**IN THE HIGH COURT OF JUSTICE** **Claim No. 2BS90956**

**QUEEN'S BENCH DIVISION**

**BRISTOL DISTRICT REGISTRY**

**MERCANTILE COURT**

**[2013] EWHC 2780 (QB)**

**Before: HIS HONOUR JUDGE HAVELOCK-ALLAN QC**

**Date: 13 September 2013**

**Between:**

**TIDAL ENERGY LIMITED**

**Claimant**

**- and -**

**BANK OF SCOTLAND PLC**

**Defendant**

**Guy Adams** (instructed by **Capital Law LLP**) for the claimant

**Neil Levy** (instructed by **Foot Anstey LLP**) for the defendant

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**APPROVED JUDGMENT**

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I direct that no official shorthand note shall be taken of this Judgment and that copies of this version as handed down may be treated as authentic.

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HIS HONOUR JUDGE HAVELOCK-ALLAN Q.C.

1. Before the court are cross-applications for summary judgment.

2. The point at issue is whether an instruction to make a payment through the Clearing House Automated Payment System ("CHAPS") is satisfied by funds being sent to, and accepted by, the bank which maintains the account with the number and sort code identified in the instruction as the destination of the payment, albeit that the holder of that account is not the beneficiary named in the instruction.

3. The facts giving rise to the applications can be very shortly stated. The claimant, Tidal Energy Limited, is a customer of the defendant, Bank of Scotland plc ("the bank"). It has a business account at the bank's branch at One Kingsway in Cardiff. In January 2012, the claimant was indebted to one of its suppliers, a company called Designcraft Limited ("Designcraft"). It owed Designcraft a sum of £217,781.57 under an invoice No. 2638. On Tuesday, 31 January 2012 the claimant gave an instruction to the bank to pay the debt.

4. The instruction was given on one of the bank's standard printed CHAPS Transfer Forms. The Form was signed by two authorised signatories of the claimant. Section 1 of the Form was headed "Details of the CHAPS Transfer". The various boxes were completed in manuscript so as to instruct the bank to pay a sum of £217,781.57 out of the claimant's business account to an account number 13027309 at Barclays Bank with sort code 20-16-12. The receiving customer name was stated as: "Designcraft Ltd". The Payment details were given as: "Invoice 2638". The date written on the Transfer Form for the payment to be processed was 31 January 2012.

5. Section 2 of the CHAPS Transfer Form was headed: "Your CONFIRMATION (terms and conditions set out overleaf)". Above the boxes containing the claimant's name and authorized signatures was the following wording:

> "You are hereby authorised to effect these instructions either by transmission through the Clearing House Automated Payments System or by such other method as you may in your sole discretion decide.
>
> I/We agree that no responsibility is to attach to you for any loss caused by delays, interruptions or errors in transmission of payment, which are not directly due to the negligence or default of your own officers or servants.
>
> Please debit the payment from my/our account number detailed in Section 1.
>
> Neither this instruction for a CHAPS transfer nor your acceptance of it shall be enforceable by the payee or any other third party. …"

6. The terms and conditions on the reverse of the Transfer Form mainly concerned the timing of the payment and cancellation and amendments. CHAPS is a fast payment mechanism. If the instruction is received before 3pm on a business day, it is normally executed that day. If it is received after 3pm, it is deemed received the next business day. The terms and conditions on

the reverse of the Transfer Form made clear that the bank could only undertake to comply with an amendment or cancellation of the instruction if it was received by 3pm on the business day before the agreed date for payment. On this occasion the instruction was sent to the bank early on the day it was to be processed and was executed through the CHAPS system the same day.

7. The sequence of events on Tuesday, 31 January 2012 was as follows:

| | |
|---|---|
| 0938 | CHAPS Transfer Form received at the bank's office at St William House, Tresilian Terrace in Cardiff. |
| 1143 | Transfer Form forwarded by fax to the bank's CHAPS processing team in Gillingham. |
| 1520 | The processing team effected the transfer through CHAPS by sending the funds from the bank's account at the Bank of England to the account of the receiving bank at the Bank of England. A "FUNDSFLOW - CHAPS DAILY ACTIVITY Form and Form MT03 (which was a record of the payment instruction) were immediately generated. All of the payee information on the Transfer Form (receiving customer's account number at Barclays, sort code of Barclays, receiving customer's name and the invoice number in respect of which the payment was being made) was reproduced in both documents. |
| After 1520 | The bank debited the claimant's account at the Cardiff branch and Barclays credited the funds to account number 13027309 at sort code 20-16-12 (which was its branch in Bury St Edmunds). |

8. The claimant says that, unbeknown to it at the time the instruction was sent, the information it had been given about the receiving account was false. The designated receiving account at Barclays did not belong to Designcraft Ltd but to a different entity called "Childfreedom Ltd". It says that it was the victim of a fraudulent misrepresentation by an unnamed third party that account number 13027309 at sort code 20-16-12 was the account of Designcraft to which the payment should be made. The defendant has put the claimant to proof of these matters: but accepts, for the purposes of the present applications, that the named receiving account did not belong to Designcraft, although neither the claimant nor the bank knew this at the time the transfer was made.

9. Around 1pm on the following Monday, 6 February 2012, the claimant telephoned the bank's Cardiff branch to say that it had been induced by fraud to pay the funds to the account number and sort code given on the CHAPS Transfer Form. The claimant asked the bank to get the money back. About 5 minutes later, the bank rang Barclays with this information and requested that the customer holding account number 13027309 at sort code 20-16-12 should not be allowed to draw on the funds until further notice. The bank made two further telephone calls to Barclays the same afternoon repeating this request. Barclays declined to put a stop on the funds unless required to do so by Court Order.

10. The bank says that, sometime by close of business on 6 February, Barclays allowed the holder of account 13027309 (presumably Childfreedom Ltd) to withdraw £217,000 of the funds, although the bank did not know this when it made the telephone calls. The implication is either that the money transferred (or £217,000 of it) represented the only money standing to the credit of account 13027309 on 6 February or that it was the last money to be credited to the account so that the withdrawal of £217,000 from the account is to be regarded as withdrawal of part of the transferred money on the "first in first out" principle (the rule in *Clayton's Case*: see *Jones v Churcher* [2009] 2 Lloyds Rep. 94 at paragraph 72). Whichever is correct, by close of business on 6 February almost all of the money had gone.

11. By the present action, commenced on 19 September 2012, the claimant seeks the following relief: 1. "A declaration that the claimant was entitled to have its account sort code 12-23-11 a/c no. 06970938 re-credited with the sum of £217,781.57 on 31st January 2012 or such other declaration as the court shall think fit" 2. "An order that the Defendant re-credit to such account the sum of £217,781.57 with effect from 31st January 2012 and re-state the said account accordingly".

12. The way the claim is put is that Barclays had no authority to accept the CHAPS payment on behalf of Designcraft because that was not the name of the customer who held account number 13027309 at its Bury St Edmunds branch. Accordingly, no valid acceptance of the payment was ever given and Barclays ought to have rejected the transfer and returned the funds the same day "… or at such other time as may be provided by the CHAPS Rules". The claimant's case in summary is that its instruction to the bank to make a payment to Designcraft was not carried out, so it is entitled to have the money back.

13. The bank served a Defence on 28 November 2012 which is to the following effect: (1) the instruction was to make payment of a sum of £217,781.57 via CHAPS using the information on the CHAPS Transfer Form; (2) the bank did not undertake to ensure that Designcraft received the money; (3) it is normal banking practice for banks to process payments through CHAPS on the basis of the payee's account number and sort code and not the name of the payee; (4) the bank was authorised by the claimant to process the transfer through CHAPS in accordance with normal banking practice and did so; (5) therefore the bank complied with its instruction and was entitled to debit the claimant's account; (6) further or alternatively it was an implied term of the instruction that the bank would be entitled to debit the claimant's account if it made a CHAPS transfer to the account number and sort code named in the CHAPS Transfer Form regardless of whether that was an account in the name of the payee specified in the Transfer Form: such an implied term is necessary to give the instruction business efficacy by reason of (a) the banking practice already referred to, and (b) the fact that the paying bank in a CHAPS transfer has no means of knowing whether the account with the number at the branch with the sort code specified in the instruction is held by the payee named in the instruction; (7) as a matter of "banking law and practice", there is no doctrine of strict compliance (such as that applicable to

documentary credits) which applies to CHAPS payments: provided the bank acted reasonably in interpreting the claimant's payment instruction, it was entitled to debit the claimant's account.

14. Not surprisingly, the claimant made a Part 18 request for further particulars of (3) (the assertion that it is normal banking practice for banks to process payments through CHAPS on the basis of the payee's account number and sort code and not the name of the payee) and asked for disclosure of copies of all relevant documents. The response was given in a witness statement of Mr Neil Johnson, a Customer & Domestic Manager within the bank's Electronic Payments Team since November 2011, and an employee of the bank for the past 28 years. His evidence is of central importance and merits quoting in full:

> "10. CHAPS is a payment mechanism used by its members (banks) to make same-day payments in sterling. CHAPS is run by the CHAPS Clearing Company Ltd ("CHAPSCo"). The CHAPS Scheme Rules, including the Reference Documents, are the technical documents which set out the service provided by CHAPSCo in the Bank to Bank space i.e. they articulate the obligations of members, CHAPSCo and the Bank of England when sending payments between member banks. They do not articulate how the Bank should transact with its customers.
>
> 11. CHAPSCo provides its members with a secure messaging system by which payment instructions may be sent from scheme members to each other and from and to the Real Time Gross Settlement System operated by the Bank of England. Whilst CHAPSCo provides the framework (rules) under which the relevant messages should be sent and received, the content of the message is defined by the SWIFT Standard MT103 (Customer Transfer). This standard format message stipulates that fields to be completed as "mandatory" e.g. amount; either the sort code or the bank identifier code; and the account number. "Beneficiary name" is not a mandatory field.
>
> 12. CHAPSCo does not prescribe the basis on which payments are processed by the members of the scheme following receipt of the payment, apart from stating that the payment should be processed within the maximum inward payment transmission time of 1.5 hours. The CHAPS Scheme Rules and associated Reference Documents are, therefore, not relevant to the Bank's allegation summarised by [the claimant's solicitors] … and are not relied on by the Bank in this regard.
>
> 13. It is my experience that all of the major UK clearing banks, including the Bank, process and route electronic payments to a customer's account, including CHAPS payments, on the basis of sort code (or bank identifier code) and account number, and not account or beneficiary name, except in the circumstances mentioned in paragraph 18 below. This means that, where the paying CHAPS member sends a message via CHAPS to pay a particular sort code and account number which matches the sort code and account number of an account held by another CHAPS member, that payment will be

successfully processed on a "straight-through" basis (no manual intervention), regardless of whether the beneficiary name entered into the CHAPS payment message by the paying CHAPS member matches the name of the account or the name of the holder of the receiving account. At pages 6 to 11 of the Exhibit is an extract from the Payment Council's guidance note entitled "Payment Services Regulations - Industry Best Practice" which reflects this position, saying *"payments executed via CHAPS are processed on sort code and account number - the "unique identifier""*.

14. I believe that CHAPS members use this system of account number and sort code primacy because it maximises the number of payments which go straight through the system without delay. "Straight-through processing" is fundamental to payments as customers operate in a real-time world and their accounts are credited in near real-time. CHAPS payments are usually high-value payments and are treated as urgent so speed of credit is important. Whilst it is open to the receiving CHAPS member (in this case Barclays) to scrutinise every payment instruction which they receive, to check that the beneficiary name entered by the paying member matches the name of the beneficiary account or account holder, I believe it would be economically impossible to do so if they are also to fulfill their obligations to process CHAPS payments within the maximum inward payment transmission time of 1.5 hours.

15. Although it is my experience that as a matter of normal banking practice, beneficiary name is not used as a primary means by which payment is routed through CHAPS, the Financial Action Task Force Recommendations require members of CHAPS, for anti-money laundering and counter-terrorist purposes, to include the beneficiary name when making payments via wire transfers, including CHAPS. At pages 12 to 24 of the Exhibit are relevant extracts from those Recommendations.

16. It is noteworthy that at paragraph 11 of the Interpretive Note to Recommendation 16 of the Financial Action Task Force Recommendations, the paying bank is obliged to verify the accuracy of the payer information in wire transfers, (which may include payer's name, account number and address), but is not obliged to ensure the accuracy of the beneficiary information contained in the payment instruction message. Paragraph 11 specifies "accurate" in relation to "originator information" but does not specify accuracy for "beneficiary information". "Accurate" is defined in the Glossary at the end of the document as "information that has been verified for accuracy". This reflects my experience that, where the beneficiary account resides with another CHAPS member bank, and is therefore held on that member's accounting database, there is no possibility for the sending bank to check and verify the account number or name of the beneficiary: such information is confidential to the payee and is not disclosed as a matter of routine by receiving banks to paying banks as this would ordinarily constitute a breach of customer confidentiality on the part of the receiving bank.

17. As set out at paragraphs 12 to 15 above, it is up to the individual CHAPS members themselves to set the criteria on which they process incoming payments. Therefore, I cannot comment with certainty on how Barclays processed the claimant's payment which is the basis for this dispute, other than to say that it is my experience that (for the reasons outlined above) when the Bank makes a payment via CHAPS, that payment is not returned if the account number and sort code entered by the Bank into the payment instruction message matches an account and sort code held by the receiving bank, regardless of the beneficiary name entered.

18. Although not directly relevant to the matters in dispute, the Bank's own process when it receives payments via CHAPS is to apply that payment to the account which matches the payment instruction message on the basis of account number and sort code only, without reference to the beneficiary name included in the payment instruction. The Bank will refer to the beneficiary name on the payment instruction message only if it cannot automatically apply the payment to an account on the basis of account number and sort code only. In other words, if the Bank does not hold an account with the account number and sort code specified in the payment instruction message. In that case, a Bank employee will manually search the beneficiary name set out in the payment instruction message against the database of accounts associated with the receiving sort code to try to identify the intended beneficiary. If the Bank employee is unable to do so with certainty, the payment will be returned to the paying CHAPS member. However, this manual matching process would not be undertaken where the Bank held an account with an account number and sort code which matches the corresponding details within the payment instruction message as such payments are subject to straight-through processing."

15. Mr Johnson signed his witness statement on 24 January 2013 and it was served shortly thereafter. It was not enough to dissuade the claimant from applying for summary judgment. The claimant's application was issued on 21 February. It was supported by a short witness statement of Ms Alexia Thomas, who is the solicitor with conduct of the action. A fair point made by Mr Levy, counsel for the defendant, is that Ms Thomas has no expertise in banking, nor does she purport to have derived any of the comments made in her witness statement from having consulted a banker with experience similar to that of Mr Johnson of how CHAPS is operated. Her evidence appears to be derived from her own analysis of how CHAPS operates and the facts of this particular case.

16. The bank's cross-application, which seeks to have the action struck out as disclosing no reasonable ground for bringing the claim or asks for summary judgment on the same basis, was issued on 25 April 2013, and was supported by a second witness statement from Mr Johnson, dated 24 April ("Johnson 2").

17. I shall paraphrase Ms Thomas' evidence, and what is said in reply to it in Johnson 2.

18. Ms Thomas says that when the receiving bank is notified of a CHAPS transfer by the paying bank, it sends an electronic acceptance to the paying bank if the payment is accepted. It is not entirely clear from where Ms Thomas got this information from. She complains that the bank has not disclosed an up-to-date version of the CHAPS Rules but infers that the Rules are no different in this respect from those which Colman J had to consider in *Tayeb v HSBC Bank plc* [2004] 4 All ER 1024. The issue in that case was whether the defendant bank, which had received a large CHAPS payment for Mr Tayeb, had been justified in returning it to the paying bank (Barclays) because of suspicions that the money represented the proceeds of criminal conduct. The transfer was made in September 2000. The judgment describes (in paragraph 14) the procedure by which payments were made through the Bank of England under the then current CHAPS Rules. I am not sure whether the MT103 is generated at step (2) or step (5): but it probably does not matter. Colman J described the next step (step (6)) as the sending of a "logical acknowledgment" or LAK by the receiving bank to the paying bank to notify the paying bank that the payment had been received and credited to the payee's account. This would seem to be the message which Ms Thomas treats as the acceptance.

19. As appears from the quotation from the CHAPS Rules in paragraph 49 of the *Tayeb* judgment, the Rules at that time contained a mechanism whereby a receiving bank could return a payment to the paying bank using a Repair Sorting Code Number. This was, in effect, a sort code through which the paying bank could receive the money back. Rule 7 ([2004] 4 All ER at page 1038f-j) specified the circumstances in which the Repair Sorting Code Number was to be used. It was to be used where payments received "cannot be applied due to (i) insufficient or incorrect bank or beneficiary details, (ii) authentication failure … [and two other causes which are immaterial for present purposes]".

20. Ms Thomas infers from the description of CHAPS in the *Tayeb* judgment and from the fact that, in that case, there was evidence that HSBC did not automatically send an LAK in cases where the payment exceeded £50,000 but operated a process of authentication which involved manual checking that the sort code and account number were those which applied to the payee's account, that "straight-through processing" is not automatic. If it is, Ms Thomas observes that this is "entirely a business judgment for the receiving bank as to the risk it is prepared to take, as there is no statutory defence to claims for repayments of CHAPS transfers such as this, as there are relating to the payment of cheques and as to which the practice of bankers may be relevant".

21. Ms Thomas also says that the relevant provisions in the Payment Services Regulations (SI 2009/209), to which Mr Johnson makes a passing reference in paragraph 13 of his first witness statement, did not apply to the subject payment because their application was excluded by a clause (clause 14.3) in the bank's terms and conditions which governed the claimant's account. The regulations Ms Thomas has in mind are regulations 75 and 76 which deal, respectively, with "Non-execution or defective execution of payment transactions initiated by the

payer" and "Non-execution or defective execution of payment transactions initiated by the payee". Since this is not disputed by the bank, I need say little more about the Payment Services Regulations.

22. There is a difference of opinion between Ms Thomas and Mr Johnson as to whether the name of the payee, if inserted in a CHAPS Transfer Form, becomes part of the "unique identifier" which the Regulations require for implementation of a single payment service contract. Ms Thomas says it does. Mr Johnson says it does not, or that banking practice is only to use the bank account and sort code of the payee as the unique identifier. I express no view on this question for it seems plain that, if regulation 75 of the Payment Services Regulations had applied to this transfer, the unique identifier given here was incorrect because there was a mismatch between the payee's name and the account number and sort code, in which case regulation 74(2)[1] would have applied.

23. In reply, in Johnson 2, the point is made that there was no need for Barclays to resort to using the Repair Sorting Code because it was able to process the payment using the account number and sort code. Mr Johnson also notes that the transfer in the *Tayeb* case took place in 2000, and the judgment was given in 2004. He says that it was common at that time for banks who were CHAPS members to apply threshold values above which incoming CHAPS payments would be subject to manual checking. But Mr Johnson continues by saying: "Nevertheless what is said in this respect in the *Tayeb* case does not reflect current banking practice. In my experience all major UK clearing banks in the CHAPS scheme now use straight-through processing systems in relation to CHAPS payments which they receive, regardless of value, and have done so since at least 2007 (my personal recollection does not extend further back than that date). Thus CHAPS payments are now automated for most if not all UK clearing banks and only those items where the account number and sort code are incorrect will not be successfully processed through the CHAPS system".

*Submissions*

24. The assertion made in paragraph 6 of Ms Thomas' witness statement is that: "… Barclays Bank had no authority to accept the payment and in doing so would among other things have been in breach of contract under CHAPS rules and would have been in breach of warranty of authority and therefore almost certainly liable to restore the payment to the Defendant, or in damages or in restitution". Mr Adams, who appeared on behalf of the claimant, developed this

[1] Regulation 74(2) provides: "Where the unique identifier provided by the payment service user is incorrect, the payment service provider is not liable under regulation 75 or 76 for non-execution or defective execution of the payment transaction, but the payment service provider – (a) must make reasonable efforts to recover the funds involved in the payment transaction; and (b) may, if agreed in the framework contract, charge the payment service user for any such recovery."

theme in the following propositions: (1) This is a case where the D failed to make the required payment. (2) As a matter of law, a payment requires evidence of an authorised acceptance of receipt by or on behalf of the payee before it is complete. (3) The acceptance may be indicated in advance, e.g. where a customer designates a particular bank account for payment, or may be given after the funds have been tendered, e.g. by an acknowledgment of receipt by the bank or by conduct on the part of the payee demonstrating that he has accepted the payment. A classic example of such conduct would be drawing on the money or giving instructions for its disposition. (4) Here, Barclays was not authorised to accept the transfer of funds on behalf of Designcraft because Designcraft was not one of its customers. (5) There was in law no payment. (7) Accordingly, the bank was not entitled to debit the claimant's account. (8) The account in Cardiff must be re-credited.

25. Mr Adams began by referring to cases in which the legal characteristics of a payment by the transfer of money between bank accounts has been analysed. In *R v Preddy* [1996] AC 815, the House of Lords had to consider whether the obtaining of advances of money by making mortgage applications containing false statements was the obtaining or attempting to obtain by deception "property belonging to another" contrary to section 15(1) of the Theft Act 1968. Some of the advances were made by cheque, some by telegraphic transfer and some through CHAPS. Lord Goff of Chieveley drew no distinction between payment by telegraphic transfer or by CHAPS. In his view each involved "a debit entry in the payer's bank account and a corresponding credit entry in the payee's bank account" (p. 833D). Neither involved the payee obtaining the property of the lending institution because "when the bank account of the [payee] is credited, he does not obtain the lending institution's chose in action. On the contrary that chose in action is extinguished or reduced pro tanto, and a chose in action is brought into existence representing a debt in an equivalent sum owed by a different bank to the defendant or his solicitor" (p. 834D-E). In *Customs & Excise Commissioners v FDR Ltd* [2000] STC 672, the court was concerned with whether a "transfer" of money took place whenever FDR, a supplier of credit card services to banks, debited cardholder accounts and credited merchant accounts, such that FDR was entitled to be treated as exempt from VAT under the Sixth Directive when it supplied such services. Laws LJ held (following *Momm v Barclays Bank International Ltd* [1977] QB 790 – see below) that " … if one leaves aside transfers in specie (of coin, goods or other property), a transfer of money means no more or less than the entry of a credit in the payee's account and the entry of a corresponding debit in the payer's account. There may be – will be – problems in cases of error or fraud in the posting of entries in the accounts. But however those fall to be resolved, there is no further, elusive, event by which the money is really transferred: no Platonic form, of which day-to-day transfers are only shadows. The pro and con entries constitute the transfer. There is nothing else." (paragraph 37).

26. Mr Adams then referred to a number of cases in support of the second of his propositions (a payment requires evidence of an authorized acceptance). They were all cases in which the court had to determine the point at which a payment was complete. For example, in *Rekstin v*

_____ [1933] 1 KB 47 the claimant (Mr Rekstin) sought to enforce payment of a judgment in his favour against the defendant (the Severo Sibirsko Bureau) by service of a garnishee order nisi on the Bureau's bank, the Bank for Russian Trade. The order was served less than an hour after the bank had received an instruction from the Bureau to close its account and transfer the entire credit balance to the account of the Soviet trade delegation in London, which was held at the same bank. The trade delegation had the benefit of diplomatic immunity from suit. The Court of Appeal held that the transfer instruction was still revocable when the order was received by the Bank for Russian Trade. All that had happened was that the bank had made entries in its books to close the Bureau's account. It had not yet credited the Soviet trade delegation's account and the trade delegation did not know of the proposed transfer. It was held that the effect of service of the garnishee order was to make the bank custodian for the Court of the debt it still owed to the Bureau in respect of the funds which had not yet been credited to the account of the Soviet trade delegation and the order to transfer was revoked.

27. The issue in *Momm v Barclays Bank International Ltd* [1977] QB 790 was whether a transfer could only be said to be complete when the payee had notice of it. The payer (Herstatt) and the payee (Momm and others trading as Delbrueck & Co.) were German banks which both held accounts with Barclays in London. Herstatt gave an instruction to transfer a sum of £120,000 from its account to Delbrueck's account "value June 26 1974". Barclays made a debit entry in its books for the Herstatt account and a credit entry for the Delbrueck account without informing Delbrueck. Later the same day, it was announced that Herstatt was ceasing to trade and was going into liquidation. The effect of the transfer was to leave Herstatt's account overdrawn by about £15,000. When Barclays learned of the failure of Herstatt, it decided to withhold dispatch of the advice notes informing Herstatt and Delbrueck of the debit and credit and to reverse the transaction. Kerr J held that the transfer was complete when the debit and credit entries were made on the value day. Notice to the payee was not an essential ingredient of a completed payment. Accordingly, Delbrueck's claim for the credit to be restored was upheld. Kerr J held (at 801H-802A) that *Rekstin v Severo* decided that "payment by means of an in-house transfer has not taken place if the payee has not assented to it, and perhaps also if the transfer has not been completed". What distinguished that case was the fact that "the trade delegation knew nothing of the proposed transfer, that there was no transaction between Severo and the delegation underlying it, and that the delegation had accordingly never assented to its account being credited with [the] monies". By contrast, Delbrueck was to be treated as having appointed Barclays its agent to receive payments made in the ordinary course of business, of which the payment by Herstatt was one.

28. *Mardorf Peach Co Ltd v Attica Sea Carriers Corporation (The Laconia)* [1977] AC 850 concerned withdrawal of a ship from time charter for late payment of hire. One question was whether, if the payment was made late, the owners had waived the lateness of the payment because their bank had accepted the money. Hire was due to be paid, semi-monthly in advance,

to the owners' bank account in London. Failing punctual payment, the owners had the right to withdraw the vessel. The next payment of hire in April 1970 fell due on a Sunday. At about 3pm on the Monday, the owners' bank received a payment order from the charterers' bank which gave notice that the funds were being transferred through the London Currency Settlement Scheme ("LCS"). The LCS was similar, but smaller and simpler, than CHAPS. It applied only to US and Canadian dollar transactions. Each of the member banks maintained an account for each of the other member banks in the LCS. Settlement between banks was made periodically and without reference to individual customers. Customers' accounts were normally credited within 24 hours of receipt by the payee's bank of an LCS payment order. In this case the owners' bank was handed the payment order over the counter and stamped it as having been received. The bank then began to process the payment. It notified the owners that a payment order had been received. The owners immediately instructed the bank to refuse the payment. The charterers' bank was notified by telephone and the following day the owners' bank sent the charterers' bank a payment order by which the funds were sent back. The arbitrators found that in order to satisfy the requirement of punctual payment, the hire was due the previous Friday and that the owners' withdrawal of the vessel on the Monday was justified. Donaldson J agreed and upheld the award. The Court of Appeal (Lord Denning MR and Lawton LJ, Bridge LJ dissenting) reversed his decision. Lord Denning said ([1976] QB at 847A-C): "Processing" [the payment] was a piece of mechanism inside the bank itself, which worked fast or slow according to the power put behind it. Its speed should not affect the legal position of the parties making or receiving payment. Again, parties in business must know where they stand. The paying bank is the agent of its own customer to receive it. The banks themselves regard the "payment order" as the equivalent of cash. The arbitrators so found. If the paying bank had sent actual currency, the payment would be made when it was handed over the counter to the receiving bank, and accepted without objection. So also with the "payment order". It is equivalent to cash paid over to the receiving bank. If accepted without objection, it is equivalent to its customer himself accepting cash without objection."

29. The House of Lords unanimously reversed the decision of the Court of Appeal ([1977] AC 850). It was held that payment did not take place until the owners' bank acted on the payment order by crediting the owners' account. This point was never reached because the owners, on being notified by their bank that the payment order had been received, refused to accept the payment. Prior to that point there had been no waiver of late payment by the mere receiving of the payment order without objection: nor had the owners' bank been authorized to waive the owners' right to object to the fact that the proffered payment was late.

30. The issue in *Royal Products Ltd v Midland Bank Ltd* [1981] 2 Lloyds Rep 194 was purely one of timing. The plaintiff was a Maltese company that wished to transfer a sum of money from its account with Midland Bank in London to its account with National Bank in Malta. In order to avoid certain bank charges, the plaintiff decided to route the payment through another bank in

Malta, called BICAL, where it also held an account. Midland was instructed to transfer the money by cable to BICAL. Midland implemented the instruction the same day by instructing its correspondent bank in Malta, which happened to be National, to pay BICAL the money "for advice credit Royal Products". Midland thereupon debited the plaintiff's account in London with the amount of the transfer and cable charges. National first became aware of Midland's instruction the following day. National acted on it by creating an internal provisional account in the name of BICAL and crediting the transfer to that account. National notified BICAL that it had done so towards the end of that second day. On the third day (which was a Saturday), the Central Bank of Malta took control of BICAL because it was insolvent. BICAL was closed and ceased banking operations. Learning of the failure of BICAL, the plaintiff asked Midland on the following Monday (day four) to amend its instruction to National so as to transfer the money direct to the plaintiff's account with National, rather than via BICAL. Midland asked National to retrieve the funds from the provisional account in BICAL's name and pay them to the plaintiff's account. National replied that the payment to BICAL had been completed on the third day and could not be recovered from BICAL. The plaintiff unsuccessfully sued National in Malta for return of the money. The plaintiff then sued Midland in London alleging (1) that its instruction was never carried out and so the money should be returned as money had and received, (2) that Midland was liable in damages for breach of fiduciary duty by National as its agent, (3) that Midland owed a duty of care to the plaintiff and was liable for breach of that duty by National as its agent, (4) that Midland wrongly failed to comply with the instruction to retrieve the money.

31. Each of these arguments failed. Webster J held (at 198 LHC) that the instruction to make the payment was "… to be regarded simply as an authority and instruction, from a customer to its bank, to transfer an amount standing to the credit of that customer with that bank to the credit of its account with another bank, that other bank being impliedly authorized by the customer to accept that credit by virtue of the fact that the customer has a current account with it, no consent to the receipt of the credit being expected or required of that other bank, by virtue of the same fact". Thus he rejected the contention that the instruction had not been complied with until BICAL had assented to receipt of the credit. Since there was no evidence that Midland had charged a fee or commission for making the transfer, Webster J rejected the notion that the instruction had given rise to a contract. But he accepted that Midland had owed a duty to use reasonable care and skill and would have been vicariously liable if National had been negligent. However Webster J found that there had been no negligence. He found also that the instruction to make the payment had been carried out as soon as BICAL was able to draw on the funds and had been notified that the money represented a credit to the plaintiff's account with BICAL, and that this position had been reached on day two.

32. Mr Adams' next authority was the decision of Hirst J in *Libyan Arab Foreign Bank v Manufacturers Hanover Trust (No. 2)* [1989] 1 Lloyds Rep 608. The facts are complicated, but for present purposes the essential features are these. In 1980 the Libyan Arab Foreign Bank

(LAFB) opened two accounts with Manufacturers Hanover Trust (MHT). One was in New York, and was not interest-bearing; the other was in London and was interest-bearing. There was an automatic transfer arrangement between the two accounts if the credit balance of either fell below a certain level. Early on 8 January 1986 LAFB be gave instructions to MHT for US$62 million to be transferred from the New York account to the London account. A matter of hours later the US President issued an Executive Order freezing all assets of the Libyan Government under U.S. control. As a consequence of the Executive Order, the automatic transfer arrangement between the New York and London bank accounts was terminated by LAFB. In 1987 LAFB made various demands for repayment of money by MHT which included: (1) US$41 million, plus interest, which was standing to the credit of the London account and (2) US$35 million, which was the net residue of the US$62 million which had been ordered to be transferred from New York to London just before the Executive Order was issued. Both claims succeeded.

33. Mr Adams focuses on the reasons given by Hirst J for upholding the second claim. He held that there was an effective transfer of the $62 million from New York to London on 8 January 1986 because MHT London had credited LAFB's London account with the sum of $62 million, and had debited the same amount from its account with MHT New York, before the Executive Order came into effect. The contrary argument was that the transfer was not effected until MHT New York had debited LAFB's account in New York, which never happened as a result of the Executive Order. Hirst J held that the action taken by MHT London was enough to constitute completion of the payment. He relied on *Momm v Barclays Bank International Ltd* for the proposition that acceptance of the instruction to credit the payee's account was enough to establish that payment had been made. However, this decision, like that in *Momm's* case, does not decide what constitutes a valid acceptance by a receiving bank, still less in the context of a modern CHAPS transfer.

34. *TSB Bank of Scotland plc v Welwyn Hatfield District Council* was decided by Hobhouse J in 1993 ([1993] 2 Bank LR 267). It concerned the unravelling of an interest rate swap transaction between Welwyn Hatfield District Council and the London Borough of Brent following the decision of the House of Lords in *Hazell v Hammersmith and Fulham London Borough Council* in 1991 that all such transactions were ultra vires local authorities. At the time the swap transaction was declared ultra vires, the net position was that Welwyn had paid Brent a net amount of $1,181,483.74 ("the sum"). On 18 July 1991 Brent paid the sum back to Welwyn by interbank transfer. The payment was accompanied by a faxed letter in which Brent said it was an unconditional tender made in payment of "any sum due to be repaid to you in restitution or otherwise". Welwyn replied the next day, saying it was only proposing to accept the sum "… on account of all the sums including interest due to this Council from your Authority". The message continued: "It must be clearly understood that such acceptance would not be in full and final satisfaction of any sums due from your Authority". Nothing further passed between the two local authorities until 6 August, when Brent repeated that the money had been sent as an unconditional tender on the terms of its letter of 18 July. As a result, Welwyn repaid the sum to Brent on 8

August. However, in the interim, Welwyn had placed the sum on the money market, earning interest of £9,000 which was not sent back as part of the repayment.

35. One issue Hobhouse J had to decide was whether Brent's payment on 18 July had been effective to discharge any liability to Welwyn in respect of the invalid swap transaction. Hobhouse J held that it had. He prefaced his conclusion with the following observations (at page 272 LHC):

> "The physical or ministerial aspect of payment involves the delivery of money by one person to another. Where the two persons meet face-to-face and the debtor seeks to hand to the creditor legal tender, the physical act of delivery (in the absence of some misrepresentation or mistake) will not be achieved without the concurrence of the debtor. Where the relevant contract or the terms of the debt require payment to be made in a particular way, as for example by payment into an identified account at a particular branch of a named bank, the payment will be effected by payment into that account. Prior authority has been given to discharge the debt or other obligation in that way; the debtor has authorised the bank (or other relevant person) to receive and accept the money on his behalf. No further act of concurrence or assent is required from the debtor. The creditor discharges his obligation by making the contractual payment in the contractually stipulated manner.
>
> Another situation which may exist is where the creditor makes the payment in a way that puts the relevant money under the exclusive control of the creditor. Thus the debtor may put legal tender through the letterbox of the creditor or may cause a payment to be made into the creditor's bank account. Once this has been done the creditor has the unconditional right to the use of the funds transferred. The debtor has divested himself wholly of the right or power to recall the relevant sum of money. In such a situation the ministerial or physical act of delivery of the money has been completed. What is the legal effect of that successful delivery of the money by the debtor to the creditor will depend upon what had been their previous relations and/or what may subsequently occur."

36. Hobhouse J held that the payment by Brent to Welwyn would have been effective if it had been made in accordance with an established mechanism agreed in advance between payer and payee. However the payment was not a contractual payment under the swap transaction but a restitutionary payment following cancellation of the swap. Next, he held that the payment would have been effective if it had been accepted by Welwyn on the terms on which it was sent. But Welwyn's letter of 19 July was at best a conditional acceptance and the condition was not one that Brent was willing to countenance. Last, he held that the payment would have been effective if it had been accepted by conduct. Between 19 July and 8 August, Welwyn had held on to the money and had earned interest on it in the money market. Hobhouse J found that this conduct had been sufficient to constitute an acceptance by Welwyn of the payment by Brent. In reaching this conclusion Hobhouse J expressly stated that cases such as *Rekstin v Severo*, *Momm v*

and *Royal Products Ltd v Midland Bank Ltd* which "... were concerned with what acts by a banker are required to complete a payment so that it ceases to be recoverable by the payer" did not assist.

37. In my judgment, *TSB Bank of Scotland plc v Welwyn Hatfield District Council* is of equally little assistance in determining whether an effective payment was made in the present case.

38. In *Customs & Excise Commissioners v Nat West Bank plc* [2003] 1 All ER (Comm) 327, the issue was whether the Commissioners had made a valid repayment of overpaid VAT by paying the refund to the taxpayer's bank account when the taxpayer had given express instructions that the money should be paid to its solicitors. Judge Rich QC held that the transfer of the money to the taxpayer's bank was no more than a tender which the bank had not been authorized to accept. He held that the taxpayer had not received the money and that the Commissioners were entitled to recover it from the bank.

39. Mr Adams then referred to *Du Preez Ltd (formerly Habana Ltd) v Kaupthing Singer and Friedlander (Isle of Man) Ltd* (2010) 12 IETLR 943 which is a decision of the Isle of Man High Court. Kaupthing Singer and Friedlander (Isle of Man) Ltd (KSFIOM) was the Isle of Man subsidiary of the Icelandic bank, Kaupthing, Singer and Friedlander. Early on 6 October 2008 instructions were given to KSFIOM on behalf or one of its customers, Habana, to transfer a sum of money in euros ("the sum") from Habana's deposit account to the account of a third party called IPMS at the Isle of Man branch of RBS. KSFIOM used to route all euro denominated payments to third parties from euro denominated bank accounts of its customers via a euro account which it held with Deutsche Bank in Frankfurt. Later on 6 October 2008, HM Treasury told banks in the UK to cease processing transfers for Icelandic-owned banks. On 7 October, KSFIOM drafted a SWIFT message to be sent to Deutsche Bank in Frankfurt requesting Deutsche Bank to remit the sum to the account of IPMS at RBS in the Isle of Man, with value 8 October. KSFIOM then created a shadow balance reflecting the entries that would appear on Habana's deposit account once the debit was approved. The debit was approved and Habana's deposit account was debited at about 5 pm on 7 October. The SWIFT message was then sent to Deutsche Bank early on 8 October, but was not immediately acted upon because KSFIOM's euro account with Deutsche Bank in Frankfurt had insufficient funds. Attempts were made to replenish the euro balance in the account so that the payment to IPMS could be completed, but they were unsuccessful before the freeze on transfers imposed by the Treasury took effect just after midday on 8 October. Later the same day, KSFIOM ceased to trade and went into liquidation. The debit entry on Habana's deposit account in the Isle of Man was later reversed but by that time KSFIOM was unable to honour the deposit.

40. Habana sued KSFIOM for a declaration that it had held the sum on a resulting trust for Habana from at least the date of the original instruction to make the payment, so that the sum

was not available to the liquidator in the liquidation. The case was therefore concerned with the status of funds following a failed transfer, rather than with whether a transfer had been completed. Mr Adams relies on it for the following passage in the judgment of the Staff of Government Division (at paragraph 64) in which the Court rejected the submission of Habana that the instruction to KSFIOM to make the payment had created a presently enforceable debt between Habana as creditor and KSFIOM as debtor:

> "In the case of an instruction by a customer to his bank to transfer funds to a third party, the paying bank has only carried out such instruction when the third party has the right to draw against his bank: see Webster J in *Royal Products* at 198 and Lord Bridge in *Awilco A/S v Fulvia SpA di Navigazione, The Chikuma* [1981] 1 All ER 652 at 657-659, [1981] 1 WLR 314 at 318-320. Accordingly if, for whatever reason, the instruction is not carried out and no payment is made to the third party, the debt owed by the paying bank to its customer is not discharged and the paying bank has no right to debit its customers account. It thus follows that we are satisfied that the debt owing by KSFIOM to Habana would only have been discharged if and when IPMS's account at RBS had been duly credited so that IPMS had the right to draw on the account in the amount so credited. ...".

41. To my mind these observations beg the question whether, in the present case, the claimant's instruction was not carried out and therefore no payment was made. If no payment was made, there is no contest that the bank was not entitled to debit the claimant's account and the claimant would be entitled to have its account re-credited.

42. Mr Adams' last case was *Razcom CI v Barry Callebaut Sourcing AG* [2010] EWHC 2598 (QB), a decision of Hamblen J on an application to set aside an order for enforcement of an appeal award of the Federation of Cocoa Commerce Ltd ("FCC"). The award was in favour of Razcom who had claimed the price of a cargo of cocoa sold to Barry Callebaut Sourcing AG ("BCS") because BCS had obtained the documents and the goods without paying for them. Before the application to enforce the award was made, BCS had made payment of the award to Razcom's bank (Ecobank). Razcom disputed that this was valid payment because it had asked BCS not to pay Ecobank but to pay the money to its solicitors. Razcom had even told BCS that Ecobank had no authority to accept payment. Razcom was in a dispute with Ecobank and did not want the bank to receive the money. Nevertheless BCS paid the amount of the award to Ecobank and Ecobank credited Razcom's account. When it found out, Razcom asked Ecobank to reverse the credit and return the funds. In the meantime, Razcom had applied for the order granting permission to enforce the award. The question was whether the payment to Ecobank had satisfied the liability of BCS under the award. *Customs & Excise Commissioners v Nat West Bank plc* does not appear to have been cited: but Hamblen J had no difficulty in holding that the payment had not been effective. Ecobank was at best Razcom's agent for the acceptance of payment. Since Razcom had notified BCS at the outset that Ecobank did not have authority to

accept payment on its behalf, the payment to Ecobank was not a valid discharge of the debt, unless there was evidence that Razcom had accepted the payment after it was made or had ratified the receipt of it by Ecobank. Hamblen J held that there was no such evidence. He dismissed the application by BCS to set aside the enforcement order.

43. Relying on all these authorities, the common theme of most of which is that a payment, even where routed through banking channels, requires an authorized acceptance by or on behalf of the payee before it is complete, Mr Adams' submission, in a nutshell, was that the payment to Designcraft was never completed.

44. Mr Levy, on behalf of the bank, approached the matter from a different angle. He submits that the bank was acting as the agent of the claimant in implementing the instruction to make payment. What the instruction required the bank to do is a matter of contractual construction. The instruction in this case authorized the bank to make a transfer of funds using CHAPS. That instruction carried with it, by necessary implication, authority to do what was required to ensure that the instruction was implemented in accordance with normal banking practice. The (effectively) unchallenged evidence of Mr Johnson about normal banking practice is that CHAPS is operated by "straight-through" processing by reference to the account number and sort code only. Members of CHAPS do not nowadays carry out manual checks. Even if they did, they would not check that the account is held by the named beneficiary. It is not the practice of the bank to check that the destination account is held by the named beneficiary of the payment, and one can infer that it is not the practice of Barclays either (or Barclays would have spotted the discrepancy on this occasion).

45. Mr Levy emphasizes that the bank faithfully copied all the information on the CHAPS Transfer form in the FUNDSFLOW – CHAPS DAILY ACTIVITY Form and the Form MT103 which it generated to accompany the payment. He says that the bank did everything it could, and everything it ought to have done, to ensure the CHAPS transfer was processed in accordance with the claimant's instructions. The transfer was processed through CHAPS in accordance with normal banking practice. As soon as Barclays established that the account number and sort code were theirs, an acknowledgment of receipt was sent back to the bank through the SWIFT messaging system. The funds were credited by Barclays to the designated account and were withdrawn by the account holder. Mr Levy therefore submits that payment, by the usual method in which CHAPS operates, was complete.

*Final determination or the Part 24 test?*

46. One would have thought circumstances similar to those in the present case arose with some frequency, and that there would be clear guidance in the authorities as to where the responsibility lay. However there appears to be none, or at any rate none was cited to me. Since

the point is of some general importance, I have considered whether I should determine it on a final basis or only by reference to the Part 24 test. I have come to the conclusion that I should determine it on a final basis and that no useful purpose would be served by my deciding that the argument of the claimant or of the bank stands a "real prospect" of success. I have come to that conclusion for 3 reasons. First, a final decision on a summary basis is what the parties want. Both say that the arguments are exclusively, or very largely, ones of law. Both appear content that the issue should be resolved in the factual context I have outlined. Second, neither side advances a fall-back argument that there might be further evidence which ought to be considered at a trial. In particular, neither party has expressed a wish to adduce further evidence of banking practice, and neither contends that it is of any relevance that there might have been other procedures for telegraphically transferring the money under which verification that the receiving account was that of Designcraft was assured. Third, I have come to a clear conclusion on the merits. For these reasons, there is in my judgment "… no other compelling reason why the case or issue should be disposed of at a trial" (CPR 24.2(b)).

*Conclusion*

47. Attractively though they were put, I think Mr Adams' submissions do not support the argument that the bank is liable to return the money. The logical first step is to ask what the bank was authorized to do and then to examine whether the bank, as agent of the claimant, complied with that instruction. The instruction was to pay a sum of money to the beneficiary by CHAPS transfer to the account number and sort code specified. Although the identity of the beneficiary was important to the claimant, the evidence is that CHAPS does not operate in such a way that the beneficiary's name forms part of the identifier which determines the destination of the payment. The reason is a practical one. The volume of transactions conducted through CHAPS each business day means that a process of manual checking would prevent payments being accomplished within the short timescale that is the hallmark of CHAPS.

48. Mr Adams pointed out that the existence of the Repair Sorting Code shows that CHAPS Rules do cater for including the name of the beneficiary in the identifier. However there is no requirement in CHAPS Rules that the beneficiary's name be included, and in practice CHAPS transfers are processed without reference to it. The evidence is unequivocal: the identity of the beneficiary is irrelevant to the way in which the payment is processed. It is the destination account number and sort code which matter. The claimant may be forgiven if it thought otherwise because the CHAPS Transfer Form includes a box for naming the beneficiary, and mentions "the payee": but the explanation for that is in paragraph 15 of Johnson 1. It is an anti-money laundering and counter-terrorism measure.

49. The conclusion I draw from the evidence of how CHAPS works is that a receiving bank which is able to match the account number and sort code to one of its accounts will be expected

to credit that account with the money and send an LAK, or its modern equivalent, back to the paying bank to indicate acceptance of the payment. At that point the payment is complete. This is what happened here. I reject the claimant's argument that in the present case the payment was not completed.

50. There is an additional reason why I do not think that the bank is liable to return the funds to the claimant or to re-credit the claimant's account. Strictly, I am not concerned with whether the instruction to make the payment gave rise to or was governed by a contract, because the claimant advances no claim for breach of contract. If the instruction did give rise to a contract it would probably have been "a single payment service contract" in the terminology of the Payment Services Regulations, unless the contractual terms governing the relationship between the claimant and the bank was a framework contract which already covered it. It matters not. Whether the instruction was contractual or was simply an "authority" (cf. Webster J in the *Royal Products* case), the transfer to which it related was one which the bank undertook to carry out on the terms of the CHAPS Transfer Form. These included the express acknowledgment by the claimant which I have quoted in paragraph 5 of this judgment ("I/We agree that no responsibility is to attach to you …"). There is no evidence that the bank was responsible for any error in transmission of the payment, let alone that its employees were negligent. The bank faithfully discharged its mandate. The payment ended up with the wrong payee because the claimant gave the wrong sort code and account number.

51. I express no view as to whether the claimant may be able to recover the payment from Barclays.

52. There will be judgment for the defendant on the claimant's claim in this action. The claimant's application for summary judgment is dismissed.