

CAN INSIDER TRADING PREDICATE THE OFFENCE OF MONEY LAUNDERING?

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1.0 INTRODUCTION

This paper examines the question whether insider trading activities, hereinafter referred to as “insider dealing,” can predicate the offence of money laundering in Zambia.¹ Although responses to such a question might point to different answers in different jurisdictions, in Zambia, insider dealing is, first and foremost, a criminal offence covered by Section 52 of the Securities Act 1993 (“Securities Act”).² Secondly, insider dealing can generate proceeds of crime.³ While the offence of insider dealing *per se* may not predicate the offence of money laundering, the offence of money laundering would arise where insider dealing involves engaging, directly or indirectly, in a business transaction that involves property acquired with proceeds of crime, or receiving, possessing, concealing, disguising, disposing of or bringing into Zambia, property derived or realized directly or indirectly from illegal activity, or retaining or acquiring property knowing that the property is derived or realized, directly or indirectly from illegal activity.⁴

Section 2 of the Prohibition and Prevention of Money Laundering Act 2001 (“Prohibition and Prevention of Money Laundering Act”) defines money laundering as including “(a) engaging, directly or indirectly, in a business transaction that involves property acquired with proceeds of crime; (b) receiving, possessing, concealing, disguising, disposing of or bringing into Zambia, any property derived or realized directly or indirectly from illegal activity; or (c) the retention or acquisition of property knowing that the property is derived or realized, directly or indirectly from illegal activity.” In the latter sections of this paper, we will examine in greater detail the constituent elements of both offences of insider dealing and money laundering. Here, suffice it to say, the common law, doctrines of equity, legislation on criminal law, financial sector legislation,

¹ Discussing the meaning of the term “predicate offence,” the Canadian Supreme Court, ruling on a criminal matter, observed as follows: “To be brought within the ambit of [section 269], an accused must have committed an underlying unlawful offence (otherwise referred to as the predicate offence).... For liability to be imposed..., the harm caused must have sufficient causal connection to the underlying offence committed (see *R. v. Wilmot* (1940) 74 C.C.C. 1 (Alta. C.A.) at pp. 17 and 26-27, appeal dismissed for other reasons [1941] S.C.R. 53).” *R. v. DeSousa*, [1992] 2 S.C.R. 944, 956, available at http://www.lexum.umontreal.ca/esc-scc/en/pub/1992/vol2/html/1992scr2_0944.html (last visited April 7, 2006).

² Securities Act of 1993, § 52, 2 L. Rep. of Zambia Ch. 20 (1995).

³ See The Prohibition and Prevention of Money Laundering Act, § 2 (2001) (Zambia). *Cf.* Securities Act, *supra* note 2, § 52. The Act is available at <http://www.boz.zm/instruments/the%20prohibition%20and%20prevention%20of%20money%20laundering%20act.pdf>.

⁴ See Securities Act, *supra* note 2, § 48 (emphasis added).

tax legislation, legislation to fight corruption, principles of international criminal law, and principles of public international law all form the backbone of the institutional and regulatory framework for combating money laundering in Zambia. We now turn to examine the concept of insider dealing in Zambia before examining how insider dealing can predicate or lead to the offence of money laundering.

2.0 MARKET ABUSES AND MONEY LAUNDERING

Part VII of the Securities Act addresses the issue of improper trading practices in the securities industry in Zambia.⁵ The Securities Act prohibits the creation of false or misleading volumes of trade in securities.⁶ The Act also prohibits the creation of a false or misleading market in securities and the creation of false or misleading prices of securities.⁷ In addition, under the Securities Act, a purchase or sale of securities does not involve a change in the beneficial ownership if a person who had an interest in the securities before the purchase or sale, or a person associated with him in relation to those securities, holds an interest in the securities after the purchase or sale.⁸ Indeed, the Act prohibits a person from maintaining, inflating, depressing or causing fluctuations in the market price of securities by means of the purchase or sale of any securities that does not involve a change in the beneficial ownership of those securities or by any fictitious transaction or device.⁹ If such transactions were to take place, the resulting property or financial gain would be caught up by the anti-money laundering provisions of the Prohibition and Prevention of Money Laundering Act.¹⁰

Under the Securities Act, it is a criminal offence to “induce[] or attempt[] to induce another person to deal in securities through misleading, false or deceptive published information.”¹¹ It is also an offence to “induce[] or attempt[] to induce another person to deal in securities” through recklessly or dishonestly published statements.¹² Forecasting of information that is false or misleading and any dishonest concealment of material facts also constitute criminal offences.¹³ Section 50 of the Securities Act extends criminal liability to any “person who, directly or indirectly, in connection with any other person involve[ed in] the purchase, sale or exchange of securities employs any device, scheme or artifice to defraud” other players in the market. Here, liability applies also to persons engaging in any act, practice or course of business which operates as a fraud or deception, or which is likely to operate as a fraud or deception of other players in the market.¹⁴ And if any of the market abuses described above require the accused to engage, directly or indirectly, in a business transaction that involves property acquired with proceeds of crime, or to receive, possess, conceal, disguise, dispose of or bring into Zambia, property derived or realized directly or

⁵ Securities Act, *supra* note 2.

⁶ *Id.* § 48.

⁷ *Id.*

⁸ *Id.*

⁹ Securities Act, *supra* note 2, § 48(2). On the fiduciary duty prohibiting stock brokers and dealers from engaging in churning and switching of securities, see *Norris & Hirschberg v. SEC*, 177 F.2d 228 (1949).

¹⁰ See The Prohibition and Prevention of Money Laundering Act, *supra* note 3.

¹¹ Securities Act, *supra* note 2, § 49.

¹² *Id.*

¹³ *Id.*

¹⁴ Securities Act, *supra* note 2, § 50.

indirectly from illegal activity, or to retain or acquire property knowing that the property is derived or realized, directly or indirectly from illegal activity, then that market abuse could predicate the offence of money laundering under the Prohibition and Prevention of Money Laundering Act.

3.0 CAN INSIDER DEALING PREDICATE THE OFFENCE OF MONEY LAUNDERING?¹⁵

Writing on an incident of alleged insider dealing and money laundering in the United States of America, Ruppert argues:

Although uniformly ignored by the mainstream U.S. media, there is abundant and clear evidence that a number of transactions in financial markets indicated specific (criminal) foreknowledge of the September 11 attacks on the World Trade Center and the Pentagon.¹⁶

According to Ruppert, in the case of at least one of these trades – which left a \$2.5 million prize unclaimed – the firm that used to place put options on United Airlines stock was, until 1998, managed by a man who, by 2001, was in the number three Executive Director position at the Central Intelligence Agency.¹⁷

Until 1997, A.B. “Buzzy” Krongard had been Chairman of the investment bank, A.B. Brown. A.B. Brown was acquired by Banker’s Trust in 1997. Krongard then became, as part of the merger, Vice Chairman of Banker’s Trust-AB Brown, one of 20 major U.S. banks named by Senator Carl Levin this year (2001) as being connected to money laundering. Krongard’s last position at Banker’s Trust (BT) was to oversee “private client relations.” In this capacity he had direct hands-on relations with some of the wealthiest people in the world in a kind of specialized banking operation that has been identified by the U.S. Senate and other investigators as being closely connected to the laundering of drug money. Krongard (re?) joined the CIA in 1998 as counsel to CIA Director George Tenet. He was promoted to CIA Executive Director by President Bush in March of 2001. BT was acquired by Deutsche Bank in 1999. The combined firm is the single largest bank in Europe. Deutsche Bank played several key roles in events connected to the September 11 attacks. Before looking further into these relationships it is necessary to look at the insider trading information that is being ignored by Reuters, *The New York Times* and other mass media. It is well documented that the CIA has long monitored such trades – in real time – as potential warnings of terrorist attacks and other economic moves contrary to U.S.

¹⁵ See generally Kenneth K. Mwenda, *Zambia’s Securities Act 1993 On Trial: The Case Of Insider Dealing*, 18 STATUTE L. REV. 150 (1997). Cf. Criminal Justice Act, 1993, part V (U.K.). See also Law Society (U.K.), THE LAW ON INSIDER DEALING, Memorandum No. 213 (1990); T.M. Ashe, *Insider Dealing*, 11 COMPANY LAW. 127 (1990); J.M. Naylor, *The Use of Criminal Sanctions for Insider Trading*, 11 COMPANY LAW. 53 (1990); Department of Trade and Industry (U.K.), THE LAW ON INSIDER DEALING - CONSULTATIVE DOCUMENT (1989); Companies Act, 1989, §§ 82, 83, 84 (U.K.).

¹⁶ M.C. Ruppert, *Suppressed details of criminal insider trading lead directly into the CIA’s highest ranks: CIA Executive Director ‘Buzzy’ Krongard managed firm that handled ‘put’ options on UAL*, FTW PUBLICATIONS, October 9, 2001, available at http://www.fromthewilderness.com/free/ww3/10_09_01_krongard.html (last visited April 7, 2006).

¹⁷ *Id.*

interests. Previous stories in FTW have specifically highlighted the use of Promis software to monitor such trades.¹⁸

Ruppert goes on to say:

It is necessary to understand only two key financial terms to understand the significance of these trades, “selling short” and “put options”. “Selling Short” is the borrowing of stock, selling it at current market prices, but not being required to actually produce the stock for some time. If the stock falls precipitously after the short contract is entered, the seller can then fulfill the contract by buying the stock after the price has fallen and complete the contract at the pre-crash price. These contracts often have a window of as long as four months. “Put Options,” are contracts giving the buyer the option to sell stocks at a later date. Purchased at nominal prices of, for example, \$1.00 per share, they are sold in blocks of 100 shares. If exercised, they give the holder the option of selling selected stocks at a future date at a price set when the contract is issued. Thus, for an investment of \$10,000 it might be possible to tie up 10,000 shares of United or American Airlines at \$100 per share, and the seller of the option is then obligated to buy them if the option is executed. If the stock has fallen to \$50 when the contract matures, the holder of the option can purchase the shares for \$50 and immediately sell them for \$100 – regardless of where the market then stands. A call option is the reverse of a put option, which is, in effect, a derivatives bet that the stock price will go up.¹⁹

In Zambia, because of the low volumes of trade in securities and the low levels of liquidity on the Lusaka Stock Exchange, insider dealing may not be easily identified. And although there is not much evidence of insider dealing on the Lusaka Stock Exchange, our argument that insider dealing rules should be improved, especially given the increase in activities of money laundering in Zambia, is pro-active and grounded in economic reasoning that efficient legal rules can help to promote the development of a competitive stock exchange.²⁰ Section 52 of Zambia’s Securities Act spells out the law on insider dealing in the following manner:

- (1) A person to whom this section applies who deals, or counsels or procures another to deal, in securities of a company concerning which he has any knowledge that -
 - (a) is not publicly available; and
 - (b) would, if it were publicly available, materially affect the price of the securities,...
- (2) This section applies to -
 - (a) any director, officer or employee of the company concerned;
 - (b) any person associated in a professional capacity with that company; and
 - (c) any person who obtains such information from any of the persons mentioned in paragraph (a) or (b).²¹

¹⁸ *Id.*

¹⁹ *Id.*

²⁰ Securities Act, *supra* note 2, § 52.

²¹ *Id.*

The above statutory provision covers two types of insider dealers. Paragraphs 2(a) and (b) relate to primary insider dealers whereas paragraph 2(c) relates to secondary insider dealers. Although the law on insider dealing in Zambia covers both primary and secondary insider dealers, it fails to address the liability of third parties who obtain and use information from secondary insider dealers. This is an important shortcoming that must be redressed.²² In short, a third-party who, after obtaining inside information from a secondary insider, engages in insider dealing and makes a financial gain can lawfully acquire property and claim ownership to that property without attracting criminal sanctions under the Prohibition and Prevention of Money Laundering Act. Equally, he can go around, using his financial gain, to acquire property knowing that the property was derived or realized, directly or indirectly from illegal activity. The reason for this argument is simple. If, under the Securities Act, no offence of insider dealing is seen to have been committed, then there will be no predicate offence to bring about a case of money laundering.

Another constraint affecting the efficacy of the legal framework is that whereas government securities can be traded on a securities market in Zambia,²³ insider dealing law applies only to company securities. Section 52(1) of the Securities Act clearly refers to “deals, or counsels or procures another to deal, in securities of a company.” In drafting the Securities Act, neither the draftsman nor members of parliament (when debating the Securities Bill) gave thoughtful consideration to a number of these issues. Indeed, it is such issues that present themselves as constraints in the promotion of a competitive and developed stock exchange. Here, there is need to revise the law so that it covers also insider dealing in government securities. A failure to do so would entail giving liberty to investors to not only use inside information relating to government securities, but also to engage, directly or indirectly, in business transactions that involve property acquired with proceeds of crime gained on a stock market, or to receive, possess, conceal, disguise, dispose of or bring into Zambia, property derived or realized directly or indirectly from illegal activity on a stock market, or to retain or acquire property knowing that the property is derived or realized, directly or indirectly from illegal activity on the stock market.

Further, the law on insider dealing in Zambia should be amended to provide that where a person has at any time in the last six months been connected with a corporate body, and through his past relation to that corporate body, he was in possession of information that is not generally available, but if it were, was likely to materially affect the price of those securities, he is an insider. Indeed, such persons should be held liable as insiders if they act on inside information within six months after leaving their employment.²⁴ Once the

²² Although under many legal systems such use of information is not regulated that does not defeat the argument that third-party insider dealers must be made liable. If investor protection hinges in part on fair (and public) use of price-sensitive information, parties gaining unfairly from use of such information must be made liable. Examples of countries where securities legislation does not address liability of third party insiders include Kenya (*see generally* Capital Markets Authority Act (1989) (Kenya)) and Zimbabwe (*see generally* Stock Exchange Act (1980) (Zimbabwe)).

²³ Securities Act, *supra* note 2, § 2.

²⁴ Six months appears to be a reasonable time. *Cf.* Kenya’s Capital Markets Authority Act, *supra* note 22, § 33, which provides: “a person who is, or at any time in the preceding six months, has been connected” with a body corporate, and through his past relation to that body corporate, was in possession of information that is not generally available, but if it were, was likely to materially affect the price of those securities.

amendment is carried out it would mean that whatever business transaction would be entered into involving property acquired with proceeds of crime from insider dealing activities within six months of the insider leaving employment would be caught up under provisions of the Prohibition and Prevention of Money Laundering Act.

It is clear from the statutory provision prohibiting insider dealing in Zambia that the Securities Act provides only criminal sanctions against convicted insiders and does not spell out civil remedies to parties prejudiced by insider dealing. Although section 54 of the Securities Act provides that civil action can be brought against any person convicted of an offence relating to improper trading – and such offences include the offence of insider dealing – that statutory provision does not provide for the type of civil remedies that would be available to parties prejudiced by improper trading.²⁵ Besides, civil action can only be brought by a prejudiced party once a criminal conviction has been obtained.²⁶ And where there is no criminal conviction, a prejudiced party cannot bring civil action against the alleged insider dealer or improper trader. It is not clear why this decision to bring a civil law suit should depend on whether or not there is a predicate criminal conviction for improper trading. Further, and as will become clearer in the latter sections of this paper, even the statutory provisions of the Prohibition and Prevention of Money Laundering Act, dealing with the forfeiture of property acquired with proceeds of crime, cannot be relied upon if a predicate offence of money laundering has not been committed.²⁷

Under section 54 of the Securities Act, the burden of proof in civil cases lies on the plaintiff to prove, on a balance of probabilities, that the defendant committed a civil wrong against the plaintiff and that the latter is entitled to civil remedies.²⁸ Some of the reasons for arguing that the Securities Act should state the type of civil remedies available to parties prejudiced by insider dealing include the following:

- (i) The burden of proof in criminal law lies on the prosecution (and not on the party suffering loss). The party suffering loss is only a complainant or a witness.

²⁵ I have argued elsewhere, see Kenneth K. Mwenda, *The Securities Act 1993 of Zambia: A Comment On The Defective Provisions For Controlling Insider Dealing In Zambia*, 8 STELLENBOSCH L. REV. 234-235 (1997), that: “The difficulty, however, in bringing civil action against the insider lies in proving that the plaintiff actually suffered loss as a result of the defendant’s action. Although the insider could have made an unfair gain from his transaction, it is not easy to say precisely which party has suffered loss from the transaction(s) of the dealer. Should the buyer of the securities (the one who buys from the insider) bring an action against the insider claiming that the insider acted unfairly towards him or should the action be brought by the company that allotted the securities claiming that it has suffered a great loss as a result of the insider’s action or should the action be commenced by the shareholders of the company that allotted the securities? Here we are faced with an issue of law and fact. The facts of each case would determine which party has the *locus standi* to bring an action. It must, however, be reiterated that the importance of having clear statutory provisions on civil remedies for parties prejudiced by insider dealing lies in part in the fact that such remedies are an incentive to promoting investor confidence in Zambia.”

²⁶ The position in some countries, such as Kenya, is that no civil remedies are provided for under legislation dealing with insider dealing. In other countries, such as Zimbabwe and Ghana, by 1997, legislation on public distribution of securities did not even cover the offence of insider dealing.

²⁷ See *infra* section 11.0.

²⁸ See generally Harry McVea, *Fashioning a system of civil penalties for insider dealing: sections 61 and 62 of the Financial Services Act 1986*, J. BUS. L. 344 (July 1996); cf. J.M. Naylor, *The use of criminal sanctions by UK and US authorities for insider trading: how can the two systems learn from each other? Part II*, 11 COMPANY LAW. 83-91(1993); B. HANNIGAN, INSIDER DEALING 124-32, (2d ed. 1994).

Although a fine may be imposed on the offender, the party suffering loss does not recover his loss;

(ii) The burden of proof in civil law cases lies on the plaintiff (i.e. the party suffering loss). Here, the prejudiced party can recover his loss;

(iii) The standard of proof in criminal cases is that of beyond all reasonable doubt. Here, the standard of proof is higher than in civil cases. Therefore, civil remedies must be provided for so that where the high criminal law standard of proof cannot be satisfied, the mere satisfaction of the lower civil law standard of proof should lead to the award of damages.

(vi) Punishment of an offending party is a fundamental objective of criminal law. In contrast to criminal proceedings, civil proceedings have restitution of the parties and/or compensation of the prejudiced party as notable objectives.²⁹

3.1 *Shadow directors as potential insiders and potential money launderers*

Under Zambia's Companies Act 1994 ("Companies Act"), "a person not being duly appointed director of a company, on whose directions or instructions the duly appointed directors are accustomed to act shall be deemed to be a director for the purposes of all duties and liabilities imposed on directors."³⁰ This statutory provision makes improvements to the law on directors' duties and liabilities in Zambia. The provision introduces the concept of shadow director to company law in Zambia. Under the Companies Act 1921, and under the Securities Act, the concept of shadow directors was not (and is not) covered to the same extent as it is covered under English law.³¹ As Goode observes, a shadow director in contrast to a *de facto* director, normally acts through someone.³² A *de facto* director, by contrast, often holds out and acts in person.

In Zambia, before the enactment of the Companies Act, no person influencing decisions of a company's board of directors (from outside the board) could be considered a shadow director. This meant that under Zambian corporate law, no person acting as a shadow director (as would be the case under English law), and releasing inside information to investors would be made liable as a primary insider dealer. However, the coming into force of the Companies Act reversed this position. The Companies Act now establishes the concept of shadow director and this applies to primary insider dealing as well. Also, under the Prohibition and Prevention of Money Laundering Act, the concept of shadow director is provided for, and, as such, a shadow director can be liable for money laundering offences under the statute.³³

3.2 *A corporate body cannot be held liable for insider dealing*

Under the Securities Act, corporate bodies are excluded from the two categories of insider dealers. In section 52(1) of the Securities Act, which reads in part "to deal, in securities of a company concerning which he has any knowledge", the pronoun "he"

²⁹ See generally D. HARRIS, REMEDIES IN CONTRACT AND TORT (1988); A. BURROWS, REMEDIES FOR TORTS AND BREACH OF CONTRACT (1994).

³⁰ Companies Act, 1994, § 203(4) (Eng.).

³¹ See Companies Act, 1985, § (Eng.).

³² See R.M. GOODE, PRINCIPLES OF CORPORATE INSOLVENCY LAW 444-468 (2d ed. 1997).

³³ See Mwenda, *supra* note 25, at 229. See also Mwenda, *supra* note 15, at 150-159.

obviously refers to individuals.³⁴ Section 4 of Zambia's Interpretation and General Provisions Act 1964 provides that words and expressions in any written law importing the masculine gender include females.³⁵ This statutory provision further states that words and expressions in any written law in the singular include the plural, and that words and expressions in the plural include the singular. Nowhere in the Interpretation and General Provisions Act 1964 and the Securities Act is it stated that the pronoun "he" includes corporate bodies. Thus, we would be pursuing a red herring in trying to argue that the pronoun "he" includes corporate bodies. To that extent, bodies corporate such as merchant banks and those acting as underwriters, promoters or operators of collective investment schemes cannot be held liable for insider dealing. By parity of reasoning, such bodies corporate cannot be held liable for money laundering that is predicated on insider dealing since there is no predicate offence.

However, the Securities Act does not exclude members of unincorporated associations (e.g. partners in a partnership) from the two categories of potential insider dealers.³⁶ To secure a conviction here, there is need to show that partners or their delegates either procured parties to deal in securities, or counselled them on these dealings or dealt in securities using inside information obtained from primary insider dealers. Here, the partnership position mainly affects lawyers and accountants. In Zambia, lawyers and accountants normally organize their businesses as partnerships. Apart from the day-to-day practice of lawyers and accountants, and where these professionals are not acting as financial intermediaries on the stock market, they will usually be acting in a professional capacity with the allotting companies. Indeed, lawyers and accountants will quite often be advising the allotting company or auditing its books of accounts, respectively. This position brings lawyers and accountants within provisions of the Securities Act as potential insider dealers. Further still, the law does not require proof that the recipient of inside information requested for the information. Insider dealing liability covers use of unsolicited inside information.³⁷ And by parity of reasoning, partners in an unincorporated partnership can be held liable for money laundering predicated on insider dealing. However, what would happen in cases of suspected money laundering involving gatekeepers such as accountants and lawyers? Does the Prohibition and Prevention of Money Laundering Act say anything about such issues? The statute is largely silent on the need to regulate gatekeepers against money laundering.

3.3 Gatekeepers as potential insider dealers and potential money launderers

In many countries, accountants serve as financial advisers and investment advisers to corporations and individuals trading on the stock market. Also, accountants and lawyers do provide trusts and company services to many business houses and these services include company formation and incorporation, providing advice on how to avoid and optimize tax situations, and carrying out powers of attorney on behalf of a customer. But,

³⁴ *Id.*

³⁵ Interpretation and General Provisions Act, § 4 (1964) (Zambia).

³⁶ In Zambia, the English Partnership Act, 1890, (Eng.) and common law govern partnership law. There are no partnerships with limited liability of partners.

³⁷ See *Re Attorney-General's Reference* [1989] 2 All E.R. 1; see also E.A. Coleman, *Securities Regulation, Involuntary Recipients of Inside Information*, 11 COMPANY LAW. 18-19 (1990).

then, what happens in a situation where accountants or lawyers assist in the commissioning of the offence of money laundering while they are providing such advice to customers or while they are carrying out their usual business functions on behalf of a customer? Should accountants and lawyers be protected by the law in cases where they deliberately and deceptively choose to hide behind the veil of judicial immunity as professionals carrying out professional functions when, in fact, they are facilitating a scheme of money laundering?³⁸ Indeed, should an accountant or a lawyer be allowed to provide financial or legal advice, as the case may be, that facilitates insider dealing or organized crime without facing any legal sanctions whatsoever? What about criminal funds that have been placed in a client account run by a lawyer on behalf of his client? Can such funds be reached by the Anti-Money Laundering Investigations Unit of Zambia, or should the lawyer be allowed to protect the funds under the argument that the funds, together with any other information and document in the custody of the lawyer, are protected by a fiduciary duty of confidentiality and the lawyer-client privileged position?³⁹ What does the Law Association of Zambia (LAZ) have to say, as the mother

³⁸ See *Patton v. United States*, 281 U.S. 276, 306 (1930); *Funk v. United States*, 290 U.S. 371, 385 (1933); *Williams v. Chapman*, 24 S.E. 810, 811 (N.C. 1896); *Locke v. Alexander*, 8 N.C. 412, 417 (1 Hawks 1821). In this regard, and specifically with respect to the attorney-client privilege, the United States Supreme Court has stated that “since the privilege has the effect of withholding relevant information from the factfinder, it applies only where necessary to achieve its purpose.” *United States v. Zolin*, 491 U.S. 554, 562 (1988) (quoting *Fisher v. United States*, 425 U.S. 391, 403 (1976)). See also *Ex parte Lipscomb*, 239 S.W. 1101, 1103 (Tex. 1922); *Russell v. Second Nat'l Bank of Paterson*, 55 A.2d 211, 217 (N.J. 1947); *State v. Murvin*, 284 S.E.2d 289 (N.C. 1981). At common law, the duty of confidentiality relating to communications between a lawyer and his client is not absolute. For example, the privilege does not apply where a client is seeking advice from the attorney in order to commit a crime or to aid someone to commit a crime. If it were, every criminal would first discuss his intentions with his lawyer in order to work out a flawless plan before committing the crime. Without this limitation, the lawyer would not be able to turn in such criminals. However, the lawyer should, in fact, to report such a person's intent to commit a crime. While a lawyer should report future intended crimes by a client, the lawyer cannot and is prohibited from reporting past completed crimes.

³⁹ See *In re Grand Jury Proceedings Under Seal*, 947 F.2d 1188, 1189-91 (4th Cir. 1991). In this case, an accountant was initially hired to provide business and tax assistance. Later, the accountant worked with a client in presenting relevant information to the attorney. The court held that the communications between the client and the accountant, in preparation for communications with the attorney were protected by the attorney-client privilege. Similar rulings were passed in *In re Beiter Co.*, 16 F.3d 929, 939-40 (8th Cir. 1994) (holding that communications between an independent consultant hired by a client and a client's lawyer were protected by the attorney-client privilege where the purpose of the communication was to seek legal advice), and *McCaugherty v. Siffermann*, 132 F.R.D. 234, 239 (N.D. Cal. 1990) (holding that communications between a client's attorneys and a consultant hired by the client were protected by attorney-client privilege). See also *United States v. Louisville & Nashville R.R. Co.*, 236 U.S. 318 (1915); Paul R. Rice, *Attorney-Client Privilege: The Eroding Concept of Confidentiality Should be Abolished*, 47 DUKE L. J. 853 (Mar. 1998), available at <http://www.law.duke.edu/journals/dlj/articles/dlj47p853.htm> (last visited April 7, 2006). Also, the INTERNATIONAL COMPLIANCE ASSOCIATION, INTERNATIONAL DIPLOMA IN ANTI MONEY LAUNDERING MANUAL (2d ed. 1993), argues that: “...lawyers are attractive because they can offer launderers and their communications with them the protection of legal professional privilege (sometimes referred to as ‘attorney client privilege’). *Legal professional privilege*, which has its foundations in English common law, provides that no legal adviser can be compelled, without the express consent of his client, to disclose statements made to him by his client in professional confidence or to produce documents made in the same circumstances. The attraction of legal professional privilege to money launderers is obvious” (emphasis added). Cf. *Scott Paper Co. v. United States*, 943 F. Supp. 489, 499-500 (E.D. Pa. 1996) (denying the defendant's claim of attorney-client privilege because it was unclear whether documents for which the defendant sought privilege “were maintained in files subject to open

body of the legal profession and also as the professional body responsible for the regulation of professional ethics in the legal profession? And what does the Zambia Institute of Certified Accountants (ZICAS) have to say, as the mother body of the accounting profession and also as the professional body responsible for the regulation of professional ethics in the accounting profession? Are there any standards or codes of practice on such matters in Zambia?⁴⁰ With specific regard to money laundering matters, no major standards or codes of practice have ever been promulgated by LAZ or ZICAS. Neither has the Zambia Securities and Exchange Commission promulgated specific anti-money laundering guidelines for stockbrokers and dealers. By contrast, countries such as Ireland have a well developed code of anti-money laundering for stockbrokers,⁴¹ while Scotland has an evolving anti-money laundering training programme for its lawyers⁴² and the United Kingdom has anti-money laundering standards for both lawyers and accountants.⁴³

In Zambia, another worrisome development is the plethora of poorly-regulated estate agents entering the real estate industry. The sudden growth in numbers of self-proclaimed estate agents poses another challenge to the fight against money laundering. These real estate agents must be properly regulated because they are, indeed, a potential conduit for money launderers to conceal their ill-gotten wealth in properties such as a chain of houses, mansions, apartment buildings, pleasure resorts, farms and other forms of property. In fact, a number of real estate agents in Zambia are simply semi-literates who, lacking formal employment, peddle the streets of Lusaka, but can hardly understand the fundamentals of the real estate industry and the attendant jurisprudence thereof. All that the real estate agents are interested in is making a living, without realizing the responsibilities and duties that come with the office and functions of a real estate agent.

What about the case of financial intermediaries such as stockbrokers and dealers? They, too, need directives or a code of conduct to guide them against committing the offence of money laundering. And what about banks and the issue of confidentiality over customer accounts and customer information, especially where examples are cited pointing to practices in jurisdictions such as Switzerland where arguments in favour of

review by all members of the IRS or whether they were maintained with an expectation of confidentiality”); *United States v. Kelsey-Hayes Wheel Co.*, 15 F.R.D. 461, 465 (E.D. Mich. 1954) (“It is difficult to be persuaded that these documents were intended to remain confidential in the light of the fact that they were indiscriminately mingled with the other routine documents of the corporation and that no special effort to preserve them in segregated files with special protections was made.”).

⁴⁰ *Cf. Hunt v. Blackburn*, 128 U.S. 464 (1888); *In re LTV Sec. Litigation*, 89 F.R.D. 595 (N.D. Tex. 1981); *United States v. Louisville & Nashville R.R. Co.*, 236 U.S. 318 (1915); *United States v. United States Gypsum Co.*, 438 U.S. 422 (1978); *Upjohn Co. v. United States*, 449 U.S. 383 (1981); *Ex parte Alfa Mut. Ins. Co.*, 631 So. 2d 858 (Ala. 1993); *Connolly v. State*, 500 So. 2d 57 (Ala. Crim. App. 1985); *Jay v. Sears, Roebuck & Co.*, 340 So. 2d 456 (Ala. Civ. App. 1976); *Melco System v. Receivers of Trans-America Ins. Co.*, 105 So. 2d 43 (1958); J.E. Sexton, *A Post-Upjohn Consideration of the Corporate Attorney-Client Privilege*, 57 N.Y.U. L. REV. 443, 443-44, 469, 473 (1982).

⁴¹ See Irish Stock Exchange, *Money Laundering – Guidance Notes for Stockbrokers*, in MONEY LAUNDERING REQUIREMENTS, available at <http://www.ise.ie/?locID=55&docID=106> (last visited April 7, 2006).

⁴² See The Law Society of Scotland, *Money Laundering – Managing Risk*, available at <http://www.mlro.net/lawscot/> (last visited April 7, 2006).

⁴³ See Accounting Standards in the UK, *Lawyers Face Prison Threat*, available at <http://news.scotsman.com/topics.cfm?tid=496&id=241402004> (last visited April 7, 2006).

non-disclosure are quite strong?⁴⁴ How does the Prohibition and Prevention of Money Laundering Act or the Bank of Zambia Anti-Money Laundering Directives 2004 deal with such matters? Both the Act and the Bank of Zambia Directives are largely silent on the matters at hand. However, at common law, the duty of confidentiality owed by banks to their customers, and the exceptions to this duty, were set out in the case of *Tournier v. National Provincial & Union Bank of England*.⁴⁵ In that case, it was ruled that banks owe their customers a fiduciary duty of confidentiality extending at least to information concerning account transactions. This duty of confidentiality extends beyond the date when the banker-customer contract terminated. Exceptions to the duty can be seen: a) where the disclosure is under compulsion of the law, b) where there is a duty to the public to disclose, c) where interests of the bank require such a disclosure, or d) where the disclosure is made with the express or implied consent of the customer.⁴⁶ It could be argued, therefore, that section 14 of Zambia's Prohibition and Prevention of Money Laundering Act, which reads, "It shall not be unlawful for any person to make any disclosure in compliance with this Act," falls under one of the exceptions to the general rule in *Tournier*.⁴⁷ However, it is doubtful this statutory provision can be used to compel

⁴⁴ Article 28 of the Swiss Civil Code protects a bank account holder's right to privacy. This statutory provision codifies the concept of bank secrecy in Switzerland. In that country, the bank account holder's right to privacy over his account extends to both individual account holders as well as businesses. An exception to bank secrecy is, however, made where a report is required pursuant to anti-money laundering legislation in Switzerland. But, it is important to note that bank secrecy in Switzerland will not be lifted for tax evasion even upon the receipt of a request from a foreign government. As the International Compliance Association points out (*see* INTERNATIONAL DIPLOMA IN ANTI MONEY LAUNDERING MANUAL, *supra* note 39, at 60): "The Swiss Supreme Court has ruled that Article 28 and the right therein imposes an obligation upon Swiss banks to maintain the privacy of customers. A number of consequences can flow from the violation of the right: a client may sue for damages; a bank may suffer administrative consequences, including the possibility of the loss of its license, and the bank officer concerned may be criminally prosecuted under Article 162 of the Swiss Criminal Code.... Enormous political pressure is now being brought to bear upon Switzerland, where bank secrecy is a product of the peculiarities of both Swiss history and Swiss law, for the country to repeal secrecy laws. In June 2002, the G7 Group of Nations issued a formal warning to Switzerland threatening economic sanctions...if the laws are not repealed. A restatement by FATF in recommendation 4 of the revised FATF 40 provides that countries should ensure that financial institution's secrecy laws do not inhibit the full implementation of all of the FATF recommendations."

⁴⁵ [1924] 1 K.B. 461.

⁴⁶ *Id.*

⁴⁷ In the American case of *E.I. du Pont de Nemours & Co. v. Forma-Pack, Inc.*, (Case # C-97-36415), No. 99 of September Term 1997, *available at* <http://lw.bna.com/lw/19981027/99.htm> (last visited Apr. 10, 2006), a U.S. Court of Appeal in the State of Maryland ruled that:

The attorney-client privilege as applied in judicial proceedings is narrowly construed, whereas the work product doctrine is broader in scope." *Leonen v. Johns-Manville*, 135 F.R.D. 94, 96 (D.N.J. 1990). Indeed, even though it is often referred to as a privilege, the work product doctrine is not a privilege at all, but is "merely a requirement that very good cause be shown if the disclosure is made in the course of a lawyer's preparation of a case." *City of Philadelphia v. Westinghouse Electric Corp.*, 210 F. Supp. 483, 485 (E.D. Pa. 1962)]. Second, the work product doctrine is "historically and traditionally a privilege of the attorney and not that of the client." *Radiant Burners, Inc. v. American Gas Association*, 207 F. Supp. 771, 776 (N.D. Ill. 1962). In contrast, it is the client who is the holder of the attorney-client privilege. *Trupp v. Wolff*, 335 A.2d 171, 184 (1975); *see also* Lynn McLain, 5 Maryland Evidence § 503.1, at 481-82 (1987) (footnotes omitted).

a lawyer to divulge information protected by the lawyer-client privilege. Indeed, section 14 does not create a statutory duty on a person to disclose information, but merely offers legal protection where such a person decides, in compliance with the Prohibition and Prevention of Money Laundering Act, to disclose relevant information to the investigating and prosecuting authorities.

3.4 *Other potential insider dealers and potential money launderers*

Where newspaper proprietors, publishers and non-employees of companies (e.g. shareholders who are not directors) engage in insider dealing activities in a capacity other than as primary or secondary insider dealers, they cannot be held liable for insider dealing.⁴⁸ And since there is no predicate offence of money laundering, any business transaction here that involves property acquired with proceeds of crime will not be caught up by provisions of the Prohibition and Prevention of Money Laundering Act. This position presents itself as a constraint in the legal framework. The reasoning behind the exemption from insider dealing liability in the case of newspaper proprietors, publishers and non-employees of companies is that third-parties using inside information obtained from secondary insiders, and not from primary insiders, cannot be held liable for insider dealing under section 52 of the Securities Act. Thus, where journalists pass [the] information on, or publish it, not as primary or secondary insiders, the Securities Act permits them to publish or pass that information on and thereby make profits from tips paid by parties interested in the securities. Indeed, the constraints on the legal framework can also be seen where a series of sham transactions are perpetuated by a group of individuals to make a journalist appear as though he or she was a third-party insider and is, therefore, not liable. Also, such lacunas in the law can provide a safe harbour for journalists and other third-party insiders to tip off money launderers, thereby frustrating investigations of money laundering.⁴⁹

As noted earlier, the Securities and Exchange Commission has no specific anti-money laundering guidelines for stockbrokers and dealers in Zambia. But, do intermediaries deal in a professional capacity when undertaking their business? Whereas section 52(2) of the Securities Act provides that the law on insider dealing in Zambia covers two classes of

The work product doctrine protects from discovery the work of an attorney done in anticipation of litigation or in readiness for trial. The United States Supreme Court's decision in the seminal case of *Hickman v. Taylor*, 329 U.S. 495 (1947), has guided the work product doctrine in both the state and federal courts. When confronted with the work product doctrine, courts must balance the need for efficient litigation through liberal disclosure against the attorney's responsibility to be a zealous and protective advocate for his or her client. The *Hickman* Court acknowledged the tension of these competing interests when it stated that "the discovery provisions are to be applied as broadly and liberally as possible," *Id.* at 506, while also noting that "discovery ... has ultimate and necessary boundaries." *Id.* at 507. With the touchstone of the work product doctrine being that the materials must have been created in preparation for trial, the *Hickman* Court also discussed two different types of attorney work product, fact and opinion. Regarding fact work product, the Court stated: "No longer can the time-honored cry of fishing expedition serve to preclude a party from inquiring into the facts underlying his opponent's case. Mutual knowledge of all the relevant facts gathered by both parties is essential to proper litigation. To that end, either party may compel the other to disgorge whatever facts he has in his possession." *Id.*

⁴⁸ For example, passing inside information on to another person or publishing inside information for the purpose of enabling another person to deal in the securities. In *In re Company Securities (Insider Dealing)*, [1988] B.C.L.C. 76, the journalist would have been held liable as an insider dealer had Part V of the Criminal Justice Act 1993 been in force. See also *In re Insider Dealing Inquiry*, [1988] B.C.L.C. 153.

⁴⁹ See *infra* section 9.4.

primary insiders, that is, company directors, and officers or employees of the company, on the one hand, and persons associated in a professional capacity with the company, on the other hand, generally, financial intermediaries *per se* cannot be regarded as professionals or as persons acting in a professional capacity on the market.⁵⁰ If this view is correct, as I contend, it would be incorrect to argue that “insider” related misconduct of financial intermediaries is covered by statutory provisions on insider dealing in the Securities Act. In the English case of *Christopher Barker & Sons v. IRC*,⁵¹ the appellants carried on business of stockbrokers, buying and selling stocks and shares on the market for clients, being remunerated by commission. They were also consulted professionally on the promotion of and the alterations and adjustments of capital in commercial undertakings, and they also made valuation of stocks and shares forming part of the estates of deceased persons, being remunerated for such advice and valuations by fee. It was held that stockbrokers in buying stocks and shares do not carry on a profession and “that the work of advice and valuation for which the appellants were remunerated by fees was done as part of and in connection with their business as stockbrokers and not in the exercise of a profession, and that therefore the appellants were liable to excess profits duty.”⁵²

The consequences of *Christopher Barker & Sons* in Zambia are that intermediaries *per se* are not professionals and do not act in a professional capacity when undertaking their duties as fiduciaries. In short, stockbrokers can rely on this position and engage in insider dealing without attracting criminal sanctions. And, if this view is correct, as I contend, then such insider activities will not predicate the offence of money laundering since there is no predicate offence. That said, in other countries this position has been reversed by legislation and stockbrokers are regarded as acting in a professional capacity.⁵³ Under the Securities Act, intermediaries can only be held liable for the offence of insider dealing where they are acting as secondary insiders. However, certain situations could present themselves as exceptions to the general rule here. For example, intermediaries could be held liable as primary insider dealers where they are seen to be acting as directors, officers or employees of the company. Besides, although financial intermediaries *per se* cannot be regarded as professionals or as acting in a professional capacity, the Securities (Conduct of Business) Rules 1993 prohibit financial intermediaries from using inside information obtained from their employees, officers or agents.⁵⁴

⁵⁰ See *Christopher Barker & Sons v. IRC*, [1919] 2 K.B. 222. It is my contention that professionals and persons acting in a professional capacity have monopoly over their trade and skill, e.g. surgeon, lawyer, accountant etc. On the other hand, upon authorization, any person can practice as a broker. For a contrary view on the position whether financial intermediaries are professionals or act in a professional capacity, a discussion with Professor D.D. Prentice, Oxford University, Oxford, October 25, 1993, showed that Professor Prentice is of the view that brokers and other financial intermediaries act in a professional capacity. Professor Prentice’s view could be true in a situation such as that obtaining under section 59 of the English Criminal Justice Act (1993) (Eng.), where the label “professional intermediary” is used. In Zambia’s Securities Act, there is no such label. Thus, in Zambia, *Christopher Barker & Sons* still applies.

⁵¹ *Christopher Barker & Sons*, [1919] 2 K.B. 222.

⁵² *Id.*

⁵³ See Criminal Justice Act, 1993, § 59 (Eng.).

⁵⁴ See generally Securities (Conduct of Business) Rules, 1993 (Eng.).

3.5 What constitutes “knowledge” of insider dealing, and what is the meaning of “materially” affecting the price of securities?

In Section 52 of the Securities Act, one of the essential requirements that must be satisfied to warrant a conviction of insider dealing is that, for information to be treated as inside information, it must “materially” affect the price of securities and the information must not be available to the public. The criterion of defining what constitutes materially is not defined in the Securities Act. It is somewhat unclear whether fraudulent omissions⁵⁵ that create inflated prices of securities could amount to insider dealing.⁵⁶ Moreover, the weakness of the local currency entails that the more the currency depreciates in value the greater the difficulty in proving the issue of “materiality.”⁵⁷ Illustratively, in the American case of *Cady Roberts & Company*,⁵⁸ the principle in American securities law that a fact was material if it, if known, would affect the investment judgement of those with whom the insider was dealing was criticised by Commissioner Cary. He argued that this principle produced uncertainty and confusion. He, therefore, suggested the direct effect on the market value of securities as a test in addition to the investment judgement principle. This dual test, however, does not establish certainty. How is market value to be determined in Zambia given a weak and fluctuating currency such as the Zambian Kwacha?

Furthermore, the Securities Act does not define what constitutes “knowledge.” Although no statute can be cited readily as an example of a foreign piece of financial services legislation in which the term knowledge has been defined, that argument alone does not defeat the view that clarity in the law, regarding the meaning of terms such as knowledge, would facilitate a smooth interpretation of the statute. In Zambia, as noted earlier, section 52 of the Securities Act reads in part “who[ever] deals, or counsels or procures another to deal in securities of a company concerning which he has any knowledge.” The term knowledge is not defined anywhere in the Securities Act. However, in *Selanghor v. Craddock (No.3)* Ungoed-Thomas J. was of the view that “knowledge meant circumstances which would

⁵⁵ Such omissions could happen, for example, where company directors with inside information make omissions in listing particulars or prospectuses.

⁵⁶ Generally, unlike the duty of disclosure that exists under insurance law, there is no such duty under insider dealing law in Zambia. *See* Securities Act, *supra* note 2, § 52. *Cf.* *Pan Atlantic Ins. Co. Ltd. v. Pine Top Ins. Co.*, [1994] 3 All E.R. 581, on the effect of an insured’s non-disclosure. However, since section 52(1) of the Securities Act, *supra* note 2, refers to an insider as an individual “who deals, or counsels or procures another to deal, in securities,” the dealing or the procurement of others to deal or the counseling of others to deal could be done while some material facts are being concealed. In this instance, though there is no general duty to disclose material facts other than those disclosed in the prospectus and the listing particulars, the price of the securities could be affected by the non-disclosure. The party advising or counseling or dealing might fraudulently choose not to disclose certain facts so that the price of the securities is affected materially. If this were to happen, the omission could lead to insider dealing. The prosecution would have to prove beyond reasonable doubt that the omission concealed relevant knowledge which was not publicly available. Consequently, this must be seen to have materially affected the price of the securities.

⁵⁷ In *Pan Atlantic*, the House of Lords considered the statutory definition of “materiality” and, by a bare majority, held that a fact is material if it is one which would have an effect on the mind of a reasonably prudent insurer considering whether or not to accept the proposed risk, even if it would not have altered his actual decision. Similarly, as Robert Bradgate observes: “In effect, therefore, a material fact is one which a reasonably prudent insurer would want to know when making an assessment of the risk. . . . [T]he insurer can only avoid a policy on the grounds of non-disclosure of a material fact if the non-disclosure did actually induce him to enter into the contract.” ROBERT BRADGATE, *COMMERCIAL LAW* 709 (2d ed. 1995)

⁵⁸ 40 SEC 907, 911. *See also* SEC v. Texas Gulf Sulphur Co. 401 F.2d 833.

indicate to an honest and reasonable man that such design was being committed, or would put him on inquiry.”⁵⁹ *In Re Montagu’s Settlements*, it was held that “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 reckless “failing to make such inquiries as a reasonable and honest man would make.”⁶⁰ Similarly, in *Baden Delvaux v. Societe Generale*,⁶¹ it was pointed out that:

[K]nowledge can comprise any one of five different mental states... :
(i) actual knowledge;
(ii) wilfully shutting one’s eye to the obvious;
(iii) wilfully and recklessly failing to make such inquiries as an honest and reasonable man would make;
(iv) knowledge of circumstances which would indicate the facts to an honest and reasonable man;
(v) knowledge of circumstances which would put an honest and reasonable man on inquiry.”⁶²

The ruling in *Baden Delvaux* imports both an objective test and a subjective test of “knowledge.”⁶³ To satisfy the subjective test, unlike in the objective test, the actual intention of the accused to commit the offence of insider dealing must be proved.⁶⁴ Paragraphs (i) and

⁵⁹ [1968] 1 W.L.R. 1555, 1559.

⁶⁰ [1987] Ch. 264 at 285.

⁶¹ [1992] 4 All E.R. 161, 250.

⁶² *Per* Peter Gibson J., [1983] B.C.L.C. 325; *see also* *El Ajou v. Dollar Land Holdings PLC*, [1993] 3 All E.R. 717 at 739; *Polly Peck Int’l PLC v. Nadir (No.2)*, [1992] 4 All E.R. 769; *Karak Rubber Co. Ltd. v. Burden (No.2)*, [1972] 1 W.L.R. 602 at 632; *Agip (Africa) Ltd. v. Jackson*, [1992] 4 All E.R. 385; *Eagle Trust PLC v. SBC Sec. Ltd.*, [1992] 4 All E.R. 488 at 499. *Cf.* *Belmont Fin. Corp. v. Williams Furniture Ltd.*, [1979] Ch. 250; *P. Birks*, [1989] *Lloyd’s MCLQ* 296; *Powell v. Thompson*, [1991] 1 N.Z.L.R. 597; *P. Birks*, 105 L.Q.R. 352, 355 (1989); *C.E.F. Rickett*, 11 O.J.L.S. 598, 602 (1991).

⁶³ *See supra* note 61.

⁶⁴ Whereas the term “actual intention” imports a subjective test, the term “constructive intention” imports an objective test focusing more on the totality of circumstances. An illustrative examination of the term “intention” is provided from Kevin’s English Law Glossary:

In [*Hyam v. DPP*, [1974] 2 W.L.R. 607], the House of Lords accepted that the accused “intends” the consequences of his actions if it is “highly probable” that those consequences will arise from the actions. However, there was no general agreement on *how* probable the consequences should be. Lord Hailsham used the terms “inseparable consequences” and “morally certain consequence”, while Lord Diplock was prepared to accept “likely”. This judgement caused some confusion because it made intention difficult to distinguish from *recklessness*.

In [*R v. Moloney*, [1985] 2 W.L.R. 648], it was held that in most cases a jury would not need to be directed as to the meaning of “intention”; a common-sense understanding was adequate. However, Lord Bridge issued guidelines to this effect: it could be assumed that if the accused realized that the results of his action were the “natural consequences” of the action, this gave additional weight to the view that the consequences were intended. The jury would still have to consider other factors along with this one of the actions. This definition is somewhat narrower than the “highly probable” consequences of *Hyam*, but perhaps slightly broader than Lord Hailsham’s “inseparable consequences”. In any event, it was not long before the inexactness of the term “natural consequences” gave rise to another complicated case.

(ii) relate to the subjective test which requires the prosecution to show that the accused had “actual knowledge” or that he “wilfully shut his eyes to the obvious.” By contrast, paragraphs (iii), (iv) and (v) relate to the objective test of how a reasonable man, when placed under similar circumstances, would be expected to act. It could be argued, however, that insider dealing offences containing objective elements of *mens rea* impute a civil negligence based test into the determination of criminal offences.⁶⁵ As we shall see below, the analysis of the term knowledge can be extended to offences of money laundering under the Prohibition and Prevention of Money Laundering Act.

In contrast to the civil law definition of knowledge, the criminal law position was defined in *Nelson v. Larholt*.⁶⁶ In that case, knowledge was said to mean more than constructive knowledge in the sense of shutting one’s eyes to the obvious.⁶⁷ In *Warner v. Metropolitan Police Commissioner*,⁶⁸ Lord Reid held that knowledge could include “wilfully shutting one’s eyes to the truth.” Willful, on the other hand, could mean deliberate or reckless acts or omissions.⁶⁹

3.6 Can insider dealing vitiate an investment contract?

To what extent can market abuses, such as insider dealing, vitiate an investment contract? As a general rule, under Zambian law, insider dealing cannot vitiate an investment contract.⁷⁰ There is, therefore, no equitable remedy of rescission. However, the forfeiture

In [R v. Hancock & Shankland, [1985] 2 W.L.R. 257], Lord Scarman approved Lord Bridges guidelines in *R v. Moloney*, but stressed that “natural consequences” should be interpreted to indicate that a high likelihood of the action having the specified consequences increased the likelihood that the consequence was intended, but it was still not enough on its own. Scarman also reiterated that it is largely a matter for the jury to use common sense to decide whether an act was intended.

In [R v. Neddrick, [1985] 1 W.L.R. 1025], the Court of Appeal accepted the House of Lords ruling in *R v. Moloney*, and allowed that foresight of the consequences of an action only allows a jury to “infer intent” if the consequences are “virtually certain” (Lane LCJ). In previous cases the Court of Appeal had tended to follow the ruling in *Hyam*.

In [R v. Woolin, [1997] 4 All E.R. 103], the Court of Appeal tried to broaden the definition of intention again, but the House of Lords restated that the principle in *Neddrick* should apply. However, the wording of the judgement uses the term “find intent” rather than “infer intent” which has let some authorities to claim that the Lords are supporting the view that a “virtually certain” consequence is the *same* as an intended consequence, where *Neddrick* only suggests that it increases the probability of intention.

At present the position on intention appears to be as follows: [(a)] if the accused carries out action A, with consequence C, then the accused intended C if he carried out A in order expressly to bring about C; [and, (b)] the accused intended C if he carried out action A, from which C was virtually certain, in which case the accused need not have a motive or desire to bring about C. Note that the meaning of “intention” is also contentious in the law of tort; see, for example, trespass to the person.

Kevin’s English Law Glossary, “intention,” available at

http://www.kevinboone.com/lawglos_Intention.html (last visited Apr. 10, 2006) (format adjusted)

⁶⁵ Cf. INTERNATIONAL COMPLIANCE ASSOCIATION, INTERNATIONAL DIPLOMA IN COMPLIANCE 198 (2002).

⁶⁶ [1948] 1 K.B. 339.

⁶⁷ *Id.* at 344.

⁶⁸ (1968) Cr. App. 373, 398.

⁶⁹ *R v. Moys*, (1984) 79 Cr. App. 72. See also *R v. Sinclair*, [1986] 1 W.L.R. 1246.

⁷⁰ Securities Act, *supra* note 2, § 52(3).

provisions under the Prohibition and Prevention of Money Laundering Act provide for some civil remedies pointing to the forfeiture of proceeds of crime.

In the United Kingdom, prior to the enactment of the Criminal Justice Act, insider dealing could vitiate an investment contract. This view was illustrated in the case of *Chase Manhattan Equities v. Goodman*, where Knox J., ruling on the legal consequences of insider dealing, observed: “The sale agreement is therefore...unenforceable...because it was tainted in its creation by an infringement.”⁷¹

The coming into force of Part V of the Criminal Justice Act, replacing the Company Securities (Insider Dealing) Act 1985, made some important changes to the law in the United Kingdom.⁷² It is now provided in section 63(2) of the Criminal Justice Act that no contract shall be void by reason only of being tainted with insider dealing. Given the above arguments, it is clear that in Zambia, like in the United Kingdom, since the Securities Act provides that insider dealing cannot vitiate an investment contract, the equitable remedy of rescission is generally not available to a party prejudiced by insider dealing.⁷³ Be that as it may, a party prejudiced by insider dealing can bring an action at common law for damages if he can prove, on a balance of probabilities, that he has suffered loss resulting from the defendant’s negligence.⁷⁴ At common law, the burden of proof is on the prejudiced party to prove that the defendant (who is the insider) owed the prejudiced party a duty of care and that the defendant breached that duty. The defendant’s breach of duty must result in the plaintiff’s loss.⁷⁵

As a general rule, under securities law in Zambia, there are no statutory defences to insider dealing.⁷⁶ Thus, market players and other individuals falling within the statutory categories of potential insider dealers must always avoid breaching section 52 of the Securities Act, which deals with insider dealing. By comparison, legislation in the United Kingdom on insider dealing provides certain defences to the offence of insider dealing.⁷⁷ These defences apply mainly to individuals who deal in securities and those that encourage others to deal in securities. Section 53(1) of the English Criminal Justice Act 1993 provides as follows:

- (1) An individual is not guilty of insider dealing by virtue of dealing in securities if he shows -

⁷¹ [1991] B.C.L.C. 897, 934. For a discussion on insider dealing and the equitable remedy of rescission, see BARRY RIDER & LEIGH FFRENCH, *THE REGULATION OF INSIDER TRADING* 92 (1979).

⁷² Criminal Justice Act 1993, § 52(3).

⁷³ See RIDER & FFRENCH, *supra* note 71, at 92.

⁷⁴ *Id.*

⁷⁵ *Id.*

⁷⁶ See Securities Act, *supra* note 2, § 52.

⁷⁷ See generally M. White, *The Implications for Securities Regulation of New Insider Dealing Provisions In The Criminal Justice Act 1993*, 16 COMPANY LAW. (1995); J.M. Naylor, *The Use of Criminal Sanctions by UK and US authorities for Insider Trading: How Can the Two Systems Learn From Each Other? Part I*, 11 COMPANY LAW. 53-61 (1993). See also S. GOULDING, *PRINCIPLES OF COMPANY LAW* 206-216 (1996). Goulding categorises defences to insider dealing under the Criminal Justice Act 1993 into general and special defenses. Most of the defenses discussed below are general defenses. Special defenses are found in paragraphs 1-5 (inclusive) of Schedule 1 to the Act. See also paragraphs 2-4 of Schedule 1 on one other general defense known as “dealing in securities”.

(a) that he did not at the time expect the dealing to result in a profit attributable to the fact that the information in question was price-sensitive information in relation to the securities, or

(b) that at the time he believed on reasonable grounds that the information had been disclosed widely enough to ensure that none of those taking part in the dealing would be prejudiced by not having the information, or

(c) that he would have done what he did even if he had not had the information.⁷⁸

The same defences are repeated in section 53(2). In that subsection, the defences apply to persons who encourage others to deal in securities. Interestingly, however, section 53(3) of the English Criminal Justice Act 1993 adds:

(3) An individual is not guilty of insider dealing by virtue of a disclosure of information if he shows -

(a) that he did not at the time expect any person, because of the disclosure, to deal in securities in the circumstances mentioned in subsection (3) of section 52;⁷⁹ or

(b) that, although he had such an expectation at the time, he did not expect the dealing to result in a profit attributable to the fact that the information was price-sensitive information in relation to the securities...

(6) In this section references to a profit include references to the avoidance of a loss.⁸⁰

In Zambia, there is need to have statutory defences to insider dealing so that individuals who find themselves in situations such as those covered by the aforesaid English statutory defences may be exonerated from liability. This could help to promote fair play and investor confidence on the market. Also, these exceptions would be a ground that does not predicate the offence of money laundering in Zambia due to the absence of a predicate offence.

4.0 A DEFINITION OF MONEY LAUNDERING

At the outset, it is important to define the term “money laundering.” What is money laundering? Money laundering can be defined in a number of ways.⁸¹ The Bank of Zambia observes that:

⁷⁸ Criminal Justice Act 1993, § 53(1).

⁷⁹ *Id.* § 52(3) provides: “The circumstances referred to above are that the acquisition or disposal in question occurs on a regulated market, or that the person dealing relies on a professional intermediary or is himself acting as a professional intermediary.”

⁸⁰ *Id.* § 53(3).

⁸¹ *See generally* M.E. BEARE, CRITICAL REFLECTIONS ON TRANSNATIONAL ORGANIZED CRIME, MONEY LAUNDERING, AND CORRUPTION (2003); P. BIRKS, LAUNDERING AND TRACING (1995); B. BLUNDEN, THE MONEY LAUNDERERS: HOW THEY DO IT, AND HOW TO CATCH THEM AT IT (2001); G. FABRE, CRIMINAL PROSPERITY: DRUG TRAFFICKING, MONEY LAUNDERING AND FINANCIAL CRISES AFTER THE COLD WAR (2003); J. FISHER, MONEY LAUNDERING LAW AND PRACTICE (2004); J. MADINGER & S.A. ZALOPANY, MONEY LAUNDERING: A GUIDE FOR CRIMINAL INVESTIGATORS (1999); C. NAKAJIMA AND B. A. RIDER, ANTI MONEY LAUNDERING GUIDE (1999); R. PARLOUR, BUTTERWORTHS INTERNATIONAL GUIDE TO MONEY LAUNDERING: LAW AND PRACTICE (1995); RESPONDING TO MONEY LAUNDERING: INTERNATIONAL

There is a growing global concern over money laundering, and Zambia is no exception. Explained in simple terms, money laundering is the “washing of dirty money” into the financial system thereby legitimizing proceeds of illegal activities such as drug trafficking. Money laundering not only undermines public confidence in the financial system, it also causes distortions in the economy in terms of significant influence on key economic variables such as money supply which do not derive from economic activity.⁸²

Worldwide, a number of countries subscribe to the definition of money laundering adopted by the United Nations in the Vienna Convention Against Illicit Traffic in Narcotic Drugs and Psychotropic Substances 1988. Article 3(b) of that treaty states that money laundering involves:

PERSPECTIVES (E. Savona ed., 1997); S. SAVLA, MONEY LAUNDERING AND FINANCIAL INTERMEDIARIES (2001); P. TEMPLE, ESSENTIAL ELEMENTS OF THE PREVENTION OF MONEY LAUNDERING (1998); F.N. Baldwin, Jr., *The Constitution, Forfeiture, Proportionality and Instrumentality: USA vs. Bajakajian - The U.S. Supreme Court Tries Again*, 1 J. MONEY LAUNDERING & CONTROL (April 1998); I. Bantekas, *The International Law of Terrorist Financing*, 97 AM. J. INT'L LAW 315 (April 2003); L.J. Candler, *Commingled Funds: How to Seize Proceeds of Electronic Crime*, 1 J. MONEY LAUNDERING & CONTROL (April 1998); A. Haynes, *Securitisation, Money Laundering and Fraud*, 1 J. MONEY LAUNDERING & CONTROL (October 1997); W. Hetzer, *Money Laundering and Financial Markets*, 11 EUR. J. CRIME, CRIM. L. & CRIM. JUST. 264 (2003); R.K. Hinterseer, *An Economic Analysis of Money Laundering*, 1 J. MONEY LAUNDERING & CONTROL (October 1997); A. Itzikowitz, *South Africa: Prevention and Control of Money Laundering*, 2 J. MONEY LAUNDERING & CONTROL (Summer 1998); D.C. Jayasuriya, *Money Laundering: The Role of Legislation in Developing Economies*, 1 J. MONEY LAUNDERING & CONTROL (January 1998); K.D. Magliveras, *Banks, Money Laundering and the European Community*, in BANKS, FRAUD AND CRIME 173-200 (J. Norton ed., 2d ed. 2000); K.D. Magliveras, *Revision to the European Community's Anti-Money Laundering Instrument: Critical Analysis*, 18 INT'L ENFORCEMENT L. REP. 181-85 (2002); D. Masciandaro, *Money Laundering Regulation: The Micro Economics*, 2 J. MONEY LAUNDERING & CONTROL (Summer 1998); M. Pheiffer, *Financial Investigations and Criminal Money*, 2 J. MONEY LAUNDERING & CONTROL (Summer 1998); J.P. Straub, *The Prevention of E-money Laundering: Tracking the Elusive Audit Trail*, 25 SUFFOLK TRANSNAT'L L. REV. 515 (2002); V. Tanzi, *Money Laundering and the International Financial System*, IMF WORKING PAPER, (1996); J.-F. Thony, *Les mécanismes de traitement de l'information financière en matière de blanchiment de l'argent*, 11 REVUE DE DROIT PÉNAL ET DE CRIMINOLOGIE (1997); J.-F. Thony, *Processing Financial Information in Money Laundering Matters: The Financial Intelligence Units*, 3 EUR. J. CRIME, CRIM. L. & CRIM. JUST. 257 (1996); C.U. Uche, *The Adoption of a Money Laundering Law in Nigeria*, 1 J. MONEY LAUNDERING & CONTROL (January 1998); UNITED NATIONS, CONTROL OF THE PROCEEDS OF CRIME: REPORT OF THE SECRETARY-GENERAL, (UN Document E/CN.15/1996/3, April 3, 1996); W. Witherell, *International Approaches to Combating Financial Abuse and Promoting Stable Financial Markets*, 5 J. MONEY LAUNDERING & CONTROL 257 (2002); M. Zeldin, *Money Laundering*, 1 J. MONEY LAUNDERING & CONTROL (April 1998).

⁸² The Bank of Zambia at <http://www.boz.zm> (last visited Apr. 10, 2006). Cf. EU Directive on Money Laundering, adopted on June 10, 1991, which provides in Article 1 that the offence of money laundering involves: “(a) conversion or transfer of property, knowing that such property is derived from criminal activity, for the purpose of concealing or disguising the illicit origin of the property or of assisting any person who is involved in committing such crime to evade the legal consequences of his action; (b) concealment or disguise of the nature, source, location, disposition, movement, rights with respect to or ownership of property in the knowledge that such property is derived from criminal activity or from an act of participation in such crime; (c) the acquisition, possession or use of property in the knowledge, at the time of receipt, that such property was derived from criminal activity or from an act of participation in such crime; and (d) participation in, association or conspiracy to commit, attempts to commit and aiding, abetting, facilitating and counseling the commission of any of the actions established in the previous paragraphs.”

(a) The conversion or transfer of property, knowing that such property is derived from any [drug trafficking] offence or offences, 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 an offence or offences to evade the legal consequences of his actions; or,

(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 derived from an offence or offences or from an act of participation in such an offence or offences.⁸³

Article 3(c)(i) of the same treaty adds that money laundering includes the acquisition, possession or use of property, knowing at the time of receipt that such property was derived from an offence or offences, or from an act of participation in such an offence or offences. Closely related to this definition, Ofofu-Amaah *et al.* define money laundering as “the process of transformation of the form or usage of ill-gotten proceeds of economic crimes, with a view to obscuring the source or origin of such proceeds.”⁸⁴ These authors argue that although “[t]he term ‘money laundering’ has traditionally been associated with drug-trafficking offences.... [M]oney laundering has [now] come to be regarded as an essential element in the fight against corruption. [It] has been extended to apply generally to all economic crimes, including corruption offences.”⁸⁵ Ofofu-Amaah *et al.* argue further that, “[as] in the case of drug trafficking, the purpose[s] of money laundering legislation [are] to ensure that crime does not pay, and that no amnesty is provided after the fact to perpetrators of serious economic crimes.”⁸⁶ In the United Kingdom, for example,

[L]egislation creating money-laundering offences in connection with drug-trafficking was first introduced in 1986. But it was not until the Criminal Justice Act of 1993, amending the Criminal Justice Act of 1988, that money-laundering provisions were extended generally to cover other forms of criminal conduct.... The Swiss Criminal Code now makes it an offense for any one to commit an act the effect of which is to impede the identification of the source, discovery, or confiscation of assets that he knows, or should have known, came from a crime.... The offense is punishable in Switzerland, even if the underlying crime has been committed abroad, provided, of course, that the set of circumstances that constitute the underlying crime amounts to a crime under both Swiss law and the foreign law.⁸⁷

We will examine below, in greater detail, the concept of money laundering as applies to the culture in Zambia. Here, suffice it to say, the staged interpretation of money laundering,⁸⁸ as is often seen in the literature on anti-money laundering, is superficial and

⁸³ Vienna Convention Against Illicit Traffic in Narcotic Drugs and Psychotropic Substances art. 3(b), Dec. 18, 1988, 976 U.N.T.S. 105.

⁸⁴ W.PAATII ET AL., COMBATING CORRUPTION: A COMPARATIVE REVIEW OF SELECTED LEGAL ASPECTS OF STATE PRACTICES AND MAJOR INTERNATIONAL INITIATIVES 53 (1999).

⁸⁵ *Id.*

⁸⁶ *Id.* at 53-55.

⁸⁷ *Id.* at 53.

⁸⁸ This approach postulates that money laundering is a simple process, which occurs in three successive stages: placement, layering and integration. Placement involves the introduction of proceeds of crime into

has its roots in a time when money laundering was a crime that was often committed only in relation to proceeds of drug trafficking which generated large volumes of cash because all drugs are sold on the streets for cash.⁸⁹ As the International Compliance Association observes:

Drug money has to be “placed”, “layered” and, eventually, “re-integrated.” As a result, much of what has been written and taught about money laundering focuses on the three stages of the money laundering process. The staged interpretation is however not always borne out in reality and could be accused of being a little simplistic, particularly when viewed in the context of crimes that do not generate cash.⁹⁰

The International Compliance Association argues that the staged interpretation of money laundering assumes two major issues – that is:

- all crime generates cash, which is then deposited or infused in some way into the financial system. This is not true. There are a number of crimes, including almost all financial crimes and frauds, which result directly in benefits within the financial system, thus, obviating the need for the benefit to be “placed.”
- there is a distinct line between the “layering” and “integration” stages of the process. In fact, these stages can be virtually impossible to distinguish. The way in which laundered funds are “re-integrated” often entails the completion of further “layers.”⁹¹

Additionally, the Financial Sector Compliance Advisers, Ltd., argues that the staged interpretation of money laundering “is misleading and has led to the development of a number of damaging misconceptions within the finance industry about the nature of the money laundering threat.”⁹² And, as shown below, a scenario on insider dealing and money laundering is generated by the Financial Sector Compliance Advisers Ltd to support its argument.⁹³

Mr Jones is an insider dealer, who having received inside information sells stock prematurely in order to avoid a loss. The benefit from his crime is the amount that represents the avoided loss. Assume that this equates to US\$100,000 dollars. The proceeds of the premature sale of his stock were remitted to his bank account where they remain earning interest. No withdrawals or third party payments are made from the account. Is Mr Jones’ bank laundering criminal

the economy. Then, layering involves different techniques used by launderers to disguise the source of the money. Layering could involve several small and repetitive money transfers or engaging in sham transactions to mislead the audit trail. The third stage is integration, which involves the re-integration of laundered funds back into the launderer’s economic domain so that these funds appear as if they have come from a legitimate source.

⁸⁹ INTERNATIONAL DIPLOMA IN ANTI-MONEY LAUNDERING MANUAL, *supra* note 39, at 71.

⁹⁰ *Id.* at 71-72.

⁹¹ *Id.*

⁹² The Finance Sector Compliance Advisers Ltd., *What is Money Laundering?*, available at <http://www.fsca.co.uk/doc.asp?doc=108&CAT=301> (last visited Apr. 10, 2006).

⁹³ *Id.*

property? The answer is of course yes. Does this example follow the conventional theory three stage model of money laundering? The answer is no. There is no placement activity, no layering activity and no integration. Furthermore, the example demonstrates the futility of seeking to describe “dirty” money or seeking to distinguish between the so called “legitimate” and “illegitimate” economy.⁹⁴

In general, the overriding objective of the money laundering process is to disguise the source of ill-gotten wealth so that it cannot be attributed to criminal activity.⁹⁵ In order to achieve these primary objectives a launderer must first achieve a number of secondary laundering objectives, including: “(a) disguising their own identity; (b) concealing the fact that they own the property; (c) concealing the fact that they may, in fact, manage and control the property; and (d) placing as much distance between themselves and the property, both physically and ‘on paper.’”⁹⁶ A good anti-money laundering programme should provide for an early warning system, covering effective and efficient risk management and compliance so as to deter and counter money laundering activities. Such a system must involve the use of such internal control measures as know your customer, due diligence, know the counter partners, know your business, know your administration, recognize suspicious transactions, and continuous education and training.⁹⁷ However, as we saw earlier, the Securities and Exchange Commission of Zambia has not promulgated specific standards on anti-money laundering for the securities industry. Yet, section 12(4) of the Prohibition and Prevention of Money Laundering Act requires that a supervisory authority, such as the Securities and Exchange Commission, should issue such directives as may be approved by the Anti-Money Laundering Investigations Unit. These directives may be necessary for institutions regulated by the supervisory authority in the prevention and detection of money laundering.⁹⁸

Overall, the policy objectives underpinning a good anti-money laundering programme are premised on the following:

(a) Money laundering undermines legitimate private sector initiatives by extending finance and credit to front companies that are used by launderers, thereby making it difficult for other companies to compete with these front companies on a fair and level playing field;

(b) Money laundering can lead to a government’s loss of control over economic policy when proceeds of crime continue to dwarf the government’s budget;

(c) “[M]oney laundering can also affect currencies and interest rates [since] launderers [tend to] reinvest their funds where their schemes are less likely to be detected rather than where rates of return are higher;”

⁹⁴ *Id.*

⁹⁵ See INTERNATIONAL DIPLOMA IN ANTI-MONEY LAUNDERING MANUAL, *supra* note 39, at 73.

⁹⁶ *Id.*

⁹⁷ David Lyman, *Corporate Practices Manual on Extortion and Bribery: Money Laundering*, (written for the ICC’s Standing Committee on Extortion and Bribery, February 17, 1999), available at <http://www.tillekeandgibbins.com/Publications/Articles/corporate/money.htm> (last visited Apr. 10, 2006) (emphasis added).

⁹⁸ Prohibition and Prevention of Money Laundering Act, *supra* note §12(4).

(d) “[M]oney laundering [can] lead to economic distortion and instability [s]ince [] launderers are [often] not interested in profit generation from their investment but rather in [concealing their identity and] protecting [the] proceeds” of crime (money launderers usually invest their laundered funds in activities that are not necessarily economically beneficial to the country, but which promise them concealment of the source of funds and the identity of the launderers);

(e) Money laundering can lead to loss of government revenue where tax evasion, as a predicate offence, is rampant in the country;

(f) “Money laundering [can] lead to risks to privatization programs ... [since] [m]oney launderers often have the financial power to out-bid legitimate investors;”

(g) Money laundering can expose a recipient country to reputation risk, resulting in the erosion of investor confidence in that country’s financial market;

(h) Money laundering can lead to a legal risk to banks in cases where banks are subjected to all sorts of lawsuits resulting from a bank’s failure to observe the “know your customer” standards or from failure to practice “due diligence” in customer evaluation and acceptance;

(i) Money laundering can compromise the corporate governance structure of a bank, especially in the case of small banks and their approach to deposit mobilization and customer selection; and,

(j) Money laundering sometimes provides fuel for terrorists, while draining its “milk” from such predicate offences as insider dealing, drug dealing, animal poaching, tax evasion, the running of illegal brothels, illegal arms dealing, illegal trafficking in children and women, and corrupt practices by public officials.⁹⁹

5.0 SETTING THE DISCUSSION IN CONTEXT

Zambia introduced principal legislation to fight money laundering in 2001.¹⁰⁰ Prior to that, the repealed section 22 of the Narcotics Drugs and Psychotropic Substances Act 1993 was the only statutory provision dealing with the criminalization of money laundering in Zambia. However, with the coming into force of the Prohibition and Prevention of Money Laundering Act, section 22 of the Narcotics Drugs and Psychotropic Substances Act 1993 has been repealed.¹⁰¹ Today, in addition to the Prohibition and Prevention of Money Laundering Act, the Bank of Zambia Anti-Money Laundering Directives 2004 also provide for the criminalization of money laundering.¹⁰²

⁹⁹ See Caleb M. Fundanga, *The Role of the Banking Sector in Combating Money Laundering* at 2-3 (January 23, 2003), available at http://www.boz.zm/speeches/Caleb/speeches_by_dr_caleb_fundanga_go.htm; <http://www.bis.org/review/r030212f.pdf#search=Fundangamoney%20lauding> (last visited Apr. 10, 2006). See also John McDowell, *The consequences of money laundering and financial crime*, 6 ECON. PERSPECTIVES: AN ELECTRONIC JOURNAL OF THE U.S. DEPT. OF STATE 7-8 (May 2001) available at <http://usinfo.state.gov/journals/ites/0501/ijee/ijee0501.pdf#search=McDowellThe%20Consequences%20of%20Money%20Laudering> (last visited Apr. 10, 2006).

¹⁰⁰ See generally Prohibition and Prevention of Money Laundering Act, *supra* note 3.

¹⁰¹ *Id.* § 31.

¹⁰² See Bank of Zambia Anti-Money Laundering Directives (2004) (Zambia), available at <http://www.boz.zm/instruments/bank%20of%20zambia%20anti-money%20lauding%20directives.pdf> (passed by the central bank pursuant to the Prohibition and Prevention of Money Laundering Act, which states: “A Supervisory Authority shall issue such directives as may be approved by the Unit (*i.e.* the Anti-Money Laundering Investigations Unit) which may be necessary for the regulated institutions to prevent

As argued above, the fight against money laundering should extend to stockbrokers, accountants, lawyers and non-profit organizations, particularly activities of registered charities and non-governmental organizations, so that these professions, relationships or organizations are not abused, directly or indirectly, to finance or support money laundering activities.

But why is it that before 2001 the legislative framework for combating money laundering in Zambia was enshrined in a small and short statutory provision found in a statute that is not even directly linked to the fight against money laundering – that is, the now repealed section 22 of the Narcotics Drugs and Psychotropic Substances Act 1993?¹⁰³ At the time of enacting the Narcotics Drugs and Psychotropic Substances Act 1993, drug trafficking was becoming a problem in Zambia and giving rise to offences of money laundering.¹⁰⁴ Since there was no principal legislation to fight money laundering in Zambia, to curb both offences of money laundering and drug trafficking, the Zambian parliament decided to insert a statutory provision to fight money laundering in the Narcotics Drugs and Psychotropic Substances Act 1993.¹⁰⁵ This development could explain, perhaps, why the Anti-Money Laundering Investigations Unit of Zambia and the Drug Enforcement Commission of Zambia share the same Commissioner.¹⁰⁶ At the time of enacting the Narcotics Drugs and Psychotropic Substances Act 1993, especially when setting up the Drug Enforcement Commission, drug trafficking was the most common predicate offence leading to activities of money laundering.¹⁰⁷ So, the Drug Enforcement Commission had to have authority to investigate and prosecute offences of money laundering as well.¹⁰⁸ All in all, the coming into force of the Prohibition and Prevention of Money Laundering Act, together with the establishment of the Anti-Money Laundering Investigations Unit, has strengthened the institutional and regulatory framework for combating money laundering and drug trafficking in Zambia. Today, close

and detect money laundering.” Prohibition and Prevention of Money Laundering Act, *supra* note 3, §12(4).)

¹⁰³ See Narcotics Drugs and Psychotropic Substances Act (1993) (Zambia), available at http://www.unodc.org/unodc/en/legal_library_1994-07-13_1994-11.html. Now repealed (*see* Prohibition and Prevention of Money Laundering Act, *supra* note 3, § 31), the Act was titled “Money Laundering” and provided as follows: “Any person who does any act or omits to do any act with an actual or constructive intention to conceal the fact that part or the whole of any property was directly or indirectly acquired as a result of (a) a crime committed under this Act; or (b) an act which, if it had been committed in Zambia, would have constituted a crime under this Act; shall be guilty of an offence and shall be liable upon conviction to imprisonment for a term not exceeding ten years”.

¹⁰⁴ This explains why section 49 of the Narcotics Drugs and Psychotropic Substances Act repealed the Dangerous Drugs (Forfeiture of Property) Act (1989) (Zambia). In the Narcotics Drugs and Psychotropic Substances Act, section 22, a statutory provision to fight money laundering, was inserted. And the repeal of the Dangerous Drugs (Forfeiture of Property) Act (1989), under which the Dangerous Drugs (Forfeiture of Property) (Special Organisations) (Drugs Enforcement Commission) Regulations (1989) (Zambia) were passed, repealed all the regulations that had been passed pursuant to the Dangerous Drugs (Forfeiture of Property) Act (1989).

¹⁰⁵ See Narcotics Drugs and Psychotropic Substances Act, *supra* note 103, § 22.

¹⁰⁶ See *infra*, note 111.

¹⁰⁷ This is evident from the decision of the Zambian Government in 1989 to enact the Dangerous Drugs (Forfeiture of Property) Act (1989). This statute was quickly followed up by the introduction of the Dangerous Drugs (Forfeiture of Property) (Special Organisations) (Drugs Enforcement Commission) Regulations (1989).

¹⁰⁸ See Narcotics Drugs and Psychotropic Substances Act, *supra* note 103, § 22.

collaboration between the Drug Enforcement Commission and the Anti-Money Laundering Investigations Unit is maintained.

6.0 THE PROHIBITION AND PREVENTION OF MONEY LAUNDERING ACT 2001 OF ZAMBIA

Zambia's Prohibition and Prevention of Money Laundering Act provides for the prohibition and prevention of money laundering in Zambia.¹⁰⁹ This statute also provides for the constitution of the Anti-Money Laundering Authority and the Anti-Money Laundering Investigations Unit.¹¹⁰ Other areas covered by the statute include the disclosure of information, on suspicion of money laundering activities, by Supervisory Authorities and regulated institutions;¹¹¹ the forfeiture of property belonging to persons convicted of money laundering; international cooperation in investigations, prosecution and other legal processes of prohibiting and preventing money laundering; and, matters connected with or incidental to the foregoing.¹¹² Under the Prohibition and Prevention of Money Laundering Act, property that can be caught up by statutory provisions against money laundering include "moneys and all other property, real or personal, movable or immovable including things in action and other intangible or incorporated property wherever situated and includes any interest in such property."¹¹³

7.0 THE CONCEPT OF MONEY LAUNDERING IN ZAMBIA AND HOW IT APPLIES TO INSIDER DEALING

In Zambia, the offence of money laundering is covered by the Prohibition and Prevention of Money Laundering Act.¹¹⁴ Where an individual, after the coming into force of the Prohibition and Prevention of Money Laundering Act, engages in money laundering, he or she will be guilty of an offence and liable, upon conviction, to a fine not exceeding one hundred and seventy thousand penalty units or to imprisonment for a term not exceeding ten years, or both.¹¹⁵ The term "money laundering", as we saw earlier, is defined in the Prohibition and Prevention of Money Laundering Act as: "(a) engaging, directly or indirectly, in a business transaction that involves property acquired with proceeds of crime; (b) receiving, possessing, concealing, disguising, disposing of or bringing into Zambia, any property derived or realized directly or indirectly from illegal activity; or (c) the retention or acquisition of property knowing that the property is

¹⁰⁹ See Prohibition and Prevention of Money Laundering Act, *supra* note 3, Preamble.

¹¹⁰ *Id.*

¹¹¹ Whereas the statutory definition of a "regulated institution" in section 2 of the Prohibition and Prevention of Money Laundering Act 2001 refers to an institution regulated by a Supervisory Authority, the definition of a "Supervisory Authority," in that same statutory provision, includes the Bank of Zambia, the Registrar of Building Societies, the Registrar of Banks and Financial Institutions, the Registrar of Co-operatives, the Registrar of Insurance, the Commissioner of the Securities and Exchange Commission, the Registrar of Companies, the Commissioner of Lands, the Investment Board at the Zambia Investment Centre, the licensing authority for casinos in Zambia, and any other authority that may be established by law as a Supervisory Authority.

¹¹² See Prohibition and Prevention of Money Laundering Act, *supra* note 3, preamble.

¹¹³ Prohibition and Prevention of Money Laundering Act, *supra* note 3, § 2.

¹¹⁴ *Id.* §§ 7, 8, 9.

¹¹⁵ *Id.* § 7.

derived or realized, directly or indirectly from illegal activity.”¹¹⁶ In essence, there are three types of activities that can lead to money laundering, and these are spelt out above. However, the question remains, what are proceeds of crime?

Section 2 of the Prohibition and Prevention of Money Laundering Act defines proceeds of crime as “any property, benefit or advantage, within or outside Zambia realized or derived, directly and indirectly from illegal activity.” This definition brings us to an inquiry on the meaning of illegal activities. We shall examine the statutory definition of illegal activities in a moment. Here, suffice it to say the statutory definition of proceeds of crime is very broad. It includes proceeds of insider dealing because insider dealing is a criminal offence under section 52 of the Securities Act.¹¹⁷ All three categories of money laundering noted above stress the fact that there should be evidence of some underlying illegal activity for there to be the offence of money laundering. Insider dealing is, of course, an illegal activity within the meaning of section 2 of the Prohibition and Prevention of Money Laundering Act.¹¹⁸ Section 2 points out that the term illegal activity means “any activity, whenever and wherever carried out which under any written law in the Republic (of Zambia) amounts to a crime.”¹¹⁹

In general, two interpretations are possible here regarding the statutory definition of money laundering. First, it could be argued that the offence of money laundering covers all benefits derived from any *illegal activity*, irrespective of whether the benefits are located abroad or in Zambia. Sections 2 and 7 of the Prohibition and Prevention of Money Laundering Act stress only that there should be some *illegal activity*. Where this illegal activity takes place is not covered in the statute. And section 2, as noted above, simply adds that the term *illegal activity* means “any activity, *whenever* and *wherever* carried out which under any written law in the Republic (of Zambia) amounts to a crime.” In essence, the offence of insider dealing is covered here since insider dealing is a crime under section 52 of the Securities Act. Zambia has, indeed, an “all crimes” criteria of determining predicate offences of money laundering. This means that anything and everything falling within the statutory definition of *illegal activity* in section 2 of the Prohibition and Prevention of Money Laundering Act can predicate the offence of money laundering in Zambia.

And while the word *whenever*, in the definition of *illegal activity* under section 2 of the Prohibition and Prevention of Money Laundering Act, is qualified by section 7 of the Prohibition and Prevention of Money Laundering Act – that is, qualified by the phrase that reads, “a person who, *after the coming into force of the Prohibition and Prevention of Money Laundering Act*, engages in money laundering” – and it points only to offences that were committed anytime after the coming into force of the Prohibition and Prevention of Money Laundering Act, the word *wherever* is not qualified. The only qualification in Section 2 is that the *illegal activity* should be seen to be illegal by reference to Zambian law even if the activity took place outside Zambia. Again, this confirms that Zambia has an “all crimes” criteria of determining predicate offences of money laundering. But, what about problems associated with extraterritorial criminal

¹¹⁶ *Id.* § 2.

¹¹⁷ See Securities Act, *supra* note 2, § 52.

¹¹⁸ Prohibition and Prevention of Money Laundering Act, *supra* note 3, § 2.

¹¹⁹ *Id.*

jurisdiction where there is no treaty to support this type of criminal jurisdiction? Indeed, what does public international law tell us?

Closely aligned to the position in international law, section 25 of Zambia's Prohibition and Prevention of Money Laundering Act provides that "[a]n offence under [the Prohibition and Prevention of Money Laundering] Act shall be deemed to be an extraditable offence under provisions of the Extradition Act" (Cap 94) of Zambia.¹²⁰ Indeed, it matters less that, under the Prohibition and Prevention of Money Laundering Act, the proceeds of crime were obtained in an indirect manner or that the predicate offence took place outside Zambia.¹²¹ As long as the underlying activity, whether it took place abroad or in Zambia, is illegal when viewed under the microscope of Zambian law then the proceeds of crime will be caught by the Zambian law on money laundering. A good example here is bringing into Zambia money derived from insider dealing on a foreign stock market that is governed by weak securities laws or lax policing and enforcement systems. Another example is bringing into Zambia money derived from the sale of marijuana in a country such as the Netherlands where the sale and use of marijuana is legal,¹²² or bringing into Zambia money derived from prostitution or pornography from a country where such practices are legal. It is important to note that the "single criminality" test applies in Zambia. The Financial Sector Compliance Advisers Ltd. observes that:

A single or dual criminality test. A dual criminality test requires a client's action be recognised as a crime both in the country where it is committed and the country where a possible laundering offence takes place. A single criminality test simply requires the country in which the laundering activity takes place to regard the activity that generated the relevant property as criminal irrespective of whether it is criminal in the country where it took place. In practice, almost all serious crimes including drug trafficking, terrorism, fraud, robbery, prostitution, illegal gambling, arms trafficking, bribery, corruption, and in some cases tax evasion, are capable of predicating money laundering offences.¹²³

The single criminality test also applies in countries such as the United Kingdom,¹²⁴ Bermuda,¹²⁵ the Isle of Man,¹²⁶ Jersey,¹²⁷ and Guernsey.¹²⁸ But, of course, the superficial

¹²⁰ *Id.* § 25.

¹²¹ *Id.*

¹²² See Columbia Daily Tribune, *Netherlands pot program faces trouble: Medicinal marijuana too costly, some say* (October 17, 2004) available at <http://www.showmenews.com/2004/Oct/20041017News019.asp> (last visited Apr. 10, 2006).

¹²³ Finance Sector Compliance Advisers Ltd, *What is Money Laundering?*, available at <http://www.fscs.co.uk/doc.asp?doc=108&CAT=301> (last visited Apr. 10, 2006).

¹²⁴ In the United Kingdom, the test of "single criminality" still applies under the new law against money laundering, the Proceeds of Crime Act, 2002 (U.K.). However, this test of single criminality is no longer limited by reference to indictable offences, but has been expanded to include all offences recognized under the laws of the United Kingdom. The Act has overhauled the previous distinction between drug related and "all crimes" money laundering offences, although the Terrorism Act, 2000 (U.K.) continues to regulate the laundering of monies relating to the funding of terrorist activities.

¹²⁵ Proceeds of Crime Act, 1997, § 3 (Bermuda).

¹²⁶ Criminal Justice Act, 1990, § 17 (Isle of Man).

¹²⁷ Proceeds of Crime (Jersey) Law, 1999, art. 1.

¹²⁸ Criminal Justice (Proceeds of Crime) (Bailiwick of Guernsey) Law, 1999, § 1(1).

cynic will be quick to argue, in the case of Zambia, against the issue of, supposedly, extraterritorial criminal jurisdiction. Perritt observes, however, that “[i]nternational [law], and [arguably] American law, recognize the legitimacy of giving extraterritorial effect to the criminal laws of a national sovereign.”¹²⁹ He argues,

The extension of criminal jurisdiction is particularly likely in two circumstances: when the actor, and potential criminal defendant, is a citizen of the state whose law is to be applied, and when the “effects test” shows that a non-national has engaged in extraterritorial conduct with the intention or the likelihood that it will have effects in the country whose law is to be applied.¹³⁰

Also, “[i]n addition to [situations involving] international crimes, international law recognizes, with some dispute, the possibility of passive personal jurisdiction to apply to criminal law.”¹³¹ Perritt argues that “[t]his basis allows a nation to prosecute anyone committing a crime against one of that nation’s citizens, regardless of where the crime was committed.”¹³² According to Perritt,

Both branches of extraterritorial criminal jurisdiction have counterparts in civil personal jurisdiction and choice of law analysis. The nationality branch of extraterritorial criminal jurisdiction corresponds to extending personal jurisdiction in a civil case over one who is domiciled in the forum state. The effects test corresponds to minimum contacts analysis in civil personal jurisdiction, especially insofar as it authorizes the assertion of personal jurisdiction in a civil case over one who acts outside the jurisdiction intending that contact with the jurisdiction will result from that person’s conduct...In general, there is no constitutional bar to the extraterritorial application of U.S. penal law. Extraterritoriality is determined by looking to congressional intent, presuming that Congress does not want to violate international law. Thus, unless Congress explicitly directs otherwise, extraterritoriality is valid to the extent permitted by international law. Additionally, choice of law does not arise in criminal cases in the same way that it arises in civil cases. The basic reason for this is that crimes were not traditionally considered transitory and thus a court either had jurisdiction or it did not. When a court had jurisdiction, it applied its own law, but a wide range of extraterritorial conduct might still be criminal. Therefore, one could be criminally liable in state A for computer-triggered conduct in state B that caused injury in state A as long as state A expressly prohibited extraterritorial conduct of that character and the actor knew or should have known of the adverse effect in state A.¹³³

Perritt goes on to say that “[e]xtraterritorial application of criminal law by multiple nations has some advantages, at least, when the substantive criminal law being applied extraterritorially is more or less the same.”¹³⁴ According to Perritt, “[c]oncurrent jurisdiction had the considerable virtue of permitting any nation catching an offender to

¹²⁹ H.H. Perritt Jr., *Jurisdiction in Cyberspace*, 41 VILL. L. REV. 1 (1996).

¹³⁰ *Id.*

¹³¹ *Id.*

¹³² *Id.*

¹³³ *Id.*

¹³⁴ *Id.*

act upon his wrongs – without resolving the fine points of a theory of exclusive jurisdiction, and without facing the political, moral and legal concerns of aiding a foreign system of justice.”¹³⁵

Arguably, in Zambia, one school of thought postulates that the Prohibition and Prevention of Money Laundering Act does not restrict itself to offences of money laundering whose predicate offences transpired in Zambia only. The illegal activity could have been committed anywhere in the world, but if that same activity would constitute a criminal offence if it were committed in Zambia, then the conduct can predicate an offence of money laundering in Zambia irrespective of whether or not it is deemed lawful elsewhere. A useful analogy here could be drawn from the U.S. PATRIOT Act 2001, regarding the extension of extraterritorial criminal jurisdiction of the United States of America over any person outside of the United States jurisdiction who engages in any act which, if it had been committed in the United States, would constitute an offence.¹³⁶ The International Compliance Association observes:

The provisions extending the long arm civil jurisdiction and extraterritorial criminal jurisdiction of the United States within the Patriot Act could, however, have severe consequences for institutions and employees outside of the United States, even where such institutions do not have a physical or representative presence within the United States. Section 317 of the Patriot Act amends the pre-existing money laundering offences in the United States under Sections 1956 and 1957 of Title 18 of the United States Code. Section 1957 has been broadened such that jurisdiction is now granted over any foreign person, including any financial institution authorised under the laws of a foreign country in circumstances where such a person commits any offence under Section 1957 involving a financial transaction that occurs either in whole or in part in the United States. *This means that any foreign person who conducts a transaction involving US dollars is subject to the jurisdiction of the US courts in respect of US anti-money laundering offences within Sections 1956 and 1957 of Title 18 of the US Code.* Given that the US dollar is used in the majority of the world’s financial transactions, the risks posed by these provisions of the Patriot Act are significant.¹³⁷

In Zambia, a second school of thought supports the “single criminality” test, but argues instead that the predicate offence should have been committed in Zambia and must be illegal by reference to Zambian law only. Indeed, if an approach were taken that the predicate offence should be illegal in Zambia, and by reference to Zambian law, and that the predicate offence should also be illegal in a foreign country in which the offence was committed, and by reference to the law of that country, then Zambia would be applying a “dual criminality” test. But such is not the case in Zambia. As noted above, Zambia applies a “single criminality” test, and the “all crime” criteria of determining a predicate offence of money laundering rests in the broad definition of *illegal activity*.¹³⁸ The only question outstanding is: which of the two schools of thought on the single criminality test applies in Zambia? It would appear that, in the absence of words such as

¹³⁵ *Id.*

¹³⁶ See INTERNATIONAL DIPLOMA IN ANTI-MONEY LAUNDERING MANUAL, *supra* note 39, at 27.

¹³⁷ *Id.* (emphasis added)

¹³⁸ *Id.*

“in Zambia” after the phrase “illegal activity”, and given the growing acquiescence of many states in the state practice of the United States regarding extraterritorial criminal jurisdiction,¹³⁹ the first school of thought is more persuasive. Moreover, section 29 of Zambia’s Prohibition and Prevention of Money Laundering Act puts it clearer and resolves the polemics by stating that:

29. Any act –

- (a) carried out by a citizen of Zambia any where; or
- (b) carried out by a person on a ship or aircraft registered in Zambia;

shall, if it would be an offence by that person on the land in the Republic, be an offence under this Act.

30. A person who commits an offence under this Act, for which no penalty is provided shall be guilty of an offence and shall be liable upon conviction to a fine...or to imprisonment for a term... or to both.¹⁴⁰

8.0 WHAT CONSTITUTES “KNOWING” IN THE STATUTORY DEFINITION OF MONEY LAUNDERING?

Whereas the first two offences of money laundering listed in section 2 of the Prohibition and Prevention of Money Laundering Act – that is, (a) engaging, directly or indirectly, in a business transaction that involves property acquired with proceeds of crime; and, (b) receiving, possessing, concealing, disguising, disposing of or bringing into Zambia, any property derived or realized directly or indirectly from illegal activity – do not import the subjective test of “knowing,” the third activity, “the retention or acquisition of property *knowing* that the property is derived or realized, directly or indirectly from illegal activity” retains that test. But how can we determine if a person *knowingly* retained or acquired the property derived or realised from an illegal activity? And should we apply a criminal law standard or a civil law standard in defining the term *knowing*? In Zambia, money laundering is a criminal offence.¹⁴¹ Therefore, the term *knowing* should be understood from a criminal law point of view. We have already examined the definition of *knowing*. We examined this term when we looked at the offence of insider dealing. Here, suffice it to say, the term *knowing* is not defined anywhere in the Prohibition and Prevention of Money Laundering Act. So, we have to go by what the courts have said about the term “knowledge.”

¹³⁹ At least, there is not much evidence of “persistent objectors” to this norm. Although it is possible in some instances for a state to object persistently to a rule of customary international law (or state practice), and thus not be subject to it, successful persistent objection is rare and can be a high standard in terms of required action for a state to meet. See David A. Colson, *How Persistent Must the Persistent Objector Be?* 61 WASH. L. REV. 957, 967 (1986).

¹⁴⁰ Prohibition and Prevention of Money Laundering Act, *supra* note 3, § 29.

¹⁴¹ See *supra* sections 4.0-6.0.

9.0 OTHER OFFENCES RELATING TO MONEY LAUNDERING IN ZAMBIA

9.1 *Offences committed by a body of persons such as a company or partnership*

As a general rule, “[w]here an offence under the provisions of [the Prohibition and Prevention of Money Laundering] Act 2001 is committed by a body of persons, whether corporate or unincorporated, that body is guilty of an offence and liable upon conviction to a fine....”¹⁴² However, since corporate bodies, as we saw earlier, unlike unincorporated partnerships, cannot be held liable for the offence of insider dealing under the Securities Act, it follows logically that corporate bodies cannot be held liable for an offence of money laundering predicated on insider dealing. That said, “every person who, at the time of the offence, under the Prohibition and Prevention of Money Laundering Act, acted in an official capacity for or on behalf of such a body of persons, whether as a Director, Manager, Secretary or other similar capacity, or was purporting to act in such capacity and who was involved in the commission of that offence, [will] be guilty of the said offence and liable ... upon conviction, to a fine ... or a term of imprisonment ... or to both.”¹⁴³ The above statutory rule covers both shadow directors and *de facto* directors in Zambia.¹⁴⁴

9.2 *Attempts, aiding and abetting or conspiring to commit an offence*

In general, “[a]ny person who attempts, aids, abets, counsels or [procures] the commission of the offence of money laundering [is] guilty of an offence and liable, [upon] conviction, to a fine ... or a term of imprisonment ... or to both.”¹⁴⁵ And [a]ny person who conspires with another to commit the offence of money laundering [is] guilty of an offence and ... liable upon conviction to a fine ... or a term of imprisonment ... or to both.¹⁴⁶ These rules extend to offences of money laundering predicated on insider dealing. However, a notable weakness in the Prohibition and Prevention of Money Laundering Act is the absence of statutory provisions to protect whistleblowers such as employees who confide in a regulated institution’s Money Laundering Reporting Officer about suspicious transactions and suspicious activities. The identity of whistleblowers must be protected to save them from possible vendettas from law offenders and to provide whistleblowers with some confidence and trust that their execution of duty is not only supported by the law, but by management as well.

And although the Prohibition and Prevention of Money Laundering Act does not define the term “Money Laundering Reporting Officer,” a Money Laundering Reporting Officer is often understood as a senior officer within the regulated institution whose duty includes, among other things, receiving reports from fellow employees regarding suspicious transactions and suspicious activities. Where a good case exists to report these suspicions to a financial intelligence unit, hereinafter referred to as “FIU,” such as the Anti-Money Laundering Investigations Unit of Zambia, the Money Laundering Reporting

¹⁴² Prohibition and Prevention of Money Laundering Act, *supra* note 3, § 8(a).

¹⁴³ *Id.* § 8(b).

¹⁴⁴ *See supra* section 3.1, for a discussion of shadow directors.

¹⁴⁵ *See* Prohibition and Prevention of Money Laundering Act, *supra* note 3, § 9(1).

¹⁴⁶ *Id.* § 9(2).

Officer will prepare and transmit to the FIU bodies a suspicious transactions report or a suspicious activities report. Also, the Money Laundering Reporting Officer may have other functions which include compliance and risk management and the preparation and implementation of an anti-money laundering training and awareness program for the regulated institution.

9.3 Falsification of documents

As a general rule, “[a]ny person who knows or suspects that an investigation into money laundering has been, is being, or is about to be conducted, falsifies, conceals, destroys or otherwise disposes of, causes or permits the falsification of material which... is likely to be relevant to the investigation of the offence, [is] guilty of an offence and ... liable, upon conviction, to a fine ... or a term of imprisonment ... or to both.”¹⁴⁷ Here, the falsification of documents, whether covering such predicate offences as insider dealing or not, will be caught up by provisions of Prohibition and Prevention of Money Laundering Act. The only question that needs to be addressed is: what constitutes “knows or suspects”? We have already examined the jurisprudence underpinning the word knowing. But, what does the word suspect mean? Lord Devlin in the English Court of Appeal decision in *Hussein v. Chong Fook Kam*¹⁴⁸ defined suspicion as, “Suspicion in its ordinary meaning is a state of conjecture or surmise where proof is lacking: ‘*I suspect but I cannot prove.*’”¹⁴⁹

Suspicion must not be confused with speculation or a hunch, or gut feeling, because suspicion may sometimes take a while to formulate and it falls only short of proof based on firm evidence.¹⁵⁰ It seems that, in the case of suspicion, there must be a factual basis upon which it can be founded.¹⁵¹ But, of course, there is a subjective test and an objective test of suspicion. The objective test is usually formulated as: where a person has reasonable grounds to suspect.¹⁵² Akin to the objective test of knowing or knowledge, the objective test of suspect or suspicion imports the concept of a reasonable man and how this reasonable man would have reacted. In the American case of *U.S. v. Arvizu*,¹⁵³ decided in 2002, the United States Supreme Court held as follows:

[Considering] the totality of the circumstances and [giving] due weight to the factual inferences drawn by [Stoddard] and [the] District Court Judge ... Stoddard had reasonable suspicion to believe that [the] respondent was engaged in illegal activity. Because the “balance between the public interest and the individual’s right to personal security,” *United States v. Brignoni-Ponce*, 422 U.S. 873, 878 (1975), tilts in favour of a standard less than probable cause in [brief investigatory stops of persons or vehicles], the Fourth Amendment is

¹⁴⁷ *Id.* § 10.

¹⁴⁸ [1970] A.C. 942.

¹⁴⁹ *Id.* at 948 (emphasis added).

¹⁵⁰ INTERNATIONAL DIPLOMA IN ANTI-MONEY LAUNDERING MANUAL, *supra* note 39, at 118.

¹⁵¹ *Id.*

¹⁵² *Id.* at 119.

¹⁵³ (00-1519) 534 U.S. 2 (2002), as reproduced by Cornell University’s Legal Information Institute, *Supreme Court Collection*, at <http://supct.law.cornell.edu/supct/search/display.html?terms=criminal&url=/supct/html/00-1519.ZS.html> (last visited Apr. 10, 2006).

satisfied if the officer's action is supported by reasonable suspicion to believe that criminal activity "may be afoot," *United States v. Sokolow*, 490 U.S. 1, 7 (1989) (quoting *Terry v. Ohio*, 392 U.S. 1, 30 (1968)). [In making] reasonable-suspicion determinations, [reviewing courts] must look at the "totality of the circumstances" of each case to see whether the detaining officer has a "particularized and objective basis" for suspecting legal wrongdoing. See, e.g., *United States v. Cortez*, 449 U.S. 411, 417-418 (1981). This process allows officers to draw on their own experiences and specialized training to make inferences from and deductions about the cumulative information available....¹⁵⁴

The United States Supreme Court noted further:

[T]he Ninth Circuit's methodology "departs sharply from these teachings," and it reached the wrong result in this case. Its "evaluation and rejection of certain factors in isolation from each other does not take into account the "totality of the circumstances," as this Court's cases have understood that phrase. The court appeared to believe that each of Stoddard's observations that was by itself susceptible to an innocent explanation was entitled to no weight. *Terry v. Ohio*, 392 U.S. 1, however, precludes this sort of divide-and-conquer analysis. And the court's view that it was necessary to clearly delimit an officer's consideration of certain factors to reduce troubling uncertainty also runs counter to this Court's cases and underestimates the reasonable-suspicion standard's usefulness in guiding officers in the field. The *de novo* standard for appellate review of reasonable-suspicion determinations has, *inter alia*, a tendency to unify precedent and a capacity to provide law enforcement officers the tools to reach the correct decision beforehand. *Ornelas v. United States*, 517 U.S. 690, 691, 697, 698 (1996). The Ninth Circuit's approach would seriously undermine the "totality of the circumstances" principle governing the existence *vel non* of "reasonable suspicion." Here, it was reasonable for Stoddard to infer from his observations, his vehicle registration check, and his border patrol experience that respondent had set out on a route used by drug smugglers and that he intended to pass through the area during a border patrol shift change; and Stoddard's assessment of the reactions of respondent and his passengers was entitled to some weight. Although each of the factors alone is susceptible to innocent explanation, and some factors are more probative than others, taken together, they sufficed to form a particularized and objective basis for stopping the vehicle.¹⁵⁵

On the other hand, and closely matching the subjective test of knowing or knowledge, the subjective test of suspicion or suspects requires the prosecution to prove that the accused actually suspected¹⁵⁶ that an investigation into money laundering had been, was being or was about to be conducted, but chose instead to falsify, conceal, destroy or otherwise dispose of, cause or permit the falsification of material which was likely to be relevant to the investigation of the offence.

¹⁵⁴ *United States v. Arvizu*, (00-1519) 534 U.S. 266, 6,7,11 (2002).

¹⁵⁵ *Id.* at 7-9.

¹⁵⁶ See INTERNATIONAL DIPLOMA IN ANTI-MONEY LAUNDERING MANUAL, *supra* note 39, at 117-119.

9.4 *Divulging information to an unauthorized person*

As a general rule, “[a]ny person who knows or suspects that an investigation into money laundering has been, is being or is about to be conducted, without lawful authority, divulges that fact or information to another person, [is] guilty of an offence and . . . liable, upon conviction, to a fine . . . or [a term of] imprisonment . . . or to both.”¹⁵⁷ We have already examined the definition of the terms knows and suspects.

Here, suffice it to say, the above statutory rule introduces the offence of tipping off a suspected money launderer.¹⁵⁸ Although the law on insider dealing does not provide for such an offence, whenever insider dealing predicates the offence of money laundering, then the relevant tipping off provisions in the Prohibition and Prevention of Money Laundering Act must be considered.

In many jurisdictions, the requirement to report suspicious transactions or suspicious activities is of no particular use if the suspected person is tipped off to the fact that he or she is under investigation.¹⁵⁹ Thus, in order to preserve the integrity of an investigation, the offence of “tipping off” usually occurs where,

[I]nformation or any other matter which might prejudice the investigation is disclosed to the suspect of the investigation (or anyone else) by someone who knows or suspects . . . that: a police investigation into money laundering has begun or is about to begin, or the police have been informed of suspicious activities, or a disclosure has been made to another employee under internal reporting procedures.¹⁶⁰

In the United Kingdom,

It is an offence to tell — or “tip off” — a suspect that a report is being made (or has been made). This could happen when an individual tips off a suspect in a way that would prejudice an investigation, when they know or suspect that an internal or external report has been made or will be made in the case of terrorism offences. The tipping off could take the form of a direct statement or more indirectly, a hint¹⁶¹

So, firms should be very careful when providing information to the effect that a report about some suspicious transaction or activity has been made. The legal framework in the United Kingdom, unlike that in Zambia, provides also for the offence of failure to

¹⁵⁷ See Prohibition and Prevention of Money Laundering Act, *supra* note 3, § 11.

¹⁵⁸ See also (1995) 2 A.C. 378; C v. S and others (The Times 5 November 1998).

¹⁵⁹ See, e.g., Criminal Law (Consolidation) (Scotland) Act 1995, § 36(1), (2); Prevention of Terrorism (Temporary Provisions) Act 1989, § 17 (as amended by section 50 C.J.A. 93).

¹⁶⁰ “The Offences,” available at <http://www.laundryman.u-net.com/printversion/offences.html> (last visited Apr. 10, 2006).

¹⁶¹ See *The New Anti-Money Laundering Rules*, available at <http://www.cozens-hardy.com/moneyl.htm> (last visited Apr. 10, 2006). See also S.I. 1993/1933; relevant amending instruments are regulation 11 of the Banking Consolidation Directive (Consequential Amendments) Regulations 2000 (S.I. 2000/2952), regulation 3 of the Money Laundering Regulations 2001 (S.I. 2001/3641) and articles 438 and 439 of the Financial Services and Markets Act 2000 (Consequential Amendments and Repeals) Order 2001 (S.I. 2001/3649).

disclose a suspicion or knowledge of money laundering.¹⁶² In the United Kingdom, failure to disclose the suspicion or knowledge of money laundering is, by itself, an offence.¹⁶³ This English law statutory rule establishes a mandatory “defensive” requirement for disclosure on all parties affected by the requisite knowledge or suspicion.

However, “if a person has not been provided by his employer with specified training, he [or she] may have a defence to the offence, in section 330 [of the English Proceeds of Crime Act 2002], of failure to disclose money laundering by a person in the regulated sector.”¹⁶⁴ The “specified” training referred to here is the training required to be provided under regulation 5(1)(c) of the Money Laundering Regulations 1993 of the United Kingdom. Regulation 5(1)(c) requires that a person carrying out relevant financial business must provide employees whose duties include the handling of relevant financial business with training from time to time in the recognition and handling of transactions carried out by, or on behalf of, any person who is, or appears to be, engaged in money laundering. The only defence to the offence of failure to disclose applies where the employee does not actually know or suspect that another person is engaging in money laundering.¹⁶⁵ But, the employee will be liable if he is found to have had reasonable grounds for knowing or suspecting that another person was engaged in money laundering.¹⁶⁶

9.5 *Obstructing an authorised officer, and failure or refusal to disclose information to the authorised officer*

Under Zambia’s Prohibition and Prevention of Money Laundering Act, it is a criminal offence for any person who:

- (a) obstructs, assaults, hinders or delays any authorised officer in the lawful exercise of any powers conferred upon the officer by any law
- (b) refuses to furnish to any authorised officer on request, any particulars or information to which the authorised officer is entitled to by or under this Act;
- (c) fails to comply with any lawful demand of an authorised officer under this Act;
- (d) wilfully or recklessly gives to an authorised officer any false or misleading particulars or information with respect to any fact or particulars to which the authorised officer is entitled to by or under this Act;
- (e) fails to produce, conceals or attempts to conceal any property, document or book in relating to which there is reasonable ground to suspect that an offence has been or is being committed under this Act, or which is liable to seizure under this Act,[]
- (f) before or after any seizure, destroy anything to prevent the seizure or securing of that property or article; [or]

¹⁶² See Proceeds of Crime Act, *supra* note 124, § 330.

¹⁶³ *Id.*

¹⁶⁴ Proceeds of Crime Act (Failure to Disclose Money Laundering: Specified Training) Order 2003 (S.I. 2003/171).

¹⁶⁵ See *generally id.*

¹⁶⁶ See Proceeds of Crime Act, 2002 (U.K.), § 330.

27. [W]ilfully fails or refuses to disclose any information or produce any accounts, documents or articles to an authorised officer during an investigation into an offence under this Act¹⁶⁷

The above statutory provisions apply also to offences of money laundering predicated on insider dealing. With the exception of section (27), *supra*, the Prohibition and Prevention of Money Laundering Act prescribes only the sanction of imprisonment without the option of a fine.¹⁶⁸ Only in situations covered under paragraph (g), involving the wilful failure or refusal to disclose information or to produce accounts, documents or articles to an authorised officer during an investigation, does the Prohibition and Prevention of Money Laundering Act provide sanctions that cover a fine and/or a term of imprisonment.¹⁶⁹

10.0 THE BURDEN OF PROOF IN OFFENCES OF MONEY LAUNDERING PREDICATED ON INSIDER DEALING

Which party should shoulder the burden of proof in cases of money laundering arising out of insider dealing and what is the required standard of proof under the Prohibition and Prevention of Money Laundering Act? Let us first take a look at some related developments in Hungary.

In 2000, the Government of Hungary established a criminal investigation bureau within the Tax and Financial Inspection Service to initiate tax and money laundering prosecutions.¹⁷⁰ According to the U.S. Department of State, the Government of Hungary initiated ten money laundering investigations in 2003 and only two individuals were apprehended and arrested, resulting in two prosecutions—one acquittal and one conviction.¹⁷¹ In these cases, the predicate offense was fraud.¹⁷² However, recent legislative changes enacted, including one that clarifies that money laundering convictions can be obtained without conviction on the predicate offense, are expected to increase the numbers of money laundering prosecutions and convictions.¹⁷³

In June 2003, a money laundering scandal broke involving a Hungarian subsidiary of a Dutch-owned bank.¹⁷⁴ A broker apparently skimmed funds from some clients in order to pad the returns of other, more favored clients. Money was laundered through several banks as well as some foreign nationals.¹⁷⁵ Hungary's FIU, the Anti-Money Laundering Section (AMLS), was still investigating the case in March 2004. The investigation had expanded to 12 suspects with financial damages estimated at US\$45 million. As one report shows:

¹⁶⁷ See Prohibition and Prevention of Money Laundering Act, *supra* note 3, §§ 26, 27.

¹⁶⁸ *Id.* § 26.

¹⁶⁹ *Id.* § 27.

¹⁷⁰ See U.S. Department of State, Bureau for International Narcotics and Law Enforcement Affairs, *International Narcotics Control Strategy Report, 2004 – released March 2004, available at* <http://www.state.gov/g/inl/rls/nrcrpt/2003/vol2/html/29921.htm> (last visited Apr. 10, 2006).

¹⁷¹ *Id.*

¹⁷² *Id.*

¹⁷³ *Id.*

¹⁷⁴ *Id.*

¹⁷⁵ *Id.*

With the organizational changes in AMLS, it is unclear how long it will take to conclude the investigation. It also is not clear whether Hungary's financial regulatory body, the Hungarian Financial Supervisory Authority (PSzAF), could be held responsible for improper reporting, as it warned the bank of improper recording procedures as early as 2000. The prosecution has denied the AMLS request to call the Head of PSzAF as a witness and has not responded to repeated requests for supporting evidence. Act CXXI of 2001 provides for reversal of the burden of proof in cases of confiscations from persons part of a criminal organization; however, this provision has not been used in practice. Hungary's confiscation regime is also defined by Act CXXI of 2001, which came into force on April 1, 2002, and considers all benefits or enrichment originating from a criminal act to be illegal. The present provision in force contains no reference to the knowledge of the origin of assets as a condition of asset confiscation from third parties, although assets obtained by a third party in a bona fide manner may not be confiscated.¹⁷⁶

In Zambia, like many other common law jurisdictions, the burden of proof in criminal law cases, including offences of insider dealing and money laundering, lies on the prosecution.¹⁷⁷ We examined the burden of proof in criminal law and civil law cases when we looked at the offence of insider dealing. Here, it is important to add that if someone accuses you of committing the offence of insider dealing or money laundering, the burden of proof requires them (*i.e.* the prosecution team) to prove that you have, indeed, violated the law and committed the offence in question.¹⁷⁸ The general rule is he who asserts must prove.¹⁷⁹ And the standard of proof here is such that the prosecution must prove beyond all reasonable doubt that you have committed the offence.¹⁸⁰ By contrast, although the burden of proof in civil law cases, like in criminal law cases, still lies on the party bringing an action, the standard of proof is lighter and only requires the plaintiff to prove against the defendant on the balance of probabilities.¹⁸¹

The problems associated with a higher standard of proof in criminal law cases and with the requirement that the burden of proof should fall on the prosecution inevitably point to a subtle necessity that the prosecution should comprise a team of competent and professional lawyers and investigators in order to have a good chance at winning the case. In Zambia, the chambers of the Director of Public Prosecution (DPP) and the Attorney-General's chambers, though having very well qualified professional lawyers,

¹⁷⁶ *Id.*

¹⁷⁷ *Woolmington v. DPP*, [1935] A.C. 462; *Rex v. Stoddart*, (1909) 2 Crim. App. 217, 244; *Rex v. Davies*, (1913) 29 Times L. R. 350; 8 Cr. App. R. 211; *Rex v. Abramovitch* (1914) 31 T.L.R. 88; *Rex v. Aubrey*, (1915) 11 Crim. App. 182; *Rex v. Grinberg*, (1917) 33 T.L.R. 428; *Rex v. Sanders*, (1919) 14 Crim. App. 11; *Lawrence v. The King*, [1933] A.C. 699, 706; *Rex v. Sturgess*, (1913) 9 Crim. App. 120; *Rex v. Hopper*, (1915) 11 Crim. App. 136; *Rex v. Brain*, (1918) 13 Crim. App. 197. *Cf.* *Rex v. Oliver Smith*, (1910) 6 Crim. App. 19, where it was stated that, as an exception to the rule that the burden of proof lies on the prosecution, where insanity is relied upon, the defendant must establish that defense. *See also* *M'Naughton's Case*, (1843) 4 St. Tr. (N.S.) 847.

¹⁷⁸ *See* *Woolmington v. DPP*, [1935] A.C. 462.

¹⁷⁹ *See generally id.*

¹⁸⁰ *See* *Miller v. Minister of Pensions*, (1947) 2 All E.R. 372.

¹⁸¹ *See* *Vining v. Detroit*, 413 N.W.2d 486 (1987); *lv denied*, 430 Mich. 892 (1988). *See also* *Petrove v. Grand Trunk W. R Co*, 464 N.W.2d 711 (1991).

are understaffed.¹⁸² There is need to attract more lawyers in the public service. Most young lawyers prefer practicing law in small but growing law firms to serving in the DPP's or the Attorney-General's chambers. There are also not enough lawyers on the bench, in the Securities and Exchange Commission, and serving in the Anti-Money Laundering Investigations Unit. It is issues like these that pose a great challenge to the efficacy of the regulatory and institutional framework for fighting money laundering in Zambia. Indeed, law policing and law enforcement arms, together with the judiciary, should be allocated more resources if they are to attract adequate numbers of well qualified people. It is worth noting that even if there are very good laws in the statute books, as long as the implementation of those laws is weak, partly due to weak enforcement and weak investigative measures, the fight against money laundering will remain a pipedream. A possible way out of this conundrum, we propose, would be to introduce legislative changes that shift the burden of proof from the prosecution to the accused so that the accused should now prove beyond all reasonable doubt how, where and when he acquired his seemingly dubious securities investment wealth. The adoption of such a novel approach in a country such as Zambia would avoid the polemics surrounding cases like the Martha Stewart case in the United States of America.¹⁸³ Commenting on the Martha Stewart case, McMenamin argues:

June [2003] did not bring much sunshine for New York City or good news for Martha Stewart. After twisting in the wind for nearly a year and a half, the Diva of Domesticity was sued for insider trading by the Securities and Exchange Commission (SEC) and indicted for securities fraud and obstruction of justice by the Department of Justice.

Those who are salivating over Stewart's demise should put down their forks. In early 2002, when she was first questioned by the feds, all the news outlets reported speculation, based on anonymous government sources, that she had sold the last remnant of her ImClone stock on December 27, 2001, because her buddy, ImClone founder and CEO Sam Waksal, had told her that the Food and Drug Administration was about to reject an application for Erbitux, the company's highly touted cancer drug. The news reports also suggested that she had lied to the feds about Waksal's tip. But as the government now tacitly admits, neither of these allegations is true. That fact helps explain why the feds waited until June 2003 to bring charges: They had trouble finding anything to pin on Stewart.

The most serious criminal charge against her is not perjury or insider trading but securities fraud, based on the fact that she denied to the press, personally and through her lawyers, that she had engaged in insider trading. This was done, the feds say, not for the purpose of clearing her name, but only to prop up the stock price of her own publicly traded company, Martha Stewart Living Omnimedia. In other words, her crime is claiming to be innocent of a crime with which she was never charged.¹⁸⁴

¹⁸² See e.g. UN Human Rights System, *Zambia: Treaty Bodies Jurisprudence (Human Rights Committee)*, available at <http://www.hri.ca/fortherecord2002/vol2/zambiajp.htm> (last visited Apr. 10, 2006).

¹⁸³ M. McMenamin, *St. Martha: Why Martha Stewart should go to heaven and the SEC should go to hell*, REASONONLINE (October 2003), available at <http://www.reason.com/0310/fe.mm.st.shtml> (last visited Apr. 10, 2006).

¹⁸⁴ *Id.*

McMenamin goes on to say:

As for the SEC's civil case, it hinges on an elastic understanding of insider trading, an offense Congress has never defined. The justification for the ban on insider trading, which makes little economic or legal sense, is just as murky as the behavior covered by it. Given the difficulty of figuring out exactly what constitutes insider trading (let alone why it's illegal), it is entirely possible that Stewart and her lawyers weren't sure whether she had broken the rules. In any event, under existing case law, it's clear that she didn't.¹⁸⁵

Our proposal to have an accused person show that he or she amassed his or her securities investments in a lawful manner would provide a valuable deterrent in Zambia. The idea is that the law offender and all would-be-offenders should be discouraged from ever committing insider dealing and money laundering offences. Once the burden of proof has been shifted to the defendant, it would no longer be a necessity for the prosecution to prove, beyond all reasonable doubt, that the accused committed the offence of insider dealing or money laundering. Rather, the accused would have to show, beyond all reasonable doubt, that he or she legally and lawfully acquired the securities investments and did not engage in any offence of insider dealing or money laundering.

Admittedly, if implemented, the above proposal would attract strong criticism, a fact of which the author is cognizant. One notable criticism could be that implementing such a proposal would have disastrous effects on the rule of law and the constitutionally guaranteed presumption of innocence.¹⁸⁶ The author, recognizes that in some cases,

¹⁸⁵ *Id.*

¹⁸⁶ See *R. v. Wholesale Travel Group Inc.*, (1991) 67 C.C.C. (3rd) 193; *Scagell v. Att'y General of the Western Cape*, (1996) 2 S.A.C.R. 579 (C.C.); *State v. Cotzee, Cotzee, De Bruin, and Marais*, (1997) 3 S.A. 527 (C.C.); *McKnight v. NZ Biogas Indus. Ltd.*, (1994) 2 N.Z.L.R. 664; *Attorney-General of Hong Kong v. Lee Kong-Kut*, [1993] A.C. 951 (Privy Council). Also, in the case of *Constitutional Reference No. 3 of 1978; Re Inter-Group Fighting Act 1977*, [1978] P.N.G.L.R. 421, the Papua New Guinea Supreme Court had to deal with a reverse onus of proof. In that case, section 10(3) of the *Inter-Group Fighting Act 1977* provided that: "A person charged with an offence against this section is guilty of that offence unless he proves to the satisfaction of the Court, that he did not take part in the actual fighting." But section 37(4) of the *Constitution of Papua New Guinea* provided for a presumption of innocence in the following words: "A person charged with an offence: (a) shall be presumed innocent until proved guilty according to law, but a law may place upon a person charged with an offence the burden of proving particular facts which are, or would with the exercise of reasonable care be, peculiarly within his knowledge." In deciding over this case, the Supreme Court of Papua New Guinea examined, *inter alia*, whether the participation in an inter-group fight was, within the language of the *Constitution*, "peculiarly" within the knowledge of the person charged. By a majority, it was found that the provision violated the constitutional presumption of innocence. The Supreme Court observed that the statutory provision could not be severed so as to retain the rest of the section. One of the judges, among the majority, observed: "It might be thought that as all that sub-section 11(3) does is to provide a bonus by enabling an accused person to secure his acquittal if he can prove that he did not take part in the actual fighting that there has been no serious erosion of the right to the protection of the law. I am of the opinion, however, that it is a bad precedent, the thin end of the wedge. The Supreme Court has been appointed the guardian of the people's fundamental rights and freedoms as defined in the *Constitution*. It should be vigilant to ensure that there is not the slightest infringement of any of these rights and freedoms." *Inter-Group Fighting Act*, [1978] P.N.G.L.R. at 431. Commenting on this ruling, Freestone observes as follows: "Although it (the Supreme Court) did not determine the matter conclusively for the purposes of the meaning of the term in the Papua New Guinea *Constitution*, it was recognized that the term 'peculiarly within the knowledge of' the accused had acquired a certain meaning

especially where the drafting of legislation is not properly carried out or where there is not due regard to the full spectrum of provisions in the Republican Constitution, shifting the burden of proof from the prosecution to the accused could be struck down by the courts as unconstitutional. But, then, is it not a precept of the law that to every general rule there can be an exception? Indeed, what wrong would there be in enshrining in the Republican Constitution an exception to the general rule, stating therein, unequivocally and explicitly, that notwithstanding whatever is contained in the Bill of Rights, the exception applies only to offences of money laundering, insider dealing, corruption, and drug trafficking? As the European Court ruled in a matter involving continued pre-trial detention, such detention can only be justified “if there are specific indications of a genuine requirement of public interest which, notwithstanding the presumption of innocence, outweighs the rule of respect for individual liberty.”¹⁸⁷

A second proposal for law reform would be to lower the standard of proof in criminal law cases of insider dealing and money laundering from beyond all reasonable doubt to the civil law standard of balance of probabilities. Such a measure would remove the onerous and strenuous task on the prosecution – especially given that police and criminal investigation offices in Zambia are understaffed and have limited resources – to prove beyond all reasonable doubt that the accused committed an insider dealing offence that comprised the offence of money laundering. I would, however, be reluctant to subscribe to the idea of lowering the standard of proof for cases of predicate offences only since there are far too many illegal activities that qualify as predicate offences of money laundering under Zambia’s Prohibition and Prevention of Money Laundering Act. The standard of proof should be lowered in both predicate offences, such as insider dealing, and money laundering offences. Indeed, if the standard of proof were to be lowered only in relation to predicate offences, what good would that do since the standard of proof in the case of money laundering would remain intact?

In Zambia, there are a number of cases where an individual could never account for the wealth he or she has amassed over a relatively short period of time. Zambia has seen a number of poverty stricken individuals enter politics and emerge among the wealthiest citizens of that country. However, given the rigidity in the law, insisting on the presumption of innocence as an absolute and fundamental right, and requiring that “he who asserts must prove” beyond all reasonable doubt, such individuals have never been charged or prosecuted. Where prosecutions have been instigated, these individuals have often been acquitted by the courts, in part due to alleged unprofessional prosecution.

11.0 CIVIL LIABILITY IN CASES OF MONEY LAUNDERING

We saw earlier that the Securities Act does not provide civil remedies in cases of insider dealing. However, under the Prohibition and Prevention of Money Laundering Act, civil liability of money launderers arises primarily in regard to statutory provisions

in the common law, referring to such circumstance as requiring the accused to prove that he or she possessed a licence, etc. The decision is a straightforward illustration of what can be expected in countries with a system of constitutionally guaranteed fundamental rights which include the presumption of innocence.” D. Freestone, *The burden of proof in natural resources legislation: some critical issues for fisheries law*, 63 FAO LEGISLATIVE STUDY 17,(1998)

¹⁸⁷ Van der Tang v. Spain, (26/1994/473/554), July 13, 1993, ¶ 55.

dealing with the seizure and forfeiture of property. That said, caution should be exercised when applying concepts of civil liability to cases of money laundering. As Burrell and Cogman observe,

A recent decision of the Commercial Court considers the position of institutions which suspect that funds in their possession are the proceeds of crime. *Amalgamated Metal Trading Ltd v. City of London Police Financial Investigation Unit and others* [2003] EWHC 703 (Comm) is a warning of the pitfalls of adopting the wrong procedural route when attempting to resolve the conflicts between the money laundering regime and the imposition of civil liability. It also adopts the theme, notable in the earlier Bank of Scotland decision, that institutions must bear some of the commercial risks that arise when money laundering is suspected.... There are a number of options open to financial institutions when faced with a dilemma regarding possible money laundering. It is easier to deal with the criminal issues and avoid liability for tipping off than it is to avoid possible civil liability and legal costs. It is therefore important that in any such situation, a clear strategy is identified from the outset, so that costs are not wasted on unnecessary court applications.¹⁸⁸

11.1 Seizure of property

As a general rule, an authorized officer is under a statutory duty to seize property which he has reasonable grounds to believe was derived or acquired from money laundering.¹⁸⁹ In cases where insider dealing has predicated the offence of money laundering, then the property involved will be caught up by the forfeiture provisions of the Prohibition and Prevention of Money Laundering Act.

We examined earlier the concept of reasonable grounds to believe when we looked at the ruling of the United States Supreme Court in *U.S. v. Arvizu*. In that case, the test of totality of the circumstances and factual inferences was set forth. Here, the authorised officer cannot turn a blind eye if he has reasonable grounds to believe that the property in issue was either derived or acquired from money laundering activities. Section 2 of the Prohibition and Prevention of Money Laundering Act defines an authorised officer as an officer authorised by the Commissioner of the Anti-Money Laundering Investigations Unit to perform functions under the Prohibition and Prevention of Money Laundering Act.

11.2 Release of seized property

Generally, where property is seized under the [Prohibition and Prevention of Money Laundering] Act, the authorised officer who effected the seizure may, at any time before it is forfeited under that Act, order the release of the property to the person from whom the property was seized if the officer is satisfied that the property is not liable to forfeiture under the Prohibition and Prevention of Money Laundering Act and that it is not otherwise required for the purpose of any investigations or proceedings under the said

¹⁸⁸ P. Burrell & S. Cogman, *Money Laundering Dilemmas in Practice* (June 4, 2003), available at <http://www.spr-consilio.com/sartmoney1.htm> (last visited Apr. 10, 2006).

¹⁸⁹ Prohibition and Prevention of Money Laundering Act, *supra* note 3, § 15.

statute or for the purpose of any prosecution under any written law.¹⁹⁰ The officer effecting the release is required by law to record in writing, specifying in detail the circumstances of, and the reasons for, the release.¹⁹¹ And when the property is released, the officer who effected the seizure, or the State or any person acting on behalf of the State, will not be liable to any civil proceedings by any person unless it is proved that the seizure and the release were not done in good faith.¹⁹² But what is good faith?¹⁹³ The concept of good faith may have different meanings to different people. However, in day to day ordinary parlance, the term good faith may be understood as complying with some standards of decency and honesty.

Keily argues that “good faith is not a principle which can be adequately defined” and that it “has been described vaguely as a rechristening of fundamental principles of contract law and a phrase with no general meaning but which operates to exclude various forms of bad faith”¹⁹⁴ Good faith is also seen as a discretionary standard preventing parties from “recapture[ing] opportunities [that were] foregone [when] contracting.”¹⁹⁵ In addition, good faith has been compared with unconscionability, “fairness, fair conduct, reasonable standards of fair dealing, decency, reasonableness, decent behaviour, a common ethical sense, a spirit of solidarity, community standards of fairness”¹⁹⁶ and “honesty in fact,” indicating that good faith is an extremely versatile concept.¹⁹⁷ Commenting on good faith, Keily observes:

[I]ts versatility is an essential characteristic because, as stated by Aristotle, “there are some cases for which it is impossible to lay down a law, so that a special ordinance becomes necessary. For what is itself indefinite can only be measured by an indefinite standard.” However, good faith is not an obligation to act altruistically. Regretfully, Lücke writes, “one must leave the universal adoption of such a noble motive to some far-distant and much more enlightened age.” Good faith does not require the abandoning of self-interest as the governing motive in contractual relations. However, it may prevent a party from abusing a legal right...¹⁹⁸

¹⁹⁰ *Id.* § 16(1)

¹⁹¹ *Id.* § 16(2)(b).

¹⁹² *Id.* § 16(2)(a).

¹⁹³ See *Vallejo v. Wheeler*, 98 Eng. Rep. 1012; *Banque Financiere de la Cité S.A. v. Westgate Ins. Co. Ltd.* (unreported, Court of Appeal of England, 28 July 1988); *Allen v. Flood*, 1898 App. Cas. 1, at 46 (P.C. 1897); ICC Arbitration Case No. 8611 (1997).

¹⁹⁴ See generally Troy Keily, *Good Faith and the Vienna Convention on Contracts for the International Sale of Goods (CISG)*, 3 VINDOBONA J. INT’L COMMERCIAL L. & ARBITRATION 15 (1999), available at <http://www.cisg.law.pace.edu/cisg/biblio/keily.html#faith> (last visited Apr. 10, 2006).

¹⁹⁵ See E. A. Farnsworth, “The Eason-Weinmann Colloquim on International and Comparative Law: Duties of good faith and fair dealing under the UNIDROIT Principles, relevant international conventions, and national laws,” 3 TUL. J. INT’L & COMP. L. 47, 59-61 (1995).

¹⁹⁶ See H. K. Lücke, *Good Faith and Contractual Performance*, in *ESSAYS ON CONTRACT* 160 (P. Finn ed., 1987).

¹⁹⁷ See generally Keily, *supra* note 195.

¹⁹⁸ *Id.*

11.3 Forfeiture of property

As a general rule, any property which has been seized under the Prohibition and Prevention of Money Laundering Act,¹⁹⁹ and which is in the possession or under the control of a person convicted of a money laundering offence and which property is derived or acquired from proceeds of crime, is liable to forfeiture by a court of law.²⁰⁰ Again, in cases where insider dealing has predicated the offence of money laundering, the property involved will be caught up by the forfeiture provisions of the Prohibition and Prevention of Money Laundering Act. Here, subject to any statutory limitations in the criminal procedural laws and the civil procedural laws of Zambia, the Subordinate Courts and the High Court, respectively, have jurisdiction to hear cases of forfeiture of property.²⁰¹ However, where a person whose property has been forfeited dies before or after the order of forfeiture by a court has been made, the order will proceed against the estate of the deceased.²⁰²

Where property is seized and no prosecution for any offence under any written law is instituted with regard to the property, including where no claim in writing is made by any person and where no proceedings are commenced within six months from the date of seizure, the Commissioner of the Anti-Money Laundering Investigations Unit can apply to a court of law, upon the expiration of the six months period, for an order of forfeiture of the property.²⁰³ It is important to stress that the court will not make an order of forfeiture unless the Commissioner meets two statutory conditions: first, that he has “given notice by publication in the Gazette and in one national newspaper” that the seized property is liable to vest in the State if it is not claimed within three months;²⁰⁴ and, secondly, three months after giving this notice the property remains unclaimed.²⁰⁵

However, where a claim in writing is made by a person that is lawfully entitled to the property, indicating that the property is not liable to forfeiture under the Prohibition and Prevention of Money Laundering Act, the Commissioner may order release of the property to the claimant “if satisfied that there is no dispute as to the ownership of the property and that it is not liable to forfeiture.”²⁰⁶ By contrast, where a claim is made against property seized under the Prohibition and Prevention of Money Laundering Act and the Commissioner finds that (a) there is a dispute over the ownership of the property, (b) that there is insufficient evidence to determine the ownership of the property, or that (c) the Commissioner is unable to ascertain whether the property is liable to forfeiture or not, the Commissioner will refer the claim to the High Court.²⁰⁷ Here, Subordinate Courts have no jurisdiction over such matters.²⁰⁸

In determining whether any property belongs to, or is in the possession or under the control of any person – that is, a “claimant” – the High Court can, upon an application by

¹⁹⁹ Prohibition and Prevention of Money Laundering Act, *supra* note 3, § 17(1)

²⁰⁰ *Id.*

²⁰¹ *Id.* §§ 2, 17(1).

²⁰² *Id.* § 17(2).

²⁰³ *Id.* § 18(1).

²⁰⁴ *Id.* § 18(2).

²⁰⁵ *Id.*

²⁰⁶ *Id.* § 18(3).

²⁰⁷ *Id.* § 18(4).

²⁰⁸ *Id.*

the Commissioner, make two types of orders.²⁰⁹ These orders can either run concurrently or be sequential. The High Court can also choose to make one order only or none at all. One order would require that any document relevant to “(i) the identification, the location or the quantification of the property of that person, or (ii) the identification or the location of any document necessary for the transfer of the property of the claimant be delivered to the Commissioner.”²¹⁰ The other order would direct a regulated institution²¹¹ to produce to the Commissioner all information obtained by that institution about any business transaction conducted by or for the claimant with the institution before or after the date of the order as the court may direct.²¹²

However, where the “Commissioner is satisfied that a person is failing to comply with, is delaying, or is otherwise obstructing the court order, an authorised . . . officer may enter the premises of that person, search the premises and remove any material document or other thing therein for the purposes of executing the such order.”²¹³ “Where property is forfeited under this Act, it will vest in the State.”²¹⁴ It is important to stress here that any person who tampers with that property or with seized property, will be guilty of an offence and liable, upon conviction, to a fine or a term of imprisonment.²¹⁵

11.4 Investigations and power to arrest and search

As a general rule, every offence under the Prohibition and Prevention of Money Laundering Act is a cognisable offence for purposes of the Criminal Procedure Code.²¹⁶ Thus, “where a person arrested under this Act is serving a sentence of imprisonment, or is in lawful custody, that person should, upon an order by a magistrate, be brought before that magistrate at such place as would be specified in the order for the purpose of investigations into the matter in respect of which the person is liable to be arrested under this Act.”²¹⁷

Also, “whenever an authorised officer has reasons to believe that there is reasonable cause to suspect²¹⁸ that in or on any premises there is concealed or deposited any property liable to seizure or forfeiture under this Act, or to which an offence under this Act is reasonably suspected to have been committed, or any book or document directly or indirectly relating to, or connected with, any dealing or intended dealing, whether within or outside Zambia, in respect of any property liable to seizure or forfeiture under the Act, or which would, if carried out, be an offence under this Act, the authorised officer may, with a warrant issued by a court of competent jurisdiction:

²⁰⁹ *Id.* § 19(1)(a).

²¹⁰ *Id.*

²¹¹ See *supra* section 13.0 for the statutory treatment of the term “regulated institution,” as provided for in Prohibition and Prevention of Money Laundering Act, *supra* note 3, § 2.

²¹² *Id.* § 19(1)(b).

²¹³ *Id.* § 19(2).

²¹⁴ *Id.* § 20.

²¹⁵ *Id.* § 21.

²¹⁶ *Id.* § 22(1). Section 28 adds that the Mutual Legal Assistance in Criminal Matters Act (1993) (Zambia) applies to offences under the Prohibition and Prevention of Money Laundering Act, except where provisions of the Mutual Legal Assistance in Criminal Matters Act are inconsistent.

²¹⁷ *Id.* § 22(2).

²¹⁸ See above for an insightful discussion regarding the meaning of “reasonable cause to suspect.”

- (a) enter the premises and search for, seize and detain any such property, book or document;
- (b) search any person who is suspected or connected with the offence, in or on the premises, and take that person into custody in order to facilitate the investigations;
- (c) arrest any person who is in or on the premises in whose possession any property liable for seizure or forfeiture under this Act is found, or whom the officer reasonably believes to have concealed or deposited the property;
- (d) break, open, examine, and search any premises, article, container or receptacle suspected or connected with the offence; or
- (e) stop, search and detain any conveyance.²¹⁹

Indeed, the above statutory provisions apply to money laundering offences predicated on insider dealing.

12.0 STATUTORY DUTIES OF SUPERVISORY AUTHORITIES IN THE PREVENTION OF MONEY LAUNDERING OFFENCES PREDICATED ON INSIDER DEALING

Under the Prohibition and Prevention of Money Laundering Act, where a Supervisory Authority, such as the Securities and Exchange Commission, obtains information that a business transaction indicates that a person has or may have been engaged in money laundering predicated on insider dealing, the Supervisory Authority should disclose or cause to be disclosed that information to the Anti-Money Laundering Investigations Unit.²²⁰ Section 2 of the Prohibition and Prevention of Money Laundering Act defines a business transaction as “any arrangement, including opening of a bank account, between two or more persons where the purpose of the arrangement is to facilitate a transaction between the two or more persons.”²²¹

As a general rule, the Supervisory Authority should not obstruct any investigation into money laundering that may be instituted by the Anti-Money Laundering Investigations Unit.²²² [“A]ny officer of the Supervisory Authority who is responsible for or causes the Supervisory Authority to obstruct such an investigation will be guilty of a criminal offence and liable, upon conviction, to a fine or a term of imprisonment, or to both.”²²³

Also, as noted earlier, all Supervisory Authorities are required by law to “issue such directives as may be approved by the Unit and which may be necessary for regulated institutions to apply in preventing and detecting money laundering.”²²⁴ So far, only the Bank of Zambia has issued these directives.²²⁵ But other Supervisory Authorities, including the Securities and Exchange Commission, should also issue their directives and ensure that those directives are adhered to by the institutions they regulate. Indeed, the issuance of such directives would help to strengthen the legal and regulatory framework

²¹⁹ Prohibition and Prevention of Money Laundering Act, *supra* note 3, § 23.

²²⁰ *Id.* § 12(1).

²²¹ *Id.* § 2.

²²² *Id.* § 12(2).

²²³ *Id.* § 12(3).

²²⁴ *Id.* § 12(4).

²²⁵ See *infra* text and accompanying notes.

for fighting money laundering in Zambia. Complex money laundering schemes, such as smurfing, cannot be easily captured by legislation alone. The Association of Certified Anti-Money Laundering Specialists observes: “[s]murfing is a commonly used money laundering method. It is a term widely used to describe a laundering scheme that involves criminals making multiple transactions of less than the reporting threshold in order to cause financial institutions to avoid filing currency transaction reports.”²²⁶

Given that the reporting threshold in different segments of the financial sector will obviously be different, and that these thresholds will normally be determined not only by legislation but also by different types of regulations set by the respective regulators in the respective segments of the financial sector, it is only best that the regulators themselves issue regulatory rules to fight sector-specific activities of money laundering. And these activities could involve smurfing. Relying solely on legislation as the only weapon to fight smurfing is not good enough. Indeed, the reporting thresholds in various segments of the financial sector tend to differ. For example, the banking sector may have different reporting thresholds from the insurance and pension fund sectors. Also, the securities industry may have its own reporting thresholds, as determined by the securities regulator. So, it is important that, in addition to what is contained in principal and secondary legislation, Supervisory Authorities issue their own directives to fight such activities of money laundering as are related to the type of businesses and financial institutions they regulate.

13.0 STATUTORY DUTIES OF REGULATED INSTITUTIONS IN THE PREVENTION OF MONEY LAUNDERING OFFENCES PREDICATED ON INSIDER DEALING

In Zambia, there are two major statutory duties of an institution regulated by such Supervisory Authority as the Securities and Exchange Commission. First, the regulated institution is under a statutory obligation to prevent offences of money laundering.²²⁷ In pursuing this goal, the regulated institution should:

- (a) keep an identification record²²⁸ and a business transaction record²²⁹ for a period of ten years after the termination of the business transaction so recorded;
- (b) report to the Unit where the identity of the persons involved, the circumstances of any business transaction or where any cash transaction, gives any officer or employee of the regulated institution *reasonable grounds to*

²²⁶ ASSOCIATION OF CERTIFIED ANTI-MONEY LAUNDERING SPECIALISTS (ACAMS), CERTIFIED ANTI-MONEY LAUNDERING SPECIALISTS (CAMS): EXAMINATION PREPARATION GUIDE 35 (2004).

²²⁷ Prohibition and Prevention of Money Laundering Act, *supra* note 3, §§ 2, 13.

²²⁸ An identification record is defined in the Prohibition and Prevention of Money Laundering Act as follows: “(a) Where the person is a corporate body, the details of - (i) the certificate of incorporation; (ii) the most recent annual return to the Supervisory Authority; or, (b) In any other case, sufficient documentary evidence to prove to the satisfaction of a financial institution that the person is who that person claims to be; and for these purposes ‘person’ shall include any person who is a nominee, agent, beneficiary or principal in relation to a business transaction.” *Id.* § 2.

²²⁹ *Id.* The Act states that a “business transaction record,” in relation to a business transaction, ‘includes - (a) the identification record of all the persons party to that transaction; (b) a description of that transaction sufficient to identify its purpose and method of execution; (c) the details of any bank account used for that transaction, including bank, branch and sort code; and, (d) the total value of that transaction.’”

*believe*²³⁰ that a money laundering offence is being, has been or is about to be committed;

(c) comply with any directives issued to it by the Supervisory Authority with respect to money laundering activities;

(d) permit any authorised officer with a warrant, upon request to enter into any premises of the regulated institution during working hours and inspect records suspected of containing information relating to money laundering;

(e) permit an authorised officer with a warrant to make notes or take any copies of the whole or any part of the record referred to in paragraph (d) and,

(f) designate an officer in each branch or local office to be responsible for reporting all transactions suspected of being related to money laundering.²³¹

Secondly, it is a requirement that a regulated institution should not “obstruct any investigations into money laundering that may be instituted by the Unit.”²³² A regulated institution that does not abide by the two statutory duties will be guilty of an offence and liable, upon conviction, to a fine.²³³ Where a regulated institution is guilty of an offence under the Prohibition and Prevention of Money Laundering Act “any officer or employee of the institution who is responsible for, or causes, the regulated institution to commit the offence will be guilty of an offence and liable upon conviction to a fine” or a term of imprisonment, or to both.²³⁴ Likewise:

In determining whether a regulated institution, officer or employee of a regulated institution has complied with the two statutory duties described above, a court can take account of the directives issued by a Supervisory Authority, such as the Securities and Exchange Commission, and which directives apply to that regulated institution, officer or employee of the regulated institution.²³⁵

14.0 CONCLUSION

This paper has examined the question whether insider dealing can predicate the offence of money laundering in Zambia. It was argued that, although responses to such a question may point to different answers in different jurisdictions, in Zambia, insider dealing is, first and foremost, a criminal offence covered by section 52 of the Securities Act. Secondly, it was noted that insider dealing can generate proceeds of crime. The paper demonstrated that while the offence of insider dealing *per se* may not predicate the offence of money laundering, the offence of money laundering would arise where inside dealing involves engaging, directly or indirectly, in a business transaction that involves property acquired with proceeds of crime, or receiving, possessing, concealing, disguising, disposing of or bringing into Zambia, property derived or realized directly or indirectly from illegal activity, or retaining or acquiring property knowing that the property is derived or

²³⁰ See *supra* section 11.1 for a fuller discussion of the phrase “reasonable grounds to believe.”

²³¹ Prohibition and Prevention of Money Laundering Act, *supra* note 3, § 13(1).

²³² *Id.* § 13(2).

²³³ *Id.* § 13(4).

²³⁴ *Id.* § 13(5).

²³⁵ *Id.* § 13(6).

realized, directly or indirectly from illegal activity. The paper provided a definition of money laundering, highlighting conceptual problems in defining terms such as knowledge, suspicion or reasonable grounds to suspect where an individual is expected to have formed an opinion that the crime of money laundering was about to or had taken place. It was pointed out that Zambia has an “all crimes” criteria of determining predicate offences of money laundering, and that such a criteria is grounded in the broad definition of illegal activities under section 2 of the Prohibition and Prevention of Money Laundering Act.²³⁶

Further, the paper examined and highlighted shortcomings of the simplistic approach of defining money laundering as a simple crime that occurs in three successive stages – that is, placement, layering and integration. It was pointed out that the regulatory and institutional framework should provide for the privacy and protection of whistleblowers who report suspicious transactions or suspicious activities of money laundering to a Money Laundering Reporting Officer or to the Anti-Money Laundering Investigations Unit. Further still, possible ways in which the legal framework for fighting money laundering in Zambia could be strengthened were explored, suggesting that Zambia should consider the introduction of techniques such as shifting the burden of proof from the prosecution to the accused and lowering the standard of proof from beyond all reasonable doubt to the preponderance of probability in criminal law cases of insider dealing and money laundering.

²³⁶ *Id.* § 2.

