

DUTIES, LIABILITIES AND PROTECTION OF THE BANKER IN BANKER-CUSTOMER RELATIONSHIP IN NIGERIA

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ABSTRACT

The contractual relationship between the banker and the customer necessarily imposes specific mutual duties and obligations on the contracting parties with attendant consequences for breach. The liability of the banker in the discharge of its duties could arise from its status as a paying or collecting banker. The article examines the duty of the banker to honour the mandate of the customer and the duty not to pay out the customer's money without his authority. The legal protection afforded the banker at common law and under the statute in case of breach of these duties is also examined with a view to determining their adequacy and the extent to which it has impacted on the banker-customer relationship. It is argued that the conditions precedent to the enjoyment of the legal protection afforded the banker against liability are strict and geared

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towards ensuring the sanctity of the primary contract between the parties and the overall financial health of the economy. The article concludes that despite the ubiquitous use of e-payment channels with the introduction of the cashless policy by the regulatory authorities, using cheques as a payment instrument is still a significant sub-set of the payments system in Nigeria. The article also makes a case for a need to continually strike a balance between the interest of the banker and that of the customer in the overall interest of the economy.

Keywords: Banker-customer relationship, Bill of exchange, Duties and liabilities of bankers, Common law defences for banker, Statutory protection for banker.

1. INTRODUCTION

The legal relationship that exists between the banker and the customer is primarily contractual and forms the *fons et origo* of the nature of other relationships that can subsequently come into existence between the parties.

² It is such a contractual relationship that is generally taken to arise from the opening and operation of a bank account accompanied by mutual duties and obligations, the terms of which cannot be unilaterally varied by either of the contracting parties.³ The legal nature of the relationship between the banker

² *Burnett v Westminster Bank Ltd* (1965) 3 All ER 81; *National Bank of Nigeria Ltd v Maja* (1967) 2 ALR (Comm) 327; *National Bank of Nigeria Ltd v Fasoro* (1976 – 1984) 3 NBLR 317.

³ In *Burnett v Westminster Bank Ltd* (n 1), it was held that the notice on a cheque-book cover restricting the use of cheques to a particular amount was ineffective without a special agreement on it between the banker on the one hand and the customer on the other.

and the customer can also be found on some other special contracts that might arise between the parties concerning specific transactions, or other banking services, in the various specialised aspects of mercantile law, including that of the creditor-debtor, particularly where it concerns the deposit of money in current or deposit account or a loan transaction,⁴ bailor and bailee where the banker undertakes to store the precious articles or valuables of the customer,⁵ or principal and agent, as regards the drawing and payment of cheques.⁶ Thus, the two terms, namely, 'banker' and 'customer', are, generally, conditioned by the character of the relationships existing between the parties.

One of the most contentious areas in the legal relationship between the banker and the customer concerns the discharge of the banker's duties in its capacity as a paying banker or a collecting banker in cheque transactions.⁷ The duties

⁴ In *Foley v Hill* (1848) 2 HL Cas 28, the legal basis of the simple relationship of banker and customer was authoritatively established as that of debtor and creditor when the latter deposits money with or takes a loan from the banker. This established relationship between the parties enables the banker to use the deposits as it may wish, being money borrowed from the customer and in full control of the banker subject always to the liability of the banker to repay the depositor when called upon to do so. The debtor and creditor relationship adopted by the court in this landmark case has tremendously influenced the subsequent judicial decisions both in England and in Nigeria: see, eg, *London Joint Stock Bank Ltd v Macmillan & Arthur* (1918) AC 777; *Joachimson v Swiss Corporation* (1921) 3 KB 110; *Official Receiver & Liquidator v Moore* (1954) LLR 46; *Wema Bank Plc v Osilaru* (2008) 10 NWLR (Pt 1094) 160 at 165; *STB Ltd v Anumnu* (2008) 14 NWLR (Pt 1106) 125; *Ishola Investment Ltd v Afribank Nig Plc* (2013) 9 NWLR (Pt 1359) 380; *Uzuegbu v Progress Bank* (1988) 4 NWLR (Pt 87) 253; *Allied Bank Nig Ltd v Akubueze* (1997) 6 NWLR (Pt 509) 374.

⁵ *Denbury v Bank of Montreal* (1918) AC 626; *Langtry v Union Bank of London* (1896) JJB 338; *Odumosu v ACB* (1976) 11 SC 55.

⁶ *Westminster Bank Ltd v Hilton* (1926) 43 TLR 124, 126 (Lord Atkin); *Capital and Counties Bank Ltd v Gordon* (1903) AC 240; *Joachimson v Swiss Corporation Ltd* (n 3) 110, 127; *Selanger United Rubber Estates Ltd v Craddock (No 3)* (1968) 2 All ER 1073, 1107; *STB Ltd v Anumnu* (n 3) 125, 150 – 151; *Access Bank v Maryland Finance Co and Consultancy Service* (2005) 3 NWLR (Pt 913) 460; *Bank of West Africa Ltd v Balogun* (1970) 1 All NLR 50; *Rickett v Bank of West Africa Ltd* (1960) 5 FSC 113; *Guarantee Trust Bank v Dieudonne* (2017) LPELR-43559..

⁷ A 'cheque' is a *sui generis* species of a bill of exchange and is so defined in s 73 of the Bills of Exchange Act (BEA), Cap B8, Laws of the Federation of Nigeria (LFN) 2004 as a bill of exchange drawn on a banker payable on demand just like any bill of exchange. A bill

owed by the banker to the customer are clearly defined under the common law and relevant statutory provisions. What amounts to a breach of these duties, the consequences attached thereto, and the immunity granted to the banker are also defined. This article aims to examine the duty of the banker to honour the customer's mandate and the duty not to pay out the customer's money without the latter's authority from the perspective of the creditor-debtor contractual relationship. The banker's liability to the customer in the event of a breach of these duties and the legal protection afforded the banker at common law and under the statute will also be examined. Specifically, our discussion will be limited to the duties, liabilities and protection of the banker in handling customer's cheques either as a paying or a collecting banker. As such, other duties arising from the legal relationship between the banker and its customer in connection with the customer's account, as well as issues that might arise from some other contractual relationship of the banker to the customer, such as, for example, that of a bailee or trustee, are not covered in the ensuing discussion. Our discussion is also limited to personal cheques. Thus, other paper-based payment instruments, such as the managers' cheques and bank drafts, are not covered.

The article is divided into seven parts. The next part delves into the legal meaning of banker and customer. The third part focuses on the duty of the paying banker to honour the customer's mandate and the duty not to pay out the customer's money without authority and the ensuing liability for breach of these duties. The fourth part focuses on the immunity afforded the banker

of exchange is itself defined in s 3 of the Act as an unconditional order in writing, addressed by one person to another, signed by the person giving it, requiring the person to whom it is addressed to pay on demand or at a fixed or determinable future time a sum certain in money to or to the order of a specified person, or to bearer. The Nigerian BEA is a re-enactment of the Bills of Exchange Act 1882 (UK) with amendments.

against liability. The fifth and sixth part focus on the duties and liabilities of the collecting banker and the legal protection available to the banker in the event of a breach. The last part is the conclusion.

2. MEANING OF BANKER AND CUSTOMER.

There is yet no specific definition given to the term 'banker' in Nigeria. Nevertheless, the term 'banker' has, generally, been described in various ways in several statutes in Nigeria either as "a body of persons whether incorporated or not who carry on the business of banking;⁸ or as a bank licensed under the Acts;⁹ or as a person who carries on the business of banking which includes the acceptance of deposit;¹⁰ or as any corporation carrying on the business of bankers or financial agents.¹¹ The judicial perspective of the term can also be gleaned from *United Dominion Trust Ltd v Kirkwood*,¹² where a banker or bank is said to refer to an organisation that is authorised to accept money from and collect cheques for their customers and place them to their credit; honour cheques or orders drawn on them by their customers when presented for payment and debit their customers

⁸ Section 2 of the BEA. This definition is, however, inaccurate since the Banks and Other Financial Institutions Act 2020 (BOFIA) in s 2(1) thereof, prohibits any person from carrying on any banking business in Nigeria except it is a company duly incorporated in Nigeria and holds a valid banking licence issued under the Act.

⁹ Central Bank of Nigeria Act 2007, Cap C4 LFN 2004, s 60; BOFIA, s 131.

¹⁰ Nigeria Deposit Insurance Corporation (NDIC) Act 2016, s 59. Banking Business is itself defined under s 131 of BOFIA as the business of receiving deposits on current account, savings deposit account or other similar account, paying or collecting cheques, drawn by or paid in by customers, provision of finance consultancy and advisory services relating to corporate and investment matters, making or managing investments on behalf of any person whether such businesses are conducted digitally, virtually or electronically only or such other business as the Governor may by order published in the Gazette, designate as banking business.

¹¹ Coins Act 1928, Cap C 16 LFN 2004, s 2.

¹² *United Dominions Trust Ltd v Kirkwood* (1966) 1 All ER 968, 975 (Lord Denning, MR).

accordingly; and to keep current accounts, or something of that nature, in their books in which the credits and debits are entered.

'Customer', in ordinary parlance, denotes a relationship resulting from habit or continued dealings. In the banking business, however, a habit or continued dealings will not make a person a bank customer unless an account is opened in his name, just as a stranger can become a customer immediately when he opens an account with the bank.¹³ Although no statutory definition of the term has yet been given, a cursory examination of some case law gives an insight into who may be regarded as a bank customer. In *Great Western Railway Co v The London and County Banking Co Ltd*,¹⁴ for example, it was found that the respondent bank had for years been in the habit of cashing cheques for H, without the latter having an account or passbook with them. It was held that an occasional or even regular cheque encashment is insufficient to establish the relationship between banker and customer. The court noted that 'It is true that there is no definition of customer in the Act, but it is a well-known expression, and I think that 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 banker.'¹⁵ Conversely, in *Ladbroke & Co v Todd*,¹⁶ the court had to determine whether a banker collected the proceeds of a cheque for a 'customer' who had paid in a stolen cheque from a letter box to open an account. One of the questions raised was whether the thief could, in the

¹³ The word 'customer' appears in s 2 of the BEA but is not explained therein. As a general rule, however, a bank customer, within the meaning of s 2 of the BEA is any person, whether incorporated or not, who has some kind of account with the bank. *Ademiluyi & Lamuyo v African Continental Bank Ltd*

¹⁴ (1901) AC 414.

¹⁵ *Ibid*, 420 – 21 (Lord Davey).

¹⁶ (1914) 30 TLR 433. See also *Ademiluyi & Lamuyo v African Continental Bank Ltd* (1964) NMLR 13, where it was held that the plaintiffs were customers of the defendants when they opened an account in their joint names with the defendants with a cheque for £24, 720. .

circumstance, be a customer within the meaning of section 82 of the BEA 1882 (UK), when he opened the account with the cheque in question. It was held that the relationship of banker and customer began as soon as the first cheque was handed in to the banker for collection, not when it was paid.

Thus, the word 'customer' signifies a relationship in which duration is not of the essence to identifying the banker-customer relationship. A person whose only connection with the bank at the material date was the payment in of a single cheque for collection is a bank customer, irrespective of whether his connection is of short or long standing.¹⁷ In the same vein, where a person deals with a bank and both parties contemplate the person becoming a customer, and a bank account is, in fact, subsequently opened, the relationship of a banker and customer is deemed to have been established from the date the bank accepted the instruction from the prospective customer even though, at that time, there was no account in existence.¹⁸ It has also been held in *Importers Co, Ltd v Westminster Bank, Ltd*¹⁹ as well as *NDIC v Okem Enterprises*²⁰ and *Ironbar v FMF*²¹ that the word customer applied equally to a bank owing an account with another bank as to a private individual.

¹⁷ *Commissioners of Taxation v English, Scottish and Australian Bank Ltd* (1920) A C 683. See also *Ademiluyi & Lamuyo v African Continental Bank Ltd* (n 15); *Warren Metals Ltd v Colonial Catering Co Ltd* (1975) 1 NZLR 27.

¹⁸In *Woods v Martins Bank Ltd* (1958) 3 All ER. 166, a case primarily dealing with the quality of a professional advice on investment given by a banker, Salmon, J. held that the plaintiff became a customer of the defendant bank from the time the bank accepted instructions from him to collect monies from a building society, to pay part to a company he was going to finance and 'retain to my order the balance of the proceeds' although these instructions were given before the account was opened.

¹⁹ (1927) 2 KB 297.

²⁰ (2004) 10 NWLR (Pt 880) 107.

²¹ (2009) 15 NWLR (Pt 1165) 506.

3. DUTIES AND LIABILITIES OF THE PAYING BANKER

The mutual obligations in the terms of the contract between the banker and the customer are aptly stated in *Joachimson v Swiss Bank Corporation* thus:

The bank undertakes to receive money and to collect bills for its customer's account. The proceeds so received are not to be held in trust for the customer, but the bank borrows the proceeds and undertakes to repay them. The promise to repay is to repay at the branch of the bank where the account is kept, and during banking hours. It includes a promise to repay any part of the amount due against the written order of the customer addressed to the bank at the branch, and a such written orders may be outstanding in the ordinary course of business for two or three days, it is a term of the contract that the bank will not cease to do business with the customer except upon reasonable notice. The customer on his part undertakes to exercise reasonable care in executing his written orders so as not to mislead the bank or to facilitate forgery. I think it is necessarily a term of such a contract that the bank is not liable to pay the customer the full amount of his balance until he demands payment from the bank at the branch at which the current account is kept.²²

(A) Duty to Honour the Mandate of the Customer

At common law, one of the implied duties arising from the contractual relationship between the banker and the customer is the duty imposed on the

²² (n 3) 127 (Lord Atkin).

banker to honour customer's draft or cheque to the extent of the balance standing to his credit or that within the limits of an agreed overdraft. A cheque drawn by a customer is, in point of law, a mandate to the banker to pay the amount according to the tenor of the cheque. The banker's duty to honour the customer's cheque is also statutorily recognised under sections 5, 6 and 7 of the BEA as the drawee of the cheque and, as such, a party thereto. The drawee is the paying bank with which the customer's account is kept and on which the customer makes demand for repayment of any credit balance. As a paying banker, therefore, the banker is obligated to honour the cheque as long as the customer has a sufficient credit balance in his account, or if the cheque is within an agreed overdraft. The banker is also expected to carefully examine the cheque before paying it in order to ensure that it is in order and that any necessary endorsements are correct. A paying banker can be liable to the true owner of the cheque if it makes a wrongful payment on the cheque.

One of the most contentious areas of the law in this regard, therefore, emanates from the dishonor of cheques by the banker. A cheque is dishonoured if the banker refuses to pay the customer any part of the money deposited with the banker when the cheque is presented for payment.²³ Thus, the refusal by the banker to pay any part of the customer's money against the written order of the customer, when it holds in hand an amount belonging to the customer equivalent to that endorsed on the cheque without lawful excuse or a just cause, amounts to a breach of contract for which the banker is liable

²³ In *Shelton v Braithwaite* 151 ER 836 (Parke, B), it was noted that 'The word "dishonour" is a technical word, which intimates that the bill has been presented and refused payment; ...'. It was also noted in the instant case by Alderson, B that 'Now the term "dishonoured" is a technical word which ... imports that the bill has been presented for payment, and has not been paid by the acceptor.'

in damages for injury to the customer's credit.²⁴ In *Marzetti v Williams*,²⁵ wherein sufficient cash was paid in at 1:00 p.m. and the payment of a cheque was refused at 3:00 p.m. the same day, the bank was held liable for wrongful dishonor of the cheque. Nevertheless, the liability of the banker arises only where demand has been made for repayment by the customer and it is dishonoured by the banker without lawful excuse. In *Joachimson*, where one of the issues raised was whether or not a previous demand was necessary to create a cause of action against the bank, it was held that in the absence of a special agreement, a demand by the customer at the branch where the account is kept and where the precise liabilities are known is a necessary ingredient in the cause of action against the banker for money lent.²⁶

Nevertheless, in the light of the ubiquitous adoption of the electronic banking system, which has revolutionised the banking system, demand for repayment of the money lent to the banker can be made at any branch of the bank and not necessarily at the branch wherein the account of the customer is domiciled. Furthermore, demand and payment are no longer limited to the presentation of cheques and payment over the counter or through withdrawal slips in the case of a savings account. The electronic banking system has provided other platforms through which demand and payment can be made, including the Automated Teller Machine (ATM), Point of Service (POS), mobile phones, or the National Electronic Funds Transfer (NEFT). There is also the written funds' transfer instruction whereby a customer instructs and

²⁴ *Ishola Investment Ltd v Afribank Nig Plc* (n 3); *Allied Bank of Nig Ltd v Akubueze* (n 3).

²⁵ (1830) 1 B & Ad 415; (1830) 109 ER 845.

²⁶ *Joachimson v Swiss Corporation* (n 3) 129 - 130 (Lord Atkin); *Yusuf v Cooperative Bank* (1994) 7 NWLR (Pt 359) 676. In the same vein, where the banker lends money to the customer, no right of action accrues until the banker gives notice or makes a demand: *Johnson (Liquidator of Merchants Bank Ltd) v Odeku* (1967) 3 ALR (Comm) 282.

authorises the banker to debit funds from a checking or savings account or a card account and credit a beneficiary's account therewith.

When a banker is adjudged liable for breach of contract on account of a wrongful dishonour of a customer's cheque, (which are *sui generis*), the direct and/or natural damages arising therefrom are at large particularly if the customer is also in trade. Thus, the court may, within reason, make an award of any such sum as it considers the circumstances of the breach of contract or dishonor of cheque warrant, although there has been no proof of any actual loss or damage to the customer.²⁷ A successful plaintiff is also entitled, in the circumstance, to recover under several heads of damages.²⁸ In this regard, it has been held in *Mainstreet Bank Ltd v Chahine*²⁹ that damages for wrongful dishonour of cheque is an exception to the general rule regarding breach of contract to the effect that the plaintiff must plead and strictly prove his loss or be entitled to nominal damages.

Generally, damages to which a trading customer of the banker is entitled are substantial, irrespective of the amount involved in the cheque.³⁰ Thus, in an action for breach of contract against a bank for wrongful dishonor of the

²⁷ *Union Bank of Nigeria Plc v Chimezie* (2014) 9 NWLR (Pt 1411) 166; *Dauda v Access Bank Plc* (2017) 9 NWLR (Pt 1569) 21.

²⁸ *Balogun v National Bank of Nigeria Ltd* (1978) 3 SC (Reprint) 111, 117 – 118.

²⁹ (2015) 11 N.W.L.R (Pt. 147) 479 C.A.

³⁰ In *Bank of America (National Trust and Savings Association) v Alexander* (1969) 2 All NLR 258, 261 (Sowemimo J), the word 'trade' is defined as business, especially mechanical or mercantile employment as opposed to a profession carried on as means of livelihood or profit. The plaintiff, a company director, was held to be trader and, therefore, entitled to substantial damages on that account for the wrongful dishonour of his cheque by the defendant. In *Marzetti v Williams* (n 24) 424, where a trader sued his bankers for wrongful dishonour of cheque although there was no evidence to show that the plaintiff had sustained any injury from the banker's mistake, Lord Tenterden, CJ remarked that: 'It is a discredit to a person, and, therefore, injurious in fact, to have a draft refused payment for so small a sum, for it shows that the banker had very little confidence in the customer. It is an act particularly calculated to be injurious to a person in trade.' See also *Ashubiojo v African Continental Bank* (1966) 2 All NLR 203; *Wilson v United Counties Bank Ltd* (1920) AC 102, 112.

cheque of a trading customer or customer in business, the customer is entitled to recover substantial, though temperate and reasonable damages for injury to his commercial credit, without the necessity of alleging and proving actual damage.³¹ On the other hand, for a non-trading customer to receive substantial damages rather than nominal damages, the preponderance of judicial authorities has shown that such a customer has to plead and specifically prove actual injury to his credit occasioned by the wrongful dishonor of his cheque.³² A contrary judicial position to the long-established authorities as regards the entitlement of a non-trading customer has, however, been laid down in *Kpohraror v Woolwich Building Society*³³ where it was held that a person who is not a trader can recover, without proof of special damage, substantial damages for injury to his credit when his cheque is wrongfully dishonoured by the bank. In the instant case, the plaintiff held a current bank account with the defendants, the Woolwich Building Society. He had described himself as a self-employed 'exporter/importer' when he converted his savings account with the defendants to a current account. He drew a cheque for £4, 550 on the account in favour of a wholesale supplier, Phils (Wholesale) Ltd, who had agreed to supply him with goods for shipment to and resale in Nigeria. When the cheque was presented for payment, the defendants wrongfully refused payment, giving an unfounded and discreditable reason for it- ('cheque reported lost'). In an action for breach

³¹ *Rolin v Steward* (1854) 14 CB 595, 607; *Wilson v United Counties Ltd* (n 29); *Ashubiojo v African Continental Bank* (n 29); *Zenith Bank Plc v Igbokwe* (2018) LPELR- 44777.

³² *United Bank for Africa Ltd v Folarin* (2003) 7 NWLR (Pt 818) 18; *Gibbins v Westminster Bank Ltd* (1939) 2 KB 882, 888 (Lawrence J). In *Oyewole v Standard Bank of West Africa Ltd* (1968) 2 All NLR 32, nominal damages of five guineas were awarded to the non-trading customer of the defendant bank whose cheque was dishonoured despite an overdraft agreement with the bank to cover the cheque in question.

³³ (1996) 4 All ER 119. See also *Nicholson v Knox Ukiwa (A Firm)* (2007) EWHC 2430 (QB).

of contract, the plaintiff claimed general damages for loss of business reputation and credit. Although liability was admitted, there was a dispute about the assessment of damages. The Master in Chambers rejected the defendants' submission that the damages should be nominal only and awarded £5, 550 with interest as general damages for the injury to the plaintiff's credit caused by the dishonour of the cheque and the discreditable reason given for it. The Court of Appeal upheld that decision. It is noteworthy that, while the Master in Chambers awarded the substantial damages on the ground that the plaintiff was a trader, the Court of Appeal allowed the damages on the ground that a person whose cheque was wrongfully dishonoured by his bank was entitled to claim substantial damages for loss of business reputation without first having to prove actual damage, whether or not he was, or was known by the bank to be, a trader. It was observed in the instant case that, in modern social conditions, it is not only a tradesman for whom the dishonor of a cheque might be obviously injurious. The credit rating of individuals is important for their personal transactions, including mortgages, hire purchases and banking facilities, and it is notorious that central registers are kept containing information relevant to credit rating. There is, thus, a presumption of some damage in every case.

In addition to the breach of contract, the liability of the banker who dishonours a customer's cheque without justification can also arise in tort for libel.³⁴ This occurs where the banker writes false statements such as "Refer to Drawer" (R.D.), or "Account Overdrawn" (A.O), "No Account" (N.A), or

³⁴ Libel is the tort of making a defamatory statement in writing or printing which, without justification, disparages a person's reputation to a third party. The test for determining whether or not these words are libellous was formulated by Lord Atkin in *Sim v Stretch* (1936) 2 All ER 1237, 1240 as: 'Would the words tend to lower the plaintiff in the estimation of right-thinking members of society generally?' If yes, liability ensues.

such similar expressions which connote insufficiency of funds to explain the dishonour on the dishonoured cheque. In *Afribank Nig Plc v Anuebunwa*,³⁵ the respondent, a lawyer was a customer of the appellant and operated a current account, which, to the knowledge of the appellant, was for the purpose of and in connection with his trade and profession. The respondent had issued a cheque for the sum of ₦573, 300 in favour of a client which was dishonoured on presentation even though one of the appellant's employees had at the material time called the respondent by phone to confirm the cheque, which he did. Consequently, the respondent filed an action against the appellant claiming damages for wrongful dishonor of the respondent's cheque and publication by the appellant of and concerning the respondent of the words 'Drawer's Confirmation Required.' The respondent's case was that the appellant wrongfully dishonoured the cheque issued to his client when he had sufficient funds to warrant the payment of the cheque, and he also led evidence to the effect that the dishonor of the cheque injured his reputation, particularly with the client to whom the cheque was issued. The trial court entered judgement for the respondent in the sum of ₦3, 500,000 only, being general damages for the wrongful dishonor of his cheque and the publication of the words 'DCR.' Appellant's appeal to the Court of Appeal was dismissed, which held, *inter alia*, that, the appellant was liable for breach of contract for wrongfully dishonouring the respondent's cheque without lawful excuse. It was further held that 'Drawer's Confirmation Required' had been interpreted to mean that the customer did not have enough money in his account which is clearly libelous.³⁶ Similarly, in *Dike v African Continental*

³⁵ (2012) 4 NWLR (Pt 1291) 560 CA.; *Jayson v Midland Bank Ltd* (1968) 1 Lloyd's Rep 409.

³⁶ See also *STB Ltd v Anumnu* (n 3); *Balogun v National Bank of Nigeria Ltd* (n 27); *Davidson v Barclays Bank Ltd* (1940) 1 All ER 316 wherein the defendant bank wrongfully

Bank Ltd,³⁷ it was held that the endorsement of 'refer to drawer' on a cheque is libelous and attracts damages without proof of actual loss and particularly so if the endorsement is made by a bank which unjustifiably places the drawer of the cheque in a position whereby the words could be used on him.

(B) Duty Not to Pay Out Money of the Customer without Authority

At common law, one of the duties owed by the paying banker to the customer is to honour the latter's instructions and make payments as instructed. The duty imposed on the banker not to pay out the customer's money without authority is, therefore, sacrosanct. The duty arises out of the agency relationship that subsists between the banker and the customer when the latter draws a cheque and instructs the banker to pay the amount specified therein to the order of a specified payee or bearer.³⁸ The banker, as the agent of the customer, must, therefore, adhere to the instructions of the customer as contained in the cheque, as doing otherwise or exceeding the authority so given, is tantamount to payment without the authority of the customer. In this instance, the banker is liable to the customer, and it can only recover such wrongful payment from the third party by bringing an action for restitution against the latter.

Payment without the customer's authority could occur in circumstances where a banker pays out money on a cheque that has been validly countermanded by the customer before it is presented to the banker³⁹ or on a

dishonoured the plaintiff's cheque with the answer 'not sufficient', it was held that these words were libelous and plaintiff was held entitled to damages.

³⁷ (2000) 5 NWLR (Pt 657) 441. See also *Allied Bank (Nig) Ltd v Akubueze* (n 3); *Balogun v National Bank of Nigeria Ltd* (n 27).

³⁸ *London Joint Stock Bank v Macmillan & Arthur* (n 3); *Westminster Bank v Hilton* (n 5).

³⁹ Section 75 of the BEA. In *Nwandu v Barclays Bank DCO* (1962) All NLR 1147, the plaintiff issued a post-dated cheque for 660 pounds in favour of a building company. The

forged cheque.⁴⁰ In the same vein, to constitute a proper mandate, the cheque presented to the banker for payment must be signed by the customer or his duly-accredited agent. Thus, the Central Bank of Nigeria (CBN)'s Nigeria Bankers' Clearing System Rules 2018 (Revised) (NBCS Rules 2018) has imposed an obligation on the banker to verify the signature of the customer on the image of a cheque,⁴¹ as well as exercise due diligence in accordance with the minimum security standard specified in the Nigeria cheque standard.⁴² The banker also has the duty to validate the cheque and observe reasonable precautions, such as verifying the tenor of the instrument; having a physical feel of the instrument; and identifying evidence of tampering that is visible to the eye or under ultraviolet light.⁴³ A forged or unauthorised cheque is, consequently, not the mandate of the customer and the amount so paid cannot be debited into his account, notwithstanding the perfect nature of

plaintiff, being dissatisfied with the work done, countermanded the cheque before payment, the defendant negligently honoured the cheque on presentment. The plaintiff was held entitled to stop the bank from debiting his account with the sum. The other instance of revocation of banker's authority under the section is notice of the customer's death.

⁴⁰ At common law, forgery is the fraudulent making or alteration of any document (eg, a cheque) to the prejudice of another person. Forgery is defined under s 465 of the Criminal Code Act, Cap C 38, LFN 2004 which provides that: 'A person who makes a false document or writing knowing it to be false, and with intent that it may in any way be used or acted upon as genuine, whether in the State or elsewhere, to the prejudice of any person, or with intent that any person may, in the belief that it is genuine, be induced, to do or refrain from doing any act, whether in the State or elsewhere, is said to forge the document or writing.' By s 467 of the Criminal Code, any person who forges any document, writing or seal, is guilty of an offence which, unless otherwise stated, is a felony and is liable, if no other imprisonment is provided, to imprisonment for three years.

⁴¹ See the NBCS Rules 2018, para. 14.1.2.

⁴² NBCS Rules 2018, para. 9.3.2.. A Revised Nigerian Cheque Standard was introduced by the CBN in 2018 with implementation date of 1 February 2019 and full enforcement from 1 April 2021: see CBN, 'Circular on the Revised Nigerian Cheque Standard (NCS) and Nigerian Cheque Printers Accreditation Scheme (NICPAS) 2018', <[https://www.cbn.gov.ng/out/2018/psmd/circular%20on%20the%20revised%20nigerian%20cheque%20standard%20\(ncs\)%20and%20nigerian%20cheque%20printers%20accreditation%20scheme%20\(nicpas\).pdf](https://www.cbn.gov.ng/out/2018/psmd/circular%20on%20the%20revised%20nigerian%20cheque%20standard%20(ncs)%20and%20nigerian%20cheque%20printers%20accreditation%20scheme%20(nicpas).pdf)> accessed 23 September 2023.

⁴³ NBCS Rules 2018, para. 9.3.1.

the forgery. The banker will be liable to the customer for such payment under section 24 of the BEA, which provides that:

Subject to the provisions of this Act, where a signature on a bill is forged or placed thereon without the authority of the person whose signature it purports to be, the forged or unauthorised signature is wholly inoperative, and no right to retain the bill or to give a discharge therefor or to enforce payment thereof against any party thereto can be acquired through or under that signature, unless the party against whom it is sought to retain or enforce payment of the bill is precluded from setting up the forgery or want of authority:

Provided that nothing in this section shall affect the ratification of an unauthorised signature nor amounting to a forgery.

In *Nigerian Advertising Services Ltd v United Bank for Africa*,⁴⁴ the defendant banker paid out several cheques of the total value of £165 belonging to the plaintiff customers to unauthorised third parties. It was discovered later that all the cheques were forged by a messenger in the employment of the customers in the circumstances suggesting that the messenger had a master key with which he opened the drawer where the customers' cheque books were kept under lock. The plaintiff customers asked for a declaration that the cheques were wrongfully debited to their account and that the amount of £165 was due and owing by the banker to them. The defendant bank alleged that the customers were grossly negligent in the manner they kept their cheque books and that they were estopped from claiming. It was, however, held that where there were forgeries which were

⁴⁴ (1965) NCLR 6.

not due to the customer's negligence, it is the duty of the banker to credit the account of such customer whose cheques had been forged.

It is noteworthy, however, that whereas the forgery of a drawer's signature renders the cheque wholly inoperative, an unauthorised signature not amounting to forgery may, nevertheless, be ratified by the drawer.⁴⁵ The distinction has been rationalised on the ground that the person forging a signature is neither acting nor purporting to act under the authority of the person whose signature he forges, whereas an unauthorised signature can be ratified because the agent is purporting to act on behalf of a customer.⁴⁶

Furthermore, payment by the banker on a cheque which has the genuine signature of the customer, but contains some material alteration or addition done without the consent of the customer, is ineffective by virtue of section 64(1) of the BEA, which provides that:

Where a bill, or acceptance is materially altered without the assent of all parties liable on the bill, the bill is avoided except as against a party who has himself made, authorised, or assented to the alteration, and subsequent endorsers.

Thus, any material alteration, such as that pertaining to the date and the sum payable, for example, must be signed by the drawer before the banker can validly make a payment thereon. In the absence of such signature, and provided the customer has drawn the cheque with reasonable care, the banker

⁴⁵ Proviso to s 24 of the BEA.

⁴⁶ J Odgers, *Paget's Law of Banking* (15th edn, Lexis Nexis Butterworth 2018) 696.

is estopped from debiting the customer's account with the sum in question as there will be no valid basis to do so.⁴⁷

4. LEGAL PROTECTION FOR THE PAYING BANKER

A paying banker who is in breach of the afore-mentioned duties is given some protection at common law and under the BEA against any liability to the customer. The relevant available legal protection is discussed hereunder.

(A) Common Law Protection for Wrongful Dishonour of Cheque

In general, a banker is protected if it dishonours a customer's cheque where the latter's mandate is irregular and ambiguous in form.⁴⁸ The banker is also protected where the customer does not have sufficient funds in his account to cover the amount so endorsed on the cheque issued by him,⁴⁹ or has competing claims for the balance in his account, or there exists a court order restraining the banker from honouring the mandate.⁵⁰ The banker's dishonor

⁴⁷ Section 64(1) of the BEA provides for alterations that are considered material on a bill or acceptance, namely, any alteration of the date, the sum payable, the time of payment, the place of payment, and where a bill has been accepted generally, the addition of a place of payment without the acceptor's assent. See also para. 13.5. (vi) of the NBCS Rules 2018 which provides that a presenting bank shall be deemed negligent if it, *inter alia*, presents cheque with alteration/erasures which are visible under ultra violet light or eye.

⁴⁸ *Halbury's Laws of England* (4th edn, vol. 3, Butterworths 1973) 39, para 50; *London Joint Stock Bank v MacMillan & Arthur* (n 3) 814 & 816 (Lord Haldane).

⁴⁹ In *Alabi v Standard Bank of Nigeria Ltd* (1974) NCLR 176, for example, the plaintiff's action for breach of contract against the defendant bank for dishonouring his cheque failed as the bank was held entitled to dishonour the cheque based on the rule of law that a banker is entitled to retain a credit balance in a customer's account against a debt due to the banker. In the instant case, the defendant bank dishonoured the plaintiff/customer's cheque for ₦45 whereas the account showed a credit balance of ₦58.50. It was established in evidence that there was a contract debt of N104 due by the plaintiff to the bank by way of costs awarded the defendant in another action. See also *Access Bank Plc v MFCC* (2005) 3 NWLR (Pt 913) 406.

⁵⁰ In *International Bank of West Africa v Kennedy Transport (Nig) Ltd* (1993) 7 NWLR (Pt 304) 238, the bank was held justified in refusing to pay the respondent's cheque pursuant to

of a cheque is also justified and, therefore, privileged if the customer's mandate is defective on account of fraud, recklessness or mistake.⁵¹ Furthermore, a cheque can be rejected at the point of deposit or scanning where it does not meet the Nigeria Cheque standard, or where the information on the cheque's Magnetic Ink Character Recognition (MICR) line is wrong, or any other irregularity is noticed thereon.⁵² The banker is also, *inter alia*, justified to dishonor a cheque if the account is closed, dormant, non-existent, not funded, or where the account name and account number differ, or the cheque is crossed to two banks, has incomplete or irregular mandate, incomplete image, or is stale or post-dated.⁵³

Similarly, in an action for defamation arising from a wrongful dishonor of a customer's cheque, the banker could rely on the defence of qualified privilege in some circumstances. In *Aktas v Westpac Banking Corporation Ltd*,⁵⁴ for example, the plaintiff was the sole shareholder and some, time, director of the second plaintiff, Homewise, who, *inter alia*, acted as property management agent. In that capacity, Homewise was required by the Property, Stock and Business Agents Act 1941 (NSW) to maintain a trust account for the rents collected. In this regard, Homewise maintained three accounts with the defendant bank. In late November 1997, when the defendant bank received notice of a garnishee order against Homewise, it mistakenly applied the order to the trust account and the other two accounts. Consequently, the bank

a court injunction on the account duly served on the appellant by normal court process and not yet set aside or overruled by any appellate court.

⁵¹ *London Joint Stock Bank Ltd v Macmillan and Arthur* (n 3) 814 (per Lord Haldane); *Joachimson v Swiss Bank Corporation* (n 3) 127 (per Atkin LJ).

⁵² See the NBCS Rules 2018, para. 12.1.13.

⁵³ See the NBCS Rules 2018, Appendix A, which contains 32 grounds upon which a banker could return instruments deposited for payment.

⁵⁴ (2007) NSWSC 1261.

wrongfully dishonoured thirty cheques payable to property owners. The dishonoured cheques were marked 'Refer to Drawer, ' which was found to be defamatory of both the first plaintiff and Homewise. The plaintiff sued the bank for defamation, while Homewise sued for defamation and breach of contract. The common law defence of qualified privilege which was, *inter alia*, relied upon by the defendant bank was upheld by the court.

(B) Common Law Protection in respect of Forged /Unauthorised Signature and Forged Indorsement

One of the common-law defences available to the paying banker in an action for breach of its contractual duty not to pay out the customer's money without authority based on an alleged forgery is estoppel.⁵⁵ The customer could be estopped in certain circumstances to set up an alleged forgery against the banker and thus be responsible for the loss occasioned by the forgery. A customer who, for instance, fails in his duty to exercise the reasonable care expected of him in drawing the cheque, but draws a cheque in such a manner as may facilitate fraud or forgery is precluded from claiming that the banker wrongfully honoured a forged cheque or paid without his authority.⁵⁶

⁵⁵ In s 169 of the Evidence Act 2011 (Nigeria), it is provided that: 'When one person has, either by virtue of an existing court judgement, deed or agreement, or by his declaration, act or omission, intentionally caused or permitted another person to believe a thing to be true and to act upon such belief, neither he nor his representative in interest shall be allowed, in any proceeding between himself and such person or such person's representative in interest, to deny the truth of that thing.' Thus, the essential factors giving rise to estoppel are: (1) A representation or conduct amounting to a representation intended to induce a course of conduct on the part of the person to whom the representation is made; (2) An act or omission resulting from the representation, whether actual or by conduct, by the person to whom the representation is made; (3) Detriment to such person as a consequence of the act or omission: *Greenwood v Martins Bank* (1933) AC 51, 57 (Lord Tomlin).

⁵⁶ *London Joint Stock Bank Ltd v Macmillan & Arthur* (n 3) 789 (Lord Finlay).

Instances of this could arise, for example, from signing a blank cheque and leaving the amount to be filled in by someone else as in *Young v Grote*,⁵⁷ or leaving space between figures and words as in *London Joint Stock Bank Ltd v Macmillan & Arthur*⁵⁸ where the defendant bank paid a forged cheque owing to the plaintiff customer's negligence in leaving a blank space on the cheque which facilitated an alteration thereon, and both the trial court and the Court of Appeal had held that such payment was made without authority. The House of Lords reversed their decisions and established the principle that if the customer is careless in the manner in which he draws a cheque, and any subsequent fraudulent dealing with the cheque is made directly possible by such want of care, then the customer and not the bank must bear the loss.⁵⁹

Nevertheless, leaving a blank space in a cheque by the customer may not necessarily be considered negligent as the crucial question to be determined in each case is whether a reasonable man would leave such a blank space.⁶⁰ Also, the duty owed by the customer to exercise reasonable care is limited to the drawing of individual cheques. As such, it was held in *Tai Hing Cotton Mill v Liu Chong Hing Bank Ltd*⁶¹ that the customer does not owe a wider duty to take reasonable precautions in the management of its business to prevent forged cheques from being presented to its bank. Moreover,

⁵⁷ (1827) 4 Bing 253.

⁵⁸ (n 3).

⁵⁹ See also *Joachimson v Swiss Bank Corporation* (n 3) 127, where Lord Atkin noted that in the banker-customer relationship, the customer undertakes to exercise reasonable care in executing the written orders so as not to mislead the bank or to facilitate forgery.

⁶⁰ In *Slingsby v District Bank* (1931) 2 KB 588, affirmed (1932) 1 KB 544, there was a material alteration of a cheque payable to John Prost & Co by the fraudulent addition to the payee's name of 'per Cumberbirch and Potts.' It was argued that the drawers of the cheque were negligent in their duty to the paying banker in not drawing a line in the blank after the payee's name and had thus enabled the fraud to be committed. It was, however, held that at that time, it was not a 'usual precaution' to draw lines before or after the name of the payee.

⁶¹ (1986) AC 80.

negligence, in this context, ‘must be in the transaction itself, that is, in the manner in which the cheque is drawn.’⁶² Thus, negligence which is not concerned with the actual drawing of a cheque will not usually give rise to an estoppel.⁶³ Similarly, where the customer misplaces his cheque book or fails to keep it properly in a secured place such that it is stolen by a stranger or an employee who subsequently forges the customer’s signature, the customer is not estopped from setting up the forgery against the banker.⁶⁴

Furthermore, a customer is estopped from alleging a forgery against the banker where he fails to notify the bank immediately upon being apprised of such. In *Greenwood v Martins Bank Ltd*,⁶⁵ the drawer was aware that his wife had forged his signature on several cheques but failed to notify the bankers of his wife’s forgeries. On his wife’s death, he brought an action against the bankers to recover the sums paid out of his account on cheques to which his signature had been forged by his wife. The action was dismissed. It was held that the plaintiff owed a duty to the defendants to disclose the forgeries when he became aware of them and so enable the defendants to take steps towards recovering the money wrongfully paid on the forged cheques. It was further held that through his failure to fulfil his duty, the defendants were prevented from bringing an action against the plaintiff and his wife for the tort committed by his wife until after her death when any action against the husband for the wife’s tort abated. The plaintiff was, therefore, estopped from asserting that the signatures to the cheques were forgeries, and was held not entitled to recover. A customer is, thus, under a duty to inform the bank

⁶² *London Joint Stock Bank Ltd v Macmillan & Arthur* (n 3) 777, 795, Lord Finlay.

⁶³ *Lewes Sanitary Steam Laundry Co Ltd v Barclay & Co Ltd* (1906) 95 LT 444.

⁶⁴ See, eg, *Nigerian Advertising Services Ltd v United Bank for Africa* (n 43); *Yorkshire Bank Plc v Lloyds Bank Plc* (1992) 2 All ER (Comm) 153, 158, HHJ Pitchers.

⁶⁵ (n 54).

of forgeries and a deliberate failure to do so amounted to a representation that the cheques were genuine. Estoppel will also operate against a customer who makes a misleading statement to the banker as in *Brown v Westminster Bank Ltd*⁶⁶ where the plaintiff's signature was forged on a number of cheques that had been stolen from her by her servants. When the bank manager drew her attention to a number of these cheques, she represented them to be regular and genuine. It was held that she was estopped from setting up the forgeries on account of her representation. In all these instances, estoppel operates to enable the banker debit the customer's account where it has paid out money on a materially-altered cheque, irrespective of the provisions of section 64 of the BEA.

It is pertinent to note, however, that in *Tai Hing Cotton Mill Ltd v Liu Chong Hing Bank Ltd*,⁶⁷ the Privy Council has emphasised the fact that the implied terms in the contract of banker and customer, based on *MacMillan* and *Greenwood* duties above, were confined to what could be seen to be plainly necessary incidents of the Banker-Customer relationship. Offered such a service, a customer must obviously take care in the way he draws his cheque, and must quickly warn his bank as soon as he knows that a forger is operating the account. Any further duty on the customer can only be imposed by express agreement.

In addition to the defence of estoppel, the defence of ratification is available to the banker for wrongful payment where the customer has subsequently ratified or adopted a payment made by the banker without his authority, such as by ratifying an unauthorised signature or alteration of the cheque.⁶⁸

⁶⁶ (1964) 2 Lloyd's Rep 187.

⁶⁷ (n 60) 106.

⁶⁸ *London Intercontinental Trust Ltd v Barclays Bank Ltd* (1980) 1 Lloyd's Rep 241.

Ratification can also be made regarding cheques drawn by an agent, such as an employee, who fraudulently exceeds his authority. Nevertheless, for ratification to be effective, the customer must have expressly or impliedly manifested an unequivocal intention to adopt the unauthorised payment and must have done so with the full knowledge that the payment was made without authority.⁶⁹ On the other hand, payment by a banker of a cheque bearing the customer's forged signature cannot be ratified.⁷⁰ Also, where applicable, the defence of contributory negligence on the part of the customer could be raised by the banker with a view to reducing the amount of damage it is liable to pay in the circumstance.⁷¹ The equitable defence of subrogation is also available to the banker who pays out money to satisfy the customer's debt in the mistaken belief that it has the authority to do so and the effect of the payment is to discharge the customer's debt.⁷² In this instance, however, the customer must have benefitted from the payment by the discharge of a liability to the payee.⁷³ The banker must also establish that it had the authority to discharge the liability in question because a banker, who makes payment without the requisite authorisation or ratification by the customer, is deemed to have made the payment voluntarily and on its own behalf rather than on behalf of the customer.⁷⁴ As such, the mere fact that the bank's payment

⁶⁹ *Swotbrooks.com v Royal Bank of Scotland Plc* (2011) EWHC 2025 (QB).

⁷⁰ *Williams v Bayley* (1866) LR 1 HL 200; *MacKenzie v British Linen Co* (1881) 6 AC 82.

⁷¹ *Lumsden & Co v London Trustee Savings Bank* (1971) 1 Lloyd's Rep 114.

⁷² In *Liggett (Liverpool) Ltd v Barclays Bank Ltd* (1928) 1 KB 48, the bank paid against cheques drawn by a single director of the company (the customer), although the mandate required two directors to sign. It was held that the payments by the bank had discharged the debts of the customer and, therefore, the bank was not liable to re-credit the customer's account.

⁷³ *Liggett (Liverpool) Ltd v Barclays Bank Ltd* (n 71); *Re Cleadon Trust Ltd* (1939) Ch 286.

⁷⁴ *Crantrave Ltd v Lloyds Bank Plc* (2000) QB 917. In *Re Cleadon Trust Ltd* (n 66), the majority of the Court of Appeal noted that the result in *Liggett* case could only be upheld on the basis that the director who had drawn the cheque had in fact been authorised to discharge the debt due to the third-party payee, although he was not authorised to draw the cheque.

enured to the benefit of the customer does not establish equity in favour of the bank against the customer.⁷⁵

(C) Statutory Protection in respect of Forged /Unauthorised Signature and Forged Indorsement

The BEA makes provision for the protection of the paying banker under certain circumstances on an alleged payment founded upon forgery or unauthorised signature of the customer. Generally, where the signature of the drawer of the cheque is forged, there is no protection whatsoever for the banker under the BEA. However, a banker who makes payment on a cheque payable to order whereon indorsement is unauthorised or forged is protected under section 60(1) of the BEA which provides that:

When a bill payable to order on demand is drawn on a banker, and the banker on whom it is drawn pays the bill in good faith and in the ordinary course of business, it is not incumbent on the banker to show that the endorsement of the payee or any subsequent endorsement was made by or under the authority of the person whose endorsement it purports to be, and the banker is deemed to have paid the bill in due course, although such endorsement has been forged or made without authority.

This provision is helpful to a paying banker who pays a cheque bearing forged or unauthorised endorsements. Similar protection is afforded the banker in the NBCS Rules which absolves a paying banker that negligently pays a defective instrument from liability, if such payment is made in good faith and in accordance with established banking procedures.⁷⁶ The protection given

⁷⁵ *Crantrave Ltd* (n 73) 923 (Pill LJ).

⁷⁶ NBCS Rules 2018, para. 14.1.

in case of forged signature is particularly apposite, especially where the payee is not one of its customers whose endorsement can be readily verified. The provision protects the banker if the cheque is paid in good faith and in the ordinary course of business without having to prove that the payee's endorsement is genuine. In *Carpenters' Company v British Mutual Banking Co., Ltd.*,⁷⁷ the plaintiffs were trustees of a charitable company and kept an account in this connection with the defendant bank. The plaintiffs' clerk misappropriated the company's funds by obtaining the trustees' signature to cheques payable to tradesmen. He then forged the payees' signatures by way of endorsement and paid the cheques into his own account, also with the defendant bank. The trial judge found that the defendant bank had paid the cheques in good faith and in the ordinary course of business and was therefore protected by section 60 of the Bills of Exchange Act, notwithstanding its negligence in collecting the cheques on behalf of the plaintiffs' clerk. On appeal, it was affirmed that negligence by the paying bank does not preclude it from the protection of section 60.

Another statutory protection for the paying banker would be found in section 82 of the BEA which provides that:

Where the banker, on whom a crossed cheque is drawn, in good faith and without negligence, pays it, if crossed generally, to a banker, and if crossed specially, to the banker to whom it is crossed, or his agent for collection being a

⁷⁷ (1938) 1 KB 511. In the instant case, it was stated that: 'It is said that in paying them they acted negligently, and for that reason they cannot be said to have paid in the ordinary course of business. I do not agree with that contention. A thing that is done not in the ordinary course of business may be done negligently; but I do not think that the converse is necessarily true. A thing may be done negligently and yet be done in the ordinary course of business; the drawing of the cheques by the plaintiffs' officials in this case seems to me a crucial example.' :536-37 (Mackinnon LJ); see also Slessor, LJ, 534.

banker, the banker paying the cheque, and, if the cheque has come into the hands of the payee, the drawer, shall respectively be entitled to the same rights and be placed in the same position as if payment of the cheque had been made to the true owner thereof.

Essentially, by this provision, once the paying banker has fulfilled the stipulated conditions of paying in good faith, without negligence, and to another banker, it is deemed to have acted lawfully and in accordance with the mandate of the drawer of the cheque. Nevertheless, section 82 should be read in conjunction with section 81(2) which makes the banker liable to the true owner of the cheque if payment is made otherwise unless it can be shown that at the time the cheque is presented for payment, it does not appear to be crossed, or to have had a crossing which has been obliterated or to have been added to or altered otherwise than as authorised by the BEA.

Moreover, concerning payment by the banker on a cheque on which there has been some material alteration, the banker is protected by the proviso to section 64(1) where the alteration is not apparent and the bill is in the hands of a holder in due course. Such a holder may avail himself of the bill as if it had not been altered and may enforce payment of it according to its original tenor. However, where the alteration of the cheque is apparent or discoverable by the exercise of reasonable care, or where the state of the cheque raises suspicion of it having been tampered with and payment is made without inquiry, the banker is not covered.⁷⁸

⁷⁸ *Scholey v Ramsbottom* (1810) 2 Camp 485. In the instant case, the banker was held liable for wrong payment of a cheque which was dirty and bore visible marks of mutilation.

Similarly, in respect of unendorsed or irregular cheques, protection is afforded under section 76(1) of the BEA to a paying banker who makes payment in good faith and in the ordinary course of business to a banker as such payment would be deemed to have been made in due course.⁷⁹

In general, while section 60 affords protection with respect to crossed and uncrossed cheques payable to order on demand, section 82 affords protection with respect to cheques crossed either generally or specially, which need not necessarily be made payable to order.⁸⁰ Also, while the protection available to the banker under section 60(1) covers payment to a payee or any subsequent endorser of the cheque, section 76, on the other hand, provides protection for payments made by the paying banker to another banker. It is also pertinent to note that the protection afforded the paying banker by these provisions is available only where it has acted 'in good faith' and 'in the ordinary course of business' or 'without negligence'. Thus, while sections 60 and 76(1) provide protection to the paying banker who has acted 'in good faith' and 'in the ordinary course of business', without the requirement to act

⁷⁹ See also s 1 of the Cheques Act 1957 (UK).

⁸⁰ Under s 78 of the Bills of Exchange Act, a cheque is crossed generally where it bears across its face an addition of (a) the words 'and company' or any abbreviation thereof between two parallel transverse lines either with or without the words 'not negotiable', or (b) two parallel transverse lines simply, either with or without the words 'not negotiable.' However, where a cheque bears across its face an addition of the name of a banker, either with or without the words 'not negotiable', the cheque is crossed specially and to that banker. In *Akrokerri (Atlantic) Mines Ltd v Economic Bank* (1904) 2 KB 465, Bigham, J stated that: 'A crossing is a direction to the paying bank to pay the money generally to a bank, or to a particular bank, as the case may be, and when this has been done, the whole purpose of the crossing has been served.' Thus, crossing of cheques generally provides a safeguard and protection to the owner of the cheque as it makes it more difficult to collect the proceeds of such cheques than one which is not crossed. Also, while open cheques may be honoured by payment of the cash to the holder over the counter, a crossed cheque can only be paid through a collecting banker and strictly in accordance with the crossing on the face of the cheque, otherwise the banker will be liable to the true owner of the cheque for any loss he may sustain owing to the cheque having been so paid: see section 81(2) of the BEA.; *United Nigeria Insurance Co v Muslim Bank Ltd* (n 15).

‘without negligence’, section 82 offers protection where it has acted ‘in good faith’ and ‘without negligence’. As such, negligence does not preclude the protection available to the banker under section 60 of the BEA.⁸¹

Moreover, while the standard for measuring the good faith of the paying banker is subjective, the requirement of acting ‘without negligence’ or ‘in the ordinary course of business’ is objective. Although ‘without negligence’ is not defined in the BEA, under section 92 of the BEA, payment ‘in good faith’, as a condition precedent for the protection is deemed where it is in fact done honestly, whether it is done negligently or not.⁸² It has also been posited that a cheque would be deemed to have been paid ‘in the ordinary course of business’, where the usual steps are taken by the paying bank as regards the examination and payment of the cheque.⁸³ In *Australian Mutual Provident Society v Derham*,⁸⁴ ‘ordinary course of business’ is defined as the recognised or customary course of transacting business adopted by the banking community at large. Thus, payment made within banking hours or as permitted by banking practice can safely be presumed to have been done ‘in the ordinary course of business’,⁸⁵ while payment of a crossed cheque, otherwise than as prescribed by the law, for example, as in *Ladipo v Standard Bank of Nig Ltd*,⁸⁶ would not be regarded as having been done ‘in the ordinary

⁸¹ See, eg, *Carpenters’ Company v British Mutual Banking co, Ltd* (n 76) 534 & 536, Slesser LJ & Mackinnon LJ.

⁸² *Raphael v Bank of England* (1855) 17 CB 161, 139 ER 1030; *Jones v Gordon* (1877) 2 App Cas 616; *Baker v Barclays Bank* (1955) 1 WLR 822.

⁸³ JM Holden, *The Law and Practice of Banking* (5th edn Pitman, London 1999) 276.

⁸⁴ (1979) 39 FKR 165.

⁸⁵ In *Baines v National Provincial Bank Ltd* (1927) 96 LJKB 801, it was held that a bank is entitled to deal with a cheque within a reasonable business margin after its advertised time of closing. Judgement was, therefore, given in favour of the bank which had paid a cheque five minutes after the advertised closing time.

⁸⁶ (1969) NCLR 469. In the instant case, the plaintiff drew a crossed cheque on the defendants, his bankers, in favour of Pedrocchi & Co. Two days later, the plaintiff countermanded the cheque. Notwithstanding the countermand, the defendants paid the

course of business.’ It is noteworthy, though, that in *Carpenter’s Company v British Mutual Banking Co. Ltd*,⁸⁷ the majority view was that a banker may be acting in the ordinary course of business even though negligent.

The preceding statutory protection afforded the paying banker is, arguably, necessary to, *inter alia*, obviate the harsh consequences of section 59(1) of the BEA, which discharges a bill by payment in due course by or on behalf of the drawee or acceptor. ‘Payment in due course’ is defined under section 59(2) as ‘payments made at or after the maturity of the bill to the holder thereof in good faith and without notice that his title to the bill is defective.’ Section 2 in turn defines a ‘holder’ as ‘the payee or endorsee of a bill or note who is in possession of it, or the bearer thereof.’ Thus, without the statutory protection afforded the paying banker, if a drawee bank pays a cheque to someone other than the holder, as defined by the Act, this will not constitute payment in due course under section 59 of the BEA, and the banker will be liable. Payment of a cheque to a person who takes a cheque payable to the order of a specified payee whose endorsement has been forged by a thief, for example, will not constitute payment in due course because such person cannot be regarded, in this instance, as the payee, indorsee or bearer of the cheque and, therefore, not a holder.⁸⁸ However, a paying banker, which pays an uncrossed bearer cheque bearing a forged endorsement in good faith and without notice of the defect in title of the bearer, is protected by virtue of section 31(2) of the BEA, which makes a bill payable to bearer negotiable by

cheque in cash to a stranger who was not the payee of the cheque and debited the plaintiff’s account. The plaintiff successfully instituted an action claiming a declaration that the defendants had wrongfully debited his account with the amount, being the loss sustained by him in consequence of the defendant’s negligence or breach of contract. See also *Bellany v Majoribank* (1852) 155 ER 999; Holden (n 75) 279.

⁸⁷ (n 76).

⁸⁸ *Lacave & Co v Credit Lyonnais* (1897) 1 QB 148.

delivery. In this circumstance, payment by the banker would be deemed to have been made “in due course” and gives protection to the banker against any claim by the customer.

5. DUTIES AND LIABILITIES OF THE COLLECTING BANKER

One of the terms of the contractual relationship between the banker and the customer is the bank’s undertaking to receive money and to collect bills for its customer’s account. A collecting banker, therefore, to whom a customer presents a crossed cheque for the credit of his account, acts basically as a mere agent or conduit pipe to receive payment of the cheque from the banker on whom it is drawn and to hold the proceeds at the disposal of its customer.⁸⁹ In this regard, the contractual relationship between the banker and its customer imposes a duty of care, the breach of which might make the banker liable for negligence. Thus, a collecting banker is required to act with due care and diligence in presenting for payment such cheques paid in for collection as neglect to use the customary and recognised channels of payment may involve him in some liability. The collecting banker, for example, is liable to the customer for any loss arising from a delay in presenting a cheque within a reasonable time after it reaches him.⁹⁰ In *Dike v*

⁸⁹*Capital and Counties Bank, Ltd v Gordon; London City and Midland Bank, Ltd v Gordon* (1903) AC 240.

⁹⁰ *Lubbock v Tribe* (1838) 3 M. & W. 607, 612, per Lord Abinger C.B.; *Have v Henty* (1861) 4 LT 363. Section 74 of the BEA provides that: ‘Subject to the provisions of this Act (a) where a cheque is not presented for payment within a reasonable time of its issue, and the drawer or the person on whose account it is drawn had the right, at the time of such presentment as between him and the banker to have the cheque paid, and suffers actual damage through the delay, he is discharged to the extent of such damage, that is to say, to the extent to which such drawer or person is a creditor of such banker to a larger amount than he would have been had such cheque been paid ...’.

African Continental Bank Ltd,⁹¹ it was held that a collecting bank owes its customer who deposits a cheque for collection the duty to exercise due diligence in presenting the cheque for payment, and the collecting bank must present the cheque within a reasonable time, otherwise, it will be liable for any consequential loss arising from its default. In the instant case, not only did the respondent not present for payment the appellant's cheque to the bank on which it was drawn within a reasonable time, it did not present it at all, and there was no proof that the appellant was informed about the fate of his cheque despite his complaints. The respondent was, therefore, held negligent in consequence of which the appellant suffered loss as he could no longer collect another cheque from his customer whose whereabouts he no longer knew. In this regard, what amounts to reasonable time for the presentation of a bill of exchange will be determined by the nature of the instrument, the usage of the trade and of bankers, and the facts of the particular case.⁹² In *Dike v African Continental Bank Ltd*,⁹³ it was held that where the appellant is a trader, a six months' delay in presenting the appellant's cheque paid into his account for collection is an unreasonable delay. Similarly, where a cheque so presented is dishonoured by the drawee bank, the collecting banker owes the customer a duty to notify him in line with section 48 of the BEA which requires notice of such dishonor to be given to the drawer immediately.

In order to address the issue of delay in the presentation of cheques for payment, the NBCS Rules has set the clearing cycle for cheques at T+1.⁹⁴ As

⁹¹ (n 36); *First Bank of Nig Ltd v African Petroleum* (1990) 4 NWLR (Pt 443) 438.

⁹² Section 74(b) of the BEA.

⁹³ (n 36); *Agbonmagbe Bank Ltd v CFAO* (1966) 1 All NLR 140.

⁹⁴ NBCS Rules 2018, para 8.0. The T+1 means that the period within which the customer is to be credited with the value of the cheque deposited into his/her account from the day it is so deposited is not to exceed two working days.

such, paper-based instruments, such as a cheque, deposited by the customer at any member bank are to be deemed paid by 10 p.m of the next working day (T+1) except where it is returned by the paying bank, or a special caution or an extension of value date request has been received from the paying banker.⁹⁵ The banker is also required to notify its customer of any unclear payment instrument deposited within 24 hours of the deposit.⁹⁶

Furthermore, it is trite that a banker, who collects the proceeds of a cheque of which the payee is a third party for its customer, is liable, along with the customer, in conversion or for money had and received to the true owner if the customer had no title or has a defective title to the cheque.⁹⁷ Although chattels are the primary object of conversion, the tort has been made applicable to cheques. The conversion, in this context, is the conversion of the chattel, the piece of paper, the cheque under which the money was

⁹⁵ NBCS Rules 2018, para 5.1.

⁹⁶ NBCS Rules 2018, para 14.3.1.

⁹⁷ At common law, a person is guilty of the tort of conversion where he deals with chattels not belonging to him in a manner which was inconsistent with the rights of the lawful owner, the conduct was deliberate, not accidental, and the conduct was so extensive an encroachment on the rights of the owner whereby he was deprived of the use and possession of them: *Kuwait Airways Corporation v Iraqi Airways Co (Nos 4 and 5)* (2002) UKHL 19, Lord Nicholls. In the words of Lord Porter in *Caxton Publishing Co v Sutherland Publishing Co* (1939) A.C. 178, 202: "Conversion consists in an act intentionally done inconsistent with the owner's right, though the doer may not know of or intend to challenge the property or possession of the true owner." Also, in *Hollins v Fowler* (1875) 33 L.T. 73; (1874 – 80) All E.R. Rep. 118, Lord Chelmsford stated that: "Any person who, however, innocently, obtains possession of goods of a person who has been fraudulently deprived of them, and disposes of them, whether for his own benefit or that of any other person, is guilty of a conversion"; *Ladbroke & Co v Todd* (n 15); *Atrib v United Bank for Africa* (1967) NCLR 166. However, in *Effiwatt & Ors v Barclays Bank D.C.O. (Nig.) Ltd* (1970) 2 All N.L.R. 26 where the defendant banker froze his customer's account pursuant to a competent directive from the Central Bank of Nigeria, the banker's action was held not to amount to conversion as it was justified in law.

collected, and the value of the chattel converted as the money received under it.⁹⁸ In *Marfani & Co Ltd v Midland Bank Ltd*⁹⁹ it was noted that:

A banker's business, of its very nature, exposes him daily to this peril. His contract with his customers requires him to accept possession of cheques delivered to him by his customer, to present them for payment to the bank on which the cheques are drawn, to receive payment of them and to credit the amount thereof to his own customer's account, either on receipt of the cheques themselves from the customer, or on receipt of actual payment of the cheques from the banks on which they are drawn. If the customer is not entitled to the cheque which he delivers to his banker for collection, the banker, however innocent and careful he might have been, would at common law be liable to the true owner of the cheque for the amount of which he receives payment, either as damages for conversion or under the cognate cause of action, based historically on *assumpsit*, for money had and received.

In general, the position of the collecting banker in the discharge of the duty of agency is a precarious one since it would, ordinarily, not be in the position to know whether the endorsement on the cheque presented to it for collection is genuine, especially where the endorser is not its customer.

⁹⁸ *Lloyds Bank Ltd v The Chattered Bank of India, Australia and China* (1929) 1 KB 40, 55.

⁹⁹ (1968) 1 WLR 956, 972 (Diplock LJ).

6. LEGAL PROTECTION FOR THE COLLECTING BANKER

The collecting banker, who is in breach of its duties, also has some legal protection against any liability that could emanate therefrom. The available common law and statutory protection shall engage our attention in this section.

(A) Common Law Protection for the Collecting Banker

At common law, a collecting banker who is sued for conversion can raise up the defence of contributory negligence where the plaintiff has contributed to the loss by his own negligence.¹⁰⁰ The liability of the collecting banker could also be reduced if the proceeds of the cheque have been applied to discharge the plaintiff's liability as laid down in *Liggett (Liverpool) Ltd v Barclays Bank*.¹⁰¹ Also available to the collecting banker is estoppel and the defence of *Ex Turpi Causa Non Oritur Actio* (No action can arise from an illegal act).¹⁰² In some cases, the collecting banker could also be entitled to an indemnity from the customer into whose account it paid the converted cheque or from its principal bank, if it has acted as agent for collection.¹⁰³

¹⁰⁰ In *Lumsden & Co v London Trustees Savings Bank* (1971) 1 Lloyd's Rep 114, the bank was sued for damages for the conversion of certain cheques. Although the bank was found to have been negligent, the plaintiff was also found to have been negligent and damages awarded to were reduced by 10 per cent.

¹⁰¹ (n 71).

¹⁰² In *Thackwell v Barclays Bank plc* (1986) 1 All ER 676, the defence prevented the plaintiff from recovering in conversion because he had been a party to forging the cheque or had known of the fraudulent act.

¹⁰³ Odgers (n 45) 796; *The Honourable Society of the Middle Temple v Lloyds Bank* (1999) 1 All ER (Comm) 193; *Linklaters v HSBC Bank* (2003) 2 Lloyd's Rep 545.

(B) Statutory Protection for the Collecting Banker

One of the statutory protections afforded a collecting banker who falls short of the duty of care owed its customer would be found in section 77(2) of the BEA, which provides that:

Where a banker, in good faith and without negligence, -

- (a) Receives payment for a customer of a prescribed instrument to which the customer has no title or a defective title; or
- (b) Having credited the customer's account with the amount of such a prescribed instrument, receives payment of the instrument for himself,

the banker does not incur any liability to the true owner of the instrument by reason only of his having received payment of it; and a banker is not to be treated for the purpose of this subsection as having been negligent by reason only of his failure to concern himself with the absence of, or irregularity in, endorsement of a prescribed instrument of which the customer in question appears to be the payee.¹⁰⁴

Nevertheless, whether the collecting banker could avail itself of the statutory protection is a question of fact dependent upon whether it has fulfilled the conditions precedent set out therein. First, the collecting banker is relieved from liability to the true owner in an action for money had and received or for damages for conversion if it acts as agent of collection to receive for its

¹⁰⁴ See also s 4 of the Cheques Act 1957 (UK).

customer a cheque which, *ex facie*, has the customer as the payee.¹⁰⁵ The banker is also protected where it has credited the customer's account for the proceeds of the cheque and thus received the payment for itself. Moreover, unless there are facts which are, or ought to be, known to the banker which would cause a reasonable banker to suspect that the customer was not the true owner, negligence will not be imputed to the banker on account of the absence of or irregularity in the endorsement of the cheque in question, as the provision has clearly obviated the need for a payee to indorse a cheque before paying it into his own account.¹⁰⁶ Secondly, the collection of the cheque by the banker must have been done in good faith and without negligence. As noted in *Marfani & Co Ltd v Midland Bank Ltd*,¹⁰⁷ the whole transaction from the taking of the cheque to the receipt and disposition of the money must be in good faith and without negligence.

Generally, while the banker's good faith is not often contested by the true owner of a stolen cheque,¹⁰⁸ the question of negligence is often frequently

¹⁰⁵In *Ladbroke & Co v Todd* (n 15), it was held that since the account had already been opened when the cheque was collected, payment had been received for a customer. However, in *Great Western Railway Co v The London and County Banking Co Ltd* (n 13), it was held that H, who had by false pretence obtained from the appellants a cheque crossed '& Co' and marked 'not negotiable', and for whom the respondents had received payment of the cheque from the bank on which it was drawn was not a customer of the respondents and that they did not receive payment of the cheque for him within the meaning of s 82 of the BEA 1882 and were not protected by that section.

¹⁰⁶In the case of third-party cheques or where an order cheque is negotiated, it would appear that the collecting banker cannot seek protection under section 77(2) of the BEA where it fails to concern itself with the necessary indorsements connecting the holder with the payee and on which the holder's right to the cheque depends. Thus, if there is an absence of, or an irregularity in, an essential indorsement, a bank which collected after failure to notice or who ignores the irregularity or absence would be deemed negligent; G Borrie, 'Problems of the Collecting Bank' (1980) 23 *The Modern Law Review* 18; *Bovins v London and South Western Bank* (1900) 1 KB 270.

¹⁰⁷(n 98) 971 (Diplock LJ).

¹⁰⁸Under s 92 of the BEA, a thing is deemed to be done in good faith, within the meaning of the Act, where it is in fact done honestly, whether it is done negligently or not. In *Capital*

raised.¹⁰⁹ The phrase ‘without negligence’ was defined in *Hannan’s Lake View Central Ltd v Armstrong & Co*¹¹⁰ as ‘without want of reasonable care in reference to the interests of the true owner.’ Similarly, in *Ladbroke & Co v Todd*, it was asserted that:

The words “without negligence” cannot mean without breach of duty towards him or towards the person who is his customer. They must mean without taking due care to protect the person whose name appears on the cheque as being the payee, and especially in the case of a cheque marked “account payee only”.¹¹¹

Furthermore, in *Commissioners of Taxation v English, Scottish & Australian Bank Ltd*, it was declared that:

and Counties Bank, Ltd v Gordon; London City and Midland Bank, Ltd v Gordon (n 88), for example, wherein the appellant banks credited a customer with the amount of cheques as soon as they were handed in to his account and allowed him to draw against the amount so credited before the cheques were cleared, it was found by the court that each of the two banks acted in good faith although they were held not protected by section 82 of the BEA (UK) as the protection given by the section applies only to cheques crossed before they are received by the banker. Similarly, in *Ladbroke & Co v Todd* (n 15), it was held that the banker had acted in good faith, but was guilty of negligence in not taking reasonable precautions to safeguard the interests of the true owner of the cheque and that, therefore, he had put himself outside the protection of s 82 of the 1882 Act.

¹⁰⁹ See, eg, *Ladbroke & Co v Todd* (n 15); *Nigerian Breweries Ltd v Muslim Bank (W/A) Ltd* (1963) LLR 78; *United Nigeria Insurance Co v Muslim Bank (W/A) Ltd* (n 107); *Abimbola v Bank of America Ltd and Osborne* (1976) NCLR 425; *Ladipo v Standard Bank of Nigeria Ltd* (n 85).

¹¹⁰ (1900) 16 TLR 236.

¹¹¹ (n 15) 44 (Bailhache, J).

The test of negligence is whether the transaction of paying in any given cheque, (coupled with the circumstances antecedent and present) was so out of the ordinary course that it ought to have aroused doubts in the banker's mind, and caused them to make inquiry.¹¹²

Similarly, in *Marfani & Co Ltd v Midland Bank Ltd*, it was stated that the test to be adopted in determining whether a banker acted without negligence is:

Were those circumstances such as would cause a reasonable banker, possessed of such information about his customer as a reasonable banker would possess, to suspect that his customer was not the true owner of the cheque?¹¹³

Moreover, in *Lloyds Bank Ltd v Savory & Co*,¹¹⁴ it is stated that the standard by which the absence, or otherwise, of negligence is to be determined must be ascertained by reference to the 'practice of reasonable men carrying on the business of bankers, and endeavouring to do so in such a manner as may be calculated to protect themselves and other against fraud.' Such standard of care is also to be ascertained by reference to current banking practice¹¹⁵ and

¹¹² (n 16) 688 (Lord Dunedin); *Commissioners of State Savings Bank of Victoria v Permewan, Wright & Co* (1914) 19 CLR 457, 458 (Isaacs J); *Morison v London County and Westminster Bank* (1914) 1 KB 356.

¹¹³ (n 98) 976 (Diplock LJ).

¹¹⁴ (1933) AC 201, 221 (Lord Warrington); quoted with approval in *Bute (Marquess) v Barclays Bank, Ltd* (1955) 1 KB 202, 214.

¹¹⁵ *Marfani & Co Ltd v Midland Bank Ltd* (n 98) 972 & 975 (Lord Diplock).

the focus should be on the ordinary practice of banks generally rather than on that of particular individuals.¹¹⁶

Generally, negligence on the part of the collecting banker could be connected with the opening of a customer's account, such as failure to obtain reference before opening an account into which the cheque was deposited for payment and collected as in *United Nigeria Insurance Co v Muslim Bank (W.A.)*¹¹⁷ and *Ladbroke & Co v Todd*,¹¹⁸ or to ascertain the occupation of its prospective customer and his employer, if an employee, as in *Lloyds Bank, Ltd v Savory & Co.*¹¹⁹ Negligence of the collecting banker could also be connected with the specific cheque received for collection, such as failure to make enquiry as to the circumstances in which the customer becomes the bearer of a cheque crossed with the words 'account payee' when he is not the named payee as in *House Property Co of London, Ltd v London County & Westminster Bank*;¹²⁰ or opening the account for the person presenting a cheque marked 'account payee only' and collecting the money for it without making inquiries as in

¹¹⁶ *Commissioners of Taxation v English, Scottish & Australian Bank Ltd* (n 16) 689 (per Lord Dunedin).

¹¹⁷ (n 107) . It is noteworthy that in *Commissioners of Taxation v English, Scottish and Australian Bank Ltd* (n 16) as well as *Kerala State Co-operative Marketing Federation v State Bank of India & Ors II* (2004) BC 1, it was held that 'negligence' referred to in s 82 of the BEA 1882 is not negligence in opening the account but negligence in the collection of relevant cheque, unless the opening of the account and depositing of the cheque in question therein form part and parcel of one scheme, as where the account is opened with the cheque in question or deposited therein so soon thereafter as to lead to an inference that the depositing of the cheque and the opening of the account are interconnected moves in an integrated plan.

¹¹⁸ (n 15).

¹¹⁹ (n 113).

¹²⁰ (1915) 84 LJKB 1846. In the instant case, a claim was made against a collecting banker in respect of a cheque crossed 'Account Payee'. The cheque was drawn in favour of a named payee or bearer, and the bank had accepted it, without inquiry, for the credit of N, a third party. It was held that 'a/c payee' does not mean the account of the man who in the process of negotiation is the owner of the cheque at the time it is collected and the 'payee' as written across the face of the cheque means the named payee on the cheque as drawn. In view of the fact that the bank had not asked for any explanation, it was held that it had been negligent.

Ladbroke & Co v Todd.¹²¹ Other instances of negligence on the part of the collecting banker include allowing a customer known to be a servant or agent to pay in for collection a cheque drawn by third parties in favour of his employer or principal as in *Hannan's Lake View Central, Ltd v Armstrong & Co*,¹²² or allowing a cheque made payable to a one-man company to be paid in by the 'one man', who was also the managing director, into his private account as in *Underwood (A L), Ltd v Bank of Liverpool*,¹²³ or crediting the private account of an agent a cheque payable to him in his representative capacity as in *Bute (Marquess) v Barclays Bank Ltd*.¹²⁴

In the same vein, under paragraph 13.5. of the NBCS Rules 2018, a presenting banker is to be deemed negligent if it fails to properly open a customer's account and all necessary 'Know Your Customer' (KYC) requirements are not met;¹²⁵ if it fails to up-date its customer information to ensure that its customers and their referees are genuine with valid and traceable addresses;¹²⁶ if on the face of the presented payment instrument, including a

¹²¹ (n 15).

¹²² (n 109).

¹²³ (1924) 1 KB 775.

¹²⁴ (n 113).

¹²⁵ See also s. 4 of the Money Laundering (Prevention and Prohibition) Act 2022, which, *inter alia*, mandates a financial institution to identify a customer, whether permanent or occasional, natural or legal person, or any other form of legal arrangements, using identification documents as may be prescribed in any relevant regulation, as well as verify the identity of that customer using reliable, independent source documents, data or information. The statutory duty imposed on the banker to verify the identity of customers carrying out electronic financial transactions would also be found under s 37 of the Cybercrimes (Prohibition, Prevention, etc) Act 2015, which mandates bankers to require customers to present documents bearing their names, addresses and other relevant information before issuance of ATM cards, credit cards, debit cards and other related electronic devices. Financial institutions are further required to apply the principle of know your customer in documentation of customers preceding execution of customers electronic transfer, payment, debit and issuance orders.

¹²⁶ See also the CBN Consumer Protection Framework 2016, para. 2.6.1.6., which mandates financial institutions to require customers to update their details within the timeline specified

cheque, irregularities, such as erasures, post-dated or stale mutilation, are evident; if it allows the withdrawal of cleared funds from payment instruments lodged into dormant accounts without re-activation of the accounts; if it pays the proceeds of instruments of unusually large amount(s) relative to the account's transaction history without further inquiry or exercising due diligence;¹²⁷ or presents cheques with alteration/erasures which are visible under ultraviolet light or eye. However, in order to reduce the incidence of negligence in the processing of cheques, banks are prohibited from accepting, clearing or paying any payment instrument into any account other than the account of the beneficiary as stated in the face of the instrument.¹²⁸ Thus, the presenting bank is required to take appropriate care to match the name of the beneficiary with the account name before processing Automated Clearing House credit.¹²⁹ In this regard, the receiving bank is relieved from liability if it applies funds into the account number sent to it, and liability for a wrong account would be that of the presenting bank.¹³⁰

It is noteworthy, however, that, while the collecting banker is bound to make inquiries when there is anything to raise suspicion that the cheque is being wrongfully dealt with in being paid into the customer's account, he is not thereby called upon to be abnormally suspicious.¹³¹ Similarly, while a banker

by the CBN, or as the need arises, in order to ensure data accuracy and ultimately enhance protection. Consumers are, in turn, required, under para 4 (a) of the Framework, to provide accurate and up-to-date information to the financial institution.

¹²⁷ Indeed, under s. 7 of the Money Laundering (Prevention and Prohibition) Act 2022, for example, a transaction, which is inconsistent with the known transaction pattern of the account or business relationship, is to be deemed suspicious and a report thereon is to be made to the Nigerian Financial Intelligence Unit immediately.

¹²⁸ NBCS Rules 2018, para 12.1.2.

¹²⁹ *Ibid*, para 13.7.

¹³⁰ *Ibid*. para 13.7.

¹³¹ *Penmount Estates Ltd v National Provincial Bank Ltd* (1945) 173 LT 344, 346.

is not to be held liable for negligence merely because it has not subjected an account to a microscopic examination as bank officials do not have to be 'amateur detectives',¹³² it should not also refrain from acting so as to avoid offending its customer.¹³³

Another statutory protection available to the collecting banker in an action for conversion would be found in section 29(1) of the BEA which gives immunity to the banker as a holder in due course of the cheque in question under certain conditions.¹³⁴ It is remarkable that, whereas the title of the holder for value to a cheque can be impugned by defect in his title, the title of a holder in due course, who takes the cheque in good faith, for value and without notice of any defect in title of the person who negotiated it, cannot be so impugned by any defect in the title of the previous holder in due course unless it is a party to any fraud or illegality affecting it.¹³⁵ The title of a person who negotiates a cheque is defective when he obtained the cheque, or acceptance thereof, by fraud, duress, or force and fear, or other unlawful means, or for an illegal consideration, or when he negotiates it in breach of faith, or under such circumstances as amount to a fraud.¹³⁶ The ground upon which the title of the collecting banker can be impugned is if the cheque is forged or bears unauthorised signature in terms of section 24 of the BEA,

¹³² *Lloyds Bank Ltd v Chartered Bank of India, Australia and China* (1929) 1 KB 40, 73, Sankey, LJ.

¹³³ *Underwood (A L), Ltd v Bank of Liverpool* (n 122) 775, 793, Scrutton LJ.

¹³⁴ A holder is defined under section 2 of the BEA as the payee or endorsee of a cheque who is in possession of it, or the bearer thereof. A holder in due course is thus defined in s 29(1) of the BEA as a holder who has taken a bill, complete and regular on the face of it under the condition, *inter alia*, that he took the bill in good faith and for value and that at the time the bill was negotiated to him, he had no notice of any defect in the title of the person who negotiated it.'

¹³⁵ Section 29(3) of the BEA.

¹³⁶ Section 29(2) of the BEA.

which disentitles the collecting banker from claiming to be a holder in due course. Similarly, if the cheque is crossed 'not negotiable' or 'account payee', the collecting banker cannot claim to have a better title to the cheque than that possessed by previous holders.¹³⁷ As such, if the title of any previous holder is defective, the collecting banker cannot claim any right thereunder. The collecting banker can claim to be a holder in due course only in the case of transferable and negotiable cheque, and must have given value for it and the cheque must have been negotiated to it.

7. CONCLUSION AND RECOMMENDATIONS

Our engagement in this article has been on the contractual relationship between the banker and the customer with particular attention to the duties owed the banker to the customer in cheque transactions, the consequences of the breach of those duties and the protection afforded the banker at common law and under the Bills of Exchange Act.¹³⁸ One of the issues that that have engaged our attention is the definition of a customer of a banker. In line with the decision in *Woods v Martins Bank Ltd*,¹³⁹ one is of the view that if both the banker and the prospective customer contemplate the latter becoming a customer, he should be entitled to be treated as such.

Also, the long-established rule that a non-trading customer is only entitled to nominal damages in case of a wrongful dishonor of cheque which has been

¹³⁷ See, for eg, s 83 of the BEA. See also Cheques Act 1992 (UK) which inserts a new section 81A into the BEA 1882 and makes cheques crossed 'account payee' not transferable and valid only between the parties to it.

¹³⁸ Cap B8, LFN 2004.

¹³⁹ (n 17).

jettisoned in *Kpohraror v Woolwich Building Society*¹⁴⁰ is salubrious given the contemporary social factor. The credit rating of individuals not in trade is as much of importance as those who are in trade and the presumption of injury to credit should apply equally across board and be compensated for accordingly.

Moreover, the defence afforded the paying banker in section 24 of the BEA as exemplified by the *Nigerian Advertising Services Ltd v United Bank for Africa*,¹⁴¹ and the rule laid down in *London Joint Stock Bank Ltd v Macmillan & Arthur*¹⁴² that negligence that would make the customer liable for the wrongful payment must be one connected with the manner in which the cheque is drawn need to be reviewed. As such, where it can be shown that the customer, whose signature is forged, knowingly or negligently contributes to the forgery or the making of the unauthorised signature, he should be made to bear the consequences thereof accordingly.¹⁴³

Notably, despite the increasing use of electronic banking platforms, cheques continue to play a vital role in domestic payment transactions in Nigeria. Based upon available data, it has been rightly argued that cheque payment is still the preferred option for high value transactions because it is more secure than other modes of payment and less prone to fraud transaction when

¹⁴⁰ (n 32).

¹⁴¹ (n 43).

¹⁴² (n 3).

¹⁴³ Section 73A of the Bills of Exchange Act (Malaysia) 1849, Act 204, for example, provides that: 'Notwithstanding section 24, where a signature on a cheque is forged or placed thereon without the authority of the person whose signature it purports to be, and that person whose signature it purports to be knowingly or negligently contributes to the forgery or the making of the unauthorised signature, the signature shall operate and shall be deemed to be the signature of the person it purports to be in favour of any person who in good faith pays the cheque or takes the cheque for value.'

compared with other modes of payment, especially e-payment.¹⁴⁴ Cheque payment also gives control over their funds to its users because of the features associated therewith, including the ability to countermand payment as well as post-date a payment.¹⁴⁵ With the establishment of the Nigeria Inter-bank Settlement System (NIBSS) in 1993 by the Central Bank of Nigeria and the Nigeria Bankers' Committee to provide electronic payments, transactions switching, payment aggregation and settlement services for the banking industry, the regulatory authorities have also continuously deployed technology, including the introduction of the Magnetic Ink Character Recognition (MICR) on cheques in 1993, the Nigeria Automated Clearing System (NACS) in 2002 and the Cheque Truncation System in 2012, which enables presentation of cheques electronically for clearing and settlement, to promote efficiency and promptness in the cheque payment system.¹⁴⁶

Thus, the common law and statutory duties imposed upon the banker in the handling of customers' cheques and the statutory protection afforded the

¹⁴⁴ Onyeka Okonkwo, 'An Overview of the Cheque Payments System in Nigeria'. (2018) 42(2) *CBN Bullion* 68,73
<<https://dc.cbn.gov.ng/cgi/viewcontent.cgi?article=1294&context=bullion>> accessed 26 October 2023.

¹⁴⁵ *Ibid.*

¹⁴⁶ See, generally, the Nigeria Bankers' Clearing System Rules 2018 (Revised) <[https://www.cbn.gov.ng/Out/2018/BPSD/Revised%20Nigeria%20Banker's%20Clearing%20System%20Rules%20\(2018\).pdf](https://www.cbn.gov.ng/Out/2018/BPSD/Revised%20Nigeria%20Banker's%20Clearing%20System%20Rules%20(2018).pdf)> accessed 16 October 2023. The Cheque Truncation System is a system whereby physical clearing instruments are dematerialised into electronic format at a stage within the bank of first deposit (the Presenting Bank) while only the electronic format (images/MICR data) is transmitted to the Clearing House: see NACS (Cheques) <https://nibss-plc.com.ng/nacs-cheques/> accessed 28 October 2023. Under para 7.5. of the NBCS Rules 2018 (Revised), all cheques that meet the Nigeria Cheque Standard are eligible for cheque truncation subject to value limits of ₦10 million each or as may be prescribed by the CBN. Under para 7.10 of the NBCS Rules, the presenting bank's capture system is required to transmit the MICR data and images of the cheque to its Clearing System Interface electronically or through electronic storage media.

paying and the collecting banker at common law and under the Bills of Exchange Act are still apposite in the digitalised banking industry. The risk to which the bankers are exposed is also so high that the relevant legal protection is expedient for business exigencies and the national economic interest. It is also pertinent to note that, though the banker could plead the protection afforded it under the BEA in appropriate cases, the protection will only avail it in deserving cases as the conditions precedent to their application, such as, for example, 'without negligence', are by no means easy to prove and, most often, actions for conversion against the banker have been largely successful on this account.