

## RISK & REGULATORY UPDATE

May 2010

### UK Bribery Act now in force

On 8 April 2010, the UK *Bribery Act 2010* received Royal Assent and passed into law. This is a truly ambitious piece of extra-territorial law making that places the UK at the forefront of international 'citizenship' in the area of fair business practices, particularly in the developing world where the effects of bribery and corruption on the underprivileged can be so profound.

More importantly though, what impact (if any) does this have on Guernsey financial services businesses? We summarise the key points [here](#).

### Proposed amendments to the Audit Regime

A number of changes have recently been proposed for *The Companies (Guernsey) Law, 2008* and sure to be welcomed amongst these are changes to the island's current audit regime.

The proposal of most interest to many will be the plan to introduce an indefinite waiver from the requirement to audit. Under the current procedure a company waiving its audit requirement must file the necessary resolution in the year proceeding the accounting to which it relates. The new proposal is doubly advantageous in that it will remove the need to pass a resolution every year and may also allow resolutions to be passed and filed retroactively.

Additionally, we were pleased to see plans to simplify the current provisions on auditor appointment. The current provisions are complicated and may benefit from streamlining. Whilst proposed wording has not yet been released for review, the goal of simplifying the procedure is a worthy one.

We are in the process of finalising our submissions on the proposed changes and would hope to disseminate a full summary of our thoughts on the proposals in the next few weeks. Watch this space.

### Shah v HSBC

In April, Collas Day's Risk and Regulatory Team published a flash update in relation to a recent English Court of Appeal decision in the matter of *Shah v HSBC*. This provided some significant clarity as to the rights and obligations of banks and other financial service providers in circumstances where they purport to make disclosures in accordance with AML obligations. As promised, in this Risk and Regulatory Update, we publish our [full article](#) in which we take a close look at the implications of *Shah*, particularly in view of the differences between the English and Guernsey AML legislation.

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More importantly though, what impact (if any) does this have on Guernsey finance businesses? We summarise the key points here.

The *Bribery Act 2010* (the Act) proscribes offering or receiving a bribe. A bribe is very widely defined, but may be broadly summarised as *the offer or receipt of payment or reward for the improper performance of a function*.

It is important to note that, as defined under the act, a bribe is still a bribe:

- Regardless of whether the function or activity was public or private, provided that the person expected to carry it out was under some form of obligation or expectation of trust or impartiality in carrying it out;
- Regardless of whether or not the person who received the bribe was the same person who was carrying out the relevant function;
- Regardless of whether or not the function was in fact improperly performed, provided that there was an expectation of improper performance;
- Whether or not the activity was to be performed within the UK or in another jurisdiction;
- Regardless of whether the payment of bribes was a usual aspect of doing business in that foreign jurisdiction (there is only a defence if the payment was required or permitted by the *written* law of that jurisdiction).

The Act also provides for a specific offence of bribing a foreign official. In some senses this is a broader offence than simple bribery, as mere "influencing" of the foreign official is the touchstone of this offence, rather than the more specific intention to effect "improper performance" of his duties.

The way in which the Act has been extended to corporate entities (or commercial organisations, as they are termed in the Act) is one of its most groundbreaking aspects. The Act creates a specific corporate offence of failing to prevent bribery. This offence will be committed where a person 'associated' with the organisation engages in bribery (or influencing a foreign official), and the organisation cannot demonstrate, by way of a defence, that it has appropriate measures in place to prevent bribery. The penalty for corporates is an *unlimited* fine.

Significantly, there is a broad definition of those who are associated with an organisation, including a rebuttable presumption that all employees are associated. It is important to note that this offence can be committed regardless of the seniority of the employee (i.e. there is no need to prove the 'directing mind' of the organisation) and regardless of whether the employee was acting within the scope of their authority. Further, senior officers of the company who 'consent to or connive' the commission of the offence may also be personally liable.

The potential for extraterritorial reach of the Act is also significant. Essentially, in addition to UK residents and nationals, the Act applies to any *British* citizen (i.e. including Guernsey citizens, amongst others), wherever in the world they reside and wherever the relevant act is committed.

Guernsey financial services businesses should ensure that they have adequate systems in place to detect and prevent bribery within their organisation, including any client entities that they have administrative or managerial responsibility for. This is particularly the case where the relevant entities have business interests in parts of the world where the payment of 'incentives' is a common and accepted part of doing business. Whilst the Act does not apply to Guernsey companies, it will apply to any UK based parts of a corporate group and will likely apply to many Guernsey based directors by reason of their British citizenship.

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## Shah v HSBC

The Court of Appeal decision in *Shah v HSBC* is likely to have implications for banks and other financial services businesses operating in Guernsey. In that case the Court of Appeal was concerned with the provisions of the UK's Proceeds of Crime Act 2002 (the "UK Act") and the obligations of a bank to notify the authorities if they suspect a customer of money-laundering.

Under the UK Act, banks (or other reporting entities) have a defence to prosecution for a money laundering offence in respect of a client that they have reported, if they request permission to enter into a transaction and SOCA does not object within a period of either 7 or 31 days (depending on SOCA's reaction to the initial notice). Much of the UK case law in this area relates to complaints about the conduct of either banks or the Serious Organised Crime Agency ("SOCA") during the period within which authorisation can be refused before the authorities have either to authorise a transaction or apply to the court for a restraint order.

However *Shah* raised the important question of the burden of proof and the Bank's obligations to disclose documents where the action is brought outside the 31 day moratorium and concerns about 'tipping off' and prejudicing investigations are no longer relevant. In considering this issue, the Court of Appeal was also required to consider the difficult question of what it means to hold a 'suspicion' of money laundering.

### The facts

Mr. Shah, a businessman with interests in Zimbabwe, had held an account with HSBC since 2002. Between September 2006 and February 2007, Mr. Shah instructed the Bank to transfer a series (in some cases quite large) of amounts from his HSBC account. The Bank developed a (in its view) relevant suspicion for the purposes of the UK Act and reported the transactions accordingly, declining to proceed with them until the expiry of the notice period in each case. As it turned out SOCA did not prevent any transaction from ultimately proceeding, however Mr Shah had attracted (as a result of HSBC's disclosures, it is implied) the attention of the Zimbabwean authorities who seized substantial of his assets, causing him substantial consequential losses.

On 12 June 2007 SOCA informed Mr. Shah's solicitors that Mr. Shah had not been under criminal investigation but, although those solicitors had asked HSBC on 25 May 2007 to disclose details of their communications with SOCA, HSBC still declined to reveal any details to Mr. Shah.

On 2 September 2007 Mr. Shah commenced proceedings against HSBC in respect of his losses arising as a result of the seizure of his assets in Zimbabwe alleging that, by reason of the Bank's failure to execute his instructions and other failures such as the failure to provide information to which he was entitled.

HSBC's defence was (i) that it suspected that each of the four transactions, which it had failed immediately to effect, constituted money laundering; (ii) that it had made an authorised disclosure seeking consent to effect them under section 338 of the 2002 Act; and (iii) that it would have been illegal for it to effect them any earlier. The Defence also alleged that it could not comply with Mr. Shah's instructions any earlier than it did.

HSBC applied to strike out or seek summary judgment in respect of the whole claim. Such application for summary relief came before the judge at first instance and it resulted in a substantial victory for the Bank in January 2009. Mr. Shah appealed that decision on the grounds that the matter was insufficiently straightforward for his claim to be dismissed at this stage and that his claim should proceed to trial.

### The arguments

Mr. Shah's primary claim against the Bank was that it had failed promptly to carry out his instructions. The Bank argued that if it had carried out Mr. Shah's instructions while it had a suspicion that the transactions he was processing constituted money laundering it would have been committing a criminal offence. The Bank therefore argued that it had a good defence to Mr. Shah's claim if it could show it had a suspicion that Mr. Shah was involved in money-laundering activities.

In this regard, the Court of Appeal considered the meaning of the word "suspect", and endorsed the definition provided in *R v Da Silva*, that:

*"the Defendant must think that there is a possibility, which is more than fanciful, that the relevant facts exist. A vague feeling of unease would not suffice. But the statute does not require the suspicion to be 'clear' or 'firmly grounded and targeted on specific facts' or based on 'reasonable grounds'."*

However, rather than merely take the Bank's word for it, Mr Shah sought to make the Bank prove that it had actually formed the necessary suspicion.

### The Decision

The Court of Appeal found that Mr. Shah was entitled to require the Bank to prove its case that it had the relevant suspicion. In doing so, the Court disagreed with the Bank's submission that it was enough to rely upon hearsay evidence of the fact of the Bank's suspicion (introduced through its legal Counsel), but that the burden was on the Bank to adduce evidence from Bank officers to support its defence.

The Court also distinguished earlier authorities relied upon by the Bank, making the point that those authorities were decided in circumstances where the tipping-off provision was highly relevant and evidence could only be given by the Bank's professional legal adviser. It was noted that any trial in those proceedings would have taken place in a very different atmosphere. Accepting HSBC's submission would be giving carte blanche to every bank to decline to execute their customer's instructions without any court investigation.

### Discussion

The UK AML legislation is broadly analogous to the regime in Guernsey. The principal money laundering offences are to be found at sections 38, 39 and 40 of The Criminal Justice (Proceeds of Crime) (Bailiwick of Guernsey) Law, 1999 (the "COJ Law"). Similarly, the UK Act creates offences of "tipping off", and "prejudicing an investigation" where a person commits an offence if he knows or suspects that an authorised or protected disclosure has been made and he makes a disclosure which is likely to prejudice any investigation that is similar to section 41 of the COJ Law.

However, one key difference between the UK and Guernsey laws is that in the UK a person does not commit any offence under the principal money laundering offences if he has made a disclosure to the relevant authorities with respect to a particular transaction and has obtained the consent of the authorities or the time for the giving or withholding of that consent has expired.

In Guernsey, whilst there is the ability of the FIS to give consent to a notified transaction, there is no default position allowing the bank to proceed with the transaction in the event that the consent is not positively refused within a certain period of time.

The Court of Appeal did recognise that banks are in an unenviable position. They are at risk of criminal prosecution if they entertain suspicions but do not report them or, if they report them, and then nevertheless carry out their customer's instructions without authorisation.

However in the UK at least the Bank's time in this position is limited to, at most 31 days. In Guernsey, reporting entities do not have this comfort and must, on occasion occupy the uncomfortable space between the two stools of the authorities and criminal prosecution and their client and a potentially large civil claim.

Although not bound by the decision, the Guernsey courts are likely to give it close consideration and to take a similar approach in such circumstances, and perhaps, allow a client's claim against them proceed to trial where the Bank is relying upon the AML disclosure defence. Whilst it is hoped that either a formal time limited consent regime is eventually established in Guernsey, in the light of this recent decision, Guernsey financial services businesses should review their AML procedure to ensure it will stand up to any challenges from customers in the same position as Mr Shah.

In particular, financial services businesses should, when refusing to act on a customer's instructions in seeking to comply with their AML obligations, make sure that they are clear (i) as to the nature of their suspicion; (ii) that the suspicion is a relevant one, within the terms of the AML legislation; and (iii) how their suspicion was formed. Most importantly, detailed records should be kept of the above - if there is any accusation of jumping the gun on AML reporting, the onus will be on the business to prove that they were justified is not following the client's instructions.

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