IN THE HIGH COURT OF THE SUPREME COURT OF JUDICATURE OF GUYANA

(COMMERICAL JURISDICTION)

2007-794-CD

BETWEEN:

MOHAMED NIZAM KASSIM

Plaintiff

And

1. REPUBLIC BANK (GUYANA) LTD.
2. THE BANK OF NOVA SCOTIA

Defendants,
Jointly and Severally

BEFORE THE HON. *NARESHWAR HARNANAN, J.*

MR. MOHABIR NANDLALL - PLAINTIFF

MR. NIKHIL RAMKARRAN - 1ST DEFENDANT

MS. GAITREE ROOKHUM - 2ND DEFENDANT

DECISION:

Introduction:

1. The plaintiff claims damages against the defendants for their negligence arising out of a banking transaction at the 2nd defendant's Bartica branch, involving a manager's cheque purportedly issued by the 1st defendant.
2. He contends that the 2nd defendant encashed the 1st defendant's manager's cheque upon him presenting it, and thereafter when they discovered that the aforesaid cheque was not legitimate (a fact which he contends had no prior knowledge of), deducted a portion of the funds disbursed, and demanded of him to pay the difference with interest, which he did.

3. The genesis of the transaction is rather unfortunate for the parties involved. They all appear to be the unfortunate victims of one Neville Alleyne, who issued a fraudulent Manager's cheque to the plaintiff.

4. The 1st defendant pleads no factual dispute with the plaintiff, and that their part in the matrix only involved their assessment of the said cheque to be fraudulent.

5. The 2nd defendant agreed that the plaintiff was ***credited with and received the full proceeds of the manager's cheque*** on the same day it was presented (22nd July, 2005), and prior to it being cleared by the 1st defendant.

6. The 2nd defendant agreed that when the 1st defendant dishonoured the said cheque, they informed the plaintiff about 4 days after paying out the proceeds (26th July, 2005), and ***reversed the credit entry***, in the plaintiff's account to an amount which was possible and made a further demand on the amount outstanding, with interest.

7. This action was filed on the 3rd October, 2007. The affidavit of defence of the 2nd defendant which makes reference to the facts narrated above, specifically at paragraphs 5 and 6, was filed on the 15th day of January, 2008, and deposed to no less than the then Country Manager of the 2nd defendant Bank.

8. Mr. Carlos Prowell, the current Bartica Branch Manager, who was the Assistant Manager, Operation and Service, at the time of the plaintiff's transaction, deposed to a witness statement (on the 7th November, 2016) almost 9 years after the filing of the affidavit of defence. He contends that the cheque was deposited into the plaintiff's account and the proceeds were delivered to him.

9. It is therefore clear from his evidence that the ***proceeds of the cheque*** were delivered to the plaintiff on the same day it was presented for clearing.

10. Strangely however, under cross examination at the trial of this action (8th February, 2018), and for the first time since the filing of the 2nd defendant's affidavit of defence and almost 11 years after, Mr. Prowell testified that the

funds issued to the plaintiff that day was from the latter's overdraft account, which was a credit-line facility, and which is distinct from the personal account of the plaintiff.

11. He therefore testified that the funds which were deducted from the plaintiff were taken from his overdraft account and not his personal account.

12. The position of the 2nd defendant therefore shifted somewhat from a point where they contended that the plaintiff was credited with and received the full proceeds of the manager's cheque; to, depositing the cheque into the plaintiff's account, but delivering funds to him from his overdraft account, which is separate from his personal account.

13. Mr. Prowell continued under cross-examination to say that the 2nd defendant never deducted the money from the plaintiff's personal account, but from his overdraft facility.

14. The uncontradicted evidence of the plaintiff was that he presented the cheque at the 2nd defendant's Bartica Branch and it was encashed at the same time, with him receiving the full proceeds thereof. The brunt of the 2nd defendant's cross-examination of the plaintiff centred on an attempt to commit the plaintiff to a Small Business Commitment Letter, which he admitted signing, and an accompanying Small Business Financial Services Agreement. The only difficulty with this approach was that the aforesaid letter was signed on the 14th June, 2010, some 5 years after the plaintiff's cause of action arose, and some 3 years after the plaintiff's action was filed. This goes without saying to be of no evidential value or weight.

15. The only helpful assertion which the 2nd defendant made to the plaintiff was their contention that the funds which were paid out to him was done in error.

The law, analysis and conclusion:

16. A cheque is a bill of exchange drawn on a banker, payable on demand. A bearer cheque is one expressed to be payable to a particular person or bearer, or to bearer. An order cheque is one which is expressed to be so payable, or which is expressed to be payable to a particular person or body and does not

contain words prohibiting transfer or indicating an intention that it should not be transferable. See ***Halsbury's Laws of England***, Vol 2, page 151 at paragraph 278.

17. In ***Bills of Exchange and Bankers' Documentary Credits***, 3rd Edition, by William Hedley, at page 3 of the text, the author stated:

> A bill of exchange is a piece of paper which is used to transfer money from one person to another instead of using the actual money itself…The best known type of bill of exchange is a 'cheque' by which we transfer money at our bank ***to people to whom we are indebted***. A cheque is payable 'on demand', that is, at any time…

18. In the text, ***Principles of Banking Law*** [1997], *Ross Cranston*, explains at page 200 that:

> ***The duty is to exercise the care and skill of a reasonable bank in carrying out the particular activity concerned***. The law does not impose liability for what turns out to be an error of judgment, ***unless the error was such that no reasonably well informed and competent bank would have made***. Moreover, two reasonable banks can perfectly come to opposite conclusions on the same set of facts without forfeiting the title to be regarded as reasonable. 'Not every reasonable exercise of judgment is right and not every mistaken exercise of judgment is unreasonable.' Sometimes it will be obvious that a bank is in breach of duty. When there are two ways of doing a thing, and one is clearly right and the other doubtful, it will not be exercising reasonable care and skill to follow or advise on the latter course…In more complex cases much will depend on the evidence, in particular the **expert evidence** of what should have been done in accordance with ***good practice*** in the particular circumstances. (emphasis supplied)

19. *Professor Roy Goode*, in the text **Commercial Law,** 3rd Edition, at page 549 of the text states:

> Only a banker who has acted without negligence in receiving payment qualifies for full protection, though it is now open to the bank to plead contributory negligence as a defence ...

Then again at page 550:

> There is a considerable amount of case law dealing with the standard of care which the collecting banker is required to exercise. In general, what is expected of him is not a microscopic examination of an account but the ***ordinary prudence required of those carrying on a banking business in accordance with normal and proper banking practice***. Yet it cannot be denied that over time the attitude of the courts has become increasingly stringent, and there are at least some cases where ***a bank has been held liable for failing to meet a standard of care which in the view of many bankers is simply impracticable*** in the light of the huge volume of cheque business conducted. (emphasis supplied)

20. It is noteworthy to also consider what 'proceeds' of a cheque are, since the terms were used consistently by the 2nd defendant. In **Commercial Law**, 3rd Edition, by Professor Goode, the following passage appears at page 542 of the text:

> It is worth taking a moment to consider exactly what we mean when we say that a bank "receives" the ***proceeds*** of a cheque. We have seen that a transfer of value takes place between clearing banks before the cheque is actually presented at the drawer's branch, but at this stage there is no payment by the drawer and no receipt by the payee, so that the transfer is purely internal to the banks. ***It is only when the cheque is honoured that the value received in advance by the collecting bank can be treated as received from***

the drawer by the collecting bank so as to be available to the payee. *(emphasis supplied)*

21. The evidence before the Court leads to the unavoidable conclusion that upon presenting the cheque to the Bartica Branch of the 2nd defendant bank, the plaintiff would have successfully negotiated the bill when he received the proceeds thereof.

22. The 2nd defendant bank, being an institution of record by various statutory enactments, has provided no evidence of their belated contentions that the cheque was not honoured by them, but that the funds equivalent to the value of the cheque was disbursed instead from the plaintiff's overdraft facility with the Bank.

23. Presumably, this information would have been readily available at the time of the filing of the affidavit of defence and would have been strategically preserved for use at trial, to be tendered into evidence, rather than a Small Business Commitment letter signed by the plaintiff 3 years after his action was filed.

24. On the 2nd defendant's suggestion to the plaintiff that the funds were disbursed in 'error', it is clear from the evidence that no reasonably well informed and competent Bank, operating with ordinary prudence, would commit such a cardinal mistake causing such a significant sum of money to be disbursed without undergoing the relevant checks and balances before payments were made.

25. In ***Cocks v. Masterman*** [1829] 9 B&C 902, *Bayley, J.* delivering the judgment of the Court laid down the rule as follows:

> But we are all of the opinion that the holder of a bill (negotiable instrument) is entitled to know, on the day when it becomes due whether it is an honoured or dishonoured bill, and that, if he receives the money and is suffered to retain it during the whole of that day, the parties who paid it cannot recover it back.

26. In commenting on the decision in ***London and River Plate Bank v Bank of Liverpool*** [1896] 1 QB 7, the authors of ***Paget's Law of Banking***, 10th Edition, Butterworths, at page 413 of the text, noted that *Matthew, J.,* held:

> …that the ruling principle was not negligence or the banker's knowledge or means of knowledge, but the right to an immediate answer as to the fate of a cheque – which is an essential element to the negotiability of the instrument and imperatively demanded by the exigencies of business.

27. This Court is of the view that that right to an immediate answer is qualified or circumscribed by the duty of care owed by the 2nd defendant bank, to its customers – operating its business in a manner consistent with best practices and in good faith.

28. In the Madras case of ***K.M. Abbu Chettiar*** *v* ***Hyderabad State Bank*** [1954] 1 Mad LJ 566, **Ramaswami J** proceeded to answer the contentions like this:

> The mutual duties and obligations of a banker and customer, so far as the passing of a forged cheque is concerned, are rested in India on the well-known relationship of agent and principal. ***This relationship requires that the agent banker is bound in making payments to bring to bear upon his task the skill and prudence required in the ordinary course of business like being able to identify the signature of the customer and detect imitations and must make the payment in good faith and without negligence***. (emphasis supplied)

29. Further, *Matthew, J.* continued in ***London and River Plate Bank*** *(cited above)*, as follows:

> In ***Cocks v Masterman*** the simple rule was laid down in clear language for the first time that when a bill becomes due and is presented for payment the holder ought to know at once whether the bill is going to be paid or not. If the mistake is discovered at once, it may be the money can be recovered back; ***but if it be not, and***

> ***the money is paid in good faith, and is received in good faith, and there is an interval of time in which the position of the holder may be altered, the principle seems to apply that money once paid cannot be recovered back***... (emphasis supplied)

30. The Calcutta High Court in ***Om Prakash Jhunjhunwala & Ors v UCO Bank & Another***, C.S. No. 192 of 1988, *Soumen Sen, J.*, was more direct in definitively stating at pages 13 and 14 of the judgment that:

> In this age of fraud, ***bank must protect its own interest and also the interest of its customers which can only be ensured if the bank is vigilant and careful of its duties and obligations***...
>
> ...the correct and proper identification of signatures is the responsibility of the banker. ***The bank is supposed to detect forgery and refuse payment. If the bank is unable to do so, it is responsible for the consequent loss***.
>
> ...the production of forged signatures has acquired the status of an art and science and the master forgers have perfected the techniques so well that it can easily mislead the layman and can hoodwink most of the bankers who have to deal with signatures and who are not handwriting experts. In this world of banking transactions involving voluminous documents, the bank sometimes acts in a hurry. ***The bank is required to exercise due safeguard in order to protect that forgery of signatures which are committed in a number of ways***... (emphasis supplied).

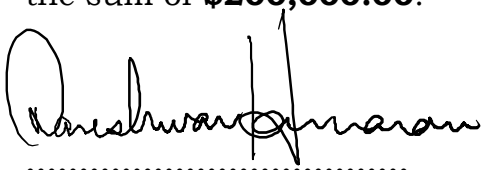
31. Having regard to the admissible evidence in the matter at bar, this Court can come to no other conclusion that the impugned cheque was honoured by the 2nd defendant when it was presented for payment. The belated attempt by Mr. Prowell claiming that the proceeds were disbursed from the plaintiff's credit facility (overdraft account), without it being pleaded and proved through evidence is not acceptable.

32. Having discovered their 'error', as was suggested by Counsel for the 2nd defendant when putting their case to the plaintiff, they deducted the funds

disbursed, from the plaintiff's account, and collected the balance on demand in cash from the plaintiff. This 'error' was clearly due to the negligence of the 2nd defendant in failing to exercise vigilance and due care in assessing the impugned manager's cheque when it was presented for cash.

33. In the circumstances this Court finds that the deductions by the 2nd defendant equivalent to $1,500,000.00 from the plaintiff's account with them, and their collection of $304,000.00 by demand, are unlawful.

34. It is therefore ordered that the 2nd defendant do pay to the plaintiff the sum of **$1,804,000.00** representing damages in negligence, together with interest pursuant to the ***Law Reform (Misc. Provisions) Act***, and costs in the sum of **$200,000.00**.



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Nareshwar Harnanan
Puisne Judge
08 May 2018