[2006]JRC111

ROYAL COURT
(Samedi Division)

1st August 2006

Before : M. C. St. J. Birt, Esq., Deputy Bailiff, and Jurats Georgelin and King.

Between **Izodia Plc** **Plaintiff**

And **Royal Bank of Scotland International Limited** **Defendant**

Advocate O. A. Blakeley for the Plaintiff.

Advocate M. St. J. O'Connell for the Defendant.

JUDGMENT

DEPUTY BAILIFF:

1. This case is concerned with which of two innocent parties should bear the loss of some £24.5 million which the plaintiff ("Izodia") alleges was stolen from the account which it held with the defendant ("RBSI" or "the Bank").

2. In briefest outline, on 2nd August 2002 Izodia transferred the sum of £27,250,000 from its account at the Bank of Scotland in Reading to an account which had been opened in its name with RBSI in Jersey. On 5th August, the whole of that sum, together with accrued interest, was transferred in three tranches to the account of Lynch Talbot Limited ("LT") also held at RBSI. RBSI made the transfers because it had been instructed to do so via its electronic banking system ("EBS") by Diane Waterton, who was an employee at LT. On 10th September the sum of £2,738,132.26 was transferred back from the LT account to Izodia's account at RBSI. Izodia now claims the balance in the sum of £24,521,387.58 plus interest. The primary claim is brought in debt. Alternatively Izodia claims for breach of contract or negligence.

3. RBSI relies upon a number of defences:-

(i) The payments were made in accordance with the mandate.

(ii) Even if this is not so, the payments were made with the actual authority of Izodia.

(iii) In any event Izodia has ratified the payments.

(iv) Alternatively, Izodia has made an election to treat the payments as valid.

(v) Izodia is estopped from claiming the sum in question from the Bank.

(vi) The bank denies negligence or breach of contract.

4. Much of the evidence was not seriously in dispute. We propose to set out the factual position as we find it to be. We will then go on to consider the various issues in turn.

The facts

(i) Background

5. At the material time Izodia was a quoted company which had raised substantial funds to develop and sell computer software. Its shares were held substantially by City institutions. However its business plans had not been successful and the company had lost a considerable amount of money. In April 2002 a concert party ("the concert party") comprising Stomp Limited, Mountcashel Plc and Corporate Synergy Holdings Plc acquired 26.3% of Izodia's issued shares. The concert party caused two directors to be appointed to the board of Izodia on 9th May 2002 namely Edward Vandyk and Christopher Roberts. As from that date the board comprised of the two of them together with Patricia Chapman-Pincher, Ross Peters and Martin Frost as chairman. Various proposals for the company to re-organise its business were explored but these were not successful and on 23rd July 2002 the board issued a Stock Exchange circular to the effect that it intended to run down and close the company's business and in due course return its assets in cash to the shareholders.

6. Sometime in July the concert party agreed to transfer its 26.3% shareholding in Izodia to the Orb Group. This was achieved by the shares of the various members of the concert party being transferred to Stomp Limited and the entire issued share capital of Stomp Limited then being transferred to General Equity Limited, a wholly owned subsidiary of Orb Arl ("Orb").

7. The Orb Group consisted of a number of companies. The Court was not given details of its ultimate shareholding but it seems clear that Dr Gerald Smith, although not apparently a director of any of the group companies, was the dominant figure in the group and was no doubt beneficially entitled to a proportion of the group in one way or another. For example, an internal RBSI memo dated 23rd November 2001 states that Dr Smith and a Sam Nolan indirectly owned LT, which was described as the ultimate parent of Orb. The memo went on to say *"The Orb connection is one of RBSI's most profitable. [Smith] is the main driving force behind the connection and is key to our on-going relationship."* It would seem that LT provided treasury management services in Jersey to the Orb Group, which was based in England. In March 2002 Orb purchased a substantial portfolio of hotels managed by Thistle. This was funded by a loan from Morgan Stanley and servicing this borrowing appears to have exerted considerable pressure on Orb's cash flow.

8. Gerard Gowans was, at the material time, a Senior Relationship Manager in the Offshore Intermediaries Unit (OIU) of RBSI in Jersey. His role primarily involved maintaining and developing client relationships, attracting new clients and business and identifying opportunities to sell banking products to clients. The main RBSI relationship with the Orb Group was managed by the Corporate and Structured Finance Team ("CSF"). CSF would structure the deals, agree loans and generally deal with strategic issues. According to Mr Gowans, he would, in his role as Senior Relationship Manager, provide 'back office' relationship support, such as assisting with account opening or monitoring when funds came in. Sometime in July 2001 it had been decided that, to the extent that the relationship with Orb required involvement from within OIU, Stuart Hamilton, Mr Gowans immediate superior, would take over Mr Gowans' role. However it transpired that Mr Hamilton was extremely busy and in practice Mr Gowans continued to deal regularly with the Orb Group in relation to administrative matters. An example of this was an enquiry apparently made by Dr Smith in April 2002 as to the level of Izodia's cash holding. At that time RBSI had no banking relationship with Izodia and accordingly, all that Mr Gowans was able to do was check Izodia's published results and inform Dr Smith of the cash holdings as disclosed in those results, namely £55 million.

9. Sir Anthony Jolliffe is a former Lord Mayor of the City of London. He was introduced to Mr Vandyk through a mutual acquaintance in April 2002. On 23rd July Mr Vandyk telephoned Sir Anthony to say that he had a chairmanship of a public company which might be of interest to Sir Anthony. They met the next day and Mr Vandyk explained that he and others held 26% of Izodia but had negotiated the sale of this stake to Dr Smith of the Orb Group. He said that Dr Smith intended to reverse a portfolio of hotel properties into Izodia and that Dr Smith required a new chairman to see this transaction completed. Mr Vandyk disclosed that Dr Smith had a previous conviction for fraud for which he had served a prison sentence. However he explained that this had been largely on a technicality and the City had since accepted that Dr Smith was a person

with whom it could do business. Sir Anthony was then taken to meet Dr Smith who elaborated on what Mr Vandyk had told Sir Anthony. He explained that he thought that Sir Anthony would be an appropriate person to be chairman of the company because of his previous experience of hotel companies. The upshot was that Sir Anthony agreed to take the post of chairman of Izodia, although he explained that he would be away for most of August and was leaving for Spain on 26th July.

10. We have been shown minutes of a meeting of the directors of Izodia held by telephone on 31st July at which, amongst other matters, Mr Frost resigned as chairman and Sir Anthony was appointed in his place. The minutes appear to have been signed by Sir Anthony. Sir Anthony does not recall there having been a meeting on 31st July and does not recall signing the minutes. He believes that the business shown as being transacted at the meeting on 31st July in fact took place at the meeting held on 2nd August, to which we shall come in a moment. However, the recollections of Ms Chapman-Pincher, Mr Roberts and Mr Corin Maberly, the company secretary, are to the effect that there was a meeting by telephone on 31st July. In addition Form 288(a) filed at Companies House shows Sir Anthony as having been appointed a director on 31st July. Sir Anthony's evidence in chief was that he believed that he had signed that form in blank leaving the details to be filled in by Mr Maberly. However, it is clear both from the evidence of Mr Maberly and from the document itself that it had been completed by Mr Maberly and then signed by Sir Anthony. We find that Sir Anthony is mistaken in his recollection. We find that there was a telephone board meeting held on 31st July at which Sir Anthony was appointed chairman.

(ii) The opening of the account

11. It is clear that, in anticipation of its acquisition of the 26.3% stake in Izodia, Orb had decided that it would procure that Izodia open an account with RBSI in Jersey where the Orb/LT group held accounts. Thus it was in late July that Mr Gowans was asked by an employee of Orb to confirm RBSI's requirements for opening an account by a quoted Plc. Mr Gowans set out the requirements by e-mail on 30th July.

12. By letter dated 1st August 2002 on Orb writing paper, Trevor Jones, the Orb Group treasurer, asked Mr Gowans to open an account for Izodia. The necessary documents were enclosed with the letter and included a bank mandate in RBSI standard form, certified copies of Izodia's articles of association, financial statements and an application for shares in RBSI's money market fund. The mandate is of critical importance in this case and accordingly we set out in full the relevant parts:-

"Excerpt from Minute of Meeting of the Directors of [Izodia] Plc ….. held at 1 Albermarle Street, London on the 1st day of August 2002.

It was resolved:

1. That a Banking Account or Accounts be opened now and further Accounts opened as may be considered advisable from time to time in the name of the Company with the Royal Bank of Scotland International Limited ("the Bank") and that the following resolutions shall apply to all accounts of the Company with the Bank now or in the future.

2. That the Bank and it is hereby instructed and authorised to honour, comply with and debit to the Company's account or accounts, whether in credit or overdrawn, or overdrawn in consequence of such debit, all cheques, warrants or other orders or instructions, bills accepted and promissory notes or negotiable instruments made, drawn or given on behalf of the Company at any time provided that any such cheques, warrants, orders, bills, promissory notes, negotiable instruments or instructions are signed by

[any two authorised signatories]

3. That as regards the following matters:

(a) instructions to withdraw, deliver, dispose of or deal with any property, documents or securities held on account of the Company and the withdrawal of securities, documents or articles lodged for safe custody on account of the Company;

(b) endorsement of all cheques, orders, bills, promissory notes and negotiable instruments payable to the Company;

(c) any indemnities or counter-indemnities given to the Bank;

(d) instructions for the opening of credits or the issue of guarantees, bonds or indemnities by the Bank;

(e) the discounting of inland or foreign bills;

the Bank or its Nominees be and are hereby authorised to accept on behalf of the Company the following signatures

[Any two authorised signatories]

……

……

……..

7. That these Resolutions be communicated to the Bank and remain in force until amending Resolutions shall be passed by the Board of Directors and a copy thereof, certified by the Chairman and the Secretary shall have been received by the Bank.

8. ……

I certify that the above is a true excerpt from the recorded Minutes of a Meeting of the Directors of the Company, at which Meeting the quorum required by the Company's Articles of Association was present and that the specimen signatures overleaf are correct.

---------- Secretary"

The signatures overleaf are those of three persons described as directors, namely Charles Helvert, Peter Catto and Jar Vahey. Mr Helvert and Mr Vahey were employees of Orb and Mr Catto was closely connected with Orb.

13. The following points are worthy of comment at this stage:-

(i) As at 1st August none of Mr Helvert, Mr Catto or Mr Vahey were directors of Izodia.

(ii) There was no meeting of the board on 1st August, nor had there been any previous meeting which had resolved to open an account at RBSI or to approve the mandate.

(iii) The minute was certified as being a true copy of a meeting of directors by Mr Nicholas Greenstone, on behalf of Walgate Services Limited, the company secretarial arm of Fladgate Fielder, Orb's English solicitors. Walgate was not the company secretary of Izodia on 1st August; Mr Maberly was. How Mr Greenstone, an English solicitor, managed to

certify as true a meeting which had never taken place on behalf of a company of which Walgate was not company secretary, is hard to understand. Unfortunately he was not called as a witness so that these matters might be explored.

14. The papers were considered by the relevant department responsible for opening accounts at RBSI. It is clear that Mr Gowans was being pressed by Orb to open the account that day and he was in turn pressing the account opening department. In an e-mail timed at 14.59 on 1st August, the relevant official in the Bank approved the opening of the accounts subject to receipt of a fax on Orb or Izodia notepaper confirming that the signatories on the mandate were authorised to act on behalf of Izodia. Dr Smith then faxed a letter on Orb paper confirming that Mr Catto, Mr Helvert and Mr Vahey, as directors of Izodia, were all known to him personally and were authorised, by virtue of their appointment as directors of Izodia, to be representatives of the Company in all matters pertaining to the Company's business. Of course, at that time, none of them were in fact directors of Izodia. However on the basis of the documents lodged with them, RBSI opened an account in the name of Izodia and allocated it an account number.

(iii) The events of 2nd August

15. We come now to the events of Friday 2nd August. A board meeting had been arranged for that day at which the board would be reconstituted to reflect Orb's acquisition of the 26% shareholding. Mr Roberts and Mr Vandyk would resign and be replaced by nominees of Orb. In the agenda, the suggestion was that three nominees of Orb would be appointed, namely Mr Catto, Mr Vahey and Mr Helvert. Their CVs were included with the board papers. The day's events are significant to the outcome of this case and we must therefore describe them in some detail.

16. At the relevant time Mr Roberts was on holiday in Cornwall. However it was agreed that, as finance director, he should be present at such a meeting and Dr Smith arranged for a helicopter to collect him from Cornwall, fly him to Slough for the meeting and then return him after the meeting. Mr Roberts accepted in evidence that he had been telephoned by Mr Vandyk on 1st August and had been informed that, at the request of Dr Smith, a bank account had been opened at RBSI in Jersey. The next morning he met with Dr Smith and Mr Vandyk prior to the formal board meeting. He regarded Dr Smith as being there as a representative of LT. Dr Smith informed him that there was a bank account in Jersey with RBSI in the name of Izodia where Izodia's cash would earn a better rate of interest than it was currently receiving. Dr Smith said that he wanted Mr Roberts to propose to the board that Izodia's money be moved to this account in Jersey so that Izodia could receive more interest on its money. He informed Mr Roberts that the rate achieved in this type of account had been as good as 4.78% in the past. He said that Mr Gowans was the man to speak to and he telephoned Mr Gowans and put him on to Mr Roberts.

Mr Roberts asked Mr Gowans to provide him with brief details of the Izodia account, which he did. According to Mr Roberts, Mr Gowans confirmed that Izodia's money would attract interest above base rate and he made a short handwritten note to that effect. Mr Gowans, on the other hand, denies that he could have said that because the Bank never paid above base rate on such accounts. We find that there was probably a misunderstanding between them. Mr Gowans accepted in evidence that he might have referred to an interest rate above base rate in the context of the placing of the money over the weekend. We think that, having been told by Dr Smith (falsely) about the rate of interest which would generally be earned on the account at RBSI, Mr Roberts misunderstood what Mr Gowans was saying and took it as applying at all times.

17. We come now to the board meeting itself, which was held at 11.00 a.m. Sir Anthony and Ms Chapman-Pincher were present by telephone. Mr Vandyk and Mr Roberts were present in person. Mr Catto, Dr Smith and Mr Maberly were also present in person. Mr Peters was the only existing director who was not present in person or by telephone. It is clear that Mr Vandyk had prepared draft minutes prior to the meeting. We have also seen a version of the minutes apparently signed by Sir Anthony as chairman, although he says that it is a forged signature. We have also seen a further version which was apparently prepared by Mr Vandyk in January 2003, some five months later, because he felt that the other versions did not fully reflect what had happened. The differences between the various versions are generally minor, subject to one matter to which we shall refer.

18. Completion of the acquisition of the concert party's shareholding by Orb had taken place shortly before the board meeting and accordingly Mr Vandyk and Mr Roberts resigned as directors with effect from the close of business that day (not the close of the meeting) and Mr Catto and Mr Vahey were appointed to the board. They were both nominated by Orb. Mr Helvert was not made a director despite the fact that this had apparently been the intention on the part of Orb. Thus the directors became Sir Anthony, Mr Peters, Ms Chapman-Pincher and the two Orb nominees, Mr Catto and Mr Vahey. Mr Maberly was replaced as secretary with immediate effect by Walgate Services Limited. In relation to the bank account with RBSI the minutes prepared in January 2003 by Mr Vandyk record the position as follows:-

> *"5.1 CR [Mr Roberts] reported that he had concluded on advice from Lynch Talbot that the company could obtain a better rate of interest depositing its money at the Royal Bank of Scotland International, Channel Islands. CR reported that an account for the company at RBSI, Jersey had been opened and proposed moving the companies (sic) surplus funds to that account. This was agreed.*

5.2 CR reported that the Company was currently getting base rate on its monies whereas at RBSI it would get LIBOR plus. Recently, rates which varied daily, had, he was informed by Lynch Talbot, been as high as 4.78%.

5.3 It was agreed that all the directors would be signatories on the account at RBSI and that Sir Anthony Joliffe would be a required signatory."

19. The only changes in this respect from the other versions were that, in 5.1 and 5.2, reference was made to the fact that Mr Roberts was acting on advice from Lynch Talbot and 5.3 was additional, there having been no mention of signatories in the other versions. Although there was not unanimity of recollection the majority view from the witnesses from whom we heard, namely Mr Roberts, Ms Chapman-Pincher, Sir Anthony and Mr Maberly was that this version of the minutes accurately reflected what had occurred save that none of them could recall any discussion of Sir Anthony being a required signatory. We find therefore that, save for this latter aspect of para 5.3, the remainder of paras 5.1, 5.2 and 5.3 accurately reflects the content of the meeting.

20. We come next to an exchange of e-mails between Mr Roberts and Mr Gowans which took place later the same day. Again, because of the importance placed on these by both parties, we must recite them in a little detail. Following his conversation with Mr Roberts it appears that Mr Gowans sent an e-mail to Mr Roberts at 11.27 giving the account number and explaining what type of account it was, how much could be held upon it etc. He also said that he understood that the intention was to invest the bulk of the funds into the Money Market Fund ("MMF"). This may well have been received during the board meeting as Mr Roberts replied at 11.55 to say the following:-

"Thanks for confirmation of account opening. Please also confirm details of authorised signatories and process of authority. Also we will need to add the rest of the directors to the authorised list, together with the group finance manager. Please confirm how this is to be actioned."

Mr Gowans replied at 12.01 as follows:-

"The current signatories are Charles, Peter and Jah from Gerald's London office. Mandate requires any two to sign.

The account will be added to our electronic banking system eQ in London and Jersey. Following receipt of an appropriately signed authority. The account can

then be viewed and payments made as per the local arrangements there. Trevor will be able to demonstrate this to you, perhaps.

To add new signatories we will simply require a new mandate, a copy of which they should have in London, if not I can send one."

Mr Roberts replied at 13.03 as follows:-

"We will need to add Sir Anthony Joliffe, Pat Chapman-Pincher, Peter Catto and Ross Peters, who are all directors of Izodia Plc and please delete Charles as he has not been appointed a director or officer of Izodia.

Can we action this as early as possible next week please.

As I am away on holiday please talk with Amanda Fox on 01753 870000 concerning the administration of this or e-mail on amanda.fox@izodia.com."

That was the end of the e-mail exchanges. Mr Roberts then left to catch his helicopter back to Cornwall. In fact no amending mandate was submitted to RBSI until after a further board meeting on 22nd August.

21. We turn now to consider what was happening at RBSI during the course of this day. It would seem that, probably early on 2nd August, Mr Gowans had a telephone conversation with Mr Jones about the possibility of adding Izodia to the electronic banking systems (EBS) of Orb and LT. Following this Mr Jones sent the following fax to Mr Gowans at 10.53:-

"Further to our earlier telephone conversation I attach herewith a copy of a letter from the directors of Izodia Plc authorising the addition of their bank account to the electronic banking systems of Orb Estates Plc in Albermarle House and Lynch Talbot Limited in Jersey. The original copy has been sent to you by post."

The accompanying letter ("the EBS letter") was dated 1st August, was written on Izodia writing paper but with Orb's address and stated as follows:-

"Izodia plc – Account Number 50293799

Electronic Banking System

We hereby authorise you to allow the above account to be accessed on the electronic banking systems operated by Orb Estates Plc and Lynch Talbot Limited at the following addresses:-

Orb Estates Plc – Albermarle House, 1 Albermarle Street, London W1S 4HA

Lynch Talbot Limited – La Chasse Chambers, 3rd Floor, La Chasse, St Helier, Jersey JE2 4UE".

It purported to be signed by two directors**.**

22. It is not clear whether Mr Gowans received this fax at the time because, as we have seen from his e-mail to Mr Roberts at 12.01, he was talking at that stage of adding the account to the EBS 'following receipt of a (sic) appropriately signed authority'.

23. At 13.04 Mr Gowans e-mailed to Mr Jones a copy of all the e-mails which had been exchanged between him and Mr Roberts during that morning. At 13.17 Mr Gowans e-mailed Pat Pennington, an employee in the administration section responsible for new accounts, changes to mandates etc, as follows:-

"Subject Izodia Plc 502393799

The above account was opened yesterday for Orb.

I have a fax from them asking us to add the account to both Lynch Talbot Jersey's and Orb in London eQ system.

It may have been done automatically however if you could check and add I would be grateful, they want to see their £30,000,000 today on eQ.

I'll send the fax over to you, however no doubt it will take 3 or 4 days to reach you ……."

24. At Orb's request Mr Gowans was clearly pressing for the instruction to be actioned promptly and it would seem that Izodia's account was added to the EBS profiles of Orb and LT prior to close of business on 2nd August. This had the effect that any person authorised to transfer money electronically from an Orb or LT account could now also do so in respect of the Izodia account.

25. It is clear from the evidence of Mr Roberts and Amanda Fox, the group finance manager of Izodia at the material time, that Dr Smith was pressing hard for the money to be transferred that day from Izodia's Bank of Scotland account at Reading to the new account at RBSI. This was eventually achieved that afternoon by means of written instructions signed by Mr Roberts and Ms Chapman-Pincher in accordance with the Bank of Scotland mandate. The sum transferred was £27.25 million. It arrived too late to be put into the MMF and was accordingly placed on a fixed deposit over the weekend.

(iv) The transfers on 5th August

26. An EBS system allows a customer itself (without the involvement of RBSI staff) to view balances and to effect payments and transfers electronically in respect of accounts with RBSI connected to that customer's EBS profile. When an EBS profile is created, the document specifies the persons who will be able to use the EBS. The lowest level of access is a person designated as a 'User'. A User can view account balances and can input the details of payments or transfers (such as payee name, account details and the sums involved) but cannot authorise such payments or transfers actually to be made. It is only a person designated as an 'Authoriser' who may authorise the actual movement of funds electronically out of the account.

27. On Monday 5th August 2002, the whole balance standing to the credit of Izodia's newly opened account at RBSI, namely £27,259,519.86 (including interest earned over the weekend) was transferred in three *tranches* of £8 million, £10 million and £9,259.518.84 to an account of LT also held with RBSI. The transfers were made using the LT EBS profile and were authorised by Diane Waterton, an Authoriser on the LT EBS profile. She was apparently an employee of LT or one of its associated companies. Her authority was limited to £10 million in respect of any individual transfer but there was no daily or aggregate limit and accordingly she effected the transfer of the whole amount by the three *tranches* mentioned above.

28. The Court has not heard any evidence as to when and where these sums were transferred out of the LT account but it does not appear to be disputed that they were dissipated fairly promptly through the Orb Group. One sum was however returned to the Izodia account, namely the sum of £2,738,132.26 on 11th September 2002. That re-transfer was also made on the authority of Miss Waterton.

(v) Which EBS letter?

29. Returning to the EBS letter dated 1st August instructing RBSI to allow access to the Izodia account via the EBS profiles, the Court has seen two versions of this letter. The first is signed by

Mr Helvert and Mr Vahey whereas the second is signed by Mr Catto and Mr Vahey. The only version found in the records of RBSI is the original letter (i.e. not a fax) signed by Mr Helvert and Mr Vahey. This is clearly the version received by the accounts processing department at RBSI because there is a manuscript note on it which was explained to us by Mr Gowans as being made by a member of that department. No faxed copy of either version has been found in the records of RBSI, notwithstanding that Mr Gowans clearly received a fax of one of the versions because he so stated to Pat Pennington in his e-mail to her at 13.17 on 2nd August. A second copy of the Helvert/Vahey version and a hard copy of the Catto/Vahey version were found at the premises of LT/Orb.

30. The question arises as to which version was acted upon by RBSI on 2nd August when it added Izodia to the EBS profiles of Orb and LT. Not surprisingly, Mr Gowans could not recall which version he had received by fax. He speculated however that it was the Catto/Vahey version. He theorised that it was the Helvert/Vahey version which accompanied Mr Jones' fax at 10.53 but that he (Mr Gowans) had not seen this because of the reference in his e-mail to Mr Roberts of 12.01 to the need for 'receipt of an appropriately signed authority'. He noted that he forwarded the exchange of e-mails with Mr Roberts to Mr Jones at 13.04 and he speculated that, on seeing this e-mail, Mr Jones realised that Mr Helvert's signature was not acceptable on the basis that, contrary to the expectation of Orb the day before, he had not in fact been appointed a director of Izodia. Mr Jones therefore obtained a second version signed by Mr Catto and Mr Vahey and faxed this through to Mr Gowans in time for him to e-mail Pat Pennington at 13.17 saying that he had received a fax.

31. There are a number of difficulties with this theory:-

(i) Mr Gowans explained that faxes addressed to him were not always in fact passed to him; they sometimes went direct to the relevant department for processing. He thought that that might have happened in relation to the 10.53 fax. If this is so, it is not clear why he thought he would personally have received an identical fax sent between 13.04 and 13.17.

(ii) The timetable seems impossibly tight. Within a space of thirteen minutes Mr Jones had to receive and read the 13.04 e-mail from Mr Gowans, get the instruction retyped, find Mr Catto and Mr Vahey and obtain their signatures and fax the new version to Mr Gowans, which then had to be delivered via RBS's internal systems to Mr Gowans in time for him to e-mail Pat Pennington at 13.17 saying that he had received a fax.

(iii) The Court has not been shown any record indicating the despatch of a fax from Mr Jones or the receipt of a fax at RBSI for Mr Gowans during the material thirteen minutes.

(iv) A letter from Mr Jones at 10.53 says that he is putting in the post the original of the letter which he is faxing. The only original version received (presumably by post) by RBSI is the Helvert/Vahey version which would suggest that it was that version which was being faxed by Mr Jones at 10.53.

(v) The Catto/Vahey version is dated 1st August. If it was prepared on 2nd August as suggested by Mr Gowans, one might have expected it to have been re-dated.

(vi) If Mr Gowans version is correct, two faxes have been lost, namely the 10.53 fax and whatever fax was sent between 13.04 and 13.17.

32. Ultimately there is no evidence to support Mr Gowans' theory. As against that, it is the Helvert/Vahey version which has actually been received by RBSI in hard copy and which we find was faxed at 10.53. Given the various matters described in the preceding paragraph, we find on the balance of probabilities that RBSI acted on the Helvert/Vahey version. We think the explanation for Mr Gowans e-mail of 12.01 (referring to the need to receive an appropriate authority) was that the 10.53 fax from Mr Jones had not yet found its way up to him. We accept that this leaves unanswered the question of why Mr Jones (presumably it was he) caused a second version to be signed but the lack of such explanation does not cause us to depart from our finding.

(vi) 6th August – 4th October

33. We turn now to consider events following 5th August. Miss Fox, Izodia's finance manager, wished quite properly to satisfy herself as to the state of the company's cash at RBSI. She sought copies of the bank statements from Mr Jones and from Mr Vahey but they brushed her off. She complained to Mr Maberly and he therefore raised the matter at the board meeting of 22nd August, which was the next meeting following that of 2nd August.

34. Immediately prior to that board meeting, Mr Peters and Ms Chapman-Pincher resigned at the request of Dr Smith. This left Sir Anthony, Mr Catto and Mr Vahey as the only three directors, although Sir Anthony made it clear to Dr Smith that he required another two independent directors to be appointed. Mr Catto was not present at the meeting and accordingly the only two directors who attended the board meeting were Sir Anthony and Mr Vahey, although Dr Smith was in attendance. It is clear that the issue of Miss Fox having access or 'visibility' (as it was put in the minutes) to details of the RBSI account was raised. The initial draft of the minutes prepared by Walgate recorded the board as having decided that she did not need to have access or visibility

to the account. That was also the recollection of Mr Maberly; and Miss Fox confirmed to us that Mr Maberly had told her immediately afterwards that this was what the board had decided. Sir Anthony's recollection is somewhat different. He recalls Dr Smith and Mr Vahey saying that they did not want her to have access but he insisted that she should and it was agreed that she should. The draft minutes were accordingly wrong and he insisted that they be amended. It was the amended version which was signed. We do not think that anything turns on this but we find that Mr Maberly's recollection (supported by what he told Miss Fox at the time and the first draft of the minutes) is to be preferred. We have absolutely no doubt about Sir Anthony's integrity and truthfulness but, given his failure to recall accurately certain other matters, the fact that his involvement with Izodia lasted only a matter of two months, and the fact that these events took place back in 2002, we find that his recollection on certain matters is imperfect.

35. Prior to this, on 15th August, Sir Anthony had written a letter addressed to Mr Stuart Hamilton at RBSI to the effect that Mr Catto and Mr Vahey were known to him personally and were authorised, by virtue of their appointment as directors of Izodia, to be representatives of the company in all matters pertaining to the company's business. Sir Anthony did not recall signing that letter and could not assist us as to why he was asked to sign it or who asked him to do so. So far as he was concerned it said nothing of note; it merely stated the legal position. RBSI has not called any evidence about the letter either. Mr Hamilton has not given evidence and neither Mr Gowans nor Mr MacDonald (the two witnesses of fact for RBSI) had anything to do with the letter. Its purpose and the use (if any) to which it was put therefore remain a mystery.

36. Miss Fox remained unable to obtain satisfactory confirmation about the account at RBSI despite approaching at various times Mr Jones, Dr Smith and Mr Vahey about the issue. Eventually, on 3rd September Mr Jones gave her what purported to be a schedule of interest earned on the 'treasury deposit' during August. It showed an interest rate of exactly 4.5% throughout the month. In the light of what we now know, it is clearly a false document. Miss Fox raised her concerns about her lack of access to the account with Sir Anthony on 10th September and he said that he would deal with the matter. The auditors also needed satisfactory evidence of the state of the account for the purposes of Izodia's interim accounts.

37. The next board meeting was on the 18th September at which Sir Anthony and Mr Catto were the directors present. Although there are minor differences between Sir Anthony and Mr Maberly as to exactly what occurred, we accept Mr Maberly's evidence on this point. Concern was expressed that Izodia did not appear to have control over its own money and Miss Fox could not get the information she required. Dr Smith then came into the meeting and he told the directors that Izodia's money was held in an Izodia account, that Izodia alone was not getting 4.5% interest but that the money which belonged to Izodia was 'pooled' with LT's money and that the pooled money together was getting 4.5%. Despite the reference to pooling, Dr Smith made it clear at the

meeting that Izodia's money was still held in its own account at RBSI because this was the concern. Mr Jones then came into the meeting and handed some documents to Dr Smith which were in turn passed around the meeting. These appeared to be certificates showing various investments in the MMF of RBSI. They purported to show that over £27 million was invested in the MMF in Izodia's name. As a result of the production of the documents the board expressed itself satisfied that the money was under its sole control and that interest was being earned at 4.5%. The documents were subsequently distributed to Miss Fox and to the auditors and were accepted by them as genuine, although Miss Fox had one or two reservations. In fact the documents were false and Dr Smith has pleaded guilty to false accounting in respect of these statements. Izodia's money had long since been transferred to LT.

38. A further board meeting was held on 26th September. Some documents refer to it as having been held on 25th but we note that Fladgate Fielder circulated a draft of the minutes by e-mail dated 27th September referring to *'last night's meeting'* and stating the date of the minutes as 26th. In any event nothing turns on it. The primary purpose of the meeting was to deal with the company's proposed listing on AIM in place of its Stock Exchange listing. However Sir Anthony had by then decided that he wished to have the company's money returned from RBSI in Jersey to the Bank of Scotland in Reading. He was cross examined quite extensively about whether this was because, by then, he had concerns for the safety of the money in Jersey, or whether it was simply in anticipation of the money being returned to shareholders. It is fair to say that his answers on this point displayed some inconsistency; but we do not consider that anything turns on exactly what the reason was for his decision.

39. Sir Anthony and Mr Maberly both stated that, in a discussion outside the formal board meeting with Mr Maberly and Mr Vahey, Sir Anthony stated that the money should be returned and asked Mr Maberly to see to it. It is clear that Sir Anthony also informed Mr Catto by telephone of his plan because the Court has seen an e-mail dated 26th September from Mr Vahey to Dr Smith which says the following:-

> *"I have just taken a call from Peter recounting a conversation that he has just had with Tony Joliffe. Peter said that he had a very panicked call from Tony along the lines that Tony was insisting that Izodia's cash "be returned to where it had come from". I said that I was unaware of any problems with the security of the cash in its current location, and would confirm back to my fellow board members the exact status of the deposit and whether there was any lien etc over it that might jeopardise the company's and the board's position. Peter commented that Tony ought "to get a backbone and remember who controls this company". Rgds Jar"*

We are quite satisfied from the oral and documentary evidence before us that both Mr Vahey and Mr Catto were well aware of Sir Anthony's intention to procure the re-transfer of the money from RBSI to Bank of Scotland in Reading. Their actions from 30th September onwards have to be seen in that light.

40. On 30th September, following Sir Anthony's instructions, Mr Maberly telephoned RBSI and asked what needed to be done to re-transfer Izodia's deposit to Reading. He was shocked to be informed that Izodia's investment in the MMF was only about £2.7 million (the sum that had been transferred back to Izodia's account by Miss Waterton on 10th September). Mr Maberly immediately informed Sir Anthony, who was similarly shocked. Mr Maberly also faxed RBSI the latest MMF confirmation that Dr Smith and Mr Jones had provided at the 18th September board meeting in an attempt to prove to RBSI that the correct value was over £27 million. It was immediately obvious to RBSI that the confirmation was a forgery. On the same day Mr Jones sent a fax (counter-signed by Mr Catto and Mr Vahey) to liquidate the MMF holding and credit it to Izodia's account at RBSI. As a result of these events, at about 2.00 p.m. that day, RBSI froze all the accounts of the Orb/LT Group.

41. This provoked an immediate crisis for the Orb Group because an interest payment to Morgan Stanley was due. Dr Smith and Mr Catto met with Mr Maberly and also spoke to Sir Anthony. Sir Anthony described Dr Smith as being 'extremely angry'. He accused Sir Anthony of causing virtually his whole business to stop. He and Mr Catto implied that RBSI thought that Mr Maberly was trying to steal the funds.

42. Mr Catto telephoned RBSI. Mr MacDonald, Group Legal adviser, who gave evidence, was present for the conversation. Mr Catto stated to RBSI that he did not know why Mr Maberly had sought to withdraw £27 million from the fund and that he (Mr Catto) was comfortable that Izodia's funds were being held by LT on behalf of Izodia. He subsequently faxed a letter from Izodia signed by himself and Mr Vahey which said:-

> *"Further to our telephone conversation just now, I am writing to confirm that there has obviously been a misunderstanding internally regarding the instructions from Corin Maberly and this fax confirms that you should ignore the instructions you received from him earlier today.*
>
> *This fax also confirms the majority of our funds are held by Lynch Talbot Treasury Management on behalf of Izodia Plc, having been transferred as agreed by the directors. In addition the instruction received today by myself and Mr Vahey should be honoured……."*

The upshot of all this was that Dr Smith despatched Mr Catto to Jersey.

43. A meeting was held at RBSI's offices in Jersey the next day attended by Mr Clive Spears, Deputy Director, Mr Stuart Hamilton, Head of OIU and Mr MacDonald on behalf of RBSI, Mr Catto on behalf of Izodia and Mr Sam Nolan on behalf of Orb/LT. The Court has seen a very detailed file note prepared by Mr Hamilton. Many matters were discussed which we do not need to recount but we would summarise the key matters as follows:-

(i) Mr Catto explained that Mr Maberly had been removed as company secretary in early August and replaced by Fladgate Fielder but did not inform RBSI that he had since been re-instated.

(ii) Mr Catto said that he did not know why Mr Maberly had attempted to transfer the funds.

(iii) He confirmed that he was happy that the £24.3 million was safe with LT and was held by LT Treasury Management on behalf of Izodia to obtain improved interest rates.

(iv) He was asked by RBSI about the Stock Exchange announcement of 27th September which stated that Izodia had cash in excess of £30 million which would be held on deposit or invested in gilts etc but that no investment would be made or related party transactions undertaken without shareholder approval. The Bank asked how this could have been said when about £25 million had been transferred to LT in early August. Mr Catto began by explaining that there was no inconsistency as the directors had agreed that LT would manage the cash on behalf of the company. He confirmed that this was reflected in the company's board minutes. He then changed his account slightly and said that money had been transferred by a way of loan to LT whereupon the Bank stated that this was not the same as holding cash and would appear to be inconsistent with the Stock Exchange announcement.

(v) Mr Catto said that he had spoken to Mr Maberly yesterday in order to seek an explanation of the previous day's events but had learned very little from him. He alleged that Mr Maberly had been in jeans and t-shirt and was in the process of being dismissed.

The outcome was that it was agreed that Mr Catto would provide extracts of the board meeting confirming the loan of about £25 million to LT and a copy of any loan documentation. Information was also sought as to whether Orb was in a position to repay the money to Izodia and other matters were also raised.

44. Whilst this was going on Sir Anthony met Dr Smith and Mr Vahey in London. Dr Smith confirmed that all his companies were cash positive. Later, following Mr Catto's return, Dr Smith said that Mr Maberly should be sent to Singapore for Orb whilst an investigation was carried on. Mr Catto confirmed to Sir Anthony that the money was safe.

45. On 2nd October Mr Spears wrote confirming the requirements of the Bank following the meeting the previous day and on 3rd October Mr Catto replied saying that he had been asked by Sir Anthony to carry out a full investigation into the events of 30th September, although (he said) this task had not been made any easier as Mr Maberly had ceased to be employed by Izodia on 30th September. He did not point out that this was of course at the instance of Dr Smith and himself. The letter also contained a paragraph to the effect:-

> *"You have informed me that the funds are not separately identified as being in Izodia's name but in the name of Lynch Talbot. I would be grateful if you could advise me how a transfer was made from Izodia to Lynch Talbot."*

This was of course wholly inconsistent with his assertion at the meeting on 1st October that the money had been loaned to Lynch Talbot and that the directors were fully aware of this and equally inconsistent with the letter of 30th September from him and Mr Vahey.

46. On 2nd October RBSI unfroze the Orb Group's accounts and the interest due to Morgan Stanley was paid without recourse to Izodia's account, which remained frozen. On the evening of 3rd October, at a meeting at Claridge's, Sir Anthony asked Dr Smith whether he had stolen Izodia's money to which Dr Smith replied that he had not but that he had a problem and needed fourteen days to sort it out. Later that evening he admitted to Sir Anthony in Mr Catto's presence that there was a problem but that he would transfer £17 million of the money back the next day, Friday 4th October and would get the balance of the funds back within fourteen days. Sir Anthony took this as an admission that Izodia's money was in fact missing and that Dr Smith was responsible for it. Sir Anthony turned to Mr Catto and asked him whether Izodia's money was safe and Mr Catto replied that he was comfortable that it was. The next day, shortly before a board meeting of Izodia was held, Dr Smith asked Sir Anthony to lie to Old Mutual, the company's financial advisers, and assure them that the cash was safe. He offered Sir Anthony a bribe for this (*'name your price'*) but Sir Anthony refused. At the board meeting immediately afterwards Dr Smith informed Sir Anthony that Orb now owned 51% of Izodia's shares and required Sir Anthony to resign. Sir Anthony did so. Thereafter, the board consisted only of Mr Catto and Mr Vahey.

(vii) Correspondence up to 8th November

47. We turn now to summarise correspondence which took place between the Bank and Izodia (or their respective lawyers) up to the 8th November 2002. As we have already stated, following the meeting of 1st October and Mr Spear's follow-up letter of 2nd October, the Bank was looking for specific information and documents from Mr Catto to set its mind at rest. He had agreed to provide these.

48. No satisfactory response had been received by 14th October when Izodia, by a letter signed by Mr Catto and Mr Vahey, instructed the Bank to pay the remainder of the company's funds (approximately £2.7 million) to its account with Bank of Scotland in Reading. On 15th October Messrs D J Freeman, English Solicitors, wrote on the Bank's behalf. They outlined the history in some detail and set out very clearly the Bank's concerns. They made it clear that the Bank would not act upon the payment instruction concerning the £2.7 million until it had a received a full and frank explanation of the circumstances generally including in particular the events of 30th September and the reference in the Stock Exchange circular to the extent of the company's cash funds.

49. Messrs Fladgate Fielder replied on Izodia's behalf on 17th October. They confirmed that the Izodia board (which they correctly stated was then comprised of just Mr Catto and Mr Vahey) had signed the instruction for the £2.7 million and that the instruction was in accordance with the mandate. RBSI were disappointed that Izodia had chosen to instruct Fladgate Fielder, as they knew that that firm acted as lawyers to the Orb Group and they did not regard them as sufficiently independent of LT or Orb. D J Freeman therefore wrote on 18th October inviting Fladgate Fielder to recommend to the Izodia board that separate independent solicitors should be retained by Izodia.

50. Further correspondence took place, with Izodia continuing to press for the payment of the £2.7 million to be made and the Bank continuing to ask for replies to the questions which it had posed. We do not think it necessary to refer to this correspondence other than to mention a letter from Mr Catto to Mr Hamilton on 1st November during which Mr Catto defended the Stock Exchange announcement of 27th September on the basis that RBSI was not Izodia's primary or only banker. He asserted that the board of Izodia was satisfied that the commercial arrangements with LT were in the best interests of the shareholders and that neither any board minute nor those commercial arrangements were of concern to the Bank. He went on to describe Mr Maberly's attempt to withdraw funds on 30th September as "*an employee driven prank*". Given that he knew that Mr Maberly had acted on Sir Anthony's instructions, we are in no doubt that he knew this to be a false statement.

51. On 6th November D J Freeman wrote to Fladgate Fielder indicating that they had been contacted by Advocate Santos-Costa of Crill Canavan and understood that he had been instructed by Izodia. It is clear that the Bank regarded this as a very positive step because they considered Crill Canavan to be the independent lawyers that they had been pressing for. The purpose of the letter of 6th November was to set the matter out in detail in order to ensure that Advocate Santos-Costa had a full understanding of the position. D J Freeman specifically requested that the letter be passed to Advocate Santos-Costa and we would commend the letter as a very clear exposition of what was troubling the Bank.

52. On 8th November Advocate Santos-Costa wrote a long letter to D J Freeman. The Bank places considerable reliance on this letter and we will revert to this in due course. When analysed closely, the letter did not in fact say a great deal that had not been said earlier although there were some additional matters. Nevertheless the fact that it was written by an independent advocate carried great weight with the Bank. The letter was written in response to D J Freeman's letter of 6th November and Advocate Santos-Costa was clearly aware of the all the issues. The letter included the following points:-

(i) He said that he received his instructions from the board of the company through its properly appointed directors.

(ii) He confirmed that his was an independent law firm.

(iii) He described Mr Maberly's actions on 30th September as *"……. The activities of those who may have attempted to cause the company mischief or alternatively may have attempted to defraud RBSI."*

(iv) As justification for the Stock Exchange announcement of 27th September, he repeated the point that RBSI was not the company's only banker and stated that *"£24.5 million was managed by Messrs Lynch Talbot on behalf of the company".* He went on to say that the fact that Lynch Talbot had confirmed that the money was held on behalf of the company must be sufficient for the Bank's purposes. He annexed a confirmation to that effect dated 4th October and a further confirmation from Lynch Talbot dated the 8th November addressed to the directors of Izodia and to Advocate Santos-Costa and stating amongst other things *"I write to confirm that on 26th September this company held £24.5 million of funds sent to us by Izodia Plc. These funds continue to attract interest at 4.5% per annum guaranteed minimum plus a profit share pro-rated against the performance of the underlying bond and equity portfolio against which the funds were placed."*

(v) He added that Izodia was prepared to provide an undertaking or indemnity that it would not issue any proceedings against RBSI in relation to its conduct whilst acting as bankers for Izodia in Jersey if RBSI complied with the £2.7 million payment instruction.

(vi) He concluded that RBSI could not be on notice of any impropriety having taken place in relation to the £2.7 million or at all and stated that if RBSI did not provide him with a satisfactory response he was instructed to refer the matter to the Royal Court.

53. The Bank concluded that, given the involvement of an independent lawyer, it had probably taken matters as far as it could and accordingly should now accept what it was being told. It therefore agreed to make the £2.7 million payment.

(viii) Internal concerns at RBSI

54. It is clear that some members of staff of RBSI were concerned about what had happened at a fairly early stage. Thus we have seen an e-mail dated 7th August 2002 from Andy Broughton, a member of the CSF department to Gary Kirkman, who was head of that department. It is to be recalled that CSF was the department which had the lead role in the relationship with Orb and was responsible for lending decisions etc. Mr Broughton recounted recent difficulties which Orb had had in funding a payment to Taylor Woodrow and went on to say that he had just discovered that the bank had opened an account with Izodia at the request of Dr Smith and that that company was a shell company with cash balances of some £30 million. He expressed concern about this and about the fact that CSF had not been consulted before this occurred. He raised other criticisms of the procedures and went on to point out in particular that, despite the file stating that the company was a plc and not a subsidiary of Orb, the bank had accepted a letter on Orb headed paper signed by Dr Smith (whom, he pointed out, was not even a director of Orb) confirming the *bona fides* of the three directors and their appointments. He also pointed out that, elsewhere, the file had stated that the company was *"controlled by Lynch Talbot"*.

55. This e-mail provoked a flurry of e-mails which indicated a difference of view between the CSF and OIU departments. Eventually the matter came to the attention of Mr Jim Paton, the chief executive of RBSI who, in an e-mail dated 12th August to Clive Spears and Gary Kirkman (which essentially told them to sort things out and manage the relationship between their two departments) went on to say –

"**As we do know that this organisation is tight for cash and have a penchant for cutting corners we need to be very careful in how cash balances**

are managed and that every withdrawal is properly authorised and that there is no opportunity for cash to be moved around inter-group companies*".*

On 13th August, Andy Broughton repeated his concerns in an e-mail which included the following –

"All that said, if we all could all just park the politics for a minute, there is a serious issue of risk management here which is being missed (by some people). It is that we as a bank seem content (according to CLS) to open accounts with substantial cash balances for companies which appear to be controlled by (but not presumably wholly owned by) management of a Group which, by any reasonable interpretation of the evidence available, is desperate for cash.

I would like to know who the authorised signatories on Izodia are (two of three directors are Orb 'folk' so presumably it is them). If it is the case that Orb have effective control of large cash balances to which they are not beneficially entitled, then in the context of (a) the Group's increasingly desperate cash management position; (b) the directors' proven lack of integrity in recent dealings with the Bank and (c) Gerald's personal history ….. is this not a bit like putting sweets in front of a child?

In my discussions with Roy H, he expressed a concern that if cash flow is so difficult, there may be a risk that GS could "revert to type" (his words) ….."

(ix) RBSI's procedures for adding to an EBS

56. Finally, in relation to the evidence, we should deal briefly with the Bank's procedures for adding a company to the EBS profile of another company. No expert evidence was adduced by either side as to general banking practice in this respect, whether in 2002 or now. However, we heard evidence from Mrs Julie Noel, who has been the EBS manager for RBSI since 2003 and has been employed in the EBS department of the Bank since July 2002. She gave evidence that, in 2002, it was the policy of RBSI to add a company to the EBS profile of another company merely on the authority of a letter signed in accordance with the mandate of the first company, even if the signatories of the first company were not the same as the signatories for the second company. This is consistent with what happened in this case, namely that, on the authority of a letter signed by Mr Helvert and Mr Vahey as signatories on Izodia's mandate, the Bank added Izodia to the EBS profiles of Orb and LT, where the signatories and those authorised to use the EBS profiles were very different from the authorised signatories on the Izodia account.

57. She said that this practice changed towards the end of 2002 and that the Bank now required a third party mandate in order to add a company to the EBS profile of another company. We have been shown an example of such a document. It is expressed, like a conventional mandate, to be a certified extract of a meeting of the board of directors at which specific resolutions were passed. The document specifically authorises another company (described as the 'Intermediary') to operate and/or view (a choice has to be made as to the functions which the Intermediary can carry out) the company's EBS account and also provides for the operatives of the Intermediary from time to time to be able to operate or view (as the case may be) the company's account via the EBS.

58. We can see signs of concern at the time on the part of the Bank as to the effect of a company being added to the EBS profile of another company with different signatories, simply on the strength of a letter. Thus, in what appears to be some form of action plan dated simply August 2002 under the name of Mr Stuart Hamilton, one finds the following comment –

> *"See attached spreadsheet – We may have a problem with the eQ links where it appears that a no. of accounts with different signing arrangements are linked to common eQ profiles, with a suspicion that 3rd party mandates have not been taken. We propose to realign mandates to result in common sigs across all the accounts, linked to common eQ profiles, or third party mandates are taken for each co."*

59. This is consistent with a letter dated 19th August 2002 written by Mr Rogan on behalf of RBSI to LT as follows –

> *"I am writing in connection to the accounts that we maintain for the "Orb Group" on which I have recently undertaken a review of the mandates. I note that there are a number of different signing arrangements across the accounts. However they are connected to common eQ profiles.*
>
> *In order for us to continue to operate a small number of eQ profiles it will be necessary for us to standardise the signing arrangements across the accounts as far as possible. Whilst I appreciate that some of the accounts will need their own profiles due to the signing arrangements being different, it may be possible for them still to be viewed in your office should the necessary third party mandate be signed."*

The letter then goes on to suggest a meeting to discuss the matter.

(x) Conclusion

60. On 24th April 2006, in the Crown Court in England, Dr Smith pleaded guilty to a number of offences relating to Izodia. The material ones for our purposes are that he pleaded guilty to stealing three choses in action, namely credit balances of £8 million, £10 million and £9,259,518 belonging to Izodia Plc, being the three sums transferred to LT on 5th August, and to a charge of false accounting in respect of the production of the false MMF certificates to the board of Izodia on 18th September 2002.

61. That concludes our review of the evidence. We would however wish to make a specific finding in relation to Mr Maberly's conduct. Mr Maberly is a solicitor whose conduct on 30th September was the subject of a serious aspersions cast by Mr Catto and/or Mr Vahey. Inevitably, as part of the necessary narrative of this case, we have had to repeat such aspersions. However we think it only fair to set the record straight by stating that we have absolutely no doubt that, in his actions on 30th September, Mr Maberly was acting in good faith as a loyal company secretary in following Sir Anthony's instruction that he organise the return of the money from Jersey to Reading. Indeed that was a reasonable and prudent decision on Sir Anthony's part. Mr Maberly acted with complete proprietary throughout these events. We found him to be an impressive and truthful witness. The allegations made against him at various times by Mr Catto and/or Mr Vahey were completely false and were made entirely to try and protect their own position or that of Orb and Dr Smith.

Discussion

62. We now turn to consider the various issues which arise for determination. These would appear to be as follows –

(i) Was the mandate Izodia's document?

(ii) Were the payments on 5th August made in accordance with the mandate?

(iii) If not, were the payments made with the actual authority of Izodia?

(iv) Did Izodia ratify the payments?

(v) Did Izodia elect to treat LT as its debtor rather than RBSI?

(vi) Is Izodia estopped from claiming the transferred sums from RBSI?

(vii) Was RBSI negligent?

(i) Was the mandate Izodia's document?

63. Izodia's first submission is that the transfers on 5th August from Izodia's account to the LT account were not made in accordance with a valid mandate because the mandate was not Izodia's document.

64. We have already found that there was no meeting of the board of directors on 1st August, that those who were described as directors in the mandate were not in fact directors at that time, that the person certifying the mandate as company secretary (Walgate by Mr Greenstone) was not in fact the secretary and that Izodia had not in fact authorised the opening of the account at that date. Indeed, although the bank had, in the mistaken belief that the documents were genuine, opened an account for Izodia and given it an account number, no director or officer of Izodia had any knowledge of what had occurred. The document could not therefore be binding on Izodia. Had the matter rested there, Izodia would not have been bound by anything done pursuant to the mandate. Izodia had not agreed to open an account with RBSI nor had it conferred ostensible authority upon any of those who purported to act in its name.

65. However matters did not rest there. On 2nd August, as Izodia admits in its pleadings, the board ratified the opening of the account. Izodia submits that the board did not however ratify the mandate itself. We disagree. It is clear that the board was informed that an account had been opened with RBSI. In full knowledge of this they agreed to transfer a major part of the company's cash to the account in order to get a better rate of interest. It is clear that the board took no interest in the detail of the matter and delegated this to its finance director Mr Roberts. Nevertheless the board must be taken to have realised that some form of mandate was in existence. Furthermore, in the various exchanges of e-mail which took place that day between Mr Roberts and Mr Gowans, it is clear that Mr Roberts fully understood and accepted that there was an existing mandate. Thus in his first e-mail at 11.55 he asked Mr Gowans to confirm details of authorised signatories and stated that the rest of the directors would need to be added to the authorised list. He clearly understood therefore that there was an existing mandate. Mr Gowans gave him exact details of the mandate of 1st August and Mr Roberts then stated that Sir Anthony, Ms Chapman-Pincher, Mr Peters and, mistakenly, Mr Catto (who was already a signatory) would need to be added but that Mr Helvert would need to be deleted. It is clear that he accepted that Mr Catto and Mr Vahey should remain as signatories. In full knowledge, through Mr Roberts, of the exact position as to signatories, the sum of £27.25 million was then transferred to the account

pursuant to the board's authority. In our judgment, the decisions taken by the board coupled with the decisions taken by Mr Roberts as finance director amounted to ratification of the mandate of 1st August notwithstanding its initial invalidity. We find therefore that, by close of business on 2nd August, the mandate was binding as between Izodia and the Bank.

(ii) Were the payments on 5th August to the LT account made in accordance with the mandate?

66. A mandate forms the basis of the agreement between a bank and its corporate customer. The bank is authorised by the mandate to accept instructions from the authorised signatories described in the mandate. In the absence of negligence on its part (to which we shall refer later) the bank is protected when making a payment on the instructions of the authorised signatories even if those signatories are acting for fraudulent or otherwise improper purposes. Thus the first issue in this case is whether these three transfers made on 5th August, whereby the entire contents of the Izodia account were transferred to the LT account, were made in accordance with the mandate. If they were, then, subject to any question of negligence or notice, that is the end of the matter and the Bank is not liable, regardless of any illicit purpose on the part of those instructing the Bank to make the payments.

67. One starts from the undisputed factual position that the three payments were made on the authority of Diane Waterton. Her name does not appear on the mandate. On the face of it therefore these payments were not made pursuant to the mandate. However, RBSI argues that one must have regard to the EBS letter. Even on the basis of the Court's finding that RBSI relied upon the Helvert/Vahey version of the EBS letter, this was a letter, says RBSI, written by two authorised signatories and RBSI was therefore entitled to rely upon it. The letter instructed the Bank to add the Izodia account to the Orb and LT EBS profiles so that any person who was an 'Authoriser' on the Orb or LT profile could thereafter also properly authorise payments out of the Izodia account. The payments were therefore in accordance with the mandate because the Bank was entitled to act on the EBS letter and the payments were made in accordance with the EBS profiles added pursuant to that letter.

68. In our judgment the Bank's argument fails for a number of reasons. One begins with the well established proposition that, in the absence of express or implied authority to do so, an agent cannot delegate his authority in whole or in part (see Bowstead & Reynolds on Agency (19th Edition) para 5-001). The authorised signatories on a mandate are the agents of the company for the purposes of giving payment instructions to the bank. In the absence of any express or implied authority to do so, they may not in turn delegate that function. It is only the company which may appoint additional or alternative authorised signatories and this must done by a further board

resolution with an appropriate new mandate. This principle is reflected in paragraph 7 of the mandate itself which says:-

> *"That these resolutions …… remain in force until amending resolutions shall be passed by the Board of Directors and a copy thereof, certified by the Chairman and the Secretary shall have been received by the Bank."*

69. The Bank argues that the authority for the authorised signatories validly to sign the EBS letter is to be found in the mandate itself. The Bank refers to the word 'instructions' in paragraphs 2 and 3 of the mandate (set out at para 12 above) and argues that this is a word with a wide meaning which is not cut down by the context in which it appears in the mandate. The EBS letter was an 'instruction' and accordingly the Bank was entitled to rely upon it as falling within the mandate.

70. We do not accept the Bank's submission. In our judgment the mandate is not wide enough to cover the EBS letter. Our reasoning is essentially that put forward by Izodia which we would summarise as follows:-

(i) Paragraph 2 of the mandate authorises RBSI to *"…… honour, comply with and debit to the company's account ……. all cheques, warrants or other orders or instructions, bills accepted and promissory notes, or negotiable instruments made, drawn or given on behalf of the company"*. In our judgment the residual class *'or other orders or instructions'* has to be read *ejusdem generis* with what goes before, namely cheques and warrants. Furthermore the authority is to honour, comply with and debit to the company's account. An instruction can only be debited to an account if it is a payment instruction. In our judgment, taking these words together with the use of words such as cheques and warrants, the only proper construction is that this paragraph is dealing solely with payment instructions.

(ii) Sub-paragraphs 3(a) and (d) of the mandate give RBSI authority to act on certain other types of 'instructions' on the authority of signatories identified for the purpose of paragraph 3 We agree with Mr Blakeley that the inclusion of paragraph 3 in the mandate shows that 'instructions' in paragraph 2 cannot have been intended to refer to an unlimited class of instructions. If this were so, the effect would be that sub-paragraphs 3(a) and (d) would be redundant if the paragraph 2 signatories were the same as the paragraph 3 signatories and they would conflict with paragraph 2 if the paragraph 2 signatories were different from the paragraph 3 signatories.

(iii) The effect of the EBS letter is to confer authority to make payments upon any 'Authoriser' who happens from time to time to be authorised to make payments on the Orb or LT EBS system. Its effect is exactly as if the authorised signatories on the Izodia mandate had written a letter instructing the Bank that Miss Waterton (or any other Authoriser on the Orb and LT systems from time to time) should be added as an authorised signatory on the Izodia account with power to sign cheques etc. In our judgment, very clear wording would be required before a mandate should be construed as conferring upon the authorised signatories unlimited power to designate whomsoever they may wish as additional signatories on the account. Interestingly Mr Gowans agreed in evidence that one would need a new mandate in order to add signatories.

(iv) Furthermore, as noted earlier, it is significant that paragraph 7 of the mandate envisages a new mandate passed by the board of directors if there is to be any alteration to the existing mandate. A mandate is a resolution by the board of directors authorising a bank to comply with the instructions of the nominated signatories and no one else. The board can of course change the nominated signatories at any time by passing a new resolution but it is quite inconsistent with that position for the board also to be taken to have authorised the bank to act in accordance with the instruction of such other persons as the authorised signatories may choose from time to time to designate.

(v) The Bank submitted that the EBS letter should be regarded simply as a letter authorising payments to be made in a different manner i.e. electronically rather than by handwritten cheque etc. Use of an EBS was simply a different method of making a payment. Thus in future the authorised signatories could make a payment either by writing a cheque or by instructing the 'Authoriser' under the EBS system to make the payment electronically. But this is to ignore the fact that, so far as the Bank was concerned, it was entitled to act entirely on the instructions of the Authoriser of the Orb/LT EBS systems and was under no obligation to go behind any such instructions. The effect was, in our judgment, exactly the same as if the authorised signatories had purported to add Miss Waterton (or any other Authoriser from time to time of the ORB/LT EBS system) as a person authorised to write cheques. If the Bank had made the three payments in question by cheque or written transfer instruction signed either by Miss Waterton alone or by Miss Waterton and one of the authorised signatories, we have no doubt that this would not have been a payment made in accordance with the mandate. The fact that the payments were actually made via the EBS system does not alter this.

71. In coming to this conclusion we have not ignored the evidence that it was the Bank's policy at the time to allow the authorised signatories of one company to add it to the EBS profile of another company notwithstanding that the signatories for the two companies were different. We have not

heard any expert evidence as to general banking practice in this respect. However we note that, as described in paras 58 and 59, the effect of the Bank's policy was causing some concern in August 2002 and the policy was changed later in 2002 so that a properly completed third party mandate is now required. That is as it should be. It is perfectly permissible for company A, acting through its board, to complete a mandate which designates as its authorised signatories such persons as may from time to time be designated as authorised signatories by company B, thus delegating to company B the final choice of signatories. Similarly it would be perfectly permissible for the board of company A either itself, or by specific authority to its signatories, to allow the company's account to be added to the EBS profile of some other company so that the Authorisers from time to time of that other company would be entitled to debit the first company's account. But this must be clearly and unambiguously done. We find that, in this case, the board of Izodia never intended or agreed to confer upon its signatories a power to do all these things and the mandate does not confer such authority. The Bank's practice of acting upon a letter signed by the relevant signatories was therefore erroneous.

72. Given our finding that the mandate does not cover the EBS letter, we do not strictly need to consider the subsidiary point raised by Izodia concerning the interpretation of the EBS letter itself. Nevertheless, having heard argument we think we should give our decision on the point. The EBS letter merely instructs the Bank to allow the Izodia account to 'be accessed' on the EBS systems of Orb and LT. This was interpreted by the Bank as meaning that the Izodia account should be added to the EBS systems for all purposes i.e. not only to view the account but also to make payments from it. In our judgment the Bank was not correct to construe the EBS letter in that manner:-

(i) As Mr Gowans accepted in evidence, there is clearly a very important distinction between an ability to view the account of another company and the ability to make payments from that account. It is quite common for one company to have an authority to view on EBS the account of another without having the right to make payments therefrom.

(ii) As Mr Gowans also conceded in evidence, it is clearly important that, if giving access for the purpose of making payments as well as viewing, the Bank is satisfied that this is what was intended. This concern is reflected in the third party mandate now used by the Bank which distinguishes between 'operate' and 'view' and requires the company to make a deliberate choice (by deletion) as to whether both or only one of these functions is to be permitted.

(iii) The Bank's standard terms and conditions for EBS profiles draw a distinction between access and the ability to make payments. Thus, according to those terms, an 'Operator' is an individual authorised by the customer to have <u>access</u> to the EBS, while a 'Payment

Authoriser' is an individual authorised by the customer to use the EBS to process a payment. We accept that the EBS letter was not written by the Bank but nevertheless the fact that the Bank itself saw the need in its standard terms to distinguish between access and the ability to make payments, suggests strongly that, if a letter is received from a customer referring merely to 'access', it would be unwise, without more, to treat this as including payments.

(iv) We accept that Mr Gowans would no doubt have understood the EBS letter in the context of his telephone conversation with Mr Jones, who no doubt wished the Izodia account to be added for all purposes. That would explain Mr Gowans' e-mail to Pat Pennington. However Mr Gowans made it clear that it was not his decision as to whether the instructions could be acted upon and what they meant; this was a matter for the administration section of RBSI. In any event, it is the written instructions that are important, not what Mr Jones may have said about them.

(v) Given the serious implications of treating the EBS letter as an instruction to make payments rather than simply an instruction for access for viewing purposes and given the context in which the letter falls to be interpreted, we find that the Bank was not entitled to treat the EBS letter as an instruction to add the Izodia account to the EBS profiles of Orb and LT for all purposes. The letter is to be construed as an authority to have access for viewing purposes only.

73. We find therefore that the three payments made from the Izodia account to the LT account on 5th August were not made in accordance with the mandate on two grounds. Firstly, the EBS letter did not fall within the terms of the mandate. Secondly, even if it did, the EBS letter, correctly interpreted, did not instruct RBSI to add Izodia to the EBS profiles for payment purposes, only for viewing purposes.

(iii) Was there actual authority for the payments on 5th August?

74. If the transfers to LT on 5th August were actually authorised by Izodia, that would provide a defence to RBSI even though the transfers were not made in accordance with the mandate (see Limpgrange Limited v BCCI [1986] FLR 36 and London Intercontinental Trust Limited v Barclays Bank Limited [1980] 1 Lloyds LR 241). On this, both parties were agreed; but there agreement ended. The following sub-issues would appear to arise:-

(i) Does the mandate itself confer actual authority?

(ii) On whom is the burden of proof to show actual authority?

(iii) Was there actual authority in this case?

(a) Does the mandate confer actual authority?

75. Mr O'Connell submitted that, by putting signatories on a mandate, a company confers actual authority on those persons to make any payment provided that they are acting in good faith in the best interests of the company. (To save much repetition, we will not usually refer to this proviso but it is to be taken as being implied when we talk about actual authority by reason of being on the mandate. Mr O'Connell fully accepted that, if a signatory is acting for an improper purpose, he does not have actual authority from the company). He submits therefore that, if the payments in this case were made on the instructions of Mr Helvert and Mr Vahey or Mr Catto and Mr Vahey, they were authorised signatories on the mandate who had actual authority to make such transfers, subject to the above proviso. Initially, Mr O'Connell's submission was that unqualified, unrestricted placing of a signatory on a mandate without further ado provided actual authority but he accepted later in his submissions that, even if there were no restrictions or qualifications to be found in the mandate itself, if the board of directors had in fact restricted the authority of the signatories (e.g. by providing that decisions on certain payments could only be taken by the finance director) then the signatories (other than the finance director) would not have actual authority to make a payment of that nature unless it had been approved by the finance director.

76. In our judgment that concession indicates the true position, which is that a court must conduct an investigation into the facts in every case in order to see whether the company has in fact conferred actual authority on the signatories to make the payments in question. A mandate is in our judgment not a grant of actual authority to the signatories on the mandate to make payments; it says nothing about the position as between the company as principal and the signatories as agents. A mandate is a document between the bank and the account holder and is an instruction and authority by the account holder to the bank to act on the instructions of the signatories. A mandate is a form of ostensible authority. The account holder expressly holds out the signatories as being authorised to make payments on the account holder's behalf. Just as, in the context of ostensible authority in ordinary non-banking transactions, the conferring of ostensible authority by the principal says nothing about the ostensible agent's actual authority to act on behalf of the principal, so the inclusion of a signatory on a mandate says nothing about the signatory's actual authority from the account holder to make particular payments. The mandate protects the bank where a nominated signatory acts without the actual authority of the account holder because the bank can rely on the signatory's ostensible authority without concerning itself about his actual authority (in the absence of notice of impropriety etc).

77. Let us test this by way of a hypothetical example which was raised during the hearing. Take a company which has substantial cash assets which require management. The company appoints a finance or investment director and confers (either expressly by resolution or, more probably, by necessary implication from the appointment of such a specialist director) responsibility on that director to determine where the company should place its assets i.e. with which bank, at what rate, for what period etc. Let us assume that the board includes two non-executive directors. Let us further assume that the mandate authorises any two directors to make payments. Suppose that the two non-executive directors, acting in good faith in what they believe to be the best interests of the company (which, let us assume, can be objectively satisfied in that their decision is a sound one) decide that the company's £50 million of cash would earn a better rate of return if it were moved from Bank A and placed on different terms with Bank B. Mr O'Connell submits that the mere inclusion of the two non-executive directors on the mandate confers actual authority upon them to make such a transfer. In our judgment such an assertion fails to distinguish the mechanical act of processing the payment (e.g. by signing a cheque) from the decision to make the payment for a particular purpose. In our judgment, it is clear in the example given above that actual authority to move the money from Bank A to Bank B to get a better rate of return rests with the finance/investment director. The board has delegated that function to him. It has not conferred that function upon the non-executive directors. They therefore do not have actual authority from the company to make the transfer regardless of the *bona fides* and reasonableness of their decision. They do of course have ostensible authority *vis a vis* the bank to make such a transfer by reason of their being on the mandate and accordingly the bank is fully protected if it relies on their instructions.

78. Accordingly we do not accept the Bank's submission on this point. In our judgment the Court has to investigate the facts in order to ascertain whether there has been actual authority for the payments in this case. Of course, in most cases the issue will not arise because the payments will have been made in accordance with the mandate. It is only where payments are made outside the terms of the mandate that a bank is likely to have to raise the defence of actual authority.

(b) On whom is the burden of proof to show actual authority?

79. Each party asserts that the burden of proof in relation to the existence of actual authority lies upon the other. Each claims assistance from certain comments of Staughton J in Limpgrange but we do not find that clear guidance on this specific issue can be found in that case. But what Limpgrange (followed in this respect in National Bank of Commerce v National Westminster Bank [1990] 2 Lloyds Rep 514) does show is that, in the case of disputed payments out of a bank account, the customer can simply sue in debt and does not have to aver that the disputed

payments were made in breach of contract or in breach of any duty of care and thereby caused loss or damage.

80. Phipson on Evidence (para 6-06) describes the general principle as being that, so far as the persuasive burden (also known as the legal burden) is concerned, the burden of proof lies upon the party who substantially asserts the affirmative of the issue. It also goes on to point out that, in deciding which party asserts the affirmative, regard must be had to the substance of the issue and not merely to its grammatical form. Thus an allegation of a failure to take reasonable care is in fact a positive allegation of negligence. It seems to us that, in the case where a customer sues a bank in debt, the starting point is that the customer alleges a debt. Suppose that he originally put in £100 he must bear the burden of showing that a debt was originally created in that sum. However, once the customer has done that, if the bank then asserts that, although there was a debt of £100, it no longer owes that sum because it has paid away £50, it is the bank that is asserting the affirmative. It seems to us that it matters not whether the assertion is that it paid £50 away in accordance with the mandate; that it paid that sum upon actual authority outside the mandate; that an originally unauthorised payment was subsequently ratified by the customer; that the customer elected to treat an unauthorised payment as valid; or that the customer is estopped from claiming more than £50. Mr O'Connell accepts, as he must, that the burden is undoubtedly on the Bank in relation to ratification, election and estoppel but he asserts that the burden is on the customer in relation to whether payments were in accordance with the mandate or were made upon actual authority but outside the mandate. We do not see the difference. In our judgment it is essentially the bank which asserts the affirmative of the issue namely that it paid away £50, either in accordance with the mandate or on the actual authority of the customer. Mr O'Connell argued that this would be unfair towards a bank because information as to the existence or otherwise of actual authority was likely to be predominantly in the hands of the customer. But this is equally true of ratification (which can be a unilateral act); yet it is clear from Limpgrange - and Mr O'Connell accepted –that the burden is on the Bank in that respect. Accordingly we find that the burden of showing actual authority lies on the Bank in this case.

(c) Was there actual authority for the payments?

81. The transfers were made upon the instructions of Miss Waterton. Did she have actual authority from Izodia to make those transfers? As a first step to deciding this issue, we ought to consider who told her to make the transfers.

82. On this, there is no direct evidence and we have some sympathy with Mr O'Connell's complaint that Izodia did not call Miss Waterton in order that she might give direct evidence as to who told her to make the transfers. However we do not know the reasons for her non attendance.

83. Izodia contends that the Court should find that she acted on the instructions of Dr Smith whereas RBSI contends that we should find that she acted on the instructions of Mr Catto and Mr Vahey, alternatively that Izodia has not fulfilled the burden of showing that it was not they who instructed her.

84. In the absence of direct evidence, the Court can only draw inferences from the surrounding circumstances but we find that she acted at the direction of Dr Smith. Our reasons are as follows:-

(i) There is overwhelming evidence that Dr Smith was the driving force behind Orb/LT. He was described as a dominating and charismatic figure. It was said that Mr Vahey would never do anything without clearing it with Dr Smith. We think it highly unlikely that a decision as important as transferring £27.3 million from Izodia to LT would be taken by any one but him.

(ii) An indication of Dr Smith's dominance can be found in an e-mail dated 8th October which Sir Anthony sent to the Chairman of Old Mutual, the financial advisers to Izodia. The relevant part reads as follows -

"Dear Christopher,

You have no idea how much I appreciate your writing to me. I have felt extremely alone during the time that I was on the Izodia board. I have totally lost confidence in the other board members and the legal advisers who have a clear conflict of interest because they act for Orb and Lynch Talbot.

I believe that there is something 'rotten in the State of Denmark'. We have not been able to have a board meeting or do anything without Gerald Smith being in control. I could not act as a proper independent director because I was continually being blocked. The truth of it is that I was sacked by Smith. I went in the knowledge that he had control of the company."

(iii) When Sir Anthony asked Dr Smith outright on 3rd October whether he had stolen Izodia's money, he made comments (see para 46) which Sir Anthony took as - and we find were - admissions that he had indeed taken the money.

(iv) It was clear that he was actively involved in the opening of the account at RBSI and the transfer of the funds to that account on 2nd August. He pressed both Mr Gowans and Miss Fox very strongly in relation to these matters to ensure that the funds were transferred that day. This suggests that he personally was very interested in seeing that the money was in the RBSI account from where it could then be extracted as a result of the EBS letter. That

letter was submitted by Mr Jones, the group treasurer of Orb, who we are satisfied took his direction from Dr Smith as the driving force and controlling influence of Orb.

(v) It was Dr Smith who produced the false MMF certificates at the board meeting on 18th September in order to convince the board of Izodia that the money was safe and was still in Izodia's name. That arises from the evidence directly before us but it is also of note that he has since pleaded guilty to false accounting in respect of the production of those false statements to the board at that board meeting.

(vi) It was Dr Smith who asked Mr Gowans to ascertain the size of Izodia's cash holdings as early as April 2002.

(vii) Dr Smith has pleaded guilty to stealing three credit balances of £8 million, £10 million and £9,259,518 belong to Izodia Plc, being the three sums transferred to LT on 5th August.

(viii) We are quite satisfied that Dr Smith was the driving force for this fraud. He took the decision and was ultimately responsible for setting up the RBSI account, procuring that Orb/LT had access to that account via the EBS letter, procuring the transfer of the funds to LT and the subsequent use of those funds to prop up the Orb Group's cash flow.

(ix) It is of course theoretically possible that, when deciding to procure the transfer of the funds from the Izodia account to the LT account on 5th August, he asked Mr Catto and Mr Vahey to instruct Miss Waterton to make the transfers rather than instructing her directly himself. However we see no reason why he would do that. The subtleties of Mr O'Connell's argument on actual authority and the burden of proof would, we are sure, not have occurred to him at that stage.

(x) We have taken into account the various assertions by or on behalf of Mr Catto and Mr Vahey at different times after 30th September that the directors (presumably meaning they) had authorised the transfer of the money to the LT account on 5th August but, as we describe in more detail later, we find that by then they were both acting dishonestly and we can place no credence on their assertions.

In the light of these considerations we find it more probable than not that it was Dr Smith who told Miss Waterton to make the transfers. It follows that, even if we had accepted Mr O'Connell's argument that the burden of proof lay on Izodia to establish that it was not Mr Catto and Mr Vahey who directed Miss Waterton, Izodia would have satisfied that burden.

85. A company acts by its board of directors to whom the power of managing the company's affairs is given. Under the Articles of Association of most companies (Izodia being no exception) the board may delegate functions to one or more individual directors or to non directors. In such cases, the delegate then has actual authority to take decisions within the terms of the delegation provided he is acting *bona fide* for the proper purposes of the company. We must therefore determine whether the board in any manner conferred actual authority on any person(s) to write the EBS letter and to make the transfers on 5th August.

86. We have no difficulty in concluding that the board did not give any such actual authority. We have heard from three directors who attended the meeting on 2nd August, namely Sir Anthony, Mr Roberts and Ms Chapman-Pincher. We have also heard from Mr Maberly who was present at that meeting. Miss Fox also gave evidence of certain events following the meeting although she was not present at the meeting itself. All three directors were absolutely clear in saying that they authorised the transfer of the funds from the Bank of Scotland account in Reading to the RBSI account in Jersey in order to obtain a better rate of interest. No one ever suggested that the money would be transferred to LT (whether by way of loan or otherwise); no one referred to the EBS letter (despite the fact that it had already been faxed to Mr Gowans at RBSI that morning and was dated 1st August) or suggested that anyone other than officers of Izodia would have power to make payments from the account. They were all absolutely clear that the money would be in an account in Izodia's name under Izodia's control and that they would not have agreed to any transfer to LT or the effective conferring of signing powers upon LT personnel if this had been suggested to them. The minutes of the meeting are consistent with their evidence, which we accept.

87. Mr O'Connell argued that, through Mr Roberts, the company's finance director, the board was aware that Izodia's account was to be added to the EBS profiles of Orb and LT because of the content of Mr Gowans e-mail to Mr Roberts at 12.01 on 2nd August when he said the following:-

> *"The account will be added to our electronic banking system eQ in London and Jersey. Following receipt of an appropriately signed authority. The account can then be viewed and payments made as per the local arrangements there. Trevor will be able to demonstrate this to you, perhaps."*

88. We can understand Mr Gowans' evidence that, to him, this e-mail stated that Izodia was to be added to the Orb/LT EBS profiles. He was aware of what Mr Jones wished to happen and it is a familiar occurrence that a writer interprets something which he writes in accordance with what he means to say. However the fact is that the e-mail makes no mention of Orb or LT. It merely talks of adding the Izodia account to 'our' EBS in London and Jersey. It is also subject to receipt of an

appropriately signed authority. We have no hesitation in accepting Mr Roberts' evidence that he did not understand the e-mail to mean that Izodia's account would be added to the Orb/LT EBS profiles, let alone that their Authorisers would have ability to make payments out of the Izodia account. He understood it merely to mean that the account would have an EBS facility in due course. No doubt he was familiar with this because the Bank of Scotland at Reading also had an EBS facility of which Izodia personnel were the operatives. In our judgment that was a perfectly reasonable – and indeed the most natural – interpretation of the e-mail and we certainly do not consider that the e-mail amounts to authority by Mr Roberts as finance director to the sending of the EBS letter, the addition of the Izodia account to the EBS profiles of Orb and LT or to the subsequent transfers on 5th August.

89. Accordingly we find that the board did not actually authorise the sending of the EBS letter or the transfer of the monies. Nor did it delegate authority to take such decisions either expressly or impliedly to anyone other than, perhaps, Mr Roberts as finance director, and he did not authorise such actions. Accordingly we find that neither Mr Helvert, Mr Catto nor Mr Vahey had actual authority to write the EBS letter and we find that neither Dr Smith nor Miss Waterton had actual authority to make the transfers on 5th August. Furthermore, even if we are wrong and it was Mr Catto and Mr Vahey who instructed Miss Waterton to make the transfers, we find that they did not have actual authority to do so on the grounds that the board had not authorised any such transfers nor had it delegated to them the authority to make such transfers.

90. In case we are held to be wrong in rejecting Mr O'Connell's submission that the mere placing of a signatory on the mandate confers actual authority to make any payment provided that the payment is made *bona fide* in the best interests of the company and in case we should also be wrong in finding that it was not Mr Catto and Mr Vahey who instructed Miss Waterton to make the transfers, we should consider whether, if they did so instruct her, they were acting *bona fide* in the best interests of the company.

91. We find that, if they sent the EBS letter and they instructed Miss Waterton to make the transfers, they were not acting *bona fide* for the proper purposes of the company. Our reasons are as follows:-

    (i) They clearly were not confident enough to tell their fellow directors that this was their plan. They made no mention at the board meeting or at any other time of the EBS letter or of any plan to transfer £27.3 million to LT. That is not indicative of good faith on their part.

    (ii) They knew that it was the clear decision of the board (as we have found) that it had only authorised a transfer to an account in Izodia's name under the control of Izodia's signatories

and that the transfer was merely being made in order to attract a better rate of interest. They cannot therefore genuinely have felt that the board would be in agreement with a decision to transfer the monies to LT.

(iii) They cannot genuinely have thought that it was in the best interests of Izodia to lend money to LT. The Izodia account was a totally secure account with a top rated bank. By contrast, we think it highly likely that, as persons connected with Orb, they would have been aware of the cash flow difficulties which Orb was experiencing at the time (as described in the various internal RBSI e-mails to which we have referred). Even if they were not aware themselves of the cash flow difficulties, they made no enquiries of LT's or Orb's financial position or as to what LT intended to do with the money. Had they made any enquiries they would have established the cash flow problem. Furthermore, there was no written agreement or other documentary evidence of any transaction between Izodia and LT/Orb or as to what the terms of any such transaction were, including in particular the vital issue of when and in what circumstances Izodia could call for repayment.

(iv) If they genuinely thought that a loan to LT was the best course for the company, the normal course would have been to say so to the other members of the board and to have arranged a transfer direct from the Bank of Scotland account at Reading to LT's account in Jersey. Why the secrecy and why the convoluted method of achieving the transfer?

(v) If they genuinely thought that the transfers were in the best interests of Izodia, why not come clean about what they had done once questions began to be raised in September as to what had had happened to the money? They could have given a simple answer saying that they had authorised the transfers and giving the reasons why they thought that had been a good idea. But nothing of this nature occurred. Those who made enquiries as to what had happened to the money were met with obfuscation and lies on their part.

(vi) We find that, if Mr Catto and Mr Vahey authorised the transfers, they were acting in the interests of Orb/LT and not in the interests of Izodia. They were accordingly acting for improper purposes and it follows that they did not have the actual authority of the company even if Mr O'Connell's argument on the law (namely that signatories on a mandate have actual authority if they are acting *bona fide* for the proper purposes of the company) is correct.

92. For all of the above reasons we find that there was no actual authority for the transfers and we therefore find against RBSI on this point.

(iv) Ratification

93. Ratification is the supply of authority after the event by approval or adoption of an unauthorised act. Thus a principal may ratify the unauthorised act of his agent whereupon the act of the agent binds the principal. Ratification may be express (e.g. the principal expressly adopts the contract made by the agent) or implied (where the principal conducts himself in such an unequivocal manner that he must be taken to have approved the transaction).

94. In the corporate field, ratification of an unauthorised act carried out on behalf of a company must of course be by the company itself. This point was emphasised by Lord Hailsham in Alexander Ward & Co v Samyang Co [1975] 1 WLR 673 at 678:-

> ***"I begin by pointing out, not as a pure piece of pedantry, but as bearing on my opinion on both parts of the case, that the ratification relied on is not that of the liquidator, but that of the company acting by the liquidator. The proceedings were ab initio in the name of the company. By the time he was sisted and adopted the proceedings, the liquidator was authorised to act for the company. It is not simply an exercise in semantics to point out that if there was ratification of the acts of Ward and Irons, it was a ratification by the company acting through the liquidator, and not by the liquidator acting on his own behalf. The question for consideration is whether the company could ratify through the liquidator, and not whether the liquidator could ratify for the benefit of the company."***

This point is further clarified at para 2-078 of Bowstead and Reynolds where it is made clear that a transaction done or entered into on behalf of a company may be ratified by the directors if they have power to do or enter into such an actual transaction on behalf of the company but may be ratified only by the shareholders if the actual transaction is beyond the powers of the directors. It follows that, if one is considering a ratification effected by the directors, one must consider whether, in doing so, they were acting *bona fide* and for proper purposes in the best interests of the company because it is only in those circumstances that they have actual authority to act for the company.

95. RBSI relies upon a number of assertions from 30th September onwards to the effect that the transfers to LT on 5th August were made with the authority of the directors. However, Mr O'Connell has concentrated his submissions on the letter of 8th November from Crill Canavan to D J Freeman, no doubt on the basis that it represents the high water mark of RBSI's case on ratification and, if he fails on that letter, he does not stand any chance of succeeding on any of the

earlier assertions. It must be borne in mind that, from 4th October onwards, Messrs Catto and Vahey were the only directors of Izodia following Sir Anthony's resignation.

96. It is to be recalled that there had been considerable correspondence between the Bank and Izodia (or their respective lawyers) following 30th September and the Bank was refusing to agree to the payment of the remaining £2.7 million in Izodia's account to the Bank of Scotland account at Reading until its concerns were satisfied. Those concerns related to two main areas, namely:-

(i) The events of 30th September when false certificates relating to the Bank's MMF were shown to it in connection with a request to pay the full £27.3 million back to the Bank of Scotland Reading account; and

(ii) how Izodia could justify the statement in its Stock Exchange announcement of 27th September as to the extent of its cash resources when £27.3 million had been transferred to LT on 5th August from where, as the bank officers knew, the money had been dissipated amongst the Orb Group such that, at any rate by reference to the LT/Orb accounts held with RBSI, the group had no immediate prospect of repaying the £27.3 million.

97. Mr O'Connell emphasised that the Crill Canavan letter of 8th November made, *inter alia*, the following points:-

(i) Crill Canavan was an *'independent law firm'*.

(ii) Crill Canavan received its instructions from the *'properly appointed'* board of directors of Izodia.

(iii) That Izodia had decided to follow the option of providing RBSI *'with as much information and comfort as can reasonably be expected in the circumstances'*.

(iv) That the reference of the matter of the apparently forged MMF confirmation note to the police and other regulatory authorities was welcomed by Izodia and that the note was provided to RBSI without any knowledge or acquiescence from the board.

(v) That RBSI was unlikely to be aware of the total worth of any of its customers, particularly when that customer was a Plc which could easily have assets all over the world; and for RBSI to question a Stock Exchange announcement regarding the overall wealth in

monetary terms of its customer, based solely on the fact that the overall wealth was not situated within the RBSI network, was not to RBSI's credit.

(vi) Nevertheless Izodia was willing to explain the Stock Exchange announcement and of the total sum referred to in that announcement, *'£24.5 million was managed by Messrs Lynch Talbot on behalf of the company'*.

(vii) Provided that Lynch Talbot had confirmed that that money was held on behalf of Izodia that must be sufficient for RBSI's purposes. Crill Canavan pointed out that this had been so confirmed by LT on 4th October and a further letter of 8th November from LT was enclosed reiterating the position. In those circumstances the £24.5 million was quite properly included in the total amount which was announced to the Stock Exchange.

Mr O'Connell further submitted that the letter was not simply the words of Mr Catto and Mr Vahey relayed by the pen of Advocate Santos-Costa. It would have been plain to Advocate Santos-Costa, in view of the letter of 8th November from D J Freeman, that RBSI was looking for the comfort of an independent lawyer and that accordingly Advocate Santos-Costa had a substantive role to play in looking into the facts. RBSI was therefore entitled to draw considerable comfort from an independent lawyer such as Advocate Santos-Costa associating himself with the assertions made in the letter.

98. In his submissions and during the course of his cross-examination of Mr MacDonald, Mr Blakeley sought to allege that Crill Canavan was not in fact independent and that Advocate Santos-Costa had in fact consulted closely with Dr Smith on the letter and was in reality acting largely on his instructions. In our judgment this was an unacceptable way of proceeding. Izodia has, we were told, refused to waive privilege in respect of Crill Canavan. Accordingly the Crill Canavan file has not been disclosed in full (although a few documents appear to have become available) and Advocate Santos-Costa has not been called as a witness. We entirely agree with Mr O'Connell that it is simply not open to Izodia in these circumstances to make unsubstantiated criticisms of Advocate Santos-Costa. We propose to disregard them and proceed on the basis of the features of the letter as described by Mr O'Connell

99. However the fact that Advocate Santos-Costa was an independent lawyer does not, in our judgment, assist on the question of ratification, although it may be relevant on the issue of estoppel. A lawyer is merely the agent of his client. The client in this case was Izodia. The issue is whether Izodia has ratified the payments made on 5th August and Izodia can only act through its board of directors, who may in turn authorise the company's lawyer. The directors

undoubtedly had power to ratify the payments provided that, in carrying out such a ratification, they were acting *bona fide* in the best interests of the company.

100. We have no hesitation in finding as a fact that, on the various occasions from 30th September onwards, culminating in the Crill Canavan letter, when Mr Catto and/or Mr Vahey confirmed that the transfers were properly made, they were not acting *bona fide* in the best interests of the company. Our reasons are essentially those put forward by Izodia and we would summarise our main grounds for so finding as follows:-

(i) It is clear that the freezing of the Orb group's accounts on 30th September as a result of Mr Maberly's contact with RBSI precipitated an immediate crisis for Orb because an interest payment was due to Morgan Stanley. It was essential for Orb to persuade RBSI that the transfers from Izodia to LT had been authorised by Izodia. To achieve this Dr Smith had to arrange for Izodia's board to confirm that fact.

(ii) It is of significance that Dr Smith did not ask Sir Anthony to confirm to RBSI that the transfers were authorised, no doubt because he knew full well that Sir Anthony would have given no such confirmation. Instead, Mr Catto and Mr Vahey wrote to give the necessary confirmation. Mr Vahey is described by virtually all the witnesses that we have seen as someone who would do exactly what he was told by Dr Smith. He was described variously as a 'puppet' or 'runner' for Dr Smith. Mr Catto was clearly a stronger and more experienced character but he was closely associated with Orb and his views on the relationship between Orb and Izodia can be seen from Mr Vahey's e-mail of 26th September to Dr Smith (referred to above) where, in relation to Sir Anthony's insistence that the money should be returned from Jersey to Reading, it is stated *"Peter commented that Tony ought to 'get a backbone and remember who controls this company'".*

(iii) In the faxed letter of 30th September to RBSI Mr Catto and Mr Vahey duly confirmed that the majority of Izodia's funds were held by LT on behalf of Izodia, having been transferred as agreed by the directors of Izodia. In our judgment, for the reasons already given, neither Mr Catto nor Mr Vahey genuinely believed that the directors had agreed to the payments on 5th August and this was a false statement on their behalf. It is also completely inconsistent with some file notes made by Mr Catto describing the events of 30th September to 3rd October, in which he states that, as far as he and the other directors of Izodia were concerned, they believed that the funds were held by Izodia under its control, albeit under the LT umbrella to obtain a higher rate of interest because of other deposits by LT.

(iv) The letter also referred to there having been a *'misunderstanding'* regarding the instructions from Mr Maberly. They knew that this was not so and that he was acting on Sir Anthony's instructions.

(v) At the meeting with RBSI officials in Jersey on 1st October Mr Catto made a number of statements which were false to his knowledge:-

(a) that the directors were happy that Izodia's money was held by LT. He knew that Sir Anthony, for one, had not and would not have accepted this;

(b) that the directors had agreed that LT would manage the cash on behalf of Izodia;

(c) that the above arrangements were reflected in Izodia's minutes; and

(d) that Izodia's money had been loaned to LT.

This last statement was not only untrue but was also inconsistent with his statement earlier in the meeting that the money was managed by LT on Izodia's behalf.

(vi) In his letter to Mr Spears of 3rd October Mr Catto stated, with apparent surprise, that RBSI had informed him that Izodia's funds were 'not separately identified as being in Izodia's name but in the name of Lynch Talbot' and he asked RBSI to advise him how a transfer was made from Izodia to LT. This was inconsistent with his faxed letter of 30th September and with what he had said at the meeting on 1st October.

(vii) The statement in Fladgate Fielder's letter of 29th October that *'the directors confirmed, when asked that they had approved the transfers of funds to Lynch Talbot Treasury Management Fund……'* was untrue insofar as it suggested (as it was clearly intended to) that Izodia's board had approved the transfers before they were made.

(viii) In a letter of 1st November to RBSI Mr Catto described Mr Maberly's dealings with RBSI on 30th September as *'an employee driven prank'*. This was clearly false. He knew that Mr Maberly was the company secretary and had acted in good faith on Sir Anthony's instructions.

(ix) The same point arises in connection with the Crill Canavan letter written on the instructions of Mr Catto and Mr Vahey where reference is made to *'those who may have attempted to cause the company mischief or alternatively may have attempted to defraud RBSI'*. This is clearly another reference to Mr Maberly's actions on 30th September although they knew that Mr Maberly had not acted improperly.

(x) It is also of note that, in the Crill Canavan letter, it is stated that Mr Catto denies that he told RBSI on 1st October that Izodia had lent the money to LT. We find on the basis of Mr MacDonald's evidence and the detailed file note prepared by RBSI that he did say that Izodia had lent the money and we find that his denial to that effect in the Crill Canavan letter was false.

101. We have no hesitation in finding that the various statements by and on behalf of Mr Catto and Mr Vahey from 30th September onwards (including the Crill Canavan letter) to the effect that the transfers of 5th August were duly made with the approval or authority of the board were false and were not made in the best interests of Izodia but rather in the interests of Orb/LT, no doubt in the hope that if matters were delayed long enough, Orb/LT might somehow be in a position to repay the funds or might acquire all the shares in Izodia, so that the issue would become of no interest. We find therefore that the directors were not acting *bona fide* in the best interests of Izodia and accordingly the various statements made from 30th September onwards and the board's decision to instruct Crill Canavan to send the letter of 8th November cannot amount to ratification of the transfers. We should add that, as a subsidiary point, Mr O'Connell argued that, even if the letter did not amount to ratification, it was evidence that the transfers had been authorised at the time. In our judgment it does not assist in this respect. We find that Mr Catto and Mr Vahey were lying when they made statements to that effect.

102. The Bank's case on ratification therefore fails.

(v) Election

103. Election is closely related to ratification and, as Mr O'Connell stated in his written closing submission, the two principles can probably be treated together on the facts of the present case. We propose therefore to deal with this topic fairly briefly.

104. The nature of election was helpfully stated by Slynn J in London Intercontinental as follows at 250:-

"Mr Hunter has also put the case upon the basis that the plaintiff elected to choose M.B. rather than the bank as its debtor.

The test as to whether the company had elected to treat one party rather than another as its debtor has been dealt with in a number of cases which have been cited to me. In Clarkson Booker v Andjel (1964) 2 QB 775, it was held that the institution of proceedings against a principal or an agent may be evidence of an election but is not conclusive. There has to be an unequivocal act with full knowledge of all the relevant facts, an unequivocal act showing that the plaintiff has chosen one party rather than the other as his debtor ……..

It is clear from these cases that a party is not to be taken as having elected or adopted a transaction unless he does so with full knowledge of all material facts. If with such knowledge he unequivocally adopts a transaction, and he pursues one claim rather than another, and seeks to obtain an advantage by pursuing one course of conduct, he cannot subsequently turn round and say that the transaction which he has sought to rely upon was invalid."

In that case the judge held that pursuing a claim against M.B. both in the liquidation and before the Stock Exchange on the basis that the transaction was valid meant that the company could not now say as against the bank that the transaction was all along invalid. The company had made its election and was bound by it.

105. Although in its pleading RBSI raised a number of incidents as constituting an election (for the most part, but not entirely, from 30th September onwards) Mr O'Connell concentrated exclusively in his closing submission on the Crill Canavan letter for much the same reason as in relation to ratification. We agree that this was sensible. He submitted that the Crill Canavan letter was an unequivocal act by Izodia showing that it had chosen LT as its debtor rather than RBSI. He pointed out that:-

(i) the letter was a considered letter written with the benefit of legal advice;

(ii) the letter responded to that of D J Freeman of 6th November which set out the issues so that an informed position could be taken by Izodia; and

(iii) the letter relied upon and enclosed the confirmations dated 4th October and 8th November from LT in connection with the funds.

106. In our judgment RBSI's case on election fails for two reasons. First, as we have held in relation to ratification, in authorising the Crill Canavan letter the board of directors was not acting in good faith in the best interests of Izodia; on the contrary it was acting in the interests of Orb/LT. It follows that the directors had no actual authority to make an election and their decision did not bind the company.

107. Secondly, it is clear from the judgment of Staughton J in Limpgrange that the threshold for showing an unequivocal act amounting to election is high. Thus, in that case, the company had shown the recipient of the unauthorised transfers as a debtor in its accounts. The judge held that this did not amount to an unequivocal choice to choose the debtor over the bank. In this case the Crill Canavan letter amounts to an assertion at that stage that the transfers to LT were valid but in our judgment it does not amount to such unequivocal act as is necessary to show that Izodia had chosen one party than the other as its debtor.

108. Accordingly we hold that the Bank's case on election does not succeed.

(vi) Estoppel

109. The principles of estoppel are well established. If a person makes a representation or assurance upon which another person relies and in consequence acts to his detriment, an estoppel may arise.

110. What is said by RBSI in this case is that the Crill Canavan letter (and some of the earlier statements made by or on behalf of the directors) amounted to representations or assurances that the transfers of 5th August were duly authorised and that RBSI relied upon the assurances. Mr O'Connell very sensibly concentrated on the Crill Canavan letter on the basis that, if he failed in relation to the assurances contained in that letter, he would not succeed on any of the earlier assurances.

111. We find that the Crill Canavan letter did amount to a representation that the transfers were duly authorised and that RBSI relied upon that representation. In the case of estoppel it does not matter that the directors were not acting *bona fide* in the best interests of the company and therefore had no actual authority to make the representations. Directors are held out as having ostensible authority on behalf of a company and a third party is entitled to rely upon their actions unless he has notice that they are acting outside or beyond their authority. Mr Blakeley sought to suggest that RBSI had such notice in that it did not believe the assurances in the Crill Canavan letter; but we accept the evidence of Mr MacDonald, supported by the correspondence, and find

that RBSI did accept and rely upon the representations contained in the letter because of the involvement of an independent lawyer. It had no notice that the directors were acting outside or beyond their authority in giving such representations. We therefore find that the first two elements of estoppel, namely a representation and reliance, are present.

112. The question then arises as to whether RBSI has suffered any detriment as a result of relying upon the representations. Subject to what is said below in paras 114 and 115, all the representations took place from 30th September onwards and related to whether the directors had approved the transfers to LT on 5th August. Thus they all occurred well after the transfers in question and cannot have induced RBSI to make the transfers. The context in which the representations were made was that Izodia had requested RBSI to pay the remaining £2.7 million to Bank of Scotland in Reading. We have no difficulty in finding that RBSI eventually agreed to make this payment in reliance upon the representations contained in the Crill Canavan letter. If Izodia were claiming against RBSI in respect of the £2.7 million, we agree that it would be estopped from doing so because RBSI would have acted to its detriment. But Izodia brings no claim in respect of the £2.7 million. On the contrary, it claims only for the sums transferred on 5th August (plus interest) less the £2.7 million. RBSI has therefore suffered no detriment by paying away the £2.7 million.

113. If the Bank had produced evidence that, for example, LT still had £27 million (or some lesser sum) in its account with the Bank as at the date of the Crill Canavan letter and it had subsequently allowed that sum to be paid away in reliance upon the Crill Canavan letter, we agree that Izodia would be estopped from claiming any such sum, because the Bank would have acted to its detriment in reliance upon the Crill Canavan letter by letting that sum be paid away out of its control. But nothing of that nature is alleged. No evidence has been produced by the Bank to show when the various sums were paid away from the LT account and whether the Bank would at any stage have been in a position to minimise the loss by preventing such sums being paid away. In the circumstances there is no evidence of detriment to the Bank by reason of reliance upon the various representations to the effect that the original payments were duly authorised. Accordingly the plea of estoppel must fail.

114. We would add for the sake of completeness that, although Mr O'Connell, correctly in our view, concentrated on the Crill Canavan letter and the representations from 30th September onwards, the pleadings also refer to certain other representations. Thus it is said that the silence of Mr Roberts and Miss Fox on 2nd August following the e-mail exchange that day with Mr Gowans amounted to a representation that Izodia agreed that its account with RBSI should be added to the EBS profiles of LT and Orb. For the reasons set out in para 88 above, we find that Mr Roberts and Miss Fox made no such representation. The question of estoppel does not therefore arise.

115. RBSI also referred in its pleading to the letter dated 15th August 2002 from Sir Anthony to RBSI to the effect that Mr Catto and Mr Vahey were entitled, by reason of their appointment as directors, to be representatives of the company in all matters pertaining to the company's business. We have referred to this in para 35. We do not read this letter as being anything beyond a statement of the legal effect of Mr Catto and Mr Vahey being directors. Even if we are wrong in this, there is no evidence that RBSI acted to its detriment in reliance upon that letter. It occurred after the transfers and, as stated earlier, there is no evidence as to when monies were paid away from the LT account or of any reliance which RBSI placed upon this letter.

116. For these reasons we hold that Izodia is not estopped from claiming in respect of the transfers on 5th August less the £2.7 million repaid to Bank of Scotland in November.

(vii) Was RBSI negligent?

117. On our findings, the question of negligence does not arise. We have held that the payments to LT on 5th August were not made in accordance with the mandate nor were they made with the actual authority of Izodia. It follows that RBSI is liable in respect of those transfers (subject to the possible defences of ratification, election and estoppel, which we have held do not succeed) and no question of negligence therefore arises. Furthermore, if, contrary to our finding, there was in fact actual authority for the transfers even though they were outside the terms of the mandate, then no question of negligence can arise. If Izodia actually authorised the transfers, it cannot possibly sue the Bank for having effected them. The question of negligence only arises if there was no actual authority but, contrary to our view, the payments were made in accordance with the mandate.

118. As we have stated previously, the signatories on a mandate are held out as having ostensible authority to make payments. It follows that a bank is entitled to rely upon the authority of such signatories unless it has notice that a signatory is acting outside or beyond his actual authority.

119. In addition, there is an implied term in the contract between a bank and its customer that the bank will observe reasonable skill and care in executing the customer's orders. There is a matching duty in tort. See Barclays Bank Plc v Quincecare Limited – decided in 1988 but reported at [1992] 4 All ER 363, approved by the English Court of Appeal in Lipkin Gorman v Karpnale Limited [1989] 1 WLR 1340. As far as we are aware this is the first occasion where the nature of a bank's duty of care has had to be considered under Jersey law. Given the importance of the banking industry in Jersey we think it may be of assistance if we quote some extracts from the above two decisions because, in our judgment, they equally reflect the law of Jersey and they give a flavour of the way in which the Court should approach the competing considerations of a

bank's duty to act upon its customer's instructions and the need to exercise reasonable skill and care in doing so.

120. We begin with the judgment of Steyn J in Quincecare at 376:-

> ***"Given that the bank owes a legal duty to exercise reasonable care in and about executing a customer's order to transfer money, it is nevertheless a duty which must generally speaking be subordinate to the bank's other conflicting contractual duties. Ex hypothesi one is considering a case where the bank received a valid and proper order which it is prima facie bound to execute promptly on pain of incurring liability for consequential loss to the customer. How are these conflicting duties to be reconciled in a case where the customer suffers loss because it is subsequently established that the order to transfer money was an act of misappropriation of money by the director or officer? If the bank executes the order knowing it to be dishonestly given, shutting its eyes to the obvious fact of the dishonesty, or acting recklessly in failing to make such enquiries as an honest and reasonable man would make, no problem arises: the bank will plainly be liable. But in real life such a stark situation seldom arises. The critical question is: what lesser state of knowledge on the part of the bank will oblige the bank to make enquiries as to the legitimacy of the order? In judging where the line is to be drawn there are countervailing policy considerations. The law should not impose too burdensome an obligation on bankers, which hampers the effective transacting of banking business unnecessarily. On the other hand, the law should guard against the facilitation of fraud, and exact a reasonable standard of care in order to combat fraud and to protect bank customers and innocent third parties. To hold that a bank is only liable when it has displayed a lack of probity would be much too restrictive an approach. On the other hand, to impose liability whenever speculation might suggest dishonesty would impose wholly impracticable standards on bankers. In my judgment the sensible compromise, which strikes a fair balance between competing considerations, is simply to say that a banker must refrain from executing an order if and for as long as the banker is 'put on enquiry' in the sense that he has reasonable grounds (although not necessarily proof) for believing that the order is an attempt to misappropriate the funds of the company …… And, the external standard of the likely perception of an ordinary prudent banker is the governing one."***

The judge went on to say that factors such as the standing of the corporate customer, the bank's knowledge of the signatory, the amount involved, the need for a prompt transfer, the presence of unusual features and the scope and means for making reasonable enquiries may

all be relevant. But there was one particular factor which would often be decisive. That was the consideration that, in the absence of telling indications to the contrary, a banker would usually approach a suggestion that a director of a corporate customer was trying to defraud the company with an initial reaction of instinctive disbelief. Trust, not distrust, was the basis of a bank's dealings with its customers and full weight must be given to that consideration before one is entitled, in a given case, to conclude that the banker had reasonable grounds for thinking that the order was part of a fraudulent scheme to defraud the company. He went on to say that one also had to guard against the use of hindsight. The argument in the case before him had assumed that the bankers in question had unlimited time available to consider, analyse and discuss the various accounts whereas the decisions which had been analysed over weeks in court would in practice have been taken in minutes by the bankers. He went on to reject the allegation that, on the facts of that case, the bank should have been put on enquiry.

121. We would also refer to two helpful passages in the decision of the Court of Appeal in Lipkin Gorman. Thus May LJ said at 1356:-

> ***"The relationship between the parties is contractual. The principal obligation is on the bank to honour its customers' cheques in accordance with its mandate on instructions. There is nothing in such a contract, express or implied, which would require a banker to consider the commercial wisdom or otherwise of the particular transaction. Nor is there normally any express term in the contract requiring the banker to exercise any degree of care in deciding whether to honour a customer's cheque which his instructions require him to pay. In my opinion any implied term requiring the banker to exercise care must be limited. To a substantial extent the banker's obligation under such a contract is largely automatic or mechanical. Presented with a cheque drawn in accordance with the terms of that contract, the banker must honour it save in what I would expect to be exceptional circumstances. ……***
>
> ***For my part I would hesitate to try to lay down any detailed rules in this context. In the simple case of a current account in credit the basic obligation on the banker is to pay his customer's cheques in accordance with his mandate. Having in mind the vast numbers of cheques which are presented for payment every day in this country, whether over a bank counter or through the clearing bank, it is, in my opinion, only when the circumstances are such that any reasonable cashier would hesitate to pay a cheque at once and refer it to his or her superior, and when any reasonable superior would hesitate to authorise payment without enquiry, that a cheque should not be paid immediately on presentation and such enquiry made. Further, it would, I think, be only in rare circumstances, and only when any reasonable bank manager***

would do the same, that a manager should instruct his staff to refer all or some of his customers' cheques to him before they are paid. In this analysis I have respectfully derived substantial assistance from the material parts of the judgment in Steyn J in Barclays Bank Plc v Quincecare Limited."

Parker LJ said at 1378:-

"I would not, however, accept that a bank could always properly pay if it had reasonable grounds for a belief falling short of probability. The question must be whether, if a reasonable and honest banker knew of the relevant facts, he would have considered that there was a serious or real possibility, albeit not amounting to a probability, that its customer might be being defrauded, or, in this case, that there was a serious or real possibility that Cass was drawing on the client account and using the funds so obtained for his own and not the solicitors' or beneficiaries' purposes. That, at least, the customer must establish. If it is established, then in my view a reasonable banker would be in breach of duty if he continued to pay cheques without enquiry. He could not simply sit back and ignore the situation. In order so to establish the customer cannot, of course, rely on matters which a meticulous ex post facto examination would have brought to light. Such an examination may well show that it was indeed obvious what Cass was doing, but in the present case the enquiry is simply whether Mr Fox, and therefore the bank, had, on the basis of the facts and banking practices established at the time, reason to believe that there was a serious possibility that Cass was misusing his authority to sign under the mandate in order to obtain and misapply the cash handed to Chapman in fraud of the solicitors."

In that case, too, the court found that, despite a number of matters which might have made the bank suspicious about Mr Cass, the bank had not been in breach of its duty to exercise reasonable skill and care.

122. Although the issue of whether the bank is on notice that the signatory is acting outside his ostensible authority (so that it may no longer rely upon the signatory's ostensible authority) is conceptually different from the issue of whether the bank exercised reasonable skill and care in acting upon the signatory's instructions, the two will in practice overlap. If the bank is on notice that the signatory has exceeded his authority, it will clearly have been negligent in acting on the instruction. Accordingly it is convenient simply to consider the issue of negligence, which is the wider concept.

123. Because the transfers on 5th August were effected by EBS, there was no human intervention on the part of RBSI. The transfers were carried out electronically as a result of the instructions inputted by Miss Waterton. It cannot therefore be said that the Bank was negligent on that score alone. The critical instruction is the EBS letter which allowed operatives of LT and Orb to make payments from Izodia's account. Izodia's case on negligence is that, in complying with the instructions contained in the EBS letter, RBSI failed to show the skill and care of a reasonably competent bank.

124. The Court has already found that it was the Helvert/Vahey version of the EBS letter upon which RBSI acted. The first key allegation made by Izodia is that RBSI acted on this version of the letter despite the fact that it knew by then (following Mr Roberts e-mail to Mr Gowans at 13.03) that Mr Helvert had not in fact been appointed a director and that Izodia wished him to be removed from the mandate.

125. In his witness statement Mr Gowans expressed the view that, until a new mandate was submitted to RBSI, the current mandate would continue to apply and the authorised signatories named in that mandate (including Mr Helvert) would continue to be authorised signatories. However he qualified this slightly in his oral evidence when pressed by Mr Blakeley and said that if he received an instruction signed by a signatory whom he had been informed was to be removed, he would ask for clarification, perhaps requesting another instruction countersigned by signatories who were to remain on the mandate. Izodia submitted that, whilst the view expressed by Mr Gowans in his witness statement may be correct as a matter of mandate, a banker who acts on a signature from an individual whom he knows or ought to know is likely to be acting without the authority of the account holder because the banker has been informed that the person is no longer a director and is to be removed as a signatory, should do so at his own risk. Mr Blakeley argued that this was a point of some general importance. He said that it must be common for a signatory on a company's bank mandate to resign or to be dismissed or to have his signing authority terminated and for the company to notify the bank informally of this fact pending receipt of a formal mandate/board resolution removing him from the mandate. He submitted that a bank that continues to act on the instructions of such a signatory without an enquiry is necessarily in breach of its duty of care.

126. Unfortunately, despite recognising that this was a point of general importance, Izodia failed to produce any expert evidence as to general banking practice in this respect; nor did RBSI. The Court is most reluctant to make a finding which may have implications for banking practice generally in the absence of any evidence as to what the reasonable and competent banker normally does in such circumstances.

127. As it happens we have concluded that, in the particular circumstances of this case, we do not need to decide the matter. This is because we know that, in fact, Mr Catto and Mr Vahey, who were continuing signatories, had signed an identical version of the EBS letter. Two continuing signatories were therefore willing to give the EBS instruction. We are satisfied that, even if RBSI had queried Mr Helvert's signature on the EBS letter and had made enquiries before acting upon it, the second version signed by Mr Catto and Mr Vahey would immediately have been made available to RBSI, which would have then acted upon it. It follows that, even if RBSI was negligent in acting upon the Helvert/Vahey version without making enquiries, such negligence did not cause any loss because the result of such enquiries would have been that an identical instruction would have been received from continuing signatories.

128. We turn therefore to consider whether it was negligent of RBSI to act upon the EBS letter. Izodia submits that it was and we would summarise the points upon which it relies as constituting reasonable grounds for suspecting that Dr Smith or the Orb group might have been intending to make improper use of Izodia's money sufficient to put RBSI, and in particular, Mr Gowans on enquiry, as follows:-

(i) Dr Smith had asked Mr Gowans to ascertain the size of Izodia's cash holdings in about April 2002.

(ii) The instructions to open an account for Izodia at RBSI were accompanied by an unusual and unexplained urgency. Thus the application to open the account was dated and arrived on 1st August and Dr Smith and Mr Jones put pressure on Mr Gowans to open the account on the same day.

(iii) There was similar urgency the next day when Orb put RBSI under pressure to ensure that the money would arrive in Izodia's account that day and to process the EBS letter.

(iv) The amount of money that Mr Gowans expected RBSI to receive into the new account was very large.

(v) The documents required for opening the account and applying for shares in the MMF came from Mr Jones at Orb, not from Izodia.

(vi) Mr Gowans knew that Mr Helvert and Mr Vahey, who signed the EBS letter, were employed by the Orb group and that Mr Catto was connected with the Orb group. In practice therefore

he knew or ought to have known that they were likely to act in accordance with Dr Smith's requests.

(vii) Mr Gowans knew that Izodia was a listed UK Plc and was not a subsidiary of Orb.

(viii) RBSI knew that Orb was short of cash.

(ix) RBSI knew that Dr Smith had a conviction of dishonesty.

(x) Mr Gowans was not aware of any commercial reason why Izodia might have wanted to transfer such a substantial sum to RBSI or, more particularly, why it might have wanted to give control of its account to the Orb group. He made no enquiries in that regard.

(xi) Mr Gowans did not take sufficient note of Izodia's position as a Plc in which Orb had only a minority interest. In the papers at the time of opening the account he described Izodia as *'controlled by Orb'.* Athough he said in evidence that this related to control of the account rather than control of the company, we did not find this explanation very convincing.

(xii) Between 7th and 14th August, certain other employees – in particular Mr Broughton – of RBSI expressed concerns internally that there was a risk of Izodia's money being misappropriated by Dr Smith/Orb. If they had reached that conclusion, that was supportive, says Izodia, of the fact that Mr Gowans should also have had such concerns.

(xiii) Unlike a payment instruction, the EBS letter was not an instruction which had to be complied with immediately. Thus RBSI could legitimately have delayed acting upon it until it had made reasonable enquiries as to why Izodia wanted to give control of its account to Orb/LT.

(xiv) In essence Mr Gowans was unduly influenced by his desire to please a customer and to secure a substantial deposit for the Bank. As a result he failed to recognise the factors which would have put a reasonably careful banker on enquiry (and which actually did so in the case of some of his colleagues).

129. We have carefully considered these submissions and it is of course true that Mr Broughton saw warning signs and expressed concern in the e-mails to which we have referred previously. But the fact that one banker recognises a risk does not mean that it is negligent for another not to

have recognised that risk. The question is whether RBSI fell below the standard of a reasonable and prudent banker.

130. We think that the considerations referred to in Quincecare and Lipkin Gorman are extremely important. Essentially a banker is expected to act upon his customer's instructions. He is not there to second-guess those instructions. A failure to act promptly upon a customer's instructions may often lead to difficulties or embarrassment for that customer and for the bank. The basis of the relationship is one of trust, not mistrust. The fact that, after a careful and painstaking analysis with the benefit of hindsight, it can be seen that an erroneous decision was taken by a bank does not mean that the bank acted negligently in making that decision during the course of a busy day.

131. In our judgment, assuming (contrary to our view) that the language of the mandate was wide enough to cover the EBS letter and that the language of the EBS letter included payments as well as viewing, RBSI did not act in breach of its contractual or tortious duty of care by acting upon the EBS letter. We would summarise our reasons as follows:-

(i) Although members of the CSF department were clearly aware that Orb had cash flow difficulties, we accept Mr Gowans evidence that he was not aware of this and there is no evidence to suggest – and it seems highly unlikely – that those responsible for processing the account opening information and the EBS letter in the back office would have been aware there were such cash flow difficulties. This is not surprising. We can well understand that customers require confidentiality about their banking affairs and they do not wish information about those affairs to be spread automatically amongst the entire membership of a bank. The functions of the CSF were very different to those of the OIU and the back office accounts department. Thus we see nothing negligent in a system whereby information about its customers held by CSF is not automatically distributed to OIU and the account opening department. In this respect the position is not dissimilar to that considered by Steyn J in Quincecare when he found that there was no duty on one branch to communicate concerns about a customer to another branch. It is true that here we are dealing with two departments in the same branch. But, given the complex and international nature of the business carried on in Jersey, we see nothing negligent or inappropriate in the Bank having a system whereby information available to a department such as CSF is not necessarily communicated to other departments.

(ii) If Mr Gowans and the back office accounts department were not aware of Orb's cash flow problems - and if it was not negligent of the Bank not to have had systems in place to ensure that they were – their actions then have to be considered against this background. The urgency placed by Orb on the opening of the account and the transfer of the cash is

hardly a matter of surprise or suspicion. As Mr Gowans said, many customers want everything done immediately and Orb was no exception. Everything always had to be done urgently with that group. There was therefore nothing suspicious about their request for urgency in this case.

(iii) The fact that the account opening documentation came from Orb rather than from Izodia was perhaps a little unusual and the Bank can certainly be criticised for its decision to seek comfort about the authority of the signatories from Orb rather than from Izodia. But that fact alone cannot amount to grounds for suspicion. Furthermore the fact remains that Mr Gowans spoke to Mr Roberts, the finance director of Izodia, on the morning of 2nd August and then had an e-mail exchange with him in which he (Mr Roberts) was provided with full details of the account. It was therefore entirely reasonable for Mr Gowans to assume that the board of Izodia was fully aware of the position and was comfortable with it. He was entitled to note that the board of Izodia had approved a mandate which contained three signatories closely connected with Orb, any two of whom were entitled to sign.

(iv) We do not consider that the existence of Dr Smith's previous conviction for dishonesty was significant. As Sir Anthony made clear in his evidence, the City had accepted him and was willing to do business with him and Sir Anthony was persuaded to become chairman despite the conviction. Furthermore Mr Gowans had been doing business with Dr Smith/Orb for some years and there had been no cause for concern during that time as to Dr Smith's honesty.

(v) We have carefully considered the various points relied upon by Izodia and we have also had regard to the facts in Quincecare and Limpkin Gorman as giving some indication of the standard to be applied in considering a banker's duty of skill and care when complying with instructions. Although, with the benefit of hindsight, some things might have been done differently, we have no hesitation in finding that, on the basis of the information available to Mr Gowans and the account opening department on 2nd August, it cannot be said to have been negligent for them to have acted upon the EBS letter. There was insufficient for them to have been put on enquiry that Dr Smith/Orb intended to use the EBS letter to defraud Izodia.

132. In the circumstances, had we found that RBSI had acted in accordance with the mandate, we would have found that it had not acted in breach of its duty of care and accordingly we would have dismissed Izodia's claim against it.

Conclusions

133. For the reasons given earlier, we find that RBSI did not act in accordance with its mandate and there was no actual authority for the transfers. Its additional defences having failed, we find therefore that, subject to what follows, RBSI is liable to pay Izodia the amounts wrongly debited on 5th August less the sum repaid on 10th September.

134. However, as was held in Limpgrange, a customer to whom a bank is liable in respect of sums wrongly debited from his account, must give credit for any sums which he has recovered from third parties in respect of the sums wrongly debited. A customer cannot recover twice. In this case, Izodia has made certain recoveries from LT/Orb although there is a dispute as to the extent or value of these recoveries. The Court ordered at a pre-trial hearing that this issue should be left over and that the Court should consider at this stage simply whether RBSI is liable to Izodia. Accordingly we content ourselves at this stage with holding that RBSI is liable to pay to Izodia the amounts wrongly debited on 5th August less the sum repaid on 10th September and less any recoveries made from LT/Orb as assessed in due course, together with interest as appropriate.

135. We would add that the Court has some sympathy with the Bank. It was after all Izodia which got involved with Dr Smith and, if the transfers on 5th August had been effected upon the written instructions of two authorised signatories of Izodia as per the mandate (e.g. Mr Catto and Mr Vahey), Izodia's claim would have failed. The difference in this case is that rather than write a cheque, two signatories wrote the EBS letter and the payments were actually made on the instructions of an LT/Orb Authoriser. Nevertheless, as Slynn J said in London Intercontinental where a bank acts upon an instruction which is not in accordance with the mandate, it takes upon itself the risk that such instruction was in fact given without the actual authority of the customer.

136. Finally, we should like to pay tribute to the quality of the oral and written submissions in this case, which have greatly assisted us in our task. We express our gratitude to Mr O'Connell and Mr Blakeley and to those who sat behind them.

Authorities

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