

8,1965

In The Privy Council

No. 44

of 1964

ON APPEAL

FROM THE SUPREME COURT OF NEW SOUTH WALES

COMMERCIAL CAUSES JURISDICTION

IN CAUSE No. 8189 of 1961

Between

UNIVERSAL GUARANTEE PTY. LIMITED

Appellant (Plaintiff)

and

THE NATIONAL BANK OF AUSTRALASIA LIMITED

Respondent (Defendant)

CASES

UNIVERSITY OF LONDON
INSTITUTE OF ADVANCED
STUDIES
-8 FEB 1966
25 BEDFORD SQUARE
LONDON, W.C.1.

80029

8, 1965

CASE FOR THE APPELLANTS

10 1. This Appeal is brought as of right and pursuant to final leave granted by the Supreme Court of New South Wales on the 7th day of September 1964. Record.

 2. The action was tried by Mr. Justice Manning of the Supreme Court of New South Wales without a jury as a commercial cause under the Commercial Causes Act (New South Wales) 1903-1957. His Honour on 22nd day of July 1964 found a verdict for the Defendant after a hearing which commenced on the 8th June 1964 and continued on the 9th, 10th, 11th, 20 12th and 16th days of June.

 3. The plaintiff was for many years and still is a customer of the defendant Bank at its Wentworth Avenue Branch in Sydney.

 4. Between 2nd December 1954 and 21st October 1960 an employee of the Plaintiff one Moffitt perpetrated at least 165 frauds involving a sum of £59,747. Particulars of these frauds are set out in paragraph 20 of the Points of Claim. The method 30 by which Moffitt perpetrated these frauds was to obtain cheques properly signed on behalf of the plaintiff and drawn on the defendant Bank. Such cheques were in respect of non-existent transactions and were payable to a named payee "or order"; were all crossed with two transverse parallel lines between which lines the words "Not Negotiable" and "Account Payee only" appeared. The named payee was either a fictitious person or a person with whom the plaintiff company had had other business transactions. pp. 8 to 11.
p. 37, l. 1 to
p. 39, l. 30.

40 6. Moffitt having obtained such a cheque, then wrote the name of the payee on the back of the cheque and also wrote on the back of the cheque "Endorsement Guaranteed", impressed a rubber stamp thereunder which read "Per Pro Universal Guarantee Pty. Limited" and signed his name thereunder. Taking the first cheque referred to in paragraph 20 of the Points of Claim as an example the front of the cheque in so far as material was p. 8, l. 8.

Record.

in the following form :

UNIVERSAL GUARANTEE PTY. LTD.	
Division of Electronic Industries Ltd.	147-149 Castlereagh Street, Sydney.
No. 6531	
THE NATIONAL BANK OF AUSTRALASIA LIMITED	
50 Wentworth Avenue	Sydney. N. S. W.
10 THE SUM OF DATE 1.12.54.	TO THE ORDER OF
One Hundred & Ninety Five Pounds--	K.R.Henry £195.0.0.
FOR UNIVERSAL GUARANTEE PTY. LTD.	
<u>G. L. Follett</u>	<u>W. R. Moffitt</u>
20	

and the back of the cheque after treatment by Moffitt was as set out hereunder:

K. R. Henry
Per Pro Endorsement Guaranteed
UNIVERSAL GUARANTEE PTY. LIMITED.
W. R. Moffitt

p. 8, 1.8 to
p. 11, 1.39.

30 In so far as material all the other 164 cheques set out in paragraph 20 were in the same form and were treated in the same way by Moffitt.

7. The plaintiff company received from day to day considerable sums of cash and this together with cheques were held by the cashier until the banking was done each day.

40 8. Moffitt obtained cash for the cheques set out in paragraph 20 of the Points of Claim by taking cash from time to time from the plaintiff's moneys to be banked. He thereupon had such cheques included in the plaintiff's banking, so that the total banking for each day upon which such a cheque was dealt with would accord with the plaintiff's records of moneys received.

9. Moffitt at all material times held the position in the plaintiff company known as Acceptance Officer and

Record.

The book contained an original and duplicate and the banking was made up so that the teller receiving the deposit for the defendant tore out and retained the original and stamped and signed the duplicate which remained in the book and was handed back to the customer.

11. It was not in dispute between the parties that Moffitt was authorised to sign cheques with another authorised officer of the plaintiff company and in fact a number of the
10 cheques set out in paragraph 20 of the Points of Claim were signed by Moffitt on the face of the cheques.

12. Although the bank from time to time obtained written authorities from the plaintiff company for the operation of the plaintiff's account with the defendant the only authority in existence at the date of the hearing was a copy of one produced by the plaintiff and is set out in paragraph 7 of the Points of Claim. The Points of Defence did not put this authority in
p.4. issue.

20

13. As far as the endorsement of cheques was concerned it is submitted by the plaintiff company that the only authority Moffitt had was in the terms of the authority referred to in paragraph 7 of the Points of Claim which was in the following words - "has also been authorised to endorse cheques and other instruments payable to or to the order of the company". It is submitted that the cheques in question were not payable to or to the order of the Company even after they had been treated by Moffitt in the manner mentioned above.
p.5, 11.8 to 10.

30

14. The plaintiff claimed that the defendant bank had been negligent in accepting cheques drawn and endorsed as set out in paragraph 6 above to the credit of the plaintiff's own bank account and that it was as a result of such negligence that Moffitt was able to perpetrate the frauds referred to above.

15. The plaintiff also claimed that the defendant was negligent in issuing duplicate deposit slips which did not correspond with the original retained by the bank and that as a result of
40 this negligence Moffitt was able to perpetrate the frauds referred to above.

16. The plaintiff claimed that if the bank had not debited to the plaintiff's account the cheques fraudulently dealt with by Moffitt as indicated above or had insisted on duplicate deposit slips corresponding with the originals it would have been impossible for Moffitt to continue to perpetrate the frauds described above.

17. The plaintiff framed its action both on breach of an implied contract arising from the relationship of banker and customer and on negligence as already indicated but for all practical purposes the duty owed by the defendant bank to the plaintiff would, it is submitted, be the same whether viewed in contract or in tort.

Record.

18. The English Cheques Act 1957 (5 and 6 Eliz. 2. C. 36) has not been enacted in Australia and the law relating to bills of exchange is contained in the Bills of Exchange Act (Commonwealth) 1909-1958 and the relevant Sections touching upon the questions involved in this Appeal with an indication of the comparable Section of the English Bills of Exchange Act 1882 (45 and 46 Vict. C. 61) are as follows:-

Section 65 - (1) 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.

(2) An order on demand, drawn by or on behalf of a banker at one place of business on and payable by the banker either at the same or at some other place of business, shall, for the purpose of the protection of the banker under this section, be deemed to be a bill payable to order on demand.

(Sub-section (1) corresponds with Section 60 of the English Act of 1882 but sub-section (2) does not appear in the English Act.)

Section 82 - (1) Where a cheque bears across its face an addition of -

(a) the word "bank" or the words "and company" or any abbreviation thereof respectively, 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",
 that addition constitutes a crossing, and the cheque is crossed generally.

(2) Where a cheque bears across its face an addition of the name of a banker, either with or without the word

Record.

"not negotiable", that addition constitutes a crossing, and the cheque is crossed specially and to that banker.

(This Section corresponds with Section 76 of the English Act of 1882 with the exception that Section 76 does not include the words - "the word 'bank' or" - or the word - "respectively".)

Section 85 - (1) Where a cheque is crossed specially to more than one banker (except when crossed to an agent for collection, 10 being a banker) the banker on whom it is drawn shall refuse payment thereof.

(2) Where a banker on whom a cheque is drawn -
 (a) if the cheque is crossed specially to more than one banker (except when crossed to an agent for collection, being a banker), pays the cheque; or

(b) if the cheque is crossed generally, pays it otherwise than to a banker; or

20

(c) if the cheque is crossed specially, pays it otherwise than to the banker to whom it is crossed or his agent for collection, being a banker,

such banker is liable to the true owner of the cheque for any loss he may sustain owing to the cheque having been so paid.

(3) Provided that where a cheque is presented for payment which does not at the time of presentment appear -

- 30 (a) to be crossed, or
 (b) to have had a crossing which has been obliterated, or
 (c) to have a crossing which has been added to or altered otherwise than as authorized by this Act,

the banker paying or receiving payment of the cheque in good faith and without negligence shall not be responsible or incur any liability, nor shall the payment be questioned by reason of the cheque having been crossed, or of the crossing having been obliterated or having been added to or altered otherwise than as authorized by 40 this Act, and of payment having been made otherwise than to a banker or to the banker to whom the cheque is or was crossed, or to his agent for collection, being a banker, as the case may be.

(Sub-section (1) of this Section reproduces Section 79 (1) of the English Act of 1882. Sub-sections (2) and (3) are in substance the same as Section 79 (2) of the English Act.)

Section 87 - Where a person takes a crossed cheque which bears on it the words "not negotiable," he shall not have and shall not be capable of giving a better title to the cheque than that which the person from whom he took it had. Record.

(This Section reproduces Section 81 of the English Act of 1882.)

Section 88 - (1) Where a banker in good faith and without negligence receives payment for a customer of a cheque crossed generally or specially to himself, and the customer had no title or a defective title thereto, the banker shall not incur any liability to the true owner of the cheque by reason only of having received such payment.

(2) A banker receives payment of a crossed cheque for a customer within the meaning of this section, notwithstanding that he credits his customer's account with the amount of the cheque before receiving payment thereof.

(Sub-section (1) of this Section reproduces the effect of Section 1 of the Bills of Exchange (Crossed Cheques) Act 1906 (6 Edward VII C. 17, repealed by Cheques Act 1957).)

19. The Appellant makes the submissions set out hereunder and in doing so the sections referred to are those of the Bills of Exchange Act (Commonwealth) 1909-1958 unless otherwise indicated:-

- (a) The cheques in question were crossed generally within the meaning of that term as defined in Section 82.
- (b) Section 85 (2)(b) requires that a cheque crossed generally must be paid to a banker.
- (c) That debiting the cheques involved in this action to the plaintiff's account and at the same time crediting the account with the amount of such cheques was not payment to a bank as required by Section 85 (2)(b).
- (d) It has been held by the Court of Appeal in Carpenter's Company v. British Mutual Banking Co. Ltd. (1938) (1 K. B. 511 at p. 537-8) that a bank complies with the requirements of Section 85(2)(b) by crediting one of its customers and debiting another.

It is submitted that this is the limit to which the interpretation of the section can be taken and that it would be

Record.

doing violence to the language of the section to say that where a bank made a credit and debit entry in the account of one of its customers that it had complied with the requirement of paying the cheque to a banker. Only McKinnon L. J. deals with the proposition that a bank complies with the requirements of the Section by crediting one of its customers and debiting another and he says at page 537-538 -

- 10 "In the strictest analysis I think the defendants paid their cheques to Blackborow, and he paid in equivalent amounts to the credit of his account".

In order to extend the reasoning of McKinnon L. J. to the circumstances of this case it would be necessary to regard the transaction as one in which the bank cashed the cheques in question notionally handed the proceeds to Universal Guarantee and that company thereupon deposited the amounts to the credit of the company's account. This would involve
20 cashing the cheques which the bank was not entitled to do.

(e) That Section 65 has no application because:-

- (i) the transactions were not in the ordinary course of business; (Slingsby v The District Bank Limited (1931) 2 K. B. 588 at 598)
- (ii) the defendant was negligent; (House Property Co. of London Ltd. v London County & Westminster Bank (1915) 84 L. J. K. B. 1846; Underwood v Bank of Liverpool (1924) 1 K. B. 775; Aust. Bank of Commerce v Perel & Ors. (1926) A. C. 737, 95 L. J. P. C. 185; Commissioner of Taxation v. E. S. A. (1920) A. C. 683)
- 30 (iii) the defendant was both collecting and paying bank; (see Greer L. J. in Carpenter's case (supra) at page 529)
- 40 (f) That Section 85 enables the true owner of a cheque paid contrary to 85 (2)(b) to recover not only the amount of the cheque but any consequential loss he may sustain.
- (g) That at all times the plaintiff was the true owner of the cheques the subject of this action (London Bank of Australia Limited v Kendal (1920) 28 C. L. R. 401) and if that be so the following consequences ensue:-

- (i) that the plaintiff by virtue of Section 85 as the true owner can recover any damages suffered; Record.
- (ii) that Moffitt at no time had any title to the cheques (Section 87) and that at the time the bank received each of these cheques for payment they were stolen cheques.
- 10 (h) That the defendant acting as both collecting and paying bank disobeyed the mandate expressed in the crossing of each of these cheques.
- (i) That the defendant owed the plaintiff the duty as reasonable men carrying on the business of bankers to carry on their business in a manner that would be calculated to protect them and others from fraud. This the defendant failed to do. (Lloyds Bank Ltd. v Savory (H. L.) (1933) A. C. 201 at 221; Underwood v Barclays Bank (1923) 1 K. B. 775 (C. A.); The Marquess of Bute v Barclays Bank (1955) 1 Q. B. 202.)
- 20 (j) That the defendant was bound by the contract between it and the plaintiff to pay cheques only in accordance with the plaintiff's instructions. (Ardern v Bank of New South Wales (1956) V. L. R. 569)
- (k) That it was no defence to this action for the defendant to say that it was so busy and had such a small staff that it could not make enquiries (Crumplin v London Joint Stock Bank (1913) 30 T. L. R. 99).
- 30 (l) That it was no defence to this action for the defendant to say that even though it did not make enquiries any enquiries would have been of no avail. (In re The Alms Corn Charity (1901) 2 Ch. 750; Barker v Barclays Bank (1955) 1 W. L. R. 836; Commercial Bank of Australia v Flannagan (1932) 47 C. L. R. 469)
20. The Appellant submits that the judgment of Mr. Justice Manning is incorrect and should be reversed for the following amongst other reasons:-
- 40 (a) That His Honour was in error in holding that the defendant did not owe the plaintiff any of the duties alleged in the Points of Claim. p. 326, 1. 36 to p. 331, 1. 28.
- (b) That His Honour fell into error in asserting that the plead- p. 328, ll. 12 to 17.

Record.

ings and particulars did not sufficiently distinguish between the obligations of the defendant bank as a collecting bank on the one hand and a paying bank on the other. It is submitted that it was not necessary to distinguish either in the pleadings or the particulars or elsewhere these duties because the defendant bank performed the duties of collecting and paying bank in all the transactions involved in this action.

- p. 329, l. 43 to 10 (c)
p. 330, l. 1.
- That His Honour also fell into error in asserting that it had never been suggested that one single bank was at a disadvantage in performing the functions of both paying and collecting bank. The bank having performed both functions, it is submitted, it was at a distinct disadvantage because as collecting bank it had a contractual relationship with the drawer of the cheque, a situation which does not exist where collecting and paying banks are separate entities.
- p. 330, l. 44 to 20 (d)
p. 331, l. 12.
- That His Honour was in error in asserting that the plaintiff contended that a bank was not entitled to act as both collecting and paying bank.
- p. 330, ll. 36 to 42. (e)
- That His Honour was in error in holding that the words "endorsement guaranteed" on the back of the cheques the subject of this action constituted in anticipation a good and sufficient answer to any enquiry which the defendant may have been required to make.
- p. 322, l. 10. 30 (f)
- That His Honour was in error in holding that the cashier was under the control of W. R. Moffitt.
- p. 322, ll. 11 to 13. (g)
- That His Honour was in error in holding that W. R. Moffitt was authorised to conduct or supervise the banking of all moneys received by the plaintiff.
- p. 322, ll. 15 to 20. (h)
- That His Honour was in error in holding that at the end of each balancing period the services of W. R. Moffitt were utilised in balancing the ledgers.
- 40
p. 323, l. 32 to (i)
p. 324, l. 16.
- That His Honour was in error in holding that it was not unusual for cheques to be deposited to the credit of the plaintiff's account (other than the cheques the subject of this action) which were payable to the order of a named payee and crossed "Not Negotiable Account Payee Only".
- p. 333, l. 8 to (j)
p. 334, l. 7.
- That His Honour having held that the defendant was negligent

in relation to certain duplicate deposit slips was in error Record.
 in holding that the plaintiff had not proved it had suffered
 any damage as a result thereof.

- (k) That His Honour was in error in holding that it was not possible to establish that the whole of the proceeds of the 165 cheques had been misappropriated and His Honour should have held that the whole of the proceeds, namely £59,747 had been misappropriated. p. 319, 1.47 to p. 320, 1.5.

10

21. The Appellant submits that for the reasons indicated above the judgment of Mr. Justice Manning is incorrect and the verdict and judgment should be set aside and one or more of the following orders substituted therefor:-

- (i) Verdict and judgment for the plaintiff for £59,747 together with the sum of £15,800.8.4. interest.

20

- (ii) Alternative to (i) supra verdict and judgment for the plaintiff for general damages consequent upon the defendant's negligence in issuing incorrect duplicate receipts, such verdict to be for the amount of the cheques set out in paragraph 25 of the Points of Claim, namely £46,772 together with interest amounting to £9,595.2.7.

p. 13, 1.8 to
 p. 23, 1.46.

- (iii) Alternative to (i) and (ii) above a verdict and judgment for the plaintiff for £3,855 being the amount of the cheques involved in Exhibits B61 to B68 inclusive and B158, the specific cases in which His Honour held the bank to be negligent.

30

p. 325, 1.12 to
 p. 326, 1.19.

R. J. M. NEWTON
 M. J. N. ATWILL