

Restructuring Bankruptcy & Insolvency Group Legal Alert

Recent clarification of the Proceeds of Crime Act 2002

The High Court, in a judgment handed down recently^[1], has provided useful clarification of a number of issues relevant to the relationship between a bank's statutory duty to seek "appropriate consent" under the Proceeds of Crime Act 2002 and its duties (contractual or otherwise) to its customer. Although the case was concerned with a bank, it will be of interest to any professional who encounters the Act.

Background

The claimants sought damages from their account holding bank (the "Bank") in respect of delays by the Bank in executing transfers from their accounts and the Bank's failure to explain the reasons for such delays. The underlying reason why the transfers were delayed was that the Bank suspected that funds in the claimants' account were criminal property and, therefore, before it could proceed, the Bank had to make an authorised disclosure to the relevant authorities and wait for appropriate consent under Part 7 Proceeds of Crime Act 2002 ("POCA"). However, at the time, the reason for the delay given by the Bank to the claimants was that the Bank was complying with its UK statutory obligations.

The issues before the Court took the form of an application by the Bank to strike out and/or seek summary judgment in respect of certain parts of the claim and an application by the claimants to amend particulars of claim.

Meaning of “suspicion” under POCA

The Court noted that the practical effect of POCA is to compel a bank to seek appropriate consent under s335 POCA in any case where the bank has a “suspicion” that a money laundering offence may be committed.

It held^[2] that “suspicion” under POCA is a purely subjective matter. It did not matter whether or not there are reasonable grounds for that suspicion, provided that it is a genuinely held suspicion. To constitute a suspicion (rather than a mere feeling of unease) there must be a basis of possible facts, but the sufficiency of those possible facts as a grounding for the suspicion is irrelevant, unless good faith is an issue.

In this case the claimants had not sought to challenge the good faith of the suspicion held by the Bank’s employees and therefore the Court concluded that there was no reasonable prospect of establishing that the Bank’s failure to execute their payment instructions was a breach of duty. Further, the Court was satisfied that, as the Bank had a relevant suspicion, the claimants had no real prospect of establishing that there was any breach of confidence by the Bank in making the authorised disclosure.

A bank’s duty of care to its customers

The Court held that there was no doubt that a banker owes a general duty of care to its customers in the way that it executes their orders^[3]. Whilst a bank’s duty to comply with POCA may restrict or qualify those duties, they are not completely excluded. By way of example, if a bank sought appropriate consent under POCA to make a bank transfer and, having obtained such consent, it unreasonably delayed in carrying out that transfer, it may be in breach of duty. Similarly, if, having decided to make an authorised disclosure under POCA in relation to a requested transfer, the bank unreasonably delayed in making that disclosure, a breach of duty may have occurred. However, in the instant case, authorised disclosures were all made within at most two days of the payment instruction, which the Court did not regard as an unreasonable delay. The Court concluded that the claim based on the duty to take reasonable care had no real prospects of success.

The offence of “tipping off” under s333 POCA

In response to the claimants’ requests for information in relation to the delayed transfers, the Bank had stated that the payment instructions could not be effected because the Bank was “complying with its statutory obligations” (the Bank presumably being concerned that any response to the effect that it has suspicions about the funds and had notified SOCA might prejudice an investigation and thereby expose it to the risk of criminal liability for the offence of “tipping off”).

The Court expressed the view that there could be little doubt that information as to why the Bank had decided to make an authorised disclosure and documentary evidence of the same would be likely to prejudice any investigation. Disclosure of the date and reference number of the report and the authority to which the report was made (which information the claimants had sought in correspondence) was less obviously prohibited but still disclosed the possibility of an investigation. Therefore disclosure of the information sought by the claimants, at the very least, would have involved serious risk of the Bank committing the “tipping off” offence. The Bank could not be in breach of duty in refusing to make the requested information available to the claimants if it would be at risk of criminal liability under s333 POCA if such disclosure was made. On that basis the claimants’ claim for breach of duty had no real prospect of success.

Conclusion

This decision offers practical guidance and continued comfort for financial institutions and others confronted by possible POCA offences and concerned about claims from affected customers. However, the decision leaves open the possibility of successful claims being pursued by customers where the relevant banks’ (or other reporting institutions’) duties are not completely excluded by POCA.

If you would like further information about the issues raised by this case please contact

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