THE EASTERN CARIBBEAN SUPREME COURT
SAINT LUCIA

IN THE HIGH COURT OF JUSTICE
(Civil)

SLUHCV2013/0405

BETWEEN:

CLETUS HIPPOLYTE

Claimant

and

BANK OF SAINT LUCIA LIMITED

Defendant

Before:
The Hon. Mde. Justice Kimberly Cenac-Phulgence High Court Judge

Appearances:
The Claimant in person
Ms. Cleopatra Mc. Donald with Ms. Diana Thomas for the Defendant

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2017: December 12.

ORAL JUDGMENT

[1] **CENAC-PHULGENCE J**: The claimant, Mr. Cletus Hippolyte ("Mr. Hippolyte") filed a claim against Bank of Saint Lucia Limited ("The Bank") on 7th May 2013 in which he claimed that the sums of $3,600.00 and $3,000.00 respectively were transferred and illegally withdrawn from his savings account no. 508964000 on 5th and 6th August 2009 respectively. Mr. Hippolyte claimed he was out of State at the material dates and produced pages from his passport to support his statement that he was absent from the State. Mr. Hippolyte also claimed the sum of $7,305.00 which he says was transferred from his savings account to clear the overdraft on his company, CSH Company Limited's ("CSH") account without his knowledge or authority.

[2] The Bank filed its defence on 24th June 2013 and averred that there were no funds withdrawn from the claimant's account on 5th and 6th August 2009. They said that equivalent sums were withdrawn on 5th August 2008 and 7th August 2008 respectively and exhibited the cash withdrawal statements signed by the claimant in support. The Bank claimed that the withdrawals were authorised by the signature of the claimant as seen from the customer withdrawal forms. The Bank also relied on statements of accounts for the year ending 31st December 2008 which supported the withdrawals which related to the withdrawal slips which has been signed by Mr. Hippolyte. The Bank also exhibited to the witness statement of Mr. Valdez James, a statement of account for Mr. Hippolyte's savings accounts for the year 2009 which showed that contrary to Mr. Hippolyte's evidence, there were no withdrawals in that year of the amounts of $3,000.00 and $3,600.00.

[3] In his evidence, Mr. Hippolyte denied signing the withdrawal slips. He denied that the signatures on the documents were his and in his words he said that the signature was a copy and that "whoever had done it, had done it 'very fine'". I understood Mr. Hippolyte to be denying that he signed these withdrawal slips. Mr. Hippolyte admitted in cross-examination that he could not read and write and that at times persons prepared documents for him and he signed after they read it over to him. Mr. Hippolyte attempted to suggest that his documents are read over to him by his lawyer but it is clear from his evidence that he had other persons who assisted him with his reading of documents. In the absence of evidence to support Mr. Hippolyte's contention that the signatures on the withdrawal slips were not his, I find that the withdrawals were made by him or with his authorization and that he did sign the slips. As counsel for the defendant, Ms. Cleopatra Mc Donald rightly pointed out, if Mr. Hippolyte wished to contest the signature as not being his, he would have had to employ a certain course of action as provided for in Article 150 of the **Code of Civil Procedure**. That he did not do. The Court is therefore not able to make any finding that the signatures were not that of Mr. Hippolyte in the absence of evidence to prove same.

[4] The Court therefore finds that the withdrawal slips were signed by Mr. Hippolyte and therefore his part of his claim for the sums of $3,000.00 and $3,600.00 is dismissed.

[5] In relation to Mr. Hippolyte's claim for $7,305.00, Mr. Hippolyte testified that the right of set-off existed only in relation to CSH, if it existed at all, and to CSH's accounts and not to accounts held in his name personally such as savings account number 508964000. He said he never gave such right of set-off in relation to his personal account.

[6] In so far as the claim for the $7,305.00, the Bank submitted in oral closing arguments that although there had been some suggestion of a course of dealing and conduct which would have supported the actions of the Bank, it was prepared to admit that no evidence was led by the Bank to support this. The Bank was prepared to admit that the sum of $7,305.00 was transferred from Mr. Hippolyte's personal account to CSH's business account without Mr. Hippolyte's consent and therefore that amount should be paid to him and that judgment should therefore only entered for that amount.

Discussion

The right of set-off

[7] The Bank's Right of Set-Off was signed by CSH & Company Ltd. on 15th August 2006 and was in the following terms:

> "…I/we agree that you may at any time without prior notice to me/us COMBINE or CONSOLIDATE any or all of such sums of money or part or parts thereof as may now stand or hereafter may from time to time be standing to my/our credit upon current account deposit account or savings account WITH any or all such sums of money or part or parts thereof as may now be or hereafter may from time to time become due or owing to you anywhere from or by me/us either as principal or surety and either solely or jointly with any other person upon current account bills or exchange or promissory notes or upon loan or any other account whatsoever or for actual or contingent liability including all usual banking charges and I/we further agree that you shall be at liberty without any notice to or further or other consent from me/any of us to apply or transfer

> any money now or at any time hereafter standing to my/our credit upon current account deposit account or savings account as aforesaid in payment or in part payment of any such sums of money as may now be or hereafter may from time to time become due and owing to you from or by me/us as aforesaid and that you may refuse payment or any cheque bill note or order drawn or accepted by me/us or upon which I/we may be otherwise liable and which if paid would reduce the amount of money standing to my/our credit as aforesaid to less than the amount for the time being so due or owing to you from or by me/us as aforesaid." (my emphasis)

[8] The basic position is that a bank has a right - but not a duty - to look at a customer's overall position and to "combine" the accounts held by that customer. This is sometimes called a right of "set off" or a right to "combine" accounts. A bank has this as a general right, whether or not it mentions the right in the account terms. **Paget's Law of Banking**[1] defines the banker's right of set off thus:

> "…where the customer of a bank has two or more accounts at the bank, the bank is entitled to utilize a credit balance on one account (s) to reduce or cover a debit balance on another account(s). This entitlement is known as the 'banker's right of set-off' or the 'banker's right to combine accounts."

[9] Certain conditions must be met before the bank can exercise its right of "set off". These are:

- the account from which the bank transfers funds must be held by the customer who owes the bank money.
- **the account from which the bank transfers the money - and the account from which the money would otherwise have come - must both be held with the same bank** although not necessarily at the same branch.
- **the account from which the firm transfers funds - and the account from which the money would otherwise have come - must both be held *in the same capacity* by the customer concerned.**
- the debt must be due and payable.

There is no obligation on the part of the bank to inform the customer before it exercises the right of set-off.

[1] 14th ed. Ali Malek QC & John Odgers QC 2014.

[10] The general position can be modified by agreement between the firm and its customer. This might include:

- an agreement that "set off" be available to a bank's mortgage arm, where it is a separate legal entity;
- an agreement to regularly "sweep" any money over a certain balance out of a current account and into a savings account;
- *an agreement that money held by a customer in one capacity can be used to pay debts owed by the same customer in a different capacity.*

[11] The banker's right of set-off does not exist where, to the bank's knowledge, the accounts are not held in the same capacity. But this can be displaced if it is shown that there was agreement otherwise between the parties or a particular course of dealing or conduct which evinces a different intention.

[12] In **Ex Parte Kingston. In re Gross**[2] G who was the county treasurer, had a private account at the bank. He then opened an account called police account at the same Bank. It would appear that G had been in the habit of mingling the county funds with his private funds and then decided to separate the county funds altogether. For the purposes of interest the *N. and P. Bank* treated the accounts as one account, and the interest on the balance in his favour was carried to the credit of his private account. At the time when the police account was opened, the manager of the bank knew that *G*. was county treasurer, and understood that he had been in the habit of paying county moneys into the bank. On the 8th of April, 1870, *G*. absconded, his private account being overdrawn, and the police account being in credit. The Court held that in these circumstances the bank was not entitled to set-off one account against the other.

[2] (1871) LR 6 Ch. App 632.

[13] In **Bank of New South Wales v Goulburn Valley Butter Co Pty Ltd**[3] a trader carried on his own business in conjunction with that of a company of which he was managing director, and by himself or his nominees held all the shares. The company's account and the trader's account were in the same bank, and blank cheques were given to the bank manager in respect of each account to be filled in with amounts necessary for the purpose of adjustment of the two accounts. Blank cheques of the company were improperly filled in by the trader with amounts which were credited in his account: It was held that in the absence of notice on the part of the bank of the state of accounts between the trader and the company, the bank was not liable to refund the money.

The distinguishing feature in this case is that the customer by his actions permitted the bank to combine the funds and so this was express permission to use funds in accounts held in two different capacities.

[14] In the case at bar, the accounts in question were held in two different capacities, one in the sole name of Cletus Hippolyte as his private savings account and the other in the name of the company, CSH Company Limited, a limited liability company. As seen, in the absence of clear and express agreement that the funds in one of these accounts could be utilized to satisfy overdraft of the other, the Bank could not have transferred the $7,305.00. If the Bank had shown that there was a particular course of dealing which was well accepted and agreed to by Mr. Hippolyte, then perhaps the position would have been different. In the absence of this, the Bank could not have transferred the monies as they did.

[15] In the premises, the Court therefore makes the following order:

(a) Judgment is entered for the claimant in the sum of $7,305.00 with interest thereon at the rate of 6% per annum from 14th August 2008 to the date of payment.

[33] [1902] AC 543.

(b) The claim for $6,600.00 is dismissed.

(c) The claim for general damages is dismissed as there is no evidence in support of this claim.

(d) Prescribed costs are awarded to the claimant in the sum of $547.88 which represents one-half of the prescribed costs on $7,305.00. The costs awarded have been discounted to account for the partial success of the claimant on his claim and also the conduct of the claimant over the course of the trial.

[16] The Court is grateful to counsel for the Bank for the manner in which the trial was conducted and the professionalism exhibited.

Kimberly Cenac-Phulgence
High Court Judge

By the Court

Registrar of the High Court