UNIVERSITY OF ESSEX *DISSERTATION*

SCHOOL OF LAW

LLM/MA IN: International Commercial and Business Law
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DISSERTATION TITLE *----------The Dark Twin of Money Laundering: Corporate Financial Crime----------* *----------* *----------* *----------*

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2018-2019

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DISSERTATION

The Dark Twin of Money Laundering: Corporate Financial Crime

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Registration Number (optional):

Number of Words: 15,332

Date Submitted: 11 September 2019

Abstract

This article analyses whether there is a constraint in convicting corporations under the money laundering offence. It is almost overlooked by many that corporations too can be found guilty of money laundering offences. The focus will be on corporations who have committed money laundering and a brief mention on financial crimes such as tax evasion and bribery. Unlike the 'associated crime groups' and 'criminal enterprises', corporate financial crimes comprise of apparent legitimate businesses that operates within legal and global markets. In a situation as such, corporations will play the third party to a money laundering operation, offering opportunities for managing illicit finances for individuals who are incapable of doing it by themselves. Hence, the corporations are usually the primary offenders, agents and administrators in facilitating illicit finances. Looking at the features between corporate and organised crime, their techniques and structures when committing a crime are similar. But the distinction is found in the institutional responses. This article looks at how the two primary issues in money laundering criminality; (1) dual criminality limitation and (2) eradication of predicate offence argument handle a fictional case involving corporate financial crime. Whether the existing prerequisites of money laundering offence can produce successful prosecution under circumstances that are contemporary in the crime circles. The analysis enables one to understand the contemporary advancement in the methodologies used to launder proceedings as compared to an ideal scenario of a money laundering operation involving 'organised crime groups.' It also shows how corporations are able to misuse a legitimate business structures, arrangements and practices in their criminal enterprise.

Introduction

Money laundering offences has often been associated with other serious crimes such as illicit drugs, prostitution, gambling and counterfeiting,[1] corporate financial crimes (corporate tax fraud (tax evasion), corporate bribery) are most of the time, overlooked or misunderstood by many as a crime

[1] Robert J. Souster, Financial Crime and Money Laundering (2nd edn, Global Professional Publishing, 2013)

that bears no relevance to the laundering offence.[2] It is also unknown to many that it is possible for a company or corporation can convicted under money laundering offences. However, there are additional conditions that needs to be taken into consideration when convicting corporations under the laundering offence.

From a business perspective, corporate financial crimes generate more financial advantages compared to dealings revolving other serious crimes.[3]The most popular justification, used by corporate offenders, is found to be closely link to a nation's poor economic situation and governmental policy which consequently results to high level of corruption.[4] It is an inevitable act and procedure that local and foreign companies must commit in order to survive unfavourable economic, social and bureaucratic conditions in the commercial circle.[5] Committing these crimes, in a way has aid in the profitability and success of the corporation and refusals to do so may cost them great financial losses and business opportunities. The more significant effect it may lead to lesser development and investment in some countries.

On the other hand, corporate financial crime has an encircling detrimental effect that harms the economic system as well as the system of governance.[6] It is usually a corporate crime has been committed, the offender's proceeds to launder the money with the intention wiping the money 'clean'. That way, it leaves no trace of the money trail and they are able to utilise fully the money or property they have laundered from the corporate fraud, tax evasion and etc. Whilst the corporation benefits, the harmful effect resonates with every spectrum of an economy. It undermines the legitimacy of the private

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[2] Nicholas Lord, Karin van Wingerde and Liz Campbell, 'Organising the Monies of Corporate Financial Crimes via Organisational Structures: Ostensible Legitimacy, Effective Anonymity and Third-Party Facilitation' [2018] 17(8) Administrative Science

[3] Karen Harrison, Nicholas Ryder, The Law Relating to Financial Crime in the United Kingdom (Routledge, 2016)

[4] P Gottschalk, H Solli-Sather, 'Financial crime in business organisations: an empirical study' [2011] 18(1) Journal of Financial Crime 76

[5] Karen Harrison, Nicholas Ryder, The Law Relating to Financial Crime in the United Kingdom (Routledge, 2016)

[6] Robert J. Souster, Financial Crime and Money Laundering (2nd edn, Global Professional Publishing Limited 2013)

sector,[7] undermines the integrity of financial markets,[8]loss of control of economic policy,[9] economic distortion and instability,[10] loss of revenue[11] and risks to privatization efforts[12] and reputational risk.[13] This in turn, would diminish development and economic growth, where legitimate global opportunities are constricted by international corporations with undesirable reputations and short term goals. The confidence of the general public in the financial markets as well as the commercial sector will be lost. Once a nations' reputation is damaged, it will be challenging to rebuild the confidence of the public. In short, corporate financial crimes and money laundering undermines the connection between public and the system of governance.[14] Hence, regardless of the justifications proposed, it has overall detrimental effects on the society as well as the nation. Therefore, corporate crimes should not be taken lightly.

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[7] The laundering process often uses front companies to co-mingle proceeds of illicit activity with legitimate funds with the purpose to conceal the ill-gotten gains. Some instances enables front companies to supply products below the market value. Thus, the competitive edge over legitimate firms may undermine legitimate business to compete against front companies.

[8] The reliance on the proceeds of crime by financial institutions places them in unstable positions. Large sums of laundered money at financial institution may disappear suddenly without any notice given through wire transfers. This causes the institution into liquidity problems and runs on banks.

[9] In a country where there is an attendant loss of policy control and frequent money laundering schemes that thrive to be unpredictable, it would undeniably make economic policy difficult to achieve. Money laundering can heighten monetary instability due to misallocation of resources. This is mostly due its operation having artificial distortions in asset and commodity prices. It would also lead to inexplicable changes in money demand and increased volatility of international capital flows, interest and exchange rates.

[10] Money laundering and financial crime deviate fund from sound investments to low quality investments in hopes of concealing their proceeds, thus does not benefit the economic system of the country where the funds are located.

[11] Schemes such tax fraud or tax bribery will diminish government tax revenue and consequently harms honest taxpayers. This loss of revenue will cause higher tax rates than what would have been if the untaxed proceeds of crime were legitimate.

[12] It may also hinder privatization initiatives by the government and a nation's financial institution and reputation will be tarnished with frequent money laundering and corporate crimes appears.

[13] John McDowell, Gary Noris, 'The Consequences of Money Laundering and Financial Crime' [2001] 6(2) Electronic Journal of the US Department of State

[14] Philip M Nichols, 'The Good Bribe' [2015] 49UCDL Rev. 682

This article seeks to access how well the criminality of money laundering can counter those who commit crimes related to corporate finance.

It is now firmly established in most jurisdictions that criminalising proceeds of crimes has a preliminary requirement which is to find a predicate offence.[15] In reference to the traditional phrase of describing money laundering offence had a 'dark twin',[16] the 'dark twin' is the predicate offence that generated the funds to be laundered.[17] For instance, theft or robbery is an criminal offence on its own and the resulting effect of the offence is of stolen cash and property. The stolen cash and property constitute to the proceeds of crime. If the offender to conceal the true source of the stolen cash and property, the laundering process will be utilised to legitimise the stolen cash and property. There have been discussions on whether if the 'dark twin' needs to be proven since there are occurrence where the predicate offence may overlap with the process of money laundering.[18] Particularly, in corporate finance crime, the scheme consists of laundering proceeds that may derived from a legitimate source. In other words, law enforcement authorities may find it difficult to find the proceeds are from a 'criminal conduct'. [19]

Another issue that prosecution may find in a money laundering prosecution is in regard to extradition. Laundering scheme as well as the corporate crime which operates on a global scale for better concealment and effective concealing of the proceeds and what about.[20] It enables them to pick a nation with the weak system of governance as well as weak anti-money laundering policies to facilitate

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[15] Guy Stessens, Money Laundering: A New International Law Enforcement Model (CUP, 2000)

[16] Ian Ross, Exposing Fraud: Skills, Process and Practicalities (John Wiley & Sons, 2015) 19

[17] Note that the laundering process is separate from the action of committing that offence that produce the proceeds of crime.

[18] Sideek Mohamed, 'Legal Instrument to Combat Money laundering in the EU Financial Market' [2002] 6(1) JMLC 66

[19] Dennis Cox, Handbook of Anti-Money Laundering (John Wiley & Sons, 2014)

[20] Heba Shams, Legal Globalization: Money Laundering Law and Other Cases (British Institute of International and Comparative Law 2004)

their proceeds.[21] Therefore, international corporation is highly sought for in international crimes. The principle of dual criminality has been adopted in terms of giving law enforcement authorities extraterritorial effect on the prosecutions of money laundering.[22] There are however limitations in the principle which may sabotage the likelihood of success in a money laundering prosecution. Hence, this article will also assess the existing principles surrounding extradition in money laundering to counter crimes that are not relevant organised crime group.

This article will be split into 4 sections. Firstly, a brief background information surrounding the concept of corporate finance crime and legal concept of money laundering itself. Secondly, the discussions will proceed to the issue with predicate offence and at the same time discussing how it will affect corporate finance crime. Thirdly, the discussion on extradition and the legal issue dealt on dual criminality extradition in money laundering will be discussed. Finally, finished with a conclusion of what has been discussed in the afore sections.

A. Brief Background

Statistical findings on corporate financial crime committed

Looking at the Global Economic Crime and Fraud Survey 2018, it was recorded that out of 7500 respondents that participated the survey, 49% of the respondents of global organisations experience economic crime in the past two years.[23] 64% of respondents reported that financial losses was due directly from most disruptive fraud could rise to US$1million.[24] This means 4800 respondent experience

[21] Bala Shanmugam, Mahendhiran Nair, and R. Sugathi, 'Money Laundering in Malaysia' [2003] 6(4) JMLC 373

[22] Dennis Cox, Handbook of Anti-Money Laundering (John Wiley & Sons, 2014)

[23] PWC, 'Pulling fraud out of the shadows; Global Economic Crime and Fraud Survey 2018' [2018] <https://www.pwc.com/gx/en/services/advisory/forensics/economic-crime-survey.html> accessed 25 July 2019

[24] PWC, 'Pulling fraud out of the shadows; Global Economic Crime and Fraud Survey 2018' [2018]

loss from disruptive fraud which in turn totalled to US$4.8 billion losses on the global economy. Not to mentioned that 7500 respondents of global organisations is a fraction of the existing companies in the world. Table 1 indicates the type of corporate crimes suffered by companies in UK and Malaysia over the past 2 years (2017- 2018).

Table 1. The Crime Types suffered by companies

	UK	Malaysia
Cybercrime	42%	48%
Bribery & corruption	6%	35%
Money laundering	7%	-
Business misconduct	21%	45%
Asset misappropriation	49%	41%

Source: PwC Global Economic Crime Survey 2018: Malaysia and UK Findings [25]

Between the two countries, it is apparent that Malaysia companies experienced higher rate by in all categories of corporate crime compared to UK companies by 8.8%.[26] It was also reported that

<https://www.pwc.com/gx/en/services/advisory/forensics/economic-crime-survey.html> accessed 25 July 2019

[25] PWC, 'Global Economic Crime and Fraud Survey 2018: Malaysia Report' [2018]

< https://www.pwc.com/my/en/publications/2018-gecfs-malaysia.html> accessed 25 July 2019

[26] This figure was calculated by the difference between the average corporate crime rate between UK and Malaysia

Malaysia suffered an all-time high in fraud rates, with 41% Malaysian companies indicating that economic crime was experienced in the last two years.[27]

In comparison to UK sector, the survey indicates a fall in the overall level of UK businesses experiencing fraud from 55% in 2016 to 50% in 2018.[28] Of course, from the figures given, the most popular method being asset misappropriation (or asset theft)[29] with 49% and this figure is relatively higher than what was reported by Malaysia. Regardless, this is seen as one of the popular crimes adopted by offenders in both UK and Malaysia. The other popular crime being cybercrime and followed by business misconduct.

It is interesting to see that in terms of money laundering; Malaysia did not provide any figures as compared to UK which comes under 7%. Nonetheless, the bribery and corruption rates of Malaysia is at 35%, higher than UK by 29%. It cannot be guarantee that money laundering is not committed by corporations in Malaysia and it would be illogical to do so. Regardless there are still money laundering cases reported by[30] Bank Negara Malaysia (BNM)[31] and currently an ongoing kleptocracy case, the 1MDB scandal. Under this 1MDB scandal, in 2015, former prime minister of Malaysia, Najib Razak was accused of transferring over RM2.6 billion (nearly USD 700 million) from a government-run strategic

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[27] PWC, 'Global Economic Crime and Fraud Survey 2018: Malaysia Report' [2018]

< https://www.pwc.com/my/en/publications/2018-gecfs-malaysia.html> accessed 25 July 2019

[28] PWC, 'Global Economic Crime and Fraud Survey 2018: UK Findings' [2018]

<https://www.pwc.co.uk/services/forensic-services/insights/global-economic-crime-survey-2018---uk-findings.html> accessed 25 July 2019

[29] Asset misappropriation defined as theft of assets. This includes embezzlement and deception by employees, or the theft of company property or assets by outsiders

[30] 50% of the cases found under BNM are charged under the Anti-Money Laundering and Terrorism Financing Act 2001 (AMLATFA)

[31] Normah Omar, Roshima Said, Zulaikha 'Amirah Johari 'Corporate crimes in Malaysia: a profile analysis' (Journal of Financial Crime, 3 May 2016)

development company, 1Malaysia Development Berhad, into his own personal bank accounts. He is consecutively charged under 42 counts; 5 counts on corruption, 28 counts consist of money laundering offence and 9 counts on criminal breach of trusts.[32]

With the current ongoing scandal taking place, it is factual to state that a lack of moral authority at the top of local government system will disrupt a legitimate public and private sector. Public offices are diligently utilised to further private business deals and private gains at the expense of the public good. Consequently, it is no surprise to witness political meddling in high corruption cases and this is reflected well in the corruption and bribery rates indicated in Table 1. As there are no effective policies to counter briberies, it would mean that the vicious cycle of money laundering in a country will be limitless.

Arguably, money launderers are able to prosper in developing countries because of the attractiveness of bribes are difficult for those that are poorly paid or 'intimidated' government officials employed to administer the implementation of anti-money laundering framework to resist.[33] Hence, they are equipped with boundless access routes to integrate illicit proceeds into the system.[34] All the loopholes have been explored and devised into the offender's strategies before integrating illicit funds into the legitimate financial system. Hence, it is in corrupt environment where offenders are able to manipulate the system easier and corruption rate are at its highest in most developing countries.

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[32] The Straits Times, 'A long list of charges against Najib as 1MDB trial kicks off on Tuesday' (The Straits Times, 11 February 2019) < https://www.straitstimes.com/asia/se-asia/a-long-list-of-charges-against-najib-as-1mdb-trial-kicks-off-on-tuesday> accessed 24 July 2019

[33] Norman Mugarura, The Global Anti-Money Laundering Regulatory Landscape in Less Developed Countries (Ashgate, 2012) 150

[34] Norman Mugarura, The Global Anti-Money Laundering Regulatory Landscape in Less Developed Countries (Ashgate, 2012) 150

What is corporate financial crime?

Financial crime is conversely to the term “white-collar crime” which is defined as ‘a crime committed by a person of respectability and high social status in the course of his occupation’.[35] The origin of the term “white-collar crime” was introduced by Professor Edwin Sutherland in his 1939 presidential lecture to the American Sociological Society.[36] And within the confinements of his findings, he concluded that financial crime is committed mostly by “merchant princes and captains of finance and industry’ while working for a wide range of corporations including those involved in ‘railways, insurance, munitions, banking, public utilities, stock, exchanges, the oil industry and real estate’.[37]

The discussions on the definition regardless has always been concentrated on crimes committed by individuals who are either a representative or agent, or an employee of a corporation and very few have considered corporate financial crime can be committed by corporations.[38] Oddly enough, this comes to no surprise because there was a common belief that only individuals are able to commit crimes.[39] Nonetheless, under common law, it is provided that corporations are able to commit a crime.[40]

[35] E. Sutherland, White Collar Crime (Dryden: New York, NY, 1949) 9

[36] E. Sutherland, White Collar Crime (Dryden: New York, NY, 1949) 9

[37] E. Sutherland, White Collar Crime (Dryden: New York, NY, 1949) 9

[38] Roland Hefendehi, ‘Addressing White Collar Crime on a Domestic Level’ [201] 8(3) J Intl Criminal Justice 769

[39] Roland Hefendehi, ‘Addressing White Collar Crime on a Domestic Level’ [201] 8(3) J Intl Criminal Justice 769

[40] Nicholas Ryder, “Too scared to prosecute and too scared to jail?” A critical and comparative analysis of enforcement of financial crime legislation against corporations in the USA and the UK” [2018] 82(3) J. Crim.L. 245

A corporation is defined as 'an incorporate body with separate legal entity which is distinguishable from the creators of the company'.[41] By having a legal entity that is separate from the individuals who create and manage them, they can be considered as 'legal persons' in their own right through the means of incorporation.[42] This also includes both public and private limited companies. Hence, certain offences can be committed by a corporation. This offences can be money laundering offences, tax evasion, bribery and corruption and fraud. And those crimes are mostly committed by large international business. In the UK, corporations are found to be liable under the Corporate Manslaughter and Corporate Homicide Act 2007, the creation of the failure to prevent bribery offences under the Bribery Act 2010[43]

Prior to the enactment of Bribery Act 2010, the English system has taken a significant departure from the long standing common law rule on corporate liability principle for offences requiring one to prove the mental element, the identification principle.[44] This departure consequently would move us one step closer to the 'respondent superior approach' that is originated from the federal courts in the US Commercial organisations.[45] In effect, the application is similar to a strict liability under the Bribery Act 2010 and Criminal Justice Act 2017.[46]

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[41] Osborn's Concise Law Dictionary 12 Ed.

[42] Salomon v Salomon & Co Ltd [1897] A.C. 22

[43] Nicholas Ryder, "Too scared to prosecute and too scared to jail?" A critical and comparative analysis of enforcement of financial crime legislation against corporations in the USA and the UK" [2018] 82(3) J. Crim.L. 245

[44] David Corker, Corker Binning, 'Why reform of corporate criminal liability is necessary and the best means of achieving it' (Lexology, 16 March 2017) < https://www.lexology.com/library/detail.aspx?g=ce953138-f7d1-4ed8-9b52-b150377ce223> accessed 26 August 2019

[45] Celia Wells, 'Corporate failure to prevent economic crime- a proposal' [2017] 6 Crim L.R. 426

[46] Celia Wells, 'Corporate failure to prevent economic crime- a proposal' [2017] 6 Crim L.R. 426

Bribery

Section 7 of the Bribery Act 2010 imposes a strict liability on corporate that fails to prevent an act of bribery.[47]The corporate will be exempted from rule if it can demonstrate that it has adequate procedures to prevent the offences from occurring. So far, this has been successful in changing the company behaviour, with evidences stating that compliance is taken seriously. This model was subsequently transferred to other areas of corporate financial crime; such as the new corporate tax offences relating to the failure to prevent UK and foreign tax evasion.[48] Furthermore, it also inspired the Ministry of Justice to issue a consultation paper "Call for Evidence on Corporate Liability for Economic Crime", with particular reference to create further impositions on corporate's "failure to prevent" fraud, false accounting and money laundering offences.[49]

Tax evasion

Just recently in the year 2017, The Criminal Finances Act 2017 was enacted and was aimed at expanding existing provisions in the Proceeds of Crime Act 2002.[50] Amongst the amendments made, one of which has to deal with imposing criminal liability on UK and non-UK company that failed to prevent the facilitation of tax evasion by an 'associated person'.[51] This includes UK and foreign tax

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[47] Bribery Act 2010, s7

[48] S.F. Copp and A. Cronin, 'New models of corporate criminality: the development and relative effectiveness of "failure to prevent" offences' [2018] 39(4)Comp. Law. 104

[49] S.F. Copp and A. Cronin, 'New models of corporate criminality: the development and relative effectiveness of "failure to prevent" offences' [2018] 39(4)Comp. Law. 104

[50] S.F. Copp and A. Cronin, 'New models of corporate criminality: the development and relative effectiveness of "failure to prevent" offences' [2018] 39(4)Comp. Law. 104

[51] Ashurst, 'Corporate criminal offences for failure to prevent facilitation of tax evasion' (ashust, 7 July 2017)

<https://www.ashurst.com/en/news-and-insights/legal-updates/corporate-criminal-offences-for-failure-to-prevent-facilitation-of-tax-evasion/> accessed 27 August 2019

evasion. An 'associated person' is broadly defined to include 'any person (or entity) that provides a service for the business or on its behalf'.[52] Hence, foreign tax adviser, offshore accountancy firm, broker, trustee or company director constitutes to an 'associated person'. Here are some instances which would fall under the new offence; a) a non-UK company will be liable under the offence if the overseas employee from its London branch commits a foreign tax evasion facilitation for an overseas client,[53] b) a foreign tax advisor will be considered as an 'associated person' if the UK firm supervise the ongoing relationship between the client and the advice sought, in which the UK firm delivers the advice to the client and in return pay the adviser's fees.[54] And c) where a UK manufacturing company create a false accounting scheme with the help of the customer and consequently enabling the customer to evade UK taxes.[55] This in effect will lead the manufacturing company liable.

Money laundering

To put this in simple terms, money laundering refers to 'financial transaction scheme which aims to conceal the identity, source, and destination of illicitly-obtained money'.[56] The empirical study of the money laundering phenomenon first started between the 1970s and 1980s where 'some suspected criminals, especially wholesome drug dealers, were becoming rich and flaunting the trappings of wealth without being subject to the criminal law'.[57] It found that there was inefficacy to bring prosecutions due to the insufficient evidence. Even if the prosecutions were successful, suspicion

[52] Criminal Finances Act 2017, s44(4)

[53] Allen & Overy, 'New corporate criminal tax evasion offence' [2016] 27(5) PLC Mag. 65

[54] Allen & Overy, 'New corporate criminal tax evasion offence' [2016] 27(5) PLC Mag. 65

[55] Allen & Overy, 'New corporate criminal tax evasion offence' [2016] 27(5) PLC Mag. 65

[56] Brigitte Unger, Daan van der Linde, Research Handbook on Money Laundering (Edward Elgar Publishing, 2013)

[57] Peter Aldridge, 'Money Laundering and Globalization' [2008] 35 J.L. & SOCY437, 440

remained that the profits had been hidden so that the prisoners could enjoy their profits after being released.[58]

Stages of money laundering

The simplest way of understanding the process involved is placing the scheme into three stages; placement, layering and integration. Placement stage is where the illicit funds will be introduced into the financial system for the first time. One method used in this stage is 'smurfing'.[59] This involves a small group of individuals who will deposit cash sums that are below the reporting threshold.

The second stage involves layering where the purpose of this stage is to complicate the money trail and make it harder to uncover the laundering activity.[60] Layering stage is initiated by having numerous transactions to disguise the origin of the illicit funds.[61] For example, over-invoicing, false paper trail and the cash purchase of tangible assets and later converted to counter the transaction cost and cash conversion to other money instrument such as traveller's cheques or letters of credit. [62]

Lastly, the final stage is integration stage. The illicit funds are this stage are safely placed and layered to the extent that the launderer can access the funds through a legitimate financial system.[63] For instance, this stage is conducted by real estate transaction where property is bought by shell

[58] Peter Aldridge, 'Money Laundering and Globalization' [2008] 35 J.L. & SOCY437, 440

[59] John Madinger, Money Laundering: A Guide For Criminal Investigations (3rd edn, CRC Press 2011)

[60] John Madinger, Money Laundering: A Guide For Criminal Investigations (3rd edn, CRC Press 2011)

[61] John Madinger, Money Laundering: A Guide For Criminal Investigations (3rd edn, CRC Press 2011)

[62] Mary Michelle Gallant, Money Laundering and the Proceeds of Crime; Economic Crime and Civil Remedies (Edward Elgar Publishing, 2005)

[63] John Madinger, Money Laundering: A Guide For Criminal Investigations (3rd edn, CRC Press 2011)

corporations using illicit proceeds.[64] Property will be sold and proceeds appeal as legitimate sales proceeds. Another sample would be using front companies and sham loans.[65] The launderer can pay his or her foreign laundering subsidiary interests on the loan and deduct it as a business expense, thereby reducing his or her tax liability.[66] Another example and frequently found in case studies is the use of foreign bank complicity.[67]

This 3-stage process is what many considered to be the traditional approach to the process of money laundering because it primarily concerns on the activities involved. Nowadays, it is rather much more complicated, and it would provide misguidance to depend wholly on a cumulation of elements set in the process. It is even possible for money to be laundered without the need to apply the 3-stage process.

Legal Definition of Money Laundering

There are many legal definitions offered by different jurisdictions. With each having slight variations to their understanding and concept of money laundering, the FATF seeks to define 'money laundering' in the aims of setting a standard for soft unification and centralisation in the enforcement and regulatory framework. The term was described as 'the processing of these criminal proceeds to disguise their illegal origin'.[68]

[64] Mary Michelle Gallant, Money Laundering and the Proceeds of Crime; Economic Crime and Civil Remedies (Edward Elgar Publishing, 2005)

[65] Ernesto Savona, Responding to Money Laundering (Routledge, 2005)

[66] Ernesto Savona, Responding to Money Laundering (Routledge, 2005)

[67] Mark Kehoe, 'The Threat of Money Laundering' <https://www.tcd.ie/Economics/assets/pdf/SER/1996/Mark_Kehoe.html> accessed 22 August 2019

[68] Financial Action Task Force, < https://www.fatf-gafi.org/faq/moneylaundering/>

In the UK, money laundering is defined as 'the process by which the proceeds of crime are converted into assets which appear to have a legitimate origin, so that they can be retained permanently or recycled into further criminal enterprises.'[69] The offence of money laundering, which is found Proceeds of Crime Act 2002, includes to:

(a) Conceal, disguise, convert, transfer or remove criminal property from the UK,[70]
(b) Become concerned in an arrangement which a person knows, or suspects facilitates the use of control of criminal property,[71]
(c) Acquire, use of have possession of criminal property[72]

Pre-requisites of money laundering offence

In all the three offences described above, there are pre-requisites that needs to be considered.

"Criminal conduct" means any conduct which constitutes as an offence in UK. It also covers conduct that is committed abroad which would also constitute to an offence had it been occurred in the UK.[73] Further discussions on criminal conduct will be found in Part D of this article.

"Criminal Property" as defined in s340 of the Proceeds of Crime Act constitutes to a person's benefit from a criminal conduct.[74]The UK regulatory framework merely defines criminal conduct as 'all conduct

[69] The Explanatory Notes to the Proceeds of Crime Act 2002 (POCA2002)

[70] Proceeds of Crime Act 2002, s327

[71] Proceeds of Crime Act 2002, s328

[72] Proceeds of Crime Act 2002, s329

[73] Peter Reuter, Chasing Dirty Money: The Fight Against Money Laundering (Peter Reuter, 2005)

[74] Legal Guidance, Proceeds of Crime Act 2002 Part 7-Money Laundering Offences

which constitutes an offence in any part of the United Kingdom'. This means an "all crimes" is adopted in respect of predicate crimes committed in the UK.[75] Some countries preferred the approach of listing predicate crimes similar to Malaysia.[76]

B. Predicate offence of Money Laundering regime

Money Laundering convictions has never been smooth sailing due to the empirical complications involved. Money laundering cases tend to be extensive, resource hungry and are prone to risk of failure at point of conviction in the courts as shown in the past.

The main obstruction lies in establishing the validity of whether the property in question is criminal in origin and whether the offender knows or suspects that the money is criminal in origin. To prove the former, it is observed that many jurisdictions would set a pre-requisite in establishing a defined crime

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<https://www.cps.gov.uk/legal-guidance/proceeds-crime-act-2002-part-7-money-laundering-offences> accessed 25 July 2019

[75] Legal Guidance, Proceeds of Crime Act 2002 Part 7-Money Laundering Offences

<https://www.cps.gov.uk/legal-guidance/proceeds-crime-act-2002-part-7-money-laundering-offences> accessed 25 July 2019

[76] Similar to UK, overarching emphasis in Malaysian anti-money laundering regulatory framework is the money, asset concerned or deemed to be proceeds of money laundering must first of all be a proceeds of an unlawful activity. Proceeds of unlawful activity means property from any activity that constitutes to any serious offence or any foreign serious offence, or any activity which bears the nature or causes the results to be a commission of any serious offence or any foreign serious offence. 'Serious offence' comprises of a non-exhaustive list almost 290 offences, as described in the Second Schedule of AMLATFA 2002, that falls under more than 40 statutes that ranges from Penal Code, Dangerous Drugs Act, Kidnapping Act, Anti-Trafficking in Persons and Anti-Smuggling or Migrants Act, Companies Act, Insurance Act, Securities Industry Act and Banking and Financial Institutions Act. The range of offences covered as serious offence under AMLATFA even covers the proceeds from copyright infringement; failure to submit income tax returns; operating an unregistered timber business; carrying on a money changing; money lending or pawnbroking business without license; and giving false trade descriptions. Both UK and Malaysia have similar anti-money laundering regulatory framework, with definitions defined in the widest of terms possible to broaden the chances for a successful conviction.

or type of crime (predicate offence) prior to proving the latter (which involved the mens rea of the offence). By having this condition, it assumes all proceeds that are laundered derives from another crime such as drug trafficking, gambling, or theft. Hence, the criminality would be proven by reference to circumstantial evidence such as audit trail,[77] lack of legitimate income to account for amounts transferred and the obvious indication to the predicate offence such as drug-contaminated notes.[78] This of course does not necessarily reflect the sophistication and complication behind a money laundering operation. This approach may be too simplistic and rigid for prosecutors to follow up.[79] In most major organised crime groups, who are resource abundant and capable of wherewithal to distance themselves from criminal activity that has generated their wealth, they would not utilise the normal approach of starting with predicate offence and only later the money laundering process.[80] Most often, they would begin with the actual laundering process itself, in which the way money is handled.[81] The entry point of the investigation in such instance, would occurred sometime after the predicate offence, usually in an outside region away from where the predicate offence was originally committed[82] and, in a manner, where it is almost impossible to establish a direct linkage between the proceed and the predicate offence.[83] Without properly considering this aspect, it would cause a low series of investigatory activity, by virtue of the persistent discouragement from the failure to prove cases that are

[77] Alan Wright, Organised Crime (Routledge, 2013)

[78] Howard Silverstone, Micheal Sheetz, Forensic Accounting and Fraud Investigation for Non- Experts (John Wiley & Sons, 2011)

[79] Brigitte Unger, Daan van der Linde, Research Handbook on Money Laundering (Edward Elgar Publishing, 2013)

[80] Howard Silverstone, Micheal Sheetz, Forensic Accounting and Fraud Investigation for Non- Experts (John Wiley & Sons, 2011)

[81] Kenneth Murray, 'The uses of irresistible inference; Protecting the system from criminal penetration through more effective prosecution of money laundering offences' [2011] 14(1) Journal of Money Laundering Control, 8

[82] Kenneth Murray, 'In the shadow of the dark twin- Proving criminality in money laundering case' [2016] 19(4) JMLC 447

[83] Kenneth Murray, 'The uses of irresistible inference; Protecting the system from criminal penetration through more effective prosecution of money laundering offences' [2011] 14(1) Journal of Money Laundering Control, 8

known to be untried and difficult.[84] How would one proceed with the convictions then? There is little unanimity towards what the circumstantial evidence are in this case.

B1 Development of the case law.

The first encounter with the issue was mentioned in the case of El Kurd[85]. The courts were confronted with this problem when it was impossible to identify a particular crime or class of crime which generated the proceeds in question. In the judgement given by Latham LJ, "it expressed [the court's] concern that Parliament has created this dichotomy with the attendant difficulties which this case exemplifies." The only solution as the courts found fit was to charge one compendious count of conspiracy.[86] 'Conspiracy' will be further discussed later on under the mental element.

At that time when the case was decided, there was two different statutory regimes which deals with different proceeds. The Criminal Justice (International Co-operation) Act 1990 repealed and re-enacted in the Drug Trafficking Act dealt with the proceeds of drug trafficking.[87] The other, Criminal Justice Act 1993, dealt with proceeds relating to all other crimes.[88] In consideration with the Courts' criticism, the Parliament addressed the issue with merging all proceeds into one statutory regime and consequently the Proceeds of Crime Act 2002 was established.[89] The enactment was supported with much hope for

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[84] Kenneth Murray, 'In the shadow of the dark twin- Proving criminality in money laundering case' [2016] 19(4) JMLC 447

[85] R v El Kurd [2001] Crim.L.R.234 CA (Crim Div)

[86]R vEl Kurd [2001] Crim. L. R. 234 CA (Crim Div) at [30] later approved in the case Hussain [2002] EWCA Crim 6

[87] Kenneth Murray, 'Dismantling organised crime groups through enforcement of the POCA money laundering offences' [2010] 13(1) J.M.L.C. 7

[88] Kenneth Murray, 'Dismantling organised crime groups through enforcement of the POCA money laundering offences' [2010] 13(1) J.M.L.C. 7

[89] David Bentley and Richard Fisher, 'Criminal Property under POCA 2002-time to clean up the law?' [2009] 2 Archbold Review 7

the future prosecutions. In the case of Singh (Rana),[90] Auld LJ, the leading judge of the case bespoke the provisional interpretation in Part 7 of the Proceeds of Crime Act 2002 as follows:

"The new offence is one of dealing with various forms in 'criminal property' namely property constituting a benefit from or representing such a benefit, from 'criminal conduct', defined in the broadest terms in section 340 as "conduct which constitutes an offence in any part of the United Kingdom".[91]

In short, regardless of whether the property is derived from the offender's own crime or from crimes committed by other, the property is deemed criminal as long as the offender holds a condescending interest over it.[92] So, proceeds from the laundering activities perform by someone else, such as professional launderers on behalf of the authors of the underlying offences is just as much liable as the principal offender of the money laundering offence.

He further suggests that there will no longer be a scope for such an issue of dichotomy of offence in the realm of a money laundering offence since it has been removed by the creation of Part 7 of the Proceeds of Crime Act 2002.[93] The emergence of a new statutory offence of money laundering has in effect repealed the substantive offences under the 1994 and the 1998 Act.[94]

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[90] R v Gulbir Rana Singh [2003] EWCA Crim 3712

[91] R v Gulbir Rana Singh [2003] EWCA Crim 3712

[92] David Bentley and Richard Fisher, 'Criminal Property under POCA 2002-time to clean up the law?' [2009] 2 Archbold Review 7

[93] Vivian Walters, 'Prosecuting money launderer: does the prosecution have to prove the predicate offence?' [2009] Crim. L. R. 8, 571-575

[94] Kenneth Murray, 'Dismantling organised crime groups through enforcement of the POCA money laundering offences' [2010] 13(1) J.M.L.C. 7

Fast forward to 3 years, the House of Lord in the case of Montilla[95] considered the argument proposed by Auld LJ. The judgement held that in both substantive offences under the s932C (2) of the Criminal Justice Act 1988 and s49(2) of the Drug Trafficking Act 1994, the prosecution must prove the property in question was in fact proceeds of criminal conduct and drug trafficking respectively.[96] The ratio decidendi however, was somewhat misleading. The courts did not suggest that the prosecution must prove that the cash that was exchanged by the defendants into Dutch guilders came from any particular offence or offences, or even a type of offence. Based on the facts, the cash proceeds are derived from criminal conduct and not drug trafficking. Therefore, s93C(2) Criminal Justice Act 1988 applies. As such, there is no mandatory requirement to prove a property in question is derived from any particular offence or type of offence.[97]

Rather than clarifying the issue, it has deepened the issue. This would inherently indicate that prosecution no longer has to deal with just the difficulty in proving a predicate offence, but they also have to consider whether it is required to prove the criminal property derived from a particular type of offence, predicate offence. The following cases, Craig[98] and R v NW[99] was decided by the same group of judges in the Court of Appeal. Nonetheless, the ratio given was inconsistent. Both offenders were convicted with the offence of money laundering under Part 7 of the Proceeds of Crime Act 2002 (s327 and s328). [100] Nonetheless, each case was decided differently.

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[95] R v Montilla (Steven William) [2004] UKHL 50

[96] Vivian Walters, 'Prosecuting money launderer: does the prosecution have to prove the predicate offence?' [2009] Crim. L. R. 8, 571-575

[97] Vivian Walters, 'Prosecuting money launderer: does the prosecution have to prove the predicate offence?' [2009] Crim. L. R. 8, 571-575

[98] R v Craig [2007] EWCA Crim 2913

[99] R v NW [2008] EWCA Crim 2

[100] Vivian Walters, 'Prosecuting money launderer: does the prosecution have to prove the predicate offence?' [2009] Crim. L. R. 8, 571-575

In the case of Craig,[101] it was concluded by the jury that there was an overwhelming inference that Mr Craig's funds were derived from criminal activity. There was no effort made to identify criminal conduct in question due to high level of drug contamination on some of the cash found. Hence, it can be indicated that the proceeds come from drug dealing. [102]

The Crown presented a view in which the statutory definition of criminal property did not specify as to means used to turn the property into 'criminal property'.[103] All that it was merely indicating the broad spectrum of criminal conduct can be considered.[104] There was no specific identification or indication of a crime has generated criminal property.[105]

Although the appeal was allowed on other grounds, it is worth to note that the upon considering the Crown's argument, the Court of Appeal considered a decision by Butterfield J. in regard to the definition of criminal conduct in s34 of POCA. He stated that 'there was nothing in the wording which imports any requirement that the prosecution prove that the property emanated from a particular crime or a specific type of criminal conduct.'[106]

This helpful development in the case law was not sustained in the further case and was replaced by the R v NW.[107] In the case of R v NW,[108] there was an issue in regard of the admissibility of evidence. The evidence in which the Crown has relied on to demonstrate the situs of money was excluded by the judge. Th Crown proceeded and invited the jury to infer from the circumstances that the proceeds was

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[101] R v Craig [2007] EWCA Crim 2913

[102] Vivian Walters, 'Prosecuting money launderer: does the prosecution have to prove the predicate offence?' [2009] Crim. L. R. 8, 571-575

[103] R v Craig [2007] EWCA Crim 2913

[104] R v Craig [2007] EWCA Crim 2913

[105] Mitchell, Taylor and Talbot on Confiscation and the Proceeds of Crime, Case Digest R v Craig

[106] Vivian Walters, 'Prosecuting money launderer: does the prosecution have to prove the predicate offence?' [2009] Crim. L. R. 8, 571-575

[107] R v NW [2008] EWCA Crim 2

[108] R v NW [2008] EWCA Crim 2

of ‘criminal property’.[109] The Crown proceeded but was abruptly stopped by the judge. It was later concluded by the Court of Appeal that the prosecution must prove at least the class of criminal conduct that the criminal property was derived from.[110] This perfectly sums up the ability crime group has in exploiting the complexity behind the modus operandi and had effectively confused the jury in terms of understanding the operation.[111]

Comparing the two cases, the decision made in R v NW[112] had definitely the prevailing status over Craig[113] since the decision in the latter case was obiter dicta. Hence, the developments to an ‘irresistible inference’ test was retracted further.

In R v Anwoir[114], the court has made developments to clarify the law on this matter. In Anwoir,[115] the appellants had been convicted of free-standing money laundering arrangement offences contrary to s328 of the Proceeds of Crime Act 2002. The mode used to launder large sums of cash was by bureaux de change with of course help from those whom have agreed to launder the money.[116] Additionally, the source of monies derived from drug trafficking and carousel fraud, also known as VAT fraud.[117] Essentially, carousel fraud consists of commodities such as mobile phones, are actually or notionally imported into the UK and later exported in order to obtain VAT repayments without having to account for the VAT itself. The imported goods are then sold through a series of companies that will be liable to

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[109] Emmanuel Ioannides, Fundamental Principles of EU Law Against Money Laundering (Routledge, 2016)

[110] Robin Booth, Guy Bastable, Nicholas Yeo, Money Laundering Law and Regulation: A Practical Guide (OUP, 2011) 39

[111] Robin Booth, Guy Bastable, Nicholas Yeo, Money Laundering Law and Regulation: A Practical Guide (OUP, 2011) 39

[112] R v NW [2008] EWCA Crim 2

[113] R v Craig [2007] EWCA Crim 2913

[114] R v Anwoir [2008] EWCA Crim 1354

[115] R v Anwoir [2008] EWCA Crim 1354

[116] R v Anwoir [2008] EWCA Crim 1354

[117] Chapter 26- Money Laundering Offences in Archbold Criminal Pleading Evidence and Practice 2019 Ed, 26

VAT, before being exported or possibly back to the original seller.[118] The first link in the chain will normally go missing without accounting for VAT and the final link in the chain will reclaim the VAT it has paid from National Treasury prior to disappearing.[119] Hence, the point of investigatory process begins at the layering stage where there have been numerous transactions prior to disguise the true origin of the money.

Hence, it is difficult to find direct evidence from which the jury could infer that some of the proceeds may come from drug trafficking and some from VAT fraud.[120] Nonetheless, prosecution could clearly make an inference from the fact that the appellant was willing to contribute in the laundering of the proceeds of drug trafficking, as evidence from the way he had describe his dealings during tape-recorded conversations.[121] Also, another factor that can be taken in as an inference to the offence was the past criminal records the appellants had with drug offences. Even though the quantity of drugs were of small quantity, the evidence taken as a whole would justify the inference.

The NW[122] case was distinguished, with particular emphasis on the facts produced between the two cases; Anwoir[123] and NW[124]. The court stated, 'NW was a case in which the prosecution's evidence was essentially based upon the fact that NW had no visible means of support …'.[125] In support to the

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[118] Anthony Barker, 'Factbox- How carousel fraud works' [2009] < https://uk.reuters.com/article/uk-carousel-fraud-britain-factbox-sb/factbox-how-carousel-fraud-works-idUKTRE57J43U20090820> accessed 22 July 2019

[119] Anthony Barker, 'Factbox- How carousel fraud works' [2009] < https://uk.reuters.com/article/uk-carousel-fraud-britain-factbox-sb/factbox-how-carousel-fraud-works-idUKTRE57J43U20090820> accessed 22 July 2019

[120] "Money laundering: extent to which derivative category or class of crime needs to be identified" [2008] 172(29) JP, 459

[121] Kenneth Murray, 'Dismantling organised crime groups through enforcement of POCA money laundering' [2010] 13(1) J.M.L.C 7

[122] R v NW [2008] EWCA Crim 2

[123] R v Anwoir [2008] EWCA Crim 1354

[124] R v NW [2008] EWCA Crim 2

[125] R v NW [2008] EWCA Crim 2

judgement in Anwoir[126], the court in the case of Ahmed[127] states that the the facts in NW[128] did not have visible means of support as principle evidence to support the relevant funds were criminal. Therefore, the Court of Appeal stated:

'We consider that in the present case the Crown are correct in their submission that there are two ways in which the Crown can prove the property derives from crime a) by showing that it derives from conduct of a specific kind or kinds and that conduct of that kind or those kinds is unlawful, or b) by evidence of the circumstances in which the property is handled which are such as to give rise to the irresistible inference that it can only be derived from the crime.'[129]

Essentially, the court affirmed the decisions in El Kurd[130]and Craig.[131] Immediately after, judgement was followed by in the case of R v F&B[132] where prosecution did not give any indication of the type or class of predicate offence the monies in question was derived.[133]

Upon closer inspection, the encompassing rule of establishing the predicate crime to the proceeds of money laundering was not eradicated. Only where it is necessary to acquire an inference, the prosecution can infer from a circumstance that the property in question derived from a criminal conduct.[134] Even so, money laundering prosecutions can be advanced with sufficient circumstantial evidence to provide an irresistible inference that the money in question is criminal.

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[126] R v Anwoir [2008] EWCA Crim 1354

[127] R v Ahmed [2005] 1 WLR 122

[128] R v NW [2008] EWCA Crim 2

[129] R v Anwoir [2008] EWCA Crim 1354 at para [21]

[130] R v El Kurd [2007] EWCA Crim 1888

[131] R v Craig [2007] EWCA Crim 2913

[132] R v F & B [2008] EWCA Crim 1868

[133] R v F & B [2008] EWCA Crim 1868

[134] Vivian Walters, 'Prosecuting money launderers: does the prosecution have to prove the predicate offence?' [2009] 2 Crim. L.R. 7

So far, with reference to recent case of R v Otegbola,[135] one can discern from the fact that the 'irresistible inference' test has been applied skilfully and effectively. The facts represent a classic case of money laundering where there was no legitimate reason for large sums of money to be paid out of the accounts.[136] The only reasonable explanation behind this it can only be derived from crime, on the manner in which the funds had been moved between the accounts.[137] There was no evidence suggesting that the offenders registered for money service business and all gave different explanations on the relevant transactions. Hence, prosecution was able to show that the monies in question was transferred between accounts controlled by the co-accused. In effect, the appeal against conviction in a money laundering was dismissed by the court where the jury was able to infer that the money could only have been derived from crime.

B.2 Findings

A much compromising approach in the judicial interpretation has been adopted by the English courts when it comes to proving that the property is a criminal property. Traditionally, the use of 'predicate offence' was never the creation of UK legislatives but borrowed from US legislation, thus there was no part of the POCA legislation.[138] The invocation for the predicate offence requirement was from a common belief at the time that without a predicate offence there was little prospect of obtaining a money laundering conviction, and as a consequence to develop such cases did not get past first base.[139] When

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[135] R v Otegbola [2017] EWCA Crim 1147

[136] Practical Law Business Crime and Investigations, 'Appeal refused in money laundering conviction (Court of Appeal)' (Practical Law, 7 August 2017) < https://uk.practicallaw.thomsonreuters.com/w-009-6778?transitionType=Default&contextData=%28sc.Default%29> accessed 1 September 2019

[137] Practical Law Business Crime and Investigations, 'Appeal refused in money laundering conviction (Court of Appeal)' (Practical Law, 7 August 2017) < https://uk.practicallaw.thomsonreuters.com/w-009-6778?transitionType=Default&contextData=%28sc.Default%29> accessed 1 September 2019

[138] Roberto Durrieu, Rethinking Money Laundering Financing of Terrorism in International Law: Towards a New Global Legal Order(Martinus Nijhoff Publishers, 2013)

[139] Money laundering was first expressed in the 1980s, it was generated by drug offences and other offences which are bound to specific criterion of seriousness. The consequence was laundering was originally regarded as a form of complicity to other serious offence by the courts in England and Wales. The standard account of complicity at common law holds the degree of culpability of the accomplice is

money laundering was first expressed in the 1980s, it was generated by drug offences and other offences which are bound to specific criterion of seriousness.[140] The consequence was laundering was originally regarded as a form of complicity to other serious offence by the courts in England and Wales. The standard account of complicity at common law holds the degree of culpability of the accomplice is limited by the offence of principal. [141]

Regardless, the popularity of predicate offence remains as the exclusive route for legal circles, although it is at odds with what is possible by reference to the statute and the relevant case law.[142] Hence, predicate offence still has an adverse influence in the early stage and in effect the money laundering provisions of POCA are still not fully exploited.[143] This does not, however, propel advantages to law enforcement authorities. The contradiction between an idealistic approach to a practical approach towards proving criminality has in effect cause uncertainty within law enforcement as what is required in money laundering conviction.[144] The uncertainty deepens with what type of evidence is needed to make an inference of criminality irresistible. Ultimately, there is still room for development through case

limited by the offence of principal. If the harm produce in the laundering process was associated to more economic harm by the launderer, then the origin of the money is irrelevant to the launderer offence. What is required is the knowing the money is criminal property and not how it became criminal property

[140] Criminal Justice Act 1988 s71 and Schedule 4

[141] Kenneth Murray, 'The uses of irresistible inference; Protecting the system from criminal penetration through more effective prosecution of money laundering offences' [2011] 14(1) Journal of Money Laundering Control, 10

[142] Kenneth Murray, 'In the shadow of the dark twin- proving criminality in money laundering cases'[2016] 19(4) Journal of Money laundering Control 450

[143] Kenneth Murray, 'The uses of irresistible inference; Protecting the system from criminal penetration through more effective prosecution of money laundering offences' [2011] 14(1) Journal of Money Laundering Control, 10

[144] Kenneth Murray, 'In the shadow of the dark twin- proving criminality in money laundering cases'[2016] 19(4) Journal of Money laundering Control 450

law intervention, but it may not be able to generate fast enough to keep up with the operational advancement in money laundering process.[145]

Hence, the main challenge, as observed in the cases mentioned above, is the use of evidence to build necessary irresistible inference. Predominantly in most money laundering schemes, fund transfers are often concealed as loans. This essentially equates to fraud.[146] Fake loan agreements are drawn up and the common feature of these loans are they are never likely to repaid. The loan agreement is made to a corporate entity which transfers the money to its set location and then file for a formal insolvency arrangement.[147] Of course, along with the insolvency arrangement set comes with the pending debts still owed to the accomplice entity.[148] The liquidator or administrator will experience hostility to be contacted from the part of the owner which has the largest creditor balance on the statement of affairs, a reticence which in a normal commercial environment would be somewhat unusual and questionable.[149]

Another instance is where funds are dissected through corporate acquisition.[150] The other common feature is the hidden agreement and teamwork of two parties to the transaction whose desire will be

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[145] Thompson Reuters, 'Technology in the Fight Against Money Laundering in the New Digital Currency Age' (White Paper, June 2013) <https://www.int-comp.org/media/1047/technology-against-money-laundering.pdf> accessed 5 September

[146] John Madinger, 'Money Laundering: A Guide for Criminal Investigations' (3rd edn CRC Press, 2011) 275

[147] John Madinger, 'Money Laundering: A Guide for Criminal Investigations' (3rd edn CRC Press, 2011) 275

[148] John Madinger, 'Money Laundering: A Guide for Criminal Investigations' (3rd edn CRC Press, 2011) 275

[149] Kenneth Murray, 'The uses of irresistible inference; Protecting the system from criminal penetration through more effective prosecution of money laundering offences' [2011] 14(1) Journal of Money Laundering Control, 10

[150] Valsamis Mitsilegas, Money Laundering Counter-measures in the European Union: A New Paradigm of Security Governance Versus Fundamental Legal Principles (Kluwer Law International B.V. 2003) 107

that it is viewed by the outside world as an arm's length transaction.[151] The reality is set when the distribution of the proceeds post-completion is analysed- which may for instance, disclose that the supposed purchaser of the corporate vehicle using funds borrowed from a legitimate lender is the ultimate recipient of the acquisition funds which are channelled to him via the acquired company's solicitors.[152]

These are essentially all clear evidential signals of illegitimate fund; false invoice, false loan agreements, the circumstances of a transferee company's demise, the apparent disappearance of a major creditor in a liquidation, the use of corporate acquisition transactions to release criminal value tied up corporate vehicles in combination. The essential characteristic of the accumulated evidence- and what will give it persuasive power in the court room- is that it all points to the same direction.[153] Over time, the will to collect such evidence will be more readily and efficiently accepted as a valid and viable route to crossing the test of proving the criminality of funds.[154]

[151] Valsamis Mitsilegas, Money Laundering Counter-measures in the European Union: A New Paradigm of Security Governance Versus Fundamental Legal Principles (Kluwer Law International B.V. 2003) 107

[152] Valsamis Mitsilegas, Money Laundering Counter-measures in the European Union: A New Paradigm of Security Governance Versus Fundamental Legal Principles (Kluwer Law International B.V. 2003) 107

[153] Kenneth Murray, 'The uses of irresistible inference; Protecting the system from criminal penetration through more effective prosecution of money laundering offences' [2011] 14(1) Journal of Money Laundering Control, 10

[154] Kenneth Murray, 'The uses of irresistible inference; Protecting the system from criminal penetration through more effective prosecution of money laundering offences' [2011] 14(1) Journal of Money Laundering Control, 10

B.3.Proving mental element: suspicion and knowledge

Whilst the victory remains that prosecution is not required to prove a class or type of crime in money laundering offence, the courts in R v Geary[155] raised another pivotal question on the matter of time relevance in the mental element of the offender. The issue was when should the offender knows and suspects that the property in question was criminal? Without considering this condition, it could 'stretch the language of the section beyond its proper limits'.[156] Hence, it was decided by the court that the property can be criminal when the offender knows or suspects at the time when the property was handed over to them. Property cannot be criminal just by the result of the action in carrying out the arrangement.[157]

This additionally raised another issue for prosecution to consider when the 'irresistible inference' test is used. The main emphasis is on the act itself and not the actual material fact that the make the property a 'criminal property'.[158] In effect, this would cause a lacuna in the law whereby an exception to the irresistible inference test can be formed.[159]Where the property was handled after the offender knew or suspects that the property derived from illicit activities, the property in question would not be considered as criminal. In that statement, it could propel an offender to evade prosecution since it has failed the mental element of proving that he knows or suspects the property was criminal at the time property was handled over to him.[160]

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[155] R v Geary (Micheal) [2010] EWCA Crim 1925

[156] R v Geary (Micheal) [2010] EWCA Crim 1925

[157] Steve Forster, 'Casting a suspicious mind over handling stolen goods: Part 1' [2017] 181(20) C.L & J

[158] Steve Forster, 'Casting a suspicious mind over handling stolen goods: Part 1' [2017] 181(20) C.L & J

[159] Kenneth Murray, 'A suitable case for treatment: money laundering and knowledge' [2012] 15(2) JMLC 188

[160] Kenneth Murray, 'A suitable case for treatment: money laundering and knowledge' [2012] 15(2) JMLC 188

Hence, an accomplice to a fraudster who has agreed to lend their bank account at the disposal of the fraudster will not be committing an offence of money laundering because all the accomplice has to do is deny the fact that he knew or suspects that the money was criminal at the time it was transferred into their bank account.

Essentially, the Supreme Court in R v GH[161] seeks to address this issue. The main issue was whether or not the victims' money first acquired its criminal character through the arrangement itself. At first instance, the Court of Appeal took it upon agreement that the case should be decided in accordance to Geary where the property in question was not criminal property within the meaning of section 340 POCA 2002.[162] This is by virtue that the B's victim had paid the money into H's account directly. [163]

In the case of Geary,[164] the emphasis and the focus point should be on the fact that the monies received into the bank account were from a legitimate source. Harrington was seeking to defraud his wife and pervert the course of justice by transferring some of his money out of the reach of his divorce settlement.[165] The money obtained its characterisation as criminal property due to the arrangement itself being carried out. In this circumstance, it was the arrangement itself which rendered the monies criminal property, and this was fatal to a charge under section 328(1) POCA 2002.[166]

[161] R v GH [2015] UKSC24

[162] Ann Mulligan, 'The Supreme Court closes a money-laundering lacuna' [2015] 6 Arch. Rev, 5

[163] Ann Mulligan, 'The Supreme Court closes a money-laundering lacuna' [2015] 6 Arch. Rev, 5

[164] R v Geary (Micheal) [2010] EWCA Crim 1925

[165] Trevor Millington, R v Micheal Geary [2011] 5 PCR 43

[166] Ann Mulligan, 'The Supreme Court closes a money-laundering lacuna' [2015] 6 Arch. Rev, 5

A conspiracy[167] to money laundering could of course be charged but this would require the Crown to prove knowledge on the part of the Defendant that the money was criminal property.[168] Furthermore, the statutory conspiracy charge in section 328 Proceeds of Crime Act[169] contains numerous ambiguity which consequently makes it difficult to rely on.[170] Specifically, with reference to Section 1(2) Criminal Law Act 1977[171]which holds the overarching provision on 'conspiracy'. The problem stems from its technical nature since the wording of the section is 'obscure'[172] thus making it difficult to understand. Furthermore, the interpretation part exposes an even more fundamental problem, the true purpose of the conspiracy offence seems to be disorientated.[173] Although the Law Commission made recommendation to amend the provision in their Report Number 318, the effect and proposals made were seen to be overtly controversial and was consequently rejected.[174]

By contrast, proof of mere suspicion is enough for the substantive money laundering offences.[175] The main authority for suspicion is not defined in POCA but in the case of Da Silva.[176] The court in the subsequent case stated that suspicion is formed where it is found to have a possibility, which is more than fanciful that the other person was or had been engaged in, or benefited from criminal

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[167] Many offences in English law can be prosecuted without the need to prove mens rea by relying on material circumstance, or recklessness or suspicion as to the existence of that circumstance.

[168] R v Saik (Abdulrahman) [2006] 4 All E. R. 866

[169] Proceeds of Crime Act 2002, s328

[170] David Ormerod, 'Proceeds of crime: conspiracy- mens rea' [2007] Crim L. R. 79

[171] Criminal Law Act 1977 s1(2)

[172] G Williams, 'The New Statutory Offence of Conspiracy' [1977] New Law Journal 1164, 1165

[173] David Ormerod, 'Making Sense of Mens rea in Stautory Conspiracies' [2006] 59(1)Current Legal Problems 188

[174] The proposals was made in 2009 and up until now, there are no still no replacement made on the provision

[175] G Williams, 'The New Statutory Offence of Conspiracy' [1977] New Law Journal 1164, 1165

[176] R v Da Silva [2006] EWCA Crim 1654

conduct.[177] This was far less difficult to prove and offers much more sensible standard to the offence of money laundering.

It felt that applying higher standard in the mental element could not have been the intention of Parliament when the present money laundering offences were enacted as part of the POCA 2002. On the basis the Crown persuaded the COA to certify a point of law of general public importance on which the SC gave leave to appeal.[178]

The Supreme Court, differing its judgement from the Court of Appeal, distinguished Geary.[179] Lord Toulson said the following:

"it was not the case of a defendant holding the proceeds originating from a crime independent of the arrangement made between them. It was Harrington's lawfully owned property when it was paid to the defendant… it bore no criminal taint apart from the arrangement made between them. The fact that the arrangement involved a conspiracy to pervert the course of justice did not mean that the money had a criminal quality independent of the arrangement"[180]

He further stated that, "the present case is different. The character of the money did change on being paid into the respondent's accounts. The property was lawful property in the hands of the victims at the moment when they paid it into the respondent's accounts. It became criminal property in the hands of B, not by reason of the arrangement made between B and the respondent but by reason of the fact that it was obtained through fraud perpetrated on the victims. I do not see it as illegitimate to

[177] R v Da Silva [2006] EWCA Crim 1654

[178] Ann Mulligan, 'The Supreme Court closes a money-laundering lacuna' [2015] 6 Arch. Rev, 5

[179] R v Geary (Micheal) [2010] EWCA Crim 1925

[180] Ann Mulligan, 'The Supreme Court closes a money-laundering lacuna' [2015] 6 Arch. Rev, 5

regard the respondent as participating in an arrangement to retain criminal property for the benefit of another."[181]

Essentially, the Supreme Court has condensed the pivotal ingredient of actus reus and mens rea into one as being read as 'an arrangement which he knows or suspects will facilitate' in recognising the current wording of s328 with the aid of description found in money laundering in the explanatory notes to the article para 6).[182] Although it may conjure criticisms, but in this circumstance, it is not sensible to interpret it as two separate components.[183]

This is because nowadays, the overarching practicality behind fraudulent activities have shifted. Whilst it is recognisable that a fraudulent activity is a common feature of money laundering schemes, the practical result behind fraudulent activity goes beyond mere deception, or false pretence. Instead, the practical result of fraud is to proceed onto the laundering process. Hence, the distinction made will likely stop prosecution as a fraudulent act on its own in a money laundering scheme. [184]

In a deception prosecution, some form of action is required on the part of a victim which he would not have otherwise undertaken and as such resulted to his loss. This is represented into the Fraud Act of England and Wales where the elements necessary to the offence are a false representation made dishonestly knowing that the representation might be untrue or misleading with intent to make gain for himself or another, to cause loss or to expose another risk of loss. [185]

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[181] R v GH [2015] UKSC 24

[182] David McCluskey and Charlotte Treguuna, 'Criminal Property- definitely defined?'[2015] 224 Money LB 6-7

[183] David McCluskey and Charlotte Treguuna, 'Criminal Property- definitely defined?'[2015] 224 Money LB 6-7

[184] Kenneth Murray, 'The uses of irresistible inference; Protecting the system from criminal penetration through more effective prosecution of money laundering offences' [2011] 14(1) Journal of Money Laundering Control, 10

[185] Kenneth Murray, 'The uses of irresistible inference; Protecting the system from criminal penetration through more effective prosecution of money laundering offences' [2011] 14(1) Journal of Money Laundering Control, 10

Nonetheless, a deception with the aim to further the laundering process, does not conspire one of the parties to the transaction. The purpose rather is to provide a veneer of commercial respectability to the shifting of criminal funds in accordance with the motive of making these funds appear legitimate.[186] This description would not suffice as fraud in the Fraud Act 2009. Nonetheless, only where the deception is properly evidenced, it may serve as an illegitimate purpose.[187]

Hence, it is right that the legal circles should consider a perspective from forensic accounting where it is known that money laundering is not like any other normal commercial activity under forensic inspection.[188] Even though the surface undertaking of money laundering may seem to be a normal activity, forensic accountants' area of interest during investigation is where 'the commercial veneer is bent or distorted to accommodate criminal purpose.'[189] This is the part where offenders get the opportunity to apply minor deception which may lead to the unravelling of a major scheme of money laundering and fraud.[190]

B.4 Findings: Application to corporation criminal liability

Generally, as discussed from above, the mental element is often the complicated aspect of the money laundering offence. Similar to convicting an individual, it is also necessary to find corporation's guilty

[186] Kenneth Murray, 'The uses of irresistible inference; Protecting the system from criminal penetration through more effective prosecution of money laundering offences' [2011] 14(1) Journal of Money Laundering Control, 10

[187] David McCluskey, 'Money Laundering: The Disappearing Predicate' [2009] 10 Crim. L.R., 719

[188] David McCluskey, 'Money Laundering: The Disappearing Predicate' [2009] 10 Crim. L.R., 719

[189] Filippo Reganati, Maria Oliva, 'Determinants of money laundering: evidence from Italian regions' [2018] 21(4) Journal of Money Laundering Control

[190] Kenneth Murray, 'The uses of irresistible inference; Protecting the system from criminal penetration through more effective prosecution of money laundering offences' [2011] 14(1) Journal of Money Laundering Control, 10

state of mind, to access if there is sufficient intention required to make it an offence. The intentions of an 'artificial legal person' can be given to a company through the identification principle.[191]

The identification principle requires a company's guilty state of mind to be proven with the 'directing mind and will' of the company is behind the offence.[192] Lord Diplock stated that to determine the agents, the actions and the state of mind of those who represents the company, one must look at the company's memorandum and articles of association. This includes 'the board of directors, the managing director and possibly other superior officers of the company'.[193]

Nonetheless, in practice, it is proven to be inadequate hold large companies liable particularly with more resources liable for criminal wrongdoing. there remains a high threshold to establish corporate guilt, since higher ranking representatives of the company such as directors and senior officers will not be likely to be where the criminal activities take place..[194] Rather, they are able to summon employees by way of bribery or threats to commit the deeds. In other ways, it encourages company to decentralise responsibilities to avoid liability.[195] The consequent effect of having to prove intent from an individual occupying a senior position in the company causes prosecutors to find it difficult to convict large modern multinational corporation due to their complex management structures. As

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[191] Archbold Criminal Pleading Evidence and Practice 2019 Ed, 'Chapter 17- The Mental Element in Crime' 17-26

[192] Lennard's Carrying Co Ltd v Asiatic Petroleum Co Ltd [1915] AC 705 affirmed in Tesco Supermarkets Ltd v Nattrass [1972] AC 153, HL

[193] Tesco Supermarkets Ltd v Nattrass [1972] AC 153, HL

[194] Ministry of Justice, 'Corporate Liability for Economic Crime; Call for Evidence' (January 2017) < https://consult.justice.gov.uk/digital-communications/corporate-liability-for-economic-crime/supporting_documents/corporateliabilityforeconomiccrimeconsultationdocument.pdf> accessed 23 August 2019

[195] Ministry of Justice, 'Corporate Liability for Economic Crime; Call for Evidence' (January 2017) < https://consult.justice.gov.uk/digital-communications/corporate-liability-for-economic-crime/supporting_documents/corporateliabilityforeconomiccrimeconsultationdocument.pdf> accessed 23 August 2019

opposed to smaller companies, where the management structures are much simpler and hence easier to hold those companies liable for the criminal wrongdoing.[196]

Whilst conviction of individuals under money laundering offence are much more coherent, the company conviction under money laundering offences still offers complexity and hindrance to dispense justice. As of now, the Law Commission is currently reviewing the inconsistency in part of a wider consultation on criminal liability in regulatory contexts.[197] So far, there is currently one consultation paper from Ministry of Justice titled Corporate Liability for Economic Crime: Call for Evidence and was published 2017. There have not been any updates ever since.

C. Dual Criminality Requirement limitations.

As discussed above, the very structure of large international corporation committing corporate financial crime involved a large network of entities working around the world to provide the best effective routes to launder the proceeds obtained from the predicate offence. Hence, it is out of necessity that states cooperate with one another to counter money laundering regime and corporate financial crimes. In order to do so, one of the first question states are confronted with is what to do with a request that relates to behaviour that do not suffice as an offence if committed in their jurisdiction.[198]

C.1 The principle of dual criminality

As far as transnational organised crime groups and international corporations are concerned, it is often found in the undertakings of international cooperation; international criminal law employs a

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[196] Joanna Ludlam, 'Corporate Liability in the United Kingdom' [Global Compliance notes, 2016] < https://globalcompliancenews.com/wcc/corporate-liability-in-the-united-kingdom/#_ftn3> accessed 22 August 2019

[197]Practical Law Business Crime and Investigations, 'Bribery Act 2010: corporate criminal liability' Practice note

[198] Wendy De Bondt, 'Double Criminality in international cooperation in criminal matters' in Rethinking International Cooperation in Criminal Matters in the EU (Maklu, 2012) 106

range of 'double conditions.'[199] And one common denominator of which is the requirements that two legal systems share a certain set of values or legal prescriptions;[200] the principle of dual criminality.

The highly contested principle of 'dual criminality' adopted into the criminality of money laundering offence depicts the classification of the offender's criminal conduct insofar as it constitutes an offense under the laws of the two respective states.[201] Hence, for an act to be extraditable, it must constitute to a crime under the laws of both state requesting extradition and the state from which extradition is requested. In other words, they require some correspondence or conceptual similarity between the crime in the requesting and requested states.

Stemming from the principle of legality (nulla poene sine lege), and also closely linked to state sovereignty and reciprocity,[202] the principle is deemed necessary for the protection of individual rights and ensure reciprocity in the extradition practice.[203] It was originally set as a mechanism to avoid states that were obliged to cooperate with respect to behaviour they did not consider criminally actionable.

Nonetheless, some argue this principle constitutes to a major obstacle to effective cooperation and outdated. In addition to the inconvenience caused by the principle, the principle is interpreted and applied differently among different jurisdictions. The interpretation of the principle leans either in abstracto or in concreto.

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[199] Practice Law Business Crime and Investigations, 'Requests to the UK from overseas authorities: the process'

[200]Lech Gardocki, 'Double criminality in Extradition Law' [1993] 27(2) Israel Law Review, 288

[201] M. Cherif Bassiouni, International Extradition: United States Law and Practice (Bluebook 20th edn, 5) 494

[202] Robert Cryer, Hakan Friman, Darryl Robinson, Elizabeth Wilmshurst, An Introduction to International Criminal Law and Procedure' [Cambridge University Press, 2nd edn) 89

[203] Lech Gardocki, 'Double criminality in Extradition Law' [1993] 27(2) Israel Law Review, 289

C.2 'Im abstracto' dual criminality

'In abstracto' focus on objective examination of the conduct[204], or rather the definition of the crime[205] and the material circumstance of the offence. It disregards subjective and personal grounds of criminal liability.[206] The interpretation focuses on the nature of the acts and the offence is extraditable when the acts of the accused qualify as bring a crime in the requested state.

There are no specific standards of criminal law and procedure imposed by extradition state onto the requesting state.[207] Rather, the main emphasis is whether or not the crime in the requested state is generally comparable to the crime in the requesting state[208] and not on the sameness or identity of the label of the crime or the required legal elements needed to be proven.[209]

Hence, there is no requirement to compare the crimes as described in the law of the countries. No concrete circumstances in the case is considered, and the relevant crimes do not need to have identical names or scope.[210] Therefore, a person charged with predicate offence via money laundering without legal justification may be charged in different countries under different types of statues involving money laundering. The laws on money laundering may be labelled differently. Likewise, there are distinctions in the degree or types of predicate offence and different fundamentals required for each such offense. Nonetheless, the similarity between the requested and requesting state is in their general

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[204] Fey-Constanze Blaas, 'Double Criminality International Extradition law'

[205] Robert Cryer, Hakan Friman, Darryl Robinson, Elizabeth Wilmshurst, An Introduction to International Criminal Law and Procedure' [Cambridge University Press, 2nd edn) 89

[206] Fey-Constanze Blaas, 'Double Criminality International Extradition law'

[207] D. Chaikin, J. Sharman, Corruption and Money Laundering: A Symbiotic Relationship (Springer, 2009) 130

[208] M. Cherif Bassiouni, Crimes Against Humanity in International Criminal Law [Martinus Nijhoff Publishers, 1999] 299

[209] M. Cherif Bassiouni, Crimes Against Humanity in International Criminal Law [Martinus Nijhoff Publishers, 1999] 299

[210] Norman Mugarura, The Global Anti-Money Laundering Regulatory Landscape in Less Developed Countries (Ashgate Publishing, 2012) 68

elements. Both material element of one person engaging in conduct which evidently contributes to the laundering of money. The mental element of knowing the act constitutes to laundering of money.

The fact that a person would be charged with a predicate offence of fraud whereas in another it is referred as wrongful deception would not be legally relevant to a finding that 'dual criminality' exists.[211] This is by virtue that the underlying facts would give rise to a similar but not identical charge in requested state. [212] No consequence will be brought onto the requested state if the charge by the requested state is fraud or wrongful deception. As long as the crime charged, corresponds to an equivalent crime in the requested state.[213]

C.3 'In concreto' dual criminality

'In concerto' involves a much rigorous interpretation and primarily attaches importance to both to all factual, personal and legal aspect.[214] This interpretation requires an objective application of the rule in the requesting states and insists on strict correlation of the title of the offence and its legal elements as well as subjective elements such as the circumstantial factors.[215] In other words, the accused must be punishable under concrete circumstances, meaning he is capable to bear criminal liability in both requesting and requested state. In the words of the Van den Wyngaert, in concreto can be explained as " it is not sufficient for the crime to be punishable 'in the books'; the judge must also look at the elements which, in the concrete circumstances, either justify or excuse the act (substantive elements) or make prosecution impossible (procedural impediments"[216] Hence, there must be identical

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[211] Norman Mugarura, The Global Anti-Money Laundering Regulatory Landscape in Less Developed Countries (Ashgate Publishing, 2012) 68

[212] M. Cherif Bassiouni, Crimes Against Humanity in International Criminal Law [Martinus Nijhoff Publishers, 1999] 299

[213] Wendy De Bondt, 'Double Criminality in international cooperation in criminal matters' in Rethinking International Cooperation in Criminal Matters in the EU (Maklu, 2012) 106

[214] Geof Gilbert, Responding to International Crime (Martinus Nijhoff,2006) 109

[215] Geof Gilbert, Responding to International Crime (Martinus Nijhoff,2006) 109

[216] Van den Wyngaert in Jareborg (ed), 51

labelling of the crime committed, identical legal elements or substantial similarity irrespective to the normative formulation or required elements.[217]

Regardless of the two interpretation, there are also ways of interpretation that are a combination of these two methods. Most states can be classified into one of the two main groups of interpretation, but in general most states have adopted a specific method of interpretation that is unique to each particular state. This is thus no uniform method of interpretation in international criminal law.[218]

C.4 Dual criminality in relation to money laundering regime

In terms of criminal conduct or unlawful activity committed abroad that relates to the offence of money laundering, UK adopted mandatory 'dual criminality' requirement on predicate offences committed abroad in order for a money laundering offence to be found.[219]

C.5 UK's perspective

In 2006, two key amendments were introduced by the UK government under Serious Organisation Crime and Police Act, one of which is the introduction of the dual criminality requirement. Upon resolving the single-criminality issue, this first set of amendment was designed as a defence specifically for a person charged with primary money laundering offence for their laundering acts occurred outside of the UK. This essentially, would place the suspect in a favourable position to the detriment on conditions placed on the transfer of proceedings or execution of foreign sentences.[220]

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[217] Neil Boister, An Introduction to Transnational Criminal Law (OUP, 2018) 361

[218] Fey-Constanze Blaas, 'Double Criminality International Extradition law'

[219] The concept of dual criminality is used sparingly in UK jurisdiction, it is rather as discussion furthers treated more like an exception to the extraterritorial effect of money laundering offences

[220] Lech Gardocki, 'Double criminality in Extradition Law' [1993] 27(2) Israel Law Review, 289

The dual criminality requirement or rather the 'overseas conduct defence', sets a person will not be found liable under the offence of money laundering under sections 327 to 329 if:

a) He or she knew or reasonably believed that the relevant criminal conduct occurred abroad
b) The relevant criminal conduct was not, when it took place, unlawful under the criminal law of that other country.

Nonetheless, this limitation does not apply to conduct that (despite being legal under local law) would constitute an offence punishable by a maximum sentence of imprisonment over 12 months in the United Kingdom if it had occurred in the UK.Hence, most cases, such as bribery, corporate fraud and tax evasion, would be within the wide extraterritorial scope of POCA. Hence, the double criminality requirement is used under a broad and constructive approach.[221]

R v Anwoir

The first judicial discussion since the implementation of the 'dual criminality requirement' was seen in R v Anwoir[222] where the courts have to consider whether it is required to prove at least the class or type of criminal conduct involved in generating the criminal property.[223] In the judgement, the courts abstain in the need to prove the location of the underlying criminal conduct. Instead, it was agreed that the relevant issue should be directed on whether the conduct that was committed abroad would constitute a criminal offence in the UK had it occurred in the UK.

[221] Nonetheless, this exception has been revoked by Article 4 of the Proceeds of Crime (money laundering- exceptions to overseas conduct defence) Order 2013

[222] R v Anwoir [2008] EWCA Crim 1354

[223] R v Anwoir [2008] EWCA Crim 1354

R v Rogers

In the case of R v Rogers[224] (2014), the Court of Appeal confirmed the principle. The facts set was Mr Rogers, a UK citizen resident in Spain, permitted money generated by a fraudulent scheme in the United Kingdom to be paid into a Spanish bank account that he controlled, and allowed another person, the launderer, to withdraw money from that account. He was convicted of s327(1)(c) of Proceeds of Crime Act 2002 of converting criminal property and consequently appealed against the conviction. [225]The argument proposed was the court did not have jurisdiction to hear the offences against a non-UK resident where the relevant conduct occurred entirely outside the United Kingdom.

Upon analysing the High Court's decision, the Court of Appeal found that the High Court has erred in applying the wrong provision, s340(11)(d) of POCA, which defines 'money laundering' for the purposes of reporting obligations set out in section 330 and 332 and, the obligation set was irrespective of the laundering act was committed in the UK or abroad.[226]

In reference to the provisions relating to the offence of money laundering, there was no particular definition of the term 'money laundering' provided.[227] Rather, the court took an innovative approach to alter the ratio in favour of the same resulting effect that the erred judgement has provided. The court stated a modern approach to jurisdiction required 'an adjustment to the circumstances of international criminality'. It denotes 'the offence of money laundering is par excellence an offence that is no respecter of national boundaries. It would be surprising indeed if Parliament had not intended the Act to have extraterritorial effect (as we have found it did).'[228]

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[224] R v Rogers [2014] EWCA Crim 1680

[225] Judith Seddon, Practitioner's Guide to Global Investigations (Law Buisness Research, 2018)

[226] R v Rogers [2014] EWCA Crim 1680

[227] Stated above, the definition was given in the explanatory notes. And even that, it provides a broad definition and did not mention particular jurisdictional limitations to the offence.

[228] R v Rogers [2014] EWCA Crim 1680 (per Treacy LJ) at p1026, para 52 and 54

Libman v R

To elevate their emphasis to move from usual norms in such circumstances as argued by the defence team, the courts strategically quoted La Forest J, a Canadian judge in Libman v R[229] on the 'celebrated discussion' by Lord Diplock of the boundaries of international comity in Treacy v Director of Public Prosecutions.[230] The quote is as follows: "The English Courts have decisively begun to move away from definitional obsessions and technical formulations aimed at finding a single situs of a crime by locating where the gist of the crime occurred or where it was completed. Rather, they now appear to seek by an examination of relevant policies to apply the English criminal law where a substantial measure of the activities constituting a crime take place in England, and restrict its application in such circumstances solely in cases where it can seriously be argued on a reasonable view that these activities should, on the basis of international comity, be dealt with by another country."[231]

Hence, there was sufficient jurisdictional nexus to convict Mr Rogers on the basis that his act committed abroad suffice to be criminal property for the purposes of POCA and had impacted the victim in the UK and the laundering proceeds was found to have direct link to those acts in the UK.

C.5 Findings

This begs one to question has the traditional approach of the presumption against a Parliamentary intention to make acts done by foreigners abroad offences which can be tried by an English criminal court is even stronger than the position where a UK national is concerned.[232] In the

[229] Libman v R [1985] CCC (3d) 206 at 221

[230] Treacy v Director of Public Prosecutions [1971] AC 537

[231] Libman v R [1985] CCC (3d) 206 at 221

[232] Jonathan Fisher QC, 'Case to answer: R v Rogers- implications for practitioners' [2015] money laundering bulletin <https://www.brightlinelaw.co.uk/images/R_v_Rogers_-_implications_for_practitioners.pdf> accessed 24 July 2019

words of Lord Russell in R v Jameson,[233] "other general canon of construction is this, that if any construction otherwise be possible, an Act will not be construed as applying to foreigners in respect to acts done by them outside the dominions of the sovereign power enacting."[234]

By strictly looking at the judgement provided by the Courts in Rogers,[235] it would seem so. The courts have taken a modern view of criminal jurisdiction; where the same considerations on a substantial measure of activities constituting the predicate fraud crime would appear to apply to those activities committed abroad. Considering where a different circumstance where the proceeds handled by Rogers were derived from a criminal conduct outside the UK. Would the decision in R v Rogers[236] be applied similarly to this circumstance?

In applying the Court of Appeal decision on statutory construction, it would seem logical that the circumstance would not change the decision, Rogers would still be found liable.[237] As the interpretation of 'criminal property' includes monies derived from foreign conduct which would equate to criminal conduct in the UK it occurred here. Hence, it is possible criminal liability is found in the UK for the handling the criminal property abroad would arise.

In practice, neither would a prosecuting authority would be interested in commencing criminal proceedings for money laundering where both the underlying criminal conduct and handling the proceeds of crime were committed abroad.[238]

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[233] R v Jameson [1896] 2 QB 425, 430

[234] R v Jameson [1896] 2 QB 425, 430

[235] R v Rogers [2014] EWCA Crim 1680

[236] R v Rogers [2014] EWCA Crim 1680

[237] Jonathan Fisher QC, 'Case to answer: R v Rogers- implications for practitioners' [2015] money laundering bulletin <https://www.brightlinelaw.co.uk/images/R_v_Rogers_-_implications_for_practitioners.pdf> accessed 24 July 2019

[238] Jonathan Fisher QC, 'Case to answer: R v Rogers- implications for practitioners' [2015] money laundering bulletin <https://www.brightlinelaw.co.uk/images/R_v_Rogers_-_implications_for_practitioners.pdf> accessed 24 July 2019

However, it can also be said that the basis on the modern view of criminal jurisdiction the courts have adopted would not be as farfetched as one could deliberates from the court's approach on the statutory construction. For as the Court of Appeal explained, with reference to the facts in R v Rogers, "This is not a case where the conversion of criminal property relates to the mechanics of a fraud which took place in Spain and which impacted upon Spanish victims. In those circumstances, our courts would not claim jurisdiction."[239] The importance on the criminality underlying the case that took place in England is the 'continued deprivation of the victims of their monies' and that leaves 'no reasonable basis for withholding jurisdiction'.[240]

These case and subsequent others indicate that a person may be guilty of a money laundering offence under section 327 to 329 of POCA in circumstances where both the predicate offending and the laundering of the criminal property take place outside the territory of the UK. [241] Consequently, this is reflected in s340(2)(b) Proceeds of Crime Act 2002 criminalise the laundering act committed abroad as a money laundering offence where the predicate offence committed abroad would also equates to an offence in any part of the United Kingdom if it occurred here.

C.6 Will the principle of double criminality inhibit the prosecution of money laundering?

The complexity in the structure of a money laundering scheme involves a network of individuals or entities based in different countries. As discussed above, the launderers would seek the most efficient routes to launder monies and that usually means picking a less developed country with weak anti-money laundering regime with high level of corruption and bribery. It is prone to be in such circumstances, the country selected may not recognised certain conducts as criminal conduct like the

[239] R v Rogers [2014] EWCA Crim 1680 at para 55

[240] R v Rogers [2014] EWCA Crim 1680 at para 55

[241]David Mol, 'The Asia-Pacific Investigations Review 2019, Cambodia: Anti-Corruption' (Global Investigations Review, 20 September 2018) https://globalinvestigationsreview.com/benchmarking/the-asia-pacific-investigations-review-2019/1174580/cambodia-anti-corruption accessed 27 August 2019

requesting state does. Particularly where some of corporate financial crime is still rather a contemporary crime in certain countries. For example, foreign bribery is not criminalised by Cambodian anti-corruption legislation.[242] Nonetheless, since foreign corruption statutes have extraterritorial applicability and companies may be prosecuted their acts conducted outside their home jurisdiction.[243]

For the UK Bribery Act to apply, it is required to prove the offender who offer or accepted the bribe has a close connection to the United Kingdom.[244] This includes companies incorporated in the United Kingdom as well as non-UK companies conducting business activities in the United Kingdom. If bribery was committed in Cambodia, the extraterritorial application of the act enables a corporation or person with a close UK connection to face prosecution in the UK.[245]

C.7 Is there still a need for international cooperation?

The contingency of an anti-money laundering measures being effective is highly dependent on international cooperation. A necessary consensus needs to be developed on an international basis.[246] In order to globalise the prosecution of money laundering, the prosecution of money laundering needs to be distanced from the original crime.[247] In other words, there must be more emphasis on the money

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[242] David Mol, 'The Asia-Pacific Investigations Review 2019, Cambodia: Anti-Corruption' (Global Investigations Review, 20 September 2018) https://globalinvestigationsreview.com/benchmarking/the-asia-pacific-investigations-review-2019/1174580/cambodia-anti-corruption accessed 27 August 2019

[243] Some of the countries which has foreign corruption statues includes, Australia, the United States and the United Kingdom (found under section 6 of the Bribery Act)

[244] R (on the application of KBR, Inc) v the Director of the Serious Fraud Office [2018] EWHC 2368 and also s12(2)(c) Bribery Act 2010

[245] David Mol, 'The Asia-Pacific Investigations Review 2019, Cambodia: Anti-Corruption' (Global Investigations Review, 20 September 2018) https://globalinvestigationsreview.com/benchmarking/the-asia-pacific-investigations-review-2019/1174580/cambodia-anti-corruption accessed 27 August 2019

[246] Kenneth Murray, 'The uses of irresistible inference; Protecting the system from criminal penetration through more effective prosecution of money laundering offences' [2011] 14(1) Journal of Money Laundering Control, 10

[247] A. Giddens, The Consequences of Mordenity (1990) in Craig J. Calhoun (ed.), Contemporary Sociological Theory (2007)

that was proceeds of crime in comparison to proceeds of any particular crime in any particular jurisdiction.[248] This would not be possible as long as money laundering is linked to a predicate offence. Where predicate offence exists in the equation, the deliberation of the policy options of the individual nation state in respect of any crime is in point will be subject to locality.[249] For instance, if a largely autonomous nation state that wish to counter proceeds of drug sales would only have one alternative to the solution, which is a more liberal policy on drugs. In effect, it would lower the amount of proceeds by the crime and consequently the global sum of money obtained from illegal activity in that jurisdiction.[250] Furthermore, any breach of those criminal law is specific to the jurisdiction because they are fixed to its own set of criminal law. This is so under the Westphalian model of sovereignty where each country was responsible for its own criminal law. There is no distribution and sharing of principles between countries as we have seen now in the contemporary era.

D. Conclusion

Looking back at the money laundering offences that holds individuals liable, it can be said that the recent development has elevated UK's position in countering money laundering scheme. With the relaxation of the rule in predicate offence condition as well as the abolishing the principle of dual criminality in money laundering offences, it is worth nothing the developments has made it much easier for prosecution to find a corporate liable. Particularly where the mental element requires merely suspicion and that can be inferred, it would lessen the constraint found in the identification principle. Nevertheless, it is still uncertain as to whether corporate would be liable to money laundering offences. As of now, all one could do is observe and wait for the Parliament to approve of the recommended reform as proposed by the Ministry of Justice.

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[248] Peter Aldridge, Money Laundering and Globalization [2008] 35 J.L.& SOC'Y 437

[249] Peter Aldridge, Money Laundering and Globalization [2008] 35 J.L.& SOC'Y 437

[250] K. Hinterseer, Criminal Finance: The Political Economy of Money Laundering in a Comparative Legal Context (2002)

It is possible for fraud, bribery, tax evasion and money laundering to occur together. Even where the all offences had different modus operandi, motivation and seriousness. Nonetheless, one thing can be concluded which is the essence of these offences all benefit the corporation from 'wrongdoing of associated persons acting in pursuit of contractual or commercial advantage or tax limitation'.[251] This provides a strong reason for a need to hold corporations liable and upon so, requires a consistent framework. Corporate economic activity is international and consequently the economic crime is international as well as a national problem. When considering a reform in corporate money laundering offence, it must be taken into consideration that corporate activity, both licit and illicit, utilises complex corporate structures, agents, intermediaries and subsidiaries. Hence, there is a need for mutual assistance between a number of international bodies and organisations in the investigation and prosecution process. This organisation can be the Council of Europe, Eurojust and the Europe Commission. The UK would have to ensure Brexit would not significantly impact the existing cooperative arrangements once UK is no longer part of Europe.

[251] Celia Wells, 'Corporate failure to prevent economic crime- a proposal' [2017] 6 Crim L.R. 426

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