[2013–14 Gib LR 260]

PAPADIMITRIOU (as heir of the estate of I. MICHAILIDIS) v. CREDIT AGRICOLE CORPORATION AND INVESTMENT BANK

COURT OF APPEAL (Kennedy, P., Aldous and Potter, JJ.A.):
October 31st, 2013

Banking—banker and customer—due diligence—failure to establish clear commercial benefit to transaction resulting in deposit in customer's account puts bank on constructive notice of impropriety of transaction (e.g. money laundering)—knowing identity of customer insufficient to negative failure to establish commercial benefit—bank's claim to be bona fide purchaser for value without notice defence therefore not established

The claimant brought an action the respondent in the Supreme Court to recover the proceeds of the sale, by a third party, of a furniture collection belonging to her.

Christo Michailidis—the appellant's brother—died in 1999, leaving a valuable collection of art deco furniture at the house in London he shared with the art dealer Robin Symes. After his death, Christo's title to the collection passed to his mother—Irene Michailidis—and not to Mr. Symes. After Irene died, the appellant—Christo's sister—became the sole heir to Irene's (and consequently Christo's) estate.

In 2000, Mr. Symes sold the furniture collection for $15m. At that time, his lawyer—a board member of Credit Agricole (Switzerland) SA—introduced Mr. Symes to the respondent, Credit Agricole Corporate & Investment Bank (CACI), as Mr. Symes had expressed a wish to establish a back-to-back credit facility in respect of $10m. which he was to receive. Mr. Symes was introduced to the head of private banking at CACI London.

In spring 2000, Mr. Symes acquired a Liechtenstein foundation (Pataco), and incorporated a British Virgin Islands company (Lombardi). Lombardi opened an account at CACI Gibraltar.

From the proceeds of sale, amounts of $10.4m. and $4.4m., less commission, were paid into the accounts of two Panamanian companies. The $10.4m. was subsequently withdrawn in cash and paid into the account of Pataco, $10.3m. of which was later paid into Lombardi's CACI Gibraltar account. It was found at a preliminary stage that the $10.3m. was part of the proceeds of the sale of the furniture collection.

CACI Gibraltar conducted "know your customer" (KYC) procedures in relation to Lombardi. As requested by CACI London, KYC forms were

completed by the company directors of Lombardi and sent to CACI Gibraltar's legal and compliance manager, Mr. Canepa. In those forms, Mr. Symes was identified as the beneficial owner of the company, his net worth as $50m., and his country of residence as the United Kingdom.

Another of Mr. Symes's companies, RSL, had a credit facility with Citibank. In order to repay this loan, RSL wanted to open a new facility with CACI London for $11.3m., which would be secured by Lombardi's deposit at CACI Gibraltar and a statue worth $6m. CACI's head office in Paris approved RSL's facility, though only for $10.3m. due to the risk involved in using art as security. Mr. Symes gave an unlimited personal guarantee in respect of RSL's debt.

RSL drew down $9.03m. of the facility over the following few months, until, in April 2001, notice was given to CACI London of a freezing order made by the English High Court in proceedings between Christo's heirs and Mr. Symes, preventing Mr. Symes or RSL dealing with "relevant chattels" (the definition of which was not provided to CACI). Accordingly, no transactions were allowed to pass through the RSL account without approval. In August, the balance outstanding on the RSL account was repaid from the Lombardi account in Gibraltar, and the RSL account was closed. The remainder of the money in the Lombardi account was transferred to others of Mr. Symes's companies, and in April 2002, Lombardi was dissolved.

Christo's mother then commenced the present proceedings in the Supreme Court to recover the proceeds of the sale of the furniture collection, submitting that she had a proprietary claim to them through Christo, and claims against the respondent bank for dishonestly assisting Mr. Symes to apply the proceeds for his own benefit in breach the constructive trust under which he held them for her, and for knowingly receiving property transferred to it in breach of trust. The Supreme Court (Dudley, C.J.) dismissed the claim on the grounds that the defendant bank had no notice of any impropriety and was a *bona fide* purchaser for value without notice (in proceedings reported at 2013–14 Gib LR 55). Christo's mother died, and the appellant, as her heir, appealed against the dismissal of the proprietary claim only.

The appellant submitted that the Supreme Court had erroneously dismissed the claim because it failed to apply the test for notice correctly, and that the respondent had failed to establish that it lacked either actual or constructive notice. If the respondent had made adequate enquiries as to the commercial purpose of the transaction, as would have been the reasonable action of a bank at the time, it would have been put on notice that that purpose was improper, *i.e.* that it was intended to launder the money improperly acquired from the sale of the furniture collection. The Supreme Court failed to consider the commercial purpose and erroneously focused only on the bank's enquiries as to the source of the funds. The arrangement, structured as it was, could have no purpose other than money laundering, as an objective such as the repayment of the Citibank loan could have been achieved by simple money transfer.

The respondent submitted in reply that appropriate enquiries would not have put it on notice of any impropriety; Mr. Symes was introduced as someone wealthy, reputable and trustworthy, and his dispute with the Michailidis family was not known at the time. Such back-to-back facilities were not abnormal, and the fees charged were relatively usual. The purpose of the transaction was quite clearly to repay the Citibank loan, and the structure of the transaction could have been for tax planning purposes, connected with Mr. Symes's planned move to Switzerland, or in order for Mr. Symes to change banks.

Held, allowing the appeal:

The appellant's proprietary claim to the money applied by CACI to discharge the London facility and the guarantee fee taken from the Lombardi account would be allowed. The Supreme Court had been incorrect in finding that the bank defeated the claim. In order to defeat the appellant's proprietary claim, the bank had to show that it was a *bona fide* purchaser for value without notice. It was not disputed by either party that the bank was a purchaser for value when it used the funds from the Lombardi account to pay off the London facility and took from it the arrangement fee, and no actual notice was alleged, but the bank had failed to establish—as it was required to do—that it did not have constructive notice of Mr. Symes's absence of a right to deal with the funds. Given that the transaction lacked a clear commercial benefit, the bank should have made more enquiries than it did. In finding that it was not on notice of any impropriety, the Supreme Court erroneously concentrated only on the adequacy of the bank's enquiries as to the source of the money, rather than as to the purpose of the transaction. Although the nominal purpose of the transaction was to pay the Citibank loan, the use of a complicated web of companies—rather than a straightforward money transfer—should have alerted the bank to the likelihood that the transaction was being used for money laundering. The scheme could not have been for legitimate tax purposes, and the cost and complication involved was too great to be justified by aiding Mr. Symes's planned move to Switzerland, or his desire to change banks; these objectives could have been achieved much more simply and cheaply. Whilst the level of reasonable enquiry on the part of the bank had to be determined against banking standards and practices at the time—and in 2000 anti-money laundering requirements were not nearly so advanced as they were at the time of trial—the bank should still have satisfied itself of a proper commercial reason for the transaction, and it had failed to do so (paras. 28–33).

Cases cited:

(1) *Barclays Bank plc.* v. *O'Brien*, [1994] 1 A.C. 180; [1993] 3 W.L.R. 786; [1993] 4 All E.R. 417; [1994] 1 FLR 1; [1994] 1 F.C.R. 357, considered.

(2) *Macmillan Inc.* v. *Bishopsgate Inv. Trust (No. 3)*, [1995] 1 W.L.R. 978; [1995] 3 All E.R. 747, considered.

(3) *Sinclair Invs. (UK) Ltd.* v. *Versailles Trade Fin. Ltd.*, [2012] Ch. 453; [2011] 3 W.L.R. 1153; [2011] 4 All E.R. 335; [2011] Bus. L.R. 1126; [2011] 2 B.C.L.C. 501; [2011] W.T.L.R. 1043; [2011] EWCA Civ 347, applied.

S. Moverley Smith, Q.C. and *C. Simpson* for the claimant;
T. Mowschenson, Q.C. and *J. Restano* for the defendant.

1 **ALDOUS, J.A.:** Mr. Christo Michailidis lived at 1/3 Seymour Walk in London with Mr. Robin Symes. On July 5th, 1999, Christo died. At the time of his death he was domiciled in Greece, and under Greek law Mrs. Irene Michailidis, his mother, and Mrs. Despina Papadimitrou, his sister, were his heirs, but as he died intestate administrators were appointed. Since then his mother has died and the administrators have been discharged. Thus his sister Despina is the sole appellant.

2 For some time before Christo's death, Seymour Walk was home to a collection of art deco furniture designed by Eileen Gray. After Christo's death Mr. Symes continued to live at Seymour Walk, but in the spring of 2000 he sold the furniture through Mr. Robert Vallois, a Parisian art dealer, for $15m. In April 2000, the furniture was removed from the house at Seymour Walk and flown to Switzerland for delivery to the buyer.

3 Investigations have shown that Mr. Symes caused $4.4m. of the proceeds to be paid to Xoilan Trader Inc., a Panamanian company, and $10.4m. to another Panamanian company, Tradesk Inc.

4 On or about May 3rd, 2000, Mr. Symes caused Lombardi Corp. to be incorporated in the British Virgin Islands.

5 On May 8th, 2000, the $10.4m. was withdrawn from Tradesk and transferred to the account of a Lichtenstein foundation of which Mr. Symes was the beneficiary. On June 7th, Mr. Symes caused a deposit guarantee account to be opened in the name of Lombardi Corp. with the Gibraltar arm of Credit Agricole & Investment Bank (CCAI). It is the respondent to this appeal. On June 28th, the $10.4m. with the Lichtenstein Foundation was remitted to Lombardi's Gibraltar account. This enabled the respondent's London branch to grant Mr. Symes's company, Robin Symes Ltd., a loan facility of $10.3m.

6 The loan facility was used and it was repaid by a payment of $9.6m. from the Gibraltar branch. The balance was disbursed elsewhere for Mr. Symes's purposes.

7 Initially, Christo's family were not aware of the sale of the collection by Mr. Symes. When they found out, some time at the beginning of 2000, they took the view that he had no right to sell it and that on Christo's death ownership passed to Christo's heirs. Proceedings were started in the High Court in England and the Greek courts. Their course and result have been

set out in other judgments and it is sufficient for me to concentrate on the proceedings in Gibraltar.

8 In about March 2004, the family discovered that part of the proceeds of sale of the collection had been deposited in the Gibraltar bank. On April 7th, 2004, proceedings were started against the respondent seeking payment of the amount deposited upon a number of grounds. Two main issues arose, both denied, namely ownership by Christo's heirs and, if that was established, whether the respondent was liable to pay back the money.

9 On May 31st, 2007, the heirs and the administrators of Christo's estate applied under the Civil Procedure Rules, r.24 for an order that summary judgment be given for the claimants on the issue of ownership because it had been determined by the Greek court. On October 25th, 2007, the Chief Justice refused the application. This court, on appeal, came to the opposite conclusion and granted a declaration that upon Christo's death his heirs became entitled to the collection. The Privy Council reversed the decision to grant summary judgment ([2009] UKPC 34), and therefore both issues required to be decided after a trial which was heard by the Chief Justice. He held that the appellant was the rightful heir and therefore had been entitled to the collection. That has not been appealed.

10 The appellant sought payment from the Gibraltar bank on three grounds. First, a proprietary claim; second, a claim based on an allegation of dishonest assistance and third, knowing receipt. There is no appeal against the judge's rejection of the last two grounds, but the appellant submits that the judge should have ordered payment to her of the funds transferred to the Gibraltar bank which totalled just over $9.8m., and the sum of $51,500, being the fee charged by the bank.

11 The appellant's proprietary claim was and is advanced upon the accepted fact that the money in the Gibraltar bank was part of the proceeds of sale of the collection. The bank's defence to that claim was that it was a *bona fide* purchaser for value without notice.

12 The judge, in his detailed and careful judgment, traced the transactional history with the aid of the evidence and the documents. As his account was not criticized, I have reproduced what he said (2013–14 Gib LR 55, at paras. 11–27).

[The learned Justice of Appeal set out those paragraphs and continued:]

13 Between June 30th, 2000 and the end of January 2001, RSL used the facility in London and, on August 13th, 2001, the Gibraltar bank transferred to London $9,860,278.78. RSL's account was closed on August 29th, 2001.

14 At the hearing before the judge, the appellant relied upon the evidence of Mr. Hopton, a banking expert. The banking expert called by

the respondent was Mr. Palette. The respondent called Mr. de Margerie who at the time was general Secretary of CACI private business line in Paris. Nobody who worked in Gibraltar was called to give evidence, but both parties relied upon witness statements of Mr. Canepa. He was a barrister by training and at the time was compliance manager of the Gibraltar bank. Four witnesses were called who worked in London. Mr. Leonard was the private bank credit manager at the London branch. Ms. de Monspey was the account manager. Mr. Trypanis was the senior risk manager and Ms. Garner was the in-house lawyer.

15 The judge concluded that he could not rely on the evidence of Mr. Canepa unless supported by documents. The other witnesses of fact were held to be "honest witnesses." The judge expressed reservations as to part of Mr. Hopton's evidence and where there was a conflict of expert evidence he preferred the evidence of Mr. Pallette.

Judgment

16 As I have already said, the judge's decision that there was no dishonest assistance or knowing receipt was not challenged on the appeal. The appeal is only against the judge's decision on the proprietary claim. In particular, whether the respondent had established that it was a *bona fide* purchaser for value without notice. It was accepted that the funds came from the sale of the furniture and therefore the decision turned on notice.

17 Before the judge, it was submitted that the test to be applied was that set out by Lord Neuberger in *Sinclair Investments (UK) Ltd.* v. *Versailles Trade Fin. Ltd*. (3) ([2012] Ch. 453, at para. 100):

> ". . . [T]he issue is to be determined by asking what the banks actually knew, and what further enquiries, if any, a reasonable person, with the knowledge and experience of the banks, would have made, and, in the light of that, whether it was, or should have been, obvious to the banks that the transaction was probably improper."

18 Counsel for the appellant accepted that the judge was right to recognize that test, but submitted that he failed to apply it. He also drew our attention to a passage in the speech of Lord Browne-Wilkinson in *Barclays Bank plc*. v. *O'Brien* (1) ([1994] 1 A.C. at 195):

> "The doctrine of notice lies at the heart of equity. Given that there are two innocent parties, each enjoying rights, the earlier right prevails against the later if the acquirer of the later right knows of the earlier right (actual notice) or would have discovered if he had taken proper steps (constructive notice). In particular, if the party asserting that he takes free of the earlier rights of another knows of certain facts which put him on inquiry as to the possible existence of the rights of that other and he fails to make such inquiry or to take such other steps as

> are reasonable to verify whether such earlier right does or does not exist, he will have constructive notice of the earlier right and take subject to it."

19 Counsel also reminded us of this warning by Millett, J. in *Macmillan Inc*. v. *Bishopsgate Inv. Trust (No. 3)* (2) ([1995] 1 W.L.R. at 1014):

> "[The plaintiff] attempted to establish constructive notice on the part of each of the defendants by a meticulous and detailed examination of every document, letter, record or minute to see whether it threw any light on the true ownership of the Berlitz shares which a careful reader—with instant recall of the whole of the contents of his files—ought to have detected. That is not the proper approach. Account officers are not detectives. Unless and until they are alerted to the possibility of wrongdoing, they proceed, and are entitled to proceed, on the assumption that they are dealing with honest men. In order to establish constructive notice it is necessary to prove that the facts known to the defendant made it imperative for him to seek an explanation, because in the absence of an explanation it was obvious that the transaction was probably improper."

20 The judge concluded that although there could be legitimate argument as to whether or not there should have been more scrutiny, CACI London did not consider there was anything untoward with the transaction and that putting a structure in place to obtain a facility for the purposes of repaying another bank with an internal guarantee as collateral was standard. The fee charged did not raise a red flag and the size of the transaction would not have raised suspicion.

21 His conclusions on the allegations of knowing receipt and dishonest receipt were as follows (2013–14 Gib LR 55, at para. 98):

> "I am of the view that in principle it was perfectly proper for CACI to rely upon Mr. Tavernier as an introducer of substance, and given his directorship in CACI Suisse, to attach significant weight to his introduction. That said, there is substance in the criticism that too much stock was placed upon it and, allied to that, there was a somewhat lax approach to KYC, including insufficient inquiry into Symes's wealth. The bank also failed to comply with some of its own internal regulations and, no doubt because the transaction was structured through three different branches, it did not have a comprehensive overview of it. However, the standards by which the claimant would have had CACI scrutinize the transaction are, when viewed in the context of 2000, the counsel of perfection. It is clear from the evidence that the approach then was very different from what it is now and the level of scrutiny to which transactions were exposed far less stringent. It is evident from my review of the evidence that I agree with the opinion of both experts that there was no dishonesty

> on the part of any individual within CACI. Nor do I find any evidence to adequately support the proposition that any individual within the bank was aware that they had been drawn into a dishonest scheme and then turned a blind eye to it. Indeed, the fact that this was a transaction which was structured in two different jurisdictions and was then sanctioned by head office in a third jurisdiction strongly militates in support of my finding that there was no awareness of any wrongdoing or unconscionable conduct by CACI staff. To the extent that the claim is framed in terms of dishonest assistance and knowing receipt it therefore fails."

22 He then turned to the proprietary claim (*ibid*., at para. 99):

> "The proprietary claim requires somewhat distinct consideration. The bank's defence to that claim is that it was a bona fide purchaser for value without notice. It is evident from the foregoing that I accept that the bank acted bona fides, however, the issue remains as to whether it was on notice and what further inquiries—if any—it should have made, and whether following such inquiries it would have become apparent that the transaction was improper. The single most serious failing which the claimant's expert can ascribe to CACI is its failure to make full inquiry from LGT Bank as to the source of the funds. If such inquiries had been made from LGT Bank, and it had replied in line with the evidence before me, CACI would have been told that the monies had been transferred by the Pataco Foundation of which Symes was the beneficiary. The proceeds of sale of the collection were laundered at or by the time it was paid into Pataco, and further inquiries by CACI as to their source would have disclosed nothing material which would have put them on notice that the transaction was probably improper. The proprietary claim also fails."

The appeal

23 Mr. Moverly Smith, Q.C., who appeared for the appellant, did not seek to challenge the findings of fact by the judge nor the legal test that he intended to apply. He pointed out that it was for the respondent to establish that it was a purchaser for value, as it was, and that it did not have constructive notice. He submitted that at the relevant time it was incumbent on a bank to ascertain the commercial purpose of the arrangement as that was the reasonable action of a bank at the relevant time. They failed to do so, and, if they had done so, they would have been put upon notice that the purpose of the arrangement was improper. Despite that submission having been made to the judge, he failed to consider what the commercial purpose was and therefore failed to spot the improper motive of Mr. Symes. His concentration on where the money came from was not sufficient.

24 There is ample evidence that at the relevant time a bank which was contemplating entering into a transaction of the type that took place should and would enquire as to the commercial purpose. The Gibraltar credit application form of June 20th, 2000 contained the comment "we have been advised by Credit Agricole Indosuez London that they are to establish the commercial benefit of the operation of the parties concerned." The Gibraltar Credit Committee added the manuscript comment: "We assume that CAI London has requested the B/O to seek independent fiscal advice—I suggest that the existence of the business benefit of the operation be well established prior to the issue of our guarantee."

25 Mr. Bertrand de Margerie agreed in cross-examination that he would want to understand the purpose of the credit application. Ms. Alix de Monspey was shown the credit application form quoted above, and agreed that to approve a transaction it needed to be understood what the purpose of the transaction was. Ms. Margaret Garner agreed in cross-examination that financial institutions should pay special attention to all complex unusual patterns of transactions which have no apparent economic or visible purpose. She accepted that "whenever these transactions have no apparent economic or visible lawful purpose, their background and purpose should so far as possible be examined . . ." Mr. Trypanis believed that without obtaining the full information, the transaction left one in a suspicious situation that should have been reported to the MLRO for further investigation. Mr. Palette's evidence supported the evidence given. He agreed that where a client was seeking to open a new account and enter into a transaction, the economic and commercial purpose of the transaction would be part of the overall check.

26 The judge, when dealing with the proprietary claim, concentrated on the source of funds and not on the commercial purpose of the transaction. If he had done so, he would have had to decide whether the result of a reasonable enquiry "would have made it obvious that there was a likelihood that the transaction undertaken with Symes was improper. That approach needs to be undertaken from the perspective of banking standards and practices [*sic*] at the time of the transaction and not importing more exacting standards which may apply now" (2013–14 Gib LR 55, at para. 6).

27 Mr. Mowschenson, Q.C. submitted for the respondent bank that an appropriate enquiry would not have alerted the bank to anything improper. Mr. Symes had been introduced to the bank by a distinguished lawyer who was a director of an associated bank. He was thought to be a wealthy art dealer. At the time, the bank had not heard of the collection and there was no apparent dispute between him and the Michailidis family. The amount of money involved was not extraordinary, and the back-to-back guarantee was quite normal at the time. As the judge found, there was no dishonesty. There was, it was submitted, nothing suspicious about the transaction. The

respondent was not on notice of any impropriety which would suggest further enquiry. In any case, further enquiry would not have rendered it obvious that the transaction was improper. The commercial purpose was clear; namely to repay an existing loan from the Citibank using funds that belonged to Mr. Symes.

28 The appellant accepted that the perceived purpose was to pay the Citibank's loan. But that could have been done by a simple money transfer. What actually happened was that Mr. Symes had the money paid from Liechtenstein into two Panamanian companies. The money was then withdrawn from Panama accounts and transferred to a Liechtenstein foundation. On June 7th, Mr. Symes opened a deposit guarantee account in Gibraltar in the name of Lombardi Corp., which had been incorporated on May 3rd, 2000, and on June 28th, the money was remitted to that account. That enabled the bank in London to grant Robin Symes Ltd. a term loan facility which was used to pay Mr. Symes' debts. The web of companies used for the transaction would have involved expense, and created doubt as to the commercial purpose. The agreement with the bank was expensive. It required an annual fee of $51,500 over the five-year term, and a $1,000 arrangement fee. An arrangement fee of $20,000 was also charged to Robin Symes Ltd. The difference between the interest earned on the deposit and the interest payable by Robin Symes Ltd. was calculated at around £180,000. No doubt the bank had not overcharged, but that did not mean that there was a commercial purpose other than to launder money.

29 The appellant rightly submitted that the arrangement could not have any commercial purpose other than money laundering. No doubt it was arranged to pay Mr. Symes's debt to Citibank, but the use of a web of legal entities and the cost would have alerted a reasonable bank to the improper motive—namely, to launder the money.

30 It was suggested that the arrangement could have been perceived to have been carried out for tax purposes. That did not stand analysis, as Mr. Symes was, for tax purposes, resident in the United Kingdom. Thus, the suggested scheme could only be designed to avoid tax that was payable. It was also suggested that the commercial purpose was, or could have been, connected with Mr. Symes's proposed move to Switzerland. How that could have been was not explained, and I can see no reason for the web of legal entities, nor the cost, unless there had been an improper motive. The other reason advanced was that Mr. Symes simply wanted to change banks. One look at the commercial purpose would have shown that to be wrong. The change could have been made without the web of legal entities and at no cost.

31 Counsel reminded the court that anti-money laundering requirements were not as advanced in 2000 as they are today. In this case they were

dealing with a client who appeared reputable and rich. They knew the funds belonged to Mr. Symes, and there was nothing to suggest that he did not have a good commercial reason for the arrangement. But the evidence was clear that in 2000, a bank should satisfy itself that there was a proper commercial reason for the arrangement. That the bank did not do. If it had considered the arrangement, it must in my view have concluded that it was improper (see para. 29 above).

32 Mr. Palette suggested in his evidence that the premium fee was relatively normal in banking. That may be the reason why no attempt was made to ascertain the commercial purpose of the arrangement. It does not however address the need of the bank to ascertain the commercial purpose.

33 The judge should have concluded that the bank should have inquired as to the commercial purpose of the arrangement. If it had done so, it would have realized that such arrangement was improper. That being so, the bank did not establish that it lacked constructive notice of the impropriety of the arrangement and the absence of any right or entitlement on Mr. Symes's part to deal with the fund in question. I conclude that the respondent is not able to defeat the appellant's claim.

34 I would allow the appeal.

35 **KENNEDY, P.** and **POTTER, J.A.** concurred.

Appeal allowed.