TIPPING OFF

1. Tipping off is an offence many financial institutions and lawyers are concerned about committing. Thousands of hours have been committed to consultations on whether a firm or an individual is likely to be committing the offence.

2. The idea of an offence of tipping off is not new. The provisions contained within the Proceeds of Crime Bill 2008 replace the former Isle of Man tipping off provisions contained within the Criminal Justice Act 1990. The UK, similarly, had legislation containing tipping off provisions prior to its Act of 2002. The provisions reflect European Directives on the prevention of the use of the financial system for the purpose of money laundering and terrorist financing.

3. The new provisions are contained within clauses 145-149 of the Proceeds of Crime Bill.

   a. Clause 145 creates offences of making a disclosure likely to prejudice a money laundering investigation being undertaken or which may be undertaken by law enforcement authorities (“tipping off”).

   b. Clauses 146 to 148 then go on to set out a range of circumstances where disclosures can be made without breaking the law.

   c. Clause 149 provides interpretative guidance for clauses 145 to 148.

4. This note will deal briefly with the substance of the individual sections, and then with some of the practical problems thrown in the way of financial institutions, the authorities, clients and lawyers, by these apparently simple offences.
Offences under section 145

5. There are two offences under section 145. They are committed if there is a tipping-off by a person in the regulated sector of the fact that there has been a money laundering disclosure, or that a money-laundering investigation is being, or may be, carried out.

6. The offences apply only to those in the regulated sector, as defined by clause 149 & Schedule 4 of the Bill.

7. There is a general defence to the offences. Under section 148 (3) & (4), a person does not commit an offence under section 145(1) or (3) if the person does not know or suspect that the disclosure is likely to have the effect mentioned (ie that it is likely to prejudice an investigation). The burden of disproving this defence must, as a result of the phrasing, be on the Crown.

8. The first offence is as follows:

Section 145(1):

A person commits an offence if

(a) the person discloses any matter within subsection (2)

(b) the disclosure is likely to prejudice any investigation that might be conducted following the disclosure referred to in that subsection; and

(c) the information on which the disclosure is based came to the person in the course of a business in the regulated sector.

Section 145(2):

The matters are that the person or another person has made a disclosure under this Part –

(a) to a constable or customs officer serving (in either case) with the Financial Crime Unit of the Isle of Man Constabulary; or

(b) to a nominated officer.

of information that came to that person in the course of a business in the regulated sector.
9. This offence is fairly straight-forward, and fairly specific. If a disclosure has been made to the authorities of suspicions, then it is an offence to disclose that fact (that a disclosure has been made) if to do so would be likely to prejudice any investigation that might be conducted as a result.

10. To obtain a conviction under section 145 (1), the Prosecution would have to prove that:
   a. A disclosure under this Part of the Bill was made; and
   b. As a result of the disclosure made, a money-laundering investigation might have been conducted; and
   c. That the defendant disclosed the fact of a disclosure under this Part; and
   d. That the information came to him in the course of a business in the regulated sector; and
   e. That the disclosure was likely to prejudice any investigation; and
   f. That the defendant knew or suspected that prejudice might result from his actions.

11. The second offence under section 145 is that at subsection (3):

   **Section 145(3):**

   A person commits an offence if:

   (a) the person discloses that an investigation into allegations that an offence under this Part has been committed, is being contemplated or is being carried out;

   (b) the disclosure is likely to prejudice that investigation; and

   (c) the information on which the disclosure is based came to the person in the course of a business in the regulated sector.

12. The Prosecution here would have to prove that:
   a. An investigation was being contemplated or carried out; and
   b. The Defendant disclosed that an investigation was being contemplated or carried out; and
c. The disclosure made by the Defendant was likely to prejudice the investigation; and

d. The information came to the Defendant in the course of business in the regulated sector; and

e. The Defendant knew or suspected that the disclosure might have that effect.

13. It is this offence which most frequently concerns legal practitioners and financial institutions. Unlike subsection (1), it is not restricted to situations where the Defendant knows that a disclosure under this Part of the Bill has already been made. There may, for the purposes of this offence, have been no disclosure by a financial institution or individual, or one made by a different institution of which others know nothing. If an institution or individual becomes aware by any means that an investigation is being contemplated or carried out, then they must not make any disclosure which is likely to prejudice that investigation.

14. The investigation being contemplated or carried out could relate to any money laundering offence in Part 3 of the Bill. ‘Contemplation’ is a wide concept, and could cover a variety of states of mind and activity within a prosecuting or investigating agency.

15. Prejudice to a money laundering investigation could be caused in any number of different ways; the destruction of evidence, the movement of funds, the alerting of others who might be involved in criminal activity, or the inability of the investigator simply to watch and observe as the activity progresses, could all amount to prejudice to an investigation.

Sentence

16. A person guilty of an offence under section 145 is liable, under section 145(4) to;

   a. Summary conviction; custody not exceeding 3 months, or a fine not exceeding £5000, or both

   b. Conviction on information: custody not exceeding 2 years, or a fine or both
Exceptions to ‘Tipping off’

17. As well as the general defences set out in section 148 (see above), there are specific exceptions set out to the criminal offences of tipping off:

A: Within own organisation

18. Section 146(1) provides that

“An employee, officer or partner of an undertaking does not commit an offence under section 145 if the disclosure is to an employee, officer or partner of the same undertaking.”

19. This means that practitioners can talk to another person within their firm about any problem. This allows for proper consideration and discussion within the firm or organisation, and to provide otherwise would be unworkable.

20. There is also provision (section 146(2)) for exchange of information between credit institutions and financial institutions belonging to the same ‘group’¹ so long as the institution to whom the disclosure is made is situated in a country or territory prescribed by the Department of Home Affairs.

21. Similar provisions legitimise exchange of information between professional legal advisers or ‘relevant professional advisers’ who work in undertakings sharing common ownership, management and control, again so long as the two parties carry on business in a country or territory prescribed by the Department of Home Affairs. (see clause 146(4)).

22. The definition of ‘relevant professional adviser’ is found in section 149(4), and in summary means a professional accountant, auditor or tax adviser.

B: With other institutions

23. These provisions are meant to encourage the exchange of information between professionals, with the aim of combating money laundering:

24. Section 147 allows for disclosures between institutions and advisers where:

a. The disclosure relates to a client or former client of both institutions or advisers;

b. The disclosure relates to a transaction involving them both; or

¹ ‘Group’ is, according to section 146(3) to be construed in accordance with any order made by the Department of Home Affairs under subsection 146(5).
c. The disclosure relates to the provision of a service involving them both.

25. The disclosure must be for the purpose only of preventing an offence under this Part of the Act (section 147(2)(b)). The institutions and advisers on each side must be subject to equivalent duties of confidentiality and the protection of personal data (section 147(2)(d)).

26. However, this exception is very specific. It relates to only 4 types of disclosures, those between the same type of institution or adviser:

   a. By a credit institution to another credit institution
   b. By a financial institution to another financial institution
   c. By a professional legal adviser to another professional legal adviser
   d. By a relevant professional adviser of a particular kind to another relevant professional adviser of the same kind.

27. This may create difficulties in practice. A disclosure by a professional legal adviser to an accountant, for example, will not be covered.

C: Detection of crime

28. Perhaps unsurprisingly, disclosures do not amount to ‘tipping off’ if they are made to the authorities. If the disclosure is made by a person to the ‘supervisory authority’ for that person, then it is not an offence. If the disclosure is made for the purpose of the detection, investigation or prosecution of a criminal offence, an investigation under the Act, or the enforcement of an order of the Court, then it is not an offence. (section 148(1)).

29. This provision may prove helpful to those financial institutions, for example, who are faced with complaints from their clients through an Ombudsman service or other external supervisory authority. Clients who have their transactions delayed or accounts frozen by a suspicious financial institution may complain, and the financial institution may not be free to tell the client the reason for the delay or the freeze. It may be important for the institution or individual to be able to be straightforward with its supervisory authority about the reasons for the disappointing customer service.
D: To the client (legal adviser)

30. Under section 148(2), a professional legal adviser or a relevant professional adviser does not commit an offence under section 145 if the disclosure:

   a. Is to the adviser’s client; and

   b. Is made for the purpose of dissuading the client from engaging in conduct amounting to an offence.

31. This copies the new sections of the Proceeds of Crime Act in the UK, section 333D(2). Section 333D(2) replaces the earlier UK legislation, sections 333(2)(c) and 333(3). The earlier protection for legal advisers was potentially broader. A person did not commit an offence under the old legislation if he was a professional legal adviser and the disclosure fell within subsection (3):

Section 333(3):

A disclosure falls within this subsection if it is a disclosure—

   (a) to (or to a representative of) a client of the professional legal adviser in connection with the giving by the adviser of legal advice to the client, or

   (b) to any person in connection with legal proceedings or contemplated legal proceedings.

Section 333(4):

But a disclosure does not fall within subsection (3) if it is made with the intention of furthering a criminal purpose.

32. The old drafting was, effectively, the doctrine of legal privilege in statutory form\(^2\). The new UK section, and the Isle of Man Bill contains the new wording, and some commentators have queried whether it is merely a re-drafting of the combined effect of sections 333(3) and (4), or constitutes a narrower form of protection. (Interestingly, the corresponding defence for legal advisers in the offence of prejudicing an investigation within Part 4 of the Act remains as per the old law). If the protection afforded by section 148 is narrower, the section comes into conflict with the doctrine of legal professional privilege. Evidence that a disclosure had been made to a client, and that it

\(^2\) see *Bank of Scotland v A Ltd* [2001] 1 WLR 751
had been made without the intention of dissuading the client from criminal conduct, could often realistically only come from files and discussions which would normally be considered privileged.

33. Whatever the legislative intention, the wording of subsection 148(2) is awkward. It makes the purpose of the legal adviser, when giving advice, the relevant feature, rather than the motivation of the client in seeking it. This may be a step too far in making the legal profession the foot soldiers of anti-money laundering activity.

34. It has an additional complication, which will be considered in the light of the case of K Ltd v National Westminster Bank (below).

Overlap with section 160

35. There is a great deal of similarity between the 'tipping off' provisions, and those contained within section 160 of the Bill; They are contained within different parts of the Act, and are in theory aimed at different offending. However, it is not difficult to see that the wider offence of section 145(3) and that contained within section 160 may have a significant degree of overlap. Both criminalise disclosures likely to prejudice an investigation into money laundering offences.

36. The UK counterpart to section 160 is section 342 Proceeds of Crime Act 2002. In the UK, the arrival of the new section 333A was accompanied by a restriction on the matters falling within section 342 (covering prejudicing an investigation into a confiscation investigation, civil recovery investigation, detained cash investigation or a money laundering investigation). Tipping off within the regulated sector being covered by 333A, section 342 now applies only to the unregulated sector.

37. This is not the case with the Isle of Man legislation. Anybody committing an offence under section 145 of the Isle of Man Bill might also be committing an offence under section 160, as the latter is not restricted in the same way as its (amended) UK counterpart. The maximum penalties on conviction are 5 years under section 160, and 2 years under section 145. However, as identified above, the defences for disclosures made in potentially legally privileged situations may also be different. As a result, the precise selection of charges may be of particular interest in this area.

38. It is perhaps worth noting in passing that the original intention of the UK legislation, which the Isle of Man closely follows, was for an 'absolute' tipping-off offence. The Home Office in the UK had sought to remove the 'prejudice' test, and having an absolute prohibition on any disclosure of money laundering reports, regardless of whether it was unlikely to prejudice an
investigation. Representations from the legal world eventually persuaded them otherwise.

Practical difficulties

39. The practical difficulties which the money laundering and tipping off provisions can have for financial institutions and lawyers are perhaps best set out by reference to some of the case law. The difficulties are particularly acute when the tipping off provisions come into conflict with the parties’ obligations under civil law to provide disclosure.

40. Some of these authorities were decided in the UK before the introduction of POCA 2002. In part, their importance may have been reduced because of the new legislation. However, they are likely still to be relevant to the courts dealing with these provisions, and are also good examples of the practical problems which can arise.

41. Three particular themes emerge from them:

   a. The practical implications of the provisions on individuals and institutions are significant;

   b. There is a very real requirement of the law enforcement agencies to be sensible and cooperative in their use of increasingly wide powers;

   c. The courts have to balance their desire to assist, where possible, financial institutions to comply with their money laundering obligations, and their reluctance to allow the courts to be used to make truly commercial decisions more properly made by the commercial entities themselves.

42. It is important when considering what occurred in each of these cases below, to recall under which legislative regime each was decided.

C v S and others\(^3\)

43. The company C wanted to trace sums of money which it alleged had been misappropriated by others. It made an application for disclosure of

\(^3\) (1999) 1 WLR 1551
documents from the bank (B). That application was made ex parte, and the order was granted.

44. The bank had previously made a disclosure to the NCIS of suspicious transactions. The documents which it was now ordered to disclose might have revealed the existence of the ongoing enquiries by the NCIS, and the bank was concerned that complying with the Court order would breach the tipping off provisions then in force.

45. The bank sought the assistance of the National Criminal Intelligence Service (NCIS), asking for an assurance that if it complied with the Court order, there would be no prosecution for tipping off. The NCIS would not give that reassurance, and also made it clear that any disclosure by the bank of its difficulties could amount to tipping off. The NCIS then made their own application in the Crown Court for an order requiring the bank to produce similar documents to those which the court had ordered be disclosed to C.

46. The Bank was in a difficult position; if it complied with the original order of disclosure, it was at risk of prosecution. If it did not comply, it would be in contempt of court. A different Judge discharged the original order for disclosure. The Judge also, following the bank’s application, gave the bank leave to comply with the Crown Court order of disclosure to the NCIS.

47. C was at liberty to apply for another order against the Bank, and did so. At the hearing, C was informed that the Bank was not prepared to consent to the application, but was excluded from hearing the submissions made to the Judge by the Bank’s counsel. The Judge decided not to order disclosure, and informed C of that fact, but gave no reasons. He did require the Bank to give undertakings that it would take all steps within its power to resolve the issue, and to inform C’s solicitors as soon as the risk of prosecution had dissipated.

48. C appealed. The Court heard from the Bank and also from the NCIS. Time was given to the NCIS to identify documents which would not impede its investigation if disclosed, but resolution of the dispute was not possible. By the time the case reached the appeal stage, the NCIS had accepted that disclosure at that time would not interfere with any investigation. The appeal itself was therefore uncontroversial. However the court attempted to give guidance for future situations:

a. The bank should inform NCIS as soon as it realises an order for disclosure, if complied with, might prejudice an investigation.

b. NCIS then has an opportunity to identify the material about which it is concerned, and express a view about how it would wish to proceed. In so doing, the NCIS should act with proper consideration; does it really
mind if this applicant knows about an investigation? If not, an undertaking to keep the information confidential might be sufficient.

c. Partial disclosure to the applicant is also a possibility and needs to be considered as an option.

d. If partial disclosure is not acceptable, then directions will have to be sought from a court.

e. At any such hearing, the extent to which the applicant can be involved in the hearing will depend on the circumstances; the general principle must be to comply with the ordinary principles to the extent that that is possible.

f. In deciding what order to make, the court will have to have input from the NCIS. Sometimes a letter might suffice, sometimes they would need to be represented and made a party.

g. It is for the NCIS to persuade the court that, if disclosure were made, there would be a real likelihood of an investigation being prejudiced. If the NCIS did not co-operate, the court could properly draw the inference that no such prejudice would be likely, and could accordingly make the disclosure order sought without offending the principle of Rowell v Pratt [1938] AC 101 (that the court would not make an order compelling somebody to commit a criminal offence), and without putting the bank at risk of prosecution.

h. The court must have evidence on which to base its decision, and must be particularly alive to the protection of the applicant’s rights, especially in cases where the applicant cannot be heard.

i. The courts should bear in mind the practical realities of these situations: an adjournment for a short period might remove any risk of the investigation being prejudiced.

j. An order for disclosure is not subject to any implied limitation excluding the obligation to make disclosure because to do so would involve commission of a criminal offence. If such concerns exist, they need to be ventilated.

k. Where disclosure orders are accompanied by an order not to disclose the fact that an order has been made, this does not stop the financial institution from approaching NCIS.

l. If a financial institution is aware of a report to the NCIS, it would be wise for it to inform the NCIS before complying with an order for disclosure covering the same subject matter.
m. Where disclosure has been restricted at the request of the NCIS, NCIS should inform the institution as soon as the risk of prejudice to an investigation has dissipated.

n. Clearance from the NCIS to disclose should satisfy a financial institution; it is unthinkable that there would be a prosecution if the NCIS gives clearance.

49. The Court in *C v S* was very unimpressed by the stance taken by the NCIS. The NCIS had attempted to distance itself from the difficulties which their investigation and the statutory prohibition on tipping off created for the Bank. They had submitted that the civil courts should not involve the NCIS as to do so resulted in its limited resources being diverted from the purpose for which they should be used.

50. This approach was described by the Court as ‘*neither sensible nor appropriate*’. If their cooperation did not result in a sympathetic and helpful response in relation to their difficulties being adopted by the authorities in return, financial institutions would be deterred from making reports. This would be counter-productive, given the important source of valuable information which such institutions provide.

**Bank of Scotland v A**

51. Similar criticism was levelled at the approach of the Serious Fraud Office in the case of *Bank of Scotland v A Ltd*. The importance of cooperation between financial institutions and the authorities was stressed, along with a warning that the Courts could not be used to make commercial, if difficult, decisions that needed to be made by the institutions themselves:

“It is of the greatest importance, in the public interest, that the police should be supported by financial institutions in their attempts to prevent money laundering and to detect it when it happens. When a financial institution cooperates with the authorities, then the courts should be sympathetic to an application for their assistance, if assistance is really necessary.”

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4 [2001] 1 WLR 751
52. The bank in that case sought directions in accordance, they felt, with the principles set out in C v S. However, departing from the guidance in C v S, there was never any investigation into what could in fact be disclosed without prejudicing the investigation. The police had expressed the view that they did not wish information resulting from the bank’s enquiries to be revealed even to the court. The Court held this approach to be unjustified.

“If there is a dispute as to whether a payment can be made or disclosure made by the bank, the SFO on behalf of the police and the bank should try to resolve it between themselves. If they can not do so, that can be the subject of an application for interim declaratory relief, in the way we have suggested. Unless the SFO acts unreasonably, it is likely that the parties to the application will have to pay their own costs.” (para 43)

“The ‘tipping-off’ legislation which was the source of the problem with which this appeal deals, gave extensive powers to the police. Properly used they were beneficial. Misused they could create unintended consequences. It is of the greatest importance that use of those powers is confined to situations where it is appropriate. Institutions such as banks need to be able to ensure that they are not affected adversely unnecessarily because of the existence of the police’s powers. The ability of the courts to grant interim advisory declarations achieves this purpose. The fact that the courts now have these powers, must not, however, be regarded as a substitute for financial institutions taking the decisions which should be their commercial responsibility. The courts’ powers are discretionary and only to be used where there is a real dilemma which requires their intervention.” (para 46)

Squirrel v NatWest Bank

53. Squirrel was a company involved in the buying and selling of mobile telephones. On 15 March 2005, NatWest froze Squirrel’s account. It did not tell its customer why it had done so. Squirrel tried to discuss it with its relationship manager, to no avail. NatWest did not unblock the account, and provided Squirrel with no explanation for the decision, because of concerns about tipping off.

54. Squirrel launched an application for relief, asking for an order that the accounts be unfrozen, and an order for disclosure of the reasons. HM

[2006] 1 WLR 637
Customs and Excise were brought in at the end of March 2005 as interveners in the proceedings. From then on, Squirrell was plainly aware of the reasons for the freezing of the account, although it had not been provided with any detail.

55. The legislative background had changed, and this case concerned the POCA 2002. Importantly, POCA 2002 had brought in the 7 and 31 day time periods in connection with making a disclosure. Further, this was not a case quite like C v S, in which the financial institution was caught fairly and squarely between two competing legal obligations; to disclose (in breach of the tipping off provisions), or to fail to disclose (contempt of court). Here, Squirrel was bringing its own action to unblock its account.

56. The Court accepted the submission on behalf of HM Customs and Excise that the time limits brought in by POCA 2002 were the protection afforded by the legislature to parties in the position of Squirrell. The Court applauded NatWest for its conduct, and refused to order the bank to make the transactions. Unfortunately for those attempting to learn from the case, Squirrel did of course by then know the reasons for the blocking of its account, and the Court found it unnecessary to express any views on the question of whether it would have ordered disclosure had Squirrell still been in the dark.

57. This case shows plainly the practical implications that these provisions can have on the company involved. Assume for a moment that they are not involved in any kind of criminal activity, and the bank’s suspicions about them are in fact ill-founded. They suffer the economic damage of having their accounts frozen. In Squirrell, the company also complained that they had, due to the accounts being frozen, been unable to instruct lawyers. Although the Court was plainly sceptical about this (Squirrel having told the Court that they also had a foreign bank account…), it did not doubt that litigants might be put in such a situation in similar cases.

N2J Ltd

58. This case also shows in stark relief the very practical problems which can afflict a company affected by these rules. The company was a wholesale trader of mobile telephones. The dispute arose over the bank’s refusal to make particular payments requested by the company. The company applied for a mandatory interlocutory injunction requiring the bank to make the payments, and to provide information about their reasons for refusing to do so.

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6 LTL 22/7/2008 (Unreported elsewhere)
59. The commercial implications of the bank’s refusal to make the payments are clear from the judgment: a transfer of £716,000 was needed to pay outstanding bills of suppliers and creditors. Further delay in making the payment might adversely affect the company’s trading.

60. By the time the matter reached court, it was known by all that the bank had made a disclosure to HMRC, that they knew or suspected that the funds were criminal property. The bank’s position was that it could not process the payment requests until the 31 days moratorium had expired, and no disclosure of the reason why the requests were not being complied with could be made, due to fears of tipping off.

61. The Court held that there was a key distinction between the legislation considered in C v S, and the new POCA legislation; the creation of the 7 day notice period, and the 31 day moratorium. These time periods provided protection for the consumer, and they were the resolution by Parliament of the tension between the private interests of the litigants, and the public interests of preventing crime. “It is in my judgement a case in which, as Lord Woolf said in C v S, where Parliament has provided ‘otherwise’, in other words Parliament has provided by this means a protection for the customer.

62. The suggestion in this case is that the actions of HMRC could, in some instances, be challengeable by judicial review. The Court did not feel that the application for a mandatory injunction was the appropriate way forward. An order that payments be made by them would be wholly inappropriate in the view of the court, when the 31 day moratorium was in force.

“there are powerful public policy reasons for permitting an investigation which has been properly triggered by a disclosure into a common, widespread and serious potential fraud to continue within the time frame created by the POCA regime. If a challenge to the procedure is made, it can, in my judgement, be by judicial review, not action against the financial institution who was obliged to make the disclosure under pain of prosecution.”

K Ltd v National Westminster Bank

63. The case of K Ltd v National Westminster Bank concerned another wholesaler of mobile phones. The bank wrote to the customer saying simply that the bank could not currently comply with his instructions (to make transfers), and could not enter into any further discussion of the matter. The customer applied for an injunction. The bank, after consultation with the Revenue and Customs, notified the customer that it had made a disclosure to

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7 [2006] EWCA Civ 1039
customs. The judge refused the application on the basis that Parliament had laid down a statutory scheme to prevent money laundering, and, once the suspicions of the bank were aroused, that was end of the matter. The customer appealed.

64. Speaking generally about the provisions for disclosure contained in the Act, the Court concluded that

“The truth is that Parliament has struck a precise and workable balance of conflicting interests in the 2002 Act. It is, of course, true that to intervene between a banker and his customer in the performance of the contract of mandate is a serious interference with the free flow of trade. But Parliament has considered that a limited interference is to be tolerated in preference to allowing the undoubted evil of money laundering to run rife in the commercial community.”

“Many people would think that a reasonable balance has been struck”

65. The Court also expressed the view that it would not be appropriate for the law enforcement agencies to communicate privately with the Judge so that the Judge could ascertain whether the applicant was likely to be successful at trial, or the institution likely to commit an offence if it makes a transfer without consent. Such a practice would not be open justice. Parliament had laid down a procedure with which the bank had properly complied.

66. For the purposes of considering tipping off, the case is important for this reason: it was decided under the old section 333 POCA 2002 tipping off offence. The bank brought matters to a head by, having discussed the matter with Revenue and Customs, asking its legal team to write to the customer to notify them that a disclosure had been made. This was done using the legal adviser exception contained within section 333(2)(c) and (3). Under those provisions, a professional legal adviser can make a disclosure to any person in connection with legal proceedings or contemplated legal proceedings. Such a disclosure, so long as not made with the intention of furthering a criminal purpose, would not constitute an offence of tipping off.

67. The bank therefore ensured that its legal adviser made the disclosure to the customer in connection with the injunction proceedings already underway. This disclosure was crucial to the way in which the case was thereafter resolved. It meant that the applicant company had some idea of why its transactions were not being made, and could challenge, if it so wished, the Revenue and Customs direct.

68. Under the new section 333D, and section 148 of the POCB, this statutory route of disclosure is no more, and the bank in a similar situation would not be
able to inform the customer in this manner. The practical import in that particular case may not be of significance; Revenue and Customs obviously had no major objection to the customer knowing of their interest, and so an investigation was unlikely to be prejudiced. However, it is a statutory route which could have eased the way for institutions which has now been closed off.

Green v Walkling\textsuperscript{8}

69. Much is said when considering these provisions about the implications for large institutions, of banks, lawyers and significant companies. It is worth remembering too that they can have a devastating effect on individuals. (This case was decided on the old section 333 POCA 2002, and therefore deals with tipping off by a person not within the regulated sector).

70. Mr Walkling had been a salesman for the whole of his career, reaping modest rewards. He impressed the Judge as a ‘person of integrity’. He was in his 60s. In July 2001, the company he had been working for, ‘Mobility Now Ltd’, (specialising in bathing products for those with mobility problems) went into administration. The assets were purchased by a young entrepreneur, Mr Moate and his wife. Mr Moate asked Mr Walkling to run the sales side of the new business, Ortega. Eventually, the Moates asked Mr Walkling to become a director. Unknown to Mr Walkling, this was because Mr Moate had been disqualified from being a director. In fact, Mr Walkling was a director only in name, and the business was in truth operated by the Moates, as before.

71. At the end of 2003, Mr Walkling overheard a casual remark which concerned him. He investigated, and discovered that Mr Moate was conducting a fairly extensive fraud on the company, and on the Inland Revenue. The inputs on the company’s VAT return were inflated, so that claims for repayments of VAT in sums of c. £80,000 rather than c. £8000 were claimed. The money fraudulently received from Customs was paid into the company bank account, and then immediately withdrawn by cheque. The company bank statements were then doctored in the not particularly sophisticated manner of folding over the two relevant entries, and keeping a photocopy of the doctored copies rather than the originals on the file. The fraud was in the region of £1.3 million.

72. Mr Walkling was tempted to confront Mr Moate, but he took solicitor’s advice before so doing. His solicitor advised him that he should act in accordance with the Proceeds of Crime Act 2002. On Mr Walkling’s behalf, the solicitor duly made a disclosure to Scotland Yard. Scotland Yard refused to act, and

\textsuperscript{8} [2008] 2 BCLC 332
suggested that he call Customs. He did so. Two officers attended the following day, took photocopies of relevant documents and said they would be in touch. As the judgement states

“Mr Walkling felt that a great weight had been lifted from his shoulders and awaited the early date when the C&E would – like the cavalry – doubtless arrive, arrest and carry away the dishonest Mr Moate and enable the recovery of the stolen money.”

73. Unfortunately this did not occur. The case got stuck at Customs and Excise, and nothing happened. Mr Walkling sat in his office, paralysed by his concern about tipping off Mr Moate to the disclosure he had made. This went on for a couple of months, with Mr Walkling regularly contacting Customs & Excise to encourage them to act. Mr Walkling was increasingly concerned: he knew that Mr Moate was trying to sell the business.

74. Mr Walkling was well and truly caught by the tipping off provisions. He had knowledge of a disclosure having been made (he had asked his solicitor to make it), and telling Mr Moate what had happened was highly likely to prejudice the investigation. None of the defences applied, and the effluxion of time is not a defence in any event. The honest Mr Walkling was in the impossible position of being party to the sale negotiations, in the full knowledge of the fraud, but having received advice that he must just go along with it, because he might otherwise be liable for tipping off.

75. Customs never came to Mr Walkling’s rescue. The sale went through, and, as he had suspected, the monies immediately disappeared. Ortega failed to pay its creditors, and the liquidator instituted proceedings for various declarations against the parties. The Moates did not appear. Mr Walkling was alleged to have been in breach of his duties as a Director, and in breach of his fiduciary duties. The Liquidator alleged that Mr Walkling could have taken the necessary and effective steps (ie refused to sign the contract of sale) without tipping off Mr Moate.

76. The Court considered Mr Walkling’s concerns reasonable. He had no reason other than of tipping off to refuse to sign the contract, and any such refusal might well have tipped off Mr Moate. Objectively speaking, the Court considered that applying to the Court for directions shortly before the sale would have been a way forward, but was not prepared to criticise the honest Mr Walkling, who had taken legal advice, for not so doing. And Mr Walkling was apparently fearful that any such application would have tipped off Mr Moate as well.
77. The Court in that case was not prepared to make any finding against Mr Walkling. He had taken and followed legal advice throughout, and that was a powerful factor in his favour. There was plainly considerable sympathy for the ridiculous situation in which Mr Walkling was caught. Other cases may not be so clear cut. The director who did not think of taking legal advice, for example, might find himself in a very different position.

Conclusion

78. The Courts will, so far as they can, follow the statutory framework of the POCA 2002 / POCB 2008, and involve themselves as little as possible in areas they consider effectively decided by the 7 day and 31 day time periods.

79. The cases of *K Limited* and *Squirrel* indicate strongly that the courts consider POCA 2002 (and by extension, the 2008 POCB), to have resolved many of the problems shown in *C v S* and *Bank of Scotland v A*. In the arena of the money laundering offences themselves, that may indeed be the case. The tipping off provisions, however, may continue to trouble the courts as they come into conflict with the other obligations of institutions and individuals. While the 31 day moratorium period may resolve many questions in relation to money laundering and disclosure, the liability for tipping off if an investigation is ongoing continues beyond that time period. Investigations can be very long-lasting, and practitioners of all backgrounds are right to continue to be wary.

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