BRITISH VIRGIN ISLANDS

IN THE COURT OF APPEAL

CIVIL APPEAL NO.14 OF 2003

BETWEEN:

THE BANK OF BERMUDA LIMITED

Appellant

and

[1] PENTIUM (BVI) LIMITED
[2] LANDCLEVE LIMITED

Respondents

Before:

The Hon. Mr. Adrian D. Saunders — Chief Justice [Ag.]
The Hon. Mr. Brian Alleyne, SC — Justice of Appeal
The Hon. Mr. Michael Gordon, QC — Justice of Appeal

Appearances:

Mr. Jeffrey Elkinson with Ms. Dawn Smith for the Appellant
Mr. Stephen Moverley-Smith with Ms. Rebecca Paige for the Respondents

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2004: June 7; 8;
September 20.

JUDGMENT

[1] SAUNDERS, C.J. [AG.]: This case raises issues surrounding the application of CPR 15, the Part of the Civil Procedure Rules that addresses requests for summary judgment. The Respondent companies, "Pentium" and "Landcleve", had, in the Court below, applied for summary judgment in respect of a claim made by each of them against The Bank of Bermuda ("the Bank"). The trial Judge, Rawlins, J., granted outright the application for judgment made by Landcleve. Regarding Pentium's application, of the various heads of Defence filed, the Judge held that there was only one issue that should proceed to trial, namely whether Pentium was estopped from asserting its claim against the Bank. The Bank has appealed to this Court against these decisions of the learned Judge. Pentium has

served a counter-notice in relation to the finding that there should be a trial on the estoppel issue.

Brief background facts

[2] The Bank provided custodian services for both Pentium and Landcleve. The course of dealing between the parties was that the companies would send faxed instructions to the bank requesting the transfer of funds from their respective accounts to third parties. In the case of Pentium, the Bank was mandated to act on any one of three signatures (one of which could be that of a Mr. Gibson) along with the countersignature of a Trust Company in the BVI. In the case of Landcleve, the signature of any one of three signatories (one of whom was the same Mr. Gibson) could suffice.

[3] Over a period of 30 months between 1996 and 1998, acting on faxed instructions received by it, the Bank made a series of payments to Swiss bank accounts. The Bank debited these payments to the accounts of the companies. Each of the faxed instructions purported to bear the signature of Mr. Gibson. It now transpires however that, according to the companies, a massive fraud was perpetrated on them by a Mr. D'Osvualdo, an employee of a subsidiary company that provided management services to the companies.

[4] The companies allege that the purported signatures of Mr. Gibson, on the faxed instructions, were not in fact placed on the instructions by Mr. Gibson. Those signatures were forged by Mr. D'Osvualdo who engineered the theft of the funds paid out on those instructions and who has since disappeared without a trace. An international arrest warrant is currently out for him. The companies therefore allege that the payments, made by the Bank, purportedly on the companies' behalf, were made without authority. They accordingly brought this action claiming that their accounts should be re-credited by the Bank. The amounts in question are quite staggering. In the case of Pentium, they total US$3,137,940.00. In the

case of Landcleve the total sum is US$1,791,000.00. The accounting firm of KPMG, Pentium's auditors, and Credit Suisse AG, a Swiss bank which was involved in the pertinent transactions, were also made defendants to this action. However, the summary judgment proceedings do not concern either of these latter defendants. They only concern the Bank.

The Statements of Case and evidence adduced

[5] The companies, in their filed statement of case, set out the respective contractual relationships between each of them and the bank including the terms of the relevant mandates and the circumstances surrounding the fraud and the forgeries. The companies' claims were based on two grounds. Firstly, it was said that the Bank had no authority to pay out their monies on a forged signature and secondly, that the Bank had a duty to draw to the attention of the directors of the companies the occurrence of circumstances that indicated that the companies might be or were being defrauded. Counsel for the companies relied only on the first ground for the purpose of the summary judgment application.

[6] The Bank's Defence to the claim that it had paid out the monies without authority was that the Bank was a stranger to the circumstances of the fraud and theft as pleaded by the companies. The Bank pleaded that the companies were being put to strict proof of the allegation that Mr. Gibson's signature was in fact forged. The Bank denied that it didn't have authority to pay out the funds and it also denied that it was in breach of contract. Other than stating that the companies were being put to strict proof of the critical allegations regarding the alleged payment without authority, the Bank did not really challenge the facts pleaded by the companies in support of those allegations.

[7] It was on the strength of these pleadings that the companies applied for summary judgment. The application was supported by an affidavit of Mr. Gibson himself. It was a short affidavit. In it, Mr. Gibson confirmed as being truthful all the matters

contained in the statement of claim. He reiterated on oath that he did not sign any of the various payment instructions. He denied that he or either of the companies had ever authorised the Bank to make payment on any of the impugned faxed instructions.

[8] The Bank's affidavit in response was sworn to by Ms. Lori Monk. In her affidavit, Ms. Monk strenuously denied that the Bank was responsible for the companies' loss. She repeated that the Bank was placing the companies on strict proof that the companies did not in fact authorise the drawing of the funds. She pointed to the circumstance that, in the case of Pentium, the Managing Director of that company had countersigned the relevant instruments that were allegedly forged. She asserted that at all material times the Bank acted properly and in accordance with the mandate given to it. She claimed that the signatures, alleged to be forgeries, appeared to be genuine and were believed by the Bank to be genuine. She noted that Mr. Gibson never indicated in his affidavit that he did not give Mr. D'Osvualdo authority to sign on his (Mr. Gibson's) behalf.

[9] Mr. Gibson filed an affidavit in response to that of Ms. Monks. In this, his second affidavit, Mr. Gibson confirmed on oath the scale of and the circumstances surrounding the criminal activity of D'Osvualdo. The crime was uncovered in March, 1999 when Mr. Gibson visited the Monaco offices of the companies. The flight on which he was traveling to Monaco had been cancelled as a result of a bomb scare and so Mr. Gibson got to Monaco a day later than originally scheduled. In Monaco he discovered that D'Osvualdo had stolen and/or destroyed files, computer backup tapes and safety deposit keys. D'Osvualdo had also formatted the hard drives of the companies' computers. Later, when given by police a recording of the bomb scare, Mr. Gibson and his wife both identified the voice of D'Osvualdo on the recording. In his affidavit, Mr. Gibson also described the steps taken in reporting D'Osvualdo's crimes to the police and in pursuing this matter with the authorities.

[10] The remaining affidavit before the Judge was that of a Swiss attorney. In that affidavit, the attorney exhibited copies of various official documents indicating the legal process that had been invoked to pursue D'Osvualdo. The documents included international arrest warrants, a summary of the District Attorney's investigations into the matter and other material emanating from the office of the District Attorney.

The judgment of the court below

[11] In his judgment in the Court below, Rawlins, J. meticulously set out the proper approach to CPR 15.2, the rule that permits the Court to give summary judgment on a claim or on a particular issue. The rule provides for summary judgment to be given if the Court considers that the defendant has no real prospect of successfully defending the claim or the issue. The learned Judge referred to the comparable English provision, Part 24.2, and to the case of Swain v Hillman[1]. The Judge must have placed significant or at least some reliance on the affidavit of the Swiss attorney and on Mr. Gibson's second affidavit because he agreed with counsel for the Bank that Mr. Gibson's first affidavit was unhelpful. In arriving at his decision, the Judge also relied extensively on the Privy Council's judgment in Tai Hing Cotton Mill Limited v Liu Chong Hing Bank[2].

The appeal

[12] Before the Court of Appeal the Bank complained firstly of the Judge's reliance on the later affidavits filed in support of the companies' application. Counsel for the Bank, Mr. Elkinson, submitted that the Judge erred in attributing weight to these affidavits. Mr. Elkinson further argued that the circumstances before the Court below were not appropriate for a summary judgment application for the reasons that: the evidence of Mr. Gibson, a witness with an interest to serve, was

[1] *(2001) 1 A.E.R. 91*
[2] *(1986) A.C. 80*

uncorroborated; as fraud was being alleged there were serious issues to be investigated; the companies had been put to strict proof of the allegations made by them; and the Bank had been shut out from cross-examining Mr. Gibson. The Bank's position was that what the learned Judge had done here was to embark upon a mini-trial and that this was plainly wrong.

[13] As to the issue of reliance on the affidavits, I regret that I do not share the learned Judge's view that Mr. Gibson's first affidavit was unhelpful. That affidavit verified the facts pleaded in the Statement of Claim. Far from being unhelpful, it is my view that this affidavit, standing alone, sufficiently established a *prima facie* case for summary judgment on the basis that the payments were made by the Bank on unauthorised instructions. Equally however, I cannot agree that the Judge was wrong to consider the contents of the latter affidavits filed by the companies. These were affidavits responding to suggestions made by Ms. Monks and attempting to clarify matters raised in *her* affidavit. In these circumstances the claimant was entitled to answer the case being set up by the defendant. *See:* Davis v Spence[3].

[14] As to the other points raised by Mr. Elkinson, both sides relied on Swain v Hillman a case of negligence. In that case the English Court of Appeal upheld the decision of a Judge who had rejected an application for summary judgment. In the Court of Appeal judgment of Woolf, MR, one easily gleans that there were, in Swain, controversial issues that required investigation at trial. Those must have been issues that arose on the pleadings. It could not be said that the defendant in that case had no real prospect of defending the case. In the course of his judgment, Woolf MR reiterated that the English Part 24 was not meant to dispense with the need for a trial where there were issues that required investigation at trial. The learned Master of the Rolls did indicate however that

> "… a judge in appropriate cases should make use of the powers contained in Part 24. In doing so he or she gives effect to the overriding objectives contained in Part 1. It saves expense; it achieves expedition; it avoids the

[3] *(1876) 1 CPD 719*

> Court's resources being used up on cases where it serves no purpose, and I would add, generally, that it is in the interests of justice…if a claim is bound to succeed, a claimant should know as soon as possible".

[15] It seems to me that in this case one has to examine the essence of the claim put forward against the bank on the summary judgment application. That claim was quite simple. The companies were alleging that the Bank had acted unlawfully, in breach of the mandate given to it, by paying out the companies' monies on instructions that were not authorised. That the payment instructions were not authorised was established by the evidence of Mr. Gibson. He having done that, it now fell to the bank to show that it had a real prospect of successfully defending that claim. Merely pointing to the fact that Mr. Gibson's evidence was self serving or uncorroborated and repeatedly utilising the expression that the companies were being put "to strict proof" to establish the allegations made by them did not, by itself indicate a real prospect of successfully defending the claim. Mr. Elkinson complains that the learned Judge did not take into account all the evidence that might be available at a full hearing but any such evidence could only have been let in if the Defence had foreshadowed it, if the Defence had put forward some case that could cast doubt on the allegations put forward by the companies. The point is that if the only defence to the allegation that the mandate was breached was to say to the companies, "Prove that!", then Mr. Gibson's affidavit evidence does just that. The risk of conducting a mini-trial only arises where there are conflicts to be resolved. Here there were none. No counterargument was put forward by the Bank. The learned Judge had before him evidence that was not contested. For what it was worth, the Bank was entitled to apply to the Court to have Mr. Gibson cross-examined. He was present at the hearing. But the Bank opted not to avail itself of that opportunity.

[16] Finally, the bank's position has been that the fraud alleged needed to be properly investigated. But Mr. Gibson's affidavits indicated all that the companies did after their discovery of D'Osvualdo's fraud. Despite being informed in 1999 about what had happened, the Bank has to date apparently done no investigation of its own or at least has turned up nothing that would positively challenge the evidence

adduced by Mr. Gibson. As to the Bank's complaint that there is as yet no expert evidence corroborating Mr. Gibson's disavowal of the signatures, it was for the Bank to engage any such experts and to place their reports before the Court.

[17] Quoting certain statements in Esprit Telecoms UK Ltd. v Fashion Gossip Ltd[4]., Mr. Elkinson submitted that it was inappropriate to entertain an application for summary judgment where allegations of fraud and dishonesty were being advanced. That may well be so. However, the crucial distinction that must be made here is that this was not a case where the claimant was alleging fraud and dishonesty *as against a defendant* far less as against a defendant that was vigorously denying the allegations.

[18] A Judge should not allow a matter to proceed to trial where the defendant has produced nothing to persuade the Court that there is a realistic prospect that the defendant will succeed in defeating the claim brought by the claimant. In response to an application for summary judgment, a defendant is not entitled, without more, merely to say that in the course of time something might turn up that would render the claimant's case untenable. To proceed in that vein is to invite speculation and does not demonstrate a real prospect of successfully defending the claim.

The Conclusive Evidence Clause

[19] One of the defences raised by the Bank was that, even if Mr. Gibson's signature had been forged, the Bank was protected by a clause in the Agreement between it and each of the companies. The clause read:

> "Advice of the execution of orders and statements relating to the Account may be considered conclusive by the Bank if the customer has not objected in writing within 10 days after the date of which the same are forwarded by mail or otherwise".

[4] *(2000) Lexis Transcript, Court of Appeal*

[20] The Privy Council considered the duties that are owed by a customer to a bank in Tai Hing Cotton Mill Ltd v Liu Chong Hing Bank Ltd [5]. Their Lordships held there that the duties owed were limited to a) exercising due care in drawing cheques; and b) notifying the bank immediately when the customer becomes aware of any unauthorised cheques. It was also held in the same case that clauses which purport to make bank statements conclusive within a limited period of time, are ineffective if they do not bring home to the customer the intended importance of the inspection the customer is invited to make.

[21] Mr. Elkinson has sought to distinguish Tai Hing on the basis that the accounts at issue in that case were simple chequing accounts and not "custodian accounts held by sophisticated commercial business entities". It was also submitted that, while in Tai Hing the relevant clause spoke to the account being "deemed to have been confirmed", in the present case, the clause refers to the account being "considered conclusive" by the Bank.

[22] In my view, Rawlins, J. rightly rejected these submissions. I agree with the Judge that their Lordships in Tai Hing sought to define the ordinary incidents of the relationship between a bank and its customer. The duties the Privy Council was considering there were common law duties of care owed by customers to banks, not duties owed pursuant to any particular bills of exchange legislation. There is no reason why these duties ought to be extended to the circumstances attending the instant case. I also agree with the learned Judge that the conclusive clause in issue here is similar to its counterpart in the Tai Hing case and was similarly ineffective in absolving the Bank of liability to the customer.

[5] *See:. (1986) 1 A.C. 80*

The indemnity clause

[23] Another of the defences pleaded by the Bank was that it could rely on the provisions of an indemnity clause in the contractual relations between the parties. The companies had executed the following clause:

> "I/We agree to indemnify and hold you and your agents harmless from all expenses, liabilities, claims and demands which you or your agents may incur in respect of the account or arising out of the holding of the Securities or anything lawfully done by you or your agents hereunder".

[24] In my judgment the learned Judge rightly held that this clause could not avail the Bank. The clause is directed towards claims from third parties, not claims for breach of contract made by the contracting party. For one to stretch the ambit of this clause to cover such claims would be to insulate the Bank from liability for breach of contract. That would render the contract nugatory and Courts of law will not enforce such a clause. *See:* Gillepsie Bros. v Roy Bowles Ltd.[6] Moreover, this clause has to be construed against the Bank, the party seeking to rely on it.

[25] In all the circumstances here, it is my view that the Judge acted appropriately, and in keeping with the overriding objective, to find that, on the pleadings and evidence adduced, the Bank had demonstrated no real prospect of successfully defending the claim that it had paid out the funds on instructions that were not authorised. Accordingly the Judge was right to enter summary judgment in the manner in which he did.

The Estoppel as against Pentium

[26] The sole matter the Judge permitted to go to trial was with respect to the defence pleaded by the Bank that, as Pentium's Managing Director had counter-signed the forged instructions, Pentium had thereby made certain representations to the Bank

[6] *(1973) QB 400 @ 417-418 per Buckley, LJ*

that all was in order for the payments to be made and that Pentium was therefore estopped from bringing this claim.

[27] Mr. Moverley Smith's response is that the Bank's case was not pleaded in this manner and that to raise successfully a plea of representation by estoppel required the Bank to show a number of things that, on the pleadings, have not been demonstrated.

[28] It would not be right for this Court, at this time, to delve too deeply into this issue. No case management conference has been held on this matter as yet. The plea of estoppel, however inelegantly counsel considers it may have been crafted, has been made on the Defence and facts have been adduced to support the plea. At a trial, the plea may or may not succeed. In my view however, the learned Judge was right to leave that issue to be determined at a trial especially having regard to the learning in such cases as Brown v Westminster Bank Ltd[7] and The Governor and Company of the Bank of England v Vagliano Brothers[8].

[29] In all the circumstances therefore I would dismiss this appeal and the cross-appeal as well and make no orders as to costs.

Adrian D. Saunders
Chief Justice [Ag.]

I concur.

Brian Alleyne, SC
Justice of Appeal

I concur.

Michael Gordon, QC
Justice of Appeal

[7] *(1964) 2 Lloyd's Rep. 187*
[8] *(1891) A.C. 107*