

DUTY, LIABILITY AND PROTECTION OF THE PAYING BANKER*

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INTRODUCTION

As the drawee of the cheque and therefore a party to it,¹ the paying banker owes a duty to his customer to honour the cheques according to the customer's mandate or written orders provided that:

- (a) It is drawn in proper form;
- (b) It is presented during the advertised banking hours or within a reasonable time thereafter at the branch at which the account is kept;
- (c) The account on which it is drawn is in credit sufficient to pay the cheque or the amount on the cheque is within the limit of an agreed overdraft, and
- (d) There is no legal cause which makes the credit balance or the agreed overdraft limit though sufficient, not available for the payment.²

Where the banker refuses or neglects to honour a cheque and the dishonour is unlawful, he will be liable to the customer for breach of contract or libel or both as the case may be. He can lawfully debit the customer's account with the amount paid out only where payment of the cheque is made in the ordinary course of business and in accordance with the customer's mandate.³ Thus, it is provided under section 59 of the Bills of Exchange Act 1990,⁴ that in order to obtain a complete discharge when paying a cheque, the banker must make payment at maturity to the holder in good faith without notice of defect, if any, in title.

In practice, while open cheques may be honoured or discharged by the due payment of cash to the holder over the counter, a crossed cheque may only be paid through a collecting banker and strictly in accordance with the crossing.⁵ Compliance with this manner of payment is also very important and mandatory for the banker.

It is to be noted that even where the banker pays on an order which proves to be invalid, he will not be entitled to debit the customer's account with the amount paid out⁶. In such a situation, the banker is entitled to recover the money from the payee or recipient but he may find it difficult if not impossible to do so.⁷

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¹ Section 5, 6 & 7 of the Bill of Exchange Act 1990.

² *Ademiluyi & Anor v. A.C.B. Ltd.* (1964) N.M.L.R., 137; *Avwevwiewwe v. Standard Bank of Nigeria Ltd. & Anor.* (1974) N.W.S.J. 199. *Baines v. National Provincial Bank Ltd.* (1927) 96 L.J.K.B. 801; *Clare & Co. v. Dresdner Bank* (1915) 2 K.B. 576; *Nwandu & Anor. v. Cooperative Bank of Nigeria*, (1981) 2 P.L.R.449; *London Joint Stock Bank v. Macmillan & Anor* (1918) A.C. 777; *Rouse v. Bradford Banking Co. Ltd.* (1894) A.C. 586; *Akwule & Ors. v. The Queen* (1963) 1 All N.L.R. 193.

³ *Balogun v. National Bank of Nigeria Ltd.* (1978) 3 S.C. 155; *Onyechi v. National Bank of Nigeria Ltd.* (1977) 1 All N.L.R. 296, 303. *Akwule & Ors. v. The Queen* (1963) All N.L.R. 193.

⁴ See Note 1 above.

⁵ Section 81 (2): *United Nigeria Insurance Co. v. Muslim Bank Ltd.* (1972), All N.L.R. (Pt. 1) 314.

⁶ *Ashubiojo v. African Continental Bank* (1966) 2 All N.L.R. 203

⁷ *U.B.A. v. Savannah Bank of Nigeria* (1979) 10 -12 CCHCJ. 255; *National Westminster Bank v. Barclays Bank International Ltd.* (1974) 3 ALL E.R. 834.

This contribution identifies for critical examination, some areas of potential problems for the paying banker while executing his duties and the statutory or legal protection afforded him under the existing laws namely:

1. Where a drawer's signature may have been forged.
2. Where endorsement may have been forged or written without authority.
3. Where there may not be an endorsement as required by law or the endorsement may be irregular.
4. Where the customer's cheque may have been fraudulently altered.

A. **CASES OF FORGERY OF A DRAWER'S SIGNATURE**

Under Section 24 of the Bills of Exchange Act 1990,⁸ where the signature on a cheque is forged or placed thereon without the authority of the person whose signature it purports to be, the forged or unauthorised signature is wholly in-operative, unless the party against whom it is sought to enforce payment of the cheque is precluded from setting up the forgery or want of authority. The drawer may however, ratify an unauthorised signature not amounting to a forgery. Thus, a banker receiving for payment a cheque on which the drawer's signature has been forged or the signature is unauthorised, has no mandate to pay, as such payment cannot be regarded as his customer's order.⁹

Examples of each of these situations under section 24 may be given for clarity. For instance, where a manager in a company who, in his usual or customary authority, is not entitled to sign or authorise the payment of a cheque above ₦10,000 (Ten thousand Naira) does so in good faith in an emergency while the Director or the appropriate officer is not immediately available, this is an case of unauthorised signature not amounting to forgery. In such a case, the company may ratify such signature. But unauthorised signature not ratified may be regarded as forgery in some cases. Thus, in *Kreditbank Cassel v. Schenkers Ltd.*¹⁰ S. carried on business in London, and had a branch in Manchester. X., the manager of the Manchester Branch, without any authority from S., drew seven bills of exchange, purporting to do so on behalf of S., and signed them "X., Manchester Manager." The bills having been dishonoured, K, a holder in due course, sued S. as drawer. It was held that the bills being drawn by X. without authority were forgeries and S. the employer, was not liable on them.

On the other hand, it was held in *State v. Udoeka*,¹¹ "that where a cheque issued by the authorised officers of a company is proved to have been issued in order to defraud the company or the employer, such a cheque will be considered forged even though everything on it is regular. Similarly, it was held in *Bank of America v. Nigeria Travel Agencies*¹² that where the authority of a signatory to a bank account has been withdrawn and such a person later signs cheques without any further authority, such cheques are forgeries. And a forged cheque is not a cheque, it is nothing but a sham piece of paper.¹³ In effect, a forged signature, in the absence of estopped, or an unauthorised signature, in the absence of ratification, renders a cheque invalid. In *Nigeria Advertising Services Ltd.*

⁸ Cap. 35, Laws of the Federation, 1990. Unless otherwise indicated all references in this Contribution are references to this Act.

⁹ Union Bank Ltd. v. Adediran (1987) 1. N.W.L.R. 52.

¹⁰ (1927) I.K.B. 826

¹¹ (1982) 2 F.N.R. 239

¹² (1976) 1 All N.L.R. 156

¹³ U.B.A. v. Savannah Bank of Nigeria (1979) 10 –12 CCHCJ. 255

v United Bank for Africa Ltd.,¹⁴ the bank paid out a number of cheques of the total value of £165 belonging to the plaintiff-customers to unauthorised third parties. It was later discovered that all the cheques were forged by a messenger in the employment of the plaintiff in circumstances suggesting that the messenger had a master-key with which he opened the drawer where the plaintiff's cheque books were kept under lock. The plaintiff asked for declaration that the cheques were wrongfully debited to their account and that the amount of £165 was due and owing by the bankers to the plaintiff. The court held that the forged signature was not the plaintiff customer's mandate and that the bank was not entitled to debit the plaintiff's account with the amount on the forged cheques.

However, by virtue of the exceptions under Section 24 a drawer may be estopped from relying on the forgery to prevent the bank from debiting his account with the amount on the forged cheque if the following conditions are satisfied:

1. Where the drawer may have held out the cheque as genuine and therefore precluded from denying the genuineness of it.¹⁵ Thus, in *Leach v. Buchanan*¹⁶ the acceptance to a Bill of Exchange was forged. A person who was negotiating with a view to becoming holder, being doubtful about the drawee's hand-writing, sent to ask him if the acceptance was his and received an affirmative reply, hereupon he gave value for the instrument. The drawee afterwards refused to pay and pleaded the forgery. It was held that he was estopped from denying that the acceptance was his and he could not rely on the forgery. Similarly, estopped may arise in the case of an unauthorised signature of an agent on behalf of a customer, for example, where the customer had not in the past objected to payment having been made on such signature.¹⁷
2. Where the drawer may have failed to inform the bank of forgery of which he knew much about. In *Greenwood v. Martins Bank Ltd.*,¹⁸ the plaintiff's wife had operated upon his account with the defendant bank by forging a series of cheques in his name. The plaintiff had discovered these frauds, but at his wife's earnest solicitation had forbore to inform the defendants of his discovery until after his wife's death. The plaintiff sued the defendants to recover the money paid away. It was held that it was the plaintiff's duty to inform the defendants of the forgery as soon as he knew of it. Having failed to do so and thus having prevented the bank from bringing an action against husband and wife for the tort committed by the wife until after her death when the plaintiff's liability for the torts of his wife came to an end, so that the bank lost their rights against him, he was estopped from complaining of the payment of the cheques and the bank was entitled to debit his amount.

However, there is authority to the effect that in the case of forgery, the banker may be able to recover the money from the person to whom it made the payment, on the ground that the money had been paid under a mistake of fact. But it seems that the claim may fail if it is proved that the defendant has acted honestly and has altered his position to

¹⁴ (1965) 1 L.L.R. 84

¹⁵ *Tai Hing Cotton Mill Ltd. v. Liu Chong Hing Bank Ltd & Ors.* (1985) 2 All ER. 947

¹⁶ (1803) 4 Esp. 226

¹⁷ *Brown v. Westminster Bank Ltd.* (1964) 2 Lloyds Rep. 187; See also Sections 23, 25, 26 and 93 – an agent may sign a bill on behalf of a principal.

¹⁸ (1933) A.C. 51

his detriment by spending or paying away the money in reliance on having received the payment lawfully.¹⁹

B. CASES OF FORGED AND UNAUTHORISED ENDORSEMENT

Under section 60, where a banker on whom a cheque is drawn pays it in good faith and in the ordinary course of business, it is not incumbent on him to show that the endorsement of the payee or any subsequent endorsement was made by or under the authority of the person whose endorsement it purports to be, and the banker is deemed to have paid the cheque in due course²⁰ although the endorsement has been forged or made without authority. This provision is in sharp contrast to Section 24 where forgery of a drawer's signature renders the cheque wholly inoperative. The rationale for this may be because, the banker has the specimen signature of the drawer and must assume greater burden under Section 24 whereas the banker does not have the specimen signature of endorser hence the less burden under section 60. Thus, in *Vinden v. Hughes*²¹ A. drew a cheque in favour of B., but A's clerk forged the endorsement and negotiated the cheque to H. who took it *bona fide* and for value. The cheque was paid by A's bank in good faith and in the ordinary course of business. It was held that the bank was not liable and could lawfully debit the drawer's account.

There are two conditions for the banker's protection under Section 60 namely:

1. The banker must have acted in good faith in paying the cheque. By Section 92 a thing is deemed to be done in good faith where it is in fact done honestly, whether it is done negligently or not. This means that proof of absence of negligence on the banker's part is not a condition for his protection under Section 60. Thus, in *Raphael v. Bank of England*²² the plaintiff was a money-changer in Paris. He received a circular from the defendants containing a list of stolen Bank of England notes with their serial numbers. Afterwards he changed a stolen note, which appeared upon this circular, but he negligently failed to refer to the circular before doing so. The jury found that there had been no dishonesty on his part, but was simply inadvertence. It was held that he was entitled to recover as a *bona fide* holder of the note in question.
2. The second condition for the protection of the banker under Section 60 is that payment must be made in the ordinary course of business. Usually, payment made within banking hours or as permitted by banking practice would be in the ordinary course of business. However, in the following situations it would appear that the banker would not be deemed to be acting in the ordinary course of business:-
 1. Where it pays a cheque before or after banking hours.²³
 2. Where a crossed cheque is paid otherwise than in accordance with the crossing,²⁴ as by paying it to a third party not entitled to it or

¹⁹ National Westminster Bank Ltd. v. Barclays Bank International Ltd. (1975) Q.B. 654

²⁰ Section 59 (2)

²¹ (1905) 1 K.B. 795

²² (1885) 139 E.R. 1030; *Carpenter's Co. v. British Mutual Banking Co. Ltd.* (1938) 1 K.B. 511.

²³ *Baines v. National Provincial Bank Ltd.* (1927) 137 L.T. 631; *Smith v. Union Bank of London* (1875) 1 Q.B.D. 31, 35

where a crossed cheque is paid in cash on the counter. Thus, in *Ladipo v. Standard Bank of Nigeria Ltd.*²⁵ Where the defendants paid in cash a crossed cheque drawn on them by the plaintiff, it was held that this amounted to negligence on their part and that they were not entitled to debit the plaintiff's account with the amount irregularly paid out.

3. Where the banker pays an open cheque presented by the plaintiff to a third party or to a person who represented to be the plaintiff's houseboy without a letter of authority. Two cases aptly illustrate this point. In *Banmeke v. Union Bank of Nigeria Ltd.*²⁶ the Africa Development Corporation issued a cheque for ₦4,832 to the plaintiff. The latter presented the cheque personally. But the cashier negligently paid it to a third party while the plaintiff was in the banking hall. The court held that the defendant bank was liable in negligence. Also, in *Takaya v. Union Bank of Nigeria Ltd.*²⁷ the plaintiff drew on the defendant bank a cheque of ₦6,300 payable to "cash" and handed it to the cashier. But in the plaintiff's absence the cashier paid the cheque to one Yusuf, who presented himself as the plaintiff's houseboy although, he did not present any letter of authority from the plaintiff. The court held that this amounted to negligence on the part of the bank.

It seems that Section 60:

- (i) applies to both crossed and uncrossed cheques whose endorsements are forged;
- (ii) does not apply where the drawer's signature is forged;
- (iii) applies even here the banker is negligent;
- (iv) applies only to cheques payable to order
- (v) does not cover cases of irregular endorsements or absence of endorsements on cheques.

C. CASES OF NON-ENDORSEMENT AND IRREGULAR ENDORSEMENT

Section 76 affords some additional protection to the banker in cases of non-endorsements or irregular endorsements on cheques. Under the section, a banker who pays a cheque drawn on him in good faith and in the ordinary course of business does not incur liability by reason only of the absence of, or irregularity in, endorsement, and he is deemed to have paid in due course.²⁸ This supplements section 60 which deals only with forged or unauthorised endorsements. It seems that the provision of section 76 applies whether or not the cheque is crossed.

²⁴ Section 81; *Ladipo v. Standard Bank of Nigeria Ltd* (1969) N.C.L.R. 469.

²⁵ (1969) N.C.L.R. 496; *National Bank of Nigeria Ltd v. Mobil (Nig) Ltd.* (1994) 2 N.W.L.R. (pt. 328) 534.

²⁶ (1982) 3 F.N.L.R. 151

²⁷ (1985) H.C.N.L.R. 304

²⁸ Section 76 (i) (a)

The major objective of this section seems to be to relieve the banker of the necessity of requiring to see the payee's endorsement in cheques in all cases. However, in practice prudent banker would insist on the payee's endorsement in most cases, for instance, where the payee or his transferee presents an open cheque to the drawee bank over the counter or an order cheque is to be paid into an account other than that of the original payee. To disregard endorsement in these cases may mean that the banker is not acting in the ordinary course of business to be protected by this section. Thus, in *Agbafe v. Viewpoint Nigeria Ltd.*²⁹ the defendant alleged that he paid the sum of ₦1020 to the plaintiff by a bearer cheque. The plaintiff denied receipt and the issue turned on the nature of a bearer cheque and the need for proper indorsement. The purported endorsement at the back of the cheque read: "Mrs. Theresa Agbafe, S.A 18 Akpata Street, Jenta New Layout, Jos." There was no signature added to these and the cheque was stamped paid, the cashier who purportedly paid it was not called to give evidence. The court held that the name and address at the back of the cheque were not signatures and therefore the purported endorsement was irregular and the bank paying it could not be protected under the Bills of Exchange Act. It would however be unnecessary for a banker to insist on endorsement where the customer presents his own cheque for payment over the counter or where a cheque is paid into a bank for the credit of the payee's own account or for the credit or for the credit of a joint or partnership account when the payee is one of the account holders.

It needs to be emphasized that these provisions are not necessarily over protective of the banker to the disadvantage of other parties involved in the transaction, since these are only exceptions to the liability of the banker under the Act. For instance, under section 81(1) it is the duty of a banker to refuse payment of a cheque crossed specially to more than one banker unless the cheque is crossed to an agent for collection being a banker. A violation of this provision attracts liability for the banker under subsection (2) which provides:

"where the banker on whom a cheque is drawn which is so crossed nevertheless pays the same or pays a cheque crossed generally otherwise than to a banker, or if crossed specially otherwise than to the banker to whom it is so crossed, or his agent for collection being a banker, he is liable to the true owner of the cheque for any loss he may sustain owing to the cheque having been so paid."

However, where a banker pays a cheque in accordance with the crossing in good faith and without negligence on his part but unfortunately the money does not reach the true owner through the collection banker it is only fair that the banker be relieved of liability and the true owner be made to pursue his rights against the recipient of the money hence section 82 provides:

"where the banker, on whom a crossed cheque is drawn, in good faith and without negligence pays it, if crossed generally, to a banker, and if crossed specially, to the banker to whom it is crossed, or his agent for collection being a banker, the banker paying the cheque, and, if the cheque has come into the hands of the payee, the drawer, shall respectively be entitled to the same rights and be placed in the same position as if payment of the cheque had been made to the true owner thereof."

²⁹ (1977) N.N.L.R. 113

The requirements of this section are that the paying banker pays in good faith, without negligence, and in accordance with the crossing. This may be illustrated as follow: X draws a generally crossed cheque on Y bank payable to A. X hands the cheque to A from whom it is stolen by B. B forges A's endorsement, and negotiates the cheque to C. C pays the cheque into his own account at D bank. If Y bank pays the amount of the cheque to D bank for the credit of C, in good faith and without negligence, Y bank has the right to debit X's account with the amount on the cheque. This is so also because, the cheque had come into the hands of the payee A. within the meaning of the section before it was stolen by B.

D. **CASES OF FRAUDULENT ALTERATION OF AMOUNT ON A CHEQUE**

A material alteration of the amount on a cheque without the consent of the drawer would render the cheque void. If a cheque presented to a banker for payment had been fraudulently altered and the alteration is apparent the banker will be at fault if the cheque is paid by him. The usual practice is for the drawer to sign any alteration on the cheque before it may be lawfully paid. Where alteration are apparent and not signed by the drawer, they render the cheque void as against him a banker paying such a cheque will not be able to debit the drawer's account with the amount. Section 64(1) provides:

"Where a bill (cheque) or acceptance is materially altered without the assent of all parties liable on the bill (cheque), the bill (cheque) is avoided except as against a party who has himself made, authorised, or assented to the alteration, and subsequent endorses."

But if the alteration is not apparent the banker may pay in the course of his duty. A holder in due course presenting such a cheque is entitled to payment according to its original tenor. The proviso to the subsection reads:

"provided that, where a bill has been materially altered, but the alteration is not apparent, and the bill is in the hands of a holder in due course, such holder may avail himself of the bill as if it has not been altered, and may enforce payment of it according to its original tenor."

However, difficult questions may arise and different legal consequences may flow from the following two situations, where a holder fraudulently alters the amount on the cheque and collects payments from the banker.

1. Where the drawer or customer draws his cheque with care giving no palpable opportunity to alter the amount thereon, and the amount nevertheless is fraudulently altered or increased and the cheque is paid. It seems in this situation, the banker cannot debit the customer's account with anything more than the original amount on the cheque, since the customer is not negligent. In the *Nigerian Advertising Services Ltd. v. United Bank for Africa Ltd.*,³⁰ the court clearly stated the legal position that where there were forgeries which were not due to a

³⁰ (1965) 1 L.L.R. 84

customer's negligence, it is the duty of the banker to credit the account of such a customer whose cheque had been forged.

But the banker, may be able to recover from the forger the amount paid to him in an action for money had and received. In addition, the latter may be liable for criminal prosecution by the State.

2. Where the drawer or customer careless draws a cheque in a way to facilitate fraudulent alteration, as where he signs a blank cheque or leaves gaps between figures and words. In this situation the legal position will be different. In *London Joint Stock Bank Ltd. v. Macmillan and Arthur*³¹ the House of Lords (England) approved the true legal position as stated in the case of *Young v. Grote* that:

It is beyond dispute that the customer is bound to exercise reasonable care in drawing the cheque to prevent the banker from being misled. If he draws the cheque in a manner which facilitates fraud, he is guilty of a breach of duty as between himself and the banker, and he will be responsible to the banker for any loss suffered by the banker as a natural and direct consequence of this breach of duty.

For the customer to drawer to be liable, there must be established on his part negligence or carelessness in drawing up his cheque or written order or mandate.³² In *Young v. Grote*³³ Y gave his wife 5 cheques signed in blank to be used by her for his business as and when necessary. Mrs. Y. gave one cheque for wages to a clerk to be filled up to £5:2s:3d. the clerk filled up the cheque for this amount, and showed it to Mrs. Y., but it was filled in such a manner that he was able afterwards to raise the words and figures to £350.2s:3d. the alterations were so made that they could not have been detected by ordinary diligence. Another cheque was fraudulently raised from £2 to £120 and was signed with the space for the amount in word left blank, and with a convenient space each side of the figure 2. The court had no hesitation in holding that plaintiff was careless in the manner he handled his cheques and that the bank was entitled to debit his account with the amount contained in the cheques as altered. Thus, it became a well settled law that if a customer signed a cheque in blank, and left it to a clerk or other person to fill it up, he was bound by the instrument as filled up by his agent.

However, whether or not there has been a breach of duty of care by the customer in any particular case is a question of fact to be decided upon the circumstances of the case and, it has been held in *Singsby v. District Bank Ltd.*³⁴ that each case has to be considered in the light of the surrounding circumstances.

CONCLUSION

The four situations of potential problems identified and examined in this contribution clearly exemplify the need for and, indeed, the provision of some statutory

³¹ (1918) A.C. 777

³² *Salawu v. Union Bank Ltd.* (1986) 4 N.W.L.R. (pt.38) 701

³³ (1827) 4 Bing 253.

³⁴ (1931) 1 ALL E.R. (Reprint) 142

protection for the paying banker under the Bills of Exchange Act 1908. Although these provisions are copious, they cannot reasonably be regarded as over-protective of the paying banker. This is because, the conditions for the enjoyment of the protection afforded by these provisions are not too easily attainable by the paying banker. Such conditions to be fulfilled by the paying banker include those requiring the banker to act "in good faith", "in the ordinary course of business" paying "in due course" and in some cases, "without negligence".