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2004

## The Beneficiary's Bank and Beneficiary Described by Name and Number: Liability Chain and Liability Standard in Wire Transfers (Part 2)

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### Source Publication:

TSAR (Journal of South African Law). 2004, Volume 2 (2004), p. 235-257.

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### Recommended Citation

Geva, Benjamin. "The Beneficiary's Bank and Beneficiary Described by Name and Number: Liability Chain and Liability Standard in Wire Transfers (Part 2)." *TSAR (Journal of South African Law)* 2004.2 (2004): 235-257.

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# The beneficiary's bank and beneficiary described by name and number: liability chain and liability standard in wire transfers (part 2)

BENJAMIN GEVA\*

## 5 Analysis

Briefly stated, dismissal of the three claims in delict went to the merit of those causes of action. The dismissal of two of the three claims in contract was premised on rejecting the allegation that the instructions were clear and unambiguous. That latter point does not require any further discussion. The dismissal of the third contract claim, alleging instructions were unclear and ambiguous, was premised on the lack of privity, an argument that in fact applied to all three claims in contract. The question of the duty of Trust Bank, as the beneficiary's bank, in relation to unclear and ambiguous instructions, was outside the scope of the judgment, and has become moot in light of the ultimate holding. The balance of the discussion in this part will be concerned with the delict and the contract privity issues. The duties of the beneficiary's bank in respect of ambiguous payment orders will be dealt with in part 6 of this article.

In an interbank credit transfer the originator and beneficiary's bank do not appear to be in a direct contractual relationship. Yet, they are still in some proximity to each other. Hence, liability in delict by the beneficiary's bank to the originator may superficially be attractive. A comparison between two American pre-article 4A cases may demonstrate the point. Thus, in *Securities Fund Ser Inc v Am Nat'l Bank and Trust Co*,<sup>73</sup> as in *Gilbey*, having received a payment order identifying the beneficiary by name and account number, the beneficiary's bank processed the payment order solely on the basis of the number; hence, it did not direct payment to the named beneficiary.<sup>74</sup> The court found the beneficiary's bank liable to the originator on several alternative theories, one of which was negligence.<sup>75</sup> Conversely, in *Bradford Trust Co of Boston v Texas American Bank*,<sup>76</sup> the beneficiary's bank was not held liable to the originator where, unlike in *Gilbey* and *Securities Fund*, the instructions,

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<sup>73</sup> (n 5).

<sup>74</sup> In *Securities Fund*, a dishonest employee of the originator fraudulently generated an authorised payment order naming a legitimate beneficiary and an account number not belonging to that beneficiary but to the dishonest employee's innocent creditor, to whom payment was ultimately directed by the beneficiary's bank that did not verify the consistency between beneficiary's name and number.

<sup>75</sup> Other theories were direct liability of a principal to a sub-agent as well as to a third-party beneficiary of the undertaking by beneficiary's bank to deliver funds as directed. For their applicability under English and South African laws, see text and notes 95-101 below.

<sup>76</sup> (1986) 790 F 2d 407 (5th Cir).

identifying the beneficiary by inconsistent name and account number, that initiated the credit transfer, were forged. In such a case the purported originator, whose account was debited by the originator's bank, could recover from the originator's bank for breach of contract. Reference was also made to the failure of the originator's bank to follow its own internal procedures to verify the genuineness of the payment order on which it acted. In the facts of the case, it was the negligence of the originator's bank, and not the failure by the beneficiary's bank to notice the discrepancy between name and number, that was held to be the ultimate cause of the loss.<sup>77</sup>

However, strictly speaking, *Bradford* need not necessarily be read to deny altogether the existence of a cause of action in torts by the purported originator of forged instructions against the beneficiary's bank. A direct Canadian precedent for the existence of such a cause of action is *Vitalaire v Bank of Nova Scotia*.<sup>78</sup> In that case, the Ontario superior court of justice "reluctantly"<sup>79</sup> dismissed a motion to strike a statement of claim, on the grounds that it did not disclose a reasonable cause of action. The judgment dealt with an action against the beneficiary's bank by a customer of the originator's bank that denied the origination of the funds transfer debited to that customer's account. More specifically, the court dealt with a part of an action that had been brought by a purported originator against the beneficiary's bank. The latter credited the beneficiary's account pursuant to genuine payment instructions received from another bank that executed instructions that purported to emanate from the originator, but that were alleged to be forged. In carrying out these fraudulent instructions the originator's bank debited the originator's account that thus suffered loss.<sup>80</sup>

The purported originator's action alleged breach of duty of care, as well as breach of a fiduciary duty by the beneficiary's bank. Alleged breach was in connection with the opening of the account without verifying the character of the would-be beneficiary and the legitimacy of its business as well as in not inquiring into the unusually large size of the transfer. The court treated the claim as one for pure economic loss, and thus insisted that "it must be subjected to stringent tests" that "require findings of foreseeability of the loss, proximity in the relationship of the parties, and a policy analysis that adequately recognises the dangers of indeterminate liability, multiplicity of inap-

<sup>77</sup> *Bradford* involved forged instructions transmitted to the originator's bank, fraudulently identifying the beneficiary by inconsistent name and account number. The beneficiary's bank placed the funds in the account as identified by number, thereby implementing the forger's fraudulent intent. As in *Securities Fund*, the account identified by number belonged to an innocent creditor of the fraudulent employee, except that, unlike in both *Securities Fund* and *Gilbey*, instructions were unauthorised. They identified beneficiary by name (being in fact the purported originator) and account number. Payment was made by the beneficiary's bank to the unsuspecting creditor's account without verifying consistency between beneficiary's name and number.

<sup>78</sup> court file no 02-CV-224459CM3 Dec 16 2002 (Pitt J) unreported.

<sup>79</sup> *Vitalaire* (n 78) 32.

<sup>80</sup> In fact, action was brought also against the originator's bank (Bank of Nova Scotia), the beneficiary (Universal) as well as against Royal Bank of Canada, whose role in the transfer is not indicated in the court's decision that was limited to the availability of a cause of action against the beneficiary's bank (Bank of Montreal). The report does not state whether the beneficiary's bank acted on instructions received directly from the originator's bank or from an intermediary bank. However, in the context of the particular issue, nothing turned on this.

propriate lawsuits, and the plaintiff's duty to protect itself against inherent business risks through insurance."<sup>81</sup>

The court thought that all these tests have been met. In doing so, it characterised the issue as involving the obligation of a bank ("Bank B") to prevent its use by its customer to defraud a customer of another bank ("Bank A"). Particularly, the court relied on cases holding for banks' duty of care to non-customers generally in opening accounts for their own customers, and specifically when confronted with circumstances so unusual or strange as to put a "reasonable banker" on his or her guard.<sup>82</sup> This situation may however be distinguishable from that in *Gilbey*. Moreover, *Vitalaire* may have been wrongly decided; in the final analysis, the logic of *Bradford* is much more compelling. Indeed, cases cited by the court in *Vitalaire* are quite distinguishable. In all of them, the fraudulent instructions were given by the defrauder directly to the defrauder's bank, that is "Bank B," rather than to the bank of the injured party, that is, "Bank A". All cases involved cheques rather than wire transfers, in circumstances where there was no alleged breach of duty by the bank of the injured party ("Bank A"), so that contract remedy was of no avail to that party. As was held in *Gilbey*,<sup>83</sup> though only in the context of the remedy against the collecting bank,<sup>84</sup> in the cheque situation, the contractual framework is inadequate to fasten liability on "Bank B" that dealt directly with the defrauder. Conversely, in the credit transfer setting, the defrauder dealt directly with "Bank A," which has a contractual relationship with the injured party. Consequently, as in *Bradford*, the sequence of contracts affords the allocation of the loss to "Bank A" that dealt directly with the defrauder, so far as the act of fraud is concerned.

Nevertheless, unlike *Vitalaire*, *Gilbey* involved genuine originator's instructions, so that the originator in *Gilbey* had no cause of action against the originator's bank for the latter's own breach. It may thus be tempting to argue that a cause of action in delict against a defaulting beneficiary's bank appears to be justified in *Gilbey*, even more than in *Vitalaire*. Yet, upon reflection, to condemn tort liability in *Vitalaire* is not necessarily to justify liability in delict in *Gilbey*. Thus, an owner of a stolen cheque and a bank that collected it for the thief are complete strangers. In essence, the same is true also with regard to an account holder who did not instruct payment out of the account, and a beneficiary's bank, to whom funds were transferred out the account. Such an account holder is not an originator of a funds transfer and thus, *vis-à-vis* the beneficiary's bank of the unauthorised funds transfer, is a complete stranger. An action in tort by that account holder against the beneficiary's bank is to be disfavoured, not because they are less strangers to each other than the true owner of a stolen cheque and the collecting bank; rather, as

<sup>81</sup> *Vitalaire* (n 78) 4-5.

<sup>82</sup> Cases relied on by the court are *Semac Industries v 1131426 Ontario Ltd* [2001] OJ No 3443 (SCJ); *Lumsden and Co v London Trustee Savings Bank* [1971] 1 Lloyd's LR 114 (QB) (for which the volume is erroneously cited as [1997]); *J & F Transport v Makwart* (1982) 136 DLR (3d) 204 (Sask QB); and *Richmond Raiders Football Club v Richmond Savings Credit Union* [1993] BCJ No 449 (BCSC).

<sup>83</sup> See text at n 76-78 above.

<sup>84</sup> Interestingly enough, three of the four cases relied on by the court and cited in n 82 above involved fraud by a depositor dealing with the collecting bank. Only *Semac* dealt with a drawer's fraud dealing with the drawee bank.

indicated, the action of account holder who did not authorise payment against the beneficiary's bank is to be disfavoured because the account holder may recover, in contract, from the originator's bank, in which the account holder's account is maintained, and from which the unauthorised transfer originated. No such option is available to the true owner of the cheque, who has no cause of action, in contract or otherwise, against the true owner's bank.

The position of an originator who instructed payment out of the originator's account, *vis-à-vis* the beneficiary's bank, is however quite distinguishable from that of the account holder who did not authorise payment towards the beneficiary's bank, as well as that of the true owner of the cheque towards the collecting bank. A beneficiary's bank designated by the originator in the payment order that initiated the transfer, or even an intermediary's bank not designated by the originator, while each is not strictly speaking, in privity with the originator, is not a complete stranger to the originator. It is more appropriate to resolve disputes between each such bank and the originator on the basis of the law that governs rights of participants in the credit transfer rather than under principles of law governing duties to strangers. To that end, delict may be even less justifiable in *Gilbey* (where the account holder instructed payment) than in *Vitalaire* (where the account holder did not instruct payment). Hence, as in *Bradford* and as should have been the case in *Vitalaire*, but notwithstanding *Securities Fund* to the contrary,<sup>85</sup> I agree with the disposition by the court in *Gilbey* of the claims in delict.

In dismissing the claims in delict, the court in *Gilbey* properly rejected Gilbeys' claim based on property in the funds received by Trust Bank and/or the existence of a fiduciary duty owed by Trust Bank to Gilbeys. In the course of its analysis, the court added however, that

“[a]lthough a bank may clearly act as a mandatary and may incur liability to its customer for consequential damages as a result of it failing in its duties in that regard, it is difficult to conceive of an action for damages in respect of a failure of a bank to credit a customer's account. The very essence of banking law runs contrary to this. As [sic] customer's action will simply be an action of debt.”<sup>86</sup>

But surely, this statement, insofar as its second part appears to deny the possibility of liability of a bank for losses incurred by the failure to credit customer's account, cannot be taken at face value. Rather, its second part must be understood as limited to state the obvious, namely, that so far as the debtor-creditor relation between the beneficiary's bank and the beneficiary is concerned, the former incurs no liability to the latter other than on the debt, and not in damages.<sup>87</sup> In other words, taken as a whole, the statement ought not to be taken to deny the possibility that the failure of a bank to credit customer's account may lead to various types of losses to the customer, such as decline of credit rating, failure to comply with net worth requirements, bank's refusal to execute payments on behalf of the customer, or wrongful dishonour of cheques drawn on the account. In principle, and subject to

<sup>85</sup> For *Vitalaire*, *Bradford*, and *Securities Fund* respectively see text at n 78-82, 76-77 and 73-75 above.

<sup>86</sup> *Gilbey* (n 7) 72.

<sup>87</sup> For the doctrinal distinction, in historical perspective, between liability on a debt and for damages for the breach of contract, see Levontin “Debt and contract in the common law” (1966) 1 *Is L Rev* 60.

normal rules as to foreseeability, all such losses are recoverable.<sup>88</sup> Nonetheless, and this is the point to be attributed to the court, their recovery is not a matter of delict, and is premised neither on proprietary interest in the funds nor on a fiduciary duty with respect to them. And of course, their recovery is not on the basis of the debt relationship. Rather, such losses are recoverable on breach of contract; in fact, as was acknowledged by the court in the first part of its statement, the contract is that of mandate. No contract between Trust Bank and Gilbeys as its customer, or the beneficiary of the credit transfer, was found to exist. Hence, the court was correct in declining to find liability for consequential damages.

It is then the question as to lack of a claim in contract by Gilbeys, as the originator of the credit transfer, which is at the crux of the matter. As recalled, Gilbeys' first alternative claim in contract was premised on what was alleged to be the "proper construction" of the instructions contained in the transaction documents as establishing a direct contractual relationship between it, as the originator of the funds transfer, and Trust Bank as the beneficiary's bank.<sup>89</sup> For each set of instructions, the court understood the contract pleaded to be not of a mandate or agency,<sup>90</sup> but rather, a contract of deposit, establishing a debtor and creditor relationship between Gilbeys and Trust Bank. Under this analysis, such a contract is concluded by the acceptance by Trust Bank of Gilbeys' written offer communicated to Trust Bank, through the agency of FNB, over each set of a credit transfer form and a clearance voucher. Under each such an alleged contract, "Trust Bank agreed to hold the amount in question for the benefit-or in the account of Gilbeys and not to credit the Fundtrust account bearing the number indicated in the credit transfer form".<sup>91</sup> As further recalled, in disposing of the first alternative claim in contract, the court held against the alleged "proper construction" of the documents but did not specifically reject this direct debtor-creditor theory.<sup>92</sup> At the same time, in upholding the exception directed against the third alternative claim in contract, premised on the ambiguity of the transaction documents and Trust Bank's alleged duty to inquire into their exact meaning, the court agreed with Trust Bank's two-fold submission that "an offer to enter into a debtor/creditor relationship can hardly be described as 'instructions',) as well as "that there can be scarcely be a contractual duty in an offeree to inquire into the exact meaning of an offer". Therefore, the court concluded, "the contract relied upon under the [third alternative claim in contract] is capable of only one construction, namely that it is a contract of mandate". To that end, "FNB did not become the representative of Gilbeys. When FNB executed the instruction to transfer it functioned as a mere mandatary".<sup>93</sup>

I submit that if there is no direct contractual relationship on the basis of

<sup>88</sup> For a codification of circumstances where such liability may arise, see UCC section 4A-404(a) and Official comment 2.

<sup>89</sup> The first alternative claim was formulated in par 8 to 15 of the particulars of the claim, set out on 14 of the judgment and discussed by the court on 20-40 (the *Gilbey* case (n 7)).

<sup>90</sup> Therefore, in this context, the court avoided discussing the issue as to whether the beneficiary's bank is to be regarded a mandatary, sub-mandatary, or substitute mandatary for the originator or originator's bank.

<sup>91</sup> (n 7) 26.

<sup>92</sup> For the first alternative claim in contract, see text around n 46-52, above.

<sup>93</sup> (n 7) 54, 55 and 58. For the third alternative in contract, see text around n 55-63 above.

ambiguous transaction documents (third alternative contract claim), no such contract can be stated to exist on the basis of “properly construed” transaction documents (first alternative contract claim). Stated otherwise, the rejection of the existence of such a contract in the former case (third alternative) must be taken to apply in the latter (first alternative) as well; the existence of a direct contractual relationship cannot be said to depend on lack of ambiguity in the transaction documents. Indeed, in rejecting a direct contractual relationship between the originator and the beneficiary’s bank in a funds transfer, the court’s mandate analysis is fully in line with both English banking law as well as South African mandate law.<sup>94</sup> Yet, as a matter of pure legal doctrine, such a direct contract is not an impossibility; in an appropriate case of an interbank transfer, one can view the originator’s instructions to the originator’s bank as a mandate to transfer funds *plus* an offer to be passed on to the beneficiary’s bank to keep funds for the originator upon their arrival to the beneficiary’s bank. Upon receiving the message and accepting the offer, the beneficiary’s bank is then to be charged with a duty to ascertain its exact meaning.

Indeed, so far as English law is concerned, the orthodox position under which no privity of contract exists between a principal and sub-agent has not remained unchallenged; it was disfavoured in the United States,<sup>95</sup> and was made in English law subject to exceptions.<sup>96</sup> It was thus recognised that privity of contract between a principal and sub-agent may exist when such privity is intended by either principal or agent.<sup>97</sup> On occasion, it may also be possible to view the contract between agent and sub-agent as one for the benefit of the principal so as to allow the latter to enforce it.<sup>98</sup> It was also specifically observed that a leading case as to the lack of liability in negligence by the sub-agent to the principal was decided prior to the emergence of modern law of negligence.<sup>99</sup> At the same time, it must be observed, establishing privity, or a direct principal-agent relationship, between the principal and sub-agent, will not universally benefit the principal. For example, if they are in a direct relationship, a principal may be held liable to the sub-agent for the sub-agent’s commissions and fees promised to the sub-agent by the agent.<sup>100</sup> As well,

<sup>94</sup> See text around n 29-37 above and text immediately below.

<sup>95</sup> See Seavey “Subagents and subservants” 1955 *Harv L Rev* 658, particularly 666-667. For a modern authority, see *eg*, *United Capitol Ins Co v Kapiloff* 155 F 3d 488, 498 (4th Cir 1998) citing *Restatement (Second) Agency* par 428(1) for the proposition that “[a] subagent who knows of the existence of the ultimate principal owes him the duties owed by an agent to a principal”.

<sup>96</sup> See in general Reynolds *Bowstead and Reynolds on Agency* (2001) 140-145.

<sup>97</sup> *De Bussche v Alt* (1878) 8 Ch D 286, 310.

<sup>98</sup> Under s 1 of the *Contracts (Rights of Third Parties) Act* 1999 Chapter c 31. Note however that for the statute to apply, while under s 1(1) enforceability by the third party needs not be explicitly provided for by the contract, s 1(3) requires that the “[t]he third party must be expressly identified in the contract by name, as a member of a class or as answering a particular description”. As a rule, a payment order issued either to an intermediary bank or to the beneficiary bank will identify the originator by name so as to satisfy s 1(3). For contracts for the benefit of a third party under South African law see *eg*, Christie *The Law of Contract in South Africa* (2001) 300-311 and Kerr *The Principles of the Law of Contracts* (2002) 85-94.

<sup>99</sup> Reynolds (n 96) 143 identifying *Calico Printers Assn Ltd v Barclays Bank Ltd* (1931) 145 LT 51 as the leading case for the lack of duty of care of the sub-agent to the principal, preceding the seminal negligence tort case of *Donoghue v Stevenson* [1932] AC 562.

<sup>100</sup> *Cf* *Winners Development Ltd v Goddard and Smith International Realty Inc* (1992) 68 BCLR (2d) 285 (SC) in Canada, in which the principal escaped such liability to the sub-agent on the basis of lack of privity.

arguably, in defending the principal's action, the sub-agent may anyway be able to rely on a disclaimer of liability clause in the agent's contract with the principal.<sup>101</sup> To that end, other than when no action is available to the principal against the agent, it is hard to justify the elimination of strict privity requirements to the position of the principal upon the default of the sub-agent so as to allow the principal to recover from the sub-agent. Particularly in the banking context, general principles of law applicable to general, and by-and-large frequent, situations, are not to be precipitated by the specific scenario of the less frequent situation of agent's insolvency.

In the final analysis, the recourse of the originator, in case of a default by the beneficiary's bank, whether against the beneficiary's bank itself, or the originator's bank as vicariously liable for the default by the beneficiary's bank, depends on the relative positions of the parties in the transaction. The court's characterisation of the beneficiary's bank as a sub-mandatar for the originator, not in privity with it and hence, in principle, not liable to it, ought thus to be examined.

It has long been established at common law that "the relation between banker and customer, so far as the pecuniary dealings are concerned, [is] that of a debtor and creditor".<sup>102</sup> Money to the credit of the customer can be placed by the customer or by a third party,<sup>103</sup> usually the debtor of the customer. Regardless from whom it is received, "the money placed in the custody of the banker is the money of the banker" who is obligated "to repay to the [customer] when demanded, a sum equivalent to that paid into his hands".<sup>104</sup>

It follows that payment by a third-party payor into the customer's bank account is in effect a mode of discharging the payor's obligation to the customer by constituting the bank a debtor to the payee-customer, in lieu of the payor, in respect of the sum payable.<sup>105</sup> Accordingly, an obligation to make "payment in cash" into a designated bank account may be discharged not only by means of the delivery of bank notes and coins to the bank, but also by means of "any commercially recognized method of transferring funds, the result of which is to give the transferee the unconditional right to the immediate use of the funds transferred".<sup>106</sup> In this context, "unconditional" was construed by the house of lords to mean "unfettered and unrestricted".<sup>107</sup>

For deposited funds, bank's indebtedness to the customer arises as early as in connection with the receipt of funds by the bank,<sup>108</sup> and not as late as when

<sup>101</sup> A question that was bypassed in *Calico* (n 99), where the action of the principal against the sub-agent was dismissed for lack of privity so that the question of the scope of the disclaimer clause in favour of the agent in its contract with the principal did not arise.

<sup>102</sup> *Foley v Hill* (1848) 2 HLC 28 at 45; 9 ER 1002 1009, per Lord Campbell.

<sup>103</sup> (n 102) 2 HLC 28 43; 9 ER 1002 1008.

<sup>104</sup> (n 102) 2 HLC 28 36-37; 9 ER 1002 1005-1006, per Lord Cottenham LC.

<sup>105</sup> King "The receiving bank's role in credit transfer transactions" (1982) 45 Mod L Rev 369 381.

<sup>106</sup> *The Brimnes, Tenax Steamship Co Ltd v The Brimnes (Owners)* [1973] 1 All ER 769 (QB) 782 per Barndon J; *aff'd* [1974] 3 All ER 88 (CA).

<sup>107</sup> *A/S Awilco v Fulvia S.p.A Di Navigazione (The Chikuma)* [1981] Lloyd's LR 371 (HL) 375.

<sup>108</sup> For a general statement to that effect, see eg *Royal Products* (n 40) 198-199, per Webster J. See also *Afivos v Shipping Co SA v R Pagnan and F Lli (The "Afivos")* [1980] 2 Lloyd's LR 469 (QB) 473 per Lloyds LJ; *rvs'd* [1982] 3 All ER 18 (CA); *aff'd* [1983] 1 All ER 449 (HL).



credit is posted to the account, not to mention the moment when beneficiary is advised of the payment.<sup>109</sup> In the context of payment by credit transfer, funds may typically be received by a beneficiary's bank by various means,<sup>110</sup> such as an interbank funds-transfer system,<sup>111</sup> credit posted to the account of the beneficiary's bank with the sending bank,<sup>112</sup> or debit posted by the beneficiary's bank to the sender's account maintained on the books of the beneficiary's bank.<sup>113</sup> The time payment occurs in the context of such banking processes is beyond the scope of this article.<sup>114</sup> However, what is important to note is that occurrence of payment from the originator to the beneficiary is linked to the receipt of funds by the beneficiary's bank and not the posting of credit to the beneficiary's account on the basis of receipt of such funds.<sup>115</sup>

Risk of delay or loss at the beneficiary's bank thus falls on the beneficiary. This is quite fair; after all, it was the beneficiary who designated, and chose to deal with the beneficiary's bank. It is for this reason that it may be appropriate to treat both the acceptance of payment and the banking operation of placing it at the beneficiary's disposal by crediting the beneficiary's account as carried out by the beneficiary's bank for the beneficiary;<sup>116</sup> having been discharged of the debt owed to the beneficiary upon the receipt of funds by the beneficiary's bank, the originator rightly lost interest in the ensuing process.<sup>117</sup> As the agent of the beneficiary, the beneficiary's bank may be sued by the originator or

<sup>109</sup> Earlier cases to the contrary, such as *Eyles v Ellis* (1827) 4 Bing 112 at 113; 130 ER 710 at 711, *per Best CJ* (requiring funds to actually be placed in the account) and *Rekstin v Severo Sibirsko* [1933] 1 KB 47 (CA) 57 *per Talbot J* (going further and requiring actual advice to the beneficiary) were either overruled or distinguished in *Momm v Barclays Bank International Ltd* [1976] 3 All ER 588 (QB) 597 *per Kerr J*.

<sup>110</sup> For an overview of means of transfers, see *eg Libyan Arab Foreign Bank* (n 39) 273-276 and 280-283.

<sup>111</sup> See *eg, Delbrueck v Manufacturers Hanover Trust Co* 609 F 2d 1047 (2d Cir 1979), dealing with an interbank payment over the New York-based CHIPS.

<sup>112</sup> See *eg, The Afvos* (n 108) and *Royal Products* (n 40) (though in the later case the account was opened by the sending bank for the purpose of carrying out this particular transfer). See also *Zim Israel Navigation Co Ltd v Effy Shipping Corp (The Effy)* [1972] 1 Lloyd's LR 18 (QB).

<sup>113</sup> See *eg, The Brimmes* (n 106), as well as n 120 below.

<sup>114</sup> Under the American UCC, the question is governed by s 4A-403, discussed by Geva "Interbank settlement in wire transfers – legal aspects" 2003 *UCCLJ* 47 64-71.

<sup>115</sup> In fact, this is also the position in the US under UCC article 4A. See s 4A-104(a), -406, and 209(b) and (c), under which a funds transfer is completed and the debt of the originator to the beneficiary is discharged upon acceptance by the beneficiary's bank which may be marked by the receipt of payment by the beneficiary's bank. Crediting the beneficiary's account marks "acceptance" and hence completion and discharge only when credit is posted prior to the receipt of funds.

<sup>116</sup> A leading case for the limited authority of the beneficiary's bank to receive payment for the beneficiary and credit the beneficiary's account (but not to make commercial decisions on the beneficiary's behalf such as to waive a delay in payment) is *Mardorf Peach and Co v Attica Sea Carriers Corp of Liberia, The Laconia* [1977] 1 All ER 545 (HL), judgments of Lord Wilberforce (with whom Lord Simon agreed) and Lord Salmon. See also *Royal Products* (n 40) 198-199, *ANZ Banking Group v Westpac Banking Corporation* (1988) 78 ALR 157 (Aus HC) (commented on by Luntz, (1988-9) 3 *BFLR* 363), as well as (in the US prior to UCC article 4A) *Delbrueck* (n 111) 1051-52.

<sup>117</sup> Notwithstanding *King* (n 105) 373, my view is that it is off the point that in placing the funds at the beneficiary's disposal by crediting the beneficiary's account, the beneficiary's bank does not necessarily act as the beneficiary's agent. Agency or mandate may be limited to the receipt of payment (possibly in discharge of a debt) and, in any event, in crediting the account the beneficiary's bank acts for the beneficiary, under a contract with the beneficiary (even if not as the beneficiary's agent) and not as the sender or originator.

sender in restitution, for funds mistakenly sent and still kept with it,<sup>118</sup> but not on the basis of liability stemming from its own breach.<sup>119</sup>

There is however also authority to the effect that in acting on a payment order received from a sender, the beneficiary's bank acts to carry out its sender's instructions, so as to put it in a contractual relationship with it in regard to instructions that purport to implement the originator's payment order. This appears to favour the treatment of the beneficiary's bank as a sub-agent or sub-mandatar of the originator, or where privity restrictions have been held not to apply, even in privity with the originator, whose specific instructions are at the root of what is carried out by beneficiary's bank.<sup>120</sup>

In my view, these two positions are not necessarily conflicting. Nor is any 'metamorphosis' necessarily involved in the position of the beneficiary's bank.<sup>121</sup> Rather, in acting on a payment order instructing payment to its customer, the beneficiary's bank may be seen as acting under both contracts, the one with the sender, and the other with the beneficiary. Yet, in case of an overlap in its obligations, it is the contract with the beneficiary that supersedes the contract with the sender. At the same time, there may be situations where no such overlap exists, in which case the beneficiary's bank is to be considered under its contract with the sender. Particularly, such would be the case where the beneficiary is not a customer of the beneficiary's bank, where there is no subsisting beneficiary's account into which funds may be deposited, or else, where the beneficiary is non-existing or unidentifiable. Otherwise in the latter case, the beneficiary's bank will be acting for nobody, which is inconceivable.

Alternatively, if a choice must be made, the beneficiary's bank is to be seen as acting exclusively for the beneficiary, in which case the originator's payment order is to be understood as instructing payment to be directed to the beneficiary's bank as the beneficiary's agent, rather than as designating the beneficiary's bank as the originator's agent instructed to make payment to the beneficiary. However, this interpretation could hold true only as long as the beneficiary's bank is in fact the beneficiary's agent, which can be the case only where the beneficiary holds a subsisting account with the beneficiary's bank,<sup>122</sup> or otherwise nominated the beneficiary's bank to obtain funds on the beneficiary's behalf. Where this is not the case, as, for example, where the beneficiary

<sup>118</sup> See *ANZ v Westpac* (n 116).

<sup>119</sup> Accordingly, where funds are deposited not as instructed, recovery from the beneficiary's bank is by the beneficiary of the credit transfer on breach of contract, or even on constructive trust, by a third party (such as a secured party of the beneficiary), claiming a beneficial interest in the funds to be deposited to a designated account.

<sup>120</sup> For the beneficiary's bank as the sub-agent of the originator, see *eg obiter* in *The Brimnes, Tenax Steamship Co Ltd v Owners of the motor vessel Brimnes* [1974] 3 All ER 88 (CA) 99; *aff'd* [1973] 1 All ER 769. For a scholarly support, coupled with rejecting the position that the beneficiary's bank is an agent for the beneficiary, see King (n 105) 373, 379, and 381. The characterisation was disfavoured in *Shawmut Worcester County v First American Bank and Trust Co* 731 F Supp 57 at 60-61 (D Mass 1990). For the beneficiary's bank as a sub-agent of the originator in a fact situation quite similar to that of *Gilbey*, see *Securities Fund* (n 5), discussed in the text at n 73-75, holding the beneficiary's bank directly liable to the originator as sub-agent, in negligence, or under a contract for the benefit of a third party.

<sup>121</sup> As argued by Ellinger, Lomnicka and Hooley *Modern Banking Law* (2002) 507.

<sup>122</sup> That is, typically, and subject to a customer's right to promptly reject an unauthorised deposit to the customer's account (as in *The Laconia* (n 116)), maintaining an account on the books of the beneficiary's bank is to be considered as an authority to receive payment.

is not a customer of the beneficiary's bank, where there is no subsisting beneficiary's account into which funds may be deposited, or else, where the beneficiary is non-existing or unidentifiable, the beneficiary's bank cannot be treated as acting for the beneficiary; hence it must be taken as acting for its sender.

There is no practical difference between these two modes of analysis;<sup>123</sup> in the absence of agency for the beneficiary, the beneficiary's bank is to be regarded as acting for its sender. Thus in *Gilbey*, if the beneficiary is to be viewed as non-existing or unidentifiable, so that Trust Bank cannot be viewed as having acted for any customer or beneficiary at the receiving end, it must be that it acted for the sender. It is in this context that Trust Bank can be viewed as a sub-agent or sub-mandatar of Gilbeys, as in fact pointed out by the court.<sup>124</sup> Yet, as indicated, under this analysis, it is not even all that implausible to regard a beneficiary's bank to be in direct contractual relationship with the originator, at least on the basis of the instructions to deposit funds in an account maintained on the books of the beneficiary's bank. This result may be more appealing than allowing the originator to sue the originator's bank for the default of the beneficiary's bank, a sub-agent designated by the originator.<sup>125</sup>

If there was a breach of duty by Trust Bank, as a matter of sound policy, it may be reasonable to release both Trust Bank from direct liability to Gilbeys and FNB from liability to Gilbeys for Trust Bank's default, only if Gilbeys is entitled to recover from FNB on the basis of a "money-back guarantee" for a funds transfer that has not been completed as instructed. Such an action is available under UCC article 4A,<sup>126</sup> but not at common law. Thus, in the absence of any action against the banks, the alleged breach by Trust Bank, which had substantially contributed to the loss, would have remained without legal consequences, as Trust Bank would not be answerable to anyone. Breach without a remedy is something to be avoided; hence, a legal analysis leading to such a conclusion ought to be discouraged. To that end, upon the default by Trust Bank, either FNB or Trust Bank must have been held liable to Gilbeys.

The key is then the existence of default by Trust Bank by reference to a duty to match a name and number or otherwise ascertain the identity of the beneficiary. It is only if such a duty exists, and that it was in fact broken, that the beneficiary of Gilbeys' payment order can be regarded as non-existing or unidentifiable. Moreover, if such a duty exists, and has been broken, Trust Bank is liable, either directly to Gilbeys, or through its obligation to reimburse FNB that is answerable to Gilbeys for the default of Trust Bank.

<sup>123</sup> With the same result effectively achieved in the US under UCC article 4A, notwithstanding the fact that, under s 4A-212, "A receiving bank is not the agent of the sender or the beneficiary of the payment order it accepts". Thus, under s 4A-209(b) and (c), acceptance by a beneficiary's bank for a payment order received for an account-holding customer may be constituted by the receipt of payment from the sender. Otherwise, under s 4A-207(c), there is no acceptance by the beneficiary's bank for a beneficiary who has no bank account by means of receipt of payment from the sender, and there is no acceptance whatsoever for a nonexistent beneficiary under s 4A-207(a).

<sup>124</sup> (n 7) 60 and see text at n 62 above.

<sup>125</sup> Cf the position under UCC s 4A-402(c) and (e) under which the "money-back guarantee" of the originator's bank to the originator arising upon the non-completion of the funds transfer (see text around n 30 above) does not apply where the transfer has not been completed due to suspension of payments by an intermediary bank designated by the originator.

<sup>126</sup> s 4A-402(c), discussed in text around n 29-30 above.

## 6 *Duties of beneficiary's bank in relation to unclear and ambiguous instructions*

At first blush, UCC article 4A appears to bypass the issue of duties of beneficiary's bank in relation to unclear and ambiguous instructions. This tentative conclusion can be drawn from the language of section 4A-207(a) that categorically provides that, in principle, "if in a payment order received by the beneficiary's bank, the name, bank account number, or other identification of the beneficiary refers to a nonexistent or unidentifiable person or account, no person has rights as a beneficiary of the order and acceptance of the order cannot occur". Yet, upon reflection, whether a beneficiary is "unidentifiable" ought to be determined under that provision by reference to the duties of the beneficiary's bank in relation to the ambiguity that necessitates identification. It was held in this context that identification can be made "in any number of ways including the plain wording of the [payment] order or the circumstances of the transfer".<sup>127</sup> Yet, case law dealing with the interpretation of UCC §4A-207(a) appears to me unsatisfactory,<sup>128</sup> focusing on its plain wording, particularly on its disjunctive language,<sup>129</sup> rather than on enhancing a desirable loss allocation scheme.<sup>130</sup> Jurisprudence other than under UCC article 4A may thus be more helpful.

In the United States, prior to UCC article 4A, *Walker v Texas Commerce Bank*<sup>131</sup> stated that in receiving a payment order from a sender, a receiving bank is under a duty "to implement commercially reasonable internal procedures designed to process [a payment order] in accordance with [the sender's] instructions, to verify the accuracy of, and compliance with, instructions, to detect and minimize inaccuracy, and to act diligently to remedy errors".<sup>132</sup> This is quite in line with the receiving bank's duty, as a mandatary<sup>133</sup> or agent, "to use reasonable care and skill" in carrying out a payment order, as set out in *Royal Products v Midland Bank*.<sup>134</sup> This applies to the beneficiary's bank as the last receiving bank in the chain of participants in a credit transfer. I will examine now the implementation of this standard in the circumstances of *Gilbey*.

In *Gilbey*, each credit transfer was carried out by means of a credit transfer form and clearance voucher issued by FNB to Trust Bank.<sup>135</sup> Arguably, for each transfer, between the two documents, it is the credit transfer form that was to be acted by Trust Bank in directing payment. On its part, being a mere acknowledgement of funds held for settlement, and not even designating a beneficiary's account, the clearance voucher served to facilitate the resulting interbank settlement for each payment carried out on the basis of the credit transfer form. In the facts of the case, as hinted by the court, the five credit transfer forms received by Trust Bank and identifying the beneficiary by Funds-

<sup>127</sup> *Donmar Enterprises Inc v Southern National Bank of North Carolina* (1993) 828 F Supp 1230 (WDNC) 1239-40; *aff'd* (1995) 64 F 3d 944 (4th Cir NC)

<sup>128</sup> See the discussion in *Geva Bank Collections* (n 8) 529-535.

<sup>129</sup> See *eg, Corfan Banco Asunción v Ocean Bank* (1998) 715 So 2d 967 (Fla Dist Ct App), where the provision was applied in the case of a payment order directing payment to an existing beneficiary properly identified by name though by a non-existing account number.

<sup>130</sup> See the dissent (n 129) at 969 at n 4.

<sup>131</sup> 635 F Supp 678 (SD Tex 1986).

<sup>132</sup> (n 131) 682.

<sup>133</sup> For the mandatary's obligations in South Africa, see *eg Joubert and Van Zyl* (n 37) 9-15.

<sup>134</sup> (n 40) 198.

<sup>135</sup> For the facts, see the text around n 12-18 above.

trust's account number and "Trust Bank (Gilbeys)" were amenable to the interpretation of instructing payment to Fundstrust's account at Trust Bank for the benefit of Gilbeys.<sup>136</sup> Such interpretation would have exonerated Trust Bank, which could only control the direction of the funds to Funds trust, and had no power whatsoever as to the subsequent disposition of the proceeds at Fundstrust's end.<sup>137</sup>

Unfortunately, the very little direct jurisprudence available from various countries may lend only limited support to this type of analysis.<sup>138</sup> Thus, a beneficiary's bank may reject an unclear or ambiguous payment order. Nonetheless, ambiguity ought to be somewhat significant; thus, a beneficiary's bank was held to be in breach in rejecting a payment order properly identifying the beneficiary by name, but misidentifying the beneficiary's account by omitting one digit from the account number.<sup>139</sup> At the same time, in case of ambiguity that cannot be described as trivial or insignificant, a beneficiary's bank was not allowed much discretion, notwithstanding good faith and reasonable efforts of identification.

Thus, in discharge of its duties as a mandatary or agent, not having rejected an ambiguous payment order, the beneficiary's bank is bound to exercise due diligence in identifying and locating the beneficiary.<sup>140</sup> Jurisprudence fastened on a bank endeavouring to identify the beneficiary quite a high standard. Having attempted to rectify an error or ambiguity in a payment order it received, a beneficiary's bank may be held to be in breach, when it acted other than on the basis of the sender's explicit and unequivocal advice, in connection with an ambiguous payment order susceptible of more than one plausible interpretation, and hence, amenable to alternative courses of action.<sup>141</sup> Accordingly, it was held that a beneficiary's bank did not act diligently, and thus was in breach, in each of the following cases:

- (a) The beneficiary's bank received a payment order directing payment into a designated account of "Lynwil". There was no such customer on the books of the branch and the designated account belonged to another company that had several accounts at the branch, one of which under the trade name of "Linwell". The branch thus credited that other company's account.<sup>142</sup>

<sup>136</sup> See *Gilbey* (n 7) 39 and the discussion in the text around n 44-45 above.

<sup>137</sup> as in *Tzaras* (n 33).

<sup>138</sup> To a large extent, the ensuing discussion summarises *Geva Bank Collections* (n 8) 519-28.

<sup>139</sup> See *eg*, in Canada, *Tafreschi v Canadian Imperial Bank of Commerce* [1986] BCI No 2096 (BCSC).

<sup>140</sup> See *eg*, in Canada, *Polack v Canadian Imperial Bank of Commerce* [1981] CA 587 (Que). For a discussion from Belgian perspective, see *eg* Thunis *Responsabilité du banquier et automatisation des paiements* (1996) 141-147, particularly 142; and Bruyneel "Le Virement" in Winandy *et al* (eds) *La Banque dans la vie quotidienne* (1986) 345 at 430-442, particularly 439-440.

<sup>141</sup> It ought to be observed that, unlike a beneficiary's bank in a credit transfer, a depositary bank in the cheque collection can draw conclusions as to the intended payee/holder from the fact that the latter is in possession of the cheque. Due to the different operation of the credit "push" mechanism (see above, first par of this article), no similar guidance is available to the beneficiary's bank.

<sup>142</sup> Canadian case of *Royal Bank of Canada v Stangl* [1992] OJ No 378; on-line: QL(OJ); No29464/88 (Gen Div), unreported. The judgment is reproduced in *Geva Negotiable Instruments and Banking* 621, being vol II of Ziegel, *Geva and Cuming Commercial and Consumer Transactions Cases, Text and Materials* (1995). The case is critically re-examined in text around n 171-172 below.

- (b) The beneficiary's bank received a payment order directing payment into a designated account of "Debor Décoration". The name did not exist on the books of the bank and the account number as provided was incomplete. Beneficiary's bank deposited the funds into an account with a very similar number, that is, with an extra digit, of "Décor Integration",) a name with "adequate phonetic resemblance" with that of the named beneficiary.<sup>143</sup>
- (c) A beneficiary's bank that received a payment order instructing payment to "maison Inro",) which did not exist on its books, deposited the funds to an account of "S.à.r.l. Inro" rather than to that of "Inro Corserty Ltd",) which was in effect the intended beneficiary.<sup>144</sup>

Arguably, these cases went too far in denying protection to a beneficiary's bank that made bona fide reasonable efforts to resolve an ambiguity in a payment order containing unclear or ambiguous description of the beneficiary. This is particularly true for the first case, and to a lesser extent the second, where account information in the payment order provided an adequate link to a beneficiary with a very similar name to the one in the payment order. What has been required from banks under this case law is something that goes beyond reasonable interpretation; rather, it is something that may approach "strict compliance" that has been required.<sup>145</sup> Be it as it may, existing jurisprudence thus seems to suggest that practically, other than in the case of insignificant ambiguity, a beneficiary's bank receiving a payment order containing unclear or ambiguous description of the beneficiary is to be advised to reject it rather than to attempt to resolve the ambiguity. Obviously, what level of ambiguity makes it "significant" may, in many instances, be in the eyes of the beholder.

In any event, a case of a payment order identifying a beneficiary by account number and name other than that of the account holder may be dealt with as a special case of unclear and ambiguous payment orders. The principal issue involved is whether the beneficiary's bank is required to spot the inconsistency and either reject the payment order or seek sender's clarifications or whether it is protected when acting on either the name or number.<sup>146</sup>

A duty to determine the consistency between the name and account number of the beneficiary can be rationalised easily by reference to the position of the beneficiary's bank as a mandatary or agent. Furthermore, at first blush, auto-

<sup>143</sup> Belgian case of *Frablemar* Mons 13 février 1984 49, as outlined by Bruyneel (n 140) 439, and Thunis (n 140) 142 n 55. Arguably, the case was distinguishable from *Tafreschi* (n 130), in which ambiguity referred only to number but not name.

<sup>144</sup> Swiss case, ATF 18 II 239 (1964). In support of the decision and against the reasonableness of the decision by the beneficiary's bank it may nevertheless be pointed out that payment was marked as referring to transactions that took place after the account holder had ceased, to the knowledge of the beneficiary's bank, to carry out business.

<sup>145</sup> For an intermediary bank in a credit transfer, the "strict compliance" standard, borrowed from the law of letters of credit, was specifically rejected in *Royal Products* (n 40) 199. For "strict compliance" as "[o]ne of the cornerstones of the law relating to letters of credit" see eg Hugo *Documentary Credits: The Law Relating to Documentary Credits from a South African Perspective with Special Reference to the Position of the Issuing and Confirming Banks* (LLD thesis Stellenbosch 1996) 114. In Canada, a beneficiary's bank was required to meet the "strict compliance" standard in identifying a beneficiary whose description was clear and unambiguous. See *Clansmen Resources Ltd v Toronto Dominion Bank* (19 Dec 1988) 86/00047 (BCSC); *aff'd* on other grounds (1990) 43 BCLR (2d) 273 (CA).

<sup>146</sup> The ensuing discussion closely follows Geva *Bank Collections* (n 8) 536-550.

mated processing based on number alone appears to be inconsistent with the duty of the beneficiary's bank to carry out the originator's presumed intention. The latter is likely to be better reflected in the name rather than in the number that is prone to be designed only to assist the direction of the funds to the intended beneficiary identified by name. This is particularly true for an originator's payment order given in writing rather than electronically. In Germany, the prevailing view is that by executing the originator's written payment order by issuing its own electronic payment order, a bank may not alter the originator's fundamental expectations that the credit transfer be carried out as manifested by the originator's intention, so that the beneficiary's bank does not become free from its duty to reconcile name and number. This precludes number-based automated processing and requires the direction of funds to the account of the named beneficiary.

At the same time in Germany, the issuance of the originator's payment order in electronic format is taken to demonstrate the originator's agreement as to the impact of automated processing. Only under such circumstances is the originator seen as relinquishing any reliance on the reconciliation by the beneficiary's bank between name and number so as to constitute a valid waiver.<sup>147</sup>

Clearing rules and interbank agreements may, however, release a beneficiary's bank from the duty to find errors and inconsistencies and authorise number-based automated processing. In such a case, loss caused by non-payment to the intended named beneficiary is to be allocated to the sending bank. Such arrangements exist in Germany,<sup>148</sup> Belgium,<sup>149</sup> as well as possibly in the United Kingdom in CHAPS,<sup>150</sup> and under the LVTS by-law in Canada.<sup>151</sup> In Holland, for large value domestic transfers, matching is undertaken by the clearing house.<sup>152</sup> There is, however, no consensus as to the impact of such arrangements on the originator, who is not a party to any such interbank agreement, and whether loss may be allocated to the originator by contract,<sup>153</sup> particularly by having such arrangements incorporated into banking standard form contracts.

All this is premised on the existence of a duty by the beneficiary's bank to match name and number, so that the debate focuses on whether and how such a duty may be contracted out of. At the same time, the very existence of such a

<sup>147</sup> See Schimansky *et al Bankrechts-Handbuch* (1997) 882-885 (in German. I relied on an unofficial translation.)

<sup>148</sup> (n 147).

<sup>149</sup> See Thunis (n 140) 143-144.

<sup>150</sup> Prior to the current NewCHAPS configuration as a combined service for sterling and euro payments, CHAPS Sterling Rule 4(f) (1999) effectively released the beneficiary's bank from the undertaking to check compatibility between name and number. The matter is not addressed in the current NewCHAPS Rules.

<sup>151</sup> no 7 PC 1998 -568, s 49.

<sup>152</sup> See Berkvens and Van Esch "Netherlands" in Effros (ed) *Payment Systems of the World* 241 (1994) 272. According to a co-author's clarification given to me, if a mismatch between a name and a number is established, advice is given by the clearing house to the beneficiary's bank which is then to decide itself whether the discrepancy is merely a matter of a typographical error, namely, whether this is merely a matter of a misspelling of a name, or whether it is indeed a matter of a named beneficiary who is not the holder of the numbered account.

<sup>153</sup> For a Belgian case holding the originator bound by such a rule, see Thunis (n 140) 144-147. For the prevailing view to the contrary in Germany, see Schimansky (n 147) 882-883. In the UK, current CHAPS Rules specifically say they do not benefit customers but are silent as to whether they bind them. See CHAPS Rule 10.1 (2002).

duty may nevertheless be put to question in an electronic environment of which participants are cognisant. Indeed, much can be said in the electronic age in favour of automated processing, and the resulting efficiency gains in automated systems, of which participants in a credit transfer ought to be aware, so as to maintain their own precautions in issuing accurate payment orders. Accordingly, the originator's knowledge of possible automated processing ought to be taken as recognition that the account number is the determinative factor in manifesting the intention as to the beneficiary's identification, regardless of whether the originator's own payment order is issued in writing or in electronic form. It is arguable then that the obligations of the beneficiary's bank as mandatary or agent are to be delineated pursuant to that newly formulated originator's intention, so that there is no room for an obligation to match beneficiary's name and account number.

Jurisprudence on this point has not set a clear course. A Canadian case from Quebec involving an inconsistency between the name and account number identifying the beneficiary is *Koridon Inc v JWI Ltd.*<sup>154</sup> Unfortunately, the issue concerning the obligation of the beneficiary's bank to match and ensure that consistency existed between the beneficiary's name and account number was bypassed there.<sup>155</sup>

<sup>154</sup> [1988] AQ No 888 (CAQ).

<sup>155</sup> In that case, a buyer of goods was instructed by the seller's fraudulent officer to pay the price into a designated bank account identified by the officer as belonging to the seller. In fact the account belonged to a company controlled by the fraudulent officer. Having attempted to send a payment order identifying the payee as the seller and instructing payment into the designated bank account, the originator's bank proceeded, the next day, and sent an amendment changing the beneficiary's name to that of the company controlled by the seller's fraudulent officer. Payment was carried out accordingly. The buyer successfully defended the seller's action for the price of the goods on the basis of the payment to the company controlled by the seller's fraudulent officer. No evidence was produced to explain the amendment to the payment order changing the beneficiary's name. The court concluded, however, that this must have happened upon compliance with the fraudulent officer's instructions given either directly to the originator's bank or to the buyer. While the report is silent on the point, this must have occurred following the rejection by the beneficiary's bank of the first payment order, identifying the seller as the beneficiary and instructing payment to an account belonging to the officer's company. The case thus appears to involve a beneficiary's bank (though the report speaks of a "banking network" ("*réseau bancaire*") into which the messages of the originator's banks were sent, such a network must be regarded as a processor acting for the beneficiary's bank) that verified the consistency between the name and account number of the beneficiary indicated in the first payment order and that moved on to reject it once it found that the beneficiary's name and account number did not match. In the facts of the case, both the seller and the company controlled by the seller's fraudulent officer had accounts with the beneficiary's bank, though in different branches. This, however, did not affect the result. However, the judgment is silent on whether this was in discharge of a duty to match name and number fastened on the beneficiary's bank. It is however interesting (though unlikely to be material in determining the law on this point) to note that, according to the evidence, in the absence of fraud involving the beneficiary's bank and one seeking to misdirect funds, the seller's president "found it impossible to believe that any Bank would deposit a sum in which the beneficiary did not correspond to the account".



In South Africa, a discussion on the issue was avoided in *First National Bank v Quality Tyres*.<sup>156</sup> On the other hand, a Swiss case<sup>157</sup> appears to be directly to the point. A beneficiary's bank received a payment order identifying the beneficiary both by name and account number. In fact, the account did not belong to the named beneficiary. The beneficiary's bank complied with the account holder's instructions and directed the funds to the specified account. Judgment was given against the beneficiary's bank, which wrongfully relied on information emanating not from its sender, but rather, from a customer claiming to be the beneficiary, which in fact was not intended by the originator to receive funds. Rather, the originator was fraudulently induced to make payment to a specified account, misrepresented to the originator as belonging to the named beneficiary, and not the actual account holder. The court held that a beneficiary's bank was not free to act on the basis of the account number alone, and in nevertheless so acting, it broke its due diligence obligation as a mandatary.

It however seems to me that the case falls short of undermining automated processing, since in the facts of the case, the beneficiary's bank acquired knowledge of the inconsistency between name and number, and chose to believe its customer and act on the customer's instructions. Stated otherwise, the case ought not to be taken as fastening on the beneficiary's bank an obligation to match a name and number; the court merely held that once knowledge of the

<sup>156</sup> 1995 3 SA 556. In that case, Senbank was instructed by Philip, a director of Quality Tyres, to provide funds under a credit facility available to Quality Tyres from Senbank, by making out a cheque payable to Quality Tyres and having it deposited at Quality Tyres' account with FNB Parktown branch. The cheque, drawn by Senbank on Trust Bank, and made out payable to Quality Tyres, was forwarded for collection by Senbank to FNB Breë Street branch, which was situated close to Senbank's premises, and with which Senbank customarily did its banking. The cheque was accompanied by a credit transfer form signed by Senbank instructing FNB Parktown branch to credit Quality Tyres' account which was further identified in the credit transfer form by number, supplied by Philip. In fact, Quality Tyres had no account with FNB, and the designated account was controlled by Philip personally. From FNB branch, the cheque and the credit transfer form were forwarded to the FNB's centralised bookkeeping centre. The credit transfer form was processed through a machine which caused the account identified by number to be credited with the amount of the cheque. The cheque was passed through the normal automated clearing process, paid by the drawee Trust Bank and returned to the drawer Senbank. Neither the cheque nor the credit transfer form passed through FNB Parktown branch. At all relevant times, this was the only location where the payee's name and designated account number could be matched. Ultimately, Philip embezzled the funds so credited to his account. Quality Tyres sued FNB for the loss, purporting to bring the action as a "true owner" claiming from a collecting bank. The action failed on the theory that, in the facts of the case and under general law, ownership in the cheque never passed to Quality Tyres, and always remained with Senbank. (But this overlooks the possibility of a constructive delivery of the cheque by Senbank to Quality Tyres. See Geva *Bank Collections* (n 8) 442 n 80, and in general for the action of the "true owner" against the collecting bank in South Africa 452-456.) In the course of the judgment, the court consistently treated the credit transfer form as a deposit slip. Thus, the case was not treated as a credit transfer to the beneficiary, under which the originator's bank paid the beneficiary's bank by cheque. Rather, it was treated as involving the collection of a cheque payable to the payee, which in fact, looks appropriate in the circumstances, notwithstanding the unorthodox form of the "deposit slip". Nevertheless, it is noteworthy that, had there been no cheque payable to the payee, payment to the beneficiary would have been effected by means of a credit transfer executed by a payment order issued by Senbank and instructing FNB to pay into Quality Tyres' account identified by number (designating in fact an account controlled by Philip). The issue of the duty of the beneficiary's bank, here FNB, to verify consistency between beneficiary's name and number, would have then arisen.

<sup>157</sup> BGE/ATF 126 III 20 (1999), unofficial translation to French [2000] *La Semaine judiciaire* 251 (Swiss federal court 17 Dec 1999)

inconsistency has been acquired, the bank is not free to overlook it. As will be seen below, this is also the position adopted by the drafters of UCC article 4A.

American common law was more decisive. *Bradford Trust Co of Boston v Texas American Bank* involved unauthorised instructions issued to the originator's bank and containing inconsistent name and account number for the beneficiary.<sup>158</sup> Loss was allocated to the originator's bank. That bank did not follow its own internal procedures to verify the genuineness of an unauthorised payment order. The payment order identified the destination account at the beneficiary's bank by number, as well as by the name of the purported originator. In fact, the numbered account belonged to the impostor's innocent creditor. This negligence of the originator's bank, and not the failure by the beneficiary's bank to notice the discrepancy between name and number, was held to be the ultimate cause of the loss. However, where the originator's payment order was genuine, the standard risk bearer under pre-article 4A American common law was the beneficiary's bank. The leading case is *Securities Fund Services Inc v American National Bank and Trust Co of Chicago*.<sup>159</sup> In that case, the beneficiary's bank was required to exercise care so as to notice a discrepancy between the account number and the beneficiary's name. Having failed to do so, it became liable to the originator. The originator could also sue the beneficiary's bank as a third party beneficiary of the undertaking by the beneficiary's bank to deliver funds as directed, as well as the principal who was injured by the negligence of his sub-agent (the beneficiary's bank).

In contrast, the Secretariat of the United Nations Commission on International Trade Law (UNCITRAL) took the position that "the development of a fast, reliable and inexpensive electronic funds transfer system could clearly be furthered by enabling banks to rely entirely upon the account number in the funds transfer instruction"<sup>160</sup> so that "a bank that entered a ... credit according to the account number on a funds transfer instruction it received would not be liable even though the entry was made to an account bearing a different name from that on the instruction".<sup>161</sup>

Originally, however, the drafters of UCC article 4A were reluctant to go all that far. Rather, under the 1987 draft of section 4A-207(6), processing based on number alone accorded protection to a beneficiary's bank only in connection with a payment order "transmitted [to it] by use of a standard machine-readable format", and only towards any sender with notice that "payment will be made on the identifying or bank account number". This was an exception to the general rule under the 1987 draft of section 4A-207(5), under which the acceptance by the beneficiary's bank by means of payment into the designated account that did not belong to the named beneficiary was invalid.<sup>162</sup>

Ultimately, the drafters of article 4A endorsed the UNCITRAL position. As

<sup>158</sup> (n 76).

<sup>159</sup> (n 5).

<sup>160</sup> Secretariat of the United Nations Commission on International Trade Law, *UNCITRAL Legal Guide on Electronic Funds Transfers* (1987) 37.

<sup>161</sup> (n 160) 128.

<sup>162</sup> National Conference of Commissioners on Uniform State Laws *Uniform Commercial Code Article 4A – Wire Transfers* (28 Sep 1987, draft for discussion only). For the UNCITRAL position, the early draft of UCC article 4A, and pre-article 4A case law, see Koh "Liability for lost or stolen funds in cases of name and number ~ discrepancies in wire transfers: analysis of the approaches taken in the United States and internationally" 1989 *Cornell Int L J* 91.

finally adopted, UCC article 4A-207(b) deals with the position of a beneficiary's bank receiving a payment order identifying the beneficiary "both by name and by an identifying or bank account" where "the name and number identify different persons".<sup>163</sup> Explicitly declining to apply to such a payment order the general rule governing a payment order payable to an "unidentifiable" beneficiary, provided by subsection (a),<sup>164</sup> subsection (b)(1), in the footsteps of UNCITRAL, allows a beneficiary's bank receiving inconsistent instructions to rely solely "on the number as the proper identification of the beneficiary of the order,"<sup>165</sup> provided that the beneficiary's bank did not know that the name and number refer to different persons. "The beneficiary's bank need not determine whether the name and number refer to the same person."<sup>166</sup>

Official Comment 2 to section 4A-207 explains that "[s]ubsection (b) allows banks to utilize automated processing by allowing banks to act on the basis of the number without regard to the name if the bank does not know that the name and number refer to different persons". The underlying automated processing environment is described in the comment as follows:

"A very large percentage of payment orders issued to the beneficiary's bank by another bank are processed by automated means using machines capable of reading orders on standard formats that identify the beneficiary by an identifying number or the number of a bank account. The processing of the order by the beneficiary's bank and the crediting of the beneficiary's account are done by use of the identifying or bank account number without human reading of the payment order itself. The process is comparable to that used in automated payment of checks."

Indeed, the drafters were quite cognisant of the fact that "[t]he standard format . . . may also allow the inclusion of the name of the beneficiary and other information which can be useful to the beneficiary's bank and the beneficiary". However, such information "plays no part in the process of payment". As a matter of fact, the drafters did not deny that a beneficiary's bank which has both number and name can determine the inconsistency; however, their conclusion was that "if a duty to make that determination is imposed on the beneficiary's bank the benefits of automated payment are lost". According to comment 2:

"Manual handling of payment orders is both expensive and subject to human error. If payment orders can be handled on an automated basis there are substantial economies of operation and the possibility of clerical error is reduced."<sup>167</sup>

<sup>163</sup> Notwithstanding *General Electric Capital Corp v Central Bank* 49 F 3d 280 (7th Cir 1995), the provision does not cover a payment order received by the beneficiary's bank identifying the beneficiary by name only, even where the account number has been omitted by the sending intermediary bank due to its own error.

<sup>164</sup> For UCC section 4A-207(a), see text around n 126-128 above.

<sup>165</sup> This position is implemented in the USA by interbank electronic networks. See eg s 4.1.4 of the Operating Rules of the National Automated Clearing House Association (NACHA) (2003 ACH Rules), as well as s 5(b) of Administrative Procedures — Clearing House Interbank Payments System (CHIPS) (CHIPS Rules and Administrative Procedures Jan 2003).

<sup>166</sup> UCC 4A-207(b)(1). No similar protection is afforded under UCC articles 3 and 4 to a depository bank that misdirected proceeds of a check on the basis of an incorrect lock box identification number placed on a cheque that contained the correct name of the payee. See *Continental Airlines Inc v Boatmen's National Bank of St Louis* 13 F 3d 1254 (8th Cir 1994). However, in part, the decision was based on lack of knowledge by the payee (and payor) of the consequences of automated processing (n 165) 1260. Cf UCC par 4A-207(c).

<sup>167</sup> Official Comment 2 to UCC section 4A-207.

In any event, section 4A-207(b) is not limited to actual cases of automated processing. "A bank that processes by semi-automated means or even manually may [nevertheless] rely on number as stated in section 4A-207."<sup>168</sup>

Under section 4A-207(b)(2), protection is afforded to a beneficiary's bank acting on the basis of the name only, rather than on the account number only where the named beneficiary "was entitled to receive payment from the originator of the funds transfer".<sup>169</sup> Protection for payment to the rightful beneficiary is also given to the beneficiary's bank under subsection (b)(2) where it knows that "the name and number identify different persons". In effect, under subsections (b)(1) and (2), where a payment order received by the beneficiary's bank identifies the beneficiary both by name and by an identifying number, the beneficiary of the order is the account holder, unless the beneficiary's bank knows that the name and number identify different persons.

On the other hand, where the beneficiary's bank knows that the name and number identify different persons it may not rely on the number as the proper identification of the beneficiary. In such a case, under subsection (b)(2), "no person has rights as beneficiary except the person paid by the beneficiary's bank if that person was entitled to receive payment from the originator of the funds transfer". Otherwise, where "no person has rights as beneficiary", the rule under subsection (b)(2) is that "acceptance of the order cannot occur".

Under UCC section 1-201(26), "knowledge" is "actual knowledge". Under UCC section 1-201(27), for an organisation such as a bank, knowledge is effective for a particular transaction "from the time when it is brought to the attention of the individual conducting that transaction, and in any event, from the time when it would have been brought to his attention if the organization had exercised due diligence". Due diligence requires the maintenance of "reasonable routines for communicating significant information to the person conducting the transaction" as well as "reasonable compliance with the routines".<sup>170</sup> It follows that knowledge by somebody at the bank, other than someone processing the payment order, does not taint the bank with knowledge. Furthermore, in an automated processing setting, it is not expected that knowledge of inconsistency between a name and number should be discovered through any interdepartmental communication. Ignorance by those processing payment orders is likely to achieve the desired result of lack of knowledge as to any discrepancy between a name and number.

Subsection (b)(1) is broad enough to protect a beneficiary's bank that does not act automatically on the basis of the account number, as long as the bank paid the designated account without knowledge that it did not belong to the named beneficiary. An analysis of a non-UCC article 4A case may serve as a good example. In *Royal Bank of Canada v Stangl*,<sup>171</sup> the beneficiary's bank received a payment order directing payment at a designated branch to Lynwil International Trading Inc, account no 916327. However, to the knowledge of that branch, this account belonged to another entity, Unitec, that had several accounts at that branch, one of which (no 627902) was in the name of Linwell International. Having consulted Unitec, and relying on past experience, includ-

<sup>168</sup> (n 167).

<sup>169</sup> UCC s 4A-207(b)(2). In theory, this may even be broader than the intended beneficiary.

<sup>170</sup> UCC s 1-201(27).

<sup>171</sup> (n 142).

ing on the provenance of the funds transfer, the branch deposited the funds into one of Unitec's accounts. In fact, the intended beneficiary was Lynwil, a different entity that had no account at that branch.<sup>172</sup>

At first blush, the application of section 4A-207(b) to this situation is unclear. Indeed, the beneficiary's bank might have assumed that "Lynwil" was a misspelling of "Linwell",) so that the bank "[did] not know that the name and number refer[red] to different persons," as envisaged by subsection (b)(1). Nonetheless, was payment made in reliance on the number (subsection (b)(1)), or to "the person [mistakenly] identified by name" (subsection (b)(2))? This may be a question of fact; however, in the final analysis, inasmuch as payment was made to the holder of account no 916327, as instructed in the payment order, and in the absence of knowledge by the beneficiary's bank of the discrepancy between the name and number, that bank should be protected under subsection (b)(1).

A recent decision in the United States appears to support this analysis of *Stangl* under UCC article 4A, but at the same time, to point out a weakness in the plain language of section 4A-207(b). In *New South Federal Saving Bank v Flatbush Federal and Savings and Loan Association of Brooklyn* three payment orders received at different times by the beneficiary's bank identified the beneficiary by the same account number.<sup>173</sup> In each case the beneficiary's bank entered the number into its system and found that the account belonged to one Femi Ingold, a name that was part of the named beneficiary in each of the three payment orders. Thus, the first payment order identified the beneficiary by name as "ROBERT PLAN INC FBO<sup>174</sup> FEMI INGOLD ULTIMATE NETWORK". The second payment order identified the beneficiary by name as "ROBERT PLAN CORPORATION" but named "FEMI INGOLD ULTIMATE NETWORK" under "originator to beneficiary information". The third and last payment order named as beneficiary "ROBERT PLAN INC FC-FEMI INGOLD ULTIMATE NETWORK".

The court was inclined to conclude that "FEMI INGOLD ULTIMATE NETWORK",) which appeared in each payment order, was Femi Ingold's trade name, and not a separate entity. This however does not settle the application of section 4A-207(b)(1); what matters under that provision is not whether the account holder and the Network are in fact "different persons";) rather, what matters is lack of knowledge by the beneficiary's bank that they are. Indeed, "knowledge" is defined in section 1-201(25) in terms of "actual knowledge",)<sup>175</sup> and in the facts of the case, no such knowledge was proved to

<sup>172</sup> Under the common law, in a non-article 4A jurisdiction, judgment was given in favour of the intermediary bank against both the beneficiary's bank and Unitec. Unitec failed to assert any restitutionary defence to the action for the recovery of the mistaken payment. Under such circumstances, both the common law and article 4A warrant the judgment against Unitec. Judgment was given against the beneficiary's bank on the basis of its negligence. For a critique on the judgment against the beneficiary's bank on the basis that it was plausible for the beneficiary's bank to believe that the beneficiary's name was misspelled and not that it referred to someone other than the account holder, see Geva "Ambiguous wire instructions: *Royal Bank of Canada v Stangl*" 1995 *Can Bus LJ* 435. In the facts of the case, the funds originated from mining operations in Guyana, of the type from which also the account holder received payments in the past. In my view this lent further support to the reasonableness of the action by the beneficiary's bank.

<sup>173</sup> 2003 WL 1888678 (SDNY Apr 15, 2003)

<sup>174</sup> meaning "for the benefit of".

<sup>175</sup> This is acknowledged by Official comment 2 to s 4A-207.

exist.<sup>176</sup> On this basis, the court held that the beneficiary's bank was protected under section 4A-207(b)(1) so that its acceptance was effective.

Nevertheless in the facts of the case, "Femi Ingold Ultimate Network" consistently appeared in each payment order in conjunction with Robert Plan Inc or Corporation, presumably the originator. Had there not been a designation of an account by number that in effect belonged to Femi Ingold, the payment orders could have been interpreted as instructing payment to Robert Plan, even if perhaps jointly with Femi Ingold. The court might be taken to suppose that the designation of the account number that actually belonged to one who was part of the beneficiary's name supported the reasonableness of the action by the beneficiary's bank. At the same time, there is nothing in the language of section 4A-207(b) to require that interpretation by the beneficiary's bank of the payment order ought to be reasonable. That is, what is required under the provision is lack of actual knowledge; in the facts of the case, doubts as to the references in the payment orders to the Network and originator as part of the named beneficiary did not amount to knowledge that the named beneficiary is other than the account holder.

The latter interpretation of section 4A-207(b)(1) is bothersome. True, protecting a beneficiary's bank acting on the number without knowledge of the inconsistency, though rationalised on the basis of the efficiency of automated processing, the provision is not so limited in its scope.<sup>177</sup> Nevertheless, section 4A-207(b)(1) ought not be read as protecting a beneficiary's bank acting on an unreasonable identification of the beneficiary based on the interpretation of the payment order. In the facts of the case, we do not know whether the beneficiary's bank had actual doubts as to who was the named beneficiary; we do know though that, from the information available at its disposal, the bank should have had doubts, as processing was not automated. On policy grounds, the court's failure to determine the reasonableness of the bank's interpretation and specifically link the ultimate decision to such reasonableness is thus unsatisfactory.

In *Stangl* doubts as to the exact spelling of the beneficiary's name did not amount to knowledge that the named beneficiary and the account holder were different persons. In this respect, it is no different from *Flatbush*, where doubts as to the identity of the named beneficiary did not amount to knowledge that the named beneficiary and the account holder were different persons.<sup>178</sup> At the same time, the identification of the named beneficiary as "Linwell" in *Stangl* appears to me to be even more reasonable than the identification of the named beneficiary as "Femi Ingold" in *Flatbush*. *Flatbush* thus demonstrates that, particularly when processing is not automated, there is a grey area between

<sup>176</sup> Since in the facts of the case all relevant information was available to "the individual conducting the transaction" at the beneficiary's bank no issue arose under s 1-202(27), dealing with notice, knowledge or notice, knowledge or notification received by an organisation.

<sup>177</sup> See Official comment 2 to s 4A-207.

<sup>178</sup> While unlike in *Stangl*, actual error, namely different intention by the originator, was not said to exist in *Flatbush*, this ought not to have affected the question concerning the interpretation of s 4A-207(b)(1). It is the action of the beneficiary's bank on the basis of an account number that belonged to one who could reasonably be viewed as the named beneficiary that ought to have afforded the protection of the provision in *Stangl* as in *Flatbush*.

knowledge and lack of knowledge as to whether name and number identify the same beneficiary. In such a case, the reasonable identification test ought to apply. It may however well be that to secure the acceptance of such interpretation a clarifying amendment to section 4A-207(b) is to be recommended.

As for *Gilbey*, the judgment does not tell us whether processing at Trust Bank was automated. Had it been automated, Trust Bank would have been protected under section 4A-207(b), in which case any ambiguity in the name of the beneficiary (that is either “Trust Bank” or “Trust bank (Gilbeys)”) would not have been relevant. Moreover, *per* the preceding analysis, irrespective of whether processing was automated or not, even actual knowledge by Trust Bank of the ambiguity would not necessarily have amounted to actual knowledge that the beneficiary was other than “Fundstrust”,) at least as long as this was on the basis of a reasonable interpretation of the payment order.

## 7 Conclusion

Had UCC article 4A applied in *Gilbey*, Gilbeys would not have had a direct cause of action against Trust Bank. It could have nevertheless recovered from FNB, either where Trust Bank had known that the payment order it had received identified the beneficiary by inconsistent name and number, or where FNB had not advised it of the possibility of processing at Trust Bank on the basis of number alone. FNB could have recovered from Trust Bank only in the former instance, that of acceptance by Trust Bank on the basis of number but with knowledge that it did not belong to the named beneficiary.

Outside UCC article 4A, existing jurisprudence does not provide unequivocal direct support for such a scheme. Nevertheless, the better view calls for the recognition or adoption, even without legislative intervention, of a rule providing for the adequacy of processing by a beneficiary’s bank on the basis of account number, where it acts without knowledge of inconsistency between name and number. After all, such a rule was adopted by legislation in response to the exigencies of commerce and hence is amenable to be developed by courts themselves as a matter of modern ‘law merchant.’

Fastening on the beneficiary’s bank an obligation to match name and number and verify consistency between them will discourage automation in the processing of payment orders. Conversely, allowing a beneficiary’s bank directing payment to rely exclusively on account number will go beyond reaping the efficiency benefits of automated processing in terms of speeding the processing of payments.<sup>179</sup> It will also release the beneficiary’s bank from the burden of dealing with, and passing judgment on, ambiguities in the name, an area in which, to date, jurisprudence has been quite hostile to beneficiary’s banks.<sup>180</sup> That is, matching name and number may disclose not only whether the account belongs to the named beneficiary, but also that the name is misspelled so that there are doubts whether the account belongs to the beneficiary. To that end, placing on the beneficiary’s bank an excessive burden, or a too high standard approaching strict compliance, will serve only to increase litigation as well as

<sup>179</sup> as described in text at n 159-167.

<sup>180</sup> See text at n 141-145 (under law other than UCC article 4A) and 128-130 (for article 4A jurisprudence).

the rejection rate of payment orders, and hence, will undermine the efficacy of the wire transfer payment.

True, what appears to me, at present, as an unjustifiably rigid state of law concerning the duties of a beneficiary's bank in ascertaining the meaning of unclear or ambiguous instructions, is not engraved in stone; the emergence of greater flexibility by court decisions is still an attainable objective. Indeed, a recent American case protecting the beneficiary's bank against a possible error in its interpretation of the named beneficiary, as long as it credited the designated account,<sup>181</sup> may signal that such flexibility is just around the corner, at least in the context of the construction of UCC section 4A-207(b)(1). Yet, it is obvious that releasing a beneficiary's bank from the duty to match name and number, namely, adopting the rule of that provision, is likely to significantly reduce the magnitude of the issue. Thus, where there is no duty to match name and number, processing may be carried out on the basis of the number alone; under such circumstances, the discovery of ambiguity in the name is less likely to happen. All this may be taken into account by courts, and not only the legislature, in determining applicable law.

Without the benefit of legislation it is more difficult to expect courts to adopt a "money-back guarantee" rule in lieu of recovery on the basis of breach of duty. Yet, as the judgment given in *Gilbey* demonstrates, as a matter of doctrine, recovery by the originator in case of breach by a beneficiary's bank is not a simple matter. Direct privity between the originator and the beneficiary's bank is not straightforward; in fact it was rejected by the court in *Gilbey*. At the same time, as indicated, it may be problematic to fasten on the originator's bank vicarious liability for breach by the beneficiary's bank, a sub-agent nominated by the originator.

I submit that liability for "money-back guarantee" may be fastened on an originator's bank on the basis of an implied term in its contract with the originator.<sup>182</sup> Nevertheless, in the final analysis, the best response to risks posed by legal uncertainty<sup>183</sup> is a comprehensive legislative solution. Requirements and needs of participants in modern payment systems are best met by a modern statute; though not without the need for further fine-tuning, article 4A-type legislation is thus the most appropriate response to issues raised in *Gilbey*. Indeed, no given solution is perfect;<sup>184</sup> yet comprehensive legislation is the best way to assure that the law will keep up with the pace of technological and business developments.

<sup>181</sup> See text around n 173-176.

<sup>182</sup> Such a term may be viewed as a "necessity" so as to satisfy the test of implying terms in a contract under *Liverpool City Council v Irwin* [1977] AC 239 254. Without such a term, if there is no privity between the originator and the beneficiary's bank and the originator's bank is not vicariously liable for the default of the beneficiary's bank, the originator will remain with no remedy for the default by the beneficiary's bank.

<sup>183</sup> Legal risk, that is, the risk of a poor legal framework or legal uncertainties, was identified, though primarily in the context of clearing and settlement, as one of four risks that can arise in payment systems. To that end, the first core principle for systematically important payment systems requires a well-founded legal basis for a system. See Committee on Payment and Settlement Systems *Core Principles for Systematically Important Payment Systems – Report of the Task Force on Payment System Principles and Practices* (Basel: Bank for International Settlement, Jan 2001).

<sup>184</sup> See for example critique on the interpretation of UCC s 4A-207(a), referred to above, in text at n 128-130.



**SAMEVATTING****DIE BEGUNSTIGDE SE BANK EN DIE BEGUNSTIGDE BESKRYF DEUR NAAM EN  
NOMMER: AANSPREEKLIKHEIDSKETTING EN AANSPREEKLIKHEIDSTANDAARD  
IN FONDSOORDRAGTE**

Die artikel handel oor aspekte rondom die identifikasie van die begunstigde in die laaste betalingsopdrag in 'n kredietoordrag ontvang deur die laaste bank in die oordragketting (die begunstigde se bank), die pligte van die begunstigde se bank in geval van 'n dubbelsinnige beskrywing van die begunstigde in die betalingsopdrag en die aanspreeklikheid van die begunstigde se bank in geval van pligsversuim. 'n Begunstigde kan in 'n betalingsopdrag aangedui word by wyse van naam, rekeningnommer, of beide. Die outeur bespreek die ongerapporteerde Suid-Afrikaanse saak *Gilbey Distillers and Vintners (Pty) Ltd v ABSA Bank Ltd* en ondersoek hoe die saak hanteer sou word in terme van artikel 4A van die *Uniform Commercial Code*. Die pligte van die begunstigde se bank met betrekking tot onduidelike of dubbelsinnige instruksies word vervolgens bespreek. Die outeur doen aan die hand dat die behoeftes van deelnemers aan moderne betalingstelsels verkieslik deur moderne wetgewing bevredig moet word. Wetgewing soos artikel 4A, met die nodige wysigings, sou die mees gepaste oplossing vir die geskilpunte in die *Gilbey*-saak wees.