IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

IN COMMON LAW

SUIT C.L. D46/93

BETWEEN	DEXTRA BANK & TRUST COMPANY LIMITED	PLAINTIFF
A N D	BANK OF JAMAICA	DEFENDANT

R. Mahfood Q.C., D. Goffe Q.C. and Susan McGhie instructed by Myers Fletcher and Gordon for plaintiff

Dr. K. Rattray, Q.C., D. Muirhead Q.C. & Douglas Leys instructed by Pamela Wright fot defendant.

HEARD: 28th, 29th, 30th June and 1st and 7th July, 1994

DETERMINATION OF THE RIGHT TO BEGIN

HARRISON J.

This is an application to determine which of the parties should begin.

The plaintiff issued its cheque for the sum of US $2,999,000.00 in favour of the defendant on the 20th day of January 1993, and delivered it on the said date. The defendant lodged the cheque to its account. The plaintiff alleges that it issued its cheque with the intention of making a loan to the defendant, but at the time of issuance, it was operating under a mistake of fact, namely, "that it was making a loan to the defendant in exchange for and in consideration of a promissory note." It received the promissory note in the name of the defendant.

The plaintiff alleges that it retained its property in the said cheque and the defendant by lodging the cheque to its account wrongly converted it to the defendant's own use and is therefore liable to the plaintiff in conversion and alternatively, for money received for the use of the plaintiff.

The defendant contends that its agents bought the cheque in the ordinary course of business as foreign exchange purchases and it credited the accounts of the said agents, with the equivalent amount, in Jamaican currency, thereby giving consideration for the said cheque; that the plaintiff retained no title in the cheque, having divested itself of its title by issuing the cheque in the name of the defendant and relinquishing its possession for delivery to the defendant; and that a presumption arose that the defendant had title in

the cheque when the plaintiff issued it in the name of the defendant.

Mr. Mahfood for the plaintiff alleges that the plaintiff retained title to the said cheque and did not lose it merely because it issued the cheque in the name of the defendant and with the intention of making a loan to the defendant; that the defendant would need to prove that the plaintiff lost title to the cheque, that it acquired title from the person from whom they purchased the cheque; that title could only have passed to the defendant if their agents acquired either a valid or voidable title, which they did not and therefore the defendant wrongfully converted the plaintiff's cheque to its use. He maintained that the defendant having admitted receiving the plaintiff's cheque, the property in which remained with the plaintiff, without any authority to do so it is guilty of conversion a tort of strict liability and is obliged to begin in disproof of its act of conversion and money received for plaintiff's use.

Dr. Rattray for the respondent replied that a prima facie presumption exists that the property in a cheque passes to a payee in whose name a cheque is issued and that the payee has given value therefor; that the defendant gave value for the said cheque that defendant is deemed to be the holder for value even previously and the plaintiff would have to show, as drawer of the cheque, that no value was given; that having signed and given up possession of the cheque a valid and unconditional delivery is presumed by the Bills of Exchange Act, on the part of the plaintiff; that the plaintiff needs to prove that it intended to make a loan; that the defendant denies that the cheque is the plaintiff's or that the plaintiff retained any title or property in the cheque; that even if induced by fraud property in the cheque passes on delivery even by a messenger or a rogue - the title is voidable - the cheque is valid in the hands of a bona fide purchaser for value; seeing that the plaintiff alleges a mistake of fact the onus is on the plaintiff to prove that mistake, that it was mistaken as to the precise identity of the defendant and that such identity and that of the messenger were of fundamental importance; that all the issues of fact are not on defendant, and on the pleadings the onus of proof on several issues is on the plaintiff who should accordingly begin.

Each counsel relied on authorities in support of his contention.

Usually in a civil case the plaintiff begins. However, the nature of the pleadings may influence that procedure.

The author in Odgers' Principles of Pleading and Practice, 22nd Edition at p. 286 states,

> "Normally the plaintiff will begin by 'opening his case' but this depends to a large extent on the pleadings, for where the burden of proof of all the issues in the action lies on the defendant he will invariably begin. If the burden of proving but one issue be on the plaintiff, it does not matter that there are others which lie on the defendant; the plaintiff will begin unless the judge otherwise directs."

This is substantially similar to the recital of Order 35 rule 7 of the Rules of the Supreme Court (England).

In Phipson on Evidence, 14th Edition, paragraph 4-07, the author states, that the burden of proof,

> "rests upon the party who would fail if no evidence at all .... were given on either side", and in

paragraph 4-07,

> "The above rule as to onus probandi holds not only as to matters which are the subject of express allegation ...."

The question of who shall begin now arises.

This Court will therefore have to look at the pleadings and apply the test - "how would judgment be entered on these pleadings if no evidence at all were given on either side" - (see Odgers', supra, page 287) - in order to determine who shall begin.

The tort of conversion is a dealing with the goods of another in a manner inconsistent with the right of the person entitled to such goods and with an intention to exercise dominion over them - See Clerk & Lindsell on Torts, 16th Edition, paragraph 22-67. Lord Diplock in Marfani & Co. Ltd. vs Midland Bank [1968] 1 WLR 956, said

> "At common law one's duty to one's neighbour who is the owner of, or entitled to possession of any goods is to refrain from doing any voluntary act in relation to his goods which is a usurpation of his proprietary or possessory rights in them ..... This duty is absolute; he acts at his peril."

Ignorance of the title of the true owner of goods is not a defence. The defendant will only succeed in conversion in the normal case, if he shows either that he had a valid title or a voidable title - that had not been avoided.

By its pleadings in the instant case the plaintiff alleges that the defendant converted the said cheque to its own use by lodging it to its defendant's account "in violation of the Plaintiff's proprietary legal rights," because the cheque remained the property of the plaintiff. Up to this point, the onus of proof rested on the defendant.

The defendant in its further amended defence denied that it wrongly deprived the plaintiff of its cheque, and stated that the cheque was not the property of the plaintiff; that the cheque was made payable to the defendant as was intended by the plaintiff who was not mistaken as to the identity of the defendant and the plaintiff caused delivery to be made, consequently it retained no title to the said cheque. The defendant, in its said pleading relied on the Bills of Exchange Act, section 21, to allege that the plaintiff was divested of title to the cheque which title vested in the defendant on the issue of the cheque in the name of the defendant and subsequent delivery to the defendant.

In its further amended reply, the plaintiff alleges, at paragraph 4,

> "In reliance on information it had received from Messrs. Michael Phillips and John Wildish and acting on a mistake of fact, the Plaintiff issued its cheque no. 4949 for US $2,999,000 drawn on its account with the Royal Bank of Canada in New York, payable to the Defendant, which the Defendant lodged to its account with Citibank for its own use and benefit."

and at paragraph 5,

> "..... the Plaintiff retained title to the cheque as the Plaintiff issued the cheque under a mistake of fact, namely, that it was making a loan to the Defendant in exchange for and in consideration of the issue of a promissory note by the Defendant."

This pleading by the plaintiff that it "retained title to the cheque as (it) issued the cheque under a mistake of fact," is a statement of mixed fact and law and is incorrect, as a general rule. It is a premise resorted to by the plaintiff in its pleading to ground its assertion that it retained title and therefore the onus is one the defendant to prove that the plaintiff lost its title.

Where goods are delivered under a mistake of fact title may or may not pass depending on the intention of the party in whom title resides at the time of such delivery. If title passes under a valid or voidable contract, any subsequent dealing with the goods may pass a good title; a void contract cannot pass title.

The attitude of the common law to mistake, was discussed in 'Cheshire Fifoot & Furmstons', Law of Contract, 11th Edition, at page 238,

> "The majority of cases in which the question of unilateral mistake has arisen have been cases of mistaken identity ..... Suppose that A, pretending to be X, makes an offer to B which B accepts in the belief that A is in fact X. In subsequent proceedings arising out of this transaction, B alleges that he would have withheld his acceptance, there is, as a matter of pure logic, no correspondence between offer and acceptance and therefore there should be no contract. Nevertheless, outward appearances cannot be neglected, and the prima facie presumption applicable to this type of case is that, despite the mistake, a contract has been concluded between the parties. The onus of rebutting this presumption lies on the party who pleads the mistake."

In the instant case, the plaintiff has pleaded, a mistake of fact on its part. The pleadings show that the said mistake of fact was probably induced by the forgery and fraud of several persons.

In Hardman vs Booth (1873) 1 H & C 803, the plaintiff acted under a mistake of fact induced by the fraud of a clerk; no title passed and therefore the plaintiff succeeded in his suit for conversion.

In Cundy vs Lindsay (1878) 3 App. Cases 459, the plaintiffs also acted under a mistake induced by a rogue Blenkarn; no title passed and the plaintiff succeeded in the House of Lords in conversion.

In Phillips vs Brooks [1919] 2 KB 243, the plaintiff acted under a mistake of fact induced by the fraud of a rogue North; the title in a ring passed; the contract was voidable i.e valid until avoided. The plaintiff failed in conversion. In Ingram vs Little]1969] 1QB 31, involving the fraud of a swindler, no property in the sale of the motor car passed.

In Lewis vs Avery [1972] 1 QB 198, the Court of Appeal held that despite the mistake, the plaintiff owner of the car had concluded a contract with the rogue and title passed.

In Midland Bank vs Brown Shipley [1991] 1 Lloyd's Law Reports, 576; [1991] 2 All ER 690 - in which the cases of Cundy vs Lindsay, Phillips vs. Brooks, Ingram vs Little and Lewis vs Avery were referred to, it was held that despite the fraud committed on the plaintiff banks, bankers' drafts issued by them were held to have validly passed title to the defendant - who consequently committed no conversion.

The existence of title in the said cheque, in the instant case, falls therefore to be determined not merely at the time defendant Bank of Jamaica came into possession of it, but moreso, as the cases demonstrate, at the time of the transaction between the plaintiff Dextra Bank and the persons who held themselves out as agents of the said defendant, and thereby effected the mistake of fact in the plaintiff bank. One may not by claiming in conversion, which pre-supposes the existence of title in the claimant, assume that title remains, because the very circumstances that existed at the time that the cheque was issued under a mistake of fact could have caused title to pass.

The mere allegation of conversion, which was traversed, is therefore not the determinant as to who shall begins. If due to the the mistake of fact title passed from Dextra there can be no subsequent conversion as alleged - to give rise to liability in the defendant B.O.J., and thereby oblige it to begin.

In addition to the common law approach, the statutory provisions of the Bills of Exchange Act, as relied on by counsel for the defendant are helpful.

Section 21 reads, inter alia,

> "Every contract on a bill, whether it be the drawer's, the acceptor's or an indorser's is incomplete and revocable until delivery of the instrument in order to give effect thereto: ...
> .....
>
> As between immediate parties, and as regards a remote party other than a holder in due course the delivery in order to be effectual -
>
> (a) must be made either by or under the authority of the party drawing, accepting or indorsing, as the case may be;
>
> (b) may be shown to have been conditional or for a special purpose only, and not for the purpose by transferring the property in the Bill.

> But if the bill in the hands of a holder in due course, a valid delivery of the bill by all parties prior to him so as to make them liable to him is conclusively presumed.
>
> Where a bill is no longer in the possession of a party who has signed it as drawer, acceptor or indorser, a valid and unconditional delivery by him is presumed until the contrary is presumed."

Furthermore section 27 provides, inter alia,

> "Where value has at any time been given for a bill the holder is deemed to be a holder for value as regards the acceptor and all parties to the bill who become parties prior to such time."

By the Bills of Exchange Act, a presumption probably exists in favour the defendant, Bank of Jamaica, which has pleaded that it gave value for the cheque. The presumption is that the defendant, having given value for the said cheque is deemed to be a holder for value; there was a delivery to it by the plaintiff bank; see Diamond vs Graham [1986] 1 WLR 1061, as also the pleadings.

The defendant Bank of Jamaica may therefore be presumed to have had title to the cheque, being a holder for value, the cheque having been issued in its name and delivered by the plaintiff bank. This presumption may be rebutted.

Section 27 of the Act is identical to the England Bills of Exchange Act 1882, section 27 (2), which was considered and interpreted in Diamond vs Graham supra. See also Lipkin Gorman vs Karpnale Ltd. et al [1992] 4 All ER 512.

In so far as the defendant in Seldon vs Davidson [1968] 2 All ER 755 was held to bear the burden and had to begin, the facts show that he admitted receipt of the moneys, and there being no presumption or other factors in his favour, he had to displace the prima facie obligation that existed that he had to repay moneys received.

In the instant case, there is no presumption that when the plaintiff bank drew and delivered its cheque, no title passed from the plaintiff, as submitted by counsel for the plaintiff. At its lowest, at Common law title may or may not have passed. On the contrary, on the pleadings, the admitted existence of a mistake of fact placed an obligation on the plaintiff to discharge the burden of proof that exists. In addition, the presumption

that arises under the Act remains, until displaced by the plaintiff.

For the above reasons, this Court holds that the plaintiff bank should begin.