CC41/15 2015 E NO. 3

**IN THE HIGH COURT OF SIERRA LEONE**
**COMMERCIAL AND ADMIRALTY DIVISION**
**FAST TRACK COMMERCIAL COURT**

BETWEEN:

ECOBANK (SL) LIMITED - PLAINTIFF

AND

DAVID KEILI - DEFENDANT

COUNSELS

O. JALLOH ESQ - PLAINTIFF

A. MARRAH ESQ

M. N. BITTAR ESQ

E. S. ABDULAI ESQ - DEFENDANT

BEFORE THE HON. MS. JUSTICE F. BINTU ALHADI J.

JUDGMENT DELIVERED THIS 16th DAY OF May 2017

On the 14th of April 2016 an application was made to the FTCC by Judge's Summons dated the 4th day of April 2016 by Ecobank (SL) Limited whose registered address is 7 Lightfoot Boston Street, Freetown against David F. Keili of No. 7 Lumley Road, Freetown aforesaid.

The Plaintiff, Ecobank (SL) Limited, was represented by O. Jalloh Esq and A. Marrah Esq both of Yada Williams and Associates firm of Barristers and Solicitors; whilst the Defendant, David F. Keili, was represented by A. S. Abdulai Esq of Abdulai and Associates firm of Barristers and Solicitors.

The following Orders were prayed for:

1. That judgment to be entered for the Plaintiff for recovery of the sum of US$ 48,500.
2. Interest pursuant to the Law Reform (Miscellaneous Provisions) Act Chapter 19 of the Laws of Sierra Leone 1960.
3. Further or other Order(s).
4. Costs.

The application was supported by an affidavit sworn to on 4th April 2016 by Mohamed Sorie Kamara, a banker of No. 4 Siaka Stevens Street, Lunsar Town, Koya Chiefdom, Port Loko District in the Northern Province of the Republic of Sierra Leone.

Counsel for the Plaintiff, Mr. O. Jalloh, in his submission to the Court on Monday 11th July 2016 submitted that, the substance of the application to the Court is that the Plaintiff and the customer had a banker and customer relationship; and that as part of the relationship, the Defendant, Mr. Keili, operated a US Dollar account with the Plaintiff. He explained that the Plaintiff received US$48,500 (Forty-Eight Thousand Five Hundred Dollars) from its correspondent bank for the credit of the Defendant's account on 23rd September 2011 as shown in Exhibit A, the bank's statement of account, of the Affidavit sworn to by Mohamed Sorie on 4th April 2016; and as shown in Exhibit B, the Defendant's copy of the statement of account also showing a credit of US$ 48,500 (Forty Eight Thousand Five Hundred Dollars) on the 23rd of September 2011.

Mr. Jalloh submitted that, under the mistaken belief that it had not credited the Defendant's account, the Plaintiff bank again on the 26th day of September 2011 credited the Defendant's account with the same amount of US$ 48,500 (Forty-Eight Thousand Five Hundred Dollars) as shown in Exhibit B at page 3. In other words, the credit of the second sum of US$ 48,500 was not based on "fresh" funds received but rather on the funds received on the 23rd of September 2011. He said that when the Plaintiff realised that it had made a mistake, it summoned the Defendant to a meeting where he was informed of

the double credit; and subsequently also notified the Defendant in a letter of 10th July 2012 shown as exhibit C.

Counsel for the Defendant, Mr. Saffa-Abdulai, in his reply to the Court, pointed out that the crux of the Defendant's case is that, his account was with the Plaintiff bank and it was alleged by the Plaintiff bank that, the account was doubly credited with US$ 48,500 (Forty-Eight Thousand Five Hundred Dollars). He posited that what was significant was that, the Defendant, Mr. Keili, was only informed and called to a meeting about the error, a year plus after the error had been made.

Mr. Saffa- Abdulai argued that, the relationship between the Plaintiff bank and the Defendant was a banker/customer relationship; and as such was a contractual one with expressed and implied terms. He also argued that the Plaintiff bank was culpable of contributory negligence; and that it failed all throughout the relevant period to provide a statement of account, which could have alerted the Defendant. He said that the Plaintiff bank bore a lot of responsibility and that it cannot commence these proceedings by summary trial and then pray for costs, damages and the sum of US$ 48,500, when it was its fault.

**DECISION OF THE COURT**

The first question that arises is this: are banks obliged to provide bank based bank statements? The Banking Code of Business Sourcebook (BCOBS), which is a voluntary code of practice agreed by banks in certain countries including the United Kingdom and which came into force in November 2009 states that, unless the account is operated electronically or the customer declines to receive such statements or the bank has reasonable grounds to believe that the customer is no longer resident at their address; banks are obliged to provide bank based bank statements to their customers; E. P. Ellinger et al 'Ellinger's Modern Banking Law' (2011) 5th edition, Oxford University Press at 233. In: Boltrun Investments Inc. v Bank of Montreal (1998) 86 OTC 211, [51] (OCJ) the court decided that there is a duty on the bank to render accounts to a customer periodically; and in M. H. Ogilvie, 'Banker and Customer: The Five-Year Review 2000-2005' (2007) 23 Banking and Finance Law Review (BFLR) 107, 138 referred to 'the common law duty of rendering accounts to the customer periodically or on request.'

It is therefore clear from the law that banks are expected to provide bank statements to their customers periodically, whether requested or not. There is no evidence that this was done by the bank; although Mr. Keili attested in court that he made several requests for statements albeit after he was informed of the wrongful payment made to him. It could be argued therefore that, had the

bank supplied Mr. Keili with monthly statements, he would have realised the bank's error, perhaps well in time, to refund the over-payment.

Secondly, was the notice to Mr. Keili of the error made, that was brought to his attention in a meeting nearly 10 months later (on calculation of the time, it was not a year plus later) unreasonable? In British and North European Bank Limited v Zalzstein [1927] 2 KB 92 the court held that a bank is always entitled to rectify an error within a reasonable time. It was pointed out that in assessing 'reasonableness' one would have regard to the terms of banking code of conduct. For instance, according to the said BCOBS (supra) and Banking Code (March 2008) in the United Kingdom, a bank was required to provide a customer with at least 30 days' notice of any change of the account of a customer that operated to the disadvantage of that customer; E. P. Ellinger et al (supra) at 233.

It is the opinion of the court that, informing a customer of an over-payment nearly 10 months later was unreasonable. To say that the Plaintiff was negligent and contributed to the negligence of the Defendant to put it mildly is at least correct; but at most unreasonable. A 30 days' notice would have been reasonable. However, it still does not absolve Mr. Keili from refunding what he unjustly benefited or take away the bank's entitlement to rectification of an error. This is because, a person who pays another money, without any reason for that payment, usually acts under a mistake. The payer is entitled to recover the amount involved by bringing a restitutionary claim or by applying for a declaration that the amount involved was not due; E. P. Ellinger et al at 234 (supra). The only thing is that, the bank is always entitled to rectify the error within a reasonable time; Commercial Bank of Scotland v. Rhind (1860) HL 643 (HL).

The third question that arises: is whether the bank paid under a mistake? Where a bank pays money as a result of a mistake of fact or law, it may bring a common law action for money had and received against the payee; E. P. Ellinger et al at 515 (supra). This is generally referred to as 'personal claim in restitution at common law.' The claim is founded on the unjust enrichment of the payee at the bank's expense. The bank's mistake renders the enrichment of the payee unjust because it vitiates the bank's intention to transfer the benefit to him. It is the reversal of that unjust enrichment that lies at the heart of the claim; Lipkin Gorman (a firm) v Karpnale Ltd [1991] 2 AC 548; Kleinwort Benson Ltd v Glasgow CC [1997] 3 WLR 923,931,947. The cause of action is complete upon receipt of the money by the payee and does not depend upon continued retention of the mistaken payment; Agip (Africa) Ltd v Jackson [1991] Ch. 547, 563 (CA).

In his testimony to the court on the 19th of July 2016, Mr. Keili said that he gave an instruction to his personal banker at Ecobank Ghana to transfer US$48,500 on the 22nd of September 2011. He said that on the following day, he gave an instruction to a different banker "to chase" the transfer. He told the court that he usually gave instructions via telephone calls. He also said that he was told by the bank that he had US$90,000 in his account, when he was actually expecting US$ 50,000. When asked whether he checked his account, he said that, he did not at the time; but asked his banker to re-check his account at another time, because he did not think that, that could have been his account with that amount of money. He said that it was about a year later that he "bothered" to check his account. When questioned as to why he did not check his account until a year later, he testified that, he did not think that it was his account, since prior to him remitting the US$ 48,500 into his bank account, he had little money in the account; at least not more than US$ 10,000 in it; and that was the reason why he told the court that, it could not have been his account.

Judging from Mr. Keili's testimony in court, it is evident that, even he, himself, knew that he had been unjustly enriched. Even though he gave the impression of being confused, he was not actually confused. He understood what had happened. It is therefore the opinion of the court that the Plaintiff bank paid the Defendant, Mr. Keili, under a mistake of fact and law; and therefore has a right to bring this action for restitution. Mr. Keili was unjustly enriched and is liable to repay the amount of US$ 48,500 to Ecobank (SL) Limited.

Accordingly, since Mr. Keili's liability crystallizes at the moment of receipt, as a general principle, the quantum of Ecobank (SL) Limited's claim is unaffected by subsequent events; that is, the fact that Mr. Keili has paid away the money without knowledge of the bank's mistake which could have given him a defence of, change of position and/or estoppel. However, even if he had raised any of these as a defence, I would have been reluctant to recognise any special defence to claims founded on mistake of law or fact; so that money was prima facie recoverable, whether paid under a mistake of fact or law; on the ground that its receipt would otherwise be unjustly enriched; Kleinwort Benson v Lincoln City Council [1999 ]2 AC 349.

Therefore, the claim to recover a mistaken payment from its immediate recipient is now understood to rest firmly on the principle of unjust enrichment. Unless the payee can establish a relevant defence that defeats the restitutionary claim, liability will follow where the payer can establish that (a) the payee has received an enrichment, (b) the enrichment was received at the payer's expense and (c) the enrichment was 'unjust', in the sense that the claim falls within one of the recognised grounds of restitution, such as mistake, duress or total failure of consideration. In other words, it is the fact that the payment is made by mistake and not the presence or absence of any knowledge on the

part of the payee, that renders the payee's enrichment unjust; E. P. Ellinger et al at 520 (supra).

I am satisfied that the Plaintiff has established all of the above three conditions for its restitutionary claim. No evidence has been provided by the Defendant that he even provided any good consideration for the payment; Barclays Bank Limited v W. J. Sims Son & Cooke (Southern) Limited [1980] QB 677.

**CONCLUSION**

In view of the above mentioned and taking into consideration the fact that, the bank could have acted earlier and was therefore unreasonable in notifying Mr. Keili of its error nearly 10 months later, I am inclined to Order that:

1. The Defendant, Mr. David Keili is to refund the sum of US$ 48,500 (Forty-Eight Thousand Five Hundred United States Dollars) or its equivalent in Leones, to the Plaintiff, Ecobank (SL) Limited;

2. That the said amount of US$ 48,500 (Forty-Eight Thousand Five Hundred United States Dollars) or its equivalent in Leones is to be repaid over a period of 10 months from today's judgment.

3. Costs of US$ 10,000 (or its equivalent in Leones) to Plaintiff Solicitors.

Signed: _____ 16/5/2017
Hon. Ms. Justice F. Bintu Alhadi, J.