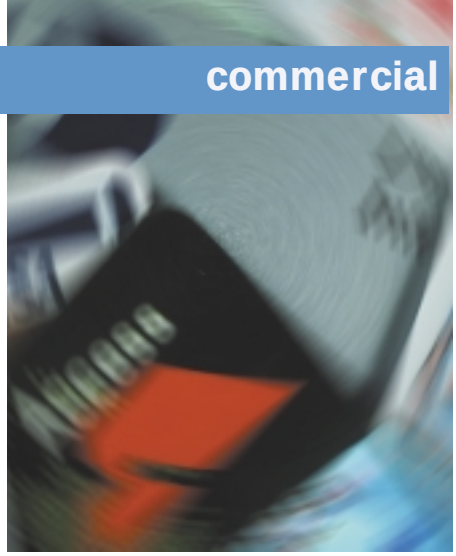

Suspicious dealings

Ed Sautter explains the effects of recent case law on banks challenged over their money laundering suspicions

IN MAY 2005, IN *SQUIRRELL V NATIONAL Westminster Bank* [2005] EWHC 664 (Ch), Laddie J provided some comfort for banks as to their position under the Proceeds of Crime Act 2002 (POCA) when, based upon a suspicion of money laundering, they refused a customer's instructions and their actions were challenged by that customer. However, the reasonableness of the bank's suspicion was not challenged in that case and there remained the possibility that account-holders might yet seek to attack a bank's actions by making such a challenge. Such an attack was launched in *K v National Westminster Bank* [2006] EWCA Civ 1039.

Background

As in *Squirrell*, the customer was a company involved in the buying and selling of mobile phones and had an account with NatWest. The customer entered into a contract to buy, and then sell, a consignment of mobile phones. To that end, the sum of £250,200 was received into the customer's account from an account in the Netherlands Antilles, and the customer instructed the bank to make an onward payment. The branch manager wrote to the customer saying that the bank could not currently comply with the instructions and could not enter into any further discussions of the matter. These actions led to the (unsuccessful) claim at first instance by the customer for an injunction obliging the bank to comply with its instructions.

The bank's solicitors had written a letter to the court explaining that the bank had made disclosure to HM Customs. That letter was criticised by the customer in the Court of Appeal as inadequate, because it did not identify the person at the bank who had the relevant suspicion and no bank official could therefore be cross-examined as to whether he or she had the relevant suspicion or not. In those circumstances, it was argued, a customer's account could be effectively frozen even if a suspicion had not been entertained. The court's guidance was also sought as to what in law constituted suspicion.

The Court of Appeal reiterated that if a banker knew or suspected that money in a customer's account was criminal property, then, without making disclosure and obtaining authorised consent, processing the customer's instruction was a criminal offence. Consequently, there could be no breach of contract nor any basis upon which the customer could apply for an injunction. If a statute rendered the performance of a contract illegal, the contract was frustrated, discharging both sides from further performance. If the statute made it temporarily illegal to perform a contract (as might be the case under POCA if consent was subsequently forthcoming), the contract would be suspended until the illegality was removed and, during that suspension, a customer had no legal rights against the bank.

Challenging suspicion

Could the customer attack the suspicion upon which the bank's conduct was based? The Court of Appeal referred to the definition of suspicion in *R v Da Silva* [2006] EWCA Crim 1654 (a criminal case decided under the predecessor to POCA). A person had a suspicion if he or she thought that there was a possibility, which was more than fanciful, that relevant facts existed, subject to the further requirement that the suspicion so formed should be of a settled nature. The Court of Appeal considered that this definition was sufficient for civil cases, like the present one.

As to the disclosure of the basis of suspicion sought by the customer, the Court of Appeal noted that once he or she had made a disclosure to the authorities, a banker was subject to the anti-tipping-off provisions in POCA and the only sure way to avoid an offence in that connection was to use the procedure under s 333(2)(c) and (3)(b) and to procure that one's professional legal adviser made the relevant disclosure in connection with legal proceedings. The bank had correctly instructed its solicitors to make the relevant disclosure to the court by the letter referred to above, when the bank was sued by the customer.

Further, it would be fruitless to cross-examine the solicitor about the existence of the bank's suspicion and (unsurprisingly in the court's view) there was no mechanism under POCA whereby any officer of the bank could be required to attend for cross-examination. In any event, cross-examination of a bank employee would be pointless – once the employee confirmed that he or she had a suspicion, that was the end of the matter. The existence of suspicion was a subjective fact, either the bank employee suspected or (s)he did not.

In *Squirrell*, the judge noted that hardship could be worked in a case where, as it transpired, the customer's conduct was entirely innocent. However, in the Court of Appeal's view, POCA struck "a precise and workable balance of conflicting interests", the court noting that the interference lasted only seven working days in the majority of cases.

In addition, the court did not consider that POCA's "limited interference" with the claimant's common law rights to require its banker to perform the contract between them impaired the right to access to the courts under Art 6 of the Human Rights Convention.

This decision confirms the comfort provided in *Squirrell* that, provided that the bank follows the statutory scheme, its actions should not be impugned in any civil proceedings by the customer and that a bank's employees should be protected from cross-examination as to the grounds of their suspicion.

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