COURT OF APPEAL

28 February–1 March; 20 March 2007

ARCHITECTS OF WINE LTD
v
BARCLAYS BANK PLC

[2007] EWCA Civ 239

Before Sir MARK POTTER, President
Lord Justice RIX and
Lord Justice WILSON

Banking — Cheque — Conversion — Director of claimant company arranging for claimant's cheques to be paid into account of associated company at defendant bank — Whether bank acted without negligence — Cheques Act 1957, section 4(1).

The claimant (AoW Ltd) was a Cayman Island company which commenced business in July 2003 selling long-term, forward wine contracts to customers in the United States. AoW Ltd was a subsidiary of Paradigm Holdings Ltd (Paradigm), of which M was the sole shareholder. M was also the sole director of AoW Ltd and of another company owned by Paradigm, Architects of Wine UK Ltd (AoW UK), a wine merchant in England.

AoW Ltd had two bankers in the Cayman Islands which had correspondent banks in the United States. AoW UK had an account with the defendant bank (the bank) in England

By March 2004 AoW Ltd was facing difficulties with the US regulatory authorities. Two states issued "cease and desist" orders on the basis that AoW Ltd's business amounted to unlawful marketing and selling of securities. At about the same time AoW Ltd's Cayman Islands banks and their US correspondents stopped accepting payments from AoW Ltd's customers. M arranged for cheques received from AoW Ltd customers to be couriered to the United Kingdom to AoW UK for presentation to the bank.

By early September 2004 some 400 cheques to the value of US$1.3 million had been paid into AoW UK's account with the bank. In the event, almost the entirety of the monies was paid away.

Paradigm went into liquidation in October 2004 and AoW Ltd shortly thereafter. In the petition to wind up Paradigm it was alleged that M had used the Paradigm group of companies to defraud the US investors.

AoW Ltd, by its liquidator, brought proceedings against the bank claiming damages for conversion in respect of the cheques paid into the AoW UK account.

AoW Ltd applied for summary judgment and the bank issued a cross-application for summary judgment, contending that M had authorised the transfer of cheques, and relying on the statutory defence under section 4 of the Cheques Act 1957.

At first instance David Steel J gave summary judgment for AoW Ltd on liability ([2007] 1 Lloyd's Rep 55). He held that the bank had converted AoW Ltd's cheques. The transfer of the cheques was a fraud committed by M against AoW Ltd and its creditors, and was not capable of being authorised by M. The bank had no realistic prospect of establishing the Cheques Act defence because the bank had failed to establish a *prima face* case of due care.

The bank appealed, contending that the judge was wrong on the Cheques Act defence.

———*Held*, by CA (Sir MARK POTTER P, RIX and WILSON LJJ) that the appeal would be allowed:

(1) The qualified duty under section 4 of the Cheques Act 1957 did not require an assumption of negligence just because a bank bore the burden of showing that it took reasonable care. The enquiry was fact sensitive. Current banking practice was highly relevant to the issue of negligence. A bank's evidence about its practice was, especially if unchallenged, relevant evidence of the current practice of bankers, and a court would be hesitant to reject such evidence. Notice of what was so out of the ordinary as to arouse doubts in a banker's mind or put him on enquiry was a relevant test of negligence, and might make the proof of the taking of reasonable care very difficult. However, the courts should be wary of hindsight or of imposing on a bank the role of an amateur detective (*see* para 12);

———*Marfani & Co Ltd v Midland Bank Ltd* [1968] 1 Lloyd's Rep 411, *Commissioners of Taxation v English, Scottish and Australian Bank Ltd* [1920] AC 683, *Lloyds Bank Ltd v The Chartered Bank of India, Australia and China* [1929] 1 KB 40 at page 59, *A L Underwood Ltd v Bank of Liverpool & Martins* [1924] 1 KB 775, and *Honourable Society of the Middle Temple v Lloyds Bank plc* [1999] 1 All ER (Comm) 193 considered.

(2) The bank's evidence that its employees conformed with current banking practice and that there was nothing out of the ordinary to put the bank on inquiry was unchallenged, and the court was not in a position to reject it as raising no realistic prospect of a good defence, even bearing in mind that it was the bank that bore the burden of showing that it acted with reasonable care (*see* para 61).

The following cases were referred to in the judgment of Rix LJ:

Commissioners of State Savings Bank v Permewan, Wright & Co (1914) 19 CLR 457;

Commissioners of Taxation v English, Scottish and Australian Bank Ltd (PC) [1920] AC 683;

Liggett (Liverpool) Ltd v Barclays Bank Ltd [1928] 1 KB 48;

Lloyds Bank Ltd v Savory and Co (HL) (1932) 44 Ll L Rep 231; [1933] AC 201;

Lloyds Bank Ltd v The Chartered Bank of India, Australia and China (CA) [1929] 1 KB 40;

Marfani & Co Ltd v Midland Bank Ltd (CA) [1968] 1 Lloyd's Rep 411;

Middle Temple (Honourable Society of) v Lloyds Bank plc [1999] 1 All ER (Comm) 193;

Ross v London County Westminster and Parr's Bank [1919] 1 KB 678;

Underwood (A L) Ltd v Bank of Liverpool & Martins (CA) [1924] 1 KB 775.

This was an appeal by the defendant Barclays Bank plc against the decision of David Steel J ([2007] 1 Lloyd's Rep 55) giving summary judgment in favour of the claimant Architects of Wine Ltd on the claimant's claim for conversion of its cheques.

Alan Steinfeld QC and Alexander Pelling, instructed by Simmons & Simmons, for Barclays Bank; Michael Black QC and Seamus Andrew, solicitor advocate, instructed by SimmonsCooper-Andrew, for the claimant.

The further facts are stated in the judgment of Rix LJ.

Judgment was reserved.

Tuesday, 20 March 2007

JUDGMENT

Lord Justice RIX:

1. The question on this appeal is whether Barclays Bank plc (the "bank") is entitled to say that the judge was wrong to give summary judgment against it for conversion of the claimant's cheques. About US$1.3 million is in issue. The essence of the matter is that over a period from April to September 2004 the bank credited its customer, Architects of Wine (UK) Ltd ("AoW UK"), with the proceeds of some 400 cheques to which its customer did not have title. The cheques in fact belonged to an associate company with a similar name, Architects of Wine Ltd ("AoW Ltd"). The bank sought to set up a defence under section 4 of the Cheques Act 1957 against its strict liability for conversion of the cheques. The effect of that section is that the bank has a defence if it can sustain the burden of proving the absence of negligence. The judge, Mr Justice David Steel, sitting in the Commercial Court, held that Barclays "has fallen well short of establishing any realistic prospect of success on the issue of negligence". The bank submits that he was wrong.

Section 4 of the Cheques Act 1957

2. Section 4 provides:

> (1) Where a banker, in good faith and without negligence,
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> (a) receives payment for a customer of an instrument to which this section applies; or
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> (b) having credited a customer's account with the amount of such an instrument, receives payment thereof for himself;
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> and the customer has no title, or a defective title, to the instrument, the banker does not incur any liability to the true owner of the instrument by reason only of having received payment thereof.

The authorities

3. We were provided with a substantial selection of relevant authorities on section 4 and its statutory predecessors. Many of them concern the payment by rogues into *personal* accounts of cheques drawn on their company, employers or other principals and which they had stolen or created without authority. Factually, such cases are rather far from the present. Nevertheless, as often in this area of the law, the leading case of *Marfani & Co Ltd v Midland Bank Ltd* [1968] 1 Lloyd's Rep 411 is well worth consulting, not for its facts (which concerned a rogue who opened a new account under a false name with the help of an incorrect reference from a valued customer) but for its statements of general principle.

4. Thus Diplock LJ said this about section 4 (at pages 422 col 1 to 423 col 2):

> It is, in my view, clear that the intention of the subsection and its statutory predecessors is to substitute for the absolute duty owed at common law by a banker to the true owner of a cheque not to take any steps in the ordinary course of business leading up to and including the receipt of payment of the cheque, and the crediting of the amount of the cheque to the account of his customer, in usurpation of the true owner's title thereto a qualified duty to take reasonable care to refrain from taking any such step which he foresees is, or ought reasonably to have foreseen was, likely to cause loss or damage to the true owner.
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> The only respect in which this substituted statutory duty differs from a common law cause of action in negligence is that, since it takes the form of a qualified immunity from a strict liability at common law, the onus of showing that he did take such reasonable care lies upon the defendant banker. Granted good faith in the banker (the other condition of the immunity), the usual matter with respect to which the banker

must take reasonable care is to satisfy himself that his own customer's title to the cheque delivered to him for collection is not defective, ie, that no other person is the true owner of it. Where the customer is in possession of the cheque at the time of delivery for collection and appears upon the face of it to be the "holder", ie, the payee or indorsee or the bearer, the banker is, in my view, entitled to assume that the customer is the owner of the cheque unless there are facts which are, or ought to be, known to him which would cause a reasonable banker to suspect that the customer was not the true owner.

What facts ought to be known to the banker, ie, what inquiries he should make, and what facts are sufficient to cause him reasonably to suspect that the customer is not the true owner, must depend upon current banking practice, and change as that practice changes. Cases decided 30 years ago, when the use by the general public of banking facilities was much less widespread, may not be a reliable guide to what the duty of a careful banker in relation to inquiries, and as to facts which should give rise to suspicion, is today . . .

What the court has to do is to look at all the circumstances at the time of the acts complained of and to ask itself: were those circumstances such as would cause a reasonable banker possessed of such information about his customer as a reasonable banker would possess, to suspect that his customer was not the true owner of the cheque? . . .

In all actions of the kind with which we are here concerned, the banker's customer has in fact turned out to be a fraudulent rogue, and attention is naturally concentrated upon the duty of care which was owed by the banker to the person who has in fact turned out to be the true owner of the cheque. We are always able to be wise after the event, but the banker's duty fell to be performed before it, and the duty which he owed to the true owner ought not to be considered in isolation. At the relevant time, the true owner was entitled to take into consideration the interests of his customer, who, be it remembered, would in all probability turn out to be honest, as most men are, and his own business interests, and to weigh those against the risk of loss or damage to the true owner of the cheque in the unlikely event that he should turn out not to be the customer himself.

5. Diplock LJ added this about the evidence of the practice of bankers (at page 424 col 1):

> The only evidence of the practice of bankers was given by the manager and the securities clerk of the branch in question of the defendant bank. No evidence that the general practice of other bankers differed from that adopted by the defendant bank was called by the plaintiff company, although they knew well in advance of the trial, as a result of searching interrogatories, exactly what steps the defendant bank had taken, and what inquiries they had made. It seems a reasonable inference that what the defendants did in the present case was in accordance with current banking practice. Nield J accepted that it was, and Mr Lloyd has not sought to argue the contrary. What he contends is that this court is entitled to examine that practice and to form its own opinion as to whether it does comply with the standard of care which a prudent banker should adopt. That is quite right, but I venture to think that this court should be hesitant before condemning as negligent a practice generally adopted by those engaged in banking business.

6. One of the tests of what is negligent that has been sounded in the authorities relates to what is out of the ordinary course of business. Thus in *Commissioners of Taxation v English, Scottish and Australian Bank Ltd* [1920] AC 683 at page 688, Lord Dunedin, giving the opinion of the Privy Council, approved (with the addition of the words in italics cited below) the statement of Isaacs J in the High Court of Australia in *Commissioners of State Savings Bank v Permewan, Wright & Co* (1914) 19 CLR 457 at page 478 that:

> the test of negligence is whether the transaction of paying in any given cheque [*coupled with the circumstances antecedent and present*] was so out of the ordinary course that it ought to have aroused doubts in the bankers' mind, and caused them to make inquiry.

7. That test was to be applied by "the standard to be derived from the ordinary practice of bankers, not individuals" (at page 689). Isaacs J's test was again approved by this court in *Lloyds Bank Ltd v The Chartered Bank of India, Australia and China* [1929] 1 KB 40 at page 59 (Scrutton LJ) and page 72 (Sankey LJ). In this connection, we have been reminded, as a counterpoint to what Diplock LJ said in *Marfani* at page 974, of what Scrutton LJ said in *A L Underwood Ltd v Bank of Liverpool & Martins* [1924] 1 KB 775 at page 793 of unusual circumstances:

> If banks, for fear of offending their customers will not make inquiries into unusual circumstances, they must take with the benefit of not annoying their customer the risk of liability because they do not inquire.

8. For these purposes, it is relevant to consider the nature of the employee of the bank before whom the cheque in question will come for action. If a cheque will only come before a cashier, then the

question of negligence has to be applied to the role of a cashier. In *Lloyds Bank Ltd v The Chartered Bank* at page 72 Sankey LJ also approved of what Bailhache J had said in *Ross v London County Westminster and Parr's Bank* [1919] 1 KB 678 at page 685, viz:

> I must attribute to the cashiers and clerks of the defendants the degree of intelligence and care ordinarily required of persons in their position to fit them for the discharge of their duties. It is therefore necessary to consider whether a bank cashier of ordinary intelligence and care on having these cheques presented to him by a private customer of the bank would be informed by the terms of the cheques themselves that it was open to doubt whether the customer had a good title to them.

9. In many circumstances, however, the conduct of a careful banker's business will mean that the supervision or knowledge of a manager (of some or other level of seniority) will be relevant, for example on the occasion of the opening of an account for a new customer. In this connection consideration may have to be given to the vastness of a modern bank's enterprise. Cheques without number have to be handled by clerical staff or even by wholly automatic processes. What is the bank's duty then in terms of negligence? One answer was given in *Honourable Society of the Middle Temple v Lloyds Bank plc* [1999] 1 All ER (Comm) 193 at page 228 (*per* Rix J):

> When, however, the cheque emerges from that multitude and is referred by the clerical staff to management, albeit only as a result of an inquiry after fate, it seems to me that different considerations come into play. The cheque is no longer a mere item following a course in a factory-like process. It no longer becomes impracticable to give it individual attention, or the attention of management. It is referred for just such individual attention, even if the cause of referral is something collateral.

10. In this connection, Mr Michael Black QC on behalf of the claimant respondent, AoW Ltd, now in liquidation, submitted that all aspects of a bank's knowledge about a customer are to be assumed to be accumulated in every employee of the bank, so that a bank cannot rely on any division of knowledge between department and department. For these purposes he relied on a passage in *Lloyds Bank Ltd v Savory and Co* (1932) 44 Ll L Rep 231; [1933] AC 201 at page 213, per Lord Buckmaster. He submitted that *a fortiori* in the era of computers and information technology, banks could not rely on ignorance as between different departments or officials of a bank. I take the point about computer and information technology. The observations of Lord Buckmaster, however, were dealing with a different problem, viz where the system adopted by the bank made it impossible to achieve what it was acknowledged a proper system of checking the contents of a cheque ought to do. I do not think that it follows that Mr Black's submission is correct, and we have not been referred to an authority which supports it. If it were correct, it would be a very big point. It might be said against it that it would be liable to make banking impossible. In any event I do not think that such a proposition could be adopted without evidence of current banking practice.

11. I referred above to Diplock LJ's dictum from *Marfani* of the inappropriateness of simply being wise after the event. That of course is a standard insight in the context of a duty of reasonable care. In this connection we were also referred to what Sankey LJ said in *Lloyds Bank Ltd v Chartered Bank* at page 73, that:

> a bank cannot be held to be liable for negligence merely because they have not subjected an account to a microscopic examination. It is not to be expected that the officials of banks should also be amateur detectives.

12. In sum, I would for present purposes underline the following matters as being indicated by these authorities. The section 4 qualified duty does not require an assumption of negligence just because a bank bears the burden of showing that it took reasonable care. The enquiry is fact sensitive. Current banking practice is highly relevant to the issue of negligence. A bank's evidence about its practice is, especially if unchallenged, relevant evidence of the current practice of bankers. A court is not bound by such evidence, but it will be hesitant to reject it. Notice of what is so out of the ordinary course of events as to arouse doubts in a banker's mind or put him on enquiry is a relevant test of negligence, and may make the proof of the taking of reasonable care very difficult. However, the courts should be wary of hindsight or of imposing on a bank the role of an amateur detective. Ultimately, these principles were not in dispute. I therefore turn to the facts of the case.

The background

13. At the root of the claim was a fraud. AoW Ltd, a Cayman Island company, sold a scheme for investing in wine futures into the American market. It appears to have been popular among doctors, who subscribed amounts running from a few hundred dollars to several thousand dollars and in some cases in excess of ten thousand dollars. It had two accounts in the Cayman Islands, neither of them with Barclays, although one of them was with an affiliate bank, namely FirstCaribbean International

Bank (Cayman) Ltd. On 3 March 2004 the State of Arkansas issued a cease and desist order against AoW Ltd, citing unlawful marketing and selling of securities to Arkansas citizens. (There were later similar orders from West Virginia on 29 July 2004 and Mississippi on 1 March 2005.) On 13 August 2004 the US Department of the Treasury issued an alert in relation to AoW Ltd (among others). The effect of these orders was that AoW Ltd's Cayman Island bankers and their US correspondent banks stopped accepting payments or collecting cheques for AoW Ltd from its customers. However, none of these facts came to the attention of the bank.

14. AoW Ltd was a subsidiary of another Cayman Islands company, Paradigm Holdings Ltd ("Paradigm"), and AoW UK was another (indirect) subsidiary of Paradigm. AoW UK had been a customer of the bank in England since February 1999. Its name then had been The Wine Corporation Ltd. It was purchased by Paradigm in the first half of 2003 and changed its name on 7 July 2003. The leading light in Paradigm was Robert Middlemiss. At around that time AoW UK moved its account with the bank from a branch in Northampton (where it had been based) to a branch in Bath, where its relationship manager became Ian Workman. At about the same time, Diana Church, an accountant, was appointed AoW UK's finance director. There were two further associated English companies, Dazebao Ltd and AVE UK Ltd which also held accounts at the bank. On 24 July 2003 Mr Workman went to a meeting with Ms Church and AoW UK's general manager, Mike King, who had previously also been finance director. There is a note by Mr Workman of that meeting, headed "Architects of Wine/Dazebao/AVE UK". The meeting was held in company offices at Salisbury.

15. Mr Workman explained the meeting's background in his witness statement in these proceedings. There had been a request for some financing to assist with cash flow which Mr Workman had turned down on the basis that he was not yet familiar enough with AoW UK's business. So the meeting was set up, in the words of the note "to get an understanding what each of these companies' activities are". The note begins by referring to Paradigm, headed by Mr Middlemiss, as the ultimate parent of the bank's three customers. There were also "a number of other companies across the world including Italy, France and the Cayman Islands". Turning to each of the bank's three customers, Mr Workman's note starts with AoW UK, which, as the judge observed, is somewhat inaccurately named as "Architects of Wine Ltd". The note records that AoW UK's business was a mail order business for "quality" wines. "There were Euro transactions for stock brought in . . . They also receive US$ from the Cayman Islands." Mr Workman's witness statement explains this last reference as being connected with his being told that if the bank was unwilling to provide financing to AoW UK, Paradigm would assist by transferring money from the Cayman Islands. There is, however, no mention in the note itself of any discussion about a request for bank financing, and it is possible that this comment reflects an earlier conversation. The note goes on to deal with the other two customers. AVE UK is said to be "the wholesale side of the UK business", selling directly to hotels and restaurants, although still in its infancy. It received US$ from the Cayman Islands and Euro payments "for stock from other group companies". Dazebao Ltd provided market research, pricing and product information to the other group companies. It received "Euros & US$ from other companies". The note concluded with an "Action Point", to open US$ and Euro accounts for all three companies.

16. Mr Workman's witness statement explains that for some reason the request to open these foreign currency accounts was not at that time followed through, probably because the customers did not then provide the paperwork. Mr Workman comments:

> I do not recall the reason why AoW UK wanted to open these foreign currency accounts but it is likely that the reason was because they were in the business of receiving foreign currency cheques, and indeed may even have purchased wine in Euros and so it would have been more convenient and cost-efficient . . .

17. In that passage Mr Workman appears, accurately or not, to be separating in his mind the suggestion of cash flow support for AoW UK from Paradigm and a more general question of cross-border business flows of transactions and currencies.

18. Mr Workman states that in November 2003 he felt that he knew Ms Church well enough to open a temporary overdraft facility for AoW UK of £40,000, lifted to £60,000 in December. (An internal bank document suggests, probably more accurately, that a small £10,000 overdraft was allowed in September, and that the £40,000 overdraft came in October.) Ms Church left in early 2004, having fallen out with Mr Middlemiss. In early 2004 AoW UK moved its offices, in effect I think there was a group move of its offices, from Salisbury to Sackville Street, London.

The cheques

19. Following the difficulties caused to AoW Ltd by the cease and desist orders, Mr Middlemiss made alternative arrangements for the encashing of

its customers' cheques. Their cheques were couriered to AoW UK in England for presentation to the bank. The judge's findings of fact in this regard were as follows:

> 27. But be that as it may, the position overall was this: the relevant account was in the name of AWUK. (2) None of the 400 cheques were payable to AWUK, the payee was variously: Architects of Wine, or Architects of Wine Limited. (3) All the cheques were in United States dollars, drawn on various United States banks, in sums averaging about $3,000, but up to as much as $27,000. And (4) some of them, about 10 per cent of them, gave the payee's address in the Cayman Islands.

20. The history, however, is more complicated, and the submissions we have read and heard require us to go into more detail than may possibly have been made clear to the judge.

21. The cheques would be presented to the bank in batches of, on average, about ten. There were 41 such batches. The first batch (of 21 cheques, in a total amount of just under US$33,000) came forward on 21 April 2004. There were five further batches over the next week. The presentations then paused, we do not know why. Up to 29 April, there had been six batches totalling 72 cheques, in a total of just over US$270,000. These six batches were all presented at the bank's counters at a branch in Regent Street (nearby to AoW UK's West End offices). From the branch, these cheques, being foreign currency cheques, were sent to the bank's International Cheques Operations ("ICO") at Poole. Mr Workman had nothing to do with these cheques.

22. The cheques would, or should, have been scrutinised at the branch by the bank's cashiers for a sufficient match between the name of the payee and the name of the account into which they were being paid. It was the bank's evidence, given by its internal regulator Mr Stephen Penny (see below), that the test for clerical staff such as cashiers, charged with the processing of cheques at the bank, is that payee name and account name should "sufficiently match". For the assistance of cashiers at its branches, the bank has an IT system (the "Customer System") which provides the name and account number of all sterling accounts. Being US cheques, they were not printed "a/c payee only", but were typically printed "Pay to the order of". However, we are not told about any endorsements, and I assume that there were none. The judge said "None of the cheques were endorsed [to?] AWUK". At ICO there would be certain further checks, at any rate to ensure that all cheques contained under a single remittance form were (a) destined for the same account, (b) in the same currency, and (c) totalled correctly. A remittance form from the branch can take up to 50 cheques. The remittance forms which the bank has recovered (covering some US$191,000 of the US$270,000 banked in April) all show the customer's correct name, *viz* "Architects of Wine (UK) [or UK] Ltd".

23. No further US cheques were presented to the bank until 4 June 2004. In the meantime, Ms Church's replacement as finance director wrote to Mr Workman on 19 May 2004 to request the opening of a new US dollar account for AoW UK to be linked to its sterling account, adding "We would like this to be effected soon as possible . . . Please also ensure this is activated in Barclays Business Master to enable us to process all requisite transactions, both locally and internationally". I am not sure what the reference to Barclays Business Master is, but I note the reference to international transactions. The letterhead of this letter is simply "Architects of Wine" and in smaller letters "AoW-GROUP.COM". "Architects of Wine" had become the trading name of the UK company, if not the group. In his witness statement, Mr Workman comments: "I considered this to be a reasonable request since the company had previously advised me that it would be receiving US$ payments." The dollar account was opened at the beginning of June.

24. The banking by AoW UK of further US currency cheques started up again on 4 June 2004 with the presentation at the Regent Street branch of a further batch of six cheques totalling some US$10,000. From now on, however, these cheques were paid into AoW UK's new US$ account. The procedure was now somewhat different. Because the bank's branch IT Customer System did not list *foreign* currency accounts, the checking of a sufficient match between cheque payee and account names was not done by the cashiers at the branch, but at ICO which had an appropriate IT system ("SOLD") which covered foreign currency accounts.

25. Between 4 and 23 June 2004 there were a further six batches of cheques, 18 in number, totalling some US$8,000. Mr Workman had nothing to do with these cheques either.

26. It was at about this time that Mr Workman was sufficiently concerned about the credit risk relating to AoW UK to place it on the bank's Early Warning List 1 ("EWL1"). This is an internal credit risk code, with 1 being the lowest level. His reason for doing this was that the temporary overdraft which he had time-limited to the spring of 2004 had not been repaid and he had been informed that it could not immediately be repaid in full. A phased

reduction had therefore been agreed, and to accompany this Mr Workman had activated the EWL1 marker as a safeguard. One consequence of this was to impact on the bank's "Refer Stream" system: AoW UK now received a refer stream number of "651", where 65 means medium business customer and 1 indicates the EWL1 marker. That refer stream number meant in turn that if the customer required foreign currency cheques to be credited to its account before the bank had received the funds, then the request for this to happen (so-called "negotiation") had to be referred by ICO to the customer's relationship manager. As a result, for the first time, by two faxes of 29 June 2004 ICO requested Mr Workman to approve AoW UK's requests for negotiation of the sums of US$30,277.86 and US$10,648.38 respectively. These reflected AoW UK's banking in London on 24 and 25 June of batches of 11 and four cheques totalling those respective amounts. I should emphasise that in accordance with the bank's system these requests are done at long range. The cheques were in the hands of ICO at Poole. Mr Workman was told almost nothing other than that there was a request for negotiation of so many dollars (a sterling equivalent was also supplied) by a customer whose account details were given. The request was solely related, as I understand the matter at present, to credit risk.

27. I make the observations in this and the following paragraph from the documents before the court, however there have been no submissions concerning these particular matters. The request form appears to have had faxed with it a "Cheque Collection and Negotiation formset". The request form itself referred to "Architects of Wine" and gave AoW UK's dollar account number. The accompanying formset gave the total currency amount and customer account details, including AoW UK's "Customer Account Name", this time more fully and accurately stated as "Architects of Wine (UK) [or UK] Ltd". The only further information contained on the formset was that the "Country on which cheque(s) is/are drawn" was given as "USA". Uniquely, the formset attached to the request form dealing with the 24 June deposit scheduled the cheque details of three (of the 10) cheques (each for about US$3,000). To this extent Mr Workman could have observed that the cheques were not drawn on banks in the Cayman Islands, and, as to the three cheques scheduled, that they were drawn by individuals (and not by Paradigm). He was being informed, however, that the customer whose cheques were in question was AoW UK. Moreover, Mr Black's submission was that Mr Workman was unaware of any of the details of the cheques, thus:

> However the system meant that the Relationship Manager never actually saw the cheques only a form stating the amount to be negotiated. Thus, the Bank's system meant that the only person who knew anything about the customer's business, ie, the Relationship Manager, was unaware of any of the details of the cheques (paras 5/6 of Mr Black's skeleton argument on appeal).

28. After the two requests made on 29 June, ICO faxed further requests to Mr Workman, down to 20 July. So far as the material in our bundles is concerned, there are a total of nine requests for sanction, relating to nine batches totalling 84 cheques and some US$261,000. It may be that there were three further requests during that period in respect of three further batches (totalling 23 cheques and some US$59,000) which have gone missing, but after 20 July, when there are no further requests, it would seem that AoW UK might have been taken off credit watch. This might have happened after the first of the phased reductions in AoW UK's overdraft was complied with, but it is not clear. The further request forms and attached formsets were all in similar form: save that (1) none of them scheduled any cheque details, and (2) the last three of the formsets referred to the customer's name as simply "Architects of Wine".

29. Mr Workman's evidence about these requests for sanction is as follows:

> 34. . . . I cannot recollect how many sanction requests I actually received from Poole relating to foreign currency cheques presented by AoW UK. These requests would not necessarily have come to me personally, but may have been sent to my assistant, Kate Maggs, who could have dealt with them without reference to me.
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> 35. If I received a sanction request from ICO in Poole, I would look at the amount for which sanction was being requested before making a decision whether to sanction the negotiation . . . I would not have been likely to refuse sanction for any request to negotiate a foreign cheque or a batch of such cheques with a value under £100,000, unless there had been a prior history of foreign cheques not being paid. I was not aware of any such history in relation to AoW UK. I do not recall thinking that it was unusual to have received sanction requests in respect of US Dollar currency cheques payable to AoW UK. This is probably because I had previously been informed by the company that it would be receiving payments in US Dollars.
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> . . .
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> 37. I would not have expected to receive (nor did I receive) from ICO in Poole copies of any of the foreign cheques in respect of which sanction

to negotiate was being requested. Unless ICO was concerned as to AoW UK's title to a cheque, there would have been no reason for ICO to send a copy to me. It was ICO's responsibility to satisfy itself as to this matter and to refer any queries to me. I do not recall that ICO ever expressed any concern to me regarding AoW UK's title to any of the foreign currency cheques which ICO processed on its behalf.

Mr Workman's monitoring of AoW UK

30. Mr Workman said in his witness statement that he would have seen a financial history report for AoW UK's sterling account on a quarterly basis. He attached examples of such reports for 3 June 2004 and 18 November 2004. It is not explained why those particular dates brought forth reports. Mr Workman commented on certain features of them. However, he did not comment on a feature which at this appeal Mr Black has put at the forefront of his case, namely that from May 2004 onwards, the credit turnover of the company on its sterling account dropped sharply. Thus up to March 2004 monthly credit turnover had never been less than £100,000, save in February when it fell to £48,028. In April it was a more standard £193,409 (even though more than half of that would have been in the form of the dollar payments: but Mr Workman would not have known about that, and nothing on the report would or could indicate it). In May, however, it fell to £66,443: but that was still well above February's total. That was the position at the time of the report of 3 June. The November report shows a significant change. The credit turnovers were: for June, £3,109; for July, £26,787; for August, £187; for September, £6,428; for October, £2; for (part) November: £0.

31. However, by the time of the 18 November report, all the cheques in question had been banked, the last of them on 9 September.

32. There is some manuscript on the November report. No one has referred to it, and I do not know who wrote it or when. There is an arrow pointing perhaps at the months of declining turnover, and the words "withdrawn. who are they banking. no financial".

33. On the subject of monitoring of AoW UK's financial activity, Mr Workman's witness statement contained the following:

> 25. The quarterly Financial History Reports, examples of which are referred to above did not contain any information regarding AoW UK's US Dollar account. If I had wanted to access information relating to the US Dollar account after it opened in June 2004, I would have needed to run a specific search. I do not recall monitoring the activity of the US Dollar account while I was the relationship manager for AoW UK.
>
> 26. I am not aware that anyone else within Barclays would have monitored the activity on AoW UK's US Dollar account. It is likely that a specific transaction would only have been flagged on Barclays's system if it had been considered outside the usual course of AoW UK's business. For example, if a very large cheque (say for US$1 million) had been paid into AoW UK's account, this would probably have attracted the attention of Barclays's anti-money laundering team because its size would have been considered unusual in the context of AoW UK's business. I do not believe that the relatively low value batches of US Dollar cheques which were regularly being paid into AoW UK's Sterling and US Dollar accounts during the period April–September 2004 would, of themselves, have triggered an alert on Barclays's system.

The fate of the money, and of AoW Ltd

34. The money paid into AoW UK's sterling and dollar accounts did not remain there long. To some extent, at any rate, the April deposits in the sterling account helped to reduce AoW UK's overdraft: by August 2004 it had been substantially paid off. There is an alternative claim for money had and received, but that is not the claim on which summary judgment has been given. By 20 September 2004 the sterling account was overdrawn by £1,996.93 and the dollar account was in credit by only US$4,343.77.

35. AoW Ltd was placed into voluntary liquidation on 13 October 2004. Paradigm was placed into provisional liquidation on 12 October 2004 and into compulsory liquidation on 9 August 2005.

These proceedings

36. The liquidators of AoW Ltd commenced these proceedings on 9 March 2006. In pre-action correspondence, the bank had put in issue the liquidators' title, had claimed a defence under section 4, and had also raised what is known as the *Liggett* defence (*Liggett (Liverpool) Ltd v Barclays Bank Ltd* [1928] 1 KB 48) on the basis that some at least of the money had found its way back to AoW Ltd. The liquidators' particulars of claim, as would be expected, did little more than list the cheques and assert title and conversion. An application for summary judgment followed. The liquidators' witness statement annexed the cheques. In asserting AoW Ltd's title, it asserted that AoW UK would have been extremely unlikely to receive so many dollar cheques for such large amounts of money as

part of its normal business. In responding to the anticipated section 4 defence, it cited a letter dated 27 February 2006, in which the bank had said that the payee name on the cheques was "ambiguous", and argued that this was a tacit admission that the bank was unsure as to the true owner of the cheques.

37. The bank also sought summary judgment in its favour. Its point was that Mr Middlemiss, as the sole director of AoW Ltd, and the sole shareholder of Paradigm, had authorised, and had the power to authorise, the payment of AoW Ltd's cheques through the accounts of AoW UK in London.

38. As for the section 4 defence, the bank relied on the evidence of Mr Workman, and also on that of Mr Penny. I have described Mr Workman's evidence above. Mr Penny describes himself as "a Business Analyst in the Quality Risk and Compliance Team" at ICO, responsible for investigating process errors and liaising with process experts regarding training, feedback, updates and reviews, and very familiar with ICO's cheque processing procedures. Although not independent, I would regard him as an expert on banking practice particularly in the field of foreign currency cheques. He had no personal dealings with the cheques in question, and had been unable to identify anyone at the bank who recalled dealing with them. He spoke to the bank's internal processes.

39. In describing the test for accepting a cheque's payee name as matching that of the name of the customer's account, as stated above he said that the test was that of "sufficiently match". He said that names were usually very similar but by no means always exactly the same. He gave as an example an account in the name of "Joanne Smith" and a cheque payee described as "Jo Smith" or "J Smith". He said:

> 9. The question of whether the payee name sufficiently matches the account name is treated as a matter of common sense. If the name of the payee on the cheque sufficiently (albeit not precisely) matches the account name — and I regard this as having been the case in respect of cheques made payable to "Architects of Wine" and "Architects of Wine Ltd" . . . then I would expect both the cashier in the branch and the operators at ICO to process the cheque without demur, provided that there is nothing else on the face of the cheque or in the circumstances surrounding its presentation to Barclays for collection that appears irregular or suspicious.
>
> 10. I understand from the particulars of claim and from the witness statement of Ian Workman, both of which I have had the opportunity of reading before preparing this statement, that in the present case the cheques were individually of fairly low value, averaging approximately US$3,500 each, and that the customer into whose account they were being paid was regarded as (and was) a bona fide trading business which had had accounts with Barclays since approximately 1999. I cannot discern anything in the facts relating to the customer, as set out in Mr Workman's statement, that ought to have warned the Barclays staff who processed these cheques (either in the branch where they were presented or at ICO) for payment to AoW UK that the customer had no right to ask the Defendant to collect the cheques for its account.

40. Other aspects of his evidence about the processing carried out at ICO have been incorporated into my summary of the facts set out above.

The argument and judgment below

41. It is clear from both the skeleton arguments below, and from a transcript of the hearing before the judge, and from the judgment itself, that most of the argument was taken up with the first point relating to AoW UK's authority to present the cheques for payment into its accounts in London. The bank failed on that point, and there is no appeal on it.

42. As for the argument on the section 4 defence, the skeleton of Mr Black and Mr Fussell on behalf of AoW Ltd devoted a mere four (out of 60) paragraphs to it. It was submitted that the statements of Mr Workman and Mr Penny did not assist. In any event the bank had admitted that the identity of the payee was "ambiguous". It was also submitted that the large number of dollar denominated cheques for relatively large sums of money, some of which expressly referred to a Cayman address, should have put the bank on notice and required further enquiries.

43. The judge dealt with the section 4 defence at paras 22 to 30 of his judgment. He did not refer to any jurisprudence on section 4, as distinct from the authority point, and it would appear that only one case on a minor aspect had been cited in either of the two skeletons. The transcript of oral argument confirms that no authorities were cited to the judge. He therefore proceeded directly to the facts, and specifically by reference to the accepted position that the onus was on the bank to show that there had been no negligence. The judge immediately stated that the bank had fallen "well short" of any realistic prospect of meeting that burden. His first reason was that there was "precious little evidence of how the defendant approached these specific cheques". That was in one sense true, but in another sense untrue, for the bank had given evidence of its systems, and it would have been a bold decision to say that there was no realistic prospect for success

with the argument that it was to be inferred that the bank's systems had been followed. In a way the judge went on immediately to recognise the danger in an argument based simply on the absence of evidence as to specific dealings with these cheques, for he said "In one sense perhaps, that is not surprising . . . "

44. The judge next went on to remind himself of Mr Workman's evidence about the requests for sanction that he had received and dealt with, but he seems both to have misunderstood the detail of that evidence and to have considered that there was some fault in the fact that in those dealings the cheques themselves were not sent to Mr Workman. As to the former, his misunderstanding appears to have been that all the 41 separate presentations were referred to Mr Workman for sanction. In fact, only some nine or perhaps 12 of them (between 24 June and 19 July) were so referred. As for his comment that the cheques were not sent to Mr Workman, I am not sure that I understand the point. He appears to have assumed that it was Mr Workman's function to have checked AoW UK's title to the cheques, or to have compared payee and customer account name. That, however, was not Mr Workman's function: that would have been done at ICO. The total figure referred to him was simply for the purpose of the credit risk that the bank might take if it allowed the customer to make use of the funds prior to their payment to the bank. The judge described the referral in these terms:

> He would merely have received a cheque collection or negotiation form or a currency lodgement form . . . which would identify the total value of the cheques in the relevant batch, together with the customer's name, which was variously described as Architects of Wine Ltd, and Architects of Wine.

45. However, as stated above, the request forms or accompanying formsets did not even disclose (with one exception) that there was more than one cheque involved in any referral, nor did they disclose the payee name on any cheque. The forms referred to the customer concerned by its correct name, Architects of Wine (UK) [or UK] Ltd (or latterly to "Architects of Wine"). The request for sanction was put to him squarely on the basis that the payment was properly due to AoW UK: thus unless there was something to put Mr Workman on notice of a defect in AoW UK's title, it is fully arguable that neither Mr Workman nor the system of referral without sending the cheques or copies of them together with the request was at fault.

46. The judge next referred to Mr Penny's evidence, and then immediately said this:

> 26. It thus remains difficult to see how and when the name on the cheque was in fact checked, since the office that was expected to carry out a check of the payee's name was not a recipient of the cheque.

47. Mr Alan Steinfeld QC on behalf of the bank submitted that this finding was wholly wrong, and Mr Black on behalf of AoW Ltd did not seek to defend it. It does appear that the judge was under a serious misapprehension, namely that ICO was not a recipient of the cheques. ICO was of course a recipient of the cheques, and that was so whether the primary compliance of payee name with customer account name was checked at the branch (when payment was to a sterling account) or at ICO (when payment was to a foreign currency account). Mr Workman did not receive the cheques, but then he was not responsible for checking that the names on the cheques and on the account matched. It appears, therefore, that the judge proceeded in the belief that the cheques themselves had never been checked by anyone. This of course would make it impossible for the bank to meet its burden; however it was not so.

48. The judge went on, however, to say "Be that as it may, the position overall was this", and he continued in his para 27 in the terms I have already cited at para 18 above. No complaint is made by Mr Steinfeld of the facts there itemised, although he would submit that they make up only part of the story.

49. In what then appears to be an important part of his reasoning, the judge reverted to the bank's burden in these terms:

> 28. In my judgment, as I have indicated, the defendants have fallen well short of establishing a *prima facie* case of due care. First: there is no evidence of any employee who exercised any judgment in the matter. Second: the payee never matched the account name. At best, it is accepted by the defendants that the names on the cheques were ambiguous. Thirdly: the business of AWUK had been described as a mail order wine company by way of adoption of a wine retailing business in Northampton and the only anticipated source of United States dollars from AWUK's point of view was from the parent company in the Cayman Islands.

50. In respect of these four reasons, Mr Steinfeld submitted as follows. As to the first, there was plain evidence before the court that every cheque would be checked, either by the branch cashier, or at ICO. No inference was to be drawn from the fact that no cashier or ICO operator could be found who recalled dealing with the cheques. It was simply what you would expect of presentations which had caused no one any problem or difficulty. As the judge had himself earlier remarked: "In one sense, perhaps, that is not surprising . . . " As to the

second, there was plain evidence before the court, through Mr Penny, of current banking practice to the effect that a sufficient match was good compliance. That evidence went unchallenged. It was not correct that the bank accepted that the names on the cheques were ambiguous. That comment was made in February 2006 by a legal officer of the bank with the hindsight knowledge that there was another company by the name of Architects of Wine Ltd. At the relevant time, the bank only knew of a single company, Architects of Wine (UK) Ltd, whose trading name was Architects of Wine, and to whom a cheque might very well be made payable as Architects of Wine or Architects of Wine Ltd. As to the third, the judge failed to mention or to bear in mind (a) that the mail order business was in quality wines; (b) that it does not matter where a mail order business is located, and AoW UK had also had offices in Salisbury and London; (c) that in 2003 the business had become part of a group with international ramifications; (d) that Mr Workman's evidence, although not entirely clear, extended to his belief that AoW UK was in the business of receiving foreign currency cheques, including US dollar cheques.

51. The judge next reverted to Mr Penny's evidence. He reminded himself of what Mr Penny had said about the test of whether a payee name sufficiently matches a customer's account name, but discounted it as being "in pretty general terms". He then concluded as follows:

> 30. Disregarding the fact that this response is by no means expressed from any independent source and the difficulty about the sanction being granted without the apparent sight of the cheques themselves, it does not address the issue in the context which I have just described. At the very least I accept the proposition that Barclays have been unable to make good an arguable case that they were not put on notice, and accordingly called upon to make further enquiries, given the circumstances in which these cheques were presented, as well as the content of the same. These points were not touched on in the evidence at all. Given that the burden is on the defendants to disprove negligence, the material is sufficient to conclude that there is no prospect of so doing.

52. I am not sure why the judge twice said that the bank's evidence was simply lacking ("it does not address the issue in the context which I have just described"; "These points were not touched on in the evidence at all"), since Mr Penny, in passages described above, stated his opinion both that the names matched sufficiently and that there was nothing else in the circumstances to put the bank on notice that AoW UK had no right to ask the bank to collect the cheques for its account. In doing so he was responding to the limited points made in the liquidators' witness statement (see para 36 above).

53. In sum, it seems to me that the position is this. Most of the effort of written and oral submissions before the judge was concentrated on the authority point. He was not assisted by the citation of any jurisprudence on section 4. The judge's reflections on the evidence before him may reflect the brevity with which the section 4 point was dealt with during argument. We have certainly, by comparison, been assisted by much more extensive written and oral submissions. Given the uncontradicted evidence deployed by the bank, it is not immediately easy to see that the case against it was so clear and so overwhelming as to make it feasible to say that it had no realistic prospect of sustaining the burden of its case that it acted without negligence. That would effectively mean that Mr Penny's and Mr Workman's evidence could be rejected without trial, and without hearing what answers they would make to any forensic counterpoint relied on by AoW Ltd. Nor is it plain whether the ultimate ratio of the judge's decision was that Mr Workman was put on notice (which might appear to be the case from the judge's para 30), or whether there was some underlying systemic problem (which appears to be logically necessary given the fact that Mr Workman did not really come on the scene, so far as any specific dollar payment of which he had knowledge is concerned, until 29 June 2004, and yet the judge considered that there was systemic liability from first to last).

Mr Black's submissions

54. In these circumstances, what was the burden of Mr Black's submissions in seeking to uphold summary judgment? For much of his submissions, he sought to ride the two horses which appear in the judge's judgment: in other words he sought to rely on both the content of the cheques, whether or not any cashier or ICO operator would have been entitled to accept the payee name as sufficiently matching the account name; and on the surrounding circumstances, whether or not Mr Workman or any one else would have been placed or charged to identify, without hindsight, what are now said to be significant facts. As for the former, his case either demanded absolute identity of name or required a backward appreciation that there was not a single cheque among the 400 in which "UK" appeared in the payee's name. As for the latter, his case appeared to be that, whether or not cashiers and other operators charged with the clerical function of checking the cheques would themselves know the significance of any surrounding circumstances, they ought to be treated as though they did; and that, whether or not Mr Workman knew about the contents of the cheques, he should be treated as

though he did. However, either or both of those propositions appear to me to be debatable, and may depend on banking practice.

55. To a great extent, moreover, Mr Black's submissions, both at their outset and at their conclusion, emphasised above all a point which, if not entirely new to the debate, was at any rate a considerable development of it. Thus, one of the factors which had influenced the judge was the appearance on the scene of dollar cheques. Mr Workman said he could not recall seeing anything strange about that, seeing that he had been told in July 2003 that his customer would receive dollars from Paradigm, and that he had been asked in May 2004 to open a dollar account, on his understanding that AoW UK was in the business of receiving cheques in that currency. In the light of the terms of AoW UK's letter of instruction (to open the dollar account) dated 19 May 2004 ("to enable us to process all requisite transactions, both locally and internationally"), it might seem that there is arguable support for Mr Workman's understanding. Mr Black's main point on appeal, however, was to seek to emphasise how totally AoW UK's business had changed during 2004: how its sterling deposits were first largely replaced by dollar deposits, and how subsequently its dollar deposits to its new dollar account completely overshadowed and replaced its steeply falling and fast disappearing sterling deposits. For these purposes he took us to the quarterly reports of 3 June and 18 November 2004 which I have described above.

Discussion and decision

56. In my judgment there is force in Mr Steinfeld's criticisms of the judge's decision to give summary judgment against the bank. One issue related to the process by which cashiers at the Regent Street branch and processors at ICO accepted the cheques as sufficiently matching the name of the customer's account, AoW UK. Although the judge may have been sceptical, he was not I think entitled to reject out of hand, or to disregard, as he appears to have done, the bank's evidence that the current banking practice was that a sufficient match was acceptable and that the names in question did in fact sufficiently match. That evidence was unchallenged. It seems to me to raise an arguable case, a realistic prospect of a defence, based on the absence of negligence at this stage. I agree that it might have been better to have had more detailed evidence about how the practice of a sufficient match operates with respect to company names: Mr Penny's examples, while apposite, related to personal names. The problem of similar corporate names within a group must be a widespread one. All of us, I suspect, know from our own experience about how imprecise we sometimes are about writing exactly the right name on our cheques, and how very frequently we may leave off everything but the trading name itself, eg Marks & Spencer, or Prudential. How is this problem dealt with? How do banks and their customers ensure that the cheques reach the right accounts, especially where there may often be several associate companies which are candidates? In the present case, however, the bank and *a fortiori* its cashiers knew of only one company, Architects of Wine (UK) Ltd. It did not have to choose between that and its foreign associate, Architects of Wine Ltd. The point that 41 batches totalling some 400 cheques went through without raising a problem is at least double-edged.

57. The "sufficient match" issue is primarily for the cashiers and their ICO equivalents. Unless there is something on the face of the cheque which ought to give those employees of the bank notice of a problem which, if they cannot resolve themselves, they ought to bring to the notice of more senior officials, the cheques will pass this check and then enter the numberless queue of cheques being processed.

58. A second issue, therefore, is whether, despite the similarity of the names, there were aspects of the cheques themselves which ought, at least arguably without further knowledge of the business of the customer, to have alerted the cashiers and ICO of something wrong. The judge relied on the fact that the cheques were all dollar cheques, in sums averaging US$3,000, and that about 10 per cent of them gave the payee's address in the Cayman Islands. I certainly understand the argument: but Mr Penny's evidence is again that such matters would not have suggested anything out of the ordinary such as would deprive the bank of its defence. That evidence, as it seems to me, raises a real defence with real prospects. It is plain that English companies do bank foreign currency cheques, and the branches have remittance forms for such foreign currency cheques which can list up to 50 of them on a single form. Once a dollar account is opened, the position changes again: for the operators at ICO would expect a customer with a dollar account to have dollar cheques for collection. It does not seem to me that an average of US$3,000 (or even the higher values of some of the cheques) is obviously out of the way for a company dealing with quality wines by mail order. There is no evidence that that is so, or that these values were out of the ordinary course of the value of cheques banked by AoW UK. I note that in 2002 the company had had a banking turnover of £3.3 million, and in 2003 of £2.5 million. Why should not this company have marketed its wines by mail order in the United States? Or have a billing address, a PO Box number it should be noted, in the Cayman Islands? Should

cashiers have alerted senior officials simply because of a change of business? Should a proper banking system be designed to throw up, for referral to a more senior official, any such change in the currency of payment? Perhaps so, even though Mr Penny says otherwise. However, that seems to me to be a question for trial.

59. A third issue is whether, when Mr Workman, the relationship manager did become involved, although that was not in fact before 29 June 2004, he should have realised that something was wrong. The judge seems to suggest that he should have been sent the cheques, or copies of them, or given more information about them, but the bank's evidence is against that. Is that evidence wrong to the extent of there being no realistic prospect of success for an argument otherwise? It seems to me that it is not possible to say that. Mr Workman was not being consulted because of something about the cheques which had given rise to suspicion, but solely on the question of the credit risk of negotiation. By that time the dollar account had been opened, as he knew. So plainly the customer was expecting to be receiving dollar cheques. On Mr Workman's very limited information, the cheques, although drawn on US banks, might, save for the three scheduled, have come from Paradigm. On Mr Black's submission (see para 27 above) the position was more simply that for all Mr Workman knew, the payments in question were from Paradigm. But even if I assume that he knew or ought to have known what ICO knew about the cheques, I do not see why the bank's evidence, from Mr Workman and Mr Penny, that there was nothing in the circumstances to put Mr Workman or the bank on notice of something wrong, must be rejected summarily. Mr Workman would have known that AoW UK was a company with a substantial turnover, which in 2003 had become part of an international group, which had moved its offices to the West End of London, and which had requested a dollar account to assist in processing its transactions "both locally and internationally".

60. A fourth issue, only raised in effect for this appeal, is that Mr Workman should have observed that AoW UK's business was going through a fundamental change, as its sterling turnover disappeared and was replaced by dollar deposits. That may be so, but it was not the argument addressed to the judge, and it does not seem to me to have unanswerable force. The report of 3 June did not show dollar deposits at all (since it was expressed purely in sterling) and came at a time before any dollar deposits had been made into the new dollar account. The report of 18 November came too late. Should Mr Workman have been monitoring the account more frequently? Should he have been specifically ensuring that he was monitoring how the new dollar account was taking shape (which I bear in mind he did not do at all)? Perhaps, but there is no evidence about this at all.

61. In sum, although AoW Ltd may have a strong case to make at trial, a matter on which I make no comment at all, it is an untested case. At present, the bank's evidence is unchallenged, and I agree with Mr Steinfeld that the court is not in a position to reject it as raising no realistic prospect of a good defence, even bearing in mind as I do that it is the bank that bears the burden of showing that it acted with reasonable care.

62. The judge thought otherwise. In this court, I think it is necessary to have considerable respect for the views of an experienced commercial judge that a defendant has not met the test of providing evidence of a defence with a real prospect of success at trial. The commercial court prides itself justifiably on its ability to distinguish the speculative but doomed claim which should be given its quietus sooner rather than later; or to identify the specious if colourable defence, which does not merit a trial. However, I do not regard the bank's defence, on the present state of the evidence, as either speculative or specious. On the contrary, I think that there is some justification in the bank's concern, expressed in submission, that if this summary judgment were to stand, then, on the basis of the judge's judgment that the bank fell "well short" of raising a proper defence for trial, this bank, and its competitors, would, for reasons which it is not easy to define or restate in advance of a judgment following trial, be required substantially to revisit what are said, expressly in the case of Barclays, and inferentially in the case of its competitors, to be their procedures and current banking practice.

Conclusion

63. I would therefore allow this appeal.

Lord Justice WILSON:

64. I agree.

The PRESIDENT:

65. I also agree.