

The Commercial Banking Company of Sydney Limited - *Appellant*

v.

Edward Rolf Mann - - - - - *Respondent*

FROM

THE SUPREME COURT OF NEW SOUTH WALES

**JUDGMENT OF THE LORDS OF THE JUDICIAL COMMITTEE
OF THE PRIVY COUNCIL, DELIVERED THE 16TH OCTOBER, 1960**

Present at the Hearing:

VISCOUNT SIMONDS
LORD REID
LORD RADCLIFFE
LORD TUCKER
LORD MORRIS OF BORTH-Y-GEST

[*Delivered by* VISCOUNT SIMONDS]

This appeal is from a judgment of Mr. Justice Walsh in the Supreme Court of New South Wales in favour of the respondent Edward Rolf Mann, a solicitor, in an action in which he sought to recover from the appellant, the Commercial Banking Company of Sydney Limited, the sum of £3,505 on each of two counts, the first that the appellant had received that sum to his use, the second that the appellant had converted thirteen documents described as bank cheques, the property of the respondent. Bank cheques are similar to "bank drafts" as known in the United Kingdom and are commonly used by solicitors in the settlement of conveyancing transactions and by other persons engaged in commercial transactions where it is inconvenient to use cash but the creditor wishes for some further assurance of payment than the debtor's personal cheque. They are in legal significance promissory notes made and issued by the bank.

The relevant facts are not in dispute, though there are some gaps in the evidence which could to advantage have been filled.

The respondent was at all material times a solicitor practising his profession at Sydney in partnership with Gordon Arthur Richardson under the firm name of E. R. Mann & Co. The appellant carries on the business of banking in the Commonwealth of Australia. At the Pitt and Hunter Street branch at Sydney of the Australia and New Zealand Bank Limited (which will be called the A.N.Z. bank) the respondent and Richardson maintained a "trust account" in the name of the partnership. Under the partnership agreement all the assets of the partnership including all money to the credit of any bank account in the partnership name were the property of the respondent, but Richardson was entitled to the income of the partnership save for small weekly drawings by the respondent.

It was also a term of the partnership that cheques might be drawn on its banking account by either partner and that the respondent should give the necessary authority for that purpose. Such authority was given to the A.N.Z. bank.

The transactions which gave rise to these proceedings can now be stated.

Between the 6th August, 1954, and 8th May, 1956, Richardson in purported exercise of the authority that has been mentioned drew thirteen cheques upon the trust account of the partnership with the A.N.Z. bank. In each case after the printed word "Pay" in the printed form of cheque was written "Bank cheque favour H. Ward" or "Bank cheque H. Ward": the printed words "or bearer" were not struck out. In each case an application upon a printed form for a bank cheque in favour of H. Ward for an amount equal to the amount of the first mentioned cheques was completed and signed "E. R. Mann & Co. per G. Richardson". These documents were taken to the A.N.Z. bank: in each case the bank debited the trust account of the partnership with the amount of the cheque and at the same time issued a bank cheque for an equal amount in the form "Pay H. Ward or bearer". It does not appear whether these cheques were handed to Richardson or Ward or some third person, but each one of them was taken by Ward to the Maroubra branch of the appellant, where he had an account, and was cashed over the counter. In due course each of the cheques was paid by the A.N.Z. bank to the appellant against delivery.

From first to last the part played by Richardson was fraudulent. Ward was not a client of the partnership and no client had authorised the payment to him of any money held in the trust account. Richardson concealed his fraud by fictitious entries in the books of the partnership.

Their Lordships will follow the course taken by the learned Judge and in the first place consider the respondent's claim that the appellant converted the bank cheques in question. It appears to have been assumed (and, as their Lordships think, rightly assumed) that, if the claim in conversion fails, so also must the alternative count in money had and received to the use of the respondent. The claim in conversion can be maintained only if the cheques were the property of the respondent and it was sought to maintain it in alternative ways. In the first place it was contended that they became the property of the respondent from the moment that they were issued and never ceased to be his property: in the second place it was contended that they became his property by his ratification of the acts of his partner Richardson. No other act of ratification was advanced than the issue of the writ in the action. It appears to their Lordships that both these contentions must fail.

It is important to distinguish between what was Richardson's authority in relation on the one hand to the A.N.Z. bank and on the other to Mann. No question arises in these proceedings between Mann and the A.N.Z. bank. It is clear that Mann could not as between himself and the bank question Richardson's authority to draw cheques on the trust account. The position as between Mann and Richardson was different. Richardson had no authority, express or implied, from Mann either to draw cheques on the trust account or to obtain bank cheques in exchange for them except for the proper purposes of the partnership. If he exceeded those purposes, his act was unauthorised and open to challenge by Mann. It is in these circumstances that the question must be asked whether, as the learned Judge held, the bank cheques were throughout the property of Mann. It is irrelevant to this question what was the relation between Richardson and Ward and whether the latter gave any consideration for the bank cheques that he received and at what stage Mann learned of the fraud that had been practised upon him. The proposition upon which the respondent founds his claim is simple enough: Richardson was his partner and in that capacity was able to draw upon the trust account and so to obtain from the bank its promissory notes: therefore the notes were the property of the partnership and belonged to Mann, and Richardson could not give a better title to a third party than he himself had.

At this stage it is convenient to refer to the case of the *Union Bank of Australia Limited v. McClintock* [1922] 1 A.C. 240 which in its facts

and the law applicable to them bears a remarkable resemblance to the present case. It came before the Judicial Committee on appeal from the Full Court of the Supreme Court of New South Wales which had set aside a verdict in favour of the appellant bank upon a trial before judge and jury. The relevant facts were as follows. The plaintiffs in the action, of whom one was named McClintock, as trustees of a will carried on the business of newspaper proprietors and in that business employed as general manager a person also named McClintock. He opened an account under the fictitious name of Robert Haynes with the appellant bank and, having done so, drew on the plaintiffs' account with the bank a number of cheques which were duly signed and countersigned in accordance with the authority given by the plaintiffs to him and obtained in exchange from the bank its own cheques for similar amounts in favour of R. Haynes, Robt. Haynes, Robert Haynes or Robert Haynes Esq. These cheques were endorsed or purported to be endorsed by the payees and were paid into the "Robert Haynes" account which was operated on by McClintock. The plaintiffs accordingly brought their action against the bank for conversion of the bank cheques, alleging that they were their property either from the time of their issue or at least by subsequent ratification. Their Lordships note how close is the parallelism of the two cases.

As has been said, the jury returned a verdict in favour of the bank and it is clear from the summing up of the learned Chief Justice which their Lordships have taken the opportunity of studying in the Privy Council record of proceedings that they could only have done so upon the footing that the cheques did not become the property of the plaintiffs and that that was so because the acts of McClintock in procuring them were as between himself and the plaintiffs unauthorised. Upon appeal to the Full Court that Court held by a majority that McClintock as general manager acted within the scope of his authority in obtaining the bank cheques, that he received them solely as the servant of the plaintiffs and that accordingly they were the property of the plaintiffs and had been converted by the bank: it was unnecessary to have recourse to the doctrine of ratification. Mr. Justice Gordon, who dissented, held that the plaintiffs had no such property in the cheques as to enable them to sustain the plea of conversion. For him too the crucial point was whether McClintock had the plaintiffs' authority to procure the bank cheques in question, but he rightly considered that the relevant authority was that given by the plaintiffs to McClintock. Thus the question was plainly posed. Were the acts of McClintock in obtaining the bank cheques authorised by the plaintiffs, not as between themselves and the bank but as between themselves and him? If they were, the bank cheques became the property of the plaintiffs: if not, not. In the latter event the further question of ratification arose.

Upon the case coming before their Lordships' Board the main question was dealt with somewhat summarily. The issue was raised in the formal reasons of the parties, the appellant bank submitting that the plaintiffs (respondents) failed to establish that the bank cheques were their property, the plaintiffs that they became immediately on issue their property. Lord Sumner delivering the judgment of the Board said:—"This evidence was used to show that, as in some cases it might be necessary—or at least common and advantageous—to obtain a bank cheque, it must be deemed to have been within the general manager's actual authority to do so whenever he thought proper. It is enough to say that it was for the jury, if they thought proper, not to accept either the contention or the grounds for it, and their Lordships think that their general verdict for the defendants shows that they negatived the plaintiffs' case on this issue—namely, that the bank cheques were theirs when their agent and manager obtained them, but were forthwith converted by the appellants". This is a direct decision that, if the acts of McClintock were unauthorised in the relevant sense of that word, the bank cheques did not when issued become the property of the plaintiffs. It appears to their Lordships that the majority of the Full Court in *McClintock's* case erred in regarding as decisive the fact that as between the plaintiffs and the bank McClintock was authorised to obtain bank cheques, whereas the relevant question was whether McClintock was as between the plaintiffs

and himself authorised to obtain the particular cheques that were converted. Upon the verdict of the jury that he was not so authorised, they should have come to the opposite conclusion. In the same way in the present case the learned Judge, having found that Richardson obtained the bank cheques in question in fraud of Mann and without his authority, should have gone on to hold that they did not become the property of Mann. Whether they became his by his subsequent ratification of the acts of Richardson is another question, which their Lordships will examine just as it was examined in *McClintock's* case. Upon what has been called the main question they observe that they could not hold that the respondent acquired a property in the bank cheques without directly contradicting a decision which has in forty years been the subject of no adverse comment. And they would add that it appears to be in accordance with principle. They agree with the analysis of the transaction which was submitted by learned Counsel for the appellant. In effect Richardson by means of unauthorised cheques misappropriated moneys in the trust account and used them to acquire bank cheques from the A.N.Z. bank which bound that bank to pay Ward or bearer out of its own money the amounts specified in the cheques. Their Lordships were not referred to any case in which in such circumstances property so acquired has been held to belong automatically to the party defrauded. In the present case as in *McClintock's* case, Counsel sought to rely on such cases as *Cundy v. Lindsay* 3 App. Cas. 459, but it appears to their Lordships, as it must have done to the Board in *McClintock's* case, that the principle that the purchaser of a chattel takes it, as a general rule, subject to what may turn out to be informalities of title has no application to a case of misappropriation of funds by an agent and their subsequent application for his own purposes. That there is a remedy, perhaps more than one, available to the person defrauded is obvious, but that is not to say that the property so acquired at once belongs to him so that he can sue in conversion a third party into whose hands it has come.

Their Lordships turn to the alternative contention that the bank cheques became the property of the respondent by reason of his ratification of Richardson's acts. This is necessarily stated somewhat vaguely, for it is nowhere specifically pleaded what acts of Richardson Mann ratified nor how he ratified them. It rests on the argument of Counsel that the ratification was effected by the issue of the writ in the action, but even so it remains obscure what acts the issue of the writ is supposed to ratify. It will be remembered that by the time the writ was issued the wheel had gone full circle: the bank cheques had been issued to Richardson (or to Ward) and had been purchased by the appellant bank from Ward and had been duly honoured on presentation by the issuing bank. It appears to their Lordships that both upon principle and on the direct authority of *McClintock's* case it is impossible for the respondent to pause at any point in this chain of events and claim to ratify the act of Richardson in obtaining the issue of bank cheques in favour of "H. Ward or bearer" without also ratifying the subsequent dealing with the cheques by him and the appellant bank. To adopt the words used in *McClintock's* case, the respondent fails to prove a conversion by the appellant of cheques which he seeks to make his own by ratification, for, if he ratifies at all, he ratifies the dealing by Ward and the appellant with the cheques, and, if he does not ratify, nothing has been converted that ever belonged to him. Their Lordships think with great respect to the learned Judge, that the minor differences of fact in the two cases which he points out do not prevent the application to them both of the same principle. If authority is needed, reference may be made to the full exposition of the principle by Baron Rolfe in *Bird v. Brown* [1850] 4 Exch. 786.

Their Lordships will for the reasons that have been stated humbly advise Her Majesty that the appeal should be allowed and the action dismissed with costs.

Counsel for the appellant intimated that in the event of success he would not ask that the respondent should pay the costs of the appeal. Therefore there will be no order as to the costs of the appeal.

In the Privy Council

THE COMMERCIAL BANKING COMPANY
OF SYDNEY LIMITED

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EDWARD ROLF MANN

DELIVERED BY VISCOUNT SIMONDS

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