CASE ON APPEAL: ENGLAND & WALES

CASE CITATION:
Shojibur Rahman v Barclays Bank PLC (on appeal from the judgment of Her Honour District Judge Millard dated 24 October 2012)

NAME AND LEVEL OF THE COURT:
Clerkenwell & Shoreditch County Court

CASE NUMBER:
1YE00364

JUDGE:
His Honour Judge Cryan

DATE OF JUDGMENT:
19 March 2013

COUNSEL FOR THE APPELLANT:
Ahmed Miah, Temple Court Chambers

SOLICITORS FOR THE RESPONDENT:
TLT LLP

COUNSEL FOR THE DEFENDANT:
Oliver Kalfon, Enterprise Chambers

Note: The court provided a copy of the judgement (for approval by the judge)

Bank card; PIN; electronic signature; verification of customer; negligence of the bank; negligence of the customer; fraud; burden of proof

1. This is an appeal against the decision of the late District Judge Millard handed down on 12th November 2012. The claim is brought by Mr Shojibur Rahman against Barclays Bank plc. By his claim the claimant sought to be reimbursed in the sum of £23,915.76, with interest, in respect of money that was paid from his account in consequences of the fraudulent activity of an unknown third party. It is the claimant's case that the bank dealt with this account negligently and in breach of their contractual obligation to him, and consequently he is entitled to recoup his losses from them. The defendant bank deny that they are obliged to repay to the claimant the money which he now seeks. In a reserved judgment, the District Judge rejected the claim, save as to the sum of £6,230.28, with interest of £989.40. The appellant submits that the District Judge was wrong and invites the court to hold that he is entitled to the entire sum claimed, with interest, and asks that this court should substitute its findings for that of the District Judge. The respondent bank has not cross-appealed but seeks to uphold the District Judge's judgment. It concedes, on the basis of proportionality, that this court should deal with the appeal, in any event, so as to achieve finality.

2. Permission to appeal was not granted by the District Judge. I directed that there should be an oral hearing of the appellant's application for permission to appeal and that, if granted, the appeal would follow on afterwards. Having heard oral argument, I granted permission to appeal on some but not all of the grounds relied upon.

3. The Background: The transactions complained of occurred in the middle of November 2008. By then the claimant had been a customer of the bank for some two or three years. He was a bus driver who had managed to amass some £24,400 in a bonus savings account with the bank and also had in his current account some £2,300. Between 14th and 20th November 2008 inclusive, a number of transactions took place using the claimant's debit card for his current account to make withdrawals from cash machines or substantial purchases. The largest purchase was of a Rolex watch from Watches of Switzerland. Its price was £14,420. In all, the transactions which resulted in money leaving the appellant's current account came to £23,915.76. Since the discovery of the disputed transactions, the claimant has been consistent in his version of what happened and has vigorously pursued his claim against the bank, taking it as far as he could through the bank's internal procedures, reporting the matter to the police, asking his Member of Parliament for assistance and making a complaint to the Financial Ombudsman. Ultimately, these proceedings were issued on 8th April 2011.

4. The account which the appellant gave throughout, to the bank and to the police and to the others whom I have just mentioned, and which he pleaded in his

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pleadings dated 1st April 2011 and repeated in his witness statement dated 14th June 2011 and again at the hearing before the District Judge in October 2012, was, in important respects, plainly and deliberately untruthful, and the District Judge so found. That part of her findings has not been, and patently could not sensibly be, appealed. In essence, the claimant said that he had received a phone call shortly after 3 p.m. on Thursday, 13th November 2008 whilst he was at work driving his bus. At that point he had briefly stopped, so that he was able to answer the telephone. He said that a man calling himself Stewart said that he was calling from Barclays fraud department and that Mr Rahman's debit account was being used at Argos in Camden. Mr Rahman confirmed that he was not using the card and told Stewart to cancel the card immediately. Stewart told him that this would be done. During this phone call Mr Rahman asserted that he checked his wallet where he had always kept his debit card and discovered it was missing.

He subsequently received more telephone calls from the same number, which he was unable to answer because he was driving. He then received a text message containing a reference number and asking him to call the same number from which the earlier telephone call had been received, namely 0870 283 2274. When he finished his shift at about 4 p.m., he said that he telephoned the number and spoke to Stewart again, who assured him that everything was okay and the card had been cancelled.

Mr Rahman's case is that nothing further happened until the following night, Friday, 14th November, when he decided to telephone the defendant's dedicated lost and stolen cards telephone number at about 10.30 in the evening to inquire what was happening. He was told about several transactions which had taken place on his account that day, including a transfer from his bonus savings account. He was at that stage speaking to somebody called Matthew, and he told Matthew that he had not authorised any of the transactions, including the transfer. He told Matthew to freeze his account and cancel his debit card, which Matthew agreed to do. It is the appellant's case that he tried to go to his branch on the following day, Saturday, 15th November, but the branch and the neighbouring branches in Camden and Kentish Town were closed. So, it was not until Monday, 17th November that he was able to go to his branch and discuss the matter. He discovered that his card had not in fact been cancelled on 14th November. His personal banking manager ensured that the card was stopped at 9.55 that day.

5. The District Judge found, for reasons I will come to presently, that in fact the appellant had not lost his debit card as he alleged. The telephone calls that he had on 13th November were not from a representative of the bank, but from an unknown fraudster, who proceeded, for want of a better word, to con him into parting with his credit[1] card in the belief that he was giving it to a messenger sent by Barclays Bank to collect it. The District Judge further concluded, for reasons I will also come to presently, that it was likely that the appellant had provided the fraudster on the telephone or otherwise with a vital information which he should not have parted with, which enabled the fraudster to more or less empty the appellant's account. It is that latter series of findings, as to the information disclosed, which the appellant challenges as being without evidential foundation and unavailable to the District Judge to make. It will be apparent that the alleged contents of the conversation between the appellant and the person purporting to be from Barclays fraud department on 13th November could not have been on the basis of the appellant's debit card having been lost as alleged.

The uncovering of the false nature of the appellant's case about whether he had lost his credit[2] card as he had alleged throughout, or parted with it as a result of the fraudulent ruse, was uncovered quite late in the day by the bank's investigation department. Evidence was given before the District Judge by the bank's investigation intelligence manager. It seems, and it is not challenged, that in early 2012 it occurred to the bank for the first time that the appellant's case had some of the key features of a scam known as 'Operation O'. According to the bank's investigation intelligence manager, the pattern of this fraud was that the bank's customers would receive a telephone call from someone purporting to be from the bank's fraud department saying that the customer's account had been subject to fraudulent activity. The customers would be told that, in order to cancel their cards or to investigate, the bank would require the customer's

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card, the corresponding PIN number and other personal information. The customer would be told that a courier would be sent to collect the card and the relevant information. The card was then collected and delivered to an address in the Gray's Inn area. The fraudster would be waiting by the address for the courier to arrive and take possession of the card and other information. It would seem that respectable couriers were frequently employed.

The bank considered that Mr Rahman might have been a victim of this fraud because the telephone number used to telephone him on 13th November, and which he used to call back, has in fact been associated with other examples of Operation O cases on some 18 occasions. On 28 occasions the caller identified himself as Stewart. Quite often, the bank card would first be used at an ATM operated by Lloyd's Bank at 344 Gray's Inn Road. It is significant that the first transaction complained of in this case is the withdrawal of £300 from that bank. The defendant in this case knew that the well known courier company, Addison Lee, had been used by the fraudster in some of the cases to collect cards. They made enquiries of Addison Lee and produced evidence before the District Judge from Linda Ibrahim, one of that firm's employees. She had checked Addison Lee's computer, which showed that at 9.45 a.m. on 14th November a booking was made for a direct, immediate pick up by motorbike from the claimant's address at Flat 22, Sanfield, Cromer Street, WC1H 8DU. Material collected was then delivered to 280 Gray's Inn Road, WC1X 8EB. The caller who had commissioned the pick up gave his name as Stewart Catterwell and a mobile phone number. Addison Lee's computer records showed that the item was collected from the address given and delivered at 17 minutes past 10 on Friday, 14th November 2008. The fee was paid in cash.

The appellant, Mr Rahman, denied that he had given any personal or secure information to Stewart over the telephone on 13th November. Before the District Judge, he was adamant that he had not been asked to send his card, PIN number or any other information by courier to Barclays. He also denied that any envelope had been collected from him or from his address on Friday, 14th November. He accepted that on that day he was at home at around 10 a.m. when the package would have been collected.

The District Judge reached the conclusion that a material part of his evidence about the conduct of the phone call he had had with the fraudster was untruthful. She came to the conclusion that he was not being truthful about that or the events of the morning of 14th November. She formed the view on the evidence before her that it was more likely that the purpose of the telephone call was to obtain the card and the information to enable it to be used, in accordance with the usual modus operandi of this type of fraud. Thus, she held that the appellant's account of how he parted from his card was in fact a lie and it could only have been a completely deliberate lie which the appellant had maintained over a period and in the face of the court. I think it appropriate that I should refer expressly to part of the District Judge's judgment at this point. At paragraph 13 she said this:

> 'Despite Mr Rahman's denial that any package was collected from his home on the morning of 14 November, I accept the information extracted from Addison Lee's computer system is accurate. There is no reason for Ms Ibrahim or anyone at Addison Lee to lie about this. Again, it is impossible to see what benefit it would be to the fraudsters to make this booking and pay the courier if not to collect Mr Rahman's card and other information.'

She went on to expressly reject a speculative concoction maintained by the appellant that he might have left his debit card at a branch of the bank accidentally in September 2008 and she rejected the disingenuous suggestion, to which the claimant must have known there was no foundation, that there was some fraudulent involvement on the part of an employee of the bank who had access to the appellant's card.

After the card was handed over, as the District Judge found, as is common ground, that a number of transactions took place. It will be recalled that the card, according to the records of Addison Lee, was dropped off in the Gray's Inn Road at 10.17 on 14th November 2008. The first withdrawal using the card and its PIN number was made 17 minutes later at the ATM of Lloyd's Bank in the Gray's Inn Road. The sum of £300 was taken and the evidence showed that the PIN number was presented accurately and used without difficulty on the first occasion. The next transaction was for £14,420 and that was the expensive Rolex watch. It took place some four and a half hours later at the premises of Watches of Switzerland. However, in the meantime, the sum of £20,400 was transferred as the result of a telephone

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instruction from the appellant's Super Saver account to his current account. Without that intermediate step, it would not have been possible to have made the withdrawals from the appellant's account to cover the watch transaction; there would have been a shortfall of well over £10,000. In addition to the watch transaction, there were three further transactions that day totalling an additional £2,665.48. The swiftness and effectiveness with which the fraudsters moved to withdraw cash and to restructure the appellant's cash holdings in his account convinced the bank and the District Judge that they could not have been achieved without the PIN and other information having been disclosed to them. On that basis, the bank and the District Judge concluded that the claimant had been negligent and had parted with the debit card and sensitive information in a way which discharged the bank from any indemnity to reimburse him.

6. The bank relied upon a constellation of factors. They came to their conclusion because their records showed that the debit card that was used was actually the debit card which had been issued to Mr Rahman and not a cloned card. The PIN had been correctly entered at the first attempt for all transactions. In addition, the person who used the card at Watches of Switzerland has correctly answered some identity verification questions. Furthermore, the telephone transfer of £20,400 from the bonus savings account to the current account could only have been completed if either the caller had correctly[3] entered on the telephone keypad the sort code, account number, passcode and registration key, or alternatively have it done by actually speaking to a member of Barclays' staff and in that conversation correctly answering some identification questions. Despite the appellant's persistent lies, the bank did not allege that the appellant was personally involved in the fraud. The District Judge expressly found that he was not.

7. Although not wholly material to this appeal, I should explain briefly what happened towards the end of the fraudulent activities with the debit card and what it was that caused the District Judge to find in part for the appellant. As I have said, the appellant's case was that late on Friday, 14th November 2008 he had telephoned the bank and discussed the events which had occurred, or at least his version of the events which had occurred. As a result of what was clearly a long conversation, he gave instructions that his debit card should be cancelled, and the bank's representative agreed to do so. The bank maintained that it was not notified of the situation until the appellant called into his local branch early on 17th November 2008. The appellant maintains that he notified the bank on the evening of 14th of November, in the telephone call to which I have just referred. The bank denied having any record of the telephone call from the appellant on 14th of November 2008. The appellant produced his itemised telephone records showing that a call was made from his telephone to the bank's dedicated lost and stolen card number on 14th of November at 20 minutes to midnight, and it lasted for 38 or more minutes. The District Judge said:

> '27. ... There seems no reason not to accept that the claimant's telephone bill shows that the call was in fact made. It lasted a long time. It is not suggested by the defendants that callers at that time were put on hold for such a long period before speaking to a call operator. In the absence of any evidence from the defendant as to the content of this conversation, I find that the claimant's evidence with regard to this telephone call is probably correct and that he did speak to somebody at the lost and stolen card department. It is understandable that he would phone to find out what is happening. It is difficult to believe that he did not make it clear that he did not authorise the transactions and that his debit card should be cancelled.
>
> 28. I find that the defendant should have cancelled the claimant's debit card by 00.20 on 15 November 2008 and the bank should re-credit to Mr Rahman's account any debits made using his card after that time.'

It is, thus, in relation to the remaining sum claimed in the case by the appellant that this appeal is brought. The appellant hopes to recover the balance of £17,385.48.

8. I gave permission to appeal on ground 1 in its general thrust and specifically in relation to aspects of subparagraphs (a) and (b). Ground 1 reads:

> 'At paragraphs 15 and 16 of the judgment, the finding of fact by the learned judge that Mr Rahman must have disclosed telephone banking security procedures to the fraudster, who "tricked"

3 *Editorial note: the transcript has 'corrected', but this word must be a typographical error.*

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> him into so doing, and used these details to access the claimant's bank account to enable the transfer of £20,400 from his savings account to his current account, is unsupported by the evidence and wrong.'

It was contended that, just because the fraudster may have had information, it could not be said that it came from the appellant. Subparagraphs (a) and (b) under ground 1 read as follows:

> 'The evidence before the judge was that Mr Rahman, despite having a number of bank accounts with both the defendant and other banks, has never taken steps to register or even use telephone banking at any bank. Mr Rahman did not feel comfortable banking over the telephone and always attended banks in person. No other evidence was available to contradict this.'

These facts were relied upon to demonstrate that the District Judge could not reasonably have inferred that the information came from the appellant. At (b) under ground 1, it was said:

> 'The terms and conditions of telephone banking with the bank state:
>
> > "Before we can act on instructions given to us by telephone or computer, we will agree security procedures with you."
>
> The bank was unable to adduce details of any telephone banking agreed security procedures that it had in place with Mr Rahman as required by its terms and conditions before telephone banking instructions could be taken.'

As an aspect of that, I allowed it to be argued that the District Judge could not appropriately have concluded that the relevant information would necessarily have come from Mr Rahman and not the fraudster, in the absence of any evidence from the bank as to the actual nature of the security procedures carried out by it. The ground goes to the transfer of funds between the appellant's accounts without which it is said the fraud could not have taken place. The appellant's case is that the bank should not have permitted the transfer and, in so far as it did, on the basis of telephone instructions, it did so wrongly. The evidential findings were recorded by the District Judge at paragraphs 15 and 16 and 32 of her judgment. At paragraphs 15 and 16 she said, amongst other things:

> 'I also find that during his telephone calls with Stuart on 13 November and/or in the documents or information included with the card given to the courier on 14 November, Mr Rahman disclosed enough sensitive information to enable the fraudsters to use the card and to know he had a Bonus Savings account and roughly how much was in it.'

At paragraph 16 she said:

> ... [Mr Rahman] was tricked into handing over his debit card and information needed by the fraudsters to use it (although his subsequent behaviour in concealing the full truth when dealing with the bank, financial ombudsman and the court was dishonest).'

At paragraphs 30 to 32, the District Judge said the following:

> '30. Mr Rahman denies he has ever registered for telephone banking although the defendant's records show that he registered on 27 May 2006 (9 days after opening his Bonus Saver account). It was suggested by the defendant's Investigations Intelligence Manager, Mr Holmes, that it was possible that this as been arranged while Mr Rahman was in the branch on other matters and he may not have realised that he was registered. In any event, it seems to be accepted that he had not used telephone banking before 14 November. On balance, I accept that Mr Rahman was registered for telephone banking in 2006. It was not set up as part of the scam of November 2008.
>
> 31. Unfortunately, the defendant has not been able to produce any information as to the precise way in which the transfer was effected. Its records show it was over the telephone but not whether this was by speaking to someone at a call centre or automatically by keying in the sort code, account number, passcode and registration key. If the latter method was used, then I would find on the balance of probabilities that the transfer was made possible only because the claimant disclosed the necessary information to the fraudsters. If the former method was used, the claimant would argue that the defendant's employee did not exercise sufficient care in checking the identity of the caller particularly as he has no history of dealing with such transfers over the telephone, he has always gone into the branch.

> 32. As we do not know whether the fraudsters spoke to the defendant's employee over the telephone, we do not know what identity verification questions he was asked and whether he answered them correctly. Verifying the identity of callers is such a routine matter for banks, it seems unlikely that this was not done. Bearing in mind that this was a transfer from one account in the name of the claimant to another account in his name, there is no reason for the bank's employee to be as suspicious as he might be if the payment were to a third party.'

9. The appellant's pleaded case on the telephone banking issue is to be found at paragraph 8 of the particulars of claim. Paragraph 8 says:

> 'The fraudsters had set up a telephone banking facility over his account and transferred £20,400 from his savings account to his current account on the 14th November 2008.'

The District Judge made no specific finding about the setting up of a telephone banking facility by the fraudsters. There was no evidence before her that that had been done. Indeed, it would seem that such facility was already in place. What she concluded was that what the bank would have done as a matter of course would have been to identity the caller before transferring funds from one of the appellant's accounts to the other. There was no question that the appellant was the caller and the bank clearly erred in its identification of the caller, but the District Judge was satisfied that the appellant was sufficiently responsible for the error, by reason of the release of his debit card bearing confidential information and the giving of other information to the fraudster, to relieve the bank of ultimate responsibility.

I am satisfied that she was entitled to come to that conclusion on the evidence before her. It was reasonable to draw the inference that, in addition to passing over the debit card, the appellant passed over other confidential information. The fact that cash had been withdrawn from the ATM soon after the card had been delivered to the fraudster, using effectively the PIN, had weighed with the bank and clearly influenced the District Judge. The District Judge found that the purpose of the telephone call which the appellant had with the fraudster had been for the purpose of obtaining not only the card but also information to enable its use. She concluded that it as also probable that the transfer was possible only because the appellant disclosed the necessary information to the fraudster.

The bank did not put before the court any detailed evidence about the security information it sought from the fraudster. It had no record of that transaction, save in general terms. In giving leave to appeal, I accepted that this court should consider whether, without knowing what information was used on this occasion, the District Judge might infer that the appellant had provided the fraudster with information, rather than that the fraudster had tricked the information from the bank. I am satisfied that the District Judge was entitled to make the finding which she did and to draw the inference which she did. It must be remembered that she did not have a truthful account of the conversation between the appellant and the fraudster provided to her; the only account she had was the appellant's persistent lies. I am satisfied that it was open to her to conclude that the most probable source of the type of information used by the fraudster was the appellant. Even if the District Judge was wrong about that, I am mindful of the fact that the transfer of funds from one account of the appellant's accounts to another caused him no loss. It was the extraction of funds from the current account by the use of the debit card which led to the loss.

10. As to ground 1(b), it does not appear that the question of whether there had been agreed security procedures in accordance with the bank's published terms had formed part of the appellant's pleaded case. Before the District Judge, the pleaded case had, rather, been that the fraudster had set up telephone banking facilities, and the District Judge had found that not to be the case. The issue of any breach of contract in relation to setting up telephone banking and when it had occurred was not part of the evidence. I accept that the District Judge resolved the pleaded issue in her judgment and she cannot now be criticised for not resolving a matter which had not been pleaded before her.

11. It is convenient here to explain why I refused permission to appeal on those parts of ground 1 of the appellant's grounds, which are set out in subparagraphs (c) to (e). In applying the criteria set out in CPR 52.3(6),[4] I am satisfied that the matters

4 *Editorial note: Civil Procedure Rules, Part 52 – Appeals:*
(6) Permission to appeal may be given only where –
(a) the court considers that the appeal would have a real prospect of success; or
(b) there is some other compelling reason why the appeal should be heard.

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relied upon at 1(c) to (e) would have no real prospect of success, nor is there any other compelling reason why permission to appeal should be granted. The fact that the appellant had not himself used telephone banking in the past for whatever reason would not render it improbable that he would be able to provide security information to the fraudster. That it was possible that telephone banking facilities set up shortly after the appellant's bank account had been opened may have been done without his knowledge is immaterial to the matters found by the District Judge and to the appellant's case that the fraudster set up telephone banking. Similarly, there is no substance in the suggestion that the District Judge gave inadequate weight to the appellant's inferior knowledge of the English language as being material to her considerations. She saw and heard him and was capable of deciding whether the issue was of sufficient materiality to be referred to. Sitting in these courts, an experienced judge such as this District Judge weights constantly the impact of language problems, and I cannot for one moment think that that would have been out of her mind here.

12. I did not grant permission to the appellant to pursue the second ground of his notice of appeal, again on the basis of the criteria set out in CPR 52.3(6). The ground complained of the District Judge's approach to the first major transaction, namely the purchase of the very expensive Rolex watch from Watches of Switzerland, some five hours after the appellant parted with possession of his card. The District Judge had considered what had happened with the bank at that stage. The card had been presented to the retailer. She identified that there was an issue as to whether the bank breached its terms and conditions and was negligent in authorising the Watches of Switzerland transaction. She dealt with that at paragraph 33 of her judgment. There she said:

> '33. The defendant has been able to produce information as to the questions which were asked of the fraudster in the Watches of Switzerland shop. The defendant's internal report shows that the fraudster was asked first all how long the account had been open. The answer was 10 years or something. That answer would not be accepted as it is quite vague. (The account was in fact opened some 3 years earlier in August 2005). The next question was where his account holding branch was and this was answered correctly. He was also asked whom he shared the account with and the again this was answered correctly (i.e. no one). He was asked how long he had been at his current address. The answer was "all my life" which the report notes is quite vague (I do not have any evidence as to the correct answer for this question). The fraudster said that he was buying a wedding present for his brother. As has been pointed out on behalf of the claimant, the two answers which were correct (i.e. that the account was in his sole name and that the holding branch was King's Cross) may have been gleaned from the debit card itself which contains the sort code and gave no indication that there was any other person named on the account. Equally, the information could have been disclosed by Mr Rahman in his telephone calls with Stuart or in the information he handed over to the courier. It is of relevance that these questions were asked in the context of the genuine card being used and the PIN being entered correctly first time and was for an amount which was covered by an apparently authorised recent large transfer from the Bonus Saver account.
>
> 34. The claimant has also pointed to the fact that the pattern of use of his accounts from 14 November was different from his usual pattern. Although he had transferred large sums from his Bonus Saver account before, this had been done by attendance at the bank rather than by telephone. There were several ATM balance enquiries whereas he rarely used ATMs. In fact he rarely used his debit card at all but it was used frequently in the period in question, generally for comparatively small sums in High Street shops. However, customers do change their spending patterns on occasion such as when on holiday or for a particular reason. They also become irate (and it causes them embarrassment and inconvenience) if their card is blocked when they try to use it for a genuine transaction. Looking at the record of transactions on 14 November, I am not satisfied that the defendant should have suspected unauthorised use on that date.
>
> 35. Taking into account the context in which these two transactions (transfer from the Bonus Saver account and payment to Watches of Switzerland) were made and the fact that we do not know precisely what information the claimant disclosed to the fraudster, I do not find that the defendant has breached contractual obligations

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> or the Banking Code 2008 or that it has been negligent. Therefore, the claimant is liable for the all losses until 00:20 on 15 November 2008 but the defendant should reimburse him for debits after that time.'

The ground of appeal complained that two of the answers were seriously incorrect. In fact, the District Judge had no evidence about the incorrectness of one of them, or of the information held by the bank on that subject. The fact that the answers were vague in the context of the telephone call and the other matters pointed to by the District Judge did not, in her judgment, constitute significant grounds for holding that the bank had acted in breach of duty in not refusing to authorise the use of the appellant's credit[5] card when accompanied by the correct PIN number. I am content that she was entitled to reach that conclusion. There was insufficient substance in the matters complained of to justify permission to appeal being given.

13. I gave permission to appeal in respect of the third ground of appeal, but only as to part. The appellant complained in the first part of ground 3 of his grounds of appeal that:

> 'The judge's inference that he did not use reasonable care on 13th and 14th November 2008 is not properly explained and contradicts her finding that the claimant was not dishonest or fraudulent on those days as, "He was tricked into handing over his debit card and information needed by the fraudster to use it."'

I shall return to that part of paragraph 15 of the District Judge's judgment in which she dealt with in this respect of the appellant's case – in order to answer it, I think it justifies repeating the passages that I have already cited, in which she said:

> 'I also find that during his telephone calls with Stuart on 13 November and/or in the documents or information included with the card given to the courier on 14 November, Mr Rahman disclosed enough sensitive information to enable the fraudsters to use the card and to know he had a Bonus Savings account and roughly how much was in it.'

The District Judge also said, at paragraph 16:

> 'I find the claimant's conduct on 13 and 14 November 2008 which led to the disputed transactions was not dishonest or fraudulent because he was tricked into handing over his debit card and information needed by the fraudsters to use it (although his subsequent behaviour in concealing the full truth when dealing with the bank, financial ombudsman and the court was dishonest). However, I find that he did not use reasonable care on 13 and 14 November 2008. He had no way of knowing that the call from Stuart was genuine or that the telephone number used belonged to the defendant. It would have been a simple matter for him to telephone the defendant's dedicated lost or stolen card number (which he did late on 14 November) or contact his local branch before handing over his card and other information to the courier.'

I am satisfied that in the circumstances the District Judge was entitled to find that the appellant did not act with reasonable care. She was satisfied that he had handed over his debit card to a third party. On its face, that is not taking reasonable care. She was satisfied that he parted with the PIN number and demonstrated why she took the view that she could be satisfied of that. Of course, there could be circumstances in which the appellant could have acted without personal fault. All frauds, all thefts are different and carry varying degrees of culpability on the part of the loser. The culpability of a loser who places a valuable object by an open window and has it stolen is very different from the culpability of a loser who has a valuable object stolen from his safe in the middle of the night. However, the unique feature of this case is that nothing in the evidence before the District Judge explained what was really said between the appellant and the fraudster. The District Judge had no evidence about that at all. All she had in relation to the transaction between the fraudster and the appellant was the appellant's dishonest and false account of what had taken place. She had nothing to explain or mitigate the simple fact that the appellant had parted with his debit card and PIN, as she found. She was satisfied that it was handed over to a fraudster, but she was given no true account of the circumstances. It was not for her to guess whether it was done foolishly on the appellant's part or only after the appellant had taken reasonable precautions. He was the only person before the court who could have

5 *Editorial note: the transcript has 'credit card', but the judge probably meant 'debit card'. This is probably a minor slip.*

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told her and he chose instead to lie.

In the circumstances, the District Judge cannot be blamed for drawing the inference that she did and I am satisfied that an appeal on the basis that the District Judge acted outside the scope of reasonable decision-making on the evidence before her would not stand a reasonable prospect of success and thus it was not appropriate, in accordance with the criteria of CPR 52.3(6), to grant permission to appeal, as such an appeal would have no real prospect of success.

14. To some extent, the second part of the third ground of the appellant's grounds of appeal is a repetition of the earlier argument advanced on the appellant's behalf, but the addition of three further heads of argument, at 3(a) to (c), caused me to grant permission to appeal. The second part of the third ground reads as follows:

> 'Further, her inference at paragraph 15 of the judgment that Mr Rahman must have disclosed enough sensitive information to enable the fraudster to use the card and to know he had a bonus savings account and roughly how much was in it, is not supported by the evidence. These inferences are legally inadequate and unsupported by the evidence and give rise to a material error of law because:
>
> (a) except for the fact that Mr Rahman's card was used in conjunction with his PIN, the bank did not say that the judge was able to identify the sensitive information the claimant was tricked into giving to the fraudster. The bank was reminded in repeated pre-action correspondence to preserve all tape recordings of conversations concerning the fraudulent transactions. The bank failed to provide any such evidence for the trial.'

In many ways, the extraordinary thing about this submission is that the appellant's case on the appeal is not based upon his own case at trial, that he had asserted all along that he had neither parted with the card or the PIN to the fraudster. In so far as the ground refers to the use of the PIN, this ground must be taken to refer to the watch transaction. Debit card PINs are not used in telephone transactions. Thus, the question is whether the appellant gave the fraudster security information which allowed that transaction to proceed. It is clear that the PIN, which is, of course, itself security information,[6] had been given to the fraudster and that it was the use of the card and that information which had initiated the transaction. The handing over of the card would, of course, have shown the sort code and gave access to the information about which branch the appellant banked with, but that information could have come from the appellant, as could information about his sole ownership of the account and the existence of other savings accounts. The District Judge had concluded that there had been a phone call in which personal banking information had been disclosed. She inferred, not unreasonably, that the appellant was in that context the most likely source of such information. He had, after all, been careless enough with his PIN. In the absence of any contradictory evidence, I am content that she had sufficient material before her to reach the conclusion which she did and to make the inference which she did.

15. At (b) of ground 3 the appellant contends that:

> 'The learned judge was wrong to simply assume that Mr Rahman must have told the fraudster about his bonus share account and how much money he had there without any evidence. The learned judge failed to consider the most obvious way the fraudster could have obtained information about the amount of money in Mr Rahman's savings account, namely from the bank employee dealing with the fraudster during the telephone banking in the false belief that they were dealing with Mr Rahman.'

The District Judge clearly took the view that that was not the obvious explanation as to how the fraudster would have known what other accounts the appellant held. Indeed, it seems to me that the District Judge was right to find that that was far from obvious. Unless the fraudster had known of the additional account, whatever purpose would he have had in telephoning the bank so swiftly after receiving the debit card and before embarking upon the second and most substantial withdrawal from the current account, which would not have been effective without first having arranged the transfer? The District Judge's inference can be reasonably based on the raft of

6 *Editorial note: in the context of its use with an ATM, a PIN serves two functions: as a means of authentication, and as an electronic signature (Stephen Mason, Electronic Banking: Protecting Your Rights (PP Publishing, 2012), 41 – 42); a PIN is one form of electronic signature, for which see Stephen Mason, Electronic Signatures in Law (3rd edn, Cambridge University Press, 2012).*

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facts which she found, including the conduct of the fraudster and the appellant. I have considered the suggestion but have ultimately come to the conclusion that her finding was within reasonable parameters.

16. Ground 3(c) suggests that:

> 'The learned judge failed to give adequate weight to the fact that the fraudsters were sophisticated operators and already possessed information relating to Mr Rahman and other customers of the bank. Indeed, the very least the fraudsters had to know was Mr Rahman's mobile phone number and the fact that he banked with Barclays in order to dupe him into believing that he was receiving a call from Barclays fraud team. The official looking 0870 number was used and Mr Rahman had received an authoritative text purporting to be from Barclays fraud department, together with a reference number and message advising him to call bank on the same 0870 number.'

In granting permission to appeal in relation to this part of the third ground, I did so with some reluctance, but considered that the appellant's position, as the victim of this scam, warranted a careful consideration of the balance of the evidence by the District Judge. Upon reflection, I am not satisfied that the criticism is soundly based. For example, that the fraudsters had the appellant's telephone number was not in itself meaningful. Whether the fraudsters knew at the start of the conversation that the appellant had an account with Barclays Bank is questionable and, without at least an honest account of the conversation between the fraudster and the appellant, the District Judge had no way of knowing that. Nowadays, one is all too familiar with e-mail banking scams that refer to accounts which the recipient is said to have with one or other of the major banks, and simply as a fishing exercise, and I suppose in something like one in five cases the recipient probably does not have such an account. However, there is nothing before this court to show that the telephone call to the appellant was other than a fishing expedition at the beginning. Just how sophisticated the fraudster was over the telephone, in the face of the appellant's false evidence, the District Judge had no way of knowing. It would seem from the bank's evidence that the fraudster was quite experienced and, without a truthful account of what was said to the appellant, the District Judge could not know how much weight to attach to that.

17. I did not give permission to appeal on the last three aspects of the third ground, namely (d) to (f). None of them satisfied, either individually or collectively, the criteria of CPR 52.3(6) and, in any event, they were repetitious in many ways of other arguments and added nothing to the proposed appeal. 3(d) returned to the point of the District Judge finding that the appellant did not use reasonable care and the assertion that it was speculative and irrational. On the basis that it was based on her primary findings as to the appellant's conduct, I am satisfied that it was not irrational. The inferences were, for the reasons which she expressed, open to her to draw. In the absence of a full and honest account, she cannot be criticised for so doing. Grounds 3(e) to (f) need not be considered at this stage in detail as they have already been considered in the course of this judgment and it will be apparent that I do not regard them as having substance.

18. Finally, in relation to the fourth ground, I should explain why I did not give permission to appeal in relation to that. It was, in effect, a repetition of an earlier ground but, in so far as it was not, I am satisfied that it provided no substantial argument in favour of the appellant's case on appeal. In essence, it is submitted, as far as it can be followed, that the District Judge had been satisfied that the appellant had acted with reasonable care in relation to the £6,230.28, which she awarded him, and in those circumstances, she ought to have awarded him the full sum claimed. This is in law the redemptive power of the instructions given by the appellant to cancel the debit card, which instructions the bank in fact failed to act upon. It might have been open to the bank to argue that, since the original parting with the card and information was the cause of the loss, they should not be liable for that. However, they have not chosen to cross-appeal. I accept that that was the proper course given their failure to act on the cancellation instructions, but it cannot be used as a weapon against them and does not invalidate the main findings of the District judge's careful judgment.

19. Therefore, for the reasons which I have given, I do not allow this appeal on any of the grounds which I have permitted to go forward.

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Commentary on appeal judgment

By Stephen Mason and Nicholas Bohm

Knowledge of the savings account

The judge addressed the issue of how the thief obtained knowledge of Mr Rahman's savings account. The District Judge at trial concluded, at paragraph 15, that Mr Rahman '... disclosed enough sensitive information to enable the fraudsters to use the card and to know he had a Bonus Savings account and roughly how much was in it.' This conclusion was based on her assessment of Mr Rahman's evidence, not, it appears, any evidence submitted by the bank. Counsel for Mr Rahman speculated that an employee of the bank might have revealed the existence of the account. However, the thief used the card to find out the balance on the account on various occasions by interrogating ATMs. This is one of the problems with the 'benefits' that banks provide their customers, whether they want them or not: that is, the ability to check balances on every account held at the bank, and the ability to effect transfers between accounts. This means that if a thief obtains a card, they are able, providing they are capable of circumventing the PIN or know the PIN, to check the status of any accounts that the card permits them to do.

The appeal judge said at paragraph 15:

> 'The District Judge clearly took the view that that was not the obvious explanation as to how the fraudster would have known what other accounts the appellant held. Indeed, it seems to me that the District Judge was right to find that that was far from obvious. Unless the fraudster had known of the additional account, whatever purpose would he have had in telephoning the bank so swiftly after receiving the debit card and before embarking upon the second and most substantial withdrawal from the current account, which would not have been effective without first having arranged the transfer? The District Judge's inference can be reasonably based on the raft of facts which she found, including the conduct of the fraudster and the appellant. I have considered the suggestion but have ultimately come to the conclusion that her finding was within reasonable parameters.'

However, there are problems with this conclusion. It does not seem as if any evidence was given as to:

(i) the number of occasions the thief used ATMs to establish the balance on the account or accounts;

(ii) whether the card could be used to establish whether there were any other accounts linked to the current account;

(ii) where the ATMs were located;

(iii) what activities were recorded;

(iv) how many times ATMs were interrogated;

(v) on what dates and at what times the ATMs were used.

With the deepest possible respect, it is not obvious that Mr Rahman gave this information to the thief. Given the lies that Mr Rahman told, it is a possibility that he informed the thief that he had a savings account, and it is perhaps a reasonable inference to make. However, this is not the only way the thief could have found out about the account, and arguably evidence should have been adduced on this precise point by the bank.

The transfer of funds between accounts

The most significant issue on appeal relates to the transfer of funds between Mr Rahman's savings account and his current account. Of fundamental significance is the burden of proof in this case. It is for the bank to prove either that it had authority from the customer, or that the customer's breach of duty caused the bank to be deceived into believing that it had his authority. In addressing this issue, the judge indicated, at paragraph 9, that:

> 'What she concluded was that what the bank would have done as a matter of course would have been to identity the caller before transferring funds from one of the appellant's accounts to the other. There was no question that the appellant was the caller and the bank clearly erred in its identification of the caller, but the District Judge was satisfied that the appellant was sufficiently responsible for the error, by reason of the release of his debit card bearing confidential information and the giving of other information to the fraudster, to relieve the bank of ultimate responsibility.

In the third paragraph to paragraph 9, the judge said that 'The bank did not put before the court any detailed evidence about the security information it sought from the fraudster. It had no record of that transaction, save in general terms.' (Also see paragraphs 31 and 31 of the trial judgment). Herein lies the rub – the bank failed to provide

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any substantive evidence of the information it required to authenticate the customer. It is not certain what method the thief used to effect the transfer. The District Judge said in her judgment at paragraph 31 that:

> 'Unfortunately, the defendant has not been able to produce any information as to the precise way in which the transfer was effected. Its records show it was over the telephone but not whether this was by speaking to someone at a call centre or automatically by keying in the sort code, account number, passcode and registration key.'

Given the facts that the bank was unable to provide such evidence, it is difficult to understand how Mr Rahman can be held to be negligent.

If speaking to a bank employee, until Mr Rahman was made aware of the questions that the bank asked to enable the transfer to take place carried out the transfer, it cannot be certain that the information that Mr Rahman gave to the thief was sufficient to enable the transfer to take place. In particular, the inference that Mr Rahman must have provided the necessary information depends on whether the information was really information that was not otherwise available to a thief. That enquiry is not necessarily easy, but it cannot be undertaken at all without knowing what information the thief actually gave the bank. It is important to be made aware of the precise questions asked, and second, to establish that the bank obtained correct answers to each question. As the District Judge indicated in paragraph 33 of her judgment, the thief failed to answer some of the questions asked at Watches of Switzerland adequately, and the same might have occurred with the answers supplied by the thief to the bank when attempting to transfer the funds from one account to the other. If the answers were not satisfactory, and the bank effected the transfer on the basis of incorrect answers, then it is liable to Mr Rahman for negligence or for effecting a transaction that was not authorised.[7]

It is of the utmost significance that this point was dismissed. It appears that two judges are prepared to accept that a bank need do next to nothing to meet the required burden of proof. If a bank is permitted to effect a transfer of money between accounts and authorise the debit of an account with wholly inadequate evidence, and nevertheless escapes liability for its breach of the banking mandate, then there is no incentive for a bank to bother with obtaining evidence in the future.

The transfer of funds did not cause a loss

The judge concluded in the third paragraph to paragraph 9 that '...the transfer of funds from one account of the appellant's accounts to another caused him no loss. It was the extraction of funds from the current account by the use of the debit card which led to the loss.' It seems impossible for the thief to have purchased the watch without the transfer having taken place, so the transfer of the funds caused the thief to be able to steal the funds.

Quality of the means of authentication

The District Judge dismissed the vague answers to the questions put to the thief by the bank when the thief was in the process of buying the watch at Watches of Switzerland on the basis that it was possible the Mr Rahman gave the thief the information. The evidence from the bank was that the answers to two of the questions posed were vague at best. It is somewhat disconcerting to conclude that banks authorise high value transactions based on nebulous information. In this instance, it appears clear that the bank, by its own admission, failed to authenticate the holder of the card effectively, or at all. For this reason, the bank ought to have been held liable for debiting the account without authority.

Usual pattern

There are two aspects to the argument that Mr Rahman's card was being used for a series of unusual transactions. The evidence relating to the purchase of the watch certainly seems to have been that this transaction was outside the normal course of use on the account. However, given that there was a transfer from the savings account to the current account before the purchase, and also given the bank purportedly authenticated that it was Mr Rahman that was buying the watch, this contention has little merit. However, the withdrawal of cash from an ATM and the interrogation of ATMs for balance enquiries on several occasions were outside the normal pattern of behaviour. On an evidential note, it is not clear which ATMs were used, and whether they were across London, nor which account or accounts were interrogated – this is important evidence to substantiate the claim.

On this point, the District Judge concluded at paragraph 34 that customers:

> '... become irate (and it causes them embarrassment and inconvenience) if their card is blocked when they try to use it for a genuine transaction. Looking at the record of transactions on 14 November, I am not

7 *Stephen Mason, 'Debit cards, ATMs and negligence of the bank and customer', Butterworths Journal of International Banking and Financial Law, Volume 27, Number 3, March 2012, 163 – 173.*

satisfied that the defendant should have suspected unauthorised use on that date.'

There are two observations on these comments: first, just because a customer becomes irate is no reason for a shop or bank to accept that the person who has possession of a genuine debit card is the rightful owner of the account, especially when they cannot answers questions accurately. If the bank prefers to avoid the risk of annoying a purported customer who cannot answer questions correctly, it should accept the loss if the purported customer is a thief. This is precisely akin to the case where a bank prefers not to check signatures on small value cheques, and accepts any resulting loss. Second, it is a mistake to compare the transactions (if this is what the District Judge did) during the course of one month. To establish a rough pattern of use, it is relevant to look back at a period of twelve months or longer (and given the account had only been open for three years, this would not have been a difficult exercise to undertake) – by so doing, it can then be established whether Mr Rahman altered his pattern of spending in such a way as to enable the bank to conclude that buying an expensive watch was within the normal pattern of use.

Failure of the bank to deliver up evidence

Even in 2013, employees of banks continue to advise customers, incorrectly, to destroy evidence (that is, their card) in circumstance such as these (although in this case Mr Rahman gave his card to the thief). The point made by counsel for Mr Rahman in his grounds of appeal was apposite and highly relevant: that the bank had failed, despite repeated pre-action correspondence, to preserve relevant evidence. It must be emphasised that the 'findings by a court must be justifiable, and meet the demands of rationality and ethics'.[8] To this extent, 'the resistance, especially of banks, to submit proper evidence to support their assertions, in particular with respect to unauthorised withdrawals from ATMs and on-line banking disputes' should be the topic of constant vigilance by lawyers and judges alike.[9]

General comments

When a claimant supports his claim with dishonest evidence, it is not surprising to find every possible inference drawn against him. Judges are human. What is unfortunate about this appeal is the court's failure to focus firmly on the importance of requiring the bank to discharge the burden of proving that the crucial transfer between accounts either was authorised by the claimant (which was clearly not the case) or was facilitated by the claimant's breach of duty in supplying information to the thief which was used to impersonate him to the bank. To discharge that burden, the bank ought to have produced evidence of exactly how the telephone transfer was purportedly authorised. No explanation was given for its failure to do so. If the information supplied to the bank in support of the authorisation had been before the court, there would have been a proper basis for reaching a conclusion about whether that information had, on the balance of probabilities, come from the claimant, or could have been found by an astute thief from other sources. If it came from the claimant, his case would fail; but if with equal or greater probability it could have come from elsewhere, the bank's system would have failed to provide evidence sufficient to discharge the burden of proof on the bank.

If banks can succeed in defending claims by their customers without producing evidence on the crucial issue of their authority to debit an account, they will have no incentive to retain it or to produce it when required. If their defence fails for lack of the relevant evidence, they will soon enough learn to make sure to retain and produce it. Soft cases make bad law.

8 *Stephen Mason, 'Electronic banking and how courts approach the evidence', Computer Law and Security Review, Volume 29, Issue 2 (April 2013), 144 – 151, 149(b).*

9 *Stephen Mason, 'Electronic banking and how courts approach the evidence', 150(a).*

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