Neutral Citation Number: [2017] EWCA Civ 253

Case No: A3/2015/4085

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE HIGH COURT (QUEEN'S BENCH)
THE HONOURABLE MR JUSTICE BURTON
CL2015000746

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 07/04/2017

Before :

LORD JUSTICE SIMON
LORD JUSTICE HAMBLEN
and
LORD JUSTICE HICKINBOTTOM

- -

Between :

The National Crime Agency	**Interested Party/Appellant**
- and -	
(1) N	**Claimant/First Respondent**
(2) Royal Bank of Scotland plc	**Defendant/Second Respondent**

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Philip Moser QC and Imogen Proud (instructed by **The National Crime Agency**) for the **Appellant**
Paul Downes QC and Joseph Sullivan (instructed by **Howard Kennedy LLP**) for the **First Respondent**
Nicholas Medcroft (instructed by **Dentons UKMEA LLP**) for the **Second Respondent**

Hearing dates : 29 & 30 March 2017

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Approved Judgment

LORD JUSTICE HAMBLEN :

Introduction

1. This appeal concerns whether and, if so, in what circumstances the court may make orders for interim relief which cut across and in effect disapply the consent regime under the Proceeds of Crime Act 2002 ("POCA").

2. In outline, the Claimant/First Respondent ("N") is an authorised payment institution which provides foreign exchange ("FX") and payment services to its customers. It held a number of business accounts with the Defendant/Second Respondent ("the Bank"). The Bank suspected that the credit balance on certain of those accounts constituted criminal property (as defined in section 340 POCA). It froze those accounts and sought the consent of the Interested Party/Appellant ("the NCA") to return the funds in the accounts to N. Such consent was granted by the NCA on 15 October 2015.

3. Meanwhile N commenced proceedings for an interim mandatory injunction requiring the Bank to operate N's accounts and for interim declaratory relief. By the time of the hearing before the court on 19 October 2015 N had identified alternative banking facilities and the relief it was seeking concerned specified past payment instructions. By an order dated 19 October 2015 (Order 1) Burton J ordered the Bank to make specified payments identified in a Schedule ("the Batch A transactions") and also declared that in so doing the Bank "will not commit any criminal offence under the Proceeds of Crime Act 2002 or otherwise ("the Criminal Law")" and that it "is not obliged to make any disclosure as would or may be required by the Criminal Law or any other law".

4. By an order dated 20 October 2015 (Order 2) Burton J made an order in similar terms in respect of further identified payment instructions ("the Batch B Transactions"). By an order dated 22 October 2015 (Order 3) Burton J made an order that the Bank be at liberty to receive from N sums in respect of identified forward contracts and a declaration in like terms in relation to those transactions.

5. The NCA appeals against all three Orders ("the Orders"). It contends that the court had no jurisdiction to make the Orders, alternatively it should have refused to make them as a matter of discretion. It submits that the only appropriate mechanism is the statutory procedure provided by POCA, and that in any event the same result follows as a matter of overriding principles of EU Law. The NCA also contends that there are a number of errors of law and fact in the judge's reasoning.

6. The NCA appeals the orders as being wrong in law in order to avoid setting a precedent. It does not seek on appeal to set aside the transactions referred to in the Orders or the interim injunctions or declarations made in relation thereto since the monies have all been irrevocably paid over. The NCA contends that the making of such orders creates a dangerous *lacuna* in the POCA statutory regime, as well as preventing the NCA from carrying out its statutory obligations in relation to the prevention of money laundering.

7. Burton J considered that, despite the absence of practical impact on the private parties to the claim, it was important that they be present on any appeal hearing. In granting permission to appeal he directed that they should be so present, with the NCA bearing their reasonable costs.

The legislative background

8. This has been helpfully set out as a Schedule to N's skeleton argument which I have drawn on in setting out the summary below.

9. Part 7 of POCA is concerned with money laundering. It comprises a fourfold structure:

   (1) The creation of the principal money laundering offences.

   (2) The consent regime defences or pre-emptive shields to certain of those offences.

   (3) The disclosure regime which involves an offence of failing to disclose and protection for persons from claims for breach of duty for making disclosures.

   (4) The freestanding offence of tipping off.

(1) Principal money laundering offences

10. Sections 327, 328 and 329 of POCA comprise the principal money laundering offences. They all utilise the concept of "criminal property", which is defined in section 340 as property which:

    (1) constitutes a person's benefit from criminal conduct or which represents such benefit (wholly or in part, and directly or indirectly); and

    (2) the alleged offender knows or suspects that it constitutes such a benefit.

11. Section 327 creates an offence of concealing, disguising, converting or transferring criminal property or removing criminal property from the UK.

12. Section 328 creates an offence of entering into or becoming concerned in an arrangement which one knows or suspects will facilitate the acquisition, retention, use or control of criminal property by or on behalf of another person.

13. Section 329 creates an offence of acquiring, using, or possessing criminal property.

(2) The consent regime

14. "Appropriate consent" is defined in section 335 of POCA. It is the consent of either a constable, a customs officer or a nominated person, being the persons to whom an authorised disclosure may be made, to do the prohibited act. Consent may be actual, or deemed.

15. Deemed consent may arise in two ways:

    (1) First, if no reply to an authorised disclosure is received by the disclosing party within seven days (starting from the first working day after the authorised disclosure is made – "the notice period"), consent is deemed to have been provided (section 335(3)).

(2) Secondly, if consent is expressly refused within the notice period, a 31 day "moratorium period" commences (on the date on which the disclosing party receives notice of refusal). If the disclosing party does not receive notification within that 31 day moratorium period, consent is deemed to have been given. At any time during either of these periods, actual consent may be given.

(3) The disclosure regime

(i) Authorised disclosures

16. It is a defence to each of the principal money laundering offences under POCA (sections 327(2)(a), 328(2)(a) and 329(2)(a)) if a person makes an "authorised disclosure" within the meaning of section 338 and obtains "appropriate consent" within the meaning of section 335.

17. An "authorised disclosure" is defined in section 338 as a disclosure to a constable, customs officer or nominated officer by the alleged offender that the relevant property is criminal property, and must be made prior to the commission of the act which would comprise a breach of section 327, 328 or 329 (unless there is a good reason for not making the disclosure prior to the act and it was made as soon as practicable thereafter – section 338(3)).

18. "Appropriate consent" is defined in section 335 of POCA, as summarised above.

19. Section 338 has recently been amended to provide that no civil liability arises in respect of the disclosure for the person on whose behalf an authorised disclosure is made where that disclosure is made in good faith.

20. In practice, authorised disclosures are made to the United Kingdom Financial Intelligence Unit ("FIU"). The FIU is part of the NCA and is an autonomous operational unit with responsibility for the gathering, analysis and dissemination of intelligence submitted through suspicious activity reports ("SARs").

(ii) Protected disclosures

21. Section 337 of POCA provides that a disclosure which satisfies three conditions shall not be taken to breach any restriction on the disclosure of information (however imposed). The three conditions are:

(1) The information or other matter disclosed must have come to the disclosing party in the course of his trade, profession, business or employment.

(2) The information or other matter must:

(i) cause the disclosing party to know or suspect that another person is engaged in money laundering; or
(ii) give the disclosing party reasonable grounds for knowing or suspecting that another person is engaged in money laundering.

(3) The information or other matter must be disclosed to a constable, customs officer or nominated person as soon as practicable after the information or other matter comes to the disclosing party.

(iii) Failure to disclose

22. A failure to make an authorised disclosure in circumstances in which a person might be in the position of committing one of the principal money laundering offences means that that person cannot obtain the protection of "appropriate consent", as set out above. It also, however, may constitute a separate offence. Section 330 of POCA provides that it is an offence where:

(1) A person knows or suspects, or has reasonable grounds for knowing or suspecting, that another person is engaged in money laundering; and

(2) The information or other matter on which the knowledge or suspicion, or reasonable grounds for knowledge or suspicion, is based must come to the attention of the person in the course of business in the regulated sector; and

(3) He fails to make the required disclosure as soon as practicable after the information or other matter comes to him.

(4) Tipping off

23. Section 333A of POCA creates two offences. The first offence (s. 333A(1)) is committed where (i) a person discloses that there has been a disclosure under Part VII of POCA (ii) that disclosure is likely to prejudice any investigation which might be conducted and (iii) the information upon which that disclosure is based came to the person during the course of business in the regulated sector. The second offence (s. 333A(3)) is committed where (i) a person discloses that an investigation into a Part VIII offence is under way or contemplated (ii) that disclosure is likely to prejudice the investigation and (iii) the information upon which that disclosure is based came to the person during the course of business in the regulated sector. The *mens rea* for both offences is that there must be knowledge or suspicion that the disclosure is likely to prejudice any potential investigation.

24. There is also an offence within Part 8 of POCA in connection with the disclosure of any information likely to prejudice an investigation. Section 342 creates an offence where a person knows or suspects that an appropriate person is acting or proposing to act, in connection with a confiscation investigation, a civil recovery investigation or a money laundering investigation which is being or about to be conducted, and that person makes a disclosure which is likely to prejudice the investigation. It is a defence for that person to show that he does not know or suspect that the disclosure is likely to prejudice an investigation.

The Third Money Laundering Directive

25. POCA Part 7 implements the Third Money Laundering Directive of 26 October 2005 on the prevention of the use of the financial system for the purpose of money laundering and terrorist financing. So far as possible POCA Part 7 should be interpreted consistently with the Directive, its terms and purposes – see, for example, *Ahmad v HM Advocate* [2009] HCJAC 60 at [32]. As to relevant purposes and terms, we were referred in particular to Recitals (1), (2), (4) and (46) and to Articles 1, 20 to 24 and 38 to 39.

The factual background

26. N had been a customer of the Bank since January 2013 and held approximately 60 active accounts with the Bank in the relevant period. These comprised four main accounts and separate client sub-accounts in sterling and various foreign currencies. The main accounts had a high volume of transactions and an annual turnover of around £700 million. The transactions on the main accounts included payments into and out of the sub-accounts, third party credits and a large volume of transactions to and from N's currency accounts relating to FX trading activity. As part of its banking facilities, N had access to internet banking and also an online FX liquidity platform which allowed it to buy and sell currency.

27. As explained in the draft witness statement of 18 October 2015 of Mr Stephens of the Bank's then solicitors, Berwin Leighton Paisner LLP, on around 29 September 2015 the Bank froze seven accounts associated with certain clients of N suspected of investment fraud (the "G Companies"). The Bank suspected that victims had paid money into these accounts. It was common ground that the accounts associated with the G Companies should remain frozen.

28. Between 9 and 13 October 2015, the Bank froze further accounts N held with it, including the four main accounts referred to above. This included N's main trading account. The Bank suspected that these accounts were tainted and contained criminal property. In particular the Bank had concerns that attempts were being made to circumvent the freezing of the accounts associated with the G Companies, that there were other clients of N who were also suspected of involvement in investment fraud and that there was co-mingling between N's main accounts and the sub-accounts.

29. On 12 October 2015 N's access to internet banking and to the FX online liquidity platform was suspended.

30. As to reporting to the NCA, Mr Stephens explained in his witness statement at paragraph 16 as follows:

> "I can now confirm that the Bank has reported to the NCA in connection with the Claimant's accounts on a number of occasions since 29 September 2015. Much, but not all, of that reporting has also involved requesting the NCA's consent to carry out specified acts. Where consent has been sought by the Bank, it has been phrased in terms of the consent to return funds to the Claimant upon the Bank terminating the banking relationship. That consent was granted on 15 October 2015 (save that a more limited consent in respect of certain accounts was granted on 8 October 2015). The Bank has not requested consent to allow it to effect any specific transactions."

31. As there explained, on 15 October 2015, the NCA gave the Bank consent under POCA to return the funds to N on the termination of the banking relationship. On 16 October 2015 the Bank gave notice to terminate all N's banking facilities with immediate effect. The NCA consent only covered the return of the funds to N. It did not cover the payment of the funds to third parties or the payments which, in due course, were the subject of Orders 1 and 3. It appears that it may have covered the payments which were the subject of Order 2. If so, the main focus of the appeals are Orders 1 and 3, neither of which related to transactions in relation to which authorised disclosures had been made or appropriate consent given.

The procedural background

32. On 14 October 2015 N wrote to the Bank demanding access to its accounts and put the Bank on notice of its intended application to the court. Notice of the application was also given to the NCA.

33. On 15 October 2015 N issued its claim form and application for interim relief. It sought an interim mandatory injunction to "operate the bank accounts held in the name of the Claimant in accordance with the terms of its mandate" and also interim declaratory relief.

34. On the same day there was a hearing before Walker J who gave directions for an expedited hearing between the parties, including the NCA as an interested party, on 19 October 2015.

35. The Bank opposed the injunction sought by N. Its position was that it did not have NCA consent to "operate the bank accounts held in the name of the Claimant" and that it was never realistically going to get consent from the NCA in such terms. Its principal concern was that, in the absence of consent, the injunction sought would expose the Bank to the risk of criminal liability under POCA for money laundering.

36. The NCA's position prior to the hearing of 19 October 2015 was neutral and it served neither evidence nor a skeleton argument.

37. The Bank's position changed once it became clear at the hearing that N had, by then, identified alternative banking facilities and that its chief concern was for the Bank to execute specified past payment instructions. In those circumstances the Bank made it clear that it would be content to execute those specified payment instructions provided it had consent from the NCA in accordance with POCA, since in the absence of consent it would be exposed to the risk of criminal liability. As made clear in Mr Stephens' witness statement, the Bank had not sought consent to effect any transactions other than transferring the credit balances to N.

38. The NCA's position also changed during the hearing. Having started from a position of neutrality, its counsel said that the NCA was opposed to a declaration expressed in general terms, as opposed to one that related to specific transactions. Its position then hardened into one where it resisted any interference with the POCA regime and the statutory timetable. It was also not prepared to commit to any shortening of that timetable.

39. Following the hearing the judge made Order 1 and gave a short judgment. Later the same day the NCA instructed leading counsel who made a telephone application for a stay of Order 1. The judge granted a stay pending a hearing the following morning.

40. At the 20 October 2015 hearing the judge dismissed the NCA's application for reconsideration of Order 1 and lifted the stay. He also made Order 2. He gave a short judgment which mainly dealt with issues of costs.

41. Order 3 was made following a telephone hearing on 22 October 2015. There is a transcript of that hearing but no separate judgment.

42. Between 21 October and 3 November 2015 the judge made further orders on N's application in similar terms to the Orders, but relating to other transactions (Batches D, E, F and G). On 16 November 2015 there was a hearing which resulted in the grant of permission of appeal.

The judgment

43. The reasoning underlying the grant of the Orders was that recorded in the judgment of 19 October 2015.

44. In relation to the application for a mandatory injunction the judge made reference to *Rover International Ltd v Cannon Film Sales Ltd* [1987] 1 WLR 670 and *National Commercial Bank Jamaica v Olint Corp Ltd* [2009] 1 WLR 1405 and considered whether there was a serious issue to be tried and whether the balance of convenience and justice required the grant of such an injunction.

45. As to whether there was a serious issue to be tried, the judge concluded at [12] that there was in relation to "the question as to whether the Defendant was entitled to terminate its banking relationship without notice, in accordance with either its current account terms or its FX terms, and in any event by reference to the Claimant's allegations of breaches of the Defendant's duty of care".

46. As to the balance of convenience and justice, the judge referred at [9] to the evidence in the witness statement of Ms Thackeray of N's solicitors, Howard Kennedy LLP, which he summarised as follows:

> "The witness statement of Ms Thackeray on behalf of the Claimant described in vivid terms the real crisis which was thus caused to the Claimant, not only in respect of the imminent loss to those customers but ongoing in the near future in relation to outstanding commitments and imminent transactions. In paragraphs 27 to 29 of her witness statement she described the real risk of loss of customers, of the risk of being pursued by customers for damages as a result of interruption to their business activities, the damage to its reputation as a result of its being unable to process on-going transactions and the serious risk of failure of the Claimant's business: the Claimant's best estimate was that it might be able to continue for a matter of days before business had to cease altogether. She estimated, on instructions, that the Claimant had around £22.8m of client money held by the Defendant which was due to be paid out, in the process of currency conversion or in the process of being transferred to the Claimant Group for cash custody, and had been unable to book and process foreign exchange trades worth approximately

> £1.5m, and had already lost in excess of £45,000 profit in relation to transactions that it had to turn away and was suffering further losses because it had been unable to effect the anticipated currency conversions."

47. In the light of the very substantial loss which he was satisfied that N imminently faced he concluded at [13] that they should be granted the protection of the injunctive relief sought "provided that the Defendant can be given protection by reference to the provisions of POCA".

48. The judge then considered whether an interim declaration should be granted in order to provide such protection. In this regard he noted that the jurisdiction to grant such a declaration is set out in CPR 25.1(1)(b) but that the commentators were agreed that it is likely to be rarely exercised, referring to *Lewis: Judicial Remedies in Public Law* (5th Ed) at paras 7-070–3; *Judicial Review Principles & Procedure*: *Auburn etc* at paras 29.55ff and in *De Smith's Judicial Review* (7th Ed) at para 18-021. He then referred to the judgment of Lord Woolf LCJ in *Bank of Scotland v A* [2001] 1 WLR 751 which he considered provided support for the grant of an interim declaration in cases such as the present so as to protect a bank from criminal proceedings.

49. The judge noted at [16] that "no express consent has been sought from the NCA by the Defendant in respect of the transactions the subject matter of this application. If it were now sought, the periods of time specified in s.335 of POCA....of up to 42 days would now triggered, with realistically almost certain disastrous consequences for the Claimant."

50. In those circumstances the judge concluded as follows at [17]:

> "17. I am satisfied that this is an appropriately exceptional case in which, particularly given the balance of injustice weighing in favour of the Claimant, with the consequent injustice to the Defendant if no declaration is given, an interim declaration should be made:
>
> i) The significant fact here is that the NCA has already given its consent in terms, which can only be deduced from the evidence of Mr Stephens set out in paragraph 11 above, to the return by the Defendant of the Claimant's funds to the Claimant, upon the Defendant terminating the banking relationship. That plainly means, and I am satisfied, that there is no evidence known to the NCA that the monies being so transferred with its consent are *criminal property or suspected of being so*, and that no objection is being taken to the Claimant, as indeed on the evidence before me there is no reason to do. The Claimant has followed and does follow all necessary compliance procedures.
>
> ii) In any event it is clear from *R v Montila* [2004] 1 WLR 3141 at paragraphs 30, 37-38 and 41, but in particular from the *common ground* between the parties recorded by Supperstone J in Shah v HSBC [2013] 1 AER (Comm) 75, that it is necessary, by reference to s.340 of POCA to establish a case, at least at this stage an arguable case, not simply that (in this case the Defendant) suspects that monies constitute or represent a benefit from criminal conduct, but that such monies must also in fact constitute or represent such benefit in relation to the transactions before me. There is no evidence in that regard."

51. The judge then looked to the NCA to see whether there was any reason not to grant the interim declaration. He noted at [23] that the NCA had only given consent to the transfer of the monies back to N but emphasised that that consent "carries with it of necessity the fact that the NCA has no evidence as of now that any of this money is the proceeds of crime or constitutes or represent the benefit from criminal conduct".

52. In the light of all these considerations he concluded that this was an appropriate case for an interim declaration to be granted in respect of the position of the Bank under criminal law and for a mandatory order to be made requiring compliance with N's instructions in relation to the specified transactions.

The grounds of appeal

53. The main grounds of appeal may be summarised as follows:

(1) The judge lacked the relevant jurisdiction to make the Orders since there exists a statutory scheme under POCA which the NCA and the parties must abide by, namely the SAR consent regime ("the statutory procedure"). Alternatively, this was a highly relevant factor to the exercise of the court's discretion.

(2) The judge erred in law in concluding that it was an appropriate case for an interim declaration in that:

(a) He wrongly placed reliance on Lord Woolf's judgment in *Bank of Scotland v A.*

(b) He erred in his finding that the NCA's consent meant that there was no evidence known to it that the monies to be transferred are or are suspected be criminal property.

(c) This is not a sufficiently exceptional case to justify the grant of an interim declaration.

(3) By reason of (1) and/or (2) interim mandatory injunctive relief should have been refused.

(4) The Orders are in breach of overriding principles of EU law in absolving the Bank from any duty of disclosure and from any criminal liability.

54. N have also put in a Respondent's Notice which relies on various matters to support the judge's conclusion, but in particular contends that the judge's decisions should be upheld insofar as they relate to accounts that were beneficially owned by N on the additional ground that those accounts could not constitute or be suspected of constituting "criminal property" as defined by the Proceeds of Crime Act section 340 where N was not suspected of money laundering ("the section 340 point").

55. It should be noted that a number of the legal arguments advanced on the appeal were not raised before the judge. In particular it was not suggested that the statutory procedure meant that he lacked jurisdiction to grant interim relief, nor, if he had jurisdiction, that that meant it was to be exercised sparingly. Nor was EU law suggested to be of relevance.

Ground 1 - Whether the judge lacked the relevant jurisdiction to make the Orders since there exists a statutory scheme under POCA which the NCA and the parties must abide by, namely the SAR consent regime ("the compulsory statutory procedure").

56. The statutory procedure, the policy underlying it and the hardship it may cause have been addressed in various authorities. In *Shah v HSBC* [2009] 1 Lloyd's Rep 328 I summarised and set out relevant passages from a number of the main authorities as follows:

> "22 The effect of Part 7 POCA on banks has been considered by the courts in some detail in two cases at first instance - *Squirrell Ltd v National Westminster Bank plc* [2005] EWHC 655 (Ch), [2005] 1 All ER (Comm) 749; *N2J Limited v Cater Allen* (Case No H006X0040 Nelson J 21 February 2006) - and by the *Court of Appeal in K Ltd v National Westminster Bank Plc (Revenue and Customs Prosecution Office and Serious Organised Crime Agency intervening)* [2007] 1 WLR 311. The role of the Serious Organised Crime Agency ("SOCA") in giving consent to execute payment instructions was considered by the *Court of Appeal in UMBS Online Ltd v Serious and Organised Crime Agency* [2008] 1 All ER 465.
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> 23 The practical effect of these provisions is to compel a bank to seek appropriate consent under section 335 in any case in which the bank has a suspicion that a money laundering offence may be committed. As Laddie J pointed out in the *Squirrell* case at para. 18:
>
> > "18 The combined effect of these provisions is to force a party in NatWest's position to report its suspicions to the relevant authorities and not to move suspect funds or property either for seven working days or, if a notice of refusal is sent by the relevant authority, for a maximum of seven working plus 31 calendar days. Furthermore, the anti-tip off provisions of section 333 of the 2002 Act prohibit the party from making any disclosure which is likely to prejudice any investigation which might be conducted following an authorised disclosure under section 338.
> >
> > 19 The way these provisions work can be illustrated by the facts of this case. Once NatWest suspected that Squirrell's account contained the proceeds of crime it was obliged to report that to the relevant authority, in this case the commissioners. It was also obliged not to carry out any transaction in relation to that account. That remains the position unless and until consent to the transactions is given by the commissioners or, if it is not, the relevant time limits under section 335 have expired. In the meantime, it is not allowed to make any disclosure to Squirrell which could affect any inquiries the commissioners *might* make. Obviously, telling Squirrell why it had blocked its account would constitute a prohibited disclosure.
> >
> > 20 These provisions could work hardship, as indicated above. But I accept Mr Grodzinski's submission that it must be assumed that the legislature intended section 328(1) to be of wide scope and for the seven- and 31-day time limits to be sufficient protection of parties in the position of Squirrell."

24 As the Courts have pointed out, the operation of the legislation may have very serious consequences for the customer. In the *Squirrell* case Laddie J observed as follows at para. 7:

> "I should say that I have some sympathy for parties in Squirrell's position. It is not proved or indeed alleged that it or any of its associates has committed any offence. It, like me, has been shown no evidence raising even a prima facie case that it or any of its associates has done anything wrong. For all I know it may be entirely innocent of any wrongdoing. Yet, if the 2002 Act has the effect contended for by NatWest and the commissioners, the former was obliged to close down the account, with possible severe economic damage to Squirrell. Furthermore, it cannot be suggested that either NatWest or the commissioners are required to give a cross-undertaking in damages. In the result, if Squirrell is entirely innocent it may suffer severe damage for which it will not be compensated. Further, the blocking of its account is said to have deprived it of the resources with which to pay lawyers to fight on its behalf. Whether or not that is so in this case, it could well be so in other, similar cases. Whatever one might feel, were Squirrell guilty of wrongdoing, if, as it says, it is innocent of any wrongdoing, this can be viewed as a grave injustice. I do not understand Mr Grodzinski to dispute this analysis. He says that the 2002 Act must be regarded as the legislature's determination of what provisions are necessary to curtail criminals' ability to profit from crimes. Furthermore, the legislation contains some, albeit restricted, provisions intended to limit the harm that these provisions can inflict on innocent parties. It is not for the courts to substitute their judgment for that of the legislature as to where the balance should be drawn. If, as he says is the case here, the legislation is clear, the courts cannot require a party to contravene it."

25 As Ward LJ stated in the *UMBS* case at paras. 8-9:

> "8 In the appellant's view this is a raft of legislation of which Dracon, the Athenian legislator, would have been proud. Mr Downes, for UMBS, endorses Longmore L.J.'s comment in *K Limited v National Westminster Bank & Ors* [2006] EWCA Civ. 1039 at paragraph 23 that the terms of the Act have, "not surprisingly, given rise to concern". The operation of the Act certainly has given us a great deal of concern. UMBS complain, and there is force in the complaints, that, for example:
>
> (1) the blocking of an account is triggered by no more than suspicion, not even reasonable suspicion;
>
> (2) the cardinal freedom of the individual to be presumed innocent until proved guilty is blown away;
>
> (3) incalculable harm may be done to the person under investigation as the account can be frozen for 40 days in all (non-working days being excluded from the initial period);

> (4) there is consequently prejudice to clients and customers of the person under suspicion: they too can face ruin;
>
> (5) SOCA may be amenable to judicial review but the difficulties of proving an abuse of its power are huge and more often than not the theoretical remedy is in reality worthless. To add to the difficulties, recovery of damages for any loss suffered may not be straightforward in a case like this.
>
> 9 In the respondent's view, on the other hand, POCA is a sharp but essential modern weapon in the fight against organised crime which gives SOCA and other law enforcement bodies the ability to counter-attack, and then pursue and recover the proceeds of the criminal activity."

26 Despite these concerns the Courts have recognised that they represent a price Parliament has deemed worth paying in the fight against crime. As Longmore LJ observed in the *K Ltd* case:

> "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 a reasonable balance has been struck."

57. Given that the statutory procedure represents the balance which Parliament has struck, the NCA submits that the court has no jurisdiction to interfere with or to disapply that statutory regime. That is, however, the purported effect of the Orders. They absolve the Bank from the need to seek and obtain the appropriate consent of the NCA in respect of the specified transactions.

58. I agree with the NCA that through Part 7 of POCA Parliament has laid down the relevant procedure and that where a bank suspects the money in the customer's account is criminal property and freezes an account, ordinarily the court should not intervene during the course of the 7 day notice period and 31 day moratorium period. Parliament has entrusted to the NCA the task of deciding whether consent should be given to the carrying out of instructions and to consequent transactions following authorised disclosure. It has also laid down a timetable for that to be done, a timetable which this court has described as being both a "workable" and a "reasonable" balance of conflicting interests.

59. I would not, however, accept that the jurisdiction of the court to grant interim relief is ousted. The legislation does not so provide. If it had been intended to remove such important powers from the court, and to deprive parties of correspondingly important

rights affecting their access to justice, clear legislative wording would be required. As Sedley LJ observed in the *UMBS* case at [58], "except where the statute prevents it" the statutory regime must accommodate "the justice of the common law". The power of the courts to grant interim relief has long been recognised. It is now set out in CPR 25.1 which was made by the Rules Committee exercising its powers under the Civil Procedure Act 1997.

60. Whilst I do not consider that the jurisdiction of the court is ousted, I accept the NCA's alternative submission that the statutory procedure is highly relevant to the exercise of the court's discretion. It cannot be displaced merely on a consideration of the balance of convenience as between the interests of the private parties involved. The public interest in the prevention of money laundering as reflected in the statutory procedure has to be weighed in the balance and in most cases is likely to be decisive. Cases justifying such intervention are likely to be exceptional, although the test is not one of exceptionality. One possible example given in argument might be demonstrable bad faith by the bank.

61. A further difficulty faced by any bank customer making an application for interim relief is that the balance of convenience will generally favour the bank in that the inconvenience to the customer will be outweighed by the potential prejudice to the bank of being compelled by the order to commit, or risk committing, a criminal offence.

62. This prejudice could be overcome if the court could be satisfied at the interim application stage that there was no real prospect of such criminal liability. Indeed this was effectively the approach taken by the judge.

63. It is unlikely, however, that there will be sufficient evidence before the court for any such conclusion to be reached. The property must actually be the proceeds of crime in order for a bank ultimately to be held criminally liable - see *R v Montila* [2004] 1 WLR 624. As I observed, however, in *Shah v HSBC* at [39] at the time that it makes an authorised disclosure "the bank is most unlikely to be in a position to know whether or not the property is criminal property". As is pointed out on behalf of the Bank, banks generally lack the investigative capacity to ascertain whether something is or is not criminal property in advance of making disclosures and the common experience of the relevant prosecuting authorities, who do have that capacity, is that it may take months or years to ascertain whether something is or is not criminal property. Further, the tipping off provisions in POCA and section 342 will in many cases prevent the bank from adducing evidence of its suspicion, or at least from disclosing the full picture, as Mr Stephens explained was the case here.

64. This prejudice could also be overcome if it was possible to demonstrate that the bank did not have a relevant or a genuine suspicion. Again, however, it is unlikely that there will be sufficient evidence before the court for such a determination to be made, particularly given the constraints on any such inquiry during the period when the tipping off provisions are relevant as determined by the Court of Appeal decision in the *K Ltd* case.

65. Another possibility in a case of real urgency and delay by the NCA in determining whether to provide consent would be to seek judicial review of its failure to do so promptly. This is likely to be difficult during the notice and moratorium periods, but the NCA's stated position is that it does respond to urgent requests, and does so

promptly. As stated in its skeleton argument and confirmed in open court, "in practice the NCA can and does in appropriate cases move considerably faster than within 7 days; potentially within hours". It is pointed out that in the present case the SAR came in without any warning as to urgency, but that consent was given within 4 working days of receipt of the SAR, which was within 4 hours of the NCA learning of the urgency.

Ground 2(a) – The judge wrongly placed reliance on Lord Woolf's judgment in Bank of Scotland v A.

66. *Bank of Scotland v A* concerned money laundering legislation which pre-dated POCA, namely sections 93A, B and C of the Criminal Justice Act 1988. It involved a bank which had been informed by police of money laundering investigations into a customer and told by them not to reveal that for fear of tipping off the customer. The bank sought directions from the court and an order was made restraining it from making payments from the account without the court's permission. This order was later discharged by Laddie J. An appeal from Laddie J's decision was dismissed but observations were made as to the courses of action open to a bank in such circumstances. In his judgment Lord Woolf LCJ stated as follows:

> "45. The wide power of the courts to give guidance to trustees is undoubted. However the court's ability to resolve disputes which could give rise to undesirable legal consequences is no longer restricted, if it ever was, to situations involving trusts. In his first Hamlyn Lecture given in 1949, Freedom Under the Law, Sir Alfred Denning identified the challenge facing the court as being to develop "new and up-to-date machinery" (p 116). The first element of the machinery identified in the lecture was the remedy of declaratory relief. The court's power to make a declaration (or "declaration of right") was derived from the Court of Chancery and was originally supposed to be restricted to declaratory judgments as to existing private rights (see *Guaranty Trust Co of New York v Hannay & Co* [1915] 2 KB 536, which sets out the early history). Sir Alfred Denning saw the need to develop its scope in order to control the abuse of executive power, and over the half-century which has elapsed since his lecture it has performed a crucial function in the emergence of the modern law of judicial review. The development of declaratory relief has not however been confined to judicial review. Doctors and hospitals have increasingly been assisted by the ability of the courts to grant advisory declarations. It was at one time thought that an interim declaration could have no practical purpose. The developments in other jurisdictions showed this was not the situation. Now the Civil Procedure Rules acknowledge that just as interim injunctions can be granted so can interim declarations…
>
> 46. The courts have responded to the need identified by Sir Alfred so many years ago. The facts of this appeal confirm the need to do so. The "tipping-off" legislation which was the source of the problem with which this appeal deals, gave extensive powers to the police. Properly used they were beneficial. Misused they could create unintended consequences. It is of the greatest importance that use of those powers is confined to situations where it is appropriate. Institutions such as banks need to be able to ensure that they are not affected adversely unnecessarily because of the existence of the police's powers. The ability of the courts to grant interim advisory declarations achieves this purpose. The fact that the courts now have these powers, must not, however, be regarded as a substitute for financial institutions taking the decisions which should be their commercial responsibility. The courts' powers are

> discretionary and only to be used where there is a real dilemma which requires their intervention.
>
> 47. The use of the court's power to grant interim declarations in proceedings involving the SFO will protect a bank from criminal proceedings but it will not automatically provide protection for the bank against actions by customers or third parties. However it seems almost inconceivable that a bank which takes the initiative in seeking the court's guidance should subsequently be held to have acted dishonestly so as to incur accessory liability. The involvement of the court should however enable, in the great majority of cases, a practical solution to be determined which protects the interests of the public but allows the interests of a bank to be safeguarded."

67. N submits that these remarks are of general application as borne out by [43] of the judgment in which it was stated:

> "If there is a dispute as to whether a payment can be made or disclosure made by the bank, the SFO on behalf of the police and the bank should try to resolve it between themselves. If they cannot do so, that can be the subject of an application for interim declaratory relief in the way we have suggested."

68. The NCA points out, however, that these remarks need to be read subject to the qualification made immediately before it that:

> "…the situations which can arise are so varied that it is extremely difficult to anticipate what will be the best course to adopt in a particular case. We would prefer to confine our guidance to what is self-evident from our judgment in this case".

69. *Bank of Scotland v A* was considered by Tomlinson J in *Amalgamated Metal Trading v City of London Police* [2003] 1 WLR 2711. In that case the claimant company had disclosed its suspicions about a customer to the police and sought their consent to the release of funds, which the police refused to provide. The company brought a claim seeking an interim declaration that the funds held were not the proceeds of criminal conduct. The judge refused to grant such a declaration. He rejected the argument that such a course of action was supported by *Bank of Scotland v A* and commented that "that was a case concerning the tipping-off provisions". Tomlinson J explained further as follows:

> "24…..The dilemma which the bank there faced, anticipating as it did the proceedings which could be expected if it refused to honour the instructions of its customer, was as to the extent of the information upon which it could properly rely. It is true that, at p 766, para 43, Lord Woolf CJ spoke of cases where there is a dispute as to whether a payment can be made or disclosure made by the bank as being those which could be the subject of an application for interim declaratory relief in the way the court had earlier suggested. But the earlier discussion, at p 765, para 40, in fact related only to a declaration setting out upon what information it would be proper for the bank to rely. Moreover it was stressed that "The life of the interim declaration would probably be short since in the majority of cases it will only be necessary to conceal the existence of the investigations for a fairly limited period": p 765, para 40. Furthermore Lord Woolf continued, at p 765, para

> 41: "The issue as to what information could be disclosed having been resolved, *the bank* could then decide what course it wished to adopt." (Emphasis supplied.) In paragraph 43 of his judgment, at p 766, Lord Woolf observed: "If proceedings are brought by a customer of the bank, the bank will have to take a commercial decision as to whether to contest the proceedings or not."….
>
> 25 When read as a whole, rather than focusing on individual passages without regard to the context, I do not detect in Lord Woolf's judgment in the *Bank of Scotland* case any support for the approach which AMT has here adopted. On the contrary, in a case like this where tipping-off was never an issue, it is implicit in what Lord Woolf said that a bank or other financial institution will have to take a commercial decision as to whether to contest proceedings if they are brought."

70. In the *K Ltd* case at [22] it was noted that the balance struck under POCA with its specified time limits avoids the difficulties raised by the previous statutory provisions considered in the *Bank of Scotland* and *Amalgamated Metal* cases.

71. In my judgment the NCA and the Bank are correct in submitting that the *Bank of Scotland* case needs to be considered with caution and cannot be regarded as providing general guidance given in particular that: (i) it concerned prior legislation which contained no time limits; (ii) as explained by Tomlinson J in the *Amalgamated Metals* case its focus was the tipping off provisions and what information it would be appropriate for a bank to disclose; (iii) the express statement that guidance was limited to what was self-evident from the judgment, and (iv) the comments made by the Court of Appeal in the *K Ltd* case as to the balance struck by Parliament in POCA. I accordingly consider that there is force in the contention that undue reliance was placed by the judge on the *Bank of Scotland* case.

Ground 2(b) – The judge erred in his finding that NCA's consent meant that there was no evidence known to it that the monies to be transferred are or are suspected to be criminal property.

72. The judge found at [23] that the SAR consent "carries with it of necessity the fact that the NCA has no evidence as of now that any of this money is the proceeds of crime or constitutes or represent the benefit from criminal conduct".

73. As the NCA points out, however, there may be many reasons why consent may be given in a particular case, including reasons linked to the fight against money laundering. The NCA has stated publicly that consent does not imply NCA approval of the proposed act, that funds are clean or that no criminality is involved. As stated by David Richards J in *Becker and Fellowes v Lloyds TSB Plc* [2013] EWHC 3000 at [29]: "If there has been disclosure, it does not follow from the fact that the relevant agency or authority has not taken direct action against the claimants that an investigation is not continuing. There may be good reason why the authority does not yet wish to act" - see also the judgment of Supperstone J in *Shah v HSBC* [2013] 1 All ER (Comm) 72 at [180].

74. It follows that one cannot infer from NCA consent that there is no evidence known to it that the monies constitute or represent a benefit from criminal conduct. Further, there was evidence that it did so in the form of Mr Stephens' witness statement and the explanation there provided as to the stance taken by the Bank.

75. One equally cannot infer from NCA consent that there is no suspicion that the monies constitute or represent a benefit from criminal conduct. In any event there was evidence of the Bank's suspicion and of the reasons for it, as set out in the witness statement of Mr Stephens, and also in the actions taken by the Bank. In circumstances where the Bank had made an authorised disclosure seeking consent to return the funds to N and made it clear that it needed NCA consent to execute the extant payments it is clear that the Bank held a suspicion.

76. Further, the judge had to be cautious about drawing any firm conclusions on the evidence given that, as Mr Stephens explained, the Bank had only had a short time to prepare its evidence, its investigation was on-going and the tipping off provisions and section 342 of POCA prevented the Bank from providing all relevant evidence of its suspicion. As Mr Stephens stated at paragraph 5 of his witness statement:

> "5. The Bank has had only a short period of time to produce its evidence for this hearing. In addition, in providing this evidence I and the Bank must be careful not to prejudice any on-going investigation(s) that may be on foot or may be about to be conducted by law enforcement agencies into the matters described herein, as this could amount to a criminal offence under section 342 of the Proceeds of Crime Act 2002 ("POCA"). For both of these reasons, this witness statement has been drafted so as to provide the Court with the salient facts necessary for the Court to deal with the Claimant's application, and with key examples explaining why the Bank has formed suspicions regarding the Claimant and the Claimant's accounts, but it should be read in the light of the on-going investigation by the Bank and the cautious approach that I and the Bank wish to take with regard to any risk of prejudice."

77. I accordingly accept that the judge's findings that there was no evidence that the monies were suspected to be or were criminal property are not borne out by the evidence or his reasons.

78. It is apparent from paragraph 17 of the judgment and the judgment in general that these findings were of central importance to the judge's conclusion that it was an appropriate case to grant an interim declaration and therefore also to grant an interim injunction. In the judge's view the prospect of criminal liability was "fanciful" (at [23]). That being so one can understand why he might have been willing to grant an interim declaration that there was no such liability. In my judgment, however, the conclusion that criminal liability was "fanciful" is not supportable.

79. In relation to the judge's findings with regard to criminal liability, N relies on the section 340 point raised by its Respondent's Notice. It contends that the judge's findings should be upheld insofar as they relate to accounts that were beneficially owned by N on the basis that those accounts could not constitute or be suspected of constituting "criminal property" as defined by POCA section 340 where N was not suspected of money laundering. It is pointed out that the credit balance of a bank account between a bank and its customer is merely a debt owed by the bank to the customer - see *Foley v Hill* (1848) 2 HL Cas 28. Ordinarily there is no fiduciary relationship - see *Tamimi v Khodari* [2009] EWCA Civ 1109. It is submitted that it therefore follows that a party who has paid over monies to N, which are then subsequently paid into N's bank account can have no interest in, nor derive any benefit from N's debt owed to it by the bank.

80. It is not necessary to determine this point as the Bank is correct in pointing out that it did have a suspicion regarding N, as stated in paragraph 5 of Mr Stephens' witness statement cited above. I also agree with the Bank that there was in any event an insufficient evidential basis for it to be concluded that N's accounts were free of any criminal property. In particular, as the Bank submits:

(1) Criminal property is defined very broadly under section 340 of POCA. It includes property that constitutes a person's benefit from criminal conduct or represents such benefit, in whole or part and whether directly or indirectly. The result is that if only a small part of the property can be traced to crime, all of it constitutes criminal property – see *R v Causey*, Unrep., CA 98/7879/W2, 18 October 1999. Property is defined in 340(9) as including "(a) money (b) all forms of property, real or personal, heritable or moveable and (c) things in action and other intangible or incorporeal property". It therefore includes debts.

(2) Whether or not the credit balances on the accounts held with the Bank constituted criminal property is fact sensitive.

(3) In the context of an urgent, interlocutory application made at a time when the tipping off provisions were highly relevant, the court was not in a position to draw firm conclusions as to the Bank's state of mind, as to whether the credit balances in the accounts were, as a matter of fact, criminal property or as to whether N was itself complicit in money laundering. This was especially the case in the circumstances of this case, where N held main accounts and sub-accounts (or client accounts), where the transactions on the main accounts included payments into and out of the sub-accounts, third party credits and inter-mingling.

Ground 2(c) – Whether this is not a sufficiently exceptional case to justify the grant of an interim declaration.

81. CPR 25.1(1)(b) provides that the court shall have the power to grant an interim declaration.

82. It was introduced following recommendations made in Law Commission Report No 226: Administrative Law: Judicial Review and Statutory Appeals. Paragraph 6.21 of that Report stated as follows:

> "6.21 *Interim Declarations:* The advantages of these are that they are not coercive, they specifically address the interim position and are better suited to clarify the position of third parties. There is no reason why they should not be granted on the same basis as interim injunctions. In New Zealand there is provision for interim declaratory relief in judicial review proceedings against the Crown in lieu of injunctive relief which is not available, and such relief is more generally available in Canada. Such declarations would refer to a right or obligation that exists prima facie and are not therefore illogical. In making a merely interim declaration, the judge reserves his or her right and admits an obligation to re-examine the question after a substantive hearing at the trial. In our view this consideration also meets the argument that a declaration in an interim form may

> inappropriately suggest that the court has already made up its mind as to the likely grant of final relief."

83. In *De Smith's Judicial Review* 7th Edn at para 18-021 it is said that the courts are gradually making greater use of interim declarations in judicial review proceedings. *R (on the application of AM) v DPP* [2012] EWHC 470 (Admin) and *G v E & Others* [2010] EWCA Civ 822 are cited as examples of cases where the remedy was granted.

84. Although CPR 25.1(1)(b) is not limited to applications for judicial review we have not been referred to any case in which such a declaration has been granted outside the judicial review context.

85. On behalf of N it is submitted that the interim declaration operates in much the same way as an interim injunction. It is both provisional and suspensory in nature, making a temporary declaration as to the state of the law or a party's rights whilst leaving the state of uncertainty to be determined at a full trial. Just as with any other interim remedy, whilst it is provisional in nature, actions carried out while it is in force will enjoy its protection for all time. Thus it will be an abuse of process to prosecute a party who has acted with the protection of an interim declaration, notwithstanding that the declaration is subsequently set aside. It is submitted that the remedy is essentially pragmatic in nature and that considerations of "justice and convenience" should lie at the foundation of its availability.

86. In the *Amalgamated Metal* case an interim declaration was sought that the funds held were not the proceeds of criminal conduct. As Tomlinson J observed at [10]:

> "….It remains to be worked out what are the circumstances in which it might be appropriate to resort to this new jurisdiction. For my part I find it difficult to conceive that the court would ever be prepared to grant an "interim declaration" of the type here sought. Either the relevant sum is the proceeds of crime or it is not. Whilst the question could only be decided as between the parties before the court, and on the basis of such evidence as they chose to place before it, the court would surely only be prepared to pronounce upon the question, if at all, on a final basis, not upon the basis that whatever is the position today may by further or different evidence tomorrow be shown to be different".

87. Tomlinson J commented further at [27] as follows:

> "27 ….it was never in my judgment appropriate for AMT to seek as against the police a declaration that the moneys are not the proceeds of criminal conduct. It was never an issue between those parties whether the moneys 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 ("the constable" in the language of the statute) 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 here 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. I also think it most unlikely that the Court of Appeal can have had in mind that the court would in such circumstances grant interim declaratory relief on the ultimate substantive question whether the funds are derived from criminal conduct. Such a question only permits of a final answer, not a temporary answer, and it is only appropriate to answer it as and when it arises, and then as between the parties between whom it arises. Then it is decided, if it is necessary so to do, upon the basis of such evidence as the parties place before the court, and having regard to the incidence of the burden of proof. Finally the granting of declaratory relief on this ultimate question as against the police whether on an interim or a final basis could prejudice future criminal prosecutions."

88. It can equally be said that here the question of whether the Bank would commit any criminal offence in making the transactions and whether the Bank was obliged by the criminal law to make disclosure were substantive law questions that only permit of a final rather than a temporary answer. For all the reasons given by Tomlinson J I have real difficulty in seeing how it could be appropriate for the court to give an interim answer to such questions. The declarations sought were in determinative rather than advisory terms.

89. Assuming, however, that such an answer can be given, it would be necessary to consider the degree of confidence which the court must have in the applicant's entitlement to a declaration before such relief could be granted. In my judgment the most appropriate evidential threshold in a case such as the present is the high degree of assurance which is generally required before mandatory injunctive relief will be granted. The need for a close consideration of the merits is particularly important in a case in which the grant of the interim declaratory relief is likely to be determinative of the issue, as in this case. The relevant potentially criminal acts here were the carrying out of the specified transactions and/or failing to make prior disclosure. Once the monies had been irrevocably paid over without further disclosure under the protection of the interim declarations there could be no criminal liability.

90. The judge did have a high degree of assurance since he considered that the prospect of criminal liability was "fanciful". For reasons already given, however, that was not borne out by the evidence or the judge's reasoning. If a high degree of assurance was required, on the limited evidence before the court the judge could not have such assurance.

91. In my judgment there is substance in all three grounds of challenge to the decision to grant an interim declaration and I have no doubt that no such declaration should have been made. To be fair to the judge the principled objections now advanced were not developed before him. At that stage the parties appear to have been content for a pragmatic rather than a principled approach to be adopted.

Ground 3 - Whether mandatory interim injunctive relief should have been granted.

92. It is clear that the grant of interim declaratory relief was integral to the judge's decision that the balance of convenience favoured the grant of mandatory interim injunctive relief. His conclusion was such relief should be granted "provided that the defendant can be given protection by reference to the provisions of POCA". If it was inappropriate to grant an interim declaration to provide such protection then, on the judge's own reasoning, it was inappropriate to grant a mandatory interim injunction. As already observed, this reflects the fact that the balance of convenience favoured the Bank because of the prejudice that would be caused to it in finding itself committing, or risking committing, a criminal offence.

93. In any event, in considering the balance of convenience the judge did not have regard to the important public interest in the prevention of money laundering as reflected in the statutory procedure. Had he done so I do not consider that he would or could have concluded that the considerations of convenience and justice for the private parties were sufficiently strong to justify the court's intervention and consequent disapplication of the statutory procedure.

94. The principal balance of convenience factor relied upon by N was the potential loss to N and the risk to its business as reflected in the judge's findings at [9]. This was an important factor and meant that it was highly desirable for the NCA to be able to respond in a prompt and appropriate manner. As already observed, the NCA now states that in cases of urgency it can and does in appropriate cases move considerably faster than within 7 days and indeed potentially within hours. Unfortunately, that was not communicated to the judge at the time. The NCA's position before the judge was that no time commitment could be made and the judge proceeded on the basis that obtaining NCA consent could take up to 42 days.

95. One can well understand why in those circumstances the judge considered that the court should strive to provide N with as much assistance as possible. In cases such as this it is clearly desirable that the need for urgency is communicated to the NCA and that it responds promptly in so far as it can do so. I would not, however, have regarded the potential losses in this case as being a sufficient justification to grant interim relief which would have the effect of displacing the statutory procedure.

96. For all these reasons I conclude that mandatory injunctive relief should not have been granted.

Ground 4 – Whether the Orders are in breach of overriding principles of EU law in absolving the Bank from any duty of disclosure and from any criminal liability.

97. In the light of my conclusion on grounds 1 to 3 it is not necessary to decide this further issue. I am, however, inclined to agree with the Bank that the Orders did not provide any general absolution to the Bank from its duty of disclosure or from criminal liability.

The Orders were all linked to specific transactions. In those circumstances it is difficult to see how general principles of EU law were breached, but there is no need to consider the issue in detail.

Conclusion

98. For the reasons outlined above I would allow this appeal.

LORD JUSTICE HICKINBOTTOM

99. I agree.

LORD JUSTICE SIMON

100. I also agree.