Judgment Book

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

CLAIM NO. C.L. 1999/L-027

BETWEEN	*LETS LIMITED*	*CLAIMANT*
A N D	*RBTT BANK JAMAICA LIMITED*	*DEFENDANT*

CONSOLIDATED WITH CLAIM NO. C.L. 1998/L-009

BETWEEN	*LETS LIMITED*	*CLAIMANT*
A N D	*EAGLE MERCHANT BANK OF JAMAICA LIMITED*	*DEFENDANT*

CONSOLIDATED WITH CLAIM NO. C.L. 2000/L-004

BETWEEN	*LETS LIMITED*	*CLAIMANT*
A N D	*NATIONAL COMMERCIAL BANK OF JAMAICA LIMITED*	*DEFENDANT*

Dr. L. Barnett and Mr. Andre Earl instructed by Rattray, Patterson, Rattray for Claimant.

Mr. Dave Garcia and Mr. Jerome Spencer instructed by Myers, Fletcher and Gordon for Eagle Merchant Bank.

Mrs. Sandra Minott-Phillips instructed by Myers, Fletcher and Gordon for Eagle Commercial Bank

Mr. Garth McBean and Mrs. Lara Dayes instructed by Dunn Cox for National Commercial Bank Jamaica Limited.

Heard: *1st December, 2003, 11th December, 2003 & 9th December, 2004*

MARSH, J.

The Claimant Lets Limited is a company duly incorporated in Jamaica and licenced under the Bank of Jamaica Act to operate as a cambio, dealing in the buying and selling of foreign currency.

Sometime in February, 1996, Claimant entered into an agreement with Eagle Merchant Bank Jamaica Limited. By this arrangement, the said Eagle Merchant Bank Jamaica Limited would submit to the Claimant foreign exchange cheques or instruments for conversion into Jamaican dollars at a negotiated rate of exchange; Claimant would send to the said bank the agreed Jamaican dollar funds.

The bank would hold the local funds (Jamaican) on deposit, making payments therefrom when the cheques or instruments sent to Claimant for conversion had been cleared or paid.

Lets Investment Company, incorporated in Jamaica, is owned and controlled by the shareholders and directors of the Claimant and operates from the same office. Sometimes, the bank (Eagle Merchant Bank of Jamaica Limited) would send the foreign exchange cheques intended for Claimant in the name of Lets Investments Ltd., which the said Lets Investments Ltd. would accept on Claimant's behalf. Both Claimant and Lets Investments Ltd. are members of the same group of companies.

Through its manager, Mrs. Georgia Kerr-Jarrett and later her successor Donovan Hunter, the said Eagle Merchant Bank Jamaica Limited assured Claimant's Managing Director Mrs. Dorothy Marzouca that the clients on whose behalf the foreign exchange cheques and instruments were submitted to the Claimant for conversion, had the necessary funds, and/or were reliable and additionally that the Jamaican dollar equivalent would be held until the aforementioned cheques or instruments had been cleared or paid.

On the basis of this agreement several transactions were effected between 1996 and 1997. Donovan Hunter assured Claimant that the clients were reputable and reliable, that the necessary funds were in the account and that the bank would hold the Jamaican dollar equivalent against the uncleared U.S. dollar cheques sold to the Claimant. This was later confirmed in writing by a letter dated April 28, 1997 (exhibited).

In pursuance of the said agreement, Claimant delivered to the said Eagle Merchant Bank Jamaica Ltd. four cheques payable to James Ogle in the total sum of J$33,350,000.00 Jamaican. Donovan Hunter, then Manager of the said bank, had instructed Claimant that the relevant amount was in the name of James Ogle and that the cheques should name the said James Ogle as payee.

On May 16, 1997, Claimant was advised by National Commercial Bank that two U.S. dollar cheques submitted to it on April 28, 1997 by Eagle Merchant Bank Jamaica Ltd. had been returned unpaid due to insufficient funds.

On 21st May, 1997 funds were deposited to Claimant's account at National Commercial Bank by way of a lodgment, but payment on these cheques was stopped.

Defendant RBTT Bank Jamaica Ltd (formerly Union Bank Jamaica Ltd.) permitted the four cheques payable to James Ogle to be lodged into the account of EMB, which it maintained at the Bank's Montego Bay Branch. These cheques had not been endorsed by the payee nor is there evidence that he had given any authority to permit the cheques to be negotiated in that manner.

The Claimant initiated action against RBTT Bank Ltd., Eagle Merchant Bank Ltd. and National Commercial Bank Jamaica Ltd, respectively. These actions were consolidated. Claim against RBTT Bank (formerly Union Bank of Jamaica Ltd.) for negligence and the damages sought therein was -

(i) the sum of $33,350.000.00

(ii) interest in the said sum at commercial bank rates as from May 16, 1997 until date of payment.

> (iii) damages for negligence being the difference between the U.S. dollar equivalent of the Jamaican sum at the time of the payment of the said cheque and the time of the repayment of the amount of J$33,350,000.00.

The Claim against Eagle Merchant Bank Jamaica Ltd (EMB) is for damages for Breach of Contract and/or damages for Breach of Contract and/or damages for breach of trust and/or damages for loss and expenses caused by the negligent misstatements of the said Defendant (EMB) its servant or agent on or about April 28, 1997. The claim against National Commercial Bank (Jamaica) Ltd. is for the sum of J$33,350,000 and the difference between the U.S. dollar equivalent of the said sum on the 28th day of April, 1997 and at the time of the repayment by Defendant to Claimant, being the damages suffered by Claimant as a result of the negligence and/or breach of contract of the Defendant in negotiating and or paying for cheques drawn by Claimant on its account with Defendant, and interest on the said sums at commercial rates or at such rates as to the Court may seem just.

By its amended defence dated 1st April, 1999, RBTT Bank Jamaica Ltd. (formerly Union Bank of Jamaica) denied that Eagle Commercial Bank Ltd. owed a duty of care to the Claimant as alleged or that it acted negligently. Eagle Commercial Bank Limited acted "in accordance with the

ordinary and proper course of the business and practice of bankers." Further, the Claimant has suffered no loss attributable to any acts or omissions by Defendant Eagle Commercial Bank Ltd.

Defendant Eagle Merchant Bank of Jamaica Ltd. denies any transaction with Claimant involving the sending of any foreign exchange cheques to Claimant or to Lets Investments Ltd. It had never bought or sold foreign exchange from or to members of the public.

If any assurances as alleged were given to the Claimant (and this is denied), then Donovan Hunter and Georgia Kerr-Jarrett were not acting "within the scope of their employment and/or authority in so doing."

It had not acted in breach of contract, as there was no contractual relationship with Claimant, nor was it in any way negligent and owed no duty of care to the Claimant.

National Commercial Bank Limited in its defence dated 30th March, 2000, relied on the provisions of Rule 26 of the Rules of Association of Kingston Clearing Bankers (1977). ("The Clearing House Rules"). It and Eagle Commercial Bank are members.

The cheques were presented to it for payment and proceeds paid out on April 28, 1997. This was done in accordance with its mandate, which did not require that there should be confirmation that the drawer had received

value, prior to the payment of such cheques. In all times, it acted in accordance with its contract with Claimant and without negligence.

1. Re Claimant's case against Eagle Merchant Bank

There were occasions, during the course of the said agreement that foreign exchange cheques, were sent by EMB in the name of Lets Investments Limited and Lets Investments Ltd. would accept these cheques on behalf of Claimant, a fellow Company of the same group. Both Claimant and the said Lets Investment Limited are owned and controlled by the same directors and operate from the same office.

Initially, it is alleged, the Defendant, through Mrs. Georgina Kerr-Jarrett, and later through Mr. Donovan Hunter, at respective times Manager of the Defendant's Montego Bay branch, each represented to Claimant that the clients on whose behalf, the foreign exchange cheques or instruments were to be submitted, were reputable and reliable, had the necessary funds in account, and that the local funds equivalent, submitted by Claimant to Defendant in respect of the foreign exchange cheque or instruments, would not be paid over until the foreign exchange cheques were cleared and/or paid.

Claimant exhibited a list of a long course of dealings between itself and Defendant. (See the list, part of paragraph 3 of the Further and Better

Particulars supplied by Claimant as requested by Defendant and ordered by the Master (Ag.) on the 28th September, 1998.)

This course of dealings covered period beginning 26th January, 1996 to 28th April, 1997 during which the Defendant sent cheques as alleged. This was in response to Defendant's request of Claimant for Further and better Particulars, "Please give full particulars of the occasions on which Defendant sent cheques as alleged, including dates and amounts."

This remains uncontroverted by any other evidence.

On this list, are two cheques each dated 28th April 1997, drawn on Merrill Lynch Bank, in the United States of America, each in the sum of US$475,075.61, in favour of Lets Investments Limited from Transact Resources Corporation/James Ogle/Marima Ogle. These were sent to Claimant for conversion on the 28th April, 1997, pursuant to the agreement earlier mentioned.

Relying on the said agreement and on verbal assurances of Mr. Donovan Hunter, that the Jamaican dollar equivalent to the U.S. dollar cheques would be held until the U.S. dollar cheques were cleared, Claimant delivered 4 cheques in Jamaican dollars drawn on its account with National Commercial Bank Jamaica Ltd. Each was in the amount of J$8,337,577.13 and payable to James Ogle. This was done as Claimant had been instructed

by Mr. Donovan Hunter that the account to which the cheques were to be lodged was in name James Ogle and not "Transact Resources Corporation." These cheques represented the local equivalent to the US dollar cheques. On May 16, 1997, Claimant was informed by NCB Jamaica Ltd. that the 2 United States dollar cheques were returned "unpaid due to insufficient funds." Claimant informed Defendant EMB by letter of same date and requested funds to cover the shortfall created.

Mr. Donovan Hunter informed Claimant that the funds to cover the shortfall were available and that this amount would be sent by wire to Claimant's account at National Commercial Bank (NCB), Montego Bay. This was not done and efforts were made to lodge 4 cheques (Money Traders and Investments Ltd) cheques drawn on a Miami Bank. Payment on these cheques was stopped.

No amount of the cheques in local funds was refunded to Claimant.

The real and central issue in the case as advanced by the Claimant against the Defendant EMB Ltd. is whether or not there was a contract between itself and Defendant and whether the representations by Georgina Kerr Jarrett or Donovan Hunter bound the said Defendant, their employers. The Defendant contends that the agreement entered into by either manager

on behalf of Defendant was not within the scope of their employment and if such an agreement was made, it was unauthorized.

The Defendant has not admitted that any such agreement was made by its managers Kerr Jarrett and Hunter.

The evidence of Dorothy Marzouca as to the long course of dealings between herself acting on Claimant's behalf and Defendant's two managers (Kerr-Jarrett and Hunter) remains uncontroverted.

These several transactions as between parties over a period of time show the existence of an agreement or agreements between them.

The letter dated April 28, 1997 from Defendant's Donovan Hunter, written on the said Defendant's behalf confirms the Claimant's contention of the existence of an agreement between Claimant and Defendant, as alleged in Dorothy Marzouca's evidence.

Defendant's contention is that the bank manager Hunter, by giving the undertaking he did, was doing so without authority.

The principle to be applied here has been stated by the author of Bowstead and Reynolds in Agency at paragraph 8 – 013, thus

> " Where a person by word or conduct, represents or permits it to be represented that another person has authority to act on his behalf, he is bound by

> the acts of that other person with respect to anyone dealing with him as an agent in the faith of any such representation, to the same extent as if such other person had the authority that he was represented to have, even though he had no such actual authority."

In ***Freeman & Lockyer v. Brockhurst Park Properties (Mangal) Ltd. (1964) 2 Q.B. 480*** at page ***503 Diplock L.J.*** (as he then was) expressed it in this way-

> ***"An 'apparent' or ostensible authority, on the other hand, is a legal relationship between the principal and the contractor created by a representation, made by the principal to the contractor, intended to be and in fact acted upon by the contractor that the agent has authority to enter on behalf of the principal into a contract of the kind within the scope of 'the apparent' authority, so as to render the principal liable to perform any obligations imposed upon him by such contract. To the relationship so created the agent is a stranger. He need not be (although he generally is) aware of the existence of the representation, but he must not purport to make the representation as principal himself. The representation, when acted upon by the contractor, by entering into a contract with the agent, operates as an estoppel, preventing the principal from asserting that he is not bound by the contract. It is irrelevant whether the agent had authority to enter into the contract."***

It is patently clear that the undertaking given by both Mrs. Kerr-Jarrett and Mr. Hunter on Defendant's behalf must have led the Claimant to conclude that by their conduct, both Mrs. Kerr-Jarrett and Mr. Hunter were represented to have authority as managers of the Defendant's bank to conduct these transactions and to deal with all matters incidental to those transactions.

Diplock L.J. (as he then was) in ***the Freeman & Lockeyer v. Brockhurst Park etc. case (supra), at pages 503,504*** continued: -

> ***"The representation, which creates 'apparent' authority, may take a variety of forms of which the commonest is representation by conduct ..... the principal represents to anyone who becomes aware that the agent is so acting, that the agent has authority to enter on behalf of the principal into contracts with other persons of the kind which an agent so acting in the conduct of his principal's business has usually 'actual' authority to enter into."***

The contractor's information as to authority must come either from the principal or the agent or both, since they alone are privy to what the actual authority is. Would the transactions which Mr. Hunter conducted on behalf of his employer's the Defendant, be such that one would expect him to be able to conduct as Manager of the Bank?

By the very nature of the agreement, the answer would be in the affirmative.

It has been shown that there was a representation by Mr. Hunter that he had authority to enter on behalf of his employer, the Defendant, into a contract of the kind sought to be enforced by Claimant.

The representation was made by someone, who had 'actual' authority to manage the business of the Defendant, in respect of those matters to which the contract related. The Claimant relied upon, and as a result, acted upon the representation alleged by Dorothy Marzouca to have been made to her by Donovan Hunter.

There is no evidence to suggest that it was ever communicated directly or otherwise to Mrs. Marzouca as Managing Director of Claimant, that there was any limitation on the authority of Mr. Hunter as Manager of the Defendant bank, to enter into the transaction, subject of this suit; nor was there any information given to her about the arrangement between the Defendant company and its manager, Mr. Hunter, that being essentially an internal matter. As ***Cockburn C.J.*** stated in ***Edmunds v. Bushell and Jones (1865) L.R. 1 Q.B. 97: -***

> ***"It is clear, therefore, that Bushell must be taken to have had authority as incidental to carrying on the business.....***

> ***Bushell cannot be divested of the apparent authority as against third persons by a secret reservation."***

See also ***Ebeed etal etc. v. Soplex Wholesale Supplies Ltd. et al (1985) BCLC 404.***

In ***Thompson vs. Bell (1854) 10 Exch. 10***, money was paid to a local bank manager for paying off a certain mortgage. He misappropriated the sum and the Court held that since he was acting within the scope of his apparent authority in receiving the money, it must be deemed to be in custody of the Bank and the bank was therefore liable to account for and repay the money.

See Denning J (as he then was) in ***Nelson v. Larholt (1947) 2 All E.R. 751 at page 752-***

> ***"..... A man's money is property protected by Law ..... if it is taken from the ..... owner, without his authority, he can recover the amount from any person into whose hands it can be traced, unless and until it reaches one who receives it in good faith and for value and without notice of the want of authority."***

The amount received by Donovan Hunter, of $33,350,000.00, was received for the purposes outlined by Claimant's Managing Director Dorothy Marzouca. These funds were not to be released "unless Lets Ltd. Cambio provides written confirmation to Eagle Merchant Bank Ltd. that the

United States Dollar cheques ..... have been cleared." See letter of Eagle Merchant Bank Ltd. over Donovan Hunter's signature, dated April 28, 1997.

There is no evidence that any such written confirmation was ever issued for the release of the funds. The United States dollar cheques were not cleared.

Claimant is therefore entitled to the judgment sought against Eagle Merchant Bank Ltd. in the sum of Thirty Three Million Three Hundred and Fifty Thousand Dollars (Jamaican) with interest thereon from 14th April, 1997 to date at the rate of 18.60% per annum. Costs are to be Claimant's to be agreed or taxed.

2. Re Claimant's case against National Commercial Bank Ja. Ltd.

The Claimant contends that National Commercial Bank Jamaica Ltd. (NCB) negligently and or in breach of contract paid the 4 cheques in question drawn by Claimant, although the cheques had not been endorsed by the payee named on them.

Defendant's Defence is that it acted in accordance with the Clearing House Rules and the Mandate obtained from the Claimant.

The contention is that NCB acted in disobedience of the Mandate and acted in breach of contract and had no authority to pay on the bank stamp of ECB/RBBT or EMB.

NCB has also, Claimant further contended, acted negligently in failing to make enquiries of the Claimant, its customer, who drew the cheques. The dealings with these cheques were irregular or unusual. It should have been placed on enquiry and failure to do so, demonstrated a lack of reasonable care.

The issues in relation to Claimant's case against National Commercial Bank are: -

(a) Did Defendant pay the proceeds of the four Jamaican dollar cheques drawn by Claimant without authority?

(b) By so paying, was Defendant in breach of Contract and or negligent in so doing?

(c) Was there a duty placed on Defendant, not to pay these cheques without ascertaining from the Claimant that it was in order to pay the said cheques?

(d) Were the loss and damage Claimant alleges it suffered caused by any breach of contract or negligence on Defendant's part?

Westminster Bank Ltd. v. Hilton (1926) 43 T.L.R. 124 at 126. Lord Atkinson defines a cheque as follows:

> ***"The cheque is an order of the principal addressed to the agent to pay out of the principal's money, in the agent's hands, the amount of the cheque to the payee thereof."***

Section 73 of the Bills of Exchange Act defines a cheque as a "Bill of exchange, which is drawn on a banker and payable on demand."

Defendant relies on the author of *"Paget's Law of Banking"* who states, *"A bank which acts in accordance with the mandate is duly authorized."* At page 340 para. 1 (a) of the said work, a customer's mandate is defined as follows: -

> "The mandate embodies the agreement which authorizes the bank to pay if given instructions in accordance with its terms. Typically, mandate will list the individuals who have authority to sign cheques or other payment orders and will specify how many individuals (if more than one) must sign any given order."

The contractual obligations of a bank to its customer were extensively considered in ***Lipkin Gorman* v. *Karpnale Ltd. et al (1992)4 All E.R. p. 40.*** This was an appeal from the judgment of Allcott J. Defendant relies quite heavily on Justice Allcott's assessment of the bank's duty of care to its customers in carrying out its mandate. It is clear that the propositions of Allcott J are peculiar to the facts of the case. Parker L.J., at p. 439 of the Lipkin Gorman case, cautions thus:

> ***"Expressions in them such as that a paying bank must pay under its mandate save in extreme cases,***

or that a bank is not obliged to act as an amateur detective, or that suspicion is not enough to justify failing to pay according to the mandate, or other like observations which are to be found in the cases, are no more than comments on particular facts or situations and embody in my view no principles of law. ..... What would be a breach of duty at one time may not be a breach of duty at another."

In ***Barclays Bank PLC v. Quincecare Ltd. and another 1992) 4 All E.R. 362 at 372, Steyn J*** stated:-

"Given that the bank owes a legal duty to exercise reasonable care in and about executing a customer's order to pay money, it is nevertheless a duty which must generally speaking be subordinate to the bank's otherwise conflicting contractual duties.

Ex hypothesi one is considering a case where the bank received a valid and proper order which it is prima facie bound to execute promptly on pain of incurring liability for consequential loss to the customer. How are these conflicting duties to be reconciled in a case where the customer suffers loss because it is subsequently established that the order to transfer money was an act of misappropriation of money..... If the bank executes the order knowing it to be dishonestly given, shutting its eyes to the obvious fact of the dishonesty, or acting recklessly in failing to make such inquiries as an honest man would make, no problem arises ..... the bank would be plainly liable ..... .
The critical question is: what lesser state of knowledge on the part of the bank will oblige the bank to make inquiries a to the legitimacy of the order?

> ***The law should not impose too burdensome an obligation on bankers, which hampers the effective transacting of banking business unnecessarily. On the other hand the law should guard against the facilitation of fraud, and exact a reasonable standard of care in order to combat fraud and to protect bank customers and to innocent third parties..... the sensible compromise which strikes a fair balance between competing considerations is simply to say that a banker must refrain from executing an order if and for as long as the banker is "put on inquiry" in the sense that he has reasonable grounds (Not necessarily proof) for believing that the order is an attempt to misappropriate the funds of the company. And, the external standard of the likely perception of an ordinarily prudent banker is the governing one."***

There is no issue that there existed a mandate of the Claimant with duly authorized signatures. This mandate is exhibited and is dated 31st March, 1995. The relevant cheques each bore authorized signatures as per the mandate.

Claimant was in the habit of drawing large cheques on the account, and on previous occasions cheques were honoured when drawn to James Ogle as payee, with and without his signature. No complaint was voiced in these cases. There is no knowledge of fraud alleged in the pleadings against the Defendant, NCB. There is no allegation of fraud or dishonesty in the particulars of negligence.

Were there any circumstances, which ought to have put Defendant on inquiry before payment of the cheques was made? Did the Defendant have a duty to pay promptly and on demand, considering the nature of Claimant's business?

In ***Lipkin Gorman v. Kapnale Ltd. etal (supra) May L.J.*** adopted the following approach:

> ***"In the simple case of a current account on credit the basic obligation on the banker is to pay his customer's cheque in accordance with his mandate. Having in his mind the vast number of cheques presented for payment everyday in this country, ... it is in my opinion only when the circumstances are such that any reasonable cashier would hesitate to pay a cheque, at once and refer to his or her supervisor, and where any reasonable supervisor would hesitate to authorize payment without enquiry, that a cheque should not be paid immediately upon presentation and such enquiry made. Further, it would, I think, only in rare circumstances, and only when any reasonable bank manager, would do the same, that a manager should instruct his staff to refer all or some of his customer's cheques to him before they are paid."***

The endorsement on the Writ of Summons and paragraph 11 of the Amended Statement of Claim aver,

"By reason of the Defendant's said breach of Contract

and/or negligence, the Plaintiff suffered loss and damage."

The Claimant was therefore obliged to prove on a balance of probabilities that its loss of the sum claimed, was due to the contractual breach of National Commercial Bank Ltd. or alternately by the said Defendant bank's negligence.

It is not an issue that the contract between Claimant and National Commercial Bank is contained, essentially in the Mandate appointing National Commercial Bank, Claimant's Bank, at a meeting held at Claimant's registered office on the 31st March, 1995. The breach of Contract suggested, is that the Defendant bank NCB paid the proceeds of the cheques (4) payable to James Ogle without his signature being placed on each of them.

There is no question as to the genuineness of the cheque or the bona fides of the named signatories.

It is Claimant's submission that Defendant NCB cannot rely on the Mandate, as it expressly places on it "the obligation to honour and comply with" Bills of Exchange, negotiable instruments and orders of the Claimant and to honour and comply with all instructions".

The bank was instructed to pay "to the order of James Ogle and so could not pay on the stamp of ECB/RBTT or EMB."

Further, in the absence of the payee's signature and having regards to the considerable amounts and obvious irregularity (by the signature's absence) the Defendant Bank NCB had acted negligently by failing to make enquiries of the Claimant. The Bank, by failing to make such enquiries, acted without reasonable care.

Defendant Bank NCB relied upon Rule 26 of the Kingston Clearing House Rules which reads as follows:-

> "The collecting bank hereby indemnifies the paying bank against any clauses that may arise with respect thereto, subject to the following conditions:-
>
> (1) That the guarantee implied by the ... stamp shall be for a period of six (6) years from the date of the payment of the cheques and that all claims must be made on the collecting bank within that period.

It was the Defendant bank's submission that the importance of the Rules is that the rules are part of the standard practice of Bankers. The provisions of Section 31 of the Bills of Exchange Act reads:

> "Where the holder of a bill payable to his order transfers it for value without endorsing it, the transferor gives the transferee such titles as the transfer had in the

bill, and the transferee in addition acquires the right to have the endorsement of the transferor."

What therefore is the effect of the failure to have the payees signature on the cheques?

It is clear from the cheques tendered as exhibits by Mrs. Dorothy Marzouca for the Claimant, at Exs. DM1 And DM2, that there were several cheques, drawn on Claimant's account with the Defendant Bank, which were honoured with no signature of payee endorsed thereon or where there is a signature, it is not that of the payee. But apparently, there was no question that the drawer had not received value for the proceeds of the said cheques.

The instant cheques made payable to James Ogle became issues only when the Money Traders cheques in US currency were dishonoured. (See Ex. DM7). The endorsement by the payee to a cheque, according to Section 55 (b) (i) the Bills of Exchange Act.

(i) engages that on due presentment it shall be accepted and paid according to its tenor, and that of it be dishonoured, he will compensate the holder; or a subsequent holder who is compelled to pay it.

(ii) is precluded from denying to a holder in due course the genuineness and regularity in all respects of the drawer's signature and all previous indorsements.

Section 56 indicates that a person signing a bill other than as drawer or acceptor incurs thereby the liabilities of an endorser to a holder in due course.

It is the clear and unambiguous evidence from Claimant's Dorothy Marzouca that James Ogle payee was successfully sued, though in another jurisdiction, by Lets Investment Ltd. It appears also that the suit was pursued in Atlanta, "as the cheques were made over there" (so stated Mrs. Marzouca in answer to Mrs. Minott-Phillips Defendant's Attorney. This suit in Atlanta, concerned matters re the subject of the proceedings.

It is not too great a leap to conclude that Claimant succeeded there and could pursue the matter in an American Court, against James Ogle only because the cheques issued by Ogle which were unpaid for "insufficient funds": these cheques were drawn in the United States. (See Ex. DM3). It was agreed by Claimant's Dorothy Marzouca, in an answer in cross examination, that (and I have recorded her answer verbatim) "I agree with you that the payee on any cheque is the person entitled to receive the money – the payee on these cheques is the person entitled to receive the money."

There is evidence from Keith Senior which remain uncontested that Lets Investments Ltd. by drawing the four cheques gave National Commercial Bank Ja. Ltd. an unconditional order to pay $33,350,000.00 from its account to James Ogle.

It is also his evidence, that "these cheques were not credited to Eagle Merchant Bank but to the account of James Ogle who maintained an account at Eagle Merchant Bank Ltd". He continued, in cross-examination by Dr. Barnett that the proceeds of the cheques were placed to James Ogle Account. This is although he admits to Dr. Barnett that he could not produce any order in respect of them in the Eagle Merchant Bank account. This seems strange, as the evidence, uncontested, is that Donovan Hunter had pleaded guilty to embezzling the amount, subject of the Suit.

As to the averment of negligence, the Claimant admits, by Mrs. Dorothy Marzouca, that the arrangements which Claimant had with Eagle Merchant Bank, re the said cheques drawn on its account with National Commercial Bank, were never communicated to National Commercial Bank. The negligence alleged is that the cheques were encashed without the signature of the payee and also the huge sums for which the cheques were drawn, ought to have placed the Defendant National Commercial Bank on enquiry. It is not denied that the Claimant, in the course of its dealing with

National Commercial Bank was in the habit of drawing cheques for large sums. The list supplied by Claimant and exhibited sets this out quite clearly.

There were several instances where proceeds were paid to payees and there were no signatures on the said cheques. There was a course of dealing in which there were several cheques drawn by Claimant in favour of James Ogle as payee.

The evidence as adduced by Claimant has failed to satisfy me, on a balance of probabilities that the Claimant's loss was occasioned directly by the action of National Commercial Bank in encashing these cheques in the absence of James Ogle signature or them. It had no way of knowing that the Claimant had not received value for the proceeds of these cheques or of Donovan Hunter's dishonesty obtaining these proceeds.

The fact that the proceeds of these cheques are alleged by Keith Senior to have reached the account of James Ogle at his Eagle Merchant Bank's account, may well have been with his authority and consent. It seems very unlikely that these sums would be lodged to Ogle's account without his knowledge, consent or authority. It must be remember that the list supplied as Ex. DM1 refers to eleven (11) such transactions, each reflecting substantial sums of money.

I hold that Claimant has failed to prove on a balance of probabilities that the honouring of these cheques without the signature of the payee, was the most likely cause of their loss of the $33,350,000. Defendant National Commercial Bank is not therefore liable for Claimant's loss. Judgment for the Defendant National Commercial Bank Jamaica Ltd. with costs to be agreed or taxed.

3. Claimant's case against (Eagle Commercial Bank) RBTT Bank Jamaica Ltd.

The basis for the claim in Negligence against the said Defendant RBTT Bank Jamaica Ltd. is that it accepted the four cheques made payable by Claimant to EMB's credit at Eagle Commercial Bank's Montego Bay Branch.

It is submitted that since the payee James Ogle had not provided the foreign exchange as the arrangement required, the Eagle Merchant Bank has held the said cheques in constructive trust for Claimant.

If, Eagle Commercial had not accepted cheques for lodgement the loss would not have occurred. Defendant owed Claimant a duty of care, determinable from the circumstances of the instant case. Since Eagle Merchant Bank had lodged the cheques to its account kept with the abovenamed Defendant it could not be acting as a banker but had acted as a

customer. It was therefore on the same position as someone seeking to negotiate a cheque payable to a third party.

The manifest irregularity in the tendering of the four cheques, (each cheque being of such a substantial amount), was such that a prudent banker would have made enquiry of the drawer.

Reliance was placed on a case from the Manitoba Court of Appeal in Canada-

Toronto Dominion Bank v. Dauphin Plains Credit Union Ltd.

(1988) 98 D.L.R. (4th) p. 736

In this case, a credit union which accepted cheques made payable to a business, for deposit the personal account of the presenter, without requiring him to endorse it on behalf of the business was held liable to the payee.

In the instant case, it is not the payee who has sought to fix liability on the presenter, it is the drawer of the cheques. It is the uncontested evidence produced by Claimant that the Jamaican dollar proceeds of the Claimant's four cheques were received by Donovan Hunter of Eagle Merchant Bank. This is confirmed in the evidence of Detective Inspector Fitz Bailey who was one of the investigating officers in the case against Donovan Hunter, executive manager of Eagle Merchant Bank's Montego Bay Branch, Donovan Hunter was charged with the offence of obtaining from Lets Ltd.

Cambio the sum of $33,350,508 by false pretence. The false pretence alleged referred to the same subject matter of these claims. To, this he pleaded guilty.

Even then, if Claimant could have established that there was a duty of care owed to it for Eagle Commercial Bank/RBTT Bank Jamaica Ltd. it would be difficult to prove as submitted, that "If ECB/RBTT had not accepted the cheques for lodgement, the loss would not have occurred."

I am not therefore convinced on the evidence, that the loss suffered by Claimant was due to negligence on the part of ECB/RBBT.

I therefore enter judgment for the Defendant ECB/RBTT Bank Ja. Ltd. with cost to be Defendant's to be agreed or taxed.