ROYAL COURT
(Samedi Division)

138.

6th July, 1994

Before the Judicial Greffier

BETWEEN	TTS International SA	PLAINTI
AND	Cantrade Private Bank Switzerland (C.I.) Limited	DEFENDA
AND	Kim Kawasaki	FIRST PARTY CONVEN
AND	Steven Cerny	SECOND PARTY CONVEN
AND	Geoffrey Lee	THIRD PARTY CONVEN
AND	Mayo Associates SA	FOURTH PARTY CONVEN
AND	Troy Associates Limited	FIFTH PARTY CONVEN

Application by the Plaintiff for Summary Judgment against the Defendant.

Advocate P.C. Sinel for the Plaintiff and for the Fourth and Fifth Parties convened.

Advocate A.R. Binnington for the Defendant.

Advocate W.J. Bailhache for the First, Second and Third Parties convened.

JUDGMENT

JUDICIAL GREFFIER: The present action came together in its presen form on 29th April, 1994 when the Court of Appeal consolidated tw sets of proceedings. The first was the action by the Plaintif against the Defendant and the second was the Representation of th Defendant to which the First, Second and Third Parties convene (hereinafter referred to as "the Litigant Investors") and th Fourth and Fifth Parties convened (hereinafter referred to as "th Associated Companies") were parties or potential parties.

The Litigant Investors and other investors placed mone through the Plaintiff and the Associated Companies in ban accounts with the Defendant in the name of the Plaintiff. Thes monies were used to speculate on the Foreign Exchange market through a company and individuals who acted as investmen advisers. A number of actions have ensued from this but thi

consolidated action relates to the question as to whether the Defendant has been entitled to refuse to pay the remainder of the monies held in the name of the Plaintiff to another bank in Jersey in the name of the Plaintiff. The Litigant Investors and other investors have been urging the Defendant not to do this and threatening the Defendant with proceedings in the eventuality of the Litigant Investors or other investors suffering any loss by reason of the transfer on the basis that the Defendant had become a constructive trustee of the funds. Under this pressure, the Defendant had brought a Representation, upon the basis that they were a trustee, seeking the directions of the Court.

The Plaintiff's case is very simple and straightforward. It is that the bank accounts are held in the name of the Plaintiff, that the Defendant is not a constructive trustee and that, therefore, the Defendant is not and has not been entitled to refuse to comply with the instruction of the Plaintiff to transfer the monies to another bank in Jersey.

At the hearing on 7th June, 1994, Advocate Bailhache appeared on behalf of the Litigant Investors and indicated that they would be withdrawing their Answer in the consolidated proceedings and would not be opposing the making of the relevant payment.

Although the law in relation to constructive trusteeship is apparently complex the Plaintiff and the Defendant were not really in disagreement as to the appropriate test as to when a situation of a constructive trust arose in relation to a bank account and a bank.

I begin with a quote from page 194 of Paget's Law of Banking, chapter 11 beginning with the second paragraph of the section on trust accounts as follows:-

> ***"If the banker has notice, however received, that an account is affected with a trust, express or implied, that the customer is in possession or has control of the money in a fiduciary capacity, he must regard the account strictly in that light. Of course, where there is no such notice, the mere fact that, unknown to the banker, moneys are held by the customer in a fiduciary capacity in no way affects the banker's right to treat them as the absolute property of the customer. Nor is the mere fact that the person opening the account occupies a position which renders it probable that he has moneys of other persons in his hands sufficient to put the banker on inquiry; but that fact may add significance to the heading under which the account is opened.***
>
> ***When once the banker is fixed with the fiduciary nature of the account he has to bear in mind two somewhat conflicting influences. He has to consider the interests of the persons beneficially entitled, perhaps including his own,***

and he has to recognise the right of his customer to draw cheques on the account and have them honoured. The banker obviously must not be a party or privy to any fraud, any misapplication of the trust fund. He could not, on the mere instruction of the customer, transfer trust moneys to private account, to wipe out or reduce an overdraft."

Advocate Sinel conceded that for the purposes of the Summary Judgment application it was arguable that the monies held by the Defendant on behalf of the Plaintiff were trust monies and that the Defendant had notice of this.

The advocates for both the Plaintiff and the Defendant agreed that the concept of a constructive trustee was not a true concept of trusteeship but rather a remedy afforded by the Courts to an individual who was wronged. They also agreed that if this was a case of constructive trusteeship then it fell within the category of "knowing assistance" and that the test set out towards the bottom of page 233 of Paget's Law of Banking (10th Edition) applied, which is as follows:-

"Knowing assistance

Four elements must be established to hold a bank liable as constructive trustee for assisting with knowledge in a dishonest and fraudulent design on the part of the trustees:

(i) The existence of a trust. This need not be a formal trust. It is sufficient that there be a fiduciary relationship between the trustee and the property of another legal person (for example, a company director's fiduciary relationship between himself and the company).

(ii) A dishonest and fraudulent design on the part of the trustee. 'Dishonest' and 'fraudulent' have their ordinary meaning. They go further than mere moral reprehensibility. It will not be purely the perception of the trustee which decides if the design is dishonest.

(iii) Assistance by the bank in that design. This is a question of fact.

(iv) Knowledge by the bank of the trust, the dishonest and fraudulent design and of its own assistance in that design."

They also agreed that the test in relation to knowledge should be taken for the purposes of this application to be that

set out in the case of Baden, Delvaux and Lecuit and others -v- Société Générale pour favoriser le développement du Commerce et de l'Industrie en France SA. (1983) B.C.L.C. 325.

This is a long and complicated Judgment but I quote first from a section on page 419 beginning just above (d) as follows:-

> ***"The refusal by a bank to comply with its customer's instructions in relation to moneys in the customer's account can have seriously adverse consequences both for the oustomer and for the bank. That is a practical consideration that militates strongly against the court extending the duty on the bank not to comply with the customer's instructions beyond what is the minimum reasonably necessary to ensure that the bank does not knowingly allow a misapplication of moneys in a customer's account with the bank. What judicial authority there is points to the duty not to comply with the customer's instructions being coextensive with the subsistence of the duty of inquiry. The bank has what Brightman J in the Karak case [1972] 1 All ER 1210 at 1231 referred to as 'a primary obligation to pay a cheque on demand'. In more general terms that is a primary obligation to comply with the customer's instructions in relation to the moneys in the account. In exceptional circumstances, in what Brightman J called an extreme case, that obligation must yield to an obligation to make inquiries. In the Selangor case [1968] 2 All ER 1073 at 1111, Ungoed-Thomas J referred to the bank's duty of care as including a requirement that the bank should make inquiries before acting and for this purpose to postpone honouring the customer's cheques, and (at p 1132) he referred to the bank being 'entitled to suspend payment pending justifiable investigation'. If an inquiry is made and answered, the only relevant question that arises is whether or not that answer would put the honest and reasonable banker on further inquiry. If it does then the bank must continue to refuse to obey its customer's instructions."***

I quote further from section 284 of the Judgment on page 420 as follows:-

> ***"284. In my judgment therefore a bank when put on inquiry remains under a duty not to comply with its customer's instructions either if it acquires knowledge of the intended misapplication of moneys which it holds or whilst it is pursuing its inquiries. It ceases to be under such duty when it receives information, whether in answer to its inquiries or from another source, that the honest and reasonable banker would accept without further inquiry."***

A great deal of correspondence and documentation was placed before me in relation to this matter. From this it was apparent that the Defendant had had various different concerns in relation

to this matter at different times. At one time the concer related to whether, in their desire to deal with the demands c some investors for repayment, the Plaintiff would pay too muc money to an investor thus depriving other investors of what wa properly due to them. At another time the Defendants seemed to b concerned about the possibility of the Plaintiff removing monie from the jurisdiction and completely defrauding all the investor of those monies. Another concern appeared to be the fact that on of the investor's accounts appeared, once calculations had bee performed, to be overdrawn by a sum of in excess of US$40,000.

The first question which I have to ask myself is the questio as to the relevant date which I should consider in relation t whether or not the Defendant ought to have made payment to th other bank in Jersey on the instructions of the Plaintiff Advocate Binnington submitted that this was the date upon whic the action had commenced and Advocate Sinel submitted that it wa the present date. I am of the opinion that the relevant date i 7th April, 1994, which was the date upon which the Order o Justice in the action against the Defendant was signed and serve upon the Defendant. In my view, if the Defendant was entitled t withhold payment at that time by reason of the duty to make enquiries and not to participate in a dishonest and fraudulent design then the Defendant would have a defence to the action. say this upon the basis that the Plaintiff must, in order t succeed with his action, have had a proper cause of action at the time when the proceedings were commenced. It seems to me that the situation is not dissimilar to that of a debtor whose debt has not yet become due. Advocate Binnington indicated that in the light of the change of attitude on the part of the Litigant Investors, the Defendant would probably be making the payment to the other bank, in any event. Accordingly, I am really considering the present application mainly in relation to the matter of costs in relation thereto.

In order to determine whether the bank was entitled t withhold the making of the transfer on 7th April, 1994, it was necessary for me to look at various documents which were attache to the Affidavit sworn on behalf of the Plaintiff.

The correspondence opens with the letter dated 7th January, 1994, which is no. 5 in the relevant bundle, in which the bank is indicating that it is only prepared to make transfers out of the account to a specific investor after confirmation from the Plaintiff and from the Plaintiff's auditors that they are both satisfied that these transfers are in order. Clearly, at this time, the concern of the Defendant was that only the appropriate sum due to a particular investor should be paid to him. As a result of this Advocate Sinel, on behalf of the Plaintiff, began to threaten the Defendant with legal proceedings and Messrs. Mourant, du Feu & Jeune, were instructed on behalf of the Defendant. In a letter of 4th February, 1994, which bears the initials of Advocate Peter Mourant, the Defendant indicated that it would have no objection to the funds which it held being paid

to the Plaintiff's account with another nominated bank. However, soon after this, Advocate M. O'Connell of Messrs. Bailhache & Bailhache came on the scene as acting for some of the investors. In a letter dated 7th February, 1994, Advocate O'Connell wrote indicating the concerns of some of the investors that if the monies were removed from the accounts of the Defendant then they might disappear and putting the Defendant on notice of a claim against it if this were to happen.

On 8th February, 1994, Advocate Binnington wrote to Advocate Sinel sending a copy of the letter from Advocate O'Connell and indicating that the Defendant would not be making the transfer without first seeking the comments of the Plaintiff on the allegations made by Advocate O'Connell and an assurance from the Plaintiff that the monies would be dealt with strictly in accordance with the entitlement of individual clients of the Plaintiff and the Associated Companies. Advocate Sinel, on behalf of the Plaintiff, continued to press for the payment over of the monies to the other bank. By a letter dated 8th February, 1994, Advocate Binnington wrote to Advocate O'Connell indicating that the Defendant would have no option but to comply with the instructions of the Plaintiff unless restrained from so doing by a Court Order. Accordingly, the Litigant Investors took out an Order of Justice on 9th February, 1994, which contained interim injunctions which affected the Plaintiff, the Associated Companies and the Defendant.

On the same day, Advocate Binnington wrote to Advocate Sinel retracting what he had said in his letter of 8th February, 1994. The letter of 9th February, 1994, indicates that the Defendant was concerned that not all the investors were in agreement with the proposal to transfer monies to another bank, that such a transfer would change the arrangements originally agreed with the investors, and that the Defendant was now only prepared to agree to this provided that they received confirmation from the Plaintiff's accountants as to the accuracy of the apportionments being made between the various investors. Alternatively, the Defendant required the confirmation of all the investors that they agreed to the transfer to the other bank. About this time, a further investor, a Mr. Ball, came on the scene and further complicated the situation by also threatening the Defendant with action if he suffered any loss by reason of the monies to which he was entitled, being transferred to another bank. On 3rd March, 1994, agreement was reached on payments out to the Litigant Investors and some other investors. On 9th March, 1994, Advocate Binnington wrote to Advocate Sinel indicating that the Defendant's primary concern was to ensure that it was not party to any transfer of funds which resulted in particular investors being favoured to the prejudice of others. The Defendant was also expressing concern that Mr. Ball did not wish his funds to be transferred to another bank and indicating that some other arrangement would have to be made in respect to his funds.

In subsequent correspondence during the second half of March, 1994, the Defendant continued to press for specific reports from the Plaintiff's accountants in relation to the funds held. During this period, Advocate Sinel, on behalf of the Plaintiff indicated that the Plaintiff's accountants would not be able to provide certification in relation to the ownership of all the monies in the bank account as they did not know where all the monies had come from.

On 24th March, 1994, the Plaintiff applied for the interim injunctions which had been obtained by the Litigant Investors on the monies held by the Defendant to be lifted and these injunctions were lifted by the Royal Court by reason of material non-disclosure.

On 5th April, 1994 Advocate Binnington wrote to Advocate Sinel indicating that on 8th April, 1994, the Defendant would bring a Representation before the Royal Court seeking directions as to how to deal with the monies which it held. The Order of Justice in this action was served the day before that Representation was presented to the Royal Court.

It is clear to me that the Defendant had throughout found itself in a very difficult position because it was caught between the Plaintiff, on the one hand, which wanted to remove funds from it prior to bringing proceedings against the Defendant relating to some of the losses suffered by investors, the Litigant Investors on the second hand, and other investors on the third hand. The Defendant was clearly very concerned at the prospect of paying over monies to the other bank and these subsequently being either misappropriated by the Plaintiff and the Associated Companies or being misapplied so that some Investors received more than they ought and others less than they ought. However, whilst I can well understand the difficulties of the Defendant, the question which arises in this case is as to whether the Defendant was entitled to continue to withhold payment of these monies. The real question is whether the Defendant had received answers to its enquiries or from another source, that the honest and reasonable banker would accept without further enquiry.

An unusual situation arose here inasmuch that, whereas in a normal situation, a bank would be making enquiries without third parties being involved, in this particular case, the people ultimately entitled to monies were actively on the scene. However, that does not change the principles which ought to be followed.

Advocate Sinel submitted that, as at the end of March, 1994, or early April 1994, the Defendants had absolutely no evidence of a dishonest and fraudulent design on the part of the Plaintiff. By that time, the Plaintiff's accountant had produced a report dealing with the sums due to a number of investors and sums of money had been sent to those investors. Advocate Sinel submitted that all the indications were that the Plaintiff was carefully

ensuring that investors were only paid the appropriate sums due to them. Advocate Sinel also submitted that the Defendant, in transferring monies to another bank in the jurisdiction, could not possibly be assisting the bank in a dishonest and fraudulent design. In his submission, the payment out to another bank in the name of the Plaintiff would be a purely neutral transaction. Advocate Binnington countered this by submitting that such a payment could immediately be followed by a payment of the funds out of the jurisdiction in a dishonest and fraudulent manner.

I am, of course, not trying this issue but merely determining whether this is a case in which Summary Judgment should be granted. The test in relation to the granting of Summary Judgment is a complex one and it is not possible to sum this up in a few words. As usual, I am applying the whole of the test as set out in the "White Book".

However, I am going to quote certain paragraphs from section 14/3-4/8 of the R.S.C. (1993 Ed'n) as follows:-

"Leave to defend - unconditional leave -

The power to give summary judgment under O.14 is "intended only to apply to cases where there is no reasonable doubt that a plaintiff is entitled to judgment, and where therefore it is inexpedient to allow a defendant to defend for mere purposes of delay". As a general principle, where a defendant shows that he has a fair case for defence, or reasonable grounds for setting up a defence, or even a fair probability that he has a bona fide defence, he ought to have leave to defend.

Leave to defend must be given unless it is clear that there is no real substantial question to be tried; that there is no dispute as to facts or law which raises a reasonable doubt that the plaintiff is entitled to judgment.

O.14 was not intended to shut out a defendant who could show that there was a triable issue applicable to the claim as a whole from laying his defence before the Court, or to make him liable in such a case to be put on terms of paying into Court as a condition of leave to defend."

And

"Where the defence can be described as more than shadowy but less than probable, leave to defend should be given, especially where the events have taken place in a country with totally different mores and laws."

It appears to me that the bank had two separate concerns.

Firstly as to whether monies would be transferred completely out of the jurisdiction and entirely fraudulently. There was an

allegation in correspondence, and that is repeated on the Affidavits which I have before me, that a Mr. Marsh, a director and part owner of one of the Associated Companies, had threatened to disappear with monies. However, Mr. Marsh is not a director of the Plaintiff and is not a signatory on any of the Plaintiff's accounts. During the period from January to April, 1994, the Defendant was in receipt of a great deal of correspondence in relation to payments being made out to certain of the investors. The Defendant had made enquiries as to what the Plaintiff intended to do with the monies. Furthermore, the instruction which was being given was purely an instruction to transfer the monies to another bank in Jersey. Furthermore, the Plaintiff had controlled the relevant accounts for some time before the difficulties with the investment managers became apparent and there is no allegation of misappropriation of funds by the Plaintiff during that period.

In my view, at April 7th, 1994, there was absolutely no evidence of a dishonest and fraudulent design on the part of the Plaintiff in so far as absconding with the monies is concerned. Indeed all the indications were that the Plaintiff was seeking to pay out appropriate sums to investors. Accordingly, I am completely satisfied that as at April 7th, 1994, such enquiries as an honest and reasonable banker would make had been answered in such a manner as to cause the Defendant to cease to be under a duty to withhold the requested payment. I am completely satisfied that an honest and reasonable banker could not possibly have considered that there was a dishonest and fraudulent design on the part of the Plaintiff under this first heading.

Secondly, there was the concern as to whether the Plaintiff would pay the correct sums to individual investors. This was further complicated by the fact that the holding of one investor in one of the sums was in deficit. However, the Plaintiff had clearly sought the advice of the accountants who had performed calculations and were performing calculations in order to assist them in dividing up monies. It was open to the Plaintiff, if it so wished, to make a Representation to the Royal Court seeking directions as to how to deal with the monies. If the Plaintiffs were going to pay out wrong amounts to individual investors then this would clearly be by way of a mistake and not by way of a dishonest and fraudulent design. Accordingly, I am completely satisfied that the Defendant was not entitled as at April 7th, 1994, to withhold payment of funds to the other bank for this reason. Furthermore, in the context of the second line of concern, I cannot see that the mere payment of monies to another bank could be construed as assisting the Plaintiff in any wrongdoing.

It therefore follows that I would, in the normal course of events, give Summary Judgment for the amount of money left in the bank accounts in favour of the Plaintiff. However, because of the serious possibility of the monies being paid over to the Plaintiff in the meantime, I will need to be further addressed by the

parties on this point. The issue of costs in relation to the application also remains and I will need to be addressed by all the parties including Advocate Bailhache on behalf of the Litigant Investors, in relation to this.

Finally, I am bound to say that this is a case in which the concerns of the Defendant to protect itself against possible claims by the investors, including the Litigant Investors, have caused the Defendant to take an overly cautious view of their duties in relation to this matter.

AUTHORITIES

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