Money Laundering: Civil Liability at Common Law and in Equity†

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We hear a lot about the global fight against money laundering, described as a modern international evil requiring concerted attention. Many countries, under pressure from the international community, have introduced criminal law enforcement measures to combat the problem, as well as imposing elaborate procedures on banks and similar institutions before they can receive money. This talk does not concern those aspects of money laundering, but rather the tools available under the civil law to enable the victim of the wrong to recover his money or compensation for his loss.

The key to money laundering is the receipt and disguise of the proceeds of a wrongful act, usually a crime. The English criminal statute dealing with these matters is appropriately named the Proceeds of Crime Act 2002. One is therefore not concerned with the initial wrong, be that theft or embezzlement, breach of trust or whatever, but rather with what happens to the money thereafter. Typically, it will pass through the hands of those, such as banks, who act ministerially, *ie* not beneficially. But there will also be a beneficiary to be found,

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usually hidden, in the transfer arrangements. Transfer and disguise are the key elements. It turns out that the common law, or rather equity supplementing the common law, has extensive remedies for these situations. These were not developed to counter anything that anyone would, until recently, have described as money laundering, but although that expression is a new one the problem has been with us for decades, if not centuries.

I would like to explore those remedies and their adequacy. My concern is with the victim of crime or breach of duty, not with the state's power to punish; it is not with the thief or dishonest trustee, but with the receiver or accessory. This brings into play the law of tracing, the economic torts and the constructive trust.

The law of restitution, despite its prodigious recent growth, cannot help us here, save in the simple case of the immediate recipient of money "had and received", as the old expression still goes. But money laundering rarely deals with that. The money has usually passed out of the hands not only of the crook himself, but of anyone to whom the victim can be said to have paid the money. It needs, in the first place at least, to be traced. The victim's first hope is to catch the money, or something which in law represents it, in the hands of a recipient who must restore it to him.

As many distinguished judges and commentators have observed, the complex differences between the common law tracing rules and those of equity are regrettable; nonetheless, they remain, at least for now *Lipkin Gorman v Karpnale*.[1] At common law, there exists the major drawback that there cannot be tracing into a mixed fund. The common law tracing rules were developed at a time when the use of bank notes and coins was more pervasive than now and long before the concept of electronic funds transfers was even thought of. So, if B misappropriates money from A's bank account, and pays it into his own account, which contains other monies, and then transfers are

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[1] [1991] 2 AC 548.

made out of B's account into that of C, A will not be able to trace his money at common law into the account of C. A would have a personal claim against B, based on B's receipt of A's money and irrespective of the fact that B does not retain the money, but this will be of no use if B has disappeared or is not amenable to the court's jurisdiction. In modern funds transfer systems, monies which are transferred will usually have to pass through some form of clearing process, or at least a process whereby net balances are struck between the paying bank and the recipient bank. This is usually fatal to an attempt to trace.

There is some hope where what is concerned is the proceeds of a cheque. In *Banque Belge pour l'Etranger v Hambrouck*[2] the Court of Appeal allowed the plaintiff's claim involving the following of the proceeds of a cheque through the clearing system. Again, in *Trustee of the Property of Jones v Jones*[3] Millett LJ allowed a plaintiff to trace the proceeds of a cheque from the plaintiff's account into a trading account of the London potato futures market and from there to the account of the defendant. As he said, the plaintiff could "follow the cheques as they pass from hand to hand", and it is "sufficient to be able to trace the money into the cheques and the cheques into their proceeds".

But where payment is made by electronic funds transfer, the situation is different, as occurred in *Agip v Jackson*.[4] Millett J gave two reasons. First, "all that passed was a stream of electrons ... " in distinction with a cheque, which the law treats as physical property. This reason was not upheld by the Court of Appeal in *Agip*,[5] who treated the sums owing by the bank to the customer as a chose in action and thus property similar to the proceeds of a cheque. But the Court of Appeal did agree with Millett J's second reason, namely that the New York clearing system through which the transfer had passed

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[2] [1921] 1 KB 321.
[3] [1997] 1 Ch 159.
[4] [1990] Ch 265.
[5] [1991] Ch 547.

involved the mixing of the plaintiff's money with other money. There is thus a highly technical, some would say absurd, distinction between the two cases. It is not even certain that the distinction is valid on its facts, since there is surely an element of mixing involved in the cheque clearing system and in the sytems of the potato futures market, but there it is!

Equity's rules for tracing are different. On the positive side, there is no problem about tracing into a mixed fund, and detailed techniques have been developed to work out which part of a mixed fund is attributed to the plaintiff seeking to trace. There is a limit where the fund is exhausted by dissipation, as was held in *Barlow Clowes v Vaughan*.[6] But the ability to trace effectively through bank accounts is revealed by *El Ajou v Dollar Land Holdings*.[7] It has even been suggested that there can in some circumstances be tracing into an overdrawn bank account *Bishopsgate v Homan*,[8] but this is dubious, as the judgment of Leggatt LJ makes clear. The downside of equitable tracing is that there must be a fiduciary relationship, as the House of Lords affirmed in *Westdeutsche v Islington*.[9] This creates a problem for those seeking to trace money paid by mistake, but should not be a difficulty in most money laundering situations. Where money has been stolen, it is trust money in the hands of the thief, as the Australian High Court said in *Black v Freedman*.[10] Fraud is not theft, but the trust must arise at the latest when the fraudulently induced transaction is rescinded; see *Twinsectra v Yardley*.[11] Further as Millett J said in *Lonrho v Fayed* (No 2): "If the representee elects to avoid the contract and set aside a transfer of property made pursuant to it the beneficial interest in the property will be treated as having remained vested in him throughout."[12]

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[6] [1992] 4 All ER 22.
[7] [1993] 3 All ER 717.
[8] [1994] 3 WLR 1270.
[9] [1996] AC 669.
[10] (1910) 12 CLR 105.
[11] [1999] Ll Rep Bank 438.
[12] [1992] 1 WLR 1 at p 12.

What happens if monies cease to be traceable? Here the law needs some way of attaching personal liability to third parties who have played a part in the flow of the laundered funds. The common law has little to offer here. There are various ways in which accessories to a tortious act can be liable to the victim, but they are all cases of accessories before rather than after the fact. Thus there are the economic torts of inducing breach of contract and of interference with business by unlawful means, which received illuminating analysis by the House of Lords very recently in *OBG v Allan.*[13] There is also the tort of conspiracy, which would be tempting to discuss, but which really falls outside the scope of this lecture. All of these concern wrongful acts which either causes the primary wrongdoer to commit his act or are themselves primary wrongs. None is apt to deal with those involved in the flow of funds after the primary wrong has been committed.

An illustration of these difficulties can be found in the decision of the Court of Appeal in *Law Debenture Corporation v Ural Caspian Ltd and others.*[14] Four English companies, who had traded in Russia, had their assets expropriated by the Soviet government. The shareholders sold their shares to X, who agreed with the plaintiff, acting as trustee for the shareholders, to pursue claims for compensation and pay any proceeds to the plaintiff. X agreed not to part with the shares without extracting similar covenants from any purchaser. The plaintiff had no proprietary or equitable rights, merely the agreement with X. X, in breach of contract, sold the shares to Y. Y knew of the terms of the agreement and indeed induced the sale of the shares from X to Y. Had the matter stopped there, the court could and would, as a remedy against Y for inducing the breach, have enjoined further transfer and required Y to transfer the shares back to X. But Y had sold on to Z, who also had full knowledge of the restrictions on X contained in the agreement. X, Y and Z were all associated companies. By now, compensation had been received from Russia,

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[13] [2007] 2 WLR 920.
[14] [1995] Ch 152.

and the plaintiff sought its money. The English companies refused to pay X who was insolvent. There was a claim for damages against Y, but the most substantial company in the group was Z. An attempt was made to hold Z liable for inducing the violation, not of the plaintiff's primary rights under the agreement, but of its secondary right to a remedy, *viz* the retransfer of the shares, against Y. The Court of Appeal struck out this claim, since at the date of Z's supposed tort there was nothing wrongful. No remedy had been sought against Y and the transfer from Y to Z was lawful. This is relevant in the money laundering context. A money launderer who induces someone further up the chain, but intermediate between him and the original thief of the money, to transfer money to him commits no tort. It is too late for the common law.

Nor is there any general common law liability for "aiding and abetting" a wrong. Facilitation is not enough, unless it amounts to inducing or procuring. This was decided by the House of Lords in *Credit Lyonnais v ECGD.*[15] The distinction between facilitation and inducement had previously been stressed by the House in *CBS Songs v Amstrad.*[16] A defendant can, of course, be liable as a joint tortfeasor with the primary wrongdoer, but that is unlikely to be particularly relevant in the money laundering context.

Again, the remedies of equity are more favourable. They have been developed under what has been called the constructive trust, although that label has become unpopular. Be that as it may, it seems to me a reasonable description. But there are two very different species, one concerned with receipt, the other with more general accessory liability. They are now generally known as "knowing receipt" and "knowing" or "dishonest assistance."

Knowing receipt is an extension of the general equitable concepts by which the beneficial recipient of trust money is in

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[15] [1999] 2 WLR 540.
[16] [1988] AC 1013.

conscience bound to account for it to the beneficiary. It requires that the money, when received, is trust money, but the proceeds of theft, and probably of fraud will qualify in this connexion, so that the concept is relevant for money laundering liability. But the receipt only qualifies where it is beneficial, not ministerial. This was made clear in the New Zealand case of *Westpac Banking Corporation v Savin*[17] and by the English Court of Appeal in *Polly Peck v Nadir (No 2)*.[18] Where a bank receives money for its customer, it will not generally act beneficially for its own account, and so will not be subject to "knowing receipt" liability. But it was said by Millett J in *Agip v Jackson*[19] that if the payee bank uses funds received to reduce an overdrawn account the position may be different and this was followed by the Canadian Supreme Court in *Citadel v Lloyds Bank*.[20]

Great controversy has surrounded the mental element necessary to be a knowing recipient. Some of the older cases seem to require dishonesty, but these are almost certainly wrong. Others moot the possibility that this is simply part of the law of restitution, so that fault is not required at all, although payment away of the money without fault might be a defence. This view has the support of Lord Nicholls and the late Professor Birks. But the better view is probably that stated by the Court of Appeal in *BCCI v Akindele*,[21] echoing the earlier Court of Appeal decisions in *Agip v Jackson*[22] and in *El Ajou v Dollar Land Holdings*,[23] namely that the test is what is unconscionable in the eye of the law; this in practice probably means the same as constructive knowledge, *ie* what a reasonable person should have known.

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[17] [1985] 2 NZLR 41.
[18] [1992] 4 All ER 769.
[19] *Supra* n 4.
[20] (1998) 152 DLR (4th) 411.
[21] [2001] Ch 437.
[22] *Supra* n 5.
[23] [1994] 2 All ER 685.

Knowing assistance is different. It does not require beneficial receipt, or even receipt at all. It does not require the defendant to induce or procure anything. Facilitation, aiding and abetting, assisting of any kind are enough, in striking distinction to the common law. In the context of money laundering, this is clearly of the greatest importance. There will usually have been something which can be defined as a breach of trust, so that all sorts of accessories can be caught under this head. But the very breadth of the concept requires a control mechanism, which has been found in the requirement to prove dishonesty. The law was unclear until the decision of the Privy Council in *Royal Brunei Airlines v Tan*,[24] which swept away many legal cobwebs and placed the law on a firm basis. The concept has now been renamed as "dishonest assistance", rather than "knowing assistance", in order to reaffirm the all-important requisite of dishonesty.

And so, the legal position is strange. The common law tort of inducing a breach of contract does not require dishonesty, but it does require active procurement. Equity does not require active procurement or even receipt, but does require dishonesty. Attempts have been made to cut through this distinction by developing a tort, or quasi-tort, of inducing a breach of fiduciary duty, but the Court of Appeal in *Metall und Rohstoff v Donaldson*[25] closed the door to this. Slade LJ said that such a tort was unnecessary in view of the available equitable remedies, but it is to be noted that this was said before the decision in *Royal Brunei Airlines v Tan*,[26] and at a time when some believed that constructive knowledge (*ie* that the defendant ought to have known of the breach of trust) sufficed. Now that the relevant equitable concept clearly requires dishonesty, it is arguable that the refusal to recognise a tort of inducing breach of fiduciary duty leaves a gap, where there has been an inducement to breach a fiduciary duty not amounting to a breach of contract, where dishonesty cannot be proved.

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[24] [1995] 2 AC 378.
[25] [1990] 1 QB 391.
[26] *Supra* n 24.

In *Royal Brunei Airlines v Tan*,[27] Lord Nicholls stated that the rationale underlying the accessory's liability for breach of trust was the same as that underlying the tort of inducing breach of contract. Rix LJ went further in *Abou-Rahmah v Abacha*,[28] where he described the dishonest assistance cause of action as an "equitable tort". Equity lawyers would be horrified. Whilst the equitable cause of action and the tort may cover overlapping situations, I do not think these statements are helpful.

Since *Royal Brunei Airlines v Tan*[29] the law has fallen back into uncertainty in relation to what is meant by dishonesty. Lord Nicholls said that the test for dishonesty was objective, but the House of Lords in *Twinsectra v Yardley*[30] cast the law back into obscurity. The case seemed to decide that the defendant must subjectively know that what he was doing was wrong. It appeared to posit a hybrid test, namely that (i) ordinary honest people would regard the assistance as dishonest and also (ii) that the defendant realised this. This opened the door for defendants to say that they did not share the moral standards of the ordinary honest people, and that by their own lights the conduct was not regarded as dishonest. That would mean that the test ceased to be objective. It would also lead to complex (and absurd) inquiries as to a defendant's moral standards compared to those of the majority of right thinking people and as to his knowledge of what general standards of honesty might be. When the point came before the Privy Council in *Barlow Clowes International v Eurotrust*[31] their Lordships (albeit wearing a different hat) realised the problems created by the *Twinsectra*[32] case. Lord Hoffmann, who had been a member of the committee which decided *Twinsectra*, gave the advice of the Privy Council. He said that *Twinsectra* had been misunderstood. All that

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[27] *Supra* n 24.
[28] [2007] 1 Ll Rep 115.
[29] *Supra* n 24.
[30] [2002] 2 AC 164.
[31] [2006] 1 WLR 1476.
[32] *Supra* n 30.

was required was that the defendant should have such knowledge as would render his participation contrary to normally acceptable standards of honest conduct. It does not require that he should have any particular view about generally accepted standards. He must be conscious of those elements of the transaction in question which make participation transgress ordinary standards of honest behaviour, but he does not have to have thought about what those standards actually were. So we are back to an objective standard.

What these cases do show, and what has been evident in all the cases decided since *Royal Brunei* Airlines *v Tan*,[33] is how difficult it is in practice to surmount the dishonesty hurdle. Only very clear cases will get through, unless there has been beneficial receipt and the "knowing receipt" cause of action is available. Whether this is the right place to draw the line in relation to civil liability for money laundering is open to question. My own view is that it is, provided that the doubts sewn by *Twinsectra v Yardley*[34] are dispelled, and the decision in *BCCI v Akindele*[35] continues to be followed in relation to "knowing receipt". The beneficial receiver should be liable if he ought to know of the breach of trust, and the English criminal statute, the Proceeds of Crime Act 2002, speaks of the liability of one who "suspects". But in order to protect banks and other intermediaries who become involved, non-beneficially, in a chain of stolen money, it is reasonable to require something more; otherwise commercial life would become perilously difficult. But this is a fast-moving area of the law, which might benefit from deeper consideration of what the policy, by which I mean legal policy should be, as to where the interests of combating money laundering and allowing normal commercial activity to prosper should be drawn.

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[33] *Supra* n 24.
[34] *Supra* n 30.
[35] *Supra* n 21.

The Doctrine of Natural Justice as an Arm of the Rule of Law in Nigeria

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I. Introduction

The principle of natural justice has featured prominently in decisions by judicial, quasi-judicial and administrative bodies affecting Nigerian citizens. Yet, in view of the high level of illiteracy in Nigeria coupled with a general lack of enlightenment regarding the rights of the citizen, most Nigerians are hardly aware what these rights and the principles behind them entail. This paper is geared towards shedding some light on those rights and principles.

II. The "Genesis"

Oyewo[1] quotes De Smith as submitting as follows:[2]

> No proposition can be more clearly established than that a man cannot incur the loss of liberty or property until he has had a fair opportunity of answering the case against him.

Oyewo[3] further recounts De Smith[4] as illustrating the tradition of natural justice by reference to scriptural history:

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[1] Oyewo, AT, *Cases and Materials on the Principles of Natural Justice in Nigeria* (Ibadan: Jator Publishing Co, 1987) at p 2.

[2] Evans, JM, *De Smith's Judicial Review of Administrative Action* (London: Stevens & Sons, 4th ed, 1980) at p 158.

[3] *Supra* n 1 at p 2.

[4] *Supra* n 2 at p 158.