**Farm AG International Trading**

**(Pty) Ltd v Barclays Bank Plc & Other**

**(2001) SLR 125**

Phillippe BOULLE for the plaintiff

Kieran SHAH for the first defendant

Ramniklal VALABHJI for the seconddefendant

**Judgment delivered on 5 November 2001 by:**

**PERERA J:** The plaintiff company, based in South Africa avers that goods to the value of R1,385,128 were supplied to the second defendant company (Bodco Ltd)during the period June 1997 to December 1998. They further aver that this amount was collected by the firstdefendant, Barclays Bank, on their behalf, and deposited in an interest bearing account for eventual transfer to South Africa in rands. The plaintiff company on 27 August 1999 obtained payment of the whole sum of R1,385,128, which sum was, at their request, deposited in the client's account of their attorney Mr P Boulle. The instant claim for R65,429.19 is the interest paid to Bodco Ltd while that sum was in the bank. The claim against the bank is allegedly based on unlawful payment to a "third party" namely Bodco Ltd, while that against Bodco Ltd is based on unjust enrichment.

Barclays Bank avers that there was no privity of contract between them and the plaintiff and that the account holder being Bodco, interest was paid to them lawfully.

Bodco Ltd avers that the plaintiff being a non-resident company did not have an account in Seychelles and that a condition of sale was the payment in South African rand as specified in the bills of exchange. They further aver that at the time payment was made in Seychelles rupees on 27 August 1999 the amount due to the plaintiff was 1,249,048.90 rands according to the exchange rate of 0.8898 on that day. Accordingly a sum of Seychelles R136,079.10 is being counter-claimed as an over-payment.

The present dispute is as regards the entitlement of the interest paid to Bodco Ltd on the deposits made to the bank in Seychelles rupees. Bodco Ltd purchased goods from the plaintiff company on bills of exchange, negotiated through Barclays Bank. These bills were payable within 180 days. The currency of payment was to be in South African rands (exhibit 2D2).There was no stipulation as regards payment of interest.

Admittedly, the plaintiff company was aware that there was a foreign exchange shortage in Seychelles and that hence the importer, Bodco Ltd, would be unable to remit payments in South African rands through the bank within the stipulated period due to circumstances beyond their control. Mr Michel Felix, a manager of Barclays Bank, testified that since 1996 the Bank had been unable to pay bills in foreign currency on the due dates. Therefore as the "collecting bank",they collected the Seychelles rupees equivalent from the drawee of the bills of exchange into an account entitled "bills paid awaiting exchange".This account was referred to as a "suspense account*"* which was in the name of Bodco Ltd.

According to exhibits 2D2 and P2, Bodco Ltd paid seven bills between the period 12 November 1997 to 23 June 1998 on the dates specified in such bills. I have prepared the following summary from particulars extracted from the documents produced in the case by all parties.

Bills paid awaiting exchange

**Date of Bank Ref. S.A.Rands Exchange Equ in Interest Deposit**

**Deposit Rate Sey. Rs Rs. Deposits**

12.1197 ABC 105/97 253,725.00 1.054 266,513.00 R 18,210.51

26.12.97 ABC 157/97 171,887.20 1.0679 183,558.00 R 12,014.24

18. 3.98 ABC 244/97 199,505.00 1.0488 209,241.00 R 10,404.72

23. 4.98 ABC 31/98 203,280.00 1.0338 210,151.00 R 8,999.07

19. 5.98 ABC 32/98 208,521.00 1.0291 214,589.00 R 8,119.10

22. 7.98 ABC 283/97 265,136.73 0.8516 225,790.00 R 5,771.56

23. 7.98 ABC 42/98 **158,861.00** 0.8516 75,286.00 **R 1.909.99**

(135,286 less **R65,429.19**

**S.A.R. 1,460,915.93 R60,000 paid to Plaintiff)**

(Less SA Rands 57,174.20

equivalent of Seychelles R60,000 paid **R1,385,128.000**

to a director of the plaintiff company

at the rate of 1.0494) = ***57,174.20***

***SA Rands 1,403,741.73***

Mr Felix stated that this system was introduced to assist the suppliers by ensuring that the rupee equivalent of the foreign currency due on the bill of exchange, on the date specified, was with the bank and not in the customer's account. The deposits were credited in the name of Bodco Ltd. However, the bank invested those amounts in Treasury Bills and earned interest, and consequently Bodco Ltd was paid a percentage of the interest so earned. The total amount of interest paid quarterly was R65,429.19, which is the sum in dispute.

The agreement of both parties as to payment is evidenced by the communications, between the bank and the plaintiff company each time a deposit was made by Bodco Ltd in Seychelles rupees. The standard format of such communication was as follows (exhibit P2) -

The above-mentioned collection has been paid in Seychelles rupees on …..

In view of foreign exchange shortage prevailing in Seychelles we are unable to remit the proceeds in foreign currency now.

As we have several requests outstanding in our pipe line remittance is subject to a considerable delay.

In as much as we would like to keep you informed of all the developments in the circumstances we are unable to speak of any definite date when payment may be expected. Upon realisation we will revert.

As the currency of the agreement and payment on the bills was to be in a SA rands, the usage of the word "paid"has to be qualified by the undertaking to make payment in foreign currency upon realisation.

In a fax message dated 17 April 1998, the bank informed the plaintiff company that the "waiting time" for remittance at that time was about 8-10 months from the date of payments effected in rupees. Prior to that on 28March 1998 the plaintiff company in a fax message to Bodco Ltd stated –

Please ensure that payment is made in rupees to the bank on 1.4.98 as we still have to wait another 8 months for forex before the bank transfer the funds to us.

This correspondence shows that although the agreed currency of payment was SA rands, the plaintiff company had agreed to accept the rupee equivalents, not as a mode of payment in satisfaction of the debt, but as a means to satisfy it, as that was the only way the bank could ensure that payment would be remitted to them in foreign currency.

Section 11(1) of the Bills of Exchange Act (Cap 51)provides that:

A bill is payable at a determinable future time within the meaning of this Act which is expressed to be payable:

1. At a fixed period after date or sight.
2. On or at a fixed period after the occurrence of a specified event which is certain to happen, though the time of happening may be uncertain.

Although the bills in the instant case were payable at a fixed period specified therein, due to the local foreign currency situation, the drawer had agreed to be paid when foreign exchange was available. The bank by letter dated 28 September 1999 maintained that "bills paid in local currency awaiting foreign exchange*"* for remittances were held in drawees' names and that interest thereon was payable to them according to the policy of the bank. The plaintiff was therefore advised that arrangements should be made direct with Bodco Ltd.

The basic dispute as to the ownership, or entitlement of the accrued interest has to be considered within the relationship of the parties inter se. The plaintiff company was the exporter, the drawer of the bill and the beneficiary thereon. Bodco Ltd was the importer, the drawee of the bill and the debtor thereof. The bank functioned in its capacity as "collecting bank",and in a banker-customer, relationship with Bodco. The plaintiff company admittedly did not have an account with the bank, and hence was not a "customer".As was stated by Lord Davey in *Great Western Railway Co v London and County Banking Co Ltd* [1901] AC 414 at 420-421,"there must be some sort of account, either a deposit or a current account or some similar relation to make a man a customer of a bank".In the same case, when before the Queen's Bench Division, it was held that if a person has no account with a bank and is not about to open an account, the fact that a bank renders some casual service to him will not make him a customer.

In the present case, when Bodco Ltd deposited the rupee equivalents on the dates fixed in the bills and informed the plaintiff company that payments had been made in local currency, the bills were not discharged, as the currency of payment still remained to be remitted. The payment in SA rand was beyond their control. Hence it was only a notice of remitting local currency to facilitate the payment of the currency of agreement when available.

Therefore as far as the firstdefendant bank was concerned, the banker-customer relationship existed only with Bodco Ltd, who had remitted money into an account in their own name awaiting the remitting of SA rands to the plaintiff. As Lord Cottenham LC stated in the case of *Foley v Hill and others* (1848) 2 HLC28:

the money placed in the custody of a banker is, to all intents and purposes, the money of the banker…He is known to deal with it as his own; he makes what profit of it he can, which profit he retains to himself, paying back only the principal, according to the custom of bankers in some places, or the principal and a small rate of interest, according to the custom of banker in other places.

The bank in the present case had an obligation to pay interest to the account holder. They also had agreed to pay the principal sum to Bodco Ltd if some other arrangement had been made to satisfy the debt in local currency. Any dispute as regards the ownership of the interest in such circumstances had to be settled with the account holder and not with the bank. Hence the plaintiff company has no cause of action against the firstdefendant bank. Accordingly the case against the firstdefendant is dismissed with costs.

In the present transaction, between the plaintiff vompany and Bodco Ltd, the bills did not specify payment of interest on the sums claimed, which was in SA rands, nor was there any agreement as to the payment of interest in Seychelles rupees. They were term bills payable within 180 days from the dates thereon. Mr Boulle, counsel for the plaintiff submitted that although no interest was claimed on the bills of exchange, interest is now being claimed on the proceeds of those bills. I have already held that the various deposits made by Bodco, in the "suspense account"in their own name, were payments made to obtain foreign exchange through the system operated by the bank. The obligation of Bodco Ltd to pay in the agreed currency was discharged only when the plaintiff company decided to accept the whole amount in Seychelles rupees which they wanted to be credited to the client's account of their attorney. Till then they were entitled only to the "sum certain"specified in the bill in SA rands. When they decided to accept the equivalent in Seychelles rupees that position was altered, as those deposits had been made not as a discharge of a debt owed to the plaintiff company. Hence the plaintiff company is not entitled to the interest paid by the bank to its customer the second defendant company. Accordingly the case against the second defendant is also dismissed with costs.

The counterclaim of the seconddefendant, Bodco Ltd, is based on the difference between R1,385,128 paid in full and final settlement of all the invoices on 27 August 1999 and R1,249,048.90, which is the rupee equivalent of SA rands 1,403.741.20, averred to be the actual amount due to the plaintiff company on that date. In the summary of invoices I have set out earlier in this judgment the total amount invoiced in SA rands is 1,460,915.93. The difference in the amount in SA rands between these two amounts is SA rands 57,174.70. This amount, at the exchange rate of 1.0494 (the rate on 19 March 1998 - exhibit 2 D3) isequivalent to R60,000 which, according to letter dated 16h July 1999 in the bundle of correspondence (exhibit P3),was paid by cheque to Pierre Maingard (a director of the plaintiff company)on 19.3.99. According to exhibit P3a, interest has been calculated on R75,286 (that is, R135,286 deposited on 23 June 1998 less R60,000 paid as aforesaid). The total of the rupee deposits up to 23 June 1998 (less R60,000)was R1,345,128. The total SA rands was 1,403,741.20.

Bodco however claims R136,079.10 as an overpayment. That sum has been calculated on the basis of the total value of the goods invoiced at SA rands 1,403,741.20 and applying the exchange rate of 0.8898 prevailing on 27 August 1999, the day a sum of R1,385,128 was paid to the plaintiff. This claim is also made on the basis that the deposits continued to belong to the second defendant and that when payment in Seychelles rupees was demanded, the total SA rands amount due on that day should have been converted at the current rate of exchange. The position of the plaintiff was that those deposits had already been accepted by them for conversion to SA rands at the rates prevailing on the dates of such deposits. However, on the basis of my finding that those deposits belonged to the second defendant company, the "sum certain" in the bills, that is, SA rands1,403,741.20 became payable. The second defendant had already deposited R1,385,128 at the rates current when the seven deposits were made, to cover the amount due in rands. By letter dated 15 August 1999, the attorney for the plaintiff company informed the bank that his client wished to accept all the deposits listed in the two schedules furnished and the accrued interest. By letter dated 26 August 1999 (exhibit 1D1),Bodco Ltd authorised the payment of R1,385,128 held in deposit to the order of Farm- Ag.

In the application form entitled "bills paid awaiting exchange"issued by the bank and used by Bodco, there is in small print, a note which states "once foreign exchange is available, I will pay any difference in exchange plus all your bank charges". Hence, the risk of the exchange rate increasing, and the consequent necessity for payment of additional Seychelles rupees was with Bodco. In addition when foreign exchange was finally available, the bank would apply the rate prevailing on that day and also levy the bank charges. If the rate was lower than on the day the deposit was made, Bodco Ltd would still have lost the difference in Seychelles rupees, as the bank was not obliged to make any refunds.

The second defendant claims the overpayment purely on the basis of the exchange rate prevailing on the date of payment in Seychelles rupees. They do not aver any ground to justify the claim for a refund of the overpayment, although obviously if SA rands 1,403,741.20 which was due on the bills was converted at the rate of 0.8898, the rupee equivalent payable to the plaintiff was R1,249,048.90 and not R 1,385,128.

In the case of *Kelly v Solari* (1841) 9 M & W 54 (cited in *Cheshire and Fifoot on Law of Contracts*), Parke Bhad this to say‑

If, indeed, money is intentionally paid, without reference to the truth, or falsehood of the fact, the plaintiff meaning to waive all inquiry into it, and that the person receiving shall have the money at all events, whether the fact be true or false, the latter is certainly entitled to retain it. But, if it is paid under the impression of the truth of a fact which is untrue, it may, generally speaking, be recovered back, however careless the party paying may have been in omitting to use due diligence to inquire into the fact. In such a case the receiver was not entitled to it, nor intended to have it.

In the present case, the seven deposits made in Seychelles rupees were known to both parties. The second defendant agreed to pay the total sum to the plaintiff when the request was made. In these circumstances payment was not made under a mistake of fact. Hence there is merit in the submission of Mr Boulle that the counterclaim is based on an afterthought. In authorising payment, the second defendant impliedly waived the right to recalculation of the sum paid. Hence they cannot now claim any sum on the basis of an overpayment.

The counterclaim is accordingly dismissed with costs.

**Record: Civil Side No 36 of 2000**