

LOSS OF A PRIVILEGE



BAKER
PLATT

Until now the rudest question that a Jersey lawyer has had to ask a client is 'can you pay my fees'. Not for much longer. Lawyers in Jersey are about to get a taste of the medicine that their financial services clients have been swallowing since the introduction of the anti money laundering regime in Jersey since 1999. From mid February, with the anticipated States approval of the newly revised Money Laundering Order, lawyers will in respect of defined activities at least, have to fall into line by implementing systems to forestall money laundering including verification of identity requirements.

The anticipated extension of the money laundering regime has caused a degree of consternation in certain quarters of the legal community, particularly because of the proposal that the Jersey Financial Services Commission be given temporary supervisory power over lawyers for anti money laundering purposes. Lawyers don't much like being regulated other than by lawyers. More importantly, there are concerns of potential conflicts in circumstances where law firms that are themselves regulated by the Commission act on behalf of clients against the Commission.

I suspect that the Commission would rather not take on the additional burden of regulating lawyers but the job has fallen to it in the absence of a better alternative and the clock is ticking in anticipation of the impending IMF visit. Jersey PLC cannot afford to do anything than impress the visit team.

The regulation of lawyers for money laundering purposes was not an idea conceived in Jersey in its ongoing efforts to placate the international community. Far from coming out of a clear blue sky this important development has been anticipated ever since the Financial Action Task Force recommended that countries should implement legislation to bring lawyers within the ambit of anti money laundering legislation.

The Proceeds of Crime Law is also being gold plated with the addition of two new mandatory reporting offences. One applies to employees outside of the financial services sector, the other (the Art 34D offence) applies to employees within the sector, including lawyers. The offence is one of failing to report to the authorities knowledge or suspicion or reasonable grounds to suspect that another person is engaged in money laundering. Unlike existing offences within the Proceeds of Crime Law, the offence can be committed in relation to persons about which information comes to light whether or not they are clients, such as prospective clients, intermediaries, associates and so on. The offence, which has a healthy dose of 'the man on the Clapham omnibus' about it has been developed to deal with people who have a DNA deficiency that causes them not be able to form a suspicion.

The legal profession in the UK has had to comply with very similar rules for the past four years. The imposition of those

rules was met by a chorus of outrage at amongst other things, the erosion of client confidentiality. The reality however is that since the rules were introduced in the UK only three lawyers have been prosecuted for failing to make reports about their clients. Jonathan Duff was one of them. He took cash into his client account and subsequently defended the same client for drug dealing. He was slow off the mark in forming a suspicion. The point is that three prosecutions in four years hardly amounts to a wholesale assault on the UK legal profession. But it is the principle nevertheless that will be exercising the minds of many lawyers in Jersey as they anticipate the imposition of similar rules.

The risk of money laundering can manifest itself across a wide range of legal practice areas including, commercial, matrimonial, criminal, conveyancing and probate. Numerous investigations internationally have revealed the role of lawyers as 'gatekeepers' to the financial services sector on behalf of criminals. There is no doubt that as a profession lawyers are vulnerable to abuse. Yet the touchstone of any state intervention in the lives of citizens including professionals, must be proportionality. Unfortunately, there have been no social scientific studies and there is no empirical data that attests to the success or failure of anti money laundering legislation. Of course, the legislation has proved enormously useful to law enforcement in the detection and prevention of crime (particularly terrorism), but has it justified the cost to civil liberties and the enormous cost of compliance? Such questions begin to have teeth when ancient concepts such as attorney client privilege are eroded and the tension between the duty to clients and the duty to the state comes into sharp focus.

Yet, and this is the problem that all other professionals have with lawyers, why is it that they should benefit from special treatment? Indeed how have they managed to escape the net so far? Why is a lawyer client relationship more sacrosanct than a banker client relationship? At first there seems to be no logical answer to these questions, but there is. It relates to the role that lawyers play in helping to regulate a citizen's relationship with the state. Often a lawyer can represent the last and only hope that a citizen has in resisting prosecution (or persecution) by the state or in seeking redress against the state. This seems melodramatic in a Jersey context, for Jersey is not North Korea, but given the importance of the role fulfilled by lawyers in a functioning democracy should the state be threatening to imprison lawyers for failing to report their clients? Are we throwing the baby out with the bathwater? Is it proportionate? Are these merely academic questions because Jersey doesn't in reality have a choice but to regulate the legal profession? The last of these questions is most certainly true, but it should not preclude ventilation of



the issues. Indeed perhaps the most worrying aspect of the new rules is the absence of debate that they have generated.

Whether the extent of the money laundering vulnerability of lawyers is such as to outweigh the public interest in client attorney privilege is a moot point (no pun intended). One thing however is for certain, lawyers should expect no sympathy from bankers or trustees.

Stephen Platt
Senior Consultant to Jersey Law Firm BakerPlatt

© BakerPlatt 2008