

THE EASTERN CARIBBEAN SUPREME COURT
SAINT VINCENT AND THE GRENADINES
IN THE HIGH COURT OF JUSTICE

SVGHCV2019/0057

BETWEEN:

GREGORY FERRARI

CLAIMANT

AND

BANK OF SAINT VINCENT AND THE GRENADINES LTD

DEFENDANT

Appearances:

Mrs. Zhinga Horne-Edwards for the Claimants

Ms. Annique Cummings and Mr. Jadric Cummings for the Defendant

Ms. Nandi Williams representative of the Defendant

2020: 11th November
17th December

JUDGMENT

Byer, J.:

- [1] The facts of this case were extremely straightforward.
- [2] Between the months of September 2016 and November 2017, the claimant, who holds a chequing account bearing account number 102012113 with RBTT Caribbean Limited ("RBTT Bank"), issued several cheques on the said chequing account to a variety of people, businesses and authorities for the purposes of paying for goods and services.
- [3] The claimant used green ink to write the name of the payee, the date of the cheque, the amount to be paid in words and figures and to sign his name on each cheque. Some of the said cheques were issued to payees that were customers of the defendant bank and held accounts with the defendant bank.

- [4] However, the defendant bank either refused to accept the claimant's said cheques for deposit when they were presented for payment, or having accepted the said cheques for deposit, thereafter refused to present them to the claimant's bank (RBTT) for payment and returned them to the various payees. The reason given to the payees was the fact that the cheques were written in green ink.
- [5] The claimant was subsequently contacted by the respective payees to make payment by other means, whether in cash or by cheque written in blue or black ink, thereby suffering inconvenience, trouble and embarrassment.
- [6] The defendant bank admits that it collected a cheque issued by the claimant to "The Hook Up" in its night deposit. It admits that it did not present the cheque to the claimant's bank for payment because it was written in green ink and it could not be captured by the bank's image capture system.
- [7] The defendant relies upon, inter alia, the Eastern Caribbean Automated Clearing House Brochure Volume 1 Issue 1, July 2014 in which is stated that customers need to know that only blue and black ink pens should be used to write cheques. The claimant maintained that he had never seen the said brochure.
- [8] The matter therefore progressed to trial on those facts for the following reliefs:
- i. General Damages
 - ii. Interest thereon from the dates of refusal of the said cheques for deposit or presentment for payment at the rate of 6% per annum and continuing until payment in full; and
 - iii. Costs.
- [9] From the evidence that was elicited at trial, and based on the prayers contained in the claim form the court agrees with counsel for the defendant that there are fundamentally two issues for this court to determine, namely;
- (i) whether there exists a duty to take care which is owed by the defendant to the claimant and if such duty exists, whether the defendant was in breach of that duty to the claimant;
 - (ii) whether in consequence of such breach, if there was one, the claimant suffered damage and such damage is recognizable in law.

Issue #1: Whether there exists a duty to take care which is owed by the defendant to the claimant and if such duty exists, whether the defendant was in breach of that duty to the claimant

The Claimant's submissions

- [10] The claimant's submissions on this point are essentially, that the standard by which the defendant must conduct themselves as they carry out their duties is that of the reasonable banker. In carrying out their duties, the claimant further submitted that the banker owes a duty of care to any person that would reasonably suffer injury due to their actions, whether that person was a customer of the bank or not.
- [11] In making this submission the claimant relied on both persuasive authority from the jurisdiction of Canada and the legislative framework of the Bills of Exchange Act Cap 137 Revised Laws of Saint Vincent and the Grenadines (hereinafter referred to as 'the Act').
- [12] In relying on these authorities, the claimant's submission was that as the Act only made specific references as to when a cheque could be rejected by a financial institution, and the reason advanced by the claimant and his sole witness which they submit is uncontroverted for the refusal did not fall within those parameters, the defendant therefore acted in breach of their duty to the claimant. It is for this breach that the defendant must be found liable and damages are payable to the claimant for inconvenience, trouble and embarrassment.

The Defendant's Submissions

- [13] The defendant submitted that in order for the claimant to obtain relief under the tort of negligence, he would have to fall within the class of persons to whom the bank owed a duty.
- [14] The defendants made it clear that the basis of the obligation of the banker to a customer to whom he owed a duty of care arose by virtue of the contractual relationship entered into by the parties. There having been no contractual or even common law obligation to the claimant by the defendant, the defendant submitted that the defendant owed no duty of care to the claimant with regard to the presentation of his cheques by customers of the defendant.
- [15] The defendant submitted that their obligation is to **their** customer under the Act to present the cheques that are for deposit into their customers' accounts within a reasonable time. What the Act does, as submitted by the defendants, is provide the bank's customers with an ability to recoup payment from the customer's bank on any cheque that has not been presented to the paying bank within a reasonable time and the cheque then is dishonoured. The Act does not however provide either an obligation to the person who wrote the cheque, or creates any obligation to that person.
- [16] The defendants therefore submitted that there is no duty owed to the claimant by the defendant and therefore the claim must fail.

Court's Considerations and Analysis

- [17] The nub of this issue for the court must be based on the fundamental tenets of the tort of negligence and whether the claimant's case can be captured by the same.
- [18] As both parties recognized the seminal case establishing the parameters of the tort of negligence is **Donoghue v Stevenson**¹ in which the "neighbour principle" was firmly established by Lord Atkin. As was stated, *"the rule that you are to love your neighbour becomes in law, you must not injure your neighbour; and the lawyer's question, who is my neighbour, receives a restricted reply. You must take reasonable care to avoid acts or omissions which you can reasonably foresee would be likely to injure your neighbour. Who then in law is my neighbour? The answer seems to be – persons who are **so closely and directly** affected by my act that I ought reasonably to have in contemplation as being so affected when I am directing my mind to the acts or omissions which are called in question."* (My emphasis added)
- [19] Therefore in order to address its mind to the determination at hand, this court must consider whether the claimant can establish the following three elements of the tort:
- a) that there is a duty owed by the defendant to the claimant
 - b) whether there was a breach of that duty by the defendant and
 - c) whether there as any damage recognized by the law that was sustained by the claimant from the breach.
- [20] The claimant must therefore establish that he is owed a duty by the defendant. If it is not established that a duty in fact exists to which the defendant must be bound, there can be no cause of action. In the case of **Grant v Australia Knitting Mills Ltd**² the court by Lord Wright made it clear that *"all that is necessary as a step to establish the tort of actionable negligence is to define the precise relationship from which the duty of care is to be deduced. It is, however, essential in English law that the duty should be established: the mere fact that a man is injured by another's act give in itself no cause of action; if the act is deliberate, the party injured will have no claim in law even though the injury is intentional, so long as the other party is merely exercising a legal right; if the act involves lack of due care, again no case of actionable negligence will arise unless the duty to be careful exists."* (My emphasis added)
- [21] Therefore the essence of this liability is the existence of a duty.
- [22] The claimant must therefore, in order to get out of the starting blocks establish that the defendant owed him a duty of care.
- [23] This court was intrigued by the reference in the claimant's submissions as to the cases that would have established, in their view, the existence of this duty to a third party or non-customer as in the case of the claimant. However, it was of some consternation that the claimant did not in fact

¹[1932] AC 562 at 579

² [1936] 1 A.C. 85 at 103

provide the court with those authorities. In any event, the court has had an opportunity to peruse the judgments referred to by the claimant and in this court's mind, the findings which the claimant seeks to impress upon this court, are not made out on the facts of those cases or the findings themselves.

- [24] The first case that was referred to by the claimant was **J & F Transport Ltd v Markwart et al**³. The facts of that case were fundamentally different from the case at bar in that the claimant in **J & F Transport** brought a claim against the Bank of Montreal claiming that it had accepted cheques stated to be in their name, obtained the funds from those cheques and deposited the sums obtained in an account in the name of J & F Transport but that had in fact been opened and maintained by the defendant Markwart. The claimant claimed damages for what they said was caused by the negligence of the Bank in allowing them to be defrauded of sums by the defendant Markwart, who also happened to be an employee of the claimant.
- [25] The court did find that the bank had been negligent but in so far as failing to adhere to the requisite requirements to open an account, leaving many of the administrative details unfinished and therefore had allowed the defendant to set up an account that was the vehicle of his fraud.
- [26] The court did not expand the ambit of the persons to whom the bank would owe a duty of care. The claimant in that case had been a customer of the bank and as such in addition to the existence of a duty owed to them on the contractual basis, the finding of the court was such that it was based on the failure of the bank to do what it was mandated by the law to do in setting up the account that allowed for the perpetuation of the fraud and it was on that basis that the bank was found liable. That is, that in those circumstances the claimant would have been foreseen to have been in that class of persons that would have been injured and was in fact injured by the creation of the "double" account.
- [27] The case at bar does not however in this court's mind, fall within the factual parameters of this case just discussed. Indeed, the claimant as the party who wrote the cheques could not in this court's mind have been part of a group that could have suffered loss if the bank rejected the cheques as not being in keeping with the clearing house system run by the Eastern Caribbean Automated Clearing House. In fact, it is clear to this court that the person or persons who could and would have been affected by the failure to adhere to the requirements of the policy setting up the clearing house system would have been the customers of the bank who having accepted those cheques for the payment of genuine debts would be faced with the debts remaining outstanding.
- [28] The second case relied on by the claimant was that of **Dupont Heating and Air Conditioning Limited and Michele Muraca v Bank of Montreal and Bank of Nova Scotia**⁴. This case, like the first, also dealt with the duty owed by the bank to a non-customer, in circumstances where a fraud had been perpetrated on that individual by a customer of the bank who was also an employee of the non-customer.
- [29] In that case, the claimant had hired one Krane to be their bookkeeper. He forged over 400 cheques which he then deposited into his account with the second defendant. The first defendant was the

³ 136 DLR (3d) 204

⁴ 2009 Canlii 2906(ONSC)

bank of the claimant. The allegations against the second defendant were they should have recognized the increased deposits on the part of the said Krane and the allegations against the first defendant were that they should have discovered that the cheques were forged and that they should have known the signature of the claimant's officer who had the power to sign the cheques.

- [30] However the court in that case was reluctant to make any dispositions that would determine whether or not there was a duty of care by a bank to third parties but was willing to consider that perhaps in limited circumstances there may in fact exist such a duty where it may be to detect indications of fraud in its own customers' account⁵, however since the main application before the court was on an issue of summary judgment it was not the proper avenue to take such a decision but would require "the benefit of [a] full record"⁶.
- [31] The court therefore made no finding as to the existence of such a duty in those circumstances but in considering the arguments before it the court did refer to some case law that had emerged on the issue and quoted the judgment of the Court of Appeal in the case of **Groves-Raffin Construction Ltd v Bank of Nova Scotia**⁷. The finding of the trial judge at first instance that the bank owed a duty of care to the company even though it was not a customer of the bank was set aside by the court of appeal and the court by Robertson JA had this to say, "*in my opinion Commerce did not owe any legal duty of care with respect to the cheque to either Groves-Raffin or Fidelity and so it cannot have committed the tort of negligence in respect thereof. In saying this I am differing from the view of the learned trial Judge that the "neighbour test" in M'Alister (Donoghue) v. Stevenson, [1932] A.C. 562, applies (either at the time when the cheque is deposited or later when the customer draws against the credit) between a banker who accepts a cheque for deposit to the credit of his customer and credits the customer's account with the amount and the drawer of the cheque. Not only am I of the opinion that those parties do not fall within the principle in M'Alister (Donoghue) v. Stevenson, but I am also of the opinion that, if it were to be held that they did, it would place a well-nigh intolerable burden on banks and seriously interfere with the expeditious transaction of banking business...*"
- [32] Thus even though this court accepts that this pronouncement of the court of appeal would only be of persuasive authority to this court, I cannot find fault with the reasoning of the same and accept that to extend the non-customer to the group of persons who would fall into the category of "neighbour" would stretch the "the tort of negligence beyond even its already extended bounds..."⁸
- [33] As far as this court is concerned the only contracts that exist upon which a duty can be found are as were so succinctly stated by Bingham J in the arbitration award concerning **Barclays Bank plc v Bank of England**⁹. In assessing what circumstances would give rise to the disposition of the presenting bank's obligations to its customer, Bingham J formulated them thusly: "*the factual premise on which issue (1) is founded envisages at least three contracts, and in my opinion four: a contract between the payee of the cheque and the presenting bank to which he delivers it for collection; a contract between the drawer of the cheque and the paying bank on which it is drawn;*

⁵ Op Cit at paragraph 45

⁶Op Cit at paragraph 45

⁷51 DLR (3d) 380 (B.C.S.C)

⁸**Calvert v Yorkshire Bank** (2 May 2003 unreported)

⁹[1985]1 ALL ER 385 at 390

a contract between the drawer and the payee arising by virtue of the cheque itself; and (as I think) a contract between the presenting bank and the paying bank as members of the clearing house."

- [34] That formulation as accepted by this court is clear indicia that not only is there no recognition of an obligation by a bank to a non-customer, save where there may be issues of fraud perpetrated on that non-customer by a customer and only in very limited circumstances but additionally that the Act upon which the claimant seeks refuge is not for the purpose as proffered by the claimant.
- [35] When one considers the wording of section 74¹⁰ of the Act, it is clear that the obligation of the presenting or collecting bank is to present the cheques received from their customer for payment on another bank within a reasonable time and acts only as a "mere agent or conduit to receive payments of the cheques from the banker on whom they are drawn and to hold the proceeds at the disposal of the customer."¹¹
- [36] In fact this court is satisfied that the only liability that arises against a presenting/collecting bank if it fails to *"present a cheque speedily, ... is [to be] liable to their customer [not the drawer of the cheque] for the loss sustained on delay. This liability is based on the contract of banker and customer. By presenting the cheque after an undue delay, the bank fails to comply with the instructions given to it by its principal, the customer."*¹²
- [37] I therefore find that the claimant has not established that the defendant owes him a common law duty of care he not being within the parameters of those persons who would constitute the "neighbour" of the defendant. I also find that section 74 of the Act is not for the protection of an individual in the person of the claimant but rather for those persons who are in fact customers of the bank and may suffer damage due to the late presentation of cheques for the benefit of their account.
- [38] The claimant has been unable in this court's mind to establish any negligence on the part of the defendant and therefore the claim is dismissed in its entirety with costs to the defendant on an unvalued claim pursuant to Part 65.5 CPR 2000.

¹⁰ Section 74 **Presentation of Cheque for Payment**

Subject to the provision of this Act-

- (a) where a cheque is not presented for payment within a reasonable time of its issue, and the drawer or the person on whose account it is drawn had the right at the time of such presentment as between him and the banker to have the cheque paid and suffers actual damage through the delay, he is discharged to the extent of such damage, that is to say, to the extent to which such drawer or person is a creditor of such banker to a larger amount than it would have been had such cheque been paid;
- (b) in determining what is a reasonable time, regard shall be had to the nature of the instrument, the usage of trade and of bankers, and the facts of the particular case;
- (c) the holder of such cheque as to which such drawer or person is discharged shall be a creditor, in lieu of such drawer or person, of such banker to the extent of such discharge, and entitled to recover the amount from him.

¹¹ Halsbury Laws of England (4th Ed) Vol 3(1) paragraph 191

¹² Ellinger's Modern Banking Law (5th Ed) page 717

[39] Having made this determination this court finds it unnecessary to determine the issue as it relates to damages suffered.

The order of the court is therefore as follows:

1. The claim is dismissed.
2. Costs to the defendant on an unvalued claim pursuant to Part 65.5 CPR 2000.

**Nicola Byer
HIGH COURT JUDGE**

By the Court

Registrar