[2020 Gib LR 75]

MAGNER and ANOTHER v. ROYAL BANK OF SCOTLAND INTERNATIONAL LIMITED

JUDICIAL COMMITTEE OF THE PRIVY COUNCIL (Lord Reed, Lord Wilson, Lord Hodge, Lord Briggs and Lady Arden): February 3rd, 2020

Civil Procedure—retrial—discretion to order retrial—discretion to be exercised judicially, on sound principles—appellate court to ask itself whether retrial in interests of justice

The appellants claimed compensation in the Supreme Court for dishonest assistance in fraudulent breaches of trust and knowing receipt.

Marrache & Co. had been a firm of solicitors in Gibraltar until its financial collapse with a financial deficit of £28m. It had been founded by Isaac Marrache, who entered a partnership with his brother, Benjamin Marrache. Their brother Solomon Marrache was financial director of the firm. The three brothers stole large sums of money from the firm's client accounts and in 2014 they were convicted of conspiracy to defraud. They were sentenced to imprisonment for substantial periods.

The first appellant was a client of the firm and the second appellant was the trustee of two trusts established by the first appellant. The appellants were among the clients of the firm who lost money as a result of the Marraches' fraudulent activity and the financial collapse. They alleged that the respondent ("RBSI") had received money which belonged to them and pursued a proprietary claim, as well as claims of dishonest assistance and knowing receipt. The firm had bank accounts with RBSI and the appellants referred to bank reports and other documents which contained expressions of concern that the firm was not properly segregating client funds from office funds.

At trial, the appellants' case alleged conspiracy involving seven named RBSI employees to turn a blind eye to the firm's misuse of client funds because of the Marraches' considerable local influence and because RBSI benefitted financially from its connection with the firm. The Supreme Court (Jack, J.) found that the RBSI staff believed the Marraches to be financially chaotic. They were also arrogant and bullying. Jack, J. dismissed the claims against six of the RBSI staff but he found that one, Mr. Shaw, had dishonestly assisted the Marraches in their misuse of client moneys. Judgment was given for the appellants against RBSI in relation to their claims of dishonest assistance and knowing receipt, and an account was ordered to determine the compensation due to the appellants.

The Court of Appeal allowed RBSI's appeal, holding that the judge's findings of dishonesty against Mr. Shaw were flawed, unjustified and should not have been made (that decision is reported at 2018 Gib LR 54). The appellants cross-appealed, seeking to uphold the judge's finding that Mr. Shaw was dishonest on additional grounds, *i.e.* that RBSI's documents showed that Mr. Shaw and others were aware of "non-segregation." The cross-appeal was dismissed.

The question on the present appeal was whether the Court of Appeal erred in law in refusing a retrial. The appellants submitted that the test for a retrial was whether the case was inevitably destined to fail.

Held, dismissing the appeal:

(1) In order to establish a claim for dishonest assistance, a claimant must show that (i) there was a trust; (ii) there was a breach of trust by the trustees; (iii) the defendant had assisted the breach; and (iv) the defendant did so dishonestly. In this context, dishonesty could be subjective in the sense that the defendant knew that what he was doing was dishonest, but that subjective understanding was not necessary to establish dishonesty. Honesty in this context was an objective standard because it was sufficient that the defendant's knowledge of the transaction rendered his participation in it contrary to normally acceptable standards of honest conduct. Deliberately closing one's eyes, in the sense of having suspicions of misfeasance but making a conscious decision not to ask questions or otherwise enquire, satisfied the test of dishonesty (para. 10).

(2) It was not disputed that s.85 of the Solicitors Act 1974 (as amended by the Building Societies Act 1986) applied in Gibraltar. The provision did not release a bank or building society from liability for the dishonest assistance of the misappropriation by a solicitor of his clients' funds, but it disclosed an intention by Parliament that, as a general rule, a banker was entitled to act upon the solicitor's instructions relating to a client account without inquiring into the propriety of those instructions. The banker did not owe duties to the solicitor's clients as a trustee of their funds (para. 11).

(3) The power of the Court of Appeal to order a retrial was set out in r.69 of the Court of Appeal Rules 2004. An appeal court had a discretion whether to order a retrial, which discretion had to be exercised judicially, based on sound principles. The question which the appellate court must ask was whether it was in the interests of justice that a retrial should take place. It was important to bear in mind that a retrial involved a waste of time, money and resources and was a remedy of last resort. Appellate courts should not order a retrial unless there was no alternative in order to achieve justice. If the question raised on appeal was the inferences to be drawn from undisputed facts, the appeal court would usually be able to draw inferences without the need for a retrial. If a judge misdirected himself or herself in law, an appeal court would often be able to correct that misdirection without having to order a retrial. But if a misdirection

had prevented a party from presenting the case which he or she had sought to present, it might cause a "substantial wrong or miscarriage of justice" (r.69(2)) which could be cured only by a retrial. In assessing what the interests of justice required, the appellate court could take into account and balance many factors. Those factors which might include the nature and apparent strength of the appellant's case at first instance, whether the courts had been able properly to adjudicate on the case which the party presented at trial, the circumstances in which the error at first instance occurred, the availability of witnesses for a retrial, the passage of time since the events which would be the subject of evidence in a retrial and the likely effect of that on witnesses' recollection, and the time, money and resources that a retrial entailed. The test was not that a retrial should be ordered unless a party's case was bound to fail. There was no such catch-all test. As the decision whether to order a retrial involved an evaluation of the relevant circumstances to determine what the interests of justice required, it could be equated with the exercise by the court of a discretion. The limitations on the ability of an appellate court to interfere with a discretionary decision of a lower court were well known. In appeals from the exercise of a discretion, the appellate court should not interfere with a decision of a lower court which had applied the correct principles and taken into account relevant matters and left out of account irrelevant matters unless the appellate court was satisfied that the decision was so plainly wrong that it must be regarded as outside the generous ambit of the court's discretion (paras. 12–16; para. 19).

(4) The Court of Appeal had been entitled to reject the appellants' cross-appeal. Like the Court of Appeal, the Board was uncertain as to the precise meaning of "non-segregation" in the RBSI documents. However, the context in which Mr. Shaw carried out his investigation was of great significance. Mr. Shaw was more determined than the other relationship managers to bring some discipline into the firm's relationship with RBSI. The Marraches disliked him and he saw them as a professional challenge. Their relationship gave Mr. Shaw no inducement to suppress evidence of any misuse of client money. In this context, the references in the documents to non-segregation provided no basis on which the judge's order could be upheld (paras. 31–32).

(5) The Court of Appeal had correctly applied the test of whether it would be just to order a retrial. It had decided that it would not be just for two reasons. First, it would be unjust to reopen the case against RBSI based on allegations against the six individuals who had been acquitted of dishonesty. Any retrial would therefore be "a substantially reconstituted one" directed to the activities of Mr. Shaw. Secondly, the claimants had adduced evidence against Mr. Shaw and he had answered it. The judge's findings of dishonesty against him were unsustainable. There was no reason to give the appellants a second chance to make good their case and no proper basis for asking a judge to retry the issue. The Board was satisfied that the Court of Appeal had been entitled to reach that view.

There was no question of the Court of Appeal having taken irrelevant factors into account or having failed to take account of relevant factors, and it could not be said that the decision was plainly wrong. The appellants would be mounting a different case from that which they pursued at first instance, focusing exclusively on Mr. Shaw. They would be relying on the documentary evidence of knowledge of "non-segregation," which they had adduced at trial, and seeking to cross-examine Mr. Shaw again on that matter. There was no question of the appellants having been unable to present their case or of the court having failed to address that case, which might have made it necessary in the interests of justice to order a retrial (paras. 33–35).

Cases cited:

(1) *Alhamrani* v. *Alhamrani*, [2014] UKPC 37, referred to.
(2) *Barlow Clowes Intl. Ltd. (in liquidation)* v. *Eurotrust Intl. Ltd.*, [2005] UKPC 37; [2006] 1 W.L.R. 1476; [2006] 1 All E.R. 333; 2005–06 MLR 112; [2006] 1 Lloyd's Rep. 225, applied.
(3) *Chen* v. *Ng*, [2017] UKPC 27, distinguished.
(4) *Lavarello* v. *Jyske Bank (Gibraltar) Ltd.*, January 15th, 2018, C.A., Civil Appeals Nos. 6 and 7 of 2017, unreported, distinguished.
(5) *Nilon Ltd.* v. *Royal Westminster Invs. SA*, [2015] UKPC 2; [2015] 3 All E.R. 372; [2015] 2 BCLC 1; [2015] BCC 521, applied.
(6) *Reid* v. *R.*, [1980] A.C. 343; [1979] 2 All E.R. 904; (1978), 27 W.I.R. 254, considered.
(7) *Royal Brunei Airlines Sdn. Bhd.* v. *Tan*, [1995] 2 A.C. 378; [1995] 3 W.L.R. 64; [1995] 3 All E.R. 97; [1995] BCC 899, applied.
(8) *Watt* v. *Watt*, [1905] A.C. 115, referred to.
(9) *White* v. *White*, [2001] EWCA Civ 955, referred to.
(10) *Wing Lee* v. *Lew*, [1925] A.C. 819, referred to.

Legislation construed:

Court of Appeal Rules 2004, r.69: The relevant terms of this rule are set out at para. 12.

Solicitors Act 1974 (c.47), s.85: The relevant terms of this section are set out at para. 11.

S. Moverley Smith, *Q.C.* and *C. Simpson* for the appellants;
A. Mitchell, *Q.C.* and *N. Medcroft*, *Q.C.* for the respondent.

1 **LORD HODGE:** The question on this appeal is whether the Court of Appeal for Gibraltar ("the Court of Appeal") erred in law in refusing the application for a retrial by Mr. Jim Magner ("Mr. Magner") and T & T Trustees Ltd., the trustees of two trusts which he had established ("the trustees"), after the Court of Appeal overturned a judgment in their favour against the Royal Bank of Scotland International Ltd. ("RBSI"), a company registered in Gibraltar.

2 The context of the appeal is the financial collapse in 2010 of Marrache & Co., a firm of solicitors which had its headquarters in Gibraltar ("the firm") with a financial deficit of £28m. Isaac Marrache, a barrister, founded the firm in 1985 and went into partnership with his brother, Benjamin, who also was a barrister. A third brother, Solomon, was financial director of the firm. The firm appeared to be very successful and had offices not only in Gibraltar but also in London, Sotogrande and Lisbon. But appearances can be misleading. All three brothers stole large sums of money from the firm's client accounts and in 2014 were convicted of conspiracy to defraud. They were sentenced to imprisonment for substantial periods.

3 Mr. Magner and the trustees were among the clients of the firm who lost money as a result of the Marraches' fraudulent activity and the financial collapse. They claim that the Marraches stole over £9.1m. from them between February 2007 and May 2008. They alleged that RBSI had received money which belonged to them and pursued a proprietary or tracing claim for that money. In their original particulars of claim, Mr. Magner and the trustees ("the claimants") pleaded only a proprietary claim but, having obtained disclosure in relation to that claim, expanded their case to include the allegations of dishonest assistance and knowing receipt, which became their principal case against RBSI. The Board is not concerned with the proprietary claim as it was dismissed at first instance and was not appealed. Counsel has not raised the question of knowing receipt. The appeal concerns the claim of dishonest assistance.

4 The firm had bank accounts with RBSI and with Jyske Bank (Gibraltar) Ltd. The firm's accounts with RBSI were an office account and four active client accounts, the latter being in sterling, euros, US dollars, and Canadian dollars. In their revised particulars of claim against RBSI the claimants referred to bank reports and other documents principally in the period between August 2005 and August 2007 which contained expressions of concern that, among other things, the firm was not properly segregating client funds from office funds. The firm's office account was frequently overdrawn and sums of money were transferred from the client accounts to the office account during this period. It is now known that the firm acted in breach of trust in making many of the transfers from the client accounts to the overdrawn office account. In response to RBSI's request for further information as to the identity of the bank officials who were said to have knowledge of the firm's breach of trust and the Marraches' fraudulent conduct, the claimants named eight individuals, Mr. Lino Brydges, Mr. Howard Shaw, Mrs. Bianca Lester, Mr. Jordan Ramagge, Mr. Kenny Maclean, Mr. Marvin Cartwright, Mr. Kelvin Heward and Mr. Bryan Simpson.

5 In his submissions at trial, counsel for the claimants presented his case as one involving a conspiracy involving seven RBSI employees to turn a

blind eye to the firm's misconduct because of the considerable local influence of the Marraches and because RBSI benefitted financially from its connection with the firm. Those employees were the people named in para. 4 above except for Mr. Brydges, who had been RBSI's relationship manager in relation to the firm until 2002 and was head of RBSI's Spanish property and mortgage department. Counsel in his closing submissions presented the case of dishonest assistance as a policy of "dishonest tolerance" of the Marraches' misuse of client funds which was dictated by Mr. Cartwright, who was RBSI's head of corporate and financial institutions in the Gibraltar branch and who effectively controlled the behaviour of the staff in that branch in relation to the firm. Mrs. Lester, Mr. Shaw and Mr. Ramagge were successively the relationship managers in Gibraltar with responsibility for the firm and they reported to Mr. Cartwright. Mr. Maclean, Mr. Heward and Mr. Simpson were RBSI credit managers based in Jersey.

6 After trial, Jack, J. in his judgment found that the Marraches presented to the RBSI staff as financially chaotic. He found that it was not clear that they were so, but he accepted that the RBSI staff believed them to be chaotic. The Marraches were also arrogant and bullying. When the credit control function was moved from Gibraltar to Jersey in 2001, RBSI started to insist that the firm provide better financial information and exercise more financial discipline. This involved the relationship managers in difficult discussions with the Marraches, who asserted that the firm's repeated breaches of its overdraft limits were the result of their failure to transfer funds from client accounts to the office account in a timely manner to pay the fee notes which the firm had rendered. The judge also explained that Mr. Shaw, who was relationship manager for the firm between July 2005 and July 2007, had decades of experience as a banker and took a tougher line with the Marraches than the other relationship managers. He found that Mr. Shaw, at a meeting shortly after he took on the role, had explained forcefully to the Marraches RBSI's requirements for financial information and had incurred their hostility.

7 Jack, J. dismissed the claims made against six of the seven people named in the opening submissions. He found Mrs. Lester to be a convincing witness who believed the Marraches to be chaotic in their financial management and that transfers from a client account to the firm's office account were fees owed to the firm. He found that Mr. Ramagge was not dishonest but simply inexperienced. The three credit managers in Jersey were entitled to rely on the assurances from the staff in Gibraltar that they were addressing the problems of non-segregation. The judge described Mr. Cartwright, who on the claimants' case was the mastermind of the policy of dishonest tolerance, as a straightforward witness who was unaware of the firm's misuse of its clients' funds. The claimants did not appeal his findings which rejected the allegations of dishonesty directed

against each of those employees. But Jack, J. found that Mr. Shaw had dishonestly assisted the Marraches in their misuse of client moneys, gave judgment for the claimants against RBSI in relation to their claims for dishonest assistance and knowing receipt, and ordered an account to determine the compensation due to the claimants as a result.

8 RBSI appealed that order to the Court of Appeal and the claimants cross-appealed, seeking to uphold the order and the finding of dishonesty on the part of Mr. Shaw on a basis other than that which the judge had identified. In a judgment dated June 12th, 2018 the Court of Appeal (Sir Colin Rimer, Dame Janet Smith and Sir John Goldring, JJ.A., reported at 2018 Gib LR 54) allowed the appeal, holding that the judge's findings of dishonesty against Mr. Shaw were "flawed from beginning to end" and that they were "unjustified and should not have been made" (*ibid.*, at paras. 209 and 214). The Court of Appeal also dismissed the cross-appeal.

9 Before discussing the basis on which the Court of Appeal upheld RBSI's appeal and refused the application for a retrial, the Board sets out the relevant law on dishonest assistance, on the nature of a banker's duty in Gibraltar in relation to a solicitor's accounts at the material time, and on the correct approach of an appellate court in relation to a decision whether or not to grant a retrial.

The legal background

(i) *Dishonest assistance*

10 In order to establish a claim for dishonest assistance, a claimant must show that (i) there was a trust, (ii) there was a breach of trust by the trustees, (iii) the defendant assisted the breach, and (iv) the defendant did so dishonestly. In this context, dishonesty can be subjective in the sense that the defendant knew that what he was doing was dishonest, but that subjective understanding is not necessary to establish dishonesty. Honesty in this context is an objective standard because it is sufficient that the defendant's knowledge of the transaction rendered his participation in it contrary to normally acceptable standards of honest conduct: *Barlow Clowes Intl. Ltd.* v. *Eurotrust Intl. Ltd.* (2) ([2005] UKPC 37, at para. 15, *per* Lord Hoffmann). Deliberately closing one's eyes, in the sense of having suspicions of misfeasance but making a conscious decision not to ask questions or otherwise enquire, satisfies the test of dishonesty: *Royal Brunei Airlines Sdn. Bhd.* v. *Tan* (7) ([1995] 2 A.C. at 389, *per* Lord Nicholls of Birkenhead).

(ii) *Section 85 of the Solicitors Act 1974*

11 It was not disputed that s.85 of the Solicitors Act 1974 (as amended by s.54(3) of the Building Societies Act 1986) applies in Gibraltar. That section provides:

"Where a solicitor keeps an account with a bank or a building society in pursuance of rules under section 32—

(a) the bank or society shall not incur any liability, or be under any obligation to make any inquiry, or be deemed to have any knowledge of any right of any person to any money paid or credited to the account, which it would not incur or be under or be deemed to have in the case of an account kept by a person entitled absolutely to all the money paid or credited to it; and

(b) the bank or society shall not have any recourse or right against money standing to the credit of the account, in respect of any liability of the solicitor to the bank, other than a liability in connection with the account."

This provision does not release a bank or building society from liability for the dishonest assistance of the misappropriation by a solicitor of his clients' funds. But it discloses an intention by Parliament that, as a general rule, a banker is entitled to act upon the solicitor's instructions relating to a client account without inquiring into the propriety of those instructions. The banker does not owe duties to the solicitor's clients as a trustee of their funds. This provision is an important part of the legal context in which Mr. Shaw's acts and omissions fall to be assessed.

(iii) ***The grounds for ordering a retrial***

12 The power of the Court of Appeal to order a retrial is set out in r.69 of the Gibraltar Court of Appeal Rules 2004 which provides:

"(1) Except as hereinafter provided the court shall have power to order that a new trial be had of any cause or matter tried by the Supreme Court in the exercise of its original jurisdiction.

(2) A new trial shall not be granted on the ground of improper admission or rejection of evidence unless in the opinion of the court some substantial wrong or miscarriage of justice has been thereby occasioned; and if it appears to the court that such wrong or miscarriage affects part only of the matters in controversy, or some or one only of the parties, the court may give final judgment as to part thereof, or as to some or one only of the parties, and direct a new trial as to the other part only, or as to the other party or parties.

(3) A new trial may be ordered on any question without interfering with the finding or decision upon any other question."

Rule 70 deals with immaterial errors which do not affect the merits of the decision or the jurisdiction of the Supreme Court.

13 An appeal court has a discretion whether to order a retrial and it is a discretion which must be exercised judicially, based on sound principles: *Watt* v. *Watt* (8) ([1905] A.C. at 122 *per* Lord Davey); *Wing Lee* v. *Lew* (10) ([1925] A.C. at 823). In the Board's view, the question which the appellate court must ask is whether it is in the interests of justice that a retrial should take place. The Board states the test in those general terms because of the wide range of circumstances in which a trial of fact may go off the rails.

14 It is important to bear in mind that a retrial involves a waste of time, money and resources and is a remedy of last resort: *White* v. *White* (9) ([2001] EWCA Civ 955, at para. 29, *per* Robert Walker, L.J.). Appellate courts should not order a retrial unless there is no alternative in order to achieve justice. If the question raised on appeal is the inferences to be drawn from undisputed facts, the appeal court will usually be able to draw inferences without the need for a retrial: *Alhamrani* v. *Alhamrani* (1) ([2014] UKPC 37, at para. 64). If a judge misdirects himself or herself in law, an appeal court will often be able to correct that misdirection without having to order a retrial. But if a misdirection has prevented a party from presenting the case which he or she sought to present, it may cause what r.69(2) calls a "substantial wrong or miscarriage of justice" which can be cured only by a retrial.

15 In assessing what the interests of justice require, the appellate court can take into account and balance many factors: *Reid* v. *R.* (6) ([1980] A.C. at 346). Without attempting to be comprehensive, the Board considers that those factors may include the nature and apparent strength of the appellant's case at first instance, whether the courts have been able properly to adjudicate on the case which the party presented at trial, the circumstances in which the error at first instance occurred, the availability of witnesses for a retrial, the passage of time since the events which would be the subject of evidence in a retrial and the likely effect of that on witnesses' recollection, and the time, money and resources which a retrial entails.

16 Mr. Moverley Smith, Q.C. founds on a statement by Sir Colin Rimer, J.A. in another appeal arising out of the Marrache insolvency, *Lavarello* v. *Jyske Bank (Gibraltar) Ltd.* (4). In that case it was alleged and held at first instance that one official of Jyske Bank had dishonestly assisted the Marraches' fraudulent activity. The Court of Appeal overturned that finding and ordered a retrial. Mr. Moverley Smith seeks to persuade the Board that the test for a retrial is whether the case was inevitably destined to fail. The Board is satisfied that there is no such catch-all test. *Lavarello* was a case in which the judge at first instance had failed to have regard to expert evidence and other evidence on banking practice and had erred in his approach to fact-finding in concluding that the employee was dishonest. As a result, the judge had not adjudicated properly on the cases which

the parties had presented. Having so found, Sir Colin Rimer, J.A., giving the leading judgment in the Court of Appeal, stated (para. 174) that the court "is in no position to decide that this is a case which was inevitably destined to fail." The Court of Appeal ordered a retrial because it would "deliver an injustice to the claimants" (*ibid.*) if it were to dismiss the claim. The Board readily sees the relevance and weight of such a consideration once it has been established that the judge at first instance has not properly considered a case which was presented. But this consideration is only one of several factors which the appellate court must balance when deciding whether to order a retrial. The test which the Court of Appeal correctly applied in *Lavarello* was whether justice required a retrial.

17 Mr. Moverley Smith also refers to the advice of the Board in *Chen* v. *Ng* (3). It is not necessary to examine this case in any detail. It concerned a dispute as to the basis on which Mr. Ng had transferred shares in a BVI company to Madam Chen. The judge at first instance had disbelieved both parties' explanations of the transfer but the grounds on which he disbelieved Mr. Ng's evidence had not been put to him either in cross-examination or by the judge. In its advice, the Board did not discuss the test to be applied when deciding to order a retrial. But it is clear that the case which Mr. Ng presented to the judge had not received a proper adjudication, that the Board could not determine the nature and legal consequences of the transaction without a proper assessment of Mr. Ng's credibility, and that justice required a fresh assessment of his credibility in a retrial.

18 In short, neither *Lavarello* nor *Chen* supports a contention that there is a test that an appellate court should order a retrial unless a party's case is bound to fail.

(iv) ***The Board's power to review a discretionary decision***

19 As the decision whether to order a retrial involves an evaluation of the relevant circumstances to determine what the interests of justice require, it can be equated with the exercise by the court of a discretion. The limitations on the ability of an appellate court to interfere with a discretionary decision of a lower court are well known. In *Nilon Ltd.* v. *Royal Westminster Inv. SA* (5), the Board stated ([2015] UKPC 2, at para. 16):

> "It is also trite law that in appeals from the exercise of a discretion an appellate court should not interfere with a decision of a lower court which has applied the correct principles and which has taken into account matters which should be taken into account and left out of account matters which are irrelevant, unless the appellate court is satisfied that the decision is so plainly wrong that it must be regarded

as outside the generous ambit of the discretion which has been entrusted to the court."

See also *Reid* v. *R.* (6) ([1980] A.C. at 346) in which the Board adopted a similar approach in relation to a decision by the Court of Appeal in Jamaica on whether to order a retrial in a criminal case.

Discussion of the Court of Appeal's judgment

20 Jack, J.'s findings of dishonesty on the part of Mr. Shaw were based on a flawed understanding of the evidence which had been led. Mr. Moverley Smith did not defend the judge's approach before the Court of Appeal or before the Board. Before discussing the Court of Appeal's approach to the judge's findings against Mr. Shaw it is necessary to set out some of the background.

21 Relationship managers had no general duty to monitor customers' accounts. Their role, as Sir Colin Rimer, J.A. stated, was to (i) act as a point of liaison with the customer, (ii) prepare credit applications for the Jersey credit management team to consider, and (iii) receive two types of report on which they needed to act. The first report was an excess report, which was made when a customer exceeded its overdraft limit. The second report was a "selective today's posting" ("STP"), which was made to an assistant relationship manager and countersigned by the relationship manager when larger transfers were made; its purpose was to address the risk of money laundering. Before October 2007, STPs were generated for transfers over £25,000 but assistant relationship managers and relationship managers paid only cursory attention to transfers of less than £100,000. After October 2007, STPs were created only for transfers which exceeded £100,000.

22 Shortly after taking on the role as the firm's relationship manager, Mr. Shaw made an excess report on July 29th, 2005 and another excess report on August 26th, 2005. In the latter report he stated that he was investigating a number of transfers between the client account and office account to understand how the Marraches were managing their own and their clients' cash. He stated: "I need to ensure they are not cross-firing/ misusing clients' funds." The nature of this investigation was central to the judge's adverse findings. First, in about October 2005, Mr. Shaw analysed transfers between the sterling client account ("the 294 account") and the office account from either January or February 2005 to August 2005. This revealed a number of large, round-sum transfers in the range between £10,000 and £30,000 as well as transfers of sums which were not round numbers. Secondly, he said that Mr. Cartwright had spoken to another banker, Joe Bautista, who used to work for NatWest, about an earlier investigation into the firm before NatWest merged with the Royal Bank of Scotland plc, when the firm had separate accounts with each bank. The

purpose of this investigation was to see if there had been "cross-firing," which involves the transfer of sums between differing funding institutions and may create the appearance of profitable trading, and not to investigate the possible misuse of client funds. Thirdly, he had a meeting with Mr. Ian Wood of Baker Tilly, who were the firm's accountants, which, Mr. Shaw said, assisted him in concluding that the firm was segregating client and office funds.

23 In a credit proposal dated October 27th, 2005 he stated that it appeared that on occasion client and office accounts were not segregated. Mr. Shaw submitted his review to Mr. Kerry Blight, the Gibraltar Regional Manager and the Jersey credit team. In his annual review in October 2006, Mr. Shaw recorded that recent experience had "seen an improvement in the management of client funds." Mr. Shaw submitted a credit application dated October 11th, 2006. In response Mr. Heward agreed to extend the facilities to the firm and stated:

> "This is a difficult position to manage. We are asked for mainly fully secured facilities for prominent local customers, with good means clear and where we also have full personal recourse. On the other [hand] we have opaque financial accounts, a history of not altogether satisfactory account conduct, an unwillingness to share information with RBSI (albeit this has improved recently—thanks for your efforts in this respect) and some doubts about the extent to which clients' funds are properly segregated."

24 At the trial, the judge had the benefit of expert evidence on banking practice on which the experts agreed. So far as relevant, the experts agreed that (a) bankers were not expected to know the relevant solicitors' accounts rules, (b) relationship managers could be expected to be aware of the need for solicitors to separate their own funds from those of their clients, and (c) if a banker became aware of matters which raised a suspicion that a customer was misusing client funds, he was obliged to investigate the suspicion.

25 Jack, J. addressed the investigations, which the Board has described in para. 22 above, and concluded that Mr. Shaw had lied about them.

26 First, although the only documentary evidence of an investigation of transfers between a client account and the office account was a spreadsheet of transfers from the 294 account to the office account between January/February 2005 and August 2005, the judge concluded that Mr. Shaw had in fact examined (i) the 294 account which showed transfers to other accounts, and (ii) the other client accounts, and in particular the US dollar and euro accounts which revealed substantial transfers of funds to, among others, the office account, the firm's payroll company, and the Marraches' property company. These transactions, the judge held, would have put a banker on notice of potential misfeasance.

27 The Court of Appeal rejected the judge's conclusions, holding that (i) there was no evidence that Mr. Shaw ever examined any account other than the office account, and (ii) the transfers from the 294 account which were shown in the office account would not have raised suspicions in Mr. Shaw's mind. The Court of Appeal held that Mr. Shaw may have been in error in confining his investigation of the firm's RBSI accounts to his examination of the office account for transfers from the 294 account, but there was nothing in that investigation to excite suspicion and prompt a wider investigation. The experts had agreed that payments from a client account into a solicitor's office account were permitted under the solicitors' accounts rules and that transfers of round sums were not suspicious. The judge had no basis for disbelieving Mr. Shaw's evidence that he did not investigate beyond the transfers into the office account from the 294 account.

28 Secondly, the judge concluded that Mr. Shaw had lied about the conversation with Mr. Bautista. But the Court of Appeal rejected that conclusion. The conversation with Mr. Bautista was not disputed. Mr. Shaw's evidence of it was not challenged and the judge was wrong to understand Mr. Cartwright as having denied any recollection of it. The judge's conclusion that Mr. Shaw had lied about the Bautista conversation, which played a material part in his conclusion that Mr. Shaw was dishonest, was both procedurally unfair and one which was not open to him on the evidence.

29 Thirdly, the judge found that Mr. Shaw had lied when he said that he had made a note of the Baker Tilly meeting. The Court of Appeal showed that that had not been his evidence and held that the judge's rejection of his evidence that he had derived comfort from the meeting was unsafe.

30 Mr. Moverley Smith does not seek to defend Jack, J.'s reasoning on any of these three matters. Before the Court of Appeal he sought to defend the judgment by cross-appeal, arguing that there were additional grounds supporting the judge's finding that Mr. Shaw was dishonest. Those reasons were that RBSI's documents showed that Mr. Shaw and others were aware of "non-segregation," which, he submitted, in context must have involved a breach of trust.

31 In the Board's view, the Court of Appeal was clearly entitled to reject the cross-appeal. While Mr. Shaw's evidence as to what he understood "non-segregation" to be was confused, it is far from clear that he understood it to involve any misappropriation of clients' funds. The evidence did not suggest that Messrs. Ramagge, MacLean, Heward and Simpson, who saw reports referring to non-segregation, understood the term to refer to the misappropriation of clients' money. There was, in any event, no evidence that RBSI officials were aware of office money being mixed with client money in the office account or other accounts. Rather,

client moneys were transferred into the overdrawn office account as Mr. Shaw's investigation of the office account had shown, but that limited investigation of itself did not give rise to suspicion. Like the Court of Appeal the Board is left in a position of uncertainty as to the precise meaning of "non-segregation" in RBSI's documents.

32 But what is of great significance is the context in which Mr. Shaw carried out his investigation. As the judge found, Mr. Shaw was more determined than the other relationship managers to bring some discipline into the firm's relationship with RBSI. The Marraches disliked him and he saw them as a professional challenge. He took a tough line with them by making demands on them with the aim of improving the banking relationship. Their relationship with him gave him no inducement to suppress evidence of any misuse of client money. Sir Colin Rimer, J.A. in the Court of Appeal rejected in robust terms the judge's conclusion that, in August 2005, Mr. Shaw had "brushed the issue of non-segregation under the carpet," stating (2018 Gib LR 54, at para. 182):

> ". . . I do not understand on what basis the judge assessed that Mr. Shaw, a very experienced, and apparently very tough, banker would not have had the courage to perform his duty to report dishonest banking transactions by customers. Secondly, his speculation appears to me to have been at odds with the evidence as to the climate of the banking relationship with the firm at the time that Mr. Shaw is assumed to have discovered such plundering. If one winds back to that time, and has regard to the then nature of the relationship, the notion that Mr. Shaw would have kept his astonishing discoveries to himself is one I would regard as incredible. "

The contemporary documents to which Sir Colin Rimer, J.A. then referred amply supported this view as they showed that there was serious friction between Mr. Shaw and the Marraches and that the Jersey credit team were frustrated by the behaviour of the Marraches and were relaxed about terminating the banking relationship with the firm. In this context, the references in the documents to non-segregation provided no basis on which the judge's order could be upheld.

33 It was only at the end of the appeal hearing, and in response to an enquiry from the Court of Appeal as to what order it should make if it were minded to allow RBSI's appeal, that Mr. Moverley Smith proposed a retrial. Sir Colin Rimer, J.A. dealt with the application briefly in two paragraphs (*ibid.*, at paras. 212 and 213). The test which the Court of Appeal correctly applied was whether it would be just to order a retrial. It decided that it would not for two reasons. First, it would be unjust to re-open the case against RBSI based on allegations against the six individuals who had been acquitted of dishonesty. Therefore, any retrial would be "a substantially reconstituted one" (*ibid.*, at para. 212) directed

to the activities of Mr. Shaw. Secondly, the claimants had adduced evidence against Mr. Shaw and he had answered it. The judge's findings of dishonesty against him were unsustainable. There was no reason to give the claimants a second chance to make good their case and no proper basis for asking a judge to retry the same issue.

34 The Board is satisfied that the Court of Appeal was entitled to reach that view. There is no question of the court having taken irrelevant factors into account or having failed to take account of relevant factors; and it cannot be said that its decision was plainly wrong. The case which the claimants presented was based on allegations against seven individuals, and particularly Mr. Cartwright. Now the claimants seek to remount a case focusing on allegations of dishonesty against Mr. Shaw and relying on his knowledge of "non-segregation" of client funds. That is an issue on which they have already cross-examined Mr. Shaw and failed to make out their case. In short, the claimants would be mounting a different case from that which they pursued at first instance, focusing exclusively on Mr. Shaw. They would be relying on the documentary evidence of knowledge of "non-segregation," which they had adduced at the trial, and seeking to cross-examine Mr. Shaw again on that matter. The judge did not rely on the references to "non-segregation" in the documents and the cross-examination of Mr. Shaw as a basis for finding against RBSI, and the Court of Appeal considered the matter when disposing of the cross-appeal by reference to the wider context of Mr. Shaw's poor relationship with the Marraches (para. 32 above). There is no question of the claimants having been unable to present their case or of the court having failed to address that case, which might have made it necessary in the interests of justice to order a retrial.

Conclusion

35 The Board will humbly advise Her Majesty that the appeal should be dismissed.

Appeal dismissed.