

STOPPING PAYMENT ON A CERTIFIED CHEQUE? - MAYBE

A. Shady Background of Funds as supported the Certified Cheques

A decision of the Ontario Court of Appeal, released September 24, 2008 (*Esses v. Bank of Montreal*), allowed BMO's appeal overturning a summary judgment motion relating to a payee's rights to certain certified cheques. The genesis of the funds that seeded the series of transactions at issue was intertwined with an underlying mortgage fraud, transactions with imposters, and a bag full of cash. These transactions culminated in the preparation of three USD cheques drawn by one party on their BMO account and at the direction of a second party, to be made payable to a third. The cheques were then certified by BMO, held by the payee for 4 months and then negotiated by the payee for deposit to their bank (Bank Leumi as collecting bank) in T.O. for transfer of funds to Luxembourg. After negotiation, BMO instructed that payment on the cheques be stopped, and the credit at Bank Leumi was reversed. The payee then sued BMO. As he was payee of the cheques and as payee of certified cheques, he asserted that he was a holder in due course.

B. Exploring the Shifting Onus of a Holder in Due Course

The summary judgment motion went against BMO, granting judgment to the payee for the face value of the cheques. BMO appealed asserting that the matter invoked issues of credibility and that the payee had failed to disclose evidence that would have brought into question whether the payee truly took the cheques 1) in good faith; 2) for value; and 3) without notice of defect in the title of the person who negotiated it.

The Ontario Court of Appeal overturned the lower court summary judgment, granting costs of the appeal to BMO, and allowing the issues to be heard at trial. In doing so, the Court noted that the certification of the cheques amounted to acceptance, but did not preclude BMO from challenging and presenting evidence that the payee could not claim as a holder in due course and that the payee could not thwart the process by refusing to answer obvious questions or by refusing production of necessary documents as would shed light on the issue of the payee's knowledge of notice of defect in title.

C. Remedies to Prevent Payout on Certified Cheques

Certified cheques are sometimes treated as tantamount to a cash substitute, even though they perhaps should not be afforded such lofty status by either the recipients or the drawee. This case affirms that certification of a cheque does not preclude all challenges of the transaction by the certifying bank and that with appropriate strategic questioning and document discovery requests that go unanswered, one can use such as a basis from which a court can draw an adverse inference sufficient to shift the onus to the payee to establish their position as being *in good faith, for value and free from notice of defect in title*. Likewise, certified cheques always remain susceptible to return for negotiation based on a forged endorsement of the payee or material alteration after certification. In addition, it may well be possible to mitigate risk exposure for lost or stolen items through court processes that seek declaratory relief to the effect that a certified cheque has never been '*delivered*' to the payee or that some other defect in title has come to light that excuses the drawee from honoring the item on presentation. Thus while certified cheques remain a stalwart of commerce, they retain frailties and are open to remedies that can prevent their misuse or interception by fraudsters.

<http://www.ontariocourts.on.ca/decisions/2008/sepber/2008ONCA0646> 

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