GDT. G6
35,1953
33813
UNIVERSITY OF LONDON W.C.1.
10 FEB 1954
INSTITUTE OF ADVANCED LEGAL STUDIES

In the Privy Council.

No. 15 of 1953.

ON APPEAL FROM THE FULL COURT OF THE SUPREME COURT OF NEW SOUTH WALES

BETWEEN

BANK OF NEW SOUTH WALES ... ... (*Defendant*) APPELLANT

AND

WALTER RICHARD JAMES LAING ... (*Plaintiff*) RESPONDENT.

CASE FOR THE APPELLANT

RECORD

1.—This is an appeal from a judgment and order of the Full Court of the Supreme Court of New South Wales (Street, C. J., Owen and Herron, JJ.) brought pursuant to the provisions of the Order in Council dated the 2nd April, 1909, and by virtue of final leave granted to the Appellant by the said Supreme Court by its order in that behalf made the 7th January, 1953.

pp. 22–36

p. 38, ll. 20–42

2.—The said judgment and order of the said Supreme Court, made on the 7th October, 1952, dismissed an appeal by the Appellant from a verdict and judgment entered and given by Mr. Justice McClemens, a Justice of the said Supreme Court, on the 20th May, 1952, in favour of the Respondent for the sum of £19,412 10s. 9d.

p. 20, ll. 20–36

10

3.—The Respondent by a writ of summons issued out of the said Supreme Court on the 15th February, 1951, and specially indorsed pursuant to Section 24 of the Common Law Procedure Act, 1900 (New South Wales) sued the Appellant to recover the said sum of £19,412 10s. 9d. The special indorsement upon the said writ of summons was as follows :—

" The Plaintiff claims £19,412 10s. 9d. for debt and £6 0s. 0d. " (besides fees properly paid for service) for costs, and if those sums " be paid to the Plaintiff or to Attorney within the time limited for " your appearance, further proceedings will be stayed.

20

" The following are the particulars of Plaintiff claim :—To " amount due by the Defendant to the Plaintiff in respect of the " following amounts of the Plaintiff's money received by the " Defendant to the use of the Plaintiff.

RECORD

"To amount of forged cheque dated 5th July 1948 "for the amount of £2950.0.0 debited by the "Defendant to the Plaintiff's Banking Account with "the Defendant £2950. 0.0
"To amount of forged cheque dated 26th November "1948 for the amount of £2950. 0. 0. debited by the "Defendant to the Plaintiff's Banking Account with "the Defendant £2950. 0.0
"To amount of forged cheque dated 20th January "1949 for the amount of £2210.18.9 debited by the "Defendant to the Plaintiff's Banking Account with "the Defendant £2210.18.9
"To amount of forged cheque dated 1st February "1949 for the amount of £2950.0.0 debited by the "Defendant to the Plaintiff's Banking Account with "the Defendant £2950. 0.0
"To amount of forged cheque dated 25th February "1949 for the amount of £2338.0.8 debited by the "Defendant to the Plaintiff's Banking Account with "the Defendant £2338. 0.8
"To amount of forged cheque dated 21st April "1949 for the amount of £890.15.8 debited by the "Defendant to the Plantiff's Banking Account with "the Defendant £890.15.8
"To amount of forged cheque dated 30th May "1949 for the amount of £2225.5.4 debited by the "Defendant to the Plaintiff's Banking Account with "the Defendant £2225. 5.4
"To amount of forged cheque dated 27th June "1949 for the amount of £2897.10.4 debited by the "Defendant to the Plaintiff's Banking Account with "the Defendant £2897.10.4

£19412.10.9

p. 3, ll. 24–34

4.—After the Appellant had duly entered an appearance to the said writ the Respondent on the 1st March, 1951, filed his declaration, by which he sued on common money counts for money payable by the Appellant to the Respondent for money received by the Appellant for the use of the Respondent and for money lent by the Respondent to the Appellant. No further particulars were filed with the declaration, the Respondent relying on the special indorsement upon the writ of summons.

p. 3, ll. 37–41

5.—By its plea, dated the 12th March, 1951, the Appellant pleaded that it never was indebted as alleged. The Respondent by his replication joined issue upon this plea.

RECORD

6.—At the hearing of the action, which commenced before Mr. Justice McClemens and a jury of four persons on the 19th May, 1952, the Respondent submitted only the following material evidence :— pp. 4–7

(i) the Appellant's records of the current account of the Respondent at the Appellant's Haymarket Branch from the 1st July, 1946, to February, 1951, which disclosed that during that period substantial sums were from time to time placed to the credit of the Respondent and that a large number of withdrawals had been made therefrom by cheque. The record showed that the result of these operations was that on the 8th February, 1951, there was standing to the credit of the Respondent in the said account a sum of £18 8s. 3d. and no more and the credit balance in the said account did not thereafter exceed the sum of £28 3s. 3d. Appendix Ex. 'A'

(ii) Certain correspondence between the parties and their Solicitors which disclosed that in October, 1950, the Respondent for the first time asserted that eight cheques (being the eight cheques particularised in the indorsement to the said writ of summons), which had been met by the Appellant on various dates between July, 1948, and June, 1949, did not bear his signature and were forged, and that the Respondent claimed that his account had been debited without his authority to the extent of the total amount of those cheques, namely, the sum of £19,412 10s. 9d. This claim was not admitted by the Appellant in this correspondence or elsewhere or at all. pp. 39–52

(iii) Eight cheques, all dated the 8th February, 1951, drawn by the Respondent on the Appellant for sums corresponding to the respective amounts of the eight cheques particularised in the indorsement to the said writ of summons and totalling the sum of £19,412 10s. 9d., and each bearing the notation " Refer to drawer—*Bona fide* dispute state of account arising alleged forged cheques." Appendix Ex. 'C'

(iv) a letter dated the 12th February, 1951, from the Appellant to the Bank of Australasia (the Bank through which the Respondent had presented the said lastly mentioned eight cheques), which states : p. 53

" With reference to certain cheques itemized here-
" under, bearing date 8th February, 1951, drawn by
" W. R. J. Laing, presented by you for payment and
" returned to you herewith with the answer ' Refer to
" ' drawer—*Bona fide* dispute state of account arising
" ' alleged forged cheques ' endorsed thereon, we advise
" that certain funds which the drawer may have con-
" sidered were at his disposal and which would have been
" sufficient to meet such cheques are the subject of a
" *bona fide* dispute arising out of alleged forgeries."

RECORD

p. 7, l. 5 ;
p. 10, l. 19

7.—At the close of the Respondent's case, in which no oral evidence was given, the Appellant moved for a verdict by direction upon the grounds, *inter alia,*

(i) that there was no evidence to support the Respondent's claim ;

(ii) that in order to succeed the Respondent must establish that there were sufficient funds in his account at the date of the demand, namely, the 8th February, 1951, to meet the cheques then presented ;

(iii) that there was no evidence that there were sufficient funds in the account at that date ; and 10

(iv) that there was no evidence that the Appellant had debited any sums to the said account without the authority of the Respondent.

During the course of argument on this motion the Respondent sought and was granted by His Honour leave to amend the indorsement to the said writ to read as follows :—

" To amount due by the Defendant to the Plaintiff for money " lent by the Plaintiff to the Defendant and for money received " by the Defendant for the use of the Plaintiff and dealt with by 20 " the Defendant in manner following."

pp. 10–14

8.—On the 20th March, 1951, Mr. Justice McClemens delivered Judgment on the motion for a verdict by direction and dismissed the application. In his Judgment His Honour said, " Not without considerable

p. 13, ll. 21–35

" doubts I have come to the conclusion that there is some scanty evidence " here sufficient to justify a jury in finding in the Plaintiff's favour. It is " established, firstly, that the Plaintiff had over a long period been making " payments into the current account. Then a dispute arose. After that " dispute arose the Plaintiff drew the eight cheques which are now " Exhibit 'C' as constituting his demand. Those cheques on being 30 " presented to the Bank of New South Wales were referred to drawer, " and referred to drawer with the notation that appears on the backs of " them, and with the letter of 12th February, 1951. In my opinion, that " notation coupled with the letter supports the view that the Defendant's " real case is this : 'I have paid you what I owe you. There is now a " 'dispute associated with the alleged forged cheques as to whether I owe " 'you any more.'
" It does seem to me here that the real defence is payment and not 'never indebted'."

9.—At the request of the parties His Honour then dispensed with the 40

p. 20

jury, and, after hearing argument, His Honour found a verdict for the Respondent for the amount claimed and directed that Judgment be entered accordingly. In his reasons His Honour expressed the view that on the pleadings he had no alternative but to find a verdict for the Respondent.

Record

10.—The appeal of the Appellant from and against this verdict and Judgment was heard by the Full Court of the Supreme Court of New South Wales (Street, C.J., Owen and Herron, JJ.) on the 17th and 18th September, 1952. By its reserved Judgment, given on the 7th October, 1952, the Full Court unanimously dismissed the said appeal with costs. In his Judgment, Street, C.J., held that although the obligation of a banker to honour his customer's cheque is subject to there being sufficient funds in the customer's account to meet the cheque, nevertheless the Appellant by its plea of "never indebted" did not put in issue the condition precedent, namely, sufficiency of funds in the account. The learned Chief Justice said, "The count for money payable for money lent involves "the allegation that money was in fact lent to the Defendant under a "contract, express or implied, in terms capable of giving rise to a presently "payable debt, and it involves also the allegation that in fact the money "was payable at the time when the action was brought. The plea of "'never indebted' in the case of an express contract denies the contract "of loan, that is, it denies that the money was lent on a promise capable of "requiring repayment at the date when the action was brought.

p. 22

p. 24, l. 27; p. 25, l. 12

p. 25, ll. 12–23

"In the case of an implied contract, such as the present, which arises "out of the proved relationship of banker and customer, it denies the "matters of fact from which a promise to repay was capable of being "inferred. In other words, it denies the loan, and nothing more." The learned Chief Justice accordingly held that the matter sought to be relied upon by the Appellant could not be raised under the plea of "never indebted" and should have been made the subject of a plea of payment. His Honour then expressed the view that as no issue of payment was raised by the pleadings the Respondent could rely on the deposits in the Appellant's records of the account as evidence in his favour without regard to the debit side of the account. Owen and Herron, JJ. in separate Judgments agreed that the appeal should be dismissed with costs. No ground for dismissing the appeal was advanced by either of the learned Justices other than those put forward in the Judgment of Street, C.J.

p. 25, l. 23; p. 26, l. 30

p. 26, l. 31; p. 27, l. 5

pp. 27–36

11.—The Appellant desires humbly to repeat the submissions made before the learned trial Judge and to submit that the fundamental consideration in this appeal is the precise nature and terms of the relevant promise to be implied from the relationship of banker and customer. The Appellant humbly submits that such a relationship does not give rise to a general promise to repay, as in the case of mere borrower and lender. In the Appellant's humble submission the relevant promise to be implied from the relationship of banker and customer is a promise from time to time to pay a sum certain upon written demand therefor if such sum should be equal to or less than the amount standing at the date of such demand to the credit of the customer in account with the banker. Comparison between the sum demanded and the state of the account between banker and the customer at the date of the demand is essential to determine whether or not the banker is under any obligation to pay the particular sum demanded.

The customer's cause of action, though necessarily, or at least ordinarily, cast in the form of money lent, is not for failure to perform a general promise to repay the sums deposited, but to recover a specific sum of money for the payment of which due demand has been made. Whether or not the banker was at the time of such demand obliged to make such a payment depends, not upon the amount formerly deposited, but upon the then state of account between him and the customer, upon the credit balance in the account. The Appellant humbly submits that any question of pleading in this appeal is incidental, but that, assuming the common money count for money lent to be available to the Respondent, the plea of "never indebted" filed by the Appellant in answer to the Respondent's claim to be paid the specific sums demanded laid upon the Respondent the necessity of establishing as part of his case the state of his account with the Appellant at the date of the demand for payment of the several sums in suit.

12.—The Appellant humbly submits that the decisions of the Full Court of the Supreme Court of New South Wales and of McClemens, J., are erroneous and that a verdict and Judgment should be entered for the Appellant, for the following among other

REASONS.

(i) BECAUSE there was no evidence that the amount standing to the credit of the Respondent with the Appellant at the date of the Respondent's demand for payment of the said several specific sums was equal to or greater than the amount demanded by the Respondent;

(ii) BECAUSE the learned trial Judge was in error in holding that there was some evidence to justify a jury in finding a verdict for the Respondent;

(iii) BECAUSE the learned trial Judge was in error in holding that the matters relied upon by the Appellant could not be set up under the plea of "never indebted" but could be raised only under a plea of payment;

(iv) BECAUSE, having regard to the manner in which the Respondent sought to establish his case, it was incumbent on him to prove that the balance of account shown by Exhibit "A" was not the true balance of account between him and the Appellant at the date of his said demand for payment of sums totalling £19,412 10s. 9d.;

(v) BECAUSE the learned trial Judge should have held that upon the Respondent's case there was no sufficient credit balance in the Respondent's account to meet the demand made by him;

(vi) BECAUSE the learned trial Judge was in error in holding that in view of the course of the pleadings he had no alternative but to find a verdict for the Respondent;

(vii) BECAUSE the learned trial Judge should have directed a verdict for the Appellant;

(viii) BECAUSE the Full Court of the Supreme Court of New South Wales was in error in holding that the Appellant's record of the Respondent's account furnished evidence of money lent by the Respondent to the Appellant or of moneys owing by the Appellant to the Respondent sufficient to meet the Respondent's demand;

10

(ix) BECAUSE the Full Court was in error in holding that the Respondent was entitled, in default of a plea of payment, to ignore the debits to the account as shown in Exhibit "A" which had been tendered by him and to rely only on the credits there shown;

(x) BECAUSE the Full Court was in error in holding that a plea of "never indebted" did not put in issue the state of account between the parties as at the date of the demand for payment of the sums for which action was brought;

20

(xi) BECAUSE upon the pleadings it was necessary for the Respondent to prove the state of account between him and the Appellant and the only proof given by the Respondent showed that there were insufficient funds in hand at the date of the Respondent's demand for payment to meet any of the sums for which demand was made;

(xii) BECAUSE the Full Court was in error in dismissing the appeal;

(xiii) BECAUSE the Full Court should have upheld the appeal and entered a verdict and Judgment for the Appellant.

30

J. G. LE QUESNE.

In the Privy Council.

No. 15 of 1953.

ON APPEAL FROM THE FULL COURT OF THE SUPREME COURT OF NEW SOUTH WALES.

BETWEEN

BANK OF NEW SOUTH WALES ... (*Defendant*) APPELLANT

AND

WALTER RICHARD JAMES LAING ... (*Plaintiff*) RESPONDENT

CASE FOR THE APPELLANT

BELL, BRODRICK & GRAY,
29 Martin Lane,
Cannon Street,
London, E.C.4.
Solicitors for the Appellant.

GEO. BARBER & SON LTD., Printers, Furnival Street, Holborn, E.C.4, and Cursitor Street, Chancery Lane.
(A61775)