BLP Corporate Crime & Investigations column: April 2016

- **Resource type: Article**
- **Jurisdictions: USA, United Kingdom**

Berwin Leighton Paisner LLP's Corporate Crime & Investigations team is led by Aaron Stephens. The team regularly share their views on topical corporate crime and investigations issues with our subscribers.

by Aaron Stephens, Robin Ganguly and Clare Reeve of Berwin Leighton Paisner

Injunction granted to bank's customer overriding POCA consent regime and granting criminal immunity for bank (N v S [2015] EWHC 3248 (Comm))

On 19 October 2015 Burton J handed down his judgment in *N v S [2015] EWHC 3248 (Comm)*. The proceedings were heard in private and the judgment has been anonymised. The case is of interest to both civil and criminal practitioners alike.

"S" (a bank) terminated its mandate with its customer "N" (an FX and payment services provider) without notice because it suspected that some of N's clients were engaged in money laundering. Those clients' funds were held with S in sub-accounts in N's name. S had sought and obtained consent, under the Proceeds of Crime Act 2002 (POCA), from the National Crime Agency (NCA) to return all funds to N upon exit of the customer relationship. For more information, see *Practice note, Disclosures and consent to proceed (www.practicallaw.com/4-594-2965)* .

N applied for an injunction requiring S to continue to perform the mandate by making a number of payments to third parties, arguing that S had improperly terminated the mandate and since N did not have other bank accounts, its business was bound to fail if S refused to honour these critical payment requests. The NCA was served with N's application and attended the hearing.

The judge found that the balance of convenience fell in favour of granting the injunction because N's business faced imminent and substantial damage, provided that S was protected from the dilemma of being forced to make payments before it could seek and obtain payment-specific consent for them under POCA. The judge appeared to be persuaded by the fact that the NCA had already consented to the return of the funds to N, which he took to mean that there was no evidence known to the NCA that the monies to be transferred were criminal property or suspected of being so, and that the NCA had no concerns about N.

Burton J granted the injunction and an interim declaration stating that S, in complying with the injunction, committed no offence under POCA or otherwise and was relieved of its disclosure obligations in respect of the transactions. Burton J relied upon the Court of Appeal decision in *Bank of Scotland v A [2001] EWCA Civ 52* as authority for the use of the interim declaration. Since that case was decided under the Criminal Justice Act regime (which, unlike the POCA regime which replaced it, allowed open-ended freezes on transactions when consent was sought), many commentators thought that it was no longer relevant.

It is significant that Burton J did not follow the proposition espoused in more recent cases, namely that POCA provides a framework which the courts should not interfere with. For example, in *K Ltd v NatWest [2006] EWCA Civ 1039* an injunction against a bank to process a customer's payment was refused and the Court of Appeal held that the temporary freezing of the customer's transactions under the POCA consent regime has been considered by Parliament to be proportionate and to provide an acceptable balance between the need to combat money laundering and the free flow of trade.

N v S is the first known instance of a court overriding the POCA framework, and it may set an unhelpful precedent for banks if it opens the floodgates for customers to apply for injunctions to compel banks to perform transactions during the POCA "freeze" period. In view of the significant implications of the decision for the private sector and for law enforcement, it would be surprising if the NCA did not seek to appeal the decision. For an overview of the NCA, see *Practice note, National Crime Agency: overview (www.practicallaw.com/4-617-6675)* .

BLP (Daren Allen, Aaron Stephens and Robin Ganguly) acted for S.

SFO'S procedure for dealing with material potentially subject to LPP deemed lawful

The Divisional Court has confirmed that the procedure adopted by the SFO for dealing with material potentially subject to legal professional privilege (LPP), which has been either seized or produced in response to a notice, is lawful and that it is not necessary for investigating authorities to use external independent lawyers or IT technicians to carry out searches to isolate material potentially subject to LPP.

Background

The decision was made pursuant to an application for permission to apply for judicial review by Mr McKenzie, who was arrested in June 2015 on suspicion of conspiracy to commit an offence contrary to section 1 of the Bribery Act 2010. At the time of arrest, and subsequently pursuant to a notice served under section 2(3) of the Criminal Justice Act 1987, a number of electronics devices had been seized by, or produced to, the SFO.

At the time of possession by the SFO, there was no suggestion that the devices may contain material subject to LPP but the SFO later notified Mr McKenzie that it believed one of the devices, a gold iPhone, may contain some LPP material. The SFO quarantined the iPhone's content and asked Mr McKenzie's solicitors to provide a list of search terms to enable its in-house IT team to run searches to identify potential LPP material for review by independent counsel. Mr McKenzie's solicitors, in response, asserted that there was LPP material on all of the devices and they refused to provide any search terms on the basis that the SFO's procedure was unlawful.

Mr McKenzie argued that the use of SFO in-house IT staff to isolate material potentially subject to LPP was inconsistent with the terms of the Attorney General's Supplementary Guidelines on Digitally Stored Material (2011) (AG's Guidelines) and that this approach gave rise to a risk that the SFO's investigative team would gain access to LPP material. Mr McKenzie referred to decisions in *Prince Jefri Bolkiah v KPMG [1999] 2 AC 222* and *R (Rawlinson and Hunter Trustees) v Central Criminal Court [2012] EWHC 2254 (Admin)* in support of his argument that the involvement of in-house IT staff was necessarily unlawful.

Judgment

Burnett LJ, with whom Irwin J agreed, rejected each of Mr McKenzie's arguments in their entirety, ruling that:

- The procedures set out in the SFO Handbook are not inconsistent with the AG's Guidelines and, in any event, "they [AG's Guidelines] do not amount to a policy which the SFO is obliged to follow."
- The duty applicable to a seizing authority is limited to devising and operating a system to isolate potential LPP material, which "can reasonably be expected to ensure that such material will not be read by members of the investigative team before it has been reviewed by an independent lawyer to establish whether privilege exists."
- Unlike a case involving a solicitor who proposes to act against a former client (*Bolkiah*), it is too onerous to require an investigating authority in the context of the exercise of statutory powers to demonstrate that there would be no real risk of LPP material being read by anyone involved in the investigation.

Burnett LJ also disagreed that *Rawlinson and Hunter Trustees* provided any support to the proposition advanced by Mr McKenzie.

Takeaway point

The decision is being hailed by the SFO as a landmark win and you can understand why, as Burnett LJ did give a very firm stamp of approval on the SFO's procedure. More importantly, perhaps, is the potential impact that this decision may have on other investigating and enforcement authorities as it presents a useful yardstick against which procedures adopted by other authorities for dealing with material potentially subject to LPP can now be measured. (See *Legal update, The SFO's policy on LPP claims and digital material deemed lawful (www.practicallaw.com/7-622-3289)* .)

OFSI established

On 31 March 2016, HM Treasury announced that the Office of Financial Sanctions Implementation (OFSI) had officially been established (see *BLP Corporate Crime & Investigations column: November 2015 (www.practicallaw.com/4-620-4386)*). In their announcement, HM Treasury said: "OFSI will provide a high-quality service to the private sector, working closely with law enforcement to help ensure that financial sanctions are properly understood, implemented and enforced."

Chancellor George Osborne said: "OFSI will be a centre of excellence for financial sanctions, raising awareness and providing clear guidance to promote compliance with financial sanctions, providing a professional service to the public and industry, and working closely with other parts of government to ensure that sanctions breaches are rapidly detected and effectively addressed."

Whilst it is clear from these statements that OFSI's role will involve providing guidance to assist and promote compliance with financial sanctions (something which will no doubt be welcomed by businesses), it is also clear that OFSI will be responsible for what is likely to be an increasingly aggressive enforcement regime.

Indeed, in the same announcement, HM Treasury foreshadowed its proposed Policing and Crime Bill, which is currently at committee stage. The Bill is intended to harmonise criminal penalties for breach of financial sanctions, and also expands the range of methods for alternative disposal of offences.

As an alternative to criminal prosecution for breach of financial sanctions, the Bill provides for a new civil regime, to be used when it is not in the public interest to pursue a criminal prosecution (or deferred prosecution agreement), and where the level of breach is such that a warning letter is unlikely to bring about a sufficient change in behaviour. The civil penalties include a maximum fine of £1 million, or 50%

of the value of the breach, whichever is the greater. The details of any penalties will be published.

It will be interesting to see the approach OFSI takes both in promoting compliance with financial sanctions, and in enforcing breaches. We expect that OFSI will model itself on the US Office of Foreign Assets Control in some respects. On 5 April 2016, HM Treasury updated its guide to the approach of OFSI. (See *Legal update, Updated Financial Sanctions Guidance published (www.practicallaw.com/0-626-0567)* .)

Resource information

Resource ID: 5-626-1791

Products: Business Crime & Investigations, PLC UK Financial Services

Related content

Topics

Financial Crime (http://uk.practicallaw.com/topic7-103-1182)

Financial Services Offences (http://uk.practicallaw.com/topic4-607-9655)