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Client briefing
November 2011

Suspicious minds: Court of Appeal Rules on Disclosure in Civil Challenges by Customers to SARs

Shah -v- HSBC Private Bank (UK) Limited[1]

Key issue:

- **Financial institutions are not required to disclose the identity of individuals initiating the reporting process in civil litigation arising from the making of Suspicious Activity Reports ("SARs")**

The Court of Appeal has ruled on the types of information which banks are required to disclose to customers about their money laundering reporting processes where customers bring civil claims for damages arising from SARs that are made.

Mr Shah, in a second visit to the Court of Appeal on an interim issue since he commenced proceedings against HSBC over two years ago[2], argued that HSBC was obliged, pursuant to its obligations of standard disclosure under CPR 31.6, to reveal the identities of the individual employees who "suspected" that he was engaged in money laundering under section 328 Proceeds of Crime Act 2002 ("**POCA**").

At first instance, Coulson J had ruled that the duty to disclose these details did arise, but that disclosure was not required in this instance as public interest immunity applied to the names of the employees concerned. Mr Shah appealed against the decision that public interest immunity applied, and HSBC cross-appealed against the decision that the obligation to disclose arose.

In a ruling which will be welcomed by the financial sector, the Court agreed with HSBC that its duty of disclosure does not extend to the names of the employees, and that it is a matter for banks as to which details of their money laundering reporting processes they decide to release.

When the proceedings came before the Court of Appeal on the first occasion in December 2009 (when HSBC tried to get summary judgment to dismiss Mr Shah's claim), Longmore LJ remarked 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*".

Following that judgment, Mr Shah sought to elicit as much information as possible about the basis upon which HSBC declined to execute his instructions and decided to make SARs, including the names of the individual employees involved.

However, beyond relatively bare assertions that staff may have had ulterior motives for making SARs about him, the Court deciding the disclosure issue found it difficult to ascertain the details of Mr Shah's case on this point. The Court therefore concluded that Mr Shah was seeking this information as part of a "*fishing expedition*".

However, the Court did not stop there, and gave useful clarification of the extent of banks' duty of disclosure in litigation such as that pursued by Mr Shah. In doing so, it emphasised that it was the bank's own "*forensic choice*" which documents it disclosed.

[1] [2011] EWCA Civ 1154

[2] The proceedings concern Mr Shah's instructions to transfer funds totaling approximately $38 million between September 2006 and February 2007, and HSBC's subsequent decision to decline to execute them and to make SARs. Following an investigation by SOCA and others (in the UK and other jurisdictions)based upon these SARs, the transfers requested by Mr Shah were found to be unconnected with any criminal activity.

Key Issue

Financial institutions are not required to disclose the identity of individuals initiating the reporting process in civil litigation arising from the making of Suspicious Activity Reports ("SARs")

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Whilst commending the approach taken by HSBC to disclosure of details of its money laundering reporting processes (which involved providing anonymised copies of memoranda and other communications between members of staff), Lewison LJ suggested that, contrary to Mr Shah's argument that it had provided insufficient disclosure, HSBC had in fact gone above and beyond what was required of it. The Court held that the financial institution in this position would need to give enough disclosure to establish that it had the requisite level of suspicion at the time the SAR was made, but that what is enough is a question of fact in the circumstances of each case. Lewison LJ went on to say, "*If the bank* [makes] *it more difficult for itself to prove its own case, it must live with the consequences*".

The proceedings pursued by Mr Shah are still ongoing, so the extent of the lasting impact of this interim decision remains to be seen. In the meantime, financial institutions will welcome the Court's defence of individual employees and recognition of the invidious position in which they and their employers are often placed by their onerous anti-money laundering obligations. Whatever the final outcome of the proceedings, the decision provides a clear illustration of the fundamental importance of thorough record keeping, not only to discharge those obligations, but also to defend litigation which may arise from doing so.

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