THE REPUBLIC OF UGANDA

IN THE HIGH COURT OF UGANDA AT KAMPALA
(COMMERCIAL COURT DIVISION)

HCT - 00 - CC - CS – 742 - 2004

OBED TASHOBYA :: PLAINTIFF

VERSUS

DFCU BANK LTD ::: DEFENDANT

BEFORE: THE HON. JUSTICE GEOFFREY KIRYABWIRE.

J U D G M E N T:

The plaintiff brought this action against the defendant bank seeking a declaration that he is not indebted to the defendant and that the mortgage purportedly created over his property by the defendant is null and void and should be removed.

The plaintiff also seeks an order that the defendant unblocks the plaintiffs account No.02L602066700 (hereinafter referred to as *"the suit account")* and refunds the plaintiff's money drawn from his accounts without his authority.

The plaintiff prays for damages, interest, the costs of this suit and any further or better remedy this honourable court deems fit.

The defendant denies the plaintiff's claim and counterclaims for US$88,294.81 with interest premised on the alleged loan and security documentation signed by the plaintiff, or, in the alternative, as money had and received.

The facts of this case as agreed between the parties at the scheduling are that the plaintiff operated a local current account in the defendant's Masaka branch. On 3rd August 2004, he deposited a cheque No. 008428 (hereinafter referred to as the *'suit cheque'),* drawn on Citibank Philippines in his favour for US$150,000 on his local shilling account. On 16th August 2004, the plaintiff was advised by the defendant to open a dollar account in order to receive his funds and he duly opened up the suit account No. 02L602066700 with the defendant's William Street branch. On the same day this account was credited with US$150,000 being the proceeds of the cheque and the plaintiff made two withdrawals thereon for US$60,000 and US$20,000. The plaintiff made another withdrawal on 17th August 2004 of US$69,000 leaving a balance of US$1,000 on the account.

On 25th August 2004, the plaintiff was informed by the defendant's manager, William Street branch, that the suit cheque had been dishonoured. The plaintiff met with the defendant's officials on 26th August and they informed him of the need to recover the money. The plaintiff volunteered to deposit money on the suit account and did deposit US$33,000 on 26th August and US$29,069 on 27th August. The plaintiff also signed security documents, namely; a credit agreement, a set-off agreement and a 2nd mortgage in respect of Kyadondo Block 265, Plot 4621 and 4622.

On 1st September 2004 the suit account was debited with US$150,000 leaving it overdrawn by US$86,951.24. The defendant set-off the plaintiff's account and recovered US$.3,953.49 and the plaintiff was subsequently denied access to his account and his cheques were dishonoured.

By consent of the parties the following issues were framed for determination by this court:-

1- Whether the suit cheque was dishonoured and if so, whether the proper steps were taken on dishonour;

2- Whether the defendant was negligent in allowing the plaintiff to draw the proceed of the suit cheque at the time it did;

3- Whether the plaintiff obtained a loan facility from the defendant;

4- If so, whether the plaintiff executed the security documents under duress/undue influence;

5- Whether the plaintiff is indebted to the defendant bank;

6- Whether the defendant correctly exercised the right of set-off of the plaintiff's accounts;

7- Whether the defendant bank is entitled to recover the US$88.294.81 from the plaintiff;

(a) As a collecting bank upon dishonour of an instrument sent for collection and, or

(b) On the strength of the security documents.

8- Remedies.

Mr. Peter Katutsi appeared for the plaintiff while Mr. Philip Karugaba appeared for the defendant.

I will now proceed to deal with the issues in the order in which they are framed.

Issue No. 1: **Whether the suit cheque was dishonoured and if so whether the proper steps were taken on dishonour.**

Whether the suit cheque was dishonoured or not is a question of fact. The plaintiff as PW1, testified that he was called on phone by the defendant's manager at William Street branch and informed that the cheque was dishonoured. The defendant's head of operations also later informed him likewise. He however disbelieves this information because no dishonoured cheque was ever shown to him nor was any produced in evidence. DASP John Ndungutse who testified as PW2 testified that he did not see the dishonoured cheque. What he obtained from the bank during investigations was only a copy of the suit cheque before dispatch to New York. Indeed DW1 Chris Byaruhanga, the operations manager of the defendant bank and DW2 Margaret Kawumi, a senior banker and manager of the defendant's William Street branch both admitted that the dishonoured cheque was not available. DW2 testified that whenever a cheque like the suit cheque is dishonoured it is mailed back. But according to DW1, the original cheque when dishonoured may not be returned.

The only direct evidence of dishonour before this court is a Telex message Exh. D7, dated 24th August 2004 showing the sender to be Citibank Delaware, addressed to DFCU Bank (the defendant in this suit) and stating that the sender had been advised to dishonour the cheque No. 8428 for US$150,000 reason being that it was made to a closed account. The maker of the cheque is International Mailings Ltd in favour of

Obed Tashobya. There is no doubt that the cheque referred to in the telex (Exh. P7) is sufficiently identified as the same suit cheque, a certified copy of which was admitted in evidence as Exh.D1. The authenticity of this telex message was not challenged by the plaintiff and court has no reason to doubt that it is genuine communication of dishonour from Citibank Delaware to the defendant bank.

Counsel for the plaintiff conceded in his submissions that prima facie, the telex message and the personal communications of dishonour to him by the defendant's William Street Branch manager and the Operations Manager was sufficient, but he submitted that where the defendant as holder of the bill wished to exercise its right to recourse against the plaintiff as an endorser of the bill, the telex fell short of the standard required in the circumstances.

The issue here is whether the suit cheque was dishonoured and the degree of proof required is on a balance of probabilities. As stated above, the authenticity of the telex (Exh.7) was not challenged in this suit nor was the fact that the telex sufficiently identified the dishonoured as the to the suit cheque. The plaintiff's argument is that since the defendant produced no proof that its account was debited, it was possible that the dishonour of the suit cheque was never confirmed and Citibank never debited the defendant's account at all. The plaintiff submits no evidence to support this contention and without such evidence, I find it highly improbable/unlikely that after communicating notice of dishonour as was done in Exh. 7, that Citibank would in the circumstances go ahead and credit the defendants account with the amount of the bill

it said was dishonoured or confirm such amount on the defendant's account if it had provisionally credited the account before clearance of the bill as was the case here. Although the usual recourse is to return the dishonoured bill to the customer, where it is not available like in this case, other evidence may be relied upon as proof and/or notice of dishonour. I am of the opinion in this case that the telex message and the personal communications of the dishonour to the plaintiff by the defendant are sufficient evidence that the suit cheque was dishonoured.

The second leg of this issue is whether the requisite steps were taken upon dishonour so as to entitle the defendant to a right of recourse against the plaintiff on the bill. It is the plaintiff's submission that even if court should find that the bill was dishonoured the defendant as holder of the bill did not take the requisited steps on dishonour i.e. to protest cheque/bill of exchange as stated in **S.50(2) of the Bill of Exchange Act (Cap 68)** and had thus lost its right of recourse against the plaintiff. In response, the defendant contends that the suit cheque being a forged instrument, having been drawn on an account that was long closed, was not a Bill of Exchange within the meaning of the said Act and that considerations for treatment of a bill of exchange upon dishonour were unapplicable.

The issue of dishonour of a foreign bill of exchange under S.50 (2) of the Bill of Exchange Act in relation to this case is an interesting one. There is no doubt from the evidence that the suit cheque was a foreign bill. The telex message (Exh. D7) did not say that the cheque was forged, as counsel for the defendant would have it, but

rather that the account on which it was drawn was closed. That notwithstanding counsel for the plaintiff submitted that the defendant (bank) as *"holder"* should have protested the cheque. Section 1(i) of the Bill of Exchange Act defines a *holder"* to mean *"...the payee or endorsee of a bill or note who is in possession of it, or the bearer of a bill or note".*

I am at a loss as to how in this case counsel for the plaintiff can see the bank as holder of this cheque when clearly the holder as payee is his client the plaintiff. The defendant was simply required to negotiate/clear the cheque for its client the plaintiff. The suit cheque was not a bearer instrument the defendant bank was negotiating for itself. Section 50(2) of the Act therefore does not apply.

All that is required of a collecting bank in these circumstances is to give notice of dishonour to its client if the cheque is dishonoured.

Issue No. 2: <u>Whether the defendant was negligent in allowing the plaintiff to draw the proceeds of the suit cheque at the time it did.</u>

It was an agreed fact that the plaintiff deposited the suit cheque on the 3rd August 2004, and the Citibank remittance schedule, Exh. D8 indicates that it was prepared for remittance on the 6th August 2004. The defendant's deposit slip Exh. D9 shows that the suit cheque was received and/or entered into the records of Citibank on the 12th August 2004. By Exh. D8 Citibank informed the defendant that it would advise of dishonour of cheques of US$500 or over.

It is also admitted as a fact that, on 16th August 2004, the plaintiff was advised by the defendant, which advice he followed, to open a Dollar account (the suit account). On the same date the account was credited with US$150,000 being the proceeds of the suit cheque. The plaintiff was allowed to make withdrawals on the proceeds, i.e. two on the 16th August 2004 for US$60,000 and US$20,000 and a third one on 17th August 2004 for US$69,000, leaving a balance of US$1000 on the account.

On the 25th August 2004 the plaintiff was informed by the defendant's manager, William Street Branch that the suit cheque had been dishonoured.

The plaintiff contends that in the given circumstances and in view of the amount of money involved the defendant was negligent. In the plaintiff's opinion a prudent collecting banker who has not got advice as to whether the cheque he presented for collection for his customer has been paid would first inquire from his clearing agent whether it was safe to allow the customer to draw the proceeds. He states that in not inquiring from Citibank as to whether the suit cheque had been cleared and then allowing the plaintiff to draw almost all the amount of the cheque, the defendant acted negligently.

The defendant bank denies any negligence as alleged by the plaintiff and contends that it acted diligently, carefully, and in accordance with well-known international custom governing banking and clearance of foreign bills. DW1 testified that upon receipt of the suit cheque the defendant sent the cheque for collection following normal procedure for encashment of foreign cheque and the defendant's nostro

account was accordingly credited with the cheque value of US$150,000 on the 12th August 2004.

According to the evidence of DW2, there is no particular set time for clearance of foreign cheques and the bank has several cases where cheques are credited on their account and then recalled even after six (6) months. She stated that where this happens, the customer's account is debited or a loan account is created for the customer.

In collecting cheques and other instruments for a customer a banker acts basically as a mere agent or conduct pipe to receive payment, however, the customer is entitled to draw on them at once only if there is an agreement, express or implied, to that effect, where such a cheque is later dishonoured on presentation the collecting banker may debit the customer's account with the amount. This appears to be the universal custom of bankers apparently recognized by Lord Lindley, in Capital and Counties Bank Ltd V Gordon [1903] A.C 240 at 248. See also Halsbury's Laws of England 4th Ed reissue at para 216 and 217.

It is, however, important to point out, as was stated by Collins L.J in the case of Bavins, Jnr & Sims V London & S. Western Bank Ltd [1900]1 QB 270 at 277, that a credit so given to a customer by a bank is in its nature provisional only and depends upon the question whether the cheque or other document finally results in a right to recover and retain the money. The customer is only credited with the amount subject to the risk of afterwards it turning out not to be so.

It was testified for the defendant by DW1 that the bank has discretion in matters like the instant one and may exercise this discretion to allow a customer to draw the proceeds of a cheque which has not yet been cleared depending on the customer, his history and account status. As such the defendant did not consider it imprudent or negligent to permit the plaintiff to draw almost all the proceeds of the suit cheque before it was cleared, and using handwritten letters/chits as evidenced by Exh. P3(a), P3(b), and P3(c), all in only two days from the date the suit account was opened and credited with the amount. Whatever the situation the whole transaction was characterized by speed and a great deal of informality.

Counsel for both the plaintiff and the defendant adopted the standard set by Lord Warrington in Lloyd Bank Ltd V E. B. Savory & Co. [1933] A.C. 201, as to what standard ought to be applied in considering whether the bank acted negligently or not.

The learned Lord Justice, at P221 of that case, states that

> *"The standard by which the absence or otherwise of negligence is to be determined must be ascertained by reference to the practice of reasonable men carrying on the business of bankers and endeavoring to do so in such a manner as may be calculated to protect themselves and others against fraud."*

This court agrees with this authority and finds the standard set therein applicable to the instant case.

I have considered all the evidence and the circumstances of this case and I find that much as the plaintiff may have been a reputable customer of the defendant bank he was not the drawer of the suit cheque, he was only a payee who could have been as susceptible to fraud as any other person, especially in light of the famous *"bicupuli"* (fake foreign cheques) that have been floating around Uganda as observed by counsel for the defendant.

There was no history of the plaintiff depositing foreign cheques with the defendant bank for collection. I think that the correct thing for the bank would have been for it to enter into some agreement with the plaintiff to place the money to his credit and indicating the consequences of dishonour. This was clearly a lot of money calling for more prudence. Given the universal customs of bankers to debit customer's accounts when they have credited the amounts before cheques clear and subsequently they are dishonoured one may not impute negligence. However, as reasonable bankers carry out business in Uganda I find that the defendant bank was imprudent which is just a bar lower than negligent.

Issue No. 3 & 4: <u>Whether plaintiff obtained a loan facility from the defendant and if so, whether the plaintiff executed the security documents under duress/undue influence.</u>

The plaintiff testified that he never applied for and/or received any credit or loan from the defendant and that the mortgage purportedly executed by the plaintiff is null and

void. There however is a signed credit agreement dated 27th August 2004 where the defendant bank allegedly lends the plaintiff US$117,000 for an unspecified project.

The defendant concedes that this was not an ordinary loan contract between a bank or and its customer and that no money was advanced to the plaintiff at the time of execution of the security documents. The defendant however contends that after being informed by Citibank that the suit cheque had been dishonoured, the defendant invited the plaintiff to its office to discuss the matter. On the 26th August 2004 the plaintiff met the defendants officials, i.e. DW1 Chris Byaruhanga the operations manager, and DW2 Margaret Kawumi, the branch manager of the defendants William Street branch. The plaintiff was informed of the need to recover the money. The plaintiff volunteered to deposit money on the suit account and did deposit US$33,000 and US$29,069.76 thereon.

On the 26th August 2004, the plaintiff signed security documents, viz; a credit agreement, (Exh. D3), a set-off agreement, (Exh.D2), and a 2nd mortgage in respect of Kyadondo Block 265 Plot 4621 and 4622 (Exh.D4). It is submitted by the defendant that by these documents, the otherwise illegal and unauthorized overdraft to the plaintiff was converted into a legitimate and documented loan.

According to **Halsburys Laws of England, Vol 3(1), (4th Ed) para 298**, *"a customer may borrow from a banker by way of a loan or by way of overdraft. A loan is a matter of special arrangement. In the absence of agreement express or implied from a course of business a banker is not bound to allow his customer to overdraw.*

An agreement for an overdraft must be supported by good consideration, and it may be express or implied. Drawing a cheque or accepting a bill payable at the banker's where there are not funds sufficient to meet it amounts to a request for an overdraft".
So clearly an overdraft may be created in several ways.

The second part of the issue to be determined is whether the security documents were executed by the plaintiff under duress or undue influence. The plaintiff contends that on the 26th August 2004 he was called to the defendant's head office at Kimathi Avenue and later taken to the defendant's Rwenzori House office where he was coerced into executing a credit agreement, a set off agreement and a second mortgage deed on his property as acknowledgement that he had obtained an overdraft/loan facility from the defendant whereas not. The plaintiff further states that the security documents were executed at the defendants Rwenzori House office long after the normal working hours in a tense atmosphere. That, there was a police officer ready with handcuffs, who was even detailed to escort him to the lavatory, and that the plaintiff was coerced into making phone calls to solicit for money to pay back to the defendant. He further states that, when he called his lawyer the defendants assured the lawyer that all was well and kept from him the fact that they latter intended to make the plaintiff execute documents on which he would require his counsel, and that the defendant coerced the plaintiff into signing the documents without legal advice and without being given time to fully appreciate their content and legal implications.

He contends that the documents were signed under duress and were thus null and void.

In response to this the defendant denies that there was any such duress or undue influence on the plaintiff's free will at the time of execution of the security documents. DW4, the legal manager of the defendant, testified that at that meeting, the need to recover the amount withdrawn by the plaintiff on the suit cheque was explained to the plaintiff who informed them that he was willing to repay it and simply wanted to be given time to do so. He states that pursuant to this understanding, the parties agreed to convert the whole transaction into a loan by the defendant to the plaintiff and accordingly executed the credit agreement, a set off agreement and a mortgage which provided for a repayment schedule of the money. He explains that the credit agreement was prepared in standard format because the plaintiff did not want to be incriminated.

As stated earlier, the defendant concedes that there was no loan advanced to the plaintiff as such but that the documents executed were intended by the parties to convert effectively an illegally obtained overdraft to a legal facility secured by a mortgage. I find that the security documents were designed to put a legal face to this already embarrassing situation for the defendant of the dishonoured cheque. The plaintiff did not enter into any credit arrangement as expressed in the said documents.

I find it unnecessary to consider further whether the documents were executed under duress or otherwise as security for a non-existent loan agreement. Clearly the defendant's remedy, if any, lays not on these security documents so executed or on an implied loan agreement.

Issues 5 & 7: **Whether the plaintiff is indebted to the defendant bank, whether the defendant bank is entitled to recover the US$88,294.81 from the plaintiff as a collection bank upon dishonour of an instrument sent for collection and whether the defendant correctly exercised the right of set-off of the plaintiff's account.**

Issue 5 and 7 essentially cover same area of law and so I shall address them together. The plaintiff contends that he is not indebted to the defendant in anyway as alleged by the defendant. It is submitted by the defendant that the plaintiffs liability to it is based on the fact of dishonour of the suit cheque by the clearing bank and the defendant's failure to recover the balance of the suit cheque value from the plaintiff. That, out of a total sum of US$150,000 the defendant has recovered US$61,705.19 leaving a balance of US$88.294.81 which is claimed under the defendant's counterclaim.

The case for the defendant has consistently been that the payment of the proceeds of the suit cheque to the plaintiff was conditional upon clearance of the foreign cheque, and that once this cheque was finally dishonoured by the clearing bank, the

defendant was entitled to recover the full sum drawn by the plaintiff from the defendant bank.

It is also the case for the defendant that the plaintiff was credited the value of the cheque by reason of a mistake of fact that the said cheque had been cleared by Citibank; whereas not.

The law on this point it that 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. (See **Halsburys Laws of England, Vol. 3(1)** (4th Ed) Para 184, and **Barclays Bank Ltd V W. J. Simms Son & Cooke (Southern) Ltd** (1980) Q.B. 677 at 695.

According to the Privy Council in **Imperial Bank & Canada V Bank of Halmilton** (1903) A.C. at 56 a payment is made under a mistake of fact if it is so made honestly, notwithstanding that the payer has means of which he did not avail himself of knowing the true facts.

The claim may, however, fail if

(1) The payer intends that the payee shall have the money at all events whether the fact be true or false, or it deemed in so to intend; or

2) 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

3) The payee has changed his position in good faith, or is deemed in law to have done so. (Halsbury's Laws of England Para 184).

Penn, Shea, and Arora, in their book on **The Law relating to Domestic Banking, Vol.1 (1987) at P. 117** also state that, if money paid by mistake is to be recovered, the following conditions must apply;

a) Payment to the payee must not be made under mandate from the customer so that a debt is created between bank and customer.

b) The mistake must be one of fact, not law;

c) The mistake must cause the payment.

As a restriction on the recovery of the money, the learned authors state, at P.119, that the money cannot be recovered if the payer is estopped from asserting his entitlement to it. In this context, the rule is that estoppel requires:-

(i) a representation made to the payee, or some breach of duty owed to him by the bank;

(ii) The payee's reliance on this representation or omission to his detriment or so that it is inequitable for the payer to claim to recover;

(iii) That the payee is himself not at fault.

The plaintiff in this case sought to rely on the doctrine of estoppel basing on the fact that a representation was made to him by the defendant that the suit cheque had been cleared, whereas not, and this was in breach of the defendants duty to correctly inform him of the state of his account. He contends that he relied on this

representation to his detriment when he "refunded" the proceeds of the suit cheque to its drawer, Mr. Busulwa, after the consideration for which it was paid failed; and that it is inequitable for the defendant to claim to recover the money from him.

The plaintiff testified that the proceeds of the suit cheque were intended to go towards the purchase of property for the drawer of the cheque and that when he was informed by the defendant that the cheque had been cleared, he so informed the drawer of the cheque (Busulwa), who traveled to Kampala on the 17th August 2004 to execute the purchase agreements for the property with the seller. The plaintiff did not however recall the name of the seller and there was no purchase agreement tendered in court.

The plaintiff further states that the deal to purchase the property failed and he made a refund of the US$150,000 in cash to Busulwa. He, however, contradicts himself when in cross examination he states that he refunded the money to Busulwa both in US Dollars and Ug. Shillings. He also contradicts himself as to how this money was repaid to Busulwa, for on 18th April 2005, the plaintiff testified that he refunded US$100,000. On 19th April, he states that he refunded US$150,000, but later, on 2nd June 2005, states that he refunded the money in Ug.Shillings which Busulwa converted to US Dollars.

The plaintiff also produced a Bank Baroda bank statement in the names of Pal Supermarket, for which he is proprietor, Exh. P.5, which reflects that the account was credited with Ug.Shs.170,000,000/= on the 18th August 2004, a day after the

proceeds of the suit cheque were drawn from the defendant bank. This does raise suspicion as to the source of the Ug.Shs.170,000,000/= so deposited by the plaintiff on that account. The plaintiff however sought to put the suspicious to rest by explaining that the money was from a sale of his Supermarket in Masaka to his former employee. The defendant challenges this contention, alleging that the purported purchaser of the Supermarket was a former employee of the plaintiff and of doubted capacity. This allegation was not challenged by the plaintiff and the said purchaser of the Supermarket was not produced as a witness for court to form its opinion on the matter.

In the circumstances therefore, the plaintiff has not discharged his burden to prove that he had so altered his position as would make it inequitable for the defendant to claim to recover. The defendant has made an alternative claim for recovery of the said money as money *"had and received".*

As was held in **Bavins, Junior and Sims V London and South Western Bank (1900) 1 Q B 270**, the mere fact that the bank had credited the customer's account with the proceeds of the cheque and that sums had been drawn out which, on the ordinary system of appropriation, exhausted those proceeds was held not to preclude the true owner from recovering as money had and received.

This was the opinion adopted/held by the authors of **The Law Relating to Domestic Banking, Vol. 1, Supra**, at Pg 119, where they stated that:

> *"it is clear that the mere fact that the recipient spends money received wrongly, even if paid to him as a result of negligence on the part of the payer, is insufficient to establish any right in the payee to retain…"*

In the more recent case of **Dextra Bank & Trust Co. Ltd V Bank of Jamaica (2002)1 All ER (Comm) 193**. The Privy Council stated that

> *"In forming their view, their lordships are much influenced by the fact that, in actions for the recovery of money paid under a mistake of fact, which provide the usual context in which the defence of change of position is invoked, it has been well settled for over 150 years that the plaintiff may recover however careless he may have been in omitting to use due diligence".*

That appears to be the position at common law however as I have discussed earlier that doest not provide banks and other financial institutionals a licence to act imprudently.

At the end of the day it would be inequitable to allow the plaintiff to retain money he had started to repay in these circumstances as that would amount to unjust enrichment. In the case of **Westdeutcher landers bank Girozintrale V Islington London Burough Council [1996]** A.C. 669

The Privy Council stated that

> *"A claim for monies had and received is a restitutionary claim based not on implied contract but on unjust enrichment, the law imposes obligation to repay rather than implying an entirely fictitious agreement to repay"* (emphasis mine).

With regard to issues 5 and 7 I find that the plaintiff's defence of estopped must fail and further more the plaintiff is indebited to the defendant for money had and received.

Issues 6: Whether the plaintiff defendant correctly exercised its right of set-off of the plaintiff's account.

According to **Halsbury's Laws of England, Vo. 3(1) (4th Ed.), para 198**:

> *"unless precluded by agreement, express or implied, from the course of business, the banker is entitled to combine accounts kept by the customer in his own right, even though at different branches of the same bank, and to treat the balance, if any, as the only amount really standing to his credit, but the banker may not arbitrarily combine a current account with a loan account.*
>
> *An agreement not to combine ceases to be effective as soon as the relationship of banker and customer comes to an end."*

Also according **to Paget's Law of Banking (Supra) at P. 602, para 29.16**,

> *"the basic rule is that a bank may combine two current accounts at any time without notice to the customer, even though the account are maintained at different branches."*

This Rule was affirmed by the C.A. in **Halesowen Presswork & Assemblies Ltd V Westerminster Bank Ltd (1971) 1 Q.B 1**, a case also cited by the defendant. At Pg. 34 of that case Lord Denning posed a question as to whether a banker has a right to combine two accounts so that he can set off the debit against the credit and be liable only for the balance, and gave the following answer:

> *"The answer to this question is: Yes, the banker has a right to combine the two accounts whenever he pleases, and to set one against the other, unless he has made some agreement, express or implied, to keep them separate..."*

As to whether banker can exercise the right of set-off where the accounts are maintained in different currencies, **Paget (at P. 608)** states that, this is an aspect of the right which, if disputed, would require to be proved by evidence of usage; that otherwise, the existence of accounts in different currencies may be evidence of an implied agreement not to combine. This however doesn't apply at the termination of the banker – customer relationship.

In this case however, the fact that the plaintiff had originally wanted to bank the suit cheque on his Uganda shilling account but for the advice of the bank would suggest that the plaintiff did not mind which currency the money would be collected. A set off in such a circumstances would be justified.

I need to point out that offset in this sense is to be understood as the right to debit the plaintiff's account by reason of money had and received and not the agreement of set off dated 27th August 2004 which is of no legal value.

Issue 8: Remedies

Some of the remedies have been determined above. The remaining ones will now be handled here under.

In this suit the plaintiff sought an order that the suit account be "unfrozen" by the defendant.

In the Banker – customer relationship either party has the right to terminate the contract and the bank has the right to terminate after reasonable notice.

The plaintiff alleged that the defendant breached his duty as a banker by dishonouring his cheques. Under the Banker – customer contract, the bank undertakes to repay any part of the amount due against the written orders of the customer, provided the customer has sufficient funds on his account. (See Atkins L. J. in Joachimson V Swiss Bank Corpn [1921]3 K.B. 110 at 127. This is also reflected in para 165 of Halsbury's Laws (supra) that;

"There must be sufficient funds to cover the whole amount of the cheque, presented, for, in absence of special arrangement, there is no obligation on the banker to pay any part of a cheque for an amount exceeding the available balance..."

In the instant case therefore, after exercising the right of set-off as seen above, the plaintiff had no balance available to satisfy his cheque and the defendant was under no obligation to honour the cheque. The plaintiff's claim under this issue therefore fails.

On the other hand, the defendant seeks interest on its money in the plaintiff's hands.

The defendant cited the case of **Wallesteiner V Moir (1975)1 All ER 849** in support of its claim. In that case, Lord Denning M.R. stated that;

"In equity interest is awarded whenever a wrongdoer deprives a company of money which it needs in its business. It is plain that the company should be compensated for the loss thereby occasioned to it. Mere replacement of the money – years later – is by no means adequate compensation, especially in days of inflation. The company should be compensated by award of interest... but the question arises; should it be simple interest or compound interest? On general principles I think it should be presumed that the company had it not been deprived of the money) would have made the most beneficial use open to it, it may be that the company would have used it in its own trading

operations; or that it would have used it to help its subsidiaries. Alternatively, it should be presumed that the wrongdoer made the most beneficial use of it. But whichever it is, in order to give adequate compensation, the money should be replaced at interest with yearly rest."

The defendant also cited the Ugandan case of **Stanbic Bank V Joseph Aine, H.C.C.S No. 314/2005** where court adopted the same reasoning to award compound interest to a commercial bank. In that case His Lordship Hon. Justice Egonda Ntende, quoting the English case of **President of India V L.A. Pintada Compania Navigation S.A [1984]2 All ER 773, at 779**, stated that;

"Chancery courts had further regularly awarded interest, including not only simple interest but also compound interest when they thought that justice so demanded, that is to say in cases where the money had been obtained and retained by fraud, or where it had been withheld or misapplied by a trustee or anyone else in a fiduciary position."

Clearly the above cases involve some form of fraud or breach of trust fudiciary duty on the part of the defendant. In the instant case, no fraud was pleaded or proved by the defendant. The amount of the suit cheque was credited on the plaintiff's account under a mistake of fact that it had been honoured. It has not been proved that the plaintiff was aware of this mistake on the part of the defendant and took advantage of it.

In the later case of **National Bank of Greece S.A. V Pinios Shipping Co. No.1 and Anor (The "Maira") No.3 [1988]2 L. R. 126**, the Court of Appeal held that there is no common law right to charge or recover even simple interest on an overdraft, but the claim could be supported on the ground of universal custom of bankers or on the basis of implied agreement or of a course of dealing. In that case, in answer to the question whether there can be a title to compound interest without a contract expressed, or implied from the mode of dealing with former accounts or custom,

Lloyd L.J affirmed *Lord Greer's holding in Deutsche Bank V Bangue des Marchands he Moscou (1931) Vol. 4, Legal Decisions Affecting Bankers, P.293* where he said;

> *"I regard the law as stated in Ex parte Bevan (1803) and Fergusson V Fyfe (1841) as laying down two propositions, first, that there can be no title to compound interest without a contract, express or implied, between the debtor and creditor, and, secondly that it never implied except as to mercantile accounts current for mutual transactions."*

This was affirmed by learned author, Grace Tumwine – Mukubwa, in **his Essays in African Banking Law and Practice (1998) at P. 126**, where he states that

> *"The position seems to be that simple interest can be charged by banks as a matter of course. But compound interest is only chargeable when the customer has expressly or impliedly agreed to it or when a trade usage or charging compound interest has been proved or is so notorious that courts take judicial notice of it".*

And according to the Nigeria case of **National Bank of Nigeria V Manja & Ors. 1967(2) ALR Comm 327 at 331**

If a party to the contract bases his claim on a trade usage, the pleadings should clearly aver not only the fact but also the precise nature of the trade usage on which the claim is founded.

The defendant in this case has failed to prove that the plaintiff expressly or impliedly acquiesced in the charging of this interest, or that there is a trade usage on which its claim is founded, or that such a trade usage is so notorious that court should take judicial notice of it. Consequently the defendants claim for compound interest fails.

However, by the universal custom of bankers, a banker has the right to charge simple interest at a reasonable rate on all overdrafts. (Halsbury's Laws of England, (Supra) para 299); and in the case of

London Chartered Bank of Australia V White & Anor (1879)4 Ch. 413 at 425. The Privy Council awarded a bank-customer interest on his money wrongly held by the bank.

On the 25th August, 2004, the plaintiff was on notice that he had no right to funds he had been credited with. On this understanding he voluntarily refunded the equivalent of US$56,069.76. Yet he retained US$88,294.81 after that notice. I think that, at any rate after notice to the plaintiff that the money belonged to the defendant, it became money received by the plaintiff for the defendant's use. This was money wrongly retained by the plaintiff, and following the principle in **London Chartered Bank of**

Australia V White & Anor (Supra), the defendant was entitled to simple interest on this amount at the current rate on overdrafts.

I would according award the defendants simple interest at 6% P.A on the sum claimed (being in US Dollars) from the 27th August 2004 until payment in full.

Given that the defendant was imprudent in the laxed manner it credited the plaintiff with funds on an uncleared cheque I will only award the plaintiff 2/3 of the costs of the suit.

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Geoffrey Kiryabwire

JUDGE

Dated: 9/05/07

09/05/07

11:56am

Judgment read and signed in Court in the presence of;

- S. Zimula for the defendant
- P. Ejangu for the plaintiff

In Court

- Defendant represented by E. Karuhanga
- Rose Emeru – Court Clerk

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Geoffrey Kiryabwire

JUDGE

Date: 9/05/07