and (b) the general recognition that a man's tax affairs are broadly a matter between him and the Revenue and are quite different from activities such as money-laundering.

Part 2

II. Civil Liability

Leaving aside cases where a professional man incurs liability to his client in contract or to third parties with whom he has a proximate relationship, such as to give rise to a duty of care in negligence, the likely means by which he may become involved in accessory liability in relation to frauds on third parties is by the law of constructive trust.

There is a well established distinction between knowing receipt and knowing assistance. Knowing receipt liability, as to which it may well be that the requirements for liability are less stringent (especially in relation to knowledge), only arises in relation to money which has been misappropriated where the person sought to be held liable receives money for his own benefit: see Agip (Africa) Ltd v. Jackson. What we are concerned with here is knowing assistance, i.e. becoming involved in a fraud on a third party without the beneficial receipt of trust property. For more than 25 years there has been serious doubt as to what is required to render an accessory liability for knowing assistance, but it is profoundly hoped that the law has now been clarified in the Royal Brunei Airlines case referred to above.

The Privy Council has now clearly affirmed that liability under this head requires dishonesty on the part of the accessory. Thus, in so far as professionals such as trust or estate practitioners or tax planning advisers find themselves enmeshed in transactions which are frauds on third parties, they do not incur liability to that third party unless they have acted dishonestly, or as is sometimes said with “want of probity”. Negligence does not suffice, nor does suspicion. Sighs of relief will no doubt be uttered at this point, but there are still dangers. Dishonesty includes not only obvious and direct dishonesty, but also the deliberate or reckless shutting of eyes to the obvious, which is sometimes referred to as “Nelsonian knowledge”. If a professional chooses not to ask questions because he would rather not receive the obvious answers, he is in the same position as if he had discovered the truth. If he allows himself to become involved in a transaction which he strongly suspects to be dishonest, but forbears from questioning it and simply keeps his head down, he is at risk of being found liable. There is a huge difference between failing to acquire knowledge which one ought with reasonable care to acquire (which does not attract liability) and putting the means of knowledge deliberately beyond one’s reach (which may very well attract liability).

In this connection, the Agip case referred to above (Case Study 3) is instructive. There a firm of accountants was involved in arrangements whereby it received (not beneficially but for another) funds which were later held to represent the proceeds of a fraud on the plaintiff. In considering whether or not the accountants were guilty of knowing assistance in the fraud on the plaintiff, attention focused on the state of knowledge of the accountants and the degree of their honesty or dishonesty. They gave no evidence to the Court, and it was held by Millett J. (as he then was) at first instance and also by the Court of Appeal that the accountants were liable. They were certainly on notice that the sums received were the proceeds of a fraud, and they put no material before the court to rebut the inference that they must have known the truth. This was nothing to do with tax fraud, but rather a straightforward case of money laundering in the ordinary sense. The courts concluded that the accountants must have known they were laundering money and were

consequently helping their clients to make arrangements to conceal dispositions of money which had such a degree of impropriety that neither they nor their clients could afford to have them disclosed.

This case neatly illustrates where the border line lies as far as the professional accountant or solicitor is concerned between liability and non-liability. Some think the case is hard on the accountants, but it must be remembered that the courts were effectively saying that they were dishonest and that their silence was eloquent to that effect. Usually, a professional who gives evidence and explains how he did not realise that he was involved in a fraudulent transaction will stand an excellent chance of being believed and escaping liability. Once he puts forward such a case in court, it is incumbent on the plaintiff to show that the professional acted dishonestly or with a reckless disregard for the truth. This is a higher hurdle than the requirement of showing suspicion of criminal conduct in section 93A of the Criminal Justice Act 1993.

In the Agip case Millett J. considered the merits of an argument put forward on behalf of the accountants that they did not act dishonestly because what they suspected was "only" a breach of exchange control or "only" a case of tax evasion. This approach received a dusty answer from the Judge. He said that at page 294H:

"What did Mr Jackson and Mr Griffin think was going on? There is some evidence of this in the minutes of the first meeting of the Directors of Keelward Limited of March 22, 1984 and it will be wrong of me to ignore it. This suggested that they thought that their clerk was engaged in evading Tunisian Exchange Control, possibly with the connivance of the plaintiffs and on their behalf - though the minutes do not say so. In my judgment, however, it is no answer for a man charged with having knowingly assisted in a fraudulent and dishonest scheme to say that he thought that it was "only" a breach of exchange control or "only" a case of tax evasion. It is

not necessary that he should have been aware of the precise nature of the fraud or even of the identity of its victim. A man who consciously assists others by making arrangements which he knows are calculated to conceal what is happening from the third party, takes the risk that they are part of a fraud practised on that party".

This is salutary advice. Once a professional sinks to a position of knowing that his client is involved in fraudulent activity, he will find it very difficult to argue that he was not sufficiently on notice of a fraud on a particular party. While the Courts are very reluctant to enforce, directly or indirectly, foreign revenue law, they do not look kindly on professionals who get involved in what they know to be dishonest activity, even if the professional believes that is "only" a fraud on a foreign tax or exchange control authority. The Courts are likely to approach questions like this on a fairly broad basis (although a narrower view was taken by Rimer J. in Brink's-Mat Ltd v. Elcombe, if the professional is acting honestly in general, he will not be liable for knowing assistance, and he will have the Court's sympathy if faced with a criminal charge under section 93A of the 1993 Act. Conversely, if he is acting dishonestly or closing his eyes to the obvious, he is very exposed in both situations whatever technical arguments may be avalable to him.

A final point to make in connection with knowing assistance is that a professional can take no refuge, where he gets involved in laundering the proceeds of a fraud, in pointing to the fact that the monies have passed through a series of foreign jurisdictions before they reached him. In El Ajou v. Dollar Land Holdings Plc the Court of Appeal affirmed the views of Millett J. (as he then was) to the effect that money can be traced pursuant to English laws of tracing even though they pass through a series of foreign jurisdictions which do not have any such rules, or indeed any rules of tracing at all. In that case a fraud was perpetrated which caused money to move from Geneva to Gibraltar to Panama and back to Geneva before arriving in London. An argument was rejected to the effect that the monies could not be traced to London unless the Rules of each jurisdiction

through which the money passed permitted the continued identity of the plaintiff's funds to be recognised. Since the money ended up in England and it was the English Court which was deciding the liability of the recipients in London according to English law, the laws of the intervening jurisdictions where held to be irrelevant.

Thus, if a professional practising in England receives money from his client which he has reason to believe derives from a fraud, he can be liable as constructive trustee (providing all the necessary requirements are met) without being able to argue in his favour that monies cease to belong to the plaintiff because they passed through jurisdictions which would not have recognised the plaintiff's continuing proprietary interest in those monies. This is a simple and beneficial rule and (although the Court of Appeal differed from Millett J. on other aspects of the case), this point attracted little attention on appeal, and does not seem to be regarded as controversial as a matter of English law. Thus, the matter comes down even more clearly to a question of whether or not the professional has behaved dishonestly, assuming that the plaintiff can trace the money into his hands at least as a matter of the English legal principles of tracing.

III. Conclusions

The rules on civil liability discussed above should not worry the honest and diligent practitioner. It is tempting to seek to apply the principles of civil law by analogy to the as yet untested provisions of the criminal law contained in section 93A (and to a lesser extent 93B and C) of the Criminal Justice Act 1993. It is tempting to argue that professionals should not be condemned for criminal misconduct where they would not be liable at all in a civil suit, but there is a limit to the extent to how far this can be pressed. The provisions of the statute are very different, and they were clearly intended to be enforced as part of the international war against money laundering. It is perhaps unfortunate that the United Kingdom

legislature has strayed beyond the confines of the E.C. Directive so as to include all forms of indictable criminal conduct under the criminal umbrella. Unfortunate or not, they are clear danger signs for professionals practising in trusts, estates and tax planning. While they need not make themselves experts on foreign law, they need to look very hard at transactions in which they become involved, even if apparently off-shore, to see whether the facts known to them would, if they all took place in the United Kingdom, constitute a criminal offence. This requires a certain knowledge of English criminal law, particularly the provisions of the Theft Acts and the law of conspiracy, at least in outline.

Where a professional knows facts which lead him to conclude that a criminal offence would have been conducted if the facts had all occurred in England, he has an uncertain basis for escape if the best he can do is to argue that he did not know what would constitute criminal conduct in England. He also has the problem that the phrasing of section 93A throws the burden of proof on to the defendant, once he suspected that his client has been involved in criminal conduct. These legislative innovations may require professionals to tighten their working practices and adopt a stricter approach than hitherto to the extent to which they can turn a blind eye to the true commercial purpose behind transactions in which they are instructed to advise and participate.

This may impose a burden on the professionals, but it is arguable that this may be justified in the interests of world wide efforts to reduce crime.

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