

THE PITFALLS OF FLAGGING UP SUSPECT BANK TRANSACTIONS

A recent court case highlights the dilemma that professionals face when handling client money if they become suspicious of money laundering. Even if they avoid criminal liability, they could be exposed to two competing civil liabilities.

In the case of *Hosni Tayeb v HSBC Bank plc* [2004] EWCH 1529, Tayeb opened an account with HSBC to receive the proceeds of a sale transaction. HSBC received the monies by electronic (CHAPS) transfer from Tayeb's client, acknowledged receipt and credited Tayeb's account. A bank employee became suspicious about the transaction and froze the account. The funds were returned to the transferor's account and Tayeb's account was closed. When Tayeb had difficulty recovering the funds, he sued HSBC.

Potential liabilities

The judge, Colman J, considered HSBC's potential liabilities. Alongside potential criminal liability for breach of anti-money laundering legislation, a professional adviser has to weigh up two competing civil liabilities. He must comply with his client's instructions or risk being in breach of both his contractual obligations and his professional duties (for example, confidentiality). However, if he follows his client's instructions, he could become liable to a third party; for example, if the client instructs the professional to transfer money to a party to whom it does not belong. The adviser may be held to have accessory liability as a constructive trustee if he provided "dishonest assistance".

Professionals potentially caught in this catch-22 situation include bankers, stockbrokers, lawyers, accountants, estate agents and anyone receiving substantial sums of money from clients and expected to do something with them.

Avoiding criminal liability

"The avoidance of criminal activity must be paramount in the mind of any professional adviser," says Simon Robert-Tissot, a partner at Barlow Lyde & Gilbert. "The obligations on professionals are onerous and the penalties for non-compliance are severe."

In *Tayeb v HSBC*, the court stressed the positive obligation on those professionals who handle client money to verify the source of the funds and to make a disclosure to the National Criminal Intelligence Service (NCIS) if there is a genuine suspicion of criminal activity. Colman J suggested that where the client is about to pay over money, the firm could make a report to NCIS in advance, or (in the case of a CHAPS payment) delay authentication of the funds while it informs NCIS. If the money has already been credited, the firm should apply to NCIS and wait for directions. Where the firm believes it is about to be requested to transfer the funds out of the account, Colman J suggested temporarily freezing the account (though he cautioned that this may give rise to potential liability for tipping off).

Unfortunately, the analysis brushes over possible problems caused by any failure of NCIS to respond quickly, or where the client is expecting monies to be applied immediately for some purpose.

If professionals seek guidance from the court, another case (*Bank of Scotland v A Ltd & Others* [2001] WLR 751) indicates they must be prepared to bear the cost of their diligence – paying their own costs in making an application to court and potentially the other side's costs too.

Avoiding liability as a constructive trustee

If there are genuine money laundering suspicions, the safest option is to refuse to pay the funds away (or even back to the client). Colman J suggested the firm could obtain further reassurance by seeking the court's guidance, but where the firm had merely held onto the monies it was "wholly unrealistic" that the firm would be found to have acted dishonestly.

However a separate case, *Amalgamated Metal Trading Limited v City of London Police Financial Investigation Unit & Others* [2003] EWHC 703 (Comm), considered the ability of a firm with suspicions to seek a declaration from the court that funds in question were not the proceeds of crime. The court was clear that, in order to make such a declaration, it would need positive evidence that the funds were not the proceeds of crime – potentially an elaborate and costly process.

Avoiding liability to your client

"To date, the courts have not really addressed the issue of civil liability to the client if the funds prove to be genuine," says Ben Sanderson, an associate with Barlow Lyde & Gilbert. "The courts have merely stated that the firm must take a commercial view as to whether or

not to defend an action."

It has been suggested that the court could be asked to issue an interim declaration setting out the information the firm can properly rely on in defence of a civil claim brought by a client, but there are clearly cost implications.

Know your client

"The case law is starting to consider some of these issues, but so far no very coherent or reassuring message is emerging," says Robert-Tissot. "However, it is clear the court is willing to place further onerous responsibilities on all regulated businesses which handle client money. In all this, the best advice for the time being is: know your client thoroughly at all stages of the business relationship so that such issues can be anticipated in advance and so they can be resolved before becoming time-critical."

Professionals could consider whether contracts with customers could be amended to cover such situations, but any such clause would need to be drafted in such a way as not to offend any provision of the Unfair Contract Terms Act 1977.

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