LALIVE

Insight

Successful group action against a Swiss bank for money laundering

- A recent group action in the Geneva Appeal Court was successful in claiming damages against a Swiss bank on the basis of a money laundering offence committed within the bank. Forty parties were involved in the group action. In a judgement dated 1 September 2020 and published early 2021, the Geneva Civil Court of Justice (Appeal Court) quashed the Geneva First Instance Court decision and found for 40 aggrieved parties.[1] This exceptional judgement deserves a closer look.
- This civil ruling was issued in the context of an increasing number of criminal probes opened against financial intermediaries (*g.* Swiss banks and asset managers) which implement transfers of funds that should be flagged as suspicious for money laundering. Employees and corporate bodies of financial intermediaries, that carry out transfers in such circumstances are criminally liable for money laundering under Art. 305bis Swiss Criminal Code ("**SCC**").[2] This offence carries monetary and/or custodial sentences for the individuals responsible; when the financial intermediary is a company, such as a bank, the company itself may also be held criminally convicted and liable to a fine of up to CHF 5,000,000 (Art. 102(1) and (2) SCC). In tort moreover, aggrieved parties (*e.g.* a bank client) of a predicate offense (*e.g.* a fraud) to the financial intermediary's acts of money laundering can sue the authors of the predicate offense (*e.g.* the fraudster) for damages, but also the financial intermediaries (*e.g.* the bank) which laundered the proceeds of such predicate offense.[3]

The Facts

- An independent asset manager, an individual referred to as "**BS**", opened a first bank account with a Swiss bank (the "**Bank**") in his own name in 1999 and a second one in 2004 with the same Bank, this time through a BVI company (the "**BVI Company**"). The beneficial owner of these accounts was declared to be BS and the origin of the funds to be deposited was announced to be management fees from BS's asset management activities. In reality, BS defrauded investors who transferred their money to BS' or the BVI Company's accounts opened with the Bank. These accounts were used for more than 1,300 transactions with credits of up to CHF 53,000,000 and debits up to CHF 45,101,229. The credit notes indicated that the purpose of the transfers was to make "*investments*". The AML IT system did not generate any AML alert. The Bank's AML IT system was configured in such a manner that the accounts (BS being a Swiss citizen, acting as an independent asset manager) were treated as low risk, which meant a higher threshold for triggering alerts. This notably allowed BS to use these accounts to defraud his clients while remaining undetected by the Bank.
- At the time of the opening of such accounts and until 2006, the Bank ignored that BS had had run-ins with justice; BS had been convicted for fraud and misappropriation in 2001 and two other banks had reported BS to the Money Laundering Reporting Office of Switzerland ("**MROS**") in 2001 and 2003. This led to the opening of a criminal investigation against him. While the case was closed because BS passed away in 2007, the prosecutor in charge of the investigation had in the meantime requested information from the Bank on the ground of suspected money laundering in 2006. The Bank's legal department informed the Bank's compliance department, which then analyzed the banking relationships relating to BS. The Bank's compliance indicated (orally) to the legal department that "*all is in order*".

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- In parallel, the Swiss Federal Banking Commission ("**CFB**", now the Swiss Financial Market Supervisory Authority "**FINMA**") had been conducting an investigation against the BVI Company. In 2008, the CFB invited the Bank to produce all related information. The Bank again reviewed the BVI companies' banking relationships. According to an internal memorandum, the Bank had already been called by the Swiss criminal authorities in March 2006 and the legal department of the Bank was informed of the suspicious activity report made in 2003 by another bank during this call. The legal department of the Bank then transferred the case to the compliance department, which closed the matter, without documenting how or why the suspicion of money laundering had been lifted.
- In 2011, the Bank reported itself to the Supervisory board of the Swiss Bankers Association ("**SBA**"), as it suspected it had not complied with its AML obligations under the code of conduct in the area of the fight against money laundering issued by the SBA. The Supervisory board reached the conclusion that the Bank had indeed breached its obligations under the code of conduct. BS' KYC profile clearly set out that the accounts were to be used for collecting management fees belonging to BS and not investments made by BS' clients. Yet, the accounts were used for more than 1,300 transactions with credits up to CHF 53,903,024 and debits up to CHF 45,101,229, and there were indications in the transfer slips that their purpose was investments made by third parties. The Bank should have accordingly repeated its process aimed at identifying the beneficial owner of the accounts and verified each of the transactions concerned, which it did not. The SBA Supervisory board ruled that the Bank's AML transaction monitoring system clearly did not comply with the Bank's AML obligations, and imposed a fine of CHF 230,000.
- In 2014, finally, several victims of the fraud filed criminal complaints against persons unknown and the Bank itself for money laundering by omission. The proceedings were however closed in June 2015 as the action had become time barred.
- The aggrieved investors together filed a civil claim in tort before the Geneva courts against the Bank claiming damages for the investment losses on the ground of Art. 41 of the Swiss Code of Obligations ("**SCO**") (unlawful act) in conjunction with a breach of Art. 305bis of the Swiss Criminal Code prohibiting money laundering. In the proceedings, they jointly appeared as plaintiffs under Art. 71 of the Swiss Procedural Civil Code, which allows for two or more persons whose rights and duties result from similar circumstances or legal grounds to jointly act as claimants.
- In first instance, the Geneva court sided with the Bank and denied the investors' claims. On appeal however, the Geneva Civil Court of Justice quashed the Geneva First Instance Court decision and found for the 40 aggrieved parties which had together challenged the decision. The first instance decision remained in force for the 26 investors who had not appealed.

The Court's Decision

- Following a detailed analysis of the Bank's AML obligations, the Geneva Appeal Court recalled that as a financial intermediary, a Bank is the guardian of the funds deposited in accounts opened in its books. It cannot remain passive, but has a duty to act, notably by requesting and obtaining clarifications that sufficiently dissipate all reasonable doubts of money laundering (or otherwise it must report to the MROS). A bank's reckless lack of reaction to reasonable suspicions of money laundering makes it civilly liable to the victims of the predicate offences (*g.* misappropriation, criminal

mismanagement, fraud, forgery of documents, etc.). It is sufficient that the bank accepted the probability that the accounts might be used to launder money, but knowing that accepted the risk.

- On this basis, the Court held that the Bank's liability was engaged on the following grounds:
  - In 2006 at the latest, when the Bank was contacted by the Swiss prosecutor, the Bank should have realized that the use of the accounts was inconsistent with the banking relationship purpose stated when the accounts were opened (receipt of management fees). This was further confirmed by the transfer slips which mentioned that the transfers' purpose was to make investment for third parties. This was clearly not a usual case of a manager receiving management fees on his account from third parties unknown to the Bank. In any case, it was incompatible to act as a manager for third parties and to sign a form A (identifying the identity of the beneficial owner) certifying that he was the beneficial owner of the assets deposited on his accounts;
  - It was all the more justified to make clarifications as the Bank files did not contain any documentation relating to any due diligence that the Bank would have carried out when opening these accounts. In fact, at that time, the Bank did not have internal directives on the on-boarding and due diligence process of independent asset managers, even though, as a financial intermediary, it had to have a process for the same in order to monitor its AML risks;
  - Following the Swiss prosecutor's request to produce documents and the related indication from the Bank's legal department to the compliance department that there was a risk of money laundering, the conclusions of the compliance department that "*all is in order*" was not founded in light of the above. The Bank file did not contain any note/document explaining and supporting this conclusion;
  - No information was requested by the Bank from BS as to the transactions effected on the accounts, although the accounts had been the subject of multiple transactions that were incompatible with the purpose of use indicated at the time of opening, as noted by the SBA; and
  - As it did not implement the AML obligations of clarification of the accounts' and transactions' background and purposes, the Bank accepted (by deliberate blindness) that the accounts may be used to launder money, which engaged its civil liability towards the 40 aggrieved investors.

- The Geneva Civil Court of Justice's decision was appealed before the Swiss Federal Supreme Court.[4] Switzerland's highest court has not yet ruled however.

Conclusion

- This judgement confirms that victims of a predicate offence and money laundering can successfully bring together a civil lawsuit against Swiss financial intermediaries and obtain compensation for their losses.
- The main advantage of civil lawsuit over criminal proceedings is that claimants do not bear the burden of proof that the financial intermediary was disorganised and that due to the disorganisation the financial intermediary failed to prevent money laundering, which are conditions to hold a bank criminally liable. However, gathering evidence in a civil case is a complicated – and often costly – process when the victim has no contractual relationship with the financial intermediary, whereas the public prosecutor has more efficient tools to obtain evidence (*g.* search and seizure). Depending on the

path that the criminal proceedings take, on the experience of the prosecutor and on his/her will to lead the proceedings, it may be wiser to first gather as much evidence as possible in the criminal proceedings and thereafter file a civil claim in tort before the civil courts.

References

[1] Decision by the Geneva Civil Court of Justice (Appeal Court) dated 1 September 2020 (ACJC/1202/2020).

[2] See in this respect Swiss Supreme Court decisions 136 IV 188, dated 3 November 2010 and 6B_729/2010, dated 8 December 2011.

[3] Swiss Supreme Court decisions 129 IV 322, dated 8 September 2003 and 134 III 529, dated 13 June 2008. See in this respect supra Sections 2.1.1 and 2.2.2.

[4] Appeal proceedings No. 4A_603/2020; appeal filed on 17 November 2020.