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Court refuses to thaw bank's decision to freeze

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In a case that will be of particular interest to all manner of financial institutions, the English Commercial Court has upheld a bank's decision to exercise its right to freeze accounts and terminate a customer relationship without notice. This decision will raise questions for institutions of just how much they can rely on their terms and conditions for assistance when they want to terminate an account or take other urgent, unilateral action.

The facts, decision and implications of ***N v The Royal Bank of Scotland plc [2019] EWHC 1770 (Comm)*** are considered below:

The Facts

The claimant (**N**) is an authorised payment institution, it provides its customers with foreign exchange and payment services, and has offices across the UK, Spain, Portugal and Dubai. N is a client of and held a number of accounts (both main and client sub-accounts) with the defendant, The Royal Bank of Scotland plc (**Bank**), which began providing banking services to N in early 2013.

The relationship between N and the Bank was governed by the Bank's Account Terms (**Account Terms**), which contained the following provisions:

1. '*The Bank will give the Customer [N] not less than 60 days' written notice to close an account, unless the Bank considers there are exceptional circumstances*'; and
2. '*The Bank shall have no liability for, and may reasonably 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.*'

In September 2015, suspicions were raised at the Bank that a number of N's clients may be involved in "*boiler room*" schemes (being those using cold calling and high-pressure sales tactics to sell securities), with the proceeds of these schemes being paid by the victims into N's client sub-accounts at the Bank.

As an initial measure, the Bank froze a number of the client sub-accounts and investigated further. During these investigations, the Bank identified that a 'mixing' of the funds had occurred between N's main and client sub-accounts. The Bank also became suspicious that N's clients planned to circumvent the account freezing when, on 8 October 2015, a large payment from one of N's main accounts was attempted.

On 9 October 2015, all of N's accounts were frozen by the Bank and the Bank's relationship with N was terminated immediately.

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Following the termination of the relationship, N brought proceedings against the Bank to challenge the decision, alleging both breach of contract and negligence.

The Decision

The Court found in favour of the Bank and ruled that, in the circumstances, the Bank had not breached the Account Terms and was entitled to terminate the relationship with N in the manner that it had done. The Court further ruled that there was no negligence on the part of the Bank.

Having reviewed the factual evidence in detail, the Court was satisfied that the Bank correctly exercised the discretion afforded to it under the Account Terms. The Court was further satisfied that, in the circumstances, the Bank's decision to freeze the accounts and terminate the relationship was reasonable.

The Court noted that the Bank's chosen course of action was just one of a range of '*honest, rational and reasonable*' decisions that it could have reached in the circumstances.

The Implications

The decision serves to remind financial institutions of the importance of the terms and conditions that they have in place with their clients and how vital it is to review the provisions of them to ensure that the greatest degree of flexibility and protection is offered to the institution.

When looking at the circumstances the Bank found itself in, it should be considered whether the discretion in the Account Terms was the very source of the issue. By the Bank fettering its own discretion to terminate a relationship in the first place (by requiring notice), it created an exposure to have to explain its actions to the Courts.

Whilst, ultimately, the Bank was able to prove that there were '*exceptional circumstances*' and that the Bank's chosen course of action was '*honest, rational and reasonable*', it required the matter to be taken before the Court, with the associated time and expense. Had the Account Terms contained a provision allowing the Bank to terminate a customer relationship without notice, it is not likely that any judicial consideration of the Bank's actions would have been necessary. The commercial conflict arises between an organisation wishing to provide itself with discretion, whilst balancing the need for fairness to clients.

This case should be contrasted with ***Shah and another v HSBC Private Bank (UK) Ltd [2012] EWCH 1283 (QB)*** where the Court implied a term into a customer contract, in the absence of an express term (permitting the bank to refuse to execute a payment instruction). In situations where AML compliance is at stake, the current case provides a clear message that institutions should allow themselves contractual flexibility in taking radical decisions (such as freezing accounts or terminating a relationship at will). This is worth remembering when terms and conditions are next up for review.

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