Neutral Citation Number: [2010] EWCA Civ 31

Case No: A3/2009/0461

IN THE HIGH COURT OF JUSTICE
COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
THE HONOURABLE MR JUSTICE HAMBLEN
(2009) EWHC 79 (QB)

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 4th February 2010

Before :

THE RIGHT HONOURABLE LORD JUSTICE WARD
THE RIGHT HONOURABLE LORD JUSTICE LONGMORE
and
THE RIGHT HONOURABLE LORD JUSTICE LLOYD

- -

Between :

1) JAYESH SHAH **2) SHALEETHA MAHABEER**	**Appellants**
- and -	
HSBC PRIVATE BANK (UK) LIMITED	**Respondent**

- -
- -

Mr Michael Brindle QC & Mr Paul Downes (instructed by **Zaiwalla & Co**) for the **Appellants**
Mr Richard Lissack QC & Mr Nicholas Medcroft (instructed by **DLA Piper**) for the **Respondent**

Hearing dates : 9th & 10th December 2009

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Approved Judgment

Lord Justice Longmore:

Introduction

1. In this case Mr Shah (together with his wife) claims damages against his bank for failure to comply with his instructions and for other breaches of duty but Hamblen J has given summary judgment against him and for the bank; on appeal this court has once again been concerned with the provisions of the Proceeds of Crime Act 2002 ("the 2002 Act") and the obligations of a bank to notify the authorities if they suspect a customer of money-laundering. Most of this court's previous decisions have dealt with complaints about the conduct of either banks or the Serious Organised Crime Agency ("SOCA") during the period within which authorisation can be refused (7 days in the first instance and a further 31 days if notified) before the authorities have either to authorise a transaction or apply to the court for a restraint order, (see in particular K Ltd v National Westminster Bank [2007] 1 WLR 311 and R (UMBS Online Ltd) v SOCA [2007] Bus L.R. 1317). The present case raises (apparently for the first time) the question whether the same considerations, as apply during that early period, also apply to the more leisurely process of an action for damages for breach of contract or duty which falls to be resolved well after the time within which authorisation must be allowed or a restraint order applied for.

The Facts

2. Mr Shah, a businessman with interests in (among other places) Zimbabwe, has had an account with the defendant bank in London ("HSBC" or "the bank") for some years since 2002. He has also had an account with them in Geneva. In July 2006 he transferred a sum of about $28 million to the bank from another account he held with Crédit Agricole. He explained that he needed to do this because there was a risk of his being impersonated by an unidentified person and that it would only be a short time before he would wish to transfer the sum back to Crédit Agricole. He agreed with his account manager (Ms Shah – no relation) that the money was to be held for a month and, subsequently on a monthly rolling deposit. The first deposit matured on 21st August 2006 and was rolled over for a further month until 21st September. In late August Mr Shah indicated that he wanted to return the money to Crédit Agricole and inquired when he would be able to do that. On 20th September 2006 Ms Shah asked him to leave the money with HSBC but Mr Shah replied that that would not be possible and asked that it be transmitted back to Crédit Agricole with the interest which had accrued apart from a sum of $850. The bank accepted his instructions in relation to the small sum but on 21st September told Mr Shah that it could not effect the larger transaction because it was "complying with its UK statutory obligations".

3. Not unnaturally Mr Shah was extremely concerned. It seems that the Bank made a Suspicious Activity Report (sometimes called an "SAR") disclosing to some statutory authority (probably SOCA) that they suspected the money was criminal property and asking for permission to perform the transaction. Consent was given on 2nd October and the transaction was carried out on 3rd October.

4. Before that happened Mr Shah on 26th September 2006 gave another instruction to the bank to transfer the sum of $7282.50 to an ex-employee to whom he owed that amount. The bank again declined to comply with his instructions because it was "complying with its statutory obligations"; the bank had apparently made a further

disclosure and asked for consent to comply with Mr Shah's instructions. The ex-employee was sufficiently incensed with Mr Shah for failing to pay him the money he was owed that he threatened to sell some of Mr Shah's goods of which he apparently had custody if he was not paid. Mr Shah also believes that the ex-employee then told the Zimbabwean police that Mr Shah was suspected of money–laundering. On 29th September 2006 Mr Shah cancelled his instructions to the Bank with regard to this second sum, before any permission to perform it had been granted.

5. On 1st November 2006 the Reserve Bank of Zimbabwe asked Mr Shah to explain what investigations into his affairs were occurring and on the next day Mr Shah met Ms Shah and Mr Roger Johnson, the head of HSBC's African department. According to Mr Shah, Mr Johnson said that there had been investigations into Mr Shah's affairs but they were now at an end and that he would provide details of them on receipt of a request by a firm of UK solicitors. Mr Shah was permitted to withdraw £680 in cash. On 10th November 2006, Mr Johnson asked Mr Shah to close his account and asked for instructions in relation to the transfer of the closing balance by 22nd December 2006, later extended to 28th February 2007. Mr Shah alleges that because he was unable to give an explanation of the investigations that had been made into his affairs, the Zimbabwean authorities unilaterally moved his investments from their then current high-yield to low yielding treasury bonds. On 31st January 2007 Zimbabwe's anti-money laundering authority ("ZFIIES") asked Mr Shah to explain why his HSBC account had been frozen but he says that he was unable to give any satisfactory answer.

6. Meanwhile the Metropolitan Police had become interested in Mr Shah's affairs and on 7th December 2006 had obtained an order requiring HSBC to produce information about Mr Shah's account.

7. On 2nd February 2007 Mr Shah asked the bank to transfer the sum of $1440 from his account in Geneva to another person to whom he owed money and the bank did so. When, however, on 6th February 2007 he asked for the sum of $8,904,910.65 to be transferred from his Geneva account to Crédit Agricole, the Bank declined to do so, made another disclosure and told Mr Shah that "statutory obligations" prevented compliance with his instructions. At the same time the bank were asking for his instructions in relation to the amounts remaining in his accounts. On 14th February 2007 SOCA gave permission for the transfer to Crédit Agricole and it was effected on 15th February 2007. On 22nd and 27th February 2007 the Bank repeated its request for instructions about the sum remaining in Mr Shah's account and on 28th February 2007 he instructed the Bank to transfer £457,956.66 to Crédit Agricole but the Bank declined to do so, apparently making a fourth disclosure to SOCA on that day. SOCA gave permission on 2nd March 2007 and the transaction was effected on 5th March 2007, although an instruction given on 2nd March, to transfer $800,000 from his Geneva account to Crédit Agricole, had apparently been effected without any delay. The judge helpfully set out the overall position in relation to the four transactions which HSBC had declined to effect until consent had been obtained:-

Date of payment instruction	Amount to be Transferred	Date of Authorised Disclosure (SAR)	Date of Consent	Date transfer Effected
20th September 06	$28,807,432.88	21st September 06	2nd October 06	3rd October 06
26th September 06	$7,282.50	28th September 06	Not applicable (payment instructions were cancelled on 29th September 06)	Not applicable
6th February 07	$8,904,910.65	7th February 07	14th February 07	15th February 07
28th February 07	£457,956.66	28th February 07	2nd March 07	5th March 07

8. On 19th March 2007 Mr Shah's solicitors asked HSBC for an explanation of the investigations that had taken place but HSBC declined to provide any information. Mr Shah alleges that RBZ has seized assets of his over which they had control in the sum of $307.5 million. On 12th June 2007 SOCA informed Mr Shah's solicitors that Mr Shah had not been under criminal investigation but, although those solicitors had asked HSBC on 25th May 2007 to disclose details of their communications with SOCA, HSBC still declined to reveal any details to Mr Shah; apparently, however, HSBC did send to RBZ certain documents relating to Mr Shah's account. On 2nd September 2007 Mr Shah issued and served Particulars of Claim against HSBC alleging that, by reason of the bank's failure to execute his instructions and other failures such as the failure to provide information to which he was entitled, he had had his assets seized by RBZ and had lost the equivalent of around $331 million in loss of interest.

9. On 9th November 2007 HSBC served its defence. This alleged (inter alia) (1) that it suspected that each of the four transactions, which it had failed immediately to effect, constituted money laundering (2) that it had made an authorised disclosure seeking consent to effect them under section 338 of the Act of 2002 and (3) that it would have been illegal for it to effect them any earlier. The Defence also alleged that it could not comply with Mr Shah's instructions any earlier than it did. A Reply was in due course served which (inter alia) put HSBC to proof of the suspicion which it alleged that it had had.

10. On 29th February 2008 HSBC issued an application to strike out the paragraphs of the claim which related to the claim that the bank had failed to provide bank statements with dispatch and other paragraphs which asserted defamation. That prompted Mr Shah to indicate on 13th May 2008 that he would seek to amend his claim to make further claims (such as a claim that, if the bank had really suspected him of money-laundering, they should have made disclosures and sought consent sooner than they had done) and to delete the defamation claim. This prompted a second application by HSBC on 24th June 2008 to strike out or seek summary judgment in respect of the whole claim. Both those applications for summary relief came before Hamblen J and they resulted in a substantial victory for HSBC on 26th January 2009. Mr Shah now appeals saying that the matter is insufficiently straightforward for his claim to be dismissed at this stage and that his claim should proceed to trial.

Legal background

11. I cannot improve on the judge's summary of the relevant statutory provisions, which I take more or less directly from his judgment.

12. Section 327 of the 2002 Act creates offences of "concealing, disguising, converting, transferring or removing criminal property from the jurisdiction." Section 328 creates an offence of entering into or becoming concerned in an arrangement which the defendant knows or suspects facilitates by whatever means the acquisition, retention, use or control of criminal property by or on behalf of another person. Section 329 creates an offence of "acquiring, using or possessing criminal property." Together, these three offences are known as the principal money laundering offences.

13. "Criminal property" is defined in part in terms of a person's *mens rea*. Under section 340(3) of the 2002 Act, property is criminal property if it constitutes a person's benefit from criminal conduct or it represents such a benefit (in whole or in part and whether directly or indirectly) and the alleged offender knows or suspects that it constitutes or represents such a benefit.

14. A person does not commit any offence under the principal money laundering offences if he has made a disclosure to the relevant authorities under section 338 and has appropriate consent. So far as it is relevant, under s.338 of the 2002 Act an "authorised disclosure" is defined as follows:

> "(1) For the purposes of this Part a disclosure is authorised if--
>
> (a) it is a disclosure to a constable, a customs officer or a nominated officer by the alleged offender that property is criminal property, and
>
> …
>
> (c) the first, second or third condition set out below is satisfied.
>
> (2) The first condition is that the disclosure is made before the alleged offender does the prohibited act.
>
> …"

15. Under section 335(1) POCA "appropriate consent" is defined as the consent of a nominated officer to do a prohibited act if an authorised disclosure is made to the nominated officer. A person who makes an authorised disclosure, and who is not given notice of refusal within a 7 working day notice period, or, having received such notice, does not receive before the end of the 31 day moratorium period notice of an order freezing the account, is bound to act in accordance with the customer's instructions (see sections 335(2)-(6) of the 2002 Act). Conversely, if notice of refusal is given initially for 7 days and then, if necessary, for another 31 days, the customer’s instructions may not be implemented.

16. Section 333 POCA creates an offence of "tipping off". A person commits an offence if he knows or suspects that an authorised or protected disclosure has been made and he makes a disclosure which is likely to prejudice any investigation which might be conducted following the original disclosure to the authorities (section 333 is the section which applied at the material time although it has since been repealed and replaced by sections 333A to 333E.) In addition, section 342 of the 2002 Act creates an offence of 'prejudicing an investigation.' A person commits an offence if he knows

or suspects that a money laundering investigation is being, or is about to be conducted and he makes a disclosure which is likely to prejudice the investigation.

The Arguments

17. Mr Shah has put his case in a number of ways but his primary claim is that the Bank failed promptly to carry out his instructions. The bank's answer, to this prima facie case, begins by asserting that it suspected that the transactions constituted money laundering. If the bank had carried out Mr Shah's instructions while it had a suspicion that the transactions he was processing constituted money laundering the bank would be committing a criminal offence. The Criminal Division of this court considered the meaning of the word "suspect" and its affiliates in R v Da Silva [2007] 1 WLR 303 and said (para 16) that the essential element in those concepts was 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 on 'reasonable grounds'."

This definition was followed by the Civil Division of this court in K Ltd v National Westminster Bank Ltd [2007] 1 WLR 311. The bank therefore has a good defence to Mr Shah's claim if it can show it had a suspicion (in the above sense) that Mr Shah was involved in money-laundering activities.

18. Mr Shah has put the bank to proof of the assertion that it had this suspicion but he has made other assertions to the effect that

i) it would have been irrational for the bank to have entertained any suspicion of money-laundering on his part;

ii) any suspicion was self-induced and, on the balance of probabilities, negligently self-induced;

iii) any suspicion was, again on the balance of probabilities, mistaken;

iv) a suspicion generated automatically by, for example, a computer programme, would have been no suspicion held by a human being and would thus be outside the statute.

Mr Shah has also made clear that he does not suggest that the bank has acted in bad faith in any way.

19. The bank was no doubt conscious of the fact that it would be unlikely to obtain summary judgment (let alone an order striking out the claim) unless it produced some evidence that it held the relevant suspicion apart from the mere verification of its defence by the relevant banking director, Mr Johnson. Mr Allen of their solicitors, DLA Piper, made two witness statements the effect of which the judge summarised in the following way:-

> "1. HSBC's process of reporting suspicion has three stages in which at least three individual employees play a part. Staff

suspicion is reported first to the Compliance department before, in common with other banks, it is reported internally to a Reporting Officer (who is a nominated officer for the purposes of Part 7 of the 2002 Act) who will then consider whether the relevant suspicion merits disclosure to the authorities;

2. HSBC suspected that the funds in the claimants' bank account constituted criminal property (namely benefit from criminal conduct or represented such benefit in whole or in part (whether directly or indirectly));

3. The relevant people employed by HSBC at all three levels of the reporting process held a suspicion in respect of each transaction;

4. At least three different people were suspicious in respect of each transaction;

5. In respect of each transaction, at least one member of HSBC's Money Laundering Reporting Office held a suspicion and independently approved the making of the authorised disclosures, which HBSC was required to make in order to comply with the claimants' instructions in respect of the First to Fourth Transactions."

The Judgment

20. Having set out that evidence the judge proceeded to reject each of the four specific assertions (irrationality, negligent self-induced suspicion, mistake and automatic mechanically induced suspicion) made by Mr Shah and, having done so, concluded that, in order to impugn the bank's decision to make an authorised disclosure under the Act and the consequent failure to execute their customer's instructions, Mr Shah had to challenge the good faith of the bank and its employees. Since Mr Shah did not seek to challenge the good faith of the bank, there was, in the judge's view, no real prospect of Mr Shah establishing that the failure to execute his instructions was a breach of duty on the part of the bank and he accordingly dismissed the claim.

Discussion

21. In my view the judge was right to say that the claims of Mr Shah based on irrationality or negligently self-induced suspicion or mistake had no reasonable prospect of success. I need not set out again the reasoning in Da Silva on which the court founded its conclusion that the relevant suspicion need not be based on reasonable grounds. We are, in any event bound by both it and K Ltd. To allow a claim based on irrationality (even in the Wednesbury sense) or negligently self-induced suspicion would be to subvert those decisions as the judge correctly held. No evidence has been put forward to justify an assertion of mistake. The position in the case of a mechanically generated suspicion may be less clear in theory but it is almost impossible to suppose that a report could be made to SOCA or other responsible authority which had no human input. In any event Mr Allen's evidence does, at least, put paid to that possibility on the facts of this case. So far, therefore, I am with the

judge, despite the strenuous submissions to the contrary of Mr Brindle QC for Mr Shah.

22. I do, however, part company with the judge when he reasons that, once he has rejected those contentions, Mr Shah can logically only be left with the bad faith assertion which he disavows. For my part, I cannot see why, rather than submit to summary judgment dismissing the claim, Mr Shah cannot require the bank to prove its case that it had the relevant suspicion and be entitled to pursue the case to trial so that the bank can make good its contention in this respect.

23. Mr Lissack QC on behalf of the bank submitted that it was enough to put in evidence the facts attested to by the bank's solicitor Mr Allen for the bank to obtain summary judgment. Alternatively he submitted, relying on K Ltd, that no court would ever expect (let alone require) the bank's employees to give evidence so that there was no point in requiring a trial to take place since any such trial could only ever result in a decision in favour of the bank.

Sufficient evidence to justify summary judgment?

24. It must be remembered that it is for the bank to prove that it suspected Mr Shah to be involved in money-laundering. It is, to say the least, unusual to grant summary judgment in favour of a party who has the burden of proving a primary fact which is in issue. Normally one expects evidence to be adduced at a trial. It is true that in Swain v Hillman [2001] 1 WLR Lord Woolf MR stressed the need for judges to use the powers contained by Part 24 of the CPR in appropriate cases. He said that, if a claimant has a case which is bound to fail, then it is in his interest to know that that is the position as soon as possible but he also stressed that the case had to be a plain case. In Equitable Life Assurance v Ernst & Young [2003] EWCA Civ 1114, Brooke LJ said:-

> "The overriding concern is the interests of justice. So far as facts are concerned, the simpler the case is the easier it is likely for a court to be able to take a view that the basis of a claim is fanciful or contradicted by all the documentary material on which it is founded. More complex cases are unlikely to be capable of being resolved in that way. There is a danger of injustice in seeking to try such cases summarily on the documents and thus without disclosure and oral evidence tested by cross-examination. It should not be done unless the court can be confident that all the relevant facts had already been satisfactorily investigated."

25. To the extent that this is a simple case, I cannot take the view that the claim is "fanciful or contradicted by the documentary material on which it is founded". On the contrary any claim by a customer that his bank has not executed his instructions is, on the face of it, a strong claim if the instructions have not, in fact, been executed. It will seldom, if ever, be contradicted by the documentary evidence on which it is founded. It is only when the bank says that it suspects the customer was money-laundering that any defence to the claim begins to emerge. That may not, of itself, make the claim a complex claim but there is, subject to Mr Lissack's second submission, no reason why the bank should not be required to prove the important

fact of suspicion in the ordinary way at trial by first making relevant disclosure and then calling either primary or secondary evidence from relevant witnesses. As Brooke LJ said, albeit in the context of complex cases, there is a danger of injustice in deciding cases without appropriate disclosure and cross-examination.

26. A comparison with K Ltd v National Westminster Bank is instructive. In that case the customer made a contract to buy mobile phones for £235,000 (inclusive of VAT of £35,000) and to sell them for £215,000. On the surface he was making a loss of £20,000 but since the purchase had been made for export he could reclaim the VAT and thus make a profit. The bank refused to comply with the customer's instruction to pay the purchase price and refused to say why. The customer applied for an immediate injunction requiring the bank to pay the purchase price as requested by him. The bank's solicitors then stated that the bank had made a disclosure to Revenue and Customs who had refused authorisation and the bank could not, therefore, pay the relevant sum. The customer said that this letter was not admissible evidence that the bank had entertained any relevant suspicion because it did not identify who in the bank held the relevant suspicion (who could then be cross-examined). The judge's decision to refuse an immediate injunction (which would be summarily to grant the relief which the customer would be seeking at trial) was upheld by this court because to require the bank to do an act without relevant authorisation within the 31 day moratorium period would be to require the bank to act illegally, and that was something which the court would not do.

27. In its judgment (which, as it happens, was a judgment given by myself with which my Lords, Ward LJ, and Laws LJ agreed) the court also emphasised the importance of the tipping-off section (333) which makes it an offence if any person, who knows a disclosure had been made, makes a later disclosure likely to prejudice any investigation which might be conducted following the original disclosure. This is particularly important during the 31 day period, if an application for a restraint order is to be made by the authorities. In these circumstances any subsequent disclosure can only be made by the bank's professional legal adviser. In the summary proceedings instituted by K Ltd (the customer), the information was given to the court (and the customer) by the bank's solicitor and the court pointed out that, at the stage the proceedings were brought, the only admissible evidence was that of the solicitor and any cross-examination of him would be pointless.

28. All this was in the context of summary proceedings brought by the claimant. In that context, the decision in K Ltd to refuse the claimant relief is not surprising. It does not at all follow that, if the customer institutes ordinary (non-summary) proceedings against the bank, the bank should be able to obtain (reverse) summary relief against the customer merely by authorising its solicitor to make a witness statement that various unidentified people in the bank entertained a suspicion. By the time of any trial the dust will have settled and it is most unlikely that the tipping-off provision will continue to be relevant. It will also almost certainly be known whether any investigation is or might be taking place which any disclosure by admissible evidence in court proceedings would be likely to prejudice within section 333(1). If any such investigation is occurring (or is likely to occur) the court can be informed of that matter in an admissible manner. But it is, in my judgment, too strong for the court to say now that the bank would be bound to win any trial and should, therefore, now be entitled to summary judgment.

29. In the context of the summary application being made by the claimant in K Ltd, I went on to say (para 20):-

> "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."

These are the remarks relied on by Mr Lissack in support of his second submission that a court would, in any event, never expect or require any bank employee to give evidence that it had entertained a relevant suspicion.

Could a trial ever take place?

30. Mr Lissack puts excessive reliance on this citation of K Ltd. I have already said that it related to a time when the tipping-off provision was highly relevant and evidence could only be given by the bank's professional legal adviser. Any trial will take place in a different atmosphere. If the bank at the time of the pre-trial review genuinely takes the view that it will be dangerous for a witness to give evidence (whether orally or by written statement) the court can be so informed and take steps to protect the witness or otherwise ensure that the gist of the evidence is available, while still ensuring a fair trial. Accepting Mr Lissack's submission at this summary stage would, in effect, be giving carte blanche to every bank to decline to execute their customer's instructions without any court investigation.

31. Mr Lissack then took the argument even further and submitted that no court would (or should) order disclosure of any relevant documents particularly the documents reporting the bank's suspicions to SOCA (or whatever authority it was to which they did report). This amounts to saying that the dispute is completely unjusticiable and that, therefore, the bank must win. It may be that the bank will win in the end but, as far as any dispute about discovery of documents is concerned, I am content to wait and see. Once again if the bank has good grounds for concealing parts of any relevant document or (more doubtfully) declining to disclose the whole of the document, those grounds can be laid before the judge in chambers and he can make a decision on appropriate evidence. What would be inappropriate is to decide now that the bank must win its case, whatever the facts may ultimately turn out to be.

32. One appreciates, of course, that the 2002 Act has put banks in a most unenviable position. They are at risk of criminal prosecution if they entertain suspicions but do not report them or, if they report them, and then nevertheless carry out their customer's instructions without authorisation. If they act as instructed, their

customers are likely to become incensed and some of those so incensed may begin litigation. But it cannot be right that proper litigation should be summarily dismissed without any appropriate inquiry of any kind. The normal procedures of the court are not to be side-stepped merely because Parliament has enacted stringent measures to inhibit the notorious evil of money-laundering, unless there is express statutory provision to that effect. In R (UBMS) v SOCA Sedley LJ said (para 58) that, in setting SOCA up, the state had set out to create an Alsatia which he defined, in terms now adopted by no less an institution than Wikipedia, as:-

> "a region of executive action free of judicial oversight."

This appeal shows that there is at least, some judicial oversight in as much as there should, at least, not be summary judgment at this stage.

33. For these reasons I find myself in respectful disagreement with the judge and would set aside his order for summary judgment in favour of the defendant bank while making clear that I agree with his conclusions on rationality, antecedent negligence, mistake and mechanically generated suspicion which should form no part of any trial between the parties. It is only fair to the judge to say that the limited ground on which this appeal so far succeeds does not appear to have been put to him with the same force as it was put before us by Mr Brindle on behalf of the appellant; indeed it is not even discernible in the grounds of appeal (the first 4 grounds of which relate to the matters in respect of which I agree with the judge). Mr Brindle disarmingly submitted that it was really implicit in the first 4 grounds; but whatever the truth of that, Mr Lissack was, as I have demonstrated, ready, willing and able to deal with it.

Other Grounds of Appeal

34. Of the remaining 5 grounds of appeal, two have been abandoned. The following 3 grounds need to be considered:-

    i) that the bank failed to make the relevant disclosure to the authorities as soon as they reasonably could;

    ii) that on or about 2nd November 2006 the bank should have responded to a request from Mr Shah to explain why his instructions had not been honoured, because the bank believed that any investigation by the authorities had been concluded by that date;

    iii) that, even if no breach occurred in November 2006, it occurred at some later date and continues up to the present date.

    The first of these grounds is an allegation of a breach of a banker's duty of care while the latter two amount to an allegation of breach of the bank's duty as agent to keep their principal informed about the state of his affairs.

Breach of duty of care

35. The judge accepted (para 58) that a banker's duty of care is not completely excluded by the 2002 Act and that, in principle, delay in making a relevant disclosure might be a breach of that duty. But he held that there was no evidence of such delay since all the disclosures were made within two days of receiving the relevant payment

instruction. On this I agree with him. Mr Shah put forward two further arguments: (1) that the Bank should have sought advance consent in respect of future transactions and (2) that disclosure should have been made when the money was initially paid into his account. But neither of these suggestions is seriously arguable. In relation to the first argument, it is impossible to imagine that the authorities will give consent in the abstract before any payment instruction is given. The second argument is, in fact, only a variant on the first. If a known and trusted customer seeks to deposit a sum of money (even if it is very large) with a reputable bank, the bank would normally have no reason at that stage to suspect the customer of money-laundering in respect of that deposit; it is only when the moneys constituting that deposit are the subject of a subsequent payment instruction that the question of money-laundering is likely to arise. Even if the bank reports the activity at the time of receipt of the money, no question of seeking authority to execute a payment instruction can arise until a payment instruction is made. The customer will thus be in no better position even if disclosure is made at the time of the deposit.

36. For these reasons I agree with the judge that there is no reasonable prospect that a claim in negligence would succeed against the bank and that the bank should now be entitled to judgment in this respect.

Breach of agency duty

37. This is a claim which is, in my view, sufficiently arguable to be allowed to go to trial. An agent is (arguably) obliged to keep the principal informed as to the state of his principal's affairs especially if his principal requests information about them. The constraint on which the bank relies is contained in the tipping-off provision of the 2002 Act (section 333) which prohibits.

> "a disclosure which is likely to prejudice any investigation which might be conducted following the [initial] disclosure"

38. Mr Shah contends that he was told by Mr Johnson of the bank on 2nd November 2006 that, although he had been the subject of an investigation, he had been cleared. Mr Johnson, however, declined to put anything in writing or to give any explanation to the authorities in Zimbabwe which might put their minds at rest. As against this, even Mr Shah was of the opinion that Mr Johnson thought that there might be a continuing investigation and, in due course, Mr Walters of the Metropolitan Police, on 7th December 2006, obtained a Production Order from a judge, requiring the bank to produce documents relating to Mr Shah's account. That was something which Mr Walters felt able to reveal in his witness statement of 2nd December 2008. It would therefore appear that, at least by that date, any investigation into Mr Shah's affairs must have ceased since otherwise Mr Walters would himself apparently be committing an offence under section 333 of the Act.

39. This all shows, to my mind, that there must (arguably) come a time when Mr Shah is entitled to have more information about the conduct of his affairs than he has yet been given. Whether he was so entitled on 2nd November 2006 must remain highly doubtful and whether any later disclosure could have avoided the losses which he is claiming must also be doubtful. But I do not feel able to this stage to say that the bank is entitled to summary judgment in this respect and would, therefore, let this

aspect of the case go to trial in addition to the question whether the bank, in fact, suspected Mr Shah of money-laundering.

Conclusion

40. To these limited extents, therefore, I would allow this appeal and ask counsel to draw up an appropriate order.

Postscript

41. Mr Lissack sought to challenge the suggestion in para 20 of K Ltd that if the authorities apply for a restraint order "all cards will have to be on the table in any event". In so saying I did not attempt to pre-judge the nature of the evidence which would be needed to justify the making of a restraint order. I was merely assuming that the evidence would be similar to the sort of evidence required for a freezing injunction in civil proceedings. It seems that this assumption is shared by the Criminal Division of this court, see King v Director of SFO [2008] 1 WLR 2634 (affirmed [2009] 1 WLR 700) para 62 per Gage LJ.

Lord Justice Lloyd:

42. I agree.

Lord Justice Ward:

43. I also agree.