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DECISION PLACES BANKS BETWEEN A ROCK AND A HARD PLACE



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Reasonable suspicion of dishonest assistance does not provide sufficient grounds for a bank to refuse to carry out customer instructions, the Supreme Court ruled last week.

*Westpac New Zealand Limited v MAP & Associates Limited*¹ will give banks little comfort in cases where they believe carrying out a customer's instructions may allow a third party to bring a legal claim against them for dishonest assistance.

The case arose out of the sale of shares in a privately-owned Bolivian bank by investors in the bank. MAP, a firm of chartered accountants, agreed to act as deposit agent for the transaction and to hold money from the sale in escrow until due diligence had been carried out, and the sale settled. MAP opened a foreign currency account with Westpac in its own name and provided the bank with information about the transaction and the parties involved.

However, by the time MAP asked Westpac to release the funds, the bank had become concerned about the transaction. In particular, Westpac was concerned that the money it held was largely to be paid out to people or organisations that did not appear to be shareholders, and the bank did not know why they were being paid.

Westpac refused to release the funds in the

absence of a court order. MAP obtained the court order – together with a requirement for Westpac to pay legal costs and interest. Westpac appealed against the interest and costs order.

The bank considered it had good reason to believe that if the funds were paid out in accordance with MAP's instructions, Westpac would have been dishonestly assisting in the commission of a breach of trust. The issue was whether this provided sufficient defence to a claim for breach of customer mandate.

The Supreme Court had to decide whether a bank could defend itself against a claim for breach of mandate on any basis short of establishing that the bank would actually incur liability for dishonestly assisting in a breach of trust (or any other wrongful conduct) by acting on its customer's instructions. Westpac argued that it did not need to establish a liability would, in fact, occur in order to have a good defence. The bank argued reasonable or well-founded grounds for suspicion, belief or concern it would be, or could be, dishonestly assisting in a breach of trust (or other wrongful conduct) should suffice.²

The Court approached the issue from a policy stance: who should ultimately bear any loss caused by the bank's refusal to act

¹ [2011] NZSC 89

² Westpac did not raise a defence that by acting on MAP's instructions it would *actually* have assisted any such wrongdoing.

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on the customer's instructions, where no liability would actually have attached to the bank as a result of acting on the customer's instructions? The Court considered that acceptance of Westpac's arguments would leave the customer bearing the loss when there was, in fact, no problem with the customer's instructions, even if the bank suspected or believed (albeit reasonably) that there was. It held that the risks involved are inherent in the banking business, and better managed by the bank than its customer. Accordingly, the customer should not bear a loss caused by a breach of mandate unless the breach was justified because the bank would *actually*, rather than *potentially*, have incurred liability by acting on its customer's instruction.

The Supreme Court's decision will provide little relief for a bank grappling with a difficult decision on whether to comply with a customer's mandate in circumstances where the bank thinks it may be vulnerable to a claim for assisting in wrongful conduct. Even where the bank's suspicions are well-founded and wholly reasonable, the Court's decision makes clear that the bank will still face liability if it fails to pay in accordance with the customer's mandate, in circumstances where the bank would not, in fact, have been liable.

The Court accepted that Westpac could have contractually provided for protection from liability for breach of mandate, on the basis of a reasonable belief or suspicion that implementing a customer's instructions would give rise to a cause of action against it. This judgment provides incentive for banks to review their terms and conditions, particularly for large and non-standard transactions, and consider whether to include specific contractual wording encompassing such a situation.

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