IN THE COURT OF APPEAL OF BELIZE, A.D. 2005

CIVIL APPEAL NO. 19 OF 2004

BETWEEN

ATLANTIC INTERNATIONAL BANK LTD. **Appellant**

v.

FULTON DATA PROCESSING **Respondent**

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BEFORE:

The Hon. Mr. Justice Sosa	**-**	**Justice of Appeal**
The Hon. Mr. Justice Carey	**-**	**Justice of Appeal**
The Hon. Mr. Justice Morrison	**-**	**Justice of Appeal**

Mr. Eamon Courtenay S.C. and Mr. E. Andrew Marshalleck for appellant.
Mr. Dean Barrow, S.C. for respondent.

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25 February, 2 March & 24 June 2005.

CAREY, JA

THE BACKGROUND

1. The respondent (Fulton) on 27 August 2001 opened a demand deposit account with the appellant (the Bank) by lodging a cheque in the sum of

US$5,000.00 drawn on Provident Bank and Trust of Belize Ltd. The Bank presented the cheque for clearance through its correspondent bank International Bank of Miami (IBOM). On 27 September 2001 Fulton's account with the Bank was credited with the proceeds of the cheque which had been duly cleared. The Bank kept the proceeds of the cheque at IBOM. Fulton's account remained inactive but for the debiting of the usual bank charges during the period September 2001 to February 2004.

2. On 7 May 2004, Fulton demanded repayment of US$4,724.00 which represented the proceeds of the cleared cheque less bank charges duly debited to the account. The Bank failed to make payment, and this caused Fulton to issue a writ under the summary procedure provisions of the Supreme Court Rules (Order 74) claiming that sum with interest. This procedure obviates pleadings and is intended to allow speedy trials. There was an application by the Bank for directions that the extended procedure be adopted. Fulton resisted the application and, in the event, it was refused. That order was not challenged, and it is only mentioned to give a complete picture of the proceedings.

THE HEARING

3. At the trial of the matter, the Bank's defence to the claim was based on the fact that the Bank's account with its correspondent bank, IBOM had

been frozen because of investigations in train by the Financial Intelligence Unit of Belize (FIU) on instructions by authorities of the Government of the United States. The Bank was given sight of a copy of a Warrant of Arrest in Rem and Seizure issued out of the United States District Court for the Western District of Pennsylvania dated 9 March 2004. This warrant directed special agents of the Internal Revenue Service to seize and take possession of funds held by the Bank at IBOM. By virtue of clauses (2) and (4) of an "Operation and Verification of Account Agreement" signed between the Bank and Fulton, the Bank, it was argued, was not liable.

4. Awich J in a reserved judgment held that upon a true construction of the agreement, the Bank was liable to repay Fulton. The appeal is against that determination of the learned judge.

THE APPEAL

5. Mr. Eamon Courtenay, S.C. strongly challenged the judgment on the ground that the judge failed to properly consider and interpret the terms of the "Operation and Verification of Account Agreement", and more particularly "he failed to find that:

> (a) Fulton by Clause (2) thereof authorized Atlantic to use correspondent banks at Fulton's sole risk and expense and further authorized Atlantic to give instructions to such banks as

Atlantic deems best unless countermanded by Fulton;

and

(b) Fulton by Clause (4) thereof authorized Atlantic to debit Fulton's account if Atlantic became "for any reason…unable to collect or withdraw" the proceeds of instruments deposited by Fulton".

These clauses, so the argument ran, were apt to protect the Bank in the circumstances that materialized.

6. This court is plainly confronted with a question of the true interpretation of these clauses referred to in the agreement as "sections". Clause (2) provides as follows:

> "(2) USE OF AGENTS: The Bank is authorized to present for payment or acceptance or collect the instruments through such banks or other agents as the Bank may deem best, at the sole risk and expense of the undersigned, and, save to the extent that definite instructions have been received by the Bank from the undersigned, to give to such banks or other agents such instructions as to collection as the Bank may deem best, and that the Bank may accept either cash or bank drafts, checks, settlement vouchers, clearing house slips or any other evidence of payment, in payment of the instruments or in remittance therefore (sic)."

And clause 4 is hereunder:

> "(4) AUTHORITY TO CHARGE ACCOUNT: The Bank is authorized to debit the account of the undersigned with any of the instruments, or any of the evidences (sic) of payment referred to in section (2) hereof, which are not paid on presentation or which, if paid, the Bank may be called upon to refund, or which may be dishonored by non-acceptance or non-payment by any party to it who is bankrupt or insolvent, or which, or the proceeds of which, through no fault of the Bank have been lost, stolen, or destroyed, or which, for any reason the Bank is unable to collect or withdraw, together with all costs, charges and expenses incurred by the Bank in connection therewith. The Bank may also from time to time debit the aforesaid account with the usual charges for the keeping of the account."

7. The relationship of banker and customer which existed between the Bank and Fulton was governed by the "Operation and Verification of Account Agreement" which set out its terms and conditions. Clause 2 on which Mr. Courtenay, S.C. relied dealt with the use of agents by the Bank. Learned counsel was quite correct in his submission that the Bank was entitled to use the IBOM as its correspondent bank to present the cheque deposited by Fulton. I part company with his submissions, however, that the Bank was entitled in the absence of instructions to the

contrary to instruct IBOM to hold the proceeds. There are no words in the clause which are apt to convey that implication. Mr. Courtenay, S.C. did not suggest that there were any such express terms. It is to be noted that the instructions to which the clause adverts, relate to instructions as to collection. So far as the facts in the instant case are concerned, the co-respondent bank IBOM, the agent of the Bank had collected payment on the instrument. There was no loss incurred with respect to that transaction, collection was at an end. Any loss incurred in the course of that process, would be at risk of the Bank. Such a contingency had been provided for.

8. Mr. Barrow, S.C. took the view that the collection of payment on the instrument was plainly permissible by virtue of clause 2. When the proceeds were lodged in IBOM that had nothing to do with Fulton, who was, so far as that transaction went, to be regarded as a stranger. The opening of account at IBOM by the Bank involved a contract between IBOM and the Bank. It was to that extent that Mr. Barrow, S.C. thought that clause 2 served his cause.

9. The learned judge put the matter in this way (p. 130)

> "6. I do not accept that the plaintiffs agreed that their money would in turn be banked at the IBOM or any other bank in the USA in particular. I accept that the plaintiffs knew or ought to

> have known that their money would be banked outside Belize and must be taken to know that the bank might invest the plaintiff's money in the normal business of the bank, however, I do not accept that to mean that the plaintiffs accepted the risk of loss in those transactions which were in the business of the defendants. I accept the submission by Mr. Barrow, S.C. learned counsel for the plaintiffs, that a clause to that effect need to be included in the operation and verification of Account Agreement, if the plaintiffs were to bear the risk of those business transaction of the Bank".

In my respectful opinion, the judge was eminently correct. The agreement should be interpreted *contra proferentem* the Bank. But it is not necessary to invoke that principle in this regard, there are no words in the clause that cover or even contemplated the events which eventuated. That is the conclusion at which the judge arrived and that effectively undermines the submissions of Mr. Courtenay, S.C. that the judge did not consider and construe the terms of clause 2, nor did he direct his mind to the import of the said clause. Those submissions accordingly fail.

10. I pass then to consider clause 4 which deals with the Bank's authority to debit Fulton's account. It is to be noted that this clause is linked with clause 2. In my opinion these clauses are not independent of each

other: clause 4 depends on clause 2 because it is dealing with instruments where agents are employed by the Bank. It follows that if clause 2 failed, then necessarily clause 4 could not attach. Thus if clause 2 failed because the use of the agent was not within its ambit, the power to debit the instrument or charges under clause 4 disappears.

11. It is, I fear, simplistic to urge that "clause 4 covers circumstances where the proceeds of an instrument have been paid into an account of Atlantic at its correspondent bank and subsequently becomes for some reason beyond the reach of Atlantic through no fault of Atlantic". Clause 2 does not cover the circumstances of the instant case. The clause does not cover the use of an agent for other than collection purposes at the sole risk of the customer. It is not so expressly stated by the wording of the clause. I would venture to think that if the bank wished to exclude its liability in such circumstances, a term to that effect, would not only be prudent but mandatory.

12. If it be right that the terms of the "Operation and Verification of Account Agreement" do not protect the Bank, then questions of the disposition of the frozen funds do not arise for consideration. The instrument has been presented for payment and collected on, a demand has been made for payment, legally the Bank cannot refuse to pay. The customer is not obliged to await the outcome of proceedings with the

Federal Authorities in the USA. The Bank is obliged to pay on the instrument on the demand of Fulton.

13. Mr. Barrow, S.C. contented himself by asserting that clause 4 was irrelevant in the circumstances and had no effect on the relationship between Fulton and the Bank. Different considerations could possibly apply had the Bank kept the account in Belize. He had tendered below a Depositary Agreement of a rival bank which dealt with Non-Belize Dollar Accounts in the following way:

> "49 - NON BELIZE DOLLAR ACCOUNTS: Balances in non-Belize dollar accounts shall be maintained in the Bank's name for Account Holder's account with correspondent banks that may or may not be located within the principal jurisdiction in which the currency shall be legal tender. The maintaining of non-Belize dollar account shall be at Account Holder's risk as regards (a) any restrictions imposed or freeze, seizure or forfeiture exercised in respect thereof by any governmental, judicial, Quasi-judicial or regulatory authority or (b) any taxes, levies or imports applicable to the balance in question (including, without limitation, exchange control or currency restrictions)."

On any fair reading of this term, there is altogether no room whatsoever for uncertainty, regarding its import. The reaction of Mr. Courtenay S.C. was an acknowledgement that the language was different but his

opinion was that the effect was the same. It is plain that these provisions speak to different situations. Clause 2 speaks to the collection exercise and makes no mention expressly or impliedly of maintaining accounts. The effect, logically can hardly be the same. That frail response must be rejected.

14. For all these reasons the appeal must be dismissed. I accordingly agreed with other of my brethren.

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CAREY JA

SOSA JA

On 2 March 2005 I agreed with my brethren that this appeal should be dismissed with costs and that the decision of the court below should be confirmed. I have read, in draft, the reason for judgment of Carey JA and I concur in the same.

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SOSA JA

MORRISON JA

I too have had the advantage of reading in draft the reasons for judgment prepared by Carey JA. I agree with them and have nothing to add.

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MORRISON JA