

JERSEY / JUDGMENT

Gichuru v Walbrook [2008]

JRC 068 (25 April 2008)

[2008] JRC 068

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judgment

the deputy bailiff: 1. This is an application by the Chief Officer of the States of Jersey Police to be discharged from the proceedings. The application raises issues as to the appropriate procedure to be followed where a financial institution in the island has made a Suspicious Activity Report ("SAR") under the Proceeds of Crime (Jersey) Law ("the 1999 Law"), the customer has requested the financial institution to pay out his money but the police have refused to consent to such a payment. The background 2. The factual background would appear to be as follows. The representor is now aged 66 and has always lived in Kenya. In 1974 he joined the Kenya Power and Lighting Company as assistant company secretary and subsequently rose through the ranks to the position of chief executive officer in 1984, a post which he held until February 2003 when he retired. The majority shareholder in the company was at all times the Government of Kenya. He states that in Kenya public servants were not barred from running their own businesses until 2003 and he had wide-ranging commercial and business operations. 3. In 1981 he opened a bank account in Jersey. He says that the account was opened for the receipt of fees which he earned from business introductions and as a consultant. In about 1986 he was advised by the Jersey office of Deloitte & Touche (the forerunner of the respondents, to whom we shall refer compositely as "Walbrook") that his needs would be better served by having a company. Accordingly in August 1986 Windward Trading Limited ("the Company") was incorporated in Jersey. Walbrook is the administrator of the Company and provides the Company's directors and secretary. The Company has bank accounts with HSBC Bank Plc and the Royal Bank of Scotland International Limited. Walbrook provides the signatories to the accounts. Since 1986 the Company has received funds as a result of the representor's activities and has also paid monies away. The representor is the beneficial owner of the Company and the various Walbrook entities hold the shares as nominee for him. 4. In May 2002 Walbrook filed an SAR with the police. The police did not give consent to Walbrook making any payments and accordingly Walbrook has refused to make any payments from the Company to the representor since that date. 5. On 21 st August 2003 a notice under the Investigation of Fraud (Jersey) Law 1990 was issued by the Attorney General demanding documents and information. The representor came to Jersey of his own volition and, with his then lawyer, met with the police in relation to the notice. He says that he was asked about two particular payments, one being to a former minister in the Kenyan

government and another to a former head of public service in Kenya. The representor states in his affidavit that these payments were made for 'purely commercial investment purposes' and says that he provided the police with a statement to this effect and with supporting documentary evidence. He says that he fully answered all of the questions which were put to him and was told that he would be furnished with a transcript of the interview, although this has not been forthcoming despite requests by his advocate. 6. In October 2003 the representor was informed that the Finnish authorities had sought information from the Jersey authorities about him and the Company. He was told that if a formal request was received from the Finnish authorities, he would have the opportunity to make representations but he says that he has not been contacted and does not know whether this matter has been taken forward. 7. On various occasions since then the representor has requested payment of funds from the Company but this has been refused by Walbrook on the basis that no police consent has been received. In 2006 his advocates sought a further meeting with the Attorney General's department but on 12 th July 2006 Crown Advocate Belhomme wrote stating inter alia "I have since met with Detective Inspector Faudemer and Acting Inspector N Troy of the Joint Financial Crimes Unit. In this respect I am instructed an investigation into the affairs of Mr Gichuru is ongoing and there is currently no prospect of the States of Jersey Police granting consent to transactions on relevant accounts pursuant to the Proceeds of Crime (Jersey) Law 1999. In the circumstances you may feel little stands to be achieved by a proposed meeting." The representor says that he has not heard further from the Attorney General's department since then. He says that he has been interviewed by the Kenya Anti Corruption Commission in June and July 2007 but that he has not been charged or arrested. In July 2007 Advocate Young wrote to Walbrook again requesting payment of the money held by the Company but was advised that Walbrook was unable to comply with the request. 8. Accordingly, on 22 nd August 2007, the representor issued his representation seeking, inter alia , an order that Walbrook be ordered to pay the assets of the Company to the representor. On 20 th September 2007 the Court ordered that the Chief Officer be convened and gave consequential directions for the serving of evidence. However, at an early stage the Chief Officer gave notice that he did not consider it proper for him to have been joined to the proceedings and he wished to be discharged. That is the application which is now before us. The problem 9. Before turning to consider the submissions it is worth summarising how the problem underlying these proceedings arises. For a fuller description of the position we would refer to the judgment in *Chief Officer v Minwalla*

[2007] JLR 409 at paras 13-27. 10. Article 15 of the 1999 Law provides that, where the Court is satisfied that criminal proceedings are to be instituted, it may grant a saisie judiciaire vesting a person's property in the Viscount pending a decision (which can only be taken following any conviction in the criminal proceedings) on whether a confiscation order should be made. Article 15(3) provides that in such circumstances ".... the court shall discharge the order if the proceedings have not been instituted within such time as the Court considers reasonable". [Emphasis added]. Thus the legislature has attempted to strike a fair balance between the rights of a person against whom no criminal prosecution has been brought to be able to deal with his assets and the need to preserve monies which

may be liable to confiscation following conviction. 11. The position is different where an SAR has been made by a financial institution such as a bank. If the police consent to the bank complying with its customer's instructions to pay out money from the account, then the bank is protected. But if the police do not consent, the bank is on the horns of a dilemma. On the one hand, it has its customer demanding that it make payment in accordance with the mandate. On the other hand, it has a suspicion that its customer has been engaged in criminal conduct and, if it makes the payment, it will clearly facilitate the retention or control of the money by its customer. Accordingly, if it were subsequently to transpire that the money in the account was in fact the proceeds of the customer's criminal conduct, the bank would have committed the criminal offence of money laundering under Article 31 of the 1999 Law. As the bank does not know at that stage whether the money in the account is in fact the proceeds of criminal conduct, it invariably errs on the side of caution and refuses to make the payment. The result is that the account is informally frozen for so long as the bank has the relevant suspicion and the police do not consent. 12. This is clearly capable of causing great hardship and unfairness. There may never be a prosecution, yet the bank may retain its suspicion. The result may be that a person, against whom no criminal charges have been brought and against whom there lies only a suspicion, finds his assets informally frozen without there having been any court order to achieve this. Furthermore, the freezing of the account may continue for an indefinite period. The position is to be contrasted with the carefully structured protection provided in respect of a *saisie*, which is clearly intended to ensure that funds are not frozen indefinitely or for an unreasonably long period in the absence of criminal charges. 13. The position is to be contrasted with that in the United Kingdom. The 1999 Law is based on the equivalent provisions of the Criminal Justice Act 1988 of the United Kingdom. However those provisions were replaced in 2002 by those contained in the Proceeds of Crime Act 2002 ("the 2002 Act") so as to provide that the police have 7 days from the SAR in which to respond. If no response is given, they are deemed to have consented to the bank dealing with the funds in question. If they respond within the 7 days and refuse consent, they have a further 31 days in which to apply for a restraint order; if they have taken no such action at the expiry of 31 days after their refusal of consent, the bank may safely proceed. At the same time as introducing these time limits, the amending legislation made it easier for the prosecution to obtain a restraint order. Such an order may be granted where the court is satisfied that a criminal investigation has been started and there is reasonable cause to believe that the alleged offender has benefited from his criminal conduct. Thus a restraint order may be obtained at an earlier stage than a *saisie* under the 1999 Law. However, section 41(7) of the 2002 Act states that the court must discharge the restraint order if criminal proceedings for the offence are not started within a reasonable time. It follows that an informal freeze may only continue for a maximum of 38 days in the United Kingdom and thereafter any continued restraint must be by judicial order with the ability to apply for the restraint order to be lifted if the investigation does not result in criminal charges being brought within a reasonable time. 14. In the present case the informal freeze has lasted for nearly six years and there are still

no criminal proceedings against the representor in Jersey or in Kenya. It is in those circumstances that he now applies inter alia for an order that Walbrook should pay the Company's assets to him in accordance with his instructions. The submissions 15. The Attorney General accepted that a customer whose assets are subject to an informal freeze has two alternative remedies. He may seek to judicially review the refusal of the police to grant consent to payment or he may institute a private law action against the financial institution seeking payment of his funds. He said that the representor had followed the second alternative in this case and that the appropriate procedure to be followed must be determined on that basis. 16. He said that where there is a private law action the issue lies between the customer and the institution; there is no issue between the police and the customer. In this connection he referred to the observations of Tomlinson J in *Amalgamated Metal Trading Limited v City of London Financial Investigation Unit*

[2003] 1 WLR 2711 at para 27 (quoted with approval by this Court in *Ani v Barclays Private Bank and Trust Limited*

[2004] JLR 165):- "..... it was never in my judgment appropriate for AMT to seek as against the police a declaration that the monies are not the proceeds of criminal conduct. It was never an issue between those parties whether the monies were such proceeds, and there was and is no occasion for the creation of a lis between them directed to determination of that point. The only question which the police were asked was whether they consented to the payment being made. Had they given their consent, AMT would have a defence under Section 93A. The Act is however silent as to the basis upon which consent is to be given or refused. The provision would manifestly be unworkable if the constable could only justify the withholding of consent if he could demonstrate his satisfaction, to whatever might be the appropriate standard, that the funds are in fact derived from or used in connection with criminal conduct. It seems clear from the section as a whole that the existence of a suspicion is sufficient to ground a proper refusal of consent. It is important to note that there has been no public law challenge to the propriety of the exercise by the constable of his discretion. It would surely be odd if a legitimate withholding of consent which can be justified on grounds of suspicion were to lead to the situation in which the police must defend (and perhaps pay the costs of) proceedings directed towards determination of a question wholly different from that which they were asked, viz the ultimate question whether the funds are in fact derived from or used in criminal conduct. I cannot think that either Parliament or the Court of Appeal envisaged that this would be the procedure to be followed consequent upon a proper withholding of consent. Such a procedure places an undue and inappropriate burden upon the police, effectively requiring them to litigate at public expense what are in truth private disputes between financial institutions and their customers. The arising of such disputes is one of the ordinary commercial risks which any financial institution faces." (Original emphasis) The issue, says the Attorney General, is between the financial institution and its customer, and is whether the Court will direct the financial institution to give effect to the relevant contractual arrangements between it and the customer. He agreed that, if, at the

conclusion of such action, the Court ordered the financial institution to pay the funds to the customer, this would in practice (if not as a matter of strict theory) fully protect the institution from the possibility of criminal proceedings being brought against it for the reasons set out in paras 22-24 of Minwalla. He emphasised however that such protection would, as set out at para 32 of the judgment of Tomlinson J in Amalgamated Metal only apply in the case of a financial institution "..... which has taken such steps as are reasonable in all the circumstances to resist proceedings but has nonetheless been ordered by the Court to pay over money which subsequently has proved to be the proceeds of criminal conduct". He submitted therefore that it would not be sufficient for a financial institution to be entirely neutral or to submit to judgment in default. 17. He demurred from Mr Thompson's submission that the police were a better position to produce evidence as to whether the funds were the proceeds of criminal conduct than the financial institution. He submitted that financial institutions were the first line of defence against money laundering in the island. It was their duty to know their customers. If an institution began to have suspicions, it should make enquiries of the customer. If the answers to the enquiries were sufficient, the institution's suspicion would be allayed and no SAR would be made. If the answers were not satisfactory and the suspicion remained, the institution would know why it retained its suspicion and would therefore be in a position to provide all the information and material which gave rise to its suspicion to the Court. Indeed, at the time of making the SAR, it was likely that the institution would know much more about the customer's affairs than the police. When faced with a private law action by the customer, the institution's duty was to put before the Court all the evidence and information which gave rise to its suspicion and generally argue the case so as to show that it was taking such steps as were reasonable in all the circumstances to resist the proceedings. 18. He further submitted that there were sound reasons for Tomlinson J's conclusion that it was wrong to convene the police to a private law action. Firstly, for the reasons given by Tomlinson J, it was inconsistent with the structure of the 1999 Law to require the police to show that the funds in question are not the proceeds of crime at a time when they may properly withhold consent simply on the grounds of suspicion. Secondly, the police will often be unwilling or unable to present their best evidence in a civil trial which is held part-way through a criminal investigation. Thirdly, the police would, if a party to the private law action, have to give discovery. It could often be very damaging to a criminal investigation if the police had to disclose everything which was in their possession at the time. An investigation could often be prejudiced by premature disclosure to the suspect. Fourthly, civil litigation can be time consuming and expensive. The police have limited resources and it would be wrong to force them to conduct civil litigation and a criminal investigation in parallel. Concentration on time-consuming civil litigation could divert them from the criminal investigation. 19. He accepted that in Minwalla, the contest had been between the Chief Officer on the one part and Mrs Minwalla on the other as to whether the funds in question were the proceeds of criminal conduct but he contended that this was an error and inconsistent with Amalgamated Metal and Ani. The advocate representing the Chief Officer in that case had also

erroneously conceded that the burden of proof lay on the Chief Officer to show that the funds were the proceeds of criminal conduct whereas the correct position, he submitted, was that the burden lay upon the customer to show that the funds were not the proceeds of criminal conduct. 20. In short, the Chief Officer should be discharged and the proceedings should continue between the remaining parties with the burden lying on the representor to satisfy the Court on the balance of probabilities that the funds in question are not the proceeds of criminal conduct and a duty lying upon Walbrook to put before the Court all relevant evidence and submissions to the contrary. 21. Mr Thompson, on behalf of Walbrook, argued forcefully that the real issue was the withholding of consent by the police. That was why a person in the position of the representor could not have access to his funds. The issue in cases such as this therefore lay between the customer on the one hand and the police on the other and battle should be joined between them, not between the customer and the financial institution. Furthermore, given that the real issue was whether the police withholding of consent should be upheld, the proper way of proceeding was by way of judicial review, not by way of a private law action against the financial institution. Indeed, he submitted that it was not open to a customer to bring a private law action against the financial institution in such circumstances; his only remedy was by way of judicial review against the police. Accordingly, in this case, the proceedings should be treated as an application for judicial review of the police refusal and directions should be given to proceed accordingly. 22. In support of his argument, he referred to how thinking had developed in the English cases. He accepted that Amalgamated Metal envisaged a private law action between the financial institution and the customer aimed at resolving the question of whether the funds were in fact the proceeds of crime. However, in subsequent cases, the English courts had adopted a different approach. 23. In *K Limited v National Westminster Bank Plc*

[2007] 1 WLR 313 (which was decided after the statutory provisions were amended as described in para 13 above) the bank refused to honour a transaction on the part of a customer on 22nd August 2005 and made an SAR. The customer launched a claim for an interim injunction requiring the bank to comply with the customer's instructions. This was refused by the judge at first instance on 9th September and an appeal was lodged. Subsequently, on 15th September, consent to the payment was given by the Revenue & Customs and accordingly there was no longer a live issue. However the matter came before the Court of Appeal on the issue of costs. 24. Mr Thompson relied on certain passages from the judgment of Longmore LJ. Having explained that a bank which dealt with the proceeds of criminal conduct in circumstances where it had the necessary suspicion would commit the criminal offence of money laundering and that it would be no defence that the bank was contractually obliged to obey its customer's instructions, Longmore LJ had this to say:- "10 If the law of the land makes it a criminal offence to honour the customer's mandate in these circumstances there can, in my judgment, be no breach of contract for the bank to refuse to honour its mandate and there can, equally, be no invasion (or threat of an invasion) of a legal right on the part of the bank such as is

required before a claimant can apply for an injunction. If that is right, there would be no issue to be tried in any later legal proceedings and any application for an interlocutory injunction has to be dismissed. Even if, for any reason, the above analysis is open to objection, the fact still remains that during the 7-working-day or 31-day period, as the case may be, the bank would be acting illegally by processing the cheque. It would be entirely inappropriate for the court, interlocutorily or otherwise, to require the performance of an act which would render the performer of the act criminally liable. As a matter of discretion any injunction should be refused. On any view, therefore, a claim for an injunction in the present case must fail, unless the customer can in some way attack the factual foundation on the basis of which the criminal liability will arise. Here it is 'suspicion' on the part of the bank. If the bank asserts that it is suspicious, can that be controverted in any way?" [Emphasis added] The court went on to hold that it was not open to the customer to seek to cross-examine the bank staff in order to see if the suspicion did in fact exist.

Discussion (i) Is a private law action available? 25. Mr Thompson argued that the effect of the 1999 Law has been to remove the right of a customer to bring a private law action where a financial institution has made an SAR and the police have refused consent. I do not agree. In my judgment it would require the clearest possible language to remove the right of a customer to bring proceedings to enforce his right to payment of his funds. There is no such language in the 1999 Law nor do I think it possible to imply any such language. 26. Mr Thompson relies upon the observations at para 10 of the judgment of Longmore LJ in K Limited (quoted at para 24 above). However, that is to ignore para 13 of that judgment. In that paragraph Longmore LJ makes it clear that a civil claim will lie if the customer can in some way attack the factual foundation on the basis of which criminal liability on the part of the financial institution will arise. In that case, the particular factual foundation which was attacked was that of 'suspicion'. However, in a case such as the present, the factual basis which will be attacked is whether the funds are in fact the proceeds of criminal conduct. If the Court finds that they are not, then the financial institution will not be committing a criminal offence by paying away the money and accordingly the normal contractual position applies. I accept, as described at para 22 in Minwalla, that it is theoretically possible that, despite the Court's finding (to the civil standard), that the funds are not the proceeds of criminal conduct, it may subsequently be established that they are. If the bank retained its suspicion even after the Court's decision, it would theoretically commit a criminal offence. However, as already mentioned, the Attorney General agreed with the Court's conclusion at para 23 of Minwalla that, where a civil court directs a financial institution to pay away funds in respect of which an SAR has been made, it is inconceivable that a prosecution would follow and that in reality the financial institution is fully protected. 27. I accept Mr Thompson's contention that the most recent English cases seem to suggest a move away from a private law action and towards challenging the non-payment by way of judicial review of the police's decision. But that has to be seen in the context of there now being a maximum period of 38 days during which funds can be informally frozen in that jurisdiction. In practice it would be impossible for a court to hold a hearing in order to

determine whether the funds were in fact the proceeds of crime in such a short timescale; the only realistic remedy is therefore one of judicial review. That is not the position in Jersey. 28. I hold therefore that a customer facing an informal freeze of his funds continues to have two alternative remedies which he may follow and it is a matter for him which he chooses. He may seek to bring a public law action for judicial review of the police refusal to consent to payment. In those circumstances, the focus of the Court's attention will be on whether the police's decision can be successfully challenged on conventional judicial review grounds. Alternatively, the customer may bring a private law action against the financial institution seeking to enforce his contractual or other right to seek payment. In this event, the issue for the Court is likely to be whether the funds are in fact the proceeds of criminal conduct. If the Court finds that they are, then it will not enforce payment because to do so would cause the financial institution to commit a criminal offence and there is clear authority for the proposition that a court should not make such an order (see *Bank of Scotland v A Limited*

[2001] 1 WLR 751 at 760 applying *Rowell v Pratt*

[1938] AC 101). If, on the other hand, the Court concludes that the funds are not the proceeds of criminal conduct, it will order the financial institution to act in accordance with its contractual or other duty towards the customer and, for the reasons already mentioned, the financial institution will thereby be protected from any criminal prosecution for making such payment. (ii) Should the police be convened to a private law action? 29. I am persuaded by the Attorney General's arguments that the police should not normally be convened to private law actions. Essentially, my reasons are those put forward by the Attorney General but I would summarise them as follows:- (i) I agree with the reasoning of Tomlinson J contained in the passage from his judgment quoted at para 16 above. In particular, the issue in a private law action is whether the funds are in fact the proceeds of criminal conduct. This is not the basis of the decision which the police must take in deciding whether to withhold consent. It cannot be right that, having refused consent on the grounds of suspicion, the police should be forced to litigate a completely different issue, namely whether the funds are in fact the proceeds of criminal conduct. I agree with Tomlinson J that there is no lis between the police and the customer in this respect. (ii) There are strong practical grounds for thinking that the States cannot have intended that the police should be forced to litigate such a matter. I agree with the Attorney General that it may well be damaging to the chances of a successful prosecution if, before they are ready, the police have to produce their best case on whether the funds are in fact the proceeds of criminal conduct. Furthermore, if convened to the proceedings, the police would face the prospect of having to give discovery of documents well in advance of any criminal prosecution. This might well prejudice the investigation by alerting potential suspects to the lines of enquiry which the police are following or to the nature of the information in their possession. The police are not normally forced to disclose information whilst they are still at the investigatory stage. Moreover, I agree that forcing the police to participate in civil proceedings directed to an issue with which they are not

strictly concerned is likely to divert them from their proper role, which is the investigation and prosecution of crime. (iii) Minwalla was a highly unusual case. In support of the decision of the English Family Division, this Court had ordered that the funds should be paid to the wife, who, on any view, knew nothing about the source of the funds and could not therefore adduce any evidence that they were not the proceeds of criminal conduct. Given the unusual background, I can well understand why the Court ordered the police to adduce evidence on that issue but I think the case should be considered as turning on its own particular facts. 30. In summary, I accept the Attorney's submission that, although the police may on rare occasions choose to seek leave to intervene in particular cases, they should not normally be convened in future to private law actions of this nature. (iii) Role of the financial institution in a private law action 31. It was suggested during the course of argument that, if the police left the defence of private law actions to financial institutions, there was a substantial risk that not all the available evidence pointing towards the funds being the proceeds of criminal conduct would necessarily be placed before the Court, with the result that funds might be paid away upon the direction of the Court when they would not have been had the full evidence in the possession of the police been made available. 32. The Attorney General's response to this was that financial institutions are under a duty to contest the customer's claim in such circumstances and must lay before the Court all available evidence which justifies their suspicion that the funds are the proceeds of criminal conduct. I agree and would summarise the position as follows:- (i) At para 23 of the judgment in Minwalla, the Court approved the observation of Tomlinson J at para 32 of Amalgamated Metal when he said:- "It is to my mind inconceivable that there could be criminal proceedings brought against a bank or other financial institution which has taken such steps as are reasonable in all the circumstances to resist proceedings but has nonetheless been ordered by the court to pay over money which has subsequently been proved to be the proceeds of criminal conduct." [Emphasis added] (ii) It follows from the emphasised passage that, if it wishes to obtain protection against a future criminal prosecution, a financial institution must take all reasonable steps to defend the customer's claim and to put forward all available evidence in support of the argument that the funds in question are the proceeds of criminal conduct. If a financial institution allows the customer to obtain a decision in his favour without putting up a proper contest, it will not have fulfilled this requirement. A financial institution should know a fair amount about the funds which it holds. In the first place it has a duty under the various anti-money laundering Orders and Codes of Practice to know its customer and to be aware of the source of funds. If there comes a time when it begins to have concerns about the source of funds, it should pose questions of the customer in order to see if those concerns can be allayed. It is only if those concerns are not allayed that it may end up having the necessary suspicion and make an SAR. All of the information in its possession should be made available to the Court in a private law action. Although the Court will be considering the issue of whether the funds are in fact the proceeds of criminal conduct rather than whether the financial institution has a suspicion, the grounds upon which the financial institution has formed a suspicion will nevertheless be highly relevant to determination of

the issue of whether the funds are the proceeds of criminal conduct. Although, for the reasons given earlier, the police will not normally be a party to the action, a financial institution which finds itself the subject of such an action should of course consult and liaise closely with the police. (iii) Mr Young submitted that it would often be appropriate for the customer to seek summary judgment. Each case must of course turn on its own facts but in my judgment it is likely to be rare that summary judgment can properly be given in such a case. In the first place, as mentioned by Lord Woolf CJ in *Bank of Scotland v A Limited*

[2001] 1 WLR 751 at para 41, where the circumstances are suspicious, that could well provide very good reason for the Court not being prepared to grant summary judgment. A similar approach was adopted by Tomlinson J in *Amalgamated Metal* (see paras 11 and 31 of his judgment). Secondly, the Court must bear in mind that, if it makes an order directing the financial institution to pay, it will be providing a bar to a criminal prosecution of that institution for making the payment and if, in truth, the funds are the proceeds of criminal conduct, it may in fact be directing the institution to commit a criminal offence. It seems to me that, in these circumstances, it would hardly ever be appropriate for the Court to make an order with such serious consequences without investigating the evidence fully at trial rather than proceeding to give summary judgment. (iv) Burden of proof 33. During the hearing the Attorney General submitted that the burden lay upon the customer to prove on a balance of probabilities that the funds in question were not the proceeds of criminal conduct whereas Mr Young submitted that the burden lay upon the financial institution to prove to the same standard that the funds were the proceeds of criminal conduct. During the hearing I asked for supplemental written submissions to be filed on this topic. Having considered the oral and written submissions I have concluded that the burden of proof lies upon the customer. My reasons are as follows:- (i) At para 89 of *Izodia plc v Royal Bank of Scotland International Ltd*

[2006] JLR 346 the Court summarised the position as follows:- " Phipson on Evidence, 16 th Edition para 6-06 describes the general principle as being that, so far as the persuasive burden (also known as a legal burden) is concerned, the burden of proof lies upon the party who substantially asserts the affirmative of the issue. It also goes on to point out that, in deciding which party asserts the affirmative, regard must be had to the substance of the issue and not merely to its grammatical form. Thus, an allegation of a failure to take reasonable care is in fact a positive allegation of negligence. It seems to us that, in the case where a customer sues a bank in debt, the starting point is that the customer alleges a debt. Suppose that he originally put in £100, he must bear the burden of showing that a debt was originally created in that sum. However, once the customer has done that, if the bank then asserts that, although there was a debt of £100, it no longer owes that sum because it has paid away £50, it is the bank that is asserting the affirmative." (ii) Transposing that principle to a case of this nature, the customer must first prove that, for example, he has money in a bank account and has demanded payment. Having proved that, the burden then switches to the bank to show why it should not pay. In a case of this

nature, the bank does that by proving on the balance of probabilities that it has the requisite suspicion, which then entitles it to refuse to pay unless the police consent or the court so orders. (iii) Once the bank has proved the necessary suspicion, the customer can only overcome that by asserting an affirmative, namely that, despite the bank's suspicion, the funds are in fact not the proceeds of criminal conduct. In accordance with normal principle, the burden must revert to the customer to prove that on the balance of probabilities. I accept that, in a case which is not concerned with money laundering, a customer does not normally have to prove that his funds are not the proceeds of criminal conduct before he can demand them. However, where a bank has made an SAR, the position changes and, in order to overcome the fact that the bank has developed the requisite suspicion, the customer must show that the funds are not the proceeds of criminal conduct and this he must do on the balance of probabilities. (iv) This approach would seem to be consistent with that adopted in *Amalgamated Metal* where, at an earlier hearing, when declining to grant an interim declaration that the funds were not the proceeds of criminal conduct, Ouseley J said "It is not enough in order to persuade a court to exercise its discretionary jurisdiction for [the financial institution] to say that it has no evidence to the effect that [the customer] has been engaged in criminal conduct and to contend that the suspicions of the police have not yet ripened into firm evidence. The absence of criminality must be proved by positive evidence, rather than by the absence of evidence from [the customer] dealing with obvious suspicions being used alone to justify an assertion that criminality has been disproved." Tomlinson J went on at paragraph 11 to agree with that approach. (v) The fact that the effect of an order directing payment is to bar a prosecution against the financial institution and (if the funds subsequently turn out in fact to be the proceeds of criminal conduct) possibly to require the financial institution to commit a criminal offence by making the payment, points strongly in favour of the burden of proof lying upon the customer so that, before making an order with such serious consequences, the Court will at least have been satisfied on the balance of probabilities that the funds are not the proceeds of criminal conduct.

Conclusion

34. For these reasons I grant the application of the Chief Officer and discharge him from these proceedings. Postscript (i) Judicial review 35. In *Ani* (para 11) and *Minwalla* (para 21) the Court alluded to the difficulty which may face a customer who seeks to judicially review a police refusal to consent to payment following an SAR. This case does not concern judicial review as the representor has chosen to proceed by way of private law action against Wallbrook; indeed the Attorney General preferred not to address any arguments in relation to judicial review as they did not strictly arise. It follows that anything said hereafter is obiter. Nevertheless, in view of some of the points which were raised, I think it would be helpful to refer to them briefly:- (i) The case of *UMBS Online Limited* is persuasive authority for the proposition that the police are under a duty to keep a refusal to consent to payment under regular review. One can therefore see the argument that any difficulties caused by the

time limits applicable to applications for judicial review could be addressed by the customer asking the police to review their refusal and then seeking to judicially review a decision not to grant consent following such review. (ii) One can also see an argument that a refusal to consent by the police which is entirely reasonable initially may become unreasonable and liable to be quashed through the effluxion of time, particularly bearing in mind the requirement in the 1999 Law for a *saisie* to be discharged if proceedings have not been instituted within a reasonable time and the corresponding provision in section 42 of the 2002 Act that a restraint order must be discharged if criminal proceedings are not started within a reasonable time. However, I repeat that I offer no view on the merits of these arguments; they will fall for decision as and when they arise. (ii) Reform 36. As already mentioned, there is the potential under our current legislation for a customer to have his accounts informally frozen for an indefinite period simply on the grounds of a suspicion. That position has been rectified in the UK by introducing the 7-day and 31-day periods coupled with a lowering of the threshold for obtaining a restraint order so that such an order can be obtained once a criminal investigation has been started. This can be contrasted with the position under the Island's legislation where a *saisie* can only be obtained once criminal proceedings are to be instituted. In relation to the amended UK provisions the Court of Appeal in *K Limited* said this at para 22:- "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 the performance of the contract of mandate is a serious interference with the free flow of trade. But 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 7 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 restraint order when all cards will have to be on the table in any event, shows that the interference with freedom of trade is limited. Many people would think that a reasonable balance has been struck. That reasonable balance avoids the difficulties, raised by the previous statutory provisions (contained in Section 93A and 93D of the Criminal Justice Act 1998, where no time limits were incorporated), and discussed in *Governor and Company of the Bank of Scotland v A Limited*

[2001] 1 WLR 751 and *Amalgamated Metal Trading Limited v City of London Police Financial Investigation Unit*

[2003] 1 WLR 2711 ." We in Jersey still have to wrestle with those difficulties. 37. Even in relation to those amended provisions Ward LJ said this at para 36 of the judgment of the Court of Appeal in *UMBS Online Limited* :- "..... I am prepared to accept that SOCA should not withhold consent without good reason. This is no more than good administration. Mr Hall does not really dissent from that proposition. SOCA is an immensely powerful statutory body whose decisions have the consequence of imperilling private and banking activity based, initially at least, on no more than a reported suspicion of money-laundering. If the proper balance is to be struck between undue interference with personal liberties and the

need constantly to fight crime, then the least that can be demanded of SOCA is that they do not withhold consent without good reason....." 38. I can see that, if any time limits are to be introduced in Jersey, it may be appropriate to have slightly longer limits than in the UK because of the international nature of the business carried on in the island, with the consequence that the police will almost invariably have to liaise with an overseas police force following receipt of an SAR. However, I would repeat the recommendation at paragraph 74 of the judgment of the Court in Minwalla that consideration be given to amending the current legislation so as to avoid the difficulties and potential injustice that it can give rise to. Such amendments could include the introduction of time limits coupled with the ability to obtain a saisie at an earlier stage than at present, i.e. once a criminal investigation has begun. Authorities Proceeds of Crime (Jersey) Law 1999. Investigation of Fraud (Jersey) Law 1990. Chief Officer v Minwalla

[2007] JLR 409 . Criminal Justice Act 1988. Amalgamated Metal Trading Limited v City of London Financial Investigation Unit

[2003] 1 WLR 2711 . Ani v Barclays Private Bank and Trust Limited

[2004] JLR 165 . K Limited v National Westminster Bank Plc [2007] 1 WLR 313. Bank of Scotland v A Limited

[2001] 1 WLR 751 . Izodia plc v Royal Bank of Scotland International Ltd

[2006] JLR 346 . R (UMBS Online Limited) v Serious Organised Crime Agency and another

[2007] WLR (D) 116. Page Last Updated: 22 Jul 2016 BAILII: Copyright Policy | Disclaimers | Privacy Policy | Feedback | Donate to BAILII

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