Privy Council Appeal No. 15 of 1925

The Australian Bank of Commerce, Limited - - - - *Appellants*

Irvine Perel and others - - - - - - - *Respondents*

FROM

THE SUPREME COURT OF NEW SOUTH WALES.

JUDGMENT OF THE LORDS OF THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL, DELIVERED THE 8TH JUNE, 1926.

Present at the Hearing:

THE LORD CHANCELLOR.
VISCOUNT HALDANE.
LORD ATKINSON.
LORD SHAW.
LORD PARMOOR.

[*Delivered by* THE LORD CHANCELLOR.]

This is an appeal by the Australian Bank of Commerce, Limited (which may be shortly referred to as "the Bank"), against a decree of the Supreme Court of New South Wales in Equity, made in an action brought against the Bank by the trustees of the estate of the late John Norton for the redemption of property forming part of that estate and mortgaged to the Bank. The question in dispute in that action was as to the right of the Bank to charge the trustees in account with twenty-two sums debited to them by the Bank between the 28th February, 1918, and the 21st July, 1919, and amounting in all to £21,268 10s. The action was heard by Mr. Justice Street, Chief Judge in Equity, who gave judgment for the trustees on that issue, holding that the Bank had no right to charge the trustees with those sums; it is against that decision that the present appeal is brought.

Mr. John Norton died in the year 1916, possessed of a valuable newspaper publishing business, which was carried on at Sydney and elsewhere in Australia and also in New Zealand. After his death the business was carried on by his trustees, their manager and secretary being one Harold James McClintock. In the year 1917 the trustees transferred their banking account to the appellant Bank, and by a letter dated the 2nd April, 1917, informed the Bank that they had authorised Messrs. H. J. McClintock and Leonard Connolly jointly to operate on the accounts (known as No. 1 Account and No. 2 Account) which they had opened with the Bank. The letter then proceeded as follows :—

> ". . . and you will please pay and charge to such accounts all cheques, promissory notes, bills of exchange, orders and other documents of whatever nature, signed accepted or endorsed by them, or which they may authorise you to pay or debit to either of the said accounts, whether the accounts be in credit or debit or be converted from a credit to an overdrawn account by any such cheque or other documents.
>
> We have also empowered them :—
>
> To endorse cheques.
>
> To make, accept, draw and endorse bills of exchange or promissory notes.
>
> To negotiate other instruments.
>
> To give and deposit with you securities against all advances that may be made on the account.
>
> To withdraw securities and deeds and give receipts therefor.
>
> Generally to transact on behalf of the trustees of the estate of the late John Norton all business connected with the said accounts or either of them.
>
> In the event of the absence through illness or otherwise of either Mr. McClintock or Mr. Connolly, we have authorised Mr. Robert James Marsh to countersign cheques with Mr. McClintock or with Mr. Connolly.
>
> All cheques and other documents drawn on or in connection with either of the said accounts will be signed as at foot hereof."

The signatures at the foot of the document included those of H. J. McClintock, L. Connolly and R. J. Marsh. On the 27th August, 1917, these instructions were modified by the addition of a requirement that all cheques drawn on the above-mentioned accounts must be countersigned by Messrs. Starkey and Starkey, the accountants of the trustees; but except in that respect the instructions remained unaltered throughout the period in question in these proceedings.

In the month of February, 1918, H. J. McClintock began to practise on his employers the series of frauds which ultimately led to these proceedings. It appears that the appellant Bank, in common with other banks in Australia, is in the habit of issuing to any customer who desires it, in exchange for a cheque drawn on that customer's account in favour of the bank, a cheque drawn by the bank on itself in favour of a person designated by the customer or order or bearer. A bank cheque so issued by a responsible bank is treated as equivalent to cash, and is used by the customer for any purpose for which cash or its equivalent is required, such

as completing a purchase, paying taxes, etc. McClintock, taking advantage of the practice above described, procured cheques to be drawn on the trustees' No. 2 account in favour of the appellant Bank and to be duly signed by himself and Mr. Connolly or Mr. Marsh and countersigned by the accountants, and took the cheques so signed to the Bank, and obtained from the Bank in exchange for these cheques bank cheques for equivalent amounts in favour of payees designated by himself alone. Of these bank cheques, the first as to which a question arises, namely, a cheque dated the 26th February, 1918, was drawn in favour of one George Tallis (with whom the trustees had business relations) or order; and McClintock having forged the endorsement of Tallis on this cheque, paid it into an account which he had opened at the Union Bank of Australia in the assumed name of "Robert Haynes." The remaining bank cheques in question, which were twenty-one in number and ranged in date from the 3rd May, 1918, to the 21st July, 1919, were drawn in favour either of "Robert Haynes" or of some other payee "or bearer"; and all these cheques were taken by McClintock and either paid into his account in the name of Robert Haynes or otherwise used for his own purposes. In the latter part of July, 1919, the suspicions of the trustees were aroused and the frauds were brought to light, and McClintock was sentenced to a term of imprisonment. The bank cheques so obtained and misappropriated by McClintock amounted together to the above-mentioned sum of £21.268 10s., and it is this amount which the appellant Bank seeks to debit to the trustees. This debit has been disallowed by the learned Chief Judge, and the question to be determined is whether it was rightly so disallowed.

That McClintock had no express authority to obtain from the Bank the bank cheques which are in dispute is clear. The Bank had received from the trustees definite written instructions that all cheques on the trustees' two accounts were to be signed by two of the three persons named in the instructions (McClintock, Connolly and Marsh) and countersigned by the accountants, Starkey and Starkey, and that these persons alone were authorised jointly to transact on behalf of the trustees all business connected with the accounts or either of them; and it was a clear breach of these instructions to hand to McClintock on his sole request bank cheques with which he could deal as he thought fit.

Nor can it be maintained that McClintock as manager had implied authority to specify the services which the Bank was to render in return for the cheques properly drawn in their favour, and in so doing to request them to issue the bank cheques in question. As Lord Sumner said in the judgment rendered by him in a previous appeal connected with these transactions (*Union Bank of Australia* v. *McClintock*, L.R. 1922, 1 A.C. 240), "a manager manages, but how and under what restrictions must be proved"; and it is hardly arguable that McClintock, merely because he was the manager, had an implied authority which would have the

effect of completely neutralising and defeating the express instructions given to the Bank. Some evidence was called with a view to proving that it is the practice of Australian banks to issue bank cheques on the request of any " responsible representative " of a customer, and it may be that some banks take that risk ; but if such a course is followed in face of definite instructions such as those which were given in the present case, the bank following that course is acting without authority.

But it was argued—and it was on this contention that the case for the appellants was mainly rested—that on the facts of this case McClintock had at least ostensible authority to require the issue of the bank cheques—or in other words, that the trustees were estopped by their own conduct from denying that authority. In support of this argument, counsel for the appellants relied on the fact that on a number of occasions, beginning in the year 1917, and continuing until July, 1919, McClintock had brought to the Bank cheques duly signed in favour of the Bank and had given directions as to the application of the amount. Twenty-seven such instances, in addition to those which are in dispute in this action, were cited, and it was argued that this evidence showed a " course of business " sufficient to justify the Bank in acting on McClintock's directions and to prevent the trustees from disputing his authority. That such a result might possibly follow if the evidence were sufficient to support it may be inferred from such cases as *International Sponge Importers* v. *Watt* (L.R. 1911, A.C. 279). *Meyer* v. *Sze Hai Tong Banking and Insurance Company* (L.R. 1913, A.C. 847), and *Morison* v. *London County and Westminster Bank* (L.R. 1914, 3 K.B. 356). But it is evident that, in order that a course of business such as is alleged may prevail over express written instructions, a strong case must be made ; and when the evidence in the present case is examined, it is found to fall far short of what is required. Of the twenty-seven instances on which the appellants rely, twenty-one resulted only in the transfer of funds from one of the trustees' accounts to some other account of the trustees, or from their bank at Sydney to their bank in Melbourne or elsewhere ; and it is obvious that no sound argument can be founded on these instances in which the sums in question did not pass out of the control of the trustees. In the remaining six cases bank cheques were issued, but Sir John Simon's analysis of the facts in these cases showed clearly that no inference as to a course of business could properly be based upon them. One of these six bank cheques, a cheque for £8,213 18s. 11d., was transmitted by the appellants themselves, by direction of the trustees, to the Commercial Bank for the purpose of paying off an overdraft at that Bank. A second cheque, a cheque for £6,898 4s. 6d., was dealt with, not on McClintock's sole instructions, but on instructions signed, as the trustees' accountant swore, by the three persons who signed the original cheque to the Bank. Of the other four bank cheques two were given in exchange for cheques to bearer ; one was given, not to McClintock, but to another clerk of the

trustees. who applied it in redeeming a security; and one only (a cheque for £128 11s. 4d.) was dealt with on the instructions of McClintock alone. Plainly this evidence. when properly understood. is of no value whatever for the purpose of proving an ostensible authority in McClintock to call for the issue of such bank cheques as he might require. This argument. therefore. breaks down on the facts.

There remains the earliest of the bank cheques in dispute. namely, the cheque for £1,000 dated the 26th February. 1918, and payable to "George Tallis or order," as to which a special case is made. It appears from the counterfoil of the original cheque for £1,000 drawn by the three signatories in favour of the Bank. which was dated the 13th February. 1918. that the proceeds of the cheque were intended to be used for the purpose of paying an instalment of purchase-money due to Tallis; and it is suggested that in these circumstances McClintock had authority to obtain in return for the cheque a bank cheque for the same amount in favour of Tallis "or order." and that for his subsequent forgery of the endorsement the Bank is not responsible. But the answer is that the Bank never saw the counterfoil. and that they had no proper authority either to draw the bank cheque in favour of Tallis or to put it in McClintock's hands. but should have obtained the authority of the signatories for the disposal of the amount. The appellants also rely on evidence which appears to show that on some subsequent date. probably when discovery was imminent. McClintock, out of moneys at his own disposal, paid to Tallis the £1,000 due to him. so that the trustees were relieved of this liability. But there was no evidence to show that this payment was made out of the proceeds of the bank cheque for £1,000. and it seems more probable that it was made (as the learned Chief Judge suggested) out of the proceeds of further thefts from the trustees. The payment to Tallis did not reduce the liability of McClintock to the trustees below the sum in issue in these proceedings. This sum has therefore been rightly disallowed.

There remains one further argument to be considered. It appears that in the month of September. 1919. shortly after the discovery of the frauds. the trustees suggested to the appellants that the former should make a claim against the Union Bank (where McClintock's "R. Haynes" account had been kept) for conversion of the bank cheques in question. and that it should be agreed that the making of such a claim by the trustees should be without prejudice to the trustees' claim against the appellant Bank. The appellants assented. and thereupon the trustees brought an action against the Union Bank for conversion. alleging in the action (as was necessary) that McClintock had the authority of the trustees to obtain the bank cheques from the appellant Bank. or that they had ratified his acts. No evidence of any specific authority or ratification was given, and the contention was one of law, founded on the facts as proved in these proceedings. The action failed. and an appeal to

this Board resulted in the confirmation of the jury's verdict. The present appellants now contend that the trustees, in pleading or contending in the proceedings against the Union Bank that McClintock had acted with authority in drawing the bank cheques, or (in the alternative) that they had ratified his proceedings, must be held to have adopted his actions, and could not now repudiate them. In their Lordships' opinion the appellants are not entitled to put forward this contention. In concurring in the proceedings against the Union Bank, which were obviously taken with a view to the common advantage of the present appellants and respondents, the appellants formally agreed that those proceedings should be without prejudice to the trustees' claim against them; and although the claim for redemption put forward in this action had not then been brought, their Lordships are of opinion that it is protected by the agreement.

For these reasons their Lordships are of opinion that the decision of the Court in New South Wales should be affirmed, and they will humbly advise His Majesty that this appeal be dismissed with costs.

In the Privy Council.

THE AUSTRALIAN BANK OF COMMERCE, LIMITED.

v.

IRVINE PEREL AND OTHERS.

DELIVERED BY THE LORD CHANCELLOR.

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