11/2/02

IN THE GRAND COURT OF THE CAYMAN ISLANDS

CAUSE NO. 580 of 2001

THE HONOURABLE MR. JUSTICE KELLOCK (In Chambers)

BETWEEN:

Christopher D. Johnson
Jeffrey A. Nason
Executors of the Estate of Cornelius Beukenkamp, Deceased

PLAINTIFFS

AND

(1) Cheryl Gale Watt (aka Cherry Watt)
(2) Christina McTaggart
(3) Joseph Daniel Watt
(4) David Samuel Watt
(5) CIBC Bank & Trust Co (Cayman) Limited
(6) National Building Society of Cayman
(7) Cayman Finance Services Ltd.
(8) Cayman National Bank

DEFENDANTS

APPEARANCES:

Andrew Jones for the Plaintiffs

Del Magner for the Fifth Defendant

REASONS FOR JUDGMENT

Kellock, J.

On December 8, 1998, Cornelius Beukenkamp M.D., who was then residing in the Cayman Islands, made his last will and testament leaving the bulk of a large estate to two American Universities and a Foundation established in his name. He left small bequests to some members of his family and indicated that other family members had already been adequately provided for. Dr. Beukenkamp then appointed Cherry Watt (who is described in a letter written by the doctor in October, 1999 as "my loyal friend for fifteen years") as the sole Executrix and Trustee. He died in November 1999 and in due course a grant of probate was made to Cherry Watt (hereinafter "Watt") on June 23, 2000.

Within a very short period of time Watt commenced distributing the doctor's funds to herself although she was not a beneficiary of the Estate and not entitled to do so. On February 8, 2001, Watt opened a new account with the Fifth Defendant, CIBC Bank & Trust Co (Cayman) Limited (hereinafter called "CIBC") into which she deposited U.S. $170,000.00 of Dr. Beukenkamp's money. This deposit, which I will call the "Watt deposit" was made by way of a Royal Bank of Canada draft payable to CIBC. (First Affidavit of Christopher Johnson paragraph 4). By virtue of a credit agreement between Café del Sol Ltd., several individuals including Watt and CIBC, the U.S. $175,000.00 became a "hypothecated fixed deposit" which was pledged as security for a loan to Café del Sol Ltd. of CI $190,000.00. It seems that on the day before (February 7, 2001) Cherry Watt had signed a direction or authorization to CIBC authorizing it to;

> "retain and hold all monies both principal and interest, payable in respect of all term deposits in the name of the undersigned, which now are or which from time to time may be placed with your branch whether or not evidenced by money market investment certificates, term deposit receipts or other documents as a general and continuing collateral security for the payment of all present and future indebtedness and liability of the undersigned to the Bank wheresoever and howsoever incurred and any ultimate unpaid balance thereof (the "indebtedness").
>
> The Bank may from time to time upon default and the payment of any part of the indebtedness and without notice, appropriate the said money or any part thereof notwithstanding that the subject deposit may not have matured or the terms thereof may not permit payment prior to maturity, towards payment of such parts of the business as the Bank in its discretion may see fit without prejudice to the Bank's rights against the undersigned for any deficiency."

The Café del Sol Ltd. credit agreement states that it is guaranteed by *inter alia* Cherry Watt and that Cherry Watt's guarantee is supported by a "hypothecated fixed deposit" in the amount of U.S. $170,000.00 together with a registered first charge on property known as Lower Valley Block 38D, Parcel 29. There is a schedule attached to the credit agreement entitled "Schedule – Standard Credit Terms". The Watt Guaranty is dated June 13, 2001. It is a CIBC form but the copy provided to me is almost illegible.

The evidence discloses that Café del Sol Ltd. carries on a restaurant business and that the CI $190,000.00 loan was to be used to establish that business. It also appears that one of the named individual guarantors was a Christina McTaggart, Cherry Watts daughter and that she may have had an interest in the restaurant business.

There was a delay in the "drawdown" of this loan and as a result a further credit agreement was prepared in the same terms and was executed by all the relevant parties in June 2001 (it is dated June 8, 2001). There does not seem to be any doubt that the Bank advanced funds to Café del Sol Ltd. on the strength *inter alia* of the Watt guarantee.

The evidence indicates that the loan is now in good standing but may be discharged in the near future if the restaurant business is sold. If the loan runs its course it is repayable by eighty-four regular blended monthly payments of principal and interest. The last of these payments together with any then outstanding principal and interest is to be made on May 31, 2006.

In due course, the University beneficiaries discovered Watt's fraud and steps were taken to replace Watt as the Executrix of the Estate. An Amended Grant of Probate dated August 1, 2001 was issued to the Plaintiffs and this action was commenced on September 18, 2001 by Writ of Summons.

The evidence is that the Bank was not aware of the Estate's claims until September 28, 2001. The Bank's Senior Manager – Credit, swears that at the date of the commencement of the relationship between the Bank and Mrs. Watt, CIBC had no notice of any alleged wrongdoing on her part or "that any funds she had at her disposal could be tainted". It appears that on September 28, 2001 the Bank received a Direction signed by Watt instructing the Bank to pay the "fixed deposit of U.S. $170,000.00 plus accrued interest forthwith" to the Plaintiff Johnson. By then Watt had admitted her fraud and come to terms with the Plaintiffs.

The CIBC filed and served an acknowledgement of service of the Writ and Notice of Intention to Defend on October 26, 2001.

The Plaintiffs' initial claim against the Bank was limited to a claim for an order to produce documents relating to the Watt deposit of U.S. $170,000.00 and the disposition of those monies. On October 31, 2001 the Plaintiffs amended the Writ of Summons by (*inter alia*) extending their claim against the Bank to a claim for payment of the U.S. $170,000.00 and damages. This amendment was made without the leave of the Court. As a result, Mr. Magner objected to the amendment on the basis that it asserted a new cause of action and accordingly could not have been properly made without leave.

A Statement of Claim was delivered by CIBC on October 21, 200 which basically tracks the claim made in the Amended Writ of Summons.

On November 9, 2001, the Plaintiffs' attorneys issued a Summons returnable January 14, 2002 for:

1. without prejudice to the contention that the Writ was validly amended pursuant to GCR 0.20, r.1, an order pursuant to GCR 0.20, r. 5 for leave to make the amendment; and

2. summary judgment pursuant to GCR 0.14, r.1

I advised counsel during the argument that I could not find that the Bank had suffered or would suffer any prejudice by reason of that amendment that could not be compensated for by a cost order and accordingly the leave sought by paragraph 1 of the Summons was granted.

The Application for Summary Judgment

CIBC resists the application for summary judgment on both procedural and substantive grounds. I will deal with the latter first.

The Substantive Issue

The Plaintiff characterizes its claim against the Bank as a claim for money had and received and contends that it is entitled to succeed if it establishes :

(a) that the Plaintiffs had legal title to the money at the time it came into the Bank's hands;

(b) the money was in fact received by CIBC; and

(c) that by receipt of that money CIBC was unjustly enriched at the Plaintiffs expense.

Mr. Jones asserted that the first two limbs of the Plaintiffs' claims were plainly established and therefore the issues to be resolved in order to decide the application for summary judgment were:

(a) whether CIBC could rely upon the defences of *bona fide* purchaser for value without notice and/or change of position; and

(b) if so, what is the effect of those defences upon the remedies available to the Plaintiffs.

In his Supplementary Skeleton Argument, Mr. Jones conceded that:

(a) CIBC acted *bona fide* (although it may have been negligent in failing to carry out any due diligence in failing to establish the source of Mrs. Watt's funds); and

(b) CIBC changed its position in that it lent more than it would otherwise have lent upon the security it obtained from Mrs. Watt.

In Mr. Jones' submission whether or not CIBC will ultimately make a profit or a loss on its loan to Café del Sol Ltd. can only be determined with the benefit of hindsight. However, he contended that the Court was obliged "to make a determination on the balance of probabilities on the basis of the evidence presently available as to whether or not the CIBC had or would sustain a loss." I must say that I cannot accept the latter proposition.

In his initial Skeleton Argument, provided before the Plaintiffs were aware of the February 7, 2001 authorization (provided to the Bank by Watt), Mr. Jones argued that the Plaintiff was entitled by way of summary judgment, at least to a declaration that the CIBC holds the principal and interest resulting from the Watt deposit of U.S. $170,000.00 upon a constructive trust for the benefit of the Plaintiffs subject to its

security interests in respect of the outstanding obligations of Café del Sol Ltd. In addition, according to Mr. Jones, the Plaintiffs are entitled to an accounting of the dealings between the CIBC and Café del Sol Ltd. concerning the U.S. $170,000.00. Mr. Jones submitted that the burden was on CIBC to satisfy the Court that it was a *bona fide* purchaser for value without notice and that this defence could not be sustained because CIBC's obligation to repay its depositor (Watt) did not amount in law to value or consideration sufficient to sustain the *bona fide* purchaser defence. He relied on a passage taken from Warne & Elliott Banking Litigation (para. 1-05) for the proposition that a claim for money had and received would be sustained if the Plaintiff showed:

(a) that he had legal title to certain money;

(b) that that money was received by the Defendant; and

(c) that by the receipt of that money the Defendant was unjustly enriched at the Plaintiff expense.

In addition, Mr. Jones relied on the judgment of Lord Templeman in *Lipkin Gorman* v. *Karpnale Ltd.* (1991), 2 A.C. 548 at 562, (1992) 4 All E.R. 512, at 519 as follows:

> "If a thief deposits stolen money in a building society, the victim is entitled to recover the money from the building society without producing the pass book issued to the thief. As against a victim, the building society cannot pretend that the building society gave good consideration for the acceptance of the deposit. The building society has been unjustly enriched at the expense of the victim. Of course the building society has a defence if the building society innocently pays out the deposit before the building society realises the deposit was stolen money."

I will return to the last sentence in this passage in due course.

While it is now conceded that the CIBC acted *bona fide* in its dealings with Watt, Mr. Jones contends that the Bank must still account to the Plaintiffs for the U.S. $170,000.00 on the basis that this money (or some part of it) is not required by the Bank as security for the Café del Sol Ltd. loan.

On behalf of the Bank Mr. Magner contends that the application for summary judgment should be dismissed on the grounds that:

1. This is not a proper case for summary judgment; and
2. CIBC has a valid charge over the Watt funds and is a *bona fide* purchaser for value without notice.

Mr. Magner referred to two cases in support of his submissions i.e. *J.R. Thomson* v. *Clydesdale Bank Limited* (1893), A.C. 282, (H.of L.) and *MacMillan Inc.* v. *Bishopsgate Investment Trust PLC* (1995), 1 W.L.R. 978 (Millett, J.), the notorious Robert Maxwell fraud case.

The *Clydesdale Bank* case involved a cheque paid by a stockbroker to the credit of his account at the Bank which at the time was overdrawn. This money belonged to the broker's customers (not to the broker). The broker had absconded and was in fact insolvent. In these circumstances, the broker's customers sought to recover the money from the Bank. It was argued on their behalf that the Bank had failed to make any enquiries as to the source of the deposit and should have known that the money did not

belong to the broker.. During the argument Lord Herschell, L.C. referred to *London Joint Stock Bank v. Simmons* (1892), AC 201 and in his judgment (with which Lord Watson, Lord Morris and Lord Shand agreed) said: (at p. 287)

> "At the time when the cheque was paid in, Mr. Thomson's account with the Clydesdale Bank was overdrawn to an amount exceeding the amount so paid. Some few days afterwards Mr. Thomson absconded, and application was then, or shortly afterwards, made by the appellants for the payment to them by the Clydesdale Bank of the sum of money which they had so received from Mr. Thomson. After the date of the receipt of that cheque some small amounts were drawn upon his account by Mr. Thomson, but the amount so drawn was greatly less than the sum paid to his account in the manner which I have described to your Lordships. The question is whether under these circumstances the appellants are entitled to follow, as it is called, this sum of money and to require its payment to them by the Clydesdale Bank, or whether the Clydesdale Bank are entitled to retain it in discharge *pro tanto* of the debt which was due from Mr. Thomson.
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> It cannot, I think, be questioned that under ordinary circumstances a person, be he bank or other, who takes money from his debtor in discharge of a debt is not bound to inquire into the manner in which the person so paying the debt acquired the money with which he pays it. However that money may have been acquired by the person making the payment, the person taking that payment is entitled to retain it in discharge of the debt which is due to him. But it is said that in the present case the bankers took with notice that the sum which they received was a sum of money not belonging to their debtor personally, but which he held or had

> received for other persons, and that, having had this knowledge or notice, they are not entitled to retain it in discharge of Mr. Thomson's debt. My Lords, I cannot assent to the proposition that even if a person receiving money knows that such money has been received by the person paying it to him on account of other persons, that of itself is sufficient to prevent the payment being a good payment and properly discharging the debt due to the person who received the money."

I asked Mr. Jones during the argument whether or not that decision put an end to the Plaintiffs claims against CIBC in this case. Mr. Jones' response was that:

(1). The *Clydesdale Bank* case was somewhat anomalous in that it was not referred to in the standard texts on banking law, and

(2) That the law was now as stated by the House of Lords in *Lipkin Gorman* under which the Plaintiffs were entitled to recover the Watt money except to the extent that CIBC had altered its position to its detriment on the assumption that the money deposited by Watt belonged to her.

Contrary to Mr. Jones' statement, the *Clydesdale Bank* case is referred to in Paget's *Law of Banking* 11th ed, 1996, and in Penn & Shea *The Law Relating to Domestic Banking* 2nd ed, 2000. In addition the *Clydesdale Bank* case is referred to and relied upon in 3(1) Hals 4th ed *inter alia* at para. 160. I must say that I am one of those who regard the Paget book as the leading text on English banking law. The *Clydesdale Bank* case does not stand alone.

In *Union Bank of Australia Limited* v. *Murray-Aynsley* (1898) AC 693 (P.C.) a company (Miles & Co.) received and deposited trust funds in an account at the bank. The company failed and at the time owed a great deal of money to the Bank. The trustees sought to recover the trust monies from the bank. Both the trial judge and the Court of Appeal held that the Bank had no reason to believe that the money did not belong to Miles & Co. Limited. Lord Watson delivered the judgment of the judicial committee and said that it was incumbent upon the trustees to prove that the monies were, to the knowledge of the Bank, trust funds and the only question in the appeal was whether or not they had discharged that onus of proof. The Privy Council held that the onus had not been discharged and the appeal was accordingly allowed.

In *Bank of New South Wales* v. *Goulburn Valley Butter Company*, (1902) AC 543 (P.C.)the company sought to recover from the Bank money which belonged to the company and which its manager (Ballantyne) had arranged to transfer into his own personal account which was overdrawn. Lord Davey gave the judgment and said in part as follows: (at pp. 550-551)

> "The law is well settled that in the absence of notice of fraud or irregularity a banker is bound to honour his customer's cheque *Gray* v. *Johnston*; *Thomson* v. *Clydesdale Bank*, and is entitled to set off what is due to a customer on one account against what is due from him on another account, although the moneys due to him may in fact belong to other persons: *Union Bank of Australia* v. *Murray-Aynsley*. On the other hand, a banker is not justified of his own motion in transferring a balance from what he knows

> to be a trust account of his customer to the same customer's private account: *Ex parte Kingston, In re Gross*. Their Lordships are of opinion that Earle (the Bank Manager) was not bound to inquire into the state of the account between the parties. He had no materials to enable him to do so, and it is difficult to suggest any one of whom he could have made inquiry other than Ballantyne himself. Their Lordships, therefore, hold that the bank is not affected with notice of any irregularity on Ballantyne's part."

Gray v. *Johnston* (1868) L.R. 3 E & I Appeals 1 is a judgment of the House of Lords.

In order to resolve the dispute that has arisen in the case at bar it is necessary to set forth the true legal relationship between the CIBC and Watt on the one hand and the relationship between the Bank and the Plaintiffs on the other.

The relationship between a Bank and its customer is established by contract and is usually the relationship of debtor and creditor.

The following is taken from Paget's Law of Banking 11th ed. at page 161;

> It was settled in *Foley* v. *Hill* that the purely debtor and creditor position excludes any element or suggestion of trusteeship or fiduciary relation in the banker with regard to a current account. The implied agreement between banker and customer as stated by Atkin LJ in *Joachimson's* case is that all money coming to the banker's hands for the credit of a current account are to be taken as lent to the banker. In *Hirschhorn* v. *Evans (Barclays Bank Ltd garnishees)* Mackinnon LJ said that there is never any question of property in the credit balance of a bank

> account; that the relation between the parties is simply that of debtor and creditor. By 'simply' the learned judge probably meant 'basically', for the simple relationship takes no account of the necessity for demand by the creditor which distinguishes the relationship from the normal debtor and creditor relationship.
>
> The banker is free to use the money as his own, like any other borrower; the customer has parted with all control over it, like any other lender, retaining only his right to repayment. And as a consequence the banker is not as a general rule concerned to inquire into the sources whence his customer derived the money, or to pay heed to the claims of third parties seeking to reach it in his hands as being by right theirs. However, this general proposition is subject to important qualifications arising out of a bank's potential liability (i) as constructive trustee and (ii) as a person who knows or suspects of money laundering, both of which are considered in other chapters."

The following is taken from Penn & Shea at page 287:

> "If a bank has no knowledge or notice, actual or constructive, of the existence of a trust, it is not liable if, acting in good faith, it treats the funds in the account as the absolute property of the customer, and it should not refuse to pay on the ground that the funds might belong to others. This principle, asserted in numerous cases, is necessary, for the bank's duty to obey its customer's instructions and pay on his or her cheques on demand would make the practice of banking excessively difficult if the bank had also to investigate its customer's title to the money. The problem for the bank (and it is a real one) is to know what in practice amounts to knowledge or actual or constructive notice sufficient to put it under a duty to inquire (rather than to obey its mandate promptly), and then to decide how

> to make appropriate inquiries without unnecessarily offending its customer.

Both of these passages are based in part on the *Clydesdale Bank* case.

Paragraph 160 in 3(1) Halsbury's (4th ed) is entitled "Customer's title to money paid in"

> "A banker is not entitled to refuse his customer's demand for repayment on grounds of mere suspicion or curiosity. Similarly, where a banker takes money from his customer in discharge of a debt, he is not bound to inquire into the manner in which the person so paying the debt acquired the money with which he pays it.
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> A banker is, however, not only entitled but bound to refuse payment if he has, or a reasonable banker would have, grounds for believing that the authorised signatories on an account are misusing their authority for the purpose of defrauding their principal or otherwise defeating his true intentions, or if he is on notice that the payment is in breach of trust."

Again, the editors of Halsbury rely on the *Clydesdale Bank* case and I note in passing that while the *Clydesdale Bank* case is not referred to in Warne & Elliott this work is (as the authors acknowledge) a discussion of selected topics in banking law not a general banking law text.

As of February 8, 2001 the Watt deposit was a debt owing by CIBC to Watt and it retained that character when it became a "hypothecated Fixed Deposit" pledged to CIBC as part of the security required to support the

loan to Café del Sole Ltd. The CIBC acquired a conditional title to that chose in action.

In *London Joint Stock Bank* v. *Simmons* (1892) AC 201 a Stockbroker pledged negotiable bonds belonging to his customers with the Bank as security for a loan to the Broker. This was unauthorized and a fraud on the customers. The Broker having absconded, the Bank realized the securities. The owner of the securities sued the Bank. A passage from the judgment of Lord Herschell is of interest. He said at page 21:

> "The general rule of the law, is that where a person has obtained the property of another from one who is dealing with it without the authority of the true owner, no title is acquired as against that owner, even though full value be given, and the property be taken in the belief that an unquestionable title thereto is being obtained, unless the person taking it can show that the true owner has so acted as to mislead him into the belief that the person dealing with the property had authority to do so. If this can be shewn, a good title is acquired by personal estoppel against the true owner. There is an exception to the general rule, however, in the case of negotiable instruments. Any person in possession of these may convey a good title to them, even when he is acting in fraud of the true owner, and although such owner has done nothing tending to mislead the person taking them. I shall have to advert hereafter to the conditions which are requisite in order to render the title of one who takes a negotiable instrument valid as against the true owner; but I dwell for the moment on the distinction to which I have called attention, because it is obvious that the facts to be proved by any one seeking to retain property he has obtained as against the person in fraud of whom it has been

> delivered to him, will differ essentially according as that property is or is not a negotiable instrument."

The House of Lords held that as there were no circumstances to create suspicion, the Bank was entitled to retain and realize the securities.

Claims for money, as in this case are treated in the same way.

> "Claims for money (or instruments which are of value to their owners not simply as concrete objects but for the choses in action they represent such as debt, negotiable instruments and cheques) present special problems, for money is not easily identifiable and normally passes into currency so that its holder is able to invoke a defence of *bona fide* purchase"
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> Goff & Jones The Law of Restitution 5th Ed 1998 at p. 96

Accordingly CIBC could acquire good title to Dr. Beukenkamp's money even though Watt had no title and the legal title thereto was vested in the trustees of his Estate. Of course the CIBC did not acquire absolute title. That result was not intended by Watt or CIBC.

Mr. Jones relied on the statement I have quoted from the Judgment of Lord Templeman in *Lipkin Gorman*, in support of the proposition that CIBC's contractual undertaking to repay the money deposited by Watt is not consideration so that CIBC cannot on the facts of this case establish the defence of *bona fide* Purchaser for value without notice. That submission ignores the last sentence in the passage quoted in which Lord Templeman acknowledges that the Building Society had a defence if it paid out the

deposit without notice or reason to suspect that the money deposited was in fact stolen.

When examined carefully the *Lipkin Gorman* case does not assist the Plaintiffs.

Before reaching the House of Lords, the *Lipkin Gorman* case gave rise to the judgment of Alliott J, (reported at (1992) 4 All E.R. 331) and the Court of Appeal (reported at (1992) 4 All E.R. 409).

In *Lipkin Gorman* a dishonest solicitor (Cass) stole client monies from his firm's (Lipkin Gorman's) trust account. Having taken that money Cass lost most of it gambling at the Playboy Club in London, a casino operated by the defendant Karpnale Ltd. The Lipkin Gorman firm sued Karpnale and Lloyds Bank plc in an attempt to recover the money. The claim against the Bank was, *inter alia*, based on the proposition that the Bank should not have allowed Cass to withdraw trust funds knowing that he was a heavy gambler.

The trial judge held that the Bank was liable as a constructive trustee for rendering knowing assistance to Cass in defrauding his firm.

In the Court of Appeal, all three judges, May, Parker and Nicholls L.J.J. held that the action against the Bank failed. The court relied on a number of authorities including *Bank of New South Wales* v. *Goulburn Valley Butter Company*. The following is taken from the judgment of May, L.J., (1992) 4 All E.R. 409 at 418;

> "I turn to the solicitor's claim against the bank based on contract or negligence. We are here concerned with the general relationship between a banker and his customer in the common case where the latter has a current account with the former which is in credit. The underlying basis of this relationship is that it is one of debtor and creditor. The money deposited with a bank becomes its own., It is *prima facie* bound to meet its debt when called upon to do so. As Lord Atkinson said in *Westminster Bank Ltd.* v. *Hilton* (1926), 43 T.L.R. 124 at 126:
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> > 'It is well established that the normal relation between a banker and his customer is that of debtor and creditor, but it is equally well established that *quoad* the drawings and payment of the customer's cheques as against money of the customer's in the banker's hands the relation is that of principal and agent. The cheque is an order of the principal's addressed to the agent to pay out of the principal's money in the agent's hands the amount of the cheque to the payee thereof.'
>
> Indeed any failure by a bank to honour its customer's instructions may well redound to the serious discredit of the customer himself."

Parker, L.J. held that Cass was an exceedingly cunning person and that the bank manager was not negligent (despite his knowledge of Cass' fondness for gambling) in failing to suspect that Cass was misapplying trust funds. He said at page 444:

> "I do not consider that a case of negligence has been made out, still less a case that the bank were liable as constructive trustees. I would therefore allow the appeal of the bank and dismiss the cross-appeal of the solicitors under this head." :

Nicholls, L.J. who dissented with respect to the Playboy Club's liability agreed with Parker, L.J. that the case against the Bank failed.

The judgment of the House of Lords, upon which Mr. Jones relies, was delivered in the appeal by the solicitors from the judgment of the majority of the Court of Appeal allowing the Playboy Club's appeal from the Judgment of Alliott, J. and dismissing the solicitors claims against the club.

No appeal was taken by the solicitors against the judgment of the Court of Appeal dismissing the solicitors claims against the Bank. There is nothing in any of the speeches in the House of Lords which casts any doubt whatsoever on the law which has been laid down in the banking cases which I have mentioned.

Consequently as CIBC had no notice of any defect in Watt's title to the U.S. $170,000.00 or any reasons to suspect that she was not entitled to make the deposit, the CIBC was entitled to deal with her as with any other honest customer of the Bank.

The CIBC would not have been liable to the Plaintiffs had it honoured a cheque or cheques written by Watts on her account and paid all of the money out to the payees of those cheques. Whether or not the Plaintiffs could recover that money from those payees is an entirely different question.

be paid to the Plaintiff Johnson it seems to me that the Plaintiffs are entitled to it subject to the CIBC's interest.

In *Bentinck* v. *London Joint Stock Bank* (1893) 2 Ch 120 a firm of Stockbrokers pledged their clients securities to the Bank to secure loans. The firm became bankrupt and the rightful owner of some of these securities sued the Bank claiming to be entitled to redeem them on paying to the Bank the amount he owed to the brokerage firm. North, J. held that there was nothing in the evidence to lead the Bank to suppose that the stocks and shares were not the broker's property. He then said at page 145:

> "Under these circumstances, I come to the conclusion that the bank are entitled to hold these stocks, shares, and bonds as a security for what is due upon the balance of account between themselves and the brokers who deposited them. Of course, that does not displace the Plaintiffs' right to an account, if they ask for it; but it is admitted that what is due to the bank upon that footing is much more than the value of the securities. No relief, therefore, is asked by the Plaintiffs upon that footing. Upon the ground on which alone they ask relief, in my opinion, they are not entitled to it, and, therefore the action must be dismissed, with the usual consequences."

As Mr. Jones concedes that there is nothing in the evidence before me to suggest that CIBC should have had any reason to suspect that Watt was misappropriating trust funds, it is clear that the CIBC ranks in priority to the Plaintiffs in its claim to the U.S. $170,000.00. However, there is no reason to conclude that if it turns out that the money is not required as

security, it should not be returned to the Plaintiffs together with accrued interest (if any).

Therefore, subject to Mr. Magner's objections based on the *Rules of Practice*, I can see no reason why a declaration to that effect should not be granted.

The Procedural Issue

Mr. Magner took the position that summary judgment may not be granted unless a Statement of Claim has been served, either as part of the Writ of Summons or served as a separate pleading. He contends that as the amendment purportedly made to the Writ was improper, the Statement of Claim (which reflects that amendment) is also defective. As stated earlier, that problem no longer exists as I gave leave to the Plaintiffs to make the amendment which has been made to the writ, *nunc pro tunc*.

In my opinion, the primary purpose of the *Rules of Practice* relating to pleadings is to ensure that litigation is conducted fairly. That of necessity requires the observance of some formalities so that each party may be informed on a timely basis of the case he will be called upon to meet. However, the *Rules* should also promote the most expeditious and least expensive determination of civil disputes possible consistent with the fairness objective. There is no doubt in my mind that the CIBC would have known what this contest was about as soon as it received the original Writ of Summons and became aware that their customer, Watt had been

accused of misappropriating Dr. Beukenkamp's money. As early as October 11, 2001, the CIBC advised the Plaintiffs' attorneys that the matter was being addressed by the Bank "directly with Mrs. Watt". On October 12, 2001, the Bank's attorneys were advised by Mr. Jones that the U.S. $170,000.00 was, on Ms. Watt's admission, the estates' money. That was followed by a host of what I will call "posturing" correspondence between the Plaintiffs and CIBC's attorneys.

The Summons seeking summary judgment was issued on November 9, 2001 and the Plaintiffs intention to make that application was conveyed to the CIBC's attorneys by letter dated November 14, 2001. On November 20, 2001, Mr. Magner wrote to the Listing Officer of this court to say that the Bank's insistence on the Plaintiff obtaining leave to amend the Writ of Summons before launching an Application for Summary Judgment was not a refusal to deal with the merits of the case. Mr. Magner advised the court that the Bank would address the merits if and when the required leave to amend the Writ of Summons had been obtained.

The Summons seeking summary judgment was served on November 27, 2001. The Affidavit of Philip Swenerton (the Senior Manager – Credit) which was provided in response to the summary judgement application was not sworn until January 9, 2002 and not filed until January 10, 2002 leaving two working days between that date and January 14, 2002 when the application was to be argued. Of even greater significance is the fact that until Mr. Swenerton's affidavit was served, the CIBC had not

disclosed the key documents upon which it now relies to establish its priority over the Plaintiffs claim in respect of the stolen money (documents it would have been obliged to produce in this litigation). When this was pointed out in argument, Mr. Magner referred to the Confidential Relationships (Preservation) Law (1995 revision). But that Law has no application to the seeking or divulging of information by a bank in any proceedings...when and to the extent to which it is reasonably necessary (to divulge) for the protection of the Bank's interest either as against its customers or as against third parties in respect of transactions of the Bank for or with its customer (Section 3(2)(b)(v)). I cannot understand why the CIBC would not (after it was sued) have disclosed these key documents to the Plaintiffs' attorneys at the earliest possible moment. In my judgment, had the Bank done so this litigation could have been easily and quickly resolved by agreement and this application would never have been necessary. If the litigation had not been so resolved then the Plaintiffs would have proceeded at the risk of incurring cost penalties.

In my opinion, this court does not exist (and no court should exist) to decide which party has taken the best advantage of the *Rules of Practice* as an exercise in "game playing" unconnected with the underlying merits of a party's cause of action or defence.

Conclusion

I am unable to identify any issue that can or should be resolved by a trial. As I have found the parties rights to and interest in the Watt deposit of

U.S. $170,000.00 are clearly established. Accordingly, nothing remains but to see if and to what extent the Bank's rights will have to prevail over the Plaintiffs rights and there is therefore nothing that a trial can accomplish at this point in time. It is therefore appropriate to grant the declaration I have described by way of summary judgment I should say that I did not find any of the draft judgments provided to me by Mr. Jones to be appropriate.

Judgment will therefor issue declaring that:

1. CIBC holds the sum of U.S. $170,000.00 together with any interest and subject to any fees which would have accrued to the first Defendant by reason of the deposit by her of U.S. $170,000.00 to an account at CIBC or in respect of any product of that deposit subject to the CIBC's right to use such money or the product thereof as security for a loan to Café del Sol Ltd. as conferred by or purportedly conferred by the first Defendant in 2001.

2. The Plaintiffs are entitled to an accounting of the interest and fees referred to in paragraph 1 and any and all other transactions undertaken or to be undertaken by CIBC in relation to the money described in paragraph 1 or the product thereof.

The final judgment will in addition to the declaration I have described, provide that the costs of the action, including the costs of the application for summary judgment shall be taxed on the standard basis, if not agreed,

and paid by the CIBC to the Plaintiffs forthwith. The costs of the action will of course be limited to the costs of the action as against the CIBC.

February 15 2002.

Kellock J.