COMMENTARIES

THE AUSTRALIAN BANK CHEQUE—SOME FURTHER LEGAL ASPECTS

Some aspects of the article by Dr W. S. Weerasooria in the May edition of this Journal headed "The Australian Bank Cheque—Some Legal Aspects" warrant further discussion. Dr Weerasooria bases his article on two cases in each of which the Commonwealth Trading Bank of Australia was the defendant. By a somewhat obtuse biblical reference, the judgments in these cases are said to have taken the salt out of the bank cheque. I feel obliged to put back a little salt in an endeavour to ensure the continued palatability of the bank cheque to the Australian lawyer, and businessmen.

The Capri Jewellers case[1]

The facts are substantially as stated on page 192 of the article. As the instrument used in the fraud was a forgery, it was not possible for the plaintiff to succeed in an action on it as a dishonoured "cheque". No matter with what degree of blind trust the community may have come to accept bank cheques over the years and no matter what degree of care a bank may have exercised in safeguarding its blank forms, there surely can be no quarrel with this. A forged bank cheque is the same as any other forged instrument; it simply is not the instrument of the purported drawer.

The plaintiff therefore relied on a count in negligence. It alleged that the defendant bank knew, or ought to have known, that bank cheques are accepted by the business and commercial community in New South Wales as a method of payment equivalent to payment in cash without enquiry by the recipient, either as to the validity of the signatures thereon, or as to any other matter, but did not take reasonably adequate precautions to prevent unauthorized persons having access to its blank bank cheque forms. In other words, the allegation was that the defendant owed a duty of care to the whole community to take these precautions, and if it did not then it was liable in negligence to anybody in the community who gave value for a bank cheque form which had been stolen and forged.

The defendant bank denied the existence of this duty of care, but pleaded in the alternative that if such a duty did exist then, either the bank had complied with it, or the plaintiff could not succeed because it had suffered economic loss only, and not economic loss consequential on injury to person or property.[2]

[1] *Capri Jewellers Pty. Ltd.* v. *Commonwealth Trading Bank of Australia*; per Macfarlan J. in the Commercial Causes Jurisdiction of the Supreme Court of N.S.W.; judgment delivered June 1973—unreported.

[2] *French Knit (Sales) Pty. Ltd.* v. *N. Gold & Sons Pty. Ltd.* [1972] 2 N.S.W.L.R. 132.

The boundaries of the tort of negligence are admittedly flexible, and are constantly being pushed further and further outward. In the Capri Jewellers case Macfarlan J. was clearly very much impressed by the plaintiff's evidence going to show what I have already referred to as the blind trust with which the community has come to accept bank cheques. However His Honour was not prepared to push the boundaries a little further out in this case. This appears in the foot-note on page 192 of Dr Weerasooria's article, but I suggest with respect, that it should be brought out a little more emphatically. In other words, there is, as yet, no judicial decision that a bank owes a duty of care to the community at large, sufficient to ground an action in negligence, to so safeguard its blank bank cheque forms that they do not fall into the wrong hands. Suffice to quote from the final paragraph of the judgment

> "This conclusion means that even if I were to be satisfied that the plaintiff was owed a duty by the defendant in the circumstances of this case it has failed to satisfy me that there was a breach of the duty for which it contends. There must therefore be a verdict and judgment for the defendant."

I suggest that His Honour, though obviously tempted to do otherwise, was wise to take the course that he did. It appears from the judgment that had he found that a duty of care did exist, it would have been because he felt that banks are aware that the community's ready acceptance of bank cheques without enquiry stems not only from confidence that banks have adequate funds to pay such cheques on presentation, but also from confidence that "*banks will so guard their blank bank cheque forms that they will not come into the hands of unauthorized persons and thereby permit the forgery or some other malpractice*".

With respect, I doubt very much whether any such thought crosses the mind of the average person accepting a bank cheque nor, I venture to suggest, should it do so. There is no special magic about a blank bank cheque form. I suggest that a more pragmatic assessment of the position would be that if the community has been accepting bank cheques as being as good as cash then it has also been accepting them as being as bad as cash i.e. liable to be counterfeited, and with almost ridiculous ease compared to a bank note. It is not negligence to carelessly tip a cup full of water into the sea where the plaintiff may already be swimming for his life.

The Sidney Raper case[3]

In his lead up to this case Dr Weerasooria on page 187 of his article makes much of several American decisions establishing that there can be no right of countermand of a "cashier's cheque", this being the American equivalent of a bank cheque. It would seem, however, that the point is technical only in that the word "countermand" assumes the existence of two parties, one of whom may revoke the authority which he has given to the other. Obviously this is not possible in the case of a cheque drawn by

[3] *Sidney Raper Pty. Ltd.* v. *Commonwealth Trading Bank of Australia; Jacobsen (Third Party); Jacobsen and another (Second, Third Party)* [1975] 2 N.S.W.L.R. 278.

a bank on itself, and I would suggest that cases going to show that such a cheque cannot be countermanded are not authorities going to show that it cannot be dishonoured. The defendant bank did not purport to "countermand" payment of its cheque in the Sidney Raper case; it simply dishonoured it.

As stated by Dr Weerasooria on page 188 of his article, the facts in the Sidney Raper case were unusual. Briefly, an American couple, Mr and Mrs Jacobsen, opened a joint account with the defendant bank by depositing a "cashiers cheque" drawn in favour of Mr Jacobsen by the Bank of California. Twelve days later Mr Jacobsen drew against this by using a counter cheque, for the purpose of obtaining from the defendant bank a bank cheque in favour of the plaintiff, a real estate agent. On that same day Mr Jacobsen handed the bank cheque to the plaintiff. The plaintiff immediately deposited it for credit to its trust account with another bank, to be held on behalf of Mr Jacobsen. Shortly afterwards on that very same day, however, the defendant bank decoded a cable from its American agent notifying it of the dishonour of the American "cashiers cheque". The funds held by the Bank of California as cover for the "cashiers cheque" had been frozen by the American taxation authorities to cover an alleged outstanding taxation liability of Mr Jacobsen. The defendant bank, therefore, dishonoured its own bank cheque on presentation, and the payee plaintiff sued as holder.

On page 188 of his article Dr Weerasooria quotes the Court of Appeal's reason supporting the defendant's right to dishonour its bank cheque as being the total failure of consideration for its issue. This, of course, arose from the prior dishonour of the American bank's "cashier's cheque". However, it was not the only reason. It was also necessary for the defendant bank to show (or at least for the Court to be satisfied) that the plaintiff gave no value for the bank cheque.[4] The Court was satisfied as to this, as the plaintiff took the cheque and held the proceeds as trustee only for Mr Jacobsen.

When this is kept in mind, it will be apparent that there is not much in the Sidney Raper judgment to unduly alarm the business community. After all, the function of a bank cheque, in the vast majority of cases where it is used, is to satisfy an obligation which one party (usually a purchaser) owes to another. If the holder of a bank cheque has not given value of some kind in exchange for it, he stands to lose nothing if it is dishonoured.

Generally

It is submitted that neither the use which the business community may have made of the bank cheque over the years, nor the various judicial comments referred to by Dr Weerasooria to the effect that in Australia a bank cheque is regarded as "the equivalent of cash", change the legal characteristics of the instrument. It is not currency. It is a promissory note in respect of which the maker (the issuing bank) can restrict the passing of title by crossing it "not negotiable" (*Bills of Exchange Act*, sections 87

[4] Ibid. per Moffitt P. at pp. 231, 235; per Hutley J. at p. 243; per Glass J. at p. 254.

and 88A). This cannot be done with cash. Also, there exists in the background a contractual relationship between the issuing bank and a third party, namely the customer who purchased it from the issuing bank in the first place. Again, this is not characteristic of cash. In other words, when the words "equivalent of cash" are used in the various judgments, I suggest that the Courts mean no more than that the community accepts that the issuing bank has adequate funds to pay the cheque on presentation. Moffitt P. may have used the word "cheque" somewhat loosely in his comments referred to on page 189 of Dr Weerasooria's article. Otherwise there would seem to be nothing in his comments inconsistent with the true legal characteristics of the bank cheque.

After all, a bank cheque cannot be filled in on the spot; it is normally used in a transaction where there has been some prior negotiation and in many cases (such as conveyancing transactions) where the payee knows with whom he is dealing. As an instrument of fraud its use is virtually restricted to circumstances where, as in the *Capri Jewellers*' case, the villain can pocket the fruits of his fraud and disappear. This is hardly likely to happen in the case of a block of land, a Rolls Royce car, or a parcel of B.H.P. shares.

I have no biblical quotation on which to close. However, with all due apologies to whomsoever may be entitled to them (I think it was "Rabbie" Burns), I condense my understanding of the problem into a few words, namely "a promissory note is a promissory note for a' that".

ROBERT MAKIM*

ADMINISTRATIVE APPEALS TRIBUNAL ACT 1975 (CTH)

This is the first, and so far only piece of legislation to have emerged from the long succession of Committees appointed by the Federal Government to consider the structure of Federal administrative law. The Administrative Review Committee (the "Kerr Committee") was established on 29th October 1968 and tabled its Report[1] almost exactly three years later. It was felt necessary to secure supplementary reports from a Committee on Administrative Discretions (the "Bland Committee"[2]) and a Prerogative Writ Procedures Review Committee (the "Ellicott Committee"[3]). Both Committees presented clear proposals for legislation, but only those of the Bland Committee concerning an ombudsman and an administrative appeals tribunal have been proceeded with further. An *Ombudsman Bill* was before Parliament when it was dissolved in 1975 and the present Government has now reintroduced it. The *Administrative Appeals Tribunal Act* 1975 (Cth)

* Chief Solicitor, Commonwealth Banking Corporation.

1 Parliamentary Paper No. 144 of 1971.
2 Parliamentary Paper No. 316 of 1973.
3 Parliamentary Paper No. 56 of 1973.