

Judgment of the Lords of the Judicial Committee of the Privy Council on the Appeal of Fleming v. The Bank of New Zealand, from the Supreme Court of New Zealand; delivered 27th June 1900.

Present at the Hearing :

LORD DAVEY.

LORD ROBERTSON.

LORD LINDLEY.

SIR HENRY DE VILLIERS.

SIR FORD NORTH.

[*Delivered by Lord Lindley.*]

This is an action brought in New Zealand by the Plaintiff against his bankers for dishonouring certain cheques. The action was tried with a jury and the Plaintiff obtained a verdict and judgment for 2,000*l.* damages. The Defendants appealed and the Court of Appeal not only set aside the verdict and judgment but entered judgment for the Defendants with costs. From this decision the Plaintiff has appealed to this Board.

The Plaintiff was a farmer and stock dealer in an extensive way of business. He was a large buyer of sheep for which he was in the habit of paying cash. He was in good credit but in August 1897 his account with his bankers was overdrawn to the extent of 859*l.* He had made an arrangement with them for an overdraft to the extent of 1,200*l.* The Plaintiff had in August and September 1897 a large number of sheep in the hands of the Southland Frozen

Meat and Export Company and these sheep were at the Plaintiff's disposal and were available as a security if the Plaintiff desired to borrow money upon them. Mr. Chisholm was the Bank Manager and Mr. Thompson was the Manager of the Frozen Meat Company.

On the 28th August 1897 the Plaintiff and Chisholm had a conversation about the Plaintiff's overdraft; about the sheep he had in store with the Frozen Meat Company; and about further purchases of sheep which the Plaintiff might desire to make. The Plaintiff and Chisholm gave different accounts of this conversation; Chisholm maintaining that these sheep were to be a security for the Plaintiff's overdraft whilst the Plaintiff maintained that no pledge of these was ever made. The verdict of the jury has rendered it unnecessary to refer more in detail to this part of the case.

On the 4th September 1897 the Plaintiff drew on the Defendants four more cheques for sums amounting in the aggregate to 658*l.* 17*s.* 2*d.* in payment of sheep then bought by him. In order to provide for the payment of these cheques the Plaintiff asked Thompson to see Chisholm and to pay 1,000*l.* into the Bank to the Plaintiffs' credit to meet these particular cheques. Thompson knew nothing of the Plaintiff's overdraft. On the 6th September 1897 Thompson saw Chisholm and explained his mission, but proposed that as a matter of convenience to the Frozen Meat Company he should deposit a store warrant for sheep instead of cash. This Chisholm assented to. A store warrant for 2,250 sheep belonging to the Plaintiff and valued at 1,000*l.* was accordingly sent to the Bank on the same 6th September. Thompson then supposed that the cheques to meet which he had deposited the warrant would be paid on presentment. Chisholm appears to have understood that the store warrant was to

secure the Plaintiff's old overdraft. Whatever the explanation may be the fact is that after Chisholm had received the store warrant the cheques were presented for payment at the Bank and were dishonoured. This is the Plaintiff's grievance and cause of action. The next day Chisholm sent to the holders of the cheques and they were again presented at the Bank and were then paid. The real controversy at the trial was whether the store warrant was deposited by Thompson to meet the four cheques drawn by the Plaintiff on the 4th September or whether it was deposited to cover the old overdraft. Another question raised at the trial was whether Thompson exceeded his authority in obtaining credit from the Bank on the security of the store warrant instead of placing 1,000*l.* to the Plaintiff's credit at his bankers in order to meet the cheques in question.

The difference between the Plaintiff's instructions and the mode in which Thompson carried them out was practically of so little consequence to any one that their Lordships are surprised that any real importance should have been attached to this variation from the Plaintiff's instructions.

The Plaintiff said he knew nothing about store warrants and asked Thompson to place 1,000*l.* to his credit. Thompson agreed to do so. He made no difficulty about it; he treated the matter as an ordinary business transaction. As regards this advance Thompson represented the Frozen Meat Company and by making the advance that Company would acquire a lien or security on the Plaintiff's sheep in the possession of the Company. The benefit of this lien could be transferred to the Bank without any instructions from the Plaintiff and without his consent. As a matter of business it was quite immaterial whether Thompson advanced the Plaintiff 1,000*l.* and placed that sum to the Plaintiff's credit with the

Bank or procured the Bank to place that sum to his credit without going through the form of making the advance himself and then transferring his debt and the security for it to the Bank. It is true that nothing was said by or to the Plaintiff about any store warrant or about Thompson obtaining an advance from the Bank on the security of a store warrant. But when the Plaintiff was told what had been done he was perfectly satisfied (Record pp. 7 and 8); and when asked why he did not bring an action against the Frozen Meat Company for not advancing the 1,000*l.* his answer was because they did what was equivalent to it (Record p. 11). This evidence proves not that there was a ratification of an unauthorised act but rather that what Thompson did was within the real scope of the authority originally conferred upon him by the Plaintiff which appears to their Lordships to be the real truth. It appears to their Lordships to be plain from the evidence given at the trial that it never occurred to Chisholm nor to Thompson nor to the Plaintiff that anything could turn on the substitution of the store warrant for cash; they all treated the substitution as of no importance at all.

The following questions however were submitted to the jury by the Judge who tried the action :—

“ 1. Did the Plaintiff and the manager of the Defendant Bank agree on the 28th August 1897 that the bank should honour the Plaintiff’s cheques up to 1,200*l.*?—Yes.

“ 2. Was it part of the agreement that the proceeds of 2,250 sheep of the Plaintiff’s then in the Southland Frozen Meat Company’s works when sold should be paid to the Defendant Bank in payment or reduction of such overdraft?—No.

“ 3. Or were the proceeds of the said sheep and also of some skins of the Plaintiff’s then at a fellmongery near Invercargill merely mentioned by the Plaintiff as the source from which he expected to pay the said overdraft?—Yes.

“ 4. Did the Plaintiff on the 4th September request Mr. Thompson to pay into his credit with the Defendant Bank the sum of 1,000*l.* to meet certain cheques which the Plaintiff had drawn to pay for sheep purchased?—Yes.

“ 5. Did Mr. Thompson tell Mr. Chisholm that he had been requested by Plaintiff to pay 1,000*l.* to Plaintiff’s credit at the Bank to meet cheques already drawn by him to pay for sheep purchased?—Yes.

“ 6. Did Mr. Thompson request Mr. Chisholm to accept a store warrant for 1,000*l.* worth of Plaintiff’s sheep instead of his paying in 1,000*l.*?—Yes.

“ 7. Did Mr. Chisholm accept the said warrant as a consideration for honouring Plaintiff’s cheques beyond the limits of his overdraft?—Yes.

“ 8. Did the request made by Plaintiff to Mr. Thompson to pay 1,000*l.* to his credit to meet the said cheques authorise Mr. Thompson to deposit a warrant for 1,000*l.* worth of sheep instead of paying 1,000*l.* to Plaintiff’s credit?—No.

“ 9. Did Plaintiff on the 7th September express his approval of Mr. Thompson’s act in depositing the said warrant?—Yes.

“ 10. Did the Bank on the 6th September refuse to pay the cheques referred to in the statement of claim?—Yes.

“ 11. Were the 2,250 sheep mentioned in the warrant sheep of the same number and value as those referred to in the conversation between the Plaintiff and Mr. Chisholm on the 28th August?—No not necessarily.

“ 12. Did the Bank between the presentation of the cheques on the afternoon of the 6th September and noon of the 7th September make inquiries to ascertain the purpose for which the said cheques had been drawn?—No.

“ 13. If so was the time taken by the Bank a reasonable time?

“ 14. Has the Plaintiff suffered any and if so what damages by reason of the Defendant Bank refusing payment on the afternoon of the 6th September of the cheques in the statement of claim mentioned?—Yes, 2,000*l.*”

On the above findings judgment was entered for the Plaintiff for 2,000*l.* damages and costs. The Defendants appealed and applied for a new trial. They contended that the Plaintiffs had no cause of action, that evidence as to special damage had been improperly admitted and that the damages were excessive.

In the Court of Appeal all the members of the Court agreed that evidence of special damage had been improperly admitted and that the damages were excessive. If a new trial had been ordered unless the Plaintiff had consented to reduce the damages to say 500*l.* as suggested by Denniston J., probably no further appeal would

have been heard of. But the majority of the Court of Appeal went further and held that the Plaintiff had no cause of action and gave judgment for the Defendants. This view is based entirely on Thompson's substitution of a store warrant for cash with the Bank as above stated. Treating that deposit as unauthorised by the Plaintiff the Court held that there was no consideration for the promise by the Bank to the Plaintiff to pay the dishonoured cheques ; and the Court further held that the ratification by the Plaintiff of the unauthorised deposit was too late to avail the Plaintiff.

For the reasons already given their Lordships would not themselves have come to the conclusion that Thompson exceeded his real authority, or that the jury really meant to find that he had. Taking the 8th and 9th findings in connection with the evidence relating to them their Lordships would not have understood the 8th finding as amounting to more than that nothing was said by the Plaintiff to Thompson about depositing a store warrant. The further inference that Thompson exceeded his real authority in depositing the store warrant is no doubt consistent with the finding ; but such inference does not appear to their Lordships to be warranted by the evidence and appears to their Lordships to be opposed to it. They would not themselves have adopted the view taken by the Court of Appeal of the 8th finding or have regarded it as meaning more than is stated above.

But even if the Court of Appeal were right in regarding the 8th finding of the jury as a finding that Thompson really did exceed his authority and thereby expose himself and the Frozen Meat Company to actions for damages their Lordships are not prepared to hold that apart from ratification no contract was proved between the

Plaintiff and the Defendants entitling the Plaintiff to sue them for a breach of it.

Omitting the 8th finding it appears to their Lordships that the 4th, 5th, 6th, 7th and 10th answers by the jury contain all the elements necessary to constitute a contract between the Plaintiff and the Bank and a breach of it for which the Plaintiff can sue.

The authority to Thompson to obtain for the Plaintiff as his principal a promise by the Bank to pay the cheques is proved. The promise by the Bank to Thompson as the agent and for and on behalf of the Plaintiff to pay the cheques is also proved. The deposit by Thompson of the store warrant of the Plaintiff's sheep as the consideration for that promise is also proved. What more is wanted? is it consideration? or is it consideration moving from the Plaintiff?

First as to the consideration.

In *Currie v. Misa* L. R. 10 Ex. 153 App. 1 A.C. 554 the question arose whether a cheque drawn by the Defendant and made payable to Lizardi & Co. was given for consideration or not and whether the Plaintiffs were holders of the cheque for value. The case is an important authority on the meaning of consideration. Mr. Justice Lush in giving the judgment of the Exchequer Chamber said (L.R. 10 Ex. 162) "a valuable
 " consideration in the sense of the law may consist
 " either in some right interest profit or benefit
 " accruing to the one party or some forbearance
 " detriment loss or responsibility given suffered
 " or undertaken by the other : Com. Dig. action
 " on the case assumpsit B 1-15." This definition has been constantly accepted as correct. Their Lordships so treat it; and if correct it covers this case so far as some consideration is concerned. The deposit by Thompson of the sheep warrant with the Bank conferred upon the Bank some

right interest profit or benefit which is all that is required by the first half of the definition to constitute a consideration for the Bank's promise to Thompson as agent for the Plaintiff to pay the cheques which he had drawn and were outstanding.

Moreover Chisholm knew the circumstances under which the store warrant was deposited; and he was content to take it as the consideration for his promise.

Next as to the objection that the consideration did not move from the Plaintiff.

The doctrine that the consideration for a promise must move from the promisee is laid down in text-books (*e.g.*, in Leake in his Digest of the Law of Contracts pp. 611 and 612) and holds good in ordinary cases where a promise is made to one man for the benefit of another. But the authorities for the doctrine do not cover a case like the present in which the consideration is supplied by an agent who obtains the promise for and on behalf of his principal. Chisholm was told that Thompson was instructed by the Plaintiff to pay the Bank 1,000*l.* and if he had required it that sum would have been paid accordingly; Chisholm chose with his eyes open to waive the payment in cash and to take the store warrant for what it was worth. Their Lordships are not aware of any authority for saying that in such circumstances the promisor can avoid performance of his promise to the third party on the ground that the consideration did not move from him; and to extend the doctrine to such a case would be wholly unreasonable.

The above view of the case renders it unnecessary to consider any question of ratification or to dwell on the decision of *Bolton Partners v. Lambert* (XLI. Ch. D. 295) and its application

to the facts of this case. The decision referred to presents difficulties; and their Lordships reserve their liberty to reconsider it if on some future occasion it should become necessary to do so.

But although their Lordships are unable to hold that the Plaintiff had no cause of action they agree with all the members of the Court of Appeal in thinking that the learned Judge who tried the case was wrong in admitting evidence of the Plaintiff's loss of custom and of credit from particular individuals. The details of this misreception of evidence are given in the judgments of the Court of Appeal and it is unnecessary to refer to them again. The damages awarded by the jury appear to their Lordships to have been exorbitant considering that the Plaintiff's cheques were honoured by the Bank the morning after the afternoon on which they were dishonoured. The Plaintiff is however entitled to substantial damages and their Lordships will adopt the views of Mr. Justice Denniston that 500*l.* would be ample.

Their Lordships will therefore humbly advise Her Majesty that the Appeal ought to be allowed and the judgment appealed from be reversed with costs and that a new trial ought to be directed unless the Plaintiff consents that the damages shall be reduced to 500*l.* and that in the event of his so consenting he ought to be entitled to judgment for 500*l.* and to the costs of the action. The Respondents will pay the costs of this Appeal in either event.
