



EVERYTHING MATTERS

2009 MLRO.com's Annual Conference

# **PROCEEDS OF CRIME ACT 2002**

Shah -v- HSBC Private Bank (UK) Ltd

*Daren Allen*

*Litigation & Regulatory*

*Tuesday, 24 March 2009*

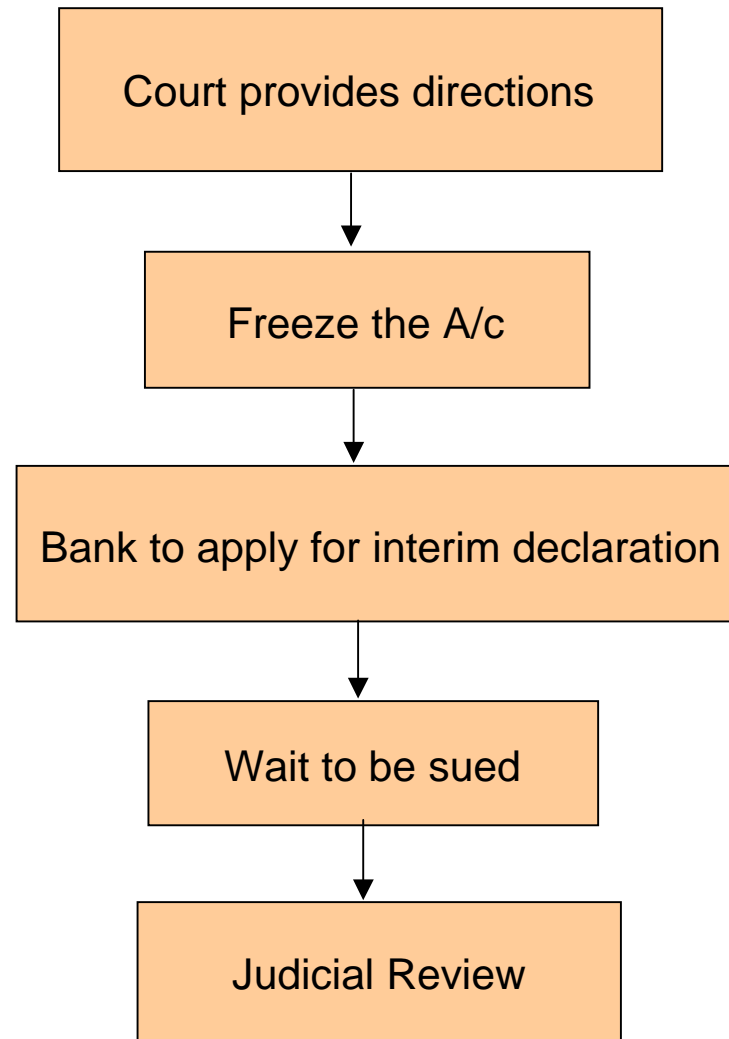
- Bank must disclose its suspicions
- Bank's contractual duty to pay
- Delay caused by SOCA decision making
- Bank's duty not to tip off
- Customer in the dark– what does it do?

# POCA AND CONSENT – Where are we now?



- C -v- S
- Bank of Scotland -v- 'A' Limited
- Squirrell -v- National Westminster Bank
- K Limited -v- National Westminster Bank – Court of Appeal
- UMBS
- Shah -v- HSBC Private Bank (UK) Ltd

# How the law has changed



- Dealer in mobile phones
- Large transaction - Netherlands Antilles
- Bank makes SAR
- Consent refused
- K makes application to Court, loses and appeals

“the essential element in the word “suspect” ... 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 upon “reasonable grounds”.”

## Suspicion

“There is no legal requirement that there should be reasonable grounds for suspicion. The relevant bank employee either suspects or he does not. If he does suspect, he must (either himself or through the Bank’s nominated officer) inform the authorities.”

# K Ltd

## Breach of Mandate



"If the law of the land makes it a criminal offence to honour a customer's mandate in these circumstances there can, in my judgment, be no breach of contract for the Bank to refuse to honour its mandate .... If that is right, there would be no issue to be tried in any later legal proceedings"

Longmore LJ

“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 7 working days in what we were told were the majority of cases and a further 31 days only ... shows that the interference with freedom of trade is limited.”

- UMBS deals in instant money transfers
- UMBS hold money through CS – in turn bank with Laiki Bank
- 6.2.07 CS make disclosure to SOCA and consent given
- 14.2.07 Laiki Bank make disclosure
- 21.2.07 Laiki Bank refused consent
- 26.2.07 Malletts ask SOCA to reconsider

- 27<sup>th</sup> February 2007:

“[The] refusal of consent is effective until the end of the expiry of the moratorium period... In the absence of a further request ... from Laiki Bank and a change in circumstances, the refusal ... will not be revisited.”

Letter SOCA to Malletts

## First Hearing

- No evidence from SOCA?

Held: Must give some explanation and undertaking

- Could SOCA look at Malletts' request?

Held: No – POCA did not envisage requests from third parties

- Was change of heart rational?

Held: ongoing investigation: infer yes

## Court of Appeal:

- Was the 27<sup>th</sup> Feb response rational?  
Held: No – SOCA ordered to reconsider
- Was change of heart rational?  
Held: Arguably not – no investigation
- Did procedure comply with Article 1, Protocol 1 HRA?  
Held: Arguably not – no prescribed procedures

Every natural or legal person is entitled to the peaceful enjoyment of his possessions.

No one shall be deprived of his possessions except in the public interest and subject to the conditions provided for by law and by the general principles of international law.

- Reconsideration by SOCA: No
- Restraint Order Obtained
- CA directed that JR continue
- Restraint Order to be considered by Court of Appeal
- JR will almost certainly return to CA

- The Claimants held an account with HSBC Private Bank.
- Between 20 September 2006 and 28 February 2007, the Bank delayed execution of four separate payment instructions given by the Claimants, including an instruction to transfer approximately US\$28million.
- The Bank suspected that the funds in the Claimants' account were criminal property. It made an authorised disclosure seeking consent.
- Once consent had been given, the Bank complied with the instructions except for one, which the Claimants cancelled.
- In each case, the Bank told the Claimants that it was complying with its statutory obligations but declined to provide any further information to the Claimants or their solicitors.

- Claimants claimed approximately US\$400 million of losses allegedly arising out of the seizure of their assets and the stigma caused to their reputation in Zimbabwe.
- The Claimants claimed damages for breach of contract arising out of the Bank's failure to comply with their instructions and refusal to provide any information about the reasons for the delay.
- Claimants alleged that bank breached duty to take reasonable care in operating the account and by failing to make a disclosure seeking consent "as soon as it was practicable to do so" when there were no "rational grounds" to suspect money laundering.
- The Claimants alleged that the Bank's disclosures to the authorities were not protected by POCA and were therefore made in breach of confidence.

- **Evidence of suspicion:** a three stage process and, in each case, at least three people (at staff, compliance and money laundering reporting office level) had held a suspicion.
- The Court accepted the Bank's evidence that it held a suspicion and in each case had made an authorised disclosure seeking consent.
- **Duty of care to report suspicion without unreasonable delay:** the Court accepted that, in general terms, a banker owes a duty of care to its customer.
- A banker who unreasonably delays seeking consent once it has decided to do so, or who unreasonably delays complying with instructions once consent has been obtained, might be in breach of that duty.

- Court found it difficult to see how consent to a transaction could be obtained until the details of the transaction in question are known.
- The Bank's disclosures had all been made within two days of payment instructions, which was not an unreasonable delay.
- **Breach of confidence when seeking consent:** Bank held a relevant suspicion and had no choice but to make an authorised disclosure.
- The Court found that the making of an authorised disclosure was exempted from any breach of confidence irrespective of whether the suspected criminal property in fact turned out to be criminal property.

- Suspicion of money laundering does not have to be reasonable or rational and is an entirely subjective matter providing there is no evidence of bad faith;
- There appears to be a duty of care on a bank not unreasonably to delay reporting a suspicion or unreasonably to delay complying with instructions once consent has been obtained. However, it was accepted that the reporting process may take time;
- The tipping off provisions in POCA offer a potential defence to any claim for a refusal to explain a delay in complying with a customer's instructions;
- A bank which suspects money laundering does not breach any confidence by making a disclosure to the authorities, even where it transpires that there was in fact no criminal property involved.

---

# ANY QUESTIONS

Name: Daren Allen  
Position: Partner  
Department: Litigation & Regulatory  
Tel: +44 (0)20 7796 6824  
Fax: +44 (0)20 7153 7710  
E-mail: [daren.allen@dlapiper.com](mailto:daren.allen@dlapiper.com)



EVERYTHING MATTERS

2009 MLRO.com's Annual Conference

# **PROCEEDS OF CRIME ACT 2002**

Shah -v- HSBC Private Bank (UK) Ltd

*Daren Allen*

*Litigation & Regulatory*

*Tuesday, 24 March 2009*