BROAD'S CASE AND SET-OFFS

Questions and Answers

Question - Charles Craigie:

Mr Chairman, I would like to ask Mr Yorke a question on the subject of Broad's case. What is the position of the bank which holds a term deposit from the customer and, on the faith of holding that term deposit, allows a fluctuating overdraft from time to time and then receives a notice that the customer has assigned the deposit to somebody else?

Answer - Richard Yorke:

If you go and ask most lawyers who haven't studied the subject what the answer is, they will tell you that means we have lost the right to the debt which has been assigned and that therefore the bank has lost its security. However, that is not the answer and if anybody gives it to you, they are wrong.

If you go back to an extraordinary overlooked case which is not implanted on banking in the English text books (but then most of the best cases aren't) called the Government of Newfoundland v. Newfoundland Railway Company (1888) 13 App. Cas. 199, you will find the problem was solved by the Privy Council nearly 100 years ago and completely overlooked since then. But it is thoroughly good law in England and there is, to the mind of those of us who worked on this subject for four years, no doubt that if that case applied, it would entitle the bank to say "I'm sorry, we have lent money against the faith of this deposit" because a bank as you know, going back 200 years, takes his customer as a whole, and doesn't look at separate individual contracts and liabilities on half a dozen different accounts unless he has expressly agreed to do so, and so he says "I lent on the faith of this money being substantially available even if fluctuating" and that takes priority over it.

Can I just read you what was said in that case - just one sentence out of it - and it is staggering to think it is a hundred years old, but it sounds like Lord Denning today:

> "It would be a lamentable thing if it were found to be the law that a party to a contract may assign a portion of it, perhaps a beneficial portion, so that the assignee shall take the benefit, wholly discharged of any counter-claim by

> the other party in respect of the rest of the contract, which may be burdensome."

Stop there and you still might be in the position which most people would think you were, that the bank would lose, but listen, this is half finished:

> "... damages may now be set off as between the original parties, and also against an assignee if flowing out of and inseparably connected with the dealings and transactions which also gave rise to the subject of the assignment."

I can see no way in which it could be denied that a bank manager who had lent against looking over his shoulder at deposits which he has already got, could not be challenged when he says that "I lent the money and the dealing and transaction are inseparably connected with the deposits that the customer had already made with me". Therefore if you look at that case you get the right answer and the banker is OK.

Question - John King (Russell McVeagh McKenzie Bartleet & Co):

I just wanted to ask Richard on that particular point though, what would be the position if it could not be established by the bank that in fact it was an inseparable oneness and transaction, as perhaps it was in Bradford's case, where it was in fact treated as a separate deposit?

Answer - Richard Yorke:

If he hadn't lent against it and wasn't regarding it as one of the factors which led him to make the loan then he can't complain if the money is assigned or taken elsewhere. If he had lent against it then he is entitled to prevail against the assignee.

Comment - John King:

So that produces a rather common basis for the point though. We have been looking at the question of the factual position, so that if you include in your contract the ability to do so, then you will be safe from the argument, but otherwise, particularly these days, people might raise that this particular deposit was a totally separate deal and it was unrelated to a loan transaction that is also in existence.

Comment - Richard Yorke:

Yes, today you have got swings and roundabouts, and you have to make the judgment. If you put it in your contract you have lost the banker's lien under the law merchant, which I think is much stronger than any contract. But yes, if you put it into a contract, then you get it that way.

Question - Charles Craigie:

I don't want to waste the time of the meeting on this unduly but there are a couple of points I think that need clarification. I asked Mr Yorke to comment on the position of notice of the assignment to the bank, what is the position if the bank receives notice of the assignment? Can it then make further advances against that deposit? Also Mr Yorke used the term "banker's lien" in connection with the deposit - the Halesowen case demonstrates that that is not the appropriate terminology with respect to a deposit with a bank.

Answer - Richard Yorke:

I was in the Halesowen case and if you care to read my 22 pages you will see why I think it is most unfortunate that the House of Lords in that case should have made yet another concept to have the same label around it that umpteen concepts already had, and therefore made the law even more confused. But hanging labels round things doesn't change the substance. The substance of the matter which is what matters is this; once you have received notice, you are in the privileged position of notice of any equitable right and any further advance you make would be postponed or takes place after the equity of which you have notice.

So the sensible thing to do as a banker would be to write both to your customer to say "sorry, no more" and to the person who has given you notice of the assignment to say "I'm sorry, I have by equitable charge, a prior banker's lien on this sum for this amount of my lending and I take note that your assignment will be the next one down the line of which I have had notice".