

Court clarifies jurisdiction to exempt bank from potential criminal liability for making payments before NCA approval received

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What happens when a company's bank accounts are frozen and, as a result, faces imminent collapse, but the bank opposes a court application to process key transactions on the basis that if the bank is made to do so by the court, the bank may be guilty of a criminal offence under the Proceeds of Crime Act 2002 (POCA)? Are the court's hands effectively tied by the requirements of POCA?

The facts of the recent case of **The National Crime Agency v N and Royal Bank of Scotland EWCA Civ 253** were that RBS froze certain of the accounts of a customer, N (a foreign exchange trading business), and sought consent from the NCA under s335 POCA to return the funds to N upon termination of the banking relationship. NCA gave consent. RBS did not request consent from the NCA to perform specific transactions, which N was seeking to undertake but merely to return all funds to N. The effect of RBS's freezing of the accounts was to bring N's business to a halt with potentially catastrophic consequences. N sought interim injunctions and declarations to require the Bank to process its transactions. RBS opposed the applications on, among other grounds, that it had no consent from the NCA to process the particular transactions, only to return the funds to N, and that if it did so without the NCA's consent, it would be potentially liable to a criminal offence under POCA. The NCA, appearing on the application, and at first having been neutral, adopted the position at the hearing that the Judge had no jurisdiction to override the statutory regime by granting any orders, that RBS was obliged to seek consent for the specific transactions from the NCA, and that the statutory period the NCA would have to respond could not be shortened. N argued that its business would collapse before the statutory period elapsed.

At first instance, Burton J granted N's applications. The balance of convenience favoured N given the catastrophic position it would be in if the relief were not granted given the statutory periods which would be required if the consent process for the specific transactions. Moreover, as the NCA had consented to the return of the money to N, it could be inferred that there was no suspicion that the money was or was suspected to be criminal property under s340 of POCA and therefore that RBS could be guilty of an offence if they transferred the funds prior to seeking the NCA's consent. The Judge considered that he had jurisdiction to make the orders, the Court's jurisdiction not having been ousted by the POCA statutory regime, and that he could also make a declaration that RBS would not be guilty of any criminal offence under POCA in effecting the transfers. He considered that the overall balance of convenience favoured the making of the orders so as to (a) protect N's business from catastrophic failure and (b) not expose RBS to criminal sanction for complying with the order to effect the transfers.

The NCA appealed against the orders on several grounds, including that the Judge lacked the relevant jurisdiction to make the orders thereby overriding the POCA statutory framework, that the consent given by the NCA to transfer the funds to N did not mean that there was no evidence the monies were or were suspected to be criminal property, and that if the Judge did have jurisdiction this was not a sufficiently exceptional case to justify the interim declaration.

The Court of Appeal concluded that the Judge had been wrong to make the orders. The Court of Appeal, importantly, accepted that the Court's jurisdiction to make such Orders was not ousted by the POCA statutory provisions. However, they were a highly relevant consideration to whether the discretion should be exercised to which the Judge had given insufficient weight. The Judge had also been wrong to conclude that the NCA's consent to transfer of the funds back to N showed the funds were clean or that there was no criminality associated with them; judges should generally be careful about reaching similar conclusions at an interim hearing. A bank would be unlikely to be able provide sufficient evidence at an interim stage to allow a court to be satisfied that there was no criminality associated with the funds, and it would therefore be proper to make a declaration that the bank was not committing any offence by transferring the funds. Moreover, there could be many legitimate reasons where NCA consent might be given to release the money where there remain suspicions that it is criminal property and the Judge's reliance on the NCA's consent to transfer the funds to N as demonstrating that there was no evidence of criminality was misplaced. Moreover, the Judge had failed to consider that the tipping off provisions of POCA might well prevent the bank from adducing evidence at the application that would allow the court to determine the issue with sufficient certainty. It followed from all of that that the judge had been wrong to declare that RBS would not commit any criminal offence by transferring the funds.

As the Judge's view that he could make the declaration that RBS would not be committing any criminal offence by

transferring the funds was fundamental to his reasoning that he could then order the funds to be transferred, the appeal succeeded on that basis alone. However, the Court of Appeal also criticised the Judge's weighing of the balance of convenience. He had been heavily influenced by the potential problems N would face if the transfers were not immediately permitted. The Court of Appeal considered that the balance of convenience would generally always favour the bank, as the potential prejudice the bank would face by being ordered to perform an act that could be a criminal offence would usually outweigh the inconvenience to the customer of the transactions not being processed. Although the prejudice against the bank could be overcome if there was no real evidence that the money could be criminal property, the Court of Appeal observed that there is rarely likely to be enough evidence before the court to determine this, which is why such orders would likely be truly exceptional.

The Court of Appeal was also influenced by a change in position of the NCA between the first instance hearing and the appeal. At first instance the NCA had indicated it was not willing to commit to any shortening of the statutory timelines for it consider whether to give consent to transactions under POCA. By the time of the appeal, the NCA noted in a case of real urgency, where a customer could face significant loss the NCA would act much faster than the periods specified in the statute, even within hours. A future court considering such an application is likely to be heavily influenced by whether the appropriate application has been made to the NCA as a matter of urgency, and how they have reacted.

As the Court of Appeal observed, the stringent and sometimes difficult provisions of POCA are Parliament's carefully struck balance between the fight against money laundering and organised crime, and permitting commercial transactions to take place in a sensible and uninterrupted manor. Where those principles collide, as they did in this case, the court has jurisdiction to intervene, but will only rarely do so in truly exceptional circumstances.

This is an eminently sensible answer to a complex question. While the importance of the POCA regime has been underlined, the NCA's commitment to act quickly to clear transactions should assist to avoid the worst injustice that the regime might provoke.

Contributors

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