

On the right terms - Shah v HSBC is a timely reminder to check standard terms and conditions

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The recent English High Court decision in Shah v HSBC Private Bank [2012] highlights again the need for banks and trust companies to be aware when they may refuse to transfer cash or assets where there is a suspicion of money laundering. While in this case the High Court implied a term into the bank's terms so that it could refuse to process payments in these circumstances, the Jersey court may not take a similar approach. There is also a possibility of criminal liability if any holder of client money or assets (the **financial institution**) has no choice but to make a transfer of tainted funds.

Rock and a hard place

Under the Proceeds of Crime (Jersey) Law 1999 (POCL) a financial institution may be guilty of assisting another to retain the benefit of criminal conduct (**assistance**) if it facilitates the retention of the proceeds of criminal conduct, including by transferring the proceeds out of Jersey. It is a defence to this charge that the transfer is made with the consent of the police. However, consent may not be forthcoming for some months or years until the police have finished investigating the case. In the meantime, the financial institution may face the dilemma of not transferring the cash or assets and thereby being in breach of contract (and possibly liable for damages), or making the transfer and being potentially criminally liable under POCL. Furthermore, the financial institution may even be guilty of assistance even if it makes a transfer at the order of the court, as obeying a court order to pay over funds is no defence to the charge.

Judgments in conflict

In the Jersey case of Gichuru v Walbrook [2008], the Court implied a term into conditions which would enable a financial institution to refuse to execute a transfer instruction where it had made a Suspicious Activity Report under POCL provided that:

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In that case the court, citing Chief Officer v Minwalla [2007], concluded that a financial institution that takes all reasonable steps to defend a claim to pay over funds would not be criminally liable even without Police consent.

However, the 2011 Guernsey Court of Appeal case of The Chief Officer, Customs & Excise v Garnet Investments Limited did not take this approach of implying a term. Instead it held that whether or not a financial institution could refuse to pay over funds would depend on to the express terms of the contract with the customer. The case was a judicial review application made by Garnet Investments Limited, a Guernsey company beneficially-owned by the son of former President Suharto of Indonesia. Garnet Investments had requested BNP Paribas to transfer some of the \$48m held in Garnet Investment's account to an account outside Guernsey. BNP Paribas, wary of a charge of assistance, declined to do so. If this judgment were to be followed by the Jersey courts then a financial institution that relies on terms and conditions which do not grant discretion to refuse to make transfers where there is a suspicion of money laundering would be exposed. Furthermore, Garnet offered no comfort on the possibility of avoiding criminal liability for a financial institution where it pays over funds without the sanction of the relevant Guernsey authority.

Shah v HSBC may offer some solace for financial institutions without express contractual provisions enabling them to refuse to make a transfer. In this case, the English High Court implied a term into the contract between customer and banker allowing the bank to refuse to pay over funds even where it has suspicion that the funds are the proceeds of crime.

However, it is not clear which judgment the Jersey court would be most likely to follow. The judgments of the Court of Appeal sitting on Guernsey cases have been found to be highly persuasive and it may be that the Jersey court would follow Garnet over Gichuru or Shah.

Contractual cover

Terms and conditions should therefore be reviewed to ensure that financial institutions may refuse to execute a payment instruction where there is a suspicion of money laundering. Other terms may also need to be considered, such as exclusion of liability to cover such events.

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