

RECENT DEVELOPMENTS NO. 2  
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In its recent decision in Tai Hing Cotton Mill Ltd. v. Lin Chong Hing Bank Ltd. & Ors. [1985] 3 WLR 317, the Privy Council has confirmed a strict line of liability for bankers in the payment of forged cheques. The facts were simple. The Hong Kong Tai Hing Cotton Mill Company had current accounts at three banks and those accounts authorised the banks to pay cheques drawn on behalf of the company if signed by certain nominated signatories. It was an express term of the company's contracts with those banks that the company would notify the banks within a certain time if there were errors in its monthly bank statements. Otherwise, those statements were deemed to be correct. An accounts clerk of the company forged some three hundred cheques of a total value of over HK\$5 million. The banks honoured these cheques on presentation and debited them against the company's accounts. When the forgeries were finally discovered in 1978 the company sued the banks claiming that they were not entitled to debit the company's accounts with the amounts of the cheques. The Hong Kong Court of Appeal held that the company was in breach of a duty of care owed to the banks and so was not entitled to any relief.

However, the Privy Council saw it otherwise. Following the English law laid down in the House of Lords cases of London Joint Stock Bank Ltd. v. MacMillan [1918] A.C. 777 and Greenwood v. Martins Bank Ltd. [1933] A.C. 51, the Privy Council held that the only duties a customer owes his bank (in the absence of express agreement) were a duty to exercise due care in drawing cheques so as not to facilitate fraud or forgery and a duty to notify the bank immediately any unauthorised cheques were brought to his notice. In particular, the Privy Council decided that no wider duty existed, for example, requiring a customer to take reasonable precautions in the management of his business to prevent forged cheques being presented to the bank for payment, or to take steps to check monthly bank statements and notify the bank of items which were not authorised. Consequently, the banks bore the liability for wrongfully paying the cheques without the mandate of the company.

The Privy Council also held that the written terms of the banking contracts were not sufficiently clear to impose upon the company any contractual obligation to examine its bank statements and to accept them as an accurate statement of the amounts shown thereon. Because the company was therefore not in breach of any express or implied duty owed to the banks, it was not stopped from asserting that its accounts had been incorrectly debited by payment of the forged cheques. The banks were held liable to the company for the amounts so wrongfully paid out, together with interest from the date of the Writ. The Privy Council referred approvingly to the decision of the High Court of Australia in Commonwealth Trading Bank of Australia v. Sydney Wide Stores Pty. Ltd. (1981) 148 CLR 304, a case which also followed the House of Lords decision in London Joint Stock Bank Ltd. v. MacMillan. Although that case was seen as a breakthrough for bankers, in that it reaffirmed that the customer owes an obligation to his banker to ensure that his own negligence does not result in the fraudulent alteration of the amount of a cheque, it does not go further than this, and certainly not so far as to protect bankers against fraudulent signatures, however negligent the customer has been.

The Sydney Wide Stores decision was based upon the proposition, as stated by the High Court, that "arising from the contract between banker and customer, there is a duty upon the customer to take usual and reasonable precautions in drawing a cheque to prevent a fraudulent alteration, which might occasion loss to the banker". That was the actual decision in Sydney Wide Stores, although some other comments made by the High Court in that case appear to go wider. In particular, the Court made three points which might give scope for further development of the law of liability of the customer in Australia, beyond that which the Privy Council was prepared to concede in Tai Hing. Those comments were:

- (i) "It seems fair as between banker and customer that the customer should bear responsibility for the loss when it is his careless drawing of the cheque that facilitates that loss through forgery. No heavy burden is placed on the drawer. He is merely required to exercise care when drawing the cheque".
- (ii) "The MacMillan case promotes the negotiability of cheques by affording banks, which have to determine the authenticity of many cheques in a short period of time, the assurance that the drawer by his negligence may not increase the risk of loss through fraudulent alteration without being responsible for the consequences".
- (iii) "There is no convincing distinction between a case where the careless drawing of the cheque facilitates loss by fraudulent increase in the amount of the cheque and the case where a customer draws his cheque in blank and his agent exceeds his authority by filling in a cheque for a

larger amount than that authorised by the drawer, in which event the drawer is responsible: MacMillan".

Whether or not the Tai Hing decision will be followed in Australia may now depend not so much upon these comments from Sydney Wide Stores as the provisions of the forthcoming Commonwealth Cheques Act. Clause 32 of the Cheques Bill (read a first time in May, 1985 but presently in legislative limbo) provides that if a drawer's signature is unauthorised it will be "wholly inoperative" unless there is an estoppel (which means that the drawer has confirmed the cheque in some way) or the signature has been ratified or adopted by him. Clause 91 of the Bill also indicates that only the narrow ground of exemption for banks in Sydney Wide Stores and Tai Hing will be available in Australia. Clause 91 provides that a drawee bank paying a cheque which has been fraudulently altered by increasing its value may debit the drawer's account provided the bank has acted in good faith and without negligence.

Although Tai Hing indicates that a carefully worded contract between banker and customer could relieve the bank of liability for paying on a forged cheque, Clause 5 of the Cheques Bill will not allow Australian banks to enter into agreements negating the effect of Clause 32. Eternal vigilance and the occasional large payout will be the price of the cheques system for Australian bankers.