

THE EASTERN CARIBBEAN SUPREME COURT
IN THE HIGH COURT OF JUSTICE
ANTIGUA AND BARBUDA

CLAIM NO: ANUHCV2010/0019

BETWEEN:

ROYAL BANK OF CANADA

Claimant

and

ANIS YAZIGI

Defendant

Appearances:

Mr. Hugh Marshall Jnr. and Mrs. Cherissa Roberts Thomas for the Claimant
Dr. David Dorsett for the Defendant

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2010: January 15
February 17
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JUDGMENT

- [1] **Michel, J:** On 8th January 2010 the Claimant, Royal Bank of Canada, filed a claim form and statement of claim against the Defendant, Anis Yazigi, claiming

restitution of \$53,000, being money had and received to the benefit of the Defendant by way of mistake of the Claimant, together with interest and costs.

[2] On the said 8th January the Claimant also filed an application without notice and affidavit in support seeking the following orders –

- (1) An injunction against the Defendant freezing funds in his account held at the RBTT Bank Caribbean Ltd. to the extent of \$53,000.00.
- (2) An Order against the Defendant requiring him to disclose to the Claimant forthwith or within such time as may be specified, full information about the nature and location of any other bank accounts or assets, where-ever situated and all documents within his possession, custody or power relating to the nature and location of such accounts and assets.
- (3) Further or other relief which may be granted by way of interim relief, pursuant to the Civil Procedure Rules 2000 Part 17 and/or the inherent jurisdiction of the Court against the Defendant in relation to the relief sought under paragraphs 1 and 2 above.
- (4) That provision be made for the cost of this Application.

[3] On the same date the Court made an ex parte Order granting the orders sought by the Claimant in paragraphs (1) and (2) above, with provision that the Order shall be returned for inter parties hearing on 15th January 2010.

[4] On 11th or 12th January 2010 the Defendant was served with copies of the claim form, statement of claim, application without notice, affidavit in support and the Order of 8th January. On 13th January the Defendant filed an affidavit seeking a discharge of the injunction against him and on 14th January skeleton arguments were filed on his behalf relative to his application for discharge of the injunction.

[5] The matter came before the Court on 15th January and Learned Counsel for the Claimant made a written and oral submission asking that the injunction do

continue, while Learned Counsel for the Defendant made an oral submission supplementing the skeleton arguments previously submitted asking that the injunction against the Defendant be discharged.

- [6] The material facts of this case are that a customer of the Claimant issued a post dated cheque to the Defendant, which cheque was countermanded by the customer before the date of payment had arrived, but the cheque was in error paid by the Claimant to the Defendant notwithstanding the notice of countermand given by the customer.
- [7] The Defendant does not dispute any of these facts.
- [8] Counsel for the Claimant submits that the issue as to whether or not the injunction should be continued turns on the answer to three questions – (1) whether the Claimant has a good arguable case, (2) whether there is a risk that a judgment in favour of the Claimant will go unsatisfied by reason of the Defendant disposing of his assets unless restrained and (3) whether it is just and equitable in all the circumstances of the case to maintain the injunction.
- [9] Counsel for the Defendant appears to be in agreement that the issue before the Court turns on an answer to the three questions posed by Counsel for the Claimant, only that he would answer the questions differently to Counsel for the Claimant.
- [10] In terms of the answer to the first question, the Court considers that the Claimant does have a good arguable case. Notwithstanding the attractively-presented arguments of Learned Counsel for the Defendant, the law appears to be settled that the authority of a bank to cash a cheque drawn on an account of its customer is withdrawn by a notice of countermand or stop payment order issued by the customer. If the bank proceeds in the face of the notice of countermand or stop payment order to cash the cheque, it cannot in law recover against the customer

the amount paid but has to recover that amount from the payee by virtue of the principle of unjust enrichment.

[11] This much emerges clearly from the judgment of Robert Goff, J. in the Queen's Bench Division of the English High Court in the case of **Barclays Bank Ltd v W J Simms Son & Cooke (Southern) Ltd and another**¹, which case was relied on by Learned Counsel for the Claimant. Robert Goff, J., having carefully reviewed a long line of cases on the issue, including decisions both of the House of Lords and the Privy Council, stated at page 535 of the report that: "From this formidable line of authority certain simple principles can, in my judgment, be deduced.

1. If a person pays money to another under a mistake of fact which causes him to make the payment, he is prima facie entitled to recover it as money paid under a mistake of fact.
2. His claim may however fail if (a) the payer intends that the payee shall have the money at all events, whether the fact be true or false, or is deemed in law to so intend; (b) the payment is made for good consideration, in particular if the money is paid to discharge, and does discharge, a debt owed to the payee (or a principal on whose behalf he is authorised to receive the payment) by the payer or by a third party by whom he is authorised to discharge the debt; (c) the payee has changed his position in good faith, or is deemed in law to have done so."

[12] Then on page 542 of the report the Learned Judge said: "In the light of the above principles, it is plain that Barclays is entitled to succeed in their claim. First it is clear that the mistake of the bank, in overlooking the drawer's instruction to stop payment of the cheque, caused the bank to pay the cheque. Second, since the drawer had in fact countermanded payment, the bank were acting without mandate and so the payment was not effective to discharge the drawer's obligation on the cheque; from this it follows that the payee gave no consideration

¹ [1979] 3 ALL E R 522

for the payment, and the claim cannot be defeated on that ground. Third, there is no evidence of any actual change of position on the part of either of the defendants or on the part of National Westminster; and since notice of dishonour is not required in a case such as this, the payee is not deemed to have changed his position by reason of lapse of time in notifying them of Barclay's error and claiming repayment."

[13] As it was with Barclays in the case presided over by Robert Goff, J., so it is with Royal Bank of Canada on the facts of this case as at 15th January 2010. First it appears to be the case that the mistake of the bank in overlooking the drawer's instruction to stop payment of the cheque caused the bank to pay the cheque. Second, since the drawer had in fact countermanded payment, the bank was acting without mandate and so the payment was not effective to discharge the drawer's obligation on the cheque, from which it would follow that the payee gave no consideration for the payment and so the Claimant's claim cannot be defeated on that ground. Third, there is no evidence of any actual change of position by the Defendant or his bank, and since no notice of dishonour is required in a case such as this, the payee is not deemed to have changed his position by reason of lapse of time in notifying him of Royal Bank's error and claiming repayment.

[14] As would be apparent, I have in fact adopted wholesale the language of Robert Goff, J. in the Barclays Bank case, which seems to apply perfectly to the facts of the present case.

[15] The argument by Learned Counsel for the Defendant that the Defendant is not unjustly enriched because the payment made to him discharged a debt due to him fails on two counts. The first is that the debt was due to him not by the payer but by a third party and the second is that the debt due to him was not thereby discharged because the money paid to him by the bank is not recoverable from the drawer of the cheque, who had countermanded it before it was tendered for payment. To suggest that the Defendant is entitled to retain the amount paid to

him because \$53,000 was due to him by someone, who was not the payer or even the drawer of the cheque, and that \$53,000 was paid to him in error by the Claimant, would virtually be tantamount to suggesting that if A owes B \$1 and B obtains \$1 from C in error, then B can retain the \$1 as discharging the debt due to him by A and A's debt is thereby discharged, even although A is not responsible for the \$1 erroneously paid to B by C.

[16] The facts of the present case are materially different from the facts of **Lloyds Bank PLC v Independent Insurance Co. Ltd.**² cited by Counsel for the Defendant, where the Court found that there was authority for the payment made by the bank to the payee and that the payment discharged a debt owed to the payee by a third party by whom the payer was authorized to discharge the debt. No such authority exists on the facts of the present case and no debt due to the payee is therefore discharged by the erroneous payment by the bank.

[17] The Court does not find the case of **Kleinwort Benson Ltd. v London City Council**³, also cited by Counsel for the Defendant, to be of assistance to the Court in the determination of this case, whereas the factual scenario does not exist in the present case to bring into focus the principle for which the cases of **Exall v Patridge** and **Moule v Garnett** were cited.

[18] On the facts of the case before the Court, this Court holds that there is at least a good arguable case that the Defendant was unjustly enriched by the payment to him by the Claimant of the sum of \$53,000 without the authority of its customer, because although the Defendant might legitimately have been owed this sum, he was owed it not by the Claimant but by a third party from whom the Claimant had no authority to pay it, such authority as might have existed from the drawer of the cheque having been withdrawn by the notice of countermand by the drawer prior to the presentation of the cheque for payment.

² [2000] 1 Q.B. 110

³ [1999] 2 A.C. 349

[19] The Court also holds that on the state of the evidence before it as at 15th January 2010, derived from the affidavit filed on behalf of the Claimant on 8th January and by the Defendant on 13th January, there does appear to be a risk that a judgment in favour of the Claimant might go unsatisfied by reason of the Defendant disposing of his assets and, in particular, the \$53,000 or the balance thereof standing in his name at RBTT Bank Caribbean Limited.

[20] The Court further holds that in the circumstances, it is just and convenient that the injunction granted against the Defendant by Order of the Court dated and entered on 8th January 2010 be continued until the trial and determination of the claim or until further order of the Court.

[21] Costs on this application shall be cost in the cause.



Mario Michel
High Court Judge