Refd to
Bank of
Auckland
Informati
Bureau In
[1996] 1
NZLR 420

[HIGH COURT OF AUSTRALIA.]

WEST . . . . . APPELLANT;
PLAINTIFF,

AND

COMMERCIAL BANK OF AUSTRALIA LIMITED . . . . . } RESPONDENT.
DEFENDANT,

ON APPEAL FROM THE SUPREME COURT OF NEW SOUTH WALES.

H. C. OF A. 1935.

SYDNEY, *Mar.* 22, 25, 27.

Rich, Starke, Dixon and McTiernan JJ

Estoppel—Acquiescence—Ratification—Banker and customer—Bank authorized by A to pay cheques drawn by B countersigned by C—By arrangement with B cheques not countersigned paid by bank—Knowledge of A—Liability of bank.

Departure from an assumption upon which another person has acted to his detriment is not permitted to a party who, knowing or believing the other labours under a mistake in adopting it, has refrained from correcting him when it was his duty to do so.

The appellant opened an account with the respondent bank for the purposes of a business conducted for him by his son, and authorized it to pay cheques drawn on the account by his son and countersigned by his wife. After some months the son arranged with a teller employed by the bank to honour cheques on his signature alone. Some time later this arrangement came to the notice of the appellant, but he took no step to stop the practice and made no communication to the bank and in one instance indorsed negotiable instruments so drawn. The practice continued. Later the appellant brought an action against the bank to recover moneys paid by it on cheques bearing only the signature of his son.

Held that the appellant was precluded by his conduct from denying the regularity of the drawings so made from his account and was not entitled to recover the moneys claimed.

Decision of the Supreme Court of New South Wales (Full Court) affirmed.

H. C. OF A. 1935.

WEST v. COMMERCIAL BANK OF AUSTRALIA LTD.

APPEAL from the Supreme Court of New South Wales.

An action was brought in the Supreme Court of New South Wales by Leonard Thomas West, senior, to recover from the defendant, Commercial Bank of Australia Ltd., the sum of £4,759 17s. 11d. which he alleged the defendant had wrongfully paid from his current account with the defendant. The defendant pleaded that it had no moneys of the plaintiff, and, by way of cross-action, claimed from him the sum of £554 11s. 9d., as being the extent to which he had overdrawn his account, and was, therefore, the debtor of the defendant. The difference between the sums respectively claimed by the plaintiff and the defendant was made up of cheques drawn upon the account which the defendant paid and debited to it. The plaintiff claimed that these cheques were drawn without his authority and that accordingly the defendant was not entitled to debit his account with them. The defendant alleged that if the cheques were not drawn with his prior authority, they were at least drawn on his behalf and for the benefit of the business of which he was proprietor, and that he ratified and adopted the drawings and with full knowledge also stood by and allowed the defendant to make the payments out of his account.

With the assent of both parties the action was heard, as a commercial cause, by a judge without a jury. The judge gave judgment for the defendant in the plaintiff's action and also in its cross-action.

An appeal by the plaintiff from that decision was dismissed by the Full Court of the Supreme Court, and he appealed to the High Court.

Further material facts appear in the judgment hereunder.

Evatt and *May*, for the appellant. The appellant did not stand by and allow the respondent to act to its prejudice. He was for a long time unaware that the respondent was not insisting upon strict compliance with the terms of his authority and to the extent that he was aware of the non-compliance he was bona fide of the belief that the respondent was entitled to act as it was doing; therefore the principle enunciated in *Pickard* v. *Sears* (1) does not apply. In the circumstances the appellant did not ratify the wrongful acts

(1) (1837) 6 Ad. & E. 469; 112 E.R. 179.

of the respondent, nor is he estopped by his conduct. The respondent is unprotected from liability in respect of all cheques paid by it up to October 1930; and, also, in respect of any cheque paid thereafter which it is unable to prove was used for the purpose of the appellant's business within the scope of his son's authority (*B. Liggett (Liverpool) Ltd.* v. *Barclays Bank Ltd.* (1)). The appellant gave definite directions to the respondent, and no duty devolved upon him to ensure that, until revoked, those directions were strictly complied with. His obligation, if any, in this respect was discharged when he directed his son to inform the respondent of the irregular practice. The respondent at all times knew that its practice in this respect was irregular. It was not misled or "lulled to sleep" by any act or omission on the part of the appellant (*Kepitigalla Rubber Estates Ltd.* v. *National Bank of India Ltd.* (2); *Lloyds Bank Ltd.* v. *Chartered Bank of India, Australia and China* (3)). On the facts there was nothing in the nature of estoppel either in October 1930, or in April 1931. Estoppel is not examined from the point of view of the person estopped, but from that of the person who sets it up. So far as the appellant is concerned none of the essential factors giving rise to an estoppel are present (*Greenwood* v. *Martins Bank Ltd.* (4)). There was not any misrepresentation on the part of the appellant. The respondent knew the extent of the authority and neglected to comply with it. The appellant was unaware of his legal position. A mistake due to ignorance of private legal rights is treated by courts of equity as equal to a mistake of fact.

[DIXON J. referred to *Cooper* v. *Phibbs* (5).]

The question of mistake is dealt with in *Daniell* v. *Sinclair* (6). The respondent was not entitled to enter into an arrangement with the appellant's son concerning the account without the consent of the appellant, and although it did enter into such an arrangement it omitted to bring that fact under the notice of the appellant. The appellant was not under any duty to inform the respondent that it was not acting in accordance with his authority. There is no evidence that the appellant knew that the respondent was labouring under a mistake, that the respondent was mistaken

(1) (1928) 1 K.B. 48.
(2) (1909) 2 K.B. 1010.
(3) (1929) 1 K.B. 40, at p. 60.
(4) (1933) A.C. 51, at p. 57.
(5) (1867) L.R. 2 H.L. 149, at p. 170.
(6) (1881) 6 App. Cas. 181, at p. 190.

H. C. OF A. 1935. WEST v. COMMERCIAL BANK OF AUSTRALIA LTD.

as to its legal position, or that the respondent did what it did as a result of the circumstance that the appellant stood by and did nothing (*Willmott* v. *Barber* (1)). There is no evidence that as a result of the appellant's silence the respondent altered its position to its detriment. To support an estoppel the evidence must be clear and unambiguous (*George Whitechurch Ltd.* v. *Cavanagh* (2)). The appellant neither acquiesced in nor ratified what the respondent had done and was doing (*Forman & Co. Pty. Ltd.* v. *Ship "Liddesdale"* (3)). The onus of proving the contrary is upon the respondent (*Greenwood* v. *Martin's Bank Ltd.* (4)), as is also the onus of proving damage suffered by it.

Markell K.C. and *Hill*, for the respondent, were not called upon.

Cur. adv. vult.

Mar. 27.

THE COURT delivered the following written judgment :—

This is a plaintiff's appeal against a decision of the Full Court of the Supreme Court affirming a judgment for the defendant entered at the trial of the action.

The action was brought against the respondent bank, of which the appellant had been a customer. He alleged that a balance remained to his credit upon his current account of an amount which in his declaration he named at over £4,750. The respondent bank, on the other hand, alleged that he was its debtor in an amount overdrawn of £554 11s. 9d. It filed a plea by way of cross-action for this sum which by the judgment given at the trial it recovered. The difference between the rival figures is made up of cheques drawn upon the account which the respondent bank paid and debited to it.

The appellant claims that these cheques were drawn without his authority and that accordingly the respondent bank was not entitled to debit him with them.

The respondent bank, on the other hand, says that if they were not drawn with his prior authority, they were at least drawn on his

(1) (1880) 15 Ch. D. 96, at pp. 105, 106.
(2) (1902) A.C. 117, at p. 145.
(3) (1900) A.C. 190, at p. 204.
(4) (1933) A.C. 51.

behalf and for the benefit of the business of which he was proprietor and that he ratified and adopted the drawings and with full knowledge also stood by and allowed the bank to make the payments out of his account.

It appears that on 21st October 1929 the appellant registered himself as the proprietor of an electrical and radio business carried on under the name "L. T. West Trading Co." On the same day he opened an account with the respondent bank in that name. He himself was a foreman printer and he commenced the new business for the purpose of enabling his son, who bore the same name as himself, to carry it on. He gave the bank sufficient security to support a small overdraft and he signed an authority in favour of his son and his wife to draw cheques, bills and promissory notes payable out of the account. Under the authority the signatures both of his wife and of his son were required. Father, mother and son seem to have been closely associated, and, according to the appellant, he wanted the mother's signature as a safeguard or protection. The son conducted the business, and until July 1930 the operations on the account were carried on regularly under the authority by means of cheques bearing both signatures. But, about 1st July 1930, West junior requested the teller at the respondent bank to honour cheques upon his signature alone for about a fortnight because his mother was ill. He said that he could obtain her signature ratifying the payments when she recovered. The request was complied with. At the end of the fortnight the teller asked for the mother's ratification; but West junior said she had gone away, having become convalescent after her illness, and that he would get her signature when she returned. This he did not do; but the respondent bank went on honouring the cheques on his signature alone until 30th March 1931. The evidence does not explain why the bank did this or whether the teller acted on his independent responsibility. But, however careless the course taken may have been, there can be little doubt that it was supposed that the appellant's approval had been obtained or at any rate would not be withheld. In point of fact he was told at the end of September 1930 that his wife had ceased to sign cheques and that they were signed by his son alone. Apparently on 29th September 1930 some

H. C. OF A. 1935.

WEST v. COMMERCIAL BANK OF AUSTRALIA LTD.

Rich J. Starke J. Dixon J. McTiernan J.

promissory notes payable at the bank were to be made in favour of a friend of the appellant to secure a loan of money for the business. The appellant was to indorse them. Upon the question arising of the need of his wife's signature, the appellant was told that she had not been signing cheques for some months and that the bank did not require her signature. The appellant indorsed the promissory notes without obtaining his wife's signature. They were made payable at the bank, where three of them were presented before 30th March, namely 2nd January, 2nd February and 3rd March 1931, and duly honoured out of the account. In answer to a question why after that he did not stop his son drawing cheques alone, a question with which he was pressed in cross-examination, the appellant said: "How could I? I told him not to go any further with it." But the appellant admitted that he knew that his son went on as before without his mother's signature. He knew that by cheques drawn by his son alone disbursements in connection with the business were made. These included all the purchases made for the business, the rent and other expenses of the business, and the instalments upon a motor car obtained for the business. These payments between the end of September and the end of March were made with his knowledge by cheques signed by his son only, drawn on the business account. He took no step to stop the practice and made no communication to the bank. Of his conduct he gave more than one explanation in cross-examination. He was asked: "You took no exception to it?" and answered: "If the bank gave him the right to do it." "You did not raise any complaint about it when you knew that?" "No. I did not give it a thought that way." At another point he suggested that it was the bank's business; he trusted it to protect him and it did not. He answered a question by the judge why he did not stop the bank going further. "Well, I thought the bank had the right to do that, that is what I thought about it. I never thought the bank would do wrong, any way, particularly in these matters; whatever they do is right, I thought they had power to do it; that was just my opinion." But, in a letter written in May or June 1931 to his friend who lent the money, the appellant gave the following account of the matter. After stating that, when he asked his wife to go to the office to give

her signature for the promissory notes, she informed him that she had not been signing for some months, and that next day he saw his son, the letter goes on: "He explained that when his mother was ill last July he got the teller to oblige him with the one signature and it had continued every since. I told him then that I considered the bank had taken the business out of my hands and that he and the bank could carry on as I was finished with it. As it was about four months before I knew I decided I would wait till I received a communication from the bank before I took action, being of opinion that an authorization for signature is irrevocable. The only thing I received was the note already referred to. I have taken counsel's advice on the matter who is taking the matter up. There has been between £5,000 and £6,000 passed through with one signature and he is of opinion that it stands to my credit. Of course Len" (his son) "is awfully annoyed. He considers the teller's position. . . . My opinion of the teller's position is that if he by kindness or any other cause revoked a signature which takes the control of the finance out of the proprietor's hands he is not worth thinking about and not worthy of his position. I hope I have explained the case fully and any advice you can offer I shall greatly appreciate."

On 2nd April 1931 the appellant's son told him that because of the overdraft the bank required that a No. 2 account should be opened. He said the overdraft was about £560 and that he had arranged that £10 a month should be paid out of the No. 2 account towards payment of the overdraft standing to the debit of the existing account. He showed his father the pass book. He asked him to sign an authority, which he produced, to enable him to operate upon the No. 2 account. The appellant considered the matter, he says, for some days, and then altered the authority so that his wife's signature as well as his son's should be necessary and signed it. He did not go near the bank himself but gave the printed authority signed by all three members of the family to his son to give to the bank. Thereafter there were no further drawings from the first account and until the end of May the business was carried on by means of the No. 2 account, from which one monthly sum of £10 was transferred to the earlier account.

H. C. OF A. 1935.

WEST v. COMMERCIAL BANK OF AUSTRALIA LTD.

Rich J. Starke J. Dixon J. McTiernan J.

The appellant made no complaint whatever against the bank until it refused to honour a cheque which in its view there were no funds to meet. He then issued his writ on 21st August 1931.

Upon these facts the appellant's case appears quite hopeless. When at the end of September 1930 he learnt that money had been drawn out of his account as on his behalf but not in conformity with his actual authority, he might have been at liberty to disown the drawings. But it must have been apparent to him that the bank had been acting and was continuing to act upon the assumption that, although the drawings were irregular in form, it might safely allow them. He was not at liberty to acquiesce in the assumption, watch his son continue the practice and then, when his son could get no further advantage from it, to depart from the assumption and so obtain immunity, if not enrichment, at the expense of the bank.

Departure from an assumption upon which another person has acted to his detriment is not permitted to a party who, knowing or believing the other labours under a mistake in adopting it, has refrained from correcting him when it was his duty to do so (Cf. *Thompson* v. *Palmer* (1)).

In the present case, the conduct of the appellant goes much further. He stood by deliberately. He indorsed promissory notes which did not bear his wife's signature, intending them to be debited to the account in exoneration of his own liability on them. He knew and approved of the arrangement to close off the old overdrawn account and pay by monthly instalments out of the No. 2 account the liability arising from the drawings that he now repudiates. These facts are much stronger than those held to be sufficient in *Greenwood* v. *Martins Bank Ltd.* (2).

For the appellant it was contended that the respondent bank laboured under no mistake of fact, under none upon which it acted to its detriment, under none to which the appellant's silence contributed and under none which it was incumbent upon the appellant to correct.

The mistake lay in supposing that his son's cheques might be properly or safely paid out of the account. It might not have been

(1) (1933) 49 C.L.R. 507, at p. 547.

(2) (1933) A.C. 51.

clear to him why the bank entertained this belief, but no one in his place could have doubted its existence. The detriment consisted in the bank's continuing day by day to meet cheques, and, later, relying upon the arrangement to pay £10 a month and refraining from any attempt to enforce liability against West junior or to follow the money. It is incredible that, but for the appellant's silence the bank would have gone on paying cheques on one signature. If he had made a protest of any sort to the bank, there can be no doubt the practice would at once have ended. It was clearly his duty not to remain silent and thus allow the bank to pay out moneys to his agent for use in his business believing that they might debit his account. Indeed, what he did affords evidence from which the inference of fact might be drawn that from September onwards the son had his authority for drawing cheques without his mother's signature and that he was content to adopt the drawings already made. It is not surprising that the Full Court drew an inference of ratification.

The appeal should be dismissed with costs.

Appeal dismissed with costs.

Solicitor for the appellant, *J. R. Thomas.*

Solicitors for the respondent, *Marsden & Lightoller.*

J. B.