Briefing

Shah v HSBC: Court of Appeal says the identity of staff making SARs in good faith is not disclosable

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INTRODUCTION

The Court of Appeal in London ruled on 13 October that HSBC Private Bank did not have to disclose the identity of employees who had made internal reports which had led to suspicious activity reports ("SARs") being filed with the authorities unless there was a firm suggestion on bad faith on their part.

The judgment is the result of satellite litigation arising from the more famous 2010 case of *Shah v HSBC*, in which the Court of Appeal ruled that parties which had suffered loss as a result of SARs being filed were entitled to demand proof from the regulated institution responsible that the suspicion on which the SAR was founded existed.

BACKGROUND

In 2007, Jayesh Shah and his wife sued HSBC Private Bank (UK) Limited for more than $300m, claiming that they had suffered loss as a result of HSBC's delay in executing four transactions with a combined value of $45m. HSBC contended that it suspected that the proposed transactions concerned criminal property and, as a result, that it was not required to comply with Mr and Mrs Shah's payment instructions. Further, it made a number of authorised disclosures to the Serious Organised Crime Agency ("SOCA") under Part 7 of the Proceeds of Crime Act 2002 ("POCA").

One of the transactions concerned a sum to be paid to an ex-employee in Zimbabwe. When the money was not paid, the ex-employee notified the Zimbabwean police that Mr Shah was suspected of money-laundering. Mr and Mrs Shah stated that these difficulties led to problems with the Zimbabwean authorities and the freezing and seizure of large investments, causing them the losses which formed the basis of their damages claim against HSBC.

In 2009, the High Court in London gave summary judgment for HSBC and dismissed the Shahs' claims. The court rejected the four ways in which the Shahs put their case (that HSBC had acted as a result of irrationality, negligent self-induced suspicion, mistake, or automatic mechanically-induced suspicion) and concluded that, in the light of HSBC's evidence of suspicion and the absence of any allegation of bad faith by the Shahs, the claims must fail.

The Court of Appeal agreed with the High Court's dismissal of the four ways in which the positive claim had been put on behalf of the Shahs. Despite that, it concluded that the High Court had been wrong to say that, because there was evidence of suspicion on the part of the defendant, that was, of itself, enough to defeat the claim. The Shahs were entitled to require the bank to prove its contention that it held the relevant suspicion and to take the case to trial on that basis.

The court also rejected the suggestion by HSBC that its employees should, as of right, never be required or expected to give evidence regarding their money laundering suspicions, and that documents concerned with the bank's reporting of those suspicions to SOCA should not be disclosable in any subsequent trial. It ruled that, if there were concerns for the safety of employees who might be required to give evidence, steps could be taken to protect them as witnesses, but that these steps did extend to excusing them from giving evidence altogether. Where the bank opposed the disclosure of a particular document, the court would review the matter on a document by document basis, but with no automatic exclusion from disclosure of a particular category of document (such as an SAR).

As a result of the Court of Appeal's ruling, HSBC disclosed both its internal reports and its SARs to SOCA. It also identified the Money Laundering Reporting Officer ("MLRO") who had received the initial reports of suspicion and had filed the resulting SARs. The names of all of the other employees involved in the formation and reporting of suspicions had been redacted from the documents supplied to the court and the Shahs.

HSBC contended that, while it was happy to call the MLRO to give evidence as to the genuine suspicions that had existed at the time, the identities of other employees involved were both irrelevant and/or should not be disclosed for reasons of public interest immunity.

HSBC applied to the High Court for an order permitting the redactions which it had made. The court ruled that:

1. The bank's obligation to make standard disclosure required it to reveal the names of employees who reported suspicions of money laundering to the MLRO; but that
2. The bank was entitled to maintain the anonymity of the individual employees concerned under the doctrine of public interest immunity ("PII").

On the particular facts of the case, the High Court ordered HSBC to identify the employees by function, but not by name. The Shahs appealed the court's refusal to order the disclosure of the names of the employees, and HSBC cross-appealed against the court's finding that its obligation to make standard disclosure required their names to be revealed in the first place (with the names only being protected by PII, and not as of right).

THE PROCEEDS OF CRIME ACT 2002

Under the Proceeds of Crime Act applicable in England and Wales, employees of firms operating in the regulated sector are required to report any knowledge or suspicion they have that monies with which the firm is dealing represent criminal property. Employees must make such a report to the MLRO. Having examined the reports received, the MLRO is required to come to his own view as to whether he has knowledge or suspicion that another person is engaged in money laundering. If he does, he must disclose his suspicion to SOCA.

"Suspicion" has been defined in the context of POCA as meaning that a person must think there is a possibility, which is more than fanciful, that the relevant facts exist. There is no requirement that the suspicion be reasonable.

THE JUDGMENT OF THE COURT OF APPEAL

Within HSBC there were three stages of AML reporting:

1. The relationship manager with a particular client would report any AML suspicion to the compliance department;
2. The compliance department would report the matter internally to the MLRO;
3. The MLRO would then, if appropriate, file an SAR with SOCA.

HSBC had disclosed a series of memos, internal reports, and similar documents. With the exception of the MLRO, the identity of all employees concerned had been redacted; they were identified only by the department (client relationship, compliance or MLRO) that they worked for. The documents did however reveal the information based on which the MLRO formed his suspicion.

The test for disclosure

The court found that the redacted identities of the employees concerned was not material on which HSBC relied to prove its case. As a result, the relevant question was: is the material either material which would adversely affect HSBC's case or material which would support the Shahs' case?

In answering the question it was important to remember that the issue remaining in the wider case of *Shah v HSBC* after the previous decision of the Court of Appeal was a narrow one: did HSBC have a genuine suspicion at the time when the SARs were filed? Accordingly, the Shahs did not put forward a positive "case"; they simply sought to test the bank's case that it did have such a suspicion. For that reason, the court ruled that the only circumstance in which the employee identities would be disclosable was if they adversely affected HSBC's case.

The Shahs had stated that two employees of HSBC ("Ms S" and "Mr J") might have had the motivation to make an internal AML report in bad faith. One had asked for a loan from Mr Shah and been refused; the other had received an abusive email from him after a transaction had been delayed. The Shahs submitted to the court that if any of the anonymous employees concerned in making an internal report turned out to be Ms S or Mr J, they might be able to allege bad faith.

Refusing disclosure, Lord Justice Lewison commented:

> *The more I listened to the explanation of why the claimants wanted the names, the more convinced I became that, to use the familiar cliché, this was a fishing expedition... [the Shahs] did not say that even if Ms S's name was revealed as one of the sources [the Shahs] would be able to assert bad faith; merely that they might be able to do so. Even that possibility was only tentatively advanced. It is all speculation and surmise.*

The court concluded that, absent a firm suggestion of bad faith by the Shahs, HSBC was entitled to withhold the identity of the staff concerned as being irrelevant to the matter under dispute. For that reason, the bank did not have to rely on the doctrine of public interest immunity.

CONCLUSION

This important judgment provides reassurance to employees of firms in the regulated sector of England and Wales that their identities will be protected if they make internal AML reports, unless there is a firm suggestion that in doing so they acted in bad faith. It also makes clear that there is no absolute requirement to disclose the identity of the MLRO who makes an external SAR, although as a regulated firm is now required to show that it had suspicion if its reporting is challenged, it may be that it will be necessary for the MLRO (if no one else) to come to court and explain why he made the report that he did.