

BANKING OMBUDSMAN

QUESTIONS AND ANSWERS

Comment - John Abbott (Chairman):

Thank you very much Gregory. I shall now ask for any questions or commentary from the floor.

Question - George Weaver (Henry Davis York, Sydney):

I do have three questions. I realise that time and patience might not allow me to run them. I would like to ask you, Mr McDonald, if one may suggest that it is fairly unusual for a tribunal of a limited jurisdiction to have conclusive power to determine jurisdictional questions. May I suggest that if there has been any unhappiness with the system it has been with decisions on jurisdiction rather than on the merits. May I suggest that it is desirable to try and protect the Ombudsman system and its image from being clouded by concerns of that kind if possible. With that introduction, may I ask what your reaction would be to a suggestion that clause 3 of the terms of reference be amended to provide that on questions of jurisdiction - not on the merits, but on questions of jurisdiction - there should be an appeal from your decisions to the Ombudsman Council.

Response - Graham McDonald (Speaker):

On those issues I have obtained counsel's opinion. Sometimes the opinion suggests that the jurisdiction is broader than I have interpreted it to be, and I have followed a narrower interpretation. But I agree with your general proposition. That seems to be the cause of the most complaint from the banks. I also note that the same issues on which the banks are challenging the jurisdiction here, on exactly the same terms of reference in the UK, remain unchallenged and accepted by the banks.

Question - Stan Lancaster (ANZ Banking Group):

Terms of reference clause 20, which of course deals with your jurisdiction - paragraph (a) requires that the complaint is made to the Ombudsman by or on behalf of the individual to whom or for whom the banking service in question was provided. You have maintained, Graham, that conversion of third party cheques comes within jurisdiction. The position of course with a conversion of a cheque is that a cheque which has been lost or stolen will come into the hands of someone who is not entitled to it, someone other than the true owner, and that person deals with it - pays it into his bank account. And the question then is, what banking service has been provided to the true owner of that cheque? I must say if I had a cheque of mine stolen or misappropriated and someone else paid it into their bank account, I would take a great deal of convincing to know that the bank was providing a service to me.

Response - Graham McDonald (Speaker):

Stan, you place me in a slightly embarrassing situation because there is a particular bank at the moment that is having particular difficulty with swallowing that decision, and I wonder how far I can go. But let me just say that clause 1 says that I am to consider disputes relating to the provision within Australia of banking services by any bank to any individual - it does not say directly or indirectly, it does not say to any customer of the bank - it says to any individual. "Banking services" is very broadly defined, as I have indicated, and I think it would be quite extraordinary to suggest that the processing of cheques is not part of the service offered by banks to individuals, if one looks at it in its complete sense. Clause 20(a) that you have mentioned really I think should be limited, and Stephen Charles QC agrees with this view; limited to just making sure where a complaint is lodged on behalf of another person that the other person in fact wants to pursue the complaint. That really should be the limit of clause 20(a). So I do not think it impacts upon the sort of decision you would have me reach with respect to third party cheques. And finally, to say that obviously the legislature itself contemplates that the issue of third party cheques in s95 of the legislation deals with that issue. It is an issue recognised by the law.

Question - Stan Lancaster (ANZ Banking Group):

With respect, I do not really think that answers the question at all. I mean there is no argument of course that s95 deals with certain protection to bankers in relation to conversion claims, but the real point is what service is provided to the true owner of the cheque when some other person without his knowledge, without his consent, pays that cheque into his account - that is, the convertor's account? I might add, if I may, that after you respond Gregory might care to comment on this question.

Response - Graham McDonald (Speaker):

Well, we obviously have to agree to disagree on the interpretation, Stan. The terms of reference do not limit me to dealing with a complaint lodged by the true owner of the cheque. I really do not see that I can take it much further than that.

Response - Gregory Burton (Commentator):

I am always chary, to use the usual barrister's cautious response, I am always chary to give advice when I do not have the full facts before me! And I have not really had the opportunity to fully consider it. Particularly if there is a dispute on at the moment. I do not really want to say anything about that issue except to say that "services" I agree is broadly defined, and the term is "individual" rather than "customer". It is interesting in respect of guarantors that Graham has come to the view that he has; that an individual guarantor is covered by his terms of reference, which is the same view that is held in the UK. However, there is an express provision in the UK, I think it is paragraph 29(c) of their terms of reference) which was inserted to cover that situation expressly. Now whether it was inserted simply for more abundant caution is an issue that may remain to be tested. Some of these areas that are grey in this way may ultimately be something that has to be determined in court because there are two good arguments.

Question - Bob Baxt (Arthur Robinson & Hedderwicks, Melbourne):

It is really a question for Gregory, seeing you raised the issue, the very interesting issue of whether the principle of confidential information would protect the material that Graham receives from the banks in relation to any matter that might go off to the courts. This is an issue that is now being considered by the Federal Court in relation to the

Johns plea in relation to the Tricontinental inquiry - although there you are dealing with specific legislation, the Australian Securities Commission legislation, which gives the ASC power to in fact refer material to other bodies. The English High Court in *Marcel's* case has suggested that the right of the individual to confidential information should override, without there being statutory provisions to the contrary, the rights of the State as represented by organisations. But of course the Ombudsman is not in that sense a representative of the State. You have raised the question - I just wonder how you would answer it?

Response - Gregory Burton (Commentator):

Bob, I think you have put your finger on the problem which is, how far the Ombudsman scheme will be seen, although it is a private ordering arrangement, how far it will be seen as conferring such a public benefit that it comes within the principles applying to public authorities and whether public interest immunity will be granted. There is an additional argument there though, applying the case in the UK that you mentioned, whether a bank (because it probably will be a bank that would want to protect the confidentiality rather than the customers or the individual complainant) whether the bank's private right of confidentiality will be seen as sufficiently important and in that case the emphasis would be on the individual and presumably a narrow view of this scheme as simply an arrangement between the banks in question. That is ultimately something that will apply to quite a few self-regulatory organisations, I would have thought, that are not statute based and do not have any statutory recognition. I would think ultimately that this scheme might in Australia - and I am purely speculating here - that this scheme in Australia might be seen as having sufficient public benefit that a court would say we recognise that it comes within the principles of public interest immunity.

It will be an interesting test if, for instance, any court at any point refers, under the powers that are available in New South Wales and I think in other jurisdictions, refers matters to a referee, the court chooses to refer matters to the Ombudsman. That would be a very strong indication, I would have thought, that it seemed a quasi-public institution.

Question - George Weaver (Henry Davis York, Sydney):

I would like to ask Mr McDonald a question which is a domestic question - I hope it is not impertinent. We have seen these statistics of the colossal number of matters which come to your office - they are growing all the time - we see many letters coming out of your office signed Graham McDonald. I suppose my question is, do all the matters which really require a decision pass through your mind? Do you have a chance to look at them all? And if so, how do you do it?

Response - Graham McDonald (Speaker):

I did for a time try to sign every letter that left the office so that I could at least have some idea of the responses and keep an eye on things. That has recently proved impossible for me to continue doing so. We have changed our system George, you will be pleased to hear; now other people sign the letters and that is identified. But that is a matter that Liza Carver, who is on the Council at present today has already raised at Council level and it is one obviously that will have to be looked at. It is physically impossible for me to sign everything. I do sign every recommendation and every award, and they at the end of the day are - at the very determinative end - and I take responsibility and sign those. So that is the situation.

Response - Gregory Burton (Commentator):

Could I just add something on that. It strikes me - and it is almost inevitable and not just a product of Murphy's law - that there will be some sort of assistant or deputy Ombudsman if this scheme is continued, simply from the geographical spread of the country. You cannot have the one person charging around the place conducting all the conferences, particularly if the scheme grows, and that this may be in fact also one means of splitting the negotiation/conciliation/mediation function from the arbitral function, and perhaps division of labour.

There is something also I should have added in relation to Bob Baxt's question. An issue that excited my mind at one point was whether in fact this scheme, being an agreement between the banks in respect of providing services, and they are in competition, had any trade practices implications. And of course the TPC has not become interested at this point, but it may be interesting to see if there was ever any public benefit determination in that regard whether it would be seen as a sufficiently public institution as well.

Comment - John Abbott (Chairman):

Firstly, thanks Graham for your informative and enlightening address. It has obviously engendered some animated discussion and Gregory has raised some potentially contentious issues and some inconsistencies in the concept of the scheme. I must say I, as a solicitor employed by a bank, still have some concerns about the disclosure of potentially privileged documents. Obviously I did not raise it now - we would probably be here for another half hour. I think in concluding I might echo Gregory's fervent hope that if push comes to shove, the differences between the parties can be resolved without resort to the courts. And perhaps I might conclude by thanking both Graham and Gregory and perhaps we could join in the usual manner in thanking them for their addresses.