

CANADA / JUDGMENT

Pan Pacific Auto & Diesel Services Ltd. v. Khalsa Credit Union

2007 BCSC 860

COURT

Supreme Court of British Columbia

DECIDED

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2007 BCSC 860 Pan Pacific Auto & Diesel Services Ltd. v. Khalsa Credit Union

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Pan Pacific Auto & Diesel Services Ltd. v. Khalsa Credit Union,

2007 BCSC 860

Date: 20070629

Docket: S025800

Registry: Vancouver

Between:

Pan Pacific Auto & Diesel Services Ltd. &

Jasvir Singh Virdi

Plaintiffs

And:

Khalsa Credit Union, The Bank of Nova Scotia Trust Company also known

as Scotia Bank & Amex Canada Inc. also known as Amex Bank of Canada

Defendants

Before: The Honourable Mr. Justice McEwan

Reasons for Judgment

Counsel for the Plaintiff

D. J. Barker

Counsel for the Defendants Scotia Bank and Amex Bank of Canada

J. Harry

Counsel for the Defendant Khalsa Credit Union

D. Unterman

Date and Place of Trial/Hearing:

October 10, 11, 12, 2006

Vancouver, B.C.

- [1] The plaintiff, Jasvir Singh Virdi, is a heavy duty mechanic. He is the sole proprietor of Pan Pacific Auto & Diesel Services Ltd. ("the Company").
- [2] The Company had a chequing account (#248401 Br 02) at the Khalsa Credit Union, ("Khalsa") and a merchant account with Amex Bank of Canada (#932-043-2942) ("Amex"). It also had an account with the Bank of Nova Scotia ("BNS"), which it opened on September 6, 2002.
- [3] The Company pleads that it sold a person named W.I. Kwong automotive and diesel parts for \$41,995.00, including \$2,747.34 G.S.T. It says Mr. Kwong paid the amount in full on August 18, 2002 using American Express credit card #3735 006218 31005.
- [4] On August 22, 2002 Amex deposited \$40,485.09 to the Company's account at Khalsa (account #248401 Br 02), pursuant to its merchant account agreement.
- [5] On the same day, on Mr. Virdi's instructions, Khalsa issued a bank draft in the amount of \$40,000 payable to him. The Khalsa account was debited \$40,000 plus a \$5.00 transaction fee.
- [6] On September 6, 2002, Mr. Virdi deposited the draft into the account he had just opened at the BNS in his own name.
- [7] On the same day, Mr. Sukhwinder Grewal, the branch manager of Khalsa in Surrey, received a call from a representative of Amex saying that Amex had a suspicion that the credit card transaction underlying the deposit had been obtained through a fraudulent credit card.
- [8] The same morning Khalsa Credit Union received a fax from the BNS asking if its cheque (official order #27242) was valid.
- [9] The BNS decided to hold the official order pending further directions.
- [10] Amex subsequently arranged with the BNS to hold the official order instead of presenting it, providing it with a letter of indemnity. Khalsa was not involved in these arrangements. It still holds the \$40,000 in a suspense account. BNS continues to hold the official order but maintains that, inasmuch as title to it is disputed, it is a "neutral stakeholder."
- [11] Mr. Virdi claims to be entitled to the release of the money.

[12] As against all of the defendants the plaintiffs plead sections 2, 75, 77, 78, 80, 95, 130 and 134 of the Bills of Exchange Act. These read as follows:

2. In this Act,

"acceptance" "acceptance" means an acceptance completed by delivery or notification;

"action" "action" includes counter-claim and set-off;

"bank" "bank" means a bank or an authorized foreign bank within the meaning of section 2 of the Bank Act;

"bearer" "bearer" means the person in possession of a bill or note that is payable to bearer;

"bill" "bill" means bill of exchange;

"defence" "defence" includes counter-claim;

"delivery" "delivery" means transfer of possession, actual or constructive, from one person to another;

"holder" "holder" means the payee or endorsee of a bill or note who is in possession of it, or the bearer thereof;

"issue" "issue" means the first delivery of a bill or note, complete in form, to a person who takes it as a holder;

"non-business

days" "non-business days" means days directed by this Act to be observed as legal holidays or non-judicial days, and any other day is a business day;

"note" "note" means promissory note;

"value" "value" means valuable consideration.

R.S., 1985, c. B-4, s. 2; 1999, c. 28, s. 148.

75. Where the holder of a bill, drawn payable elsewhere than at the place of business or residence of the drawee, has no time, with the exercise of reasonable diligence, to present the bill for acceptance before presenting the bill for acceptance before presenting it for payment is excused and does not discharge the drawer and endorsers.

R.S., c. B-5, s. 76

77. A bill is duly presented for acceptance that is presented in accordance with the following rules:

- (a) the presentment must be made by or on behalf of the holder to the drawee or to a person authorized to accept or refuse acceptance on his behalf, at a reasonable hour on a business day and before the bill is overdue;
- (b) where a bill is addressed to two or more drawees who are not partners, presentment must be made to all of them, unless one has authority to accept for all, in which case presentment may be made to him only;
- (c) where the drawee is dead, presentment may be made to his personal representative; and
- (d) where authorized by agreement or usage, a presentment through the post office is sufficient.

R.S., c. B-5, s. 78

78(1) Presentment in accordance with the rules set out in section 77 is excused, and a bill may be treated as dishonoured by non-acceptance where

- (a) the drawee is dead, or is a fictitious person or a person not having capacity to contract by bill;
 - (b) after the exercise of reasonable diligence, the presentment cannot be effected; or
 - (c) although the presentment has been irregular, acceptance has been refused on some other ground.
- (2) The fact that the holder has reason to believe that the bill, on presentment, will be dishonoured does not excuse presentment.

R.S., c. B-5, s. 79

* * *

80. A bill is dishonoured by non-acceptance when

- (a) It is duly presented for acceptance and such an acceptance as is prescribed by this Act is refused or cannot be obtained; or
- (b) presentment for acceptance is excused and the bill is not accepted.

R.S., c B-5, s. 81

* * *

95(1) Subject to this Act, when a bill has been dishonoured by non-acceptance or by non-payment, notice of dishonour must be given to the drawer and each endorser, and any drawer or endorser to whom the notice is not given is discharged.

- (2) Where a bill is dishonoured by non-acceptance and notice of dishonour is not given, the rights of a holder in due course subsequent to the omission are not prejudiced by the omission.

- (3) Where a bill is dishonoured by non-acceptance and due notice of dishonour is given, it is not necessary to give notice of a subsequent dishonour by non-payment, unless the bill is accepted in the meantime.

130. No person is liable as drawer, endorser or acceptor of a bill who has not signed it as such, but when a person signs a bill otherwise than as a drawer or acceptor, he thereby incurs the liabilities of an endorser to a holder in due course and is subject to all the provisions of this Act respecting endorsers.

134. In the case of a bill that has been dishonoured, the holder may recover from any party liable on the bill, the drawer who has been compelled to pay the bill may recover from the acceptor, and an endorser who has been compelled to pay the bill may recover from the acceptor or from the drawer, or from a prior endorser, the damages prescribed in section 133.

- [13] Khalsa explains that it received a direct deposit of \$40,485.09 from Amex to the Company's account and then issued the "official order", in the amount of \$40,000 to Mr. Viridi. The funds were removed from the Company's account and placed in a special account at Kalsa where money is held when such orders are issued. Khalsa takes the position that it has no obligation to pay until the order is presented, and says that accordingly it has not paid. It also says that if the order were presented it would be obliged to pay.

- [14] The BNS says that it simply holds the order. Its pleadings include an application for an order of interpleader.

- [15] Amex pleads that it does not have possession of the order or the funds represented by the order, which are respectively in the possession of the BNS, as to the order, and the Khalsa, as to the funds.

- [16] Amex pleads sections 55(2) and 57(2) of the Bills of Exchange Act. They read as follows:

55(1) A holder in due course is a holder who has taken a bill, complete and regular on the face of it, under the following conditions, namely,

- a) that he became the holder of it before it was overdue and without notice that it had been previously dishonoured, if such was the face; and
 - b) 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.
- (2) In particular, the title of a person who negotiates a bill is defective within the meaning of this Act when he obtained the bill, or the 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.

56 A holder, whether for value or not, who derives his title to a bill through a holder in due course, and who is not himself a party to any fraud or illegality affecting it, has all the rights of that holder in due course as regards the acceptor and all parties to the bill prior to that holder.

57(1) Every party whose signature appears on a bill is, in the absence of evidence to the contrary, deemed to have become a party thereto for value.

(2) Every holder of a bill is, in the absence of evidence to the contrary, deemed to be a holder in due course, but if, in any action on a bill, it is admitted or proved that the acceptance, issue or subsequent negotiation of the bill is affected with fraud, duress or force and fear, or illegality, the burden of proof that he is the holder in due course is on him, unless and until he proves that, subsequent to the alleged fraud or illegality, value has in good faith been given for the bill by some other holder in due course.

[17] Amex pleads that the issue of a credit card to a party named W.J. Kwong was induced by fraud, and that shortly after the card was issued, on June 5, 2002, the Company entered into a merchant agreement with Amex. Only two charges were ever processed against that account, on July 30, 2002, for \$75,000, and the second \$41,995 charge which is the charge underlying the plaintiff's action. The Amex account was closed on August 28, 2002.

[18] Amex pleads that the plaintiffs knew or ought to have known that the Kwong card was fraudulent, and that in any event they knew or ought to have known there was no legitimate underlying transaction for the first or second charge. It seeks a set off and counterclaims for each of the two transactions.

[19] The plaintiffs respond to the counterclaim with a bare denial and repetition of the Statement of Claim.

[20] The plaintiffs rely on the legal definition of conversion, an example of which they quote from *National Holdings Ltd. v. Canadian Imperial Bank of Commerce*, 2005 B.C.S.C. 369 per Gray, J. at paragraph 5:

A conversion is a wrongful interference with goods, such as by taking, using or destroying them in a manner inconsistent with the owner's right of possession. To constitute the injury there must be some act of the defendant repudiating the owner's right, or some exercise of dominion inconsistent with it. The wrongful act may be done in all innocence, but this is no defence.

[21] The plaintiffs take the position that Khalsa has breached its contractual obligation by taking a \$5.00 fee and then interfering with negotiation of the official cheque; that BNS has breached its contractual obligation by refusing to deposit the cheque; and that Amex has breached its contract with the Company by reneging on its approval of the \$40,485.09 it credited to the Company's account and then interfering with the plaintiffs' access to the money. The plaintiffs allege that Amex has, in so interfering, also committed the tort of inducing the breaches of contract of Khalsa and Bank of Nova Scotia.

- [22] The plaintiffs acknowledge that Amex was defrauded by "someone who: a) obtained the Kwong credit card; b) obtained the Kwong cheques on the California Bank; c) used the Kwong credit cards at a number of businesses in B.C., including that of Pan Pacific; d) [and] used the "Kwong" cheques to pay the Kwong Amex account", to quote from their submission. The plaintiffs suggest that Amex did not specifically plead that the plaintiffs were directly involved in the fraud:
9. Amex says that on or about May 17, 2002 an Amex credit card was issued in the name of Dr. W.J. Kwong which was subsequently discovered to be fraudulent
 11. Amex says that the Kwong Card was used at Pan Pacific on or about July 30, 2002 in the amount of \$75,000 and on or about August 18, 2002, in the amount of \$41,995.00
 13. Amex says that Plaintiffs or either of them, knew or ought to have known that the Kwong Card was fraudulent or were reckless or wilfully blind in whether it was fraudulent. In either case, the Plaintiffs, or either of them, knew or ought to have known there was no legitimate underlying transaction for the First Charge and the Second Charge.
 14. In the alternative, Amex says that the funds to purchase the Order were obtained through fraud and the Plaintiffs have no proprietary right to, interest in or title to the Order and title to the Order is defective.

[from the pleadings of Amex and BNS]

- [23] The plaintiffs submit that the state of the proof is such that the defendants have not shown circumstances that would rebut the plaintiffs' claim that there has been a wrongful interference with its prima facie right of possession. They submit that the onus is high, citing *Continental Insurance Co. v. Dalton Cartage Co. Ltd. et al* 131 D.L.R. (3d) 559 (SCC) per Laskin, J. at paragraph page 563, citing Lord Denning in *Bater v. Bater* [1950] 2 All E.R. 458 c. 459:

Many great judges have said that in proportion as the crime is enormous, so ought the proof to be clear. So also in civil cases. The case may be proved by a preponderance of probability, but there may be degrees of probability, within that standard. The degree depends on the subject-matter. A civil court, when considering a charge of fraud, will naturally require a higher degree of probability than that which it would require if considering whether negligence were established. It does not adopt so high a degree as a criminal court, even when it is considering a charge of a criminal nature, but still it does require a degree of probability which is commensurate with the occasion."

- [24] They further cite in *Kolesnykov v. ICBC* [2004] BCSC 173, where Martinson J. held:

"33 Because fraud is a quasi-criminal allegation and a finding of fraud could affect the claimant's life well beyond the outcome of the insurance claim, the trial judge, when scrutinizing the evidence, must keep in mind that substantially more than a mere tilting of the evidentiary scales is required. The quality of the evidence must be assessed taking into account the degree of proof

required. The scrutiny is heightened in the sense that the judge must determine whether the evidence is clear and cogent enough to more than just tilt the scales. The more serious the allegation and its consequences, the greater the degree of proof required."

- [25] Amex does not take particular issue with the law as set out by the plaintiffs, as far as it goes. Its position (in which it is joined by BNS) is that there can be no conversion of property as against a person or person who is not entitled, as owner, to that property, and that the plaintiffs' knew or ought to have known that the Kwong card was fraudulent. It also submits that there were no legitimate transactions underlying the Kwong charges or the Company's merchant account. Inasmuch as Mr. Virdi is the sole proprietor of the Company, what the plaintiffs knew or ought to have known is, in fact, what he knew or ought to have known.
- [26] Mr. Virdi said nothing in his direct evidence concerning the transaction underlying the issue of the Amex charge. In cross examination he was obliged to answer questions put to him about those circumstances.
- [27] Before dealing with that evidence I think it best, however, to address the evidence adduced by Amex in its side of the case, to provide some context.
- [28] Mr. Richard Neals, whose title is Director of Corporate Security, Canada, for Amex, testified concerning the investigation of the Kwong Amex card. Mr. Neals went through a series of Amex records. The Amex merchant account set up record verifies that the Company opened an account with Amex on June 5, 2002. Mr. Virdi is represented on the document as the "owner" of the Company.
- [29] The record concerning the Kwok Amex Card shows that it was opened as a result of an internet application. The applicant gave a Surrey address, "Apt. 228 6832 King George Hwy. Surrey, B.C. V3W 4Z9". The same applicant filled out the form by giving his own fax number as his Bank fax number. The record confirms that the card was used twice, and that both transactions were with the Company.
- [30] Two cheques printed with "the Bank of California Private Banking" on their face, and bearing a Surrey address with "Doctor Kwong" and "Dr. Wilson Kwong" printed on them, were written to Amex on August 16, 2002 and August 23, 2002 for \$74,999.00 and \$42,599 respectively. These were delivered from a downtown Vancouver travel office. Other records in Amex's possession showed that a "Bajan Virdi" lived at 6832 King George Highway". The postal code is recorded as "V3W 4C9".
- [31] When Amex searched the name "Viridi" it was determined that the Kwong card and a card in the name of Bajan Virdi, Mr. Virdi's wife, had the same address. Mr. Neals also went through a number of accounting records demonstrating how the Kwong card was "keyed" a number of times, an indication that the person using it might be testing whether it could be processed effectively.

- [32] In cross examination Mr. Viridi agreed that his business was repairs, rentals and inspection of heavy equipment until 2001, at which time the Company lost its licence to perform inspections. He expressed some pride in his abilities as a mechanic but did not describe his business as one engaged in sales.
- [33] Mr. Viridi said that he applied for the Amex card in response to "flyers" Amex circulated, and that he was motivated to do so because some customers wanted to pay him by that means. Despite the fact that he had no computer at work, and could apply by telephone, or fax, or by submitting a written application, he says his daughter, who lives in Abbotsford, applied on his behalf. Mr. Viridi says his son, who lives in his basement on an on and off basis, had nothing to do with the account. He did acknowledge that his son had been charged with a form of credit card fraud in 1999 and 2000 and that he sometimes went with him to court. He also acknowledged helping his son carry a large amount of money across the American border.
- [34] Mr. Viridi said that the Company was busy and had between 100 and 130 customers. In 2001 he had reported sales of \$149,137, and in 2002, of \$136,049. When he was asked if this did not imply that the majority of his business in 2002 was represented by the two Kwong transactions, he suggested that, as disputed transactions, they had been kept off his books by his accountant. He agreed, however that he received \$72,000 in the first transaction and that the only money outstanding is the subject matter of his claim in this action. This still means that over half of the Company's sales in 2002 are represented by that single transaction. If both sales are counted, there is only \$24,000 in sales to other customers. This is very difficult to square with Mr. Viridi's evidence that he worked ten to fourteen homes per day charging about \$60 per hour, with some jobs charged at up to \$150 per hour. It is, on the other hand, quite possible to square this level of activity the Company's reported sales, assuming Mr. Viridi works alone. If either or both the Amex transactions are included, however, he does not work nearly as hard, or have nearly as many customers as he claims, or he works for nothing.
- [35] There are other problems with Mr. Viridi's evidence. These very large transactions are curiously unmemorable to him. He has not always remembered the name of this huge customer - on Discovery, he called him "Wong" - nor did he find out who had referred Mr. Kwong to him, although he says another customer did so. It is also difficult to understand what sort of "customer" of a "repair" shop would be the source of a referral for the purchase of two large orders for equipment, which were completely anomalous transactions. Mr. Viridi could not be sure whether Mr. Kwong came with a flatbed trailer or a five ton truck, a discrepancy between his testimony at trial and the evidence he gave on discovery.
- [36] The invoices themselves are rather lacking in detail. They appear to be bare lists of miscellaneous parts. There are no documents verifying the acquisition, the ownership, or even the existence of these chattels beyond the invoices themselves. The court is left with evidence that one Kwong (or was it Wong?) pulled up one day with a flatbed (or was it a 5-ton?) and purchased equipment for amounts approaching the yearly revenue of the

plaintiff's repair shop, in transactions that were unprecedented in character (equipment sales rather than repairs), and kind (the only two Amex accounts ever processed). The unknown fraudster, Kwong, seems to have used the same street address as that of the plaintiff's wife.

- [37] The plaintiff, as I have noted, addresses none of these curiosities, but bases his case on a theory that having crossed the threshold of obtaining an official order, none of it matters. In taking this position he overlooks the fact that this is a transaction "affected by fraud" within the meaning of section 57(2). While the plaintiff's concede that "Kwong" perpetrated a fraud, they suggest that, absent a specific plea that they are themselves direct parties to the fraud, the defendants have no recourse. That is not, however, the test.
- [38] Given that the transaction is "affected" by fraud, the burden falls on the plaintiffs to establish that they are holders in due course. This imposes on them an obligation to demonstrate that "value in good faith" subsequent to the fraud or illegality has been given by "some other holder in due course". The plaintiffs, being the only such subsequent holders, must, in the circumstances, demonstrate that such has occurred. In order to do so they must satisfy the court, on a balance of probabilities, by marshalling sufficient cogent evidence.
- [39] There are circumstances where that might simply be the sworn evidence of a party on a witness. In the case of large commercial transactions, however, the absence of any means of verification of the existence of the materials transacted, documentary or otherwise, combined with a dearth of evidence as to who took the material, where, for what purpose, and by what means, will tend to undermine any bare assertion that such a transaction actually occurred. There is also the remarkable convergence of the street address of the fraudster and a person closely linked to the plaintiffs.
- [40] The evidence as a whole raises significant doubt as to the bona fides of the transactions underlying the official order. The plaintiffs have not met the burden of proof they must carry, in such circumstances, under s. 57(2) of the Bills of Exchange Act, of showing that "subsequent to the fraud value has in good faith been given for the bill". The evidence does not establish that there was any transaction underlying the issue of the official order. The plaintiff's action is, accordingly dismissed as against each of the defendants.
- [41] Amex has counter-claimed for the \$40,995 paid out on the second charge, which is the subject of the plaintiff's claim. It shall have judgment for that amount against the defendants, on the basis that, in defence of the plaintiff's action, it has established the best claim to the money. BNS shall be at liberty to release the funds it holds to Amex, in partial discharge of the judgment. Khalsa shall be at liberty to cancel or void its official order. The claims against the three financial institutions are dismissed with costs.
- [42] Amex has also counter-claimed for the \$75,000 paid out on the first charge. While it has assembled a certain amount of evidence to show that the two transactions were similar and highly suspicious, I am of the view that the proof offered, while of value in establishing that the transactions underlying the plaintiff's claim were "affected by fraud", thereby casting

upon the plaintiffs a burden they have failed to meet, falls short of meeting the onus established by the cases for fraud, examples of which are cited at paras. 23 and 24 of these reasons. It may be that a better case could be made, or that Amex may find redress in another forum.

[43] Respecting the positive claims set out in the counter-claim, however, Amex has failed to carry the burden of proof of establishing a clear and cogent case of fraud or conduct tantamount to fraud, that can be laid to the plaintiffs. There is a distinction between the plaintiff's failure to establish a right to the money they claimed in this action, resulting in the return of the money associated with the second charge to its source (Amex), and the burden on Amex to convincingly establish fraud in a positive sense, relative to both charges, although the distinction is immaterial relative to the second transaction, in view of my disposition of the plaintiff's case. The first charge has been paid and its recovery does not turn, in the way the second does in the circumstances, on the terms of the Bills of Exchange Act. The Amex counter-claim to the extent of the \$75,000 claim is accordingly dismissed.

[44] If there are issues respecting accounting, or costs, there shall be liberty to apply.

The Honourable Justice T.M. McEwan

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