

Banks, SARS & the customer

Banks & customers are potential victims in an unhappy balance, says **David Hislop**

IN BRIEF

- The case of *Shah and Another v HSBC Private Bank (UK) Ltd* [2009]1 Lloyd's Rep 328, [2009] All ER (D) 204 (Jan) yet again provides an illustration of the very concerning implications of Pt 7 POCA upon the business of banking and the rights of the individual.

Part 7 of the Proceeds of Crime Act 2002 (POCA 2002) put banks between a rock and a hard place. The bank has no interest in acting contrary to the needs or interests of their customers upon whom they rely for business. Doubtless they have every desire to meet their own contractual duties owed to their customers in the interests of good business. But Pt 7 of POCA 2002 clearly puts the bank between its customer and the legislature.

Even if a bank account did not contain funds which were criminal property and no offence had been committed by the customer, s 328(1) applied where the bank had a suspicion that it was involved in dealing with criminal property; the combined effect of ss 328(2), 335 and 338 is to force a third party in the bank's position to report its suspicions to the relevant authorities and not to move suspect funds or property for the requisite time period; in the meantime, the bank is not allowed to make any disclosure which could affect an inquiry that the relevant authority might make; the current state of the law is that if these circumstances prevail the course the bank has taken is unimpeachable; and that, accordingly, an order requiring the bank to operate the applicant's account in accordance with the applicant's instructions would be to require the bank to commit a criminal offence.

POCA 2002

Section 327 of POCA 2002 creates offences of "concealing, disguising, converting, transferring or removing criminal property from the jurisdiction". creates an offence of entering into or becoming concerned in

an arrangement which the defendant knows or *suspects* facilitates by whatever means the acquisition, retention, use or control of criminal property by or on behalf of another person. Section 329 creates an offence of "acquiring, using or possessing criminal property". Together, these three offences are known as the principal money laundering offences.

"Criminal property" is defined in part in terms of a person's *mens rea*. Under POCA 2002 s 340(3), property is criminal property if it constitutes a person's benefit from criminal conduct or it represents such a benefit (in whole or in part and whether directly or indirectly) and the alleged offender knows or suspects that it constitutes or represents such a benefit.

A person does not commit any offence under the principal money laundering offences if he has made a disclosure to the relevant authorities under s 338 and has appropriate consent.

The combined effect of these provisions force the bank to report its *suspicion* to the relevant authorities and not to move funds or property either for seven working days or, if a notice of refusal is sent by the relevant authority, for a maximum of seven working days plus 31 calendar days. Also, the anti-tip-off provisions of POCA 2002, s 333 prohibit the party from making any disclosure which is likely to prejudice any investigation which might be conducted following an authorised disclosure under s 338.

The unhappy balance

The case of *Shah and Another v HSBC Private Bank (UK) Ltd* [2009] 1 Lloyd's Rep. 328 yet again provides an illustration

of the very concerning implications of Pt 7 POCA 2002 upon the business of banking and the rights of the individual.

Absent bad faith, little more than a "bad feeling" (even if a bank account did not contain funds which were criminal property and no offence had been committed by the customer, s 328(1) applied where the bank had a suspicion that it was involved in dealing with criminal property) can trigger a bank's disclosure obligations under POCA 2002, with in some cases catastrophic commercial consequences for the customer and a damning of his hitherto "good name" in the business community. The existence of suspicion is a subjective fact. There is no legal requirement that there should be reasonable grounds for the suspicion. The meaning of suspicion was considered by the Court of Appeal in *R v Da Silva* [2006] 4 All ER 900 at para 16 (and applied in *K Ltd v National Westminster Bank plc* [2007] 1 WLR 311, [2006] 4 All ER 907 and now *Shah and Another v HSBC Private Bank (UK) Ltd* (supra) at para 41):

"It seems to us that the essential element in the word 'suspect' and its affiliates, in this context, is that the defendant must think that there is a possibility, which is more than fanciful, that the relevant facts exist. A vague feeling of unease would not suffice. But the statute does not require the suspicion to be 'clear' or 'firmly grounded and targeted on specific facts' or based on 'reasonable grounds'."

As stated by Ward LJ in the case of *UMBS Online Ltd v Serious and Organised*



Crime Agency [2008] 1 All ER 465 at para 8:

“The operation of the Act certainly has given us a great deal of concern.

UMBS complain, and there is force in the complaints, that, for example:

- (1) the blocking of an account is triggered by no more than suspicion, not even reasonable suspicion;
- (2) the cardinal freedom of the individual to be presumed innocent until proved guilty is blown away;
- (3) incalculable harm may be done to the person under investigation as the account can be frozen for 40 days in all (non-working days being excluded from the initial period);
- (4) there is consequently prejudice to clients and customers of the person under suspicion: they too can face ruin;
- (5) SOCA may be amenable to judicial review but the difficulties of proving an abuse of its power are huge and more often than not the theoretical remedy

we were told were the majority of cases and a further 31 days only, unless the relevant authority goes to the length of applying to the court for a restraint order when all cards will have to be on the table in any event, shows that the interference with freedom of trade is limited. Many people would think a reasonable balance has been struck.”

There must remain however considerable concerns whether the right balance has been struck. Take for instance the case of *Squirrel Limited v National Westminster Bank plc (Customs and Excise Commissioners intervening)* [2006] 1 WLR 637, [2005] 2 All ER 784. There was no dispute between the parties in that case that no one was suggesting that either Squirrel Limited (the customer of the respondent bank) or any of its associates had committed a criminal offence nor was there shown that there was even as much as a prima facie case that the company or any of its associates had committed a criminal offence. The sum of £200,000 was the funds of the

if it did then any interference with quiet enjoyment was in the public interest.

What was not argued, and has not been argued before the courts, is whether there may be cases where Art 8 (right to private life) becomes important to consider. The court in *K Ltd* (supra) stated that the right balance had been struck without it would seem an exhaustive analysis of the human rights aspect of the intrusion created by POCA and the 2007 Regulations which undoubtedly creates an obligation on banks, solicitors, accountants and the like to be proactive in their analysis of the private financial affairs of their clients. If banking confidentiality and the attendant rights that follow do fall within the concept of private life under Art 8(1) then any interference must be proportionate to the legitimate aim of the legislature. The interference must be the very minimum possible whilst achieving the legitimate aim. What may prove a challenge to the courts in due course in considering the issue of proportionality is whether the interference (the adherence to the reporting obligations under POCA 2002) can be proved to be in reality a measure rationally progressing the legitimate aim of the legislature. Some would argue that the reporting obligations have little if any effect on the prevention of money laundering.

The combined effect of ss 328(2), 335 and 338 is to force a third party in the bank's position to report its suspicions to the relevant authorities and not to move suspect funds or property for the requisite time period; in the meantime, the bank is not allowed to make any disclosure which could affect an inquiry that the relevant authority might make.

The current state of the law is that if these circumstances prevail the course the bank has taken is unimpeachable; and that, accordingly, an order requiring the bank to operate the applicant's account in accordance with the applicant's instructions would be to require the bank to commit a criminal offence. The case of *Shah and Another v HSBC Private Bank (UK) Ltd* [2009] 1 Lloyd's Rep 328, [2009] All ER (D) 204 (Jan) yet again provides an illustration of the very concerning implications of Pt 7 POCA upon the business of banking and the rights of the individual.

Absent bad faith, little more than a “bad feeling” can trigger a bank's disclosure obligations under POCA, with in some cases catastrophic commercial consequences. **NLJ**

“A limited interference is to be tolerated in preference to allowing the undoubted evil of money-laundering to run rife in the commercial community”

is in reality worthless. To add to the difficulties, recovery of damages for any loss suffered may not be straightforward in a case like this.”

The counter-argument raised by the Commissioner is that POCA is a sharp but essential modern weapon in the fight against organised crime which gives SOCA and other law enforcement bodies the ability to counter-attack, and then pursue and recover the proceeds of the criminal activity. Despite these concerns the courts currently believe that they represent the price Parliament has deemed “worth paying in the fight against crime”: para 26, *Shah* (supra).

As Longmore LJ observed in the *K Ltd* case (supra): “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. The fact that the interference lasts only for seven working days in what

company frozen in its account by the bank as a result of the impact of POCA 2002 Pt 7. Such was the economic hardship this created for the company that it could not afford to instruct solicitors and counsel to pursue their application for relief against the respondent bank. Mr Justice Laddie said “this can be viewed as a grave injustice”: *Shah*.

The possible far reaching economic losses said to have been suffered by Mr Shah in *Shah and Another v HSBC Private Bank (UK) Ltd* (supra) again brings in to sharp focus concerns as to whether the right balance has in fact been struck.

Human rights

In *K Ltd* (supra) the court considered submissions “not pressed very hard in oral argument” by the applicant that the suspension of the applicants account as a consequence of the operation of POCA breached the applicant's Art 6 rights in that it impaired the right of the applicant to access to the court to require its banker to perform its contract. The court found that the right of access to the court was not impaired in anything other than a short suspensory manner.

The court further doubted whether Art 1 of the First Protocol had application but

David Hislop is a barrister at Doughty Street Chambers. E-mail: j.flint@doughtystreet.co.uk