

# Suspicious Minds - Getting caught in a trap - Jayesh Shah & Anor v HSBC Private Bank (UK) Limited

On 4 February 2010, the English Court of Appeal delivered a judgment in the above case, which acts as a warning, in particular to banks (but also to other financial service providers) regarding the possibility of having to disclose evidence relating to and/or justify in court, suspicions upon which a suspicious activity report (SAR) was filed and which lead to a refusal to act on client instructions.

Jersey's anti-money laundering legislation and, in particular, the position in which a bank can find itself having filed an SAR and not having been given consent by the JFCU to carry out the transaction (on occasion for an indefinite period) has been a subject for debate for some time. Such a situation leaves the customer with the option of pursuing a civil law claim against the bank (typically for breach of duty/mandate) or a judicial review of the JFCU's refusal to consent.

## Summary of Facts

In broad summary, Mr Shah is suing HSBC for losses he alleges were caused as a result of HSBC's failure to execute certain transfer instructions he had given, and the bank's refusal to provide certain information that he had requested. The delays in HSBC carrying out transfer instructions arose as a result of SARs having been filed by HSBC with SOCA in the UK in respect of those instructions. Mr Shah alleges that it was irrational for the bank to have suspected him of money laundering or that such suspicion was negligently self-induced or based on a mistake. The refusal by HSBC to provide information (ie details concerning HSBC's communications with SOCA) was claimed to have resulted in the Reserve Bank of Zimbabwe seizing assets worth more than US\$300m. In its defence to the claims, HSBC relied upon its suspicions concerning the transfers that Mr Shah had instructed be made.

The High Court granted summary judgment in HSBC's favour. In so doing it applied earlier decisions of the English Court including *K Ltd v Nat West Bank Ltd*. That case involved a customer seeking an immediate injunction to require its bank to carry out instructions notwithstanding the bank's filing of an SAR and having had no consent at that stage to carry out the transaction. It was held in *K Ltd* that a court would not expect or require a bank's employees to give evidence in relation to suspicions it held; because of tipping off concerns at that

stage, only the bank's legal advisor would be able to give such evidence. The High Court concluded that Mr Shah's claims could not succeed unless bad faith was established on the part of HSBC, which was not part of Mr Shah's claim.

## Court of Appeal Decision

The Court of Appeal distinguished *Re K Ltd*, on the basis that this was not a summary proceeding brought at an early stage. The Court of Appeal held that, in a case in which damages for breach of contract/duty were sought in proceedings brought after the event, Mr Shah was entitled to put HSBC to proof with regard to whether it had the relevant suspicion for the purposes of the proceeds of crime legislation.

## Comment

Mr Shah's case might never reach trial and it will remain to be seen whether HSBC will in fact be required to make disclosures or produce witnesses to prove what suspicion it actually had. However, the decision of the Court of Appeal confirms that, in principle, banks and other financial service providers can be required to justify suspicions held. The Court of Appeal considered that if the *Re K Ltd* reasoning was applied across the board such that a bank was never to be required to give evidence relating to the suspicion upon which an SAR had been filed, claims against banks in these circumstances would be impossible to bring.

Although the English legislation concerning the granting of consent to transact following a relevant disclosure is different to that in Jersey, the relevant state of mind (knowledge or suspicion) that could expose a bank to committing a money laundering offence under both English and Jersey law is materially similar. The decision in *Shah* is one that would be considered persuasive in Jersey and in many respects supports the views of the Royal Court as described in our case summary on the Royal Court's decision on 25 April 2008 in *Re Representation Gichuru* [Frozen Funds - Client Briefing](#), namely that a bank will be required to place before the Court evidence of its suspicion should it face a claim by a customer for failing to act on instructions in circumstances where following the filing of an SAR the JFCU has refused to consent to the transaction.



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The implications for banks and other financial institutions not only include the prospect of having to disclose and justify suspicions in Court, but also careful consideration will have to be given to how suspicions are recorded and documented internally. The potential to have to give disclosure in relation to suspicion, might well also give rise to claims relating to the speed within which a bank reacted to those suspicions.

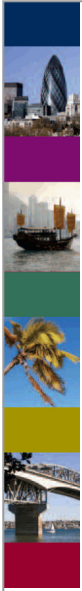
In light of ongoing requirements under Jersey's anti-money laundering framework, banks and other financial service providers in Jersey should give thought as to whether internal procedures and/or training are adequate to put the bank in the best position should it face a claim such as the one brought by Mr Shah. It must, however, be borne in mind that the legal threshold for a suspicion is low: a person must *think there is a possibility, which is more than fanciful*. Accordingly, the threshold for making at least an internal disclosure will be similarly low.

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