ST. CHRISTOPHER AND NEVIS

IN THE COURT OF APPEAL

CIVIL APPEAL NO. 26 OF 2003

BETWEEN:

EMILIO RIVERA

Appellant

and

QUANTUM GROUP LIMITED

1st Respondent

BANK OF NEVIS [INTERNATIONAL] LIMITED

2nd Respondent

Before:

The Hon. Mr. Brian Alleyne, SC	Chief Justice [Ag.]
The Hon. Mr. Michael Gordon, QC	Justice of Appeal
The Hon. Mr. Denys Barrow, SC	Justice of Appeal [Ag.]

Appearances:

Mr. Mark Brantley with him Ms. Keinya Blake for the Appellant
Mr Charles Wilkin, Q.C., with him Mr. Damian Kelsick, and Mr. Oral Martin for the 2nd Respondent

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2005: April 5;
May 23.

JUDGMENT

[1] BARROW, J.A.[AG.]: The Appellant was defrauded a million United States dollars. He sent his money to the second Respondent, the Bank of Nevis International Limited (the bank) for Quantum Group Limited, the first Respondent, to invest. The individuals behind Quantum, which turned out to be a fraud from start to finish, took the money from the account into which it had been placed and disappeared. The Appellant sued the bank alleging that it was the negligence of

the bank that caused him to lose his money.[1] The trial Judge found otherwise. The Appellant does not accept that verdict.

[2] In his witness statement the Appellant stated that he had been informed by the fraudsters that a special account had been opened for him in the name of "Cimarron S.A." with the bank. Cimarron S.A. was the name of a company that belonged to the Appellant. The fraudsters had given the Appellant to understand that this account would be used to keep the monies that he sent and the huge returns that he had been promised. He had been promised returns of 50% to 100% per month.

[3] The Appellant stated that he considered the establishment of the Cimarron account as an essential safeguard without which he would not have sent his money. The Appellant stated that he understood that the monies he sent would be segregated in his own account in the name of Cimarron SA from other monies sent by other investors or held by the first Respondent. There was no such account, as it turned out.

[4] On 1st September 1999 the Appellant had Citibank send his one million dollars through the Bank of New York. On 2nd September 1999 Bank of New York transferred that sum to the bank. On the transmission record, under the heading 'sender to receiver information', appear these words:

> "Final credit to: The Quantum Group Ltd. a/c 8295140 Sub a/c Cimarron SA 8295140-9991"

[5] Unbeknown to the Appellant, two days before he sent his money Quantum had prepared the bank for the arrival of these funds with a facsimile in the following terms:

> "Memo: Reference account 829 5140 The Quantum Group"
> "We have, for internal purposes, created sub-accounts for our families, friends and associates. Those sub-account numbers will be our regular

[1] Default judgment was entered against Quantum but that is an empty judgment since Quantum was always a shell and the Appellant's money is long gone.

> Account number plus the numbers 9991 through 10100. Therefore the sub-Account will be as follows: Cimarron SA, account number 8295140-9991 Through Ziare Holdings, account number 8295140-10100.
>
> "The first wire transfer in the amount of One Million USD will arrive today To sub-account Cimarron SA, account number 8295140-9991.
>
> "Have you set up the MasterCard/Visa credit card account yet? We are still interested in securing a credit/debit card."
>
> [signed] Teddy W. Solomon"

[6] The Appellant's case is that the special instructions given by the Appellant to the bank in relation to the transferred funds could not be complied with as the named final beneficiary, Cimarron SA, and the account numbered 8295140-9991 did not exist with the bank. The Appellant argued that the bank made no inquiries of the Appellant or his bank in relation to the impossibility of performance of the instructions regarding the placement of the transferred funds but instead placed those funds in the account of the fraudsters *simpliciter*.

[7] It was argued by the Appellant that by failing to deal with the transferred funds precisely as instructed the bank facilitated the fraud against the Appellant. The Appellant argued that compliance with the special wire instructions having proved to be impossible, owing to the non-existence of the sub account, then the bank, as a prudent banker, had an obligation to return the funds to the sender as it was unable to credit them as instructed or to secure the funds of the Appellant while it investigated the matter. Thus, the Appellant argued, by its negligence the bank placed the Appellant's monies under the exclusive control of the fraudsters and so facilitated the fraudulent appropriation of these monies by the fraudsters.

[8] A second limb of the Appellant's case is that the bank failed to do a complete background check on the fraudsters when they became customers of the bank. The Appellant contended that if the bank had referred the information that the individuals behind Quantum gave to the bank for a fraud investigation that it sometimes has conducted into prospective customers the bank might have

discovered the truth about its proposed customers. In failing to conduct that check and to make full inquiries of its prospective customer the bank was negligent not only in complying with its own due diligence procedures but also in the duty that it owed to persons such as the Appellant who used its services in this admittedly high fraud-risk sector. By accepting Quantum as a customer and opening an account for it without any real knowledge of the people behind it and for what the account was intended the bank negligently allowed the fraudsters the necessary banking facility through which they could defraud innocent victims and engage in international financial crimes, the Appellant submitted.

[9] In a carefully reasoned judgment Edwards J found that even if the money had gone to the account that the Appellant thought existed and into which he desired the money to go it would have made no difference. The Judge relied on the evidence of the Appellant himself to find that such an account would have been operated and controlled by the fraudsters and not the Appellant, notwithstanding that the Appellant thought and intended otherwise. The fraudsters would have been able, just as easily, to deplete the supposed sub-account.

[10] The Appellant's focus on the appeal was to insist that the bank had a duty to comply strictly with the Appellant's instructions. If the bank had advised the Appellant or the Appellant's bank that the bank was unable to comply with the Appellant's instructions, had the bank simply inquired – one telephone call or fax or e-mail, would have done it, as I understood the argument - the Appellant would have been alerted. So alerted the Appellant would have known that something was wrong. He could then have taken appropriate measures. It seemed to me that this was really the pillar of the Appellant's case.

[11] The footing of that pillar is the Appellant's contention that the bank did not comply with his instructions. It is a contention that requires a detailed scrutiny of what took place and what instructions the Appellant gave.

[12] What took place was that the Appellant arranged to send money to the bank. But the bank had no knowledge of the Appellant. The bank received and accepted the money to render a service to its customer, Quantum. The bank did not receive the money to render a service to the Appellant. Further, the bank received the money because of and pursuant to arrangements made by Quantum. The Appellant made no arrangements with the bank. Both the Appellant and the bank understood that the money was to be credited by the bank to the benefit or account of a payee. As it turned out they each had a different understanding of which account and who was the payee. There was no shared understanding between the Appellant and the bank. Each held, independently of the other, an understanding based on the separate arrangements that Quantum made with each of them.

[13] The Judge found that the bank owed a duty of care to the sender but it was simply a duty not to execute payment instructions negligently. The Judge also found that the bank owed a contractual duty to Quantum. That duty was to receive the money that Quantum had arranged to be sent to it as payee and to credit it to Quantum's account.

[14] What instructions did the Appellant give?[2] Counsel for the Appellant, Mr. Brantley variously referred to the "clear" or the "specific" or the "clear and unequivocal" instructions that the Appellant gave to the bank. But were they? The transmission said simply, "Final credit to: The Quantum Group Ltd. a/c 8295140 Sub a/c Cimarron SA 8295140-9991."

[15] What did those words mean? The inquiry is not what was in the claimant's mind when he used those words but what did his words mean. What those words meant must be considered in the context of all the surrounding circumstances known to or affecting the bank to who they were communicated. The surrounding circumstances included the facts that there was a relationship between Quantum

[2] The witness for the bank testified that the bank did not get instructions from the appellant; he said the bank received 'payment information'.

and the bank, that the bank was expecting the money for Quantum, that the bank had been prepared to see reference to a sub-account, that Quantum had told the bank that Quantum had itself created sub-accounts as an internal matter, that there was no relationship between the bank and the Appellant, that there had never been any communication before between the Appellant and the bank, that the Appellant left it entirely to Quantum to make the arrangements with the bank, and that the incoming money would be for the sole control of Quantum.

[16] Had the surrounding circumstances been different the sender's message could have conveyed what the Appellant said he intended it to convey, which was 'pay to Cimarron SA, holder of sub-account 8295140 –9991'. Indeed, it was perfectly open for the Appellant to have sent precisely those instructions to the bank. Instructions so worded would have conveyed to the bank that the money was to be credited to a separate payee and to a separate sub-account. Such instructions would have waved the red flag that the Appellant contends was raised by the impossibility of strict compliance with his instructions and would have obliged the bank to inquire as to how to comply. An inquiry by the bank in response to such instructions would have alerted the Appellant or his bank that no sub-account existed.

[17] It seems fairly obvious that the reason why the Appellant did not send to the bank instructions so worded was because the Appellant was simply complying with directions given to him by the fraudsters as to how to send the money. Therefore, the object of the Appellant in sending the message or instruction that the Appellant sent was to identify the payee of the funds, not to instruct or direct the bank to safeguard the funds.

[18] The Judge relied on the case of Midland Bank Ltd. v Seymour[3] to hold that the concomitant of the duty on a banker to comply strictly with instructions was the need for the giver of the instructions to give them in a clear form. Devlin J decided

[3] [1952] 2 QB 147 at 153.

in that case that when a banker acts upon ambiguous instructions he is not in default if he can show that he adopted what was a reasonable meaning.

[19] Because of what the Appellant had been told by the fraudsters the Appellant expected, when he sent the money along with the message, that the money would be credited to a sub-account of Cimarron SA. He accepted that the bank had been told by Quantum what to do. He, therefore, did not endeavour to make it explicit to the bank that he required them to place his money in a segregated sub-account that belonged to him and not to Quantum. He expected it. He accepted that the bank would do as he expected. In the same way that he accepted that the bank had opened a sub-account for Cimarron. In the same way that he accepted that the bank permitted sub-accounts. And in the same way that he accepted that sub-account 8295140-9991 existed. All of which he accepted without any verification from the bank.

[20] The unreasonableness of the Appellant's conduct and expectations is well expressed by the trial Judge. She stated: "Mr. Rivera said he was 47 years old, financially successful and familiar with banking practice, yet he believed that the sub-account designation pinned to Quantum's Account was sufficient for him to be recognized by BNI as their customer. He believed that the sub-account guaranteed that he could telephone BNI at any time and demand his money, since he intended that the funds were to be collateral funding business transactions. Mr. Rivera was himself negligent in making the investment."

[21] The Appellant relied on the Canadian case of Royal Bank of Canada v Stangl[4] for the proposition that it was negligent for a bank to credit money to the account of a payee other than the specified payee and this was not excused by the fact that the names of the different payees were similar. That situation required a bank to be more careful to ensure that funds were correctly deposited in accordance

[4] [1992] O.J. No. 378, DRS 93-09153, Action No. 29464/88.

with the instructions received, that case decided. The Judge in that case accepted testimony to the effect that if a bank received telex instructions in which there was a discrepancy, for example, if the account number and the name of the beneficiary did not match up, the practice of the banks involved was to seek clarification. This was Mr. Brantley's point.

[22] Mr. Wilkin, Queen's Counsel for the bank, relied on the view of the Judge in Royal Bank of Canada Bank v Stangl that nothing turned on the fact that the funds were deposited to one and not the other of the accounts of the payee to whom the bank decided to credit the funds. As the Judge stated, if the funds were deposited to the credit of the correct beneficiary, that beneficiary could direct to which account they were to be deposited. On that view, therefore, the primary obligation was to make payment to the specified payee rather than payment to the specified account.

[23] In the instant case the trial Judge found, as mentioned before, and it is not challenged, that had the funds been credited precisely as the Appellant intended, it would have made no difference. The Judge found that Quantum would have had exactly the same access to the funds. There is implied in that finding recognition of the fact that the payee, according to the Appellant's instructions, and whether he thought it through or not, was Quantum. I cannot see any other conclusion flowing from "Final credit to: The Quantum Group Ltd. a/c 8295140 Sub a/c Cimarron SA 8295140-9991". It seems to me that a sub-account could only be held by the holder of the main account. Were it otherwise the holder of a main account would be able to make persons whom it selected, holders of accounts with the bank and, therefore, customers of the bank. It is difficult to see how that scenario would work.

[24] The Appellant's instructions were, therefore, to pay the money to Quantum. This is what the bank did. I agree with the trial Judge and with the Judge in Royal Bank of Canada v Stangl that it made no difference that the money was not paid into a sub-account. It was consistent with the Appellant's instructions for the bank to

have paid the money to Quantum's account, and not to a sub-account, because of the memorandum about internal sub-accounts that Quantum had sent to the bank two days before the bank received the money. The reference in the Appellant's instructions to a sub-account was not sufficient to put the bank on inquiry or to raise the need for clarification.

[25] The Appellant's loss was not caused by any negligence on the part of the bank in failing to comply with instructions or failing to inquire. As the Judge found, it was caused by the Appellant's reliance on the fraudsters and the Appellant's failure to take proper care to ensure that the arrangements that he thought were in place were, in fact, in place before he parted with his money.

[26] The other limb of the Appellant's allegation of negligence on the part of the bank was that the bank failed to fully investigate the fraudsters before accepting them as its customers. This contention raised the issues whether the bank owed a duty of care to the Appellant to conduct such an investigation and whether, in the circumstances, the failure to conduct such an investigation was culpable. It may be mentioned that the bank did in fact conduct what it considered were the necessary inquiries into the prospective customer by contacting the bankers to whom the bank had been referred. The Appellant maintains that what the bank did was not enough.

[27] The trial Judge decided that by offering to send and receive money by wire transfer the bank placed itself in a relationship with persons who chose to use its services. The trial Judge gave full consideration to the obligation of a bank to know its customer and the fact that international banks do business in an environment that lends itself to abuse by fraudsters. She considered the evidence as to what was done and what was required to be done as well as the law that applied to this area. The Judge agreed with the submission of Mr. Wilkin for the bank that the Appellant had not relied upon the adequacy of the bank's due diligence exercise when the Appellant chose to enter into relations with Quantum or when he chose

to send his money through the bank to Quantum. As Counsel submitted, without such reliance there could be no loss flowing from a breach of duty.

[28] Nothing was urged on this appeal to alter that conclusion. So far as the evidence shows, the Appellant and the bank knew nothing of each other before this money transfer. There is no evidence that, at the time he made the money transfer, the Appellant knew anything about the bank beyond the fact that this was the bank with which Quantum maintained its account. The Appellant appears to have relied exclusively on his communications with the fraudsters and not in any way upon any action or want of action by the bank.

[29] The assertion, which appears in the Appellant's skeleton argument, that the Appellant maintained throughout his testimony that he felt that he could rely on the professionalism and prudence of the bank as an entity holding itself out as an international bank offering international banking services, is not borne out by the notes of evidence. The passages to which the skeleton argument refers simply indicated that the Appellant thought that he would have been able to exercise control over the money in the intended bank account by telling the bank to send his money back to him and, also, that he thought that if the bank could not comply with his specific instructions the bank would send the money back to him.

[30] I find no basis upon which to make the bank liable for the loss that the Appellant suffered. I would dismiss the appeal.

[31] The bank cross appealed against the decision of the Judge that after the bank had been contacted by the Appellant to seek the bank's assistance the bank ought to have realized that the money in the Quantum account was impressed with a trust.

[32] What had happened was that by a fax dated 10th October 1999 the Appellant informed the bank that he had deposited US$1,000,000.00 in the bank for credit to Quantum's account, that he was unable to contact Quantum's representative and

that he needed certain information to ensure the safety of his capital. The bank did not disclose the requested information since the Appellant was not a signatory to the account. Subsequent to the Appellant's fax the bank complied with instructions from Quantum and transferred some $26,000.00 from the account.

[33] The Judge held that the bank was liable as constructive trustee for the sums it transferred after the Appellant contacted the bank:

> "since after having knowledge that the balance of the moneys was trust moneys, and that Quantum was or may have been involved in wrongdoing, it knowingly assisted Quantum in the wrongdoing by transferring the trust moneys, knowing at the time of the transfer the continued existence of the trust, and the wrongdoing of Quantum, and also that it was assisting in the wrongdoing."

[34] The Judge took the view that in the existing circumstances the bank ought to have cooperated with the Appellant and actively assisted him. Instead, she found, the bank ignored the Appellant and paid out the balance from the account. The Judge relied on Baden v Societe Generale[5] as establishing that a stranger to a trust could make himself accountable as a constructive trustee if he knowingly assisted in a fraudulent design on the part of a trustee. The Judge stated that "a banker may be fixed with sufficient knowledge to impose a constructive trust on him where he has actual knowledge, or where he wilfully shuts his eyes to the obvious, or where he recklessly fails to make appropriate inquiries. The onus is on the claimant to establish that the banker had possessed that knowledge. Where the banker had such knowledge he is under a duty of inquiry and is under a duty not to comply with his customer's instructions."

[35] The factors upon which the Judge relied to fix the bank with knowledge included the nominal balance that was kept in Quantum's account until there was the one inflow of $1 million followed by a flurry of activity over four days when $300,000.00, $100,000.00 and $500,000.00 were transferred, the fact of the

[5] [1992] 4 All ER 161.

Appellant's request for assistance from the bank, and the failure of the bank to make inquiries from other sources after the Appellant contacted them.

[36] When the Appellant contacted the bank, first by telephone on 8th October and then by his fax two days later, this should have put the bank on inquiry, the Judge accepted. She held that while the fluctuations in the account may have put the bank on inquiry the additional factor of the Appellant's inquiry "ought to have made [the bank] realize that the money in the Quantum account was impressed with a trust. At that point [the bank] would have had good grounds for thinking that the $1 million had been obtained by the Quantum's associates wrongdoings and in equity belonged to [the Appellant]."

[37] Mr. Wilkin submitted that Baden was disapproved in Royal Brunei Airlines v Tan[6] and cited the following passage from the opinion of Lord Nicholls[7]:

> "Drawing the threads together, their Lordships' overall conclusion is that dishonesty is a necessary ingredient of accessory liability. It is also a sufficient ingredient. A liability in equity to make good resulting loss attaches to a person who dishonestly procures or assists in a breach of trust or fiduciary obligation. It is not necessary that, in addition, the trustee or fiduciary was acting dishonestly, although this will usually be so where the third party who is assisting him is acting dishonestly. "Knowingly" is better avoided as a defining ingredient of the principle and in the context of this principle the *Baden* [1993] 1 W.L.R. 509 scale of knowledge is best forgotten."

[38] Counsel for the bank relied further on Twinsectra Ltd. v Yardley[8] in which the House of Lords held by a majority that for a person to be liable as an accessory to a breach of trust he must have acted dishonestly by the ordinary standards of reasonable and honest people and have been himself aware that by those standards he was acting dishonestly.

[6] [1995] 2 All ER 378.
[7] At 392.
[8] [2002] 2 A.C. 164.

[39] Even by reference to the discredited element of 'knowingly' it does not appear to me that there was any proper basis for making the bank liable for assisting in a breach of fiduciary obligation. In the context of the bank's state of knowledge, at the time, there was nothing to make the single inflow to the Quantum account and the three large outflows immediately thereafter of any particular significance. The witness for the bank explained that the bank had been expecting this sort of movement of funds. It may now seem obvious, in light of present knowledge, what the fraudsters were up to. That knowledge must be disregarded in considering the bank's response at the time.

[40] When the Appellant contacted the bank and told them of his circumstance that should certainly have raised concerns by the bank. That contact may have made the bank wonder if what the Appellant was saying was true. It may have caused the bank to have second thoughts about its customer, Quantum. But I cannot see the justification for deciding that the bank should have, at that point in time, concluded that their customer was dishonest and disclosed confidential information to the Appellant who, it is to be remembered, was not a signatory to the account or an officer of Quantum.

[41] For the bank to arrive at the conclusion of dishonesty what was needed was something along the lines of the further step that the Appellant took on 26th November 1999. On that day he personally attended at the bank's premises and produced documentation that showed him to be the originator of the funds, that Quantum had sent him a fraudulent bank statement purportedly issued by the bank showing a balance of US$1.333 million in its account at the bank and that the Appellant was requesting a formal investigation into an apparent fraud and the return of his money. The Appellant had also, by that date, contacted the Nevis Financial Services Department to report the fraud and that authority subsequently wrote to the bank.[9]

[9] It may be wondered why the Appellant had not, at the point when he contacted the bank, taken the decisive step of obtaining a freezing order which would have been effective to stop the bank from transferring funds

[42] However, even if the bank should have concluded that its customers were fraudsters when the Appellant sent them the fax of 10th October 1999 there is no suggestion on the evidence that it did, in fact, so conclude. As the later decisions establish, the Appellant needed to have proved more than suspicion or even knowledge of wrongdoing. The headnote of the Royal Brunei case summarised the requirement for liability as "conscious impropriety as distinct from inadvertent or negligent conduct or carelessness …"; and noted "that the third party's knowledge had to be assessed on the basis of his actual knowledge at the time not what a reasonable person would have known or appreciated …"[10] The Appellant needed to show that the bank acted dishonestly and was aware that it was so acting. I find that the Appellant has failed to so show.

[43] Accordingly I would allow the cross appeal, with prescribed costs of the appeal and the cross appeal to the bank. The bank is entitled to its costs in the Court below. On a claim for US $1 million, which converts to EC$2,700,000.00, costs work out to EC$ 130,000.00 at first instance and EC$86,666.00 on appeal.

Denys Barrow, SC
Justice of Appeal [Ag.]

I concur.

Brian Alleyne, SC
Chief Justice [Ag.]

I concur.

Michael Gordon, QC
Justice of Appeal

out of the account. What the Appellant contended at the trial was nothing short of saying that the bank should have frozen the account.

[10] [1995] 2 AC 378 at 379.