Neutral Citation No. [2013] NIQB 50 | *Ref:* **WEA8833**

Judgment: approved by the Court for handing down | *Delivered:* **19/03/2013**
*(subject to editorial corrections)**

IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND

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QUEEN'S BENCH DIVISION (COMMERCIAL)

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BETWEEN:

JEREMY TAYLOR

trading as TRACKED DUMPER HIRE UK

Plaintiff

And

BANK OF IRELAND (UK) plc

Defendant

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WEATHERUP J

[1] The plaintiff sues the defendant for £91,500, being the value of two items of machinery released by the plaintiff to a prospective purchaser after the plaintiff claims to have received assurances from the defendant that the purchaser's funds had cleared. The defendant denies that such assurances were given. Mr O'Donoghue QC and Mr McMahon appeared for the plaintiff and Mr David Dunlop for the defendant.

[2] The plaintiff is the proprietor of a business specialising in the hire and sale of tracked vehicles to the construction industry. He held a sterling business account at the Belfast City Branch of the defendant. On the 10th of June 2009 the plaintiff entered into an agreement to sell two tracked dumper vehicles for £91,500 to an entity described as Automac 1 Machinery Company in Dubai in the United Arab Emirates. The plaintiff provided Automac 1 with his firm's banking details and on the 17th of June 2009 the plaintiff consulted his online banking account with the defendant and learned that £91,500 had been credited to his account.

[3] The plaintiff's case is that on 17 June 2009 both the plaintiff and Jane Fallon, his accounts clerk, made specific enquiries by telephone to the defendant and both were advised that the sum of £91,500 represented cleared funds. Accordingly, and in reliance on the defendant's advice that the sum represented cleared funds, the plaintiff permitted the collection of the machinery by a haulage contractor on behalf of Automac 1 on the 18th of June 2009.

[4] On the 24th of June 2009 the plaintiff received notification that the payment of £91,500 to the plaintiff's account had been recalled. The plaintiff was provided with a document entitled 'Advice of unpaid cheque' completed on the 19th of June 2009 which asserted that the payment had been prevented due to a suspected fraud and counterfeit cheque. Accordingly, and contrary to the specific representations claimed to have been given by the defendant on the 17th of June 2009, the amount credited to the plaintiff's account did not represent cleared funds. The machinery released by the plaintiff was never recovered.

[5] Thus the plaintiff claims the sum of £91,500 against the defendant by reason of the negligence and breach of contract of the defendant. The defendant disputes liability to the plaintiff and rejects the contention that any representative of the defendant advised the plaintiff that the sum of £91,500 had been credited to the plaintiff's account as cleared funds. Further, the defendant asserts that the plaintiff was guilty of contributory negligence in failing to undertake further investigations in relation to the status of Automac 1, given that the entity was based outside the UK and that the plaintiff had no previous business dealings with that entity and was unaware of the identity of the prospective purchaser. Further, the defendant relies on Terms and Conditions for Business Customers and Business Banking – a Guide and Conditions of Use in relation to the provision of information on the clearing of cheques and that the provision of the defendant's services was not to be taken as conclusive evidence of the state of the customer's account and the defendant was not to be liable for any loss suffered as a consequence of information provided by the services.

[6] The customer with online banking is presented with three balances. First of all yesterday's closing balance, which is the closing ledger balance on the previous working day and would include uncleared funds; secondly, the value balance, being the last working day's ledger balance, adjusted so that it contains only amounts for which the bank has received value by the close of business on the last working day; thirdly, yesterday's closing balance, being the latest balance, which is the most up to date balance available and includes uncleared items. The plaintiff did not receive training in respect of online banking. This was because the plaintiff was not based in Northern Ireland but based in Norfolk in England and as the training was being provided within Northern Ireland the plaintiff did not avail of the training services.

[7] An issue arose as to whether payment from the purchaser for the machinery was made by cheque or by electronic fund transfer (EFT). The plaintiff believed that

payment had been made by EFT but the payment had been made by cheque. A cheque has to be cleared and thus the present payment, having been made by cheque, did not clear because of the fraud of the purchasers of the machinery. An EFT represents cleared funds and thus it would not have been necessary to obtain an assurance on cleared funds had the transfer been made by EFT. While the plaintiff believed that payment would be made by EFT and could see online that the payment had been lodged to the account, the evidence of the plaintiff was that nevertheless the defendant was telephoned for assurances on cleared funds in the account.

[8] It is common case that there were two phone calls made by the plaintiff's firm to the international division of the defendant on the 17th of June 2009. The first call was at 11.17 lasting one minute fifty three seconds and the second call was at 11.19 lasting two minutes and two seconds. The plaintiff's evidence was that the calls did not go to an automated options telephone system but went direct to a member of the bank staff. The plaintiff says that when he made his call he was transferred to another member of staff who gave the information requested. Ms Fallon, who made the first of the two calls, did not state that she had been transferred. Further, the plaintiff and Ms Fallon stated that they were not put on hold by the member of staff to whom they spoke and further that they gave particulars of the account and were told that the funds represented cleared funds and hence the plaintiff authorised the release of the machinery from his yard.

[9] The evidence for the defendant was that in June 2009 there operated within the Bank a telephone system known as the Hunt system which applied four automated options for a caller to select. It was denied by the plaintiff and Mr Fallon that the calls were answered by the automated option system. Further, the defendant's evidence was that calls from customers to the international division are recorded and a trawl of recordings showed no recorded calls between the plaintiff or Ms Fallon and the defendant. Further, the defendant's evidence was that the international division would not have had the information about the plaintiff's account and if that information was sought to be retrieved through the international division it would have been necessary for the bank official who took the call to leave their desk and go to a terminal for what was called the 'infocus' system to access the plaintiff's account. The plaintiff would have had to be put on hold for that exercise to be undertaken by bank staff. The plaintiff and Ms Fallon denied that they were put on hold. Further the defendant's evidence was that there would not have been sufficient time for a staff member to access the infocus system in the times recorded for the calls.

[10] The plaintiff sought to advance his position by producing a schedule of calls to illustrate that the firm had on previous occasions undertaken calls to the defendant to seek assurance of clearance of funds. He produced 12 such instances. I did not find that the schedule advanced the plaintiff's case. The circumstances of the individual calls were the subject of dispute, only four of the calls were made to the international division, one related to the present calls on the 17th of June 2009, two calls were on the 2nd of March 2009, one of which was accepted by the defendant as a

possible instance of seeking assurance of clearance of funds and one call in 2010 may have been to seek assurance on clearance of funds and was dismissed by the defendant as a self-serving example after the event.

[11] I am satisfied that the plaintiff and Ms Fallon made the calls to the international division on 17 June 2009 as confirmed by the BT records. Further I am satisfied that the purpose of making the two calls on that day was to seek confirmation that the funds were cleared before the plaintiff authorised the release of the machinery to the buyer.

[12] Rosaleen Cairns was a manager employed by the defendant and she undertook a review of the processes in the international division to investigate the manner in which the calls might have been dealt with on the 17th of June 2009. In light of Ms Cairns evidence I am satisfied of a number of matters. First of all the Hunt system had been introduced by the defendant prior to the 17th of June 2009. Secondly, any customer calling the international division on the 17th of June 2009 would be met with the automated four options in the Hunt system. Thirdly, the Hunt system was in working order at the relevant time as Ms Cairns recovered the recordings of the calls made on the 17th of June 2009. Fourthly, neither the plaintiff nor Ms Fallon spoke to international division staff because, had they done so, there would have been a recording of the calls. Fifthly, in any event, had the plaintiff and Ms Fallon got through to international division staff on that day they could not have obtained the information about the plaintiff's account from staff accessing the infocus system within the international division as the two minutes that each call took would not have afforded sufficient time to do so.

[13] One possibility raised was that the plaintiff and Ms Fallon hung up before the calls were answered. That possibility would address the BT record of the calls being made and the absence of recorded calls from the plaintiff or Ms Fallon within the defendant's system. However, I reject this possibility because the whole purpose of making the calls was for the plaintiff to seek clarification of the state of the account and if he and Ms Fallon were to hang up because they did not get an answer, the whole object of the exercise would have been defeated. The plaintiff would then have decided to order the release of the machinery without knowing if he had cleared funds. Having heard the plaintiff and Ms Fallon and taking account of the fact that £91,500 was in question, I cannot believe that the plaintiff would have decide to confirm the clearance of the funds and then hang up and simply authorise the release of the machinery.

[14] The plaintiff says that he was transferred when he made his call. I leave aside for the moment the issue of automated options. By letter to the defendant of the 30th of June 2009, some two weeks after the event, the plaintiff described as follows what happened when he made the call. The person who answered maintained they had to transfer the call; he spoke to an official in the bank and gave him the account details; he was asked some security questions; he asked for the current credit balance

of the account; he was informed that the business account was £296,000 in credit; he asked the official to verify this was cleared funds and the official did so.

[15] The plaintiff made a statement of evidence but did not repeat the suggestion that he was transferred. Ms Cairns, when she was undertaking her investigation, was provided with the plaintiff's witness statement and was not aware that earlier correspondence from the plaintiff had indicated that there had been a transfer when the plaintiff made the call. Thus this was not a matter she had investigated. Ms Fallon did not give evidence that she was transferred. The issue was not raised. The issue of the transfer was raised by the plaintiff in his first account of the matter shortly afterwards and I am satisfied that there was a transfer of the plaintiff and Ms Fallon.

[16] For the plaintiff and Ms Fallon to speak to an official there would have had to have been an automatic transfer from the international division to an unrecorded line. An automatic transfer from the international division to an unrecorded line could have been effected from the extension in the international division, although such a step would not have been authorised. There were unrecorded lines in other parts of the defendant's building where the international division was housed. It was possible for bank staff at the extensions in the international division to leave their desks or not deal with their calls and to automatically transfer calls to an unrecorded line. Thus a customer could call the international division, go through the automated options, proceed to an international division extension on automatic transfer and be transferred to an unrecorded line.

[17] For the plaintiff and Ms Fallon to have obtained the details in relation to the plaintiff's account I am satisfied that they had to have spoken to someone in the plaintiff's branch. The information could not have come from anyone in the international branch because there are no recorded calls. The information could not have come from a person elsewhere in the building on an unrecorded line as they would not have had access to the details. Ultimately the plaintiff and Ms Fallon would have had to be transferred to the branch where the information could be obtained.

[18] For the plaintiff to have spoken to the branch would have required an unrecorded line operative to have received the call from the international division and have transferred the call to the branch. That would have required the staff member to have the branch number. The staff did have access to the branch numbers. It is possible that such a staff member on an unrecorded line outside the international division transferred the calls to the branch. Again this was not authorised.

[19] I commend Ms Cairns for her diligent inquiries and forthright evidence. There was some criticism made of her lack of notes and of steps she might have taken. I do not accept these criticisms. Ms Cairns inquiries were negative and she did

not make notes of the negatives. Her evidence was that had she made a positive finding she would have completed a report of any such finding.

[20] The outcome is first of all that on making the calls the plaintiff and Ms Fallon had to choose automated options. They denied having to do so but I am satisfied that they were mistaken in this regard. Secondly, the international division operative placed the extension on automatic transfer to an unrecorded line outside the international division. Thirdly, the unrecorded line answered and transferred the callers to a Belfast City branch extension. Fourthly, the branch took the call and gave the assurances sought.

[21] The evidence of the plaintiff and Ms Fallon was that they gave particulars of the account to the person they spoke to, they asked about the balances that were recorded as they had looked at them online and asked whether or not the stated balance represented cleared funds. The defendant suggested that if the plaintiff and Ms Fallon spoke to someone in the bank they would have asked generally about EFTs representing cleared funds, as opposed to asking if the funds in the particular account represented cleared funds. That could not have happened in the international division because there are no recorded calls. For the plaintiff and Ms Fallon to make that general enquiry and to receive that general answer it would have had to have been as a result of the operation of the automatic transfer from the international division to an unrecorded line where the person on the unrecorded line answered the queries about EFTs from unknown callers. Presumably that would have been a query that should not have been answered by such a person. Nor do I accept that that would have happened if the callers had reached the branch where the details required were available once they provided the necessary security information.

[22] On balance I conclude that the plaintiff and Ms Fallon did receive assurances of cleared funds. They were mistaken in their evidence about the absence of automated options. They had to go through the option system which was in place at that time. I am satisfied that there was a system whereby the plaintiff and Ms Fallon were able to be put through and receive information about cleared funds in the plaintiff's account. With a sale to a foreign party that the plaintiff had not previously dealt with an assurance on cleared funds was an obvious step to take and the plaintiff stated that he did not agree to the release of the machinery until he had received that assurance. I am satisfied that the plaintiff and Ms Fallon did receive such assurances.

[23] The defendant claims that the plaintiff was responsible for contributory negligence in not carrying out checks in relation to the buyer. I do not accept that claim. There were grounds for suspicion about the buyer but it was to the defendant that the plaintiff turned in order to seek assurances before he released the goods and he relied on assurances from the defendant.

[24] The defendant relied on the Terms and Conditions and the Guide to Banking Business and the Conditions of Use. I am satisfied that the conditions do not serve to exclude liability to the plaintiff where, in the circumstances that I have found, bank officials gave assurances to the plaintiff that there were cleared funds.

[25] The loss to the plaintiff is the value of the machinery rather than the value of the cheque. This was a fraud and the price agreed by the fraudster was to facilitate the fraud rather than representing the market value of the goods. I do not accept that the plaintiff can recover the amount that the fraudster agreed to pay. That sum was however the plaintiff's asking price for the goods and he was surprised that there was no attempt at bargaining by the buyer and clearly some discount on the asking price was possible. Two reports on value were produced, one for a value of £51,000 in 2009 and the other for £74,000 was the value in 2012. While I did not hear evidence from the plaintiff on possible discounts on the asking price I assume that the plaintiff might have discounted the price by 10 to 20 per cent.

[26] Looking at the values in reports and taking account of the possible discount I value the goods for the purposes of the plaintiff's loss at £75,000 which is the amount I find recoverable by the plaintiff. I assume it to be the position that the Bank has charged interest on the absence of this money from the plaintiff's account if the account was overdrawn. If interest and charges have been imposed on the plaintiff because of this shortfall in the account then of course the plaintiff should recover that amount. If the plaintiff was in credit throughout and did not incur any interest or charges as a result of the loss of the funds then the added loss is the amount that the defendant would have paid to the plaintiff had the sum been available. I leave it to the parties to determine whatever interest or charges or additional payment might have been deducted or paid by the defendant. The plaintiff has the costs of the action.