Banks Ordinance (Cap 364), which replaced the Exchange Banks' Association. The HKAB together with The Hong Kong Association of Banks Ordinance provides a systematic way to exchange views and future developments in the banking system between the Hong Kong Government and the banking sector.

Membership of the HKAB is mandatory for all fully licensed banks in Hong Kong and they must follow rules and regulations stipulated by the HKAB. The role and objectives of the HKAB include furthering the interests of licensed banks and making rules for the conduct of the business of banking. Until 1995, the HKAB had the monopoly to lay down the interest rates charged by the member banks on Hong Kong dollar time-deposits below HK$500,000, but such monopoly has been removed. The Hong Kong dollar-time deposits are now fixed daily by a reference to the HKAB FRA terms and also the average rates given by the 20 reference banks designated by the HKAB.

(b) No Central Bank in Hong Kong

Hong Kong has no central bank and it is unlikely that one will be set up in the near future. The absence of a central bank does not mean that the powers and functions normally exercised by a central bank do not exist in Hong Kong. A unique feature of Hong Kong's banking industry is that the role of the central bank is performed partly by the Government through the Monetary Authority and partly by the territory's leading banks, namely The Hong Kong and Shanghai Banking Corporation Limited, Standard Chartered Bank and the Bank of China Group. Prudential supervision of financial institutions, however, is vested in the Monetary Authority, which came into existence in April 1993.

(c) The Hong Kong Monetary Authority

Monetary policy comes within the responsibility of the Hong Kong Monetary Authority ('HKMA'), which is also responsible for the management of the Exchange Fund. The HKMA was established on 1 April 1993 by merging the Office of the Exchange Fund with the Office of the Commissioner of Banking. The powers and functions previously exercised by the Commissioner of Banking and the Secretary for Monetary Affairs are now vested in the HKMA. The Exchange Fund Ordinance (Cap 66) s 3 sets out its purposes in the following terms:

(1) There shall be established a fund to be called 'the Exchange Fund' which shall be under the control of the Financial Secretary and shall be used primarily for such purposes as the Financial Secretary thinks fit affecting, either directly or indirectly, the exchange value of the currency of Hong Kong and for other purposes incidental thereto. The control of the Financial Secretary shall be exercised in consultation with an Exchange Fund Advisory Committee of which the Financial Secretary shall be *ex officio* chairman and of which the other members shall be appointed by the Chief Executive.

(1A) In addition to using the Fund for its primary purpose, the Financial Secretary may, with a view to maintaining Hong Kong as an

international financial centre, use the Fund as he thinks fit to maintain the stability and the integrity of the monetary and financial systems of Hong Kong.

(1B) The Financial Secretary, in using the Fund for the purpose specified in subsection (1A), shall have regard to the primary purpose of the Fund.

The HKMA is headed by a chief executive, who is assisted by three deputy chief executives. One deputy is in charge of external affairs, corporate services and research, another is in charge of banking policy, development and supervision issues and the last deputy is in charge of monetary management, reserves management and financial infrastructure.

The role of the HKMA is set out by s 5A of the Exchange Fund Ordinance which states as follows:

(a) to assist the Financial Secretary in the performance of his functions under this [Exchange Fund] Ordinance;
(b) to perform such functions as the Financial Secretary may direct; and
(c) to perform functions imposed on or assigned to the Monetary Authority by any other Ordinance.

As mentioned earlier, the role previously held by the Commissioner of Banking under the BO has now been taken over by the Monetary Authority. Bank supervision is now in the hands of the Deputy Chief Executive heading the Bank Supervision Department, which is responsible for the day to day supervision of Authorised Institutions and the Banking Policy Department, which in turn is responsible for the development of the policy framework under which the supervision is carried out. Further, s 7 of the BO specifically states the function of the HKMA as:

(a) being responsible for supervising compliance with the provisions of [the Banking] Ordinance;
(b) taking all reasonable steps to ensure that the principal places of business, local branches, local offices, overseas branches and overseas representative offices of all authorised institutions and local representative offices are operated in a responsible, honest and business-like manner;
(c) promoting and encouraging proper standards of conduct and sound and prudent business practices amongst authorised institutions and money brokers;
(d) suppressing or aiding in suppressing illegal, dishonourable or improper practices in relation to the business practices of authorised institutions;
(e) co-operating with and assisting recognized financial services supervisory authorities of Hong Kong or of any place outside Hong Kong, whenever appropriate, to the extent permitted by this or any other Ordinance;
(f) considering and proposing reforms of the law relating to banking business and the business of taking deposits; and

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(3I) (Repealed 4 of 1997 s. 27)
(4) Every director, every chief executive and every manager of an authorized institution which fails to comply with any requirement of the Monetary Authority under subsection (1)(A) commits an offence and is liable-
(a) on conviction upon indictment to a fine at tier 9 and to imprisonment for 5 years and, in the case of a continuing offence, to a further fine at tier 5 for every day during which the offence continues; or
(b) on summary conviction to a fine at tier 5 and to imprisonment for 2 years and, in the case of a continuing offence, to a further fine at tier 2 for every day during which the offence continues.
(5) In this section, 'relevant person', in relation to an authorized institution, means any person who-
(a) is the Manager of the institution;
(b) is a minority shareholder controller, majority shareholder controller or indirect controller of the institution;
(c) has ceased to be a chief executive or director of the institution by virtue of section 53B(1)(a);
(d) is a chief executive or director of the institution by virtue of the operation of section 53B(2).

The then Commissioner of Banking ordered the closure of the Bank of Commerce and Credit Hong Kong ('BCCHK') under s 52 of the BO. The legality of the commissioner's closure order was questioned *In the Matter of Order 53 and rule 3 of the Rules of the Supreme Court* and *In The Matter of an Application for Leave for Judicial Review* MP No 3052 of 1991 (referred to as *In the Matter of Order 53 and rule 3*) on the ground that it was outside the scope of the powers granted by ss 52(1)(A) or (C). However, the High Court upheld the order's validity.

In the Matter of Order 53 rule 3

Hong Kong High Court

Jones J

(Unreported, No 3052 of 1991)

Jones J: On the 1st November I dismissed the application of Commodore Electronics Limited (the applicant) heard in chambers for leave to apply for judicial review and said that I would hand down my reasons later. I am now handing down my reasons in court having regard to the public interest involved.

The application relates to the closure of the Bank of Credit and Commerce Hong Kong Limited by the Commissioner of Banking (the Commissioner) on the 8th July and the subsequent presentation of a winding up petition by the Financial Secretary. I shall refer to the Bank either as the Bank or BCCHK.

The applicant, is a substantial depositor with the Bank and has claims for sums in excess of US$10,000,000.

Upon an application for leave to apply for judicial review, the applicant is required to establish that there is an arguable case.

The evidence placed before me consists of an affidavit of Alice Tsui, the controller of the Hong Kong branch of the applicant with a number of exhibits including a policy statement made by the Financial Secretary at a meeting of the Legislative Council on the 9th April 1986, the report by the Commissioner to the Governor dated the 30th July pursuant to s.52(1)(D) of the Banking Ordinance, Cap.155 (the Ordinance) describing the events relating to the Bank up to the appointment of the provisional liquidator on the 17th July and various copies of newspaper and other reports relating to the closure of the Bank and subsequent events.

Having regard to the evidence and the importance of the application, I directed that there should be an oral hearing upon notice to the Attorney General. As a result I have had the benefit of submissions by Mr Clifford Smith, counsel for the applicant and by Miss Hartstein on behalf of the Attorney General.

The report of the Commissioner reveals that the Bank of Credit and Commerce group consists of a holding company, B.C.C. Holdings based in Luxembourg which owns a number of banking operations around the world. The Bank is a direct subsidiary of the Luxembourg holding company. The Government of Abu Dhabi became the majority shareholder of the group and therefore of BCCHK in 1990. During 1990, BCCHK recorded a loss of $431,000,000 which resulted in its capital adequacy ratio being reduced below the minimum ratio of 11% applied to the Bank under the Ordinance. However, the position was restored in the last week of June by the injection of $125,000,000 of capital by the Abu Dhabi shareholders in the form of a subordinated loan. At that time BCCHK had complied with all the requirements under the Ordinance with regard to capital adequacy and liquidity.

During this period the Commissoner was directing his efforts to ensure that the Bank's assets were realistically valued, that it had sufficient capital and liquidity and that its exposure to the rest of the group was limited.

The crisis that led to the closure of BCCHK arose very suddenly when the Commissioner's representative in London was informed on the 2nd July that the Bank of England had received a report from the Bank's auditors Price Waterhouse of suspected fraud in the two main subsidiaries of BCC Holdings, BCCI SA which is incorporated in Luxembourg and BCCI Overseas which is incorporated in the Cayman Islands. Neither of these companies Operates in Hong Kong. NO mention, however, was made that BCCHK was involved in the suspected fraud.

On the 3rd July, the Commissioner briefed the Secretary for Monetary Affairs and the Financial Secretary about the situation and thereafter kept them informed. On the 5th July, the Commissioner wrote a memorandum to the Financial Secretary Stating that upon the information available BCCHK was "solvent and viable", but nevertheless, through no fault of its own, could become caught up in the wider problems of the rest of the group. He therefore considered that it might be necessary to exercise his powers under

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No doubt one can achieve by bona fide banking transactions a result that could be achieved by other means, but in my view, upon their true analysis, none of the transactions which Lonsdale Motors Ltd's current account with U.D.T. purports to record involves any acceptance by U.D.T. of deposits of money from Lonsdale Motors Ltd or any withdrawal by Lonsdale Motors Ltd of money deposited. As respects the credits for "stocking loans," if they are to be regarded as anything more than the counterpart of a debit to some other undisclosed account with Lonsdale Motors Ltd in U.D.T.'s books, perhaps of "bills receivable," these credits were of moneys provided by U.D.T. itself and the corresponding debit entries represented not a withdrawal of money deposited by Lonsdale Motors Ltd with U.D.T. but loans from U.D.T. to Lonsdale Motors Ltd As respects the credits and debits for the purchase price of vehicles sold by Lonsdale Motors Ltd to U.D.T., the debits represent payments made by U.D.T. as manager for Commercial and the corresponding credits are mere bookkeeping entries which are presumably the counterparts of debits to some undisclosed account with Commercial in U.D.T.'s books. It is not suggested that they represent cheques or drafts of Commercial collected by U.D.T. as Lonsdale Motors Ltd's banker. The choice whether these credit entries for loans or for the purchase price of cars should be made before or after the corresponding payment was debited to Lonsdale Motors Ltd was that of U.D.T. itself. It generally chose to make them afterwards, leaving the account temporarily in debit balance. Throughout the whole period of the account there was never a single penny in it representing moneys deposited by Lonsdale Motors Ltd either in the form of cash or in the form of cheques drawn by third parties to be collected on their behalf which U.D.T. could use for its own profit by lending it out again or in any other way. The account was merely the way in which U.D.T. chose to record its transactions with Lonsdale Motors Ltd as lender of money to Lonsdale Motors Ltd and as paying agent for Commercial. It does not, in my judgment, record any genuine banking transactions at all.

The evidence was that this account, the only one produced, was typical of all traders' accounts kept by U.D.T. It was said that there were variants. Not all traders with "current accounts" received "stocking loans". Some traders, instead of selling cars to Commercial, entered into hire-purchase contracts direct with their customers and discounted the hirer's promissory notes with U.D.T. In the case of these traders, the sum for which each note was discounted was credited to the trader's account and the corresponding sum debited when he drew on U.D.T. a cheque payable to himself. These credits did not represent moneys deposited with U.D.T. by the trader. They represented moneys paid by U.D.T. itself in consideration for the transfer of the promissory note. These differences are unimportant. They do not give the accounts the essential characteristics of recording banking transactions.

Mr. Garrett, however, stated that where a "current account" had been opened in the name of a trader and a cheque book issued to him, if the trader drew any cheques drawn on U.D.T. in favour of third parties as payees, U.D.T. would pay such cheques up to the amount to which his current account was in credit and was willing to collect on behalf of the trader payment of cheques drawn by third parties in favour of the trader, and that any moneys so paid or collected would be debited or credited to the trader's current account. There was no evidence that U.D.T. ever communicated an offer to do so to Lonsdale Motors Ltd or to any other trader; but, in the absence of evidence, I am prepared to assume that contractual obligations to pay and to collect cheques for traders are to be implied from U.D.T.'s providing the trader with crossed cheque forms for drawing on U.D.T. upon the face of which U.D.T. described itself as "bankers."

I do not doubt that if it were proved that traders' accounts were in fact operated in the way in which Mr. Garrett said, U.D.T. was willing to operate them, they would satisfy the essential characteristics of banking accounts, since the moneys collected on third parties' cheques and credited to the trader's account would be moneys deposited with U.D.T. by the trader, its customer, and the moneys paid out to third parties on the trader's cheques drawn on U.D.T. would be withdrawals by cheque. U.D.T. would to that extent be carrying on the business of banking. But I do not think that the mere fact that U.D.T. offered to pay and collect cheques for traders, or even that it undertook a contractual liability to do so, would constitute the carrying on of the business of banking unless traders availed themselves of the services so offered. It proves no more than that U.D.T. is willing to carry on the business of banking or is holding itself out as carrying on that business. But that, in my view, is not enough to bring U.D.T. within paragraph (d) of section 6 of the Money-lenders Act, 1900. The main definition of moneylenders in that section points to the distinction between a person who carries on a business and one who "advertises or announces himself or holds himself out as carrying on that business." Both are moneylenders. But the exception in paragraph (d) is drafted differently. To come within it a person must be actually carrying on the business of banking. It is not sufficient that he holds himself out as willing to do so.

If, as I think, these are the only transactions disclosed by the evidence on which U.D.T. can rely as being genuinely of the legal nature of banking business, the case turns upon whether U.D.T. has proved that the collection by U.D.T. of cheques payable to traders with "current accounts" and the payment by U.D.T. of cheques in favour of third parties drawn by such traders on their "current accounts" are more than negligible in size and number compared with the rest of its business. They need not constitute a large part of U.D.T.'s business but they must constitute more than a negligible part and it is for U.D.T. to prove that they do.

Mr. Garrett was unable to give any idea of the number of traders who in fact engaged in transactions of these kinds with U.D.T. or of the extent to which any trader did so. Under cross-examination all that emerged from his evidence was that not more than 20 per cent. of traders have "current accounts" at all, that of those with current accounts "not very many" use them for payment of cheques drawn in favour of third parties or collection of cheques drawn by third parties, and that even of those that do. the extent to which they do so is "small, I imagine. I do not know about minute."

Once one eliminates the kinds of transactions recorded in the "current account" of Lonsdale Motors Ltd as not being in the legal nature of banking transactions at all, the evidence of Mr. Garrett in my judgment leaves a

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was only entitled to find dishonesty, fraud, lack of probity, call it what one will, on the basis of the allegations in sub-sub-paragraphs (1) to (7) to which I have referred. It is sufficient if I say at this stage that such allegations, even if fully made out, were wholly inadequate material on which to base a finding, or an inference of fraud or dishonesty on Mr. Fox's part.

The principal passage in the judge's judgment on which he based his finding that the bank was at least in part liable to the solicitors is at [1987] 1 WLR 987, 1012G–1013A. I shall deal further later in this judgment with the two findings of fact contained in the first two sentences of this paragraph of the judgment at first instance. However, for the reasons I have given I think that the bank's challenge to the judge's finding of knowledge on the part of Mr. Fox of Cass' fraud is made out and that the finding against the bank on this score cannot be upheld: see also *Nihill v Nihill* (unreported), 22 June 1983; Court of Appeal (Civil Division), Transcript No. 276 of 1983.

I turn to the solicitors' claim against the bank based on contract or negligence. We are here concerned with the general relationship between a banker and his customer in the common case where the latter has a current account with the former which is in credit. The underlying basis of this relationship is that it is one of debtor and creditor. The money deposited with a bank becomes its own. It is prima facie bound to meet its debt when called on to do so. As Lord Atkinson said in *Westminster Bank Ltd v Hilton* (1926) 43 TLR 124 at 126:

> It is well established that the normal relation between a banker and his customer is that of debtor and creditor, but it is equally well established that *quoad* the drawing and payment of the customer's cheques as against money of the customer's in the banker's hands the relation is that of principal and agent. The cheque is an order of the principal's addressed to the agent to pay out of the principal's money in the agent's hands the amount of the cheque to the payee thereof.

Indeed any failure by a bank to honour its customer's instructions may well redound to the serious discredit of the customer himself. On the authorities it is clear that at least in the last century the terms of a customer's mandate to his banker in respect of his current account were sacrosanct. In *Bodenham v Hoskins* (1852) 21 LJ Eq. 864 at 869 Kindersley V-C. said:

> Let us see, therefore, what was the position of the bankers in the matter. I entirely agree with many of the observations that have been made by... counsel for the defendants, that, as between banker and customer, in a naked case of banker and customer, the banker looks only to the customer, in respect of the account opened in that customer's name, and whatever cheques that customer chooses to draw, the banker is to honour. He is not to inquire for what purpose the customer opened the account; he is not to inquire what the monies are that are paid into that account, and he is not to inquire for what purpose monies are drawn out of that account: that is the plain general rule, as between banker and customer.

In the similar case, *Gray v Johnston* (1868) LR 3 HL 1, 11, Lord Cairns LC said:

> I think, fortunately, your Lordships will find that the law on that point is clearly laid down, and may be derived without any hesitation from the authorities which have been cited in the argument at your Lordships' bar, and I apprehend that you will agree with me when I say that the result of those authorities is clearly this: in order to hold a banker justified in refusing to pay a demand of his customer, the customer being an executor, and drawing a cheque as an executor, there must, in the first place, be some misapplication, some breach of trust, intended by the executor, and there must in the second place, as was said by Sir John Leach, in the well known case of *Keane v Robarts* (1819) 4 Madd 332 at 357, be proof that the bankers are privy to the intent to make this misapplication of the trust funds.

In similar vein Lord Westbury said, at 14:

> The relation between banker and customer is somewhat peculiar, and it is most important that the rules which regulate it should be well known and carefully observed. A banker is bound to honour an order of his customer with respect to the money belonging to that customer which is in the hands of the banker; and it is impossible for the banker to set up a jus tertii against the order of the customer, or to refuse to honour his draft, on any other ground than some sufficient one resulting from an act of the customer himself. Supposing, therefore, that the banker becomes incidentally aware that the customer, being in a fiduciary or a representative capacity, meditates a breach of trust, and draws a cheque for that purpose, the banker, not being interested in the transaction, has no right to refuse the payment of the cheque, for if he did so he would be making himself a party to an inquiry as between his customer and third persons. He would be setting up a supposed jus tertii as a reason why he should not perform his own distinct obligation to his customer.

Finally, in *Bank of New South Wales v Goulburn Valley Butter Co Proprietary Ltd* [1902] AC 543 at 550, Lord Davey, in giving the opinion of the Privy Council, said: "The law is well settled that in the absence of notice of fraud or irregularity a banker is bound to honour his customer's cheque."

However, in two relatively recent decisions, strongly relied on by counsel for the solicitors, it seems to me that at first instance two judges went appreciably further. These two decisions were *Selangor United Rubber Estates Ltd v Cradock (No. 3)* [1968] 1 WLR 1555 and *Karak Rubber Co Ltd v Burden (No 2)* [1972] 1 WLR 602. The facts of each case were complicated and it is unnecessary to set them out in detail. The disputes were concerned with the use of a limited company's moneys to finance the purchase of its own shares. In addition to claims against personal defendants the several banks involved in the relevant transaction were also sued, first, as constructive trustees with the directors of the company's funds in respect of breach of trust; secondly, in negligence in relation to the way the banks paid cheques drawn on them.

In the circumstances of the instant case it may strictly be unnecessary to consider the views expressed in both *Selangor United Rubber Estates Ltd v Cradock (No. 3)* [1968] 1 WLR 1555 and *Karak Rubber Co Ltd v Burden (No 2)* [1972] 1 WLR 602 about how far a claimant against a bank has to go to demonstrate that the latter acted as a constructive trustee of its customer's funds. However, it seems to me that in each case the court considered whether a constructive trust had come into existence on the one hand, and whether the bank had been negligent on the other, from very much the same viewpoint. In *Selangor United Rubber Estates Ltd v Cradock (No 3)* [1968] 1 WLR 1555 Ungoed-Thomas J first considered the potential liability of the relevant bank as a constructive trustee. In doing so he quoted the well known dictum of Lord Selbourne LC in *Barnes v Addy*, LR 9 Ch App 244, 252 to

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A meticulous examination of the facts of the present case reveals that Mr. Barrow never "crossed the line." Nor was the transaction unfair to Mrs. Morgan. The bank was, therefore, under no duty to ensure that she had independent advice. It was an ordinary banking transaction whereby Mrs. Morgan sought to save her home; and she obtained an honest and truthful explanation of the bank's intention which, notwithstanding the terms of the mortgage deed which in the circumstances the trial judge was right to dismiss as "essentially theoretical," was correct: for no one has suggested that Mr. Barrow or the bank sought to make Mrs. Morgan liable, or to make her home the security, for any debt of her husband other than the loan and interest necessary to save the house from being taken away from them in discharge of their indebtedness to the building society.

For these reasons, I would allow the appeal. In doing so, I would wish to give a warning. There is no precisely defined law setting limits to the equitable jurisdiction of a court to relieve against undue influence. This is the world of doctrine, not of neat and tidy rules. The courts of equity have developed a body of learning enabling relief to be granted where the law has to treat the transaction as unimpeachable unless it can be held to have been procured by undue influence. It is the unimpeachability at law of a disadvantageous transaction which is the starting-point from which the court advances to consider whether the transaction is the product merely of one's own folly or of the undue influence exercised by another. A court in the exercise of this equitable jurisdiction is a court of conscience. Definition is a poor instrument when used to determine whether a transaction is or is not unconscionable: this is a question which depends upon the particular facts of the case.

I propose, therefore, that the House order as follows: (1) that the appeal be allowed; (2) that possession of the house be given within 28 days of the date of judgment in this House; (3) that no order be made as to costs in the Court of Appeal or in this House save for a legal aid taxation of the respondent's costs.

Lord Keith of Kinkel: [710] Mr Lords, I agree that this appeal should be allowed for the reasons set out in the speech of my noble and learned friend, Lord Scarman.

Lord Roskill: [710] My Lords, I have had the advantage of reading in draft the speech of my noble and learned friend, Lord Scarman. I respectfully and entirely agree with it and for the reasons he gives I would allow this appeal.

Lord Bridge of Harwich: [710] My Lords, for the reasons given in the speech of my noble and learned friend Lord Scarman, with which I fully agree, I would allow this appeal.

Lord Brandon of Oakbrook: [710] My Lords, I have had the advantage of reading in draft the speech prepared by my noble and learned friend, Lord Scarman, I agree with it, and for the reasons which he gives I would allow the appeal.

Cornish v Midland Bank

Court of Appeal

Kerr, Croom- Johnson and Glidewell LJJ

[1985] 3 All ER 513

The plaintiff, a customer of the bank, signed a second mortgage in favour of the bank without appreciating and without being informed by the bank that it was so worded as to secure a loan of £200 for renovations to a farmhouse jointly owned by the plaintiff and her husband. The bank made further advances to the husband under the mortgage and, when the farmhouse was eventually sold, the proceeds of sale barely covered the first and second mortgages and the sale expenses.

Held - where a bank chose to advise a customer as to the nature and effect of a mortgage in favour of the bank prior to the customer executing the mortgage, the bank was under a duty not to negligently misstate the effect of the mortgage. In particular, the bank was required to explain that the mortgage covered any further advances if that was the case. However, the mortgage itself would not be set aside unless the customer could show that the bank had taken unfair advantage of them so that the presumption of undue influence arose. In the circumstances, the bank had assumed a duty to give the plaintiff proper advice concerning the effect of the mortgage and had been negligent in the way it had discharged that duty. The plaintiff was therefore entitled to damages against the bank for negligence, but existing between the plaintiff and the bank was a relationship of banker and customer and no unfair advantage had been taken of her, therefore no presumption of undue influence arose.

Croom- Johnson LJ: [515–520] In the court below the plaintiff's case was advanced on the basis that the advice given to her at the time of the execution of the second mortgage was negligent, and also the bank owed a fiduciary duty to her and so should have advised her to obtain independent advice. In addition, it was alleged that from the time when the bank knew on 28 June 1976 that the marriage was breaking up it owed her a duty to see that her interest in half the equity in the farm was not prejudiced by further loans to the husband. The farm was ultimately sold in 1979 for £27, 000, by which time the bank had made further advances to the husband. It is enough to say for the present that only £748 was left over after the building society, the bank and sale expenses had been paid.

Both the husband and Mr Winslow. The view he took of what happened was that the husband was anxious to pay as little to the plaintiff as he could and that in that he was assisted by Mr Winslow.

It is appropriate now to return to the occasion in 1976 when the plaintiff signed the second mortgage on the farm. When she went to sign she saw Mr B L Park, a grade 3 clerk deputed to deal with her by Mr Winslow. Both gave evidence, and were considered by the judge to be honest witnesses struggling to recall a conversation held eight years previously. The effect of

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from either its own breach of duty or the fraudulent conduct of its officers for which she cannot be held responsible.

The facts of this case are unusual. As the defendant tells it, the story began in 1982 when she was introduced to Low Chun Seng and his brother, Low Chang Hian (CH Low) at a social function in Singapore, Hong Kong and Malaysia, was employed as the managing director of her father's Singapore property development company. The defendant knew that the two Lows, together with their younger brother, were highly enterprising and successful businessmen who owned and ran the plaintiff bank and were also owners and developers of property in Singapore, Malaysia and Hong Kong.

In early 1983 the defendant visited Hong Kong and met the Low brothers in the office of the bank. At this meeting, she was introduced to one Victor Tan Khai Chong and his assistant, Doreen Yong Poh Choo. The defendant was told that Victor Tan, one of the executive vice- presidents and directors of the bank, was the man in charge of the treasury department and the private banking department which serviced high net worth individuals and helped them manage their investment portfolios. The two low brothers spoke very highly of Victor Tan and the defendant learned that he was also a director of stockbroking firms in Singapore and Kuala Lumpur.

Subsequently the defendant met the Low brothers and Victor Tan on several social occasions in either Singapore or in Hong Kong. Some time in early 1984, Victor Tan told the defendant that the bank wanted to carry out forex and bullion dealings in Indonesia but needed an Indonesian national to hold the necessary licence. He enquired whether the defendant would be interested in a joint venture with the bank whereby she would hold the licence and the bank would run the business. Although the defendant expressed some interest in the project, it came to naught as at the time the defendant was involved in establishing Macron Futures Pte Ltd (Macron), a financial and commodity futures broking house in Singapore, of which she bcame managing director in mid-1984.

In the course of discussion on the Indonesian project, the defendant mentioned to Victor Tan that she was interested in dealing in the Hong Kong stock market. He then suggested that she could obtain a loan from the bank for this purpose but the defendant did nothing to take him up on the suggestion. In early May 1984, however, Victor Tan telephoned the defendant and told her that the bank was prepared to offer her a HK$20m clean overdraft facility. Though overwhelmed both by the amount of the facility and by the fact that no security was requested, the defendant accepted the facility without question.

The very next day, Victor Tan went to see the defendant in her office in Singapore and gave her two documents to sign. These were the bank's standard documents required in connection with the extension of overdraft facilities. The defendant signed the documents in blank in his presence and they were later completed and dated 28May 1985 by other officers of the bank. A formal facility letter was sent to the defendant in September 1984.

At this May 1984 meeting, Victor Tan told the defendant that the bank would help her to manage her account and would handle her investment portfolio on her behalf. The defendant agreed to let the bank have full discretion to manage the account. On Victor Tan's advice hat it would facilitate the operation of the account if he had pre-signed cheques from the defendant, she then signed three books of blank cheques and handed them to Victor Tan together with the two signed agreements.

The bank's records show that the account was opened on 22 May 1985 with a deposit of $1,000. The defendant says that she did not make any such deposit and that, after signing the forms and the cheques, she left the handling of her account entirely to the bank. Occasionally she asked Victor Tan how it was doing and also requested that statements be supplied. She was told the account was fine but she was neither given details orally nor any bank statements. The defendant did not press for information, however, as she did not want to disturb her rapport with the bank. Also, some months after the account was opened, Victor Tan gave the defendant HK$2000, 000 in cash telling her that this money represented profits earned on her account.

On 25 June 1985, Victor Tan telephoned the defendant from Hong Kong and told her that her overdraft account had been repaid in full. He then suggested that she invest in the shares of the bank itself which were then trading at HK$1.20 and which he assured her would not fall below par. The defendant accepted his advice and told him he could go ahead and buy the shares of the bank. The defendant was unaware until later that at the time of the advice the bank was involved in the general banking crisis in Hong Kong.

Two months later, at the end of September, Victor Tan told the defendant that the bank's shares were falling and indicated that she should not support them any longer. She agreed that he should sell them. In early October she received, or the first time, a statement of account from the bank. To the defendant's shock, it showed that as at the end of September her account has had a debit balance of more than HK$19m. She called Victor Tan immediately and asked him why there was such a big debit balance and he informed her that this account had been used to purchase the bank's shares. Subsequently she received the October statement which showed a reduced debit balance of some HK$6m. She was still alarmed by this figure and Victor Tan told her that the bank would not seek repayment for five years and that he would help her with her investments so as t recoup her losses.

The defendant contacted Victor Tan several times thereafter but he said that he was very busy restructuring the bank and he did not have the time to make investment decisions for her. The matter remained quiescent until October 198 when the defendant received a letter of demand from the bank's solicitors. By that time the Lows and Victor Tan had left the bank and it was under new management. Subsequently, she had a meeting with one Mr C K Phoon who was an officer with the bank charged with recovering outstanding loans incurred during the Low's regime. She told Mr Phoon that if the bank could show her some share certificates or any documentary evidence showing that the HK$7m odd debit balance represented the loss incurred on the sale of the shares then she would repay the bank without further ado.

In fact, the bank was in no position to show the defendant any such documents. Their evidence was that the Low brothers and Victor Tan had used their positions in the bank to defraud it. One of the ways in which this was done was through the establishment of 'anonymous' accounts. Such

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do with the document treated it as a bill of exchange payable to the order of the drawer. That such a document is a good bill of exchange has not been denied. We asked in the course of the argument for some authority that a bill payable to the order of the drawer is not a good bill of exchange, and no such authority was produced. And I find that as long as 1791, Eyre CB, in *Gibson v Minet* 1 H Bl 605, said: 'Bills of exchange being of several kinds, the title to sue upon any one bill of exchange in particular will depend upon what kind of bill it is, and whether the holder claims title to it as the original payee, or as deriving from the original payee, or from the drawer in the case of a bill drawn payable to the drawer's own order, who is in the nature of an original payee'. I think that this was a good bill of exchange, the meaning of it being, 'Pay to the order of the drawer', and that every one always regarded it in that light. The objection that it was not a bill of exchange therefore fails entirely, and that is the only point we have now to decide, except that, there not having been a satisfactory trial of the question of fraud, that question must go back for a new trial.

Section 7 of the BEO further stress the importance of the payee's identity and provides the solution for the situation where the payee is a fictitious payee or a non-existent payee.

(a) Fictitious or Non-existent Person

Bank of England v Vagliano Brothers

House of Lords

Lord Halsbury LC, the Earl of Selborne, Lords Watson, Bramwell, Herschell, Macnaghten, Morris and Field

[1891] AC 107

Vagliano Brothers (Vagliano) were in the habit of accepting bills of exchange drawn on them by Vucina and payable to Petridi and Co. Vagliano's clerk, Glyka, forged a bill as if it were drawn by Vucina on Vagliano and payable to Petridi and Co at the Bank of England for a substantial amount. Vagliano accepted the forged document. Glyka then forged Petridi's indorsement and presented it to the Bank of England, which paid him the amount in cash over the counter.

Lord Halsbury LC: [113–122] My Lords, the simple question in this case is whether the plaintiff's bankers have paid away the plaintiff's money under such circumstances as enable him to refuse to acknowledge the payments as made on his behalf. Each of the parties is innocent of any wilful default. They are both free from any suspicion of bad faith; but the banker has paid away and placed to the debit of his customer a sum of £71,500, while the customer was not conscious of and certainly never intended to authorise the payment of that sum on his behalf.

The authority to pay, which was relied upon by the bankers as justifying the payments, was written documents in the form of bills of exchange, and,

though they were not really bills of exchange at all, it is important to bear in mind what a real bill of exchange would import to the mind of a person to whom it was sent for payment.

Now, apart from the particular machinery by which this transaction was effected, it will not be denied that a principal who has misled his agent into doing something on his behalf which the agent has honestly done, would not be entitled to claim against the agent in respect of the act so done; and upon this branch of the case the question is whether the agent was misled into doing the act by the default of the principal: see *Ireland v Livingston* Law Rep 5 HL 395.

I will treat the transaction for the sake of clearness as if it were a single payment. Could it be doubted that if the two parties met, and by word of mouth the customer had said to his banker, 'There is a bill coming due tomorrow of such and such an amount; it is drawn on me by a customer of mine named Vucina, and will be presented for payment at your bank tomorrow', that such a statement was calculated to put the banker off his guard and be likely to induce him to act as he did act? Does it make any difference that the words were not spoken, but upon its face the document, reaching the banker's hands by the act of the customer, in which phrase I include the course of Vagliano's business, said this as plainly as if the words had been spoken? Vucina, in fact, had not drawn any such bill. There was no transaction between Vagliano and Vucina such as the instrument in question purported to effect, and yet this was the written statement which upon the face of the instrument Vagliano made to the bank.

Further, by a separate and independent writing, Vagliano told the bank that such a bill of exchange for such an amount was becoming due, and would have to be paid out of his account. No such bill of exchange existed, although a false document corresponding in all particulars was accredited by Vagliano in writing his acceptance upon it.

In estimating the effect upon an agent's mind, it must of course be remembered, that though I have here for clearness spoken of it as a single transaction, it is a transaction repeated 43 times and spread over a considerable period. The false documents were paid, duly debited to the customer, and duly entered in his passbook, and so far as the banker could know or conjecture brought to his knowledge on every occasion upon which the payment was made and the bills returned. Further, on each occasion when these false documents were, by what I have called the act of the customer, permitted to reach the bank for payment, they were accompanied with a considerable number of other genuine bills of exchange, many of them drawn by Vucina, and regularly entered in the notice of bills about to become due, together with the false documents in question.

My Lords, it seems to me impossible to dispute that this was, in fact, a misleading of the bankers. I pass by for the moment the question whose default it was, for the purpose of considering the proposition which has found favour with one of your Lordships, and which I will not dispute, that the carelessness of the customer, or neglect of the customer to take precautions, unconnected with the act itself, cannot be put forward by the banker as justifying his own default...

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Westminster Bank v Zang

House of Lords

Viscount Dilhorne, Lords Reid, Hodson, Upjohn and Wilberforce

[1966] AC 182

Viscount Dilhorne: [215–221] My Lords, in 1962 during the weekend of Easter Mr J Tilley gave the respondent Zang £1,000 in cash in exchange for a cheque for £1,000 drawn by the respondent and made payable to 'J Tilley or Order'. The £1,000, which Mr Tilley gave to the respondent, was the property of Tilley's Autos Ltd, a company controlled by Mr Tilley and of which he was the managing director. On 27 April 1962, Mr Tilley went to his bank, the Euston Road branch of the appellants, and filed in a paying-in slip. On that slip he wrote that the account to be credited was that of Tilley's Autos Ltd, and the cheques he paid in and entered on the paying-in slip included the cheque he had received from the respondent. The other cheques he paid in had been drawn payable to Tilley's Autos Ltd. Mr Tilley did not indorse the respondent's cheque before paying it in. On the paying-in slip were printed the following words:

> The bank reserves the right, at its discretion, to postpone payment of cheques drawn against uncleared effects which may have been credited to the account.

The cheque for £1,000 drawn by the respondent was presented to his bank for payment three times. The first time it was returned marked 'Please re-present'. On the second and third occasions it was returned marked 'Refer to drawer'.

Mr Tilley decided to sue the respondent and on 11 January 1963, his solicitors wrote to the appellants asking the bank to let them have the dishonoured cheque on their undertaking to return it on demand. On 18 January 1963, the bank sent them the cheque. On 6 February 1963, Mr Tilley issued a writ against the respondent claiming the £1,000 due on the dishonoured cheque. This action was eventually dismissed as a result of Mr Tilley's failure to comply with an order for discovery.

On 13 September 1963, the cheque was returned to the bank at their request and on 11 December 1963, the appellants issued a writ against the respondent as holders in due course or for value of the cheque.

'Holder' is defined by section 2 of the Bills of Exchange Act 1882, as meaning 'the payee or indorsee of a bill or note who is in possession of it, or the bearer thereof'. As the appellants had received the cheque from Mr Tilley without indorsement by him, they did not become holders of the cheque within the meaning of section 2 of the Bills of Exchange Act 1882.

In 1957 the Cheques Act was passed with the object of reducing the labour involved and the time taken by collecting and paying banks in ensuring not only that each cheque was indorsed but also that the indorsement corresponded with the name of the payee on the face of the cheque. Section

2 deals with the rights of collecting banks in respect of cheques not indorsed by holders and reads as follows:

> A banker who gives value for, or has a lien on, a cheque payable to order which the holder delivers to him for collection without indorsing it, has such (if any) rights as he would have had if, upon delivery, the holder had indorsed it in blank.

The appellants relied upon this section and sought to establish (1) that the holder had delivered the cheque to them, (2) that it had been delivered to them for collection and (3) that they had given value for it or had a lien upon it.

The respondent, in addition to pleading the Gaming Act and denying that the appellants had any right to sue on the cheque, pleaded that by delivering the cheque to Mr Tilley's solicitors, the appellants had lost any rights they had to sue on it.

The action was tried by Roskill J, who held that the Gaming Act plea failed. He gave judgment for the appellants for £1,000 and £75 interest. The respondent appealed to the Court of Appeal (Lord Denning MR, Danckwerts and Salmon LJJ). The Gaming Act plea was not pursued nor was the appellants' claim to have a lien on the cheque. The Court of Appeal allowed the appeal.

The issues for your Lordships' determination were whether the bank had established the matters necessary for them to avail themselves of section 2 of the Cheques Act and whether, if they had any rights in relation to the cheque by virtue of that section, they had lost them by delivery of the cheque to Mr Tilley's solicitors.

The first question, namely, whether the holder of the cheque had delivered it to the bank, was answered by the Court of Appeal in the affirmative. In my opinion, it is clear that Mr Tilley was, when he delivered the cheque to the bank, the holder of it within the meaning of section 2 of the Bills of Exchange Act 1882.

Much argument was directed to the second question, namely: was the cheque delivered to the bank for collection? It was argued for the respondent that 'collection' in section 2 of the Cheques Act was to be interpreted as meaning collection for payment into the payee's account when the payee is named on the cheque; and that as the appellants had received the cheque unindorsed with the direction that it was to be paid into the account of Tilley's Autos Ltd, they could not rely upon section 2. This argument found favour with Lord Denning. He held that a banker who receives a cheque for collection only has the right conferred by section 2 when the cheque is to be credited for the account of the payee. Salmon LJ on the other hand, found it impossible to give words 'for collection' in section 2 the restricted meaning for which the respondents contended.

Production of a paid cheque indorsed by the payee is very strong evidence of receipt by the payee. By dispensing with the requirement of indorsement on all 'order' cheques, the Cheques Act deprived the drawer of ability to establish receipt by the payee in this way. He might, it is true, be able to secure evidence from the payee's bank if it had been credited to the payee's account, but, if it was credited to the account of some other person, it

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customers. The final section of Chapter 4 will consider the response of the courts, actual and potential, to this development.

2. The Bank's Responsibility to the Customer

The bank has a duty to follow a customer's instructions. If it fails to do so it is in breach of the contract. One of the two most common functions which a bank performs is to collect cheques payable to a customer and place the value of those cheques to the credit of the customer's account. The other is to pay the amounts stated on cheques drawn by customers to the named payees, when the payees' banks collect on them.

The Bills of Exchange Ordinance (Cap 19) ('BEO'), s 73(1) provides: 'A cheque is a bill of exchange drawn on a banker payable on demand'. No instrument is a cheque, therefore, unless it is payable to a specified person or to bearer (see BEO, s 3(1)). Cheque forms made payable to 'cash' are therefore not cheques (see *Madnani v Atwani*, quoted in Chapter 3). The bank must follow the instructions on the cheque, not only the name of the payee and the date, but also the instruction as to whether the cheque is payable to bearer or order, or further restricted by crossings or other markings, such as crossings or otherwise. BEO, ss 76 and 81 deal with crossings. If a bank does not pay as instructed by the crossing, it breaches its contract with the customer. Moreover, if it pays on an instrument which has been forged, it has not followed its customer's instructions and must bear the loss, if any. It has no right to debit the customer's account except according to the customers instructions. But banks have been accorded some protection through legislation. They have also sought to escape liability by expressly changing the clauses which would otherwise be implied in their contracts with customers.

3. Crossings

BEO acknowledges the use and provides for the legal interpretation of general and special crossings. Section 78 of the BEO also specifically states that crossings recognised by BEO form a material part of the cheque. Therefore, any alteration to the crossing of the cheque after it has been issued without the consent of the issuer would constitute a material alteration. Further, s 76 of the BEO provides for the meaning of general and special crossings:

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

(a) the words "and company", or any abbreviation thereof, 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 words "not negotiable", that addition constitutes a crossing, and the cheque is crossed specially and to that banker.'

Section 79 of the BEO lists out the banks' duties towards a crossed cheque and s 80 provides for protections to the bank in relation to crossed cheques. Section 81 provides: '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'. If words other than 'not negotiable' are used, they will not take away negotiability unless their meaning is unambiguous.

National Bank v Silke

Court of Appeal

Lindley, Bowen and Fry LJJ

[1886–90] All ER Rep 801

The defendant had agreed to advance a sum of £450 to a Mr J F Moriarty, upon certain conditions as to security, and in pursuance of this arrangement gave him the cheque in question. The cheque was drawn upon at the Camden Town branch of the Alliance Bank, and was payable to the order of J F Moriarty, Esq, and was crossed thus: 'Account of J F Moriarty, Esq, National Bank, Dublin'. Moriarty, on receiving the cheque sent it by post to the National Bank Dublin, who were his bankers, in a letter in which he told them to 'credit' his account with the £450. The bank did so at once, before they knew whether the cheque would be honoured, and sent Moriarty an acknowledgment of the receipt of the cheque as 'for your credit'. On the day Moriarty sent the cheque to the bank, his account was £6 overdrawn. He immediately drew upon his account and thus received the greater part of the value of the cheque before it had been paid to the bank. The bank sent the cheque on to London, and on its being presented by their Camden Town branch to the Camden Town branch of the Alliance Bank for payment, payment was refused by the direction of the drawer, which had been given in the meantime. The reason for this direction was that Moriarty had not fulfilled the condition as to security upon which the advance had been made to him. The National Bank then applied to Moriarty to refund to them the sum which they had advanced upon the faith of the cheque being honoured, and, as he failed to do so, they brought an action against the drawer of the cheque. Day J gave judgment for the plaintiffs. The defendant appealed.

Lindley LJ: [802–803] The question in this case is whether the National Bank is entitled to sue the defendant upon a cheque drawn in this particular form. It has been contended that the bank cannot maintain this action because they have no right to sue upon the cheque at all; that it was not a transferable or negotiable instrument, and consequently no one can sue upon it but Moriarty himself. It must be remembered that the Bills of Exchange Act 1882, which governs this question, contains special provisions relating to cheques. I am not satisfied that a cheque payable to order or bearer can be made not negotiable in any mode, except that which is expressly pointed out

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consideration the undersigned agrees with the said Bank that he they will within 15 days from date hereof, examine the said vouchers and check the credit and debit entries in the said pass book or statement of account (and especially all debit entries purporting to be represented by such vouchers), and will in writing point out to the said Bank any errors therein, and from and after the expiration of said period of 15 days except as to improper charges or errors previously pointed out in writing, it shall be conclusively settled as between the Bank and the undersigned that the vouchers in respect of all such debit items are genuine and properly chargeable to and charged against the undersigned, and that the undersigned was not entitled to be credited with any sum not credited in said pass book of statement of account.

The contract which was held by the Quebec Court of Appeal in *Syndicat des Camionneurs Artisans du Quebec Metropolitain v Banque Provincale du Canada* [1969] 11 DLR (3d) 610, to have precluded a customer from later complaining that his bank had paid cheques drawn on his account bearing a forged signature was as follows:

1. The Bank shall from time to time deliver to the customer or to his duly authorised representative or else send to the said customer by ordinary mail, a statement of his account with the cheques and other relevant documents connected therewith.
2. The customer shall examine the said cheques and other relevant documents and all the debit and credit items on the said statement, and shall notify the Bank, in writing, within thirty (30) days of the date of each delivery or that of dispatch by mail, of all errors, irregularities or omissions shown by the said statement. The customer expressly agrees that the production by the Bank of the record of dispatch and delivery of the said documents and statements, duly initialled by the officials designated for this purpose shall constitute prima facie and indisputable evidence of such delivery, dispatch and receipt to and by the customer of the said documents and statements.
3. On the expiry of this period of 30 days (excepting errors, irregularities or omissions previously notified to the Bank, as aforesaid, and excepting payments made on counterfeit or unauthorised endorsements) the customer agrees once and for all with the Bank that the balance shown in this statement of account is correct, that the said cheques and other relevant documents are authentic duly chargeable and debited to his account and that he has no right to be credited with any sum which is not shown on this statement.

It is not necessary to give further examples but, broadly speaking, the form of wording successfully relied upon by the Canadian banks to resist claims by their customers which would otherwise have succeeded have the following elements:

(i) they are clearly contractual in nature;
(ii) the customer has undertaken to verify the statement of account and to notify the bank of errors within a specified time; and
(iii) at the end of the stipulated time, the parties agree that the account as kept by the bank is (subject to certain exceptions which do not concern us here) conclusive and no claim to the contrary is admissible.

Mr Henry Litton, for the customer, made a number of submissions regarding the evidence as to what occurred when Mr Chan and his wife opened the account, and Counsel addressed me at considerable length on the principles to be drawn from the law applicable to exclusion clauses. The analogy might well be apt. In the *Arrow Transfer Company's* case [1971] 27 DLR (3d) 81, Bora Laskin J said at 98:

> The construction that I would put on the verification agreement is consistent with the approach to contractual limitations of liability in other kinds of relationships, such as bailee and bailor, carrier and consignor, retailer and purchaser. Risks that are by contract to be passed by a party, upon whom they would otherwise rest, to the other party to the relationship must be brought home expressly if they are to be effective; at least this is so when the limitation would still have subject-matter if unexpressed risks be found to be outside its general language.

However, for reasons which will shortly appear, I did not feel it necessary to reach any conclusions upon considerations of that kind, for in my judgment the Bank had failed to discharge the onus cast upon them. In my judgment para 5 of the Bank's 'Rules for Current Accounts' cannot be said to contain contractual terms, and nothing is added by a customer agreeing to be bound by its contents. Even if the two documents relied upon, when read together, can fairly be understood to impose an obligation on the customer to check the bank statements, it seems to me that the words 'should no errors or omissions be reported in writing within ten days from the date of despatch of such statements, *the Bank will regard the statements as having been verified and found correct*' [emphasis added] cannot, by any fair use of language, be construed as an agreement by the customer that he will not dispute cheques drawn on the account and paid although they bear forged signatures. If such a term were to be implied the court would have to be satisfied that it was within the minds of both parties to the contract. It is all very well to say that the Bank will look upon the account as correct in certain circumstances, but what is surely needed, if the Bank is to succeed, is a clear acknowledgement that the customer will also look upon them in a similar light. Although the formulae discussed in the Canadian cases have no particular magic about them one has only to contrast them with the words employed here to see how very much stronger and explicit they are.

It must also be said that when the 'Rules for Current Accounts' are examined as a whole, they do not bear the hallmarks of contractual terms. A customer would, in my view, even if he read them, be entitled to conclude that they were merely instructions and that he was not binding himself contractually to the Bank, for no one would expect to have been so bound by a document which ends as it does:

> 15. These rules are subject to change at any time without notice to depositors.

Mr Martin Lee also relied on the doctrine of estoppel but his arguments were based, as they had to be, on the contention that upon the customer had been cast a duty imposed by contract to speak or act after receipt of the bank

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In respect of the second lot of deliveries the plaintiff received the cheque in question for $9,035 on or about 10 April 1963. It was drawn by the company and post-dated to 10 May 1963. It named the plaintiff firm as the payee, but the words '*or Bearer*' which were printed on the cheque in the space immediately following the name of the payee were deleted; and the cheque was crossed thus: *a/c Payee Only*. When the plaintiff received this cheque direct from the drawers he telephoned the second defendant and advised him that if he wished the delivery notes to be issued on this cheque for $9,035 he should sign his own name on the cheque. The second defendant agreed, and when the plaintiff arrived at the second defendant's place of business – the Wire Investment Co where he was the factory manager – the plaintiff produced the cheque and the second defendant signed his name on the back of it and handed it back to the plaintiff. In due course the plaintiff then issued the relevant delivery notes, and on those notes the company obtained the goods.

From the Bank chop with date 10 May 1963, on the back of the cheque I am satisfied that the plaintiff firm presented the cheque for payment through the bank on the date the cheque matured; and from the chop stamp '*Yee Sang Metal Supplies Co*', followed within that stamp by a signature on the back of the cheque I am satisfied that the plaintiff firm, the payee, indorsed it before presentation. I am satisfied too on the balance of the probabilities that the plaintiff would not have delivered the delivery notes for the goods covered by that cheque had the cheque not been backed with the second defendant's signature; that when the plaintiff requested him to indorse it it was with the intention of having it guaranteed; that the second defendant was aware of this, and that when he indorsed it on about 12 April, he did so as a guarantor that that cheque would be met.

The liability of a backer of a cheque to the payee is a matter that must have been considered frequently throughout the past hundred years and more, and it is surprising that it is still a matter of argument. The law about it was found in the usage and customs of merchants – a thing distinct from the common law. That usage and custom was so frequently resorted to that it was codified as to bills of exchange, cheques and promissory notes in the Bills of Exchange Act 1882. This Act has been reproduced in Hong Kong almost section by section – at least up to section 81 – in the Bills of Exchange Ordinance, Cap 19. One is inclined readily to conclude that the popularity of this law which was not the common law arose from the simplicity of the manner in which the parties to bills of exchange, including cheques, disclosed their liabilities under them – liabilities which seem to be disclosed in respect, eg of indorsers by looking at the apparent order in which their signatures appear on the back of the bill and by following the simple rule that the indorser's rights are against prior parties and his liabilities are to subsequent parties. On the other hand, one must also realise that this popularity would be diminished considerably if these efficient formalities appearing on the bill were so absolute as to defeat the true intention of the parties to it.

Some compromise between pure form and true intention had to be made, and the law allows for it, and it is because of this allowance that the result is that the form of a bill is simpler than its interpretation. Cases show that an

explanation not appearing on a bill might so affect the rights and liabilities of the parties to it as to change and even reverse the rights and liabilities that would otherwise be considered to flow from the appearance of the bill, or even create rights and liabilities when under the ordinary rule against circuity of actions which would appear from the features on the bill to be applicable such rights and liabilities cancel out each other, eg *Wilkinson & Co v Unwin* (1881) 7 QB 636. And so it happened that when an indorser of a bill was sued on it by the payee it was held by the House of Lords in one case *Steele v M'Kinlay* (1880) 5 App Cas 754, that he was not liable, and in another case *McDonald & Co v Nash & Co* [1924] AC 625, the indorser was held to be liable to the payee. Lord Dunedin in the latter case at 635 distinguished it from the former case thus:

> I do not think that the case (*Steele v M'Kinlay*) affords any help, because there is no question that there was no explanation given as to with what purpose or in what manner M'Kinlay's name found itself on the back of the bill.

In *Steele v M'Kinlay* it seems that Walker, the drawer of a bill, was prepared to advance £1,000 to the firm of W & T M'Kinlay of Strabane. He drew the bill payable to himself or his order and addressed it to that firm and then he handed it to James M'Kinlay – the man who negotiated the loan with him in Glasgow. James M'Kinlay forwarded it to the addressees. They duly accepted it and returned it to James. He then wrote his own signature across the back of it and handed it back to the drawer, and the drawer then remitted the amount less discount to the drawee firm. James died before the bill matured. Upon maturity W & T M'Kinlay failed to pay. Walker died after the bill matured. It was owing to these deaths that it was not known exactly for what purpose James M'Kinlay put his name on the back of the bill. The action was brought by Walker's trustees, the appellants, to recover on the bill the amount thereof from the representatives of James M'Kinlay. The Lord Ordinary expressly found that James was liable as indorsee, but the Inner House by a majority recalled that finding and declared against him without specifying in what character liability attached to him (at 780). On appeal the House of Lords held that James M'Kinlay was not liable on the bill. Lord Blackburn at 772 considered two types of indorsers. He said:

> An indorsement in general is a transfer in writing by the holder of the bill to a new holder on whom the property is thereby conferred; and it is clear that J M'Kinlay was not such an indorser …
>
> But the indorsement by a stranger to the bill on it to one who is about to take it is efficacious in English law, and has the same effect as an avail … ; such an indorsement creates no obligation to those who previously were parties to the bill; it is solely for the benefit of those who take subsequently.

Lord Watson at 782 would seem to be considering this latter type of indorser when he said:

> But it is perfectly consistent with the principles of the law merchant that a person who writes an indorsement with intent to become party to a bill, shall be held – notwithstanding he has not and therefore cannot give any right to its contents – to be subject, as in a question with subsequent holders, to all the liabilities of a proper indorser.

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Chorley and Smart's *Leading Cases in the Law of Banking* states at p 116:

> The marking *'Account payee'* or *'Account ... only'* is at least as old as *Bellamy v Marjoribanks* ((1852) 7 Ex 398) and is now widely used. It is not part of the crossing (although it does not constitute an unlawful addition to an authorised crossing within section 79 of the Bills of Exchange Act), (Cf *Akrokerri (Atlantic) Mines Ltd v Economic Bank* [1904] 2 KB 465), and it does not restrict the negotiability of the cheque (*National Bank v Silke* [1891] 1 QB 435); but it is an effective direction to the collecting banker, who ignores it at his peril.
>
> The effect of the words is, however, merely to put the banker on inquiry, and he does not lose the protection of section 82 if his inquiries are reasonably answered.

It may be remarked at this stage that there is no evidence that the defendant made any attempt whatsoever to make enquiries from the plaintiff or the plaintiff's bankers.

I now come to the cases of *Bevan v The National Bank (Limited)* and *Bevan v The Capital and Counties Bank (Limited)* 23 TLR 65 at 68 which were tried together as they raised similar points. In these cases the plaintiff claimed, inter alia, for damages for wrongful conversion of cheques belonging to the plaintiff. The facts shortly were that one Malcolm Wade traded under the name of Malcolm Wade Printing Ink Company. Later the plaintiff took over the business and became the sole proprietor, but he retained Malcolm Wade as manager, who continued to run the business. The plaintiff opened an account for the business in Lloyd's Bank in the name of Malcolm Wade & Co, CM Bevan, sole proprietor. All cheques drawn on that account were stamped with a rubber stamp bearing the words *'Malcolm Wade & Co'*, and the plaintiff signed his own name thereunder. Wade had authority to endorse cheques received and it was his duty to pay them into the Lloyd's Bank account. The conduct of the business was left almost entirely in Wade's hands, the plaintiff from time to time visiting him. Wade opened bank accounts in the defendant banks in his own name, namely in the name of *'Malcolm L Wade trading as Malcolm Wade & Co'* in the case of the bank concerned in the first case, and in the name of *'Malcolm Lascelles Wade'* in his account with the bank in the second case. He told the bank manager in the first case that he traded as Malcolm Wade & Co. In the second case the bank manager assumed that he did so. Wade then paid cheques in favour of the plaintiff's firm into his own bank accounts with the defendants, utilising the proceeds for himself. When this was discovered the plaintiff brought the actions against the defendant banks.

In his judgment Channell J said:

> Then came the question, Did they receive them in good faith and without negligence? There was no doubt about it that they received them in good faith. But it was said for the plaintiff that it was negligence on the part of the defendants to place cheques which on the face of them were firm cheques to an account which on the face of it was a private account, especially when marked *'account of payees'*. That marking was not provided for by the Bills of Exchange Act. It had grown up in order further to protect the drawer of a cheque against the consequences of it being lost or stolen. It was a direction to the receiving banker that the drawer desired to pay the particular cheque into the bank which kept the account of the payee. To disregard a direction of that kind, if the banker had information which might lead him to think that the account into which he was paying the amount was not the payee's account would, in his opinion, be negligence. Here the defendants said that they took and paid these cheques into this account because they understood that Wade was trading as Malcolm Wade and Co.

In that case, in the circumstances, the judge found that the defendant banks had not been negligent, but it is to be noted that he was of the opinion that for a banker to disregard an endorsement of *'account of payees'*, if the banker had information which might lead him to think that the account into which he was paying the amount was not the payee's account, would be negligent. In the case on appeal before us the defendant bank obviously clearly knew that the account into which the cheque was being paid was not the payee's account.

The last case to which I would refer is that of *House Property of London Limited and others v London County and Westminster Bank Limited* 113 LT 817 at 818–9. In that case a cheque for £800 was drawn by the plaintiffs in favour of *'FS Hanson & others or bearer'* and crossed *'and Co'* and with the words *'A/C payee'*, and one Norman, a solicitor, wrongfully and fraudulently paid it into his bank account with the defendant bank, and the defendant bank collected and received payment of the £800 and credited it to Norman's account. The plaintiff claimed £800 from the defendant bank for the wrongful conversion of the cheque. In that case during his judgment Rowlatt J said:

> The real defence of the defendants, and the only defence, is under section 82 of the Bills of Exchange Act, which exempts from liability for conversion the banker collecting a cheque such as this for a customer bona fide without negligence. It is not suggested that there was any bad faith on the part of the bank. It is admitted they collected it for the customer. The question is whether I am to decide in their favour that they collected it without negligence. The bank have called no witness before me to explain or indicate the circumstances under which this cheque came to be collected by them for this man Norman. They invite me to say that, upon the facts as stated by the plaintiffs and as I have stated them, they collected this cheque without negligence.
>
> Mr Leslie Scott in the first place said: This cheque is a cheque to Hanson and others or bearer – that is, a cheque to bearer – and Mr Norman was the bearer, and in passing it to his account they only did pass it to the account of the payee, because the payee was the bearer, and the bearer was Norman. I am bound to say that this is a somewhat shallow argument, because, upon the wording of this document, I have not the slightest doubt that *'a/c payee'* does not mean the account of the man who, in process of negotiation, is the owner of the cheque at the time it is collected; but, apart from the questions of whether it is a bearer cheque or whether it is a specially endorsed cheque, or whether the owner is the endorsee, or whether he is the bearer after general endorsement, *'payee'* as written across the face of this cheque means the named payee on the cheque as drawn – namely, *'FS Hanson and others, or bearer'* – and therefore it cannot possibly be said that the bank were only doing the obvious thing and were guilty of no negligence in collecting it for Norman because he was the bearer of the cheque at the time when they collected it....
>
> Then it was said that you must not lightly interfere with the negotiability of a cheque; that it requires plain and unambiguous words before the negotiability of a cheque or a bill of exchange can be restricted. Certainly, but, as I have already stated, the question of negotiability has nothing whatever to do with this case. What I have to consider is whether, when the banker saw upon the face of the cheque that the proceeds were intended to go to the account of Hanson and others, when he saw that that was the

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'The rule in its terms is sufficiently satisfied, by holding that no man shall, under the pretence of an ignorance of the law, excuse himself from the performance of his own obligations, or acquire an advantage, or avoid a detriment, when he has omitted using the means ordained by law for those purposes. Applied to the immediate subject matter, it has no reference to the point, of money paid under a mistaken idea of a preceding obligation.'

The overall impression is that, in the eighteenth century, it was widely understood that no distinction should be drawn in the present context between mistakes of fact and law, but that towards the end of the century the view was emerging that a mistake of law should not ground recovery. This view must have been more widely held than the single dictum in *Lowry v Bourdieu* suggests, having regard to the strong terms in which Lord Ellenborough CJ expressed his judgment in *Bilbie v Lumley*, and the account given by Gibbs J (in *Brisbane v Dacres* (1813) 5 Taunt 143 at 155–157, 128 ER 641 at 646) of his experience as counsel in Chatfield v Paxton (Note) (1802) 2 East 449 and of the universal opinion among the practitioners in the Court of King's Bench that where money was paid with knowledge of the facts it could not be recovered on the ground of mistake.

The decision in *Bilbie v Lumley* was followed and applied by the majority of the Court of King's Bench in *Brisbane v Dacres* (Chambre J dissenting). There the commander of a naval vessel, HMS Arethusa, had paid to the admiral in command a proportion of freight received for the carriage of publicly owned bullion on board the Arethusa in the belief that this was due to the admiral as a matter of usage. On later discovering that the money was not due because the usage had been discontinued, he sought to recover it from the admiral's widow and executrix. It is important to observe that the decision in *Bilbie v Lumley* was expressly challenged in this case. Here full argument was heard on the point, unlike *Bilbie v Lumley* itself which appears to have been decided on the basis of counsel's concession. Judgment was reserved, and fully reasoned judgments were delivered by all members of the court. Although the maxim ignorantia juris non excusat was invoked by counsel, no member of the court founded his judgment upon it; indeed the dissenting judge, Chambre J, ((1813) 5 Taunt 143 at 158–159, 128 ER 641 at 647–648) stated (perhaps rather too narrowly) that the maxim applied only in cases of 'delinquency,' and all the other judges appear to have considered that it had no role to play in the recovery of money paid by mistake. The question whether it was against conscience for the defendant to retain the money was expressly addressed, notably in the judgment of Sir James Mansfield CJ, and was answered by him in the negative, because the admiral acted (as all admirals then did) in accordance with what was generally believed to be his accustomed right, and in particular because he might have changed his position on the faith of the payment. However, the ratio decidendi is perhaps most clearly stated in the leading judgment of Gibbs J when he said, ((1813) 5 Taunt 143 at 152, 128 ER 641 at 645):

> 'We must take this payment to have been made under a demand of right, and I think that where a man demands money of another as a matter of right, and that other, with a full knowledge of the facts upon which the demand is founded, has paid a sum, he never can recover back the sum he has so voluntarily paid. It may be, that upon a

> further view he may form a different opinion of the law, and it may be, his subsequent opinion may be the correct one. If we were to hold otherwise, I think that many inconveniences may arise; there are many doubtful questions of law: when they arise, the Defendant has an option, either to litigate the question, or to submit to the demand, and pay the money. I think, that by submitting to the demand, he that pays the money gives it to the person to whom he pays it, and makes it his, and closes the transaction between them.'

See also (1813) 5 Taunt 143 at 160, 128 ER 641 at 648, per Heath J. Such a conclusion might have provided the basis for a more sophisticated development of this branch of the law, founded upon a prima facie right of recovery subject to specific defences. Unfortunately, however, this was not to be so. It seems that the rule hardened, as rules are liable to do. In *Wilson and M'Lennan v Sinclair* (1830) 4 Wils & S 398 at 409, Lord Brougham LC stated that since *Brisbane v Dacres* it had been considered an established point that the mistake must be 'in the fact.' Furthermore, *Kelly v Solari* (1841) 9 M & W 54 at 55 Parke B said of *Bilbie v Lumley* (1802) 2 East 469, [1775–1802] All ER Rep 425 that '[a]ll that that case decides is, that money paid with full knowledge of all the facts cannot be recovered back by reason of its having been paid in ignorance of the law,' a statement which was reflected in the judgment of Lord Abinger CB ((1841) 9 M & W 54 at 57–58, [1835–42] All ER Rep 320 at 321–322). These statements were made in the context of a case concerned with mistake of fact, the issue being whether means of knowledge, as opposed to full knowledge, of the facts was enough to preclude recovery. Even so, the observations of the judges appear to have reflected an accepted opinion that money paid under a mistake of law was not recoverable as such. At all events the existence of the mistake of law rule became well established in the course of the nineteenth century, and in the twentieth century it was regularly applied by courts of first instance and on occasion by the Court of Appeal. It has however never fallen for consideration by your Lordships' House before the present appeals, which are now being heard after many years of criticism of the rule by scholars specialising in the law of restitution, and after the rule itself has been discarded in a number of major common law jurisdictions.

Criticism of the rule

Although *Bilbie v Lumley* was the origin of the rule, *Brisbane v Dacres*, in which the whole question was fully argued and the decision in *Bilbie v Lumley* reconsidered and affirmed in reasoned judgments, might more properly have been regarded as encapsulating the reasoning on which the rule was based. Unfortunately, however, since the rule became hardened into the form stated in *Kelly v Solari*, many critics have concentrated their fire on *Bilbie v Lumley*, and in particular on the easy target of what Lord Wright (in his Legal Essays and Addresses (1939) p xix) called the 'hasty and ill-considered utterance' of Lord Ellenborough CJ in which he invoked the maxim ignorantia juris non excusat. This maxim, it has been pointed out, is properly directed to cases in which the defendant was charged with wrongdoing, whether civil or criminal, and has no place in the law of quasi contract; see Professor Keener's Treatise on the Law of Quasi-Contracts

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amount paid. The matter cannot, however, be finally resolved in this way because of the provisions of sections 94A and 94B of the Judicature Act 1908 as enacted by the Judicature Amendment Act 1958. Whether or not the appellant will be entitled to recover all or part of the money will depend upon a determination of the matters contemplated in those sections. This is something which I am unable to attempt as additional evidence will be required. Accordingly, the appeal is allowed and the judgment appealed from is vacated. The case is remitted to the Magistrate for determination by him under sections 94A and 94B after th e taking of such additional evidence as may be necessary.

Commercial Bank of Australia v Younis

New South Wales Court of Appeal

Hope, Reynolds and Hutley JJA

[1979] 1 NSWLR 444

On 16 December 1976, Hallit, a director of the company, gave Younis a company cheque for $3,000 post-dated to Monday 20 December 1976, telling Younis that the amount was subject to a check as to the amount actually owing. A check was made over the weekend, and Hallit concluded that the company owed Younis no more than $2,264. He, therefore, stopped payment of the cheque by telephoning the company's bank before 10.00 am on the Monday. When Mrs Younis, acting for her husband, presented the cheque at the company's bank later on the Monday, a bank officer wrote on the back of the cheque: 'Awaiting confirmation of instructions not to pay' and returned it to Mrs Younis. Later the same day, Hallit gave the bank a written instruction to stop payment of the cheque. Younis then saw Hallit, who explained why payment of the cheque had been stopped and gave Younis a company cheque for $2,000 which Younis cashed at the company's bank the same day. However on Monday, 20 December 1976, Mrs Younis, at the request of Younis, paid the cheque for $3,000 into his account with his own bank. The next day, the cheque was presented at the company's bank, and was paid by mistake, arising in part from the press of business shortly before Christmas. The bank sought to recover the sum of $3000 from Younis.

Held – the bank was entitled to recover the money.

Hope JA: [447–451] The development of the law as to the recovery of money paid under mistake of fact has been complex, indeed tortuous. There are not a few decisions, and many dicta, which it is difficult to reconcile. Many of its problems seem to be due to the application of dicta, made in the context of particular facts, to quite different facts, as if they established principles of general application. I do not think that it is necessary to traverse all this history for the purposes of the present case. The principal proposition upon which the appellant relies is to be found in a dictum of Bramwell B in *Aiken v Short* (1856) 1 H & N 210 at 215; 156 ER 1180 at

1182: 'In order to entitle a person to recover back money paid under a mistake of fact, the mistake must be as to a fact which, if true, would make the person paying liable to pay the money; …'

As appears from the analysis of *Aiken v Short* by Kitto J in *Porter v Latec Finance (Qld) Pty Ltd* (1964) 111 CLR 177 at 190, this dictum was obiter, but it has often been quoted as if it had a universal application. That this is not so was pointed out by Scott LJ in *Morgan v Ashcroft* [1938] 1 KB 49 at 73, 74 where, after a discussion of a number of decisions, he said: 'In none of the above cases, as I have already said, not even in *Aiken v Short*, was there a decision of the Court that the action failed simply because the mistake did not induce a belief of liability. And indeed in *Kerrison v Glyn, Mills, Currie & Co* (1911) 15 Com Cas 1; 17 Com Cas 41, it was definitely decided by Hamilton J and by the House of Lords that the plaintiff was entitled to recover a payment made to the defendants for the purpose of meeting an anticipated liability although he then knew that no actual liability had yet attached to him. The decision of the House of Lords seems to me conclusive that the rule as stated in *Aiken v Short* (1856) 1 H & N 210; 156 ER 1180 cannot be regarded as final and exhaustive in the sense that no mistake, which does not induce in the mind of the payer a belief that payment will discharge or reduce his liability, can ground an action for money had and received.'

Scott LJ went on to point out at 74 that, in many cases, it may be appropriate to apply the dictum, but only because of the nature of the transaction and the relationship to it of the relevant mistake; that is, because in particular circumstances, the mistake would not have the necessary relationship with the relevant transaction unless the mistaken fact, if true, would make the person paying liable to pay the money. Many of the cases on or relating to the question are discussed in an article by Mr H Luntz, now Professor Luntz, on 'The Bank's Right to Recover Cheques Paid by Mistake' in 6 Melbourne University Law Review, p 308.

The limitation which Scott LJ placed upon the dictum of Bramwell B was taken further by Kitto J in *Porter v Latec Finance (Qld) Pty Ltd* (1964) 111 CLR 177 at 190. He there said: 'Then the appellant submits that what the respondent paid him it paid him voluntarily though under a mistake of fact, and that money so paid is irrecoverable unless the payer would have been liable to pay it to the payee if the fact had been as he supposed. The doctrine asserted has its main support though perhaps not its origin in a dictum of Bramwell B in *Aiken v Short*; but at least since *Morgan v Ashcroft* [1938] 1 KB 49 at 66, 67, 73, and *Larner v London County Council* [1949] 2 KB 683 the view must, I think, be accepted that a mistake of fact enables a payer of money to recover it if the mistake was fundamental to the payment, even though the payer would not have been liable to pay it if the supposed fact had existed: see Sir Percy Winfield's article on "Mistake of Law" (1943) 59 LQR 327 at 338.'

This view accords with that expressed in the judgment of Barwick CJ in the same case: 'There is some possibility of confusion when dealing with the subject matter of the recovery of payments said to have been made under mistake in speaking, as some of the cases do, of the payments being "voluntary", as if a voluntary payment made to the wrong person could

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reason why we should imply any such term into this contract. I do not think it is a question of implication. I think when a seller is given a right to ship over a period and there is machinery for payment, that machinery must be available over the whole of that period. If the buyer is anxious, as he might be if the period of shipment is a long one, not to have to put the credit machinery in motion until shortly before the seller is likely to want to ship, then he must put in some provision by which the credit shall be provided 14 days after a cable received from the seller, or the like. In the absence of any provision of that kind, I think the answer which the judge gave to the question posed is plainly right, and the appeal should be dismissed.

Denning LJ: [88–89] The sale of goods across the world is now usually arranged by means of confirmed credits. The buyer requests his banker to open a credit in favour of the seller, and in pursuance of that request the banker, or his foreign agent, issues a confirmed credit in favour of the seller. This credit is a promise by the banker to pay money to the seller in return for the shipping documents. Then the seller, when he presents the documents, gets paid the contract price. The conditions of the credit must be strictly fulfilled, otherwise the seller would not be entitled to draw on it.

The question in this case is this: In a contract which provides for payment by confirmed credit, when must the buyer open the credit? In the absence of express stipulation, I think the credit must be made available to the seller at the beginning of the shipment period. The reason is because the seller is entitled, before he ships the goods, to be assured that, on shipment, he will get paid. The seller is not bound to tell the buyer the precise date when he is going to ship; and whenever he does ship the goods, he must be able to draw on the credit. He may ship on the very first day of the shipment period. If, therefore, the buyer is to fulfil his obligations he must make the credit available to the seller at the very first date when the goods may be lawfully shipped in compliance with the contract. I agree with the answer given by McNair J. The appeal should be dismissed.

Alan & Co Ltd v El Nasr Export and Import Co

Court of Appeal

Lord Denning MR, Megaw and Stephenson LJJ

[1972] 2 QB 189

Two contracts, dated 12 and 13 July 1967, were entered into between the sellers, a Kenyan company, and the buyers, an Egyptian company, for the sale of coffee in two lots of 250 tons, fob Mombasa. The price was Shs 262 per cwt and payment was by confirmed irrevocable letter of credit to be opened at sight one month prior to shipment. Shipment under the first contract was to be made during September/October and under the second during October/November 1967. Under the terms of the contract English law was the governing law.

The buyers opened a letter of credit in favour of the sellers up to a sum of £131,000. The letter of credit did not conform to the contracts in a number of respects and it was expressed in terms of payment in sterling. However, the sellers accepted the confirmation of the credit in those terms. They began to operate the credit, asked for an extension of the date for shipment and presented documents, including invoices expressed in sterling, against payment in sterling.

When the final 221 tons under the second contract had been loaded, the sellers prepared an invoice dated 18 November 1967, again expressed in sterling, against payment of the price for the 221 tons. However, on 18 November 1967, before they presented the documents, the sterling was devalued. A few days later it was clear that the Kenyan currency would not be devalued. Consequently, the sellers claimed that Kenyan shillings were the currency of account in the original contracts and that the buyers, having paid under the credit a price equivalent to Shs 262 sterling per cwt, were liable to pay an additional sum that would bring the price up to to Shs 262 Kenyan shillings at the current rate.

Lord Denning MR: ***[206–214] Currency of account***

An important question is: what was the money of account as distinct from the money of payment? I explained the difference between them in the recent case of *Woodhouse A C Israel Cocoa Ltd SA v Nigerian Produce Marketing Co Ltd* [1971] 2 QB 23 at 54. At the time when the contracts of at sale were made it did not matter what was the money of account: because Kenya shillings and sterling shillings were worth the same. But on and after 18 November 1967, it did matter. The sellers say that the money of account was Kenya shillings and that they are, therefore, entitled to the price as measured in Kenyan currency, and not in sterling: whereas the buyers say that the money of account was sterling from the beginning....

If I am right in holding that the money of account was Kenyan currency, then, in order to conform with the contract, the letter of credit should, I imagine, have been expressed in Kenya shillings and confirmed by a bank in Kenya. But that was not done. It was expressed in sterling. What is the consequence?

The issues

The buyers say that the sterling credit was decisive: because, at the time it was given and accepted, it amounted to payment of the price. Alternatively they say that the money of account was *varied* by agreement, or that the sellers *waived* payment in Kenyan currency and accepted sterling instead.

The first point, whether the letter of credit amounted to payment, is of much importance: but it does not arise if the second point is good. We are all agreed that the second point is good. So it is not strictly necessary to go into the first point. But both counsel have done much research on it. They presented their arguments in full before us and with great ability. They invited us to express our views, whatever the outcome. I propose to do so. In any case, the discussions have helped me in coming to a decision. And I think it would be a pity if the work of counsel were lost and forgotten. There

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