

In the High Court of Justice Administrative Court

Claim No. 137 Of 2004

Safdar Azam

— v —

Wahid Iqbal and Sara Dayman

The operation of
contemporary Informal Value
Transfer (Hawala) systems:
A report

by

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APPENDIX 1: ROGER BALLARD CV		ERROR! BOOKMARK NOT DEFINED.

1 The basis on which this report has been prepared

1.1 My instructions

This report has been prepared in response to instructions from Mr Sukhwinder Singh Riyait of Stachiw Bashir Green Solicitors to prepare report on the operation of Informal Value Transfer/Hawala systems, and most especially with the following matters:

1. Whether the Money Transfer business which the defendant operated was a Hawala System.
2. Whether this operation was comparable to a banking operation
3. How quickly it is expected that monies will be delivered to the point of destination in such systems?
4. If the monies do not reach the destination, what consequences are expected to follow?
5. In such a system, can the monies handed over for delivery to a distant destination be utilised for any other purpose than that specified by the client?
6. To what extent is it commonly understood by the parties involved in a Hawala system that the system is based on expectations of trust, reliability and honesty on the part of all those concerned in the operation?

1.2 My academic and professional standing

As an anthropologist, I have a long-standing professional interest in all the many social, cultural, political and economic issues which have arisen as a result of migration from India and Pakistan to the UK. My first-hand experience of these developments now stretches back for more than thirty years, during the course of which I have spent a considerable amount of time conducting first-hand ethnographic research in migrants villages of origin in India and Pakistan, as well as in the communities which migrants and their locally-born offspring have become established in so many of Britain's major cities. On the basis of this research I have produced a large number of academic publications, so much so that I can reasonably claim to be one of Britain's leading academic experts in this field. One result of this is that I am frequently instructed to prepare expert report in all manner of legal proceedings – both civil and criminal – in which members of one or other of Britain's South Asian communities have been involved. My current academic post is Director of the Centre for Applied South Asian Studies in the University of Manchester. (I have attached a fuller CV as an Appendix to this document).

In recent years I have also begun to take a special interest in the organisation of financial transactions within Britain's South Asian communities, and most especially the ways in which settlers in the UK transfer funds to their kinsfolk in India and Pakistan through Informal Value

Transmission Systems – otherwise known as IVTS or Hawala networks. As the publications list in my CV makes clear, I have recently published a number of articles on migrant remittances in a number of books and Journals. More specifically, I am the author of two specialist papers on the operation of Hawala systems. “Coalitions of Reciprocity and the Maintenance of Financial Integrity within Informal Value Transmission Systems: the operational dynamics of contemporary hawala networks” published in *The Journal of Banking Regulation* Vol. 6, no. 4 (2005), and “Hawala: criminal haven or vital financial network?” which is to be published in the October Issue of the *Newsletter of the International Institute of Asian Studies*, University of Leiden. In addition I recently submitted a paper addressing these issues in response to HM Treasury's current consultation initiative on the better regulation of money service businesses.¹

1.3 The material on which I have relied

In preparing this report I have for the most part relied on the contents of the bundle of documentation with which I have been supplied by those instructing me, namely:

1. Statement of Claimant and Statements in support;
2. Statement of the Defendant, Sarah Dayman, Receiver;
3. Pleadings;
4. Order of 11th October 2006.
5. Copy Transcript Re: I;
6. Copy Transcript Re: H.

1.4 Statement of truth

In preparing this report, I have taken it for granted that my principal obligation is to the Court, rather than to those instructing me. In fulfilling my instructions I have also made my best efforts to present an objective account of the business practices currently deployed by UK-based Hawaladars conducting international cross-currency value transfer operations. I can consequently confirm that all the analyses I have developed and conclusions that I reached on this basis, and which I have set out in this Report represent my considered professional opinion and are true to the best of my knowledge and belief.

¹ Copies of these papers can be downloaded from
<http://www.casas.org.uk/papers/pdfpapers/coalitions.pdf>
<http://www.casas.org.uk/papers/pdfpapers/IAShawala.pdf>
<http://www.casas.org.uk/papers/pdfpapers/IVTSconsultation.pdf>

2 The process of value transfer through contemporary IVTS/Hawala networks

2.1 *My perspective*

It must be emphasised at the outset that I have prepared this report as an anthropologist, not as a lawyer, and the analytical vocabulary that I have utilised in setting out my argument is powerfully conditioned by my disciplinary background. Hence if there should at any stage be a dispute about the precise meaning of any of the terminology used in this report, the presumption should always be that I am using the term about which debate has arisen within an anthropological frame of reference, rather than one derived from English law.

The most obvious example of a term around which confusion may arise is the term trust. Besides looming large in my own analysis, this issue is also a major bone of contention between the litigants in these proceedings. In this particular case the issue can (or so I trust) be disentangled relatively straightforwardly. Unless indicated otherwise, I will normally use that term in its verbal form, and go on to use it as a key feature of the relationships of reciprocity which can readily be established between two persons who trust one another. However from my perspective whether, when, and in what circumstances such behaviour leads either to the creation of a Trust, or to the notion of something being held in Trust from the perspective of English law is quite another matter. I am emphatically not an expert on English law. Hence even when I use terms drawn from English law, or which are congruent with those which have a specialist meaning in English law – and for obvious reasons I will try to use such terms as infrequently as possible – I should emphasise that I am from a legal perspective ultimately using such terms in an *inexpert* way.

2.2 *Basic operational premises in which contemporary IVTS/Hawala systems are grounded*

In making sense of how contemporary IVTS/Hawala trans-currency and trans-national value transfer networks operate, several key points are worth making at the outset

- i. The whole operation is underpinned by relationships of mutual reciprocity, both as between hawaladars (operators of the system) and their customers, and as between hawaladars themselves.
- ii. The transmission of delivery information (how much is to be delivered, in what currency, to whom and where) travels along a quite different, and much more straightforward route than that followed by the underlying units of value.

- iii. Hence the transmission is handled separately, and normally takes the form of consolidation of individual units of value denominated in currency x into much larger tranches – typically worth £/\$ 100,000.
- iv. Once in place these tranches are used to broker back-to-back settlement-swaps. Such swaps involve Hawaladar A exchanging his tranche of value denominated similar value in currency x for a tranche of similar value, but denominated in currency y , assembled by Hawaladar B at some distant destination.
- v. Once such value-swap – the core feature of every Hawala operation – has been made, Hawaladar A's can set about arranging the disaggregation of his tranche of value, now more appropriately denominated in currency y , ready for delivery to the nominated recipients.

2.3 *The customers' perspective*

This is to look at the basic premises of the whole operation from the Hawaladar's point of view, and can conveniently be regarded as the 'mystery' of his trade – in the sense that that term was used in mediaeval English; and just as was the case with respect to a mediaeval Guild, no-one who is not a member of the transnational coalition of Hawaladars is quite sure how its initiates achieve their magical ability to the transfer of value from one place to another, and from one currency or another, virtually overnight. All they know is that Hawaladars routinely and reliably implement the promised transfer, and the calculations they make in working out just how much will be delivered at the other end.

The calculation which Hawaladars currently set before their customers are quite straightforward, and contain two variables. Firstly the exchange rate (which varies on a daily basis) on the basis of which the hawaladar calculates the relative value of differing currencies, and secondly the fee he charges for implementing the transfer. Lets us call these variables e and f . If we denote the value of the sum paid in as x , and the sum (of an identical value) paid out in a different currency on delivery as y , we can construct a simple formula to represent the transaction: $xe + f \rightarrow y$

In choosing the Hawaladar on whose services they wish to rely, customers can easily enquire about the scale of the size of the two variables, e and f , which a given Hawaladar uses – and perhaps even bargain about them – before making their final choice. As a result of intense mutual competition the fee rate has been driven down to a minimal level: it currently appears to be no more than £5, no matter what the size of the value transfer may be. As a result the crucial variable – no less for the hawaladar than the customer, is the exchange rate e . To cite a concrete example, let us suppose that a customer wishes to transfer £500 to Pakistan, and the

Hawaladars offers an exchange rate of Rs. 100 to the Pound. The calculation will then run: $£500 \times 100 = \text{Rs. } 50,000$, with a further fee of £5 being payable for implementation.

At first sight the transaction might seem to offer extremely poor pickings to the Hawaladar – but only if one ignores the additional profits he is in a position to make on the exchange rate. This can be done in a variety of ways. One of the most vital is by having access to constant flow of information about changes in relative value of a variety of currencies, and the capacity to make spot purchases at opportune moments; the second is by having access (whether direct or indirect) with holders of Pakistani rupees prepared to pay a premium to convert their value into a harder currency; and the third – and perhaps the most important – is access to an international network of hawaladars through which to broker value swaps.

However Hawaladars' customers have no knowledge of – and very little interest in – the details of these back-office practices. As far as they are concerned the Hawaladar is simply a transfer agent, with whom he makes an agreement that for an agreed fee, the sum of value which he hands over will be delivered in an appropriate form in some distant part of the world within forty eight hours. In the unlikely event of the contract not being fulfilled, the customer expects to get his money back.

2.4 *The facts of the instant case*

On 18th September 2004 the claimant made an agreement with the defendant to the effect that the defendant would arrange to transfer the sum of £12,000 into his sister's account in the UBS Bank in Pakistan. The defendant indicated that his fee for so doing would be £5, and that the rate of exchange he was currently offering was Rs. 105.75 to the Pound. Hence the defendant calculated that the sum of Rupees due for delivery was Rs. 1,269,000. The claimant then presented the defendant with a banker's draft for £12,000, together with – or so I presume – £5 in cash to cover the fee. The defendant then handed the claimant receipt, setting out the details of the transaction that had been agreed upon, and also including a note of the Know Your Customer precaution which he had taken in compliance with the requirements of the Anti Money-Laundering regulations.

Unbeknownst to the claimant – and, or so I presume, the defendant – Customs and Excise were about to obtain an order freezing all the defendant's assets, on suspicion that he was engaged in money laundering. As a result of his having his assets frozen – or so I once again presume – the defendant failed to fulfil the contract he had agreed upon. Subsequently the defendant was

not proceeded against, but all his assets were subject to confiscation, with the result that they were transferred to the custody of a receiver, the second defendant, Ms. Sara Dayman.

These proceedings have arisen as a result of the non-fulfilment of the contract which the claimant made with the defendant on 18th September 2004, with the result that the customer is now suing the Hawaladar – in the form of the Receiver, who has now taken control of all the Defendant's assets – seeking the return of his funds.

2.5 *The core issues*

As the correspondence which the litigants have exchanged, two core contentious issues of fact have emerged:

- i. What has happened to the funds which the claimant transferred to the defendant?
- ii. What was is the precise status of the funds once a customer has transferred them to a Hawaladar?

Whilst neither question admits either an easy or a straightforward answer, the first is rather easier to address than the second. Moreover it is impossible to give a fully reasoned answer to the second question without have begun to resolve the issues thrown up by the first.

3 **Just what happens when a customer hands over funds to a Hawaladar?**

Customers utilise the services of Hawaladars with a very specific purpose in mind: to effect a swift transfer of value from one location to another. Since customers expect delivery within forty eight hours, Hawaladars do not hang about. They get on with the task of value transfer at the earliest opportunity.

3.1 *The logistics of value transfer*

However, just like a carrier who offers a next-day parcel delivery service to his customers, Hawaladars do not set about delivering all the parcels of value which they receive one by one. Rather they wait until the end of the day before bulking up all the parcels of value they receive, before transmitting them in bulk through the logistical structure of their delivery system – just as Courier businesses such as DHL or Fed Ex do on a global scale and a daily basis. But whilst the operators of value transfer systems utilise exactly the same logistical process of collection → consolidation → bulk transfer → deconsolidation → delivery to implement their customers orders, the stuff which they process in this way is not physically packets and parcels, but instead something far more abstract, since their business is one of *value* transfer.

How, then, do Hawaladars go about implementing their logistical task? Whilst it is only to be expected that every operator's procedures will display some distinctive quirks, the challenges which they all face are identical in character, to which only a limited set of logistical viable solutions are currently available. With this in mind it is worth noting that several sets of solutions are available, depending on whether the Hawala swap of the kind indicated in 2.2 iv. above takes place locally, and hence in Sterling, or whether it is brokered internationally in a currency other than sterling – which most usually means in US dollars in New York.

If the swap is implemented in sterling, my experience suggests that the transfer of value is most usually made physically, in the form of a transfer of sterling currency notes in the UK, matched by a parallel swap of Rupee currency notes in the reverse direction in Pakistan.²

But if, as is probably much more frequently the case, the deal is brokered internationally, a rather different route is normally followed. The swap cannot in these circumstances be effected in sterling. Hence the funds in question must be re-denominated in an internationally negotiable currency – in fact almost always in US dollars – before the Hawala swap can be implemented. If this route is followed, currency notes swiftly fall out of the picture – at least as far as the process of value transfer is concerned.

3.2 *The use of banks and bank accounts in facilitating internationally-brokered Hawala swaps*

In these circumstances the Hawaladar will normally bank all the funds he has received in cash from his customers as soon as possible, keep a close eye on the relative value of the relative value of the pound and the US dollar on his live feed from the financial markets, and when he judges the price to be advantageous, contact his bank's forex dealing room to instruct them to make a purchase on the spot market, the proceeds of which are then immediately transferred to his US dollar account. He is then in a position to participate in the brokering of a back-to-bank Hawala deal. Once such a deal is agreed upon he can then transfer his now consolidated and US Dollar denominated tranche of value by TT to whatever destination the Hawaladar with whom he has brokered the deal may specify (most often I account held in a major bank on

² I have set out a detailed account of this kind of settlement swap in my paper *Hawala: criminal haven or vital financial network?* (see note 1)

Wall Street), in exchange for a similar tranche of value denominated in Rupees, delivered to his agent in Pakistan (or indeed in any currency and country that he may choose to specify).³

It goes without saying that a consolidating Hawaladar must be appropriately equipped to undertake procedures of this kind. Amongst other things he will need bank accounts denominated in US dollars as well as in sterling, as well as arrangements with his bank to facilitate the bulk delivery of pre-counted currency notes, appropriate arrangements with its forex dealing room, and a ready access to TT facilities. It also follows that these accounts will exhibit an exceptionally high level of value through-put. Hawaladars operate in the *value-transfer* business, and the more swiftly they can implement those transfers the more efficient his business will be, and the greater his profits are likely to be.

Value transfers and re-denominations in this context are invariably implemented in a highly consolidated format. The distinctiveness of the relatively small packets of value of which Hawaladars take delivery from their retail customers is consequently wrapped up in a parcel of VALUE which will in due course be disaggregated into packets of value re-denominated in another currency, in which format they are for delivery as promised at the final destination. To further reinforce my point about the insubstantial nature of value transactions at this level, it is worth noting that in real terms the transfer is implemented by the transmission of a multitude of bits and bytes of data wrapped up in a highly encrypted format within streams of electronic packets passed through the internet as a part and parcel of on-going exchanges of information between the computer systems of major international banks.

3.3 *Madina Travel's methods of implementing value transfer*

I have not yet had access to the documentation which would enable me to establish precisely how Madina Travel set about implementing the logistics value transfer on behalf of its customers. Nevertheless it seems reasonable to assume that its practices were closely akin to those outlined above, and discussed in much greater detail in my paper in *The Journal of Banking Regulation*. If so, I would assume that once retail customers handed over with instructions that the sum agreed upon should be delivered in Pakistan, the sum delivered to the defendant would not remain denominated in sterling for very long. Rather it would soon be

³ Full details of transactions structured in this way can be found in my paper *Coalitions of Reciprocity and the Maintenance of Financial Integrity within Informal Value Transmission Systems: the operational dynamics of contemporary hawala networks* (see note 1)

swept together with all the other packets of value which he had received during the course of the day, and used to purchase US dollars in the spot market. Once purchased, the proceeds would promptly be transferred into the Hawaladar's US dollar account, ready to be used in a Hawala swap which would release a tranche of Pakistani Rupees of an equivalent value, ready for disaggregation and delivery to retail customers.

If no such delivery was made in this case, it seems reasonable to assume that the value drawn from the funds transferred to the Defendant by the Claimant never found their way into that final value swap. To be more explicit when Madina Travels' assets were frozen, it is only to be expected that some packets of value which the Hawaladar which was in the midst of processing would not have moved sufficiently far through the system to be included in such a swap, with the result that they would still either be located in the sterling account into which they were initially deposited, or – if they had moved one step further onwards through the process – in the Hawaladar's US dollar account. Since the Receiver reports that Madina Travel's Sterling account was overdrawn at the point at which she took over, but that there were significant assets in the US dollar account. Given that the promised delivery never took place, there appear to be good reasons to believe that the packet of value associated with the funds passed to the defendant by the claimant had reached his US dollar account by the time the freeze occurred.

4 The current dispute

4.1 The Claimants' position

In a letter dated 25th May the claimant's solicitors set out the basis of their client's claim as follows:

We believe that our Client has demonstrated to yourselves that the monies which were held on trust by Wahid Iqbal and Madina Express were monies from legitimate sources and from his own bank account, the Halifax.

Despite our Client being able to demonstrate that the monies were totally legal and from legitimate funds we understand that you have refused to refund those monies, which we presume you have possession of.

Please could you confirm whether or not you acknowledge that the monies, a sum of £12,000.00, was deposited by our Client with Madina Express on or about the 18th September 2004. Please also confirm whether those monies passed through the account of Madina Express into any other account. Please confirm whether there are any monies in the account of Madina Express or its associated companies.

4.2 The Defendant's response

In a letter dated 31st March 2005 the Defendants replied as follows:

Thank you for your letter of 24 May 2005, the contents of which have been noted.

I am Unable to determine the date at which your client's money was deposited into the Pound Sterling account or transferred into the US Dollar account. This is because varying amounts are deposited and transferred to the US Dollar account, which DO NOT correspond with the amounts deposited by individuals or credited to the Pound Sterling account. To this end, I am unable to determine whose money was deposited into the Pound sterling account on which dates.

For your information all the funds held in the sterling account were transferred to the US dollar account.

You will note at paragraph 23 of the Court Order, that it does 'not prevent any bank , exercising any right of set off it may have in respect of any facility which it gave to the Defendant before it was notified of [the] order.'

I would confirm that the bank did exercise their right of off set, between the overdrawn Sterling account and US Dollar account.

In the case of Akhtar Hussain – DTA No. 21 of 2001, where monies were deposited under similar circumstances, it was deemed that the funds form no part of monies held on trust, express or implied and ordered that the Receiver continue to hold them pending determination of the confiscation proceedings. . .

Furthermore, I would reiterate that following the decision in re. W [*The Times 15 November 1990*] no payment can be made in respect of the liability outstanding to your client from restrained funds.

4.3 The Claimant's response

On 4th August 2005 the Claimants replied

We would ask you to provide us with copies of the ledgers of the sterling and dollar accounts for Medina Travel. We would also ask for you to confirm how much money there was in these accounts at the date when you commenced your receivership. Please also confirm how much monies there is in those accounts now, and if there is a difference between the two amounts, please provide a detailed account of why there is a difference,

The results of their request clearly did not meet with their satisfaction, for they wrote again on 6th October:

Please provide us with the following:

1. Copies of all ledgers of the sterling and dollar accounts for Madina Travel.
2. Confirmation of how much money was in these accounts (sterling and dollar) at the date eighth of September 2004. .
3. Confirmation of how much money was in these accounts (sterling and dollar) when you commenced your receivership.

4. How much monies there are in these accounts (sterling and dollar) at present explaining any differences if any from the date when you started your receivership together with details of why there is a difference, should there be a difference.
5. Copies of bank statements for Madina Express Travel for the dollar and sterling accounts from the 8th September 2004 onwards.

4.4 *The Defendant's final response to the Claimant's letters of enquiry*

The correspondence went on for some time in this vein, and appears finally to have come to a close in a letter from the Defendants dated 2nd December 2005:

You have previously requested a great deal of information and copy documentation. I regret that I am not able to release copies of the company's records as you requested. I must emphasise that I am not being deliberately obstructive, and certainly have no wish to appear so.

The records, of which you request copies, were provided to me by my appointers under the terms of an Order appointing me as Receiver of the above defendant's assets. Those records were provided to enable me to deal with matters involving the assets subject to the Receivership. At no time was it envisaged that such records, or copies, would be provided to any other party.

I emphasise that I have nothing to hide. To answer the questions raised in your letter of 25 November 2005, I confirm that, according to the copy of the day book in my possession, it would appear that your client did pay the sum of £12,000.00 to the Travel Agency and/or Money Transfer business of the above defendant. I have no records in my possession which directly show your clients funds being paid into the Sterling Account. On the assumption that your clients monies were indeed deposited into the Sterling Account then those funds would have been included in transfers made into the US\$ Dollar Account.

As previously stated the Sterling Account was overdrawn at the time of my appointment and a net balance was remitted to me following the application of set-off by the bank.

Nothing I have seen in this case indicates that your client's monies were held on trust. Whilst I appreciate your client's position in this, I regret that I cannot provide copy documentation to any party for the reasons set out above.

As far as I am aware no further progress on these matters has since been made.

4.5 *Some factual conclusions which can be drawn on the basis of this correspondence*

At the very least it seems to be agreed that

- i. A sum of £12,000 was transferred into one or other of Madina Travel's accounts shortly before its assets were frozen
- ii. By the time the Receiver took over, the relevant Sterling Account was overdrawn, because all of its contents had been transferred into a US dollar account.
- iii. There was a substantial amount of funds in the US dollar account when the Receiver took control of Madina Travel's assets,
- iv. Since then the bank has exercised its right of off-set between the overdrawn Sterling account and US Dollar account.

4.6 *Points still in contention*

These still include

- i. Whether the Claimant has a right to have a sight of the details of the transactions and balances in the relevant bank accounts
- ii. Whether the sum which the Claimant transferred to the Defendant to be held in trust on his behalf, as the claimant alleges, or whether the transaction was more akin to a straightforward deposit, such as one might make into one's bank account.
- iii. If the defendant had further transferred the value which the claimant had transferred into his bank account, whether that value was still sufficiently distinguishable for it even to be arguable that he had any claims over it.

As far as point i. is concerned, I am clearly in no position to offer any opinion as whether or not the claimant has right to see the details he has asked for. All I can say from my part is that if that available was indeed available, I would be in a much better position to gain an understanding of the way in which this particular Hawaladar organised his businesses, as well as the most likely fate of the funds which the claimant had instructed the defendant to transmit to Pakistan on his behalf. That said, points ii. and iii. are best addressed after having considered the legal precedents to which I have found myself directed as a result of having examined the arguments advanced by the contending parties.

5 **Relevant precedents cited by the contending parties**

5.1 *Mr. Justice Moses' ruling in Re: H*

In a case involving a virtually identical set of issues, and in which I had acted as an expert witness in the criminal trial which preceded the subsequent civil trial exploring issues closely akin to those at stake in these proceedings, Mr. Justice Moses made extensive reference to a report on The Operation of Contemporary Hawala Systems which I had prepared for use in the original criminal trial. In these circumstances I have decided that I can best proceed by setting out a substantial excerpt from his judgement before going on to present a commentary on the conclusions which the learned judge went on to draw, very largely with reference to the arguments and analyses which I had set forth in my report.

11. As described both by the anthropologist, Dr Ballard, and in the statement that I have read from the Receiver, the Hawala system operates as follows: a claimant or a wholesaler acting on behalf of a number of claimants would approach Mr Hussain in order to secure a rupee equivalent or Pakistan rupee equivalent of sterling for collection in Pakistan. Mr Hussain would offer the claimant a particular sterling Pakistan rupee exchange rate. If acceptable to the claimant he or she would pay an amount in sterling to Mr Hussain, always in cash. In return for that payment Hussain

would agree to make available for collection in Pakistan an agreed rupee equivalent. In those circumstances, Mr Hussain would collect substantial sums from customers which were paid into a sterling account at the Alliance and Leicester. In order to fulfil his obligations to his customers in relation to making Pakistan rupees available for collection in Pakistan, he would convert the sterling into either US dollars or Pakistani rupees at a more favourable exchange rate than that which he had agreed to make these transactions on behalf of the customers. In those circumstances he earned in his turn, and he was able to do so because particularly as a wholesaler, he was dealing in very large sums indeed, and was able, therefore, to obtain more favourable exchange rates. When the recipients were in Pakistan, he arranged for his brother, who operated a business in Pakistan, to distribute the agreed funds to the intended recipients.

12. The system was described in two full reports (which make extremely interesting reading) from Dr. Ballard which were, as I understand it, used in the trial. He points out, in a report dated 6th April 2001, that the system of Hawala dates back to the 11th Century. Hawala was described as a system which underpinned long-distance trade. It is described as a transfer of debt, overcoming some very understandable problems of financial security when traders had to sail down the Red Sea and across the Indian Ocean susceptible to attack from pirates as they travelled by camel Mesopotamia and Iran along the Silk Road to Central Asia and China.

13. The Hawala business required trust between customers and the hawaladar operating system. It is described by Dr Ballard as creating a spatially extended kinship network so that visiting traders in any one of the centres could either deposit funds or, failing that, provide goods or property as a surety to the custodian of that arm of the business who would in turn provide a Hundi, effectively a letter of credit, even if in technical terms the document was in fact a letter of acknowledgment of debt to the depositor which was encashable either on demand or at some fixed date in the future.

14. Later in his report, Dr Ballard quoted the IMF of the World Bank Report of 2003 relating to hawala transactions, in which the report says:

"The accounting details of hawala transactions are similar to other kinds of international payments, including those that go through the banking system. Like the hawala system, banks do not necessarily move physical cash between branches or correspondent banks when effecting transfers. The main difference between hawala and formal institutions is that the subsequent settlement of accounts usually remains outside formal operating channels that can be monitored by international authorities."

Nevertheless, competitive though the business is, Dr Ballard describes the existence and necessity for keeping records, despite the fact that the hawaladars do have excellent memories. He says at paragraph 6.5.2:

"... the records which each member of the hawala chain keeps (and is interested in keeping) are tightly circumscribed. No-one is exactly interested in exactly where their partners got their money from: that is their business; similarly no-one is greatly interested in how those funds are passed on - they reach their assigned destination: all that matters is that they get there. It therefore follows the amount of information which hawaladars will have immediately to hand with respect to the transactions which pass through their node in the system will vary considerably depending on their precise location in the network, as well the category of transaction at hand."

The reference to "a chain in the system" is apt to describe the sort of procedures that took place in relation to Mr Akhtar Hussain's case. He deals sometimes with

individuals, but mainly as a wholesaler, those lower down the chain collecting from their clients and then depositing a collection of that money with Mr Hussain who himself would enter into transactions with foreign banks both in New York and Dubai. Dubai is important because it was there that the settlement would take place, and the money having been deposited at Dubai the settlement would then be exchanged for the Pakistan rupees, for example, which would be transferred through other financial institutions so that money would finally be available for collection in Pakistan.

15. Dr. Ballard describes the system as analogous to commercial banking, saying at paragraph 9.3.4:

From this perspective hawala money transmitters can be seen to be in the same position as [a] commercial banker who receives a payment from a client (and not infrequently from his client's agents) asking for funds to be taken from one account and transferred into account number such and such in the name of so and so in such and such a branch of a such and such a bank on the far side of the world."

The contention that the claimants might have a proprietary claim in the light of facts, which, I have briefly identified, seems to me completely without foundation.

16. Let me stress the following facts. Firstly, Mr Akhtar Hussain was not required to use the money either deposited by a wholesaler lower down the chain than him or by an individual client in any particular way. His obligation was to make available an agreed number of, for example, Pakistani rupees in Pakistan. That was the limit of obligation. By buying and selling Pakistan rupees at different and more favourable exchange rates he was able to conduct his business at a profit. The claimants would not have known the extent of his profit, nor would they have had any right to know since, after all, this is a cut-throat, highly competitive business and it would be important for Mr Akhtar Hussain to be able to keep to himself the rate of his [re]turn and how he was able to make it.

17. The timing of his foreign currency purchases would be to suit his own interests and to obtain the most favourable interest rates; and it appears that on occasions he would distribute funds to intended recipients well before he had received any from Mr. Akhtar Hussain. Thus there was no identifiable link between the particular money paid over by a particular claimant and the funds available for collection distributed in Pakistan.

18. Mr Hussain was not contractually obliged to and did not operate any kind of segregated account or accounts for the monies received by him from the claimants. They were paid into the sterling account, mixed with his own money and used from time to time entirely legitimately, it seems to me, for his own purposes. He used them, for example, for his own business expenses, and there are examples of payments to Syrian Arab Airlines and Securicor. The claimants would have been well aware that the money was not to be segregated in any way and there is no suggestion of any obligation that they should be. In those circumstances the claimant's money became Mr Hussain's money and was paid, as I have repeatedly said, in return for an obligation to make available Pakistan rupees for collection in Pakistan,

19. That outline of the facts and the salient features of the system, as I have said is totally inconsistent with any trust. A number of authorities have been referred to me by Mr Cullen, who appears for the Receiver. The well-known passage in Foley v Hill (1848) 2HL 28 at 35 is far more analogous in its description of a bank and the bank's relationship with the customer to the hawala system than that of any trust. The Lord Chancellor said at page 35 (page 1005 of the report):

"Money when paid into a bank ceases altogether to be the money of the principle. It is then the money of the banker who is bound to return an equivalent by paying a similar sum to that deposited with him when he has asked for it."

In the instant case the obligation is, as I have described it, to make available for collection money in a foreign country.

5.2 *Foley v Hill*

Given that Mr. Justice Moses used the judgement in *Foley v Hill* as the foundation for his analysis, I took the opportunity to look more closely at the contents of their Lordships judgement in this case.

The summary of their judgement reads as follows:

The relation between a Banker and Customer, who pays money into the Bank, is the ordinary relation of debtor and creditor, with a superadded obligation arising out of the custom of bankers to honour the customer's drafts; and that relation is not altered by an agreement by the banker to allow the interest on the balances in the Bank.

The relation of Banker and Customer does not partake of a fiduciary character nor bear analogy to the relation between Principal and Factor or Agent, who is *quasi* trustee for the principal in respect of the particular matter for which he is appointed factor or agent. (1002)

I then went on to look at the grounds on which their Lordships reached this conclusion. Commenting on the supposed fiduciary character existing between the banker and his customer, the Lord Chancellor argued that an analogy with the role of a factor was inappropriate in this context:

Partaking of the character of a trustee, the factor – as the trustee for the particular matter in which he is employed as factor – sells the principal's goods, and accounts to him for the money. The goods, however, remain the goods of the owner or principal until the sale takes place, and the moment the money is received the money remains the property of the principal.

So it is with regard to an agent dealing with any property; he obtains no interest himself in the subject-matter beyond his remuneration; he is dealing throughout for another, and though he is not a trustee according to the strict technical meaning of the word, he is *quasi* a trustee for that particular transaction for which he is engaged; and therefore in these cases the Courts of Equity have assumed jurisdiction.

But the analogy entirely fails, as it appears to me, when you come to consider the relative situation of a banker and his customer; and for that purpose it is quite sufficient to refer to the authorities, which have been quoted, and to, the nature of the connection between the parties (as to a banker's right to lien see *Brandao v. Barnett*, 12 C1. and F. 787). Money, when paid into a bank, ceases altogether to be the money of the principal (see *Parker v. Marchant*, 1 Phillips 360); it is then the money of the banker, who is bound to return an equivalent by paying a similar sum to that deposited with him when he is asked for it.

The money paid into the banker's, is money known by the principal to be placed there for the purpose of being under the control of the banker; it is then the banker's money; he is known to deal with it as his own; he makes what profit of it he can, which profit he retains to himself, paying back only the principal, according to the custom of bankers in some places, or the principal and a small rate of interest, according to the custom of bankers in other places.

The money placed in the custody of a banker is, to all intents and purposes, the money of the banker, to do with it as he pleases; he is guilty of no breach of trust in employing it; he is not answerable to the principal if he puts it into jeopardy, if he engages in a hazardous speculation; he is not bound to keep it or deal with it as the property of his principal, but he is of course answerable for the amount, because he has contracted, having received that money, to repay to the principal, when demanded, a sum equivalent to that paid into his hands.

6 A commentary on Mr. Justice Moses' analysis and conclusions

6.1 *The five grounds on which Mr. Justice Moses arrived at his conclusions*

The core feature of Mr. Justice Moses' analysis is that the services provided by Hawaladars are closely congruent with those provided by banks, and hence that the status of any funds which a customer passes to a Hawaladar is effectively identical in law to that of any funds which a customer deposits with his bank. Hence the principles laid down in *Foley v Hill* also apply in the instant case.

In the analysis he sets to justify his position, Mr. Justice Moses specifies five grounds on the basis of which he reached this conclusion. These are:

- i. Dr. Ballard describes the system as being akin to commercial banking (para 15)
- ii. Mr. Akhtar Hussain was not required to use the money deposited in any particular way.(para 16)
- iii. The timing of [Mr. Hussain's] foreign currency purchases would be to suit his own interests, and to obtain the most favourable interest rates (para 17)
- iv. Mr Hussain was not contractually obliged to and did not operate any kind of segregated account or accounts for the monies received by him from the claimants. The claimants would have been well aware that the money was not to be segregated in any way and there is no suggestion of any obligation that they should be. (para 18).
- v. the facts and the salient features of the system [are] totally inconsistent with any trust (para 19)

Whilst I am most gratified in the extensive use which the learned Judge made of my reports in reaching his conclusion, I would like to emphasise that I was not called to give evidence in the course of the proceedings in question. Indeed I did not know of their very existence – let alone that Mr. Justice Moses' relied extensively on the contents of my reports in the course of

reaching the conclusions on which he based his judgement – until I was instructed in the instant case.

Had I been called to give evidence in *Re: H*, I would have had an opportunity to make a contribution to the discussion about the contents of my reports which I presume took place during the course of those proceedings. But I was not present to do so. Hence I would like to take the opportunity to do so in the context of the present proceedings. With that in mind I have taken the opportunity to submit each of the grounds on which the learned Judge reached his conclusions to further analysis.

6.2 *Foley v Hill and its implications*

So far as I can see Mr. Justice Moses used two main sources to reach his core conclusions: my own reports on the operation of Hawala systems on the one hand, and their Lordships judgment in *Foley v Hill* on the other. Having read that judgement in full, I came to the conclusion the analysis which their Lordships made of the issues before them in that judgement – the most crucial sections of which I have set out above – is exceedingly germane to the current proceedings. The principal reason why I came to that conclusion is that besides dealing with the question of the status of any deposit a customer may have made whilst it is in the custody of his bankers, the ruling also clearly differentiates between the status of such a deposit made with a banker, and that when the principal passes turns of some other kind of good to a factor or agent. In the latter context the Lord Chancellor ruled that the agent

... obtains no interest himself in the subject-matter beyond his remuneration; he is dealing throughout for another, and though he is not a trustee according to the strict technical meaning of the word, he is *quasi* a trustee for that particular transaction for which he is engaged.

This may well be precisely the kind of argument which the Claimants in the instant proceedings are seeking to advance. It consequently follows that a central issue is whether in fulfilling his role as a Hawaladar Wahid Iqbal (and indeed others in a similar position) can most appropriately be regarded as having acted as a banker in the sense outlined in *Foley v Hill*, or whether his role was more akin to that of a factor or an agent.

6.3 *Responses to the specific points raised by Mr. Justice Moses*

For the sake of clarity I have begun by responding to Mr. Justice Moses five grounds simply as they stand, before going on to reconsider his overall arguments and conclusions in the light of their Lordships ruling in *Foley v Hill*.

6.3.1 *Dr. Ballard describes the system as being akin to commercial banking (para 15)*

As far as I am concerned the crucial term here is my phrase *akin to*: in all my published work I have taken great care to emphasise that whilst the operators of IVTS/Hawala networks provide their customers with services of the same kind as *some* of those which are provided by banks, and although they also use settlement methodologies which are in many ways structurally identical to those deployed by banks, the package of services offered by the operators of such networks are far more limited than those provided by banks.

Hence whilst the system [of value transmission] which underpins their operation may indeed be *akin to* those deployed by commercial banks, in my opinion it is not at all helpful to describe them as banks. Indeed I made the point at some length in my submission to HM Treasury, in response to their current Consultation on the better regulation of Money Service Businesses.

Although Hawaladars implement value transfer operations of the same kind as those implemented by banks, they do not take deposits, nor do they make loans: rather theirs is a highly specialised *value-transfer* business. Moreover the essence of the whole operation is speed. Settlements are completed on a daily basis, and the core feature of the whole operation – a pair of back-to-back value swaps – is in principle implemented instantaneously. (page 9)

It is also worth setting UK policy towards Money Services Businesses in general, and Money Transmitters in particular, in an international context. Whilst many European jurisdictions – including Germany, Holland and France – require all such business to formally register themselves as Banks, and hence to comply with the full panoply of banking regulations, in the UK no such requirements are made, with the result that such businesses are very much more lightly regulated in the UK. It is precisely with the issue as to whether, and if so how, the current regulatory regime is in need of improvement that the current HM Treasury consultation is concerned.

To reiterate my opening remarks: whilst there are clearly parallels between the narrowly focussed value transfer service which Hawaladars offer their customers and *some* of the vast range of services which Banks now offer theirs, both the structure, scale and character of financial operations facilitated by hawala networks differ markedly from those aspects of the services offered by banks which their Lordships analysed in such careful detail in *Foley v Hill*.

6.3.2 *Mr. Akhtar Hussain was not required to use the money deposited in any particular way. (para 16)*

For reasons which I will discuss in detail later, I would query whether it is appropriate to use the terms ‘money’ and ‘deposited’ in this context. Hence I myself would prefer to use the more neutral terms ‘value’ and ‘transferred to’ in this context. Having said that, I would also query the accuracy of the leaned Judge’s assertion that “Mr. Akhtar Hussain was not required to use the money/value deposited/transferred to him ... in any particular way”.

I would take a different view. In my opinion a better view is that Hawaladar makes a contract with his customer to handle the value he receives in a very particular way: namely to change the currency in terms of which that packet of value is denominated, and to deliver that value in its new format to a specified destination within 48 hours. What the customer does not specify is the logistics of the process where by the process of conversion and delivery is to be achieved. He leaves all those matters – as the Mr. Justice Moses rightly pointed out – to the Hawaladar himself.

This would appear to be precisely the burden of the three witness statements which the Claimant has produced in support of his arguments.

6.3.3 *The timing of [Mr. Hussain’s] foreign currency purchases would be to suit his own interests, and to obtain the most favourable interest rates (para 17)*

Whilst the first part of this comment is accurate enough in empirical terms, the learned Judge was in my opinion gravely mistaken with respect to the second.

For a number of reasons interest plays no part whatsoever in Hawala transactions.

One of the most fundamental points is that the interest payments of the kind which the learned Judge assumed the Hawaladar might receive are identified as *riba* in Islamic Law, and as such are *haraam* – beyond the pale of legitimacy. That is why the Hawala system originated not just as an exchange of debt (which Islamic Law regarded as both real and legitimate) as opposed to capital (which was regarded as fictional and oppressive), and also assumed that all such debts would by definitions be interest-free. Debt in the context consequently amounted to an obligation to repay a favour which one honourable individual owed to another, and which was underpinned by a reciprocal relationship of mutual trust between the two contracting parties. This still provides the

broad ideological framework in terms of which most contemporary Muslims order their inter-personal financial dealings.

Secondly, and more practically, given the speed with which contemporary hawala transfers are implemented, there is simply no time for significant interest payments to accrue. Hence whilst very large quantities of value pass through the hands of major hawaladars, the prospect of them quietly loaning out the funds temporarily in their hands, thereby earning profits on them by way of interest – an activity which is, of course, one of the most substantial sources of profit as far as most banking houses are concerned, and which their Lordships clearly had in mind in *Foley v Hill* – simply does not arise in the context of exceptionally speedily settled Hawala swaps. To be sure the banks in which Hawaladars hold their accounts, and between which these settlement swaps take place, may well have an opportunity to make profits in just the kind of way described in *Foley v Hill* as all this is going on; however I have never seen any indication that the Hawaladars themselves do so – or even have an opportunity to do so.

Having dealt with the question of interest, we must return to the issue of Hawaladars “making foreign currency purchases would be to suit his own interests.” In just what sense do Hawaladars ‘play the money market’? This is, of course, an activity which is once again a major source of profit as far as many banking houses are concerned – always provided that they do not put their operations in the hands of players such as Nick Leeson. The capital with which such plays are made is of course derived from the customers’ deposits, which – following the principles set out in *Foley v Hill* – banks can of course deploy in any way they choose. How far are Hawaladars engaged in the same kind of operation?

That Hawaladars purchase their funds in the same currency spot-markets as do outright speculators such as Mr. Leeson is plain to see. But do they do so in search of profit from their investment – no matter how short-term their investment may be? The answer, so far as I can see, is a categorical no. Rather Hawaladars enter the foreign exchange markets with two objectives in mind.

The first and most basic is to fulfil a crucial part of the task which they have been commissioned to perform by their customer: namely to begin the process of converting

the value which they have agreed to transmit on their behalf from one denomination to another.

Secondly, they do indeed seek to implement that process of conversion at the greatest possible advantage to themselves. After all they have businesses to run. The fee of £5 which they charge for their troubles is clearly derisory, but they are able to charge such minimal fee in the expectation that their skill in manipulating the logistical process of value transmission – precisely the task which their customers engage them to undertake – will allow them to generate profits along the way. Gaining access to the most advantageous conversion rate over and above that which they have offered to their customers is the principal basis on which they do so

Those profits so generated are real. Hawaladars could not run their businesses otherwise. That said, we are back once again with our core conundrum: do funds ‘deposited’ with a Hawaladar have the same or a different status as compared with funds deposited with a bank? And are the financial operations implemented by Hawaladars with respect to those funds of the same or of a different order than those implemented by banks?

6.3.4 Mr Hussain was not contractually obliged to and did not operate any kind of segregated account or accounts for the monies received by him from the claimants. The claimants would have been well aware that the money was not to be segregated in any way and there is no suggestion of any obligation that they should be. (para 18).

In straightforward empirical terms this statement is clearly correct. I can also readily confirm that none of the Hawaladars with whose business practices I am familiar made any attempt to segregate the funds they received from different clients, or indeed to segregate clients’ funds as a whole from those with which they ran their commercial operation.

Two comments are in order here. Firstly the logistics of value transfer outlined earlier require – if the operation is to be carried out on a commercially viable basis – that the value represented by all clients’ funds should be consolidated into very much larger tranches as a necessary prerequisite to setting the value transfer operation in motion. Secondly the whole business of segregation does indeed need very close examination. However I will postpone my detailed exploration of that issue until a later stage of this report.

6.3.5 The facts and the salient features of the system are totally inconsistent with any trust

As an anthropologist – albeit one with a great interest in legal and banking system – I am in no position to comment on any aspect of the English law of trusts. All I can do in this regard is to reiterate the point that Hawala systems are grounded in reciprocal relationships of absolute trust between the participants, and that from this perspective Hawaladars’ customers entrust (in the commonsense, rather than legal sense of the term) entrust their Hawaladar with funds of a certain value on the understanding that a sum of equivalent value will in due course be delivered in some other currency at a distant destination. However there are also aspects of the discussion in *Foley v Hill* which may be germane to this issue.

6.4 Mr Justice Moses’ use of the arguments set out in Foley v Hill

With all due respect to Mr. Justice Moses’ reasoning, it seems to me that the learned Judge only took partial cognisance of the arguments set out in *Foley v Hill*. Whilst he accurately cites that part of the judgement which deals with the subsequent status of deposits which customers may have placed in their bank accounts, he pays no significant attention to the other dimension of the judgement, which differentiates between the status of funds deposited with bankers, and other sorts of goods passed to agents and brokers. As the then Lord Chancellor put it, deposits are

placed there for the purpose of being under the control of the banker; it is then the banker’s money; he is known to deal with it as his own; he makes what profit of it he can, which profit he retains to himself, paying back only the principal, according to the custom of bankers in some places, or the principal and a small rate of interest, according to the custom of bankers in other places.

By contrast the agent’s or broker’s relationship to any property which is passed to him for further processing is quite different:

he obtains no interest himself in the subject-matter beyond his remuneration; he is dealing throughout for another, and though he is not a trustee according to the strict technical meaning of the word, he is *quasi* a trustee for that particular transaction for which he is engaged.

To be sure the property in question in the instant case is a sum of money to the value of £12,000. It was passed by the claimant for further processing – in this case the transmission of this parcel of value to his sister’s bank account in Pakistan. But does it necessarily follow that the property in question was money, rather than some kind of physical good, does it follow that the recipient was fulfilling the role of a banker, such that the cash could best be regarded as ‘a

deposit', and hence something with the status and attributes set out with such clarity in *Foley v Hill*?

If we turn to the criteria set out in the two paragraphs above, we find the situation confronting us here lying somewhere between the two. That the claimant placed the sum agreed upon under the control of the Hawaladar is clear; however it is by no means clear that it consequently became the property of the Hawaladar. The defendant was not free to do with it what he willed: he had been commissioned to transmit the packet of value which he received to Pakistan on an immediate basis. But whilst he did indeed seek to turn a profit over and above the fee charged during the course of the transmission process, he did not do so by investing the funds in some alternative project, or by lending it on interest to some other customer. Rather he covered the costs of his business, and having done so made what profits he could, from the difference in the exchange rate agreed with his customer and the rate he was able to obtain in the international money markets – a practice which is common to all those engaged in the money transmission business.

In doing so are hawaladars 'dealing with the value they are processing as if it was their own, and making what profit of it as they can'? Clearly there is at least some sense in which they can be said to be doing precisely that. But to the extent that they are indeed so doing, it is quite clear that they turn this profit as part and parcel of the service which they are in the midst of providing to their customers, rather than in the context of separate, autonomous and personally conceived efforts to generate profits on their own account from 'their' money, as bankers do in the circumstances which the authors of the judgment in *Foley v Hill* manifestly had in mind.

Set against this, it is once again a moot point as to how far it is accurate to suggest that the Hawaladar 'obtains no interest himself in the subject-matter beyond his remuneration'; whilst he is clearly not in a position to charge interest in a direct sense by placing the money out on loan to a third party as a banker readily would, it might be said – as Mr. Justice Moses suggests – that he takes a small slice of the value he is processing by taking advantage of the fact that he is able to obtain a better conversion rate than the one he offers to his customers. But is this enough to turn the value which he is instructed to transfer to distant destinations by his customers into 'deposits' of the kind envisaged by in *Foley v Hill*? Or is he better regarded as standing in the position where he is 'quasi a trustee for that particular transaction for which he is engaged.' That is a matter for lawyers, not an anthropologist, to disentangle.

7 Money or value?

7.1 *An anthropological perspective*

All this opens up yet another set of knotty questions – at least from my perspective as an anthropologist – is the precise conceptual status of the £12,000 which the Claimant transferred to the Defendant, and which the Defendant agreed, in return for a fee of £5, to further transfer on his behalf into a Bank account held by his sister in Pakistan. Clearly this was an item of value. Yet what substance did it have? Was it money – given that so far as I am aware it had no physical existence as currency notes? Was it a deposit, with respect to which – as a pseudo-banker – the Defendant could invest as he wished, always provided he fulfilled his customer's instructions to pay it back in another currency in a city 5,000 miles away within forty-eight hours – a period significantly less than a UK bank would take to clear a personal cheque? Or did the Hawaladar simply stand in the position of a specialist value transfer *agent*, offering to transfer packets of value – as opposed to packets of goods – to overseas destinations on a reliable and exceptionally speedy basis? If so the packets of value which he was transferring would no more become his property during the course of the transfer process than would this report when I come to send it to those instructing me through the Royal Mail.

Of course the reason why this becomes a knotty problem is because money is not an ordinary good. If it has any substance it is only in the form of paper currency notes which are of no intrinsic worth whatsoever. Such printed notes only acquire their significance because they are regarded as symbols of *value*, which by common consent of their users can be used as a means of buying and selling goods and services. However the units of exchange to which we attribute our all-important concept of value need not have any physical existence whatsoever, as when I use a credit card to purchase goods and services, or when I transfer funds into and out of my internet bank account. Value may be real, but ultimately it has no physical substance. The concept – the legal fiction, perhaps – only gains its power because we choose to regard its more or less concrete physical substitutes – which may well take no more than the capacity to produce figures on a computer screen, thanks to a brief wholly physically inaccessible magnetic entry on a distant bank's hard drives – as a legitimate surrogate for the power of value.

Furthermore when it comes to the issue of value *transfer*, we are not concerned with the deployment of value to facilitate the process of buying and selling, thus obviating the need for barter. To be sure the Claimant in these proceedings will have used some of the value at his

command to purchase a service: he paid the sum of £5 to the defendant, in return for which the defendant agreed that he would transfer a packet of value to the claimant's sister's bank account in Pakistan, and in the process of so doing switch its denomination from Pounds sterling to Pakistani Rupees. However so far as I can see this packet of value was neither sold nor loaned, nor did the claimant direct or expect it to be used for any other financial purpose other than the one the Claimant had directed the Defendant to implement – namely its redenomination in rupees and delivery in Pakistan.

7.2 *Value as a commodity*

In these circumstances I would further suggest that in the midst of such a process of value-transfer the 'packet of value' – worth in this case £12,000/Rs.1,269,000 – which the Claimant instructed the Defendant to transmit to Pakistan effectively ceased to be a medium of exchange, although it still undoubtedly retained that potential. Instead it had in effect become a commodity – and item of goods, if you wish – which the claimant had instructed the defendant to transmit to Pakistan on his behalf.

However these goods were of a highly distinctive kind. In his statement of claim the Claimant identifies the sum of £12,000 which he had passed to the Defendant for onward transmission to Pakistan, and which he now seeks to reclaim as 'these monies'. Without making any kind of judgement either for or against the intrinsic validity of the claim itself, and speaking as an anthropologist rather than a lawyer, the issues in this case would to my mind be greatly clarified if the term 'these monies' was replaced by, or at least understood as being represented by, a more neutral term such as 'this value'. If this is done, it becomes possible to gain a much better understanding – or so I would suggest – of what happened to the Claimant's funds once he had passed them over to the Defendant.

Once viewed in from this perspective, it follows that when the Claimant's bankers draft was paid into the Defendant's bank account 'these monies' – or to be more precise the value which this draft represented – became what was in effect a commodity which the Defendant had contracted to transmit to an overseas destination. In the process of implementing his instructions, the defendant's first step would be to consolidate all the separate and differently sized packets of value which he had received that day into a single large tranche, which he then used to purchase a tranche funds of an identical value, but this time denominated in US Dollars rather than in Pounds sterling, which were then deposited (in the banking sense of the term) in the Defendant's US dollar account.

But whilst the Defendant had in doing so begun to implement the familiar logistical process of collection → consolidation → bulk transfer → deconsolidation → delivery deployed by all those engaged in the long-distance delivery of small-volume consignments of goods, the fact that the goods in question in this context were intrinsically insubstantial packets of *value* with no physical reality, the process of consolidation did not take the form of loading all the variously sized but intrinsically discrete packages of goods destined for a specific destination into a single container – as a courier business such as DHL might do. Since the units in terms of which all packets of value are denominated in a given currency are inter-changeable, and since the whole purpose of the initial process of consolidation was also to change the currency in terms of which all these packets of value were denominated – a process in which the economies of scale that result from carrying out the operation in bulk are truly enormous – the fine detail of the operations performed at this stage by money transmitters differ significantly from those deployed by couriers delivering discrete packages of one kind or another. It is easy to see why.

A Money Transmitter could at least in principle put all the packages of value given to him by his customers into separate envelopes in the form of currency notes, address the envelopes appropriately, put all those destined for delivery into a container, ship the container to the destination (perhaps using the services of DHL to do so), and then deconsolidate the packages of notes ready for delivery to the nominated recipients at the destination. But of course no Money Transmitter operates in that way. Not only would the cost of such an operation be prohibitively high, but it would not address a central purpose of the whole exercise: the conversion of the denomination of the packet of value in question from one currency into another. As we have seen the key feature of the service which efficient Money Transmission agents are able to offer their customers is value conversion at bulk – as opposed to penny-packet – rates.

We are back, once again, to the distinctive character of the goods which Hawaladars – and all other Money Transmitters – pass through their logistics facilities. Not only is the good in question – value – insubstantial in character, but provided they are denominated in terms of the same currency, all the units of which any given package of value are identical in character, and thus comprehensively interchangeable. Hence, for example, if one was to ask of a commodity transfer (rather than a payment) of \$100,000, and ask "Which dollar belongs to whom?" the question admits no answer. There is only one way in which that all the separate packages of

value which had been consolidated into a single whole might be identified in such a way: by not consolidating them. If every separately owned package of value was separately labelled, its owner would remain at all times clearly identifiable. But if consolidation was avoided, so allowing every single package of value to be identified in this way the whole process value transfer would become horrendously expensive – so much so that the inherent cost of the labelling process would in all probability entirely destroy the value of the smaller tranches of value being transferred. In this context it is also worth noting that one of the principal reasons why inter-changeable currency notes – followed by accountancy systems and most recently electronic transfer and settlement systems – were invented was to overcome precisely these kinds of problems.

7.3 *Who owns transmitted value whilst it is in the course of transmission?*

As far as I can see this state of affairs brings us directly into confrontation with a further moot point which has been thrown up by these proceedings. If we accept, for the sake of argument, that the operation being conducted by a value transmitter is better understood as being far more akin to a courier than a banking business, and if we also acknowledge that during the course of the logistical processes through which the process of value transmission will be accomplished a process of (unlabelled) consolidation will of necessity take place, just who can legitimately claim ownership of the value whilst it is in that consolidated state?

If we follow the principles set out in *Foley v Hill*, it would appear that ‘he is *quasi* a trustee for that particular transaction for which he is engaged.’ But whilst that point is clear enough, our problem in this context is that the various packets of value of which he is *quasi* a trustee are all, of necessity, jumbled together during the transmission process, and their separate identities will only be sorted out again once they reach their destination. Of course the value transmitter is well aware of what is going on here, and has detailed records of his own, by means of which he is able to ensure that the disaggregative process of sorting out the individual packets of value can be accurately implemented in due course.

Moreover it is also worth remembering that the attachment of labels to all the many components of a consolidated consignment of value which is to be deployed in the course of an upcoming Hawala swap is of no significance whatsoever. If and when a tranche of value consisting of US\$ 100,000 is swapped for a similar sized tranche of value, but this time denominated in Rupees rather than US dollars, it is the *Rupees* which will be disaggregated, and in the course of so redistributed into separate packets of value which will be assigned to

their various owners. Meanwhile the value encased in the tranche of US dollars will also be similarly disaggregated – but in this case into packets of value congruent with those which had been consolidated to produce the tranche of Rupees of which the Hawaladar will by now have taken possession on behalf of his UK customers.

8 Conclusion

In the light of all this I would offer the following answers to the specific questions posed by those instructing me.

1. *Whether the Money Transfer business which the defendant operated was a Hawala System.*

I can readily confirm that the Money Transfer business run by the defendants, and which the applicant engaged to transmit the sum of £12,000 to his sister’s bank account in Karachi, where the value was to be delivered in rupees, is wholly congruent with the model of the operation of contemporary IVTS/Hawala systems which I have set out in Sections 3 and 4 above. I can likewise confirm that the defendants’ *modus operandi* was closely parallel to that deployed by Watan Travel, the business on whose operations Mr. Justice Moses commented at length in Re: H.

2. *Whether this operation was comparable to a banking operation*

It goes without saying that I am only in a position to answer this question as an anthropologist. That said, if the analysis which I have set out in sections 5, 6 and 7 above is correct, then in my opinion the business conducted by the defendants does not appear to have been a banking operation in the sense specified in *Foley v Hill*. The appellant did not hand the sum of £12,000 to the defendant to hold in safe-keeping on his behalf for an unspecified period of time, and still less did he expect him to use it for his own purposes, such that he might for example, invest it in such a way that he might make a profit on the capital. Nor did he expect to be able to draw down in small cheques he might issue against his deposit, nor did he expect to be paid a sum by way of interest on it. In other words the claimant did not expect the defendant to implement any of the practices identified as those characteristic of a banker in *Foley v Hill*, nor are there any indications that the defendant even tried to do any of these things with respect to the value passing through their hands.

On the contrary the claimant transferred the sum of £12,000 to the defendant with a wholly different objective in mind: to use his services as a value-transfer agent to facilitate the

transmission of the bundle of value he had passed to him to an overseas destination, such that the sum of Rs. 1,269,000 would be deposited in his sister's bank account in Karachi within 48 hours. Hence the defendant provided the claimant with what can in my view be much more accurately described as a *value transfer* than a banking service, at least with reference to the way in which the services of a banker are defined in *Foley v Hill*.

To be sure most contemporary retail banks also offer all sorts of services besides their core banking activities, which are still – at least so far as I am aware – congruent with the definition set out in *Foley v Hill*. Hence besides value transfer services, most high street banks offer all manner of additional financial services to their client – such as insurance, estate agency and stock broking services, for example.

Just because a service is offered by a business whose primary business is banking, I cannot see that it necessarily follows that all the services which it chooses to offer its customers should be classified *ipso facto* as banking services.

Hence my short answer to the question is that the role of the defendant in this context appears, at least in my opinion, to have been to provide a value transfer service to his customers, and in this specific case to the claimant. As such the defendant's role does not appear to have been congruent with that of a banker as identified in *Foley and Hill*; instead the service he provided appears – at least from my perspective – to have been such that his status was much more akin to that which the then Lord Chancellor went on in the course of those proceedings to identify as being characteristic of a broker or an agent.

3. *How quickly it is expected that monies will be delivered to the point of destination in such systems?*

Hawaladars promise speedy delivery to their customers. The normal expectation is that execution of the transfer – and hence delivery – should not exceed 48 hours.

4. *If the monies do not reach the destination, what consequences are expected to follow?*

The contract which the hawaladar makes with his customer is to deliver the specified amount of value to the specified destination. Once the value has been delivered to the recipient (or to the recipient's bank account, as the case may be) the contract is complete. Should the contract not be completed for any reason, the customer would in my view expect to get his money back.

5. *In such a system can the monies handed over for delivery to a distant destination be utilised for any other purpose than that specified by the client?*

The hawaladar is expected to do what is necessary with the money handed over to him in order to transform its value into another currency and implement its delivery at a distant destination. Just how the hawaladar achieves this is of no concern to the customer: delivery is what matters. But given that the hawaladar has no more than 48 hours to complete the operation, the customer can have a reasonable expectation that the hawaladar will have no opportunity to do anything more with the value he is transmitting on his customers behalf than to be getting on with the activity for which he has been engaged: namely the transnational and cross-currency transmission of value.

6. *To what extent is it commonly understood by the parties involved in a Hawala system that the system is based on expectations of trust, reliability and honesty on the part of all those concerned in the operation?*

It is fundamental to the operation of the Hawala system of value transmission and exchange that all operators in the system stand in a relationship of absolute trust vis-à-vis one another, and that they will consequently fulfil all agreements they may make accurately, instantly, and without demur. Retail hawaladars also stand in a similar relationship of trust vis-à-vis their clients, and all the more so when a substantial sum of money is being transferred. Hence in this case I have little doubt that Safdar Azam knew of Wahid Iqbal, and that there was in consequence a bond of personal trust between them. However in keeping with his standard business practices, as well as in compliance with HMRC's regulatory requirements, the defendant also issued a receipt to the defendant. As far as I can see this document is best regarded as a record of a value-transfer contract, indicating that the sum of Rs 1,269,000 would be delivered to the agreed destination.

The fee charged for the service was £5. Assuming that that the interpretation which I have set out above is correct, there appears to be little doubt that in this case the specific purpose of the agreement made between Safdar Azam and Wahid Iqbal was the transfer of this sum to Pakistan, and that the agreed-upon contract was not fulfilled.



Roger Ballard

20th February 2007