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G.D.T.G. 6

Judgment
4, 1966

IN THE PRIVY COUNCIL

No. 10 of 1965

ON APPEAL FROM THE SUPREME COURT
OF NEW SOUTH WALES

B E T W E E N

AUSTRALIA AND NEW ZEALAND BANK
LIMITED

(Defendant) Appellant

- and -

ATELIERS DE CONSTRUCTIONS
ELECTRIQUES DE CHARLEROI

(Plaintiff) Respondent

CASE FOR THE APPELLANT

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CLASS MARK

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GDI. G. 6

UNIVERSITY OF LONDON
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LEGAL STUDIES

25 APR 1977

25 RUSSELL SQUARE
LONDON, W.C.1.

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CASE FOR THE APPELLANT

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INTRODUCTION

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1. This is an appeal from a judgment of the Supreme Court of New South Wales entered in favour of the Respondent against the Appellant in the sum of £55,540.18. 7 and costs in an action entered in the Commercial Causes List of that Court pursuant to the provisions of the Commercial Causes Act 1903-1957 and heard before Mr. Justice Manning sitting without a jury in which the Respondent was Plaintiff and the Appellant was Defendant. The judgment so entered has, by reason of Section 5 of the Supreme Court Procedure Act 1900-1957, the same force and effect in all respects as a judgment of the Supreme Court of New South Wales.

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2. The said action was commenced by a writ

RECORD:

RECORD: issued out of the said Court on 20th February 1961 in which the Respondent claimed from the Appellant damages on an unspecified cause of action in the sum of £280,309.16.11. Pursuant to an order of the Court made on 25th July 1961, pleadings were dispensed with and the Respondent and the Appellant were ordered to file points of claim and points of defence respectively.

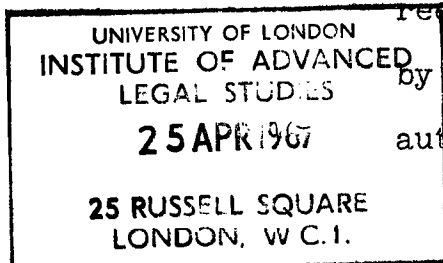
p.1 3. In its points of claim the Respondent alleged that the Appellant, by crediting to the account of Helios Heavy Electrical Engineering Contracting Co.Pty.Limited (hereinafter called "Helios") fifteen cheques of the Respondent all of which were drawn by the Snowy Mountains Hydro-Electric Authority (hereinafter called "SMHEA") in favour of the Respondent on the Commonwealth Bank of Australia totalling in amount £280,309.16.11., converted the said cheques and claimed the said sum from the Appellant as damages for the said conversion.

Exhibit "A"
p.231

p.2 4. In its points of defence as amended the Appellant -

(i) Denied that it wrongfully converted the said cheques to its own use.

(ii) Alleged that the said cheques were received by the Appellant and collected by it for its customer with the authority of the Respondent.



3.

- (iii) Alleged that before action brought the Respondent ratified and confirmed the acts of Helios in depositing the said cheques to the credit of its account with the Appellant. RECORD:
- (iv) Alleged that the Respondent was estopped by its conduct from denying that the said cheques were received by the Appellant and collected by it for its customer with the authority of the Respondent.
- (v) Alleged that the Respondent was guilty of contributory negligence.
- (vi) Alleged that as a banker acting in good faith and without negligence it received for a customer payment of the said cheques.
- (vii) Denied that the Respondent suffered the damage alleged or any damage.

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20 5. In its reply the Respondent denied that it authorised the receipt by the Appellant and the collection by it for its customer of the said cheques, denied that the Appellant acted in good faith and without negligence and joined issue on the amended points of defence. p.4

6. The hearing of the action occupied eight days between 7th and 16th September 1964 and on 7th October 1964 His Honour delivered judgment. p.209

RECORD: The conclusions to which His Honour came were as follows:

- (a) Helios did not have the Respondent's authority - express, implied, or apparent - to endorse the cheques for payment into its own account or to deposit them therein.
- (b) There was accordingly a conversion by the Appellant of the said cheques.
- (c) The Appellant acted in good faith but not without negligence in collecting the cheques for its customer Helios. 10
- (d) The subsequent conduct of the Respondent did not amount to a ratification of the action of Helios in depositing the cheques in its own account.
- (e) The loss which the Appellant had suffered was necessarily the difference between the total value of the said cheques and the amount in fact remitted by Helios to the Respondent which difference was £55,540.18.7. 20

7. The Appellant proposes briefly to review the circumstances out of which the action arose as revealed by the evidence and then to present the contentions by reason of which it is respectfully urged that His Honour's judgment was wrong. The review is contained in

paragraphs 8 to 49 hereof and the contentions
in paragraphs 50 to 80 hereof.

RECORD:

CIRCUMSTANCES OUT OF WHICH THE APPEAL ARISES

8. The Respondent (referred to throughout the proceedings as "A.C.E.C") is a company incorporated in Belgium and engaged in the manufacture, sale and installation of heavy electrical equipment throughout the World. p.7
LL.11-17

10 9. By an agreement in writing dated 24th February 1953 the Respondent appointed Helios Heavy Electrical Engineering & Contracting Co. (hereinafter also called "Helios"), a firm registered in New South Wales of which one Thomas Ismet Guler (hereinafter called "Guler") was the proprietor to be its agent in Australia and on 8th June 1954 a codicil thereto was signed. The company Helios was in 1956 incorporated in New South Wales and Guler was its governing director and principal shareholder. It took over
20 the business of the firm and became in its place the Respondent's agent in Australia although no formal agreement between itself and the Respondent was entered into. As His Honour found, "it seems to have been regarded by all parties as unnecessary to distinguish between T.I. Guler personally, the firm, and the company, and all three have been treated as one and the same". Exhibit
"1" p.569
Exhibit
"1" p.573
p.209
L.31

RECORD: This finding the Appellant does not challenge.

10. After the appointment referred to in the preceding paragraph Guler procured for the Respondent a contract for the supply of transformers to the Electricity Commission of New South Wales and commenced negotiations on the Respondent's behalf with SMHEA in connection with a tender for the supply of seven transformers and auxiliary equipment to be installed in a power station constructed as part of the Scheme. For the purpose of preparing a draft tender Guler visited the Respondent in Belgium in October 1954. In the course of this visit he informed Mr. Chevalier, Managing Director of the Respondent's Transformer Division that Guler would be responsible for all the delivery, transport, customs duty and other charges arising in Australia. 10

P.59, L.16

P.62, L.2

11. On 9th September 1954 Guler as the sole proprietor of Helios opened with the Appellant a current account in the name of that firm and in November 1954 on his return from Belgium 20

P.359, L.33

informed the Appellant that he was submitting a tender to SMHEA for the installation of heavy equipment.

Exhibit "4"
p.584

12. On 23rd November 1954 the Respondent forwarded to Helios information for submission of the tender to SMHEA and authorised Helios

to prepare tender prices. The Respondent's prices were F.O.B. and C.I.F. prices whereas the tender price to SMHEA included customs duty, cartage in Australia, local insurance, installation and other outgoings arising in Australia (hereinafter called "local expenses") which were incurred not by the Respondent but by Helios together with a percentage commission added by Helios for itself.

RECORD:

10 13. On 13th December 1954 Helios placed a written tender before SMHEA on behalf of the Respondent. This tender was for the supply and delivery of the equipment to the site; payments for local expenses such as customs duty and transport in Australia were to be paid by SMHEA to Helios upon presentation of invoices and customs entry. This tender was seen and approved by Mr. Chevalier, the said Managing Director of the Respondent's Transformer Division, in Australia before it was submitted.

Exhibit "4"
p.593

p.598,L.19

p.62,L.21

20 14. On 14th February 1955 Guler called on the Appellant with a letter from the Respondent to advise that the Respondent was arranging with its Bankers to establish a guarantee in Australia in favour of Helios authorising an overdraft up to £5,000 to cover customs duty and other charges incurred by Helios on its behalf for electrical equipment being shipped from time to time.

p.360,L.34

RECORD: 15. Following discussions between Guler and
p.63,L.4 representatives of SMHEA concerning the method
of payment under the proposed contract, Helios
wrote on 7th March 1955 a letter to SMHEA
Exhibit"4" stating "we are in agreement that the payment will
p.610,L.32 be executed in accordance with your specification..."
and deleting portion of the payment clause in
Exhibit"4" the tender letter of 13th December 1954. As a
p.598 result, the tender as amended provided for
Ll.19-23 payment by SMHEA to the Respondent in Australia 10
for the local expenses rather than to Helios.

16. On 21st March 1955 Helios sent to the
Exhibit"4" Respondent a cable requesting a "full
p.612 credential" for submission in connection with
Exhibit"4" the tender. On 21st March 1955 the Respondent
p.613 sent a cable to SMHEA: "We A.C.E.C. confirm that
Helios Heavy Electrical Engineering Contracting
Co. owned by Mr. Guler are our general agents
for Australia and they have the attorney to act
on our behalf for submission, execution and 20
realising contracts made or sub-contracts by
ourselves with full technical and financial
Exhibit"4" backing". A confirming letter dated 22nd March
p.613 1955 was in material respects identical except
Ct.Exhibit for the use of the word "realisation" instead of
"D",p.234 "realising". Copies of these documents were
sent to Helios for it to use as it saw fit (as
the Respondent's Export Manager agreed in

- evidence) and in particular to show to the Appellant. RECORD:
p.21, L1.3-11
17. Guler was notified in May 1955 that the tender he had submitted would be accepted and this was conveyed to the Respondent who congratulated him on his success. A formal acceptance in writing was communicated by SMHEA to "The Manager A.C.E.C. care Helios Heavy Electrical Engineering etc. . ." on 27th July 1955. The formal contract itself - identified as No.40,006 - was not signed until 13th June 1957 pursuant to a Power of Attorney from the Respondent to Guler dated 3rd April 1957. p.66, L.7
Exhibit "4", p.620, L.25
Exhibit "4" p.627
Exhibit "K" p.280
18. By letter dated 8th August 1955 Helios forwarded to the Respondent the original letter of acceptance from SMHEA and sent a copy of the letter to SMHEA of 13th December 1954 referred to in paragraph 13 above giving the F.O.B. prices quoted informing the Respondent that "the difference in francs between your F.O.B. prices and the F.O.B. price quoted by us gives in percent our commission rate". This percentage was in fact 1.7837% and was to be allocated to Helios after completion of payments due in accordance with the contract. Exhibit "Q" p.397
Exhibit "4" p.635
19. The Respondent proceeded with manufacture of the equipment to be supplied under the contract and in a letter dated 8th February 1956 Exhibit "4" p.635, L.19
Exhibit "4" p.860 L.1
20. The Respondent proceeded with manufacture of the equipment to be supplied under the contract and in a letter dated 8th February 1956 Exhibit "4" p.639

RECORD: the Respondent approved the attempt by Helios to obtain progress payments from SMHEA. The agreement constituted by the acceptance by SMHEA of the tender referred to above provided that progress payments would be made by instalments of 20% each of the F.O.B. contract value of any portion of the equipment upon certification by the Engineer of SMHEA that the proportion of work carried out justified the payment; it was further provided that in consideration of SMHEA making progress payments the Respondent should furnish a banker's guarantee on conditions which would ensure delivery of the equipment or repayment of the advances. Helios duly applied to SMHEA for such a payment. All the goods supplied by the Respondent to SMHEA under the said contract were shipped to Australia under bills of lading in favour of Helios.

20. In May 1956 Guler called on the head office of the Appellant to make the acquaintance of Mr. Dunstone a new sub-manager. Guler informed Dunstone that, as the Respondent's representative, he was administering contract 40,006 with SMHEA and showed him a copy of the authority which the Respondent had sent in March 1955 referred to in paragraph 16 above. He informed Dunstone that Helios would be receiving payments from SMHEA, that he would pay them into the account of Helios

Exhibit "K"
p.323,L.3

p.323,L.10

Exhibit "4"
p.640,L.25

p.170,L.24

p.68,L1 4-14
p.154,L.13

p.68,L.30

p.68,L.32
-p.69,L.12

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with the Appellant and that he would then apply for export exchange approval and issue cheques for transmission of the money to Belgium.

RECORD:

21. In its capacity as general agent for the Respondent in Australia, Helios had also supplied large quantities of electrical equipment manufactured by the Respondent to other authorities including, amongst others, the State Electricity Commission of Victoria, the State Electricity Commission of Western Australia, the Electricity Trust for South Australia, the Northern Riverina County Council and the Northern Rivers County Council, under contracts which it entered into in its own name. The Respondent does not appear to have differentiated between customers to whom it was supplying equipment pursuant to a contract to which it was itself a party and those, who were buying its equipment pursuant to a contract entered into by them with Helios: in each case it looked to Helios for the collection of money from them and referred to them without differentiation as "the Australian clients". Payments under these contracts were made to Helios and paid into its current account with the Appellant and the moneys to which the Respondent was entitled were transmitted therefrom to Belgium. By the end of 1954 the total of the moneys so transmitted by Helios to the Respondent in Belgium from its

E.g.,
Exhibit "4"
p.646, L.9
p.655, L.9
p.658, L.22
Exhibit "S"
Pp.500,504.
Cf.p.175,
L.21

RECORD: said account with the Appellant was approximately
 Exhibit "14" a quarter of a million pounds. By June 1956
 p.884 this amount had risen to over £450,000 as
 p.153,L.9-24 Dunstone was at that time aware. By 1958 the
 total of these transmissions exceeded a million
 p.160,L.26 and a quarter pounds.

Exhibit "A" 22. On 25th June 1956 SMHEA drew a cheque on
 the Commonwealth Bank of Australia in favour of
 "Ateliers de Constructions Electriques de
 Charleroi or Order c/- Helios etc. Co., 164 Pitt 10
 Street, Sydney" for £62,180.11.2 representing 40%
 p.142,L.8 of the F.O.B. value of one transformer and 20% of
 the F.O.B. value of the other six. This was
 deposited by Helios to the credit of its account
 p.158,L.30 with the Appellant on 29th June 1959 and on the
 Exhibit "4" same day Helios wrote to the Appellant (on a
 p.662 letterhead which described it as "Australia Office
 p.70,L.10 for A.C.E.C.") enclosing a cheque drawn on its
 p.156,L.15 own account for £62,967.12.0. and requesting
 transmission to the Respondent of the equivalent 20
 in Belgian Francs of that amount. The Foreign
 Exhibit "19" Exchange Regulations in force at the time required
 that foreign currency should be sold only to the
 holder of an import licence and only to the
 amount stated in that licence and all the licences
 in respect of the importation of the equipment
 p.170,L.23 supplied by the Respondent under the said
 contract were applied for and issued in the name

of Helios. Helios lodged a copy of the import RECORD:
 licence in question with the Appellant to
 enable this transmission of funds to Belgium to p.159,L.27
 take place.

23. The Respondent was informed of this trans- Exhibit"4"
 mission by a notification from the Respondent's p.663
 Belgian bank of the receipt of this transmission
 by it on which notification it was stated that
 the transmission from Australia was on the
 10 instructions of Helios. p.663,L.28

24. The contract assumed an exchange rate of
 112 Belgian francs to the Australia pound and on Exhibit"4"
 27th July 1956 Helios requested from SMHEA a p.598,L.41
 further sum to cover a difference in the rate of Exhibit"4"
 exchange at the date when the transmission was p.667
 made which had been paid by Helios out of its own
 account to obtain the necessary number of Belgian
 Francs for the Respondent and this was in due
 course paid by the cheque of SMHEA for £1,061.11.2
 20 dated 27th August 1956 made out to the Respondent which was
 deposited into the account of Helios with the
 Appellant. About this payment into Helios' account p.22,
 the Respondent's Export Manager said in evidence L.32
 no complaint was made.

25. On 10th January 1957 SMHEA wrote to Helios Exhibit
 a letter containing instructions concerning the "4"
 procedure for lodging invoices and making claims p.672
 upon it. With this letter a sample claim form was Exhibit
 "4"
 p.676

RECORD: enclosed on which a demarcation was made between those portions of any sum paid by SMHEA which were for transmission to Belgium and those which were to remain in Australia.

Exhibit"4" p.682 On 1st February 1957 Helios wrote to the Respondent enclosing a copy of this letter and of the sample claim form. By letter dated 15th June 1957, the Respondent expressed agreement with this procedure for making claims on SMHEA for payment.

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26. It was necessary that the transformers being supplied by the Respondent be filled with oil and the Respondent originally suggested to Helios (in its letter of 25th May 1955) that SMHEA should purchase oil in the United Kingdom whence it could be sent to Belgium in order to fill the transformers prior to their shipment. After the tender had been accepted by SMHEA,

Exhibit"4" p.635, L.28 Helios informed the Respondent that as things stood the purchase of oil was the Respondent's responsibility (see letter 8th August 1955). By letter dated 19th September 1956 the Respondent instructed Helios to order the oil from

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H.C. Sleigh Ltd. in Australia and this Helios did and accepted liability therefor. These purchases of oil were known by the Respondent to amount to many thousands of pounds. From SMHEA Helios received details of transformer oil to be supplied in the letter of 31st January 1957. Finally the Respondent, being aware that SMHEA would accept claims only in the form prescribed and would make payment only to the Respondent by name, instructed Helios by letter of 15th June 1957 to include in the claims on SMHEA amounts which Helios had expended on the purchase of oil for the transformers.

27. On 24th October 1956 Helios had informed the Respondent that it was negotiating for further progress payments from SMHEA and on 12th April 1957 Helios wrote to the Respondent advising that SMHEA was prepared to make one. On 6th May 1957 Helios wrote to the Appellant requesting that it should give a guarantee in respect of a further progress payment and on 7th May 1957 wrote to the Respondent saying "We intend to pay you this week £38,000 clear . . .". On 13th May 1957 Helios made a claim upon SMHEA for £38,862.17.1. for progress payments and forwarded the necessary bank guarantee.

28. On 27th May 1957 SMHEA drew a cheque on its said bank in favour of the Respondent or Order

RECORD:
Exhibit
"4"
p.667
Cf.p.670
p.33,L.34
Exhibit
"4"
p.680
Exhibit
"4"
p.750
Exhibit
"R"
p.407
Exhibit
"4"
p.699
Exhibit
"4"
p.725
Exhibit
"4"
p.726,L.1
Exhibit
"4"
p.728
Exhibit
"A"

RECORD: "c/- Helios etc. Co., 197 Victoria Avenue, Chatswood, N.S.W." for £38,862.17.1. This was deposited by Helios to the credit of its account with the Appellant and on the same day Helios wrote to the Appellant enclosing a cheque drawn on its account for £38,862.17.1 together with an application by it for foreign currency with a request that the Appellant transmit to the Respondent the equivalent in Belgian Francs of that amount. Again this transmission was made against an import licence in respect of the goods in question issued in the name of Helios.

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Exhibit "4" p.749 29. As before the Respondent was informed of this transmission by letter from Helios and by notification from its bank in Belgium of receipt of the transmission on which it was again stated that the transmission was on the instructions of Helios. On 11th June 1957 the Respondent wrote to Helios acknowledging receipt of this transmission and requesting Helios to claim further progress payments.

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Exhibit "4" p.753 30. By letter dated 18th June 1957 to the Respondent, Helios confirmed that further progress payments from SMHEA would be requested and by letter dated 25th June 1957 advised the Respondent that it had made claims for further progress payments, saying "As soon as we receive payments, we shall submit them to you". In a letter to the

Exhibit "4" p.756

Respondent's Export Manager dated 1st July 1957 RECORD:
Guler said in relation to payments from SMHEA: Exhibit
"R"
"I hope to receive 20% for No. 1 and 20% for No.4 p.432
p.433
in the near future". L.10

31. On 12th July 1957, in an interview with
Dunstone concerning the state of his account,
Guler, referring to an amount of over £90,000 which
had been lodged the previous day, stated that it
represented payment for equipment supplied and the Exhibit
"10 bulk of it would be sent to Belgium. On 12th August p.368
1957 Dunstone asked Guler to open a Helios No. 2 L.31
Account for the Australian enterprise, leaving
the ordinary Helios account for his Belgian
principals and this he agreed to do. p.368
L.44

32. On 30th August 1957, SMHEA sent to Helios
a further cheque drawn in the same way for
£9,822.8.7. This was deposited by Helios to Exhibit
"A"
the credit of its account with the Appellant and
on 12th September 1957 Helios wrote to the Exhibit
"20 Appellant enclosing a cheque drawn on its account p.776
for this sum and requesting transmission to the
Respondent of the equivalent in Belgian Francs of
that amount. Again, this transmission was made
against an import licence in respect of the goods
in question issued in the name of Helios. The
Respondent was informed of this transmission by Exhibit
"R"
letter from Helios and by notification of receipt p.437
Exhibit
"R"
from its bank in Belgium on which it was stated p.435

RECORD: that the money had been transmitted "By order of Helios, Sydney".

Exhibit "A" 33. On 9th September 1957 SMHEA sent another cheque to Helios drawn in the same way for £3,513.1.6. This cheque was entirely for local expenses incurred in Australia by Helios and none of the money represented by it was described on the claim form in response to which it was paid as being for transmission to Belgium. It was deposited by Helios to the credit of its account with the Appellant and no part of it was in fact transmitted to Belgium. 10

Exhibit "A" 34. On 23rd September 1957 a further cheque was drawn by SMHEA on which the payee was described in the same way for £15,545.2.10. This was deposited by Helios to the credit of its account with the Appellant and on 30th October 1957 Helios wrote to the Appellant enclosing a cheque drawn on its said account for £15,545.2.10. 20

Exhibit "4" p.794 together with the usual application for foreign currency and request for transmission to the Respondent. As usual the transmission was

Exhibit "4" p.797 made against an import licence held in the name of Helios. On the same day Helios notified the Respondent of this transmission and it was in

Exhibit "4" p.797 due course notified by its own bank that this sum had been received on the order of Helios.

Exhibit "4" p.796 35. On 30th October 1957 Helios wrote to the

Respondent in the following terms: "Please note RECORD:
 that we do not want you to send transformers in
 a closer succession than four weeks. In view of
 the fact that it is us who pays the customs duty
 and other charges which amount to about £6000 -
 £7000 per transformer, we do not wish to be
 burdened unnecessarily. Furthermore we cannot
 supervise two transformers in one month. Normally
 it takes anything between 1 - 3 months to
 10 recuperate (sic) our monies from the customers
 for customs duty and expenses. . . Today we have
 transferred £15,545.2.10 against your Bank
 Guarantee. The amount of 1,087,244.55 B.F. sent
 in September represented 20% plus C.I.F. charges
 for Unit No. 2". In its reply to this letter Exhibit
 the Respondent acknowledged the difficulties Helios "R"
 was experiencing in meeting customs duty and other Pp 456-
 expenses and "in order to help you in this 461
 connection" suggested a basis upon which a demand p.459,L.31
 20 for three further progress payments could be
 justified.

36. In October 1957 two further cheques were
 drawn in the same way by SMHEA for £5,919.15.2 and Exhibit
 £6,189.14.10 of the total of which sums almost "A"
 half was for local expenses and not transmissible Exhibit
 to Belgium. On 12th December 1957 SMHEA drew a "11"
 cheque in the same way for £380 which was p.882
 entirely in respect of local expenses. All Ll.28-34
 p.882
 Ll.35

RECORD: these cheques were deposited by Helios to the credit of its said account with the Appellant.

37. On 19th December 1957 a further cheque for Exhibit "A" £23,317.14.3 was drawn by SMHEA in the manner aforesaid and deposited by Helios to the credit of its said account being wholly in respect of moneys transmissible to Belgium. On 22nd

Exhibit "4" January 1958 a sum of £28,977.14.3 was transmitted p.816

by Helios through the Appellant bank to the Respondent against an import licence held by Helios and two days later the Respondent was notified of its receipt by its Belgian bank in

Exhibit "4" a communication which stated that the payment p.817 came "from Helios".

38. On 30th January 1958 a further progress payment from SMHEA was made by cheque drawn as before for the sum of £42,636.12.11.

Exhibit "A"
Exhibit "11" A proportion of this amount represented p.883, L1.3-8

It was deposited by Helios to the credit of its said account with the Appellant as before. On 12th February 1958 a further cheque for £23,317.14.3 was sent by SMHEA to the Respondent "c/- Helios etc." and this was deposited with the Appellant and collected by it

Exhibit "4" in the usual way. On 11th February 1958 a p.822A request in the usual form was made by Helios to the Appellant for transmission of this last-mentioned sum to the Respondent in Belgium and

this was done in the usual way, with the usual notification to the Respondent.

RECORD:
Exhibit
"4"
p.826

39. In February, March and April three further cheques (being the last of the subject fifteen) were drawn by SMHEA in the usual way for a total sum of £47,562.13.2 and sent to Helios. Of these three cheques, two represented payments which were in part for local expenses and the third wholly so. The amount thereof which was in respect of local expenses was £17,282.3.8. These three cheques were also collected by the Appellant for the account of Helios. In the months of February and April Helios transmitted to the Respondent in Belgium out of its said account in the usual way a total of £45,000 which was identified to the Respondent as pertaining to the subject contract.

Exhibit
"A"

Exhibit
"11"
p.883
L1.10-20

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40. Mr. Guillery, the Respondent's Manager for the export zone which included Australia (hereinafter called "Guillery"), had visited Australia in 1955, 1957 and 1958 to supervise the activities of its sole agent Helios. In 1957 he had come pursuant to instructions given in a letter to him from the Respondent of 23rd April 1957. Discussing delays which had occurred in the receipt by the Respondent of payments from Australian customers, this letter stated :

Exhibit
"R"
p.472

Exhibit
"R"
p.474
Exhibit
"R"
p.477

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p.8,L1.3-9

Exhibit
"4"
p.717

"Mr. Guler usually joins his invoices to ours and

p.720
L.26

RECORD:

transmits them to the client, and we fear that certain delays could originate in this transmission. In addition, Mr. Guler's letters in connection with payments have lead us to believe that the clients usually paid him and he in turn paid A.C.E.C. . . ." He remained in Australia until June of that year when he left with warm thanks to Guler for all his assistance during his stay.

Exhibit "4"
p.745, L1.14

41. When Guillery returned in February 1958 we made further investigations into the conduct by Helios of its agency because at this time the Respondent was suspicious that Helios was receiving money from SMHEA and from other customers for which it did not account to the Respondent. He was an experienced investigator. Particular attention was given to the precise amount actually received by Helios from SMHEA and at the offices of that Authority he saw all documents relating to payments made by SMHEA under the subject contract including the fifteen cheques now in question. He also learned that each of those cheques had been paid into the account of Helios with the Appellant and had been collected by the Appellant for the credit of that account. In a letter which he wrote to Mr. Callinan, the officer of SMHEA in charge of this contract, on 26th April 1958 after he had

p.37, L.28

p.13, L.28

p.52, L.3

p.10, L1.33-35

p.11, L1.6-8

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been investigating this matter for two months and had called on the Appellant, he said: "I would like to renew my thanks for the kind assistance which you gave me by **communicating** to me the document regarding payments made by the Snowy Authority on Contract 40,006. I am glad to inform you that I found everything perfectly in order: all remittances from Snowy for A.C.E.C. have been transferred by the representa-

10 tive. Only in a few cases some delay occurred in the transfer, due to the fact that the money was temporarily used for paying local expenses, such as customs duties, rail transport etc. but as soon as the Authority reimbursed those expenses to the representative, the amounts received by him were immediately transferred. This procedure is perfectly normal and never raised any objection from A.C.E.C.". This he stated in evidence to be in part deliberately false.

20 Nevertheless to Mr. Callinan he said on 23rd May 1958, after becoming aware that the cheque in question were made payable to the Respondent and had been paid into the Helios account, that the amounts so received by Helios had been transferred to the Respondent.

42. On 28th May 1958 Guillery signed on behalf of the Respondent jointly with Helios a document addressed to SMHEA concerning the subject

RECORD:
 p.13, L1.11-20
 p.14 L1.24-30
 p.16, L. 40
 p.p.15 17
 p.12, L. 10
 Exhibit "E"
 p.235

RECORD: contract and another contract (numbered 40,019) for the supply of equipment to SMHEA by the Respondent to which Helios was the contracting party. The material portion of this document was in the following terms :-

"Contracts 40,006 (7-56 MVA Transformers) and 40,019 (22 Lightning Arrestors)

WE the undersigned representatives of Ateliers de Constructions Electriques de Charleroi and Helios Heavy Electrical Engineering Contracting Company Pty. Ltd., the Contractors for the above-mentioned Contracts, respectively HEREBY REQUEST that all future payments due by the Authority to the Contractors under those Contracts be made by the Authority's cheques payable and paid to the Sydney Branch of Comptoir National D'Escompte de Paris to be credited to the account of Ateliers de Constructions Electriques de Charleroi with the said Bank and WE STATE that the receipt of the said Bank for the said payments shall be a sufficient discharge to the Authority of its liability to the said Contractors for the said payments under the said Contracts and WE ACKNOWLEDGE that all payments made by the Authority on account of the said Contracts up to the date hereof have been properly made and have been received by the said Contractor on the said account and WE UNDERTAKE to furnish to the Authority within one month of the date hereof written confirmation by the said Contractors respectively of the above request, statement and acknowledgment".

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Exhibit "E"
p.236

This document was on 19th June 1958 formally confirmed by the Respondent in Belgium under the hand of its Managing Director at the British Embassy in Brussels before the British Pro-Consul at a time when it was known to the Respondent that all subject cheques had been endorsed by Helios and paid into its account with the Appellant.

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43. In return for the signature by the Respondent

of this document, Guler transferred to Guillery on behalf of the Respondent the remaining import licences in the name of Helios necessary for the transmission to Belgium of further moneys falling due under the contract with SMHEA.

RECORD:
p.149,
L1.8-20
Exhibit
"4"
p.832

44. Guillery in the meantime had, on behalf of the Respondent, given instructions to a firm of Sydney Solicitors and on 10th June 1958 those
10 Solicitors wrote to Guler both in his personal capacity and as the Director and Manager of Helios a letter on behalf of the Respondent. This letter referred to the remuneration to which Helios was entitled in respect of local expenses incurred in connection with performance of the subject contract with SMHEA and proceeded: "We understand that included in the cheques received
20 from the Snowy Mountains Authority and made payable to A.C.E.C. were some moneys which belonged to Helios. Having received the cheques and paid them into the account of Helios your plain duty was to account immediately to **our** clients for that portion of the proceeds which really belonged to them. This was not done". The letter then referred to the new arrangements for the making of payments by SMHEA under the subject contract as recorded in the document of 28th May 1958 quoted in paragraph 42 above and

Exhibit
"16"
p.891

p.891, L.31

Exhibit
"E"
p.235

RECORD: proceeded: "This however does not dispose of
p.892,L.5 the problem as to the moneys which have already
been received by you and which are not satis-
factorily accounted for. On the facts put before
us we have advised A.C.E.C. that your handling of
their moneys in this way could in fact amount
to misappropriation . . .". Guillery saw this

Exhibit "M"
p.373,L.16

letter and showed a copy of it to the Assistant
Manager of the Appellant at an interview between
them which took place on 23rd June 1958. He

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Exhibit "16"
p.889

forwarded a copy of it to the Manager of the
Appellant on 4th July 1958.

45. At the said interview with the Assistant
Manager of the Appellant on 23rd June 1958

Exhibit "M"
p.374,L1.1-17

Guillery stated that Guler was receiving moneys
from SMHEA and other contracts which were not
remitted to Charleroi until as much as ten weeks
later and, in some cases, it was doubted whether
Guler had remitted all the moneys received which
had prompted the Respondent's Solicitors' letter
to him. In consequence of all this Guillery

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said that the Respondent had decided that as it had
been associated with the Ccmptoir National
D'Escompte de Paris in other countries, it would
open an account with that Bank in Sydney for the
receipt of all progress payments and funds would
be remitted directly they were received and would
reach Charleroi the same day. He made no

reflection on the Appellant but said that even had the Respondent opened an account with the Appellant the transmitted funds would have to go through London and that would mean further delay. On the following day Guillery promised to send the Appellant a photostat copy of the document of 28th May 1958 referred to in paragraph 42 above signed by the Respondent and by Helios and this was subsequently done.

RECORD

p.375,L.3

Exhibit
"E"
p.235

10 46. On 25th July 1958 at an interview between Guillery, the Assistant Manager of the Appellant and certain other persons, Guillery asked that an Accountant who was present should examine the Helios No. 1 Account maintaining that there should be no liability on the part of the Respondent to Helios as Helios had received reimbursement for all outlays which it was obliged to make, and should investigate whether all payments received by Helios on behalf of the Respondent had been transferred, maintaining
20 that there was at least £14,000 withheld.

Exhibit
"M"
p.378,L.40
-p.379,L.3

47. In July 1958 Helios was in financial difficulties through failure on the part of a customer to make payments under a large contract and on 26th July 1958 the Appellant, under an equitable mortgage which it held in respect of the Helios bank account, appointed a Receiver of that company. Helios was subsequently put into

p.88
L1.28-40
p.87,L.34

RECORD: liquidation and was unable to pay its creditors in full.

Exhibit "4"
p.834,L.26

48. After May 1958 Guillery on behalf of the Respondent entered into correspondence with SMHEA and on 5th August 1958 that Authority forwarded to him a schedule of payments to Helios for remittance overseas and amounts received by the Respondent.

Exhibit "4"
p.861

49. On 12th January 1960 the Respondent wrote to the Appellant a letter stating that it "had been unable to trace" certain progress payments claimed by SMHEA to have been made under contract No.40,006 between July 1956 and March 1958. After an acknowledgment of this letter, certain further correspondence and enquiries from the Receiver of Helios, the Appellant by letter of 10th June 1960 rendered to the Respondent an account of amounts received by Helios from SMHEA in payment of expenses incurred by it and of those received by it on account of the Respondent.

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Exhibit "4"
pp865-869

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CONTENTIONS

50. The Appellant presents its submissions under the following headings :

- I. Helios had actual authority - express or implied - to pay the subject cheques into its own account, (Paragraphs 51-63).

II. Helios had apparent authority to pay RECORD:
the subject cheques into its own account.
(Paragraphs 64-65).

III. There was no conversion at least of
those cheques which included sums to
which Helios was entitled.
(Paragraphs 66-68).

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IV. The acts of Helios in depositing the
subject cheques to the credit of its
account with the Appellant were
ratified by the Respondent.
(Paragraphs 69-73).

V. The Appellant as a banker acting in
good faith and without negligence
received payment of the subject
cheques for a customer.
(Paragraphs 74 - 77).

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VI. In any event, the damages recoverable
by the Respondent could not exceed the
difference between the amount of the
subject cheques not remitted to the
Respondent and the total of that portion
of the cheques which represented sums
payable to Helios. (Paragraphs 78-80).

I. HELIOS HAD ACTUAL AUTHORITY -
EXPRESS OR IMPLIED - TO PAY THE
SUBJECT CHEQUES INTO ITS OWN
ACCOUNT.

51. In examining the actual antecedent authority

RECORD: which Helios had so to deal with the cheques the following legal principles are relevant:

- (a) Where instructions given to an agent are ambiguous, the agent has authority to act in accordance with a reasonable construction of them.
- (b) An agent has authority to do, in the usual way, any act which is necessary for, and ordinarily incidental to, the effective execution of his express authority. 10
- (c) An agent employed to act in a particular place where transactions are governed by certain customs and usages, has authority to act in accordance with such customs and usages, whether or not known to his principal. One illustration of this is where local law requires a particular course to be followed.

52. Express authorities given by the Respondent to Helios which are relevant to the subject contract with SMHEA include: 20

- Exhibit "1" p.569 (i) The agency agreement of 24th February 1953 and the codicil thereto of 8th June, 1954;
- Exhibit "1" p.573
- Exhibit "4" p.613 (ii) The cable of 22nd March 1955;
- Exhibit "4" p.613 (iii) The letter of 23rd March 1955;
- Exhibit "Q" p.396 (iv) The Power of Attorney of 3rd June 1955; and
- Exhibit "Q" p.397

(v) The Power of Attorney of 3rd April 1957. As already noted in paragraph 9 above, it was agreed on both sides and accepted by His Honour that the company Helios Heavy Electrical Engineering Contracting Co.Pty.Ltd. succeeded to such of these authorities as were given to Guler.

RECORD:
Exhibit
"Q"
p.397

10 53. Although there was a particular occasion for sending the cable and letter of 21st and 22nd March 1955 (referred to in paragraph 16 above), the authority they gave was wide and general and was not countermanded. The Respondent expected Guler to put them to such use in the interests of the Respondent as he saw fit and did nothing to discountenance their continued operation and circulation. On the contrary, subsequent conduct on the part of all concerned was consistent with a wide interpretation of the authority thereby given including within it an authority to collect and receive 20 money on behalf of the Respondent. This proposition is illustrated by the evidence referred to in the following two paragraphs.

54. In relation to the Respondent's affairs generally, Helios filled (inter alia) the role of a collector of money. In a number of items of correspondence the Respondent acknowledged that Helios was making payments to it in

Exhibit
"4"
p.613

RECORD: respect of Australian contracts; for example,
 Exhibit "4" in its letter to Guler of 12th May 1956 the
 p.646 Respondent referred to the fact that he was
 making payments to it of money received from
 Australian clients. From time to time Helios
 reported to the Respondent on the financial
 position of Australian clients and was
 consulted by and received instructions from the
 Respondent on this subject; for example, in the
 Exhibit "4" letter of 22nd May 1956 Guler informed the 10
 p.650 Respondent of moneys which he was sending
 Exhibit "4" to it and in reply received instructions from
 p.655 the Respondent of the attitude which should
 be taken in the collection of outstanding
 accounts. On other occasions the Respondent
 acknowledged Helios as "holding" money from
 Australian clients as, for example, in the
 Exhibit "4" letter to Helios of 26th June, 1956. The
 p.658 Respondent knew that, at least in some cases,
 payments by clients were not made directly to 20
 it as, for example, the use of the word
 Exhibit "4" "usually" in its letter of 23rd April 1957
 p.720,L.26 (referred to in paragraph 40 above) shows, a
 Exhibit "4" fact confirmed by the letter of 3rd February
 p.821 1958 to the Respondent from its own bank.
 55. In particular, the Respondent relied
 upon Helios to ensure performance by SMHEA of
 contract 40,006. Payments under this contract

were to be made in Australian currency as the letter of 13th December 1954 from Helios to SMHEA (referred to an paragraph 13 above) and the subject contract itself show. Notwithstanding that the contract was with the Respondent, Helios was relied on to procure progress payments; see, for example, the letter of 8th February 1956 from the Respondent (referred to in paragraph 19 above). Helios received the request of SMHEA to make a payment (see its letter of 10th February 1956) and reported to the Respondent on progress. It was through Helios that the initial progress payment was obtained by the issue of a letter of guarantee (see the letter of 21st June 1956 from the Respondent to its own bank) and it was to Helios that the Respondent directed the request for information concerning the making of this payment (see cable set out in letter from Helios of 3rd July 1956). The second progress payment was asked for by the Respondent from Helios (see its letter of 28th May 1957) and it was to Helios that the Respondent addressed its statement setting out the progress payments made and those alleged to be due in its letter of 6th June 1957. A request for further payments was similarly addressed by the Respondent to Helios (see

RECORD:
Exhibit
"4"
p.598, L.31
Exhibit
"K"
p.286, L.41

Exhibit
"4"
p.639

Exhibit
"4"
p.640
Exhibit
"R"
p.399
Exhibit
"4"
p.666

Exhibit
"4"
p.658

Exhibit
"R"
p.406
Exhibit
"R"
p.411

Exhibit
"S"
p.536

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RECORD: letter of 11th June 1957 referred to in
 Exhibit "4" paragraph 29 above). As the subject contract
 p.748 was in fact between the Respondent and SMHEA
 this course of dealing between the Respondent
 and Helios constituted Helios its agent to
 receive moneys on its behalf.

56. The "realisation" of the contract as that
 expression was used in the "credential" given
 by the Respondent to Helios referred to in
 Exhibit "4" paragraph 16 above involved the whole carrying 10
 p.612 out of the contract. This authority (of which
 a copy was provided to the Appellant) empowered
 Helios to perform any function essential to
 the performance of the contract and would
 therefore authorise the receipt by Helios
 from SMHEA of such sums of money as SMHEA was
 obliged to pay to the Respondent in discharge
 of its obligations under the contract. Since
 Helios was empowered to receive money from
 SMHEA it must have been equally empowered to 20
 take any steps which were necessary to convert
 into money any authorities for payment issued
 by SMHEA. To have this authority was consistent
 with the position Helios had always held. Helios
 administered the contract on its financial side
 and in fact settled the financial terms of the
 contract into which the Respondent and SMHEA
 Exhibit "4" ultimately entered (see the letter from the
 p.584

Respondent to Helios of 23rd November 1954	<u>RECORD:</u>
(referred to in paragraph 12 above) and	
subsequent correspondence with SMHEA concerning	Exhibit
prices). The Respondent accepted guidance from	"4"
Helios on fixing the price (see its letter of	Pp. 593,
11th May 1955) and even when the contract was	601, 607
fully negotiated the Respondent was not aware of	Exhibit
the price SMHEA was paying (see its letter to	"4"
Helios of 9th June 1955). Helios in fact	p. 617
exercised considerable discretion in arriving	Exhibit
at the tender price (see its letter of 2nd	"4"
April 1956).	p. 623
10 57. As SMHEA began to perform its part of the	
subject contract by making payments, the	
Respondent had abundant notice that these	
payments were being received by Helios and that	
Helios was carrying out whatever functions were	
necessary for the lawful transmission of the	
amounts thereof. (See notification to the	
Respondent of the first payment by letter of	Exhibit
3rd July 1956, the letter from Helios of 7th	"4"
May 1957 concerning the second payment and the	p. 663
notification by letter of 12th June 1957 of the	Exhibit
transmission of this payment in which Helios	"4"
advised the Respondent that "we sent to you by	p. 725
telegraphic transfer on 3rd June the sum of	Exhibit
B.F. 4,332,430.96, being progress payments. . .")	"4"
In similar vein was the letter from Helios of	p. 749
20	

RECORD: 18th June 1957. Any doubt as to whether Helios
 Exhibit "4" was itself receiving the money was removed in
 p.753
 Exhibit "4" its letters to the Respondent of 25th June and
 p.756
 Exhibit "4" 1st July 1957 both referred to in paragraph 30
 p.759 above. Helios informed the Respondent of the
 purpose of the next guarantee requested in its
 Exhibit "4" letter of 9th July 1957 and notified the
 p.763 Respondent when the next payment was transmitted
 Exhibit "4" (see its letter of 20th September 1957). This
 p.782 notification was matched by a communication 10
 to the Respondent from its own bank of 17th
 Exhibit "4" September 1957. Helios kept the Respondent
 p.780 informed of the position concerning the bank
 guarantees which were necessary for the
 continuity of progress payments (see letter to
 Exhibit "4" Respondent of 27th September 1957).
 p.783

58. The acquiescence of the Respondent in the
 activities in which Helios was engaged with
 regard to the receipt of progress payments
 amounted in itself to an authority to pursue 20
 that course even if the authority had not pre-
 existed. Ratification of past acts was authority
 for future similar acts. The Respondent was
 thereafter aware of continuing acts of a like
 nature. Further information concerning a
 payment made and the identity of a past payment
 Exhibit "4" was contained in the letter from Helios of
 p.796 30th October 1957. This was confirmed by the

	notification to the Respondent from its own	<u>RECORD:</u>
	bank of 5th November 1957. The making of the	Exhibit
	next payment by Helios was similarly notified by	"4"
	its letter of 12th November 1957. The Respondent	p.797
	made no complaints about lack of explanations	Exhibit
	and in fact thanked Helios for providing them	"4"
	(see its letter of 12th December 1957). Subsequent	p.803
	notifications to the Respondent from its bank	Exhibit
	confirmed that moneys were being transmitted	"4"
10	by Helios (see letters of 24th January, 15th	p.813
	February, 19th February and 4th April 1958).	Exhibit
	At a point of time when Guillery knew that	"4"
	Helios had been receiving moneys from SMHEA under	p.817
	the contract, everything was to him in order	Exhibit
	except for a deficiency in transmissions to	"4"
	Belgium of £2,806.	p.823
		Exhibit
		"4"
		p. 824
		Exhibit
		"4"
		p. 828
		p.15,L.35
59.	The subject contract between the Respondent	
	and SMHEA clearly required that payment be made	
	to someone in Australia. Payment was to be made	
20	in Australia in Australian currency. The	
	authority of Helios extended to acceptance of	
	payment in whatever form it was made. The form	
	of payment was likely to be by cheque payable	
	to the Respondent or order, crossed and	
	marked "not negotiable". It was unlikely,	
	having regard to the stipulation by SMHEA that	
	all sums payable by it under the contract should	
	be paid to the Respondent (see paragraph 15 above)	

RECORD: that cheques would be made payable to Helios, or that they would not be not negotiable, or that they would be payable to bearer, and it was even more improbable that they would be made by cash or some equivalent, such as a bank cheque made payable to bearer. It was inconsistent with the contract that SMHEA would purchase a bank draft, or would otherwise arrange payment in Belgian Francs. The authority in Helios to receive payment therefor 10 included an authority to receive cheques such as those in fact received.

60. Someone in Australia, being the holder of the import licences, had to purchase the foreign currency. This was the duty of Helios. In order that this might be done, Helios had to have the funds to purchase the foreign currency. The cheques of SMHEA were not funds usable for that purpose. Being crossed and not negotiable they could only be collected by the Appellant 20 for the account of a customer. Moreover, since the cheques were payable to a named payee "or Order", they had to be endorsed before the paying bank would pay. The authority in Helios was, or must be presumed to have been, adequate to enable Helios to endorse the cheques, and pay them into a bank account. The Respondent having, prior to May 1958, taken no steps to open an

RECORD:

account in its name in Australia, it follows that the only method of converting into money the subject cheques was for Helios to endorse them and present them for collection to the credit of its own account. The Appellant could not, of course, by itself opening an account in the name of the Respondent unilaterally create the relationship of banker and customer between itself and the Respondent. Helios therefore
10 had authority to endorse cheques from SMHEA and pay them into its own account.

61. Indeed, in relation to at least eight of the subject cheques (more fully referred to in paragraph 66 below) there was an additional necessity for this to be done because they all included moneys which could not be sent outside Australia. The Banking (Foreign Exchange) Regulations were in this respect quite explicit: banks were authorised to sell foreign currency
20 in payment for imports against and up to the value shown on the relevant import licence but not beyond: furthermore, foreign currency to pay for imports could be sold only by the bank and at the branch named in the relative import licence and only to the licensee or to the person or body otherwise specified on the licence (see Exhibit "19"). The cheques in their entirety could not therefore have been remitted to the

Exhibit
"19"

RECORD: Respondent or otherwise placed to its credit without special Commonwealth Bank consent. It would of course have been possible for Helios, on behalf of the Respondent, to have applied for this consent but no one suggested that this be done, it was not done and there is no reason to think that it would have been granted if asked for. But even if consent had been sought and obtained, it would still have been necessary in acquiring funds for the purchase of the foreign currency for the cheques of SMHEA to have been endorsed and collected through an Australian bank account and in the premises there was only one appropriate account, namely, that of Helios. 10

62. When examined, the conduct of the Respondent indicates that it treated Helios as having authority to pay cheques from SMHEA into its own account. The following are some of the more significant aspects of its conduct in this connection: 20

- (a) It knew the terms of the contract 40,006 (a draft having been forwarded to it on 7th December 1956)
- (b) It knew from the outset that payments were to be made to it in Australian currency and that the claim forms submitted by Helios to SMHEA segregated from the total

amount claimed the portion thereof which was to be sent to Belgium. (A copy of the letter of 10th January 1957 from SMHEA to Helios and its enclosure was sent to the Respondent on 1st February 1957 who acknowledged receipt on 15th June 1957). Accordingly, as was acknowledged by Guillery in evidence, the Respondent knew that in response to these claim forms

RECORD:

Exhibit
"4"
p.672

Exhibit
"4"
p.682

Exhibit
"4"
p.750
p.25
L1.1-40

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Helios would from time to time be receiving cheques in respect of sums part only of which was to be remitted to Belgium.

- (c) It knew that Helios was incurring substantial local expenditure on its behalf for which - as it acknowledged in the correspondence referred to in paragraph 35 above and elsewhere - Helios was entitled to look for reimbursement from cheques being paid under the contract by SMHEA. In

Exhibit
"R"
pp456-
461

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its solicitor's letter of 10th June 1958 (referred to in paragraph 44 above) the Respondent spoke of these cheques as including "some moneys which belong to Helios".

Exhibit
"16"
p.891

- (d) It knew from the outset that the payments ~~were~~ being made by cheque in its name, or, alternatively, was indifferent as to the precise manner of payment.

p.19,L.27

RECORD:

- (e) It knew from an early stage and had at all times expected that Helios would receive payment and arrange transmission. The Respondent knew it had no bank account in Australia in its own name. It knew of and raised no objection to Helios' description of itself to all the world as "Australian Office for A.C.E.C.".
- p.31, L1.30-40
p.19, L.19
p.50, L1.28-30
Cf., eg., pp.399, 406
- (f) It knew at least by June 1957 that the transmission was not an automatic one and that the system being adopted permitted Helios to retain some payments. The letter from the Respondent of 23rd April 1957 (referred to in paragraph 40 above) confirms this. In its letter of 15th June 1957 it expressly authorised Helios to draw up the claim forms in its name.
- Exhibit "4"
p.720
Exhibit "4"
p.753, L.13
- (g) It stated to Helios on 12th December 1957 that it did not complain about progress payments.
- Exhibit "4"
p.813
- (h) It executed in May 1958 and formally confirmed in the following month the document quoted in paragraph 42 above with full knowledge of all relevant circumstances. Leaving aside for the moment the question of whether or not this document was a ratification, it is strong evidence of the Respondent's own belief as to the scope of
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Helios' authority. No recorded
 complaint was made to Helios other than
 that of possible misappropriation of the
 Respondent's moneys (see its Solicitor's
 letter referred to in paragraph 44 above),
 no complaint was at that time made to the
 Appellant about its action in receiving
 and collecting the cheques and the only
 complaint then made to the Appellant
 about Helios was that of delay in
 remitting to the Respondent the whole of
 the moneys received by Helios on its
 behalf (see paragraph 45 above).

RECORD:Exhibit "16"
p.891

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(i) It made no formal complaint to the Appellant
 until over a year and a half later (see
 paragraph 49 above) and did not take
 action until 1961.

Exhibit "4"
p.861

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63. All this shows that the Respondent took the
 view that Helios had the authority mentioned. It
 shows also that the Respondent was indifferent
 to the form of the cheques and the precise method
 of dealing and that Helios had its authority to
 deal with them whatever form they took. It must
 be inferred that the Respondent reposed
 sufficient confidence in the integrity of Helios
 to leave it to Helios to decide which method of
 dealing with payments made by SMHEA was to be
 adopted and accordingly Helios had actual

RECORD: authority to act in the manner in fact adopted by it in regard to endorsement of the subject cheques and their payment into its account.

II. HELIOS HAD APPARENT AUTHORITY TO PAY THE CHEQUES INTO ITS OWN ACCOUNT.

64. The Respondent is bound not only by the authority it actually gave (express or implied) but by the authority which its agent apparently had. Much of the evidence indicative of the apparent authority which Helios had to pay the cheques into its own account has already been reviewed but the following matters are of special significance under this heading since they are all matters which in one way or another were brought to the Appellant's attention: 10

(a) Helios was the Respondent's general agent and representative in Australia and was held out as being "Australian Office for A.C.E.C."

E.g., Exhibit
"15"
p.885

(b) The Respondent maintained no office in Australia. 20

(c) The agency agreement of 1953 and the codicil thereto of 1954 between the Respondent and Helios had been entered into.

Exhibit "1"
p.569
Exhibit "1"
p.573

(d) In addition, the Respondent had given the letter of authority of 23rd March 1955.

Exhibit "D"
p.234

(e) The Respondent had given Helios Power of

Attorney to enter into contracts for the Respondent.

RECORD:
Exhibit "Q"
p.396

(f) Helios had the power of sale of materials invoiced to it and of which it was given possession by the Respondent.

(g) The Respondent had guaranteed accounts of Helios and through Helios had given guarantees in respect of contracts.

10 (h) There was a close and constant liaison between Helios and the Respondent and senior officers of the Respondent were from time to time visiting Helios and SMHEA in connection, inter alia, with contract 40,006.

(i) The Respondent had no bank account in Australia

20 (j) Cheques were frequently being lodged by Helios for remittances to the Respondent which even before June 1956 approximated one-quarter of a million pounds and continued in large sums of money through 1957 and 1958.

Exhibit "14"
p.884

Cf. pp.837-
860

(k) There had been no query from the Respondent concerning the procedure adopted in relation to cheques received under the subject contract with SMHEA or generally.

(l) Cheques for the Respondent were sent in care of Helios by a government authority.

RECORD:

- (m) The Respondent obviously reposed great trust in Helios as evidenced, inter alia, by the fact that immensely valuable goods were consigned to Helios and that the whole of the Respondent's trade and reputation in Australia were in the hands of Helios.
- (n) Helios was incurring substantial local expenditure on behalf of the Respondent for which it was plainly entitled to early reimbursement. 10
- (o) Helios held the only import licences in connection with contract 40,006 and, as remittances could be made only against those licences, the Australian expenses could not be remitted overseas.
- (p) Helios was concerned with some of the largest engineering contracts in Australia all of which were public bodies and it was unlikely that Guler's reliability and integrity had not been fully explored by the Respondent and by those authorities. 20

65. The Appellant relies on these matters to contend that the Respondent is by its conduct estopped from denying that the cheques were received by the Appellant and collected by it for its customer with the authority of the Respondent. It is plain that the Appellant relied upon the conduct of the Respondent, both

acts and omissions, to its detriment. It is respectfully submitted that the learned judge in the very brief reference in his judgment to this issue misdirected himself. The learned judge found that the Appellant was "convinced of a very close association and a situation of mutual trust" between the Respondent and Helios but then proceeded to find that the circumstances which he had previously enumerated did not give rise to "any inference" of ostensible authority. Clearly, on the facts, the Appellant did infer that there was ostensible authority and the essential issue was therefore - Was the Appellant entitled to draw this inference? In determining this issue, the subjective intentions of the Respondent were quite irrelevant.

RECORD:p.223
L.13-15

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III. THERE WAS NO CONVERSION AT LEAST OF THOSE CHEQUES WHICH INCLUDED SUMS TO WHICH HELIOS WAS ENTITLED.

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66. In Exhibit "11" there is set out in tabular form an analysis of the fifteen cheques disclosing the portion of each cheque which represented local expenses and oil. (The said cheques are, where individual identification is necessary, hereinafter numbered 1 to 15 respectively in order of date). From this analysis it appears that eight of the cheques, numbered respectively 5, 7, 8, 9, 11, 13, 14 and 15 (hereinafter

p.882

RECORD: collectively called the "mixed cheques") were, either wholly or in part, drawn in respect of moneys payable by SMHEA for local expenses and oil. Without authority to endorse these cheques and pay them into its own account, Helios would have been unable to obtain immediate reimbursement for the sums which it had expended in respect of these matters. It was known by the Respondent that cheques might be in respect of local expenses and oil as well as C.I.F. prices but these outgoings were not matters of direct financial concern to it. It initially had no interest in them as the letter of 13th December 1954 (referred to in paragraph 13 above) indicates **and** it was not the Respondent's suggestion that local expenses should be paid to it but rather a stipulation imposed by SMHEA. The Respondent was concerned only with the making out of invoices to the extent to which they contained overseas components (see, for example, its letter of 15th June 1957); the final invoices were prepared by Helios and those of the Respondent were merely complimentary to them (see letter from Helios of 9th July 1957 and from Respondent of 27th November 1957).

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Exhibit"4"
p.598

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Exhibit"4"
p.750

Exhibit"4"
p.762
Exhibit"4"
p.805

67. From this it follows that, at least in relation to eight of the cheques which between

RECORD:

them include the bulk of the money received by Helios which was not in fact transmitted to the Respondent, Helios had an interest as the person entitled to the portion of the money represented by each such cheque and expected by the payee of the cheque to receive that portion. In large measure, this goes to the authority which Helios had to deal with the cheques but it also goes to the right in Helios to possession of the cheques and to what is loosely called "title" in cheque cases. The conclusion to which the evidence leads is that the local expenses and the cost of the oil were to be paid to Helios out of the proceeds of the cheques. In view of the Banking (Foreign Exchange) Regulations (referred to in paragraph 61 above), it would not have been lawfully possible to send this portion of the moneys overseas or to raise a credit therefor. No arrangement for reimbursing Helios for local expenses and oil was ever made and (as already noted in paragraph 62(b) above) Guillery acknowledged that only portion of these "mixed cheques" was to go to Belgium.

p.25
LL.20-40

68. In these circumstances, either Helios had title to or an interest in part of the proceeds of any "mixed cheque" or a partial title to any such cheque. Had the Respondent initially received the whole of the proceeds of any of

RECORD: the "mixed cheques", then that part of such proceeds as represented disbursements in respect of local expenses and oil would have been money received by the Respondent to the use of Helios. An agent cannot be guilty of conversion of property which he partly owns unless he does some further act equivalent to an ouster. In the circumstances, the payment of the cheque into his own account cannot be regarded as such an ouster but merely as a means of obtaining his interest. If by payment of any of the said "mixed cheques" into its own account Helios is not liable for conversion, neither then is the Appellant. Further or alternatively, if the Appellant is guilty of conversion in respect of any of the "mixed cheques", that conversion would be only in relation to that part of the proceeds which represented payment to the Respondent for the imported goods. The total proceeds of the "mixed cheques" is the sum of £106,201.17. 7 of which £68,418.18.0 represented payment for the imported goods and £37,782.19.7 payment for local expenses and oil.

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IV. THE ACTS OF HELIOS IN DEPOSITING
THE SUBJECT CHEQUES TO THE CREDIT
OF ITS ACCOUNT WITH THE APPELLANT
WERE RATIFIED BY THE RESPONDENT.

RECORD:

69. The circumstances relied upon by the Appellant as constituting this ratification by the Respondent are referred to in paragraphs 41 to 44 above. Foremost among them is the execution and subsequent formal confirmation of the document of 28th May 1958 (hereinafter called Exhibit "E") for in this document the Respondent unequivocally states that payments previously made had been received by it, that is, that payment into the Helios account was payment to it. Ratification is in law equivalent to previous authority and the Respondent thereby authorised all that Helios had done including the endorsement of cheques made payable to the Respondent and the deposit of those cheques into the Helios account.

70. This adoption was complete and voluntary: to achieve what it wanted, namely, an express arrangement with SMHEA for the payment of moneys into a particular local account, it had to affirm that it had in fact received prior payments and had to adopt as authorised the acts performed by Helios in relation to them. It was also no doubt necessary for this to be done before Helios would pass over the outstanding import licences to it. This

Exhibit
"E",
p.235

RECORD:

therefore is one of those relatively rare cases of express ratification. Most reported cases are instances of participation in the advantage resulting from the act (as, for example, by accepting the proceeds of an unauthorised sale) in which event ratification is implied.

Ratification, may, however, be achieved by the express approbation of a past act even though the approbation does not occur in circumstances giving rise either to a contract or an estoppel. 10

Buron v. Denman (1848) 2 Ex. 167; 154 E.R. 450 is but one example, being a case in which a trespass was held to have been ratified by the Crown when, on behalf of the Secretary of State, a letter was written stating that the acts constituting the trespass "ought to be approved". It follows that it is nothing to the point (even if it were the case) that no person at the time or thereafter relied upon this adoption by the Respondent of the acts of Helios to his detriment 20 since ratification is a purely unilateral act.

71. As at 28th May 1958 and 19th June 1958 (being the respective dates of the original signing and formal confirmation of Exhibit "E") the Respondent had full knowledge of the nature of the acts which it was ratifying. It knew -

- (i) The total amount of the fifteen cheques drawn by SMHEA;

RECORD:

- (ii) The manner in which the said cheques had been drawn;
- (iii) The manner in which they had been respectively endorsed by Helios;
- (iv) That they had been deposited by Helios to the credit of its account with the Appellant;
- (v) That from this account Helios had not transmitted to the Respondent the whole of the moneys so deposited or the full proportion of the moneys represented by these cheques to which the Respondent was itself entitled.

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It also knew the extent to which the amounts received by Helios from SMHEA in respect of the subject contract exceeded the portion thereof actually transmitted by Helios to it because every such transmission from Helios was identified to the Respondent by reference to contract No. 40,006. As early as March 1958, according to the evidence of Guillery, the Respondent knew precisely how much had been remitted to it in connection with this contract. No evidence was given by the Respondent to suggest that it was ignorant of any of these things at the dates of execution and confirmation of Exhibit "E" or was otherwise mistaken as to what it was doing. Guillery said of this document: "I was

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p.51,L.6

Exhibit
"E"p.235

p.44,L.11

RECORD: careful of what I was signing". His Honour with respect was in error when he suggested that the evidence showed that it was the Respondent's belief in May and June of 1958 that "Helios remittances were short by £2,800". This may have been Guillery's belief in April but by 23rd May 1958 he had what he called "the final figures". It was his intention when he signed the document that SMHEA should interpret it as an acknowledgment by the Respondent that it had itself received all payments made by SMHEA. 10

p.224,L.48

p.52,L.13

p.44,LL.35-42

72. In any event, even if the Respondent had been mistaken as to the precise amount of the deficiency of Helios' transmissions (a matter on which, as Guillery admitted, there was some uncertainty) that would not in itself prevent the formal adoption of the previous acts of Helios from operating as a ratification. It was not in law material to find as His Honour did (referring to Exhibit "E") that "at the time this document was executed, the whole of the true facts were not known" to the Respondent or its representative. 20

p.52,L.9

Exhibit"E"
p.235
p.225,L.10

The question rather is whether it was ignorant of any fact which as a matter of law would prevent the document from operating according to its tenor. It had full knowledge of all the material circumstances in which the acts of its agent were done. Even if it had been ignorant of the precise extent

of its agent's failure to account to it for the money so received, that was a merely collateral circumstance not affecting the nature of what was being ratified. RECORD

73. The other acts of the Respondent mentioned in paragraphs 41 to 44 above are either independent acts of ratification or circumstances surrounding the execution and confirmation of the document Exhibit "E" indicative of the attitude of the Respondent towards the past conduct of Helios in relation to the cheques which had by then been fully revealed to it and its understanding of what had occurred.

Exhibit
"E"p.235

V. THE APPELLANT AS A BANKER ACTING IN GOOD FAITH AND WITHOUT NEGLIGENCE RECEIVED PAYMENT OF THE SUBJECT CHEQUES FOR A CUSTOMER

74. Section 88 of the Bills of Exchange Act 1909-1958 of the Commonwealth of Australia is identical with S. 82 of the Bills of Exchange Act 1882 of the United Kingdom (now re-enacted in S. 4 of the Cheques Act 1957) and provides as follows :

"Where a banker in good faith and without negligence receives payment for a customer of a cheque crossed generally or specially to himself, and the customer has no title or a defective title thereto, the banker shall not incur any liability to the true owner of the cheque by reason only of having received such payment".

RECORD

The circumstances relied upon by the Appellant as sustaining this defence are particularly those referred to in paragraphs 11, 14, 16, 20-22, 28, 31-39 and 64 above.

75. The good faith of the Appellant is not impugned. The Appellant collected payment for a customer. The Appellant was not negligent.

"Broadly speaking, the bank must exercise the same care and forethought in the interest of the true owner, with regard to cheques paid in by the customer, as a reasonable businessman would bring to bear on similar business of his own": Paget's Law of Banking (6th Ed.), p.348. The test is not whether such care was taken as an ordinary man invited to purchase or cash such a cheque might reasonably be expected to take; the standard must be derived from the ordinary practice of bankers; not individuals: Commissioner of Taxation v. English Scottish & Australian Bank Ltd. (1920) A.C. 683, at p. 689. The mere fact that a cheque is payable to order and is not negotiable does not preclude a finding of no negligence. 10

76. It is easy to be wise after the event. "It is not expected that officials of banks should also be amateur detectives": Lloyds Bank Ltd. v Chartered Bank of India (1929) 1 K.B. 40, at p. 73. "To require a thorough enquiry into the history of each cheque would render banking 20

business impracticable: therefore there must be something markedly irregular in the transaction": *ibid*, at p. 59, per Scrutton L.J. The fact that a principal's cheque is being paid into an agent's account has been said in several cases to be a circumstance of suspicion. As a matter of commonsense this is obviously an important factor in many cases. Helios was, however, not any ordinary agent and there was every-
10 thing to dispel suspicion, particularly after the first six cheques had been banked and, so far as necessary having regard to their content, had been wholly transmitted to Belgium. It was not a breach of fiduciary duty for Helios to bank "mixed" cheques into its own account. But Helios was much more than a mere fiduciary and this was recognised on all sides.

77. On the facts of the present case, the indifference of the Respondent to the precise
20 form in which SMHEA was making payments is of considerable significance; at the time, the way in which the cheques were made out was not a matter of concern to it and has only become so following the financial failure of Helios with the realisation of the advantage which it might thereby derive. The deposit of cheques made out to the Respondent care of Helios into the Helios account became the practice. It is true that

RECORD

where there is a series of cheques a collecting bank is not for that reason alone entitled to exercise less care in relation to the later cheques than it was required to exercise in relation to the earlier ones. It is also true that silence on the part of the true owner of the cheques may be relied on by the Bank only if it appears that the true owner in effect ratified what was done or is estopped from denying authority to do it. Nevertheless, 10

circumstances relevant to the question of the banker's negligence include the nature of the operations carried out through the account and all information concerning the relationship between the customer and the payee of the cheque which the banker has, whether derived from extrinsic sources or the cheque itself. It must therefore be of significance that a number of transactions consistent with the banker's belief as to the scope of his customer's 20

authority have apparently been regularly carried through. This was the situation in the instant case.

VI. IN ANY EVENT, THE DAMAGES RECOVERABLE BY THE RESPONDENT COULD NOT EXCEED THE DIFFERENCE BETWEEN THE AMOUNT OF THE SUBJECT CHEQUES NOT REMITTED TO THE RESPONDENT AND THE TOTAL OF THAT

PORTION OF THE CHEQUES WHICHRECORDREPRESENTED SUMS PAYABLE TO HELIOS.

78. In approaching the question of the damages recoverable by the Respondent for any proved conversion of a cheque or cheques, as in approaching the question of the occurrence of a conversion itself, it must be borne in mind that the Respondent combines fifteen causes of action in the one suit and really sues for fifteen separate acts of conversion. This being so, it is both legitimate and useful to deal with each of these supposed causes of action singly. No damages would be recoverable in respect of seven of the cheques (numbered 1, 2, 3, 4, 6, 10 and 12) if sued for singly, because the whole of the proceeds of the cheque was in each case transmitted to the Respondent by one or other of the eight transmissions of money from Helios to the Respondent in respect of the subject contract set out in paragraph 6 of the points of defence the making of which transmissions was not denied by the Respondent. The transmission with which each of these cheques was identified is as set out hereunder:

<u>No. of Cheque</u>	<u>No. of Transmission</u>
1 and 2	First
3	Second
4	Third

p.3.LL.27-37

RECORD

<u>No. of Cheque</u>	<u>No. of Transmission</u>	
6	Fourth	
10	Part of the Fifth transmission (the balance of that transmission being £5,660 which was that portion (omitting shillings and pence) of cheque No.7 which represented moneys transmissible to Belgium).	10
12	Sixth	
<p>79. In addition there are three other cheques (numbered 5, 9 and 15) which, if sued for singly, would not be actionable because Helios was entitled to the whole of the moneys represented thereby and payment could not lawfully have been remitted to Belgium. If cheque No. 7 were sued for singly no damages would be recoverable (save for the shillings and pence) because the Respondent, by means</p>		
	of the fifth transmission, received the whole of that portion of it to which it was entitled. That leaves only four cheques (numbered 8, 11, 13 and 14) the alleged conversion of which, if sued for singly, could result in an award of damages to the Respondent. The break-up of these cheques into the C.I.F. content transmissible to Belgium and the local expenses and oil remaining in Australia is as follows :-	20
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<u>No.</u>	<u>Amount of Cheque</u>	<u>C.I.F. Content</u>	<u>Local Expenses and Oil</u>	<u>RECORD:</u>
8	£5,919.15.2	£927.8.2	£4,992.7.0	Exhibit "11" p.882
11	42,636.12.11	31,550.13.11	11,085.19.0	
13	29,338.5.0	25,919.2.10	3,419.2.2	
14	<u>17,745.8.1</u>	<u>4,361.6.8</u>	<u>13,384.1.5</u>	
	<u>£95,640.1.2</u>	<u>£62,758.11.7</u>	<u>£32,881.9.7</u>	

Thus, if these four cheques were sued for singly
the Respondent would be entitled to recover as
damages for the alleged conversions the sum of
10 £62,758.11.7 being the total of their C.I.F. content.

But it would have to give credit for the final
two payments, namely, the seventh and eighth
transmissions totalling £45,000 (referred to
in paragraph 39 above) made by Helios to the
Respondent on account of money received by Helios
from SMHEA under the subject contract, leaving
a nett amount of damages recoverable by it of
£17,758.11.7. This is the maximum amount of
20 damages to which the Respondent could be
entitled in this action.

80. Put another way, the only loss suffered by
the Respondent as a result of the alleged
conversions was the difference between the amount
of the subject cheques not remitted to the
Respondent and the total of that portion of the
cheques which represented sums expended by
Helios in respect of local expenses and oil. This

Exhibit
"4"
pp.826,
827
Exhibit
"R" p.477

RECORD:

Cf. Exhibit "O"
p. 393

loss was in fact the difference between the total of the C.I.F. content of the fifteen cheques, namely £242,526.17.4 and the total of the sums remitted to the Respondent by Helios, namely, £224,767.19.4 which difference is £17,758.18.0. This corresponds with the figure arrived at in the preceding paragraph except for the sum of 6s.5d. being the amount of shillings and pence which, as already noted, was omitted when the C.I.F. content of cheque No.7 was included in the fifth transmission. The balance of the amount which by the verdict and judgment of the Supreme Court of New South Wales now appealed from the Respondent has recovered represents local expenses and oil which Helios paid or for which it accepted liability. To include these amounts in the judgment in fact enables the Respondent to make a profit out of the action.

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SUBMISSION

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81. The Appellant therefore respectfully submits that the verdict and judgment of the Supreme Court of New South Wales in favour of the Respondent ought to be set aside, that

this appeal should be allowed and that a verdict and judgment should be entered for the Appellant for the following amongst other

REASONS

1. The Appellant did not convert the said cheques the subject of the action.
2. The said cheques were received by the Appellant and collected by it for its customer with the authority of the Respondent.
3. Before action brought the Respondent ratified and confirmed the acts of its agent alleged to constitute the said conversion.
4. The Appellant as a banker acting in good faith and without negligence received for a customer payment of the said cheques.

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PHILIP JEFFREY