Neutral Citation Number: [2020] EWHC 268 (Admin)

Case No: CO/1859/2019

IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
DIVISIONAL COURT

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 12th February 2020

Before:

LORD JUSTICE DAVIS
and
MRS JUSTICE MCGOWAN

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In the matter of the National Crime Agency **Appellant**

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- -

Mr Tom Hoskins (instructed by **NCA Legal**) for the **Appellant**
Mr Louis Mably QC (as advocate to the court (by written submissions only))

Hearing date: 22 January 2020

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Approved Judgment

Lord Justice Davis:

Introduction

1. This case involves consideration of the meaning and ambit of s.357(2) of the Proceeds of Crime Act 2002, as amended ("the 2002 Act"). The principal point raised is of some general importance.

2. The issue arises in the context of an application made by the National Crime Agency ("the NCA") for a disclosure order in a money laundering investigation. The Crown Court judge was prepared in principle to make such an order: and did so. But he decided that such disclosure order could not apply to bank accounts which were the subject of account freezing orders previously made in the course of a frozen funds investigation then being undertaken by the City of London Police. The question is whether the judge was right in so deciding and in restricting the disclosure order in that way.

Legislative Scheme as to disclosure orders

3. In order to make any sense of the background and of the judge's decision it is necessary at the outset to refer to a number of the provisions of the 2002 Act.

4. It may be that, as initially enacted, the disclosure order provisions of the 2002 Act relating to investigations were not so very complex. As a result, however, of various substantial amendments and accretions to the legislation in the intervening years, the position has become (even by the standards of this statute) fearsomely complex.

5. In its original form, the relevant section in the 2002 Act relating to disclosure orders in investigations (s.357) confined the entitlement to apply for a disclosure order to the Director of the Assets Recovery Agency: and an application by the Director in relation to a money laundering investigation was precluded by s.357(2). However, a number of additional types of investigation have since been added to the legislative scheme: and a number of differing bodies have had conferred on them the power to initiate such investigations and make such an application.

6. At the time of this present investigation by the NCA and at the time of the application to the Crown Court judge in this case, there were a number of different kinds of investigation comprehended within the 2002 Act (and there is no hierarchy under the legislation). These include: a money laundering investigation; a confiscation investigation; a civil recovery investigation; an exploitation proceeds investigation; a detained cash investigation; a detained property investigation; and a frozen funds investigation. These are the subject of definition in s.341 of the 2002 Act. For present purposes, it is necessary only to refer to s.341(3C) and s.341(4):

> "(3C) For the purposes of this Part a frozen funds investigation is an investigation for the purposes of Chapter 3B of Part 5 into –
>
> (a) the derivation of money held in an account in relation to which an account freezing order made under section 303Z3 has effect (a "frozen account") or of a part of such money, or

(b) whether money held in a frozen account, or a part of such money, is intended by any person to be used in unlawful conduct.

(4) For the purposes of this Part a money laundering investigation is an investigation into whether a person has committed a money laundering offence."

7. So far as a frozen funds investigation is concerned, that is the subject of detailed provisions in a separate part of the 2002 Act (Part 5, Chapter 3B). The amended provisions of the 2002 Act (as inserted by the Criminal Finances Act 2017) permit a relevant court – ordinarily, in England and Wales, the Magistrates' Court – to make an account freezing order where there is a frozen funds investigation: see ss.303Z1 and following. Also by amendment introduced by the Criminal Finances Act 2017, the relevant authority (the NCA) is now empowered to seek a disclosure order under s.357 of the 2002 Act in relation to a money laundering investigation.

8. In its current amended form, s.357 of the 2002 Act provides as follows:

"**357 Disclosure orders**

(1) A judge may, on an application made to him by the relevant authority, make a disclosure order if he is satisfied that each of the requirements for the making of the order is fulfilled.

(2) No application for a disclosure order may be made in relation to a detained cash investigation, a detained property investigation or a frozen funds investigation.

(3) The application for a disclosure order must state that –

(a) a person specified in the application is subject to a confiscation investigation which is being carried out by an appropriate officer and the order is sought for the purposes of the investigation, or

(b) a person specified in the application or property specified in the application is subject to a civil recovery investigation and the order is sought for the purposes of the investigation, or

(ba) a person specified in the application is subject to a money laundering investigation which is being carried out by an appropriate officer and the order is sought for the purposes of the investigation, or

(c) a person specified in the application is subject to an exploitation proceeds investigation and the order is sought for the purposes of the investigation.

(4) A disclosure order is an order authorising an appropriate officer to give to any person the appropriate officer considers has relevant information notice in writing requiring him to do, with respect to any matter relevant to the investigation for the purposes of which the order is sought, any or all of the following –

(a) answer questions, either at a time specified in the notice or at once, at a place so specified;
(b) provide information specified in the notice, by a time and in a manner so specified;
(c) produce documents, or documents of a description, specified in the notice, either at or by a time so specified or at once, and in a manner so specified.

(5) Relevant information is information (whether or not contained in a document) which the appropriate officer concerned considers to be relevant to the investigation.

(6) A person is not bound to comply with a requirement imposed by a notice given under a disclosure order unless evidence of authority to give the notice is produced to him.

(7) In this Part *"relevant authority"* means –
(a) in relation to a confiscation investigation, an appropriate officer; and
(b) in relation to a civil recovery investigation, a Financial Conduct Authority officer, a National Crime Agency officer, an officer of Revenue and Customs or the relevant Director; and
(ba) in relation to a money laundering investigation, an appropriate officer, and
(c) in relation to an exploitation proceeds investigation, a National Crime Agency officer."

9. The requirements for making a disclosure order are then set out in s.358. This provides as follows:

"**358 Requirements for making of disclosure order**

(1) These are the requirements for the making of a disclosure order.

(2) There must be reasonable grounds for suspecting that –

(a) in the case of a confiscation investigation, the person specified in the application for the order has benefited from his criminal conduct;
(b) in the case of a civil recovery investigation –
(i) the person specified in the application for the order holds recoverable property or associated property,
(ii) that person has, at any time, held property that was recoverable property or associated property at the time, or
(iii) the property specified in the application for the order is recoverable property or associated property;

> (ba) in the case of a money laundering investigation, the person specified in the application for the order has committed a money laundering offence;
>
> (c) in the case of an exploitation proceeds investigation, the person specified in the application for the order is a person within section 346(2A).
>
> (3) There must be reasonable grounds for believing that information which may be provided in compliance with a requirement imposed under the order is likely to be of substantial value (whether or not by itself) to the investigation for the purposes of which the order is sought.
>
> (4) There must be reasonable grounds for believing that it is in the public interest for the information to be provided, having regard to the benefit likely to accrue to the investigation if the information is obtained."

The judge was satisfied, on the material placed before him, that those requirements with regard to this money laundering investigation were met.

10. It is also a requirement of the legislation that an application of this kind must (in England and Wales) be made to a judge of the Crown Court: see s.343. It is further provided that an application for a disclosure order may be made ex parte to a judge in chambers: see s.362(1) That is not to say that the application *must* be made ex parte: see the observations of Edis J in the civil recovery investigation case of *National Crime Agency v Simkus and others* [2016] EWHC 255 (Admin). As to the procedural requirements, those are set out in Criminal Procedure Rules r.47.20. Further, it is provided that an application to discharge or vary a disclosure order may be made to the court by the person who applied for the order or any person affected by it: see s.362(3). However, rather oddly, disclosure orders in civil recovery investigations and exploitation proceeds investigations are for some reason excluded from this right to apply to vary or discharge: see s.362(5). Section 361, among other things, further provides that there is no right to require disclosure of privileged material or excluded material (as defined).

11. Just why, by s.357(2), detained cash investigations, detained property investigations and frozen funds investigations are excluded from the disclosure orders regime was and is not at all clear to me. We asked Mr Hoskins (appearing before us on behalf of the NCA) what the underpinning rationale for this exclusion was.

12. Mr Hoskins suggested that the rationale may be found in concerns as to privilege against self-incrimination. That may or may not to an extent be so: although one might have thought that such a concern (if there was one) could have been addressed by express statutory language exempting from disclosure, in that kind of investigation, material that might self-incriminate. He also observed that the kinds of investigation excluded by s.357(2) are more in the nature of civil, in rem, proceedings than the other kinds of investigation. That to an extent may also be so. But that hardly provides a convincing explanation either: for civil recovery proceedings are expressly within the reach of this disclosure order regime, as s.357(2), read with s.357(3), confirms. Moreover, when one looks at the production order provisions contained in s.345 of this part of the 2002 Act, that

section does indeed (by s.345(2)) seem to draw a distinction between those investigations which are directed at a person and those which are directed at property. But that section also provides no true correlation with s.357(2): since s.345(2)(b) includes civil recovery investigations along with detained cash, detained property and frozen funds investigations.

13. So the underpinning rationale for those exclusions from s.357 remains, to my mind at least, rather obscure.

Background facts

14. Against that outline of the statutory provisions, I come to the background facts. Given the circumstances, it is neither necessary nor desirable to set out those background facts, as alleged, in any detail.

15. The City of London Police had previously commenced an investigation with regard to certain individuals and a company. The concern was as to the possible laundering of vast quantities of criminal cash through the United Kingdom Banking System, with further concerns that an Organised Crime Group or Groups may be involved. A number of people have been arrested. Large numbers of production orders were obtained in that investigation. Further, the City of London Police had during 2018 also applied for, and obtained, account freezing orders in respect of certain bank accounts: part of the investigation comprising a frozen funds investigation under s.341(3C) of the 2002 Act. That investigation remains ongoing.

The application of the NCA to the Crown Court

16. In December 2018 the NCA commenced its own, money laundering, investigation. That investigation currently extends to the same individuals and company as are the subject of the frozen funds investigation being undertaken by the City of London Police.

17. On 20 February 2019 Nicholas Brooks of the NCA, as appropriate officer, applied for a disclosure order in the Preston Crown Court. The information accompanying the application was full, thorough and detailed. It was clearly designed to comply with the 2002 Act, with the relevant Code of Practice applicable to this Chapter of the 2002 Act and with Criminal Procedure Rules r.47.20.

18. In the course of his written application, Mr Brooks made extensive reference to the background and to the bank accounts which could be involved. These included (although were by no means confined to) the bank accounts which were subject to the account freezing orders obtained by the City of London Police: to which orders Mr Brooks, entirely properly, made reference. Mr Brooks also referred to the City of London Police having obtained several hundred production orders. As to the many bank accounts identified in Mr Brooks' application, it seems that nine were subject to account freezing orders obtained by the City of London Police.

19. It is also neither necessary nor desirable to set out the details of the application. But this much at least, for present purposes can, I think, be said. Mr Brooks explained fully the aims of the money laundering investigation being undertaken by the NCA. He said that: "this application seeks to obtain a forward-facing order for the life of the investigation, allowing the NCA the opportunity to act swiftly when trying to investigate these money laundering

offences …". He also made clear that there had been cooperation and coordination with other enforcement agencies. He stated: "This investigation forms part of a larger response from the National Crime Agency, Metropolitan Police Service, HMRC and the City of London Police to the threat that this activity represents to the UK". It was also made clear that the City of London Police had shared with the NCA information and documentation arising from aspects of their continuing investigation.

20. Mr Brooks went on to explain why it was considered that a disclosure order for the purposes of the NCA's money laundering investigation would greatly enhance an understanding of what was going on with regard to the cash deposits and withdrawals, in the past, present and future.

21. When this application first was filed at Preston Crown Court, the matter initially came before Judge Lloyd. Having considered the position, she raised a concern by reference to s.357(2), having regard to the references in the application to the concurrent frozen funds investigation being undertaken by the City of London Police and to the account freezing orders made as part of that investigation. The NCA then filed a written Note, dated 6 March 2019, seeking to deal with the concern so raised. In the course of that it was, among other things, stated that the City of London Policy had not sought the assistance of the NCA in respect of its frozen funds investigation. It was also stated that the purpose of the NCA in seeking a disclosure order was to further its own money laundering investigation. Whilst the NCA could not exclude the possibility that any information it obtained might be of assistance to the City of London Police, there was "no intention at the present time" to share any information obtained under the disclosure order with the City of London Police: and the "purpose of the application is not associated with" the investigation of the City of London Police. However, the Note also fairly went on to say that sharing of such information in the future could not be ruled out (with reference also being made to s.7 of the Crime and Courts Act 2013).

22. The Note stressed that the money laundering investigation of the NCA was of a type very different from the frozen funds investigation of the City of London Police. The money laundering investigation was in the nature of a criminal investigation into potential money laundering offences by individuals or companies with a view to assessing the bringing of criminal proceedings, whereas the frozen funds investigation was more in the nature of a civil, summary asset-forfeiture, investigation not directly linked to present or prospective criminal proceedings. Concern was expressed that to limit the disclosure order so as to confine its reach to bank accounts which were not the subject of account freezing orders would seriously undermine the effectiveness of the money laundering investigation being conducted by the NCA.

The judgment of the judge

23. In the event, the matter came before Judge Medland QC, sitting in chambers, on 28 February 2019. It is evident that the judge (as had Judge Lloyd before him) had carefully and conscientiously considered the papers in advance. He was right to have done so. Disclosure orders should never be made lightly or without a proper understanding and critical scrutiny of the material provided in support of the application.

24. In the result, the judge was not persuaded by the NCA's arguments on this particular point. In his reserved written ruling dated 13 March 2019 he readily accepted, on the materials

before him, that a disclosure order should in principle be made. However, he considered that s.357(2) posed a "significant complicating feature".

25. He reviewed aspects of the legislative provisions. His essential reasoning and conclusion was expressed in paragraph 12 of his judgment as follows:

> "No doubt arising from the best of intentions, NCA is conducting a money laundering investigation whilst, concurrently, City of London Police are conducting a frozen funds investigation. These two things cannot sit together in the context of a disclosure order because the plain words of the statute forbid it."

26. He reinforced his viewpoint by further saying, after dealing with and rejecting the submissions of the NCA in its Written Note:

> "Parliament could not have been clearer in its language and I am to presume that the plain words of that section mean exactly what they appear to mean,"

He suggested that an alternative remedy may lie in the relevant account freezing orders first being discharged, with the cooperation of the City of London Police, and a fresh disclosure order application relating to those accounts then being made. He also suggested, by way of further alternative available remedy, that production orders could be sought in respect of those accounts under s.345 of the 2002 Act. He concluded his judgment in this way:

> "Accordingly, I grant this application but strictly limited to this extent: it does not apply to any bank account which is subject to an account freezing order. Such accounts cannot, in my judgement, be the subject of a disclosure order."

27. The disclosure order made by him, dated 13 March 2019, reflects that decision. The disclosure order was made in the wide terms sought by the NCA: but was qualified in this way:

> "Note: This Order does not apply to any account which is subject to an account freezing order."

28. It is from that aspect of the order of the judge that the NCA now seeks to appeal.

Jurisdiction of this Court

29. It is at this point that there arises a rather tiresome question of jurisdiction. But as it is a point of jurisdiction, and as the point potentially could recur in other cases of this particular kind, it needs to be addressed in a little detail.

30. The appeal before this court is, in form, an appeal by way of case stated. The case was stated by Judge Medland QC, on the application of the NCA, on 29 April 2019. This was done pursuant (or purportedly pursuant) to s.28 of the Senior Courts Act 1981 ("the 1981 Act") and Criminal Procedure Rules r.35. Two questions are posed in the case stated:

> "i) "Was I correct when I refused to make a disclosure order under Section 357(2) in respect of bank accounts which were already subject to account freezing orders?"
>
> and further, or in the alternative,
>
> ii) "In what circumstances, if any, may a disclosure order be made under Section 357(2) of the Proceeds of Crime Act 2002 in respect of any bank account which is already subject to an account freezing order under that same Act?""

31. On the face of it, there would appear to be no problem in this kind of procedure being adopted. Section 28(1) of the 1981 Act provides as follows:

> "(1) Subject to subsection (2), any order, judgment or other decision of the Crown Court may be questioned by any party to the proceedings, on the ground that it is wrong in law or is in excess of jurisdiction, by applying to the Crown Court to have a case stated by that court for the opinion of the High Court."

Subsection (2) has no application in this case as the judgment or decision of Judge Medland QC did not relate to a trial on indictment; nor was this a decision of the court under the Local Government (Miscellaneous Provisions) Act 1982. Thus, on the face of it, this was a judgment or other decision within the ambit of s.28(1).

32. So far, so good. The potential difficulty which is raised derives from the decision of the Divisional Court in the case of *Loade and others v Director of Public Prosecutions* [1990] 1 QB 1052.

33. In that case, at the outset of a hearing in the Crown Court by way of appeal from conviction in the Magistrates' Court (and so not a trial on indictment) and before any evidence was called, the appellant defendants submitted that the offence as charged was not an offence known to law. The Crown Court judge rejected that submission. However, having done so, he then acceded to a defence application to state a case, by reference to s.28(1) of the 1981 Act, and to adjourn the Crown Court proceedings. The matter proceeded in the Divisional Court on the basis that the decision of the Crown Court judge was by way of interlocutory ruling.

34. The Divisional Court, rejecting the arguments both of the appellant defendants and of the respondent Director of Public Prosecutions, decided that it had no jurisdiction. After a learned review of various authorities and of past practice, Neill LJ (with whom Pill J agreed) said this at p.1064G:

> "… there is a very powerful argument for construing the word "decision" as meaning final decision. Indeed, in the case of criminal proceedings I am satisfied that the word should be so construed and that, whether as a matter of jurisdiction or of invariable practice, the High Court will not entertain an appeal by way of case stated in a criminal case unless the Crown Court has reached a final determination."

At a later stage in his judgment he said, at p.1065E:

> "… it would be contrary to the practice of this court and might well be in excess of jurisdiction if we were to adjudicate on this appeal."

So Neill LJ seems to have been framing his decision primarily by reference to the practice of the court rather than by reference to any strict statutory delimitation on jurisdiction. (In the event, it may be added, the court in *Loade* did proceed – obiter – to discuss the points sought to be raised on appeal and said that they would have failed anyway.)

35. The Divisional Court in *Loade* had emphasised that the ruling in the Crown Court had been an interlocutory ruling. Indeed, by reason of the decision in the Crown Court, the matter was still capable of final determination in the Crown Court: because, following the judge's ruling, the matter could then have proceeded to a substantive hearing, with evidence adduced and an adjudication at the close of the appeal as to whether the appeal succeeded or failed. If convicted, the defendants could then have sought to appeal on the point of law previously sought to be raised: if acquitted, the point would in any event have fallen away. In such situations, one can see the eminent good sense, as a matter of practice, of letting such a matter travel to final conclusion, without permitting an interlocutory appeal.

36. It may be noted, however, that Neill LJ did *not* specifically deal with or address the converse position. Suppose, in *Loade*, the defence arguments in the Crown Court had not been rejected but had prevailed? On that scenario, the ruling of the Crown Court judge would, in practical effect, indeed have been a final determination: since the appeal would then necessarily have succeeded.

37. It seems to me, overall, that the present case is quite different from *Loade*. It is, in fact, extremely difficult to see that an application under s.357(1) of the 2002 Act is the kind of "criminal proceedings" that Neill LJ there had in mind. An application under s.357 is not being sought in the context of any wider ongoing or extant court proceeding. Rather, the application for the disclosure order *is* the proceeding. Thus the situation is, in a number of respects, distinguishable from that being addressed in *Loade*.

38. In reaching this conclusion, I have borne in mind decisions such as *Platinum Crown Investments Ltd v N.E. Essex Magistrates Court* [2017] EWHC 2761 (Admin) and *Highbury Poultry Farms Produce Ltd v CPS* [2018] EWHC 3122 (Admin). Both those cases involved purported appeals by way of case stated from Magistrates' Courts by reference to s.111 of the Magistrates Courts Act 1980 and so are different from the present case. Besides, both cases involved decisions which were undoubtedly interlocutory in nature and effect and which were to be set in the context of wider (criminal) ongoing proceedings.

39. I have also borne in mind that s.362(3) of the 2002 Act in terms permits the making of an application to vary or discharge a disclosure order, not only by a person affected by it but also by the applicant for the original order. In that sense, it might be argued that the prior decision to make the disclosure order was not final or determinative of the proceedings. But in reality that was not the position here with regard to the NCA. The NCA could not have gone back to the judge under s.362(3) on the self-same materials and self-same legal arguments and asked him to reconsider his previous decision. That would in effect have

been asking the judge to sit on appeal from himself. The judge rightly would, in such circumstances, have refused to entertain such an application, had it been made, as res judicata.

40. Ultimately, on an issue of jurisdiction such as this, all depends on the particular circumstances and particular statutory context. In this particular context, the judge's decision, in my opinion, is to be regarded as a final determination. I therefore would hold, in general terms, that, in circumstances where an application to discharge or vary is not, or is no longer, available a disclosure order made (or refused) under s.357 of the 2002 Act is ordinarily capable of being appealed on a point of law under s.28(1) of the 1981 Act.

41. It would be intolerable if, in principle, the NCA had no means of challenging in the High Court a decision of the present kind, raising as it does an important point of law. Had I concluded that this court had no power to entertain an appeal by way of case stated, I would unhesitatingly, in order to achieve justice, have adopted the procedure adopted in the *Platinum Crown Investments* case (cited above); and would have treated the appeal by way of case stated as brought before this court by way of judicial review, dispensing with all other formalities attendant on judicial review proceedings. But, as will be gathered, I do not regard it as necessary to have recourse to such a procedure.

Disposal of Appeal

42. That enables me to turn to what this case is really about.

43. The appeal first came before a constitution of this court (Nicola Davies LJ and McGowan J) on 22 October 2019. Mr Hoskins on behalf of the NCA (who had prepared conspicuously thorough and well-researched written submissions) was, then as now, in effect submitting that the judge had been entirely wrong in his decision. In the nature of things, there was no respondent to argue the contrary. However, the court on that occasion was concerned that this was potentially an important point of law, on which there was no previous authority and with implications for other such cases in the future; and when the matter was by no means necessarily clear cut or straightforward. In such circumstances, the hearing was adjourned in order to enable an advocate to the court to be instructed, so that the competing arguments could be raised and addressed. Mr Louis Mably QC was in due course instructed as advocate to the court. This court is grateful for the written observations which he has provided. Mr Mably's opinion was, in the event, firmly to the effect that the judge had erred in law and that the contentions of the NCA were, in essence, correct.

44. Thus we have this position. On the one hand, the Crown Court judge considered that the plain wording of the statute precluded him from making a disclosure order with regard to bank accounts which were subject to the account freezing orders made in the frozen funds investigation. On the other hand, not only the NCA but also the advocate to the court say, without any real equivocation, that this conclusion of the judge is not tenable on the plain wording of the statute. This divergence of outcome perhaps reinforces a view that the matter is not altogether straightforward.

45. Having considered the matter for myself, however, I do conclude that the judge did, with all respect to him, err in law.

46. Mr Hoskins made the point that, as the evidence makes clear, it was not the purpose of the NCA, in its money laundering investigation, to seek disclosure so as to assist the City of London Police in its frozen funds investigation. The true intent and dominant purpose of the NCA for seeking the disclosure order was to assist the money laundering investigation. That no doubt is so. But that does not of itself necessarily provide the answer. That is not least because while s.357(3)(ba) does indeed require stating that the application must be "for the purposes of" the money laundering investigation, that is not precisely reflected by the language of s.357(2). The words there used are not "for the purposes of": they are "in relation to". Those latter words are thus not to be taken as co-extensive with the words "for the purposes of".

47. The words "in relation to" had in fact appeared in the original wording ofs.357(2) of the 2002 Act, as originally enacted. That provided:

> "No application for a disclosure order may be made in relation to a money laundering investigation."

The Explanatory Notes to the 2002 Act (as originally enacted) explain that restriction by saying that, at a time when only the Director of the Assets Recovery Agency could apply under s.357(1), he should only be able to do so in respect of his own investigations: and the investigation of money laundering was not something at that time in which the Director had a role. "He cannot use his power on behalf of law enforcement authorities in respect of investigations they are carrying out and in which the Director is not otherwise involved" (paragraph 516 of the Explanatory Notes). That is, to my mind, quite revealing.

48. The original version of s.357 has, of course, as I have said, since been the subject of very extensive amendment and insertion, in a context where a number of different forms of investigation have been introduced. Moreover, various agencies ("relevant authorities") now may apply for a disclosure order under s.357; and these, from 31 January 2018, also include the NCA, by an appropriate officer, in relation to a money laundering investigation.

49. It is, I accept, appropriate to bear in mind that there are indeed very real differences between a money laundering investigation on the one hand and other types of investigation on the other hand. In particular, so far as detained cash, detained property and frozen funds investigations are concerned those, as the NCA has observed, tend and are designed to operate on an in rem basis and in a civil, or quasi-civil, context. Money laundering investigations, however, operate on an in personam basis and are in the nature of criminal investigations geared towards ascertaining the assistance of indictable criminal offending. That provides some relevant context to s.357(2). But it can by no means be a governing consideration, especially when one sees that civil recovery investigations are within the ambit of s.357.

50. The words "in relation to" invariably are words of connection. But there can, in my opinion, be no set meaning as to the ambit and reach of that phrase. It will depend on the particular context, be it statutory or contractual, in which those words appear. As always, context is all.

51. In the present case, the judge, as can been seen, considered that a disclosure order in the terms sought by the NCA was precluded just because, and to the extent that, it otherwise might apply to accounts which were the subject of the account freezing orders obtained by

the City of London Police in the frozen funds investigation. But I consider that gives too wide a reading of and application to s.357(2).

52. It is crucial, to my mind, to bear in mind that, to be precluded from the disclosure order regime of s.357, the required relationship of the application is to a frozen funds (or detained cash or detained property) *investigation* (emphasis added). The required connection is thus to the type of investigation identified. The required connection is not to the target of such investigation or any by-product of such investigation. It is true that, in the present case, those currently subject to the money laundering investigation are the same individuals and company as are the subject of the concurrent frozen funds investigation and that a number (albeit by no means all) of the bank accounts are common to both types of investigation: thus there is some element of overlap. It is also true, as the NCA has accepted, that there has been, and may also hereafter be, a degree of information sharing, and that there has been a degree of cooperation between various agencies. But the point remains that the money laundering investigation is distinct from the frozen funds investigation. The present application by the NCA for a disclosure order under s.357(1) has in essence nothing to do with, and is not in any way dependent upon, the (separate) frozen funds investigation of the City of London Police; and vice versa.

53. Accordingly, I would accept the submissions of Mr Hoskins and Mr Mably to the effect that s.357(2) requires the court to focus on the type of investigation being undertaken by the applicant and not on the potential effects of that investigation. In the present case, the disclosure order sought by the NCA was indeed being sought in relation to the money laundering investigation. The mere fact that some bank accounts may feature in other types of investigation, and have been in this case the subject of account freezing orders in the (separate) frozen funds investigation, does not mean that the application of the NCA is "in relation to" a frozen funds investigation.

54. Indeed, it seems to me that the judge's approach, if right, would at least potentially suggest that a disclosure order ought not to be made with regard to material which may have been the subject of production orders in the frozen funds investigation. Indeed, potentially that would be the consequence in any instance of a concurrent frozen funds investigation where production orders had been obtained even where account freezing orders had not been obtained. It is difficult, however, to credit that Parliament could ever possibly have so intended. It is also difficult to credit that Parliament could have intended a kind of hierarchical, first come, first served, approach to investigations (not otherwise to be extracted from the 2002 Act): so that an application for a disclosure order by, say, the NCA in a money laundering application may be confined simply by reference to whether or not orders had previously been obtained in a concurrent frozen funds (or detained cash or detained property) investigation. These considerations tend to confirm, in my opinion, that the very broad approach to the words "in relation to" taken by the judge was not correct.

55. Of course, an application for a disclosure order in a money laundering investigation *would* potentially fall foul of s.357(2) if it was indeed intended or calculated to circumvent the lack of power to apply for a disclosure order in a frozen funds, detained cash or detained property investigation. That would accord with the kind of mischief intended to be precluded as explained in paragraph 516 of the Explanatory Notes to the 2002 Act as originally enacted, as set out above.

56. But that, on the materials present to the Crown Court, was not the position here. The information provided by Mr Brooks in the application firmly displaced such a notion. The application was not associated with the frozen funds investigation in any relevant sense; its purpose was not to facilitate the frozen funds investigation – its purpose was to further the NCA's money laundering investigation. That is not displaced by the element of coordination between the various agencies and the prospect of information sharing in the future. Indeed, as I read his judgment, the judge did not seek to rely on those matters as a reason for including the Note to his Order. His reason was altogether broader, by refence to the very fact of the existence of the account freezing orders in the concurrent frozen funds investigation.

57. Accordingly, and for those reasons, I reach a conclusion different from that of the judge as to the meaning and effect of s.357(2), as to be applied in this case. It is, in particular, incorrect to state as a general proposition, as the judge did, that, in the context of a disclosure order, a money laundering investigation and a frozen funds investigation cannot "sit together".

58. This conclusion which I would in any event reach is also, I think, supported by other, purposive, considerations.

59. As I have said, the rationale for excluding detained cash, detained property and frozen funds investigations from the s.357 regime is not (to me, at least) clear. But what is clear is that disclosure orders are designed to further and assist the objectives of those types of investigation for which an application for a disclosure order is available. In his application, Mr Brooks had certainly set out at some length the perceived benefits to the money laundering investigation being undertaken by the NCA if the disclosure order as sought in this case was made.

60. As appears from his judgment (summarised above) the judge evidently thought that what the NCA was seeking could be achieved by other means. It is to be inferred that he considered that what he thought was the availability of other remedies lent support to his wide approach to s.357(2). Thus he considered that the NCA and the City of London Police could "act together" (in his words) and seek a discharge of the relevant account freezing orders, with the NCA then making a fresh application under s.357(1). But these are separate agencies, with separate functions, separate responsibilities and separate investigations. I cannot readily conceive that the City of London Police would – indeed, properly could – forego, at the behest of the NCA but to the detriment of its own frozen funds investigation, the account freezing orders which it had obtained in order to aid and protect its own frozen funds investigation. As to the judge's other suggestion, by way of further or alternative remedy, that production orders under s.345 could be sought by the NCA, no doubt they could be. But not only would a disclosure order potentially greatly reduce the need for multiple production orders it also would potentially yield up more in terms of recoverable relevant information than would be achieved by production orders.

61. I thus conclude that the presumed intention of Parliament with regard to disclosure orders would be undermined if an unfettered approach were taken to the words "in relation to" as used in s.357(2). Whilst applications will ultimately, as to their outcome, to a degree depend on their own circumstances and evidence, I would hold that the mere fact that there is a concurrent detained cash, detained property or frozen funds investigation does not, of itself, operate to affect the extent of a disclosure order which may be made on an

application in the other kinds of investigation set out in s.357(3). And the mere fact that an account freezing order or orders may previously have been made in a concurrent frozen funds investigation does not of itself operate to restrict the extent of a disclosure order which may properly be made on such an application.

Conclusion

62. I would therefore allow this appeal. The Note appended to the disclosure order made by the judge was not required by the provisions of s.357(2) of the 2002 Act, properly interpreted and applied.

63. I would therefore answer the first question posed by the case stated in the negative. The second question is posed too generally to admit of a useful answer and I would decline to answer it: although I would hope that at least some of the potentially relevant considerations will appear from this judgment.

Mrs Justice McGowan DBE:

64. I agree.