1979 January 27

[A. LOIZOU, DEMETRIADES, SAVVIDES, JJ.]

EVDORAS PAPADOPOULOS,

Appellant–Defendant,

v.

NATIONAL BANK OF GREECE, S.A.,

Respondents–Plaintiffs.

(*Civil Appeal No.* 5578).

Estoppel—Banker and customer—Banker mistakenly crediting sum to customer's account—Customer withdrawing and spending it—Statement of account sent by Banker to customer, as to balance of account, not including the sum mistakenly credited—Subsequent oral statement by banker as to balance of account, on date of withdrawal, which included sum mistakenly credited—Customer could have realized that there was a mistake—Whether Banker estopped from claiming restitution of the money—Principles applicable.

The appellant–defendant kept a current account with the respondent–plaintiff Bank but had no overdraft facilities. On the 3rd February, 1971, a sum of C£2,267.238 mils was deposited at the respondent Bank by the CYTA Staff Medical Fund. The clerk of the Bank who filled in the lodgment form inserted by mistake the account number of appellant, instead of the account number of CYTA and as a result the appellant was credited with this sum. The mistake was discovered on the 6th July, 1972 and on the same day the appellant was called to the office of the Manager of the Bank and was informed about it. The appellant admitted that the lodgment was not his but would check the copies of his lodgment. When he failed to communicate with the Bank on the subject the latter wrote to him on the 8th July, 1972 giving him details of the mistake and requesting him to pay the amount overdrawn from his current account. The overdraft arose because on the 2nd January, 1971, the appellant had a credit balance of C£2.300 mils (two pounds three hundred mils) and on the 22nd February, 1971, there was a credit balance

in his name for C£575.900 mils. As a result of the mistaken lodgment the appellant' s account showed that there was a sum of C£2,843.228 mils standing to his credit. On the 22nd February, 1971, he called in person at the Bank, asked to see his account, drew a cheque for C£2,660, and collected the money. Had there not been the mistaken lodgment, his account would have become overdrawn by C£2,084.010 mils. By the correction of the mistake on the 7th July, 1972 there was an overdraft of C£2,127.960 mils.

In accordance with its practice of sending six monthly statements of accounts to clients, the respondent Bank did, on February 19, 1971; send by *post* to the appellant a statement of his account till the 31st December, 1970, which showed a balance of C£2.300 mils.

When the Bank sued the appellant to recover the money paid to him as above under a mistake of fact, the appellant contended (a) that at some time between the 7th January, 1971 and before the 22nd February, 1972 he deposited with the Bank the amount of C£2,300, made of from C£2,000 paid to him by Andreas Lambrou, a dentist to whom he had lent the money, and C£300 which he had at his house, and that the respondent Bank never credited him with this account; and (b) that even if the Bank credited him with the cheque of CYTA and even if it is found that the defendant made no lodgment for C£2,300 then the Bank is estopped from recovering the money paid to him under a mistake of fact because his position was changed to the worse.

The trial Judge rejected appellant's contention (a) above; with regard to contention (b) he stated* that the defence of estoppel could not succeed because such defence could only succeed if it was established that:

"(a) the money were paid under a mistake of fact;

(b) the recipient changed his position for the worse by spending 'the mony beyond recall' and there was some fault, as, for instance, some neglect or breach of duty or misconduct on the part of the payer, and

(c) no fault on the recipient..."; and that only condition (a)

* See the relevant passage at pp. 16–17 *post*.

above was satisfied and the remaining two conditions were not warranted by the facts of the case.

The appellant was found by the trial Judge to be at fault as at the time he was informed of his credit balance he must have realized that there was a mistake and he ought to have informed the Bank about it instead of keeping silent and collecting the money.

Upon appeal counsel for the appellant-defendant contended:

(a) That the statement of the law on estoppel by the trial Judge was correct with the exception of the words "spending the money beyond recall" and that the correct statement of the law is to be found in the case of *United Overseas Bank* v. *Jiwani* [1977] 1 All E.R. 633*;

(b) that there was no evidence of posting and consequently nothing to show that the appellant received the statement of account in respect of the period ending 31st December, 1970, showing a credit balance in favour of the appellant for the amount of C£2.300 mils;

(c) that there was no constructive knowledge as to what amount the appellant had at the Bank, and

(d) that the trial Judge failed to comment on the relevant system employed by the respondent Bank in supplying customers with successful statements of account.

Held, dismissing the appeal, (1) that the defence of estoppel must not be extended beyond its proper bounds; that the fact that the recipient has spent the money beyond recall is no defence unless there was some fault—as, for instance, a breach of duty—on the part of the Bank and none on the part of the recipient (see *Larner* v. *London County Council* [1949] 1 All E.R. 964 at p. 967 per Denning L.J.); that the appellant was found to be at fault as at the time he was informed of his credit balance he must have realized that there was a mistake and he ought to have informed the Bank about it instead of keeping silent and collecting the money; and that accordingly, contention (a) above must fail.

* See the relevant passage at p. 18 *post*.

Per curiam: We see no difference in the statement of the law on the subject as appearing in the *Jiwani* and *Larner* cases (*supra*); but had we noticed any difference we would have adopted the statement of the law in the *Larner* case which was the unanimous judgment of the Court of Appeal as compared with that of McKenna J. trying the case alone, bearing in mind the principles of judicial precedent followed in England.

(2) That this Court does not agree with contentions (b)(c) and (d) above as the findings of the trial Judge were duly warranted by the evidence before him; that there was evidence that the statement of account was posted on the 19th February, 1971, and there was nothing in the evidence to suggest that this account was never received by the appellant; that, on the contrary, the trial Judge concluded that when the appellant was told on the 22nd February, 1971, that his credit balance exceeded C£2,500 he should have realized that there was a mistake because he could have remembered what deposits he had made between 1.1.1971 and 22.2.1971; that instead he chose to keep silent and collect the money; that this finding leaves no room for any issue of constructive knowledge on the matter; that the trial Judge referred to the evidence regarding the supply of customers with six monthly statements of accounts and there was nothing to call for any further comment on the subject; and that, accordingly, the appeal must be dismissed.

Appeal dismissed.

Cases referred to:

Larner v. *London County Council* [1949] 1 All E.R. 964;

United Overseas Bank v. *Jiwani* [1977] 1 All E.R. 733 at pp. 736 and 737;

Lloyds Bank Ltd. v. *Brooks* [1972] J.I.B. 114.

Appeal.

Appeal by defendant against the judgment of the District Court of Nicosia (Kourris, S.D.J.) dated the 30th March, 1976, (Action No. 3663/73) whereby the sum of £2,400.700 mils was awarded to plaintiffs as money credited to the account of the defendant by mistake.

A. Hadjiioannou with *A. Georghiades*, for the appellant.

A. Dikigoropoulos for the respondents.

A. LOIZOU J. gave the following judgment of the Court. This is an appeal from the judgment of a Judge of the District Court of Nicosia by which the appellant was adjudged to pay the sum of C£2,400.770 mils with interest on the sum of C£2,127.960 mils at 9% p.a., from 8.7.1972 to the date of payment, and the costs of the proceedings amounting to C£221.350 mils.

The appeal is based on the following grounds:-

"The trial Judge erred in Law and/or in fact viz:

(a) The trial Judge erroneously expounded and applied the rules of law relating to estoppel.

(b) The reasoning behind his finding of fact on which he applied the said rules was defective and/or erroneous, taking into account the evidence as a whole".

The facts of the case, as found by the trial Judge and set out in his elaborate judgment, are as follows:-

The appellant kept a current account with the respondent Bank at their Ledra Street, Nicosia Branch Office, but had no overdraft facilities. On the 3rd February, 1971, a sum of C£2,267.238 mils, in the form of a cheque issued on the Bank of Cyprus, dated 3rd January, 1971, was deposited at the said Branch by the CYTA Staff Medical Fund. The clerk of the respondent Bank who filled in the lodgment form inserted by mistake Account No. 516218, which is that of the appellant, instead of the account number of CYTA of the said Fund which is No. 516260; as a result the appellant was credited with this sum. This mistake was not discovered until the 6th July, 1972, when the auditor of CYTA informed the Committee of the aforesaid Fund that this amount had not been credited to their account by the respondent Bank. Thereupon steps were taken with the respondent Bank, the mistake was discovered and the Fund was credited with the amount, plus interest. On the same day the appellant was called to the office of the Manager of the respondent Bank and was informed about the mistake. He admitted that the lodgment was not his, but would check the copies of his lodgment. He did not, however, communicate with them on the subject and the respondent Bank wrote to him on the 8th July, 1972 (*exhibit* 6) giving him therein details of the mistake and requesting him to pay the amount overdrawn

from his current account. In reply thereto, the appellant wrote to the respondent Bank on the 18th July, 1972 (*exhibit* 7), alleging that the contents of their letter were incorrect and that after such a long time he did not keep the necessary receipts as upon receiving their returns, he checked them, found them to be accurate and disposed of them. The respondent Bank insisted on their demand for the refund of the amount overdrawn from his account by their letter dated 24.7.1972 (*exhibit* 8).

This overdraft arose because on the 2nd January, 1971, the appellant had a credit balance of C£2.300 mils (two pounds three hundred mils) and on 22.2.1971 there was a credit balance in his name for C£575.900 mils. As a result of the mistaken lodgment, the appellant' s account showed that there was a sum of C£2,843.228 mils standing to his credit. On the 22nd February, 1971, he called in person at the respondent Bank, asked to see his account and drew a cheque for C£2,660.–and collected the money. Had there not been the mistaken lodgment, his account would have become overdrawn by C£2,084.010 mils. By the correction of the mistake on 7.7.1972, there was an overdraft of C£2,127.960 mils in respect of which the trial Judge awarded 9% interest from 22.2.1971 up to 7.2.1972 amounting to C£272.810 mils, which sum was added to the amount the appellant was adjudged to pay, plus interest, which in both cases was calculated at 9%, the rate with which debit balances of accounts of clients are charged.

It is worth noting that in accordance with the practice of the respondent Bank of sending six monthly statements of accounts to clients, they did on the 19th February, 1971, send by post to the appellant a statement of his account till the 31st December, 1970, which showed a balance of C£2.300 mils (two pounds three hundred mils).

The trial Judge further accepted that the appellant stated that he wanted to repay the amount, but was unable to do so and inquired whether the respondent Bank would be prepared to accept payment of same by monthly instalments of C£10.– each.

The version of the appellant, which was rejected by the trial Judge, was to the effect that at some time between the 7th January, 1971, and before the 22nd February, 1972, he deposited with

the respondent Bank the amount of C£2,300.–made up from C£2,000.–paid to him by Andreas Lambrou, a dentist to whom he had lent the money, and C£300.–which he had at his house, and that the respondent Bank never credited him with this amount.

The trial Judge then dealt extensively with the issue of estoppel and the authorities relied upon by both sides and concluded as follows:–

"According to the above principles the defence of estoppel can succeed if it is established:

(a) that the money were paid under a mistake of fact;

(b) the recipient changed his position for the worse by spending 'the money beyond recall' and there was some fault, as, for instance, some neglect or breach of duty or misconduct on the part of the payer, and

(c) no fault etc. on the recipient (see *Larner* v. *London* County Council [1949] 1 ALL E.R., 964, at p.967, letters 'A' - 'D')".

And then went on to say:–

"That the money were paid by the plaintiffs to the defendant under a mistake of fact it is not disputed.

With regard to (b) above, I think that the payment of the money by the defendant for the account of his son to acquire a business in South Africa it is not spending the money beyond recall because the defendant did not spent it on living expenses and he can recover the money from his son. I will consider the position, however, on the assumption that I am wrong on this point. Assuming that, contrary to my view, the defendant spent the money beyond recall, then it must be shown that there was neglect or misconduct or breach of duty on the plaintiffs' part. The duty which a Bank owes to a customer is to keep a customer correctly informed as to the position of his account, a duty not to overcredit his statements of account and not to authorise him or induce him by faithful representations contained in the statement of account to draw money from his account

to which he is not entitled. This is what Lynskey, J., held in *Lloyds Bank Ltd.* v. *Hon. Cecily K. Brooks.* I have traced this passage in *Paget's Law of Banking*, 7th Ed., p. 101. The note to this case indicated that it is unreported and unfortunately I have not been able to acquaint myself with the facts of this case. This case is also mentioned at p. 352 in the same book under the chapter of 'Money Paid under a Mistake of Fact'. When the defendant asked the Bank employee of his credit balance at the time he drew the cheque for C£2,660.–and collected the money, the Bank employee informed him of his balance including the wrong entry. I, therefore, take the view that there was breach of duty on the Bank to keep the defendant correctly informed as to the position of his account.

In view of my finding that there was a breach of duty on the part of the Bank and assuming that, contrary to my view, the defendant changed his position to the worse by spending the money beyond recall, it still remains to be examined whether there was no fault on the part of the defendant. I am of the view that there is fault on the part of the defendant preventing him from successfully raising the defence of estoppel, his fault being that at the time he was informed of his credit balance he must have realized that there was a mistake and he ought to have informed the Bank about the mistake instead of keeping silent and collecting the money. I am of the opinion that the defendant must have realized that there was a mistake when informed of his credit balance, because he must have received his statement of account as on the 31.12.1970 which was posted to him on 19.2.1971 and he must have seen what his credit balance was. In point of fact, according to the evidence before me, his credit balance was C£2.300 mils and on 22.2.1971 was C£575.990 mils, excluding the wrong entry. Therefore, when he was told on 22.2.1971 that his credit balance exceeded C£2,500.–, which in fact was C£2,843.228 mils, including the wrong entry, he must have realized that there was a mistake because he could have remembered what deposits he had made between 1.1.1971 and 22.2.1971, and he chose instead to keep silent and collect the money.

For these reasons the defence of estoppel cannot succeed."

It is the case for the appellant that the aforesaid statement of the law by the learned trial Judge was correct with the exception of the words "spending the money beyond recall" set out in para. (b) hereinabove, and that the correct statement of the law is to be found in the case of *United Overseas Bank* v. *Jiwani* [1977] 1 All E.R., p. 733, where at pp. 736 and 737 it is stated:-

> "The question remains whether the defendant is liable to repay the plaintiffs the sum with which they credited him in error. In my opinion, which I base on the statement of the law in Goff and Jones' s The Law of Restitution, he is liable unless he can show that the plaintiffs are estopped from claiming restitution, and there are three conditions to be satisfied by him if he is to make good this estoppel. First, he must show that either the plaintiffs were under a duty to give him accurate information about the state of this account and that in breach of this duty they gave him inaccurate information, or that in some other way there was a misrepresentation made to him about the state of the account for which the plaintiffs are responsible. Secondly he must show that this inaccurate information in fact misled him about the state of the account and caused him to believe that the plaintiffs were his debtors for a larger sum than was the case and to make the transfer to Mr. Pirani in that mistaken belief. Thirdly, he must show that because of his mistaken belief he changed his position in a way which would make it inequitable to require him now to repay the money. I have no doubt that the first of these requirements is satisfied. I shall assume for the moment that he has satisfied the second, returning to that matter a little later in this judgment. He has, I think, completely failed to establish the essential third condition".

We see no difference in the statement of the law as appearing in the two statements on the subject. Among the authorities referred to in the footnote to the statement of the law by Goff and Jones, *The Law of Restitution* 1966, p. 491 is also the case of *Larner* v. *London County Council* (*supra*), with particular reference to what Lord Denning, L.J., said at p. 967, which is what the trial Judge reproduced in his judgment. Undoubtedly, it is a difficult proposition for a customer to prove that he acted on a wrong credit. This is more so when the circum-

stances are doubtful or where the amount involved is substantial. It is because of this difficulty that the appellant obviously attempted to persuade the Court by evidence that at the material time he paid into his account the amount of C£2,300.- which was almost the same as the amount with which he was mistakenly credited by the respondent Bank.

As McKenna J., said in his judgment in *Jiwani* case (*supra*), there must exist three requirements before the defence of estoppel is allowed: (1) that the Bank has misrepresented the state of the account; (2) that he had been misled by the representation, and (3) that as a result he changed his position in a way which would make it inequitable to require him to repay the money.

The first condition was found by the learned trial Judge to have been clearly satisfied. The remaining two conditions were found by the trial Judge not to be warranted by the facts of the case. The evidence of the appellant was not accepted. the appellant was found to be at fault as at the time he was informed of his credit balance he must have realized that there was a mistake and he ought to have informed the Bank about it instead of keeping silent and collecting the money.

In the case of *Larner* v. *London County Council* (*supra*), Denning L.J., in delivering the unanimous judgment of the Court of Appeal had this to say:-

> "The defence of estoppel, as it is called—or more accurately, change of circumstances—must, however, not be extended beyond its proper bounds. Speaking generally, the fact that the recipient has spent the money beyond recall is no defence unless there was some fault—as, for instance, a breach of duty—on the part of the paymaster and none on the part of the recipient."

This sums up the situation and we need not say anything more except that this passage was also quoted in the judgment of Lynskey, J., in the case of *Lloyds Bank Ltd.* v. *Brooks*, [1972] J.I.B., 114, referred to also by the learned trial Judge in his judgment.

On the law as stated above and on the facts as found by the trial Judge, this ground of appeal fails. We need only point out here that had we noticed any difference in the statement of

the law between what McKenna said in the case of *Jiwani* (*supra*) and Denning L.J., in the *Larner* case (*supra*), we would have adopted the statement of the law in the latter case which was the unanimous judgment of the Court of Appeal as compared with that of McKenna J., trying the case alone, bearing in mind the principles of judicial precedent followed in England.

It remains now to consider the second ground of appeal. The argument advanced by counsel for the appellant on this was threefold:

(a) that there was no evidence of posting and consequently nothing to show that the appellant received the statement of account in respect of the period ending 31st December, 1970, showing a credit balance in favour of the appellant for the amount of C£2.300 mils.

(b) that there was no constructive knowledge as to what amount the appellant had at the Bank, and

(c) that the trial Judge failed to comment on the relevant system employed by the respondent Bank in supplying customers with successful statements of account.

We do not agree with either of these three contentions as we have already referred to the findings of the trial Judge which were duly warranted by the evidence before him. There was evidence that the statement of account was posted on the 19th February, 1971, and there was nothing in the evidence to suggest that this account was never received by the appellant. On the contrary, the trial Judge concluded that when the appellant was told on the 22nd February, 1971, that his credit balance exceeded C£2,500.– he should have realized that there was a mistake because he could have remembered what deposits he had made between 1.1.1971 and 22.2.1971. Instead he chose to keep silent and collect the money.

This finding leaves no room for any issue of constructive knowledge on the matter.

With regard to the third contention, the learned trial Judge indeed referred to the evidence regarding the supply of customers with six monthly statements of accounts and there was nothing to call for any further comment on the subject.

For all the above reasons this appeal must be dismissed with costs.

Appeal dismissed with costs.