

IN THE SUPREME COURT OF THE YUKON TERRITORY

Citation: *Maurice Herle, et al. v.
Ed Isaac, et al.* 2003 YKSC 32

Date: 20030626
Docket: 02-A0129
Registry: Whitehorse

Between:

**MAURICE HERLE and CAROL CHURCH,
CARRYING ON IN PARTNERSHIP UNDER THE NAME AND STYLE OF
CASHPLAN FINANCIAL (WHITEHORSE)**

Plaintiffs

And:

**ED ISAAC,
CARRYING ON BUSINESS UNDER THE NAME AND STYLE OF
NORTHCREST ENTERPRISES**

Defendant

Appearances:

Mr. Bruce Willis, Q.C.
Mr. Keith Parkkari

Counsel for the Plaintiffs
Counsel for the Defendant

Before: Mr. Justice Veale

REASONS FOR JUDGMENT

Introduction and Facts

[1] Cashplan Financial (Whitehorse) (referred to as Cashplan) is in the business of advancing money by cashing cheques for a fee. Between July 26 and September 17, 2002, Janine Firth presented four cheques payable to her by Northcrest Enterprises

(Northcrest) and drawn on the Bank of Montreal. On each occasion, Cashplan paid Janine Firth the amount of the cheque, less its usual fee.

[2] Three cheques were dishonoured by the Bank of Montreal on the grounds of irregular signatures and the final cheque had a stop payment notification.

[3] Cashplan had no knowledge of any problems with Janine Firth or Northcrest until September 19, 2002.

[4] Cashplan brings this claim against Northcrest to recover \$6,757.60 paid to Janine Firth.

[5] Cashplan had no knowledge that the signatures were forged or that the cheques were stolen. Northcrest says that the four cheques were stolen from its place of business. It did not make, sign or deliver the four cheques to anyone. Northcrest says that the four cheques were obtained by fraud and the signatures were forged.

Northcrest's position is that Cashplan's only claim is against Janine Firth, the person who negotiated the forged cheques. Northcrest advised the Bank of Montreal that the cheques had been forged on September 16, 2002.

[6] Janine Firth is not a party to this action. Cashplan's claim is proceeding by way of summary trial based on sworn affidavits, as there is no dispute on the facts.

Issue

[7] Is Cashplan, a holder in due course who cashed the Northcrest cheques in good faith for value, entitled to recover its loss from Northcrest despite the forged signatures?

Decision

[8] Cashplan relies upon the following sections of the *Bills of Exchange Act*, R.S. 1985,

c. B-5:

16.(1) A bill of exchange is an unconditional order in writing, addressed by one person to another, signed by the person giving it, requiring the person to whom it is addressed to pay, on demand or at a fixed or determinable future time, a sum certain in money to or to the order of a specified person or to bearer.

...

55.(1) A holder in due course is a holder who has taken a bill, complete and regular on the face of it, under the following conditions, namely,

(a) that he became the holder of it before it was overdue and without notice that it had been previously dishonoured, if such was the fact; and

(b) that he took the bill in good faith and for value, and that at the time the bill was negotiated to him he had no notice of any defect in the title of the person who negotiated it.

(2) In particular, the title of a person who negotiates a bill is defective within the meaning of the Act when he obtained the bill, or the acceptance thereof, by fraud, duress or force and fear, or other unlawful means, or for an illegal consideration, or when he negotiates it in breach of faith, or under such circumstances as amount to a fraud.

...

57.(1) Every party whose signature appears on a bill is, in the absence of evidence to the contrary, deemed to have become a party thereto for value.

(2) Every holder of a bill is, in the absence of evidence to the contrary, deemed to be a holder in due course, but if, in an action on a bill, it is admitted or proved that the acceptance, issue or subsequent negotiation of the bill is affected with fraud, duress or force and fear, or illegality, the burden of proof that he is the holder in due course is on him, unless and until he proves that,

subsequent to the alleged fraud or illegality, value has in good faith been given for the bill by some other holder in due course.

. . .

73. The rights and powers of the holder of a bill are as follows:

(a) he may sue on the bill in his own name;

(b) where he is a holder in due course, he holds the bill free from any defect of title of prior parties, as well as from mere personal defences available to prior parties among themselves, and may enforce payment against all parties liable on the bill;

(c) where his title is defective, if he negotiates the bill to a holder in due course, that holder obtains a good and complete title to the bill;

[9] Cashplan relies upon s. 73(b) and submits that as a holder in due course, it holds the cheque free from any defect of title. I find that Cashplan is a holder in due course. By virtue of s. 55(2), Cashplan is not subject to a defect in title where the person who negotiated it obtained the cheque by fraud, duress, or force and fear or other unlawful means or negotiates it under such circumstances as amounts to fraud. Thus, Cashplan would not be subject to the defect in title of Janine Firth, the person who negotiated the cheque.

[10] Northcrest takes the position that forgery is a complete defence against a holder in due course and relies upon ss. 48 and 130 of the *Bills of Exchange Act*, which states:

48.(1) Subject to this Act, where a signature on a bill is forged, or placed thereon without the authority of the person whose signature it purports to be, the forged or unauthorized signature is wholly inoperative, and no right to retain the bill or to give a discharge therefor or to enforce payment thereof against any party thereto can be acquired through or under that signature, unless the party against whom it is sought to retain or enforce payment of the bill is precluded from setting up the forgery or want of authority.

(2) Nothing in this section affects the ratification of an unauthorized signature not amounting to a forgery.

...

130. No person is liable as drawer, endorser or acceptor of a bill who has not signed it as such, but when a person signs a bill otherwise than as a drawer or acceptor, he thereby incurs the liabilities of an endorser to a holder in due course and is subject to all the provisions of this Act respecting endorsers.

[11] Cashplan submits that the words “subject to this Act” in s. 48(1) brings into play all the sections of the *Bills of Exchange Act* that it relies upon and effectively denies this defence to Northcrest. However, in my view, the words “subject to this Act” must be interpreted as referring to the fact that the forged cheque is still covered by the *Bills of Exchange Act*, although the forged signature is wholly inoperative. Thus, in this case, Cashplan still has a claim as a holder in due course against Janine Firth. A close reading of s. 55(2) reveals that it protects the holder in due course from a defect in title of the person who negotiated the cheque. However, it does not address the issue of forgery.

[12] The combined effect of ss. 48 and 130 of the *Bills of Exchange Act* is that a drawer of a cheque, such as Northcrest is not liable as it did not sign as drawer. Where the signature is forged, as in this case, the signature is wholly inoperative.

[13] This conclusion is supported by Crawford and Falconbridge, *Banking and Bills of Exchange*, 8th ed., (Toronto: Canada Law Book Inc.), 1986, at section 5003.3, page 1367, wherein the author concludes by saying:

The result is that the forgery or want of authority of one’s signature is a real defence available even against a holder in due course.

[14] The entire passage from the text was quoted from an earlier edition in *Protheroe v. Bank of Montreal*, [1948] 2 W.W.R. 404 (Man. K.B.).

[15] Counsel for Cashplan relies on *360788 B.C. Ltd. v. 304983 British Columbia Ltd.*, [1998] B.C.J. No. 3228 (*Money Mart v. Niners Diner*). In that case, an employee named Langille had a normal payday on August 5 with Niners Diner. His manager agreed to pay him early, but not before August 1. The signed cheque was dated August 1 and placed in a desk in a locked office of Niners Diner. On July 30, Langille did not come to work and the cheque was gone. Niners Diner stopped payment at the Credit Union, but on the same day, July 30, Money Mart cashed the cheque before the stop payment was issued. Money Mart had no knowledge of Langille's fraud. On August 18, Money Mart was advised payment had been stopped and sought payment from Niners Diner as the maker.

[16] Wilson J. found Money Mart to be a holder in due course when it took the post-dated cheque in good faith for value. He granted judgment to Money Mart on the policy ground that Niners Diner should pay the loss as it had a better chance of recovery from the fraudulent employee/payee.

[17] Unfortunately, *Money Mart v. Niners Diner, supra*, has no relevance to the case at bar. Janine Firth not only obtained the Northcrest cheques fraudulently, she forged the authorized signature of Northcrest, which brings ss. 48 and 130 of the *Bills of Exchange Act* into play. These sections were not considered in *Money Mart v. Niners Diner, supra*, and thus the case does not apply to the facts before me.

[18] I conclude that the claim of Cashplan should be dismissed with costs to the defendant on scale 4. Counsel may speak to costs, if necessary, as there were no submissions at the summary trial.

VEALE J.