IN THE SINGAPORE INTERNATIONAL COMMERCIAL COURT OF THE REPUBLIC OF SINGAPORE

[2019] SGHC(I) 04

Originating Summons No 1 of 2018

In the matter of a SWIFT MT 103 STP Single Customer Credit Transfer (Sender's Reference No: PET164502181) dated 30 June 2017 sent by Barclays Bank PLC to Malayan Banking Berhad

Between

Malayan Banking Berhad

… *Plaintiff*

And

Barclays Bank PLC

… *Defendant*

JUDGMENT

[Banking] — [Electronic banking] — [Electronic funds transfer]
[Contract] — [Implied contracts]
[Contract] — [Illegality and public policy]

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v
Barclays Bank PLC

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Singapore International Commercial Court — Originating Summons No 1 of 2018
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25–27 March 2019

12 April 2019 Judgment reserved.

Jeremy Lionel Cooke IJ:

Introduction

1 The claimant (to whom I shall refer as "Maybank") applies by way of Originating Summons No 1 of 2018 filed on 14 February 2018 for declarations *vis-à-vis* the defendant (to whom I shall refer as "Barclays") that:

(a) an implied contract arose between the parties by Barclays sending to Maybank and Maybank accepting and acting upon the payment instruction contained in a Society for Worldwide Interbank Financial Telecommunication ("SWIFT") MT 103 STP Single Customer Credit Transfer ("MT 103 STP") sent on 30 June 2017;

(b) pursuant to such an implied contract, Barclays was obliged to initiate a sequence of transfers that would have ultimately led to

Maybank's correspondent bank paying Maybank the funds in relation to the MT 103 STP; and

(c) Barclays breached such an implied contract by failing to initiate a sequence of transfers that would have ultimately led to Maybank's correspondent bank paying Maybank the funds in relation to the MT 103 STP.

2 Maybank further seeks an order that Barclays pay Maybank the sum of US$871,085.61, being the equivalent of the interbank settlement amount specified in the MT 103 STP, within seven days of such order being made and an order for payment of its costs in bringing this action.

3 Maybank is a licensed commercial bank incorporated in Malaysia and doing business in Singapore. Barclays is a bank registered in England as a public listed company, with a branch in Singapore. Both parties are users of the international financial message system operated by SWIFT. This is a secure platform on which banks can exchange messages formatted according to message text standards developed by SWIFT to, among other things, facilitate fund transfers between banks. It is common ground that it is only a messaging system, not a means of transfer of funds and that those who participate in it are bound by a multilateral contract in relation to its use, as set out in the SWIFT Message Type Standards which are contained in the SWIFT User Handbook. The relevant version is that of November 2016 ("the SWIFT Standards MT" or simply "the Standards").

4 The SWIFT General Terms and Conditions describe themselves as:

> … the main set of SWIFT standard terms and conditions for the provision and the use of SWIFT services and products. They

> apply to each electronic form or contract executed by the customer to subscribe to SWIFT services and products …

From the SWIFT General Terms and Conditions, it is stated:

> SWIFT offers SWIFT services and products to all customers on a common contractual basis.
>
> This is a key element of SWIFT's co-operative nature. It ensures … that the sender and receiver of a SWIFT message are treated equally in all material respects.
>
> …

5 Paragraph 5.5 of these conditions is entitled "Industry Practice, Applicable Laws, and Regulations". The following appears:

> Industry Practice, Applicable Laws, and Regulations
>
> The customer is responsible for its use of SWIFT services and products, including any data transmitted through SWIFT.
>
> In using SWIFT services and products and conducting its business, the customer must always exercise due diligence and reasonable judgment, and must comply with good industry practice and all relevant laws, regulations, and third-party rights, even if this restricts its usage entitlement under SWIFT's governance.
>
> Without prejudice to the generality of the foregoing, the customer must:
>
> …
>
> (b) ensure not to use, or try to use, SWIFT services and products for illegal, illicit or fraudulent purposes …
>
> (c) use BICs [business identifier codes] and message standards as prescribed in the applicable documentation
>
> …

6 On Friday 30 June 2017, Maybank received payment instructions or payment information from Barclays in a particular type of SWIFT message (known as an MT 103 STP) and proceeded to act upon it by crediting US$871,080.61 into the account of the beneficiary customer, PLG International

Pte Ltd ("PLG"), that day. Maybank's position is that, although it was not obliged to act on such a message until receipt of funds into its account or that of its correspondent bank, or until it received a communication informing it that instructions had been given by Barclays (in the form of a SWIFT message MT 202 COV) to transmit such funds from Barclays' correspondent bank in New York, US (being Barclays' New York branch ("Barclays NY")) to Maybank's own correspondent bank there, JP Morgan Chase Bank NA ("Chase"), Maybank was entitled to act on such instructions in the MT 103 STP and Barclays was obliged to reimburse the sums paid out to PLG on its instructions. It is Maybank's case that, once the MT 103 STP instruction was acted on by it, the instruction could not be cancelled and Barclays was obliged to send (as this was a US dollar ("USD") transaction) an MT 202 COV to Barclays NY. Barclays NY would inform and pay Chase which would inform Maybank, with funds then accruing to Maybank in its mutual accounting with its correspondent bank, with a credit transfer. The MT 202 COV would be sent to "cover" the MT 103 STP. This has been referred to as "the Cover Method", as opposed to other forms of messaging which can achieve the same effect under the SWIFT system, such as "the Serial Method".

7 An MT 202 COV was in fact sent by Barclays to Barclays NY on 30 June 2017, at about the same time as the MT 103 STP was sent to Maybank on 30 June 2017. However, no payment or confirmation of payment was ever made to Chase because, after sending the MT 103 STP and the MT 202 COV, Barclays received information that the funds to be transferred had been received by its customer in "questionable circumstances". Bearing in mind the time differences (Singapore was seven hours ahead of London, UK which was five hours ahead of New York), Barclays in London sought, a few hours later:

(a) the cancellation of the MT 103 STP instruction by sending to Maybank a SWIFT message in the form of an MT 192, which was not received until after closing hours on the Friday 30 June 2017 in Singapore, by which time payment had already been made by Maybank to PLG's account with it, which had been credited with the relevant sum; and

(b) the cancellation of the MT 202 COV instruction by sending to Barclays NY a SWIFT message in the form of an MT 292, and Barclays NY was still open at that stage and assented to the instruction to cancel the MT 202 COV.

8 As already stated, by the time of effective receipt by Maybank of the MT 192 cancellation request from Barclays, which was after the weekend, on Monday 3 July 2017, Maybank had already credited its customer PLG. Maybank thereafter sought PLG's consent to adjust the position to debit the funds credited, but PLG refused, saying that the payment was made for a genuine business transaction.

9 Maybank seeks payment of the sum which it credited into PLG's account (plus a US$5 handling fee). Maybank relies on what it describes as an implied contract based on principles of contract law and banking law relating to entitlement to reimbursement for fulfilment of instructions from other banks. Maybank also relies on principles of agency and the applicable rules governing the use of SWIFT messages, to which banks using the SWIFT system adhere.

10 Barclays' case, as put in its early evidence and at the case management conferences, was that Maybank was not entitled to treat the MT 103 STP as irrevocable because it could be cancelled and was so cancelled by Barclays

when it sent the MT 192 upon the discovery of a potential fraud. Barclays also submitted that Maybank acted in a manner inconsistent with market practice by effecting the credit transfer to PLG's account without having first received the underlying MT 202 COV and that this was an internal credit risk decision which Maybank took and for which it should bear the consequences. For convenience I shall refer to the bank sending the MT 103 STP as the "Sending Bank" and to the bank receiving it as the "Receiving Bank". Barclays contended, at that stage, that:

(a) An MT 103 STP sent using the Cover Method is irrevocable only if and when the Receiving Bank receives the MT 202 COV. The MT 202 COV must match the MT 103 STP.

(b) If the Receiving Bank decides to act upon the MT 103 STP by effecting the underlying credit transfer, without receipt of the funds from the Sending Bank, this decision is an internal policy matter and a credit risk which the Receiving Bank voluntarily takes.

(c) If the Receiving Bank ultimately does not receive the underlying settlement instruction by way of the MT 202 COV, its recourse is to unwind the credit of the funds into its beneficiary customer's account; its recourse is not to recover the funds from the Sending Bank.

(d) This position is consistent with the SWIFT Standards MT in relation to the MT 103 STP, the Payments Market Practice Group ("PMPG") Market Practice Guidelines for use of the MT 202 COV ("the PMPG Guidelines") (and in particular, frequently asked question ("FAQ") 10 of the PMPG Guidelines) and market practice.

(e) In the present case, Maybank did not receive the MT 202 COV from Barclays in respect of the MT 103 STP. Therefore, Barclays was entitled to cancel the MT 103 STP.

(f) Under the SWIFT General Terms and Conditions, Barclays and Maybank are obliged, as SWIFT users, to comply with all relevant laws, regulations and third-party rights, *even if that affects their use of the SWIFT messaging system*, and they agreed not to use SWIFT services for illegal, illicit or fraudulent purposes. Since the MT 103 STP was issued in connection with a potential fraud, Barclays was acting consistently with the SWIFT General Terms and Conditions by seeking to cancel the MT 103 STP and refusing to issue the related MT 202 COV.

11 As expressed by Barclays at the time of the case management conferences, there was, at the very least, terminological inexactitude in the way it put its case, since the evidence shows that the Receiving Bank does not receive an MT 202 COV. The MT 202 COV is the instruction sent by the Sending Bank to its correspondent bank, instructing it to pay the correspondent bank of the Receiving Bank. The latter notifies the Receiving Bank of the receipt of actual funds, which occurs by wire transfer or clearing house transaction, by means of a communication which is usually in the form of an MT 910, and so the MT 202 COV is not sent to the Receiving Bank. The lack of precision in Barclays' case, as put, is odd but is now expressed differently, but raises essentially the same point of substance. The point is that Maybank was not entitled to any reimbursement of sums paid out by it pursuant to the MT 103 STP if it chose to pay before the actual receipt of funds by its correspondent bank in New York, *ie*, Chase, and/or communication of that to it.

Evidence

12 This matter came before the court for a first case management conference following the filing of an affidavit by Mr Ng Kuyn Fong, dated 14 February 2018, for Maybank, and affidavits by Ms Gemma Trood and Mr Ian Warrington ("Warrington 1"), both dated 26 April 2018, for Barclays. Warrington 1 set out factual evidence as to the events at Barclays. The affidavit of Ms Trood contained opinion evidence of the effect of the different SWIFT forms, by reference to the SWIFT Standards MT, the SWIFT General Terms and Conditions, the PMPG Guidelines and the Bank for International Settlements Committee on Payments and Market Infrastructures Correspondent Banking Report ("the BIS Report"). This led to an affidavit from Mr Chan Poh Choy and an affidavit and expert report from Mr Roger Stuart Jones in reply, with an application by Barclays to adduce expert evidence from Mr Robert John Lyddon in response, which I granted. By a late application, which I determined in a ruling on 21 March 2019, Barclays sought to adduce further evidence of fact, which I allowed in part only, namely a second affidavit from Mr Warrington ("Warrington 2").

13 Additionally, Barclays had, in April 2018, adduced affidavit evidence in the form of a legal opinion from an English lawyer Mr Stephen Gentle which, in summary, said that if Barclays had proceeded to transfer to Maybank the funds under the MT 103 STP, Barclays could have been:

(a) liable for an offence of money laundering under s 327 of the Proceeds of Crime Act 2002 (c 29) (UK) ("POCA"); and

(b) subject to criminal or regulatory enforcement by the UK Financial Conduct Authority ("FCA"), pursuant to: (i) The Money Laundering, Terrorist Financing and Transfer of Funds (Information on

the Payer) Regulations 2017 (SI 2017 No 692) (UK) ("the Regulations") (in particular, regs 19 and 20); (ii) para 6.3 of the Senior Management Arrangements, System and Controls ("SYSC") Sourcebook of the FCA's Handbook; and/or (iii) FCA's Principles for Businesses.

14 I expressed doubt at the first case management conference at the course that the proceedings were taking in the light of the opinion evidence of Ms Trood of market practice and the English law opinion. The issues raised by the former were not likely to be capable of resolution on affidavit evidence alone and the latter seemed to me to be of questionable relevance, if there was an implied contract of the kind alleged by Maybank, in the absence of any actual illegality in the transfer of funds by Barclays to Maybank, particularly since Barclays was always free to transfer funds out of its own pocket, rather than funds from its customer's account which had been credited in "questionable circumstances". I was prepared to accept some expert evidence because the SWIFT materials might involve more than a question of construction, but the end result has been that the proceedings have been protracted. The originating summons has taken an unusual course and, instead of being a speedy procedure for the determination of points of construction of documents, such as the MT 103 STP and other related SWIFT forms, has resulted in a hybrid form of proceedings with oral evidence and cross-examination. At the end of the day, no relevant "market practice" has been shown, which could affect the outcome, and the expert evidence was no more than useful background to the operation of the SWIFT system and the way in which banks operate.

15 The facts as stated in Warrington 1, Warrington 2 and the other evidence, so far as material, can be readily set out. I do not need to refer to a second MT 103 STP of the same date, *ie*, 30 June 2017, as that with which the court is concerned, save in passing, because the facts are different, the outcome

was different, leading to litigation between PLG and Maybank. The issues here are self-contained and unaffected by what transpired in relation to that litigation which appears to have been settled.

16 The facts, including those known only to Barclays, as relayed in Warrington 1 and Warrington 2, include the following:

(a) On 29 June 2017, a sum of US$3,999,975 was deposited into an account of Barclays' customer ("Bengeo") (*ie*, US$4,000,000 less applicable bank charges).

(b) On Friday 30 June 2017, Bengeo issued seven instructions to Barclays to transfer a total sum of US$4,017,615.76 from its account with Barclays to various beneficiaries' bank accounts with four banks (including Maybank).

(c) Accordingly, Barclays sent MT 103 STPs to the four banks (including Maybank). In particular, there were two MT 103 STPs sent to Maybank (of which this court is concerned with only one) using the Cover Method.

(d) Therefore, corresponding MT 202 COVs to these MT 103 STPs were also sent by Barclays to Barclays NY as the USD correspondent bank.

(e) On the evening of 30 June 2017, the Barclays branch in Singapore learnt that the sum of US$3,999,975 mentioned at [16(a)] above was deposited into Bengeo's account in questionable circumstances – because that sum of US$4,000,000 was intended to be credited into the account of another customer of Barclays instead. A

request was received from the correspondent bank of the sender of those moneys at 10.18am London time in a SWIFT message asking for the return of the moneys and saying "payment was not intended for you" and "suspected fraud payment". Because of this and the receipt of other emails to similar effect, Mr Warrington in London said that he had reason to believe that the inbound funds from which payment to Maybank was to be made were the subject of fraud. He instructed the cancellation of the fund transfers, which included the sending of an MT 292 to Barclays NY requesting cancellation of the MT 202 COV and of payment to Maybank's correspondent bank, Chase. Steps were taken to request cancellation of the MT 103 STP with an MT 192.

(f) The MT 103 STP with which this court is concerned was received by Maybank at around 5.15pm. This was processed by Maybank and the payment instruction carried out by crediting PLG's account with the relevant sum by about 7.39pm that day.

(g) The second MT 103 STP, with which this court is not concerned, was received at around 7.59pm after the close of business on Friday 30 June 2017 and was only made available for processing on the next business day, Monday 3 July 2017.

(h) On the evening of 30 June 2017, Barclays issued MT 192s to all four banks who had received the MT 103 STPs, seeking cancellation of the latter.

(i) The MT 192 in relation to the MT 103 STP with which this court is concerned reached Maybank at 9.53pm on Friday 30 June 2017, long after banking hours, and was not seen or capable of being processed until Monday 3 July 2017. The effective time of receipt was about 8.25am on

3 July 2017, by which time the MT 103 STP with which this court is concerned had been implemented (but the second MT 103 STP, with which this court is not concerned, had not).

(j) Barclays also issued MT 292s to Barclays NY in respect of the MT 202 COVs, including an MT 292 in relation to the MT 103 STP with which the court is concerned, at 9.54pm Singapore time (9.54am New York time).

(k) Upon receiving the MT 192s, the three banks apart from Maybank agreed to cancel the MT 103 STPs which they had received respectively, and upon receiving the MT 292s, Barclays NY agreed to cancel the MT 202 COVs it had received, including that relating to the MT 103 STP sent to Maybank with which this court is concerned.

List of issues

17 The parties agreed a list of issues as follows:

(a) whether the MT 103 STP was irrevocable by Barclays once Maybank acted upon the MT 103 STP by crediting PLG's account with the relevant sum on 30 June 2017 at 7.39pm;

(b) if the answer to issue (a) is yes, whether, and if so, to what extent, Barclays is liable to Maybank in respect of the MT 103 STP;

(c) whether an implied contract arose between Barclays and Maybank by Barclays sending to Maybank, and Maybank acting upon, the MT 103 STP, under which Barclays was obliged to initiate a sequence of transfers that would have ultimately led to Maybank receiving the funds in relation to the MT 103 STP;

(d) if the answer to issue (c) is yes, whether Barclays was in breach of the implied contract by failing to initiate a sequence of transfers that would have ultimately led to Maybank receiving the funds in relation to the MT 103 STP; and

(e) what are the costs orders that should be made in respect of the entire hearing of the matter.

18 It appears to the court that the fundamental issue always has been that set out at [17(c)] above and that the sequence of the questions raised should be seen in that light. The question of the irrevocability of the MT 103 STP is only part of that issue. Whether or not an MT 103 STP is revocable in general does not necessarily assist in answering the fundamental issue, since it may well be revocable in general, as with any instruction which is capable of being cancelled prior to being implemented, but once fulfilled by the party receiving the instruction, the position may be different. If there was some universal market practice that an MT 103 STP instruction to pay was capable of cancellation following implementation by the Receiving Bank, that would be directly to the point, but there was no evidence of such a practice and the court has to determine the rights of the parties in the light of the messages sent and received, the general law and any relevant market practice that may be established which could impact on that.

Implied contracts

19 The implied contract here is said to arise on the sending of the MT 103 STP instruction to pay PLG and the action of Maybank in accepting that instruction and making the payment instructed. The implied contract requires Barclays to reimburse Maybank in respect of the payment made on Barclays' instructions. The SWIFT documentation, as appears below, recognises the

existence of such an obligation, but the question is whether the test for the existence of an implied contract and the implied obligation is met.

20 I was referred to the decision of the Singapore Court of Appeal in *Cooperatieve Centrale Raiffeisen-Boerenleenbank BA (trading as Rabobank International), Singapore Branch v Motorola Electronics Pte Ltd* [2011] 2 SLR 63 ("*Rabobank*") where it was observed that an implied contract is no different in legal effect from an express contract but that the difference lies solely in the manner in which the consent of the parties is manifested. Such a contract can arise from communications between the parties and from conduct (see *Rabobank* at [46]). In the *Rabobank* decision, it was said that in a case where the court was faced with a claim that an agreement had been entered into by conduct, and the mechanism for offer and acceptance was conduct, rather than express written or oral agreement, it ought to scrutinise the evidence carefully to determine whether the existence of a contract, compliant with all the requirements of contract formation, had been proved on the balance of probabilities. "[A]ll the surrounding circumstances must be considered objectively to determine whether or not a contract may properly be implied. No assumptions should be made, since contracts are not to be 'lightly implied'" (*Rabobank* at [50]). Elsewhere the following appears (at [49], citing *Tribune Investment Trust Inc v Soosan Trading Co Ltd* [2000] 2 SLR(R) 407 at [40]):

> … the function of the court is to try as far as practical experience allows, to ensure that the reasonable expectations of honest men are not disappointed. To this end, it is also trite law that the test of agreement or of inferring *consensus ad idem* is objective. Thus, the language used by one party … is to be construed in the sense in which it would reasonably be understood by the other. [emphasis in original]

21 I was also referred to decisions of the English courts and in particular to that of the Court of Appeal in *Baird Textile Holdings Ltd v Marks & Spencer*

plc [2002] 1 All ER (Comm) 737 where the court said that it was fatal to the implication of a contract that the conduct in question was explicable by reference to other facts. It was not enough for the conduct to be consistent with the alleged contract. For a court to imply a contract it had to be necessary to do so because the conduct was not explicable on any other basis. The court (at [20]) cited *Mitsui & Co Ltd v Novorossiysk Shipping Co (The "Gudermes")* [1993] 1 Lloyd's Rep 311 at 320:

> … it is not enough to show that the parties have done something more than, or something different from, what they were already bound to do under obligations owed to others. What they do must be consistent only with there being a new contract implied, and inconsistent with there being no such contract.

The court also (at [18]) cited the decision of Bingham LJ (as he then was) in *"The Aramis"* [1989] 1 Lloyd's Rep 213 at 224:

> … it would, in my view, be contrary to principle to countenance the implication of a contract from conduct if the conduct relied upon is no more consistent with an intention to contract than with an intention not to contract. It must, surely, be necessary to identify conduct referable to the contract contended for or, at the very least, conduct inconsistent with there being no contract made between the parties. Put another way, I think it must be fatal to the implication of a contract if the parties would or might have acted exactly as they did in the absence of a contract.

22 Barclays submits that sending an MT 103 STP could not be construed as the making of an offer to pay which could be accepted by Maybank by paying PLG. It was not to be understood by a reasonable recipient to be an offer and did not require Maybank to pay PLG when to do so would be contrary to common sense without receiving covering funds. There would be no certainty of any payment reaching Maybank because it might be stopped for any number of reasons which had nothing whatever to do with the Sending Bank or Receiving Bank. Cover payments could be stopped along the payment chain

because of failure to pass the screening by intermediate/correspondent banks for money laundering, financing of terrorism or sanctions, the financial failure of the Sending Bank or one of the correspondent banks, transfer risk, and operational risk.

23 Barclays' arguments carry no weight, if the MT 103 STP constitutes an instruction by it to Maybank to pay PLG. It is not suggested that the payment would have been made by Maybank if there had been no MT 103 STP sent to it and if one bank instructs another to make payment on its behalf, the suggestion that the latter makes such a payment without the promise of reimbursement is so uncommercial as to be laughable. If the MT 103 STP has the effect for which Maybank contends, in instructing payment to be made to PLG on the assurance that a payment from Barclays will be forthcoming, it can only amount to an offer to reimburse Maybank should it accept the instruction and comply with it by making the payment to PLG. As appears below, the conduct of both Barclays and Maybank is explicable only on the basis, as supported by the SWIFT documentation, of an implied contract requiring Barclays to reimburse Maybank for payment to PLG on Barclays' express instructions.

24 It is, in my judgment, inconceivable in the world of banking, that Barclays could ask Maybank to make a payment to its customer and that Maybank would comply with instructions from Barclays to pay PLG, without such an obligation arising on the part of Barclays. To my mind it is inconceivable, despite the evidence from Barclays as to revocability, that this was not the expectation of Barclays on a subjective basis at the time of issuing the instructions. Whether or not that is the case, on an objective basis, no other analysis of the parties' relationship makes any commercial sense. The bank of one party seeking to pay another party does not give instructions to another bank to pay that party without being obliged to reimburse the latter for the payment

in question, if it is made. The payment of the sum, if the instruction is accepted, is made by the Receiving Bank on behalf of the Sending Bank which sends the instructions to pay. In the context of the MT 103 STP and the Cover Method, as explained below, with the supposed simultaneous sending of the MT 202 COV to a correspondent bank in New York to cover the payment instructed by the MT 103 STP, a contract is necessarily created. The contract must necessarily be implied from the sending of the MT 103 STP and the acceptance of the instruction within it, when making the payment. The only question which arises is whether there was some conditionality in the instruction that constituted the offer which meant that it was not to be acted on unless and until the Receiving Bank received confirmation of some kind that funds had reached it or its correspondent bank, which was the effect of what Barclays seeks to argue, although it does not put its case precisely in that way, preferring to argue that the payment instruction was revocable at all times until such confirmation was given.

25 The actions of Maybank in complying with the instructions given are only explicable by reference to an implied contractual obligation of reimbursement unless the terms of the SWIFT messaging system and/or market practice operate to make the instructions, offer or obligation conditional in some way. For the reasons given below, the implication of that contract is supported by the SWIFT documentation which refers to the mandate given and the requirement to reimburse when the mandate is implemented. There is no problem either about uncertainty of the terms of the contract or an intention to create legal relations, although Barclays suggests otherwise. The implied contract is straightforward, with instructions between banks to pay a given sum amounting to an offer to reimburse that sum if the instruction is fulfilled. No bank would act on the instruction unless there was an enforceable obligation to

reimburse and both banks would understand that. No objective observer would think any differently.

26 Whilst I considered initially that Maybank could not be seen as Barclays' agent in effecting payment to PLG, it is hard to see how else the situation can be analysed. There is an apparent difficulty in analysing the situation thus because Barclays is the agent of Bengeo in making the payment through its correspondent bank in New York whilst Maybank could be seen as the agent of PLG to receive the payment through its correspondent bank there. Yet, as appears in this judgment, the whole point of the MT 103 STP is to instruct payment by the Receiving Bank which is distinct from the cover payment passing between banks. It is not a case of a transfer of funds from one bank to another for the account of the latter's customer, since that would require no MT 103 STP at all. Funds would, on that basis, simply be transferred by Barclays, as Bengeo's agent, to Maybank, as PLG's agent, so that the latter's account could be credited, and there would be no need for the MT 103 STP and the MT 202 COV at all.

27 There is here, however, as I expressly find below, an unconditional instruction given direct by Barclays to Maybank to make a payment on the basis of an assurance of reimbursement and, when making that payment, as mandated, Maybank fulfils the mandate and can only be seen as making that payment "on behalf of" Barclays, whether or not that amounts to an agency in law in doing so. If Maybank chooses to wait until receipt of the funds before making payment, it may fulfil its mandate by accepting the funds as agent for its customer and crediting the latter's account, but if it pays in advance of receipt it does so from its own pocket in crediting the customer's account, is out of pocket when granting that credit and it is entitled to retain the funds for itself when they arrive from the Sending Bank. The fact that it receives

reimbursement which it does not credit to PLG but which inures to its own benefit indicates that it has paid PLG on instructions from, and as agent for, the Sending Bank, rather than receiving funds as agent for PLG which would be credited to the latter's account.

28 If this is not a pure agency relationship because of the different capacities in which the Receiving Bank acts from time to time, it is so akin to it that the principles of agency which apply to instructions given to agents and their irrevocability once implemented (which represent trite law) must be applied by analogy and the implied contract reflects the interrelationship of the Sending Bank and the Receiving Bank and their mutual contracting which is subject to the SWIFT Standards MT.

Terms of the SWIFT messages and the SWIFT Standards MT

29 The SWIFT Standards MT describes the rationale for financial messages to adhere to the message text standards as "[t]o ensure that the multitude of practices and conventions of users are in harmony" (para 2.1).

(a) In "Category 1 Message Types" appears the entry "103 STP" which is given the MT name of "Single Customer Credit Transfer" with the stated purpose of "[i]nstruct[ing] a funds transfer".

(b) In the section under the heading "MT 103 STP Single Customer Credit Transfer", appears the following: "The MT 103 STP … allows the exchange of single customer credit transfers using a restricted set of fields and format options of the core MT 103 to make it straight through processable".

(c) The scope of the MT 103 STP is described in the following way:

> This message type is sent by, or on behalf of, the financial institution of the ordering customer, directly or through (a) correspondent(s), to the financial institution of the beneficiary customer.
>
> It is used to convey a funds transfer instruction in which the ordering customer or the beneficiary customer, or both, are non-financial institutions from the perspective of the Sender.
>
> This message may only be used for clean payment instructions. It must not be used to advise the remitting bank of a payment for a clean, for example, cheque, collection, nor to provide the cover for a transaction whose completion was advised separately, for example, via an MT 400.

30 There can be no doubt therefore that the use of the MT 103 STP by one bank to another is an instruction to the Receiving Bank to pay a sum of money to the beneficiary named in it.

31 When the terms of the relevant MT 103 STP are examined, that is also plain. The message, as produced in the bundle of documents before the court as "FIN 103.STP Single Customer Credit" for its title, has the date and time "30/06/17-17:15:47". The sender is named as "Barclays Bank PLC … London" and the receiver as "Malayan Banking Berhad Singapore" [original emphasis omitted]. The name of the ordering customer is given as "Bengeo Ltd" and the names of both of the correspondent banks in New York, "Barclays Bank PLC New York" and "JPMorgan Chase Bank, NA New York", and the name of the beneficiary of the payment, "PLG International Pte Limited Singapore", also appear [original emphasis omitted]. Under the heading "Currency/Instructed Amount" appear the entries "USD (US Dollar)" and "871,109.05" whilst under the heading "Val Dte/Curr/Interbnk Settld Amt" appear the date "30 June 2017", "USD (US Dollar)" and "871,085.61" [original emphasis omitted].

Sender's charges of US$23.44, set out in the document, explain the difference between the two sums. There are also the sender's reference "PET164502181" and the remittance information "INV098872001".

32 On its face, therefore and by reference to the SWIFT Standards MT, this is a payment instruction from Barclays to Maybank to pay PLG the sum in question.

33 It is recognised that there are two different methods of making payment when there are more than two banks (the Sending Bank and the Receiving Bank) involved, such as where each has a correspondent bank in New York through which USD payments have to be made. These two methods are known as the Cover Method and the Serial Method. The latter involves a series of payments between a chain of banks, one after the other, with funds moving only on receipt from the previous bank in the chain. That process takes time and is not well suited to "same day value" transfers. The Cover Method is a quicker process and involves the Sending Bank sending an MT 103 STP to the beneficiary's bank (*ie*, the Receiving Bank) at the same time as sending an MT 202 COV to the Sending Bank's correspondent bank in New York.

34 In the Standards, under the heading "MT 103 STP Guidelines", the different methods of transfer are detailed. The Cover Method is described as follows:

> If the Sender and the Receiver have no direct account relationship in the currency of the transfer or do not wish to use their account relationship, then third banks will be involved to cover the transaction. The MT 103 STP contains only the payment details and the Sender must cover the customer transfer by sending an MT 202 COV General Financial Institution Transfer to a third bank. This payment method is called 'cover'.

35 The MT 202 COV is described in the SWIFT Standards MT as a "General Financial Institution Transfer" and the stated purpose as "[r]equest[ing] the movement of funds between financial institutions, relat[ing] to an underlying customer credit transfer that was sent with the [C]over [M]ethod."

36 The MT 202 COV is therefore a message from the Sending Bank requesting a transfer to be made by its correspondent bank, and alongside it, there will be debit/credit entries as between the Sending Bank and its correspondent bank. This is then intended to lead to an actual transfer of funds in the form of a wire transfer, Clearing House Interbank Payments System (CHIPS) transfer or other clearing house transfer between the Sending Bank's correspondent bank and the Receiving Bank's correspondent bank in New York. This latter bank then notifies the Receiving Bank of the receipt of such funds and of the credit made in its own books for the benefit of the latter bank (usually by means of an MT 910). At that point, the Receiving Bank would consider that it had received payment by way of "cover" for the sum it was instructed to pay under the MT 103 STP, whether it had paid its customer, the ultimate beneficiary, or not.

37 There is further guidance to be found under the heading "MT 103 STP Market Practice Rules" which appear in the Standards:

> As indicated in the MT 103 STP Guidelines, when an MT 103 STP is sent using the [C]over [M]ethod, an MT 202 COV message must be sent to cover the transfer. A credit to a beneficiary's account that is based on the receipt of an [MT 103 STP], without receipt of the related cover payment, is a policy decision. Institutions have deployed processes that are approved by their internal risk committees; the risk lies clearly with the beneficiary institution. Guidelines for the processing of

> an MT 103 STP sent with the [C]over [M]ethod have been published by the [PMPG].
>
> …

38 The form of an MT 103 STP as set out by SWIFT has certain mandatory fields which include field 32A which specifies the value date, the currency and the settlement amount, the latter being the amount to be booked/reconciled at interbank level. Fields 53a and 54A refer to the Sending Bank's correspondent bank and the Receiving Bank's correspondent bank respectively and are conditional fields to be completed when required. The Standards set them out in this way:

> **11. Field 53a: Sender's Correspondent**
>
> …
>
> DEFINITION
>
> Where required, this field specifies the account or branch of the Sender or another financial institution through which the Sender will reimburse the Receiver.
>
> …
>
> USAGE RULES
>
> …
>
> When field 53A is present and contains a branch of the Sender, the need for a cover message is dependent on the currency of the transaction, the relationship between the Sender and the Receiver and the contents of field 54A, if present.
>
> …
>
> **12. Field 54A: Receiver's Correspondent**
>
> …
>
> DEFINITION
>
> This field specifies the branch of the Receiver or another financial institution at which the funds will be made available to the Receiver.

> …
>
> USAGE RULES
>
> …
>
> Field 54A containing the name of a financial institution other than the Receiver's branch must be preceded by field 53A; the Receiver will be paid by the financial institution in field 54A.
>
> The use and interpretation of fields 53a and 54A is in all cases dictated by the currency of the transaction and the correspondent relationship between the Sender and Receiver relative to that currency.
>
> …

39 In circumstances where the payment was to be in USD, completion of these fields was mandatory and provided the details required for reimbursement by the Sending Bank of the Receiving Bank for payment made by the latter pursuant to the instructions to pay given by the MT 103 STP. Furthermore, on the evidence of Mr Lyddon, the entries under the heading "Val Dte/Curr/Interbnk Settld Amt", where "30 June 2017", "USD (US Dollar)" and "871,085.61" appear [original emphasis omitted], represent the assurance that these funds will be made available on the date given in interbank funds between the Sending Bank's correspondent bank and the Receiving Bank's correspondent bank. The passages cited in the Standards thus assume, if they do not impose, an obligation on the part of the Sending Bank to cover the payment instructions given in the MT 103 STP by means of the Cover Method, using an MT 202 COV and the form of the MT 103 STP which was utilised in the present case confirms and sets out that obligation.

40 It is agreed on all sides that payment to the beneficiary on receipt of the MT 103 STP involves risk on the part of the Receiving Bank if it has not received notification that a cover payment has been made to its correspondent bank in New York. It is also agreed that the Receiving Bank has an option

whether to make such a payment in advance of notification but the dispute is whether the Sending Bank is bound to make the cover payment if the Receiving Bank has paid out in advance of such receipt of notification or whether the Sending Bank is entitled effectively to cancel the MT 202 COV request to its correspondent bank and the credit given to it, with the result that no payment is then made by that correspondent bank to the Receiving Bank's correspondent bank.

41 Nothing in what I have thus far set out suggests that there is any conditionality in the MT 103 STP "funds transfer instruction" or any ability on the part of the Sending Bank unilaterally to cancel the payment instruction given by an MT 103 STP, but entries for the MT n92 form of message and the MT 192 do refer to a request to cancel.

42 An MT 192 is given the name of "Request for Cancellation" and the stated purpose is that of "[r]equest[ing] the receiver to consider cancellation of the message identified in the request". Under the Message Reference Guide in the Standards for "Category n - Common Group Messages", "Category n Message Types" gives the description for "n92" as "Request for Cancellation" and the stated purpose as "[r]equests the Receiver to consider cancellation of the message identified in the request". In the more detailed section, under the headings "MT n92 Request for Cancellation" and "MT n92 Scope", the following appears:

> This message is:
>
> - sent by a financial institution to request a second financial institution to consider cancellation of the SWIFT message identified in the request.
> - sent by a corporate customer to request a financial institution to consider cancellation of the SWIFT message identified in the request.

> If the Receiver of the request for cancellation has already acted on the message for which cancellation is requested, the MT n92 asks for a retransfer, that is, reversal, with the beneficiary's consent.
>
> …

43 The MT 192 in the present case was headed "FIN 192 Request for Cancellation", sent by Barclays to Maybank, and used the following language, after quoting the same reference number and referring to the MT 103 STP dated "170630" (30 June 2017):

> 1ST REQUEST. PLEASE CANCEL OUR PAYMENT AND RETURN FUNDS TO OURSELVES. OR CONFIRM VIA AUTHENTICATED SWIFT THAT YOU HAVE TREATED OUR PAYMENT AS NULL AND VOID AND PROVIDE FULL RETURN PAYMENT DETAILS. WE HAVE RECEIVED A REQUEST TO RECALL THE FUNDS AS REMITTER STATING REASON AS PAYMENT WAS REPORTED AS FRAUDULENT PROCEEDS

44 On its face, therefore and by reference to the SWIFT Standards MT, this was a request for cancellation or consideration of cancellation of the previous MT 103 STP, and the terms of the wording set out at [42] above suggest that it was recognised that the consent of the beneficiary would be required if the instructions to pay in the MT 103 STP had been implemented already.

45 When reference is then made to the SWIFT Standards MT Usage Guidelines, para 11 is headed "Cancellation of an MT 103 Payment Instruction for which Cover has been Provided by a Separate MT 202 COV". Four options are set out and the purpose of the guidelines in the paragraph is stated to be "to give guidance on the best option to use, both from a practical and legal point of view".

46 Paragraph 11.2 states that "[t]he MT 103 payment instruction and its cover, the MT 202 COV, should be considered as one transaction" and that:

> As practices vary widely and may impact the choice of a preferred option, the legal relationship established between the sender and the receiver of the original MT 103 (that is, mandator and mandated party) must be taken into account. The receiver is therefore responsible for carrying out the mandate given by the sender.
>
> The MT 103 payment instruction and its cover, the MT 202 COV, should be considered as one transaction. Consequently, cancelling the original MT 103 should automatically trigger the cancellation by the receiver of the whole transaction, including the cover.

47 The guidelines do not state the circumstances in which cancellation can be effected, nor the effect thereof, but set out four options, of which attention focused on the first and fourth. The first option of "Sending an MT 192 to the receiver of the [MT 103 STP]" is said to be "the recommended and most logical option" [original emphasis omitted]. The first option then proceeds thus:

> The receiver of the [MT 103 STP] and MT 192 is responsible for requesting cancellation of the payment from the beneficiary if payment has already been effected, and for initiating the return of the funds through the correspondent chain, that is, reversing the MT 202 COV. …
>
> By doing so, the receiver retains control of the funds, and does not run the risk of having the cover reversed by its correspondent before consent is received from the beneficiary and debit authorisation is given to the receiver's correspondent.
>
> …

The fourth option reads: "Sending an MT 192 to the receiver of the [MT 103 STP] without sending any cover." The advice then proceeds to say:

> This option presents threats for both sender and receiver. This situation could arise if the sender realises that a mistake has been made, and requests cancellation of the [MT 103 STP] before the MT 202 COV instruction has been sent.

> The receiver will be put in a position of having received, and possibly acted on, a bona-fide payment instruction for which it is entitled to expect reimbursement. If the beneficiary subsequently refuses to refund the payment, the receiver will be out of funds.
>
> The sender obviously does not want to be debited by its correspondent for an instruction that should not have been sent. Nevertheless, the risk is that the receiver and/or beneficiary will refuse to refund the original, or that the refund will not be effected with original value.

48 In the PMPG Guidelines appears, as FAQ 10, the question:

> If the beneficiary institution has credited the beneficiary's account based on the [MT 103 STP] and the covering funds are frozen by an intermediary institution due to a sanction against any party in the payment chain what is the recourse of the beneficiary institution?

The answer given is that:

> Crediting a beneficiary's account based on the receipt of an [MT 103 STP] without receipt of the cover payment is a credit policy decision. Each institution has deployed a process that has been approved by the internal risk committees; the risk being clearly with the beneficiary institution. Policies should be reviewed on a regular basis as part of the MT 202 COV handling to ensure a proper reflection in internal credit risk policies.

A note appears alongside saying: "Only the entity whose funds are frozen can apply to the appropriate government agency for an unfreezing of funds."

49 A number of points emerge from these passages in the SWIFT documentation and from the nature of the SWIFT system as revealed in definitional statements elsewhere:

(a) The SWIFT system is a secure messaging system and not a mechanism for transfer of funds.

(b) The SWIFT materials offer guidance as to how the documents are to operate as matters of best practice in order to achieve harmony in usage. The nature of the different format of messages to be used, with mandatory and optional fields to be completed in each, is set out.

(c) The SWIFT materials do not seek to set out statements of law but give voice to the market understanding of the effect of the MT 103 STP and the MT 202 COV.

(d) The MT 103 STP is an instruction by one bank to another to pay a beneficiary, with no element of conditionality in it.

(e) The MT 202 COV is an instruction by a bank to a correspondent bank to pay a sum to cover the instruction given by an MT 103 STP.

(f) The bank which issues the MT 103 STP should as a matter of practice, issue an MT 202 COV at the same time as part and parcel of the same operation.

(g) A bank which receives an MT 103 STP is expected to fulfil the instruction and can do so when it is received without receiving notification that an MT 202 COV has been issued to cover the payment it makes in accordance with the MT 103 STP; but there is a risk in so doing because there may be a blockage in the system of transfer of funds as a result of sanctions imposed by governments (particularly the US) or for other reasons, which may delay or prevent the receipt of the funds.

(h) The risk that is referred to is a credit risk, *ie*, the risk that payment by way of reimbursement for fulfilling the instruction may be delayed or prevented. That has no impact on the legal obligations of the parties.

(i) The risk that is referred to is not the risk of being unable to recover that sum from the beneficiary because, as between the Sending Bank and the Receiving Bank, recovery from the beneficiary requires its consent.

(j) The recipient of an MT 103 STP is responsible for fulfilling the mandate given to pay.

(k) A Receiving Bank which pays out in accordance with the payment instruction contained in an MT 103 STP is entitled to expect reimbursement by the Sending Bank.

(l) Cancellation of an MT 103 STP can occur but a bank which wishes to cancel, sends a message requesting the recipient of the MT 103 STP to consider cancellation and, if payment has already been made pursuant to the instruction, to seek the consent of the beneficiary to reverse the payment it has received. There is no ability, unilaterally to cancel the payment instruction, once payment has been made although, if no payment has been made and no commitment by the Receiving Bank to pay, there is no reason why it should refuse.

50 The recommended option when a bank is seeking to cancel an MT 103 STP which would cancel the whole operation (since there would then be no need for any payment to cover the instruction to pay out) is to place responsibility on the bank paying out on the MT 103 STP to seek to retrieve the funds and initiate a process of reversal, including the reversal of the MT 202 COV instruction to transfer funds (and the transfer which followed it). It is not recommended to withhold making the cover payment, even if it is realised before sending the MT 202 COV that a mistake has been made. To take the latter course "presents threats for both sender and receiver", because the Receiving Bank "will be put

in a position of having received, and possibly acted on, a bona-fide payment instruction for which it is entitled to expect reimbursement" and "the risk is that the receiver and/or beneficiary will refuse to refund" the sum paid (see [47] above).

51 Nowhere in the SWIFT documentation is there any suggestion that an MT 103 STP is a conditional instruction to pay or that the Sending Bank is entitled unilaterally to countermand an instruction to a Receiving Bank to pay regardless of any payment made by that bank in accordance with the instruction given. Whilst there is no clear statement saying that the Sending Bank is not entitled to do so, the terms of the SWIFT documents recognise both the entitlement of the Receiving Bank paying out on instructions to reimbursement and the need for consent on the part of that bank and its beneficiary to cancel and reverse the credit if payment has been made.

52 I have no hesitation in concluding on the basis of the SWIFT materials and the evidence before me that the sending of an MT 103 STP carries within it an implied promise to cover the payment which the Receiving Bank is instructed to make. That is why the MT 202 COV is to be issued at the same time as part and parcel of the same operation and is implicitly referenced in the MT 103 STP (see [31] and [38] above). No bank would pay out on instructions unless it considered that the Sending Bank was obliged to reimburse it and in the context of SWIFT messages, the issue of an MT 103 STP does amount to an implied promise to issue an MT 202 COV and to make the necessary payment to cover the payment which the Receiving Bank is instructed to make.

53 As appears below, that is consonant with the general law and practice of banking. If a bank instructs another to make payment, the latter rightly expects repayment and would not contemplate following instructions to pay without an

enforceable right to it: nor could a Sending Bank sending such instructions expect anything else. There is plainly, implicit within the instructions, an implied promise to reimburse.

54 Of course, as with any instruction, whether given to an agent or anyone else, the instruction can be withdrawn before it is acted on, since the promise to repay is only operative in respect of a payment actually made and it has nothing to bite on until such payment is made in accordance with the instruction given. Once however, payment is made, the instruction cannot be revoked because it has been acted on and the promise to reimburse is fully operative.

55 Reliance was placed by Barclays on the BIS Report which describes the Serial Method and the Cover Method of channelling a correspondent banking transaction through the SWIFT network and the distinction drawn between the two. The report refers to the Cover Method "decoupling" the "settlement information" from the "payment information" inasmuch as the MT 103 STP sent to the Receiving Bank contains the latter, whereas the settlement instruction is sent via intermediary banks through the path of direct correspondent banking relationships. Ms Trood seized on this distinction to say that the MT 103 STP was not an effective payment instruction until the MT 202 COV was issued and that in consequence the former was revocable and only became irrevocable once there was a transfer of funds to the Receiving Bank.

56 There is a fundamental fallacy in this approach which was perpetuated in Barclays' case throughout. The transfer of funds is distinct from instructions given to pay. To speak of the MT 103 STP containing nothing but payment information as to the identity of the beneficiary and the amount to be paid is to ignore the indisputable fact that it is an instruction to pay. That, for the reasons given above and below, gives rise to an obligation to reimburse for the payment

made on instructions. The implied promise exists before the funds are transferred and the MT 202 COV is in itself only an instruction from the Sending Bank to its correspondent bank to pay the covering sum to the correspondent bank of the Receiving Bank.

57 Unless there is some established market practice that operates to prevent any instructions to pay being operative unless and until funds are transferred to the Receiving Bank or its correspondent bank, the position in law is clear and applicable – namely that reimbursement must be made for a payment made on instructions.

58 In the BIS Report appears a passage which, when comparing the two methods, states that the Cover Method is considered to be faster but that, when using it, two separate message flows exist, which means that the bank receiving the MT 103 STP is aware that it will receive funds and should it not do so via the MT 202 COV, it can then investigate. It is stated at para 3.5.2 of the BIS Report that:

> … On the other hand, depending on the commercial policies of a [R]eceiving [B]ank, this knowledge either allows the customer account to be credited sooner or it might put the bank under pressure – for competitive reasons – to credit the sum to the account of its customer before it actually receives the funds (eg in the case of large corporates). This might be especially critical in cases where the beneficiary bank has received the [MT 103 STP] but the MT 202 COV is stopped or rejected by one of the banks involved in the payment chain due to compliance concerns. Therefore, banks need to ensure that appropriate unwinding procedures are in place to reverse a credit on the account should the need arise. Moreover, as mentioned above, the [R]eceiving [B]ank always needs to 'match' both message flows.

59 Once again Barclays sought to say that because this passage advised Receiving Banks to ensure that they could reverse payments made to their

beneficiaries (by appropriate terms and conditions allowing them to do that in circumstances where payment down the chain was delayed or prevented) that meant that a Receiving Bank which paid out was not entitled to look to the Sending Bank for reimbursement and had recourse only to the beneficiary. That is a *non sequitur*. Whether or not a Receiving Bank is entitled to recover from a beneficiary in such circumstances does not affect the right of the bank paying on instructions to recover from the Sending Bank. The Receiving Bank may have more than one right of recovery (and it is recommended that it does) and, in accordance with usual banking terms and conditions it is likely to be able to seek recovery from the beneficiary, but that does not change the Sending Bank's implied promise to reimburse unless there is some established market practice to that effect.

60 In the context of this argument, to talk simply of the revocability or irrevocability of the instruction given in the MT 103 STP is nothing to the point. To talk of revocability in the abstract as negating the implied contract is to put the cart before the horse in the context of general principles of law. The real question is whether as a matter of established market practice, the implied promise to reimburse is ineffective because the instruction to pay is itself conditional upon receipt of the funds in the Receiving Bank or the hands of its correspondent bank in New York. There is nothing in the SWIFT documentation to support that contention and, in that context, I turn to the question of market practice and the expert evidence.

Market practice: Test in law

61 The burden is on the party alleging a market practice to prove it. On being asked what the relevant market practice was, counsel for Barclays pointed me to Mr Lyddon's report at para 28(d) where the following appears:

> … market practice started to evolve in 2001 (and settled since 2008) such that a Receiving Bank no longer makes payment on an MT 103 STP until the Receiving Bank receives confirmation that the cover payment has been received. … [original emphasis omitted]

62 It is Barclays' contention, supported by Ms Trood and the following passage in Mr Lyddon's report that:

> Accordingly … where a Receiving Bank pays out on an MT 103 STP before receiving confirmation of cover, it takes its own risk that it may not ultimately receive the underlying funds if the cover payment does not proceed for financial crime or other reasons. If it is out of pocket, its remedy lies against its customer, and not against the [Sending] Bank. The [Sending] Bank is not obliged to follow through with the MT 202 COV in these circumstances. …

63 As to what amounts to a market practice which can give rise to a term of a contract, the authors of *The Law of Contract in Singapore* (Andrew Phang Boon Leong gen ed) (Academy Publishing, 2012) from para 06.078 onwards stated that the same rules and principles apply as in English law. A term can be implied from custom or usage where it is universal in the sense that it is generally accepted by those who habitually do business in the trade or market concerned and is so generally known that an outsider who makes reasonable enquiries could not fail to be made aware of it (see the Privy Council decision in *Chan Cheng Kum v Wah Tat Bank Ltd* [1971–1973] SLR(R) 28 (on appeal from the Federal Court of Malaysia) at [13]–[14]). The custom or usage should be certain, reasonable and not repugnant, in the sense of being inconsistent with the express or implied terms, or the nature of any contract or of any title

document it affects. The authors went on to cite the decision of Ungoed-Thomas J in *Cunliffe-Owen v Teather & Greenwood* [1967] 1 WLR 1421, where he stated at 1438–1439 that:

> 'Usage' may be admitted to explain the language used in a written contract or to add an implied incident to it, provided that if expressed in the written contract it would not make its terms or its tenor insensible or inconsistent …
>
> 'Usage' is apt to be used confusingly in the authorities, in two senses, (1) a practice, and (2) a practice which the court will recognise. 'Usage' as a practice which the court will recognise is a mixed question of fact and law. For the practice to amount to such a recognised usage, it must be certain, in the sense that the practice is clearly established; it must be notorious, in the sense that it is so well known, in the market in which it is alleged to exist, that those who conduct business in that market contract with the usage as an implied term; and it must be reasonable.
>
> The burden lies on those alleging 'usage' to establish it …

64 The authors of *Chitty on Contracts* vol 1 (H G Beale gen ed) (Sweet & Maxwell, 33rd Ed, 2018) said at para 14-033 that such a practice, if it is to represent a term of the contract, must be notorious, certain and reasonable and something more than a mere trade practice. It must be an invariable, certain and general usage or custom of a particular trade or place for it to represent a term by which the parties are bound. Such usages are incorporated on the presumption that the parties did not mean to express in writing the whole of the contract by which they intended to be bound, but a contract with reference to those known usages.

65 As to the evidence required to show a market practice, Maybank drew attention to the English decision in *Tayeb v HSBC Bank plc and another* [2004] 2 All ER (Comm) 880 ("*Tayeb*") where Colman J had to consider whether "ordinary banking practice" entitled HSBC to freeze and then return funds paid into a customer's account on the ground that it suspected that the transfer into

the account was illegitimate. Whilst the decision has echoes of the facts in the present case, the citation was for the purpose of establishing the need for clear and cogent evidence to meet the stringent test applied to implying a term by reason of market custom or usage. In that case, HSBC argued that, had it not acted as it did, it would have been at risk of committing an offence of money laundering under s 93A of the Criminal Justice Act 1988 (c 33) (UK) or of being held liable as a constructive trustee if the funds represented proceeds of fraud. Colman J considered that the market practice for which HSBC contended was contrary to the Clearing House Automated Payment System ("CHAPS") rules and the terms of the contract between HSBC and its customer. Whilst giving full weight to the need to comply with the Criminal Justice Act 1988 and to the objective of discouraging money laundering transactions or transactions involving the proceeds of crime, he stated at [66] that:

> … the argument that, in order to protect the interests of the bank, the express regime of the CHAPS rules can be ignored by the transferee bank by reference to some overriding concept of banking practice designed to achieve disengagement of the bank from a transfer of funds as to which it justifiably entertains suspicions can carry little weight unless there is cogent evidence of a settled banking practice to this effect. … If banks are to be entitled to depart from their contracts with customers, on the basis of suspicion of unlawfulness and of general banking practice, that practice has to be clearly proved. That such alleged practice goes well beyond what is necessary to protect the bank from unlawful activity may be a strong indication that no such practice exists.

He further stated at [71] that "[i]f the implication of any such overriding practice … is inconsistent with what would otherwise be the terms of that relationship, very strong evidence of such a practice would be necessary for its implication."

66 The learned judge held that the market practice for which HSBC contended did not exist and that, notwithstanding justifiable suspicions, the practice would not only be fundamentally inconsistent with the basis of the

contract with the customer and with the CHAPS rules, but would go well beyond what was reasonably required for compliance with the criminal law or for reasonable protection of the bank against the risk of liability as a constructive trustee and that there was no cogent evidence for it.

67 It will be noted that the market practice itself to which Mr Lyddon deposes, as set out at [61] above, simply goes to the practice of waiting for the assurance of available funds in a correspondent bank before paying on an instruction from a Sending Bank. It does not go to the lack of entitlement to claim reimbursement if an instruction to pay is implemented before the receipt of such funds; nor does it meet the point as to what is to occur if a Receiving Bank does make payment before obtaining such confirmation of receipt of cover payment. The conclusion that is drawn by him and Barclays, following the words "accordingly", as set out at [62] above, does not follow from the premise. Whether habitually Receiving Banks do or do not pay until they are informed that cover payment has been made does not constitute a market practice that, contrary to ordinary principles of contract law and banking law, a bank mandated to pay is not entitled to look to the mandator to reimburse the sums paid out. The market practice alleged is not therefore to the point.

68 Nor am I satisfied that such a practice is made out in any event. I should perhaps mention at this point that some reliance was placed by Barclays on the fact that the other banks who had received MT 192s at the same time as Maybank agreed to cancel, but there was no evidence that they had, before receipt of the request for cancellation, paid out in the way that Maybank had or, if they had, whether the customers agreed to reverse the credit. Their different reaction therefore takes the argument no further forward.

Expert evidence

69 Ms Trood offered opinion evidence to the same effect as Barclays' appointed expert. Maybank responded to the former with an affidavit from Mr Chan, who is the Head of the Remittance/Concentre Unit at the Singapore Branch of Maybank and had worked with payments and related operations for about 28 years, involving the SWIFT system and its message types from the introduction of that system in place of the telex-based system. He had been a member of the SWIFT Task Force under the purview of the Association of Banks in Singapore for 18 years and attended yearly meetings of the SWIFT User Group in Singapore organised by that association, where updates on SWIFT matters were provided and recommendations and issues faced by those who used the system were discussed. He had extensive experience of the management of payments transactions and related systems including the SWIFT messaging system. His evidence was that Maybank had never previously encountered a situation where the Sending Bank stopped, recalled or cancelled an MT 202 COV after issuing the MT 103 STP. The only situation where the MT 202 COV might be stopped, blocked or rejected was where a correspondent bank took such action as a result of either more stringent anti-money laundering ("AML") screening than the Sending Bank had carried out in respect of funds transferred to or from sanctioned countries or of its own internal compliance reviews. Maybank's experience was that once a Receiving Bank had acted upon an MT 103 STP sent as part of the Cover Method, it was considered entitled to be reimbursed with the cover payment, as was shown by situations where, due to administrative oversight by Maybank, there had been a failure to send the MT 202 COV in support of an MT 103 STP sent to another bank and the latter had made complaint about the failure, resulting in immediate rectification.

70 I had the benefit of expert evidence from Mr Jones and Mr Lyddon, both of whom also had extensive experience in the context of the SWIFT system. The starting point of their evidence had of necessity to be their understanding of the SWIFT documentation to which I have already referred. It is common ground that there was nothing in that documentation which said that a bank should wait for the MT 202 COV before paying on the MT 103 STP or, on the proper reading of the wording referred to, that the Receiving Bank had no recourse to the Sending Bank if it did so. I have come to clear conclusions, as set out above as to the true meaning of the provisions in the SWIFT materials to which the experts referred and nothing in their evidence, which I took fully into account when reading the documents, gainsays those conclusions. To the extent that Mr Lyddon came to a different view, I reject his evidence.

71 I accept Mr Jones' evidence that there was no change in the principles which governed banking relationships before the introduction of the SWIFT system in relation to the operation of instructions to pay and reimbursement when given by paper/telex or other means. SWIFT merely codified the existing practices of the earlier system by introducing standard message formats so as to reduce the risk of ambiguity and confusion across different banks all over the world. The SWIFT system is purely a secure structured messaging service, not a payment system, and the SWIFT Standards MT is purely formatting standards designed simply to facilitate automated processing of messages. The conclusions that I have reached in relation to the manner in which the MT 103 STP and the MT 202 COV operate under the SWIFT system are entirely consistent with pre-existing practice in relation to payment instructions and reimbursement. Contrary to the evidence of Mr Lyddon that an MT 103 STP contains only payment information and is not a payment instruction, the MT 103 STP is a payment instruction for a credit transfer which can be relied on and

actioned to carry out the instructed transfer. The MT 202 COV is the message sent by the Sending Bank to its correspondent bank to reimburse the Receiving Bank in respect of those payment instructions.

72 Mr Jones' evidence was that when a Receiving Bank receives an MT 103 STP under the Cover Method, it can choose whether to make payment to the customer prior to receiving the cover payment. In making that decision it would ordinarily consider three main factors, namely the creditworthiness of the Sending Bank, the operational competency of the Sending Bank and the due diligence competency of the Sending Bank in order to evaluate the credit risk that it would assume in acting on that bank's instructions and complying with its instructions to pay. In practice, with a bank of the standing of Barclays, with its screening processes in relation to US sanctions and its competence in regulatory compliance, there would appear to be a very limited risk in that regard. Regardless of the degree of risk assumed in paying the beneficiary before receipt of funds from the Sending Bank, however, the Sending Bank remained obliged to reimburse the Receiving Bank by following through on the MT 103 STP with the MT 202 COV. Even if there was an actual fraud committed by the ordering customer, the Sending Bank, in giving instructions to pay in the MT 103 STP, bound itself to reimburse the Receiving Bank if it complied with the instructions. Nothing in the BIS Report or the SWIFT materials, including the PMPG Guidelines dealt with the situation of actual or alleged fraud, and FAQ 10 of the PMPG Guidelines upon which Barclays relied concerned only the situation where payment was withheld by a financial institution in the payment chain by reason of government sanctions and issues of illegality in making payment (see [48] above).

73 Mr Lyddon had, between 2003 and 2016, run the general secretariat of IBOS Association Limited ("IBOS") which he described as a procompetitive

banking alliance which offered an end-to-end service for companies and groups of companies that used different banks in order to improve efficiency in the transfer of moneys between such accounts. In 2016 there were 27 banks in this "club", of which 13 or 14 were "full members" and the balance were subsidiaries or associated companies. He maintained that the consensus of market practice in 2017 was a practice which had started evolving since the end of 2001 and had been settled since about 2008. The consensus was that a Receiving Bank would not make payment until it had received the underlying cover payment. He maintained, for reasons which I could not fully understand, that an MT 103 STP was not a payment instruction at all, but merely contained payment information about the identity of the person in the Receiving Bank whose account was to be credited. He maintained that "bankers follow the money" and what was key, especially since 2008, was the "exchange of value", namely the receipt by the Receiving Bank's correspondent bank of funds, whereupon a Receiving Bank could rely and act on the MT 103 STP to carry out the instructed transfer.

74 He accepted that, prior to 2008, the practice of banks was to pay out on receipt of the MT 103 STP if it was sent by an "A" list bank, as opposed to a "B" list bank, where the former list represented those major banks who were seen to be financially and operationally sound. He considered that the practice changed following the financial crisis of 2008 and the screening processes introduced for AML, counter-terrorism financing ("CFT") purposes and sanctions. The nature of the MT 103 STP could not however change, just because of these factors.

75 In denying that the MT 103 STP was an instruction to pay, he ignored the terms of the SWIFT materials set out above or distorted their meaning. It is, of course, self-evidently the case that, under the Cover Method, no funds are

transferred until the MT 202 COV instructs the correspondent bank to pay but that is nothing to the point. The whole purpose of an MT 103 STP is to constitute an instruction, whether or not the Receiving Bank chooses to await confirmation of the receipt of funds before crediting its customer. Mr Lyddon agreed that the Receiving Bank had a choice to make in this respect, so the inherent illogicality in his denial that it was a payment request is obvious.

76 He sought to argue, in line with Ms Trood's affidavit, that an MT 103 STP could be cancelled at any time before funds had been transferred across the line to the Receiving Bank's correspondent bank. This stemmed from his expressed view that sensible banks would not pay out until receipt of funds because of the risk involved in doing so. He thus conflated, as did Barclays throughout its case, obligations created by contract with the completion of transfer of property. Barclays' constant refrain by reference to a series of authorities was that unless the transfer was completed, so that cash was available to the Receiving Bank, any instructions given were revocable. None of the authorities cited, however, has any relevance where there is an implied contract to reimburse where payment is made by the recipient of the instructions.

77 At para 68 of his report, Mr Lyddon stated that "a Receiving Bank is entitled to treat an MT 103 STP as irrevocable only when the cover payment is received in its account with its correspondent bank" [original emphasis omitted]. This was no more than bare assertion, without regard for principles of law, of which he may, understandably, have been ignorant, but also without regard for years of banking practice as referred to in the SWIFT materials when objectively read.

78 The GSL (Guaranteed Service Level) on Transaction Settlements and Funding which Mr Lyddon himself drafted when at IBOS in October 2012 give

the lie to his own evidence about the market consensus to which he referred in his report, which he described elsewhere as ubiquitous. At p 17 of the document he referred to cover payments and the use of the MT 103 STP and the MT 202 COV. There he said that the Sending Bank "must send" the MT 202 COV to its relevant correspondent bank simultaneously with the dispatch of the MT 103 STP to the Receiving Bank and that the Sending Bank must also ensure compliance with the STP requirements of its correspondent bank so that the MT 202 COV resulted in an STP payment through to the Receiving Bank or its correspondent bank. That, in itself, is the language of obligation in sending the MT 202 COV to cover the MT 103 STP.

79 He then went on to say that:

> Where the default policy of the Receiving Bank is to wait to see the cover payment arrive before processing the [MT 103 STP] from the IBOS Sending Bank, the Receiving Bank should apply for a policy exemption for IBOS payments such that the [MT 103 STP] can be processed upon receipt.
>
> …

Thus, this document recognised that there were some IBOS banks with a default policy of waiting for funds to arrive before implementing the payment instruction in a MT 103 STP, which necessarily means that he recognised the existence of a body of other banks which had no such policy and would pay on receipt of the MT 103 STP. Moreover, the document stated that, in the context of IBOS payments, the former group should apply for an exemption so that payment could be made upon receipt of the MT 103 STP. Whilst the number of banks involved in the IBOS club was unclear and it is also unclear whether the group with the default policy was in the majority or minority, there would appear to be a significant number in each and the IBOS objective was to pay out on the MT 103 STP.

80 Whilst this latter objective, with reliance on an MT 103 STP in the context of transfers of funds between the bank accounts of one company or intracompany within the same group, in order to achieve same day transfer and not lose overnight interest, may represent a limited group within the overall market using MT 103 STPs, not only does it show the lack of universality of the alleged practice, but one of the main reasons advanced by Mr Lyddon for the practice of waiting for the confirmation of the cover payment was the imponderable and unmanageable risk of false positives turning up in AML/CFT/sanctions screening, which would apply even to such transfers between the same company or connected companies.

81 Mr Lyddon's evidence that the practice of paying out on the MT 103 STP had essentially disappeared by 2008 is therefore not borne out by this document. Moreover, the number of references in the SWIFT materials dated November 2016, at the earliest, to payment on this basis, as a policy decision with the credit risk involved, shows that the practice was very much alive as at the date of publication (see *eg*, the "MT 103 STP Market Practice Rules" and the "MT n92 Request for Cancellation" in the Standards, and the PMPG Guidelines). If the practice no longer existed, there would be no need for any such provision.

82 In cross-examination, Mr Lyddon stated that these provisions reflected standard market practice (in particular FAQ 10 of the PMPG Guidelines), albeit on the basis that he wrongly understood the credit risk referred to as the credit risk involved in seeking recovery from the beneficiary rather than the credit risk of the Sending Bank or intermediary bank in the chain and saw that as affecting the obligation of the Sending Bank. For the reasons already given, that construction is not tenable, the context being the absence of payment under the MT 202 COV. However, even on the basis of his own interpretation, the

provisions plainly referred to the fact of payments being made on receipt of an MT 103 STP without receipt of the cover payment pursuant to an MT 202 COV.

83 A further document exhibited by him was authored or sponsored by a number of banks and included a series of presentation slides concerning "The Introduction of the MT 202 COV in the International Payment Systems", which was said by Mr Lyddon and Mr Jones to be introduced in 2009 at the instigation of the US authorities and/or banks which wished to be able to screen correspondent bank USD payments for sanctions purposes and which resulted, in Mr Lyddon's view, in the virtual death of payments on MT 103 STPs before receipt of the cover payments, because of the risk of payments being held up in the chain. Under the heading of "What is a Cover Payment?" appears the bullet point:

> …
>
> A cover payment involves two distinct message streams ([MT 103 STP] & [MT 202 COV]).
>
> > [MT 103 STP] – Direct payment order to the Beneficiary's Bank, and
> >
> > [MT 202 COV] – Bank-to-bank order(s) to Intermediary Bank(s) to cover the Originator's Bank's obligation to pay the Beneficiary's Bank.
>
> …

This too is inconsistent with Mr Lyddon's thesis, because, it refers to an obligation to cover the MT 103 STP.

84 If an obligation exists, as I have found it does, it cannot be overridden by a market practice that merely avoids its operation by waiting for a cover payment to arrive in order to eliminate any risk in making the payment. Whilst waiting for such funds might make the MT 103 STP direct request to pay effectively otiose, because funds have arrived for the account of the beneficiary,

there is no avoiding the fact that a request was made thereby, with a corresponding duty to reimburse the payer, if payment is made. I can understand how Mr Lyddon could take the view that the MT 103 STP, in practice, fulfils a limited function if the Receiving Bank waits for the cover payment before paying out, but that does not detract from its effect in law as a request to pay with the concomitant obligation of reimbursement on fulfilment of the instruction.

85 Furthermore, in a later slide in the same presentation, made between May 2009 and November 2009, reference is made to the need for "[c]onsideration of a process to handle the [MT 103 STP] if a corresponding MT 202 COV gives rise to a true hit [as opposed to a false positive], and the cover is not forthcoming". At that stage the practice of payment in reliance on the MT 103 STP was obviously extant since otherwise there would be no need to consider a process for handling the situation when no cover payment came through.

86 In a 2018 paper written by Mr Lyddon himself (and thus after the events with which this court is concerned), he criticised the Wolfsberg Group guidance of 2016 on SWIFT non-customer Relationship Management Application ("RMA") and argued for its withdrawal on a number of bases. One reason advanced was that the use cases referred to in that guidance for such non-customer RMAs did not include the most common one in practice which was where an MT 103 STP was sent by the Cover Method. In the part of Mr Lyddon's paper dealing with "Timing", the following appears:

> A USD payment made from the UK to Germany at 14:00 UK time would have a good chance of being credited with same-day value in Germany, if the Beneficiary Bank received the direct [MT 103 STP] at 15:01 CET[.]

> At that point the Account-With Institution [the ordering institution] has committed to deliver good funds to the Beneficiary Bank's USD correspondent, and the Beneficiary Bank can claim compensation from the Account-With Institution if good funds are not delivered[.]
>
> …

87 It can be seen that in writing this, Mr Lyddon, long after the point at which he maintained that the practice had changed so that no bank ever paid out on an MT 103 STP alone, has accepted the obligation of the Sending Bank to pay the Receiving Bank in circumstances where an MT 103 STP has been issued by it. The existence of such an obligation is inconsistent with his thesis that the MT 103 STP gives only payment information and is not an instruction by the Sending Bank to the Receiving Bank to pay, with recourse to it. There is thus a direct contradiction between his evidence before this court and his comments in this paper.

88 If "same day value" is to be given in circumstances where there can be a time lag between an MT 103 STP instruction and an MT 202 COV being acted on in New York of around 12 hours (Singapore/New York) or more, the only way that same day value could be assured would be to act on the MT 103 STP without waiting for confirmation of the cover payment. The reality of this, of necessity, means that banks would have to rely on the MT 103 STP alone if they are to fulfil the instructions.

89 In the light of this evidence, it is clear that Barclays cannot discharge the burden of proof of showing that there was an established banking practice which constitutes a usage or custom that was notorious, certain and reasonable that Receiving Banks do not to pay on MT 103 STPs until a cover payment is received, let alone a usage of lack of entitlement to be reimbursed when payment is made before receipt of the cover payment. There is nothing which could

impact on the implied contract which necessarily exists when one bank instructs another to make a payment on its behalf. To the contrary, the evidence shows that such payments have continued to be made and of necessity, have to be made in some circumstances, if same day value is to be given.

90 Thus the reality is, even were it to be shown that there is a general reluctance on the part of banks to make payment on MT 103 STPs prior to receipt of MT 202 COVs, which is about as far as Mr Lyddon's evidence could really run, that this would go nowhere near establishing a market practice which would negate the obligation to reimburse a Receiving Bank that has paid out on the instructions of a Sending Bank under an MT 103 STP.

Illegality and industry practice

91 As mentioned at [5] above, at para 5.5 of the SWIFT General Terms and Conditions entitled "Industry Practice, Applicable Laws, and Regulations", the following appears:

> Industry Practice, Applicable Laws, and Regulations
>
> The customer is responsible for its use of SWIFT services and products, including any data transmitted through SWIFT.
>
> In using SWIFT services and products and conducting its business, the customer must always exercise due diligence and reasonable judgment, and must comply with good industry practice and all relevant laws, regulations, and third-party rights, even if this restricts its usage entitlement under SWIFT's governance.
>
> Without prejudice to the generality of the foregoing, the customer must:
>
> …
>
> (b) ensure not to use, or try to use, SWIFT services and products for illegal, illicit or fraudulent purposes …
>
> …

92 No evidence has been adduced by Barclays to show that an actual fraud was in fact committed or was in process at the time of the cancellation of the MT 103 STP and the MT 202 COV. The evidence is that Mr Warrington suspected such a fraud as the result of messages received and instructed the cancellation of the payment of funds on that basis. Barclays has remained silent as to the outcome of its suspicions and the events which actually occurred. Its silence on this is significant and no defence of illegality is put forward in respect of the payment due at the time or in respect of any payment which the court might now order. When pressed on this point in his closing submissions, counsel for Barclays placed reliance upon the requirement that Barclays had to comply with "industry practice" which meant, he said, not paying Maybank in circumstances where there was a suspected fraud, even if, in actuality there was no such fraud.

93 Ms Trood in her affidavit and Barclays, by reference to English law as put forward by Mr Gentle, maintained that, had it not cancelled the payment instructed by the MT 202 COV and the MT 103 STP, it ran the risk of incurring liability for (see [13] above):

(a) an offence under s 327 of POCA; and/or

(b) breaches of various regulatory provisions enforced by the UK FCA under regs 19 and 20 of the Regulations, para 6.3 of the SYSC Sourcebook and FCA's Principles for Businesses.

94 It was maintained that to have paid in such circumstances, rather than taking steps to cancel the instructions already given, would be contrary to industry practice but no evidence of such practice was put before the court, although a bank's concern not to be party to any fraud or money laundering or

to be involved in such, or to run the risk of such involvement is obvious. A bank has also to consider the contractual commitments it has made and the two considerations may come into conflict. In this case, as I have found, Barclays had made a contractual commitment to Maybank and, absent a defence of illegality, was bound to make payment to it by way of reimbursement of the sums paid out by it pursuant to Barclays' instructions.

95 It would unnecessarily prolong this judgment to set out *in extenso* the provisions referred to in the Regulations and, in any event, attention focused on ss 327 and 340 of POCA. Those sections provide:

> **327 Concealing etc**
>
> (1) A person commits an offence if he—
>
> (a) conceals criminal property;
>
> (b) disguises criminal property;
>
> (c) converts criminal property;
>
> (d) transfers criminal property;
>
> (e) removes criminal property from England and Wales or from Scotland or from Northern Ireland.
>
> …
>
> **340 Interpretation**
>
> …
>
> (3) Property is criminal property if—
>
> (a) it constitutes a person's benefit from criminal conduct or it represents such a benefit (in whole or part and whether directly or indirectly), and
>
> (b) the alleged offender knows or suspects that it constitutes or represents such a benefit.
>
> …

96 For an offence to be committed under s 327 of POCA, therefore, there is a need to show that the property which is the subject of the actions set out in

s 327 is truly criminal property, meaning that it must constitute a person's benefit from criminal conduct or represent such a benefit. There is no offence if the alleged offender merely suspects that criminal property is involved, in the sense that he suspects that the property constitutes a person's benefit from criminal conduct, when in fact it does not or cannot be shown to be such.

97 Mr Gentle was careful in his submissions on English law not to say that there would have been a liability resting upon Barclays if it had made the payment required by the MT 103 STP but to say that there was, at the time of cancellation of payment instructions, a risk of such liability on the information available to Mr Warrington. In such circumstances, Mr Gentle submitted that no responsible bank would have paid out and that it would have been reckless for Barclays to ignore that risk and make the payment.

98 Barclays had in fact given instructions by the MT 103 STP to Maybank to pay PLG and had also given instructions to its correspondent bank in New York to make the cover payment by sending the MT 202 COV before receiving any information which raised suspicion. In circumstances where I have found that it was contractually obliged to fulfil its obligations to Maybank, Barclays decided to cancel the MT 202 COV by an MT 292 and to request the cancellation of the MT 103 STP by sending an MT 192. Barclays was not faced with a stark choice of debiting Bengeo's account and paying the sums it had contracted to pay or cancelling payment outright, however. Barclays had other options available without running the risk of any liability under s 327.

99 Whilst Barclays might have considered that it was bound to freeze the sum of just under US$4m recently received into Bengeo's account:

(a) Barclays could have utilised other funds of Bengeo (if sufficient) to reimburse Maybank, once Maybank had declined the request for cancellation because it had already paid PLG which had refused to reverse the credit. There was no evidence before the court as to the existence or non-existence of other funds available in Bengeo's accounts, but PLG had maintained to Maybank that the payment was in respect of a genuine invoice and transaction. If that was the case, then funds might be expected to be found in Bengeo's accounts or it might have had a facility to borrow from its bankers.

(b) Barclays could have paid funds of its own, from its own pocket, in order to fulfil its interbank obligations, on the basis that, when the true position was ascertained, financial adjustment could be made in its books. It could then recoup the expenditure if and when suspicions of fraud were allayed. If they were never allayed or if fraud was proved, it would then be in a position where it suffered the loss as the result of its customer's fraud, rather than Maybank which had simply complied with the instructions given to it with the implied promise of reimbursement.

100 Whilst, as Colman J pointed out in *Tayeb* ([65] *supra*), banks should be careful not to assist in any fraudulent or money laundering activity, he found no basis for an implied term that enabled the bank to avoid its obligations under the CHAPS system by reference to a reasonable suspicion of wrongdoing. This court would wish to encourage all banks to fulfil their obligations in respect of suspected fraud or money laundering but the possibility of a customer being

involved in wrongdoing of this kind which impacts upon the bank's own obligations to other banks is an occupational hazard.

101 It is fanciful to suggest that, in making payment from its own funds or even from other funds available to Bengeo (if sufficient), whilst making appropriate disclosures to the authorities of suspected fraud or money laundering, in accordance with the obligations imposed in other sections of POCA, Barclays ran any risk of liability under POCA or under the money laundering regulations. It could not seriously be said that, had it acted in this way, it was either concealing or disguising suspected criminal property, let alone transferring it or removing it from the jurisdiction. What Barclays chose to do was to renege on its obligations to Maybank and foist the immediate loss onto it in respect of the suspected wrongdoing of its own customer. In that connection, the castigation of Maybank in seeking reimbursement for the payment it had made to PLG, on the basis that it was seeking to transfer to Barclays a loss of its own making, does Barclays no credit.

102 Mr Gentle drew attention to regs 19 and 20 of the Regulations and the risk of Barclays acting in breach, with resultant possible regulatory enforcement by the FCA. He further referred to para 6.3 of the SYSC Sourcebook and to the FCA's Principles for Businesses, both of which are of mandatory application.

103 When Barclays was put on notice that funds had been transferred into Bengeo's account in questionable circumstances, Mr Warrington deposed that he suspected fraud. Regulations 19 and 20 of the Regulations set out the requirement to establish and maintain policies, controls and procedures to mitigate and manage effectively the risks of money laundering and terrorist financing. There is no evidence of any failure on the part of Barclays to establish and maintain such policies, controls or procedures, so that the only basis for any

such failure would be an inference to be drawn from the fact that Barclays had paid Maybank. If, however, Barclays had taken the steps referred to above in the context of POCA and thus avoided any risk of an offence under POCA, such an inference could not arise.

104 Paragraph 6.3 of the SYSC Sourcebook contains a requirement to ensure the establishment of policies and procedures which include systems and controls that enable the entity concerned to identify, assess, monitor and manage money laundering risk and are comprehensive and proportionate to the nature, scale and complexity of its activities. Once again there is no evidence of any such failure on the part of Barclays and the only basis for any suggestion of it would be the payment to Maybank. If, however, Barclays had taken the steps referred to above in the context of POCA and thus avoided any risk of an offence under POCA, such an inference could not arise.

105 The FCA's Principles for Businesses require that an entity conduct its business with integrity and take reasonable care to organise and control its affairs responsibly and effectively, with adequate risk management systems. The same point arises here as for the Regulations referred to above. In the absence of any violation of POCA or the Regulations, there could be no breach of the Principles for Businesses either, and taking the steps to which I have referred could not involve a violation of the Principles for Businesses in question.

106 Moreover, as Mr Raymond Cox QC (the English lawyer providing legal opinion for Maybank) pointed out in his report, it would be surprising if the Principles for Businesses required Barclays not to take all legitimate steps to meet its contractual obligations to Maybank. Barclays made no attempt to do so and cancelled payment at the outset, maintaining that cancellation in the face of

clear statements that payment had already been made by Maybank on the basis of the MT 103 STP sent to it.

107 Other points were made by Mr Cox for Maybank in relation to the absence of any realistic potential corporate liability on the part of Barclays, as opposed to that of any individual employed by it, including the nominated officer to receive disclosure of suspected money laundering, and the absence of any risk of an offence if disclosure was made. I need make no decision in relation to these contentions. No bank could, or would, I hope, regard the prospect of one of its employees being liable for breaches of the kind alleged, with equanimity, because it would have no corporate liability.

108 I accept that, *prima facie*, the relevant person at Barclays who should be produced to give evidence of suspicion of such activity and potential liability is the nominated officer, as set out in *Shah and another v HSBC Private Bank (UK) Ltd* [2011] EWCA Civ 1154 at [46]–[47], and that Barclays' evidence of the basis of anything other than the initial suspicion, which led to cancellation of the MT 103 STP and the MT 202 COV on the basis of the messages received, is not cogent.

109 No case was advanced at the hearing and no evidence was adduced to show that the payment of funds would have amounted to dishonest assistance in the transfer of funds belonging to another or of any constructive trust or breach thereof, so there is no basis for this court finding that a payment would have been in breach of third-party rights.

110 Barclays' submission that to make payment at the time, or after investigation or even now, would fall foul of para 5.5 of the SWIFT General Terms and Conditions because it would not have been or would not now be in

compliance with industry practice or relevant laws, regulations and third-party rights is therefore unsustainable.

Conclusion

111 In all the circumstances and for the reasons given, Maybank is entitled to the declarations sought, as set forth in [1] of this judgment. It is also entitled to judgment in the sum of US$871,085.61, being the equivalent of the interbank settlement amount specified in the MT 103 STP. Further, in the absence of any special circumstances of which I am unaware, it must follow that it is entitled to be paid its costs of this action on the standard basis, such costs to be the subject of assessment if not agreed and absent any submissions that there are such circumstances, I so order.

Jeremy Lionel Cooke
International Judge

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