Raffles Money Change Pte Ltd (formerly known as Honest Money Changer Pte Ltd) v Skandinaviska Enskilda Banken AB (Publ) (formerly known as Skandinaviska Enskilda Banken AB)
[2009] SGHC 37

Case Number : DA 33/2007

Decision Date : 17 February 2009

Tribunal/Court : High Court

Coram : Chan Sek Keong CJ

Counsel Name(s) : N Sreenivasan and Palaniappan Sundararaj (Straits Law Practice LLC) and Lin Ming Khin (Donaldson & Burkinshaw) for the appellant; Chew Ming Hsien Rebecca and Nigel Pereira (Rajah & Tann LLP) for the respondent

Parties : Raffles Money Change Pte Ltd (formerly known as Honest Money Changer Pte Ltd) — Skandinaviska Enskilda Banken AB (Publ) (formerly known as Skandinaviska Enskilda Banken AB)

Banking – Cheques – Forged – What constituted "complete and irreversible payment" by bank – When paid funds might be debited by bank on discovery of fraud – Relevance of change in position by recipient of mistaken payment

17 February 2009 Judgment reserved

Chan Sek Keong CJ:

Introduction

1 This was an appeal by Raffles Money Change Pte Ltd ("the Appellant") against the decision of the District Judge ("the DJ") in District Court Suit No 1465 of 2006 (see *Raffles Money Change Pte Ltd v Skandinaviska Enskilda Banken AB (Publ)* [2008] SGDC 70 ("the GD")). The DJ had dismissed the Appellant's claim against Skandinaviska Enskilda Banken AB (Publ) ("the Respondent") for repayment of €39,982.71 which the Appellant claimed had been wrongfully debited against its account by the Respondent.

Facts of the case

2 The Appellant operated a foreign currency account with the Respondent subject to the Respondent's general terms and conditions for operating such accounts ("the General Terms"), the relevant clauses of which are as follows:

> **Credit**
>
> 1.23 Cheques, financial instruments received for collection will be credited after the Bank receives payment provided the Bank may, however at its sole discretion give immediate credit for cheques, provided that the Bank reserves the right to debit such credited amount from the account if the cheques are dishonoured.
>
> …
>
> **13 DRAFTS, CHEQUES AND SIMILAR INSTRUMENTS NEGOTIATED**

13.1 The Bank has the right to debit the customer's account with drafts, cheques or similar instruments previously negotiated for the customer's account, in case of their non-payment. Pending the settlement of the debit balance arising out of such debit entries, the bank retains a claim for payment of the face amount of the instrument plus related expenses against any party to the instrument.

3 On 23 September 2005, the Appellant presented a bank draft dated 1 September 2005 ("the Euro Draft") drawn on the Bank of Ireland, Glassen Dublin, in the sum of €40,000 to the Respondent for collection. The Respondent sent the Euro Draft to its wholly-owned subsidiary, SEB AG Merchant Banking in Frankfurt ("the Frankfurt subsidiary"), for clearance and collection. On 6 October 2005, Ms Chua Mui Suan ("Ms Chua"), an employee of the Respondent, called the Appellant's managing director, one Mr Lim Joo Boon ("Lim"), and informed him that the Respondent would be crediting the Appellant's account with the value of the draft, less bank charges (*ie*, the net amount of €39,982.71) on 7 October 2005. This was done. Subsequently, on 12 October 2005, the Respondent informed the Appellant that the Euro Draft was counterfeit and that the drawee bank would not be paying the draft. The Respondent accordingly debited the Appellant's account in the sum of €39,982.71.

4 The Appellant then commenced these proceedings against the Respondent to recover the amount of €39,982.71 on the ground that the Respondent had wrongfully debited its account. The Respondent relied on cll 1.23 and 13.1 of the General Terms. The Appellant's arguments before the DJ were as follows:

(a) Clauses 1.23 and 13.1 of the General Terms were exclusion clauses and infringed the Unfair Contract Terms Act (Cap 396, 1994 Rev Ed) ("UCTA") as they were unfair and unreasonable.

(b) The Respondent misrepresented to the Appellant the nature of the payment made to the Appellant on 7 October 2005 and was thereby estopped from relying on cll 1.23 and 13.1 of the General Terms.

(c) The Respondent breached its contractual duty (as well as its duties under the law of torts) to act with reasonable skill and diligence.

(d) The Respondent had debited the Appellant's account wrongfully.

The DJ's decision

The Appellant's arguments

5 The DJ rejected all the Appellant's arguments. As the Appellant has not appealed against the DJ's ruling that cll 1.23 and 13.1 of the General Terms were not exclusionary clauses and therefore did not infringe UCTA, this judgment will deal only with the remaining three grounds which the Appellant has raised before me.

Misrepresentation giving rise to estoppel

6 On the issue of misrepresentation giving rise to an estoppel, the DJ stated that the law required such a representation to be "unambiguous" or "unequivocal" (see the GD at [16]). The DJ found on the evidence that, on 6 October 2005, Ms Chua had merely informed Lim that the sum of €39.982.71 would be credited to the Appellant's account and that she had not informed Lim that the Respondent would not be relying on its contractual rights under cll 1.23 and 13.1. This was also not the first time this "standard operating procedure" had been followed by the Respondent in calling the

Appellant to inform it of the clearance of foreign currency cheques and bank drafts whenever funds were being credited to its account. The DJ also found that, on 7 October 2005, the Respondent had sent an online statement to the Appellant saying that the amount credited on the same day was "subject to final payment", which Lim confirmed having received. Accordingly, the DJ held that there was no misrepresentation giving rise to an estoppel.

7 The DJ also held that, in any event, even if there was a misrepresentation on 6 October 2005, the Appellant did not rely on it to make payment of the said amount to its customer on 7 October 2005 as Lim also admitted that he relied not only on oral communications from the Respondent but also on online statements. In the present case, the online statement had contained a caution that the crediting was subject to final payment.

Breach of duty in contract and tort

8 With respect to the allegations of breach of duty by the Respondent in contract and tort, the DJ dismissed them on the ground that they were no different from the allegation of misrepresentation giving rise to estoppel.

Wrongful debiting of account

9 The DJ considered argument (d) (see [4] above) as the key plank of the Appellant's case. It was argued by the Appellant that since the Frankfurt subsidiary had sent a SWIFT (Society for Worldwide Interbank Financial Telecommunication) message to the Respondent's Singapore branch ("the Singapore branch") crediting its account with €40,000, it meant that the crediting was a payment to the Singapore branch that was "complete and irreversible", and therefore the resulting payment by the Respondent to the Appellant was also "final and irrevocable". It was also argued that the Respondent had adduced no evidence that the Frankfurt subsidiary was entitled to reverse the payment to the Singapore branch, and for this reason cll 1.23 and 13.1 of the General Terms were not applicable, and that the caution "subject to final payment" in the online statement sent by the Respondent to the Appellant was meaningless as a unilateral contractual term.

10 The Respondent objected to this argument on the ground that it was not pleaded, which the DJ upheld. But, in any event, the DJ was of the view that the Appellant's arguments relied heavily on the interpretation, effect and implication of the SWIFT message sent by the Frankfurt subsidiary on which the Appellant had led no evidence. The DJ distinguished the New Zealand Court of Appeal case of *Dovey v Bank of New Zealand* [2000] 3 NZLR 328 ("*Dovey*") (which involved SWIFT transactions) on the ground that both parties there had led expert evidence on the effect of a message sent under SWIFT. Furthermore, the Appellant had adduced no evidence as to what it meant by a payment being "complete and irreversible" or "final and irrevocable". The DJ also held that the decisions relied upon by the Appellant to support its argument, *viz*, *Momm v Barclays Bank International Ltd* [1977] QB 790 ("*Momm*") (payment from one customer's account to another customer's account within the same bank) and *Royal Products Ltd v Midland Bank Ltd and Bank of Valletta Ltd* [1981] 2 Lloyd's Rep 194 (transfer of money between separate bank accounts at separate banks), were not relevant.

Remaining issues

11 The Appellant also argued that cll 1.23 and 13.1 did not apply unless the Respondent had made immediate payment, which it had not done in the present case. The DJ rejected this argument on the ground that, under cl 1.23, it was not mandatory for the Respondent to give immediate credit as the giving of such credit for cheques was clearly expressed to be discretionary. The DJ also rejected, as illogical and irrational, the Appellant's argument that, as cl 13.1 was expressed to be applicable to

negotiable instruments, it could not apply to the Euro Draft which was a forgery and therefore not a negotiable instrument.

12 Finally, the DJ held that, even if she were to accept the arguments of the Appellant (which she did not), its claim would still fail as it had not produced any evidence that it had paid the sum of €39,982.71 to its customer. Under cross-examination, Lim admitted that the Appellant had no documentary evidence to show that it had paid €39,982.71 to its agent in Kuala Lumpur for onward transmission to its customer or its customer's beneficiary, as the Appellant had alleged. The Appellant's internal documents also did not show that payment had in fact been made or that its customer had received such payment.

13 For all the foregoing reasons, the DJ dismissed the Appellant's claim with costs.

Issues in this appeal

14 In this appeal, the Appellant has argued that the DJ was wrong in holding that the Respondent was entitled to debit the Appellant's account in the sum of €39,982.71 on the following grounds:

(a) Clauses 1.23 and 13.1 of the General Terms had no application to the facts of the case.

(b) The Respondent had made a misrepresentation of fact (that the payment made by the Respondent into the Appellant's account was final and irreversible), which led the Appellant to rely on it to its detriment (by paying the funds to its customer). Accordingly, the Respondent was estopped from reversing the payment to the Appellant.

(c) A SWIFT message received by the Respondent from the Frankfurt subsidiary on 6 October 2005 ("the SWIFT message") was proof that the Respondent had received payment from the Frankfurt subsidiary and the Respondent had failed to disprove that the payment was not complete and irrevocable.

Applicability of clauses 1.23 and 13.1 of the General Terms

15 The basis for the Appellant's argument on cl 1.23 is that it has two limbs. The first limb states that cheques and financial instruments received by the Respondent for collection will be credited after the Respondent has received payment. The second limb states that the Respondent may at its discretion give immediate credit for cheques only and not bank drafts. The Appellant therefore argued that, since the Respondent collected a bank draft but not a cheque, and did not give immediate credit to the Appellant, neither limb of cl 1.23 was applicable.

16 I agree with the Appellant's argument on the construction of cl 1.23 that it has two limbs and that neither limb provides a defence to the Respondent on the facts of this case. The word "payment" ordinarily means final payment and not conditional or revocable payment. Similarly, the word "credited" means an irrevocable crediting. In the context of cl 1.23, both words are intended to have those meanings because their fulfilment imposes an obligation on the part of the Respondent to pay the customer. In the present case, the Respondent's case is that it did not receive final payment and also that it only paid the Appellant subject to final payment from the Bank of Ireland or the Frankfurt subsidiary.

17 I also agree with the Appellant's argument that the second limb applies only to cheques, but whether it applies in the present case depends on whether the Euro Draft was a cheque. In the present case, the bank draft was ostensibly drawn by the Bank of Ireland on Deutsche Bank AG for

€40,000 payable to the Appellant. Although the Respondent made no argument on this point, in law, it would be a cheque, as a bank draft is only a cheque drawn by a bank on another bank. However, whether or not the Euro Draft was a cheque is not significant in the present case because, as argued by the Appellant, the Respondent did not give immediate credit for it. What the Respondent did was to send the Euro Draft to the Frankfurt subsidiary for collection from the Bank of Ireland, and later it credited the Appellant's account with the net proceeds of the collection after receiving the SWIFT message from the Frankfurt subsidiary. The crediting was subject to final payment. For this reason, cl 1.23 is not applicable to protect the Respondent.

18 Clause 13.1 applies only where the Respondent has negotiated cheques or drafts for the customer's account. The Appellant has not argued that the Euro Draft was not negotiated to the Respondent but has argued that cl 13.1 required the Respondent to establish as a fact that it did not receive payment from the Frankfurt subsidiary before it was entitled to debit the Appellant's account, and this the Respondent had failed to show. The Appellant further argued that the fact that the bank draft was counterfeit did not establish that the Respondent was not paid, and that the Respondent's own documents showed that its own account was in fact credited.

19 In my view, the Appellant's argument has no merit. The Respondent's own documents indeed show that its own account was credited; but it was credited by the Frankfurt subsidiary and not by the drawee bank (the Bank of Ireland). This was a collecting bank-correspondent bank communication between the Respondent and the Frankfurt subsidiary. Since the Bank of Ireland did not pay on the forged draft, the Frankfurt subsidiary could not have been paid, and, similarly, it could not have paid the Respondent. This is plain common sense. What the Appellant is relying on is a technical argument that, because the Frankfurt subsidiary had credited the account of the Respondent and had so informed the Respondent, the latter had received payment irrevocably, and that unless the Respondent produced evidence to show that it had not received such payment, it could not debit the Appellant's account. The fact is that when the Respondent advised the Appellant of the receipt of funds from the Frankfurt subsidiary, it did so on the understanding that it had not received final and irrevocable payment from the drawee bank. In my view, the word "payment" in cl 13.1 must mean payment from the drawee bank, and not from the collecting bank, which is only a conduit for the collection of the proceeds of the bank draft from the drawee bank. In my view, the Respondent has produced sufficient evidence to show that it was not able to collect the proceeds of the Euro Draft from the Bank of Ireland, and therefore it was a case of non-payment under cl 13.1. Accordingly, the Appellant's argument that cl 13.1 does not apply fails.

20 However, even if neither cl 1.23 nor 13.1 provides a defence to the Respondent in the present case, it does not automatically mean that the Appellant is entitled to be paid the sum of €39,982.71 (which the Respondent had never collected), for two reasons.

21 The first reason is that it is well established that the payee of a forged instrument has no right to receive payment on the instrument (*National Westminster Bank Ltd v Barclays Bank International Ltd* [1975] QB 654). Therefore, the Frankfurt subsidiary, who is merely a collecting agent, has no right to receive payment. If a bank making the payment is unaware of the forgery, the payment is made under the mistaken belief that the payee is entitled to receive payment on the instrument. In that situation, if the Respondent, as the collecting bank, has paid to the Appellant finally and irrevocably the sum of €39,982.71 (which it has not collected), it would have been making a mistake of fact in so doing. In that case, the Respondent would be entitled at common law to recover the payment from the Appellant unless the Appellant has changed its position to its detriment (*Kleinwort, Sons, and Co v Dunlop Rubber Company* (1907) 97 LT 263). The Appellant has indeed alleged that it had changed its position by paying the proceeds of the collection to its own customer immediately after its account was credited with the funds on 7 October 2005. However, the DJ rejected this argument on

the ground that the Appellant had produced no evidence to prove that it had changed its position. Accordingly, as the Appellant was unable to show that the DJ's finding in this regard was wrong, this appeal fails.

22 The second reason is that, as found by the DJ, when the Respondent credited the Appellant's account in the sum of €39,982.71, it informed the Appellant that the credit was "subject to final payment". As the Appellant could not show that the DJ was wrong in her finding, the appeal fails on this ground as well.

Representation, reliance and detriment to the Appellant not proved

23 The Appellant's argument on misrepresentation is that the DJ failed to recognise the significance of the conversation between Ms Chua and Lim on 6 October 2005 when she informed him that the Euro Draft had been cleared and the amount of €39,982.71 would be credited to the Appellant's account the next day. The argument is that it was an unsolicited conversation which occurred about two weeks after the Euro Draft was handed to the Respondent for collection and therefore there must have been a reason for it, which reason was that Ms Chua wanted to convey a piece of important information to the Appellant so that it could act on it. That piece of information was that the Appellant's account would be credited with the net proceeds of the Euro Draft. The Appellant did act on it the next day when it allegedly paid the proceeds of the collection to its customer.

24 It was further argued that the DJ, instead of making a finding of fact whether or not such a conversation had taken place between Ms Chua and Lim, wrongly considered its significance on the basis of whether the conversation had displaced the contractual terms in cll 1.23 and 13.1 of the General Terms, *ie*, whether the Respondent had waived its rights to debit the Appellant's account under cll 1.23 and 13.1.

25 In my view, this argument also fails on the simple ground that, regardless of whether Ms Chua did inform Lim that the crediting would be subject to reversal if final payment was not received, the DJ found as a fact (and it was also not disputed) that an online bank statement was sent to the Appellant on 7 October 2005, stating that the amount credited into the Appellant's account was "subject to final payment". This statement has two implications for the Appellant. The first is that, irrespective of whether cl 1.23 or 13.1 applies to the transaction, it is implicit in this statement that if no final payment was received the credit entry would be reversed. It was never necessary for the Respondent to rely on cl 1.23 or 13.1 to debit the Appellant's account after the Respondent was notified by the Bank of Ireland that the Euro Draft was a forgery. The second implication of this statement is that, if the Appellant alleged that it had acted on Ms Chua's representation to Lim on 6 October 2005, it had to produce evidence that it had made payment of the amount credited to its account to its customer before it received notice of the Respondent's statement, and that it had made an attempt to recover the payment from its customer and was not able to do so. The Appellant has produced no such evidence.

26 The documentary evidence produced by the Appellant did not show that it had made any payment of the sum of €39,982.71 to its customer. It showed that the Appellant had made entries in its own accounts showing a foreign exchange transaction with the Respondent with respect to the €39,982.71. In this respect, the Respondent's evidence (given by Ms Valerie Tan, an employee of the Respondent, on 27 March 2007) was as follows:

Q: Just one question to ask the witness. Can you refer to DBD-40B? It is a Raffles MC Customer Eur A/C for 6 – 7 Oct 05. After the credit had been made for Euro39,982.71, can you explain to the

court what happened to this Euro39,982.71?

A: This Euro39,982.71 which was credited to RMB Euro account, subsequently, the customer fixed a foreign exchange deal/contract to convert the Euro amount to Singapore dollars.

Q: Can I refer you to PBD-19? You mentioned you fixed the foreign exchange transaction. Can you confirm this is the foreign exchange transaction you mentioned earlier?

A: Yes.

Q: What happened to the SGD81,826.78 after it was sold to the [Appellant]?

A: *This SGD81,826.78 was used to offset the foreign exchange contracts that [the Appellant] had done with us on that day and the nett amount due to us was also deposited into our account as final settlement of all the outstandings.*

[emphasis added]

27 Counsel for the Appellant has argued, correctly, that the fact that the Appellant had used the €39,982.71 for its other foreign currency transactions with the Respondent did not mean that it could not have changed its position. It could have used its other moneys to pay its customer. However, there is no such evidence either. What the Appellant has adduced by way of evidence of its alleged payment to its customer are:

(a) copies of two statements dated 17 October 2006 and 13 October 2005 respectively, confirming that it had bought $81,764.64 from its Malaysian agent (KL Resources Sdn Bhd) on 7 October 2005 and sold $81,764.64 to its customer (one Shahul Hameed) on 7 October 2005; and

(b) a police report dated 14 October 2005 made in Singapore saying that it had received, *inter alia*, the Euro Draft for €40,000 from Shahul Hameed for collection, and that after it had been paid the net proceeds, its agent, KL Resources Sdn Bhd ("the Agent"), had released the Malaysian Ringgit funds (in cash) to Shahul Hameed who then released the same to the real customer, Vee Tee International (who had originally given the Euro Draft to Shahul Hameed for collection).

28 The two statements were not evidence of payment to the Agent as they were merely internal entries in the books of the Appellant. Neither was the police report which contained merely the Appellant's assertions and was also hearsay in relation to the alleged payment by Shahul Hameed to Vee Tee International. The Appellant did not present any evidence that the Agent had indeed paid cash to its customer, or when such a payment was made.

The SWIFT message

29 The Appellant has relied strongly on the effect of the SWIFT message from the Frankfurt subsidiary as evidence of a complete and irreversible payment by the Frankfurt subsidiary to the Respondent. Hence, the Respondent's crediting of the sum of €39,982.71 was also final and irrevocable. In support of this argument, counsel for the Appellant referred to the decision in *Momm* ([10] *supra*) where it was held that payment was complete and irreversible once instructions to make payment were carried out and funds were available to the payee. Reference was also made to the decision in *Dovey* ([10] *supra*). The short answer to this argument is that, in the present case, there

were no funds available for payment to the Appellant. For this reason, the decision in *The Brimnes* [1975] QB 929 at 963, which the Appellant has relied on for the proposition that payment is said to be complete when the creditor receives cash or has cash available on which he can draw if he so wishes, is also not relevant. What the Respondent did was to make a provisional credit to the Appellant's account subject to it being reversed if final payment on the Euro Draft was not made. It should be remembered that the Frankfurt subsidiary which sent the SWIFT message was only a collecting bank. Neither *Momm* nor *Dovey* nor *The Brimnes* involved collecting banks. *Momm* and *The Brimnes* both concerned internal funds transfers between accounts held at a single bank, while *Dovey* dealt with a funds transfer from one bank to another. In all three cases, no cheques or bank drafts were involved.

30 It is contrary to commercial sense for a collecting bank to make a complete and irreversible (or unconditional) payment of funds to its instructing bank if it has not collected the funds. The fact that the Frankfurt subsidiary had not collected the funds is proved by the Respondent's caveat that the crediting to the Appellant's account was subject to final payment. There would be no reason for the Respondent to qualify the crediting unless it had a similar arrangement with the Frankfurt subsidiary. Furthermore, the Appellant's arguments on misrepresentation and also estoppel in the present case were based on the Respondent having received a complete and irreversible payment as evidenced by the SWIFT message. This argument has no merit. As noted by the DJ, SWIFT is just a swift means of communication between banks and is not in itself a system of settlement of accounts between banks (see the GD at [31]).

Conclusion

31 For the foregoing reasons, the appeal is dismissed with costs and the usual consequential orders.