THE SOCIETY FOR ADVANCED LEGAL STUDIES

ANTI-CORRUPTION WORKING GROUP

BANKING ON CORRUPTION

THE LEGAL RESPONSIBILITIES OF THOSE WHO HANDLE THE PROCEEDS OF CORRUPTION

FEBRUARY 2000

2673924

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FOREWORD BY THE CHAIR OF THE ANTI CORRUPTION WORKING GROUP

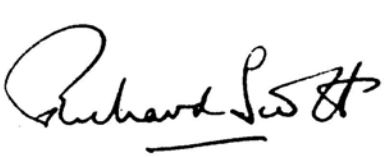
This report concentrates on corruption by foreign leaders. Whilst there is nothing new about corruption, recent press reports suggest the scale of wealth acquired by this means seems greater than ever before. One can only contrast this with the poverty of those countries that have been the victims of corruption. An explanation for the sums at stake in recent cases could be the development of sophisticated electronic banking systems and the comparative ease with which the proceeds of corruption can be transferred abroad. Once outside their home countries these funds can then be used to acquire assets and fund opulent lifestyles.

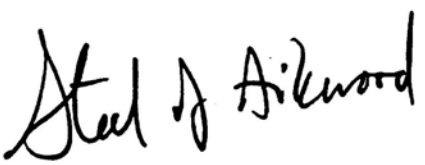
The report seeks to clarify the civil and criminal liabilities facing those that handle the proceeds of corruption overseas. We read with interest that its authors conclude that criminal liability may be more easily incurred on the same facts than civil liability. We share their view that in principle, a lesser degree of knowledge should not suffice to establish criminal liability than would suffice to establish civil liability. It remains to be seen whether the Courts will be prepared to infer the requisite mental element in civil and criminal cases where the sums at stake are so large that they cannot have been acquired by legitimate means.

These liabilities will be of grave concern to banks and others that may become involved in handling the proceeds of corruption. Clearly they have a self-interest in preventing the financial system being mis-used in this way. The Report suggests procedures that should be implemented to help to ensure this.

We were concerned to see that the Report concludes that the UK's present prevention of corruption legislation does not meet the requirements of the OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions. The main reason for this view is that no offence is committed under UK law if the offer and payment of the bribe takes place abroad. We understand that members of the Working Group have had meetings with the relevant ministers about this and suggested that an extraterritorial offence of bribing foreign public officials should be introduced, and other changes should be made, so as to comply with the Convention. We await with interest the Government's recommendations on the domestic law of corruption that are due to be published shortly.

We congratulate the Society of Advanced Legal Studies for taking this initiative. We congratulate those who have written the report and are pleased to been involved with the Working Group's activities.





The Right Honourable Sir Richard Scott
The Vice Chancellor of the Supreme Court

The Right Honourable The Lord Steel
of Aikwood KBE

FOREWARD BY THE SECRETARY OF STATE FOR INTERNATIONAL DEVELOPMENT

There is nothing new about rulers exploiting their office for personal gain. But it matters that some of the world's poorest countries have become victims of corruption on a grand scale. This can affect whole economies. The origins of the crisis in Asia and Russia included corruption. Now it is clear to all that economic development without transparency and accountability is unsustainable.

Richer countries have a responsibility for ensuring that they are not contributing to corrupt practices. As a major financial centre, the City of London is almost certain to have handled the proceeds of corruption. Financial institutions and other professionals need to be aware of their legal responsibilities to properly identify their customers and report any suspicions of money laundering. I welcome the initiative taken by the Society for Advanced Legal Studies to study this further. I hope this will lead to a wide discussion about the contribution the financial and legal professions can make to reducing the scope for corruption.

The Right Honourable Clare Short MP
Secretary of State for International Development

INTRODUCTION TO WORKING GROUP REPORT

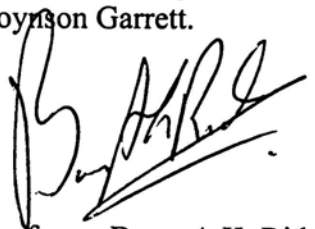
The Society for Advanced Legal Studies (SALS) was established in February 1997 with the object of promoting legal research at an advanced level. The Society seeks, through the medium of the Institute of Advanced Legal Studies (IALS), to achieve this by fostering co-operation and collaboration between academic lawyers, legal practitioners, members of the judiciary and lawyers employed by public and private organisations, both in the United Kingdom and elsewhere. The Society is incorporated as a company limited by guarantee and is a registered charity.

One of the means that the Executive Committee of the Society has adopted to promote collaborative research is through the appointment of expert working groups in a number of areas of the law. Reports of these groups are submitted to the Advisory Council of the Society, which sits under the chairmanship of Lord Steyn of Swafield, and are then made available to the public. In July 1999, the Executive Committee appointed The Rt. Hon. Sir Richard Scott, Vice Chancellor of the Supreme Court and Lord Steel of Aikwood to chair an expert working group on the legal and other issues that arise when financial intermediaries receive or handle the proceeds of corrupt acts overseas.

The work of the group was co-ordinated and directed by its convenors Mr Nicholas Burkill and Mr Toby Graham, partners of Taylor Joynson Garrett, Mr Andrew Maclay and Mr Mark Tantam of Deloitte & Touche; and Dr Bruce Butcher and Mr Jason Haines of the IALS. To assist in the examination of a number of complex areas of the law, the working group established a number of sub-groups under the chairmanship of Dame Barbara Mills QC, Mr Michael Tugendhat QC, Mr Richard Jones QC, Sir Kenneth Warren, Mr Tony Girling and Dr Bruce Butcher. Members of the Institute's academic and research staff assisted and supported the working group and Mr Jon McNae, one of the Institute's Research Officers, edited the final report.

It would be inappropriate to assume that members of the Executive Committee or the Advisory Council, let alone members of the Society, would necessarily endorse and agree with every observation and recommendation in the reports of the various expert working groups that are published under the auspices of the Society. However, in the present case I am confident that this report will make a significant contribution to discussion of an important and complex area of the law. There is real concern, in many quarters, to assist those countries that have seen their economies raped by corruption, particularly by those in high office. At the same time, the law is becoming far more demanding on those who are prepared to handle other people's wealth. In this report, a number of experts from many different disciplines and backgrounds have carefully examined not only the relevant law, but also practical issues in regard to tracing and recovery and the position of intermediaries.

On behalf of the Executive Committee I must acknowledge and thank the generous contribution that members of the working group have made to the success of this project. Although it can be invidious to name one, out of so many who have gratuitously given considerable amounts of time and effort, it would be wrong not to acknowledge that the driving force behind this important initiative is Mr Toby Graham of Taylor Joynson Garrett.



Professor Barry A.K. Rider
Chairman of the Executive Committee, SALS
Director of the IALS

CHAPTER ONE

POLICY AND JURISDICTION ISSUES

Background to this report

There has been a steady trickle of press reports into cases of so-called 'grand corruption'. The scale of the wealth reported to have been acquired in such cases is staggering and can even threaten economic development and stability of whole countries. One can but contrast this wealth with the poverty of countries that have been the victims of corruption in such cases, namely the people of the countries in question. Whilst there is nothing new about corruption the impression gained from press reports is that the problem of grand corruption is getting worse. Obviously it is difficult to know whether this really is the case as there is a complete and understandable absence of reliable data on the extent of the problem.

The preamble to a draft Council of Europe Convention on Corruption sums up the effects of corruption generally, not just grand corruption, as follows:

'corruption threatens the rule of law, democracy and human rights, undermines good governance, fairness and social justice, distorts competition, hinders economic development, and endangers the stability of democratic institutions and the moral foundations of society'.

We all agree that corruption is morally wrong. The question is whether it is legally wrong. In this report we seek to answer this question, largely from the point of view of the present laws of England and Wales.

An English Criminal or Civil Court is unlikely to have jurisdiction to try foreign public officials responsible for grand corruption as their wrongful conduct is likely to have taken place outside the jurisdiction. However, wrongful conduct within the jurisdiction connected with grand corruption would be subject to the court's jurisdiction. Examples of this conduct include:

those within the jurisdiction who make bribe payments to foreign public officials; and

banks and other intermediaries in England and Wales that 'handle' the proceeds of corruption. If they do so with knowledge of wrongdoing, even wrongdoing committed abroad, the handler could commit criminal offences and could be liable to civil claims.

Banks and other intermediaries in this country are involved in 'handling' the proceeds of corruption in a variety of ways, some less innocent than others. The examples we refer to in this report are taken from recent newspaper articles. We do not know whether what is reported is fair and accurate; we refer to them for illustrative purposes only. The scale of corrupt payments can be so large that they cannot go unnoticed. The so-called Ajaokuta debt buy back arrangement in Nigeria is one example. Here a US$2.5 billion debt to the Russian Government was allegedly sold to Nigerian government officials for US$500 million. They are said to have arranged for Nigeria to repay the debt in full less than a week later resulting in a profit of US$2 billion. A press report quotes an unnamed source who describes how 'many external creditors got wind of the transaction' and 'it was impossible to move such amount of money around without alarm bells starting off.'[1] Other reports refer to the banking system being used to launder dirty money on a grand scale. Officials at Citibank are reported to have violated money laundering controls to help the brother of the former Mexican President move US$100 million out of the country. The Bank of New York is reported to be assisting authorities in their investigation into the use of bank facilities to allegedly transfer US$4.2 billion on behalf of Russian organised crime between October 1998 and March 1999.[2]

The main focus of this report is on the criminal and civil liabilities of those that 'handle' the proceeds of corruption. This is dealt with in separate chapters in this report. Before we come on to them, in the remainder of this chapter we set the scene by defining what we mean by grand corruption and consider jurisdictional issues that arise in these cases.

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1 Africa News Service 2 April 1999
2 Financial Times 20 August 1999

Conclusions

Briefly, we concluded that:

(a) it is unclear whether bribery of foreign public officials is an offence under UK's existing prevention of corruption legislation. We consider a new clear offence should be introduced.

(b) No offence under the existing prevention of corruption legislation is committed if the offer and payment of the bribe takes place abroad. Thus, the law is easily circumvented. The new offence should apply to bribery of foreign public officials abroad.

(c) If the bribe is offered and paid abroad, it is tax deductible. In this way, the UK tax payer is subsidising bribery. Steps to disallow tax deductibility should be taken.

(d) The threat and economic damage caused by corruption to the economies and fabric of society and the world mean that corruption and the fight against it must be accorded the highest possible status in terms of international assistance and breadth of jurisdiction;

(e) While it is important to be sure that the measures to tackle corruption that have taken place are of the highest quality, it is as important, if not more important, to have in place good active machinery to detect and diagnose problem areas before they become acute.

1. Defining grand corruption

1.1 We use the term grand corruption to describe cases where massive personal wealth is acquired from States by senior public officials using corrupt means. So the distinguishing features of grand corruption are the scale of wealth acquired by corrupt means and the seniority of the officials involved. We

consider this readily distinguishable from petty corruption and 'grease' payments[3] and that there is no arbitrary threshold for the amount of wealth involved. One difficulty is that there is obviously no reliable publicly available information as to the sums involved.

1.2 There is no reliable publicly available information on the precise means by which such fortunes have been acquired with the result that no one can be certain they were not acquired legitimately as opposed to corruptly.[4] Legitimate means seem very unlikely, given the scale of the sums allegedly involved. It is tempting to assume in view of the scale of the sums at stake that there must have been corrupt activities in such cases. Such an assumption has a long pedigree in UK legislation. Section 2 of the Prevention of Corruption Act 1916 provides that when a government official has received a money gift or other consideration from a person seeking to obtain a contract from the Government or a public body, they 'shall be deemed to have been paid or given and received corruptly... unless the contrary is proved'. The Law Commission recommends this presumption be abolished.[5] However, its remit did not include consideration of the position of government officials. This was considered in the Home Office Report 'The Prevention of Corruption'. The Home Office considers, 'it is right to consider carefully an extension of the presumption of corruption.'[6] The justification for this presumption is summarised in The Home Office Report '*The Prevention of Corruption*' at paragraph 3.11 'it may be reasonable therefore to expect a person in these circumstances [namely a government official] to justify any questionable payments made to them. The Government therefore believes it is right to consider carefully an extension to the

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3 Whilst such payments are important, they fall outside the scope of this report. This is consistent with the OECD's views. The Commentary to the OECD Convention on Combating Bribery and Corruption in International Business Transactions makes clear that small facilitation payments made to induce public officials to perform functions part of their routine duties do not constitute payments 'to obtain or retain business or other improper advantage' and therefore fall outside the terms of paragraph 1 of the Convention and are not required to be criminalised.

4 President Marcos is said to have claimed his wealth was acquired legitimately. He put the huge increase in his personal fortune acquired whilst in office down to discovery of gold reserves in land he owned.

5 Para. 4.78 – Legislating the Criminal Code: Corruption

6 At para.. 3.11

presumption of corruption'. If it is extended to government officials, we can see no reason for it not applying to foreign officials as well.

1.3 The existing UK offences of corruption require the prosecution to prove that an advantage has been received 'corruptly'. This brings us on to the question of what the term corruption means. It includes a range of activities. The precise boundaries of activities that fall within its range are not easy to draw and may well vary from country to country. The Law Commission's recent report entitled 'Legislating the Criminal Code: Corruption' contains recommendations on how these boundaries should be drawn in future United Kingdom legislation. The Law Commission Report notes that whilst the United Kingdom legislation uses the term 'corruptly', it does not define what this means.[7] The Report then refers to two competing strands of judicial interpretation of this term. The Report describes this position to be unsatisfactory. It considers whether a definition is necessary or whether the meaning of the term is sufficiently clear. It notes that responses were about equally divided on this issue. The Law Commission concludes that the term should be defined in United Kingdom law. The relevant section of the proposed bill provides as follows:

> '(1) A person who performs his functions as an agent performs them corruptly if:
>
> > (a) he does an act or makes an omission primarily in order to secure that a person confers an advantage (whoever obtains it); and
> >
> > (b) he believes that if the person did so he would probably do so corruptly
>
> (2) A person who performs his functions as an agent performs them corruptly if –

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7 Para.. 5.63

(a) he does an act or makes an omission when he knows or believes that a person has corruptly conferred an advantage (whoever obtained it), and

(b) he regards the act or omission as done or made primarily in return for the conferring of the advantage.'

1.4 The Law Commission proposals are currently being considered by an inter-ministerial working group co-ordinated by the Home Office. A government policy paper is expected shortly. The Anti Corruption Working Group will seek to comment on the government paper when published, and it is not proposed here to comment in detail on the Law Commission's proposals.

1.5 In the case of *R v Wellburn and others*,[8] the Court of Appeal approved the following definition of the Recorder of London that 'Corruptly is a simple English adverb and I am not going to explain it to you except to say that it does not mean dishonestly. It is a different word. It means purposefully doing an act which the law forbids as tending to corrupt.' The Working Group considers that these sentiments apply with particular force to cases of grand corruption. We consider the definition of 'corruptly' in further detail in Chapter Two. For the moment, the following attributed to J.J. Senturia back in 1931, encapsulates what we mean by grand corruption 'abuse of public office for private gain'.[9]

1.6 A person does not need to show favour in consequence of having received a gift, the prosecution have merely to prove that a person received a gift as an inducement to show favour, for the gift to be corrupt.[10] A person who accepts a gift knowing that it is intended as a bribe is guilty of an offence even if he does not intend to carry out what is expected of him.[11]

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8 (1979) 69 Cr App R

9 World Bank Report 'Helping Countries Combat Corruption the Role of the World Bank' Sept 1997 Ch 2. This is taken from the definition attributed to J.J. Senturia, Encyclopædia of Social Sciences, Vol. V, 1931

10 *R v Carr* (1957) 40 Cr App R 188

11 *R v Mills* (1979) 68 Cr App R 154

2. Corruption involving bribery

2.1 It is our view that grand corruption involves two main activities. We deal with each separately. The first involves bribe payments. An illustration of how this could be relevant can be found in press reports in relation to Benazir Bhutto's husband. He is accused 'of taking secret kickbacks from airline, power station and pipeline projects, rice deals, customs inspections, defence contracts, land sell offs, even government welfare.' The same article states,

> 'the most lucrative contract discovered was a US$4 billion deal to buy 32 Mirage Jets from the French company Dassault. The documents, which include letters from Dassault executives, indicate an agreement was reached to pay 5% "remuneration" -- about US$200 million -- to Marleton Business, a BVI Company controlled by Zardari [Bhutto]'.

2.2 The Court in Pakistan has convicted both Mr and Mrs Bhutto of corruption and sentenced them for five years in prison, ordered fines of US$8.6 million and disqualified both from holding public office.[12]

2.3 According to a World Bank estimate, the sums distributed world-wide each year in 'pay-offs' or 'bribes' total US$80 billion. The OECD comments that 'given much of bribery and corruption goes undetected, this figure probably represents the tip of the iceberg'.[13]

2.4 We consider the substantive offence of bribery in Chapter Two. We consider the jurisdictional issues in relation to this offence in the following paragraphs. Had such activities taken place in this country (as opposed to Pakistan) and had the public official bribed been British, there can be little doubt that both he and the briber would have committed criminal offences of corruption. The position is less clear where the bribee is an official of a foreign government and the conduct took place abroad. We consider these issues in Chapter Two, Paragraph 10.

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12 Eastern Economic Review 29 April 1999

13 From OECD website 'what is the economic significance of corruption and bribery'

Briefly, with regard to the first (where the bribee is an official of a foreign government) the UK's prevention of corruption legislation does not specifically address bribery of foreign public officials. The Law Commission consider that provided they are employed by or acting for another, foreign public officials are 'agents' within the meaning of section 1(2) of the 1906 Act. This defines agents to include 'any person employed by or acting for another'. It seems from the Hansard reports on the debate over the 1906 Bill that Parliament did not consider it applied to bribery of foreign public officials. The primary purpose of the Bill was to outlaw private sector corruption and not public sector corruption overseas. We could find no court decisions on this point and conclude there is some uncertainty over whether a court would interpret this term in the same way as the Law Commission suggest. Because of this doubt we reached the view that the existing offences may not comply with the OECD Convention. Article 1 requires parties to, 'take such measures as may be necessary to establish that it is a criminal offence under its law for any person intentionally to offer, promise or give any undue pecuniary or other advantage...to a foreign public official'. This is defined in the widest terms possible to include, 'any person holding legislative administrative or judicial office in a foreign country...any person exercising a public function for a foreign country, including for a public agency or public enterprise.'

2.5 It is generally recognised that judges, local councillors and officials of public international organisations are not 'agents' for the purpose of the 1906 Act.[14] Therefore, even if the Law Commission's view is correct, UK law does not apply to bribery of some foreign public officials covered by the Convention and may therefore not be fully compliant.

2.6 The Law Commission's proposed bill seeks to remove the doubt surrounding the present offence: it defines 'agent' to be, 'a person... performing functions for the public' and that in this regard 'public' 'is not confined to the public of the United Kingdom'.

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[14] See paragraph 2.26 etc. of Law Commission Report

2.7 With regard to the second issue (conduct abroad), the Law Commission concluded the English Courts will only have jurisdiction if, 'the act (of, for example, offering or accepting a bribe or agreeing to accept it) takes place in England and Wales'.[15] They say that, 'if A, who is abroad, telephones B in England and offers a bribe, it is doubtful whether A would at present be committing an offence under English law.' This appears to be the view of the Inland Revenue also; Guidance to Inspectors on whether bribe payments are deductible in order to calculate taxable profits states:

> 'Preparatory action only in UK
>
> 'However, the UK does not have jurisdiction over a corruption offence merely because some preparatory action took place here provided the actual offer or payment of the bribe took place abroad.
>
> Jurisdiction and Nationality
>
> 'Jurisdiction is not tied to nationality except where British Crown Servants are involved, the UK Courts do not have jurisdiction over corruption offences which take place entirely abroad even if all those involved are British nationals.'

2.8 It is arguable that the OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions requires the new offence to apply even though the conduct takes place abroad. The argument runs as follows. Firstly, Article 4(1) requires parties to take jurisdiction 'when the offence is committed in whole or *in part* in its territory' (emphasis added). It is not clear what is meant by 'in part' for these purposes. The Commentary on the Convention adds some light; this states 'the territorial basis for jurisdiction should be interpreted broadly so that *an extensive physical connection* to the bribery act is not required' (emphasis added). It appeared to us that the present offences do require an 'extensive physical connection to the bribery act'. The

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15 Para. 7.8

required physical connection will be lessened when the Law Commission's recommendation that the new corruption offences in its proposed new bill are Group A offences listed in section 1(2) Criminal Justice Act 1993. We deal with the effect of this change in paragraph 4.3 below.

2.9 Secondly, Article 4(2) of the Convention provides that each 'party which has jurisdiction to prosecute its nationals for offences committed abroad shall take such measures as may be necessary to establish its jurisdiction to do so in respect of bribery of foreign public officials, according to the same principles'.

2.10 It is recognised that under English law, criminal jurisdiction has historically been territorially based. However, this principle is subject to an increasing number of exceptions. Examples include:

(a) Section 134 of Criminal Justice Act 1988 (enacting the 1984 Torture Convention) makes torture outside the jurisdiction triable within the jurisdiction;

(b) Section 9 of the Offences Against the Person Act 1861 which permits the prosecution of any British national for murder anywhere of any person whether a British national or not; and

(c) The War Crimes Act 1991 enabling the Court to prosecute murder and other homicide committed between 1 September 1939 and 5 June 1945 in a place which was at that time part of Germany or under German occupation. This jurisdiction applies irrespective of the nationality at the time of the offence and requires only British citizenship or residence after 8 March 1990;

(d) Section 7 of Sex Offenders Act 1997 giving courts jurisdiction over certain sexual offences against children under the age of 16, wherever committed, provided that it was also an offence under the law in force in the country in which it was committed. This jurisdiction is restricted to

those having British citizenship or residence in the United Kingdom on or after the commencement of the section which was 1 September 1997;

(e) The Sexual Offences (Conspiracy and Incitement) Act 1996 which makes it an offence to conspire to commit, or to incite the commission of certain sexual offences abroad against children.

2.11 Given that our courts clearly do have jurisdiction, albeit it in relation to limited classes of conduct, to prosecute its nationals for offences committed abroad, Article 4(2) of the Convention applies and states parties, '*shall* take such measures as may be necessary to establish its jurisdiction to do so in respect of the bribery of a foreign public official, according to the same principles' (emphasis added). The strict approach suggested by the word 'shall' is not matched by the commentary which states, 'For countries which apply nationality jurisdiction only to certain types of offences, the reference to "principles" includes the principles upon which such selection is based.' The United Kingdom applies nationality jurisdiction in limited cases; and we consider these principles shortly. The commentary is relied on by Home Office Officials to say the convention does not require the United Kingdom to apply these principles to bribery of foreign public officials. It is debateable whether this is the correct approach.

2.12 Thirdly, Article 4(4) requires the United Kingdom to review the underlying effectiveness of the present basis of jurisdiction. The fact that no-one has been convicted for bribing foreign officials under the present Prevention of Corruption legislation calls into question the underlying effectiveness of the present basis for jurisdiction.

2.13 The position contrasts with that in Australia, which is also a party to the OECD Convention. Australia has carried out its own review of the effectiveness of domestic legislation. It concluded that the 'conduct sought to be proscribed is essentially international criminal activity likely to take place wholly outside Australia and that the objectives and intent of the OECD Convention will not be met unless jurisdiction for the offence is broader.' They considered jurisdiction

was the central issue on which the effectiveness of the Bill would be judged and concluded that 'if the provision on jurisdiction required at least some of the conduct to have occurred in Australia it would be too easy for people to avoid the proposed legislation'.[16] As a result of this review, Australia has introduced an extra-territorial offence. We share Australia's view that the Convention seeks to prevent bribery that is likely to take place wholly outside the jurisdiction. This would not be an offence under Australian law. Australia's solution was to introduce an offence of bribery abroad, based on nationality. We consider UK should do the same in order to comply with the letter and spirit of the Convention and to live up to the Government's declared intent to stamp out corruption. This would also meet the recommendations of the International Development Committee that:

> 'We recommend that the Government bring in legislation in the next session of Parliament and criminalise the bribery of foreign public officials and cease the tax deductibility of such bribes. We also expect all business dealing with the developing world to have in place clear and regularly monitored anti corruption standards.'[17]

2.14 In the United States, the Foreign Corrupt Practices Act 1977 (as amended) makes it an offence to bribe foreign officials, political parties, party officials, or candidates for public office for the purpose of influencing an official act or decision, official action or failure to act, securing an improper advantage, or inducing the use of influence to obtain, retain, or direct the placement of business. The FCPA has been amended to provide for jurisdiction over the acts of US businesses and nationals in furtherance of unlawful payments that take place wholly outside the United States. The amendment to confer jurisdiction nationally was considered to be a requirement of Article 4(2) of the OECD Convention.

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16 Para. 53 of Explanatory Memorandum

17 Extract from 6th report to House of Commons 28 July 1999

2.15 However, the Department of Trade and Industry appears to consider the existing legislation meets the requirements of the Convention. It submitted an Explanatory Memorandum at the time the OECD Convention was laid before Parliament. This Memorandum gave assurance that:

> 'the scope of these provisions [of the Convention] is fully compatible with existing United Kingdom law... The Convention does not require the territorial basis for the application of the UK anti corruption statutes to be changed, but the effectiveness of the current basis for jurisdiction must be reviewed ...The domestic legislation which will enable the United Kingdom to implement the convention is already in place and does not require amendment.' (emphasis added).

2.16 The OECD's own records of steps taken to ratify and implement the Convention refers to 'internal consultations' which show the existing laws United Kingdom, 'meets the requirements of the Convention'. The internal consultations referred to do not seem to have taken place in public and the basis of this view is not clear. It remains to be seen whether the peer group review reaches the same view.

2.17 We considered whether bribery of a foreign public official meets the Home Office's own policy guidelines on when courts should take extra-territorial jurisdiction. These are contained in a Home Office Steering Committee Report *'Review of Extra-Territorial* Jurisdiction' (July 1996). Six 'tests' are described in paragraph 2.21 of the Report. It is our view that, in cases of grand corruption, there are good arguments for saying the bribery of foreign public officials satisfies five of the six. These arguments are briefly as follows:

(i) Where the offence is serious (this might be defined, in respect of existing offences, by reference to the length of sentence currently available)

2.18 The maximum term of imprisonment on conviction on indictment is seven years. Additional sanctions are available. These include an unlimited fine and an order that the Defendant repay the bribe or any part thereof (see section 2(a) and (b) of

1889 Act). The Law Commission felt that bribery was of such importance that it recommended the new offences it proposed should be Group A offences for the purpose of the Criminal Justice Act 1993. The Law Commission report notes that the substantial majority of those that commented on this issue agreed with them.[18]

(ii) Where there is international consensus that certain conduct is reprehensible and that concerted action is needed involving the taking of extra-territorial jurisdiction

(A) Consensus on need for concerted action to combat corruption

2.19 Such consensus is evident from the number of international initiatives to try to tackle the problem of corruption. These include the OECD, the European Union, The Council of Europe, the United Nations, the G7, the World Trade Organisation, World Bank, the Organisation of American States and the International Chamber of Commerce. We summarise at Appendix A these initiatives. By way of example, the preamble to a draft of the Council of Europe Convention on corruption emphasises that, 'corruption threatens the rule of law, democracy and human rights, undermines good governance, fairness and social justice, distorts competition, hinders economic development, and endangers the stability of democratic institutions and the moral foundations of society'.[19]

(B) Corruption is reprehensible

2.20 The argument for saying grand corruption is reprehensible emerges from the fact that senior public officials have amassed substantial wealth from bribe payments. Mr and Mrs Bhutto are said to have obtained US$1.5 billion largely through this way.[20] Corruption is recognised to have played an important part in the recent financial crisis in Asia and Russia. The International Development Secretary, Clare Short, explained, 'Short term capital flows triggered the crisis.

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18 Paragraph 7.14 of Legislating the Criminal Code: Corruption

19 5.33 Legislating the Criminal Code: Corruption

20 The Sunday Times Review, 12 April 1998, referring to the statements of Pakistani investigators

But the origins of the crisis included poor investments and weak regulation. In the absence of democratic accountability, cronyism and corruption flourish. And this understanding --which is now widespread-- is a major change. Many used to dismiss complaints about human rights and point to the economic performance of Indonesia. Now it is clear to all that economic development without transparency and accountability is unsustainable.'[21]

(ii) Where the vulnerability of the victim makes it particularly important to be able to tackle instances of the offence

2.21 The victims of corruption are not states, rather the people that make up those states. The United Nations describes its effects:

> 'Corruption in government increases poverty in many ways. Most directly, it diverts resources to the rich people, who can afford to pay bribes, and away from the poor people, who cannot. But it also skews decisions in favour of capital intensive enterprise (where the pickings are greater) and away from labour intensive activities more likely to benefit the poor. Corruption also weakens government and lessens their ability to fight poverty. It reduces tax revenues and thus the resources available for public services.'[22]

2.22 The Government White Paper comments in developing countries it is the poor who bear proportionately the heaviest cost. The consequences include:

- the immediate impact on the poor people of higher prices and fewer employment opportunities due to the distortions that corruption can cause, while corrupt officials may demand payment for public services which are supposed to be free;
- the diversion of scarce budgetary resources away from poverty elimination into unproductive expenditure or into repayment of debts

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21 Speech at Conference: Corruption as a Threat to World Trade and Investment, the corporate response. 19 March 1999

accumulated because of corrupt activities, as well as the loss of tax and customs revenues;

- the indirect economic impact that constrains economic growth by increasing the uncertainty and unpredictability of costs to prospective investors; and
- the indirect political impact that reduces poor people's representation as elites cling to power in order to exploit opportunities for corruption.

(iv) Where it appears to be in the interests of the standing and reputation of the UK in the International community

2.23 In his evidence to the House of Commons Committee on Standards in Public Life on 20 January 1998, the Home Secretary stated, 'The Government is determined that the UK should stay at the forefront of the fight against corruption both domestically and internationally'.[23] The majority of British companies do not offer bribes to win business. They are unfairly disadvantaged and we feel sure would welcome measures that resulted in a more level playing field. If all foreign bribe payments are outlawed international business will become more fair and open. It will help ensure that decisions to award contracts are based on sound economic judgements and not on who makes the biggest bribe. Other countries, notably United States and Australia, have enacted, or are in the process of enacting, legislation which will have an extra-territorial reach.

(iii) Where there is a danger that offences would otherwise not be justiciable

2.24 Many cases of grand corruption will never be prosecuted in the country in which the bribee is a public official. He may be a Head of State or a senior politician following a practice which is followed in his country. The conduct is kept secret and the bribee is in a position to influence the suppression of information and the process of law enforcement.

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22 1997 Human Development Report
23 Para. 105 of Jack Straw's evidence

3. Tax Treatment of Bribe payments

3.1 Where the offer and payment of the bribe takes place abroad it will be tax deductible. This is because section 577A(1) ICTA 1988 (as amended)[24] provides that in computing profits or gains chargeable to tax under Schedule A or Schedule D, no deduction is to be made for any payments 'the making of which constitutes the commission of a criminal offence'. Thus, the Inland Revenue's Guidance for Inspectors provides:

> 'Three main statutes apply to corrupt activities. Collectively they are known as the prevention of corruption Acts 1889 to 1916. They are summarised in IM666G to 666I below. The common law situation is dealt with in IM666J. Finally IM666K and IM666L explain the territorial limitations - broadly they apply to the UK and not to corruption overseas (with some exceptions). Expenditure which is within the Corruption Acts is caught by section 577A(1) ICTA 1988.'
>
> Corruption offences - territorial aspects
>
> 'Corruption offences are not subject to any special jurisdictional rules but the law is applied territorially. Anyone of any nationality who corruptly offers, solicits, pays or accepts a bribe within Great Britain (or onboard a British ship or aircraft in British territorial waters or British airspace) is therefore guilty of an offence. This includes foreign officials who offer, solicit, pay or receive bribes here and those who offer bribes to them or receive bribes from them here.
>
> Physical presence
>
> 'The territorial rule does not require the recipient to be physically present in this country. For example, the UK resident trader may agree to pay a

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[24] These provisions were inserted by the Finance Act 1994

bribe to a foreign official into the official's bank account in London. Both parties would be guilty of a corruption offence under UK law because the payment was made here.

Preparatory Acts only in UK

'However, the UK does not have jurisdiction over a corruption offence merely because some preparatory action took place here, provided the action of offer or payment of the bribe took place abroad.

Jurisdiction and nationality

'Jurisdiction is not tied to nationality and, except where British Crown Servants are involved, the UK Courts do not have jurisdiction over corruption offences which take place entirely abroad even if those involved are British nationals.'[25]

3.2 Thus, UK taxpayers are effectively subsidising bribe payments. Clearly this should cease forthwith so as to ensure the UK's compliance with the OECD's revised recommendation that parties 'which do not disallow the deductibility of bribes to foreign public officials re-examine such treatment with the intention of denying this deductibility.'[26] Perhaps the simplest way of achieving this would be to introduce a new offence of bribing foreign public officials. Provided the Courts have extra-territorial jurisdiction, such bribe payments would cease to be lawful wherever they were made. By virtue of section 577A ICTA 1988, they would cease to be tax deductible as well.

3.3 Our two main conclusions lead us to make one further recommendation concerning co-operation between authorities and disclosure of information. This is not the place for an exhaustive analysis of the multiple codes governing confidentiality of information in the hands of the police, relevant government

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25 Inspectors Manual Schedule D

26 Para. IV of OECD's revised recommendations adopted by the Council on 23 May 1997

departments (including the Inland Revenue and Customs and Excise), the financial services regulators and so on. Suffice it to say that, in general terms, the obligation to keep information confidential contains exceptions which are useful in the context of alleged criminal conduct such as corruption. And there is a 'clearing house' for cases of current interest, the Financial Fraud Information Service, which is now chaired and staffed by the Financial Services Authority (FSA). We hope, and believe, that this machinery is available and is in regular use, not only for domestic cases but also for those with an international element.

3.4 There is, however, one suggestion that we would make to produce greater clarity in this field. In the past the revenue departments, principally the Inland Revenue and the Customs and Excise, have been concerned to protect the security of the revenue and thus to adopt policies designed to secure to the maximum the supply of information to them in connection with the gathering of taxes and duties. In the past, therefore, these departments and the Ministers answering for them, have been concerned at the possible implications of any widespread policy of interchange of information with other authorities. Various changes in that area have taken place over the years, in relation, for instance, to the supply of names and addresses in certain family proceedings, and more recently in relation to social security fraud. We recommend, in accordance with our general policy and thrust, that it should be made clear beyond doubt that the fight against corruption should rank at the top of the concerns that are accepted as legitimate cases for co-operative supply of information by the revenue authorities. We understand that the Government propose to achieve at least part of this by regulation under what is now clause 308 of the Financial Services and Markets Bill, to enable the Inland Revenue to pass information about financial crime to the FSA, notwithstanding the concept of taxpayer confidentiality. Beyond that, we hope that, if it is necessary to embed in primary legislation a wider policy choice in favour of such disclosure, the government will bring forward the necessary measures.

4. Corruption involving misappropriation/ embezzlement of state assets

4.1 The second type of activity involving grand corruption is embezzlement and misappropriation of state assets. There are many examples. One press report about Nigeria claims, 'in a country known for the kleptocratic tendencies of its leaders, the reviled dictator achieved new levels of greed and corruption. During his five year reign, the British-trained career soldier turned institutionalised corruption into a family business. He is believed to have looted up to £4 billion, mainly from the oil sector. Most of the plunder is believed to have gone to foreign bank accounts, many of them in the Middle East. Abacha personally controlled the oil business, which generates more than 90% of Nigeria's foreign exchange earnings. He would take hefty cuts before approving contracts, which was well known by foreigners operating there. But that was only the start. He and his cronies siphoned off fortunes from sales of Nigerian crude oil as well as diverting large sums from four state-owned refineries, leaving them in near-total collapse.'[27] Other reports claim the late General's family 'handed over more than US$625 million and more than £75 million.'[28] Russia provides a second example. Recent reports quote Congressman Jim Leach, Chairman of the House of Representatives Banking Committee saying 'what you really have is a kleptocracy, a Government that has institutionalised theft at its heart'. [29]

4.2 We consider the substantive offence of theft in Chapter Two. We consider jurisdiction issues in relation to this here. The general position, stated in Archbold (paragraphs 21-44) is as follows:

> 'Where property is appropriated outside the jurisdiction, no offence is committed within the jurisdiction: R v Atakpu 98 Cr App R 254 (CA). In R v Thomsett [1985] CrimLR. 369 (CA), the Court held that there can be no conviction of theft where the appropriation occurs outside the jursdiction. In R v Governor of Pentonville Prison, ex. p Osmon 90 Cr App R 281, the divisional court did not regard itself as bound by Thomsett on the ground that the Crown in Thomsett declined to argue that the act of the Defendant within the jurisdiction could constitute an

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27 David Orr. The Scotsman 4 December 1998
28 The Australian, 11 November 1998
29 Times 28 August 1999

appropriation and the Court had deliberately left the point open. In Thomsett, the Court said that prima facie theft takes place where the property stolen is appropriated and prima facie appropriation takes place where the property is situated. In *ex. p Osmon*, however, it was held that where a person within the jurisdiction does an act constituting an assumption of the right of the owner of property situated outside the jurisdiction (telexing instructions to a foreign bank), the theft takes place within the jurisdiction. To the extent that this precludes the courts in the place where the property is situated from having jurisdiction to try cases where the offender has operated from outside the jurisdiction, it is likely to cause great inconvenience. It is also contrary to common sense, which strongly suggests that the essence of the offence being the appropriation of property, it takes place at the location of the property at the time of the appropriation. *Ex. p Osmon* was followed in *R v Ngan,*[30] where the property was in England, the Defendant was at all material times in England, the only act done by her was done in England, but it was held that the act which constituted the appropriation was done by her accomplices in Scotland and, therefore the English courts had no jurisdiction. These facts illustrate the unsatisfactory nature of the conclusion in *ex. p Osmon.*'

4.3 The position has been modified somewhat with the coming in to force of Part One of the Criminal Justice Act 1993. This came into force on 1 June 1999 and is not retrospective. Theft and other offences involving dishonesty are listed in section 1(2) as Group A offences. By virtue of section 2, the Court has jurisdiction to try a group A offence where any one of the constituent elements of the offence occurs in England and Wales. Section 3(1) provides that a person may be guilty of a group A offence whether or not he was in England and Wales at any material time and whether or not he was a British citizen at any such time. We concluded that as all constituent elements that go to make up grand corruption are likely to have taken place outside the jurisdiction and therefore Part One is unlikely to be of much relevance.

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30 [1998] 1 Cr App R 331 (CA)

5. Civil Liability of Corrupt Public Officials

5.1 Such claims will be based on constructive trust principles, which we come on to consider in Chapter Three. Briefly, it is a well established principle that no criminal can benefit from his crime. This was illustrated in the cases of *Attorney General v Goddard*,[31] *Reading v Attorney General*[32] and *Attorney General for Hong Kong v Charles Warwick Reid and Others*.[33] Thus property obtained by theft is impressed with a constructive trust and held by the thief for the benefit of its rightful owner. Such trusts may extend to those that receive the property and those that assist in the breach of trust. In the first of these situations, where the person receives for his benefit property impressed with a trust, a trust arises if he knows it to be trust property that has been transferred in breach of trust. In the second, where the property is not received beneficially, a person may still be liable if he knowingly assists in a dishonest or fraudulent breach of trust.

5.2 Dicey and Morris sum up the position saying the English Courts 'may assume jurisdiction if in the action begun by the Writ the claim is brought for money had and received or for an account or other relief against the Defendant as constructive trustee, and the Defendant's alleged liability arising out of acts committed, whether by him or otherwise within the jurisdiction'[34].

5.3 The commentary to this rule states:

> 'there has been a division of judicial opinion as to the extent to which the relevant acts necessary to establish liability must occur in England in order to bring the case within clause 20 [that is the passage quoted above]. Millett J held that the clause only applies if all the acts necessary to impose liability are committed in England; and that clause 20 therefore applies to knowing participation by acts in fraudulent breach of trust

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31 [1929] KB 743
32 [1951] AC 507
33 [1994] 1AC 324
34 Rule 27(20), Dicey and Morris 12th edition, p 348

committed in England, but not knowing receipt abroad of the proceeds of such fraud. In subsequent proceedings in the same litigation Hoffman J suggested, obiter, that this was too narrow a view and that clause 20 was primarily designed for a foreign entity which had not participated in the fraud but had been used as a receptacle for the proceedings. The latter view was followed by Knox J in *Polly Peck International plc v Nadir* (unreported). He held that a construction of clause 20 which required all acts constituting the alleged constructive trust to have been committed in England would empty it of nearly all its practical utility. It was sufficient if some, at least, of the acts which gave rise to the claim (but not necessarily the acquisition of knowledge) had occurred in England.'

5.4 In relation to many civil claims, this test may mean that it is unlikely that proceedings can be commenced against corrupt foreign officials, but it may be possible in some instances to sue them as being 'the necessary or proper parties' to actions brought against banks or intermediaries who are properly sued in the English courts. It matters not that the liability of those intermediaries is accessory to that of the corrupt official themselves, provided that there is a genuine claim against the intermediary, brought in England for its own sake, and not simply as a peg on which then to hang an attempt to bring the corrupt officials themselves within the English jurisdiction.

6. Criminal liabilities of accessories

6.1 Having seen the difficulties with the court assuming jurisdiction over the corrupt official, we turn now to consider the position of those in this jurisdiction who conspire with or incite a foreign official to be corrupt. We start by considering jurisdiction issues in relation to possible criminal offences. Conspiracy is the act of two or more people agreeing together to pursue a course of action which amounts to a criminal offence. Incitement is the act of one person encouraging another to commit an offence. The general position is that if the acts of conspiracy or incitement take place here but relates to an act which is committed or planned to be committed outside the country, then notwithstanding that conspiracy and incitement themselves are criminal offences, our courts would

not have jurisdiction unless the conduct that is desired by the conspirators or the inciters amounted to or involved a criminal offence in England and Wales.

(A) Bribery

6.2 We have already said that the English Courts will only have jurisdiction if the act (of, for example, offering or accepting a bribe or agreeing to accept it) takes place in England and Wales and visa versa. Thus a conspiracy formed in this country to bribe an official overseas is not an offence. The position is the same if someone in this country incites another to bribe a foreign public official overseas.[35] Recognising this position to be inadequate, the Law Commission has recommended that the new offence of corruption be a Group A offence. We consider the consequences of this proposal in relation to Theft (which is already a Group A offence). If this proposal was enacted the argument for saying that UK complies with Article 1(2) of the OECD Convention grows stronger. That Article requires parties to 'take any measures necessary to establish the complicity, including incitement, aiding and abetting, authorisation of an act of bribery of a foreign public official shall be a criminal offence. Attempt and conspiracy to bribe a foreign public official shall be a criminal offence to the same extent as attempt and conspiracy to bribe a public official of that party.'

(B) Theft

6.3 Theft is a Group A offence and conspiracy or incitement to commit theft is a Group B offence (see section 1(3) CJA 1993). The court has jurisdiction over three possible offences of conspiring with a foreign public official to commit corrupt acts. These were recommended in Law Commission in their Report 'Jurisdiction over Offences of Fraud and Dishonesty with a Foreign Element'.[36] This states:

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35 See Law Commission Report 'Criminal Law Jurisdiction over Offences of Fraud and Dishonesty with a Foreign Element' states at paragraph 5.11, 'We are not aware of direct authority as to whether a similar rule applies to incitement; but in logic it would seem that an incitement here to perform actions abroad that, if performed here, would constitute an offence is not justiciable in our courts.'

36 Law Comm No. 180 27 April 1989

'To give the Courts of this country jurisdiction in such cases may appear to require justification, since the results that the accused seeks to produce are not intended to have effects in this country. We consider, however, as we indicated in part one of this report, that it is desirable and, indeed necessary, the Courts of this country should have jurisdiction over such conduct. What this country can legitimately object to, and seek to control, is the use of this country to plan or encourage dishonest activities damaging the financial interests of other countries. This country's important reputation as an international financial centre would in our view be seriously affected if it came to be perceived as a haven from which international fraud can be directed with impunity. Our recommendations aim to remove that possibility.'[37]

6.4 The report recommends that, 'the new jurisdictional rules should be: if any party to a conspiracy either (i) became a party to it in England and Wales; or (ii) did anything in England and Wales in relation to its formation or in pursuance of its objects [then] every party to the conspiracy is triable here.'[38] The report recommends that 'the relevant actions in this country need not be performed by a conspirator in person; if, for example, a fraudulent scheme is concocted abroad which is to involve the use of an innocent agent in this country, performance by the agent of his unwitting part in the scheme should ground jurisdiction, since in substance the acts are those of the conspirators.'[39]

6.5 The three possible offences are as follows:

(b) Conspiracy to commit a Group A offence provided some constituent element of the substantive offence takes place in England and Wales; this conspiracy will be triable in England and Wales provided that the agreed course of conduct would, if carried out in accordance with the parties'

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37 Para. 5.1 Law Commission, Criminal Law - jurisdiction over offences of fraud and dishonesty with a foreign element

38 Para. 5.17 Law Commission Report

39 Para. 5.19 Law Commission Report

intentions, result in one of the constituent elements of the Group A offence occurring in England and Wales. Section 3 provides that it is immaterial to the court's jurisdiction over conspiracies to commit Group A offences that a defendant is not in England and Wales at the relevant time, or that he was not a British citizen (section 3(1)), or that he did not join the conspiracy in England and Wales, or that no act or omission or other event in relation to the conspiracy took place in England and Wales (section 3(2)).

(c) Conspiracy to commit a Group A offence where no constituent element of offence takes place in England and Wales. Section 1A in the Criminal Law Act 1977 inserted by section 5(1) CJA has not yet been enacted. When enacted, it will dramatically extend the statutory bounds of conspiracy defined by Section 1 of the Criminal Law Act 1977. It provides that every party to a conspiracy to perform abroad what, if performed in England and Wales, would constitute a Group A offence, should be triable here if:

(i) the Defendant (or his agents) did anything here relating to the formation of the conspiracy or in pursuance of its object, or he (or his agent) became a party to it in England and Wales.

(ii) what the Defendant had in view would involve the commission of an offence under the law in force where the whole or part the offence was intended to take place (Section 6(2)). Theft of state assets is likely to be an offence in most if not all countries.

(d) Conspiracy to defraud where the fraud is not intended to take place in England and Wales. Section 5(3) of CJA was enacted on 1 June 1999. Its provisions are similar to section 1A and give the court jurisdiction where the fraud the parties had in view was not intended to take place in England and Wales. The prosecution must establish the two elements summarised at (b) in relation to section 1A.

6.6 Incitement to commit Group A offences will be triable in England and Wales by virtue of section 5(4) of the Criminal Justice Act 1993. This provides that 'a person may be guilty of incitement to commit a Group A offence if the incitement

(a) took place in England and Wales and would be triable in England and Wales but for what the Defendant had in view not being an offence triable in England and Wales; and

(b) the conduct the Defendant had in view would involve the commission of an offence under the law in force where it was to take place.

6.7 Thus, if corruption was included as a Group A offence, a director in this country who instructed an agent to make a corrupt payment to foreign public officials abroad would be guilty of incitement and both might be guilty of conspiracy (assuming that corruption contravened the law of the relevant country).

7. Money Laundering

7.1 Section 93A(1) creates a new offence of entering into an arrangement 'whereby the retention of 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)... knowing or suspecting that A is a person who is or has been engaged in criminal conduct or who has benefited from criminal conduct.' Section 93B creates an offence of 'knowing that any property is, or in whole or in part directly or indirectly represents, another person's proceeds of criminal conduct, he acquires or uses that property or has possession of it'. Section 93C creates an offence of concealing or disguising 'any property which is in whole or in part directly or indirectly represents his proceeds of criminal conduct'. These offences are considered in detail in Chapter Two below.

7.2 The precondition for one of these offences is 'criminal conduct'. Section 93A(7) defines 'criminal conduct' to mean 'conduct which constitutes an offence to which this part of this Act applies or would constitute such an offence if it had occurred in England and Wales or (as the case may be) Scotland'. This provision is of great importance in connection with the potential liability of intermediaries for money laundering the proceeds of corruption from abroad. The banker cannot close his eyes and say that he is not concerned with what has happened abroad, but must rather treat those events as if they had occurred in England. Section 93A(7) is therefore a geographical deeming provision. The conduct in question is translated notionally to England and judged accordingly. Once translated here by that mechanism, it is judged entirely according to English law. This in one stroke sweeps away the jurisdiction issues in relation to substantive offences that we have considered earlier in this chapter.

8. Civil liability of intermediaries in this country

8.1 By virtue of clause 20 of rule 27 from Dicey and Morris (see paragraph 5.2 above) the courts will have jurisdiction in connection with 'alleged liability arising out of acts committed, whether by him or otherwise, within the jurisdiction'. For this purpose 'acts' include 'handling' the proceeds of corruption with the requisite degree of knowledge.

The Convention makes it a crime to offer, promise or give a bribe to a foreign public official in order to obtain or retain international business deals. It aims to stop the flow of bribe money for the purpose of obtaining international business deals and to strengthen domestic anti corruption efforts aimed at raising standards of governance and increasing civil society participation. The Convention provides a broad, clear definition of bribery, requires countries to impose dissuasive sanctions, and provides for mutual legal assistance. It also encourages co-ordination between countries through regular working contact in the OECD Working Group on Bribery and calls on signatories to carry out a programme of follow-up to monitor and fully implement the Convention.

The Convention commits the 34 countries who are signatories to adopt common rules to punish companies and individuals who engage in bribery transactions. So far, 18 countries have already changed their domestic laws in accordance with the Convention, including Austria, Australia (without ratification), Belgium, Bulgaria, Canada, Finland, Germany, Greece, Hungary, Iceland, Japan, Korea, Mexico, Norway, Sweden, the UK and the US.

All 29 OECD countries (Australia, Austria, Belgium, Canada, Czech Republic, Denmark, Finland, France, Germany, Greece, Hungary, Iceland, Ireland, Italy, Japan, Korea, Luxembourg, Mexico, the Netherlands, New Zealand, Norway, Poland, Portugal, Spain, Sweden, Switzerland, Turkey, United Kingdom, and the United States) as well as 5 non-OECD countries (Argentina, Brazil, Bulgaria, Chile, and Slovak Republic) have signed the OECD Convention.

The United Nations

The UN General Assembly adopted in 1996 a Declaration against Corruption and Bribery in International Commercial Transactions calling for criminalising foreign bribery and denying tax deductibility of bribes. In 1998, the same Assembly adopted a resolution that urges Member States to criminalise, in an effective and co-ordinated manner, the bribery of public office holders of other

States in international commercial transactions, and encourages them to engage in programmatic activities to deter, prevent and combat bribery and corruption.

The World Bank

Corruption is addressed by the World Bank as an economic concern. The Bank activities in the areas of combating corruption fall into three main areas: preventing fraud and corruption within bank-financed projects, helping countries in their efforts to reduce corruption by advising on economic policy reform and strengthening institutional capability; adding voice and support to international efforts, including OECD's efforts, to reduce bribery and corruption.

The International Monetary Fund

The IMF has a macroeconomic mission, its mandate is restricted to those specific instances of corruption that may have a significant macroeconomic impact. The IMF has adopted a policy that denies financial assistance to countries where bribery and corruption threaten to undermine economic recovery programs

The World Trade Organisation

The WTO has begun to increasingly examine corruption in public procurement as an important policy concern. The WTO Ministerial Conference held in December 1996 established the Working Group on Transparency in Government Procurement. This Working Group has undertaken a study on transparency in government procurement practices, taking into account national policies. Based on this study, it will develop elements for inclusion in an appropriate agreement. The IMF, the World Bank, and the United Nations have observer status in the Working Group.

The Council of Europe

The Council of Europe's Criminal Convention on Corruption was opened to signature on January 27 1999 and at least 27 countries have so far signed it. The Convention adopts a very broad concept of corruption, to include trafficking in influence, as well as, all passive and active forms of domestic and foreign bribery in both the public and private sector. The Criminal Law Convention also

provides for a follow-up monitoring mechanism that is outlined in the GRECO Agreement, which entered into force on May 1, 1999. The first meeting of GRECO took place in September of this year. Furthermore, The Council of Europe's Working Group on Corruption has also completed its work on a Civil Convention on Corruption. The Council of Europe is now preparing for the 4th Conference of Specialised Services in the Fight Against Corruption, on the subject of international co-operation in the fight against corruption and offshore centres.

The European Commission

The European Commission adopted in May 1997 a Communication to the Council and the European Parliament on a Union Policy Against Corruption. This communication sets out the EC's comprehensive policy on corruption inside the European Union as well as in its relations with non-member countries. The communication deals with a number of actions, including the ratification of conventions criminalising the active and passive corruption of EC officials and officials of member countries, eliminating the tax deductibility of bribes, reforming public procurement and auditing systems. For non-member countries, the European Union's policy aims at establishing anti corruption programs with countries that have concluded co-operation or assistance agreements with the EC.

The Inter-American Convention Against Corruption

The Inter-American Convention Against Corruption, negotiated in 1996 by delegates to a Specialized Conference of the Organisation of American States (OAS) and which entered into force in March 1997, represents the first international treaty dealing with the issue of trans-national bribery and the leading example of regional action in the developing world. Building on the Convention, the OAS General Assembly adopted a comprehensive Plan Against Corruption at its meeting in Lima, Peru, in June 1997. Under this plan, the OAS provides support to its member countries and co-operate with local populations and other international organizations -including the OECD - in preventing and fighting corruption.

The International Chamber of Commerce

The International Chamber of Commerce (ICC) has been participating in the national and international efforts to curb corruption for several years. In 1996 the ICC issued revised Rules of Conduct to Combat Extortion and Bribery in International Business Transactions. To promote the rules -which are not binding on ICC members, but companies may endorse them voluntarily, the ICC has set up a standing committee on extortion and bribery and several sub-committees dealing with issues of interest to the private sector such as private to private bribery. The OECD and other international organizations (European Commission and Council of Europe) participate in the work of the Committee.

The Pacific Basin Economic Council

The PBEC's Charter On Standards For Transactions Between Business And Government seeks to foster integrity, transparency, and accountability in the awarding of government contracts and permits, in tax matters, in environmental and other regulatory matters, and in judicial and legislative proceedings are necessary elements for a productive economy and an open and predictable trade and investment climate. Integrity, transparency and accountability strengthen the efficient management of enterprises, facilitate the operation of open, competitive markets, and bolster consumer welfare.

CHAPTER TWO

CRIMINAL ISSUES OF GRAND CORRUPTION

9. Introduction

9.1 We conclude in Chapter One that an English criminal court is unlikely to have jurisdiction to try foreign public officials for grand corruption as their wrongful conduct would have taken place overseas.

9.2 Clearly, wrongful conduct connected with grand corruption that takes place within England and Wales would be subject to the English court's jurisdiction. Criminal liability will be an issue where:

(a) those within the jurisdiction offer or pay bribes to foreign public officials (or conspire or incite others to do so);

(b) banks and other intermediaries in England and Wales 'handle' the proceeds of corruption. If they do so with knowledge of wrongdoing, even wrongdoing committed abroad, the handler could commit criminal offences.

9.3 In this chapter we consider the possible criminal liability in these two situations.

10. Bribery of foreign public officials

10.1 The first issue is whether bribery of foreign public officials is an offence under the UK's prevention of corruption legislation. As we explain in Chapter One, there is no specific offence of bribing a foreign public official. Section 1(1) of the Prevention of Corruption Act 1906 provides that an offence is committed where any person 'gives or agrees to give or offers any gift or consideration to an agent'. It will be seen that the section proscribes three types of activity namely where a person (a) gives (b) agrees to give (c) offers any gift or consideration to an agent.

10.2 The Act defines agent in section 1(2) as follows:

> 'the expression 'agent' includes any person employed by or acting for another'.

Section 1(3) states a person performing duties on behalf of the Crown is an agent within the meaning of the Act. If Parliament had intended the Act to apply to foreign officials, it seems likely that it would have provided, in section 1(3), that persons performing duties on behalf of foreign governments are agents. The Hansard reports on the debates on the bill contain nothing to suggest Parlaiment believed the Bill would tackle the bribery of foreign public officials.

10.3 Section 4(3) of the Prevention of Corruption Act 1916 provides that a person 'serving under any such public body [such body refers to the previous subsection which mentions 'local and public authorities of all descriptions'] is an agent within the meaning of the' 1906 Act. It is arguable that this includes persons serving under local and public authorities in foreign countries; the Law Commission dismissed this and stated that section 4(3) of the 1916 Act, 'appears to have been intended only to include certain British bodies which fell outside the original definition.'[40] They were of the view that:

> 'Where the official were employed by it or acting for it [namely a public body existing outside the UK], he or she would be an agent within the original definition of section 1(2) of the 1906 Act'.[41]

10.4 There are no reported decisions on this point. As far as we are aware there have been no convictions for bribery of foreign public officials in the 93 years that the Act has been on the statute books. There must be some doubt over whether a court would take the same approach as the Law Commission to whether a foreign public official is an agent.

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40 Para. 3.17 Legislating the Criminal Code:Corruption

41 Para. 3.18, ibid.

10.5 An offence under section 1(1) of the 1906 Act will only be committed if any 'gift or consideration' was paid to the foreign official 'corruptly ... as an inducement or reward for doing or forbearing to do... any act in relation to his principal's affairs or business, or for showing or forbearing to show favour or disfavour to any person in relation to the principal's affairs or business'. The Act does not define what is meant by 'corruptly'. It has been considered in a number of cases, but a clear and consistent definition has not emerged. An example of this lack of clarity is the Court of Appeal's approval of the following definition of the recorder of London, (see paragraph 1.5 above). The Law Commission concluded that the present position is unsatisfactory and recommended reform.[42] It seems to us to be probable that a jury trying a case involving grand corruption would not have much difficulty finding that payments to foreign public officials were made corruptly.

10.6 Section 2 of the Prevention of Corruption Act 1916 provides that if in any proceedings for an offence under the 1906 Act, it is proved that, 'any money, gift, or consideration has been paid or given to or received by a person in the employment of Her Majesty or any Government Department or a public body by or from a person, or agent of a person, holding or seeking to obtain a contract from Her Majesty or any Government Department or public body, the money, gift, or consideration shall be deemed to have been paid or given and received corruptly as such inducement or reward as is mentioned in such Act unless the contrary is proved.' The effect of this so-called presumption of corruption is to shift the burden of proving that the payment was made corruptly from the prosecution so that the defendant has to show that the payment was made innocently. The phrase 'any Government Department' seems wide enough to include departments of a foreign government though we could find no cases that decided this one way or another. It seems to us to be strongly arguable that the presumption of corruption is available in any prosecution for bribing a foreign public official.

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42 Para. 2.31 Legislating the Criminal Code: Corruption

10.7 Even if the presumption does not apply in such cases, a jury seems likely to presume a substantial payment was made corruptly if it is established that it was made by or on behalf of a person seeking to obtain a contract from a foreign government. The larger the size of the payment (and contract in question) the harder this conclusion will be to avoid in the absence of a plausible explanation from the accused.

10.8 The 1906 Act has no extended territorial limit and the offence is only committed if the person 'gives or agrees to give or offers any gift to an agent' within England and Wales. As noted in Chapter One, the Law Commission has recommended that the new offence of corruption be listed in section 1(2) of the Criminal Justice Act 1993 as a group A offence. We concluded that as all the constituent elements that go to make up grand corruption are likely to have taken place outside the jurisdiction this is unlikely to be of much assistance.

10.9 The law in relation to conspiracy has seemingly undergone a revolution with regard to agreements to commit offences outside the jurisdiction. This is as a result of a new section 1A Criminal Law Act 1977 inserted by section 5(1) Criminal Justice (Terrorism and Conspiracy) Act 1998. This in turn has repealed section 5 Criminal Justice Act 1993 which introduced a new section 1A into the Criminal Law Act (which was never brought into force). An agreement to commit a crime outside the jurisdiction prior to 4 September 1998, when the new section 1A was came into force, is governed by the old law of conspiracy. By virtue of section 1(1) of the Criminal Law Act 1977, an offence of conspiracy is only committed if it would result in the commission of 'any offence'. This is defined as 'an offence triable in England and Wales'. This means that an agreement within the jurisdiction to offer or pay a bribe abroad is not covered by a conspiracy offence.

10.10 An agreement entered into after 4 September 1998 to commit offences abroad may give rise to an offence under section 1(1) Criminal Law Act 1977 if the following conditions are satisfied:

(i) The pursuit of the agreed course of conduct would at some stage involve-

(a) an act by one or more of the parties, or

(b) the happening of some other event

intended to take place in a country or territory outside the United Kingdom.'

(ii) 'the act or other event constitutes an offence under the law in force in that country or territory';

(iii) 'the agreement would fall within section 1(1) as an agreement relating to the commission of an offence but for the fact that the offence would not be an offence triable in England and Wales, if committed in accordance with the parties' intentions'; and

(iv) '(a) a party to the agreement or a party's agent did anything in England and Wales in relation to the agreement before its formation, or

(b) a party to the agreement became a party in England and Wales (by joining it either in person or through an agent),or

(b) a party to the agreement, or the party's agent, did or omitted anything in England and Wales in pursuance of the agreement.'

10.11 The last of these conditions seems to require some act or omission to take place in this jurisdiction by a conspirator or his agent before or after the formation of the agreement. Therefore, a mere verbal agreement between two persons to commit an offence abroad would not by itself be covered by section 1A. As to what 'did anything' means in practice remains to be seen.

10.12 A further difficulty may arise in relation to proving that the act or other event constitutes an offence in another country. By reason of section 1(a)(*x*), this will be a question of law for the judge alone to decide. A degree of co-operation will be needed from foreign states or their agents if and when proof of foreign law is required.

11. Corruption involving appropriation of State Assets

11.1 The second type of grand corruption involves appropriation and embezzlement of assets. This can be dealt with briefly as this type of activity does not require the involvement of a third party, such as a briber, who may be based in this jurisdiction. The position had been that an appropriation takes place where the

property appropriated is situated.[43] In such cases the property appropriated is likely to be situated abroad. Therefore the appropriation and the theft take place abroad and no offence is committed under English Law.[44]

11.2 This position has been modified somewhat with the coming into force of Part One of the Criminal Justice Act 1993 on 1 June 1999. This provision is not retrospective. Theft and other offences involving dishonesty are listed in section 1(2) as Group A offences. By virtue of section 2, the Court has jurisdiction to try a Group A offence provided one of the constituent elements of the offence occurs in England and Wales. Section 3(1) provides that a person may be guilty of a Group A offence whether or not they were in England and Wales at any material time and whether or not they were a British citizen at any such time. It seems likely that as all the constituent elements that go to make up the second type of activity (theft and embezzlement) are likely to have taken place outside the jurisdiction, part one is unlikely to be of much relevance.

12. Money Laundering offences

12.1 Sections 29 to 31 of the Criminal Justice Act 1993 insert provisions into the Criminal Justice Act 1988 which take their place as sections 93A to 93C of the Criminal Justice Act 1988. These offences may be committed by individuals, companies or partnerships. This is because each offence applies to a 'person' which section 5 Schedule 1 of the Interpretation Act 1978 requires the court to interpret widely (unless the contrary appears which does not seem to be the case). We consider each offence below.

Section 93A

12.2 This provides:

'Assisting another to retain the benefit of criminal conduct

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43 This is a prima facie rule from *R v Thomsett* [1985] Crim LR 369 (CA).
44 See Archbold 21-44, Para. 5.2, above.

93A. - (1) Subject to subsection (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.'

12.3 Of the offences created by sections 93A to 93C, we consider section 93A is most relevant to persons that 'handle' the proceeds of corruption. Section 93A is modelled on section 24 Drug Trafficking Offences Act 1986 (now section 50 Drug Trafficking Act 1994). The first element of the actus reus of the offence under section 93A is 'entering into or otherwise being concerned in an arrangement'. This term has been defined as, 'something whereby the parties to it accept mutual rights and obligations,'[45] and includes retainers to provide financial, legal and accounting services. The arrangement must have one of three possible results for an offence under this section. These are as follows:

(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 are used to secure that funds are placed at A's disposal; or

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45 Wilmer LJ, 2 All ER 807, at 814

(c) A's proceeds of criminal conduct are used for A's benefit to acquire property by way of investment.

12.4 Subsection (2) provides that 'references to any person's proceeds of criminal conduct include a reference to any property which in whole or in part directly or indirectly represented in his hands his proceeds of criminal conduct.' Thus provided that the property in question at least partly represents, however indirectly, the proceeds of criminal conduct, it falls within the scope of the section.

13. Criminal conduct

13.1 The section refers to A's criminal conduct. In cases of grand corruption, A will be a foreign public official. For reasons explained in Chapter One, such officials will not be amenable to the jurisdiction of the Courts in England and Wales. We do not consider it necessary for the offence under section 93A for this foreign official to have first been convicted by a Court in this country. The prosecution must simply establish that the foreign official has committed criminal conduct. This is also the view of R.F. Fortson, editor of Current Law Statutes Annotated[46] who states, 'it does not seem necessary for the prosecution to actually secure a conviction against A and it is questionable whether a conviction against A would be admissible in evidence against a defendant, charged under section 93A of the CJA 1988 in any event. The prosecution must therefore prove A's criminal conduct to the civil standard of proof.' We were doubtful that a civil standard of proof would suffice absent a clear indication in the statute that Parliament intended it should. Despite the obvious problems of persuading parties to testify, it will be difficult enough for the prosecution to discharge a civil standard of proof in such cases because of the practical difficulties of obtaining evidence from the country where the corrupt acts took place.

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[46] Volume 3, p. 36-80.

13.2 Criminal conduct is defined, in section 93A(7), as, 'conduct which constitutes an offence to which this Part of the Act applies or would constitute such an offence if it had occurred in England and Wales or (as the case may be) Scotland'. Section 71(9) Criminal Justice Act provides that 'references to an offence to which this Part of this Act applies are references to any offence which... is an indictable offence, other than a drug trafficking offence. 'Thus the first part of the definition in section 93A(7) means that the conduct in question must involve indictable offences (other than drugs trafficking) for it to be 'criminal conduct'.

13.3 The second part of the definition in section 93A(7) provides that in assessing whether conduct is criminal conduct for these purposes the place where the conduct took place is completely irrelevant. What matters is whether that conduct would constitute such an offence *if* it had taken place in England, Wales or Scotland. It is irrelevant that the conduct would not be criminal under the laws of country where it took place. If the type of conduct which we suggest in Chapter One makes up grand corruption had taken place within England and Wales the following possible offences would have been committed:

(a) theft;

(b) forgery;

(c) false accounting;

(d) obtaining property by deception;

(e) conspiracy to defraud a foreign authority;

(f) obtaining pecuniary advantage by deception and procuring the execution of a valuable security by deception; and

(g) bribery contrary to section 1(1) of the Prevention of Corruption Act 1906.

As section 93A(7) deems the bribe to have been offered and paid in the United Kingdom, the courts of this country would have jurisdiction over the briber. If the bribee is an agent for the purpose of the 1906 Act he or she will also have committed an offence under this Act. If he or she is employed by a Government Department or Public Body, the presumption of corruption in the 1916 Act may also apply.

13.4 All these offences are indictable offences and thus the conduct in question would be criminal conduct for the purposes of section 93.

14. State Immunity Act 1978

14.1 Section 1(1) of the State Immunity Act 1978 provides that a state is immune from the jurisdiction of the courts of the United Kingdom. It could be argued that, in view of this immunity, it is impossible for a foreign head of state to commit 'criminal conduct' for the purpose of section 93A. Section 14 of the State Immunity Act provides that for the purpose of the Act, State includes not just the foreign state but also its sovereign or head of state personally. But this is only the case if the head of state is acting in a public capacity. It is inconceivable that grand corruption for the personal benefit of the head of state could be said to be acting in a public capacity. An additional reason why such activities do not attract immunity is that section 3 provides a state is not immune 'as respects proceedings relating to (a) a commercial transaction, entered into by the state'. By virtue of section 14 this includes commercial transactions entered into by the head of state. Subsection (3) defines 'commercial transaction' to include '(b) any loan or other transaction for the provision of finance and any guarantee or indemnity in respect of such transaction or of any financial obligation; (c) any other transaction or activity (whether of a commercial, industrial, financial, professional or other similar character) into which a State enters or in which it engages otherwise than in the exercise of sovereign authority'. The types of transactions we mention in Chapter One would be considered to be commercial transactions and therefore could not attract immunity.

15. Tax evasion and cheating the revenue

15.1 Tax evasion cannot be criminal conduct because, under section 100 Taxes Management Act 1970, this offence is not dealt with by way of proceeding by indictment, but by way of a proceeding for a penalty before the Commissioners of the Inland Revenue.

15.2 The common law offence of cheating the public revenue preserved by section 32(2) of the Theft Act 1968 is not as straightforward.[47] There are two views on whether this offence is criminal conduct for the purpose of section 93. The first invokes the principle underlying the decision in *Government of India v Taylor*,[48] that the English criminal law will not concern itself with the enforcement of foreign revenue laws, and also relies on the fact that section 93A(7) does not, by its language, permit the court to substitute the foreign revenue with the UK Inland Revenue. It only translates the conduct and says nothing about the object or victim of any criminal conduct also being notionally substituted by an English object or victim. The other view relies upon similar provisions in extradition law, in particular section 2(1) of the Extradition Act 1989 and the decision of the divisional court in the 1988 *Nuland* case.[49]

15.3 The *Nuland* case certainly restricts the scope of the *Government of India v Taylor* principle in the context of the function of an English court in considering an extradition request. There is, however, no authority as to how that principle might apply where the English criminal court is seeking to try someone on indictment before it for contravening or being involved in the contravention of foreign revenue law, where no other offence is involved. It is thought that the present Government's view is that such conduct is or ought to be within section 93A, but the point is unclear and unresolved. It is unlikely that a case involving nothing more than foreign revenue offences will be used by prosecuting authorities to test the ambit and scope of section 93.

16. Conspiracy and Section 93A

16.1 It would seem that conspiracy adds nothing to a charge contrary to section 93A. The offence is by its nature one of conspiracy by virtue of the opening words of the section 'if a person enters into or is otherwise concerned in an arrangement'.

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47 See also Chapter Three, Para. 47

48 [1955]1 All ER 292 (HL)

49 R v Chief Metropolitan Stipendiary Magistrate, ex parte Secretary of State for the Home Department [1988] 1 WLR 1204

17. Mens Rea of the offence in section 93A

17.1 The mens rea of the offence in section 93A is 'knowledge' or 'suspicion' that 'A is a person who is or has been engaged in criminal conduct or has benefited from criminal conduct'. The exclusion, by virtue of section 71(9), of drugs trafficking from the definition of 'criminal conduct' means that a Defendant would be acquitted if he successfully argued that he believed that A had been engaged in drug trafficking as opposed to criminal conduct. Therefore if there is any evidence that A has been involved in drugs trafficking, an alternative charge under section 50 Drug Trafficking Act 1994 should be brought.

17.2 Knowledge or suspicion for these purposes seems to mean actual knowledge or suspicion, rather than what a person should have known or suspected. This is suggested from comparisons with

(i) the analogous provisions in section 11 of the Prevention of Terrorism (Temporary Provisions) Act 1989 which provides that 'in proceedings against a person for an offence under this section it is a defence to prove that he did not know *and had no reasonable cause to suspect* that the arrangement related to terrorist funds' (emphasis added).

(ii) Section 93C(2) which we come to below. This offence is committed by a Defendant 'knowing or *having reasonable grounds to suspect*' certain matters.

17.3 There is some uncertainty over whether knowledge includes so-called Nelsonian knowledge i.e. deliberately (but not necessarily negligently) shutting one's eyes to the truth or means of acquiring the truth. Archbold states, at 17-49, as follows:

> 'There is some authority for the view that in the criminal law 'knowledge' includes "wilfully shutting ones eyes to the truth"... However, such a proposition must be treated with great caution. The clear view of the Courts at present is that this is a matter of evidence, and

that nothing short of actual knowledge (or, in the case of dishonest handling, belief) will suffice.'

17.4 If Nelsonian knowledge does not constitute knowledge for the purpose of section 93A, it probably constitutes suspicion. Suspicion is not defined. *Butterworths Money Laundering Bulletin*[50] with regard to suspicion, states:

> 'The inclusion of suspicion as a basis for criminal liability is relatively novel in English criminal law and has caused some consternation and uncertainty. Barry Rider has clarified the issue slightly by (sic) stating that suspicion was included as an alternative ingredient of the mens rea: "to cover the situation where a person deliberately chooses not to carry out an investigation into the source of funds. Obviously it must be proved that he was suspicious in the first place as to the status of the person with whom he is dealing."'

17.5 The authors refer to three cases which attempt to define the word suspicion. They are *Hussien v Chong Fook Kam*[51] where the Court held that ordinary meaning of the word suspicion is a state of conjecture or surmise where proof is lacking; 'I suspect, but I cannot prove'. The second is *Corporate Affairs Commissioner v Guardian Investments,*[52] where Ormiston J said that suspicion connotes, 'a degree of satisfaction, not necessarily amounting to belief, but at least extending beyond speculation as to whether an event has occurred or not.' The third is *Walsh v Loughman*[53] where it was held that 'although the creation of suspicion requires a lesser factual basis than the creation of a belief it must nonetheless be built on some foundation.'

17.6 The dictionary definition of suspicion is '[an] act of suspecting: state of being suspected: the imagining of something without evidence or on slender evidence: inkling: mistrust' (Chambers 7th edition). The authors of *Confiscation and the*

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50 Paras 195-200
51 [1969] 3 All ER 1626
52 [1984] VR 1019
53 [1991] 2 VR 351

Proceeds of Crime,[54] quote this definition and conclude, at paragraph 9-009 that 'as suspicion is a word in daily usage, it should be interpreted as defined in the dictionary. Thus any inkling or fleeting thought that the property might be the proceeds of drug trafficking will suffice'.

17.7 The view of the Joint Money Laundering Steering Group, in the Guidance Notes for the financial sector, is that 'suspicion is personal and subjective and falls far short of proof based on firm evidence. However, it is more than the absence of certainty that someone is innocent. Nevertheless, as stated in section 2 paragraph 2.04, a person would not be expected to know the exact nature of the criminal offence or that the particular funds were definitely those arising from the crime. Where there is a business relationship, a suspicious transaction will often be one which is inconsistent with a customer's known, legitimate business or personal activities or with the normal business for that type of account.'[55]

17.8 Having said that the 'suspicion' for the purpose of the section means actual suspicion, it seems probable that fact finders will be prepared to find that the defendant was suspicious if it is considered that a reasonable person with the same training as the defendant would have been suspicious. We can foresee heated debates along the following lines. The Defendant will say he is dealing with a head of state, with all the authority this brings to bear, and will stress that it is a very strong thing to suspect such a person of corruption or other offences. The prosecution will point in many cases to the size of the sums of money involved, contrast this with the head of state's legitimate wealth, and argue the Defendant must have suspected criminal conduct in the absence of credible explanations for the source of the funds in issue. It is difficult to give clear guidance on this, and much will depend on the approach of the court when the case comes before it.

18. Comparison with knowledge needed to establish civil liability

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54 Mitchell, Taylor and Talbot

55 Para. 6.01

18.1 The level of knowledge needed to establish civil liability for 'laundering' the proceeds of corruption is considered in Chapter Three. Civil liability is unlikely to arise where the launderer merely suspects. It seems arguable that criminal liability may be more easily incurred on the same facts than civil liability. In principle, a lesser degree of knowledge or suspicion should not suffice to establish criminal liability than would suffice to establish civil liability. The two liabilities have a very different legal and political background but it is difficult to avoid the conclusion that the criminal provision provide a greater danger in this area.

Defence of disclosure to a constable

18.2 Section 93A (3) provides an important limitation to the offence in this section. This provides :

> '(3) Where a person discloses to a constable a suspicion or belief that any funds or investments are derived from or use 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 subsection (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.'

18.3 Whilst the section refers to a 'constable', in practice the disclosure would be made to the National Criminal Intelligence Service ('NCIS'). NCIS at present

has no investigative function or remit of its own, but operates by selecting the agency considered most appropriate to carry out the investigation. On receiving the disclosure, NCIS will add any other relevant information that it holds, and sends this 'information package' on.

19. Section 93B

19.1 Section 93B mirrors section 23A Drug Trafficking Offences Act (now section 51, Drug Trafficking Act 1994) and provides as follows:

> 'A person is guilty of an offence if knowing that any property, in whole or in part, directly or indirectly represents another person's proceeds of criminal conduct, he acquires or uses that property or has possession of it.'

19.2 Many of the observations on section 93A apply equally in relation to the offence created by this section and do not need to be repeated.

19.3 'Acquires' is not defined and there is some doubt as to its precise scope. *Current Law Annotated* suggests:

> 'it is arguable that the word "acquires"... is wide enough to embrace almost every dealing with property which passes through the hands of the defendant but if that is the correct construction one might ask what purpose is served by specifically prohibiting use or possession of that property? The answer may be that "acquires" denotes the acquisition of an interest in the property held by the defendant or held on more than a merely transitory or short term basis.'

We could see no reason for adopting this limitation. The editor of *Butterworths Money Laundering Bulletin* is of the same view that 'it will be irrelevant to the Defendant's case that the acquisition by the defendant is merely transitory or temporary'. If 'acquires' is interpreted widely, it is capable of applying to banks and others that handle the proceeds of corruption.

19.4 Possession is defined very widely by section 93B(6); this states that 'having possession of any property shall be taken to be doing an act in relation to it'.

19.5 The mens rea of this offence is knowing that any property is or represents another person's proceeds of criminal conduct. The uncertainty over whether knowledge includes 'Nelsonian Knowledge' is of greater importance here than in section 93A where the prosecution could succeed by showing the defendant was suspicious. It will be difficult for the prosecution to prove, to the criminal standard or proof, that a defendant had knowledge.

20. Section 93C

20.1 Section 93C(1) creates an offence of concealing and transferring the proceeds of criminal conduct as follows:

> **'Concealing or transferring proceeds of criminal conduct**
>
> 93C. (1) A person is guilty of an offence if he -
>
> (a) conceals or disguises any property which is, or in whole or in part directly or indirectly represents, his proceeds of criminal conduct; or
>
> (b) converts or transfers that property or removes it from the jurisdiction
>
> for the purpose of avoiding prosecution for an offence to which this Part of this Act applies or the making or enforcement in his case of a confiscation order.

20.2 Subsection (3) defines 'concealing or disguising' in wide terms. (Transfer is not defined and also appears to be a wide term). The offence created by subsection (1) is committed by the person that committed the underlying offence, which in cases of grand corruption will be the corrupt foreign public official. This raises the possibility of the corrupt foreign public official committing an offence under this section by simply transferring the proceeds of corruption into or out of 'the jurisdiction'. We consider that 'the jurisdiction' means the geographical

jurisdiction of the courts of this country. Therefore transferring property out of the corrupt official's home jurisdiction into this country would not result in an offence. Is an offence committed where the corrupt foreign official transfers his proceeds of corruption out of the United Kingdom? This will only result in an offence if the transfer was 'for the purpose of avoiding prosecution for an offence to which this Part of this Act applies or the making or enforcement in his case of a confiscation order.' Since the courts of this country do not have jurisdiction to prosecute foreign public officials for corruption abroad, it will be impossible for the prosecution to show that the transfer was for the purpose of avoiding prosecution for an offence to which this Part of this Act applies. What about transferring for the purpose of avoiding a 'the making or enforcement... of a confiscation order'? The mechanism for making a confiscation order is contained in Part VI of Criminal Justice Act 1988 (as amended). It is only available in cases where a Defendant is convicted in the criminal courts in this country. Since the courts are unlikely to have jurisdiction to convict, they will not be able to make confiscation orders. Therefore it will be impossible for the prosecution to prove the transfer was made for the purpose of avoiding a confiscation order.

20.3 Subsection (2) provides as follows:

> 'A person is guilty of an offence if, knowing or having reasonable grounds to suspect that any property is, or in whole or in part directly or indirectly represents, another person's proceeds of criminal conduct, he -
>
> (a) conceals or disguises that property; or
>
> (b) converts or transfers that property or removes it from the jurisdiction
>
> for the purpose of assisting any person to avoid prosecution for an offence to which this Part of this Act applies or the making or enforcement in his case of a confiscation order.'

20.4 This offence is committed not by the person that commits the underlying offence but by 'any other person'; this is capable of including persons that 'handle' the proceeds of corruption. However, it is most unlikely that such persons will

assist the corrupt foreign public official 'for the purpose of' avoiding prosecution or a confiscation order. Foreign public officials cannot be prosecuted or made the subject of confiscation orders for the reasons we have previously mentioned.

20.5 The offence in subsection (1) seems to be made out once the prosecution show the defendant has concealed, disguised, converted or transferred his proceeds of criminal conduct for the purpose of avoiding prosecution. Arguably transfers for some other purpose (perhaps to allow the Defendant to enjoy the proceeds elsewhere) would not result in an offence. The offence in subsection (2) requires the prosecution to show that the defendant knew or had reasonable grounds for suspecting the property in question was another person's proceeds of criminal conduct. This contrasts with section 93A in that the test of suspicion is objective. This means that the offence is committed if a reasonable person would have suspected the property he was handling represented the proceeds of criminal conduct, even though the Defendant did not have any suspicion.

21. Tipping off

21.1 Section 93D Criminal Justice Act 1988, inserted by section 32 Criminal Justice Act 1993, provides:

'Tipping off

(1) A person is guilty of an offence if-

(a) he knows or suspects that a constable is acting, or is proposing to act, in connection with an investigation which is being, or is about to be, conducted into money laundering; and

(b) he discloses to any person information or any other matter which is likely to prejudice that investigation, or proposed investigation.

(2) A person is guilty of an offence if-

(a) he knows or suspects that a disclosure ('the disclosure') has been made to a constable under section 93A or 93B above; and

(b) he discloses to any other person information or any other matter which is likely to prejudice any investigation which might be conducted following the disclosure.

(3) A person is guilty of an offence if-

(a) he knows or suspects that a disclosure of a kind mentioned in section 93A(5) or 93B(8) above (disclosure) has been made; and

(b) he discloses to any person information or any other matter which is likely to prejudice any investigation which might be conducted following the disclosure.'

21.2 The section creates three offences of disclosing information or any other matter which is likely to prejudice an investigation into money laundering when a person knows or suspects that:

(a) a constable is acting or is proposing to act (subsection 1);
(b) a disclosure has been made under sections 93A or 93B (subsection 2);
(c) a disclosure of a kind mentioned in section 93A(5) or 93B(8) [that is to a Money Laundering Reporting Officer of a person's employer] has been made (subsection 3).

21.3 It has been suggested that by reason of section 93D, a person who knows or suspects criminal conduct is prevented from making direct contact with the probable true owner of plundered funds. This could lead to him incurring civil liability, under constructive trust principles. These are considered in detail in Chapter Three. It is said that whilst the consent of the Police to proceed with a transaction may provide a defence to criminal proceedings, this might not be an answer to a civil claim.

21.4 We concluded that there was no real difficulty because it is very hard to conceive that a court would consider a person making a bona fide disclosure, who follows the police's advice would have the requisite knowledge to establish liability under constructive trust principles. In any event, one solution to this dilemma may be to apply to the court for directions under RSC Order 85 (Scheduled to the Civil Procedure Rules) before making disclosure to NCIS.

We do not consider that such an application would constitute an offence under section 93D; certainly, it did not in the case of *C* v *S*.[56]

22. Confiscation Orders and Civil Forfeiture

22.1 It is clear that it has been a long standing intention of Parliament that a person who has benefited from corrupt payments should be deprived of those payments. *Section 2 of the Public Bodies Corrupt Practices Act 1889 provides:*

> '(1) Any person on conviction for offending as aforesaid shall, at the discretion of the court before which is convicted, -
>
> ...
>
> (b) in addition be liable to be ordered to pay to such body, and in such manner as the Court directs, the amount or value of any gift, loan, fee or reward received by him or any part thereof.'

In any consideration of the issue of corruption therefore, one important issue is whether effective means exist to return funds to those to whom they rightfully belong. This may be particularly important in cases of corruption involving appropriation or embezzlement of state assets, such as are discussed in paragraph 4.1 of Chapter One, which can have profound consequences for the economic wellbeing of developing countries. Although funds can be voluntarily returned by a person who has gained them illicitly, it is certainly unwise to rely on this being the case. Experience has shown in the drug trafficking field that convicted defendants would often prefer to endure a long prison sentence if they have the prospect, upon release, of access to their criminal proceedings. The means whereby funds can be returned to those to whom they rightly belong may be said to fall into three categories:

(a) An order of the Court following civil action by the rightful owner.
(b) *A confiscation order following a criminal conviction.*
(c) An order for civil forfeiture.

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56 [1999] 1 WLR 1551

23. An order of the court following civil proceedings

23.1 This is dealt with further in Chapter Three.

24. Confiscation orders

24.1 The mechanism for making confiscation orders is contained in Part VI of the Criminal Justice Act 1988. Essentially, once the Defendant has been convicted of an offence of a relevant description and the prosecution have given written notice that it considers that it is appropriate to seek a confiscation order, then the Court must determine, firstly, whether the Defendant has benefited from criminal conduct and, secondly, whether the Defendant has any realisable property to pay any order which might be made. The Court will then make an order for the lesser of the two amounts (so as to avoid making an order for an amount that the Defendant is unable to pay). In making the two financial calculations, the Court may, depending on the offences of which the defendant has been convicted, have at its disposal discretionary assumptions that the property previously received by the Defendant, property currently held by the Defendant and expenditure made by the Defendant since the commission of the offence of which he has been convicted, are the proceeds of criminal conduct unless he can show otherwise to a civil standard of proof. A similar kind of reverse onus provision was considered by the Strasbourg Commission in *X v United Kingdom* [57] to be compatible with the European Convention on Human Rights.

24.2 There are two aspects of the confiscation scheme which are of particular relevance to victims of financial crime. Firstly, by virtue of section 72(7) of the 1988 Act, where the Court makes both a compensation order and a confiscation order against the Defendant in the same proceedings and it appears to the Court that he does not have the means to satisfy both orders in full, then the payment of the compensation order will be made out of any funds recovered under the

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[57] App 5124/71, (1972) Collection of Decisions 135

confiscation order. Secondly, the powers of the High Court are available under the legislation to enforce the confiscation order by means, for example, of the appointment of a receiver.

Civil forfeiture

24.3 The third report of the Home Office working group on confiscation, publishing in November 1998, recommended that the criminal confiscation legislation be supplemented by the introduction of civil forfeiture legislation modelled on recent legislation introduced in Ireland.

24.4 It is envisaged that application would be made to the High Court ex parte for restraint order preventing the disposal of any property, which the Court would grant if it was satisfied there were reasonable grounds for suspecting that a person was in possession or control of or had acquired property which represented, inter alia, the proceeds of criminal conduct. The legislation would give the Court power to make the restraint order for such a period as it thought fit, at the end of which the order would need to be renewed. The restraint order would be similar to that made in relation to criminal confiscations, in that it would leave property in the possession and control of the person subject to the order and, for example, allow the person to live in a particular property. There would, however, be explicit provision for the property to be seized, taken under the control of a managing receiver or sold if there was any reason to believe that its value was being diminished or that an attempt might be made to place it beyond the scope of forfeiture.

24.5 Once a restraint order was granted, the authorities would then apply to the Court for an interlocutory order. They would seek to satisfy the Court on the balance of probabilities that the property constitutes, directly or indirectly, the proceeds of crime or that it was acquired in whole or in part or in connection with property that constitutes, directly or indirectly, the proceeds of crime. Once an interlocutory order has been granted and remained in force for two years, the authorities would apply to the High Court for a disposal order which would be

granted by the Court unless the Defendant could show that the property was not the proceeds of crime.

24.6 The Home Office Working Group also recommended the establishment of a national confiscation agency which would be responsible for instituting applications under the radical new civil forfeiture legislation. The agency, which could also handle cases under criminal confiscation legislation, would be a multidisciplinary body consisting of lawyers, financial investigators, criminal investigators and forensic accountants. The working group's report state that the creation of a single agency would provide a dedicated unit whose sole objective would be to seek out proceeds of crime and ensure that they were confiscated.

24.7 If Parliament passes legislation creating such an agency and permitting civil forfeiture as recommended by the Home Office Working Group, this has major implications for removing the proceeds of corruption which have been transferred into any jurisdictions in the United Kingdom because the powers of the State can now effectively be actively engaged in returning funds to the victims of financial crime in a much more effect way than before. The Working Group's report recognises that the power of the State to seize property must take second place to a victim's right to recover property which it was unlawfully deprived of and any new powers must therefore contain provisions for the holders of legitimate interest in property to recover those interests. The Home Office Working Group's proposals have some merit, and we await draft legislation with interest. If passed in the form envisaged it could have a major impact in dealing with cases of corruption where the proceeds of that corruption have been transferred to the United Kingdom. Nevertheless, it must be recognised that even with new powers which have been described problems will inevitably still remain with mutual legal assistance and the obtaining of evidence from overseas.

25. Possible reform: The case for an all crimes money laundering offence

25.1 The CJA 1988 is complimented by the Drug Trafficking Act 1994 ('DTA 1994'). Sections 49 to 51 inclusive of DTA 1994 criminalise the laundering of

the proceeds of drug trafficking in analogous terms. The Prevention of Terrorism (Temporary Provisions) Act 1989 ('PTA 1989') also contains anti money laundering provisions, although these are in somewhat different terms. Although the three statutes mentioned here, namely CJA 1988, DTA 1994 and PTA 1989, have their discrete areas of prescription, we think that a difficulty is caused in the prosecution of those who deal with the proceeds of foreign corruption as a result of this very fragmentation. It may be possible to argue before a jury that the person who handled the proceeds of corruption knew or suspected that the funds had a dubious origin, but the prosecution also needs to prove beyond all reasonable doubt that the Defendant knew or suspected that the funds in question were derived from criminal conduct that falls within the ambit of one of the three pieces of anti money laundering legislation. In cases where there are large cash transactions over a period of time, it has been possible to argue that an inference can be made that a financial intermediary knew or suspected that it was dealing with the proceeds of drug trafficking, but we think that it would be difficult for such an inference to be made once the funds have entered the legitimate financial system.

25.2 We think that lessons can be learnt from the Irish anti money laundering regime, a comparative exercise that has already been undertaken by the Home Office Working Group on Confiscation in relation to the confiscation and forfeiture laws. By section 31(3) of the Irish Criminal Justice Act 1994 a person shall be guilty of an offence if he handles any property knowing or believing that such property is, or represents, another persons proceeds of drug trafficking or other criminal activity. By section 31(6) of the 1994 Act, a person handles property if he dishonestly:

(a) receives it;

(b) undertakes or assists in its retention, removal, disposal or realisation by or for the benefit of another person; or

(c) arranges to do any of the things specified in paragraph (a) or (b).

25.3 In this respect, we note that the Irish legislation seems to follow legislation in the United States and Australia. The Australian money laundering legislation

contained in The Proceeds of Crime Act 1987 (Commonwealth), provides, in sections 81 and 82, that the Defendant's state of mind need relate only to 'some form of unlawful activity'. This uses the same language as the United States, where Title 18 USC Section 1956 penalises financial transactions which involve 'specified unlawful activity' but the Defendant's state of mind need only relate to some form of unlawful activities

26. Common test for mens rea

26.1 The mens rea of the various money laundering offences in Section 93 differs. We considered it desirable, in the interests of clarity, that the mens rea for each offence should be the same. We considered an appropriate mens rea. The majority considered that it should be 'knowledge or suspicion'. A minority considered that, given the generally agreed scale of international money laundering and the public interest in prosecuting it whenever it occurred, that the mens rea should also include the objective element of having reasonable grounds to suspect.

27. Amendment to 93C(1)

27.1 Where prosecuting authorities have admissible evidence that a senior public official has moved his proceeds of corruption into the United Kingdom, that does not necessarily mean that there can be a successful prosecution for money laundering. This is because the legislation requires the prosecutor to prove that the actus reus was done, 'for the purpose of avoiding prosecution for an offence to which this Part of this Act applies or the making or enforcement in his case of the confiscation order.' The purpose of moving the proceeds of corruption into the United Kingdom would, however, be much more likely to be the avoid of the making of a confiscation order in his own jurisdiction or so that the corrupt official can enjoy them for his own purposes. We therefore consider whether it should be desirable to add the words 'or confiscation order (or its equivalent) in another state' to the section. We concluded, however, that it would be more desirable to remove this limb from the section entirely. The anti money laundering defences of the United Kingdom must be such as to deter non-

residents from moving the proceeds of crime, including corruption, into or through our financial system.

27.2 We consider it should be possible for the Courts of England and Wales to make a confiscation order where the criminal conduct takes place overseas.

CHAPTER THREE

SITUATIONS WHERE LIABILITY WILL ARISE UNDER CIVIL LAW IN ENGLAND AND WALES WHEN BANKS AND OTHERS HANDLE PROCEEDS OF CORRUPTION

The Committee has considered the present state of English civil law in relation to remedies available to victims of money laundering. We summarise in the enclosed Report the relevant rules and principles of English law. Set out in Section IV are our conclusions.

In summary, we recommend codification and clarification of the law in this area. The law relating to liability for those involved unwittingly in assisting a money launderer or receiving laundered monies (including in the context of the conflict of laws) is insufficiently certain for market participants to take action with confidence as to their position. In order to maximise certainty, we would recommend, as part of a codification process, the introduction of a clear statutory safe harbour for market participants so as to make clear exactly what they were required to do and what they were not.

Any such codification would of course need to be undertaken generally, not just in relation to the imposition of liability in connection with the receipt of laundered funds. The creation of an exceptional regime to benefit the victims of money laundering would create unacceptable complexities and variations in this area of the law.

As regards reform of the law, we feel that, overall, the balance of English law in this context is about right, and we do not recommend increasing civil liability for banks and professionals. Any extension of liabilities on financial institutions or professionals could act as a deterrent to such organisations participating in the UK's financial markets on grounds of both principle and costs.

In terms of principle, an extension of liability for intermediaries would carry with it an implicit assertion that those involved in the financial markets have a positive duty to police potential money laundering activity elsewhere. This might be resisted, in our view with some legitimacy, on the basis that it is a function that should properly be reserved to states themselves (and their law enforcement agencies).

As for costs, the concern is that an extension to liability would carry with it the necessity for further expenditure to minimise liability - which in turn may make the UK an unattractive place to do business. This is especially relevant in light of the proposals of the Basel Committee and now the European Union to introduce a more formal requirement for banks (and also, in the EU, investment firms) to hold capital against operational risk, which may be affected by legal risk. Any amendment to English law in the context of money laundering might well have the effect of increasing the capital required to be held by UK-incorporated institutions. Those overseas institutions conducting business in the UK through a branch presence may also be affected in the capital base they need to hold in order to satisfy the regulators in the jurisdiction where they are incorporated.

Summary of the Current Legal Position

28. 'Corruption', 'proceeds' and 'handling'

28.1 The corruption under consideration involves two main activities: bribery of senior public officials and misappropriation by them of state assets.[58] The two are not always distinguishable.

28.2 Large bribes need to be accounted for in the books of the payer. For example they may be described as remuneration or commission for services rendered, or as loans to shell companies, or as payment for goods which have been over-invoiced or not delivered at all. An investigator who finds that money has been paid for no, or for inadequate, consideration may not know whether the motive of the person responsible for the payment is to profit himself by theft or to profit a third party by a bribe.

28.3 Corruption arises in particular where there are large payments by way of aid donations or loans flowing from an international organisation or first world state to a third world state, or where large payments are made from a third world state

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58 See also the Policy and Jurisdictional issues raised in Chapter One,.

to a supplier of goods or services in the first world. The latter may be funded by the former. Corruption also occurs within all states, whereby those in power embezzle state funds or are bribed by local traders. The proceeds of corruption are, in the former case the product of aid donors' funds, and in the latter, the product of the local economy which are simply exported to the first world.

28.4 Proceeds of corruption may be in the form of money or other assets, whether financial securities, real property or moveable property such as works of art.

28.5 Handling here includes not only disposing of such proceeds, but also advising and assisting on their disposal. Those who handle the proceeds of corruption in England and Wales are mainly financial institutions, lawyers and accountants, but also include others such as auctioneers and dealers in real and moveable property.

29. Who may be a defendant?

29.1 A principal whose agent has been bribed has the right to recover the amount of the bribe from either the briber or the agent. The principal may, alternatively, recover from the bribed agent, as damages for fraud, any loss, in excess of the amount of the bribe which he has actually sustained in consequence of entering into the transaction in respect of which the bribe was given. He need not elect between these alternatives before the time has come for judgment to be entered in his favour in one or other of them.[59]

29.2 Those who handle the proceeds of corruption encounter the civil law mainly in the following ways:

(a) as persons named in a court order freezing assets of which they have custody for a person against whom an allegation of corruption is made;

(b) as defendants to a claim for restitution of assets they have received from a person against whom an allegation of corruption is made; or

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59 *Mahesan v Malaysian Housing Society* [1979] AC 374

(c) as defendants to a claim for compensation for their own wrongdoing in assisting in or advising on the disposal of proceeds of corruption.

29.3 Claims for compensation for wrongdoing are normally:

(a) for 'dishonest assistance' in a breach by another of his fiduciary duty.[60] The fiduciary is typically a person in a responsible position within the claimant organisation;

(b) for participation in a tort of wrongful interference with proceeds of corruption which are in the form of moveable property[61] (where liability is strict i.e. it arises without proof of dishonesty or negligence);

(c) for the tort of negligence, or for breach of contract, for breach of a duty of care in the performance of services to the claimant; or

(d) for participation in a tort of conspiracy to injure the claimant.[62]

29.4 Dishonest assistance in a tort where the assistance falls short of participation (i.e. where the assister does not participate sufficiently to be jointly liable for the tort) does not attract liability.[63]

29.5 Where a defendant is sued, and he claims that, if he is liable at all, then so too are other people who were involved, then there is a need for a mechanism for those others to be brought before the court as defendants, and for laws as to how any liability is to be distributed.

30. Who may be a claimant?

30.1 All claimants must claim to be victims of the alleged misappropriation or wrongdoing. But not all those who claim to be victims are entitled to be claimants.

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60 E.g. *Agip v Jackson* [1990] Ch 265, [1991] Ch 547

61 E.g. *Brinks v Abu-Saleh* [1995] 1 WLR 1478

62 E.g. *Kuwait Oil Tanker Co v Al Bader* (unreported) 16 November 1998; *Grupo Torras SA v Al-Sabah* (unreported) 24 June 1999

30.2 A victim must normally be a person whose claim is based on a right of property. The simplest case is where a private individual claims for return of his own property, or compensation for its loss. Claims by states are assimilated to this. In the UK and some other Commonwealth countries when the state is a victim the claimant is generally the Crown represented by the Attorney-General.[64] But a state is funded by taxation and the true victim is not the state but the people. Similarly, with companies, the claim must normally be brought by the company. The true victims may be the shareholders, but they can only claim in exceptional cases where the company remains under the control of the alleged wrongdoers. So too with trusts. Normally it is the trustees who must sue, even though their loss is not personal. The beneficiaries who are the real victims may not sue unless the trustees are themselves the wrongdoers or are otherwise unwilling or unable to sue.[65]

30.3 Trust law, company law and public law give the true victims varying rights to compel the trustees, the company and the state to bring claims on their behalf, and to ensure that the proceeds of any successful litigation are disposed of lawfully. In that indirect way the true victims of corruption have means of redress through the law.

31. Who is a fiduciary?

31.1 *In England*

(a) A fiduciary is a person who undertakes to act for another in conditions where he agrees to put his loyalty to that other person before his own self interest. Trustees, professional advisers and employees in positions of responsibility are common examples. A senior executive and a security guard will each be fiduciaries. But agents and banks may be fiduciaries in relation to some transactions, but not others. In giving trust and advisory services they are likely to be fiduciaries, but they are not fiduciaries where they are engaged in arms length commercial

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63 *Credit Lyonnais v ECGD* [1999] 1 All ER 929, at 939g

64 *A-G v Reid* [1994] 1 AC 325; *A-G v Blake* [1998] Ch 439

65 *Royal Brunei Airlines v Tan* [1995] 2 AC 378, at 392

transactions, such as exchanging currency or acting as mere custodians.[66] Different common law countries apply different tests as to who is a fiduciary.

(b) Not all breaches of duty by a fiduciary are breaches of fiduciary duty. For example, negligence by a solicitor may not be a breach of his duty as a fiduciary.[67] So it is necessary to look not just at the status of the person whose breach of duty is in question, but also the nature of duty of which he is in breach.

31.2 *Abroad*

(a) Many foreign systems of law either do not recognise the concept of a fiduciary relationship, or categorise it differently. English law takes a pragmatic approach in attributing fiduciary status to a foreign person. For example, an accountant in Tunisia was accepted as a fiduciary.[68] If the duties under the foreign law are capable of being categorised as fiduciary, and if the person is liable to account to his principal under the local foreign law, he may be recognised as a fiduciary by an English court.[69]

(b) English law has recently recognised that when money is obtained by fraud the fraudulent recipient is a fiduciary and so that the payer can follow the money into the hands of those to whom it is paid on.[70]

32. Differences between the types of liability

32.1 If a bank or agent receives money disposed of in breach of a fiduciary duty and invests it, the claimant will claim that it received the money as a trustee. Until judgment, the claimant's interest will generally be protected by a freezing order.

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66 *Re Goldcorp* [1995] 1 AC 74

67 *Bristol and West BS v Mothew* [1998] Ch 1

68 *Agip v Jackson* [1990] Ch 265, [1991] Ch 547

69 *Kuwait Oil Tanker Co v Al Bader* (unreported) 16 November 1998; *Arab Monetary Fund v Hashim (No 9)* (unreported) 29 July 1994

The bank or agent may have little interest in the outcome of the dispute. So long as the receiver holds the assets in question, liability depends on the claimant tracing trust property into the defendant's custody, and not on any wrongdoing or knowledge on the part of the defendant. Normally this type of claim is used where the defendant claims no title or interest in the property. It may also arise where the interest of the defendant arises from a transaction which the law does not recognise as legally binding, such as gaming.[71]

32.2 Similarly, if a bank or agent receives money stolen from a victim's bank account, the victim may claim restitution, whether or not there has been a fiduciary involved. This used to be called an action for 'money had and received'. But if there is no fiduciary involved there may be greater difficulties in showing that what the defendant has received represents the proceeds of the theft.

32.3 If the bank or agent receives the money beneficially it may be liable for the receipt, depending upon its state of knowledge. This situation occurs typically when the bank or agent receives the money in payment of a debt due to it, perhaps for professional fees, or in repayment of an overdraft or loan.

32.4 Liability for receipt is by its nature limited to the amount received. In this it is to be contrasted with the other forms of liability discussed here. Dishonest assistance, wrongful interference with goods, negligence and conspiracy give rise to a liability which are related neither to the benefit obtained by the assister/conspirator, nor to the extent to which his wrongdoing has contributed to the claimants' loss.

32.5 The different types of liability may affect the likelihood of the claimant realising the value of any judgment he might obtain. Where the defendant is solvent and able to pay the amount of the claim, there will be no difference. Where the defendant is insolvent or not able to pay the whole judgment, a claim based on

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70 *Twinsectra v Yardley* (unreported) 28 April 1999 (CA) para. 99-100; *Westdeutsche LBG v Islington BC* [1996] AC 669, 716

71 *Lipkin Gorman v Karpnale* [1991] 2 AC 548

receipt from a fiduciary will give the claimant priority over other creditors, and may enable him to follow or trace the assets into the hands of other defendants who still hold the asset, or are able to pay compensation for their role in disposing of it.

33. Receipt of property disposed of in breach of fiduciary duty or obtained by fraud

33.1 This is usually referred to as 'knowing receipt', but in the light of possible developments in the law, this may have become a misnomer. As the law stands at present, the claimant must prove that his property has been disposed of in breach of trust; that the defendant has beneficially received the property, or other property which is traceable as its product; and that the defendant received it with knowledge of the breach.

33.2 But commentators, who include Lord Nicholls of Birkenhead writing extra-judicially, favour a change in the law to strict liability for receipt of money disposed of in breach of trust, subject to defences of purchase in good faith and change of position.[72] The third element, the state of mind of the defendant, would then be relevant only to the defence, and would not have to be proved by the claimant.

33.3 If the property is still in the hands of the defendant, and has not changed in value, the claimant will simply recover it. He can claim it as his own property. So if the property has increased in value, the claimant will recover it, notwithstanding the increase. But if it has declined in value, or the defendant has disposed of all or part of it, the claimant will have a personal claim in addition to the proprietary claim. The defendant will be under a personal liability to compensate the claimant for the disposal or loss of value.

33.4 'Knowledge' has given rise to debate. The debate is whether a person who actually receives monies for his own benefit should be treated as unjustly

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72 *Restituiton – Past, Present and Future* (ed Cornish 1998)

enriched if he has failed to act in a way which an honest and reasonable person would in the circumstances have done, or whether his liability should be conditioned upon actual knowledge of, or at least a turning of a blind eye to, the facts i.e. dishonesty, as in a case of (mere) assistance without receipt. While the position has not been authoritatively determined, the weight of judicial opinion now seems to favour a requirement for dishonesty.[73]

33.5 If at the time the receiver of the money does not know of the breach of trust, but he subsequently learns of it and thereafter disposes of the money, then he may be liable under a similar principle, sometimes called inconsistent dealing.

33.6 'Dishonesty' is discussed in Paragraph 34, below, under 'dishonest assistance'.

33.7 Where property has been transferred by the first recipient to another, both of whom are in a jurisdiction other than England, there is uncertainty as to the consequences. It may depend on whether the local law of the subsequent recipient recognises a continuing interest of the claimant.[74]

34. Dishonest assistance in breach of fiduciary duty

34.1 Until 1995 this head of liability was referred to as 'knowing assistance', and the requirements for it have been being developed and changed rapidly by the courts in recent years. Further developments may be expected. The most recent statement of the requirements of liability is by Mance LJ:

> 'The liability which the [claimants] assert under this heading arises in equity. It does not depend upon participation by the relevant defendant in a conspiracy, or necessarily upon any conspiracy at all. The case-law establishes that it depends on proof of the following conditions: (i) A breach of trust or fiduciary duty by someone other than the defendant (ii)

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73 *Dubai Aluminium v Salaam* [1999] 1 Ll Rep 387, 453; *Grupo Torras SA v Al-Sabah (unreported) 24 June 1999*

74 *MacMillan v Bishopsgate Trust (No 3)* [1996] 1 WLR 387, 399, 410, 424; *El Ajou v Dollar Land Holdings* [1993] 3 All ER 717, at 736

in which the defendant assisted (iii) dishonestly, together with (iv) resulting loss... In this context, as in conspiracy, it is inappropriate to become involved in attempts to assess the precise causative significance of the dishonest assistance in respect of either the breach of trust or fiduciary duty or the resulting loss... But it is necessary to identify what breach of trust or duty was assisted and what loss may be said to have resulted from that breach of trust or duty. An allegation of a single and continuing conspiracy to commit and cover up a misappropriation is one thing. But it may involve a series of breaches of trust or fiduciary duty. The actual loss may have resulted at the early stage of misappropriation, rather than from the cover up. Dishonest assistance confined to the cover up stage may not or not necessarily attract liability for such previous loss.'[75]

34.2 Dishonesty in this context means conscious impropriety. The standard of propriety is objective, and must be judged in the light of all the relevant circumstances. But it is not any dishonesty at all that will suffice. An assister may be being dishonest in a way that is unrelated to the loss of the claimant.

34.3 It is not yet clear quite how a distinction is to be drawn between relevant and irrelevant dishonesty. The latest formulation is that the defendant's dishonesty must have been towards the claimant in relation to property held or potentially held on trust. It is not necessary that the defendant should know of the existence of the particular trust or of the facts giving rise to the trust[76]. In that case, some defendants, who knew there was a dishonest concealment, but believed that the concealment was to assist the payees to avoid exchange controls which affected them (i.e. they believed that payment away of the employers' funds was not of itself dishonest, because the payee was entitled to the money, or would return a benefit the employer), were found not liable.

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75 *Grupo Torras SA v Al-Sabah (unreported) 24 June 1999* V.3(a)

76 *Ibid.*

34.4 Where the assistance takes place abroad the provisions of local law are relevant. It has been said that the assistance must be wrongful by English law and that there must be no local law which would provide a defence.[77]

34.5 Liability may arise under this head in cases where money is advanced for a primary purpose, to revert to the payer if the primary purpose fails, e.g. funds provided to a solicitor to pay for a house. A person who assists in the utilisation of the funds for some other purpose may be liable for dishonest assistance.

34.6 What amounts to assistance is a question of fact not law. The assistance must be more than minimal. This is rarely a matter of dispute.

35. Conspiracy

35.1 To establish liability for conspiracy under English law,[78] a claimant must show that the relevant defendant combined or agreed with at least one other person to do an unlawful act or use unlawful means causing loss or damage to the claimants. It is not sufficient that there should have been an agreement or combination. The agreement or combination must be carried into effect so as to damage the claimant.

35.2 It is unnecessary to show that there existed an intention at the outset to injure either claimant specifically - it suffices if there was an intention to injure whichever of the claimants ended up bearing the loss. People who wish to disperse huge sums of others' monies for their personal purposes will not be over-concerned who makes or bears the payments, so long as they can be covered up. In circumstances where persons combine to abstract monies from a group and then to cover up and account for the abstraction in any way they can, an intent to injure or defraud any company which, as a result of their operations, ends up bearing the loss, may readily be inferred.

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77 *Dubai Aluminium v Salaam* [1999] 1 Ll Rep 387, 452; *Grupo Torras SA v Al-Sabah (unreported) 24 June 1999* V.3(b)

78 *Grupo Torras SA v Al-Sabah (unreported) 24 June 1999* V.1.

35.3 Where there are a series of transactions there may nevertheless be one conspiracy. A and B may be the first to conspire, and C may join in the conspiracy at a later date and then A may drop out and be replaced by D. But it all remains a single conspiracy as long as all of them are for the period of their participation acting in combination to achieve the same criminal objective.

35.4 A conspirator will not be permitted to avoid liability by attempting to show that the loss would have been caused whether or not he joined the conspiracy, although he will not be liable for losses caused before he joined the conspiracy.

35.5 Given these requirements, it is not likely that banks or intermediaries will often face allegations of conspiracy. And where their employees do join conspiracies, the employer will not normally be liable for such activity, which is beyond the scope of their employment.

36. Wrongful interference with goods

36.1 Wrongful interference with goods includes an act of deliberate dealing with a chattel in a manner inconsistent with the owner's right of property whereby that other is deprived of the use and possession of the property. The defendant does not have to intend this result, and may not even be aware of it. It is enough that the defendant's conduct is inconsistent with those rights. This is the civil equivalent of theft and handling stolen goods. The corrupt person who steals his principal's property, or receives a valuable object as a bribe, commits the tort in so doing.

36.2 Persons in the UK who are at risk of facing claims are dealers, auctioneers and custodians of property which has been stolen or received as bribes, as well as those who buy the chattels from the thief or the dealer.

36.3 Goods that are likely to be the subject of such a claim include works of art, negotiable instruments and securities.

37. Negligence

37.1 Claims in negligence are not commonly brought in this context. But the possibility remains. Banks and intermediaries who act for states, trusts and companies will normally owe to them the ordinary duty to exercise skill and care. If loss results from a breach of that duty, they will be liable without proof of dishonesty.

37.2 Breach of duty may result from a failure to question instructions from a representative of a state or corporate client,[79] or to advise the client of the risks involved in carrying out instructions which appear to put the client's property at risk.[80]

38. Distribution of liability

38.1 Where all the appropriate defendants are in England and Wales, there are laws and procedure for contribution which enable a defendant to bring others who should also be liable to be brought before the court. There are also procedures, e.g. under the Brussels Convention, for bringing some foreign defendants before the English courts. But apart from cases covered by the Brussels Convention and other conventions governing reciprocal enforcement of judgments, defendants in cases with an international dimension are in an unfavourable position. First, English law on distribution of liability is notoriously unfavourable to banks and professionals, because each wrongdoer is normally liable for the whole loss. Second, even where banks and intermediaries in other countries are also liable in respect of the corruption, it can be difficult or impossible to obtain any effective contribution.

38.2 Where the defendant is one of a number of partners, the law is unclear as to whether the other partners will also be liable to the claimant where the basis of liability is dishonesty.[81]

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79 Cf *Grupo Torras SA v Al-Sabah (unreported)* 24 June 1999 IV.3(g)

80 *Lipkin Gorman v Karpnale* [1989] 1 WLR 1341

81 In *Agip v Jackson* [1991] Ch 547 (CA) the partners were held liable, but without citation of *Re Bell's Indenture* [1980] 3 All ER 425

39. What should give rise to suspicion

39.1 Official guidance was given in 1988 by the Basle Committee on Banking Regulations and Supervisory Practices, and has since been given in relation to the money laundering legislation by the JMLSG.[82] Since suspicion alone may create liability under this legislation, it is unlikely that any other guidance would be appropriate in relation to potential civil liability, where the threshold for liability is higher. But if there is to be any such guidance, it should come from the same source.

39.2 Where bribery is accounted for by forged documents or by means also used for embezzlement it raises no difficulties that do not also arise in relation to embezzlement. When these cases raise suspicion, it is often because there are discrepancies which cannot be explained.

39.3 But where bribery is accounted for by invoices purporting to be for services rendered, considerable problems may arise. There may be no discrepancies. A banker or intermediary in England may be in no position to judge the position in life of the customer, or whether the size of a commission or fee is suspicious or not. If the corruption is or might be authorised at a sufficiently high level, it may be impossible for him to know to whom to address any queries. Inappropriate queries may be a tip-off, or seriously jeopardise the commercial relationship between him and the client. If a public official on a low salary suddenly becomes rich it may be very difficult to judge the credibility of any explanation given, for example of an inheritance, or the sudden increase in the value of property obtained during an earlier part of his career. In financial institutions large transactions are carried out without the need for consideration

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82 See Criminal Law Paper for the Drug Trafficking Act 1994, The Prevention of Terrorism (Temporary Provisions) Act 1989 and the Criminal Justice Act 1993 and the Money Laundering Regulations 1993

by senior staff, and junior staff cannot be expected to identify many transactions designed to conceal the laundering of bribes.

39.4 Persons in England receiving money from abroad will have no practical means of knowing whether what they regard as possible wrongdoing may be defensible by the law of the place where it occurred.

40. What to do where there are grounds for suspicion

40.1 If a person is holding money or property which he suspects might be the proceeds of corruption then (apart from any obligations under the Money Laundering legislation) he can apply to the court for directions as to what to do.[83] This is likely to be a course which is only rarely practical, given the volume and time constraints of many transactions. In the case of a bank, it is only in the clearest cases that the client's instructions can be refused without risk of liability for breach of contract.[84]

40.2 In the case of a person who does not receive or have custody of any assets, but is only asked to assist in a transaction, there is no means of going to the court for directions. In such a case there is no trust to administer.

The Viability of Claims by Victims

41. The rights of victims to be claimants

41.1 The system whereby a company, a trustee, or a state is required to be the claimant where the ultimate victims may be the public, or a section of it, works well when the claimant is based in England and Wales or some other state where the rule of law prevails. But the system will not work well where the true victims are in states where the rule of law does not prevail. And corruption is closely associated with a failure in the rule of law.

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83 *Finers v Miro* [1991] WLR 35 and *CvS* [1999] 2 All ER 343

84 *Lipkin Gorman v Karpnale* [1989] 1 WLR 1341

42. Effectiveness and availability of interim relief

42.1 *Purpose of Interim Relief*

(a) There are three basic factors involved in dealing with the proceeds of corruption:

(i) the origin of such proceeds must be disguised as must the identity of the person(s) who carried out/facilitated the corrupt act;

(ii) the proceeds must be converted into a different kind of asset or funnelled in a way that cannot be traced. The method of doing this must be obscured; and

(iii) control must be maintained over the proceeds at all times.

(b) These factors can be distilled into two elements: concealment and control. The grant of interim relief can serve two purposes in dealing with this:

(i) to obtain information about the proceeds of corruption or to assist in any investigation about the corrupt act; or

(ii) to freeze or otherwise safeguard the proceeds of corruption whatever form they now take.

(iii) The purpose of this part of the paper is to evaluate how effectively the available types of interim relief serve these objectives.

43. Types of Interim Relief

43.1 The most relevant types of interim relief when dealing with the proceeds of corruption and which are considered here are as follows:

(i). Freezing injunctions;

(ii). Search Orders;

(iii). Third Party/pre action discovery;

(iv). Disclosure Orders;

(v). cross-examination about assets;

(vi). Delivery up of assets;

(vii). Restraints on leaving the jurisdiction;

(viii). the appointment of a receiver.

43.2 The various types of interim remedies available are listed in the Civil Procedure Rules ('CPR') 25.1 and include other forms of relief such as payment into court or the provision of accounts. The list is not however exhaustive. The diversity of remedies available is sufficient to combat the factors set out in paragraph 1.1 and more specifically deal with the two crucial factors of concealment or control.

43.3 Jurisdiction

(a) The inherent jurisdiction to grant the various forms of interim relief has been confirmed by statutory provisions, for example, sections 33 (presertation of property and disclosure and production of documents) and 37 (injunctions) of the Supreme Court Act 1981 ('SCA 1981').

(b) Section 25 of the Civil Jurisdiction and Judgments Act 1982 enabled the High Court to grant interim relief where the substantive proceedings had been or were to be commenced in a contracting state to the 1968 Brussels or 1988 Lugano Conventions. This section was based on Article 24 of the Brussels Convention which referred to 'protective measures' available under the law of the relevant state i.e. if another contracting state had jurisdiction to hear the substantive proceedings regarding any corruption, a freezing order or other protective measure could be obtained here. Under the Civil Jurisdiction and Judgments Act 1982 (Interim Relief) Order 1997 (SI 1997 No. 302), interim relief can be obtained herein for aid of corruption proceedings in a non-contracting state.

(c) Is the test now sufficiently clear as to when this jurisdiction will be invoked? In *Credit Suisse Fides Trust SA v Cuoghi*[85] it was said that the test was one of expediency, having regard to the absence of jurisdiction over the substantive proceedings. The Court should adopt a cautious approach so as to avoid conflict with orders of the Court seised of the substantive proceedings. By contrast in *S & T Bautrading v Nordling*[86] it was said that the Court would not make an order which extended beyond its own territorial jurisdiction save in an exceptional case.

43.4 *Freezing Injunctions*

(a) A freezing injunction (Mareva) restrains a party from removing assets from the jurisdiction or from dealing with any assets whether located within the jurisdiction or not.[87] Application for such an order can be made by any party to a cause or matter before or after the trial. The corrupt official will invariably no longer be holding the assets so the initial problem is to identify both the correct party and cause of action/possible tracing claim. The right to the order is dependent upon there being a pre-existing cause of actions against the defendant arising out of an invasion, actual or threatened by him of a legal or equitable right of the plaintiff for the enforcement of which the defendant is amenable to the jurisdiction of the court.[88] It is necessary to have a clear basis of civil liability against third parties who assist in the dissemination of the proceeds of corruption, albeit courts have indicated the discretion to grant such interim relief will be more readily exercised if the claim is of a proprietary/tracing nature.[89]

(b) The jurisdiction to grant freezing injunctions was confirmed in section 37(3) SCA. The guidelines for the grant of such orders have evolved in

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85 [1998] QB 818 (CA)
86 [1997] 3 All ER 718 (CA)
87 CPR 25(1)(f)
88 *The Siskina* [1979] AC 210, at 256
89 Republic of Haiti v Duvalier [1990] 1 QB 202, at 211

the case law. The three main conditions were set out in *Derby & Co Ltd v Weldon*.[90] These are:

(iv) has the Claimant a good arguable case;

(v) has the Claimant satisfied the Court that there are assets within and, where an extra-territorial order is sought, without the jurisdiction; and

(vi) is there a real risk of dissipation or secretion of assets so as to render any judgment which the Claimant may obtain nugatory.

Guidelines were set out in *Third Chandris Corpn v Unimarine SA*:[91]

(A) The claimant should make full and frank disclosure of all matters in his knowledge which are material for the Judge to know.

(B) The Claimant should give full particulars of his claim against the Defendant and should fairly state the points made against it by the Defendant.

(C) The Claimant should give same grounds for believing that the Defendant has assets here. The existence of a bank account in England is enough, whether it is in overdraft or not.

(D) The Claimant should give some grounds for believing that there is a risk of the assets being removed before the Judgment or Award is satisfied. The mere fact that the Defendant is abroad is not by itself sufficient.

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90 [1990] Ch 48, at 57
91 [1979] 1 QB 645, at 668

(c) The Courts have been careful to safeguard the position of banks and other innocent third parties,[92] and will not grant a freezing order which would interfere with the normal course of business particularly if the claim is speculative.[93]

(d) Are the guidelines sufficiently clear? Yes. With respect to proceeds of corruption it may be that past dealings should negate any need to show risk of future dissipation.

43.5 *Search Orders*

(a) A search order (Anton Piller Order) requires the Defendant to allow the Claimant or his representatives to enter premises controlled by the Defendant for the purpose of inspecting or taking possession of documents or other articles. The purpose of such orders is 'primarily the preservation of evidence which might otherwise be removed, destroyed or concealed but it operates, of course, also as an order for discovery in advance of pleadings.' [94]

(b) The strict conditions for such orders developed in cases such as *CBS United Kingdom Ltd. v Lambert*,[95] and *Columbia Picture* Industries *Inc. v Robinson*.[96] They are now largely incorporated in the CPR. Historically, the orders were developed in the context of infringements of copyright patents and trade marks, but are potentially very useful to safeguard evidence in respect of proceedings relating to corruption. The applicant has to show a real possibility incriminating documents or items will be destroyed. The court will infer the probability of disappearance or destruction of evidence where 'it is clearly established on the evidence before the court that the defendant is engaged in a nefarious act which renders it likely that he is an untrustworthy person.'[97]

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92 *Z Ltd. v A-Z and AA-LL* [1982] QB 558

93 Polly Peck International Plc v Nadir (No. 2) [1992] 4 All ER 769

94 *Crest Homes Plc v Marks* [1987] 1 AC 829, at 853

95 [1983] 1 Ch 37

96 [1987] Ch 38

97 *Dunlop Holdings Ltd v Stavaria Ltd* [1982] Com LR 3

(c) Disadvantages:

(vii) disclosure orders are viewed as extremely draconian and granted in very limited circumstances;

(viii) a very strong and clear case would have to be shown about the corrupt act and syphoning of the proceeds. The orders cannot be made as a means of finding out what charges can be made in the action;[98]

(ix) the privilege against self-incrimination.[99]

44. Third party/pre-action discovery

(a) Norwich Pharmacal

Discovery could be obtained against a third party on the principle of *Norwich Pharmacal v Customs & Excise Commissioners*[100] that if through no fault of his own a person became mixed up in the tortuous acts of others so as to facilitate their wrongdoing, he did not incur personal liability but came under a duty to assist the person who has been wronged by giving him full information and disclosing the identity of the wrongdoer.

(b) Further the relief was not limited to the case of identifying wrongdoers but was more generally available to enable the person who claimed to have been wronged to protect his interests.[101] It was also extended to the case where it is necessary to obtain information for use in bringing proceedings against a third party, even though it could not be ascertained,

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98 *Hytrac Ltd v Conveyors International* [1 983] 1 WLR

99 *Rank Film Distributors Ltd. v Video Information Centre* [1982] AC 380

100 [1974] AC 152

101 *CHC Software Care Ltd* [1993] FSR 241

without the information sought, that the third party had committed a tort (or other wrong) against the claimant.[102]

(c) *Bankers Books Evidene Act 1879*

Section 7 of the Bankers Books Evidence Act 1879 provides:

> 'On the legal application of any party to a legal proceeding a court or judge may order that such party be at liberty to inspect and take copies of any entries in a banker's book for any of the purposes of such proceedings. An order under this section may be made either with or without summoning the bank or any other party.'

(d) The proceedings must already have been started for the jurisdiction to be exercised under the Act.

(e) *The CPR*

Third Party/pre-action disclosure has been extended by the CPR in the following respects:

(i) Disclosure before proceedings have commenced (Rule 31.16)

The Court may order a person who is not a party but is likely to have in his control documents relevant to an issue arising or likely to arise out of the claim to disclose whether those documents are in his control and if so to produce them to the Applicant's legal, medical or other professional advisors (but not in term of the Applicant). Section 33 *SCA 1981*. Section 52 *CCA 1984* (as amended by the Civil Procedure (Modification of Enactments) Order 1998/SI 2940). Both the Applicant and the Respondent must be likely to be a party to subsequent proceedings. Disclosure before proceedings have started must be desirable (not necessary) in order to dispose fairly of the anticipated proceedings, assist the dispute to be resolved without proceedings

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102 *P v T Ltd* [19971 1 WLR 1309

or save costs. This statutory power is subject to the limitation in section 35 *SCA 1981* that order cannot be made if compliance with it would be likely to be injurious to the public interest.

(ii) *Disclosure against Third Parties (Rule 31.17)*

Prior to the CPR a procedural means of achieving disclosure against a third party was by Writ of Subpoena Duces Tecum. A non-party could be ordered to attend court and produce document(s).[103] The Court can order disclosure against a non-party where the documents of which disclosure is sought are likely to support the case of the Applicant or adversely affect the case of the other parties to the proceedings and disclosure is necessary in order to dispose fairly of the claim or to save costs.[104]

(f) Interim relief is available in relation to proceedings outside the jurisdiction or if the application is for pre-action disclosure under section 33 SCA 1981.

(g) *Generally*

Third party discovery is an important form of interim relief when banks or others have innocently and involuntarily become involved in dealing with the proceeds of corruption. One advantage for the party pursuing the claim is that there is no restriction on the use of the information in other proceedings unless the court makes an express order (contrast freezing orders or disclosure orders).

(h) The power to grant this pre-action/third party disclosure now seems clear but also flexible and sufficiently protects those who inadvertently become connected with the corrupt act.

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103 *Khanna v Lovell White Durrant* [1995] 1 WLR 121

104 Section 34 *SCA 1981*. Section 53 *CCA 1984*. Again this statutory basis is subject to the public interest element under section 35.

(i) However, there are inevitably conflicting principles between statutory provisions designed to combat serious crime and interference with the individual's rights. Guidelines providing protection for the bank or other financial institution and the party seeking disclosure without prejudicing the investigations of the NCIS or other agency were set out in *C v S (Money Laundering: Discovery of Documents).*[105] (Eight points which can be adapted to the particular circumstances).

(j) Further there could be a jurisdictional problem on third party disclosure in respect of proceeds of corruption on an international scale. See for example *Mackinnon v Donaldson Lufkin and Jenrette Securities Corpn* [1986] 1 Ch 482: There it was said that save in exceptional circumstances, the court should not require a foreigner who was not a party to an action, and in particular a foreign bank which would owe a duty of confidence to its customers regulated by the law of the country where the customer's account was kept, to produce documents outside the jurisdiction concerning business transacted outside the jurisdiction.

45. Disclosure Orders

45.1 A distinction can be made between two types of disclosure order both of which are ancillary to an injunction or other form of interim relief.[106]

(x) Disclosure orders in a proprietary claim for the purpose of ascertaining the whereabouts of the missing funds. Interlocutory relief can be granted to preserve the asset which were the subject of the litigation and are the subject of criminal proceedings. It is a case where unless effective relief is granted, justice may well become impossible because the evidence and the fruits of crime and fraud may disappear.[107] In particular, the court may order a bank (whether or not party to the proceedings) to give discovery

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105 [1999] 1 WLR 1551

106 See *A and B v C* [1980] 2 Lloyd's Rep. 200; *Ashtiani v Kashi* [1987] 1 QS 888, at 905.

107 *London and Country Securities Ltd. v Caplan* (1978)

of documents in relation to the bank account of a defendant who is alleged to have defrauded the plaintiff of his assets; and it may make orders for interrogatories to be answered by the defendants or their employees or directors.[108]

(xi) Disclosures orders ancillary to a freezing injunction/search order. There is an inherent power to grant such an order if it appears to the court to be just and convenient to ensure the freezing order/search order is effective to achieve its purpose.[109] Limits are usually placed on the use of the information.

45.2 *Cross-Examination about assets*

A person can be ordered to attend for cross-examination on his affidavit or witness statement[110] or otherwise (even if he has not sworn an affidavit or made a witness statement).[111] This can be in aid of an injunctive order or in aid of execution of a judgment.

45.3 *Delivery up of assets*

(a) There is power under the Court's inherent jurisdiction to order delivery up of assets, sometimes used in support of freezing injunction. There is no need to show any proprietary interest in the assets.

(b) There has to be some evidence or inference that the property was acquired as a result of the defendant's alleged wrongdoing as for chattels acquired from proceeds of corruption. Guidelines are set out in *CBS United Kingdom Ltd. v Lambert.*[112] Factors on discretion include matters such as whether hardship will be suffered or whether assets are used in a business. Any proceeds of a corrupt act would need to have been put into easily removable and disposable chattels,

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108 *A and B v C* [1980] 2 Lloyd's Rep. 200
109 *Bekhor v Bilton* [1981] 1 QB 923
110 Ibid, at 925
111 *House of Spring Gardens Ltd. v Waite* [1985] FSR 173

(c) The guidelines in *Z Ltd* (see paragraph 4.3) must be followed in respect of third parties. Payment of cash into court can be ordered against defendant or a third party such as a bank.[113] This is a useful jurisdiction to safeguard tangible assets which might have been acquired from the proceeds of corruption. It is confirmed in Part 25 CPR. in practice, it would only necessary if assets require safekeeping or if an injunction restraining any dealings with such assets would not be effective. The jurisdiction should be more readily exercised when it can be shown or inferred that the proceeds of corruption have been used to acquire readily convertible assets.

45.4 *Restraints on leaving*

A writ ne exeat regno – preventing a person from leaving the jurisdiction is of limited use. The conditions for its grant are set out in *Felton v Callis*.[114] The Court can require a defendant to deliver up his passport and prevent him leaving the country as an ancillary remedy to a disclosure order or an injunction.[115]

45.5 *Appointment of a Receiver*

(a) The inherent jurisdiction to appoint a receiver is confirmed in section 37 *SCA 1981*. The purpose of such an appointment is to get in and preserve assets. An order for the appointment of a receiver is most likely to be sought when the proceeds of corruption have been channelled into business or properties.

(b) Such an order can be a free-standing form of interim relief. Proceedings do not actually have to have been commenced/be contemplated and no other relief need be claimed. The property in question can be outside the jurisdiction if the person is within the jurisdiction.[116]

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112 [1983] Ch 37, at 44

113 *Themehelp Ltd v West* [1996] QB 84, at 103

114 [1969] 1 QB 200, at 212

115 *Bayer AG v Winter* [1986] 1 WLR 497

116 *Derby & Co. Ltd v Weldon* No 6 [1990] 1 WLR 1139

(c) There are two categories of receiver, both of which are potentially relevant to safeguarding assets acquired from criminal proceeds:

(xii) a *pre-judgment* receiver is appointed to preserve property in a state of security pending litigation. This relief can be granted in a in wide variety of circumstances to prevent misapplication or dissipation of funds. The two conditions are that: (i) the claimant has an interest in the property which is the subject of the receivership and (ii) the property is in danger;

(xiii) a *post-judgment* receiver – This is a receiver by way of equitable execution. This provides a more limited in that such an appointment is made when legal forms of execution would not achieve their purpose.

45.6 *Public Policy*

Normally, public policy considerations are not a factor the court takes into account in granting the above or other ancillary forms of interim relief unless for example application is made by the Attorney General. *A - G v Blake*[117] or statutory provisions to combat crime are involved *C v S*. The grant of interim relief involves balancing considerations of public policy and the rights of the individual.

46. Summary

46.1 Should there be a more codified form of the types of interim relief available and conditions for their grant when dealing with the proceeds of corruption?

No. The remedies are varied enough and the guidelines which have evolved are sufficiently clear.

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[117] [1998] Ch 439, at 462

46.2 Should there be a different, less stringent test for granting some of the forms of interim relief when they are sought in respect of the proceeds of corruption? Analogy could be made with the statutory provisions in the United States whereby proceeds of criminal conduct or property used to facilitate such conduct or which is traceable to criminal acts can be civilly seized and forfeited by the government. There was a conflict of decisions as to whether the evidential standard should be to show merely a 'nexus' between the property and the criminal act or a 'substantial connection'.

Here the tests for granting the various terms of relief are sufficiently clear. Guidelines have developed in the context of cases when dealings have been fraudulent/criminal.[118]

46.3 Are third parties such as banks etc. sufficiently safeguarded/sufficiently accountable?

Yes. A balance has evolved. Courts are vigilant in safeguarding the interests of innocent third parties but need to involve them to ascertain information or prevent the proceeds of corruption or assets acquired from such proceeds from disappearing. Courts have inferred the likely existence of powers relating to interim relief since 'it would be surprising if the Court lacked power to control wilful evasion of its orders by a judgment debtor' (or other wrongdoer) 'acting even through innocent third parties. The jurisdiction is of course one to be exercised with caution, restraint and appropriate respect for the legitimate interests of third parties.'[119]

47. The privilege against self-incrimination

47.1 Section 14 of the Civil Evidence Act 1968:

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118 See Parctical Guidance, p. 81, above.

119 *Mercantile Group (Europe) AG v Aiyela and ors* [1994] QB 366, at 377 (post-judgment freezing injunction and disclosure order).

(a) the privilege against self-incrimination has long been established in English law, deriving it is thought from the practices of the Star Chamber. As long ago as 1812 in *Paxton v Douglas*,[120] Lord Eldon LC explained it as follows:

> 'In no stage of the proceedings in this Court can a party be compelled to answer any question, accusing himself, or any one in a series of questions, that has a tendency to that effect: the rule in these cases being, that he is at liberty to protect himself against answering, not only the direct question, whether he did what was illegal, but also every question, fairly appearing to be put with the view of drawing from him an answer containing nothing to affect him, except as it is one link in a chain of proof that is to affect him.'

(b) The privilege now exists on a statutory footing, having been re-stated in section 14 of the Civil Evidence Act 1968:

> 'The right of a person in any legal proceedings other than criminal proceedings to refuse to answer any question or produce any document or thing if to do so would tend to expose that person to proceedings for an offence or for the recovery of a penalty -
>
> (a) shall apply only as regards criminal offences under the law of any part of the UK and penalties provided for by such law; and
>
> (b) shall include a like right to refuse to answer any question or produce any document or thing if to do so would tend to expose the husband or wife of that person to proceedings for any such criminal offence or for the recovery of any such penalty.'

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120 (1812) 34 ER 502

(c) The privilege is available only in respect of the claimant's own documents and, according to Colin Passmore in his book Privilege, the privilege can probably only be claimed by natural persons. However, the decision of the House of Lords in *Rio Tinto Zinc* Corporation *v Westinghouse Electric Corporation*[121] and of the Court of Appeal in *Sonangol v Lundqvist*[122], have left open the question whether directors, servants or agents of a corporate body could claim the privilege on that body's behalf.

(d) The privilege against self-incrimination, like professional privilege, excuses a party from producing documents or answering questions, but does not excuse him from disclosure of the existence of the document.

(e) Particular difficulties may arise in the case of Search and Seizure Orders providing for the immediate production of documents, some of which may incriminate the defendant. A supervising solicitor may be requested to screen the documents to ensure that no incriminating documents are handed over to the Claimant's solicitors, although it should be noted that this precaution was deemed an inadequate protection for the defendant in the recent case of *Den Norske Bank ASA v Antonatos*.[123]

47.2 *A sufficient risk of incrimination*

(a) The main substantive step for the defendant in establishing the privilege is the need to show a sufficient risk of incrimination. A mere statement by the defendant that the answer may tend to incriminate him is not by itself sufficient to found the claim for privilege against self-incrimination. Instead, the court needs to be satisfied that there is reasonable grounds for the privilege and that the objection is taken bona fide.[124] The test is sometimes expressed as to whether there is a, 'real and

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121 [1978] AC 547
122 [1991] 2 QB 310
123 [1998] 3 All ER 74
124 *Jackson v Gamble* [1983] 1 VR 552

appreciable risk of criminal proceedings... being taken against the witness'.[125] In other words, a remote or slight possibility of legal peril to a witness may not, in a particular case, be sufficient to invoke the privilege and to sustain a refusal to answer a question.[126]

(b) The most recent analysis of the test has come in the Court of Appeal case of Den *Norske Bank*, where Waller LJ took the view that a simple test of whether the disclosed information would, 'increase the risk of prosecution', was to put the test too narrowly. He relied in particular on the dicta of Staughton LJ in *Lundqvist*, where Staughton LJ stated that the substance of the test is that there must be grounds to apprehend danger to the witness, and that those grounds must be reasonable, rather than fanciful. Staughton LJ also listed a number of other factors to emerge from the case law, and these can be summarised as follows:

(xiv) the Affidavit claiming privilege is not conclusive;[127]

(xv) the deponent is not bound to go into detail, if to do so would itself deprive him of protection.[128]

(xvi) 'If the fact of the witness being in danger be once made to appear, great latitude should be allowed to him in judging for himself of the effect of any particular question'[129]

(xvii) The privilege is not available where the witness is already at risk, and the risk will not be increased if he were required to answer.[130]

(xviii) 'If it is one step having a tendency to criminate him, he is not to be compelled to answer' and 'as it is one link in the chain of

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125 See *Rank Film Distributors Limited v Video Information Centre* [1982] AC 380
126 See *R v Boyes* [1861] I B. & S. 311
127 See *R v Boyes, Ex p Reynolds* 20 Ch 294 and *Khan v Khan* [1982] 1 WLR 513
128 See *Short v Mercier* (1851) 20 LJ Ch 289 and *Rio Tinto Zinc*
129 See *R v Boyes, Rio Tinto Zinc* and *Khan v Khan*
130 See *Brebner v Perry* [1961] SASR 117 and *Rio Tinto Zinc*

proof' (see *Paxton v Douglas*). On this last point, Staughton LJ linked it to Lord Wilberforce's comment in *Rank Film Distributors* where he said that the disclosure, 'may set in train a process which may lead to incrimination or may lead to the discovery of real evidence of an incriminating character'. Staughton LJ thought that this may go further, and could protect a man from disclosing the names of those who could give evidence against him. He said he was not convinced that the privilege, by virtue of the doctrine of the links in a chain, extended as far as that, however this was not a point he had to decide in the Lundqvist case.

(xix) Relying on this dicta from Staughton LJ, Waller LJ concluded that the test was not simply whether there was a 'risk of prosecution'. He thought that Coburn CJ put it most neatly in *R v Boyes* when he said:

'Courts must see, from the circumstances of the case and the nature of the evidence which the witness is called to give, that there is reasonable ground to apprehend danger to the witness from his being compelled to answer.'

47.3 Waller LJ also noted that in *Saunders v United Kingdom*,[131] the European Court of Human Rights had used the test of testimony 'which appears on its face to be of a non-incriminating nature - such as exculpatory remarks or mere information on questions of fact - may later be deployed in criminal proceedings in support of the prosecution case, for example to contradict or cast doubt upon other statements of the accused or evidence given by him during the trial or to otherwise undermine his credibility'. Waller LJ himself concluded:

'A witness is entitled to claim the privilege in relation to any piece of information or evidence on which the prosecution might wish to rely in

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131 [1997] 23 ECHR 313

establishing guilt. And, as it seemed to me, it also applies to any piece of information or evidence on which the prosecution would wish to rely in making its decision whether to prosecute or not.'

47.4 Waller LJ further commented in *Den Norske Bank*, that even if a witness could be said to be acting in bad faith in using the privilege against self-incrimination, this will not necessarily cause the privilege to be overridden. In his view the position is not that simple. He said that clearly if there is no risk of prosecution, and if the witness does not believe that he will be prosecuted and is simply not answering the question because he does not wish to provide the evidence or the information, then he will not be entitled to claim the privilege. However, Waller LJ pointed out that witnesses may have mixed motives and, if a question does tend to expose him or her to risk of future prosecution, then it is the duty of the court to uphold the privilege even if the witness is acting from mixed motives or even malafide because he or she does not fully appreciate the risk.

47.5 *Statutory modification of the privilege*

(a) There has been some statutory modification of the privilege against self-incrimination. Certain Acts have removed the privilege in relation to compliance with orders in civil proceedings requiring information to be supplied or documents to be produced which might lead to charges for an offence under that Act. The main example is section 31 of the Theft Act 1968, which removes the privilege in relation to information to be supplied or documents to be produced which might lead to charges for an offence under that act, although the material thus provided is not then admissible in the subsequent, related criminal proceedings. Similar provisions are contained in section 9 of the Criminal Damages Act 1971 in relation to offences under that Act, and section 72 of the Supreme Court Act 1981 in relation to passing off or infringement of intellectual property rights.

(b) These statutory modifications do not extend to the common law offence of conspiracy: see *Lundqvist*.

47.6 *Adequate protection*

(a) An argument often advanced by the Claimant seeking disclosure is that, notwithstanding the risk of incrimination to the Defendant, sufficient protection can be put in place to remove the risks, for example, through assurances that the documentation or information will never be used in criminal proceedings. The instructive cases on this point are *AT&T Istel v* Tully[132] and *United Norwest Cooperatives v Johnstone* (1993) (Unreported). These cases considered the scope of the protection which the Civil courts or the Claimant could offer the Defendant, and the level of protection necessary to displace the privilege. In *Istel*, it was recognised that the civil court could not tie the hands of the criminal courts, or control directly or indirectly their proceedings. Hobhouse LJ noted in *United Norwest Cooperatives* that in general the civil obligations and duties must defer to the compulsory powers of the criminal justice system. Furthermore, the discretionary powers possessed by prosecuting authorities or criminal courts did not suffice to displace the privilege and, in any event, insofar as material would be in the possession of the Claimant, then an application could be made by the prosecuting authorities for its production and the civil court could not at an earlier stage prejudge that decision.

(b) However, in *Istel* itself, the Claimants had gone as far as to obtain express agreement from the prosecuting authorities not to make use of the material disclosed in the civil action for the purposes of subsequent criminal proceedings. It was held that with that safeguard, and if the Defendant could otherwise adequately be protected, then the Defendant would *not* be allowed to invoke the privilege.

(c) The same point arose in *United Norwest*, except that in that case there was no safeguard in the form of an agreement from the prosecuting authorities, merely a proposed injunction directed to the Claimant restraining the disclosure of any information to any police force or

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132 [1993] AC 74

prosecuting authority. The majority in the Court of Appeal held that this did not adequately safeguard the Defendant, and was not sufficient reason for withholding the privilege against self-incrimination. Dillon LJ noted that if the prosecuting authorities subsequently applied to the Court, the Court might well assist them in obtaining any information filed or disclosed in the proceedings, regardless of any order made against the Claimant in the civil action.

(d) It seems, therefore, that the present position with safeguards is that only assurances from the prosecuting authorities themselves are likely to amount to protection sufficient to deprive the Defendant of the right to rely on the privilege against self-incrimination.

47.7 *The risk of self-incrimination in foreign criminal proceedings*

(a) It will be seen from the wording of section 14 of the Civil Evidence 1968 that the privilege against self incrimination applies only to offences under the law of any part of the United Kingdom (it should also be noted that this includes EC law following the decision in *Rio Tinto Zinc v Westinghouse*). Therefore, in civil proceedings in this country, the privilege against self-incrimination cannot prima facie be relied upon by the Defendant in respect of possible self-incrimination under foreign laws.

(b) However, the possibility of self-incrimination under the laws of a foreign state can be taken into account in the exercise of the Court's discretion whether to order a document to be produced or a question answered (*Arab Monetary Fund v Hashim*[133]). In that case, Morritt J took the view that in exercising his discretion, the existence of a risk of self-incrimination in relation to foreign criminal proceedings was a factor he should take into account. However, Morritt J satisfied himself that there was no evidence at all of any steps being taken by anyone against the Defendant so as to give credence to the fears which the Defendant had.

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133 [1989] 1 WLR 565

Similarly, in the case of *Canada Trust Company v Stolzenberg and Others*,[134] it was held that even though the disclosure of information may constitute an offence under Swiss or Liechtenstein law, this did not prevent the English Courts from ordering an individual subject to such legislation to make the requisite disclosure. In the specific circumstances of that case, the Court considered that the risk of prosecution in Switzerland or Liechtenstein was low.

(c) Clearly, the weight to be given in the Court's discretion to any possibility of self-incrimination in foreign criminal proceedings will vary from case to case. Similar factors may come into consideration as operate under the normal privilege, for example, the possibility that sufficient protection may be introduced to guard against the apparent risk of self-incrimination in foreign proceedings. Indeed, in *Arab Monetary Fund*, Morritt J referred to certain undertakings given by the Claimants regarding the use of the information, and it may be that such safeguards are sufficient, in the Court's discretion, to remove any risk that exists. It should also be recognised that whereas in the normal operation of the privilege against self-incrimination in English criminal proceedings, a Claimant's undertaking on its own is unlikely to be a sufficient safeguard, there is no reason why the court should be bound by this in the context of exercising its discretion under *Arab Monetary Fund* in respect of a risk of self-incrimination in foreign criminal proceedings. Indeed, given the current criticism of the privilege against self-incrimination (described further below), a judge exercising his discretion under *Arab Monetary Fund* in respect of a risk of self-incrimination in foreign criminal proceedings, will not necessarily regard it as a dominant discretionary consideration, and is likely to afford it no more than the actual weight it deserves.

47.8 *The application of the privilege in corruption cases*

Those dealing in the proceeds of corruption presently risk involvement in both criminal and civil proceedings. The Summary of the Current Legal Position,

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134 High Court 1 October 1997

above, outlines the various ways in which such a person may encounter the civil law, both as substantive defendant to an action and as a person subject to orders designed to safeguard the proceeds of corruption pending determination of the issues in litigation. Chapter Two this report addresses the position of such a person under the criminal law. For present purposes it is assumed that the relevant criminal offences will be under sections 93A to 93C Criminal Justice Act 1988 (assisting another to retain the benefit of criminal conduct, acquisition possession or use of proceeds of criminal conduct and concealing or transferring proceeds of criminal conduct), which are offences that are capable of being committed by corporate or unincorporated bodies as well as individuals.[135]

47.9 The key issue, however, is that as soon as civil and criminal proceedings co-exist in respect of the same corruption complaint, then the rights of defendants in criminal proceedings and the rights of victims of corruption are likely to clash. This clash of rights will also occur where there is a real risk of criminal proceedings and whether the criminal proceedings relate or are threatened in respect of the same or different subject matter. The defendant may wish to preserve his defence in actual or anticipated criminal proceedings; the victim on the other hand will wish to obtain as much information as possible as to the defendant's dealings in the claimed proceeds of corruption so as to trace them, even though that disclosure may harm the defendant's defence. In fraud and corruption cases it is often the information as to dealings in the proceeds and the speed with which that information is obtained that is vital to the practical success of civil proceedings. The privilege against self-incrimination presently strikes the balance in favour of the actual or prospective defendant.

47.10 Whilst attention is drawn to the possibility that a bank or other legal person may be the defendant to proceedings under sections 93A-C Criminal Justice Act 1988, it should also be noted that a legal person will not always be criminally responsible for the acts of its employees. A legal person can obviously only act

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[135] Section 5 Interpretation Act 1978 and Schedule 1 of that Act

through the medium of human agents, and it is clear that liability in this context attaches only where the agent is a directing mind of the legal person.[136]

47.11 This distinction between the legal person and its employees has important repercussions for the effectiveness of the tracing assistance that may be required by the Court or for substantive civil actions against the legal person itself. Since the privilege is against self-incrimination, the legal person cannot rely on the privilege where the risk of criminal proceedings is against an employee rather than itself. Conversely, an employee who is not a directing mind may be faced with a witness summons requiring the production of his employer's records under his control in respect of which the privilege may well not be an answer even if the employer faces the risk of criminal proceedings. It appears therefore that the privilege will be of direct relevance in circumstances either where the actions of the directing mind of the legal person have given rise to the complaint or where it is an individual who is the person to whom the proceedings are addressed. In other cases the privilege is unlikely to be an answer to the tracing or similar order or to the provision of details in the course of substantive civil proceedings.

47.12 In circumstances where the privilege does arise, there are a number of matters for consideration. First, the mere existence of criminal proceedings or their threat does not necessarily give rise to the right to invoke the privilege. For example, the person's defence to a prosecution under section 93A (assisting another to retain the benefit of criminal conduct) may be that he intended to disclose his suspicions but had a reasonable excuse for his failure to do so.[137] Disclosure of documents relating to the dealings in the proceeds of the claimed corruption may, but will not necessarily, harm that defence, depending on individual circumstances.

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136 See for example *HL Bolton (Engineering) Co Limited v TJ Graham & Sons Limited* [1957] 1 QB 159, at 172, per Denning LJ; and *Tesco Supermarkets Limited v Nattrass* [1972] AC 153, at 171, per Lord Reid

137 Subsection 93A(4)(c) of the 1988 Act

47.13 Again, the mere existence of actual or threatened criminal proceedings should not lead to a successful plea of privilege against self incrimination where the documents could be obtained by the prosecuting authorities in any event: for example relevant documents of substantial value to an investigation may be ordered to be given up under section 93H Criminal Justice Act 1988 subject to savings for legal professional privilege and material excluded by the Police and Criminal Evidence Act 1984.[138]

47.14 The issue of principle to be resolved by Parliament is whether or not the current balance of rights between those claiming to be victims of corruption (or fraud) and those fearing prosecution should be changed. This is not a new issue, having already been the subject of pleas to Parliament by the House of Lords and Court of Appeal, but is no less urgent for delays that have taken place in the past. These past pleas have been put in terms of wider criticisms of the privilege. Lords Templeman and Griffiths have described it as:

> 'an archaic and unjustifiable survival from the past when the court directs the production of relevant documents and requires the defendant to specify his dealings with the plaintiff's property or money.'[139]

47.15 Templeman LJ (as he then was) has also said in a previous judgment:

> 'Where a defendant in a civil action relies on the doctrine against self-incrimination and insists on remaining silent and on concealing documents and other evidence relevant to the action, he is relying on his own wrong doing or on his own apparent or possible wrongdoing to hamper the plaintiff in proof of his just claims in the suit. That is the inevitable result of the doctrine which can only afford protection of the defendant at the risk or price of causing an injustice to the plaintiff.'[140]

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138 See s.11 Police and Criminal Evidence Act 1984 for the definition of excluded material, incorporated by subsection 93H(12) of the 1988 Act

139 *Istel v Tully* [1993] AC 45

140 *Rank Film Distributors Limited v Video information Centre* [1982] AC 380, at 442

47.16 Finally, while in *Den Norske Bank*, Lord Justice Waller clarified the privilege through his review of the case law, he also criticised it, and emphasised the need for Parliament to act to widen statutory modifications such as section 31 of the Theft Act 1968. He said:

> 'If only Parliament had done that for which there has been a need now for far too long, of extending the policy underlining section 31 of the Theft Act to criminal offences more generally, the above sorry saga might never have needed to unfold in the way it did.
>
> If its [section 31] ambit were wider so that it not only applied to offences under the Theft Act but to criminal offences more generally, [the Defendant] could have been required to answer questions even though they incriminated him; [the Claimant] would have been able to protect such assets as they could have traced; and [the Defendant] would have been protected from having the answers used in evidence against him in any criminal proceedings. The call for Parliament to act made in cogent terms in January 1990 by Sir Nicholas Browne-Wilkinson V-C (as he then was) in *Sociedade v Lundqvist*[141] repeated by others since, including Lord Lowry in the House of Lords in *Istel Ltd v Tully*[142] appears to have gone unheeded.
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> Unfortunately, the court itself has no power to fill the gap left by Parliament. It has been recognised, all too clearly, that nothing that a civil court can do can prevent the prosecuting authorities obtaining information supplied. [see Lord Wilberforce in *Rank Film Ltd v Video Information Centre*[143] and *Istel* (above).] If there is to be protection it must be statutory.'[144]

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141 [1991] 2 QB 310, at 338
142 [1993] AC 45, at 69
143 [1982] AC 380 at 442
144 Den Norske Bank ASA v Antonatos and another [1999] QB 271

47.17 The course suggested by Lord Justice Waller is to extend the policy of section 31 Theft Act 1968,[145] which is limited to offences under that Act and which balances the needs of the victim to obtain information and the removal of the privilege in civil proceedings on the one hand, with the alternative protection for the defendant that his disclosure in civil proceedings shall not be used in criminal proceedings.

48. Data protection, privacy and loyalty

48.1 The need for pre-action investigations

(a) Victims of corruption, if they are to have any reasonable prospect of pursuing a civil claim, need to obtain sufficient evidence to frame and prove their cases. In addition, they will generally require interim relief, such as a freezing injunction, if their claim is to be of any value.

(b) It is at this preliminary, investigative, stage that laws protecting privacy and confidentiality pose considerable obstacles. Once sufficient evidence has been obtained to begin an action, the court's powers to order disclosure of information and documents by the defendant and third parties will enable the claimant to cut through many of the protections normally afforded to privacy. For example, a person cannot refuse to give disclosure of documents merely because they are confidential: the court will weigh that confidentiality interest in the balance in deciding whether to order disclosure, but unless it takes the special form of legal

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145 Section 31 Theft Act 1968 provides:

(1) A person shall not be excused, by reason that to do so may incriminate that person or the wife or husband of that person of an offence under this Act—

(a) _____from answering any question put to that person in proceedings for the recovery or administration of any property, for the execution of any trust or for an account of any property or dealings with property; or

(b) _____from complying with any order made in any such proceedings;

but no statement or admission made by a person in answering a question put or complying with an order made as aforesaid shall, in proceedings for an offence under this Act, be admissible in evidence against that person or (unless they married after the making of the statement or admission) against the wife or husband of that person.

professional privilege it will not be an absolute bar to obtaining information.[146]

(c) A victim of corruption, however, will often be reluctant or unable to begin proceedings and invoke the court's coercive powers to obtain information until investigations are quite considerably advanced. Mere suspicion will not be enough to obtain, for example, a freezing injunction or a search order. A freezing injunction requires the claimant to show a 'good arguable case' on the merits.[147] A search order requires the claimant to show a 'strong prima facie case'.[148] Neither of those requirements can be met until the claimant has carried out fairly substantial investigations into the underlying facts.

(d) There are also tactical considerations. A freezing injunction against an unscrupulous defendant is of little value unless substantial assets have already been traced, so that those who hold the assets can be informed of the injunction. Too early an application (e.g. for disclosure of documents by third parties who have become inadvertently mixed up in the fraud,[149] or to trace assets[150]) may alert the perpetrators of corruption to the fact that proceedings are imminent, enabling them to take steps to hide assets and destroy evidence. Although the court may, exceptionally, prohibit the recipient of such an order from disclosing the fact of the investigation to the person investigated, such 'gagging' restrictions are, naturally, unusual. And, unless the recipient of the order can be trusted to comply with them, they are of no value to the claimant.

(e) All this highlights the inevitability that a victim of corruption will, before being able to invoke the court's jurisdiction, have to carry out substantial investigations, frequently without official assistance. The purpose of

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146 *Science Research Council v Nasse* [1980] AC 1028

147 See, *e.g.*, *Ninemia Maritime Corp v Trave Schiffahrtsgesselschaft GmbH (The Niedersachsen)* [1983] 2 Lloyd's Rep 600

148 See, *e.g.*, *Anton Piller KG v Manufacturing Processes Ltd* [1976] Ch 55

149 *Norwich Pharmacal v Customs & Excise Commissioners* [1974] AC 152

150 *Bankers Trust Co. v Shapira* [1980] 1 WLR 1274

those investigations is to pierce the privacy of the suspected perpetrator. It is inevitable that, in doing so, the investigators will face obstacles which the law erects precisely to protect the privacy of individuals and companies.

48.2 Data protection

(a) The Data Protection Act 1984 required those who hold personal data to register that fact, and the purposes for which the data was held. It was an offence under that Act to use data for any purpose other than the purpose for which it is registered (section5(2)). An offence was not committed simply by accessing data: it is necessary to show that some unauthorised use is made of the data.[151] A person who procured the disclosure to him of personal information in contravention of section 5(2), knowing or having reason to believe that the contravention has occurred, also committed an offence.[152] Thus a bank official who provided information to a private investigator which was used in a private investigation into a client's affairs may have committed an offence under section 5(2), and the private investigator may have committed an offence under section 5(6).[153]

(b) The Data Protection Act 1998, which implements the European Communities data protection Directive,[154] modifies these offences. The key offence will now be under section 55 of the 1998 Act, which makes it an offence for a person to obtain or disclose personal data, or to procure the obtaining or disclosure of personal data, knowingly or recklessly without the consent of the data controller. The data controller, meanwhile, commits an offence under section 21 by processing data except in accordance with a registration made under the Act. Moreover, the Act embodies a regulatory machinery designed to ensure compliance with data protection principles, which strictly limit disclosure, and which

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151 *R v Brown* [1996] 1 All ER 545, (HL)
152 Section 5(6)
153 This was assumed by Rix J in *Dubai Aluminium Co v Al Alawi* [1999] 1 All ER 703
154 Dir 95/46/EC

it is the duty of all data controllers to follow. The Act does, however, appear to contemplate that data controllers may be justified in both processing of data and disclosure of data where the purpose is to protect the rights of third parties, even without the data subject's consent.[155]

(c) Another possible source of criminal liability where data is covertly obtained is the Computer Misuse Act 1990. Under section 1 of that Act, a person commits an offence if he causes a computer to perform any function with intent to secure access to any data held in any computer, the access he intends to secure is unauthorised, and he knows that the access is unauthorised when he causes the function to be performed. The offence is committed even though no harm is done to the data that is accessed.

(d) The 1990 Act is primarily directed at hacking, and it would undoubtedly apply in a case where, for example, a private investigator hacked into a bank computer or other database in order to obtain unauthorised access to records kept there. But it is not limited to that sort of conduct. It encompasses direct access to a computer by a person not authorised to make that access.[156] And in *R. v Bow Street Metropolitan Stipendiary Magistrate, ex p. Government of the United States of America*[157] the House of Lords held that a bank employee who was only authorised to access accounts which were assigned to her would have committed an offence under the Act by accessing records of accounts which were not assigned to her. However, the Act does not extend to a case where a person who is authorised to access data for one purpose misuses that authorisation to access it for another purpose.[158]

48.3 Theft Act 1968

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155 See s.35(2) and Schedule 2, para. 6

156 *Attorney General's Reference (No. 1 of 1991)* [1993] QB 94

157 [1999] 3 WLR 620

158 *Director of Public Prosecutions v Bignell* [1998] 1 Cr App R. 1, as explained in *R v Bow Street Magistrate, ex p. U.S. Govt.*, above.

The criminal and civil law naturally protect individuals against gross invasions of their proprietary rights. An investigator who entered premises without permission in order to search for or remove documents would be civilly liable in trespass, and might commit the offence of burglary under section 9 of the Theft Act 1968 (though not if there was no intention to remove anything from the premises). Such conduct is probably rare. A more common practice is that of searching refuse. Although taking documents found in that way is likely theft, copying them is probably neither criminal nor 'iniquitous'. Though it would probably be civilly actionable, either as conversion or for breach of copyright, this liability is no likely to be much discouragement to the use of the technique.[159]

48.4 Breach of confidence

(a) Through the provisions of the Data Protection Act 1998 and the Computer Misuse Act 1990, the criminal law gives quite extensive protection to information held on a computer. Far less protection is given to information held in written form, or to information which exists only in the mind of an individual.[160] Protection in this area is largely dependent on the civil law.

(b) Many people owe duties to others which will include a duty not to disclose confidential information: lawyers and other professionals to their clients, agents to their principles, employees to their employers, banks to their customers. It is a civil wrong for such persons to disclose confidential information. The consequences of doing so may include dismissal (in the case of employees), action for injunctions or monetary remedies, and disciplinary action against professionals. A person who induces a fiduciary to breach a duty of confidentiality also commits a tort.[161]

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159 *Dubai Aluminium Co Ltd v Al Alawi* [1999] 1 All ER 703, at 707h. Presumably this is not theft since (i) there is no intention permanently to deprive anybody of the documents and (ii) it is unlikely to be dishonest. Information, as such (even if it is accompanied by a copyright interest) is unlikely to be regarded as 'property' for the purposes of the Theft Act 1968. See Ian J Lloyd and Moira J Simpson, 'Computer Crime' in Reed (ed) *Computer Law* (3rd ed., 1996), Ch. 8 at pp. 257-261

160 Although the Data Protection Act 1998, when fully in force, will cover certain 'paper' records.

161 See *Law Debenture Trust v Ural Caspian* [1993] 1 WLR 138, 150-151, [1995] Ch. 152, 163; *Boulting v Association of Cinematograph, Television and Allied Technicians* [1963] 2 QB 606, 627, 648; *The Prudential Insurance Co v Lorenz* (1971) 11 KIR 78

(c) The duty of confidentiality is recognised not to be absolute:[162]

> 'The duty of confidentiality, whether contractual or equitable, is subject to a limiting principle. It is subject to the right, not merely the duty, to disclose information where there is a higher public interest in disclosure than in maintaining confidentiality.'

The Public Interest Disclosure Act 1998 embodies this principle in statutory form, by providing protection for employee 'whistleblowers'.

(d) The exception, however, whether in statutory or common-law form, is of very uncertain scope.

(xx) Its scope is uncertain, and probably varies depending on the particular nature of the relationship, but it appears to be quite narrow. A lawyer, for example, is not generally entitled to disclose information which relates to a crime that has already been committed, much less to a civil wrong that has already been committed. It has been said that a banker would not be warranted in disclosing, even to the police, information with regard to a customer suspected of crime.[163]

(xxi) Except in the most extreme cases, it involves a very difficult balancing act. This is hard enough for a court, but harder still for a person who holds confidential information. Unless there is a positive obligation to disclose (coupled with sanctions) the safer course will usually be to maintain confidentiality.

(xxii) It seems unlikely that the public interest will often justify disclosure to a private individual rather than disclosure to a public authority.

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162 *Price Waterhouse v BCCI Holdings (Luxembourg) SA* [1992] BCLC 583

163 Hapgood (ed.), *Pagets Law of Banking* (11th ed., 1996) p. 122, citing *Tournier v National Provincial and Union Bank of England* [1924] 1 KB 461, at 474. This was approved in *Price Waterhouse v BCCI*, above, at 598

48.5 The Human Rights Act 1998

(a) Article 8 of the European Convention on Human Rights and Fundamental Freedoms provides that 'everyone has the right to respect for his private and family life, his home and his correspondence'. This right is not restricted to 'personal' matters in a narrow sense: it extends to some business and professional affairs.[164]

(b) The right to privacy is not absolute: it is permissible for a Contracting State to interfere with it, provided the interference is conducted according to reasonably well-defined legal rules, and is proportionate to a legitimate aim.[165] It might be thought that private investigations would fall outside the regime of the Act altogether, since the Act applies only to 'public authorities'. But a court is always a public authority;[166] the Act may therefore come into play when the court is asked to act upon evidence which has been obtained by means of an infringement of privacy. It may not be possible for the court simply to wash its hands of what has happened, on the basis that the person who caused the infringement of privacy was a private individual, since Article 8 imposes positive obligations on national authorities (including courts) to protect the rights it guarantees.[167]

(c) The result is likely to be twofold. First, it is widely expected that courts will use the Act as a spur to the development, through the common law, of a 'privacy tort'. Such a tort is likely to have a 'public interest' exception, developed by analogy to the public interest exception to duties of confidentiality. Secondly, it is likely that Article 8 will be used by defendants seeking to exclude evidence which has been obtained by means of infringement of their privacy. In those cases, too, it is likely that the court will take its cue from *Chappell*, and from the explicit

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164 *Niemietz v Germany* (1992) 16 EHRR 97.

165 Thus the European Court of Human Rights has held that *Anton Piller* orders are legitimate: *Chappell v United Kingdom* (1989) 12 EHRR 1

166 Human Rights Act 1998, s.6(3)(a).

recognition in Article 8 that privacy may in an appropriate case give way to the need to protect the rights of others. But, quite apart from the predictable uncertainty caused by these developments, ad hoc interferences with privacy by private individuals -- not subject to the independent safeguards and judicial scrutiny available when the court acts -- may be hard to square with the basic demand that interferences should be 'in accordance with the law', however justified they may otherwise seem to be (or transpire to have been). Thus claimants are faced with the familiar circle: until substantial evidence of wrongdoing, it is not right to interfere with privacy; but without interfering with privacy, substantial evidence of wrongdoing is hard to collect.

49. Effect of breach of the civil or criminal law in the course of investigation corruption

49.1 At common law, the fact that evidence has been obtained improperly or unfairly is not ordinarily a reason for its exclusion, and indeed the court probably does not have the power to exclude it. This was true even in criminal cases. In *R v Sang,*[168] the House of Lords held that:

> 'save with regard to admissions and confessions and generally with regard to evidence obtained from the accused after the commission of an offence, [the trial judge] has no discretion to refuse to admit relevant admissible evidence on the ground that it has been obtained by improper or unfair means. The court is not concerned with how it has been obtained.'[169]

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167 See, e.g., *Lopez Ostra v Spain* (1994) Series A, No. 303-C.

168 [1980] AC 402.

169 See also *Kuruma v R* [1955] AC 197, 203; *R. v Leatham* (1861) 8 Cox CC 498, 501.

Although this rule has now been altered for criminal cases as a result of section 78 of the Police and Criminal Evidence Act 1984, it appears to remain the rule in civil matters.[170]

49.2 Nevertheless, the fact that evidence has been obtained unlawfully does not mean that a potential claimant can break the law, or procure others to do so, with impunity. In *Dubai Aluminium Co Ltd v Al Alawi,*[171] Rix J held that all the material generated by an investigation which involved 'iniquity' is subject to disclosure: the privilege which would normally attract to documents produced for the purpose of contemplated litigation, or for the purpose of giving or receiving legal advice, is over-reached by the 'iniquity' involved. Rix J was concerned that the court should not be seen to sanction such conduct. It seems likely that this principle would extend also to taking the conduct of the claimant into account in deciding whether, as a matter of discretion, interim relief such as a freezing injunction, should be granted.

49.3 One uncertain question is how far the Human Rights Act 1998 may affect this approach. By virtue of Article 6 of the Convention, everyone is entitled to a fair trial -- in civil as well as in criminal cases.[172] No doubt the precise requirements of fairness will differ as between different types of case,[173] but the orthodox view that a civil judge is not able to exclude evidence because of the manner in which it was obtained will have to be reconsidered. It would be wrong to suppose that evidence must always be excluded because there has been some impropriety in the manner in which it has been obtained. But the court will always need to ensure that the proceedings are, viewed as a whole, fair (and to safeguard other Convention rights, such as those given by Article 8, striking a fair balance between individuals). It will also have to consider the fairness *to the victim*, and the need for victims to be able to pursue civil proceedings in order to vindicate their rights. Striking a fair balance will not be easy, but it is hard to

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170 But see *ITC v Video Exchange* [1982] Ch 431, where evidence obtained in contempt of court was excluded.

171 [1999] 1 All ER 701

172 See, *e.g.*, *Fayed v United Kingdom* (1994) 18 EHRR 393

see why it should always be struck in favour of the party seeking to rely on the improperly obtained evidence, as the orthodox rule suggests.

49.4 There remains the question of how far a claimant is under any duty to reveal how it has carried out its investigations. If, as will usually be the case, an application is made for some form of interim relief without notice to the defendant, then the duty to make full and frank disclosure[174] will often require such information to be given. For example, if the investigation has involved 'iniquity' of the sort discussed in *Dubai Aluminium*, which would be relevant to the exercise of the court's discretion, that fact ought to be disclosed. In other cases, the requirement that the sources of information should be identified[175] in written evidence may require details to be provided of, for example, the identity of an employee or agent of the defendant who has provided relevant information.[176]

50. Conclusion

(a) Civil and criminal laws designed to protect individual privacy make it difficult to investigate corruption with a view to launching a civil claim. Claimants and third parties who are scrupulous about their civil and criminal obligations will find it difficult to carry out a thorough investigation. Those who are less scrupulous should be deterred by the possible sanctions (including prejudice in any resulting civil proceedings) and by the fact that the duty of full and frank disclosure is likely to require revelation of the way the investigation was carried out. Until quite recently,[177] the difficulties have been largely ignored.

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173 See Paul Davies, 'Self-Incrimination, Fair Trials, and the Pursuit of Corporate and Financial Wrongdoing' in Markesinis (ed), *The Impact of the Human Rights Bill on English Law* (1998), Ch 6

174 CPR Part 25 Practice Direction, para. 3.3

175 CPR Part 32 Practice Direction, paras 4.2 (affidavits), 18.2 (witness statements)

176 But, exceptionally, such identification may be omitted (*e.g.* to protect a source who would otherwise be in physical danger). That omission probably goes to the weight (rather than the admissibility) of the evidence: *Deutsche Ruckversicherung AG v Walbrook Insurance Co Ltd* [1995] 1 WLR 1017, 1025, *Compagnie Noga d'Exportation et d'Importation SA v Australia and New Zealand Banking Group Ltd* (Rix J, 27.7.99), transcript, at p. 26

177 Recognition of the problems surrounding data protection appears to have surfaced first in 1997, when the Bar Council published guidance (reprinted in Gee, *Mareva Injunctions and Anton Piller Relief* (4th ed, 1998), p. 121. Judicial recognition emerged in *Dubai Aluminium*, in 1998.

(b) There is clearly a real problem here; but it is a problem that is very hard to resolve. Until investigations have reached the stage of establishing reasonably strong grounds to suppose that a person has been guilty of wrongdoing, the law rightly protects privacy, especially against self-interested infringement by unaccountable individuals. Wrongdoers can hide behind that protection; but it is sometimes impossible to distinguish between those who deserve the protection and those who do not deserve it without undermining the protection itself.

POSSIBLE CHANGES TO ENGLISH CIVIL LAW

51. Liability for Knowing Receipt and Dishonest Assistance

Codification and Clarification

51.1 It is our view that what is required is clarification of the existing law. The law relating to knowing receipt and dishonest assistance (including in the context of the conflict of laws) is insufficiently certain for market participants to take action confident of their position. The law would therefore benefit from codification, with (ideally) the introduction of a clear statutory safe harbour for market participants so as to make clear when liability would not be imposed on those who have not been knowingly involved in receiving laundered money or dishonestly assisting a money launderer.

51.2 Any such codification would need to be undertaken generally, not just in relation to those in receipt of laundered monies or assisting the money launderer. The creation of an exceptional regime to benefit the victims of money laundering only would create unacceptable inconsistencies between conduct relating to laundered monies and conduct associated with more general wrongdoing.

It seems probable that, until recently, many of these issues have been simply ignored, or dealt with by employing private investigators while refraining from asking too many questions about their methods.

51.3 As identified in paragraph 53, below, we endorse and repeat previous calls for the extension of the Theft Act 1968 section 31 scheme for restricting the privilege against self-incrimination.

51.4 Possible Changes That We Have Considered But Rejected

We have considered a number of changes to the law that could in principle be made with a view to strengthening it. However, our view is that the law as it stands strikes the right balance between the respective interests of victims of corruption and financial institutions and that these changes should not be made.

(a) *Liability could be imposed on those who control the proceeds of crime.*

This would impose liability on fund managers who might otherwise escape liability for knowing receipt on the basis that they frequently do not receive any interest in the assets that they manage, whereas those who do hold the assets, the custodians, will rarely have any knowledge of what is being managed. This point would be of particular importance where the case for dishonest assistance is not made out and the assets cannot simply be recovered from the custodian.

(b) *Liability could be extended for firms in respect of the actions of their employees involved in money laundering.*

This could perhaps include the imposition of liability on firms which fail to maintain adequate internal controls to prevent employees using the firm's name and facilities to assist in money laundering activities.

(c) *The availability of the defence of "change of position" and "bona fide purchaser" could be lessened for those who have received the proceeds of laundered monies.*

We note in this context the suggestion, made elsewhere in this report, that the position with respect to the receipt of money should be brought in line with the law on the receipt of assets with the result that the state of a recipient's knowledge would only be relevant as a defence to a claim against him (as in the case of claims to recover assets). Instead of the claimant having to prove

knowing receipt, the institution would have to prove that they were a purchaser in good faith, or change in position.

(d) The instances of liability of those involved as assisters of money laundering could be extended.

For many years there has been a debate as to whether a person who assists another in a breach of fiduciary duty should only be liable on proof of dishonesty, or whether it would suffice for the claimant to prove lack of care. Where there is a contract or a relationship akin to contract between the assister and the claimant (for instance, where a company claims against its accountants or lawyers), lack of care will suffice. But in the absence of a contract it has now been decided that dishonesty is a necessary (and sufficient) condition for liability[178]. It would, of course, be possible for the law to be changed, but probably not without legislation at this stage.

It might be argued that there is a case for widening the condition of liability to cover negligence (even where there is no contract). The Criminal Justice Act 1988[179], Drug Trafficking Act 1994, Prevention of Terrorism (Temporary Provisions) Act 1989[180] and the Money Laundering Regulations 1993[181] set out what can be described as a requirement to take reasonable precautions to forestall or prevent money-laundering. An adviser or agent or banker may be guilty of an offence if he merely suspects that the arrangement he has entered into is one which relates to any person's proceeds of criminal conduct. It is not necessary that he should have known the identity of the criminal or the nature of the crime. It might appear anomalous to some that a bank or professional can be guilty of this offence but that the victim may not be entitled to compensation because the degree of suspicion was not such as to make the defendant dishonest so as to be liable under the civil law.

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178 *Royal Brunei Airlines v. Tan* [1995] 2 AC 378, 392.
179 As amended by the Criminal Justice Act 1993.
180 As amended by the Criminal Justice Act 1993.
181 SI 1993/1933.

(e) *The categories of potential claimants could be extended to include those who never received any interest in the monies that were laundered (which will frequently be the case for victims of money laundering).*

This point is important. In the absence of a reform of this nature, it is not clear how English law could be adapted to remedy the inability of the courts to benefit the true victims of corruption. The usual claimants will be states or other governmental organisations, not the citizens who suffer from the money launderer's activities. It will not be possible, through any English legal process, to ensure that any monies recovered by those organisations will ultimately be used for the benefit of the citizens who suffer. English law cannot govern the relationship between a foreign state and its citizens or a foreign corporation and its shareholders. English courts cannot be invoked to protect assets purchased with monies derived from an English court's judgment once those assets have been transferred to the foreign claimant's own jurisdiction. An English court could not stay the execution of a judgment in favour of a foreign state on the ground that it did not trust those in power in that state not to use the money for their own personal purposes rather than for the benefit of the citizens of that state as a whole. So long as it impossible for the English courts to control the use to which the compensation is put by the claimants, an increase in liability on participants in the financial markets could be pointless or counter-productive.

(f) *The conflict of laws rules relating to assistance given abroad could be brought into line with other areas of the law.*

As we have noted above, English case law now favours the view that where the assistance has taken place wholly or partly abroad the claim will fail unless the assistance is wrongful by English law and there is no defence under local law. This principle is similar to that which formerly existed in respect of foreign torts. Since the Private International Law (Miscellaneous Provisions) Act 1995 the court has been required to apply the applicable law, which is generally the law of the country in which the events, or the most significant elements of the events,

occurred[182]. The law applicable to "assistance" liability could now be brought into line with that adopted for torts.

52. The need for (and desirability of) reform?

52.1 We refer to the matters set out above in turn.

(a)-(f) General extension of liability

Overall, we do not believe that the liability imposed on participants in the financial markets should be extended at all. Any extension of liability might have a significant impact upon the competitiveness of the financial markets in the United Kingdom. Internationally, regulators are seeking to impose capital charges for "operational risk", which is likely to cover the risk of liability for actions of recalcitrant employees. An increase of liability for institutions would have a significant impact on the competitiveness of those institutions in their UK activities.

Furthermore, whilst the adoption of some of the above reforms would appear superficially attractive (for providing additional protection to the victims of money laundering), the provision of that protection would be made by institutions and professionals involved in the financial markets in the United Kingdom. Under existing legal principles developed in another context, these institutions and professionals would not expect to be liable for the losses suffered by money laundering victims in such circumstances. They are not the parties naturally responsible for the losses suffered by the victims and it would seem inappropriate to attempt to cure any injustice created by the money launderer by means of the extension of liability of intermediaries.

(c),(d) Extension of accessory liability

More specifically, we are not persuaded of the case for any extension of accessory liability (for assistance provided to another in breach of fiduciary duty). The function of the criminal law in this context is to place the law enforcement agencies in a position where they can take appropriate action.

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182 s.11.

Liability arises under the civil law for an entirely different purpose. It rebalances the positions of those affected and involved, but it does this with regard to the fault of the parties who are to be held liable.

A wider test of accessory liability would not of itself deprive the corrupt of their gains. It seems unjust to increase the burdens on banks and professionals unless they have clearly been at fault. It is unclear that the law as it stands distinguishes inappropriately between those who have been at fault and those who have not.

As regards a possible amendment to liability for knowing receipt so as to mirror the position for the receipt of assets (discussed in this Report at [ ]), it would seem to us difficult to question the premise that liability should depend on sufficient knowledge on the part of the recipient. The issues at stake for the financial markets do not necessarily match those relating to goods. Indeed, in the securities markets we believe there are strong arguments in favour of reducing liability for those in receipt of assets to match the position for the receipt of monies (rather than vice versa). Transactions are conducted with such speed that, in the absence of knowledge, the need for certainty should be made paramount.

(e) Extension of categories of claimants

We are not persuaded that it would be practicable to extend the categories of potential claimant. Obvious problems arise in this context in identifying the class of true beneficiaries and ensuring that they are the ultimate recipients of any monies recovered.

(f) Conflict of laws rules

It is very doubtful that a reform of the conflict of laws position would be workable. Most civil law countries would have no similar rule to apply as they do not have constructive trusts.

52.2 Injustice in the existing law

In some respects the law would benefit from reform in favour of financial institutions and professionals. Under the existing law, once liability for dishonest assistance or wrongful interference with goods is established, the court has little means for limiting the consequences by reference to the extent to which the wrongdoing contributed to any loss, and regardless of whether any other persons involved can be made to share in the burden. The position contrasts with that in the criminal law, where the court can choose the appropriate sentence.

Justice would seem to require that the court should have power to limit the extent of that liability. However, this issue does not in itself warrant legislative attention. We would hope that the courts will in due course strike a more appropriate balance.

52.3 The need for appropriate clarification

In conclusion, it is our view that what is required is clarification of the law on knowing receipt and dishonest assistance (as outlined in 1.1 above), not reform or the extension of liability in this area. The law at present strikes an appropriate balance between the interests of the victims and the needs of financial institutions.

53. Self-incrimination: extending the policy of the Theft Act 1968 section 31

53.1 There is no reason in principle why the scheme contained in legislation such as the Theft Act 1968 (section 31) should not be extended - either generally, or to offences relating to corruption in particular. The scheme would remove the privilege against self-incrimination in respect of information supplied or documents produced in the course of civil proceedings when the supply or production might lead to charges for an offence under the money laundering legislation. However, the scheme would then ensure that information so provided would not then be admissible in subsequent, related criminal proceedings. This would provide protection for persons claiming to be victims of corruption whilst at the same time ensuring that the actual or anticipated defendant was not visited with criminal sanctions as a result of that disclosure.

This development is one that would appear to have the support of many judges, whose pleas for the general development of the Theft Act scheme would seem to have been ignored by Parliament in the past.

54. Other Possible Measures for Discouraging Corruption

54.1 We have considered in addition the following possible reforms as techniques to discourage corruption.

(a) There could be a requirement upon auditors to test for corrupt practices and to report their findings. This might discourage the paying of bribes by organisations subject to audit requirements in the UK or in international organisations based in the UK which are concerned with the giving of aid.

(b) Arrangements could be made for the exchange of information by the Inland Revenue and prosecuting authorities concerned with corruption. This might assist in the detection and prosecution of those who bring the proceeds of corruption to the UK.

However, the introduction of any measures of this sort should be made after appropriate consultation and consideration by the established law reform bodies.

CHAPTER FOUR

THE FUNDING OF ACTIONS

55. Executive summary

55.1 In this chapter, the options for funding large-scale corruption actions for the recovery of assets and the seizure of assets as part of civil claims for damages for human rights abuse are considered. We have sought to set out our understanding of particular funding mechanisms which are either available to be used in England and Wales or are available in other jurisdictions and thus could potentially be made available in England and Wales.

55.2 We have identified six alternative methods of funding corruption cases:

1. Conditional fee arrangements are now used in England and Wales to finance the cost of some forms of civil litigation. This has otherwise been termed 'no win, no fee' litigation and is distinct from the contingency fee regime which is permitted in the United States. Conditional fees require a degree of risk sharing between the client and the lawyer. It may be that due to the enormity of the potential costs involved in this type of litigation and the fact that such cases tend to be one-off (thus reducing the opportunity for the lawyers or accountants to spread the risk of losing one case against the probability of winning others), this is a less attractive form of funding.

2. After the event litigation costs insurance enables the claimant to insure against the contingent liability for its own costs and disbursements in the case and also for the contingent risk of incurring costs and disbursements for the defendant in the case. This form of funding has been used in a small number of large-scale cases in the last five years. It may provide some level of risk management and accounting certainty to the claimant, which may be a public body. It may also provide an incentive for the defendant to settle the case in view of the claimant's cost protection. The insurance policy may also form the basis of security for a loan to finance

the costs of the actual litigation. However, any insurer requires that there is a reasonable prospect of success.

3. Venture capital may be used to allow victims to assign a partial share of their claim to an owner of capital, who in return funds the cost of the litigation. The venture capital company funds the action in the expectation that the case will win and the venture capital company will receive satisfaction through its partial share of each of the victims' claims, whilst the victim receives damages to the value of its remaining interest in the claim.

4. At least the initial investigatory stages of any litigation could be financed by an international lending agency or bilateral aid agency. We consider that litigation which ought to have the effect of deterring corruption by Public Sector Officials and securing recoveries to, in part, permit repayment of loans owed to the international lending agency could be within the mandate of such international bodies. We also believe that funding multi-jurisdictional litigation by such an international body would enhance the international respectability and accountability of such litigation.

5. Large law firms might be prepared to take on an international corruption case on a pro bono basis if they anticipated receiving worthwhile positive Press coverage from their involvement or wanted to use the case as a means of showing their expertise in the area in order to win further work.

6. 'Booty hunters' are considered in passing in the report for the sake of completeness. We consider whether there is a role for the 'booty hunter' in financing the tracing of assets in corruption cases in return for a share of the assets if they are recovered.

55.3 Case management issues are also considered of relevance by the group due to the number of professionals from different disciplines who would need to be involved in cases of this magnitude and complexity.

55.4 Finally, we consider the ethical aspects of different methods of financing litigation. We note that conditional fees and after the event litigation costs insurance are currently permitted by the ethical rules governing solicitors and barristers in England and Wales. Success fees, whereby the fee is based on a percentage of the ultimate recovery, are not permitted for lawyers in England and Wales, although they are a method of funding litigation which could be used in certain other jurisdictions, most notably certain states in the United States, and they can also be used by forensic accountants, where they are not engaged as experts to assist the court. We note that, subject to certain exceptions (such as insolvency law), venture capital finance or other purchasing of unliquidated claims is not permitted in England and Wales by the doctrine of champerty and maintenance. However, we consider whether a reform of this doctrine might facilitate greater access to justice for victims from developing countries, who are unable to pay the high costs of litigation in England and Wales.

56. Recommendations

56.1 In order to improve access to justice for the victims of corruption, we recommend:

1. International and bilateral agencies, including the World Bank, should consider whether they are prepared to finance at least an initial investigation into the possibilities of asset recovery litigation in cases of corruption by Public Sector Officials.

2. The Government should undertake further study to consider the place of the doctrines of maintenance and champerty in the legislative framework of the twenty first century and whether the demands of public policy have changed such that these doctrines are in need of reform.

3. As a part of such a study, the Government should consider whether the use of venture capital and United States-style contingency fees should be

approved forms of funding for litigation undertaken in England and Wales.

4. Whilst the provision of legal services on a pro bono basis will never provide a complete solution to this type of costly and risky litigation, the Law Society and the Solicitors Pro Bono Group should consider including this type of work in any future survey of pro bono work, to ascertain whether any of the large law firms would be interested in undertaking this sort of international corruption litigation on a pro bono basis.

57. The nature of the problem

57.1 Legal action to recover money misappropriated by Public Sector Officials tends to be very expensive. Recovery is an avenue which is beyond the financial reach of many of the victims of such wrongdoing. In this chapter, we consider the mechanisms for the finance of legal actions that are or could be available to the victims in England and Wales, and how these might be used to assist the victims of misappropriation to recover their assets. We have assumed, for the purposes of this paper, that the costs of mounting an effective multi-jurisdictional investigation and legal action will be in excess of £1 million, and they may be considerably in excess of this amount.

57.2 Examples of the type of misappropriations of funds which we have considered are the well-publicised cases of alleged corruption by ex-President Mobutu of the former Zaire, ex-President Marcos of the Philippines, ex-Prime Minister Bhutto and her husband, Asif Ali Zadari, of Pakistan, President Milosevic of Serbia and others. In considering these cases, we have relied on Press reports and have made no attempt to verify the accuracy of such reports.

57.3 The types of victims in cases such as these can be summarised as either:

- sovereign states; or

- victims of human rights abuses or other individuals who have suffered loss.

57.4 Individual victims are often unlikely to have access to sufficient funds to mount a legal action in their own right, as are sovereign governments of many of the developing countries which have suffered from such misappropriations by Public Sector Officials. Governments of richer nations may have difficulty in justifying the spending of large sums of money on legal actions in jurisdictions outside their own where the likely outcome is subject to a high degree of risk.

57.5 Litigation may be commenced in England either because the underlying act of wrongdoing was committed in this jurisdiction, because the relevant assets are located in this jurisdiction, or because the proceeds of the offending act passed through this jurisdiction, most commonly due to the role of the City of London as a major international financial centre.

57.6 The traditional approach to funding a legal action is for the client to be charged fees which are dependent on the number of hours spent on the case by the lawyer and agreed hourly rates. Such costs are normally recoverable from the losing party at the end of the legal action.

57.7 More recently, there have been a number of innovations in methods of funding legal actions in England and Wales, and in this chapter we consider how these may be applied to legal actions such as multi-jurisdictional corruption cases. We also consider methods of funding legal actions which are not currently permitted in England and Wales, but which may be used in other jurisdictions, such as the United States and which may be particularly applicable to this type of legal action.

57.8 The recovery of the proceeds of corruption tends to be very expensive to initiate because:

- the assets misappropriated have typically been transferred through several jurisdictions, many of them offshore financial centres including the Channel Islands and the Isle of Man, before arriving in their current physical location;
- there is usually a need for work to be carried out by forensic accountants, investigators and lawyers in other jurisdictions, as well as by solicitors and barristers in England and Wales;
- the defendants are often able to use the misappropriated monies to hire experienced legal teams to act in their defence;
- the litigation will typically need to be conducted in a number of jurisdictions simultaneously, and appropriate use will need to be made of interim forms of relief such as freezing and tracing orders and their equivalents; and
- the courts may require the posting of substantial sums into court to act as cross-undertakings in damages or costs, particularly in the case of litigants from overseas, before they will grant interim relief such as freezing injunctions.

57.9 The cost of mounting a legal action for the recovery of assets may be divided into legal costs, court fees and the costs of evidence gathering by forensic accountants and investigators. In smaller cases, solicitors may agree with their client not to be paid until the outcome of the case is known, but few firms of solicitors are likely to be able to take on cases of this size, on a one-off basis, without being paid by their clients on an ongoing basis.

57.10 In addition, the costs incurred in respect of the forensic accountants and investigators are likely to be incurred at the beginning of any legal action, when the evidence is being sought. Again, these professionals will expect payment early on, either from the client or from the instructing solicitor, which is an additional reason why a funding mechanism needs to be put in place at the outset. These are costs which are typically not covered by conditional fee

arrangements or litigation costs insurance and which may be significant in this type of litigation; thus, a method of funding such costs needs to be considered.

57.11 It should be pointed out that larger firms of solicitors, forensic accountants and other professionals may be prepared to carry out some initial work, particularly of an investigative nature, without any guarantee of payment, in order to begin to ascertain whether their client's case has any reasonable prospect of success – if they believe that the case may ultimately prove to be profitable to them or if they believe that it could be in their interests to carry out such initial work without payment, either because of a desire to continue or build up a positive relationship with their client or because of the prospect of positive publicity, for example by way of Press coverage. However, the extent of such initial free work is likely to be limited, particularly in the context of the high risk which attaches to this type of work – in terms of failure to recover assets, adverse Press publicity or a change in the client's intentions during the course of the litigation.

58. Assistance from criminal investigations

58.1 One method of funding recovery actions in cases of political corruption, which we have not considered in detail, is for the investigation and litigation to be conducted by a government agency such as, in the English context, the police and the Crown Prosecution Service or the Serious Fraud Office.

58.2 If the remedy sought is a criminal remedy, this will be the normal route for investigation and consequent litigation. The relevant criminal offences of corruption and money laundering are considered in Chapter Two. The police and the Serious Fraud Office will also often be involved in cases originating in overseas jurisdictions where there is an English aspect to the investigation or crime.

58.3 We have concentrated in this paper on the funding of civil actions. In certain countries in Europe, evidence collected in a criminal investigation by investigating magistrates can be used in civil cases once the suspect has been indicted. In the United States, there is also provision for the criminal authorities

to hand over their information for use in a civil action, although in practice there is often a reluctance by prosecutors to get involved in civil cases.

58.4 In addition, forfeiture of the proceeds of crime is possible in the United States and takes two distinct forms – criminal and civil. Nearly all contemporary forfeiture involves the civil variety. Criminal forfeiture operates as punishment for a crime, and therefore requires a criminal conviction; in this form of forfeiture, the state takes the assets in question from the criminal. In addition, the criminal authorities are able to obtain an order of restitution[183] to provide restitution for a person directly and proximately injured by a criminal act. However, as a practical matter, criminal restitution is only rarely effective.

58.5 Civil forfeiture in the United States rests on the idea (a legal fiction) that the property itself, rather than necessarily the owner, has violated the law. Thus, the proceedings are directed against the *res*, or the thing involved in some illegal activity specified by statute. Unlike criminal forfeiture, *in rem* forfeiture does not require a conviction or even an official criminal charge against the owner. There are a number of categories of property subject to forfeiture, as set out in the case *of Bennis v Michigan;*[184] these are (i) contraband; (ii) proceeds from illegal activity; and (iii) tools or instrumentalities used in the commission of a crime. These categories of property are widely construed.

58.6 In the UK, the criminal courts have limited ability to compensate the victim from the assets of a convicted criminal, and there have been few major successful recoveries to date under the Proceeds of Crime Act 1995, the proceeds of which are retained by the state in any event, rather than being used to compensate the victims.

59. Funding an initial investigation

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183 Pursuant to the provisions of section 3663 of Title 18, USC

184 517 US 1163 (1996)

59.1 A further method of funding this type of legal action is to finance more complex legal actions out of the proceeds of earlier successful asset recoveries. This approach is commonly used by Insolvency Practitioners who may, for example, sell an asset and use the proceeds to fund a civil action for recovery of further assets for the benefit of the creditors.

59.2 In this approach, a relatively simple and cheap litigation, if such is available, is pursued initially. Such a case might be one where the asset was easily identified, where clear and adequate proof is available that it was purchased using funds obtained through corruption and where the asset has been frozen.

59.3 Pursuing a relatively simple action initially has the positive effect of testing the adequacy of the evidence and the strength of the case before more complex litigation is pursued. It may indeed result in the abandonment of further litigation on the grounds that the case is too weak unless further more persuasive evidence can be obtained.

60. Methods of funding asset recovery actions

60.1 We now consider six alternative methods of funding this type of corruption litigation, as follows:

i) conditional and contingent fees;

ii) after the event litigation costs insurance;

iii) venture capital;

iv) an international fund;

v) pro bono work; and

vi) 'booty hunters'.

60.2 The final section of this chapter considers the ethical issues which arise in connection with some of these methods of funding litigation.

61. The nature of contingency funding in non-contentious work

61.1 Contingency fee arrangements have always been permitted for non-contentious work in England and Wales. Indeed, section 57(2) of the Solicitors Act 1974 specifically authorises percentages and commissions as a means of charging for non-contentious work. However, a contingency fee arrangement is unenforceable if it covers contentious work.

61.2 The essential, although simplistic, distinction between contentious and non-contentious work is whether proceedings have been begun in a court.

61.3 The prospects must be remote of securing the proceeds of corruption by negotiation and settlement without the institution of court proceedings. Accordingly, in the civil courts of England and Wales a true contingency fee arrangement under which the lawyers would be rewarded by a percentage of what is recovered could not be entertained.

62. The nature of contingency funding in litigation

62.1 Until the Courts and Legal Services Act 1990, any form of contingency funding was contrary to the common law doctrine of champerty and was unenforceable (not unlawful) in litigation.

62.2 The 1990 Act introduced the concept of conditional fee agreements, the essential elements of which are:

- no fee for the lawyer if the case is lost and the fee if the client wins is an hourly rate enhanced by up to 100 percent as a success fee;

- the client has to fund its own disbursements and in particular court fees and experts' fees but can of course seek a separate conditional fee agreement to cover counsel's fees; and

- in most litigation, after the event insurance is desirable in support of the conditional fee agreement to protect the client against the risk of losing. This provides indemnity in respect of the opponent's costs and the client's own disbursements.

62.3 Section 27 of the Access to Justice Act 1999 substitutes a new section 58 of the Courts and Legal Services Act 1990. All contingency fee type arrangements are now lumped together under the generic description of 'conditional fees':

> 'A conditional fee agreement is an agreement with the person providing advocacy or litigation services which provides for his fees and expenses, or any part of them, to be payable only in specified circumstances.'

The Act provides that a conditional fee agreement which does not satisfy all of the conditions specified in Section 58 '*shall be unenforceable*'.

62.4 Divisional Court decisions of *British Waterways Board v Norman*[185] and *Aratra Potato Co Ltd v Taylor Joynson Garrett*[186] had held, respectively, that the client must be under a liability to pay its lawyers whether they won or lost and that the lawyers could not offer to discount their fees in the event of a loss. The Court of Appeal decision in *Thai Trading v Taylor*[187] distinguished these arrangements as 'contingent fee' agreements. The Access to Justice Act has now provided them with statutory recognition.

62.5 The Lord Chancellor can prescribe regulations for these contingent fee type agreements but has indicated that he is not minded to do so at present.

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185 (1993) TLR 11 November
186 SJ 16 June 1994, 587
187 [1998] 3 All ER 65

Accordingly, a solicitor conducting corruption litigation could agree a substantial fixed fee, payable only if successful, or a high hourly rate which could be deemed 'reasonable' for litigation of that nature – again payable only on success or with a discounted rate in the event of failure.

62.6 Instead of a contingent fee, would a conditional fee agreement with a 100 per cent success fee be potentially more attractive to persuade a lawyer to fund such litigation? The reward for the lawyer has to reflect the risk of not getting paid at all, the absence of any payments on account for the work throughout the case and possibly some help with the actual funding of disbursements such as court fees. If the basic hourly rate was high enough, then the success fee might adequately reflect those aspects. However, the lawyer would be taking a risk. Civil Procedure Rules 1998, Part 48, Rule 9, permits the client to seek detailed assessment of the conditional fee agreement between him/herself and his/her own solicitor. The Costs Judge can review both the hourly rate and the success fee. The 1990 Act prevents a conditional fee agreement from being a contentious business agreement and it is not possible therefore for the solicitor to secure agreement on the hourly rate on a basis which cannot subsequently be challenged by the client.

62.7 The Access to Justice Act includes the much-heralded provisions for possible recovery of success fees and insurance premiums. The relevant provisions are set out below:

Section 29:

> 'Where in any proceedings a costs order is made in favour of any party who has taken out an insurance policy against the risk of incurring a liability in those proceedings, the costs payable to him may, subject in the case of court proceedings to rules of court, include costs in respect of the premium of the policy.'

The explanatory notes confirm that this is not limited to insurance policies taken out alongside a conditional fee agreement.

The new Section 58A(6) of the Courts and Legal Services Act 1990 states:

> 'A costs order made in any proceedings may, subject in the case of court proceedings to rules of court, include provision requiring the payment of any fees payable under a conditional fee agreement which provides for a success fee.'

A consultation paper is current as to how these provisions are to be brought into effect and the Rules Committee is then going to be required to come up with the answers.

63. Will conditional fees work in corruption litigation?

63.1 The forms of conditional fee funding now available open up the possibility that a law firm will be prepared to conduct this type of litigation on a 'no win, no fee' basis. This is potentially less attractive than the unenforceable contingency fee which would provide a direct share of the proceeds as permitted in some other jurisdictions such as the United States. The lawyers will have little idea of exactly how much time may be required and therefore what the value of any success fee may be.

63.2 Lawyers, both solicitors and counsel, would be ill advised to contemplate any such arrangement unless they had absolute confidence in the instructing client. In particular, they would need to be as satisfied as they could be that the client would accept the financial arrangements agreed and not seek to challenge them, following a successful outcome, in order to maximise its own return.

63.3 With conditional fees in commercial litigation, both lawyers and clients have to be aware of the following:

- risk sharing between lawyer and client gives rise to an inherent conflict of interest - two parties are buying and selling a product;

- regular business in the way of repetitive litigation lends itself to conditional fee funding more obviously than one-off major cases. In the latter there is no swing to ride if you fall off the roundabout;

- there may very well therefore be a need for negotiation and independent advice upon the terms of the conditional fee agreement itself;

- in particular, the definition of 'success' may be a matter for considerable negotiation. What if judgment is obtained but is not capable of being enforced on a cost-effective basis? There will need to be careful discussion as to the possible outcomes of the litigation. If, instead of financial compensation, an acceptable outcome would be a Human Rights Statement, then manifestly a conditional fee arrangement would be wholly unattractive to the lawyers;

- what protection do the lawyers have if the client decides to withdraw instructions before success is achieved? Most conditional fee agreements in routine litigation provide that the client would then become liable for all of the work done at the basic hourly rate. That assumes that the client will be in a position to pay. In addition, it would be inadequate remuneration for the carrying of risk and absence of funding in a case where success had become assured and the client changed to other lawyers on an ordinary funding basis to conclude the litigation;

- solicitors operating Conditional Fee Arrangements (CFAs) in commercial litigation place increased reliance on a client's credibility on matters of fact. Warranties should be sought and responsibility formally allocated. The clients in CFA litigation need to be advised that they will compromise their own control of the proceedings. Solicitors expect to be able to terminate the retainer at any stage if they become concerned and no longer believe that the prospects justify their continued involvement and investment; and

- under a conditional fee agreement, in many instances clients are really seeking funding when what they should be purchasing is quality, independent advice. Are solicitors best placed to act as a bank or an

insurance company in litigation of this nature? If the expectation is that the solicitors will fund major disbursements on the basis of any sort of direct return in the event that the case is successful, there may be Consumer Credit Act difficulties.

63.4 Subject to these caveats, a lawful funding mechanism exists which could provide lawyers with significantly enhanced remuneration for their efforts in this type of recovery litigation. A firm that is attracted by the high profile nature of the litigation and has substantial capital and staff resources might be more likely to take it on because of additional rewards that might be achieved.

After the Event Litigation Costs Insurance

64. Introduction

64.1 After the event litigation costs insurance covers the insured claimant against contingent liability for own costs and disbursements and for the contingent risk of incurring liability for the costs and disbursements of the defendant.

64.2 After the event insurance should be considered whether or not a conditional fee agreement has been entered into between the claimant and his solicitor. If there is a conditional fee agreement then a claimant may only wish to insure against the contingent risks of incurring liability for the defendant's costs and disbursements. Even if there is a conditional fee agreement in place the claimant/his solicitor may still wish to insure a proportion of the claimant's basic costs which will be unpaid in the event that the litigation is unsuccessful.

64.3 As a matter of professional practice, solicitors in England and Wales are now required to advise clients on whether the client's liability for their own costs may be covered by insurance and whether the client's liability for another party's costs may be covered by pre-purchased insurance and, if not, whether it would be advisable for the client's liability for another party's costs to be covered by

after the event insurance including every case where a conditional fee or contingency fee arrangement is proposed.[188]

64.4 Practice Rule 15 also requires the solicitor to discuss with the client whether the likely outcome in a matter will justify the expense or risk involved, including, if relevant, the risk of having to bear an opponent's costs. This involves the solicitor undertaking a cost/benefit analysis. In order to do this he will need to assimilate the information that is required in an after the event costs insurance proposal form.

65. Limits of Indemnity

65.1 It is wrong to say that after the event litigation costs insurance is restricted to smaller scale actions where costs are modest. Over five years ago a policy was written for circa £4.6 million to cover claimant's own costs and contingent risks for the costs of the defendant. Recently a policy has been written for litigation proceedings overseas with a limit of indemnity of circa £15 million, split equally between claimant's own costs and liability for defendant's costs.

66. The reasons to Insure

66.1 The reasons for taking out a policy covering after the event litigation costs insurance may include the following:

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188 See Solicitors Practice Rule 15

- accounting certainty;
- an incentive for the defendant to settle;
- security for costs; and
- raising finance for funding litigation.

We consider each of these in turn.

Accounting Certainty

66.2 In many instances, this type of action will be pursued by governments, public bodies or liquidators using public/creditors funds to pursue the litigation. Once a premium has been agreed and paid a claimant knows that its liability for own costs and contingent risks for the costs of the defendant are capped at the level of the premium, subject to the limit of indemnity. This is particularly important where the claimant may be publicly accountable for the costs of the litigation or where liquidators may be personally liable. Increasingly litigation costs insurance may be seen as prudent public accounting.

Incentive to Settle

66.3 A defendant knows when a claimant is sensitive to the issue of costs. A defendant's classic tactic in an action of this type is to obfuscate and delay, thereby causing the claimant to increase legal expenses and to exert pressure on the claimant to withdraw the action and/or settle. A policy of after the event insurance sends a message to the defendant that underwriters are confident in the claimant's ability, not only to prosecute the litigation to a successful conclusion, but also to achieve a recovery of assets. The policy of insurance also puts the defendant on notice that the claimant is in the litigation for the duration and cannot be subjected to political and/or financial pressure with regard to the costs being incurred, both in respect of own costs and in respect of contingent liability for the costs of the defendant.

Security for Costs

66.4 If the claimant has to provide security for costs then it is possible for the policy of insurance to be linked to a bond which will stand as security for costs in place of a payment into Court. The cost of the bond will normally be approximately three per cent of the value of the bond. The value of the bond will normally be less than the amount insured for defendants costs and disbursements.

Security for Borrowing in Order to Fund Litigation

66.5 If a loan is needed in order to fund own costs/disbursements it is now possible for a lender to be a named interest in the policy of insurance and to lend on the basis that the policy acts as security for the loan. The lender may advance up to 80 per cent of the amount of own costs insured. The lender's risk is that the insurers will avoid making a payment in the event that there is a claim under the policy. The answer to this is for the lender to take out a separate policy of insurance insuring against the risk that insurers of the primary policy may not pay out. The cost of this supplemental policy is approximately five per cent of the amount of the loan. Part of the loan may be used to pay the insurance premiums. The lender will wish to recover interest at an agreed commercial rate in addition to the principal sum loaned.

Premiums for Policies covering own Costs and Disbursements and Defendants Costs and Disbursements

66.6 Premiums for this type of policy of insurance are calculated as a percentage ('the rate on line') of the total amount of costs insured ('the limit of indemnity'). The rate on line generally varies between 15 per cent and 30 per cent of the limit of indemnity. Quotes should be obtained from more than one insurer. Rates on line will vary as different insurers may assess the risk differently. The credit rating of the insurers may also influence the choice of insurer. If a case is worth insuring then it should be possible to place the risk at a rate on line not in excess of 30 per cent.

Recoverability of Insurance Premiums

66.7 Section 29 of the Access to Justice Act provides that where in any proceedings a costs order is made in favour of a party which has taken out an insurance policy against the risk of incurring a liability in those proceedings, the costs payable to it may, subject in the case of court proceedings to rules of court, include costs in respect of the premium of the policy. There is a consultation process in place at the moment and it is currently uncertain when Section 29 will become law. It is likely only to apply to policies taken out after Section 29 comes into effect. This may mean that in actions already commenced, but where a policy of insurance is taken out after Section 29 comes into force, the premium paid for such a policy will be recoverable.

Underwriting Considerations

66.8 There are few underwriting considerations that are unique to civil actions brought in England and Wales that involve tracing assets. As with any civil matter, part of the underwriting process will involve an analysis of the issues, the strengths and weaknesses of the claimant's case and the likelihood of recovering the assets to which the claimant alleges he is entitled. Underwriters will look at the merits and look at whether, on balance, the claimant is likely to be able to establish entitlement to funds/assets within the jurisdiction and whether there are any such funds/assets within the jurisdiction. Underwriters will be reluctant to write policies of this type for speculative actions where no assets have been identified. Actions of this type may be motivated by bias against political opponents and/or a desire for retribution. Underwriters will not be persuaded by such political considerations but will apply a cost/risk/benefit approach in deciding whether to write a policy of insurance. In many ways this is similar to the cost benefit analysis that solicitors are required to provide for clients pursuant to the Solicitors Practice Rule 15. The underwriting process should be helpful to clients and their solicitors. Clients spending public or creditors' money will not wish to embark upon litigation that may prove fruitless. There will normally be a fee payable for the underwriting process. This will vary according to the quality and detail of the legal advice available and the complexity of the issues. Fees for underwriting reports can vary from as little as £1,000 up to £25,000 for the more complex cases.

Proceedings in Jurisdictions outside England and Wales

66.9 There is no reason, in principle, why a policy of insurance cannot be written or extended to cover proceedings outside England and Wales that involve tracing against the same defendant. Underwriting considerations dictate that it will be helpful if the other jurisdictions have similar rules regarding the risk of incurring costs i.e. costs will normally follow the event. However, this is not necessarily essential. Normal policy wording provides that assets recovered/damages awarded have to be utilised before any claim can be made under a policy of insurance for own costs/any liability for costs of the defendant. This means that if a policy was taken out in respect of proceedings in England and Wales and costs were incurred and no recovery was made and the policy was extended to proceedings tracing assets in other jurisdictions and assets were recovered in those jurisdictions, such assets would be brought into 'hotchpot' in order to avoid any claim being made under the policy. Premiums paid for a policy to cover costs in a foreign instruction may not be recoverable from the defendant, subject to the rules of that jurisdiction.

67. The Development of After the Event Litigation Costs Insurance in the London Market and its applicability to claims involving tracing

67.1 Insurers in the London market are showing an increasing understanding of after the event litigation costs insurance and are becoming increasingly aware of the client's requirements. The underwriting process whereby an independent insurer rates the case should form a helpful part of the due diligence process for any public body/Court official pursuing a tracing claim. It will have the knowledge that insurers believe that the case is worthwhile and the underwriting process will focus the minds of the clients and the lawyers on the likely costs involved, the contingent risks for costs and on an early assessment of the merits of the case.

67.2 The proposed recoverability of insurance premiums under the Access to Justice Act should make England and Wales an attractive forum in which to litigate

such claims, assuming that the courts here will accept jurisdiction. The insurance market in London is becoming increasingly sophisticated in developing funding products linked to policies of insurance. These developments will assist and facilitate sovereign governments, their citizens and liquidators who may wish to bring actions here to recover funds allegedly appropriated by current or former Government ministers or statesmen; banks or commercial organisations; or individuals where criminal enforcement measures have failed to achieve such recovery.

Other Methods of funding claims

68. Venture Capital finance of claims

68.1 A development which could make the funding of large-scale asset recovery actions considerably more viable would be the development of a rule which would permit regulated access to the capital markets for claims, in which venture capitalists would be free to invest and compete, thereby opening up the availability of capital for meritorious claims, at competitive rates. A valid view is that there is no rational reason to permit the twelfth century doctrines of champerty and maintenance to quash uncritically an otherwise viable market - a market that would help victims, defendants, the courts and society at large.

68.2 The development of an appropriately regulated market for the third-party finance of litigation would expand the options available to victims by allowing them to adjust the level of risk they wish to bear, the amount and timing of the recovery they seek, and other variables to a far greater degree than they are presently able to do. The introduction of venture capital into the market would be likely to lower the cost of capital over a period of time, and ultimately provide victims with a more cost-efficient and comprehensive method of financing litigation than typical, conditional or contingency fee type arrangements. Such a market would foster meritorious litigation while discouraging less worthy claims. As a general rule, the owners of capital do not take irrational or emotive risks with their money. Third party finance will not flow into doubtful or complex matters unless there exists a viable chance of recovery, or unless the use of the portfolio

theory of investment is permitted to assist in the spreading of risk over a number of complex claims by a number of investors.

68.3 For the purposes of the present discussion, it is important to have sight of the magnitude of cost involved in the funding of a large-scale corruption action. It is also necessary to bear in mind those who would be affected – the would-be claimant or victim. Depending upon who the perpetrator of the crime is, the victim can be all manner of person. Thus, the victim can be a sovereign state, the citizens of that state, the public at large, public-sector enterprises or entities, a private sector enterprise or a central bank. The encouragement of third-party funding of recovery actions on behalf of victims of large-scale government corruption naturally raises questions of significant public and political importance. Quite apart from financial considerations, political complications may act as a barrier or a disincentive to public law enforcement authorities embarking on a particular course of action, whereas a private law enforcement concern, focused on victim recovery for the victim rather than punishment, may not be so constrained. The privatisation, so to speak, of victim recovery litigation represents a neutral and effective method of providing restitution to victims, with the added benefit of deterring the practices which caused the loss in the first place. Enabling access to capital markets in such a scenario effectively privatises law enforcement within the context of victim recovery, thereby providing access to justice for the victim, together with the social good achieved by compelling the perpetrator to account.

68.4 The assignment of a partial interest in a claim to an owner of capital is a risk-sharing device, whereby part of the potential award from a lawsuit is exchanged for money or services. It is thus not dissimilar from a typical contingent fee type arrangement, whereby the fee is calculated by a professional service provider by way of a percentage of the economic benefits of the successful outcome of the case. The ability to assign all or part of the fruits of a cause of action provides an effective method of finance of litigation, assuming the availability of access to capital. That access, however, must be fostered, not fettered. For many victims of corruption, access to venture capital represents the only viable method of financing multi-jurisdictional, complex and expensive litigation. While

conditional fee type arrangements theoretically provide a method of financing a portion of the litigation aspect of such an action, 'extra-litigation' costs are largely ignored. In large-scale corruption cases, the 'extra-litigation' aspect can be of greater fundamental importance (or more expensive) than the litigation element. There can be no meaningful recovery for victims if the necessary groundwork in terms of asset-location, forensic analysis and intelligence work is not carried out competently. Millions of pounds of security must be posted. The funding of these aspects of multi-jurisdictional proceedings does not come within the ambit of conditional fee arrangements with professionals, nor does it come within the ambit of the typical litigation costs insurance arrangement. This is where access to capital markets is of most crucial importance.

68.5 In expressly allowing venture capitalists to enter the market for the finance of bona fide litigation, the door is opened for the regulation and supervision of the same. Thus, while providing meaningful economic access to justice, the court can also guard against any feared abuses of its process. Regulation of the industry would be impossible if the industry *per se* was illegal. The third party finance of litigation is currently taking place. In some areas, an open market in litigation already exists.[189] The comprehensive recognition and acceptance of such practice, supported by the installation of a judicially enforced regulatory framework governing the funding of litigation, would serve to address the concerns which are currently advanced by those who oppose and criticise the

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189 For example, much bankruptcy and insolvency legislation permits the sale, mortgage or pledge of assets of an insolvent estate, including claims for the purpose of financing or 'selling' the requisite litigation involved. (See *In the Matter of Addstone Pty Ltd (In Liquidation) v Peter Ivan Macks* (Federal Court of Australia No. 638/98; 9 June 1998; Quicklaw, where the court sanctioned a complex arrangement between a liquidator and a third party to fund the pursuit of a multi-million dollar claim against Coopers & Lybrand, amongst others, for negligence, in return for a 35 per cent contingent fee, notwithstanding the fact that the creditors (including the Australian Revenue authority which held a Aus$50 million claim) apparently declined to fund the same.) Moreover, it is not uncommon for commercial lenders to provide loans to a litigant for the purpose of financing litigation on the basis that the fruits of a successful outcome provide the security. A relatively new entrant to the insolvency litigation market in the U.K. is the firm of Kingfisher Solvency Solutions which in effect takes an assignment of 100 per cent of a claim from an insolvency practitioner without a down payment, in return for an agreement to prosecute that claim on behalf of the insolvency practitioner and ultimately share in the proceeds. This firm only pursues claims which do not fall foul of the champerty prohibition (pursuant to the exception contained in the UK Insolvency Act 1986). Factors, participants in secondary markets of debt and the securitisation of future revenue streams all involve the formation and development of a market in claims in one form or another. The foregoing represent but a small sample of the types of third party finance of litigation which are currently taking place.

funding of litigation by non-parties as immoral, unfair and contrary to the doctrines of maintenance and champerty. The false inflation of damages, suppression of evidence and the subornation of witnesses are all evils which are proscribed within the context of today's mature legal systems. Toulson J. was undoubtedly thinking along these lines and in futuristic terms when he referred to *'an unlicensed and unregulated market in litigation'*.[190] It is time to consider not how we can stop or prohibit the formation of an advanced market in the finance of claims, but rather how the court can effectively regulate it – providing safeguards for those for whom we wish to provide both access to justice and protections against the taking of unfair advantage.

68.6 The concept of third party funding of litigation gives rise to serious ethical considerations which are discussed further in Paragraphs 67 and 68, below.

69. An International Fund

69.1 In many cases of political corruption, the assets misappropriated will be located in and have passed through a number of jurisdictions. It may also be the case that the monies misappropriated originated in further jurisdictions, such as in a case where grants or loans to a developing nation have been misappropriated. In such situations, it may be that the funding of any action to recover misappropriated assets should come from a global fund set up either as a fighting fund to finance litigation or as an insurance fund to pay out claims and then to recover the assets.

69.2 Such a fund could be set up under the auspices of the United Nations, an international court, the Financial Action Task Force or other body. The advantage of a truly international body such as the United Nations would be that it represents most sovereign states and thus could be seen to be impartial; however, it must be said that the United Nations itself is often perceived to be a western-dominated body, less well disposed towards developing nations. Its disadvantage would be that it is too unwieldy and that governments which had

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190 *Stocznia Gdanska SA v Latvian Shipping Company and ors.* (No. 2) [1999] 3 All ER 822, at 831

played a role in making corrupt transfers of funds would have too great an influence over the fund.

69.3 On the other hand, the disadvantage of a narrower international body is that any legal action taken could risk being seen as a 'western' initiative based on western definitions of corruption.

69.4 The example of the United Nations Compensation Commission ('UNCC') which awards compensation to victims of Iraq's invasion and occupation of Kuwait in 1990 on the basis of recommendations by truly international panels of experts, is a model that could be followed. However, the UNCC is financed clearly by Iraqi oil sales and it, thus, seems unlikely that this model could be applied to the legal actions for the recovery of assets misappropriated by Public Sector Officials.

69.5 We consider that a realistic possibility is that the litigation or at least the initial investigation stage could be financed by an international lending agency such as the World Bank[191] or by bilateral agencies. A model which we believe could be effective would be for the initial investigation to be financed by such an international or bilateral body and for further investigation and litigation work by forensic accountants, lawyers and investigators to be put out to competitive tender once the basic facts, likely costs and risks involved had been ascertained. We consider that a reasonable initial investigation ought to be able to be carried out for not more than £500,000.

69.6 A difficulty with any proposal for asset recovery litigation being funded by an international or bilateral lending agency is that their funds are primarily designated for development, and costly, risky, multi-jurisdictional litigation may not be seen as part of their mandate or as falling within their terms of reference.

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191 Precedents for World Bank involvement would include its investigation into alleged corruption in the Pakistani power sector, reported in *The Financial Times* on 12 November 1999; however, this investigation also illustrates the political risk involved, from the point of view of the World

69.7 However, our understanding of the powers of international organisations such as the World Bank is that they are able to use their funds to further development. If the recovery of assets from previous Public Sector Officials would discourage future Public Sector Officials from misappropriating funds, such legal actions would appear to fall within their powers.

69.8 An advantage of an investigation such as those envisaged being funded by an international body is that it should give the litigation a degree of international respectability and accountability, rather than it simply being action taken by a single nation to further an end which it considers to be desirable, but which may not be considered to be desirable by the whole international community.

69.9 Funding such an investigation could equally be undertaken by a bilateral aid organisation, and the same considerations as to whether such legal action would be within the organisation's terms of reference would be expected to apply. However, funding by an international body may be particularly appropriate to litigation which is likely to be cross-border in nature.

69.10 Funding political corruption cases by an international body may also enable weaker cases, which may have important human rights or sensitive political aspects and which may not be commercially viable in their own right to be pursued. Such cases may not be able to be funded by venture capital or other forms of commercial funding, which will inevitably tend to focus on the strongest cases which offer potentially the largest rewards.

70. The World Bank

70.1 We have not considered it to be within the terms of our brief to approach any of the international organisations or bilateral aid agencies in our own right to ask them for their views on our suggestion that they might consider funding at least the initial stages of an asset recovery action. We also appreciate that there may

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Bank, in that the investigation is now being criticised as being politically motivated, as a method by which ex-Prime Minister Nawaz Sharif could target his predecessor, Mrs Bhutto.

be reasons why such organisations might not wish to state publicly whether or not the pursuit of such legal actions would be something they would consider funding. However, one of our recommendations is that such organisations should consider their responsibility to fund such actions in the future or that an approach should be made to them in a semi-official manner to ascertain whether or not they would be prepared to fund such actions.

70.2 However, the best-known international lending agency is the World Bank, and we have considered it as an example of why an international organisation might be motivated to fund such legal actions:

i) the World Bank is actually a principal creditor of the country concerned in many cases of money removed illegitimately from developing countries. Thus, the recovery of assets by or on behalf of the government concerned may give it the ability to repay amounts owed to the World Bank;

ii) in other cases, the money stolen from the developing country may be money lent by the World Bank to the relevant country, which has effectively been re-routed into the personal assets of a Public Sector Official before it ever reached the people or projects for which it was intended;

iii) as the principal lender to developing nations and as a major advocate against international corruption, the World Bank may find that it furthers its objectives to sponsor litigation to recover assets;

iv) the World Bank is currently backing initiatives to instil effective principles of corporate governance in the governments and the developing countries it lends to. One action which might encourage good governance and accountability might be backing legal actions to recover funds removed from the relevant country by Public Sector Officials; and

v) the World Bank has recently intensified its own efforts to police its own loans and check them for fraud, and it has hired external consultants to assist it in so doing.

70.3 The provision of World Bank grants towards a victim recovery process may represent a way of enforcing international law via confiscation of the proceeds of crime by the victims themselves. Sufficient safeguards could be incorporated into such a system so that the provision of such grants or funding would be dependent upon a level of commitment from the victim to proceed through to conclusion with the litigation concerned, and an undertaking from the victim to employ a reasonable amount of effort. Where success was achieved, the World Bank would be entitled to recover all or part of the grant originally provided out of the proceeds of recovery.

70.4 A major difficulty which an international lending agency would have to face in this domain is to maintain a reputation for fairness and impartiality. A risk is that it could be seen to be being used by the government of a developing nation to target the leaders of a former regime. For example, an article in *The Financial Times*[192] recently was critical of the World Bank for assisting the now-fallen government of Nawaz Sharif in Pakistan to pursue an investigation which was seen to target his predecessor, Mrs Bhutto.

71. Pro Bono work

71.1 We consider briefly whether multi-jurisdictional corruption actions could be run on a pro bono basis by firms of lawyers and forensic accountants giving their time free for altruistic reasons or in anticipation of beneficial publicity.

71.2 Although we consider that the costs of any corruption case are likely to be over £1 million, the actual cost to a firm of lawyers will be much less than this if they use their own staff on the case, simply because their actual costs will be based

192 Ibid.

on the employment costs of the staff involved on the case rather than the hourly charge-out rates charged to clients.

71.3 If the reason behind the litigation is to achieve access to justice for human rights victims, for example, there may well be a motive for professionals to take on the case on a pro bono basis.

71.4 In addition, cases such as these are likely to attract a large amount of international publicity, and consequently firms of lawyers may believe that it would be in their interests to take on such a case, in anticipation of such positive Press coverage or of winning further work in the corruption area.

71.5 However, as we have considered previously, this type of case is likely to be long, complex and expensive, and thus it is unlikely that many organisations would be able, let alone prepared, to take it on such a pro bono basis.

71.6 Even if a law firm was prepared to take on an individual case on a pro bono basis, it is likely that this would need to be a case which had a particularly high public profile and where the chances of success were particularly high. This form of funding of an action is unlikely to be realistic for other riskier cases, which may be equally deserving of being pursued.

71.7 We believe that it would be helpful for the Law Society to carry out research, probably amongst the larger London law firms, to ascertain whether they would be prepared to take on international corruption litigation cases on a pro bono basis.

72. 'Booty hunters'

72.1 Possibly the cheapest way of recovering assets is for the victim to hand the problem over to booty hunters, or permit them to try to find the assets in return for a share of the recoveries. This has many similarities with litigation conducted on the basis of a success fee, which is possible, for example in the United States.

72.2 The principal difficulties with this approach are:

- the methods used by the booty hunter may not be legal or ethical,[193] and thus the information may not be able to be used in court; in addition, we consider that the ethics of using unethical methods to obtain information in a corruption case are distinctly dubious;
- any professional firms involved may suffer major adverse publicity from the Press and others who regard it as morally wrong for lawyers or forensic accountants to make a large amount of money out of investigating assets removed by political leaders;
- the morality of the booty hunter may be questioned, if the reward is so high that he is only involved in looking for assets for personal gain;
- there may be arguments over who actually 'found' the asset, and thus who is entitled to the reward. The reward could be due to the person who located the asset physically, or to the person who produced sufficient proof for a court to order it to be handed over;
- the information provided by the booty hunter may receive widespread Press coverage, but may in fact be false. It is noticeable that the amounts allegedly held in Swiss bank accounts belonging to Public Sector Officials are often huge, but when it comes down to actual recovery, they are tiny, e.g. ex-President Mobutu was alleged to have stolen up to US$16 billion, but the Swiss Banking Commission only found some US$4 million to freeze; and
- ultimately some form of litigation is required to recover the asset – to prove that the asset was purchased with money stolen from a previous government – and such litigation may be costly and may fail; the booty hunter may not have located adequate reliable evidence for a court to enforce the recovery of the asset; this litigation is still expensive and risky.

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193 Perhaps the classic example here is that of Reiner Jacobi, who claims to have found missing Marcos accounts and gold deposits in Swiss banks, but who was arrested in Germany on a Swiss warrant for the charge of economic espionage. The charges against Jacobi were subsequently dropped.

73. Case management issues[194]

73.1 We sought to identify key elements that would be required for the conduct of litigation in England and Wales. It is assumed for the purposes of this section that the litigation envisaged is civil in nature, involving foreign parties, one of whom may be a State, the other a Public Sector Official or former Head of State. The litigation is of the nature of asset searching and freezing and recovery, where assets are within the jurisdiction or some other jurisdictional nexus is available to the English Courts. It is also assumed that the instructions from the client are clear and unequivocal.

73.2 The nature of this type of litigation is potentially long term and we consider the need to be aware of the vagaries of political considerations. These have no bearing on how the litigation is conducted except that the planning of the stages of litigation to achieve recovery may be affected by the strength of political will behind the litigation.

73.3 There are two types of considerations which need to be borne in mind throughout, assuming that more than a strong-prima facie case of an actionable wrong doing can be established. These are Evidential and Practical - namely, is there enough evidence available to support a trial or application for interim relief, and, even if there is, do the resources exist to make the litigation viable (either to fund it or in terms of the size of the recovery at the end of the day)?

73.4 From Counsel's point of view, from start to finish, involvement in case management should be very much 'hands on'. This is because the case as prepared is the one presented. If the person presenting the case is to put the most effective position forward, in the context of this type of complicated litigation, involvement from the outset helps to safeguard against the end product being incompatible with the desired ends. Accordingly, right from the outset, the following need to be identified (looked at from the client's perspective):

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194 Also, see generally Chapter Five, below.

Initial stages

73.5 Preliminary assessment of the amounts involved, where they might be, whether they are worth pursuing and the legal basis for claim in each case, together with the potential defences.

73.6 If more than one forum is available, choosing the strongest (evidentially and in terms of potential recovery) as the springboard. We have assumed that England is so but in many cases it will be elsewhere.

73.7 If England is parallel or collateral to another forum, there is a need to consider whether there are any potential issues of reciprocal enforcement of any judgments or orders. There will be a need to obtain opinions from foreign Counsel and highlight potential problems from the outset. There will also be a need to collect evidence from other forums and periodically to review this evidence.

Personnel who should be involved

73.8 Investigators skilled in asset identification and tracing – thought should be given to setting up channels of communication with the police and/or Foreign and Commonwealth Office.

73.9 Forensic Accountants, who can piece together the picture from the corporate web and undoubted myriad of bank accounts.

73.10 Solicitors with experience of large scale litigation of this nature. Likewise Counsel.

Injunctive Relief

73.11 A particularly sensitive time in the litigation process is once enough evidence has been put together to make the application for injunctive relief, having been careful with regards to confidentiality. At this stage information can be revealed

which enables assets to be moved out of the jurisdiction or rendered irrecoverable. Accordingly, there should be as little delay as possible between starting on the case and getting into court. The more the delay, the more likely that the end yield will be limited.

Post injunction

73.12 Following on from and as part of the injunction will be a discovery order addressed to the Defendant. This is a useful pressure point which needs to be pressed on with vigour. Indeed, having achieved a tactical surprise (one hopes), this is a good time for the litigation team to consider whether 'without prejudice' negotiations are worthwhile. The litigation team will need to consider the strengths and weaknesses of the parties' positions. The team will need to try to involve the criminal authorities after an injunction has been obtained to achieve the objective of exerting maximum pressure on the Defendant and possible yielding more evidence.

73.13 Regular conferences need to take place with the professionals involved, assessing the strengths and weaknesses in the legal and evidential position and measures to address the same. Regular progress reports with time deadline targets should be agreed upon and provided to the client.

73.14 As and when the litigation terminates, either because of a successful outcome or otherwise, it will be important to provide the client with a summary, both of the chronology and of the steps taken and results achieved. This is something that the client may require at intervals in any event for internal purposes and/or Press release purposes.

74. Ethical Issues[195]

[195] A lengthy paper on the subject of champerty and maintenance was received from Martin Kenney and Elizabeth O'Brien, members of the sub-group; this is available to anybody who would be interested in reading it.

74.1 In England and Wales, the activities of the professionals who will be involved in any litigation to recover assets on behalf of governments or any other victims are governed by the ethical rules and guidelines of their particular profession.

74.2 Whilst ethical rules are constantly in a state of flux, we believe that careful note should be taken of what is currently possible, from an ethical standpoint, in England and Wales, as well as considering what might be possible, were the ethical frameworks under which the relevant professionals work to be changed.

74.3 As noted previously, solicitors and barristers in England and Wales are permitted to take on litigation which is financed by traditional hourly rates, by conditional fees or by after the event litigation costs insurance. They are not currently permitted to take on litigation on the basis of a success fee, based on a percentage share of the assets recovered. Litigation financed by success fees is permitted in other jurisdictions, such as the United States[196]. The prohibition on the use of a pure contingency fee appears to be based on the premise that legal professionals ought not to have a financial stake in the outcome of the case. Instead they ought to receive proper payment for professional services regardless of the outcome of the case, in order to retain professional independence from the case and therefore fulfil their duties to both the client and the court.

74.4 Forensic accountants who are members of the Institute of Chartered Accountants in England and Wales,[197] on the other hand, are not bound by any ethical rules prohibiting them from taking on an assignment on the basis of being remunerated by a success fee, in asset recovery cases where they are not acting as independent experts to assist the court. The principal impediment to them taking on a large asset recovery assignment on the basis of a success fee would be the very large risk of incurring considerable costs for no recovery and thus no fee. This risk is greater in a situation where such asset recovery actions are one-

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196 It is interesting that litigation on behalf of 9,539 human rights victims in the Philippines was conducted over a thirteen year period by Robert Swift, a Philadelphia lawyer. He achieved a US$150 million judgment in favour of the victims, and is due US$34.5 million in fees (based on a 22.9 per cent success fee), should the Philippines government ever release the relevant assets. It is also interesting that the victims are disputing the amount of this fee.

off cases rather than part of a portfolio of work where the accountants can take on several cases, and expect to recover their fees on some, whilst recovering none of their costs on others.

75. Finance from third party investors

75.1 There are two principal concerns that are commonly expressed which cast doubt on the probity of permitting third-party investors to have unambiguous access to the finance of litigation. The first concern is the potential for the taking of unfair advantage over a vulnerable victim or plaintiff. The second relates to the issue of 'control' to be exercised by the third party over the conduct of the underlying judicial proceedings. The first concern relates to the protection of the weak and the vulnerable by unscrupulous men of money. The second is directed towards the internal workings of the court and of the judicial process.

75.2 It is acknowledged that the taking of unfair advantage by persons who have greater wealth and knowledge can and does occur in a free market.[198] The acid test for the 'unfairness' of a bargain involving the third-party finance of litigation is the 'price' and how it is arrived at.[199] In what is arguably the most efficiently priced market for legal services (or for access to capital to finance their provision) - the United States of America, this issue has been thoroughly considered by courts and scholars alike within the context of lawyers'

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197 We have not considered the ethical guidelines of the other accountancy bodies in England and Wales.

198 For instance, a mining company will have an unfair bargaining advantage over a rural land owner in appreciating the speculative value to be accorded a nascent mineral find embedded in a geological formation deep under the surface of the earth. The formation of a private contract between the mining company and the rural landowner will be influenced by the parties' respective bargaining positions, experience and knowledge. Unless the mining company can be construed as a fiduciary for the landowner, the landowner, in a free market, must be responsible for his own decisions. The landowner can seek to obtain independent legal advice in completing the formation of a private bargain with the mining company, in an attempt to protect his interests. In addition, the law of non est factum (a plea denying the validity of an instrument sued on); unconscionable bargains; contracts of adhesion; the rule of construction of contracts which resolve ambiguities in favour of the party which did not draw the instrument; the law of fraudulent or negligent misrepresentation; and other norms and doctrines exist to afford the party with a lesser bargaining position some protection.

199 'Price' refers to the cost of finance – the amount of profit that the third-party financier will require in order to advance capital, and take risk in a litigation.

contingency fees. Perhaps the leading American legal scholar on the abuse of contingency fee agreements between lawyer and client is Professor Lester Brickman of Cardozo Law School in New York City. In his 1989 article, *Contingent Fees Without Contingencies: 'Hamlet without the Prince of Denmark?'*[200] Professor Brickman first posited his 'corollary proportionality proposition'. Professor Brickman's thesis is that the quantum of a contingency fee must be in proportion to the degree of risk and the anticipated measure of work to be undertaken by a fiduciary on behalf of his principal. A substantial contingency fee should not be charged by a fiduciary for work performed on a matter that is devoid of meaningful risk. Professor Brickman, whom the American Bar Association Journal once characterised as a professor of ethics at Cardozo who, '*is known as something of a conservative pitbull chewing on contingency fee abuse,*'[201] has recently deposed in an expert opinion affidavit that:

> 'Contingent fees in excess of 50 per cent (which are typically precluded by court rules, statute or custom), should, in my opinion, be upheld in cases where the risk of non-recovery and greater efforts than anticipated, are high.'[202]

75.3 Although it is difficult to predict where a more open market for the finance of valid claims would develop in relation to the price to be charged for capital in complex, trans-national litigation, the experience of some members of the group may be of some assistance. In a matter involving the pursuit of the restitutionary claims of approximately 800,000 largely elderly American victims of a telemarketing crime that took in an estimated US$240 million of illicit proceeds, the court-sanctioned price of 50 per cent of the proceeds of recovery in return for

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200 37 UCLAL Rev 29

201 ABAJ 28 (August 1997)

202 As per paragraph 175 on page 78 of Professor Brickman's affidavit sworn on 27 October 1999 and filed in the Court of Queen's Bench of Alberta (Judicial Centre of Calgary) in Action No. 9901-01422 in *Interclaim Holdings Limited, et al v Timothy Down, et al.* In the same passage in the same affidavit, Professor Brickman makes reference to three judicial authorities in the United States where a greater than 50 per cent contingency fee payable to a lawyer was permitted in instances involving an unusually high measure of difficulty and risk.

the advance of in excess of US$4 million of cash and US$3.5 million of security to support a number of pre-emptive asset freezing orders, may act as a helpful guide to assessing where the market price for complex asset recovery capital might travel.[203]

75.4 In addressing the vulnerability of a party to being taken unfair advantage of by a financier in connection with the finance of litigation, the analysis must be fact-driven. Obviously, Citibank, for example, as a victim of crime is in a different bargaining position to a group of 800,000 unrelated, under-capitalised elderly victims. The latter case would probably require some form of court-sanctioned agreement for approval of the quantum of the fee to be paid to those who seek to advance the risk capital in the proceedings.

75.5 Agreements with third parties to finance litigation would be more warmly embraced by all who are involved in the administration of justice, if they were subjected to:

(i) full and fair disclosure to the court in advance as to the nature of the proposed financial arrangement;

(ii) the scrutiny and prior approval of the court (to the extent that the relative bargaining positions of the parties require it);

(iii) the consensual and open exposure on the part of the financier, to the extent of an agreed limit, to risk of loss for cross-undertakings in damages and adverse costs orders; and

(iv) meaningful access to independent legal advice for the victim counter-party to the proposed agreement of finance.

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203 It is noted that the matter referred to, *In the Matter of the Bankruptcy of James Blair Down et al* (Supreme Court of British Columbia Docket Nos. 188266/7/8/VA '98 (Vancouver Registry)), involves complex 'concealed' asset-preservation litigation by a court-appointed interim receiver, Arthur Andersen, in eight jurisdictions, including Switzerland, Guernsey, Jersey, the British Virgin Islands, and Barbados, as well as extra-judicial investigations involving at least an additional 20 countries. In this matter, in excess of US$100 million of 'protected' assets have been successfully preserved in support of the claims of the victims. The fact that over US$4 million of investor cash was made available to support this endeavour on commercially rational terms, as approved by the court, would suggest that it would be available in similar matters, particularly where a reform of the law of champerty and maintenance could be advanced to clarify the lawfulness of such arrangements.

Having the court involved in the approval of such arrangements, where appropriate or necessary, would:

(a) create greater access to capital and lower the price thereof, as it would increase certainty in the lawfulness of the arrangements thus struck; and

(b) permit the court to be satisfied that it remains in control of its own process.

76. Champerty and maintenance[204]

76.1 The proposal contained in this paper for funding asset recovery litigation by means of venture capital is not currently possible in England and Wales because of the doctrine of champerty and maintenance, save for certain recognised exceptions under (i) insolvency law, (ii) for claims sounded in liquidated debt, (iii) claims ancillary to a property right, or (iv) where the funder of litigation has a pre-existing interest in the lis.

76.2 Halsbury's Laws[205] contains the following definitions of maintenance and champerty:

> 'Maintenance may be defined as the giving of assistance or encouragement to one of the parties to litigation by a person who has neither an interest in the litigation nor any other motive recognised by the law as justifying his interference. Champerty is a particular kind of maintenance, namely the maintenance of an action in consideration of a promise to give the maintainer a share in the proceeds or subject matter of the action'.

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204 This section of the report is put forward by one member of the group, whose view is one that other members do not necessarily share. However, the section obviously forms part of the necessary debate, and it is hoped it will be considered as such.

205 Volume 9(1) Halsbury's Laws (4th edition) (1998 re-issue) para. 850

76.3 Champerty and maintenance are doctrines which have their origins in twelfth century medieval England. The development of the laws of champerty and maintenance since then have been greatly influenced by policy considerations which have shaped them from past to present times. In recognition of the fact that public policy has evolved and changed radically over the intervening years, it may not be right that these doctrines should continue to prevent the opening up of meritorious litigation by means of finance from venture capital or other financing sources which involve the purchasing of or investment in claims by independent third parties, in the twenty-first century.

76.4 Large scale corruption by Public Sector Officials involves victims who are often citizens in the world's poorest and most underprivileged regions. They may be unable to afford the enormous costs of a multi-jurisdictional legal action, and thus they are unfairly deprived of access to justice, in favour of the Public Sector Official who is able to use his financial might, which may have been acquired through corrupt means, to finance his own defence. Given this inequality in economic power, it may be more equitable for the victim to be allowed to sell at least an interest in his claim to a provider of finance, and thus be permitted to pursue his claim to recover at least a part of the damages.

76.5 In most human endeavours where there is a need for financial capital, the capital markets seek to furnish the necessary supply where economic gains can be realised. Claims are assets in the hands of their owners. They have speculative value. It is suggested that if victims could gain access to capital markets by 'selling' a portion of the speculative, future value of their claims to the owners of capital, this would allow more genuine claims to be advanced. Therefore access to justice could, following this theory, become a more practical and realistic right.

76.6 The prohibitions against maintenance and champerty have their roots in twelfth century Medieval England. The law originated in the struggle for power between English sovereigns and their feudal lords and barons. Ownership of

land was a principal source of power. Disputes over title to land were waged as a form of virtual warfare. The struggle led to the corruption and exploitation of the Medieval judicial system. In the present day, opportunities for taking unfair advantage in the judicial process are not waged in this way. Indeed, the law of maintenance and champerty has evolved largely due to the influence of prevailing public policy considerations to a stage where the policy underlying the law on champerty is now

> 'directed against wanton and officious intermeddling with the disputes of others in which the [maintainer] has no interest whatever, and where the assistance he renders to the one or the other party is without justification or excuse.'[206]

76.7 In determining the relative weight that should be given to those public policy objectives that favour the doctrines of champerty and maintenance, and those that seek to inhibit speculative claims, it is essential to assess their relevance to the times. While recognising that national policy considerations are neither transient nor readily changeable phenomena, it is clear that such policy objectives have evolved over the years to an extent that it is not prudent to rely unquestioningly on dictates that were laid down many centuries ago. The current social, legal and political norms are widely divergent from those that witnessed the birth of the doctrines of maintenance and champerty in the twelfth century. Oliver Wendell Holmes said

> 'It is revolting to have no better reason for a rule of law than that so it was laid down in the time of Henry IV...It is still more revolting if the grounds upon which it was laid down have vanished long since, and the rule simply persists from blind imitation of the past.'[207]

76.8 It could be said that the doctrines of champerty and maintenance are currently underpinned, to the extent that they are supported at all, by two policy

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206 Per Fletcher Moulton LJ in *British Cash and Parcel Conveyors Limited v Lamson Store Service Co. Limited* [1908] 1 KB 1006, at 1014

objectives. Firstly, the protection of the economically weak and the relatively vulnerable from those more powerful who would seek to abuse the power of the courts; and secondly, to a lesser extent, the need to sustain the orderly administration of justice by restraining third parties from financially supporting litigation on the basis of the fear that such parties may be more inclined to abuse the court's process (by, for instance, manufacturing evidence or falsely inflating the value of the asserted claim). These goals appear meritorious when examined in isolation. However, there are two primary reasons why these doctrines have limited utility in a modern legal system. Firstly, the underlying policy goals that provide these doctrines with their *raison d'être* may be more effectively achieved through other legal protections that are a part of the administration of justice.[208] Second, the application of these doctrines to some potential legal actions, as detailed above, produces results that are opposed to those intended. In view of the paradoxes that may result in an unquestioning application of the doctrines of maintenance and champerty, English law has long recognised that certain legitimate exceptions to the strict application of these norms are necessary. However, these 'exceptions' have developed in an ad hoc and unpredictable way. The case law is reliant upon vague concepts and language. For instance, what is the application of the term 'officious intermeddling'?[209] What does it mean for a private bargain to 'savour' or 'smack' of champerty?' Why is litigation, as a concept, to be impugned by the verb 'to traffic' as in an unlawful sale of narcotics when an impecunious plaintiff seeks financial assistance from a third party?

76.9 Under recognised principles of economic analysis of law, all forms of litigation could be regarded as an expression of aggression. Litigation is a justified and indeed socially good and useful method of resolving conflict if the claim on the

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207 See *The Path of the Law* (1897) Harvard Law Review Vol. X, 457

208 Such as the law of evidence, the torts of abuse of process and malicious prosecution, the procedural right to strike-out scandalous or vexatious pleadings and other norms of this kind.

209 These definitions provide scant help in sorting permitted practices from those which are prohibited. See *Abuse of Legal Procedure*, at 21 ('Maintenance is officious meddling in a suit. But what is "officious"? The vagueness of this term has probably saved maintenance from total disappearance from modern law. Most of the medieval litigation on the topic centred on its meaning.'). Per US District Court Judge Sweet in *Elliott & Associates, L.P. v Republic of Peru*, 12 F Supp 2d 328, 351, (SDNY 1998).

merits is valid and bona fide. The corresponding reaction (that is the presentation of defence in court) is in itself a form of aggression. Likewise it may be said that a defence is socially good and useful, if on the merits it is valid and bona fide. If either the claim or the defence, on the merits, is not valid or bona fide, a social mischief occurs when the presentation or consideration of the same is entertained by the court. Champerty and maintenance may be said to be one sided in that their focus is on the potential abuse that plaintiffs may make of the legal system, while ignoring abuses wrought by defendants. This imbalance may work in favour of well-financed defendants at the expense of those who have suffered great economic and social hardship and who will be denied access to justice unless their case can be financed by others. Public policy and economic utility considerations recognise that the limitation of litigation in general is not the ultimate goal, as in some cases there could be said to be too little litigation. A civil society in general benefits from getting bona fide claims into litigation. Conversely, a society suffers when non-merits based (or, arguably, gratuitous), barriers prevent valid claims from being heard and adjudicated rationally.

76.10 The protection of the weak from oppression and the prevention of the pursuit of unmeritorious claims by third parties for profit may not best be accomplished by an ad hoc application of the ancient rules of champerty and maintenance. The protection of the weak from oppression can only be ensured by providing for a mechanism whereby the weak can enforce their legal rights within a framework that protects them and increases the effective administration of justice at the same time. The starting point for any consideration of whether third party funding of litigation should be condoned, must be whether an abuse of process *will occur* - not whether an arrangement is champertous *per se*, in accordance with the reasoning in *Abraham v Thompson*,[210] *Faryab v Smyth*[211] and most recently in *Stockznia Gdanska SA v Latvian Shipping*.[212]

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210 Ibid.

211 Ibid.

212 Ibid.

76.11 Without access to capital markets to provide for the funding of large-scale global asset recovery cases deriving from egregious forms of corruption, the reality is that there will be no prosecution of many such cases. Without access to money, there can be no meaningful access to justice for the man on the street - or for developing nations, alike.

77. Conclusion

77.1 Whilst it is not currently possible to finance litigation in England and Wales by means of venture capital finance, it appears to us that the issue of whether the doctrines of champerty and maintenance unfairly inhibit access to justice for victims who are unable to finance costly asset recovery litigation should be considered.

77.2 Ten years ago, lawyers in England and Wales might have said that conditional fees were not permissible on ethical grounds, because they might influence a lawyer to recommend action, such as settlement, which was in his own interests, rather than in the interests of their client. However, conditional fees are now part of the English litigation landscape.

77.3 In the United States, success fees are accepted in many states, whereas they are not in England and Wales. This may indicate that professional ethics in this area are far from absolute, and are subject to change. The very possibility of financing litigation of this nature by way of success fees in the United States may drive such litigation to the United States, rather than to England and Wales.

77.4 It is worthy of consideration whether access to justice is achieved better by maintaining the principles of champerty and maintenance, which may deprive the victims of corruption of meaningful access to the court, or by allowing some element of the financing of claims by the capital markets. We recommend that further study be undertaken by the Government to consider possible legislative reform to the doctrines of maintenance and champerty.

APPENDICES B AND C - CASE STUDIES

This section of the report outlines a selection of cases that would fall within the ambit of the corruption working group's brief. It illustrates the types of cases that may be brought before the courts and the scale of finance and of case management systems that are required to meet the challenge of actions of this magnitude.

The case studies have predominantly been compiled from readily available published sources, in many instances from the Internet. It should be noted that due to the time constraints involved in this project, it has not been possible to verify the accuracy of the information presented here or to corroborate it from other sources. Thus, we can take no responsibility for their accuracy, and they should be regarded as illustrative only.

Appendix B - President Slobodan Milosevic of Yugoslavia

This case study is based on research in British and international newspaper archives, on interviews conducted with the Prosecutor's Office of the International Criminal Tribunal for the former Yugoslavia, the US State Department, with lawyers, and on information obtained from other sources in Belgrade.

Subject: Slobodan Milosevic

Born: 20th August 1941, Pozarevac, Belgrade, son of a Serbian Orthodox priest.

Politics: Serbian Nationalist.

Background: A former banker who became Belgrade party chief in 1984 and head of the Serbian party in 1986. Indicted for war crimes 27th May 1999.

- ***"Power in Serbia was based on corruption and nepotism... the higher the position the greater the power."*** Britain's Defence Minister George Robertson quoted in the UK press in April 1999.
- ***"Swiss freeze assets of Serb leaders."*** A headline in *The Guardian*, June 1999.
- ***"Milosevic indicted for war crimes."*** Newspaper headlines May 1999.

The case of President Milosevic highlights the difficulties of pursuing a government leader alleged to have committed crimes against humanity and to have been involved in corruption.

By its very nature the sort of corruption which we consider in this report is an enterprise crime invariably perpetrated by the elite. It involves not only theft but also the alleged abuse of privilege and power. History has shown that the extent of many of the cases only becomes apparent once the government or person leaves power and its prosecution relies on a change in government or political will. In this case, however, President Milosevic remains in power.

There have long been reports in the Western media that Slobodan Milosevic had taken advantage of the power vacuum after the collapse of President Tito's regime and the rise of capitalism in the Balkans to feather his own nest and those of his friends from the sale of his country's assets.

His critics are reported to have claimed he siphoned off hundreds of millions of pounds from a deal in which a Greek company run by a close friend received a five-year contract worth £315 billion to receive one third of the precious metals from the Trepca mining complex in Kosovo. (*The Sunday Express*, April 1999).

"Milosevic family mafia makes millions" The Sunday Times, 18 October 1998 in a report alleging that various friends and relatives of President Milosevic made millions of pounds from the sale of state assets and from tobacco smuggling.

There were suspicions too about the sale of the Yugoslav state telecommunications system to Italian and Greek companies for £620 million, reportedly in cash.

Newspaper reports variously describe the President as having moved assets to Greece, Cyprus, and South Africa. *" Milosevic clan builds £4m hideaway"* (*The Sunday Times* May 1999), reporting how the family had built a villa in an exclusive area of Athens.

Reports in the Sunday Observer in June 1999 suggested the President had moved billions of dollars from accounts in Switzerland into neighbouring Liechtenstein.

At the height of the war the media feasted on stories of the President's alleged corrupt activities *" Greedy tyrant and his cronies get rich by ripping off Serbs"* ran the headline in The Sun in April 1999.

Whilst there have been many reports, the veracity of the claims of theft, corruption and nepotism have yet to be tested and there is unlikely to be any major action until there is a change of government.

Since the peacekeepers moved into Kosovo most of the attention has been focused on criminal investigations into alleged war crimes.

In May 1999 the International Criminal Tribunal for the former Yugoslavia (ICTY) issued an international warrant for the arrest of President Milosevic on charges of crimes against humanity. They also issued a Worldwide order freezing his assets.

According to a tribunal spokesman the decision to go after the President's assets is aimed principally at reducing his capability to function outside Yugoslavia and to ensure he does not have the assets to escape justice. The Tribunal is thought, however, to be determined that no one should profit from crimes allegedly committed in the Balkans.

Once the orders were issued all member states of the UN were asked to identify any accounts or assets within their jurisdiction.

The Tribunal's action has been backed by the EU, which has issued a similar directive to all member states obliging them to enforce the orders. The US government has also issued an executive order freezing any assets held in the US and, as the criminal investigation continues, more assets are being identified worldwide.

Civil action for alleged war crimes.

On 27 September 1999 two Kosovan Albanian refugees in the US filed what is believed to be the first civil action for human rights violations against President Milosevic at the Federal District Court in Boston.

The plaintiffs, identified only as John Doe 1 and John Doe 2 for fear of retribution, filed suit against the President, his wife and 14 other named defendants and laid a total of 16 claims including genocide, conspiracy to commit genocide, war crimes, crimes against humanity, murder and torture.

One of the plaintiffs, who is seeking political asylum, brought the case under the Alien Tort Claims Act. The Act, dating back to the first Congress in 1789, allows for non-US citizens to sue for tort and damages internationally where they have suffered an international tort or a breach of international law or suffered as a result of breaches of human rights.

The second plaintiff, a US citizen, brought the action under the Torture of Victims Protection Act which has similar provisions but can only be commenced by US citizens.

Both plaintiffs are seeking damages for losses incurred and punitive damages. The case has so far gone undefended.

Could an International Fund help?

The civil litigation against President Milosevic falls within the remit of our study.

In this case we have two individuals who claim to have suffered human rights abuses and who are seeking damages. In this case they have filed suit under the 200-year-old US Alien Tort Claims Act which allows them to claim for damages inflicted outside the US.

Under the US law their claim is for restitution and for punitive damages, something not seen in the UK.

If their claim is successful, they will have to recover their damages but will first need to identify assets which, according to media reports, are likely to be well protected and dotted around the world. It may be they will be hoping for assistance from the authorities but there could be competing claims as criminal investigations continue.

Whilst they may have no problems enforcing judgment in the United States, they may have more difficulty abroad. Media reports suggest that assets have been moved to safer locations including countries which have close religious or political affinities with the President or his regime.

One source expects that any follow up action will move swiftly from the US to the UK which could become the springboard for action to identify and seize assets within the UK and Europe.

Having already commenced action in the United States, this is one case which could justify assistance from an international fund although there may be some ethical considerations if it was funded by the World Bank as this involves individuals seeking restitution and punitive damages.

Whilst some may balk at the prospect of someone gaining personal wealth from the use of World Bank or IMF funds it could be argued that, if the World Bank or IMF were to back such an action, it could have a deterrent value.

The damages sought in a case such as this would probably be small in comparison with claims which one might ultimately expect to arise from the Balkan crisis but it is possible the litigation would yield information about other assets to which other authorities, including the World Bank or the IMF, might in the future have a claim.

Appendix C - Ex-President Marcos of the Philippines

The litigation

The post-Marcos regime in the Philippines set up a Presidential Commission on Good Government ("the PCGG"), which was charged with tracking and identifying companies and assets controlled by Marcos and his associates. Executive Order No. 1 granted it the power to conduct investigations and recover assets both in the Philippines and overseas.

Marcos initially attempted to use an 'international defence' against prosecution when he fled to Hawaii after a popular revolt in February 1986. This related to his status as a head of state, which would entitle him to sovereign immunity in the courts under American law. Academics stated that even if this could be applied to ex-heads of state, the immunity could be waived by the ex-head of state's home government, as indeed happened (*The Economist* 13/01/90).

In March 1986, Jovito Salonga, a Philippine envoy arriving in America, stated in relation to recovering Marcos assets that "*With respect to properties in the Philippines, yes there is no problem. That is within our jurisdiction. With respect to properties in the United States, we foresee some litigation*". Salonga stated that Marcos allegedly also had assets in Switzerland, Brazil, Austria and other countries (13/03/86).

The difficulties with a case such as that of Marcos is that assets were in the form of bank accounts, stock and real estate and were scattered throughout the US, Europe and Asia. These assets were held in a complex web of dummy companies, laundered funds and aliases allegedly used by Marcos and his associates to loot the state treasury (*The Associated Press* 23/07/88).

In August 1986 a Marcos mansion in Manhattan was sold and items of furniture of value were auctioned in order to finance the recovery of other valuable assets that disappeared before Marcos accepted electoral defeat in 1986. The property was one to which the Philippines government was easily able to establish a claim. *The Times* stated that *"Establishing a claim to other Marcos property is proving much more difficult"*.

In 1989 four Manhattan buildings in New York formerly owned by Marcos and purportedly worth US$400 million were sold. The buildings were involved in the racketeering charges filed against Marcos, his wife, business associates and cronies. Senate president Jovito Salonga stated that no other government in the world had "*succeeded in recovering assets of former dictators in the courts of the US*" (*Reuters* 07/03/89).

Claims made

There are three groups of claimants in relation to the Marcos money:

1. the Philippine government;
2. the Marcos family; and
3. 10,000 victims of human rights abuses by the Marcos government. The victims of human rights abuses eventually split into two groups, one being known as Claimants 1081.

In addition, there are other undeclared claimants. The report stated that estimates of the Marcos fortune had been put at anywhere between US$5-10 billion (03/09/95).

The government's claim was primary as it involved a criminal case, while the other claims were civil (*Asia Intelligence Wire* 29/08/95).

Members of the Marcos family were originally sued in July 1987 by the Philippine government for the recovery of alleged ill-gotten wealth claiming that Marcos and his family had *looted the nation's treasury, betrayed public trust and abused power during his twenty year rule.* The case was amended on 23 April 1990 to include a number of other individuals plus Prime Holdings Inc. The government sought to recover the following:

- P1.6 billion in bank deposits;
- real estate valued at P51 million;
- shares of stock in various companies, including 2.4 million shares in Philippine Long Distance Telephone Company apparently worth P1.6 billion;

- assets and property in the US including US$292 million in bank deposits, US$98 million in investments in banks, financial houses and other firms and other real property investments.

(*Asia Intelligence Wire* 23/01/97)

Marcos associates were included in the claim as they were believed to be front men for the Marcoses ownership of businesses (*The Associated Press* 17/07/87).

According to *The Associated Press* the above broad civil suit claimed that the Marcoses had made off with US$10 billion, and demanded this amount back together with US$12.55 billion in damages, US$25 million to be paid to the PCGG for the cost of tracking the money and the payment of other unspecified fees and penalties. Another US$10 billion in damages was later added to the claim, as well as the names of 31 Marcos associates (06/08/96).

The mansion residence at which Marcos settled once in Hawaii also became part of the claim against him, with the Philippine government alleging that it was part of Marcos's illegally acquired overseas wealth (*The Associated Press*, 26/11/86).

In March 1999 it was reported in *Business World* that the Philippines government was seeking the trial of Imelda Marcos, Lucio Tan and former officials of a state-run development bank, Development Bank of the Philippines, for allegedly committing graft.

An article on the *Fox News* website in March 1999 stated that only a fraction of Marcos's wealth had been recovered after 12 years of litigation.

Swiss assets

In September 1995, after Swiss bankers decided to unfreeze the accounts, it was decided that US$500 million of the Marcos money put into unnumbered Swiss bank accounts was to be returned to the Philippines. The relevant accounts were with Credit Suisse and Swiss Bank Corp (now UBS). This occurred in conjunction with pressure being applied from the United States on the Swiss government, and was effectively the first time that the Swiss authorities

had agreed to return money from secret bank accounts, thus setting a powerful precedent. This money has still not been permitted to leave Switzerland.

Magtanggol Gunigundo, the head of the PCGG at the time, stated that this showed that in relation to Marcos assets "*All we need to get the right proof, in most cases, is access*". The money was then to be placed in an escrow account with the Philippine National Bank. The Sandiganbayan, the Anti graft court, would then decide whether the money had been honestly obtained or whether the Marcoses had plundered it from the people of the Philippines. The article stated that in 1966 the Marcoses had declared an income of US$69,300 and assets worth US$300,000 (03/09/95).

The above US$500 million assets were registered in the names of fifteen foundations, believed to be dummies and identified with the Marcos family. One of the issues involved was whether the wealth was immediately retrievable, as some of the money may have been invested in real estate and in similar assets.

A further issue regarding the retrieval of the funds was a law automatically appropriating ill-gotten wealth to the Comprehensive Agrarian Reform Program.

Other Swiss accounts and Marcos gold:

Still in dispute is US$13.46 billion in a UBS account in the name of Irene Marcos. There have also been continued rumours throughout the course of the actions being brought against the Marcos family regarding US$800 million gold deposits in the name of Mrs Marcos (*Business World* 16/06/99).

On 16 June 1999 a Senate blue ribbon committee announced that it was to investigate whether the alleged US$13.46 billion bank account of Irene Marcos-Araneta at UBS existed. The former Solicitor General, Frank Chavez, had presented the committee with documents indicating the existence of the account. The committee chairman, Senator Aquilino Pimental stated that the committee "*hope to establish once and for all whether the Irene bank account exists and if so, where it can be found, whether it is still intact or whether it has been siphoned off to other banks and where it came from*".

There has been much controversy over the years over the existence of this account and of gold deposits supposedly in Marcos's possession. The account had originally been in the name of Sandy Anstalt, a foundation, but was transferred to Araneta's name in 1992. An Australian treasure hunter, Reiner Jacobi, claimed to have traced the account for the Philippines government.

Mr Jacobi has also been making allegations since 1991 that he had discovered approximately 1,400 tonnes of Marcos gold deposited with Freilager AG in Switzerland's Kloten airport.

To counter this, the PCGG stated that it had documentary evidence refuting Mr Chavez's claim which was supposedly based on official records, all of which had been authenticated by the Swiss and US authorities. Mr Chavez has claimed that some of the officials of the PCGG have plotted to hide the existence of the alleged Marcos assets (*Business World* 11/06/99).

One of the problems identified with recovering the gold bullion deposited abroad was that due to the Philippines government's failure to identify the funds earlier, the gold bullion did not form part of the assets sequestered or frozen by the PCGG and so were beyond the reach of the Philippines government (*Business World* 09/03/99).

Settlement of the human rights litigation

In February 1999 a US$150 million compromise agreement was reached between the Marcos family and the victims of human rights abuses. The lawyers for the victims were led by Robert Swift of Kohn, Swift & Graf, a Philadephia law firm.

In 1986 a lawsuit was filed in Honolulu on behalf of 9,539 Filipinos in a class action suit against the Marcos estate for torture, summary executions and disappearances. The suit was filed in Honolulu, where Marcos had fled to once he was deposed, which meant that he was subject to being sued in a US court. The class action was won in 1995, with jurors awarding US$1.9 billion to the plaintiffs. This amount included US$1.2 billion punitive damages.

Robert Swift has stated that the litigation lasted for 13 years, and was undertaken almost entirely on a contingent basis financed by his firm, which specialises in class actions. His fees for the litigation, which involved 26,000 hours of work, were US$34.5 million, based on 22.9% of recoveries. He has stated that this fee was justified for "*the first human rights judgement against a former head of state, the first class action human rights case in history and the first fully litigated human rights case in US history.*"

The judgement was upheld by the 9th US Circuit Court of Appeals in December 1996. Despite this, the plaintiffs have had problems collecting money in foreign accounts with contested ownership, (*ABC News* website 25/02/99). The claimants have complained both that the settlement removed their rights to pursue further civil suits against the Marcos family, which they wanted to do, and that the size of the fee earned by Mr Swift was unreasonable. The settlement did not affect all other pending cases against the family being pursued by the government or individual complainants. Additionally, Senator Juan Ponce Enrile stated that the settlement only affected the claimants' money claims and not criminal liability (*Business World* 02/03/99).

One possible problem regarding the settlement was that the compromise agreement, drawn up in a US court, had to comply with Philippines laws and jurisprudence.

In April 1999 former Solicitor General Francisco Chavez asked the Sandiganbayan to refuse the transfer of US$150 million of Marcos money to the Honolulu district court for the human rights victims, as Chavez stated that the Marcos family should pay the claim out of their own pockets. Chavez also criticised the PCGG for negotiating a settlement with the Marcos family, rather than litigating (*Asia Intelligence Wire* 27/04/99).

Further legal moves

The Philippines Senate stated in December 1998 that it had identified forty-nine corporations that may have been used by Marcos as repositories of alleged ill-gotten wealth. The Senate had asked the SEC to provide documents showing the firms' 20 top stockholders from 1986 to the present. Business tycoon Lucio Tan owned some of the companies cited. A Senate resolution had also been passed to look into the extent of the Marcoses ownership of big

corporations i.e. how the assets were acquired. An inquiry was also to be instigated after Mrs Marcos had claimed that the Marcos family owned 'most of the Philippines' through local blue-chip companies (*Asia Intelligence Wire* 17/12/98).

Lucio Tan was sued for allegedly bribing Marcos in exchange for concessions to his corporations. In August 1986 the Supreme Court upheld a Sandiganbayan ruling directing the government to substantiate its suit against Mr Tan by being more specific in its accusations (*Business World* 11/06/97).

In December 1998 Ombudsman Aniano Desierto (the government's top graft investigator), scrapped three more criminal charges against the Marcos family and their associates. Desierto had already dismissed 27 cases lodged before him by the PCGG and vowed to continue to throw out cases due to insufficiency of evidence or proscription (the failure of the PCGG to lodge a complaint within 10 years from the time the offences were committed). This had led to Desierto being investigated on whether his dismissal of the cases was 'legally justified' (*Manila Times* 04/12/98).

On 3 February 1999, it was reported in *Business World* that four Filipino congressmen had asked the Supreme Court to compel Ayala Corp and its real estate arm, Ayala Land Inc, to return a 135 hectare property in Quezon City to the government. It was claimed that Marcos illegally seized the property in 1982.

Also in February 1999, legal impediments were cited by Senator Teofisto Guingona Jr regarding a compromise deal between the government and the Marcos family. A compromise would involve immunity from suits and exemption from tax payments, both of which would be questionable on constitutional grounds (*Business World* 11/02/99).

Imelda Marcos

The Independent reported that the Philippines government was suing Mrs Marcos for approximately £2 billion which it alleges she and her husband looted and salted away. The government allowed Mrs Marcos back in the country, to enable her to be prosecuted as otherwise Marcos funds abroad could not be touched (04/11/91).

An article in *The Financial Times* reported that Imelda Marcos had been charged on more than 100 counts, ranging from tax evasion to the theft of hundreds of millions of pounds (03/02/92).

In October 1998 the Supreme Court acquitted Imelda Marcos in a graft case where she was earlier convicted and sentenced to 12 years imprisonment. The Court stated that there was 'neither legal or factual basis' for Mrs Marcos's conviction, (*Business World* 07/10/98). On reporting the dismissal of the case *Reuters* stated that '*Still pending before local courts are scores of lawsuits accusing her of helping her husband steal billions of dollars from the Treasury*' (06/10/98).

In December 1998 *The Financial Times* reported that Mrs Marcos had launched a legal battle to reclaim more than US$12.8 billion of assets entrusted by her husband to a number of his associates. Mrs Marcos had decided to take the action after the success of a number of her husband's former associates in regaining control of assets that had been sequestered by the Philippines government.

As at April 1999 former Solicitor General Francisco Chavez stated that he had filed at least 79 criminal cases against Imelda Marcos and in 1992 he had successfully obtained a permanent freezing order preventing her family from moving their allegedly illegal wealth from Swiss banks (27/04/99).

Funding Issues

The various investigations and Court cases appear to have been funded by:

- seizing certain "easy" assets, such as a Marcos mansion in Manhattan, and using the proceeds to fund further litigation;
- State finance from the Government of the Philippines for the PCGG and the anti graft court. The Philippines regarded the recovery of Marcos assets as part of a moral crusade against the memory of the Marcos regime;

- a contingent fee arrangement over a 13 year period by the lawyers who led a class action on behalf of the victims of human rights abuses.

The fact that Marcos fled to Hawaii when he was deposed meant that he was subject to US litigation, and that the amounts that could be awarded against him were higher.

Political pressure on the Swiss government and banks from the US may have assisted in the recovery of assets from Switzerland.

CHAPTER FIVE
INVESTIGATIONS AND ENFORCEMENT ISSUES

78. Central Issues

78.1 The investigation and enforcement sub-group felt that its contribution to this project was best made by suggesting answers to this question:

> Within the existing legal and regulatory framework, what can we, as practitioners involved in investigations and enforcement, recommend to improve the way in which banks and professional advisors (as either the victims or potential victims of corruption) might be better equipped to pursue civil remedies in the courts in England and Wales to recover the proceeds of corruption?
>
> Alternatively, in courts outside England and Wales. In addition, what measures can we suggest (possibly outside the existing framework) which might reduce the need for civil remedies to be pursued?

79. Introduction

79.1 Corruption takes many forms. As Denis Osborne points out, 'corruption anywhere threatens anybody everywhere: corruption has global consequences.'[213] But this begs the question: what is corruption? The Concise Oxford Dictionary defines it as 'moral deterioration, especially widespread' and the 'use of corrupt practices, especially bribery or fraud'.[214] That dictionary earlier defines corrupt as 'morally depraved' and 'influenced by or using bribery or fraudulent activity'.[215] The criminal law in the UK, and in most other countries for that matter, has not managed to prevent or inhibit the growth of either domestic or international corruption. The UK experience suggests that it is difficult to obtain evidence on which to ground criminal proceedings, and

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213 Osborne D, 'Deciding to Fight Corruption' (1999) 7 *Journal of Financial Crime* 26, at 28
214 Allen R E, The Concise Oxford Dictionary of Current English (8th ed) BCA, London, 1990

even more difficult to secure a conviction for corrupt acts.[216] This experience would also appear to be an analogue of that in many, if not most, other countries.

79.2 Many of the problems associated with investigating corruption offences are based on the difficulty of securing adequate and admissible evidence. The perpetrators themselves are usually the only witnesses to the corrupt act. The act itself is easy to conceal and the intention behind it is difficult to establish to the requisite standard of proof. Absent adequate and admissible evidence, the successful prosecution of civil and criminal actions is not possible.

79.3 Jurisdiction and territoriality is a significant problem when combating corruption. Although writing in a different context, the following passage by the editors of *Guide to Financial Services Regulation* nonetheless emphasises the difficulties:

> '[The] law relating to jurisdiction has not kept pace with technology and in England, within those jurisdictions that follow English common law, the criminal law and most public law confines itself within the strait-jacket of the 'territorial principle'... In a world where transactions can occur on an almost instantaneous basis in or through a number of sovereign jurisdictions, the limits of the criminal justice system become immediately apparent.'[217]

79.4 Where investigators do secure adequate and admissible evidence of offences involving corruption, or where they establish reasonable grounds for suspecting corruption, it is essential that they then quickly trace and freeze the monies and any other assets involved. The speed with which monies are today electronically transferred around the world, from one jurisdiction to any number of jurisdictions, makes it increasingly difficult to arrest corruption by stopping the transfer of monies

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215 Ibid.

216 Rider B A K, 'Taking the Profit Out of Crime' in Rider B A K (ed), *Money Laundering Control* Round Hall Sweet & Maxwell, Dublin, 1996 at 26-27

217 Rider B A K, Abrams C and Ashe M, *Guide to Financial Services Regulation* (3rd ed) CCH Editions Ltd, Bicester, 1997 at 419-420

and other assets, and confiscating the proceeds. A fortiori within the existing commercial, legal and political framework. As Osborne recently observed:

> 'The public, the media, politicians and officials have decided that 'something should be done about corruption'. Deciding what to do is a more difficult task. Because the success of policies and actions requires support from society, those decisions may need to differ from place to place and from time to time. Deciding how to fight corruption after it has become systemic in an organisation or nation is especially difficult.'[218]

79.5 This serves to emphasise the importance of ensuring that immediate action is taken to redress and restructure the existing commercial, legal and political framework as it is being sorely tested at present in ways which demonstrate its glaring inadequacies. The difficulties associated with investigation of corruption domestically and internationally are testament to those inadequacies. Moreover, facilities need to be in place, 'for the rapid and reliable communication of information and in appropriate cases, intelligence.'[219]

79.6 Where the monies misappropriated through corrupt activities are substantial, the principal aim of the investigator is likely to be to recover those monies. There may also be secondary aims. For example: (i) to secure convictions for those responsible; (ii) to determine the control weakness(es) which made the loss possible so as to ensure that the misappropriation can not easily be repeated; and (iii) to identify and root out any accomplices. Hence the initial objectives in respect to investigating any corruption, whether major or not, are to:

- establish the facts in order to determine whether a claim should be brought;
- establish the evidence which supports those facts;

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218 Osborne D, 'Deciding to Fight Corruption' (1999) 7 *Journal of Financial Crime* 26, at 26

219 Rider B A K, 'The Enterprise of Crime' in Rider B A K (ed), *Money Laundering Control* Round Hall Sweet & Maxwell, Dublin, 1996, at 88

- develop a strategy designed to secure achievable outcomes in keeping with those facts, the evidence and the resources available;
- secure the assets by the use of freezing orders; and
- locate key individuals/companies involved (whether as possible defendants, third parties or witnesses).

79.7 It is generally very difficult to recover monies which others have obtained through corrupt activities. In the UK the difficulties faced by the prosecutors of corruption will only increase. A fortiori in the event that the Law Commission's proposals in its recent report entitled *Legislating the Criminal Code: Corruption*[220] are implemented as this will remove the present reversal of the onus of proof where gifts are made by contractors to government employees. Were the traditional onus to be restored, it will no longer be necessary for donors or donees to prove that such gifts are not tainted with corruption. From an investigative and prosecutorial perspective, that will make an already difficult task that much harder.

79.8 Investigations into corruption which occurs either outside the UK or in two or more jurisdictions are generally undertaken in the same manner as any fraud or money laundering inquiry. By their very nature these are inevitably complex and resource intensive. There are additional difficulties associated with corruption, however, given that corrupt practices generally occur covertly and often the victim is unaware of suffering any disadvantage. The international element also exacerbates the problems faced by law enforcement agencies within, and outside, the UK. For example, some jurisdictions do not recognise private sector corruption.[221]

79.9 Furthermore, when investigating corruption, it is also necessary to consider the legislative framework in those countries perceived as being the original source of the monies obtained by corruption. One must also contemplate the extent to which local legal procedures support the effective investigation of corruption, assist overseas authorities to trace the origin of the funds in question and secure adequate and admissible evidence of the corrupt act itself.

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220 Consultation Paper Number 145

221 E.g., Switzerland and Morocco

Substantive Anti corruption Law

80. United Kingdom

80.1 Corruption offences are currently dealt with in the UK under the following three statutes:

- Public Bodies Corrupt Practices Act 1889 (UK);
- Prevention of Corruption Act 1906 (UK); and
- Prevention of Corruption Act 1916 (UK).

80.2 The 1906 Act introduced offences pertaining to private sector corruption. The 1916 Act introduced the reverse presumptions in public sector cases. These Acts were perceived to have had many defects. The Salmon Commission and the Committee on Standards in Public Life called for a review of the law. As a result, the Law Commission examined the current position and proposed radical changes.

80.3 Many of the current problems in the UK stem from the lack of an agreed definition of what 'corruptly' actually means. There are difficulties in both definition and perception. Furthermore, the existing legislation is dependent on a distinction between public and non-public bodies. There is now great uncertainty as to what constitutes a public body, especially as many have now been privatised and it is unclear which of them, if any, can still be regarded as public bodies.

80.4 The Law Commission began by dealing with an 'agent' being tempted by bribery to betray the trust owed to his or her principal. It then extended the analysis to include those entrusted to perform functions for the public in the UK or elsewhere. It was considered that this would enable the UK to comply with the OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions ('OECD Bribery Convention'). Four new offences are proposed by the Law Commission:

(i) corruptly conferring, or offering or agreeing to confer, an advantage;

(ii) corruptly obtaining, soliciting or agreeing to obtain an advantage;

(iii) corrupt performance by an agent of his or her functions as an agent; and

(iv) receipt by an agent of a benefit which consists of, or is derived from, an advantage which the agent knows or believes to have been corruptly obtained.

80.5 The third and fourth of these proposed offences would represent a strengthening of the law. The existing legislation accepts that bribery is an offence, whilst the betraying of a trust is not. The proposals make it sufficient to prove that an agent's conduct was motivated by the hope of a corrupt reward, whether or not there was any agreement to that effect. Furthermore, an agent who accepts part of a bribe, paid to a third party in return for a favour, commits an offence. The term 'corruptly' is defined in the Law Commission's proposals.

80.6 The Law Commission also recommends that there should be no distinction between public and non-public bodies. The Law Commission accepts that corruption has an increasing international element and recommends that the new offences of corruption should be included in the list of Group A offences for the purposes of Part 1 of the Criminal Justice Act 1993 (UK) ('CJA 1993'). The CJA 1993 came into effect in July 1999 and extends the jurisdiction of the English courts over any of the new offences committed abroad where certain criteria are met, such as where a significant act occurs in the UK.

80.7 The Criminal Justice (Terrorism and Conspiracy) Act 1998 (UK) came into force on 4 September 1998. The Act makes provision concerning membership of proscribed terrorist organisations and conspiracy to commit offences abroad. It amends the Criminal Law Act 1977 (UK) which sets out the statutory offence of conspiracy and now includes a new section 1A, which provides that it is an offence to conspire to commit an offence outside the UK provided that certain conditions are satisfied. These conditions are:

(i) the conspiracy must involve an act by one or more of the parties or the happening of some other event intended to take place outside the UK;

(ii) the act or event must constitute an offence under the law in force in that country;

(iii) the act or event must also be an offence triable in England or Wales were it committed there and not outside the UK; and

(iv) some part of the conspiracy must have taken place within England or Wales.

80.8 Importantly, any act done by means of a message however communicated is to be treated as done in England or Wales if the message is received or sent in England or Wales. This covers facsimile transmissions, telephone and e-mail messages. It is immaterial whether or not the accused was a British citizen at the time of his or her participation in the conspiracy.

81. Overseas Requests

81.1 Given the global nature of corruption, requests are from time to time received in the UK from foreign jurisdictions seeking assistance to obtain evidence in the UK or to freeze and/or seize assets held or located in the UK. These requests can be dealt with in a variety of ways. The following are examples.

81.2 Police to police requests for intelligence concerning bank accounts and the like can be satisfied via production orders under the Proceeds of Crime Act 1995 (UK).[222] Should such intelligence be required as evidence, a formal request must be sent to the UK central authority by the foreign central authority.[223] Formal requests are dealt with under the Criminal Justice (International Co-operation) Act 1990 (UK) ('CJICA 1990').[224] As Candler points out:

> 'For the two years ending in November, 1995, the Home Office received 120 requests from the United States and submitted 185 requests to the United

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222 Operative 1 November 1995

223 The central authority in the UK is the Home Office

224 Operative 5 April 1990

States. The 1990 Act was used to obtain copies of documents, videotape depositions, restraint of assets, and search and seizure. Most of the U.K. requests to the United States were for voluntary witness interviews, service of process, and production of documents.'[225]

81.3 The UK can only offer assistance in freezing and/or confiscating the proceeds of drug trafficking and other serious crime to countries which have been designated for that purpose. Countries are so designated where the UK has an expectation of reciprocal confiscation assistance and occurs where:

(i) the other country has a corresponding law;
(ii) a treaty or other instrument is in force between the requesting country and the UK; or
(iii) the other country and the UK are parties to an international convention on mutual assistance.

81.4 CJICA 1990 section 4 empowers a UK court or judge conducting a hearing to receive evidence. There is no requirement for criminal complicity in the UK. The overseas authority has to satisfy the UK central authority that it is instituting an investigation into a suspected offence. There does not need to be a similar offence in the UK. However, political offences will not be considered. Under section 4, police officers can act as agents of the court by identifying the relevant witnesses and any evidence required. The witness is then called to the hearing, a deposition is taken and any documentary evidence produced.

81.5 CJICA 1990 section 7 relates to search warrants and production orders. These matters are firmly linked to the Police and Criminal Evidence Act 1984 (UK). Therefore, more stringent access conditions must be satisfied by the requesting authorities. When law enforcement officers in the UK have conducted inquiries concerning suspected criminal activity, and it is decided that their findings will support a

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225 Candler L J, 'Tracing and Recovering Proceeds of Crime in Fraud Cases' in Rider B A K (ed), *Money Laundering Control* Round Hall Sweet & Maxwell, Dublin, 1996, at 159

prosecution abroad, section 4 proceedings can be used to forward the evidence obtained.

81.6 Problems may arise in the UK concerning resourcing such inquiries and incentives for police forces to allocate staff to properly respond to such requests. At present the British Government's priorities for police are generally directed towards high volume crime that has an immediate impact on the quality of life in local communities.[226] Action against burglary, street crime, violence and disorder are all examples of such priorities. Statutory obligations to work in partnerships with other relevant authorities and setting locally agreed priorities underpin the Government's policy. The police are judged against national and local performance indicators. These priorities have increased pressure on chief officers to focus more on local problems. Hence resources formerly dedicated to economic crime and non-police corruption have been redeployed in other areas. This does not auger well for combating major corruption on either a domestic or an international front.

81.7 It is possible that some chief officers no longer have the resources or are no longer willing to devote personnel to overseas requests that are resource intensive and which offer no obvious and direct benefit for the undertaking of such inquiries. The need for some form of dedicated National Economic Crime Squad should not, therefore, be overlooked when considering a response to issues discussed in this report. Hypothecation should also be considered as an attempt to compensate the police for undertaking such inquiries outside of their national and local priorities.

Restraint and Confiscation Orders

81.8 Criminal Justice Act 1988 (UK)[227] ('CJA 1988') section 71 provides for confiscation of the proceeds of crime in fraud and other non-drug related offences.[228] The court

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226 *The Times*, 30 November 1999: 'Property crime will rise by up to 30 per cent, forcing the Government on to the defensive between now and the next general election, according to Home Office figures published yesterday... A National Crime Reduction Task Force will be set up and eight regional crime directors appointed... The report estimates that theft and handling stolen goods will rise by about 650,000 offences between 1997 and 2001 but could rise by up to 40 per cent.'

227 As amended by the Proceeds of Crime Act 1995 (UK)

228 Operative 1 April 1989

has a duty to make a confiscation order if the prosecution gives notice that the Defendant has benefited from the offence. If a victim has or will initiate a civil damages claim, the court may, but is not required to, impose a confiscation order. As Candler notes:

> 'The criminal prosecution is focused on convicting the Defendant, not recovery of funds, and victims may be left out of the process. One impediment to tracing and freezing assets in a criminal case is time. Tracing the assets through a number of offshore jurisdictions may be too time-consuming, particularly where the investigation is hampered by secrecy laws and confidentiality laws restricting the disclosure of bank and business records. There are procedures for seeking such evidence, such as mutual legal assistance treaties, but these require formal requests which take time to execute.'[229]

81.9 The court may prior to trial, and in some cases even prior to charges being filed,[230] issue a restraint order to prohibit any person from dealing in realisable property, wherever located.[231] Realisable property is any property of the Defendant which can be used to satisfy a confiscation order. It does not have to be property linked to the offence as required under US law. The restraint application is made ex parte. Once made, it permits the police to seize any realisable property to prevent it from leaving the jurisdiction. Alternatively, the prosecution may seek a charging order against real property. Realisable property also includes any property which the Defendant may have allegedly gifted to another person at any time after the commission of the earliest offence.[232]

81.10 A restraint order may extend to property situated outside the geographical jurisdiction of the UK.[233] If the Defendant deals with the property after it is restrained, that would constitute a contempt of court. Moreover, an order may be made requiring a

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229 Candler L J, 'Tracing and Recovering Proceeds of Crime in Fraud Cases' in Rider B A K (ed), *Money Laundering Control* Round Hall Sweet & Maxwell, Dublin, 1996, at 143

230 As long as there is a reasonable likelihood that charges will be filed

231 CJA 1988 s.77

232 As per provisions in Criminal Justice Act 1988 (UK)

Defendant to repatriate property outside the jurisdiction.[234] Hence funds transferred offshore can be transferred back to the UK to satisfy a confiscation order. A Defendant may also be required to file a disclosure affidavit identifying all of his assets, wherever located. Failure to make full disclosure would be a contempt of court. Restraint and disclosure orders may also be made against third parties in possession of property in which the Defendant has an interest.

82. Possible Impediments to Prosecuting Foreign Officials for Corruption or Money Laundering

82.1 There is an exception to extradition for political offences.

82.2 Diplomatic or sovereign immunity may present as a bar to prosecution.

82.3 Privilege against self-incrimination may be invoked by the Defendant to resist an order to disclose assets.

82.4 The inability of law enforcement and investigating agencies to obtain adequate and admissible evidence in a timely fashion or at all.

82.5 It is not always acceptable to simply have regard to the criminal law of the country in which the funds originated. If the matter is a wholly domestic one, then no doubt the local law and system of values will satisfactorily determine the issue. However, most cases will involve two or more jurisdictions. It might well be that although the conduct giving rise to the funds is regarded as a criminal offence in the country concerned, the same conduct would not be regarded as even improper elsewhere, and certainly not in the country where the money comes to rest.[235]

Some Limitations Upon Civil Actions

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233 CJA 1988 s.102(3).

234 *Re WJT* (1992) (unreported)

235 Rider B A K, 'Taking the Profit Out of Crime' in Rider B A K (ed), *Money Laundering Control* Round Hall Sweet & Maxwell, Dublin, 1996, at 6

82.6 The English courts will not order general discovery of documents as that constitutes a 'fishing' expedition.[236] This is considered anathema to civil practice and procedure. However, the courts are empowered to order third parties to disclose information before proceedings have been commenced. Such orders are known colloquially as Norwich Pharmacal orders.[237] These can be litigated in civil proceedings in a personal capacity. Such orders can be extended to a Shapira order where third parties are ordered to disclose information in aid of a tracing claim.[238] However, this has to be specific. For example, where it can be shown that it will lead to assets against which a proprietary claim can be made. But it may be necessary to give cross-undertakings in damages to the banks.

82.7 There are particular difficulties in obtaining evidence from foreign jurisdictions. For example, bank secrecy in the foreign jurisdiction may still be a barrier to evidence gathering, since mutual legal assistance treaties ('MLATs') are not available to plaintiffs. Moreover, there is difficulty in getting English courts to compel parties to produce documents which are located abroad.[239]

82.8 Other potential obstacles include the inability of civil parties to offer protection for witnesses or collaborators. There may be a significant public interest element to the civil prosecution of corrupt practices, but the plaintiff has to bear the risk of an adverse costs order. The plaintiff also has to bear the risks of any associated litigation. For example, counterclaims or defamation proceedings. Moreover, collateral attacks through the civil and administrative courts are sometimes brought against a hapless plaintiff: irrespective of the merits of such collateral litigation. In some jurisdictions this presents as a significant concern. The prospect of seemingly endless proceedings which a multi-jurisdictional investigation can generate, will be a significant barrier to any plaintiff. This is likely to involve a serious diversion of management resources and also financial resources.

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236 *Compapgnie Financiers du Pacifique v Peruvian Guano Company* (1882) 11 QBD 55

237 *Norwich Pharmacal Co v Customs and Excise Commissioners* [1974] AC 133. See Paragraph 44, above.

238 *Bankers Trust Co v Shapira* [1980] 1 WLR 1274

239 See also Appendix A and Paragraph 24

83. Freezing Orders and Disclosure Orders

83.1 It may be possible to obtain a Mareva injunction[240] against a foreign government official who has received improper payments.[241] In *Republic of Haiti v Duvalier*,[242] for instance, the Court of Appeal upheld a world-wide Mareva injunction against Jean-Claude Duvalier, his wife and his mother preventing them from disposing of assets, wherever located, which represented funds allegedly embezzled from the Republic of Haiti. The Duvaliers did not reside in England. Nonetheless, the court concluded that 'there is jurisdiction to grant a Mareva injunction, pending trial, over assets world-wide,'[243] although cases where such orders will be applied are rare.[244] A Defendant can be ordered to disclose his assets, wherever located, in connection with an application for a Mareva injunction.[245]

84. The Serious Fraud Office ('SFO')

84.1 The SFO was created in 1987. It may also respond to some letters of request from international agencies. The SFO can use its investigative powers under Criminal Justice Act 1987 (UK) ('CJA 1987') section 2. However, the SFO does require a suspicion of criminal complicity by persons in the UK. CJA 1987 section 2(3) provides for the production of documents which relate to any matter under investigation and gives the SFO the power to take possession of any relevant documents, or to take any necessary steps to preserve them and prevent interference with them.

84.2 Such powers may now be exercised by the SFO on behalf of foreign prosecutors, in response to requests submitted under the CJICA 1990, if the request for assistance involves serious or complex fraud. The SFO recently conducted its first s2 interview on behalf of the US pursuant to a letter of request from the US Department of Justice.

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240 Now known as a civil freeze order.

241 *Mareva Compania Naviera SA v International Bulk Carriers SA 'The Mareva'* [1975] 2 Lloyd's Rep 509

242 [1990] 1 QB 202

243 Ibid at 216-217

244 Candler L J, 'Tracing and Recovering Proceeds of Crime in Fraud Cases' in Rider B A K (ed), *Money Laundering Control* Round Hall Sweet & Maxwell, Dublin, 1996, at 152

In addition, the SFO has utilised its section 2 powers on behalf of investigators from other countries and it is expected that this role will increase significantly in the future.[246]

84.3 The experience of the SFO and the Crown Prosecution Service's fraud section in the light of the very significant changes that have taken place in the law relating to the taking and admission of evidence, particularly from overseas, under the CJA 1988 needs to be built upon. These authorities require more resources to render them more effective and efficient in the utilisation of their various powers.[247]

85. National Confiscation Agency

85.1 Rider advocates the creation of a National Crimes Authority able to address organised crime, and possibly other matters of grave concern such as serious fraud, corruption and possibly even terrorism, at all levels in a co-ordinated and efficient manner. It would not be concerned solely to investigate specific offences, let alone secure convictions. Rather it would be concerned with the evaluation of problems, the identification of threats, the development of relevant strategic plans, the co-ordination of information and intelligence, the co-ordination, direction and support of multi-agency investigations, the supervision and support of remedial, prophylactic and enforcement action, the monitoring of preventive systems and the formulation and development of reform and other measures.[248]

85.2 At present, consideration is being given to the establishment of a National Confiscation Agency which may operate in a way similar to that of the Criminal Assets Bureau in the Republic of Ireland. The role of such an agency would be to target persons whose lifestyle is partly/wholly funded by illegal proceeds and to confiscate such funds through the civil court system.

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245 *Bekhor & Co v Bilton* [1981] QB 923, at 936-937

246 Candler L J, 'Tracing and Recovering Proceeds of Crime in Fraud Cases' in Rider B A K (ed), *Money Laundering Control* Round Hall Sweet & Maxwell, Dublin, 1996, at 156

247 Cf. Rider B, Abrams C, and Ferran E, *Guide to the Financial Services Act 1986* (2nd ed) CCH Editions Ltd, Bicester, 1989, at 249

85.3 The role of a National Confiscation Agency in dealing with overseas requests has not been clarified and it may still fall to traditional law enforcement agencies to satisfy such enquiries. However, it is likely that such an agency would only be responsible for seizing illicit funds and would otherwise play a non-prosecutorial role.

86. Traditional Law Enforcement

86.1 Even if the relevant laws are capable of application on an extra-territorial basis, and very few are, by involving another jurisdiction significant practical barriers are placed in the path of investigators in obtaining and securing evidence which would be admissible before a court. Such difficulties are exacerbated, as Rider explains, by certain jurisdictions, 'willing to offer banking and other facilities on the basis that secrecy will be assured. Sadly, there are countries which have been prepared to facilitate the receipt of money no matter what its source.'[249]

86.2 The investigation/confiscation response in the UK is dependent upon resourcing by traditional law enforcement in conjunction with international conventions, MLATs and bi-lateral agreements. Where resources are scare, and priorities are directed elsewhere, traditional law enforcement is ill-equipped to combat domestic and international corruption of the magnitude which this report contemplates.

86.3 It is a regrettable fact in the UK that law enforcement will never have sufficient resources to police all transactions designed to obscure the source of funds obtained from serious criminal activity. It must be remembered that whilst the proceeds of illicit trafficking in drugs are vast, other forms of criminal activity such as art and cultural property related crimes, securities frauds and counterfeiting also produce sums well beyond comparison with many national economies. Thus, whatever devices that the law has for detecting and controlling, or rather inhibiting, money

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248 Rider B A K, 'The Enterprise of Crime' in Rider B A K (ed), *Money Laundering Control* Round Hall Sweet & Maxwell, Dublin, 1996, at 98

249 Rider B A K, 'Taking the Profit Out of Crime' in Rider B A K (ed), *Money Laundering Control* Round Hall Sweet & Maxwell, Dublin, 1996, at 9

laundering, must be deployed strategically and to best effect.[250] Nonetheless, in Rider's view:

> 'Even in situations where it is most unlikely judicial proceedings will be feasible whether for evidential, jurisdictional, resource or even political reasons, it must never be forgotten that the intelligence value of information relating to the funding of enterprise and serious crime may be of critical value, both strategically and tactically.'[251]

87. United States: A Comparative Model

87.1 In the US, civil forfeiture proceedings are initiated under 18 USC section 981. Criminal forfeiture proceedings are initiated under 18 USC section 982 and 21 USC section 882.[252] The US forfeiture statutes provide for restraint of assets only for specified offences. Although not all crimes are covered, bribery is a specified offence for the purpose of forfeiture. But criminal forfeiture or criminal confiscation orders do not guarantee that funds will be returned to victims of the offence. Instead, the funds will be forfeited to the US Government. The assets may be shared with the foreign law enforcement agency that participated in the investigation and/or initial seizure pursuant to asset sharing agreements between the two countries.

87.2 US laws on freezing criminal proceeds are more restrictive than those in some other countries. A criminal forfeiture order may be sought under 19 USC section 982 for any person convicted of money laundering under 18 USC sections 1956 or 1957. The property must be involved in such offence or traceable to such property. The civil forfeiture statute is 18 USC section 981. This provides for the seizure and forfeiture of any property involved in, or traceable to, a money laundering transaction. The money laundering statute is 18 USC section 1956.[253] This provides that anyone who conducts a financial transaction knowing that the property involved represents the proceeds of a specified unlawful activity, with the intent to carry on the specified

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250 Ibid., at 25
251 Ibid., at 26
252 For drug trafficking offences.
253 Money Laundering Control Act 1986 (US)

unlawful activity or to conceal the owner or controller of the proceeds of the specified unlawful activity, is guilty of an offence.

87.3 If the assets derived from, or traceable to, the offence have been dissipated or transferred out of the jurisdiction, the substitute assets provision of 21 USC section 853(p) may be used to seize any other property of the Defendant. However, in a money laundering transaction, a person who acted merely as an intermediary is not subject to this provision unless he or she conducted three or more separate transactions involving a total of US$100,000 or more in any twelve month period.[254]

Extension of Jurisdiction - Foreign Corrupt Practices Act 1977 (US)

87.4 In support of these international initiatives, the US recently amended its anti-bribery legislation, the Foreign Corrupt Practices Act 1977 ('FCPA 1977'), to provide for jurisdiction to prosecute US persons[255] who:

> '[Corruptly] do any act outside the United States in furtherance of an offer, payment, promise to pay, or authorisation of the payment of any money or offer, gift promise to give, or authorisation of the giving of anything of value to any of the persons or entities set forth... for the purposes set forth therein.'[256]

87.5 This means that the US can prosecute for the payment of a bribe to a foreign government official or private party, even where that activity takes place solely outside the US, if the payment is made by a US person. Consequently, US companies must now assume greater responsibilities to ensure that their employees overseas do not attempt to secure a contract or close a business deal through the payment of improper commissions or bribes.[257]

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254 Ibid.

255 Persons includes individuals, corporations, partnerships, trusts and sole proprietorships.

256 FCPA 1977 para. 78dd-1 (g)(1) see also Appendix D.

257 Cf. Osborne D, 'Deciding to Fight Corruption' (1999) 7 *Journal of Financial Crime* 26, at 27-28.

87.6 The US legislative amendment to the FCPA 1977[258] is consistent with Article 4, paragraph 25 of the Commentaries to the OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions[259] which provides that: 'The territorial basis for jurisdiction should be interpreted broadly so that an extensive physical connection to the bribery act is not required.'

Extra-territorial Reach of US Anti Money Laundering Laws

87.7 It is significant that 18 USC section 1956(f) provides for extra-territorial jurisdiction over the substantive money laundering offences where the impugned conduct is by a US citizen, or otherwise if the conduct occurs in part in the US, and in either situation the transaction involved over US$10,000. Since there is no requirement that the conduct occurring in the US must have been substantial, then as long as the money passes through the US banking system a US court could assume jurisdiction even though the Defendant himself or herself did not enter the US.

Anti Corruption Efforts of Other Governments

87.8 Until recently, no other country had introduced legislation similar to the FCPA 1977. Indeed, several governments had allowed companies to claim foreign bribes as tax-deductible expenses. In today's climate of increased global competition, however, governments recognise that they will find it harder to attract foreign investment if they are seen to lack integrity. Cleaner governments are now pursuing reforms and demanding higher standards of themselves and, in turn, of their companies. As reforms gather momentum, companies will find that they may be barred from future public tenders if they fail to live up to these new standards.

87.9 The German tax authorities, for example made no moral judgment on bribery. However, they were concerned to ensure that companies did not exploit alleged payments as a tax loophole by claiming to have paid a bribe while diverting the funds to a German account. When making claims, companies had to establish that: (i) they had secured, or hoped to secure, some concrete benefit in return for their bribe; (ii) the

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258 15 USC s.78.

259 Adopted by the Negotiating Conference on 21 November 1997.

bribe had been paid; and (iii) that the payment was roughly in proportion to the expected benefit. Ideally, they were to name the recipient of the bribe in their tax returns, but in sensitive cases officials were sometimes prepared to accept an oral statement.

87.10 Similar regulations formerly applied in, for example, Austria, Australia, Denmark and Switzerland. These regulations permitted companies to establish that the bribes were customary in the country where they had been paid. Japanese law treats both domestic and foreign bribes as 'entertainment expenses', which are not tax-deductible. The official UK position is that existing legislation criminalises trans-national bribery, but legal opinions differ and there have been no prosecutions to date.

Multilateral Initiatives

88. The OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions ('OECD Bribery Convention')

88.1 The OECD Bribery Convention was adopted on 21 November 1997 and implemented on 15 February 1999. It provides an international framework for criminalising the payment of bribes to foreign public officials and for assisting signatory countries in investigating these offences. Specifically, the Convention provides in Article 1, paragraph 1 that:

> 'Each Party shall take such measures as may be necessary to establish that it is a criminal offence under its law for any person intentionally to offer, promise or give any undue pecuniary or other advantage, whether directly or through intermediaries, to a foreign public official, for that official or for a third party, in order that the official act or refrain from acting in relation to the performance of the official duties, in order to obtain or retain business or other improper advantage in the conduct of international business.'

88.2 There is a separate provision within the OECD Bribery Convention which provides for mutual legal assistance. Article 9, paragraph 1 of the Convention states that:

'Each Party shall, to the fullest extent possible under its laws and relevant treaties and arrangements, provide prompt and effective legal assistance to another Party for the purpose of criminal investigations and proceedings brought by a Party concerning offences within the scope of this Convention and for non-criminal proceedings within the scope of this Convention brought by a Party against a legal person. The requested Party shall inform the requesting Party, without delay, of any additional information or documents needed to support the request for assistance and, where requested, of the status and outcome of the request for assistance.'

88.3 This mutual co-operation provision is broader than bilateral mutual legal assistance treaty ('MLAT') provisions, which are generally limited to assistance in criminal matters. Under the OECD Bribery Convention, the parties shall assist in non-criminal proceedings brought against a legal person. There is a specific provision in Article 8, paragraph 1 which requires the parties to take measures for the proper maintenance of books and records and financial statements to prohibit the establishment of off-the-books accounts designed to hide the payment of a bribe. Failure to keep proper records or the falsification of books and records is to be punished by proportionate and dissuasive civil, administrative or criminal penalties. This should ensure that parties investigating corruption cases are better able to access proper accounting records in order to verify legitimate payments and investigate suspicious transactions.

88.4 Article 3, paragraph 3 of the OECD Bribery Convention provides for the seizure of the bribe or the proceeds of the bribery, and relevantly states that:

'Each Party shall take such measures as may be necessary to provide that the bribe and the proceeds of the bribery of a foreign public official, or property the value of which corresponds to that of such proceeds, are subject to seizure and confiscation or that monetary sanctions of comparable effect are applicable.'

88.5 Article 3 of the OECD Bribery Convention concludes in paragraph 4 by requiring each party to, 'consider the imposition of additional civil or administrative sanctions upon a person subject to sanctions for the bribery of a foreign public official.'

89. The Council of Europe Criminal Law Convention on Corruption ('Convention on Corruption')

89.1 On 4 November 1998, the Council of Europe adopted the Convention on Corruption. This requires the parties to criminalise the acceptance of a bribe by a public official, a member of an international organisation, or a private sector employee, 'when committed intentionally in the course of business activity.' Article 18 of the Convention provides that each party shall adopt appropriate measures to ensure that legal persons can be charged with active bribery, trading in influence and money laundering, when committed by any natural person[260] for the benefit of the organisation. The Convention also provides for mutual legal assistance in investigations and prosecutions, and allows for the spontaneous sharing of information.

Other International Initiatives

89.2 Appendix D contains a summary of some other international initiatives into anti corruption activity.

90. Mutual Legal Assistance Treaties ('MLATs')

90.1 The OECD Bribery Convention and the Convention on Corruption both state that bank secrecy laws shall not apply to the investigation of offences covered by them. These conventions also state that assistance can be provided pursuant to existing MLATs. These provide for a wider basis for assistance. Bank secrecy laws are lifted for criminal investigations and criminal proceedings. Information can be shared with foreign law enforcement officials. Assistance is available in search and seizure, and in restraint and confiscation of assets.

90.2 The US has MLATs with a number of countries including: Anguilla, Argentina, The Bahamas, the British Virgin Islands, Canada, the Cayman Islands, Hungary, Italy, Jamaica, Korea, Mexico, Montserrat, Morocco, the Netherlands, Panama, the Philippines, Spain, Switzerland, Thailand, Turkey, the Turks and Caicos Islands, the UK and Uruguay. Requests pursuant to an MLAT must be submitted by the central authority. In the US this is the Office of International Affairs of the US Department of Justice. In the UK it is the Home Office.[261] In most countries, the Minister of Justice or the Attorney-General's Chambers acts as the central authority.

90.3 There are also a number of multilateral treaties that provide for assistance in criminal investigations and the seizure of proceeds of crime. These include the Organisation of American States ('OAS') MLAT, the Council of Europe Money Laundering Convention, the Convention on Laundering, Search, Seizure and Confiscation of the Proceeds from Crime,[262] and the European Convention on Mutual Assistance in Criminal Matters 1959.

90.4 MLATs also provide that the requested country will assist in the restraint and forfeiture of assets to the extent permitted by local law. Under either the OECD Bribery Convention or an MLAT, the procedures for seizing and confiscating monies paid as a bribe, or an amount equivalent to such benefit, will depend on the domestic law of the requested country.

91. The Hague Evidence Convention ('HEC') and Letters Rogatory Requests

91.1 The HEC provides for the taking of evidence abroad. It was adopted by the Hague Conference on Private International Law on 26 October 1968. It entered into force for the US on 7 October 1972. The HEC provides for assistance in civil and commercial

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260 Who had a leading position within the organisation.

261 For the two years ending in November, 1995, the Home Office received 120 requests from the United States and submitted 185 requests to the United States. The 1990 Act was used to obtain copies of documents, videotape depositions, restraint of assets, and search and seizure. Most of the U.K. requests to the United States were for voluntary witness interviews, service of process, and production of documents: Candler L J, 'Tracing and Recovering Proceeds of Crime in Fraud Cases' in Rider B A K (ed), *Money Laundering Control* Round Hall Sweet & Maxwell, Dublin, 1996, at 159.

matters pursuant to a letter of request issued by a judicial authority for use in judicial proceedings, either commenced or contemplated, in the requesting country. In countries that are not parties to the HEC, a judicial authority in one country may make a request for evidence from another country pursuant to a letter rogatory request.

91.2 The US can assist private parties in response to a request under the HEC or a letter rogatory request submitted by a foreign court or 'any interested person' pursuant to 28 USC section 1782. Thus, a party bringing an action to recover funds allegedly embezzled or improperly obtained by a foreign government official could seek assistance under this statute. It allows for the appointment of a US prosecutor or a private attorney as a commissioner to obtain evidence in response to a letter rogatory request from a foreign court or any interested person. Application is made *ex parte*. A commissioner appointed under this statute can compel production of documents, including bank records, and can compel witnesses to give evidence. The witness is entitled to claim any legally applicable privilege, such as self-incrimination or attorney-client privilege.

91.3 There is no specific provision for search and seizure under section 1782. The US Constitution prohibits unreasonable search and seizure, and the showing of probable cause is required. Search warrants can be obtained under rule 41 of the Federal Rules of Criminal Procedure for requests submitted by foreign prosecutors pursuant to an MLAT, but this provision is not applicable in civil cases.

92. Requirements to Support the Effective Investigation of Corruption

92.1 Successful action in the UK will be dependent upon the ability to conduct effective investigations outside the UK. Hence it is critically important that the fundamental requirements for such investigations are in place in as many jurisdictions as possible.

92.2 The emphasis of the OECD, and other international initiatives, is on the prohibition and prevention of corruption. However, when corruption is perpetrated, the investigation of the corrupt act and all those infected by it is called into play. That

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262 Signed at Strasbourg on 8 November 1990.

which follows assumes that the corrupt act has already taken place and focuses on the requirements that need to be in place to progress an investigation. This could usefully be crafted into a checklist and contribute towards several objectives. First, it could provide for a standard of best practice against which a particular government or law enforcement agency could measure its own existing procedures. Secondly, it could be used by external bodies such as the International Monetary Fund ('IMF') and the World Bank in assessing the effectiveness or otherwise of the current procedures in a particular 'target' country.[263] Finally, a checklist could be used to benchmark success against multinational initiatives to combat corruption. This would enable an audit of the procedures in place in a given jurisdiction to be made against an agreed model of best practice.

92.3 It is suggested that legislation should be in place that specifically criminalises corruption. The prohibition should be sufficiently broad to accommodate the common criminality requirements involved in requests to and from overseas governments. Legislation should also provide a comprehensive statutory framework for investigations, and define realistic and practical evidential requirements that are more readily met than at present.

92.4 Legal mechanisms should be available, at short notice, to allow investigators to trace funds linked to corruption. These procedures should be readily available to assist with domestic matters and to facilitate timely responses to legitimate requests from overseas as well. While in some jurisdictions such procedures already exist, they may be rendered ineffective because the process is too slow. To be of any practical value, the procedures need to recognise and acknowledge the speed at which funds can now be moved overseas. Legal mechanisms should also be available to allow for the freezing of suspect assets once the tracing process has confirmed the connection between the assets and the underlying corrupt activity. To the extent that it is practical and reasonable, the freezing order should have effect beyond the jurisdiction.

92.5 Procedures for the ultimate confiscation of the proceeds from corruption should allow for flexibility in the way in which the funds are used and distributed. In particular, it

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263 *Financial Times*, 7-8 August 1999.

should be possible to consider the disbursement of funds back to domestic and/or overseas law enforcement agencies to support future investigation work.[264] Such an initiative would require the political will to resist the predictable response to such self-funding measures.

92.6 Without unreasonably compromising either civil rights or human rights, the local legal framework for investigation procedures should provide for the controlled use, during investigations, of both informants and undercover officers. Adequate legal and personal protection should be available for 'whistle blowers' who wish to volunteer information. Unless disclosures can be shown to have been made with malice and without any reasonable justification, there should be protection for the whistle blower even if the allegations prove to be incorrect. Legal provisions should be in place which require the disclosure of assets by politicians, senior civil servants and their families/associates. Without any unnecessary erosion of either civil rights or human rights, the law should support the pro-active investigation and detection of corrupt activity. Again, such an initiative would require a strong political will.

92.7 A specialist investigation body should be in place, structured in such a way as to be independent and protected against improper political influence. The Independent Commission Against Corruption in Hong Kong ('ICAC') provides an example of the sort of organisational structure, internal procedures and external reporting arrangements that might be considered.[265] The investigatory body mooted should be sufficiently resourced and staffed with trained specialists. The investigation of corruption is a highly specialised and resource intensive discipline. In addition to possessing the necessary level of technical skill, those involved must be of unquestioned integrity.

92.8 There should be some carefully applied legal sanction against the refusal of suspects in corruption investigations to answer questions. Where there is specific evidence that an individual's wealth may in whole, or in part, have been derived from corrupt

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264 Cf. Candler L J, 'Tracing and Recovering Proceeds of Crime in Fraud Cases' in Rider B A K (ed), *Money Laundering Control* Round Hall Sweet & Maxwell, Dublin, 1996, at 183

265 Other examples include the Anti Corruption Agency in Malaysia; and the Corrupt Practices Investigation Bureau in Singapore.

activities, there should be procedures for the compulsory declaration of assets and sources of wealth.

92.9 There should be the political willingness and necessary legal mechanisms in place allowing for the jurisdiction in question to enter into MLATs for the investigation and confiscation of the proceeds of corruption. In confiscation proceedings, the evidential burden of proof should be reversed such that there is a presumption that assets are derived from corruption unless proven otherwise.

92.10 The criminal law should provide for a suspicion based disclosure requirement for financial institutions. The basis for disclosure should encompass funds or transactions linked to corruption through an 'all crimes' provision rather than being limited to specific offences. There should be an offence of failing to report suspicious transactions, and a sanction against anyone who reveals to the owner or controller of the funds in question that such a disclosure has been made.

92.11 Consideration should be given to enhancing public co-operation in the detection and investigation of corruption. Co-operation might better be encouraged through the use of suitable reward schemes.

The Way Forward

93. New Domestic Controls

93.1 The purpose of this section is to outline a proposed control structure which would not only prevent and discourage corruption, but should also assist in the effective investigation of suspected acts of corruption arising in the following circumstances:

(i) the funding of development projects, or loans to assist with development projects, by the IMF and other international organisations such as the EU;

(ii) the contractual relationships established between overseas customers and domestic contractors/financial institutions and the like undertaking

international military, health, development and other projects, or supplying goods and services; and

(iii) domestic contractual and public sector arrangements.

93.2 An essential requirement in preventing, discouraging and, where corruption is suspected of having taken place, proving corruption is to have in place a control framework which will also provide robust enforcement and investigation procedures. As well as discouraging involvement or connivance in corrupt activities, the proposed control framework should assist effective investigation of suspected corrupt payments, provide evidence for prosecutions, and supply documentary proof of illegal acts and amounts of money for the purposes of tracing and recovering corrupt payments.

93.3 As a first step, the control framework must provide both checks and transparency in the way in which monies for grants, loans, goods and services are paid, received and spent. There are two parties to any corrupt relationship. First, there is the corrupter who benefits from influencing the conduct of the person being corrupted. Secondly, there is the person being corrupted who benefits financially or otherwise. Any control framework must tackle both sides of this relationship and provide an evidential audit trail. In tackling the corrupter, there are two aspects to consider:

(i) discouraging the illegal conduct; and

(ii) applying sanctions.

93.4 In terms of discouraging the illegal conduct, it must be made difficult and dangerous to follow a corrupt course of action, particularly where this involves documentation with its inevitable paper trail or the electronic equivalent. Apart from individuals who use their personal resources to corrupt, it is suggested that most corrupt monies originate in organisations, be they national or international, governmental or corporate. It is at this point that controls must start: by contract where international or public sector organisations are involved, and by legislation where companies alone are involved. Such controls should require a public accounting for the monies of international and public sector organisations and their beneficiaries, and of the fruits

of contractual relationships between companies and their clients. These controls must be designed to be as fail-safe as possible, whilst at the same time provide for a clear audit trail. The creation of an effective audit trail will require the involvement of not only the standard setting bodies, but also the international and public sector organisations themselves.

93.5 Contracts funded by international organisations should include standard audit trail clauses. There should be monitoring of stage payments through access to all relevant donee government records, bank statements and the like. No second or subsequent stage payments should be approved or made until the recipient has accounted for the previous stage payment. Particularly where international organisations are making grants, those organisations must be prepared to walk away from projects, leaving them unfinished, where donee governments fail to meet their side of the bargain. Where this happens, consideration should be given to compensating those contractors who have been blameless for the loss suffered by them through not being able to complete the project. Such compensation would come from monies withheld from the donee government. Without sanctions which encourage co-operation, transparency and accountability for monies received and expended on the part of the donee, it will be difficult, if not impossible, to trace what has happened to the grants or loans made.

93.6 The audit trail clause should be supplemented and reinforced each year by the publication by the donor organisation of a project specific report, disclosing the donor's findings on the outcome of the anti corruption monitoring of the contract. These annual reports would provide public justification, where necessary, for withholding payments or terminating a grant or loan, and for approving further requests for grants or loans. Without such published reports, it will be too easy for the staff of international organisations to cover up the failings and corruption of donees.

93.7 So far as the contractor is concerned, its contract with the donee government should provide that all monies payable under the contract are to be paid into a bank account in the name of the contractor unless the contract specifies both the names of other recipients and the nature of the services to be rendered by them. The bank account requirement for such other recipients would remain. This would also provide an audit

trail and accountability on the part of the contractor. However, controls on contractors should not be left entirely to *ex post facto* discovery, but rather to company directors and their external auditors who should have specific reporting obligations placed upon them. Ideally, these obligations should be incorporated into the domestic laws of individual countries, but pending that happening, they should be incorporated into contracts involving international and public sector organisations.

93.8 It is essential that contractors be made accountable for all monies paid under contracts. Each year the directors of the company or institution concerned should be obliged to make a 'purity' declaration. The effect of such a declaration would be to discourage corrupt payments or, should corrupt payments have been made, increase the fear of discovery through whistle blowing. This purity declaration should be incorporated as a standard requirement in every contract funded by international and public sector organisations. If the terms of the contract were breached, then no further payments should be made. This purity declaration could be extended to all international contracts entered into by companies or institutions, but it is likely that coercion in the form of domestic legislation would be necessary. Such legislation should provide for the compulsory inclusion of directors' purity declarations in company annual reports.

93.9 All large companies have computerised accounting systems which are subjected to an annual external audit. External auditors should be required to certify that they have found no evidence that any unspecified gift or commission or illegal expenditure or any other type of financial advantage has been, or will be paid in connection with the procuring, execution or retention of a contract. In carrying out a typical external audit, reliance is placed by the auditor upon the client's accounting system to capture and record information correctly. Whilst 'walk through' tests are conducted to confirm that the system operates as expected, if the results of these tests are satisfactory, the auditor then places great (perhaps too much) reliance upon the outputs from that system.

93.10 The typical audit approach focuses on the examination of the outputs of the system and the identification and investigation of exceptions and discrepancies. In many

cases computerised audit techniques are used to identify such items. It would not be difficult for auditors either to adapt existing computerised audit programmes or to develop a new programme to assist in identifying and reporting on actual or suspected corrupt payments. This should become mandatory.

93.11 Current accounting standards for banks and other financial services institutions already require special reports. It would not, therefore, be groundbreaking to introduce special reporting requirements in relation to suspected corrupt payments. Domestic legislation for this new reporting requirement could be extended to cover companies and financial institutions involved in grants and loans by international organisations. The legislation should require 'no corruption' certificates to be furnished by the auditors and then published in the company's annual report.

93.12 The final building block in the control framework is the amendment of tax legislation to deny tax relief for any corrupt payment wherever and to whomsoever it is paid. There should also be a requirement for a statement in the annual report of contracting companies or institutions confirming that no tax relief has been claimed for any expenditure made by any company or individual within the corporate organisation which represented, or could be considered to represent, a corrupt payment. If any such payments had been made, for which tax relief had not been claimed, these would have to be detailed separately. Nil reports would be required. The provision of incorrect or misleading information about tax deductions would provide grounds for prosecution for tax evasion. This would discourage corruption.

93.13 Whilst it appears at present that making a corrupt payment abroad to a foreign party does not constitute the offence of corruption in the UK, it may already constitute an offence of money laundering. Where the proceeds of foreign criminal conduct, in this case corruption, pass through the UK, CJA 1988 section 93A(7) has the effect of making the foreign criminal conduct the predicate offence. This may constitute an act of money laundering. However, this is an uncertain basis upon which to proceed, and it is therefore recommended that, as in the US, it should be an offence for a UK resident, or person present in the UK at the relevant time, to make (e.g. from a domestic company) or promote (e.g. from a subsidiary domestic or foreign resident

company) a corrupt payment wherever it is paid or received. Other countries should be encouraged to do the same. But, like the US, the UK should be prepared to go it alone.

94. Draft Control Framework

94.1 A draft control framework incorporating these proposals should be developed along the following lines. This would include legislation along the lines of the FCPA 1977 revised or extended as follows:

> '"Payments" to include gifts, commissions, illegal expenditure (e.g. inducements, bribes, threats, blackmail) or any other type of financial advantage (e.g. favourable terms on another contract, financial guarantees) paid or rendered prior to the award of, during or after the completion of a contract, by a contracting enterprise (either directly or indirectly through an intermediary (e.g. a subsidiary company, sub-contractor or agent)) in connection with the procuring or execution or retention of a contract with a gross value of £5 million or more in any period or 12 months or a series of contracts valued in total at £5 million or more in any period of 12 months.'

94.2 All payments relating to the procuring or execution or retention of a contract must be made to a bank account in the name of the contracting enterprise, unless the contract specifies the name of the other recipient(s), the nature of the services to be rendered by that recipient(s) and the amount (or method of calculating the amount) to be paid direct to a bank account in the name of the other recipient(s).

94.3 Annual purity declarations by directors of each contracting enterprise, confirming that they have not paid, authorised or approved, and will not pay, authorise or approve any payment (as defined above) either directly or through any intermediary, and that they have no knowledge of any such payment made, or to be made, to any person or enterprise in connection with the procuring or execution or retention of the contract. Annual purity declaration by directors of each sub-contractor (and sub-sub-contractors where involved) to the contracting enterprise should also be made in these terms.

94.4 Legislation disallowing tax relief for any illegal expenditure whether paid in the UK or abroad, and whether paid to any public official or any employee or agent of any contracting or sub-contracting enterprise (or to any person or enterprise connected with any such official or employee or agent), made in connection with the procuring or execution or retention of a contract.

94.5 The external auditors of contracting enterprises (and the external auditors of every subsidiary or sub-contractor or sub-sub-contractor of contracting enterprises) have a positive obligation to report that they have found no evidence that any unspecified gift or commission or illegal expenditure or any other type of financial advantage has been, or will be, paid in connection with the procuring or execution or retention of the contract.

94.6 The contract for every project funded by an international or public sector organisation to include a term enabling unrestricted access on the part of a 'Special Audit/Investigation' team to all relevant government records and bank statements and the like of the country in which the project is to take place, and of the business records and bank statements of the contracting enterprise and of any other recipient (who must be specified in the contract or be a bona-fide sub-contractor of sub-sub-contractor) of sums received or expended in connection with the procuring or execution or retention of the contract. The government issuing the contract would be obliged to include the access entitlement as one of the terms of the contract. The contractor would be obliged to accept the access entitlement in order to obtain the contract, and no part of the loan/grant would be paid by the international organisation until the contract, duly executed, had been approved as satisfactory by the grant/loan making body. The main contractor would be contractually bound to include similar terms for sub-contractors and the like, and failure so to provide, or to ensure that access was provided by sub-contractors and the like would lead to the withholding of sums due to the main contractor.

95. Corruption: A New International Crime?

95.1 The Rome Statute of the International Criminal Court was finalised in July 1998 under the auspices of the United Nations ('UN'). Once it comes into force it will result in the establishment of the first permanent international court. Were corruption to be declared a crime and thus subject to the jurisdiction of the International Criminal Court ('ICC') in the Hague, then this would be a significant advancement towards combating corruption on a global scale. However, this is a long way off.

95.2 The issue of the jurisdiction of the ICC has given rise to much debate. There are many differences of opinion amongst UN member states. In the light of the international nature of drug trafficking and terrorism, some states maintain that the prosecution of such crimes should be placed within the ambit of the ICC's jurisdiction. They argue that given the prevalence and subversive character of these crimes their control should not escape the court's jurisdiction. However, others object on the basis that problems of investigation would be too much of a strain upon the resources of the ICC. As a result of this lack of consensus, in its present form the statute simply provides that the jurisdiction of the ICC shall be limited to, 'the most serious crimes of concern to the international community as a whole.'[266] For now, these are listed as the crime of genocide, crimes against humanity, war crimes and the crime of aggression.[267]

95.3 The relevance of the ICC to the present report is that given the high-level, large-scale and multi-jurisdictional nature of the corruption being considered, a case should be made out for the inclusion of such type of criminal activity falling within the ICC's jurisdiction. Indeed, the type of corruption contemplated by this report not only threatens the stability of the country in which the offender is an official, but also represents a security risk to that country's neighbours and touches upon the soundness of the financial sector of the countries through which the illicit proceeds pass.

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266 Article 5, paragraph 1.

267 Article 5, paragraph 1(a)-(d)

95.4 It has been suggested that the systematic theft of a country's wealth and resources by its leaders deserves international concern.[268] In this regard, the illegal acts of depredation committed for private ends by constitutionally appointed rulers or other public officials have been described as acts of 'indigenous spoliation' which should be defined as a crime under international law and accompanied by an enforcement system allowing for individual criminal liability.[269]

95.5 By having corruption included within the ICC's jurisdiction, the international community would be provided with an alternative option for dealing with corruption where there is little prospect of a domestic solution. Countries which are the victims of corruption may fall into a state of political and social collapse following the departure of the official and the looted wealth. There may be no courts capable of dealing with the crimes committed. The government may be reluctant to prosecute such a high-ranking official. The victim country may also lack the resources needed to pursue and recover the funds on its own initiative.

95.6 The ICC has the legal machinery necessary for the recovery of offenders and their spoils. Powers to recover the fugitive offender include the authority to issue an international arrest warrant obligating all states party to the statute to arrest the offender. There also exists a framework for state parties to provide assistance to the ICC in relation to investigations and prosecutions. This involves states *inter alia* assisting in the production of evidence (including official records and documents), the execution of searches and seizures, and also the identification, tracing and freezing of the proceeds and instrumentalities of the crime for the purpose of eventual forfeiture.[270] The ICC has the power to order forfeiture of the convicted person's tainted property,[271] and state parties are obliged to give effect to such order in

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268 Kofele-Kale N, *International Law of Responsibility for Economic Crimes-Holding Heads of State and Other High Ranking Officials Individually Liable for Acts of Fraudulent Enrichment* Kluwer Law International, London, 1995.

269 Ibid..

270 Article 93, para. 1.

271 Article 77, para. 2(b).

accordance with their national laws.[272] Forfeited assets would be placed in a trust fund for distribution to victims. This could include the victim country.[273]

95.7 Since the jurisdiction of the ICC operates under the principle of complementarity, individual states would not have to be concerned about the encroachment into their sovereignty by the ICC. National courts will continue to have priority in investigating and prosecuting corruption and its related money laundering, since the ICC will act only when national courts are unable or unwilling to exercise jurisdiction. Otherwise, the ICC will only be able to assume jurisdiction if a case is referred to it by the UN Security Council acting under Chapter VII of the UN Charter. In the latter situation, the ICC could exercise jurisdiction even when neither the state in whose territory the crime has been committed nor the state of nationality of the accused is a party to the Rome Statute.

95.8 The categories of crimes over which the ICC has jurisdiction are not closed. Any state party may propose amendments including changes to the scope of crimes. However, such proposed amendments can only be made after the expiry of 7 years from the entry into force of the Rome Statute.[274] Similarly, at the end of this time period the Secretary-General of the UN is obliged to convene a Review Conference to consider any amendments to the Statute, and it is specifically set out that this would involve a review of the list of crimes.[275] In fact, at the Rome Conference in 1998 a resolution was adopted recommending that the Review Conference consider the inclusion of drug and terrorism related crimes in the ICC's jurisdiction. Hence the door is still open for the consideration of corruption as a justiciable offence.

95.9 Unfortunately, the Rome Statute has not yet come into force. This requires the ratification of at least 60 members. To date 84 countries have signed. But only four countries have ratified. One can only look to the ICC, therefore, some considerable distance down the track.

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272 Article 109, para. 1.
273 Article 75, para. 3.
274 Article 121, para. 1.
275 Article 123, para. 1.

96. Raising International Awareness

96.1 The international reaction to money laundering in recent years should provide comfort and impetus to those wishing to raise international awareness against the evils of corruption. It would greatly assist in tackling the enormous problem of corruption on a global scale were the international community to unite and more strongly voice its disapproval of all forms of corruption. Were corruption to enjoy even further the disapprobation of the UN, the OECD, the IMF, the World Bank and the international commercial generally, then significant changes in attitude to this distasteful practice would follow. On 12 November 1999, the *Financial Times* reported that:

> 'Offshore centres around the world have rarely felt as threatened as they do today. From all sides, large governments and international groups have stepped up pressure against jurisdictions which they believe offer shelters for illicit money, create loopholes in the international financial regulatory framework, or simply undercut them through low or zero tax regimes. For the last five years, islands in the Caribbean or the English Channel have, for the most part, gone along with the demands of the international community. Under pressure from the US or the UK, country after country has extended its money laundering laws to include the proceeds of all crime even, in most cases, of tax evasion, despite a traditional reluctance to pay attention to fiscal offences.'[276]

96.2 The widespread contempt now held by the international community insofar as money laundering is concerned, should demonstrate to all those troubled by corruption that significant in-roads can be made into venal practices when international awareness is raised and public opinion united. That this is possible is reinforced by Rider and Ashe who relevantly note, 'the plethora of legislation that now subjects the financial world to a degree of surveillance and control that many would have thought unacceptable just a few years ago.'[277]

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276 *Financial Times*, 12 November 1999.

277 Rider B A K and Ashe M, 'preference' in Rider B A K, 'The Enterprise of Crime' in Rider B A K (ed), *Money Laundering Control* Round Hall Sweet & Maxwell, Dublin, 1996, at v.

96.3 The US has been a world leader in anti money laundering measures. The pressure which it has applied through its powerful regulatory approach, its extra-territorial reach[278] and its economic might to money laundering practices, is such that countries hitherto considered as safe havens, are no longer looked upon in such a light. Seldom can a country withstand the wrath of the US authorities when its collective resources are marshalled and directed towards resolving a particular problem which enjoys the universal support of its major allies. There is no reason why such an approach ought not readily translate into the murky world of corruption.

96.4 Systemic corruption affects us all. High level domestic and international disapproval will greatly assist in its interdiction. This would make it more difficult to perpetrate. Whilst a free press, league tables, well published articles and television programs can expose the problems inherent in corruption, it is the international community itself that will ultimately lead to the implementation of the changes considered necessary to significantly impact upon and restrict this global problem.

96.5 In the light of the international reaction to money laundering, it is not beyond the pale to believe that similar reaction cannot be cultivated insofar as corruption is concerned. But the matter should not rest there. As earlier parts of this report have identified, suitable agencies able to investigate and prosecute the corrupt and those corrupted need to be established, resourced and supported both domestically and internationally as well. Hence a dramatic shift in the prevailing attitude to corruption is required to raise the ante, and an even stronger political will on the part of the government is needed to make a difference.

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278 Foreign Corrupt Practices Act 1977 (US)

1. United Nations ('UN')

The UN General Assembly passed its first resolution on corrupt practices in international commercial transactions in December 1975. The resolution reaffirmed the right of any state to take legal action against trans-national corporations for corrupt practices such as bribery, and called upon both home and host governments to take all necessary action to prevent such practices. In 1979 the Economic and Social Commission produced a draft agreement on illicit payments, together with a draft code of conduct on trans-national corporations. However, political divisions between Western countries and members of the non-aligned movement of developing countries meant that the General Assembly formalised neither draft.

Corruption returned to the UN agenda in the 1990s. On 12 December 1996 the General Assembly passed further resolutions on this issue which included:

(i) A/RES/51/59, a resolution on the responsibilities of government officials. This calls on member states to adopt the International Code of Conduct for Public Officials. The Code includes guidelines on issues such as conflict of interest and disclosure of assets, and states that public officials, 'shall not solicit or receive directly or indirectly any gift or other favour that may influence the exercise of their functions'; and

(ii) A/RES/51/191, a resolution calling on member states to criminalise the bribery of foreign officials in international commercial transactions, and asking member states to deny tax-deductibility on foreign bribes. The UN General Assembly adopted the Declaration against Corruption and Bribery in International Commercial Transactions.

Several other UN agencies are working on measures to limit corruption within their areas of responsibility. These include the: (i) UN

Commission on Crime Prevention and Criminal Justice; (ii) UN Commission on International Trade Law; and (iii) UN Development Programme, which is concerned about the economic and social impact of corruption.

2. World Trade Organisation ('WTO')

In December 1996 the WTO Ministerial Conference in Singapore agreed to set up a Working Group on Transparency in Government Procurement. The Group's mandate is to conduct a study of existing procurement practices with a view to drafting the main elements of future agreement. The Group's meetings have largely consisted of exchanges of information between national representatives. The process of reaching consensus will prove slow because of the large number of WTO member states,[279] all of which have different views. By the same token, the WTO's wide membership will lend extra significance to any agreement reached on transparency.

3. The IMF and the World Bank

Since 1996 corruption has risen to the top of the agenda of both the IMF and the World Bank, and they are working closely together on measures to combat it. This new approach reflects a shared view that good governance - including the avoidance of corruption - is one of the key issues that influences macroeconomic performance. One of their prime objectives is to encourage member countries to develop an economic environment that favours private business.

Both the IMF and the World Bank acknowledge their responsibility to ensure that their own programmes are administered correctly. Their first objective has been to eliminate corruption within their own organisations. The World Bank has called in consultants from PriceWaterhouseCoopers to investigate possible embezzlement and kickbacks amongst its own officials. The IMF and the World Bank also insist that companies tendering for

business funded by their loans must sign an anti corruption pledge and observe the highest standards of ethics. Companies found guilty of corruption will be debarred from future contracts. The second objective for both organisations is to now offer governments technical advice on institutional reforms to reduce corruption. The IMF's areas of expertise include tax and customs administration, foreign exchange allocations and banking. In the corporate sector, the IMF has identified a role in advising on the transparency of corporate balance sheets and dismantling monopolies.

The IMF and the World Bank will bring specific corruption cases to the attention of the relevant national authorities if they believe that a country's macroeconomic performance is under threat. If the government concerned fails to respond, both organisations are prepared to suspend their programmes in that country.

4. European Union ('EU')

Since 1995 the EU has proposed a series of measures designed to combat trans-national corruption. Initially, the driving force seems to have been a desire to combat fraud and corruption within EU institutions. However, many of the themes that occur on the wider international scene have now come up in EU discussions. These include the desirability of ending tax-deductibility on foreign bribes, and the possibility of barring offenders from future contracts. The European Commission ('EC') supports the OECD anti-bribery initiatives. The main stages in EU deliberations on corruption include:

(i) July 1995 - The EU Council adopted the Convention on the Protection of European Communities Financial Interests. The convention's first and second protocols require all member states to make corruption involving an EU official a criminal offence in

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[279] 132 countries as of September 1997.

all member states if it damages the EU's financial interest. The convention and the two protocols have been signed, but not yet ratified by all member states' parliaments;

(ii) December 1995 - The European Parliament passed a Resolution on Combating Corruption in Europe. It calls on member states to abolish tax legislation and other legal provisions or rules that indirectly encourage corruption. It also calls on the EC and member states to exclude for given periods of time market operators convicted of and sentenced for corruption from competing for public contracts; and

(iii) May 1997 - The EU Council adopted the Convention on the Fight Against Corruption involving Officials of the European Communities. This requires member states to criminalise bribery of EU officials, whether or not EU financial interests are at stake.

5. Organisation of American States ('OAS')

Officials from 21 OAS member states signed the Inter-American Convention Against Corruption in March 1996. The US signed it in June 1997. The convention calls on member states to criminalise domestic corruption and trans-national bribery. It declares both to be extraditable offences. It also includes recommendations on a series of preventive measures, including proposals for record systems and internal accounting controls for publicly held companies, and the encouragement of private sector participation in fighting corruption.

By April 1998 Argentina, Bolivia, Costa Rica, Ecuador, Paraguay, Peru, Mexico, and Venezuela had ratified the convention. In addition, several members of the OAS have signed the OECD Convention Against Bribery, and others are likely to follow.

6. European Bank for Reconstruction and Development ('EBRD')

The EBRD makes good governance a central element in its reform programme in eastern and central Europe. In addition to maintaining a tight rein on its own procurement policies, the EBRD advises on management and the means of promoting

transparency in its partner institutions. The EBRD is keen to ensure the integrity of such institutions, not least because its relationship with them will put its own reputation at stake.

7. Inter-American Development Bank ('IDB')

Like the World Bank, the IDB has introduced tougher rules for loans. Its revised regulations and guidelines oblige public officials and business to conform to new international standards. Companies must also have active corporate policies that prohibit bribery in pursuit of corporate activity, and must assert that they have not been convicted of bribery within five years of certification. If a company is found to have been convicted of bribery, the IDB may debar it from future participation in a project funded or guaranteed by the IDB.

8. Asian Development Bank ('ADB')

In July 1998, the ADB announced a series of measures to combat corruption in the region. The ADB is primarily concerned with the prevention of corruption, and plans to make public institutions more efficient and accountable, while also pressing for increased market liberalisation. It will suspend or cancel loans where there is credible evidence of corruption.

9. African Development Bank ('AFDB')

The AFDB has recently been working on reforms to its procurement guidelines, including an overhaul of its procurement dispute process. The procurement rules for goods and civil works have been upgraded and brought closer to those of the World Bank.

10. Non-Governmental Organisations ('NGOs')

The main focus for NGOs has been the environment and human rights (including labour issues). Corruption may be linked to both. Corrupt officials, for example, may be paid to overlook

infringements of environmental and labour regulations. Several NGOs have now taken up corruption issues. Their initiatives reinforce corruption issues, and reinforce pressure on governments to institute reforms. Similar groups are active in other countries in Asia, Latin America and Africa (to a lesser extent). Transparency International has helped establish a global forum for such groups.

10A. Transparency International ('TI')

TI was founded in 1993 as the only international NGO to focus exclusively on corruption. This organisation has branches or affiliated organisations in some 94 countries, and its rapid expansion reflects the breadth of international concern on the corruption issue. The basis of TI's concern is humanitarian: it believes that corruption distorts development, as well as weakening both government and business.

TI believes that no single agency is capable of ending corruption. It therefore sees its agenda as raising public awareness, and forming alliances that include representatives from governments, companies and NGOs. It is particularly well-known for its Corruption Perception Index ('CPI'), which is based on a 'survey of surveys of perceived corruption in some 50 countries', and for its promotion of the concept of islands of integrity. These islands consist of specific sectors where all the participants, for example, rival firms, compete for projects on the basis of explicit undertakings not to engage in corruption. The idea is that these islands will gradually expand to form continents.

11. International Chamber of Commerce

The International Chamber of Commerce is a 'business person's NGO' with consultative status at the UN, and has also concerned itself

with corruption. The Chamber of Commerce has national committees or councils in some 60 countries. It first published a set of guidelines relating to trans-national corruption issues in 1977. These included a recommendation to set up a panel of business people to monitor and assess best practice. Regrettably, this recommendation foundered because few companies were prepared to take part in the panel.

The Chamber of Commerce returned to the perplexing issue of corruption in the mid-1990s. In 1996 it issued a revised set of guidelines on Extortion and Bribery in International Business Transactions. The Chamber's Code of Conduct begins uncompromisingly: 'No one may, directly or indirectly, demand or accept a bribe'. However, the accompanying notes argue that the highest priority of government and business should be ending large-scale extortion and bribery involving politicians and senior officials. The Chamber of Commerce does not condone small payments to low-level officials to expedite routine approvals, but argues that they represent a lesser problem. To reduce the temptations of bribes, the Code of Conduct calls on companies to ensure that any payment made to agents represents no more that appropriate remuneration for legitimate services. It also calls on companies to maintain a record of the names and terms of employment of agents, and says that this record should be open to inspection by auditors.

CHAPTER SIX
ISSUES CONCERNING COMPLIANCE

INTRODUCTION

97. The Aims of this Report

97.1 In preparing this report, the compliance sub-group has set out to (a) summarise the current compliance regime as a matter of law and practice, (b) identify particular problem areas within that regime concerning Public Sector Officials ('PSOs'), and (c) suggest recommendations for change. The result may be seen as providing features of a 'model' compliance structure designed to cause difficulties for corrupt PSOs seeking to launder the proceeds of their corruption; UK law and practice has formed the springboard for the model, but it should be stressed that in order to be of any utility any suggested changes would have to be adopted (effectively) universally throughout the financial world. Piecemeal adoption by one or a few states would merely be likely to drive the tainted monies elsewhere, and would not serve the desired purpose of reducing the extent/profitability of corruption.

97.2 The introduction of workable and rigorous compliance requirements concerning PSOs would possibly amount to the single most effective (and cost-effective) weapon against the laundering of corruptly obtained funds. The implementation of changes in 'coalface' practice is logically the first step to be taken in a concerted effort to combat corruption. It is of course essential that any additional requirements imposed on financial institutions are seen by them as practicable; co-operation as opposed to coercion is necessary for any regulatory regime to achieve its potential. It is hoped that the suggestions made in this paper, which only propose to introduce a further significant layer of obligations once a customer has been identified as a PSO, do not raise the prospect of undue administrative burdens.

97.3 For present purposes we have proceeded on the basis that:

- the compliance provisions we propose would, to be of effect, need to be imposed on the full range of institutions that might be used for laundering, to include e.g. investment banks, security houses etc.; for the sake of convenience, this report uses 'banks' as an umbrella term; and
- a working definition of the term 'PSO' is that it includes: (i) any senior employee of, or person engaged by, a State; (ii) any elected official; (iii) any person with direct or indirect responsibility for public funds; (iv) any person who has in the past occupied any such position; and (v) persons connected to any of the above (e.g. relatives).

97.4 Appendix E to this report contains case studies based upon actual cases of corruption, which provide illustrations of the proposals made.

98. The Law

98.1 UK law contains certain offence-specific anti money laundering provisions (particularly in relation to drug trafficking and terrorism) which are unlikely to impinge upon the laundering of the proceeds of corruption. Those aside, the law is principally contained in sections 93A, 93B and 93C of the Criminal Justice Act 1988 ('CJA 1988') (inserted by the CJA 1993) and in the Money Laundering Regulations 1993 ('the Regulations').

98.2 In summary, the effect of the material provisions of the CJA 1988 is to make it an offence for any person to provide assistance to another to obtain, conceal, retain or invest funds knowing or suspecting that those funds are the proceeds of criminal conduct. 'Criminal conduct' is defined so as to include conduct which constitutes an indictable offence, or which would constitute such an offence if it occurred in England and Wales. As to reporting obligations, in the case of drug trafficking or terrorist activity, it is an offence for any person who acquires any knowledge or suspicion of money laundering in the course of their trade, profession, business or employment, not to report that knowledge or suspicion as soon as is reasonably practicable. In respect of all other indictable offences, it is not an offence to fail to report, but it is a defence against a possible later charge of assisting [to launder the

proceeds of any serious crime] if the person handling the funds, or undertaking the transaction, reported their knowledge or suspicion. The CJA 1988 applies to all persons and businesses in the UK. It may be thought likely that only in relatively extreme cases will the existence of provisions such as these result in avoidance of laundering of the proceeds of corruption. The individuals concerned are often sophisticated, such that without further enquiry there may well be no material to generate the requisite knowledge or suspicion.

98.3 The Regulations, which generally implement the provisions of the European Money Laundering Directive, place additional administrative requirements on persons and firms operating within the financial sector. They require financial sector businesses to establish and maintain specific anti money laundering policies and procedures in respect of:

- internal controls and communication of policies
- identification procedures
- record keeping
- recognition and reporting of suspicious transactions.
- education and training of staff.

For the purposes of their application, the Regulations materially define money laundering as doing any act which constitutes an offence under the CJA 1988, except that there is an added requirement in relation to conduct committed abroad; not only must it be such that it would constitute an indictable offence if committed in England and Wales, but it must also contravene the law of the country in which it occurs.

98.4 Failure to comply with any of the requirements of the Regulations constitutes an offence punishable by a maximum of two years' imprisonment, or a fine, or both. This is irrespective of whether money laundering has taken place. The Regulations were not drafted with the intention of standing alone, and therefore provide that in determining whether a person or institution has complied with any of the requirements, a court may take account of relevant guidance issued or approved by a supervisory or regulatory body, or in its absence, guidance provided by a trade

association or other representative body. The UK guidance to support the Regulations is currently provided by the Joint Money Laundering Steering Group (JMLSG), which represents thirteen financial sector trade associations. The Recognised Professional Bodies also issue guidance for their members based on that of the JMLSG. There follows a slightly more detailed examination of the key provisions of the Regulations.

99. Identification Procedures and Record Keeping

99.1 The Regulations state that whenever a business relationship is to be established e.g. when a bank account is opened or a significant one-off transaction or series of linked transactions is undertaken, the identity of the applicant for business i.e. the prospective customer should be obtained. An individual's identity is deemed to comprise name, address, nationality and date of birth. For the purpose of the Regulations, evidence of identity is satisfactory if it is reasonably capable of establishing that the applicant is the person he claims to be and the account opening institution is satisfied that this is the case.

99.2 The Regulations also require that if it is known or suspected that funds to be deposited or invested are being supplied by or on behalf of a third party, then reasonable measures should be taken to establish the identity of the underlying beneficiary.

99.3 Financial sector businesses must retain the underlying records of customer identification and all records of transactions undertaken subsequently for that customer.

100. Requirement to Report Suspicions

100.1 The Regulations impose on the businesses to which they apply an obligation to maintain internal reporting procedures which include provision for:

- financial sector staff to report knowledge or suspicions of money laundering to the 'Appropriate Person' (the Money Laundering Reporting Officer)

- such a report to be considered in the light of all relevant information (by the MLRO or another designated person) to determine whether or not it does give rise to the requisite knowledge or suspicion
- securing that the information in a report is disclosed to a constable where the person who has considered the report knows or suspects that another is engaged in money laundering.

101. Current Practice

101.1 Whilst the legislation and regulations concentrate on customer identification at the start of a business relationship, the guidance notes advise that the key to recognising a suspicious transaction lies in knowing not only the true identity of the customer, but also knowing enough about the customer's expected business activities to be able to recognise the unexpected.

101.2 The FSA expects that KYC policies should be tailored to a bank's particular operations and should ensure that the nature of the business that the customer expects to conduct with the bank is ascertained at the outset to demonstrate what might be expected as normal activity. Once a relationship has been established, for as long as it lasts, a bank should be alert for any unusual business, such as transactions inconsistent with its knowledge of the customer or the customer's normal business practice. In order to be able to judge whether a transaction is or is not suspicious, a bank must have a clear understanding of the legitimate business activities of its customer.

101.3 All jurisdictions that have put in place anti money laundering procedures in accordance with international standards require financial institutions to verify identity, but not all jurisdictions require additional KYC information or on-going monitoring of transactions. The UK legislation currently falls into this category and, therefore traditional KYC procedures that would have been adopted as sound prudential banking practice have tended to be set aside whilst banks concentrate on verifying identity at the outset in accordance with the Regulations.

101.4 The possibilities of UK banks becoming involved in the laundering of funds derived from the proceeds of corruption are increased when handling accounts for Government Ministers and senior public sector officials, particularly in developing countries where the controls against corruption are less robust. This has led to some banks refusing to open accounts for senior public sector officials save in exceptional circumstances. However there will often be cases where an existing customer, e.g. a lawyer or member of the military, subsequently takes public office perhaps many years after opening his/her account with the UK bank. In Russia, for example, academics move in and out of government on a regular basis. Even such banks who refuse to open such accounts have problems in knowing who is in or out and what action they should take when an account holder moves into government. Under the existing law, no specific measures are required by a bank to guard against handling the proceeds of corruption. True identity will have been verified to the complete satisfaction of the bank on the basis of the best documentary evidence. There is no statutory need to record details of profession or employment and, consequently, no need to record whether the customer is already a senior government official or to update the information when the customer takes public office.

101.5 Moreover there are significant commercial pressures on a bank to keep accounts on behalf of high ranking PSO's. Such accounts give the banks who accept them a significant marketing edge amongst the elite in the country concerned. Refusal to open such accounts, on the other hand, could be construed as a political or racist move, thereby undermining the business in the country concerned.

101.6 Whilst there is a requirement to take reasonable steps to identify the underlying beneficiary when an account is being opened by a third party, the phrase 'reasonable measures' tends to reduce the importance of this vital requirement. Heads of State, government ministers and public sector officials who wish to open accounts anonymously will often use an intermediary, such as a respected lawyer, to open the account on their behalf, and then use lawyer/client confidentiality to mask the true beneficial owner of the funds. Alternatively, they will channel the funds through the account of a family member thereby avoiding the money laundering procedures. Many banks expect to be able to rely on lawyers in these circumstances and, indeed,

the Solicitors Act precludes the bank from breaching client confidentiality to seek details of the underlying beneficiary of the client account. If the lawyer is not covered by the Money Laundering Regulations (because he is not undertaking investment business) he will be under no obligation himself to verify the identity of the client and may not actually know the identity of the beneficial owner of the funds.

PROPOSALS IN DETAIL

102. Overview

102.1 Broadly speaking, the proposals concern three relevant stages. At the outset of the relationship between a bank and a new customer, Know Your Customer obligations arise. In the present context two layers of KYC activity fall to be considered, namely (1) procedures designed to identify the involvement of a PSO (see Paragraph 103, below), and (2) additional KYC obligations that arise once such involvement has been identified (see Paragraph 104). The third stage concerns the monitoring of PSO accounts (see Paragraph 106).

102.2 It will be seen that one of our principal recommendations is to the effect that institutions ought to maintain a register of PSO accounts held with them. The additional monitoring requirements that we suggest, and the most stringent of the additional KYC requirements, will only bite if involvement of a PSO has been identified. Accordingly, the most labour intensive tasks will not be required 'across the board' whenever a bank is approached/used by a new customer, but only in the small minority of cases actually involving PSOs.

103. KYC procedures designed to identify the involvement of a PSO

103.1 **Direct Approach.** The most straightforward case concerns a direct approach to a bank by a person who admits to a PSO status, or a family member of a PSO, or a person purporting to act on behalf of an admitted PSO. In these circumstances, obviously the additional layer of KYC activities, proposed at Paragraph 104, below is triggered. Such cases do arise in practice (see e.g. Appendix E, Case Study 1).

103.2 **Approach by a nominee.** The current provisions require a bank in these circumstances to take 'reasonable measures' to ascertain the true ownership of the funds. In practice, this requirement is often effectively not complied with; the requirement is treated as circumscribed, and the concept of reasonableness creates uncertainty and scope for significant variations in procedures between institutions (see Paragraph 100, above). It seems to us that, if corruption is to be tackled seriously, there is simply no possibility of allowing nominee accounts to be held unless the bank has satisfied itself as to the true beneficial ownership of the funds involved. On that basis, provision is needed to the effect that if the bank knows or suspects that funds are being supplied by or on behalf of a third party, it must independently identify and verify the identity of the beneficial owner(s) of the funds. Unless it can do so, the business should not be accepted.

103.3 **Approach by/on behalf of a company.** A similar point arises to that made in the previous paragraph. In some senses, a company is merely a veil for its beneficial owners (and in some senses for its directors, who control movements of the company's funds), and it seems to us that when a bank discovers/is informed that the funds emanate from a company, it ought not to proceed until it has satisfied itself as to the true beneficial ownership of the company and the true identity of the directors. Inevitably some individuals will be sufficiently sophisticated to create a sham that appears genuine; however, practitioners tend to have good instincts as to what is and is not legitimate when provided with information of this nature, such that many shams ought to be detected. No system is ever perfect, but it seems to us that this requirement is vital if the difficulties in laundering the proceeds of corruption are to be maximised.

103.4 **Introductions by other institutions.** Frequently one institution will be approached by another, requesting services on behalf of a customer whose anonymity (to the new bank at least) is to be preserved. In many cases the desire to maintain anonymity to that extent stems from legitimate commercial considerations. Further, the vast majority of such introductions do not concern PSOs. This situation can be quite simply catered for (on the assumption that both institutions are bound by the proposed

compliance regime) by a requirement that the new bank seek from the existing bank a representation to the effect that the customer/beneficial owner of the funds is not a PSO. If the existing bank is able to furnish such a negative representation, then the new bank should be entitled to rely upon that and accept the business. If the existing bank does not furnish such a representation when asked to do so, then the only inference is that a PSO is involved, in which case the new bank should not proceed unless it is able to identify the individual and carry out the further KYC procedures proposed in Paragraph 104, below. This area may well call into question the existing law (in the UK at least) of a bank's obligations of confidence to its customer (the *Tournier* doctrine), as to which see Paragraph 108.3, below.

103.5 **Sources of information**. One difficulty that may well arise in practice is the simple question: how is a bank to know that a particular individual is a PSO? Whilst there may be no doubt in relation to heads of state and other very prominent individuals, any relatively broad definition of PSO will include persons who may not be immediately recognisable as such. It seems to us that consideration should be given to the maintenance by funding agencies (e.g. the World Bank or IMF) of a list of individuals who fall into the category of PSO, with penalties (e.g. in relation to the availability of aid/grants) accruing to states that do not regularly notify the body of the identities of their PSOs.

104. KYC procedures to be followed upon learning of the involvement of a PSO

104.1 **PSO Register**. As stated above, every bank ought to maintain an internal register of the identities of customers who are PSOs, members of a PSO's family or people/companies acting on behalf of a PSO; inclusion in the register will trigger the additional monitoring requirements proposed at Paragraph 106, below.

104.5 **Independent verification by bank of source of funds**. Once a proposed new customer has been identified as a PSO, or e.g. a member of a PSO's family, we propose a requirement on the part of the bank to:

seek independent verification of the customer's statements as to the source of the funds; in this respect it should not be sufficient to rely upon the customer's statements alone (or upon unsupported statements from a previous bank), or material produced by the customer which is not capable of independent corroboration by a third party;

carry out a sensible analysis of the financial situation of the customer/family members; explanations of business activities generating substantial funds should be independently justified; sums deposited initially should be analysed to ascertain whether they are realistically normal for such persons in the light of the information obtained; and

seek independent verification of the authority of the person seeking to open the account.

104.6 The bank should not proceed with the customer if the above enquiries cannot satisfactorily be carried out, or if the information obtained reveals (or gives rise to a suspicion of) corruption. Case Study 1 in Appendix E provides an exposition of the above proposals.

105. Constitutional certificate of wealth.

105.1 It seems to us that, in seeking to ascertain whether the amount of funds apparently owned by a PSO is consistent with that individual's legitimate wealth, banks would be assisted by a certificate of wealth provided by the state in question. In effect, we propose that consideration be given to the implementation of a procedure whereby, upon attaining high office, senior PSOs are required to give to the state full disclosure of their assets, and the information so obtained is incorporated into a certificate detailing the net worth of the individual at the time of taking office. If the individual later approaches a bank (having by now had an opportunity to engage in corrupt activities), seeking to transfer funds to it, the amount of the funds could be compared with the information in the certificate; the implications of a significant disparity between the two (without a convincing and independently verified explanation) would

be plain. In so far as certain states are considering the implementation of a constitution, such a procedure could relatively easily be incorporated into the same before its enactment. States with existing constitutions would have to consider amendment. Again it seems to us that the presence or absence of such a procedure could be treated as a relevant consideration in relation to the provision of monies by way of grants/aid.

An alternative to such a certificate of wealth would be some form of 'internationally recognised warranty certificate' to be produced when funds are introduced to a new PSO account from another bank, with the latter certifying that:

- they have known the client for *n* years;
- there have been no suspicious transaction reports or enquiries by regulatory/ judicial authorities in respect of the account/individual during those years.

In the absence of such a certificate, the account should not be permitted to accept inward transfers; in effect such a procedure would provide the funds with a 'passport' which goes with them whenever a new account is opened. Such a procedure might be more palatable to the PSO community.

105.2 Ideally, these documents should also include a register of the accounts operated by or on behalf of the PSO concerned. This would allow freezing orders to be obtained quickly and cheaply should corruption subsequently be uncovered. However, this might be resisted on the basis that it constitutes an undue invasion of privacy.

105.3 **Officials of state** banks. Case Study 2 in Appendix E makes specific recommendations in relation to customers who are themselves officials of state banks.

105.4 **Customers who obtain PSO status after relationship with the bank has commenced**. It is of course possible that a particular individual might commence a relationship with a bank long before attaining a PSO status. To cater for this scenario, it seems to us that if the list referred to at Paragraph 103.5, above, is created, it ought to be circulated every time it is amended, with banks checking the names on the

amended list against the names of all existing clients (presumably a relatively simple computer exercise). Banks' contracts with non-PSO customers ought to oblige the customer to notify the bank in the event of the customer becoming a PSO. Once a bank learns that an existing customer has acquired a PSO status, it ought then to place the relevant accounts on the PSO register (including those for family members and people/companies acting on behalf of the PSO), carry out the additional KYC procedures and commence the PSO monitoring regime. Provision could be made for restrictions on movements to/from the relevant accounts pending completion.

106. Additional monitoring requirements in relation to accounts on the PSO Register

106.1 It would be a pious hope to think that requirements relating to monitoring for suspicious transactions applied indiscriminately to all accounts, such that corrupt activities might be detected, is possible. However, it seems to us that the same difficulties do not apply if a PSO register is maintained. It will presumably contain a relatively small number of accounts such that effective monitoring becomes a realistic possibility; furthermore the additional KYC procedures proposed at Paragraph 104, abov, will have furnished the bank with a fairly substantial body of evidence to be used for comparative purposes. We know of a number of banks who put PSOs on a watch list to specifically monitor movements over those accounts.

106.2 We therefore propose that such a requirement is introduced for PSOs, members of their family and people/companies acting on their behalf. The watch list would mean that the accounts are monitored on a regular basis by a senior account officer and a senior compliance officer, and by such persons on a case by case basis involving identifiable amounts in excess of a prescribed minimum amount. Any transaction or series of transactions which is or is suspected to relate to or arise out of any corrupt practice (wherever the same has occurred) should be notifiable.

107. Role of the Funding Agencies.

107.1 We believe that the role of the funding agencies is crucial in persuading countries, to whom they are giving aid, to adopt the Constitutional Certificate of Wealth

Procedure.[280] This obligation should be written into the constitution so that, on attaining office, a PSO has to file such a certificate with the country's treasury. This document can then be consulted by banks as part of the Know Your Customer process.

107.2 The funding agencies should also maintain a list of key PSOs in the countries with which they are involved.[281] Finally, the funding agencies could also maintain a database of the incidence of corruption in each of those countries, which could inform banks on a regular basis of the risk of corruption in each of the countries where they are opening accounts.

RECOMMENDATIONS FOR CHANGE SUMMARISED

108. KYC procedures to identify involvement of a PSO

108.1 **Nominees.**

A bank should not accept business unless it has satisfied itself by independent verification as to the identity of the beneficial owner of the funds.

108.2 **Companies.**

A bank should not take funds said to belong to/emanate from a company unless it has satisfied itself as to the true beneficial ownership of the company and the identity of the directors.

108.3 **Introductions by other institutions**

The new bank should require the existing bank to furnish a representation to the effect that none of the funds involved are beneficially owned by a PSO. If such a representation is not furnished the new bank should not take the business unless it is able (1) independently to identify the persons involved, and (2) if any PSO is involved, to carry out the further KYC procedures proposed at Paragraph 109, above.

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280 See Paragraph 105, above.

281 See Paragraph 103.5, above.

Consideration should be given to a statutory exception to the *Tournier* doctrine enabling an introducing institution to pass to another financial institution particulars of the identity of a customer (whether a PSO held on its PSO register or otherwise) if requested to do so, notwithstanding instructions to the contrary given by/on behalf of the customer.

108.4 **Sources of information**

Consideration should be given to the creation of a (possibly non-exhaustive) list of individuals who fall within the category of PSO. Such a list could be administered by the funding agencies e.g. the IMF or the World Bank, and subscription to it by a state could be a prerequisite to grants/loans/aid. Funding agencies could also maintain a database recording the incidence of corruption in each country with which they are concerned.

109. KYC procedures when a PSO is involved

109.1 **Independent verification of source of funds**

Before accepting business from a PSO (or family member of a PSO or a person/company acting on their behalf), banks ought to be required independently to verify the source of the funds, and to carry out a sensible analysis of the customer's explanation of e.g. business activities/personal wealth.

109.2 **Constitutional certificate of wealth**

There should be a model constitutional provision legislating for a certificate of wealth/worth to be provided upon appointment/election of senior PSOs. Again the implementation by a State of such a procedure could be a condition of financial assistance granted by a funding agency.

109.3 **Officials of state banks**

The authority of such persons (who are particularly well placed to misdirect publicly owned funds) to operate their own business ought to be checked before they are accepted as customers. Salary details ought to be compared with incoming funds.

109.4 **Existing customers who obtain PSO status**

The list referred to at Paragraph 108.9 ought to be checked by banks against the names of their existing customers upon each updating of that list.

109.5 **PSO Register**

Banks should be required to maintain an internal register of accounts involving PSOs.

110. Monitoring of PSO register accounts

110.1 Accounts on the PSO register should be placed on a watch list requiring them to be monitored regularly by a senior account manager and a senior compliance officer. Case by case monitoring ought to occur whenever the value of a particular transaction exceeds a prescribed minimum amount.

110.2 The Money Laundering Regulations 1993 should be amended to provide that any transaction or series of transaction which is or is suspected to relate to or arise out of any corrupt practice wherever the same shall have occurred is notifiable. Accounts on the PSO register are to be subject to such amendment in addition to existing laundering provisions.

110.3 Consideration should be given to 'whistle-blowing' arrangements, protecting employees or former employees from proceedings/prejudice on the basis that they have bona fide disclosed to an appropriate body particulars of a transaction which appears to be notifiable under the Regulations as amended.

1.1 Case Study 1

The facts

1.1.1 A president's son (the customer) wished to open an account with a new Bank. The transfer (US$100,000,000) was to come from accounts at an existing FATF bank ('the old Bank'). The customer asked the new Bank not to request an introduction from the old Bank, as the old Bank was anxious to keep the account. The customer stated that the funds had been with the old Bank for at least two years. His explanation as to the source of the funds was that he had made successful investments. He did not work, and had an assistant/partner who had previously opened accounts in excess of US$20,000,000.

1.1.2 In fact, the monies had been misappropriated from Government funds, including by misappropriation of bonds from a state project.

1.1.3 Subsequently the customer requested the liquidation of the portfolio and the transfer of US$100m to the Bank for Reconstruction and Development in Washington; the new Bank agreed to this but the customer then countermanded that instruction and instructed that payment be made to a Bank in his home country. The new Bank complied with that instruction. Substantial litigation resulted when the misappropriations were discovered.

Conclusions

1.1.4 The new Bank complied with current requirements in so far as it verified the identity (name etc.) of the customer. The successful money laundering exercise involved in this case, which concerned a new customer who admitted being a relative of a head of state, could have been avoided by the following:

1.1.4.1 a requirement that banks seek independent verification of the authority of persons seeking to open accounts;

1.1.4.2 a requirement that banks seek an introduction certificate from any bank that the customer already uses;

1.1.4.3 a requirement that banks seek independent verification of the customer's statements as to the source of the funds; in this respect it should not be sufficient to rely on the customer's word alone, or upon statements from a previous bank; or

1.1.4.4 a requirement that banks carry out a sensible analysis of the financial situation of a government official's family members; explanations of business activities generating substantial funds should be independently justified; sums deposited should be analysed to ascertain whether they are realistically normal for such persons in the light of information so obtained.

2.1 Case Study 2

The facts

2.1.1 Three officials of a state Bank opened accounts with a Bank, involving one special purpose vehicle (SPV) for the three as joint beneficial owners, and individual special purpose vehicle accounts for each, said to be 'for their own investments'. Large sums of money proceeded to flow in and out leaving a margin in the SPV accounts, which was then distributed by payments made to other accounts with the Bank not obviously connected in any way in the Bank's records to the original SPV.

2.1.2 The Bank did verify the identity of the three individuals, but did not:

- obtain any references other than an introduction from a local agent;
- obtain verification that the state Bank's officials were permitted to operate their own businesses; or
- carry out any check of the source of the funds or the purpose of the individual payments.

2.1.3 In fact, the individuals were misappropriating the funds of the state Bank, making investments for themselves and for favourite customers, retaining the profits in the SPV and related company accounts, and returning the capital to their employer.

Conclusions

2.1.4 Again, the Bank complied with the requirement to verify identity, which was not sufficient to prevent the laundering of the improperly obtained funds. In cases where officials of a state Bank are involved, the following would have served to prevent the laundering:

2.1.4.1 a requirement to check that state Bank officials have authority to operate their own businesses;

2.1.4.2 a requirement to verify the source of the funds, and to compare them with the expected salary of the individual(s) involved; or

2.1.4.3 in the case of senior officials, a requirement to seek Board authority for the opening of accounts. Possibly, in the case of very senior officials, a requirement to seek shareholders' authority.

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