



## Litigation

# What price disclosure?

# Employee anonymity after Shah v HSBC



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### Employee anonymity after Shah v. HSBC

The UK Court of Appeal has provided some welcome comfort to nervous employees of financial institutions faced with the prospect of having to give evidence against their customers in cases involving disclosures made to the authorities under the “proceeds of crime” legislation.

The identities of employees who are part of the notification process are not generally disclosable in any such proceedings, although the MLRO or nominated officer may still have to be identified and called as a witness if the institution wishes to rely on the statutory defence of disclosure to the authorities.

This is the latest ruling in satellite litigation arising from the 2010 ruling by the Court of Appeal that parties suffering a loss as a result of disclosures being made to the authorities under the AML and/or CFT legislation, especially where “consent” is requested, could demand proof from the institution that the suspicion upon which the disclosure was founded existed at the relevant time.

### Background

Mr Shah and his wife sued for damages in excess of \$300m arising from the bank’s alleged delay in executing four transactions between September 2006 and February 2007. The delays themselves varied between one and three days.

The bank, suspecting that the transactions concerned criminal property, made a number of disclosures to the Serious & Organised Crime Agency (“SOCA”) and did not comply with the payment instructions as a consequence. Three of the four transactions were subsequently effected following receipt of consent from SOCA, whilst the fourth was cancelled by the first plaintiff.

As is often the case, the smallest of the transactions is believed to have had the most impact. The individual to whom the funds were meant to be

sent (in an act of apparent revenge for non-payment) is alleged to have contacted the authorities in Zimbabwe and notified them that Mr Shah was suspected of money laundering. The Zimbabwean authorities then froze and seized a number of significant investments held by Mr Shah, leading to the substantial losses now being sought from the bank.

### First Instance

The High Court awarded summary judgment to the bank and dismissed the claims. The Court rejected the arguments that the bank’s decision to make disclosures was irrational, founded on negligent self-induced suspicion, mistake, or on a mechanically-induced suspicion. In light of the bank’s evidence of suspicion and the lack of any allegations of bad faith, the claims were doomed to failure. The plaintiffs appealed.

### Court of Appeal

The Court agreed with the dismissal of the claims as pleaded, however it stated that mere evidence of suspicion was not enough to defeat them. Plaintiffs in this type of case should be entitled to force defendant institutions to prove their case (i.e. prove that they have the requisite suspicion at the relevant time), including putting witnesses to proof and testing the documentary evidence as one would in the ordinary course of a trial.

The Court noted that there was a risk of injustice “in deciding cases without appropriate disclosure and cross-examination”. The public policy need for judicial oversight of a legislative regime which has potentially draconian implications for customers was clearly a key factor in the Court’s thinking.

The issue of witness anonymity was also considered. The bank was concerned that the wholesale disclosure of witnesses’ details could in certain cases endanger them, given the nature of the cases and the background of some of the protagonists involved. Concerns of this nature are undoubtedly the principal drivers for confidentiality in this type of case. The Court held that it would be for the defendant institution to inform the Court of any issues it may face and to seek

redaction of documents and/or anonymity for the witnesses concerned on the grounds of public interest immunity (“PII”) (subject to the general principle of ensuring a fair trial could take place).

The Court also allowed the plaintiffs’ appeal in respect of the bank’s alleged failure to provide them with information as to why the transactions had not been effected. The Court noted that:

“there must (arguably) come a time when [ the customer ] is entitled to have more information about the conduct of his affairs than he has yet been given.”

The Court did not give any guidance on the length of time after which it could be considered appropriate to provide an update to the customer, nor did it confirm what information (if any) could be provided and which would not offend the “tipping off” provisions of the law.

The issue of the redaction of personal details remained contentious, necessitating a further hearing before the High Court.

## Witness Identification & Redaction (High Court)

Following the Court of Appeal’s ruling, the Bank disclosed both its internal reports and Suspicious Transaction Reports (“STRs” in Guernsey, Suspicious Activity Reports “SARs” in Jersey), but declined to provide the details of any employees involved in the reporting process, with the exception of the MLRO. The bank claimed PII in respect of the identity of the employees, but also argued that their identities were in any case irrelevant for the purposes of determining whether the bank had the requisite suspicion to make the disclosures.

## Public Interest Immunity

The onus is on the party arguing that PII attaches to a particular document to prove that such is indeed the case. If PII is found to attach to a document, then the Court has to carry out a balancing exercise - does withholding the source of the evidence to protect the employees and to avoid possible inhibitions in reporting in future outweigh the

public interest in open justice and the plaintiff’s right to face his accusers in court?

In concluding that the documents produced by the bank’s employees did attract PII, the Court held that employees reporting their suspicion are in an analogous position to that of police informers. An employee’s position is especially precarious, as they are under a statutory duty to provide the relevant information, as opposed to informers, who do so of their own volition. Furthermore, the Court was concerned that a lack of certainty in relation to confidentiality would have a significant and adverse effect on the reporting process within institutions, to the detriment of the fight against crime.

In an ordinary civil case, the public interest in confidentiality would usually outweigh the interests of open justice, primarily due to the risks of inhibition and of reprisals against employees. In the present case, three factors were of importance in this regard:

- There was no evidence that the plaintiffs were involved in money laundering.
- There was no suggestion that the employees were at risk of reprisals.
- Given the lengthy bank/customer relationship, the plaintiffs were likely to have at least some idea of the identities of those employees.

On that basis, the Court considered that a further level of disclosure would be appropriate, but that an unqualified removal of all redactions would be inappropriate (for the public interest reasons set out above).

## Suspicion

It is a fundamental requirement that the defendant institution is able to show that the suspicion it held was genuine (i.e. held in good faith). This involves assessing the institution’s procedures and ascertaining which employees held the requisite suspicion and how and when that suspicion was communicated to the MLRO and/or the authorities. The Court was concerned that an employee motivated by bad faith could produce reports purporting to identify suspicion and which could be

acted upon without being properly checked by the MLRO. It would therefore be necessary to test the evidence in respect of each stage of the reporting process.

Following on from that analysis, it seems insufficient for the MLRO to simply give evidence of their suspicion if it was only formed as a result of a reported suspicion being provided to them by others in the organisation. It is questionable how often the motivation of individual employees will be called into question, although given that a detailed knowledge of the customer's activity can only be built up by getting to know them and their business, it is perhaps unsurprising that the Court was keen to ensure that the system be subject to judicial oversight.

It is important to remember that the relevant suspicion must relate to the individual or entity involved in the transaction. The Jersey case of *Papadimitriou –v- Nearco Administration Services* involved STRs being made in respect of two companies under common ownership, only one of which was involved in the transaction. The Court held that the STR made in respect of the non-party had been made erroneously and therefore did not attract the statutory protections afforded by the law. It also held that the mere fact that a case was weak did not mean that it would be struck out automatically, particularly in a developing area of law such as this, where the interaction between the AML legislation and the duties owed to customers by financial institutions was largely untested.

## Relevance and Redaction

The Court held that the documents containing the employees' identities were relevant to determining the issues in the case, but noted that the mere fact of their disclosure did not entitle the plaintiffs to sight of the whole of the document. It is a matter for the disclosing party to assess which parts of the document(s) it considers irrelevant and to make redactions as appropriate. However, it should be prepared to demonstrate the justification for that redaction.

In assessing whether redaction of the employees' details was appropriate, the Court took the "third way". Whilst a unilateral decision to redact the

information wholesale was unjustified, information that would enable the plaintiffs to assess which employees had been involved at each stage of the reporting process would go some way towards demonstrating the probity (or otherwise) of that process.

If it could be shown, for example, that the various documents were generated by a number of individuals and widely circulated, then this could alleviate any concerns that a particular individual within the institution was exerting some form of improper influence over the process, or acting in bad faith.

The Bank was therefore ordered to produce a schedule of relevant employees and allocate to each employee a letter and the name of the department in which they worked. Their names would remain redacted, but the additional information would enable the plaintiffs to identify the spread of employees involved in the reporting process and how and by whom the various memoranda were formulated and disseminated. It would be open to the plaintiffs to make an application for an order compelling the disclosure of an individual's identity at a later stage.

Taken in combination with the Court's ruling on the PII issue, a partial solution to the problem appeared to have been achieved.

However, the ruling did not prove satisfactory to either party. The plaintiffs appealed the Court's refusal to order disclosure of the employees' identities, whilst the bank cross-appealed the finding that its obligations under standard disclosure required it to reveal the names in the first place (i.e. their identities should be protected as of right and not just as a result of the application of PII).

## Witness Identification & Relevance (Court of Appeal)

The two principal questions for the Court were:

- Whether the bank's obligation to make standard disclosure requires it to reveal the names of its employees who report suspicions of money laundering to the MLRO or nominated officer (i.e. are the names of the employees relevant)?

- If so, whether the bank is entitled to maintain the anonymity of those individuals on the grounds of PII.

The first issue to address is whether the documents and/or information fall within the test of standard disclosure. This is outlined in Part 31 of the Civil Procedure Rules in England (“CPR”). Similar provisions are contained in The Royal Court Civil Rules in both Guernsey and Jersey (“the Rules”).

The Court considered that whilst pre-CPR case law on the question of “relevance” exists, the current test was that set out in the CPR. “Relevance” should be assessed by reference to whether the documents fell within the categories set out in Part 31 CPR (Rule 65 in Guernsey and Rule 6/17 in Jersey). The plaintiffs were unable to persuade the Court that the parts of the documents identifying the employees fell within one of these categories.

As the bank had taken the decision to redact the identities of the individuals, then on the face of it, the bank would not be relying upon that information in defending itself. If this meant that its case was weakened as a consequence, that was a matter for the bank. The bank would also have had to assess whether the material adversely affected its own case, adversely affected the plaintiffs’ case or supported the plaintiffs’ case. It was insufficient that the disclosure “might lead to a train of inquiry that might adversely affect the bank’s case”.

In the absence of any credible evidence or pleaded case of bad faith, the plaintiffs were unable to persuade the Court that the material adversely affected the bank’s case. Given the narrow scope of the issues in the case (concerning the existence of the bank’s suspicion at the relevant time), there was no “case” for the plaintiffs to present as such, and so the identification material could not be said to either adversely affect nor support, any such “case”. It was common ground that there was no requirement in any practice direction to support disclosure of the material.

Since the documents did not pass the test for standard disclosure, there was no need for the Court to consider the more complex and vexed

question of the applicability of PII. The identities of the employees were held not to satisfy the test for standard disclosure and the bank was not required to provide those details to the plaintiffs.

## Update

The Court of Appeal has within the last fortnight dismissed the plaintiffs appeal against an order refusing them leave to amend their pleadings. They had sought to plead allegations of bad faith and/or conspiracy to make a STR when there was no basis for doing so. The Court ruled that the amendments were speculative, had no real prospect of success and mirrored those for which permission to amend had previously been refused. Although fact-specific, it is a further reminder of the need to ensure that a clear paper trail is kept in respect of each customer relationship.

## Practical Implications for Guernsey & Jersey

- With the exception of the MLRO (or nominated officer), employees of an institution will not generally be called as witnesses, nor have their details disclosed should the matter be litigated
- The evidence of the MLRO (or nominated officer) should be sufficient to demonstrate that a suspicion was held at the relevant time
- Institutions will be put to proof on the fact of their suspicions
- Any delay in actioning payment instructions may amount to a breach of duty
- It is unclear whether computer generated markers could legitimately produce a “suspicion”
- Cases are likely to reach discovery stage or trial, they will not simply be struck out
- Check your insurance policy covers disclosures and related litigation/claims
- Ensure staff training is current

- Ensure procedures are clear and any decisions taken are adequately recorded
- Check your terms of business and limitation clauses

The “tipping off” provisions of the law in Guernsey and Jersey do not make provision for the disclosure of internal reports or STRs in civil proceedings. It would therefore be prudent to obtain consent from the FIU/JFCU for the disclosure of such material, and at the very least agree a strategy with them in advance of having to file defences (which will necessarily refer to a disclosure having been made if the institution wishes to avail itself of the statutory defence).

Please note that this briefing is only intended to provide a very general overview of the matters to which it relates. It is not intended as legal advice and should not be relied on as such.

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