
CASE FOR THE RESPONDENT

1. This is an Appeal brought by leave of the Supreme Record
 10 Court of New South Wales from a Judgment of The Honourable p. 335.
 Mr. Justice Manning sitting in Commercial Causes dated the
 Twenty second day of July, One thousand nine hundred and
 sixty four, under which His Honour entered a verdict for
 the Defendant.

2. (a) The circumstances out of which this appeal arise
 are set forth in paragraphs 3 to 10 hereof.

(b) The contentions to be urged by the Respondent
 20 are set forth in paragraphs 11 to 27 hereof.

3. The action was commenced in the Common Law
 jurisdiction and, after transfer to the list of Commercial
 Causes, Points of Claim, Points of Defence and a Replic-
 ation were filed. The Issues for Trial appear from the
 said documents as amended on both sides during the course
 of the hearing together with letters requesting and furn-
 ishing further and better particulars which letters were
 tendered in evidence (Exhibit A). pp. 3 to 34.

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4. The issues involved two lines of contention on
 the part of the Appellant (Plaintiff) against the Respondent
 as its Banker namely :

(a) That the Respondent, in breach of five alleged
 tortious and contractual duties, had wrongly debited
 one hundred and sixty five (165) cheques to the
 Appellant's account with it thereby occasioning
 loss to the Appellant; all of these cheques were
 40 drawn by the Appellant and were deposited to the
 credit of the same account with the Respondent as
 that on which they were drawn;

(b) That the Respondent, in breach of an alleged tortious
 and contractual duty, gave to the Appellant duplicate
 receipts for deposits made by the Appellant to the
 credit of its account which did not correspond in

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all particulars with the original receipts retained by the Respondent thereby occasioning loss to the Appellant.

5. (a) On the first line of contention the specific allegations made by the Appellant were summarised in the Judgment of Manning J. in the following terms :

p. 326, l. 43 et seq.

10 "The promise and the duty alleged are in five categories, namely :

(1) That the defendant bank would not debit to the plaintiff company's account any crossed cheques drawn by the plaintiff if the endorsement of the payee appearing on the back of the cheque was forged. (Amended Points of Claim paragraphs 8 and 14)

20 (2) That the defendant bank would not pay any crossed cheque drawn by the plaintiff company on its account unless the holder thereof presented such cheque through a bank for payment. (Paragraphs 9 and 15)

30 (3) That when the plaintiff company drew cheques in favour of a named payee and crossed such cheques 'Not Negotiable, Account Payee Only', the bank would not debit any such cheques against the plaintiff's account if the endorsement of the payee was forged (Paragraphs 10 and 16)

40 (4) That when the plaintiff company drew a cheque in favour of a named payee and crossed such cheque 'Not Negotiable, Account Payee Only', the defendant bank would not debit any such cheque to the plaintiff's account unless such cheque had been negotiated through another bank or paid to the credit of the payee in an account with the defendant bank (Paragraphs 11 and 17)

(5) That when the plaintiff drew a cheque in favour of a named payee crossed 'Not Negotiable, Account Payee Only', and such cheque was lodged for collection to the credit of the plaintiff's account the defendant bank would not accept such cheque unless it was endorsed on

"behalf of the plaintiff by the signatures of two officers of the plaintiff authorised to draw cheques. (Paragraphs 12 and 18)."

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(b) On this first line of contention the Appellant alleged wrongful debiting of 165 cheques specified in the amended Points of Claim (paragraph 20) the wrongful element being based on the breaches of the five enumerated duties (paragraphs 20 to 24). The Appellant claimed to recover the total amount of such cheques together with interest (paragraphs 26 and 27). In addition the Appellant sought to recover the damages suffered by the misappropriation of its funds perpetrated by one of its employees after the first of the wrongful debits (paragraph 28).

p. 7, l. 41 et seq.

p. 7, l. 41 to p. 12, l. 39.

p. 24, ll. 1 to 21.

p. 24, l. 23.

6. (a) On the second line of contention the specific allegations made by the Appellant were also the subject of a separate allegation alleging an implied term and alleging a tortious duty, the term and duty as pleaded in paragraphs 13 and 19 of the Amended Points of Claim being

p. 6, l. 28; p. 7, l. 35.

"that upon deposits being made by the plaintiff to the credit of its account with the defendant that the duplicate receipt issued by the defendant to the plaintiff would correspond in all particulars with the original receipt retained by the defendant."

(b) On this second line of contention the Appellant alleged that the Respondent gave to the Appellant duplicate receipts for deposits which did not correspond in all particulars with the original receipts retained by the Respondent the details of such non-correspondence being indicated more particularly in paragraph 25 of the Amended Points of Claim. The Appellant on this second line of contention sought to recover the damages it suffered by the misappropriations of its funds perpetrated by the said employee after the first incorrect duplicate receipt was issued by the Respondent to the Appellant (paragraph 29).

p. 12, l. 41.

p. 24, l. 31.

7. The principal defences propounded by the Respondent as pleaded in the Amended Points of Defence were, in summary :

(a) A traverse of the alleged contractual and tortious duties relied on by the Appellant in both its lines of contention. (paragraph 3)

p. 25, l. 15.

(b) Traverses of the allegations made by the Appellant

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- p. 25, l. 20 to p. 28, l. 1. of the specific acts of the Respondent relied on as constituting breaches of the duties propounded by the Appellant. (paragraphs 4 to 18)
- (c) Traverses of the Appellant's allegations of damage. (Paragraphs 19, 20 and 22)
p. 28, ll. 3 to 13, p. 28 l. 26.
- (d) That the damages suffered by the Appellant by the misappropriations of its funds by its employee were too remote. (Paragraphs 21 and 23)
p. 28, l. 14; 10
p. 28, l. 30.
- (e) That the claims in respect of cheques debited and duplicate receipts given more than six years before the commencement of the action were Statute barred. (Paragraph 24).
p. 28, l. 43.
- (f) Payment, that is to say in respect of each cheque debited there was a simultaneous and corresponding credit to the Appellant's account. (Paragraphs 25 and 26)
p. 29, l. 14; p. 29, l. 26.
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- (g) That the Respondent in respect of each cheque debited acted in good faith and without negligence and paid the same to a banker (Bills of Exchange Act, Section 86). (Paragraph 27)
p. 29, l. 36.
- (h) That the Respondent in respect of each cheque debited acted in good faith and in the ordinary course of business (Bills of Exchange Act, Section 65). (Paragraph 28)
p. 29, l. 44.
30
- (i) That the Appellant was guilty of contributory negligence in its internal office systems and in particular in relation to the activities of its fraudulent employee. (Paragraphs 29 and 30).
p. 30, ll. 5 to 44.
- (j) That the Appellant impliedly warranted to the Respondent that the Respondent could with propriety and validity accept the cheques for debit to the Appellant's account and that the duplicate deposit slips were either correct or recorded such information as the Appellant required, breach of such warranties giving rise either to a cross - action for the amount recoverable by the Appellant or, on the principle of circuitry of action, to a defence to the Appellant's claim. (Paragraph 31)
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p. 30, l. 45.

- (k) That by way of cross-action, if the Appellant recovered Record the amounts of the cheques debited to the Appellant's account, it thereupon became indebted to the Respondent for money had and received. (Paragraph 32). p. 31, l. 38.
8. The main facts and circumstances involved in the action are set out in the Reasons for Judgment of Manning J. p. 319, et seq.
- 10 9. The evidence upon which the findings of fact contained in the Judgment of Manning J. were based is contained in the transcript, the following being the specific topics upon which evidence was given and the names of the witnesses concerned :
- (a) The control of the Appellant's business.
 Tyack p. 166, ll. 7 to 17.
 Moffitt p. 36, ll. 34 to 43.
- 20 (b) Size and personnel of the Appellant's office administration.
 Moffitt p. 138, l. 36 to p. 140, l. 20.
- (c) Appellant's high standing and high repute.
 Tyack p. 194, l. 10 to p. 195, l. 12.
 Specific finding p. 224, ll. 40 to 47.
- 30 (d) By 1956 Appellant's account was a well established account at the Wentworth Avenue (Sydney) Branch of the Respondent.
 Tyack p. 194, ll. 6 to 8;
 p. 195, ll. 3 to 13.
- (e) The scale of the Appellant's banking operations with the Respondent (daily bankings etc.)
 Moffitt p. 141, l. 23 to p. 142, l. 6.
 Sorbie p. 198, ll. 7 to 10.
- 40 (f) Moffitt's authority to sign (jointly) and endorse (solely) operations on bank account.
 Tyack p. 167, l. 20 to p. 168, l. 4, p. 172, ll. 6 to 30.
 Sorbie p. 203, ll. 4 to 26.

<u>Record</u>	(g)	Practice followed by Appellant in relation to bankings.
p. 127, ll. 3 to 13; p. 142 l. 5 to p. 144, l. 21.		Moffitt
p. 188, ll. 1 to 10; p. 192 l. 19 to p. 193, l. 37		Tyack
p. 198, l. 1 to p. 199, l. 9; 10 p. 201 l. 3 to p. 202, l. 45		Sorbie
p. 205, l. 42 to p. 206, l. 6.		Specific admission
	(h)	Scope of Moffitt's duties and authorities.
	(i)	as acceptance manager; Moffitt
p. 148, l. 7 to p. 149, l. 2. 20		Moffitt
p. 166, ll. 29 to 34; p. 190 ll. 21 to 31 p. 190, l. 45 to p. 191, l. 40.		Tyack
	(ii)	in relation to banking; Moffitt
p. 140, l. 24 to p. 144, l. 23; p. 147 ll. 4 to 24. 30		Moffitt
p. 166, l. 47 to p. 169, l. 22; p. 172 ll. 6 to 30; p. 188, ll. 1 to 10; p. 192 l. 10 to p. 193, l. 46.		Tyack
p. 198, l. 45 to p. 199, l. 9; p. 201, l. 25 to p. 203, l. 26; p. 204, l. 30 to p. 205, l. 10. 40		Sorbie
	(iii)	in relation to ledger balancing Moffitt
p. 150, l. 27 to p. 154, l. 6.		Moffitt
p. 166, ll. 36 to 46; p. 189, ll. 20 to 23.		Tyack

	Sorbie	<u>Record</u>
		p. 204, l. 30 to p. 205, l. 10
10	(i) Fraudulent procedure adopted by Moffitt to procure drawing of cheques, Moffitt	p. 39, l. 32 to p. 41, l. 2; p. 43, l. 3 to p. 45, l. 35; p. 158, l. 40 to p. 160, l. 9.
	Specific admission	p. 53, l. 33.
	(j) Moffitt's extraction of cash and interference with duplicate deposit slips. Moffitt	p. 38, ll. 20 to 30; p. 40, l. 38.
	Exhibit C.	p. 349 et seq.
20	(k) Banking operations were bona fide as far as Respondent was concerned, Moffitt	p. 155, l. 37 to p. 156, l. 35.
	Rose	p. 285, l. 29 to p. 286, l. 9.
30	Moffatt	p. 299, l. 40 to p. 300, l. 10.
	(l) Appellant's duplicates of deposit slips would not add up correctly if they had been checked in the Appellant's office. Moffitt	p. 57, l. 10 to p. 60, l. 26.
40	(m) Duplicate deposit books were only referred to in Appellant's office after banking.	
	(i) Once a year to add up cash content of banking for insurance premium calculation. Moffitt	p. 146, l. 15 to p. 147, l. 2.
	(ii) For the purpose of making any specific correction in a figure that the bank may have telephoned about after banking.	

<u>Record</u>	Moffitt
p. 147, ll. 4 to 21.	
p. 171, ll. 1 to 21.	Tyack
p. 203, l. 28 to p. 204, l. 12.	Sorbie

No evidence that accountant or auditors ever looked at duplicate deposit books (although point was specifically adverted to in evidence during Appellant's case).

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p. 169, l. 45 to p. 170, l. 46; p. 195, ll. 41 to 44.	Tyack
p. 199, ll. 11 to 14.	Sorbie

10. In addition to the facts and circumstances appearing in the Judgment the following facts and circumstances in respect of which Manning J. made no express finding were established by the evidence indicated in each
20 instance :

	(a)	Ordinary commercial practice requires that in a business of the type carried on by the Appellant there should be some system of internal control;
		Carrick
p. 214, l. 25 to p. 216, l. 43.		
p. 276, ll. 39 to 43.		Firth

	(b)	Ordinary commercial practice requires that in any such system of internal control it is necessary for there to be separation between persons handling cash and persons balancing the ledger;
		Tyack
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p. 169, ll. 23 to 45; p. 187, l. 27 to p. 188, l. 43; p. 189 l. 8.		Sorbie
p. 204, l. 23 to p. 205, l. 19.		
p. 214, l. 25 to p. 216, l. 43.		Carrick
p. 275, l. 20; 40 p. 281, ll. 6 to 24; p. 276 l. 37.		Firth

(c) The Appellant at all material times had sufficient staff in its employ for it to be practicable for the persons handling cash to be separate and distinct from the persons balancing the ledgers;

	Tyack	<u>Record</u> p. 187, l. 43 to p. 189, l. 8.
(d)	The Appellant did not at any material time have a reasonably effective system of internal control in its business;	
	Tyack	p. 189, l. 20 to p. 190, l. 12.
10	Sorbie	p. 204, l. 23 to p. 205, l. 19.
	Firth	p. 276, ll. 1 to 37; p. 280, ll. 30 to 44.
(e)	Auditors did not examine duplicate deposit books or balance the ledgers properly;	
20	Moffitt	p. 147, ll. 19 to 21; p. 153, ll. 14 to 35.
	Tyack	p. 170, ll. 44 to 46; p. 195, ll. 41 to 44.
	Sorbie	p. 199, ll. 11 to 21.
	Firth	p. 278, ll. 26 to 39.
30	(f) As a matter of ordinary banking practice the lodging for deposit to the credit of the Appellant's account with the Respondent of the cheques tendered in evidence by the Appellant and relied upon by it would not be queried by the receiving teller;	
	Farmer	p. 238, l. 30 to p. 240, l. 48.
40	Irving	p. 249, ll. 10 to 45; p. 253, ll. 28 to 47; p. 254, l. 40 to p. 256, l. 30.
	Gaughan (not cross-examined on own Bank's instructions regarding deposits)	p. 260, l. 45 to p. 261, l. 48; p. 268, l. 44 to p. 269, l. 34; p. 282, ll. 24 to 46; p. 283, l. 21.

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p. 177, l. 45 to
p. 178, l. 3;
p. 180, l. 42 to
p. 181, l. 10.

Allingham

p. 286, ll. 29 to
42; p. 291, ll. 22 to
43; p. 292, ll. 4 to 9;
p. 295, l. 43 to
p. 296, l. 4.

Rose

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p. 300, ll. 23 to
26.

Moffatt

p. 107, ll. 12 to
15; p. 113, l. 47
to p. 114, l. 16.

Jupp (not all references included)

- (g) As a matter of ordinary banking practice the Examiner or Ledger Supervisor employed by a bank reading the cheques tendered in evidence and relied upon by the Appellant would not query them;

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p. 230, l. 41' to
p. 231, l. 45.

Farmer

p. 271, l. 39 to
p. 272, l. 6.

Gaughan

p. 184, ll. 13 to
35.

Allingham

p. 286, ll. 29 to
42.

Rose

p. 300, ll. 28 30
to 30; p. 310,
l. 8 to p. 311,
l. 16.

Moffatt

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- (h) As a matter of ordinary banking practice the notation "Endorsement guaranteed" appearing on a cheque would be regarded as a certification of the genuineness of the endorsement and would not occasion any query;

p. 236, ll. 1 to
36; p. 237, ll.
1 to 8.

Farmer

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p. 270, ll. 25
to 48.

Gaughan

p. 184, l. 13
to p. 185, l. 30.

Allingham

p. 255, ll. 4 to
35.

Irving

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| | Rose | <u>Record</u>
p. 296, ll. 21 to 28. |
| | Moffatt | p. 309, ll. 15 to 20. |
| (i) | As a matter of ordinary banking practice it is not unusual for a customer to draw cheques in favour of himself or itself; | |
| 10 | Irving | p. 254, ll. 1 to 18. |
| | Gaughan | p. 272, ll. 8 to 10. |
| (j) | As a matter of ordinary banking practice it is not unusual for a customer to draw a cheque in favour of a third party account payee only and then to pay it back into his or its own account; | |
| 20 | Gaughan | p. 272, ll. 12 to 31. |
| (k) | As a matter of ordinary banking practice, if it were desired to query the regularity of accepting to the credit of a customer's account a third party account payee only cheque by that same customer, reference to a person having joint authority to draw cheques on that customer's account and sole authority to endorse cheques for payment to the credit of that customer's account would be sufficient; | |
| 30 | Farmer | p. 234, ll. 16 to 26; p. 243, ll. 11 to 27. |
| | Rose | p. 296, ll. 14 to 19; p. 298, ll. 23 to 43. |
| (l) | Each of the duplicate deposit slips tendered in evidence and relied upon by the Appellant bore the stamp; "Lodged as per slip therewith;" | |
| 40 | | p. 49, l. 20 to 28; Exhibit B. |
| (m) | The custom of bankers does not involve their accepting responsibility for the correctness of any entries on the duplicate other than the total of the deposit, the customer's name and the date; | |
| | Farmer | p. 229, l. 42 to p. 230, l. 36; p. 238 ll. 4 to 29; p. 241, ll. 20 to 26. |

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p. 246, l. 27 to
p. 249, l. 2; p. 251,
ll. 36 to 46.
p. 260, ll. 7 to 43;
p. 267, l. 38 to p. 268,
l. 11.

Irving

Gaughan

p. 179, l. 14 to p. 180,
l. 40; p. 186, ll. 36 to
40.

Allingham

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p. 286, l. 44 to p. 287,
l. 9; p. 292, l. 11 to
p. 293, l. 33.

Rose

p. 356 et seq.

Exhibit 1 (Minutes from Australian Bankers'
Association)

p. 103, ll. 28 to 37;
p. 105, ll. 6 to 12.

Jupp (not all references included)

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(n) The auditing profession recognises and accepts that
the duplicate deposit slip is an acknowledgment from
the Bank of the total only and not the individual items;

p. 274, l. 33 to
p. 275, l. 11.

Firth

pp. 165, 196, 206, 219. 30

(Firth was not cross-examined on this point at all; no
suggestion made by Appellant of unreasonableness in
Respondent's attitude; although Appellant called three
qualified accountants and a solicitor with commercial
experience, Appellant did not seek from any of them
any evidence suggesting that the Respondent's absence
of responsibility for details was not known to and
accepted by them or suggesting that they regarded the
Respondent's attitude as unreasonable).

11. The Respondent submits that on neither of the
Appellant's two lines of contention is it entitled to recover
damages from the Respondent.

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NO SUCH DUTIES AS CLAIMED LAY ON RESPONDENT

12. On the first of the Appellant's lines of contention
the Respondent submits that none of the duties propounded, even
if they exist in the terms in which they are alleged (which the
Respondent disputes), applies to transactions such as presently
in issue, namely transactions in which a customer's own cheque

is deposited by him to the credit of his own account. The Record
 Respondent submits that the two circumstances which are of
 overriding significance in the present case in precluding the
 Appellant from establishing that the act of the Respondent
 in debiting each cheque to the Appellant's account was wrong-
 ful are

- (a) that no moneys either actually or notionally went out
 of the account of the Appellant; and
- 10 (b) that the Respondent could not by debiting the cheque
 to the Appellant's account expose the Appellant to any
 possible liability to a third party.

It is submitted that the attempted analysis of particular steps
 in the transactions in question such as the Appellant seeks to
 achieve in propounding the first four specific duties does not,
 having regard to the nature of the transactions, enable any
 affirmative finding of fault to be made against the Respondent
 20 sufficient to support the claims for damages.

13. The Respondent submits that the legislative
 provisions from which the Appellant purports to derive the first
 four duties are concerned only with transactions of debit involv-
 ing a payment out (actual or notional) of funds from a customer's
 account; unless there is some such payment out there is not a
 debit or payment properly so called within the meaning of those
 words in such provisions. Such provisions are accordingly not
 relevant to the present circumstances. But it is submitted
 30 that, even if they were so relevant, on the evidence and the
 findings of Manning J. the Respondent's actions in making the
 debit entries in the Appellant's account were not such as to
 expose it to liability to the Appellant. The Respondent relies
 upon the express findings of Manning J. on the first second and
 fourth duties, these findings also being directly applicable to
 the third duty.

14. As to the fifth duty the Respondent submits that
 the evidence does not support the introduction of any such duty
 40 into the dealings between the Appellant and the Respondent or,
 indeed, between banker and customer.

The Respondent refers to the comment by Manning J. :

p. 327, l. 37 to
 p. 328, l. 3.

"It is to be noted that the fifth allegation was originally
 in a form which alleged a promise and a duty upon the
 bank not to accept any cheque sought to be deposited to

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10 "the credit of the plaintiff's account unless such cheque was endorsed on behalf of the plaintiff by an officer authorised to endorse cheques. On the last day of the hearing this alleged promise was amended in the manner mentioned. Thus the plaintiff receded from the attitude originally adopted in the pleadings and by the particulars, as well as by argument during the course of the hearing, and asserted that an endorsement, in the circumstances mentioned, by a person authorised to endorse cheques was insufficient, and that any such endorsement necessarily would have to be made only by the person or persons authorised to draw cheques"

p. 330, ll. 32 to 42. 15. The Respondent relies upon the express finding of Manning J. in relation to the fifth duty, namely :

20 "...irrespective of which of the various views might be preferred, the fact is that an endorsement of the named payee, which was regular on its face, did not require the bank to make any inquiries where the cheque was being received for the credit of the drawer. Even if it is to be supposed that some inquiry should have been made, the memorandum appearing on the back of the cheque that the endorsement was guaranteed, and such memorandum having been signed by an endorsing officer on behalf of the plaintiff, would, in my view, constitute an anticipation of inquiry by the bank and a good and sufficient answer to any such inquiry as might be made."

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In addition the Respondent submits that there is no valid basis for attempting to import into transactions of the nature of those in issue in the present proceedings (namely a deposit by a customer of a cheque to initiate corresponding debit and credit entries in his own account) any duty either in the express terms of the fifth duty or to a like or similar effect. The Respondent submits that
40 similar considerations affect the allegation of this duty to those referred to in the submissions regarding the first four duties.

16. The Appellant in argument before Manning J. relied substantially to support the five duties propounded by it on the decisions on Section 82 of the English Bills of Exchange Act (or its Australian Equivalent,

Section 88 (1)). In answer to this argument the Respondent Record submits

10 (a) That these decisions are dealing with a duty of a fundamentally different nature to that which is sought to be propounded in the five heads of the Appellant's first line of contention. The Bills of Exchange Act is interposed, so far as is presently relevant, as between banker and customer, inter alia :

(i) to regulate the circumstances in which dealings or payments made by a banker are binding on the customer so as to give the banker a release pro tanto from the debt he owes to his customer (e.g. Section 65 (Aust.)), and

20 (ii) to confer certain immunities on the collecting banker as against the claims of third parties (e.g. Section 88 (Aust.)).

(b) That for the purpose of determining whether a collecting banker acted "without negligence" the relevant duty is a duty to the true owner, whoever he may be.

30 "The words 'without negligence' do not mean without a breach of duty on the part of the bank towards itself or towards the person who is its customer. The phrase means 'without want of reasonable care in reference to the interests of the true owner if there is in the appearance and details of the cheque, the nature of the persons dealing with it' . . 'anything unusual or suspicious, and suggesting the necessity for inquiry' in the interests of the true owner, then it is for the Bank to exercise due care for the protection of these interests."

40 (Commercial Bank of Australia Limited v. Flannagan; 47 C. L. R. 461 at 467 per Gavan Duffy C. J. and Starke J.)

The decisions on Section 88 (Aust.) (and its equivalents) are no guide at all to the existence nature and extent of any duty owed by the collecting banker

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to his own customer. The frequent references in those decisions to a duty to enquire are relevant to a duty owed to the true owner whose cheque the collecting banker may be going to convert.

- (c) That a collecting banker owes no duty to his own customer to make enquiry in relation to a cheque deposited by the customer with the banker for collection. In terms more directly applicable to the present case, a banker owes no duty to his own customer to make any inquiry in relation to a cheque deposited by the customer for credit to his account with the banker.
- (d) That even if it is permissible to regard a banker as a paying banker when he debits to his customer's account a cheque drawn on and deposited to the credit of that same account by the customer, the banker is not, as the customer's agent, making any disbursement of his customer's funds in retirement pro tanto of his debt to his customer, and he is not committing his own customer to any liability at the hands of a third party; in short he is not paying away his customer's money or hazarding his customer to proceedings by a third party: and accordingly in these circumstances he owes no duty to his own customer to make any inquiry in relation to the cheque.
- (e) That a customer of a collecting banker who lodges a cheque with his banker for collection cannot reasonably expect his banker to make any further inquiry of him. If a customer lodges his own cheque with his banker for credit and debit to his own account he likewise cannot reasonably expect his banker to make any inquiry of him even though it may be conceivable that, in the process of negotiation through one or more other people, third parties may have acquired rights in relation to the cheque.

17. The Respondent further submits that where a banker is charged with a breach of duty to his customer evidence of the ordinary custom of bankers is admissible (Commissioners of Taxation v. E. S. & A. Bank : 1920 A. C. 683 at 689). Proof of precautions customarily observed by bankers is used as founding inferences that the bankers, in taking such precautions, do so because they recognise that the scope of their duty of care is wide enough to require the taking of such precautions.

The Respondent submits that in the present case the converse applies: the evidence establishing that within ordinary standards of prudence a banker would without question or inquiry have accepted these cheques for debit and credit (Paragraph 10 (f) and (g) above) tends strongly against there being any such duty as is propounded by the Appellant.

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DAMAGES ARE TOO REMOTE

10 18. On the second of the Appellant's lines of contention, that in which the Appellant alleged a duty to the effect that the duplicate receipt for deposits would correspond in all particulars with the original retained by the Respondent, the Respondent submits that, not only is there no evidence to support the existence of such a duty, but rather the evidence establishes affirmatively that a banker accepts responsibility only for the correctness of the total of the deposit, the customer's name and the date as inserted on the duplicate deposit slip retained by the customer; the Respondent adduced
20 evidence from an experienced auditor of his views as to the extent of a banker's responsibility and it is not suggested by the Appellant that the custom is unreasonable. (Paragraph 10 (m) and (n) above.)

19. The Respondent also submits that the damages suffered by the Appellant are too remote. All that took place was a mere initiation by the Appellant of a pair of self-balancing (or self-cancelling) entries being made in its ledger account with the Respondent. There
30 was no turnover of funds in the real or in any sense. The Appellant cannot in such circumstances charge the Respondent with having carelessly paid away funds deposited by it with the Respondent; nor can the Appellant charge the Respondent with having carelessly exposed the Appellant to liability at the hands of a third party or with having carelessly injured its credit; the damages claimed do not fall within any of the categories hitherto recognised as comprising the field of damages for which a banker may be liable to his customer. The evidence
40 that transactions of this nature would not within ordinary banking practice be queried (Paragraph 10 (f) and (g) above) establishes that a banker would not foresee or recognise the existence of any risk to his customer against which he, the banker, ought to take steps to protect the customer. The second branch of the rule in Hadley v. Baxendale ((1854) 9 Exch. 341) is equally applicable to the Appellant's claims in tort as to its

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p. 346, ll. 23 to
34.

its claims in contract (Overseas Tankship(U. K.) Limited v. Mort's Dock & Engineering Company Limited: 1961 A. C. 388). The present relationship between the parties was not qualified by any special term or arrangement and on the evidence it is not established that the parties would reasonably have had in contemplation the likelihood of loss of this nature to the Appellant nor is it established that the Respondent should reasonably have foreseen the likelihood of such loss to the Appellant. Although the
10 onus rests on the Appellant, the Respondent submits that the evidence supports the conclusion that a banker would not have recognised that by accepting from his own customer his own customer's cheque for credit and debit to the customer's account a banker was in any way risking his customer's funds, (Paragraph 10 (f) and (g) above.)

p. 333, 1. 12 to
p. 334, 1. 29.

20. On the second of the Appellant's lines of contention the Respondent relies on the express finding of fact by Manning J. to the effect that no damage was caused
20 to the Appellant by reason of the absence of correspondence between the original deposit slips lodged with the Respondent and the duplicates retained by the Appellant.

STATUTE OF LIMITATIONS

21. The Respondent submits that so much of the Appellant's claim as did not arise within six years next before the institution of this action is statute barred; the Respondent relies on the Statute of Limitations (21
30 Jac. 1 c. 16 Sec. 3)

PAYMENT

22. The Respondent submits in respect of every one of the allegedly wrongful debits that there was a precisely corresponding credit and that even if the debits were prima facie wrongful each credit constitutes a payment or satisfaction by the Respondent to the Appellant in respect of each of the allegedly wrongful
40 debits. If each debit was wrongful and moneys had been paid out to a third party then the Appellant's entitlement against the Respondent would have been limited to the recovery of the amounts wrongfully paid out. The Respondent submits that, tested in this way, the effect of the corresponding credits satisfies and discharges any claim which the Appellant might have been entitled to propound if it could succeed in establishing the wrongful nature of

the debits.

Record

CONTRIBUTORY NEGLIGENCE

23. The Appellant seeks to recover under its first line of contention as one of its heads of damage the losses it suffered by the misappropriations perpetrated by its employee after the first cheque was wrongly debited; the damages claimed under its second line of contention are the losses suffered by the misappropriations of its funds perpetrated by its employee after the first incorrect duplicate receipt was issued by the Respondent. These claims were amplified in the further and better particulars:

"The Plaintiff claims under these paragraphs that as a result of the Defendant's negligence in wrongfully debiting the first cheque referred to in paragraph 20 to the Plaintiff's bank account with the Defendant and in the Defendant's negligence in issuing the first incorrect duplicate receipt the Defendant enabled Moffitt to perpetrate the misappropriation of the funds of the Plaintiff represented by the cheques set out in paragraph 20 of the Points of Claim."

The Respondent submits that the evidence establishes that the Appellant was not taking proper care for its own safety and that the losses which it suffered through the misappropriations of Moffitt were the very sort of losses against which it ought to have guarded itself. It was by the manipulations of the weaknesses in the Appellant's own systems that Moffitt in fact inflicted the losses upon it and it was these weaknesses which were the direct and proximate cause of the Appellant's loss. In every instance the moneys were actually taken by Moffitt and the cheque drawn before the Respondent came into the matter at all, Moffitt being enabled to do this by reason of the deficiencies in the Appellant's own office procedures. The moneys were taken as a direct or proximate result of such deficiencies in the Appellant's office procedures. Not only did the Appellant fail to take reasonable steps to protect itself against such manipulations as Moffitt engaged in but the failure of the Appellant to discover the defalcations of Moffitt in that there was an absence of any reasonably sufficient check or audit of the Appellant's own records was subsequent, severable and independent negligence on the

p. 24 ll. 23 to 29.

p. 24, ll. 31 to 37.

Exhibit A, p. 348
ll. 30 to 37.

p. 204, l. 23 to p. 205
l. 18.

p. 214, l. 25 to p. 216,
l. 43.

Record

p. 334, ll. 9 to 23.

part of the Appellant which was the ultimate and direct factor enabling Moffitt to perpetrate the misappropriations relied upon by the Appellant. The Respondent relies on the finding of fact of Manning J. ;

10 "The real cause of the loss is to be found in the circumstances already referred to, namely, that, on each balancing date, Moffitt's services were utilised to add the balance in one or more of the debtors' ledgers. In fact, Moffitt concealed his defalcations by ensuring that he added the ledger or ledgers in which the original entry had been made of the fictitious transaction, and he increased the actual balance shown in such debtors' ledgers by adding thereto an amount equal to the sum of the fictitious accounts he had created. It may be inferred that Moffitt's false additions were accepted both by the company's officers and by the auditors as being correct. That is, over the whole of the period in question, Moffitt was enabled to conceal from both the company and its auditors the fact that he had misappropriated the amounts in question".

20

The Respondent submits that the evidence establishes that the Appellant, in so conducting its office procedures, was not taking reasonable care for its own safety (Paragraphs 9 (1) and (m); 10 (a) to (e) above).

ACTS OF SERVANT ARE BINDING ON APPELLANT

30

24. The Respondent submits that, having regard to the scope of Moffitt's actual authority,

- (a) the transactions were authorised by the Appellant,
 - (b) the transactions were warranted by the Appellant to be regular, and
 - (c) the Appellant is estopped from challenging the propriety of the Respondent's actions.
- 40

Moffitt's actual authority (paragraph 9 (f) (g) (h) and (m) (ii) above) extended to presenting cheques to the Respondent for collection by the Respondent and credit to the Appellant's account, to the completion of the necessary documents in that regard (including the filling in of original and duplicate deposit slips and any endorse-

ment of cheques which may be necessary), and to the making of any necessary amendments in the deposit slips. Throughout each step in the banking transactions in question Moffitt was acting within the scope of his authority. It was Moffitt's act, in the course of his service, in depositing a cheque (which in every instance was the property of the Appellant) which led to the debit/credit entry in the Appellant's ledger account with the Respondent. Each deposit was presented to the

10 Respondent by Moffitt as being regular and proper and was accompanied by an original and duplicate deposit slip represented as being regular and proper. The Respondent relies upon the general principles enunciated in Lloyd v. Grace Smith (1912 A. C. 716 at 724-5, 733, 738 and 739-742); Underwood v. Bank of Liverpool ((1924) 1 K. B. 775 at 791-2, 795-8); Bank of England v. Bagliano (1891 A. C. 107); London Joint Stock Bank v. Macmillan (1918 A. C. 777 at 792-3, 811-2, 830-4).

20 CROSS-ACTION AND RATIFICATION

25. The Respondent submits that if the Appellant succeeds in recovering the amounts of the cheques on the ground that the same were wrongly debited to its account with the Respondent, then the Appellant is not entitled to retain against the Respondent the amounts of the corresponding credits passed to the Appellant's account. The Appellant has denied liability to the Respondent under this cross-action. The Respondent sub-

30 mits that such denial involves an assertion by the Appellant of a right to retain the benefit of these credits and carries with it a ratification by the Appellant of each transaction; such ratification precludes the Appellant from challenging the validity of the debit portion of the transaction. It is submitted that the Appellant cannot at the same time challenge the debits and assert a right to retain the benefit of the credits; if the Appellant succeeds in its claim against the Respondent in recover-

40 Appellant is no longer entitled to retain the benefit of the credits and the amount thereof is recoverable by the Respondent as money had and received.

SUBMISSION

26. The Respondent therefore submits that the appeal should be dismissed with costs for the following

Record

amongst other

REASONS

- (1) That no such duties as claimed by the Appellant lie on the Respondent.
- (2) That the damages claimed by the Appellant were not caused by any breach of contract or fault on the part of the Respondent and they are too remote.
- (3) That in respect of any debits established by the Appellant to have been wrongful, the Respondent paid and satisfied any lawful claim thereupon arising against the Respondent by passing a corresponding and simultaneous credit to the account of the Appellant.
- (4) That if there is shown to be a debit within the meaning of the Bills of Exchange Act in respect of any of the cheques in question, the Respondent acted in the premises in good faith and without negligence and paid the same to a banker.
- (5) That if there is shown to be a debit within the meaning of the Bills of Exchange Act in respect of any of the cheques in question, the Respondent acted in the premises in good faith and in the ordinary course of business.
- (6) That the Appellant was guilty of contributory negligence.
- (7) That the Appellant authorised the transactions in question, warranted to the Respondent that the same were regular and proper and is estopped from seeking to establish against the Respondent that they were not regular and proper or that the duplicate deposit slips were not correct or did not contain the information required by the Appellant.
- (8) That the Appellant in asserting a right to retain the benefit of the credits which in each instance correspond with the debits has ratified the transaction which in each instance led to the simultaneous and corresponding debit and credit entries, the Appellant thereby precluding itself from re-

covering in respect of the alleged wrongful debits. Record
If this does not amount to ratification and if the
Appellant does recover from the Respondent the
amounts debited in respect of the cheques, it is
submitted that the Appellant itself becomes liable
to the Respondent for money had and received in
respect of the corresponding credits.

27. The Respondent also submits that so much
10 of the Appellant's claim as arose more than six years
next before the institution of this action is statute barred.

L. W. STREET

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