

Money Laundering Made Simple

David Winch, May 2006

Don't panic - David Winch says that a lawyer's money laundering obligations are quite straightforward, really

- **the simple, two question approach**
- **practical points on reporting requirements.**

Many lawyers appear to be unsure as to when they are obliged to report suspicions of criminal conduct concerning their clients or others to the Serious Organised Crime Agency (SOCA), via their firm's Money Laundering Reporting Officer (MLRO). The recent imprisonment of conveyancing solicitor Gavin David McCartan will certainly serve to increase their anxieties.

Leaving aside suspicions regarding terrorism, and issues relating to legal professional privilege, the matter can be simply addressed by answering two key questions:-

1. Did the information come to the lawyer in the course of an activity falling within the 'regulated sector' of Schedule 9 Proceeds of Crime Act 2002 (PoCA 2002) as amended by SI 2003/3074?
2. Does the information concern: (a) a potential 'prohibited act' (that is an act which, if not reported, may be a contravention of one or more of sections 327 – 329 PoCA 2002) by *the lawyer*, or (b) knowledge or suspicion of 'money laundering' (that is a 'prohibited act' or one of the other acts listed in section 340(11) PoCA 2002) by *another person*, or (c) both?

Regulated sector

A provider of legal services will be in the 'regulated sector' when, and only when, engaged in an activity "*which involves participation in a financial or real property transaction (whether by assisting in the planning or execution of any such transaction or otherwise by acting for, or on behalf of, a client in any such transaction)*" Schedule 9, paragraph 1(1)(l) PoCA 2002.

In other legal work, such as acting for a client in connection with civil or criminal litigation, a provider of legal services is not within the 'regulated sector'. A provider of legal services in general practice might move into and out of the 'regulated sector' numerous times in the course of a typical day's work. Of course when dealing with the administration of the practice, or when not working, the lawyer is not within the 'regulated sector'.

Having answered question 1, the lawyer can move on to question 2. Essentially, is *the lawyer* at risk of committing one of the principal money laundering offences in sections 327 – 329?

Outside the regulated sector

If the information on which the lawyer's knowledge or suspicion of money laundering rests came to him in the course of an activity which does *not* fall within the 'regulated sector' then he is only obliged to report the matter if he or she is at risk of committing a 'prohibited act' contrary to sections 327 – 329. The lawyer should use the report to seek consent to undertake the 'prohibited act', and very probably will swiftly receive the consent he requires. About 10,000 such consent requests are received by SOCA annually and just over 50% of these are from lawyers. SOCA claim to respond to most consent requests within 24 hours. Less than 10% of consent requests are refused.

Inside the regulated sector

If, on the other hand, the information on which the lawyer's knowledge or suspicion of money laundering rests came to the him in the course of an activity *within* the 'regulated sector' then the lawyer is obliged to report this knowledge or suspicion of 'money laundering,' as defined by section 340(11), by another (whether or not a client) under section 330 PoCA 2002. In such cases consent is not at issue since the lawyer is not himself proposing to engage in 'money laundering'. Over 180,000 reports under section 330 are received by SOCA annually; the majority of these reports are made by banks.

If the lawyer has knowledge or suspicion of 'money laundering' by another and is at risk of committing a 'prohibited act' himself or herself then a single report will meet his or her obligations both under sections 327 – 329 and under section 330. In this event the lawyer will need to seek consent for the act.

Other services

So far, so good. But I have glossed over a couple of areas. First, a lawyer often acts as a provider of legal services, but may act in other capacities, some of which may fall within the 'regulated sector'. For example, Tom Smith calls to see his solicitor. Tom is married with two adult children. He wishes to make a will. He proposes to leave small legacies to each of his two children and the residue of his estate worth, say, £500,000, to his wife. In drawing up a will to give effect to Tom's wishes, his solicitor is providing legal services. As these services do not involve participation in a financial or real property transaction this work falls outside the 'regulated sector'.

However if the solicitor points out to Tom that there may be Inheritance Tax advantages in making lifetime gifts, Tom may then instruct the solicitor in respect of conveyancing or other work which will fall within the regulated sector.

A solicitor might also be involved in other activities within the 'regulated sector' such as: advising on investments, company formation, acting as an insolvency practitioner, or estate agency work.

So for a lawyer, answering the question "Did the information come to me in the course of an activity within the 'regulated sector'?" is not quite as simple as I painted it earlier. Nevertheless the two-stage approach which I have advocated will, I believe, be of practical assistance.

Reasonable grounds

The second area which I glossed over concerns the objective test in section 330. The section obliges a person within the regulated sector to report where he 'has reasonable grounds for knowing or suspecting that another person is engaged in money laundering'. In practice, what might amount to 'reasonable grounds' in this context?

The concept of reasonable grounds for suspicion has been employed many times before in UK criminal law. The wording is also used elsewhere in PoCA 2002. For example s 289 provides search powers for a customs officer or constable who has 'reasonable grounds for suspecting' the presence of cash which is recoverable property. The Secretary of State has issued a code of practice in connection with the search power conferred by s 289. The code of practice includes a commentary on 'reasonable grounds for suspicion':-"Whether there are reasonable grounds for suspicion will depend on the circumstances in each case. There must be some objective basis for that suspicion based on facts, information and / or intelligence ... Reasonable suspicion can never be supported on the basis of personal factors alone without reliable supporting intelligence or information or some specific behaviour by the person concerned. For example, a person's race, age, appearance, or the fact that the person is known to have a previous conviction, cannot be used alone or in combination with each other as the reason for searching that person. Reasonable suspicion cannot be based on generalisations or stereotypical images of certain groups or categories of people being more likely to be involved in criminal activity. It should normally be linked to accurate and current intelligence or information."

There may be 'reasonable grounds for knowing or suspecting' that an individual is engaged in money laundering where there is some factual basis, related to that individual, underlying the suspicion. The factual basis need not be very great, and need not involve documentary evidence.

Legal professional privilege

On occasions where a report would otherwise be required under section 330, the solicitor may be exempted from an obligation to report by reason of legal professional privilege. This is outside the scope of this article.

Size matters

Although there is no de minimis rule in PoCA 2002, Part 7 or the Money Laundering Regulations 2003 and a report is required whenever reasonable grounds for suspicion exist, there is no bar to consideration of the amount involved in the context of deciding whether or not there are reasonable grounds for suspicion.

Suppose a client visits his solicitor's office and pays over £100 in £10 notes to enable the solicitor to undertake local searches in a conveyancing matter. This would not normally be regarded as a sufficient basis for a reasonable suspicion of money laundering.

Suppose that the client returns a few days later and pays over £70,000 in bundles of notes in respect of the deposit on the property purchase. In the absence of a satisfactory explanation, and taking account of any relevant surrounding circumstances, this might well be regarded as grounds for a reasonable suspicion of money laundering. Indeed, conveyancing solicitor Gavin McCartan was recently imprisoned for failure to report a suspicion of money laundering in connection with a similar cash receipt.

Reporting to SOCA

When making a report to SOCA it is certainly helpful, both to the solicitor / MLRO and to SOCA, if the report is kept to a reasonable length and submitted on the SOCA forms. This should ensure that relevant information is included and that SOCA can process the report quickly. A report comprising four lever arch files of material received by SOCA recently contained much irrelevant material (including medical records) which need not have been divulged. That said, information received by a lawyer in the course of his work which causes him to suspect money laundering, which is reported to SOCA in good faith, is unlikely to be the subject of legal or disciplinary action for breach of confidence, or contract, or professional ethics, as the report is protected by section 337 or section 338 PoCA 2002.

In April 2006 SOCA introduced submission of reports by internet via its website as an alternative to fax or post.

Informing the client

Having made a report to his MLRO, is the lawyer able to inform his client of this report? Section 333 of PoCA 2002 provides that an offence is committed where a person knows or suspects that a report has been made (either internally to the MLRO or externally to SOCA) and makes a disclosure which is likely to prejudice any investigation which might be conducted following the report.

However a 'professional legal adviser' does not commit an offence if he or she makes a disclosure to a client (or client's representative) in connection with the giving of legal advice to the client, or to any person in connection with legal proceedings or contemplated legal proceedings, unless the disclosure was made by the professional legal adviser with the intention of furthering a criminal purpose.

Terrorism

With regard to suspicions of terrorist property offences, the relevant legislation is to be found in sections 19 and 21A Terrorism Act 2000 (as amended). This legislation is outside the scope of this article but a lawyer with any suspicions of terrorist property offences may well be under an obligation to report them and should carefully check the legal requirements or consult with his or her MLRO.

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