

06/77

SUPREME COURT OF VICTORIA

TINA MOTORS PTY LTD and ITALIANO v ANZ BANKING GROUP LTD

Crockett J

17, 20, 21 September, 7 October 1976 — [1977] VicRp 24; [1977] VR 205

CIVIL PROCEEDINGS – ESTOPPEL BY REPRESENTATION AND/OR NEGLIGENCE – VALIDITY OF CHEQUES DRAWN ON A COMPANY ACCOUNT – BANK INFORMED THAT PERSON PRESENTING THE CHEQUES WAS GENUINE – CHEQUES LATER FOUND TO HAVE BEEN FORGED – CLAIM BY COMPANY THAT THEIR BANK ACCOUNT WAS IMPROPERLY DEBITED.

The bank made enquiry of Mr Italiano – the director of Tina Motors – as to the validity of cheques drawn on the company and signed by Mrs Italiano (a co-director and normal signatory) but presented for cash by an employee Stella. The Court found that on two occasions Mr Italiano had told the bank manager that, although he had no personal knowledge of the cheque enquired about, if they were presented by Stella – "he is my brother-in-law – you have got no worries". Stella was later found guilty of forgery of fifty-four cheques totalling \$70,785.00. The company and the Italianos sought a declaration that in each of the forged cheques their account was improperly debited. The bank claimed that the plaintiffs were estopped from denying that the cheques were genuine.

HELD: Judgment for the defendant bank.

It was clear that what the bank was told amounted to a representation that the signature upon any cheque presented by the employee for payment was genuine. Accordingly, reliance was placed by the bank upon that representation and the requirements of estoppel were made out.

CROCKETT J: *[After setting out the facts and the relevant evidence, His Honour continued]* ... Having regard to these additional facts, the defendant contends that the plaintiffs are disentitled to succeed in their action. The bank maintains that there has been established an estoppel by representation and/or (although it was not precisely so articulated in the pleadings) estoppel by negligence; cf. e.g. *Moorgate Mercantile Co Ltd v Twitchings* [1977] AC 890; [1976] 3 WLR 66 per Lord Edmund Davies, at p82 *et seq*; [1976] 2 All ER 641; [1976] RTR 437. Or, it might have been intended that the negligence pleaded might be that which the defendant could raise in a counter-claim to support a claim for damages equivalent to the amount paid out on the forged cheques. The effect of the success of such a claim would be to cancel out the bank's liability. To avoid circuity of action it seems the contention may be raised by way of defence instead of counter-claim. But, if such a course is adopted (and it appears to be authorized – see *London Joint Stock Bank Ltd v Macmillan* [1918] AC 777, at p793 and *National Bank of New Zealand Ltd v Walpole and Patterson Ltd* [1975] 2 NZLR 7 at p19), the plea is not one of contributory negligence which, of course, has no relevance to such a cause of action. See Weaver and Craigie, *Banker and Customer in Australia*, at p350.

That mutual duties of care are owed by banker and customer is beyond question. The duty is a continuing one to act with reasonable care to ensure the proper working of the account. The duty of the bank is to know the customer's signature and to pay without delay upon the authority created by the cheque and in conformity with the mandate constituted by the directions found in the cheque. But payments may be delayed for a reasonable time to permit a reference to the drawer. The customer must use reasonable care in drawing the cheques so that the bank will not be misled. However, in ordinary circumstances, compliance with his duty does not require the customer to contemplate the possibility of either an authorization or mandate being forged. He is thus under no duty to exercise reasonable care in the general course of carrying on business to prevent forgery on the part of an employee.

On the other hand, the duty of the bank would require it to report to the customer any rejection by it of a cheque as being forged, so as to enable the customer to enquire into, and protect himself against, the circumstances of the supposed forgery. Should such a report be communicated so that the customer became aware that forged cheques were being presented to his banker, discharge of his duty of care would demand his informing the banker of that fact. The corollary of this proposition is that silence in the face of a duty to speak may give rise to

an estoppel. These propositions emerge from a consideration of such cases as *Colonial Bank of Australasia Ltd v Marshall* [1906] AC 559; 75 LJCP 76; *London Joint Stock Bank Ltd v Macmillan, supra* (in so far as the opinions of the House of Lords therein expressed are not in conflict with the advice of the Privy Council in *Marshall's Case*); *Greenwood v Martins Bank Ltd* [1932] 1 KB 371 (CA), esp. per Scrutton LJ and [1933] AC 51 (HL); *Brown v Westminster Bank Ltd* [1964] 2 Lloyd's Rep 187; *Varker v The Commercial Banking Co of Sydney Ltd* [1972] 2 NSWLR 967 and *National Bank of New Zealand Ltd v Walpole and Patterson Ltd, supra*.

By the doctrine of estoppel a person is precluded from denying the truth of the representation acted upon for any purpose which results in a detriment to the representee. It was contended for the plaintiffs, should Hardy's version be accepted, that upon the true construction of that version the defendant could not be shown to have acted upon such representation as was made. If it did, then that it did so to its detriment is undeniable. The critical question therefore is: What is the nature of the representation involved in Italiano's twice-stated comments?

For the plaintiffs, it was contended that Italiano was asserting no more than that, because of his family relationship with Stella, he (Italiano) had reason to, and in fact did, consider Stella completely trustworthy; but, particularly as Italiano himself did not (as the bank well knew) have any personal knowledge of the cheque, the bank would have to make up its own mind about the genuineness of the signature. In support of this construction it was pointed out that on two occasions in fact the bank simply did not honour a cheque in reliance upon the representation first made by Italiano. These were, of course, the occasion that prompted the second conversation with Italiano and that which ultimately led to the detection of the fraud. Moreover, attention was directed to evidence that, because of Stella's business antecedents, including an insolvency, the bank officers at the Clifton Hill branch regarded Stella's integrity at all times with some circumspection. It was said that the existence of such an independent ground for suspicion so sufficiently neutralized the disarming effects that Italiano's declamations might otherwise have had that, in all the circumstances, the representation made was not intended to be – or at all events was not in fact – relied upon.

On the other hand, the defendant submits that, in effect what Italiano twice said was: "Any suspicion you may have concerning the signature may be put at rest. I am so convinced of Stella's trustworthiness that I can assure that the signature you are querying must be genuine if it is Stella who is presenting the cheque".

I consider this latter interpretation is the correct one. Not only is it the only reasonable construction that the words used can bear but it is one which gives effect to the nature of the enquiry that was being made. The bank was in real doubt as to the authenticity of the signature when it made each of its enquiries. So to enquire was its obligation. In turn the customer's duty was to meet the enquiry. That duty was not discharged by prevarication or by telling the bank to make up its own mind or that it must take its own risks.

Upon the construction I prefer it is clear that what Italiano told Hardy amounted to a representation that the signature upon any cheque presented by Stella for payment was genuine. It inevitably follows that reliance was undoubtedly placed upon the representation made in that form. It was suggested by counsel for the plaintiffs that the evidence shows that there was, in fact, no such reliance – at least in respect of a number of the cheques. It was said that the periods when Mrs Italiano was in hospital or absent from the State were known to the bank and that cheques purporting to bear her signature presented during such periods must, to the bank's knowledge, have been palpable forgeries. It is enough to say that the evidence falls short of establishing the facts upon which the plaintiffs seek to rely in order to support such a submission. Accordingly, the requirements for an estoppel are made out. Indeed, such a view of the case makes it indistinguishable from *Brown v Westminster Bank Ltd, supra*.

However, I might add that in my opinion, the bank remains entitled to succeed regardless of the construction placed upon the words used by Italiano. Those words must be looked at in conjunction with his conduct. No matter how strongly he felt about Stella's probity, Italiano was put on enquiry. That circumstance placed upon him a duty of due investigation and notification to the bank of the detection of any impropriety. With such a duty to speak imposed upon him his subsequent silence amounted to a continuing representation that the signatures about which

suspicion might otherwise be entertained were in fact genuine. Clearly, the bank also relied upon this tacit representation.

One final argument of the plaintiffs should be noticed. It was suggested that the authority to meet the cheques contained in the representation made by Italiano was robbed of its effectiveness because the bank withheld from Italiano information in its possession which was critical to the exercise by Italiano of a judgment as to Stella's honesty. This is tantamount to an argument that the bank did not rely on this representation because it knew more than did Italiano about Stella's propensity for questionable commercial activity and, as it was aware that Italiano did not know what it knew, his opinion concerning Stella's honesty was not worthy of any reliance.

This argument fails on the facts. It is clear that Italiano must have known as much, or substantially as much, as did the bank about such of Stella's circumstances that might have been thought to have operated adversely upon his business reputation.

However, one forged cheque for \$400 was paid prior to the first of the conversations between Hardy and Italiano. Can the plaintiff obtain a declaration as to the wrongful debiting of the plaintiffs' account with that sum? I think not. The reason for that is explained by Roskill J in *Brown's Case*. His Lordship said ([1964] 2 Lloyd's Rep, at p203): —

"One has to look at the position as at the date of the representation. What were the facts which then existed and in relation to which the representation is then made? The facts were that cheques which in truth were forged were represented as genuine. Applying the principles laid down in the cases I have cited, the plaintiff is thereafter debarred from setting up the true facts in relation to the cheques which had already been forged, and she is also debarred from setting them up in regard to future cheques."

The detriment consists of payment of both past and future cheques. On the view I have taken of the case it becomes unnecessary to consider the defendant's further submissions that rest upon the principles relating to ratification and adoption. There will be judgment for the defendant with costs to be taxed. Order accordingly.

Solicitors for the plaintiff: Gair and Brahe.
Solicitors for the defendant: Corr and Corr.
