

Filing Cabinet

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA
IN CIVIL DIVISION

CLAIM NO. 2003 HCV 0270

BETWEEN	BRATTON LIMITED	CLAIMANT
AND	FIRST CARIBBEAN INTERNATIONAL BANK (JAMAICA) LIMITED (Formerly CIBC (Jamaica) Limited)	DEFENDANT/ ANCILLARY CLAIMANT
AND	NATIONAL COMMERCIAL BANK (JAMAICA) LIMITED (By way of claim for contribution and/or indemnity by the Defendant)	1 ST ANCILLARY DEFENDANT
AND	RBTT BANK JAMAICA LIMITED (By way of claim for contribution and/or indemnity by the Defendant)	2 ND ANCILLARY DEFENDANT

CONSOLIDATED WITH:

CLAIM NO. 2003 HCV 0221

BETWEEN	AUBREY WONG (T/A Spanish Grain Store)	CLAIMANT
AND	FIRST CARIBBEAN INTERNATIONAL BANK (JAMAICA) LIMITED (Formerly CIBC (Jamaica) Limited)	DEFENDANT/ ANCILLARY CLAIMANT
AND	NATIONAL COMMERCIAL BANK (JAMAICA) LIMITED (By way of claim for contribution and/or indemnity by the Defendant)	1 ST ANCILLARY DEFENDANT
AND	RBTT BANK JAMAICA LIMITED (By way of claim for contribution and/or indemnity by the Defendant)	2 ND ANCILLARY DEFENDANT

TRIED WITH:

CLAIM NO. C.L. 2002 /L-066

BETWEEN	DOROTHY LEE	1 ST CLAIMANT
AND	GEORGE LEE	2 ND CLAIMANT
AND	MADGELINE LEE	3 RD CLAIMANT
AND	NATIONAL COMMERCIAL BANK (JAMAICA) LIMITED	DEFENDANT

Mr. Sheldon Codner and Ms. Annalisa Chapman instructed by Lightbourne and Hamilton for Bratton Ltd. and Aubrey Wong (t/a Spanish Grain Store)

Mr. John Vassell Q.C., Mr. Jermaine Spence, Mrs. Julianne Mais-Cox and Mr. Peter Simmonds instructed by DunnCox for First Caribbean International Bank (Jamaica) Ltd.

Mrs. Michelle Champagnie, Mrs. Corrine Henry and Ms. Ky-Ann Lee instructed by Myers Fletcher and Gordon for National Commerical Bank (Jamaica) Ltd.

Mr. Charles Piper, Ms. Nicole Roberts and Ms. Kanika Tomlinson for RBTT Bank (Jamaica) Ltd.

Mr. Barrington Frankson, Mr. Maurice Frankson, Mr. Leymon Strachan and Mr. Winston Taylor instructed by Gaynair and Fraser for Dorothy Lee, George Lee and Madgeline Lee.

Bills of Exchange – Cheque – Fraudulent Indorsement – Drawer issuing incomplete crossed cheque – Cheque completed by a person other than the named payee and indorsed to third party – Whether payee “fictitious” - Bills of Exchange Act, sections 7 and 8.

Banking - Effect of crossing on cheque - Rights and responsibilities of paying bank – Rights and responsibilities of collecting bank - Bills of Exchange Act, sections 60, 80, 82 and 90.

12th, 13th 14th 15th January and 23rd July 2009

BROOKS, J.

Bratton Limited and Spanish Grain Store (SGS) both import and sell meat and vegetables. Bratton operates in Montego Bay and SGS in Kingston. SGS is the trading name used by Mr. Aubrey Wong. He and Bratton's principal, Mr. Victor Chin enjoy mutual respect. As a result, SGS interacts, on behalf of both companies, with the agents of the shipping company which transports the products to Jamaica. SGS uses the services of a customs broker to arrange clearance of the products from the wharves in Kingston. Both SGS and Bratton operated current accounts with First Caribbean International Bank (Jamaica) Ltd.

Each importation involved SGS delivering cheques drawn against the bank account of the importing firm and handing those cheques to an employee of the customs broker for delivery to the shipping agents. Usually the amount on the cheque was left blank with the intention that it would be filled in by an employee of the respective agent, which are both limited liability companies. The cheques were, however, all made payable to the agent and the majority were crossed. Some of the cheques, says SGS, were not delivered to the agent but were fraudulently indorsed to a third party who presented them to First Caribbean, either directly or through other banks. First Caribbean paid against those cheques and debited the relevant account.

The firms say that the sums were wrongly debited because the cheques were fraudulently indorsed and that First Caribbean paid to persons other than the named payee. In two claims, which have been consolidated, the firms seek to recover from First Caribbean, sums totalling \$29,218,185.40. The sums concerned a total of 248 cheques.

First Caribbean has denied liability. It alleges that it paid against the cheques in the normal course of business, in good faith and without negligence. It also alleges that any loss which these firms have suffered was as a result of their own negligence in issuing the cheques involved. It asserts that the firms failed to have the cheques properly completed and failed to so conduct their businesses that the fraudulent activity could be quickly discovered, rather than continuing between 1997 and 2001, as is alleged by Bratton and SGS.

In addition, First Caribbean has alleged in ancillary claims that, to the extent that it is found to be liable to these firms, it is entitled to be indemnified by National Commercial Bank Jamaica Ltd. (NCB) and RBTT Bank Jamaica Ltd (RBTT). These were the banks that collected from First Caribbean on some of the cheques. First Caribbean alleges that it received the cheques through the clearing house, from NCB, RBTT, or RBTT's predecessors and paid them in accordance with the relevant Rules of the

Association of Kingston Clearing Bankers (the Clearing House Rules). It relies, in particular, on rule 26 which governs the matter of authenticity of the indorsements on cheques.

Both NCB and RBTT have denied any liability to First Caribbean. NCB asserts, among other things, that First Caribbean is not liable to Bratton and SGS, because the payees of the cheques were fictitious and thus the cheques were "bearer notes". As a result, payment against them could properly be claimed by both of these collecting banks.

Dorothy, George and Madgeline Lee operated, among other things, a cheque-cashing business. They have instituted the claim which has been tried along with the consolidated claims. The common factor between the claims is a number of the cheques in question. In their claim, the Lees say that they received the cheques in good faith, provided value in return for them and lodged them to their various accounts with NCB. They seek to recover, from NCB, amounts represented by these cheques which, they assert, NCB has wrongly taken from them by debiting their accounts.

There were serious questions raised, particularly by NCB, as to whether the firms were unaware of the, so-called fraudulent scheme. Apart from that issue, few disputes as to fact arose on the evidence. The issues mainly revolved around the application of the Bills of Exchange Act (the

Act), particularly as it pertained to cheques, and around the Clearing House Rules which govern transactions between banks, again concerning cheques drawn against the accounts of their respective customers. In this judgment three broad areas of assessment will be addressed:

1. The issues between the firms and First Caribbean
2. The issues between the banks
3. The issues between the Lees and NCB

The issues between the firms and First Caribbean

The Pleadings

The claims on behalf of the firms were simply framed. They alleged that the firms respectively drew crossed cheques in favour of specific payees but that First Caribbean, wrongfully and without authority, paid against the cheques to the accounts of persons other than those of the named payees. They also allege that First Caribbean wrongfully debited the accounts of the respective firms, with the amounts involved.

First Caribbean relies on Sections 60 and 80 of the Act, insofar as it is the paying bank or drawee, and section 82, insofar as it is, through one of its branches, also the collecting bank. These sections protect a bank from liability where it pays or receives payment in respect of fraudulent cheques. They only apply in the event that the bank has acted in good faith and in the

ordinary course of business (section 60) or, in good faith and without negligence (sections 80 and 82). Despite the reliance on those sections, it is important to note that in paragraph 3 of its defence, First Caribbean did not admit that the cheques had been drawn in favour of the shipping agents as the firms had pleaded. The significance of this is that the burden of proof rests on each firm. They must prove their respective cases on a balance of probabilities. I should state here that the fact that there was an agreement by one of First Caribbean's witnesses, that the subject cheques bore forged indorsements, does not displace the burden. It, of course, forms part of the body of evidence which the court must consider in determining the issue.

The evidence

The witnesses on behalf of SGS and Bratton were, respectively, Miss Christine Wong and Mr. Victor Chin. Neither was impressive as a witness. Indeed, the level of ineptitude which they asked this court to accept, as categorizing the manner in which they conducted their respective businesses, stretched the bounds of credibility.

I start with Miss Wong. She is Mr. Arthur Wong's daughter. She bore the brunt of the day to day management of the section of the SGS' business which interacted with the brokers and shipping agents. It was she who wrote up the bulk of the cheques which were to have been delivered to

the shipping agents. As mentioned before, she did so, on behalf of each firm, according to which was the importer at the relevant time.

Miss Wong was a very intelligent witness. She had no difficulty appreciating the nature and effect of questions asked by counsel. She seemed knowledgeable about her business and has had over 20 years of experience in it. This was no small informal trader. According to Miss Wong, it was a firm with an annual turnover in the region of a billion dollars; importing several shipments of products per month. The products are imported in refrigerated shipping containers.

She testified that when shipments arrived on the wharf, she would deliver approximately 3 cheques per shipment to the broker. This would be as against entries prepared by the broker. She said that when she delivered the cheques to the broker, there was no timely delivery to her of the shipping agent's receipt for the payment. According to her, the broker would sometimes delay delivery of the receipt for weeks and sometimes not deliver the receipt at all. Miss Wong admitted in cross-examination, that "we were lax in that area of not getting receipts". She testified that the firm would use the receipts in reconciling the cancelled cheques, but also admitted that "we were lax in that area". An employee of the firm, a Miss Gordon should

have done reconciliation at the end of each year. This, Miss Wong said, was done "on an ad hoc basis"... "sometimes not at all".

The litany of woes continued. According to Miss Wong, "if the [firm's] accountant was doing the work properly then he should have discovered the irregularity...As it turns out it wasn't being done properly....The irregularities spanned 1997-2001".

The number of cheques in issue for SGS is 109. Each month saw an average of three to four irregular cheques. In the last 15 months of the scheme, each cheque was in excess of \$180,000.00. August of the year 2000 saw six such cheques totalling \$1,118,290.00. Could it be, on a balance of probabilities, that the number of transactions effectively concealed a continuing swindling of her firm?

Miss Wong testified that there were 20-30 shipments per month. The documentation from the agents suggests that there were less, but they were indeed, several per month. Despite that, the effect of the haemorrhage of sums of that magnitude "could not fail of being generally and severely felt". Yet, Miss Wong indicated a state of oblivion on her part. At best, she indicated that she "was concerned in a general sense of the possibility of leakage from the company".

I do not accept that Miss Wong was ignorant of this dishonest scheme. It is true that she says that sometimes a cheque could cover more than one shipment, but in each case the relevant shipment or shipments was, on her evidence, noted on the cheque stub. I cannot accept that the cheque stubs were not eventually completed with the amount for which the cheque was drawn. I cannot accept, that for over three years, no one in SGS identified that there were major discrepancies between the payment would be required by the shipments noted on the cheque stubs as opposed to the amount for which the corresponding cheque was actually drawn.

I cannot accept that goods could be priced for sale without knowledge of what was the cost of acquisition. The cost of freight, duty and handling are necessary aspects of determining that cost. If one accepts Miss Wong's testimony, goods would have been brought into inventory and sold without determining the shipper's cost or the demurrage associated with those goods. It is not impossible for SGS to have had some other system of calculating a sale price but Miss Wong has not shown that it had one. Her evidence is not sufficient to reach the civil standard of proof.

Two further answers given by Miss Wong, in cross-examination by Mrs. Champagne for NCB, cement my view of Miss Wong's knowledge of the situation in respect of the cheques drawn by SGS:

Suggestion. "In relation to these cheques there are no corresponding shipping documents".

A. "As it turns out, yes I agree".

and later:

Suggestion. "The sums in these cheques were far in excess of the sums payable to Port Contractors or Lannamans" [the agents].

A. Maybe so, but it is always difficult to determine that in advance.

I am not sure what Miss Wong means by that last answer, because, on her evidence, she would not have known in advance, the amount for which the cheque was written. What seems to me clear, is that upon receipt of the cancelled cheques from the bank, these figures "far in excess of the sums payable" to the agents, would have rung alarm bells with any person charged with entering the amounts on the cheque stubs or reconciling the cheques with the receipts from the agents. That it could fail to galvanize such a person into action could only mean that the cheques and their large amounts were not an unexpected occurrence. The situation certainly could not have continued, blithely unnoticed, for three and a half years.

I have two reservations about a finding, adverse to SGS. Firstly, I have not been provided with any evidence of a motive which Miss Wong would have for being a participant in a scheme defrauding her father's firm. A theory was explored by NCB's counsel in cross-examining Miss Wong, but it does not, of course, amount to evidence. There is, however, no burden

on First Caribbean to prove a motive. The burden is on SGS to satisfy me as to its claim and I find that it has not. The second reservation is that it was Miss Wong who, effectively, brought the scheme to an end. This was done immediately upon her being alerted by First Caribbean that an SGS cheque had been unusually presented to it for payment. I find however, that that evidence is not sufficient to displace the severe dissatisfaction which I harbour in respect of the rest of Miss Wong's testimony.

I now turn to Mr. Chin. He testified that he recognized that something was wrong with his operation but that he could not identify what it was. His stated *modus operandi* in respect of the imports was that he sent batches of blank, signed but crossed, cheques, to Miss Wong at SGS. He authorized Miss Wong to complete the cheques required for each shipment, to meet the cost of customs duty, demurrage, storage and the clearing of the containers.

There were 139 cheques which Mr. Chin testified were improperly negotiated. The amounts involved generally followed the pattern of those in the case of SGS. Bratton's loss allegedly totalled \$16,318,460.00. Mr. Chin testified that although there was a delay in getting the agent's receipts, they were eventually received and reconciliation was done every three months. The reconciliation was done on behalf of Bratton by a relative of Mr. Chin. Despite that testimony, Mr. Chin said in cross-examination:

"As far as I know I got receipts for all the cheques [SGS] wrote on my behalf....I used those receipts to compare to make sure that they were for payments for goods received....In all cases the receipts were for payments in respect of goods received....I used the receipts to compare with my bank statements....The cheques were in respect of services connected with goods I had imported."

Mr. Chin disagreed with a suggestion that the quarterly reconciliations would have made him aware that cheques were being drawn without his receiving goods in connection with those cheques. He accepted that he had "some laxity here and there", but insisted that he was relying on the honesty of SGS. Said he, "I found no fault with them".

Mr. Chin's testimony cannot withstand close scrutiny. The evidence is that the shipping agents had been paid for every container which they handled for Bratton. There was no money outstanding to them. That is not surprising; in the latter year or so of the relationship, it was essentially a payment-on-delivery arrangement which they had respectively had with Bratton and SGS. That situation would have simplified the reconciliation process. True it is that there was a credit system in place for the earlier years, but for the last twenty-four months there would have been little need to consider any outstanding payments. Against that scenario, three-monthly reconciliations could not but reveal that there were between 2 and 7 cheques per month which had no corresponding receipt from the shipping agents. The fact, as Miss Wong testified, that the cheques were for sums far in excess of the sums due to the agents, would have exacerbated the need to

urgently investigate an unwarranted payment. Had it been a situation of which he did not approve, Mr. Chin's operation would have quickly identified that there was a problem and have pinpointed the source. The transactions most certainly could not have continued for nigh on four years without his complicity.

Yet, it could be said that he was not connected to the day to day dealings with the cheques. There is no evidence that he had any contact with the brokers or their employees. That he was a willing participant in the scheme can only be inferred from its longevity in light of its transparency.

I have paid close attention to this evidence of these witnesses because it is critical to the respective cases of Bratton and SGS. I shall presently explain the importance.

Were the payees fictitious for the purposes of section 7 of the Act?

Section 7 of the Act stipulates, among other things, that where a payee is a fictitious or non-existing person, a bill of exchange, in this case a cheque, may be treated as a bearer note; that is, that the bearer thereof may demand payment on it. Counsel on both sides of this particular issue have generally agreed that section 7 has been interpreted in previous cases, to mean that, in deciding whether a payee on a cheque is fictitious or not, the intention of the drawer of the cheque, at the time of drawing it, is critical.

The question to be decided, as arising from the assessment which has just been concluded, is whether the payee named in the relevant cheques was fictitious. The fact that a person by that name (*i.e.* the agent) exists does not preclude the payee on the cheque from being fictitious. The payee may be deemed fictitious if the name is inserted as a mere pretence. The authority for the point is *The Governor and Company of the Bank of England v Vagliano Brothers* [1891] A.C. 107.

Based on my findings concerning Miss Wong, I find that the names of the various agents were inserted on the respective cheques, as a mere pretence in order to facilitate the indorsement thereof. I, therefore, find that the relevant SGS cheques are all bearer notes. If Miss Wong were the drawer, there would have been no complexity resulting from that finding; the cheques would have been deemed bearer notes. The fact is, however, that the bank account was that of Mr. Aubrey Wong and he signed all of the cheques. Can he be distinguished from Miss Wong or must her actions be attributed to him? I find that he cannot be distinguished. He has not given evidence himself. Miss Wong has been the face of SGS in this court and her actions must be deemed to be Mr. Wong's actions.

In light of my findings in respect of Mr. Chin's participation in the dishonest scheme, Bratton's cheques must also be deemed bearer notes.

In the circumstances, I find that counsel for NCB are correct in saying that the collecting banks would each have properly credited their respective customers with the face value of the relevant cheques. First Caribbean would have been entitled to pay against such cheques and debit the corresponding account with the sum involved. SGS and Bratton would, therefore, have each failed in their respective bids to show that the amount of each of the cheques was wrongly debited from their respective accounts.

Does the crossing on the cheques affect the issue of "fictitious payee"?

All but 8 of the subject cheques bore a crossing. Each of Bratton's cheques bore the crossing "A/C PAYEE ONLY". The vast majority of the SGS cheques were crossed with the general crossing; "& Co". Despite the respective crossings, however, each cheque bore the direction, as part of the printed format thereof, the words "Pay to the order of". Following those words were the respective names of the relevant agents.

Counsel for the firms have laid great emphasis on the fact of the crossings. The thrust of the submission is that the payment of a crossed cheque, contrary to the crossing (i.e. the customer's mandate), deprived the paying bank of the protection provided by sections 60, 80 and 82 of the Act. Counsel submit that such a bank could not properly say, in circumstances

where it had paid on a cheque, which had been indorsed to a person other than the named payee, that it had acted in good faith or without negligence.

Counsel for First Caribbean and the other banks dispute that stance. They say that, in law, a crossing on a cheque does not, by itself, prevent the drawer's bank from paying the proceeds to the account of a person other than the payee named by the drawer.

It may therefore be asked whether the crossings on these cheques affect the issue of the named payee on the cheque.

Apart from the fact that section 7 deems an affected cheque as being payable to its bearer, there is authority to support the proposition that the crossing does not prevent the cheque being negotiated. Where the cheque directs the drawee bank, to pay to the order of the named payee, that payee may order that the payment be made to someone else; the indorsee. Section 8 of the Act addresses the matter of a cheque made payable to the order of the payee thereof. It states in part:

“...A negotiable bill may be payable either to order or to bearer....

A bill is payable to order which is expressed to be so payable, or which is expressed to be payable to a particular person, and does not contain words prohibiting transfer or indicating an intention that it should not be transferable.

Where a bill, either originally or by indorsement, is expressed to be payable to the order of a specified person, and not to him or his order, it is nevertheless payable to him or his order at his option.”

The principle that a cheque made payable to the order of the payee is transferable despite a general crossing, is accepted as being the banking

practice in Jamaica. This was the testimony, in cross-examination, of Mr. Richard Hines, one of NCB's witnesses. What, in fact, the crossing requires is for the paying banker to pay the proceeds of the cheque to another banker. Lord Upjohn in *Universal Guarantee Pty. Ltd. v National Bank of Australasia Ltd.* [1965] 2 All E.R. 98 at p. 102 G-H explained it thus:

"The addition of the words "a/c payee" or "a/c payee only" refer to the payee named in the cheque and not the holder at the time of the presentation...but they do not prevent, at law, the further negotiability of the cheque."

The crossing does, however, put a greater onus on the collecting bank. It is "a warning to the collecting bank that if it pays the proceeds of the cheque to some other account it is put on inquiry and may have difficulty relying on any defence under [the equivalent of section 82] of the Act in an action against it for conversion of the cheque" (*per* Lord Upjohn in *Universal Guarantee (supra)* at p. 102 H).

Lord Upjohn continued by saying that the crossing does not "cast on the paying bank, paying the cheque to a banker, any additional obligation to satisfy itself that the collecting bank is collecting it on behalf of the named payee. That is entirely the responsibility of the collecting bank" (p. 102 I).

It is not in dispute that First Caribbean paid each of these cheques to a collecting banker. I conclude from the portions of the judgment just quoted, that First Caribbean, as the paying bank, does not incur any liability to the

firms as a result of having paid to NCB or any of the other collecting banks, the proceeds of the crossed cheques. Authority for this conclusion may also be found in the cases of *Akrokerri (Atlantic Mines) v Economic Bank* [1904] 2 K.B. 465 at p. 472 and *Honourable Society of the Middle Temple v Lloyds Bank plc and another* [1999] 1 All E.R. (Comm.) 193 at pp. 204j-205b.

In the instant case, the collecting banks, including First Caribbean where it so acted, would be exposed to liability to the named payee, but perhaps not to the firms, as ostensibly it would be the payee which would have suffered the loss. Lord Upjohn considered this liability at page 103 B of *Universal Guarantee Pty. Ltd.* It turns out, of course, that the named payee, in the instant case, has suffered no loss in respect of those cheques. Bigham, J. in *Akrokerri*, mentioned above, held a different view concerning the liability of the collecting bank to the drawer; the firms in the instant case. He held, however, that the statutory defence (in Jamaica, section 82 of the Act), available to a collecting bank, could provide exemption from that liability (see page 469).

Sections 60, 80 and 82 of the Act

Although the above analysis would dispose of the claims by Bratton and SGS, I shall briefly examine the submissions of counsel in respect of sections 60, 80 and 82 of the Act. I refer first to section 60:

