BANK OF ZAMBIA v ATTORNEY-GENERAL (1974) ZR 24 (SC)

SUPREME COURT
DOYLE CJ, BARON DCJ AND GARDNER JS
18th JANUARY and 19th FEBRUARY 1974
(Appeal No. 5 of 1973)

Flynote

Bank - Forged cheque - Liability on Bank - Forged cheque - Negligence of customer - Estoppel - Absence of negligence of bank - Relevance of.

Headnote

The appellant paid on a cheque purporting to have been drawn by the Ministry of Health but which, as was conceded, was forged. The appellant argued that the respondent was negligent in its care of its cheque forms and stamps and in failing to discover that money had been paid on a forged cheque and for either of those reasons was estopped from denying the genuineness of the cheque. The appellant argued also that there was no negligence on the part of the bank in paying on the forged cheque.

Held:

(i) The basis of a bank's liability where it has paid on a forged instrument is not negligence but because money has been paid away without the authority of the customer.

(ii) The absence of negligence on the part of a bank can at best only be relevant if a *prima facie* case of estoppel or adoption has been made out against the customer and the latter seeks to rely on negligence by the bank to meet such defence.

(iii) It is necessary to distinguish between conduct of a customer which induces his bank to pay on a forged instrument and conduct which prejudices the opportunity of the bank to recover the money so paid. In each case the conduct must be shown to be the proximate cause of the particular loss in respect of which estoppel is being set up.

(iv) Even gross carelessness by the customer in the care of its cheque forms and stamps is too remote to found a defence of estoppel on the basis of conduct inducing the bank to pay.

(v) There is no obligation on a customer to examine the paid cheques returned to him by his bank in order to discover whether there have been any forgeries.

Cases cited:

(1) *Bank of London v Vagliano Brothers* (1891 - 4) All ER 93.

(2) *Bank of Ireland v Evans Trustees* 10 ER 950 5 HLC 389.

(3) *London and River Plate Bank v Bank of Liverpool* (1896) 1 QB 7.

(4) *Greenwood v Martin's Bank* (1932) 1 KB 371 (CA).

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(5) *Greenwood v Martin's Bank* (1933) AC 51.

E Dumbutshena, Dumbutshena and Company, for the appellant.
A J Nyangulu, Assistant Senior State Advocate, for the respondent.

Judgment

Baron DCJ: This is an appeal against a decision of the High Court granting a declaration that the appellant (to which I will refer hereafter as the bank) was not entitled to debit the respondent's account with an amount of K12,806, being the amount paid by the bank to some person unknown on a cheque which purported to be a cheque drawn by the Ministry of Health but was in fact a forgery.

In the court below the appellant did not concede that the cheque was forged, but before us Mr Dumbutshena, who urged everything that could possibly be urged on behalf of the bank, made no attempt to argue that the cheque was genuine and the matter proceeded on the basis as was held by the learned judge, that the instrument was a forgery.

The instrument in question purported to be a Ministry of Health cheque. The evidence is overwhelming that it was typed on one of the machines in the machine room at the Ministry. It was dated 23rd June 1970, and was cashed on 26th June, 1970. The evidence also makes it highly probable that someone working in the machine room at that time stole the cheque form and typed the cheque and was therefore implicated in the forgery. The cheque was drawn in favour of a fictitious payee, the crossing was cancelled ostensibly by the same signatories as had drawn the cheque, was duly endorsed, and was cashed across the counter. The forgery came to light only in about October or November when the accountants at the Ministry of Health were checking the cancelled cheques against their records; investigations were instituted and the matter was finally reported to the police and brought to the attention of the bank about the 11th January, 1971.

Mr Dumbutshena argues that the respondent was negligent and that by reason of such negligence it is estopped from denying the genuineness of the cheque. It is, however, essential to distinguish between conduct which induces a bank to pay on a forged instrument and conduct which prejudices the opportunity of the bank to recover the money so paid since in each case the conduct in question must be shown to be the proximate cause of the particular loss in respect of which estoppel is being set up; it is necessary therefore to consider the evidence and the findings of fact made by the learned judge below in relation to these two basically different aspects of the matter.

The conduct which it is alleged induced the bank to pay on the forged cheque was the negligence in allowing the cheque to be stolen and allowing it to be completed on one of the machines in the machine room, and in failing to take adequate care of the "crossing cancelled" stamp with the result that such stamp was impressed on the cheque. The learned judge found that the respondent was not negligent in these respects, and on the evidence it cannot in my judgment be said that he was not

justified in so finding. But the matter goes further; even assigning that the conduct of the Ministry amounted to gross carelessness it is impossible to say that this conduct was a proximate cause of the loss. Thus in *Bank of London v Vagliano Brothers* [1] Lord Halsbury, LC,said at page 99:

"In order to make (these) cases... authorities in this case, it would be necessary to assume that the plaintiffs in those cases had by some voluntary act of their own given credit and the appearance of genuineness to the particular powers of attorney which were forged in those cases; and, if they had, I very much doubt whether the decision would have been what it was, but no such fact appeared; all that the parties whose negligence was relied on had done was to leave their seal carelessly in the custody of the person who abused the trust."

And in *Bank of Ireland v Evans Trustees* [2] it was held that:

"If there was negligence in the custody of the seal it was very remotely connected with the act of transfer. The transfer was not the necessary or ordinary or likely result of that negligence. It never would have been but for the occurrence of a very extraordinary event, that persons should be found either so dishonest or so careless, as to testify on the face of the instrument that they had seen the seal duly affixed. It is quite impossible that the bankers could have maintained an action for the negligence of the trustees, and recovered the damages they had sustained by reason of their having made the transfer."

These passages are in my view correct statements of the law and I am satisfied that even if it could be said that the Ministry was careless in the respects alleged, any such carelessness was too remote to amount to conduct inducing the bank to pay on the forged instrument.

Before turning to the second aspect of the matter it is convenient to deal with the question of the bank's conduct. Mr Dumbutshena argued that the forgeries were cleverly executed and that there was no negligence on the part of the bank in paying on the forged instrument. At one time it was said that a banker was bound to know his customer's signature and that it was negligence to pay on a forged instrument, but this basis of a bank's liability has long since been shown to be false; it is now established that the real basis of the bank's liability is that money has been paid away without the authority of the customer: *London and River Plate Bank* v *Bank of Liverpool* [3]. Normally, therefore, it cannot avail a bank to say that it was not negligent. Where, however, a bank sets up conduct of its customer as supporting a defence of estoppel or ratification, it may be open to the customer to rely on negligence by the bank to meet such a defence, although Scrutton,

LJ, in *Greenwood* v *Martin's Bank* [4] seems to have questioned this proposition. Be that as it may, on any view the absence of negligence on the part of the bank can at best only be relevant if a *prima facie* case of estoppel or adoption has been made out against the customer.

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It is well settled that a person has a duty to warn a banker if he knows or has reasonable ground for believing that a forged instrument, purporting to be his, is likely to be presented for payment. *Paget's Law of Banking*, 6th Edition, says at page 437:

"If a man knows or has reasonable ground for believing that his name has been forged on a bill or cheque and that it is about or likely to be presented for payment to a banker, he is bound with reasonable despatch to warn the banker of the fact. If he does not, and the bank's position is thereby prejudiced, he adopts the bill or cheque."

A similar position obtains where the forgery is discovered only after the bank has paid on the instrument. Paget, at page 439, puts the matter thus:

"The prejudice or injury to the bank, resulting from the customer's or other person's silence, which will estop him from disputing his signature or constitute adoption by him of the bill or cheque, is not confined to payment thereof. The customer or other person will be equally bound if, by his silence, the bank are precluded from the opportunity of protecting themselves against subsequent forgeries, if any, by the same person, or lose the chance of taking proceedings, civil or criminal, against the forger, as by his escaping out of the jurisdiction in the interval."

The evidence discloses that paid cheques were returned by the bank every week to the Ministry of Finance. The evidence is vague in the extreme as to what then happened; it seems clear that in the fulness of time reconciliation of the bank statements with the Ministry's books were undertaken, but precisely when this exercise took place is not stated. It does, however, emerge from the evidence that about the end of October or the beginning of November the Ministry of Health accountants, in the course of their own reconciliation, discovered that this particular cheque was not supported by a backing sheet, that is, by the typed copy which should have been kept of every cheque. At this stage there appears to have been a certain delay while the matter was being investigated internally, and it was not until January that the forgery was reported to the police and brought to the attention of the bank.

I will assume in favour of the bank, but without deciding, that negligence can be a ground for holding that a customer, because his conduct has deprived the bank of the opportunity of recovering from the forger, is estopped from denying the genuineness of a forged cheque. If actual knowledge be necessary then we are concerned here with the period between the discovery by the Ministry of the forgery and the report to the police and to the bank; for estoppel or adoption to operate there must be "detriment" to the bank (*Greenwood* v *Martin's Bank* [5] per Lord Tomlin at page 57), and on the evidence on record it is impossible to argue that this delay of a further two months - five months having already elapsed since the encashment of the cheque - may have altered the position of the bank for the worse. But assuming negligence

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without actual knowledge is sufficient, the customer's conduct must be shown to be negligent. There is no rule of which I am aware that requires a customer to call upon his bank to deliver bank statements and paid cheques at stated intervals, and I am not prepared to hold that when paid cheques are in fact returned to a customer by his bank there is an obligation on him to examine them in order to discover whether there have been any forgeries. The evidence in this case is that the Government, in the shape of the Ministry of Finance, received cancelled cheques within a few days after payment; the learned judge below held that the failure to discover the forgery at that time was not negligence, and in my view he was right on the evidence before him so to hold. It may be that if the systems in the Ministry of Finance and the Ministry of Health had been canvassed in greater detail it might have emerged that the forgery ought to have been discovered within a week of the payment of the forged cheque, and in that event the prospects of detecting the forger would no doubt have been greater. But there is totally inadequate evidence on which to hold that either the Ministry of Finance or the Ministry of Health has been negligent, and it is

unnecessary therefore to consider what might have been the position had such negligence 20 properly been found.
I would dismiss this appeal.

Judgment

Doyle CJ: I concur. As Gardner, JS, has informed me that he also concurs the result is that the appeal is dismissed with costs.

Appeal dismissed