Neutral Citation Number: [2006] EWCA Civ 1039

Case No: 2005 2189 A3

IN THE SUPREME COURT OF JUDICATURE
COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
MANCHESTER DISTRICT REGISTRY: MERCANTILE COURT
His Honour Judge Gilliland QC

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 19th July 2006

Before :

LORD JUSTICE WARD
LORD JUSTICE LAWS
and
LORD JUSTICE LONGMORE

- -

Between :

K Ltd	**Appellant**
- and -	
NATIONAL WESTMINSTER BANK Plc	**Respondent**
- and -	
HM REVENUE AND CUSTOMS	**Intervening Parties**
and	
SERIOUS ORGANISED CRIME AGENCY	

- -
- -

Ms BARBARA DOHMANN QC, DAVID BERKLEY Esq QC and PEPIN ASLETT Esq
(instructed by **Blacks Solicitors LLP, LS2 8NG**) for the **Appellant**
RICHARD LISSACK Esq QC and PAUL DOWNES Esq
(instructed by **DLA Piper Rudnick Gray Cary, EC2V 7EE**) for the **Respondent**
ANDREW MITCHELL Esq QC and PETER de VERNEUIL SMITH Esq
(instructed by **The Solicitor's Office, HM Revenue and Customs, WC2R 1LB and The Serious Organised Crime Agency, SE11 5EN**)for the **Intervenors**

Hearing date : 7th June 2006

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Approved Judgment

Lord Justice Longmore :

1. Introduction

This appeal raises questions of construction in relation to the money-laundering provisions in part 7 of the Proceeds of Crime Act 2002 ("the 2002 Act"). Section 328 of that Act provides:-

> "**Arrangements**
>
> (1) 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.
>
> (2) But a person does not commit such an offence if –
>
> (a) he makes an authorised disclosure under section 338 and (if the disclosure is made before he does the act mentioned in subsection (1)) he has the appropriate consent . . . . ."

2. In the present case the defendant Bank asserts that to comply with a payment request made on 22nd August 2005 by its customer to pay money out of its account would mean that it would become concerned in an arrangement which it suspected would facilitate the use of criminal property by its customer. In order to avoid committing a criminal offence it had therefore to make an authorised disclosure and obtain the appropriate consent.

3. Appropriate consent is defined in section 335 of the Act:-

> "(1) The appropriate consent is –
>
> (a) . . . .
>
> (b) the consent of a constable to do a prohibited act if an authorised disclosure is made to a constable;
>
> (c) the consent of a customs officer to do a prohibited act if an authorised disclosure is made to a customs officer.
>
> (2) A person must be treated as having the appropriate consent if –
>
> (a) he makes an authorised disclosure to a constable or a customs officer, and
>
> (b) the condition in subsection (3) or the condition in subsection (4) is satisfied.

(3) The condition is that before the end of the notice period he does not receive notice from a constable or customs officer that the consent to the doing of the act is refused.

(4) The condition is that –

(a) before the end of the notice period he receives notice from a constable or customs officer that consent to the doing of the act is refused, and

(b) the moratorium period has expired.

(5) The notice period is the period of seven working days starting with the first working day after the person makes the disclosure.

(6) The moratorium period is the period of 31 days starting with the day on which the person receives notice that consent to the doing of the act is refused."

In the present case HM Revenue and Customs refused consent within the notice period of 7 working days but they granted consent before the moratorium period of 31 days expired.

4. The Customer (as I shall call the claimant) made a claim for an interim injunction requiring the Bank to comply with the Customer's instructions. That application was refused by HH Judge Gilliland on 9th September 2005. Since consent was granted on 15th September and the transaction was therefore performed, the appeal itself has been rendered redundant. Nevertheless costs are still in issue and this application gives rise to important questions under the 2002 Act.

5. <u>The Facts</u>

The Customer had a business account since July 2001. On 18th August 2005 it made two transactions:-

(1) a contract to purchase a consignment of mobile telephones from Fones Centre Ltd ("Fones") for £200,000 plus VAT (viz £235,000 in all);

(2) a contract to sell the same telephones to a Swiss company for £215,200. The VAT paid on the purchase would be reclaimable since the purchase was made for export. That meant that the Customer would make a profit of £20,000 on the transaction.

About the same time the Customer's director, Mr H explained to the Manager (Mr Gibson) who was responsible for his account that he would need to make a substantial payment to Fones. On 22nd August the Swiss purchaser paid £215,200 into the Customer's account at the Bank from an account in the Netherlands Antilles and on the same day Mr H instructed the Bank by fax to pay Fones £235,000. On 23rd

August Mr Gibson wrote to Mr H saying that the Bank could not currently comply with his instructions and could not enter into any further discussion of the matter. The Customer immediately put the matter in the hands of its solicitors who, after letters before action, applied to the court for an injunction on 6th September. The court adjourned the application until 9th September and a formal notice of application was issued by the Customer on the following day. Meanwhile the Bank (after consultation with Revenue and Customs) caused a letter of 6th September to be sent by its solicitors to the effect that it had made a disclosure to the Customs. On 9th September the judge refused the application on the basis that Parliament had laid down a statutory scheme to prevent money laundering and, once the Bank stated that it suspected money in the Customer's account was criminal property, that was an end of the matter.

6. The submissions

Ms Barbara Dohmann QC appeared to argue the appeal for the Customer. She submitted:-

(1) the Bank by refusing to honour its customer's instructions, was acting in breach of the contract of mandate whereby the Bank had agreed to honour its Customer's instructions;

(2) that the judge should have restrained the Bank from continuing to act in breach of contract and should have granted the injunction sought;

(3) that if the Bank was going to rely on any suspicion that the money in the Customer's account was criminal property, it should have given admissible evidence to the court of any such suspicion. A solicitor's letter which baldly stated that the Bank had made a disclosure was insufficient because

(a) it did not identify the fact that the Bank entertained any suspicion on the matter;

(b) it did not identify who in the Bank had had any such suspicion;

(4) if there had been admissible evidence before the court, the maker of the statement could be cross-examined on the question whether he did actually entertain a suspicion and (perhaps) whether there were any grounds for such suspicion. Otherwise, a customer's account could be effectively frozen even if a suspicion had not been entertained; the Court's guidance was sought on what in law could constitute suspicion;

(5) if the judge was right that the court was powerless to question whether the Bank did have any suspicion, the

customer was deprived of access to a court which was his right under Article 6 of the European Convention on Human Rights ("the Convention"), or deprived of his possessions under Article 1 of the First Protocol of the Convention and therefore the statutory provision should be interpreted (or read down) to avoid such a result.

7. Mr Richard Lissack QC for the Bank submitted:-

(1) it had been agreed that the solicitors' letter of 6th September could be treated as evidence;

(2) on that basis it was clear that the Bank did entertain a relevant suspicion;

(3) once the Bank did entertain such a suspicion, it would be a criminal offence for them to perform the required transaction; no court should grant an injunction which required a defendant to act illegally;

(4) it was not contemplated by Parliament that a banker (or anyone else) should be cross-examined as to whether a suspicion was entertained; suspicion was an ordinary English word on which no guidance was needed from the court; in any event a moratorium of 7 working days + 31 ordinary days (= 40 days in all) was too short a time for any meaningful investigation to take place;

(5) the Human Rights Convention had no part to play.

8. By permission of the court, Her Majesty's Revenue and Customs ("Revenue and Customs") and The Serious Organised Crime Agency ("SOCA") intervened in the appeal. Mr Andrew Mitchell QC on their behalf supported the Bank's submissions and informed the court that institutions to which the money-laundering provisions in the 2002 Act applied would normally have Nominated Officers pursuant to sections 330 and 331 of the Act and it was those officers who would be in contact with SOCA or the investigating authority to whom SOCA would have referred the disclosure, would be making any authorised disclosure to SOCA or any other relevant authority and would be seeking the relevant consent from them to process any transactions. It would also be such persons who would be making disclosure to the court for the purpose of the tipping off provisions of the Act whereby no disclosure could be made to the customer save for the purpose of legal proceedings pursuant to section 333(2)(c) and (3)(b) of the Act. It would scarcely be feasible to cross-examine any such person since he or she would not be the person who originally entertained the suspicion.

9. The Criminal Law

There can be no doubt that, if a banker knows or suspects that money in a customer's account is criminal property and, without making disclosure or without authorised consent (if disclosure is made), he processes a customer's cheque in such a way as to transfer that money into the account of another person, he facilitates the use or control of that criminal property and thus commits an offence under section 328 of the 2002 Act. It would be no defence to a charge under that section that the Bank was contractually obliged to obey its customer's instructions.

10. If the law of the land makes it a criminal offence to honour the 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 and there can, equally, be no invasion (or threat of an invasion) of a legal right on the part of the Bank such as is required before a claimant can apply for an injunction. If that is right, there would be no issue to be tried in any later legal proceedings and any application for an interlocutory mandatory injunction has to be dismissed.

11. It could be said that this puts the matter over-legalistically or over-dramatically in the sense that it is not usually a defence to a claim for a breach of contract that the contract-breaker would, by performing the contract, be in breach of the criminal law. That is not, however, correct. The conventional view is that, if a statute renders the performance of a contract illegal, the contract is frustrated and both sides are discharged from further performance. In a case, however, where a statute makes it temporarily illegal to perform the contract, the contract will only be suspended until the illegality is removed. That still means that, during the suspension, no legal right exists on which any claim to an injunction must depend.

12. Even if, for any reason, the above analysis is open to objection, the fact still remains that during the 7 working day or 31 day period, as the case may be, the Bank would be acting illegally by processing the cheque. It would be entirely inappropriate for the court, interlocutorily or otherwise, to require the performance of an act which would render the performer of the act criminally liable. As a matter of discretion any injunction should be refused.

13. On any view, therefore, a claim for an injunction in the present case must fail, unless the Customer can in some way attack the factual foundation on the basis of which the criminal liability will arise. Here it is "suspicion" on the part of the Bank. If the Bank asserts it is suspicious, can that be controverted in any way?

14. "Suspicion"

The Customer forcefully submits that it cannot be enough merely for the Bank to say that it suspects that processing a cheque will facilitate the use or control of criminal property. It must say so in a properly admissible form, stating who in the Bank has formed the suspicion, and be prepared to be cross-examined on that question. The fact that the Bank's solicitors letter was agreed to be received in the evidence in the present case does not conclude this question since the letter did not identify the person in the Bank who had the relevant suspicion and was not in a form amenable to render any Bank official liable to be cross-examined as to whether he had the relevant suspicion or not. It is in this context that the definition of "suspicion" or "suspect"

arises because, in the absence of any legal definition, it is unclear whether a bank official had a true suspicion or not.

15. Mr Lissack and Mr Mitchell urged us not to yield to the blandishments of Ms Dohmann's request to the court to give some guidance for the future as to the meaning of "suspect". Any definition of what was an ordinary English word was, they said, likely to be unhelpful and only put a gloss on the statute. That is all very well but the problem has arisen in the Criminal Division of this court in appeals in cases where judges have tried to assist juries on the meaning of the concept of suspicion and it is important that both divisions of this court speak, so far as possible, with one voice. The problem is not made easier by the fact that Mr Mitchell, who in an authorial capacity has co-written the leading work on the topic, Mitchell, Taylor and Talbot on Confiscation and Proceeds of Crime, in his capacity as leading counsel for the Intervening parties before us expressed unease at the definition used in his important work which cites the Chambers' Dictionary definition of the word suspicion and adds

> "Thus any inkling or fleeting thought that the property might be [criminal property] will suffice". See Volume II, section VIII 008-009.

16. In R v Da Silva [2006] EWCA Crim 1654 this court has said that for a defendant to be convicted of an offence under section 93A(1)(a) of the Criminal Justice Act 1988 (the earlier equivalent of section 328 of the 2002 Act), he or she must think that there is a possibility, which is more than fanciful, that the relevant facts exist. This is subject, in an appropriate case, to the further requirement that the suspicion so formed should be of a settled nature. If that definition is sufficient for criminal cases, so also should it be for civil cases.

17. That still leaves the question of how, in a civil case, evidence of suspicion is to be adduced and whether it can be cross-examined. This is an anxious and difficult matter.

18. Evidence of suspicion

A disclosure by a banker to the authorities that he suspects he is being asked to facilitate the use or control of criminal property is an authorised disclosure pursuant to section 338 of the 2002 Act. Thereafter the tipping-off provision contained in section 333 of that Act comes into effect. That section provides:-

> "(1) A person commits an offence if –
>
> (a) he knows or suspects that a disclosure falling within section . . . . 338 has been made, and
>
> (b) he makes a disclosure which is likely to prejudice any investigation which might be conducted following the disclosure referred to in paragraph (a).

> (2) But a person does not commit an offence under subsection (1) if –
>
> (a) he did not know or suspect that the disclosure was likely to be prejudicial as mentioned in subsection (1);
>
> (b) the disclosure is made in carrying out a function he has relating to the enforcement of any provision of this Act or of any other enactment relating to criminal conduct or benefit from criminal conduct;
>
> (c) he is a professional legal adviser and the disclosure falls within subsection (3).
>
> (3) A disclosure falls within this subsection if it is a disclosure –
>
> (a) to (or to a representative of) a client of the professional legal adviser in connection with the giving by the adviser of legal advice to the client, or
>
> (b) to any person in connection with legal proceedings or contemplated legal proceedings.
>
> (4) But a disclosure does not fall within subsection (3) if it is made with the intention of furthering a criminal purpose."

This section makes it clear that a banker who makes a disclosure which he knows or suspects is likely to prejudice any investigation commits a criminal offence. The only sure way in which such an offence can be avoided is if the banker avails himself of sub-section 2(c) and procures his professional legal adviser to make the relevant disclosure and then only to a person in connection with legal proceedings pursuant to sub-section 3(b). The Bank in the present case correctly followed this statutory route of disclosure and procured its solicitors to make the relevant disclosure to the court by the letter of 6th September 2005, when they were sued by the claimant for an injunction.

19. It cannot be of any consequence whether the Bank's solicitor made the disclosure to the court by way of letter or by way of formal witness statement since the solicitor will not himself have any suspicion; he will only be reporting the suspicion of the bank's officers, whether that be the Nominated Officer of the bank or the manager of the account who may have been the first person to entertain the relevant suspicion. It would be a fruitless exercise to cross-examine the solicitor about the existence of the bank's suspicion. There is, moreover, no mechanism whereby any officer of the bank can be required to attend for cross-examination since there is no provision enabling the relevant person to give evidence of his suspicion.

20. This is not surprising. It may well have been the intention of the statute to protect those having a suspicion and reporting that suspicion to the authorities from being identified, since it is notorious that those concerned in money laundering are no respecters of persons who report them to the authorities. This conclusion is bolstered by the further consideration that any cross-examination of a bank employee would, in fact, be almost as pointless as cross-examination of a bank's solicitor. Once the employee confirmed that he had a suspicion, any judge would be highly likely to find that he did indeed have that suspicion. Any cross-examination would be bound to decline into an argument whether what the employee thought could amount in law to a suspicion, which is not a proper matter for cross-examination at all.

21. Ms Dohmann submitted that, if this was the position, it would be all too easy for banks to assert a suspicion which was in fact groundless. She instanced this very case, saying that the only reasons for the transaction to be suspect was that it concerned mobile telephones and that the payment by the Swiss purchaser came from an off shore account. That she said was just not enough to amount to a proper suspicion in law. The answer to this submission is two-fold:-

    (1) The existence of suspicion is a subjective fact. There is no legal requirement that there should be reasonable grounds for the 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;

    (2) The provisions of the statute permitting only the bank's professional legal adviser to make a disclosure on its behalf and then only for the purpose of court proceedings cannot be side-stepped.

22. 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, 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 that a reasonable balance has been struck. That reasonable balance avoids the difficulties, raised by the previous statutory provisions (contained in sections 93A–93D of the Criminal Justice Act 1988 where no time limits were incorporated) and discussed in Bank of Scotland v A Ltd [2001] EWCA Civ 52, [2001] 1 WLR 751 and Amalgamated Metal Trading Ltd v City of London Police Financial Investigation Unit [2003] EWHC 703 (Comm), [2003] 1 WLR 2711.

23. Even so the terms of the Act have, not surprisingly, given rise to concern. Judge Norris QC in New Bridge Holdings v Barclays Bank in Birmingham 10th February 2006, paragraph 26, has suggested that one way forward might be:-

> "to provide for some procedure whereby the arbitrary and capricious exercise of power should be prevented by the court being told, in confidence by the relevant authority, whether or not an investigation is in progress and the general nature of that investigation, so that the court could form a view – a view as to the likely success of the applicant at trial in obtaining the relief he seeks or the Bank committing an offence if it makes the transfer without the relevant consent."

I fear that I do not think it would be satisfactory or acceptable for SOCA to communicate privately to the court without the court being able to communicate to the claimant. That would not be open justice. Insofar as Judge Norris was concerned about arbitrary or capricious exercise of power by SOCA (or any other relevant authority) that can be catered for by judicial review. I did not understand Mr Mitchell to assert that SOCA (or any other authority) were not amenable to judicial review on ordinary principles. That is not a matter with which this court is concerned on this application. The only matter with which this court is presently dealing is whether the Bank had a suspicion that the money in its customer's account was criminal property. But again for the Bank to communicate its suspicion to a judge in private would not be right either. Quite apart from the elementary principle of open justice, the court might be put in a position where its own view was that the Bank did not hold a suspicion (perhaps because it thought that any suspicion could not reasonably be held) but the SOCA took a contrary view. An expression of view by the court in the absence of SOCA could not bind them; it would also be a misuse of resources for them to have to instruct counsel in every case in order that they could be bound by the result. For all these reasons I do not think it right for the judge to be drawn into dealing with these matters in the absence of the claimant. It is quite unlike debates about privileged documents when the judge sometimes sees the documents and makes up his own mind whether privilege is rightly claimed. In such cases the litigation is well developed and the issues can be debated, at any rate in outline, with all parties present.

24. ECHR Convention

Quite correctly Ms Dohmann did not press her arguments on the Convention very hard in the course of oral argument. In relation to Article 6 she relied on Ashingdane 14/1983/70/106 paragraph 57 for the uncontroversial proposition that, while national courts are entitled to regulate the right of access to their courts, such regulation must not impair the essence of that right and must pursue a legitimate aim in a proportionate manner. However, the limited interference with the claimant's common law rights to require its banker to perform its contract (which is constituted by the Proceeds of Crime Act) does not in my view impair the right of access to the courts in anything more than a short suspensory manner and, for the reasons given in paragraph 22 above, is in any event, a legitimate aim pursued in a proportionate manner.

25. As far as Article 1 of the First Protocol is concerned, it must be doubtful whether a right to have a contract of mandate performed is the kind of possession which Article 1 contemplates will be peacefully enjoyed. It is not as if the debt constituted by the account with the Bank has been cancelled or otherwise done away with. All that has happened is that performance of the mandate contract has been deferred by a number of days (7 or 38 as the case may be). But in any event for the reasons I have

attempted to give, any such interference with peaceful enjoyment as there may have been was in the public interest and subject to the conditions provided for in the 2002 Act. There is therefore no breach of Article 1 of the Protocol.

26. Conclusion

For these reasons I would hold with Judge Gilliland QC that Parliament has laid down the relevant procedure with which the Bank has lawfully and properly complied and I would dismiss this appeal.

Lord Justice Laws:

27. I agree.

Lord Justice Ward:

28. I also agree.