WRONGFUL HONOUR AND DISHONOUR OF CUSTOMER'S CHEQUES: THE REMEDIES AVAILABLE TO THE CUSTOMER AGAINST THE PAYING BANK

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The law relating to cheques, bills and promissory notes in Papua New Guinea is governed by the *Bills of Exchange Act* 1951[1] (hereinafter referred to as the 'Act'). The Act carefully defines bankers' rights, duties and defences, whilst making inadequate provisions for customers. Viewing it from that perspective it may be said that the law relating to banking is banker oriented. However, that is not to say that customers are left without remedies in case of wrongful honour and dishonour of cheques.

The only remedy available to a customer in the event of wrongful honour is non-debiting of account. In the case of wrongful dishonour, a customer may elect to bring an action either for breach of contract or defamation. For breach of contract damages depend on whether a customer is a trader or not, whereas in an action for defamation, the question depends on the reasons and words used in dishonouring the cheque. The trader/non-trader dichotomy does not arise when awarding damages relating to an action for libel.

I. *Wrongful Honour of Cheques.*

Wrongful honour connotes payment of forged, unauthorised or stolen cheques. Bankers' liability arises when such cheques are handled by them. However, a banker will not be liable if the payment is made in good faith,[2] in due course,[3] in the ordinary course of business,[4] without

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1. No. 60 of 1951.

2. Section 98 of the Act states that 'a thing is deemed to be done in good faith, within the meaning of this Act, where it is in fact done honestly, whether it is done negligently or not.'

3. Section 64(1) of the Act states that 'payment in due course' means payment made at or after the maturity of the bill to the holder thereof in good faith and without notice that his title to the bill is defective. An 'order' cheque paid to a person who holds it under a forged indorsement of the payee is not considered payment in due course.

4. Under Section 65(1) of the Act, a banker who pays an order cheque 'in good faith and in the ordinary course of business' is entitled to the protection of the section. Green L.J. in *Carpenters Co.* v. *British Mutual Banking Co.* [1938] 1 K.B. 511, expressed the view that when a banker acts negligently, he cannot be regarded as paying a cheque in the ordinary course of business. Thus, a departure from established banking practice is not an act done in the ordinary course of business.

negligence,[5] or if the customer is estopped from denying liability by his representation,[6] course of conduct[7] or negligence.[8]

Customers' negligence will exonerate the banker from liability and entitle it to debit the account with the amount. Where a banker is negligent, ignores or exceeds his authority or mandate by paying a cheque which should have been dishonoured,[9] he cannot debit the customer's account.

A. Forgery of Customer's Signature as Drawer of Cheque, Accepter of Bills or Maker of Promissory Notes.

Section 29 of the Act states:

> ....where a signature on a bill is forged or placed thereon without the authority of the person whose signature it purports to be, the forged or unauthorised signature is wholly inoperative, and no right to retain the bill or to give a discharge therefore or to enforce payment thereof against any party thereto can be acquired through or under that signature, unless the party against whom it is sought to retain or enforce payment of the bill is precluded from setting up the forgery or want of authority:
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> Provided that nothing in this section shall effect the ratification of an unauthorised signature not amounting to a forgery.

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5. Banker's negligence in payment arises when be exceeds his mandate or goes outside the established banking practices, which include proper inquiries. In case of corporate customers the bank must not rely blindly on its mandate to pay cheques. Where the bank has reason to believe that the authorised signatories are misusing their authority it should make inquiry: *Selangor United Rubber Estates Ltd.* v. *Cradock and Others* [1968] 2 All E.R. 1073. The standard of care owed by the banker is whether the transaction of paying in any given cheque, coupled with the circumstances antecedent and present, was so out of the ordinary course that it ought to have aroused doubts in the banker's mind, and caused him to make inquiries: *Commissioners of Taxation* v. *English Scottish and Australian Bank Ltd.* [1920] A.C. 683.

6. *Brown* v. *Westminster Bank* [1940] 2 Lloyd's Rep. 187.

7. *West* v. *Commercial Bank of Australia Ltd.* (1935) 55 C.L.R. 315.

8. *London Joint Stock Bank* v. *McMillan* [1918] A.C. 777; *Marshall* v. *Colonial Bank of Australia* [1906] A.C. 559, 4 C.L.R. 196; *Young* v. *Grote* (1827) 4 Bing 253; *Scholfield* v. *Londesborough* [1896] A.C. 514; *Greenwood* [1933] A.C. 51.

9. See below. Briefly, such cases arise when a cheque is paid irrespective of notice of countermand, irregularity or payment made before due date (or maturity) in case of a post-dated cheque.

The Section recognises the well-established rule that where a signature on a bill is forged or placed thereon without authority, a paying banker is not entitled to debit the customer's account because it has no mandate to do so.[10]

The proviso in s.29 is that the forgery or the unauthorised signature is inoperative if the customer ratifies it. That is to say that after ratification of the forgery, the banker has a right to debit the customer's account. However, the question is whether forgery, an illegal act, is capable of ratification by the customer. The general rule is that a person cannot ratify a forgery of his own signature.[11]

After considering *Braidwood* v. *Turner & Forrest* (1908) 10 W.A.L.R. 105, Ellinger[12] argues that it may be ratified. In this case the agent, the paying banker, exceeded his authority by paying a cheque with his principal's (customer's) signature forged. At the time of payment, the agent was unaware of that fact. As the payment was done on behalf of the customer, the act was not considered illegal. On that basis, Ellinger submitted that bankers' payment of a forged cheque may be ratified. The writer of the present article is of the opinion that a forgery is an illegal act and as such is incapable of ratification.

A customer will be estopped if he has knowledge or reason to suspect that his name has been forged on a bill and that it is to be presented to his banker: he is bound to warn the bank. If he fails to do so and the bank's position is prejudiced, he adopts the bill.[13] In *M'Kenzie* v. *British Linen*, Lord Watson said:

> It would be a most unreasonable thing to permit a man who knew the bank was relying upon his forged signature to a bill, to lie by and not to divulge the fact until he saw that the position of the bank was altered for the worse. But it appears to me that it would be equally contrary to justice to hold him responsible for the bill because he did not tell the bank of the forgery at once, if he did actually give the information, and if when he did so, the bank was in no worse position than it was at the time when it was first within his power to give the information. I do not think that the Scotch cases which have been cited at the bar bear out

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10. *London and River Plate* v. *Bank of Liverpool* [1891] 1 Q.B. 7.

11. *Brook* v. *Hook* [1821] L.R. Ex. 89; *M'Kenzie* v. *British Linen Co.* (1881) 6 A.C. 82; *Imperial Bank of Canada* v. *Begley* [1936] 2 All E.R. 367; *Stoney Stanton Supplies (Coventry) Ltd* v. *Midland Bank Ltd.* [1966] 2 Lloyd's Rep.

12. P.E. Ellinger, 'Collection and Payment of Cheques', (1969-1970) 9 *Western Australian Law Review* 101.

13. *Ewing* v. *Dominion Bank* [1904] A.C. 806; *Morrison* v. *London County & Westminster Bank* [1914] 3 K.B. 356; *Greenwood* v. *Martins Bank* [1933] A.C. 51.

> the proposition that silence in circumstances such as occur in the present case, is per se sufficient to imply adoption of a forged bill.[14]

The question of estoppel, negligence or adoption will not arise from mere silence without any injury to the bank resulting therefrom. According to Lord Watson, silence *per se* is not sufficient to imply adoption of a bill, unless there is injury to the bank. The duty to disclose forgeries, which is a general duty towards the bank, extends not only to forgeries of the customer's signature but also to fraudulent alteration of cheques (raised cheques) and forged indorsements on bills.

B. Forged Indorsements on Bills accepted Payable at the Bank.

Section 65 (1) of the Act states:

> ...when a bill payable to order or demand is drawn on a banker, and the banker on whom it is drawn pays the bill in good faith and in the ordinary course of business, it is not incumbent on the banker to show that the indorsement of the payee or any subsequent indorsement was made by or under the authority of the person whose indorsement it purports to be, and the banker is deemed to have paid the bill in due course, although such indorsement has been forged or made without authority.

First, the section only applies to forgery of indorsement and not to forged signature of the payee on the back of the bill merely as evidence of receipt. Second, the protection available under the section is not a general one. It is only limited to bills payable 'to order or demand' and to come within that protection the banker on whom the bill is drawn must pay it 'in good faith and in the ordinary course of business'. Third, it is submitted that the onus is on the customer to show that indorsement on a bill is forged or made without authority. Fourth, it is submitted that forgery of indorsement *per se* does not give rise to an action by a customer against a banker.

In *Smith* v. *Commercial Co. of Sydney Limited* (1910) 11 C.L.R. 667, the question of forgery of indorsement on the bank of the bill as evidence of receipt was considered. In this case the appellant, who was about to sail from England to Sydney, obtained a draft for £30 issued in two parts, and payable to his order. He retained the first part and sent the second to his own address at the G.P.O., Sydney. The second copy was stolen by a thief who presented it for payment to the respondents, a firm of bankers. The appellant sued the respondents as acceptors of the draft. The respondents denied acceptance and claimed the benefit of a section similar to s.65 by which a banker is protected where he pays in good faith and in the ordinary course of business, on a forged indorsement, in the case of a bill drawn on the banker and payable to order or demand. At the trial it appeared that the thief was asked to sign his name on the back of the bill and, after comparing his signature with a specimen signature of the appellant, the draft was

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14. (1881) 6 A.C. 82, 109.

paid to him. The High Court of Australia (Griffith CJ., O'Connor and Isaacs JJ.) entered judgment for the appelant holding that the respondents (bankers) could not rely on the section as the signature of the thief was not an indorsement. O'Connor J. said:

> The reason for protection conferred by the section is the obligation of the banker to pay on indorsements which come to him in the ordinary course of business under circumstances in which it is in most cases impossible to test their genuineness. Where payment is made to the holder, as holder, and not as indorsee, where he is not bound to indorse before obtaining payment, and he is asked to put his name on the back merely as a receipt, or a test of identity, the reason for protection is at an end. In such a case the bank pays it because it is satisfied as to the identity of the payee, and not because it is satisfied as to the genuineness of the indorsement. It is quite clear on the evidence that the bank did not pay or intend to pay on the indorsement of the forger... His signature was obtained merely for the purpose of identifying him as the payee - the payee named in the bill whom he fraudulently represented himself to be.[15]

In view of that decision a bank pays an order bill with forged indorsement at its own risk. As the payment is to a wrong person, the banker is not entitled to debit the customer's account.[16] It is submitted that a person who pays an order bill to a person who holds it under a forged indorsement does not pay it in due course and therefore is not entitled to the protection of s.65.

However, it should be stressed that the position is different with regard to 'bearer' bills. Section 36(2) of the Act provides that 'a bill payable to bearer is negotiated by delivery'. As the person who takes it does not derive his title from indorsement but from its delivery to him, s.65 does not apply. The bill is tranferred by delivery and as such the bank is entitled to debit the customer's account even if the indorsement is forged. Similarly, if the payee is a fictitious or non-existing person, the bank is discharged and can debit the customer's account on the basis that the bill is a 'bearer' bill.[17] A bill may be payable to a fictitious or non-existing person even though there may be a real person in that name. When the name of the payee is inserted by way of pretence without any intention that payment shall be made in conformity therewith, the payee is a fictitious person whether the name be that of an existing person, or of one who has no existence.[18]

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15. (1910) 11 C.L.R. 667, 678.

16. *Vagliano* v. *Bank of England* [1891] A.C. 107.

17. Section 12(3) of the Act provides that 'where the payee is a fictitious or non-existing person, the bill may be treated as payable to bearer'.

18. *Vagliano* v. *Bank of England* [1891] A.C. 107.

C. Fraudulent Alteration of Cheques Presented for Payment, Whether as to the Amount or Otherwise Material Alteration - Raised Cheques.

Section 69 of the Act states:

> (1) Where a bill or acceptance is materially altered without the assent of all parties liable on the bill, the bill is avoided except as against a party who has himself made, authorized, or assented to the alteration, and subsequent indorsers: provided that where a bill has been materially altered, but the alteration is not apparent, and the bill is in the hands of a holder in due course, such holder may avail himself of the bill as if it had not been altered, and may enforce payment of it according to its original tenor.
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> (2) In particular the following alterations are material, namely, any alteration of the date, the sum payable, the time of payment, the place of payment and, where a bill has been accepted generally, the addition of a place of payment without the acceptor's assent.

The section is not exhaustive of the types of material alterations that can occur and it has been stated that any alteration is material if it would make the instrument operate differently or alter its business effect.[19]

The general rule in relation to fraudulent alterations of customer's cheques is that the banker cannot charge the customer with any sum in excess of that for which it was originally drawn.[20] To justify charging the customer with the amount of the cheque the bank must show that it was genuine in every respect.

There is some doubt whether a banker having paid a cheque or bill which has been fraudulently altered may debit the customer with the sum for which it was originally drawn. The difficulty arises when the bank endeavours to justify its act by alleging estoppel or negligence on the part of the customer.

(1) Estoppel.

Estoppel may arise from representation or course of conduct of the customer. In *Brown* v. *Westminster Bank* (1904) 2 Lloyd's Rep. 187, the servant forged the plaintiff's signature on cheques drawn on the bank. The manager called on her on several occasions to inquire about some cheques. She assured him that the cheques were regular and genuine. It was held that her conduct precluded her from asserting that some of the

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19. *Luth* v. *Stewart* (1880) 6 V.L.R. 383; *Suffell* v. *Bank of England* (1882) 9 Q.B.D. 555; *Commercial Bank of Australia Ltd* v. *Boyd* (1890) 4 Q.L.J. 14; *Sim* v. *Anderson* [1908] V.L.R. 348

20. *Hall* v. *Fuller* (1826) S. & C. 750.

cheques were forged.

(2) Customer's Negligence.

The leading case is *London Joint Stock Bank* v. *Macmillan* [1918] A.C. 777. In this case the plaintiff (customer) was going out for lunch when the clerk came up to him and said he wanted £2 for petty cash, and produced a cheque for signature. The clerk had repeatedly presented cheques for signature to get petty cash, but usually for £3. The plaintiff asked why it was not £3 on this occasion. The clerk replied that £2 would be sufficient. The plaintiff then signed the cheque. When he next saw it, it has been presented at the bank by the clerk as a cheque for £120 and paid. The figure '2' was in the cheque when the plaintiff signed it and was some way from the left hand side There was also room on the right hand side of the figure '2' for the insertion of another figure. On discovery of the fraud the plaintiff sued the bank stating that the cheque was for £2 and asked for the reversal of the excess debit of £118. The Bank contended that the plaintiff had drawn the cheque so negligently as to lead to the fraud and that by entrusting the cheque to the clerk the plaintiff had authorised him to fill it up.

The Trial Judge and the Court of Appeal decided in favour of the plaintiff customer, holding that he was not negligent and as such the bank could not debit the account with the full amount of the cheque. The House of Lords reversed the decision and held the customer liable. Lord Parmour said:

> The risks of paying a forged mandate ordinarily rest upon the bank, but there are exceptional instances in which a banker is entitled to charge the account of his customer, although the amount has been paid by him on a forged document.[21]

The exceptional instances referred to by Lord Parmour are where the customer is estopped due to representation or course of conduct or negligence on his part. Discussing the customer's duty, Viscount Haldane said:

> ...In the case of a cheque drawn by a customer on his bank there is a special duty to exercise care in the framing of what is a mandate, a special duty which does not exist in the same fashion in the instance of the acceptor of a bill of exchange.[22]

Relying on Kennedy J. in *Lewis Sanitary Steam Laundry Co.* v. *Barclay, Bevan & Co.*[23] he went on to say that the duty is a duty to be careful not to facilitate any fraud, which, when it had been perpetrated, is seen to have, in fact, flowed in natural and uninterrupted sequence from

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21. [1918] A.C. 777, 830.

22. [1918] A.C. 777, 815.

23. (1906) 22 T.L.R. 739.

the negligent act. The Lord Chancellor, Lord Finlay, expressed the duty which the customer owes to the bank thus - to draw the cheque with reasonable care to prevent forgery, and if owing to neglect of this duty, forgery takes place, the customer is liable to the bank for the loss.

For a customer to be liable, the fraud or loss complained of must be a natural and direct consequence of the customer's negligence in drawing the cheque. There must be connection between the carelessness or neglect and the fraudulent act.[24] Customer's negligence does not extend to leaving of space after the name of the payee.[25]

(3) Silence as Negligence.

The customer has a duty to divulge or disclose forgeries and silence can under certain circumstances be taken as a breach of that duty. In *West* v. *Commercial Bank of Australia* (1935) 55 C.L.R. 319, West authorised the bank to pay cheques drawn on his account by his son and countersigned by his wife. After a few months, the son told the teller of the bank that his mother was ill and unable to countersign the cheques and came to an arrangement with the teller to honour cheques only on his signature. West became aware of the arrangement but made no attempt to stop it. West later sued the bank to recover monies paid on the sole signature of the son. It was held that due to his silence he could not recover the monies claimed. As West stood by and allowed the banker's position to be altered for the worse, it was contrary to justice for him to recover.

However, the question of negligence does not arise from mere silence without any injury to the bank. Similarly, silence agreed to honestly and for the benefit of the banker upon request of the bank is not a breach of the customer's duty to disclose forgeries: *Ogilvie* v. *West Australian Mortgage and Agency Corporation Ltd.* [1896] A.C. 257. In this case Ogilvie, the customer, after discovering forgeries on his account, brought the matter to the notice of the accredited agent of the bank. He was requested to remain silent for fear the company would lose all chance of getting the money back. This he did and said nothing about the forgeries to anyone. Subsequently he asked the bank to credit his account with the forged cheques that had been wrongly debited to his account. It was held that the agent of the bank had had knowledge of the forgeries long before Ogilvie and it was at his specific request that Ogilvie had remained silent, in the honest belief that he was acting in the interests of the bank. Under those circumstances, the customer's act (i.e. silence) was not in breach of his duty towards the bank.

II. *Wrongful Dishonour of Cheques.*

One of the prime duties of a bank is to honour cheques. However,

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24. *Perel* v. *Bank of Commerce* (1824) 24 S.R. (N.S.W.) 63; *Lewis Sanitary Co.* v. *Barclay Bevan & Co.* (1906) 95 L.T. 444. Customer's negligence must be the cause of the loss. Mere carelessness or neglect in keeping cheque books or rubber stamps used in connection with the drawing of cheques is insufficient.

25. *Slingsby* v. *District Bank Ltd.* [1932] 1 K.B. 544.

a bank will dishonour cheques where the funds are insufficient;[26] where the cheques are not in proper form;[27] or where there are legal bars to payment.[28]

A. Insufficient Funds.

There must be sufficient funds to meet the cheque, the absence of which will entitle a bank to dishonour. Although there are sufficient funds, the bank is entitled to reasonable time between paying in and drawing against, in which to carry out book-keeping entries.[29] Apart from insufficient funds, the courts have taken into account a number of other factors when dishonouring a cheque - namely set-off,[30] bank charges and interest,[31] agreed overdraft limit,[32] funds specially allocated.[33]

B. Cheques in Proper Form.

A number of requirements must be met before a cheque is valid.

(1) Signature.

Section 28 of the Act states:

> No person is liable as drawer, indorser, or acceptor of a bill who has not signed it as such:
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> Provided that:
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> (a) where a person signs a bill in a trade or assumed name he is liable thereon as if he had signed it in his own name; and
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> (b) the signature of the name of a firm is equivalent to the signature,

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26. *Bank of N.S.W.* v. *Goulburn Valley Butter Factory Co. Pty. Ltd.* [1902] A.C. 543.

27. *Commercial Bank of Australian Ltd.* v. *Hulla* (1884) 10 V.L.R. 110.

28. *MacDougal* v. *Bank of Victoria* (1881) 7 V.L.R. 230.

29. *Whitaker* v. *Bank of England* [1835] 1 C.M. & R. 744.

30. *Bank of N.S.W.* v. *Goulburn Valley Butter Company Ptd. Ltd.* [1902] A.C. 543.

31. *Roby* v. *Oriental Bank Corporation* [1879] 2 S.C.R. (N.S.W.) N.S. 56.

32. *Doria* v. *Bank of Victoria* [1879] V.L.R. 393; *Dawson* v. *The Bank of N.Z.* [1889] 5 L.R. (N.S.W.) 154; *Bank of Australia* v. *Plamer* [1892] A.C. 540; *Jason* v. *Midland Bank* [1967] 2 Lloyd's Rep. 563.

33. *Huenerbem* v. *Federal Bank of Australia* (1892) 13 C.L.R. (N.S.W.) 244.

by the person so signing, of the names of all persons liable as partners in that firm.

Section 99 of the Act provides:

(1) Where, by this Act any instrument or writing is required to be signed by any person, it is not necessary that he should sign it with his own hand, but it is sufficient if his signature is written thereon by some other person by or under his authority.

(2) In the case of a corporation, where, by this Act, any instrument or writing is required to be signed, it is sufficient if the instrument or writing be sealed with the corporate seal.

But nothing in this section shall be construed as requiring the bill or note of a corporation to be under seal.

(2) Stale Cheques.

Section 8 of the Act provides:

(1) In the absence of any agreement between the banker and the drawer of the cheque or of any direction of the drawer of the cheque to the contrary, a banker may refuse payment of a stale cheque.

(2) A stale cheque is a cheque which appears on the face of it to have been in circulation for more than twelve months.

(3) Post-dated Cheques.

Section 8(2) of the Act provides:

A bill is not invalid by reason only that it is ante-dated or post-dated, or that it bears date on a Sunday.

A post-dated cheque is a bill of exchange payable at a future date, and a banker may render himself liable to an action by the customer for negligence if he pays such cheque before the day it bears date.[34]

(4) Improper Endorsement.

At common law a banker may be liable for paying an irregularly endorsed cheque.[35] However, s.90A(1)(a) makes that requirement no

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34. *Hinckcliffe* v. *Ballarat Banking Co.* [1820] 1 V.R. 220.

35. *Slingsby* v. *District Bank Ltd.* [1932] 1 K.B. 544.

longer necessary. It states:

> Where a banker in good faith and in the ordinary course of business pays to another banker a cheque drawn on the first-mentioned banker that is not indorsed, is irregularly indorsed or has been indorsed without authority, the first-mentioned banker does not, in paying the cheque, incur any liability by reason only of the absence of, or irregularity in, indorsement or his failure to concern himself with the existence of authority for indorsement...

(5) Alterations and Omissions.

Section 69 provides for material alterations. By virtue of s.69(2), the following are material:

> Any alteration of the date, the sum payable, the time of payment, the place of payment, and where a bill has been accepted generally, the addition of a place of payment without the acceptor's assent.

It should be stressed that the list under s.69(2) is not exhaustive. Any alteration which operates to alter the instrument or its business effect is material.[36]

C. Legal Bars to the Payment of Cheques.

(1) Countermand of Payment.

Section 82(a) provides that:

> ...the duty and authority of a banker to pay a cheque drawn on him by his customer are determined by countermand of payment.

A banker paying a cheque after it has been effectively countermanded is liable to his customer for its amount.[37] The countermand of payment must be made to the branch of the bank on which the cheque was drawn, not to another branch of the same bank.[38] It should also be stressed here that with notice of countermand, the bank must have actual knowledge, not constructive knowledge.[39]

(2) Customer's Death.

Section 82(b) provides that:

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36. See discussion of s.69 of the Act, above.

37. *Twibell* v. *London Suburban Bank* [1869] W.N. (N.S.W.) 127.

38. *London Provincial and South Western Bank Ltd.* v. *Buszend* (1918) 35 T.L.R. 142.

39. *Curtice* v. *London City and Midland Bank Ltd.* [1908] 1 K.B. 293.

> The duty and authority of a banker to pay a cheque drawn on him by his customer are determined by notice of the customer's death.

(3) Bankruptcy or Winding Up of the Customer.

A banker-customer relationship is terminated by the customer's insolvency. Cheques drawn after the customer's bankruptcy (in the case of the individual) or winding-up (in the case of a company) must be dishonoured.[40]

(4) Notice of Insanity.

Where a banker has notice of the customer's insanity be will be barred from paying cheques.[41]

(5) Notice of Garnishee or Injunction.

A garnishee order against the customer prevents any payment on the part of the bank.[42] Accordingly, an injunction not to pay prevents payment.[43]

(6) Knowledge of Breach of Trust.

The bank must have notice or actual knowledge of misapplication of trust funds before it can dishonour. In *Dixon* v. *Bank of N.S.W.*[44] it was held that bankers are bound to honour executors' orders in the absence of notice of any intended misapplication of trust funds.

D. Remedies to Customers.

The action against a bank for wrongful dishonour is available only to a customer. A payee has no such right of action.[45]

The usual remedy for wrongful dishonour is damages. The onus is on the customer to prove that he has sufficient funds in his account at the time of dishonour.[46] A customer whose cheque has been wrongfully

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40. *MacDougall* v. *Bank of Victoria* (1881) 7 V.L.R. 230. Section 7(1) of the Act provides that 'the rules in bankruptcy relating to bills of exchange, cheques and promissory notes, shall continue to apply thereto notwithstanding anything in this Act contained.'

41. *Drew* v. *Nunn* [1879] 4 Q.B.D. 661; *Bradford Old Bank Ltd.* v. *Sutcliffe* (1918) 34 T.L.R. 229.

42. *Rogers* v. *Whiteley* [1892] A.C. 118.

43. *Fontaine Besson* v. *Parr's Banking Co. and Alliance Bank Ltd.* (1895) 12 T.L.R. 121.

44. (1896) 17 L.R. (N.S.W.) 355.

45. *Schroeder* v. *Central Bank of London* (1896) 34 L.J. 735.

46. *Bank of N.S.W.* v. *Laing* [1954] A.C. 135; *Bell* v. *Capital and Counties Bank* (1887) 3 T.L.R. 540.

dishonoured may bring an action for breach of contract or libel against his bank. The actions may be combined, or taken separately.

(1) Breach of Contract.

Damages for breach of contract depend primarily on whether the customer is a 'trader' or 'non-trader'. The question whether a customer is a trader or not is a mixed question of fact and law.[47]

(a) Trader. Where the customer is a trader he is entitled to recover substantial damages - though temperate and reasonable - for injury to his business reputation and credits.[48]

The court in *Robin* v. *Steward*,[49] awarded substantial damages without proof of special damages. Williams J., after considering the position of a trader, said:

> ...When it is alleged and proved that the plaintiff is a trader, I think it is equally clear that the jury, in estimating the damages, may take into their consideration the natural and necessary consequences which must result to the plaintiff from the defendant's breach of contract: just as in the case of an action for a slander of a person in the way of trade, or in the case of an imputation of insolvency on a trader, the action lies without proof of special damages.[50]

Robin v. *Steward* has been adopted, applied and accepted in both England[51] and Australia[52] as standing for the proposition that a trader need not prove special damage in order to receive substantial damages for the wrongful dishonour of a cheque.

(b) Non-Trader. Traders are in the fortunate position of being able to receive substantial damages without any loss having been incurred. Non-traders are restricted to only nominal damages where no actual or special damage is alleged or proved.[53]

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47. *Magill* v. *Bank of North Queensland* (1895) 6 Q.L.J. 262; *Bank of N.S.W.* v. *Milvain* (1884) 10 V.L.R. 3; *Baker* v. *A.N.Z. Bank Ltd.* [1955] N.Z.L.R. 907.

48. *Marzetti* v. *Williams* [1830] B & Ad 415; *Robin* v. *Steward* (1854) 14 C.B. 595.

49. (1854) 14 C.B. 595.

50. (1854) 14 C.B. 595, 607.

51. See *Wilson* v. *United Counties Bank Ltd.* [1920] A.C. 102.

52. See *Bailey* v. *Bank of Australia* (1906) 6 S.R. (N.S.W.) 686; *Queensland Bacon Pty. Ltd.* v. *Rees* (1967) 115 C.L.R. 266.

53. *Bank of N.S.W.* v. *Milvain* (1884) 10 V.L.R. 3; *Mugill* v. *Bank of N.Q.* (1895) 6 Q.L.J. 262; *Baker* v. *A.N.Z. Bank Ltd.* [1958] N.Z.L.R. 907.

In the leading English case *Gibbon* v. *Westminster Bank* [19[illegible] 2 K.B. 882 the plaintiff's cheque for rent to her landlord was dishonoured by a mistake at the bank. As a result of dishonour her landlord demanded that she remit all future rent payments in cash. She sued the bank for wrongful dishonour but did not allege or prove actual or special damage. It was also conceded at the trial that she was not a trader. The court awarded only nominal damages of 40 shillings. J. Lawrence said:

> The authorities which have been in argument all day lay down that a trader is entitled to recover substantial damages for the wrongful dishonour of his cheque without pleading and proving actual damage, but it has never been held that the exception to the general rule as to the measure of damages for breach of contract extends to anyone who is not a trader... In my opinion this matter should be treated as covered by the authorities and I hold accordingly that the corollary of the proposition laid down by them is the law - namely that a person who is not a trader is not entitled to recover substantial damages for the wrongful dishonour of his cheque, unless the damage which is suffered is alleged and proved as special damages.[54]

(2) Defamation.

The bank's liability for libel depends on the reasons assigned or the words used by the bank in dishonouring the cheque. Where the dishonour is wrongful, and therefore the answer is untrue, the customer is likely to suffer injury to his credit, standing and reputation. The bank will be liable if the words tend to lower the customer in the estimation of right-thinking members of society generally.[55]

The most common terms used by banks are 'refer to drawer' and 'present again' with the former creating considerable difficulty.

(a) Refer to Drawer. In *Flack* v. *London and South Western Bank* (1915) 31 T.L.R. 334 and *Plunkett* v. *Barclays Bank* [1936] 1 All E.R. 653, the words were held not to be libellous. However, in both cases there were unusual circumstances. In the former case, it was due to wartime moratorium law. In the latter case, a garnishee order was attached to the customer's balance and served on the bank.

The term is becoming increasingly accepted as simply the standard answer used by a bank which wishes to dishonour a cheque for insufficient funds. The natural and ordinary meaning is still non-defamatory, but the innuendo is growing stronger. Because of its accepted usage as a term for dishonouring payment, it may now be considered defamatory in its ordinary meaning. That is, the ordinary meaning of 'refer to drawer' has become 'insufficient funds'.

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54. [1939] 2 K.B. 882, 888.

55. *Sim* v. *Stretch* [1930] 2 All E.R. 1240; *Baker* v. *A.N.Z. Bank Ltd.* [1958] N.Z.L.R. 907.

In *Baker* v. *A.N.Z. Bank Ltd.*[56] the customer's cheques were returned marked 'present again', although at the time there was sufficient credit in his account to meet payment. The Court held that the words were defamatory. Shorland J. said:

> Whatever the answer 'present again' may imply as to prospects of future or later payment, it surely imports the clear intimation that the maker of the cheque so answered has defaulted as to time for performance of the loyal and ethical obligation to provide for payment, by the bank on presentation of a cheque used for immediate payment. Written words which convey such meaning must, to my mind, tend to lower a person in the estimation of right-minded members of society generally.[57]

Holder views *Baker* v. *A.N.Z. Bank Ltd.* as laying down the proper test when determining whether the answer on a cheque is defamatory or not i.e. that it makes no difference whether the answer is 'refer to drawer', 'present again' or 'not sufficient'.[58]

In the more recent English case *Jason* v. *Midland Bank* [1968] 1 Lloyds Rep 409, the Court of Appeal upheld the findings of the jury that the words 'refer to drawer' upon two cheques had the effect of lowering a customer's reputation in the minds of right-thinking people.

Most text writers consider the term 'refer to drawer' defamatory.[59] By weight of decisions and text writers' opinion, the courts will be likely to find 'refer to drawer', at the very least, capable of defamatory meaning.

(b) Present Again. In the case of *Baker* v. *A.N.Z. Bank Ltd.*,[60] the question arose as to whether 'present again', when written on a dishonoured cheque, was defamatory. The court held that the term is reasonably capable of conveying a defamatory meaning. Shorland J. after a careful analysis of earlier authorities, said:

> ...the answer "present again" marked on a cheque conveys the meaning, inter alia, that the customer has insufficient credit in his account to meet the cheque on original presentation...[61]

One of the earlier authorities referred to was *Sednaoin Zarifta Nahas & Co.* v. *Anglo-Australian Bank* (1909) 30 Journal of Institute of Bankers 413, where it was held that where a cheque is refused payment with a request to 'present again', it lies entirely with the holder whether he will present again or at once treat the cheque as dishonoured.

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56. [1958] N.Z.L.R. 907.

57. [1958] N.Z.L.R. 907, 911.

58. Milnes Holden, *The Law and Practice of Banking* (1970), 84.

59. Paget, *Law of Banking* (8th ed., 1972), 311, expresses a contrary view.

60. [1958] N.Z.L.R. 907.

61. [1958] N.Z.L.R. 907, 910.

The term 'present again', because of its common use, has gained notoriety. Although it is less innocuous than 'refer to drawer', the holder may now treat the cheque as dishonoured. To this end the word is reasonably capable of a defamatory meaning.

(3) Damages.

The general remedy for breach of contract or defamation is damages. For breach of contract, the question depends primarily on whether the customer is a trader or not. However, special damages must be alleged and proved.[62]

Special damages can be awarded in cases where there is a connection between the dishonour of a cheque and injury to the customer's business and credit. It would appear that special damages, when alleged and proved, will be awarded for injury to the plaintiff's business or credit which can be directly attributable to the dishonour of his cheques.[63] Special damages cannot be allowed for injuries unrelated to a customer's business or credit.[64]

(4) Assessment of Damages.

The question of assessment was considered in *Baker* v. *A.N.Z. Bank*[65] and Shorland J., after careful consideration of earlier authorities, said:

> The matters to be taken into consideration in assessing damages are the position and standing of the plaintiffs, the nature of the libel, the mode and extent of the publication, the absence of any retraction or apology, and the whole conduct of the defendant from the time when the libel was published, down to the very moment of verdict.[66]

(a) Banker's duty to mitigate damages. The most important factor considered by courts when assessing damages for wrongful dishonour of a cheque is the action taken by the bank to mitigate the injury to their customer's credit and reputation.

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62. *Fleming* v. *Bank of New Zealand* [1900] A.C. 577; *Gibbons* v. *Westminster Bank* [1939] 2 K.B. 882.

63. *Roby* v. *Oriental Bank Corporation* (1879) 2 S.C.R. (N.S.W.) (N.S.) 56; *Jayson* v. *Midland Bank Ltd.* [1967] 2 Lloyd's Rep. 653.

64. *Jones* v. *National Bank* (1870) 1 A.J.R. 170; *De Plevitz* v. *A.J.S. Bank* (1902) 2 S.R. (N.S.W.) 355. Special damages were refused in the former case for illness and in the latter for arrest. Both were regarded as non-mercantile injuries and as such the customers were not entitled to special damages.

65. [1958] N.Z.L.R. 907.

66. [1958] N.Z.L.R. 907.

(b) Position and standing of the plaintiff. The position and standing of the plaintiff must be taken into consideration when assessing damages.

(c) Customer's knowledge of dishonour. The question of amount of damages will be affected if the customer knows that his cheque will be dishonoured. In such circumstances, the court will be reluctant to award anything but nominal damages. It was held in *White* v. *Bank of N.S.W.*[67] that as the plaintiff knew of the dispute between himself and the bank, he had no right to draw a cheque for the purpose of getting it dishonoured, and so giving himself a right of action. This, however, affects the question of what amount of damages he was entitled to, and not the right of action.

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67. (1883) 2 S.C.R. (N.S.W.) 17.