www.moneylaunderingbulletin.com

Money Laundering Bulletin

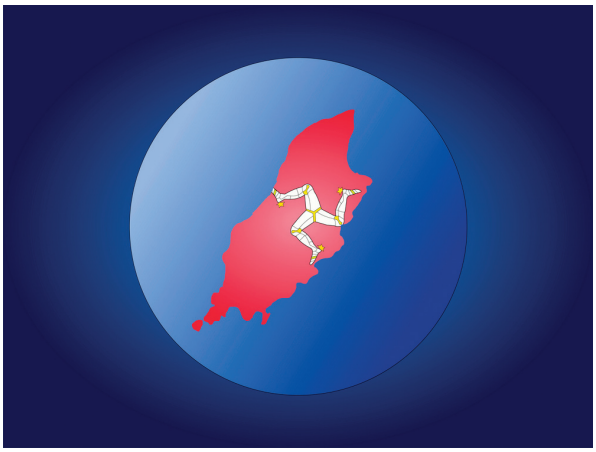
April 2015

FEATURE › LAWYERS

Holt v Attorney General - professional fees and the money laundering offences

Jenny Holt's prosecution for money laundering in the Isle of Man created quite a stir, writes **Jonathan Fisher QC**.

The trial Judge (the Deemster) had described Ms Holt, a young English barrister and Manx advocate employed by a firm called Moroneys, as "of exemplary positive good character" and "the sort of daughter every parent would be proud of". Yet following her conviction and suspended sentence of 12 months imprisonment the headline in IOM Today screamed out that "Baines advocate should have gone to prison" (2 July 2011). In the event, Ms Holt's conviction was subsequently quashed by the Privy Council (Holt v Attorney General [2014] UKPC 4). But in its wake the case has left some real anxieties about the application of the money laundering offences to fees paid to professional advisers, and particularly lawyers, for the services they are asked to render. The anxieties are exaggerated, though not entirely unfounded.



The facts

Ms Holt was aged 28 at the time of her conviction. Although she had no experience of criminal work, she came to have day-to-day conduct of the defence of a man called Trevor Baines and his wife who had been charged in the Isle of Man (IOM) with money laundering offences involving around US$175 million. Mr and Mrs Baines administered a number of trust funds, one of which was known as the Hermitage Securities Trust (Hermitage). The Hermitage trust had been established by the settlor for the benefit of his daughters and the trust assets amounted to around US$20 million. It is clear that Mr and Mrs Baines were experiencing difficulty with finding fees to pay Moroneys for their defence. Queens Counsel and junior counsel from London had been retained for the trial, and Moroneys needed around UK£400,000 on account to cover their costs. In due course, UK£400,000 was transferred to Moroneys for this purpose.

The problem was that the Baines had committed further criminal offences in order to obtain the UK£400,000 in question. Mr Baines had persuaded Kleinwort Benson to advance the money to Hermitage by dishonestly pretending that it was to finance property in Douglas which he was buying as an investment for the trust. Having obtained the money dishonestly and then stolen it from Hermitage, Mr and Mrs Baines paid Moloneys with the proceeds of crime. The prosecution did not allege that Ms Holt knew about the fraud perpetrated on Kleinwort Benson or the theft from Hermitage. Instead, the case against Ms Holt was that she had connived in the use of the UK£400,000, knowing or suspecting that it was criminal property. Her error, the prosecution alleged, was to get too close to a client who turned out to be a crook.

The principal charge against Ms Holt was framed under *section 140(1)* of the IOM's *Proceeds of Crime Act 2008* (IOMPOCA), which replicates *section 328(1)* of the *Proceeds of Crime Act 2002* (POCA) in the United Kingdom (UK). Accordingly, Ms Holt was alleged to have "become concerned in an arrangement which she knew or suspected facilitated the acquisition, retention, use or control of criminal property, namely the sum of UK£400,000 belonging to Hermitage Securities Limited by or on behalf of John Trevor Roche Baines and Wendy Nicolau De Almedia Baines". Unlike the provision in *section 329(2)(c)* of POCA, which provides a defence to an offence involving the acquisition, use or possession of criminal property where the defendant acquired, used or had possession of the property for adequate consideration, there is

no equivalent defence under *section 328(1)* of POCA or *section 140(1)* of IOMPOCA.

What did Ms Holt know?

Ms Holt gave evidence that she thought the UK£400,000 derived from a different source, such as personal funds held by Mr and Mrs Baines in their trust management company. Whilst Ms Holt accepted that she knew Mr Baines was proposing to borrow money from Hermitage and that Hermitage wanted some security from him, she said that she did not connect in her mind the receipt of the UK£400,000 with the possibility of Mr Baines obtaining a loan from Hermitage.

As the Privy Council noted (judgment, paragraph 9), the jury by its verdict must have rejected Ms Holt's evidence that she believed the source to be other than Hermitage, and there was ample evidential basis for this conclusion (judgment, paragraph 10). In particular, in the context of discussion about fees, Mr Baines had made clear to Ms Holt that he needed to give all of his possessions to Hermitage in order to secure a loan, and at one point Ms Holt had asked the barristers in London whether there was any impediment to the funding of the case if Mr and Mrs Baines took a loan from a trust. The barristers said this was unobjectionable if the loan was commercial and at arm's length. In this connection, the Privy Council commented that "there could on the face of it have been no reason for defence counsel in the upcoming trial to be asked any question about the proposed loan unless [Ms Holt] understood it to be a loan for the fees which their clerks were chasing".

It was against this background that the jury came to convict Ms Holt of the money laundering offence, and also two associated offences of false accounting which related to attendance notes made by Ms Holt regarding discussions that had taken place with the barristers.

The appeal

The key point on appeal before the Privy Council (before Lords Mance, Kerr, Wilson, Hughes and Gill) related to the way in which the Deemster had left the case to the jury. The Deemster was correct to identify the only real issue in the case as that of guilty mind, and also to identify the principal factual dispute on the evidence as to whether or not Ms Holt believed the source of the UK£400,000 for fees to be separate from Hermitage and from any loan from that trust. However, the Deemster fell into error because he left the case to the jury as one which would be concluded by the answer to the question whether Ms Holt had held this belief or not. By leaving the case to the jury in this way, the Deemster had invited the jury to assume that if they disbelieved Ms Holt in her evidence about where she thought the money was coming from, conviction must inevitably follow. But as the Privy Council pointed out, this conclusion does not necessarily follow.

What the Deemster ought to have done was to ask the jury whether, if they rejected Ms Holt's evidence about where she thought the money was coming from, they were nevertheless satisfied that Ms Holt knew or suspected when transmitting the money to the barristers that it represented the proceeds of criminal conduct which Mr Baines had committed (judgment, paragraph 23): "It would not be necessary for the appellant to know that the law labelled what occurred a crime, still less which crime, if she knew or suspected facts which amounted to a crime of some kind. But it was necessary for the prosecution to prove that she had applied her mind to the circumstances in which the money had been produced. Actual knowledge or suspicion that there was criminal conduct of some kind involved is an essential element of the offence. It was not enough to show that she ought to have realised that some crime, such as theft or obtaining by deception, might well have been involved. Knowledge or suspicion that to receive the money from Hermitage would be irregular, in the sense of a breach of trust, is not automatically the same as knowledge or suspicion that a crime is involved" (judgment, paragraph 26).

The Deemster's failure to direct the jury in these terms constituted a central deficiency in the summing-up and the conviction for money laundering had to be quashed. Even if Ms Holt had realised that the UK£400,000 was coming irregularly from Hermitage, it was not an inevitable conclusion that she had applied her mind to possible criminal activity rather than naively assuming that the formalities of the loan would follow (judgment, paragraph 27). In this connection, it is right to remember the prosecution had not at any stage in the proceedings alleged that Ms Holt knew or suspected that Mr Baines had committed a fraud on Kleinwort Benson or stolen any money from Hermitage in respect of which he had been acting as controller of a corporate trustee. The Privy Council concluded that the convictions on the false accounting offences were also tainted and fell to be quashed (judgment, paragraph 29).

A sympathetic decision

The Privy Council's decision demonstrates the need for a trial Judge to be sensitive to potential defences which had not been put forward by the defendant. In this case, because the perception of irregularity in the handling of trust funds was inconsistent with the factual defence which Ms Holt had run, it had become incumbent on the trial Judge to safeguard Ms Holt's interests in the event that the jury rejected her account that she believed the monies had derived from Mr Baines' private funds: "The case in which a defendant advances a defence which may well be disbelieved imposes a particularly acute duty on the trial Judge. It is essential that he considers carefully what the position will be if the defendant's account is indeed rejected. Sometimes the result will be that the only proper verdict will be guilty…. But very

often it will be necessary for the jury to be required to apply its mind to the remaining steps to conviction, and it is especially important that it be reminded that it must do so because the defence will normally not have addressed other possible obstacles to conviction which are inconsistent with the case being advanced by the defendant in evidence" (judgment, paragraph 24).

On any view, this is a generous approach. After all, if Ms Holt had proceeded with the transfer of UK£400,000 in circumstances where she thought it may have constituted an irregularity in civil law but there was no question in her mind that the monies represented the proceeds of crime, then she ought to have run this defence. Once the jury had rejected her evidence as unreliable, it is rather bold to posit that the jury might have acquitted her on a totally different and manifestly inconsistent basis. The judgment leaves the reader with the distinct impression that the Privy Council had sympathy for "a newly qualified advocate out of her depth and taken in by a persuasive and dishonest client" (judgment, paragraph 30), and rightly so.

Money laundering implications

At first blush, notwithstanding Ms Holt's acquittal on appeal, the circumstances of her case send real shivers down the spines of professional advisers who have accepted tainted funds as payment for their fees. As already noted, there is a clearly recognised defence of "adequate consideration" which applies where an offence contrary to *section 329(1)* of POCA would otherwise have been committed. The Crown Prosecution Service acknowledges the applicability of the defence in its legal guidance on POCA offences. Similarly, the Law Society references the defence in paragraph 5.5.2 of its Money Laundering Guidance. However, there is no equivalent defence where an offence contrary to *section 327* of POCA (transferring criminal property) or *section 328* of POCA (facilitating the handling of criminal property) is indicted. As it happens, there is no equivalent defence in the IOM at all, but if the same facts had occurred in the United Kingdom and a prosecuting authority elected to indict under *section 328* of POCA instead of *section 329* in a case where a professional adviser has given adequate consideration for payment of fees, the potential exposure to criminal liability is obvious.

The circumstances in *Holt v AG* highlight this issue, and the Law Society has been aware of the problem for some time. In its submission to the House of Lords European Union Select Committee on 4 March 2009, the Law Society argued that the adequate consideration defence ought to be expanded to apply to the *section 327* and *328* offences: "To ensure that the legislative intention of the defence of adequate consideration is fully implemented, the Society would like to see the defence also applied to *sections 327* and *328*. This defence does not provide an open gate for criminals to siphon off criminal funds to their professional advisors. Instead it helps to guarantee the fundamental human right of access to justice and a fair and just legal system for people suspected, accused or even convicted of criminal activities" – Minutes of Evidence, Money Laundering and the Financing of Terrorism, Session 2008-9, Supplementary Memorandum by the Law Society of England and Wales, paragraph 3.4.

Conclusion

Without question, the exposure of professional advisers to the commission of money laundering offences is real and it is always necessary to act with caution. Insofar as the UK is concerned, the adequate consideration defence in *section 329(2)(c)* of POCA remains extant and perhaps the critical lesson which emerges from a consideration of Ms Holt's experiences is the need for professional service providers to ensure that in a case where there is any concern about the lawfulness of a client's conduct, they do not assist the client in making arrangements which enable their fees to be paid.

In this regard, arguably Ms Holt over-stepped the mark. In one email exchange, Ms Holt asked Mr Baines what he needed to be done in order to secure the loan. Mr Baines replied that he wanted Ms Holt to draft something. Ms Holt then asked Mr Baines for a list of his unencumbered assets, the value of the loan, whether interest was being charged and the terms of the loan, for example whether it is a loan for an unspecified or specified period (judgment, paragraph 12). Later, Ms Holt attended a meeting with Mr and Mrs Baines at which a list of assets was drawn up for provision as security for a loan of up to UK£1 million (judgment, paragraph 15). It is here that Ms Holt became exposed because by her conduct it enabled the prosecution to allege that she was not merely receiving tainted funds in respect of her professional fees but more significantly she had become concerned in an arrangement to raise them. No doubt it was for this reason that Ms Holt was prosecuted for an offence contrary to *section 140(1)* of IOMPOCA and not the offence contrary to *section 141(1)* which is equivalent to the UK's *section 329(1)* offence.

It is one thing to passively receive tainted funds in circumstances where adequate consideration has been rendered; it is something else to actively assist a client in raising monies to enable professional fees to be paid. Ms Holt crossed this line, and although she was ultimately acquitted it is clear that she paid a heavy price.

Jonathan Fisher QC is a practising barrister at Devereux Chambers in London and a Visiting Professor in Practice at the LSE. (www.jonathan-fisher.co.uk)