IN THE SUPREME COURT OF NEW ZEALAND

SC 98/2010
[2011] NZSC 89

	BETWEEN	WESTPAC NEW ZEALAND LIMITED Appellant
	AND	MAP & ASSOCIATES LIMITED Respondent

Hearing: 31 May 2011

Court: Elias CJ, Blanchard, Tipping, McGrath and William Young JJ

Counsel: R B Stewart QC for Appellant
B D Gustafson and K A Van Houtte for Respondent

Judgment: 16 August 2011

JUDGMENT OF THE COURT

A The appeal is dismissed.

B The appellant is to pay the respondent costs in the sum of $15,000.00 plus disbursements to be fixed, if necessary, by the Registrar.

REASONS

(Given by Tipping J)

Introduction

[1] The appellant bank (Westpac) declined to pay monies standing to the credit of the respondent (MAP) in accordance with MAP's instructions. Prima facie it thereby breached its mandate. When sued by MAP for breach of mandate, Westpac raised as a defence the proposition that it had good reason to be concerned that if it had paid in terms of MAP's instructions, it would have been dishonestly assisting in the commission of a breach of trust. Westpac's contention is that its belief that it was vulnerable to a claim for dishonest assistance should be recognised as a valid

defence to MAP's claim for breach of mandate. That, very shortly and broadly put, is the compass of this appeal.

[2] The issue is whether a bank can defend itself against a claim for breach of mandate on any basis short of establishing that it would actually have incurred liability for dishonestly assisting in a breach of trust (or other wrongful conduct) by acting on its customer's instructions.[1] MAP contends that nothing less will suffice as a defence. Westpac contends that banks should not have to go so far in order to have a good defence. The precise nature of Westpac's proposed defence was the subject of some reconsideration and discussion during the course of the hearing. Various formulations were advanced, including reasonable or well-founded grounds for suspicion, or for belief, or for concern that the bank would or might be involved in dishonestly assisting in a breach of trust.

[3] The significance of the issue is that Westpac has never endeavoured to establish that if it had acted on MAP's instructions it would actually have become liable to an action for dishonestly assisting in a breach of trust. There was no evidence that any breach of trust was involved. Hence Westpac cannot and does not contend that by acting on MAP's instructions it would actually have assisted any such wrongdoing, whether dishonestly or not.

[4] As we are of the view that MAP's submission on this point should be accepted, Westpac's claim to have a defence to the proceeding for breach of mandate must fail. Its appeal is determined by the decision on the point of law. The factual background is therefore of no moment. It is, however, desirable to sketch that background in outline so that the legal discussion that follows has some factual context. A fuller reference to the facts can be found in the report of the case in the Court of Appeal.[2] The outline which follows is taken largely from the headnote to that report.

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1 If that is established it is common ground that the bank would have a defence.

2 *Westpac New Zealand Ltd v MAP & Associates Ltd* [2010] NZCA 404, [2011] 2 NZLR 90.

Factual background

[5] Some 20 or so shareholders in a small privately-owned Bolivian bank known as Prodem wished to sell their shareholdings, which together comprised 94 per cent of Prodem's share capital. A Venezuelan bank, which can be referred to for short as BIV, was identified as a potential purchaser. In due course the shareholders entered into an agreement with BIV for the sale and purchase of their shareholding. MAP, which is a New Zealand firm of chartered accountants, agreed to act as deposit agent for the transaction and to hold the purchase monies in escrow until due diligence had been carried out and the sale was settled. MAP therefore opened, in its own name, a foreign currency account with Westpac. It provided Westpac with information about the transaction and the parties involved.

[6] In December 2006 MAP supplied Westpac with a sealed envelope containing instructions to action specified transfers of money. Westpac was instructed to open the envelope and implement the transfers once it had received authority to do so from MAP. Sums totalling almost US$50m were paid into the account opened by MAP to be held under the escrow arrangement. Westpac did not receive instructions from MAP to disburse the funds until February 2008. It is not necessary to discuss the reasons for this delay.

[7] BIV had in the meantime assigned its rights in the transaction to another bank called Bandes. On 31 January 2008 MAP gave Westpac another sealed envelope containing replacement instructions. Westpac was again instructed to open the envelope and execute the transfers in accordance with the latest instructions when it received authority from MAP to do so. On 26 February 2008 MAP instructed Westpac to act on the latest instructions. By this time Westpac had, for various reasons, become concerned about the transaction. Its concern, as outlined in this Court, was primarily that the money it was holding was in substantial part to be paid out to people or organisations who appeared not to be shareholders and it was unaware of the basis upon which they were to receive payment. It asked for further information and clarification of certain matters. On 2 March 2008 it was given a copy of a communication from a Mr Anker, who held a power of attorney from the selling shareholders, confirming that the transfer instructions were in accordance

with their wishes. Westpac was nevertheless unwilling to act on the instructions supplied to it and instead invited MAP to apply to the High Court.

[8] MAP applied to the High Court, seeking an order that Westpac carry out its instructions and also seeking compensation by way of interest on the sum withheld, and costs. The High Court made an order, unopposed, requiring Westpac to act on the instructions[3] and, subsequently and separately, determined that Westpac had no answer to MAP's claim for breach of mandate and that Westpac ought accordingly to pay interest and costs.[4]

[9] Westpac appealed against the interest and costs orders to the Court of Appeal. That Court held that it would have been dishonest for the bank to pay out until it received Mr Anker's communication on 2 March, but not thereafter. Hence interest should run from that date rather than 26 February, as fixed by the High Court. The Court's focus was on dishonesty. It appears that the Court was not directed to the underlying issue of whether there would have been a breach of trust involved in the payment instructions. Hence the Court did not address specifically whether the bank could have a defence in the absence of there actually being a breach of trust involved. But, because of its approach to the interest commencement date, the Court thereby implicitly held that to have a defence the bank did not have to prove all the ingredients of a cause of action. As the bank's submissions were developed in this Court they included the proposition that something less than the establishment of a cause of action would suffice.

The issue

[10] It is worth emphasising that it is not necessary, in order to answer the single issue raised, to consider in any detail all the ingredients of the cause of action now known as dishonest assistance. Nor is it necessary to consider the application of the relevant ingredients to the facts of this case. The issue which requires resolution is,

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3 *MAP & Associates Ltd v Westpac Banking Corp Ltd* HC Auckland CIV-2008-404-1373, 1 April 2008.

4 *MAP & Associates Ltd v Westpac Banking Corp Ltd (No 2)* HC Auckland CIV-2008-404-1373, 10 March 2009; *MAP & Associates Ltd v Westpac New Zealand Ltd (No 3)* HC Auckland CIV-2008-404-1373, 1 May 2009.

in short, whether it is necessary for the bank to establish all the ingredients of the cause of action in order to have a defence to a prima facie breach of mandate or whether, as Westpac contends, some lesser standard suffices, based on reasonable belief, suspicion or concern that it would be dishonestly assisting a breach of trust. If it is necessary for Westpac to establish that it would actually have been liable for dishonest assistance, Westpac accepts that it cannot do so. This is because, leaving aside the question of dishonesty, it cannot establish that any breach of trust would have been involved in implementing MAP's instructions. A party cannot assist, dishonestly or otherwise, in the commission of a breach of trust, if no breach of trust is actually occurring.

Discussion

General

[11] As Mr Gustafson emphasised, in reliance on the decision of the Court of Appeal in *US International Marketing Ltd v National Bank of New Zealand Ltd*,[5] the starting point for resolving the issue must be that, as a matter of contract, a bank's clear initial duty is to act in terms of its customer's instructions. Too ready or easy an undermining of that obligation would introduce much inconvenience and uncertainty into a fundamental commercial relationship. To allow a bank to justify a breach of mandate by demonstrating a suspicion or a belief, even on reasonable grounds, that honouring the mandate would involve it in dishonestly assisting in a breach of trust would significantly lower the threshold on which the bank could decline to act on its customer's instructions. This would not be consistent with the need for security of contract in this field.

[12] Liability to perform a contract is generally strict. A contract breaker is ordinarily liable to pay damages for breach notwithstanding the making of reasonable efforts to perform.[6] Of course the terms of the contract may ameliorate

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5 *US International Marketing Ltd v National Bank of New Zealand Ltd* [2004] 1 NZLR 589 (CA) at [6].

6 See *Raineri v Miles* [1981] AC 1050 (HL) at 1086 per Lord Edmund-Davies:

> It is axiomatic that, in relation to claims for damages for breach of contract, it is, in general, immaterial why the defendant failed to fulfil his obligation, and certainly no defence to plead that he had done his best.

this consequence. Mr Stewart QC, for Westpac, accepted, however, that there was no express or implied term of the particular contract between Westpac and MAP having this ameliorating effect. Nor, understandably, was it suggested that in doing what it did Westpac was in breach of the duty of care it owed to MAP as its customer.[7] When agreeing to participate in this somewhat unusual transaction, Westpac could have expressly contracted for protection from liability for breach of mandate on the basis of reasonable belief or suspicion that implementing its instructions would give rise to a cause of action against it for dishonest assistance. But it did not.

[13] In cases where frustration or illegality of performance is said to excuse non-performance of a contract, the contract must actually have been frustrated or it must actually have been unlawful to perform it.[8] As *Chitty* puts it, "[a] contract may be discharged … *when* something occurs ... which renders it ... impossible to fulfil the contract".[9]

[14] Similarly, equity does not restrain an action at law on a contract simply on the basis that a party reasonably suspects or believes that the contract has, for example, been procured by undue influence or represents an unconscionable bargain.[10] Proof must be given of the actuality, not of a belief or suspicion, however reasonable that state of mind may have been.[11] The present case can fairly be viewed as coming within that rubric, consistent as it is with the common law approach that liability for breach of contract is generally strict. A customer may have a cause of action against

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7 See, for example, the judgment of Steyn J in *Barclays Bank plc v Quincecare Ltd* [1992] 4 All ER 363 (QB).

8 See John Burrows, Jeremy Finn and Stephen Todd *Law of Contract in New Zealand* (3rd ed, LexisNexis NZ, Wellington, 2007) at [13.6] and [20.3]; HG Beale (ed) *Chitty on Contracts* (30th ed, Sweet & Maxwell, London, 2008) vol 1 at [16–204] and [23–001]; MP Furmston *Cheshire, Fifoot and Furmston's Law of Contract* (15th ed, Oxford University Press, Oxford, 2007) at 489, 506 and 737–738; Edwin Peel *The Law of Contract* (12th ed, Sweet and Maxwell, London, 2007) at [11–001] and [19–001].

9 At [23–001] (emphasis added).

10 For the concept of equity restraining an action at law in circumstances recognised by equity as justifying that course, for example undue influence or unconscionable bargain, see *O'Connor v Hart* [1985] 1 NZLR 159 (PC) at 171 and 174.

11 See John Burrows, Jeremy Finn and Stephen Todd *Law of Contract in New Zealand* (3rd ed, LexisNexis NZ, Wellington, 2007) at [12.3.5] and [12.4.2]; HG Beale (ed) *Chitty on Contracts* (30th ed, Sweet & Maxwell, London, 2008) vol 1 at [7–001]; MP Furmston *Cheshire, Fifoot and Furmston's Law of Contract* (15th ed, Oxford University Press, Oxford, 2007) at 385–386; Edwin Peel *The Law of Contract* (12th ed, Sweet and Maxwell, London, 2007) at [10–008] and [10–039]; SM Waddams *The Law of Contracts* (6th ed, Canada Law Book, Ontario, 2010) at 518–522.

a bank for breach of mandate; equity will, however, provide a defence and restrain enforcement of the cause of action at law, but only if performance of the mandate would actually, rather than potentially, render the bank liable for the equitable wrong of dishonest assistance. There is no basis or authority for equity's intervention on some lesser threshold.

[15] We accept, as Mr Stewart emphasised, that banks in the present kind of situation are in an awkward position. Indeed this was recognised in *US International*.[12] The bank has to anticipate the view a court may later take after a much fuller consideration of the circumstances than is usually possible when the bank is faced with an immediate demand from a customer. Nevertheless it is important to recognise that there is, in this sort of case, an issue of policy as to who should bear any loss occasioned by the bank's declining to act on the customer's instructions when no liability would actually have attached to the bank for doing so.

[16] Acceptance of the bank's submission would leave the customer bearing the loss when there was in fact no problem with the customer's instructions, but the bank, albeit reasonably, suspected or believed there was. Banks are in the business of receiving customers' money and using it to their advantage. The risks involved are inherent in conducting their business and are better managed by the bank than its customer. In that light we consider the customer should not bear a loss occasioned by a breach of mandate unless the breach is justified because the bank would actually, rather than potentially, have incurred liability by acting on its customer's instructions. A contrary conclusion would result in the bank having the best of both worlds: the benefit of a lesser standard for a defence but a higher standard for liability. We now turn from these general and policy matters to examine such authorities and text references as there are on the subject.

Authority

[17] There has been much recent discussion on the subject of dishonest assistance generally, but none specifically related to whether a lower threshold than the existence of a cause of action for dishonest assistance should suffice as a defence to

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[12] At [5].

a claim against a bank for breach of mandate. There is, however, a useful discussion of a closely related issue in *Law of Bank Payments*.[13] The authors discuss the liability of banks on documentary credits and related transactions when it is said that payment should not be made on account of fraud.

[18] The law is that if a bank decides not to pay it takes upon itself the burden of proving the fraud. In *Society of Lloyds v Canadian Imperial Bank of Commerce*[14] the banks concerned endeavoured to avoid this burden. They could not prove fraud but argued that the material available to them was, to a reasonable banker in their position, sufficient to give rise to a reasonable inference of fraud. Saville J held that nothing short of proof of actual fraud would be sufficient to justify the banks' dishonour of the drafts drawn on them.[15] In coming to this conclusion the Judge relied on the decision of the House of Lords in *United City Merchants (Investments) Ltd v Royal Bank of Canada*.[16] If fraud is actually established, the bank is neither obliged to pay nor should it.[17]

[19] Mr Stewart sought to distinguish letters of credit from the bank's ordinary obligations to its customer. It is true, as counsel pointed out, that the principal strength of letters of credit for commercial purposes is that the bank is not required or allowed to go behind the letter to inquire into the merits of any dispute there may be between, for example, buyer and seller. A leading American authority captures the essence of the matter by saying that a letter of credit is independent of the primary contract of sale between the buyer and the seller.[18] The only basis on which an obligation under a letter of credit may be disavowed by a bank is actual fraud.

[20] Mr Stewart submitted that application of the test established in letter of credit cases to a paying bank's obligations generally would put the bar too high; and potentially facilitate breaches of trust in circumstances where the bank was highly

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13 Michael Brindle and Raymond Cox (eds) *Law of Bank Payments* (3rd ed, Sweet & Maxwell, London, 2004) at [8–088]ff.

14 *Society of Lloyds v Canadian Imperial Bank of Commerce* [1993] 2 Lloyd's Rep 579 (QB).

15 At 580.

16 *United City Merchants (Investments) Ltd v Royal Bank of Canada* [1983] AC 168 (HL).

17 In English law the position is the same in the case of demand bonds as it is with letters of credit. See Brindle and Cox *Law of Bank Payments* at [8–089].

18 *Sztejn v J Henry Schroder Banking Corp* 31 NYS 2d 631 (NY 1941) at 633. See also *Bank of Nova Scotia v Angelica-Whitewear Ltd* [1987] 1 SCR 59 at [16].

suspicious of the propriety of the transaction. It was suggested that this potential was recognised in *US International*.[19]

[21] We do not consider that anything said in *US International* gives support to Westpac's submission in the present case. If anything, the tenor of the judgments in that case points towards the same standard applying for a defence as applies for a cause of action. More specifically, there is nothing in *US International* that supports the view that a bank can have a defence to a claim for breach of mandate on the basis of a well-founded suspicion or belief, when the bank cannot establish that a breach of trust was actually involved.

[22] Looking at the matter more generally, we do not consider the point of principle should depend on the nature of the contract which gives rise to the bank's liability to pay. We accept that letters of credit can be distinguished from a bank's general duty to its customer. But, both for the policy reasons already discussed and on account of longstanding authority to which we are about to come, we consider that banks should not have a non-contractual defence short of proving that payment, as directed by the customer, would actually have given rise to liability for dishonest assistance.

[23] The dearth of modern authority directly on the point is probably due to the fact that the law has been regarded as settled over a century ago by the decision of the House of Lords in *Gray v Johnston*.[20] There the issue was whether a bank was entitled to dishonour a trustee's cheque, there being money available to meet it. Lord Cairns LC, who gave the leading speech, said that the result of the authorities on the point was that in order to hold bankers justified in refusing to honour a demand of their customer, the customer being an executor of an estate, there must first be some misapplication, some breach of trust, intended by the customer and

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19 Reference being made to the judgment of Tipping J at [6].

20 *Gray v Johnston* (1868) LR 3 HL 1. See the commentaries on this case in George Alfred Weaver and CR Craigie *The Law Relating to Banker and Customer in Australia* (looseleaf ed, Thomson) at [3.4190] and in EP Ellinger, Eva Lomnicka and Richard Hooley *Ellinger's Modern Banking Law* (4th ed, Oxford University Press, Oxford, 2006) at 250–251.

secondly there must be proof that the bankers were privy to the customer's intent to make misapplication of trust funds.[21] This clearly amounted, in context, to a statement that to have a defence the bank had to show (1) that it actually knew that a breach of trust was intended and (2) that a breach would actually have taken place if the bank had acted on its customer's instructions.[22]

[24] The decision in *Gray v Johnston* was based substantially on the need, in the interests of commerce, for there to be a strong prima facie rule that banks should ordinarily honour their customers' instructions.[23] Only very limited exceptions from that rule were appropriate. One of them was where to do so would make the bank party, or privy as Lord Cairns put it, to the commission of a breach of trust. Banks will become liable in that way only if they actually know a breach of trust is intended or, as is now established, if they are wilfully blind to that intention. Nothing less suffices as a defence to a claim against the bank for breach of mandate.

Suspicion

[25] There is only one aspect of the cause of action for dishonest assistance that needs any present discussion. Westpac relied in its submissions on a number of references to suspicion made in the course of the judgment of the Privy Council in *Barlow Clowes International Ltd v Eurotrust International Ltd*.[24] It is desirable to clarify how suspicion relates to the overriding need for proof of dishonesty.

[26] In *Barlow Clowes*, which represented a significant volte-face[25] from the decision of the House of Lords in *Twinsectra Ltd v Yardley*,[26] Lord Hoffmann

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21 At 11.

22 See his Lordship's application of the law to the facts at 12–13:

> ... I take leave to doubt very much whether the mere fact that some breach of trust, as regards this trade, had in time past been committed by their customer would, alone, have entitled the bankers, or justified them, in refusing to honour the cheque of their customer, unless it could be shewn that they knew, as regards the particular cheque, that it also was to go in the same line of misapplication.

23 Ibid.

24 *Barlow Clowes International Ltd (in liq) v Eurotrust International Ltd* [2005] UKPC 37, [2006] 1 WLR 1476.

25 See Christopher Hare "Banking Law" [2011] NZ Law Rev 121 at 154.

26 *Twinsectra Ltd v Yardley* [2002] UKHL 12, [2002] 2 AC 164.

summarised the state of the law on dishonest assistance.[27] The major difference between *Twinsectra* and *Barlow Clowes* is that in the latter case their Lordships recognised, as had Lord Millett in his dissenting speech in *Twinsectra,* that although a dishonest state of mind is a subjective mental state, the standard by which the law determines whether it is dishonest is objective. If by ordinary standards a defendant's mental state would be described as dishonest, it is irrelevant that the defendant has different standards and does not appreciate that his conduct, by ordinary standards, would be regarded as dishonest. We would adopt his Lordship's summary in *Barlow Clowes* but with some elaboration as regards when suspicion amounts to dishonesty. In that respect the Privy Council said that the necessary state of mind could consist in suspicion combined with a conscious decision not to make inquiries which might result in knowledge.[28]

[27] The key ingredient in the cause of action for dishonest assistance is the need for a dishonest state of mind on the part of the person who assists in the breach of trust. We agree with the statement in *Barlow Clowes* that such a state of mind may consist in actual knowledge that the transaction is one in which the assistor cannot honestly participate. But it may also consist in what we would describe as a sufficiently strong suspicion of a breach of trust, coupled with a deliberate decision not to make inquiry lest the inquiry result in actual knowledge. For the purpose of this alternative, it is necessary that the strength of the suspicion that a breach of trust is intended makes it dishonest to decide not to make inquiry. That state of mind, which equity equates with actual knowledge, is usually referred to as wilful blindness. It involves shutting one's eyes to the obvious and can thus fairly be equated with the dishonesty involved when there is actual knowledge.

[28] This is well demonstrated by the decision of the House of Lords in *Manifest Shipping Co Ltd v Uni-Polaris Insurance Co Ltd*.[29] That case was concerned with whether shipowners had knowledge of the unseaworthiness of a ship and specifically whether, for insurance purposes, they were privy to that unseaworthiness. Lord Hobhouse said that if their decision not to inquire was made because the

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27 At [10]–[19].
28 See [10]–[12].
29 *Manifest Shipping Co Ltd v Uni-Polaris Insurance Co Ltd* [2001] UKHL 1, [2003] 1 AC 469.

shipowners did not want to know the truth "for certain", a finding of privity should be made.[30] Similarly, in *Compania Maritima San Basilio SA v Oceanus Mutual Underwriting Association (Bermuda) Ltd*,[31] a case relied on in the *Manifest Shipping* judgments, Roskill LJ said that 'blind-eye knowledge' would exist if the facts amounting to unseaworthiness were there "staring the assured in the face". He could not escape from being held privy to the unseaworthiness by "blindly or blandly" ignoring the facts or by refraining from asking relevant questions in the hope that by his lack of inquiry he would not know for certain what inquiry would have made plain beyond possibility of doubt.[32]

[29] This general approach to wilful blindness is supported in a banking context by the decision of the Court of Appeal of England and Wales in *Governor and Company of the Bank of Scotland v A Ltd*[33] to which counsel made reference. The circumstances were a little different from the present, but the Court implicitly rejected a submission that banks have a defence to a claim for breach of mandate when they have "a reasonable apprehension that [they] might be held liable" for dishonest assistance.[34] Rather, as Lord Woolf CJ said when delivering the judgment of the Court (which also comprised Judge and Robert Walker LJJ), wilful blindness would exist if the bank has such strong grounds for doubting its customer's honesty that it would itself have been dishonest to turn a blind eye to its doubts.[35]

Conclusion and disposition

[30] Returning to the issue in the present case, it must follow that as Westpac could not show that any breach of trust would actually have occurred had it followed MAP's instructions, it had no defence to MAP's claim for breach of mandate. We are not required to consider whether, had a breach of trust been involved, Westpac, in light of what it actually knew at the time, would, by following MAP's instructions,

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30 At [25].
31 *Compania Maritima San Basilio SA v Oceanus Mutual Underwriting Association (Bermuda) Ltd* [1977] QB 49 (CA).
32 At 68.
33 *Governor and Company of the Bank of Scotland v A Ltd* [2001] EWCA Civ 52, [2001] 1 WLR 751.
34 At [31].
35 At [37].

have been giving dishonest assistance in its commission. Westpac's appeal must be dismissed with costs.

Solicitors:
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Kensington Swan, Auckland for Respondent