The Banker-Customer Contract

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NOTES OF CASES

The Banker-Customer Contract

Burnett v. *Westminster Bank*[1] raised the interesting and fundamental question of what is necessary to alter the basic banker-customer contract. The plaintiff had accounts with two branches of the defendant bank, one of which (A) operated the electronic computer system and the other (B) did not. Using a cheque form of branch A the plaintiff altered the heading to read branch B, completed the instrument for £2,800 and delivered it in payment of a gambling debt which he had incurred on behalf of himself and two non-playing partners. The following day, deciding to countermand payment, he telephoned branch B and instructed it not to pay, following this up with a letter confirming the countermand and, incidentally, indicating that the instrument was drawn on a cheque form of A branch. The instrument was duly presented in the clearing to the Westminster Bank computer centre and was directed to branch A, the magnetic lettering at the foot of the cheques issued by that branch preventing them from going elsewhere. At branch A someone should have noticed the change of name of the branch on which the instrument was drawn; instead the cheque was paid. Cheque-books issued by branch A bore on their cover a note to the effect that " The cheques and credit slips in this book will be applied to the account for which they have been prepared. Customers must not, therefore, permit their use on any other account."

The defendant bank alleged that it was an express term of the banker-customer relationship that cheque forms of branch A would be applied to the account for which they were prepared and also that customers would not use them or permit their use on any other account. These terms were allegedly contained in a letter from the bank to the plaintiff, of which he had no recollection. The bank further asserted that, in the alternative, the plaintiff was in breach of his contract with the bank in altering the cheque as he did. The parties agreed a statement of facts by which the plaintiff admitted that he had seen the notice on the cheque-book cover, but had not read it, even less had agreed to it.

The plaintiff claimed the sum of £2,800 as damages for breach of his mandate not to pay the cheque; or for money had and received to his use; or as money lent. He asserted that

(a) the notice was inadequate to affect the basic contractual position between banker and customer;

[1] [1965] 2 Lloyd's Rep. 218; [1965] 3 All E.R. 81.

(b) there was no consideration for the imposition of a new express term upon the basic implied contract;

(c) even if he must be regarded as contractually bound, the alteration of the name of the drawee branch prevented the cheque from being mandate to the bank to pay it and to debit his account at branch A; and that,

(d) assuming that he had been in breach, this gave the bank the right only to sue for damages, not to pay the cheque.

The defence failed on the ground that the notice on the cheque-book cover was not adequate notice. The bank argued that, having seen the notice, the plaintiff must be taken to have accepted its terms, not having objected to them; and tried to draw an analogy with the " ticket " cases. The plaintiff, however, pointed out that there was no analogy. The basic contract between banker and customer was an implied one, which came into existence at the time the account of the plaintiff was opened and was a continuing agreement, in the same terms as those in which it started, until later by mutual agreement it was changed. On the other hand, the " ticket " contract came into existence purely as the result of the passenger's request and at the moment the ticket was sold; he had either to accept it or refuse it. In the former case there was time and necessity for the change of relationship to be approved by both parties; in the latter, there was none, which fact in both cases must be within the contemplation of the parties.

While, however, the learned judge was not prepared to find the analogy with the ticket cases and held that the notice was not adequate to change the relationship so as to bind the customer, he said that he would

> " . . . be prepared to accept as the equivalent of the latter [*i.e.*, a document signifying the customer's approval of the new condition] the signature of the customer upon a cheque provided that the cheque form itself bore words limiting its use to the bank, branch and account shown in print upon it."

The learned judge added to this, on the plaintiff's points (a), (b) and (c) above, that " as at present advised, I do not think that any of these points would have availed the plaintiff had the defendants succeeded on the point as to notice."

The learned judge dismissed all the plaintiff's arguments but the one as to the adequacy of the notice. However, it might be thought that, even if the notice relied on by the bank had been upon the cheque itself, this would not justify the bank's debiting the cheque to the account at branch A, if the name of the drawee branch had been altered to branch B. The instrument evidenced on its face that it was a mandate addressed to B branch and, without the positive and expressed approval of the drawer, the bank could not debit the account at branch A. This is not affected by the fact

that the right to sue for breach might place the bank in the same position as before.

On the second of the pleas, consideration is still necessary to support a simple contract. There is mutual consideration for the basic implied banker-customer contract. The same consideration can hardly be sufficient to support a new contract, even though the new contract consists of the earlier contract to which has been added a new express term.

MAURICE MEGRAH.

CREDITOR, DEBTOR AND CONSIDERATION

ATTITUDES to *Cumber* v. *Wane* [1] tend to be hostile. Thus, among the textbook writers Cheshire and Fifoot [2] use such epithets as " gross " and " irrational " in regard to it and Anson [3] says " the rule enables a creditor to go back on an agreement solemnly entered into and intended to affect legal relations," and some very strong remarks have been made about it by judges: thus, Watkin Williams J. once described it as " a reproach to English law." [4] It is well known also that the Law Revision Committee in 1937 proposed its abolition along with the rule in *Pinnel's* case, which would then become unnecessary [5]—their repugnance to the whole doctrine is obvious.

It is interesting, therefore, to find the Court of Appeal applying it almost with gusto in *D. & C. Builders Ltd.* v. *Rees.*[6] The explanation for this unusual attitude is that the debtor in this case was making use of his knowledge that his creditor was near to bankruptcy for the purpose of driving a hard bargain—he " behaved very badly," said Danckwerts L.J.; whereas in the usual case coming under this rule the boot is on the other leg, since it is a hard-pressed debtor, trying to obtain some alleviation from his creditor, who finds himself struck down by the rule. Obviously there are factors involved in this type of situation of the kind which have weighed with Courts of Equity in formulating equitable rules. It is not surprising, therefore, that in the instant case one member of the Court of Appeal at any rate, Lord Denning M.R., considered that the time had come to decide such an issue on a basis of equity.

The plaintiffs were builders who had done work at the defendant's shop. In July 1964 they had received part of what was owing from them, but £482 was still due, and despite their efforts to obtain it from the defendant, it was still owing in the following November. At that time the defendant offered them £300 in settlement and the plaintiffs, being " in desperate financial straits,"

1 (1721) Stra. 426.
2 See their *Law of Contract*, 6th ed., p. 80.
3 *Law of Contract*, 22nd ed., p. 104.
4 In *Foakes* v. *Beer* (1883) 11 Q.B.D. 221 at p. 223.
5 See Cmnd. 5449.
6 [1966] 2 W.L.R. 288; [1965] 1 All E.R. 837.