RECENT DEVELOPMENTS NO. 2
TAI HING

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1. Introduction

The facts and contentions in the long awaited decision in Tai Hing Cotton Mill Ltd. v. Liu Chong Hing Bank Ltd. and Ors. [1985] 3 W.L.R. 317 may be briefly stated.

1.1 Facts

The appellant Tai Hing conducted its business in Hong Kong in five divisions and utilized the services of three different banks. All mandates were expressed more fully than is customary in Australia and the designated signatories were the managing director or any two of four nominated authorized signatories. The company employed one Leung as an accounts clerk responsible for two of the divisions of the company. He was an untried junior accountant who was immediately placed in a position to defraud. He was dishonest and commenced operations by forging the supporting documentation necessary to obtain validly signed cheques, stole cheques after they had been properly signed and later took simply to forging the relevant signatures. The forgeries were evidently of such a high standard as to require a trial to establish, on balance, that they were not genuine. Almost by way of reward he was promoted to look after two more divisions and was later promoted to his superior's position. From 1972 until 1978, the appellant had no system of any sort to check on the activities of Leung. For example, the stolen cheques do not seem to have caused any difficulty to Leung despite the lapse of time. No cross-checking of the bank statements against the company books was ever undertaken. It was uncontested that the appellant had failed to take any reasonable steps to protect its own position.

1.2 Contentions

The appellant sued only in respect of the forged cheques. Prima facie, its position was a strong one. The cheques not being in accordance with the mandate, the bankers who had paid them had no authority to deduct a similar amount from the account of the appellant.

The bankers countered this prima facie position by arguing firstly that there was a duty upon a customer to use reasonable care in the conduct of his account, this duty arising either from an implied term of the banking contract or from the wider law of tort. Two formulations of the duty were hazarded. They also sought to argue that certain terms of the express mandate excluded liability. Finally they argued estoppel.

1.3 The Decisions

In the Privy Council, they failed on all grounds. Their Lordships held there could be no additional duty in tort - there being no contract; no duty could be implied into the contract in the absence of an express term and in the absence of either of these duties no estoppel could arise. The express terms were held to be ineffectual to exclude liability.

1.4 Summary

The burden of this paper is to look briefly at some of these matters. In each case, my thesis is that, so far as Australian law is concerned, their Lordships' advice is, with the greatest of respect, less than compelling, purely from the point of stare decisis, without the necessity to embark upon a jurisprudential justification of the position of either the appellant or the banks. To adopt the comments of Sir Frederick Pollock (23 L.Q.R. 408):

> "The House of Lords, if that case had come before it, might or might not have arrived at the same conclusion, but at all events we should have had fuller reasons and some critical discussion."

1.5 Stare Decisis

So far as State courts are concerned, the question of stare decisis is one of considerable complexity. State courts are bound by decisions of the Privy Council but where these conflict with a High Court decision (which also binds) the safer course is to follow the High Court: National Employees v. Waind & Hill [1978] 1 N.S.W.L.R. 372. However, the contrary material here is only dicta in the High Court on the question of an independent tortious duty and express decisions and dicta on implication of terms. The failure of counsel to put the Australian authority (and much English authority) to their Lordships tempts one to suggest it is a per incuriam decision but given the excellent judgments in the Court of Appeal in Hong Kong, it is hard to credit that their Lordships were unaware of the cases. On the estoppel point one is on safer ground.

On the balance, however, given that the Privy Council is now out of the judicial hierarchy and given the weight of authority against three of its central propositions, the safer course for a single judge and Full Court, it is submitted, is treat it as not applicable in the Australian environment.

2. Duty in Tort

It is convenient, first, to commence with their Lordships' rejection of the proposition that a customer, a party to a banking contract with its banker, could owe a duty to that banker independent of the terms of that contract. I preface my remarks by noting that the conclusion at which their Lordships arrived is a conclusion which had been reached by many others over the course of the years. Their Lordships do so in less than a page, assisted, no doubt, by the fortuitous circumstance that they were unhampered by recitation of any authority whatsoever other than a dissenting speech in a House of Lords' case, the result of which was diametrically opposed to the conclusion to which their Lordships had just come on another matter. It is a pity that their Lordships did not have cited to them more than one of the authorities which had expressly considered the topic (and that a case coming to the contrary conclusion). It is also unfortunate that their Lordships did not take the opportunity to explain how it is that in a large number of other similar matters the opposite view has been accepted - in the House of Lords, Privy Council and High Court - as requiring no comment.

These opposing views are one of the matters which has excited text writers for a considerable period of time. Whether an independent tortious liability can co-exist with a contractual relationship between the parties has produced so many cases and writing so voluminous that Mr Justice Lush, in one of the more recent cases on the topic, said (Macpherson & Kelley v. Prunty & Associates [1983] 1 V.R. 573, 574):

> "Indeed, so much has been written inconclusively that it is difficult to feel any enthusiasm for adding to the literature, unless one is imbued with a crusading zeal to bring light where others have failed to bring it."

In that case, the Victorian Full Court concluded that the authorities were against the proposition adopted by their Lordships in Tai Hing. A unanimous New South Wales Court of Appeal, after a much more limited review of the authorities came to a similar conclusion adding, perhaps injudiciously, that the proposition later to be adopted by the Privy Council:

> "... is an aberration which was never soundly rooted in doctrine, but it has been laid to rest in England and ... it would be similarly treated in the High Court if squarely raised for decision."
> Brickhill v. Cooke [1984] 3 N.S.W.L.R. 396, 401.

In the United Kingdom, there are dicta in the House of Lords both ways on the topic, there are express decisions in the Court of Appeal both ways (the earlier support the view taken by the Privy Council and the latter, being decisions of Lord Denning M.R. subscribe to the alternative view). In Australia too the cases are legion. I have listed them in a schedule to this paper.

I mentioned that their Lordships were singularly unencumbered by authority. They did, however, quote some "wise words" of Lord Radcliffe in his dissenting speech in Lister v. Romford Ice and Cold Storage Co. Ltd. [1957] A.C. 555 as supportive of their view.

It is of more than passing interest to note that in that same case, Viscount Simonds, who, perhaps more significantly, was one of the members of the majority, took the opposite view saying, that:

> "It is trite law that a single act of negligence may give rise to a claim either in tort or for breach of a term express or implied in a contract. Of this the negligence of a servant in the performance of his duty is a clear example." (p.573)

(See also to similar effect Lord Macmillan in Donoghue v. Stevenson [1932] A.C. 562 at 609-10.)

One should perhaps draw attention to the dictum of Viscount Haldane from Nocton v. Lord Ashburton which is set out in the appendix. Most writers refer only to the first two sentences as authority in favour of a dual negligence duty: in fact, his Lordship is referring to the historical position and indicates that such duality had probably ceased with the fuller development of the law of contract.

For Australia, the Full Courts of Queensland and Victoria (both by a majority) and the Court of Appeal in New South Wales (unanimously) have all held that the view which was rejected by the Privy Council is in fact the law. The High Court has had before it two cases in which it made comments consistent with the state courts' view. It refused leave to appeal from one of the decisions in the Full Court.

One may muse on the inconsistency of the Privy Council approach with the "holy writ" that an employer owes his employees a duty to take reasonable care to provide a safe system of work. The existence of the contract of employment has never been a bar here.

Whilst the academic lawyer may have cause to fulminate about the lack of compelling reasoning, the absence of full or critical discussion and the selective treatment of the earlier decisions and dicta, the practicing lawyer has more cause for complaint. The decision sheds no guidance on whether a contract between banker and customer is different from (and if so why) a contract between a solicitor and client, a contract between mortgagor and mortgagee, a contract of employment or a contract of carriage, all of which have been held to admit of a parallel tortious duty.

Finally, one may also be curious as to why the tortious duty should be excluded absolutely when the fiduciary duty is not. Why should one of the creatures nurtured by equity suffer this

ignominous exclusion when another creature does not? The High Court, in a comprehensive discussion of the implication of fiduciary obligations into a distributor agreement, indicated quite clearly that a wholesale implication of fiduciary obligations into commercial contracts was not to be countenanced. They did not, however, in blanket terms, exclude the possibility of fiduciary obligations being imposed in a contractual situation. (Hospital Products Ltd. v. United States Surgical Corporation (1984) 58 A.L.J.R. 587, 55 A.L.R. 417.)

For myself, I dislike the tendency to remedy problems in a contractual relationship by bringing in doctrines best left elsewhere - tort and fiduciary obligations to name two. However, to attempt to reverse the trend is, now, simply to emulate Canute.

3. Implied Terms

3.1 General Principles

Just when the basis for the implication of terms had been sufficiently canvassed for all to be certain of what the law in Australia was, the Privy council has changed the rules yet again.

So far as Australia is concerned, the locus classicus for implication of a term to a particular contract comes from a judgment of the Privy Council in BP Refinery (Westernport) Pty. Ltd. v. Hastings Shire Council (1977) 52 A.L.J.R. 20 at page 26:

> "Their Lordships do not think it necessary to review exhaustively the authorities on the implication of a term in a contract which the parties have not thought fit to express. In their view, for a term to be implied, the following conditions (which may overlap) must be satisfied: (1) it must be reasonable and equitable; (2) it must be necessary to give business efficacy to the contract, so that no term will be implied if the contract is effective without; (3) it must be so obvious that it 'goes without saying'; (4) it must be capable of clear expression; (5) it must not contradict any expressed term of the contract."

This passage was adopted with approval by the High Court in Secured Income Real Estate (Australia) Ltd. v. St. Martin's Investments Pty. Ltd. (1979) 144 C.L.R. 596 at 605, in the judgment of Mason J. with whom Gibbs, Stephen and Aickin JJ. concurred and in Codelfa Construction v. State Rail Authority (1982) 149 C.L.R. 337, at 347 per Mason J., Stephen, Wilson JJ. concurring and p.404 per Brennan J. and in Hospital Products v. United States Surgical Corporation (1984) 58 A.L.J.R. 587, 55 A.L.R. 417.

It is significant to note that immediately following this passage in the opinion of their Lordships in B.P. Refinery, the Lordships went on to cite the Moorcock (1889) 14 P.D. 64 at p.68:

> "The law is raising an implication from the presumed intention of the parties with the object of giving to the transaction such efficacy as both parties must have intended that at all events it should have. In business transactions such as this, what the law desires to effect by the implication is to give such business efficacy to the transaction as must have been intended at all events by both parties who are businessmen ..." (per Bowen L.J.)

Their Lordships (In B.P.) also cited Scrutton L.J. in Reigate v. Union Manufacturing Co. [1918] 1 K.B. 592 at 605:

> "A term can only be implied if it is necessary, in the business sense, to give efficacy to the contract i.e., if it is such a term that it can confidently be said that if, at the time the contract was being negotiated, someone had said to the parties, 'what will happen in such a case?', they would both have replied: 'of course, so and so will happen; we did not trouble to say that; it is too clear'."

In the Tai Hing case, their Lordships held that the test for implication was that of necessity "no more, no less". By necessity, their Lordships meant a term without "the whole transaction would become inefficacious, futile and absurd". It is not clear if their Lordships require all three tests to be passed or only one.

On this new strict test, virtually no term is ever going to be implied into a contract. Most contracts will work without any extra term; rarely, if ever, will they be futile; rarely, if ever, will they be inefficacious. Absurdity is in the eye of the beholder.

It is worthwhile looking at the types of terms which have been implied to reassure ourselves that the doctrines of implication of terms is not completely dead.

In Secured Income Real Estate itself, a large office building was sold on the basis of a purchase price with a reduction of that price by a formula if the vendor was unable to provide evidence that the aggregate rents under leases of the premises had reached a specified figure over a specified period. It provided that all leases of premises after the execution of the contract should be approved by the purchaser but that the purchaser could not capriciously or arbitrarily withhold consent. There was no requirement for the purchaser to grant leases after it became the registered proprietor. The aggregate rental period covered a considerable portion of the time during which the purchaser alone could grant leases.

The purchaser took the view that it did not need to let premises during the period when it was the owner, thereby reducing the aggregate rental and thereby reducing the purchase price.

The High Court held that the manifest intention of the parties from the contract itself was that there was an implied obligation on the purchaser to do all things reasonably necessary to enable leases to be granted.

In this particular case, it cannot be said that the contract was inefficacious, futile or absurd with such a provision. The contract provided for the sale of land which, in fact, was conveyed. The contract provided for the calculation of the purchase price which was, in fact, calculable. A very substantial sum was paid to the vendor, almost $2,000,000, and it was only the balance $170,000 which would be affected by the absence of the implied term. Although the result without implication might have been strange to the average person, it could hardly be said to be futile, inefficacious and arguably not absurd. Had the vendor wanted the purchaser to continue to let premises after conveyance, he could have provided for that. Nevertheless, the High court supplied the additional obligation.

Their Lordships, in Tai Hing referred with approval to Liverpool City Council v. Irwin [1977] A.C. 239.

The case is, it must be emphasized, a landlord and tenant case. To that extent, it tends to be more restrictive against the tenant in favour of the landlord. One must always be a little careful in extrapolating decisions in this area into broad generality but it seems from the Privy Council decision that one is entitled to do that here. Again, the approach of their Lordships in Irwin was not uniform.

The plaintiff was a resident on the 9th floor of a high-rise building, access being by staircase and two electrically operated lifts. There was also an internal shute into which garbage could be placed in order to travel to the ground floor.

The lifts continually failed, sometimes both at one time, the stairs were not lit and were in a dangerous condition with unguarded holes giving access to the rubbish shutes and there was also frequent blockage of the shute.

Lord Salmon from whom the test of implication quoted comes thought that asking a pregnant woman accompanied by a young child to walk up 15 storeys in pitch dark to reach her home would render the contract inefficacious, futile and absurd. His test of necessity is clearly different from the ordinary English use of that term. She could clearly have carried a torch and gone up by degrees as most of the high-rise office workers in Queensland have had to do during our power strikes. It is not impossible, it is not futile, it is not necessarily absurd. Was she pregnant at the time that she entered into the contract? Is it only futile and absurd because she is pregnant or had a small child or both? Does the decision mean that asking someone to walk a long distance uphill requires the landlord to install a mechanical means of conveyance? Surely not. If that were so, to let any house on the top of a hill would require some mechanical

transportation to be provided. If the tenant really wanted any existing mechanical conveyance to be kept in working order, the tenant could stipulate for that. Nevertheless, their Lordships held that there was a term to be implied into the contract of tenancy to take reasonable care to keep the means of access in reasonable repair and usability.

Finally, their Lordships also referred to Lister v. Romford Ice and Cold Storage Co. Ltd. [1957] A.C. 555. In that case, their Lordships in the House of Lords had held that it was an implied term of a contract of service that an employee would be under a contractual obligation of care to his employers in the performance of his duty. Again, it is not necessary for such term to be implied. If he does the job with no skill at all, it does not render the contract absurd, inefficacious or futile. Such as he manages to get done giving no care at all to the work will be received by the employer. If the employer really does want some reasonable degree of skill applied, he can always contract for it. Nevertheless, the term was implied.

In this day and age it is, with respect, a little unrealistic to think that everybody has a skilled legal draftsman available for every contract. It is also unhelpful for people to be forced to state the obvious - the "goes without saying" terms - for fear that a court will not imply them. As Deane J. said in Hospital Products:

> "... care should be taken to avoid an over-rigid application of the cumulative criteria which they specify to a case such as the present where the contract is oral or partly oral and where the parties have never attempted to reduce it to complete written form. In particular, I do no think that a rigid approach to the requirement 'that it must be necessary to give business efficacy to the contract' should be adopted in the case of an informal and obviously not detailed oral contract where the term which it is sought to imply is one which satisfies the requirement of being 'so obvious that it goes without saying' in that if it had been raised both parties would 'testily' have replied 'of course' (cf the BP Refinery case (52 A.L.J.R.) at 27). As a general rule however, the 'so obvious that it goes without saying' requirement must be satisfied, even in the case of an informal oral contract, before the courts will imply a term which cannot be implied from some actual statement, from previous dealings between the parties or from established mercantile practice."

3.2 The Banking Contract

So far we have examined only their Lordships' new, more stringent test for the implications of terms into a normal "negotiated" contract. How, then, does that fit with the contract of banker and customer which traditionally, and to a large extent in Australia, is not the subject of any writing at all other than the setting out of the nature of the mandate?

We are all familiar with the classic judgment of Atkin L.J. (as he then was) in Joachimson v. Swiss Bank Corporation [1921] 3 K.B. 110, 127:

> "I think that there is only one contract made between the bank and its customer. The terms of that contract involve obligations on both sides and require careful statement. They appear, upon consideration, to include the following provisions. The bank undertakes to receive money and to collect bills for its customer's account. The proceeds so received are not to be held in trust for the customer, but the bank borrows the proceeds and undertakes to repay them. The promise to repay is to repay at the branch of the bank where the account is kept, and during banking hours. It includes a promise to repay any part of the amount due against the written order of the customer addressed to the bank at the branch, and as such written order may be outstanding in the ordinary course of business for two or three days, it is a term of the contract that the bank will not cease to do business with a customer except upon reasonable notice. The customer, on his part, undertakes to exercise reasonable care in executing his written orders so as not to mislead the bank or to facilitate forgery."

Their Lordships in Tai Hing acknowledge that the statement was not exhaustive. That is not surprising as the only point in question in Joachimson was whether a customer had to make demand upon the bank before the bank became liable to the customer to make the payment.

It is plain from the passage cited and from the other judgments in the Court of Appeal that it was not a question of an express term of the contract, but rather what terms the court thought applied to the contract, given that the parties had never discussed the matter. In truth, it is inaccurate to describe the term as implied, even on The Moorcock basis, "imposed" is probably more accurate, imposed as seeming reasonable to the court given what is desired to be achieved in a banking contract, what "the parties must have intended", (p.129 per Atkin L.J.). In such a matter, one is producing the term as "a legal incident of a particular class of contract" for which the test is based "upon more general considerations" per Mason J. in Codelfa at p.345-6.

In such a case the test, according to Lord Wilberforce in Irwin is "common sense" as between the parties (p.255) or as stated at p.256 "necessarily aris(ing)" or because "the nature of the contract, and the circumstances require". In short, the two situations are quite different as recognized in Codelfa at p.345-6 per Mason J. and Lister v. Romford Ice [1957] A.C. 555 at 576 per Viscount Simonds. The test is also different.

Another area where the courts have implied terms in to the banking contract is the area of secrecy. Banks L.J. in Tournier v. National Provincial and Union Bank of England (1924) 1 K.B.

461 at 471 asserted "with confidence" that the duty was a legal one arising out of contract but that it was qualified. His Lordship notes that there is no authority on the point and then sets out the qualifications in the well-known passage at page 473. His Lordship considers it to be no difficulty in the matter that there was no authority on the matter, that the exact terms of this duty of secrecy could not be spelt out with certainty and, apart from pointing out the necessity to speak with caution on the question generally and confining himself to the particular facts in issue, these matters did not seem to trouble his Lordship. Likewise, Scrutton L.J. had no doubt that there was an implied term of the banker's contract with his customer that the bank would not disclose the account or transactions relating thereto of his customer except in certain circumstances. Again, the approach of their Lordships is inconsistent with the strict doctrine of implied terms in a contract.

With these well known examples of implied terms in the banking contract, none can be said to be such that the absence of them would make the banking contract inefficacious, futile or absurd. Take the example of secrecy, none of those epithets would characterize a banking contract in which no such duty was implied. Take the term that reasonable notice of closure of the account must be given. The contract is hardly inefficacious or futile. Finally, take even the fundamental term, the undertaking to collect bills on its customer's account. Few might be interested in a banking contract without it, most might rather go to a banker who offered the facility to collect bills but a banking contract without it is not inefficacious, futile or absurd. Again, all are "implied" on the more general basis stated above. They are all "good sense" between the banker and his customer.

With respect to their Lordships, the test which they have adopted for the implication of terms is so strict that it renders the doctrine of implication of terms itself inefficacious, futile and absurd, both in general and with respect to banker/customer contracts. In this class of contract there are terms which are implied simply because both parties knew that it was to be a term of the contract and not because it was necessary for the contract in the sense of being inefficacious, futile and absurd without it. There are terms which must have been intended if the parties had thought about it but did not. There are terms which the parties did not need to express. There are terms which "good sense" between the parties to the contract produce. To require everyone to write everything down or to express everything - which could "go without saying" - is a regressive step.

4. Customer's Duty

Given the approach of their Lordships both to the dual existence of a tortious duty and to the implication of terms, it is surprising that there is any duty cast upon banking customers at all. There is nothing express in any banking contract about such duty and it is not "necessary" for the banking contract to have

such a duty for, as their Lordships pointed out, the banks could always increase the severity of the terms of their contracts, or they could use their influence as they have done in the past to persuade the legislature to grant by statute further protection. The existence of any contract negatives an independent tortious duty.

To this glib scenario, it is embarrassing to object that two earlier decisions of the House of Lords had adopted a less restrictive approach to the relationship of banker and customer and imposed duties on the customer. Faced with that difficulty, their Lordships, in Tai Hing forced these square pegs into the round holes, confining each to their specific facts on a basis which, with respect, was not that expounded in the cases themselves - judicial metamorphosis or reconstruction which, if pursued by a witness of fact, would produce uncomplimentary observation of his veracity.

4.1 Basis of Macmillan and Greenwood

The first case which their Lordships reworked to fit their adopted thesis is London Joint Stock Bank v. Macmillan [1918] A.C. 777.

This case, you will recall, is the case of the clerk who prepared a cheque for 2 pounds payable to bearer. The amount of the cheque was not written in words and, after proper execution by the employers, the clerk altered the figures to 120 pounds, wrote in the necessary words, cashed the cheque and made away with the proceeds.

The House of Lords held that the banker was entitled to debit the cheque to the customer's account. This is so, notwithstanding that the debit was not in accordance with the mandate issued by the customer.

Their Lordships in Tai Hing were at pains to turn this case into an implied terms contract case. It is respectfully submitted that this is not the basis upon which their Lordships decided the matter.

The case was clearly decided on the basis of duty. Nowhere in the case at any level, in the judgments or in argument, is the doctrine of implication of terms discussed.

This case is a particularly lengthy one and I have set out in an appendix to the paper passages which make it plain that, whatever else the case was, it was not a case of implied contractual terms. The judgments of their Lordships may be read, on the one hand, as being statements of a duty in tort arising from the proximity of the relationship of banker and customer and on the other as imposing the duty as arising ex contractu. However, by no stretch of the imagination can their Lordships be thought to have been dealing with implications of terms into the banking contract. It may be, however, their Lordships were simply

imposing terms into the banker/customer contract very much as the Court of Appeal was later to do in Joachimson and in Tournier.

The High Court, in Commonwealth Trading Bank v. Sydney Wide Stores (1981) 148 C.L.R. 304, Gibbs C.J., Stephen, Mason, Aickin, Wilson and Brennan JJ. indicated that they considered the principle of Macmillan to be:

> "That the drawer of a cheque would be responsible for any loss caused by his drawing of a cheque in such a manner as to facilitate a fraudulent alteration of the cheque." (p.308)

The High Court certainly placed the duty cast on the customer as arising ex contractu but there is not a word in the argument or judgment about implication of terms into a contract. In Sydney Wide Stores, because of an inconsistent earlier decision of the High Court and Privy Council, in Marshall v. The Colonial Bank of Australasia (1904) 1 C.L.R. 632, (1906) 4 C.L.R. 196, [1906] A.C. 559, it was necessary to conduct a lengthy analysis of the authorities. In considering the ratio decidendi of Young v. Grote the High Court said (p.313):

> "Not all the Law Lords [in Scholfield (1896) A.C. 514] appear to have appreciated that there is a contractual relationship between the drawer of a cheque and his paying bank which imposes on the drawer a duty of care to that bank and that this relationship distinguishes the drawing of a cheque from acceptance of a bill."

In criticizing the judgments of the High Court and the Privy Council in Marshall the High Court observed (p.315):

> "The existence of the contractual relationship which is the foundation for imposing a duty on the customer in relation to the drawing of his cheque is absent in the case of the acceptor of a bill. In the second place, the judgments failed to recognize that the decision in Young v. Grote had been followed in many cases and that the principle that the drawer of a cheque was guilty of negligence vis-a-vis his banker in so drawing a cheque as to facilitate forgery had been accepted in many cases. ... in the third place, the judgments support the view ... that it is not the duty of a drawer of a cheque to guard against the possibility of a forgery, that this is a matter best left to the criminal law. This view does not conform to modern notions of the duty of care and the standard of care expected of the reasonable man. It is now well settled that the reasonable man should, in appropriate circumstances, take account of the possibility that others will break the law and act accordingly."
>
> "The question of law submitted for determination by this Court may be answered by saying 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." (p.316)

With respect, if such cases are to be treated as involving the implication of terms, the test adopted by the Lordships is quite inadequate to explain the results achieved, let alone the ratio used by the judges.

Their Lordships' approach to Greenwood v. Martins Bank [1933] A.C. 51 is similar but more blatant. This case, again, was put by their Lordships as being an implied term case, that is an implied term which their Lordships considered to be plainly necessary. They thought that the customer "must obviously warn his bank as soon as he knows that a forger is operating the account". With respect to their Lordships that is not a necessary term, nor is it inefficacious, futile or absurd to have a banking contract without it. The credit card contracts - in some cases - are examples to the contrary. If the bank's duty is to pay only on a mandate validly signed by the customer, why should the customer have an implied contractual duty forced upon him to warn the bank that it is or might be breaching its contract? One is not obliged to give warning of breaches of contract in construction contracts or contracts of conveyance. Why do so here? If the bank wanted such a duty, it could stipulate for it.

The House of Lords in Greenwood v. Martins Bank did not consider the matter as an implied contract case. It was an estoppel case. The facts of the matter were that the defendant opened a bank account, the mandate in respect of which required signatures by the plaintiff alone. The passbook and cheque book were kept by his wife who gave her husband a cheque form when he asked for it. Eventually when he asked for a cheque, she informed him there was no money and told him that she had used the money to help her sister in legal proceedings. He asked her who forged his name and she would not tell him. She begged the plaintiff not to inform the respondents of the forgeries until her sister's case was over. In the hope of a favourable result to the sister's action and for his wife's sake, the appellant said nothing to the banker.

Some time later, the plaintiff discovered that his wife had deceived him with regard to the purpose of the money and said he would go to the bankers. That day, after he had returned (without seeing the bankers), his wife shot herself.

The defence of the bank, apart from denying the forgeries, was to plead that they were caused to pay the money by reason of the appellant's own negligence and, further, that the appellant was estopped from saying that the respondents paid the money wrongfully or without his authority or that the signatures on the cheques were placed there without his authority.

By the time the matter came to their Lordships, the sole question left was that of estoppel. One of the elements of an estoppel is, of course, a representation and the classic passage from their Lordships' judgment, in the judgment of Lord Tomlin is as follows (pp. 57-58):

> "Mere silence cannot amount to a representation, but when there is a duty to disclose, deliberate silence may become significant and amount to a representation."
>
> "The existence of a duty on the part of a customer of a bank to disclose to his bank knowledge of such a forgery as the one in the case in question was rightly admitted."
>
> ...
>
> "The appellant's silence, therefore, was deliberate and intended to produce the effect which it in fact produced - namely the leaving of the respondents in ignorance of the true facts so that no action might be taken by them against the appellant's wife. The deliberate abstention from speaking in those circumstances seems to me to amount to a representation to the respondents that the forged cheques were in fact in order, and assuming that detriment to the respondents followed there were, it seems to me, present all the elements essential to estoppel."

Significantly, his Lordship goes on with the following passage (pp. 58-59):

> "Further, I do not think it is any answer to say that if the respondents had not been negligent initially, the detriment would not have occurred. The course of conduct relied upon as founding the estoppel was adopted in order to leave the respondents in the condition of ignorance in which the appellant knew they were. It was the duty of the appellant to remove that condition however caused. It is the existence of this duty, coupled with the appellant's deliberate intention to maintain the respondents in their condition of ignorance, that gives its significance to the appellant's silence. What difference can it make that the condition of ignorance was primarily induced by the respondent's own negligence? In my judgment it can make none. For the purposes of estoppel which is a procedural matter, the cause of the ignorance is an irrelevant consideration."

With respect to their Lordships in Tai Hing, Greenwood's case is an estoppel case not a contract case nor a tort case. It was treated as an estoppel case in Fung Kai Sung v. Chan Fui Hing [1951] A.C. 489.

Greenwood has been followed in the banker and customer situation on two occasions. The first was the High Court in West v. Commercial Bank of Australia Ltd. (1935) 55 C.L.R. 315, where the

bank accepted cheques drawn by only one signatory. The customer who knew and said nothing was held to be estopped.

The case was decided by a unanimous High Court, Rich, Starke, Dixon and McTiernan JJ. purely on the basis of estoppel. Contract never entered anyone's thoughts let alone the complications of implied terms. The High Court considered Greenwood's case to be nothing more than an estoppel case. The obligation cast upon the bank's customer to inform the bank that the account was being operated otherwise than in accordance with the mandate (one signature instead of two) was placed in terms of duty not in terms of contract:

> "It was clearly his duty not to remain silent and thus allow the bank to pay out moneys to his agent for use in his business believing that they might debit his account." (p.323)

(cp. Cabana v. Bank of Montreal (1919) 50 D.L.R. 88.)

The second was Brown v. Westminster Bank (1964) 2 Ll. R. 184 where the customer was asked about specific cheques on several occasions. Roskill J. (who sat on the Board in Tai Hing) held her estopped by her silence or refusal to answer notwithstanding that he was unable to find whether she had knowledge of the forgeries.

In their explanation of Greenwood on the basis of contract their Lordships are not perfectly consistent in their summary of the duty established by that case. Greenwood was a forgery case and the duty is initially expressed by their Lordships (p.324) as being a "duty to inform the bank of any forgery of a cheque purportedly drawn on the account as soon as he, the customer becomes aware of it." Their Lordships later (p.330) say that there can be "no wider duty than that recognized in Macmillan and Greenwood" yet in their conclusion (at page 331) themselves widen the Greenwood duty to require the customer to "inform his bank at once of any unauthorized cheques of which he becomes aware". To be fair, they express this wider phrase as applying only to "forged cheques".

It should be noted, in passing, that such fairness here is not so fair in so far as their Lordships' summary of Macmillan is concerned. Their Lordships are, nevertheless, caught on the horns of a dilemma. Either the duty cannot be expanded beyond Greenwood in which West is clearly wrong (not being a forgery case) or the duty relates to unauthorized cheques and the sanctity of the outer boundary established by Greenwood is broken leaving room for analysis of where the new outer limit should be established. Again, the decision in Brown can only be accommodated by further embroidery of the duty or by "imputing" knowledge.

With respect, the reworking of authority is now becoming somewhat wholesale. This is not necessary if one simply accepts

Greenwood, West and Brown for what they were - estoppel cases. In each case it is the representation and intention that it be relied upon which (with the other elements) grounded the estoppel. In each case the representation was by silence - with knowledge or with wilful closing of eyes. On this basis, Tai Hing Cotton Mills was not far from existing authority.

The second reason the estoppel cases cannot be treated as contract cases is the measure of damage applicable. With estoppel established, the plaintiff loses its case. In contract, the defendant recovers the loss caused. In both West and Brown the detriment suffered was to pay out on further cheques, yet the estoppel prevented recovery even of those cheques paid before the representation was made.

In Greenwood there was no analysis of the value of the lost cause of action or the chance the wife would have survived to judgment. Once that loss was established the plaintiff lost. Again, the cases are clearly estoppel cases not contract cases.

4.2 Limitation of Macmillan and Greenwood

Having reformulated Macmillan and Greenwood to fit the hypothesis, their Lordships, with respect, then used portions of the judgments to limit the ambit of the implied terms to that which was necessary to achieve the results in those cases - and only those results.

Their Lordships took no notice of the oft repeated injunction that the words of a case must be read secundum subjectam materiam, in the light of the matter raised for decision and limited to the facts in issue: The Commonwealth v. Bank of NSW, the Bank case (1949) 79 C.L.R. 497, 637-8; Quinn v. Leathem [1901] A.C. 495, 506 (per Lord Halsbury); Olive v. Hinton [1899] 2 Ch. 264, 276 per Rigby L.J. that same point was made by Banks L.J. himself in Joachimson (supra) p.120 when his Lordship said:

> "Too much reliance must not be placed upon the language of learned judges who had not the precise point before them ..."

It may be conceded at once that there are passages in Macmillan which limit the customer's duty to take care of the drawing of the cheque and not the system of custody of the cheque. However, there are equally passages in the same judgments which are of broader application.

It should not be assumed that because their Lordships stopped at the exact point at which it was necessary to stop in order to decide the case before them, that the duty imposed on the customer was not one iota greater.

The restrictive passages have to the writer's mind firstly a flavour of the old notions of negligence - not yet enlightened by Donoghue v. Stevenson or The Wagon Mound and secondly a flavour

of legal prescription of the chain of causation - causa causans and cause sine qua non still being the order of the day.

If one concedes there is a duty to take care not to mislead the bank into thinking a signature is genuine, and if that duty is broken and in fact causes loss why should the customer not pay damages? The kind of damage is clearly foreseeable. Even the method of causation is broadly foreseeable (although this is not necessary Mihaljevic v. Longyear [1985] 3 N.S.W.L.R. 1).

Why should the breach be limited to breaches "in or immediately connected with the drawing of the cheque itself"? Or "in the transaction itself, that is, in the manner in which the cheque is drawn"?

Such a restrictive approach does not, to adopt the words of the High Court in Sydney Wide Stores:

> "... conform to modern notions of the duty of care and the standard of care expected of the reasonable man. It is now well settled that the reasonable man should, in appropriate circumstances, take account of the possibility that others will break the law and act accordingly."

Despite the weight of authority and dicta in Bank of Ireland v. Evans Trustees (1855) 5 H.L.C. 389; 10 E.R. 950 opinion of Parke B. p.410-411, 959; Welch v. Bank of England [1955] Ch. 508; Lewis Sanitary Clean Laundry Co. Ltd. v. Barclay & Co. Ltd. (1906) 95 L.T. 444 11 Com. Cas. 255; Kepitigalla Rubber Estates v. National Bank of India [1909] 2 K.B. 1010; Swan v. North British Australasian Co. [1863] 2 H. & C. 175, 159 E.R. 73, at p. 182 76 per Blackburn J., Walker v. Manchester & Liverpool District Banking Co. (1913) 108 L.T. 728 per Channell J., National Bank of New Zealand v. Walpole & Petterson (1975) 2 N.Z.L.R. 7, Mayor etc. of Merchants of the Staple of England v. Bank of England (1888) 21 Q.B.D. 160., Perel v. Australian Bank of Commerce (1923) 24 S.R. (N.S.W.) 62, 81-82 and Bank of England v. Vagliano Brothers [1891] A.C. 107, 115 per Lord Halsbury it is hard to see any logical rationale for such a restriction.

It is of interest to note that the limitation imposed by the cases finds expression in a judgment of Bray J. in Kepitigalla. That same judge sat in the Court of Appeal in Macmillan and concluded that the view he took in Kepitigalla precluded the bank from success in Macmillan. Their Lordships in the House of Lords approved his observations but came to the contrary conclusion. With respect one needs, perhaps, caution in relying on the ipissima verba.

As the High Court in Sydney Wide Stores said, there is:

> "no convincing distinction between a case where the careless drawing of the cheque facilitates loss by fraudulent increase of the amount of the cheque and the case where the customer draws his cheque in blank and his agent exceeds his

> authority by filling in a cheque for a larger amount than that authorized by the drawer, in which event the drawer is responsible."

With respect, there is also no convincing distinction between those cases and the case where the customer carelessly facilitates the loss through the predations of the fraudulent employee allowing the bank to consider that all is well by refusing to look at his bank statements or take any heed for his own safety.

In circumstances other than the banker and customer, mere facilitation of a state of affairs which, given the additional negligence of yet another act or result in a loss, can result in the original facilitator being partly responsible for the loss in question see, eg. Chapman v. Hearse (1961) 106 C.L.R. 112 at 122, Voli v. Inglewood Shire Council (1963) 110 C.L.R. 74 at pp. 87-88, Mahony v. Krushchich (Demolitions) Pty. Ltd. (1985) 59 A.L.J.R. 504, 506; Lothian v. Rickards (1911) 12 C.L.R. 165, 176; Singer & Friedlander Ltd. v. John D. Wood & Co. (1981) The Valuer 400; (1977) 243 Estates Gazettes 212; Cooke v. S. [1967] 1 W.L.R. 457.

For Australia, the matter is not yet settled. In Sydney Wide Stores the High Court made it quite clear that they were dealing only with the question of law submitted for determination - not with the facts at issue. At p.316-7 they said:

> "But there is no occasion to pursue the question whether the duty of care extends to the drawing of a cheque in such manner as not to facilitate a fraudulent alteration in the name of the payee ... . We are merely to decide whether the primary judge was correct in following Marshall in preference to Macmillan."

Such a wider duty was found to exist by Nicholson J. in re Gasbourne [1984] 1 V.R. at 389 and in Canada in Canadian Pacific Hotels v. Bank of Montreal (1981) 122 D.L.R. (3d) 519 affd. (1982) 139 D.L.R. (3d) 575.

5. Estoppel

With regard to estoppel, their Lordships held that in the absence of a contractual duty (because no term was to be implied) or a tortious duty (there being a contract), no duty to warn the banks could arise such as would found an estoppel. With due respect, the duty which founds the obligation to speak is not necessarily the same as a duty which gives rise to an action in tort or for breach of contract. This is made clear by the Privy Council in Fung Kai Sun v. Chan Fui Hing [1951] A.C. 489 at 501 in the advice of the Privy Council delivered by Lord Reid, in an appeal, it should be noted, from Hong Kong:

> "It was argued for the respondent that they were under no duty to volunteer information to the appellant, and that, as they never said or did anything which misled the appellant, they cannot now be prevented by mere delay from asserting the truth about the deeds. It was said that as there was no contractual or other relationship between the respondents and the appellant there could be no duty to volunteer information. It was quite true that there was no duty in the sense that failure to perform it would be a tort or a ground for an action of damages. But it is well established that silence can in some cases give rise to an estoppel without there being a duty in that sense ... ."

The two duties are different, they arise from different sources, they are not dependent upon contract nor necessarily upon a proximity relationship. As Fung Kai Sun shows, even where there is no relationship whatsoever between the parties other than the existence of a forgery of A's name on a document held by B, the duty to disclose arises and a failure to carry out that duty can, given detriment, result in A being estopped from denying the validity of the signature. West shows that the duty is not confined to forgeries but includes unauthorized transactions. Brown shows that knowledge is not necessary, a wilful refusal to look at the facts may suffice.

6. Exclusion Clauses

This paper is long enough without delving into the law relating to exclusion clauses. It is worth noting that one clause read:

> "The bank's statement of my/our current account will be confirmed by me/us without delay. In case of absence of such confirmation within a fortnight the bank may take the statement as approved by me/us."

In one case, the statements were confirmed as examined and found accurate. Given the more lenient approach now to be adopted towards such clauses Photo Productions v. Securior Transport [1980] A.C. 827 one must ask, with respect, what does the clause mean? As Mahoney J.A. said in Bright v. Sampson & Duncan Enterprises [1985] 1 N.S.W.L.R. 346 at 365:

> "... where the limitation of the general words of an exclusion clause is involved, it is proper to construe the words by reference to the essential purposes of the transaction to which they relate."

What, one may ask, is the point of requiring confirmation and deeming it to occur in the case of silence if it was not, at the very least, to amount to a representation that the customer had examined the statement and considered each transaction recorded therein to be a valid transaction? What did the clause mean?

RECENT DEVELOPMENTS NO. 2
TAI HING

Annexure A

To paper by Martin Kriewaldt

Negligence - Contract Interrelationship

Some of the more important obiter observations:

> "On the one hand there is the well established principle that no-one other than a party to a contract can complain of a breach of that contract. On the other, there is the equally well established doctrine that negligence, apart from contract, gives a right of action to the party injured by that negligence - and here I use the term negligence, of course, in its technical legal sense, implying a duty owed and neglected. The fact that there is a contractual relationship between the parties which may give rise to an action for breach of contract does not exclude the co-existence of a right of action founded on negligence as between the same parties, independently of the contract, though arising out of the relationship in fact brought about by the contract. Of this the best illustration is the right of the injured railway passenger to sue the railway company either for breach of the contract of safe carriage or for negligence in carrying him". (Donoghue v. Stevenson [1932] A.C. 562 at pp. 609-610 per Lord Macmillan.)

> "An architect undertaking any work in the way of his profession accepts the ordinary liabilities of any man who follows a skilled calling. He is bound to exercise due care, skill and diligence. He is not required to have an extra-ordinary degree of skill or the highest professional attainment. But he must bring to the task he undertakes the competence and skill that is usual among architects practising their profession. And he must use due care. If he fails in these matters and the person who employed him thereby suffers damage, he is liable to that person. This liability can be said to arise either from a breach of his contract or in tort." (Voli v. Inglewood Shire Council (1963) 110 C.L.R. 74, 84 per Windeyer J.)

> "My Lords, the solicitor contracts with his client to be skillful and careful. For failure to perform his obligation he may be made liable at law in contract or even in tort,

> for negligence in breach of a duty imposed on him. In the early history of the action of Assumpsit this liability was indeed treated as one for tort. There was a time when in cases of liability for breach of a legal duty of this kind the Court of Chancery appears to have exercised a concurrent jurisdiction. That was not remarkable, having regard to the defective character of legal remedies in those days. But later on, after the action of Assumpsit had become fully developed, I think it probable that a demurrer for want of equity would always have lain to a bill which did no more than seem to enforce a claim for damages for negligence against a solicitor." (Nocton v. Lord Ashburton [1914] A.C. 932 at 956 per Viscount Haldane.)

("Want of equity" - "namely ... being so simple as to not be the proper subject for a bill in the Court of Chancery" per Warrington L.J. in Joachimson v. Swiss Bank [1921] 3 K.B. 110, 123.)

The following is a table of cases which have considered the matter:

Dual Liability - both Tort and Contract

Govett v. Radnidge (1802) 3 East 62; 103 E.R. 520.

Howell v. Young (1825) 5 B. & C. 259, 108 E.R. 97.

Marzetti v. Williams (1830) 1 B. & Ad. 415, 109 E.R. 415 (as explained Godefroy v. Jay (1831) 7 Bing. 413, 131 E.R. 154).

Brown v. Boorman (1841) L.J.Q.B. 273; (1842) L.J. Ex. 437; (1844) 11 Cl. & Fin. 1, 8 E.R. 1003.

Smith v. Fox (1848) 6 Hare 386; 67 E.R. 1216.

Blyth v. Fladgate [1891] 1 Ch. 337, 365-6.

Meux v. Great Eastern Rly. [1895] 2 Q.B. 387 at 394 (C.A.).

Taylor v. Manchester (etc.) Rly. [1895] 1 Q.B. 134 at 140 (C.A.).

Bowen v. Blair [1933] V.L.R. 398 (not expressly argued).

Jackson v. Mayfair Windows [1951] 1 All E.R. 215.

Whit v. John Warwick [1953] 1 W.L.R. 1285 (C.A.).

Matthews v. Kuwait Bechtel Corp. [1959] 2 Q.B. 57.

Robertson v. Bannigan [1964] S.L.T. 381.

Dominion Freeholders v. Aird (1966) 67 S.R. (N.S.W.) 150 at 158.

Treloor v. Henderson [1968] N.Z.L.R. 1085.

Ogden & Co. v. Reliance [1973] 2 N.S.W.L.R. 7.

Dominion Chain Co. v. Eastern Construction Co. (1976) 68 D.L.R. (3d) 385.

Esso Petroleum v. Mardon [1976] Q.B. 801.

Hardy (Qld.) Employees Credit Union v. Hall Chadwick & Company (unreported) - Qld. Sup. Court - 1976 Douglas J.

Arenson v. Casson, Beckman Rutley & Co. [1977] A.C. 405 at 434.

Employers Corporate Investments Pty. Ltd. v. Cameron (1977) 3 A.C.L.R. 120.

Batty v. Metropolitan Realizations [1978] 1 Q.B. 554.

Power v. Halley (1978) 88 D.L.R. (3d) 381.

Midland Bank Trust Co. Ltd. v. Hett Stubbs & Kemp [1979] Ch. 384.

Ross v. Caunters [1980] Ch. 297.

Watts v. Public Trustee [1980] W.A.R. 97 at 101.

Aluminium Products (Qld.) Pty. Ltd. v. Hill [1981] Qd. R. 33.

Forster v. Outred & Co. [1982] 1 W.L.R. 86.

Macpherson & Kelley v. Prunty & Associates [1983] 1 V.R. 573.

Vulic v. Bilousky [1983] 2 N.S.W.L.R. 472.

Brickhill v. Cooke [1984] 3 N.S.W.L.R. 396.

Bright v. Sampson & Duncan Enterprises Pty. Ltd. [1985] 1 N.S.W.L.R. 346, 357.

The following cases came to the same conclusion, without real discussion of the basis:

Max Garrett (Distributors) Pty. Ltd. v. Tobias (1975) 50 A.L.J.R. 402 (Obiter).

Canadian Pacific Hotels v. Bank of Montreal (1981) 122 D.L.R. (3d) 519 affd. (1982) 139 D.L.R. (3d) 575.

South Australia v. Johnston (1982) 42 A.L.R. 161, 175 per Gibbs CJ., Mason, Murphy, Wilson and Brennan JJ. (Although this case was one of negligent misstatement which induced a contract, the claim was brought both in tort and in contract. The High Court said that damages on the contract claim were no wider than in tort and the former had a "problem of the period of limitation".)

Sacca v. Adam & R. Stuart Nominees Pty. Ltd. (1983) 33 S.A.S.R. 429.

Northumberland Insurance Co. v. Alexander (1984) 8 A.C.L.R. 882 at 906.

Liability Under Contract Only

Davies v. Lock (1844) 3 L.T. (OS) 125.

Bean v. Wade (1888) 2 T.L.R. 157, 158 (C.R.) but on a misapprehension of a limitation point from Howell v. Young (supra) and Smith v. Fox (supra).

Ward v. Lewis (1896) 22 V.L.R. 410.

Hall v. Brooklands Auto Racing Club [1933] 1 K.B. 205 at 213.

Jarvis v. Moy Davies Smith Vanderville & Co. [1936] 1 K.B. 399.

Groom v. Crocker [1939] 1 K.B. 194.

Yager v. Fishman [1944] 1 All E.R. 552.

Lake v. Bushby [1949] 2 All E.R. 964.

Bailey v. Bullock [1950] 2 All E.R. 1167.

Hall v. Meyrick [1957] 2 Q.B. 455.

Clark v. Kirby-Smith [1964] Ch. 506.

Ford v. White [1964] 1 W.L.R. 885, 2 All E.R. 755.

Baggit v. Stephen Scanlan & Co. Ltd. [1966] 1 Q.B. 197.

Cooke v. Swifen [1967] 1 W.L.R. 457, [1966] 1 W.L.R. 635, [1967] 1 All E.R. 299.

Belous v. Willetts [1970] V.R. 45.

A.S. James Pty. Ltd. v. Duncan [1970] V.R. 705.

Dillingham Constructions Pty. Ltd. v. Dowds [1972] 2 N.S.W.L.R. 49.

Bevan Investment Ltd. v. Blackall Struthers (No.2) [1973] 2 N.Z.L.R. 45.

McLaren Maycroft & Co. v. Fletcher Development [1973] 2 N.Z.L.R. 100.

Heywood v. Wellers [1976] Q.B. 446.

Pennant Hills Restaurant Pty. Ltd. v. Barrel Insurance Pty. Ltd. [1977] 2 N.S.W.L.R. 827.

Messineo v. Beale (1978) 86 D.L.R. (3d) 713.

Rowe v. Turner Hopkins & Partners [1980] 2 N.Z.L.R. 550.

Seale v. Perry [1982] V.R. 193, 211.

The following case comes to the same conclusion but without discussion:

Burrows v. March Gas & Coke Co. (1872) 7 Exch. 96.

No Conclusion Reached

Simonius Visher v. Holt & Thompson [1979] 2 N.S.W.L.R. 322 at 355. (Per Samuels J.A. "open and arguable".)

The reader is also referred to:

Professional Liability, D.A.K. Ferguson (1923) 47 A.L.J. 592.

Tort or Contract, W.D.C. Poulton (1966) 83 L.Q.R. 344.

Solicitor's Negligence - Contract or Tort, J.L. Dwyer (1982) 56 A.L.J. 524.