IN THE SEYCHELLES COURT OF APPEAL

Reportable
[2022] SCCA 22 (29 April 2022)
SCA 58/2019
(Arising in CC 45/2014)

In the matter between

SEYCHELLES INTERNATIONAL MERCANTILE BANKING CORPORATION LIMITED **Appellant**
(rep. by Kieran Shah, SC)

and

ELITE CLUB LIMITED **Respondent**
(rep. by Basil Hoareau)

Neutral citation: *Seychelles International Mercantile Banking Corporation v Elite Club Limited* (SCCA 22) (29 April 2022) SCA 58/2019 (Arising in CC45/2014
Before: Fernando, President, Twomey, JA and Tibatemwa-Ekirikubinza, JA
Heard: 11 April 2022
Summary: Interpretation of Point of Sale agreement between merchant and bank-chargeback – interest payable when not agreed by parties.
Delivered: 29 April 2022

ORDER

The appeal is partly allowed.

(1) The Respondent, Elite Club Limited is to pay the Appellant, Seychelles International Mercantile Banking Corporation Limited the sum of €130, 395.77

(2) Interest at the legal rate is payable on the amount owed.

(3) Each party to bear their own costs in this court.

JUDGMENT

TWOMEY JA

Background

[1] This appeal concerns the commercial and banking practice referred to as *chargeback* and the interpretation of an associated Merchant Point of Sale Agreement (hereafter POS). The concept of *chargeback* is simply defined as a return of money to a payer of a transaction, especially a credit card transaction and more commonly in circumstances where a fraudulent transaction was performed with the credit card without the knowledge or authorisation of the cardholder.

[2] In the present case, Seychelles International Mercantile Banking Corporation (hereafter the Bank) charged back the sum of Euros 130,397.77 and interests from its client, Elite Club Limited, a tour operator (hereafter Elite), for numerous purchases by one of its clients using several MasterCards, allegedly, fraudulently. The fraudulent transactions were performed repeatedly in December 2009.

[3] The chargeback by the Bank resulted in Elite's bank account going into overdraft and incurring specific interests and despite the Bank's claims for the reimbursement of the same, Elite refused to pay the same.

[4] In the resulting case before the court *a quo*, the learned trial judge interpreted the Point of Sale Agreement between the Bank and Elite and found that clause 5 of the contract with regard to chargeback should be interpreted to allow Elite the opportunity to contest the chargeback before the Bank debited its account.

The Appeal

[5] Dissatisfied with the decision of the trial court the Bank has filed five grounds of appeal against this decision as follows:

(1) The learned trial judge erred in her analysis of the Merchant POS Agreement generally, and in particular finding that Clause 5.1(b) as drafted did not express the common intention of the parties that the Merchant (that is, the Respondent) shall immediately repay the amount of the Sales Transfer.

(2) The learned trial judge erred in the interpretation of Clause 5 in not appreciating that clause 5 places the risk on the Merchant.

(3) The learned trial judge erred in finding that there was an implied term under clause 5.1 that such an obligation to repay the amount of sales vouchers arose if the Respondent was granted proper opportunity to contest any claim made regarding payment effected; and that the Appellant provided satisfactory proof to the Respondent that any claim was a genuine one and/or rightful one.

(4) The learned trial judge was in error in not considering the fact that the Appellant Bank did not exercise a discretion in following the credit card (MasterCard) rules, hence equity does not require implying a term that the Appellant would provide an opportunity to the Respondent to challenge the chargeback. Alternatively, even if such a term should have been implied, there was evidence that, if such an opportunity had been provided, it would have made a difference.

(5) The learned trial judge failed to appreciate the fact that the payments of sales vouchers to the Appellant bank for the credit of the Respondent's bank account is from the credit card company(MasterCard) which has the right to chargeback and over which the Appellant bank had no control.

[6] The issues raised in the grounds of appeal and that fall for determination before this Court are whether the learned trial judge erred in her understanding of the concept of bank chargeback and the interpretation of the Merchant POS Agreement.

The contractual clause regarding chargeback

[7] Clause 5 of the POS agreement signed between the parties provides as follows in relevant part:

> *5 Charge-Back Rights*
> *5.1 If a Sales Voucher is issued or presented in breach of this Agreement or a cardholder makes a claim against the Bank relating to a transaction in respect of which a Sale Voucher has been issued*
> *(a) the Bank may without specifying a reason, withhold payment in presentation of a Sales Voucher;*
> *or*

(b) if the Merchant has been paid for the Sales Voucher, the Merchant shall immediately repay the amount of the Sales Voucher."(emphasis added)

[8] To understand this clause, the expression "sales voucher" must be understood. The Agreement defines "sales voucher" as a "voucher approved by the Bank". I must take judicial knowledge of the fact that a sales voucher in relation to a credit card is the credit slip we all receive from a merchant after we use our credit card for a purchase. The slip or voucher is the evidence of the sales transaction.

[9] Hence, on the presentation of the sales voucher to the Bank, the latter pays the Merchant the amount of the sales voucher by crediting the Merchant's Account (see clause 2 of the Agreement).

Meaning of "repay" in the Agreement

[10] The word "repay" has been subjected to different interpretations by the parties and the court *a quo*. Mr. Shah SC, for the Bank, submitted that properly interpreted, clause 5 (1) (b) provides that the Merchant has to immediately repay the amount of the Sales Voucher if they have been paid for the same, and if the said Voucher was issued or presented in breach of the Agreement or a cardholder made a claim against the Bank relating to a transaction in respect of which the Voucher had been issued.

[11] He further submitted that the receiving Bank does not assume the risk of the chargeback because it is not a party in the contractual relationship between the cardholder and the merchant, however fraudulent or genuine the transaction. The receiving bank is only the intermediary. The merchant ought to challenge the cardholder or MasterCard and show the information relating to the impugned transaction.

[12] Mr. Hoareau, Counsel for the Merchant submitted that under clause 5.1 of the Agreement, the Bank was permitted to withhold payment of the voucher without providing reasons. In contrast, under clause 5(1) (b), the Bank had to give reasons as to why the Merchant was obliged to repay the amount of the Sales Voucher.

[13] In the present case, Mr. Hoareau contended, the Bank did not notify Elite of its obligation or the reasons why it had to repay the amount of the Sales Voucher, a duty that the Bank had under the Agreement.

[14] He relies for this proposition on both Article 1134-3 of Civil Code of 1976, which applied at the time, and which provides that contracts shall be performed in good faith and Article 1162 that the where there is any doubt in respect of a provision of the contract it should be interpreted against the party which drafted the contract.

[15] The learned trial judge had this to say in relation to the sales voucher and its repayment:

> *"75. Clause 5.1(b) of the Agreement appears to suggest that the defendant may have no knowledge of a charge back until money has been withdrawn. The right is triggered inter alia whenever a card holder makes a claim against the plaintiff: see clause 5.1 of the Agreement. Unfortunately, this court did not have the opportunity to examine the rules of MasterCard relating to the chargeback process.*
>
> *76. In the view of this court, the facts of this case are in so many important areas unclear. This court notes that Mr. Confait attempted to explain the implication of clause 5.1(b) of the Agreement and the chargeback process…*
> *…*
> *82. It follows, therefore, that the nature of the Agreement, in particular clause 5/1 (b) of it, and the evidence of Mr. Confait and Mr. Rene warrant recourse to Article 1156 of the Civil Code. In the view of this court, it was clearly not the common intention of the plaintiff and the defendant that "the Merchant shall immediately repay the amount of the Sales Voucher…*
>
> *89. This Court finds that there is no doubt as to the meaning of the word "repay" in clause 5.1 (b) of the Agreement. According to clause 5 of the Agreement, the plaintiff pays the defendant that amount of the sales voucher issued, through Visa and MasterCard, by crediting the bank account of the defendant. Clause 5.1(b) of the Agreement provides that the Merchant shall immediately "repay" the amount of the sales voucher, if a sales voucher is issued or presented in breach of the Agreement or a cardholder makes a claim against the plaintiff relating to a transaction in respect of which a sales voucher has been issued.*

> *90. The court finds that the word 'repay" ought to be interpreted so as to grant the plaintiff the right to charge back the paid amount, i.e. the plaintiff may debit the account of the defendant by way of chargeback: provided that the plaintiff does not fall foul of the requirements of good faith and fairness set down under Article 1134 and 1135 of the Civil Code…*
>
> *91. This court finds that the word "repay" is clear and free from ambiguity."*

[16] I am, with respect, not convinced by this reasoning. It is clear to me from the approach of the plain meaning rule to interpretation that the usual and ordinary meaning of Clause 5 is that dishonoured payments had to be paid back by Elite unless it could show that the payments were legitimate. If all of the transactions which led to the chargeback were indeed fraudulent, I do not understand Elite's contention that it does not owe the Bank, unless given the opportunity to explain. In other words, Elite is not absolved from the responsibility to return money which is not theirs. In simple terms, the money was taken from a legitimate cardholder by an alleged fraudster and given to Elite. It is stolen goods that must be returned. Elite, it would seem, would prefer to imply terms into the Agreement to enable it the opportunity to challenge the debited amount.

[17] Confusingly, the learned trial judge accepts that the meaning of "repay" is clear and free from ambiguity but then resorts to implying provisions of the Civil Code into the Agreement. The recourse to the Civil Code is unnecessary. Parties are free to enter into any contract of their choice as long as they do so voluntarily – it is not the court's duty to police contracts freely entered into for fairness.

Notice to repay

[18] Mr. Hoareau's further contention, if I understand him correctly, is that if, which is not admitted,[1] the money had to be refunded, the Bank should have notified Elite.

[19] A close reading of the Agreement does not lend itself to this interpretation. A contrast between circumstances in which the Bank requests information about a transaction and

[1] The Statement of Defence is to the effect that Elite "ha[d] rightfully refused to pay the said sums".

chargeback is clear when comparing clause 3.3.1 5 to clause 5. In terms of Clause 3.3.1 of the Agreement, the Merchant agrees:

> *"to provide to The Bank within three working days a copy of the transaction when requested. Failure by the Merchant to provide such copy within the time specified will result in a chargeback to the Merchant"*.

[20] It is clear that when a request is made regarding a transaction and the Merchant does not comply, the Bank is authorised to debit the Merchant. On the other hand, clause 5 does not put any obligation on the Bank to send a request before debiting the Merchant's account.

[21] This interpretation is supported by Clause 11 of the Agreement that the Bank is indeed authorised to debit Elite's' account:

> *"If the Merchant has an account with the Bank, the Merchant authorises the bank to debit the merchants account with all amounts due to the Bank under this Agreement. In all other cases, payment will be made to the Bank by cash or cheque or other means at the discretion of the Bank.*

[22] Hence, as Elite's account was held with the Bank, and the chargeback was considered to be 'all the amounts due to the Bank' as opposed to for example meaning bank charges, service charges, then the Bank was authorised to debit the Merchant's account in keeping with the chargeback clause.

[23] This view has been supported in Seychellois jurisprudence on the issue. In *Ardyen B.V. v Barclays Bank of Seychelles Ltd*[2], although the facts are not exactly the same as the present case as the fraud was committed by the defendant, the court indicated that the chargeback was paid by the plaintiff (bank) and had to be repaid by the defendant. The court stated:

[2] (Civil Side No: 300 of 2009) [2012] SCSC 42 (19 November 2012)

> *"…This money is taken from the Plaintiff's bank account and the Defendant is now liable to pay this money back to the Plaintiff.*
>
> *The conduct of the Defendant amounts to a fraud and the Defendant is now liable to pay the money back to the Plaintiff so that the latter pay back to the Cardholders who were victims of the fraud committed by the Defendant."* (emphasis added)

[24] In *Chalet d'Anse Reunion & Ors v SIMBC*[3], a case with similar facts involving several fraudulent transactions, the bank reversed the payments by chargeback and froze the plaintiff's accounts. The plaintiff claimed that the bank committed a *faute* by unlawfully debiting the accounts and freezing the accounts without notice.

[25] The judgment, although focused on different issues to the present case, held that the plaintiff had to refund the money:

> *"It is clear from the evidence in this case led by the defendant and the documents produced that the 1st Plaintiff was informed of the fraudulent transactions in respect of the credit card transactions. However, the Plaintiffs without taking steps to have the fraudulent funds credited in their Euro account refunded by issuing a sales refund voucher, the said fraudulently credited money had been withdrawn as specified in paragraph 6 of the defence. As the transactions were subsequently reported as being fraudulent by the cardholders and though informed by the Defendant of same as the 1st Plaintiff provided no satisfactory explanation for the transactions pursuant to the POS agreement the defendant in accordance with the POS agreement clause 11.1 debited the account of the 1st Plaintiff of the sums fraudulently credited."*[4]

[26] No *faute* was found on the part of the bank and it was held that the bank's actions were in conformity with the agreement between the parties.

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[3] CS 149/2019) [2021] SCSC 741 (12 November 2021)

[4] Ibid, paragraph 12

[27] In a similar case in St. Lucia[5] delivered on 29th March 2022,[6] one of the issues considered (Issue 3) was whether the bank unlawfully reversed the sum of $1,500,000.00 from the plaintiff's account causing loss and damage to its business. The company alleged, among other things, that the bank breached its fiduciary duty. The bank stated that the relationship between the parties was never beyond that of banker and customer. The bank also alleged that the company breached the terms of the merchant and cash management services agreement by attempting to process excessive unauthorized card transactions and filed a counterclaim for outstanding sums due to it by reason of the company's overdrawn account.

[28] The judgment is lengthy and addressed various points, not particularly relevant to the present case but the following analysis is however relevant to the present case:

> *"[107] I accept and agree with the Bank's position that having regard to all the circumstances the transactions were highly unusual and suspicious. It was reasonable for the Bank to form the view that they were tainted with impropriety, illegality or unlawfulness and quite possibly fraudulent. The Bank produced a document [. . .] which showed 10 dropped transactions which were destined for the Chequing Account totaling $18,512,653.7 4. The transactions ranged from $1,120,000.00 to $3,198,663.74 originating from 6 different credit card numbers within a week. The amount of these transactions is well outside even the total annual sales stated by Bamboo Springs, and moreover the monthly card transaction size of approximately $9,098.00.*
>
> *"[113] [. . .] The Bank was therefore not only entitled to reverse the sum of $1,500,000.00 and not accept the other three transactions, but also to report these transactions to the relevant authority under the Money Laundering (Prevention) Act 22 ("the MLPA")"*
>
> *"[116] I therefore conclude that the Bank did not act unlawfully in reversing the sum of $1,500,000.00 and Bamboo Springs in not entitled to the return of this sum. The Bank also did not act unlawfully in not clearing the other three*

[5] St. Lucia, a mixed jurisdiction, has a Civil Code similar to that of Seychelles.
[6] *Bamboo Springs Bottled Water Ltd v The Bank of Nova Scotia* SLUHCM2019/0063

transactions complained of, if these actions were in fact taken by the Bank, as opposed to the third-party processor."

[29] In *A Company v The Commissioner for the South African Revenue Service,*[7] the court noted that it is common knowledge that certain payments made by credit cards are amenable to chargebacks, which are effected in terms of the card scheme's rules.

> *"The terms of the transactions in terms of which gift cards are 'sold' exclude cash refunds, but suggest that a credit card refund might be possible. No evidence was adduced at the hearing, but I think it may be accepted as a matter of common knowledge that in certain circumstances payments made by credit card are amenable to chargebacks, whereby the credit to the merchant or supplier's account is reversed and the consumer's credit card account is credited. Chargebacks are effected in terms of the card scheme's rules, and are not related to the terms of the contract between the consumer and supplier in respect of which the credit card payment was made."*[8]

[30] The card rules are, as submitted by Mr. Shah, rules operating between the Merchant and the Card company to which the Bank is not privy. The Bank cannot be faulted for not producing them. The present case is solely about the Agreement between the parties where the chargeback clause is clear. Any reference to the Card rules is therefore misleading and unnecessary. The Bank cannot be faulted for applying clause 5.1 (b) as agreed by the parties. The grounds of appeal relating to the chargeback are therefore allowed.

Interest

[31] Since Elite's account did not have sufficient funds for full payment of the amount charged, it went into overdraft. While the Bank was indeed authorised to debit Elite's account, there had been no agreement with the rate of interest to be charged if the Merchant's account when debited went into overdraft. In such situations, the approach of the court has been that in the absence of proof by the bank of the rate of interest chargeable, to impose the legal rate under section 3 of the Interest Act. (See *Vijay*

[7] (IT 24510) [2019] ZATC 1 (17 April 2019)
[8] Ibid, fn 4

Construction Pty Ltd & Anor v Aluminium And Steel Works Ltd,[9] *Seychelles National Commodity Co. Ltd v Faure*[10]*).* Indeed, Mr. Shah has conceded as much in the absence of an agreement between the parties.

Decision

[32] In the circumstances, the appeal is partly allowed and the Supreme Court judgment in the present case is set aside. The Bank was entitled to a chargeback in the sum of €130,395.77 from Elite's account but only with interest at the legal rate from the date of judgment of court below.

Order

[33] I therefore make the following orders:

(1) The Respondent, Elite Club Limited is to pay the Appellant, Seychelles International Mercantile Banking Corporation Limited the sum of €130, 395.77
(2) Interest at the legal rate is payable on the amount owed.
(3) Each party to bear their own costs in this court.

Signed, dated, and delivered at Ile du Port on 29 April 2022.

[9] SCA2/02 [2003] (11th April 2003)
[10] (1981) SLR 160

Dr. Mathilda Twomey-Woods, JA

I concur

Anthony Fernando, President

I concur

Dr. L. Tibatemwa-Ekirikubinza, JA