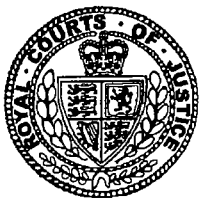

Neutral Citation Number: [2014] EWCA Civ 1107

Case No: A3 2013 2871

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
BRISTOL DISTRICT REGISTRY
MERCANTILE COURT
HIS HONOUR JUDGE HAVELOCK-ALLAN QC
[2013] EWHC 2780 (QB)

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 31/07/2014

Before :

THE MASTER OF THE ROLLS
LORD JUSTICE TOMLINSON
and
LORD JUSTICE FLOYD

Between :

TIDAL ENERGY LIMITED	**Appellant**
- and -	
BANK OF SCOTLAND PLC	**Respondent**

Guy Adams (instructed by **Capital Law LLP**) for the **Appellant**
Raymond Cox QC and **Neil Levy** (instructed by **Foot Anstey LLP**) for the **Respondent**

Hearing date: 23 June 2014

Approved Judgment

Lord Justice Floyd:

Introduction

1. A customer gives its bank ("the remitting bank") instructions to pay one of its suppliers using the clearing houses automated payment system ("CHAPS"). The instructions include the correct name of the supplier whom the customer wishes to pay. However, the instructions also include numerical data (account number and sort code) which the customer believes, wrongly, to be the bank account of the supplier at another bank ("the receiving bank"). In fact, although there is an account corresponding to those numerical data at the receiving bank, it is in the name of, and belongs to, a third party, apparently unconnected with the supplier or the customer. The receiving bank does not check the name on the account to confirm that it corresponds to the name of the supplier, because it is not banking practice to do so. Once the amount of the transfer is credited to the third party's account, it is withdrawn. Is the remitting bank entitled in these circumstances to debit the customer's account with the amount transferred? That is the issue which arises on this appeal. It raises a short point of construction of the instructions which the customer gave to the remitting bank on the bank's standard transfer form.

2. By his judgment dated 13 September 2013 and resulting order, HHJ Havelock-Allan QC dismissed the application of the customer, Tidal Energy Limited ("Tidal"), for summary judgment against its bank, Bank of Scotland plc ("the bank"), for wrongly debiting its account in the circumstances I have outlined. Instead, he entered summary judgment for the bank on the bank's cross-application, and dismissed Tidal's claim. Tidal appeals from that judgment and order with the permission of Lewison LJ, granted on the papers.

3. Mr Guy Adams argued the case for Tidal. Mr Raymond Cox QC with Mr Neil Levy responded on behalf of the bank.

4. The relevant facts can be shortly stated. Tidal had an obligation to pay one of its suppliers, Design Craft Limited ("Design Craft"), the sum of £217,781.57. It appears that someone purporting to represent Design Craft had spoken to someone at Tidal and supplied banking details (sort code, account number and bank name). Tidal had a business bank account at the bank's branch at One Kingsway, Cardiff. On 31 January 2012 Tidal completed the bank's CHAPS transfer form ("the transfer form"), wishing by this means to pay its supplier.

5. The transfer form was headed "*Your request to make a CHAPS transfer*". In section 1 the form required the customer to insert what it described as "*Details of the CHAPS transfer*". It informed the customer that all requests received by 3 pm will normally be made on the same business day. Section 1 of the transfer form contained a series of boxes in which the customer must fill in details of the transfer. These included the date that the transfer was to be processed, the amount of the transfer in figures and in words, and further boxes entitled "*Sending (remitter) sort code*", "*Sending (remitter) account number*", "*Account number to be charged (if different)*", "*Sending (remitter) name*", "*Payment reference (if known)*", and "*Payment details (if any)*". Tidal provided the relevant mandatory details, and gave its supplier's invoice number in the optional "*payment details (if any)*" box.

6. There followed four boxes, still within section 1 of the transfer form, giving details of the destination of the transfer. These boxes were entitled "*Receiving (beneficiary) sort code*", "*Receiving (beneficiary) bank and branch*", "*Receiving (beneficiary) customer account number*" and "*Receiving (beneficiary) customer name*". Tidal filled in the first three of these boxes with the banking information with which it had been supplied, purportedly by Design Craft. These identified the receiving (beneficiary) bank as Barclays (but did not specify a branch). In the fourth box Tidal inserted the name of the intended recipient of its funds, namely Design Craft Ltd.

7. Section 2 of the transfer form was headed "*Your confirmation*". There followed a statement, which Tidal was required to confirm with appropriate signatures, as follows:

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

8. The statement in section 2 of the transfer form went on to point out that any personal information relating to individuals named in the form might be processed for purposes related to, for example, anti-money laundering and anti-terrorism laws, and might be transferred outside the jurisdiction. Two authorised signatories signed and dated the section 2 statement on behalf of Tidal.

9. The second page of the transfer form contains terms and conditions mainly concerned with the timing of the payment, cancellation and amendments. These made clear that the bank could only undertake to comply with an amendment or cancellation of the instruction if it was received by 3pm on the business day before the agreed date for payment. Clause 4, of these terms, on which some reliance was placed by Mr Cox, stated that if the bank refused to execute a CHAPS transfer they would inform the customer "*within the maximum execution time for a payment transaction of this type*".

10. The bank received Tidal's instruction at 09.38 on 31 January 2012. At 15.20 their processing team initiated the transfer through CHAPS by sending the funds from the bank's account at the Bank of England to the account of the receiving bank at the Bank of England. A daily activity form and Form MT03 (which was a record of the payment instruction) were immediately generated. All of the payee information on the transfer form (receiving customer's account number at Barclays, sort code of Barclays, receiving customer's name and the invoice number in respect of which the

payment was being made) was reproduced in both documents. As soon as Barclays established that the account number and sort code were theirs, they sent an acknowledgment of receipt back to the bank using the SWIFT messaging system. Barclays made a credit entry in the account corresponding to the account number and sort code. It was an account in the name of Childfreedom Limited, not Design Craft. On the same day, the bank made a debit entry on Tidal's account.

11. On 6 February 2012 Tidal telephoned the bank to say that it had been induced by fraud to provide the account details in the transfer form. The bank communicated this information to Barclays. The bank now understands that by close of business on 6 February 2012 the Barclays customer had withdrawn £217,000 from the account.

12. The evidence before the judge included a witness statement from Neil Johnson, an employee of the bank in its electronic payments team. This witness statement had been made in response to a CPR Part 18 request concerning the banking practice relied upon by the bank, namely that it was not banking practice to check customer names when executing CHAPS transfers. Mr Johnson explained that it was normal banking practice for banks to process payments through CHAPS on the basis of bank account number and sort code only and not on the basis of the name of the payee. It was not practicable to scrutinise every payment: CHAPS transfers were treated on a straight through basis, because the objective of CHAPS was to achieve speed of credit. Although it was his experience that, as a matter of normal banking practice, beneficiary name is not used "*as a primary means by which a payment is routed through the CHAPS system*", he explained the requirement to provide the name of the beneficiary by saying that certain provisions of the Financial Action Task Force Recommendations required members of CHAPS, for anti-money laundering and counter-terrorist purposes, to include the beneficiary name when making payments via wire transfers, including CHAPS. Mr Johnson also made the point that the CHAPS scheme rules merely regulated the obligations of CHAPS scheme members between themselves – they did not "*articulate how the Bank should transact with its customers*".

13. The evidence also included a witness statement of Ms Alexia Thomas, Tidal's solicitor, which drew attention to the fact that, at least in a previous version of the CHAPS scheme rules, there was provision for each member bank to have a repair sort code number. Payments received which could not be applied due to "*insufficient or incorrect beneficiary details*" were amongst those to be returned to this code. She also drew attention to the fact that, at least at one time, it was the practice of banks to check all CHAPS transfers above the value of £50,000: whether or not this remained the case it was a business judgment of the banks as to the risk they were prepared to take. In a second witness statement Mr Johnson explained that in 2004 there had been a quite common practice of manual checking, although different banks might have used different thresholds. At the current time "*all major UK clearing banks use straight-through processing in relation to CHAPS payments they receive*". CHAPS payments were now automated for most if not all UK clearing banks.

The judgment of HHJ Havelock-Allan QC

14. Having set out the facts and the contentions of the parties, the judge dealt with the case in the following way. He said that the first step was to ask what the bank was authorised to do, and then to examine whether the Bank, as agent of Tidal, complied

with that instruction. He answered the first part of this question by saying that the instruction was to pay a sum of money "*to the beneficiary*" by CHAPS transfer to the account number and sort code specified. Although he accepted that the account name was important to Tidal, the evidence was that CHAPS did not operate in such a way that the beneficiary's name formed part of the identifier which determined the destination of the payment. This was because the volume of CHAPS transactions would make manual checking impossible within the short timescale.

15. The judge rejected an argument that the existence of a repair sorting code for cases where there were insufficient or incorrect beneficiary details affected the position. There was no requirement in the CHAPS rules that the beneficiary's name be included and in practice CHAPS transfers were processed without reference to it. He said that Tidal could be forgiven for thinking that the identity of the beneficiary was relevant to the way in which the payment was processed, because the CHAPS transfer form includes a box for naming the beneficiary. However he treated the explanation given by Mr Johnson that the information was requested for anti-money laundering and counter-terrorism purposes as the explanation for that requirement.

16. The judge concluded from the evidence of how CHAPS works that a receiving bank which receives a CHAPS transfer and which is able to match an account number and sort code to one of its accounts will be expected to credit that account with the money and send an acknowledgment to the remitting bank. At that point payment is complete. He therefore rejected Tidal's argument that the payment was not completed, and that the instructions had not been complied with.

17. The judge also found in favour of the bank on an alternative ground based on the language of the statement on the form that "*no responsibility is to attach to you for any loss caused by delays, interruptions or errors in transmission of payment, which are not directly due to the negligence or default of your own officers or servants.*" Mr Cox did not support the judge on this alternative ground.

Discussion

18. I would formulate the issues in a slightly different way to the judge. To my mind the question is this: in what circumstances, pursuant to the transfer form, is the bank authorised to debit Tidal's account with the amount specified on the form? In particular does the form authorise the Bank to debit the account when money has been paid into an account having the number and sort code identified, but in the name of someone other than Design Craft?

19. As with any contractual document, its meaning falls to be determined by ascertaining what a reasonable person would have understood the parties to have meant by the language which they have used. The relevant reasonable person is one who has all the relevant background knowledge which would reasonably have been available to the parties in the situation in which they were at the time of the contract. If there are two possible constructions, the court is entitled to prefer the construction which is consistent with business common sense and to reject the other - see per Lord Clarke of Stone-cum-Ebony in *Rainy Sky SA and others v Kookmin Bank* [2011] UKSC 50 at [21].

20. A preliminary question is what knowledge is to be imputed to the reasonable person as part of the background to the making of the payment in this case. The judge took account of the way in which a CHAPS transfer works inside the banking system, and in particular the fact that it was the practice of banks to use only the account number and sort code and not the beneficiary name. He also took account of the Bank's suggestion that the name of the beneficiary was supplied for anti-money laundering and counter-terrorism purposes and not for the purposes of routing the payment to an account in that name.

21. Does banking practice invariably form part of the relevant background for interpreting a contract or other instrument between the bank and its customer? The bank's skeleton argument referred to the statement of Willes J in *Hare v Henty* (1861) 10 C.B. (N.S) 65, 77 that "*A man who employs a banker is bound by the usages of bankers*". Like all generalisations, care must be taken in its application to individual circumstances. The narrow issue in *Hare v Henty* was whether a banker receiving a cheque from a customer had a duty to transmit it to the paying bank for presentation on the day on which he received it, or whether it had until the following day to do so. Instead of transmitting the cheque directly to the paying bank, as had previously been the practice, the presenting bank had used the recently established country clearing house. The use of the clearing house had resulted in delay as compared with the earlier practice, with the result that the cheque had not been paid, and the customer claimed damages in negligence or contract. Erle CJ held that the remitting bank's duty to transmit the cheque was defined by earlier authority, *Rickford v Ridge* 2 Campb. 537, and allowed the presenting bank until the following day. He said that that rule would apply in the case in point unless "*circumstances exist from which a contract or duty on the part of the banker to present earlier ... can be inferred*". No such circumstances arose at the relevant time, as the practice of using the clearing house necessarily involved a delay. Willes J's observation about the practice of bankers was made in the course of argument, and did not form part of a judgment. The case is not authority for any general proposition that a contract with a bank must always be construed by reference to banking practice, far less banking practice not known to the customer.

22. In *Barclays Bank plc and others v Bank of England* [1985] 1 All ER 385, a decision of Bingham J as a judge of the Commercial Court appointed as an arbitrator, the court had to determine the time and place at which a bank presenting a cheque for payment through the clearing system was discharged of its responsibility towards its customer. Although Bingham J cites Willes J's statement in *Hare v Henty* at paragraph 17 of his award, he does so, firstly, in a passage which set out the respondent's argument, which he went on to reject. It was contended for the respondent that delivery at the clearing house was, by agreement or by usage of the banks, treated as equivalent to presentation and therefore amounted to a waiver of the normal obligation to present at the paying bank. Bingham J rejected the contention that there was any agreement to treat delivery at the clearing house as dispensing with the need for presentation at the bank. In a concluding, and *obiter*, passage of his judgment he said that if the drawer was to lose any right which he possessed "*as a result of a private agreement between banks for their own convenience the very strongest proof of his knowledge and assent would be needed*". He also said this:

> "In deciding whether presentation in a given way, as through the clearing house, is a proper and reasonable discharge of the presenting banker's duty to his customer, reference to the ordinary usage and practice of bankers is very relevant, and likely in most cases to be decisive (see, for example, *Hare v Henty* (1861) 10 CBNS 65, 142 ER 374, *Prideaux v Criddle* (1869) LR 4 QB 455), but the usage and practice contended for here, even if proved, could not without more derogate from the presenting bank's duty to its customer. "

23. Those passages distinguish, in my judgment correctly, between the use of banking practice to decide whether a bank has complied with a duty imposed on it by contract, and the use of such practice, if unknown to the customer, to inform the meaning of the contract itself. Of course, if the practice is known or reasonably available to both customer and bank, then its use for interpretation is uncontroversial. Where that is not so, banking practice cannot in my judgment have a bearing on deciding the meaning and scope of the authority granted to the bank.

24. The evidence before the judge did not show that there was material reasonably available to the customer to show how CHAPS worked, and in particular to inform him of the fact that CHAPS did not use the account name. Mr Johnson's evidence stressed the difference between the relationships between the banks "*in the Bank to Bank space*" and those between the banks and their customers when he said that the CHAPS Scheme Rules "*do not articulate how the Bank should transact with its customers*". His evidence as to banking practice was obtained as a result of Tidal's Part 18 request. The bank made no attempt to establish that the relevant aspect of the operation of CHAPS was known outside banking circles. One document which mentioned the practice "*Payment Services Regulations – Industry Best Practice*" was not targeted at consumers. In fact it states that it focuses on direct members, that is to say those members of the Payments Council who have direct access to the technical infrastructure, and not on payment service providers or indirect members. The judge was of course entitled to accept Mr Johnson's evidence about the practice. He was not in my judgment entitled to hold that it established that the practice was reasonably available to customers.

25. Mr Cox did not seriously seek to support the judge's additional reliance on the bank's suggestion that the beneficiary's name might be required in order to comply with anti-money laundering or counter-terrorism rules. The suggestion that the user of the transfer form would make a connection between the reference to those matters in section 2 and the requirement for the name of a beneficiary in section 1 is quite unrealistic. For reasons similar to those I have given, such knowledge, possessed only by the bank, would not be part of the admissible background.

26. One comes back, therefore, to the circumstances in which, pursuant to the transfer form, the bank is authorised to debit Tidal's account with the amount specified on the form. Section 2 of the form expressly asks the bank to "debit the payment" from Tidal's account. Both sides agreed that the bank could not validly debit the payment from Tidal's account unless the payment was made. What for the purposes of this form constitutes a payment?

27. Mr Cox focused his arguments on this appeal on the contention that the reasonable person would understand the transfer form as an instruction to pay Barclays, and not as an instruction to pay the named beneficiary. This would appear to be a different conclusion to that reached by the judge, who concluded at paragraph 47 that the instruction was one "to pay a sum of money to *the beneficiary* by CHAPS transfer to the account number and sort code specified". Moreover, as I read paragraph 49 of the judgment, the judge held that payment was not complete at least until Barclays had credited the amount of the transfer into the account identified by the numerical data, which is one step beyond a payment to Barclays. However, Mr Adams did not suggest that the bank should be precluded from putting its case in this way, despite the absence of a respondent's notice.

28. Mr Cox submitted that the instruction was complied with if the bank paid Barclays and merely forwarded the details given on the transfer form of the beneficiary and its account to Barclays to enable them to make the onward payment. As long as the bank paid Barclays and passed on the information in section 1 of the form, the bank would be entitled to debit Tidal's account. He supported this argument with detailed submissions based on the form. Thus, he submitted that the form was an instruction to make a CHAPS transfer. The reference in section 1 was necessarily to the person Barclays was to pay, not a person that the bank was required to pay. The reference in section 2 to the fact that the bank was "*authorised to effect these instructions, either by transmission through [CHAPS] or by such other method as you may in your sole discretion decide*" did not mean that if the bank used CHAPS to pay Barclays it did not give effect to the instructions. The payee referred to in section 2 was Barclays. All other references to payment were capable of meaning payment to Barclays. In particular where the terms and conditions on the second page of the form referred to "*a payment instruction of this type*" it was equating "payment" to a payment to Barclays.

29. In my judgment this argument is not sustainable for a number of reasons. Firstly, it is clear, not simply from the naming of Design Craft as beneficiary in section 1, but also from the reference to "the payee" in section 2 that the instruction and authority given to the bank is to pay the beneficiary, Design Craft, as the judge held. On the bank's construction, the passage in section 2 would alert the customer to the fact that the instruction was not enforceable by Barclays, without specifically mentioning the position of the person for whose actual benefit the payment was being made. Secondly, the fact that the bank has complete discretion as to how the instructions are complied with, including using methods other than CHAPS, leads one to the conclusion that the meaning of "payee" would, on the bank's case, vary according to the method chosen. Thirdly, it must follow from the bank's construction that Barclays could credit the funds received by it into *any* account, whether or not it matched any of the numerical data or the name of the beneficiary, and the bank would still be able to say that a payment in accordance with the instructions had been made. This, to me, is a most improbable and uncommercial result.

30. For his part Mr Adams cited numerous authorities in which the courts have wrestled, in various different contexts, with the meaning of the word "payment" and in particular with the precise time at which a payment can be taken to have been made. He relied in particular on the fact that it has been held that a payment is not made unless the beneficiary's bank has the actual or ostensible authority of the beneficiary

to accept payment on the beneficiary's behalf: see Paget's *Law of Banking*, 13th Edition, paragraph 17.208.

31. Basing himself on this proposition Mr Adams submitted that the form required a payment to Design Craft, and that as Barclays had no authority to give an acknowledgment on behalf of Design Craft, no payment had been made. He also referred us to the meaning of "payment" in the Payment Services Regulation (SI 2009/209), regulations which were introduced to give effect to Directive 2007/64/EC on payment services in the internal market.

32. I think Mr Adams' approach over-complicates the issue which we have to decide. The transfer form plainly authorises the bank to seek to effect, through the CHAPS system, a payment to the named beneficiary by payment into the identified bank account. As between Tidal and the bank, therefore, no question could arise that successful payment into Design Craft's account did not occur until it was clear that Barclays had the actual or ostensible authority of Design Craft to accept payment on their behalf. Tidal was representing that it did. I did not find Mr Adams' tour of the authorities on payment, which he provided us with in his skeleton argument, at all illuminating. Likewise, as it seems to me, nothing of any substance can be extracted from the Payment Service Regulations or the European Directive on which they are based, beyond the fact that a payment transaction normally includes a transfer of funds from one person to another, normally called a payer and a payee, something which I would have been prepared to accept absent the citation of legislation.

33. Mr Adams' underlying submission, however, is that the natural meaning of "payment" is a transfer of funds between a payer and a payee, the payee being the person that the payer wishes to benefit from the transfer. The transfer may occur in a number of ways, and if the payment is to occur through the banking system it will normally involve the payer authorising his own bank to debit his account in exchange for the creation of a corresponding credit in the account of the payee.

34. To my mind, on the proper construction of this form, a payment cannot be said to be made until funds are credited into an account which conforms to the four identifiers which the customer is required to give in section 1 of the form: sort code, bank name, account number and customer name. It seems to me to be plain, as I think it did to the judge, that the first three of these are essential indicators of when a payment has been made. I can see no rational criterion for excluding the fourth identifier – customer name. Indeed, so far as the customer is concerned at least, it could be said to be the most important. The judge expressly found that the identity of the beneficiary was important to Tidal and noted that the customer could be forgiven if he thought that the account name mattered, given that the transfer form included a box for naming the beneficiary and mentions the "payee". If that is the case, then the reaction of the reasonable person to the language used in the form is the same. There is nothing whatever in the form, or the admissible background, to alert the reasonable person to the fact that, in routing the payment, account would be taken of some but not all of the identifiers, and in particular that no account would be taken of the name. Tidal was of course consenting to the use of the CHAPS system (or indeed any other payment method which the Bank decided on) to carry out its instructions, but Tidal was not agreeing that the bank could carry out those instructions in a way which allowed it to disregard any of the identifiers, least of all the name of the beneficiary.

35. I agree that it is not reasonable to expect the bank to ensure that a payment to Design Craft has been made, if by that one means that there has been, in fact, a proper discharge of the legal obligation which Tidal had to pay them. It is, however, entirely reasonable for a customer to expect the bank to obtain an acknowledgment that a credit has been made to an account conforming to all (and not just some) of the identifiers given on the transfer form, when he is given nothing to make him believe the contrary.

36. It follows that on the construction of the form which I consider to be correct, the bank has no right to debit the customer's account when a transfer is made to an account having the correct sort-code and account number but a different account name. The customer has the right to prevent the bank from debiting his account except when the payment is made to an account matching the four identifiers. Nothing in the private arrangements between the banks as to how they manage CHAPS payments between themselves, such as their decision to disregard the beneficiary name, can add to or derogate from that right.

37. Lurking beneath the submissions in this case is a suggestion that, if we were to decide the case against the bank, it would undermine the CHAPS system. I cannot accept that this is so for a number of reasons. Firstly, the bank could deal with the matter by drawing attention to the relevant aspect of the system on their CHAPS transfer forms, or when they accept oral instructions, if they do, to make a CHAPS transfer. In those circumstances it would be clear that a "payment" in accordance with the instruction would be made provided only that the sort code, bank and account number coincided with those on the form. If, for commercial reasons, they prefer not to take this simple step, then the risk that there will be a percentage of transfers for which a customer may subsequently claim to be reimbursed is a risk which the bank voluntarily undertakes. In that connection there was some material before the judge that the banks did at one time operate a process of manual checking when a CHAPS transfer exceeded £50,000. The abandonment of the manual checking process was no doubt based on an assessment of the risk which the bank was prepared to take.

38. Although this is an appeal from a summary judgment, neither side suggested that it turned on the test for summary judgment. The bank expressly accepted that if the instruction was an instruction to pay Design Craft rather than Barclays, then it would have no defence. In my judgment it is clear that the bank only had authority to debit Tidal's account if a payment was made which complied with the four identifiers on the transfer form. I would, for my part, have allowed the appeal and granted summary judgment to Tidal on its claim.

Lord Justice Tomlinson:

39. I have read in draft the judgments prepared by Floyd LJ and by the Master of the Rolls. I find myself in the invidious position of having to choose between them.

40. When I first read the papers in this case, it seemed to me likely that the loss would properly lie with Tidal, for it was Tidal which was defrauded into believing that the account information with which it supplied the bank corresponded to an account held by its supplier, Designcraft Limited. That instinctive answer however simply begs the question as to the proper construction of the instruction given by Tidal to the bank,

and by the end of the hearing I was more or less persuaded that that instruction should be construed as Floyd LJ has done.

41. Even so, I remained troubled by two aspects of this conclusion. The first, which I sought to explore with Counsel at the hearing, relates to the possible lack of correspondence between the "Receiving (beneficiary) sort code" as advised by the bank's customer (or sending (remitter)) and the "Receiving (beneficiary) bank and branch", as advised by the bank's customer. What is the position if the customer supplies the correct sort code but wrongly believes that it belongs to a branch of Barclays whereas it in fact relates to a branch of Lloyds? Given that the hallmark of CHAPS payments is speed, is it really intended that payment should not be made but only that, within the designated maximum execution time, the bank should inform its customer of its refusal or inability so to do? That could have serious consequences for the customer, bearing in mind that CHAPS is frequently used where time for payment is of the essence. The question may be more starkly posed. As set out by Floyd LJ at paragraph 6 above, the bank's standard form invited the customer to supply both receiving bank name and receiving bank branch. As it happens Tidal here filled in that box with the single entry "Barclays". As it also happens the bank branch uniquely identified by sort code 20-16-12 is Barclays' branch at Bury St Edmunds. But suppose Tidal knew that its supplier, Designcraft, is based in Newmarket and wrongly assumed that its account was held at Barclays' branch in that town. Should payment not be made because the customer had identified the wrong branch of Barclays by name of location, albeit it had identified the right branch by sort code?

42. Similar questions arise in relation to the "Receiving (beneficiary) customer name". The form was in this case completed in manuscript capital letters. Subject to what I point out below, what was here written was "DESIGN CRAFT LTD". Leaving aside that this company apparently calls itself Designcraft Ltd rather than Design Craft Ltd, what would be the position if, contrary to Tidal's belief, Designcraft was not a limited company, or if its account was simply designated Designcraft rather than Designcraft Ltd? Who is to be the arbiter of whether any discrepancy is significant, or if it requires payment not to be made? One can think of many examples of plausible misrendering of the beneficiary's name, likewise of many examples where the beneficiary's name and the name attached to its bank account may not correspond.

43. It may be that something has here been lost in the photocopying, but as it happens in the present case only a person familiar with the English language would readily realise that the beneficiary name here written was "DESIGN CRAFT LTD" for what is written more closely resembles "DCSIGN CRAFT LTD". This has caused no problem here, but one can readily conceive of cases in which poor handwriting could inadvertently be misleading as to the identity of the intended beneficiary.

44. In short, and on reflection, I can see grave difficulties arising if payment may only be made where there is correspondence with all four identifiers. Sort code and account number are alone sufficient to identify the intended destination of the payment and conformity therewith requires only mechanical checking without the need for the exercise of any subjective judgment.

45. The normal banking practice of which Mr Johnson here gave evidence therefore comes as no surprise. Whether the average bank cashier who accepts over the counter

instructions to effect a CHAPS transfer is aware of it is another matter, as is, I think, whether the average customer, corporate or otherwise, is aware of it either. A contract cannot be construed against the background of facts which are neither known nor reasonably ascertainable.

46. In that regard it is I consider little short of astonishing that the judge was asked to resolve this question, and we are asked to determine this appeal, without the benefit of seeing the CHAPS Scheme Rules and associated Reference Documents. Disclosure was, incredibly to my mind, resisted by the bank on the ground that these documents "set out the service provided by CHAPSCo in the Bank to Bank space, i.e. they articulate the obligations of members, CHAPSCo and the Bank of England when sending payments between member banks. They do not articulate how the Bank should transact with its customers". Mr Johnson, who made this statement, went on however to say "CHAPSCo does not prescribe the basis on which the payments are processed by the members of the scheme following the receipt of the payment, apart from stating that the payment should be processed within the maximum inward payment transmission time of 1.5 hours". In my view this important reservation alone rendered the CHAPS Scheme Rules and associated Reference Documents relevant to the bank's pleaded contention that "it is normal banking practice for banks to process payments through CHAPS on the basis of the payee's account number and sort code and not the name of the payee" – Defence, paragraph 8.1. As the Master of the Rolls has demonstrated, and as I allude to above, the feature of the CHAPS system that it is intended to achieve rapid payment is key to the proper construction of the mandate. Moreover, the "designated maximum execution time for a CHAPS transfer" is referred to in the Terms and Conditions on the reverse side of the bank's standard form instruction, a point to which I return below. However, as I understand it the Appellant did not persist in its request for disclosure.

47. The bank adduced no evidence as to how a customer, as opposed to a payment services provider, could find out about the practice described by Mr Johnson. Whilst I am inclined to think that the Master of the Rolls must be right in his observation that the CHAPS practice of clearing banks would have been reasonably available to the Appellant and any other customer who wished to use the CHAPS payments system, the bank can hardly complain if I harbour reservations as to the enthusiasm or accuracy with which any enquiry would have been met.

48. All this notwithstanding, I reach the same conclusion as the Master of the Rolls. At paragraph 59 the Master of the Rolls suggests that, "subject to any contrary express terms, a customer who uses CHAPS is taken to contract on the basis of the banking practice that governs CHAPS transactions." Given my lingering concerns as to the ease with which a customer could ascertain that practice, and the paucity of the evidence in this case, I would prefer to put the point a little differently. In my judgment, the customer's instruction made by execution of this specific "CHAPS transfer" request form, and in particular the giving of the confirmation "You are hereby authorised to effect these instructions . . . by transmission through the Clearing House Automated Payments System" was an instruction to make a payment transfer in accordance with the current CHAPS Scheme Rules and as the CHAPS transfer system is currently operated in accordance with the usual practice adopted by the participating clearing bankers. A question might arise if the usual banking practice is unreasonable or otherwise inimical to the nature of the instruction, but no such

question arises here as the practice described by Mr Johnson cannot, as I have endeavoured to show, be said to be unreasonable. My lingering belief that a customer might have needed to show some persistence in order successfully to find out the usual banking practice does not deter me from construing the mandate in the way I do. After all, by agreeing to clause 4 of the Terms and Conditions on the reverse of the form, the customer agreed that in the event of refusal of the bank to execute a CHAPS transfer it would be informed "within the designated maximum execution time for a payment transaction of this type" without any explanation of what that designated maximum execution time is. Furthermore, the customer agreed that, having been so informed together with the bank's reasons for refusal, and the procedure for rectifying any factual errors that led to the refusal, the bank's obligation in such event would then be to "make the CHAPS transfer within the designated maximum execution time for a payment transaction of this type after the reasons for stopping it cease to exist".

49. The Master of the Rolls at paragraph 60 suggests that most customers would not be interested in obtaining information as to how CHAPS works in practice, and would be content if the CHAPS transfer is executed in accordance with normal banking practice. I agree. In my judgment the proper analysis is that the customer, by execution of the form, authorised the bank to execute the transfer in accordance with usual banking practice, thereby rendering that practice the contractual method of performance. That conclusion is in no way dependent upon the nature of the practice being reasonably available to the appellant and to any other customer. My conclusion is simply that the customer authorised execution in accordance with usual banking practice, whatever that might be, subject possibly to questions of reasonableness which do not here arise.

50. Accordingly, I would dismiss the appeal.

Master of the Rolls:

51. The facts have already been sufficiently stated by Floyd LJ. I can, therefore, come immediately to the reasons why I respectfully disagree with his conclusion.

52. The question raised in this case is what is the proper construction of the CHAPS transfer form. In particular, did it authorise the Bank of Scotland ("the bank") to debit the appellant's account (i) only when the payment was made to an account matching all four "identifiers" (sort code, bank name, account number and customer name) or (ii) only when the payment was made to the first three identifiers. Floyd LJ favours (i); the judge favoured (ii). I agree with the judge essentially for the reasons that he gave.

53. CHAPS is an electronic bank to bank same day payment scheme for payments made within the UK in sterling. Up to 50% of UK GDP flows through the CHAPS payment system each day: see *Paget's Law of Banking* (13th ed) para 17.8. Floyd LJ has summarised some of the evidence as to CHAPS banking practice which was given by Mr Johnson and was accepted by the judge. Mr Johnson was a Customer & Domestic Manager within the bank's Electronic Payments team. In my view, the judge was plainly entitled to accept his evidence.

54. I would emphasise the following. CHAPS is run by the CHAPS Clearing Company Limited ("CHAPSCo"). CHAPSCo does not prescribe the basis on which payments

are processed by the members of the scheme, apart from stating that payments should be processed within the maximum inwards payment transmission time of 1.5 hours. Since at least 2007, all of the major UK clearing banks have processed and routed electronic payments to a customer's account, including CHAPS payments, on the basis of sort code (or bank identifier code) and account number, but not account or beneficiary name. This is reflected by the Payment Council's guidance note entitled "Payment Services Regulations—Industry Best Practice" which states "*payments executed via CHAPS are processed on sort code and account number—'the unique identifier'*". Banks are expected to process the vast majority of CHAPS payments on a "straight-through" basis (ie without manual checks) in order to meet the short time-scale that is the hallmark of CHAPS. Mr Johnson says at para 14 of his first witness statement:

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

55. The evidence of Mr Johnson (para 15 of his first statement) is that:

> "Although it is my experience that as a matter of normal banking practice, beneficiary name is not used as a primary means by which a payment is routed through CHAPS, the Financial Action Task Force Recommendations requires members of CHAPS, for anti-money laundering and counter-terrorist purposes, to include the beneficiary name when making payments via wire transfers, including CHAPS".

56. In my view, the critical question in this case is whether the banking practice described by Mr Johnson can be relied on in order to construe the transfer form.

57. Floyd LJ has referred to the statement by Willes J in *Hare v Henty* (1861) 10 CB (N.S.) 65, 77 "A man who employs a banker is bound by the usages of bankers". I accept that this statement was made in the course of argument and did not form part of the judgment. But it was applied by Bingham J in *Barclays Bank plc v Bank of England* [1985] 1 All ER 385 at para 26 of his award, as Floyd LJ points out at para 22 above. In *Paget* at para 17.46, the editors say:

> "A customer of a clearing bank may be bound by, and able to rely on, the clearing house rules against his own bank through

> an implied term of the bank-customer contract. The customer is taken to have contracted with reference to the reasonable usage of bankers, including those clearing house rules which represent such reasonable usage."

58. The authorities cited in support of this passage include *Hare v Henty.* They also include *Tayeb v HSBC Bank plc* [2004] EWHC 1529 (Comm), [2004] 4 All ER 1024 in which Colman J said at para 57:

> "Equally, if a customer opens an account of a kind which is of a kind [*sic*] into which CHAPS transfers can be made, that customer is entitled to assume that, if a transfer is made for the credit of that account, the bank will operate the account in accordance with the CHAPS Rules, but subject always to such course as may in the circumstances be required for the purpose of compliance with the 1988 Act and the Regulations and Guidelines."

59. Floyd LJ distinguishes these authorities on the basis that there is a material difference between (i) the use of banking practice to decide whether a bank has complied with its contractual duty and (ii) the use of such practice, if unknown to the customer, to inform the meaning of the contract itself (para 23). He suggests (or at least implies) that banking practice may be relevant to (i), but not to (ii). I respectfully disagree. In my view, it may be relevant to both. Subject to any contrary express terms, a customer who uses CHAPS is taken to contract on the basis of the banking practice that governs CHAPS transactions. On the evidence which the judge accepted, there is a clear and settled practice that the receiving bank in a CHAPS transaction does not check the beneficiary's name for correspondence with the other identifiers. There are good commercial reasons why this practice is adopted: see paras 62 and 63 below.

60. In any event, the distinction which Floyd LJ seeks to draw may not matter in the present case. That is because he accepts that, if the existence of the practice is known or reasonably available to both the customer and the bank, then "its use for interpretation is uncontroversial" (para 23). Even if this formulation is correct, I do not agree that the evidence did not show that "there was material reasonably available to the customer to show how CHAPS worked, and in particular to inform him of the fact that CHAPS did not use the account name" (para 24). The practice that at the material time the bank name, sort code and account number were the "unique" identifiers was not a secret. It was not a practice, knowledge of which was only available to bankers. It is a practice which has been adopted since at least 2007. It is mentioned in the *Payment Services Regulations—Industry Best Practice.* The fact that this document is targeted at payment services providers does not mean that its contents are not reasonably available to customers. Any customer who wishes to find out in detail about how CHAPS works in practice can do so either by asking the bank for information or seeking information on-line. I would expect that most customers would not be interested in obtaining such information, and they would be content if the CHAPS transfer is executed in accordance with usual banking practice. But even if that is wrong, the important point is that the CHAPS practice of clearing banks would have been reasonably available to the appellant and any other customer who wished to use the CHAPS payments system.

61. Even if a banking practice is not reasonably available to the customer, the court should still be astute to avoid a construction of the contract which is inconsistent with business common sense. As Lord Steyn said in *Mannai Investment Co Ltd v Eagle Star Life Assurance Co Ltd* [1997] AC 749 at p 771:

> "In determining the meaning of the language of a commercial contract...the law...generally favours a commercially sensible construction. The reason for this approach is that a commercial construction is more likely to give effect to the intention of the parties. Words are therefore interpreted in the way in which a reasonable commercial person would construe them."

62. In my judgment, the construction sought by the appellant produces a result which is not reasonable and not commercially sensible (and therefore unlikely to have been intended by the parties) for the following reasons. First, the object of the CHAPS system is to achieve rapid (maximum of 1.5 hours) payment. That is why customers choose to use this system of electronic payment. Secondly, the court should lean against a construction which involves imposing a requirement on a receiving bank which would frustrate the customer's wish to have the money transferred within 1.5 hours. If the beneficiary's name has to be checked within this period for correspondence with the other identifiers, the evidence is that this would be economically impossible to do.

63. Thirdly, the appellant's construction places on the remitting bank an obligation, in effect, to guarantee correspondence between the beneficiary name and the account number even though it has no control (i) over the care with which its customers complete the transfer form and (ii) over the way the receiving bank processes its incoming CHAPS payments. As regards this second point, Mr Johnson says at para 16 of his first statement that, where the beneficiary account resides with another CHAPS member bank, there is no possibility for the remitting bank to check and verify the account number or name of the beneficiary: such information is confidential to the payee and is not disclosed as a matter of routine by receiving banks to remitting banks. In my view, the appellant's construction is unreasonable and makes no business sense. I see no reason why the remitting bank should assume responsibility for the accuracy of the name of the beneficiary entered by the customer on the form or for its correspondence with the other identifiers.

64. Floyd LJ says that the remitting bank could make it clear on the form that a "payment" in accordance with the instruction will be made provided only that the sort code, bank and account number (but not the name) coincides with those on the form. I accept that this could be done. But that possibility should not distract us from the question of construction that lies at the heart of this appeal.

65. For the reasons that I have given, I would dismiss this appeal. I should add that I agree with Floyd LJ that, for the reasons that he gives at paras 27 to 29, the transfer form should not be construed as an instruction to pay the receiving bank.