Suit Ct. Bank — negligence — acceptance of money order on which Plaintiff had affixed his signature — Bills of Exchange Act — liability

No case referred to

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

IN COMMON LAW

SUIT NO. C.L. 1986/W281

BETWEEN	CHARLES WILSON	PLAINTIFF
AND	NATIONAL COMMERCIAL BANK OF JA.	1ST DEFENDANT
AND	K. G. YAPP	2ND DEFENDANT

Mr. E.L. Frater and Miss Stacey Mitchell instructed by Frater, Ennis & Gordon for Plaintiff

Mr. C. Honeywell and Miss J. Donaldson instructed by Clinton Hart & Co. for Defendants.

Heard: 14th April, 1993

REID, J.

Reasons for Judgment

When at the conclusion of the hearing of this matter in the late afternoon, I entered judgment for the plaintiff in the amount of his claim. I indicated that I would put my reasons in writing early. Mr. Honeywell had intimated that he would shortly file an appeal against my judgment and award.

The action by the plaintiff, a hotelier of Lucea in the parish of Hanover, against the National Commercial Bank of Jamaica Limited, hereinafter called 'the Bank', alleges negligence on the part of the Bank and its manager at the Lucea branch, Mr. Yapp, the second defendant when the latter accepted an instrument purporting to be a valid money order on which the plaintiff had affixed his signature. A certain Patrick Edwards who was neither a party to this cause nor a witness at the hearing, had had a brief sojourn at the hotel of the plaintiff. On or about the 26th August 1985, the former secured the signature of the plaintiff, a customer of the Bank, on to the back of an instrument designated a 'money order' for the sum of US$2,500.00 and purporting to be in the name of the said Edwards as drawer and payee. It is not in dispute that that signature had facilitated the encashment and payment of the equivalent in Jamaican currency at the rate of exchange then obtaining. The circumstances, from the evidence and perspective of

the plaintiff and Mr. Yapp respectively, differ somewhat. The 'money order' in evidence Exhibit 1, was returned to the Bank, dishonoured; the Bank requested from the plaintiff reimbursement, and he complied. Not satisfied, he consulted his attorneys and now claims that irregularities manifest on the face of the instrument, support an action in negligence against both defendants. The particulars of negligence read (edited)

> 1. Failing to take .... adequate measures to ensure that the (money order) was a valid instrument.
>
> 2. .....
>
> 3. Failing to exercise reasonable care, skill, diligence and competence in..... encashing the (money order).

The plaintiff also claimed interest on the aforesaid sum at 18% per annum. The defence pleaded was that the second defendant as agent and servant of the Bank, had acted in good faith and in the (normal) course of business; that having discovered the invalidity of the instrument, had done as entitled, namely to request re-imbursement from the plaintiff and that the latter had complied voluntarily. Further, pleaded the defendants, the plaintiff

> "... by endorsing the money order had engaged that on presentation, it should be accepted and paid according to its tenor and that if it were dishonoured, he would compensate the first defendant who was compelled to pay it."

Specifically alluding to the provisions of Section 55 (11) of the Bills of Exchange Act, they pleaded further or alternatively that

> "the first defendant was a holder in due course and the plaintiff (thereby) precluded from denying to the defendants the genuineness and regularity in all respects of the signature of the drawer of the said money order and all previous endorsements".

Still continuing, the pleadings, relying on Section 55 (iii), ibid, read:

> ".... the plaintiff is precluded from denying to the defendants that the said money order was at the time of his endorsement, a valid and subsisting bill and that he had a good title thereto".

The defence also set up an estoppel, that, inasmuch as the plaintiff by indorsing the money order, had thereby represented to the defendants that

the instrument had been properly drawn; thereon the defendants had placed reliance in making payments (as they did). In the event, however, that negligence should be imputed to the defendants, the plaintiff should not be absolved from the consequences of contributory negligence.

The plaintiff by way of reply, would aver that his signature had only been affixed to facilitate the identification of the person presenting the instrument as the person named thereon as payee; that section 29 of the Act was unavailing for the defendants to qualify as 'holder in due course' as the enactment there, postulates a "bill complete and regular on the face of it" (underlining, mine).

The events, testified the plaintiff, began with a telephone call from the Bank, in his words: "somebody from the Bank - Mr. Yapp", and who said that he was sending the money for plaintiff to

> "endorse the cheque to identify him".

Replying to an inquiry if the man was plaintiff's hotel guest, his response, said plaintiff had been in the affirmative. Thereafter, testified plaintiff, the said Patrick Edwards returned to have him sign the money order. When cross-examined, the plaintiff did not evince the habit of scrutiny whenever in similar instances he had signed instruments. To emphasize, perhaps, the limited context in which his signature had been made on Exhibit 1, he repudiated the following suggestion by Mr. Honeywell:

> ".... what in fact happened was that you simply endorsed the back so as to assist Mr. Edwards in presenting it for encashment".

Expressly admitted was his failure to examine the money order, explaining, in reference to its status:

> "..... it comes in like a certified cheque and I endorse it to identify the person".

Admitting unequivocally that he had not checked the type of instrument, he offered as his reason, his reliance on the telephone call from the Bank. Recanting from his earlier assertion that Mr. Yapp had been the first alleged caller, he said: I don't remember; so long", but added: "only Mr. Yapp's voice would go like that".

Mr. Yapp for his part, maintained that Exhibit 1 had been brought to him by a member of staff as its value was above the competence of the clerk to negotiate. Yes, he had telephoned the plaintiff whose voice he had recognised, he said, but only in order to verify plaintiff's signature "out of an abundance of caution". The money order after encashment was despatched in the normal course to the Bank's Central Control Centre at No.77 King Street, Kingston. Its irregularity only subsequently came to light and is signified by the word "counterfeit"; and also, the stamp-mark "Irving Trust New York" would support this. Foreign drawn bills would not be afforded closer scrutiny than local ones, said he, as the former category would only be accepted "with recourse". By this method, acceptance would only be accorded to a person holding an account at the Bank or otherwise, the payee having by way of guarantee, the endorsement by someone so holding an account, as in the instant case. To Mr. Wilson, described as 'astute', this should have been obvious without the benefit of any explanation. Repudiating the suggestion of negligence imputed to him in negotiating Exhibit 1. Mr. Yapp conceded, however, adding "with hindsight", that the bill on the face of it was not valid. The text of the question was:

> "Knowing now what you do would you agree that the cheque was not valid on the face of it?"

Whatever his answer, it is my view that the irregularity on the face of the cheque is to ordinary scrutiny, manifest. Except for the processing stamp-impressions, Exhibit 1 clearly would not have reflected any difference at the time of acceptance, as compared with its present state. Conveniently now, I refer to the more relevant provisions of the Bills of Exchange Act as this will clear the stage for determination of the crucial issues. By section 30, ibid

> "Every person whose signature appears on a bill is prima facia deemed to have become a party thereto for value".

Likewise, section 56 (ibid) provides as follows:

> "Where a person signs a bill otherwise than as drawer or acceptor he thereby incurs the liability of an indorser to a holder in due course".

Not surprisingly, the defendants in their pleadings used some of the ipsissima verba of section 55 of the Act which reads:

> "The drawer of a bill by drawing it -
>
> (a) .....
>
> (b) .....
>
> The indorsor of a bill by indorsing it
>
> (i) engages that on due presentment it shall be accepted and paid <u>according to the tenor</u> and that if it be dishonoured he will compensate the holder or a subsequent <u>indorser who is compelled to pay it</u> provided (etc.) .....
>
> (ii) is precluded from denying to a holder in due course the genuineness and regularity in all respects of the drawer's signature and all previous indorsements.
>
> (iii) is precluded from denying to his immediate or a subsequent indorser that the bill was at the time of his indorsement a valid and subsisting bill, and that he had a good title thereto.

The term 'holder in due course' is explained by Section 29 (ibid) as

> "... a holder who has taken a bill, <u>complete and regular on the face of it,</u> under the following conditions, namely:-
>
> (a) .....
>
> (b) .....

What-ever Mr. Wilson's impressions were, it appears that having signed the bill, he became, prima facie, a party to it (Section 30) and would by virtue of section 56 incur liability to a holder in due course. Even if a holder in due course should fail so to qualify because the bill, on the face it did not appear regular and complete, the provisions of section 55 (iii) would enure to the advantage of such person and preclude an indorser from impugning the bill's genuineness and regularity should the latter be taxed by a subsequent indorser. Equally unavailing to him would be Section 23 which reads:

> "No person is liable as drawer, indorser or acceptor of a bill who has not signed as such."

Notwithstanding Mr. Yapp's failure to caution Mr. Wilson, the latter could not have resisted successfully an action against him by a hypothetical intermediate indorser who had subscribed the bill subsequently to him. The bank vis-a-vis the plaintiff Mr. Wilson should, prima facie, be in no

different position and thereby entitled to make a demand as in fact it did. But for the circumstances peculiar to the present case, I would so have held and the plaintiff's quest for recovery would have failed.

If, as was strongly urged, Mr. Wilson by his cursory examination of the bill and his signing same did exhibit a want of care that facilitated the payee and thereby had also misled the bank, then a fortiori, was the conduct of the second defendant who testified that, 'until today' he had not seen the presenter of Exhibit 1. This is not to say that such an omission, per se, constituted a cavalier approach. More important is Mr. Yapp's interpretation of what, for want of better expression, may be called the 'guard limit' of the bill. According to him he interpreted it as "five hundred thousand dollars." The expression 'NOT VALID OVER' with the following integers, to wit: $500.00 0 00" is in a form disguised and calculated to deceived. The mis-spelling "EXCATLY" preceding the figures $2500.00 in red as well as the blurred data all in frank-stamp along the line, by themselves are not significant but with ordinary scrutiny might have been noticed. This follows from Mr. Yapp's commendably candid admission in effect that were the matter now res integra, Exhibit 1 would not be accepted - on the face of it. Acceptance of the bill by second defendant in a probably unguarded moment (an uncalculated 'risk' not derogating from otherwise competent management generally) must be subsumed under the rubric of negligence. If the second defendant's duty of care to the bank included the avoidance of bills not appearing 'complete and regular on the face' (thereof), then such a duty must extend, mediately, to all and any the bank's customers, particularly one who in good faith appeared to have guaranteed such a bill. The proximate cause of the bank's detriment arose from the failure of ordinary care on the part of its officer rather than the guarantee by the indorser, implied under the provisions of the Bills of Exchange Act. Far from being a 'party compelled to pay', the bank

was a party who ought not to have accepted the bill. Any other interpretation would, in my view, constitute a constriction on the process of reasoning.

Moreover, the fiduciary relationship between bank and customer precludes any reliance by the defendants on the voluntariness of the repayment which on the evidence from the defence, I accept. From what I have indicated above, it follows that the question of contributory negligence does not, in my view, arise.

On the question of interest on the award, Mr. Yapp described the plaintiff as a good customer but stressed the latter's enjoyment of the facility of a considerable overdraft. On a reconsidered recollection, he conceded, however, that the plaintiff may have also maintained a personal account at the bank. The plaintiff's evidence that the prevailing rate of interest on deposits was 18% is unchallenged qua suggestion of a lower figure and this translates into 12% interest awarded (allowance being made for a one-third deduction by the bank for remittance to Chancery). As there was no evidence of when the plaintiff had complied and paid the bank, the award of interest was set to commence from 18th June 1986 the date on which the writ was issued. Costs were awarded to the plaintiff to be taxed unless agreed upon.