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Claim No: CL-2015-000746

IN THE HIGH COURT OF JUSTICE
THE BUSINESS AND PROPERTY COURTS OF ENGLAND & WALES

COMMERCIAL COURT (QBD)

Royal Courts of Justice
Strand, London, WC2A 2LL
Date: 08/07/2019

Before :

MR JUSTICE ROBIN KNOWLES CBE

- -

Between :

N

Claimant

and

THE ROYAL BANK OF SCOTLAND PLC

Defendant

Paul Downes QC and Emily Saunderson (instructed by **Howard Kennedy LLP**) for the **Claimant**

John Wardell QC and Nicholas Medcroft QC (instructed by **Dentons UK and Middle East LLP**) for the **Defendant**

Philip Moser QC and Ewan West for the **National Crime Agency**

Hearing dates: 30-31 January, 1, 5-7, 11-14, 18-21, 25-28 February, 6-7 March 2019

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JUDGMENT

I direct that pursuant to CPR PD39A para 6.1 no official shorthand note shall be taken of this Judgment and that copies of this version may be treated as authentic

MR JUSTICE ROBIN KNOWLES CBE

Introduction

1. The claimant ("N") is an authorised payment institution providing foreign exchange and payment services to its customers. It banked with the defendant ("the Bank").

2. In October 2015 the Bank froze accounts held with it by N and terminated the banking relationship. In response N commenced these proceedings challenging the lawfulness of that action on the part of the Bank.

3. Interim proceedings followed before Burton J (now Sir Michael Burton GBE) and, on an appeal by the National Crime Agency, the Court of Appeal (Simon, Hamblen and Hickinbottom LJJ). The National Crime Agency participated because the alleged context was money laundering and the proceedings had implications for the working of the Proceeds of Crime Act 2002 and the criminal law more generally.

4. This judgment follows the trial of the proceedings.

N and the Bank

5. N was established in 2003 with an office in Kent. Two offices in Spain were opened in 2003, and offices in Portugal and in Dubai followed by 2007. It opened an office in London in 2013.

6. The type of business carried on by N is sometimes termed a money service business, or MSB.

7. A short introduction can be taken from the decision of the Court of Appeal at [2017] EWCA Civ 253; [2007] 1 WLR 3938 at [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."

8. The main accounts included what N would term a "pooled client account" at the trial. The internet banking service was named Bankline.

The key contract terms

9. It was not in issue between the parties that the terms governing their contractual relationship of customer and banker included two key clauses.

10. First, Clause 9.4 of the Bank's Account Terms ("BCAT") which provided:

> "The Bank will give the Customer not less than 60 days' written notice to close an account, unless the Bank considers there are exceptional circumstances"

11. For N, Mr Paul Downes QC and Ms Emily Saunderson emphasise in relation to the first part of Clause 9.4 that 60 days is a minimum period. In relation to the second part they contend for N that:

    a. The clause gives the Bank a wide discretion.

    b. However the discretion must "be exercised in a reasonable manner".

    c. Further the clause should be sparingly exercised and only where the circumstances fully justified such steps.

12. The second key clause was Clause 13.1 of BCAT (with a materially similar clause in relation to the Bankline service) which provided:

> "The Bank shall have no liability for, and may delay or refuse to process or proceed with processing any payment if (i) in its reasonable opinion it is prudent to do so in the interests of crime prevention or in compliance with laws including sanctions laws or regulations, or (ii) such delay or refusal is a consequence of checks carried out as part of the proper operation of the Bank's payprocessing systems."

13. Mr Downes QC contends for N in relation to Clause 13.1 that:

    a. The Bank must establish an opinion that a refusal was prudent in the interests of crime prevention.

    b. The opinion must be reasonable.

    c. The opinion would be reached after consideration of the material circumstances.

    d. The opinion "would be legally correct" and "based on a sound understanding of the relevant legal principles".

    e. The Bank would adopt "a proportionate approach taking account of the adverse impact that any freeze would have on N's business, and would seek to tailor its actions accordingly; it would have an understanding of its own computer systems and would seek to work within those systems to adopt a proportionate response to any money laundering risk it identified".

14. I should observe that the second part of Clause 9.4 of BCAT reads "unless the Bank considers there are exceptional circumstances". There is no question that what is urged by N is an elaboration on that language.

15. As is well known, the authorities continue to examine the important question of whether rationality or objective reasonableness or neither is required when a contract gives the right to a contracting party (rather than a third party) to reach a decision.

16. As to Clause 13.1 of BCAT the first two points advanced by Mr Downes QC reflect the language of the clause. The third follows without difficulty. The fourth and fifth read language into the clause that is not there, though perhaps some elements may be within the second and third points.

17. Mr Downes QC adds that N accepts that the material clauses in the BCAT and the Bankline terms were reasonable terms, "provided that they are given the construction that N contends for". If they are not given that construction then, argues Mr Downes QC, the clauses should be held to be unreasonable for the purposes of the Unfair Contract Terms Act 1977. And Mr Downes QC further contends that the clauses should be construed contra proferentum to get to the construction that N contends for.

18. In the present case the facts are such that it is not necessary to enter further into these questions. The case does not turn on the differences between what N contends the clauses mean and what the Bank contends they mean. Even if the standards were those urged by N, those standards were, as I find below, met.

The business of N, to October 2015

19. It is important to recognise that just as the business of N as an MSB would provide a valuable service to legitimate businesses by facilitating the flow of funds that same service would be vulnerable to illegitimate use by others if they were able to access it. The illegitimate use would include a form of investment fraud sometimes termed boiler room fraud.

20. Given this vulnerability, N's systems and controls were of particular importance. This was in its own interests, those of its clients, those it dealt with (including the Bank), and the interests of the wider public. The relevant systems and controls included due diligence in relation to clients and other anti-money laundering procedures.

21. Mr Downes QC described N's accounts with the Bank as of particular importance in the business it was doing, drawing an analogy with a carpenter's tools. If I pursue the analogy I would highlight the importance of the tools being used carefully and not falling into the wrong hands.

22. At trial the evidence revealed the following picture.

23. N's systems and controls were, regrettably, materially inadequate as at 2013 and 2014. Mr Nathan Bullas, then the Money Laundering Officer, gave evidence. My assessment of Mr Bullas is that he is a person whose natural abilities tend to business development rather than to the compliance function in this type of business, and whose understanding of risk has increased since 2015. His evidence was honest but at times imprecise.

24. Mr Bullas accepted that "onboarding" of clients was essentially left to individual account managers, who were remunerated by reference to revenue from those

clients. For some, at least, of this same period no formal risk assessments were carried out. From the evidence of a number of N's witnesses it is clear that the quality of its document keeping was poor.

25. In due course N retained a compliance consultancy. Ms Catherine Fry, an honest and accurate witness, and a careful person with high professional standards, recalled this from her meeting with them soon after she arrived in November 2014:

> "My recollection is that they talked about how the Account managers used to rely too heavily on [them] for on-boarding assistance or providing some sort of assurance to the on-boarding process. They felt they were being asked to do the on-boarding on behalf of the Account managers, but that was not their role."

26. N was however taking steps to improve its controls. The month after her arrival, by December 2014 Ms Fry was, in Mr Bullas' assessment, very much "the Head of Compliance". The Bank itself through Mr John Wardell QC and Mr Nicholas Medcroft (now Mr Mecroft QC) made clear at the trial that it recognised that Ms Fry of N did try to improve the culture after she became involved. Mr Andrew Fundell of N, who impressed me with straightforward and conscientious evidence, brought to life the difference that Ms Fry started to make. There was a positive "KYB" [sic.] update by the Bank in respect of N in May 2015.

27. But Mr Fundell was honest enough to recognise that from N's perspective "we always tried to do our best but there was certainly a learning curve in terms of some of the clients that we did work with that we wouldn't have taken on again". He was frank enough to give a plain "yes" to the suggestion from Mr Wardell QC that N's best "was a long way short of good enough".

28. There was an echo here of the assessments of Ms Fry in her evidence. Speaking of March 2015 she described the scale of what had to be improved:

> "And I think I was panicking because, looking at the task in front of me, it's not just a massive sum of paperwork but just a horrible feeling in the pit of your stomach when you realise that [alleged investment fraud by relevant companies] has been going on. It's not a nice feeling to think about the consequences of what I've – of what these people and these companies have been doing."

Ms Fry also put things this way in her evidence. She said that N had the intention of onboarding legitimate clients but "perhaps they didn't know how to go about it".

29. And notwithstanding the improvements Mr Fundell, again with a frankness that was to his credit, admitted that the automated systems used led to N at one point taking money in relation to a venture that it "knew was an investment scam from the outset".

30. I accept that N had made material progress by September 2015. However those controls were still not by that date at the point at which they were as good as they should be. I accept Ms Fry's evidence which included the following in re-examination:

> "Ms Fry: … I was there for about 15 months, but there was a long period firstly of settling in and then there was constant improvement. I don't think there was ever a rest from the improvement. And even when everything is fine, you still need to keep improving because that is how - because crime evolves and because criminals find different ways of doing things, you have to keep changing your methods of preventing it.
>
> So I would say it was just an evolutionary path that we were always on.
>
> Mr Downes QC: What was the state of play by, let's say, August 2015?
>
> Ms Fry: I think the culture - I think by August 2015 we were aware of where the rot had entered and we had taken steps to seal that route. We were sending a message out to this type of client that our doors were closed to them. We had our sleeves rolled up and we were just dealing with the outcomes. There was a huge amount of work going on communicating with and being open and honest with the regulator, law enforcement, and actually internally as well."

31. But the next month, taking further from the summary in the decision of the Court of Appeal, this time at [26]:

> "…. [O]n 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."

32. Mr Wardell QC did not exaggerate when he said that by Thursday 8 October "RBS had identified that N was banking 9 separate boiler rooms. There were dozens of red flags." Nor did he exaggerate in describing the assessment of N by Mr Coles, an experienced and credible expert witness called by the Bank, as "excoriating". The experts called by each side ultimately agreed that there were numerous failures in N's due diligence and regulatory compliance. Having read their reports and heard them I consider the failures justify the description "serious".

33. In its written closing submissions N accepted that by 9 October there were 10 accounts where the Bank did suspect proceeds of crime were held. N says it does not criticise the Bank for freezing these. But that is only part of the point that that concession reveals. There were accounts where the Bank properly suspected proceeds of crime were held, to the point of entitling the Bank to freeze the accounts.

34. As further described below, there was commingling between sub accounts and main accounts, which presented its own vulnerability in this context. Then on 8 October 2015 an attempted payment of £500,000 ("the £500,000 Attempted Payment") aroused suspicion as the attempt was to use a main account in an apparent effort to circumvent the freeze on the frozen sub-accounts.

35. Mr Michael Heather, then Head of the Financial Crime Intelligence & Investigations Unit at the Bank but now with the Foreign & Commonwealth Office, correctly put things this way in his evidence as a witness called by the Bank:

"… What I am saying is that action has been taken to divert payments into N's main account.

Mr Downes QC: Who do you suspect? Do you suspect somebody is seeking to evade the freeze [on the frozen sub accounts]?

Mr Heather: I think that's obvious. Yes, I do.

Mr Downes QC: So who do you suspect is seeking to evade the freeze?

Mr Heather: I don't know, nor did I need to know. What I needed to be aware of was that the freeze was being circumvented.

Mr Downes QC: Does it change the risk, and if so why?

Mr Heather: At the stage – yes, it does change the risk, it increases it sharply if the main account is directly receiving proceeds of fraud from victims.

Mr Downes QC: You already are under the impression that there is commingling.

Mr Heather: Correct.

Mr Downes QC: So you are already under the impression that the main account is taking some money in that is suspect.

Mr Heather: Indeed. But the purpose of freezing the underlying accounts is to actually prevent victim harm. So it is not to punish N, it is to prevent victim harm. And if that prevention, which was the only one that the Bank could adopt in these circumstances, was no longer working because that control has been circumvented and victims are now being asked to pay into the main account, by whom doesn't matter, then the control simply doesn't work, the job that we had to do to protect victims and secure funds is not working."

36. Perhaps in 2016 N reached or would reach the point when it had, used and understood all the systems and controls it needed and kept improving them. Ms Fry kept working there until the end of January 2016. Mr Bullas claimed "huge advancements and evolution in our … compliance function" "by 2016".

37. N is, as I understand it, still in business today, enjoying banking facilities from other banks (the threat to that business as outlined to Burton J and the Court of Appeal not having, in the event, matured). Even then, as is perhaps obvious, even the best systems and controls would not eliminate risk.

38. Be that as it may, it had not in my judgment reached that point by September and October 2015. In September and October events (some of them legacies from decisions made when systems and controls were weaker still) caught up with N.

The Bank's decision

39. The Bank's pleaded case is that :

"21. By no later than 9 October 2015 and at all material times:

(a) RBS suspected that the credit balances on, amongst others, the Main Accounts constituted benefit from criminal conduct or represented such benefit (in whole or in part and whether directly or indirectly); and

(b) RBS suspected that [N] was engaged in money laundering.

…

23. On 9 October 2015 RBS froze, amongst others, the Main Accounts, took the decision to terminate its relationship with [N] immediately and made an authorised disclosure seeking consent [from the National Crime Agency] to return the credit balances on various accounts on termination of the banking relationship. … RBS considered that there were exceptional circumstances justifying the closure of [N's] accounts without notice.

24. The decision to terminate the relationship was taken after careful consideration by Mr Simon Kingsbury, Director of Financial Crime and Group Money Laundering Reporting Officer in consultation with [others]."

40. Mr Kingsbury gave evidence at trial and was cross examined on that evidence by Mr Downes QC for N. He was the most important witness in the case for obvious reasons.

41. Realistically, and responsibly, N accepts that in giving his evidence Mr Kingsbury was doing his best to assist the Court, and was careful, reliable and truthful. I agree. He was, perhaps understandably, a little wary of questions, but there is no question he was an honest witness.

42. Having listened carefully to Mr Kingsbury's oral evidence and read his written statements, and taken careful account of all other evidence in the case, I find the facts that I set out below.

43. On Tuesday 6 and Wednesday 7 October 2015 Mr Kingsbury was briefed by Mr Heather in relation to an investigation within the Bank and in particular to the payment of £600,000 by a possible victim of investment fraud into client accounts held by N with the Bank. On Thursday 8 October 2015 he was briefed by Ms Nicola Hannan, Investigations Team Manager at the Bank.

44. I have already made some reference to Mr Heather's evidence at trial. Ms Hannan also gave evidence at trial. Mr Heather was clear, precise, and straightforward. His frankness showed courage in admitting error and accepting responsibility. Ms Hannan was a calm and reliable witness, and clearly highly professional in her work.

45. Ms Hannan had a decade's worth of experience of investigating money laundering. Her assessment of the situation at 8 October was that N had "engaged" in money laundering and utilised the Bank's accounts to do that; she made clear her use of the term "engaged" covered the possibility of innocent engagement. Her focus was purely on obligations in a money laundering context but she well appreciated what could be the consequences for a customer of closing an account without notice. She was clear however that the decision was Mr Kingsbury's.

46. Mr Downes QC put to her that "the money laundering was at this stage two victims". Her answer was that she did not think that one victim would have been the only victim of what she assessed were "various boiler rooms he paid into". In

her experience it was a particularly serious case of money laundering; the second most serious she had seen. She later pointed out that this was a "£700 million turnover" account, with what were referred to by both parties as suspect sub-accounts, and as to the main account:

> "My general feel in relation to how the accounts operated were that all of the – all of N's accounts regularly, daily, interacted with each other. By that I mean they credited and debited constantly. So there was a huge risk that transactions that were then in the sub-account were also then at some point in time crediting and debiting the main account."

47. Later in her evidence Ms Hannan testified, and I specifically accept, that from looking on the Bank's systems she had actually seen money come from the suspect sub-accounts and into the main account. In this light I cannot accept Mr Downes QC's contention in closing that "it is apparent from the evidence that no steps were taken" to investigate the question of commingling between accounts.

48. Mr Kingsbury's view of Mr Heather and Ms Hannan was as follows:

> "I had a very positive view of both Mike and Nicola. They are both very capable and experienced individuals. They both have extensive experience in investigating financial crime and in reporting to the NCA [National Crime Agency]. They had a particular focus on and experience in protecting the victims of fraud and would therefore focus not only on the interests of the Bank but also its customers. They were not, in my experience, individuals who would jump to conclusions. I was satisfied that they would have a forensic basis for any views that they formed including direct access to the records of transactional activity; information from external law enforcement agencies and access to historical investigations carried out on behalf of the Bank."

49. By the afternoon of Thursday 8 October 2015 Mr Kingsbury's understanding of the views of Mr Heather and Ms Hannan was that there was a risk that proceeds of crime would be dissipated, that the anti-money laundering controls at N gave them concern, and that they held suspicions regarding a number of client accounts held by N with the Bank.

50. In the early evening of Thursday 8 October 2015 Mr Kingsbury received advice from Ms Hannan and from Mr Rashel Chowdhury (Director of the Bank's Specialist Financial Services Team) to the effect that it would not be operationally possible to assess each payment on N's accounts as the volume (realistically put by Mr Chowdhury at 150 transactions per day) would be too great. On the question of what was and was not operationally possible Mr Downes QC criticises the Bank for not calling Mr Chowdhury, but I had sufficient evidence from other of the Bank's witnesses.

51. By email at 1835 on Thursday 8 October 2015 Ms Hannan reported as follows to Mr Kingsbury:

> "We have commingling between suspect accounts and the four primary [N] Accounts."

52. Mr Kingsbury was conscious that N provided services to a large number of clients and understood that a decision to freeze main accounts would be a decision of a

serious nature. He appreciated "… this would have an impact on N's ability to operate and also potentially an impact on its wider client base and the ability of those clients to transact using the services of [N]". At the same time he was also concerned that it would not be practicable to separate proceeds once the proceeds of crime had entered an account that also held the proceeds of legitimate activity.

53. On Friday 9 October 2015 Mr Heather briefed Mr Kingsbury on the Attempted £500,000 Payment. Mr Kingsbury was to describe this at trial as the straw that broke the camel's back.

54. Mr Kingsbury held a meeting of the Bank at 1600 on Friday 9 October. This occasion was described by Mr Downes QC in opening as lying at the heart of the case.

55. The meeting was held at the Bank's London head office. Some participants were physically present and some dialled in by telephone. Attendees included Mr Heather and Mr Chowdhury. Ms Hannan dialled in late. A note of points was prepared after the meeting in an email but I do not consider that adds a great deal to the evidence I have read and heard in this case.

56. By the conclusion of the meeting Mr Kingsbury reached the decision that the main accounts should be frozen in addition to suspect client accounts, and that N's relationship with the Bank should be terminated with immediate effect.

57. In his oral evidence Mr Kingsbury did not see himself as the only decision-maker on the latter point, rather he saw this as a decision taken in collaboration with others. That is as may be but I am satisfied that his decision on the point was the pivotal one and represents the decision of the Bank.

58. In reaching his decision Mr Kingsbury took account of the matters described above. He further reasoned as follows:

> "I considered it reasonable to conclude that, if [N]'s clients had already attempted to transfer suspect funds directly to the [N] Main Accounts, they may have done so previously and would continue to attempt to do so going forward.
>
> This meant that the Main Accounts could no longer be adequately ring-fenced by freezing the suspect Client Accounts. I was now satisfied that I had a suspicion that the Main Accounts were or would be used to directly receive the proceeds of crime. Having formed this suspicion, I felt that the Bank could no longer continue operating the Main Accounts without placing the Bank at risk of committing money laundering offences and facilitating financial crime including investment fraud and boiler room activity which would result in further victims including vulnerable customers of the Bank who may suffer significant financial losses. …
>
> [My view was that] an exceptional level of concern had been raised about both [N] and its clients. [I felt] that the relationship between [N] and the Bank had broken down and that the relationship would have to be terminated in its entirety. [T]here were three ways of exiting the relationship.
>
> The first way would be to give the standard length of contractual notice before closing its accounts. The problem with this proposal would be that, during this

period, the bank would be obliged to continue operating [N]'s accounts. This would mean that the Bank would have to seek consent from the NCA for every single suspicious transaction on these accounts. As I suspected that both the suspect Client Accounts and the Main Accounts contained the proceeds of crime, this would mean seeking consent for every single transaction on these accounts. This was unworkable and an abuse of the SAR [Suspicious Activity Report] regime. As MLRO [Money Laundering Reporting Officer] … from a financial crime perspective, I could not sanction such action.

The second way would be to give [N] notice but to keep its accounts frozen. I was told that this would expose the Bank to an unacceptable level of litigation risk from both [N] and its clients.

The third way would be to terminate the Bank's relationship with [N] with immediate effect. [T]he decision to terminate a customer relationship with immediate effect is unusual. My understanding was that under the terms and conditions, this could only be done in exceptional circumstances. [I] agreed that this situation was exceptional. There was evidence to suggest that numerous [N] clients were fraudsters and were using their Client Accounts and, at the very least, attempting to use the Main Accounts to launder the proceeds of their crime. Furthermore, the Bank had a large relationship with [N], which required a large number of transactions to be processed a day. For these reasons the decision was made … to terminate [N's] relationship with the Bank with immediate effect."

59. For N, Mr Downes QC challenges whether the decision "to close without notice" was made on that Friday 9th October 2015. However that is ultimately, in my assessment, Mr Kingsbury's evidence and I accept it.

60. It is true that in cross examination Mr Kingsbury was to say, as highlighted by Mr Downes QC:

"Mr Kingsbury: I clearly remember a particular call where there was a consideration around the point of notice. It's possible that this call was simply a briefing discussion and update regarding where we had got to and the actions that we thought we needed to take with respect to Bankline, for example, and there was then a subsequent call. I simply -- I cannot directly remember.

…

It may be that I am combining, conflating two calls, yes, my Lord, or two meetings, yes, my Lord.

…

[T]he call on the 9th was not an absolute determination in terms of the notice period that would be provided.

… So I think there was further discussion, and here it does relate to the provision of legal advice, subsequent to this email.

Mr Downes QC: So the decision to exit was taken, the final decision was taken after this email.

Mr Kingsbury: Not the decision to exit, no, my Lord. The timeframe in terms of notice.

Mr Downes QC: Sorry, the final decision to exit without notice was taken after the date of this email.

Mr Kingsbury: I would have to check my records to be sure, but I believe so, my Lord.

Mr Downes QC: What records are you going to check, Mr Kingsbury, that haven't been made available in this case?

Mr Kingsbury: The legal advice I referred to, my Lord."

61. However the reality of the situation faced by Mr Kingsbury and addressed by him was freely and revealingly described by him in the following part of his cross examination by Mr Downes QC:

"Mr Kingsbury: Well, in all honesty, I mean – I was in a difficult position, my Lord, in the sense that we had the factor with respect to what I had been told around commingling; we had – I had the nominated officer [Mr Heather] with what I understood to be a suspicion, which I had asked a number of questions about, where he had affirmed his view around suspicion; and I had the factors to take into account regarding the … preparedness, if I can put it that way, of one of the fraudsters to be using the main omnibus accounts, not only through sub-accounts; and I was very concerned as to what the position would be both for the bank and others in the event that we didn't take action on the 9th to try and preclude the ongoing risk, as I saw it, of money laundering through those accounts, my Lord.

Mr Downes QC: A transactional analysis was being undertaken, it seems. Do you agree with me?

Mr Kingsbury: Yes, my Lord.

Mr Downes QC: Wouldn't it have been better for you to have seen that, considered that, and satisfied yourself that that had been fully investigated?

Mr Kingsbury: Well of course I would prefer to have all the available information that could come to light, but at the same time I felt at the time on the 9th, as I have said, my Lord, the position both of the nominated officer and of myself meant that we had to take the actions that we took.

…

Mr Downes QC: … Given the consequences, whatever they may be, given the seriousness of the consequences, was it not something that could have been given further thought over the weekend?

Mr Kingsbury: Given that I had already in my mind pushed the nominated officer function on the question of commingling and given that there was evidence of an attempted fraudulent payment that day, I was not of the view that I could leave it any further before taking the decision, before we took the decision with respect to ceasing to allow or stopping the accounts from operating.

Mr Downes QC: With the benefit of hindsight, wouldn't it have been better to have bottomed that issue out?

Mr Kingsbury: I didn't feel, once I was suspicious of the accounts and once the nominated officer was suspicious of the accounts, that I had the latitude to wait any further before taking the decision. …"

62. Mr Downes QC points out that Ms Hannan and Mr Heather could not recall discussion of the issue to terminate with immediate effect, although accepting Ms Hannan did join the call late, and that Mr Heather did not record such a decision. But Mr Heather explained things in this way:

> "So what I would say to that was I don't recall that particular aspect of the conversation. It was a day of high pressure and an element of high drama, with a lot of moving parts during the course of the day. So I wouldn't blame myself or anybody else if they didn't remember every aspect of it."

63. Mr Downes QC says it is inconceivable that such a decision would have been made where there are subsequent emails from Mr Mark Andrews (Managing Director, Regional Corporate Banking at the Bank) insisting that notice should be given. He says the Bank's decision not to call Mr Andrews as a witness is particularly relevant in this context, but although invited to do so I decline to draw any adverse inference. The invitation from N to do so is based on speculation.

64. Mr Downes QC also invited an adverse inference from the fact that the Bank did not call Mr Andrew Young the Bank's relationship manager with N. I do not consider it appropriate to accede to that invitation in the present case. A point about Mr Young was that he did not in fact contribute materially to the decision making, rather than that he could give evidence because he did.

65. It is reasonably clear that legal advice was available or taken. Mr Downes QC argues that a claim to privilege cannot be supported in relation to the decision itself, and that the upshot is that the Bank has adduced no evidence or disclosure relating to the decision itself. He contends the Bank must therefore be found to have failed to discharge the burden of proof in this respect. I respectfully disagree. The Bank's decision, even if subject to legal advice was made when Mr Kingsbury made it, and was made by him.

66. Mr Kingsbury knew and intended that his decision would cover Bankline, and another facility called Marketplace. N does not allege any loss from the latter. There was some challenge from Mr Downes QC that view-only access to Bankline should have been given, but I consider that, on the facts, to be so marginal as not to warrant separate consideration on 9 October. (Some visibility was in the event restored on 15 October). On the limited evidence available to me at trial I also reject the suggestion canvassed by N that it was possible to provide

selective operational access to Bankline, even if that would otherwise have been appropriate in the circumstances of this case.

67. Mr Downes QC contends that "no-one who was part of the decision-making understood how Bankline worked or what its limitations were" and that "nobody investigated the position with the Bankline team on 9th October 2015". In my judgment, given the decision at issue it was sufficient for the decision-maker, Mr Kingsbury, to know that the banking services used by N included Bankline. I reject the contention that others at the Bank who helped inform Mr Kingsbury's decision (including the witnesses who gave evidence) did not understand how Bankline worked.

68. Mr Kingsbury revisited his decision of 9 October on 16 October 2012 but the outcome of that was that the decision stood. The decision of 9 October therefore remains the decision that is at the heart of the case.

69. I should add that in the event, the decision on 9 October was in practice followed by some flexibility on a case-by-case basis and over time. This included some sub accounts not having 'no operations' markers attached, the making of some payments pursuant to orders made by Burton J, and the return of monies to N with the permission of the NCA.

70. At the same time, it must also be said that the decision on 9 October was followed by more information of further matters of concern in the same context of money laundering.

N's challenges to the decision

71. It is to be noted that in its written closing submissions, in addition to accepting that by 9 October there were 10 accounts where the Bank did suspect proceeds of crime were held, N made plain:

    a. it did not criticise the Bank for "seeking to react to [the] development" in relation to the Attempted £500,000 Payment;

    b. it did not criticise the bank for "entertaining a suspicion that the Main Accounts may have contained criminal property"

72. It is important to keep in mind that the materiality of the "development" in relation to the Attempted £500,000 Payment lies in its connection with the main accounts. The suspicion that the main accounts may have contained criminal property was further the result of the detection of apparent commingling.

73. N's focus in its written closing was:

    a. that there was no suspicion of complicity by N in money laundering;

    b. that N "was not suspected of being involved in the 'evasion'" in relation to the Attempted £500,000 Payment;

    c. that "it was incumbent on the Bank to investigate the commingling issue and ascertain the extent of the issue".

74. As to the first of these three points of focus, in the course of cross-examination Mr Heather explained succinctly why absence of suspicion of complicity by N did not assist:

> "… it's not just the mental state, it's also the practical effect of the control environment. So complicity is one end, where somebody has set up the business for money laundering. A very poor control environment can have almost exactly the same effect, simply because the customers who wish to launder money through that organisation have spotted the weakness."

75. Mr Downes QC however argued that because there was no suspicion that N was complicit or implicated in the underlying frauds of its clients, the commingling issue "was not insurmountable".

76. There were, he argued, "a number of possible ways of meeting this issue which individually or collectively could have avoided the freezing of N's sterling pooled client account". Mr Downes QC put forward six ways, but none in my judgment holds water in the present case.

77. First, "ring-fencing suspect funds". In my judgment this had in effect been tried by the freezing of the suspect sub accounts. But commingling meant the main accounts were also involved. And the Attempted £500,000 Payment undermined confidence that ring-fencing suspect funds would succeed.

78. Second, "manually operating the account". In my judgment, and having regard to the evidence of Ms Hannan, Mr Heather and Mr Kingsbury in particular, the Bank was entitled to conclude that this was impractical given the volume of transactions and the challenge of investigating each one.

79. Third, "preventing further credits to the account (to avoid further evasion of the freeze)". In my judgment the Bank was entitled to conclude that things had gone too far for this. And the suggestion does not deal with existing balances.

80. Fourth, "breaking the account (if necessary with NCA consent)". In my judgment the Bank was entitled to conclude that things had gone too far for this and that it did not offer a realistic or practical course. It suffered much the same shortcomings as a suggestion as did ring-fencing. As to the reference to NCA consent, Mr Kingsbury made clear that separately from the view of the NCA the Bank has to consider its own obligations, and he was right to do so. Even with NCA consent, the Bank would be right to form its own view on what was necessary for the prevention of crime and the protection of the victims of crime.

81. Fifth, "as a last resort seeking consent on a daily basis by way of an omnibus SAR". Mr Kingsbury, basing himself on his experience, rejected in clear terms the realism or appropriateness of this way of engaging with the NCA, and again the impracticality of the suggestion. In my judgment he was right to do so, and entitled to hold the opinion he did. It found further support from other sources too, as Mr Wardell QC showed in his closing argument.

82. Sixth, "adopting a cooperative approach to the exit of the relationship by working with N (as the Bank had done to date) over the suspect accounts". In my judgment the Bank was entitled to conclude that things had gone too far for this, and that there was not time for it. Further although Mr Downes QC describes the position as one of "no suspicion of complicity" in fact the Bank was not in a position to

judge whether N's involvement was or was not innocent or unwitting (to use the term used often at the trial). Whilst the answer to that question did not affect the need to act it would be highly material to whether a cooperative approach was realistic.

83. The second point of focus, that N was not suspected of being involved in the "evasion" in relation to the Attempted £500,000 Payment does not assist. The "evasion" was the problem.

84. The third point of focus, the argument that "it was incumbent on the Bank to investigate the commingling issue and ascertain the extent of the issue" is met by the facts. The fact is that commingling was seen. The fact of it, without more investigation, was a relevant circumstance for Mr Kingsbury to take into account in reaching his decision.

85. Mr Downes QC criticises the decision to terminate the relationship without notice on several further grounds.

86. First, he argues the factors outlined by Mr Kingsbury took no account of the potential for the destruction of N's business.

87. Yet Mr Kingsbury said, and I accept, that he did consider this in respect of the potential for significant impact to their business. It is also material that he went on to say that if he had believed there was a real risk of destruction then he would still not have done things differently. This was, in my assessment, a realistic assessment of the situation and its seriousness; it was also reflected in the caution with which he reached the decision he did.

88. I add in this regard that the impact of the freeze and termination on N is one thing but the impact of not freezing and terminating has to be part of the consideration. Mr Downes QC rightly acknowledged on behalf of N in the course of his cross-examination of Ms Hannan that the Bank would be unable to countenance a risk that it would be laundering money.

89. Second, Mr Downes QC argues that the decision proceeded on the mistaken assumption that the main accounts and the suspect sub accounts consisted of the totality of the relationship.

90. I do not consider that suggestion is supported by the evidence at trial. For example Mr Kingsbury had sent an email the evening before the day of the decision in which he said that blocking the four main accounts would affect other sub accounts that were not yet suspect; showing that he did appreciate that the main accounts and the suspect sub accounts were not the totality of the relationship.

91. But of course perhaps the most material accounts were the main accounts, as Mr Kingsbury explained in cross examination:

> "Mr Kingsbury: … [I]f the accounts were not operating [i.e. frozen], that would also have significant impact on N, or the potential for significant impact on N. So the difference between notice and no notice [to close] in that regard is not the same as if I had been of the view that we could allow the accounts to

operate during a notice period. Clearly then the decision to exit without notice would be really quite different to a period of notice.

Mr Downes QC: When you say "I do follow the point, but, to reiterate, if the accounts were not operating ..." what accounts are we talking about?

Mr Kingsbury: In this respect the main focus, the primary focus would have been the main accounts, in relation to an impact on N. Clearly there are other customers involved in the suspect accounts; I wouldn't want to ignore those, but ..."

92. Third, Mr Downes QC contended that "[s]hort of established complicity or proven fraud such a course [that is, closing an account without notice] could never rationally be adopted by a bank".

93. I cannot accept such a broad contention. The contract provides for a right to close an account without notice where "the Bank considers there are exceptional circumstances", not "where there is established complicity or proven fraud".

94. It is of course relevant to recognise that different decisions could have been taken on 9 October 2015, and taken honestly, rationally and reasonably. However the availability of other decisions within the range of decisions that are honest, rational and reasonable does not mean that the decision reached by Mr Kingsbury fell outside the range of decisions properly open to him. It was an honest, rational and reasonable decision.

95. In more detail, in my judgment:

    a. the Bank's decision was made on 9 October 2015, by Mr Kingsbury;

    b. the Bank considered there were exceptional circumstances for closing the accounts then and without the minimum notice that would otherwise apply;

    c. that view was one held in good faith, and was a rational view;

    d. if the view was required to meet a standard of objective reasonableness, it did meet that standard;

    e. the discretion was exercised "in a reasonable manner";

    f. the circumstances fully justified the steps decided on;

    g. the Bank held the opinion that a refusal to process payments was prudent in the interests of crime prevention;

    h. that opinion was reasonable;

    i. the opinion was reached after consideration of the material circumstances;

    j. the opinion was "legally correct" and "based on a sound understanding of the relevant legal principles";

    k. the Bank adopted "a proportionate approach taking account of the adverse impact that any freeze would have on N's business";

    l. the Bank sought to tailor its actions accordingly;

m. the Bank had an understanding of its own computer systems and sought to work within those systems to adopt a proportionate response to the money laundering risk it identified.

N's secondary case in negligence

96. N also advanced a secondary case of negligence on the part of the Bank.

97. In its written closing submissions it identified the key issue in this respect as follows: "To the extent that the decisions to freeze the accounts were reasonable and rational: did the Bank act negligently in reaching and implementing those decisions such as to amount to a breach of the Bank's duty of care".

98. N relied on the same facts as for its primary case. The secondary case must fail on the basis of the facts I have identified in relation to its primary case.

Section 338(4A) Proceeds of Crime Act 2002

99. Section 338(4A), amending the Proceeds of Crime Act 2002, is in these terms:

> "Where an authorised disclosure is made in good faith, no civil liability arises in respect of the disclosure on the part of the person by or on whose behalf it is made."

100. The Bank recognised that, given its terms, the section would not provide a complete answer to the whole of N's case. In particular it does not contend that the section "absolves it from liability for terminating the relationship without notice" if it was in breach of contract or negligent in so doing.

101. Given the conclusions I have reached the Bank does not need to rely on the section to succeed in its defence of N's case. I prefer in those circumstances not to enter into an argument over the section.

Conclusion

102. On the facts at trial, the claim of N must fail.

103. I fully appreciate that the Bank's decision had major consequences for N. But the Bank's decision was itself a proper response to circumstances for which N, not the Bank, must take responsibility.

104. Especially in N's sphere of business as a MSB, N simply had to be better prepared to guard against money laundering than it then was. I say nothing about the standards it may have reached today.

105. As I believe is appreciated by N, the interests and reputation of N and of the Bank are only part of the picture. The wider, public, interests of the prevention of

crime and the protection of the victims of crime are a further crucial part of the picture.