THE NECESSITY FOR BANKERS TO ACT REASONABLY AND FAIRLY IN DEALING WITH CUSTOMERS

Comment by

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The question for consideration is the customer's duty to act reasonably vis-a-vis the bank. It will be recalled that until 1981 there were two basic doctrines involved. The Marshall [1] doctrine and the McMillan [2] doctrine. The Marshall doctrine prevailed in Australia; the McMillan doctrine in the rest of the Commonwealth of Nations.

The Marshall doctrine imposed the liability on the bank even where the customer was careless in drawing a cheque, eg where he signed it in blank or left empty spaces.

The Marshall decision was based on an earlier English decision [3] and overlooked altogether the question of the customer's mandate to the bank. A few years after the Marshall decision, the House of Lords, in the McMillan case reversed the position insofar as England was concerned. The House of Lords followed the decision delivered in 1827 in the case of Young v Grote. [4] It decided that if the customer signed a cheque which was in such a state that a rogue such as his employee could raise its amount, the customer bore the risk of loss.

In 1918 the House of Lords based its reasoning on the finding of an estoppel. It concluded that, if the customer acted in such a way that the cheque could be altered or raised, he was estopped from denying the mandate given by him to the bank. The phrase "duty of care" is mentioned once or twice, but the emphasis is on contractual analysis.

After McMillan we have two rules: the English rule, imposing the liability on the customer, and the Australian doctrine imposing the liability on the bank. The position remained unaltered until 1981 when, in the Sydney Wide Store [5] case, the Australian High Court abandoned Marshall and adopted the reasoning of McMillan.

In this 1981 landmark case the High Court analysed the question carefully, in terms of duties of care and liability, and concluded that the customer owed a duty of care to the bank. The only judge who focussed on the policy issue was Murphy J who pointed out that the Marshall doctrine had not effectively put any unbearable burdens on the banks. He thought that the banks

could well absorb those losses. Nevertheless, Murphy J agreed with the other judges in the High Court to the effect that it would be reasonable to impose some duty of care on the customer. The latter should not be allowed to draw cheques carelessly and make the bank bear the loss. But his Honour emphasized that the duty of care must be a reasonable one. It should not be such a duty as would impose on the customer a duty to look over his shoulder all the time and act suspiciously vis-a-vis his own workers or employees. It is a duty of care to act reasonably, but not much more than that.

The McMillan doctrine and the Australian doctrine decided in 1981 were of restricted application. The doctrine in McMillan was strictly limited to imposing on the customer a duty to act carefully when he drew a cheque. Other English cases [6] made it clear that the customer did not owe a general duty of care to the bank to act carefully in carrying on his business. For example, if an employee got hold of the cheque book and forged the cheques, then the customer was not liable. And this could be so even though the cheque book was left in his custody for months. [7] It was also immaterial that the customer knew that his employee had at one stage been convicted of forgery.

These restrictions of the doctrine have now been challenged in the most recent newcomer to this field - the decision of the Court of Appeal of Hong Kong in Tai Hing Cotton Mills Limited v Lee Chong Hing Bank Ltd. [8] Here, again, the customer left his cheque book in the hands of an employee, who, over a number of years, perpetrated different forgeries. In some cases he induced his employer, that is to say the bank's customer, to sign cheques in an incomplete form or in blank. In addition, and as the years went by, he became confident and started to forge the employer's signature.

When the forgeries came to light, the customer was prepared to bear the loss resulting from all the cheques which had been raised or improperly completed by the rogue. But he demanded that the bank bear the loss incurred in the case of cheques bearing a forged signature. The bank refused to do so, challenging the narrowness of the scope of the McMillan doctrine. The Court of Appeal gave judgment in the bank's favour, holding that there was no rational reason for drawing a distinction between a duty of care related to the drawing of a cheque and a duty of care related to the general manner in which the customer carried out his business. Unfortunately, I do not have the time to discuss in detail the three decisions of the judges. In any event, the case is now before the Judicial Committee. Will the Privy Council affirm or will it reinforce McMillan? It is difficult to do more than hazard a guess; mine is that the Privy Council will in all probability adopt the reasoning of the Court of Appeal. Naturally, it is not easy to make such a prediction with confidence. But it seems to me that over the last twenty or twenty-five years there has been a certain change in the approach of the courts to problems of this sort.

Let me now draw your attention to a few dates. Marshall was decided in 1906; McMillan in 1918; and quite a number of other cases cited by me in the period of up to about 1945. Then we get

the Sydney Wide Stores case in 1981, the slightly earlier ideas of the New Zealand Court of Appeal in National Bank of New Zealand Ltd v Walpole & Patterson Ltd, [9] and Tai Hing itself. And there is a difference in the judgments or in the tone of the judgments.

In the earlier judgments the courts always speak about contractual duties and estoppel. Even in McMillan's case, the phrase duty of care is very scarcely used. In the later cases they tend to speak about breach of duties of care.

It seems to me that what has happened is that the law of contracts has become much closer to the law of torts, due to a major development. The development, I believe, begins with Donoghue v Stevenson, [10] and reaches its zenith in the decision of the House of Lords in Hedley Byrne & Co v Heller & Partners. [11]

In all those cases, handed down in the thirty-five years following Donoghue v Stevenson, our orientation has shifted from pure contractual analysis to a consideration of duties of care. Although, initially, this reasoning was much closer to the law of torts than to the law of contracts, Hedley Byrne shows us that the courts are inclined to use this analysis in contracts as well. It seems to me that Tai Hing is just one further step in this direction. We will see whether I am right.

Footnotes

[1] Colonial Bank of Australasia v Marshall [1906] AC 559.

[2] London Joint Stock Bank v McMillan [1918] AC 777.

[3] Scholfield v Londesborough [1896] AC 514.

[4] (1827) 4 Bing 253.

[5] Commonwealth Trading Bank of Australia v Sydney Wide Stores Pty Ltd (1981) 35 ALR 513.

[6] Bank of Ireland v Evans' Trustees (1855) 5 HLC 389, 410-1; Lewes Sanitary Steam Laundry Co Ltd v Barclay & Co Ltd (1906) 95 LT 444; Kepitipallor Rubber Estates Ltd v National Bank of India [1909] 2 KB 1010; Welch v Bank of England [1955] Ch 508.

[7] Lewes Sanitary Steam Laundry case, supra.

[8] [1984] 1 Lloyd's Rep 555.

[9] [1975] NZLR 7.

[10] [1932] AC 562.

[11] [1964] AC 465.