JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CIVIL APPEAL NO. 66/95

COR: THE HON MR JUSTICE CAREY JA
THE HON MR JUSTICE FORTE JA
THE HON MR JUSTICE GORDON JA

BETWEEN BRANDMASTER LIMITED **APPELLANT**

A N D BANK OF NOVA SCOTIA (JA) LIMITED **RESPONDENT**

Clarke Cousins & Miss Karen Wilson for appellant

Crafton Miller & Miss Patricia Roberts-Brown for respondent

21st 22nd November & 20th December 1995

CAREY JA

This is an appeal against an order of Malcolm J dated 29th June 1995 whereby he refused an application by the appellant (the plaintiff) to strike out the defence and to enter judgment for the plaintiff. After hearing submissions we allowed the appeal, set aside the order of the court below and entered judgment for the plaintiff for $543,200 with costs both here and below. We promised to put our reasons in writing and these now follow.

Brandmaster Ltd maintained a current account in the Premier Plaza branch of the respondent's bank. A number of forged cheques drawn on the company's account were encashed at the Bank's branch and duly debited against the company's account. On the discovery of the forgeries, the company duly advised the bank which nevertheless failed to make correcting entries and objected on the ground that the company was estopped from asserting that the cheques were forgeries because the company had made lodgments to cover the overdraft caused by the debits. The question raised in this appeal is whether the defence raises a triable issue, and more particularly, whether the defence of estoppel as pleaded was an answer to the claim.

This then brings us to the material pleadings. In the statement of claim, the following allegations were made:

> "4. On the dates stated hereunder six (6) cheques in favour of persons unknown to the Plaintiff bearing the numbers and the sums particularised and purportedly executed by officers of the Plaintiff were presented to the Defendant by persons unknown to the Plaintiff and encashed by the Defendant.
>
> PARTICULARS OF CHEQUES
>
> | DATE | CHEQUE NUMBER | AMOUNT |
> |---|---|---|
> | 4/6/93 | 1924 | $90,000.00 |
> | 7/6/93 | 1932 | $85,000.00 |
> | 8/6/93 | 1923 | $96,000.00 |
> | 15/6/93 | 1934 | $95,000.00 |
> | 16/6/93 | 1933 | $86,600.00 |
> | 17/6/93 | 1929 | $87,600.00 |
> | | | $540,200.00 |
>
> 5. The said cheques were forgeries in that they bore the identical cheque nos. of unused cheques issued by the Defendant to the Plaintiff but were executed by persons other than the authorised signatories to the Plaintiff's account.
>
> 6. On or about the 14th day of July 1993 upon discovery of the aforesaid forgeries the Plaintiff notified the Defendant of same and subsequently by letter dated the 23rd July 1993.
>
> 7. The said cheques were drawn and paid without lawful authority and the Defendant wrongfully debited the Plaintiff's account for the amount of each forged cheque."

The riposte of the bank is to be found in paragraphs 3 - 8 of the defence as under:

> "3. Save and except that the Defendant does not admit that the six (6) cheques referred to in paragraph four (4) of the Statement of Claim were drawn in favour of persons unknown to the Plaintiff, and that cheque number 1933 was for the sum of $86,000.00 and the Defendant states that this cheque number 1933 was for $89,000.00, paragraph four (4) of the Statement of Claim is admitted.
>
> 4. At the times of encashing the said cheques, the Defendant acted in good faith

and in ordinary course of its business as bankers and in concurrence with the Plaintiff's instructions.

5. No admission is made as to paragraph five (5) of the Statement of Claim.

6. Save and except that the Defendant does not admit that said cheques were forgeries, paragraph six (6) of the Statement of Claim is admitted.

7. Paragraph seven (7) of the Statement of Claim is denied.

8. The Defendant says that the Plaintiff is estopped and precluded from saying that the said cheques were forgeries because its servant and/or agent, MR PETER LEE, when told by the servant and/or agent of the Defendant, MR. L.S. DeRISSIO, on the 7th June, 1993, and 18th June, 1993, that cheques had been presented for payment which would cause an overdraft of the Plaintiff's said account acted swiftly to lodge funds to cover the overdrafts, raised no question of any impropriety, and on the 18th June, 1993 expressly requested the Defendant to honour cheque number 1932 in the sum of $85,000.00, thus by his conduct inducing the Defendant to believe that the said cheques were genuine, and to make payment on them, and to debit the Plaintiff's account accordingly."

Mr Cousins founding himself on ***Brown v Westminster Bank Ltd*** [1964] Lloyd's Rep. 187, argued that there was no representation made by the company which unequivocably showed that the cheques could be accepted. The lodgments were made in the ordinary course of business, and that involved no unequivocal representation. Mr Miller for his part, put his case this way. He said that the pleadings raised the issue of forgeries because by paragraph 6 the bank put the company to prove that the cheques were in fact forgeries. Secondly, it raised estoppel as a valid defence in paragraph 8, the particulars of which were that the company made a representation when it lodged funds to cover the overdraft and said nothing about the cheques. He relied on ***Amalgamated Investment***

& Property Co Ltd (in liquidation) v Texas Commerce International Bank Ltd [1981] 3 All ER 577.

I accept unreservedly that Brandon L.J. in the above case gave some assistance with respect to the kind of estoppel applicable in the case of banker/customer relationship. At p. 591 he said this:

> " 'This form of estoppel if founded, not on a representation of fact made by a representor and believed by a representee, but on an agreed statement of facts the truth of which has been assumed, by the convention of the parties, as the basis of a transaction into which they are about to enter. When the parties have acted in their transaction upon the agreed assumption that a given state of facts is to be accepted between them as true, then as regards that transaction each will be estopped as against the other from questioning the truth of the statement of facts so assumed.'"

But Mr. Miller, in my opinion, was not able to call our attention to an agreed statement of facts, the truth of which has been assumed by the parties as the basis for the transaction into which they were about to enter. The fact of the matter is that there were no agreed statement of facts. The averments merely alleged that in the case of five cheques, their sum created an overdraft, the company lodged funds to cover the debits and in the case of cheque #1932 requested the bank not to dishonour it. There was, in my view absolutely no representation made by the company that the cheques were not forgeries but genuine cheques and it was entirely unreasonable to conclude from the mere lodgment of funds or the promise to lodge funds (which is but another way of requesting that a cheque not be dishonoured), that the cheques which created the overdraft were genuine. In ***Brown v Westminster Bank Ltd*** (supra) the trial judge Roskill J (as he then was) found that the customer (Mrs. Brown) specifically told the bank manager that the cheques were genuine cheques and that at no time did she deny the genuiness of those

cheques. He held on that finding that "the plaintiff was debarred from setting up true facts as to cheques already forged...".

In my judgment, the averment pleading estoppel did not in the particulars allege that the company represented that the forgeries was genuine which would have debarred the company from saying the cheques were forgeries. The bank although as a matter of pleading and necessity, put the company to proof on the question of forgery, was defending the claim on the basis that lodgement of funds and a promise to do so amounted to a representation that the cheques which created the overdraft amounted to an estoppel. It is in no way possible to extract from the defence any suggestion that the bank was saying that the cheques were honoured without negligence on their part. As was pointed out by Lord Scarman in ***Tai Hing Cotton Mill Ltd v Lia Chong Hing Bank Ltd & Ors*** [1985] 2 All ER 947 at p. 956:

> "... The business of banking is the business not of the customer but of the bank. They offer a service, which is to honour their customer's cheques when drawn on an account in credit or within an agreed overdraft limit. If they pay out on cheques which are not his, they are acting outside their mandate and cannot plead his authority in justification of their debit to his account. This is a risk of the service which it is their business to offer. The limits set to the risk in the Macmillan and Greenwood cases can be seen to be plainly necessary incidents of the relationship. Offered such a service, a customer must obviously take care in the way he draws his cheque, and must obviously warn his bank as soon as he knows that a forger is operating the account."

The company advised the bank of the forgeries as it was bound as a matter of law to do. But it was not made an issue because the bank was saying by its pleadings - whether there be forgeries or not you have certified them as genuine and accordingly estoppel applies.

As to the responsibilities of a bank in relation to its customers, the observations of the Supreme Court of India in ***Canara Bank v Canara Sales Corporation & Ors.*** [1988] L.R.C. (Comm) 5 are, I think apposite:

> "Notwithstanding that a customer was obliged to inform the bank on irregularities in his statement of account if he had knowledge of them, and his conduct should not facilitate payment of money on a forged cheque, there was no presumption of the customer's breach of duty to the bank if he was negligent in other ways, nor was he prevented from bringing a successful action against the bank for recovery of any loss sustained. The bank was required to provide evidence that the customer had remained silent after he had knowledge of the fraud, to sustain a plea of acquiescence. Unless a bank was able to prove either an express term in the contract with its customer or unequivocal ratification it could not escape liability. Moreover, since the presentation of a cheque by a customer before a bank carried a mandate to the bank to pay, although there was no such mandate if the cheque was proved to be forged, the bank was, nevertheless, liable unless it could prove the customer's knowledge of the forgery."

It is not, I venture to suggest, at all necessary to become involved in any exegesis on the law of banking. This court's duty is to say whether the defence as pleaded is an answer or raises any triable issue, which is the same thing, to the claim being maintained by the company. Mr Miller is to be commended for his pertinacity but I fear, his ammunition was not as dry as he thought.

There is one remaining issue with which I must deal. We allowed interest of 30% from the date of the service of the writ. It was not doubted that interest was payable. The only question was the quantum. Mr Cousins suggested the average rate of interest on Government Treasury Bills between 1988 and March 1995 which was calculated as 30%. Mr Miller did not suggest any better methodology. We were of opinion that such a rate was in all the circumstances reasonable. We conclude by pointing out that the bank should not feel hard done by because in the ***Tai***

Hing case (supra) interest was ordered by the Privy Council to run from the date of the writ.

FORTE JA

I concur and have nothing to add.

GORDON JA

I agree.