CONVERSION AND BANKERS

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INTRODUCTION

In a UK Court of Appeal case in the 1960s involving an action against a bank for the conversion of a cheque, Diplock L.J. remarked:

> "It may seem odd that in the 1960's the liability of the defendant bank for the part which they were deceived into playing in this transaction should be affected by the series of legal fictions by use of which the lawyers of the sixteenth century evolved from the ancient real action of detinue sur trover a personal action on the case of trover which, with the abolition of forms of action, became the modern tort of conversion."

His Honour went on to say:

> "It may also seem odd that the basis of their liability is that the piece of paper on which the cheque was written was 'goods' belonging to the plaintiff company, and that the defendant bank's acts in accepting possession of that piece of paper ..., in presenting it to the Bank of India and accepting payment of it, constituted an unjustifiable denial by them of the plaintiff company's title to its goods, from which damage flowed. Such, however, is the common law of England, and one of the consequences of the historic origin of the tort of conversion and its application to negotiable instruments as 'goods' is that the tort at common law is one

> of strict liability in which the moral concept of fault in the sense of either knowledge by the doer of an act that is likely to cause injury, loss or damage to another, or lack of reasonable care to avoid causing injury, loss or damage to another, plays no part."

Mafarni & Co Ltd v. Midland Bank Limited [1968] 2 All ER 573 at 577.

In the context of cheques, therefore, conversion depends on two things: first, who owns the piece of paper constituting the cheque, and secondly, did the bank deal with it in a way inconsistent with the rights of that person as owner.

The normal situation dealt with in the cases is one where a rogue steals a cheque payable to and owned by an innocent victim. He then pays that cheque into an account which may or may not bear a name similar to that of the victim. The collecting bank, by presenting the cheque to the paying bank and thereby impliedly seeking payment upon it, and the paying bank, by receiving it and making a payment in relation to it (to use a neutral phrase), are acting inconsistently with the rights of the true owner. Liability, once these matters are established, is strict and therefore does not depend on fault once the plaintiff has first established that he is the true owner.

This strict liability referred to by Lord Justice Diplock has been modified by creating certain statutory defences for banks, and more recently, in Australia, for non-bank financial institutions, which are discussed later in this paper. Initially, the non-statutory defences are discussed.

COLLECTING BANK AS HOLDER IN DUE COURSE

A collecting bank may, where it has itself given value for a cheque by having allowed drawings against or cashed an uncleared cheque, succeed in claiming that it is a holder in due course of the cheque. If a collecting bank achieves this status, it has a better title to the cheque than the party claiming to be the true owner. This would preclude common law liability in conversion. A holder of a cheque is a holder in due course if he satisfies the requirements of s.50 of the Cheques and Payment Orders Act, 1986, Commonwealth ("CPOA"). It is not possible to become a holder in due course of a cheque which has been crossed "not negotiable" (CPOA, s.50(1)(a)(iii)).

ESTOPPEL

It is possible that a collecting bank could also defend a claim brought against it for the conversion of a cheque on the basis that the claimant was estopped from denying the authority of its agent or employee in depositing cheques to the principal's bank account. It is, however, difficult for a collecting bank to succeed in a defence of estoppel by representation (note comment

by Creswell, Blair, Hill and Wood, Encyclopaedia of Banking Law, Volume 1, paragraph d(116)).

In AGC Limited v. Commissioners of the State Bank of Victoria (1989) ATR 86-229, a recent decision of the Supreme Court of Victoria, the Bank failed to make out a defence of estoppel by negligence. Ormiston J. said that "as the Bank chose to collect the proceeds of each cheque for a person who was not the named payee, I do not think it can allege that AGC was estopped in any relevant way from making its present claims". Ormiston J. doubted whether in fact AGC had been negligent in any way, and the bank had "failed to make any relevant enquiries" before collecting the cheques.

In different circumstances, however, it might be possible to raise an estoppel. Tina Motors Pty Limited v. ANZ Bank [1977] VR 205 was an action against a paying bank. The bank manager had enquired of a director of the drawer regarding the signature on the cheque, and was told that if the employee (the forger) was presenting the cheque it was in order. Crockett J. commented that to avoid circuity of action, it would seem that the negligent failure of the customer to investigate after enquiry by the bank, might be raised by way of defence rather than counter-claim (at pages 208-9). The company was estopped from denying the truth of the representation as the bank had relied upon them to its detriment.

RATIFICATION

Although Morison v. London County and Westminster Bank Limited [1914] 3 KB 356 is often now spurned as the origin of the now-discredited doctrine of "lulling to sleep", the decision of the Court of Appeal in that case was based, as to the earlier cheques in question, not on that doctrine but on the plaintiff's ratification of the transactions of his fraudulent manager. The manager had admitted to the plaintiff that he was responsible for a deficiency in the capital of the plaintiff's firm discovered after the preparation of balance sheets, and a further investigation of the affairs of the firm by the plaintiff's accountants led to the plaintiff adjusting the balance sheets and, inter alia, carrying the shortage into the balance sheet as a debt due from the manager, with some understanding that the manager was to replace it at some undefined time. A similar shortage in the following year was treated in the same way. Further, the plaintiff thereafter renewed the manager's employment. These actions, the court held, amounted to ratification. Phillimore L.J. said at page 385 that "as to knowledge, it is unnecessary to decide what inference should be drawn when a principal knows so much that it is a policy of an ostrich to know no more. It is unclear that in such cases we can altogether rely upon the doctrine that for this purpose, means of knowledge are not really the same as knowledge. It is unnecessary to decide this; for here the plaintiff put the accountant in his place ...", and the accountant knew or must have known what had taken place.

In Bank of Montreal v. Dominion Gresham Guarantee & Casualty Company Limited [1930] AC 659, however, the defence of ratification failed, because "the customers and their directors were throughout in ignorance of what [the fraudulent manager in that case] was from time to time doing". The Privy Council rejected (at page 666) "the so-called doctrine of lulling to sleep" and, in a passage beginning with an oft-quoted aphorism, stated that:

> "Neglect of duty does not cease by repetition to be neglect of duty. If there be any doctrine of lulling to sleep it must depend upon and can only be another way of expressing estoppel or ratification. It was admitted before their Lordships that estoppel had no place in this case. Effective ratification necessarily involves knowledge of all the material facts on the part of him who ratifies."

The defence for this reason would seem to be available only in comparatively rare circumstances.

ILLEGALITY

Illegality has been successfully pleaded by a bank to an action in conversion: Thackwell v. Barclays Bank Plc [1986] 1 All ER 676. In that case the plaintiff was a party to a fraudulent re-financing transaction, for which the cheque was drawn and made payable to him. The court found that it would be contrary to public policy to permit him to recover the proceeds of the cheque from the bank.

COLLECTING BANK'S RIGHT TO INDEMNITY FROM CUSTOMER

A collecting bank held liable in conversion to the true owner of a cheque would normally be entitled to indemnity from the customer who had deposited the cheque, even though the bank has acted in breach of its legal duties. Generally, the bank would be able to rely on the principle that "when an act is done by one person at the request of another, which act is not manifestly tortious to the knowledge of the person doing it and such act turns out to be injurious to a third party, the person doing it is entitled to an indemnity from him who requested that it should be done": Sheffield Corporation v. Barclay [1905] AC 392 at 397; note also Yeung Kai Yung v. Hong Hong & Shanghai Banking Corporation [1981] AC 787.

Where, however, one of two partners misappropriated cheques payable to a third party and deposited them in the firm's bank account, withdrew the proceeds and applied them to his own use, the bank, upon being held liable in damages for conversion, could not recover from the innocent partner under s.10 of the Partnership Act, New South Wales: National Commercial Banking Corporation of Australia Limited v. Batty, (1986) 160 CLR 251. The right of recovery under s.10 only applies where the fraudulent partner was acting in the ordinary course of the business of the firm, which was not the situation in this case.

THE STATUTORY DEFENCES AVAILABLE TO A BANK AGAINST AN ACTION IN CONVERSION

Section 95 of the CPOA provides protection to collecting banks. The protection operates, in slightly oversimplified terms, where the collecting bank collects in good faith and without negligence. For this purpose, the collecting banker is not deemed to be negligent by virtue of failing to concern itself with the regularity of endorsement of an order cheque if the name of the account is the same as or reasonably similar to that of the customer (in the latter case provided that it was reasonable for the bank to assume that the customer was the person intended by the drawer as the payee). There is also additional protection for a collecting bank which collects merely as agent for another bank. It need not concern itself at all with the absence of, or irregularity in, endorsement of the cheque.

This section, then, does not greatly alter the position which existed under the old Bills of Exchange Act. In simple terms, a tort of strict liability has superimposed upon it a defence of absence of negligence. Putting this a little differently, a requirement of negligence is imposed but the onus of proof of its absence rests on the collecting bank.

Sections 88 to 94 deal with the position of the paying bank or, as it is now called, the "drawee bank". Briefly, authority to pay a cheque ceases when it becomes stale (after 15 months), 10 days after notice of the drawer's death, (a new provision) immediately on countermand and immediately on notice of the drawer's mental incapacity to draw cheques. Where the only fraudulent alteration to a cheque is to increase its amount, the bank is entitled to debit its customer's account with the amount for which the cheque was drawn provided that it does not act negligently. This is also a new provision. If the bank pays a crossed cheque in good faith and without negligence, it is not liable where the cheque, on its face, does not appear to be a crossed cheque. Finally, a drawee bank is given analogous protection to that given to the collecting bank where it pays a fraudulently endorsed cheque in good faith and without negligence. The previous protections to a drawee bank were expressed in terms of payment in good faith and in the ordinary course of business.

Although there are minor differences, the new Act substantially follows the form of the old Division 3 of Part III of the Bills of Exchange Act, 1909. The protections are more precisely defined and, in general, are slightly more favourable to banks.

Non-bank financial institutions, (building societies and credit unions), since the commencement of the CPOA, have been given equivalent statutory protections to banks, where NBFIs accept deposit of cheques for their customers to the credit of their accounts.

MEANING OF "WITHOUT NEGLIGENCE"

It has long been accepted that the conduct of the bank prior to and at the time of accepting payment of a cheque will be relevant to whether the bank has acted without negligence (Commissioners of Taxation v. English Scottish and Australian Bank [1920] AC 683.

Thus, the conduct of a bank in failing to take reasonable steps to ascertain the identity of the customer opening the account to which the converted cheque is subsequently credited will be relevant to the bank's negligence, as will its conduct at the time it collected the cheque.

The Cash Transactions Reports Act 1988 lays down procedures for banks and non-banks which must be complied with in the opening of an account or the continuance of operations on it where a signatory changes. Although other provisions of the Act have now commenced, including the prohibition against a person opening or operating on an account in a false name, the sections imposing the obligations to be observed when opening accounts have not yet commenced.

When the sections commence, they will apply to the opening of a new account and alterations to signatories on existing accounts, whose credit balances exceed $1,000.00, or where credits of more than $2,000.00 per month are made to the account.

There will be a specific obligation to provide forms of statement setting out full details of the customers and signatories and statutory declarations as to identities of signatories from acceptable referees, who will probably be persons who can provide certificates of identity for passport applications.

In view of the procedural steps for opening accounts imposed upon banks by the statute, it may well be difficult to envisage how a bank which complies with the statutory requirements can subsequently be held by a court to be negligent in the opening of an account.

THE CUSTOMER'S DUTY OF CARE

In Australia, there is now judicial acceptance of the view that a customer owes a duty of care to the bank in drawing his cheques. This question was for many years controversial and, in particular, it was the subject of conflicting decision of the House of Lords (London Joint Stock Bank v. McMillan, [1918] AC 777) and the Privy Council (Marshall v. Colonial Bank of Australia, (1904) 1 CLR 632). A further complication was that the latter decision affirmed the decision of the High Court.

The controversy can be traced back through many fascinating cases in the English Reports starting with Young v. Grote, (1827) 4 Bing 253, 130 ER 764 and including the rather amusing decision of

the House of Lords in Scholfield v. Earl of Londesborough, [1896] AC 514 in which Lord Halsbury L.C., after setting out over two pages from Scacchia in the original Latin and nearly four pages from Pothier in the original mediaeval French, said at page 531:

> "My Lords, I do not myself think that either the original by Scacchia or the commentary by Pothier are relevant to the matter in hand."

One shudders to contemplate what his Lordship might have accomplished with a word processor, let alone an optical reader. The controversy was finally and decisively resolved, so far as Australia is concerned, by the decision of the High Court in Commonwealth Trading Bank of Australia v. Sydney Wide Stores Pty Ltd, (1981) 148 CLR 304. In that case, the plaintiff had engaged a firm called "Computer Accounting Services" and it drew cheques in its favour from time to time. Unfortunately, many such cheques were drawn so as to identify the payee by its initials which were duly written in capitals without any full stops. It was a simple matter for a dishonest employee of the plaintiff to add the letter "H" and thus convert (if you will pardon the pun) the cheques into cash cheques which, on one view of the matter, may not have been cheques at all. In any event, they were treated as cash cheques by the collecting bank (the Bank of New South Wales, as it then was) and by the paying bank (the Commonwealth Trading Bank of Australia). Both were sued. The action against the paying bank was separately determined and it pleaded an estoppel arising out of the negligence of the customer in drawing cheques payable to "CAS" bearing in mind the ease with which those initials could be altered to "CASH". Rogers J. held (not unnaturally) that he was bound by Marshall's Case and accordingly struck out the defence. The High Court granted special leave to appeal and ultimately allowed the appeal, overruled Marshall's Case and followed McMillan's Case.

The case was one eminently suited to be a test case. Almost all the earlier cases involved blanks in cheques and special doctrines had been developed by the courts for dealing with this problem. The instant case is one of the rare cases where a cheque was drawn negligently, but the negligence did not consist in leaving a blank.

Ironically, the ratio of the case had little to do with banking law. One common theme which permeates tort decisions of the High Court over the last decade is the universality of negligence. The approach being taken by the court in this area is that there are not separate doctrines laying down criteria for negligence in different areas of human endeavour but rather one general doctrine of negligence which should be applied "across the board". This approach is well illustrated by the concurring judgment of Murphy J. who regarded the result as contrary to social and economic policy but accepted it on the basis that the law in this area should be brought into harmony with the law in other areas. He added, however, that no high standard of care should be imposed.

The effect of all this is that a bank may cross-claim for damages for negligence where the customer has negligently drawn a cheque. It may also (as in Sydney Wide) rely upon an estoppel based on negligent conduct. In either event, its own liability would be effectively reduced. As a practical matter, of course, it will be a rare case where, in all the circumstances, the customer will be held negligently to have drawn a cheque. In the meantime, beware of organisations whose initials are "CAS" or "ASH".

The customer's duty in drawing cheques so as not to facilitate fraudulent alteration has not, unfortunately for banks, been extended to include a duty not to facilitate actual forgery of cheques, although there may still be scope for testing the matter further before Australian courts.

The possibility of imposing a duty on a customer to take reasonable steps to avoid forgeries of his cheques was rejected by the Privy Council, on appeal from the Hong Kong Court of Appeal, in Tai Hing Cotton Ltd v. Liu Chong Hing Bank Limited [1986] AC 80.

In that case, the company customer had an inadequate system of supervising the drawing of cheques and examination of bank statements, with the result that a fraudulent employee forged and obtained the proceeds of cheques over a period of some six years.

The Hong Kong Court of Appeal thought that "in the world in which we live today it is a necessary condition of the relation of banker and customer that the customer should take reasonable care to see that in the operation of the account the bank is not injured."

The Privy Council rejected this notion, recognising only the Sydney Wide duty and the duty on a customer to notify his bank upon becoming aware of forgeries (Greenwood v. Martins Bank Ltd [1933] AC 51). As a variation to the duty recognised in Greenwood's case where a bank queries a customer concerning the genuineness of signatures on cheques and the customer negligently fails to investigate possible forgery by an employee, and represents that an employee's signature is in order, the customer is subsequently estopped from denying the truth of the representations: Tina Motors Pty Limited v. ANZ Bank [1977] VR 205.

The issue has only received airing before the Australian High Court in a special leave application in Westpac Banking Corporation v. Metlej [1986] 5 Leg Rep SL 4, where special leave was refused. The subsequent Court of Appeal judgment in this case would appear to indicate that there could be scope for some duty to be developed in future cases.

DUTIES TO THE COLLECTING BANK

There is no authority to suggest that a drawer owes any duty to the collecting bank in relation to the drawing of cheques, or which could be pleaded as defence by the collecting bank against an action by the drawer in conversion where the drawer is the true owner of a cheque.

In Lloyds Bank Ltd v. Chartered Bank of India Australia and China [1929] 1 KB 40, it was held that it was immaterial that the plaintiff in a conversion action against the collecting bank had been negligent in not having a proper and reasonable system of checking the work of its servants.

In Lloyds Bank v. E B Savory ([1933] AC 201 at 229) Lord Wright made it clear that in his view the negligence of the plaintiff in signing cheques in blank, and in leaving it to his clerks to fill in the amount and the names of the payees was completely immaterial; note also Bank of Montreal v. Dominion Gresham Guarantee and Casualty Co Ltd [1930] AC 659.

While the courts have not recognised a duty by the drawer to the collecting bank, there has been judicial and statutory recognition in the UK of the plaintiff's negligence contributing to the cause of the bank's conversion. In some instances, the drawer may be the true owner of the cheque and if contributory negligence of the plaintiff is ultimately recognised in Australia as it has been in England, a form of drawer's duty to the collecting bank may well arise in such circumstances.

In Orbit Mining & Trading Co Limited v. Westminster Bank Limited [1963] 1 QB 794, one director of the drawer company left with the other director blank cheque forms signed by him. The signatories of two directors were required to operate on the account. The other director fraudulently made out the cheque to himself and added his own signature and completed the cheque in all respects. He then deposited the cheque to the credit of his personal account with another bank.

In the UK Court of Appeal, the collecting bank succeeded in relying on the defence of absence of negligence, as it had no knowledge or reason to connect the fraudulent director with the drawer company. The fraudulent director's signature as drawer was apparently illegible. It was not, accordingly, necessary for the court to consider the conduct of the plaintiff company, through its directors, as drawer, although Sellers L.J. recognised that the conduct of the drawer had contributed to the loss, and it would be "one-sided" to blame the bank. ([1963] 1 QB at 818).

CONTRIBUTORY NEGLIGENCE

Various defences have been put forward by the banks over the years in an attempt to "water down" the prevailing judicial

attitude that strict liability should be applied to the bank's conduct but, on the other hand, the conduct of the customer is irrelevant.

From the bank's point of view, things started to look up with the birth of the doctrine of "lulling to sleep" which came out of the decision of the Court of Appeal in Morison v. London County and Westminster Bank Ltd [1914] 3 KB 356. Bushby L.J. said at page 377:

> "... The position after (say) the end of 1907 was such that any suspicion which they ought to have had would have been lulled to sleep by the action of Morison himself. Such a sufficient time had then elapsed during which the customer had received back his passbook and his cheques, and had raised no question as to the validity of the cheques, as that the defendants were entitled to assume that there was no cause for suspicion or inquiry."

Whilst the doctrine had a reasonable innings, unfortunately for the banks it lost support in a series of cases in the 20s and was disowned by all three judges of the Court of Appeal in Lloyds Bank Ltd v. Chartered Bank of India Australia and China [1929] 1 KB 40. Sankey L.J. considered that the doctrine could only be based on adoption or ratification and the Privy Council agreed with that view in 1930 in Bank of Montreal v. Dominion Gresham Guarantee and Casualty Co Ltd [1930] AC 659.

Of the various remaining defences attempted by the banks since then, only contributory negligence looked like punching a hole in the formidable barrier of strict liability. The significant judicial development in England on the question of contributory negligence was the decision of Donaldson J. in Lumsden and Co v. London Trustee Savings Bank [1971] 1 Lloyd's Rep 114. The court held that the Law Reform (Contributory Negligence) Act, 1945 (UK) allowed a defendant bank which was unable to establish that it acted without negligence to nevertheless seek an apportionment of damages based on the contributory negligence of the plaintiff. Similar legislation is in force in all Australian states and it was inevitable that sooner or later the point would also be taken in Australia. In terms of the legislation, it was necessary for the defendant in the Lumsden case to satisfy Donaldson J. that either the plaintiff had committed a breach of the duty of care which it owed to the defendant bank, or had itself been guilty of an act or omission which would have given rise to the defence of contributory negligence at common law.

In order to reach this latter conclusion it was necessary for the court to distinguish Savory's case mentioned earlier, and to follow a decision of the New Zealand Court of Appeal (Helson v. McKenzies (Cuba Street) Ltd [1950] NZLR 878) where the damages claimed by the plaintiffs in an action for conversion were reduced by reason of the plaintiff's contributory negligence.

Donaldson J. did not clearly identify one or other of these arguments as the basis for his decision but accepted "one or both" of them ([1971] 1 Lloyd's Rep 114 at 177) and ordered the plaintiff to bear ten per cent of the loss.

The equivalents in NSW and Victoria of the Law Reform (Contributory Negligence) Act 1945 (UK) are the Law Reform (Miscellaneous Provisions) Act 1965 (NSW) (s.10) and the Wrongs Act 1958 (Vic) (s.26) which provide that where any person suffers damage as a result partly of his own fault and partly of the fault of any other person or persons a claim in respect of that damage shall not be defeated by reason of the fault of the person suffering the damage but the damages recoverable in respect thereof shall be reduced. "Fault" in s.9 of the NSW Act (s.25 of the Victorian) is defined to mean: "negligence ... or other act or omission which gives rise to a liability in tort or would, apart from this Part, give rise to the defence of contributory negligence ..."

The leading case on contributory negligence is the decision of Samuels J. in Wilton v. Commonwealth Trading Bank [1973] 2 NSWLR 644. Whilst the bank argued that the plaintiff had been guilty of contributory negligence, it claimed that the negligence was not too remote to the cause of the conversion and, therefore, that the plaintiff's responsibility for the loss exceeded that of the bank. Samuels J. found that although the plaintiff was negligent, it would not afford the bank a complete defence to the action.

Samuels J. interpreted the requirement that the plaintiff's fault "would [apart from the Act] give rise to the defence of contributory negligence" as meaning that contributory negligence had to be found to be a defence to an action for conversion at common law, ie. prior to the enactment of the Act. Carelessness alone was not sufficient to deny the owner the rights he had over his own property.

Although Fleming, in his Law of Torts, 5th edition 1983, at pages 255-6, comments that "the statutory formula [in the various equivalents of the Law Reform (Contributory Negligence) Act 1945 of the UK] is ... ambiguous on the question whether it authorises apportionment only in cases where contributory negligence was a defence before the Act, or whether there is room for a developing common law which would now allow a reduction of damages in cases where formerly a complete denial seemed too punitive", and a persuasive case was made in an article by Goldring, "The Negligence of the Plaintiff in Conversion" (1977) 11 MULR 91, for the conclusion that the common law did not prior to Wilton's case deny the availability of contributory negligence as a defence to an action for conversion.

However, the decision of Samuels J. was followed in Day v. Bank of New South Wales (1978) 18 SASR 163 (Full Court), Grantham Homes Pty Limited v. Interstate Permanent Building Society

Limited (1979) 37 FLR 191 (Supreme Court of the ACT), and in AGC Limited v. Commissioners of the State Bank of Victoria (1989) ATR (Supreme Court of Victoria).

According to Fleming, Law of Torts, 6th edition 1983, page 254, however, "there is every reason in policy for (and none against) [contributory negligence's] relevance to any tort claim for negligent injury, whether that claim be formulated as actionable negligence or as an independent cause of action ... perhaps even conversion".

In the United Kingdom, contributory negligence was judicially found in Lumsden's Case to be a defence to actions in conversion. This appeared to be swept away by the Torts (Interference with Goods) Act 1977 which provided in s.11(1) that "contributory negligence is no defence in proceedings founded on conversion or intentional trespass to goods", but the defence was then specifically restored in the case of conversion of cheques by the Banking Act 1979, s.47. Accordingly, there is now a clear rule in the UK that holders of cheques should be under a duty to take reasonable care to prevent theft or improper use of the forms.

It is of interest to consider the cases where the negligence of the plaintiff (the true owner) contributed to the relevant cheque coming into the hands of a person not entitled to it, with the result that the collecting bank dealt with the cheque contrary to the interests of the true owner.

Day v. Bank of New South Wales (1978) 18 SASR 163 commenced an action in conversion involving two cheques. The bank succeeded in relying on the statutory defence in relation to one cheque, but was held liable by the South Australian Court of Appeal in conversion of the other cheque.

This cheque had been drawn by the purchaser for payment of the balance of the purchase price paid on settlement of a purchase of land. It is unclear whether it was common practice in South Australia in 1970 (when the events took place) for personal cheques to be tendered on settlement of land purchases, but the judgment indicates that it was normal for a "bank-marked cheque" to be used.

The cheque in question was an order cheque crossed "not negotiable" drawn by the purchaser in favour of Frank L Day, the real estate agent of the vendor. The cheque was endorsed by one S W Sharley, who was a relative of the plaintiff and one of the family members managing the real estate business. The cheque was endorsed: "Frank L Day pp S W Sharley", pp standing for "per procurationem".

The cheque was paid by S W Sharley into the Sharley Real Estate Trust Account. Sharley later withdrew the funds and misappropriated the proceeds. It was found that Sharley did not have implied authority from the plaintiff to endorse the cheque.

The court distinguished the case from Australia & New Zealand Bank v. Ateliers de Constructions Electriques de Chareroi [1967] 1 AC 86 ("the Snowy Mountains" case) which involved the question of implied authority to draw cheques.

The court found the bank to have been negligent in not questioning the endorsement of an order cheque crossed "not negotiable", payable to a named payee by a person other than the payee.

The bank argued estoppel and contributory negligence, on the bases that the plaintiff's business arrangements made it possible for the practice of endorsement of cheques to be made in the manner of the endorsement in this case. The court accepted Wilton's case and held that contributory negligence could not be a defence to an action in conversion, and did not therefore reach a conclusion on whether the plaintiff had been negligent, although the view was expressed by Bray C.J. and King J. that it would have been difficult to establish negligence on the part of the plaintiff.

Grantham Homes Pty Limited v. Interstate Permanent Building Society Limited (1979) 37 FLR 191, concerned fraudulent actions by an employee of the plaintiff. The cheques in Grantham Homes were drawn by the first defendant building society in favour of the plaintiff, the building society having received withdrawal forms requesting a withdrawal of moneys from the building society's account and the issuing of a cheque. The withdrawal forms had been signed in blank by signatories for the company and taken and used by the fraudulent employee. The building society dealt with a well known and trusted employee of the plaintiff company, and even though the employee had no authority to authorise the particular withdrawal, and was doing so for his fraudulent purposes, the building society was not liable to the plaintiff. The defendant bank was, however, held liable. The cheques were drawn in favour of the plaintiff company, were crossed not negotiable "account payee only" and the bank collected them for the credit of the employee's personal account.

On the defence of contributory negligence, McGregor J. followed the analysis of Samuels J. in Wilton's case and held that it was not a defence. His Honour, did, however, express the view that, even if the defence were recognised, contributory negligence could not have been made out. His Honour thought that the signing of the blank withdrawal form was not a sufficiently causative factor in the defendant bank accepting the cheques, and its negligence, if any, was exhausted at the time the cheques were presented. His Honour also took into account that the fraudulent employee was a trusted employee of long standing who could reasonably be entrusted with signed blank withdrawal forms. It is suggested that this conclusion is open to question. Where any person, director or employees of a company, are entrusted with the withdrawal and payment of moneys by being authorised signatories on the account, it is arguably negligent to sign any

cheque in blank without the full particulars being completed. Signing blank forms indicates a lack of supervision of the purpose for which the moneys are being withdrawn, which is the reason the person is made a required signatory in the first place.

There is now legislative provision in the Cheques and Payment Orders Act (s.15(4)) recognising that a cheque may be drawn with an instruction that it be not more than a specified sum. The Act provides to the effect that a cheque which contains such an instruction, and an actual sum which differs from the limit described, can only be paid by a drawee bank for the lesser of the two sums.

Accordingly, it is suggested that it should be negligent for a drawer, who also claims to be the true owner, to issue signed blank instruments, without, first, the name of payee being identified, and secondly, where it is not possible to insert the exact amount, a maximum amount instruction being included.

The most recent case where contributory negligence was rejected as a defence arose in Australian Guarantee Corporation Limited v. Commissioners of the State Bank of Victoria (1989) ATR.

AGC had drawn five cheques in favour of companies and businesses which they believed had delivered goods for the purpose of a proposed lease to certain lessees. Certain of the cheques were handed to a finance broker for the purpose of paying for and acquiring title to the goods.

All of the cheques were in favour of the different suppliers, identified by name and address and were crossed not negotiable, "account payee only". The goods were not delivered by the proposed suppliers and the cheques were allegedly obtained by false misrepresentation. AGC claimed to be the true owner of the cheques. The bank which had collected the cheques claimed to be a holder in due course.

The bank did not seek ultimately to rely on the statutory defence of having acted without negligence, but it did claim AGC was guilty of contributory negligence.

The court found that in each transaction AGC obtained no title to the goods, that the cheques were obtained by fraud and that AGC was the true owner in the sense that it was entitled to call for immediate possession of the cheques, which also denied the bank's defence that it was a holder in due course.

The bank alleged that AGC should be estopped by its conduct in delivering the cheques without adequately supervising the supply of the goods, from asserting its title to the cheques. The Victorian Supreme Court followed the Australian line of decisions commencing with Wilton's case, but also expressed the view that

it was basically the negligence of the bank in disregarding the instructions in the cheques which caused the loss, rather than any alleged negligence of AGC.

The contributory negligence issue in Lumsden & Co v. London Trustee Savings Bank [1971] 1 Lloyds Rep 114, the UK decision which affirmed the existence of the defence in the UK, arose from the practice of the plaintiff, a stockbroker, of drawing cheques in favour of their client not in the client's correct name, "Brown Mills and Co", but, merely in the name of "Brown". A fraudulent employee opened an account in the name of J A G Brown, to which he deposited the cheque. The bank opened the account relying on a forged reference, which was held, on the facts, not to amount to negligence. The court found the defence of contributory negligence to have been established.

It is interesting that the contributory negligence in this case, of the true owner, the drawer, arose from the manner in which the cheque was drawn, rather than the conduct of the plaintiff in allowing the cheque to be put into circulation and come into the hands of the fraudulent person.

It is in the area of negligent drawing of cheques where the courts have recognised duties of a drawer to the drawee bank. None of the Australian cases referred to, where contributory negligence was denied as a defence, involved the negligent drawing of the cheque itself. Perhaps the defence of estoppel by negligence, even if contributory negligence could not be successfully pleaded, would be more readily available in Australia if a case arose similar to Lumsden's case.

There would appear to be merit in any submission that an Australian legislative provision along the lines of s.47 of the UK Banking Act would be justified. As well, there would appear to still be scope, given the right fact situation, in a future case to seek to have the defence of contributory negligence tested before an appellate court.

"ACCOUNT PAYEE ONLY"

Despite the recommendation of the Manning Committee, the legislature, in enacting the Cheques and Payment Orders Act 1986 did not legislate to render void and of no effect the instructions on a cheque: "account payee only".

In a recent decision of the New South Wales Supreme Court (Giles J.) Hunter BNZ Finance Limited v. C G Maloney Pty Limited & Anor (judgment handed down 26 August 1988 not yet reported) Westpac, one of the defendants, collected a cheque marked "not negotiable", "account payee only", to the credit of an account other than that of the named payee.

Westpac mounted an argument that it could rely on a defence under s.88D of the Bills of Exchange Act, that it acted in good faith

and without negligence, notwithstanding that it had disregarded the account payee only instruction.

Westpac cited the view of the Manning Committee that a collecting bank must act with substantially equal care and make the same type of enquiry in the case of a cheque crossed "account payee only" as in the case of a cheque crossed "not negotiable".

In the present case, Westpac argued that there was apparently a proper endorsement on the cheque, and the existence of the "account payee only" marking did not put the bank on any further enquiry, where the cheque and the endorsement were otherwise in order.

The court rejected this argument and found that the authorities supported that a bank would be negligent if it collected a cheque marked "account payee only" for a person other than the named payee, without enquiries.

The New South Wales Court of Appeal in National Commercial Banking Company of Australia Limited v. Robert Bushby Limited [1984] 1 NSWLR 559 had affirmed this position. This case, on the separate point of the bank's claim against the innocent partner in the matter was taken on appeal to the High Court in National Bank v. Batty referred to earlier in this paper. Priestley J.A. cited, in particular, the two authorities: AL Underwood Ltd v. Bank of Liverpool and Martins [1924] 1 KB 775 and Universal Guarantee Pty Limited v. National Bank of Australasia Limited [1965] 1 WLR 691 as authority for the principle that enquiry is necessary in the collection of a cheque with an "account payee only" crossing.

As in the Hunter BNZ case, the bank's instruction manuals were referred to in the Robert Bushby case, describing enquiries that should be made in the collection of "third party" cheques, as evidence of the bank's own policies of making enquiries in collecting third party cheques.

MEASURE OF DAMAGES IN CONVERSION OF CHEQUES

Conversion of a cheque, and the value of the cheque converted has been held to be the money received from presentation of the cheque (Lloyds Bank Limited v. The Chartered Bank of India, Australia and China [1929] 1 KB 40).

The measure of damages for conversion of a cheque is, accordingly, prima facie the money which presentation of the cheque will produce (Associated Midland Corp v. Bank of New South Wales [1983] 1 NSWLR 533-536 (Hutley J.A.).

The Associated Midland Case, concerned action in conversion brought by the plaintiff finance company against the bank which had collected the relevant cheques. The cheques had been drawn by the finance company in favour of the supplier of goods which

were to be purchased by the finance company and leased to a lessee. The cheques were handed to the lessee for delivery to the supplier, but the lessee deposited them to the credit of its own account with the defendant bank.

It was held by the Court of Appeal and not in issue in the High Court that the finance company had title to sue. Until the cheques were delivered by the lessee as its agent to the supplier to purchase the goods, the finance company retained the right to possession of the cheques.

The issue involved the measure of damages. The lessee actually paid the supplier itself, under two payments, and received deliveries of the items to be leased.

In the High Court, the finance company argued that there was no contract between it and the supplier in relation to the supply of the goods the subject of the second payment, as the finance company alleged that it had not agreed to finance, by lease financing, the acquisition of these goods by the lessee. As a result, the finance company had not acquired title to the goods and had not become liable for the price.

It was conceded that had there been a contract, the finance company would in fact not succeed in its argument that it suffered substantive rather than nominal damages. The High Court found that there was a contract between the finance company and the supplier, with the result that the finance company could not establish that it had suffered more than nominal damages as a result of the bank's conversion.

In the AGC case ((1989) ATR 68-405) which involved similar facts, the damages to AGC were reduced by the amount of rentals received. However, Ormiston J. in AGC distinguished the Associated Midland case as involving a genuine sale and delivery of goods to the finance company, for lease to the lessee, whereas the AGC case involved forged invoices, the cheques were obtained by fraud and no goods were delivered.

CONCLUSION

Like those about whom Helen Reddy sang in the early seventies, the law of conversion by bankers has come a long way. The historical anomaly of using the law of conversion to deal with what is really a specialised legal problem remains no more than a historical anomaly as the law, combined with the extensive modern statutory codification, provides a satisfactory base upon which bankers and customers can work when fraudulent use of cheques occurs.