Editorial

Looking at the tea leaves!

How good we are in Britain at risk assessment is a moot point. Perhaps the most accurate assessment is that we are quite good at it – or at least not materially worse than most other developed societies, but not particularly good about doing anything about it! The Treasury and Home Office's first published risk assessment on money laundering and terrorist finance was released last October and makes interesting (and disturbing) reading. Of course, many other countries have long published risk assessments relating to such issues albeit in the main not as a separate exercise from a more general strategic assessment. In practice, these tend to reflect the historic allocation of resources within government than any sensible predictive analysis of the future. At best one can discern trends – and given the way government and, in particular, quasi-law enforcement agencies work, these have usually long achieved the status of a *fait accompli*! The UK assessment reflects the risk of intelligence (we are perhaps being generously complimentary!) being a reflection of already determined priorities.

The penetration of the high-end property market by those with questionable wealth has long been recognised, and not just on the basis of anecdotes. Thirty years ago, the then National Drug Intelligence and Investigation Unit (NDIIU) identified this as a risk! MI5 took an interest in at least certain aspects of this 20 years ago, and H.M. Revenue and Customs (HMRC) have had programmes (again we might be being generous!) ten years ago! In fact, the Commonwealth Commercial Crime Unit raised this as an issue in terms of the proceeds of sovereign looting in 1981! The concern that professionals – whether lawyers, accountants, estate agents and bankers – facilitate the placement of all this suspect dosh goes back somewhat further in time. Indeed, there are a plethora of reported civil cases in the 1970s and 1980s which manifestly throw up the reality of "high end facilitation". Indeed, John Moscow, the lead prosecutor in New York of the Bank of Commerce and Credit International Ltd. (BCCI) crooks, at the annual symposium on economic crime in Cambridge in 1994, raised just this issue. More recently, the Economic Crime Command of the National Crime Agency (NCA) has rightly decided to focus attention on all this, but at a time when the Government has, again for sensible albeit perhaps not very ethical reasons, decided to go a little more softly in its dealings with the City and its "professional" foot soldiers. Consequently, it remains to be seen whether Mr Donald Toon, who heads the NCA in this regard, is going to achieve more than that somewhat nebulous goal of disruption rather than banging up a few magic circle partners. Whether giving the NCA some "direction" over the Serious Fraud Office for England and Wales (SFO), albeit only in regard to corruption, will make any difference – except to those concerned with constitutionality – also remains to be seen.

The Law Society and the Institute of Chartered Accountants rushed to address the perceived threat of professionals facilitating money laundering by criticising the Treasury and Home Office's assessments on the basis that they have not been properly researched and are based on perceptions and anecdotes rather than real intelligence. The view that the City of London itself remains at risk is perhaps less easy to contest. The NCA has itself expressed concern as to the way in which the suspicion-based reporting system is working, or perhaps not working. Senior officers have expressed the view that

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some institutions are adopting a policy of defensive reporting – perhaps with the primary objective of reducing their exposure to allegations of inadequate "due diligence". Section 37 of the Serious Crime Act 2015 which now provides that where an authorised disclosure is made in good faith, no civil liability arises in respect of the disclosure on the part of the person by or on whose behalf it is made. This provision extends the immunity of those reporting their suspicions pursuant to the Proceeds of Crime Act beyond liability arising merely from the confidential relationship that may exist. However, it does not address, according to Lord Bates in introducing the amendment, those in the regulated sector responsible for submitting such reports negligently or maliciously (see also *Shah v. HSBC Private Bank* (UK) Ltd [2012] EWHC 1,283). Nor does this provision, which was enthusiastically welcomed by the financial sector, address the prospect of liability arising under the law relating to constructive trusts or for "knowing assistance" in laundering the proceeds of a breach of fiduciary duty (see *Credit Agricole Corporation and Investment Bank v. Papadumiteiou* [2015] UKPC 13). It also remains to be seen just how valuable to anyone these reports are in practice. For example, of the 350,000 Suspicious Activity Reports (SARs) filed annually with the NCA, according to Transparency International (TI), only seven transactions were actually blocked last year with a value of less than £113m. The total cost to the financial sector of operating all this has been "guestimated" at well in excess of 2 billion!

One never knows the extent to which intelligence gleaned from these reports, and the follow up which may take place has resulted directly and indirectly in the prevention or reduction of crime – including terror. While the official line is that the system is helpful, comments of those involved in its operation are equivocal. Indeed, there is a view in some police and security quarters that the morass of information that is now available invaluably "hides" nuggets, which in other circumstances would have come to the surface far more efficiently. Indeed, a number of years ago one very senior police officer submitted a report to his superiors and their political masters claiming that proceeds of crime laws that in practice could not be enforced sufficiently to represent a real risk to criminal organisations might well simply result in more and more complex money laundering. The Treasury and Home Office's assessment would seem to recognise a current situation not at variance with such a warning.

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