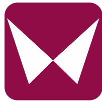

RECOVERING THE PROCEEDS OF GRAND CORRUPTION THROUGH THE CIVIL COURTS

ADDRESS TO THE THIRTY-FOURTH INTERNATIONAL SYMPOSIUM ON ECONOMIC CRIME

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There are three keys points I should like to make good today in the time allotted to me. First, the civil courts in the UK have an important role to play in discouraging the commission of financial crime, and in particular, grand corruption. Secondly, in performing this role, the forensic deployment of the anti-money laundering (AML) regime – or more accurately the neglect of AML obligations - is pivotal. Thirdly, the area for maximum potential development relates to the application of constructive trustee liability principles in grand corruption cases where banks have handled monies unlawfully obtained by politically exposed persons, invariably these funds having been dishonestly appropriated from State resources.

Historically, it has not been easy for a claimant to hold a bank liable as a constructive trustee where monies have been obtained fraudulently. Typically, this situation arises in a Ponzi-type fraud where a bank has provided the fraudster with banking facilities. This occurred in *Jeremy D. Stone Consultants Ltd v National Westminster Bank plc* [2013] EWHC 208 (Ch)where the court was satisfied that the bank did not appreciate that its customer was a sophisticated fraudster. The judgment was not expressed in these terms, but it is clear that as a matter of policy the court had taken the view that a bank should not be regarded as an insurer or guarantor of its customer's honesty when operating a bank account on the customer's behalf.

Similarly, in the United States J P Morgan successfully resisted an action by investors to recover losses or grounds of constructive trust liability. The investors' case was that J P Morgan had constructive knowledge of Madoff's Ponzi-style fraud but the District Court in Manhattan ruled that J P Morgan was negligent and not fraudulent.

However, Governments of countries which have been victims of asset stripping may find the courts more favourably disposed towards their interests than in the case of a Ponzi-type fraud. As Lord Brown-Wilkinson explained in *Westdeutsche Landesbank Gironzentrale v Islington LBC* [1996] AC 669, there is a difference between an institutional constructive trust and a remedial constructive trust.

> "Under an institutional constructive trust, the trust arises by operation of law as from the date of the circumstances which give rise to it: the function of the court is merely to declare that such trust has arisen in the past… A remedial constructive trust, as I understand it, is different. It is a judicial remedy giving rise to an enforceable equitable obligation: the extent to which it operates retrospectively to the prejudice of third parties lies in the discretion of the court" (at page 714 G -H).

The notion of unconscionability on the part of a bank underpins its potential liability, with the prospect of liability arising where facts become known to a bank which affect its conscience, in the sense of causing it to suspect that its customer is behaving in a less than honest manner. There is no doubt that this principle applies where a bank has a level of awareness that monies passing through its accounts had been misappropriated by a national or local politician. As Lord Browne-Wilkinson said slightly later in his judgment with reference to stolen monies:

> "I agree that the stolen moneys are traceable in equity. But the proprietary interest which equity is enforcing in such circumstances arises under a constructive, not a resulting, trust. Although it is difficult to find clear authority for the proposition, when property is obtained by fraud equity imposes a constructive trust on the fraudulent recipient: the property is recoverable and traceable in equity" (at page 716 C -D).

Williams v Central Bank of Nigeria [2014] UKSC 10 in the UK Supreme Court in 2014 is also a very interesting case in this regard. Williams was fraudulently deprived of $6.5 million. The vast majority of this money was paid by the fraudster into an account held by the Central Bank of Nigeria. Williams sought recovery from the bank on the basis that it was a constructive trustee of the funds, and the bank was said to have been giving knowing assistance to the fraudster. The case failed on jurisdictional grounds. But Lord Sumption, with whom Lords Neuberger and Hughes agreed, recognised that an equitable obligation to repay the monies had arisen. It was a strong case on the

facts, but the bank's actions were adverse to the beneficial owner and so the bank was liable to account, not as a trustee but as a wrongdoer.

Unlike the case of an investor who has lost money in a Ponzi-style fraud perpetrated by a bank's customer, in the present climate from which the courts are not wholly detached, I believe that unconscionable behaviour on the part of a bank will be easier to establish in a case of grand corruption, especially where a bank has failed to perform enhanced due diligence under the AML regime adequately. It is this potential exposure to civil liability which makes the decision to circumvent the bank's established anti-money laundering requirements so extraordinary in the recent Barclays Bank case.

As the Financial Conduct Authority made clear when imposing a £72 million disciplinary fine, the failings related to a £1.88 billion transaction that Barclays had arranged and executed in 2011 and 2012 for a number of ultra-high net worth clients. The clients involved were politically exposed persons and should therefore have been subject to enhanced levels of due diligence and monitoring by Barclays (Enforcement Notice, 26 November 2015). Barclays Bank may have correctly counted on the pusillanimity of the Financial Conduct Authority not to prosecute it criminally for a most egregious breach of the Money Laundering Regulations 2007, but the risk of liability in civil law is less sanguine.

This is not to suggest that the funds handled by Barclays Bank in this case represented the proceeds of crime or anything of the sort. Indeed, the Financial Conduct Authority explicitly stated that there was no financial crime involved and there was no criticism of the underlying clients. Rather, it is to make the point that whilst a swinging fine may be a drop in the ocean for a global bank, if a bank or one of its subsidiary companies were to face multiple claims by underlying beneficial owners to recover sums unlawfully misappropriated from their countries' coffers, the position for

the bank could look quite different, especially where the anti-money laundering regulations had been circumvented. In this instance, the civil law would serve the interests of justice well by requiring the funds to be restored to their rightful owner, even though no criminal prosecution would have taken place.

The danger for a bank is that whilst at the time of the banking arrangement there may seem little prospect of constructive trust liability arising where misappropriated monies are being handled by agents of politically exposed persons who have stolen funds, the position can sometimes change rapidly and dramatically. Following the recent change in political regime, Nigeria's current quest to recover its stolen funds is a case in point. It will be interesting to follow the progress of the next round of Nigerian cases as they progress through the English courts.

Jonathan's article in Money Laundering Bulletin (May 2016) entitled "The law of unintended consequences - money laundering in civil cases" is available here.

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