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COURT OF APPEAL FOR ONTARIO

CARTHY, WEILER AND AUSTIN JJ.A.

B E T W E E N :	)	
	)	
PINNACLE BANK, N.A.	)	**Randolph D. Mills,**
	)	**for the Appellants**
	)	
Plaintiff (Respondent)	)	
	)	
- and -	)	
	)	
1317414 ONTARIO INC., cob as JAY-B CONVERSIONS and WILLIAM GIBBS	)	**Christine Tabbert,**
	)	**for the Respondent**
	)	
Defendants (Appellants)	)	
	)	
	)	**Heard: January 8, 2002**

On appeal from the judgment of Justice John G. Kerr dated February 14, 2001.

AUSTIN J.A.:

[1] The defendants appeal from the decision of Kerr J. granting summary judgment with costs against all defendants.

[2] The facts are not complex. The plaintiff ("Pinnacle") is a bank in Georgia, U.S.A. One of Pinnacle's clients is Kustom Marketing Inc. ("Kustom"). Kustom did business with 1317414 Ontario Inc. carrying on business as Jay-B Conversions ("Jay-B"). William Gibbs ("Gibbs") is a principal of Jay-B.

[3] The nature of the business was that Kustom bought goods and services from Jay-B and paid for such goods and services by having Pinnacle wire funds from Kustom's account at Pinnacle to Jay-B's account at the Royal Bank of Canada ("RBC").

[4] On the occasion in question Kustom directed Pinnacle to transfer $60,101. U.S. to Jay-B's account at RBC. Pinnacle carried out this direction on December 24, 1999. As a result of its own purely clerical error Pinnacle wired a further sum in precisely the same amount on December 27, 1999 to Jay-B's account at RBC. About two weeks later Pinnacle discovered its error and requested Gibbs to return the second payment. It was not returned. Jay-B's position is that Kustom owed the additional $60,101. U.S. to Jay-B in any event and that the money has been used to pay the business that supplied the goods which Jay-B sold to Kustom.

[5] The motion judge found that the state of accounts as between Kustom and Jay-B was in issue but that that fact did not provide the defendants with any defence. He ordered the defendants to repay the second payment of $60,101. U.S. to the plaintiff together with costs and pre-judgment interest.

[6] The defendants ask for the dismissal of the action as against all defendants, in the alternative for dismissal as against Gibbs and in the further alternative that the summary judgment be set aside and the action proceed to trial.

[7] The motion judge rested his decision in favour of the plaintiff on two different bases. The first was the decision of Dysart J. in *Royal Bank v. The King*, [1931] 2 D.L.R. 685 (Man. K.B.). The second was the decision of the Supreme Court of Canada in *Rural Municipality of Storthoaks v. Mobil Oil Canada, Ltd.*, [1976] 2 S.C.R. 144 (S.C.C.). As the latter is binding upon this court and in the circumstances, of clearer application, it should be dealt with first.

[8] Mobil held oil and gas leases pursuant to which it paid royalties to the municipality in which the lands were located. In error, Mobil continued to pay royalties after surrendering the leases. When it discovered its error, Mobil demanded repayment. The municipality refused the claim and Mobil sued. The trial judge dismissed the action basing his decision on the fact that an officer of Mobil was aware of the surrender of the leases. The Alberta Court of Appeal allowed Mobil's claim and appeal upon the ground that the monies were paid under mistake of fact. The Supreme Court of Canada dismissed the appeal upon the ground that:

> . . . where money is paid on the supposition that a specific fact is true which would entitle the other to receive it, which fact is untrue and the money would not have been paid if the fact had been known to be untrue, it can be recovered "and it is against conscience to retain it." (p. 159)

[9] That authority is sufficient to dispose of this appeal.

[10] *Royal Bank v. The King* is a somewhat more complicated case but in it Dysart J. purported to set out the law with respect to the right to recover money paid under mistake of fact in the form of four principles as follows:

> First: that the mistake is honest. There must be on the part of the person paying the money the genuine *bona fide* belief that certain facts exist which really do not exist. It is not what he ought to believe or what he ought to have learned. His last laches or negligence will not of themselves affect his belief. Knowledge will not be imputed to him, however ample may be the means of knowledge which he has on hand, however readily accessible those means may be, they do not constitute knowledge; and knowledge will not be imputed to him or inferred against him, unless he wilfully abstains from enquiry. [Authorities omitted.]
>
> The second condition is that the mistake must be as between the person paying and the person receiving the money. In other words, the receiver must in some way be a party to the mistake, either as inducing it, or as responsible for it, or connected with it : 21 Hals., p. 30; *Skyring v. Greenwood*, 4 B. & C. 281, 107 E.R. 1064; *Chalmers v. Miller*, 32 L.J.C.P. 30; *Pollard v. Bank of England*, L.R. 6 Q.B. 623; *Thomson v. Clydesdale Bank, Ltd.*, [1893] A.C.282.
>
> The third condition is that the facts, as they are believed to be, impose an obligation to make the payment. This obligation must be legal or equitable or moral, as will appear from a reading of the cases already referred to. It is not enough that the payment is desirable or advantageous, the compulsion must at least be practical. [Authority omitted.]
>
> The fourth condition to recover is that the receiver of the money has no legal or equitable or moral right to retain the money as against the payer. This proposition is not the exact converse of the third condition. The money may be owing to the receiver from a third person who has induced the payment,, but the existence of such a debt is not enough to defeat recovery : see *John v. Dodwell & Co.* and *Reckitt v. Barnet, Pembroke & Slater Ltd., supra*. Thus, the mere volunteering cannot defeat recovery : *Banque Belge v.*

> *Hambrouck*, [1921] 1 K.B. 321. As was stated in *O'Grady v. Toronto* (1916), 31 D.L.R. 632, 37 O.L.R. 139, the money ought not to be retained if it cannot be retained honestly and conscionably.

[11] Counsel in the instant case, both here and below, were agreed that conditions one and three had been met. Counsel for the appellants argued that conditions two and four had not been met. The motion judge found that all four conditions had been met.

[12] As to condition four, the appellants rely upon the evidence of Gibbs that Kustom owed even more than the two payments of $60,101. U.S. and on the finding of the motion judge that there was in fact a difference of opinion as to what debt was owing by Kustom to Jay-B.

[13] The motion judge went on to find that that difference of opinion did not afford the defendants any defence to this action. He did not say why but I agree with his conclusion because Kustom is not a party to these proceedings. The fourth condition requires that the receiver of the money has no legal, equitable or moral right to retain the money as against the payer. The payer is Pinnacle, not Kustom. To constitute a defence, Jay-B must have some claim against Pinnacle and none is disclosed on the evidence. Accordingly condition four is met.

[14] This leaves for consideration the second condition which Dysart J. set out as follows:

> The second condition is that the mistake must be as between the person paying and the person receiving the money. In other words, the receiver must in some way be a party to the mistake, either as inducing it, or as responsible for it, or connected with it.

[15] In finding that the second principle had been met, Kerr J. relied on *Royal Bank v. The King*, but appears in my view to have mixed the second and third principles. His reasons in this regard read as follows:

> With respect to the second condition, counsel relies on the *Royal Bank* decision, above-cited, which she submits closely resembles the factual situation presented in the case at bar, where in that case, the provincial authorities who were found liable had no previous knowledge of the intended action of Mr. Rheaume, yet they subsequently received and retained the money as the fruit of his actions, and when they learned the facts, they refused to refund the money.

It was said there that by receipt of the money, and that refusal to return it, the province adopted Mr. Rheaume's action in issuing the cheque in the name of, and as attorney for, the Manitoba Tax Commission, and by implication, adopted his action in making the said deposit.

With respect to the second condition, it is said the mistake must be as between the person paying the money and the person receiving the money; that is to say, the receiver must in some way be a party to that mistake, either by inducing it, or is responsible for it, or connected with it.

Counsel for the defendant submits that the receiver must in some way be a party to the mistake, and that in this case, the defendant was not a party to the mistake, but that he must be party to the mistake before he can be liable, either by inducing the mistake, or as actually responsible for the mistake itself, or having a connection with it.

On the subject of the third principle, the *Law of Contract* at page 62 makes the following comment upon which the defendant relies:

> "In much the same way, it appears to have been suggested that there can be no recovery on the basis of money had and received, in the older terminology, or restitution in more modern language. unless some equivalent 'privity' exists between the parties."

It is submitted by defence counsel that no such privity exists here.

But Fridman, at page 65 of the same volume states as follows:

> "The cases in which privity appears to have been a possible issue concern payments made by or to banks. This is hardly surprising since in other instances, money will have gone in the form of cash directly from the mistaken payer to the disentitled payee. In 'bank' cases, either the payer of the money is a bank acting for or on behalf of its customers, or the payee is the bank,

> in which event the bank may be receiving the money for its own purposes or use. It seems clear that courts will regard the relationship between a bank acting as agents for the third party, and payee as being sufficiently direct to give rise to the necessary privity. It would appear that the precise nature of the mistake is of no significance as long as the party paying made a mistake in regard to the payment in question.
>
> Now, I gather from that, and it is my understanding of that, that on that basis, there is privity between the bank, the defendant, and Custom (*sic*) Marketing Inc. sufficient to form a basis for the fulfilment of condition two above-cited.

[16] The references to the *"Law of Contract"* at pages 62 and 65 is to *Restitution* by G.H.L. Fridman, 2d Edition 1992 (Toronto; Carswell). These references deal with a related subject, namely, "privity" as between payer and payee. With respect, privity is not relevant to the instant case. Pinnacle did not act on behalf of Kustom in making the second payment and the fact that the second payment was received by RBC on behalf of Jay-B is irrelevant. For all practical purposes, the two payments may as well have been received directly by Jay-B.

[17] The authorities cited by Dysart J. for his second principle are as follows:

> 21 Hals., p. 30; *Skyring v. Greenwood*, 4 B. & C. 281, 107 E.R. 1064; *Chalmers v. Miller*, 32 L.J.C.P. 30; *Pollard v. Bank of England*, L.R. 6 Q.B. 623; *Thomson v. Clydesdale Bank, Ltd.*, [1893] A.C.282.

None of those authorities can be related directly to the facts of the instant case. The reference to the Halsbury is to the law as it stood in 1912. Halsbury today deals with the recovery of money paid under a mistake as "part of the law known as quasi-contract, which has now developed into the law of restitution, the central principle of which is the reversal of unjust enrichment". 32 Halsbury's Laws of England, 4th Edition re-issue, *Mistake* paragraph 69 (Butterworths; London 1999). That law provides no basis whatever for the retention of the second payment by the defendants.

[18] In these circumstances, Jay-B must be found to be connected with and a party to the mistake of Pinnacle by virtue of Jay-B having received the second payment, thus fulfilling Dysart J.'s second condition.

[19] Accordingly, the appeal must be dismissed with respect to 1317414 Ontario Inc., carrying on business as Jay-B Conversions.

[20] The motion judge gave judgment for the plaintiff without distinguishing as amongst the defendants. Counsel for Pinnacle did not respond to the appellant's argument with respect to Gibbs personally. No basis has been shown upon which to find personal as opposed to corporate liability. In the result, the appeal as against Gibbs is allowed and the action as against him is dismissed without costs either here or below. The appeal as against 1317414 Ontario Inc., carrying on business as Jay-B Conversions, is dismissed with costs.

RELEASED: January 29, 2002

"Austin J.A."
"I agree J. J. Carthy J.A."
"I agree K. M. Weiler J.A."