BRITISH VIRGIN ISLANDS

IN THE COURT OF APPEAL

CIVIL APPEAL NO.31 OF 2006

BETWEEN:

PENTIUM (BVI) LTD

Appellant

and

THE BANK OF BERMUDA LIMITED

Respondent

Before:

The Hon. Mr. Michael Gordon, QC — Justice of Appeal
The Hon. Mr. Denys Barrow, SC — Justice of Appeal
The Hon. Mr. Hugh A. Rawlins — Justice of Appeal

Appearances:

Mr. Stephen Moverley Smith QC and Mr. Oliver Clifton for the Appellant
Mr. Jeffrey Elkinson and Mr. Richard Evans for the Respondent

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2007: February 14;
March 23.

JUDGMENT

[1] BARROW, J.A.: The Bank of Bermuda Limited (the Bank) acted on nine forged wiring instructions that were sent by fax to the Bank and paid out US$3,137,940.00 for which it debited the account of Pentium (BVI) Limited (Pentium). The Bank's sole defence to Pentium's claim that it had wrongfully debited Pentium's account was that Pentium was estopped from so asserting because of the representations that Pentium had made to the Bank by the faxes that Pentium's managing director sent to the Bank. Hariprashad-Charles J upheld

this defence and entered judgment[1] for the Bank dismissing the claim with costs of $132,189.70. It is against that decision that Pentium has appealed.

[2] The arrangement between the Bank and Pentium for the operation of Pentium's account with the Bank was governed by a mandate. Presumably, Pentium's board of directors issued that mandate. The mandate required two signatures: the signature of Pentium's managing director, Matheson Trust Company Limited (Matheson) and the signature of one of three other persons, including Mr. Norman Gibson. Pentium was an international business company incorporated in the British Virgin Islands that traded in foreign exchange from offices in Monaco. An associated company owned those offices and employed there one Roberto D'Osvualdo.

[3] Between March 1996 and August 1998 Matheson faxed the forged wiring instructions to the Bank. They bore the signature of an officer of Matheson and what purported to be the signature of Mr. Gibson. D'Osvualdo had forged the signature of Mr. Gibson. His method, one gathers, was to forge the signature of Mr. Gibson on the wiring instructions, send the forged instructions to Matheson representing that Mr. Gibson was sending them, and thereby induce Matheson to sign the instructions and fax them to the Bank. Mr. Gibson did not discover the frauds until March 1999. D'Osvualdo was subsequently convicted and sentenced in his absence to 10 years imprisonment. He remains at large and the money remains unrecovered.

[4] It was a limited trial that was conducted before Hariprashad-Charles J because on an earlier application for summary judgment Rawlins J (as he then was) had given judgment on 30 April 2003 rejecting the entirety of the Bank's pleaded defences. Those defences included allegations that Pentium owed the Bank a duty to take reasonable steps to prevent the fraud. Rawlins J decided that the only issue that could go to trial was whether Pentium was estopped from asserting the Bank

[1] Claim BVIHCV 2002/0122, judgment delivered 9th October, 2006

unlawfully debited its account. The matter of negligence on the part of Pentium, therefore, was not a live issue in the trial before Hariprashad-Charles J.

The judge's findings

[5] Pentium accepted that the judge properly appreciated the purpose and effect of the mandate when she stated:

> "[78] … It requires two signatures. The purpose of having two signatures is to ensure that the payment instruction is the will of two separate people acting on behalf of the Customer, and not just the frolic or fraud of one. If a bank could rely on the second signature as verifying the first, this protection would be totally undermined: it would permit the bank to avoid liability, for example, where one signatory signs in his own name and forged his co-signatory's signature, the very situation a two-signature mandate is designed to avoid."

[6] The Bank argued before the judge that while Matheson alone had no authority to issue wiring instructions it did have authority to communicate Pentium's approval. The judge therefore considered what representations Matheson in fact made in the fax cover sheet that Matheson sent along with the wiring instructions. The fax cover sheets were to the effect: "We would be grateful if you could take action as per the attached Instructions" or "Please take action as per the attached." The wiring instructions were unremarkable; they followed the same format as genuine wiring instructions that were sent. The only difference was that the signature of Mr. Gibson was forged.

[7] The judge concluded thus:

> "[99] I have already alluded that the Bank accepted that the Managing Director alone did not have authority under the mandate to order Pentium's money to be paid away. However, it clearly, by virtue of being the Managing Director, had authority to communicate the Customer's approval of the transaction and that the Customer wanted these transactions processed. Emanating from the Managing Director as it did, [*the fax cover sheet along with the wiring instructions*] clearly represented a transaction in the course of Pentium's business.

> "[100] … Ms. Carter explicitly stated that she relied on Matheson's directions regarding payment. In addition, she stated that she would not have paid out if she did not see Matheson's signature and the faxed cover page emanating from Matheson's office as she knew Matheson was ultimately responsible for managing Pentium's account …"

[8] Mr. Moverley Smith QC, leading counsel for Pentium, noted that the judge did not state what was the consequence of her findings until she stated in paragraph [112] of the judgment, under the heading "Summary", as follows:

> "At the end of his submissions, Learned Counsel for the Bank suggested that "blame for what occurred should not lie at the door of the Bank" and whilst the Mandate was indeed breached, this is a case where the Bank may nevertheless escape by the invocation of the Doctrine of Estoppel. All things considered, I concluded that Pentium is estopped from denying that the Bank lawfully debited its account on the wire instructions that were purportedly signed by Mr. Gibson and its Managing Director."

A matter of logic

[9] The core of Pentium's case on appeal was logic. I understood Mr. Moverley Smith's argument in this way. It was clear from the mandate that Matheson alone could not authorise or instruct the Bank to make payments. Therefore the Bank was not permitted to act on payment instructions issued by Matheson alone. However, Matheson alone, by its fax cover sheets, communicated to the Bank that Pentium approved the making of payments. The proposition that the Bank was thereby authorised to make payments meant that Matheson alone authorised the Bank to make payments. This directly contradicts the primary finding of the judge that Matheson alone could not authorise or instruct the Bank to make payments.

[10] To put the argument another way, the Bank was authorised to pay Pentium's money out only on the strength of instructions signed by two persons. It made no difference if those instructions came in the form of wiring instructions or a fax cover sheet or a letter of approval. The instructions had to be given by two persons. The fax cover sheets were not instructions given by two persons. Therefore the Bank acted without proper authority.

Authority to represent

[11] The Bank's response drew a distinction between authority to transact and authority to represent. There was no dispute that for estoppel by representation to operate there must have been a representation made by or on behalf of the person to be estopped and made by a person having the authority to make the representation.[2] The judge upheld the distinction drawn by the Bank between authority to transact and authority to represent by her decision, at paragraph [99] of the judgment[3], that while Matheson had no authority to order Pentium's money to be paid away Matheson had authority to communicate the customer's approval of the transaction and that the customer wanted these transactions processed. She found that coming from the managing director, the faxed instructions clearly represented a transaction in the course of Pentium's business. The judge did not, as Mr. Smith observed, reason beyond that finding to state the effect that such a representation could have in the face of the terms of the mandate.

[12] Mr. Elkinson, leading counsel for the Bank, argued that Pentium has steadfastly refused to accept the distinction between having authority to enter into a transaction and authority to make representations on behalf of a principal. Mr. Elkinson referred to a number of cases to support the drawing of the distinction, including Manchester and Oldham Bank Limited v W.A. Cook[4] where a bank manager had no authority to approve a loan but did have authority to express the approval of the loan by others and Bank of England v Vagliano Brothers[5] where, counsel said, Lord Halsbury concluded that a representation by a confidential clerk was binding on the account owner, even though the clerk was not a sole signatory. The judge thought none of the cases cited was particularly helpful although she found enlightening the distinction drawn by Steyn LJ (as he then was) in First Energy UK Ltd. v Hungarian International Bank[6] where a

[2] Volume 16 (2) Halsbury's Laws of England, 4th edition, paragraph 1052
[3] See paragraph [7], above
[4] (1883) 49 LT 674
[5] [1891] A.C. 107
[6] [1993] 2 Lloyds Rep. 194

senior manager did not have authority to make an agreement but did have authority to represent that those who could do so had agreed. Steyn LJ stated:

> "[93] It seems to me that the law recognizes that in modern commerce an agent who has no apparent authority to conclude a particular transaction may sometimes be clothed with apparent authority to make representations of fact. In accordance with general understanding in commerce the managing director and the general manager of such a bank is clothed with a general actual or apparent authority to convey such information. It would be absurd to suggest that the third party should seek information from the board of directors as a whole."

Limits on the mandate

[13] Mr. Elkinson appreciated that Pentium's case was based entirely on the mandate and he sought to establish limits on the sway of the mandate. Thus he argued it was not correct that beyond prescribing who had authority to sign transactions the mandate also prescribed who had authority to make representations. There is no authority for such a proposition, Mr. Elkinson argued, and it ran counter to Manchester and Oldham Bank, First Energy and Bank of England v Vagliano Brothers.[7] There was no reason why, in banking alone, an instruction setting out who can enter into a transaction prescribes by implication who can make representations, Mr. Elkinson submitted.

[14] Mr. Elkinson further submitted that such a proposition makes little commercial sense. In many cases bank signatories are mere functionaries and not real owners. On Pentium's argument the real owner could never make representation about his account unless he was sole signatory. A bank would have to ignore reality and insist upon hearing the representations from the mouth of the signatory (and if there was a requirement of dual signatures, from both signatories) even if the signatory was a mere functionary. On the facts of this case, according to Pentium, Mr. Elkinson submitted, if Pentium's own managing director had verbally insisted till he was blue in the face that the transactions were entirely genuine and fully approved, no estoppel could arise.

[7] [1891] A.C. 107

[15] This is overly prescriptive, Mr. Elkinson submitted. He continued: "The terms of a mandate must be a powerful factor in determining whether an individual has authority to make representations. It may, and often will, be determinative. But it remains a question of fact, not inevitability. There will sometimes be individuals who, while not signatories, have the ability to make representations. This is commercial reality …"

Limits set by the mandate

[16] It seems to me the distinction on which Mr. Elkinson depended, between authority to transact and authority to represent, is of no avail to the Bank on the facts of this case. There is no question that such a distinction may be drawn. The question is whether the ostensible or apparent authority of a managing director, to represent to a company's bankers that the company wishes them to make a payment, can overreach the clear terms of a mandate issued by the company which specified that a payment can only be authorised in a certain way. Mr. Smith correctly submitted, in my view, that the only basis on which the Bank could have relied upon such a representation was to treat it as a variation or amendment of the mandate. But clearly a managing director does not have ostensible or apparent authority to vary the mandate of the board of directors. It follows that the managing director simply did not have the authority or capacity to effectively represent that Pentium approved the payments. Therefore the Bank had no right to rely on the representation of the managing director as authority for the Bank to pay out Pentium's money.

[17] Mr. Elkinson relied on the decision of the Privy Council in Morrell v Workers Savings & Loan Bank[8] that oral statements can vary a written bank mandate. However the facts of that case make it easily distinguishable from the present case. In Morrell the bank was authorised to withdraw money from the customers' account by acting on "any receipt, cheque or other document signed by any one of

[8] Privy Council Appeal No 20 of 2006, judgment delivered 18th January 2007

the undersigned … without any further signature or consent." The customer argued that by the terms of this mandate the bank was disentitled from debiting any sums in respect of which it did not obtain one of the customers' signatures. The Privy Council decided the fact that a customer promises to repay any amount due against the written order from the customer "does not exclude either the possibility of an oral order or a bank's right to be indemnified in respect of an oral order, if it can be shown that such was given by the customer or with his authority."[9] The judgment continued:

> "…Even if contractual documentation purported to preclude a bank from acting upon, or being indemnified for acting upon, a customer's oral instructions, there would be little conceptual difficulty about treating subsequent oral instructions given by the customer on which the bank acted as involving a consensual variation..."[10]

[18] Crucial differences are found in Morrell. Firstly, the question was whether the bank was authorised to act on the genuine oral as distinct from the genuine written instructions of the customer. Secondly, the person who gave the instructions was the actual owner of the account and the money in the account was his to spend as he chose. Thirdly, there was no limit on the customer's authority to debit the account; he was expressly authorised to act alone. Fourthly, it followed that the customer was to be treated as having the authority to vary the requirement of writing because the customer had the capacity to confirm by his own signature what he had instructed orally.

[19] In the instant case the question was whether the bank was authorised to act on the representation of the managing director as distinct from the signatures of two signatories. Secondly, the entity that made the representation was not competent, by whatever method, to order payment of money from out of the account except as specifically permitted by the company. Thirdly, there was a clear limit on the managing director's authority to debit the account; it was expressly not authorised to act alone. Fourthly, the managing director had no authority, and could not have

[9] Paragraph 10.
[10] Paragraph 10.

been thought to have authority, to vary the signature requirements that the company gave because the managing director alone could not validate by signature what the managing director alone had represented.

[20] If, in the colourful expression of Mr. Elkinson, Matheson had stated on oath and had insisted till it was blue in the face that the instructions were entirely genuine, the Bank should have told it to save its breath because the Bank was simply not capable of acting on such authorisation.

[21] It seems to me the Bank acted in breach of its mandate and cannot rely on the representation that Pentium's managing director made. The judge's finding that Matheson represented it was a transaction in the course of Pentium's business is really an indirect way of saying Matheson represented that it was a genuine transaction. But the essence of a genuine transaction is that it contains two genuine signatures. Matheson's representation, therefore, was that the signatures were genuine. The self-evident proposition that the Bank could only validly pay out Pentium's money on the authority of genuine signatures meant the Bank had a duty to verify for itself that the signatures were genuine.

[22] In this case the Bank did not do so. Instead, it relied on the representation of Matheson that the signatures were genuine. This, to repeat, was what the representation amounted to. For the reasons I have given, the Bank is not entitled to say, contrary to the clear instructions of Pentium to pay only on the strength of two genuine signatures, that because Pentium's managing director impliedly represented to the Bank the signatures were genuine Pentium should be bound by the statement of its managing director that the signatures were genuine. If that were so the exact situation that the judge decided was not permissible would obtain:

> "[78]…If a bank could rely on the second signature as verifying the first, this protection [of requiring two signatures] would be totally undermined: it would permit the bank to avoid liability, for example, where one signatory

> signs in his own name and forged his co-signatory's signature, the very situation a two-signature mandate is designed to avoid." [11]

That reasoning applies equally when the verifying second signature is not in the payment instruction but on a fax cover sheet.

[23] In my judgment the appeal succeeds. I would reverse the judgment of the court below and enter judgment for Pentium against the Bank for US$3,137,940.00 with interest thereon to be agreed or assessed by the Registrar or a Master. I would award prescribed costs in the court below of US$132,189.70 and prescribed costs in this court of 2/3 of that amount, being US$88,126.47.

Denys Barrow, SC
Justice of Appeal

I concur.

Michael Gordon, QC
Justice of Appeal

I concur.

Hugh A. Rawlins
Justice of Appeal

[11] Claim No. BVIHCV 2002/0122, judgment delivered 9th October, 2006