C.J. file
31.5.95

IN THE GRAND COURT OF THE CAYMAN ISLANDS

HOLDEN AT GEORGE TOWN, GRAND CAYMAN

CAUSE NO. 10 OF 1992

BETWEEN:	ALI IBRAHIM	PLAINTIFF
AND:	BRITISH AMERICAN BANK LTD	DEFENDANT

For the plaintiff: Ian Croxford Q.C.,
with him Mr. George Giglioli

For the defendant: Pierre Lamontagne Q.C.,
with him Mr. Phillip Boni

HARRE CJ.

JUDGMENT

The plaintiff was a customer of the defendant bank which at the time these proceedings were issued in 1992 was called First Home Banking Ltd and is now called British American Bank Ltd. He was introduced by a lady called Roberleigh Brougher ("Brougher"), who was already a customer of the Bank, and opened individual accounts on 16th February 1990. The mandates in respect of each of these accounts authorised the bank to honour only signed withdrawal orders. The plaintiff's evidence was that when he gave instructions to the bank by facsimile ("fax") he spoke to a bank officer also and he did not give withdrawal instructions in that way. With the exception of one unconsummated

transaction that is consistent with the contemporary documentation.

On 28th June 1990 the plaintiff sent a message to the Bank for the attention of Ms. Marisa Boyd giving an instruction to buy a six month CD (term deposit) for all the funds in his savings account No. 10795052 (sic). In fact the correct account number was 1079052 but nothing turns on that. The fax was sent on the printed paper of a company called Quantum Consulting Network Inc. ("Quantum") and the telephone and fax numbers in the body of the message are the same as those in the printed heading. On 20th December 1990 Mr. Ibrahim issued a further instruction on a similar style of transmission form giving an instruction for the completion of another CD, with the result that the total sum deposited at the bank by way of certificates of deposit was some $900,000. All figures in this judgment are expressed in United States dollars.

The two instructions by fax purporting to be signed by Mr. Ibrahim which have given rise to the present proceedings were dated respectively 9th and 28th May 1991. The first purported to direct the bank to break CD. No. 5001697, to transfer $500,000 to account No. 1081637 and to purchase a further 6 months CD with the balance. Account 1081637 was a joint account of the plaintiff and Brougher which had been opened on 2nd April 1991 and on which either had authority to sign. The second purported instruction was to break CD No. 5001628 and credit savings account 1079052 and then transfer $400,000 to an account of Quantum Consulting Network Inc. in Atlanta.

The plaintiff was the sole witness on his own behalf and no evidence was offered by the defence. He says that he discovered the two transactions on his return from India in June 1991 and that these faxed instructions were forged by Brougher. He had given no authority to any third party to give the instructions which purported to have been given, and no instructions or authority to the bank to disclose any information to Brougher. His evidence of admissions by the bank official Ms. Boyd that the bank sought unsuccessfully to verify the bogus instructions by telephone and was fobbed off by Brougher, and that information had been given to Brougher which enabled her to make up a shortfall of $14,000 on the plaintiff's account so that the second transaction could be completed went unchallenged. It is convenient at this point to observe that the sum of $14,000 which was thus deposited became in accordance with established principles of banking law a debt owed by the bank to the plaintiff and does not fall to be separately treated in any way. Any matter in issue between the plaintiff and the depositor is of no concern of or assistance to the bank. After various broken promises by Brougher to repay, the plaintiff instructed lawyers on 26th June. Extensive consultations ensued with these lawyers - Kilpatrick & Cody - and a criminal complaint was instituted through other lawyers, Garland and Samuel.

On 18th July an Escrow Agreement was entered into under which Brougher agreed to deposit $871,448.61 with Bank South NA as Escrow Agent pending determination of the respective interests of Brougher, the plaintiff and his brother (who had been initially a plaintiff in the present action). In fact a settlement was reached, and is embodied in

a document dated 26th September 1991 which recites the payment of $871,448.61 under the Escrow Agreement; that Brougher has maintained a right to possession of portions of the escrow fund based on various theories, including, without limitation settlement of an assault and battery claim against Ali Ibrahim and settlement of certain claims against Quantum for unpaid commissions and consulting fees; that the parties had agreed to settle their disputes; and that it is understood that the agreement is a compromise of doubtful and disputed claims and is not an admission of liability by either of the parties. The agreement then provides that the present plaintiff and Brougher will instruct the escrow agent to distribute $121,448.61 to Brougher and the remainder of the escrow fund with interest to Kilpatrick & Cody, attorneys for the Ibrahims. There then follow, among other things, mutual releases and undertakings to discontinue the action commenced in Georgia alleging that Brougher had converted over $900,000 of the plaintiff's funds.

No evidence was given on behalf of the defendant, but among the matters pleaded is the assertion that the instructions were issued by the plaintiff and under his authority on the stationary of a company controlled by him and from that company's offices; and that the bank has the plaintiff's signature which was verified by it against its record.

A banker owes his customer the duty to use reasonable care and to honour the instructions of his customer given in accordance with that customer's mandate. There is also a duty of confidentiality. The

mandate in force required that withdrawal instructions should be signed by the plaintiff. The plaintiff gave evidence which was not challenged with regard to his practice when sending instructions by fax. It was that he spoke to the bank when sending such instructions and had not given instructions as to withdrawals in that way.

The enquiries which the bank admit it made were insufficient and it paid out monies on the basis of inadequate and insufficient instructions. With present technology the ease with which a bogus facsimile signature can be appended to a document is obvious. In any event to describe an instruction bearing a facsimile signature as being signed by the person whose signature it purports to be seems to me to be a misuse of language.

I have no doubt that the bank was in breach of its duty of care in this instance. Indeed, in not admitting liability Mr. Lamontagne for the bank said that he was not going to say anything about it and as I have said these matters were neither challenged in cross-examination nor was evidence about them brought by the defence. Moreover confidential information that funds where not available to cover the second withdrawal in full was given to Brougher and this enabled her to top up the funds from an account over which she had control in the sum of $14,000 and so enable the transaction to proceed. That too was a breach of duty.

A number of legal issues arise from that finding which I will deal with in sequence. They are these -

1. **Is there an equity in favour of the defendant?**

It was argued that such an equity arose from the principle expressed in **B. Liggett (Liverpool) Ltd. v. Barclays Bank Ltd.** (1928) I K.B. 483 and considered thereafter in cases to which I shall refer. Wright J. in Liggett took the statement of the equitable doctrine under which a person who has in fact paid the debt of another without authority is allowed to take advantage of his payment from the language of Scrutton LJ in the case of **A.L. Underwood Ltd v. Bank of Liverpool and Martins** (1924) 1 K.B. 775. and concluded that it should apply to a case where a cheque was paid by a banker without authority so that the banker will be entitled to the benefit of that payment if he can show that it went to discharge a legal liability of the customer.

Liggett was considered by the Court of Appeal in **Re Cleadon Trust** (1938) ALL. E.R. 518 and subsequently in the Supreme Court of Ontario in **Royal Bank of Canada v. LVG Auctions Ltd.** (1985) LRC (Comm) 95. I take the following succinct statement of the doctrine and its consequence in the Canadian case, which is fully in accordance with the earlier statements in the English cases, from the judgment of Cromarty J -

> "There are equitable doctrines under which a person who pays the debt of another without authority may be allowed to take advantage of the payment. This equity may be extended, if the circumstances justify, to a banker who pays a cheque without authority if it is shown that the payment discharged a legal liability of the customer. The reasoning which supports the equity is put by Wright J in **B. Liggett (Liverpool) Ltd v. Barclays Bank Ltd.** (1928) I K.B. 48 at p 64".

> "The customer in such a case is really no worse off because the legal liability which has to be discharged is discharged, though it is discharged under circumstances which at common law would not entitle the bank to debit the customer."

On the facts of the case before him Cromarty J concluded that extension of the equity to the defendant was fully justified in that payment of the cheque concerned discharged a clear legal liability of the plaintiff and to allow the plaintiff's claim would be in substance to make the defendant pay the plaintiff's debt.

Although **Re Cleadon Trust** is the leading authority from the English Court of Appeal I do not propose to refer to it at any greater length, so far, in my judgment, are all the cases on the equitable doctrine from the facts of the present matter. There is no authority or principle - least of all a principle of equity - which applies where a fraudster extracts money from a bank and subsequently succeeds in retaining some of it as part of a settlement of a disputed claim with the account holder who has been defrauded. It is of course true that the settlement was arrived at with the knowledge and consent of the plaintiff. But it was arrived at without any acknowledgment of liability, clear or otherwise, and falls in my judgment far outside the equitable doctrine. What the plaintiff was doing was seeking to mitigate his loss. He was placed in a difficult position by reason of the bank's breach of duty and acted reasonably in the adoption of remedial measures.

2. **What, if any, sum is the defendant now liable to pay?**

The disputed payments fall into the following categories -

(a) Legal expenses

The plaintiff claims reimbursement of legal expenses. Very detailed accounts are in the agreed bundle. They are from the two firms of lawyers to whom I have referred. The plaintiff challenges these bills on two grounds. Firstly because the actual payment was made by Quantum, the company, rather than by the plaintiff himself; and secondly because it is said that the bills do not only relate to the civil dispute between the plaintiff and Brougher. I have been through the bill of Kilpatrick & Cody in some detail and conclude that the intense activity which the lawyers undertook in the period from June to September 1991 relates substantially to the settlement negotiations with Brougher and their consummation. There is a reference to "divorce", which the plaintiff explained, in relation to one of the meetings but that meeting also related to "the complaint" which I take to be a reference among many others to the complaint relating to Brougher. There is also a reference to a jury trial and to transfer of funds to Bermuda which the plaintiff says was a matter ancillary to the prospective settlement. I see no reason to doubt that. The fees are categorised (though of course the categories do not prove themselves) in detail and I see no reason under the circumstances of this case to embark on anything in the nature of a taxation exercise and disallow any of them. Indeed to do so without evidence would be quite wrong.

In relation to the objection that payments were made by Quantum and not by the plaintiff himself, my attention was drawn to several cases.

Esso Petroleum Company Ltd. and Mardon (1976) 1 Q.B. 801 was a case in which money was lost through an unfavourable deal with the petroleum company. An argument put before the Court of Appeal in relation to damages was that it was not Mardon's money that had been brought into the venture and lost but the money of a company in which he and his wife were the only shareholders. They could at any time have wound the company up and taken the money standing to its credit as their own. Instead Mardon drew cheques from the company's accounts and the court found that it was to all intents and purposes his and his wife's money. In view of the conclusion which I shall reach in a moment I do not need to consider whether that is the situation between the plaintiff and Quantum. I think it is unnecessary to pierce any corporate veil by analogy with the approach adopted in **DHN Food Distributors Ltd and London Borough of Tower Hamlets** (1976) 3 ALL. E.R. 462. It is in my view much simpler than that. It was the plaintiff who instructed the lawyers to recover his money and prima facie he is responsible for the fees. The arrangements which he made for payment are not relevant to the question of establishing the defendant's liability towards him.

(b) Pre-judgment Interest

The plaintiff's claim is pleaded in breach of contract and in

negligence. The plaintiff claims an account of the penalty interest charged by the defendant on the purported surrender of the certificates of deposit before their maturity and of the interest that would otherwise have accrued to the certificates at the defendant's rate of interest in force from time to time had they not been broken. Pre-judgment interest pursuant to Section 62 (2) of the Judicature Law is separately pleaded, but I shall make no award under that head. There seems to me to be no difference in principle between the case where the plaintiff loses contractual interest because money has been wrongfully paid away and a case such as **Wadsworth v. Lydall** (1981) 2 ALL. ER 401 where interest charges are incurred on a borrowing as a consequence of non payment of money under a contract.

For these reasons the plaintiff is in my judgment entitled to recover the following relief -

	US$
Monies paid out by the defendant without authority and taken by Brougher, less credit for amount recovered from her.	150,000.00
Legal fees paid to Kilpatrick & Cody	82,768.73
Legal fees paid to Garland & Samuel	4,469.00
Fee paid to Escrow Agent	2,000.00
An account of the penalty interest on the purported surrender of the Certificates of Deposit before maturity and of the interest which would otherwise have accrued to the said Certificates of Deposit had they not been broken.	

Costs to be agreed or taxed.

31st May 1995

G.E. Harre
Chief Justice