**AGBONMAGBE BANK LTD**

**v.**

**C.F.A.O.**

SUPREME COURT OF NIGERIA

25TH MAY, 1966

SC.576/1964

**LEX (1966) - SC.576/1964**

OTHER CITATIONS

2PLR/1966/16 (SC)

**BEFORE THEIR LORDSHIPS:**

ADETOKUNBO ADEMOLA, C.J.N.

VAHE ROBERT BAIRAMIAN, JSC

GEORGE BAPTIST A. COKER, JSC

**ORIGINATING COURT:-**

LAGOS HIGH COURT *(*Adedipe J., Presiding*)*

**REPRESENTATION**

A. K. I. MAKANJU, with him H. A. LARDNER, and Mrs T. I. WILLIAMS - for the Appellant

A. O. LAMPEJO - for the Respondent

**ISSUES FROM THE CAUSE(S) OF ACTION**

BANKING AND FINANCE:- Banker-customer relations - Payee of a cheque - Whether banker liable thereto for non-payment of cheque – Amount of damages payable – How determined

BANKING AND FINANCE:- Banking practices - Delay in returning dishonoured cheque by Bank – Effect – When would amount to negligence on part of Bank - Duty of care to non-customer of bank to whom check is made out - Whether banker can be liable to non-customer – Basis of in tort as distinct from one under the doctrine of privity of contract

BANKING AND FINANCE:- Principle in Stevenson v. Donogue – When applicable in banking transactions – Rule in Hedley Byrne & Co. v. Heller & Partners Ltd - When bank’s failure to observe standard practices relating to check clearance will be deemed negligent representation – Nature of damages arising thereto

CHILDREN AND WOMEN LAW:- Women in business – Contract for supply of goods – Duty of payment of contract sum – Use of check to secure payment – Matters arising therefrom – How treated

COMMERCIAL LAW – CONTRACT:- Privity of contract arising from supply of goods – Recovery of sum due – Failure to recover full sum secured by way of check - When can be recovered against bank – Proper cause of action thereto – Whether contract or tort

DEBTOR AND CREDITOR:- Recovery of contract sum secured by way of check – When creditor may proceed against bank for undue delay in clearance of check – Proper cause of action – Sums recoverable

TORT AND PERSONAL INJURY:- Negligence – How proved – Principle in Donogue v. Stevenson – Rule in Hedley Byrne & Co. v. Heller & Partners Ltd - When applicable to banking transactions - Damages arising therefrom - What needs be proved

**PRACTICE AND PROCEDURE ISSUES**

ACTION:- Cause of action - Two separate causes of action - Whether judgment obtained in one is a bar to the other – Proper treatment

ACTION – DAMAGES:- Negligence - Proof of

ACTION ESTOPPEL - Judgment obtained for contract - Whether a bar to action against a separate action founded negligence – How determined

APPEAL:- Attitude of appellate court to an appeal before it

JUDGMENT:- Variation of – Proper treatment - Whether an appellate court can vary judgment in favour of a respondent who had cross-appealed

**MAIN JUDGEMENT**

**BAIRAMIAN, J.S.C.** **(delivering the judgment of the Court):-**

In this appeal the Agbonmagbe Bank Ltd. complains of the judgment given by Adedipe J., in the Lagos High Court Suit No. LD/344/1963 on 6th July, 1964 in favour of the C.F.A.O. for £9,865-4s-4d.

The C.F.A.O. had a customer by the name of Esther Abiola Amushan, who gave the company a number of cheques on the Agbonmagbe Bank’s Branch at Shagamu between the 7th August, 1957 and the 5th October, 1957 amounting to £10,197-8s-4d; the company handed the cheques to the Bank of West Africa Ltd., for collection, and this Bank sent them to the headquarters of the Agbonmagbe Bank at Ebute Metta, which returned the cheques dishonoured on the 10th October, 1957 in a bunch. The C.F.A.O. wrote to the Agbonmagbe Bank headquarters to complain that the delay of their Shagamu Branch in returning the cheques caused them loss for which the company held the Bank responsible, but received no reply. The C.F.A.O. sued Mrs Amushan and obtained judgment against her for what she owed the company-£13,829-Os-IOd, which included the amount of the cheques; the company managed to collect £250 from her and could collect no more; so they sued the Agbonmagbe Bank for the amount of the cheques in question. The company’s manager testified as follows:

“When the cheques were not returned within reasonable time, my company assumed that they must have been paid. If the cheques had been returned within a week or so we would have stopped delivering further goods to Mrs Amushan and our loss would have been minimised. We lost the value of the cheques as a result of the delay occasioned by the defendant.”

The C.F.A.O. manager agreed in cross-examination that the Agbonmagbe Bank were not his company’s bankers; but there was no cross-examination on the company’s assumption that as the cheques were not returned within a reasonable time they must have been paid. That there was undue delay on the part of the Agbonmagbe Bank was proved by a manager of the Bank of West Africa who testified on bank practice; he was not cross-examined. The Agbonmagbe Bank offered no evidence in defence.

The learned trial judge was of opinion that cheques sent from Lagos to Shagamu should, if not paid, have been returned within a week, and in his opinion the Agbonmagbe Bank had failed to fulfil its duty of returning them in the ordinary course of business to the Bank of West Africa within a reasonable time with an intimation that they would not be paid. The learned judge recognised that there was no privity of contract between the C.F.A.O. and the Agbonmagbe Bank; he relied on Donoghue v. Stevenson [1932] A.C. 562, for his view that the Bank was liable for negligence.

In that case Lord Atkin gave his view of negligence in tort (at p. 580) as follows:

“At present I content myself with pointing out that in English law there must be, and is, some general conception of relations giving rise to a duty of care, of which the particular cases found in the books are but instances .... You must take reasonable care to avoid acts or omissions which you can reasonably foresee would be likely to injure your neighbour. Who, then, in law is my neighbour? The answer seems to be-persons who are so closely and directly affected by my act that I ought reasonably to have them in contemplation as being so affected when I am directing my mind to the acts or omissions which are called in question.”

Adedipe J., states in his judgment that it was clear on the cheques that the Bank of West Africa was the agent of the C.F.A.O. for the purpose of collection, and that the Agbonmagbe Bank had a duty of care in dealing with the cheques which were sent to it for collection, but it was negligent and the C.F.A.O. suffered damages owing to its negligence. Hence the judgment in favour of the C.FA.O., from which the Agbonmagbe Bank has appealed.

The objections to the judgment made on the Bank’s behalf are two-

(1) that the judgment against Mrs Amushan was a bar to a suit against the Bank;

(2) that the Bank had no duty of care to the C.FA.O.

The court approaches an appeal on the principle that the appellant must show that the decision was wrong.

The Court is not persuaded that the judgment was wrong in the first respect, having regard to the fact that the claim against Mrs Amushan was based on contract but that on the Bank was based on tort. There were two separate causes of action against two distinct persons, and the judgment against Mrs Amushan did not extinguish the right of the C.FA.O. to sue the Bank, even though it was in respect of the same cheques. What was important was that the C.FA.O. should not recover the money on those cheques twice. They tried to recover it from Mrs Amushan and only sued the Bank when they could not recover it. Mr Makanju sought to support his argument by referring to Gafai v. U.A.C. Ltd.. [1961] All N.L.R. 785, and to Scarf v. Jardine (1882) 7 App. Cas. 345. Gafai sued the U.A.C. Ltd. twice for breach of one and the same contract, which is not possible: he ought to have made all his claims arising out of the breach in the first action. In Scarf v. Jardine the facts were these. Jardine had dealings with a firm known as W. H. Rogers & Co., earlier it consisted of Scarf and one Rogers; they dissolved the partnership and Scarf retired; Rogers took one Beech as partner, and they continued trading as W. H. Rogers & Co.; Jardine sold goods to the firm not knowing of the change. After he had notice of it, he sued Rogers and Beech, who later went into liquidation; Jardine proved in the liquidation, and then sued Scarf. The decision was that Jardine could have sued either Rogers and Scarf as the old firm, and that Scarf would have been liable by estoppel under the doctrine of agency between partners, as he had had no notice of the dissolution when he sold the goods, or could have sued Rogers and Beech as the new firm to whom he actually supplied the goods; but he could not have sued Rogers and Beech and Scarf together; and having elected to sue Rogers and Beech he could not sue Scarf any more. It is to be noted that there was only one cause of action, and the basis of it was contract. Neither Gafai’s case nor Scarfs is similar to the case in hand, and the first objection must fail.

The Court is also not persuaded that the trial judge erred in deciding that the Bank had a duty of care towards the C.F.A.O. Mr Makanju relied on Schroeder v. Central Bank of London, Ltd. (1876) 34 L.T.R. (N.S.) [7351. It is true that a banker is ordinarily not liable to the payee of a cheque for non-payment of the cheque: a cheque is not an assignment of debt in English law. But that case is on there being no privity of contract between the payee and the banker on whom a cheque is drawn. Here the C.F.A.O. is suing the Bank on the basis of negligence in tort.

Mr Makanju has pointed out that the principle of the decision in Donoghue v. Stevenson (supra) is summed in these words of Lord Atkin (at p. 599):

“...amanufacturer of products, which he sells in such a form as to show that he intends them to reach the ultimate consumer in the form in which they left him with no reasonable possibility of intermediate examination, and with the knowledge that the absence of reasonable care in the preparation or putting up of the products will result in an injury to the consumer’s life or property, owes a duty to the consumer to take that reasonable care.”

That certainly was the decision on the facts of the case. Donoghue drank some ginger-beer at a cafe out of an opaque bottle that was sealed with a cap; her case was that there was a decomposed slug in it, and that she suffered in health. There was no privity of contract between the plaintiff and the manufacturer, but he had a duty to take care towards potential consumers. Why? Because, as stated earlier by Lord Atkin at p. 580 in the passage first quoted in our judgment, the consumers are persons whom the manufacturer ought reasonably to have in contemplation as closely and directly affected by his acts or omissions. The decision is an application of the principle stated at p. 580 to the facts of the case.

The learned counsel’s reference to the passage at p. 599 was doubtless designed to show that it was only in that type of case that there was a duty to take care in the law of tort. Lord Macmillan in Donoghue’s case made it clear that the duty was not so restricted; he said as follows (at p. 619):

“What, then, are the circumstances which give rise to this duty to take care? In the daily contacts of social and business life human beings are thrown into, or place themselves in, an infinite variety of relations with their fellows; and the law can refer only to the standards of the reasonable man in order to determine whether any particular relation gives rise to a duty to take care as between those who stand in that relation to each other...The categories of negligence are never closed”

Mr Lampejo, for the C.F.A.O., referred to Hedley Byrne & Co. Ltd. v. Heller &Partners Ltd. [1964] A.C. 465, as showing that bankers may be liable to persons who are not their customers for tort negligence which causes them pecuniary damage. In that case the defendants, who were merchant bankers, were asked by a bank on behalf of the plaintiffs, a firm of advertising agents whose name was not stated to the defendants, about the creditworthiness of a company who were customers of the defendants; and the decision was that the defendants were careless in what they said but escaped liability because they expressly disclaimed it in their answer. The case shows that bankers normally owe a duty of care to persons whose bank is making such an enquiry on their behalf.

There is a business practice among bankers in regard to cheques, and we think that the defendant Bank ought to have followed it, to avoid it being thought, as it would reasonably have been thought by the C.F.A.O., that Mrs Amushan s cheques were being paid. On the limited evidence in the case we do not think the learned judge erred in deciding that the Bank had a duty of care towards the C.F.A.O. and was liable for damage caused by its negligence, and the second objection to the judgment must also fail. It seemed to us, however, when preparing this judgment, that the trial judge when assessing the damages erred in two respects-(I) in deducting the cheques of the 4th and of the 5th October, 1957, and (2) in allowing for the cheques taken by the C.FA.O. between the 7th and the 14th August, 1957. We therefore had a further hearing on the 22nd April, 1966 on those points, in a desire to put things right for guidance on the application of the law of tort negligence, which is that the plaintiff must show that the defendant owed him a duty of care, and that he suffered damage in consequence of the defendant’s failure to take care.

In this case, the C.FA.O. could not say with propriety that the delay in the return of cheques had anything to do with giving goods on credit to Mrs Amushan between the 7th and the 14th August, 1957: for the cheques of the 7th would not be expected back until the 14th. The cheques received from Mrs Amushan between those dates come to £1,236-13s-5d, which ought to have been deducted.

On the other hand, the C.FA.O. could say with propriety that if earlier cheques had been returned dishonoured, the firm would not have given Mrs Amushan goods on credit on the 4th and the 5th October. The fact that the four cheques issued on those two days were returned on the 10th October was no reason for deducting their value, which is £1 ,332-4s-Od and which was deducted by the trial judge.

He gave judgment for £9,865-4s-4d: he ought to have given judgment for £9,960-1 5s-Od (to the nearest shilling). We do not however intend to vary the judgment in regard to the amount: the C.FA.O. neither cross-appealed nor gave any notice that they would ask for the judgment to be varied, not even before the second hearing, after the mistake had been drawn attention to by this Court.

The appeal is dismissed with costs to the plaintiff/respondent assessed at thirty-five guineas.

Appeal dismissed.