



A Note on the Court of Appeal's judgment in *K Ltd v NatWest*

The recent decision of the Court of Appeal in *K Ltd v National Westminster Bank Plc* [2006] EWCA Civ 1039 considered the anti-money laundering provisions of the Proceeds of Crime Act 2002 ("POCA"), what a bank's obligations are when requested by a client to transfer funds which are suspected to be the proceeds of crime, the definition of suspicion and the courts' powers to order the bank to make a payment out of a customer's account.

Background to the case

The facts of the case can be summarised as follows:

1. The Bank's customer, K Ltd, was involved in the business of buying and selling, among other things, mobile telephones.
2. On 18 August 2005, the customer made two transactions. In the first, it agreed to purchase a consignment of mobile telephones for £200,000 plus VAT (total: £235,000). In the second, it agreed to sell the same telephones for £215,200 to a Swiss company, thereby making a profit of almost £20,000 since the VAT paid on the purchase would be reclaimable.
3. On 22 August 2005, the Swiss purchaser paid £215,200 into the customer's account at the Bank and on the same day the customer instructed the Bank to pay £235,000 to an account in the Netherlands Antilles.
4. On 23 August 2005, the customer was told by the Bank that it was not in a position to honour the transaction. No reason was given.
5. On 5 September 2005, the customer applied for an injunction ordering the release of the funds.
6. On 6 September 2006, the Bank's solicitors (DLA Piper) wrote to the

customer informing it that a suspicious activity report ("SAR") had been made to the relevant authorities and that consent had been refused.

7. The customer's application was heard on 9 September 2005 by HHJ Gilliland QC, who refused it, applying the decision in *Squirrell Limited v National Westminster Bank Plc and HM Customs and Excise*¹. An order for costs was made against the customer in favour of the Bank.
8. On 15 September 2005, consent was given by the authorities and the transaction proceeded.

The customer appealed to the Court of Appeal. By permission of the court, Her Majesty's Revenue and Customs ("HMRC") and The Serious Organised Crime Agency ("SOCA") intervened in the appeal.

The law: the Proceeds of Crime Act 2002 ("POCA")

Section 328(1) of POCA provides that:

"A person commits an offence if he enters into or becomes concerned in an arrangement which he knows or suspects facilitates (by whatever means) the acquisition, retention, use or control of criminal property by or on behalf of another person."

The relevant threshold is **suspicion** (as opposed to speculation) and a bank does not need to have actual evidence of money laundering. As soon as a bank suspects that monies on its customer's account may be the proceeds of crime then (whether or not they in fact are) the bank is prohibited from entering into any arrangement in relation to those funds without obtaining consent.

Once a SAR has been made, the prosecuting

¹ See our earlier briefing note for further details of the judgment in *Squirrell v NatWest*



authority may:

- consent to (or refuse to consent to) the transaction; or
- if a disclosure has been made and no notice refusing consent has been received from the authorities within seven working days consent is deemed to have been given.

If consent is refused within seven working days, the relevant prosecuting authority has a further 31 calendar days (the moratorium period) to consider the matter and the transaction cannot proceed until such time as consent is given or, the moratorium period expires.

Unless and until consent is given (or is treated as having been given), the bank or financial institution may commit a criminal offence if it:

- (i) proceeds with the transaction in question; and/or
- (ii) tips off the customer that a disclosure has been made.

The decision of the Court of Appeal

In dismissing the appeal, the court held that:

- The bank had complied "*lawfully and properly*" with the relevant procedure laid down by Parliament in POCA.
- If the bank held a suspicion, it was prohibited by the criminal law from honouring the customer's mandate. This provided the bank with a defence to any claim for breach of mandate. The contract with the customer was temporarily suspended until the illegality was removed.
- The court should refuse any application for an injunction as a matter of discretion as it would not be right to compel the Bank to perform a criminal act.
- A person held a suspicion if he or she

thought there was a "*possibility, which is more than fanciful, that the relevant facts exist*". This was subject, in an appropriate case, to the further requirement that "*the suspicion so formed should be of a settled nature*". Suspicion is subjective and there is "*no legal requirement that there be reasonable grounds for suspicion*".

- On the basis of DLA Piper's letter of 6 September 2005 to the customer's solicitors (confirming that a disclosure had been made), it was clear that the bank held a suspicion. The bank correctly followed the statutory procedures under section 333 POCA by having its professional legal advisers write to the customer once legal proceedings were contemplated².
- It would not be appropriate for the court to examine the suspicion through cross-examination of the professional legal adviser or relevant bank employees. There was no mechanism for this in POCA and it may well have been the intention of Parliament to protect those reporting suspicions from having their identity revealed to money launderers.
- Parliament had struck a "*precise and workable balance of conflicting interests*" in POCA. The temporary interference to the free flow of trade was preferable to allowing the undoubted evil of money laundering to run rife in the community. Such a temporary interference was reasonable and did not therefore breach the customer's human rights.

Conclusion

This case has provided banks and financial institutions with further clarity concerning the meaning of "suspicion". It has also confirmed that, providing a suspicion is held, the bank will

² Sections 333(2)(c) and (3)(b) of POCA provides that a bank does not commit a tipping off offence if a disclosure is made by a "*professional legal adviser ... to any person in connection with legal proceedings or contemplated legal proceedings*".

have a defence to any breach of mandate claim.

The court's comments on the "professional legal adviser exception" do, however, need to be approached with some caution. On the face of it section 333 makes it clear that no tipping off will occur when a disclosure is made by a professional legal adviser in relation to actual or contemplated legal proceedings. Circumstances may, however, arise where confirmation from a legal adviser that a disclosure has been made may prejudice an ongoing investigation and it may still be prudent and/or good practice for firms, when faced with actual or contemplated legal proceedings, to liaise with the authorities first to endeavour to agree the wording of any disclosure to a customer.

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