

Toe the line

Three sets of leaked documents, the last of which is the Pandora Papers, purport to show how the rich and powerful avoid paying tax and hide dishonest deals. **John Gould** discusses to what extent professional advisers should take on these clients.

Once it was thought that there was no moral dimension to giving tax advice. The assumption was that everyone was justified in arranging their affairs to pay as little tax as possible. There was no suggestion that advising how best that could be done might be culpable or immoral. The test to be applied was legality, not whether people might consider avoiding tax to amount to sharp practice or poor citizenship.

Helping the immoral rich

Times have changed. Artificial schemes, which probably don't work, may now involve professional misconduct on the part of a regulated adviser who facilitates them. Arrangements involving offshore jurisdictions, which could not be described as artificial but which lack easy transparency, may be criticised because they could cloak undetectable criminality or tax evasion.

At its broadest, it may be said that it is wrong for advisers to facilitate the rehabilitation of dodgy individuals from dodgy places helping them to enjoy their immoral wealth and to become respectable.

Two recent research efforts (The Pandora Papers and the Chatham House report *The UK's Kleptocracy Problem*) have brought these themes together. Both have an underlying assumption that advisers and others are facilitating things which, even if not illegal, are immoral or reprehensible. They are both substantial efforts and strike blows in a developing battle of ideas and beliefs. Between them they set out the case

Key points

- The Pandora Papers leak purports to expose a 'shadow financial system that benefits the world's most rich and powerful'.
- A Chatham House report argues that British professionals enable post-Soviet elites to launder their money and their reputations.
- These reports argue that professionals know or ought to suspect that their clients are disreputable and should refuse to work for them.
- Advisers who act like the three wise monkeys are falling below the professional standards and may be breaking the law.



against offshore tax advice and advisers who assist the immoral rich.

The Pandora Papers

Pandora's Box was the receptacle which served to contain the evils of the world and bad things followed from their release. It is a parable about the dangers of letting things loose but was, no doubt, chosen because it alliterates with previous leaks of offshore information called the Panama Papers and the Paradise Papers.

“The exercise seems to have been less of a leak and more of an industrial scale and untargeted hack.”

The 11.9 million leaked documents span five decades but mostly date from the period between 1996 and 2020. They include information on 29,000 beneficial owners tied to 27,000 companies. The documents come from 14 'offshore service providers' which operate in jurisdictions including Anguilla, Belize, Singapore, Switzerland, Panama, Barbados, Cyprus, United Arab Emirates, Bahamas, British Virgin Islands, Seychelles and Vietnam. Their clients come from more than 200 countries and territories. Within a stadium's worth of beneficial owners, there are said to have been more than 330 politicians and public officials. There are 'big political donors', billionaires and celebrities.

The documents are said to include spreadsheets, tax declarations, invoices, PowerPoint presentations, emails and company records listing directors and shareholders. They also include suspicious activity reports, sanctions lists, due diligence reports, know-your-customer forms, passports, utility bills and photos.

One can only speculate whether the leak was from one source or many sources but it seems likely that, subject to any public interest defences, laws have been broken. The exercise

seems to have been less of a leak and more of an industrial scale and untargeted hack.

The general point made by the consortium of journalists responsible for the disclosures, the International Consortium of Investigative Journalists (the consortium), is that secrecy can give cover to illicit money flows enabling bribery, money laundering, tax evasion, terrorist financing, human trafficking and other human rights abuses. Poor nations may suffer disproportionately by wealth being stashed in tax havens and the very leaders who might make that more difficult are themselves involved.

The consortium denies that offshore service providers judiciously vet clients or strive to act within the law. Links, which are sometimes apparently very indirect, are made by the journalists between financial secrecy and numerous types of activity including impeding criminal or civil proceedings, the smuggling of art and antiquities, complex inheritance arrangements, profiteering from evictions, and even sex abuse.

It is said that the publication comes at a critical moment in the debate over the role of western professionals in the 'shadow economy'. The consortium appears to share the view that professional advisers are part of the problem by facilitating a system which should not exist at all and which has no legitimate purpose. Advisers may find themselves associated with stories which suggest wrongdoing.

The Chatham House Report

In December 2021, Chatham House published *The UK's Kleptocracy Problem – How servicing post-Soviet elites weakens the rule of law* (tinyurl.com/2p8tvfk3).

In summary, the report considers that globalisation and de-regulation at the same time as the disintegration of the Soviet Union allowed a transnational kleptocracy to develop in which British professionals enable post-Soviet elites to launder both their money and their reputations.

It argues that the UK's system for anti-money laundering (AML) relies on checks by professionals and is actually poor at identifying risk with over-reporting by banks creating an unmanageable deluge of reports and under-reporting by others. Bodies such as the National Crime Agency have not been up to the task. Court judgments have been flawed as expensive lawyers defeat or deter weak and under-resourced opponents and regulators.

The report suggests that UK professionals provide aggressive reputation management services such as libel actions and the use of PR agents against journalists. Reputation laundering by donations places the integrity of UK institutions such as charities or universities at risk. Westminster itself may be open to influence from wealthy donors loyal to post-Soviet regimes.

It concludes that all of this is damaging to the UK's reputation as an opponent of international corruption and that the UK's own rule of law has been weakened. A hostile environment is needed for the world's kleptocrats and loopholes should be closed, institutions should be transparent, sanctions should be deployed against post-Soviet elites, and British professionals who enable money laundering by kleptocrats should be more frequently prosecuted.

Kleptocracy is a system in which ruling elites are able to steal public funds. It is a worldwide phenomenon but

countries such as Russia, Azerbaijan, Kazakhstan, Ukraine and Uzbekistan are often mentioned. Kleptocrats are often public officials, their family members or close associates. The report identifies the professionals involved in 'enabling' as estate agents, lawyers, accountants, and trust and company service providers – referred to as designated non-financial businesses and professions by the Financial Action Task Force, an inter-governmental body created to promote global standards on preventing money laundering and terrorist financing.

The gravamen of the charges against advisers is set out in the report:

'London has no shortage of lawyers, estate agents and wealth managers offering bespoke instruments for post-Soviet elites to hide their money and gain respectability. Individually, each of these service providers may facilitate a transaction that is legal and within established norms and codes of ethical conduct of these professions. But, although the coordination of enabling activities is usually not done through explicit joint intent, the services provided by the wealth manager, the estate agent and the PR adviser, as well as the welcome from 'respectable' UK individuals, complement each other and in many ways could not exist independently.

[...]

'Such companies will help such people who are moving to the UK craft a 'coherent narrative' for who they are, and will advise them against 'out of place' investments that will draw unwanted attention. They will often work with law firms who will be able to help the client purchase property, prevent critical press coverage via 'cease and desist letters' to journalists and NGOs, and suggest 'family office' wealth managers who can place the client's funds in safe, profitable projects.

'Reputations are burnished in different ways: through the creation of charitable foundations; philanthropic giving; the support of think-tanks and academic programmes at elite universities; the acquisition of prestigious commodities such as football clubs; or the endorsement of a member of the Western elite. There is often a distinct contrast between an individual's philanthropic activities – which must be publicised – and his or her private wealth, investments and assets – where the emphasis is on maintaining secrecy at all costs.'

A moral compass?

All of this may leave the average adviser in a state of uncertainty as to how to act correctly. The easy part is the law itself because reputable advisers do not break the law. Although a little less clear, the second principle is also reasonably uncontroversial namely that advisers must comply with the rules of their profession.

Conversely, advisers are not expected to be their client's moral gatekeepers. This is particularly true of lawyers because the rule of law depends on people being able to obtain representation irrespective of whether they are undesirable or immoral.

Thirdly, an adviser's own conscience (or lack of it) must be respected. No one should be forced to provide services to facilitate something which, although legal, they find ethically repugnant. Conversely no one should be denied the freedom to carry out work on the basis that someone else finds it morally objectionable. The common denominator of moral positions is the law.

In saying this, I have not overlooked the 'cab rank' rule by which barristers may not reject clients because they don't approve of them. There is an important difference between facilitating something against one's own conscience and defending a person who may well be an evil person accused of an evil act. A professional adviser's integrity is not to be assessed on the basis of the integrity of their client.

The area of difficulty is where views of what is right or wrong in society are presented as moral truths binding on all. There is nothing wrong in believing that wealth and income inequality needs to be addressed or that the UK should disassociate itself from kleptocracy more effectively or that more should be done to combat climate change or that wealthy people should pay more tax – but those beliefs should not be relevant to a professional's advice. That should be the case whether they are the professional's own beliefs or the beliefs of a section of society. If beliefs matter at all, the relevant ones are those of the person paying for advice.

“The criticism of advisers suggested by the report is that they know or ought to suspect that their clients are 'shady' or disreputable.”

The end justifies the means

The Pandora Papers exercise cast aside the protections provided to individuals under the law. Sometimes leaking specific information about wrongdoing is justified.

Individuals should be able to reveal confidential information about criminality and wrongdoing and if the authorities aren't listening the media might be the right recipient.

That is not the same as trawling through huge amounts of information relating to people against whom nothing is alleged in the expectation of turning up something about a person now accused of wrongdoing. On that basis not even the domestic bank accounts or the medical records of ordinary members of the public are safe, if hacking into enough of them might reveal the payments and receipts of someone now believed to be a criminal. The views and purposes of those obtaining the information are irrelevant, only the law can justify searches and then only if they are specific and for a proper reason.

Illicit wealth

Most of the observations of the report, in relation to advisers, simply follow from the attractiveness of the financial and professional services provided in the UK to the very wealthy. The report accepts that in many cases the illicit original source of the kleptocrats' wealth has long disappeared, layered beyond identification through legitimate businesses, and

acknowledges that the original 'thefts' may not actually have been illegal under the laws of the relevant country. The use of the law by the wealthy to protect undeserved reputations is hardly a new thing or confined to foreign kleptocrats.

The wealthy can use their resources to deter criticism and it is true that access to justice is not equally available irrespective of wealth. Donating large sums of money often provides membership of influential networks.

The nub of the criticism of advisers suggested by the kleptocracy report is that they know or ought to suspect that their clients are 'shady' or disreputable and should, therefore, refuse to work for them. The thrust of the Pandora commentary is much the same but with the addition that advisers should not be involved with offshore structures at all because they know or ought to know that, in many cases, they are being used to conceal illegality or avoid tax.

The contrary position

The contrary position does not require an endorsement of illegality, money laundering, tax evasion, bribery, hypocrisy or even bad citizenship. The debate should concern the role of advisers not the moral worth of their clients. It is a given that advisers must obey the law and professional codes including the duty to act with the integrity. Advisers who act like the three wise monkeys and hear, see and say no evil are falling below the professional standards required and may be breaking the law. 'Blind eye dishonesty' is still dishonesty.

Advisers are not, however, moral gatekeepers for their clients nor should they be censors criticising and excluding individuals from their services because they disapprove of them in some way. There may be activity which although legal, would offend the conscience of any reasonable person but those cases are likely to be rare. Would an employment lawyer (had such things existed) have been morally culpable in advising Ebenezer Scrooge as to how best to dismiss Bob Cratchit on Christmas Eve without liability?

The contrary position is, however, not without its own difficulties. Most people would now say that sportsmen were wrong to tour South Africa during apartheid. It would be naïve to think that logic admits no exceptions and it is often the case that laws only follow once a social consensus is formed by moral leadership and pressure.

In the end perhaps generalisation is too difficult and it comes down to a single question. What are you prepared to do? ●

Author details

John Gould is senior partner of Russell-Cooke LLP and author of *The Law of Legal Services, Second Edition* (2019, LexisNexis) (www.russell-cooke.co.uk).



FIND OUT MORE On Taxation.co.uk

- Tax lessons from the Paradise Papers: tinyurl.com/4mwm4b6z
- Investigations result from Panama papers leaks: tinyurl.com/yc8dkdss
- Lessons from the Panama and Paradise Papers: tinyurl.com/2p96sk3e