Privy Council Appeal No. 44 of 1964.

Universal Guarantee Pty. Limited – – – – – *Appellant*

v.

The National Bank of Australasia Limited – – – – *Respondent*

FROM

THE SUPREME COURT OF NEW SOUTH WALES

JUDGMENT OF THE LORDS OF THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL, DELIVERED THE 24TH MARCH 1965

Present at the Hearing:
LORD REID
LORD HODSON
LORD PEARCE
LORD UPJOHN
LORD WILBERFORCE
(*Delivered by* LORD UPJOHN)

This is an appeal by leave of the Full Court of New South Wales from a judgment of Manning J. sitting in the Supreme Court under the Commercial Causes Act who on the 22nd July 1964 found for the defendant (respondent before their Lordships).

The plaintiff Company (appellant before their Lordships) is a finance company of high repute. Its main business is the provision of finance on hire purchase for persons who desire to purchase goods manufactured by Electronic Industries Limited of which company the plaintiff Company is a subsidiary, but it also carries on hire purchase transactions in respect of other goods, particularly motor cars. The respondents, who will be referred to as the Bank, are and were at all material times the bankers of the plaintiff Company.

Between the years 1954 and 1960, an employee of the plaintiff Company, one Moffitt, consistently defrauded his employers of sums of money which over those years aggregated at least £59,000 and it may well be much more. These frauds were committed by the presentation of fictitious cheques to the Bank accompanied by falsified paying-in books in a manner which will be described later, and the whole question is whether the Bank in dealing with those cheques and paying-in books without making any communication to the plaintiff Company committed any breach of duty owing by the banker to its customer in relation thereto.

Before setting out the allegations made by the plaintiff Company against the Bank on breach of duty, their Lordships think it will be convenient to describe quite briefly Moffitt's successful method of defrauding the plaintiff Company over this long period.

Moffitt joined the plaintiff Company as a very young man in December 1945, but apparently soon gained the confidence of his employers and at all material times he was the acceptance officer, that is to say the officer whose duty it was to consider and in his discretion to accept applications for hire purchase finance, and his duties also included taking the cash to the Bank daily and also assisting to write up the ledgers. As acceptance officer he was authorised to sign cheques as one of two joint signatories and he also had the right to endorse them. Their Lordships will deal with this in detail later. Every day it was Moffitt's duty to bank the cash and cheques which in the normal course of business the Company received. Every day the cash and cheques paid in would amount to some thousands of pounds, mainly in

cheques but normally including many pounds of cash received from customers of the plaintiff Company. Moffitt's method of fraud was very simple. He prepared forms of application for hire purchase finance to the plaintiff Company in the names of fictitious applicants which as acceptance officer he approved and he then opened the appropriate accounts in a ledger, so the book-keeping appeared to be entirely in order. He would then prepare a cheque drawn by the plaintiff Company on the Bank which he signed and was able to persuade another of the authorised officers to sign payable to the order of this apparent customer of the plaintiff Company. Let the customer be called Bruce, one of his favourite fictitious customers. He then, in the name of Bruce, endorsed it over to the plaintiff Company and then purported to certify the genuineness of the endorsement. These fictitious cheques appear in general normally to have been between £100 and £500. From the cash due to be paid in that day he removed an amount equivalent to the fictitious cheque and paid in, in lieu, the fictitious cheque, so that the total of cash and cheques paid in was correct. This simple fraud plainly demanded some falsification of the paying-in books. Each such book consisted of original sheets which were torn out by the Bank and under each a carbon copy duplicate sheet which remained as the plaintiff Company's copy. On the top right hand corner of each sheet and carbon was a " box " containing a summary for notes, silver, copper and cheques. As the payments in each day were very large and filled several pages of the book naturally it was only the box on one of the top sheets that was filled in. In the body of the same sheet was filled in, in words, the total amount of the cash and cheques paid in. During the first two years of this systematic fraud Moffitt was very careful to see that when presented to the Bank the " box " on the top sheet corresponded exactly with the carbon copy duplicate, and he then, after presentation, made alterations to the " box " in the duplicate copy so as to accord with the cash entered in the plaintiff Company's books. By way of example, if he ought to have paid in £500 cash, he would withdraw £400 and would present and add to the cheques in the paying-in book a fictitious cheque for £400 and would pay in and show in " the box " only £100 cash. After presentation to the Bank he would alter the £100 cash in the duplicate retained by the plaintiff Company to £500 and initial it. Such alteration was quite normal because the entries each day were so numerous and occupied so many sheets that innocent mistakes were frequently made and therefore an alteration duly initialled would give rise to no suspicion. After a time, however, having regard to the success of his fraud, he became more careless or more confident and it was proved that in the year 1957 in 8 cases (it is admitted that *per incuriam* the learned judge said 9) he made the necessary alterations to the carbons to accord with the plaintiff Company's books before presentation of the paying-in book to the Bank with the relevant cash and cheques. So that, as the learned judge held, comparison with the " box " on the top sheet with its carbon counterpart would have disclosed a serious discrepancy in the amount of cash paid in.

However it was not suggested that any of the many tellers who must have received these paying-in books accompanied by the cash and cheques every day over a period of six years ever in fact did make any comparison between the box in the top sheet and the box in the duplicate. All they ever did in fact was to check that in the top sheets the figures of cash corresponded to the actual cash paid in and that the total of cash and cheques paid in (usually with the help of an adding machine) corresponded with the aggregate written in words on the top sheet.

Their Lordships have sufficiently stated the relevant facts as to the commission of this prolonged fraud to enable them now to state the legal issues involved between the plaintiff Company and the Bank.

The plaintiff's case against the Bank rests on two quite independent branches of alleged breach of duty.

First it was said that the form of these fictitious cheques paid in should have put the Bank on inquiry and led them to warn their customer that something was wrong. Secondly that this failure of the Bank to notice the discrepancy between the top and carbon " boxes " amounted to a failure to exercise due care by the Bank to its customer.

As to the first branch, in the pleadings and before the trial Judge there was much elaborate argument alleging five separate obligations by the Bank to the plaintiff Company as its customer first in breach of contract and secondly in tort in which it was said the Bank had failed in its duty.

These allegations depended to some extent on an analysis of the obligations of the Bank to the plaintiff Company as (1) the banker who has to pay the cheque drawn on it and (2) the banker who has to collect the cheque which has come into its hands on behalf of the holder of the cheque.

Before their Lordships Counsel for the appellant did not press these elaborate arguments but stated the obligations of the Bank to the plaintiff Company and its failure to observe them in a briefer way which will be mentioned in a moment. Their Lordships think that Counsel was right to do so for while a bank may sometimes play a dual role in that one customer may be the payer and another the payee in which event the rights and obligations of the Bank may have to be analysed as such, see e.g. *Carpenters Company v. British Mutual Banking Company Limited* [1938] 1 K.B.511 at p. 537 per McKinnon L. J., that is not the case before their Lordships.

In this case only the Bank and its customer the plaintiff Company were concerned. When the Bank received the cheque it did not " pay " it to anyone and it did not " collect " it on behalf of anyone. It made two contra entries in the same account of its customer. In truth and in law nothing was paid out and nothing was collected or paid in. In the result the debtor/creditor relationship between the Banker and its customer remained entirely unaffected. In such circumstances any analysis of the obligations of the Bank as a " paying " or " collecting " Bank is unrealistic and entirely out of place, as is any allegation of tortious neglect.

The sole question, therefore, is whether the Bank has failed in its contractual duty to its customer in the particular circumstances of this most unusual case.

This alleged breach of duty as presented to their Lordships may be shortly stated.

When the Bank received a cheque payable to a named payee (e.g. Bruce) " or Order " crossed " a/c payee " then although endorsed (apparently) by Bruce the Bank should have been put on inquiry because (*a*) it had not been paid to Bruce and (*b*) had not been paid through another Bank. Why, the question was posed, was the cheque not torn up instead of being paid in?

To understand this submission their Lordships must state briefly the effect of crossings on a cheque, well understood though it may be. In this respect the statutes of the Commonwealth of Australia and of England appear to speak with one voice.

(1) A crossing means that the paying Bank paying the cheque to a banker in good faith and without negligence has the protection of section 86 of the Bills of Exchange Act 1909–58 of the Commonwealth of Australia.

(2) The words " not negotiable " do not prevent the cheque from being negotiated but mean that the holder of the cheque cannot have and is not capable of giving a better title to the cheque than that of the holder from whom he obtained it (section 87 of the Bills of Exchange Act 1909–58).

(3) The addition of the words " a/c payee " or " a/c payee only " refer to the payee named in the cheque and not the holder at the time of presentation, *House Property Co. of London v. London City & Westminster Bank* (1915) 84 L.J. (N.S.) 1846, but they do not prevent, at law, the further negotiability of the cheque. The words merely operate as a warning to the collecting bank that if it pays the proceeds of the cheque to some other account it is put on inquiry and it may be in a difficulty in relying on any defence under section 88 of the Act in an action against it for conversion of the cheque; per Scrutton L. J. in *Underwood v. Bank of Liverpool* [1924] 1 K.B. 775 at 793. These words do not cast on the paying bank, paying the cheque to a banker, any additional obligation to satisfy itself that the collecting bank is collecting it on behalf of the named payee. That is entirely the responsibility of the collecting bank.

In the circumstances of this case their Lordships wholly fail to understand how the Bank was put on any inquiry which should have led them to be suspicious in dealing with cheques drawn in favour of a person, apparently endorsed by him, and paid in by the customer drawing the cheque, leading as their Lordships have already pointed out, to no more than two contra items in the customer's account. Their Lordships can see nothing suspicious and the Bank's only possible qualm upon the matter might be as to whether the payee might have some action against it for conversion of the cheque; but this would not worry the Bank for its customer was of the highest standing who had paid out nothing on the cheque and if in fact a sum was due to the payee, could safely be relied upon to discharge it. But such qualms are quite insufficient to put the Bank on inquiry that there was or might be something sinister in the administration of the plaintiff Company in paying in these cheques which made it necessary for them to inform the plaintiff Company of these simple banking entries. There may be many reasons for not tearing up the cheque such for example as preservation of evidence of some cancelled contract.

This branch of the claim fails.

The second branch of the argument depends entirely upon the failure of the Bank to make a comparison between the top and carbon copies of the paying-in book. Upon the pleadings it was alleged that the Bank owed a duty to the plaintiff Company to see that the duplicate or carbon copy in the paying-in book would correspond in all particulars with the original receipt retained by the Bank. This was rightly abandoned for it cannot be supposed, and the evidence did not support the view, that a Bank is under any duty to observe an exact correspondence between the original sheet presented to the Bank and the duplicate preserved for its own purposes by the customer. Before their Lordships the alleged breach of duty was stated in different terms entirely and was concentrated on the eight cases which their Lordships have mentioned earlier. The plaintiff Company's case was based on an alleged negligence in failing to observe the discrepancies between the top and carbon copies in the " boxes " of the paying-in slips in those eight cases.

Upon this issue there was much evidence of banking practice before the judge and that evidence has been fully reviewed before their Lordships. They do not however think it necessary to discuss it in detail for the Judge's findings have not been seriously attacked. Manning J. on reviewing the evidence found that subject to some limitations which he discussed later the " teller " of the Bank receiving the cash, cheques and paying-in book is not normally required, when issuing a receipt for a deposit, to do more than check three items (1) the date of the receipt, (2) the name of the customer, and (3) the total amount of the deposit. Of course for his own protection the teller counts and ticks off the cash in the " box " on the top sheet.

The learned Judge then said:

> " It is not the custom for the teller receiving the deposit to compare each cheque or money order lodged with the list on the original, let alone on the copy. It is customary for the total amount of the cheques and money orders to be ascertained by the teller's clerk, frequently with the assistance of an adding machine, and compared with the total shown on the deposit slip. At least this is the custom in metropolitan and larger branches where a teller's clerk is employed, even if not in smaller and more remote branches.
>
> I see no reason to condemn this practice. Indeed, I am satisfied that it is a step forward, and that the necessity for the teller to verify that the list supplied is correct in all respects would place an undue burden on the bank, and would gravely retard banking business. It follows that there is no obligation on the teller to compare the copy with the original in this respect."

Their Lordships accept that statement as to the banking practice in New South Wales. That, on the facts already reviewed, is sufficient to dispose of the argument on this branch of the case.

Manning J. however went on to qualify this general statement by stating that it was not necessary to attempt to lay down a general rule and said that if a teller failed to observe a striking and obvious difference or any discrepancy which should be observed upon a cursory examination then if the customer acts upon the faith that the erroneous receipt (i.e. carbon or duplicate) is correct he would have a right of action. Their Lordships however, do not understand Manning J. to be saying that the discrepancy between the " box " in the top and duplicate fell within that description. Where there is no duty to compare and on the evidence no comparison ever was made, their Lordships do not think that the Bank's tellers are to be criticised (or the Bank to be held liable) because they failed to notice a discrepancy between the cash figures in the " box " in the top sheet and duplicate.

However the actual decision of Manning J. proceeded on the footing that if the teller did fail to observe a striking and obvious difference the plaintiff would nevertheless fail in the action. He said:

> " I do not think it can be denied that no right of action can be maintained in any event unless the customer does act upon the faith that the erroneous receipt is correct and does suffer loss as a result of so acting. In this case, I can see no evidence either that the plaintiff did act upon the faith that the erroneous receipts were correct or that it suffered loss as a result thereof. It was no part of the book-keeping or auditing system of the plaintiff company that any examination was made of the duplicate bank deposit slips after they had been receipted by the bank."

Their Lordships entirely agree with the judgment of Manning J. in this respect.

This branch of the claim also fails.

It only remains to mention one point which depends on the authority of the plaintiff Company given to the Bank, authorising Moffitt and others to endorse cheques. The authority, set out fully on pages 4 and 5 of the record, limited Moffitt's authority to the endorsement of cheques ". . . payable to or to the order of the company ". It was argued truly that these eight cheques were not payable to the order of the plaintiff Company but to a named though fictitious payee.

Their Lordships have looked at the original cheques and doubt whether Moffitt's signature was intended to be an endorsement on behalf of the plaintiff Company; it seems more likely that it was only the signature of an officer guaranteeing the payee's endorsement on behalf of the plaintiff Company. If so, cadit quaestio, for no serious argument has been founded, before their Lordships, on that guarantee.

But if that be a wrong view in fact and Moffitt's signature was treated as an endorsement on behalf of the plaintiff Company and if it is right to give such a very strict construction to a purely commercial document their Lordships cannot think that the point is of the slightest importance when the cheques in question were being paid back into the drawer's own account. Whatever formalities were required by the authority no bank could be criticised or charged with a failure to recognise some suspicious or dishonest circumstance in crediting and debiting a cheque drawn and paid in by one of its customers, because some formalities as to endorsement were not completely performed.

Their Lordships will humbly advise Her Majesty that the appeal should be dismissed.

The appellant must pay the respondent's costs of the appeal.

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In the Privy Council

UNIVERSAL GUARANTEE PTY. LIMITED

v.

THE NATIONAL BANK OF AUSTRALASIA LIMITED

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