

5 ST JAMES COURT

Stanford Asset Holdings Ltd and another (Appellants) v AfrAsia Bank Ltd (Respondent) (Mauritius) [2023] UKPC 35

Issue

Did the Supreme Court of Mauritius err in refusing an application brought by the victim of an alleged fraud seeking to compel an innocent third party to disclose information relating to the alleged fraud?

Facts

In February 2022, as a result of an alleged fraud, over USD 11 million was transferred from an account belonging to Stanford Asset Holding Limited at AfrAsia Bank Limited ("AfrAsia") to the bank account of Key Stone Properties Limited ("Key Stone"). Approximately USD 4 million remains in the account of Key Stone and has been frozen. The remainder has been transferred into the accounts of unknown third parties. The Appellants brought an application seeking to compel AfrAsia to disclose information about the identity of the recipients of any of the allegedly misappropriated funds. The objective of their application is to trace, freeze and recover the funds.

The Supreme Court of Mauritius refused the relief sought, setting aside the Appellants' application. The Appellants have been granted final leave to appeal to the Judicial Committee of the Privy Council.

Decision

The Board held that the effect of section 64 of the Banking Act 2004 ("the 2004 Act") is central. Subsections (1) and (2) of the 2004 Act impose obligations on any "person having access to the books, accounts, records, financial statements or other documents of a financial institution". The obligation in subsection (1) is to take an oath/make a declaration of confidentiality in the prescribed form as regards the affairs of the institution. Subsection (2) imposes a duty of confidentiality as regards information relating to the affairs of the customers of the institution. Subsection (3) provides for exceptions to the obligation of confidentiality imposed by section (2).

It is in the Board's opinion clear that subsections (1) and (2) impose obligations only on natural persons and not on the institution itself, and it is well-established that an obligation of confidentiality is owed at common law by banks.

That conclusion does not mean that there is no role for section 64 (3) in cases where a party seeks an order requiring a bank to disclose confidential customer information. A bank can only act through natural persons, and it would be wrong for a court to order it to disclose confidential information about a customer if the order could not be complied with without the relevant employee or agent being in breach of their duty under section 64 (2).

The Board examined whether the Supreme Court was right to refuse Norwich Pharmacal relief in the circumstances of the case. It was held that the starting point is that section 64 of the 2004 Act does not impose a duty of confidentiality on banks themselves (as opposed to on individual employees and agents). That duty arises, rather, at common law and there is accordingly no difficulty about giving effect to a common law (or, strictly, equitable) exception to it of the kind recognised in Norwich Pharmacal. It is true that it would be wrong to make an order for disclosure if compliance could only be achieved by requiring an individual employee or agent to break their duty of confidentiality under section 64(2). But in the Board's view such a case is covered by the exception in subsection (3)(d), since a Norwich Pharmacal application clearly constitutes "*civil proceedings ... involving the financial institution and the customer or his account*".

In the Board's opinion the making of the order sought by the Appellants was indeed an appropriate and proportionate response in the circumstances of the present case and was necessary in order to do justice.

It was accordingly held that the jurisdiction of the Supreme Court to grant relief of the kind sought in the present case does not have to be sought in the provisions of section 64 of the 2004 Act. Furthermore, the Board was satisfied that the Bank's employees can comply with an order made against it, by virtue of subsection (3)(d). Accordingly, the question whether the Appellants' application fell within the terms of subsections (3) (h) or (10) does not arise.