IN THE SUPREME COURT OF NEW ZEALAND SC 98/2010

[2011] NZSC Trans 15

BETWEEN **WESTPAC NEW ZEALAND LIMITED**

Appellant

AND **MAP & ASSOCIATES LIMITED**

Respondent

Hearing:	31 May 2011
Court:	Elias CJ Blanchard J Tipping J McGrath J William Young J
Appearances:	R B Stewart QC for the Appellant B D Gustafson and K A Van Houtte for the Respondent

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CIVIL APPEAL

MR STEWART QC:

Good morning Your Honours, I appear for the appellant, Westpac.

ELIAS CJ:

Yes thank you Mr Stewart.

MR GUSTAFSON:

May it please Your Honours Gustafson and Ms Van Houtte for the respondent.

ELIAS CJ:

Thank you Mr Gustafson, Ms Van Houtte. Yes Mr Stewart.

MR STEWART QC:

Your Honours the single approved ground of appeal is whether the Court of Appeal was correct in holding that Westpac had breached its mandate. In this regard MAP, on the 11th of March 2008, issued proceedings in the High Court, first of all by way of originating application and then by order of the Court, a statement of claim, alleging that Westpac had breached its mandate by failing to make payments to a number of named beneficiaries in terms of MAP's payment instructions issued to Westpac on the 26th of February 2008. That was the singular complaint of breach of mandate from the – dated 26th of February and it remained the complaint right through to the end of the High Court proceedings.

Now despite accepting that there were features of the transaction which caused Westpac justifiable concern and which rose legitimate questions, the Court of Appeal held that the circumstances known to Westpac were insufficient to justify Westpac's refusal to follow the instructions of its account holder, MAP. Now the bank accepts that the starting point is that a bank has a clear prima facie duty to its customer, to allow the customer immediate access to its fund. The law nevertheless recognises that banks may be entitled and indeed obliged in certain circumstances, to decline to meet the customer's' demand, if to do so would amount to giving the customer a dishonest assistance to commit a breach of trust or a breach of fiduciary obligations.

Now it's common ground that Westpac's decision is to be assessed in the light of what it actually knew at the time which is the 26th of February 2008 and the days following. And in my submission it's important to review the facts leading to the establishment of the account, what Westpac was told about the proposed transaction, the matters which Westpac claims placed it on inquiry and the explanation provided to Westpac and Westpac's decision to decline MAP's instructions. Now there's no difficulty if a bank has actual knowledge of a breach of trust and if it proceeds with a transaction and participates in the implementation of the transaction, it is at risk for dishonest assistance.

It's also accepted in the authorities, both the New Zealand Court of Appeal and the Privy Council, House of Lords, that there can be exposure to a bank, when there's what they call "one-eyed blindness" or "Nelsonian blindness" and that arises where there's circumstances which puts the bank on inquiry but that bank proceeds with its participation and the transaction and it is a finding that it does so for fear of knowing the true position or discovering the true facts.

TIPPING J:

I've often wondered whether deliberate blindness might be a better expression Mr Stewart because there does need to be that element of deliberation, doesn't there, that conscious decision not to look any further for fear, as you say?

MR STEWART QC:

Yes and I imagine if you dispense with that characterisation you find yourself slipping back into the territory of negligent or gross negligence and that 'it didn't cross my mind'. And one of the cases cited by my friend, the *Attorney-General of Zambia v Meer Care & Desai* [2008] EWCA 875, involved a lawyer who is living in London, allowing funds to be run through his firm's trust account, funds emanating from the Zambian Government, but as it turned out, being misapplied by the lawyer's client. And the witness was hopeless and the Court found nowhere as near competent as he represented himself to be or indeed as he possibly thought himself to be, but failed to find that he had been complicit in the fraudulent conduct because he so trusted his client that it never occurred to him that he should question the transactions. And while Sir Peter Gibson found the lawyer guilty of dishonest assistance at first instance, the Appellate Court set it aside because they were satisfied from the lawyer's evidence that he simply wasn't up to the task.

Now we have a situation here removed from anything that I've mentioned so far in that we have Westpac deciding that it was on inquiry, that there were circumstances that it needed to address and it conveyed this to the account holder and wasn't satisfied with the answer and the question is really, what is the standard or what is the level of satisfaction that is to be required by the bank in these circumstances before it's justified in proceeding with the transaction. Now just as a entrée into this, we see there's a number of descriptions about what amounts to dishonest conduct, the want of probity, which is – Lord Nicholls says, "It's synonymous with dishonesty," and, the authorities establish that the dishonest assistor's knowledge of the transaction had to be such as to render his participation contrary to normally acceptable standards of honest conduct. Now if we take that as one description of what is culpable conduct in this matter, if you took a reasonable banker involved in a transaction of this size and nature and he had concerns –

ELIAS CJ:

Why does size matter?

MR STEWART QC:

It's just the seniority of the banker and therefore the banker's expertise. Normally a transaction of this size would be managed at a senior level of the bank as opposed to perhaps the question of whether or not you honour or pay out a $10,000 cheque. You might get –

ELIAS CJ:

So size bears on what a reasonable banker could be expected to do?

MR STEWART QC:

Well the *Attorney-General of Zambia* case and also Lord Millett's judgment in *Twinsectra Ltd v Yardley* [2002] UKHL 12, [2002] AC 164, [2002] 2 All ER 377 says that you have an objective assessment of what the reasonable honest banker would do but in bringing that assessment to account, you have to have regard to the particular banker's knowledge and circumstance and expertise in handling the transaction, so there's a subjective element at that part. So –

McGRATH J:

Is the reasonable banker aspect being introduced in British law as well as New Zealand law?

YOUNG J:

Has it been introduced in New Zealand law, I didn't think the test was the reasonable banker, I thought it was the honest banker.

MR STEWART QC:

Reasonably honest banker.

ELIAS CJ:

No, definitely not that. I think, I think –

McGRATH J:

I thought this was a New Zealand gloss on the English decision.

ELIAS CJ:

I think so too.

MR STEWART QC:

Well I just –

TIPPING J:

I probably –

ELIAS CJ:

I think it was you.

TIPPING J:

I have to – I'm quite open-minded on this at the moment, frankly I think it may or may not have been a good idea to flirt with reasonableness at, in any shape or form.

MR STEWART QC:

Well one of the reasons that the Court of Appeal in the *Attorney-General of Zambia* case, which is a long case, it's 70 pages and it's only got a couple of pages at the very most on the law, there are big chunks of cross-examination by Sir Peter Gibson and the Court characterises it as cross-examination rather than questions from the Bench, and lots of evidence, but in that case they said that the High Court Judge fell into error by assessing the performance of this lawyer against the standards of what a competent lawyer would or would not do and leaving out of account the particular frailties, or shortcomings or incompetence of the lawyer, and that was an error. So –

TIPPING J:

In an organisation where you've got a lot of people of differing levels of competence and expertise, then you've got to try and strike some happy medium, if you like. This is what was vexing me in the *International Bank* case. It's all very well where you've got a single mind, but you can't have a banker, the dopier they are, the better off they are. Well, maybe you can. That's the issue, really, isn't it?

YOUNG J:

Well, if it's dishonest assistance, it might have to, if it's –

TIPPING J:

It might have to.

MR STEWART QC:

Well, yes, in the *Zambia* case the one partner in this firm kept the entire matter to himself pretty much, and he was able to do it, but in this case it was dealt with by the bank at a senior level and Mr Collins was a senior solicitor in the bank. He was in the decision making so it was dealt with as you'd expect. Transaction problem, $50 million at senior level. Now I just want to look at what Lord Millett said in the *Twinsectra* case, which is to be found in my learned friend's thin casebook.

ELIAS CJ:

So that is the only reliance you place on the size of the transaction, the level at which the transaction was handled in the bank and the inferences as to honesty or reasonableness, whatever the test is, that can be drawn from that fact. Is that right?

MR STEWART QC:

No, not only that, Your Honour, as I get to the matters that were of concern to Westpac and its position. Given the amount involved here, and on its understanding of what it was being required to do, it was potentially at risk for a sum of $US26 million if its concerns were borne out in that these moneys that I'll come to, which were going to consultants, were going out to the British Virgin Islands, Panama, the Cayman Islands. These funds could have disappeared into the ether, and if the Bolivian shareholders were then to come to light and say, "We've found out that double what we've been paid, has been paid for our shares," then they could come, would come after the bank, and they would say to the bank, no doubt, "Look, you had all these concerns" – I'll come to these concerns in some detail – "You were right across this. You asked the question and you got fobbed off for this very significant sum by a facile assertion." So it would have been a very easy thing for the people running the transaction to say, "Oh, yes, it's a fair question. I'll tell you what, it's this, this and this."

Now, the smaller the amount involved, if it's a relatively small sum, the bank might be prepared to take the risk in that it will pick up the tab, but when you're dealing with something like $US26 million, what that would do to the bank's bottom line, and it's a disproportionate and, in my submission, an unreasonable risk, so you have to factor that into the level of the bank's concern and inquiry, and the answers that it can expect to receive from its inquiries.

BLANCHARD J:

It may be careless to be fobbed off but is it dishonest?

MR STEWART QC:

Well, if you genuinely believe the explanation was good enough against all the knowledge and you've made an error of judgement in that assessment, yes, you would – it's negligence, gross negligence, and you're not exposed. But if you're an experienced banker and you say, "Well, that's just not good enough, given all of the circumstances," and that banker knows that for him to proceed without more is not honest conduct, because it's in disregard of the beneficiaries, the beneficiaries truly entitled to these moneys, then he can't say that it was negligence under cross-examination, there'd be the question, "Wouldn't it occur to you that there was a risk here?" "Yes." "Were you not satisfied" – "Were you satisfied that the question had been properly answered?" "No, I wasn't really but we didn't want to hang onto this money. We just had to get it out."

TIPPING J:

When you don't know, really, what's going on, the Court must try and strike some form of level of risk, or some form of screen, if you like, that a bank can reasonably act with, I would have thought. In other words, the bank's got to be given some reasonable guidance as to what level of concern it has to have –

MR STEWART QC:

Yes.

TIPPING J:

– before it can deny the mandate, because the starting point must be answer the mandate.

MR STEWART QC:

That's right.

TIPPING J:

It's a defence, if you like, to a breach of mandate if you've got a sufficient level of concern. I'm not trying to define anything at the moment, Mr Stewart. I'm just trying to articulate what at least in my mind is the ultimate issue that this is all about.

MR STEWART QC:

And that's why we're here today.

TIPPING J:

Yes, yes, but am I right in saying it's really the level of concern that the bank has to reach, if you like, before it can say, I'm denying the mandate?

MR STEWART QC:

Yes. Now –

TIPPING J:

And how you articulate that is not altogether easy, but the underlying premise of a cause of action, for knowing or – sorry, for dishonest assistance, is that necessarily to be taken across holus-bolus to what amounts to a defence? Do you understand what I'm saying?

MR STEWART QC:

Not quite, Sir.

TIPPING J:

Well, the cases tend to analyse it in terms of whether you would be giving dishonest assistance.

MR STEWART QC:

Yes.

TIPPING J:

That may be the right way of looking at it, but what we're really talking about here is a defence to an action for breach of contract, isn't it?

MR STEWART QC:

Well –

TIPPING J:

Well, it's not the actual raising of a cause of action.

MR STEWART QC:

No, it is a defence, and –

TIPPING J:

And I'm just putting counsel on notice that at least I am wondering whether there's anything in that distinction. There may not be.

MR STEWART QC:

Yes.

ELIAS CJ:

And I'd like to add that it's not clear to me that as a defence the bank doesn't have to get it right. In other words, you're not asserting that there was a breach of trust involved. The bank's position was that it would not disburse the money until it was protected by a direction from the Court.

I'm not sure that – because the case is really one of breach of contract and the principle is going to apply much more widely than in banking cases. Why should it not be that the bank, in accepting the mandate, if it wants to refuse to act in accordance with it, must be right, to have a defence?

MR STEWART QC:

But of course, in this case, as I'll take you to the facts, A & L, who is the agent for the Bolivians, was told that the bank will need to be satisfied as to the bona fides of this transaction, and you'll need to supply the bank with this, this and this, and if they're not satisfied, you, the bank is likely to impound the monies, and they proceeded against that background, so they knew that that was –

TIPPING J:

But is that pleaded as an express term of this contract? It's not, is it?

MR STEWART QC:

Not as a – well, it didn't bring – no, as you say, it was a defence. It's not – it wasn't pleaded as a –

TIPPING J:

Well, it's not pleaded either as an express or implied term of the contract giving rise to a defence, is it?

MR STEWART QC:

No.

TIPPING J:

No.

McGRATH J:

It wasn't even from the bank, was it? It was from the respondent, wasn't it, to –

MR STEWART QC:

Yes, yes, but the respondent had had discussion with the bank. MAP had had discussions with the bank about what was the bank's requirements, and it was relaying the information back.

McGRATH J:

Mr Stewart, just while you've been thrown a couple of balls by my colleagues, can I invite you to extend your juggling to a third one?

MR STEWART QC:

Yes, Your Honour.

McGRATH J:

But it seems to me that you're inviting the Court to address the principles of dishonest assistance and to refashion them in a situation in which everybody has to be sympathetic to the problem the bank was facing, but why can't the bank address that problem in the beginning by setting terms contractually on which it will receive, it will undertake a transaction of this kind? I mean, if we're looking as to what the policy of the law should be, isn't there some value in not lowering the threshold for dishonest assistance but rather saying to the bank, you want to alter – you want to protect yourself against this sort of situation, you do it contractually at the start.

MR STEWART QC:

Well, do we want the banks then to add another term into their condition saying all care, no responsibility, we can choose when we're going to dishonour the mandate;

and of course these terms and conditions are standard form. They're signed all the time. I think that might be using a sledge hammer to crack a nut. I mean, you get a handful of these.

McGRATH J:

It was a transaction that was unusual in New Zealand and did, one would have thought, might have commanded in Hamilton and in the head office some sort of thought as to whether it should be looked at in a particular way rather than on standard terms.

MR STEWART QC:

Yes, that's granted Sir, but we can't say well because of that the bank doesn't get the protection that's available for those bankers in everyday transactions who are relieved of the obligation to perform the mandate, if they are of the view and reasonably of the view, objectively of the view, that to do so would be dishonest assistance.

YOUNG J:

Can I ask, are you inviting us to deal with the case in terms of if it were a hypothetical question: if this had been a fraud by the agent on the shareholders, would the bank have been guilty of dishonest assistance if it complied with the mandate?

MR STEWART QC:

Yes.

YOUNG J:

Under which there would have to be some sort of secondary test –

MR STEWART QC:

I mean there may have been –

YOUNG J:

– that there would be some threshold suspicion as to whether it was a fraud?

MR STEWART QC:

Yes there is. Now the authorities are clear on that. You don't have to have actual knowledge of wrongdoing or fraud but you have to have a –

YOUNG J:

Well yes, I think that this is what Justice Tipping was saying, it's not that easy just to translate the whole law of dishonest assistance into this situation where it's clear that there wasn't a fraud or would appear that there wasn't a fraud.

MR STEWART QC:

Well there's no proof.

YOUNG J:

No proof that there was a fraud.

MR STEWART QC:

No, but if –

YOUNG J:

So it wouldn't have been dishonest, it would never have been dishonest for the bank, on the hypothesis that there wasn't a fraud, then it would never have been dishonest for the bank to comply with the mandate.

MR STEWART QC:

Well we're going to peer back and say they removed the, if what you're suggesting is, remove the threshold with the banks on inquiry because the bank may not know for certain but there are enough circumstances there that point clearly to wrongdoing or fraud. Now it's on inquiry at that point, that's how the law has dealt with it to date.

YOUNG J:

But has it dealt with it where a fraud is later independently established?

MR STEWART QC:

No, even if it's not established and look we don't know, there may well have been a fraud here that's still not been detected by the Bolivians.

YOUNG J:

All right well let's assume for the minute that it wasn't a fraud because when, if there was a fraud it's likely that the shareholders by now would have now started to kick up bobsidie about where there money was.

MR STEWART QC:

Well no, they might have been told they're only getting 26 million. Well there are hypotheses I agree.

BLANCHARD J:

We can't assume there was a fraud – or a breach of trust.

MR STEWART QC:

No and I'm not asking you to but what I'm, if – when we get into the facts there is not only an inconsistency but there is a contradiction about the transaction from that explained to the bank – a complete –

YOUNG J:

Yes that's – I still want for myself, I mean I understand the point that you're saying but what I'm struggling with is, and partly it's because I suppose there's always some fact of uncertainty, but assuming as I'm rather inclined to do that it wasn't a fraud, it wouldn't have been dishonest for the bank to comply with the instruction?

MR STEWART QC:

No, as it turned out.

YOUNG J:

Okay, now all the cases on dishonest assistance are cases where there was a fraud –

MR STEWART QC:

Yes.

TIPPING J:

You can't assist dishonestly in a breach of trust if there isn't one.

YOUNG J:

Yes, so how do we take the dishonest assistance principles, if we should, from cases where there was a fraud and then apply the cases where there wasn't a fraud but there was a smell of fraud?

MR STEWART QC:

Well because the bank, what's happened you see, where the issue –

TIPPING J:

How big does the smell have to be in other words?

MR STEWART QC:

Yes that's right and it has to be well-grounded. Now if the bank, what happens, when the litigation arises as in this case, the bank is then hit for costs and interest because it's in breach of mandate and they were, if you say, well look the bank here had fraud written all over large on this transaction –

YOUNG J:

Well, there's a heuristic that, where one tends to assume that what happened was inevitable, so if there was a fraud then all the indicia would shout and scream and say how obvious it was there was a fraud.

MR STEWART QC:

Well, what the bank, the bank –

YOUNG J:

That's the problem from the bank's point of view.

MR STEWART QC:

That's the invidious position the bank is in. On your approach, Your Honour, the bank just has to take the risk of –

YOUNG J:

No, it's not my approach, I'm just actually – what I'm puzzled by –

ELIAS CJ:

But it is my tentative approach, at least it's my question, why shouldn't the bank take the risk? Why isn't it its call and if it's wrong, it's in breach of contract?

MR STEWART QC:

Because if the bank suspects there's fraud there, then it's obliged to stand –

ELIAS CJ:

It's got to weigh up the risk of acting on the smell and not -

MR STEWART QC:

Yes, okay, so what it does is it asks the question, doesn't it? It's on inquiry, there's no doubt about that. It then has to make the inquiry and the Court of Appeal accepted the bank was on inquiry and asked the question.

TIPPING J:

It's that, that point is to how large the smell is in the light of the, then known, information and the response.

MR STEWART QC:

Yes, well can we just, can I just take you to –

TIPPING J:

If there is to be a sliding scale of smell.

MR STEWART QC:

Well, it has to be well-grounded. Now, if we go to the, in the casebook, the appellant's casebook, the first authority, *Royal Brunei Airlines v Tan* [1995] 2 AC 378. Well, perhaps since we – if we go to the –

ELIAS CJ:

Sorry, which one is it?

MR STEWART QC:

If we go to the third authority which is *Barlow Clowes Ltd v Eurotrust Ltd* [2006] 1 WLR, just start there. If we go to page 1483.

BLANCHARD J:

The third authority is an All England law reports version.

ELIAS CJ:

May I just say that the All England reports have been reproduced throughout and it's not very helpful for us, because we need to refer to the official reports, so if counsel could remember that for the future, please.

MR STEWART QC:

Yes, Your Honour. Tab 3, page 341, paragraph 28, "Their Lordships considered that this passage displays two errors of law. First, it was not necessary (as the staff of Government Division had themselves said earlier in the judgment) that Mr Henwood should have concluded that the disposals were of moneys held in trust. It was sufficient that he should have entertained a clear suspicion that this was the case." And that –

YOUNG J:

Well, that's for the benefit of hindsight that it was a big fraud, of course.

MR STEWART QC:

Well, does it matter at this stage if it was or it wasn't, otherwise –

YOUNG J:

Well, I agree the problem with saying the bank's got to get it right, is that it may encourage banks, encourage banks to be causal about money laundering so there's one policy factor that says, well, they took the money and they've jolly well got to pay it back to whoever they took it from or at their instructions, the policy factor that's in your favour is that if you take too black and white approach to it, then it facilitates money laundering.

BLANCHARD J:

Is there a statutory test on money laundering as to the bank's satisfaction?

MR STEWART QC:

Not yet, we don't have it here, I'm not aware of any.

YOUNG J:

Well, what the financial transactions reporting –

MR STEWART QC:

Look, I think there's a very low threshold if they think they – under the money laundering and anti-terrorist legislation they can investigate almost anything.

BLANCHARD J:

Yes, but that's never been alleged here.

TIPPING J:

The question is whether, the first question is whether suspicion as opposed to belief should be the criteria. The next question is, if it's suspicion at what level the suspicion is. With the greatest respect, it's not altogether easy to talk about a clear suspicion.

MR STEWART QC:

Well-grounded suspicion, I mean, if it's a –

TIPPING J:

Well, this is the key point, Mr Stewart, on the law I think, is to what level – unless one goes to the taking of the risk stance. What, how are we going to articulate the level of whatever it is that the bank must have before it has a defence?

MR STEWART QC:

You're not going to get a proposition that's going to accommodate all circumstances in all cases. It's really fact specific.

TIPPING J:

Well, you've got to know what you're looking for.

MR STEWART QC:

Well, in the *Manifest Shipping Co Ltd v Uni-Polaris Shipping Co Ltd* [2001] UKHL 1, [2001] 1 All Er 743, [2001] 2 WLR 170 case which is in the bundle –

TIPPING J:

Well, that's quite a helpful case I think.

MR STEWART QC:

Yes, I mean that talks about the finding there that there was, the High Court Judge was wrong to find that there was a suspicion and also the other case, *Zambian* case,

they threw that out as being that the High Court Judge was wrong to find that the lawyer suspected wrongdoing.

TIPPING J:

Well, Lord Scott wasn't it, in the *Manifest*, is that the name of it, the *Manifest*, that's the shipping case which was the level of knowledge or suspicion of unseaworthiness, wasn't it?

MR STEWART QC:

Yes.

TIPPING J:

Which is not, not out of left field but it does have conceptually some…

MR STEWART QC:

Yes and that was, in my submission, a long bow, the fact it had two previous fires, they've got a new –

TIPPING J:

I'm not talking about the facts, Mr Stewart, I'm talking about the articulation of the level of, whether it be suspicion or whatever test is adopted. I mean it can't be just some vague feeling of unease, as Lord Scott, I think, put it in, in *Manifest* –

MR STEWART:

No.

TIPPING J:

– but it's got to be clearly more than that –

MR STEWART QC:

It would have to be –

TIPPING J:

– what level has it got to achieve?

MR STEWART QC:

It would have to be factors, that without an explanation would –

TIPPING J:

Probability of wrongdoing?

MR STEWART QC:

Wrongdoing, yes. I mean –

TIPPING J:

Probability, would you settle for a probability?

MR STEWART QC:

Well –

TIPPING J:

I'm not necessarily wedded to that myself.

MR STEWART QC:

No.

TIPPING J:

There's got to be something that sets the standard, if you like.

MR STEWART QC:

Something unusual, perhaps – well, simply to put you on inquiry to say, well, hang on a minute, is this all going as it should go or is there something wrong here? Maybe it doesn't have to be, the level of suspicion doesn't have to be that high, but there have to be facts, well-grounded facts which cause a banker to ask a question and say, well, is this money going to the right people here? If he doesn't have to do that much, all right, then he can just pay the cheque out all day long.

TIPPING J:

What about a test which suggests, that borrows from the cause of action test, but isn't precisely in accordance with it, which says the bank must show that in the light

of that all that it knew, it would have been dishonest for it to have answered the mandate.

MR STEWART QC:

It's been put as –

ELIAS CJ:

It would have been.

YOUNG J:

But how do you apply that if there wasn't a fraud?

MR STEWART QC:

If there was fraud, if there was fraud.

TIPPING J:

Well, that's basically coming – yes, I suppose that's not going to help us, is it, now on reflection?

MR STEWART QC:

No, no.

ELIAS CJ:

But doesn't that really drive you to having to look at this as a matter of basic contract, contract principle and why should belief, you know, leaving aside whether suspicion is enough, but why should belief that performance of the contract will involve you in an illegality or breach of trust or something for which you might be liable, why should that belief be a defence to breach of contract unless it is found to be correct? In other words, why is your subjective view relevant at all? Why should you not have to establish that there was a breach of trust and that you were, therefore, justified in not acting on the mandate?

MR STEWART QC:

Well, of course, in that case, the bank is going to be liable and not liable every time according to whether it is or is not fraud at the end of the day.

ELIAS CJ:

Well, the bank can as Justice McGrath put to you, protect itself by contract and, indeed, I thought in an earlier answer, although it hasn't been pleaded, you indicated that, in fact, the mandate was hedged around with an acknowledgement that the bank would have to satisfy itself, so it doesn't seem to me that the impediment is really quite as great as you are suggesting.

MR STEWART QC:

Well, except that might not be acceptable to substantial customers to enter into –

ELIAS CJ:

Well, then the bank won't get the custom.

MR STEWART QC:

Yes, yes, well –

TIPPING J:

The banks are actually in a pretty awkward position here. I mean there is an element of attraction and purity in what the Chief Justice is putting to you, but on the other hand, the banks are in an intensively awkward position – if they can protect themselves by a contract in a one-off situation like this, perhaps that's what they should do, but the idea that they'd have to put it in all their standard – is somewhat unattractive –

MR STEWART QC:

Well, I mean –

TIPPING J:

In other words, we'll make up our minds whether we're going to answer your cheque.

MR STEWART QC:

We had the same discussion on *Westpac New Zealand Limited v Clark* [2009] NZSC 73 where you could have a provision in the contract like that, but that wasn't acceptable and would be not user-friendly.

BLANCHARD J:

The Court can avoid some of the peril for banks going forward by pitching the test sufficiently exactly because then a bank can look at that exacting test and say, "Well, unless our suspicion is at that level, we've got to pay out" and can't be criticised for doing so. I noticed, going back to the *Manifest Shipping* case, a couple of helpful passages. One is a –

ELIAS CJ:

Sorry, which case?

BLANCHARD J:

Manifest Shipping –

TIPPING J:

Tab 6 –

BLANCHARD J:

At page 780.

MR STEWART QC:

Sorry, Sir?

BLANCHARD J:

At 780 – there's quite a useful quotation from Lord Justice Roskill, "If the facts amounting to unseaworthiness," for which I'd say amounting to fraud, "are there staring the assured in the face so that he must, had he thought of it, have realised their implication upon the unseaworthiness in his ship, he cannot escape from being held privy to that unseaworthiness by blindly or blandly ignoring those facts, or by refraining from asking relevant questions regarding them, in the hope that by his lack of inquiry, he will not know for certain that which any inquiry must have made plain beyond any possibility of doubt" and then at paragraph 116 on the next page, 781, there is a summary in the course of which Lord Scott talks about the fact that, "Suspicion is a word that can be used to describe a state of mind that may, at one extreme, be no more than a vague feeling of unease and at the other extreme, reflect a firm belief in the existence of the relevant facts," and he seems to plump for the latter. He goes on, "In my opinion, in order for there to be blind eye knowledge, the suspicion must be firmly grounded and targeted on specific facts, the deliberate decision must be a decision to avoid obtaining confirmation of facts and whose existence the individual has good reason to believe."

TIPPING J:

Yes, that was the passage that was in my mind too.

MR STEWART QC:

And I'd have no difficulty with that and that's where I started and in this case, I don't think that, my submission will be that the suspicion was well-grounded and the bank was on inquiry and had to ask the question. The –

BLANCHARD J:

Did the bank have good reason to believe that there was a fraud going on?

MR STEWART QC:

In my submission, yes, yes.

BLANCHARD J:

It certainly knew that there might be because of the oddity about where the monies were now said to be going.

MR STEWART QC:

I just have got a couple of facts on that, Sir. When the transaction was delivered to the bank, it received a string of emails saying that the 49 million was to go to the shareholders and they identified the fees, 450,000 for A&L Consultants Limited, $US100,000 for a spotter's fee, $50,000 for MAP and that was it. Now, when the transaction – they were then given the instructions in a sealed envelope and told to open the envelope –

ELIAS CJ:

Is that a usual sort of thing that banks do –

MR STEWART QC:

I don't know –

ELIAS CJ:

– accept sealed envelope instructions?

MR STEWART QC:

There may have been confidentiality reasons. There's no evidence on that, Your Honour. To me it was unusual –

ELIAS CJ:

No, no, I saw that.

MR STEWART QC:

– but the bank, in any event, as it got closer to the day said to MAP that they were going to open the envelopes and have a look at these instructions, a substantial amount of money being paid out and what happens is that they see that $26 million of the 50 million is not going to shareholders. So a simple question, is this what's meant to happen? Now, they don't get any response to that. They're just told to pay it out. Now, the easy thing for the people running the transaction saying, "Yes." Now, it wasn't until – yes, that is correct and for these reasons. They don't say that.

Now what happens, is that on the 11th of March, two weeks later, MAP issues proceedings and they exhibit, what they say, were the payment instructions given to Westpac except they weren't, because the payment instructions they exhibited, disclosed that these payments, that 26 million was going to the consultants and, furthermore, they were going to consultants who were all part of the A&L Management Group, the people who were told they were going to get $450,000. Not once, up until that date, did MAP or Mr Anker or anybody else involved with the transaction, disclose that these were consultant fees going to non-shareholders. Then, when they come to do their reply affidavits, rather than saying, "Well, yes, these are consultant's fees and this has been agreed and here is the authority from the shareholders," they don't address that at all. Five affidavits in reply are filed and all they ever say is, "Give us our money back."

Now, twice Westpac said, "Will you please explain why 50% of this money is going to non-shareholders and people who are not listed in the escrow agreement or the sale and purchase agreement," no explanation was ever given. Now, in my submission, Westpac had a suspicion. How strong it was would depend on the answer and when they didn't get any answers at all, and then discovered that all the money was going to the consultants, in my submission, it is hard to imagine that a bank could have been more concerned about this transaction, and to suggest that the bank, as the law presently stands, subject to whatever the mandate might provide, is obliged to pay out the 26 million and take the risk, is a remarkable position because the fact is, it

would be so easy for the people promoting the transaction to give an explanation. They didn't once. Now, the facts –

TIPPING J:

Is the high water mark of the suspicion and the confirmation, if you like, by lack of explanation, this question of about half the money going to non-shareholders, is that really the nub of it?

MR STEWART QC:

That is, in this case. It is, and that's point A and then compare that with what they were told about, the consultant's fees at the outset, so this is a huge spin around, isn't it, from $450,000 to 26 million, they're not told is going to consultants but they discover that when the proceedings are filed and they then discovered that they'd been given only half the instruction sheet. The instruction sheet they got had the information –

TIPPING J:

Well, at what point – we're talking about the developing picture, if you like. At what point do we freeze the frame as to the knowledge of the bank, Mr Stewart?

MR STEWART QC:

Well, and it is a developing picture because if you accept, Sir, that a bank's on inquiry – let's say –

TIPPING J:

It may be that what they get later, it reinforces the – and if they're on inquiry, then I think it must be the case that whatever they learn from the inquiry is relevant to their belief, state of mind, whatever.

MR STEWART QC:

Yes, otherwise the inquiry serves no purpose –

TIPPING J:

A waste of time.

MR STEWART QC:

– yes, a waste of time, so what happens is that I imagine that a bank might be excused for not paying out the money for a few days. Now remember, money, not paying this money, interest was running the way the High Court dealt with it, $US10,000 a day so it may be for three or four days until they got an explanation about it all. They were justified to just hold it back. Now, the explanation they got, far from satisfying the inquiry, Your Honour and in my submission when we go to it, heightened the concern. Now –

TIPPING J:

This is what I understood you to be saying.

MR STEWART QC:

Yes, so and then when it never gets an explanation and it's, must have been –

TIPPING J:

It's the point at which they decide not to pay out that that's when the clock starts, stops running, I would have thought, from the point of view because after that it depends entirely, doesn't it, on who decides to do what? I mean, you can't – are you seeking to bring in the material that was filed in the proceedings later and, if so, on what basis?

MR STEWART QC:

Well, there may – if you're on inquiry and I don't imagine it's just one question and answer process –

TIPPING J:

No, no.

MR STEWART QC:

– it may well be an ongoing thing. They may say, well, we'll get this information for you, it will take a couple of days, and the information comes in and you say, hang on, this won't do either, and, yes, it may well go on. Let's say in their affidavit in reply for the first time the Bolivians and Venezuelans filed affidavits exhibiting the authority signed by the individual shareholders and that this, indeed, was a transaction where 50% of the sale proceeds were to go to the consultants, notwithstanding at the outset they were told only $450,000 was going to the consultants, then you'd say, all right,

we accept that. We've now got this and we've seen it all and it marries up with signatures and we'll pay the money out.

TIPPING J:

But they did seem, as the Chief Justice pointed out a little earlier, to be, to have reached the view that they were never going to pay out, they wanted the protection of a Court order.

MR STEWART QC:

I can take you through the – yes, and there is a flavour of that but I can take you through the correspondence that shows that the bank twice asked to just please explain why 50 –

TIPPING J:

Are you saying it's a reasonable inference that if they'd got a satisfactory explanation, what they thought was satisfactory, they would have paid out?

MR STEWART QC:

Yes and they asked for it many times. The fact is they never ever got it and they still haven't got it today. They still don't know.

ELIAS CJ:

So they paid out only on a Court order?

MR STEWART QC:

Well, no, what happened two business days before the hearing and they got a hearing within 30 days, all the players, BIV, BANDES, Prodem, the shareholder and A&L joined, and MAP, five of them, with an affidavit saying, "Well, give us our money back then and we'll give it," because the bank's, it's not the bank's money, "Please let us have our money back, we'll do something else about it," and Westpac said at that point it would do that if there were authenticated SWIFT messages to support that from each bank, that then confirmed authority and if the Court ordered it and that's how the matter was resolved. Now, there may be a question, let's say a person comes in with a deposit of a million dollars at the bank and then there's an unusual transaction, the bank says, "Well, hang on, that's for your customer. Why are you

taking this out in travellers cheques made out to you?" and he says, "That's none of your business," and the bank says –

TIPPING J:

You mean this is a servant of the company or a director, or something like that?

MR STEWART QC:

Yes, yes and he says, "Well, that's none of your business, I'm afraid," and he says, "I've deposited the money, give it back to me then." Now, if the bank believes that there's an, understands there's a fraud there, is it off the hook completely by relinquishing the company's money back to this director who it's concerned is involved in a very unusual transaction or should it say, "No, I'm not satisfied that this, that you've got proper intention for this money." Now, it would be a great thing if you'd said the bank can just pass it back and then they're off the hook. They can't be complicit or held to have dishonestly participated in or assisted any breach of trust or fiduciary duty. Now, I don't believe it's that easy, Sir, for myself but there's no authority on that and I think most bankers would be surprised if they could simply solve the problem by handing the money back to the suspected fraudster.

TIPPING J:

Well, assume for the moment that the threshold for denying the mandate is not reached at that time, but it later emerges that they were, in fact, unknowingly, if you like, or, well, of course, if they were unknowing then, of course, they wouldn't be liable anyway so I suppose there's an element of circularity in here which is –

MR STEWART QC:

It is and in lots of ways the bank, who's on inquiry, is in a much more invidious position than a bank who doesn't know.

TIPPING J:

Quite.

MR STEWART QC:

Now, I think what's required of the banker who's on inquiry is really what we all want to know and this is why, I think I said in the leave application, there's not yet a New Zealand case dealing with what is required of the bank who is on inquiry, and I mentioned, not for the purpose of any indication in this case, the House of Lords

decision in *Royal Bank of Scotland v Etridge (No 2)* [2002] 2 AC 773. They spent some time saying what a bank can do to insulate itself –

TIPPING J:

But you're only dishonest, looking at it from a cause of action against the bank point of view, if you either know or deliberately refrain from blind eye knowledge, as Lord Scott put it so –

MR STEWART QC:

Yes, that's right.

TIPPING J:

– so you're not vulnerable to a cause of action unless you are found to be in either of those two states.

MR STEWART QC:

Yes, so let's say and I think we're getting right to the point here, let's say that the bank is on inquiry and he asks the question, and he gets an answer and he says to himself, "My word, this won't do, you know, but it's taken too much time and there's a lot of pressure. I'm just going to pay it out anyway," that he's personally not satisfied and an honest banker would not be satisfied with that explanation and why not? Because of many ways to answer the question this doesn't come near it, and he pays it out and in the witness box he's got to say, "I wasn't really satisfied but I, you know, I just had to deal with it because otherwise I was going to get sued," or whatnot. He is then up for knowing assistance or dishonest assistance, we must call it now, and that's the predicament.

Now in this case, maybe the bank thought, well, the half a million dollars, or whatever it is it had to pay by way of interest, was a reasonable premium for the risk of being sued for $26 million. But it shouldn't be in that position if you accept, from the facts, that there were legitimately solid grounds for being on inquiry and the explanations never got near it.

TIPPING J:

The grounds for – let's take this in steps. The grounds for being on inquiry were the dissonance between the shareholders and the payees.

MR STEWART QC:

The mismatch.

TIPPING J:

A mismatch, yes. That's the ground for going, for being on inquiry.

MR STEWART QC:

Well, first of all they were told that all the money was going and the sums were mentioned going to shareholders that far exceeded whatever ultimately went there, and this, these were emails given to the bank to give it comfort about the transaction, and they were told there were only $450,000 in consultants' fees, and so that was their understanding, and when they get the payments instructions they notice that over $26 million is going to non-shareholders and people not listed in the escrow agreement. So why is this, they ask? That's a legitimate question and I would think a banker who is concerned to understand a transaction at that level would want to know, and they just get told it's okay. They don't get told it's consultants' fees and they don't get told why, what's the nature of the payment, or why, if it was consultants' fees, how come it's so much?

YOUNG J:

Prodem's quite a well known company. It's sort of –

MR STEWART QC:

Well –

YOUNG J:

Not in New Zealand.

MR STEWART QC:

No.

YOUNG J:

But in Latin America and in the world of microfinance, it was a sort of exemplar of a particular business model. But it was a closely held company, wasn't it?

MR STEWART QC:

Well, no, not really. There was – well, 75% of it was owned by a society or a group.

YOUNG J:

But weren't they mainly the employees?

MR STEWART QC:

Not – no evidence on that, Sir.

YOUNG J:

And the sale itself was a very controversial one?

MR STEWART QC:

I'm not sure. No evidence on that either. I mean, you have more information than the Court did and I do.

ELIAS CJ:

Did you Google?

YOUNG J:

Oh yes, Google but it was a very controversial one because Morales as the president of Bolivia and Chávez as the president of Venezuela should have been, one might have thought allies with similar social views but this was seen as something of a challenge to Morales.

BLANCHARD J:

But the bank couldn't be expected to know all that sort of thing.

YOUNG J:

No, no, I know, I understand that but it is, what –

TIPPING J:

So it's the shift from what they were originally told to what they were then told to do that really put them on inquiry?

MR STEWART QC:

Yes.

TIPPING J:

And then being on inquiry, your submission is that they just got nothing which, in effect, fuelled the fire of suspicion?

MR STEWART QC:

Yes and they were asked for it several times.

YOUNG J:

What is there in the material about who the shareholders were because this was – this all is for 94% of the shareholdings, isn't it?

MR STEWART QC:

Yes, 94%, that's right. Maybe the 6% was already held by somebody else, I'm not sure Sir.

BLANCHARD J:

Mr Stewart, it might help if you actually took us through the documents.

ELIAS CJ:

Yes, I think that would be helpful.

BLANCHARD J:

Starting from the beginning, of what the bank was told at the beginning and what they were told at various points.

MR STEWART QC:

Yes, I was headed there. You will find this chronology comprehensive and just while I've got that in my hand, can I make a correction on page 3 please, of the chronology and it's under item 13, the second of last line, the instructions are at volume 4, it should read 591 to 600.

ELIAS CJ:

Sorry, 59?

MR STEWART QC:

Should read 591 to 600.

TIPPING J:

Volume 4?

MR STEWART QC:

Yes.

TIPPING J:

I've got volume 3 here.

MR STEWART QC:

No –

ELIAS CJ:

You're not looking at the chronology.

TIPPING J:

I'm sorry, I'm looking at a separate chronology, I beg your pardon.

MR STEWART QC:

So, if we start at page 2 of the appellant's submissions, paragraph 9, "The evidence is that 94% of the shareholders of the Bolivian bank granted Mr Anker a power of attorney," a translation of which is in the bundle, "authorising him to search for a buyer of their shares. Mr Anker was a minor shareholder, he had 0.78% of a share… The power of attorney authorised Mr Anker to represent Prodem's shareholders to enter into all necessary documentation to give effect to the sale and enter into an escrow agreement once a buyer was found."

Now, using the power of attorney, Mr Anker appointed A&L Management Limited as Prodem's consultant to assist Prodem with finding a buyer. Now, that reference should be –

ELIAS CJ:

Mr Stewart, just pause a moment. You're going through the matter in the chronological order but was this information given to Westpac and if so, when?

MR STEWART QC:

When the proceedings were issued about the power of attorney, for example, not before.

ELIAS CJ:

I see. It didn't have the power of attorney at the time it received the mandate?

MR STEWART QC:

No but it understood and accepted what it was told, that Mr Anker held a power of attorney.

TIPPING J:

Is there any –

ELIAS CJ:

Should we not start with the – and really it's in your chronology, the information and the correspondence with the bank, at the beginning?

MR STEWART QC:

Right, yes, yes, all right, let me do that.

TIPPING J:

Yes, I agree with that, otherwise we're losing track of what is important.

MR STEWART QC:

Yes, well shall we stay with the chronology. The bank didn't have two. Now, what happened, the first contact was a contact from the 3rd of May and Mr Van Oosten of MAP contacts Westpac about the possibility of Westpac receiving 45 million US dollars –

McGRATH J:

Mr Stewart, would you mind not departing from the microphone too much, thanks.

MR STEWART QC:

Sorry Sir, yes. Now, the first – this is the important thing. Item 4, at volume 3, 419, if we go to that.

ELIAS CJ:

Volume 3, 419.

MR STEWART QC:

This is the first written communication that Westpac gets from Mr Van Oosten. He says how he knows Mr Lara. He says that Mr Lara is a principal of that law firm, it turns out that he's not. He says how he met Mr Lara.

BLANCHARD J:

When did the bank find out that Mr Lara was not a principal?

MR STEWART QC:

After the inquiry. When they started looking into this transaction.

BLANCHARD J:

Right.

MR STEWART QC:

Now, he said –

ELIAS CJ:

Before proceedings were issued?

MR STEWART QC:

In the period from around, in early February – yes, I believe before the proceedings were issued. Yes, they were – well, Westpac said in their affidavit, gave evidence about it. Now, it then says in the third paragraph, "Enclosed is the correspondence received from the above connection and our reply, culminating in our discussions," and if we go to the attached emails –

TIPPING J:

I'm sorry Mr Stewart, it's obviously my fault, what volume are we in?

MR STEWART QC:

We're in volume 3 Sir.

TIPPING J:

Volume 3. We're looking at item 4 in the chronology, are we?

MR STEWART QC:

Yes, we are, at page 419. Now, if we go through to –

ELIAS CJ:

Sorry, in this letter, just before you go to the attachments, is this what you were referring to, at the bottom of the page, on the first page, "We would expect the bank's requirements will include the three due diligence of all matters as required by the bank"?

MR STEWART QC:

No, there was another letter where they –

ELIAS CJ:

I see. What does this mean?

MR STEWART QC:

Their last paragraph?

ELIAS CJ:

No, the acknowledgement that there will be banks – the bank will have requirements which will include due diligence of matters that it would require due diligence of.

MR STEWART QC:

Oh, probably the money laundering and anti-terrorist act. In other words, the bona fides of the transaction and we do come to that in this email that I'm going to.

ELIAS CJ:

I see, yes.

MR STEWART QC:

At page 422, at the bottom of the page, this is a letter to Mr Martin Fine of MAP, from Mr Lara. Now, Mr Lara was held out to be a principal of that law firm, Arias & Arias, he wasn't. He was held out to be a director of A&L and he wasn't but he says, "It was great to catch up with you afternoon. I'm going to explain here the case I mentioned to you over the phone. I have a group of bank owners from Bolivia selling their small bank, the reason being a change of Government. They are very worried about the new Bolivian president, Evo Morales. This new president is very socialist

and they believe it's going to be very hard for the private sector to do good business during Morales' mandate. On the other hand, the Venezuelan bank that wants to penetrate South American countries. They are very interested in buying the Bolivian bank. I would like you to let me know a few facilities for us, your escrow account facility and even your custodial services for a share of the bank for sale. The buyer is a very well-known Government-owned Venezuelan bank and the other is a great small bank from Bolivia with all the documentation in order. I have with me the auditor's shareholders information. I also have a copy of the bank's fitch rating. Here is the opportunity for us. Chávez, the Venezuelan President, is not very fond of the USA and he would like to use an independent bank, a bank outside the USA. When I mentioned New Zealand, I just got the job right away. The buying entity will feel much more comfortable sending the payment money to the seller through a bank trust, New Zealand bank trust account. From there, the funds will have to be distributed to the shareholders. The selling price is 45 million. The shareholders have shares with different prices. All of these prices will be in the paperwork. Some shareholders will receive 17 million and another group will receive 12 million."

Well, that's more than they ever got anyway, those two amounts and so on. "The directors have some special share remuneration. These values are also described in the paperwork we are preparing. Some of the larger shareholders would like to keep the funds outside Bolivia. Some others would like their funds back in Bolivia. As you can see, the funds will come into the trust account and then the funds will go to other accounts. I'll need to know from your end the expenses associated in doing this and what you need me to do to have the funds received in your escrow, please. Please let me know if you can do it and the cost associated. I have told the seller that we will be requiring 450,000 fee and he said that this is okay to pay for our work. Also, the person that introduced me to the deal is going to keep the hundred," I'd say that's $100,000. "As you can see, there are some expenses already. I hope you can do this work for us at a good price. I'll be waiting for your reply." So –

TIPPING J:

Ernesto is, what's his full name?

MR STEWART:

Ernesto Lara. Now, he goes back on page 422, "Hi Ernesto, further to your email, I've done some investigation into the feasibility of the transaction here in New Zealand. We would have to involve a New Zealand bank and set up US dollar

accounts et cetera, that's fine. The bank will want to investigate the bona fides of the transaction and have Treasury approval before it will consent to the transfer. So what will be required is a copy of the agreement and contact details for the parties so that the bank can independently satisfy itself in relation to the transaction. –

ELIAS CJ:

Note the next paragraph's rather interesting.

MR STEWART:

Yes and he said, "Our fee will be, cost about $US50,000 to $US75,000" and the rest of it on page 421 is not that – but that's what they were told at the outset. Now, item 5, we said in July '06 that A&L –

YOUNG J:

Sorry, what page?

MR STEWART:

I'm back to my synopsis, Sir, item 5, sorry, not the synopsis, the chronology. A&L identify BIV as a potential purchaser in July. There are various extensions of the mandate as it 90 day extensions. Now, nothing heard by the bank –

ELIAS CJ:

Why are there extensions and –

MR STEWART:

Because they had a mandate for 90 days and when the transaction wasn't progressing –

ELIAS CJ:

No, what I mean is, do we have the original, the first mandate? We've got –

MR STEWART:

Yes, we do.

ELIAS CJ:

– term extensions but do we have the –

MR STEWART:

Yes, Your Honour. The mandate is at – we get the agreement at page 3, item 11 and that has the purchase price in it.

ELIAS CJ:

Sorry, page?

MR STEWART:

Volume 4, 466 and the shareholders are named there on the first page at 466. The price is at page 479 and Westpac got this document, "MF5" means Martin Fine, exhibit 5, when the proceedings were issued. Now, Ma'am, I'll just find that mandate for you, Your Honour. It's at volume 3, 371.

TIPPING J:

And this is the document of which these extensions took place, is it, Mr Stewart?

MR STEWART:

Yes, Sir. Now, it seems that this one we've, we've got the name of the vendor shareholders at page 374 recorded in the body of the mandate. The mandator is Mr Anker and A&L is the advisor, they're the parties to this agreement. When they find the buyer in July – by the way, A&L according to Mr Fine's evidence, that's volume 2, page 128 at paragraph 4, A&L was charged with the identification of interested purchasers for the 94%. The valuation of the shareholding, the negotiation and structuring of the sale including entering into an escrow agreement and to act as intermediary between Prodem and the escrow agent, that's MAP and to act as intermediary between Prodem and any interested purchaser. So it would appear that A&L did the bulk of the work including the valuation of the shares and the negotiation.

BLANCHARD J:

I take it this doesn't say anything about A&L's fees?

MR STEWART:

It does but it doesn't tell you how much. I'm pretty sure it did. Page 380, "Fees and expenses."

TIPPING J:

But I understood you to say that this document didn't come to the notice of the bank until quite a lot later, Mr Stewart, is that…

MR STEWART QC:

Westpac got this document, Sir, on the 11th March, when the proceedings were issued.

TIPPING J:

Yes. Well, as the Chief Justice had pointed out, it's quite difficult to sort of follow this through when we're sort of interleaving documents that didn't come to Westpac's notice until –

ELIAS CJ:

It's my fault, because I asked for the mandate, because there were extensions of mandate which were provided, were they, yearly –

TIPPING J:

Ultimately –

ELIAS CJ:

They were attached to the material that – to the letter, were they not?

TIPPING J:

I think they were attached to show that the mandate was still alive, yes.

MR STEWART QC:

Yes, yes, there were – that's right, Your Honour, there was, the bank – when the transaction came in, the bank was –

ELIAS CJ:

Yes.

MR STEWART QC:

– told that in December '06, that it was anticipated, when the money came in, it would settle in about a week. And, of course, the bank would ring up and say, "What's happening now?" and throughout 2007 these enquiries were made on a regular basis

by the bank and what they would do, they would produce an extension of the mandate, saying –

ELIAS CJ:

Yes.

MR STEWART QC:

– there were difficulties with the Bolivian authorities.

TIPPING J:

When did the bank first overtly start making enquiries on account of its concerns, Mr Stewart, because that's probably getting close –

MR STEWART QC:

Right.

TIPPING J:

– to when we're going to have to focus on, isn't it?

MR STEWART QC:

Yes, Sir, and what happened there – I do have to leap ahead onto documents, but, in December, in January the 31st 2008, which is on page 4 of the chronology, there's a meeting of some bank representatives and some, two gentlemen from Prodem, and Westpac get further instructions, and I have to deal with these payment instructions specifically because there are lots of unusual features about those. It was after that meeting – at that meeting, Westpac was told that the transaction is about to settle, it's not far away, and so Westpac wrote to MAP and said, "We're going to open the payment instructions," they had – they had been given these instructions in a sealed envelope and told, "They are to be opened and actioned when MAP advises you that the transaction has been completed," and the bank thought, "Well, that doesn't give us much time," so they decided in early February, about February the 4th, to open these instructions, and they also got a copy of the company search of Prodem, from Bolivia, and they asked for a copy of the escrow agreement, and it was then that they could see that there was a mismatch between the payment instructions and the shareholders of significant size. And so it was February, throughout February that they were looking at this.

Now, they did go off on a false trail, in that a Mr Thompson – this is at item 20 on the 8th of February – sent a SWIFT transmission to BIV Caracas seeking explanations about matters which, in my submission, are really money laundering issues. So, when Westpac looked at these payment instructions it made this inquiry. Now, what Westpac had failed to register is that it had been sent a letter which told them that BIV was no longer the purchaser, but the purchaser was another Venezuelan company called BANDES, and when Westpac contact BIV, BIV said, "We don't know anything about this, this transaction never proceeded, don't pay the money out."

ELIAS CJ:

Well, it was slightly ambiguous, the Court of Appeal I think said, the communication. BIV said something like, "The transaction hasn't proceeded," which could have been a reference to its participation in the transaction.

MR STEWART QC:

Oh, it went on to say, "Don't pay the money up, we want to," they said, they meant recoup, "But we want to recuperate [*sic*] the monies, please keep the money secure, they shouldn't be paid out." Now, that confusion reigned for about –

ELIAS CJ:

You're going to take us to that, are you?

MR STEWART QC:

Yes, I am. At the end of the day, when Westpac, about a day after it got the instructions to pay out, or two days after instructions to pay out, it got clarification from BIV that all was in order and it's no longer involved in the transaction. So, it was really getting quite alarmed about nothing. But – so, at that point it thought, "Well, this transaction's not happening, and we need some SWIFT instructions, SWIFT messages, to pay the money back to the person who paid it in," that's BIV. And then BIV said, "Well, no, it is proceeding through another entity." At that point Westpac reviewed the mismatch and told MAP that, because of the mismatch between the shareholders and the recipients, it wasn't able to pay the money out. And then I take you through what happens there.

TIPPING J:

Item 28, it looks as if Westpac were still diverted with the BIV.

MR STEWART QC:

Yes. Now, just on that, can I just perhaps put it this way to Your Honours? I deal with this over about three pages of my submission, in a chronological order, and that starts at page 8. We don't need to delve into that, there's some pretty alarming communications from the BIV –

TIPPING J:

Well, on the face of it, yes.

MR STEWART QC:

Yes. "We're conducting an investigation", and so Westpac thought that they were in the middle of something that was quite ugly.

BLANCHARD J:

But that's all really an irrelevancy.

MR STEWART QC:

It is, but – it is, but it does explain why Westpac was diverted from the mismatch that they had started to identify in early February, because it didn't think this thing was going ahead at all. When it was told that it was an irrelevancy and it, it then focused on the mismatch.

TIPPING J:

Did it accept that it was an irrelevancy at the time?

MR STEWART QC:

Yes, yes, it did. By midnight on the 28th of February, two days after the instructions to pay out came, it had got a message, an email from BIV Caracas and BIV New York, referring to this assignment. Now, Westpac missed the assignment for this reason: when these monies first came into Westpac they were told to put them on nil deposit, because it was going to settle in a week or so. That was December '06. It wasn't until November the 20th '07, nearly 12 months later, that a letter came in to MAP and MAP was instructed to pass the letter on to Westpac and it never did, for some reason, we don't why. But towards the bottom of the second page of that letter there's a small reference to the money being placed on a certain investment earning an interest rate, and it wasn't until the 24th of January the following year that MAP

instructed Westpac to place the money on deposit, and sent that letter to Westpac as containing the authority for the money to be on deposit.

TIPPING J:

It must have money for jam for Westpac in the meantime.

MR STEWART QC:

Yes, well, I don't – I'm not sure – well, actually, it wasn't.

TIPPING J:

I mean, they had this huge sum of money and they weren't having to pay interest on it.

MR STEWART QC:

No, but, as the evidence shows, money was deposited with Westpac, Chase Manhattan Bank in New York, and money on call, even on deposit-earning interest, was earning about 2.25% interest. That's why the seven and a half percent hurt.

TIPPING J:

Quite.

MR STEWART QC:

So, now, the man in charge of this account was away for the four days that this letter came in, so a junior actioned –

TIPPING J:

I'm sorry, I didn't really mean my enquiry to divert you into this much detail, Mr Stewart –

MR STEWART QC:

No, so –

TIPPING J:

– I just wanted to know whether Westpac became aware of and accepted that this BIV thing was a diversion –

MR STEWART QC:

Yes.

TIPPING J:

– and that there had been this assignment to the BANDES.

MR STEWART QC:

Yes. And all that was outstanding then – Westpac said, "Okay –

TIPPING J:

That problem went away.

MR STEWART QC:

Almost, but it wasn't the reason for not paying out. What Westpac had said was, when the money came in to Westpac's account it came in via an authenticated SWIFT message, and Westpac said to BIV New York and BIV Caracas, "Well, thank you for that, we understand, will you please send us an authenticated SWIFT message telling us now to pay the money on BANDES' instructions," well, "and to confirm the assignment." It took a while for BIV New York to send its authenticated message, but it did, by about March the 4th, but BIV Caracas never did.

TIPPING J:

Is that relevant? It could only be relevant to when interest starts to run, wouldn't it?

MR STEWART QC:

Well, if it wasn't – that's right. If it wasn't for the fact of the mismatch, all it meant that until they got the SWIFT message they wouldn't have paid the money out and, in fact, when they had to give the SWIFT messages, in terms of the Court order, they all flowed in, in a couple of days, so there was no real delay on that. But that's putting the money back to BANDES.

TIPPING J:

But what seems to me to be the real significance here is when Westpac started to raise the alarm, so to speak –

MR STEWART QC:

Right.

TIPPING J:

– and then the response they got, and the basis on which they raised the alarm.

MR STEWART QC:

Well, let's go to that, and I agree with that, Sir. Page 11 of the submission, paragraph 44. And, you know, it's probably just as easy to follow this, I'll deal through the chronology, but MAP sends in the telegraph transfers for Westpac to pay the money out to the recipients. Now, we go over the next page to page 12. On 27 February – and this is at volume 5, 743, this is Westpac saying it won't pay. There are two issues: at this point the BIV confusion hadn't been cleared up, and there were two instructions that didn't have named beneficiaries, and under the international regulations they are required.

TIPPING J:

At this stage, it was the BIV problem which later resolved, and just this relatively technical point about the naming of the beneficiaries, rather than just giving their accounts?

MR STEWART QC:

No, Westpac also had the mismatch in their mind –

TIPPING J:

Oh, I see, but they didn't put in down on this paper?

MR STEWART QC:

No, because this BIV thing was so clear-cut from the BIV, and that's why I put the passage in there. The communication from the BIV was, "This is completely off the radar, do not pay the money up, the transaction never went ahead and we want all the money back." So, as far as Westpac was concerned, the mismatch didn't matter, because the money was going to be going back to –

TIPPING J:

That was the evidence, was it?

MR STEWART QC:

Yes, going back to BIV. Now, when MAP get this letter, on the 27th, they don't contact Westpac about this at all. But you see, at paragraph 49, overnight on Thursday the 28th Westpac receive a message from BIV, a complete about-turn, and they say, "That's a mistake, it's been assigned, please pay the money to MAP." On Thursday the 28th of February, paragraph 51, MAP provides the names for the, the missing names for the two instructions. However, one name provided in respect of one of the payment instructions was for US$11 million to an entity called "Sunny Services Corporation", a British Virgin Islands company, wasn't a Prodem shareholder and neither did its name appear in escrow agreement. Now, what happens next is that really on the Friday the 29th of February – now, I'm bearing in mind at this stage Westpac have still not got a response from MAP about the BIV situation.

But at paragraph 54, and this is at document, volume 5, 751, which would have – now, at this point, when Westpac sends that letter out, it says at paragraph 54 of the synopsis, Westpac was able to establish that $25 million, 51%, of the purchase monies were being paid to recipients who are not listed in the escrow agreement and were not Prodem shareholders. And Westpac says at that point, "It may be that you would like to make an application to the High Court." Then the next page, at 752 of volume 5 is MAP's response, at 7.15 on the Friday night, and it's a bit of an odd explanation, in my submission, in –

TIPPING J:

That reference to the indemnity, in the second paragraph of this letter, was that an oral request or was it a written request?

MR STEWART QC:

Well, there's no evidence of it.

TIPPING J:

No evidence of it?

MR STEWART QC:

No, but an indemnity –

TIPPING J:

But there's no dispute that it was requested, that this is accurate?

MR STEWART QC:

Not – well…

TIPPING J:

Since Westpac seems to be suggesting that it would pay if MAP indemnified them.

MR STEWART QC:

Well, they wouldn't have said, because MAP's just a small limited liability accounting firm.

TIPPING J:

Well…

MR STEWART QC:

And there's no evidence that Westpac ever requested it. And, I mean, an indemnity –

TIPPING J:

So there's no evidence –

MR STEWART QC:

No.

TIPPING J:

– other than this statement in this letter, that the matter is not dealt with in evidence at all?

MR STEWART QC:

No, Sir. It's a small three-man accounting firm in Hamilton. We're talking about a concern over 26 million.

TIPPING J:

No, I understand the point.

BLANCHARD J:

So they're being told that the decision about who's going to get the money has been determined by the escrow agents and the authority of the attorney acting for the shareholders, –

MR STEWART QC:

That's right.

BLANCHARD J:

– who was the chairman of Prodem?

MR STEWART QC:

Yes. And there are, there is an issue about the extent to which Mr Anker is in control of these funds, which we come to, and about $8 million of this money. So, nothing there about why 25 million is going to people other than shareholders and, simply told, "The fact that the disbursement instructions do not reflect parties to the escrow agreement does not mean that those parties, or, is there a shareholder not being compensated." You could read that to mean it's being paid to a nominee or an agent of the shareholder.

BLANCHARD J:

Well, the payment's being made under the authority of the attorney acting for the shareholders.

MR STEWART QC:

Yes.

TIPPING J:

Being the very same man to whom they committed the carriage of the transaction.

MR STEWART QC:

Yes, and the – who instructed A&L and authorised A&L to value the share and do everything.

TIPPING J:

Whose signature is appended to the original wiring instructions.

MR STEWART QC:

Well we don't have that, we never got those. We've got wiring instructions signed by A&L, well actually I'll come to these instructions which were important, they were unsigned. When they were exhibited in Court they were different instructions, different details and signed by A&L. The position gets more confused, not clearer, as the – as we go down the track. But that, in my submission –

TIPPING J:

Here is a firm of accountants in New Zealand telling a New Zealand bank that this information here, your submission involves the proposition that the bank was entitled to disbelieve or at least require further valid verification of this?

MR STEWART QC:

Well bearing in mind that this, MAP had also passed onto the bank information that this money was to go to pay the shareholders of this bank and these were the fees, about $600,000 worth US. Now the bank is simply saying, why is 26 million going to non-shareholders, they're not known to the escrow agreement. Now there should be a simple explanation for that. Now obviously MAP didn't consider that was a sufficient explanation because over the page –

TIPPING J:

When you say MAP didn't, the bank didn't?

MR STEWART QC:

No MAP, itself.

TIPPING J:

I see. What –

MR STEWART QC:

At 752, if you go to 753, 15 minutes after that letter back to Westpac, MAP sends an email off to an Ernesto Lara seeking, "Can you please produce a letter from the attorney acting for the beneficiaries confirming that the disbursement instructions are in accordance with the wishes of the vendors. The bank is being difficult because of the flag that was placed on the funds by BIV and want to ensure the matter is dealt

with correctly." Well even then MAP is not actually telling Mr Ernesto Lara that the bank's concern on the 29th was the mismatch.

TIPPING J:

Well they do really, don't they –

MR STEWART QC:

Yes.

TIPPING J:

– suggest the beneficiaries are not – reflect the parties to the escrow agreement?

MR STEWART QC:

Yes, I'm sorry Sir, that's correct. And then –

TIPPING J:

Well this is all – what are you seeking to make out of this because frankly this is all that MAP could do at this stage. I mean to try and get further reinforcement for what was being asserted.

MR STEWART QC:

Well MAP would have appreciated the bank had been told something different, that the money was to go to shareholders, what the fees were and now there is this mismatch. So you're saying to Mr Anker, could you please explain. And you know why wasn't there –

TIPPING J:

Who is the trustee here, who's supposed to be committing a breach of trust, which the bank is fearful that it's going to be implicated in?

MR STEWART QC:

Well I think there's a series of them. You've got Mr Anker, who plainly is a, had a fiduciary obligation to the shareholders from whom he holds the power of attorney, and he appears to be controlling the transaction, and he has instructed A&L as a consultant to the sale and A&L have retained MAP and the money is being held by MAP in a New York bank account with Westpac.

TIPPING J:

You say by that chain MAP should be regarded as holding the money on trust for the ultimate correct beneficiary?

MR STEWART QC:

Yes and MAP might be innocent but, yes, the ultimate beneficiaries are the shareholders. That's the basis on which Westpac receipted the monies.

COURT ADJOURNS: 11.34 AM

COURT RESUMES: 11.54 AM

ELIAS CJ:

Yes Mr Stewart.

MR STEWART QC:

If you go to paragraph 57 of the synopsis, Mr Lara gets a letter at volume 5, 756, from Mr Anker and really paragraph 1 and 2 is what he says.

BLANCHARD J:

But why couldn't the bank take the view that Mr Anker had a power of attorney, the shareholders had entrusted him with a power of attorney, he was acting in accordance with the power of attorney and if there was a problem that was between him and those who'd given him the power of attorney, it wasn't for the bank to start making enquiries into that relationship?

MR STEWART QC:

Well, and I would agree with you Sir if it wasn't for the fact that the instructions conveyed to Westpac conveyed a very different transaction and it revealed a transaction whereby for some reason 50% of the purchase price, we don't know what the nature of the payment was at this stage, is going to people other than the shareholders. Now – so one would have thought that Mr Anker could give a very simple explanation in less than a paragraph about that.

BLANCHARD J:

Well maybe he thought it was none of the bank's business.

MR STEWART QC:

Well then he could at least say why the bank had got a different message when the account, when the bank was asked to open the account and receive the monies. Why was it that he was given these emails that conveyed a completely different position and suggested fees of $650,000 and not 26 million and it would be, in my submission, such a straightforward simple explanation and the matter could have just rolled on as Mr Anker wanted it to.

BLANCHARD J:

Where is the reference to fees of 26 million?

MR STEWART QC:

That comes, at this stage, at this point the bank doesn't know that. What they do know is that only 25 million or 24 million is going to shareholders and they just wanted to know –

BLANCHARD J:

Well they don't really –

MR STEWART QC:

They don't know what the payment –

BLANCHARD J:

They don't know that the money is not going to shareholders, it's not going to the people under the shareholders' names but it may well be going to the shareholders through nominee companies or in some indirect way.

MR STEWART QC:

Yes, possibly.

YOUNG J:

Where is the fee explanation, where does that appear?

MR STEWART QC:

Yes I'm coming – we don't get that until the 11th of March when the proceedings were filed.

YOUNG J:

Right.

MR STEWART QC:

Can we just stay with this chronology. I'm happy – I'm not far away from that Sir.

YOUNG J:

That's all right. Thank you.

MR STEWART QC:

So the objection here, or the concern here is the turn around in what the payment was explained to be, and Mr Anker doesn't derive any documents, evidencing the shareholders' alleged designation and approval of payments totaling $25 million going elsewhere than to them and it could well be, I agree Your Honour, that it could be going to their agents. Now what happens now, this is correspondence which doesn't take the matter any further. At paragraph 65 there are two letters exhibited by Mr Anker and a BANDES representative which Westpac never got until the proceedings were issued. That's at paragraphs 65 and 66, I mentioned that. Now what happens, and we get to these instructions now. MAP issues proceedings at paragraph 67 on the 11th of March and Mr Fine in paragraph 22 of his affidavit, in my submission, misrepresented the position when he says "on 26 February I provided Westpac with transfer authorities to enable the disbursement of funds to Prodem shareholders". In fact only over half the share purchase price was being paid to entities who were not Prodem shareholders.

TIPPING J:

Well we don't know that for sure. I mean they weren't nominally, as my brother says.

MR STEWART QC:

That's right, now –

TIPPING J:

It may have just been a rather loose conclusion.

MR STEWART QC:

It could have been sent to their agents.

TIPPING J:

It could have been sent to a nominee, it could have been sent to a trustee.

MR STEWART QC:

Could he not just say that and then that's fine. That's absolutely fine.

TIPPING J:

Well, I don't think anything is going to turn on whether he misrepresented the position.

BLANCHARD J:

Wasn't the bank effectively told that it could act on Anker's instructions because he was the attorney.

MR STEWART QC:

Well that's what Mr Anker was saying, yes.

BLANCHARD J:

Yes.

MR STEWART QC:

They knew that Mr Anker had these ultimate beneficiaries who were his clients –

BLANCHARD J:

Did the bank ask to see the power of attorney?

MR STEWART QC:

Not before proceedings were issued.

BLANCHARD J:

No.

ELIAS CJ:

Did it know, it did know, that's referred to in the initial letter, isn't it?

MR STEWART QC:

Yes, yes, it did understand, it did understand that Mr Anker was the attorney but they didn't have a copy of it.

BLANCHARD J:

But if it didn't have a copy of the power of attorney, how could it know that there was something amiss, and how could it be dishonest in those circumstances to pay in accordance with what Mr Anker was saying?

MR STEWART QC:

We're back where we started. They didn't know. What they get are specific advice as to this transaction and what it entails and that all the detail's in the paperwork, it's all in the contracts, and they understand it's all going to shareholders. Absent that, there wouldn't have been a problem, but now they get these transfers where the money's going off to other than shareholders. Now if Mr Anker comes back and says, "These are representatives of the vendors, and, oh…" Well, that's fine, but he doesn't give any explanation other than to say it's all okay. Now what could be more demanding or more difficult than for Mr Anker to say that?

BLANCHARD J:

Was he obliged to?

MR STEWART QC:

Well, if he's not obliged to then he could – he could be required to reconcile what's happening there with what he conveyed in those emails, what was conveyed to him in those emails, presumably with his authority from A&L, and that conveyed that – well, they mentioned two dollops of shares up to 27 million going to the shareholders, and that amount didn't get to shareholders, and he said then there are other amounts for other shareholders. So somewhere the position has changed.

Anyway, then what happens is we, Mr Fine's affidavits are incorrect in another respect. Paragraph 68. He said that on 11 December, and this is where we come to these instructions, he gave Mr Morrison an envelope containing instructions from A&L to action the transfer required by Prodem and its shareholders, and he purported to exhibit those as MF10. However, those weren't the instructions that Westpac got.

Now if we just go to –

TIPPING J:

I just have some slight conceptual difficulty in carrying all these in a factual inquiry beyond the point at which Westpac says, "We're not paying," because if it should have paid at that time, nothing else matters.

MR STEWART QC:

Well, if you find that Westpac had no basis to be on inquiry and it should have paid –

TIPPING J:

Well, never mind the on inquiry, but if the position – if it was entitled not to pay at that stage, I would be inclined to accept that nothing that happened further would have altered that, but the crunch surely is as to whether or not it should have paid at the time we're looking at here, not when affidavits start to be filed, misleading or otherwise.

MR STEWART QC:

Well, Westpac was saying, you know, perhaps to get some local solicitors or file some affidavits or something like that.

TIPPING J:

It can't avail them if the Court holds, and I'm not saying that's my view, but if the Court were to hold that they should have – that Westpac should have paid on or around the 4th of March, then what happens later surely is of no moment.

MR STEWART QC:

Well, if you say that Westpac had made the inquiry and that the response it got was sufficient to allay its concerns, or its anxiety about it –

TIPPING J:

Or whatever the correct test is.

MR STEWART QC:

Or whatever the correct test is.

TIPPING J:

Whatever the correct test is, that Westpac hasn't met it at that time, well, that's the end of the matter, isn't it?

MR STEWART QC:

Well…

BLANCHARD J:

If the test is knowledge or wilful blindness as to fraud, can you really say that it was blindingly obvious on the 4th of March that a fraud was being committed?

MR STEWART QC:

Well, you have to – there's a difference between having firm grounds to suspect that there's fraud and fraud being blindingly obvious.

BLANCHARD J:

Well, as I said, if the test is one of wilful blindness, actual knowledge or wilful blindness, then it's got to be blindingly obvious that there's a fraud, otherwise you've got to pay.

MR STEWART QC:

Well, I've never – none of the authorities put the test that high. If you're on inquiry, you make the inquiry. Now let's assume the bank manager says, "There's something not right here. We've been told one thing and now something completely different has happened." So he says, "We should make inquiry and just get a simple explanation. I'm sure if there is one, we can all move on," and he doesn't get anything other than an assertion "it's all okay". Now, what I'm submitting is an experienced bank officer would be most uncomfortable, having been put on inquiry, and getting a letter of this nature, and simply disbursing the cheques, because what put him on inquiry – and instructions, initially cost, particularly as to fees, so where's this other 26 million going?

TIPPING J:

Could you be precise, Mr Stewart, as to what you say the test ought to be? What is your submission that in these circumstances, what level would you invite the Court to adopt as the test for a defence, if you like, to not answering the mandate?

MR STEWART QC:

If matters come to the knowledge of the bank, which put it, raises a concern that money may not be being paid to those properly entitled, and that that concern has a solid foundation, and I would say a solid foundation is when you've had the transaction explained to you and then that something quite contrary appears to happen so you ask a simple question. The –

TIPPING J:

So a concern on a solid foundation?

MR STEWART QC:

Yes. Yes, it has to be well-founded. It can't be just a level of, level of unease about it.

TIPPING J:

So if you have a bank has a concern that the customer is going to disburse or make use of the funds that are prima facie the customer's in a way that's dishonest or in breach of trust –

MR STEWART QC:

Not authorised, yes, not going to the authorised recipient.

TIPPING J:

– then the bank is entitled not to answer the mandate?

MR STEWART QC:

No, it is on inquiry. The bank is entitled to ask the question, seek an explanation, otherwise there's no point in having an inquiry, and I don't know that it – if you – if the explanation comes back, satisfying –

TIPPING J:

Well, say the explanation takes you nowhere, as you assert here, then the solid – you still have a concern –

MR STEWART QC:

Yes.

TIPPING J:

– on a solid foundation because it's not been dispelled –

MR STEWART QC:

Yes, and if anything –

TIPPING J:

– and are you then entitled not to answer the mandate?

MR STEWART QC:

Yes, because I say that if anything, the concern is heightened by the inadequate explanation where there should be a very simple explanation.

McGRATH J:

I think the problem for me is whether that amounts to the dishonest assistance or wilful blindness notions as they currently stand on the key overseas authorities.

MR STEWART QC:

Why it should do, Sir, is because the bank manager, if he paid out, would be paying out because he's asked a question, because he has concerns, and he has satisfied himself that the response doesn't allay those concerns. So why does he pay out? He pays out for no reason really because he's –

McGRATH J:

I think that you are advancing reasons in support of your approach, but do you agree it is a different approach to the concepts of dishonest assistance and wilful blindness as explained in the recent English authorities?

MR STEWART QC:

No, I don't. I think that it is wilful blindness. What he does at that point is to pull the shutters down and to pay the money, if he paid it out, because he's not satisfied. Now if the Court finds, well, you know, a reasonable bank manager, or a bank manager in that position, should be satisfied with that, with no further explanation, no reconciliation of what was said earlier, and just pay the money out.

McGRATH J:

Well, just on the cases, in your casebook, and added to which is the case Mr Gustafson's casebook, can you just give me the reference to the passages that say that's wilful blindness?

MR STEWART QC:

Well, what they do say wilful blindness is, is when you don't ask a question or a further question because you don't want to know the answer, or for fear of learning the truth. Now what happens with the banker who is on inquiry, asks a question, and it doesn't go anywhere near enough, and it may well be, he would concede, there could be a legitimate explanation for this, it could be that my concerns are well-founded and that this money is being diverted, it's an easy matter. Now I'll tell you where we get to on this.

McGRATH J:

The banker has to reappraise his position. He might have asked the question on the basis that he wants as much comfort as possible and the good answer, the positive answer would give that, but if he doesn't get a satisfactory answer, surely he has to reappraise his position and decide whether he would be wilfully blind to proceed, if he proceeded to pay out.

MR STEWART QC:

All right, well, the matter's not completely free of authority, and it was dealt with in the *Royal Brunei* case at tab 1 at page 389.

McGRATH J:

All right.

MR STEWART QC:

And the discussion starts under the heading, "Dishonesty" –

McGRATH J:
Yes.

MR STEWART QC:
– and about letter F His Lordship says, "In most situations there's little difficulty in identifying how an honest person would behave. Honest people do not intentionally deceive others to their detriment, honest people do not knowingly take others' property. Unless there's a very good and compelling reason, an honest person does not participate in a transaction if he knows it involves the misappropriation of the trust assets to the detriment of other beneficiaries. Nor does an honest person in such a case deliberately close his eyes and ears or deliberately not ask questions lest he learn something he'd rather not know, and then proceed regardless. However, in the situation now under consideration the position is not always so straightforward. This can best be illustrated by considering one particular area, the taking of risks," and page C over the page, unless Your Honours wish to get the flow of that?

Okay, down to D. "There difficulty here is that the differences are of degree rather than kind. So far as the trustee himself is concerned, the legal analysis is straightforward. Honesty or lack of honesty is not the test for liability. He is obliged to comply with the terms of the trust, his liability is strict. If you depart from the trust terms he's liable unless excused by a provision and instrument, or relieved by the Court. The analysis of the position of the accessory, such as the solicitor who carries through the transaction for him, does not lead to such a simple, clear-cut answer in every case. He is required to act honestly, but what is required of an honest person in these circumstances? An honest person knows there is doubt. What does honesty require him to do? The only answer to these questions lies in keeping in mind that honesty is an objective standard. The individual's expected to attain a standard which would be observed by an honest person placed in those circumstances. It is impossible to be more specific.

Justice Knox captured the flavour of this in a case with a commercial setting when he referred to a person who was guilty of commercially unacceptable conduct in the particular context involved. Acting in reckless disregard of others' rights or possible rights can be a telltale sign of dishonesty. An honest person," and here we go, "would have regard to the circumstances known to him, including the", just as to that, what he was told initially about the transaction, "including the nature and importance

of the proposed transaction," a lot of money, $50 million going to shareholders, "the nature and importance of his role," he's banking the money in a trust account for an agent, "the ordinary course of business," was this in the ordinary course of business? Nowhere near was this in the ordinary course of business, with half the money possibly going to other than the shareholders, "the degree of doubt," that was accentuated because of the conflict, apparently, from what he was told and what appears to be the case.

Now, this is important, "The practicality of the trustee or third party proceeding otherwise." Now, that's done by Mr Anker, the trustee or third party, giving a simple explanation. Instead of just saying, "Well, we're not telling you." Now, if he doesn't want to tell us, why doesn't he say that, instead of saying, "I assure you it's all okay"? And then next, "The seriousness of the adverse consequences of the beneficiaries." That goes without saying, there's 26 million might be diverted. And then it says, "The circumstances will dictate which one or more of the possible courses should be taken by the honest person."

Now, just up a bit it talks about a banker or a person who's guilty of commercially unacceptable conduct in the particular context. For me, that's a – here's an enquiry – he asks a question, he gets a feeble answer or an answer that's nowhere near good enough, but he says, "Well, me, myself, I'm not persuaded but I'll pay it out." Now, turn that around, if there is fraud, and the beneficiaries come back and say to the bank, "These people will disappear to the British Cayman Islands, et cetera, et cetera," you, right across this, you ask the question, you got this one, this letter from Mr Anker saying it was all okay, he's gone with the money too, you know, we've 26 million, very hard for the bank to come back from that. The question to the bank will be, "Well, why didn't you actually press for another explanation?

TIPPING J:

What basis did they have for suspecting, even at a low level, dishonesty on the part of Anker?

MR STEWART QC:

Well, Mr Anker – well, it's better to come to that. He seemed to be controlling –

TIPPING J:

All right, well, come to it later, if you wish.

MR STEWART QC:

Right. Now, I'm at my synopsis.

ELIAS CJ:

Can I just ask you whether, to explain why the bank was asking the right question in looking at the change from the original instructions? Because wasn't MAP, to the knowledge of the bank, a trustee which was obliged to disburse the money in accordance with the direction of the person with the power of attorney?

MR STEWART QC:

Yes.

ELIAS CJ:

And wasn't the material that was given sufficient to discharge that responsibility, the bank's responsibility? Because, why was it necessary for the bank to go further?

MR STEWART QC:

Well, it may be that MAP's innocent and MAP might be being duped on this as well. Why it was necessary? Because MAP was only relaying information from Venezuela and from Bolivia, and MAP wrote off and asked Mr Anker to provide a letter or something to explain that this is all in order. It was just a middle man. And Mr Anker was also a trustee for the beneficiaries.

ELIAS CJ:

Well…

MR STEWART QC:

I don't see that – there's no requirement –

ELIAS CJ:

But if the bank – as I understand your argument, it's the change in position that makes the bank suspicious as to whom the payments are to be made. But, on your argument, it would have been perfectly all right for the bank to pay out on the directions given by Mr Anker, -

MR STEWART QC:

Well –

ELIAS CJ:

– the original directions given.

MR STEWART QC:

Yes, if all of the, if the payment instructions were all to, the majority of them, to shareholders, as had been relayed to the bank, there would be no difficulty, that was in accordance as the transaction had been explained. It was because 50% of the money was not going to the shareholders, –

ELIAS CJ:

Or was not going to –

MR STEWART QC:

– as far as the –

ELIAS CJ:

– the accounts to which –

MR STEWART QC:

That's right.

ELIAS CJ:

– were originally to be paid.

MR STEWART QC:

Remember, every document the bank got listed the shareholders: the escrow agreement, the mandate agreement, the extension certificates, time and time again, repeated the list of the shareholders. When they opened the payment instructions, lo and behold, there are names that are not listed in any of those documents, and they're not shareholders. So, in my submission, a prudent banker would say, "Just please confirm to us what's going on here, why is it not as we understood it to be and can you explain why 26 million is going somewhere else?" What could be difficult?

ELIAS CJ:

I've just, it may be that I just don't understand the documents that I'm looking at, but I was looking at the original instructions that were given, and they don't seem to name the shareholders, they're all about the accounts.

MR STEWART QC:

Where are you looking, Your Honour?

ELIAS CJ:

Page 591, I think they…

MR STEWART QC:

So, this is our own document?

ELIAS CJ:

In your synopsis you say that –

MR STEWART QC:

Yes, volume – sorry.

ELIAS CJ:

– these are the original instructions –

MR STEWART QC:

Yes.

ELIAS CJ:

– and then you contrast them with the instructions that came to light in the proceedings.

MR STEWART QC:

Okay, 591 is what the bank got, all right?

ELIAS CJ:

Well, it's a whole lot of them.

MR STEWART QC:

Yes, all right. Now, a number of these names aren't shareholders and some of them don't have names at all.

ELIAS CJ:

Yes.

MR STEWART QC:

But if you then go forward in the book to page –

ELIAS CJ:

But this is what they had in the sealed envelope.

MR STEWART QC:

Yes.

ELIAS CJ:

And – I mean, are you saying that they couldn't have paid out on these, the bank couldn't have paid out on these instructions?

MR STEWART QC:

Yes.

ELIAS CJ:

You are?

MR STEWART QC:

Yes.

ELIAS CJ:

Okay.

TIPPING J:

Are these the original instructions?

ELIAS CJ:

Yes.

TIPPING J:

Yes.

MR STEWART QC:

Yes.

ELIAS CJ:

So it's not just the change –

MR STEWART QC:

Well –

ELIAS CJ:

– in instructions, you're saying that the bank before disbursing the funds would have to have satisfied itself that the funds were going to shareholders?

MR STEWART QC:

These instructions were delivered to the bank in December 2006.

ELIAS CJ:

Yes.

MR STEWART QC:

In the same year that they got the information about where all the money was going, so that's, in other words, these emails but they should have married up, or some explanation as to why the names in these instructions were different from the shareholders –

ELIAS CJ:

Well, as you said, some of these instructions don't have names on them.

MR STEWART QC:

Two of them don't.

ELIAS CJ:

Is it only two?

MR STEWART QC:

Two. Now what happens, when they then file the proceedings we get these instructions appearing at, for instance, page 605 and onwards. This is what Mr Fine exhibits. Now Your Honour if you compare 591 with 605.

ELIAS CJ:

Five nine?

MR STEWART QC:

591 which is what the bank got and 605 is what Mr Fine exhibited.

TIPPING J:

Everything's the same except the final item account number?

MR STEWART QC:

No except the bottom half.

TIPPING J:

Sorry?

MR STEWART QC:

591 stops at account 45221, right?

TIPPING J:

Yes.

MR STEWART QC:

But then there's nothing in the balance of the page at 591. In other words, reason for transfer is missing. Link to contract, missing. Authorised by, missing and this is signed by someone at A&L.

TIPPING J:

Well actually I rather – up to the middle of the page it's identical isn't it?

MR STEWART QC:

Yes it is. Now –

TIPPING J:

And all that's happened is that the one at 605 has more writing on the page.

MR STEWART QC:

Yes so let's go forward then to 605 – 6.

BLANCHARD J:

Sorry, what number?

MR STEWART QC:

Sorry, 610. Now this is involving Mr Anker. $8 million is going to stay in Westpac's account. Or instructions are going to come later, that's what that says.

TIPPING J:

Well that's the same as 596.

MR STEWART QC:

Yes, except for the bottom half.

TIPPING J:

Except for the bottom half.

MR STEWART QC:

Yes now the next page, from there on in the instructions are all, reason for transfer at page 611, payment of services rendered by Sunny Corporation, corporation British Virgin Islands, linked to contract, they are part of the A&L group and every single consultant's payment totalling 26 million was going to the A&L group. Now – so the bank said, well how is that? Never, ever explained, not in correspondence and not in affidavits, and still not explained today.

BLANCHARD J:

And what point did the bank hear first?

MR STEWART QC:

The 11th of March, the date the proceedings were filed. Not even an explanation, Your Honours, as to why they weren't given these signed instructions and only got the, the half page instructions earlier. Now, with respect, at this stage, assuming the inquiry is still going on and it hasn't stopped as Your Honour Justice Tipping thought it might do, or may even still do depending on Your Honour's decisions, this only adds to the concern and so why couldn't somebody, Mr Anker or somebody simply say –

TIPPING J:

Well I'm inclined to agree that if at the 4th of March they had good reason not to pay out, nothing happened subsequently to, at least inter partes, to change that.

MR STEWART QC:

Yes.

TIPPING J:

If anything the position may have been enhanced but my concern is really to focus as of the 4th of March and I would have thought it was unprincipled to assess the validity of their concerns by reference to something that comes to their knowledge after they've made the decision not to pay out.

MR STEWART QC:

Well let's say on the 11th of March affidavits were filed that explained all of this matter and they simply –

ELIAS CJ:

Yes.

MR STEWART QC:

– pay the money out.

TIPPING J:

That's fine.

ELIAS CJ:

Yes, they might not be in breach until later when the inquiry is answered to their satisfaction, yes.

MR STEWART QC:

That's right.

TIPPING J:

Yes, I accept that.

MR STEWART QC:

So –

TIPPING J:

But you can't reinforce yourself by something that comes up later –

MR STEWART QC:

No.

TIPPING J:

– can you, if you should have paid out on the 4th.

MR STEWART QC:

Yes, that's right, but then let's say what you then get later on is proof positive of the fraud.

TIPPING J:

Well, then it's bad luck.

MR STEWART QC:

Well –

TIPPING J:

Well maybe it's all right if you're bold enough to hang on.

MR STEWART QC:

You know, should it be bad luck? If you go the way that Lord Nicholls analysed it by reference to (inaudible) analysis and there is a doubt then the bank is in an invidious position. Looking at those factors, in my submission, the bank in this case would come within every one of those factors as justifying not paying out until further information was provided. I mean –

TIPPING J:

Well that's the key question, isn't it? As of the 4th of March.

MR STEWART QC:

Yes and also the key question is linked to that, the one that's always, I found the elusive one in this matter, a competent experienced bank manager is on inquiry, he asks the question and he's not satisfied. He says this still doesn't look right to me. Now if he pays with that state of mind and it is short in my submission he's right in the firing line for an action for wilful blindness.

BLANCHARD J:

Mr Stewart, one of the things that I was a bit surprised by is that we don't seem to have been given references to any of the leading banking texts.

MR STEWART QC:

Well we've got Paget.

BLANCHARD J:

What does it say?

MR STEWART QC:

Commercially it's in – well Paget's is probably one of the few banking texts that have developed this since the recent cases Your Honour.

TIPPING J:

It just simply goes through the chronology from *Barnes v Addy* (1874) LR 9 Ch App 244 onwards ending with *Barlow Clowes* –

MR STEWART QC:

All it says at tab 2 of the thin volume of authorities and its summary of the present position, [21.12], item 4, dishonesty on the part of the bank. This is judged from an

objective standard and in particular by asking whether the bank has been guilty of commercially unacceptable conduct in light of all the circumstances known to it, and that's just picking up really on *Brunei*.

TIPPING J:

Well with great respect the idea of commercially unacceptable conduct being equated to dishonesty is a little difficult. I know there is a reference to that amongst the many things that Lord Nicholls says in *Brunei*.

MR STEWART QC:

Well yes he does.

TIPPING J:

I know he does but I'm just putting you on notice that I don't think that's satisfactory to equate commercially unacceptable conduct with dishonesty.

BLANCHARD J:

Putting you on inquiry.

ELIAS CJ:

But this is again all about claims against the paying bank by non-customers, that's the chapter you've reproduced here. In Paget's there is nothing, is there, dealing with the sort of use that you are using of these cases of knowing assistance as a defence? Or indeed of any defence for non-performance of the contract by reason of suspicion of illegality of some other sort?

MR STEWART QC:

Well yes, I mean Lord Millett deals with this in *Twinsectra* and Lord Hoffman in *Barlow Clowes*, there is no doubt that you don't have to know, you just have to have a well-grounded suspicion then you're on inquiry.

ELIAS CJ:

That's in respect of claims where the bank has paid out?

MR STEWART QC:

No not – well, no –

ELIAS CJ:

By –

YOUNG J:

And where there was fraud.

MR STEWART QC:

Well no –

ELIAS CJ:

And where there was fraud, yes.

MR STEWART QC:

No, there are cases where the bank – there was the case of *Bank of Scotland*, which I've got a copy of here, where there was no fraud but the bank was sued for costs and the question there, that was a bit of a different case in that in the UK they've got the SFO and there's legislation to stop people tipping potential wrongdoers off about inquiries and in this case the bank was put on notice by the SFO that they weren't to let their customer know anything about an inquiry taking place and the bank went off to see a Judge in chambers and got a, Justice Lightman gave an ex parte order restraining the customer from drawing the funds out. Now in that case the bank, there was no wrongdoing on the part of the customer and the customer sued the bank for substantial costs and got them and it's an interesting discussion about the role the at the Court can play or should play when bankers are in the, on the horns of a dilemma. Perhaps I should pass this up. But it has some general observations about the role of the Court, and the Court can in certain circumstances help the bank. So the banks are going to be liable, if it turns out there is no fraud. Well, if there is no fraud they will be liable still for costs and interest.

The general discussion about these – one of Your Honours will have a highlighted account copy. It's not on all fours with what we're dealing with here, but the relevant paragraphs appear at 24, 33 and 37. There is an issue as to what level of suspicion the bank might have, I accept that. Justice Blanchard referred to the Lord Justice Scott decision in *Manifest Shipping Co Limited v Uni-Polaris Insurance Co Limited*. In my submission, there are enough facts here to dispose of that question in favour of the bank, it was on inquiry. And the inquiry then shifts to, was the response in all the circumstances sufficient? And if you look at the matters that are in Lord Nicholls'

judgment, I'd say the bank was entitled to continue to hold out until further explanation was provided. And, yes, I say that the amount involved is relevant on that issue, the fact that it's 26 million and not 26 hundred, because, as Lord Justice Nicholls says, the significance of the role of the bank and the beneficiaries and the importance to them of the amounts involved, it has a bearing on the analysis.

BLANCHARD J:

There is something useful in paragraph 37, of the *Bank of Scotland* case, the second sentence. "If A Limited had been the recipient of funds which were the proceeds of fraud and if the bank had such strong grounds for doubting its customer's honesty, that it would itself have been dishonest to turn a blind eye to its doubts." Isn't that the test?

MR STEWART QC:

Well, it's not "the" test, it's probably – that wasn't the real focus of this decision, Sir.

BLANCHARD J:

No, but that seems to be pretty close to the test we've been considering, this is Lord Woolf, and it's a pretty strong Court, it's Lord Woolf and Lord Justice Judge and Lord Justice Robert Walker.

MR STEWART QC:

Unfortunately, that Court resisted the temptation to lay down guidelines at the end of the judgment and declined to endorse the guidelines which Laddie J had provided in the judgment when he set aside the injunction. Para 44 is the start of that discussion.

BLANCHARD J:

Well, I must say I'm at the moment attracted to the concept of the bank having strong grounds for doubting its customers' honesty. In this case, of course, it's MAP's honesty, it's the honesty of, effectively, Mr Anker.

MR STEWART QC:

Well, it's told one thing, then presented with a set of instructions in a sealed envelope, not to open until the day of paying out the money. I would have thought,

Your Honour, that there were very firm grounds to say, "Well, we need an explanation, there may be an innocent one."

BLANCHARD J:

Well, Anker's given instructions, he's changed the instructions. Is that strong grounds for doubting his honesty, when he holds a power of attorney, which the bank's never looked at?

MR STEWART QC:

No, well –

BLANCHARD J:

And which, for all the bank knows, could be a very general power of attorney.

MR STEWART QC:

Well, I must say, with respect, I'm surprised at the approach whereby he doesn't have to explain such a dramatic turnaround, a change, why should he? You know, if that's the position, the banks can receive that sort of answer, and so, well, "We're stuck with that," and pay out, well, that's a significant departure from where the cases are currently in the Commonwealth. Normally you would –

BLANCHARD J:

It's not as though the bank knew at that point what the terms of Anker's agency or trust was, it didn't know that. As far as it knew, Anker had a generalised power in connection with this sale.

MR STEWART QC:

So it comes down to this –

BLANCHARD J:

He had power to negotiate it.

MR STEWART QC:

Well, he delegated that.

BLANCHARD J:

Yes, he may have done, but he had power to negotiate it.

MR STEWART QC:

So, I think they'd come down to this, that the bank is told when it agrees to take the account on and it gets instructions at that date, this is the important thing, and in 2006, at the time the instructions are given, what the transaction's all about, and that the money will be going to shareholders and only 400 or 650,000 will be going to consultants. And then when it opens those instructions it sees that a very significant amount is not going to the shareholders, and these shareholders' names get repeated.

BLANCHARD J:

It doesn't know at that point that they're going, that those payments are going to consultants.

MR STEWART QC:

No, doesn't know where they're going. They could be going to Mr Anker, for all they know. But they're not going to the shareholders, which is what they've been told at the outset, and every document they get has all the shareholders listed. Now, I would have thought that they're on inquiry and they're entitled to ask the question and get an explanation, other than the assertion, "It's all okay."

ELIAS CJ:

This *Bank of Scotland* case, which I'm inclined to skim through and probably have misunderstood, does seem to be in point in the sense that it was a comparable case to this, because the bank didn't pay out because of the danger it saw of it being held a constructive trustee.

MR STEWART QC:

Not quite the bank, but it got an injunction against itself, which the Court was critical of, how can a party…

ELIAS CJ:

And said it was not affected –

MR STEWART QC:

Yes.

ELIAS CJ:

– and that it wasn't entitled to rely on it. It seems – I'm looking particularly at paragraph 41 and 42 – but it seems as though the bank was held to have been liable –

MR STEWART QC:

If what it says –

ELIAS CJ:

– and the only, the question is about the costs that everyone was put to in making the application to the Court. But the case seems to be adverse to the position that you're advancing here.

MR STEWART QC:

Well, they never engaged very long, but the issue was that the Court said the bank should have got a private proceeding against the SFO, because it was the SFO that was tying the bank's hands about the investigation, and not to tip the customers off.

ELIAS CJ:

But the bank was in breach because it didn't honour A Limited's instructions because of its concern that it would be liable as a constructive trustee, and the Court seems to have said that, since it wasn't liable as a constructive trustee because there was no fraud, it was liable to A Limited for not following its instruction and, moreover, that –

MR STEWART QC:

Mmm, there's –

ELIAS CJ:

– Laddie J was entitled to make the order that the bank should pay the costs.

MR STEWART QC:

Well there was no discussion about the bank in our inquiry and what not. The Court was saying that the bank got it procedurally all wrong. It shouldn't have brought this injunction which is no good to it. It decided to –

ELIAS CJ:

Well it was on inquiry in a sense that it knew that the Serious Fraud Office was investigating this.

MR STEWART QC:

Yes well that's not always led to fraud as we know.

ELIAS CJ:

No. No but if one is looking at what puts you on inquiry, one would have thought that the banker did have reasons for suspicion.

MR STEWART QC:

Possibly yes, Your Honour. I mean the first stage of an inquiry, sometimes they, lots of times they amount to nothing.

TIPPING J:

Is it possible that one could fuse two concepts by saying the level of suspicion must be such as to give rise to a legitimate finding of dishonesty by not following it up or by paying out in the face of it?

MR STEWART QC:

I – I don't know that putting the bar too high for your inquiry helps much.

TIPPING J:

Well I'm just, speaking for myself, I just don't think it's helpful to give encouragement to banks to have to go looking around and making inquiries unless there's a pretty strong reason. The strong reason might be that it would be dishonest not to make further inquiry or to pay out in the light of what you know. That would be a very simple –

MR STEWART QC:

What did you say about the experienced banker?

TIPPING J:

I'm not –

MR STEWART QC:

Or banker – well you know if he's an experienced banker he has a –

TIPPING J:

But if he's given enough guidance then he has to apply that approach when he's faced with a particular situation.

MR STEWART QC:

These cases are really decided on their own facts but –

TIPPING J:

Well clearly they will be but the Court must give some guidance, surely, as to how a banker is expected to approach this problem as a matter of law. What better test really than to say that a banker should make further inquiry if it would be in the circumstances dishonest not to and as a result of everything that then comes to light, have to make an assessment as to whether it would be dishonest to proceed to facilitate the transaction.

MR STEWART QC:

Well if the bank didn't make an inquiry and paid out, because it didn't want to know what the answer was, didn't want to be involved in the matter, didn't want to offend his client –

TIPPING J:

Well then it just takes a commercial risk.

MR STEWART QC:

Yes and – that he will be in complicit in the breach of duty in those circumstances. Now – because he closed his eyes to it. Now I can't see any difference between that situation Sir and –

BLANCHARD J:

Well that's not closing your eyes to the breach of duty unless you have really good reason to know that there is a breach of duty occurring. The fact that there might be a breach of duty occurring is not enough.

MR STEWART QC:

Well you have to have a foundation and I believe that in my submission –

BLANCHARD J:

I must say I'm attracted to the strong grounds for doubting the customer's honesty.

TIPPING J:

Whereabouts is that?

BLANCHARD J:

It's paragraph 37. "Had such strong grounds for doubting its customer's honesty that it would itself have been dishonest to turn a blind eye to its doubts."

TIPPING J:

Well that – my proposal is really that in a different language. It's just, unless it could be dishonest of a bank to pay out, it should have to. If it would be dishonest to pay out without making further inquiry.

MR STEWART QC:

Well okay, you know there are a couple of more layers around this and why, I mean the bank hadn't previously dealt with Mr Anker. This was a transaction being routed through New Zealand –

ELIAS CJ:

It received the funds and you're saying to us that it should – it wouldn't have been able to pay out on the instructions on which it accepted the funds.

MR STEWART QC:

Well no – well, because they've changed.

ELIAS CJ:

Well no. When I asked you about that, whether it was simply the change, I understood you to answer that they could not have paid out on the instructions when they opened them.

MR STEWART QC:

Sorry I misunderstood you Your Honour. And the reason they couldn't pay out when they opened them, is because they were so at odds with what they had explained to them when the account was established, that's what I was intending to indicate.

ELIAS CJ:

Well they accepted the funds on the basis of these sealed instructions.

MR STEWART QC:

Yes and their explanation as to what those instructions were and when they opened them it appeared that they, that those instructions that they put in the emails were incorrect. They weren't consistent with the instructions in the envelope.

TIPPING J:

The jurisprudence in this field has the accessory liability turning on dishonesty. Now I'm now of the provisional view that the same, it should be the same whether it's viewed as a defence or a cause of action, that you should be able to, that simplicity and coherence in the law suggests that it should be the same otherwise there's a gap in the middle and if equity has decided in the cause of action cases that the touchstone is dishonesty, the same touchstone should be there for the defence.

YOUNG J:

What about where there isn't a fraud because there can't – I mean in one sense there can't be fraud, dishonesty if there wasn't a fraud. There has to be some –

ELIAS CJ:

Well *Bank of Scotland* seems to be a bit like that.

MR STEWART QC:

Well it may or may not be a fraud. I mean if you say – you can be – the present authorities are you can be liable if you, on strong grounds or good grounds, suspect fraud and don't make the inquiry.

YOUNG J:

And there is fraud.

MR STEWART QC:

No.

YOUNG J:

You can only be liable if there is a fraud.

MR STEWART QC:

Well okay –

YOUNG J:

I mean if the transaction is entirely clean –

MR STEWART QC:

But then you're also, you're liable if there isn't fraud and you don't pay out. Now –

TIPPING J:

You take the risk, in other words, as to whether you can ultimately establish fraud.

YOUNG J:

So is the defence to the mandate, the requirement, that the bank must pay out unless it's a fraud?

MR STEWART QC:

Well that can't be right. I mean the *Brunei* case talks about the difficulty, the difficult area, which obviously we're trying to skirt around, what about where there is real doubt? There is doubt? What do you do?

YOUNG J:

And the problem for the bank, I think, is that human nature being what it is, if it later comes to pass that there was a fraud, becomes apparent there was a fraud, then all these indicia of fraud that you point to will seem to have pointed to it inevitably and Judges are just as prone to hindsight bias as everyone else so –

MR STEWART QC:

It doesn't help the bank, does it?

YOUNG J:

It doesn't help the bank. Now –

MR STEWART QC:

And these authorities are designed to assist the bank in these invidious positions.

YOUNG J:

And your strongest point, I guess, is that when asked for an explanation of the disconnect between the original explanation for the transaction, and the payment instructions, they never got a straight answer.

MR STEWART QC:

They got no answer.

YOUNG J:

Well the answer was “it’s all right” or “mind your own business”.

TIPPING J:

That answer was just an assertion. That’s the only point you’ve got frankly.

BLANCHARD J:

Mr Stewart –

MR STEWART QC:

Any other answer we would welcome with open arms that gave, reconciled the matter that was concerning the bank.

ELIAS CJ:

But you did get one. I think this case, which I will read properly over lunchtime, is quite helpful because what the Court of Appeal endorses is an approach that is effectively the approach that you took here, of bringing matters to a head through the Courts, but it doesn’t endorse the black and white approach that you’re not in breach of contact. It says that they were in breach of contract and so what you’re really at risk of is the costs of obtaining the green light.

MR STEWART QC:

Well –

ELIAS CJ:

So it's not as bad as saying, you have to be a constructive trustee or not but if you have suspicions, if you have a mechanism for bringing matters to a head and getting an authoritative determination, you've just got to wear the fact that you may have to bear the costs of that.

MR STEWART QC:

Okay, so in this case what Your Honours are indicating, as I understand it, is you get instructions as to how a transaction is going to unfold, you open the instructions, you find that the, it appears that half the money is going to someone other than shareholders, you don't ask the question, you just pay it out, because if you're wrong, you're going to be sued either way. I mean, on the current law, if you just simply pay it out, you look at this and say, well, this isn't what we've been told.

ELIAS CJ:

Well, your liability is not the same as if you had been a constructive trustee. Your liability today, what you're arguing about today, is not the liability you'd have been up for if there had been fraud and you'd been found to be a constructive trustee.

BLANCHARD J:

Mr Stewart, can I suggest that *Royal Brunei* is not really the case that we should be guided by? It is a generalised case on honest assistance, but it's not a case about someone like a bank which has an obligation to pay in accordance with a mandate.

MR STEWART QC:

No, but the principles are intended to –

BLANCHARD J:

The principles may apply generally but it seems to me it's the wrong test for when a bank is obliged to pay and the circumstances in which it will have a defence if it doesn't pay.

TIPPING J:

The key problem in this case, I think, is the question of whether it has to be an all or nothing or whether the bank can have a defence even if there is no fraud, because it honestly believes on reasonable grounds, shall we say, just to pluck a phrase from the air, that there is fraud.

MR STEWART QC:

Yes.

TIPPING J:

That seems to me to be the key and difficult problem in this case.

MR STEWART QC:

Then what Your Honours are saying that if the bank refuses to pay and there is no fraud, well, it's going to be liable to the customer.

TIPPING J:

Well, the issue is if the bank refuses to pay and there is no fraud, is that the end of the matter or might the bank have a defence on the basis that there was a clear appearance of fraud but fraud was not actually established? I'm just putting the question.

MR STEWART QC:

Yes.

TIPPING J:

I'm not suggesting an answer. The Chief Justice has put to you that it ought to be the former.

MR STEWART QC:

That would relieve the bank of making inquiry when it suspected there may be fraud, that it had a suspicion that fraud – that the money was being diverted from the people truly entitled.

TIPPING J:

Well, it can make inquiry to try and establish whether there is in fact a fraud, in which case if it can demonstrate that then it's in the clear by not paying.

MR STEWART QC:

No, but –

TIPPING J:

But the question is, is the bank entitled to withhold payment in any situation short of actually being able to demonstrate a fraud? Later, of course, as a defence.

MR STEWART QC:

Well, you see, Lord Justice Millett talks about this, that the bank don't even have to know the existence of the trust or the terms of the trust. They just have to know that some money may be being diverted from the people properly entitled, then it's on inquiry.

BLANCHARD J:

Where does Lord Justice Millett say this?

ELIAS CJ:

In his dissent, is it?

TIPPING J:

In *Twinsectra*, I think, towards –

BLANCHARD J:

Perhaps we'd better have a look at that.

TIPPING J:

But it doesn't – that passage, I don't think, deals with the issue that – because all the cases seem to be premised on the basis there is a fraud.

MR STEWART QC:

At page – well, yes, but if there is fraud and the bank withholds payment, well, it's done someone a huge favour, hasn't it?

TIPPING J:

Exactly. The difficult case is if there is actually no fraud but the bank thinks on a fair basis that there is, or might be.

MR STEWART QC:

Yes, well, I've read *US Marketing* case. I know that time's moved on since then as –

TIPPING J:

Probably going to move on a lot further. We didn't grapple with that in *US Marketing*. We didn't really have that issue in mind.

BLANCHARD J:

Where's the bit then from Lord Millett that you're relying on?

MR STEWART QC:

At paragraph 135. It's really knowledge of the –

BLANCHARD J:

It may be sufficient that he knows he is assisting in a dishonest scheme.

MR STEWART QC:

And over the page.

TIPPING J:

I don't think that helps because that presupposes that there is in fact a dishonest scheme.

MR STEWART QC:

No –

TIPPING J:

And no one's troubled by that.

BLANCHARD J:

Nobody knows about it.

TIPPING J:

Exactly.

ELIAS CJ:

But it's – are you relying on the passage that he's satisfied that knowledge of the arrangements which constitute the trust is sufficient?

MR STEWART QC:

Yes. He doesn't have to know of the existence of a trust, and often they won't know for certain. I mean, I rather accepted that –

TIPPING J:

But read on, "Of course, if they do not create a trust then he will not be liable."

MR STEWART QC:

No, but –

TIPPING J:

But he takes the risk that they do.

MR STEWART QC:

But it shouldn't have to take that risk.

ELIAS CJ:

Well, that's the big question really, isn't it?

TIPPING J:

That's the big question.

ELIAS CJ:

When we – we'll take the luncheon adjournment shortly – it may be necessary for you to take us back to the discrepancies between the two sets of instructions since you're placing so much emphasis on them, because I note that at page 596, for example, one of the transfer instructions in respect of $8.6 million is simply to pay as directed by Mr Anker.

MR STEWART QC:

Mmm.

ELIAS CJ:

So, I mean, that's quite a sizeable chunk that –

MR STEWART QC:

For a person who was only entitled to $140,000 himself on his shareholding.

ELIAS CJ:

No, well, this may well be for payment of fees, for example. It's not – there's nothing there to indicate that it's to pay to him beneficially.

MR STEWART QC:

No, but we then get our further instruction on that and we find that 5.5 million goes up to the BIV for a company called Searcy Consulting, whereas they'd been told that this money was actually for the senior executives of –

ELIAS CJ:

I see, that was this one, was it? Yes. It just may be necessary for you to go through these indicia of fraud that the bank relied on. How do you think you're going, Mr Stewart? What do you want? Where do you want to take us after lunch?

MR STEWART QC:

I think I'm going not very well and why don't I just – I mean, the submissions do track all of that but I'll look to pull that together in about a quarter of an hour after lunch, those bits.

COURT ADJOURNS: 12.58 PM
COURT RESUMES: 2.17 PM

ELIAS CJ:

Yes, Mr Stewart.

MR STEWART QC:

Your Honours, in the *Barlow Clowes* case, there are quite a few references, at least half a dozen or eight, to the fact of suspicion being sufficient to put the defendant on inquiry. Sometimes it refers to solid ground, other times just mere suspicion, other times a growing suspicion, it's not a discussion about what should be the extent of the suspicion but, plainly, the case recognises, House of Lords, that suspicion can operate to place a banker on inquiry. Now, I thought I would just go through the various matters that I say produced a difficulty for the bank and put it on inquiry, and we start on the 26th of May, that's volume 3, 419.

ELIAS CJ:

Sorry, volume…

MR STEWART QC:

Volume 3.

ELIAS CJ:

Yes, thank you.

MR STEWART QC:

Page 419. Now, payment of this letter, this is the starting point when, on the 25th of May, they enclosed a string of emails. Now, we've looked at those emails already, but there is one I didn't take you to, at page 421, that's dated the 20th of May and it's from Mr Lara to Mr Fine, and about the third paragraph it says, "The selling bank and the buying bank directors met today and they are happy with each other, I believe we could be moving with this in one week or two." Now, about two inches down, it says, "The contract that we are working on will clearly stipulate what is going to happen with the funds after they reach your account," and I've taken you through the other emails attached.

Now, back to 419, just a reference at the bottom of that page to, "We are aware that the proposed requirements fall outside our area of expertise and accordingly we now need to be in a position to have the bank confirm its requirements and guidelines to ensure the transaction meets all the needs of all parties," and they give a list of five things to come to their mind.

The next matter is volume 4, page 461. This is letter from MAP to Arias & Arias, the solicitors for A&L, and, starting at the bottom of the page, "As you are aware, the transaction must comply with Financial Transactions Reporting Act which, inter alia, requires us to be satisfied as to the bona fides of the transaction and the identity of the parties. At this stage, we have copied in information from the vendor bank, we are satisfied the purchaser is properly identified, we will require your confirmation of the identities of the sellers and an undertaking that you are satisfied they have been properly identified, have agreed to the transaction, and that you are holding details that allows you to ensure that the sale process will be transferred to the right parties. We assume that Mr Arteaga, Mr Anker, will be a position to supply this." Well, of course, he never supplied that when he was asked for to give assurance, and that would have helped immeasurably, of course, if not absolutely.

Now, the next one is volume 4 at 601, same volume.

ELIAS CJ:

I'm sorry, this letter –

MR STEWART QC:

Yes.

ELIAS CJ:

– precedes the depositing of the funds, does it?

MR STEWART QC:

It does.

ELIAS CJ:

And they got a sheaf of documents following this, the bank, is that right?

MR STEWART QC:

You mean the string of emails?

ELIAS CJ:

Yes, and some annexures and things.

MR STEWART QC:

Yes, that was the first document I took you too.

ELIAS CJ:

Yes.

MR STEWART QC:

That was May '06, earlier in the year.

ELIAS CJ:

Oh, May '06.

MR STEWART QC:

By which time they had, the vendor and purchaser had met each other and they seemed to be happy with each other.

ELIAS CJ:

So, did anything follow after this to the bank before or at the time the monies were deposited?

MR STEWART QC:

Yes, at 601. Now, it says, in relation to the escrow agreement, second paragraph, "We are delivering to the bank a closed and sealed envelope containing the original irrevocable instructions issued by the consultant, A&L to MAP, to action the transfers required by the final beneficiaries, as instructed to them by, by them to A&L, A&L's a consultant." Now, Westpac had of course understood that the final beneficiaries were the shareholders, from the string of emails. Now, the next –

ELIAS CJ:

Where's the document that you say identifies the shareholders?

MR STEWART QC:

Oh, okay.

ELIAS CJ:

But that – no, had it been supplied at this time or did it come in later?

MR STEWART QC:

It came in later. Westpac asked for it in February, early February '08, a couple of years later, and it asked for it after it got an updated set of instructions and advice that the payments would be shortly required.

ELIAS CJ:

I thought you indicated that the list of shareholders was in the escrow –

MR STEWART QC:

Yes, but Westpac didn't get that till early February.

ELIAS CJ:

It didn't get it. Thank you, that's fine.

MR STEWART QC:

Now, on the 11th of December a meeting, when Westpac got that – it's at 601, I think we just looked at that. When Westpac received the letter from MAP and MAP, at that meeting, at page, volume 4, 587. This is a letter to A&L from Mr Anker, and there's an acknowledgement at the bottom by Mr Ernesto Lara, described as a director. You'll see from the submissions at paragraph 21 that Westpac in February '08 that he was not a director. Now, the next development is 31 January 2008 and we go to volume 4, 667, and this is where Westpac gets the updated instructions, and I'll – now, if we look at, keeping that page open at volume 4, 596, this was an original instruction given to Westpac in December '06 and it's referring to an amount of – near the top, it's got, "Monetary fund transfer instructions number 6/10," it's in respect of a sum of 8.6 million and it's to be delivered to Westpac Bank and held pending further instructions from Mr Anker or a Mr Gonzalo Vargas. Now, the instructions that came in on 31 January '08 were simply dividing that 8 million into 12 separate payments, and we see that at volume 4, 682, and there are the 12 payments dividing that, that sum of money up, and –

TIPPING J:

I don't understand. You're not suggesting there's something sinister about this, or are you?

MR STEWART QC:

Well, if we go to instruction number 6, which Mr Fine exhibited…

ELIAS CJ:

At 596?

MR STEWART QC:

Yes. If we go to 610 of that volume, that's where we get the explanation about the money.

TIPPING J:

Yes.

MR STEWART QC:

The reason of transfer. "This shareholder," it says, "is the holder in the high executive of FFP Prodem." That represents 15% of the social capital, according

to the certificate of dematerialisation. So it looks like there's one shareholder there holding 15%.

TIPPING J:

Well, the direction is by Mr Anker, to divide it into tranches and distribute accordingly. I can't understand what's – at the moment I can't see what the problem with this is.

MR STEWART QC:

Well, the first one, the first brief says that – it doesn't say he's going to divide it up, does it?

TIPPING J:

Well –

ELIAS CJ:

Does it matter?

MR STEWART QC:

Pending his further instruction.

TIPPING J:

I mean, at his instruction.

MR STEWART QC:

Yes. Well, the significant part about it, that Westpac was concerned about, is that, rather than going to Prodem shareholders, the last instruction, which is at page 693, send 5.4 million off up to the BIV, to a company, a beneficiary called Searcy Consulting Inc. Now, that's a consulting company, it's not a shareholder, I mean, there's no explanation given about this when Westpac asks. I mean, this was another consultant, this brings the total consultant payments up to 26 million and –

ELIAS CJ:

Sorry, where are you now?

MR STEWART QC:

Oh, I'm just saying, if you take the reasons for payment and Martin Fine's instruction to exhibit it, his affidavit, those payments plus this additional payment here brings the consultants, payments to consultants, up to 26 million.

TIPPING J:

Well, that's an assumption. The fact that the company has the name "Searcy Consulting" doesn't mean that it was acting as a consultant in this transaction. It may well have been a corporation associated with one of the beneficiaries.

MR STEWART QC:

Well, it could have been, yes, that's a possibility, but we're not told. Now, on the next matter, in my submissions at paragraph 30, what happens here is that on the 4th of February Westpac writes to MAP saying, "We don't have the names for two beneficiaries."

ELIAS CJ:

Sorry, page –

MR STEWART QC:

Submissions at paragraph 30.

ELIAS CJ:

Thank you.

MR STEWART QC:

Now, MAP replied on the same day, saying it would obtain the payment detail requested by Westpac. Now, if you go – what happens is that MAP doesn't do that and come the, later in the month, after Westpac gets the payment instruction, on the 27th of February, volume 5, 743 –

ELIAS CJ:

Sorry, are we meant to be keeping our fingers still in the volume –

MR STEWART QC:

No, no, you, no.

ELIAS CJ:

– or are you taking, you've finished that?

MR STEWART QC:

Yes.

ELIAS CJ:

I was obediently doing it.

MR STEWART QC:

Sorry, Your Honour.

ELIAS CJ:

Sorry, we go now to volume 5…

MR STEWART QC:

Five, 743. It's Westpac saying it needs the names of the two further beneficiaries. Now, they get one, on 744, which is 342,000, that's to a shareholder, name Eduardo Bazoberry, and the other one, for 11.8 million, is in fact to a consultant, because that's the description on the…

TIPPING J:

Well, there's someone with a Swiss bank account.

MR STEWART QC:

Yes.

TIPPING J:

Is that what gives rise to the suspicions?

MR STEWART QC:

Well, no, this is just, this is what we were saying, that – and this is dealt with, if you like, in the – this is 11.8 million, this is when, before Westpac discovers that 26 million have gone to consultants, here's a payment off to a consultant up in Switzerland, but it didn't know that that was a payment –

BLANCHARD J:

Well, wait a minute, how do we know it's a consultant?

MR STEWART QC:

Well, I'm just coming to that. If we go to volume 5, 611…

BLANCHARD J:

Volume 4.

MR STEWART QC:

I beg your pardon, Sir, volume 4, sorry, 611, that is the payment instruction that Mr Fine exhibited, for which there was no name on Westpac's earlier payment instruction, that amount, 11,877, shows that this is payment to a consultant who is part of the A&L Group, and Westpac found that out on the 11th of March, when proceedings were filed.

TIPPING J:

I see in the document, 745, the name "Sunny Services Corporation" actually appears in that document, which is the same name as in the instruction.

MR STEWART QC:

Yes, but it doesn't appear as a beneficiary, that's all.

TIPPING J:

Well…

MR STEWART QC:

You see, under 611?

TIPPING J:

Yes.

MR STEWART QC:

Yes, it does.

TIPPING J:

I'm not quite sure what the problem here is. Is it that it's a consultant? Is it no more simple or no more complicated than that?

MR STEWART QC:

That's right. Because when Westpac got the name, of course, at 745, it doesn't see that it's a consultant but, by linking back to the instructions exhibited by Mr Fine, it can see this is a further consultant's payment.

TIPPING J:

But it didn't know that at the time, it only found that out later.

MR STEWART QC:

No, at the time it didn't even know what the payments were for.

ELIAS CJ:

And what's the answer, though, to the question that was put to you by Justice Blanchard about whether these were consultancy fees or whether they were simply payments to beneficiaries who were consultants, or companies that were consultants?

MR STEWART QC:

Well, there are a couple of things –

ELIAS CJ:

Sometimes it seems to me that half the world is a consultant.

MR STEWART QC:

Wouldn't we love to be. Twice Westpac wrote and pointed out to MAP about these consultants' fees and got no response. Westpac put in an affidavit on the 20th of March, detailing at length, as I mentioned in my submissions, about these payments to the consultants. Five affidavits in reply filed, none of them taking any issue with any of that. At that point they said, "Give us our money back." And, you know, I think it is striking, unless you stop the clock running, as Justice Tipping suggests, at an earlier date, that, despite the repeat requests and the affidavit evidence and the matter before the Court, Westpac didn't get a whisper about why so much money was going to consultants. It does intrigue me that this isn't a matter that would be regarded by Your Honours as a matter requiring an explanation by an experienced banker, or any banker, and if these were, well, –

TIPPING J:

Well, the question is –

MR STEWART QC:

– they were all part of the A&L Group. Now, A&L had no shares in Prodem, they were retained solely by Mr Anker as consultants to the transaction, and Mr Fine's affidavit sets out what their role was. Now, Westpac was told, at volume 3, 419, paragraph 4, end of paragraph 4, "including negotiations with the bank to receive the offshore funds in the US dollar account and participate in the distribution and subsequent investment process," so that Westpac's being told that it's going to be participating in the distribution and subsequent investment process, so that Westpac's being told that it's going to be participating in the distribution and subsequent investment process of the monies.

TIPPING J:

Well, the "we" there is MAP, isn't it?

MR STEWART QC:

Sorry, Sir? Beg your pardon, Sir?

TIPPING J:

Well, the "we" there is Midland Pacific, actually. It's not – Westpac's not going to be participating, is it?

MR STEWART QC:

Well, I would have thought – well, you may be right. I've read that it is the – Mr Lara was to formalise a number of issues. There's no suggestion that A&L's brief in the description of its functions was going to be involved in that aspect after the moneys received by the investors, or that they were to be involved at that part. So also including negotiations with the bank to receive offshore funds in the US dollar account and the bank to participate in the distribution and subsequent investment process.

ELIAS CJ:

How many shareholders were there of this company? Do we know that?

MR STEWART QC:

About 26 are named but then there's a big group of them in the, 75%, of which I think they call the functionale group. There's a group who are all wrapped up and then there's about 26 other ones. Yes, they are listed in the escrow agreement.

Those are the main matters and they are carefully set out and tracked in the written submission in two or three places that Westpac had its submissions about whether this money was going to where it was intended to go. Why did it have suspicions? Because it had been told where it was going to go and now it gets paperwork, being the instructions for payment, and sees that it's – in fact, half of it's going somewhere else.

TIPPING J:

If this was all a fraud, pretty odd –

MR STEWART QC:

Well, you know, it still may be.

TIPPING J:

It's pretty odd, isn't it, that they didn't come up with the fraud first time? They had to alter something that was – in order to create the fraud?

MR STEWART QC:

Sorry, Sir, what was altered?

TIPPING J:

The payment instruction.

MR STEWART QC:

Well, were they altered?

TIPPING J:

Well, according to your submission, yes, that's what gave you, your client, all the reason to be concerned.

MR STEWART QC:

Well, it may be that these instructions were in place and existing at the time Westpac's got these other instructions, not showing that payments were going to consultants. I mean, you've got to take into account the unusual fact of this transaction coming through this country, and I don't know if there's any answer to say well, Westpac should have thought about that when it took it on, of the fact that these instructions were given in a sealed envelope, not to be opened until the day that MAP tells you you can make the payments out, and you open them and disburse the payments.

There's Mr Lara's status. He wasn't a director of A&L and he wasn't a principal in Arias & Arias.

TIPPING J:

Well, Westpac wasn't originally adverse to that, was it? It didn't say, "Oh, we're not prepared to accept instructions on these terms," at the outset about sealed instructions and so on.

MR STEWART QC:

No, but then – and that alone may not have been a problem for confidentiality reasons, but when they opened and see there's a mismatch with what they're told, that does give rise –

TIPPING J:

Yes, it's the mismatch.

MR STEWART QC:

Yeah, that one is the mismatch –

TIPPING J:

It all comes back to that.

MR STEWART QC:

Yeah.

YOUNG J:

Although in a context.

MR STEWART QC:

Sorry, Sir?

YOUNG J:

Although in a context.

MR STEWART QC:

Your Honours don't know and I don't know that these shareholders may have accepted that they've got the full purchase price and it's only $24 million. They may have got away with it.

BLANCHARD J:

They're probably wandering around Hamilton looking for it as we speak.

MR STEWART QC:

Well, you'll see in the evidence that Westpac was approached for another investment of $1.6 billion from the same group, A&L, and said no, part-way through this transaction.

TIPPING J:

Beware, under the once bitten principle.

MR STEWART QC:

Anyway, I don't think there's anything more I can –

ELIAS CJ:

Where do we find the escrow agreement, because it's not annexed to the affidavit of Mr Fine that we have, I don't think.

MR STEWART QC:

No, it's – volume 4, 511. Most of these documents are referenced in the chronology.

ELIAS CJ:

Yes.

MR STEWART QC:

In fact, all of them are. Now another oddity about this, because now look at this escrow agreement, you can't find all of these names in the payment instructions. Some are there. A lot are not. So it wasn't only that money was going elsewhere, not all the shareholders seem to have been included in the payment instructions.

YOUNG J:

Well, they may have been in there elsewhere.

MR STEWART QC:

In the big conglomerate?

YOUNG J:

Yes, or they may have been in the funny names.

TIPPING J:

What's this business two? The citizens and then a big blank?

MR STEWART QC:

No, well, no explanation about that, but we think that may be the 75% of the functionale, but some of these ones that are listed there are named.

TIPPING J:

Yes, and then there's six more categories just called, "The Citizens".

ELIAS CJ:

Well, these are called "The Citizens" too, aren't they? "The Citizens" and then they're named.

MR STEWART QC:

Well, yeah.

ELIAS CJ:

So presumably these are –

MR STEWART QC:

You can see in the affidavits of Mr Collins that – and it's in his affidavit that this was the English translation. It didn't marry up with the Spanish original that Westpac subsequently asked for. There were two more categories of citizens than in the English one. But the big issue for Westpac, if it wasn't for the mismatch it would have disbursed the monies and if all the monies were going to shareholders…

YOUNG J:

One of the funny names is Sunny Services Corporation. It's $11.8 million.

MR STEWART QC:

Yes, and that's up in the BIV, and we don't know, we can't find out who that is or what that is and no explanation is given.

TIPPING J:

Mr Stewart, if, and I emphasise "if", and I'm sorry, were you going to add something, because I was moving to a different subject?

YOUNG J:

No, no, no.

MR STEWART QC:

Yep, and if I was, His Honour doesn't want to hear.

TIPPING J:

If, and I emphasise "if", the law were to be that you have to have either an express contractual provision allowing you to withhold, or you have to establish that it would actually have been dishonest assistance to pay out, can your client succeed?

MR STEWART QC:

Yes, because it would have been dishonest assistance to have paid the money out without inquiry.

TIPPING J:

No, I'm signalling a possible view that either you've got to have an express contractual term, which is not in issue here because it's not pleaded, or you've got to show that you actually would have been participating in a breach of trust dishonestly by paying out. Can your client succeed?

MR STEWART QC:

Well, it can't succeed if you're saying that it must establish that there was in fact fraud.

TIPPING J:

Or dishonest participation in a breach of trust, which I suppose is the same thing as fraud, for present purposes anyway.

MR STEWART QC:

Yes. Westpac can only succeed, and has only ever endeavoured to succeed on the basis that it was on inquiry on proper grounds and –

TIPPING J:

And the inquiry wasn't sufficiently answered.

MR STEWART QC:

That's right, and therefore if it paid the money out, it was – and I think this is in my first couple of pages of my introduction – it was going to be vulnerable to a dishonest assistance claim and the bank does not have to be in that position. It's got – that is a – that possibility, based on proper suspicion, discharges it from its obligation to pay out until its inquiry's answered.

TIPPING J:

And is there any banking law case beyond those that you've already referred to – presumably not, otherwise you would have referred – that addresses that precise issue?

ELIAS CJ:

Being?

TIPPING J:

The precise issue being is there a defence short of showing you were actually in the gun or you would have actually been in the gun had you paid out?

MR STEWART QC:

No.

TIPPING J:

You see, you can't show that here and you're no, setting out to show it. So you have to have a defence that's less than that.

MR STEWART QC:

Yes, the defence has to be that there was a suspicion.

TIPPING J:

Yes.

MR STEWART QC:

On inquiry –

TIPPING J:

No, in a banking case like the present one –

MR STEWART QC:

Yes.

TIPPING J:

– where there isn't actually –

MR STEWART QC:

Proof of fraud.

TIPPING J:

– proof of fraud –

MR STEWART QC:

No.

TIPPING J:

– is there any authority that you're aware of that says that the lesser state of suspicion, absent any proof of actual fraud, is enough to constitute a defence?

MR STEWART QC:

Well, I guess I get there – no, I checked with this briefly – not that I'm aware of, Sir. The route by which I attempt to get there is that if it's sufficient, like in the *Barlow Clowes* cases, for an individual to be guilty of dishonest assistance, if he suspects fraud but proceeds anyway with the transaction, proceeds to participate without asking, without enquiring or asking questions, now, it seems that –

TIPPING J:

But *Barlow Clowes* was a case where fraud was established –

MR STEWART QC:

Yes, yes.

TIPPING J:

– so it's not the same as our present case.

MR STEWART QC:

No.

TIPPING J:

In that crucial respect.

MR STEWART QC:

Yes, but he does have a defence saying, "I wasn't aware that there was fraud," the reason, because he didn't ask, he had Nelsonian blindness. Now, it seems to me to – and I think I tried to put it before – that if a person's on inquiry, he suspects fraud, doesn't know, but he's very nervous about it, worried about it, and therefore –

TIPPING J:

I know, I'm not inviting you to repeat your submission, I just wanted to clarify whether you'd been able to find a case where there wasn't actually fraud but a sufficient suspicion of fraud –

MR STEWART QC:

No.

TIPPING J:

– amounting to a defence?

MR STEWART QC:

And – no – and the reason for that probably is because those cases never come on, because –

TIPPING J:

Well, exactly.

MR STEWART QC:

– either the fraudster's got away with it or, the more likely position, is that the fraud's gone, well, it had gone undetected, or the person, like in this case, if my learned friend hadn't pursued the claim for costs of interest it would never have been an issue, the money would have gone out, but it doesn't mean to say that there wasn't a fraud or that, had there been a fraud, the bank would have been held complicit through paying out without enquiring, and holding the money back.

ELIAS CJ:

Well that, though, that's the different point. There are some cases which – I'm fooling around in the library, probably hopelessly out of my depth – I did come across, in the slightly different area of banks deciding not to pay out on documentary credits because of suspicion of fraud. Are you aware of those, because they – so it's cases like *The Society of Lloyds v Canadian Imperial Bank of Commerce*, and there's a whole lot of cases which follow on from that in the English Court of Appeal, principally applying the principles set out in *United City Merchants*, which was also in that area. But in those cases it seems to have been argued that the bank was entitled to dishonour the drafts because of the suspicion, but that argument was rejected and it was said that the banks had to establish fraud.

MR STEWART QC:

Yes.

ELIAS CJ:

I'm just wondering if you have any comment, if you're aware of those cases, any comment on those or any submission you'd want to make as to whether they are distinguishable or shouldn't be carried over, the reasoning shouldn't be carried over into this type of case?

MR STEWART QC:

I am aware of them and I, to be frank with you, Your Honour, I didn't look at those in the context of this matter of dishonest assistance.

ELIAS CJ:

They may be quite different circumstances. One would see that you would want a very high standard before you would permit those sort of credit documents to be, not to be honoured on presentation, but like –

MR STEWART QC:

Likely to be the equivalent to cash, aren't they, or as good as cash, really –

ELIAS CJ:

Yes.

MR STEWART QC:

– because they're usually for a supply of goods.

ELIAS CJ:

Yes. So there may be policy reasons why a higher standard should apply but the reasoning does look quite comparable.

MR STEWART QC:

Would you give me 48 hours to put in a –

ELIAS CJ:

Yes, of course.

MR STEWART QC:

– brief memorandum? If I thought that I agreed or disagreed with that.

ELIAS CJ:

Yes. I'm looking, just so that you know, at *Brindle and Cox* at page 726 in particular. And as I say it may be totally irrelevant but I was casting around for analogies.

MR STEWART QC:

Well I'd be happy to cast around too, Your Honour.

McGRATH J:

Mr Stewart, just perhaps in the same vein. It's very clear, I think, that you've never run this case, or your client has never run this case on the basis of any terms of the contract, implied terms of the contract that would permit it to do what it did?

MR STEWART QC:

No we looked at the mandate terms and it was just normal foreign currency standard terms.

McGRATH J:

So you stand by those and we needn't be concerned with any contractual terms at all in this case?

MR STEWART QC:

There are no contractual terms and whilst I attempted to say that the correspondence, the standard correspondence imported those terms, it wasn't pleaded and it wasn't run in the first instance so –

McGRATH J:

Thank you.

ELIAS CJ:

Thank you Mr Stewart. Yes Mr Gustafson.

MR GUSTAFSON:

Your Honours, as I understand my friend's position, what he is saying, and what this case is coming down to, was whether or not there was a disconnect between the way that Westpac was told and thought funds were going to be distributed in May of 2006

and how the payment instructions that were opened in February of 2008 differed and then Westpac goes on to say, well on that basis we are put on inquiry, we have a suspicion, and it made inquiry. And I think my learned friend's response to that is the response to the query about the disconnect between the May 2006 instructions and the February 2008 instructions was insufficient and I think he used the term 'facile'.

The response of MAP to those two issues is twofold. First, it says that in the High Court, and I'll take Your Honours through the various papers that are in evidence, Westpac never raised the fact that there was this disconnect. Westpac, as Your Honours will probably know from the submissions, didn't consent or oppose the application for the funds to be distributed. Certainly Westpac, by the beginning of March, had a concern about disbursing the funds.

If I can take Your Honours to volume 5 of the case on appeal. It's my submission that there was never a request made for clarification on this point and I'm looking, Your Honours, at page 751. This is the letter form Mr Collins and my friend's submission is well this was Westpac asking for clarification of the disconnect. Well it doesn't actually ask for any further information. What it says is that the parties that are the shareholders don't, and the escrow, don't reflect to the payment terms and then it says that Westpac is not willing to disburse the funds in this account. There's no request here for any further information. No request for –

BLANCHARD J:

Well that's a bit harsh as a construction of the letter I think because it says that given that on the information it has at present Westpac is not willing to disburse the funds into the account. And maybe that MAP wishes to make an application. I would have thought that one would sensibly read that as being if there's no further information which you can provide, you may want to make an application?

MR GUSTAFSON:

That's probably a fair enough interpretation Your Honour. The – what is not said here is, look there's a disconnect between monies that were going to be distributed – the way they understood money was going to be distributed when we took this fund on and how they're going to be distributed now. The only thing to talk about is whether or not the right parties are receiving the money from the escrow. So that's –

TIPPING J:

Well that again, with respect, seems to me to be a bit tough.

ELIAS CJ:

Yes.

TIPPING J:

I mean in essence they're simply saying there's this disconnect. Please help us.

MR GUSTAFSON:

Yes, yes they are. They're saying there's a disconnect between the people who are listed in the escrow as sellers and the people who are –

TIPPING J:

Who now you're asking us to pay to.

MR GUSTAFSON:

Yes Your Honour.

TIPPING J:

And then please explain, in a sense. You don't say that but that, in essence, is what they're saying.

MR GUSTAFSON:

Well, that is what they say. Essentially what I say this letter means, Your Honour, is it's going back to say, are you sure that the parties that are indicated in the payment instructions, are authorised to accept this money? That's how I would put a fair interpretation of this letter. And the response is over the page and it comes from Mr Van Oosten and he simply says, look the facts – and it's in the second paragraph – the fact that the disbursement instructions did not reflect the parties to the escrow agreement does not mean that those parties or their shareholders are not being compensated. This has already been determined by the escrow agents in Panama and the authority of the attorney acting for the shareholders whose signature is appended to the original wiring instructions.

TIPPING J:

Well they're saying, the point that's concerning you doesn't matter because people are actually getting so called compensation, that's the terminology?

MR GUSTAFSON:

Exactly and it's been authorised on –

TIPPING J:

Well on that unhappy basis the stand-off took place?

MR GUSTAFSON:

Well that's not what, where it ended Your Honour, because over the page again my friend took you to page 753 and said, well MAP wrote off and asked for clarification from Mr Lara and that's what it did. Now it's, at this stage it's not being asked to talk about, find out why, as my learned friend would submit to you, why are the payments to consultants possibly so high. That's actually not in this correspondence. What it's, the thrust of this, in my submission, is whether or not these payments have been authorised. What comes back again is at page 756 and that's the letter my learned friend also took Your Honours too and that's from Mr Lara saying, paragraph 2, these payments instructions, yes they are authorised. He sets out, for clarity, what they are. And at page 758 Your Honours is the response from Westpac, this time from their barrister, from its barrister, and it says, "Westpac does not consider that these emails give any greater clarity. Accordingly, and for the reasons set out in the letter to you on 29 February, Westpac's position remains that it will not disburse the funds from the account." And then it goes on to talk about making application to Court to sort the matters out.

BLANCHARD J:

Am I right in thinking that Westpac was supplied immediately with that letter from Mr Anker on the 29th of February?

MR GUSTAFSON:

Yes. Yes, Your Honour. That is at page 754.

BLANCHARD J:

Yes, I see now. Thank you.

MR GUSTAFSON:

So coming back to 758, Westpac comes back and says, look, still not good enough. Still no mention of this disconnect between May 2006 payment instructions and what's been put forward in February.

TIPPING J:

You seem to have been dragged by Mr Stewart into a sort of semantic debate about precisely what this correspondence amounts to. I would have thought your client would be in a better position simply to take a somewhat higher ground than that sort of detail, or is this just a warm up?

MR GUSTAFSON:

I'm just doing some stretches Your Honour. It is just a warm up. But it is important because it comes back to the way the High Court proceedings were conducted. My friend has made a lot of the fact, look there, we kept asking for explanations early on about why there was the disconnect between the two payment instructions. In my respectful submission, that's actually not correct. When you look at this material what was being addressed was, were the payments authorised. Were the payments authorised by the person who held the power of attorney for the vendors, the shareholders, and that's what was being addressed. That is what first of all MAP came back with and it's then what MAP's solicitors came back with.

TIPPING J:

Well that's the way the MAP side handled Westpac's inquiry which was not to engage with the reasons for the dissonance but to simply say, that shouldn't concern you because this is all authorised.

MR GUSTAFSON:

But there is no, in anything we've seen to date Your Honour there is nothing that says why are the consultancy fees so high, which is what my friend is submitting to you.

BLANCHARD J:

Well they didn't know that they were consultancy fees at that stage.

MR GUSTAFSON:

No they didn't. And the primary concern seems to have been were people who were recipients of the funds, were they the proper recipients of those funds, and basically

the question for that, and I think it was Your Honour Justice Blanchard said, if there's the power of attorney, and it's authorised, what is the problem. Because what we are talking about here, and this is –

TIPPING J:

Your client may be right in that but that is how you answered the query, didn't you, from the bank?

MR GUSTAFSON:

Yes.

TIPPING J:

You chose to answer it that way, which is arguably a perfectly tenable way of answering.

MR GUSTAFSON:

Well there was never a query about the level of the, at this stage, the level of the payment.

TIPPING J:

The reason my brother said.

MR GUSTAFSON:

Yes. But it's not –

TIPPING J:

I just don't understand why we're –

MR GUSTAFSON:

Well because of this Your Honour. It's not a question of, at this stage, queries being raised about the level of money being paid to consultants and whether or not there was no response to that. It's entirely different, in my submission. What was being challenged was whether or not the proper parties were being paid.

BLANCHARD J:

I think we understand that.

MR GUSTAFSON:

Yes, Your Honour. Just to really conclude on that point Your Honour, and this is slightly different, but if Your Honours look at the affidavit of, and I'll give you just the page references for this, the affidavit of Mr Collins for Westpac at page 151 in volume 2. So this is his affidavit in the proceedings in the High Court. There was never a mention made of this level of fees being set at $600,000 for consultants, it's just not mentioned. And it's not mentioned in the submissions that were filed in the High Court as well by Westpac and it's also not mentioned, and that's at page 79 of volume 1 – sorry, that's the – page 79 of volume 1 is the statement of defence, so it was never raised in that, and it was never raised in the judgment.

ELIAS CJ:

So what was the defence? I did look at it before. It seemed to be simply…

MR GUSTAFSON:

Bare denials really.

ELIAS CJ:

Yes, bare denials. There's no affirmative –

MR GUSTAFSON:

No.

ELIAS CJ:

– defence that is pleaded, is that right?

MR GUSTAFSON:

I don't believe so, Your Honour.

TIPPING J:

It was one of those highly illuminating defences that we're all taught to try and get away with.

MR GUSTAFSON:

There's no –

YOUNG J:

I suppose the initial focus was on what was to happen to the money –

MR GUSTAFSON:

Yes.

YOUNG J:

– and the fact that there was an underlying dispute that had to be resolved escaped, at least initially escaped, the attention of the Judge –

MR GUSTAFSON:

Well –

YOUNG J:

– because he didn't give a judgment on it for a year.

MR GUSTAFSON:

Well, Your Honour, the point is this. My friend has – my learned friend has submitted to you, "Look, we never needed to – we never got a correct answer from the parties who knew about why the consultancy fees were so high." That's his submission to you.

TIPPING J:

Or whether the consultancy fees were actually a cloak for something else.

MR GUSTAFSON:

Yes, exactly. That –

TIPPING J:

Those were the two potential points in play presumably.

MR GUSTAFSON:

Well, they weren't – that's my point, Your Honour. They weren't –

TIPPING J:

That's your point.

MR GUSTAFSON:

They weren't actually in play in the High Court because they weren't raised in the affidavit, they weren't raised in the statement of defence, in the submissions, and we had the substantive order that the moneys be distributed was neither consented to nor opposed, and my friend rightly notes that by 27 March the parties were looking to cut the Gordian knot, and the way to do that seemed to be just to, if Westpac had a significant – as it was claiming – a significant concern about dishonest assistance, the way to do that was to give the funds back to BANDES, who was the vendor, and then settlement to take place between the vendors and the shareholders. And as Mr Anker said in his affidavit, which was filed on the 27th, and Mr Anker is obviously the power of attorney holder for the vendors, he is saying, "Well, look, I can – we can handle that without having a potential claim or disadvantage to the vendors because if the vendors don't get paid the money, we simply won't transfer the share scrip." So that's essentially what happened.

So there's no – there was no refusal to get into the level of fees or why they were so high. The initial concern was whether or not these payments were authorised. That's what was met.

TIPPING J:

Now was it – the prayer for relief was a declaration almost in the nature of mandamus –

MR GUSTAFSON:

Yes.

TIPPING J:

– and then there was a claim for interest and costs.

MR GUSTAFSON:

Yes.

TIPPING J:

And the defence didn't say at any stage, although it seems to be implicit now, that we were justified in not performing the mandate because of this dishonest assistance issue. I put that very, very colloquially.

MR GUSTAFSON:

Yes, yes, yes, and –

TIPPING J:

But there's no prejudice in that because at least, at this stage, we know full well that that's what they're saying.

MR GUSTAFSON:

We do know that now and the prayer for relief was amended, and that's clear in His Honour Justice Keane's judgment, because from 27 March the thrust then was getting the money repatriated back to BANDES and that's indeed the order that the Court made, that the money come back. So at that point in time, that was not objected to, not consented to, but that was the order that was made, and really, it's been touched on, I think, certainly it was raised in *Bank of Scotland* and raised this afternoon by my learned friend, if interest and costs had not been sought, I doubt that my friend and I would be standing before you now.

TIPPING J:

But it does raise the issue of one, what is the law by way of all this, and two, and I presume your client's argument is simply that it wouldn't have been dishonest for them to pay, therefore they should have paid.

MR GUSTAFSON:

Absolutely Your Honours.

TIPPING J:

It's as simple as that, I would have thought –

MR GUSTAFSON:

It is that simple.

TIPPING J:

– from your client's point of view, assuming the law requires an element of dishonesty to be established before you can withhold payment on an ordinary prima facie mandate.

MR GUSTAFSON:

Well, that's right, Your Honour, and the way that I've approached the submission is to say, well, and it's like any implied term, if you don't have to pay because you are going to, as a bank, because you are going to be guilty of dishonestly assisting, to me that is clearly a proper implied term for the banker/customer relationship, because otherwise it does put the bank in an impossible position. You're either going to be sued by the third party who you've just been an accessory to help defraud, or you're going to be sued by the customer for breaching the mandate.

TIPPING J:

Would you say that that was a term implied by law on account of equity –

MR GUSTAFSON:

Well –

TIPPING J:

– stepping in to modify the rigour of the common law duty to pay in accordance with the mandate, or something along those lines?

MR GUSTAFSON:

Yes, Your Honour. In *US International Marketing Ltd v National Bank of NZ* [2004] 1 NZLR 589, His Honour Justice Rodney Hansen in the High Court approached the question as Your Honour put it today as a contractual nature, and that was also, I'm sure Your Honour's far more familiar with the case than I am, but certainly Justice Glazebrook in the Court of Appeal also looked at this as, as a matter of contract. There is an implied contract that the mandate will be honoured except in exceptional circumstances. What is the exceptional circumstance? And I say that there's another implied term, and that is that you will not have to honour it as a bank if you're going to be sued, and the only way you can be sued by a third party in this case is dishonest assistance, and that means dishonesty, and it's not a matter of looking at suspicion as my friend submitted to you. There is suspicion, in *Barlow Clowes*, *Royal Brunei*, *Twinsectra*, and the *Attorney-General of Zambia*. In none of those cases, none of those cases, a mere suspicion would come anywhere near a finding of dishonest assistance against the accessory.

TIPPING J:

Well, of course, all those cases, if my memory serves me right, are cases where fraud was actually established.

MR GUSTAFSON:

Yes, Your Honour, yes. And the ones that deal with Nelsonian blindness or which – I did like the way Justice Blanchard put it, the blindingly obvious – if it's so, if it is absolutely so obvious that you are shutting your eyes to a fraud, of course you should not be paying out, of course you are dishonest if you do. But what we have here at the beginning of March 2008 is well short of that.

As my friend submitted to the Court, if MAP had come back, had been able to read the mind of Westpac and realise that it was concerned not about whether the payments were authorised but the level being paid to these non-parties to the escrow, if they had come up with an explanation that said, look, these shares have been sold to A&L or A&L's holding these amounts on trust, or they just simply agreed that it was a very, very hard transaction, and two years of work required a significant payment, if any of those answers had come back on my friend's case then the money would have been paid out. Now that must fall well short of them failing to make an inquiry because you know that it will confirm a fraud to you. Westpac wasn't in that position.

Your Honours, if I can just take you perhaps to the, to my written submission. I'll just perhaps quickly take Your Honours through that, if that's acceptable.

ELIAS CJ:

We have read it so you can –

MR GUSTAFSON:

Yes, I –

ELIAS CJ:

– you can expand or touch on or emphasise.

MR GUSTAFSON:

I promise not to read it.

ELIAS CJ:

Yes.

MR GUSTAFSON:

Your Honours –

TIPPING J:

I would be particularly assisted, if this is any help to you, by any submission you might want to make in support of the proposition that the test should be equivalent to the cause of action. In other words, to have a defence you have got to show that you would actually have been in the gun.

MR GUSTAFSON:

Certainly.

TIPPING J:

And if you can't show that, you've got no defence.

MR GUSTAFSON:

Well I can perhaps take Your Honour right there actually because Your Honour, just coming over to page 7 of the submission, obviously Your Honour knows about, and I'm sure all of the Court has looked at *US International*. *US International* is the case where the fraud was not made out and there was some discussion today about that and in that case the defence that was run was we were effectively put on notice that there could be a claim by a third party, that the funds were not the funds of the client and were being dealt with in breach of those rights. And what I'm doing here today is essentially saying that the finding, which appears at paragraph 14, and on the top of page 8, is effectively correct, and that should actually be not page 47, it should be page 592, my apologies for that.

TIPPING J:

I don't think this test for implication of terms of *BP Refinery* is appropriate for a term that's implied by law. Or it's not necessary to have –

MR GUSTAFSON:

I agree Your Honour. It could be, if it's an implied term of law, fine, but when you look at the five categories, if you like, or five tests that need to be satisfied, they do require some rigour to how the term will have an effect in commerce and I think what my friend, and with respect I hope I'm not putting words in his mouth, but what he is asking you to do, if the test – sorry if the term implied by law or under *BP Refinery* is

as set out in paragraph 14. He is asking you to dial that back. What he's asking you to do is to dial it back to a point where the bank does not have to pay out if it has suspicion, nothing more. And the test in *BP Refinery* while Your Honour may be right, it may be unnecessary if it's implied by law, does raise these five points and having run through these, I mean obviously I say it's reasonable and equitable. I then go on and say, well it must be necessary to give business efficacy because you can't have a situation where regardless of whether the bank knows it's dishonest and still complies, that –

ELIAS CJ:

Mr Gustafson, I'm with Justice Tipping on this. I cannot see that this is the correct approach and I think it's much more, we're more in the ballpark of general principle in terms of illegality or fraud or illegality in equity than in performance. No one's obliged to perform a fraud. Even if they otherwise would be contractually obliged to do it and that's just general principle, general policy. I mean you may say that that's a term imposed by law but it's the law.

MR GUSTAFSON:

Yes, I accept that Your Honour and I guess the reason for doing this was to say, well what is the alternative. If, I agree with Your Honour, it's absolutely so totally clear that if you are participating you are in fraud. If you are dishonestly assisting you, saying that I had a contractual obligation to do it, is absolutely no excuse at all. So I agree to that. But what happens if you don't –

ELIAS CJ:

And it folds back on the contract. It's not enforceable.

MR GUSTAFSON:

Yes, yes.

BLANCHARD J:

It's not really contractual, I think, at least Lord Woolf didn't see it that way in the *Bank of Scotland* because he says at paragraph 26, "It is clear that a bank may become subject in equity to an accessory liability if it dishonestly assists in a breach of trust committed either by its customer or by others."

ELIAS CJ:

Chitty, however, does deal with this as a matter of general principle in terms of performance and whether you're obliged to perform if you are participating. It's the mirror image –

BLANCHARD J:

It certainly would modify, the equity would modify the contractual terms.

MR GUSTAFSON:

And the reason for touching on it and why I say look dishonest assistance is the right test, one it's, there's a very large weight of Commonwealth law now behind it that says, you know, if you're an accessory to liability it is dishonesty. If you are to accept what my learned friend says, then we are moving back away from that to something closer towards knowing receipt because what he is asking you to say is the bank does not have to honour a mandate if it has a suspicion. That's –

TIPPING J:

We run the risk, I think you could say, of sliding back into those awkward five part Peter Gibson LJ knowledge exercise.

MR GUSTAFSON:

Yes, yes and that's –

TIPPING J:

And what degree of suspicion, what degree of belief is getting back into that sort of conceptual approach whereas Privy Council clearly released us from that in –

MR GUSTAFSON:

Yes.

TIPPING J:

– in favour of a straightforward test of dishonesty. In fact unfortunately the articulation of it in *Royal Brunei* wasn't as straightforward as some would have liked but that's what we've got, subject to modification.

MR GUSTAFSON:

Yes Your Honour and you have, if I can just, just on that point, bring Your Honours over to page 23 of the submission. The footnote at 30, that's the descending five heads of knowledge that Lord Justice Peter Gibson came up with and in my submission my friend is asking you to say the bank, the bank could be acting dishonestly if it acted with knowledge of circumstances which put an honest man on reasonable inquiry. So it's a very, it's the very bottom rung. And as Your Honour Justice Tipping just said, the whole point of the cases, *Royal Brunei*, *Twinsectra* and *Barlow Clowes*, dealing with this in Nelsonian blindness, as Nelsonian blindness is just another manifestation of dishonesty. It's not constructive notice, it's not that at all. It's basically just manifesting a dishonest intent.

TIPPING J:

Well it treats you as having actual knowledge of something to which you are deliberately shutting your eyes.

MR GUSTAFSON:

Yes. You deliberately did not ask the question because you did not want to know the answer. And that's where, that's where Westpac, in my submission, Your Honour here is, it cannot come, say that it was in that position as at 3 and 4 March when it was getting the responses from Mr Lara. It was not, not asking questions because it did not want to know the answer and Nelsonian blindness is a two stage test. If I could just take Your Honours to that case.

ELIAS CJ:

Which case are you going to take us to?

MR GUSTAFSON:

Sorry, *Manifest Shipping* Your Honour.

ELIAS CJ:

Yes.

MR GUSTAFSON:

While I've set out in the submission the statements of Lord Scott and Lord Hobhouse, the one I would like to refer Your Honours to is at page 753 of Lord Hobhouse's judgment and it's at paragraph 25, it's about halfway through the paragraph, just before line C and it's the illuminating question 'Why not inquire?' To be guilty of

Nelsonian blindness you have to put the telescope to your blind eye. You're doing that because you do not want to know what the answer is and –

ELIAS CJ:

You do not want to have confirmed what you really know.

MR GUSTAFSON:

Exactly. That's exactly right. I'm not about to sound a retreat, in Nelson's case, because I don't want to know. I can win this. And Westpac is just so far away from that and coming to what Your Honour Justice Tipping said about a higher level. What we have at the moment with *US International* is a very, and *Barlow Clowes*, *Twinsectra*, *Royal Brunei*, we have a very, very workable case for banks and for people dealing with banks. Unless the bank is going to be dishonest, it pays out, and certainly I know in Your Honour Justice Tipping's judgment in *US International* it's very, very important for not only banks but the commercial world, and indeed individuals, to have that certainty of payment. And once you move to what is described by Lord Nicholls as a sliding scale, which is the five stage test of Lord Justice Peter Gibson, when you're looking at knowledge, you move into dark shadow. That is where it becomes much more difficult to say, do I have the requisite level of knowledge to be knowingly assisting.

TIPPING J:

I see Lord Hobhouse actually, at letter F of the page you cited, actually uses the word "deliberately" and emphasises it.

MR GUSTAFSON:

Yes.

TIPPING J:

If the ship owner *deliberately* refrains, so it's that element of deliberately.

MR GUSTAFSON:

Yes, yes.

TIPPING J:

You say that's the second stage effectively, deliberately putting the telescope –

MR GUSTAFSON:

Yes and it's, it's dealt with in the –

TIPPING J:

But here we have a case where they did inquire. It's not that they deliberately didn't inquire, they did inquire and then they say well the answer wasn't good enough. But if the test is they have to have, they have to have so conducted themselves that they would be liable for dishonest assistance, none of this matters, does it, because they can't really measure up to that I wouldn't have thought.

MR GUSTAFSON:

No they can't.

TIPPING J:

Or haven't really even tried to.

MR GUSTAFSON:

Well they –

TIPPING J:

Has it ever been asserted in terms that it would have been giving of dishonest assistance if they had paid out?

MR GUSTAFSON:

Well that –

TIPPING J:

That's not Mr Stewart's submission now.

MR GUSTAFSON:

No, no it's not. It's not but that was the point that was put by His Honour Justice Young to my learned friend this morning, is that isn't it the contra. If the payment had been made on 3 or 4 March, would you have dishonestly assisted, because if you

had dishonestly assisted, you've got a complete defence. If you were short of the dishonesty you don't have a defence.

YOUNG J:

I'm not quite sure that's the way I formulated it, if I did –

MR GUSTAFSON:

But that is, it perhaps is the issue that has been raised this morning which is, is it necessary to have a lower threshold for a defence than there is for a cause of action against the bank and in my submission it's not because the bank, the bank is there protecting itself from participating in a fraud. If it's not going to participate in a fraud it does not need a defence. And Your Honours at the end of the submission, I will come to this shortly, but there seems to me there were options available to Westpac in this scenario and one of them was what it did which is really simply to do nothing and invite proceedings to be issued and from my quick reading of the *Bank of Scotland* case it seems to be that that is considered a possibility but if you do that then you run the risk of, if you can't establish a dishonesty you run the risk of interest and costs and that's what essentially happened here. There was no stringent defence put up to the, to the substantive claim that the proceeds be disbursed away from Westpac.

ELIAS CJ:

It's not just costs though you're opened up to, is it, because you could be up for huge consequential losses.

MR GUSTAFSON:

Yes.

TIPPING J:

If you deny your client money, like in *US International* where the assertion was, I don't know whatever happened to it in the end, was that without that money he'd lost a valuable contract.

MR GUSTAFSON:

Yes it was about 700,000 for the –

TIPPING J:

Yes, so he said.

MR GUSTAFSON:

– holding back a $10,000 payment. Yes and it actually highlights the reason why there needs to be a very clear test because if the bank, if the bank can – whether it, if it has a suspicion, if it doesn't get around to perhaps chasing it up quite as quickly as it should, if it turns out to be groundless, if it perhaps gets made a wrong call, why should – and this is coming back to the *Bank of Scotland* case at I think it's paragraph 45 – why should the client, why should the customer bear that. Banks are in the business of taking on these contracts. That is their business, that is how they make their daily bread. Now they have to make a call and basically it's, in my submission, slightly ironic that what Westpac is asking for today is for that, what is currently a clear delineation under *US International*, to be slightly muddied.

YOUNG J:

Say, I know your position is that the challenge over the mismatch was more vague than the way it was formulated by Mr Stewart, but say the bank had said to MAP, look, half the money is going in what seems to be consultants' fees, some to funny sounding names. This is in stark contrast to what we were originally told as to the level of fees. The fact that this money is being diverted raises the very strong suspicion in our mind that there is a fraud, kindly explain it, and your client had just said, well go whistle, pay us the money and honour the mandate. Now that's a slight exaggeration of what Mr Stewart said and you say that it's well adrift of what the reality was because the complaints were more general or concerns were more general. But just taking my hypothesis, is the bank entitled to ask a straight question and expect a straight answer in circumstances of uncertainty?

MR GUSTAFSON:

What I would say Your Honour is that the bank should protect itself by way of a contractual term. I don't see, I don't see any legal imperative on the client to come back but there is a commercial one, clearly. The commercial one would be, well if you're not going to pay it out, and this is what the, this is what the correspondence that I was taking Your Honours through before, shows is that there was a huge commercial imperative on MAP and everybody else –

YOUNG J:

To get the money out.

MR GUSTAFSON:

To get the money out. It wasn't because we were worried, we're not responding because we thought there was a legal case. We just wanted the money.

YOUNG J:

And by the time it gets to Court the affidavits are rather more flat batting, aren't they, the responses, I think does Mr Anker simply say well it's none of the bank's business?

MR GUSTAFSON:

No, he doesn't. What he says is we have, by the 27th of May what Mr Anker says is well, we have all got together and we've decided the best way to resolve this, is the money comes back to BANDES and that cuts the Gordian knot.

ELIAS CJ:

May I just interrupt and say I'm conscious that you haven't had, that you didn't get underway until well after lunch. What time do you think that you will require because we might consider taking an adjournment if we have to sit.

MR GUSTAFSON:

I would have thought I'd need at least another hour, Your Honour, maybe 45 minutes. I'm in Your Honour's hands.

ELIAS CJ:

All right, let's carry on then, thank you.

MR GUSTAFSON:

I've now completely lost my train of thought.

ELIAS CJ:

I'm so sorry.

MR GUSTAFSON:

Sorry.

TIPPING J:

I think you were telling us what Mr Anker –

ELIAS CJ:

Yes.

MR GUSTAFSON:

Yes, yes.

TIPPING J:

He came up with this brainwave of taking the money back to the purchaser.

MR GUSTAFSON:

Yes, Your Honour. If Your Honours come to volume 2 at page 100 and – the front page is 169, the affidavit is 170, 71.

ELIAS CJ:

Was there no cross-examination on these affidavits, no?

MR GUSTAFSON:

No there wasn't because, again, there was no opposition to the orders being made.

ELIAS CJ:

No, no –

TIPPING J:

It was a done deal, effectively, wasn't it?

ELIAS CJ:

Of course, of course, it was a deal, yes.

BLANCHARD J:

Do we really need to get into this? All we need to know is that the South American parties got together and came up with a formula which got the money away from Westpac.

MR GUSTAFSON:

Yes, yes and that was the –

McGRATH J:

And the Judge was satisfied by that?

MR GUSTAFSON:

Yes.

BLANCHARD J:

The exact nature of that is of no moment.

MR GUSTAFSON:

That's probably right, Your Honour.

BLANCHARD J:

It certainly seems to indicate there was no fraud going on but one couldn't take it any further than that.

MR GUSTAFSON:

No.

TIPPING J:

What would you say to the proposition – just before you move on from the general subject we're discussing, the question of when you have to make further enquiry. I would have thought, consistently with the underlying premise, is that you don't have to make further enquiry unless it would be dishonest not to.

MR GUSTAFSON:

That's right, Your Honour.

TIPPING J:

I think there are dicta, some of the cases are broadly to that effect, but I can't pinpoint them, because if you think that, if a situation is there in front of you where you say, "Well, crumbs, I can't pay out at least without making further inquiry because it would

be dishonest to do that," then you make the further inquiry and it either remains dishonest or you're satisfied.

MR GUSTAFSON:

Exactly, Your Honour, exactly and it comes back to the choices that Westpac had as at, as at the date of the hearing before Justice Keane. I mean if the bank really thought that this was still going to be dishonestly defrauding the vendors, why did it not oppose? The money was going back but as my friend submitted in the Court of Appeal, that doesn't really – the fraud is so complex that it's duped BANDES, BIV and either/or Mr Lara and Mr Anker, shouldn't the bank, at that point, if it's so dead certain there is a fraud here, shouldn't have to put his hand up.

TIPPING J:

I don't think it really minded as long as it got the protection of a judicial order. I would think, with respect, that's probably the practical reality of the matter.

MR GUSTAFSON:

That is the practical reality of the matter, Your Honour, you're right and basically should – the question then is, is, if Your Honours were to say today that Westpac did the right thing, then basically in situations where there is a suspicion, short of dishonesty, then the correct thing to do is to just not pay out and force the customer to go to Court, and enforce the mandate.

TIPPING J:

A point that you made –

McGRATH J:

They made a business judgment. There was prospect, perhaps a tiny one, of huge exposure –

MR GUSTAFSON:

Yes.

McGRATH J:

– and then there was the alternative course of action that, relatively, had very minimal exposure and they were more comfortable with going that way and accepting that sort of exposure, it seems to me –

MR GUSTAFSON:

I think –

McGRATH J:

– and I think we have to face the fact that a bank manager, banks, in this situation, are going to always seek a bit more comfort. They may not be in a position of knowing or even be extremely suspicious of fraud, but they may just want to have a bit more comfort before they pay out and the bare fact that they ask questions, which don't happen to get straightforward answers, doesn't to me really alter the matter at all. The bank manager tried to get a bit more comfort, didn't get it and then has to assess the situation and did the bank manager then have knowledge of dishonest in the situation?

MR GUSTAFSON:

Yes and to that, Your Honour, I'd say, "No, the bank manager did not have knowledge of dishonesty," and the question is, well, then the bank decided to, as Your Honour says, it made a commercial decision and decided to put MAP to the cost of going to Court. That was the lesser of the two commercial evils, the lesser of the risk. What –

McGRATH J:

I think we sort of appreciate that and a lot of what we teased out with Mr Stewart has clarified these, some of these aspects this morning.

MR GUSTAFSON:

Yes, where this case and if the case had stopped there it would have been, for me, it would have been totally commercially understandable for Westpac to have taken that approach. What strikes me, in my submission, as odd, is Westpac now coming to Court and saying, "You should, you should effectively find that what we did, did not breach the mandate and the reason we say that is because the test in *US International* is too highly put." That's essentially what's being said now and this is – it's, Westpac made a commercial decision to not honour the mandate –

McGRATH J:

Well, you characterise it that way but I think that Mr Stewart put the submission more subtly than that. I think that he said he was within the principles of *US International* and other cases and really I think that you have addressed the submission that that's just not, you've made the conscious submission that's not so.

MR GUSTAFSON:

No, I'm not subtle unlike my friend so – but, Your Honours, it's –

McGRATH J:

Isn't it really as simple as whether the bank, in the end, was in breach of contract insisting the matter go to Court and the Court order be obtained –

MR GUSTAFSON:

Yes.

McGRATH J:

– given what it knew at the time?

MR GUSTAFSON:

Yes, that's exactly it, Your Honour, because the only, there was no dishonesty on the part of Westpac and there's no evidence of dishonesty or fraud by anybody else, so you have a situation where applying *US International Marketing Ltd v National Bank of New Zealand* as it stood, Westpac should have paid out, made the commercial decision not to, that's fine. Does that mean that the law, as it currently stands, should be changed? The only way to do it, that I can see, is to go backwards from dishonest assistance towards knowing assistance. I strongly hope that doesn't happen, but –

McGRATH J:

Well, as I say, I don't think Mr Stewart's asked us to do that so I'm not really sure you have to reply to that.

MR GUSTAFSON:

Well, that's good. The –

TIPPING J:

But you are saying that the effect of adopting Mr Stewart's submission would tend in that direction. I think that's the (inaudible 15.48.54) of your point.

MR GUSTAFSON:

Yes it is, Your Honour, because if Westpac is not going to be sued by a third party, why does it, why does it need to make an inquiry? If it feels it wants to, fine. Commercially it can do whatever it likes, but where it cannot establish that there is, it will be dishonestly assisting, it should not then be able to say to the vendor, sorry, the customer in the circumstance, "We are not going to honour the payment mandate and also you can't sue us because we have a defence."

TIPPING J:

Well that's, the point you made a few minutes ago strikes me as being quite important that that would shift the loss onto the customer, and as the Chief Justice pointed out a few minutes ago, the loss could be very substantial by being denied funds at a time when you need them to consummate a transaction, transactions cancelled against you and when you look at who's in business to do what, it would seem to be a dissonance there that the loss should be suffered by the customer, unless the customer was up to mischief.

MR GUSTAFSON:

Yes. And, looking at this case, the underlying transaction did not fall over, but it could have. And it is a, it was a transaction that, as my friend said, was meant to take a couple of weeks to sort out and finalise, it ended up taking almost 20 months. And so, at that point in time, had it fallen over, Westpac may have been staring at a very significant claim.

Your Honours, moving quite a way forward in the submission, just to page 25, paragraph – actually, page 24 at 92, paragraph 92 – I think it was Your Honour Justice Tipping invited my learned friend to try and particularise what he says the defence should be, and maybe putting up a straw man, but I had a go at it myself in paragraph 92 and, if Your Honours accept that all that Westpac had were the submissions, this is the defence that would be incorporated into –

TIPPING J:

Well, if you add it on a solid foundation after your suspicions, you'd be pretty well exactly on all fours.

BLANCHARD J:

Well, yes, reasonable suspicions, I think –

MR GUSTAFSON:

Yes.

BLANCHARD J:

– might be the way it was, could be phrased.

TIPPING J:

It raises a concern that the money was not going to the right people, based on a solid foundation.

MR GUSTAFSON:

Yes. And in 93, in the preceding paragraphs, and I know that we've spoken about why it's not probably a good idea to use this test, but just covering the points in there, if Your Honours were to find that defence in 92, surely there must be an obligation as well, an obligation to actually make an enquiry. If not, it just complete neuters and takes away from the mandate to pay, because if the bank can raise any suspicion on reasonable grounds and then do nothing, then that is shifting the burden wholly back onto the customer, because of the bank's suspicion. If the bank was to make inquiry, that's placing a very large burden on, conversely, on the bank, if every time the bank feels it has a suspicion that a third party may be disadvantaged, if it has to make an inquiry or some form of inquiries or tell the customer what it wants to satisfy itself.

TIPPING J:

And might one have to make an inquiry, it will just say, "On this formulation, I have a reasonable suspicion," and then if that's found you just sit on the money.

MR GUSTAFSON:

And what happens next, Your Honour?

TIPPING J:

Well, presumably the customer then has to apply to the Court for an order that the money be released in answer to the mandate.

BLANCHARD J:

Of course, the problem then for the banks would be that in future instances people would be coming along and saying, “You should have had a reasonable suspicion.”

TIPPING J:

Yes.

MR GUSTAFSON:

Yes.

BLANCHARD J:

Lowering the standard will ultimately work to the disadvantage of banks.

MR GUSTAFSON:

I couldn't agree more, Your Honour.

TIPPING J:

Unless we kept some sort of reasonably artificial divide between the defence and the cause of action which, initially, I was toying with in my mind, but I’m now not keen on.

MR GUSTAFSON:

I think, as a matter of perhaps – would it be difficult to see the logical reason for that distinction, Your Honour, I think, in my submission?

TIPPING J:

I think the two have to be in harmony.

MR GUSTAFSON:

Yes, because one is protecting –

TIPPING J:

Because it’s only then that our equity can step in and say –

MR GUSTAFSON:

Yes, exactly.

TIPPING J:

– because you'd be breaching equity –

MR GUSTAFSON:

Yes.

TIPPING J:

– we'll relieve you from your duty at law.

MR GUSTAFSON:

Yes, yes. And, going back to the *US International* case, Your Honour, you had a situation there which was entirely so much more advanced than this case, where you had a Court-appointed liquidator, goes to the bank, says, "Do not pay out, the monies belong to the company in liquidation, we're going to get an injunction," at that point in time the, it's a much stronger case than this, but the decision handed down there, with respect, Your Honour, gave absolute clarity to what parties had to do.

TIPPING J:

Well, we hope so.

MR GUSTAFSON:

Well, in my respectful submission, it did, Your Honour, and moving away from it is going to impact adversely on banks, and that is perhaps the ironic nature of the appeal. And I've really covered off that point at 93.2, Your Honour. If there's no Nelsonian blindness, if what the bank is doing comes well short of that, there's no need, there's no need to protect the bank, you're protecting the bank from nothing. If the bank is not going to be sued, as Your Honour rightly says, there's no need for equity to step in at all. And, again, I just, I do have extreme difficulty with whether or not it's a necessary matter to complication the relation between the bank and the customer by importing that.

At paragraph 96, I've set out what I think are the three options to a bank that have a suspicion that something is amiss, and 96.1 is what the bank did here. Right from the very first letter, what was being invited of MAP was to apply to the Court for an urgent order, and that is ultimately what happened, Your Honours. In relation to that, if that is the approach that banks should take or are going to take, there needs to be,

as there was in this case, there needs to be, if no fault can be established, the revisitation, as is normal, if you succeed in ordinary proceedings, costs and interest should be visited on the bank. So that is an option, and it's one that Westpac decided to take. The second option is to really look at the actual facts before the bank. What does it actually know, sit down with its legal team and work out, "Are we going to be guilty of dishonestly assisting?" Now that, that has the attraction of being very workable and very clear. The bank is, at a point in time, making a decision about its liability and then acting accordingly. The third option which I've set out it really – sorry, I've reversed the two. 96.3 is just deciding to pay out. The second one is actually – oh, no, I was right.

TIPPING J:
I think that's clearly set out here.

MR GUSTAFSON:
Yes.

TIPPING J:
I don't think you really need to elaborate then, Mr Gustafson, it's the second one that you say is the most, is the appropriate one.

MR GUSTAFSON:
Yes.

TIPPING J:
You just sit down and work out whether you'd be acting dishonestly in doing what, in answering the mandate.

MR GUSTAFSON:
Yes, yes, Your Honour. And that's clear. You stay away from that sliding scale of knowledge, which is problematic. Because every – the trouble with those five – and I'm not saying that honesty and dishonesty is an easy thing to work out, even though, I think it was Lord Justice Nicholls said, "You're either honest or your not, you're either one thing or the other, it's black and white," but when you start talking about knowledge, being put on notice, making inquiries, it is a much, much more difficult test, much harder for banks and, possibly, for courts as well.

Your Honours, the only other point which I wanted to make, unless Your Honours have any further questions, was just – and I don't want to jump back into the minutiae – but the initial comment that's in the email attached to the 22 May 2006 letter at page 424 of the case on appeal – I think that's volume 3. So this is the, at page 41, this is the email, which is apparently detailing the first, what needs to happen. And if you come over to page 424, this is where it talks about the fees, that my friend placed a lot of reliance on, and you'll see that, "I've told the seller that we will be requiring a US$450,000 fee," and he said, "This is okay, to pay for our work. Also, the person that introduced me to this deal was going to keep $US100,000. As you can see, there are some expenses already." And what I'd say in relation to that is, my friend has submitted to you that was all the costs that were going to be charged on this. That last bit makes it, in my submission, equivocal. It seems to be the costs to date, not the costs all up.

YOUNG J:

I suspect that it's probably more relevant to look at the page before – what was the page, 422 – 423, where there are references to, "Shareholders have shares with different prices, all of these will be in the paperwork, some shareholders will receive 17 million, another group will receive 12 million and so on, the directors say there are some special share remuneration, value subscribed, the larger shareholders would like to keep the funds outside Bolivia."

MR GUSTAFSON:

Yes, which would – the British Virgin Islands, the last time I checked, were outside Bolivia, but… Unless I can help Your Honours with anything, I think…

ELIAS CJ:

No, thank you, Mr Gustafson. Mr Stewart?

MR STEWART QC:

Just briefly, Your Honour. Justice Tipping, to my learned friend, said, "Is it your position that to have a defence, you will need to show that you'll be in the gun. If you can't show that, you have no defence." Is Your Honour saying that you'll be in the gun unless you can show that there was in fact fraud?

TIPPING J:

I think that was the purport of my question, yes.

MR STEWART QC:

Yes, that's tough, isn't it, because the onus then goes on the bank to prove fraud, when it's not privy to all the arrangements, transactions and machinations that the customer is and has been engaged in. But that must be a huge –

TIPPING J:

But it must march, the two must march together. If you can't – you have a defence only if you know you have sufficient knowledge, either actual or reputed to you through Nelsonian blindness, and if you have that knowledge you've got a defence. The defence is that you would thereby be assisting in a breach of trust.

MR STEWART QC:

Well…

TIPPING J:

If you don't have that level of knowledge, you won't be dishonestly assisting in a breach of trust, so you've got nothing to worry about.

MR STEWART QC:

Well, I think that, I think if you have that level of knowledge you've got a defence, even if there is no fraud. In other words, that you were wrong about your concerns.

TIPPING J:

Well, that's the issue. I mean, you're saying you do have a defence, short of being able to show that on paying out you would have been liable for dishonest assistance.

MR STEWART QC:

If there was in fact –

TIPPING J:

Mr Gustafson is saying, "No." All I was trying to do was just encapsulate Mr Gustafson's position, just for clarity in my own mind, I'm not saying which way round I'm minded to go at the moment.

MR STEWART QC:

Okay.

TIPPING J:

Although there may have been an implication, Mr Stewart, not wishing to mislead you.

MR STEWART QC:

No, no, no. It's just going to be a hopeless position for banks to say, "Well, you're only going to have a defence to dishonest assistance, no matter how suspicious you are and what enquiries you make, if in fact there is fraud at the end of the day." Because if there isn't, you're in the gun, and I think…

YOUNG J:

I suppose claims against banks for dishonest assistance would have started in the 80s.

MR STEWART QC:

1980s?

YOUNG J:

Yes. I mean, those are the case – there wouldn't be many cases before the 1980s where there's a claim against a bank for dishonest assistance.

TIPPING J:

In moving money around?

YOUNG J:

Yes. What was the – but even so, we've had 25 or 30 years, and there haven't been many cases where this particular situation has actually crystallised into litigation.

MR STEWART QC:

I think probably we will get our money-laundering legislation in shortly. The banks are going to have far greater powers to stand up transactions, particularly these types of transaction.

BLANCHARD J:

Well, provided that they're doing it on the basis that they suspect money laundering.

MR STEWART QC:

That's right.

BLANCHARD J:

If they suspect some sign of fraud, which doesn't involved money laundering, these cases will still continue to hold sway.

MR STEWART QC:

This could have involved money laundering, this case.

BLANCHARD J:

But you didn't ever suggest that it did.

YOUNG J:

Well, it's just, money laundering is just a label. I mean, running, putting money, describing money that may be one thing as consultants' fee is money laundering, or can be. But is there, is there a Bill at the moment, or just a report about money laundering?

MR STEWART QC:

No, I think –

UNKNOWN PERSON:

It's passed. The regulations are in.

MR STEWART QC:

The regulations are in?

UNKNOWN PERSON:

No, the regulations are not out yet.

MR STEWART QC:

I know it's very close. I think we're one of the few jurisdictions that don't have this legislation. Now, my learned friend said that my argument was that the Bank does not have to pay if it has suspicions, it's not that, it isn't the proposition. I said the bank does not have to pay out if it had well-grounded suspicions that put it on inquiry, if you need that. Having arrived at that position, then the bank has to make inquiry

and, having done that, if the explanation response does not allay those suspicions then the bank's not required to take the risk of being sued for dishonest assistance.

TIPPING J:

So the customer bears the loss, even if the bank is ultimately wrong?

MR STEWART QC:

Well, yes, and you know, that's still, that's appropriate, but it is the customer who can provide the explanation, it's got all the facts, and why shouldn't it? Why couldn't the customer just say what they said in this case, "It's okay"?

TIPPING J:

I'm just thinking in more general terms, Mr Stewart, that that may be a fair response in this particular case, but if the law is that you have a defence short of the cause of action, if you understand my shorthand, then the customer is going to bear the loss, even though the bank is in the business of taking monies on deposit and dealing with it and so on, and actually is erroneously withholding the money, if the balance of, the balance of commercial –

MR STEWART QC:

All right.

TIPPING J:

– fairness, if you like.

MR STEWART QC:

I mean, you could deal with the facts in this case and say a simple explanation of the actual position by the customer would have allayed the bank's concerns and the money would have flowed. Now, why try and squeeze this into some more difficult principles than that?

TIPPING J:

Well, that may or may not be the answer to this case, but if the law is laid down that you have a defence, short of, on some hypothesis, short of actually demonstrating that you would have been liable, then it is true, isn't it, that the customer is going to bear the loss, even though there was nothing wrong?

MR STEWART QC:

Well, yes, and perhaps that's where the risk should lie, because the customer's the one who can give carte blanche about the transaction that the bank's worried about. Now it's got to be a well-founded suspicion, it can't be just a feel of unease or, "I'd like to know what you're doing, Mr Customer."

TIPPING J:

This well-founded suspicion of yours, or your client…

MR STEWART QC:

I'm not by nature, Sir.

TIPPING J:

No, no. Is that what triggers the obligation to inquire –

MR STEWART QC:

Yes.

TIPPING J:

– and then, subject to the response to the inquiry, what if the inquiry is answered in a completely neutral way that doesn't either assist or foster more suspicion? Can you then withhold simply on the basis of a well-founded suspicion?

MR STEWART QC:

Well, then yes, but the bank runs the risk of the finding being, well, that response and all the circumstances was adequate. The bank has to make an assessment there, it will probably err on the side of making the payment.

TIPPING J:

This will be construed as the Court saying that you can withhold payment if you have a well-founded suspicion.

MR STEWART QC:

Well, perhaps you put the barrier – Justice Blanchard was attracted to Lord Justice Scott's judgment. The terminology I've seen is solid suspicion or well-grounded suspicion. I haven't seen it much higher than that. I have seen mere suspicion, but a suspicion has to be properly based so that you suspect that a third party is being

cheated out of their entitlement or there's a breach of trust, and you don't likely arrive at those positions.

TIPPING J:

Well, suspicion is a distinctly lesser state of knowledge or mind than belief. I mean, do we really want to get back into these sorts of subtleties, Mr Stewart? This is what I thought the Privy Council was very anxious to get us away from in the *Brunei* case.

MR STEWART QC:

The knowledge?

TIPPING J:

Well, it's not precisely knowledge but it's the sliding scale problem that beset the whole law in this area until it was unshackled with the simple concept, or perhaps not entirely simple, but much simpler concept of dishonesty.

MR STEWART QC:

Well, he has to get over the first hurdle. That, there has to be a well-grounded suspicion that a third party is being, there's a breach of trust against a third party and only then is it incumbent on the bank to inquire, make the inquiry and you've still got this suspicion. It's not abated at all. What does the bank do then? It says, "Well, I'll pay out because I still suspect there's fraud here, but I'm not getting a decent response. What do I do? Sit on the money and get sued or do I pay it out? I'd pay out." Now, I'd say in that case, Sir, they're taking the easy option and it is dishonest, and I know you don't like it, Sir, but unacceptable commercial conduct by a professional banker to make the payment in those circumstances, notwithstanding his suspicion and notwithstanding it hasn't been abated after the opportunity to give an explanation has been given.

TIPPING J:

Crumbs, I just don't like unacceptable commercial conduct. You're dead right.

McGRATH J:

Mr Stewart, do – can I put it to you that you have moved away from the concept of dishonest assistance at this stage –

MR STEWART QC:

No.

McGRATH J:

– and you're really bringing that, you really are lowering the threshold more in your reply than you were in your principal submissions?

MR STEWART QC:

No, I'd say that it is dishonest of the bank in those circumstances to pay out because it still suspects fraud and it's paying out – because it's not shutting its eyes. Well, it is actually. It's tantamount to shutting its eyes because it's paying out to get rid of the problem.

McGRATH J:

It's not shutting its eyes, is it, on your test to an obvious fraud?

MR STEWART QC:

It's not shutting its eyes because it's afraid of the truth. It wants the truth, can't get the truth so it just pays out. Now, that's a hopeless position for the law to be in, particularly, if there's somebody there who can tender an explanation that should allow the transaction to proceed or not.

McGRATH J:

Well, it's a hopeless position for the law but we're dealing with the law of equity and when that should intervene to override, if you like, the law of contract. If I come back to what I was starting with, in this case, it is open for the banks to set contractual terms as to the basis on which it will do business and to specify the sort of thresholds you have in mind as being workable thresholds for banks.

MR STEWART QC:

I've not seen them yet but it doesn't mean to say they won't come after this decision.

TIPPING J:

You can see the draft being prepared as we speak.

MR STEWART QC:

I think I'll think better of it at the end of the day, but – it may be that's where it ends up and I've been alive to that possibility in, since I've got engaged with this case. I didn't do the High Court case, you understand, Sir.

McGRATH J:

But from our perspective, I think we do have to consider the extent to which we can re-fashion a principle of equity, if you like, to apply it in this situation which is different to the situations in which it's been applied in the cases so far and a principle, of course, which the Australian High Court isn't keen on at all anyway.

MR STEWART QC:

No, but if you let the banks fashion these provisions so, as will happen, they will be very much in the bank's favour and there would be the ability there to inconvenience a customer at the drop of a hat and maybe that's what, that's a commercial decision.

TIPPING J:

Well, one would hope banks would be a little bit more responsible than that, Mr Stewart and only give themselves what protection is reasonable.

BLANCHARD J:

Bearing in mind that we're dealing with an Australian bank here, have you looked at the Australian banking text books to see what the test is there?

MR STEWART QC:

No. You mean the High Court Australia test on dishonest assistance?

BLANCHARD J:

Well, how that's being interpreted in the banking context because it wasn't enunciated in a banking context by the leading Australian textbooks on banking.

MR STEWART QC:

No, I would have thought my instructing solicitor might have, but it's not something that I've looked at, Sir. I believe our terms, Westpac's terms, are drafted locally.

BLANCHARD J:

I'm not thinking about Westpac's terms, I'm thinking about what answer the Australian textbooks would give to the problem in this case?

MR STEWART QC:

I haven't looked at it. I have searched –

BLANCHARD J:

I mean it occurred to me that we oughtn't to come up with a test that's a long, way away from the one they're using in Australia, if that's possible, given the difference in the jurisprudence.

TIPPING J:

What – can I just risk irritating you, Mr Stewart, what do you suggest is the policy reason for lowering the threshold for a defence as opposed to a cause of action? Why should that be done in the bank's favour?

MR STEWART QC:

Because the matter that concerns the bank is all the customer's making and it's a customer's activities that the customer's fully apprised of and –

ELIAS CJ:

It's not a stranger matter, is that what you're saying?

MR STEWART QC:

The bank will be a stranger to, in most cases like in this one, to the –

ELIAS CJ:

Breach?

MR STEWART QC:

– particulars of what's going on, but the customer won't be.

TIPPING J:

I thought the banks already had a fair degree of protection by the deliberate decision of the Court of Appeal in that US case, which I was part of, to make the test or the threshold pretty high so that the banks wouldn't be in trouble, other than if something

was staring them in the face, putting it colloquially, and why should, if that is right, why should the defence be any different?

MR STEWART QC:

Only in the circumstance where in your judgment contemplated if a bank's on inquiry, it should make inquiry, only in circumstances where it's accepted the bank was on inquiry, makes inquiry and the bank is fobbed off by a customer who is not prepared to disclose. In that case, it shouldn't – the bank's position should have a lower threshold than otherwise.

TIPPING J:

A lower threshold if fobbed off?

MR STEWART QC:

Yes, or if there's a refusal to give an explanation which should, one would have thought, be readily and easily forthcoming and my learned friend said that the bank never asked, but it did, twice, by the way, in letters. Expressly asked for an explanation as to why are these payments to consultants over 50% of the entire purchase price, and the first time is volume 5, page 800 and then volume 5, 809, on the 18th of March and again on the 26th of March got no answer.

BLANCHARD J:

But that's a fair way down the track, isn't it?

MR STEWART QC:

Yes and if you follow through the chronology there was nothing from MAP between the 4th and the 11th of March when proceedings were issued and then there's some correspondence between the 13th of March, and by the 18th of March the bank had asked that question specifically. It had the new instructions by then to show there were consultants' fees. Now, in Mr Collins' affidavit, just while we're on this point, paragraphs 25 to 33, he labours the bank's concern about the level of the consultants' fees and why, and MAP could have been under no illusion about what was the basis of the bank's concerns in respect of these fees and that's when the, MAP changed direction, said, "Well, give us the money back." Mr Anker's first affidavit is, Your Honour Justice Young mentioned, simply batted the whole issue away. His first affidavit just didn't engage, page, volume 2, page 133, didn't address the mismatch at all. Didn't tender any explanation and just relating to the final couple

of points, there was no amendment to the prayer for relief about paying the money out to BANDES.

Ms Peters, in the High Court, suggested that perhaps the prayer for release should be amended to show an order that the money be paid but that was resisted by my learned friend, and that's mentioned in the judgment of Justice Keane. His 1st April judgment, judgment of 1st of April. You see, my learned friend on the *Manifest* case said it's Nelsonian blindness if you don't inquire because you don't want to know. That's accepted but what about the, I hope I'm not being repetitive here, you inquire, and if you don't get an acceptable answer by those who do know and can explain, but decide not to, what's the bank to do? Pay and take the risk that it will be sued by the people who have been cheated out of their money or not pay and be sued by the customer?

Now, the bank's case – perhaps I thought, it's actually recorded in my submissions at paragraph 120 of the written submission. This was the bank's case in the Court below and it's a, it was our case in the Court of Appeal and I hoped it was a case here. At paragraph 120, "Quite apart from MAP's agreement as to the terms on which Westpac accepted a deposit. Westpac was, in any event, justified in declining to action MAP's payment instructions on the basis that to do so would render it vulnerable to a claim of dishonest assistance." Not actually going to be successfully sued –

TIPPING J:

Does vulnerable, in that formulation, mean liable to?

MR STEWART QC:

Yes, so it had to face a claim because it was on inquiry, got an answer that wasn't adequate but decided to pay out and I'd say that's – and I know it's going to irritate you, Sir, unacceptable commercial conduct but also –

TIPPING J:

We seem to have a mutual –

MR STEWART QC:

I think you're ahead, but –

ELIAS CJ:

He's up here.

MR STEWART QC:

And it might be described as pragmatism, but I still say it has the colour of dishonesty if you pay out, because you've got your well-grounded suspicion, but still you get an answer, you take the easy way out and pay out and the people, your suspicions were well-founded and they get sued, and I say that you shouldn't have to, being sued or not, you shouldn't have to depend on whether there was subsequently proven fraud.

ELIAS CJ:

My ability to be sued is a fairly low threshold, given the prevalence of litigation.

TIPPING J:

I thought Mr Stewart meant liability to be successfully sued –

ELIAS CJ:

Well, no, I don't think he was –

TIPPING J:

Were you being quite –

ELIAS CJ:

I think he is trying to protect against –

MR STEWART QC:

No, no, not – it would have to be a real risk of the suit succeeding. In other words, that the, your conduct was characterised as dishonest because you had the suspicions, the suspicions were still there after the, asked the question and, in fact, your suspicions were heightened, given the response you got but you go ahead and pay out. Now, a third party who has lost as a result of that conduct would have a pretty good start, I would have thought, at getting home on a case against the bank. You paid out for the wrong reasons. You paid out because you didn't want to know, didn't be bothered going through the exercise to get the right answer, but you were alive to it. I'll just – you probably don't need to answer this Justice Blanchard, but you said, well –

TIPPING J:

Is the temptation too great, Mr Stewart?

McGRATH J:

Give him his rights.

MR STEWART QC:

I'll ask him on Thursday night if I don't ask tonight. You said the South Americans got together, Mr Gustafson and said, "Give us the money back," and you said, "Yes," and we don't need to go any further than that do we, he said, yes, and you said it certainly indicates no fraud. I would have thought it might have been, well be at least equal. I mean they got their money back and said, "Well, we'll do it another way." I mean I wouldn't have thought that –

BLANCHARD J:

Well, I would have thought that the purchasers would have been concerned to see that the money went to the right source, because otherwise they're not going to get a proper receipt.

MR STEWART QC:

Well, the transaction had been completed. I mean, the shares were there in with the depository agent, MAP, money goes, they get it but they didn't know of any fraud and I've put that in my submission. You can't expect BANDES to have been in on this too. It may well be they said, "Well, contract price is 49 million. It's all going to Prodem and the other shareholders." How would they know? I can assure Your Honours, that if MAP hadn't changed its attack on this and pushed on for an order that the bank pay out 50 million to non-shareholders, it wouldn't have done so without a Court order or some more informed consent, and I would have thought that in the circumstances I've plagued you with today, that's not an unreasonable position.

Just to finish off with now, last point. My learned friend at paragraph 92 attempted to capture what Westpac's position was and I just wonder if I can leave you with what I think it is it should be. A bank will not need to honour a mandate if it has well-founded suspicions that put it on inquiry of a possibility of a breach of trust, and –

ELIAS CJ:

Sorry, if aware, did you say, or if it has suspicions?

MR STEWART QC:

Well-founded suspicions. If a bank has well-founded suspicions that put it on inquiry as to the possibility of a breach of trust occurring –

ELIAS CJ:

Put it on inquiry?

MR STEWART QC:

Yes, yes –

McGRATH J:

Is that opposed to the formulation which I think came from Mr Gustafson, well-founded suspicions based on a solid, sorry, reasonable suspicions based on a solid foundation?

MR STEWART QC:

Yes.

McGRATH J:

I mean, putting it on inquiry, as you say, is I think what blurs the concept a little.

MR STEWART QC:

Well, I think it's inevitable because we have either actual knowledge in which case you're in the game if it's actual knowledge. Nelsonian blindness arises if you, short of actual knowledge, you, you're not certain but something doesn't look right about all of this.

BLANCHARD J:

Well, no, it's really that you do know the truth –

MR STEWART QC:

All right.

BLANCHARD J:

– but you're not going to make inquiry because that will simply confirm what you know that you know.

MR STEWART QC:

Well, not do you know the truth because then you wouldn't need Nelsonian. You suspect it could be something you don't want to know about, I'd rather not know.

BLANCHARD J:

Well, Nelsonian blindness is a species of actual knowledge.

MR STEWART QC:

Yes, but I think we're on the same wave length. You get there by refraining to ask a question that will give you actual knowledge if you get the answer that you want.

McGRATH J:

But you're doing it deliberately?

MR STEWART QC:

That's right.

McGRATH J:

– to ignore the obvious.

BLANCHARD J:

So that you can say or think you can say, "I didn't know?"

MR STEWART QC:

Yes. Now, it must be then that what gives rise to the need to make the inquiry has to be knowledge short of actual knowledge, the suspicion, well-grounded suspicion that something's going on. Now, if that's not right then I probably misunderstood the basis in which the case had been put.

McGRATH J:

I think we understand the area of subtlety we're in, yes.

MR STEWART QC:

Yes, but you can have information that you think, "This doesn't look right. This is very unusual and I'm going to have to just find out what's going on here," and so you can't, you're not, crossed the line with actual knowledge but you suspect it. You make the inquiry and you get an answer that's inadequate. You've still got this wrong suspicion. You can't prove it but you think somebody's exposed. Then I say, having made that inquiry in response, does not allay the suspicion, in fact might heighten it, then the bank has a defence and it doesn't have to honour the mandate.

Just a final thought in this area, just at this contract, if the bank is in breach in not paying out, then the customer has a duty to mitigate and perhaps by giving an explanation that, prior to the bank's breach of mandate, it wasn't inclined to. We can't encourage the customer to stand there and play hardball.

TIPPING J:

But the duty is to mitigate the effects of the breach. The duty doesn't arise until there has been a breach.

MR STEWART QC:

Well, wouldn't he do that by –

TIPPING J:

This is a step before there's a breach that you're addressing.

MR STEWART QC:

Well, no, let's say –

YOUNG J:

A continuing breach in the sense the damages are interest so the period of time the damages run for might, or the interest runs for, might be mitigated by an intransigent refusal to satisfy reasonable concerns.

TIPPING J:

Yes.

ELIAS CJ:

And in another case that may well be argued, but it hasn't been here, Mr Stewart –

MR STEWART QC:

No.

ELIAS CJ:

– but it is a, yes, it is a valid point –

MR STEWART QC:

It may be something under the –

ELIAS CJ:

It may not be particularly helpful to you because it dilutes the all-or-nothing quality of things.

MR STEWART QC:

We really want these customers to be honest and candid and come and tell the bank what they're doing. Anyway, Your Honours, I'm very grateful I've occupied much more of the afternoon or the day that I intended to, but I've been grateful anyway for the opportunity.

ELIAS CJ:

Well, thank you, Mr Stewart. We mentioned a couple of lines of inquiry that I think would assist us if you would undertake it. We don't require anything elaborate but they are first if you would have a look at the line of authority which is derived from the *United City Merchants* case, and particularly the *Society of Lloyds v Canadian Imperial Bank of Commerce* case, those cases, to see whether they are an analogy or whether you would seek to distinguish them. Secondly, if you would consider whether there is any Australian text which considers the points on anything that you might want to say arising out of that. You don't need to be held to a 48 hour turnaround, but it would help if you're able to get something to us or, at least an indication if the matter needs further inquiry, by Friday this week. Would that be all right?

MR STEWART QC:

Yes, I can do that, Your Honour.

ELIAS CJ:

And Mr Gustafson, if you want to make a similar survey, you might get a head start on Mr Stewart and then be able to put in anything else in response by say, Wednesday, next week.

MR GUSTAFSON:

I'm fine, Your Honour.

ELIAS CJ:

Thank you. We don't want anything elaborate, it's just that we will be looking at these things and it may be that you would have something to say about them.

COURT ADJOURNS: 4.35 PM