

BRENNAN

BANK of IRELAND

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1981 No. 3556P
THE HIGH COURT

BETWEEN:

MICHAEL BRENNAN

PLAINTIFF

and

THE GOVERNOR AND COMPANY
OF THE BANK OF IRELAND

DEFENDANTS

Judgment of Mr. Justice Francis Murphy delivered the 23rd day
of May, 1985.

This a claim by the plaintiff for damages first for the alleged negligence and breach of contract of the defendant Bank in the collection of a cheque entrusted to them for collection by the plaintiff and, secondly, for certain representations which it is alleged were made by an official of the defendant Bank and which, it is said, were false.

The plaintiff is a farmer who resides at Carrowntogher, Elphin, in the County of Roscommon, where he has a farm of some hundred and fourteen acres on which he raises cattle. He is a man of 68 years. He has had a Bank account with the defendant Bank at their Elphin Branch for many years. In addition he has or did have a Bank account with the Castlereagh Branch of the Ulster Bank. It is accepted by the defendants that Mr. Brennan was a respected and trusted customer of their Bank: his integrity was never called in question.

Andrew Towey was engaged in the meat business in the Roscommon area from mid-1979 until the end of 1980. His father had been engaged in a similar business for many years

before that and enjoyed a high reputation which his son inherited. Mr. Andrew Towey acquired the meat factory in Ballaghaderreen sometime in 1979. In connection with the business carried on there Mr. Towey purchased very large numbers of cattle at marts and from individual farmers in the West of Ireland during the period from mid-1979 until the end of 1980. For the greater part it appears that Mr. Towey paid for the cattle so purchased by him by means of cheques drawn on an Irish pound account in his name (or more particularly in the name of A.J. Towey & Co. (Exports) in the Silloth Branch in Carlisle, Cumbria, of the National Westminster Bank Limited. No evidence was available as to what connection, if any, Mr. Towey had with that part of England or as to how or why he came to open a Bank account in Silloth. Less still was any explanation offered by either party as to why the account in England was maintained in Irish pounds. The fact that the cheque was drawn on an English Bank meant that it could not be cleared in the Irish clearing-house system and the fact that the cheque was payable in Irish pounds prevented it being dealt with within the London clearing-house system. Of necessity, therefore, payment would have to be secured by special collection in the sense that it would require to be presented by some means outside the clearing-house system. The evidence called by both parties made it clear that the maintenance of accounts in one country in the currency of other countries was not unusual and if such foreign currency accounts did give rise to some difficulties it was not suggested that these were insuperable. In the present case it is clear that from the outset that there was a considerable delay in

securing payment from the Silloth Branch of the cheques drawn on it in favour of payees in the West of Ireland. By the Autumn of 1980 these delays were in the order of twenty-one days but earlier in that year may have been somewhat less but not significantly so.

The plaintiff himself had in all four transactions with Mr. Towey. In the year 1979 he sold two lots of cattle to Mr. Towey for which he was paid by cheques drawn on the Silloth account and these cheques were ultimately met and the proceeds remitted to the plaintiff's Bank account. Again in August 1980 the plaintiff sold twelve cattle to Mr. Towey for which he received a cheque in the sum of £6,540-47 drawn on the Silloth account. That cheque was dated the 10th August, 1980. Some days later it was given to the Manager or Assistant Manager of the Elphin Branch of the Bank of Ireland for collection. (I note that the cheque was given for collection rather than lodged. As it was not capable of being collected within the clearing-house system neither that cheque nor any other of the Towey cheques was credited to the account of the payees thereof until after the proceeds had been received). In any event the cheque was promptly transmitted by the Elphin Branch to the International Department of the Bank of Ireland at Galway where it was received on the 19th August. On the same date it was transmitted to the National Westminster Bank Limited Overseas Branch, 53 Threadneedle Street, London, which is the branch designated on the cheque itself for the presentation thereof. The only instructions accompanying the document provided as follows:

"Irish pounds account with our Dublin Office under

tested telex advice to us plus our charges £11".

The amount of the cheque was duly paid on the 9th September, 1980 by the National Westminster Bank authorising the Bank of Ireland by telex to debit the sum in question (less certain charges) to their account with the Dublin Office of the Bank of Ireland. That transaction is, I think, reasonably illustrative of the delays involved but more particularly it confirms the fact that the plaintiff was conscious of delays of that magnitude in securing payment of cheques drawn by Andrew Towey on his Silloth account.

The particular transaction to which the present proceedings relate arose as a result of the sale by Mr. Brennan to Mr. Towey of two lots of cattle on or about the 4th or 5th November, 1980. One lot consisted of twenty five cattle in respect of which the plaintiff received a cheque on the Silloth account in the sum of £13,773-25. The other lot comprised four cattle in respect of which the payment amounted to £2,317-17. On receipt, the cheque for the lesser amount was entrusted to the Ulster Bank at Castlereagh for collection on the 10th November, 1980. The proceeds of that cheque were received by the Ulster Bank in Castlereagh on the 3rd December, 1980 on which date they issued to Mr. Brennan a receipt in that sum.

As I say, the transaction giving rise to the payment took place on the 4th/5th November, but the cheque was not issued until the 10th of that month either as a result of some misunderstanding or deliberate obstruction on the part of the payer.

In any event the cheque, for the larger amount, that is, the cheque for £13,773-25 was on the 12th November, 1980,

entrusted to the Elphin Branch of the defendant Bank for collection. At that time Mr. Nolan, who was the Assistant Manager of the Branch, was in fact the Acting Manager as the Manager was absent through illness at the time. It is, of course, common case that the cheque was never met. Equally, it is clear that the defendants would not at any time have had any means to compel payment of the cheque. What the plaintiff says, however, is that having parted with the cheque on the 12th November, 1980, and having entrusted it to the defendants on terms that they would be paid the appropriate fees and charges to collect the proceeds on his behalf that it was not until the 6th January, 1981, that he was informed by the defendants (through Mr. Nolan) that the cheque had been returned by the National Westminster Bank marked "refer to drawer". Indeed, the cheque was represented to the National Westminster Bank on the 7th January, 1981, and finally returned by them to the Elphin Branch and by it to Mr. Brennan on the 15th January, 1981. The plaintiff says, therefore, that the defendants took some fifty five days to ascertain that the cheque in question would not be paid.

Before dealing with the defendants' response to that allegation and, indeed, the questions of law to which it gives rise, I turn to consider the other claim made by the plaintiff which, unhappily, gives rise to a total conflict of fact. Mr. Brennan says that he was in the Elphin Branch of the Bank of Ireland on the 26th November, 1980, when he was cashing a cheque for £100. Mr. Brennan swears positively that on that occasion he called to Mr. Nolan the Acting Manager of the Branch and asked him about his cheque. He asked Mr. Nolan

whether it was cashed and Mr. Nolan having checked said "no" but that it would be "cashed in a week". Again, on the 10th December, 1980, Mr. Brennan was in the Elphin Branch and once more he cashed a cheque for £100. His evidence was on that occasion he did not contact Mr. Nolan but that Mr. Nolan attracted his attention. It is Mr. Brennan's evidence that then the following conversation took place:-

"Michael, your cheque will be cashed today".

to which Mr. Brennan replied:-

"Time for it, Seamus, after four to five weeks".

Mr. Brennan in his evidence went on to say that it was Sunday the 21st December, 1980, that he learnt that Mr. Towey was in financial difficulties. He heard a general rumour to that effect but he was not worried as he thought that his cheque was cashed. It is his account that on the 6th January he received a letter from Mr. Nolan dated the previous day and that immediately on receipt he called in to Mr. Nolan as he was requested to do. Again, Mr. Brennan gave a very clear account of his recollection as to what took place at the meeting on the 6th January, 1981. It was his clear recollection that the conversation started with general topics and that it was he, Mr. Brennan, who brought the matter around to the Towey cheque. He said that Mr. Nolan told him then that he had got his cheque back. That he had sent it away again and that probably the plaintiff would be paid on it this time. The plaintiff described his reaction to this news. He said, "He was stuck to the ground and unable to talk. He knew he was done".

Mr. Nolan's account of his dealings with Mr. Brennan may

be summarised by saying that he denied with equal emphasis that he ever told Mr. Brennan that his cheque would be "cashed in a week". Indeed, Mr. Nolan denied that he would ever have used those words to describe the transaction. It was his evidence that what he said was that the proceeds were not to hand. Again, in relation to the 10th December it was Mr. Nolan's evidence that he informed the plaintiff that the cheque had not been paid but did not say that it would be paid.

There is a further conflict between the parties as to the communications which took place between Mr. Nolan and Mr. Brennan immediately prior to Christmas 1980. Mr. Nolan says that on receipt of certain information from the International Division of his Bank in Galway to the effect that the Towey cheques then outstanding were to be returned unpaid that he set out with a view to informing Mr. Brennan (among others) of that fact. Indeed, he recalled putting on his coat and jacket as he was about to set out to contact Mr. Brennan but apparently other cheque-holders arrived in the office at the time so that he postponed contacting Mr. Brennan at that stage. It was his evidence, however, that he did make contact with Mr. Brennan on the 19th or 20th December, 1980 and that he had a conversation with him either in the Elphin Branch or in the street in Elphin. Thus, Mr. Nolan maintained that he had informed Mr. Brennan that the cheques were being dishonoured sometime before Christmas. Again, Mr. Nolan's account of the meeting which took place on the 6th January 1981 differs materially from the account provided by Mr. Brennan. Mr. Nolan recalled using the words:-

"Michael, I have bad news for you: your cheque is here".

He then went on to explain that he had given Mr. Brennan the option of taking the cheque away with him or permitting Mr. Nolan to send it back to the National Westminster Bank in London.

Perhaps the one thing on which Mr. Brennan and Mr. Nolan were agreed is that Mr. Brennan was shattered by the news that the cheque was dishonoured.

I am forced to choose between these two divergent accounts. It may be said of Mr. Brennan in relation to the conversations which it is alleged took place on the 26th November and 10th December that he is asserting a positive content of the conversations whilst Mr. Nolan's evidence is substantially negative in that regard. The situations are reversed in so far as the meeting which Mr. Nolan alleges took place on the 19th/20th December is concerned. There is no doubt that Mr. Brennan was in the Elphin Branch on the dates in which it is alleged that the earlier conversations took place. This fact was verified by the production of the cheques which he cashed on those dates. Again, it is easy to accept that some conversation took place between the customer and the Bank Manager with regard to this substantial transaction. In relation to the manner in which they gave their evidence it must be said that Mr. Brennan gave his evidence with confidence and precision. Mr. Nolan was perhaps equally confident but rather less precise. His evidence tended to take the form that he would have done this or that he would not have done that rather than make a positive statement as to what he did or did not do. Again, there was nothing in the demeanour of either witness which was of any significant assistance to me in determining which was the more credible.

Whilst I would greatly have preferred that this conflict of evidence could have been resolved by a jury rather than a Judge sitting alone I am afraid that I must take the responsibility of deciding between the two accounts even though I am conscious of the fact that my decision could be mistaken with very serious consequences for one or other of the parties. It is not without very considerable hesitation, therefore, that I have decided to prefer the account given by Mr. Nolan as to what took place at the crucial meetings on the 26th November and 10th December. It is inherently improbable that a Bank Official would give a positive assurance as to the future outcome of a financial transaction whether the period in question was twenty four hours or seven days. In the present case, however, the background to the entire transaction with the Towey cheques over a period of nearly a year which was explored in some detail in evidence makes it quite clear that a person in Mr. Nolan's position would have been conscious of the fact that considerable delays had occurred and that there was considerable uncertainty as to the date (though not as to the fact) of payment. Most importantly of all, however, is the fact that there was no document or information in Mr. Nolan's possession on the 26th November or 10th December, 1980 which would justify him in making any positive forecast as to the date of payment. No reason could be advanced as to why Mr. Nolan would have made a positive statement as to the date on which the cheque would be paid without having appropriate information before him on which to base that statement and, as I say, no information has been traced to Mr. Nolan's possession - nor indeed does it appear to have existed anywhere - which

would have justified or, at any rate, provided some grounds for the statements attributed to him. In these circumstances I can only conclude that Mr. Brennan is somehow mistaken in his recollection as to what took place. In that connection I do recognise that there is sometimes a tendency for witnesses, and particularly parties to proceedings, to brood over the events which gave rise to their misfortunes and in attempting to reconstruct what took place to mislead themselves as to the true facts, to confuse what took place with what they would like to think happened. Indeed, in the present case one cannot but be struck by the fact that Mr. Brennan purports to recall the precise words used in a conversation which took place more than four years ago in respect of a transaction which, at the time, was taking what was then regarded as its ordinary course and with no sense of alarm on the part of Mr. Brennan which would heighten his awareness or give a particular reason to recall the matter with such precision. In the circumstances I am forced to conclude that in reconstructing the events that took place Mr. Brennan has misled himself as to the content of the conversations which he had with Mr. Nolan.

That finding of fact disposes of the alternative basis on which the plaintiff based his claim but I return now to consider the law and the facts in so far as they related to the claim grounded on the alleged negligence and breach of duty of the defendants in collecting the cheque in question on behalf of the plaintiff.

There was considerable conflict between the parties as to the nature and extent of the duties which a collecting Bank owes to its customer. On behalf of the defendants it was argued

that the duty of the collecting Bank, and by that I mean the Bank to which an item is entrusted for collection (what would be described as "the remitting Bank" in the uniform rules for collections) is to present the item for collection with reasonable skill and diligence to the Bank on which it is drawn. It is contended on behalf of the defendants that the Bank on which a cheque is drawn owes no duty to the payee with regard to the payment or non-payment of any cheque or the order in which the cheques presented against the drawer are met. That aspect of the defendants' case is fully supported by the decision of the Supreme Court in Dublin Port and Docks Board and Bank of Ireland 1976 I.R. 132 and is not disputed by the plaintiff. What the plaintiff says, however, is that the duty of the collecting Bank does not stop on presentation of the item entrusted for collection. The collecting Bank must exercise reasonable care to secure payment on foot of the document or alternatively procure and transmit without delay notice of dishonour.

It seems to me that in general the legal proposition for which the plaintiff contends is supported by the proposition taken from Harte's Law of Banking, 4th Edition, page 532 in the following terms:-

"As his customers agent in the matter, the Banker is bound to use reasonable skill, care and diligence in presenting and securing payment of the drafts entrusted to him for collection and in placing the proceeds to his customers account or in taking such other steps as may be proper to secure his customers interests."

In fact the question whether a collecting Bank has any

responsibility to its customer subsequent to the presentation of the bill is the subject-matter of specific judicial comment in this country. In Royal Bank of Ireland Limited and O'Rourke 1962 I.R. 159 at page 178 Lavery J commented as follows:-

"Delay in dealing with a bill duly presented is the responsibility of the paying bank, though I would have no doubt that a collecting bank, or a bank presenting as holder, might incur a responsibility if it failed to use diligence in requiring the paying bank to deal with a bill presented and failed to treat a bill as dishonoured if there was undue delay, on the ground that payment could not be obtained."

It has been pointed out that this statement was merely obiter and is not binding on this Court. I accept that this is so. Again, the point is taken on behalf of the defendants that the comment of the distinguished Supreme Court Judge was made in the context of a case where the Court was considering the position in relation to a domestic bill (payable in Irish currency though not so expressed) drawn on the Dublin Branch of an Irish Bank and presented for payment through the Irish clearing-house system. The defendant in the case was the endorser of the cheque so that the question of presentation within a reasonable time and the provision of notice of dishonour likewise within a reasonable time was of crucial importance having regard to the provisions of Sections 45 and 48 of the Bills of Exchange Act 1882. The fact that in the present case the cheque was not endorsed, that it was drawn on a foreign Bank and in Irish currency and that accordingly it could not be collected either through the Irish or the English

clearing-house systems does create a positive distinction between the circumstances of the present case and the Royal Bank of Ireland case so that I do not think that the comments of the late Mr. Justice Lavery could be applied without qualification but in substance I reject the proposition that the duty of a collecting Bank ends with the presentation of the bill or other instrument entrusted to it for collection. Even when that has been done it seems to me that there is still a duty imposed on it - in the words taken from Harte's Law of Banking aforesaid, "to take such other steps as may be proper to secure the customers interests".

Accordingly, it seems to me necessary to examine what the defendants did and what they might have done with a view to securing or protecting their customers interests.

As and when cheques were entrusted to the Elphin (and other branches of the defendant Bank) for collection on the Towey account in Silloth, the local Manager posted the same to the International Department of the Bank of Ireland at 9 Eyre Square, Galway (hereinafter referred to as 'The Galway Branch'). In relation to the particular transaction in question and such others in respect of which documentation was produced in Court, it appears that this aspect of the matter was dealt with commendable expedition. The cheques were posted to the Galway Branch on the date on which they were received by the local branch and it appears that they were ordinarily received in Galway some two days after posting. Again, it is the evidence of the Officials of the Galway Branch that they posted the items for collection to the U.K. on the date on which they were received or the date next following that date. Again, that evidence is fully supported by the documentation relating

to the instant case and others explored in the course of cross-examination. What is less clear is the extent of the postal delays between Galway and the U.K. Whilst witnesses speculated as to whether three, four or five days would be a reasonable period to allow for such delays, it was interesting to observe that a Senior Official in the Overseas Department in the Threadneedle Street Branch of the National Westminster Bank informed the Galway Branch by letter dated the 1st February, 1980, that the letter from that Branch to which his letter was a reply had taken seven days to reach its destination and that in fact the average time taken for items posted from Galway to London was a period of ten days. Apart from any delay in the postal service between Galway and London (where the cheques were to be presented) it was clear that the transaction also involved the transmission of the cheque from London to Silloth; the processing of the cheque there; authorisation to be transmitted from Silloth to London; payment or authority for it from London to Dublin; notice of the payment from Dublin to Galway; onward communication of that news to the local Branch and finally crediting the customer with the amount of the cheque. Undoubtedly this procedure was calculated to give rise to delay and it did so.

From the outset the Acting Manager of the Galway Branch, Mr. Crowley, was conscious of the delays and took very positive steps to reduce them.

As I say, the Galway Office wrote to the Threadneedle Street Branch of the National Westminster Bank as far back as the 11th January, 1980, complaining of delays in dealing with the cheques drawn on the A.J. Towey & Co. (Exports) accounts.

It was more than three weeks before the defendants received a reply to that complaint. Furthermore, the only suggestion made by National Westminster Bank at that stage and in that letter was that as payment was made by them to the Dublin Office of the Bank of Ireland that the Galway Branch should request the Dublin Office to expedite implementing payment instructions.

In April, 1980 the Galway Branch telexed the National Westminster Bank in London enquiring whether industrial action by the Porters of that Bank would affect payment of cheques for collection on the Silloth Office by customers of A.J Towey. Apparently such industrial action was taking place but was not a factor contributing to the delays concerning the parties.

Mr. Crowley and his Assistant Mr. Kelly subsequently set about proposing and securing consent to the alteration of the rather cumbersome system of collection. First it was proposed to the Officials in Threadneedle Street by telephone that instead of presenting cheques drawn on the Towey account to that Branch as had been the practice (and was indeed required by the instructions on the cheque) that they should be sent direct from Galway to Silloth. That was agreed by the Officials in Threadneedle Street and in a subsequent telephone conversation the alteration was likewise approved by the Silloth Branch. The evidence was that the first batch of cheques dispatched in pursuance of that arrangement was made on the 18th September, 1980. This procedure was continued until the 26th November when the parties reverted to the former practice of sending the cheques to Threadneedle Street.

As I understand it, it was about the same time -September 1980 - the Officers of the Galway Branch negotiated a further change in the arrangements with the co-operation of the Officers

at Threadneedle Street and the International Division in Baggot Street, Dublin. The Galway Branch procured the telex code which enabled it to receive direct by the tested telex communications from Threadneedle Street authorising payment on Towey cheques and thus obviating any delay which might be caused by routing these communications through Dublin.

In these circumstances I think it can be said fairly that the defendants - and in particular the Officials of the Galway Branch - went to very considerable lengths to improve the payment system which had been selected by Mr. Towey and acquiesced in by his customers and for which system the defendants had no responsibility whatever.

Some criticism was made of the manner in which the given system was administered by the defendants. The defendants did have an established procedure for collecting foreign items. That procedure was discussed by certain experts who gave evidence on behalf of the plaintiff. In particular, Mr. Smith, a retired but very experienced Bank Official, compared the Bank of Ireland system for collecting foreign items with that used by Lloyds Bank. Both Banks used a series of forms on which the appropriate information was included. Much of this information was dealt with by ticking appropriate boxes set against various matters in respect of which authority was required by the Bank. One difference between the forms used by the two Banks to which Mr. Smith drew attention in particular was the failure of the defendants' forms to seek information with regard to the fate of the cheque or other instrument. However, it did seem to me that an even more fundamental distinction could be drawn between the two sets of forms. Apparently in Lloyds Bank the

form was filled out in the Branch to which the instruments were entrusted. In the present case these forms were, as I understand the transaction, completed in the International Division in Galway. They were not based on information or authority obtained expressly from the customer at all. Indeed, there was no evidence led to the effect that Mr. Brennan required the moneys to be paid to him by means of a tested telex or indeed, that he would be responsible for the fees incurred by adopting that procedure. I would infer that in the system operated by Lloyds Bank - or at any rate in the Branch in Piccadilly with which Mr. Smith was particularly familiar - the Branch to which the instrument was entrusted retained a larger measure of control over the transaction than was the case here.

Mr. Smith explained that the document for collection would be transmitted ordinarily by mail to an agent of Lloyds Bank in the same town as the foreign Bank on which the cheque was drawn. The agent Bank would then present the cheque for payment and on payment to it the agent could effect immediate payment to the International Division of Lloyds by an appropriate debit to its agency account. The Lloyds system provides - as does the defendants' system - for a chaser (or tracer as it is called by the defendants) to be dispatched in the event of no reply or acknowledgment being received to the first communication. Mr. Smith expected the chaser to issue within ten days of the original communication. Under the Lloyds system there is provision for a follow-up procedure in the event of no satisfaction being received to the two first communications. They do not, however, use a second tracer as is the practice with the defendants. It was Mr. Smith's view that if the first

chaser did not procure a satisfactory result that more positive steps should be taken. He explained that appropriate procedures would include communications at a high level between the two Banks concerned. Indeed, he gave examples where the Chief Inspectors of the two Banks concerned communicated one with another.

Within their own procedures it is clear that the Galway Branch forwarded the items drawn on the Towey account during the year 1979 and up to the month of September 1980 directly to the National Westminster Bank at Threadneedle Street, London. The sworn evidence of Mr. Crowley and, indeed, of the Official dealing with the collections was that on dispatching any series of items for collection a date some two weeks forward was noted in the diary of the Branch and if by that date a reply had not been received the first tracer was sent. On dispatching the first tracer a similar entry was made in the diary for some ten days later. Again, it can be said that the evidence to this effect is supported by the documentation put in evidence. In particular, it can be seen that the collection which included the cheque payable to the plaintiff was dispatched on the 14th November (in that case in pursuance of the altered arrangement directly to Silloth), the first tracer was sent on the 27th November and the second tracer on the 9th December. But the matter was not left there. The evidence of Mr. Crowley - which I accept in full - was to the effect that he was in frequent communication by telephone with Mr. Ritchie, the Manager of the Silloth Branch. He 'phoned him every ten days or so. Not only do I accept that as being the case but it must be remembered that the tracers or reminders were all sent and made in the context of the various communications and negotiations and,

indeed, against the background of an express written complaint with regard to delay to the National Westminster Bank at Threadneedle Street.

However, evidence was given by Mr. Crowley that he spoke to Mr. Ritchie on the telephone in particular in the month of October 1980, that is to say, after the introduction of the procedure by which the cheques were remitted direct to the Silltoth Branch. In that telephone conversation Mr. Ritchie explained - as he had apparently done before - that the delay at his Branch was due to staff shortages. In fact Mr. Ritchie, at the request of Mr. Crowley, set out the problems with which he was faced in a letter to Mr. Crowley dated the 15th October, 1980. In that letter Mr. Ritchie made the following points:-

1. That in the weeks prior to the letter many Irish Banks had been short circuiting the established procedure by presenting cheques directly to his Branch instead of to the London Overseas Branch which was the Department equipped to deal with them.
2. That the Silloth Branch did not have the staff to deal with the volume of work.
3. That the staff problems had been exacerbated in the period prior to the letter.
4. That the situation had been improved and that it was hoped to reduce the delay to a period of five working days.

As Mr. Crowley was not satisfied with the progress that was achieved, it was decided to revert to the procedure by which the cheques were sent to Threadneedle Street.

However, it is clear that Mr. Crowley maintained communication with the Silloth Branch because it was on the 17th December, 1980, when he 'phoned that Branch and sought

to speak to Mr. Ritchie that he was informed that the latter was not available. He asked to speak to the person in charge and he was put in contact with a Mr. Gates who explained that he was temporarily in charge of the Branch. Mr. Gates went on to say that he was not in a position to discuss the Towey file and that the whole matter had been sent to Head Office for their control. However, he agreed to speak to Mr. Crowley the following day and did so and it was then that Mr. Crowley was informed that the cheques drawn by Mr. Towey and then outstanding would be returned marked "refer to drawer". This information was promptly included in a cautionary memorandum dated the 19th December, 1980, issued to all of the defendants Branch Managers. On the same day National Westminster telexed the Galway Branch informing them of the particular collections which were being returned. In fact, the list did not specify the collection which included Mr. Brennan's cheque but it was quickly established that this was an oversight and that indeed Mr. Brennan's cheque also was being returned.

The position then, as I see it, is that the Acting Manager, Mr. Nolan, having entrusted Mr. Brennan's cheque to the Galway Branch maintained an appropriate and effective interest in the matter by communicating from time to time with that office. The Galway Branch, having identified at an early stage the lapse of time between the dispatch of documents from their office to the U.K. and the receipt of the proceeds of the cheques, advocated and effected desirable alterations in the scheme which they were required to operate. They took every action which was required of them promptly and they followed up the transaction as a whole - rather than individual cheques - with Officials

of the Bank of Ireland in Dublin; Officials of the National Westminster Bank in Threadneedle Street both in correspondence and on the telephone and, more particularly, frequent telephone conversations with the Manager of the Silloth Branch.

It seems to me that even by the most exacting standards that the defendants exercised reasonable skill, care and diligence in presenting and attempting to secure payment of their customer's cheque.

In these circumstances an alternative argument was put forward on behalf of the plaintiff. It was contended that even assuming the defendants themselves had acted diligently and promptly in pursuit of their clients interests (as I am satisfied they did) that they are none-the-less vicariously liable for the negligence of the Silloth Branch in presenting the cheque in question to itself. To succeed in this contention the plaintiff must establish first that the Silloth Branch was the agent of the defendant and, secondly, that the same Branch acted negligently in that capacity.

No difficulty arises in analysing the rights and duties of each party where the payee of a bill himself demands payment from the drawer. Again, the issue is straightforward where the payee engages a bank to collect a bill on his behalf and the collecting bank send - as they once did - a messenger or representative to the drawee bank to collect payment thereof. In either case the person or the bank liable to pay on foot of the bill will, on presentation thereof, either pay or refuse to pay. However, as appears from the judgment of Bingham J. in Barclay's Bank and Bank of England 1985 A.E.R. 385 at 387 the increasingly laborious task of messengers collecting payment of cheques from individual banks was superseded (originally in London in

the early Eighteenth Century and later elsewhere) by the clearing house system which originated as an informal meeting-place where the messengers concerned exchanged cheques and settled the difference between the total exchanged. It is now well settled law that the engagement by a customer of a bank to carry out financial transactions on his behalf impliedly authorises the bank to adopt the established commercial usage. That usage includes resort to the clearing-house system and indeed the right to present cheques by post, a right which is conferred by usage on banks but on banks alone.

In relation to the clearing-house system and its relevance in relation to questions concerning the presentation of bills for payment there is a clear conflict of judicial opinion as expressed in this jurisdiction and as laid down in the British Courts. In the case of Barclay's Bank and Bank of England (referred to above) Bingham J. concluded that delivery at the clearing-house did not amount to presentation at the drawee bank even though the officers of the drawee bank at that stage took the item into their possession. In reaching that conclusion Bingham J. followed the decision of Murnaghan J. in the Royal Bank of Ireland Limited and O'Rourke 1962 I.R. 159 notwithstanding the fact that the latter decision was reversed by the unanimous decision of the Supreme Court reported at page 170 of the same volume. The conclusion of the Supreme Court can be summarised by quoting one of the sentences from the decision of Lavery J. at page 177 as follows:

"In the opinion of the Court the handing over of the cheque to the representative of the National Bank in the clearing-house was a presentment".

However, it is not the question of the interposition of the

clearing-house system that is material in the present case. Clearly I am bound by and would have no hesitation in applying the decision of the Supreme Court in that regard. There lies behind the English decision the proposition that whilst the officers of the drawee bank obtained possession of the item in question at the clearing-house they did so in the first instance at any rate as agents of the collecting bank. Whilst rejecting the ultimate decision reached in the Barclay case it seems to me that the concept of the drawee bank acting in certain circumstances and for certain purposes as the agent of the collecting bank is in no way inconsistent with the decision of the Supreme Court in the Royal Bank case. In fact this concept was earlier referred to in the decision of Erle C.J. in Bailey and Bodenham 16 C.B. (N.S.) 288 where, dealing with presentation by post, the Chief Justice said (at page 296) the following:-

"Assume that the City Bank adopted a usual and a proper course in sending the cheque by post to the drawees - and I am rather inclined to think that this could be a good presentment - they thereby constituted them their agents to present it to themselves".

It is on this basis that the plaintiff contends that the defendants are vicariously liable for the failure of the Silloth Branch to present the cheque to itself with reasonable promptness.

It seems to be that there is a very real distinction to be made between the nature of the agency which exists between a collecting bank, its own branches and employees or indeed any other bank selected by it for the purpose of collecting an item on behalf of a customer on the one hand and the involuntary agency which appears to arise by operation of law when the

collecting bank dispatches the item to the paying bank with a request for payment. It would appear that the agency of the paying bank is of a very limited and somewhat notional variety. Indeed it seems to me that this particular concept has been devised solely for the purpose of affording the paying bank a moratorium of twenty-four hours within which to discharge the duty which it owes to its own customer. It will be noted, for example, in Paget's Law of Banking, Seventh Edition page 435, dealing with presentment by post, explains the position in the following terms:-

"Presentment by one bank to another by post is sufficient.

In such case it would seem that the paying bank receives the cheque as agent for presentation to itself, and so can hold it till the day after receipt".

Again Halsbury's Laws of England, Fourth Edition, Volume 3 paragraph 100, deals with the same topic in similar terms as follows:-

"Presentment by post is sufficient and it would appear that when a bank forwards a cheque by post to the bank on which it is drawn the latter receives it as agent for presentment to itself, and in that capacity can hold it till the day after receipt".

In these circumstances it might be said that the presentation of an item is deemed to be made by the agent bank on the expiration of twenty four hours after its receipt by him through the post. It seems to me, however, that it would be more correct to say that the presentation is, in fact, made on the receipt of the item but, as a result of an agreement between banks or commercial usage, the presentation is deemed not to be made until the expiration of twenty-four hours. Certainly, it

would seem difficult to accept that a drawee bank could have possession of an item for several days and yet deny that it had been presented to it.

In my view, presentation is made by the effluxion of twenty-four hours after the delivery by post to the drawee bank. It follows that a collecting bank cannot incur responsibility for delay by the drawee bank in presenting an item to itself for collection.

Next it is contended that Mr. Crowley should have insisted upon a decision for Mr. Ritchie to dishonour the cheque if he was not prepared to meet it.

If the cheque had been endorsed and was being presented on behalf of a person to whom it was negotiated, then it would be important to obtain a prompt decision as to whether the cheque would be met. In the present case, however, I cannot see how the defendants would have "secured the best interests of their customer" by inviting the drawee bank to dishonour the cheque presented to it. In my view, it was the duty of the defendants to press the drawee bank to deal with the matter but it seems to me preferable that the defendants should have urged the drawee - as they did - to pay the cheque rather than to dishonour it.

There remains the conflict of fact as to whether or not Mr. Nolan informed Mr. Brennan on or about the 19th or 20th December that his cheque was being returned unpaid. It is true to say - as I have already pointed out - that the reference to Mr. Brennan's cheque had been omitted from the telex received from National Westminster on the 19th December and it is also true to say that the evidence of Mr. Nolan with regard to his communication with Mr. Brennan was somewhat vague. He was very confident that he had spoken to Mr. Brennan about this time and

advised him of the fate of the cheque. On the other hand, he could not say where the conversation took place. It may have been in the Bank, or in the street in Elphin or, indeed, in the street in Elphin somewhere near the Bank. However, notwithstanding these infirmities on balance I prefer the evidence given by Mr. Nolan with regard to this communication. Mr. Nolan showed himself as being concerned on behalf of all of his customers in relation to the Towey cheques. He was in frequent communication with the Galway Branch about them. I find it impossible to believe that he would have failed to communicate with Mr. Brennan at any time between the 19th or 20th December and the 5th January. Indeed, if he had failed to make contact it would surprise me if Mr. Brennan had not communicated with him. Even on Mr. Brennan's own account of what took place it would be staggering if he did not seek clarification or confirmation of the position having regard to the far-reaching implications of the news of the Towey disaster which was in general circulation in the Elphin area by the 20th December, 1980.

Perhaps I should add that even if I had taken a contrary view on either cause of action on which the plaintiff relies that I would not necessarily accept that the measure of damages to which the plaintiff was entitled was the amount of the cheque which was returned unpaid. It was the plaintiff's case that if the cheque had been returned to him at an earlier date that he would have taken the opportunity - as others had done - of calling upon Mr. Towey personally and pressing him for payment. Whilst it is true to say that some customers were more fortunate than others and did secure payment, the overall position, in so far as I am aware of it, is that Mr. Towey was adjudicated a bankrupt and that his creditors have not been and will not be paid in full. In his evidence Mr. Brennan went on to say that if he could not recover payment from Mr. Towey

personally that he would take the matter to his, Mr. Brennan's, solicitors and have Mr. Towey made bankrupt. It seems to me that that is the only course of action which the plaintiff could have guaranteed. In effect, it seems to me that at best he might have prevented other creditors of Mr. Towey obtaining preferential treatment and so secured a greater dividend for himself in Mr. Towey's bankruptcy. However, having regard to the view which I take on the main issues the question of damages does not arise.

There are two other matters on which I would like to comment first, I should make it clear that when I say - as I have said - that the National Westminster Bank - the paying Bank - owes no obligation to the plaintiff in these proceedings, it must be clearly understood that I am referring to the obligations which arise in contract and in tort from the very fact of acting in a banking transaction. It is not to be inferred, and I am not purporting to decide, that a Bank in the position of the National Westminster Bank could not - as a result of the activities of its employees - incur a liability to the plaintiff in the present case or any person similarly placed as a result of a wrong-doing of some other description. And secondly I should say that both parties referred to various passages from the decision of Mr. Justice Gannon in Tulsk Co-Operative Livestock Mart Limited and The Ulster Bank Limited (delivered the 13th of May 1983). That was another case which arose as a result of the somewhat unorthodox banking procedures adopted by Mr. Towey. The Tulsk Mart were placed in a particular difficulty as they purchased cattle on terms which allowed very limited credit facilities so that the substantial sales of cattles which they made to Mr. Towey created particular cash-flow problems having regard to the delay in procuring payment of the cheques drawn by him. Apart from that

consideration the management of the mart had frequently and clearly sought advice from the Ulster Bank with regard to the credit worthiness of Mr. Towey and the defendants had given them reassurance on that matter. Whilst Mr. Justice Gannon in his very detailed analysis of the numerous problems that arose, did draw attention to the fact that the delays in meeting the cheques were of themselves grounds for suspicion, the substantive issue in that case concerned the comforting advice which the defendants gave to the plaintiff as to the credit worthiness of Mr. Towey which advice was based upon information provided by the Manager of the Silloth branch but without regard to the very substantial body of other information - some rather disturbing - available to the defendants themselves in their capacity as bankers to Mr. Towey. Accordingly, neither party in the instant case felt that he could invoke the decision of Mr. Justice Gannon as being decisive on any of the issues which arose in the present case.

affixed

*J.D. W
5/6/85*