

## BANKS, FRAUD & UNJUST ENRICHMENT

### Jeremy D Stone Consultants Ltd v Nat West Bank Plc [2013] EWHC 208 (Ch.)

#### **Banks as amateur detectives**

1. It is not the task of banks to subject an account to ‘microscopic examination’ or to play the role of ‘amateur detective’ *Lloyds Bank v The Chartered Bank of India, Australia and China* [1929] 1 KB 40, 73 per Sankey LJ.
2. But see: Proceeds of Crime Act 2002, Money Laundering Regulations 2007 & the FCA’s Principles of business & the Senior Management Arrangements, Systems and Controls Handbook (SYSC)

#### **Good faith change of position**

3. Lord Goff in *Lipkin Gorman v Karpnale Ltd* [1991] 2 AC 548 at 579:

“It is of course plain that the defence is not open to one who has changed his position in bad faith, as where the defendant has paid away the money with knowledge of the facts entitling the plaintiff to restitution; and it is commonly accepted that the defence should not be open to a wrongdoer. These are matters which can, in due course, be considered in depth in cases where they arise for consideration.”

4. *Niru Battery Manufacturing Co v Milestone Trading Ltd (No 1)* [2002] EWHC 1425 Moore-Bick J at [135]:

“[Bad faith] is capable of embracing a failure to act in a commercially acceptable way and sharp practice of a kind that falls short of outright dishonesty as well as dishonesty itself.”

In the Court of Appeal ([2003] EWCA Civ 1446 per Clarke LJ at [149]):

**“the essential question is whether it would be inequitable or unconscionable, and thus unjust, to allow a recipient of money paid under a mistake of fact to deny restitution to the payer”**

5. Approach adopted in:
  - *Abouh-Rahmah v Abacha* [2006] EWCA Civ 1492
  - *Jones v Churcher* [2009] EWHC 722
  - *Jeremy D. Stone Consultants v National Westminster Bank Plc* [2013] EWHC 208 (Ch.) per Sales J at [246].
6. Commentators have expressed some reservations about this formulation: see *Goff & Jones* (7 Ed.) at paras 40-012 – 40-015.
7. Duty on the bank to make enquiries: see *Armstrong DLW GMBH v Winnington Networks Ltd* [2012] EWHC 10 (Ch.) per Mr Stephen Morris QC [at 110]:

“....good faith does not go so far as to require the making of enquiries which a reasonable person would have realised should have been made but which the Defendant did not in fact so realise. Mere negligence is not sufficient to establish bad faith. Where Moore-Bick J referred to the payee having ‘good reason’ to believe (or think) I consider that he was referring to what the payee actually knows or believes i.e. knowledge of circumstances which give rise to actual suspicion or doubt on the part of the payee.”
8. Suspicion and money laundering: *Abouh-Rahmah v Abacha* [2006] EWCA Civ 1492

### **Wrongdoing on the part of the Bank**

9. Lord Goff said that the defence of change of position would not be available to a ‘wrongdoer’. In practice, notion is aligned with that of illegality.
10. Application to restitution based on wrongdoing, as opposed to unjust enrichment? see Henderson J in the *FII Group Litigation v Commissioners for Revenue & Customs* [2008] EWHC 2893 (Ch).
11. However, the general view is that a defendant will be deprived of the defence if he has committed a criminal offence in connection with the change of position: *Barros Mattos Junior v General Securities & Finance Ltd* [2005] 1 WLR 247.

12. Relevance to banks:

- Section 330 POCA: A person working in the regulated sector who knows or suspects (or has reasonable grounds to know or suspect) that another person is engaged in money laundering must make a disclosure.
- Regulation 8 of the Money Laundering Regulations imposes a duty to conduct “ongoing monitoring of the business relationship.”

13. Stone Consultants v NatWest at [251] & [254]: Such breaches would constitute strict liability offences which would be ‘technical’ or ‘insufficiently grave’ and are not of the character which would justify the Court disbarring the bank from relying on the change of position defence according to the standard of good faith behaviour explained in Niru Battery.

14. See also: O’Neil v Gale [2013] EWCA Civ 1554.

**Ministerial receipt**

- Portman Building Society v Hamlyn Taylor Neck (A firm) [1998] 4 All ER 202, 207 – 208
- Jones v Churcher
- Stone Consultants v NatWest at [245].

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