

**Section 333 of The Proceeds of Crime Act 2002 (Part 7) – Evil of Money
Laundering vis a vis The Rights of Individuals**

By Kartik Mittal, Zaiwalla & Co. Solicitors

All civilised societies today recognise the principle of ‘Rule of Law’ which provides for supremacy of law i.e. No man is above the Law. This principle enriches within itself the concept that all decisions should be based on reason and thus a Government or any of its body should not act arbitrarily but rationally in accordance with the principles governing the society.

Today we live in a society which is faced with the evils of drugs, crime, terrorism and human trafficking. To fight against these evils it is essential to curb the funding on which the organisations promoting these evils thrive. To achieve this end many countries around the world have promulgated Money Laundering Legislation to ensure that the funding to such organisations stop.

The Money Laundering framework in the United Kingdom is provided under Part 7 of the Proceeds of Crime Act 2002 (‘POCA 2002’). The aim of this article is to establish ways to harmonise the purpose of this legislation with the age old accepted principles of Human Rights.

For the sake of brevity, this Article only focuses on the Tipping off provision under Section 333¹, Part 7 of the POCA 2002.

¹ Tipping off

(1) A person commits an offence if—

- (a) he knows or suspects that a disclosure falling within section 337 or 338 has been made, and
- (b) he makes a disclosure which is likely to prejudice any investigation which might be conducted following the disclosure referred to in paragraph (a).

(2) But a person does not commit an offence under subsection (1) if—

(a) he did not know or suspect that the disclosure was likely to be prejudicial as mentioned in subsection (1);

(b) the disclosure is made in carrying out a function he has relating to the enforcement of any provision of this Act or of any other enactment relating to criminal conduct or benefit from criminal conduct;

(c) he is a professional legal adviser and the disclosure falls within subsection (3).

(3) A disclosure falls within this subsection if it is a disclosure—

(a) to (or to a representative of) a client of the professional legal adviser in connection with the giving by the adviser of legal advice to the client, or

(b) to any person in connection with legal proceedings or contemplated legal proceedings.

(4) But a disclosure does not fall within subsection (3) if it is made with the intention of furthering a criminal purpose.

Section 333 of POCA 2002 has been subject to judicial scrutiny by the Courts in the landmark case of: **K Limited v. National Westminster Bank Plc (CA)**². In this case **Lord Justice Longmore** in his judgment laid down the principle that bankers cannot be compelled to comply with their contractual obligation to disclose all material facts in relation to its customer's account or to carry out his instructions with diligence during the period when an investigation under section 337 or 338 of **POCA 2002** is ongoing.

In the **K limited case**, the Court of Appeal did not have the opportunity to delve into the details of Section 333 of POCA 2002, and thus there remain many questions unanswered. The **K Limited case** failed to answer the following questions:-

- 1) What is the nature of information which, in the opinion of the Court, may be likely to prejudice any investigation?
- 2) What is the meaning of the term 'investigation'? Will it cover investigations conducted by an agency other than the agency to which a disclosure under section 337 or 338 has been made?
- 3) At what time an investigation is deemed to have commenced and to have ended?

Recently in 2010, the case of Jayesh Shah against HSBC came before the Court of Appeal in an Appeal against a Summary Judgement order passed by Mr. Justice Hamblen (High Court Queen's Bench Division). The facts of this case have provided the opportunity for the Court of Appeal to fill the lacuna in this law and thus this case is likely to lay down the Law for times to come.

The decision to permit leave to appeal to Mr Shah had been anxiously awaited by many, in order to see how the Court of Appeal would manage the onerous task of drawing a balance between, on the one hand, the statutory powers of the investigating authorities and the Community of Bankers/Regulated sector under Money Laundering legislation and on the other hand, the implied and contractual right of the individual to be provided with information concerning their own bank accounts.

In this case the Court of Appeal has been called upon to explain the meaning of its own words when it stated in the **K Limited v. National Westminster Bank Plc (CA)**³, in vague terms as follows:

'The truth is that parliament has struck a precise and workable balance of conflicting interests in the 2002 Act. It is, of course, true that to intervene between a banker and his customer in performance of the contract of mandate is serious interference with the free flow of trade. But the parliament has considered that a limited interference is to be tolerated in preference to allowing the undoubted evil of money laundering to run rife in the commercial community. The fact that the interference lasts only for seven working days in what we were told were the majority of cases and a further 31 days only, unless the relevant authority goes to the length of applying to the court for a restraining order

² [2007] 1 WLR

³ [2007] 1 WLR

when all cards will have to be on the table in any event, shows that the interference with freedom of trade is limited.'

The Long awaited Judgement in **Shah v HSBC**⁴ was finally delivered on Thursday, 4th February 2010. The Court of Appeal while delivering its Judgment accepted that this was a novel case which raises questions which the Court had not considered in the past. The Court upheld the plea of Mr Shah. It ordered the Summary Judgment to be set aside and directed that the matter should go to Trial.

While making this order the Court made various observations on the factual and legal points in order to guide the Lower Court in determining various questions that would come before the trial court, including the question as to the interpretation of section 333 of POCA 2002.

The Court of Appeal began by stating that the facts of this case were different from any previous cases that had come before the Court. The Precedents, namely *K Limited v. National Westminster Bank*⁵ and *R (UMBS online Ltd) v. SOCA*⁶ dealt with circumstances where the conduct of the Bank and Serious Organised Crime Agency was called into question during the initial period of 7 working days followed by the 31 days moratorium period. Thus the Court indicated that these cases can only help the Trial judge to a limited extent rather than being considered as a precedent.

Lord Justice Longmore in the Shah case emphasised the importance of section 333 of the POCA 2002 and stated that this was an important provision to ensure that Banks do not make any disclosure which is likely to prejudice any investigation which might be conducted following the original disclosure. However, the Court of Appeal further made it clear that there has to be a time when a disclosure could be made by a bank to an account holder without attracting Section 333 of POCA 2002.

The Shah Matter has now been remanded for Trial and we will have to wait and see how the Courts will interpret Section 333 of POCA 2002 in light of this latest Judgement of the Court of Appeal.

Conclusion

In my view, one of the ways to reconcile this legislation with the rights of individuals will be to interpret the legislation in the following way-

- 1) The investigations under Part 7 of the POCA 2002 shall be deemed to commence on the day a report to Serious Organised Crime Agency ('SOCA') has been made by the Bank, and shall initially last for 7 working days until consent is obtained or deemed to be obtained or refused under Section 335 of POCA. Upon receipt of the consent, it shall be deemed that SOCA does not deem it necessary for any further investigations to be carried out based on the material before them.

⁴ [2010] ECWA Civ 31

⁵ *ibid*

⁶ [2007] Bus L.R. 1317

In cases where SOCA refuses consent, the Investigation can continue only for a further period of 31 days. At the expiry of that period, it will be essential for the appropriate authority to seek an order of the Court seeking further time to investigate the matter or a restraining order as the Court may determine. By establishing such a framework the Courts can ensure that the enforcement agencies can arbitrarily restrict an act/transaction to be carried out only for a limited period of time, at the expiry of which it shall be the Court which will, after hearing the parties, decide the reasonableness of the enforcement agency's decision on the facts of the case.

- 2) Under Section 333 POCA, a person commits an offence if he discloses any information which is likely to prejudice any investigation. It is difficult to ascertain as to exactly what information will attract this section without taking into account the facts of each case. But generally one might have the view that basic information such as the complaint reference number, name of the agency and date of disclosure will not prejudice any investigation. Further in my view, it will be reasonable to state that section 333 of POCA shall only be operative until the time that an investigation under Part 7 of POCA is being carried out by the appropriate agency.
- 3) An investigation conducted by any investigative arm of the government shall be deemed to be an investigation under the Act to the extent that such an investigation is carried out directly in relation to a disclosure made under Section 337 or 338 of POCA. An investigation carried out by an agency (Example Met Police) for the reason that another agency (for Example SOCA) is carrying out an investigation into the alleged offender's assets under POCA 2002 should not come within the term 'investigation' under this legislation. This is because such investigations would have been instigated by a suspicion indirectly induced from a pending investigation pursuant to a disclosure under Section 337 or Section 338 of POCA, and thus is not an investigation directly resulting out of a disclosure under section 337 or 338 of POCA.

Finally, The Court of Appeal in the **Shah v. HSBC** Judgment states as follows

'By the time of any trial the dust will have settled and it is most unlikely that 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 court to say now that the bank would be bound to win any trial and should, therefore, now be entitled to summary judgment.'