IN THE SUPREME COURT OF JUDICATURE OF JAMAICA
IN CIVIL DIVISION

CLAIM NO. 2003 HCV 0270

BETWEEN	BRATTON LIMITED	CLAIMANT
AND	FIRST CARIBBEAN INTERNATIONAL BANK (JAMAICA) LIMITED (Formerly CIBC (Jamaica) Limited)	DEFENDANT/ ANCILLARY CLAIMANT
AND	NATIONAL COMMERCIAL BANK (JAMAICA) LIMITED (By way of claim for contribution and/or indemnity by the Defendant)	1ST ANCILLARY DEFENDANT
AND	RBTT BANK JAMAICA LIMITED (By way of claim for contribution and/or indemnity by the Defendant)	2ND ANCILLARY DEFENDANT

CONSOLIDATED WITH:

CLAIM NO. 2003 HCV 0221

BETWEEN	AUBREY WONG (T/A Spanish Grain Store)	CLAIMANT
AND	FIRST CARIBBEAN INTERNATIONAL BANK (JAMAICA) LIMITED (Formerly CIBC (Jamaica) Limited)	DEFENDANT/ ANCILLARY CLAIMANT
AND	NATIONAL COMMERCIAL BANK (JAMAICA) LIMITED (By way of claim for contribution and/or indemnity by the Defendant)	1ST ANCILLARY DEFENDANT
AND	RBTT BANK JAMAICA LIMITED (By way of claim for contribution and/or indemnity by the Defendant)	2ND ANCILLARY DEFENDANT

TRIED WITH:

CLAIM NO. C.L. 2002 /L-066

BETWEEN	DOROTHY LEE	1ST CLAIMANT
AND	GEORGE LEE	2ND CLAIMANT
AND	MADGELINE LEE	3RD CLAIMANT
AND	NATIONAL COMMERCIAL BANK (JAMAICA) LIMITED	DEFENDANT

Mr. Sheldon Codner and Ms. Annalisa Chapman instructed by Lightbourne and Hamilton for Bratton Ltd. and Aubrey Wong (t/a Spanish Grain Store)

Mr. John Vassell Q.C., Mr. Jermaine Spence, Mrs. Julianne Mais-Cox and Mr. Peter Simmonds instructed by DunnCox for First Caribbean International Bank (Jamaica) Ltd.

Mrs. Michelle Champagnie, Mrs. Corrine Henry and Ms. Ky-Ann Lee instructed by Myers Fletcher and Gordon for National Commerical Bank (Jamaica) Ltd.

Mr. Charles Piper, Ms. Nicole Roberts and Ms. Kanika Tomlinson for RBTT Bank (Jamaica) Ltd.

Mr. Barrington Frankson, Mr. Maurice Frankson, Mr. Leymon Strachan and Mr. Winston Taylor instructed by Gaynair and Fraser for Dorothy Lee, George Lee and Madgeline Lee.

Bills of Exchange – Cheque – Fraudulent Indorsement – Drawer issuing incomplete crossed cheque – Cheque completed by a person other than the named payee and indorsed to third party – Whether payee "fictitious" - Bills of Exchange Act, sections 7 and 8.

Banking - Effect of crossing on cheque - Rights and responsibilities of paying bank – Rights and responsibilities of collecting bank - Bills of Exchange Act, sections 60, 80, 82 and 90.

12th, 13th 14th 15th January and 23rd July 2009

BROOKS, J.

Bratton Limited and Spanish Grain Store (SGS) both import and sell meat and vegetables. Bratton operates in Montego Bay and SGS in Kingston. SGS is the trading name used by Mr. Aubrey Wong. He and Bratton's principal, Mr. Victor Chin enjoy mutual respect. As a result, SGS interacts, on behalf of both companies, with the agents of the shipping company which transports the products to Jamaica. SGS uses the services of a customs broker to arrange clearance of the products from the wharves in Kingston. Both SGS and Bratton operated current accounts with First Caribbean International Bank (Jamaica) Ltd.

Each importation involved SGS delivering cheques drawn against the bank account of the importing firm and handing those cheques to an employee of the customs broker for delivery to the shipping agents. Usually the amount on the cheque was left blank with the intention that it would be filled in by an employee of the respective agent, which are both limited liability companies. The cheques were, however, all made payable to the agent and the majority were crossed. Some of the cheques, says SGS, were not delivered to the agent but were fraudulently indorsed to a third party who presented them to First Caribbean, either directly or through other banks. First Caribbean paid against those cheques and debited the relevant account.

The firms say that the sums were wrongly debited because the cheques were fraudulently indorsed and that First Caribbean paid to persons other than the named payee. In two claims, which have been consolidated, the firms seek to recover from First Caribbean, sums totalling $29,218,185.40. The sums concerned a total of 248 cheques.

First Caribbean has denied liability. It alleges that it paid against the cheques in the normal course of business, in good faith and without negligence. It also alleges that any loss which these firms have suffered was as a result of their own negligence in issuing the cheques involved. It asserts that the firms failed to have the cheques properly completed and failed to so conduct their businesses that the fraudulent activity could be quickly discovered, rather than continuing between 1997 and 2001, as is alleged by Bratton and SGS.

In addition, First Caribbean has alleged in ancillary claims that, to the extent that it is found to be liable to these firms, it is entitled to be indemnified by National Commercial Bank Jamaica Ltd. (NCB) and RBTT Bank Jamaica Ltd (RBTT). These were the banks that collected from First Caribbean on some of the cheques. First Caribbean alleges that it received the cheques through the clearing house, from NCB, RBTT, or RBTT's predecessors and paid them in accordance with the relevant Rules of the

Association of Kingston Clearing Bankers (the Clearing House Rules). It relies, in particular, on rule 26 which governs the matter of authenticity of the indorsements on cheques.

Both NCB and RBTT have denied any liability to First Caribbean. NCB asserts, among other things, that First Caribbean is not liable to Bratton and SGS, because the payees of the cheques were fictitious and thus the cheques were "bearer notes". As a result, payment against them could properly be claimed by both of these collecting banks.

Dorothy, George and Madgeline Lee operated, among other things, a cheque-cashing business. They have instituted the claim which has been tried along with the consolidated claims. The common factor between the claims is a number of the cheques in question. In their claim, the Lees say that they received the cheques in good faith, provided value in return for them and lodged them to their various accounts with NCB. They seek to recover, from NCB, amounts represented by these cheques which, they assert, NCB has wrongly taken from them by debiting their accounts.

There were serious questions raised, particularly by NCB, as to whether the firms were unaware of the, so-called fraudulent scheme. Apart from that issue, few disputes as to fact arose on the evidence. The issues mainly revolved around the application of the Bills of Exchange Act (the

Act), particularly as it pertained to cheques, and around the Clearing House Rules which govern transactions between banks, again concerning cheques drawn against the accounts of their respective customers. In this judgment three broad areas of assessment will be addressed:

1. The issues between the firms and First Caribbean
2. The issues between the banks
3. The issues between the Lees and NCB

The issues between the firms and First Caribbean

The Pleadings

The claims on behalf of the firms were simply framed. They alleged that the firms respectively drew crossed cheques in favour of specific payees but that First Caribbean, wrongfully and without authority, paid against the cheques to the accounts of persons other than those of the named payees. They also allege that First Caribbean wrongfully debited the accounts of the respective firms, with the amounts involved.

First Caribbean relies on Sections 60 and 80 of the Act, insofar as it is the paying bank or drawee, and section 82, insofar as it is, through one of its branches, also the collecting bank. These sections protect a bank from liability where it pays or receives payment in respect of fraudulent cheques. They only apply in the event that the bank has acted in good faith and in the

ordinary course of business (section 60) or, in good faith and without negligence (sections 80 and 82). Despite the reliance on those sections, it is important to note that in paragraph 3 of its defence, First Caribbean did not admit that the cheques had been drawn in favour of the shipping agents as the firms had pleaded. The significance of this is that the burden of proof rests on each firm. They must prove their respective cases on a balance of probabilities. I should state here that the fact that there was an agreement by one of First Caribbean's witnesses, that the subject cheques bore forged indorsements, does not displace the burden. It, of course, forms part of the body of evidence which the court must consider in determining the issue.

The evidence

The witnesses on behalf of SGS and Bratton were, respectively, Miss Christine Wong and Mr. Victor Chin. Neither was impressive as a witness. Indeed, the level of ineptitude which they asked this court to accept, as categorizing the manner in which they conducted their respective businesses, stretched the bounds of credibility.

I start with Miss Wong. She is Mr. Arthur Wong's daughter. She bore the brunt of the day to day management of the section of the SGS' business which interacted with the brokers and shipping agents. It was she who wrote up the bulk of the cheques which were to have been delivered to

the shipping agents. As mentioned before, she did so, on behalf of each firm, according to which was the importer at the relevant time.

Miss Wong was a very intelligent witness. She had no difficulty appreciating the nature and effect of questions asked by counsel. She seemed knowledgeable about her business and has had over 20 years of experience in it. This was no small informal trader. According to Miss Wong, it was a firm with an annual turnover in the region of a billion dollars; importing several shipments of products per month. The products are imported in refrigerated shipping containers.

She testified that when shipments arrived on the wharf, she would deliver approximately 3 cheques per shipment to the broker. This would be as against entries prepared by the broker. She said that when she delivered the cheques to the broker, there was no timely delivery to her of the shipping agent's receipt for the payment. According to her, the broker would sometimes delay delivery of the receipt for weeks and sometimes not deliver the receipt at all. Miss Wong admitted in cross-examination, that "we were lax in that area of not getting receipts". She testified that the firm would use the receipts in reconciling the cancelled cheques, but also admitted that "we were lax in that area". An employee of the firm, a Miss Gordon should

have done reconciliation at the end of each year. This, Miss Wong said, was done "on an ad hoc basis"..."sometimes not at all".

The litany of woes continued. According to Miss Wong, "if the [firm's] accountant was doing the work properly then he should have discovered the irregularity...As it turns out it wasn't being done properly....The irregularities spanned 1997-2001".

The number of cheques in issue for SGS is 109. Each month saw an average of three to four irregular cheques. In the last 15 months of the scheme, each cheque was in excess of $180,000.00. August of the year 2000 saw six such cheques totalling $1,118,290.00. Could it be, on a balance of probabilities, that the number of transactions effectively concealed a continuing swindling of her firm?

Miss Wong testified that there were 20-30 shipments per month. The documentation from the agents suggests that there were less, but they were indeed, several per month. Despite that, the effect of the haemorrhage of sums of that magnitude "could not fail of being generally and severely felt". Yet, Miss Wong indicated a state of oblivion on her part. At best, she indicated that she "was concerned in a general sense of the possibility of leakage from the company".

I do not accept that Miss Wong was ignorant of this dishonest scheme. It is true that she says that sometimes a cheque could cover more than one shipment, but in each case the relevant shipment or shipments was, on her evidence, noted on the cheque stub. I cannot accept that the cheque stubs were not eventually completed with the amount for which the cheque was drawn. I cannot accept, that for over three years, no one in SGS identified that there were major discrepancies between the payment would be required by the shipments noted on the cheque stubs as opposed to the amount for which the corresponding cheque was actually drawn.

I cannot accept that goods could be priced for sale without knowledge of what was the cost of acquisition. The cost of freight, duty and handling are necessary aspects of determining that cost. If one accepts Miss Wong's testimony, goods would have been brought into inventory and sold without determining the shipper's cost or the demurrage associated with those goods. It is not impossible for SGS to have had some other system of calculating a sale price but Miss Wong has not shown that it had one. Her evidence is not sufficient to reach the civil standard of proof.

Two further answers given by Miss Wong, in cross-examination by Mrs. Champagnie for NCB, cement my view of Miss Wong's knowledge of the situation in respect of the cheques drawn by SGS:

> Suggestion. "In relation to these cheques there are no corresponding shipping documents".
>
> A. "As it turns out, yes I agree".

and later:

> Suggestion. "The sums in these cheques were far in excess of the sums payable to Port Contractors or Lannamans" [the agents].
>
> A. Maybe so, but it is always difficult to determine that in advance.

I am not sure what Miss Wong means by that last answer, because, on her evidence, she would not have known in advance, the amount for which the cheque was written. What seems to me clear, is that upon receipt of the cancelled cheques from the bank, these figures "far in excess of the sums payable" to the agents, would have rung alarm bells with any person charged with entering the amounts on the cheque stubs or reconciling the cheques with the receipts from the agents. That it could fail to galvanize such a person into action could only mean that the cheques and their large amounts were not an unexpected occurrence. The situation certainly could not have continued, blithely unnoticed, for three and a half years.

I have two reservations about a finding, adverse to SGS. Firstly, I have not been provided with any evidence of a motive which Miss Wong would have for being a participant in a scheme defrauding her father's firm. A theory was explored by NCB's counsel in cross-examining Miss Wong, but it does not, of course, amount to evidence. There is, however, no burden

on First Caribbean to prove a motive. The burden is on SGS to satisfy me as to its claim and I find that it has not. The second reservation is that it was Miss Wong who, effectively, brought the scheme to an end. This was done immediately upon her being alerted by First Caribbean that an SGS cheque had been unusually presented to it for payment. I find however, that that evidence is not sufficient to displace the severe dissatisfaction which I harbour in respect of the rest of Miss Wong's testimony.

I now turn to Mr. Chin. He testified that he recognized that something was wrong with his operation but that he could not identify what it was. His stated *modus operandi* in respect of the imports was that he sent batches of blank, signed but crossed, cheques, to Miss Wong at SGS. He authorized Miss Wong to complete the cheques required for each shipment, to meet the cost of customs duty, demurrage, storage and the clearing of the containers.

There were 139 cheques which Mr. Chin testified were improperly negotiated. The amounts involved generally followed the pattern of those in the case of SGS. Bratton's loss allegedly totalled $16,318,460.00. Mr. Chin testified that although there was a delay in getting the agent's receipts, they were eventually received and reconciliation was done every three months. The reconciliation was done on behalf of Bratton by a relative of Mr. Chin. Despite that testimony, Mr. Chin said in cross-examination:

> "As far as I know I got receipts for all the cheques [SGS] wrote on my behalf....I used those receipts to compare to make sure that they were for payments for goods received....In all cases the receipts were for payments in respect of goods received....I used the receipts to compare with my bank statements....The cheques were in respect of services connected with goods I had imported."

Mr. Chin disagreed with a suggestion that the quarterly reconciliations would have made him aware that cheques were being drawn without his receiving goods in connection with those cheques. He accepted that he had "some laxity here and there", but insisted that he was relying on the honesty of SGS. Said he, "I found no fault with them".

Mr. Chin's testimony cannot withstand close scrutiny. The evidence is that the shipping agents had been paid for every container which they handled for Bratton. There was no money outstanding to them. That is not surprising; in the latter year or so of the relationship, it was essentially a payment-on-delivery arrangement which they had respectively had with Bratton and SGS. That situation would have simplified the reconciliation process. True it is that there was a credit system in place for the earlier years, but for the last twenty-four months there would have been little need to consider any outstanding payments. Against that scenario, three-monthly reconciliations could not but reveal that there were between 2 and 7 cheques per month which had no corresponding receipt from the shipping agents. The fact, as Miss Wong testified, that the cheques were for sums far in excess of the sums due to the agents, would have exacerbated the need to

urgently investigate an unwarranted payment. Had it been a situation of which he did not approve, Mr. Chin's operation would have quickly identified that there was a problem and have pinpointed the source. The transactions most certainly could not have continued for nigh on four years without his complicity.

Yet, it could be said that he was not connected to the day to day dealings with the cheques. There is no evidence that he had any contact with the brokers or their employees. That he was a willing participant in the scheme can only be inferred from its longevity in light of its transparency.

I have paid close attention to this evidence of these witnesses because it is critical to the respective cases of Bratton and SGS. I shall presently explain the importance.

Were the payees fictitious for the purposes of section 7 of the Act?

Section 7 of the Act stipulates, among other things, that where a payee is a fictitious or non-existing person, a bill of exchange, in this case a cheque, may be treated as a bearer note; that is, that the bearer thereof may demand payment on it. Counsel on both sides of this particular issue have generally agreed that section 7 has been interpreted in previous cases, to mean that, in deciding whether a payee on a cheque is fictitious or not, the intention of the drawer of the cheque, at the time of drawing it, is critical.

The question to be decided, as arising from the assessment which has just been concluded, is whether the payee named in the relevant cheques was fictitious. The fact that a person by that name (*i.e.* the agent) exists does not preclude the payee on the cheque from being fictitious. The payee may be deemed fictitious if the name is inserted as a mere pretence. The authority for the point is *The Governor and Company of the Bank of England v Vagliano Brothers* [1891] A.C. 107.

Based on my findings concerning Miss Wong, I find that the names of the various agents were inserted on the respective cheques, as a mere pretence in order to facilitate the indorsement thereof. I, therefore, find that the relevant SGS cheques are all bearer notes. If Miss Wong were the drawer, there would have been no complexity resulting from that finding; the cheques would have been deemed bearer notes. The fact is, however, that the bank account was that of Mr. Aubrey Wong and he signed all of the cheques. Can he be distinguished from Miss Wong or must her actions be attributed to him? I find that he cannot be distinguished. He has not given evidence himself. Miss Wong has been the face of SGS in this court and her actions must be deemed to be Mr. Wong's actions.

In light of my findings in respect of Mr. Chin's participation in the dishonest scheme, Bratton's cheques must also be deemed bearer notes.

In the circumstances, I find that counsel for NCB are correct in saying that the collecting banks would each have properly credited their respective customers with the face value of the relevant cheques. First Caribbean would have been entitled to pay against such cheques and debit the corresponding account with the sum involved. SGS and Bratton would, therefore, have each failed in their respective bids to show that the amount of each of the cheques was wrongly debited from their respective accounts.

Does the crossing on the cheques affect the issue of "fictitious payee"?

All but 8 of the subject cheques bore a crossing. Each of Bratton's cheques bore the crossing "A/C PAYEE ONLY". The vast majority of the SGS cheques were crossed with the general crossing; "& Co". Despite the respective crossings, however, each cheque bore the direction, as part of the printed format thereof, the words "Pay to the order of". Following those words were the respective names of the relevant agents.

Counsel for the firms have laid great emphasis on the fact of the crossings. The thrust of the submission is that the payment of a crossed cheque, contrary to the crossing (i.e. the customer's mandate), deprived the paying bank of the protection provided by sections 60, 80 and 82 of the Act. Counsel submit that such a bank could not properly say, in circumstances

where it had paid on a cheque, which had been indorsed to a person other than the named payee, that it had acted in good faith or without negligence.

Counsel for First Caribbean and the other banks dispute that stance. They say that, in law, a crossing on a cheque does not, by itself, prevent the drawer's bank from paying the proceeds to the account of a person other than the payee named by the drawer.

It may therefore be asked whether the crossings on these cheques affect the issue of the named payee on the cheque.

Apart from the fact that section 7 deems an affected cheque as being payable to its bearer, there is authority to support the proposition that the crossing does not prevent the cheque being negotiated. Where the cheque directs the drawee bank, to pay to the order of the named payee, that payee may order that the payment be made to someone else; the indorsee. Section 8 of the Act addresses the matter of a cheque made payable to the order of the payee thereof. It states in part:

> "...A negotiable bill may be payable either to order or to bearer....
> A bill is payable to order which is expressed to be so payable, or which is expressed to be payable to a particular person, and does not contain words prohibiting transfer or indicating an intention that it should not be transferable.
> Where a bill, either originally or by indorsement, is expressed to be payable to the order of a specified person, and not to him or his order, it is nevertheless payable to him or his order at his option."

The principle that a cheque made payable to the order of the payee is transferable despite a general crossing, is accepted as being the banking

practice in Jamaica. This was the testimony, in cross-examination, of Mr. Richard Hines, one of NCB's witnesses. What, in fact, the crossing requires is for the paying banker to pay the proceeds of the cheque to another banker. Lord Upjohn in *Universal Guarantee Pty. Ltd. v National Bank of Australasia Ltd.* [1965] 2 All E.R. 98 at p. 102 G-H explained it thus:

> "The addition of the words "a/c payee" or "a/c payee only" refer to the payee named in the cheque and not the holder at the time of the presentation...but they do not prevent, at law, the further negotiability of the cheque."

The crossing does, however, put a greater onus on the collecting bank. It is "a warning to the collecting bank that if it pays the proceeds of the cheque to some other account it is put on inquiry and may have difficulty relying on any defence under [the equivalent of section 82] of the Act in an action against it for conversion of the cheque" (*per* Lord Upjohn in *Universal Guarantee (supra)* at p. 102 H).

Lord Upjohn continued by saying that the crossing does not "cast on the paying bank, paying the cheque to a banker, any additional obligation to satisfy itself that the collecting bank is collecting it on behalf of the named payee. That is entirely the responsibility of the collecting bank" (p. 102 I).

It is not in dispute that First Caribbean paid each of these cheques to a collecting banker. I conclude from the portions of the judgment just quoted, that First Caribbean, as the paying bank, does not incur any liability to the

firms as a result of having paid to NCB or any of the other collecting banks, the proceeds of the crossed cheques. Authority for this conclusion may also be found in the cases of *Akrokerri (Atlantic Mines) v Economic Bank* [1904] 2 K.B. 465 at p. 472 and *Honourable Society of the Middle Temple v Lloyds Bank plc and another* [1999] 1 All E.R. (Comm.) 193 at pp. 204j-205b.

In the instant case, the collecting banks, including First Caribbean where it so acted, would be exposed to liability to the named payee, but perhaps not to the firms, as ostensibly it would be the payee which would have suffered the loss. Lord Upjohn considered this liability at page 103 B of *Universal Guarantee Pty. Ltd.* It turns out, of course, that the named payee, in the instant case, has suffered no loss in respect of those cheques. Bigham, J. in *Akrokerri,* mentioned above, held a different view concerning the liability of the collecting bank to the drawer; the firms in the instant case. He held, however, that the statutory defence (in Jamaica, section 82 of the Act), available to a collecting bank, could provide exemption from that liability (see page 469).

Sections 60, 80 and 82 of the Act

Although the above analysis would dispose of the claims by Bratton and SGS, I shall briefly examine the submissions of counsel in respect of sections 60, 80 and 82 of the Act. I refer first to section 60:

> "When a bill payable to order on demand is drawn on a banker, and the banker on whom it is drawn pays the bill in **good faith**, and in the **ordinary course of business**, it is not incumbent on the banker to show that the indorsement of the payee, or any subsequent indorsement, was made by or under the authority of the person whose indorsement it purports to be, and the banker is deemed to have paid the bill in due course, although such indorsement has been forged or made without authority." (Emphasis supplied)

The section requires the banker to show that the payment was made in good faith and in the ordinary course of business. The phrase "in good faith" is defined in section 90 of the Act. It requires an act so done to have been "done honestly whether it is done negligently or not".

There is no evidence, in my view, that First Caribbean, as paying banker, acted other than in good faith or in the ordinary course of business. The subject cheques were, as far as other banks were involved, all paid through the clearing. They were all regular on the face of it and properly presented by the respective collecting banks. There was nothing which would alert First Caribbean that the indorsement was irregular. The discrepancy between the payee's name "Lannaman & Morris" (one of the named payees), as appearing on the face of some of the cheques as opposed to the name in the disputed indorsement on the rear of the cheque, by way of a stamp, "Lannaman & Morris (Shipping) Ltd." does not take the matter out of the normal course of business. There is no evidence that Lannaman and Morris were customers of First Caribbean or that First Caribbean had any

reason to know that an indorsement made by Lannaman and Morris, or indeed, either of the named payees, was not genuine.

A similar observation may be made in respect of the application, to the facts of the instant case, of section 80 of the Act. It states:

> "Where the banker on whom a crossed cheque is drawn, **in good faith**, and **without negligence** pays it, if crossed generally, to a banker, and if crossed specially, to the banker to whom it is crossed, or his agent for collection being a banker, the banker paying the cheque, and, if the cheque has come into the hands of the payee, the drawer, shall respectively be entitled to the same rights, and be placed in the same position, as if payment of the cheque had been made to the true owner thereof." (Emphasis supplied)

Again, I draw a distinction between First Caribbean in its capacity as paying bank, as opposed to its identity as collecting bank. Although the test for section 80 differs from that of section 60 insofar as negligence is the standard for section 80, I find that in paying through the clearing, First Caribbean has satisfied the required standard. The significance, or lack thereof, of the crossing, for a paying bank, has been discussed above and is also applicable in this context.

Insofar as First Caribbean is also the collecting bank, the evidence of Mr. Douglas Cupidon, for First Caribbean, is that 46 cheques are affected. Of these, he says, 31 were drawn on Bratton's account at First Caribbean's Montego Bay branch. These were negotiated at First Caribbean's Half Way Tree branch. An examination of the SGS cheques revealed that 14 were lodged at the Half Way Tree branch and 1 at First Caribbean's Newport

West branch. There was one cheque, #01268 (page 42 of SGS's documents in Exhibit 3), which bore the crossing stamps of both the Half Way Tree branch as well as an NCB branch. Without specific evidence on this cheque, I am not prepared to treat it as belonging to one category or the other.

Mr. Vassell, Q.C., on behalf of First Caribbean, submitted that there "is no claim against [First Caribbean] as a collecting bank...and there is no claim in the tort of conversion". An examination of paragraph 4 of the respective Particulars of Claim supports this submission. It states:

> **4.** "...the Defendant wrongfully and without the Claimant's authority **paid the said crossed cheques** to personal accounts in the names of one Mr. George and/or Mrs. Madgelin Lee and/or Mr. Andrew Dennis **at several financial institutions including the Defendant's and debited the Claimant's account** with the amounts thereof." (Emphasis supplied)

The stress of the paragraph is on the payment. That payment was to "several financial institutions including" First Caribbean. The dichotomy between the separate identities that a single bank may have, in respect of a cheque, is recognized in several of the decided cases. I have mentioned two of those above, namely *Universal Guarantee Pty. Ltd* and *Akrokerri.* I, therefore, accept Mr. Vassell's submission on this point, as correct. That finding allows for a consideration of section 82 of the Act.

Section 82 provides protection for a collecting bank. It states:

> "Where a banker, **in good faith and without negligence,** receives payment for a customer of a cheque crossed generally, or specially to himself, and the customer has no title or a defective title thereto, the banker shall not incur any liability to

> the true owner of the cheque by reason only of having received such payment. A banker receives payment of a crossed cheque for a customer within the meaning of this section notwithstanding that he credits his customer's account with the amount of the cheque before receiving payment thereof." (Emphasis supplied)

As with section 80, it would have been for First Caribbean to have satisfied the court that it acted in good faith and without negligence. The quotations from Lord Upjohn in *Universal Guarantee,* which were set out above, demonstrate that the duty placed on a collecting bank when it is presented with a cheque crossed with the limitation "A/C Payee Only".

Were my findings on the points, concerning the fictitious payee and whether First Caribbean has been sued as a paying bank only, been otherwise, there is no doubt that First Caribbean as a collecting bank would have failed in respect of the onus placed on it by this section. It has provided no explanation, by way of evidence, why it ignored the crossings on the cheques, especially those of Bratton, which stated "A/C Payee Only", and accepted the cheques for the credit of another of its customers.

Mr. Douglas Cupidon, giving evidence for First Caribbean, during cross-examination, sought to give an explanation. He said "...the teller relied on the indorsement of the 3rd party being a customer of the bank." Apart from the fact that he is speculating as to the teller's motivations, there is no evidence as to what step, if any, the teller took in seeking to protect the true owner of the cheque. It is true that the decided cases are, in many cases,

against a banker failing to make enquiries as to the indorsement in the face of a crossing, (see, for example, *Honourable Society of the Middle Temple v Lloyds Bank* mentioned above), but the cases do not exclude the possibility of an exculpatory explanation. In the absence of such an explanation, First Caribbean, indeed all of these collecting banks (for none has adduced such evidence), would have been liable to the true owner of the cheque. They are, of course, not found to be so, because of the previous finding made.

I now turn to the issues joined between the banks.

The issues between the banks

The funds taken from the firms' accounts

Having decided that the firms' accounts were properly debited, I now have to determine what should be the arrangement between the banks in respect of the funds so debited. Three amounts are involved.

The first is a sum of $11,127,730.00. When Bratton and SGS informed First Caribbean that the cheques had not been genuinely indorsed, the banks attempted to recover the monies involved. A large portion had been credited to the accounts of the Lees and as mentioned before, the monies were then withdrawn from those accounts. A total of $11,127,730.00, taken from the Lees' accounts, has been placed on escrow by NCB. I shall make further reference to it below.

The second amount is a sum of $2,607,600.00. This sum is due to NCB by First Caribbean as a result of cheques presented by NCB for payment. NCB has counterclaimed against First Caribbean for its return.

According to the evidence of Mr. Patrick Moyston for First Caribbean, (paragraph 29 of his witness statement) this sum represented payments which were made by First Caribbean to NCB for cheques presented through the clearing. The total was, however, repaid to First Caribbean on its demanding same on the basis that the indorsements were forged. Mr. Moyston's evidence is that the sum was re-credited to the account of SGS. As I understand the evidence, that sum was later demanded by NCB from First Caribbean but was not paid. The Lees are however, entitled to it.

The sum of $2,607,600.00, having been, initially, properly debited from the relevant firm's account (SGS), must be repaid, by First Caribbean, to NCB, with interest at a rate which will ensure that the Lees suffer no loss.

The question which naturally follows is whether First Caribbean may recover the sum from SGS. I, however, do not need to answer that question. I shall content myself to observe that issues of the absence of a counterclaim, the relevant limitation period and the contract between First Caribbean and SGS will no doubt feature in the resolution of that question.

It would seem that First Caribbean's Ancillary Claim against NCB cannot avail it in these circumstances. Its liability does not arise from a liability to SGS and, strictly speaking, has nothing to do with the Clearing House Rules.

The third amount is $373,630.00. This represents the total of two cheques which, on the evidence of Mr. Richard Hines of NCB, were returned to NCB within days of First Caribbean having paid them. According to Mr. Hines, they "were returned within the recourse period and so funds were still being held", in respect of those cheques, by NCB. The inference is that NCB repaid First Caribbean, debited the Lees' account and kept the cheques in order to have recourse to the Lees. Mr. George Lee stated in his witness statement that the two cheques were presented to him at a meeting with his bankers at NCB. It was then, he said, that he was told that the cheques were "forged items". The further inference is that First Caribbean, having recovered the sums from NCB, would have re-credited the relevant account of the respective firm (SGS).

This amount does not figure as an issue between First Caribbean and NCB. The position is that NCB has refused payment of the two cheques and it is for the holders, the Lees, to take such steps as are open to them to

recover the sums involved. In light of the lapse of time, and the general surrounding circumstances, it is perhaps unlikely, that recovery will occur.

Dispute as to fact

Unfortunately, there is a dispute as to fact between First Caribbean and NCB. This is in respect of the process by which the sum of $11,127,730.00 came to be placed in escrow by NCB.

Mr. Moyston stated in his witness statement that when the irregularities were discovered, First Caribbean returned 85 cheques, to NCB and requested repayment of the sum of $11,127,730.00 on the basis that they bore "forged indorsements". The cheques were returned through the clearing house. He said that NCB returned the cheques within the appropriate time, denying First Caribbean's request. According to Mr. Moyston, "First Caribbean has never received the said $11,127,730.00".

Mr. Justin Seaton, testifying on behalf of NCB, said that First Caribbean requested from NCB **and received**, the following sums:

a. $984,890.00 through the clearing house;

b. $10,142,840.00 through the clearing house;

c. $2,607,600.00 by direct presentation;

d. $373,630.00 through the clearing house;

the first two sums were in respect of Bratton's cheques and the latter two were in respect of cheques drawn by SGS. His evidence concerning the sum of $11,127,730.00 was supported by NCB witness, Mr. Richard Hines.

According to Mr. Seaton, NCB recovered some of these monies. The sum of $11,127,730.00 was recovered in two tranches from First Caribbean. The first tranche was in the sum of $984,890.00 and the second was in the sum of $10,142,840.00. He disagreed with a suggestion, made to him, that these sums were not paid to and then recovered from First Caribbean.

Surprisingly, neither side provided any documentary evidence to support its position. I am inclined to accept Mr. Moyston's testimony in preference to that of Mr. Seaton. I do so for three reasons. Firstly, it is not disputed that First Caribbean received and retained the sum of $2,607,600.00. The probabilities are that the payments would have all been made by NCB at or about the same time. First Caribbean is unlikely to have returned $11,127,730.00 and retained the smaller sum. Its position would have been identical in respect of both (or rather, all three) sums. I doubt that the fact two different branches were involved could have accounted for the inconsistency.

Secondly, the undisputed evidence of Mr. George Lee is that "beginning on or about 27 July 2001, [NCB] started debiting [the Lees']

accounts" with various sums. We now know that those sums represent some of the subject cheques. An examination of a statement of his account numbered 062145528 (Exhibit 2, pages 46-48 of the Lees' documents), shows that the debits for the unpaid cheques were effected on the 26th July. Yet, page 49 of the exhibit shows that a number (though not all) of those debits were reversed between the 30th and 31st July. The reversals, on that page alone, result in credits amounting to approximately $4.0m. The issue is further complicated by the fact that the reversals on the 30th have corresponding debits, on that date, in those sums, on the Lees' account numbered 062145773. I have not seen the statements for accounts numbered 062145536 and 777-7702-3007-192 to determine if there is a similar co-relation concerning the reversals noted on the 31st. Paragraph 6 of Mr. Seaton's further witness statement does not assist me in the matter.

Although bankers are forced to and do, act quickly in dealing with cheques, especially through the clearing house, I have taken notice from the calendar that the 28th and 29th July 2001, were a Saturday and Sunday, respectively. I doubt that, in the context of the controversy, the payment would have been made to First Caribbean and returned to NCB for credit to Mr. Lees account on Monday 30th July.

Thirdly, the correspondence does not support the sums of $984,890.00 and $10,142,840.00 having been transferred between the banks. A letter dated August 24, 2001 was written by Myers Fletcher and Gordon, representing NCB, to First Caribbean (then CIBC) concerning the dispute. It refers to the subject cheques but, curiously, fails to mention that two payments had been made and returned through the clearing house. Letters exchanged between the banks on November 1, 2001 are restricted to the issue of the sum of $2,607,600.00.

It is regrettable that so much space has had to be dedicated to this dispute. It has not affected the credibility of the relevant witnesses, as none was personally involved with those matters but were speaking from their recollection of bank records. I have had to examine the matter because the dispute affects the question of who should pay interest to the Lees in respect of the $11,127,730.00. It will, of course, be NCB.

Issues made otiose

It was a major issue between the banks as to the effect that the Clearing House Rules would have had on the matter of First Caribbean's Ancillary Claim against NCB and RBTT respectively. First Caribbean intended to rely heavily on Rule 26 of those rules, in the event that it was found to have been liable to the firms. That event has not materialized and I

therefore need not explore the effect of the rule in the context of this case. Nor need I consider the provisions of the order made by the Minister of Finance on April 28, 1999 concerning the business of Eagle Commercial Bank, in the context of RBTT's liability for Eagle's commitments.

The issues between the Lees and NCB

The Pleadings

The Particulars of Claim pitched the Lees' claim on two main bases. Firstly, they alleged that NCB was negligent in crediting their various accounts with the amounts of the respective cheques, before the cheques were cleared. I think that it now clear, based on the time period over which these transactions took place, that that allegation has no factual support.

The second plinth of the Lees' claim is that NCB "wrongfully and unlawfully debited" their various accounts with sums totalling $12,507,179.00.

NCB has denied that it acted improperly and has sought to link its actions to the issues raised in the Bratton/SGS claims. Although the bulk of the monies will be returned to the Lees by virtue of the resolution of the Bratton/SGS claims, it is necessary to decide if there is any liability on the part of NCB, in order to assist in determining the issue of who should pay the costs of this independent claim.

The Evidence

Mr. George Lee testified on behalf of his wife, his mother and himself. As a witness he came across as unsophisticated, honest and straightforward. The court was impressed with his answer to a suggestion which was made to him. It was to the effect that any loss which he suffered would be as a result of his fault. Surprisingly, he agreed with the suggestion. His explanation was that it was because he "took the chance" when he accepted the cheque. I interpreted him to mean that he accepted a business risk, rather than that he took a gamble on a dishonest transaction.

His testimony was that pursuant to his family's cheque-cashing business, he cashed the cheques in question for a Mr. Andrew Dennis. It was Mr. Dennis who received payment in respect of the majority, if not all, of the affected cheques. Mr. Lee said that he had had a system in place to prevent fraudulent cheques being accepted. This, he said, was applied to the cheques which Mr. Dennis presented. He however did not, himself, take the steps required by the system. He stated that that would have been done by an employee. He said, nonetheless, that he also questioned Mr. Dennis about his possession of the cheques and was satisfied with the latter's explanation for their having been endorsed to Dennis' name.

NCB's evidence was focussed, in the main, on the issues joined with First Caribbean. Mr. Moyston stated, however, in his witness statement that he interviewed Mr. Lee on July 13. It seems that Mr. Moyston was, unimpressed, to say the least, with Mr. Lee. I do not think it is inappropriate for me to say that it seems that Mr. Moyston suspected Mr. Lee of complicity in the scheme concerning these cheques. Mr. Moyston reported the matter to the police and the Lees' accounts were debited, commencing on or about the 26th July. There is no record of any of the Lees ever having been charged with any offence in connection with the illegal scheme.

The Law

Counsel for the Lees have cited, in support of their stance, the case of *The London and River Plate Bank, Ltd. v The Bank of Liverpool, Ltd. and ors.* [1896] 1 Q.B. 7. In that case a bank, having paid on a bill of exchange with a forged indorsement was unable to recover the sum paid, despite the mistake, from the indorsee who was a holder in due course. This was because too much time had elapsed between the date of payment and that of discovery of the mistake. It was an early case of the recognition of the principle of change of position. The headnote accurately states the principle accepted in the judgment:

> "When a bill becomes due and is presented for payment, and is paid in good faith and the money is received in good faith, if such an interval of time has elapsed

> that the position of the holder may have been altered, the money so paid cannot be recovered from the holder, although indorsements on the bill subsequently prove to be forgeries."

Mathew, J. justified his decision in *London and River Plate,* in part, on the principle that "the position of a man of business may be most seriously compromised" by delay. He said, at page 11:

> "...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 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."

The decision on this point came in for some criticism from the Privy Council in *Imperial Bank of Canada v Bank of Hamilton* [1903] A.C. 49. Their Lordships were of the view that there should be a burden on the person receiving the benefit, to demonstrate that he had had an actual change in position, before restitution could be denied the payer.

Analysis

NCB may have had its doubts about whether the Lees received the money in good faith, but unless its contracts with them in respect of the various accounts, allowed it to debit the accounts despite the lapse of time, I find that it was not entitled to do so. The document entitled "Appointment of Bankers – joint account form", apparently the contract between NCB and the Lees for account numbered 232067675, (at page 11 of NCB's documents

in Exhibit 2), does not give that authority. No other contract is exhibited. The Lees were clearly business people and the accounts (or at least that numbered 062145528), apparently very heavily used, business accounts. The sums involved would have been paid out to Mr. Dennis. The situation here would virtually speak for itself, despite the findings in *Imperial Bank of Canada.*

In the circumstances I find that the principle espoused by Mathew, J. in *London and River Plate* is fully applicable here and that NCB is liable to the Lees in this claim. As a consequence of all the findings made above, NCB is to credit the account of the Lees with all funds taken from their respective accounts as a result of the complaint about the cheques cashed for Mr. Dennis. The sums involved are the $11,127,730.00 being held in escrow by NCB and the $2,607,600.00, recovered by First Caribbean. NCB has no liability to the Lees in respect of First Caribbean's refusal to honour the two cheques totalling 373,630.00. I have already expressed a view concerning the recovery of the latter sum.

Conclusion

Although this case was complicated by of the number of parties, claims and issues involved, the major issue between the firms and First Caribbean is resolved in favour of First Caribbean. This is on the basis that

all the cheques, the subject of the claims, have been found to have been drawn to a fictitious payee in the sense of section 7 of the Act. The firms had the burden of proving that the cheques were not indorsed by the intended payee, and I find that they have failed in that responsibility. The manner in which the cheques were handled and the length of time for which the scheme subsisted, ostensibly undetected, made it more probable than not, that the principal officers of both firms, and the signers of the cheques drew the cheques in the names of the respective agents as a pretence and were aware of the manner in which the cheques were actually being indorsed.

In the circumstances, the cheques became "bearer instruments" and First Caribbean, as the paying bank, was entitled to pay on them and debit the respective accounts with the various sums involved. To the extent that the sum of $2,607,600.00 was re-credited to SGS' account, First Caribbean must determine whether it may properly re-debit the account. It has not counterclaimed against its customer, and SGS has not asked for a declaration concerning that repayment. I express no view on the point.

As between the banks, the bulk of the issues joined between them, was made redundant by the finding on the primary claims. The ancillary claim against RBTT was rendered wholly otiose by the finding in favour of First Caribbean. For NCB, the result, however, is that First Caribbean must

repay NCB the sum of $2,607,600.00, having initially, properly debited SGS's account. The payment must be made with interest at a rate that will reimburse the Lees for the loss which they have suffered.

In *Tai Hing Cotton Mill Ltd. v Liu Chong Hing Bank Ltd and others* [1986] 1 A.C. 80, their Lordships, sitting in the Judicial Committee of the Privy Council on an appeal from Hong Kong, awarded interest on a sum due by three banks to a customer, for having improperly debited its accounts. This was so despite the fact that the accounts did not attract interest. Not unexpectedly, their Lordships at page 111 D, found that the customer had "lost the opportunity of placing the money at interest as a result of the unauthorised debits made by the banks to the respective current accounts". Interest was awarded at "1½ *per cent.* over the prime rate in force in Hong Kong from time to time", for the relevant period.

I must confess some diffidence as to arriving at the correct formal decision in respect of First Caribbean's ancillary claim against RBTT. Should that claim, which proved not to have eventually arisen, be dismissed or should there be judgment for RBTT? I have found very little by way of guidance on the trial aspect of ancillary claims. It seems, however, that a definitive position should be stated, resolving the ancillary claim. There was

in fact no trial of the issues joined and therefore it might be appropriate to dismiss it. I shall adopt that route.

Finally, the Lees, as business people operating business accounts, are entitled to judgment against NCB for having improperly debited their accounts so long after the credits were applied. The testimony given by Mr. Seaton, was that there was a difference between the rate of interest charged to the Lees, on the overdraft caused by the debits and that being applied to the monies which were placed in an escrow account, pending the resolution of these claims. The Lees should not be disadvantaged by the difference. The charges should all be reversed and the Lees paid interest on the principle set out above in accordance with the *Tai Hing* case mentioned above.

Costs

Despite the intricacy of the matter, applying the principle that costs follow the event, I find that Bratton Limited and Aubrey Wong (trading as Spanish Grain Store) should each pay the costs of First Caribbean as well as those of RBTT and NCB in their respective claims. I find that First Caribbean was justified in bringing the ancillary claims and should be reimbursed its costs in respect thereof. I have found guidance, on this point, in the decision of Diplock, J. (as he then was) in *L.E. Cattan, Ltd. v A.*

Michaelides & Co. (a firm) (Turkie third party, George (trading as Yarns & Fibres Co.) fourth party) [1958] 2 All E.R. 125 at p. 128.

NCB should pay the costs of the Lees in their claim.

Based on all the above the judgment is as follows:

1. Judgment for First Caribbean International Bank against the Claimant in claims HCV 2003 /0270 and HCV 2003 /0221 respectively;
2. Judgment for National Commercial Bank against First Caribbean International Bank on the Counterclaim to the Ancillary Claim in Claim HCV 2003 /0221;
3. First Caribbean International Bank shall pay to National Commercial Bank the sum of $2,607,600.00 together with interest thereon at the rate of 1½ % above the prime lending rate used by National Commercial Bank, from time to time during the period July 26, 2001 and July 23 2009;
4. The ancillary claim against RBTT Bank Jamaica Limited is hereby dismissed as no liability accrued against First Caribbean International Bank to require adjudication on the claim for an indemnity;
5. Judgment for the Claimants against National Commercial Bank in Claim C.L. 2002 / L 66 in the sum of $13,735,330.00 ($11,127,730.00 + $2,607,600.00);

6. National Commercial Bank shall reverse all interest and other charges made by it against accounts numbered 062145528, 062145536, 062145773, 232067675 and 777-7702-3007-192 held with it by Dorothy Lee, George Lee and/or Madgeline Lee, between July 26, 2001 and July 23, 2009;
7. National Commercial Bank shall pay to the Claimants in Claim C.L. 2002 / L 66 interest on the said sum of $13,735,330.00 at the rate of 1½ % above the prime lending rate used by it, from time to time during the period July 26, 2001 and July 23, 2009;
8. An account shall be taken of the said accounts on the application of the Claimants Dorothy Lee, George Lee and/or Madgeline Lee;
9. The Claimant in Claim HCV 2003 /0270 shall pay the costs of the Defendant and those of each of the ancillary defendants thereto;
10. The Claimant in Claim HCV 2003 /0221 shall pay the costs of the Defendant and those of each of the ancillary defendants thereto;
11. The Defendant to Claim C.L. 2002 / L 66 shall pay the costs of the Claimants thereto.