

UPDATE

# Credit Agricole Corporation and Investment Bank v Papadimitriou [2015]

Update prepared by Jonathan Speck (Partner, Jersey), Bruce Lincoln (Partner, Jersey) and Justin Harvey-Hills (Partner, Jersey)

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On appeal by the bank from the decision of the Court of Appeal of Gibraltar, the Privy Council held that a bank had constructive notice of a third party's proprietary rights where it had failed to make inquiries as to the commercial purpose of a transaction.

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## Facts

The matter concerned a proprietary claim relating to the proceeds of sale of an antiques collection of art deco furniture worth approximately US\$15m. The collection had been sold by a Mr Symes who had been held not to be the true owner. The issue was whether the respondent, Ms Papadimitriou, could trace into the hands of the appellant bank, where about US\$10m of the proceeds ended up via a complex scheme.

Of the total price of US\$15m, the sum of US\$4m was paid to a Panamanian company, Xoilan Trader Inc (**Xoilan**), and US\$10.4m was paid to another Panamanian Company, Tradesk Limited (**Tradesk**). Of the US\$10.4m, the sum of US\$10.3m was paid into an account at the Bank through a Liechtenstein foundation called Pataco Foundation (**Pataco**). The monies were deposited in the Gibraltar branch of the Bank and credited to the account of Lombardi Corporation (**Lombardi**), which was a British Virgin Islands Company incorporated at the request of Mr Symes. With the deposit in Gibraltar serving as a guarantee, the Bank's London branch gave another Symes company, namely Robin Symes Limited (**RSL**), a facility for US\$10.3m, which was drawn down and thereafter repaid in full in the sum of US\$9,860,278.78 from the guarantee deposit held by Lombardi in Gibraltar. The reason given to the bank for the transaction was the repayment of another facility of RSL from Citibank. However, the balance was disbursed elsewhere for Mr Symes' purposes.

It was accepted that the appellant would succeed unless the bank could establish that it was a bona fide purchaser for value without notice. The bank argued that there was nothing suspicious about the transaction that would have put it on notice.

## Decision

The Privy Council held that the bank did have constructive notice and upheld the finding of the court below (the Court of Appeal of Gibraltar) that, had the bank given adequate consideration to the commercial purpose of the transaction, it would have concluded that the purpose of the transaction was improper. In particular, the use of a web of companies routing payments via Liechtenstein and Panama and the extra costs thereby incurred could not have had a proper commercial purpose and would have alerted the bank to the improper motive, namely to launder the proceeds of sale. The issue was not confined to what would have been revealed to the bank had it investigated the source of the funds for the transaction, contrary to the approach taken at first instance by the Gibraltar Court which had dismissed Ms Papadimitriou's proprietary claim.

The Privy Council essentially applied the test stated by Lord Neuberger in *Sinclair v Versailles* [2011] EWCA Civ 347 – ie whether on the facts known to the bank at the time at which they received the payments in question, the bank had notice of the appellant's proprietary right to the money.

In addition to cases of actual notice, constructive notice can arise in two types of circumstances:

1. where a reasonable person with the attributes of the bank should have appreciated, based on the facts already available to it, that a proprietary right probably existed; and
2. where the bank should have made inquiries or sought advice which would have revealed the probable existence of such a right.

As to the latter, Lord Clarke stated that a bank will be required to make inquiries if there is 'a serious possibility of a third party having such a right or, to put it another way, if the facts known to the bank would give a reasonable banker in the position of the particular banker serious cause to question the propriety of the transaction.'

## Discussion

This decision provides an important reminder that banks need to consider the propriety of transactions in which they become involved.

The question of whether a bank will need to make further inquiries in a particular case will depend on the facts and circumstances. According to Lord Sumption, 'if there are features of the transaction such that if left unexplained they are indicative of wrongdoing, then an explanation must be sought before it can be assumed that there is none.'

Here, on the facts known to the bank, there was no explanation for the interposition of Panamanian and Liechtenstein entities in the transaction unless it was to conceal the origin of funds derived from third parties – and the bank ought to have made inquiries before proceeding as if there was an innocent explanation.

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**Jonathan Speck**  
Partner, Jersey  
+44 1534 676 371  
jonathan.speck@mourant.com

**Bruce Lincoln**  
Partner, Jersey  
+44 1534 676 461  
bruce.lincoln@mourant.com

**Justin Harvey-Hills**  
Partner, Jersey  
+44 1534 676 105  
justin.harvey-hills@mourant.com

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