

**IN THE HIGH COURT OF FIJI**  
**AT SUVA**  
**CIVIL JURISDICTION**

**Civil Action No. HBC 50 of 2011**

**BETWEEN** : **GAVIN O'DRISCOLL** trading as **O'DRISCOLL & CO** having its registered office at 22 Carnarvon Street, Suva, Fiji.

**PLAINTIFF**

**AND** : **MARGRET MAUSIO** of 31 Brewster Street, Toorak, Suva.

**1<sup>ST</sup> DEFENDANT**

**AND** : **WESTPAC BANKING CORPORATION** a limited liability company incorporated in Victoria, Australia and having its place of business at 1 Thomson Street, Suva.

**2<sup>ND</sup> DEFENDANT**

**BEFORE** : **Justice Deepthi Amaratunga**

**COUNSEL** : **Mr. Nandan** for the Plaintiff

**Mr. Kunal Singh** for Defendant

**Date of Hearing** : 15<sup>th</sup> November, 2011

**Date of Decision** : 3<sup>rd</sup> September, 2013

**DECISION**

**A. INTRODUCTION**

1. The Plaintiff who is a legal practitioner maintained a Trust Account for professional duties, and the 1<sup>st</sup> Defendant was an employee of the said law firm where the Plaintiff was a partner, and the 2<sup>nd</sup> Defendant was the bank in which the Trust Account was maintained. According to the statement of claim the 1<sup>st</sup> Defendant had forged some cheques and money was drawn from the said Trust

Account. The Plaintiff is seeking a declaration that the 2<sup>nd</sup> Defendant was not entitled to debit the Plaintiff's Trust Account for a sum of \$81,638.19 and also for payment of sum of \$41,771.43 as monies owing by the Defendants to the Plaintiff. The 2<sup>nd</sup> Defendant filed the present application for strike out of the claim against the 2<sup>nd</sup> Defendant on the basis that there was no reasonable cause of action disclosed against the 2<sup>nd</sup> Defendant in the statement of claim. The action is based on unauthorized payments for the forged cheques and there is a reasonable cause of action disclosed in terms of Section 24 of the Bills of Exchange Act.

## **B. ANALYSIS**

2. The Plaintiff had indicated that there was no reasonable cause of action disclosed in the statement of claim. The 1<sup>st</sup> Defendant allegedly forged the cheques drawn from the Trust Account of the Plaintiff's law firm and the 2<sup>nd</sup> Defendant being the banker to the said Trust Account had honoured the said forged cheques. In the statement of claim at paragraph 3 the status of the 2<sup>nd</sup> Defendant is described, but apart from this there is only one paragraph that mention of 2<sup>nd</sup> Defendant in the statement of claim and it states as follows;

'8. The Second Defendant debited the Trust Account of the Plaintiff of a total amount of \$81,638.19 in respect of the above particularized cheques.'

3. In the circumstances the Plaintiff is not specifically making a claim against the 2<sup>nd</sup> Defendant however, in the following paragraph though 2<sup>nd</sup> Defendant is not specifically mentioned it is implied that the cause of action is based on unauthorized payments to the said cheques and the paragraph 9 of the statement of claim states as follows

'9. The Plaintiff did not draw the said cheques or authorize the drawing thereof and the Plaintiff's signature thereon was forged by the First Defendant. In the premises, **the**

**Defendant had no authority to pay the said cheque.'**(emphasis added)

4. No specific mention of 2<sup>nd</sup> Defendant in the above paragraph 9 of the statement of claim, but it can be inferred that Plaintiff is alleging that 2<sup>nd</sup> Defendant had no authority to pay the said forged cheques. This needs to be stated clearly and can be done so by an amendment and even without it the inference is clear. When this application for strike out was filed the Plaintiff would have seen the deficiency of the statement of claim. The defect was clear and obvious and minor insertion could cure the defect by reference to the 2<sup>nd</sup> Defendant directly instead of leaving it for inference, but the main objection of the 2<sup>nd</sup> Defendant was not this omission, and they allege that there is no cause of action disclosed against the 2<sup>nd</sup> Defendant.
5. When a cheque is forged Section 24 of the Bills of Exchange Act is applicable and states as follows

‘Forged and unauthorised signature

24. Subject to the provisions of this Act, where a signature on a bill is forged or placed thereon without the authority of the person whose signature it purports to be, the forged or unauthorised signature is wholly inoperative, and no right to retain the bill or give a discharge therefore to or enforce payment thereof against any party thereto can be acquired through, or under that signature, unless the party against whom it is sought to retain or enforce payment of the bill is precluded from setting up the forgery or want of authority:

Provided that nothing in this section shall affect the ratification of an unauthorised signature not amounting to a forgery.’

6. In Kepitigalla Rubber Estates Limited v The National Bank of India, Ltd [1909] K.B 1010 at 1022 Bray J stated

**‘..... although the relationship between a customer and his banker is not that of principal and his agent; the same considerations would seem to apply.** The customer is asking the bank to do something. Surely he should take care that his request is made in such a way as not to mislead his banker. Now, assuming this to be a duty, has it been broken in this case? The plaintiff gave a clear instruction to the defendants to honour only cheques signed by two directors and their secretary, and they gave the bank genuine signatures of all the directors and the secretary to enable the bank to see if the signatures on the cheques were genuine.’ (emphasis added)

7. The Plaintiff had given necessary instructions to the 2<sup>nd</sup> Defendant and the proof of forgery would indicate that the 2<sup>nd</sup> Defendant had paid for unauthorized cheques. Already in the criminal action the fact of forgery was admitted by the employee of the Plaintiff. Once the forgery is proved there is a cause of action based on payments to the said forged cheques by the 2<sup>nd</sup> Defendant.
8. The Plaintiff need not plead more in the statement of claim as what is needed is only a precise statement of facts and not the evidence. The requirements in the statement of claim is contained in the Order 18 rule 6 of the High Court Rules of 1988.

Order 18 rule 6 deals with Facts, not evidence, to be pleaded

‘6(1) Subject to the provisions of this rule, and rules 9, 10, and 11, every pleading must contain, and contain only, a statement in a summary form of the material facts on which the party pleading relies for his claim or defences, as the case may be, but not the evidence by which those facts are to be proved, **and the statement must be as brief as the nature of the case admits.**’ (emphasis is added)

9. In Supreme Court Practice (1988) at page 269 it was stated under the “Material facts, not evidence” 18/7/3 state as follows

‘Material facts, not evidence’- Every pleading must contain only a statement of the material facts on which the party pleading relies, and not the evidence by which they are to be proved (per Farwell L. J in N. W. Salt Co Ltd v Electrolytic Alkali C Ltd [1913] 3K.B. 422,425). “The distinction is taken in the very rule itself between the facts on which the party relies, and the evidence to prove those facts (per Brett L.J. in Philipps v Philipps (1878) 4 Q. B. D. 133). All facts which tend to prove the fact in issue will be relevant at the trial, but they are not “material facts” for pleading purposes. **“It is an elementary rule in pleading that, when a statement of facts is relied on, it is enough to allege it simply without setting the allegation”** (per Lord Denman C.J. in Williams v Wilcox (1838) 8 A& E 314, p 331; and see Stuart v Gladstone (1879) 10 Ch. D. 644).....’ (emphasis is added)

10. The facts that can be averred in a statement of claim cannot be strictly defined, but when one examines the pleadings one can see very clearly if it does not conform to the requirements contained in Order 18 rule 6 of the High Court Rules of 1988. The Pleadings are very important as that is what the other party

has to answer and if that is not properly understood it cannot be answered adequately or formulate the defence properly. While the statement of claim needs to be precise and brief it needs to contain the necessary facts in order to ascertain the cause of action against each Defendant.

11. In Supreme Court Practice (1999) at page 314 under the heading 'Need for compliance' of Order 18 where it was stated as follows

'Need for compliance- These requirements should be strictly observed (per May L. J. in Lipkin Gorman v Karpnale Ltd [1989] 1 W.L.R 1340 at 1352). Pleadings play an essential part in civil actions, and **their primary purpose is to define the issues and thereby to inform the parties in advance of the case which they have to meet**, enabling them to take steps to deal within it, and such primary purpose remains and can still prove of vital importance, and therefore it is bad law and bad practice to shrug off a criticism as a "mere pleading point" (see per Lord Edmund Davis in Farrell v Secretary of state for Defence [1980] 1 W.L.R 172 at 180, [1980]1 All E.R. 166 at 173)'. (emphasis is added)

12. The Plaintiff is alleging that the 2<sup>nd</sup> Defendant had no authority to pay for the forged cheques and seeks a declaration that the 2<sup>nd</sup> Defendant was not entitled to debit the entire amount debited using forged cheques, but seeks a lesser amount in the preceding prayer, since some of the forged cheques were utilized to pay authorized payments. Though the payments were authorized allegedly no cheques were signed by the authorized personnel and some of the forged cheques were utilized for approved payments by the wrongdoer. These are issues that needs to clarify in trial. Even a weak case needs the time of the court, and in this event the Plaintiff is suing the 2<sup>nd</sup> Defendant on the basis that it had paid to cheques that were forged hence unauthorized by the account

holder. When a mandate is signed by the account holder he only allowed the Bank to pay authorized payments and the ascertainment of authority is from the signature. If the said instructions are breached the account holder prima facie has a cause of action against the Bank.

13. In Price Meats Ltd v Barclays Bank Plc [1999] EWHC Ch 190 (decided 30<sup>th</sup> November, 1999) discussed the law relating to forged signatures in Bills of Exchange and held that in the absence of some deliberate act on the part of the customer either to induce the said forgery or non disclosure of forgery promptly to the Bank, that the Bank will be liable in a civil suit for the recovery of the money paid based on forged cheques. In the said case it also distinguished the Greenwood (Pauper) V Martins Bank Ltd [1933] A.C 51 and Morison v London County and Westminster Bank Ltd [1914] 3 K.B 356.
14. The 2<sup>nd</sup> Defendant in his submission relied on the said **Greenwood** case (supra) but in that case the court held that the Bank was not liable for payments made to forged cheques since the Plaintiff had delayed the disclosure of the forgery till the death of the person who forged the cheques, that prevented the Bank from recovery of the money from the said person and the principle of estoppel was also applied. I cannot see such issues in this case and in any event these are matters that needed a proper hearing by the court, and does not qualify for summary dismissal of the action against the 2<sup>nd</sup> Defendant.
15. The 2<sup>nd</sup> Defendant also relied on the case of Morison v London County and Westminster Bank Ltd [1914] 3 K.B 356 to absolve the liability of the 2<sup>nd</sup> Defendant for payments done on forged cheques. Again, this is a case where the plaintiff had direct involvement in the ratification of the fraudulent act, and these are valid defences for the 2<sup>nd</sup> Defendant and can test them in trial, but without that I cannot decide from the judgment seat on such matters that involve law and facts that needs proof in court. I cannot at this stage without

considering the evidence come to a conclusion as to the involvement of the Plaintiff and whether he had ratified the fraudulent cheques or had any positive involvements either through positive act as in **Greenwood** or **Morrison** (supra).

16. In The Kepitigalla Rubber Estate Limited v The National Bank of India Ltd [1909] 2 K.B. 1010 it was held that though the careful examination of account statements would have revealed the fraud much earlier, still the Bank was liable for payments done to forged bills and at page 1029 rejected the fallacy of the customer's negligence in detection of the fraud as follows

‘Apart from authority one has only to look at the facts of this case to see how absurd it would be to hold that the taking out of the pass-book and its return constituted a settled account. It would mean this, that a secretary of a company, by going to the bank for his own purposes in order to prevent the discovery of his own fraud, and without any knowledge on the part of any of the directors, and getting the pass-book (with pencil entry in it of the balance), can bid the company for all purposes.’

17. The above case law authorities indicate that the prima facie liability is on the bank for payments made on the forged cheques. The Bank may adduce evidence to show the involvement of the Plaintiff, or the delay in disclosure so as to deprive the Bank an action in tort against the wrongdoer, so that principle of estoppel can be used as a defence as in **Greenwood** (supra). By the same token the circumstances of the case needs to be considered to ascertain the liability of the bank as in The Kepitigalla Rubber Estate Limited v The National Bank of India Ltd [1909] 2 K.B. 1010 These are all issues that needs to be considered in the trial. What the Plaintiff has to allege is that the Bank had paid unauthorized payments and claim the same from the Bank. This is done by the Plaintiff against the 2<sup>nd</sup> Defendant and there is a reasonable cause of action disclosed in the statement of claim.

**C. CONCLUSION**

18. The Plaintiff had pleaded the facts of the forgery and had stated that 2<sup>nd</sup> Defendant's payments to the said forged cheques were not authorized hence the cause of action for a declaration sought and for the sum stated in the statement of claim. In Young v Grote & Others (1827) 4 Bing 253 at p766 Best CJ said '*Undoubtedly, a banker who pass a forged cheque, is in general bound to pay the amount again to his customer, because in the first instance he pays without authority*'. In the prayer the Plaintiff has not indicated whether the sum stated is claimed jointly and or severally, but this again can be cured by an amendment. I reject the contention that there is no reasonable cause of action disclosed against the 2<sup>nd</sup> Defendant, in the statement of claim. The Plaintiff's statement of claim is precise and essential facts are included. Paragraph 9 and prayer (2) needs amendments as stated in this decision and these are minor amendments that will not prejudice any party. The Plaintiff is granted two weeks to rectify the said omissions and to file and serve an amended statement of claim, based on the said directions. The cost of this application will be cost in the cause. The delay is regretted.

**D. FINAL ORDERS.**

- a. Summons to strike out dismissed.
- b. The Plaintiff to file and serve an amended statement of claim within 14 days from today as per directions.
- c. The cost of this application is cost in the cause.

Dated at **Suva** this **3<sup>rd</sup> day** of **September, 2013**.

.....  
**Justice Deepthi Amaratunga**  
**High Court, Suva**