IN THE HIGH COURT OF JUSTICE
IN THE CHANCERY DIVISION

No. 428/SD/2000

The Royal Courts of Justice
The Strand
LONDON WC2A

Wednesday 21st March, 2001

B e f o r e:

MR JUSTICE HART

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IN THE MATTER OF
AJBAR VERJEE & ANOTHER

(Applicant)

- v -

CIBC BANK

(Respondent)

- - - - - - - - -

Computerised transcript of
Smith Bernal Reporting Ltd
190 Fleet Street, LONDON EC4A 2AG
Tel: 0171 404 1400. Fax: 0171 404 1424

MS L FRASER (instructed by Gouldens, London EC4) appeared on behalf of the Applicant)
MR D LIGHTMAN (instructed by Dawson & Co, London WC2) appeared on behalf of the Respondent.

J U D G M E N T

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MR JUSTICE HART: This is an application by Mr Verjee to set aside a statutory demand, dated 5th October 2000, which was served on him by CIBC Bank Trust Company (Channel Islands) Limited. The statutory demand was in a sum of £21,402.73, which represented, as to £20,000, the amount of a cheque presented to the bank and honoured by it in a sum of £20,000 on or about 6th December 1999, and the interest accruing due as a result of the bank having paid that cheque. The position was, at that date, that Mr Verjee's account with the bank had only a few pounds to its credit or, indeed, had a nil balance. The result of the payment by the bank, pursuant to the cheque, was therefore to cause Mr Verjee's account with the bank to become overdrawn to the extent of approximately £20,000.

The basis upon which Mr Verjee seeks to set aside the statutory demand is that he has either a defence to the claim of the bank, or that he has a counterclaim against the bank which equals or exceeds the amount of the bank's claim.

In essence, Mr Verjee's application is based on the proposition that the bank was in breach of a duty of care which it owed him when it honoured the cheque, it being Mr Verjee's case that the cheque was presented dishonestly in circumstances in which the bank should not have paid out in respect of it without making enquiry directly of Mr Verjee.

The circumstances in which the cheque is said to have been presented dishonestly are, according to Mr Verjee, these: he says that at some date, he is not specific as to the time, he gave to a Mr Sonjy(?) who appears to have been a business acquaintance or partner of Mr Verjee, two blank cheques drawn on the bank and signed by Mr

Verjee.

Mr Verjee says that the understanding between him and Mr Sonjy was that Mr Sonjy would not present the cheques for payment except for the purpose of withdrawing commissions owing from their joint commercial enterprises. Mr Verjee says that it was in breach of that understanding that Mr Sonjy filled in both dates and payees on both the cheques in late 1999, and thereby caused them to be presented for payment.

The first of the cheques, and the only one which I am directly concerned, was made out to Pal Swicuriwal(?) or Pal Swicuruwal(?), and dated 25th November 1999 in a sum of £20,000. The date and the payee and the amount of the cheque are all filled in by typewriting. Mr Verjee's signature is his own. That cheque was, as I said, presented for payment on about 6th December. The other cheque was similarly filled in, but in a sum of £10,000 and was dated in December 1999 and was presented for payment, it would appear, somewhat later than the second cheque.

The account that Mr Verjee gives of the basis of his understanding with Mr Sonjy and Mr Sonjy's breach of that understanding, has not been expressed by Mr Verjee in exactly the same way on every occasion on which he has had an opportunity to address the question. There is before me a transcript of a telephone conversation which took place between them and Miss Nicola Baker, an account manager at the bank on 18th January 2000, in which he describes the cheques as having been given to Mr Sonjy because of some existing debt owed by Mr Verjee to Mr Sonjy, but also against the background of a relationship in which (according to that

conversation) Mr Sonjy also owed Mr Verjee some money.

Nothing more has been divulged by Mr Verjee as to the precise basis of the transaction between him and Mr Sonjy, which resulted in Mr Verjee giving Mr Sonjy these two blank cheques. Mr Verjee asserts that Mr Sonjy's behaviour in relation to those two cheques has been a breach of the understanding which existed between them and was dishonest. However, as Mr Lightman, on behalf of the Bank, has pointed out, there is no suggestion that Mr Verjee has ever taken any steps to refer this dishonesty to any police authority.

However that may be, the essential ground upon which it is suggested that the bank was in breach of a duty of care owed to Mr Verjee is that the bank ought to have realised that there was something wrong with the situation when the cheque was presented to it for payment, and should then have made enquiry, and that on the making of that enquiry it would have become clear that Mr Verjee was not authorising the payment.

The factors upon which Miss Frazer, on behalf of Mr Verjee relies, on the basis of the evidence which has now come out as giving rise to that duty of enquiry, are first that the account had for all practical purposes been dormant since it had been opened in 1997, although it is acknowledged that there had been other extensive dealings between the bank and Mr Verjee at earlier periods.

Secondly, reliance is placed on the fact that not only was the account dormant, but that so far as the evidence adduced by the bank is concerned, its previous lending to Mr Verjee (or his companies) had been on an authorised rather than an unauthorised basis. That is not, in fact, a matter which is prayed in aid by Mr Verjee himself

in the affidavits he has sworn in support of this application.

It is said that the bank could easily have contacted Mr Verjee since it knew his address and telephone number, and there would have been no difficulty in making the enquiry which it is said should have been made.

In addition, it is the case that Miss Baker, the accounts officer who initially dealt with the cheque on its presentation marked it "refer to drawer". She did so because it was not within her authority to authorise an overdraft on the account and having checked, as her duties required her to do, the signature and the account details, she appreciated that the account would be become overdrawn if the cheque was honoured. She, therefore, referred it to her superiors.

There is, in fact, some lack of clarity in the evidence as to exactly what happened next. According to the transcript of the telephone conversation to which I have referred, it seems possible from that conversation that Miss Baker was by then under the impression that both the cheques had initially been returned through the clearing system, but that one of them, the cheque in question for £20,000, had been re-presented and then paid.

The evidence before me does no establish who at the bank made the decision to pay the cheque, or when exactly that decision was in fact made. It is, however, clear that no contact was made with Mr Verjee before the cheque was honoured, and it is of course clear that, at some point between the date of its receipt by the bank on or about 6th December and the telephone conversations between Miss Baker and Mr Verjee in January, that it was honoured.

Miss Fraser on behalf of Mr Verjee has also sought to derive

from the transcripts of the telephone conversations, which have made their appearance in the evidence before me at a very late stage, the suggestion that the bank itself may have known about the arrangement between Mr Verjee and Mr Sonjy in relation to the two bank cheques. She derived that from a passage in the transcript in which Mr Verjee is recorded as having said:

"No, I have a very special relationship with him and he would not do this, and I mean he owes me money, which I can evidence that he said to me, 'Give me a couple of blank couple of signed cheques', because I owed him some money. He said when the money is deposited he will withdraw it but he would advise me."

Nicola Baker is recorded as having said:

"That's what we thought, yes".

I am not prepared on this application to entertain the inference which Miss Frazer asked me to draw from those words, "That's what we thought, yes". It seems to me clear that if there was to be any suggestion that the bank had earlier knowledge of the arrangements between Mr Sonjy and Mr Verjee, and in relation to Mr Sonjy's authority to complete the blank cheques and cause them to be presented to the bank, that is a matter peculiarly within Mr Verjee's own knowledge, and he should have made that case in one or other of the affidavits which he has sworn in support of this application. It seems to me quite clear from the fact that he has not, that there really can be no suggestion that the bank knew anything more about this matter than that they had received a cheque, apparently and actually signed by Mr Verjee, drawn in favour of the payee, and that it was a matter for the bank as to whether or not to pay that cheque.

The question whether in making that decision the bank owed in exercise of the duty of care it owed to Mr Verjee, had some duty to check with him that the cheque was a genuine transaction of which he approved, is the essential question which I have to decide.

As Miss Fraser submitted, and as I am content to accept, the duty of care owed by a bank to its customers can for this purpose be taken from the judgment of Steyn J, as he then was, in **Barclays Bank v Coin Care Limited** [1992] 4AER 363, in which at page 375H and onwards, Stain J put the matter in this way:

"Primarily the relationship to the bank from a customer is that of debtor and creditor but... (**Reading to the words**)... agent."

I can then go to the passage on page 376B and C:

"Given that the bank owes a legal duty to exercise reasonable care in and about executing a customer's order to transfer money, it is nevertheless a duty which must generally speaking be subordinate to the bank's other 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 and a 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 by the director or officer? If the bank executes the order knowing it to be dishonestly given... (**Reading to the words**)... of an ordinary prudent banker is the governing one."

Then going to page 377, he said this:

"Having stated what appears to me to be the governing

principle... (**Reading to the words**)... instinctive disbelief", and then he cited the well-known passage from the judgment of Byrne LJ in **Sanders Brothers v McLean & Co**.

I should, I think, emphasise that that passage is of course dealing with the standard of care required by a banker when dealing with the account of a company. In other words, a situation where the signatory of the cheque is necessarily not himself the account holder. Similarly, in **Lipkin Gorman** where the question had to be considered both at first instance and in the Court of Appeal, the court had to deal with a case where the signatory of the cheque was not the only person who was liable on it. It seems to me necessarily the case that the possibility of fraud is always more likely to be present in a case where those circumstances obtain.

In the present case we are dealing with a situation where the apparent signatory of the cheque is himself the account holder. In those circumstances if the bank has no reason not to believe the signature to be genuine, no question on the face of it can arise of some fraud being committed on the signatory. He is, on the face of it, requesting the bank to make payment at his own expense. That has to be borne in mind, in my judgment, in applying the various criteria listed by Stain J in the facts passage to the facts of this case.

The general duty of a banker in relation to cheques drawn on his account by a customer are helpfully set out in the judgment of Goff J in **Barclays Bank v Simms** [1980] QB677 at page 680, where he says:

"It is a basic obligation owed by a bank to its customer that

it will honour on presentation cheques drawn by the customer on the bank provided that there are sufficient funds in the customer's account to meet the cheques, or the bank has agreed to provide the customer with overdraft facilities sufficient to meet the cheque. Where the bank honoured such a cheque... (**Reading to the words**)... the payment is made within the bank's mandate and in particular the bank is entitled to debit the customer's account, and the bank's payment discharges the customer's obligation to the payee on the cheque."

It seems to me that if that is a correct statement of the law it is really conclusive of this case, unless it can be said that there was something in the circumstances which were or should have been present to to the bank's mind when the cheque was presented, which should have given it pause for thought.

On the face of it there was, by virtue of the presentation of the cheque, a request for an overdraft in that amount which the bank could choose whether or not to accede to. On analysis it seems to me that the only circumstance that Mr Verjee really relies upon as showing that the bank was somehow in breach of its duty of care to him in deciding to accede to that request, is the fact that he had not previously, in respect of this account, made such a request. But that, it seems to me, is quite insufficient to put the bank on notice that there was something sufficiently odd about the request to suggest the possibility that some fraud was being committed in connection with the cheque.

It seems to me that the bank was entitled to take the view which Mr Betts(?) says that it took, that a lending of that sum to Mr Verjee was a commercial risk that it was prepared to take. As I have

indicated, there is some opacity about the way in which the bank in fact came to make the decision to meet the cheque, and it seem to me possible, if the facts were further investigated, that it might turn out that the cheque had in fact been met as a result of some internal mistake by the bank. However, even if that were so, it does not seem to me that that would indicate a breach of a duty of care owed by the bank to its customer. As Mr Lightman has, on behalf of the bank, submitted to me, it would not matter whether the bank made its decision to lend to Mr Verjee as a result of tossing a coin. The only question would be whether the circumstances were such that they ought to have sought Mr Verjee's confirmation that he really did want this cheque to be met before meeting it.

For the reasons I have indicated I do not think they were under any such duty. That makes it unnecessary for me to consider further arguments that Mr Lightman has raised on behalf of the bank which are based on an estoppel, which allegedly arises as a result of Mr Verjee's failure at any time, until the service of the statutory demand in October of last year, to assert that which he now asserts, namely, that the bank was negligent and he is therefore not liable to it.

I have been taken in some detail both by Miss Frazer and Mr Lightman to the correspondence in this respect, but I do not think it is necessary for me to comment further on that aspect of his submissions.

I should also mention that I heard extensive submissions upon both sides as to what was the right test for me to apply in deciding whether to set aside the statutory demand. I am content to accept the test as formulated by Miss Frazer on behalf of Mr Verjee by

reference to the recent decision in the Court of Appeal in **Turner v Royal Bank of Scotland** [2000] BPIR 683 where the test is stated to be as to whether or not there is a "genuine triable issue", as to whether the amount of the counterclaim or cross demand will equal or exceed the amount of the debt specified in the statutory demand.

Accepting that test, it seems to me that the prospects of Mr Verjee being able to establish by calling, for example, expert banking evidence -- one possibility suggested by Miss Frazer -- or by cross-examination of the bank's witness -- another -- or by further disclosure from the bank that there were some circumstances beyond those which I have mentioned which ought to have alerted the bank to the possibility of the fraud which was alleged to have been committed are really fanciful, and for the reasons I have indicated, the circumstances which I have already mentioned and which are accepted for the purposes of this application to being present in the bank's mind, namely, the dormancy of the account, were not sufficient to put the bank on enquiry.

I would, therefore, dismiss the application to set aside the statutory demand.

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