BARCLAYS BANK PLC v. BARAKHA LIMITED and ATTORNEY-GENERAL

SUPREME COURT (Kneller, C.J.): March 31st, 1994

Banking—interpleader—competing claims to funds—bank to show two or more existing claims against it to funds in account, or real expectation of being sued—if notifies potential claimants without court's leave, guilty of collusion contrary to Rules of Supreme Court, O.17, r.3(4)(b)

Civil Procedure—judgments and orders—declaratory judgment—declaration available in interlocutory proceedings under Rules of Supreme Court, O.15, r.16—no declaration on academic or hypothetical matter, e.g. non-existence of claim not asserted, or future events not clearly foreseeable—parties affected must be before court

Trusts—constructive trusts—knowing assistance—bank liable as constructive trustee if knowingly participates in breach of trust or inter-meddles in trust property otherwise than as agent

The applicant bank applied for interpleader and declaratory relief against the respondents.

The first respondent company (B Co.) held two accounts with the bank in Gibraltar, for which M was the authorized signatory. When the bank audited B Co.'s accounts with it, it identified a number of transfers which seemed to be incompatible with the company's business activities. Included was a transfer to the company's account with a Bolivian bank, allegedly authorized by M. When B Co. refused to answer the bank's queries, it asked for the accounts to be closed. M complained to the bank that he had not authorized the transfer to the Bolivian bank and claimed reimbursement from the bank. He alleged that his former business partner, P, had defrauded him by falsifying the transfer procedures.

The bank then discovered that M and P had been fined and banned from operating in the United States due to regulatory breaches in the conduct of their US finance brokerage company and were under similar investigation by the Spanish police. P's own company and the guarantor company they used had received some of the moneys transferred from B Co.'s account with the bank, and the payments in were received by order of the US company. There was also evidence that M and P had forged documents suggesting that their services were endorsed by several banks.

M wrote to the bank authorizing it to transfer the remaining funds in B Co.'s accounts to The Bahamas. The bank's solicitors advised that if the funds then became untraceable, it could be liable under a constructive trust

to potential claimants against M and P as having knowingly assisted in their fraudulent design. The Attorney-General advised that the bank should do nothing pending the investigation of B Co. by the Gibraltar police.

The bank applied for an order under O.17 of the Rules of the Supreme Court that B Co. and the Attorney-General state the nature of their respective claims to the accounts and maintain or relinquish the same, or an order under O.15 that the bank was bound to comply with the instruction to transfer the funds to The Bahamas. It submitted that since it anticipated being sued if it paid out the moneys to M's order, it was irrelevant that there were no existing claims to the funds. It was unable to alert any potential victims of the frauds without the court's sanction, since that would amount to collusion for the purposes of O.17, r.3(4).

B Co. submitted, *inter alia*, that (a) there had been no claims to the funds other than M's as beneficial owner of B Co., the bank was unlikely to be sued and interpleader relief was inappropriate; (b) the transfers in question were legitimate well-documented business activities and there was no evidence that M or his US company had defrauded anyone; (c) there was no danger that a constructive trust would be imposed without fraudulent activity; if P had later defrauded B Co., that did not concern the bank; (d) the bank could not obtain a declaration under O.15 in an interlocutory matter; and (e) the bank should have sought instructions regarding the Bolivian transfer directly from M.

The Attorney-General submitted that he had no claim to the sums and appeared, effectively, as *amicus curiae*. He believed that M and P had wrongly received the funds transferred to Bolivia and were attempting to obtain the same sum again from the bank as compensation.

Held, making the following orders:

(1) The bank was not entitled to interpleader relief, since there were not two or more rival claims against it for the funds and there was no foundation for its expectation that it would be sued. B Co. had stated its claim to the accounts through M, its beneficial owner, and neither the bank nor the Attorney-General had any claim (page 331, lines 24–31; page 332, lines 8–18; lines 35–45).

(2) The court would not order the bank to retain the funds until the Spanish and Gibraltar police had informed potential claimants of the existence of funds against which they could claim, since that would take too long and might yet result in no sustainable rival claims. Without such an order, the bank would be guilty of collusion, namely, "playing the same game as a claimant" in requesting that they be notified, and would fail to satisfy the evidential requirement under O.17, r.3(4)(b) in any event (page 330, line 36 – page 331, line 4; page 333, lines 1–9).

(3) Instead, a declaration would be granted that the bank was bound to comply with M's instructions to transfer the funds to his order. Although this was an interlocutory matter, O.15, r.16 enabled the court to grant a

declaration as sought by the bank. It was not being requested to decide a hypothetical or academic question, to declare that no claims against the funds could exist, or to pronounce upon future events which could not be clearly foreseen, and all the parties concerned were before the court. The bank could not be liable as a constructive trustee unless it had knowingly participated in a breach of trust or inter-meddled in trust property other than as an agent. No charges had been brought against M, P or their company, and P had never been involved in B Co. The bank had no knowledge, actual or constructive, that M was not entitled to deal with the remaining funds in the accounts as he saw fit, and it would not be unlawful to comply with his instructions as signatory (page 331, line 32 – page 332, line 34; page 333, lines 10–28).

Cases cited:

(1) *Baden* v. *Société Gén. pour Favoriser le Dév. du Comm. et de l'Indus. en France S.A.*, [1993] 1 W.L.R. 509n; [1992] 4 All E.R. 161.
(2) *Barnato (Decd.), In re, Joel* v. *Sanges*, [1949] Ch. 258; [1949] 1 All E.R. 515.
(3) *Carl Zeiss Stiftung* v. *Herbert Smith & Co. (No. 2)*, [1969] 2 Ch. 276; [1969] 2 All E.R. 367.
(4) *Clay, In re*, *Clay* v. *Booth*, *In re Deed of Indemnity*, [1919] 1 Ch. 66; *sub nom. In re Deed of Indemnity*, *Clay* v. *Booth* (1918), 88 L.J. Ch. 40.
(5) *Curtis* v. *Sheffield* (1882), 21 Ch. D. 1; 51 L.J. Ch. 353.
(6) *F (Mental Patient: Sterilization), In re*, [1990] 2 A.C. 1; [1989] 2 FLR 376.
(7) *Harrison* v. *Payne* (1836), 2 Hodg. 107.
(8) *Isaac* v. *Spilsbury* (1833), 10 Bing. 3; 131 E.R. 805; 2 Dowl. 211.
(9) *Karak Rubber Co. Ltd.* v. *Burden (No. 2)*, [1972] 1 W.L.R. 602; [1972] 1 All E.R. 1210, applied.
(10) *Lipkin Gorman* v. *Karpnale Ltd.*, [1992] 4 All E.R. 409; on appeal, [1991] 2 A.C. 548; [1992] 4 All E.R. 512.
(11) *Mersey Docks & Harbour Bd., Ex p.*, [1899] 1 Q.B. 546; (1899), 68 L.J.Q.B. 540; 80 L.T. 143, observations of A.L. Smith, L.J. applied.
(12) *Morgan* v. *Marsack* (1816), 2 Mer. 107; 35 E.R. 881, applied.
(13) *Murietta* v. *South American Co.* (1893), 62 L.J.Q.B. 396; 9 T.L.R. 380.
(14) *Naylor* v. *Wrotham Park Settled Estates*, *The Times*, March 6th, 1987, unreported.
(15) *New York Life Ins. Co.* v. *Public Trustee*, [1924] 2 Ch. 101; (1924), 93 L.J. Ch. 449.
(16) *Rossage* v. *Rossage*, [1960] 1 W.L.R. 249; [1960] 1 All E.R. 600.
(17) *Rowlandson* v. *National Westminster Bank Ltd.*, [1978] 1 W.L.R. 978; [1978] 3 All E.R. 370.
(18) *Sharpe* v. *Redman* (1837), Will. Woll. & Dav. 375; 1 Jur. 775.
(19) *Staples, In re*, *Owen* v. *Owen*, [1916] 1 Ch. 322; (1916), 85 L.J. Ch. 495.

(20) *Stevenson (H.) & Son Ltd.* v. *Brownell*, [1912] 2 Ch. 344; (1912), 81 L.J. Ch. 694.
(21) *T* v. *T*, [1988] Fam. 52; [1988] 1 All E.R. 613.
(22) *Tucker* v. *Morris* (1832), 1 C. & M. 73; 149 E.R. 319.
(23) *Watson* v. *Park Royal (Caterers) Ltd.*, [1961] 1 W.L.R. 727; [1961] 2 All E.R. 346, applied.

Legislation construed:
Rules of the Supreme Court, O.15, r.16: The relevant terms of this rule are set out at page 329, line 44 – page 330, line 2.
O.17, r.1(1): The relevant terms of this paragraph are set out at page 330, lines 23–30.
r.3(1): The relevant terms of this paragraph are set out at page 330, lines 32–34.
(4): The relevant terms of this paragraph are set out at page 330, lines 36–43.
O.41, r.5(2): The relevant terms of this paragraph are set out at page 331, lines 6–8.

J.E. Triay, Q.C. and *R.A. Triay* for the applicant;
D.J.V. Dumas for the first respondent;
J. Blackburn Gittings, Attorney-General, for the Crown.

KNELLER, C.J.: Barclays Bank PLC (Barclays) by its originating summons of April 30th, 1993 asks for an order: (a) that Barakha Ltd. ("Barakha") and Her Majesty's Attorney-General for Gibraltar appear and state the nature and particulars of their respective claims to Barakha's current account No. 3145837 and deposit account No. 005540001 with Barclays in Gibraltar, and maintain or relinquish the same and abide by such order as may be made herein; or (b) that Barclays is bound to comply with the instructions dated April 21st, 1993 requiring it to transfer the remaining funds in those accounts.

The first order would be by way of interpleader relief under the Rules of the Supreme Court, O.17, and the second by declaration under O.15.

Barakha opposes the making of either order and the Attorney-General claims that he is really only an *amicus curiae*.

The application is supported by two affidavits dated May 7th and 17th, 1993 of Mr. Ferro, the Managing Director of Barclays Bank Offshore Financial Services (Gibraltar) Ltd., a wholly-owned subsidiary of Barclays.

Barakha has an associate company called Investors Capital Holdings Ltd. ("Investors"), controlled by Mr. Patino. Barakha and Investors are companies incorporated in Gibraltar and their registered offices are those of Mr. Clinton, a Chartered Accountant who also runs a company management business, and who incorporated them. Mr. Clinton's son, Robert Clinton, is Barakha's company secretary. Mr. Ferro has been a

banker in Gibraltar for 33 years and Mr. Clinton Snr. has practised here for over 40 years, so they have often dealt with one another.

Barakha opened two accounts with Barclays on February 6th, 1992. They were numbered 3145837 and 005540001 and were a current and deposit account respectively. On May 4th, 1992 the balance in the current account, No. 3145837, was US$5,000 and in the deposit account, No. 005540001, it was US$122,728.14. Interest accrued daily on the deposit account.

The only person authorized to operate either account was a US citizen called Daniel Joseph McCarthy. Mr. McCarthy opened those accounts, and when he did so he was accompanied by a Bolivian, Carlos Patino Ruiz. Mr. Patino telephoned Robert Clinton on September 25th, 1992 and told him he had received instructions from Mr. McCarthy to transfer US$550,000 from those accounts to Barakha's account No. 201 0017 564 at the Banco Santa Cruz at La Paz in Bolivia, and when it did, to let him know. Robert Clinton repeatedly asked Mr. Ferro if Barclays had received these instructions.

Robert Clinton and Barclays received faxes dated September 28th, 1992, apparently signed by Mr. McCarthy, with those instructions, so Barclays asked Robert Clinton to confirm that the faxed instructions were in order and Robert Clinton said they were. Barclays does not act on unauthenticated fax signatures or instructions. The name and address of the bank to which the funds were to be sent were illegible in the faxed instructions to Barclays and the last four figures of the account to which the funds were to be sent were obscure on the fax to Robert Clinton.

Robert Clinton checked with "the customer" and confirmed that the instructions were in order and he supplied the name and address of the receiving bank, which was in Bolivia. On October 6th, 1992 Barclays sent the US$550,000 to Barakha's account with the Banco Santa Cruz at La Paz. Barclays sent it by Swift Telegraphic Transfer on Friday, October 6th, 1992, Banco de Santa Cruz received it on Sunday, October 8th and the funds were withdrawn on the Monday.

After that, in the course of a routine internal audit, Barakha's accounts with Barclays revealed frequent payments in and out of substantial sums of money which were difficult to identify with Barakha's business activity. Examples of these include:

1992		
May 8th	Bank of Cyprus f/o Suevic Ltd.	$25,044.27
May 22nd	Bank of Cyprus f/o R. Povey, of Suevic Ltd.	$25,044.27
May 26th	Bank of Cyprus f/o Suevic Ltd.	$25,045.00
June 9th	Bank of Cyprus f/o Suevic Ltd.	$25,044.97
July 23rd	Anker Bank Geneva f/o Investors Capital	$100,110.00
Nov. 3rd	Hong Kong & Shanghai, Hong Kong f/o Investors Capital	$220,220.00
Nov. 3rd	Bank of Cyprus f/o Suevic to Barakha's accounts	$35,039.68

1992		
June 24th	Transfer received by order of Consult-Finsa	$80,000.00
June 30th		$130,000.00
July 6th		$50,000.00
July 8th		$150,000.00

Bankers nowadays need to know the origin of funds paid into their customers' accounts and the purposes for which they are paid out, and if the customer refuses to answer such questions the bank will not open or maintain its account. Barclays wrote to Robert Clinton on October 27th, 1992 as secretary of Barakha and asked him to close its accounts by mid-December 1992.

On November 4th, 1992 Mr. McCarthy complained to Barclays that he had not authorized the transfer of US$550,000 from Barakha's account here to its account with Banco Santa Cruz at La Paz. He demanded that the bank should pay the same amount back to Barakha's account with the bank here.

His attorneys-at-law in Miami, Florida are Zuckerman, Spaeder, Taylor & Evans and they wrote to Barclays on November 11th, 1992, demanding that the amount be credited to Barakha's account here, and also an investigation and explanation. They alleged that Barclays had remitted that sum of US dollars "on nothing more than a fine-line telecopier instruction, which was unauthorized and utterly insufficient, regardless of the sum of money involved, and bore the forged signature of Daniel McCarthy, the authorized signatory for the account."

Disturbed by this letter, Barclays questioned Robert Clinton about his reference to "the customer" and Robert Clinton said he meant not Mr. McCarthy but Mr. McCarthy's *alter ego*, Mr. Patino. Barclays made some enquiries about Mr. McCarthy and Mr. Patino and discovered they are directors of Consult-Finsa, a US corporation. They are finance brokers. They used a Cyprus company, Suevic Ltd. ("Suevic"), as guarantors and promised other enterprises in different parts of the world that they would arrange for them to be given loans. They charged commission on their brokerage for loans that never materialized, with the result that Consult-Finsa and Mr. McCarthy were fined US$5,000 for violating Chapter 687 of the Florida Statutes and ordered to cease and desist business.

Mr. McCarthy and Mr. Patino also use the title "International Consult & Financial Group," based in Miami, Florida. They send out letters under that name to banks and copies go to their customers who want loans. The copies are marked with date stamps purporting to indicate on what date the banks received them. The banks have denied receiving them and declare the date stamps are not theirs. One result is that the Spanish police are investigating complaints by Spanish businessmen that they paid Mr. McCarthy and Consult-Finsa for brokerage of substantial loans which they have never received and which Mr. McCarthy and Consult-Finsa never tried to negotiate.

To illustrate this Mr. Ferro exhibits letters dated July 6th, 1992 on Consult-Finsa writing paper, signed by Mr. McCarthy, sent to the China State Bank, Chekiang First Bank, Bank of Seoul, Bank Pembanguiman Indonesia and Credit Lyonnais Hong Kong (Finance) Ltd., submitting the business proposal of Frutas El Cortijo S.A. of Almunecar, Spain, with what purport to be the rubber stamp marks of the banks, suggesting that the banks have received the letters. A letter from a representative of each bank's branch in Hong Kong to Barclays Hong Kong follows and the stamps are said to be not currently in use.

Mr. Ferro also exhibits a photocopy of a telefax dated August 12th, 1992 to the Midland Bank from the Group Chief of the Spanish Judicial Police Financial Frauds Group, asking for information about alleged frauds committed by Consult-Finsa, Barakha and Suevic.

Some time in May and June 1992 the Cooperativa de Vivienda de America ("Cooperativa"), a Peruvian company in Lima, looked for a loan and told Consult-Finsa and Mr. McCarthy so. On June 18th, 1992 Mr. McCarthy said Consult-Finsa would help Cooperativa find suitable warranties, additional collateral or guarantees in the form of Euro or US Treasury Bonds, and a lender to provide the funds, in return for 3% commission on the net loan, debt or any other funding. He collected a fee of US$42,000 from Cooperativa. This was before Cooperativa obtained any loan, which was a violation of s.687.141 of the Florida Statutes (1991).

The Comptroller of Florida sent Consult-Finsa and Mr. McCarthy a notice that he would make a final order that they cease and desist their violations of Florida law, take appropriate corrective action and pay administrative fines as prescribed by law, not exceeding US$5,000 for each violation, unless they asked for a hearing and successfully resisted what the Comptroller proposed to do. Consult-Finsa and Mr. McCarthy did not oppose the Comptroller's notice and executed a stipulation and consent agreement, admitting that they collected an advance fee from a borrower to provide their services as a loan broker and agreeing to pay it back to Cooperativa, pay the administrative fines and not repeat the violation.

On April 21st, 1993 Mr. McCarthy wrote to Mr. Ferro authorizing him to wire the funds in Barakha's two accounts (giving the wrong number to its current account, I think) to Chase Manhattan, New York, for further credit to an account in the Bank of The Bahamas, Nassau for it to credit a Kirkly Management account there.

Barclays, as paying banker, has, however, been put "on enquiry" as to whether it should obey its customer's instructions. It believes its knowledge and information of a dishonest and fraudulent design by Mr. McCarthy and Mr. Patino precludes it from doing so. At first, Mr. Triay, Q.C. advised Barclays that interpleader relief was not available because it had not received any claim adverse to that of Consult-Finsa or Mr. McCarthy. Later he cautioned it that if Barclays wired the balances in

Barakha's accounts to The Bahamas and they became untraceable, Barclays would knowingly have assisted in a dishonest design and be open to an action by anyone claiming against Consult-Finsa, Mr. McCarthy or Mr. Patino.

He wrote to the Attorney-General in this vein on January 12th, 1993 in the hope and expectation that the police would protect the money in Barakha's accounts at Barclays Bank just as they protect other property which they suspect has been stolen. Three days later the Attorney-General replied to Mr. Triay suggesting that Barclays do absolutely nothing with the moneys in Barakha's account while members of the Royal Gibraltar Police Fraud Squad investigated their service. Detective Sgt. Richard Mifsud is one of the investigators.

On November 23rd, 1992, Mr. McCarthy, attended by Mr. Dumas, went to Barclays and claimed he had been defrauded by Mr. Patino, who was neither a colleague nor a business associate of his. Mr. McCarthy left Gibraltar and told his lawyers to send a letter of complaint, which they did. He did not go to the Police Station.

Mr. McCarthy, in his affidavit of August 18th, 1993, points out that the Attorney-General does not claim the balances in Barakha's accounts and cannot have a claim to them. There are no claims to them apart from his as the beneficial owner of Barakha and sole signatory to those accounts. So this is not a proper case for interpleader relief. The application should be dismissed and he should be at liberty to withdraw those sums.

He was the Chief Executive of Consult-Finsa, which paid for letters of commitment and arranged for security between borrowers and lenders. If it obtained a letter of commitment from an investor and Consult-Finsa's services contributed to the securing of the loan, 3% of the net amount of the loan was payable by the borrower to Consult-Finsa "at the time of the closing of the loan." This is in para. 5 of the Consult-Finsa borrower application/agreement. When that application/agreement was executed, the borrower had to pay the Atlantic Consulting Group, Inc. ("Atlantic"), as the escrow agent, a specified sum of money according to Consult-Finsa and the borrower's escrow agreement. Those escrow funds were to be used to repay Consult-Finsa for out-of-pocket expenses incurred by it in trying to get a letter of commitment for the borrower. The expenses had to be documented. If Consult-Finsa failed to get a letter of commitment within a certain time, all the borrower's escrow funds had to be returned to it.

Consult-Finsa did not guarantee that its client would obtain any loan or that its client's bank would accept the letter of commitment. Sometimes the letters of commitment were supplied by Suevic to Consult-Finsa's clients when Consult-Finsa had paid Suevic out of moneys on deposit in Barakha's account. Suevic never paid any sums into that account.

The Clintons are Barakha's resident agents but do not manage or perform any substantive duties for it.

Mr. McCarthy's signature has been forged on the faxes of September 28th. He has no knowledge of account No. 2 010 017 564 at Banco Santa Cruz and it is not a Barakha one. Barclays should have asked him if he wanted US$550,000 transferred from Barakha's accounts and he would have told them he did not and they must ignore the faxes. Mr. Patino, he continues, has no connection with Barakha and was not authorized by Mr. McCarthy to give Barclays or Mr. Clinton instructions about Barakha's accounts.

Mr. Clinton denies that he told Mr. Ferro the faxed instructions were "in order" but instead warned Barclays that it would receive instructions directly from Mr. McCarthy and Mr. Clinton never asked Mr. McCarthy if the instructions in the fax were "in order."

The internal audit could not be routine, Mr. McCarthy claimed, because the deposits and withdrawals were just like any other ordinary standard banking transactions. It was a special audit carried out after Barclays improperly made the payment out. There was no basis for Mr. Ferro's view that the transactions were inconsistent with the known business activity of Barakha.

Turning to Mr. Patino, Mr. McCarthy rejects the allegation that he was ever his *alter ego* and that there was a close association between them. They were business partners in Consult-Finsa until early September 1992, when they parted and Mr. Patino left Consult-Finsa. Mr. Patino never had anything to do with Barakha. Mr. McCarthy went on to state that if Mr. Patino had defrauded Barakha, that did not excuse Barclays's conduct.

Consult-Finsa hired agents to deliver "loan packages" to banks around the world for Consult-Finsa's clients and the agents said they were delivered, but he cannot confirm or deny that the banks' receipt stamps are authentic or false. He has read that the Spanish police had made some investigations of Mr. Patino's activities but no charges have been filed or issued against anyone in Consult-Finsa or Barakha.

Mr. McCarthy exhibits the executed stipulation and consent agreement, and there in para. 5 it reads: "C.F. and McCarthy neither admit nor deny the allegation set forth in the complaint, but for the purposes of settlement consent to the Department's unilateral finding." The stipulation and consent agreement which Mr. Ferro exhibited was unsigned and misleading.

Barclays, Mr. McCarthy concludes, could not be accused by anyone of assisting Consult-Finsa or Mr. McCarthy in any fraud, since neither had committed one. Barclays, on the other hand, had probably assisted Mr. Patino in his fraud on Barakha's account. That was why Barclays applied for interpleader relief. It was Barclays's attempt to get Mr. McCarthy "off its back."

That provides a reasonably full account of the background facts to the application. I must now set out briefly the contentions of Mr. Triay, Q.C. and Mr. Dumas or else it may be difficult to fathom why I reach the decision I do.

Mr. Triay put the case for Barclays this way: It is aware of the doctrine of constructive trust. The object of the application is to obtain this court's opinion on whether or not Mr. McCarthy should be paid the balance of Barakha's accounts with it. Barclays has no right to it but if it pays out to Mr. McCarthy it wants to know that no one else could successfully sue it for knowingly taking part in a fraudulent design. It wonders if the sums from Suevic or Consult-Finsa in the accounts are impressed with a trust for other parties such as Sr. Jeronimo Fernandez of La Frutas, whose application for a loan through Mr. McCarthy and Consult-Finsa failed. There was no proof that the relevant fax was forged. There was no affidavit from Mr. Clinton to indicate if he told Mr. Ferro in answer to the question: "Is this fax in order?" either "Yes! I have consulted the customer (Mr. Patino)" or "Wait for direct instructions from Mr. McCarthy."

Barclays did not know what Barakha's business was and could not applaud or condemn it, but with today's regulations it had to know if the payments in or out were *bona fide* transactions.

Mr. McCarthy was at pains to dissociate himself from Mr. Patino but there had been a joint interest in Consult-Finsa before they allegedly parted and Mr. McCarthy admitted that the Spanish Judicial Police were investigating the activities of Consult-Finsa and Mr. Patino.

Barclays did not allege that Consult-Finsa or Mr. McCarthy had committed any crime but it knew, however, that about 30 days before its application was made the last signature was put to the stipulation and consent agreement between Consult-Finsa, Mr. McCarthy and the Director of the Division of Finance of the State of Florida Department of Banking & Finance. Barclays, Mr. Triay opined, could be held to be a constructive trustee with sufficient notice and so should not pass on Barakha's moneys to Mr. McCarthy in obedience to his mandate and instructions even if it were the simplest course for Barclays to take.

Barclays knew of the Consult-Finsa–McCarthy–Patino operation, and sooner or later might be liable to the victims for their frauds. It might be liable to the liquidator of Barakha if it folded. Barclays, in fact, expected to be sued if it paid out the balance of Barakha's accounts to Mr. McCarthy, and that was enough for interpleader relief. There did not have to be two or more claimants to these moneys. It could not alert the victims, for that would amount to collusion. Referring the matter to the Attorney-General did not amount to collusion. Whether or not Barclays had a good defence to any such action was irrelevant.

If the court found there was no other claimant and Barclays was trying to avoid its obligation to pay Barakha and Mr. McCarthy, the application should be dismissed. Barclays would welcome a direction from the court that it should inform those who paid advance brokerage fees and received no loan of these circumstances and give them time to claim.

Mr. Dumas's reply was in two parts. First came the procedural points. The Attorney-General filed and served Det. Sgt. Paul Mifsud's affidavit

out of time and it should be ignored. Furthermore, it was defective because the sources of his information and belief were not divulged. Mr. Ferro's affidavits were tainted with the same heinous omission so they should be cast aside too. Secondly, Mr. Dumas pointed out, Barclays could not obtain a declaration in an interlocutory matter and it had yet to begin an action against Consult-Finsa, Mr. McCarthy or Mr. Patino.

The evidence before the court revealed no illegal activity or action. The very most that emerged from the affidavits and exhibits was that in Florida a loan broker could not charge or accept fees before he or it obtained a loan for a client. It was, so far, not illegal to do so in Gibraltar. Money was collected by Consult-Finsa and Mr. McCarthy and held in an escrow account for payment in advance of obtaining a loan to meet out-of-pocket expenses in obtaining it. These were properly documented and all of it had to be repaid if the loan never materialized. No one was forced to take part in this operation. The documents for the exercise reflected the fact that it was a legitimate business. There could be no constructive trust with notice of a fraudulent transaction here if there were no such transaction.

Sr. Jeronimo Fernandez had not claimed any of Barakha's moneys and nor had anyone else in the 18 months since Mr. McCarthy had claimed repayment, so Barclays could not say it feared being sued after such a long period. There was no evidence of fraud by Mr. McCarthy and if there were it was highly unlikely that he would sue Barclays even if it had transferred US$550,000 of Barakha's money as a consequence of an illegible flimsy fax.

All moneys held by Barakha in Barclays were those paid in or out in the course of loan transactions documented publicly and there was nothing suspicious in them. There was no evidence that they were even fees which were not paid until the client was granted the loan. There was no evidence these sums belonged to anyone else. Barclays could not be a constructive trustee on the basis of allegations. That had to be based on facts which revealed its knowledge of an illegal design and that it was a party to it.

The Attorney-General, for his part, declared that he did not claim these sums. He explained that Mr. McCarthy and Mr. Patino were being investigated by the Spanish Judicial Police for alleged frauds on the Andalusian company Frutos Ltda. in Granada, and there was material that suggested Mr. McCarthy and Mr. Patino had had US$550,000 wrongly transferred to one or both of them in Bolivia and that they or one of them were now trying to get the same sum for the second time. Mr. McCarthy, it was said, used a forged passport in the name of John Daniel Hearn Suarez.

I see no profit in distilling any more of the submissions of counsel, so it is time I turned to the law they cited.

O.15, r.16 provides that—

"no action or other proceeding shall be open to objection on the ground that a merely declaratory judgment or order is sought

thereby, and the Court may make binding declarations of right whether or not any consequential relief is or could be claimed."

This court may make a declaration as to rights depending upon a future event but not in ordinary cases unless (i) a present right depends on it, (ii) all parties interested in the event are *sui juris*, or (iii) there are other special circumstances: see *Curtis* v. *Sheffield* (5) and *In re Staples* (19). It has, in exceptional circumstances, been made in applications by medical advisers seeking to perform surgical operations to terminate pregnancy in or to sterilize adult voluntary mental patients without their express or implied consent: see *T* v. *T* (21) and *In re F (Mental Patient: Sterilization)* (6).

Care has to be taken here. The court should not decide an academic or hypothetical question: see *In re Barnato (Decd.)* (2). Where no claim has been made against a person, he cannot obtain a declaration that no such claim exists: see *In re Clay*, *Clay* v. *Booth* (4). Unless future events can be foreseen with confidence, the court has no jurisdiction to make a declaratory judgment in respect of it save with the consent of the parties: see *Naylor* v. *Wrotham Park Settled Estates* (14). And in ordinary cases it is exceedingly unusual to make a declaration in the absence of parties upon a matter which is of obvious interest and concern to them: see *New York Life Ins. Co.* v. *Public Trustee* (15) ([1924] 2 Ch. at 118 and 122).

The relevant parts of O.17 are in these terms:

"1.–(1) Where—

(*a*) a person is under a liability in respect of a debt or in respect of any money, goods or chattels and he is, or expects to be, sued for or in respect of that debt or money or those goods or chattels by two or more persons making adverse claims thereto…

the person under liability … may apply to the Court for relief by way of interpleader.

…

3.–(1) An application for relief under this Order must be made by originating summons unless made in a pending action, in which case it must be made by summons in the action.

…

(4) …[A] summons under this rule must be supported by evidence that the applicant—

(*a*) claims no interest in the subject-matter in dispute other than for charges or costs,

(*b*) does not collude with any of the claimants to that subject-matter, and

(*c*) is willing to pay or transfer that subject-matter into Court or to dispose of it as the Court may direct."

There must be a real foundation for the applicant's expectation that he will be sued and the two or more claims should be actual and not just

anticipated: see *Watson* v. *Park Royal (Caterers) Ltd.* (23). "Collusion," here, means "playing the same game" as one of the claimants and not necessarily something morally wrong: see *Murietta* v. *South American Co.* (13); and *Tucker* v. *Morris* (22).

Continuing with the Rules of the Supreme Court, O.41, r.5(2) is in these terms: "An affidavit sworn for the purpose of being used in interlocutory proceedings may contain statements of information or belief with the sources or grounds thereof." Applications are interlocutory if they do not decide the rights of the parties: see *Rossage* v. *Rossage* (16). If the sources and grounds of the statements of information or belief are omitted, it is irregular. Basically, what is required, among other things, is the identification of the individual who could give admissible evidence, and the deponent's grounds for his belief in the truth of it.

So to the English decisions that were cited. They yielded these principles: Interpleader is a means of preventing a plaintiff from being doubly vexed and it is necessary therefore that the applicant should admit a right in two or more parties to sue him: see *Morgan* v. *Marsack* (12). Where all the relevant conditions in O.17 exist there is no limitation on the power of this court to grant relief by way of interpleader, provided it is satisfied that in the circumstances of the case it is just and proper that the relief should be granted: see *Ex p. Mersey Docks & Harbour Bd.* (11) ([1899] 1 Q.B. at 551, *per* A.L. Smith, L.J.) and *H. Stevenson & Son Ltd.* v. *Brownell* (20) ([1912] 2 Ch. at 347, *per* Cozens-Hardy, M.R.).

Interpleader procedure does not apply if the applicant is not being sued and does not expect to be sued. Nor does it apply where the applicant was being sued by one person and that matter ripened into a judgment by consent and he expects to be sued by only one other (*ibid.*, at 346–347). It will not be granted unless there appears to be some real foundation for the expectation of a rival claim: see *Isaac* v. *Spilsbury* (8); *Harrison* v. *Payne* (7); *Sharpe* v. *Redman* (18); *Morgan* v. *Marsack* (12); and *Watson* v. *Park Royal (Caterers) Ltd.* (23) ([1961] 1 W.L.R. at 734).

An agent who receives money from his principal which belongs at law or in equity to a third party is not accountable as a constructive trustee to the third party unless he has been guilty of some wrongful act in relation to that money. What is to "act wrongfully?" The agent must be guilty of knowingly participating in a breach of trust by his principal or inter-meddling with the trust property otherwise than merely as an agent. Again it would be "to act wrongfully" if he received or dealt with the money knowing that his principal has no right to pay it over or to deal with it in the manner indicated. Also, to do some dishonest act relating to the money would be "to act wrongfully": see *Carl Zeiss Stiftung* v. *Herbert Smith & Co. (No. 2)* (3) ([1969] 2 Ch. at 303–304); *Rowlandson* v. *National Westminster Bank Ltd.* (17); *Baden* v. *Société Gén. pour Favoriser le Dév. du Comm. et de l'Indus. en France S.A.* (1) and *Lipkin Gorman* v. *Karpnale Ltd.* (10).

Actual knowledge of the trustee's breach of trust is not necessary for his agent to be liable in equity as a constructive trustee. It will be sufficient to show constructive knowledge, which would be that the agent had knowledge of circumstances which would have indicated to an honest reasonable man that a dishonest and fraudulent move was being committed or would have put him on enquiry as to whether it was being committed: see *Karak Rubber Co. Ltd.* v. *Burden (No. 2)* (9).

Returning now to the summons, it is clear that Barakha has appeared and stated the nature and particulars of its claim to its current and call accounts with Barclays Gibraltar and maintained its claim. Barclays has no claim to them and the Attorney-General has none. They are Barakha's accounts, and Mr. McCarthy is the beneficial owner of Barakha and any sums in those accounts. The bank should obey his instructions with regard to the disposal of those sums. There has been no other lawful claim to those funds since April 21st, 1993 when Mr. McCarthy authorized Mr. Ferro to send them to Chase Manhattan, New York and then to the Bank of The Bahamas, Nassau for the credit of a Kirkly Management account there.

Detective Sgt. Richard Mifsud's affidavit is defective but its material was covered by Mr. McCarthy's admission that the Spanish Judicial Police have been or were investigating alleged frauds by Consult-Finsa, Mr. Patino and himself, though he denied being involved in them. According to Mr. McCarthy, at the beginning of April 1993 he and Consult-Finsa had executed a stipulation and consent agreement with the Director of the State of Florida Banking & Finance Department consenting to the Department's finding that they had violated s.687.141 of the Florida Statutes (1991) but they had neither admitted nor denied those allegations.

Mr. Patino never had anything to do with Barakha and left Consult-Finsa in early September 1992. It was Mr. Patino who had tricked Barclays into transferring US$550,000 to an account in the Banco de Santa Cruz in La Paz. So far the Spanish and Royal Gibraltar Police Forces had not brought any charges against anyone in relation to these matters and Barclays had not begun any action against Consult-Finsa, Mr. McCarthy or Mr. Patino.

At the moment Barclays, in my view, cannot provide a real foundation for its expectation that it will be sued if it transfers the balances in Barakha's accounts on the orders of Mr. McCarthy because, although it anticipates one or more claims over and above that of Mr. McCarthy to them, it cannot say they are actual claims. And at present Barclays could not be said to know that Consult-Finsa or Mr. McCarthy had no right to pay over the sum in Barakha's accounts or deal with them in the manner Mr. McCarthy wished to deal with them. It was put on enquiry at this stage and has received Mr. McCarthy's explanation, which has not been convincingly rebutted. The consequence is that interpleader relief for Barclays is inappropriate at this stage.

Should the court order Barclays to hold on to the Barakha funds and tell the Spanish Judicial Police and the Royal Gibraltar Police to advise would-be claimants to them to make their bids? Such an order was not asked for in the summons but was suggested by Mr. Triay, Q.C. in the course of his submissions and resisted by Mr. Dumas. It would be collusion if Barclays did it without a court order. The exercise of contacting the possible claimants and their reaction to the information would take months and possibly lead to no rival claims because of their weakness, so I decline to make such an order.

Barclays has, however, asked for an order that it is bound to comply with Mr. McCarthy's instructions dated April 21st, 1993 requiring it to transfer the remaining funds in these accounts. At first, Mr. Dumas called this a declaratory order which the court had no jurisdiction to grant, since Barclays's summons was an interlocutory step, but when his attention was drawn to O.15, r.16, I understood him to withdraw that objection. I am not being asked to decide an academic or hypothetical question. The court is not about to declare that no other claim against these moneys could exist in the future. At present all the parties concerned are before the court and it seems the application by Barclays for this order should succeed despite the Attorney-General's submission that Barclays should do absolutely nothing with the moneys until Consult-Finsa, Mr. McCarthy and Mr. Patino are brought to book which, I have to say, may never happen. Mr. McCarthy will not, I apprehend, object to the alternative order.

Barclays's application for interpleader relief is refused. Its application for an order that it is to comply with Mr. McCarthy's instructions dated April 21st, 1993 requiring it to transfer the remaining funds in those accounts succeeds.

If the parties cannot agree the issue of costs they should apply to the Registrar to have the matter listed for, say, half an hour in Chambers before me.

Order accordingly.
