

**“THE CRIMINALISATION OF TAX EVASION
AS A MONEY LAUNDERING OFFENCE:
IMPLICATIONS FOR THE LEGAL PROFESSION”**

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Significant debate in the Caribbean region on the topic of money-laundering has arisen over the specific issue of the applicability of anti-money laundering legislation to the proceeds of foreign tax evasion.

The debate arises from the adoption throughout much of the region of “all crimes” anti-money laundering legislation based on United Kingdom legislation; the Criminal Justice Act 1988 (“the CJA 1988”).

The primary object of the legislation is the criminalisation of the laundering of the proceeds of all serious or indictable offences.

While some jurisdictions have taken the approach of listing in a schedule the offences to which the legislation is intended to apply,¹ several (including the British Overseas

Territories) have adopted the United Kingdom approach which is based upon a generic unspecified reference to all indictable offences, treating them as predicate offences covered by the Act.² The Bahamian Proceeds of Criminal Conduct Act 2000 appears to be an innovative hybrid – using as it does a schedule which lists some offences, but which also adopts the generic language. It also generally deals both with drug trafficking offences and other crimes, thus combining in one Act, the scheme that was dealt with in two Acts in the UK until 2002.³

The central question is as to what is the combined effect of the generic reference to all indictable offences when taken with the further provision that includes conduct committed overseas which conduct, if committed within the local jurisdiction, would be an indictable offence under the laws of the local jurisdiction; ie: the so called “dual criminality rule”.^{3A}

While “income tax evasion” strictly so called is not an offence known to the laws of several regional jurisdictions – notably the Bahamas and the British Overseas Territories

– it is nonetheless very much a concern whether the common law equivalent of cheating the public revenue or a conspiracy to do so, is included.

The purpose of this paper is to invite examination of the difficulties which might confront the legal (and other) professionals because of the conundrum created by these provisions.

It now appears to be the accepted position in the United Kingdom having regard to some decided cases there⁴, that the offences caught by the equivalent U.K. Acts, include assisting another to retain the proceeds of tax evasion.

For present purposes it is important to note that this became the position there under the CJA 1988; even before the latest charges were introduced by the Proceeds of Crime Act 2002. In the leading case, a Mr. Allen was convicted and ultimately sentenced in the year 2000, to 7 years imprisonment as a result of failure to pay or declare liabilities for income or corporation tax due in respect of certain offshore companies he managed. The confiscation order was made (later upheld by the Court of Appeal) in the sum of £3.1million with a further consecutive sentence of 7

years in default of payment. The Court held that it was clear from S.72(3) and (7) of the CJA 1988 (as amended in 1993); that Parliament intended that a confiscation order could be made in respect of the benefit obtained from the offences of tax evasion, notwithstanding that, in law, taxes can never be ultimately evaded because the debt or liability always remains recoverable at law until paid⁵. Further, that as Mr. Allen had sought to cheat the public revenue of the UK where he lived; it mattered not that the income he failed to declare was that of offshore companies beneficially owned or controlled by him. Those companies were to be regarded as merely his alter egos.

At page 145 f - g Laws LJ said this:

“In short, the fact that the tax remains due does not mean that its evasion did not confer a pecuniary advantage, nor indeed that that pecuniary advantage consisted of the whole of the tax withheld, the value of the liability that was evaded. By his crime the appellant evaded payment of £4 million tax. That sum constituted the proceeds of the offence.

On the agreed figures, as we have indicated he had realizable assets of £3.1 million. The fact that he remained in law liable to pay the tax, the fact even, were it so, that the Revenue might later recover it, does not, in our judgment, yield the proposition that the proceeds of his crime were one penny less than the whole of the tax evaded”⁶.

Thus in the UK, the common law offence of cheating the public revenue became an offence, the proceeds of which became amenable to forfeiture as being the proceeds of crime.

While there does not yet appear to be a case leading to conviction for the offence of laundering the proceeds of tax evasion by, for example, assisting another to retain such proceeds; it became the official position that under the CJA 1988; the same meaning must be given to the expression “proceeds of crime” for the purposes of the penal provisions of the Act, as for the confiscatory provisions.

In evidence given before the Treasury Select Committee of the UK Parliament in 2000, the Financial Secretary Melanie Johnson, stated the UK Government’s position:

In the UK there is no specific offence of tax evasion. The offence with which tax evaders are commonly charged include offences under the Theft Act 1968 and the common law offence of cheating the public revenue. These are included within the definition of criminal activity for the purposes of the Criminal Justice Act [1988] which extends to all indictable offences. This means that laundering the proceeds of tax evasion is considered to be a serious offence in the UK, and the financial institutions and others have a statutory obligation to report suspicions of tax evasion to the National Criminal Intelligence Service. This obligation extends to the proceeds of offences committed overseas, where the relevant conduct would have been criminal if it had occurred in the UK. In this way the UK clearly sets out that we do not wish to provide a haven for dirty money”.

That statement of policy begs many questions, not least that which arises from the notion that money which may well have been otherwise lawfully obtained becomes pro tanto,

dirty money in respect of which the crime of money laundering can be committed, once one fails to declare and pay tax liabilities which relate to it.

The notion of foreign tax evasion as the predicate to money laundering also caused immediate concerns among UK professionals, particularly those providing services from the international financial district of City London.^{6A}

Despite the apparent dangers, a similar construction was recently argued but unsuccessfully on behalf of the prosecution in three matters before the courts of the Cayman Islands⁷, where, as I have said, the legislation is based on the 1988 UK Act.

In the Cayman statute “proceeds of criminal conduct” is defined, importantly for present purposes; differently than in the UK and the Bahamas:

“ - - references to any person’s proceeds of criminal conduct include property which in whole or in part directly or indirectly represented in his hands his proceeds of criminal conduct”.

The expression “benefit from criminal conduct” is not adopted in this context. There is however such a direct

correlation in the Bahamian Proceeds of Crime Act – see sections 3 as read with section 40 (1) and (2) and in the UK 1988 Act (see endnotes 2) – between “benefit” and “proceeds of criminal conduct” for the purposes of the penal money laundering provisions.

The differences between these provisions in the context of the statutory regimes is fundamental: the deeming of a notional benefit to be property for the purposes of confiscatory orders is one thing; the deeming of such benefits to be the proceeds of crime so as to impose criminal liability (often upon a third party) in respect of the laundering of the proceeds of such crimes; quite another.

Yet that is the assimilation – without analysis but perhaps sustainable nonetheless on the basis of the CJA 1988 definitions - which has been created by the interpretation of “proceeds of crime” as being the same as “benefit from crime” in the judgment of the Court of Appeal in Allen’s case.

Before looking further at this construction and by way of background, it is worth reflecting briefly on the genesis and history of the legislative scheme.

While the offence of money laundering is a fairly recent phenomenon, no one would today argue against the correctness of criminalizing the laundering of the proceeds of serious crime. Archetypically, this is accepted as including the proceeds of drug trafficking, fraud, kidnapping, official corruption and terrorist funding – predicate crimes which universally offend all notions of civilised behaviour.

It is also worth recalling that at the global level, the anti-money laundering initiative began with the United Nations Convention against the Illicit Traffic in Narcotics and Psychotropic Substances done in 1988 in Vienna (“the Vienna Convention”); although the Americans had already addressed the subject in the United States Criminal Code^{7A}. The Vienna Convention was soon adopted by the G7 who in 1990, formed the Financial Action Task Force.

The FATF’s first 40 recommendations focused on ensuring compliance with the Vienna Convention (as well as with the Basle banking Concordat which required that bankers should truly know what their customers are about)⁸. Soon however, the G7 remit was to extend to “all crimes” money

laundering and within its membership and among the other less powerful countries under its scrutiny, the laundering of the proceeds of all serious crimes became an offence⁹.

In retrospect, it is also safe to say that those less powerful countries did not seek to question the validity of the FATF's campaign. What did and still causes concern, were the breaches of sovereignty, the lack of due process and the lack of transparency which characterised that campaign.

The Caribbean offshore jurisdictions had unequivocally committed to the campaign against organized criminals and their money-launderers, but they properly continue to object to the “do as we say, not as we do” arrogance of the G7.

But even amidst the early turmoil created by the FATF initiatives, tax evasion was nowhere mentioned as a predicate offence to money laundering.

It was mentioned publicly for the first time as a matter of concern to the FATF on 2nd July 1999¹⁰ when the directive against the so-called “fiscal excuse loophole” was issued.

Here again, the non-G7 countries hardly objected to the principle that those who seek to launder the proceeds of

serious crimes should not be facilitated in doing so. It simply not being acceptable that they should give the facile excuse that what would otherwise be suspicious activity seems that way only because they are seeking to evade taxes.

Indeed, the amendment to the 40 FATF recommendations to include that advice was welcomed by the Caribbean Financial Action Task Force¹¹.

And, as a matter of the enforcement of the criminal sanctions against money laundering, financial advisers who actively assisted or deliberately turned a blind eye; were not to be heard to say that “we did not think that the money that we were handling was the proceeds of drug trafficking, we only thought that it was the proceeds of tax evasion”.

They did so at their own risk of prosecution if it turned out instead indeed to be the proceeds of drug trafficking or some other sanctionable predicate crime. From then, codes of conduct properly required that they were to be wary of suspicious activity, irrespective of the excuse.

But that, at least in the Caribbean context, was still regarded as being a far cry from making professionals

criminally liable for assisting someone - not in committing some universally sanctionable offence - but in committing foreign tax evasion, or for laundering its proceeds.

The unveiling of that particular agenda by the G7, in furtherance of the OECD harmful tax competition initiative; came not in the form of specific legislative changes, but in the form of policy statements of the kind by the Financial Secretary quoted above,^{11A} giving that interpretation to the “all crimes” money laundering legislation; as including foreign tax evasion. Thus, not only was domestic tax evasion said to be a predicate money laundering offence, but also tax evasion wherever it may occur. Of further significance is the fact that some of these policy statements have sought to blur the line between tax evasion and legitimate tax avoidance for those purposes of treating them both as predicate criminal activity.

Thus, issues of tax evasion, tax avoidance and money laundering came finally to be completely linked.

The policy statements emanating from the G7 states and from the UK in particular; giving that construction to the

statute, led also to the issuance of regulations which carried penal sanctions for non-compliance.

The then stated justification was that tax evasion is invariably connected with other crime and in particular drug crime, and therefore all fall to be treated in the same way. This was a process which at least one writer has described as “legislation by stealth”¹².

Nonetheless, emboldened by the earlier tacit acceptance there, the UK Government is now in the process of issuing even more far-reaching regulations under the new Proceeds of Crime Act 2002 which will, for the first time, bring barristers within the regulated sector.

A recent guidance note circulated by the Bar Council reveals the manner in which that body anticipates the regulations will impact upon barristers.

In respect of section 340 (3) of the Act of 2002 which defines what criminal property is (see further below); the guidance note accepts the now seemingly settled position, that property which represents the benefit of the non-payment of tax constitutes criminal property for the purposes of the Act.

The Council poses the following hypothetical questions:

“where a barrister advises a client in respect (say) of how to enforce his rights in respect of certain property, is the barrister “concerned in an arrangement which ---
- facilitates the acquisition etc of criminal property”
(Assuming that the property is criminal within the meaning of the Act)?

Answer: “He may be.” Where the barrister knows or suspects that as a result of following his advice his client may (for eg.) acquire criminal property, the barrister could also be said to be concerned in such an arrangement”.

To put the issue in context, the new definition of “criminal property” under the UK Act of 2002 must be borne in mind: It no longer pivots around the expression “proceeds of crime”. No longer is there a requirement that the property *be obtained as a result of or in connection with the commission of the offence*: “property is criminal property” if

- (a) it contributes to a person's benefit from criminal conduct or it represents such a benefit (in whole or part and whether directly or indirectly), and
- (b) the alleged offender knows or suspects that it constitutes or represents such benefit."

Unlike under the earlier legislation where it was at least arguable whether a liability for tax evaded which is payable in respect of money lawfully earned, could itself be treated as the "proceeds of a crime" for money laundering purposes; it is now clear that such a liability evaded or undeclared becomes criminal property as being, among other things, the benefit from the criminal conduct of tax evasion. This also - on the basis of Allen's case above - that "property" includes an intangible such as a pecuniary advantage; eg: a debt evaded or deferred.

Thus, a barrister who gives advice to a client with respect to money which contains an element of evaded tax or in respect of which a liability to tax has been deferred, could be guilty of money laundering for being involved in an arrangement by which that element is retained.

But what under the new regime, will be the barrister's recourses?

When one looks at the disclosure requirements of the new U.K Act 2002, what is in my view the true danger, is revealed.

By section 328, if the barrister makes a disclosure to the National Criminal Intelligence Service before acting for the client and gets the consent of that body, he may proceed to act for the client.

If he does not do that, say because he tells the client of his intentions to do so and the client objects; he must withdraw from the retainer or run the risk of being criminally implicated. The English Court of Appeal was given no pause at all in a recent judgment in declaring the duties under S.328 of a barrister to be "straightforward": P.v.P. 2003 EWHC 2260 (Fam). and N.L.J. 17.10.03 p.1550

I will not venture now into the appropriateness or constitutionality of, in that manner, requiring a lawyer in effect to become a policeman over his clients' affairs.

Certainly Canadian Courts have described similar provisions there as an unprecedented intrusion into the

traditional solicitor-client relationship; declaring them to be unconstitutional¹³.

A main difference of course, is that in England, the theory of Parliamentary Supremacy is still recognized, subject only to the Human Rights Act which allows the courts to declare whether an Act infringes fundamental rights. But the courts there have no power to strike down legislation. Those of us from Caribbean states where the Constitution reigns supreme, anxiously await the outcome of the Appeal from this jurisdiction to the Privy Council¹⁴ on the similar issues which have arisen here; (Financial Cleraing Corp: Action No 236/2001, Common Law Side) and indeed the outcome of a pending Supreme Court decision in Jamaica¹⁵.

The specific problem which I seek to focus upon here arises from the dual criminality provisions of the earlier UK model legislation the CJA 1988; which has been repeated in a number of the regional equivalents; including the Cayman Islands and in the varied terms in the Bahamas as

well. The UK equivalent as it was in the CJA 1988 (as amended): said this:

93 A (7) “- - “criminal conduct” means conduct which constitutes an offence to which this Act applies or would constitute such an offence if it had occurred in the United Kingdom”.

Against the historical background of the legislation, the question for us in this region having the similar provisions becomes: does this include foreign tax evasion? We have seen what has been affirmatively stated to be the official construction in the U.K. in that regard even in the absence of specific reference to fiscal offences in the legislation there. The uncertainty here arises because the regional legislation under discussion does not specifically exclude tax evasion or its common law equivalent as a predicate offence.

What therefore, is the position with the continuing existence of the offence of cheating the public revenue at common law and because of other statutory offences under our Theft or Larceny Acts (eg: false accounting) and those involving indirect taxation?

The argument has been raised (but not pursued) in the Cayman Islands¹⁶, that the common law offence of cheating the Public Revenue is part of the laws of the Cayman Islands and that that is sufficient to satisfy the dual criminality test and to impose criminal liability for laundering the proceeds of foreign tax evasion. Further, that the position is a fortiori in respect of the statutory indirect tax offences, such as customs duty evasion.

This was despite repeated statements in the Legislative Assembly (but only ex post facto the passage of the Law)¹⁷ that the Law was not intended to treat tax offences as money laundering predicates.

There are many troublesome implications which this state of the law presents for legal practitioners (and indeed for anyone giving professional financial advice to foreign clients) -:

- (i) In the context of the meaning and effect of the legislation which has emerged, giving advice to a foreign client which on the face of it is in keeping with the local laws because no local tax law is to

be infringed; but where the client's intent (perhaps undisclosed) is to evade the revenue laws of his own country; presents a troublesome scenario. It is a scenario in which an advisor could, by virtue of the lawful advice he gives; be assisting a client illegally to evade taxes in the client's country and thus, because of the dual criminality rule, could be committing an offence to which the money laundering provisions apply. And given the dictum of the English Court of Appeal in the Allen case; any further steps taken – in a regional jurisdiction whose Laws is worded in the same way - to assist that client could result in the offence of laundering the proceeds of tax evasion on the basis that the proceeds which represent the clients assets which he is able to retain as the result of evading the taxes of his own country, became the proceeds of a crime covered by the local law.

Though no local law has been breached by the giving of the advice, the hypothesis of the dual criminality rule becomes real. Example: a local lawyer establishes a trust and becomes trustee for a European client whose civil law domicile does not recognize the trust concept and so regards the assets as still belonging to him. The client does not declare income earned on them and so commits tax evasion at home, an offence which would have a local common law equivalent. Does the local lawyer commit the offence of money laundering by acting as trustee in respect of the deemed proceeds of the client's crime?

While it may well be the intention of the local Governments of the day - as in the case of the pronouncements of the Cayman Islands Government - that criminality should not attach in those circumstances, the conundrum presented by the provisions and the manner of their interpretation in other places sharing the same common law legacy, hangs like the proverbial sword of Damocles.

- (ii) The natural consequence of all this would certainly be welcomed by the OECD countries: If criminality can arise in the offshore jurisdictions from the dealings with a foreign client, either because the consequences of his scheme under

the laws of his own country are unknown, or because he fails to disclose his true intentions to his advisor; getting and keeping him as a client might not be worth the risks. In this regard it is to be noted that the requisite mens rea is “knowledge or suspicion” and even if the requirement is that it must be proven to be subjectively held, the proof would be sought by reference to “objective” criteria.¹⁸ It is here too, looked at from the point of view of an advisor in an “onshore” jurisdiction; that the pejorative implications of the expression “offshore” takes on special meaning.¹⁹

- (iii) Such concerns in the mind of the advisor (be he or she “onshore” or “offshore”); can only be quieted and the risks fully negated by onerous and expensive enquiries – going beyond the ordinary requirements of due diligence so as even to ensure that the foreign client only intends to act strictly in keeping with his own domestic tax laws.

Whereas the ordinary and otherwise tenable due diligence enquiries might show that a client has obtained his money legitimately, this requirement goes further to assure that he is not about evading taxes.

- (iv) In an indirect way, the local legislation could thus have the effect of discouraging what would

otherwise be – at least under local laws - legitimate foreign business in a manner that indirectly serves to enforce foreign tax laws.

- (v) In light of the centuries old common law principle - that a state has no obligation in the absence of treaty to enforce the fiscal laws of another state - it is certainly doubtful that regional Parliaments had any obligation to frame the laws so as to have that effect.

The principle settled in Holman v Johnson (1775) 1 Cow p 341 per Lord Mansfield and most authoratively restated by the House of Lords in Government of India v Taylor [1955] A.C. 491; is still good law.

The original and proper concern of Parliament in the UK and by extension in this region, would have been to criminalise the laundering of the proceeds of serious crime within the jurisdiction, irrespective of where the predicate crime was committed. The parliamentary intent in so doing must be regarded as shown from the legislative history - never to have intended simply by implication to sweep away the long-standing common law rule that the Courts will not be used (in the absence of treaty) for the enforcement directly or indirectly of foreign tax laws.

There are still further conceptual and legal difficulties:

- (i) A lawyer facing a money laundering charge for having assisted a client to commit tax evasion would of course have a right to defend himself. But would that right extend to being allowed to breach client confidentiality²⁰ and legal professional privilege?

If so, would such a right give rise nonetheless to concerns about the client's constitutional rights? Such measures in the present context imply not only a duty to become intimately acquainted with a foreign clients affairs, they also imply a duty to become acquainted with the domestic tax laws of his foreign state.

Indeed, those concerns do not arise only in this context of considering foreign tax evasion as a money laundering offence, they run throughout the entire fabric of the due diligence codes of conduct which would purport to criminalise the failure of legal advisers to detect or report on their clients' suspicious activities.

Are such measures proportionate responses to society's proper concern to prevent money laundering? Is that concern of such paramouncy as to justify the abrogation of the otherwise absolute legal professional privilege and public interest in protecting client confidentiality?

When one considers the implications of these and other concerns, one can further appreciate the importance to be attached to the decision of the Privy Council and further decisions of the Supreme Court of the Bahamas which are now

awaited in the Financial Clearing Corp. action (Common Law Side No. 236 of 2001).

Little wonder that in response to similar concerns Switzerland, which has received OECD clearance notwithstanding its pre-eminence as an “offshore” tax neutral jurisdiction;²¹ has made it clear in its regulations that it is only active involvement in an overseas tax fraud that constitutes a criminal offence. Passive involvement in the so – called laundering of the proceeds would not do.

- (ii) What protection is there for a lawyer or other professional who has damaged a client’s business interests or reputation by making a suspicious transaction report which turns out to be unfounded; particularly as the professional will have known that the subject-matter is money which the client otherwise came by lawfully in the first-place? This is a risk which is far more pronounced when the only suspicion is one of tax evasion, not one which prompted by circumstances, suggesting that the primary source of the clients money is criminal activity.
The legislation provides no “safe harbours” against civil liability, even while it requires the professional to report in order to avoid criminal liability.
- (iii) The difficulty as to how the property

which is the subject of tax evasion is to be identified for the purposes of making it the subject of a money laundering offence deserves further consideration. That is; the question – “what are the proceeds?”

When the question is whether someone should be convicted for a money laundering offence, the question is asked “what property has he laundered?”

If one assists a drug trafficker to retain the proceeds of his drug trafficking, it can be plain enough what the proceeds are – the money obtained in exchange for the drugs which he sold. Proper due diligence enquiries can put one on reasonable notice or suspicion that the client or the money is unsafe.

Not so with tax evasion, where, depending on the circumstances, the very advice which one gives may be the means by which the client commits the offence.

What starts off as a legitimate lawyer – client relationship for the handling of a client’s affairs, could later be transformed into a money laundering arrangement by the unilateral failure of the client to declare his domestic liability to tax.

Could a lawyer then be heard to say “I had no reasonable cause for suspicion”?

That would be a dangerous assumption where the legislative scheme includes a due diligence code of conduct which imposes a duty to make all

necessary enquiries. And moreover, where it seems that although the test of whether suspicion was held will be subjective, that test may be considered by reference to undefined “objective” criteria such as those discussed at end-note 19.

In conclusion, the view I wish to express is that the present state of legislation in several regional states on this issue is unsatisfactory.

Do they or do they not regard the evasion of foreign tax as predicate criminal conduct for the offence of laundering the proceeds?

Many professionals, including lawyers and other fiduciaries, now operate in uncertainty about this issue. Not only is that kind of uncertainty bad for business; it is also doubtful governance: the criminal law must be clear and certain so that people will know for what they may be liable.

The basic problem is that many of the regional laws based upon the U.K. Criminal Justice Act 1988 (as amended in 1993) do not give a conclusive meaning to the expression “proceeds of crime” and give no guidance whatsoever insofar as that expression might relate to the proceeds of tax evasion.

And despite the fact that the natural and ordinary meaning would refute the notion that money lawfully obtained before a crime is committed could be said to be the proceeds of that crime – as by definition, tax evasion can only arise after there is income or proceeds to be declared) - the

position that emerged in the UK under the CJA 1988 Act, now confirmed by use of significantly different language in the Act of 2002; is to the contrary.

There are the two decisions earlier cited at first instance by the Cayman Islands Courts which adopt the natural and ordinary meaning of the word “proceeds”.²² But the fact that in those cases, (and notwithstanding the different meaning there of “proceeds of crime” for the purposes of the penal provisions in section 22 (2)) of the Cayman statute) the Crown argued to the contrary; is clear indication of the need for more definitive resolution by legislative action.

Nor should the international ramifications of the seemingly tacit acceptance by regional parliaments of the accepted construction of UK based legislation be overlooked.

No good can come from giving the impression that these provisions are to be honoured more in the breach than in the observance “offshore” jurisdictions which have enacted them.

In considering all these issues in the round, one must of course recognize and acknowledge the socio-economic and moral imperatives which dictate that tax laws must be enforced.

These imperatives might even suggest an edict of comity among nations not to encourage or facilitate the evasion of each others tax laws.

But even such an edict would recognize that not all national regimes are deserving of such notions of comity and that there are many reasons why persons who live under the heels of oppressive regimes would seek to put their assets outside their reach.

Such notions of comity could not extend to legitimise the supra-national overreach of agencies such as the OECD. It's real agenda, far from addressing any real concerns about unfair tax competition, is aimed at controlling the free movement of capital despite the phenomena of the new global economy²³. Indeed the agenda is the antithesis of free competition and is aimed at the offshore centers which more and more are for practical reasons, positioned at the hub of the wheel of the global movement of capital.

Principles of comity cannot extend to a requirement that offshore centers (a term which in its truly relative sense would apply equally to all OECD members States which incentivise the movement of capital) to surrender whatever benefits may be derived from the legal, fiscal or regulatory arbitrage of their positions vis-à-vis other States. That is the very process by which G7 financial centers attract overseas investment. Otherwise, the natural but ludicrous conclusion of the G7 argument, would be that "tax havens" have an obligation to ensure that their laws and fiscal regimes comport with those of the G7.

Comity among nations requires instead that the conflicts of interest between the G7 States in seeking to preserve their tax bases, and the “offshore” jurisdictions in seeking to attract capital; must be resolved by diplomatic means by

treaty. Not by such legal artificialism as seeking to treat tax avoidance or evasion at home or abroad as predicate criminal activity to money laundering offences.

Hon. Anthony Smellie QC
Chief Justice
Cayman Islands.

End Notes

¹ cf. Bahamas Proceeds of Crime Act 2000 and Antigua and Barbuda: Proceeds of Crime Act 1993; sections 2 and 3 and the Schedules where respectively despite extensive lists of offences the “dual criminality” test is nonetheless adopted.

² For ease of reference a comparison follows: it is important to remember that the initial focus of the UK CJA 1988 was upon the confiscation of the proceeds of crime; identifiable as the proceeds of a primary offence.

The money laundering offences were not proscribed until by the CJA 1993 which introduced the offences of assisting another to retain the proceeds of his criminal conduct; as well as the offences of acquiring, possession or using the proceeds of crime; or concealing or transferring proceeds of criminal conduct and tipping off – CJA 1993 sections 93 A – 93 D respectively.

And by section 71 (4):

“For the purposes of this Part of the Act a person benefits from an offence if he obtains property as a result of or in connection with its commission and his benefit is the property so obtained”.

(5) where a person derives a pecuniary advantage as a result of or in connection with the commission of the offence, he is to be treated for the purposes of this Part of this Act as if he had obtained as a result of or in connection with the commission of the offence a sum of money equal to the value of the pecuniary advantage.

For the purposes of the same Part of the CJA 1993; proceeds of criminal conduct in those terms: “proceeds of criminal conduct” in relation to any person who has benefited from criminal conduct, means that benefit.

Of pivotal importance to the present issue; section 93A (7) reads:

“In this Part of this Act [dealing with confiscation of the Proceeds of an offence as well as the new money laundering offences] “criminal conduct” means conduct which constitutes an offence to which the 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) in Scotland”.

“offences to which the Part of this Act applies” by virtue of section 79 (9) (read with the 4th Schedule) means effectively all indictable offences (apart from drug trafficking which was covered by the DTOA 1986).

The provision in the Cayman Islands Proceeds of Criminal Conduct Law are, mutatis mutandis, the same. See sections 5 (3) and (4); 22; 23; 24; 25; 27 (7). There is however this important difference in the narrower definition of proceeds of criminal conduct in s. 22 (2) [the money laundering offence]: “In this section, references to any person’s proceeds of criminal conduct include property which in whole or in part, directly or indirectly represents in his hands his proceeds of criminal conduct”. The word “benefit” is not used.

The relevant Bahamian provisions are in the Proceeds of Crime Act 2000 section 3:

“criminal conduct” means

- (a) drug trafficking, or
- (b) any relevant offence

“proceeds of criminal conduct” in relation to a person who has benefited from criminal conduct, means that benefit and includes a reference to any property which in whole or in part directly or indirectly represents the proceeds of criminal conduct. [creating in effect the same link between “benefit” and “proceeds or criminal conduct” as in the UK legislation].

“relevant offence” means an offence described in the Schedule.

Schedule

- (1) An offence under the Prevention of Bribery Act.
- (2) An offence under section 40, 41, or 42 of this Act (money laundering).
- (3) An offence which may be tried on information in the Bahamas other than drug trafficking [(which is already included under section 3)].
- (4) An offence committed anywhere that, if it had occurred in the Bahamas, would constitute an offence in the Bahamas as set out in this Schedule”.

Section 40 of the Bahamian legislation prescribes the offence of money laundering.

It adopts the UK legislation in this regard but with the important variation of making the principal offender himself liable for laundering the proceeds of his own criminal conduct (s40(1)) and other persons liable for laundering the proceeds of another’s criminal conduct (s40 (2)):

“40 (1) A person is guilty of an offence of money laundering if he

- (a) uses, transfers, sends or delivers to any person or place any property which, in whole or in part directly or indirectly represents his proceeds of criminal conduct; or
- (b) disposes, converts, alters or otherwise deals with in any manner and by means that property,.

With intent to conceal or disguise such property.

(2) A person is guilty of an offence money laundering if, knowing, respecting or having reasonable grounds to suspect that any property in whole or in part directly or indirectly represents another person’s proceeds of criminal conduct he

(a) uses etc - - -”

(b) disposes of etc ---.

³ The UK Proceeds of Crime Act 2002 now deals with the laundering of the proceeds of drug trafficking and all other indictable offences in one legislative scheme.

It also introduces a new regime for the restraint and confiscation of proceeds; including by means of in rem proceedings. It contains a new definition for “proceeds of criminal conduct”.

A further discussion of this significant change in the context of the present debate follows below.

^{3A} Some writers question whether this provision strictly depends on the dual criminality rule as the legislation does not specifically require that the conduct when committed abroad must be an offence there. The Money Laundering Regulation subsequently added that requirement in the UK. See Bridge & Green Journal of Money Laundering Control Summer 1999 p.51 (Henry Stewart Publications).

⁴ Tighe [1996 1 CAR (5) 314; R v Allen [2000] 2 All E.R. 142, Banks [1997] 2 Cr. All R (s) 110.

⁵ R v Allen (supra): while the offence here was not one by which Allen actually obtained anything other than a pecuniary advantage, the value of that benefit was treated as the proceeds of his crime; ie: as if he had actually obtained a sum of money of that value.

⁶ For an interesting examination of this issue Allridge: Journal of Money Laundering Centers Vol. 4. No. 4 (Henry Stewart Publications, London).

^{6A} See for instance: “The Impact of UK Money Laundering Legislation on Fiscal Crime” by /John Rhodes of the London firm of Macfarlenes Financial Times March 2000.

⁷ In the Matter of Crystal Limited 2002 CILR 497 where the Court held (per Henderson J) that civil provisions relating to confiscation orders under s.5 of the Proceeds of Criminal Conduct Law were broader than those creating money-laundering offences, since the Crown need only show that the offender had benefited from property obtained as a result of or in connection with the criminal conduct (which might not qualify as its proceeds). That benefit could include a pecuniary advantage derived in connection with the commission of an offence and in some other connection. However to convict of a money laundering offence under s. 22 (1) or 24 (1) of the Law, the Court would need to be satisfied that the moneys in question are property directly or indirectly representing the proceeds of criminal conduct (s. 22 (2)). Any ambiguity in the construction of the phrase “criminal conduct” (which included, by s. 22 (10), conduct that would be an offence were it committed in the Cayman Islands) would be resolved in favour of the defendant.

A similar conclusion was reached by the Grand Court in R v Stewart, Cunha et al (Re Shapiro) unreported (per Smellie CJ; Nov. 2002). Earlier arguments to the effect that a person’s benefit from tax evasion could be regarded as the proceeds of crime for the purposes of indicting others for laundering those proceeds were raised but abandoned in the same case (2002 CILR 420, 444 – 445).

^{7A} Title 18 USC Section 1956 (a) introduced by the Money Laundering Control Act 1996 itself enacted as Title 2 subtitle H of the Anti-Drug Abuse Act 1986.

⁸ See reference at f.n. 10.

⁹ Revised FATF Recommendations 1996 – see reference at f.n. 10.

¹⁰ An FATF Directive, issued on that date in the form of an “interpretative note” to its 40 recommendations proclaimed that “suspicious transactions should be reported by financial institutions regardless of whether they are also thought to involve tax matters --- (that) to deter financial institutions from reporting a suspicious transaction, money launderers may seek to state inter alia, that their transactions relate to tax matters”. See: www.oecd.org/fatf/recommendations.htm.

¹¹ Noted and accepted by the CFATF Council meeting in Tortola BVI October 1989, source CFATF Secretariat Port of Spain.

^{11A} See also G7 press release, May 1998 (Financial Times): “The G7 agreement paves the way for more international exchange of tax information to curb international tax evasion and avoidance through tax havens and preferential tax regimes.

We are determined to put in place strong and practical measures to tackle the growth threat of international crime and evasion through tax havens and preferential tax regimes” and Rt. Hon. Jack Straw, Home Secretary 1st February 1999: “ - - - tax evasion offences are criminal offences like any other. The legislation as originally enacted (in 1993) does not treat them in any way as a special case, and there is no reason why an exception should be made of them now ----. Realistically --- there is no prospect of the Government changing the law in this area”.

¹² See. Allridge: op cit p 358. the writer demonstrates by reference to Hansards that the proponents of the amendments by the CJA 1993 had in mind only an extension of the territorial reach of the act to encompass the proceeds of non-fiscal indictable crimes wherever such predicate crimes are committed. The Regulations which include fiscal offences, came later as a matter of policy edict.

¹³ Lavallee et al v Canada 2002 SCC 61; eg: Law Society of B.C. v A.G Canada 2002 BCCA 49 and various other decisions of provincial appellate Courts.

¹⁴ Albeit at this stage only on the interlocutory matter of whether the Supreme Court of the Bahamas can grant a stay of legislation, pending the final outcome of the challenge to its constitutionality.

¹⁵ At time of writing the Full Court of the Supreme Court had reserved judgment on challenges to a search warrant issued under Mutual Legal Assistance Legislation in aid of a Canadian request and which had been relied upon to enter a lawyer's office and seize information relating to a client who was the subject of the request; a process which by virtue of Lavallee's case would not be permitted in Canada itself. The legality of the warrant and the constitutionality of the enabling law is challenged.

¹⁶ R v Stewart, Cunha, Burges and Donegan 2002 CILR 420, 444 – 445.

¹⁷ October 1996 Hansards. When the Bill for the Cayman PCCL was first propounded it contained provisions which expressly excluded fiscal offences. Those were however withdrawn when the U.K. Government objected on the basis that it negated the FATF concerns already being expressed against the fiscal excuse loophole". Later statements in the Assembly insisted that the PCCL was nonetheless not intended to cover tax evasion as a predicate crime to money laundering.

¹⁸ Archbold 2003 para 17 – 49.

¹⁹ In their textbook, Rowan Bosworth-Davis and Graham Saltmarsh gave the following guidance to UK practitioners in 1994 on how the Courts may well approach this issue. They commented that the objective test of reasonable grounds will serve to:

“extend the burdens placed upon the shoulders of an advisor because the courts are willing to infer that reasonable grounds for suspicion existed from the actions or the behaviour of the advisor before and after he entered into the arrangement - -- Thus where a solicitor, accountant, company formation advisor, broker or financial adviser –is approached in future to form an offshore company in one of the more esoteric corporate-secrecy jurisdictions and who is subsequently used to transfer assets through the accounts of that company, the court will, if the adviser is charged with an offence under this section, look carefully at the circumstances under which the adviser was introduced to the client; will consider the nature of the client's need for offshore secrecy facilities; will consider the form of the transactions being requested and the source and type of the assets being introduced; will consider whether the transactions are being undertaken for any meaningful, lawful or proper commercial purpose or whether they are merely an attempt to disguise their real nature; and will consider, in view of all of the circumstances whether the adviser was acting in a bona fide manner or whether he was turning a Nelsonian “blind eye” to the possible consequences of his actions. If the Court formed the latter view, it is likely therefore that they will be prepared to infer that the adviser had reasonable grounds to suspect that the property he was handling in whole or in part, directly or indirectly represented the proceeds of criminal conduct, and convict him accordingly”.

²⁰ In the present state of the law, such disclosure without client consent or without a court order; would be an offence under the Confidential Relationships (Preservation) Law of the Cayman Islands and under other regional equivalents eg: Bahamas, Turks & Caicos Islands.

²¹ 2000 OECD List of Offshore Tax Havens: www.oecd.org.

²² The view taken by the Grand Court of the Cayman Islands (per Henderson J) in the Matter of Crystal Limited (2202 CILR 497) is that the commission of the predicate offence must have contributed in some material way to the acquisition of the alleged proceeds.

See also in In Re Shapiro. (supra).

²³ The reason why the U.S Government repudiated its support for the OECD Harmful Tax Competition Initiative. See statement of Treasury Secretary O'Neill on OECD Tax Havens “Treasury New 1st May 10th, 2001:

“Although the OECD has accomplished many great things over the years, I share many of the serious concerns that have been expressed recently about the direction of the OECD initiative. I am troubled by the underlying premise that low tax rates are somehow suspect and by the notion that any country, or group of countries, should interfere in any other country's decision about how to structure its own tax system. I also am concerned about the potentially unfair treatment of some

non-OECD countries. The United States does not support efforts to dictate to any country what its own tax rates or tax systems should be and will not participate in any initiative to harmonise world tax systems. The United States simply has no interest in stifling the competition that forces governments – like businesses – to create efficiencies”.