Banking Law Association Conference
"Recent Developments - Case Law and Legislative Review"
11 June, 1999
The Hon P de Jersey, Chief Justice of Queensland

- Salutations -

The first case I consider illustrates yet again the desirability of strict compliance with apparently precise notice and default provisions in finance agreements. It also illustrates what we sometimes call "litigation risk": how highly refined intellects can - arguably quite reasonably - take widely differing approaches to the same issue.

I refer to *Australia and New Zealand Banking Group Ltd v Pan Foods Co Importers and Distributors Pty Ltd,* in which the Victorian Court of Appeal gave judgment (unreported) on 19 June, 1998. The Bank lent money to Pan, a food importer. There were loans at fixed and variable rates and letters of credit. Security included a debenture over the company's assets and undertakings. The financing arrangement was subject to an annual review by the Bank. The Bank's reviewing accountants recommended that unless Pan was able to provide a viable restructuring programme, the Bank should enforce its security. Pan was in dire financial straits. The Bank decided to act. A manager of the Bank delivered a notice to Pan demanding repayment of all monies due. The monies were not repaid and the Bank appointed a receiver.

Pan challenged the validity of the notice on two grounds of relevance today. Both were of a technical nature. Pan lost both points.

The Bank's obligation was to give notice by an "authorized representative", which was a defined term. The notice had been signed by the Bank's solicitors; they did not fall within the definition. Pan first argued the notice had not been duly "given". The Bank pointed out in response that while the notice had been signed by the solicitors, it had physically been given to Pan by a bank manager, a bank manager falling within the definition of "authorized representative". Two of the three judges held that because the notice was physically handed over by an authorised representative, it was "given", even though not properly signed. But what a risk the bank took: one would think prudence would automatically lead to the signing of such a notice by the authorized representative required to "give" it.

Pan's second point was also technical. It lost the point, but the differential judicial approaches suggest the Bank may have been lucky to "scrape through".

Pan argued the notice was defective for failing to declare the monies due and payable. The Bank simply demanded repayment. The facilities agreement allowed the Bank to declare, upon default, that all monies had become due and payable, in which event they were. As I have said, the Bank did not make such a declaration, simply demanding payment. The majority Judges differed on this. Winneke P said substance was more important than form, and found there had been substantial compliance. Kenny JA disagreed: Her Honour pointed out that the parties had set out specific requirements as to default, and apparently intended there be strict compliance. Interestingly, she nevertheless ultimately upheld the Bank's position. How ? She relied on a

clause of the debenture, which she held formed part of the facility, and allowed termination without notice. Also interestingly, Her Honour was prepared to rely on this - having referred to issues of formality - even though the Bank's notice made no mention of the relevant clause of the debenture. The presiding Judge did not have to consider this aspect of the debenture. The dissenting Judge considered the debenture had in this respect been overtaken by the subsequent agreements.

There were other points in the case, but those two are enough for today. It is probably comforting to see highly technical points failing. But it is difficult to understand why such risks would be taken. Presumably in these days of "plain English" drafting, what is required is even more easily identifiable.

And as Wordsworth said:

> "Still glides the stream, and shall forever glide;
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> The Form remains, the Function never dies."

However fluid the modern approach of the courts to matters formal may appear, "form remains", and only a fool would ignore it. The real risk, of course, is in inadvertently overlooking it. There are mechanisms to minimize that risk, although I concede human error can never be eliminated.

The High Court's decision in *Parsons v. The Queen*, (unreported, 9 February, 1999), which is a criminal case, therefore rather unusually contains an interesting analysis of an intensely civil "legal" matter, the nature of cheques.

The appellant, employed as a salesman by a stationery company, deceptively induced newsagents to pay in advance for copy paper, never supplied. Payment was made by bearer or bank cheque, deposited into the company's account. The appellant fraudulently drew out the money for himself using blank cheques the company directors signed as usual practice to enable him to conduct the business.

The appellant was charged under s. 81 of the Victorian *Crimes Act* 1958. It says that "a person who by any deception dishonestly obtains property belonging to another, with the intention of permanently depriving the other of it, is guilty of an indictable offence..." There was no question that the appellant had obtained possession or control of the cheques. Similarly there was no question that the cheque forms had "belonged" to the newsagents. .

Section 71 says that "'property' includes money and all other property real or personal including things in action and other intangible property". But , claimed the appellant, these cheques were not "property belonging to another": they only ever were choses in action of the bearer. They only ever gave rise to rights in the bearer, none of which "belonged" to the drawer newsagents at any stage. He appears to have contended their only significance, as "property", arose upon

delivery to him. The High Court rejected this approach. In doing so, it examined the nature of bank and bearer cheques.

The Judges said a cheque has characteristics which render it "more than a chose in action held by the payee against the drawer" - in other words, it involves rights, or incidents, rendering it something capable of "belonging", as a piece of property to these drawer newsagents. What incidents ?

Primarily, the mandate by the drawer to its banker "to effect a pro tanto satisfaction of the indebtedness of the banker to the drawer by honouring the cheque". That gave the cheques, their Honours said, "intrinsic value as instruments", "a value beyond what otherwise was their quality as mere pieces of paper".

These conclusions followed an analysis of provisions of the Commonwealth *Cheques Act* 1986.

The appellant separately argued that he could not have intended permanently to deprive the newsagents of the cheques. This in modern Australian times rather bold argument was based on an English pronouncement, in *R. v. Preddy* [1996] AC 815 at 836 - 837, that as cheques are returned by the drawer's bank after presentation, there can be no intention on the part of a payee permanently to deprive a drawer of the cheque form. While the High Court suggested the position under the *Cheques Act* "inconclusive", because of apparent acknowledgement of a right

in a drawer to reclaim a cheque, the Judges ultimately rejected the submission by reference to Australian banking practice: it is not usual practice for Australian Banks to return cheques to drawers after presentation, as in England. Also, and probably more significantly, the cheques had been used in a way which deprived them of the characteristics which led to their classification as property[1]. In the Victorian Court of Appeal, Tadgell JA had said:

> "The slip of paper that is returned to the drawers' bank has ceased to be a valuable security. Rather, it has become a record of what the valuable security was."[2]

And so, whether or not the appellant intended permanently to deprive the newsagents of the cheque forms, there was an intention permanently to deprive the newsagents of the cheques in their form as property.

I regret having to acknowledge in conclusion, with relation to this case unlike the first, that poetry offers me no elegant ending. The intricacy of the law of cheques leaves no room for the non-cerebral.

And now to a case which affirms the traditional approach to one matter - appropriation of assets by a creditor to particular debts of a debtor - and leaves unresolved another creature of the modern age still at most in a state of gestation - the so called "agreement" to negotiate in good

[1]Ibid at para 41

[2][1998] 2 VR 478 at 491

faith. The case is *Healey v. Commonwealth Bank of Australia*, Unreported NSW Court of Appeal, 8 December, 1998. The Commonwealth Bank financed a partnership of solicitors who also dealt in other matters, and owed money to the Bank. They defaulted, and the Bank sold their secured asset, appropriating the proceeds to their joint "mortgage" account, but also, as to the excess, to Mr and Mrs Healey's private overdraft account. The Bank then sued for the balance, leading to judgment against Mr Healey for $3.8M.

Mr Healey appealed on two grounds: first, that the Bank was not entitled to appropriate the proceeds of sale of the secured asset to reduce the outstanding balance of Mr and Mrs Healey's joint account; and second, that the Bank had breached an enforceable agreement with Mr Healey requiring it to negotiate in good faith.

On the issue of appropriation, there was no dispute as to the general principle, and it is worth restating, that where a debtor does not give directions as to the appropriation of money being paid to his or her creditor, "the right of application devolves on the creditor"[3]. And as you will recall, any direction must be clear and contemporaneous with the payment. Mr Healey's argument was that the account to which proceeds of sale were appropriated was not an available debt for this purpose, as it was a debt of Mr and Mrs Healey. The only relevant debt, Mr Healey claimed, could be a debt of Mr Healey and his business partner Mr Morrissey. This argument

[3] *Cory Brothers & Co v. Owners of the Turkish Steamship "Mecca" ("The Mecca")* [1987] AC 286 at 293

failed. Why ? Simply because Mr Morrissey had guaranteed payment of Mr and Mrs Healey's overdraft account. Mr Morrissey was therefore liable, jointly with the Healeys, to repay their overdraft account. The "Healey" debt became, in effect, a business debt, to the reduction of which the proceeds of sale of the secured asset could therefore be appropriated.

Mr Healey also failed on the alleged agreement to negotiate in good faith. The trial Judge held there was no such agreement, and that was upheld. But it is useful to reflect on the law for a moment.

It is not clear that there can ever be a legally binding agreement to negotiate in good faith. A majority in *Coal Cliff Collieries Pty Ltd v. Sijehema* (1992) 24 NSWLR 1 thought there could be, but other cases leave the position inconclusive. That particular case involved a commercial resolution of incidents which, even if ultimately unresolved, left a workable agreement nevertheless intact. One thing is clear: merely entering into negotiations, without more, cannot give rise to any such obligation. What, you may ask, could be clearer than that ? But that one is justified in stating it alerts us all to what we are well-reminded: the common law continually evolves!

Let me refer now to a decision at first instance which again illustrates the risk banks run when they participate in loose overdraft arrangements. It is *Narni Pty Ltd v. National Australia Bank*

Ltd, unreported, Victorian Supreme Court, 26 November, 1998.

The plaintiff ran a private nursing home. It proffered cheques to pay various expenses, including loan repayments. The Bank dishonoured the cheques. Debentures crystallized and the business was sold. The plaintiff sued the bank for damages for wrongful dishonour. To honour the cheques would have taken the plaintiff's overdraft account beyond its approved limit. But the plaintiff argued the Bank had been contractually obliged to honour the cheques. How did this arise ?

The Judge found the managers of the Bank involved with the plaintiff's account had allowed the account to be overdrawn. The account was regularly subject to large deposits and withdrawals. Often the account would temporarily fall into debit. The business was operated through the account and was viable, as the Bank knew. The plaintiff was pressing the Bank to review the overdraft facility. There was however no express agreement, as such, which would have authorized these cheques.

But did the Bank bind itself by its <u>conduct</u> to honour them ? The plaintiff relied on a combination of circumstances: the account had been operating substantially over its overdraft limit for more than a month (after a short period in credit, the account fell to a debit of over $100,000 beyond the limit for almost one month); there was no evidence of a warning by the Bank that the account was out of order. The first of the cheques was then dishonoured. Had the Bank impliedly

extended the limit and agreed not to dishonour cheques drawn without first giving notice ? While warnings had occasionally been given about the state of the account, none had been given during this period while the overdraft limit was greatly exceeded, prior to the dishonour of the cheques.

The Judge considered statements made in *Cumming v. Shand* (1860) 157 ER 1114 and related commentary in *Weaver & Craigie, "The Law Relating to Banker and Customer in Australia"* [4] and *"Paget's Law of Banking"*[5] to the effect that "where a customer has been permitted to incur casual overdrafts from time to time with a certain ceiling, but without the Bank's formal approval, this may establish a course of dealing by which the Bank will be bound", and that, "in these circumstances the Bank cannot safely cease to honour cheques within the amount established by the course of dealing unless it gives adequate notice"[6]. He accepted those statements, remarking that while "an overdraft is repayable on demand ... [this] right ... should be exercised so as not unduly to prejudice the borrower's interests, in the shape, for example, of outstanding cheques drawn in the belief that the facility was available even if the limit of overdraft has already been reached"[7].

The Judge went on to find, applying those principles, that this approved overdraft limit " was at

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[4]2nd Ed., 1990

[5]11th Ed., 1996

[6]*Narni Pty Ltd v. National Australia Bank Ltd* Supra at paras 40 and 41

[7]Ibid at para 41

best a nominal limit and that the Bank would tolerate surges well in excess of that limit"[8]. He held the parties had "operated and permitted the account to operate in a very flexible way" and that the Bank was aware that the plaintiff had relied upon this arrangement in the operation of its business. He concluded it was a term of the arrangement "that the Bank would not refuse to honour cheques" simply because doing so would cause the account balance to exceed the approved limit. He also said "it was an implied term of the arrangement that the Bank would not terminate or vary it without giving the customer reasonable notice"[9]. It followed that the dishonour of the cheques by the Bank in the circumstances amounted to a breach of the terms of the arrangement.

The Judge went on to conclude there was a sufficient causal connection between the dishonour of the cheques and the failure of the business. As he put it, "I am satisfied that the appointment of the agent in possession and the subsequent sale of the Carrum Nursing Home was caused by the breach on the part of the Bank of the contractual arrangements in place between it and [the plaintiff]"[10].

But it was an amazingly pyrrhic victory for the customer. Judgment was nevertheless entered in favour of the Bank. The plaintiff's action failed because it could not prove loss. As the judge

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[8]Ibid at para 43

[9]Ibid at para 44

[10]Ibid at para 56

said, "upon receipt of the proceeds of the sale of the business [the plaintiff] received its full value which included the value of its future earnings and these were applied to reduce its debt to its secured creditors. It has been shown to have suffered no further compensable loss"[11].

But the message for banks is nevertheless clear. At the risk of further unpopularity, monitor overdraft accounts regularly; establish clear limits; if they are to be exceeded, do so under discrete arrangements. Otherwise, there is risk of substantial liability in damages, if loss can be shown.

A listing of recent cases really must sensibly include discussion of *National Australia Bank v. Garcia* (1998) 72 ALJR 1243, though the case is by now no doubt well known to most of us. I have made some comment on this decision elsewhere, but the importance of the decision is such that I propose today to repeat some of my previous commentary. The case is critically important for lenders, establishing the present law, but also leaving open the opportunity for serious further extension. What were the facts of this case ?

Mr Garcia ran a business through a company. Mrs Garcia had no financial interest in the company. A mortgage had been executed over the family home and secured "all moneys" which Mr Garcia owed to the Bank. Mrs Garcia later signed several guarantees, one relating to the debts of the

[11]Ibid at para 68

company. The company was wound up. The Garcias then divorced. Mrs Garcia asked to have the guarantee set aside. The Bank demanded payment of the loans to the company, cross-claiming in Mrs Garcia's action for possession of the mortgaged family home pursuant to her guarantee.

The trial judge declared the guarantees were not binding, and that Mrs Garcia owed nothing to the Bank in respect of the mortgage on the house - declaring that the mortgage only secured her husband's interest in the house, as determined by the Family Court in earlier matrimonial property settlement proceedings. The trial Judge relied on *Yerkey v. Jones*[12]. The Court of Appeal reversed that decision, holding the principle of Yerkey v. Jones no longer applied in New South Wales.

The High Court upheld the trial Judge.

The majority asserted at the start that it was up to the High Court only to decide whether or not its previous decision should be upheld.

The majority rejected the Court of Appeal's claim that *Yerkey v. Jones*[13] was based on "the vulnerability [of women] to exploitation because of their emotional involvement" or "notions

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[12]Supra

[13]Supra

based on the subservience or inferior economic position of women"[14]. The High Court suggested the basal notion was "trust and confidence, in the ordinary meaning of those words, between marriage partners"[15]. It reserved its position on "long term and publicly declared relationships short of marriage between members of the same or opposite sex"[16].

The majority properly acknowledged Dixon J's qualification, in *Yerkey v. Jones*[17], that provided the creditor had taken "steps to inform [the wife] and reasonably suppose[d] that she [had] an adequate comprehension of the obligations she [was] undertaking and an understanding of the effect of the transaction, the fact that she [had] failed to grasp some material part of the document, or, indeed, the significance of what she [was] doing"[18] would not avail her. Because in *Garcia*[19] the evidence was that the creditor had *not* "taken adequate steps" to inform Mrs Garcia, she could invoke the Yerkey v Jones equity.

The majority judges rejected submissions that *Amadio*[20] overruled or subsumed *Yerkey v. Jones*:

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[14]*Garcia v. National Australia Bank Limited* Supra, at paragraph 20.

[15]Ibid at paragraph 21.

[16]Ibid, at paragraph 22

[17]Supra

[18]Ibid, at paragraph 24.

[19]*Garcia v. National Australia Bank Limited* Supra

[20](1983) 151 CLR 447

Amadio[21] was not intended to "mark out the boundaries of the whole field of unconscionable conduct"[22]. A matter for anxiety in lenders?

The majority judges added, I think interestingly, that they "prefer[red] not to adopt the analysis made by Lord Browne-Wilkinson in *Barclays Bank Plc v. O'Brien*"[23]. In that decision His Lordship held that the creditor must "have had notice of the wife's equity to set aside the transaction"[24]. The High Court held that in Australia the only relevant notice required in this situation - and not notice of an "equity" as such - would be the creditor's having notice that the surety was married to the debtor[25], a matter of fact. These judges added the well-established, that the creditor can avoid a situation where the surety claims to be mistaken by simply explaining the transaction or ensuring that the surety has received "competent, independent and disinterested advice"[26].

In a separate judgment, Justice Kirby asserted that the law should respond to changes in society.

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[21]Supra

[22]*Garcia v. National Australia Bank Limited* Supra, at paragraph 29.

[23]Ibid at paragraph 39

[24]*Barclays Bank Plc v. O'Brien* Supra at page 195

[25]Ibid at paragraph 40

[26]Ibid at paragraph 41

He considered whether Dixon J's judgment in *Yerkey v. Jones*[27] represented the ratio decidendi of that case, concluding that while it was "neither expressly nor impliedly a statement of a holding of [the] Court"[28], it had long been long accepted as legal precedent. This is certainly the view I had adopted in previous discussions of these cases. He then embarked on a detailed examination of whether the Yerkey principle should still be applied - ultimately saying no.

Kirby J said *Yerkey*[29] was "discriminatory against those who may be more needful of the protection of a 'special equity' but who do not fit within the category of married women"[30]. Justice Kirby criticised the principle for the way in which it assumed that marriage makes women vulnerable, suggesting that "it would seem more rational to look at all the facts of the relationship between the surety and the borrower"[31].

He went on to apply the O'Brien principle, as expressed by him, concluding that "Mrs Garcia was a married woman in need of special protection"[32] and as such had a right to have the transaction set aside. Thus, whilst disagreeing with the reasoning of the majority, Justice Kirby agreed with

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[27]Supra

[28]*Garcia v. National Australia Bank Limited* Supra at paragraph 64

[29]Supra

[30]Ibid at paragraph 66.2

[31]Ibid at paragraph 66.3

[32]*Garcia v. National Australia Bank Limited* Supra at paragraph 83

the proposed orders.

Despite Justice Kirby's approach, it is therefore clear that *Garcia*[33] provides modern - and perhaps surprising - proof that *Yerkey*[34] survives: it remains our law, the assumption will only apply to married women. But could it not be clearer that given an appropriate case, the High Court may well extend the assumption to sureties of either sex in a relationship of trust and confidence with the debtor? I again repeat my previous warning: creditors around the nation are well advised to ensure they clearly and comprehensively explain the effect of any transactions with such sureties, and that these borrowers or sureties obtain competent and independent legal advice.

In the latest issue of the Journal of Banking and Finance law and Practice, Justice Santow, of the New South Wales Supreme Court, examined this decision and provided this additional warning to creditors:

> "Any statement of precautions lenders should take, while needing to be able to be relied upon as a statement of settled practice for the generality of cases, must be tested by common sense and in the light of practical experience. Cases will inevitably emerge which throw up exceptional circumstances; for example, a guarantee that is manifestly improvident. A wise bank will be flexible and fair in following such a set of prudent, sanitary rules, keeping them under review in light of experience and of any decisions of

[33]Supra

[34]Supra

the courts. Such an approach should strike a fair balance between the interests of all parties involved: the lender, borrower and surety."[35]

Commonwealth Bank of Australia v. Khouri (unreported, Supreme Court of Victoria, 4 November, 1998) is a recent example of the application of *Garcia*[36] at trial. The facts were similar to those of Garcia. Mrs K had signed a guarantee and second mortgage as security for a loan to support Mr K's business. The effect of the transaction was to allow the Bank to realise her interest in a property in the event of default in repayment of the loan. The judge accepted Mrs K's evidence that she was given no adequate explanation of the purpose of her signing the guarantee, even though she had sought one. He said the Bank's conduct at the time "left much to be desired; it demonstrated a faith in standardised approach that cannot be justified when the Bank is dealing with a customer with limited experience in business"[37]. Mr K had signed the document in the mistaken belief that it was merely a temporary facility to enable them to meet tax liabilities.

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[35]Santow J., "Sex, Lies and Sureties - Touching the Conscience of the Creditor" (1999) 10 Journal of Banking and Finance Law and Practice 7 at p.23.

[36]Supra

[37]*Commonwealth Bank of Australia v. Khouri*, Supra, para 63

The Judge found the approach of *Garcia*[38] applicable. The Bank argued those principles could not be applied as Mrs K was not a volunteer: she had a direct interest in Mr K's business, being company director and secretary. He pointed out that this factual scenario was similar to that of Garcia. Mrs Garcia was found to be a "volunteer" because she had no control of the running of the business, and had no real financial interest in it. Similarly here, the Judge found Mrs K played no part in the running of the business, and that any benefit she gained was "the result of the exercise of discretion by Mr [K]." He concluded that she "was in truth a volunteer".[39]

The Bank had further argued *Garcia*[40] could not apply as the surety, Mrs K, had not "reposed 'trust and confidence' in the debtor"[41]. The judge responded:

> "It is true that the majority judgment resorts to that expression on a number of occasions. It would nevertheless be a mistake to think that there is any particular magic in its use. The important point is that the relationship be one, such as a marriage relationship, of which the creditor has knowledge, and which may result in the surety not receiving from the debtor all the information to which the surety is entitled - given that a conscientious creditor and a conscientious debtor would be astute to ensure that a surety, in that relationship and who was also a volunteer, would be placed in a position from which a

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[38]Ibid

[39]Ibid at para 65

[40]Supra

[41]*Commonwealth Bank of Australia v. Khouri* Supra, para 66

fully informed decision could be made"[42].

He went on to point out that the majority in *Garcia*[43] had not held that there need be evidence of actual undue influence, or of actual trust and confidence between the parties. He concluded then that as the parties in this case were married the Bank was ipso facto placed on notice consistently with *Garcia*[44]. Accordingly the Bank was not permitted to realise its security under the second mortgage or guarantee, against Mrs K's interest in the mortgaged property.

It is to this commentator quite extraordinary to think of a national institution as august as the Reserve Bank being successfully sued for damages for deceptive conduct; but the "unthinkable" has occurred. The case is *Sykes v. Reserve Bank of Australia,* Unreported, Full Court of the Federal Court of Australia, 6 November, 1998. The facts are not particularly remarkable, but the identity of the defendant renders the case worthy of mention; and for lawyers, there is recent worthwhile restatement of principle.

The appellants were involved in the development of a device to bundle plastic bank notes into

[42]Ibid at para 66

[43]Supra

[44]Ibid

variously sized groups. The Bank had announced it would be releasing a new series of such notes, beginning with a $5 note. The appellants alleged the bank informed them the new $5 note would be released shortly after Easter 1991, with other denominations sequentially thereafter at six monthly intervals. The appellants spent money planning and developing the device, and refrained from obtaining other employment to concentrate on the task. The plastic $5 note was not in fact released until 18 months late, and the other denominations were not released as promised thereafter.

The appellants argued the bank had contravened s. 52 *Trade Practices Act* 1974, so that they were entitled to damages pursuant to s.82. They relied on s.51A to urge that the Bank had been misleading. Where a corporation makes a representation with respect to any "future matter" and there is "no reasonable ground" for making it, the representation is deemed to be misleading. The main issues on appeal were, first, whether the representations related to future matters, and second, whether the Bank had established reasonable grounds for making them.

The representations included, in sequence: an unqualified statement that the new series of note would be launched late in 1990; an expression by a bank officer directly to the appellants that the Bank's "best guess" was that the launch would occur after Easter, 1991; a press release which repeated this, but without the qualification; and, the revision by the Bank of a draft editorial by the appellant, stating that the plastic notes would be introduced from April, 1991. The majority of the Court found that these last two actions involved positive representations by the Bank that

the launch would occur soon after Easter, 1991.

At first instance it had been held that these representations related to future matters, and this finding was not disturbed by the majority of the Full Court. There was some discussion as to whether the alleged representations were related to the future, or simply statements as to present intention or belief by the Bank. Sundberg J, in the majority, helpfully summarised the heart of the issue as "whether a representation about the representor's state of mind concerning a future matter lacks the character of a representation of the future because it states his present belief". The majority, invoking the time hallowed formula, concluded the question was to be answered "according to the facts of each particular case". The majority found "the release of the notes was a 'matter', and it was something which was going to happen, or not happen, in the future"[45].

As to whether the Bank had established reasonable grounds for making the representations, the majority said "no". Heerey J said:

> "The Bank's case was directed to showing that the long delay in the release of the $5 note was due to problems which it could not have reasonably anticipated. ... But the question posed by s.51A is whether the representor had reasonable grounds for making the representation. ... [T]he evidence ... convincingly shows that there was not merely lack of positive grounds for the Bank making the representations, but evidence pointing the other way."

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[45]per Heerey J.

Even Reserve Banks are not above the law!

A recent English decision considered whether a bank is entitled to restitution where it has mistakenly transferred money to a non-customer: *Lloyds Bank plc v. Independent Insurance Co Ltd* (1998) TLR 767.

A customer had instructed the Bank to pay the money to the defendant to discharge a debt. The customer had deposited cheques to cover the amount, but they - or some of them - were not met, and not realizing this, the Bank paid out the creditor.

At first instance the Bank successfully recovered the amount mistakenly transferred to the defendant.

The law in the United Kingdom is that a person who has mistakenly paid money to another is prima facie entitled to recover it, subject to several "defences". This is based on the notion that a person who is paid funds as a result of a mistake of fact will be "unjustly enriched". The defences, which rebut the "presumption" of unjust enrichment, are set out in *Barclays Bank Ltd v. Simms*[46]. The High Court affirmed the applicability of these defences in Australia in *David Securities Pty Ltd v. Commonwealth Bank of Australia*[47]. That decision removed the former

[46][1980] QB 677

[47](1992) 175 CLR 353