ANTIGUA AND BARBUDA

IN THE COURT OF APPEAL

CIVIL APPEAL NO.6 OF 2004

BETWEEN:

W.W.I.A.Q./WORLD WIDE INVESTMENTS

Appellant

and

AMERICAN INTERNATIONAL BANK LIMITED (In Receivership)

Respondent

Consolidated with

WORLD WIDE TELE-SPORTS

Appellant

and

AMERICAN INTERNATIONAL BANK LIMITED (In Receivership)

Respondent

Before:

The Hon. Mr. Adrian Saunders	Justice of Appeal
The Hon. Mr. Michael Gordon, QC	Justice of Appeal
The Hon Mr. Hugh Rawlins	Justice of Appeal [Ag.]

Appearances:

Ms Sharon Cort for the Appellants
Mr. Gerald Watt, Q.C. with Mr. Norris Scholar for the Respondent

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2005: March 18;
June 27.

JUDGMENT

[1] GORDON, J.A.: There were two High Court actions instituted by the Respondent in this appeal against each of the Appellants. By consent, the two actions were

consolidated and heard together, the issues in both being substantially the same and only the detail differing.

[2] The Respondent at the material time, June 1997, was an offshore bank incorporated and licensed to do business by the Antiguan authorities. The Appellants, which stand as parent and subsidiary in relation to each other, are International business companies incorporated in Antigua whose businesses were Internet gambling and investments. In June 1997 the Appellants and the Respondent had a relationship as customers and banker. In June 1997, at the request of the Appellants the Respondent prepared some 41 banker's cheques drawn on the Popular Bank of Florida for the payment of persons who were customers of the Appellants. This was a normal course of dealing between the parties. Popular Bank was a correspondent bank of the Respondent. The Appellants' accounts with the Respondent were debited by the Respondent with the amount of the cheques and the appropriate charges in respect of those cheques.

[3] Shortly after the preparation and dispatch of the prepared cheques to the Appellants' customers, the Appellants began to receive telephone calls from their customers advising them that the cheques were being dishonoured. Not unnaturally, the Appellants called upon the Respondent for an explanation. It is common ground between the parties that there were sufficient funds in the Appellants' accounts for the appropriate debit to be made by the Respondent to recover the cost of the cheques issued by the Respondent at the Appellants' request. The then manager of the Respondent advised the Appellants that they were having problems with Popular Bank and that he, the manager, had been advised by Popular Bank that the cheques had been dishonoured by that latter bank.

[4] The then manager of the Respondent sent to the Appellants a list of all drafts issued by the Respondent in June and asked the Appellants to identify which persons or entities on the list represented customers of the Appellants. This the Appellant did. The Respondent at the Appellants' request re-credited the Appellants' accounts with the sums representing the amount of the cheques issued and charges that had been originally debited by the Respondent from those accounts, some US$294,057.99

[5] Of the original 41 customers of the Appellants to whom cheques had been issued by the Respondent some of them were issued with new (replacement) cheques by the Respondent and some of the others of the 41 customers were paid by direct transfers through Western Union by the Appellants and the remainder subsequently admitted that their cheques originally issued by the Respondent had been honoured prior to any alternative arrangements being made to pay them

[6] In 1999 Mr. Edward Smith was appointed receiver of the Respondent and he was the sole witness for the Respondent. His evidence relied on the documents he had found on the Respondent's premises as receiver as he had no first hand knowledge of the transactions involved. As the learned trial Judge also found, the Appellants were similarly handicapped in that the principal employee of the Appellants who had dealt with this matter died before the trial.

[7] The Respondent's Statement of Claim in the Court below contains the following two paragraphs:

> "3. In about July 1997, the Claimant's overseas correspondent bank returned approximately 19 cheques which were issued to third parties on behalf of the Defendant. The Claimant acting on the Defendant's instructions issued replacement cheques for these returned cheques, the Claimant at the time being, being ignorant that the original cheques had in fact been paid.
>
> 4. In consequence whereof the Defendant received the benefit of these funds twice, and is only lawfully entitled to receive the benefit of the funds once, and is therefore obliged to return the amount by which they were paid in error to the Claimant."

[8] Though the pleading could be clearer, I understand the Respondent to be claiming in quasi-contract for restitution of the monies paid twice by the Respondent. The classic statement of the law in this field is by Lord Wright in Fibrosa Spolka Akcyjna v Fairbairn Lawson Combe Barbour Ltd[1] where he said:

> "It is clear that any civilized system of law is bound to provide remedies for cases of what has been called unjust enrichment or unjust benefit, that is, to prevent a man retaining the money of, or some benefit derived from, another which it is against conscience that he should keep. Such remedies in English law are generically different from remedies in contract or in tort, and are now recognized to fall within a third category of the common law which has been called quasi-contract or restitution."

[9] In Chitty on Contracts, 25th Ed., at paragraph 1943 the learned authors speak to the type of enrichment which may give rise to the quasi-contractual right. They say:

> "[It] may take the form of a direct addition to the recipient's wealth, such as by the receipt of money, or an indirect one, for instance where an inevitable expense has been saved. The most common example of the second type of benefit is the discharge of an obligation of the defendant, whether by paying his creditor ……. Or performing some other service for which he is primarily responsible."

[10] As I understand the factual situation, the Respondent debited the Appellants' account with the cost and charges of the replacement cheques so those costs are not in issue. Unfortunately, the original cheques drawn on Popular Bank by the Respondent were in fact honoured and the claim by the Respondents was for the amount of the original cheques and charges. Mr. Edward Smith, the Receiver of the Respondent and its sole witness put it this way:

> "The first set of instruments were issued and paid by the bank. [Popular bank] We reversed the money and gave it back to the defendants on a mistaken assumption. Then on their instruction we issued replacement drafts.
>
> Defendants paid on the second set of drafts. This claim arises only on the first payment, when the bank [Respondent] realized that they had been paid by Popular Bank and there was not enough money to pay back the bank [Respondent] from the accounts of the defendant."

[1] [1943] A.C. 32

[11] In any action for unjust enrichment it is incumbent on the claimant to show that the defendant has been unjustly enriched, either, as stated above, by the addition to the defendant's wealth or by fulfilling a legal obligation which the defendant would otherwise have to meet.

[12] As I understand the Respondent's case, it is that the Appellants must make restitution because they were unjustly enriched by virtue of the fact that the customers of the Appellants were paid by the original cheques issued by the Respondent for which cheques the Appellants have not paid, or having paid were refunded. The additional cheques which those customers received represented monies that the Appellants were under no obligation to pay to them.

[13] The Appellants raised the issue of the Respondent's negligence in their defence. This defence, in my view also incorporates the defence of estoppel in the context that the Respondent as a result of its own negligence must be estopped from demanding back the monies it claims have been had and received by the Appellants. Clearly there was evidence of negligence of a most grievous nature, but by whom? In his evidence under cross-examination, Mr. Edward Smith stated in reference to a document before the trial Court which document stated that the cheques issued by the Respondent drawn on the Popular Bank were returned that that document originated with Popular Bank. Mr. Smith further stated that the Respondent bank had been run incompetently, a general comment, and gave evidence of how he, a banker of some 30 years experience, according to the evidence, would have handled the specific circumstances of this case which was quite different from the way it was handled in fact by the Respondent. In other words, there is evidence of negligence both by the Respondent and Bank Popular. It is common ground between the parties that the Appellants had no relationship with Popular Bank.

[14] Most tellingly, Mr. Smith says the following in cross-examination:

> "Yes the defendant [Appellant] has paid its customers in full. The real issue is who was negligent in this matter, the claimant or the defendant.
> Yes, I said if I had been president, I would have handled the matter differently.
>
> Yes, there was confusion at the bank. There appears to have been confusion from the beginning."

[15] The following general propositions of law are to be found set out in Goff and Jones, The Law of Restitution, 2nd ed (1978) pp 554-555. A plaintiff will be estopped from asserting his claim to restitution if the following conditions are satisfied:

(a) the plaintiff must generally have made a representation of fact which led the defendant to believe that he was entitled to treat the money as his own;

(b) the defendant must have, bona fide and without notice of the plaintiff's claim, consequently changed his position;

(c) the payment must not have been primarily caused by the fault of the defendant.

[16] In this case the Respondent made a representation of fact, namely, that the Popular Bank was returning unpaid the cheques written by the Respondent at the Appellants request. On that basis the Respondent re-credited the Appellant's account with the amount originally debited. On that basis the Appellants were led to believe that they were entitled to treat that money as their own. The Appellants, bona fide, and without notice of the Respondent's claim changed their position by authorizing the Appellant to issue 'replacement' cheques for which the Appellants paid. If there was fault in the whole affair, it was not that of the Appellants, thus the three conditions have been met.

[17] In a House of Lords decision, Lipkin Gorman v Karpnale Ltd[2] it seems to me that the defence has been taken many steps further. In that case Lord Goff of Chieveley said the following:

> "…it is right that we should ask ourselves: why do we feel that it would be unjust to allow restitution in cases such as these? The answer must be that, where an innocent defendant's position is so changed that he will suffer an injustice if called upon to repay or to repay in full, the injustice of requiring him so to repay outweighs the injustice of denying the plaintiff restitution. If the plaintiff pays money to the defendant under a mistake of fact, and the defendant then, acting in good faith pays the money or part of it to charity, it is unjust to require the defendant to make restitution to the extent that he has so changed his position. Likewise, on facts such as those in the present case, if a thief steals my money and pays it to a third party who gives it away to charity, that third party should have a good defence to an action for money had and received. In other words, bona fide change of position should of itself be a good defence in such cases as these. The principle is widely recognized throughout the common law world. It is recognized in the United States of America (see *American Law Institute, Restatement of the Law, Restitution (*1937), section 142, pp. 567-578 and *Palmer, The Law of Restitution* (1978), vol. III, para. 16.8); it has been judicially recognized by the Supreme Court of Canada (see *Rural Municipality of Storthoaks v Mobil Oil Canada Ltd. (1975)* 55 D.L.R. (3rd) 1); it has been introduced by statute in New Zealand (Judicature Act 1988, section 94B (as amended), and in Western Australia (see Western Australia Law Reform (Property, Perpetuities and Succession Act 1962, section 24, and Western Australia Trustee Act 1862, section 65(8), and it has been judicially recognized by the Supreme Court of Victoria: see Bank of New South Wales v. Murphett [1983] 1 V.R. 489. In the important case of Australia and New Zealand Banking Group Ltd. v. Westpac Banking Corporation (1988) 78 A.L.R. 157, there are strong indications that the High Court of Australia may be moving towards the same destination (see especially at pp. 162 and 168, per curiam). The time for its recognition in this country is, in my opinion long overdue."

I can do little better than to echo the sentiment of Lord Goff. In this case I am of the view, and I so hold, the Appellants have changed their position by buying the replacement cheques from the Respondent and sending them off to the customers of the Appellants. That money is irrecoverable by the Appellants. In my view, and I so hold, this gives them a good defence to an action for restitution.

[2] [1991] 2 A.C. 548

[18] For the reasons set forth above I would allow this appeal and reverse the finding of the learned trial Judge. The claims of the Respondent against the Appellants are dismissed with costs both in this Court and the Court below based on prescribed costs in the Civil Procedure Rules 2000.

Michael Gordon, QC
Justice of Appeal

I concur.

Adrian Saunders
Justice of Appeal

I concur.

Hugh Rawlins
Justice of Appeal [Ag.]