

RECENT DEVELOPMENTS NO. 2
TAI HING

Questions and Answers

Question - George Weaver (Henry Davis York):

I would just like to suggest for the consideration of the meeting with heavy respect to Mr O'Bryan that the Cheques Act has nothing to do with Tai Hing. I don't think it has ever been suggested that the Cheques Act is a Code any more than the Bills of Exchange Act is a Code.

It touches on some of the twiddly bits but leaves vast amounts of the law still to be regulated by the common law, for instance it is almost totally silent about conversion and yet that is a very big area relating to cheques, barely touched on in the Cheques Act except the section dealing with the collecting bank in terms derived from section 88D of the present Act.

Secondly, it has been acknowledged that under clause 32 there is still room for the operation of estoppel if estoppel can be invoked and it has been argued by Martin that it may well still be open to invoke estoppel in which case even if the section is the be all and end all, an alley-way is left in the section itself.

Thirdly, it has been said that the section which now turns Sydney Wide into statutory law is the be all and end all of the duties owed by the customer to the banker. I would respectfully dissent from that. Sydney Wide is law now and because the present Bills of Exchange Act is not a Code there is a duty laid down by the common law, tacked on to the statutory law. So if for instance, Tai Hing were to go the other way in Australia, there would be another duty tacked on to any other common law duties and to the statutory duties embodied in the Act.

I really feel there is room in terms of the Act itself for the operation of estoppel if the courts like to hold that it is applicable. Since the Cheques Act is not a Code there is room for common law duties to be tacked on. I really think it will ultimately depend on whether the High Court in Australia, whether inspired by the Australia Act or otherwise, decides to follow or not to follow the decision of the Privy Council in the Tai Hing case.

Comment - Norman O'Bryan (Gillotts):

I readily agree with that. The point about estoppel, of course, is that it is covered in Clause 32 itself, whereas negligence and contract are not and, once again, one wonders why the estoppel or ratification ground was given express recognition. I don't think any of that changes the fact, though, that Clause 32 (looked at in the context of the whole Bill and also in relation to Clause 91) seems to indicate that we are not going much wider than Sydney Wide Stores at present.

Comment - George Weaver (Henry Davis York):

I'll argue one of course doesn't really make new law; it clarifies the existing law. In Varkers case where the cheques were raised there was some question about whether the original amount of the cheques could be debited to the account. In a Victorian case which I think was called Greensborough Floor Sanding which I think is unreported, the court did hold that the amount of a cheque as originally drawn could be debited to the account. I think all section 91 does is to tidy up that particular question in relation to raised cheques but has nothing whatever to say about cheques on which the signature is forged.

Comment - Norman O'Bryan (Gillotts):

No, but clearly Clause 32 is designed to cover that area - the question is, how comprehensively?