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Introduction

1. Counter-terrorist financing would appear to be the poor cousin of anti-money laundering. It is not uncommon for the two to be lumped together as if they were virtually identical. To take one example among many, the UK Government launched a strategy in 2007 to combat money laundering and the financing of terrorism.¹ The very fact that the two are addressed together is telling, and to be sure, reference is made throughout the document to ‘crime and terrorism’ or ‘criminals and terrorists’. Although it acknowledges that ‘terrorism and organised crime [...] are distinct phenomena with differing drivers’,² the strategy deals with them in broadly the same way by proposing to ‘deter crime and terrorism’, ‘detect the criminal or terrorist abuse of the financial system’ and ‘disrupt criminal and terrorist activity’.³ A reader might be forgiven for wondering whether anti-money laundering and counter-terrorist financing differ in any substantial way at all.
2. Furthermore, it is perhaps also noteworthy that MLROs themselves are responsible for reporting possible terrorist financing as well as money laundering: in this case, the very professional title potentially obfuscates the distinction between money laundering and terrorist financing. (It is perhaps nonetheless fortunate that the acronym has not been replaced by MLTFRO.)
3. Judging from a various statistics, it might likewise be tempting to imagine that counter-terrorist finance is of negligible concern. The Serious Organised Crime

¹ HM Treasury, ‘The Financial Challenge to Crime and Terrorism’, February 2007, 30.

² Ibid., 8.

³ Ibid., 9. Although a sketchy attempt to distinguish the two is made at 23–27, the strategy still firmly aligns the two by insisting that ‘just as action against money laundering frustrates the criminals’ ability to sustain their activities, so action against funds linked to terrorism impedes the operations of the networks involved, and ultimately helps to thwart attacks’ (25).

Agency reported that in 2009 it received 228,834 Suspicious Activity Reports ('SARs'), of which 4,772 (2.09%) were made by solicitors.⁴ By comparison, only 703 SARs were made in relation to terrorist finance, of which a meagre 11 (1.58%) were made by solicitors.⁵ A similar story is told by conviction rates: Home Office statistics show that, since 11 September 2001, there have been only 11 convictions for terrorist finance offences under Part III of the Terrorism Act 2000.⁶ Terrorism in general would appear to have dwindled in the national consciousness, too: a poll in April this year claimed that only 11% of people in the UK currently consider defence, foreign affairs and terrorism as amongst the most important issues currently facing the country.⁷

4. To be sure, the terrorist threat has no doubt been overstated at times by scaremongering politicians and journalists alike at the expense of other unreported atrocities. Nevertheless, counter-terrorist financing remains a genuine concern for MLROs: failing to report suspicious activity could result in a criminal conviction, while conversely making a report in the wrong circumstances could expose a professional to the possibility of being sued by the client—something which is more real than ever in light of the Court of Appeal's recent decision in *Shah v HSBC Private Bank (UK) Ltd.*⁸
5. It is therefore essential that MLROs understand the circumstances in which they should make a terrorist finance SAR. In order to do so, it is necessary to appreciate the significant differences between the anti-money laundering and counter-terrorist financing regimes in the UK, as well as the fundamental distinction between money laundering and terrorist financing themselves. The two are, in fact, far too readily aligned, and in order to fully understand their

⁴ Serious Organised Crime Agency, 'Suspicious Annual Reports Regime Annual Report 2009', 45.

⁵ *Ibid.*, 47.

⁶ Home Office, 'Operation of Police Powers under the Terrorism Act 2000 and Subsequent Legislation: Arrests, Outcomes and Stops & Searches, Great Britain 2008/09', 26 November 2009, 26.

⁷ Ipsos MORI, 'Ipsos MORI Issues Index', April 2010.

⁸ [2010] EWCA Civ 31.

reporting obligations, MLROs must understand both what is unique to terrorist finance and also the ways in which it can intersect with money laundering.

6. This paper therefore begins with a detailed examination of the difference between money laundering and terrorist financing, before proceeding to survey, in the second part, the various international legislative and policy measures which have been adopted to fight terrorist financing, as well as examining in more detail the relevant legislation in the UK. This leads to a consideration, in the third part, of the MLRO's obligation to report suspected terrorist financing. Particular attention is paid to the problem of how to avoid civil liability in relation to the client. The implications of the *Shah* decision have so far primarily been considered in relation to the UK anti-money laundering regime; it is submitted, however, that this case may pose an even greater conundrum for professionals who suspect their client of terrorist involvement.

I. Distinguishing terrorist finance

Funds as means to an end

7. Terry Davis, Secretary General of the Council of Europe, succinctly pointed to one of the central differences between money laundering and terrorist financing when he stated that 'terrorists seldom kill for money, but they always need money to kill.'⁹ Although it might appear obvious, it is worth bearing in mind that money laundering has a distinct purpose from terrorism: the former is ultimately geared towards generating profit by 'cleaning up' the proceeds of crime, whereas, for terrorists, money is merely the means to effect some other change.
8. This is, admittedly, an overly simple distinction. Iain Cameron has pointed out that terrorism and organised crime can overlap considerably since members of a

⁹ Terry Davis, Speech given at the Joint Plenary of MONEYVAL and with the Financial Action Task Force, Strasbourg, 21 February 2007.

terrorist organisation may also be interested in increasing their wealth.¹⁰ Furthermore, the supposedly terrorist purpose of an organisation might in fact conceal a profit-making agenda. Terrorists and organised criminals may also have a ‘symbiotic relationship’, especially in dysfunctional states where authorities exercise little control.¹¹

9. For this reason, it is naive to presume that counter-terrorist financing measures are a sure-fire way of combating terrorism. A tough money-laundering regime may certainly lead to a reduction in the various forms of delinquency which generate profit for organised criminals, since there is little point in drugs-trafficking if the profits cannot be enjoyed safely; the same is not necessarily true in reverse for terrorism, though, since terrorists can always find an alternative means of funding their activities. Michael Kilchling, for one, has stressed that the preventative component of counter-terrorist financing regimes may be ‘largely ineffective where terrorist organisations are involved’ since ‘removing financial means or specific finance channels cannot remove the original danger’.¹²

Legitimacy of funds

10. This leads to a further dilemma, namely that the principle of ‘dirty’ money which is central to the idea of anti-money laundering does not necessarily apply in the case of counter-terrorist finance. This is because terrorism need not be funded by criminal activity: on the contrary, it may be financed by perfectly legitimate earnings. It is believed, for instance, that the attacks of 11 September 2001 were funded by lawful funds transferred to the US by means of wire transfers, physical transportation of cash and use of debit and credit cards to

¹⁰ Iain Cameron, ‘Memorandum’, House of Lords European Union Committee Nineteenth Report on Money Laundering and the Financing of Terrorism, HL Paper 132-II, 22 July 2009.

¹¹ Ibid.

¹² Michael Kilchling, ‘Financial Counterterrorism Initiatives in Europe’, paper given at the International Conference on Legal Instruments in the Fight against International Terrorism (Brussels, 7–8 May 2002), 15.

access overseas accounts.¹³ The money used to fund the London transport bombings on 7 July 2005 would by all accounts have been even harder to identify as terrorist funds, since, according the official report, Mohammad Sidique Khan funded it himself using his earnings as a teaching assistant, supplemented by credit cards and a loan:

The group appears to have raised the necessary cash by methods that would be extremely difficult to identify as related to terrorism or other serious criminality. Khan appears to have provided most of the funding. Having been in full-time employment for 3 years since University, he had a reasonable credit rating, multiple bank accounts (each with just a small sum deposited for a protracted period), credit cards and a £10,000 personal loan. He had 2 periods of intensive activity – firstly in October 2004 and then from March 2005 onwards. He defaulted on his personal loan repayments and was overdrawn on his accounts. Jermaine Lindsay made a number of purchases with cheques (which subsequently bounced) in the weeks before 7 July. Bank investigators visited his house on the day after the bombings.¹⁴

Low cost

11. This problem is all the more serious given that terrorist acts are relatively cheap to carry out. The US Government estimated that the cost of executing the attacks on 11 September 2001 cost between \$400,000 and \$500,000.¹⁵ At the other end of the spectrum, insider information suggests that a Hamas suicide bombing costs in the region of \$1,500.¹⁶ The estimated cost of recent high-

¹³ 'Final Report of the National Commission on Terrorist Attacks Upon the United States', 22 July 2004.

¹⁴ 'Report of the Official Account of the Bombings in London on 7th July 2005', 23.

¹⁵ 'Final Report of the National Commission on Terrorist Attacks Upon the United States', 22 July 2004, 172.

¹⁶ 'Follow the Money', *The Economist*, 30 May 2002.

profile attacks are also remarkably slight: £8,000 for the London bombings on 7 July 2005, \$10,000 for the Madrid train bombings on 11 March 2004 and \$30,000 for the Jakarta JW Marriot Hotel bombing on 5 August 2003.¹⁷ It is therefore not an exaggeration to liken terrorist funds to a needle in the proverbial haystack that is the international banking system.

Legitimacy of goals

12. Perhaps a more fundamental dilemma, however, is the question of what constitutes terrorism in the first place. The decision as to whether a particular organisation is terrorist cannot but be political: as Richard Alexander points out, the Counsellor for Security at the Turkish Embassy might well state that funds transferred to Turkey by members of the Kurdish community might well give reasonable, or even strong, grounds for suspicion that they are to be used for terrorist purposes, but a jury might well disagree and ‘much may ultimately depend on their political sympathies.’¹⁸ Another particularly striking example would be the Palestinian Liberation Organization, which the US Congress determined to be a terrorist organisation between 1987 and 1991.¹⁹ In 1990, however, the PLO was diplomatically recognised by over 100 states and enjoyed observer status at the UN.²⁰ Although law can never be separated from politics, counter-terrorist financing is particularly politicised.
13. Having highlighted some of the crucial differences between terrorist financing and money laundering, it is nonetheless worth bearing in mind that, in practice, the two might be closely linked. The possible symbiotic relationship between the two has already been addressed above. However, it is possible for there to be an even greater degree of overlap. During the Troubles in Northern Ireland,

¹⁷ Financial Action Task Force, ‘Terrorist Financing’, 29 February 2008, 7. This is based on data from the UK Home Office and the UN Monitoring Team.

¹⁸ Richard Alexander, ‘Money Laundering and Terrorist Financing: Time for a Combined Offence’, *Company Lawyer* 30/7 (2009), 200–4.

¹⁹ 22 USC Section 5201.

²⁰ Deon Geldenhuys, *Isolated States: A Comparative Analysis* (Cambridge: Cambridge University Press, 1990) 155.

for instance, there was a close connection between sectarian so-called ‘freedom fighters’ and serious organised crime, particularly in the form of protection rackets. Although the difference in intention might be obvious to a fellow-conspirator, it might be considerably less so for a professional intermediary such as a bank or a solicitor. A further complication arises with the fact that, even if the intention behind the attack were terrorist in nature, the handling of funds might also be caught if there were a suspicion that their origin was criminal. The relationship between terrorist financing and money laundering is therefore of considerable practical significance.

II. Legislative measures

International measures

14. Before considering in detail the counter-terrorist legislation in the UK, it is helpful to have an overview of the wider international measures which have been taken, not only because these have informed local law, or even been adopted wholesale by the UK, but because the fight against terrorist finance is by its very nature international in scope.
15. The United Nations has had a prominent role in the international fight against terrorism and terrorist financing ever since the Convention for the Suppression of the Financing of Terrorism in 1999 created a framework for tackling terrorist finance.²¹ In broad terms, the Convention creates an offence as follows:

Any person commits an offence within the meaning of this Convention if that person by any means, directly or indirectly, unlawfully and wilfully, provides or collects funds with the intention that they should be used or in the knowledge that they are to be used, in full or in part, in order to carry out:

²¹ United Nations, ‘International Convention for the Suppression of the Financing of Terrorism’, 1999.

(a) An act which constitutes an offence within the scope of and as defined in one of the treaties listed in the annex; or

(b) Any other act intended to cause death or serious bodily injury to a civilian, or to any other person not taking an active part in the hostilities in a situation of armed conflict, when the purpose of such act, by its nature or context, is to intimidate a population, or to compel a government or an international organization to do or to abstain from doing any act.²²

16. The Convention creates further related offences such as attempt to commit the main offence, participating as an accomplice in the main offence, organising or directing others to commit the main offence and so on.²³ It further requires signatory states to cooperate in the prevention, investigation and punishment of terrorist financing.²⁴ Provision is also made for freezing and seizure of terrorist funds.²⁵
17. The UN has also adopted a number of significant Resolutions. In the same year as the Convention, the Security Council adopted a Resolution required the freezing of all assets belonging to the Taliban.²⁶ The Resolution also created a committee responsible for maintaining a list of individuals and organisations who are subject to sanctions. At its most recent update, the list contained 137 individuals associated with the Taliban, 256 individuals associated with Al-Qaida and 103 entities and other groups and undertakings associated with Al-Qaida.²⁷ A further Resolution adopted in the immediate aftermath of the attacks on 11 September 2001 required all countries to implement a raft of measures

²² Ibid., Article 2.1.

²³ Ibid., Articles 2.4 and 2.5.

²⁴ Ibid., Article 18.

²⁵ Ibid., Article 8.

²⁶ United Nations Security Council, 'Resolution 1267(1999)', 15 October 1999.

²⁷ <http://www.un.org/sc/committees/1267/consolidatedlist.htm>, accessed 28 April 2010.

intended to disrupt terrorist financing, including criminalising various acts and ensuring international cooperation and exchange of information.²⁸

18. In October of the same year, the Financial Action Task Force ('FATF') extended its remit beyond money laundering by publishing its nine special recommendations for countering terrorist financing.²⁹ These consist of ratifying and implementing UN instruments, criminalising the terrorism financing and associated money laundering, freezing and confiscating terrorist assets, reporting suspicious transactions related to terrorism and specific recommendations relating to international cooperation, alternative remittance, wire transfers, non-profit organisations and cash couriers.
19. The Council of the European Union has passed numerous legislative instruments to implement the UN Security Council lists,³⁰ as well as two Council Common Positions creating autonomous EU terrorist lists.³¹ The Council has also implemented a number of legal instruments to facilitate intelligence sharing between the private sector, financial intelligence units, other national authorities, Europol and Eurojust.³²
20. There is, to date, a considerable body of EC legislation which seeks to implement the FATF special recommendations on terrorist finance. The principle instruments are as follows:

²⁸ United Nations Security Council, 'Resolution 1373(2001)', 28 September 2001

²⁹ FATF, 'FATF IX Special Recommendations', 30 October 2001, amended 22 October 2004.

³⁰ Council Regulation No. 881/2002 of 27 May 2002, which has been subject to numerous subsequent amendments.

³¹ Council Common Positions of 27 December 2001 on Combating Terrorism (2001/930/CFSP) and on the Application of Specific Measures to Combat Terrorism (2001/931/CFSP). The latter has most recently been updated by Council Common Position of 26 January 2009 (2009/67/CFSP).

³² Council Decision of 20 September 2005 on the Exchange of Information and Cooperation Concerning Terrorist Offences (2005/671/JHA) and Council Framework Decision of 18 December 2006 on simplifying the exchange of information and intelligence between law enforcement authorities of the Member States of the European Union (2006/960/JHA).

- a. The Third Anti-Money Laundering Directive, which covers most of the 40 FATF Recommendations and some of the 9 FATF Special Recommendations.³³
 - b. The Payment Services Directive, implementing FATF Special Recommendation VI on alternative remittance.³⁴
 - c. A Regulation requiring the freezing funds of suspected terrorists, which together with Regulation (EC) 881/2002 implementing Special Recommendation III on freezing terrorist assets.³⁵
 - d. A Regulation on controls of cash entering or leaving the Community, implementing Special Recommendation IX on cash couriers.³⁶
 - e. A Regulation on information on the payer accompanying transfers of funds, implementing Special Recommendation VII on wire transfers.³⁷
21. The legality of the mechanisms whereby blacklists are incorporated into European law were subject to judicial challenge in the joined cases of *Kadi* and *Al Barakaat*.³⁸ It is beyond the scope of this paper to consider the full significance of this authority, which has major implications for EC constitutional law.³⁹ In short, the ECJ determined that freezing an individual's assets without informing them of the reason for the decision breached their right to a fair hearing and an effective judicial remedy. Moreover, the court held that the freezing of funds was an unjustified restriction given that there were no

³³ Directive 2005/60/EC of 26 October 2005.

³⁴ Directive 2007/64/EC of 13 November 2007.

³⁵ Council Regulation No. 2580/2001 of 27 December 2001.

³⁶ Council Regulation No. 1889/2005 of 26 October 2005.

³⁷ Council Regulation No. 1781/2006 of 15 November 2006.

³⁸ *Kadi v Council of the European Union* (C-402/05 P) and *Al Barakaat International Foundation v Council of the European Union* (C-415/05 P) [2009] 1 AC 1225.

³⁹ For a detailed discussion of these issues, see Takis Tridimas, 'Terrorism and the ECJ: Empowerment and Democracy in the EC Legal Order', *European Law Review* 34/1 (2009), 103–26.

procedures available by which blacklisted individuals or entities could challenge the sanctions.

22. The Council of Europe, for their part, opened the Warsaw Convention on Money Laundering and Terrorist Financing for signature in 2005. This attempts to create an international agreement on the exchange of bank account data.⁴⁰ This has only been of limited success, however: as of 30 April 2010, only 12 states were signatories to the Convention and a number of prominent states were still not even party to the Convention, including the United Kingdom, Germany and France.⁴¹

UK

23. Whereas much counter-terrorist measures were enacted in the wake of 11 September 2001, the UK is more familiar with such legislation as a result of the conflict in Northern Ireland. From the 1970s onwards, a number of temporary provisions were enacted, although it was not until the Terrorism Act 2000 ('TA') that a more permanent solution was found. This was amended in part by the Anti-Terrorism, Crime and Security Act 2001 ('ACSA 2001') but it is worth remembering, for our purposes, that the provisions in TA which deal with terrorist property (Part III) existed in the original version.
24. A considerable amount of legislation has been subsequently enacted to deal with terrorism, including the Prevention of Terrorism Act 2005, the Terrorism Act 2006, the Terrorism (Northern Ireland) Act 2006 and the Counter-Terrorism Act 2008 ('CTA 2008'). It is only the last of these which tackles terrorist finance, however, again largely through amendments to TA.
25. In addition, various statutory instruments have been enacted in order to give effect to the UN blacklisting provisions. In a development which parallels the

⁴⁰ Council of Europe Convention on Laundering, Search, Seizure and Confiscation of the Proceeds from Crime and on the Financing of Terrorism, Warsaw, 16 May 2005.

⁴¹ <http://conventions.coe.int/Treaty/Commun/ListeTableauCourt.asp?MA=50&CM=16&CL=ENG>, accessed 30 April 2010.

ECJ's challenge to the UN blacklisting in the *Kadi* case discussed above, the UK Supreme Court recently found in *A v HM Treasury* that a number of these orders were ultra vires in that they interfered with basic rights more than was allowed for by the United Nations Act 1946.⁴² Furthermore, it was held that the Treasury had exceeded its powers by introducing a test of 'reasonable suspicion' into the orders, where none was to be found in the original UN Resolutions.⁴³ In his leading judgment, Lord Hope stated:

SCR 1373(2001) is not phrased in terms of reasonable suspicion. It refers instead to persons "who commit, or attempt to commit, terrorist acts". The preamble refers to "acts of terrorism". The standard of proof is not addressed. The question how persons falling within the ambit of the decision are to be identified is left to the member states. [...] It was not necessary to introduce the reasonable suspicion test in order to reproduce what the SCR requires. It may well have been expedient to do so, to ease the process of identifying those who should be restricted in their access to funds or economic resources. But widening the scope of the Order in this way was not just a drafting exercise. It was bound to have a very real impact on the people that were exposed to the restrictions as a result of it. The facts of these cases show how devastating their imposition can be on the restricted persons and their families. [...] Is it acceptable that the exercise of judgment in matters of this kind should be left exclusively, without any form of Parliamentary scrutiny, to the executive?⁴⁴

⁴² *A v HM Treasury* [2010] UKSC 2. The Orders to which the case referred were the Terrorism (United Nations Measures) Order 2006 SI 2006/2657 and the Al-Qaeda and Taliban (United Nations Measures) Order 2006 SI 2006/2952.

⁴³ The Terrorism (United Nations Measures) Order 2006 gave effect to SCR 1373 (fn. 28 above) and SCR 1452, 20 December 2002. The Al-Qaeda and Taliban (United Nations Measures) Order 2006 gave effect to a series of Resolutions made pursuant to SCR 1267 (fn. 26 above) including SCR 1452.

⁴⁴ *A v HM Treasury*, paragraph 58.

26. Various enactments have also put into force the European legislation cited above, most notably the Money Laundering Regulations 2007, which implement the Anti-Money Laundering Directive.⁴⁵ Although the focus of this paper is the reporting duties under TA, it is important to bear in mind that the Regulations also impose a number of significant obligations concerning customer due diligence, record-keeping, procedures, training, supervision and registration. They apply to a wide range of bodies, including credit and financial institutions, auditors, accountants, legal professionals, estate agents, dealers in high-value goods and casinos. Customer due diligence must be carried out when there is a suspicion of money laundering or terrorist financing and a higher level of due diligence is required when there is heightened risk of money laundering or terrorist financing.⁴⁶
27. In broad terms, the UK's compliance with the FATF special recommendations has generally been positive. In mid-2007, FATF found that the UK complied with five of the nine special recommendations, was largely compliant with three (VI, VIII and IX) and only partially compliant with one, namely special recommendation VI on wire transfers.⁴⁷ A follow-up report in October 2009 found that the UK's implementation of the EU Wire Transfer Regulations⁴⁸ by means of the Transfer of Funds (Information on the Payer) Regulations 2007⁴⁹ had remedied this situation.⁵⁰
28. As noted above, though, the Warsaw Convention still remains to be signed. In a recent report, the House of Lords European Union Committee strongly criticised the Government for failing to ratify the Convention, saying that it 'sends out a

⁴⁵ SI 2007/2157.

⁴⁶ Regulations 7 and 14 respectively.

⁴⁷ FATF, 'Summary of the Third Mutual Evaluation Report: Anti-Money Laundering and Combating the Financing of Terrorism: United Kingdom of Great Britain and Northern Ireland', 29 June 2007, 15.

⁴⁸ EC Regulation 1781/2006/EC.

⁴⁹ SI 2007/3298.

⁵⁰ FATF, 'Mutual Evaluation Fourth Follow-Up Report: Anti-Money Laundering and Combating the Financing of Terrorism: United Kingdom', 16 October 2009,

negative message about current United Kingdom commitment to the prevention and control of money laundering and the financing of terrorism'.⁵¹ The Government's response has been to state that Article 47 of the Convention would require the Serious Organised Crime Agency ('SOCA') to postpone suspicious transactions at the request of another member State's Financial Intelligence Unit, but that SOCA has no such domestic power at present.⁵² The Convention remains unratified at present.

Offences under TA

29. As already discussed, the primary counter-terrorist financing offences are to be found in Part III of TA. The Act also provides, as amended by CTA 2008, mechanisms for forfeiture of terrorist property. In addition, ACSA 2001 provides the means for and forfeiture of terrorist cash. The remainder of this paper, however, will focus on the main offences in TA.
30. The Act defines **terrorism** broadly in s. 1 as the use or threat of action where:
 - a. that action involves serious violence against a person or damage to property, endangers a person's life, other than that of the person committing the action, creates a serious risk to the health or safety of the public or a section of the public, or is designed seriously to interfere with or seriously to disrupt an electronic system.
 - b. the use or threat is designed to influence the government or an international governmental organisation or to intimidate the public or a section of the public, and
 - c. the use or threat is made for the purpose of advancing a political, religious, racial or ideological cause.

⁵¹ House of Lords European Union Committee Nineteenth Report on Money Laundering and the Financing of Terrorism, HL Paper 132-I, 22 July 2009, para. 48.

⁵² 'The Government Reply to the Nineteenth Report from the House of Lords European Union Committee Session 2008-09 Paper 132: Money Laundering and the Financing of Terrorism', October 2009, 3.

31. **Terrorist property** is then defined in s. 14 as money or other property which is likely to be used for the purposes of terrorism (including any resources of a proscribed organisation), proceeds of the commission of acts of terrorism, and proceeds of acts carried out for the purposes of terrorism.
32. The first offence is that created by s. 15 TA, namely the offence of **funding-raising**. This is committed when a person receives or invites another to receive money or other property intending or having reasonable cause to suspect that it will be used for the purposes of terrorism. It also applies when a person provides money or other property knowing or having reasonable cause to suspect that it will be used for the purposes of terrorism.
33. The second offence, created by s. 16, is that of **use and possession**. This is committed when a person uses money or other property for the purposes of terrorism, or possesses money or other property and intends that it should be used, or has reasonable cause to suspect that it may be used, for the purposes of terrorism.
34. The offence of a **funding arrangement** under s. 17 is committed when a person enters into or becomes concerned in an arrangement as a result of which money or other property is made available or is to be made available to another, and he knows or has reasonable cause to suspect that it will or may be used for the purposes of terrorism.
35. Confusingly, the Act also has its own **money laundering** offence under s. 18. This is committed when a person enters into or becomes concerned in an arrangement which facilitates the retention or control by or on behalf of another person of terrorist property:
 - a. by concealment,
 - b. by removal from the jurisdiction,
 - c. by transfer to nominees, or
 - d. in any other way.

36. Section 19 puts an **obligation to disclose** upon someone who believes that another person has committed any of the above offences and bases his belief or suspicion on information which comes to his attention as a result of his trade, business, profession or employment. Such a person commits an offence if he does not disclose his suspicion, or the information on which it is based, to a constable as soon as is reasonably practicable. This provision does not, however, apply if the information came to the person in the course of a business in the regulated sector, which includes the legal profession.
37. The offence of **failing to disclose within the regulated sector** is somewhat different. Under s. 21A, the offence is committed if a person:
- a. knows or suspects, or has reasonable grounds for knowing or suspecting, that another person has committed or attempted to commit an offence under any of sections 15 to 18;
 - b. the information or other matter on which his knowledge or suspicion is based, or which gives reasonable grounds for such knowledge or suspicion, came to him in the course of a business in the regulated sector; and
 - c. he does not disclose the information or other matter to a constable or a nominated officer as soon as is practicable after it comes to him.
38. Crucially, however, the offence is not committed if the person is a professional legal adviser and the information or other matter came to him in privileged circumstances. These are defined as circumstances in which information is communicated:
- a. by (or by a representative of) a client of his in connection with the giving by the adviser of legal advice to the client,
 - b. by (or by a representative of) a person seeking legal advice from the adviser, or

- c. by a person in connection with legal proceedings or contemplated legal proceedings.
39. There are clear parallels between these provisions and the money laundering provision in the Proceeds of Crime Act 2002 ('POCA'): specifically, s. 18 TA overlaps considerably with the money laundering offences in ss. 327–239 POCA. The most notable difference between the two Acts is that TA repeatedly requires reasonable cause to suspect, whereas an offence is committed under POCA if there is merely a suspicion, whether or not reasonable. (Note, however, that reasonable suspicion is also the threshold for the offences of failing to disclose in the regulated sector and by nominated officers under ss. 330–332 POCA.) Similarly, s. 17 TA on arrangements overlaps with s. 328 POCA. The overlap here is only partial, however, since TA has the added provision of making the property available.

III. Reporting obligations: the dilemma for professionals

40. The above provisions clearly put MLROs under a considerable burden. However, in making a report, professionals open themselves up to the possibility of being sued by their clients if they make a disclosure when they should not have done, and which results in a loss to the client. Clearly, then, it is essential for professionals to understand the circumstances in which they should make a disclosure.

Terrorist property

41. The first question to address is that of what might constitute terrorist property. Although there is little case law on the above offences at present, guidance can be found from a line of cases which address the question, in relation to money laundering under POCA, of what constitutes 'criminal property'. This is defined in s. 340 POCA as property which constitutes a person's benefit from criminal conduct or represents such a benefit (in whole or part and whether directly or indirectly), and the alleged offender knows or suspects that it constitutes or

represents such a benefit. Criminal conduct in turn is defined as conduct which constitutes an offence in any part of the United Kingdom, or would constitute an offence in any part of the United Kingdom if it occurred there.

42. In the case of *W*,⁵³ the Court of Appeal held that funds were not criminal property within the meaning of s. 340 POCA, since the prosecution had produced no evidence of specific criminal conduct or even a particular type of criminal conduct on the part of the defendant. In the later case of *Anwoir*, however, the Court of Appeal held there were two ways in which it could be proved by the Crown that property derived from crime: 1) by showing that the property derived from conduct of a specific kind and that conduct of such a kind was unlawful; 2) by evidence of the circumstances in which the property was handled which were such as to give rise to the irresistible inference that it could only be derived from crime.⁵⁴ This was affirmed in *Ahmad (Mohammad) v HM Advocate*, where it was held that there was nothing in the language of s. 340 which required that it was necessary to prove that property derived from a particular offence.⁵⁵ In this case, the court went even further in stating that there was no obligation even to provide evidence of money laundering, but that only suspicion that money laundering taken place had to be shown.

Avoiding civil liability

43. As mentioned above, the problem of civil liability has recently been addressed by the courts in the recent case of *Shah*. In this case, Mr Shah brought an action against HSBC to recover financial losses he suffered as a result of the delay in processing transactions caused by the bank making a number of SARs. Mr Shah claimed that HSBC has breached its contractual obligation to carry out his instructions; in their defence, HSBC stated that they would have committed an offence under POCA if they had carried out these instructions. HSBC applied

⁵³ [2008] EWCA Crim 2.

⁵⁴ [2008] EWCA Crim 1354.

⁵⁵ [2009] HCJAC 60.

for summary judgment, producing a witness statement from their solicitor stating that they had suspected money laundering. The application succeeded, since Hamblen J held that there was no real prospect of success for Mr Shah. An appeal by Mr Shah was allowed by Longmore LJ on the basis that it was insufficient to produce a witness statement declaring HSBC's suspicion, but that HSBC should be required to adduce evidence at trial as to their suspicion.

44. Because *Shah* was only an appeal on summary judgment, it may not be the *carte blanche* to litigious clients that some commentators have suggested. When the case goes to trial, if HSBC can show that they had a genuine suspicion then they would have committed an offence had they not made a disclosure and this will serve as a sufficient defence to the client's civil claim. However, matters are somewhat different when considering a disclosure under TA. In these circumstances, a MLRO would need to provide sufficient evidence to show that they had reasonable cause to suspect terrorist financing of one kind or another, as would indeed be the case for an offence committed under s. 330–332 POCA, which of course apply to MLROs.
45. It is not inconceivable that a MLRO might suspect terrorist financing, but that suspicion might be based on only very sketchy details. In considering whether to make a disclosure, a MLRO could therefore be in an unenviable position: on the one hand, if a disclosure is made and the client subsequently sued the MLRO's institution, the MLRO might not have sufficient evidence to show that there was reasonable grounds to suspect terrorist financing; on the other hand, if no disclosure is made and a subsequent criminal trial takes place, the MLRO might be found to have had reasonable grounds for suspicion, especially if a jury were susceptible to alarmist media reporting and therefore inclined to be tough on terrorist collaborators.⁵⁶

⁵⁶ Actual or apparent bias in a juror of course gives grounds for discharge, *R v Gough* [1993] AC 646, *Re medicaments and Related Classes of Goods (No. 2)* [2001] 1 WLR 700, but a solicitor would hardly wish to have reached this stage in proceedings.

What would constitute reasonable suspicion?

46. The current test for suspicion in relation to POCA, applied in *Shah*, was set out in *K Ltd*,⁵⁷ itself applying a test established in the criminal case of *Da Silva*.⁵⁸ This defines a suspicion as thinking that there is a possibility which is more than fanciful that the relevant facts exist.
47. The question remains of what, under TA, would constitute a reasonable suspicion. On this matter there is no case law at present. One practitioner text proposes, with reference to the corresponding requirement for reasonable suspicion under s. 330 POCA, that the *Baden* principle might be applied.⁵⁹ This would define reasonable suspicion as wilful blindness, i.e. turning a blind eye to the obvious; negligence, i.e. wilfully and recklessly failing to make the adequate enquiries that an honest person would be expected to make in the circumstances; or failing to assess adequately the facts and information that are either presented or available and that would put an honest person on enquiry.⁶⁰ However, this test has been problematised in subsequent case law.⁶¹
48. Further guidance may be sought in a number of documents which have been produced in order to further clarify the circumstances in which a disclosure should be made. Most important of these is the Joint Money Laundering Steering Group's guidance.⁶² Such document needs no introduction in present company. In addition, HM Treasury has recently issued a statement, based upon a statement issued by FATF, pointing to certain overseas jurisdictions which

⁵⁷ *K Ltd v National Westminster Bank plc (Revenue and Customs Commissioners and another intervening)* [2006] EWCA Civ 1039.

⁵⁸ *R v Da Silva* [2006] 4 All ER 900.

⁵⁹ Daren Allen (ed.), *Butterworths Money Laundering Law*, para. 1247.

⁶⁰ *Baden Delvaux and Lecuit v Société Générale pour Favoriser le Développement du Commerce et de l'Industrie en France SA* [1987] BCLC 161.

⁶¹ See for example *Bank of Credit and Commerce International (Overseas) Ltd v Akindele* [2001] Ch 437.

⁶² Joint Money Laundering Steering Group, 'Prevention of money laundering/ combating terrorist financing', 7 November 2007.

have deficiencies in their anti-money laundering framework.⁶³ Iran is singled out for its ongoing and substantial deficiencies, but other jurisdictions which are flagged include Pakistan, Uzbekistan, Turkmenistan and São Tomé and Príncipe, and Azerbaijan. A further statement has subsequently been released by FATF earlier this year which highlights Angola, the Democratic People's Republic of Korea, Ecuador and Ethiopia as other problematic jurisdictions.⁶⁴ It is to be hoped that, in a borderline situation, a MLRO could rely on following the guidance present in such documents and later show that s/he acted appropriately.

Conclusion

49. Counter-terrorist financing may be the poor relative of anti-money laundering, but the current legislative framework in the UK poses a significant dilemma for professionals who are responsible for making SARs. We therefore ignore the distinctive regime for counter-terrorist financing at our peril. Although the recent case of *Shah* concerned money laundering, there is no reason to believe at present that it would not encourage increasingly litigious clients to take action against a professional who made a terrorist SAR. It can only be prudent for MLROs to be aware of this threat, and to take the necessary measures to ensure that, should such a case come to trial, there would be sufficient evidence of their reasonable cause for suspicion so as to defend a claim.

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⁶³ HM Treasury, 'Statement on Money Laundering Controls in Overseas Jurisdictions', 10 November 2009. The original statement by FATF was made on 16 October 2009.

⁶⁴ FATF, 'Public Statement', 18 February 2010.