Caught between the devil and the deep blue sea

Commercial life can often create some interesting problems.

Assume that you are, say, a bank manager, a corporate service provider, or any individual or entity that holds money, goods or chattels. Eight years ago your client – Mr Smith – arranged to transfer into an account, in his name, a sum of money. At the time of the transfer you were quite satisfied as to the bona fides of the underlying transactions giving rise to the funds, and you were quite content that you discharged all of your anti-money laundering and KYC procedures.

He has dealt with, the funds and other assets that you hold, over the years, without there being any difficulty and your working relationship with him has been excellent.

On Monday of a given week, Mr Smith contacts you and asks that you transfer to an off Island bank the majority of the funds that you hold to facilitate a property acquisition. You have been aware of this transaction for some time.

His request is e-mailed to you at 9.00am. He would like the completed transfer by close of banking hours Wednesday of that week.

At 10.00am you receive an e-mail from a Mrs Smith. You have not heard from her before, and did not know that she existed. She says that she is the estranged, but not yet divorced, wife of your valued client. They are in the process of going through divorce proceedings in another jurisdiction, say South Africa, and the money that has been sitting on your account, represents money that was improperly transferred to your account by Mr Smith, against her knowledge and, in fact, under South African divorce law it is money that she is, unquestionably, entitled to in its entirety. She asks you to confirm that you still hold the money, and that you will pay it over to her or generally deal with it, in accordance with instructions that she will later give you.

You immediately transfer the substance of what you have received from Mrs Smith, to your client who, equally quickly, replies to the effect that his estranged wife's claims are pure fiction and that he now requires you to action the transfer before the end of the day otherwise the property deal would be lost and he is likely to suffer considerable financial damages, with the hint, within his reply, that he will sue you in turn, for any losses that a delay in actioning the transfer causes.

At 1.00pm you then receive a fax from a firm of Advocates on the Isle of Man, saying that they act on behalf of Mrs Smith; they repeat all that she already has said to you and say that unless you confirm:

a. how much you hold; and
b. that you will only action any dealings with the funds in accordance with her instructions [which will be routed through them], they will sue you for that money. They send you copies of orders and pleadings that refer to ongoing divorce proceedings in Cape Town.

Your customer has been on the phone talking to several of your colleagues and is now looking for you, having made it clear, in words of one syllable, that unless the money is transferred immediately, in accordance with his instructions, he will also sue you and/or your organisation without further notice.

It is now 1.30pm, and your day is going from bad to worse.

What can be done?

If you act in accordance with your customers instructions, you face the real prospect of being sued by his, [up until that point, unknown to you], estranged wife. If you act in accordance with the demands of Mrs Smith, and her Advocates your customer will sue you.

One solution lies in your making an application to the Chancery Division of the High Court, known as an "inter pleader" application.

(NOTE: Potential issues of constructive trusteeship and the statutory remedies that may be applicable will be dealt with in a separate article).

Inter pleader is a process whereby the person, or company, from whom two or more persons claim the same property or debt, and who does not claim the property or debt himself, can protect himself from legal proceedings by "inter pleading" between the two competing claimants; to challenge them to prove their claims, so that the title to the property or the debt can be decided by the Court. The basis of the application is found in Order 10A of the Rules of the High Court of Justice of the Isle of Man, and derived from a long standing line and procedure under the laws of England and Wales.

Upon hearing such an application the Court has a range of powers which can include determining the competing claims between, in our example, Mr & Mrs Smith, directing that Mr & Mrs Smith litigate as between each other, before the Court, to determine rights of ownership.

Several criteria must be satisfied before it is appropriate to bring an inter pleader application. These include providing evidence within the application that:

a. you claim no interest in the subject matter of the dispute other than a claim for your charges or costs;
b. you have not colluded with any of the disputing parties to the subject matter of the dispute; and
c. you are willing to pay or transfer the subject matter of the dispute into Court or dispose of it as the Court may direct.

Is the asset that you hold capable of being the subject matter of an application? If it is money sitting in a bank account, then the answer is clearly yes.

If not, then it is still possibly capable of falling within the definition of "goods and chattels" as, in particular, chattels has been described as "one of the widest words known to the law in its relation to personal property". The phrase includes, for example, shares in a company or title deeds of a property.

Usually, the crucial question when faced with such a situation, will be the extent and nature of your expectation that you are to be sued by two or more persons. Whilst the facts of each situation will differ, there must be a "real" foundation for the expectation, and the claim must be actual and not merely anticipated. If you are already a Defendant to an action, then, of course, such an expectation is easily demonstrated.

A degree of anxiety inevitably exists with legal proceedings, because of inevitable cost implications of going to Court.

The news, and indeed your difficult working day, may get a little better, bearing in mind that the Court has a discretion on the question of determining who pays the costs of the application; the Court can Order that you can take, from the funds in dispute, your costs, in making the application funds, or that the costs of the application will be borne by either or both of the parties that then actively litigate before the Court.

Hopefully, by the end of your working day, you will have found that there is a more comfortable place, that does not leave you caught between the Devil and the Deep Blue Sea.

Contact Us

If you would like further information or legal advice on any of the matters referred to in this document, please contact us by email at enquiries@simcocks.com

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This document is intended to provide a general overview and should not in any way be construed as legal advice. Always seek specific advice in respect of any particular issue.

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