

# Follow the money

Andrew Katzen and Nick Yeo provide some guidance on how to get the best out of experts in the complicated area of money laundering cases

**"FOLLOW THE MONEY"**. It was Deep Throat, the infamously named informant of journalists Bernstein & Woodward's account of 1970s Nixon's Watergate scandal *All The President's Men*, who used this telling phrase to show the authors how to expose the political corruption they discovered.

Since then, this term has become the catch phrase for financial crime investigators and lawyers worldwide. In fraud, follow the proceeds through the banking system, to the beneficiaries, and you are likely to find a culprit. In money laundering, follow the money back to its source, and you should find the predicate offences. The unravelling of a complex web of financial entities and transactions is just one way in which an expert might assist in a money laundering case.

## The offences

The offences of money laundering are defined in part 7 of the Proceeds of Crime Act 2002. There are three principal crimes of concealing, acquiring using and possessing criminal property and entering into an arrangement to facilitate such acquisition, use and possession of criminal property. All the offences are based upon the concept of criminal property. That is to say property that is derived from criminal conduct, and which the offender know or suspects it to be so derived. The recent case of *NW [2008] EWCA Crim 2* tends to suggest that the prosecution has to prove not just that the property is the proceeds of a crime but also the type of criminal conduct that generated it. This can present some difficult problems in establishing guilt. It is insufficient to demonstrate that the defendant's apparent lifestyle is out of all proportion with his declared income. Arguably, no matter how suspicious it may appear, a person stopped by the police in possession of a huge sum of cash may not be successfully prosecuted for money laundering without some solid evidence connecting it with a particular kind of



offending such as drug dealing and fraud. Thus expert evidence can be critical to show the relationship between the property identified and the underlying criminal behaviour alleged cases

Although money laundering may have an almost infinite variety of circumstances, on a day to day level, the cases often fall into one of three categories. One is simply an individual with unexplained assets beyond their legitimate means (the millionaire on the dole), the second is the channelling of money from a criminal enterprise (the global networking of funds from a VAT fraud), the third is a business which is designed to replace dirty money with clean finances (the bureau de change operating as a bank for criminals).

## The prosecution expert

In the first type of case there may be little need for financial experts. However, where cash is involved, the banknotes themselves are routinely forensically examined for contamination by drugs. Where the level of drug contamination is much higher than is expected of the notes in ordinary circulation the evidence can be used to indicate that the money is the proceeds of drug trafficking. The admissibility and weight of this evidence is still a matter of some controversy – for instance cash taken from organising nightclub events is likely to be more contaminated than from a farmers market.

In the second and third classes of cases, there is a particular need for a financial expert, often an accountant. The prosecution expert may be asked to say what financial records exist, what is missing, do the sums add up and, if not, how big is the discrepancy, are there entries in the records matching specific suspicious transactions and what is the source and the destination of the 'dirty' money?

Frequently it will be suggested that large sums of money are "off the books". The expert may be able to show a pattern of non-recording, for example the observations of holdalls of cash being brought into the bureau de change are never matched by entries in the disclosed accounts. Fake transactions may have occurred: there are references in the accounts which lack a corresponding reference elsewhere, for example a 'sale' in one set of accounts with no corresponding purchase in the purported counterparty's accounts. An expert may identify transactions with no likely commercial purpose; a seemingly innocuous high-value contract between two companies becomes inexplicable when it is revealed the beneficial owner of the businesses is the same person.

Declared tax and VAT records may show gross underpayments in respect of the apparent true turnover of the business. This may disclose offences such as fraudulent evasion of VAT or cheating the Revenue. On occasions prosecutions have been brought relying on the tax offending as the predicate offence for the money laundering charge.

## The defence expert

From a defence perspective the steps to be taken will be:

- Identifying the area of expertise;
- Choosing an appropriate expert;
- Providing proper instructions;
- Understanding the expert's findings; and
- Ensuring that helpful opinions can be effectively presented in court.

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Sometimes the defence expert is there simply to test and contradict the findings of the prosecution expert. An alternative understanding of the accounts may eliminate a black hole. A better understanding of a person's business interests may give purpose to an otherwise incomprehensible transaction.

### Smurfs, cuckoo smurfs and hawala

The quaintly named practices of 'smurfing' and 'cuckoo smurfing' are often cited as features of money laundering. Expert evidence on these subjects can be powerful in building up a case or pulling it down.

Smurfing is the practice of breaking down large cash deposits into smaller sums so as to avoid triggering money laundering suspicions. A money launderer may despatch cycle couriers to deposit £1,000 blocks of cash into various named accounts at differing banks across the City. Cuckoo smurfing goes further. It is when the accounts of others are used to move small sums of money apparently without the knowledge of the account holder.

Many cases involving alleged smurfing and cuckoo smurfing turn on the use or misuse of 'Hawala'. Law enforcement agencies seem to have an almost inherent suspicion of Hawala as it operates unregulated outside the traditional banking system. It is an ancient system of money transmission favoured by many migrant communities in Britain. Often small sums of cash are remitted using brokers called 'Hawaladars' who are often from the same ethnic group and who operate on trust. In this way huge amounts of money are informally sent across the world. There are a number of reasons – a desire to sidestep foreign exchange controls, a suspicion of banks, greater levels of trust in the 'Hawaladar' who may share the same background, language and religion, an absence of suitable banking facilities in the foreign country, expense and delay.

Frequently there are practical limits on how much money can be sent home in one transaction depending on the funds available in the foreign country. Thus a series of remittances of small values may occur which looks like smurf-

ing. Transferors may be using bank accounts which are not theirs: is this cuckoo smurfing or is this to do with their inability to access a bank account due to immigration and/or language problems.

Say a debt, for goods legitimately exported to Pakistan, is owed by a Karachi-based company to a firm in London. The repayment of this debt using Hawala can be used as a means of transferring wealth to Pakistan without any money actually crossing the borders. The Pakistani company does not buy any sterling nor does it transfer funds in any currency to the British business. Instead, the debt in London is paid by an English broker, and, simultaneously, the Pakistani company pays the broker's contact in Pakistan. As well as the settlement of the debt, the effect of this is a transfer of an equivalent amount from the London broker to his contact in Pakistan.

The process is ideal for use by money launderers – little checks are carried out by the English company as to who is paying the debt and how. If it is used as a

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means of transferring the proceeds of a drug deal back to a drug lord, then it is money laundering. However, it could equally well be a means of effecting a low-cost money transfer as part of legitimate business.

An expert in how the Hawala system operates may be needed by the defence. This is to support the assertion that the client's activities are consistent with Hawala as opposed to money laundering. Experts may be available to make it clear just how popular Hawala is and the reasons for that. Some creative thinking may be best in selecting the right kind of expert. Such an expert may be available from a social science background as opposed to a traditional financial background.

### Choosing an expert

You need somebody who has experience not just of the financial world but of giving opinions in a courtroom. A conference may make that apparent. Care should be taken to instruct an expert who is not only a member of relevant

professional organisations but who comes recommended by colleagues. The case law may guide you towards the right person: read the leading cases and identify the expert witnesses used. A short call to the solicitors who acted in those cases may give a good indicator of their level of satisfaction. Make sure that the expert fully understands their role within the case, and the importance of legal professional privilege.

### The 'ultimate issue'

The role of the expert is expanding and has never been more significant in criminal litigation. An expert may now be permitted to give his opinion on what has been called 'the ultimate issue' that is in effect, the guilt or otherwise of the defendant.

In *Gokal* [1999] 6 Archbold News 2 an accountancy expert was allowed to express the opinion that the arrangements under consideration were such as to demonstrate, in his opinion, dishonest collusion between the parties to the transactions.

Money laundering can be difficult to prove by direct evidence. Those who do so rarely advertise it. Hence you may find a prosecution expert who declares that the only proper understanding of a company's affairs is that the defendants are operating a dishonest money laundering service. If so, you may find that your expert has to study every aspect of a company's business to identify patterns and purpose. Each transaction may call for investigation. This shows that to follow the money is only the start of the expert's job. In order to help determine guilt or innocence, it could be that the expert is called upon to give a running commentary on each step of the money's progress.

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