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*Judgment: approved by the Court for handing down (subject to editorial corrections)** | *Delivered:* ***03/05/07***

IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND

QUEEN'S BENCH DIVISION

BETWEEN:

J J MacMAHON (BUILDING CONTRACTOR) LIMITED

Plaintiff;

v

ULSTER BANK LIMITED

Defendant.

DEENY J

[1] The claim in this action arises out of somewhat unusual banking transactions carried out in the name of the plaintiff by its Managing Director, when he left the calm waters of the building trade in Northern Ireland for the choppy seas of Nigerian finance. The plaintiff is a limited company operating as a building contractor and sometime developer and based in Cookstown, County Tyrone. The defendant is a long established bank, which is now part of the Royal Bank of Scotland group. Mr Mark Horner QC appeared with Mr Stuart Spence for the plaintiff. Mr Stephen Shaw QC appeared with Mr Craig Dunford for the defendant.

[2] Mr Sean MacMahon is the Managing Director of the plaintiff company. He owns 60% of the shares and his wife, who is the Company Secretary, owns 40%. After a degree in Building Measurement at Aston University, Birmingham, Mr MacMahon commenced working in the building trade and has done so ever since. At the time of giving evidence he estimated the turnover of his business at 10 to 12 million pounds per annum, although it would have been somewhat smaller at the time of these various events.

[3] In the 1990's he was asked to tender for a job with the Nigerian Embassy in Dublin. He did so but was not successful in the tender. His evidence was that sometime afterwards a Mr Osborne Brown got in touch

with him. He was a Nigerian who said he was connected with the Embassy in Dublin. He said he was owed $9.6M but he had difficulty getting it out of the Nigerian banking system. He offered Mr MacMahon 10% of that sum of money if he would assist him in realising this purported asset. At this stage Mr MacMahon, in the late 1990s, had not heard of any frauds or attempted frauds, which have, in the subsequent evidence of the bank, been associated with Nigerian nationals relating to such transactions. As Mr MacMahon volunteered he rather foolishly agreed to pay a number of alleged charges relating to the cost of transfer and the cost of a certificate that the money was not associated with illegal drug transactions which came to some tens of thousands of pounds. However the main sum of money from which he was meant to benefit did not appear. He was then advised by one of the people involved in that that it was necessary for him to clear the money through "the clearing house" in Washington. He was referred to a Mr Christopher Brown in that city. More instructions were given which involved the payment of more fees. Again Mr MacMahon said that this was 10s of thousands without specifying the precise amount. But again neither the $9.6M nor the money Mr MacMahon paid in fees appeared. He then contacted a friend Mr David Owen who had been at university with them. He was now living in Johannesburg in South Africa. He in turn referred him to a Mr or Dr, or even Senator Ola Shola. By this stage it was apparently the beginning of 2002. Mr Shola had a number of telephone conversations with Mr MacMahon. He convinced him that he knew Belfast well and had indeed attended Campbell College. (Counsel for the plaintiff has said that this was not in fact the case.) He assured Mr MacMahon that he was pursuing the claim for his monies vigorously and it would lead to results. He did not initially ask for any fees for his work unlike the previous purported intermediary. However after some time he said that as he was helping Mr MacMahon, Mr MacMahon could do something for him. It would not involve any risk. He Mr MacMahon would be paid a cheque into his account and he would transfer the amount into an account nominated by Mr Shola. Mr MacMahon agreed to assist in this. On or about 2 September 2002 a cheque arrived with him in the sum of $53,425 drawn on the Royal Bank of Scotland in Worchester, England by the North Beach Company.

[4] It is at this point that the defendant enters the picture. The plaintiff company had been banking with the Ulster Bank from 1997. The account was in the name of the plaintiff. But, significantly, that account was the only account which Mr and Mrs MacMahon operated. They treated it as their own current account. It was left to the accountant at the end of the year to allocate the various drawings between the company and the personal expenditure of Mr and Mrs MacMahon. Although he had first got to know their bank through another manager by 2002 his point of reference was Mr Mark King of the business banking section of the Ulster Bank in Belfast. It was a feature of the evidence that these two men did not disagree on any factual issue. Mr King no longer worked for the bank at the time he came to give evidence

having moved into the world of property development. At the time of the transactions in question Mr MacMahon phoned Mr King and told him this cheque was ready to be lodged but he would be paying out against it. There was no point in putting it into his main account as it would only be going in and out in dollars. Mr King instructed him to go to the Ulster Bank in Cookstown and open a US dollar account, which he had never had before nor had experience of. He did so, (page 99 of bundle). He had a note of his deposit made on 2 September (page 67). He was told by Mr King that it would take a period of time for this incoming cheque to clear but he was not told how long. No overdraft facility was arranged on this US account. There was a facility on his main account but it required careful management of the account to keep within it. He and Mr King would have frequent conversations to ensure that enough cheques were incoming to the company account to allow payments out to be made to it. As Mr King later advised he often had to make decisions on Friday afternoon whether to agree to the payment of cheques for sub-contractors and employees in particular, for wages, when it would put the company over its limit. This evidence was relevant as supporting Mr MacMahon's claim that he did not want to write money out on foot of these cheques until they cleared. He meant by that that they were good for value and that it was safe for him to pay out to an equivalent extent. It later transpired that the expression cleared could mean two other things. It was used by the bank to mean cleared for interest ie the bank would begin crediting interest on such an amount. Secondly it could mean that the cheque had cleared to the extent that the client could indeed pay out monies from an account using the credit of the incoming cheque but that there was still a possibility that the cheque would be dishonoured. In that eventuality the risk would lie with the customer and not with the bank. As a general statement I am satisfied that these distinctions were never explained to Mr MacMahon and I am satisfied that at some stage he was in fact told that this and the subsequent cheque had cleared without that explanation being given to him.

[5] Mr King, in his evidence, said that he had formed the view that this dollar cheque had something to do with the sale of assets belonging to a company in which Mr MacMahon had an interest in England, Premier Environment. But Mr MacMahon denied, convincingly, that he had ever said that to Mr King who accepted that that might well be the case. Mr MacMahon had received a fax from Mr Shola of 6 September giving him instructions how to pay the money out. He was referred to Mr Jess, another official of the bank by Mr King. Mr MacMahon wanted to make sure the cheque had cleared and says that he was told, by Mr Jess, that the cheque had cleared, on or about 19 September. On that date he transferred $10,000 on foot of Mr Shola's instructions and on the following day transferred the balance of $43,435 (pages 102, 103). These are US$ I refer to throughout. On subsequent examination the value dates on these transfers had been changed. They had been making their way through the internal banking system of the defendant.

[6] I pause here to state briefly the legal position at this point in time. The relationship between the banker and its customer is not normally a fiduciary relationship: Jeffers v Northern Bank [2004] NIQB 81 and Foley v Hill [1848] 2 HL Cases 28. But nevertheless the defendant can be liable if a person has suffered financial loss as a result of a negligent mis-statement upon which the plaintiff has relied. Hedley Byrne & Co Ltd v Heller & Partners Ltd [1964] AC 465. The relevant law seems to me succinctly stated in the well-known passage of Lord Browne-Wilkinson in White v Jones [1995] 2 AC 207 at 274F:

> "I am not purporting to give any comprehensive statement of this aspect of the law. The law of England does not impose any general duty of care to avoid negligent misstatements or to avoid causing pure economic loss even if economic damage to the plaintiff was foreseeable. However, such a duty of care will arise if there is a special relationship between the parties. Although the categories of cases in which such special relationship can be held to exist are not closed, as yet only two categories have been identified, viz. (1) where there is a fiduciary relationship and (2) where the defendant has voluntarily answered a question or tenders skilled advice or services in circumstances where he knows or ought to know that an identified plaintiff will rely on his answers or advice. In both these categories the special relationship is created by the defendant voluntarily assuming to act in the matter by involving himself in the plaintiff's affairs or by choosing to speak. If he does so assume to act or speak he is said to have assumed responsibility for carrying through the matter he has entered upon. In the words of Lord Reid in Hedley Byrne [1964] A.C. 465, 486 he has "accepted a relationship . . . which requires him to exercise such care as the circumstances require," ie although the extent of the duty will vary from category to category, some duty of care arises from the special relationship. Such relationship can arise even though the defendant has acted in the plaintiff's affairs pursuant to a contract with a third party."

[7] When Mr MacMahon, as a client of the bank, in effect, rings up seeking specifically to know whether these cheques through the bank's system had cleared, and an official of the bank voluntarily answers that question, such a

special relationship exists. At that point, and on any subsequent occasions of a similar kind, the bank is under a duty to take reasonable care. This is over and above the bank's normal duty to the customer. The bank here did not refuse to answer. Nor did they answer subject to an express refusal to incur legal liability.

[8] It is important to focus firstly on 19 September. It seems clear that on that date Mr MacMahon did speak to Mr Jess about the first cheque although Mr Jess has no specific recollection of that. I have already quoted Mr MacMahon's evidence in chief. In cross-examination by Mr Shaw, on 28 November, he said that he "gathered" on 19 September that it was safe to pay out on the cheque, in the course of several conversations with Jess around that date. When asked when he was told that the bank could pay out on the cheque "without any recourse to you" he gave the date of 6 November. That was on foot of a conversation with Mr Jess. That would rather weaken his case. As would the fact that he had made no note of the earlier conversation of 19 September. He was basing his recollection to some degree on the document subsequently discovered. When asked further in re-examination about these matters it has to be said that his evidence was rather equivocal. One was left with the impression that at least initially he was warned that the bank were not in a position to pay out against the funds.

[9] The evidence of Mr Jess was, as I have said that he could not recollect the actual conversation. He contended that it was his practice, having formerly been employed in the Treasury Division of the bank, to warn anyone dealing in dollar cheques on every and each occasion, that they might not know for six months or more whether the cheques were good. While it is undoubtedly the case that Mr MacMahon behaved naively and indeed foolishly in his dealings with the various Nigerian nationals it does seem to me most unlikely that if he had been given such an express warning that he would nevertheless pressed ahead with these transactions. It was originally put to him by counsel that he received such a warning at the beginning of the matter ie when opening a dollar account. Counsel said that that was inadvertence on his behalf but I find it a more plausible contention. However here it was Mr King who opened the dollar account and not Mr Jess. Mr Jess might well have presumed that Mr King had given such a warning. I am satisfied that members of the public such as Mr MacMahon would not have been aware at this time that dollar cheques could remain of uncertain status for many months, unless they have been expressly told that by a well informed banker. There were certain other points, partly relating to interrogatories, which would incline me to prefer the evidence of Mr MacMahon to that of Mr Jess on the fairly limited area where they are in disagreement. I have of course had the benefit of hearing both witnesses in considering their evidence. I find that Mr MacMahon was not expressly warned that he might not know for six months or more whether these cheques were good.

[10] In resolving this matter the court has some assistance from documents which were discovered, in some cases at a late stage. They included the transcript of a conversation between Mr Jess in Belfast and one of his former colleagues in the Treasury Division of the Ulster Bank which is currently in Dublin. These are to be found in bundle B at pages 224ff. The first call of Mr Jess to a colleague in Dublin was made on 19 September 2002. It would certainly be very surprising if, after the conversation described in that transcript, Mr Jess had rung Mr MacMahon back and assured him that it was safe to pay out on the cheque. He rang again on 23 September to see whether the cheque had cleared within the bank at this time ie the cheque from the North Beach Company. He was not assured that it had. He rang further on 26 September 2002. That transcript is something of a two-edged sword for the bank. On the one hand Mr Jess begins by wanting to make sure the money is in before, implicitly, they pay out on Mr MacMahon's transfer documents. But there is a shift in the conversation and it becomes clear that both bank officials effectively relax about the issue when they realise that the plaintiff company has considerable assets and that the bank will not be at a loss even if the North Beach Company cheque were to prove valueless. One is left with a strong impression, which Mr Jess did not redress in oral evidence, that he ceased to be concerned about whether Mr MacMahon was at risk and was only concerned about whether the bank was at risk. That could well constitute a breach of reasonable care on his part if he then failed to make clear to Mr MacMahon that his company was still at risk on this cheque even though the bank would honour the two transfer requests to a total of $53,000 which he had signed on 19 September. But that is the point on which Mr Shaw relies. Mr MacMahon had in fact signed the documents on 19 and 20 September. Reading the transcripts together and taking all the factors into the account he suggests that it was clear that he could not have received such an assurance from Mr Jess at that time. It was his eagerness to cooperate with Mr Shola which led him to forge ahead even though it was unwise to do so. I remind myself that the onus is on the plaintiff to prove, on the balance of probabilities, that the bank was negligent at this time ie at the time when he gave instructions to draw on the first North Beach Company cheque. The plaintiff has not persuaded me of that. I consider it more likely that assurances about the cheques having cleared, in all likelihood ambiguous, were given after the conversation of 26 September.

[11] Does that end the matter? It does appear that Mr Jess could have chosen not to act on Mr MacMahon's written instructions on 26 September either at all or, at least until he had gone back to Mr MacMahon and explained that to him that he was still at risk that the cheque from North Beach Company would prove valueless and that the funds had not cleared. If the bank were in a fiduciary relationship with the plaintiff at that point in time that is something one might reasonably have expected them to do. But was it careless not to do so? I am inclined to think that although somewhat

unattractive the bank's position at this point in time does not amount to carelessness. As I have said I find that they did not assure him that the funds had cleared as early as 19 September but nevertheless he went ahead.

[12] One relevant matter here is the absence of full candour on the part of Mr MacMahon. He did not tell either Mr King or Mr Jess that this cheque involved getting money out of Nigeria for a Nigerian national whom he had never met. He was cross-examined vigorously on the grounds that he was very foolish and naïve in these regards. It was not put to him that he was dishonest. Indeed with regard to that I find that these are not transactions which are defeated by the maxim ex turpi causa non oritur actio. As subsequently emerged the bank never got further than saying there was suspected fraud in connection with these cheques. They have never shown that they were fraudulent. Nor that Mr MacMahon's conduct was fraudulent rather than naïve. Mr Horner for the plaintiff makes the point that as there was no fiduciary relationship between the parties Mr MacMahon was not under an obligation to volunteer the nature of the transaction although it would have been a different matter if he had been asked directly and had given an untruthful reply. I accept that submission. I find that the silence of Mr MacMahon on this topic was, on balance, not sinister but an aspect of native reticence. I recall that it was of County Tyrone among other counties that the Irish Laureate Seamus Heaney was writing when he said:

> "Where to be saved you only must save face
> And whatever you say, you say nothing."

[13] Without setting out all the helpful submissions of counsel seriatim I have concluded that the plaintiff fails with regard to the first cheque. Subsequently the funds it represented were debited from the plaintiff's main account and I find that the bank was entitled to do that. In assessing the evidence of Mr Jess I have taken into account the absence of any note or memorandum by him affirming his recollection of this matter.

[14] Mr MacMahon remained in touch with Mr Shola. On the same basis as before he received a cheque in the sum of $210,645.00. This was again lodged with the Ulster Bank which provided a confirmation of increased deposit in that sum dated 29 October 2002 (p. 71). Again Mr MacMahon said that he sought reassurance that this cheque was good before paying out on foot of it. He said that he received such assurance on a date after 29 October. This would appear to be correct. An internal memorandum from Mark King to John McNally, then Chief Executive, CBFM within the bank dated 2 December 2002 includes the following statement:

> "Credits were lodged via our Cookstown office, however due to the non-BAS nature of the account the amounts did not appear on our Sunguard Report,

> therefore we were unaware of the timing, frequency and amount of specific cheques. Notwithstanding this after cheques had been lodged the customer enquired through us if funds were cleared, with any response relayed after consultation with Treasury."

I note that the expression used there is "funds were cleared". The expression is not whether "the cheque has cleared" which might, on the banks case, be ambiguous. The bank's expert Mr Greenman very properly accepted in cross-examination that this could only mean that he was asking whether the cheque had been cleared "for fate" as Mr Greenman described it or to make it safe for him to pay out on foot of the cheque, as he was concerned about. But the matter does not end there from the plaintiff's point of view. It will be recollected that he had paid out on foot of the first cheque in September. In early November he had received no indication that there was anything wrong with Mr Shola's first cheque. Mr MacMahon therefore in the light of that and of an apparently express assurance from Mr Jess signed an instruction on 8 November to pay $10,000 to Viva Telecommunications Limited at an account at Barclay's Bank, Exeter. On 13 November the bank received a further telegraphic transfer instruction from Mr McMahon to pay $200,645 to Cerizim Vent Limited at Union Bank of Nigeria, London. As appears from the evidence of the bank and an internal memorandum (p. 194) the bank made an enquiry itself on 25 November from the Royal Bank of Scotland Cheque Centre in Birmingham and were advised on Friday 29 November that both cheques which had been sent to them on a collection basis remained unpaid due to "suspected fraud". I will return to that memorandum in a moment. The effects of it was for Mr King to inform Mr MacMahon that these amounts would be debited from the plaintiff's main account. However this was conveyed to Mr MacMahon while he was travelling in a motor car with friends in Scotland, by mobile phone. I read nothing adverse to his case in his reaction to that. He subsequently had a meeting with the bank on his immediate return to Northern Ireland. The bank sought to place reliance on his passive response to their debiting of his account in the amount of the two cheques which had been sent on the instructions of Mr Shola. However I take the view that this is not of material assistance. Firstly, it would be natural if Mr MacMahon did feel somewhat sheepish about this matter. Secondly, then and even somewhat later he was still hoping that Shola would clear these matters up, as he had promised on the telephone to do. Indeed he set two other cheques in purported substitution which proved to be worthless, but Mr MacMahon did not know that on 2 December. Thirdly and most importantly Mr MacMahon was dependent on the bank for continued credit facilities in the immediate future and did not feel in a strong position to denounce them in forceable terms. Subsequently the bank discontinued the relationship with the plaintiff company because of this matter and the plaintiff found banking arrangements elsewhere. It was indicated to Mr MacMahon that might well be the case when they met on 2 December 2002.

However no letter was written as indicated and a memorandum to be found at page 166. The plaintiff contends that the bank is liable to the plaintiff because they were in breach of the duty of care owed to the plaintiff and were not entitled to debit its account for the value of the second cheque in the sum of $210,645. He does this firstly on similar grounds to the first cheque ie. that he had only given the transfer instructions outwards when assured that the second cheque had cleared. It is pointed out that this is not denied by the bank officials who say they cannot remember the telephone conversations. Their own memorandum as quoted above would appear to bear out his contention in this respect. As indicated no challenge was made to the honesty of Mr MacMahon. I also note that when Mr Jess was enquiring of his Treasury Division on 26 September 2002 he said that Mr MacMahon wanted to make sure the money is in ie. before paying out on it. It seems to me that therefore he is in a stronger position than in respect of the first cheque. I find that he was told that the funds had cleared in early November with regard to the second inwards cheque. I find that was not in fact the case and it was therefore a negligent statement by the bank's official. The plaintiff company suffered loss as a result. In the alternative the bank was not entitled to debit its account in the way that it did and the plaintiff is entitled to recover that sum with interest from the date of debit.

[15] Further or in the alternative I consider the plaintiff is entitled on another ground to succeed with regard to this second cheque. The bank was the collecting bank for this cheque. As part of its duty of care in that respect it had a duty to collect the cheques speedily or, at least within a reasonable time. See, for example, 7-097 of the Law of Bank Payments, Brindle and Cox (3rd Edition). I note the bank's internal documents suggest that cheques should be processed within eighteen days. Not only was that not done here but a period of nearly seven weeks elapsed between the paying out on foot of the first cheque and the paying out on foot of the second cheque. I consider that a reasonably careful bank should have ascertained the validity of the first cheque by that time. If, of course, they had reported to Mr MacMahon that it was being held because of suspected fraud it is most unlikely that he would have then paid out the sums of money on foot of the second cheque. I find that he would not have done so.

[16] The case against the bank is strengthened by its own evidence and documents. Mr Greenman gave evidence on this point which was hearsay but in the circumstances I intend to give some weight to it. He had been told that the first cheque had been erroneously sent to New York as a dollar cheque when it ought to have been sent to the Royal Bank of Scotland in England as it was drawn on an account of that bank in England. That was an error on the part of the bank and a clear one. In the memorandum of Ellvena Graham of 2 December 2002 (p. 194) she states:

> "ICS are currently investigating why RBS did not advise on receipt of the cheques that they may be fraudulent. As it transpires that RBS fraud have a case already in hand regarding fraudulent cheques drawn on this particular account in RBS Worcester. RBS are operating a telephone call back to North Beach Company to authenticate all cheques drawn on the account."

While I appreciate that the defendant is a separate legal entity from its parent company in England it is clear that the Ulster Bank itself is dissatisfied with the information it received and understandably so. Mr King bears that out himself in his memorandum to Mr McNally at p. 193:

> "I queried the fact that both cheques had been presented some time ago, but I was advised that mistakes had been made in sending one of the cheques for collection and consequently the suspected fraud only came to light today (29 November 2002) after the RBS cheque centre Birmingham had been contacted."

Of course if the first cheque had been sent to the right place within a reasonable period of time it is possible that there would have been money in the account to meet the cheque. But no such evidence has been led by the defence. In the circumstances it seems inevitable that I find that the failure to clear that cheque timorously put Mr MacMahon in an entirely false position when he was dealing with the second cheque. Counsel for the plaintiff also pointed out that when the plaintiff's solicitors wrote to the bank on 26 October 2004 making the case that the bank agreed to inform the plaintiff as to when the funds were cleared and that the bank had so informed the plaintiff in respect of both cheques the bank in its reply of 8 November did not dispute that claim.

[17] I accept that the bank would never have opened the dollar account in Cookstown if they had known it was designed to process cheques from Nigeria. But the officials at the bank do not claim that they asked Mr MacMahon for the purpose of the account. Nor, it is clear, was either in a fiduciary position at that time. The principle of uberrimae fides did not apply. I have indicated above my view of Mr MacMahon's reticence on the point. The plaintiff also relies on the fact that although the plaintiff's account was debited the two cheques in question were never returned to him with the label "suspected fraud" allegedly recorded upon them. The bank seemed to have been content to recoup their loss from the plaintiff company without making any attempt to recover the funds in question or even clarify how the situation had arisen.

[18] On the facts before me, and for the avoidance of doubt, I do not find that a statement that the cheque had cleared was a careful and sufficient answer to a direct enquiry from Mr MacMahon as to whether it was safe for him to write outward transfers on foot of that cheque. A careful banker, faced with that express enquiry should have said that they were prepared to pay out on foot of the cheque but Mr MacMahon and his company were still at risk. In any event as I have pointed out the bank's own memorandum says he asked if "funds had cleared". It seems to me that at that time of the second cheque the bank were in a very different position from the period in September when the account was being established. I do not hold against Mr MacMahon that he did not call a witness from the Royal Bank of Scotland as to the fate of the two cheques. Neither party chose to do so although the bank in question is the parent company of the defendant.

[19] On foot of its claim with regard to public policy the bank relied on the fact of a newspaper cutting reporting that Mr Shola had been convicted of fraud in Nigeria. But that took place after these events as did the two worthless cheques to which I have already made reference. I do not find that the defence of ex turpi causa non oritur actio is made out here. Regarding the role of RBS I note their solicitor's letter of 17 October 2006 saying that they had been unable to locate either of the original cheques or any other documentation covered by the subpoena.

[20] I note that there was no plea of contributory negligence by the defendant against the plaintiff. A calculation of interest due on the deduction of £170,642.97 of 2 December 2002 has been furnished. However this presumably relates to both cheques. I will allow the plaintiff to furnish a separate calculation in the light of the finding of the court. As indicated in argument interest is within the discretion of the court and may not be awarded for the whole period or at full commercial rates in the factual circumstances arising here.

[21] After the conclusion of the hearing, and by agreement, the plaintiff furnished a schedule which was a calculation of alleged overcharging by the Ulster Bank, unrelated to this matter up to the last day of the trial hearing. However by their letter of 8 December 2006 the solicitors for the defendant say that the figures set out in that "schedule of loss" are agreed without prejudice to liability. I do not see therefore how I can make any award on foot of that heading unless the bank agrees that there was overcharging by it, for whatever reason or hear evidence to satisfy me that such was the case. I will hear counsel in respect of that matter.