These notes should be appended behind the case study for your information.

Question 1

What options are available in your jurisdiction when a suspicious activity report (or report with similar purpose) is made to the police regarding monies linked to overseas jurisdictions? Does your jurisdiction have any provisional freezing measures, such as the moratorium period?

It is an offence in the UK (under section 328 Proceeds of Crime Act 2002) to enter into or become concerned in an arrangement suspected to facilitate (by whatever means) the acquisition, retention, use or control of criminal property by or on behalf of another person. A bank would therefore commit an offence if it allowed ordinary banking business to be conducted in respect of funds suspected to be criminal property. That is, however, subject to the bank making an authorised disclosure (i.e. a Suspicious Activity Report) and then receiving the appropriate consent from the UK-FIU. If consent is refused, the 31 day moratorium period is triggered. The **moratorium period** provides the UK investigative authorities with an opportunity to investigate the suspicions raised by the institution and to decide how best to proceed.

If it is considered appropriate to begin a domestic investigation, then usually the relevant prosecuting authority (e.g. the CPS) will apply for a restraint order to freeze the assets in question.

However, in the instant case It was decided that it would be more prudent to invite the overseas state to send a Letter of Request inviting the UK to restrain S from dealing with the accounts as the overseas state already had full knowledge and conduct of the matter and a criminal investigation had already begun. However, in other overseas money laundering cases, where there is either insufficient evidence to proceed to criminal proceedings in the overseas jurisdiction or in the event of an acquittal following a trial, it is certainly open to the UK to begin its own domestic prosecution, providing of course there is sufficient evidence.

Question 2

Does your legislation permit consequential freezing requests in third jurisdictions? To freeze property pursuant to an external request, does the property have to be physically located within your jurisdiction or is it sufficient if it is controlled from within your jurisdiction?

Currently, UK legislation does not permit consequential freezing requests in third jurisdictions. When a restraint order is granted pursuant to an external

request the restraint order does not extend to any jurisdiction other than that of **England and Wales**. This is in contrast to the position in domestic restraint proceedings.

Property has to be located in England and Wales in order for the Court to have jurisdiction to grant the restraint order pursuant to an external request. In the instant case a distinction was drawn between the concepts of "**control**" and "**location**." The CPS took the view that "control" was simply not sufficient for the purposes of UK legislation and so the Letter of Request did not invite the UK to restrain any the monies physically located outside the jurisdiction.

It should be noted that the correct legislative interpretation of the phrase, "located in England and Wales", is likely to be considered by the UK House of Lords very soon in respect of a different case (*King* v *SFO*).

Question 3

What are your disclosure duties when making the application to effect an external request?

Whenever an application is made for restraint or receivership and particularly in an application for ex parte relief, there is a stringent requirement of **full and frank disclosure** of all material facts whether or not they support the application. It should be noted that the duty extends to all matters which *ought* to have been known to the applicant if all proper enquiries had been made prior to making the application. This is an established principle of English common law but there have been two reported international request cases dealing in part with this issue: *India* v *Ottavio Quatrocchi* [2004] EWCA Civ 40 and *SFO* v *A* [2007] EWCA Crim 1927. However, in neither cases did the court find that the allegation of failure to disclose material was made out to the extent that the restraint order should be discharged.

In *Quattrocchi* the Court of Appeal dismissed the defendant's appeal against the refusal of the Crown Court judge to discharge the restraint order granted pursuant to an external request from the Government of India. The Court of Appeal noted that non-disclosure in itself is not a bar to the granting of a restraint order so long as the disclosure did not go to a central matter.

SFO v A concerned an external restraint order made under the 2005 Order pursuant to a request originating from the Military Branch of the Judicial Organisation in Iran. The Crown Court discharged the order on grounds of alleged non-disclosure. The Court of Appeal quashed the order discharging the restraint order. The Court noted:

> Plainly, in order to provide any ground for discharging the initial order which has been obtained without notice to the suspect, any non-disclosure must be material, that is to say it must be something which would have affected the Judge's decision on the application. If there has been a material failure of disclosure, that may justify discharging any order, but it need not do so. The proper approach is to consider whether the public interest does or does not call for the order to stand, now that the true position is known, and taking into account the previous failure of disclosure. Whether the non-disclosure was deliberate or accidental will be a material factor, although not necessarily determinative. ...(para 18)

The Court then remitted the application for discharge back to the Crown Court for rehearing. The application for discharge was reheard (under the name of Al Zayat [2008] EWHC 315 Crim). The application to discharge the restraint order was dismissed.

In the instant case outlined in the case study it was appropriate to attach the letter of request to the application although that is not necessary in most cases and it is certainly not standard practice in the UK. The idea was to

ensure that the CPS did not inadvertently mislead the court as to the state of proceedings and criminal conduct alleged in the requesting state.

Question 4

What challenges may be made in your proceedings to freeze pursuant to an external request or enforce an external order?

The challenge to the order in the instant case is made on two basic grounds. The first ground is that the overseas authority that made the request had no jurisdiction, under the law of the requesting state, to make a request to the UK for the freezing of assets and hence the resulting letter of request was not an external request as defined by POCA. This is essentially a "jurisdictional" attack on the order.

The CPS will argue that whether the request is *ultra vires* the laws of the requesting state is actually irrelevant. What counts is whether the requirements of the UK legislation have been satisfied. So long as the overseas authority represents itself as being able to make the request on behalf of the requesting state (i.e. the definition of an "overseas authority" in the 2005 order), then that meets the UK test and the issue should not be

taken any further. In any event, if a challenge is sought on the basis that the request is unlawful under the requesting state's domestic law then the challenge should be made in the requesting state. Having said that, the CPS have obtained a expert's legal opinion to deal with merits of the challenge. This was thought prudent in case the UK court does wish to at least consider the requesting state's law more fully.

The second part of the challenge is that there are no circumstances justifying the making of an order, in the requesting state, for the recovery of assets. This is essentially an attack on the merits of the criminal case against the alleged offender.

Question 5

What use can be made by the requesting state of witness statements (or information contained in those statements) served by the applicants in the course of their application to discharge the restraint order?

This is an issue that has already arisen in our case. The concern of the applicants was that in the process of mounting the challenge they would expose themselves to further criminal investigation by the requesting state.

They therefore wished to have a blanket protection so that the statements could not be used for any purpose other than the restraint proceedings.

The CPS agreed that such protection should be provided but only to the extent provided by UK legislation, which reserves the right of the UK court to give permission to allow such material to be used for other purposes. It should be noted that this position is different to the speciality rule, which prevents one state from using evidence obtained as a result of a mutual legal assistance request to another state for any purpose other than that *disclosed in the letter of request*.

A written undertaking was also sought (and obtained) from the requesting state to honour the protection offered.

Question 6

Who bears the costs of freezing/ enforcement in your jurisdiction pursuant to an external request for assistance? Can costs issues ever be a bar to providing assistance to another jurisdiction? How are costs issues in mutual legal assistance cases resolved in your jurisdiction?

Ordinarily the requested state should bear the burden of the costs of effecting the request but of course it is open for states to agree a different position, for instance as envisaged by Article 18(28) of the UN Convention against Transnational Organized Crime (Palermo Convention, 2000). In cases of an extremely complex or serious nature or of a high-risk level, this course may well be appropriate.

For instance, if a successful application is made in the UK to discharge a restraint order, it is likely that the losing party (e.g. the CPS) would have to pay the winning party's legal costs. In cases where substantial legal costs are likely to be incurred, the UK may invite the requesting state to agree to indemnify the UK for any legal costs ordered to be paid to by the UK to the winning party. Indeed in the instant case such an indemnity has been provided by the requesting state.

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