HAS ANTI-MONEY LAUNDERING LEGISLATION IMPACTED LPP IN THE CARIBBEAN REGION?

INTRODUCTION

The rise of money laundering[1] activities globally has caused much concern and has given impetus to a series of initiatives among nations designed to curtail, if not eliminate, money laundering activities worldwide. One of the most efficient tools in combating serious and organized crime is targeting the proceeds of crime so as to deprive criminals of the benefits of their ill-gotten gains.

It has been recognised that money launderers have proven to be quite adept at moving and concealing huge sums of illicit currency across international borders through increasingly sophisticated combinations of techniques. These include the increased use of legal persons to disguise the true ownership and control of illegal proceeds, and an increased use of professionals to provide advice and assistance in laundering criminal funds.

It is within this context that Lawyers are now, perhaps somewhat inadvertently, at the forefront of the battle against money laundering. The confidentiality obligations of lawyers prove to be especially tempting to money launderers, as well as the advantage lawyers enjoy, in that, they usually do not attract the unwelcomed attention of the law enforcement authorities.

[1] The term 'money laundering' allegedly originated in a scam set up by Al Capone in Chicago in the 1920s in which he set up a Chinese laundry through which he passed the profits of criminal activities in order to disguise their origins. The term money-laundering nowadays means precisely that: disguising the origins of money, so that the profits of, for example, illegal drugs sales cannot be traced back to their origins.

In current world conditions, the practice of law is not as simple as it use to be and lawyers must now take responsibility so that they are not wittingly or unwittingly used as instruments of illegal activities such as money laundering. As Judicial Officers it is therefore imperative that we bestir ourselves and indulge in some serious reflection of the state of the law in our own countries in light of developments internationally and at home. This paper seeks to focus particular attention on anti-money laundering legislative measures in Jamaica/Caribbean, and the emerging challenges that they seem to pose for the legal profession, particularly as it relates to LPP (LPP)

WHAT IS Legal Professional Privilege

The practice of law was once revered as a noble profession, and lawyers were expected to keep the confidences of their clients and were honour bound to resist any attempt made by anyone to betray those confidences. This gave rise to the now enshrined common law practice of Legal Professional Privilege (LPP). The term LPP is not defined in any Jamaican legislation but the term has been mentioned in the ***Financial Investigations Division Act***[2] (**FIDA**) and th***e Proceeds of Crime Act***[3] (**POCA**). The concept of LPP has developed over time through decisions of courts and tribunals, i.e. the common law, and so the meaning, may only be derived from an application of common law principles.

LPP (LPP) grants protection from the disclosure of communications made to lawyers by clients. It is a right that attaches to the client (**not to the lawyer)** and so may only be waived by the client. The privilege is absolute, in the sense that once it is established, it may not be weighed

[2] Section 17(5).
[3] Section 105.

against any other countervailing public interest factor, but may be overridden expressly by statute. The privilege is regarded as a fundamental principle of justice.

Rationale for LPP

LPP encourages full and frank disclosure by clients to their lawyers and, thereby, serves the public interest in the administration of justice.

The protection granted by LPP ensures that people are able to seek and obtain:

- legal advice in the conduct of their affairs; and
- Legal assistance in and for the purposes of the conduct of actual or anticipated litigation, without being concerned about prejudice they may suffer if those communications are subsequently disclosed.

The scope of LPP

There are two forms of LPP, which apply to differing groups of people:

- Legal Advice Privilege

Legal Advice Privilege protects confidential communications between lawyers and their clients for the purposes of giving or obtaining legal advice.

- Litigation Privilege

Litigation Privilege protects confidential communications between lawyers, clients and third parties made for the purposes of litigation, either actual or contemplated.

General requirements for LPP

A claim of privilege to resist the production of documents should be made clearly and precisely. An assertion that a document is protected by privilege will not, on its own, be enough. The person claiming LPP has

the onus of proving that the claim is valid and must provide sufficient information to enable the Court to determine whether a particular document will be privileged. The following information is required to make an informed decision:

- a clear description of the communication, including the date on which it was made (e.g. fax from...to...regarding...dated...); and
- Justification of the claim for privilege.
- Each document must satisfy all the elements of privilege to justify the claim for non-disclosure:
    - there must be a lawyer–client relationship;
    - the privilege must be claimed for a confidential communication between a client and lawyer, or with a third party for the benefit of the client;
    - for providing legal services in respect of actual or anticipated legal proceedings; and
    - the communication must have been made for the dominant purpose of obtaining or giving legal advice.

Where a communication has been brought into existence for more than one purpose, the person claiming the privilege must establish that the dominant purpose is for legal advice or litigation. The person claiming privilege does not have to give information that would reveal the content of the document, but should provide sufficient evidence to demonstrate objectively that the claim is valid. The existence of LPP is not established merely by the use of verbal formula. Nor is a claim of privilege established by mere assertion that privilege applies to particular communications or that communications are undertaken for the purpose of obtaining or giving ‘legal advice’.

In practice, when considering documents on a legal file, advice privilege may apply to the following communications:

- records of client meetings
- file notes of phone calls with clients
- legal advice
- correspondence seeking or providing instructions exchanged between lawyer and client.

It may be necessary to examine the terms of the legal adviser's retainer to determine whether those communications attract advice privilege.

Litigation privilege attaches to communications that are made:

- for the purposes of litigation that is reasonably anticipated or already commenced
- at the request or suggestion of the legal adviser or, even without any such request or suggestion, for the purpose of being put before the legal adviser to obtain advice or to enable the legal adviser to prosecute or defend an action.

The dominant purpose is *'the ruling, prevailing or most influential purpose* for which a document is brought into existence. Dominant purpose has been distinguished from the "primary" or "substantial" purpose. While there may be several purposes for a document's creation, only one of those purposes will be the dominant one. If there are two (or more) purposes of equal importance, no one purpose can be said to be the dominant purpose.

The purpose for which a document is brought into existence is a question of objective fact, which is to be determined by reference to:

- evidence
- nature of the document
- submissions from the parties.

Evidence of the intended use or uses of the document by the person who created it or the person who sought its creation is relevant, but not determinative.

The time at which the dominant purpose is to be determined is generally the time at which the document is brought into existence, not the time of its communication. (**Example:** where a client has received advice from a third party, such as an accountant, privilege will not extend to that advice simply because it is "routed" onto the legal adviser for their information but without a corresponding request for legal advice).

Where privilege does not apply

Even where the four elements examined above are established, communications may not be subject to LPP because:

- privilege has been waived, either expressly or impliedly; or
- the improper purpose exception applies.

Illegal or improper purpose

At common law, privilege will not be available where a communication is made in furtherance of an illegal or improper purpose, i.e. a purpose that is contrary to the public interest. It is immaterial whether or not the legal adviser knows of that purpose. This is known as the **improper purpose exception**. In the words of Kekewick J. "… long experience has shewn that it is essential to the due administration of justice that [the] privilege should be upheld. On the other hand where there is anything of an underhand nature or approaching to fraud, especially in commercial

matters where there should be the veriest of good faith, the whole transaction should be ripped up and disclosed in all its nakedness to the light of the Court", (***Williams v Quebrada Railway, Land and Copper Company*** [1995] 2 Ch 751).

For the purpose of the illegal or improper purpose exception, a distinction must be made between a communication made for the purpose of being guided or helped in achieving an illegal or improper purpose, which is a non-privileged communication, as compared with a communication made for the purpose of seeking advice in relation to past conduct, which may be a privileged communication.

In determining whether the improper purpose exception applies, the following considerations will be relevant:

- there must be *prima facie* evidence (sufficient to afford reasonable grounds for believing) that the relevant communication was made in preparation for, or furtherance of, some illegal or improper purpose;
- only communications made in preparation for, or furtherance of, the illegal or improper purpose are denied protection, not those that are merely relevant to it. In other words, it is not sufficient to find *prima facie* evidence of an illegal or improper purpose. The evidence must show that the particular communication was made in preparation for, or furtherance of, an illegal or improper purpose;
- knowledge, on the part of the legal adviser, that a particular communication was made in preparation for, or in furtherance of, an illegal or improper purpose is **not**

necessary, however, such knowledge or intention on the part of the client, or the client's agent, is required.

The person alleging that privilege has been displaced by reason of an alleged illegal or improper purpose must show that it is made out in the current circumstances. Also, in establishing improper purpose, the standard of proof is high[4]. Sufficient evidence to at least make out a prima facie case would be required as it is a serious thing to override LPP where it would otherwise be applicable and as a result, vague or generalised contentions of crimes or improper purposes will not suffice.

THE IMPACT OF MONEY LAUNDERING INITIATIVES ON LPP

The international community has focussed its attention on the issues of financial investigations and the confiscation of the proceeds of crime geared towards the prevention and prosecution of money laundering, etc. The Group of Seven industrialized nations (G-7) met at the Summit held in Paris in 1989 and created the Financial Action Task Force on money laundering (FATF).

The FATF is an intergovernmental policymaking entity tasked with developing world-wide effective measures to combat money laundering. Aside from reviewing money laundering techniques and devising appropriate counter-measures, the FATF also monitors members' progress in implementing anti-money laundering mechanisms, encourages other countries to adopt their anti-money laundering methods, and collaborates with other international bodies involved in anti-money laundering operations.

[4] The courts require prima facie evidence before LPP can be displaced, see**, *O'Rourke v Derbyshire*** [1920] AC 581]; ***Derby & Co Ltd v Weldon (No 7)*** [1990] 3 All ER 161. The sufficiency of that evidence depends on the circumstances: it is easier to infer a prima facie case where there is substantial material available to support an inference of fraud.

Pursuant to its functions, the FATF in 1990 issued forty (40) recommendations to assist in combating money laundering. The "40 Recommendations" have since been updated to reflect changes in money laundering techniques. These Recommendations have been endorsed by over 130 countries and are the international anti-money laundering standard. Although non-binding, the members[5] of FATF are enjoined, if not expected, to implement the 40 Recommendations through national law, regulations and administrative practice. Significant among these Recommendations are the Customer Due Diligence (CDD) and record keeping requirements set forth under Recommendation No. 5 and filing of Suspicious Transaction Reports (STR) under Recommendation No. 13.

What makes these particular recommendations controversial[6] is the fact that compliance therewith is extended to professional advisers, including lawyers. There is however a caveat that "Lawyers, notaries, other independent legal professionals, and accountants acting as independent legal professionals, are not required to report their suspicions, if the

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5 Caribbean Financial Action Task Force (CFATF) is an associate member of FATF, there was an initial black list published in 2000 of uncooperative countries in which Cayman Islands, Dominica, St. Kitts & Nevis and St. Vincent and the Grenadines made an appearance, in 2001 Grenada made it on this listing. The list has been updated several times and after the 8th review in 2007 no countries were listed as such. There is still concern about implementation of recommendations and policies and at times Caribbean countries still make debuts on the OECD's grey list (international tax standards) this has included Antigua & Barbuda, The Bahamas, Barbados, British Virgin Islands, Cayman Islands, Dominica Grenada, St Kitts and Nevis, St Lucia, St Vincent and the Grenadines.

6 There has been tremendous opposition to the Second EU Directive by the legal profession. The Belgian Bar, for example, claimed it was anti-constitutional and in July 2001 the Belgian courts referred the issue of its compatibility with the right to a fair trial to the European Court of Justice. The French Bar has petitioned the European Parliament on the reporting obligations of lawyers while the Polish Bar has issued challenge in its national courts to determine whether some of the regulations are consistent with the Polish constitution. See article*, Gatekeepers or Policemen? Third Money laundering Directive a step too far, International Bar News*, October 2005, p 5. The Canadian Proceeds of Crime (Money Laundering Act 2000, c 17) was challenged in the British Columbia Supreme Court, where interlocutory relief was granted on the basis that there was a constitutional issue to be determined regarding whether the Act violated the independence of the Bar, in March 2003 the Canadian government rescinded the Gatekeeper Initiative.

relevant information was obtained in circumstances where they are subject to professional secrecy or LPP".

In 2001 the Financial Action Task Force, (FATF)[7] depicted lawyers as potential "gatekeepers" to money laundering and terrorist financing efforts, due to the varied nature of services they provide to their clients. In the FATF Report on Money Laundering Typologies 2000-2001[8], the FATF stated that lawyers are vulnerable to complex money laundering schemes due to their ability to easily switch between advising on financial and fiscal matters, establishing trusts and corporate entities and completing property and other financial transactions, such as investments. Additionally lawyers are sometimes seen as the authenticity for other professionals when a client is referred to them, confirming their supposed "legitimacy" by association.

The response in Europe to the concerns highlighted by the FATF was to enact a Second Money Laundering Directive[9], imposing anti-money laundering obligations set out in the First Directive (suspicious transaction reporting, client due diligence checks, record keeping and international co-operation) on legal professionals assisting in the planning or execution of client transactions, including property transactions, the management of client money or other assets and the creation of companies and trusts.

The Second Directive had a significant impact on LPP for all lawyers operating within the European community. Its result was to place a wide-

[7] The FATF-XII Report on Money Laundering Typologies (2000-2001)
[8] The Financial Action Task Force on Money Laundering (FATF) held its annual meeting of experts on money laundering methods and trends on 6th & 7th December 2000. The group of experts met in Oslo, Norway under the chairmanship of Mr. Lars Oftedal Broch, Supreme Court Judge.
[9] The Council of the European Communities (ECC), Council Directive 91/308/EEC of 10 June 1991 on prevention of the use of the financial system for the purpose of money laundering (O.J*. 1991 L 166, p. 77), as amended by Directive 2001/97/EC of the European Parliament and of the Council of 4 December 2001 (O.J. 2001 L 344, p. 76).
*Official Journal of the European Communities

ranging limit on the protection afforded previously to the lawyer-client relationship. Many Member States took advantage however of the caveat created by Article 6(3)[10] of the Directive which provided that LPP would only be "broken" where the legal professional was not providing advice to the client with a view to legal proceedings. The subsequent variation in practice did cause some difficulties and the result was a number of cases brought before the Courts demanding some clarification of the true position. The limiting effect of the Second Directive is neatly demonstrated in the following decision.

In Case C-305/05, *Ordre des barreaux francophones and germanophone & Others v Conseil des Ministres (ECJ, Grand Chamber) (26 June 2007) (unreported)*[11]

The ambit of LPP (LPP) was contested in this case and the ECJ's Grand Chamber reviewed the legality of the obligation on Lawyers to inform and cooperate with competent authorities, which is imposed on the legal profession by Directive 91/308/EEC (the 1991 Directive) in respect of money laundering. The ECJ's decision based on a restricted understanding of LPP found the obligation to disclose information concerning money laundering consistent with LPP. It determined the protection offered by LPP to be limited by reference to the right to fair trial guaranteed by Article 6 of the European Convention on Human Rights (ECHR).

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[10] "In the case of the notaries and independent legal professionals referred to in Article 2a (5), Member States may designate an appropriate self-regulatory body of the profession concerned as the authority to be informed of the facts referred to in paragraph 1(a) and in such case shall lay down the appropriate forms of cooperation between that body and the authorities responsible for combating money laundering. Member States shall not be obliged to apply the obligations laid down in paragraph 1 to notaries, independent legal professionals, auditors, external accountants and tax advisors with regard to information they receive from or obtain on one of their clients, in the course of ascertaining the legal position for their client or performing their task of defending or representing that client in, or concerning judicial proceedings, including advice on instituting or avoiding proceedings, whether such information is received or obtained before, during or after such proceedings".

[11] (2008) 27 Civil Justice Quarterly.

In reaching its decision the ECJ recognised the importance of protecting the confidentiality of lawyer/client communications, at the same time; however, it significantly limited the scope of LPP only to the context of judicial proceedings. The ECJ went on to confirm that it was limiting LPP to judicial proceedings and explained that the 1991 Directive imposed a disclosure obligation on lawyers outside the context of judicial proceedings only, and that these obligations were therefore in conformity with the guarantees enshrined in Article 6 ECHR. While Article 2a (5) of Directive 91/308 imposes obligations of information and cooperation upon lawyers only in so far as it relates to advising clients in the preparation or execution of certain transactions – essentially those of a financial nature or concerning real estate. As a rule, the nature of such activities is such that they take place in a context with no link to judicial proceedings and, consequently, those activities fall outside the scope of the right to a fair trial.

In addition to financial institutions, the FATF Recommendations also affected a number of designated non-financial businesses and professions (DNFBPs). Guidance for legal professionals was formulated and after much international consultation with both public and private sectors, the FATF at its October 2008 Plenary, adopted a 'Guidance' for such persons. The Guidance it is to be noted is not mandatory. The provisions contained in this Guidance, when applied by each country, are subject to professional secrecy and LPP. As is recognised by the interpretative note to the FATF Recommendation 16, the matters that would fall under LPP or professional secrecy and that may affect any obligations with regard to money laundering and terrorist financing are determined by each country. Likewise, ethical rules that impose obligations, duties, and

responsibilities on legal professionals vary by country. It is against this background that Jamaica and other Caribbean States declined to impose mandatory statutory disclosure obligations on lawyers.

Notwithstanding the discretionary nature of the ***Guidance***, all member states of FATF are obliged to give effect to the directives by implementing necessary domestic laws, and so too are Caribbean Countries because under CFATF[12] we are associate members. There has been compliance as a general rule but as it relates to lawyers and LPP, this has given rise to variations of the Directive. In the UK, for example in terms of the Proceeds of Crime Act, 2002, solicitors are obliged to report if they "know or suspect" or have "reasonable grounds for knowing or suspecting that another person is engaged in money laundering", if the information on which his knowledge or suspicion is based came to him "in the course of a business in the regulated sector. Tipping off is criminalised in the UK as also in South Africa, whereas lawyers in Austria, are permitted to disclose to their clients that a suspicious transaction report has been filed. Similarly, in Ireland a solicitor is not specifically prohibited from informing his client that he will cease to act because he was unhappy with the transaction.

CFATF has recommended that "[t]he fact that a person acting as a financial advisor or nominee is an attorney… should not in and of itself be sufficient reason for such person to invoke an attorney-client privilege,

[12] The Aruba Conference on Money Laundering in June 1990 produced 21 recommendations. These and 19 which were adopted at the Kingston Ministerial Meeting on Money Laundering in November 1992. During Council IV (held in Cayman Islands) it was decided to endorse the Revised 40 FATF Recommendations. A working group examined the impact of these revised Recommendations on the CFATF 19 Recommendations and Council V (held in the British Virgin Islands, October 20th, 1999) decided to modify some of the CFATF 19 Recommendations.

or any other confidentiality clauses"[13] , none the less, Jamaican/Caribbean lawyers are keeping a strict adherence to their common law duty to keep the affairs of their clients confidential. Common Law jurisdictions have traditionally been resistant towards modifying the current anti-money laundering legislation to impose obligations upon lawyers, because they regard trust and confidence as the keystone principles to the lawyer/client relationship. These would be eroded significantly, if lawyers were required to reveal information to third parties relating to their clients, and particularly based upon mere suspicions. A client must feel free to seek legal assistance and be able to communicate with his legal representative fully and frankly. It is not surprising therefore that all attempts to date to include lawyers within the scope of anti-money laundering legislation have resulted in lawyers having the option as to whether or not to disclose that their client is involved in suspected money laundering activities.

None the less anti-money laundering initiatives are here to stay and all countries must make provision to implement them. In Jamaica, domestic legislations involving disclosure are not mandatory for lawyers; the provisions are couched in oblique language[14] making the obligation somewhat discretionary; the two significant legislations are the ***Financial Investigation Division Act (*FIDA)** and The **Proceeds of Crime Act (POCA).**

[13] REVISED CFATF 19 RECOMMENDATIONS, October 20th, 1999.

[14] See section 92 (1) of POCA, this provision encompasses facilitators or outsourced launderers, that is any person who provide assistance to criminals who wish to hide their ill-gotten gains. Lawyers and financial service providers would be caught by this provision if they acted with the requisite state of mind.

HOW DOES MONEY LAUNDERING OFFENCES UNDER POCA AFFECT LAWYERS.

Section 92(2) of POCA, creates an offence where a person enters into or becomes involved in an arrangement that facilitates the acquisition, retention, use or control of criminal property by or on behalf of another. It therefore means the offer of **ANY** kind or type of service on behalf of persons who proceed to use these arrangements to acquire property constituting criminal property can expose lawyers to liability under this section of the POCA. The penalty on conviction in the case of an individual is a fine not exceeding $3million and/or imprisonment for a term nit exceeding five (5) years, in the case of a body corporate, a fine not exceeding $5million. The term any kind/type of service contemplates activities such as the sale and purchase of real estate and since this is a common activity of many law practice it is quite obvious how lawyers can be easily affected by this.

Section 93 (1) of the POCA makes it an offence where a person acquires, uses or has possession of criminal property and the person knows or has reasonable grounds to believe that the property is criminal property. Interestingly; this very section provides that any Attorney at law receiving bona fide legal fees for legal representation does not commit any offence. Does this mean therefore that fees paid to lawyers could be contemplated as criminal property? And if yes what fees are or does not constitute bona fide legal fees? Think on these things.

Section 94(2) Failing to make the requisite disclosure within the stipulated timeframe in circumstances where there is knowledge or belief that another person has engaged in a transaction that could constitute or be related to money laundering, and this knowledge or belief arose in the

course of a business in the regulated sector;(STR obligation) does this section contemplate lawyers? Yes it does.

Section 105 of ***POCA*** makes provision for disclosure of information to be made to an authorized/appropriate officer**; section 17** of ***FIDA*** is also in similar terms for production and inspection orders. A disclosure order can be made against a person who appears to be in possession or control of the information or material[15], subject of course to all other criteria of the legislation being fulfilled and any other public interest consideration.

The phrase "a person… [who] appears to be in possession of the information or material" encompasses real and artificial persons and most definitely lawyers. Parliament, however, did not leave lawyers devoid of all protection as there are caveats within both ***POCA and FIDA***; that "information subject to LPP" is not required to be produced under a disclosure/production/Inspection order. There is also a provision made under ***POCA pursuant to section 115*** for a search and seizure warrant to be issued by a Judge; usually but not limited to circumstances where there has been nom-compliance with a production/disclosure order. The warrant likewise is subject to a caveat and does not authorise the seizure of information or material subject to LPP[16].

Lawyers may also have a duty of disclosure to their clients; however, ***POCA*** prohibits disclosure of information in circumstances amounting to "***tipping off***" and where such disclosure is likely to prejudice an existing or proposed investigation. In order to protect the investigative process,

[15] Section 105 (2) (d)

[16] It is to be noted that criminal prosecution can be brought against persons for non-compliance of a disclosure order made under POCA, "unless the person has a reasonable excuse", see section 112 of the Proceed Of Crime Act, 2007 [JA]. A conviction of such an offence attracts a maximum fine of JA. $1,000, 000 and or a maximum term of imprisonment of 12 months.

POCA has created the offence of tipping off.[17] In the provision if any person (including a lawyer) knows or has reasonable grounds to believe that a disclosure under **section 100** (i.e. a protected or authorized disclosure) was made and he/she makes a disclosure which is likely to prejudice any investigation that might be conducted because of the disclosure, that person commits an offence. Similarly, if a person knows or has reasonable grounds to believe that the enforcing authority is acting or proposing to act in connection with a money laundering investigation, which is being, or about to be, conducted and he/she discloses information or any other matter relating to the investigation to any other person, then that person commits an offence.

THE CRUCIAL QUESTION NOW ARISES; HOW DOES LLP AND POCA/FIDA CONCERN US?

We are, at the core, all lawyers and as judicial officers we are repeatedly called upon to make pronouncements on the provision of the various statutes and to balance the competing interests of all concerned parties. It is, therefore, incumbent upon us all to be aware and sensitized not only in relation to statutory provisions but also in relation to ever changing world trends and opinions. In my judicial capacity I was recently called upon to justify a production order I had granted in favour of the FID, pursuant to ***section 17 of FIDA***. The order was directed to a firm of Attorneys-at-Law and required them to disclose to a named officer of FID; a number of conveyance documents and other documents relative to one of their clients. The client was under investigations for fraud and larceny and the FID investigators had provided cogent evidence to support their suspicion that the proceeds of the criminal offences had been funnelled into the conveyance transaction. The lawyers sought to resist the production of

[17] Ibid, section 97.

the documents on the basis of LPP and further sought to impugn the efficacy of the production order alleging the following:

- The order was made *ex parte* and therefore the onus of proof was upon FID to prove that LPP did not attach;
- That although the Statute provided that an application for a production order "shall be made without notice" (ex parte) this provision was merely directory and it was "irregular and improper" for the Court to grant the order in the absence of any basis being established by FID, (e.g. urgency); and
- The offence of 'money laundering' no longer existed because the Money laundering Act had been repealed.

This matter is currently before the Court of Appeal, I look forward to their decision on the several issues raised by the Appellant and perhaps some guidance as to LPP in the wake of ***POCA***, as currently, the court's jurisprudence does not provide an adequate framework for addressing the multitude of issues that currently exist and that are likely to arise regarding the Privilege.

CONCLUSION

So in the Caribbean has anti-money laundering provisions made any impact on LPP? My humble view is that it has not made much of an impact. Many Lawyers within the Caribbean jurisdictions, including Jamaica, are still unwilling to dilute the long standing common law doctrine of LPP which affords an appreciable degree of protection to their clients. In particular the legislature in Jamaica has not taken any definitive measure to deal with designated non-financial businesses and professions[18]; including lawyers. On the contrary, the Jamaican POCA

[18] Recommendation 24 CFATF, in March 2009 in a follow up report Jamaica was deemed as been non compliant re the regulation, supervision and monitoring of DNFBPs.

provides a defence and exception to the requirement to report suspicious transactions where lawyers are concerned. Under sections 94 (5) (b), 94 (8) and 97 of the POCA, lawyers are not required to disclose information received in privileged circumstances, if the information is communicated:

- By, or by a representative of, a client of his in connection with the giving by the lawyer of legal advice to the client;
- By, or by a representative of, a person seeking legal advice from the lawyer; or
- By a person in connection with legal proceedings or contemplated legal proceedings.

NB: The only exception is in those circumstances where the information was communicated with the intention of furthering a criminal purpose. Additionally, section 117 of the POCA provides that a search and seizure warrant does not confer the right to seize any information or material that a person would be able to refuse to produce on the grounds of legal professional privilege in proceedings in the Supreme Court.

Additionally the Courts in the Caribbean, certainly in Jamaica; have demonstrated a willingness to speak clearly in defending the importance of LPP; to date; courts have generally been receptive to the arguments submitted in favour of its preservation[19]. However, it would be a mistake

[19] Case in point Attorney General et al v The Jamaican Bar Assoc. et al, SCCA nos.96, 102 & 108/2003; 213/2003 and 238/2003 delivered – Dec 14th 2007. In this case, on January 27 and 28, 2003 the offices of attorneys-at-law Ernest Smith and Hugh Thompson were searched and several documents seized. The police said the search was to assist the Canadian Government in its investigation of drug-related and money-laundering charges preferred against Robert Bidwell. Mr. Bidwell was a Canadian national whose extradition from Jamaica was requested by Canada, to face the charges. Following the searches, the Jamaican Bar Association and the two lawyers filed motions in the Supreme Court; they are seeking several declarations, one of which is that there was a breach of the confidentiality which exists between lawyers when the offices were searched and files removed. The motions were consolidated and on 31st October 2003, the Full Court sitting of the Supreme Court ruled that the searches of two lawyers' offices conducted by police teams earlier this year did not constitute a breach of attorney-client privilege and that the warrants complied with statutory requirements, were lawfully issued, and were indeed valid. The provision of the Mutual Assistance (Criminal Matters) Act did not offend the constitution and therefore enabled a search of the lawyers' offices. The Court of

to think that the law and the practice relating to the Privilege are static. As the European experience on interventions by governments demonstrate, legislative intrusions on the Privilege are frequent, and possibly will become more so. We live in an increasingly globalized legal world and the Caribbean common law on the Privilege now differs in significant respects from other jurisdictions which are important in terms of their influence on Caribbean law (e.g. decisions from the Privy Council no doubt coloured by their EC obligations).

In the decision of ***, Ordre des barreaux francophones and germanophone & Others v Conseil des Ministres*** , the ECJ did not examine the aspects of how LPP promotes the proper administration of justice and the rationale which underlies LPP as it is known in a common law[20] context. That Court has grounded the Privilege on a clearly-articulated rights basis, and by so doing, it has enabled the Privilege to be more easily overcome by "public authority" exceptions. As a result, domestic laws drafted to fight terrorism and organized crime have allowed for increasing intrusions into rights to privacy protections[21]. In applying a proportionality analysis, the ECHR has been more willing to balance public need against the Privilege in a way that is generally foreign to the English common law courts. Thus, it appears that the ECHR approach is to interpret the convention as "a search for a fair balance between the demands of the general interest of the community

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Appeal ruled in December 2007 that the search and seizure were unlawful and were in breach of legal professional privilege.

20 See for example the House of Lords' decision in Three Rivers District Council and Others v. Governor and Company of the Bank of England (No 6) [2004] 3 W.L.R. 1274.

21 Article 8 of the European Convention on Human Rights – "Rights to privacy".

and the requirements of the protection of the individual's fundamental rights."[22]

In the United Kingdom, the Privilege remains a common law doctrine which the courts have been vigilant in protecting, however, under parliamentary supremacy, Parliament can and has expressly abrogated the Privilege. Demonstrative of this is the attitude is the stance taken in setting up the Iraq Inquiry. The UK government of former Prime Minister Gordon Brown broadly waived the Privilege and as a result senior government legal advisers have testified as to the legal advice that they provided regarding the legality of the war. A more memorable attack on the Privilege occurred a month after 9/11; when the then Attorney General of the USA, Ashcroft, issued a Bureau of Prisons Order which allowed for the monitoring of attorney-client conversations in federal prisons on the standard of "reasonable suspicion . . . to believe that a particular inmate may use communications with attorneys or their agents to further or facilitate acts of terrorism."[23]

Finally, changes in society and in the practice of law will generate more questions for LPP than answers; a fundamental question that we, as a profession, have to face is whether the doctrine of the Privilege will adapt to new circumstances or whether lawyers' behaviours will have to adapt to deal with the strict rules of the Privilege. The challenge for us is to consider how this ancient concept which is a fundamental part of the administration of justice should apply and adapt to the changes of the 21st century.

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22 Ursula Kilkelly, The Right to Respect for Private and Family Life: A Guide to the Implementation of Article 8 of the European Convention on Human Rights (Strasbourg: Directorate General of Human Rights Council of Europe, 2003), note 147 at 31.

23 *National Security; Prevention of Acts of Violence and Terrorism*, 66 Fed. Reg. 55,062 (Oct. 31, 2001) (codified at 28 C.F.R. §§ 501.2, 501.3 (2003).

Presented by: Georgiana Fraser
Senior resident Magistrate [JA].
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