LEGAL ASPECTS OF ELECTRONIC CLEARING AND SETTLEMENT

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INTRODUCTION

Most of the legal problems of electronic clearing and settlement have nothing to do with the "electronic" part of the process. But it is also true that in the absence of the electronic clearing systems that many of the problems could not have arisen. This contradiction stems from the fact that electronics has allowed the payments system to grow to such a size that what might once have been a "glitch" in the system might now be a major problem.

The other way in which the electronics revolution has impinged upon the legal problems of payment and settlement is to offer the possibility of "presentment" of cheques and other negotiable paper by means other than physical presentment. It is generally thought that this could not be implemented without changes in the Cheques and Payments Orders Act 1986 (Cth).[1]

This paper will consider some of the current legal problems of the clearing and settlement system. I would like to establish at the outset that I doubt that there are any serious problems. However, there are a few uncertainties and the size and velocity of the system are such that should one of the unlikely problems materialise then it could be disastrous. There is little room for legal error here if things do go wrong.

The paper is split into two main parts. The first is the discussion of the "truncation" provisions of the Cheques and Payments Orders Act. These amendments are straightforward even if long-winded. The second part of the paper discusses certain legal uncertainties about the efficacy of "netting" arrangements. Since much of the legal framework of both depends upon the so-called clearing house rules, I begin with a short description of the legal effect of these rules.

The Role/Effect of Clearing Rules

Clearing house rules have effect as a multi-lateral contract between the parties. The effect of the rules on outsiders is not as clear, but it is certain that the rules will not be treated as creating customary law. In *Barclays Bank plc v Bank of England* [2] the issue was whether presentment of a

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1 See the Appendix for the outline of an argument that such an implementation might have been possible under the Bills of Exchange Act. The argument is of historical interest only.

2 [1985] 1 All ER 385.

cheque occurred at the clearing house or when the cheque was physically delivered to the branch upon which it was drawn. Bingham J held that it was at the time of delivery to the branch.[3]

As to the effect of the Clearing House Rules, Bingham J said:[4]

> "If it is to be said that the drawer loses [the right to have the cheque duly presented] as the result of a private agreement made between the banks for their own convenience, the very strongest proof of his knowledge and assent would be needed, not only because of the general rule that an individual's rights are not to be cut down by an agreement made between others but also because, in this particular case, the rights of additional parties (such as indorsers) could be affected."

There is an obvious consequence: customers are not bound by unusual terms of which they cannot be aware. The result is particularly ironic since it seems to have been the custom in Australia to consider the Clearing House rules to be confidential.

There is, however, no doubt that customers are bound by clearing house rules that are reasonable: See *H H Dimond (Rotorua 1966) v Australia and New Zealand Banking Group Ltd*;[5] *Riedell v Commercial Bank of Australia Ltd*.[6]

Time Sensitivity

Even though an electronic system mirrors a paper system, the electronic system may experience practical problems not encountered in the paper system. The reason for this is that users come to rely upon the speed and precision of the system. The margin for error is reduced.

This is probably the explanation for the occurrence of litigation during the 1970s and early 1980s which centred on the time of payment. The volatility of shipping prices during that time meant that ship owners were looking for contract breaches which would permit termination of the charterparty.

In the payments system the emphasis is on a slightly different problem. If one of the institutions fails then one way of recovering "payments" is to show that the payment has not yet occurred. This is discussed below.

CHEQUE TRUNCATION

The mechanics of cheque truncation has been explained in Peter Smith's presentation. The first attempt to provide a legal framework for truncation was the enactment of the Cheques and Payment Orders Act 1986 (Cth), sections 61 and 62. In fact, one of the great disappointments of the CPOA was that the main substantive changes in the law were restricted to the presentment of cheques. The remainder of the Act was (and is) a rewording and expansion of those sections of the Bills of Exchange Act which were applicable to cheques. Those sections which were specific

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3 The actual result is not relevant to Australia where the Cheques and Payment Orders Act 1986 (Cth) permits a cheque to be presented at a "designated exhibition place" or at a "designated place": section 62 and see below. It is also interesting that the same result was reached in *Royal Bank of Ireland Ltd v O'Rourke* [1962] Ir R 159 at the first instance but was reversed by the Supreme Court of Ireland.

4 [1985] 1 All ER 385, at 392.

5 [1979] 2 NZLR 739.

6 [1931] VLR 382.

to bills of exchange and promissory notes were omitted. It has been described as being drafted "in line with modern preference for comprehensive, technical drafting".[7]

The sections which were intended to permit truncation were never put into practical effect. Following representations by banking interests the Act was amended in 1994. Sections 61 to 68 were amended and several new sections were added in an attempt to clarify the truncation scheme.

A cheque is "duly presented" if a demand is made form payment in accordance with procedures established in sections 62, 62A or 63. A post-dated cheque is not "duly presented" if the demand is made prior to the date of the cheque.[8]

Presentment by Exhibition

The amendments distinguish between a bank which is collecting a cheque which is drawn on another bank (called "external" presentment by the Act) and collecting a cheque which is drawn on itself (called "internal" presentment). "Internal" presentment permits the bank to make demands of itself, to exhibit cheques to itself, etc. In the following discussion it will be assumed that the presentment is an "external" one. The rules for "internal" presentment are similar.

Cheques may be presented by being "exhibited". The term is not defined in the Act but it seems that presentment by exhibition is the type of presentment with which we are familiar. This type of presentment may be either at the "proper place" or a place that is a "designated exhibition place".[9] The "proper place" is either the business address as specified on the cheque (if the cheque contains such a specification) or the place of business of the branch at which the account on which the cheque is drawn is maintained.[10]

By publishing a notice in the prescribed form a bank may specify a place as a "designated place". The place so specified will be a "designated exhibition place" if the notice so specifies. In this rather roundabout way the decision in *Barclays Bank plc v Bank of England*[11] is overcome and cheques may be presented at the clearing house.

Electronic Presentment

If the demand is not made by exhibition then it must be made at a designated place, at a designated time and (most importantly) made by a means of communication that is a designated means of communication.[12] Whatever the means of communication, the information required by the Act must be presented in a form which is "intelligible to, or readily decipherable by, the drawee bank".

The Act attempts to provide a complete code for truncated presentment without limiting the forms of communication which might be used. This necessarily results in sections which are too wordy and somewhat convoluted.

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7 See Coleman, A R, *The Cheques and Payment Orders Act 1986*, Longman Professional, 1987, p vii.

8 Section 61(2).

9 Section 62(1)(c)(i).

10 Section 64.

11 [1985] 1 All ER 385.

12 Section 65 defines the relevant terms.

It is clear that in any truncation scheme the collecting bank must provide sufficient details of the cheque so that it can be unambiguously identified. The Act incorporates this observation as section 62(3)(1). The Act goes further in subsection (4) by deeming that the cheque is adequately identified by indicating the sum to be paid, the cheque number, the account against which it is drawn and the proper place in relation to the cheque.

The scheme permits the drawee bank to seek more information about the cheque. To this end, the Act requires that the collecting bank provide as part of the demand a "nominated place" where further enquiries may be made, the time at which such enquiries may be made and the means of communication which should be used.[13]

Subsection (5) gives the drawee bank the right to make requests of further particulars of the cheque or, if it so wishes, to request the collecting bank to exhibit the cheque of a copy of a specified kind, provided that the request is made at the nominated place, at the nominated time and using a nominated means of communication. The request must (of course) identify the cheque with reasonable certainty (subsection (7)) and the Act repeats the criteria for identification (subsection (8)).

Other subsections of section 62 spell out in similar detail the responsibilities of the collecting bank responding to requests and the responsibilities of the paying bank when asking for further information.

The section ends with subsection (12) which is a "fail safe" section intended to ensure that the truncation scheme has no unintended adverse consequences. The subsection declares that nothing in the scheme is to be taken to relieve the drawee bank of any liability to which it would have been subject in relation to the particular cheque if the cheque had been presented by exhibition.

Summary

The Act seems to provide a complete framework for a cheque truncation scheme without unnecessarily restricting the type of technology which might be used. This is obviously important since "presentment" by computer communications might be the norm but imaging technology might be more suitable for answering requests from drawee banks.

These sections certainly exhibit the "comprehensive, technical drafting" style mentioned above. It is impossible to read them without feeling that there has been a rather massive overkill for what should be a simple problem. On the other hand, there is much at stake and it is easy to be forgiving of institutions who wish to see that every possible problem is properly addressed. The rumbling sound of Sir Mackenzie Chalmers turning in his grave should probably be ignored.

TIME OF PAYMENT

Many of the legal problems concerning electronic clearing and settlement concern the recovery of money already paid, usually to an insolvent entity. The problem may be circumvented in some circumstances merely by showing that payment has not occurred at the relevant time.

Problems concerning the time of payment are often confused because of the number of parties involved in a modern payment transaction. It is necessary to identify clearly which payment is the subject of contention. So, for example, A wishes to make a payment to B. A instructs P bank to make the payment to R bank for B's account. Before P bank makes the payment, A changes his mind and withdraws authority. P bank makes the payment to R bank by mistake. That payment is

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13 Section 62(3A).

made (although it may be recoverable) even though the payment from A to B has never been made.[14]

As between the participants in a clearing system it will be possible in most cases to determine the time of payment by means of the clearing house rules. Only when those rules are unclear or ambiguous will there be an dispute as to the time of payment.[15]

For participants which are not party to the clearing house rules the situation is more complex. A very complete analysis has been made by Goode[16] and the matter will not be pursued further here.

NETTING

Bilateral Netting

The expression "netting" refers to replacing a series of obligations between two parties with a single obligation which is calculated by summing all of the obligations owed by each party to the other and deducting the smaller from the larger. The process is commercially referred to as "netting out" the obligations.

Netting arrangements do not necessarily all fall into the same legal category for the purposes of analysis. The banker's right of combination under the rule in *Garnett v M'Kewan*[17] is a form of netting which flows from the banker/customer contract.[18]

At other times a form of set-off or netting is provided for by bankruptcy legislation. In Australia the relevant legislation for companies is section 553C of the Corporations Law. When the legislation applies it would appear that the netting is mandatory so that all mutual dealings falling within the legislation must be included in the set-off regardless of existing contractual arrangements.[19]

There are in fact at least four different kinds of bilateral netting which have been identified in the legal literature[20] but there is no need in this paper to consider the variations. We are concerned primarily with what has been called "payment netting"[21] Money is due on a particular day from one party to another. The obligations have arisen from several contracts. The parties agree that only the net amount of the debts should be paid by the party with the greater gross liability in full satisfaction of the original gross obligations payable by either party.

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14 See *Rekstin v Severo Sibirsko Gosudarstvennoe Akcionernoe Obschestvo Komseverputj* [1933] 1 KB 47.

15 See, for example, *Royal Bank of Ireland Ltd v O'Rourke* [1962] Ir R 159; *Barclays Bank plc v Bank of England* [1985] 1 All ER 385.

16 Goode, R M, *Payment Obligations in Commercial and Financial Transactions*, Sweet & Maxwell, 1983.

17 (1872) LR 8 Ex 10.

18 See *Halesowen Presswork and Assemblies Ltd v National Westminster Bank Ltd* [1971] 1 QB 25; [1972] AC 785.

19 See *Halesowen Presswork and Assemblies Ltd v National Westminster Bank Ltd* [1971] 1 QB 25; [1972] AC 785.

20 Derham, R "Set-off and Netting of Foreign Exchange Contracts in the Liquidation of a Counterparty - Part II: Netting" [1991] *JBL* 536.

21 Also called "settlement netting".

Multi-Lateral Netting

The netting process described above is bilateral netting. In a system such as the payments system which has many players it is desirable to have "multi-lateral" netting arrangements. Each organisation will either make or receive a single payment which represents its position at the end of a trading period.

Although the payments and clearing system could operate on the basis of a series of bilateral netting agreements it does not in fact do so. The netting arrangements are "multi-lateral" in the following sense: each participant pays or receives a single payment at the end of each period.

There are several legal frameworks which may be used to implement multilateral netting. The simplest and most common is to use the clearing organisation (or some related organisation) as an agent for the purpose of making and receiving settlement payments based on the netting out of all obligations. The clearing rules call for payment to the agent to act as a discharge of all inter-party liabilities.

It is also possible for the clearing organisation to take a more central role. The rules may provide that upon the happening of certain events the original contract between two of the members is replaced by two separate contracts, one between each member and the clearing organisation.[22] In effect, all payment obligations in the system come to be owed to and by the clearing organisation. After that conversion (by novation of contracts) the set-offs involved in settlement become bilateral rather than multilateral.[23]

The legal foundation for multi-lateral netting in the payment system probably lies in the clearing house rules which operate as a multi-lateral contract under seal.[24] Each participant of the system agrees to abide by the clearing rules in force for the time being. The rules apparently provide for the Reserve Bank to act as the agency for making and receiving net payments which are calculated by the Australian Payments Clearing Association.

Insolvency Problems

Netting is obviously important in a payments clearing and settlement system. The discrepancy between gross and net exposures in a payments system is likely to be extremely large. In the present legal structure a financial institution is treated like any other creditor of a failed company. This is as it should be when the company is a normal debtor, but when the debt arises as a result of the failed company's participation in the payments system other policy matters come into play which suggest that special rules should apply.

The concern is that a requirement that institutions meet gross obligations could cause unacceptable liquidity pressures at the least, insolvency problems at the worst. As mentioned above, the structure could be built on a bilateral netting framework, but it is obvious that a true multilateral structure is superior for the purpose.

In the event that the netting arrangements failed to protect transactions the system would be exposed to several serious risks. "Contagion" risk is the risk that the failure of a single institution may lead to liquidity problems for its commercial neighbours. The size of the daily clearing in the payments system makes this risk a very serious one.

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22 Again, it is not necessary that the clearing organisation perform both the clearing and the payment role.

23 The Companies and Securities Advisory Committee report of the Subcommittee on Netting in Financial Derivatives Transactions refers to this as a "counterparty clearing organisation".

24 See section 180 of the Corporations Law.

"Systemic" risk is the risk that the above mentioned contagion could become a plague in the financial markets. If netting arrangements were held to be invalid then both "contagion" and "systemic" risks become very real and serious problems.

Where there are payments in the system which have not been cleared prior to the insolvency of a member there may be problems.[25]

Many bilateral netting arrangements fall within the scope of section 553C of the Corporations Law. However, whatever the legal basis of multi-lateral netting, the arrangement does not have the benefit of section 553C which applies only to "mutual credits, mutual debts or other mutual dealings between an insolvent company that is being wound up and a person who wants to have a debt or claim admitted against the company."

This is not to say that section 553C is irrelevant to the payments system since even if the multilateral netting arrangements were held to be invalid it might still be possible to save the day by a consideration of the several bilateral arrangements between the failed institution and the other members. Consequently, concerns which have been expressed about the validity of bilateral arrangements are by no means irrelevant to the payments system.

In order to appreciate the danger to the system of invalid netting agreements, consider the following. A liquidator could engage in "cherry picking", claiming the benefits of profitable contracts and disclaiming onerous ones.[26] Even if the liquidator did not disclaim onerous contracts, it would seem likely that the solvent institutions would have to prove in the liquidation.[27] In the very worst case it might be that earlier transactions amount to unfair preferences which could permit the unwinding of transactions for up to six months!

Netting and RTGS Systems

Although the introduction of a Real Time Gross Settlement system is a welcome development, it does not resolve the netting problem in the payments system. There is no plan, indeed, no possibility, of replacing the current netting settlement procedures for small electronic systems or for paper systems.

Although these systems are concerned with "small" payments, there is nothing small about the systems or about the amounts which are to be netted out. Recall that cheques alone still account for some 30 percent by value of all non-cash payments. The gross sums involved are very significant and effective netting is an essential component of the system.

Validity on Insolvency: British Eagle

According to section 555 of the Corporations Law debts and claims proved in a winding up should rank equally. If the property of the company is insufficient to meet all claims then they should be paid proportionally. There are, of course, a number of exceptions to this rule of creditor equality but the basic rule is enshrined as a fundamental principle of insolvency law.

The most important exception (if it is an exception) to the principle is section 553C which provides for set-off in the winding up of a company. The section reproduces the substance of section 86 of the Bankruptcy Act 1966 (Cth).

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25 The House of Lords held that netting provisions were effective as regards payments which had been cleared prior to the insolvency of British Eagle: *British Eagle & International Airlines Ltd v Compagnie Nationale Air France* [1975] 2 All ER 390.

26 See Part 5.6 Division 7A of the Corporations Law.

27 To argue otherwise is to argue in favour of the validity of the netting arrangement.

It is worth setting out the section in full:

553C Insolvent companies - mutual credit and set-off

(1) Subject to subsection (2), where there have been mutual credits, mutual debts or other mutual dealings between an insolvent company that is being wound up and a person who wants to have a debt or claim admitted against the company:

(a) an account is to be taken of what is due from the one party to the other in respect of those mutual dealings; and

(b) the sum due from the one party is to be set off against any sum due from the other party; and

(c) only the balance of the account is admissible to proof against the company, or is payable to the company, as the case may be.

(2) A person is not entitled under this section to claim the benefit of a set-off if, at the time of giving credit to the company, or at the time of receiving credit from the company, the person had notice of the fact that the company was insolvent.

Although it is not expressly stated in the section, the mutual dealings which are eligible for set-off are those which occur prior to the "relevant date".[28] In most, not all, cases the "relevant date" will be the day which the winding up order is made. Although the "dealings" must occur before the relevant date it is not necessary that the dealings have matured into fixed liabilities at that time.[29]

In addition to section 553C and the other provisions of the Corporations Law which make exceptions to the equality of creditors principle there is a body of case law which permits contracts which violate the principle of creditor equality to be struck down as contrary to public policy.

The scope of the common law principle is uncertain. One of the most significant cases is *British Eagle & International Airlines Ltd v Compagnie National Air France*.[30] British Eagle was a member airline of the International Air Transport Association (IATA) which conducted a clearing arrangement for members. Under the IATA rules a member which issued a ticket for transportation over routes operated by another member agreed to pay the appropriate costs through the clearing organisation. The clearing rules provided that these payments were to be in substitution for payments *inter partes*.

Payments by the clearing organisation were made to member organisations on a net monthly basis. When British Airways went into liquidation it was a net debtor to the clearing organisation. If, however, the positions of each member could be considered separately some of the members would be debtors to British Eagle.

The liquidator of British Eagle brought action against one of these other members seeking to recover the net balance owed to British Eagle. The House of Lords held, by a majority, that the liquidator could recover those debts which had not cleared prior to the commencement of the winding up.

The majority decision held that the clearing arrangements amounted to an attempt to contract out of the UK equivalent of section 555 since participating members would obtain priority over other

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28 See section 553(1) and the definition of "relevant date" in section 9.

29 See, for example, *Gye v McIntyre* (1991) 171 CLR 609, 618.

30 [1975] 2 All ER 390.

unsecured creditors. Permitting this would be contrary to the public policy embedded in section 555.

The minority took the view that by participating in the clearing arrangements that British Eagle had disentitled itself from any direct claim against other members of the organisation. On this view, the relevant property protected by the creditor equality principle is the overall credit after netting.

On a broad reading *British Eagle* prohibits any contractual arrangement which has the effect that an asset owned by a company at the commencement of its liquidation is dealt with in any way other than in accordance with section 555. It is not relevant that the contractual arrangement makes good commercial sense.[31]

This broad interpretation is so far removed from common commercial understanding (not to mention common contractual provisions) that a more limited reading has been sought.[32] It is clear that section 533C permits an exception to the creditor equality principle in the case of certain mutual dealings and, indeed, Lord Cross expressly allowed set-off to operate between British Eagle and Air France. On that basis, contractual arrangements which are for the purposes of establishing bilateral set-off cannot be against public policy.

However, it does appear from *British Eagle* that arrangements which attempt to structure a form of multilateral set-off, not being sanctioned by statute, may be treated as an attempt to evade the insolvency laws. This level of uncertainty in multilateral netting arrangements is intolerable when so much is at stake. Legislation which regularised netting arrangements would clearly not be in violation of the basic creditor equality principle and would serve to resolve doubts about the scope of the *British Eagle* principle.

Problems with Section 16 Banking Act

Section 16 of the Banking Act 1959 (Cth) states:

> "(1) In the even of a bank becoming unable to meet its obligations or suspending payment, the assets of the bank in Australia shall be available to meet that bank's deposit liabilities in Australia in priority to all other liabilities of the bank."

The section is clearly designed to be a depositor protection device, one of a series of five sections in Division 2 of the Act entitled "Protection of Depositors". In fact, it is the only section which provides any direct protection. The other sections instruct the Reserve Bank to exercise its powers and functions under the Division for the purpose of protecting depositors. Those powers are essentially a power to call for information from a bank (section 13) and a power to appoint a person to investigate the affairs of a bank and to take over its control in certain circumstances (section 14).

The Reserve Bank and others are not to be the subject of any action or liability in respect of anything done or omitted to be done in good faith and without negligence in the exercise of the

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31 See, for example, Peter Gibson J in *Carreras Rockmans Ltd v Freeman Matthews Treasure Ltd* [1985] 1 All ER 155.

32 See Wood, P R, *English and International Set-Off*, Sweet and Maxwell, 1989; Goode, R M, *Legal Problems of Credit and Security*, 2nd ed, Sweet & Maxwell 1988; Goode, R M, *Principles of Corporate Insolvency*, Sweet & Maxwell, 1990; Derham, R "Set-Off and Netting of Foreign Exchange Contracts in the Liquidation of a Counterparty - Part II: Netting" [1991] *JBL* 536.

powers conferred by Division 2 (section 15). This probably reinforces the case law which has held that Central Banks and their officers have no direct duty to the depositors.[33]

If section 16 is taken at face value, and there seems little reason to take it otherwise, then the netting arrangement would amount to a set-off which would violate the section. The Subcommittee on Netting in Financial Derivatives Transactions has recommended that section 16 be changed to make it clear that the assets referred to are net assets.

Problems with Time

The large daily sums involved in the payment system dictate that any netting arrangement should be valid up to the very moment that insolvency occurs. Unfortunately the Corporations Law seems to identify only the day of the commencement of the winding up.[34] This problem, sometimes called the "zero hour" problem, obviously needs clarification.

The Cheques and Payment Orders Act

Cheques which have been cleared may be "netted out" even if *British Eagle* is given its full scope. There may, however, be a problem with cheques which are "in the system" but which have not yet been cleared.

One of the problems is that a cheque which has been deposited for collection must be presented for payment within a reasonable time. Failure to do so will mean that the collecting bank may become liable to the holder.[35] If, however, the cheque is presented to an insolvent institution it may be "paid" even though the insolvent institution cannot settle for the cheque later. The collecting institution would be responsible to its customer for the value of the cheque but with no expectation of receiving value itself.

Cheques presented by the insolvent institution also pose a problem. The paying bank has no legitimate reason to refuse payment of the cheque yet if it fails to dishonour the cheque it will incur a liability to the insolvent institution.

If *British Eagle* is correct then the clearing rules do not provide a sufficient basis for set-off of these liabilities. Further, since the liabilities incurred by the solvent institution were done at a time when it was known that the other institution was insolvent, section 553C of the Corporations Law does not permit bilateral set-off.

The easy solution to these problems is to change the Cheques and Payment Orders Act 1986 to permit unwinding transactions which have not yet cleared.

APPENDIX: CHEQUE TRUNCATION WITHOUT THE CPOA

My opinion is that it would have been possible to introduce cheque truncation without the structure imposed by the Cheques and Payments Orders Act 1986. The argument is of interest now only for historical reasons.

Suppose that truncation is introduced. A cheque "presented" to bank P by bank C is either honoured or not. If it is honoured, that is, paid, then it does not seem possible that the drawer of

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33 See *Davis v Radcliffe* [1990] 2 All ER 536; *Monories Finance Ltd v Arthur Young* [1989] 2 All ER 105.

34 See sections 513A-513D.

35 Section 65.

the cheque could complain. Note that it would be possible to agree by contract that payment could be made under electronic presentment.

It is when payment is refused that the problems arise. Has the cheque been "dishonoured"? Does the holder of the cheque have a right of action against one or more of the banks? The collecting bank has an obligation (contractual) to present the cheque for payment. The paying bank has an obligation (tortious) to deal promptly with the cheque upon presentment.[36]

Has the cheque been "presented"? The usual argument is that the cheque must be physically presented to the drawee bank. The argument is based on *Barclays Bank plc v Bank of England* [37] and, to a lesser extent, *Riedell v Commercial Bank of Australia Ltd* [38]. In my opinion, those cases may be confined to their role in interpreting the clearing house rules rather than as general rules as to presentment. Certainly there are older cases which admit the possibility of presentment of bills of exchange other than physically transporting the bill to the acceptor.

If electronic presentment can be interpreted as "presentment" for the purposes of the BEA, then that is the end of the matter. Assume that I am wrong and everyone else is right and that physical presentment is called for.

The effect of the "dishonour" then is not that the cheque has been dishonoured. It cannot have been since it has not been presented for payment. The messages can only be interpreted as an indication that the paying bank will not pay upon presentment. "Dishonoured" cheques can then be physically presented for payment and dishonoured.

Is the presentment timely? Provided the clearing house rules are reasonable the customer must be taken to be bound by them. Clearing house rules implementing the truncation scheme would ensure faster payment for the vast majority of cheques and a short delay for those that are to be dishonoured. Such rules would seem reasonable to me, but then perhaps I am not an impartial observer.

In order to be absolutely safe it might be necessary to physically present indorsed cheques. Since these amount to a very small percentage of the total number of cheques the savings would still be significant.

As mentioned above, the argument is of historical interest only. Further, there are enough uncertainties in it that no reasonable banker could be expected to have implemented the scheme in the absence of the statutory blessing which was given by the CPOA.

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36 See *H H Dimond (Rotorua 1966) v Australia and New Zealand Banking Group Ltd* [1979] 2 NZLR 739.

37 [1985] 1 All ER 385.

38 [1931] VLR 382.