Neutral Citation Number: [2019] EWCA Civ 294

Case No: A3/2018/0488

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS
BUSINESS LIST (ChD)
Mr Justice Barling
[2017] EWHC 2804 (Ch)

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 01/03/2019

Before:

LORD JUSTICE LEWISON
LORD JUSTICE NEWEY
and
LORD JUSTICE MALES

- -

Between:

FIRST CITY MONUMENT BANK PLC	**Appellant (Defendant)**
- and -	
ZUMAX NIGERIA LIMITED	**Respondent (Claimant)**

- -
- -

Miss Poonam Melwani QC and Mr Paul Henton (instructed by **Clyde & Co**) for the **Appellant**
Mr Francis Collaço Moraes (instructed by **Mordi & Co**) for the **Respondent**

Hearing dates: 12-14 February 2019

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Approved Judgment

Lord Justice Newey:

1. This is an appeal from a decision of Barling J granting the claimant, Zumax Nigeria Limited ("Zumax"), summary judgment.

2. Zumax is a Nigerian company which formerly provided engineering and other services to oil companies. It is based in Warri, Nigeria.

3. The defendant, First City Monument Bank plc ("FCMB"), is a Nigerian bank. As a result of a merger with Finbank plc, which had itself come into being as a result of a merger involving, among others, IMB International Bank plc ("IMB"), FCMB has inherited the rights and obligations of IMB.

4. The proceedings relate to some bank transfers dating from 2000 to 2002. At that time, Zumax's main banker was IMB, with which it held a Naira-denominated account in Lagos. Zumax also had Naira-denominated accounts with Warri branches of Citibank Nigeria, Standard Trust Bank and Equitorial Trust Bank.

5. IMB, too, had a Naira-denominated account in Nigeria with Standard Trust Bank, as well as ones with Guaranteed Trust Bank and Citizens Bank. It also held two US dollar-denominated accounts, numbered 160122964015 and 160122964010, at the London branch of Commerzbank. A third US dollar-denominated account with Commerzbank ("the IMB Morgan Account") was held by an entity associated with IMB, IMB Morgan plc ("IMB Morgan", formerly known as "IMB Securities plc"), and for the purposes of this appeal FCMB accepts that no distinction is to be drawn between IMB and IMB Morgan. All three Commerzbank accounts were "correspondent" accounts.

6. At least in part, the oil companies for which Zumax undertook work would be invoiced in US dollars and asked to pay the money into an account that Redsear Limited ("Redsear), a company incorporated in the Isle of Man, held with Chase Manhattan International ("Chase") in London. Barling J described Redsear as a nominee of Zumax, and it was common ground before us that Redsear held the funds that it received from Zumax's customers on trust for Zumax. Money in the account ("the Redsear Account") would be used to meet Zumax's US dollar business needs, with any surplus funds being transferred to Nigeria.

7. The accounts that IMB and IMB Morgan held with Commerzbank had a central role in these arrangements. Where money was to go to Nigeria, either to Zumax itself or (say) to one of the company's suppliers, it would in the first instance be transferred from the Redsear Account to one or other of the Commerzbank accounts. In the case of money destined for Zumax, the plan, according to Zumax, was that it should be credited with Naira to a corresponding value on its account with IMB in Lagos. FCMB, in contrast, maintains that Zumax would often prefer to use an informal "parallel" market which offered a more attractive exchange rate than the official rate. Mr Toyin Owolabi, who was IMB's treasurer and head of treasury/business development between 2000 and 2004, has said in a witness statement that in such circumstances:

> "IMB would pay through its local NGN [i.e. Naira] account with Citizens Bank, by issuing a cheque to the customer or

> paying into one of the customer's local current accounts with another bank in Nigeria or direct to a third party (such as a supplier) as the customer wishes".

8. The present proceedings concern ten transfers from the Redsear Account to the Commerzbank accounts that were made between May 2000 and April 2002. The transfers were as follows:

Number	**Date of receipt**	**Amount**
1	10 May 2000	$205,000 (less $15 charge)
2	11 May 2000	$105,000 (less $15 charge)
3	12 May 2000	$205,000 (less $15 charge)
4	24 July 2000	$505,000 (less $15 charge)
5	8 January 2001	$355,000 & $250,000 (less $15 charge on each transfer)
6	10 August 2001	$901,000 (less $15 charge)
7	23 October 2001	$410,000
8	24 December 2001	$155,000 (less $15 charge)
9	27 February 2002	$251,000 (less $15 charge)
10	23 April 2002	$410,000 (less $15 charge)

9. Five of the transfers were into the IMB Morgan Account and the remainder into one or other of IMB's own accounts. In each instance, save in respect of the third transfer, Chase received manuscript instructions from Mr Edwin Chinye, who was a director of Redsear and the signatory on its account with Chase. Mr Chinye was also the managing director of IMB (and a director of Zumax), but it is common ground that he was not acting on behalf of IMB in signing the Redsear instructions (see paragraph 66(vii) of the judgment). To a substantial extent, Mr Chinye's instructions were then reflected in the relevant entries in the statements that Commerzbank produced for the three accounts.

10. In the case of, for example, the first transfer, the manuscript instructions asked Chase to transfer $205,000 to one of IMB's accounts with Commerzbank, stating:

> "Beneficiary: International Merchant Bank IMB
>
> for further credit to
>
> Zumax Nigeria Limited
>
> Ref: By order of Redsear Ltd UK".

The Commerzbank statement then recorded in respect of the credit entry (for $204,985, after deduction of a $15 charge):

> "FOR FURTHER CREDIT TO ZUMA[X] NIGERIA LIMITED BEING USD 205000 LESS OUR CHG
> REDSEAR LTD".

11. Similar wording was to be found in the manuscript instructions relating to the other eight transfers to which this appeal relates (the third transfer not being the subject of the appeal). All the instructions included either "for further credit to Zumax" or "for final credit to Zumax". In the majority of cases, that language was reflected in the entries in the Commerzbank statements (though "for further credit" was abbreviated to "FFC" on two occasions). With the seventh and eighth transfers, however, there was no reference to Zumax in the bank statements. The entry for the eighth transfer, for example, stated:

> "RFB [i.e. reference for beneficiary] /BY ORDER/REDSEAR LIMITED//ATTENTION FARRAH UDIN
> REDSEAR LIMITED 24 RIDGEWAY STREET DOUGLAS ISLE OF MAN".

12. The present proceedings were issued on 3 October 2013. By them, Zumax claims a declaration that FCMB is liable to account "as trustee" for the total of the ten transfers (viz. $3,752,000), an order for FCMB to pay the sum found due on the taking of such account, and interest. The amended particulars of claim allege:

> "Upon receipt of the said funds IMB, its agent/nominee and its successors (including FCMB) held the said fund on resulting or constructive trust for Zumax which retained an equitable proprietary interest in the said funds. Further, or in the alternative, as bankers IMB and its successors (including

> FCMB) owed Zumax a fiduciary duty to ensure that the said funds were transferred to Zumax."

Zumax goes on to allege that Zumax never received any of the money and that FCMB therefore "holds the said funds on trust or on constructive trust for Zumax". As regards interest, this is said:

> "The sum total of the interest amounts claimed by Zumax … is U.S.$211,894,783 (equivalent to £169,823,310 at the closing exchange rate on 21 November 2016 …). Zumax further claims such interest amount as accrues from 21 November 2016 until judgment at the compound rate of 30% per year or such other rate as the court thinks fit."

13. On 5 March 2014, Zumax applied for summary judgment. The application was stayed to await the outcome of a dispute as to jurisdiction (which was resolved in Zumax's favour: see [2016] EWCA Civ 567), but eventually came before Barling J in 2017. As the judge explained, Mr Francis Collaço Moraes, who appeared for Zumax (as he also did before us), made clear at the outset of his submissions that the claim was a proprietary one and that the application was made "solely on the basis that a trust in favour of Zumax exists" (paragraph 55 of the judgment). FCMB both denied that there was any trust and advanced a number of other defences. The judge, however, did not consider that there was anything of substance in FCMB's arguments against the existence of a trust (paragraph 83) and concluded (in paragraph 82):

> "In the light of the evidential material shown to me, I consider that all the criteria are satisfied for the transfers in question to be impressed with a trust in favour of Zumax at the stage when the funds arrived in the relevant Commerzbank accounts. In my view the trust constitutes an express trust, but failing that it is a *Quistclose* trust."

The judge further rejected a suggestion from FCMB that it would be Redsear rather than Zumax that would have the right to enforce any trust, saying (in paragraph 80):

> "I consider that such a submission is unsustainable. First, I consider that the settlor was clearly Zumax, acting through its agent/nominee Redsear. But even if the settlor was Redsear, I can see no principled reason why, in the present circumstances, Zumax, as the sole and express beneficiary, is not entitled to enforce the trust. I am fortified in that view by the decision of Mr Michael Crystal QC, sitting as a Deputy High Court Judge, in *Re Magaretta Limited* [2005] BCC 506 at paragraphs 15-30. See also *Carreras Rothmans v Freeman Matthews Treasure Limited* [1985] Ch 207 at 222F-223G per Peter Gibson J, and *General Communications Limited v Development Finance Corporation of New Zealand Limited* [1992] LRC (Comm) 247 at 257-260."

14. FCMB suggested that the third transfer was a mistake (see paragraph 88 of the judgment), and Barling J did not feel able to reject that defence as hopeless

(paragraph 90). That apart, however, he considered that FCMB had no real prospect of making out any of its defences. He therefore granted Zumax summary judgment on all the transfers other than the third and ordered FCMB to pay £2,659,576.89 (the sterling equivalent of $3,507,450 on 10 November 2017). The extent of FCMB's liability for interest was to be determined in a subsequent accounting exercise.

15. FCMB now challenges Barling J's decision in this Court. The appeal is much narrower in scope than the argument below. Some of the points that FCMB took before the judge were not pursued before us, in part because on 5 October 2018 Mrs Justice M. O. Obadina had given judgment against it in related proceedings in the High Court of Lagos State, holding that terms of settlement and a consent order dating from 2005 were vitiated by fraudulent misrepresentation and concealment of material facts.

16. The central question raised by the appeal is whether, as Barling J considered was the case, the transfers at issue were impressed with a trust. FCMB also contends that, contrary to the judge's view, it has a real prospect of successfully defending the proceedings on the basis that (a) Zumax's claim in respect of the tenth transfer is barred as an abuse of process or by reason of cause of action estoppel and (b) it paid or otherwise accounted to Zumax for transfers other than the tenth. I shall begin, however, by addressing the dispute as to whether there was a trust.

Were the transfers held on trust?

The context

17. As I have said, Barling J considered there to have been an express trust or, failing that, a "*Quistclose*" trust.

18. The first of these, an express trust, requires the "three certainties" recognised in *Knight v Knight* (1840) 3 Beav 148. In that case, Lord Langdale MR said (at 172-173):

> "As a general rule, it has been laid down, that when property is given absolutely to any person, and the same person is, by the giver who has power to command, recommended, or entreated, or wished, to dispose of that property in favour of another, the recommendation, entreaty, or wish shall be held to create a trust.
>
> First, if the words are so used, that upon the whole, they ought to be construed as imperative;
>
> Secondly, if the subject of the recommendation or wish be certain; and,
>
> Thirdly, if the objects or persons intended to have the benefit of the recommendation or wish be also certain."

An express trust thus needs certainty of *intention*, *subject-matter* and *objects*.

19. "*Quistclose*" trusts take their name from *Barclays Bank Ltd v Quistclose Investments Ltd* [1970] AC 567. A trust of this kind can potentially arise where money or other property is transferred to someone else for a particular purpose. In *Quistclose* itself, the respondent had lent money to Rolls Razor Limited to enable it to pay a dividend and a separate bank account had been opened to receive the loan. Rolls Razor Ltd having gone into liquidation without having paid the dividend, the House of Lords held that the money was held on trust for the respondent. Lord Wilberforce said (at 582):

> "In the present case the intention to create a secondary trust for the benefit of the lender, to arise if the primary trust, to pay the dividend, could not be carried out, is clear and I can find no reason why the law should not give effect to it."

20. The basis of *Quistclose* trusts was considered by Lord Millett in *Twinsectra Ltd v Yardley* [2002] UKHL 12, [2002] 2 AC 164. He concluded that such a trust involves a resulting trust coupled with a power. He said at paragraph 100:

> "The lender pays the money to the borrower by way of loan, but he does not part with the entire beneficial interest in the money, and in so far as he does not it is held on a resulting trust for the lender from the outset. Contrary to the opinion of the Court of Appeal, it is the borrower who has a very limited use of the money, being obliged to apply it for the stated purpose or return it. He has no beneficial interest in the money, which remains throughout in the lender subject only to the borrower's power or duty to apply the money in accordance with the lender's instructions. When the purpose fails, the money is returnable to the lender, not under some new trust in his favour which only comes into being on the failure of the purpose, but because the resulting trust in his favour is no longer subject to any power on the part of the borrower to make use of the money. Whether the borrower is obliged to apply the money for the stated purpose or merely at liberty to do so, and whether the lender can countermand the borrower's mandate while it is still capable of being carried out, must depend on the circumstances of the particular case."

21. In the course of his judgment, Lord Millett explained that a *Quistclose* trust requires more than just payment for a specific purpose. He said:

> "73. A *Quistclose* trust does not necessarily arise merely because money is paid for a particular purpose. A lender will often inquire into the purpose for which a loan is sought in order to decide whether he would be justified in making it. He may be said to lend the money for the purpose in question, but this is not enough to create a trust; once lent the money is at the free disposal of the borrower. Similarly payments in advance for goods or services are paid for a particular purpose, but such payments do not ordinarily create a trust. The money is intended to be at the free disposal of the supplier and may be

> used as part of his cashflow. Commercial life would be impossible if this were not the case.
>
> 74. The question in every case is whether the parties intended the money to be at the free disposal of the recipient: *In re Goldcorp Exchange Ltd* [1995] 1 AC 74, 100 per Lord Mustill. His freedom to dispose of the money is necessarily excluded by an arrangement that the money shall be used *exclusively* for the stated purpose, for as Lord Wilberforce observed in the *Quistclose* case [1970] AC 567, 580:
>
> > 'A necessary consequence from this, by a process simply of interpretation, must be that if, for any reason, [the purpose could not be carried out,] the money was to be returned to [the lender]: the word "only" or "exclusively" can have no other meaning or effect.'"

22. Lord Millett also said this (at paragraph 83) about the position of the borrower in the context of a *Quistclose* trust:

> "The borrower's interest pending the application of the money for the stated purpose or its return to the lender is minimal. He must keep the money separate; he cannot apply it except for the stated purpose; unless the terms of the loan otherwise provide he must return it to the lender if demanded; he cannot refuse to return it if the stated purpose cannot be achieved; and if he becomes bankrupt it does not vest in his trustee in bankruptcy. If there is any content to beneficial ownership at all, the lender is the beneficial owner and the borrower is not."

23. In *Bieber v Teathers Ltd* [2012] EWCA Civ 1466, Patten LJ stressed the importance of the "structure of the arrangements and the contractual mechanisms involved" to whether a *Quistclose* trust arose. He said (at paragraph 15):

> "in deciding whether particular arrangements involve the creation of a trust and with it the retention by the paying party of beneficial control of the monies, proper account needs to be taken of the structure of the arrangements and the contractual mechanisms involved. As Lord Millett stressed in *Twinsectra* (at [73]) and the judge repeated in [17] of his own judgment, payments are routinely made in advance for particular goods and services but do not constitute trust monies in the recipient's hands. It is therefore necessary to be satisfied not merely that the money when paid was not at the free disposal of the payee but that, objectively examined, the contractual or other arrangements properly construed were intended to provide for the preservation of the payor's rights and the control of the use of the money through the medium of a trust."

24. Treacy J held that there was no *Quistclose* trust in a case with facts somewhat similar to those of the present case, *Abou-Rahmah v Abacha* [2006] 1 Lloyd's Rep 484.

There, the claimants had paid money into an account that a Nigerian bank held with HSBC which was used to receive sums in dollars and sterling in London. The payments were made with instructions that the money was to be held for the benefit of "Trust International". While the Nigerian bank was named as the "Beneficiary Customer", the transfer documentation also identified "Trust International" as the "Beneficiary". The claimants argued that they had retained a beneficial interest in the money, but Treacy J rejected the contention. He said (at paragraph 79):

> "Once the Claimants had paid the monies to the Defendant's HSBC account … they had parted with the monies unconditionally. There was no retention of a beneficial interest by them in the monies in a way comparable to the situation arising from the undertaking set out at Paragraph 9 of the *Twinsectra* case, or the specific arrangement underlying the loan in *Barclays Bank Ltd v Quistclose Investments Ltd* (1970) AC 567. What the Swift transfer document required … was the transfer of the monies to the Defendant's account at the HSBC. Once this was done the Claimants had disposed of the monies and had not retained an interest in it. Moreover, the fact that Field 70 of the Swift Transfer Document referred to Trust International as the account within the Defendant to which the monies should be attributed does not suffice to impose a trust obligation on the Defendant vis à vis the Claimants."

When the case reached the Court of Appeal, the claimants did not pursue the *Quistclose* point: see [2006] EWCA Civ 1492, [2007] Bus LR 220, at paragraph 7.

25. Turning to points relating to banking, the basic banker-customer relationship is that of debtor and creditor, not that of trustee and beneficiary. In *Foley v Hill* (1848) 2 HLC 28, Lord Cottenham LC said (at 36-37):

> "The money placed in the custody of a banker is, to all intents and purposes, the money of the banker, to do with it as he pleases; he is guilty of no breach of trust in employing it; he is not answerable to the principal if he puts it into jeopardy, if he engages in a hazardous speculation; he is not bound to keep it or deal with it as the property of his principal, but he is of course answerable for the amount, because he has contracted, having received that money, to repay to the principal, when demanded, a sum equivalent to that paid into his hands."

26. A "correspondent" bank (such as Commerzbank was in the present case) is one that provides services for another financial institution. A bank may use a correspondent bank, in particular, to service transactions originating in a foreign country in which it does not have a physical presence. An international funds transfer will require the services of at least one correspondent bank unless the payer's bank and the payee's bank are themselves correspondents (i.e. hold accounts with each other).

27. Strictly, a transfer between bank accounts does not involve an actual transfer of property. In *Foskett v McKeown* [2001] 1 AC 102, Lord Millett explained (at 127-128):

> "We speak of money at the bank, and of money passing into and out of a bank account. But of course the account holder has no money at the bank. Money paid into a bank account belongs legally and beneficially to the bank and not to the account holder…. We speak of tracing money into and out of the account, but there is no money in the account. There is merely a single debt of an amount equal to the final balance standing to the credit of the account holder. No money passes from paying bank to receiving bank or through the clearing system (where the money flows may be in the opposite direction). There is simply a series of debits and credits which are causally and transactionally linked."

"Transfer" (as used in "account transfer"), Staughton J observed in *Libyan Arab Foreign Bank v Bankers Trust Co* [1989] QB 728 (at 750), "may be a somewhat misleading word, since the original obligation is not assigned …; a new obligation by a new debtor is created". One chose in action is extinguished or reduced pro tanto, and a chose in action is brought into existence representing a debt in an equivalent sum (see *R v Preddy* [1996] AC 815, at 834).

The Judge's reasoning

28. Barling J observed in paragraph 71 of his judgment that "the terms of the instructions are simple and unequivocal: 'for further credit to Zumax' or, in the case of three of the transfers 'for final credit to Zumax'". He went on in the next paragraph:

> "In my view those unequivocal instructions, conveyed by Redsear/Zumax to Redsear's bank (Chase), and passed on by the latter to FCMB's bank (Commerzbank), which recorded them in its own account documents, are (subject to any relevant context which points the other way) capable of only one sensible construction, namely that they evince a clear intention on the part of those concerned, and in particular Mr Chinye, that the funds transferred should be held by FCMB in its Commerzbank accounts, not for its own benefit but for the benefit of Zumax. That is the only reasonable, objective interpretation of the instructions. I accept Mr Moraes's submission that there was a clearly specified purpose and a clearly specified beneficiary."

29. In paragraph 74 of his judgment, the judge said:

> "Not only were the purpose of the transfer and identification of the beneficiary expressly acknowledged by Commerzbank by the designation in its own documents, which reflected the instructions of Mr Chinye, but by the same token the funds were segregated by being so identified on the face of the Commerzbank account statements. It is clear beyond argument that both Commerzbank and the account holder were aware of this, at the latest, when the funds reached the account."

In the judge's view, there was "clear and uncontroverted support in the evidential material … that funds transferred to the accounts in question were treated by FCMB and Commerzbank as identifiable and segregated" (paragraph 75). The judge further considered that the various matters that he listed in paragraph 76 make "clear that the funds in question were also regarded by FCMB as belonging to Zumax".

The parties' positions

30. Miss Poonam Melwani QC, who appeared with Mr Paul Henton for FCMB (neither of whom appeared below), argued that none of the nine transfers at issue was subject to a trust. There was, she submitted, neither the requisite certainty of intention for an express trust nor, as would have been necessary for a *Quistclose* trust, any intention that the particular money should be used exclusively for Zumax and not be at the free disposal of IMB. The correct analysis, she maintained, was that IMB never became a trustee but had a personal obligation to credit Zumax with the amounts of the transfers. In any case, IMB would not have known that the transfers were for the benefit of Zumax until it saw the relevant entries in the Commerzbank statements, by which time the funds would already have been IMB's legally and beneficially and it would have been too late to impress them with a trust. The entries in respect of the seventh and eighth transfers, furthermore, did not even mention Zumax. Further, were any transfer to have been subject to a *Quistclose* trust, it would have been Redsear rather than Zumax which would have been entitled to enforce it.

31. In contrast, Mr Moraes supported Barling J's decision. The judge was right, he said, to find that there was a clear intention to create a trust and that the funds were not to be at the free disposal of IMB. IMB will, moreover, have become aware of the trust at the latest when a transfer reached the Commerzbank account in question. Even supposing that there was a *Quistclose* trust rather than an express one, proceedings could be brought in Zumax's name, as opposed to Redsear's, for the reasons that the judge gave. Mr Moraes further prayed in aid matters relating to (a) interpleader proceedings initiated by Commerzbank in 2003 and (b) what FCMB has said about the tenth transfer.

Analysis

32. We indicated to the parties during the hearing that we had concluded that the transfers were not subject to any trust. I give my reasons in the paragraphs which follow.

33. In the *first* place, the fact that a transfer may have been made for a particular purpose need not of itself mean that it was the subject of a trust. As Lord Millett explained in *Twinsectra*, a *Quistclose* trust "does not necessarily arise merely because money is paid for a particular purpose" (see paragraph 21 above).

34. *Secondly*, I do not think that the entries in respect of the transfers in the Commerzbank statements manifest an intention to create a trust or that the funds should not be at IMB's free disposal. The words are at least as apt to refer to an intention that the money should be *credited* to Zumax, without any trust. Redsear will have needed to identify the entity for whose benefit the transfers were made regardless of whether they were to be impressed with a trust. Payers must routinely seek to identify to whom a payment is to be credited without any trust being intended. *Abou-Rahmah v Abacha* is a case in point.

35. *Thirdly*, the funds cannot, as it seems to me, be said to have been "segregated" in any meaningful way. In the *Quistclose* case, the money had been paid into a separate bank account opened specially for the purpose. In *Twinsectra*, the funds had been credited to a solicitor's client account and so could fairly be described as "segregated": the money standing to the credit of the account will have been held on trust for clients (see e.g. *In re A Solicitor* [1952] Ch 328; *Twinsectra,* at paragraph 12; and *Menelaou v Bank of Cyprus UK Ltd* [2016] AC 176, at paragraph 137) and subject to strict regulatory rules. There was nothing comparable in the present case. The transfers at issue will have been mingled with money transferred into the Commerzbank accounts from numerous sources for the benefit of a range of recipients and with funds that on any view were IMB's alone. In *Twinsectra*, Lord Millett spoke of someone in IMB's position under a *Quistclose* trust having to "keep the money separate" (see paragraph 22 above). That neither happened nor was ever agreed.

36. *Fourthly*, the context, including the "structure of the arrangements and the contractual mechanisms involved" (to quote from Patten LJ in *Bieber v Teathers Ltd*), suggests that there was to be no trust. The transfers were made because Zumax banked with IMB, and the basic banker-customer relationship is that of debtor and creditor (see paragraph 25 above). The principle that "money placed in the custody of a banker is, to all intents and purposes, the money of the banker, to do with it as he pleases" (see paragraph 25 above) is both long-established and fundamental to how banking is carried on. Of course, it is possible for a banker to become a trustee for a customer, but that is very much the exception rather than the rule. In *Westdeutsche Landesbank Girozentrale v Islington LBC* [1996] AC 669, Lord Browne-Wilkinson noted (at 704) that "wise judges have often warned against the wholesale importation into commercial law of equitable principles inconsistent with the certainty and speed which are essential requirements for the orderly conduct of business affairs". In the present case, Zumax's submissions, if accepted, could confuse and complicate the operation of correspondent accounts. After all, were the transfers in dispute held on trust, would it not follow that payments into correspondent accounts must commonly be subject to trusts? It is notable, too, that on Zumax's own case the idea was for IMB to end up *owing* Zumax equivalent sums (once the money had been credited to Zumax's Naira account with IMB, according to Zumax). If there was to be a personal obligation at that stage, why should it be inferred that Zumax was meant to have a proprietary claim against IMB en route to that destination?

37. As I have mentioned, Barling J considered that matters that he listed in paragraph 76 of his judgment made it clear that the relevant funds were regarded by IMB/FCMB as belonging to Zumax. I do not myself, however, see them as important. Those identified in sub-paragraphs (i), (ii) and (iii) all involved occasions when IMB/FCMB said that money "belonged" to Zumax or something similar. Thus, sub-paragraph (i) referred to a letter that IMB sent to Commerzbank on 27 June 2002, shortly after the IMB Morgan Account had been frozen (see paragraph 41 below), in which the heading included the words "Re: USD Credits: $409,985.00 Belonging to Zumax Nigeria Ltd." and the writer then said that, if Commerzbank checked through its records, it would appreciate that it had "been receiving payments on their behalf over the years". In sub-paragraph (ii), the judge said that FCMB's defence in the present proceedings contended that relevant funds had been paid to Zumax by bankers' drafts, a contention which, the judge considered, "indicates that they belonged to Zumax". As for sub-paragraph (iii), this was based on the witness statement of Mr Owolabi,

who, in the course of explaining the parallel market, remarked that once IMB had made a payment in Naira from its account with Citizens Bank "the dealer would note the amount in the USD account which now belonged to the bank, effectively debiting the customer's allocated amount of funds in the USD account". Aside, however, from the fact that all these matters post-dated the disputed transfers, it is quite possible to speak of money in a bank account "belonging" to the customer even though the money is in truth *owed* to the customer by the bank. Further, payment by bankers' drafts (or otherwise) is consistent with IMB having had a personal obligation to Zumax. It does not seem to me to tell you anything about whether IMB was a trustee rather than a debtor.

38. In a similar vein, Mr Moraes suggested that a paragraph in a witness statement from a solicitor then acting for FCMB was inconsistent with FCMB's case. The witness statement was made soon after Barling J had given judgment and in support of an application to discharge a freezing order that the judge had granted against FCMB. The paragraph in question included this:

> "As the court knows, like any correspondent bank account, the Bank's correspondent bank accounts in London and elsewhere are pooled accounts into which are credited all customer receipts and disbursements without segregation. The monies in these accounts are customer monies and not the bank's own assets, but the injunction seeks to prevent the bank from dealing with the monies in accordance with customers' instructions."

39. I do not think, however, that this is of any significance. Far from dating from the time of the relevant dealings, the witness statement was made long afterwards, at a point when it was perfectly clear that FCMB disputed the existence of a trust. The author may have used language loosely, but his comments are of no help with the trust issue.

40. Paragraph 76(iv) of the judgment arose from some entries in Commerzbank statements. Sums received into an IMB account early in 2000 of, respectively, $45,298 "FAV FARIOG NIG. LTD" and $220,000 "IN FAVOUR OF FINANCE APPLICATIONS SYSTEMS LTD" are shown as having been transferred out by way of "internal transfer" within a short period. At the end of 2001 and beginning of 2002, there were also three "internal transfers" totalling $330,000 from an IMB account to the IMB Morgan Account where "ZUMAX NIG LTD" featured in the entry. Zumax contends that these matters indicate that funds were earmarked. However, the entries in question related to only a very few of the multitude of receipts into the Commerzbank bank accounts (relating both to Zumax and to other customers) and are in any event explicable on the basis that they may in one way or another have helped IMB to keep track of what it owed to customers.

41. Paragraph 76(v) of the judgment concerned the interpleader proceedings that I have already mentioned. These concerned the IMB Morgan Account and a sterling account that IMB Morgan also held with Commerzbank. The accounts were frozen from May 2002 as a result of, among other things, suspicion that they were being used for money-laundering. Commerzbank issued an interpleader application in relation to the money standing to the credit of the two accounts, and claims far exceeding the amounts in the accounts were advanced. Giving judgment on 30 November 2004 (see

[2004] EWHC 2771 (Ch), [2005] 2 All ER (Comm) 564), Lawrence Collins J recorded that IMB Morgan had made no claims to the funds (paragraph 37) and explained that, "In order to establish a claim to a share in the fund, claimants must show that they have a proprietary right, i.e. a right in property and not simply a debt due from IMB [Morgan]" (paragraph 36). He went on to say this:

> "There are three relevant bases for such a claim, and most of the claimants have a claim (if any) under the first basis, which is that a person who has been defrauded may trace property into the hands of the recipient…. The second basis for a claim is that a payment was made by mistake. Whether a person who has made a payment by mistake has a proprietary claim is by no means clear. But I am satisfied that in a case of this kind, where (as in the case of the payment by Citizens Union Bank) double payment was made at the request of the recipient (IMB Morgan), where there is an identifiable fund, and where the recipient has notice of the claim, it would be unconscionable for IMB Morgan (and in effect the other claimants to the fund) to retain the benefit of that payment…. Third, where money is paid for a purpose which is not fulfilled, the recipient holds the money on trust for the payer: *Barclays Bank Ltd v Quistclose Investments Ltd* [1970] AC 567; *Carreras Rothmans Ltd v Freeman Matthews Treasure Ltd* [1985] 1 All ER 155. The third head applies to the claims by Mr Vine/Hawick Plant Auctions, and Mr Baker."

42. Zumax put forward one claim, in respect of the IMB Morgan Account. Lawrence Collins J said this about the claim:

> "On April 22, 2002, $410,000 was transferred, on behalf of Zumax, from Redsear Limited's account with [Chase] in London into the [IMB Morgan] Account. Zumax claims that it had instructed Mr Chinye, the main signatory of Redsear Limited's account (a $ offshore account which had been set up to hold Zumax's hard currency assets), to use money from this account to meet Zumax's obligations in Nigeria; that $441,000 had been intended for use by Zumax in its oilfield supply business with Chevron and Shell; and that as a result of fraud perpetrated by Mr Chinye, this sum was instead directed through the [IMB Morgan] Account to IMB … in Nigeria to cover otherwise failing loans of that bank. Zumax says that the $441,000 is part of a total of $7,400,000 which Zumax claims Mr Chinye transferred fraudulently from the Redsear account. The documents show that $410,000 (less bank charges) was transferred, and Zumax has withdrawn its claim for the balance. On the basis of the evidence submitted by Zumax I will admit the claim for $409,985."

43. Since, however, the claims on the IMB Morgan Account far exceeded the balance on it, Zumax and other claimants received only about 9% of their claims (see paragraph 51 of Lawrence Collins J's judgment).

44. Barling J noted in paragraph 76(v) of his judgment that Lawrence Collins J had "held … that Zumax had a proprietary interest in the 10th transfer" and that "IMB Morgan itself had made no claim to the monies". I do not myself, however, see the interpleader proceedings as lending any support to Zumax's case on the trust issue. While Lawrence Collins J may have held Zumax to have had a proprietary interest in the tenth transfer, that was on the (mistaken) basis that the money derived from an unrelated fraud perpetrated by Mr Chinye. Zumax did not suggest to Lawrence Collins J (and he did not find) that the tenth transfer, or any of the other transfers now at issue, was subject to either an express trust or a *Quistclose* trust. Further, it is hardly surprising that IMB Morgan did not assert any claim to money in the IMB Morgan Account when the balance on it was wholly inadequate to meet the proprietary claims, almost entirely founded on fraud, to which it was subject.

45. Mr Moraes also placed reliance on the stance that FCMB adopted to the tenth transfer in the context of this appeal. Among other things, Mr Moraes cited a paragraph in Miss Melwani's skeleton argument in which she said that the tenth transfer "was trapped in the frozen IMB Morgan account" and that FCMB "therefore accepts that it has not paid or accounted for this transfer". Mr Moraes submitted that the fact that money in the IMB Morgan Account was "trapped" could not have affected FCMB's liability to discharge a *personal* obligation and, hence, that it was implicitly being accepted that money in the account had been held on trust for Zumax. To my mind, however, this is at most a forensic point, especially since the very skeleton to which Mr Moraes referred made it perfectly plain that FCMB's position was that the transfers at issue were not subject to any trust. The point does not go to the substance of the dispute.

46. Mr Moraes took us, too, to *McGraddie v McGraddie* [2013] UKSC 58, [2013] 1 WLR 2477. In that case, the Supreme Court stressed how rarely an appellate Court should interfere with a trial judge's factual findings. I cannot see, however, that *McGraddie v McGraddie* is of any relevance in this case, where there has been no trial and no oral evidence.

47. As I have indicated, I concluded, differing from Barling J, that the transfers at issue were not the subject of any trust. It seems to me that, having accepted the various transfers that had been made for the credit of one of its customers (viz. Zumax), IMB was obliged to credit Zumax with them, either through Zumax's Naira account in Lagos or (on FCMB's case) potentially in some other way, via the parallel market. I do not, however, consider that IMB became a trustee. Its obligations were personal.

48. That view chimes with *Abou-Rahmah v Abacha*, the facts of which are summarised in paragraph 24 above. In paragraph 68(iv) of his judgment, Treacy J said:

> "The defendant [i.e. the Nigerian bank] received the monies as the agent of its customer to whom it owed duties arising from their contractual relationship."

49. The present appeal arises, of course, in the context of an application for summary judgment, but in my view it is possible to determine now, without waiting for a trial, that no trust arose. There is no reason to suppose that additional evidence would cast significant light on the issue. In this connection, a passage from the judgment of

Lewison J (as he then was) in *Easyair Ltd v Opal Telecom Ltd* [2009] EWHC 339 (Ch) is in point. Lewison J said in paragraph 15(vii):

> "it is not uncommon for an application under Part 24 to give rise to a short point of law or construction and, if the court is satisfied that it has before it all the evidence necessary for the proper determination of the question and that the parties have had an adequate opportunity to address it in argument, it should grasp the nettle and decide it".

It is to be noted, moreover, that FCMB said in its appellant's notice that the relief that it was seeking from this Court included an order to the effect that it was not a trustee.

50. The conclusions I have arrived at thus far mean that I do not need to address FCMB's arguments to the effect that IMB would not have known that the disputed transfers were for the benefit of Zumax until it was too late to impress them with a trust and that it would anyway have been Redsear rather than Zumax which would have been entitled to enforce any *Quistclose* trust. I would not wish, however, to be taken to have endorsed paragraph 80 of the judge's judgment (quoted in paragraph 13 above).

Other matters

51. The conclusion that the transfers at issue were not the subject of a trust does not dispose of the proceedings as a whole. Although Zumax's application for summary judgment was founded on its trust arguments, its particulars of claim also include an allegation that IMB and its successors owed Zumax a fiduciary duty. That allegation is not developed and, as presently pleaded, the relief sought is dependent on the trust claim. However, Miss Melwani did not suggest that we were in a position to rule on whether the claim based on breach of fiduciary duty was well-founded although, if it is to proceed, the particulars of claim will require amendment. I thus need to address two further grounds of appeal that FCMB advances.

The tenth transfer

52. FCMB's case is that it should be allowed to take to trial the contention that, having made a claim for the tenth transfer in the interpleader proceedings on the basis of fraud, Zumax should not be allowed to seek relief in respect of the transfer on a different basis in the present proceedings.

53. Barling J rejected such an argument. He gave this explanation of what had happened (in paragraph 134 of his judgment):

> "It is clear from [Zumax's evidence in the interpleader proceedings], read alongside the judgment of Mr Justice Lawrence Collins, that Zumax was claiming a quite different sum of $441,000, but the judge had access to documents referring to the 23 April 2002 $410,000 transfer. Presumably these included the Commerzbank statements of the account, which were not at this time available to Zumax. As the judge was willing to grant Zumax the sum of $410,000, it

> understandably did not press a claim for the difference between the two sums."

The judge went on to refer to evidence that "in 2004 the information available to Zumax was limited, and that it was the court not Zumax who identified the receipt of $410,000 into the IMB Morgan Commerzbank Account, and confirmed that Zumax had a proprietary right to the sum" (paragraph 135).

54. Miss Melwani's position is that Zumax in fact had all the material it reasonably needed to advance its claim in the interpleader proceedings on an express/*Quistclose* trust basis. With a view to substantiating that, she seeks permission to adduce new evidence. She submits that, in the circumstances, FCMB has at least an arguable defence, as regards the tenth transfer, of abuse of process or cause of action estoppel.

55. I am not persuaded. Zumax cannot be criticised for not asserting in the interpleader proceedings a personal claim such as it is now to take forward in the present proceedings. It could not have availed it to do so since only those with proprietary claims were to receive anything, and then only a small fraction of what they were seeking. As mentioned above (paragraph 41), Lawrence Collins J explained in his judgment that claimants had to "show that they have a proprietary right, i.e. a right in property and not simply a debt due from IMB [Morgan]". In advancing, moreover, a proprietary claim to funds in the IMB Morgan Account, Zumax was not saying anything about whether it had a personal claim against IMB. Zumax cannot, in the circumstances, be said to have renounced whatever personal claim it might have against FCMB. Further, there is no question of FCMB having been prejudiced by Zumax's recovery of a small proportion of the tenth transfer as a result of the interpleader proceedings: Zumax accepted in its particulars of claim that it should give credit for what it received.

56. It seems to me that this ground of appeal fails.

Payment

57. The other ground of appeal that I need to consider relates to payment. FCMB contends that it should be allowed to pursue the defence that it paid over and/or otherwise accounted to Zumax for the first, second and fourth to ninth transfers.

58. In the past, FCMB relied on a document referred to as the "Warri Schedule", which it suggested showed the amounts of bankers' drafts provided to Zumax but which proved in fact to record "sums which were *debited* to Zumax's Naira Account with FCMB, and which can be seen to increase Zumax's overdraft" (paragraph 112 of the judgment). By the time of the hearing before Barling J, FCMB was relying on other schedules produced by Mr Chinye, but the judge concluded that FCMB was "clutching at straws" (paragraph 127) and that its payment defence was hopeless. He said this:

> "138. In my view there is no substance whatsoever in the current version of this defence, based on a notional set of bankers' drafts which were said arguably to have been issued at about the same time and in the same amounts as, and in addition to, the drawdown payments referred to in the Warri

> Schedule. There is no evidence that any such additional bankers' drafts existed, and the suggestion that they did is wholly implausible in the circumstances. There is no reason to suppose that further relevant material would become available at a trial or that oral evidence would make a difference. FCMB have identified no issue in this regard which requires a trial. The current bankers' draft defence is hopeless.
>
> 139. FCMB have only been constrained to rely on this point because their two earlier defences (the initial denial of receipt of the transfers, and the subsequent Warri Schedule defence) have been shown to be false. FCMB's inability to point to any real evidence in support of the latest defence inevitably falls to be seen in the context of those earlier assertions, which were vigorously made and later abandoned…."

The judge went on to say that an expert report dealing with the parallel foreign exchange market did not affect his view (paragraph 140).

59. I shall come in a moment to the sixth transfer. As regards the other relevant transfers (the first, second, fourth, fifth, seventh, eighth and ninth), Miss Melwani argued that FCMB has a real prospect of successfully defending the proceedings on the basis that Zumax was paid as a result of parallel market transactions. On that basis, she said, Zumax could be expected to have received sums corresponding to the transfers into one or other of its Warri accounts (none of which was held with IMB).

60. The arguments that Miss Melwani advanced on this aspect of the case included these:

i) It is inherently probable that Zumax was paid. Mistake is unlikely to provide an explanation for failure to pass on seven transfers made over a period of nearly two years. That leaves fraud, but, while Mr Chinye may have misappropriated other money, there is no reason to suppose that he diverted these sums, which he himself instructed should be transferred for the credit of Zumax. Further, no one else has been identified as the potential fraudster;

ii) Mr Owolabi has confirmed that customers such as Zumax would normally prefer to use the parallel market and that such transactions would not be recorded in a bank's official books;

iii) FCMB's inability to put forward documentary evidence confirming payment to Zumax can also be explained by the fact that FCMB was not itself involved in the transactions but has inherited IMB's rights and duties only through two mergers. It is significant in this context that FCMB has been unable to find bankers' drafts that are known to have existed during the relevant period;

iv) Statements and other records from the Warri banks are not as yet available for the relevant period. The fact that Zumax was able to adduce statements for the Citibank Nigeria account in the Nigerian litigation for early 2003 suggests that material documents could be obtained, but it seems that Zumax has not even asked for them; and

v) Zumax was extraordinarily slow to complain of non-payment, and FCMB has not had the chance to cross-examine Zumax's witnesses about the reasons for this.

61. Mr Moraes, for his part, denied that there was any substance in such arguments. Among other things, he said:

i) There is no documentary evidence indicating that Zumax was paid. Transactions on the parallel market such as FCMB suggests must have taken place would have been recorded to some degree at least, but nothing substantiating them has been found;

ii) Zumax does not itself have relevant documents. Its trade books were taken when it went into receivership in December 2002 and were not returned when the receivership came to an end in 2005. Nor does Zumax have bank statements for the Warri accounts for the period when the relevant transfers were made;

iii) A due diligence report on IMB prepared in 2005 when First Inland Bank plc (which became Finbank) was seeking to acquire it found, among other things, "Unethical banking practices", some "fictitious accounts" which were used by management "to warehouse bogus and unauthorised expenses and open, operated and concealed from the regulatory authorities to siphon money out of the bank", a "travelers' cheque scam" and a "Finders fees scam";

iv) Zumax raised queries as long ago as 2002; and

v) FCMB is essentially hoping that something will turn up, and that is not good enough. As Briggs J said in *Lexi Holdings v Pannone and Partners* [2009] EWHC 2590 (Ch) (at paragraph 4):

> "the principle is that, in order to challenge an assertion that a party has no real prospect of success, or of successfully defending, in relation to a claim or issue, it is necessary to do more than say that some evidence currently unavailable might turn up in time for the trial".

62. On the other hand:

i) As Miss Melwani pointed out, there is nothing in the due diligence report to suggest that IMB or anyone working for it was stealing money from customers' accounts, let alone a correspondent account;

ii) The due diligence report confirms that IMB had been engaged in transactions on the parallel market; and

iii) It is appropriate for the Court to ask itself, not merely what is at present available to support FCMB's case, but whether "reasonable grounds exist for believing that a fuller investigation into the facts of the case would add to or alter the evidence available to a trial judge and so affect the outcome of the case" (see *Doncaster Pharmaceuticals Group Ltd v Bolton Pharmaceutical Co 100 Ltd* [2006] EWCA Civ 661, [2007] FSR 63, at paragraph 18, and *Easyair*,

> at paragraph 15(vi)) and whether "there is a sufficient prospect that material will become available in time for trial so as to afford the defendant the real prospect of a successful defence" (*Lexi Holdings*, at paragraph 4).

63. There is undoubtedly force in the points that Mr Moraes made. Should statements for Zumax's Warri accounts for the relevant period become available and prove to lend no support to FCMB's case, it may need to re-evaluate its position. As matters stand, however, I have concluded, on balance, that FCMB does have a real prospect of defeating the claim as regards the first, second, fourth, fifth, seventh, eighth and ninth transfers on the strength of the payment defence.

64. That brings me to the sixth transfer. Here, FCMB wishes to rely on a new document, that was not before Barling J, which it says indicates that Zumax was paid via its Naira account in Lagos. The document in question is an internal IMB memo dated 16 July 2001 in which Mr Chinye said:

> "Zumax has requested for a temp OD to accommodate an immediate cash requirement of N100 million against $1 million Dollars or 120 million Naira receivables expected from Chevron and Shell within the next week.
>
> I have verified these receivables and hereby grant approval to their request.
>
> Make a draft of GTB or STB payable at Warri in favour of the company today. Company MD will be in the Bank at 6.00 pm to collect same."

With the benefit of this document, FCMB maintains, the sixth transfer can be linked to a credit entry on Zumax's Naira account in October 2001. The point was summarised as follows in one of Miss Melwani's skeleton arguments:

> "[T]he memo shows that Zumax requested a temporary overdraft increase to accommodate an immediate cash requirement of Naira 100 million, offset against receivables of US$1 million/Naira 120 million expected from Chevron/Shell within the next week. The memo anticipates a payment of US$1 million from Chevron/Shell for the benefit of Zumax in the latter half of July; and in fact a payment of US$901,000 ($900,985.00 after the $15 charge) was made by Redsear from the Chevron/Shell contract into the IMB Commerzbank Account (the 6th transfer) on 13 August 2001. Zumax's account statements then show a credit entry of Naira 119,369,250 in respect of a cheque deposit on 15 October 2001. Absent any other competing explanation (Zumax has supplied none), this cheque deposit appears to relate to the 6th transfer, which offsets/reduces back down the temporary overdraft increase."

65. With regard to whether the memo could with reasonable diligence have been obtained for use at the hearing before Barling J, FCMB accepted that it had had the document in its possession but said that it had been identified only as a result of extensive

searches going far beyond what might be expected for a summary judgment hearing. A witness statement explained that FCMB knew that it had some old IMB documents in three archive locations and that these were searched in advance of the summary judgment hearing both generally and in relation to a specific disclosure request that Zumax had made. However, the documents in question amounted to 3714 boxes and 114 bags which, while they had some generic labelling on the outside, were not otherwise indexed or catalogued, and the memo was not found at that stage. It came to light when, following Barling J's judgment, FCMB made a "wholesale non-discriminatory search of every document at all three locations, looking for any document anywhere that referred to 'Zumax'", involving 10 people searching through boxes and bags for some 78 days.

66. Mr Moraes argued that FCMB could with reasonable diligence have obtained the memo in time for the hearing before Barling J. He further submitted, among other things, that:

i) Zumax was prevented from explaining the Naira 119,369,250 credit in October 2001 by the fact that its records had been taken from it and not returned;

ii) Mr Chinye never suggested that there was a link between the Naira 119,369,250 credit and the sixth transfer;

iii) The documents do not show Zumax to have asked for or needed "a temp OD to accommodate an immediate cash requirement of N100 million". Although one version of the statements for Zumax's Naira account showed it to have a debit balance of some Naira 397 million at the relevant date, other versions belied that;

iv) The sixth transfer was not paid into Commerzbank "within the next week" after 16 July 2001 (when the memo was written), but not until 13 August;

v) There was an interval of two months between receipt of the sixth transfer and the date of the Naira 119,369,250 credit; and

vi) Even using the parallel market, the sixth transfer (of $901,000 less the $15 charge) could not have generated a credit of Naira 119,369,250.

67. In considering whether the memo could with reasonable diligence have been obtained for use at the hearing before Barling J, it is of some relevance that the case had not reached trial. In *Langdale v Danby* [1982] 1 WLR 1123, Lord Bridge said (at 1133):

> "It may well be that the standard of diligence required of a defendant preparing his case in opposition to a summons for summary judgment, especially if under pressure of time, will not be so high as that required in preparing for trial."

At all events, my own view is that FCMB satisfies the reasonable diligence requirement, in the light of the matters mentioned in paragraph 65 above.

68. In other respects, there is once again force in Mr Moraes' contentions. Even so, it seems to me that the memo is of sufficient significance, and the defence based on it of

enough substance, for the right course to be to admit the memo into evidence and to permit FCMB to pursue its payment defence in relation to the sixth transfer. FCMB has, to my mind, a real prospect of successfully defending that part of the claim on that basis.

69. I would therefore allow the appeal on this ground.

Limitation

70. One of FCMB's grounds of appeal related to observations which Barling J made about limitation matters. As the judge recognised, what he said was obiter, and it was agreed between Miss Melwani and Mr Moraes that any limitation issues should be addressed afresh, without reliance on the judge's comments, in the context of the claims that are now to proceed. I do not therefore need to say anything on the subject.

Conclusion

71. I would allow the appeal on ground 1 (the trust issue) and ground 3D (payment). In my view, the transfers at issue were not the subject of any trust (either express or *Quistclose*), and FCMB should be allowed to take to trial the defence that it paid over and/or otherwise accounted to Zumax for the first, second and fourth to ninth transfers. In contrast, I would dismiss the appeal on ground 3E (relating to the tenth transfer).

Lord Justice Males:

72. I agree with both judgments.

Lord Justice Lewison:

73. Although Newey LJ has covered the ground, I wish to add a little more on the trust point. As we all discovered during the course of the hearing of this appeal, it is all too easy to fall into the use of loose language when speaking of bank accounts. Although we speak of "money being transferred" from one bank account to another; or of money in a bank account "belonging" to the customer, these phrases are inaccurate.

74. The relation between customer and banker is a contractual relationship of creditor and debtor. What is represented by the balance in the customer's account is the amount of the debt that the bank is required to pay the customer if he demands it. Its legal character is that of a chose in action. This has been settled law for over 150 years. Newey LJ has already quoted part of the speech of Lord Cottenham LC in *Foley v Hill* (1848) 2 HL Cas 28. It was argued in that case that an action for an account lay against a banker, by analogy with an action for an account against an agent or factor. The court emphatically rejected that argument. Lord Cottenham LC explained:

> "But the analogy entirely fails, as it appears to me, when you come to consider the relative situation of a banker and his customer; and for that purpose it is quite sufficient to refer to the authorities, which have been quoted, and to the nature of the connection between the parties … Money, when paid into a bank, ceases altogether to be the money of the principal…; it is then the money of the banker, who is bound to return an

> equivalent by paying a similar sum to that deposited with him when he is asked for it.. The money paid into the banker's, is money *known by the principal to be placed there for the purpose of being under the control of the banker*; it is then the banker's money; he is known to deal with it as his own; he makes what profit of it he can, which profit he retains to himself, paying back only the principal, according to the custom of bankers in some places, or the principal and a small rate of interest, according to the custom of bankers in other places. The money placed in the custody of a banker is, to all intents and purposes, the money of the banker, to do with it as he pleases; he is guilty of no breach of trust in employing it; he is not answerable to the principal if he puts it into jeopardy, if he engages in a hazardous speculation; he is not bound to keep it or deal with it as the property of his principal, but he is of course answerable for the amount, because he has contracted, having received that money, to repay to the principal, when demanded, a sum equivalent to that paid into his hands.
>
> That has been the subject of discussion in various cases, and that has been established to be the relative situation of banker and customer. That being established to be the relative situations of banker and customer, *the banker is not an agent* or factor, but he is a debtor. Then the analogy between that case and those that have been referred to entirely fails; and the ground upon which those cases have, by analogy to the doctrine of trusteeship, been held to be the subject of the jurisdiction of a Court of Equity, has no application here, as it appears to me." (Emphasis added)

75. In the same case Lord Brougham said:

> "Now, as to the banker: is his position with respect to his customers that of a trustee with respect to his cestui que trust? Is it that of a principal with respect to an agent? or that of a principal with respect to a factor? I see no ground for contending that there is any identity in those two points. I am now speaking of the common position of a banker, which consists of the common case of receiving money from his customer on condition of paying it back when asked for, or when drawn upon, *or of receiving money from other parties, to the credit of the customer*, upon like conditions to be drawn out by the customer, or, in common parlance, the money being repaid when asked for, because the party who receives the money has the use of it as his own, and in the using of which his trade consists, and but for which no banker could exist, especially a banker who pays interest. But even a banker who does not pay interest could not possibly carry on his trade if he were to hold the money, and to pay it back, as a mere depositary of the principal. But he receives it, to the knowledge

> of his customer, for the express purpose of using it as his own, which, if he were a trustee he could not do without a breach of trust." (Emphasis added)

76. If a bank receives an instruction from the customer to make a payment to another account, and makes the payment telegraphically or electronically, then as the House of Lords explained in *R v Preddy* [1996] AC 815, the chose in action consisting of the credit balance in the customer's account is extinguished or reduced to the extent of the requested payment. A new chose in action is created in the payee's account, consisting of the credit in the amount of the payment instruction. These are two different choses in action, although their monetary value may be equivalent. No "money" actually changes hands. In point of law, the payment instruction is an instruction to the bank to debit the customer's account in the amount of the payment; and to credit (or procure the credit) of the payee's account with a credit in the equivalent amount.

77. What this means is that a claim such as that in the present case is dependent on tracing. Lord Millett explained all this in *Foskett v McKeown* [2001] 1 AC 102, 128:

> "We speak of money at the bank, and of money passing into and out of a bank account. But of course the account holder has no money at the bank. Money paid into a bank account belongs legally and beneficially to the bank and not to the account holder. *The bank gives value for it, and it is accordingly not usually possible to make the money itself the subject of an adverse claim. Instead a claimant normally sues the account holder rather than the bank and lays claim to the proceeds of the money in his hands.* These consist of the debt or part of the debt due to him from the bank. We speak of tracing money into and out of the account, but there is no money in the account. There is merely a single debt of an amount equal to the final balance standing to the credit of the account holder. No money passes from paying bank to receiving bank or through the clearing system (where the money flows may be in the opposite direction). There is simply a series of debits and credits which are causally and transactionally linked. *We also speak of tracing one asset into another, but this too is inaccurate. The original asset still exists in the hands of the new owner, or it may have become untraceable. The claimant claims the new asset because it was acquired in whole or in part with the original asset. What he traces, therefore, is not the physical asset itself but the value inherent in it.*" (Emphasis added)

78. That is why in both *Quistclose* and in *Twinsectra* the real contest was between the account holders. It is necessary to say a little more about *Quistclose* in order to explain the role of the bank. The simplified facts of that case were as follows. A lent money to B on terms that it would be used only for the particular purpose of paying a dividend. B banked with Barclays. A advanced the money by cheque, which B paid into a separate and newly opened account at Barclays. The agreement between A and B was known to Barclays. The House of Lords decided that *as between A and B* the fund in the new account was held by B; there was a trust; with the consequence that

the fund did not become part of B's free estate. It was common ground that if Barclays knew of the trust, it was bound by it. It was because the fund was not at the free disposal of B that Barclays was unable to exercise the right to combine accounts. *Quistclose* does not, in my judgment, say anything about funds in transit between one bank account and another.

79. From the perspective of the payee it is an implied term of the banking relationship that the bank will receive money and collect bills for its customer's account. In *Joachimson v Swiss Bank Corporation* [1921] 3 KB 110, 127 Atkin LJ explained:

> "I think that there is only one contract made between the bank and its customer. The terms of that contract involve obligations on both sides and require careful statement. They appear upon consideration to include the following provisions. The bank undertakes to receive money and to collect bills for its customer's account. The proceeds so received are not to be held in trust for the customer, but the bank borrows the proceeds and undertakes to repay them."

80. These statements of high authority deny the existence of any trust relationship between the bank and its customer, whether holding "money" in a bank account or in collecting "money" on its behalf. It is particularly to be noted that in *Joachimson* Atkin LJ considered that there was no trust at the point of receipt by the collecting bank of the proceeds. He did not say that a trust arose which was discharged or executed by crediting the customer's account.

81. There is no reason to suppose that any different principles apply where the execution of the customer's payment order takes place through the medium of a correspondent back. It is simply administrative machinery. If a bank customer wishes to instruct his bank to make a payment to someone else, it seems obvious that the customer must, somehow or other, tell the bank for whose benefit the payment is to be made. But that indication cannot give rise to a trust relationship. If it did, it would paralyse the business of banking. If the payment is to be made through a correspondent bank, it is not enough for the customer to specify the recipient correspondent bank. If that were all that was specified, the receiving bank would have no idea to which of its customers' account to credit the payment. So the payment instruction (or at least the information which is passed to the receiving bank via its correspondent) must inform the receiving bank to which account to credit the payment. I cannot accept that the fact that the account holder giving the payment instruction identifies the account holder in whose favour the credit is ultimately to be made thereby creates a trust, whether a resulting trust of the *Quistclose* kind, or an express trust under which the intended recipient is the beneficiary. As Mr Moraes accepted, if his argument were correct the only way in which the recipient bank could avoid the onerous obligations of a trustee would be to send "the money" back to the sending bank. But that would almost certainly be a breach of contract vis-à-vis its own customer; not to mention extremely damaging to the banker/customer relationship. Mr Moraes' argument is also inconsistent with the decision of the Staff of Government Division (i.e. the Court of Appeal of the Isle of Man) in *Du Preez Ltd v Kaupthing Singer and Friedlander (Isle of Man) Ltd* (2010) 12 ITELR 943; as well as the considered opinion of the authors of Brindle and Cox on Bank Payments (5th ed) para 3-091. Moreover, Mr Moraes was unable to explain convincingly how a transfer of funds via a

correspondent bank could be effected without creating a trust, assuming that the paying customer did not wish to create one. He attempted to do so by reference to a diagram in Brindle and Cox which illustrated the movement of SWIFT payment messages. But those payment messages are initiated by the paying bank itself: not by the customer. I do not consider that by initiating a SWIFT payment message the paying bank could itself impose a trust on the recipient bank. Any trust must be created by the customer; not by the bank.

82. Nor can I accept that the recording of the credit to the bank's account, and the subsequent recording of the debit to the bank's account representing the receipt of funds from the sending bank, and the credit to the customer's account, amounts to a segregation of funds. It is no more than bookkeeping. Indeed, it appears that even in the case of a solicitor's client account, money paid in on behalf of one client is mixed with money paid in on behalf of other clients, with the consequence that its separate identity is lost: *R v Preddy* at 838. That would not, of course, preclude a tracing claim in an appropriate case.

83. At [72] the judge said:

> "In my view those unequivocal instructions, conveyed by Redsear/Zumax to Redsear's bank (Chase), and passed on by the latter to FCMB's bank (Commerzbank), which recorded them in its own account documents, are (subject to any relevant context which points the other way) capable of only one sensible construction, namely that they evince a clear intention on the part of those concerned, and in particular Mr Chinye, that the funds transferred should be held by FCMB in its Commerzbank accounts, not for its own benefit but for the benefit of Zumax. That is the only reasonable, objective interpretation of the instructions. I accept Mr Moraes's submission that there was a clearly specified purpose and a clearly specified beneficiary."

84. In my judgment, however, there is "relevant context" that overwhelmingly points the other way. These were routine banking transactions, in which it was necessary to identify the account to which the ultimate credit was to be made. The objective interpretation of Redsear's instructions goes no further than that. Accordingly, I consider that the judge was wrong to decide that any trust was created by Redsear's payment instructions.

85. For these reasons, as well as those given by Newey LJ, I joined in the decision that no trust had been created. On all other points in the appeal, I agree with Newey LJ for the reasons that he has given.