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Pecunia non olet: Cleansing the money-launderers from the Temple

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Abstract. This article analyses the development of police-bank relationships, principally in the UK but also elsewhere, within the context of the control of money laundering. It argues that we have moved from a situation of national control over bank secrecy to an emerging New International Order in which most, though not all, countries are pressurised into taking greater measures to reduce bank secrecy where crime is suspected. In Europe, particularly, banks are being turned into an arm of the state by being required to keep detailed records and to inform police where they suspect – or even where they ought to suspect – that moneys banked are the proceeds of crime. The article concludes with discussion of the limitations on this process generated by political economy factors.

Introduction

The principal points of contact between police and bankers are in relation to (1) frauds (and other crimes such as robbery) against banks themselves, and (2) crimes or suspected crimes involving dishonesty, import/export prohibitions (e.g. as I write, arms to Iraq), narcotics, or terrorism whose perpetrators and victims have individual or corporate bank accounts, even though in such cases, the banks themselves may not lose any money and may even make profits from handling the accounts. There are also further areas of state interest in banking transactions, such as the activities of arms dealers who may not be committing any offences in the UK or elsewhere, but who are of concern to the security services.

The movement in the direction of encouraging – and in an increasing range of cases, requiring – "active citizenship" on the part of banks has as its objectives to prevent criminals from benefiting financially (a) from the offences for which they have been convicted, and (b) to the extent that monetary gain is the *criminals'* primary goal or is a crucial means to their other (e.g. political) goals, to deter or prevent them and others from commiting crimes for gain in the future. These objectives are being pursued not only in Britain but also in the international arena.

Why should bankers co-operate with the police? Motives for co-operation can be placed on a continuum between *positive* – as when natural and/or

corporate persons all hope to get something they want out of the relationship, even if the benefits are unequal – and *negative* – if the relationship arises solely out of fear or threat that something bad will happen to either or to both parties. Many non-banking professionals such as lawyers and accountants responded to my announcement of this research topic by asking, rhetorically, "what relationships?" But in practice, police-bank relationships are characterised by a combination of both positive and negative elements.

What do bankers hope to get out the relationship with the police? Fraud prevention is something that in principle they could arrange for themselves, if only fear of losing custom to competitors did not get in the way, as it frequently does when it is proposed to share databases to enable bankers to build up a broader pattern of customer trading. (This mutual secrecy applies also to other financial services institutions such as building societies and insurance companies.) Police can gather intelligence from formal sources – such as Criminal Records Office – and act against fraudsters in ways the banks find hard. This includes not only post-fraud (or post-*attempted* fraud) electronic surveillance, arrest and detention – whether in the U.K. or by cross-border pursuit via Interpol – but also bans on the entry into the U.K. of "undesirables" (subject to appeal and the Treaty of Rome) and/or their surveillance if they are allowed to enter the country. The police are important to the banks principally because of their case-management resources and because they provide an *entrée* into the criminal justice process when needed for deterrent and incapacitation purposes. Without police involvement, bankers would be forced into paying for their own prosecutions and without the *threat* of police involvement, the perceived deterrent effect on potential offenders would be weakened. Most bankers in the developed world also see themselves and wish to be seen by others as "responsible citizens". Indeed *some* of the major U.K. banks are spending a considerable amount of staff time (and therefore money) on liaison with the police, particularly with drug squads, but also on court-ordered compliance with information production orders for which they charge very little. Finally, on the more negative side, the banks seek police and customs co-operation in not prosecuting their officers or staff for failing to comply with obligations to report suspected offending, in areas such as drug trafficking and terrorism that are discussed in depth later.

What do the police want out of the banks? Obviously, they want *information* to add to their criminal intelligence files and, where appropriate, as evidence to produce convictions. They want banks to *volunteer* information about people and activities that the police might otherwise know nothing about, at least at the time, as well as to give information about suspected persons to them on request. This includes not only major crimes for economic gain such as fraud, narcotics, and terrorism, but also the increasingly valuable tracing of murder, rape, or other major suspects' movements via their credit card,

Automated Teller Machine card, and cheque transactions. The police want the assistance of the banks to deter money-laundering, to trace the transfer of criminal assets and, where lawful, to freeze and confiscate it. Though most policing remains local and routine, the internationalisation and growth of narcotics trafficking, fraud, terrorism, and other forms of "organised crime" has altered the focus of policing so that more explicit attention than used to be the case has been given to the matrix of networks that lie behind criminal enterprise. Within this matrix, the transfer (or, in the negative label loved by Police Chiefs and headline writers, "laundering") of money has become a key point in the criminal and therefore in the enforcement chain. This focus on crime as a network *system* is the underlying *rationale* for the changes in legislation and in police practices that have prompted this article (and research study) of the theory and practice of relationships between police and banks.

It is possible to *imagine* a world in which the interests of the police (including non-police regulators) in maximising intelligence collation and the interests of bankers coincided precisely. However, this is not the world in which we live. Why not? Looked at globally, the factors that inhibit police-bank harmony include the following:

1. Though neither "bankers" nor "police" are homogeneous in their attitudes, some bankers wish on principle to maximise the confidentiality of the affairs of their customers, except under highly restrictive conditions, whereas many police believe that bankers, like citizens generally, have a moral obligation to provide them with any information relevant to the prevention and detection of crime.
2. The culture and commercial interests of bankers, which may be affected by the different sensitivities produced by different frauds, as well as by the values and expectations of their customers.
3. Legal rules regarding when information may or must be communicated to the police and to other policing agencies. (The enactment of such legislation may be influenced by commercial pressures from indigenous financial institutions, or by the desire of the State to compete against other offshore financial centres by offering low registration fees and high transaction secrecy.)
4. Confusion on the part of investigators over the appropriate lines of communication with "the banks" – a collective noun that obscures differences between banks and internal organisational complexities – which may be affected by training or by its absence.
5. "People factors" such as extreme unwillingness to co-operate on the part of particular individuals, for personal or organisational objectives, or simply because of personality conflicts. Sometimes, poor training can lead to insecurity and frustration, producing an inability to see the other side's point of view.

Commercial interests

Banks exist to make profits, and banking depends upon depositors having confidence in bankers' integrity and competence not to fritter away funds. No bank is liquid enough to survive – without external support – a sudden mass withdrawal of deposits. Although 75 per cent of British bank deposits up to £20,000 are guaranteed against bank failure (which, Bank of Credit and Commerce International notwithstanding, is unlikely in the U.K., unlike the U.S.), it is hard for bankers to predict what will damage confidence, and they are cautious about how present and potential individual and corporate customers will react to information about fraud against and by the banks, as well as how they will react to banks informing official agencies about their transactions. Looked at in this way, we can see that the way that banks (and other institutions) react to frauds of different types may reasonably reflect their perceptions of the likely consequences of publicity.

Embezzlement by senior management causes different problems for both bank and individual reputation than does credit card fraud, which generates less sense of vulnerability. On the other hand, other sorts of alleged criminal involvement by banks may produce different reactions: irrespective of the outcome of the criminal prosecution which takes place in 1991, the severe criticism of the financing by County NatWest Ltd. and County NatWest Securities Ltd. of the Blue Arrow takeover of Manpower (DTI, 1989) may affect firms' willingness to use County NatWest in the future – notwithstanding their voluntary compensation to those who lost money – but it is hardly likely to lead many personal or corporate account-holders to close their accounts with NatWest (domestic bank), or even to refuse to transact international financial deals through NatWest International. On the other hand, though the sums realistically at risk are less than those from embezzlement or from fraudulently managed banking institutions, perhaps most confidence-harming to all to the general public is the possibility that without customer carelessness or without the theft of *both* cashcard *and* Personal Identification Number, customers or even the bank can be defrauded via Automated Teller Machines.[1]

Where senior officers of legitimate banks are corrupt or banks are established specifically for corrupt and/or fraudulent purposes, it is obvious why they will not co-operate with the police. (Though it should be acknowledged that in some such countries, the motives of the police too may be suspect, so it is not self-evident that information imparted to them will be used for proper law-enforcement purposes. The information could be used for personal or political blackmail.[2]) However, the more substantial issue is that even in the most pristine of jurisdictions and even in a select group of reputable bankers, bankers may legitimately be concerned about the impact of customer anxiety

regarding the confidentiality of their affairs (a) culturally, in terms of their training and peer-group socialisation; (b) from their beliefs that customers have a *right* to be "protected" from the State; and (c) from the possibility of loss of business – particularly the business of corporations and wealthy individuals – to other banks and/or countries that have *both* trustworthy bankers *and* higher standards of confidentiality.

This anxiety has economic roots: bank headquarters sales staff are concerned that if branch staff treat every potential customer as a potential narcotics trafficker or terrorist, legitimate and illegitimate customers alike will simply be displaced to other rival financial institutions. These displacement fears arise locally and, in the case of offshore banks and foreign countries, internationally. In this respect, it is worth stressing that historically, much of the American concern about *deliberate* money-laundering – whether of illegal-source income by organised crime groups or of legal-source income by the "average American" – has been related to (1) small banks – often in the Miami area – beneficially owned by organised crime groups, and (2) offshore "shell" or "phantom" banks whose principal existence is as a brass plate at the office of a West Indian or South Pacific lawyer. (Although Block's (1990) work and cases such as *United States* v. *Bank of Nova Scotia* 691 F.2d 1384 (11th cir. 1982) demonstrate that during the 1970s, the US Internal Revenue Service and Justice Department began to focus more upon the role of large banks in laundering money.)

Allegations of the involvement of mainstream U.S. or, *a fortiori,* British banks in laundering money have generally concerned their failure to ask hard questions of their clients – which include marginal banks for whom the majors are willing to transfer funds and/or to act as correspondent banks – before doing business with them. (Though unsubstantiated claims that vast sums of narcotics money are laundered via London have become staple media diet.[3]) In 1989, the principal source of concern in regard to *fraudulent* banks was Montserrat, where "encouraged" by American and Metropolitan Police Company Fraud Department intervention, over 100 such banks out of a total of some 250 were stripped of their licences (in 1991 only 16 banks remain). (The "Zurich Overseas Bank" based in Montserrat, taking advance fees for loans that are alleged never to have materialised, consisted mainly of a busy fax machine beneath a bar, and was operated by a bartender.) Nevertheless, the U.S. Treasury has expanded its sphere of operational interest to include all the financial transfer centres, including the U.K..

Although the nature of the "dirty money" problem shifts over time, it would be wrong to see this solely as a terrorism/drug money laundering nexus. The Senate Permanent Subcommittee on Investigations observed that the abuse of offshore tax havens was "not limited to any particular faction of the U.S. population" and "is continuing to grow at an alarming rate" (PSI, 1985, pp.

2–3). Indeed, the consequence of concentrating on drug money is (p. 20) "to leave virtually untouched many of the so-called 'white-collar' criminals who may be just as guilty of violating the reporting requirements of the Bank Secrecy Act". Many poor Third World countries, desperate for hard currency to pay for essential imports (and, in some cases, luxuries for the elite), have been engaged in a "race to the bottom" which, until recent treaties and Memoranda of Association in relation to narcotics shifted the balance somewhat, does not incline them to look too closely at the *bona fides* of bank *purchasers*, let alone bank clients. (In 1989, in Montserrat, the government got £2,000 from each of the 250 banks registered: a considerable total sum for a poor country.) This tolerance results partly from commercial pressures, partly from corruption, and partly from inadequately trained regulators who have far too low a status compared with those they would seek to regulate. But tolerance (or wilful blindness) can also derive from more parochial concern about the profitability of individual bank branches: the Bahamas branch of Bank Leu International was building up custom slowly and found it hard to make a profit until Dennis Levine's heavy insider trading helped to lift its commission income by 71 per cent in 1984.

Now, mainly under pressure from the United States, special provisions are made in some countries for lifting the secret banking veil where the US Attorney-General certifies that the information is narcotics-related. However, there remain many loopholes. As the Senate PSI (1985, page 67) notes in relation to the changes in the Bahamas:

> It is impossible to know which banks adhere to these policies and for which customers. The reporting of large transactions does not apply to customers who have an existing relationship with the bank. Nor does it apply to those customers recommended by "reputable" parties, a term that broadly encompasses law firms, accounting firms, and other professionals. Hence, it appears that it is still a relatively simple matter for narcotics traffickers and other criminals to establish a relationship with either a bank or a reputable third party.

Major Western countries often claim that money-laundering does not happen here but in remote and disreputable foreign jurisdictions, but this is plainly not so. Security from political instability – present or future – is an important consideration for criminals and for political leaders who, like ex-Presidents Noriega, Marcos and Duvalier, look sceptically upon their long-term political futures. It should be remembered that to Americans, the U.K. is "offshore", and vice versa.

As for profits in domestic banking, bankers understandably are affected by the expectation that *major* investors, depositors, and financial services utilisers (rather than personal banking clients, who are less geographically mobile) will operate on the principle which can be expressed as: *provided that the client*

feels safe from fraud or expropriation, money will move where regulation is lightest. Britain is a society where privacy of financial affairs is an obsession (between spouses, as much as between bank account-holder and the State). Given the amount of undeclared legal-source and illegal-source income that is said to be floating around the economies of all nations – see Naylor (1987), Suddle (1988), and Walter (1989) – it is not surprising that many bank clients want to hide things from the State. With all the public worry about the expansion of information technology, people may not realise just how tenuous – at least in the UK – are the communication links between the Revenue and the police, or even between different police forces or specialist squads within the same force. Outside tax shelter nations, the policing agencies involved – which include not only the police but also revenue agencies – adopt a rather moralistic line about society not living off dirty money, but they seldom consider the complexities of how bankers can reasonably ascertain whether – if it is dirty money at all – its grubbiness derives from tax evasion, fraud, narcotics trafficking, or terrorism.

The bulk of the financial transactions undertaken in offshore financial centres arises from the (mainly) lawful activities of multinationals seeking to minimise taxation worldwide and to optimise the distribution of their profits. However, encouraged by none-too-gentle pressure from the U.S. and sometimes by domestic scandals in financial centres that are publicised by the U.S., not only the U.K. but even some traditional havens of secrecy are changing their approach: Ziegler (1990) has reviewed critically the role played by Swiss bankers and professionals in laundering funds, which information became public in the aftermath of the 1988 scandal in which the husband of the Swiss Justice Minister was named in a drug trafficking case. The Swiss Federal Banking Commission initially supported legislation aimed at punishing even negligence by bank employees in laundering, though under pressure from the banks, the more extreme proposals were dropped. The preamble to the legislation [my translation] – Article 305 of the Swiss Penal Code – expresses the background diplomatically as follows:

> The Swiss financial marketplace has had to admit that its tradition of free circulation of capital, the protection it offers by its relationship of confidentiality between bankers and clients, the high degree of performance of its services, as well as the profound stability of its political, economic, and legal systems expose it equally to abuse by international crime.

The Act passed by Parliament criminalises – with a (heavy by Swiss standards) maximum sentence of five years' imprisonment and a £350,000 fine – anyone acting to thwart an investigation into the origin, the discovery or confiscation of assets that s/he knows, or must assume, stem from a crime, irrespective of

whether or not the crime occurred in Switzerland. A maximum of one year in prison and a fine will be imposable upon anyone who does not show "sufficient care" in identifying the beneficial owner when accepting, transferring, or helping to invest foreign assets. British bankers will find familiar the response of the president of the Union Bank of Switzerland that the banks cannot implement provisions "forcing us to regard every one of our customers as a potential criminal and to look into the origins of all larger sums moved via bank accounts" (*Financial Times,* April 25, 1989). When one considers that each year, £28–36 *billion* in foreign currency notes are exchanged in Switzerland, one can comprehend bankers' anxieties. The confidence of corporate customers is particularly crucial to banking profits, and legislation that threatens the corporate customer base is singularly unwelcome to any country whose central financial institutions depend on the well-known preference of major clients for "confidentiality".

Cultural considerations

Cultural factors are central to understanding the attitudes of bankers because – in Britain no less than in Switzerland – irrespective of the *legal* rules which make account disclosure a criminal offence in some overseas jurisdictions, confidentiality is one of the first ideas with which the banker – like the police officer, social worker, researcher (and even, in respect of their *own* sources, the reporter) – is indoctrinated. The duty not to divulge information about customers to parties outside the bank – except in the interests of the bank – occupies a Commandment-like status in banking *mores.* It is arguable that a lot of the concern expressed by British bankers about lawsuits for breach of confidentiality is irrational: although lawsuits may be *threatened,* it is hard to see how damages would arise if the *customer* discovered that confidentiality had been breached, provided that police suspicion was not known to some wider public. If account details were leaked in the media – or to commercial rivals of the customer – the *quantum* of damages might still not be very great, unless it affected credit ratings or Mergers and Acquisitions moves.[4]

Normally, threats of legal actions related to alleged unlawful disclosure of information are uttered only by criminals: sources indicate that there are very seldom even out-of-court settlements, and no stated cases. Nevertheless, the fear of lawsuits exists at high managerial levels within banks, and this transmits to more junior officials to the extent of becoming a taken-for-granted *credo.* However this may be related to the commercial interest of the banks in not alienating individual or corporate customers, concern about privacy does have a real significance, inasmuch as the public and the media frequently display enormous outrage towards banks whenever details of accounts are revealed

accidentally or as a result of deceptions such as that practised by the press to gain information about the accounts of Dennis Thatcher.

Although the culture of banking confidentiality may be similar thoughout the world, what bankers are prepared to do for their clients may vary. The 1985 Dennis Levine insider trading scandal showed that – at least at a time when this was not seen as morally bad and legally dangerous – Bank Leu International personnel in the Bahamas were keen to "piggyback" for their own account on Dennis Levine's share dealing, and were prepared to fabricate documentation to hide their own and Levine's involvement from the U.S. Securities and Exchange Commission. However, the officials involved refused to falsify the bank's computer records or to destroy the signed slips that corresponded to the trades and cash withdrawals. Frantz (1989) attributes this refusal to the ritual belief of Swiss bankers in the necessity of maintaining the integrity of the bank's internal system. This seems plausible. However, "laundering services" appear to generate fewer scruples, at least prior to the 1990s. The Lebanese Magharian brothers allegedly paid into Swiss banks more than £260 million in cash over three years, which they converted into gold. They had no fixed address, living in a hotel in Zurich, and initially did not even bother with a corporate "front". Nevertheless, they used to deposit weekly millions of pounds in numerous currencies at *Credit Suisse.* Allegedly, substantial amounts of money paid in were found by the bankers to be forged, and the bankers – who were doing well from commissions – simply returned the forged banknotes to the brothers, without notifying the police informally or formally (Ziegler, 1990). Such services would be hard to obtain in the U.K. Even before the closure of the Bank of Credit and Commerce International in 1991.

Culture is modifiable, however. There is some indication that British bankers' attitudes towards the police are changing in some areas. Greater willingness of some bankers to involve the police in an effort to protect their customers – such as when bankers suspect that a customer is being swindled and cannot themselves persuade their customer not to invest their money in the suspect business – and familiarity with passing information on drug trafficking and terrorism to the police or customs – discussed in detail later – breaks down some barriers. But bank policies are far from uniform, and to the extent that change is happening at all, it is occurring centrally at medium-level headquarters rather than at a local branch level.

Legal rules

It may be helpful to divide the legal position up into *duties* to divulge and *liberties* to divulge, and to distinguish between the *proactive* volunteering of information by the banks on their own initiative – whether suspicions of drug

trafficking or the filing of currency transfer forms – and the bank's *reactive* responses to police requests for information about specific clients, which depend on the police (or other policing agency such as the Serious Fraud Office or H.M. Customs & Excise) having suspicions to begin with.

Taking the UK alone, policing powers – taken in their broadest sense to mean all persons and bodies authorised by statute to regulate individuals or businesses, with sanctions for non-compliance – which affect financial institutions are scattered around at least the following statutes (in descending order of date, with the relevant statute sections and officials to whom information is communicated in brackets, where appropriate):

> Criminal Justice (International Co-operation) Act 1990; Companies Act 1989; Prevention of Terrorism (Temporary Provisions) Act 1989; Criminal Justice Act 1988 (S. 98 – police); Income and Corporation Taxes Act 1988 (S. 483 – Board of Inland Revenue); Banking Act 1987 (Bank of England); Criminal Justice Act 1987 (S. 2 – Director of Serious Fraud Office); Building Societies Act 1986 (Building Societies Commission); Insolvency Act 1986 (Court in winding-up); Financial Services Act 1986 (S. 105 and S. 177 – Secretary of State for Trade and Industry and persons authorised by him); Drug Trafficking Offences Act 1986 (S. 24 and S. 29 – Circuit Judge or Sheriff); Companies Act 1985 (particularly S. 435, S. 633, S. 721 – Secretary of State for Trade and Industry); Value Added Tax Act 1983 as amended by Finance Act 1985 (Tax Commissioners); Police and Criminal Evidence Act 1984 (Justice of the Peace or Circuit Judge); Mental Health Act 1983 (Lord Chancellor/Master of Court of Protection); Insurance Companies Act 1982 (S. 44 – Secretary of State for Trade and Industry); Customs and Excise Management Act 1979 (S77A – Customs & Excise officers); Evidence (proceedings in other jurisdictions) Act 1975 (High Court/Court of Sessions in Scotland, where information requested by courts in other countries); Welsh Development Agency Act 1975 (S. 23 – Secretary of State for Wales or WDA); Consumer Credit Act 1974 (Director General of Fair Trading); Taxes Management Act 1970 (S. 17 – Inspector of Taxes); Income and Corporation Taxes Act 1970 (S. 481 – Board of Company); Trade Descriptions Act 1968 (Weights and Measures Authority); Charities Act 1960 (Charity Commissioners); The Statistics of Trade Act 1947 (S. 1); Bankers Books Evidence Act 1879 (S. 7 – Court or Judge); Extradition Act 1873 (Secretary of State).

There has been a steady enhancement of the circumstances under which policing agencies (including the police, Customs & Excise, and the Department of Trade and Industry) can *require* the banks to provide information about their clients. It may surprise some readers that some of these developments were welcomed by the banks, for one universal aspect of such *reactive* court-ordered demands is that they release the banks from any legal liability to clients for breach of confidentiality. These developments in powers remain haphazard, because it is alien to the government in Britain (and, as far as I know, almost everywhere else) to be consistent across the board in setting out the powers of different departments (or, for that matter, in rationalising their

policies). Powers have sometimes been rationalised at an intra-agency level, but inter-agency co-ordination – which remains variable in extent – received low legislative priority before criticisms by the Keith Committee (1983) and the Roskill Committee (1986) prompted respectively some harmonisation of tax powers and the establishment of the Serious Fraud Office under the Criminal Justice Act 1987.

Policing powers in relation to fraud

Documentary and other forms of forensic evidence play a modest role in crime investigation generally, but except in those cases where the *absence* of documentation itself constitutes and offence – for example the offence of failing to keep proper books of account – successful investigations and prosecutions usually depend upon some kind of paper trail. Getting access to this paper trail is a major hurdle, because (a) the potentially damaging information usually is kept by the suspect himself or by organisations such as banks that owe a duty of care and confidence towards the suspect personally and/or towards companies connected with the suspect(s), and (b) overcoming the barriers of commercial privacy often requires the demonstration of a *prima facie* case that is difficult to establish clearly without the information that is being sought. This means that we must pay close attention to the legal rules governing access to documents and to the attitudes towards the invasion of privacy on the part of regulators, judicial authorities, and those from whom information is sought. The U.S. Securities and Exchange Commission would probably not have been able to pursue successfully major cases in 1986 against Dennis Levine and against foreign investors who traded on insider information in the shares of the Santa Fe International Corporation, if it had not been able to threaten bank assets in the US to penetrate banking secrecy laws in the Bahamas and Switzerland to discover the identity of account-holders, e.g. that Levine was a client of Bank Leu. Bank Leu provided limited information about Levine in exchange for non-prosecution of any bank staff.

It is important to appreciate just how far the balance of power between police and banks has shifted in the brief period since 1984. Before that year, the supply of information from banks to the police was conducted on a wholly *ad hoc* basis, sanctioned by law only following "the institution of criminal proceedings", normally a summons or the laying of charges. In this review of police powers, I shall range beyond areas which apply strictly to banks, because my objective is to place provisions affecting bank information within the broader context of how other professionals and fraud *suspects* may be treated. At present, powers are scattered around as the detritus of historical development of agencies and problems posed by frauds and other crimes at

various times. First, I shall review briefly the powers of the police to search for documentary evidence.

Prior to the Police and Criminal Evidence Act 1984 (PACE), the police had no powers to search bank records for evidence prior to charging a suspect (see Leigh, 1982; Levi, 1982). S. 7 of the Bankers' Books Evidence Act 1879, as amended by the Banking Act 1979, provided that on the application of any party to a legal proceeding, a Court or Judge may order that such party be at liberty to inspect and take copies of entries in a banker's book for any of the purposes of such proceedings. The banker was obliged, within 3 days of receipt of the court order, to allow the applicant free access to inspect and take copies of any entries in a banker's book. This was a laborious procedure and could only be commenced if the police were "party to a legal proceeding". The provisions of the Act remain in force in Jersey today. Even after amendment in the Banking Act 1979, there remained major gaps in what counted as a banker's book under S. 9. The correspondence file does not count: see *R.* v. *Dadson* (1983) 77 Cr. Appl. R.91. Nor do cheques or credit slips: see *Williams* v. *Williams* [1987] 3 W.L.R. 790. The logic behind this is that the original purpose of the Act had little to do with banking confidentiality but rather the minimising of inconvenience to bankers by allowing books to remain in the bank instead of being taken to court: see Williams, *supra,* 793, 794. However, the net effect was that despite the fact that orders to inspect could be obtained from a magistrate, the intelligence and evidential yield of them was modest, and the criteria for access severe.

The Police and Criminal Evidence Act 1984

Section 8 of te Police and Criminal Evidence Act 1984 (referred to hereafter as PACE 1984 or PACE) deals with search warrants issued by magistrates in relation to serious arrestable offences. However, more germane for the purpose of this review is s. 9 and Schedule 1 of PACE 1984, under which a circuit judge may issue the police with a warrant to search for evidence in relation to "special procedure material" – such as information held in confidence by banks (s. 14) – if s/he is satisfied that there are reasonable grounds for believing, *inter alia,* that

- a serious arrestable offence has been committed, this being defined in s. 116 *inter alia* as an offence which has led, or is intended or likely to lead, to substantial financial gain or loss to any person;
- there is material likely to be of substantial value (whether by itself or together with other material) to the investigation;
- the material is likely to be relevant evidence;

- there is no prospect of the material being obtained without a Production Order (e.g. if bankers' obligations of confidentiality prevent them from disclosing information); and
- access to the information is overall in the public interest (whatever that might mean!).

Applications for orders under Schedule 1 para 4 must be made *inter partes* – both parties represented – though under s. 8 of PACE 1984, search warrants are available *ex parte* – without the proposed subject of the search being informed – where bankers themselves are clear suspects and/or service of notice might seriously prejudice an investigation.

Problems can arise over whether or not an offence is arrestable. Graham and Walker (1989, p. 188) observe in relation to s. 116 that

> Financial loss is measured subjectively according to the circumstances of the person suffering it. As banks are generally rather affluent bodies, only collossal frauds or thefts could have such an impact on them. However, any loss will often be sustained ultimately by a customer and so may be assessed by less ambitious financial standards. In any event, large financial losses to victims will result in substantial financial gains to criminals, and gains are to be guaged objectively. So a substantial gain remains substantial even to a substantial criminal.

However, this sidesteps three issues. First, some bankers justify *not* reporting some frauds to the police because public knowledge might affect the reputation of the bank and thereby produce collateral "material" costs: consequently it is too simple to look merely at the sum defrauded when assessing impact. (Bankers argue that these collateral costs arise if and when the fraud is *reported,* not when it occurs, though one might balance this against any special or general deterrent effect of reporting.) The subjective component might even include the feelings of the bankers, measured by their self-reported emotions. Second, most of the frauds that the police would seek to pursue via PACE 1984 would be not those committed against the bank, which anyway could be reported because to do so is in the interests of the bank – see *Tournier* v. *National Provincial and Union Bank of England* [1924] 1 KB 461 – but rather those frauds committed against others. Third, even though the test is supposedly objective, there is something inevitably subjective about what one means by a "substantial gain". However, given the modest average gross cost of domestic burglaries (£745) and thefts (£643) in England and Wales in 1988, unless many burglars and thieves are to be defined as outwith the provisions of s. 116 – and what if the person burgled is delighted to have the opportunity to get his insurers to purchase a "new for old" video recorder and camera, or even goods that were not actually stolen? – most frauds would fall within the s. 116 definition.

S. 8 (2) of PACE 1984 defines three categories of extraordinary material for

which the police might wish to search: "items subject to legal privilege", which cannot be subject to a search warrant from anyone at all; and "excluded material" and "special procedure material", for which warrants may be issued only by a circuit or a deputy circuit judge under s. 9. (They are *not* valid if made by a Recorder or Assistant Recorder: see s. 24 of the Courts Act 1971). This requirement applies also to orders made under s. 27 of the Drug Trafficking Offences Act 1986, discussed later. A search warrant may be issued only for material that has evidentiary value in the legal sense, that is, they must be admissible and not hearsay. Banking and police sources state that there is very seldom any objection to Production Orders under Schedule 1 of PACE 1984 in *inter partes* hearings (though this may partly reflect pre-application agreement between the parties). It is contempt of court to breach a Production Order, with a potential sanction of imprisonment, though this has never yet had to be activated.

Excluded material includes "journalistic material" and personal welfare records held in confidence by a third party who has acquired it in the course of any trade, business, or profession. The principal circumstances in relation to *fraud* in which the police might be interested in such records are (a) where a fraud suspect has consulted a psychiatrist or other doctor about his health with special pleading in mind; and (b) a journalist has information about a fraud suspect in relation to which there is an express or implied undertaking of confidence. However, much information in the latter category is in any event unlikely to be admissible, so a warrant for the *police* to search for it would not be obtainable. (It may, however, be obtained if "necessary" to the deliberations of Department of Trade and Industry Inspectors: see *Re an Inquiry under the Company Securities (Insider Dealing) Act 1985,* [1988] 1 All ER 203.)

However, no warrant may ever be issued to search for evidence which is legally privileged. Such material is defined in s. 10 (1) as covering communications between a professional legal adviser and his client or his client's representative made in connection with the giving of legal advice; communications made between the adviser and his client and any other person that have been made in connection with or in contemplation of legal proceedings; and items enclosed with or referred to in such communications and made in connection with the giving of legal advice. Legal advisers include barristers, solicitors, and their clerks, and "any other person" referred to might include an accountant or banker asked to prepare a report "in connection with" legal proceedings. So all documents and other records in the possession of a solicitor *in relation to the affairs of his clients* are either legally privileged or special procedure material: see *R* v. *Guildhall Magistrates' Court, ex parte Primlaks Holdings Co. (Panama) Inc.* [1989] 2 W.L.R. 841.

S. 10 (2) states that "items held with the intention of furthering a criminal purpose are not items subject to legal privilege". But whose intention is

included here? The House of Lords – by a 3–2 majority decision – has eased the investigative path by upholding the view that legal privilege does not apply, not only where the criminal purpose is that of the client – as was the common law view in *R.* v. *Cox and Railton* [1884] 14 Q.B.D. 153 – but also where the documents are said to further the criminal intentions of a third party. This was a case where the police believed that a drug trafficker provided substantial sums to members of his family to repay through a floral business a £330,000 mortgage, though the case was pursued on the basis that the family did not know that it was drug money: see *R.* v. *Central Criminal Court, ex parte Francis & Francis* [1988] 3 W.L.R. 989.

It is a matter for speculation whether the same view would have been taken had the suspect been suspected of laundering the proceeds of fraud rather than drug trafficking, or where it was clear that the solicitors' client was truly unaware of any criminal intention on the part of the third party. In *R.* v. *Board of Inland Revenue, ex parte Goldberg* [1988] 3 All E.R. 248, the Divisional Court held that in a case under s. 20 (3) of the Taxes Management Act 1970, copies of documents brought into existence for the sole purpose of obtaining legal advice were privileged, even if the originals were not. Thus, though the originals had disappeared, a barrister could not be required to hand over copy documents related to the case of his client, whose tax affairs were under investigation – though not at that stage criminal investigation – by the Inland Revenue. However, in the later case of *Dubai Bank Ltd* v. *Galadari and others*, (*The Times,* August 10, 1989), the Court of Appeal declined to follow *Goldberg* and held that a copy of an affidavit was not protected by legal professional privilege, as the original was not privileged. *Francis & Francis* above applies to all serious arrestable offences pursued under the Police and Criminal Evidence Act 1984 and the Drug Trafficking Offences Act 1986: to fraud as well as to drug trafficking investigations. It apllies also where "laundering" offences cannot be laid specifically, since as Lord Goff observed (at p. 1015), "The purpose of a bank robber is not just to rob a bank: it is to obtain the money for his own benefit". In *ex parte* cases where the solicitor is not under suspicion, the order is normally made to take effect within seven days, during which time the solicitor can apply to the judge to discharge the order: see Rule 25 (B) of the Crown Court (Amendment) Rules 1986 (S.I. 1986 No. 2151).

The interpretation of these issues has to be decided on a case by case basis, but though commercial fraud (and, *a fortiori,* drug trafficking and money laundering) have been highlighted as major crimes since 1986, the police and prosecutors cannot confidently expect the courts knowingly to allow these provisions to be used for evidentiary fishing expeditions. (See Stone, 1988) Indeed, the Divisional Court has reminded judges of the need to examine carefully that the access conditions have been complied with before granting a

Production Order: *R.* v. *Lewes Crown Court, ex parte Hill,* (*The Times,* November 12, 1990). The greater independence from the police of judges compared with magistrates, as well as the complexity of some requests for access, are the principal (non-political) reasons why magistrates were not given the right to make such production orders. The general inference arising out of the case law is that statutory safeguards are essentially intended for the protection of the person or body against whom production orders are sought, rather than for the protection of the suspect. Thus, the Court of Appeal has ruled that banks are under no contractual duty to their customers either to resist the making of production orders or to inform their customers that production orders have been applied for *inter partes: Barclays Bank plc* v. *Taylor; Trustee Savings Bank of Wales and Border Counties* v. *Taylor* [1989] 1 W.L.R. 1066. Any protection for *suspects* lies

- in the *internal* criteria applied within policing organisations before seeking information from banks (which, in practice, varies both within and between policing agencies); and
- in how critical circuit judges are when reviewing, before making a production order, whether or not the access conditions under various statutes have been satisfied.

Willingness to grant orders can subside rapidly if judges take the view that the authorities are beginning to abuse their powers.

One problem that sometimes arises relates to the particularisation of documents. The names of account-holders regarding whom information is sought can be communicated orally rather than written on the documentation. This is important where it is suspected that there may be leaks inside the bank to the account-holders: see *R.* v. *Manchester Crown Court, ex parte Taylor* [1988] 1 W.L.R. 705. In *R.* v. *Central Criminal Court ex parte Adegbesan & others* [1986] 3 All ER 113 – which concerned allegations of corruption in relation to the adinistration of funds by a trustee of the Youth Association on the riot-hit Broadwater Farm Estate in London – the Divisional Court quashed the "special procedure" order made by the Common Sergeant, stating that it was the duty of the police to set out a description of all the material that was to be produced. Failure to do so could result in the recipient of the notice unwittingly destroying the material, since it was impossible for him to know whether or not it was covered by the order. When the police did provide further particulars, the defendants appealed once more, on the grounds that the particulars were still inadequate: *Carr and others* v. *Atkins* [1987] 3 All E.R. 684; *R.* v. *Central Criminal Court, ex parte Carr* (February 27, 1987, LEXIS; *The Independent,* 5 March, 1987). In argument before the Divisional Court regarding the appeal over the second set of production orders, counsel

for the Metropolitan Police accepted that in relation to two of the Production Orders, the evidence before the circuit judge was inadequate to satisfy the access conditions under s. 9, though the judge had in fact granted those orders. Those orders were quashed, but the others upheld. Leave was then granted to appeal to the House of Lords over whether notices under s. 9 must specify *all* the facts and matters upon which the applicant for the order intends to rely, and whether it is allowable that orders be granted against parties severally, where the applicant does not know which party has which documents.

These are characteristic problems in police fraud investigations: the police may not know precisely where they may be able to find documents which they suspect exist without inspecting them, but they cannot get an order requiring production until they know where the information can be found. Moreover, the Codes of Practice that accompany PACE 1984 state that searches for special procedure or excluded material must be carried out under the command of an officer of at least the rank of inspector, who has a duty to ensure that it is carried out with discretion and in such a manner as to cause the least possible disruption to business carried on at the premises (para 5.13). The failure to observe the Codes of Practice is a breach of the police discipline code, though it will not automatically render inadmissible any information that is obtained.

As regards the *seizure* of material during a search, this may occur if the officer reasonably believes it is evidence in relation to an offence that has been committed and/or he is investigating, whether or not it was part of the original warrant. He may not seize material that he reasonably believes to be subject to legal privilege, and if he "unwittingly" does seize such material, it may well be rendered inadmissible at trial (though is still may be useful intelligence). Before taking away property, the officer should listen to any representations made by the person from whom he is taking it. Section 19 (4) enables a police officer acting in pursuance of his powers to require information stored on a computer to be produced in a visible and legible form so that it can be taken away.

In relation to commercial fraud complaints, the question of how much selectivity should occur before seizure presents some difficulties, for it is often hard to know which documents will be relevant. This is not a problem that arises in other spheres of alleged crime, and thus suspected fraudsters enjoy a comparative advantage. Much criticism of the Inland Revenue and the police in the *Rossminster* tax raid arose from the apparent failure to examine all the documents in detail prior to carting them away. Children's scrapbooks were removed, and the average viewing time per file was 90 seconds: see *R.* v. *IRC, ex parte Rossminster Ltd.* ,[1980] 1 All ER 80, HL; and Tutt (1985). Subsequently, the Court of Appeal has held that in cases which involve a very large quantity of records, the police should be broadly selective, ruling out those

documents that are "clearly irrelevant" and taking away others that they reasonably believe to have evidential value: see *Reynolds* v. *Metropolitan Police Commissioner* [1985] 2 W.L.R. 93, CA. Sections 2 (6) and 2 (7) of the Criminal Justice Act 1987 provide for Serious Fraud Office officials or other non-police officers authorised by the Director to accompany the police on searches, to try to ensure that only relevant documents are seized. It is evident that discretion has to be exercised, and the courts will not be slow to criticise the police for being too seizure-happy in fraud cases. This is quite apart from any lawsuits for civil damages that may be taken out by the subjects of searches who claim that there were no reasonable grounds for them: civil claims in relation to Rossminster tax avoidance schemes were finally settled out of court in 1989, in a way that generally supported the Revenue's civil tax demands.

My interviews lead me to conclude that many frustrations experienced by the police in obtaining evidence are caused by delays – not necessarily unconscionable ones – by the Crown Prosecution Service and by judges in file preparation and in hearing applications, which not infrequently lead to a gap of a week between police requests for Restraint Orders and their being granted. It is difficult to be sure where the principal fault lies, but for example, in the Broadwater Farm Youth Association case in April 1986, the Common Serjeant at the Old Bailey made out three of the four Section 9 Production Orders not to the *individuals* named in the application but to the Youth Association itself, to the Day Care Centre, and to the Community Project. These orders were subsequently quashed on appeal. Likewise, an order to a bank to divulge all D's accounts would not include the accounts of all the companies with which D was connected: it makes more sense to make out an order to divulge all accounts to which D is signatory.[5] It is therefore mistaken to view these as police-bank co-operation problems, except inasmuch as some police may blame a bank or the banks for "failing" to give them what they want informally. In other words, the banks may be scapegoated for the organisational deficiencies in the criminal justice process or for due process rights that are built in by Parliament to protect bankers and/or customers.

Drug Trafficking Offences Act, 1986

Section 24 of the Act creates an offence of assisting drug trafficking. It also provides immunity from being sued for breach of contract where (ss 3):

> a person discloses to a Constable a suspicion or belief that any funds or investments are derived from, or used in connection with, drug trafficking or any matter on which such a suspicion or belief is based . . .

By contrast with PACE 1984 Production Orders – which are *inter partes* – s. 27 Production Orders from a circuit judge are *ex parte*, though s. 27 (6) does allow the person on whom the order has been served to apply for variation or discharge of the order. It is general practice for the bank to be informed beforehand as a matter of courtesy and sensible policing, not least because the bank can delay the giving of information within the range – normally up to 7 days – granted by the court, or because the bank has supplied the information informally already and the authorities have decided that it is sufficiently useful to justify applying for the Order. However, on occasions, the bank itself may be suspected of high-level involvement in money-laundering, so unlike *R.* v. *Manchester Crown Court, ex parte Taylor* [1988] 1 W.L.R. 705, no-one will be informed even orally in advance.[6]

Supplementary problems may be caused in relation to information about third parties overseas that is seized during a raid. In *R.* v. *Southwark Crown Court, ex parte Customs & Excise* and *R.* v. *Southwark Crown Court, ex parte Bank of Credit and Commerce International* [1989] 3 W.L.R. 1054, the Divisional Court quashed an order of the circuit judge preventing *copies* of information about Panamanian General Noriega's accounts that were seized during a raid on the Bank of Credit and Commerce International from being communicated to the U.S. authorities.

S. 24 continues to cause great alarm in banking circles, even though it is a defence (ss4) to prove *inter alia* that one did not know or suspect that the arrangement related to *any* person's proceeds of drug trafficking. If the police have already revealed *their* suspicions about the customer, the defence might be hard to sustain. This generates problems in how to deal with the account of someone thus suspected. Often, for intelligence purposes, the account will be allowed to run. But at other times, the police may want the bank to act in a manner which may not protect the bank by law. An example occurred in December 1987, when a press leak allegedly emanating from the police brought to a head criticism of one major bank because even though the bank knew of his arrest on drugs charges, a Rastafarian was allowed to withdraw from his account in Toxteth £1,500: a fairly insubstantial sum compared with the vast international syndicates against whom the legislation was allegedly aimed, but almost his entire liquid assets. (See my earlier discussion of what is a "serious arrestable offence" under s. 116 of PACE 1984.) The circumstances are as follows.

On Friday afternoon, the Merseyside police arrested the individual, and informed the bank. He was released on bail, presumably because there were insufficient grounds under the Bail Act to keep him in custody. On Monday morning he went to the bank to withdraw £1,500, and after a telephone call to the bank's headquarters, the branch were instructed to pay the sum, because the police had not obtained a Restraint Order or even applied for one, and

there was no legally defensible reason for refusing to repay his money. The bank sought police guidance, but no officer was available to assist it in its decision. The money was paid. The police then threatened to interview under caution two junior bank officials from the Toxteth branch, in relation to prospective charges for assisting drug trafficking under s. 24. (*Prima facie,* it is unlikely that these charges would have been sustained in court.) After some high-level interventions in which the bank received the sympathy – and in some but not all cases, the active support – of other banks, the general policy of most banks has changed so that if the police confirm in writing that the Crown Prosecution Service is applying for a Restraint Order – which can be obtained only from the High Court in London, not from a High Court judge elsewhere – the bank will release the information and risk a civil lawsuit from the client.

Sometimes – particularly in the laundering sphere and organised crime groups – the same people are involved in drug trafficking, fraud, and terrorism, – but the legal framework for reporting requirements is *offence*-based, not *offender*-based. The obscurely drafted s. 98 of the Criminal Justice Act 1988 does not impose an obligation to report suspicions, but rather exempts from liability for breach of contract a bank that decides to disclose "to a constable" a suspicion or belief (or "any matter on which a belief or suspicion is based", presumably such as documentation) that property is directly or indirectly the proceeds of a crime or is being used for a crime to which the Part of the Act applies. In practice, there has developed a certain fluidity in access to banking information in Britain, depending largely on whether the bank is one of the major ones or not, though even among large banks, there are substantial variations. Where the officers (police and Customs) are trusted and have been shown to be reliable, information may be given for *intelligence* purposes on condition that it will not be used *evidentially* without its being obtained officially via a Production Order. (Frequently, what will happen is that the official will simply indicate to the police that there is something or that there is nothing suspicious about the account: many bankers are wary of police "fishing expeditions" to build up a case, and will only co-operate without legal compulsion where information already in the possession of the police assures them that the investigation is a targeted one of substance.) Where this system breaks down, it is usually because the police seek to short-circuit their own hierarchies and the banking hierarchies – or are not aware what the proper procedures are – not appreciating the risks that the bankers are running from laws whose implications are uncertain or from their own superiors if they co-operate with the police without the plain legal protection of a court order.

It may be that general police acceptance of due process rules has improved as a consequence of training and habituation to the Police and Criminal Evidence Act 1984, but many officers traditionally take the view that civil rights are not so much legitimate constraints as obstacles to be circumvented

where this is possible without adverse disciplinary or court action. If, in the way they approach bankers, they are very aggressive, this will be counter-productive, particularly where the police are ignorant of precisely what information *is* held by the bank, for quite apart from the assistance banks give to the police in identifying fraudsters, the police normally depend upon banker co-operation for interpretation of records, and even passive compliance will harm police interests. This applies whether requests for information are made regarding suspected fraud (as at National Westminster Newbury in 1987, when the local CID were pursuing a case in which an elderly lady had allegedly been defrauded by a roofing contractor who held his account there), or narcotics or terrorism offences.

Some police consider that the Drug Trafficking Offences Act 1986 entitles them to require information from banks without any legal formality other than their *own* (reasonable or unreasonable, but genuine) suspicion of drug trafficking: a view of the law that is intriguing. (If it is correct, why would the Act have specified procedures through the Crown Court for granting Production Order access to the police?) It is possible, for instance, that a court might hold that *criminal* as well as civil liability for assisting in the disposal of the proceeds of drug trafficking arises where suspicion – which need not be reasonable – exists, and that such suspicion is established by virtue simply of receiving the suspicions of someone in authority. So *provided that drug trafficking by the account-holder or its disposal through him/her could be established,* it would be dangerous for the banker to refuse the request for information, and certainly for the banker to inform the account-holder, to give him/her the opportunity to object to any Production Order, for this communication to the account-holder might give rise to prosecution under s. 31 of the Drug Trafficking Offences Act 1986.[7]

Yet such fears about the extent of police powers and the misuse of Production Orders may be overstated. In the admittedly extreme case of legal privilege, rather than mere special procedure material, in relation to the Drug Trafficking Offences Act 1986, Lord Griffiths – in *R.* v. *Central Criminal Court, Ex parte Francis & Francis* [1988] 3 W.L.R. 1008 – took the view that

> If an order to give access to documentation is made under section 27, the solicitor-client relationship provides a reasonable excuse within the meaning of the section for the solicitor to take his client's instructions as to whether the order should be contested.
>
> If the police believe that this would hinder their investigation, then they will have to try to persuade a judge to grant them a warrant to make an immediate search of the premises pursuant to an application under section 28 of the Act of 1986... The judge will have to be satisfied that the material is not in fact subject to legal privilege because it was prepared for the purpose of furthering a criminal purpose an in making this decision take into account the fact that there will be no opportunity for the solicitor to argue in favour of the privilege. I would have thought that the issue of

> an immediate search warrant of a solicitor's office would be justified in comparatively rare occasions and generally confined to cases in which the solicitor was suspected of complicity in the crime.

The possibility of legal privilege does not normally arise for bankers and most other professionals, so search warrants against banks would create fewer problems for judges than would search warrants against solicitors. (The "legal privilege" position for accountants might become more complex if there develop cross-professional practices.) The conditions under which informing the client of a police request for information counts as "lawful authority or reasonable excuse for making the disclosure" have not been tested properly in the courts in relation to special procedure material. It is certainly not the practice of banks to inform their customers of such requests, but whether they would be liable if they did inform them remains uncertain.

The Prevention of Terrorism (Temporary Provisions) Act 1989

The final area of *police* – as contrasted with broader policing – power to which I will refer here is in relation to terrorism. Many provisions of the Act are draconian. Not only are there powers similar to PACE 1984 under Schedule 7 of the Act, but it is an offence (s. 18) for anyone who has information which he knows or believes might be of material assistance to preventing an act of terrorism "connected with" the affairs of Northern Ireland *or* in bringing terrorists or their aides to justice *not* to communicate it to the authorities as soon as reasonably practicable. "Terrorist funds" include – Section 11 (3) (b) – "the proceeds of the commission of such acts of terrorism or of activities engaged in in furtherance of or in connection with such acts" and – ss (c) – "the resources of a proscribed organisation". Section 11 (1) of the Prevention of Terrorism (Temporary Provisions) Act 1989 states that

> A person is guilty of an offence if he enters into or is otherwise concerned in an arrangement whereby the retention or control by or on behalf of another person of terrorist funds is facilitated, whether by concealment, removal from the jurisdiction, transfer to nominees or otherwise.

Section 11 (2) states:

> In proceedings against a person for an offence under this section it is a defence to prove that he did not know and had no reasonable cause to suspect that the arrangement related to terrorist funds.

Section 12 (2) provides that a person such as a banker does not commit an offence if, *inter alia,* he discloses his suspicions to a constable *and* if – ss (b) –

> the disclosure is made after he enters into or otherwise becomes concerned in the transaction or agreement in question but is made on his own initiative and as soon as it is reasonable for him to make it.

(Provided that he does not go on to assist the suspected terrorist against the wishes of the officer.) Prosecutions can arise only with the consent of the Attorney General, but the maximum penalty for assisting in the retention or control of terrorist funds – like that under the Drug Trafficking Offences Act 1986 – is fourteen years' imprisonment. It seems plain that Section 11 – like "reverse onus" rules generally – has the advantage for prosecutors of increasing the pressure for defendants to give evidence in the witness box. However, the wording is different from that of the Drug Trafficking Offences Act 1986, inasmuch as the subjective "suspect" is replaced by the objective "had no reasonable cause to suspect", and even this quasi-objective issue is a matter for defence demonstration rather than proof by the prosecution. The risk for bankers here is that at the time they handled the funds, they might not have considered the transactions suspicious, whereas in retrospect, perhaps they should have thought more about them. Thus, to cope with the provision, banks may have to establish regular reviews of bank transactions, applying agreed criteria to decide whether or not there is "reasonable cause" to suspect the source of the moneys to be terrorism. It is very difficult to do this on a systematic basis, but although this is being done to some extent to comply with the provisions of the Drug Trafficking Offences Act 1986 – from which identical wording was dropped following lobbying from the British Bankers' Association and the Law Society – it clearly places greater burdens on bank staff who can no longer plead the "thoughtless idiot" line of defence. There are also problems of who is liable under this section: is it just the front-line staff who handled the transactions, or is there some vicarious liability for supervisory staff who ought to have looked at the transactions, whether or not they actually did? Some banks have authorisation for voluntary reporting of suspect cases at the level of the Deputy General Manager: will s/he be the person to go into the dock?

The justification for inserting the wording in its strong form was given by Earl Ferrers, Minister of State for the Home Office, in the House of Lords Committee stage, responding to an Opposition amendment strongly supported by the British Bankers' Association – later withdrawn – to add "knowing or suspecting them to be terrorist funds" after "A person is guilty of an offence if", and to leave out subsection 2 (*Hansard,* vol. 504 no. 43, col. 959):

> The parallel with the laundering of drug money is not entirely apt. I believe that terrorism is different. We have to take account of the special circumstances of Northern Irish terrorism and the climate of fear which terrorism creates and which the terrorists aim to generate... We have all heard of the building site extortions but

> ... there are other forms of racketeering ... the control of pubs and clubs, the pirating of videotapes, the manipulation of estate agencies... Someone who is caught up in a financial transaction which is assisting the terrorists will frequently have a very good idea of what is going on. The pressure on him to deny that he knew or suspected anything untoward may be very great...
> But unless people come forward, the rackets cannot be broken. We must ensure that it is a person's interest to act where there is reason to do so... (U)nless we have a test of "reasonable cause to suspect", it will be all too easy for a person to turn a blind eye, knowing that it would be extremely difficult for the prosecution to prove that he actually suspected terrorist involvement. How can you prove what is going on in another person's mind?... If a bank has doubts about a transaction or a particular customer, the police should be informed... Of course we do not want to see prosecutions in cases of genuine carelessness or ignorance on the part of junior staff.

Earl Ferrers said that he thought it reasonable for an accused person to have to demonstrate that he did not know or had nor reasonable cause to suspect. Yet there is surely an intermediate position here, which was not moved, and that would have been to have amended subsection 2 to substitute "did not suspect" for "had no reasonable cause to suspect". Nevertheless, the accused would have to *dis*prove the allegation on a balance of probabilities, even with a subjective test of knowing or suspecting. It seems plain that the objective is to put pressure on everyone by giving them fewer grounds on which they might hope that the courts – whether juries in England, Scotland, and Wales, or judges alone in Northern Ireland – might excuse them. It is moot whether the risks of prosecution and sentence will be effective in rendering bank officials proof against potential threats to their families from Republican or Loyalist groups against whom they inform (or even with whom they refuse to do business). Bank staff in Northern Ireland, particularly, are afraid that the provisions will jeopardise their safety, for the IRA will lay the blame on bank managers if there should be any leak of the paper trail. (Though informants or police surveillance could equally be the source.) But the legislation may inhibit terrorist groups by making them less confident that their wishes will be obeyed by bankers.

The powers of the Department of Trade and Industry

The Department of Trade and Industry (DTI) has a number of different sorts of powers. However, although its inspectors under the Companies Act 1985 can require information from any past or present officer of the company, until the Companies Act 1989, there was no general power to question officers of the company about matters not in the books, nor were bankes, employees, or "financial consultants" included within the category of people who are required to answer questions.

The Financial Services Act 1986 (hereafter, FSA) extended the powers of

the DTI and of "competent authorities" (Schedule 13) – such as investigators from self-regulatory organisations – in relation to persons carrying on investment business. Apart from provisions applying to the managers and trustees of unit trusts or other collective investment schemes (s. 94), the major powers are granted under section 105 and 177. S. 105 gives the Secretary of State or a competent authority the power to require a person whose affairs are to be investigated to answer questions or furnish information "with respect to any matter relevant to the investigation". Likewise, documents (including computer-held data) must be produced if requested and, subject to legal professional privilege, "the person producing them or any connected person" (extending as far as bankers, auditors, and solicitors) may be required to explain them.

Initially, s. 105 (7) preserved confidentiality for recognised banks or licensed institutions "unless the Secretary of State considers it necessary to (require disclosure) for the purpose of investigating any investment business carried on ... by the bank, institution, or customer or, if the customer is a related company of the person under investigation, by that person". However, doubtless mindful not only of complaints about obstacles to investigation but also of the possibilities of judicial review regarding the exercise of the Secretary of State's discretion, this protective provision was repealed by s. 73 of the Companies Act 1989. Nevertheless, as a partial sop to banking institutions, some customer confidentiality is preserved where, under s. 106, a competent person is authorised by the Securities and Investments Board (SIB) to exercise on its behalf the powers under s. 105 to investigate a *specified* person or persons. Inspectors of self-regulatory organisations (SROs), overseas regulators, or even a firm's compliance officer could be granted these powers, so there is reason to adopt a more restrictive position on the disclosure of banking information there. S. 73 (4) (5) of the Companies Act 1989 consequently amends s. 106 of the FSA 1986 to insert

> (2A) A person shall not by virtue of an authority under this section be required to disclose any information or produce any documents in respect of which he owes an obligation of confidence by virtue of carrying on the business of banking unless –
> (a) he is the person under investigation or a related company,
> (b) the person to whom the obligation of confidence is owed is the person under investigation or a related company,
> (c) the person to whom the obligation of confidence is owed consents to the disclosure or production, or
> (d) the imposing on him of a requirement with respect to such information or documents has been specifically authorised by the Secretary of State.

Evidence compulsorily obtained is admissible in subsequent criminal proceed-

ings: failure to comply without reasonable excuse is a summary offence punishable by up to six months' imprisonment and/or a fine.

S. 177 of the Financial Services Act 1986 relates to insider dealing and is more extensive than the other investigation powers, perhaps reflecting the Catch-22 difficulty of establishing without a full enquiry whether or not insider dealing has occurred. Sub-section (3) creates a duty for any person whom the inspectors consider is or may be able to give information:

> (a) to produce to them any documents in his possession or under his control relating to the company in relation to whose securities the contravention is suspected to have occurred or to its securities;
> (b) to attend before them; and
> (c) otherwise to give them all assistance in connection with the investigation which he is reasonably able to give.

As with sections 94 and 105 of the Act, statements obtained under compulsion are admissible in evidence and these informational requirements were extended to bankers provided that the Secretary of State is satisfied – not necessarily "reasonably", for that word is not contained in the text – that the disclosure or production is necessary to the investigation *and* that the bank customer "is a person who the inspectors have reason to believe may be able to give information concerning a suspected contravention": see s. 177 (8). However, this too was substituted in the Companies Act 1989 by the less restrictive wording of s. 74 (4).

> (8) A person shall not under this section be required to disclose any information or prdocue any document in respect of which he owes an obligation of confidence by virtue of carrying on the business of banking unless –
> (a) the person to whom the obligation of confidence is owed consents to the disclosure or production, or
> (b) the making of the requirement was authorised by the Secretary of State.

Under s. 178, if anyone refuses to co-operate, the inspectors may certify this in writing and a court may enquire into the case. If, after hearing any witness produced by the offender and any statement made by the defence, the court is satisfied that the person had no reasonable excuse to refuse to give the information requested, it may punish him as for contempt of court or direct that the Secretary of State may exercise his powers to restrict or cancel the person's authorisation to undertake investment business, either generally or in specific areas. This may be done even though the offender is not within the jurisdiction of the court, if the court is satisfied that he was notified of his right to appear before it and of the powers available to the court. S. 178 (6) expressly states that it is *not* a reasonable excuse for non co-operation to claim

> in a case where the contravention or suspected contravention being investigated relates to dealing by him on the instructions or for the account of another person, by reason that at the time of the refusal –
> (a) he did not know the identity of that other person; or
> (b) he was subject to the law of a country or territory outside the United Kingdom which prohibited him from disclosing information relating to the dealing without the consent of that other person, if he might have obtained that consent or obtained exemption from that law.

The extensiveness of the requirement to disclose is indicated by the judgment of the House of Lords in the case of Jeremy Warner, the journalist who refused to disclose his source of leaked takeover information to the Department of Trade Inspectors. The court took the robust view that if the information is necessary for the prevention of crime – taken in the most general sense – there is no reasonable excuse for witholding it. Lord Griffiths observed that "'necessary' has a meaning that lies somewhere between 'indispensable', on the one hand, and 'useful' or 'expedient' on the other . . . The nearest paraphrase I can suggest is 'really needed'." (*Re an Inquiry under the Company Securities (Insider Dealing) Act 1985,* [1988] 1 All ER 203.) Journalists are less popular than bankers with the judiciary, but if the courts can override so readily the normal presumption of journalistic privilege in s. 10 of the Contempt of Court Act 1981, bankers too may expect little tolerance.[8]

S. 177 of the Financial Services Act 1986 may deter by generating a more effective audit trail and by discouraging banks and professionals in the Channel Islands and the Isle of Man from allowing insider dealers to use them as a conduit for funds. However, unless new international judicial assistance treaties are negotiated, bankers and others in countries such as Austria, Switzerland, Liechtenstein and Panama which impose a legal obligation of secrecy on banks will continue to fall outside the provisions: their bankers could not "have obtained exemption from that law". Nor is it yet certain how the phrase "if he might have obtained that consent" will be interpreted. Will it count as a reasonable excuse for the *banker* if the person under investigation refuses to give his consent though consent might lawfully have been given? There is still ample scope for judicial interpretation and for argument be defence counsel.

As part of the trend towards a global regulatory "level playing field", the Companies Act 1989 extended the powers of the DTI still further, both in relation to alleged domestic misconduct and in relation to investigations on behalf of overseas authorities. *Inter alia,* s. 63 broadened the scope of the power to require the production of documents; provides PACE-type powers of search and seizure on warrants from a magistrate (including the power to require explanations of documents – s. 64); and amends the banking confidentiality provisions of s. 452 (1) (b) of the Companies Act 1985 as follows:

> (1A) Nothing in section 434, 443 or 446 requires a person (except as mentioned in subsection (1B) below) to disclose information or produce documents in respect of which he owes an obligation of confidence by virtue of carrying on te business of banking unless –
> (a) the person to whom the obligation of confidence is owed is the company or other body corporate under investigation;
> (b) the person to whom the obligation of confidence is owed consents to the disclosure or production, or
> (c) the making of the requirement is authorised by the Secretary of State.
>
> (1B) Subsection (1A) does not apply where the person owing the obligation of confidence is the company or other body corporate under investigation under section 431, 432, or 433 . . .

In relation to requests to assist overseas regulatory authorities, defined in s. 82 of the Companies Act 1989, banking information appears to be required to be given freely to the Secretary of State under s. 83, including the open-ended provision of s. 83 (2) (c) that any person may be required "to give him such assistance in connection with the inquiries as he is reasonably able to give". However, officers or other competent persons may also be delegated under s. 84 to exercise his powers. Here, the impact on bankers is more restricted. S. 84 (4) states:

> A person shall not by virtue of an authority under this section be required to disclose any information or produce any documents in respect of which he owes an obligation of confidence by virtue of carrying on the business of banking unless –
> (a) the imposing on him of a requirement with respect to such information or documents has been specifically authorised by the Secretary of State, or
> (b) the person to whom the obligation of confidence is owed consents to the disclosure or production.

In short, though the specific powers vary for different companies offences, companies legislation has made substantial inroads into customer confidentiality and – once a decision to investigate has been made – requires banks to disclose information fairly freely.

The Serious Fraud Office

The Serious Fraud Office was established in response to criticism by the Fraud Trials Committee (1986) that a more co-ordinated approach to the investigation and prosecution of fraud was needed (Wood, 1989). One of the results of this was a set of powers that were often greater than police powers. A special provision in s. 2 (10) of the Criminal Justice Act 1987 – inserted partly in response to pressure from the banks – requires the personal *fiat* of the Director

(or his designate where it is impractical for him to act) to investigate any bank accounts: this places a layer of bureaucracy and time in the way of speedy information trawl. Nevertheless, such powers are extensively used: during 1989–90, 574 section 2 notices were issued (Serious Fraud Office, 1990), and one accountant was imprisoned for five months for non-compliance. (Though the sanctions for non-cooperation are much lower than the maxima for substantive fraud offences.) As in s. 105 of the Financial Services Act 1986, s. 2 (13) states that

> Any person who without reasonable excuse fails to comply with a requirement imposed on him under this section shall be guilty of an offence and liable on summary conviction to imprisonment for a term not exceeding six months or to a fine not exceeding level 5 on the standard scale or to both.

Except for revenue intelligence, which will be disclosed to others only for the purpose of a criminal prosecution by either the Serious Fraud Office or, in relation to an inland revenue offence, to the Crown Prosecution Service – see s. 3 of the Act – information obtained by the SFO may be passed on not only to the police but to Department of Trade Inspectors, the Official Receiver, and, under s. 3 (6),

> (1) any body having supervisory, regulatory, or disciplinary functions in relation to any profession or area of commercial activity; and (m) any person or body having, under the law of any country or territory outside Great Britain, functions corresponding to any of the functions of any person or body mentioned . . . above.

So – enhanced subsequently by the Criminal Justice (International Co-operation) Act 1990 – the possibility of developing international intelligence and supervisory interchange is very considerable.

So much for the heavy "must disclose" powers. What about the "permissives", where the bank is relieved of its supposed contractual obligations of confidentiality but is not actually *required* to tell? We should be clear that bankers are not the *only* people involved here: under s. 47 of the Banking Act 1987, auditors cannot be sued if in good faith they tell the Bank of England about any suspicions they may have about banks they audit. This may ease the kind of problems experienced by auditors in situations where they are concerned about the capital adequacy of banks or integrity of personnel – viz. Johnson Matthey Bankers, Bank of Credit and Commerce International – though it creates for bankers new problems in how open they should be to their auditors, and for auditors problems of how bankers will react if they *are* reported. Bankers – like directors generally – can always change their auditors, subject to the provisions of the Companies Act 1989.

The civil law can have an impact, because under the Bills of Exchange Act

1882, banks are liable in conversion for losses made unless they can show that they acted without negligence, while s. 4 of the Cheques Act 1957 protected bankers from negligence suits if they acted "in good faith and without negligence". But what constitutes negligence by the bank? In *Marfani & Co Ltd.* v. *Midland Bank Ltd.* (1968) 2 All E.R. 573, the Court of Appeal held that the duty of care owed by the banker to the true owner of the cheque did not begin until the cheque was delivered to the banker by the customer. Thus, the failure to make full enquiries when opening up an account did not imply negligence on the part of the bank.

Some banks check that an account applicant is a registered voter at a genuine address, and require some documentation with a signature on – driving licence, passport, state pension or child benefit book, union card, or AA membership card – as proof of identity. Others, wary of cross-firing cheque frauds or advance fee frauds against the bank itself or against its customers, may check for multiple-account addresses, or multi-referee companies. But at least prior to 1990, many major financial services institutions – such as building societies – did not check the identity of account-holders significantly: they were not liable for loss. In this respect, the U.K. differed from Germany (Article 154 of the Fiscal Code), France (Article 30 of the *Decret* of 3 October 1975), or even the much maligned Switzerland where, following the 1977 scandal in which the manager of *Credit Suisse* in Chiasso lost large sums by lending money to an Italian wine and food group instead of blue-chip European securities, a Convention of Diligence was signed by all the major Swiss banks, the Swiss National Bank, and the Swiss Bankers' Association. Banks can be fined up to S. Fr 10 million by a committee of bankers if they accept large cash or securities deposits, engage in fiduciary activities, or allow safe deposit boxes to be used, without knowing the identity of the counterparty. (Walter, 1989, p. 193, reports that up to 1983, 30 banks were brought under the Convention, the largest fine being S. Fr 500,000.) In 1987, the Convention was revised to require any fiduciary agent – including lawyers and accountants, who formerly could open accounts for unidentified clients – to sign a statement that he handles business for the client and is not merely providing a front for a third party. Whereas formerly, deposits or withdrawals over S. Fr 500,000 required identification of the client to the bank, the 1987 Convention reduced the identification threshold to S. Fr 10,000. These provisions have subsequently been extended also to finance houses and money-changers. (The husband of the Justice Minister, Mrs. Elizabeth Kopp, was vice-president of a finance company. She resigned in January 1989 after he was named by prosecutors in the Lebanon Connection drug trafficking case and, in February 1990, she was acquitted of criminal charges of disclosing confidential information, successfully arguing that she believed the news given by her assistant to be rumour rather than judicial information.) This is not to suggest

that fiduciaries do not sign statements falsely or that the banks always – particularly when under financial or other pressure – do check their customers' identities rigorously. Nor does it ensure that many persons later seen as unsavoury are prevented from opening accounts provided that their identities are known. My analysis merely indicates that legal provisions do not guarantee their own implementation.

In the U.K., there is no general legal obligation on the part of a bank to satisfy itself as to the identity of its customers, and as regards proof of identity, until 1990 it was harder to get a Video Club membership card from a local corner shop that to open up a bank account. This is notwithstanding the fact that the Drug Trafficking Offences Act 1986 and, *a fortiori,* the Prevention of Terrorism (Temporary Provisions) Act 1989, have led many banks and building societies to verify all customers' identities at least to the extent of checking electoral rolls, debt registers, etcetera, which many used to do only if there was some financial risk to the bank such as a request to borrow money. Simple deposit account-holders were seldom checked up on: banks were pleased to have the custom. My experimental survey of several building societies in 1989 revealed that all they required was some item of identification with my signature on it. Whether they would have checked further after opening the account remains open, but by then, I could have laundered my funds. This relative laxity may be why in recent completed and pending narcotics trafficking cases, funds have been found in building society rather than in bank accounts. However, building societies have not yet developed as international institutions to the extent that continuous money-laundering requires.

On the other hand, Canada had looser requirements than does the U.K. (Jack Committee, 1989, 44–45), though whereas the Committee asserts that this looseness applies also to Australia, Karmel (1989, 82), observes that Australia has comprehensive identity checks on new customers and that there is an Australian proposal to require a customer's *referees* to make a statutory declaration that s/he is who s/he appears to be. (Subsequently, Australia has adopted tough legislation and U.S.-style currency transaction reporting requirements.) The deterrent implications of identification requirements are probably overstated: there is a flourishing black market in false and stolen passports, and documentary fraud in relation to fiduciary instruments also is a growth area for organised criminals. Though there may be an impact on the opportunist, casual cheque thief and the user of stolen/burgled cheques and credit cards – important categories in themselves – the need to obtain false identification will not deter the serious fraudster, though it will impose extra costs and inconvenience, and will help any subsequent jury realise that there were criminal motives right from the start (see Levi et al. 1991).

As regards the *conduct* of bank accounts once opened, national practices also vary. In the United States, the Money Laundering Control Act 1986

creates an offence where (s. 1956) any person or financial institution participates or attempts to participate in any financial transaction which involves the proceeds of specified unlawful activity. The defendant need only know that the transaction involved the proceeds of some form of felonious activity, and wilful blindness is culpable: e.g. if a banker accepts a substantial "counting fee" or other such benefit. Section 1957 makes it an offence knowingly to engage in, or to admit to engage in, a monetary transaction in property of a value greater than $ 10,000, which value is derived from specified unlawful activity.

Wherever legislation creates penalties for failure to report or disclose, this opens up not only the "legal duty" but also possibly the "interests of the bank" grounds for relief from civil liability for breach of confidence: see, generally, *Tournier* v. *National Provincial Union of England* [1924] 1 K.B. 461. Normally, the "interests of the bank" notion is applied to the bank's ability to drop confidentiality when it is a party to legal proceedings. But the notion could be widened. There is no hard evidence on the extent to which publicity for under-reporting *per se* – rather than fear of bank insolvency or intensified police/revenue interest in *clientele* – will lead basically legitimate clients to desert the bank. But since it presumably is not in the interests of the bank to have its employees jailed and to receive bad publicity for assisting money laundering, this can open up considerably the opportunities for disclosure. However, even this is not self-evident, for in a competitive market for funds, ready disclosure of information may harm the interests of the bank also: even legitimate clients who suspect that account details may be passed on to the police or to a government department – and thence, who knows? – may choose to bank elsewhere, within the jurisdiction or outside: hence the importance of a global level playing field in practice as well as in law or rule. Furthermore, banks (or parts of banks) that knowingly launder money will not avail themselves of disclosure opportunities, except perhaps as part of a subtle strategy to legitimate themselves in the eyes of the authorities. However, as we have seen, recent legislation imposes serious consequences not only of imprisonment but also of asset confiscation for those bankers who accept funds and who know or suspect that the money is the proceeds of drug trafficking, or who know or have reasonable cause "objectively" to suspect that the funds are terrorist moneys.

The United States approach to bank confidentiality domestically

Prior to 1970, there was no generic concept of customer confidentiality in the U.S.. The courts approached the question of bank secrecy broadly in keeping with the spirit of *Tournier,* except that there was no right to privacy in relation

to (i) cheques, cancelled cheques, and bank statements for cheque accounts (including even the commercial cheque accounts of lawyers) – see *Harris* v. *United States,* 413 F. 2d 316 (9th Cir. 1969); and (ii) records that are made and paid for by a bank for its convenience and business purpose. *Cooley* v. *Bergin,* 27 F. 2d 930 (D. Mass. 1928) and *Donaldson* v. *United States* 400 U.S. 517 (1971) make it clear that bank records are liable to *subpoena* (or, in Internal Revenue Service cases, to a summons), often by the Grand Jury. The fact that the records belong to the bank and not to the customer is critical, for the customer otherwise might be immune even from disclosure under *subpoena.* The Fourth Amendment, which does not apply to the issue of summons or *subpoenas,* gives citizens rights against "unreasonable" search and seizure, but search and seizure is seldom used in relation to banking information. However, despite these access powers, governmental frustration at what for their purposes was poor bank record-keeping led to the passage of the Bank Secrecy Act (Pollard et al. 1988, p. 465).

The Bank Secrecy Act 1970 authorised the Secretary of the Treasury to require banks to keep records of the identity of each person having an account in the United States with the bank and of each individual authorised to sign cheques, make withdrawals, or otherwise act with respect to any such account; reproductions of each cheque, draft, or similar instrument drawn on it and presented to it for payment; records of instruments received for deposit or collection; and the identity of any individual engaging in a transaction required to be reported or recorded under the Currency and Foreign Transactions Reporting Act. Financial institutions were required to verify and record the identity, address, and identification or social security number of all persons sending $ 10,000 or more or receiving $ 5,000 or more in currency. The susceptibility of all such banking records to *subpoena* was confirmed by the Supreme Court in *United States* v. *Miller* 425 U.S. 435 (1976).

Following this and other rulings, there was a shift of the political pendulum, and Congress enacted the Right to Financial Privacy Act 1978 – now amended – which circumscribed availability of bank records: although Grand Jury *subpoenas* were exempted from the disclosure provisions of the Act, search warrants had to be accompanied by notice to the customer within 90 days, unless the issuing court granted a delay; and the customer was given the right to file a motion to quash the subpoena or summons. In tax cases, so long as there was no formal referral to the Justice Department with a view to prosecution, the Internal Revenue Service (IRS) can use a summons to gather evidence (Title 26, Chapter 78, s. 7602 of the Internal Revenue Code). However, all banks and savings & loan institutions are third party record keepers covered by s. 7609 of the Code, and any customers whose records are to be examined must be informed within three days on which the summons is served but no later than twenty three days before the day on which the records

are to be examined. Consequently, IRS examination of bank records without the customer's knowledge is unlawful and evidentially pointless, because of the exclusionary rule which bars the use in court of information improperly obtained. The Right to Financial Privacy Act 1978 required a government agency to show that it had a demonstrable reason to believe that the records contained information that would assist a legitimate investigation of law violations within its jurisdiction, but a bank customer challenging disclosure had the initial burden of presenting a *prima facie* case of impropriety before the government had to respond: see *Hancock* v. *Marshall,* 86 FRD 209 [1980].

The Act appears to have limited governmental "fishing expeditions", and for that very reason was the target of much criticism by the investigative authorities and by the Presidential Commission on Organized Crime (1986). It was amended by the Anti-Drug Abuse Act of 1986, PL 99–570, Title 1 of which contained the Money Laundering Control Act 1986. This subjected individuals to criminal liability for *knowingly* participating in the laundering of money (18 U.S.C. section 1956 (Supp. V 1987)), with maximum sentences of ten years. In a manner analogous to the (U.K.) Criminal Justice Act 1988, Section 1353 of the Act authorised financial institutions (and their officers, employees and agents) to disclose information identifying any individual or account involved in any suspected illegal transaction. Section 6186 (c) amended the Right to Financial Privacy Act by allowing a financial institution *or supervisory agency* to provide the Federal authorities with the financial records of any "major borrower", officer, director, employee or controlling shareholder of such institution whenever there is reason to believe that such records are relevant to show possible criminal activity by such individuals against the institution or supervisory agency. There is no room in this short paper to discuss details of the development of this Act (see Zagaris, 1989). However, one intriguing feature of U.S. legislation – never officially suggested in the U.K. – is the fact that bankers are obliged to report to their regulatory authorities frauds and other criminal transactions using banks, though news of this does not often reach the Justice Department.

In July 17, 1986, the Office of the Comptroller of Currency (OCC) published its final rule in the Federal Register pertaining to 12 Code of Federal Regulations Part 21, which imposed upon all *national* banks a criminal referral reporting requirement within 30 days of the detection of any violation. These regulations were revised from April 1988, with the goals of facilitating the assessment and investigation of possible criminal matters, aiding the identification of patterns of criminal misconduct, improving the OCC's ability to track the disposition of criminal referrals, and enabling evaluation of banks' internal controls.

The rule requires the submission of a "short form" upon the discovery of any known or suspected (Federal) criminal violation committed against a bank or

involving a financial transaction conducted through the bank involving bank personnel. A report must be filed where bank personnel are involved regardless of the amount of money; where criminal transactions involve $ 1,000 or more and the bank has a substantial basis for identifying a possible suspect or group of suspects; and where a transaction "appears to be part of a pattern of criminal activity committed by one or more identifiable individuals and the aggregate value of the transactions totals $ 1,000 or more". In situations such as money laundering and false statements on credit applications in which the bank does not lose any money, the bank is required to evaluate whether the transaction involved or had the potential to involve $ 1,000 or more. Where there is *no* plausible suspect – e.g. credit card frauds – the bank need file a referral only if the loss reaches $ 5,000. Similarly, a bank must report mysterious disappearances or unexplained shortages of bank funds or property only when they amount to $ 5,000. So much for the formal rules. But what do they mean in practice? The guidelines issued by the Office of the Comptroller of Currency are far from explicit. They state (Federal Register, March 11, 1988, p. 7883):

> By "suspected violation" the OCC is referring to a transaction or series of transactions for which there is reasonable cause to believe that a criminal violation has occurred. The OCC cannot quantify the precise amount of evidence needed to trigger the reporting requirement any more than it can delineate all the relevant factors that a bank must consider in deciding whether or not to report a suspicion or otherwise irregular transactions.
>
> In many instances the suspicious nature of the transaction is a function not only of the transaction itself but also of the bank's experience with the individuals associated with the transactions, either as employees or as customers of the bank. In many situations, the bank will be able to discern the "intent" of those involved in a suspicious transaction. Invariably, however, the pivotal question of criminal intent will be left for the determination of law enforcement authorities. All that a bank can do in those situations is to make a practical assessment of the suspicious transaction based upon a good faith examination of all the relevant factors. Clearly, the more serious the irregularity, particularly if it involves a bank insider, the greater the obligation upon the bank to fully investigate the matter.

Banks in the United States are advised in case of doubt to report rather than not report possible money laundering. In other words, banks are told to use their common sense. Unfortunately, in an atmosphere where banks, their officers and directors may be faced with criminal penalties for failure to file CTRs, this leads to the banking equivalent of "defensive medicine" – known as "aggressive compliance" – without getting round the problem of how we get junior personnel to make sound judgments about what is and is not suspicious. It may be that this is unduly alarmist: the repetition of certain transactions may lead someone in the bank to notice that there is "something wrong". However,

it is equally plausible that the routinisation of certain transactions may lull bankers into a false sense of security: normality equals legitimacy! Ultimately, bankers will just have to hope that their pleas of "reasonable under the circumstances" are heeded by prosecutorial authorities in their case screening or by the courts in their adjudications of guilt. However, it is scarcely surprising that they are concerned about the legal and financial impact of the trends towards imposing ever-more-extensive reporting requirements.

These examples reaffirm the importance of asking: confidentiality to whom for what? The obligations of bankers to report to banking regulators should be placed in the context of the level of banking (and, *a fortiori,* of Savings and Loan Association) failure in the United States, compared with its almost complete absence in the U.K.: between 1984 and 1987, the rate of failure of banks rose to an average of 0.37 per cent from an average 0.07 per cent in the period 1946–1984, and in 1987, 184 out of almost 15,000 commercial banks in America failed. Moreover, organised crime group penetration and ownership of financial institutions is a much more salient problem there, as it is in Italy. In the U.S., for these and other (historical) reasons – during the 1920s, more that 500 banks failed in an average year, and 9,000 banks failed during the Depression – banking regulators have taken a much more aggressive role in requiring banks to report defalcations against them. Deposit insurance, like investors' compensation schemes under the U.K. Financial Services Act 1986 and equivalent U.S. legislation, gives regulators a financial self-interest in avoiding major failures quite additional to the general public interest in preventing a run on the banks collectively. Nevertheless, the enormous cost of the collapse in the Savings & Loan movement bears witness to the inadequacies of supervisory standards that then prevailed: the best way of robbing a bank was plainly to own one!

In short, the United States has gone for routine information on currency movements and deposits as a key component of its battle against organised crime. This contrasts heavily with the British approach, which requires bankers only to report on their own initiative their *suspicions* of money laundering.[9] A combination of objections in principle by the banks, the economic costs of such routines to the Treasury (given banks' understandable objections to paying for compliance themselves), and scepticism about the *effectiveness* of such information in fighting organised crime meant that similar notions were never developed into legislative form in the U.K., and they were rejected also by the Financial Action Task Force set up by the Group of Seven, which reported in 1990.

Nevertheless, as part of the general drift of extra-territorial jurisdiction claimed by the U.S., Senator Kerry proposed in the omnibus Anti-Drug Abuse Act 1988 that all U.S. currency transactions over $ 10,000 by U.S. and non-US banks abroad should be reported to the U.S. Treasury, as a condition

of continued access to U.S. dollar clearing or wire transfer systems.[10] A compromise was passed by Congress which merely directs the Secretary of the Treasury to enter into negotiations with appropriate financial supervisory agencies or other officials of any foreign countries, the banks of which "do business in United States currency", with the "highest priority" given to countries that the Treasury deems to be engaging in narcotics money laundering. In the first instance, these negotiations have taken place on a voluntary basis, but where such a country has not reached agreement for exchanging adequate records and is not negotiating in good faith – whatever that entails – sanctions of non-participation in currency clearing must be imposed unless it is in the "national interest" that penalties be delayed or waived. (Even if the *country* is subject to sanctions, individual banks may be exempted.) Partly because of its strategic importance in setting trends elsewhere, the U.K. may be regarded as a fairly high priority venue for "substantially engaging" (not necessarily deliberately) in money laundering, so *U.S.* currency reporting requirements may not be as far off as we imagine, though it seems likely that in the short term, U.K. arrangements for monitoring banking transactions will be given a clean bill of health.

Currency reporting requirements undoubtedly have a symbolic value in indicating to the public that something is being done about the War on Drugs. But there is insufficient hard evidence of their actual yield in generating convictions that – but for their existence – either would not have occurred or would have taken much longer. Though the U.S. system plainly inconveniences potential launderers, – and will do so more as other countries co-operate with U.S. authorities – convictions of *banks* for noncompliance with the rules are not the same as convictions of drug *traffickers*. U.S. Customs have developed a computerised expert system which allegedly makes judgements to target money-laundering, which according to the U.S. Attorney-General has led to 68 indictments by the end of October 1989. (Though we cannot be certain that these indictments would not have been generated anyway.)

Overall, despite being sincerely believed in by their adherents, it is arguable that currency-reporting requirements are an example of an over-trumpeted intelligence methodology, since except in a targeted investigation, the system has neither the capacity to input the data rapidly (within six months of receipt) nor the capability of putting the information to sound operational use. This is hardly surprising, since in 1988, some 7 million CTRs were filed: a rise from 5 million in 1987, 3.5 million in 1986, and a mere 740,000 in 1983.

It is assumed, but not to my knowledge convincingly demonstrated, that reporting requirements have a deterrent effect on the overall level of drug importation and – an important aspect also – on within-country narcotics distribution. The illegal circumvention of the laws (by "Flying Bagmen") does enable some people to be charged with strict liability offences of failing to

report currency imports or exports if those who detect them are not amenable to corruption. However, the principal benefit of currency reporting rules is not for proactive policing and for new investigation-generation by the Treasury and Drug Enforcement Administration but for *ex post facto* audit trails which can be used (1) in post-arrest evidence, and (2) for proving that assets derive from an individual subject to confiscation proceedings under the draconian civil or criminal provisions of the Racketeer Influenced and Corrupt Organizations Act 1961 – popularly known as RICO – and of the Continuing Criminal Enterprises Act 1982 (CCE), which are now codified under the Comprehensive Forfeiture Act of 1984, Pub. L. No. 98–473. The laying of audit trails may be a desirable objective in itself, but leads to further questions about whether such convictions can reasonably be expected to have a significant impact on levels of narcotics abuse or on drug-related crimes. Such issues are too substantial for this report, but one must emphasise that the conviction of some "bad people" does not necessarily reduce crime overall. Indeed, there is a tragic paradox that to the extent that supply-side restrictions are partially successful, rises in narcotics prices may lead not to less drug use, but rather to more crime for gain to pay for the same level of narcotics consumption.

Squaring the circle: Bankers' obligations to customers, third parties, and domestic and international policing

Intra-organisational communications

I now come to a rather different issue: the question of policy communication *within* banks and *within* the police. One of the public relations – and criminal liability – problems that confronts the banks is that outsiders such as the police, press, and courts have very little idea of the complexity of decision-making structures within banks, nor of the conflicts *within* institutions – such as between sales and security personnel – that may affect either official policy or deviations from official policy. It is often assumed that bank staff know all about their customers' activities, without realising that to do so would be wholly uneconomic. In the corporate world, especially, the shift from long-term relationship banking to short-term transaction banking, seen for example in the large number of banks lending money to corporations that subsequently fail, reduces the ability of any one bank to get a good total picture of its client.

Let us take as an example the question of reporting suspected fraud and/or money-laundering. This logically entails an awareness that there is something odd *and* suspicious about a transaction or series of transactions. Does any obligation to disclose require proof of *actual* suspicion by those who handled the transactions, or does it apply some objective test of when a reasonable

person *ought* to be suspicious (as in the Prevention of Terrorism Act 1989)? This is a critical issue, since the *subjective* test rewards the thoughtless idiot – or someone who can convince the jury that he is one – by granting him immunity from punishment, while the *objective* test risks punishing those who make genuine mistakes in good faith in circumstances where suspiciousness was not self-evident, e.g. in relation to cash deposits and withdrawals by a well-established client for whom the sums are not plainly absurd.

The aftermath of the Brinks'-Mat robbery of 1983 involved a previously obscure firm suddenly generating a large number of transactions and withdrawing huge sums in cash. Between September 1984 and January 1985, a company called Scadlynn – which previously had been trading in tens of thousands of pounds monthly – deposited over £10 million allegedly as the result of dealers buying scrap gold. Once or twice-weekly cash withdrawals escalated from £20,000 to £300,000 over the four-month period; new cashiers were recruited at the small three-till branch to deal with the account; special arrangements were made with Barclays Bullion Centre at Bristol to supply £50 notes; and the firm warned the bank that they would soon require £1 million per day, which information was communicated to the Bank of England. It took some time before the upsurge in cash transactions was reported up the line to the inspection department and, even then, it was not reported to the police: there was no *legal* obligation for the bank to report it.[11]

Scadlynn's managing director had not long before being given a suspended prison sentence for conspiracy to defraud, and several convictions for fraud, though the bank manager and the inspection department did not know that: this knowledge might have made a difference in practice to the way they treated the account, though at that time, even had the bank known, it would not have affected the bank's legal duty in relation to its contract with him. (It doubtless would have made a difference had he wanted to *borrow* money.) However, given the publicity for Barclays that was generated, could it not be said that to have reported these transactions as suspicious would have been in the interests of the bank? The answer to that is rather obscure at the present time. It is possible that standing instructions were not sufficiently clear about the proper procedure to be followed. But how many employees are aware of all their standing orders? And what is clear to most may not be clear to a person whose competence record had already led to their transfer, as was true of one key figure in Brink's Mat. The training, quality, and guidance of branch staff is always a problem, and all that can be done without significant cost is to remind branch staff regularly by way of circulars what their obligations are. Largely because of the changes in the legal obligations of bankers, however, it is unlikely that any Barclays branch would behave now in the same way that it did in 1984, not is it quite so likely that no questions would be asked along the line. (Though large cash transfers for corporate clients would not automatical-

ly raise suspicions once they moved beyond the client's bank: they are normal multinational routines.)

There are some contradictions here. On the one hand, events that are highly atypical for country or small branches may be responded to in a thoughtless manner by staff who are not always of the highest quality: that is why the staff are not in major branches. Provided that they are given some sort of explanation, not many bank staff in village areas think ordinarily of the possibility that cash transactions are money laundering: they may think it is merely tax evasion! On the other hand, if banks – particularly the British branches of overseas banks – deal habitually with clients who deposit and/or transfer large sums in cash, do we really expect them to require documentation for how the funds were generated? The client might well move his account and the manager would be fired. Likewise, in conducting execution-only trades in foreign exchange or other financial transfers for large overseas banks – which may themselves operate banking secrecy at a high level – are banks going to question the provenance of the funds? In a sense, the larger the sums involved, the less likely they are to be questioned.

On the other hand, when opening *new* accounts, the principles may be different. Thus, in the Brink's Mat case, ringleader Kenneth Noye approached a branch of the Bank of Ireland in Croydon in September 1984, flashily dressed and – probably unknown to the bank – using a false name. He inquired about offshore bank facilities, and opened an offshore Dublin account in his false and his wife's maiden name, stating that he did not want statements sent to him. He also left no means by which the bank could contact him. He allegedly told the bank that he was in the property development business, but had made a killing on the stock market. From September 4 1984, he made five monthly deposits of £200,000 in cash, in new £50 notes. Again, this was prior to the Drug Trafficking Offences Act 1986, and the bankers might have been more wary of taking the money subsequent to that Act, at least without referring the matter to headquarters (as they may have done, anyway). [The risk to an Irish bank of accepting such sums will be greater still following the passage of the Prevention of Terrorism (Temporary Provisions) Act 1989, though the bankers may still reasonably be concerned about possible reprisals should they fail to co-operate.] The bankers' defence might be that they suspected the client of tax evasion, and that there is no obligation to report that. (Though if they agreed to aid and abet a crime, they might fall foul of the conspiracy provisions of s. 4 of the Criminal Law Act 1977.) However, even at that time when there was no risk of imprisonment for assisting in disposing of the proceeds of drug trafficking or terrorism, the Bank of Ireland was certainly acting on a narrow conception of its social obligations.

Wilful blindness or even active conspiracy in money laundering sometimes occurs: such is alleged on the part of five senior officials of the Bank of Credit and

Commerce International who, as a result of Operation C-Chase, were imprisoned in the United States for money-laundering and other drug offences. (In a plea bargain, the U.S. Bank was fined $ 14 million. One junior officer of the BCCI has also been imprisoned in England under s. 24 (1) of the Drug Trafficking Offences Act 1986. In July 1991, most of BCCI's operations were closed down world-wide, though principally because of fraud rather than money-laundering.) But even assuming a genuine desire to comply and complete integrity throughout the bank, it is hard to develop a *realistic* set of instructions that will guide the civic conscience of bank employees *at all levels from director to assistant cashier* without paralysing the banking activities or the handling capacity of the police. This is a different problem from that we see in responding to requests for information from the police, for in the latter, except where the information is requested without a court order, no judgment of suspiciousness on the part of "the banker" is called for. (Though problems can arise where there is localised misconduct of which Head Office is unaware – see Frantz, 1989.) It is where we are asking bankers to use initiative that real organisational communication problems arise. This depends not only on the ethics but also on the nature of the normal banking activities of the branch: unlike mainland High Street branches, where bank staff generally know customers personally, offshore branches in the Channel Islands, for instance, will normally have scanty information about clients unless they wish to borrow money. Inter-bank international electronic payments transfers, perhaps involving currency swaps by the (presumed) corporate clients of third-party banks that are common as hedges, would not be expected to excite the sort of interest that would lead to a report to the National Drugs Intelligence Unit.

Offshore branches, as we shall see, are beyond the jurisdiction of the legislation, but transactions that are normal in some contexts are abnormal in others. Sometimes, as in the case of the Mafia front car-cleaning firm in the U.S. that registered 200 cars going through one outlet on a day when a blizzard had stopped all traffic, trading claims are testable in principle. But how, for example, are bankers to treat market traders and other substantial cash depositors from the Indian sub-continent? This, after all, is a major drug exporting as well as arms trafficking region. Market traders are not best known for their book-keeping, and it is very difficult to verify the genuineness of the levels of trade that correspond to their currency deposits. They often send money back home to support their families in India and Pakistan. Are bankers expected – like VAT investigators – to mount surveillance operations to check the level of trading? The situation can easily degenerate into methodic suspicion of particular ethnic or national groups simply on the basis of their area of personal (or even antecedent) origin. This becomes more acute still where there is a potential terrorist connection. Like sophisticated fraudsters, money-launderers are often more subtle than simple depositors of suitcases full of

money (which many normal car dealers might use). There are also problems that arise from the *personal* mobility of *either* bank *or* police: informal understandings may be disrupted when officials change posts, as often happens in U.K. Fraud, Drug, and Regional Crime Squads, or when *local* bank officials are not aware of such arrangements or when they change their attitudes towards them.

Bankers' obligations to third parties

Although case law has been developed in relation to civil fraud, not drug trafficking or most of the activities undertaken by terrorists, it is instructive to look at the doctrine of constructive trust, for some *ex post facto* guidelines for determining bankers' obligations have been developed by the courts to deal with allegations that bankers who are not trustees have knowingly assisted in the furtherance of a fraudulent and dishonest breach of trust. (As in most law, the reconstruction of states of mind and knowledge usually contains an irreducibly subjective component which may be influenced by judges' beliefs about moral standards in commerce generally or the reputation of the particular firm in question.) A general account of constructive trusts can be found in Hayton (1987, 1989), and I will not discuss them extensively here. In *Re Montagu's Settlement* [1987] 2 W.L.R. 1192, Megarry V-C's judgment imposed personal liability where persons knowingly receive trust property:

> Knowledge is not confined to actual knowledge but includes actual knowledge that would have been acquired but for shutting one's eyes to the obvious, or wilfully and recklessly failing to make such inquiries as a reasonable and honest man would make, for in such cases there is a want of probity which justifies imposing a constructive trust.

It remains open, however, whether liability for constructive trust would be imposed in the case of what Peter Gibson J. held in *Baden, Delvaux, and Lecuit* v. *Societe Generale* [1983] B CLC 325 was "type (iv)" knowledge, i.e. "knowledge of circumstances which would indicate the facts to an honest and reasonable man, though not the morally obtuse defendant".

In *Lipkin Gorman* v. *Karpnale* [1987] 1 W.L.R. 987 – later reversed by the Court of Appeal, though perhaps mainly because the pleadings were not drafted appropriately, in respect of Lloyds Bank's liability as constructive trustee [1989] 1 W.L.R. 1340, C.A. – the question arose whether the bank was negligent in not informing fellow partners that a solicitor, Mr. Cass, was gambling heavily and was drawing substantial cash sums from the firm's client account. The bank manager, Mr. Fox, did not pass on his knowledge to the

assistant regional manager or the any other superiors when questioned later. The judge of first instance, Alliott J., held that

> his conduct is only explicable on the basis that he was shutting his eyes to the obvious source of Cass's money to gamble with, or was wilfully and recklessly failing to make such enquiries as a reasonable and honest man would make. I find that Mr. Fox, *and therefore the bank* (italics not in original), had reasonable grounds for believing that the probability was that Cass was operating the clients' account in fraud.

He held, *inter alia,* that from the date when the manager, Fox, recorded that he did not accept that Cass's gambling was a controlled activity the bank had been in breach of duty to the solicitors and was liable as constructive trustee for rendering knowing assistance to Cass. (He held also that the bank's liability ended when, some four months later, a partner saw the disproportionate expenses claims made by Cass and took no immediate steps to investigate or to control Cass's authority to sign cheques.) Expert evidence from a retired banker played an important role in determining the degree of negligence by contrast with "good practice".

At the trial, the banker was examined at p. 1013:

> *Q.* And if . . . you came up with a large number of cash drawings on client account, what would you do? *A.* It would be proper and usual procedure to suggest to the senior partner that there should be two signatories on client account cheques in the future.

However, May LJ, giving the majority judgment of the Court of Appeal in *Lipkin Gorman* v. *Karpnale Ltd. & and another* [1989] 1 W.L.R. 1340, C.A. observed that too high a duty of care was being laid on bankers by Mr. Justice Alliott and by previous case law:

> Negligence by a banker was not sufficient to make him a constructive trustee: some want of probity had to be shown. It was wrong to equate the duty to inquire, where there had been fraud and the bank had known of it, with that where all that was alleged against the bank was negligence . . . Only where any reasonable cashier would hesitate to pay a cheque at once and refer it to his superior and where any reasonable superior would hesitate to authorise payment with inquiry should a cheque not be paid immediately and such an inquiry be made.

The judgment indicates that save in exceptional circumstances, bankers who comply with the bank mandate will be relieved of liability that would attach to constructive trustees. In considering whether a reasonable bank manager would think that the facts suggested dishonesty, the court would consider:

- the practical difficulties involved in supervising the encashment of cheques;

- the incidence of suspicious transactions in relation to the totality of transactions conducted on the account;
- the standing of the signatory/customer operating the account and the duration of his relationship with the bank;
- that most bankers will assume that with very strong evidence to the contrary, directors of corporate customers do *not* seek to defraud their companies.

The bank was not a defendant in the action, but some relevant further discussion of mental states arose in *AGIP (Africa) Ltd.* v. *Jackson and another* [1989] 3 W.L.R. 1380, in which one chartered accountant and an employee working from the Isle of Man were found liable to account as constructive trustees for moneys transferred with employee complicity from AGIP in Tunisia to nominee accounts opened for the employee by the accountants at Lloyds Bank in London. The action for money had and received failed, on the grounds that "nothing passed between Tunisia and London but a stream of electrons" – thereby suggesting the need for reconceptualising the pre-electronic age notion of moneys passing – and that the accountants never had any beneficial entitlement to the money. However, the accountants were held to have assisted – at best by their indifference – in the fraudulent design. The case is under appeal, but Millett J. observed (at p. 1390):

> The true distinction is between honesty and dishonesty. It is essentially a jury question. If a man does not draw the obvious inferences or make obvious inquiries the question is: why not? If it is because, however, foolishly, he did not suspect wrongdoing or having suspected it, had his suspicions allayed, however unreasonably, that is one thing. But if he did suspect wrongdoing yet failed to make inquiries because "he did not want to know" ... or because he regarded it as "none of his business" ... that is quite another. Such conduct is dishonest, and those who are guilty of it cannot complain if, for the purpose of civil liability, they are treated as if they had actual knowledge...
>
> (The defendants) are professional men. They obviously knew that they were laundering money. They were consciously helping their clients to make arrangements designed for the purpose of concealment from (*inter alios*) the plaintiffs. It must have been obvious to them that their clients could not afford their activities to see the light of day. Secrecy is the badge of fraud. They must have realised at least that their client *might* be involved in a fraud on the plaintiffs ...
>
> (the evidence) suggests that they thought that their clients were engaged in Tunisian exchange control, possibly with the connivance of the plaintiffs and on their behalf – though the minutes do not say so. In my judgment, however, it is no answer for a man charged with having knowingly assisted in a fraudulent and dishonest scheme to say that he thought it was "only" a breach of exchange control or "only" a case of tax evasion. It is not necessary that he should have been aware of the precise nature of the fraud or even the identity of its victim. A man who consciously assists others by making arrangements which he knows are calculated to conceal what is happening

> from a third party, takes the risk that they are part of a fraud practised on that party ... [T]he defendants cannot claim that the possibility of a fraud on the plaintiffs never crossed their minds; it was specifically drawn to their attention. Yet they never made any enquiries of the plaintiffs or took any steps to satisfy themselves that the arrangements had the plaintiffs' knowledge and approval. They comforted themselves with the fact that there was "no clear case of fraud under English law."
>
> I am led to the conclusion that [the defendants] were at best indifferent to the possibility of fraud. They made no inquiries of the plaintiffs because they thought that it was none of their business. That is not honest behaviour. The sooner that those who provide the services of nominee companies for the purpose of enabling their clients to keep their activities secret realise it, the better ... It is quite enough to make them liable to account as constructive trustees.

It is questionable whether a similar constructive trust would be placed upon banks, unless they acted as financial advisers and set up networks on AGIP lines. Moreover, it is plausible that the judge was influenced by the relatively low status of the accounting firm (compared with principal U.K. banks) and by the opprobrium – fair or unfair – that has increasingly been attached to fringe operators in some of our offshore financial centres. But the ruling does raise questions about when it is proper and legally safe for professionals *not* to look behind the rationale for the establishment of nominee companies, which often are used for facilitating crime as well as for lawful privacy.

More generally, the conditions under which one has a "duty to the public", referred to by Bankes LJ in *Tournier* as a circumstance under which banks may disclose, would generate irresolvable conflict among most philosophers. What we have is a conflict between two principles: the duty of an agent to his principal, and the duty of a citizen towards the state. If we extend the duty to the state to situations that further "the prevention of crime" – as in insider dealing enquiries: see *Re an Inquiry under the Company Securities (Insider Dealing) Act 1985,* [1988] 1 All ER 203 – almost anything can count as permitting or requiring disclosure, since there are few things that do not assist the commission of some crime or other. The courts traditionally have sought to use some imprecise notion that confidentiality should be preserved except where required by law or where there is danger to the state (as in wartime): *Weld-Blundell* v. *Stephens* [1920] AC 956, 965.

At the risk of drawing up a "society is a seamless web" theory to justify the repression of economic crime, it is arguable that except in relation to commercial espionage or in countries entirely dependent on banking confidentiality of their existence as a financial services centre, public confidence that one will be protected from fraud is more valuable than is bank secrecy to economic development. There may have been a changed climate of opinion in this respect. As Lord Goff observed in the leading judgment of the House of Lords in *R.* v. *Central Criminal Court, ex parte Francis & Francis* [1988] 3 W.L.R.

1918, giving reasons for the yielding of legal professional privilege to inspection by the police, "the disclosure of iniquity must, in the interests of justice, prevail over the privilege of the client, innocent though he may be". If that is the approach of the courts in the case of lawyers, it surely is so *a fortiori* in the case of banks. If these propositions are accepted, the argument then shifts to consideration of the practical *consequences* of any proposed change: what will be its criminal justice yield? For although it is increasingly common for the police to complain about obstacles to information-gathering, it is important to look critically at what the information produces in terms of arrests

- because the private sector costs of generating it are high;
- because – as in Neighbourhood Watch Schemes and all police labour-intensive initiatives – the handling of such information is a strain upon scarce police resources that have alternative uses; and
- because liberties of many "suspect populations" (including political dissidents and/or unions) can be invaded by reference to "necessity" for "crime prevention".

International co-operation in pursuit of offenders and asset-freezing

Another kind of problem that increasingly arises in the courts with serious implications for banking confidentiality and, on occasions, profitability, is the question of conflict of laws. The appropriate weighting of the competing interests is not self-evident, and may well be influenced by judicial perceptions of moral climate. As White (1989) notes, in relation to letters rogatory and subpoenas from abroad, the English courts have tended to take a strong line against extra-territorial invasions of banking privacy: see *Westinghouse* [1978] AC 547; *X AG* v. *A Bank* [1983] 2 All ER 464. However, the cases he examines occurred largely before the inroads into banking confidentiality in England already discussed, and it may be possible to deduce an attitude shift in the direction of greater openness to foreign courts from the decision of the House of Lords in *Re State of Norway's Applications (Nos 1 and 2)* [1989] 1 All ER 745, which took a generous approach to the Norwegian authorities' request to interview senior bankers from Lazards in relation to alleged tax liabilities from the estate of a Norwegian businessman. Lord Goff supported the approach of the lower courts to the Norwegian letter of request, observing (at page 762) that this "was in substance a request for what, by English law, would be regarded as assistance in obtaining evidence". He went on to balance the public interest in preserving confidentiality of bankers' dealings with their clients against "the public interest in the English courts assisting the Norwe-

gian court in obtaining evidence in this country", upholding the lower court's decision to require the witnesses to give evidence in Norway but allowing them to withold the identity of the Settlor, unless at least one of them stated in evidence that the Settlor was acting in relevant respects as the nominee or agent for the alleged tax avoider, who was deceased. In *R.* v. *Chief Metropolitan Stipendiary Magistrate, ex parte Secretary of State for the Home Department* [1989] 1 All ER 151, the Queen's Bench Division likewise supported the extraditability of a Norwegian for tax evasion.

If co-operation with the information requirements of foreign states occurs in cases with a strong fiscal element, one may expect still more accomodation in other areas of suspected misconduct, creating further inroads into banking confidentiality, except where statutory provisions or objections to extreme extra-territorial claims generate specific reasons to resist. Whether or not one agrees with their seriousness rankings, we may expect the English courts to take a less aggressive jurisdictional line in relation to offences of drug trafficking, terrorism, and insider dealing than they do in relation to anti-trust and other offences that they may deem to be "purely economic". Thus, in *R.* v. *Southwark Crown Court, ex parte Customs and Excise* [1989] 3 W.L.R. 1054, the Divisional Court took the view that information obtained as a consequence of a Production Order under the Drug Trafficking Offences Act 1986 could be communicated to a foreign agency to

> serve suitably the ordinary obligations of our law enforcement agencies to co-operate with their colleagues in achieving their common aims.

The Court even took the view that where an overseas country could not be trusted to respect the confidentiality of the material sent to it, that ought not to influence a court in the way it exercised its discretion to grant an order, though it might reasonably affect the willingness of the domestic agency to apply for a Production Order to assist that overseas agency. However, without further proceedings, the *originals* of the documents should not be sent overseas, even where secondary evidence (e.g. photocopies) were inadmissible there in evidence. The Court brusquely rejected as unimpressive the claims of the Bank that information should not be sent to the U.S. lest this lead to reprisals, presumably at the behest of General Noriega's associates, against the bank's staff in Panama:

> The Courts of this country are not to be deflected from making orders in aid of the international battle against drug trafficking for fear of reprisals no matter from where the threat of them emanates.

Hitherto, at least where criminal charges are in issue, English courts have also

exercised a self-denying ordinance to refuse orders that would seek to infringe the jurisdiction of foreign courts on behalf of parties in Britain. In *R.* v. *Grossman* [1981] 73 Cr. App. R. 302., the Inland Revenue sought an order under s. 7 of the Bankers' Books Evidence Act 1879 to require the London head office of Barclays Bank to instruct its office in the Isle of Man to obtain information about the account of someone accused of tax evasion. The Court of Appeal discharged the order on the grounds that it would lead to a conflict of jurisdiction between England and the Isle of Man, and "that is a conflict which we must always avoid". It is likely that a differently constituted court – without Lord Denning MR – would have taken a different view today, given the publicity not only about tax evasion but also about money-laundering using offshore jurisdictions. It is possible also that the Court was influenced by the fact that the extra-territorial claim was clearly a way to try to get around the forthright rejection of a *local* application to the Isle of Man Deemster for a disclosure order under the Manx Bankers Books Evidence Act 1935. But the position of the English courts is at least conceptually consistent within the limits of statutory powers which, as I have argued earlier, are themselves inconsistent. The underlying concern is best indicated by Hoffman J. in *MacKinnon* v. *Donaldson Lufkin and Jenrette Securities Corporation* [1986] 1 All ER 653, dismissing the application of a victim of an alleged international loans fraud originating in the Bahamas for a s. 7 Bankers' Books Evidence Act 1879 order against the London office of a New York-based bank (at page 658):

> If every country where a bank happened to carry on business asserted a right to require the bank to produce documents relating to accounts kept in any other such country, banks would be in the unhappy position of being forced to submit to whichever sovereign was able to apply the greatest pressure.

In practice, the fast-developing expansion of bilateral and multilateral information exchange treaties represents the most amicable way of resolving the conflict, at least in the context of public law. But the Mackinnon case reveals just how conservative the English courts have been until very recently when dealing with alleged international fraud. Mackinnon alleged fraud against two individuals who had paid the proceeds of the alleged fraud into the account of a Bahamian company at Citibank in New York. Hoffman J. set aside his subpoena on the London branch of Citibank to produce documentation held by New York, despite the fact that – unlike the *Grossman* case in the Isle of Man – disclosure here would not have violated any New York law. The Bahamian company had long since been dissolved and no duty of confidence under New York law then existed. Hoffman J. stated that an alternative remedy – application to New York courts – existed, and that disclosure could not be justified unless it was a case of hot pursuit. (An example of the latter was

London & County Securities v. *Caplan*, 1978, unreported, where Templeman J. – now Lord Templeman – ordered an English bank to procure from its overseas banking subsidiaries documents related to accounts connected with Caplan to trace assets that he was said to have embezzled: the justification was that otherwise, "the evidence and the fruits of crime and fraud may disappear": see White, 1989, 12; and McLachlan, 1989, 40.)

There are many cases in which the British police may wish to obtain information from abroad, from *Commissions Rogatoires* and letters of request, under the Swiss Federal Act on International Mutual Assistance in Criminal Matters, 1981; the Evidence (Proceedings in Other Jurisdictions) Act, 1975; from Eire under the Foreign Tribunals Evidence Act 1956 etc.; and in future, more generally, under the Criminal Justice (International Co-operation) Act 1990. Quite apart from the usual commercial/political "black hole" problem of Liechtenstein *anstalts* to (even post-Noriega) Panama, the difficulty is delays caused by going through the usual channels. Many Third World public or private sector bureaucracies, in particular, are not used to handling matters rapidly, even where there is no deliberate obstructiveness, as is alleged in relation to the Serious Fraud Office investigations into the Al-Fayed brothers who purchased the House of Fraser (DTI, 1990) and into Polly Peck International during 1990–91. The BCCI investigation will also be difficult in this respect. Overseas police forces do not always treat requests via Interpol with maximum expedition. These delays could be reduced by the preparation of *pro forma Commissions Rogatoires,* which can be filled in by more junior officers, but there seems no ready way out of the "usual channels" problem. Again, where we have corruption, or the need of a bank to act as a money laundry to survive in what is becoming a highly competitive financial services market, *universal* voluntary or compulsory disclosure seems a goal unlikely to succeed.

There has been substantial police complaint in the past about the unco-operativeness of the Channel Islands and the Isle of Man in relation to police enquiries, but sometimes, there are short-circuited by personal relationships. The Isle of Man, in particular, has done much to clean up its financial markets, via requirements that there has to be at least one Manx-resident director of a non-resident company and that the name of any beneficial owners be kept. The Isle of Man has adopted legislation similar to the Drug Trafficking Offences Act. (Though the level of supervision of transactions may unintentionally reduce, following the 1989 relaxation of rules which required all banks to employ staff on the Isle of Man: it is hard to supervise the transactions of clients of correspondent banks.) Recent legislation should increase this co-operation considerably. The Criminal Justice (International Co-operation) Act 1990 will enable PACE production orders to be obtained on behalf of overseas jurisdictions even where there is no corresponding offence under

U.K. law, provided that the Home Secretary is satisfied that an offence under the law of the requesting country of territory has been committed or that proceedings or investigations in respect of an offence that is reasonably suspected of having been committed are under way (Section 4). This should generate greater official reciprocity, which has improved greatly since the U.K. government agreed to take foreign, e.g. Swiss, Examining Magistrates' demands for interviews as equivalent to "the institution of proceedings", which in turn can give rise to Bankers' Books (Evidence) Act applications.

The freezing of assets

The other circumstance in which international co-operation from banks may be wanted is in relation to the transfer of assets held on behalf of a suspect or of a criminal or civil defendant. The speed by which the proceeds of alleged crime (or civil misconduct) can be transferred abroad, beyond the reach of the criminal courts and, possibly, of successful plaintiffs in civil actions, has given rise to several recent cases involving world-wide and domestic *Mareva* injunctions which restrain the defendants and named parties from dealing in assets, and also may require them to disclose those assets, domestically and overseas. All of these cases involve banks, though not all involve the police, and they impose legal compliance costs upon the banks. Banks are concerned because it is a serious contempt of court – punishable by imprisonment – for anyone to interfere with or impede the administration of justice, and any banker who, *knowing of the court order,* assists in the breach of that order by the person to whom it is addressed would be in contempt. The overall objective is to stop the defendant – civil or criminal – from evading the payment of judgment debts or of compensation or confiscation orders.

In *Chief Constable of Leicestershire* v. *M and another* [1988] 3 All ER 1015, Hoffman J. dismissed a police application to restrain the *profits* of alleged mortgage fraud from being transferred – the houses being more than sufficient to pay the lenders – observing (at page 1018) that the "recent and detailed interventions of Parliament in this field suggest that the courts should not indulge in parallel creativity by the extension of general common law principles".

There have been few restraint cases yet under the Criminal Justice Act 1988, which came into force in April 1989, and the current policy of the Crown Prosecution Service – which is charged with implementation of that Act – is not to use the confiscation orders (upon which the *rationale* for freezing assets is predicated) in cases where there are identifiable victims/plaintiffs, as contrasted with cases like insider dealing and multiple share applications where the victims are more abstract and may be impossible to identify. The reason given

for this policy is that there would generally be insufficient money to pay *both* the full compensation *and* more than the minimum £10,000 for which a confiscation order must be made. s. 72 of the Criminal Justice Act 1988 gives priority to compensation over confiscation orders: ss (7) states that in such a case, where

> (b) it appears to the court that he will not have sufficient means to satisfy both the orders in full, it shall direct so much of the compensation as will not in its opinion be recoverable because of the insufficiency of his means shall be paid out of the sums recovered under the confiscation order.

However, s. 72 (1) states that

> A court shall not make a confiscation order unless the prosecutor has given written notice to the court to the effect that is appears to him that, were the court to consider that it ought to make such an order, it would be able to make an order requiring the offender to pay at least the minimum amount.

The combined effect of these subsections is that unless the offender has benefited by at least £10,000 more than the amount that would be paid in compensation, the very priority of compensation over confiscation means that the prosecutor cannot with integrity apply for a Restraint Order, *even though the absence of such an order may mean that after conviction, there are no assets within the jurisdiction remaining to pay the compensation.* Ironically, in a contemporary equivalent of *Chief Constable of Leicestershire,* there *might* have been grounds for the imposition of a Restraint Order, since the alleged offender benefited by far more than the victims lost. However, it seems uncertain if in cases where victims have insufficient resources to take out civil *Mareva* injunctions, there may be some remaining scope for common law intervention by the *police.* Thus, such victims may be worse off in future than they would have been prior to the Criminal Justice Act 1988. (The taxpayer is protected from paying the legal costs of banks and other wealthy victims in taking out prosecutorial Restraint Orders rather than the banks paying for civil *Marevas:* however, in most major cases, the victims have already applied for and received civil restraint and discovery before reporting their case to the police or Serious Fraud Office.)

There is no sharp dividing line between criminal and civil fraud, and *prima facie,* some of the civil *Mareva* cases could have been treated as criminal prosecutions. Indeed, in both the Brink's Mat and the Guinness case, there have been overlapping civil and criminal actions which have resulted in civil appeals: see *Brink's Mat* v. *Elcombe and others* [1989] 1 W.L.R. 1350. (The different burdens of proof mean that civil actions can succeed even where defendants are acquitted in the criminal case.) *In Re DPR Futures Ltd.,* [1989]

5 BCC 603, Millett J. stated that proceedings were bound to attract widespread publicity in the media, and that because "there would be a real risk of prejudice to the respondents' right to a fair trial if the civil proceedings were heard before the criminal proceedings", all further interlocutory proceedings should be heard *in camera* and that civil trial should not take place before the conclusion of the criminal proceedings. Nevertheless, he continued Mareva injunctions until trial, merely granting the respondents a limited cross-undertaking in damages (and refusing them the right to have access to and take copies of documents seized by the Serious Fraud Office, since only the company, not its former directors, had such a right under s. 21 of PACE 1984).

Despite the caution of Hoffman J. with regard to the *profits* of alleged crime under *common* law, the underlying approach of the courts to restraint orders seems unambiguously activist, extending their effect to assets outside the jurisdiction even where there are none in England and Wales. Thus, taking cognisance of *Chief Constable of Leicestershire* v. *M*, Browne-Wilkinson VC allowed the Securities and Investments Board, exercising the functions of the Secretary of State for Trade and Industry, to obtain *ex parte* relief restraining Pantell SA and its parent company from dealing with or removing from the jurisdiction any of its assets within the jurisdiction *or within the Channel Islands:* see *Securities and Investments Board* v. *Pantell, S.A.* [1989] 2 All E.R. 673. He distinguished this case on the grounds that s. 6 (and, arguably, s. 61) of the Financial Services Act 1986 gave the Board a *statutory* right of action to recover money from persons carrying on investment business without authorisation or exemption. The courts have certainly moved a long way from the original purpose of the *Mareva,* which was to stop a ship from leaving the jurisdiction!

The sanction for disobeying the terms of a *Mareva* injunction is not the punishment of third parties – which may reside in Panama where little will be done to them – but the ability of the court to bar the defendant's right to defend. As Lord Donaldson MR observed in *Derby & Co. Ltd. and others* v. *Weldon and others* (nos. 3 & 4) [1989] 2 W.L.R. 412 (at pages 419–420):

> The fundamental principle underlying this jurisdiction is that, within the limits of its powers, no court should permit a defendant to take action designed to ensure that subsequent orders of the court are rendered less effective than would otherwise be the case. On the other hand, it is not its purpose to prevent a defendant carrying on business in the ordinary way or, if an individual, living his life normally pending the determination of the dispute, nor to impede him in any way in defending himself against the claim. Nor is its purpose to place the plaintiff in the position of a secured creditor . . . [I]t behoves the courts to adapt their practices to meet the current wiles of those defendants who are prepared to devote as much energy to making themselves immune to the courts' orders as to resisting the making of such orders on the merits of their case.

Though restraint orders do not give any right to cross-undertakings to protect or compensate innocent third parties – see *Re* K. (Restraint Order) [1990] 2 W.L.R. 1224, and *Re R,* [1990] 2 W.L.R. 1232) – particular complications in what might be termed "criminal *Marevas*" have arisen because of doubts about the *locus standi* of the police as parties to the proceedings. However, *civil* cases which may complement or be an alternative to criminal prosecutions fall to be dealt with under the Civil Jurisdiction and Judgments Act 1982 and the Foreign Judgments (Reciprocal Enforcement) Act 1933. Even where they are not the victims, banks are often joined as a party to litigation, because discovery orders in relation to full banking documentation can be attached to *Mareva* injunctions so that the plaintiff can follow the money trail: see *Bankers Trust Co.* v. *Shapira* [1980] 1 W.L.R. 1274. The English courts have been willing to grant freezing orders in cases which involve actions whose primary forum is overseas, at least within countries party to the European Convention enshrined in the 1982 Act above. I will not seek to review in detail the general case law of international banking – see, for example, Penn, Shea, and Arora (1987, vol. 2) and Cranston (1989) – but will focus upon some recent cases in this fast-developing area. The problems encountered here are a useful guide to the difficulties that inhere when the Crown Prosecution Service and Serious Fraud Office seek Restraint Orders and Charging Orders under the Drug Trafficking Offences Act 1986, the Criminal Justice Act 1988, and the Prevention of Terrorism (Temporary Provisions) Act 1989.

In *Derby & Co. Ltd. and others* v. *Weldon and others* [1989] 2 W.L.R. 276, Parker L.J. expressed clearly (at page 283) the issues to be dealt with before domestic or international *Mareva* injunctions should be granted:

> (i) has the plaintiff a good arguable case; (ii) has the plaintiff satisfied the court that here are assets within, and, where an extra-territorial order is sought, without the jurisdiction; and (iii) is there a real risk of dissipation or secretion of assets so as to render any judgment which the plaintiff may obtain nugatory.

He (and Nicholls L.J.) went on to criticise the length of time taken to deal with the *Mareva* application – over five weeks – and the raising of complex issues which were the preserve of the substantive trial. In *Republic of Haiti and others* v. *Duvalier and othes* [1989] 2 W.L.R 261, the Court of Appeal held that the defendants' assets in England could be frozen pending a case in France which sought to recover U.S. $ 120 million, and that the *Mareva* writ could be served out of the jurisdiction without leave. As Staughton L.J. observed (at p. 273)

> This case is most unusual ... What to my mind is determinative is the plain and admitted intention of the defendants to move their assets out of the reach of the

> courts of law, coupled with the resources they have obtained and the skill they have hitherto shown in doing that, and the vast amount of money involved. This case demands international co-operation between all nations. As the judge said, if ever there was a case for the exercise of the court's powers, this must be it.

In the slightly earlier case of *Babanaft International Co. S.A.* v. *Bassatne and another* [1989] 2 W.L.R. 232, the Court of Appeal held that it would be improper for the Court to grant, *after* judgment, an unqualified *Mareva* injunction extending to the defendant's assets outside the jurisdiction because this would amount to an exorbitant assertion of extra-territorial jurisdiction over third parties. The original injunction granted by Vinelott J. led to the plaintiffs' solicitors contacting 47 entities in different countries, including 24 banks and two international credit card companies. The banks were required to give the solicitors at least five clear English working days before allowing the defendants to deal with any assets held by the bank. As Kerr L.J. noted (pages 240–241), the banks' responses varied: an (unnamed) foreign bank rejected the order in strong terms, "perhaps unnecessarily drawing the senders' attention to the fact that 'the decisions have been rendered by a British court' "; other banks questioned the meaning and effect of the order; while one international bank with a branch in England telexed its Athens branch observing that officers of the bank within the English jurisdiction could be responsible – and punishable for contempt – for any breaches of the injunction by the bank in foreign jurisdictions. Neill L.J. observed in relation to bankers' concerns (page 254) that

> it is wrong in priciple to make an order which, though intended merely to restrain and control the actions of a person who is subject to the jurisdiction of the court, may be understood to have some coercive effect over persons who are resident abroad and who are in sense subject to the court's jurisdiction.

Nicholls L.J. agreed, noting (page 257) that although it was eminently proper to require the judgment debtor not to move or deal in assets outside the jurisdiction, third parties such as bankers who were not before the court could not properly have obligations not to deal placed upon them. Third parties should be affected only to the extent that the courts of the states in which assets are located choose to give effect to restraint orders in relation to them. He added (pages 258–259) that it would not be right

> to attempt to distinguish between third parties who are resident or domiciled or present within the jurisdiction and those who are not. This could give rise . . . to a distinction between an overseas bank which has a branch in London and one which does not . . . [E]ven if giving notice abroad does not have the effect, so far as an English court is concerned, that the third party may be in contempt of court if he knowingly assists in a breach of the order of which he has been given notice, I

> consider that it is still not desirable to make such an unqualified order freezing assets abroad . . . there would remain a difficulty about overseas banks and others with branches in this country.

However, Staughton L.J. – in *Republic of Haiti* v. *Duvalier* [1989] – dissented from Nicholls L.J. in *Babanaft,* arguing (at page 275) that individuals other than the defendants who are resident in England and Wales should be subject to the *Mareva* and liable for contempt:

> If it so happens that there is a bank account in the Channel Islands or the Isle of Man, which can be operated on the signature of an English resident . . . I would find it offensive that he should be free to cross the channel and sign away the money. I have some qualms about limiting this category to natural persons as opposed to corporations. But this should avoid one problem . . . which was whether the court should distinguish between an overseas bank which has a London branch and one that has not. And a corporation can only act by a natural person, unless its computer is programmed to take action without instructions from anybody.

In *Derby & Co. Ltd. and others* v. *Weldon and others* (nos. 3 & 4) [1989] 2 W.L.R. 412, Lord Donaldson MR (at page 426) provided a different formulation which treated natural and juristic persons on the same basis, observing that the Staughton approach not only produces some technical difficulties with regard to registration as a judgment overseas but

> places an English corporate bank in a very difficult position. It may know of the injunction and wish to support the court in its efforts to prevent the defendant from frustrating the due course of justice, but the proviso deprives it of the one justification that it would otherwise have for refusing to comply with his instructions.

Both the *Babanaft* and *Duvalier* cases involved defendants who were perceived as leading individual and corporate lifestyles that were not conducive to obedience to the jurisdiction of the English courts, but the *Duvalier* case was distinguishable by the open admission of the defendants that they would frustrate what they regarded as an international conspiracy to "get" them. These conditions equally applied in *Derby & Co. Ltd. and others* v. *Weldon and others* [1989] 2 W.L.R 276. The Court of Appeal held that in view of the very large sum involved (£25 million), the insufficiency of English assets, the existence of foreign assets and the judge's justifiable finding that there was a real risk that they would be dissipated before trial, it was appropriate as a matter of justice to the plaintiffs that a worldwide *Mareva* be granted.

The present state of the law indicates general agreement that the position may be different in practice for pre-judgment and post-judgment cases, and in claims which seek only a money judgment from those in which proprietary claims are made by the plaintiff who seeks the return of chattels or land which

are his property, or who claims that a specific debt is owed by a third party to him and not to the defendant. Particular concern has been expressed in all appellate cases over the position of third parties in pre-judgment cases. However, multi-national legal remedies are very expensive, and this must act as a deterrent to pursuit of suspected fraud by plaintiffs who are not wealthy themselves or who are not supported by their insurers: their lawyers will not act for them and cannot give undertakings to the court to indemnify the defendants (and costs to third parties such as banks) as required in *Mareva* injunctions and *Anton Piller* orders.

As regards the implications for *criminal* cases, the courts set great store on their perceptions (from the evidence) of the moral character of the defendants, and although judges are exhorted not to seek to resolve in interlocutory hearings any disputed questions of fact, the backgrounds of defendants may be significant to their decisions. As Nicholls L.J. observed in *Derby* v. *Weldon* [1989] 2 W.L.R. 276, (at page 286):

> The third point ... to which the judge attached overriding weight, was that in previous cases where orders have been made regarding overseas assets there was a background of proven misconduct by a defendant, but in the present case no dishonesty has yet been proved. The judge said that he must assume that the two individual defendants are honest. Of course, the outcome of the trial may be that the defendants are wholly innocent of all the charges, and are not liable under any of the claims made against them. But if by what he said the judge meant that a restraint order in respect of overseas assets should not be made in the absence of proof of dishonesty on the part of defendants even though the action is at a very early interlocutory stage, then I would feel bound to part company from him.

So whereas the absence of previous convictions on the part of most higher-status fraud defendants may advantage them compared with many of those charged with armed robbery or with drug trafficking, this is not crucial to the issue of a *Mareva,* at least where the plaintiffs have substantial means. As for remedies in relation to loss suffered as a consequence of restraint orders issued under the Criminal Justice Act 1988, s. 89 provides for payment of compensation to those acquitted, pardoned, or whose convictions are quashed. However, ss 2 states that the High Court shall not order compensation unless it is satisfied that there has been some "serious default" on the part of a person concerned in the investigation or prosecution; and ss 3 bars compensation "where it appears to the court that proceedings would have been instituted or continued even if the serious default would not have occurred". S. 19 of the Drug Trafficking Offences Act 1986 contains the same provisions, as does s. 13 and Schedule 4 (7) of the Prevention of Terrorism (Temporary Provisions) Act 1989. So the chances of anyone obtaining compensation are modest, though the various agencies involved will – like *Mareva* plaintiffs – have the means to

repay if it is demonstrated on the balance of probabilities that (i) there was serious default *and* (ii) this fault was a necessary condition for their sustaining the loss.

There is one final important aspect of the criminal dimension of disclosure orders made pursuant to Restraint Orders that I wish to note here. In *Sociedad Nacional de Combusteiveis de Angola UEE & others* v. *Lundqvist and Another (Financial Times Law Reports,* 6 February 1990), the Court of Appeal held that disclosure of a defendant's assets in a Mareva context could be negated where the defendant could reasonably claim that such disclosure might lead to self-incrimination in possible future criminal proceedings. Browne-Wilkinson V.-C. expressed unhappiness at the consequences of this decision and subsequently, in a different context, the Court of Appeal has found a partial way around the issue. In *M J O'C and another (The Independent Law Reports,* 23 November 1990), it held in an appeal against a disclosure order made in connection with a Restraint Order under Section 77 of the Criminal Justice Act 1988, that a condition could be imposed forbidding any disclosures made in compliance with the Restraint Order from being used in subsequent criminal proceedings against the person making the disclosure or any spouse of the discloser. This should ensure that civil disclosure orders are not abused *evidentially* as a method of circumventing whatever rights remain under the panoply of statutes discussed earlier.

The United States' approach to extra-territoriality

To a far greater extent than the courts in England and Wales, the United States courts have tended to press extra-territorial jurisdiction in *public* law cases, in terms of (1) "waiver by conduct" principles – now abandoned, at least for the present – whereby anyone doing investment business in the United States is deemed to have submitted to the jurisdiction of the Securities and Exchange Commission (and consequent U.S. legal procedures); and (2) the willingness of the American courts to impose santions on bankers for placing their legal obligations to customers overseas before their obligations to U.S. courts. [For the most recent U.S. principles on conflict of laws, see the Restatement (Third) of Foreign Relations Law (1987).]

The tactics of the American agencies to overcome the barriers of international banking secrecy involve

- Serving *subpoenas* on the United States branches of banks whose foreign records they seek. This tactic (against a Bahamian branch of the bank) was approved by the U.S. Court of Appeals in *United States* v. *Bank of Nova Scotia,* 691 F. 2d 1384 (11th cir. 1982). A request for *certiorari* in relation to

large fines for civil contempt for non-compliance was denied by the Supreme Court.

- After review by Department of Justice officials in Washington D.C., serving *subpoenas* on those officers of foreign banks deemed to be material witnesses if they enter the United States. This was approved in *United States* v. *Field,* 532 F. 2d 404 (5th Cir. 1976). [Although the Canadians have both case law and policy against the pursuit of their criminal jurisdiction extraterritorially, they *will* pursue bankers under this heading and can compel bankers on Canadian soil to disclose information, even when that disclosure violates the law of a foreign government: see *R.* v. *Spencer,* 31 *Carswell's Practice Cases* 162 (1983).]
- After applying comparable standards and review within the Department of Justice, serving *subpoenas* on lawyers and agents for foreign corporations allegedly involved in money laundering schemes who travel to the U.S., to require them to testify and to produce records of the corporations. See *United States* v. *Bowe,* 694 F. 2d 1256 (11th Cir. 1982).

In the mid-1980s, a case in which the Internal Revenue Service wished to examine further payments of $ 900,000 to a Hong Kong corporation, Garpeg Ltd., by Gucci Shops, Inc. and (later imprisoned) Aldo Gucci led to a tough response by the Hong Kong Court of Appeal, denying access to the accounts (White, 1989, 18–19). Nevertheless, the U.S. Tax Court upheld the summons against Chase Manhattan under what was then Restatement Ch. 40 of the Foreign Relations Law: see *United States* v. *Chase Manhattan Bank,* 84-1 CCH 1984 Stand. (S.D.N.Y. March 27, 1984). However, such displays of national independence do not always provide *financial* protection for the *bank,* which tends to be caught in the middle of these jurisdictional conflicts. For example, in June 1988, in *Securities and Exchange Commission* v. *Wang & Lee,* an insider dealing case in which Lee was said to have made U.S. $ 19 million in illegal profits, the District Court of New York gave the SEC a temporary freezing order directing banks holding the defendants' assets anywhere to retain them. (Wang, a former financial analyst with Morgan Stanley, pleaded guilty to criminal charges of passing inside information to Lee, and entered into a financial settlement with SEC. Because the information Wang possessed was confidential and was able to be prohibited by an injunction from being communicated to others, the information had some "property-like" characteristics and could be treated by the U.S. courts as subject to a proprietary constructive trust, giving the power to trace assets through bank accounts. The United States generally makes such public tracing rights easier: all drug money is legally the property of the Federal Government, giving the government the right to trace.)

In August and October 1988, the District Judge for the Southern District of

New York – where many of the major white-collar crime cases are heard – made orders which required the Standard Chartered Bank (SCD), on pain of contempt, to pay into the registry of the U.S. District Court a sum equal to the aggregate balances in personal and corporate accounts maintained at the bank's Hong Kong branch that were alleged by the Commission to be controlled by Lee; and which directed that the sum be paid over to unidentified "defrauded investors" to reimburse their losses and to the U.S. Treasury, in payment of a civil penalty assessed against Lee, pursuant to the Insider Trading Sanctions Act 1984 (which provides for triple penalties). District Judge Owen expressed the strong – if not Imperial – view of American rights when he observed that he was not inclined to take

> a back seat to some other court because, if the United States has found what are, arguably, illegally gotten assets in violation of United States criminal laws and those assets happen to be in your possession, innocently as they are to you, and I have on behalf of the United States court said do not pay, it doesn't seem to me that I should be sitting still when some Hong Kong judge says pay and then you say, sorry, Judge Owen, we have got to pay . . . This is not funds in a Hong Kong bank, this is funds in your bank which is here and over which this court has jurisdiction and by pushing a computer button, you can cause this to be kicked anywhere you want.

The low frustration tolerance of U.S. courts could hardly be in greater contrast to the principles of comity expressed in *Grossman* and in *MacKinnon* v. *Donaldson Lufkin* discussed earlier. Under protest, the SCB paid U.S. $ 12.5 million into court in New York, while the defendant Lee (who remained outside the U.S. and did not defend the SEC suit) and the corporations allegedly controlled by him – which had never been served with any papers related to the civil suit by the SEC – sued it in Hong Kong for repayment of money deposited there. The Hong Kong courts decided that the U.S. court order had no extraterritorial effect on the accounts in Hong Kong, but permitted Standard Chartered to delay repaying its depositors. If it had been decided by the Hong Kong courts simply that the proper law of the contract between the Bank and Lee was Hong Kong, the bank risked having to pay U.S. $ 12.5 million to both parties, as well as incurring considerable legal costs: see *Libyan Arab Foreign Bank* v. *Bankers Trust Company* [1988] 1 Lloyd's Rep 259.

Standard Chartered appealed against the District Judge's order to the 2nd Circuit Court of Appeals, arguing *inter alia* that the forced transfer and deposit of Standard Chartered's funds confiscated the assets of an innocent third party – the SCB – without doing anything to make those or any other funds safe from Lee, who had the right to obtain his money from the Hong Kong branch at which the proper law of te contract existed. As its later appellate brief observed,

> the fund the SEC wishes to establish to compensate 'investors who have been robbed

> by Lee's illegal scheme of insider trading' will have been funded not by Lee or his illegal profits, but by the innocent bank with its stockholder's money. Similarly, the U.S. Treasury will have been enriched by taking the bank's property, not by a payment from Lee.
> . . . in order to enforce a U.S. law, a U.S. district court may direct any bank having a branch (or headquarters) in the U.S. to pay over to the district court balances in accounts maintained at any other branch of the bank, anywhere in the world, whatever the law of the foreign nation involved . . . such a rule is wholly inconsistent with the premise upon which the . . . international banking system is based, i.e. the concept that locally-sited branch debts are subject to the laws and regulations of the nation in which the branch is located.

Part of Standard Chartered's argument was also that the SEC failed to pursue discovery and constructive trust remedies in the Hong Kong courts which it ought properly to have done. It might additionally have questioned whether the Hong Kong courts would be able to enforce extra-territorially SEC penalties which in effect may be penal law provisions. (International law looks at the substance, not just the form, of law, so some civil and administrative penalties are treated as penal ones and are not enforceable internationally.) To the extent that the SEC penalties are *un*enforceable, the only remedies for Americans against Lee and his alleged companies would be the equitable claims of defrauded investors.[12]

In July 1989, the cases against all parties were settled out of court. Instead of the triple penalty he faced under the Insider Trading Sanctions Act 1984 – and the $38 million actually proposed by the judge – Lee agreed to pay the Securities and Exchange Commission $25 million, including the $19 million profits from his trading (and including the $12.5 million that the SCB had been ordered to pay into the U.S. court). To satisfy the proprieties of the bank's claim, the New York Court Registry issued a cheque to SCB in New York for $12.5 million, minus Wang's specifically U.S. money; and the SCB in New York then remitted money back to SCB in Hong Kong who, after deducting costs of some $300,000 towards their legal expenses agreed by the New York Court, then credited the sum to the Hong Kong accounts. The SCB in Hong Kong then followed instructions by their customer, Lee, to send to the Receiver in the U.S. the sums agreed.

The advantage of this settlement for the SEC was the avoidance of an appellate precedent in a case that seems to this author fairly weak, inasmuch as the SEC clearly did not pursue all reasonable remedies according to comity with the Hong Kong Courts or with the innocent bank which, before the making of the order to pay funds into New York, had fully complied with worldwide asset-freezing orders, had rejected – at risk to itself – demands by accountholders for payment, and was vigorously defending in the Hong Kong courts

actions by two accountholders for repayment. It was not surprising that the "maximum bid" position of the SEC led to the Standard Chartered Bank being supported on appeal by *amicus curiae* briefs from, *inter alia,* the U.K. government and the Federal Reserve Bank of New York, and supported also by the British Bankers' Association, the Committee of London and Scottish Bankers, the International Bankers' Association, the Institute of International Bankers, the Hong Kong Association of Banks, the Canadian Bankers' Association, and the New York Clearing House Association. Although the "finance capital class" were united here in defence of their common economic interest, and were supported by the British State, the fact that the SEC pursued this case in this way demonstrates the conflicting interests within "the American State".

In its brief, the SEC urged the Court of Appeals to create a "hot pursuit" principle in civil litigation, which forces repayment of sums that are transferred just *prior* to the making of freeze orders. Frustrating though such transfers are for the authorities and for victims, as the SCB's reply brief states:

> It cannot be the rule that a Commission telephone call saying that it intends to seek a freeze order the following week has the effect of an injunction. It is the function of the courts to determine whether an order that stops ordinary commercial process is appropriate and until it does so, upon a legally sufficient showing, no freeze or injuction is in effect.

We cannot know what the Court of Appeals would have held, but assuming that it was not "got at" by the State Department or was not influenced by other pending cases which required co-operation, the SEC's willingness to settle out of court indicates that it was far from confident of victory. This case may be compared with the controversy over the interpretation of the restraint provisions of the Drug Trafficking Offences Act 1986 and allied legislation, discussed earlier.

The future of police-bank co-operation

Neither the law – civil and criminal – that applies to banking, not the way banks conduct their relations with their customers and the police exist in a political vacuum. Bankers and their representatives can exert some influence over legislators and over law enforcement, both in decisions to report or not report fraud and in the measures they take to identify and report suspected money-laundering. But (i) bankers' responses to the police and other regulators, and (ii) the legal framework, whether statute law or, as we have seen in the discussion of police access to formerly confidential and legally privileged

information, case law, are all affected by broader features of political economy and "opinion", both national and international. In this final chapter, we examine where banking confidentiality and police-bank co-operation are *likely* to go from here, and – a separate issue – where they *should* go from here. This is a large question, affecting many people and a great deal of money. In 1988, there were 295 U.K.-incorporated banks and 256 non-U.K.-incorporated banks, with some 14,000 High Street branches and around 1,500 branches of other banks. The number of staff employed by British Bankers' Association members alone – the great majority of banks doing personal business – was 431,600. Committee of London and Scottish Bankers and other High Street banks deal with 62 million personal accounts and an unknown number of business accounts. That is a large (and therefore expensive) area of activity to regulate in the interests of crime prevention.

I have identified three key areas of police-bank relationships: (i) the reporting of fraud *against* banks; (ii) the investigation of fraud, narcotics, and other serious crimes involving bank *customers,* but which may not entail any losses to the banks themselves; and (iii) the tracing, restraining, and confiscation of the proceeds of crime. Let us try to summarise some of the principal findings of my study and to predict what developments are likely to occur.

It should be borne in mind that the police or quasi-police agencies are not the only parties with an interest in banking. The role of banking supervision has been clarified under the Banking Act 1987 by enhanced powers granted to the Bank of England to investigate banks operating in the U.K.. However, despite the growth in the activities of overseas banks, the number of customer deposit-taking U.K. banks remains comparatively small. Despite the pressures towards global uniformity, it is still possible to believe that informal investigations and understandings – albethey backed by regulators' powers under the Banking Act 1987 – are a feasible way of regulating the principal U.K. banks, though increased access to the U.K. market by the branches of overseas-based banks and more aggressive marketing approaches by indigenous banks have strained the approach to regulation known as "the Governor [of the Bank of England]'s eyebrow".

The pressures of the financial services marketplace are producing rather contradictory tendencies. On the one hand, the competition not only from other banks but also from building societies – the U.K. equivalent of S & Ls in the U.S. – has shattered the traditional caution of bankers in taking references on new customers and mortgages, for fear that they will go elsewhere. At a *personal* level, "performance-related bonuses" (in U.K. and U.S. banks, but not yet in Dutch ones), or promotion for increased and demotion for decreased branch turnover, likewise increase the pressure to snatch customers. On the other hand, in tandem with the criminal liabilities I have discussed here, the marketing pressures are inducing bankers to learn far more about the

customers they do have, so that they can sell more "super-banking" services to them. The days of the dormant deposit account-holder are over, and it is harder to keep the banker at bay simply by not seeking to borrow money from him. (Though such banker involvement is far less when the bank is used simply to "book" transactions.) Quite irrespective of legal obligations, bankers do appear to be more vigilant in protecting themselves and their customers from fraud than they used to be, and not infrequently will try vigorously to persuade clients not to engage in deals which place them at risk from people the bankers suspect of being fraudsters.

In the U.K., there are rules about auditors not accepting more than 25 per cent of their business from any one client. Similar conflicts of interest may apply to bankers who are substantially dependent upon a few clients, so perhaps similar rules should apply to them? Organised crime groups may respond by setting up different legal entities, and how are bankers to know that they are connected? *Chacun a sa pizza parlour!* Indeed, the entire panoply of reporting requirements in U.K. legislation has been premised upon persons opening up *individual* accounts and putting large wedges of money into them in cash: inter-company and particularly international banking transfers by electronic means seem to by-pass this control mechanism entirely, except where there is prior suspicion and surveillance by the authorities. Despite wide circulation of the provisions of the Drug Trafficking Offences Act 1986 and warning circulars from the Bank of England and the Building Societies Association about the dangers of money-laundering, the "know your customer" rules for investment advisers under the Financial Services Act 1986 cue stockbrokers and merchant bankers, as well as clearing bankers, far more into the sophistication and financial means of their clients than into the origins of their (personal or corporate) money.[13] To this extent, one may argue that the draconian legislation has more symbolic than practical value against major crime syndicates.

The legal framework and enforcement policy can affect the level of awareness: although it is arguable that the banks did not act in bad faith, the prosecution in 1985 of the Bank of Boston and others for failing to make full currency transaction reports probably increased the general perception of the importance of these reports among bankers at all levels. Whereas in the period up to early 1985, 21 U.S. banks – including some majors – had been fined for failing to report currency transactions exceeding $ 10,000, the Bank of Boston prosecution (and fine of $ 500,000) led to 40 banks coming voluntarily to the Treasury to report their own violations by July 1985, and by August 1985, some 60 banks were under Treasury scrutiny in respect of suspected Bank Secrecy Act non-reporting. It is too early to guage the effect of similar prosecutions of brokers E.F. Hutton – fined $ 1 million in 1988 – of Shearson Lehmann, of a former Vice-President of Paine Webber, and of the Bank of Credit and

Commerce International (subsequently closed because of alleged massive fraud rather than for "mere" money laundering). What is certain is that the effectiveness of such prosecutions and fines as general deterrents is only partial: in August 1987, long after the Bank of Boston case, the Midland Bank-owned Crocker National Bank was fined $ 2.25 million for failing to report cash transactions totalling $ 3.98 billion, most of which emanated from six Hong Kong banks that shipped currency to Crocker's San Francisco office, but some of which came from branches near the U.S.-Mexican border. Where banks or their local employees are greedy or, as in the Crocker case and many U.S. savings and loan institutions, are under serious financial pressure, the temptation to cover up cash transactions will remain, and some will follow Oscar Wilde's maxim that the only way to deal with temptation is to yield to it. That is why general regulation of the stability of financial institutions cannot be separated fully from checks on their probity, whether for fraud or money-laundering purposes.

The Committee on Government Operations (1988) – which was severely critical of the attitude taken by *all* U.S. agencies to banking fraud – observed (p. 10) that in June 1988, there were 7,350 open FBI and Federal Grand Jury investigations into fraud against banks, thrift unions and credit unions. Of these, 46 per cent involved losses in excess of $ 100,000; in February 1988, the insolvencies of 357 financial institutions were under investigation for criminal misconduct, almost double the figure in 1986; and at least one third of commercial bank failures and over three quarters of savings & loan insolvencies appear to be linked in varying ways to misconduct by senior insiders or outsiders. (This was before the failure of the "junk bond" market and the failure of major investment bankers Drexel Burnham Lambert, shortly after they paid a $ 650 million fine to the SEC to settle insider dealing allegations.) The precise volume and cost of fraud against U.K. banks is unknown, but by contrast with the U.S. situation and despite BCCI, British bankers and banking regulators may be tempted to display some complacency.

The Drug Trafficking Offences Act 1986 and the Prevention of Terrorism (Temporary Provisions) Act 1989 have had some effect in getting British bank managers to enquire into the genuineness of the identities of their *new personal* custumers and to keep a closer eye on the relationship between customers' actual and expected transactions (given the kind of work the customers claim to do). Terror works, though regular nagging from Head Office is required to keep branches alert, since individual branches are aware of relatively few cases of laundering and therefore find it hard to develop guidelines or to sustain a policy of laundering-spotting.

But there is a fine line between wilful blindness and recklessness – i.e. seeing that there is a risk and ignoring it – on the one hand, and sheer thoughtlessness, on the other. The way that judges and juries may draw this line in practice may

depend on (a) the degree of opprobrium attached to the conduct itself – and judicial intolerance of white-collar and narcotics crime has been increasing; and (b) the perception of the villainousness of the people or institution involved – were there prior warnings or convictions? (See further, Levi, 1987, 1989). Whatever the risk of criminal conviction of bank staff, however, the banks are concerned also about the bad publicity that attaches to them if they are seen to be unco-operative in investigations into serious crime: an image problem that has been skilfully and sometimes crudely exploited by the police when they are refused information they want. Some of these image problems for banks can arise when accounts are held for former "respectables" who are later treated as disreputable: particularly Third World politicians caught out by changes in government. This has been a problem for the Swiss, but it is also a problem for the U.K. banks when headlines appear such as "Marcos cash trail leads to Barclays" (*The Observer,* 25 June, 1989), even though there is no hard evidence that except where bank insolvency is feared, customer business is affected by such publicity.

Regulators often regard financial institutions as "obstacles to be overcome" rather than as resources and as allies. [This is true *a fortiori* of overseas regulators and crime investigators: hence the enormous pressure for the growing number of bilateral and multilateral mutual assistance treaties, from securities violations to tax information (OECD, 1989) to narcotics trafficking – see the U.N. Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances, 28 I.L.M. 493 (1989).] Though most of my police and banker sources agree that police-bank relationships have improved – both in relation to money-laundering and in relation to reporting of fraud against banks – suspiciousness by some police officers and their unwillingness to see differences of perspective as legitimate has led to an increasingly heavy-handed approach by the State and a reliance on the threat of sanctions for non-cooperation as a policing methodology. As we have noted, difficulties arise when detectives try to lean hard on branch officials, perhaps because they do not know what the appropriate channels are, and threaten them with arrest and/or with search warrants – which anyway are inappropriate for bank records. (See *R.* v. *Guildhall Magistrates' Court, ex parte Primlaks Holdings Co. (Panama) Ltd.* [1989] 2 W.L.R. 841, which held that if documents sent by clients to solicitors were not subject to legal privilege, they were subject to special procedure provisions rather than arrest warrants.) This "banker awareness" is partly a question of police professionalism and training: some bankers (and police) expressed the opinion that police competence in fraud matters had *declined* in the last decade, and that in some geographical areas – which for reasons of confidentiality I will not specify – the attitudes of the police were arrogant and aggressive. There are considerable local variations in practice and some banker sources stated that they had detected a greater

realisation on the part of the police recently that fraud against banks was serious and deserved more resources. Nevertheless, in the U.K., the extreme pressure on general policing resources, combined with police perceptions of banker unwillingness to take preventative communal action against some sorts of fraud, has encouraged police to withdraw services from "those who can afford to lose money and will do little to help themselves": an example of this is the generally low priority given to the detection and prosecution of credit card fraudsters (Levi et al. 1991). It is not only in rape and other cases of violence against women that the police apply a judgment about "contributory negligence"!

Some of the tensions in relationships between bankers and police – though not all bankers, at least at central office, agreed that there *were* such tensions – arise also from police difficulties in coming to terms with the fact that bankers prefer restitution through the civil courts or informal negotiations to prosecution. Although police officers understand the *rationale* behind this, they resent what they see as undue dilatoriness and selectivity in the reporting process, and are critical where they believe that *individual* banks or branches of banks are holding out from informing them or even their fellow banks about fraudulent operations, thus displaying insufficient social concern. Police are particularly critical if they believe that the threat of criminal prosecution is being used merely as a lever to extract financial settlements from offenders, and that the victim will then drop the prosecution.[14]

As for the broad and growing area of financial investigations and confiscation, one may expect that asset-freezing issues will continue to give rise to tensions, because in relation to fraud and other non-drug trafficking crimes, the offender must have benefited to the extent of at least £10,000, and – where no proceedings have yet been instituted – s. 76 (2) of the Criminal Justice Act 1988 requires the court to be satisfied that (i) a person is to be charged with an offence and (ii) a confiscation order may be made in proceedings for it. In NatWest Newbury – as in many smaller frauds – these conditions will not apply. Moreover, applications cannot be made by the police but must be made by a prosecutor to the High Court, and this will generate delays. The scale of future demands upon the banks in relation to asset-confiscation is unknown,

- because there is not systematic national information on how many convictions involve more than £10,000 profit/loss *averaged* – except where a particular defendant could be shown to have received a disproportionate share – among *all* the defendants in a case;
- because of conflicts of interpretation between police and prosecutors over the use of confiscation orders (and therefore of Restraint Orders);
- because in an unknown number of cases, there may be insufficient funds to justify the application for and making of an order, particularly given the fact

that except where a Receiver is appointed, the prosecutor's costs are not recoverable even if a Confiscation Order is ultimately made; and
- because it is not known how the *courts* will use the provisions in non-drug cases, though it is unlikely that Orders will be made where the defendant's financial empire is already in ruins.

How sentencing judges will face up to complex issues of fraudulent preference and third-party part-ownership of business assets is an interesting avenue for speculation.[15] Nationwide, excluding drug cases, it is anticipated that Confiscation Orders are likely to be requested by the Crown Prosecution Service and the Serious Fraud Office in some 300–500 cases annually.

One critical question is whether or not bankers are going to freeze assets at the request of the police, pending such court authorisation. Except in the legally ambiguous areas of drug trafficking and terrorism, to do so would place them on very dangerous legal territory. This reliance upon *police* assurances might become more problematic still because of differences in the interpretation of the appropriate use of Restraint Orders on the part of police, on the one hand, and the Crown Prosecution Service and Serious Fraud Office, on the other. Currently, most prosecutors interpret the Criminal Justice Act 1988 narrowly as meaning that they are permitted to apply for a Restraint Order only when they are satisfied that a Compensation Order will not be made, for compensation has priority over confiscation, yet sentencers are required to take the confiscation order into account when awarding compensation! Since the Act requires sentencers to justify the *non*-imposition of compensation orders, these will normally be applied. Therefore, it is argued, confiscation orders are appropriate only for "victimless crimes", even though unless the victim has substantial assets (and knowledge of the identity of the principal suspect), *civil* Mareva action will be impossible, and there may be no assets remaining to be compensated or confiscated. The extra-territorial effect of orders – s. 38 (3) Drug Trafficking Offences Act 1986; s. 102 (3) Criminal Justice Act 1988 – is likewise going to generate some interesting conflicts with banks and branches overseas. In relation to the Prevention of Terrorism (Temporary Provisions) Act 1989, the possibility of some jurisdictions defining "terrorism" as a "political offence" may also impact upon the willingness of those jurisdictions to co-operate in the freezing of assets already overseas. It is also possible – despite the label of confiscation provisions as "non-penal", fortified by the presumption that they are not germane to the consideration of imprisonment – that countries overseas will refuse to enforce them on the well-established convention of public international law that countries will not enforce the penal provisions of other states.

After some initial problems in interpreting the Drug Trafficking Offences Act 1986 – which generated a great deal of extra work in dealing with reports

from branches, as well as uncertainty about (i) how much to tell branches to do and (ii) what "suspicion" meant in practice – the growing involvement of banks in police and customs narcotics investigation is now working much more harmoniously, and since it is often *prima facie* impossible to tell whether large cash transfers relate to drugs, to terrorism, or to fraud (including tax fraud), the information flow is beginning to develop quite strongly. Future "voluntary" reports are likely to continue to exceed 3,000 cases per annum. Whether something that turns out to be fraud rather than drug trafficking or terrorism is passed on to those whose task it is to act against fraud is a grey area: the permeability of inter-agency Chinese Walls depends on personal relationships and institutional interests. One advantage enjoyed by Customs & Excise over the police is that they are centrally co-ordinated with a much smaller number of personnel authorised to deal with the banks – 16 in Great Britain – compared with hundreds of police officers whose assignments are often not long-term and many of whom never deal with the banks often enough to develop a *rapport* of mutual trust. Generally, interaction between "repeat players" generates far less conflict than the involvement of "one-shot" players who have no long-term interest in stable relationships and have less understanding of the world that bankers inhabit. It is not surprising, then, though inhibited by inter and intra-organisational rivalry, that the Association of Chief Police Officers' Crime Committee is in favour of concentrating asset-tracing and confiscation personnel rather than dispersing them according to the type of criminal activity: drugs/terrorism/fraud/other property crime.

In March 1989, the Metropolitan Police Company Fraud Department established a special squad to deal with confiscation orders except in relation to narcotics trafficking, which will still be handled by the Drug Profit Confiscation Unit. However, the reduction in the number of police personnel interacting with banks is inhibited in the Metropolitan Police by the autonomy granted to area commands, each of which has its own Asset Confiscation Desk, none of which is superordinate to any other. In the short term, granted that the police may be involved in confiscations over a wider spread of offences, it does not seem likely that the police will adopt universally the Customs & Excise model of minimising the number of officials who deal with banks, though eventually, unless funds confiscated are given back direct to the agency that prosecutes, there may be inter-agency financial investigation and asset-confiscation squads.

Bankers complained that many officials – particularly the police – were unwilling to inform them whether a particular client investigation is active, inactive, or "no problem", taking some of the tension and uncertainty out of banks' responses to withdrawal requests. The banks are understandably worried lest some court misinterpret the transfer of money of someone regarding whom information has been supplied to the authorities as a violation of s. 24 of

the Drug Trafficking Offences Act 1986 or of s. 11 of the Prevention of Terrorism (Temporary Provisions) Act 1989. Except where they have concrete suspicions of the bankers themselves – in which case they presumably would not have requested information from them direct – the police agree that they *ought* to inform them of the state of investigations and risk their passing on this information to suspects, though officers may be afraid as individuals of giving the "green light" to banks and then being punished by *their* superiors if the individual turns out to have been involved in drug trafficking after all. Such defensiveness may be understandable – and can be justified technically by reference to secrecy obligations under the Official Secrets Act 1989 – but it leads to resentment on the part of bankers, some of whom feel that the balance of power has tipped strongly in favour of the police. Negative banker perceptions have secondary consequences in terms of banker willingness to report crimes, co-operate as witnesses, and volunteer information without legal compulsion in the future. Bankers do have the power to be obstructive without committing Contempt of Court: for example, they can require witness summons to be served in person at remote branches, rather than at Head Office; they can send staff to give oral evidence at court, rather than using pre-prepared witness statements; and they can generally be unhelpful in volunteering information.

One area of possible contention is who is going to pay for all this co-operation. Some controversy exists as to the justification for the high cost of self-regulation in financial services (Seldon, 1988), and many financial services firms think they are paying too high a financial price for what they regard as political window-dressing (Levi, 1987a). However, whatever the merits of the opposing views, regulation is plainly in the interest of market participants themselves. The same cannot be said for the costs imposed on banks for obedience to legislation on money-laundering, which can be represented as a targeted tax rather than a donation by shareholders *pro bono publico*. Granted that the heavy compliance costs borne by banks in the U.S. do not arise in the U.K., because only the Australians have adopted the currency transfer reporting requirements, there is nevertheless a cost which has to be borne by somebody. Currently, the customer whose account is investigated pays for bank costs only if s/he signs an authority for the police to inspect the account. For other information obtained by court order or under executive authority, the costs are borne by customers generically and shareholders. (Though some Restraint Order and Confiscation/Forfeiture Order costs are part-reimbursed by prosecution agencies.) Will policing and government agencies be required to make greater financial contributions to the policing of banking transactions?

I have no evidence about police responses to banking fraud in the U.S., but the requirement there to report fraud generates a more valid database for

crime prevention and detection than is possible in the U.K., and – at least in a rational world, which may not be the world in which we live – it would not make sense to compile the data unless the authorities intended to take action in response.[16]

On the international side, there will continue to be greater pressure – prompted by banking supervisors' determination to avoid regulatory fiascos such as Banco Ambrosiano as well as by the determination to reduce international terrorism, drug trafficking, and insider dealing – to co-ordinate efforts against money-laundering. In June 1980, the Committee of Ministers of the Council of Europe adopted Resolution R (80) 10, which concluded that "the banking system can play a highly effective preventative role while the co-operation of the banks also assists in the repression of such criminal acts by the judicial authorities and the police". The Basle Committee on Banking Regulations and Supervisory Practices – which represents Belgium, Canada, France, Germany, Italy, Japan, Netherlands, Sweden, Switzerland, United Kingdom, United States, and Luxembourg – has expressed the view in a statement of December 1988 that "banking supervisors have a general role to encourage ethical standards of professional conduct among banks and other financial institutions". In an accompanying Statement of Principles, the Committee asserts the following:

> With a view to ensuring that the financial system is not used as a channel for criminal funds, banks should make reasonable efforts to determine the true identity of all customers requesting the institution's services. Particular care should be taken to identify the ownership of all accounts and those using safe-custody facilities. All banks should institute effective procedures for obtaining identification from new customers. It should be an explicit policy that significant business transactions will not be conducted with customers who fail to provide evidence of their identity.
>
> . . . As regards transactions executed on behalf of customers, it is accepted that banks may have no means of knowing whether the transaction stems from or forms part of criminal activity. Similarly, in an international context it may be difficult to ensure that cross-border transactions on behalf of customers are in compliance with the regulations of another country. Nevertheless, banks should not set out to offer services or provide active assistance in transactions which they have good reason to suppose are associated with money-laundering activities.
>
> Banks should co-operate fully with national law enforcement authorities to the extent permitted by specific local regulations relating to customer confidentiality. Care should be taken to avoid providing support or assistance to customers seeking to deceive law enforcement agencies through the provision of altered, incomplete, or misleading information. Where banks become aware of facts which lead to the reasonable presumption that money held on deposit derives from criminal activity or that transactions entered into are themselves criminal in purpose, appropriate measures, consistent with the law, should be taken, for example, to deny assistance, sever relations with customer and close or freeze accounts.

The December 1988 Statement of Principles concludes:

> All banks should formally adopt policies consistent with the principles set out in this Statement and should ensure that all members of their staff concerned, wherever located, are informed of the bank's policy in this regard. Attention should be given to staff training in matters covered by the Statement. To promote adherence to these principles, banks should implement specific procedures for customer identification and for retaining internal records of transactions. Arrangements for internal audit may need to be extended to establish an effective means of testing for general compliance with the Statement.

There are unresolved questions of how this will be implemented (particularly in relation to business customers and to checks on persons opening new accounts – though see Guidance Notes, 1990), and how overseas branches and subsidiaries outside the Group of Ten countries – who are merely exhorted to follow the principles – will react. It should not be forgotten that some of the concern on the part of Third World citizens about banking secrecy is about the ability of corrupt *governmental* personnel – who presumably would have passed the test of fitness and propriety to be bank customers – to hide funds overseas. But the Statement represents official perspectives on the appropriate role of the banks in assisting crime prevention and the police. This perspective is being reinforced – probably coincidentally, though they are responding to the same perceived public attitudes and needs – by the present willingness of the English judiciary to embrace world-wide *Mareva* injunctions and other mechanisms for freezing assets within and outwith the jurisdiction.

The European Community's directive on money-laundering

Criminal law matters are normally an issue reserved to member governments individually: they are not within the legal competence – in the technical rather than efficiency sense – of the Community as a whole. However, in the interests of developing a single European market in financial matters, the U.K. and other EC countries have agreed to treat attempts to combat money-laundering as within the competence of the Community. The preamble to the Council Directive on Prevention of Use of the Financial System for the Purpose of Money Laundering of June 10, 1991 seeks to justify this competence by noting, *inter alia,* that

> when credit and financial institutions are used to launder proceeds from criminal activities . . . the soundness and stability of the institution concerned and confidence in the financial system as a whole could be seriously jeopardized, thereby losing the trust of the public.

When the Single Banking Licence comes into effect, it will no longer be possible for a Member State of the EC to refuse a licence to a bank which has been given a Licence in another Member State. The costs of financial supervision in the money-laundering arena are very high and if some countries act vigorously while others do not, this will distort competition between the Member States. Consequently, there would not be a level playing field, and Article 57 (2) and Article 100a of the EEC Treaty are considered by most – though not all – lawyers to give a legal basis for EC intervention to prevent distorted competition. The Council of Europe Convention – discussed later – was aimed principally at co-operation between law enforcement and judicial authorities, so there is not necessarily any conflict with the EC Directive, whose public aim is the efficient regulation of financial markets. Indeed, the EC Directive mirrors Article 6 of the Council of Europe Convention, which in turn mirrors the 1988 UN Convention, which first defined laundering in technical terms.

This involvement in regulating money-laundering is the "thin end of the wedge" for Community interference in domestic criminal justice issues – by analogy with the unbounded value of "crime prevention" as a *rationale* for police powers, discussed earlier – insofar as much significant crime for gain involves the use of financial institutions at some stage. Potentially, the ambit of money-laundering rules is very wide: Article 1 of the European Community (EC) Directive of 10 June 1991 defines it – if "define" is the appropriate word – as follows:

> the following conduct *when committed intentionally* [italics not in original]:
>
> the conversion or transfer of property, knowing that such property is derived from criminal activity or from an act of participation in such activity, for the purpose of concealing or disguising the illicit origin of the property or of assisting any person who is involved in the commission of such activity to evade the legal consequences of his action;
>
> the concealment or disguise of the true nature, source, location, disposition, movement, rights with respect to, or ownership of property, knowing that such property is derived from criminal activity or from an act of participation in such activity;
>
> the acquisition, possession, or use of property, knowing, at the time of receipt, that such property was derived from criminal activity or from an act of participation in such activity.
>
> participation in, association to commit, attempts to commit and aiding, abetting, facilitating, and counselling the commission of any of the actions mentioned in the foregoing paragraphs.
>
> Knowledge, intent or purpose required as an element of the abovementioned activities, may be inferred from objective factual circumstances.
>
> Money laundering shall be regarded as such even where the activities which generat-

ed the property to be laundered were perpetrated in the territory of another Member State or in that of a third country.

The Directive applies to branches of third country institutions that are established in the EC, so no credit or financial institution is immune. The globalisation of financial services is therefore being given some regulatory mechanism, at least in theory.

Except insofar as it will *always* include the proceeds of drug trafficking, the definition of what criminal activities are to be covered by the Directive remains unresolved, with some countries currently wishing to restrict it to drug trafficking and others to any other offences regarded as serious by the Member States. The text of the proposed Council Directive of 30 November 1990 – revised after consultation with the Economic and Social Committee and with the European Parliament – stated that the Directive would apply to "serious crime", meaning "a crime specified in Article 3, paragraph 1 (a) and (c) of the United Nations convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances adopted the 19th December 1988 in Vienna, terrorism and any other serious criminal offence (including in particular organised crime), connected or not with drugs, as defined by the Member States". In short, it went for a rather broad and loose definition of "serious crime", though one no less vague than in s. 116 of the Police and Criminal Evidence Act 1984. However, by December 17, 1990 and in subsequent drafts, the reference to "serious crime" had been deleted and was replaced by "criminal activity", defined as "a crime specified in Article 3 (1) (a) of the Vienna Convention and any other criminal activity designated as such for the purposes of this Directive by each Member State". A Working Party will examine the question whether to extend the *mandatory* coverage of the Directive to crimes other than drug offences. There is a certain irony in what is plainly a political compromise between Member States, insofar as the Directive will apply mandatorily to the proceeds of drug trafficking but not to the proceeds of fraud against the European Community. The latter is surely more central to Community competence than is the former. In practice, as I have argued earlier in this article, whether or not specifically provided for by law, mechanisms that detect or prevent *drug* money-laundering are likely to affect *other* forms of money-laundering. (The Council of Europe Convention, discussed next, relates to all kinds of offences, but provides for a possibility of reservation against particular types of crime.)

Article 3 states:

1. Member States shall ensure that credit and financial institutions require identification of their customers by means of supporting evidence when

entering into business relations, particularly when opening an account or savings accounts, or when offering safe custody facilities.

2. The identification requirement shall also apply for any transaction with customers other than those referred to in paragraph 1, involving a sum amounting to ECU 15 000 or more, whether the transaction is carried out in a single operation or in several operations which seem to be linked. Where the sum is not known at the time when the transaction is undertaken, the institution concerned shall proceed with identification as soon as it is apprised of the sum and establishes that the threshold has been reached . . .

(Paras 3 and 4 exempt certain categories of insurance policy, which I will not discuss here.)

5. In the event of doubt as to whether the customers referred to in the above paragraphs are acting on their own behalf, or where it is certain that they are not acting on their own behalf, the credit and financial institutions shall take reasonable measures to obtain information as to the real identity of the persons on whose behalf those customers are acting.
6. Credit and financial institutions shall carry out such identification, even where the amount of the transaction is lower than the thresholds laid down, wherever there is suspicion of money-laundering.
7. Credit and financial institutions shall not be subject to the identification requirements provided for in this Article where the customer is also a credit or financial institution covered by this Directive.

Article 4 requires credit and financial institutions to keep a copy or the references of the identification evidence required for a minimum five years after the relationship with the customer has ended. In the case of transactions, the records and registration documents, the original documents or copies admissible in court proceedings under the applicable national legislation will have to be kept for at lèast five years following the execution of the transactions. These requirements have important evidentiary implications, for example in relation to handwriting examination, since eyewitness identification is generally unreliable, particularly after the lapse of years.

An earlier draft of what is now Article 5 of the Directive raised interesting issues by requiring credit and financial institutions to "examine with special attention any unusual transaction not having an apparent economic or visible lawful purpose". How these requirements would have been applied in practice is mysterious, but the agreed Article 5 requires special attention for "any transaction which they regard as particularly likely, by its nature, to be related to money-laundering".

Article 6 requires credit and financial institutions and their directors and employees to "co-operate fully with the authorities responsible for combating money laundering", the relevant authorities being left open, "by informing

the authorities, on their own initiative, of any fact which might be an indication of money-laundering" and by furnishing them "with all necessary information" at their request. They are forbidden (under Article 8) to inform customers or third parties that they have released any information. In return, the bankers are freed from civil and criminal liability for any good faith disclosures (Article 9). Article 7 refines previous drafts to permit institutions to transact business with suspected launderers under the guidance of the authorities and to open accounts for suspects provided that they inform the authorities immediately thereafter. Information supplied may be used only in connection with the combating of money-laundering. However (Article 6), "Member States may provide that such information may also be used for other purposes", presumably such as tax collection.

Article 10 sets up (slightly ambiguously) the fabric of increased inter-agency co-operation by requiring that "Member States shall ensure that if, in the course of inspections carried out in credit or financial institutions by the competent authorities, or in any other way, those authorities discover facts that could constitute evidence of money laundering, they inform the authorities responsible for combating money laundering". Will this apply to information coming into the possession of the Inland Revenue, which might be relevant to other agencies? (The Inland Revenue has not hitherto had much communication with other agencies, by contrast with the Australian Cash Transaction Reports Agency which explicitly has been set up to do something about "the black economy" as well as illegal goods and services. To the extent that the Bank of England is the responsible authority, auditors already have certain duties under the Banking Act, but the further boundaries of this provision *as it affects the U.K.* remain uncertain.)

Article 11 requires all institutions to establish adequate procedures of internal control and communication "to forestall and prevent operations related to money-laundering" and to educate their employees about the issues, though as I write, there is disagreement about the scope of the educational requirements. Member States are required to bring into force the laws, regulations, and administrative decisions necessary to comply with the Directive by 1 January 1993 at the latest. The Commission is required to report on the implementation of the Directive.

Council of Europe Convention on laundering, search, seizure and confiscation of the proceeds from crime

The Council of Europe also has produced a Convention, signed (November 8, 1990) by Belgium, Cyprus, Denmark, Germany, Iceland, Italy, Netherlands, Norway, Portugal, Spain, Sweden, and the U.K., in relation to laundering,

seizure, and confiscation. Four other States – Finland, France, Ireland, and Switzerland – declared officially that they would sign the Convention "at an early date". In addition to the 25 Council of Europe Member States, the Convention is open for signature to Australia, Canada, and the USA. Article 6 states:

1. Each party shall adopt such legislative and other measures as may be necessary to establish as offences under its domestic law, *when committed intentionally* [italics not in original];
a. the conversion or transfer of property, knowing that such property is proceeds, for the purpose of concealing or disguising the illicit origin of the property or of assisting any person who is involved in the commission of the predicate offence to evade the legal consequences of his actions;
b. the concealment or disguise of the true nature, source, location, disposition, movement, rights with respect to, or ownership of, property, knowing that such property is proceeds;
   and, subject to its constitutional principles and the basic concepts of its legal system;
c. the acquisition, possession or use of property, knowing, at the time of receipt, that such property was proceeds;
d. participation in, association or conspiracy to commit, attempts to commit and aiding, abetting, facilitating and counselling the commission of any of the offences established in accordance with this Article.

Article 6 (2) (c) provides that "knowledge, intent or purpose required as an element of an offence set forth in that paragraph may be inferred from objective, factual circumstances", though note that it is the permissive "may", not the obligatory "shall". (The same wording is found in the UN Convention.) Section 2 (a) also commends consideration of criminalisation where the offender "ought to have assumed that the property was proceeds".

Article 4 of the Convention provides that:

> Each Party shall adopt such legislative ... to empower its courts ... to order that bank, financial or commercial records be made available or be seized in order to carry out [investigations, searches, seizures, and confiscation]. A Party shall not decline to act under the provisions of this article on the grounds of bank secrecy". So bank secrecy should not, at national level, present an obstacle to the carrying out of investigations, provisional measures and forfeitures in relation to the proceeds of crime.

Much of the Convention is concerned with international co-operation, which is to be refused only under exceptional circumstances set out in Article 18. One important part of that Article is s. 7, which states that

> A Party shall not invoke bank secrecy as a ground to refuse any co-operation under this Chapter. Where its domestic law so requires, a Party may require that a request for co-operation which would involve the lifting of bank secrecy be authorised by either a judge or another judicial authority, including public prosecutors, any of these authorities acting in relation to criminal offences.

In relation to the freezing and seizure of assets, Article 13 (1) states:

> At the request of another Party which has instituted criminal proceedings or proceedings for the purpose of confiscation, a Party shall take the necessary provisional measures, such as freezing or seizing, to prevent any dealing in, transfer or disposal of property which, at a later stage, may be the subject of a request for confiscation or which might be such as to satisfy the request.

So – if the domestic law of the requested country so requires – international freezing cannot take place without some formal criminal justice procedure, an issue which currently arouses police complaints in the U.K., since prosecutors, not themselves, have a monopoly on freezing applications. Third party rights are protected by the provisions of Article 22: ss 2 (a) states that recognition may be refused if third parties "did not have adequate opportunity to assert their rights". However, it is unstated whether the adequacy of the opportunity will be viewed substantively or formally, though criteria are developed in the Explanatory Report on the Convention.

In the light of complaints that some countries tend to dismiss mutual assistance requests for dubious reasons (including reasons of corruption – Ziegler, 1990), it is interesting that Article 12 (2) states that:

> Before lifting any provisional measure taken pursuant to the Article, the requested Party shall, wherever possible, give the requesting Party an opportunity to present its reasons in favour of continuing the measure.

Likewise, Article 30 requires requested parties to "give reasons for any decision to refuse, postpone, or make conditional any co-operation". Again, responding to twentieth century communications and the necessity for speedy action, Article 23 (2) allows judicial authorities, including public prosecutors, in cases of urgency to communicate directly – including by fax – instead of through a central authority. Likewise, requests or communications may be made through Interpol (ss. 3). Requests for information that do not involve coercive action can be transmitted direct, eliminating potential inter-police communication obstacles (ss. 5).

In short, a substantial amount of legal movement is taking place in Europe and elsewhere in the field of international mutual assistance in relation to money-laundering and the freezing and seizing of assets. The moral and political pressure is so great that it is hard for countries to resist agreement.

How the formal rules work out in practice is another question – e.g. what counts as prompt response? – but the requirement to explain does constrain previously laggard nations. It should be noted, however, that if a regulatory "level playing field" is to exist at a substantive rather than merely formal, symbolic level, more attention will have to be given by regulators to rule compliance if competitive under-enforcement is not to undermine the effect of these developing rules. This indeed is the rationale given by the European Commission for their intervention in money-laundering. However, the evaluation of implementation has not hitherto been a strength of international bodies.

Some of the criteria for putting bankers on notice of laundering require banker knowledge of customer activities – which varies in practice between and within countries, and is particularly low in offshore jurisdictions which are used mainly for "booking" transactions – but others require less knowledge. It should be acknowledged, however, that in practice, almost anyone being questioned with an eye to potential civil or criminal liability will tend – consciously or not – to understate their degree of knowledge which reasonably or actually might have given rise to suspicion of money-laundering. Moreover, these may be triggers to further enquiries by bankers, rather than for immediate onward transmission to policing agencies.

There is some recognition by policing agencies that bankers will do more for them – formally and informally – if they help banks with their fraud problems. The City of London police are making some initiatives in this regard, with their Operation Fraudstop and Bank Watch schemes which promote, respectively, fraud prevention and the communication of information about suspected "plastic" fraudsters by different banks on the same street. Elsewhere, banker sources state that Fraud Squad responses to fraud against banks other than cheque and credit card fraud are normally – though not invariably – reasonably energetic, but that they are also happenstance, depending on chance factors such as the expertise and personality of the officer, as well as heavy police caseloads which incline them to "no crime" cases as "civil matters" wherever there is no "clear" evidence of crime.

But what is all this extra policing of banking transactions likely to achieve? One cynical approach is to argue that in sensitising and reforming the many, all we do is to impose barriers to entry into the money-laundering market which (via bank-unauthorised personal or bank-authorised institutional "counting fees") drives up the price of corruption for the remaining few. The sophisticated offenders generate business fronts that can be used to launder funds in a way that is unlikely to be caught by even the most conscientious pro-active monitoring on the part of the banks. (Though targeted surveillance, from the inside or outside, can succeed against particular syndicates, and this may benefit greatly from bank co-operation.) In the meantime, there may be some

overall diminution of criminal activity as the barriers to entry into the international or national laundering game prove too burdensome for some potential players, and there may be some national displacement of crime, as mobile criminals operate in areas they perceive as more lightly regulated.

Let us take drug trafficking as an example. Although most people are convinced that opiate addiction is a serious social evil, the likely net effect of internationalising money-laundering rules on reducing total levels of drug supply, drug abuse, and drug-related property crime, or reducing terrorism, let alone on reducing fraud (including tax evasion), has to be viewed critically. As the 1988 and 1989 struggles against drug traffickers in Panama and Colombia demonstrate, the global political economy of the narcotics business is easier to condemn than to do something effective about (though see also Bullington and Block, 1990). Both at a domestic and international level, to catch some offenders – even major ones – is not necessarily to reduce crime and vice: the crime-reducing effects of conviction and confiscation depends on the organisation of the criminal markets and upon the willingness and capacity of new or existing offenders to enter them (Reuter, 1983). It is always arguable that a criminal justice policy is failing because it is not being implemented with sufficient vigour, but the end-purpose of policing banking transactions is often forgotten in the thrill of the chase, which becomes an end in itself.

This is not to say that existing rules have *no* deterrent function: examples are commonplace of potential customers being turned away by U.K. bankers because they will not explain satisfactorily the origins of their large would-be cash deposits. Such deterrent cases do not show up on the effectiveness indicators of "detective yield", which consequently underestimate the impact of the current regulatory regime. However, neither the supply nor the consumption of narcotics, nor levels of fraud or terrorism, have been abated in any obvious way or to any dramatic extent by money-laundering regulations hitherto, and it is matter of faith rather than of historic evidence that they will be so abated in the future.

Conclusion

We should note some interesting paradoxes in attitudes towards policing the banks. Some of those I interviewed – businesspeople, lawyers, regulators, and police – who are otherwise free marketeers have such strong views about the evil of drugs and terrorism that they are willing to countenance what may the profit-reducing activities on the part of banks in depriving crime syndicates of funds. On the other hand, some "wet" and even "pink" people I interviewed expressed strong reservations about what from their perspective was the *liaison dangereuse* between financial institutions and the variety of policing

agencies. They were very critical of the notion that private sector institutions such as banks should become an arm of the State. Furthermore, quite apart from those ex-police who go into the banking security world post-retirement and experience acute discomfort at the shift to profit-oriented work, some businesspeople of very conservative disposition argue that it would be in the interests of all for the banks to be required to report all "serious" frauds to the police or other regulatory authority, since currently, sensitivities about the effects of publicity are dominated by the fear of being singled out for being *unusually* risk-prone: if everyone had to report, each bank's losses would be placed in more rounded perspective and there would be less publicity for each reported crime and even readier fraud prevention. Consequently, public confidence in any particular fraud-suffering bank should not diminish, unless it actually lost money to the point where its losses would be material and therefore should be reported anyway under present legislation. So there is no simple link between political beliefs and beliefs about what should be the duties of banks towards the State.

A broad spectrum of non-socialist opinion would agree that the business of banking is to make money for its shareholders within the law of the State that governs the contract between it and its customers. But this does not take us very far, since it does not address what the underlying purpose of such laws should be. Those free marketeers who remain resolute that "active citizenship" on the part of bankers should be purely voluntary would argue that except for direct complicity in crimes, bankers should be able to participate in whatever activities their shareholders approve as being profit-maximising. Furthermore, they might question the value of financial supply-side controls that do not appear hitherto to have had much effect on levels of availability of narcotics in Britain or America. (Whether insider dealing or terrorism can be affected dramatically by them is unknown.) Consequently, even if one were to argue that no bank is an island, entire within itself, the balance of public interest would be in favour of allowing banks to report whatever crimes against them and whatever laundering transactions through them they chose, but no more.[17] The other extreme line of argument would be that banks have a responsibility to maximise social welfare, which might include their playing a part in reducing suffering from crime.

The moral imperatives of the War on Crime have been used to justify many inroads into what used to be regarded as purely private interests, including matters as diverse as family violence, football spectating, and banking. Indeed, a major difficulty for libertarians is that since the extent and pattern of some sort of crime is affected by most social and commercial activities, almost any restraint on freedom can be justified if one views "crime prevention" as a homogeneous, unalloyed good. The fact is that *all* crime control involves social costs as well as social benefits: whether we approve of particular measures is

affected by how seriously we view the crime and by how intrusive and effective we consider the measures to be. (Often, in practice, this depends on how crimes and particular preventative steps respectively affect us and those we care about.)

The Jack Committee (1989) takes a very strong line in support of the principle of banker-customer confidentiality, arguing that the banks are far too ready to reveal details about customers without their express consent to other financial services groups, whether within-group or external credit reference agencies. The Report is relatively silent on the subject of when bankers *may* disclose, except to recommend the abolition of the "duty to the public" criterion in *Tournier* on the grounds that it is too vague. As regards disclosure under compulsion by law, the Committee did express its great unease at the legislative trend when it observed (p. 30) that

> We do not question, that these statutory interventions in customer confidentiality are, in each individual case, justified by the public interest at stake. But it cannot be doubted that cumulatively, they amount to a formidable burden on bankers, not made easier to bear when there is some uncertainty as to the precise nature of the obligations imposed by law ... [T]hey constitute a serious inroad into the whole principle of customer confidentiality as conceived at the time of *Tournier*.

It went on to recommend (p. 37) that

> all existing statutory exemptions from the duty of confidentiality should be consolidated in the new legislation. The law should also provide that any new statutory exemptions from the duty of confidentiality should be made by reference to this new provision, with the sanction that, if they did not do so, they would not override the central duty.

In the current political climate, such appeals for restrictiveness are unlikely to be heard, but the Jack Report does stand as a *critique* of the conceptually incoherent development of legislation, determined more by what the political market will bear than by intellectual or moral principle. One might seek to construct a justification for present variations in treatment of potentially laundered money in relation to differential offence seriousness: but from the viewpoint of the banks, money is just money, and it is not normally evident to a non-conspiring banker what kind of "dirty money" it is, if it is dirty money at all.

In the fight against illegal money movement, the development of international *Mareva* injunctions is of crucial deterrent and restitutive significance, though procedures for the enforcement of these, particularly outside Europe, will need to be overhauled if their effectiveness is to be enhanced. This is ultimately a matter of political will; despite the enactment of Protection of

Trading Interests legislation in several countries in response to U.S. attempts to impose extra-territorial jurisdiction, and at some considerable cost to the principles of (short-term) international comity, current aggressive American regulatory and judicial policy may generate sufficient pressure to encourage other countries to develop easier rules of civil enforcement as an alternative to constant conflict of laws problems of the kind encountered in *SEC* v. *Wang and Lee* [1988], discussed earlier. The internationalisation of U.S. enforcement policy has succeeded substantially at a formal level already with Mutual Assistance treaties and Memoranda of Understanding, at least where countries' central commercial interests have not been threatened, though as Zagaris (1989) has observed, there have been serious delays in Senate ratification of those Treaties. U.S. efforts to combat the international crime chain in relation to drugs, terrorism, insider dealing, and tax evasion, have dragged international banks – albeit in some countries, kicking and screaming – into the public enforcement business.

But such legislative changes will not magically create harmony between police and banks, nationally or internationally. Where national legislation allows, the police (or other agencies such as the Serious Fraud Office and Department of Trade and Industry Inspectors) can wield the iron fist to get information out of banks in relation to known clients. This, in insider dealing and some other banking cases can involve the threat of de-authorisation from conducting investment business in the U.K..[18] However, in the *proactive* cases where the State wants bankers to report suspicions of fraud or narcotics trafficking on their own initiative, it is inevitable that some bank employees do not and will not suspect cases which "actually" are money-laundering, just as they may defensively report cases that "actually" are *not* money-laundering (or are not *drug* or *terrorism* money laundering). Police and customs officers vary in their opinions on how much filtering they want the financial institutions to engage in: some realise that they could become overwhelmed by "aggressive compliance", particularly given tight personnel budgets which constrain the processing of the data. Presently, over 3,000 voluntary disclosures are made annually by banks and building societies, which strains agency processing capacity. Likewise, banks vary in the extent to which they filter such suspicions before passing them on centrally to the police and Customs. Indeed, there is a certain irony in this, since prior to the passage of the Consumer Credit Act 1974, the major banks tended to operate fairly uniformly as a cartel: competition policy and the internationalisation of financial services have inhibited inter-bank co-operation, and this affects fraud prevention as well as the money-laundering issues discussed here.

Civil libertarians are wary that close and regular contact can lead to the elision of "proper boundaries" between public and private sector institutions: under such conditions, informal understandings tend to undermine and re-

place formal rules, because working relationships have to be established between regular "players", even if they are not always harmonious. But unless banks and other pressure groups win the hearts and minds of State agencies and, perhaps, the general public and get them to appreciate the superordinate virtues of privacy – a development of which there is no sign – policing demands on banks will continue to increase. On the other hand, the development of controls on (vaguely defined) money-laundering may appear to be the foundation for an international Police State in which local and international financial transactions are made transparent. However although these developments in Economic Surveillance should be taken seriously, there are far too many national interest conflicts and too many contradictions between foreign and domestic policy for such global agreements to be worked out easily.[19]

What I have sought to do in this article is to describe some of the principal trends in civil and criminal law which illustrate this move towards a Brave New International World Order: the limits to this process, in law and in action, are a key indicator of the scope for (some) crime control harmonisation in the post-Communist world.

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Notes

1. For a consumerist – if inadequately analysed – response to this, see the Jack Committee (1989). See also Levi et al. (1991) on credit card fraud.
2. Lest political interference in white-collar investigations should be mistaken as the preserve of the Third World or Communist dictatorships, Block (1990) has brilliantly analysed the way in which the Internal Revenue Service was misused by President Nixon to conduct tax investigations into his political enemies and to suppress "inconvenient" investigations into organised crime in the Bahamas.
3. See, for example, the somewhat dubious claims about the extent of money-laundering in the Report of the Financial Action Task Force (unpublished, 1990).
4. Though the Jack Committee, 1989, para 5.46 recommends that "legislation should spell out that damages for a breach of confidentiality under any of these rules should include compensation for distress, embarrassment, inconvenience, regardless of whether financial loss could be proved".
5. Though very few banks have data retrievable in that form, and few keep centrally all accounts in D's name, raising interesting questions about how they are able to comply with Mareva and other asset-restraining injunctions discussed later. This process can be eased where the applicants have information from surveillance about the geographical spread of the defendant's activities. Otherwise, it has been stated to me that "we do the best we can".

6. The original application for access in this case was based on suspicion of drug offences, and was later subject to judicial criticism when directing Mr. Taylor's acquittal in 1989 on fraud charges. Mr. Taylor was a friend of the former Deputy Chief Constable of Greater Manchester, John Stalker, and it is alleged that the purpose of this police investigation was to justify the removal of Stalker from the "shoot to kill" enquiry in Northern Ireland, where he was showing more vigilance that the U.K. government felt was desirable (Taylor, 1990; Stalker, 1988).
7. Bankers and others face similar risks under s. 17 of the Prevention of Terrorism (Temporary Provisions) Act 1989. No similar liability arises for other offences by virtue of the Criminal Justice Act 1988, except where the banker's actions would be tantamount to aiding and abetting an offence – such as fraud – itself, as distinct from aiding the disposal of the proceeds of the offence. In the United States, also, drug trafficking investigations make it illegal for the bank to inform the client, though in those few Internal Revenue Service cases conducted other than by Grand Juries, banks are required to inform their customer that the account is being examined.
8. Conspiracy theorists might choose to see this as a way of reducing the amount of investigative journalism into the upperworld. I do not so regard it myself, but it fits the data.
9. Though they must respond positively to police requests for information if a production order is issued by a circuit judge under s. 17 of the Prevention of Terrorism (Temporary Provisions) Act 1989, s. 27 of the Drug Trafficking Offences Act 1986, or s. 9 of the Police and Criminal Evidence Act 1984, as well as to requests from the Director of the Serious Fraud Office.
10. Bullington and Block (1990) have demonstrated the benefits of waging the War on Drugs for the War on Communism, in enabling military action to be undertaken under the guise of anti-drug action. (This applies also to prohibitions on arms sales to developing countries, for which there is an exception if they are needed to fight narcotics trafficking.) Now that there is precious little Communism left – if there ever was any – it could be argued that this is no longer a valued premise for U.S. foreign policy. However, the interests of specifically *American* hegemony can still be served by policy initiatives based around drug trafficking, though the explanatory independent variable must shift from capitalism in general to nationalistic capitalism in particular.
11. This was prior to the passage of the Drug Trafficking Offences Act 1986, so banks were less geared up to co-operation with the police than they are today. Furthermore, the drug trafficking, financial services, and terrorism legislation has altered the banks' implied duties towards their customers, at least for those suspected crimes.
12. S. 61 of the Financial Services Act 1986 might provide civil remedies enforceable overseas, but has not yet been tried out even in the U.K., though Browne-Wilkinson, V.-C., did open this up as a possibility in granting a *Mareva* injunction to the Securities and Investments Board in *SIB* v. *Pantell* [1989] 2 All E.R. 673. The government's response to suggestions about the desirability of increased use of civil sanctions in insider dealing has been negative: see House of Commons (1990).
13. It is too early to asses the effect of the Guidance Notes for Banks and Building Societies issued in December 1990 by the British Bankers' Association and the Building Societies' Association.
14. Confiscation Orders are mandatory on the courts in all drug trafficking cases but are optional under the Criminal Justice Act 1988 and the Prevention of Terrorism (Temporary Provisions) Act 1989. The number of orders imposed under the Drug Trafficking Offences Act 1986 has risen from 1,245 in 1987 to 1,972 in 1989. The average amount ordered to be confiscated has also risen, from £5,800 to £9,790, though this does not mean that those sums were actually *recovered.* To date, only two orders have been made in excess of £1 million, both in 1989 (Home Office, 1990, p. 178).

15. On the other had, I have knowledge of many cases in which fraud squad officers express relief at disposing of a difficult case – particularly if they can treat it as a cleared-up crime (i.e. one whose perpetrator is "satisfactorily" established) – so even police are ambivalent about the reporting issue. Furthermore, the reporting of *all* crime against banks would have significant downstream implications for police investigative and prosecutorial resources.
16. The ability to find a justification for collecting data – as required by the U.S. Paperwork Reduction Act 1980 – does not demonstrate the capacity or willingness to act upon data once they are obtained. The willingness of the British police to pass on information to Customs and Excise, or of CID officers to communicate with the National Drugs Intelligence Unit, is somewhat less than complete: but this is true of U.S. agencies also, exacerbated by the direct return of confiscated assets to the agency that handled the case, which gives them an even greater than normal incentive to claim all the credit for the arrests. See, for example, the highly critical comments of the Senate Committee on Governmental Operations (1988).
17. Likewise, it would be up to the police, Serious Fraud Office, or other policing agency to determine its priorities for enforcement from among those crimes reported to it or about which it has learned proactively.
18. See also the toughening of international powers in the Companies Act 1989 and the Criminal Justice (International Co-operation) Act 1990.
19. An example of this is the European conflict over whether or not fiscal offences are to be regarded as falling within the scope of money-laundering mutual assistance conventions. Another is the value of banks such as the Bank of Credit and Commerce International for the disbursement of CIA funds, legally or illegally. The Noriega and Iran-Contra examples are but two which indicate the profound internal contradiction in money-laundering controls.

References

A. Block, *Master of Paradise* (New Brunswick: Transaction Books, 1990).

B. Bullington and A. Block, "A Trojan Horse: Anti-communism and the war on drugs," *Contemporary Crises,* 1990 (14): 39–56.

Committee on Government Operations, *Seventy-Second Report,* House of Representatives Committee on Government Operations (Washington D.C.: Govt. Printing House, 1988).

R. Cranston (ed.), *Legal Issues of Cross-Border Banking* (London: Chartered Institute of Bankers, 1989).

DTI, *County Natwest and County NatWest Securities,* Department of Trade and Industry Inspectors' Report (London: HMSO, 1989).

DTI, *House of Fraser plc,* Department of Trade & Industry Inspectors' Report (London: HMSO, 1990).

D. Frantz, *Mr. Diamond* (London: Pan, 1989).

C. Graham and C. Walker, "The Continued Assault on the Vaults – Bank Accounts and Criminal Investigations", *Criminal Law Review,* 1989: 185–197.

D. Hayton, *Underhill and Hayton: Law Relating to Trusts and Trustees* (London: Butterworths, 1987).

D. Hayton, *The Law of Trusts* (London: Sweet and Maxwell, 1989).

Home Office, *Criminal Statistics England and Wales 1989* (London: HMSO, 1990).

House of Commons, *Company Investigations,* Trade and Industry Committee, Third Report (London: HMSO, HC 36, 1990).

Jack Committee, *Banking Services: Law and Practice,* Report by the Review Committee (London: HMSO, Cm. 622, 1989).

M. Karmel, "Sources of Bank Deposits: The Banks' Responsibilities", in R. Cranston (ed.), *Legal Issues of Cross-Border Banking* (1989).

L. Leigh, *The Control of Commercial Fraud* (Aldershot: Gower, 1982).

L. Leigh, *Police Powers in England and Wales* (London: Butterworths, 1985).

M. Levi, *The Phantom Capitalist: the Organisation and Control of Long-Firm Fraud* (Aldershot: Gower, 1981).

M. Levi, *Regulating Fraud: White-Collar Crime and the Criminal Process* (London and New York: Routledge: Chapman & Hall, 1987).

M. Levi, "Crisis? What Crisis? Reactions to Commercial Fraud in the United Kingdom", *Contemporary Crises* 1987b (11) 207–221.

M. Levi, "Suite Justice: Sentencing for Fraud", *Criminal Law Review,* 1989 (June): 420–434.

M. Levi, P. Bissell, and T. Richardson, *The Prevention of Cheque and Credit Card Fraud* (London: Home Office, 1991).

C. McLachlan, "Remedies Affecting Bank Deposits", in R. Cranston (ed.), *Legal Issues of Cross-Border Banking* (1989).

R. Naylor, *Hot Money and the Politics of Debt* (London: Unwin Hyman, 1987).

OECD, *Explanatory Report on the Convention of Mutual Administrative Assistance in Tax Matters* (Strasbourg: Council of Europe, 1989).

G. Penn, A. Shea and A. Arora, *The Law and Practice of International Banking* (London: Sweet and Maxwell, 1989).

A. Pollard, J. Passaic, K. Ellis and J. Daly, *Banking Law in the United States* (Boston: Butterworth Legal Publishers, 1988).

PSI, *Crime and Secrecy: the Use of Offshore Banks and Companies,* Permanent Subcommittee on Investigations, Senate Committee of Governmental Affairs (Govt. Printing House: Washington, D.C., 1985).

P. Reuter, *Disorganized Crime* (Cambridge, Mass.: MIT Press, 1983).

A. Seldon (ed.), *Financial Regulation – or Over-Regulation?* (London: Institute of Economic Affairs, 1988).

Serious Fraud Office, *Serious Fraud Office, Second Annual Report* (London: HMSO, 1990).

M. Solly, "Offshore Havens: The Role and Responsibilities of Financial Institutions to Assist in the Prevention of Money-laundering", Paper presented at an international conference on *Dirty Money,* Jesus College, Cambridge, 1989.

R. Stone, "Special Procedures and Legal Privilege", *Criminal Law Review,* (1988): 498–507.

M. Suddle, *White-Collar Crime: A Study of the Nature, Extent, and Control of Tax Evasion in Pakistan,* unpublished Ph.D. thesis, University of Wales, 1988.

N. Tutt, *The Tax Raiders* (London: Financial Training Services, 1985).

I. Walter, *Secret Money,* 2nd edition (London: George Allen & Unwin, 1989).

J. White, "Principles of Confidentiality in Cross-Border Banking", in R. Cranston (ed.), *Legal Issues of Cross-Border Banking* (London: Chartered Institute of Bankers, 1989).

J. Wood, "The Serious Fraud Office", *Criminal Law Review,* March (1989): 175–184.

B. Zagaris, "Dollar Diplomacy: International Enforcement of Money Movement and Related Matters – A United States Perspective", *George Washington Journal of International Law and Economics,* (1989): 22, 465–552.

J. Ziegler, *La Suisse Lave Plus Blanc* (Paris: Editions du Seuil, 1990).