The Challenges of POCA

Private Rights vs Public Benefit

Introduction

I begin my presentation today with a quote from Dr. Henley Morgan in an article he wrote for the Jamaica Observer dated May 21, 2008

‘Where crime pays, crime stays’.

He went on to say in that article:

‘The conviction rate for serious crime is in the region of 35 per cent, ranking Jamaica among the poorest performers in apprehending and putting criminals behind bars. We tolerate lawlessness and disorderly conduct as a normal way of life. When a crime boss dies, he is recognised with an extravagant funeral and more “bling” than would be accorded the most honourable man. But there is an even more sinister reason why Jamaica is the best place to be a criminal. In Jamaica crime pays and it pays big. In fact, it yields bigger pay days with less sweat and fewer risks than any other job or form of investment.’

Implied in his statement is the notion that if we ensure that crime does not pay, criminals will be put out of business, and the crime rate will be reduced. It is this school of thought which was the driving force behind proceeds of crime legislation worldwide. Living in a global society with the development of technology, commerce, banking and financial services over the years, the methods by which criminals attempt to conceal those proceeds have become more and more sophisticated. Therefore, although laws previously existed in relation to the confiscation or forfeiture of the proceeds of crime, it has been
recognized that the authorities require significantly wider powers in order to
locate and confiscate those proceeds. Hence POCA and the Regulations made
thereunder.

The Jamaican Proceeds of Crime Act 2007 (hereinafter referred to as 'POCA')
was gazetted on March 2, 2007 and came into effect on May 30, 2007,
(hereinafter referred to as ‘the appointed day’).

Subsidiary legislation under POCA has also been enacted. The Proceeds of
Crime Regulations, 2007 (‘the POCA Regulations’) The Proceeds of Crime
(Money Laundering Prevention) Regulations 2007 (‘the POCA MLP Regulations’)
Both pieces of subsidiary legislation were gazetted on March 29, 2007.

‘It is a notorious fact that professional and habitual criminals frequently take
steps to conceal their profits from crime. Effective but fair powers of confiscating
the proceeds of crime are therefore essential.’¹

Right thinking members of society are unlikely to dispute that it is appropriate
and morally correct to deprive individuals of their ill gotten gains, which would
have been obtained at the expense of law abiding members of society (through
petty crimes, murder, extortion, drug dealing), and to return those proceeds to
the public purse where they could be used for the public good, such as
providing further resources to fight crime. However, those same right thinking
members of society are also concerned about the cost of proceeds of crime
legislation in terms of the actual or potential invasion of personal rights and
liberties. Some persons will take the view that the law has already gone too far
and that far too many fundamental rights of citizens have been whittled away.
Others will state that the law has not yet gone far enough to make a significant

¹ R v Rezvi [2002] 1 All ER 801, per Lord Steyn at page 808f
impact on criminality. These and similar issues continue to be the subject of fierce debate and this presentation addresses some of the issues which represent the tug of war between the public interest and private rights.

So to summarise the benefit to the public of such legislation is:

- To deter crime
- To purify ill gotten gains
- The production of revenue for the state

So what about the cost to private interests. POCA has many aspects to it and each has sparked a significant amount of debate. In today’s presentation I propose to deal with a few of the major concerns which have been expressed about POCA’s inroads into private rights:

- The presumption of innocence and reverse burden of proof
- POCA and Offences under Other Statutes
- Money Laundering and the Challenge to LPP

The Presumption of Innocence and Reverse Burden of Proof

Does POCA create a reverse burden of proof? The answer to that is yes, in some instances it does. Take for example the section 8 of POCA. Commonly referred to as the section 8 assumptions, this new scheme provides that where, in criminal forfeiture proceedings, the Court has decided that the defendant has a criminal lifestyle, the Court will make the assumptions listed in section 8(2) for
the purpose of (a) determining whether the defendant has benefited from his
general criminal conduct and (b) identifying his benefit from that conduct. 2

Section 8(2) states that,

‘The assumptions referred to in subsection (1) are that-

(a) any property transferred to the defendant at any time after the relevant
day was obtained by him-
   (i) as a result of his general criminal conduct; and
   (ii) at the earliest time from which the defendant appears to have held it;

(b) any property held by the defendant at any time after the date of
    conviction was obtained by him-
   (i) as a result of his general criminal conduct; and
   (ii) at the earliest time from which the defendant appears to have held it;

(c) any expenditure incurred by the defendant at any time after the
    relevant day was met from property obtained by him as a result of his
general criminal conduct; and

(d) for the purposes of valuing any property obtained, or assumed to have been obtained, by the defendant, he obtained the property free of any other interests in it.’

The practical effect of the assumptions in section 8 of POCA are that, where a person is determined to have a ‘criminal lifestyle’, the prosecution may seek a

---

2 Section 8(1) POCA
forfeiture order in relation to the defendant’s assets acquired over the ten year period before the start of proceedings (circumscribed by the appointed day of May 30, 2007) and any time after conviction, without having the burden of proving that they are linked to the crime giving rise to the conviction, or indeed any crime at all. The legal burden of proof shifts to the defendant with respect to the assumptions, and he has to show that the assumptions are false otherwise a forfeiture order may be made against him.

In the English Court of Appeal case of Steed v The Crown[^1] involved the issue of tax evasion by the defendant who argued that the assumptions were incorrect and that there was a serious risk of injustice as the defendant had shown that a substantial proportion of his activities were legitimate and that his criminality was not the activities in themselves but the fact that he did not pay tax on those activities. The Court of Appeal noted that the Crown Court judge had found that the defendant had also been involved in other criminal activities and that it was more likely than not that he was involved in criminal conduct over and above the count to which he pleaded guilty and that these findings were fatal to the defendant’s argument. They showed that the defendant was unable to establish (on the balance of probabilities) the extent to which his assets and expenditure were legitimate or illegitimate, and therefore the consequence was that he could not show in relation to given assets and items of expenditure that they were not from the proceeds of general criminal conduct. The Court of Appeal further stated that the burden was on the defendant to show the source of the assets and expenditure and what proportion of his business was legitimate. Since he was unable to do so, he could not rebut the assumptions, and there was no foundation for any contention of a serious risk of injustice by the fact that to some unknown extent, some of his activities were legitimate.

[^1]: [2011] EWCA Crim 75
The defendant must account for his benefit and his available assets. In the case of Walbrook and Glasgow\(^4\), the dicta was established that a defendant must provide, “clear and cogent evidence” to disprove assumptions in confiscation cases, and that where their evidence stood alone, unsupported but for their own word, it was to be accorded minimal credibility.

So how do the assumptions stack up against section 20(5) of the Constitution? In the system of jurisprudence to which Jamaica ascribes he who asserts must prove...or does he?

We may recall that there is a savings provision in section 20(5) which states,

> ‘Provided that nothing contained in or done under the authority of any law shall be held to be inconsistent with or in contravention of this subsection to the extent that the law in question imposes upon any person charged as aforesaid the burden of proving particular facts.’

In fact, the reverse onus of proof provisions are not unheard of in the Jamaican context. Indeed, sections 7A(2) and 22(7) of the Dangerous Drugs Act are examples of such provisions. Section 7A(2) speaking to where ganja is packaged in a suitable manner for exportation or found in any prescribed port or place that it shall be prima facie evidence of steps being taken to export the ganja. Secion 22(7) speaks to a situation where a person is found in possession of more than a certain quantity of a dangerous drug that it is deemed that it for the purposes of dealing unless the contrary is proved.

The constitutionality of these provisions, in light of section 20(5) of the Constitutions was considered by the Court of Appeal in R v Jonathan Outar\(^4\)

\(^4\) [1994] 15 Cr App R (S) 783
and Rupert Senior. It was determined that section 7A(2) and 22(7)(e) of the Dangerous Drugs Act did not offend section 20(5) of the Constitution. The Court stated that the proviso,

‘[the proviso] is an example of the foresight of those who framed the Constitution. The principle could have been developed by the courts as being a necessary implication if individual rights ought to be reconciled with the public interest, but it was made explicit in this proviso so as to put the matter beyond debate.’

And it

‘illustrates the importance of necessary implications in constitutional law to ensure the balance between fundamental freedoms and order in a well governed society.’

The issue of the presumption of innocence and the burden of proof has been considered on a number of occasions by courts at the highest level. In McIntosh v Lord Advocate and another, the Privy Council, in a devolution appeal from Scotland, upheld the Proceeds of Crime (Scotland) Act 1995 and the Human Rights Act 1998, many of the arguments in that case related to the shifting of the burden of proof to the person whose assets were being confiscated. Lord Hope of Craighead stated:

‘The essence of drug trafficking is dealing or trading in drugs. People engage in this activity to make money, and it is notorious that they hide what they are

---

5 RMCA 47/97 (unreported)
6 At page 29
7 At page 35
8 [2003] 1 A.C. 1078
9 In paragraph 45
doing. Direct proof of the proceeds is often difficult, if not impossible. The nature of the activity and the harm it does to the community provide a sufficient basis for the making of these assumptions. They serve the legitimate aim in the public interest of combating that activity. They do so in a way that is proportionate. They relate to matters that ought to be within the accused’s knowledge, and they are rebuttable by him at a hearing before a judge on the balance of probabilities. In my opinion a fair balance is struck between the legitimate aim and the rights of the accused.’

Therefore the case law points to a balancing exercise that is conducted by the judiciary who have so far concluded that the reverse burden of proof in the confiscation legislation is proportionate to the legitimate aim of the public interest. It remains to be seen if the local courts make the same findings in relation to section 8 assumptions.

The constitutionality of the cash seizure and civil recovery provisions

Another example of the actual or potential inroads into private interests by POCA is the confiscation without conviction regime introduced by POCA namely through the cash seizure and civil recovery mechanisms in the Act.

Cash Seizures

Section 75 provides that an authorised officer may seize any cash (minimum of $100,000) if he has reasonable grounds for suspecting that the cash is recoverable property or it is intended for use in unlawful conduct. That seized cash may be the subject of forfeiture order by a Resident Magistrate if he/she is satisfied that the cash or part thereof as the case may be is recoverable property or intended for use in unlawful conduct.
Civil recovery orders

Section 58 POCA provides that the Supreme Court may, upon the commencement of proceedings by the Assets Recovery Agency, make a civil recovery order if it is satisfied that any property is recoverable property – meaning property obtained through unlawful conduct.

The Court shall decide these matters on a balance of probabilities. Further, it is possible to invoke civil recovery and cash forfeiture proceedings even though proceedings have not been brought for a criminal offence in connection with the property (for example where there are insufficient grounds for a prosecution, or the suspect is outside of the jurisdiction or has died. Civil recovery and cash forfeiture proceedings may also be brought where a defendant has been acquitted – (Director of the Assets Recovery Agency v Taher and Ors [2006] EWHC 3402 (Admin) per Collins J.

Do the civil recovery procedures breach section 20(5) of the Constitution? Foreign case law says no.

Article 6(2) of the ECHR deals with the presumption of innocence and this matter was in issue in The Director of the Assets Recovery Agency v Walsh [2004] NIQB 21, where Coghill J held that civil recovery proceedings differ significantly from the situation of a person charged with a criminal offence and therefore Article 6(2) of the ECHR did not apply. The Court enunciated the following principles:

---

10 Section 56(3) POCA
11 Section 56(2) POCA
1. all the available indicators point strongly to recovery cases being classified as a form of civil proceedings:
   ‘the Appellant is not charged with a crime...He is not liable to imprisonment or fine if the recovery action succeeds. There is no indictment and no verdict. The primary purpose of the legislation is restitutionary rather than penal’ [para 29]

2. In terms of the nature of the proceedings the allegation made does not impute guilt and there is no prosecutorial function [para 29]

3. The primary purpose of the legislation is to recover the proceeds of crime; it is not to punish the appellant in the sense normally entailed in a criminal sanction [para 39]

The cash seizure provisions have arguably been the most utilized and successful provisions of POCA since it came into force. According to an article in the Jamaica Observer dated July 1 2010, since 2007 various law enforcement agencies have seized more than $700m under POCA and on July 8, 2011 it was reported that over $5m in cash has been seized in the parish of Westmoreland, of which $1m has been accounted for and returned, just over half a million has been forfeited with the balance of the cases still pending.

There have also been more practical objections to the confiscation without convictions provisions in POCA.

The fact that the prescribed amount is J$100,000. By comparison the figure in the UK is 1000 pounds which, at today’s exchange rate is the equivalent of about J$132,000. So the figure is not completely out of sync with international trends. However, having regard to the cost of living in Jamaica and that it is a cash society. Is this figure reasonable in the circumstances or should it be revised.
Also the section 72 search provisions which provide that an authorised officer
who is lawfully on any premises may search those premises if he reasonably
suspects there is cash on those premises which is recoverable property.
Similarly can search a person or an article in that person’s possession if he is
suspected of carrying recoverable cash. Now section 74 states that the Minister
shall establish a code of practice in relation to the exercise of those search
powers but to date no such code has been established. In the absence of a code
of conduct are such searches permissible and even if they are there are
dangers of excess in the application of those provisions without the appropriate
guidelines.

Anecdotally, in the UK case of Re L\textsuperscript{12} £8,000 was actually seized from a
Magistrate under these powers! The money was returned once solicitors
became involved and pointed out to the police their obvious error. This case
does illustrate that no one is immune from an overzealous customs or police
officer and highlights the importance of having such a code of practice in
Jamaica.

By contrast no civil recovery orders have yet been made in Jamaica, but there
are 6 cases currently before the courts and the potential is there. Some cases
which may be likely candidates for civil recovery orders:

Christopher ‘Dudus’ Coke – Under a Plea agreement Coke recently pleaded
guilty to one count of racketeering conspiracy and one count of conspiracy to
commit assault with a dangerous weapon in aid of racketeering. This is said to
be’s home in Plantation Heights, St. Andrew.

Norris ‘Deedo’ Nembhard, 52, businessman of Cardiff Hall, near Runaway Bay,
St. Ann, who had been extradited to the United States in July 2008, pleaded

\textsuperscript{12} Unreported. See: http://www.jmw.co.uk/services-for-business/business-crime-regulation/proceeds-of-crime-
act/poca-seizure-detention-and-forfeiture-of-cash/
guilty to charges of conspiracy to import more than 5 kilograms of cocaine and more than 1,000 kilograms of marijuana into the United States. Norris Nembhard was sentenced to 13 years in federal prison.

These are cases where no conviction exists in Jamaica but there is evidence that the persons have been engaged in criminal conduct and may be a case on the civil standard of proof that the real and personal properties which they own constitute recoverable property. It remains to be seen if the authorities pursue these and similar cases under the civil recovery procedures.

POCA and the Relationship with Other Statutes

What is the relationship between POCA and convictions under other statutes?

Since one of the aims of POCA is to deter crime, it is intended to be used in conjunction with convictions under other statutes, such as arms and drug trafficking. That much is clear. However, in other jurisdictions it has been used as an adjunct to convictions for white collar crimes such as tax evasion, such as in the case of Steed v Crown which I spoke to earlier.

It has also been used in perhaps less newsworthy crimes. In an interesting English Court of Appeal decision in Basso & Anor v R the power of the Crown Court to make confiscation orders under POCA in planning enforcement cases was confirmed. Hounslow LBC used POCA to recover money earned from Mr. Deol from the illegal conversion of two residential properties into flats and built unauthorised extensions to the properties. He had done so without planning permission. The Council refused his application to continue using properties as flats and four separate enforcement notices were served requiring the cessation of use and removal of the extensions. Deol pleaded guilty to the failure to comply. The judge found that Mr. Deol had financially benefited from his offences in the sum of 186,680 pounds and confiscation order made in that amount.
Another important point to note about POCA is that according to Section 5(2)(c) when deciding on making a forfeiture or pecuniary penalty order, the Court can also forfeit any property used in or in connection with the offence.

So for example where a Defendant is convicted of an offence of dealing under the Dangerous Drugs Act, the land or property on which illegal drugs are packaged or stored would be liable to be forfeited under POCA.

However, this provision raises interesting questions when the property which is used in or in connection with the offence concerned, has a primary purpose which is legal. In the aforementioned example, if the property is also a private dwelling or in another example, where the proprietor of a licensed bar operates an illegal gambling enterprise in a back room on certain days, whether that would lead to the forfeiture of the entire premises.

Certainly section 5(12) of POCA provides for any person having an interest in the property to make an application for the Court to declare the nature and extent of that person’s interest but they have to prove they were not in any way involved with the offence. As the local case law surrounding POCA develops, interesting questions such as these will inevitably be decided.

Money Laundering and the Challenge to Legal Professional Privilege

Lets us now look at the most topical of the objections to POCA’s actual or potential invasion into private rights; money laundering, the reporting requirements and its impact on attorneys and LPP. These are also known as the gatekeeper provisions.
Earlier this year a well known attorney in the US, Robert George, as charged with money laundering. Certainly the evidence against Robert George, if proven true, is a clear cut example of a breach of the money laundering provisions but there are many seemingly innocuous situations an attorney could find themselves in which could land them in hot water.

As a reminder, let us review the money laundering provisions in POCA.

Money Laundering is an action which constitutes an offence under section 92 and 93 of POCA or an attempt, conspiracy or incitement to commit such an offence or aiding, abetting counselling or procuring the commission of such an offence. Sections 92 and 93 of POCA money laundering offences are applicable to any person in any walk of life including attorneys.

Essentially, sections 92 and 93 speak to engaging or becoming concerned in an arrangement which in some way shape or form involves criminal property and you know or have reasonable grounds to believe at that time that it is criminal property.

Under section 92(1), a person commits an offence if that person:

(a) engages in a transaction which involves criminal property;
(b) conceals, disguises, disposes of or brings into Jamaica any such property; or
(c) converts, transfers or removes any such property from Jamaica

and the person knows or has reasonable grounds to believe, at the time he does any such act that the property is criminal property.

An example here would be the Robert George scenario.
Section 92(2) states that ‘a person commits an offence if that person enters into or becomes concerned in an arrangement that the person knows or has reasonable grounds to believe facilitates (by whatever means) the acquisition, retention, use or control of criminal property by or on behalf of another person’

We will shortly be looking at a case involving this provision and a legal advisor.

Section 93(1) states that a person commits an offence if that person acquires, uses or has possession of criminal property and the person knows or has reasonable grounds to believe that the property is criminal property.

NOTE that whereas the MLA (which was repealed by POCA) referred to property ‘that is derived from the commission of a specified offence’ whereas POCA refers to property which constitutes any person’s benefit from criminal conduct, whether in whole or in part, directly or indirectly. It is immaterial who carried out or benefited from the conduct. Further, under the MLA it had to be established that the defendant knew that he was dealing with such property whereas under POCA it is sufficient to show that he had reasonable grounds to believe that he was dealing with such property, so it extends to a situation of ‘wilful blindness’.

It is a defence to both sections 92 and 93 if, before doing any such act as described in those sections, he makes an authorised disclosure and receives the appropriate consent to act.

An authorised disclosure is essentially reporting the matter to a nominated or authorised officer and they either give you consent to continue with the transaction or do not respond within the notice period which is at least 7
business days and because it is an ‘authorised’ disclosure it provides immunity from prosecution for any breach of confidentiality under any other legislation.

Section 97 of POCA creates the offence of ‘Tipping Off’ – disclosing information about an actual or impending money laundering investigation to any person which is likely to prejudice such an investigation.

POCA also introduces a new concept of the ‘regulated sector’ which includes both financial institutions and designated non-financial institutions. At the moment only financial institutions constitute the regulated sector but this may change.

It has been recognised that there are elements of POCA which do not fully meet the required international standard of legislation to deal with the proceeds of crime put forward by the Financial Action Task Force (FATF). Specific areas of deficiency include the need to deal specifically with Designated Non Financial Businesses and Professions.

The regulated sector is required to comply with the reporting requirements under POCA however, as per the Fourth Schedule of POCA, the regulated sector is currently limited to financial institutions. If Jamaica is to comply with the recommendations of the FATF, it is necessary to designate Non Financial Businesses and Professions who by the nature of their business are high risk for money laundering and terrorist activities.

The FATF has recommended that the following businesses and professions should be so designated:
a. Casinos (including internet casinos)
b. Real Estate Agents
c. Dealers in precious metals
d. Dealers in precious stones
e. Lawyers, notaries, other independent legal professions and accountants
f. Trust and Company Service Providers

Lawyers

The Recommendations prescribe that legal professionals should be subject to obligations regarding customer identification; record-keeping; suspicious transaction reporting, employee screening procedures and internal systems to facilitate STRs when, on behalf of a client, they engage in a financial transaction in relation to the following activities:

1. Buying or selling of real estate;
2. Managing of clients money, securities or assets;
3. Management of bank, savings or securities accounts;
4. Organisation of contributions for the creation, operation or management of companies;
5. Creation, operation or management of legal persons or arrangements, and buying and selling of business entities

So in the very likely event that regulations do come into effect designating these non financial businesses such as lawyer services what are the reporting requirements under POCA which will be applicable to attorneys?

Section 94 creates the offence of non disclosure of a suspicious transaction by a person in the regulated sector.
Section 95 – creates the offence of non disclosure of a suspicious transaction by a nominated officer

According to Section 94(2) a person commits an offence if:

(a) that person knows or believes, or has reasonable grounds for knowing or believing, that another person has engaged in a transaction that could constitute or be related to money laundering;

(b) the information or matter on which the knowledge or belief is based or which gives reasonable grounds for such knowledge or belief, came to him in the course of a business in the regulated sector; and

(c) the person does not make the required disclosure as soon as is reasonably practicable, and in any event within fifteen days, after the information or other matter comes to him.

Section 95(1) A repetition of 94(2) but this applies to a nominated officer.

A nominated officer commits an offence if:

- the nominated officer knows or believes, or has reasonable grounds for knowing or believing, that another person has engaged in a transaction that could constitute or be related to money laundering;

- the information or matter on which the knowledge or belief is based or which gives reasonable grounds for such knowledge or belief, came to the nominated officer in consequence of a disclosure made under section 94; and
• the nominated officer fails without reasonable excuse to make the required disclosure as soon as is reasonably practicable, and in any event within fifteen days, after the information or other matter comes to him.

Just some housekeeping issues in the aforementioned provisions:

For the purposes of making a required disclosure, persons in the course of business in the regulated sector must pay special attention to:

• Complex unusual or large business transactions by that customer; and

• Unusual patterns of transactions, whether completed or not, which appear to be inconsistent with the normal transactions carried out by that customer

Also:

• Required Disclosure is to the nominated officer or the designated authority (CTD of the FID)

• Nominated Officer is a person nominated by the business to receive such disclosures

So how do these provisions affect attorneys and the information that they may receive during the course of the provision of legal services.

There do exist within POCA savings provisions in relation to LPP, although not in respect of sections 92 and 93.

Section 93(3) (MONEY LAUNDERING OFFENCE which applies to everyone across the board). The only exception for attorneys is:
‘An Attorney-at-Law shall not be taken to engage in money laundering to the extent that he receives bona fide fees for legal representation’

That is an interesting provision in the context of Jamaica where the regulatory body does not prescribe or provide guidelines as to fee scales for particular legal services. If a client pays a unusually large sum of money for a particular legal matter, what is the reference point for determining if it is bona fide or not?

94(5)(b)(NON DISCLOSURE BY PERSON IN REGULATED SECTOR):

‘A person does not commit an offence under this section (s94) if he is an attorney-at-law and the information or other matter came to him in privileged circumstances’

What, according to POCA, are privileged circumstances?

Section 94(8) states,

Information or other matter comes to an Attorney-at-Law in privileged circumstances if it is communicated or given to him –

(a) by, or by a representative of a client of his in connection with the giving by the Attorney-at-Law of legal advice to the client;
(b) by, or by a representative of, a person seeking legal advice from the Attorney-at-Law; or
(c) by a person in connection with legal proceedings or contemplated legal proceedings
Provided that this subsection does not apply to information or other matter that is communicated or given with the intention of furthering a criminal purpose.

Defence to Tipping Off

However, an attorney-at-law does not commit such an offence if the disclosure is made:

(a) to, or to a representative of a client of his in connection with the giving by the Attorney-at-Law of legal advice to the client;

(b) to a person in connection with legal proceedings or contemplated legal proceedings

Provided that a disclosure is not made with the intention of furthering a criminal purpose.

It is important to note that the proviso that the disclosure is not made with the intention of furthering a criminal purpose also applies to hiding the proceeds of crime, and LPP will be set aside even where the intention of further a criminal purpose is not that of the solicitor or client but a third party using the client as a tool. See House of Lords case of Francis and Francis v Central Criminal Court [1988] 3 All ER 775.
Search and Seizure Warrants

A search and seizure warrant is a document authorising an appropriate person to enter and search premises and to seize and retain any information or material found which is likely to be of substantial value\textsuperscript{13}

However, Section 117 provides that a search and seizure warrant does not confer the right to seize any information or material that a person would be able to refuse to produce on the grounds of legal professional privilege in proceedings in the Supreme Court.

But what about where an investigating authority searches premises for relevant material and a dispute arises as to whether document falls within LPP or perhaps that part of it does. Or at a secondary level what if the authorities believe that a document has been created in the course of a criminal endeavour as in the case of Francis.

In the local Court of Appeal decision of Jambar and Others v The Attorney General and DPP SCCA Nos 96, 102, and 108/2003 this issue was not determined since it was found that the warrants were illegally obtained. In other jurisdictions such as the UK, the Courts have offered the practical solution of appointing an independent counsel to review the seized material to determine if it is privilege or not. (ex p Popely\textsuperscript{14}, ex p Bramley\textsuperscript{15}, ex p Tamosius\textsuperscript{16})

This is an interesting compromise since the legislation states that there is no power under a warrant to actually seize material subject to LPP in the first

\textsuperscript{13} Section 115(3) POCA
\textsuperscript{14} (1999) STC 1016
\textsuperscript{15} (1999) STC 1077
\textsuperscript{16} [2000] 1 ALL ER 411
place. But the courts seem to be accepting the fact that where a warrant permits the search of a lawyer’s office, it is likely that there will be items therein that will be subject to LPP and some sort of sifting and analysis will have to be done after the fact.

The FATF Recommendations expressly recognise the paramount role of legal professional privilege and therefore do not require that the obligations to make suspicious transaction reporting override this principle.

Also the foregoing indicates that there is no need for a blanket designation when it comes to attorneys but rather a designation that captures specifically attorneys when they are carrying out the specified activities.

So, having regard to the existing savings provisions under POCA and the recognition of the paramount role of LPP, wherein lies the problem for attorneys? Surely LPP is adequately protected. Well to my mind a pertinent issue is: Where does LPP end and money laundering reporting requirements begin?

Let us revisit section 92 of POCA in particular the words ‘engages in a transaction’ or ‘becoming concerned in an arrangement’ which involves criminal property.

As a routine part of their business, attorneys are drawing up contracts involving assets transferring from one person to another, particularly in estate management or matrimonial proceedings. What if the attorney discovers that either his client or the other party is trying to acquire, dispose of or transfer an interest in criminal property. Remember that there is no savings provision for LPP in relation to section 92 offences.
That was the situation in the case of Bowman v Fels [2005] EWCA Civ 226 treated with section 328 of the Proceeds of Crime Act 2002 (which is analogous to section 92(2) of POCA.

Facts:

Claimant lived with the Defendant for 10 years in a house that was registered in the Defendant’s sole name. After the relationship ended she asserted a right to the beneficial interest in the property arising out of a constructive trust. The Defendant resisted her claim and the matter was listed for trial. The Claimant’s solicitors notified NCIS prior to the hearing of their suspicion that the defendant had included the cost of the work he had carried out at the property within his business accounts and his VAT returns, even though these were unconnected with his business. The Claimant’s solicitors believed that section 328 obliged them to make this disclosure ie ‘becoming concerned in an arrangement’ and that it also prevented them from telling either their client or the defendant’s solicitors what they had done.

The central issue was whether section 328 applies to the ordinary conduct of legal proceedings at all. There was also the narrower issue, namely if it did, whether Parliament can be taken, without using clear words to that effect, to have intended to override the important principles underlying legal professional privilege and the strict terms on which lawyers are permitted to have access to documents disclosed in the litigation process.

It will probably be a relief for most of you to know that the Court of Appeal concluded that the proper interpretation of section 328 is that it is not intended to cover or affect the ordinary course of litigation by legal professionals, including any step taken by them in litigation from the issue of
proceedings, the securing of injunctive relief up to its final disposal by judgement.

On the narrower issue, the Court concluded that there was nothing in the language of section 328 to suggest that Parliament intended to override such privilege and that it would require much clearer language before a parliamentary intention could be gleaned to the effect that a party's solicitor is obliged, in breach of his implied duty to the court, and in breach of the duty of confidence that he owes to his client as the litigation solicitor, to disclose to a third party a suspicion that he may have that documents disclosed under compulsion by the other party raise an issue under section 328.

You will have noted that one of the recommendations by FATF is that attorneys should be required to comply with the Know Your Customer (KYC) regime. So if you thought that you have not been as familiar with your clients as you could be, don’t worry, you are about to get to know them a lot better.

In other jurisdictions, KYC requires strict investigation procedures, where the onus is on you, to prove you "know your customer". No longer can a firm plead ignorance, or claim they "did not know" a client or customer may or may not have been associated with terrorism or money laundering.

In the context of KYC and LPP it is important to note that foreign case law states that

‘Whilst it was important that that the court, as far as possible should respect an express condition of confidentiality subject to which a client had provided his contact details to solicitors, there was a clear distinction between LPP which was absolute and the right to protection of confidential information which was
What about one of your longstanding clients whom you also socialise with. Perhaps you play golf together from time to time. You have previously acted for him in a litigation matter. He pays you some money on account of costs as well as a further sum because he intends to invest those sums in a new business venture. The economic climate changes, your client decides against investing in the business, you deduct your costs and write a cheque for the balance to be returned to your client.

You think nothing of it at the time but at a future date, your client is arrested at Norman Manley International in possession of large sums of cocaine and it later emerges that this was part of a wider conspiracy rather than the one off circumstances, which involved numerous illicit trips in the past several years for drug trafficking purposes and evidence of a high and extravagant standard of living, round about the time that you performed that transaction for him. You begin to realise that perhaps you may have been for the purposes of money laundering but this is several years after the fact. What do you do?

Well, you would be advised to report the matter to the authorities immediately and hope that on an objective test it is not considered that you had reasonable grounds for suspecting at that time that the monies were criminal property.

When Mr. Duff became concerned he consulted literature from the Law Society and came to the conclusion that the legislation did not apply to transactions in the past. He interpreted the words ‘who is engaged in money laundering’ to connote present dealing. He also had doubts as to how his duties under POCA were to be reconciled with his duties to his client. He personally concluded that he was not under a duty to report the transactions. Six months after having his initial suspicions, he subsequently sought legal advice from another firm of solicitors who advised him that his interpretation of the legislation was the correct one and that there had been no duty to report.

They were both wrong.

The appellant actually pleaded guilty to two counts and was given a custodial sentence. His appeal was on the question of whether a custodial sentence was justified as well as the length of the sentence which was six months.

The solicitor who has been at the bar for 18 years, and established in his own practice for 11 years dealing mainly in conveyancing and personal injury litigation. Submissions were made that the appellant was of previously good character, was married with three children all under the age of 10, his practice had collapsed as a result of the case, and as a solicitor whose practice was almost entirely conveyancing and personal injury work, he was unfamiliar with the provisions of the Drug Trafficking Act 1994.

The Court of Appeal disagreed, and determined that breaches of the money laundering legislation by professional people could not be overlooked and the custodial sentence was warranted and not excessive.

An important note for you in house counsel - if foreign case law is followed in the local courts the LPP saving provisions in POCA are unlikely to apply to in house counsel.
'the exchange had to be connected to the client’s rights of defence and had to emanate from independent lawyers who were not bound to the client by an employment relationship.'

Therefore if as in house counsel you become aware of a transaction by the company for which you are employed which may constitute money laundering you are under an obligation to report it, irrespective of whether the information came to you in the course of your employers seeking legal advice.

I began this section of the presentation with the question – where do LPP end and ML reporting requirements begin. Whilst we are searching for clarity and certainty in this regard, there may not be much clarity to be had. The exact demarcation line is a work in progress, even in other jurisdictions where the regulations have been in effect for some time already. One is not going to find a set of definitive guidelines on how to treat with this matter, and we are learning as we go along and the case law develops.

Another major issue surrounding the proposals is the costs of compliance and who is going to foot the bill?

The exact nature of the regulations which are likely to be implemented re lawyers depends on the level of risk of money laundering that industry represents. However, as a regulated business, reg 5(1) of the POCA Money Laundering Regulations will apply which provide that the following programmes should be implemented:

- Procedures to ensure high standards of integrity of employees;
- System of evaluating personal employment and financial history of employees;
- Training of employees on a continuing basis as to their responsibilities under POCA and Regulations
- Arrangements for an independent audit to ensure that the above is done

Certainly the above represents a cost to a legal practice, and more so to a small practice.

Firms will have to appoint a nominated officer who will have to be compensated for the extra risk which he/she is expected to take in that position. In large firms that might be a post in itself whilst in smaller firms it may be the office manager or the partners or sole practitioners themselves.

A competent authority will have to be designated who will monitor compliance by the group. This may well be the General Legal Council.

**Parting Thoughts**

With regard to the proposed inclusion of attorneys within the gatekeeper provisions, my prediction is that Jamaica is likely to see some form of these regulations coming into force and it behoves the legal profession and its representative bodies to make representations to get the best out that situation. There is a need for as much clarity as can be had in order to assist attorneys in the tasks that they will be required to perform, whether that clarity is reflected in the legislation or in the guidance notes from the competent authority. It is also important, before the legislation comes into effect, to take account of the likely costs involved in implementing these regulations and where those resources are coming from. We live in hope that the authorities will instigate the appropriate dialogue stakeholders to ensure that these and other issues are considered before the legislation comes into effect.
When it comes to the balancing of private rights and public interest, as the local case law develops surrounding POCA, there will no doubt be interesting challenges made to the legislation. The local courts will not of course be bound by decisions in foreign jurisdictions, but may, in the absence of local case law have regard to them as persuasive authority. Certainly the foreign courts have concluded that the public importance of proceeds of crime legislation outweighs certain private interests and rights, particularly in the case of criminals whose actions have deprived them of certain protections under the law. It remains to be seen if the local courts will adopt this hard line approach.