
**MISTAKEN PAYMENTS IN BANKING TRANSACTIONS: AN
APPRAISAL OF THE LEGAL CONSEQUENCES**

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Abstract

This article appraises the legal consequences of mistaken payments in banking transaction and answers the question as to whether mistaken payments made by a bank, or bank customer during transactions, are recoverable by the parties involved and who is liable if the funds are not recovered. The article further explores the nature and circumstances under which payments may be wrongly made and the problems which may arise in practice and rules relating to recovery of money paid under a mistake and the defenses available in such circumstances. Customers and banks alike need to exercise due care, when giving out cheques or paying out drawn cheques, writing or entering account numbers, bank details and particulars. As banking transactions are mostly processed by account numbers and drawn cheques, it is necessary that this crucial piece of information should be obtain right. Although banks will often ask for an account name as well as an account number, there are usually system failure or the system maybe hacked for the purposes of committing fraud. This article posits that the banks should be able to solve these problems which hamper effective service delivery.

Keywords: financial intermediation, Banking Transactions, Consequences

Introduction

The banking sector in any economy serves as a catalyst for growth and development. Banks are able to perform this role through their crucial functions of financial intermediation, provision of an efficient payments system and facilitating the implementation of monetary policies. It is not surprising therefore, that the Nigerian government often attempt to evolve the banking system, not only for the promotion of efficient intermediation, but also for the protection of depositors, encouragement for efficient competition, maintenance of public confidence in the system, stability of the system and protection against systemic risk and collapse.¹

In banking transactions, payments are made every day to, and on behalf of various customers in Nigeria, and indeed, the world over, to different bank accounts worldwide and as such it is easy to make mistakes in the transactions. Mistakes can be made when making payments in a number of ways: one could fill in the wrong account number on a manual deposit slip or when using

¹A. I. Iyade, "The Impact of Regulation and Supervision on the activities of banks in Nigeria", in C.C. Onwidiwe & Co. "Banker Customer Relationship a practical guide. (Harvard Law Form, 2016)

internet banking, transfers could be made to the wrong accounts; banks can honour a stolen cheque or cash out cheques that were forged, or not properly drawn. When these happen, the

money can end up in someone else's account, which may be traceable or in the hands of a total stranger.

Transactions are mostly processed by account number. Although, banks will often ask for an account name as well as an account number, their systems do not always check that they match or the systems may be faulty or hacked for the purposes of committing fraud. The authors have examined the legal consequences of such mistaken transactions and recommends practical measures for recovery of such payments. The systems should be designed, both physically and legally, to minimize these problems and to resolve them equitably at less expenses. It also explores rules relating to recovery of money paid under a mistake and the defenses available in such circumstances and highlights the rules and processes of tracing or recovering mistaken payments. In banking transactions, there are some important key players without which banks cannot exist. The important players here are banks, bankers and customers. We shall attempt to define them.

Definition of a Bank

A bank is defined as “any person who carries on banking business and includes commercial banks, and acceptance house, discount house, financial institutions and merchant banks.... A bank is a corporate body duly licensed to carry on banking business.”² “The word ‘bank’ and ‘banker’ are used interchangeably. Therefore, a definition of one is sufficient for the other.”³

Definition of Banker

A banker refers to a company licensed to carry on banking business and not to an employee or director or shareholder. In *Akwule & 10 others v. Reginam*⁴, it was held by the Supreme Court that: “The word ‘banker’ does not, in our view, include a person who is mere employee of a bank. The relationship between a banker and a customer is that of a debtor and creditor in respect of the money deposited with the banker by the customer. This position becomes clearer when a customer asks for his money. If the amount is not paid, the customer can sue the bank. The action will lie against the bank, not the bank manager. It is therefore not possible to agree with the view that the 1st Appellant in this case was a banker. If the bank defaults, the first appellant, as manager of the bank, will not be sued; the bank will be sued.” The Court held that the first appellant, being an employee of the bank could not be referred to as the banker. The banker in this definition is the employer.

² J. O. Enyia, ‘The Legal Effect of Banking Contract in Nigeria: An Overview.’ *The Calabar Law Journal*, vol.16 2013-15, P.323

³ K.G. Muhammed, ‘An Appraisal of the Relationship Between Banker and Customer in Nigeria,’ *European Journal of Business and Management*, (EJBM) vol. 7. No. 4, 2015.

⁴ (1963) All NLR 193.

Section 66 of Banks and Other Financial Institution Act (BOFIA)⁵ defines bank thus: “Bank means a bank licensed under the Act.” Section 2 of the Bill of Exchange Act⁶ defines bankers to “include a body of persons whether incorporated or not who carry on the business of banking.”

Definition of Customer

A customer of the bank is someone who has, or maintain an account with a bank or who is in such a relationship with the bank that the relationship of a banker and customer exists. The law is that a customer must be an account holder with the bank, the duration of the account is not relevant here. The person becomes a customer as soon as he opens an account with the bank. In *Commissions of Taxation v. English, Scottish and Australian Bank Ltd*⁷. Where it was held that “a customer is a person whose money has been accepted by the bank which undertakes to honour cheques up to the amount standing to the customer’s credit, irrespective of whether his relationship with the banks is of the short or long duration.” The decision in *United Nigerian Insurance Co. v. Muslim (W.A.) Ltd*⁸. Also supports this position.

Meaning of Banking Transactions (Banking Business)

There are no statutory definitions of the phrase ‘banking transactions’, but a similar phrase ‘banking business’ is defined by the Banks and Other Financial Institution Acts (BOFIA)⁹ to mean “the business of receiving deposits on current account, saving account, paying or collecting cheques drawn by or paid in by customer, provision of finance or such other business as the Governor may, by order publish in the Federal Gazette, designate as banking business.”¹⁰

Banking business was also defined in the case of *Societe Bancaire (Nig) Ltd v. De Lluch*,¹¹ as “the business of banking, as defined by law and custom, consists in the issue of notes payable on demand intended to circulate as money when the banks of issue; in receiving deposits payable on demand; in discounting commercial paper, making loans of money on collateral security; buying and selling bills of exchange; negotiating loans, and dealing in negotiable securities issued by the government, state and national, and municipal and other corporations.” This definition appears to capture the core financial business of a bank.

The legal basis of the relationship that exists between a banker and his customers has come under intense scrutiny from both the judiciary and academia. Originally, the basis was thought to be one of principal and agent, then, one of trustee and beneficiary, and finally one of debtor and

⁵ Cap 37, LFRN, 2000. hereinafter referred to as BOFIA

⁶ Cap 37, LFRN, 2004, (hereinafter referred to as BEA)

⁷ (1920) A.C.683.

⁸ (1997) 1 NLR 314.

⁹ 2004.

¹⁰ S.66 BOFIA

¹¹ (1993) NWLR (PT 288) P. 502.

creditor. The law fluctuated¹² between these conceptual underpinnings before settling for the debtor and creditor rationale.

Obligations of the Bank to the Customer

In banking business and transactions, there are several obligations which parties owe to each other; and such obligations and duties have been held by the various courts to be binding on parties in the banking business and transactions. Some of these are discussed hereunder.

- 1. Duty to honour and pay cheques; to pay customers their money standing to their credit in the bank:** Banks owe customers the duty to honour customer's cheques if there are sufficient funds in the account and to adhere strictly to the terms of its mandate¹³. The bank is duty bound to honour the customers' cheques covering an amount which stand to the credit of the customer with the bank, or any other amount by way of overdraft. This legal position is fortified in the case of *Issa v. Union Bank*,¹⁴ where it was held by the court that a customer who has been granted an overdraft facility is entitled to damages from the bank if cheques drawn to utilize the facility are dishonoured by the bank. When carrying out this mandate, banks must exercise diligence and caution. Where a cheque has been altered by an authorized person, who may have raised the amount on the cheque or changed the name of the payee, if the bank pays the altered cheque, the customer may be entitled to object to the debit of his account with such unauthorized payment and the bank will be liable to recover such funds. In common law, the bank may have a defense if by the customer's conduct of carelessness, the alteration was facilitated as to induce the bank to make the payment thus the customer's conduct may give rise to estoppel. The bank also owes the customer the duty to pay him the money to the customer's credit with the bank on demand.¹⁵
- 2. Duty to Keep Correct Account:** The bank is duty bound to keep adequate, proper and correct account details of transactions with the customer. The bank may fail to keep the proper and correct account of the customer, thereby giving wrong information of the customer's account as to the actual money standing to the credit of the customer with the bank. When the account is not properly kept or wrong information and records are given to the customer, this may mislead the customer. If a bank credits a customer's account with the fund not belonging to the customer, and this mislead the customer into spending such fund, the bank is estopped from claiming the money from the customer.¹⁶ In *Lloyds Bank v. Brooks*,¹⁷ the bank credited the customer certain amount which the customer was not entitled to. The customer, not being aware of the error, withdrew and spend the

¹² See *Foley v. Hill* (1848) 2 NL Cas 28, 9ER 1002); *Ekpenyong v. State* (1967) 1 ANLR 285 287); *Yusuf v. cooperative Bank* (1994) ASCNJ b)

¹³ Ibid footnote 1 p.10

¹⁴ (1993) NWLR (PT 288) P. 502.

¹⁵ Ibid 492

¹⁶ Ibid p.12

¹⁷ (1950) 6 LDAB 161-169.

money. In an action to recover the money, when the error was discovered by the bank, the court held that the bank was estopped from recovering the money as the misled the customer with the wrong information about her account balance.

3. **Duty to Act on the Mandate, Instructions and Authorization of the Customer:** the bank has a duty to strictly follow the instructions of the customer and as such payments made without the authorization of the customer will be invalid and rejected by the customer. In *Union Bank v. Adediran*,¹⁸ a customer substituted a signatory to an account with the bank and replaced the signatory with another and notified the bank accordingly. The bank went ahead to honour a cheque from the replaced signatory and the bank was held liable to the amount paid out from the cheque from the signatory. Also, where a customer has effectively and validly countermanded a cheque issued by him, the bank must not honour the cheque.

S.75 of the Bill of Exchange Act, which provides that: “The duty and authority of a banker to pay a cheque drawn on him by his customer are determined by-

- a) Countermand of payment
- b) Notice of the customer’s death.”

The banker’s duty to honour a cheque ceases immediately the cheque is countermanded or the customer dies.

4. **Duty of Confidentiality and Secrecy:** The bank owes it as a duty to keep mute on the transactions of the customer, although there are exceptions to this rule. The bank must not disclose or divulge information about the customer’s account details and transactions without the consent of the customer. The bank owes the customer duty of utmost confidentiality and should not disclose confidential information of a customer except with the customer’s consent, by court order, or for the interest of the bank. The law on bank confidentiality is based on the old case of *Tournier v. National Provincial & Union Bank of England*.¹⁹ The bank disclosed to its customer’s employer that the customer’s unpaid cheques were drawn in favour of a bookmaker’s account, that “cheques passing through Tournier’s account were for betting men and we think that Tournier is better heavily”. As a result of this information, the customer’s employer did not renew his contract with the customer. The court held that the bank breached the duty of confidentiality owed the customer and was liable in damages.

In general, the bank owes a duty of confidence to its customer, but there are instances where it is possible to override a bank’s duty of confidentiality. They are: the disclosure by compulsion of law; the bank is under a duty to the public to disclose; the interest of the bank requires disclosure; or the disclosure is made as a result of express or implied consent of the customer.²⁰

¹⁸ (1932) 1 KB 321

¹⁹ (1924) 1 KB 461

²⁰ *Tournier v. National Provincial & Union Bank of England*, (1924) 1 KB 461

Other duties owed customers by the bank are:

- Duty to keep multiple accounts of the customer separate and distinct.
- Duty to report cheques dishonoured as forged.
- Duty to supply cheque and pass books.
- Duty to give reasonable notice before closing account.

Obligations of the Customer to the Bank

1. **Duty to Exercise Reasonable Care in Drawing Cheques:** The customer as a duty to draw or fill his cheque in such a way as not to facilitate alteration. The bank will not be responsible if a wrong payment is made as a result of the careless way in which the customer drew or filled out the cheque. On irregularly drawn cheques which occasioned loss, the customers were held to be liable for the losses.
2. **Duty to Inform the Bank of Missing or Forged Cheque:** A customer is expected to inform or report to the bank if he loses his cheque booklet or reasonably suspects that his cheque has been forged and is about to be drawn from his account with the bank.²¹
3. **Duty to Make Demand on the Bank:** The bank is in custody of the customer's money and may be referred as a debtor to the customer. Notwithstanding, the customer must make a demand for payment of any amount in his account before such amount can be paid to him.²²

Mistaken Payments in Banking Transactions

If there are mistaken payments by the bank or customer from one account to another account, or from the bank to a customer in error or from the bank to a total stranger,²³ it may not be possible to stop or reverse the payment once it has been made. The payer may only be able to recover such a payment made, with the consent of the account holder who received it, that is the recipient or payee, or by a court order. If a customer/payer asks the bank to recover payment from the recipient's account, the bank will use reasonable effort to do so, and charges may apply as permitted by law or regulation. Reversing such transactions may be very complicated and this may involve bank charges and unnecessary cost and expenses.

Banks often ask for an account name as well as an account number, their systems do not always check that they match or the systems may be faulty or hacked for the purposes of committing fraud. Electronic payment systems that require consumers to enter numbers are inherently prone to error and system failure.

One key issue, that is very vital in mistaken payment, involving bank transactions, is the time lapse or time interval between the transactions. The earlier the information of the mistaken

²¹Ibid p.17; *Greenwood v. Martins Bank; Brewer v. Westminster Bank Ltd.*

²² Ibid 17

²³ As in the case of *Trade Bank PLC v. Benilux (Nig) Ltd (2003) NWLR (Pt 825), 416*. Where a banker money to a total stranger. The banker was held liable.

payments gets to the bank, mainly the receiving bank, the better the chances of recovering the money or reversing the transaction. It may be more difficult to retrieve a mistaken payment if it has gone into a valid account and lingered for a period of time. The recipient may have disbursed the fund and then in an action to recover the payment, plead estoppel and change of position as defense when the payer files an action against the recipient.

There are consequences for mistaken payments. Even though there is a general right to recover money paid in error, the bank may not be able to get the recipient as he may withdraw the money and disappear. Even if the customer/recipient does not disappear, it may be difficult for the bank to recover such fund if the customer has changed his position by virtue of the payment received in good faith, not being aware of the mistake from the bank. If a cheque was issued by the recipient upon the payment, unaware of the mistake, and dishonoured (after the bank realized the mistake) based on the negligent payment by the bank,²⁴ the bank may be liable for damages.

There are various ways in which there may be mistaken payments in banking transactions. They are:

1. **A Bank May Pay a Cheque without a Valid Mandate or Pay a Cheque to the Wrong Person not entitled to the Payment:** In the case of a current account, a bank may pay a cheque without the mandate, authorization, or instruction of the customer. Such cheque may or may not be drawn by the customer. If the cheque was drawn by the customer, the customer may have countermanded the cheque, or the cheque was not properly drawn by the customer, thereby giving room for fraudulent alteration and raise of the amount,²⁵ or the cheque was forged. The bank may also without knowledge of any forgery, make payment on forged drawn cheques. Thus the bank cannot debit the customer's account if it makes payment against an instrument that bears a forged drawer's signature.²⁶ The bank may also make the payment to a total stranger, not known to the bank or the customer. This was the situation in *Trade Bank PLC v. Benilux (Nig.) Ltd.*²⁷ In this case, the bank was mandated to pay the sum of ₦1,000,000 to Benilux, mistakenly paid the money to a total stranger. The court while relying on series of cases, held that the bank was liable for the tort of conversion and was bound to pay the money to the proper owner as they were originally mandated by the customer, even though Benilux was not their customer. The Supreme Court arriving at the decision held that "it is settled law by a long string of authorities that bankers who collect cheques and pay them to those not entitled to the proceeds of the cheques are guilty of the tort of conversion."²⁸

²⁴ P. K. Mogaji, 'Statement of Bank Account: The Practice, the Right and Duties of The Customer and the Banker.' Journal of The Institute of Bank's of Nigeria, (CIBN) Akure. Vol. 4, No 1. 2011.

²⁵ A. Arora, 'Banking Law,' Pearson, 2014, p.614.

²⁶ Ibid p.613

²⁷ (2003) pt 825, p.416.

²⁸ See further *Kleinwort v. Comptroller National d'Escompte de Paris*(1984) 2 QB 167. *Fine Art Society v. Union Bank of London*(1886-87) 17 QBD 705. *A. L. Underwood Limited v. Bank of Liverpool and Martins*(1924) 1 KB 775. *Bute (Marques) v. Barclays Bank*(1955) 1 QB 202.

The bank may be liable for not properly checking or confirming the signature of the account owner or signatory to the account. In *Union Bank v. Adediran*, a customer substituted a signatory to an account with the bank and replaced the signatory with another and notified the bank accordingly. The bank went ahead to honour a cheque from the replaced signatory, and was held liable to the amount paid out from the cheque drawn by the former signatory. The bank had made the payment without the authorization of the customer.²⁹

This also includes payment on forged instruments, like forged the signature of the drawer or payee, forged signature on withdrawal's slip, etc. the cheque may also be signed in excess of the actual amount, and unauthorization alteration of the instrument. Also, in *London Joint Stock Bank v. Macmillan & Ahor*,³⁰ the bank was held not liable for the mistaken payment made as a result of the customer's carelessness. Here, the customer out of his own carelessness did not draw or fill out the cheque properly, instead left spaces for his agent to fill in and he increased the amount on the cheque, the bank was held not liable for the excess amount paid out to the customer's agent.

The bank cannot debit the customer's account over the payment of a forged cheque unless the customer on becoming aware of the forgery of his cheque, withheld the information from the bank. Also, in *Greenwood v. Martins Bank Ltd.*,³¹ the customer was aware that his wife was drawing his cheque and did not inform the bank. The man brought an action against the bank after his wife died. The court held that the customer was estopped from claiming the money from the bank since he was aware that the wife was drawing money from his account with his cheque.

Defenses under Mistaken Payments of Cheques

It is to reduce liability of banks in mistaken payments of cheques to wrong persons that the law provided some defenses for the banks particularly where the bank acted reasonably and in good faith.

- a) One of such defenses is found in S.60 of the Bill of Exchange Act 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."³²

This provision states clearly that where a banker pays a cheque drawn on him in good faith and in the ordinary course of business, he is not prejudiced by the fact that an endorsement was forged or made on the cheque without authority and he is deemed to

²⁹*Union Bank v. Adediran*(supra),

³⁰ (1932) 1 KB 321

³¹ (1933)

³² S.60 Bill of Exchange Act, 1882, Cap B8 LFN, 2004.

- have paid the cheque in due course in accordance with its mandate and discharged its obligation.
- b) The liability of the payee bank may also arise where a crossed cheque is not paid in accordance with the crossing. Thus, if it pays in accordance with the crossing, it will also be protected from liability if the payment is made in good faith and without negligence.³³S.82 Bill of Exchange Act provides that:
- “where the banker, on whom a cross 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 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 right and placed in the same position as if payment of the cheque has been paid to the true owner thereof.”³⁴
- c) **Collection Bank:** If a bank collects payment of a valid cheque for a person who is not the owner, he exposes himself to an action for conversion at the suit of the true owner.³⁵ It can however escape liability by the provisions of S.77 (2) of the Bill of Exchange Act, which provides that:
- a) “where a banker, in good faith and without negligence 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, received 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.”

If a bank must succeed under this defense, it must prove that it acted in good faith that there was no negligence on its part and that transaction was for a customer.

Instances of Negligence on the Part of the Bank

- a) Collecting official cheques without enquiring for the private account of a company official or public officer.
- b) Collecting money payable to a partnership account without enquiring for the private account of a partner.
- c) Collecting money for the private account of an official, cheque payable to him in this capacity.

³³ Ibid Footnote 1,p. 18.e.

³⁴ See S.82 Bill of Exchange Act

³⁵See *Trade Bank PLC v. Benilux (Nig.) Ltd.*

- d) Collecting cheque for an amount which is manifestly inconsistent with the customer's status in accounts.
- e) Collecting cheques crossed "A/C only" for an account other than that of the payee.

A bank cannot not be said to be acting in the ordinary course of business:

- a) Where it pays before or after the normal business hours.
 - b) Where it pays a crossed cheque on the counter.
 - c) Where it pays an open cheque presented through post by a stranger.³⁶
2. **Payment on Cheque despite a Valid or Effective Countermand Orders:** S.75 of the BEA stipulates that the banker's duty to honour a cheque ceases immediately the cheque is countermanded.

S.75 of the Bill of Exchange Act, which provides that:

"The duty and authority of a banker to pay a cheque drawn on him by his customer are determined by-

- a) Countermand of payment
- b) Notice of the customer's death."

The bank is bound to respect the customer's instructions where the customer has effectively and validly countermanded a cheque, if the bank goes ahead to honour the cheque, the bank becomes solely liable and cannot debit the customer.

3. **Where Banks Honour a Cheque in Excess of Amount Credited to Customer's Account or Credit the Customer's Account Wrongly:** If a bank honours a cheque or any other form of negotiable instrument and subsequently discovers that the customer had insufficient funds in his account. The bank may also credit the customer's account with funds that do not belong to the customer. The bank may be able to recover the payment if the customer is fully aware of the mistaken payment and wants to take undue advantage of the bank's error out of fraud. In *Rhind v. Commercial Bank of Scotland*³⁷ where the customer was aware that the bank made a mistake in posting wrong fund into his account but wanted to take advantage of the mistake, the court did not allow him to do so as he was fully aware of the error. If the customer's position has not been altered, by the wrong payment, the bank is at liberty to show that the entry was made by mistake and reverse the payment.

If the customer was of the mistaken belief, that he had sufficient money, the bank may be estopped, and not be able to recover the fund.³⁸ Also, in *Holt and Co. v. Markham*,³⁹ the account of a customer was credited with wrong gratuity entitlement for long, it was held that the conduct of the banker led the customer to believe that the money was his own

³⁶ Ibid footnote 1, p.21

³⁷ (1860) 3 INlacq. H.L.R. 643.

³⁸ See *Lloyds Bank v. Brooks*

³⁹ (1923) 1 K.B. 504.

and as he had altered his position by spending the money, it would therefore amount to hardship to enforce repayment of money.

There are circumstances where banks that pay out their customer's money, without a valid mandate may debit their account. But in a situation whereby a computer error leads to an automated payment being made twice, or a bank error leads to a cheque being honoured despite the customer's valid countermand. In such circumstances, the bank's only remedy is to reclaim the money from the payee rather than from its customer or the bank will be liable. This fact is supported by the decision in *Nasaralai Ent. Ltd. v. Arab Bank*⁴⁰ where the Court held that a bank is bound to act only on the instructions of the customer. Also, in *Union Bank v. Adediran*,⁴¹ it was explained that payee refers to either the payee or his bank. And restitution may be sought from the payee or his bank.⁴²

Mistaken Payments Made to the Wrong Account and Banking Practices in Reversing Mistaken Payments

If there is a mistaken payment, or payment made in error to a wrong or another account, the person who made the payment should contact his or her bank as soon as possible. The sooner contact with the bank is made, the better the chance of recovering the money. If the payment has been made to an invalid account, it will bounce back into the payer's account.⁴³ It may be more difficult to retrieve a mistaken payment if it has gone into a valid account and a period of time has elapsed.

If a payment is made to a third party in error the payer should be contacted so as to get more information about who the money was paid to, that is, the details and particulars of the recipient, the much he knew as at the time of the payment, then make attempt to recover the money through the recipient's bank. Although, the bank owes a duty of confidentiality to its customers, which means it may not be able to reveal information to anyone about the particulars and details of the recipient, but with corroboration on the part of both banks and depending on the circumstances, some details of the recipient may be released to enable them trace the fund. The details can also be released on the order of court after a court action must have been instituted against the relevant parties. The payer may file an action in court, joining all the parties involved in the transaction-the recipient's bank, the payer's bank and the recipient.

The banks may reverse payment paid into an account, with the recipient's consent and without giving notice if:

- They made an error;

⁴⁰ (1986) 17 NSCC (PT 2) 1039

⁴¹ (1987)1 NWLR (PT 47) P. 52.

⁴² Ibid at 514; see also Dow, Steven, Ellis, Nan, 'The Payor Bank's Right to Recover Mistaken Payments: Survival of Common Law Restitution Under Proposed Revisions to Uniform Commercial Code Articles 3 and 4' Indiana Law Journal 1990 vol 65, Iss. 4, 983. Available at <http://www.repository.law.indiana.edu/ilj/vol65/iss4>. Accessed on 18/7/2017.

⁴³ www.bankomb.org.nz-BankingScheme. Accessed on 14/7/2017.

- The person or organization making the payment has made an error;
- Another bank or financial institution involved in making the payment has made an error or has dishonoured the payment;
- The bank is required to do so by relevant law or legal rules, or the rules of a card scheme or payment system;
- The bank reasonably suspects the payment is being used to facilitate fraud, money laundering, or other criminal offences; or
The payment was unauthorized, and the bank reasonably believes that the recipient is not legally entitled to retain it.

As a general rule, banks can only reverse mistaken payments made in error to a particular account, with the consent of the account holder who received the payment or the bank would have breached the duty of confidentiality owed the customer. If a payer or a paying bank reports a mistaken payment, the payer's bank and the recipient's bank must co-operate to recover the payment. In banking practice, this usually involves:

- The payer's bank contacting the recipient's bank to do what is called "*Post No Debit*" (PND): This happens if the time interval in-between the transaction very short, or the mistake was detected immediately after the payment was made. In this situation, the paying bank, alerts the recipient's bank of the mistaken payment and instructs the recipient's bank not to post any debit to the recipient's account pending when the issues are resolved.⁴⁴
- The payer's bank contacting the recipient's bank to "place a lien" on the recipient pending when the issue will be resolved, however, not for long. This will be done pending when the recipient will be contacted for consent to reverse the transaction. This usually happens when there is a lag in the period of the mistaken payment, the recipient has received alert of the payment but the fund is still in the recipient's account and has not been withdrawn or transferred.
- The recipient's bank contacting the account holder (recipient) to ask their permission to reverse the transaction.
- Filing an action in court to recover mistaken payments.

If a customer mistakenly transfer funds to a wrong account liaises or agrees with his bank (payer's bank) over certain conditions like producing a collateral or guarantor for the money transferred by mistake, the paying bank (payer's bank) may enter into indemnity with the receiver's (recipient or payee) bank and request that the transaction be reversed and the money returned to the proper account or paid to the rightful owner.⁴⁵

If the recipient of the payment refuses to return the money, the payer will need to resolve the issue directly with the recipient by other means available. This might involve bringing in the law

⁴⁴ P. K. Mogaji, 'Statement of Bank Account: The Practice, the Right and Duties of The Customer and the Banker.' JCIBN, Vol. 4, No 1. 2011.

⁴⁵ Ibid Mogaji.

enforcement agencies and filing an action in court. Although there may be privacy issue in getting the recipient's contact details, at this stage, the law will take its course if the payer seeks court order. Mistaken payments can be made by a bank, financial institution, customer or customer's agent sent by the customer.

Mistaken Payment Received by Payee (Recipient of a Mistaken Payment):

If a recipient receives payment in his/her account that he/she was not expecting, the recipient should contact his bank as soon as possible to inform the bank of the development. If the recipient's bank contacts the recipient for reversal of transaction, the recipient ought to agree to reverse the transaction which was made out of inadvertence or in error and allow the money to be returned to the rightful owner.

If the money has been spent by the recipient, the recipient will need to repay the money unless all or any of the following circumstances apply:

1. The recipient received the payment in good faith: he/she reasonably believed the money was due him or owed him/her.⁴⁶
2. The recipient altered his/her position reasonably and in reliance received that payment: this means that he/she used the money, believing reasonably that the money was due or owed him, and did not act fraudulently or recklessly.
3. It will be inequitable to require the recipient to repay the money: this is considered whether it is fair for the recipient to repay the money, given the recipient's particular situation and the circumstances surrounding the payment/transaction, but under restitution in common law, this defense may not avail the recipient.

Common Law Restitution for Mistaken Payment

Restitution means giving back some form of property to its original owner.⁴⁷ It can also be defined as "the award of a generic group of remedies which have one common function, namely to deprive the defendant of a gain rather than to compensate the plaintiff for loss suffered."⁴⁸

The law of restitution deals with whether a claimant can claim a benefit from the defendant rather than compensation for the loss suffered by him.⁴⁹ The purpose of the law of restitution is to prevent unjust enrichment; and restitution for mistaken payments which was enforced under the writ of *indebita asumpsit* in quasi-contract under Roman law. '*Indebita assumpsit*' is a Latin phrase which "means promise to pay a debt or embezzlement."⁵⁰ Others have argued that the basis for restitution of mistaken payment should be corrective justice.⁵¹ Although, restitution is

⁴⁶ *Lloyds Bank v. Brooks*

⁴⁷ F. Emiri, 'The Law of Restitution in Nigeria', Lagos; Malthouse Press Limited, 2012. P.1

⁴⁸ G. Virgo, 'The Principle of the Law of Restitution', Oxford; Clarendon Press 1998.

⁴⁹ A. Aura, 'Banking Law', Pearson, 2014, p.589.

⁵⁰ Black's Law Dictionary, 7 edition.

⁵¹ www.lawteacher.net. Accessed on the 20/7/2017.

one of the courses in law, it is recognized by few common law countries like United States of America, England, Australia and only few of their universities offer the law of Restitution as a course. It is not a known or popular course in Nigeria and so no university offers Restitution as a course. But Festus Emiri⁵² has written a book on Restitution and others have written articles on the subject.

Restitution is one of the ways of recovering mistaking payments or reversal of involuntary bank transactions made in error recognized in common law.⁵³ Although, restitution is an adjunct of law of contract, other common law countries have it as civil liability.⁵⁴

In *Kleinworth Benson Ltd v. Lincoln City Council*⁵⁵ it was held that “where money is paid to another under the influence of a mistake, that is upon the supposition that a specific fact is true, which would entitle the other to the money, but which fact is untrue, and the money would not have been paid if it had been known to the payer that the fact is untrue, and the money will lie to recover it back, and it is against conscience to retain it though a demand may be necessary in those cases in which the party receiving may have been ignorant of the mistake.” Where a bank pays money as a result of a mistake, it may bring an action for money had and received against the payee as this may be termed an unjust enrichment of the payee at the bank’s expense. The bank’s mistakes render the enrichment of the payee unjust as it vitiates the bank’s intention of transferring the benefit to another. The cause of action is complete upon receipt of the money and continuous retention of the mistaken payment.⁵⁶

In *Sempre Metals Ltd. v. Inland Revenue Commissioner*,⁵⁷ the court held that, “a mistaking (payer) should be entitled to recover compound interest as a matter of right from the payee for the period between the payee’s receipt of the payment and the payer’s recovery of those funds. Such interest represents the ‘time value’ of the mistaken payment and the full benefit that the payee had derived from its use of the funds.” To succeed in the claim for recovery, the bank must show that it once owned the money mistakenly paid away.

Defenses Available to a Recipient of Mistaken Payment under Common Law

The defense available to a recipient who receives money out of the mistake of another are change of position, estoppel and consideration.

⁵² Ibid

⁵³ Ibid 2,p.2.

⁵⁴ Ibid 2, p.3.

⁵⁵ (1925) 133 LT512, per Parke B. See also *Kelly v. Solari* (1841) 9 M&W 54.

⁵⁶ E. P. Ellinger, E. Lomnicka, C.V. M. Hare ‘Ellinger’s Modern Banking Law, London; Oxford University Press,(5th edn), p.515

⁵⁷ (2007) 3 WLR 354, 19.

1. **Change of Position:** This defense is like estoppel, but the element of a representation is not required. The enriched payee will succeed if he can show that he acted to his detriment on the faith of the receipt. This defense is based upon the payee's change of position. "It appears inequitable to demand that a person repay money where he has reliance on the bank's mistaken payment, in reliance on its receipt, incurred a liability or has given up an advantage. This argument, though not clear cut, affords a payee the plea that, the windfall", which he thought was due him, has encouraged him to incur a liability."⁵⁸ The payee may have paid out the money without knowledge of the bank's mistake. The payer's right to recover mistaken payment is not affected by a claim that a payee may have against the third party. It is sufficient that the payer is under an operative mistake concerning his own motive or reasons for making payment.⁵⁹ See *Lloyd Bank v. Brooks*. It was held that the risk lies on bank for the mistaken payment made by the bank into the customer's account. *Holt and Co. v. Markham*.⁶⁰ In this case, where the account of a customer was credited with wrong gratuity entitlement, it was held that the conduct of the banker led the customer to believe that the money was his own and as he had altered his position by spending the money, it would therefore amount to hardship to enforce repayment of the money.
2. **Estoppel:** The defense of estoppel differs from change of position as the recipient depends on a representation by the person making the payment. A bank mistakenly makes payment into the account of another who is unaware of the mistake, and the customer was of the mistaken belief, that he had sufficient money and goes ahead to make use of the money, the bank may be estopped, and not be able to recover the fund. See *Lloyds Bank v. Brooks*. The position of the law is changing with the decision in *Scottish Equitable v. Derby*.⁶¹ The court held that it has unconscionable or inequitable to allow the recipient to keep the whole of the mistaken payment of £172,351 when his resultant irrecoverable expenditure was limited to £9,662.

Conclusion/Recommendations

It is apparent from the foregoing that several mistaken payments are made during banking transactions and these may be as a result of negligence on the part of the bank or the customer. Mistaken payments made by banks in the course of their transactions to other accounts may be recoverable. However, the bank may be liable for conversion if it goes outside its mandate to pay a cheque drawn on it by a customer to a wrong payee. In an action against the recipient or payee, for recovery of mistaken payments, the defendant or recipient would have a herculean task proving to the court why the money should not be recovered from him despite the defense recognized in common law.

⁵⁸*Ibid*, p. 527.

⁵⁹*Ibid*, p. 523.

⁶⁰ (1923) 1 K.B. 504.

⁶¹ (2000) 3 ALL ER 793.

It is recommended that when carrying out its mandate to honour cheques, banks must exercise diligence and caution. One needs to take real care when giving, writing or entering account numbers or drawing cheques. However, if a repayment is mistakenly paid into an account, the receiving banks should be notified immediately; the receiving bank should return the payment and debit the account of its customer unless it believes that it can establish that it has accounted to its customer, that is, the money has been withdrawn by the customer.

If the customer has closed the account or if it may be shown in some other way that the receiving banks as accounted to its customer, the payer must go after the customer instead of the receiving bank. Therefore it must produce evidence that it has accounted to the customer, and this in turn will require disclosure of the customer's name which is clearly with the "own interest", an exception of the *tournier case*. Armed with information, the payer may pursue the ultimate payee if he or she so wishes.

Electronic payment systems that require consumers to enter numbers are inherently error-prone. The systems should be designed, both physically and legally, to minimize these problems and to resolve them equitably when they occur.

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- ¹(1963) All NLR 193.
- ¹Cap 37, LFRN, 2000.hereinafter referred to as BOFIA
- ¹ Cap 37, LFRN, 2004, (hereinafter referred to as BEA)
- ¹(1920) A.C.683.
- ¹(1997) 1 NLR 314.
- ¹ 2004.
- ¹ S.66 BOFIA
- ¹(1993) NWLR (PT 288) P. 502.
- ¹ See *Foley v. Hill* (1848) 2 NL Cas 28, 9ER 1002); *Ekpenyong v. State* (1967) 1 ANLR 285 287); *Yusuf v. cooperative Bank* (1994) ASCNJ b)
- ¹ Ibid footnote 1 p.10
- ¹(1993) NWLR (PT 288) P. 502.
- ¹ Ibid 492
- ¹ Ibid p.12

¹ (1950) 6 LDAB 161-169.

¹ (1932) 1 KB 321

¹ (1924) 1 KB 461

¹*Tournier v. National Provincial & Union Bank of England*, (1924) 1 KB 461

¹*Ibid* p.17; *Greenwood v. Martins Bank*; *Brewer v. Westminster Bank Ltd.*

¹ *Ibid* 17

¹As in the case of *Trade Bank PLC v. Benilux (Nig) Ltd (2003) NWLR (Pt 825)*, 416. Where a banker money to a total stranger. The banker was held liable.

¹ P. K. Mogaji, 'Statement of Bank Account: The Practice, the Right and Duties of The Customer and the Banker.' *Journal of The Institute of Bank's of Nigeria*, (CIBN) Akure. Vol. 4, No 1. 2011.

¹ A. Arora, 'Banking Law,' Pearson, 2014, p.614.

¹ *Ibid* p.613

¹(2003) pt 825, p.416.

¹See further *Kleinwort v. Comptroller National d'Escompte de Paris* (1984) 2 QB 167. *Fine Art Society v. Union Bank of London*(1886-87) 17 QBD 705. *A. L. Underwood Limited v. Bank of Liverpool and Martins*(1924) 1 KB 775. *Bute (Marques) v. Barclays Bank*(1955) 1 QB 202.

¹*Union Bank v. Adediran*(*supra*),

¹ (1932) 1 KB 321

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¹ S.60 Bill of Exchange Act, 1882, Cap B8 LFN, 2004.

¹ *Ibid* Footnote 1, p. 18.e.

¹ See S.82 Bill of Exchange Act

¹See *Trade Bank PLC v. Benilux (Nig.) Ltd.*

¹ *Ibid* footnote 1, p.21

¹(1860) 3 INlacq.H.L.R. 643.

¹See *Lloyds Bank v. Brooks*

¹(1923) 1 K.B. 504.

¹ (1986) 17 NSCC (PT 2) 1039

¹(1987)1 NWLR (PT 47) P. 52.

¹ *Ibid* at 514; see also Dow, Steven, Ellis, Nan, 'The Payor Bank's Right to Recover Mistaken Payments: Survival of Common Law Restitution Under Proposed Revisions to Uniform Commercial Code Articles 3 and 4' *Indiana Law Journal* 1990 vol 65, Iss. 4, 983. Available at <http://www.repository.law.indiana.edu/ilj/vol65/iss4>. Accessed on 18/7/2017.

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¹ Black's Law Dictionary, 7 edition.

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¹(1925) 133 LT512, per Parke B. See also Kelly v. solari (1841) 9 M&W 54.

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