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Judgment
4/11/966

IN THE PRIVY COUNCIL

No. 10 of 1965

O N A P P E A L
FROM THE SUPREME COURT OF NEW SOUTH WALES
SITTING IN COMMERCIAL CAUSES

B E T W E E N:-

AUSTRALIA & NEW ZEALAND BANK LIMITED
... .. Appellant

- and -

10 ATELIERS DE CONSTRUCTIONS ELECTRIQUES. DE
CHARLEROI Respondent

C A S E FOR THE RESPONDENT

RECORD

- 1. This is an appeal from a Judgment dated p.229
the 7th day of October, 1964, of His Honour
Mr. Justice Manning, a Justice of the Supreme
Court of New South Wales sitting in Commercial
Causes, in favour of the Respondent, in an
action brought by the Respondent as Plaintiff
against the Appellant as Defendant.
- 20 2. The action was heard by Mr. Justice pp.4-208
Manning on the 7th, 8th, 9th, 10th, 11th,
14th, 15th and 16th days of September, 1964
when evidence both oral and documentary was
given.
- 30 3. The Respondent sued the Appellant for
damages for conversion by the Appellant of pp.1 & 2
fifteen cheques of the Respondent all of
which were drawn by the Snowy Mountains Hydro-
Electric Authority (hereinafter referred to as
"the Authority") in favour of the Respondent
or its Order on the Commonwealth Bank of
Australia. The Respondent claimed damages of
£280,309.16.11 being the total of the amounts
of the said cheques. Mr. Justice Manning
entered a verdict for the Respondent on the p.229
7th day of October 1964 for the sum of
£55,540.18. 7.

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4. The said fifteen cheques were all collected by the Appellant on behalf of a company incorporated in New South Wales and known as Helios Heavy Electrical Engineering Contracting Co. Pty. Limited (hereinafter referred to as "the Helios company") and the proceeds thereof credited by the Appellant to the account of the Helios Company with the Appellant at its branch at the corner of Martin Place and George Street, Sydney during the period from June 1956 to April, 1958. The Respondent has never banked with the Appellant.

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LEGAL STUDIES

25 APR 1967

25 RUSSELL SQUARE
LONDON, W.C.1.

5. The Respondent is a company incorporated in Belgium which had for many years past and at all material times carried on business as a manufacturer of heavy electrical equipment.

pp. 569 & 574

6. By a written agreement made on the 24th day of February 1953 the Respondent appointed a firm known as Helios Heavy Electrical Engineering Contracting Co. (hereinafter referred to as "the Helios firm") of which the proprietor was Thomas Ismet Guler to be its agent in Australia for the sale therein of all material manufactured by the Respondent. On the 2nd day of August 1955 the Helios company was incorporated in the State of New South Wales and subsequently appears to have taken over the agency from the Helios firm. No formal agreement was entered into between the Respondent and the Helios company. The Appellant and the Respondent regarded it as unnecessary to distinguish between the Helios firm, the Helios company and Mr. Guler personally and all three were treated in the action as one and the same.

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p.365 Ll.25-29

p.209 Ll.30-35

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pp.245-253

7. By letter dated the 27th July 1955 the Authority, a corporation sole constituted by the Snowy Mountains Hydro-Electric Power Act, 1949-56 of the Commonwealth of Australia, accepted a tender previously submitted to it on behalf of the Respondent for the manufacture testing supply delivery and erection

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of seven large transformers and auxilliary equipment for installation in the power station constructed as part of the Snowy Mountains Hydro-Electric Scheme and known as T1. Thereafter the Respondent proceeded to manufacture the transformers and auxiliary equipment.

10 8. The contract between the Respondent and the Authority provided that certain payments be made to the Respondent as the work of manufacture proceeded. p.294 L1.1-6 p.321-323

9. Payments were made under the said contract by the Authority from June 1956 onwards. The total of the said payments to on or about the 14th day of April 1958 was £280,309.16.11. p.393

20 10. The said payments were made by cheque drawn by the Authority in favour of "Ateliers De Constructions Electriques De Charleroi or Order" on the Commonwealth Bank of Australia, being the Authority's bankers. p.231

11. Each of the said fifteen cheques was obtained by the Helios company, the Helios firm or Mr. Guler, indorsed as hereinafter stated and lodged for collection with the Appellant being the bankers of the Helios company, the Helios firm and Mr. Guler.

30 12. Upon receipt of each of the said fifteen cheques the Appellant credited the said account of the Helios company with the proceeds thereof.

13. Of the sum of £280,309.16.11 received by the Appellant and credited to the said account of the Helios Company sums were from time to time remitted by the Appellant to the Respondent or its bankers in Belgium, totalling £224,768.18.4.

40 14. The verdict entered in favour of the Respondent by His Honour Mr. Justice Manning for the sum of £55,540.18.7. represented the difference between the said sums of

RECORD

p.216 Ll.30- £280,309.16.11 and £224,768.18.4. and the
40 loss suffered by the Respondent by reason
of the conversion of the said cheques.

PRINCIPAL ISSUES

15. The principal issues between the parties are whether,

(i) as the Appellant alleges, the Helios company, the Helios firm, Mr. Guler or any of them were expressly authorised by the Respondent to indorse the said cheques or any and if so which of them; or whether

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(ii) as the Appellant alleges, the Helios company, the Helios firm, Mr. Guler or any of them were impliedly authorised by the Respondent to indorse the said cheques or any and if so which of them; or whether

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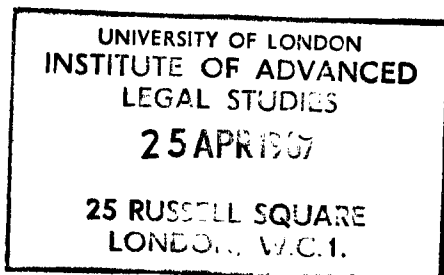
(iii) as the Appellant alleges, the Helios company, the Helios firm, Mr. Guler or any of them had ostensible authority to indorse the said cheques or any and if so which of them; or whether

(iv) as the Appellant alleges, even if there were no express, implied or ostensible authority to indorse the said cheques, the Respondent had by its conduct ratified the conduct of the Helios company, the Helios firm, Mr. Guler or any of them in indorsing the said cheques; or whether

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(v) as the Appellant alleges, the Appellant is entitled to the protection of Section 88 of the Australian Bills of Exchange Act, 1909/1936.

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16. Mr. Justice Manning decided in favour of the Respondent on all of the said issues. By reasons of the matters herein-after set out it is contended that His Honour was right in law in so finding.

p.221 L.50
to p.222 L1.1-4
p.223 L1.13-18
p.225 L1.10-20
p.226 L1.3-5
p.228 L1.40-43

FACTS OF THE CASE

10 17. The Helios company, the Helios firm or Mr. Guler had for some years past and at all material times banked with the Appellant at its Martin Place and George Street branch. The Respondent has never banked with the Appellant.

18. The Respondent for some years past had from time to time entered into contracts with corporations in Australia for the manufacture supply and erection by the Respondent of heavy electrical equipment.

20 19. From time to time payments were made under the said contracts by the Australian corporations to the Respondent by cheques drawn by the said corporations in favour of the Respondent obtained by the Helios company, the Helios firm or Mr. Guler, and then remitted to the Respondent or its bankers in Belgium after Mr. Guler made the necessary arrangements for such remission in accordance with the Foreign Exchange Regulations of the Commonwealth of Australia. None of the said cheques were banked to the credit of the said account of the Helios company, the Helios firm or Mr. Guler with the Appellant or any other Bank.

20. Save for the said fifteen cheques the Helios Company, the Helios firm or Mr. Guler had never received cheques payable to the Respondent or its Order, indorsed them and paid them into any bank accounts of the Helios company, the Helios firm or Mr. Guler.

40 21. The Helios company, the Helios firm and Mr. Guler never wrote to the Respondent for its authority to indorse the said fifteen cheques of the Respondent or any of them and never told any servant or officer of the Respondent that the said fifteen

p.8, L1.17-43
p.9, L1.1-21

RECORD

cheques or any of them had been indorsed by the Helios company, the Helios firm or Mr. Guler.

pp.569 & 574-
578

22. By the agency agreement of the 24th February, 1953 hereinbefore referred to the Helios firm was required to develop sales in Australia, to visit customers regularly and to open in the business quarters of Sydney an office of the Respondent. The agreement also required the Helios firm to pay for all expenses for publicity, correspondence, cables, deposits on specifications travelling expenses and other expenses generally of whatsoever nature. The agreement also stated that the Helios firm would be entitled to the commissions therein provided but that they would be payable only on final settlement of the contracts in question. The agreement did not refer to any authority of the Helios firm or Mr. Guler or any person on behalf of them or either of them to indorse cheques of the Respondent on its behalf.

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pp.573 & 578

23. The agreement was varied by a codicil dated the 8th day of June 1954 between the Helios firm and the Respondent. Nothing turns on the codicil.

24. For some time past and at all material times the Respondent in performing its contracts with customers in Australia manufactured equipment and arranged for it to be sent to Australia. The Helios company, the Helios firm or Mr. Guler was then responsible for unloading the equipment from the ship, clearing it through the Customs, transporting it to the site and, where required, installing it or assisting in its installation.

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25. The Helios firm or company incurred various expenses in and about the performance of its said duties including payment of Customs Duties, costs of unloading equipment from ships and arranging for its transport to the site and in certain cases erection and maintenance costs. Such expenses

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were known by the Respondent, the Helios Company, the Helios firm and Mr. Guler as local charges.

10 26. In or about May 1954 the Respondent through its Belgian bankers guaranteed the opening of credit of £2000 established in favour of the Helios firm or Mr. Guler to enable the Helios firm or Mr. Guler to lodge deposits with tenders submitted on behalf of the Respondent. p.265 L1.10-23 p.270

27. By letter dated 3rd February, 1955 Mr. Guler requested the Respondent to establish with the Appellant a credit in the sum of £3000 to £4000 to enable the Helios Company or Mr. Guler to withdraw moneys therefrom to reimburse him primarily for payments by him of local charges on the basis that he would repay such moneys upon being reimbursed by the customers concerned in respect of the same. pp.263 & 264

20 28. Shortly thereafter the respondent guaranteed through its Belgian bankers a credit facility with the appellant in favour of the Helios firm or Mr. Guler to the extent of £5000 for the purpose mentioned in paragraph 27 hereof. p.267 L1.30-35 p.271

30 29. In July 1955 the amount of the guarantee mentioned in paragraph 28 hereof was increased by the Respondent through its Belgian bankers to the sum of £10,000 in response to a prior request by the Helios company and Mr. Guler. pp.278-280

30 30. By letter dated the 13th day of December 1954 Mr. Guler, on behalf of the Respondent, submitted a tender to the Authority for the manufacture, supply and erection of the said seven transformers and auxiliary equipment for installation in the power station known as T1. pp.236-244

40 31. By letter dated the 27th day of July 1955 the Authority accepted the tender of the Respondent with certain modifications therein set forth including the rejection by the Authority of the Clause on page 4 of the letter mentioned in paragraph 30 hereof reading:- pp.245-253

RECORD

"We especially draw your attention that payment of Customs Duty and Transport in Australia will be paid by your Authority to Helios Company, upon presentation of original invoices and relevant Customs entry."

32. Shortly after the Authority accepted the said tender the Respondent proceeded to manufacture the said transformers and auxiliary equipment. 10
- pp.280-334 33. There was some delay in the preparation of a formal contract between the Respondent and the Authority and it was not until on or about the 13th day of June 1957 that the contract was signed by the Respondent and the Authority. The contract is known as Contract 40,006.
- p.281 Ll.10-12 34. Contract 40,006 provided, amongst other things, that all payments to be made thereunder were to be made to the Respondent, 20 that all payments under the contract were to be made in Australia and in Australian currency or as may be agreed upon between the Authority and the Respondent, that certain payments would be made to the Respondent as the work of manufacture proceeded, that in consideration of the Authority making such payments the Respondent would furnish a banker's guarantee on conditions which would ensure delivery of 30 equipment or repayment of advances made in the event of non-delivery under the contract, that the Exchange rate for the purposes of the contract was 112 Belgian francs to £A1 and that applications by the Respondent for payment by the Authority under the contract must be accompanied by a detailed claim setting forth particulars of the claim.
- p.295 Ll.21-25
- p.355 L.27 to p.356 35. Banker's guarantees were in fact provided in accordance with Contract 40,006 40 for approved payments to the Respondent, all of which were furnished by the Appellant pursuant to an arrangement made with the Respondent's bankers in Belgium.
- (Exhibit M)

RECORD

36. Claim forms for payments to the Respondent under Contract 40,006 were from time to time during the currency thereof submitted to the Authority by the Helios Company or Mr. Guler on behalf of the Respondent.

p.847
(Exhibit 7)

37. Each of the said claim forms contained provision for the insertion of the address to which cheques were to be sent.

10 38. The said fifteen cheques were drawn by the Authority in favour of the Respondent or its order on the Commonwealth Bank of Australia, being the Authority's bankers. An address corresponding with the address mentioned in paragraph 37 hereof appeared after the name of the payee on each of the said cheques in the following terms:-

<u>Identifying Number</u>	<u>Date of Cheque</u>	<u>Cheque No.</u>	<u>Amount of Cheque</u>	<u>Address on face of Cheque</u>
20	1	27th June 1956	32926 £62,180.11.2	"c/-Helios Heavy Elect. Engr. And Contracting Co.164 Pitt Street, Sydney"
	2	27th August 1956	36447 1,061.11.2	"City House, 164 Pitt Street, Sydney N.S.W."
30	3	27th May 1957	51470 38,862.17.1	"c/- Helios Heavy Electrical Eng. Cont.Co. Pty. Ltd., 197 Victoria Avenue, Chatswood N.S.W."
	4	30th August 1957	57616 9,822. 8.7	"c/- Helios Heavy Electrical Engineering Contracting Co. Pty. Ltd. 197 Victoria Avenue, Chatswood, N.S.W."
40	5	9th September 1957	57976 3,513. 1.6	"c/- Helios Heavy Electrical Engineering Co. Pty.Ltd. 197 Victoria Avenue, Chatswood, N.S.W."

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<u>Identifying Number</u>	<u>Date of Cheque</u>	<u>Cheque No.</u>	<u>Amount of Cheque</u>	<u>Address on face of Cheque</u>
6	23rd September, 1957	58660	£15,545. 2.10	"c/- Helios Heavy Elect. Eng. Cont. Co. Pty. Ltd. 197 Victoria Avenue, Chatswood, N.S.W."
7	21st October 1957	60332	6,189.14.10	"c/- Helios Heavy Elect. Eng. Cont. Co. Pty. Ltd. 10 197 Victoria Avenue, Chatswood, N.S.W."
8	28th October 1957	61297	5,919.15. 2	"c/- Helios Heavy Elect. Eng. Cont. Co. Pty. Ltd. 197 Victoria Avenue, Chatswood, N.S.W."
9	12th December 1957	64220	380. 0. 0	"c/- Helios Heavy Electrical Engineering Contracting Co. Pty. Ltd. 197 Victoria Avenue, Chatswood, N.S.W." 20
10	19th December, 1957	65050	23,317.14. 3	"c/- Helios Heavy Electrical Engineering Contracting Co. Pty. Ltd. 197 Victoria Avenue, Chatswood, N.S.W." 30
11	30th January, 1958	67181	42,636.12.11	"c/- Helios Heavy Electrical Engineering Contracting Co. Pty. Limited, 197, Victoria Avenue, Chatswood, N.S.W." 40
12	12th February 1958	67890	23,317.14. 3	"c/- Helios Heavy Electrical Engineering Contracting Co. Pty. Ltd., 197 Victoria Avenue, Chatswood, N.S.W."

<u>Identify- ing Number</u>	<u>Date of Cheque</u>	<u>Cheque No.</u>	<u>Amount of Cheque</u>	<u>Address on face of Cheque</u>
13	28th February, 1958	69084	29,338. 5. 0	"c/- Helios Heavy Electrical Engineering Contracting Co. Pty. Ltd., 197 Victoria Avenue, Chatswood, N.S.W."
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14	30th March, 1958	70182	17,745. 8. 1	"c/- Helios Heavy Electrical Engineering Contracting Co. Pty. Ltd., 197 Victoria Avenue, Chatswood, N.S.W."
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15	14th April, 1958	71755	479. 0. 1	"c/- Helios Heavy Electrical Engineering Contracting Co. Pty. Ltd. 197 Victoria Avenue, Chatswood, N.S.W."
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39. All of the said fifteen cheques were indorsed by the Helios company, the Helios firm, Mr. Guler, one Bevan, or one Holt, lodged with the Appellant for collection and paid into the account of the Helios Company.

40. When the first cheque was issued by the Authority in the sum of £62,180.11.2. it was indorsed as follows:-

40 "Helios Heavy Electrical Engineering and Contracting Co., 197 Victoria Avenue, Chatswood. Ja.2592."

These words and figures were impressed upon

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the cheque by means of a rubber stamp and were followed by a signature which appears to be "T. Holt".

41. The said cheque did not purport to be indorsed on behalf of the Respondent to whose order it was payable.

42. The said cheque was deposited by the Helios Company, the Helios firm or Mr. Guler for collection at the Chatswood Branch of the Appellant.

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p.158 L.20 to
p.160 L.14

43. The said cheque appeared irregular to the officer to whom it was delivered at the Chatswood Branch of the Appellant on the 29th day of June 1956 and on that day he rang the sub-manager of the Branch at the Corner of Martin Place and George Street, Sydney, a Mr. Dunstone, who was the sub-manager of the said Branch of the Appellant from May 1956 to October 1958, had been familiar with a number of dealings between the Helios company and the Respondent and at about the very time the matter was referred to him by the Chatswood Branch he had in his possession a cheque drawn by the Helios Company for the identical amount, an application for authority under the Foreign Exchange Regulations to remit the same amount of money to Belgium to the bankers of the Respondent and a request to make the remittance by telegraphic transfer. Mr. Dunstone authorised the Chatswood Branch of the Appellant to accept the cheque for collection to the account of the Helios Company. This was done.

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pp.662, 665

44. Shortly after the said cheque for £62,180.11.2. was paid into the account of the Helios Company, the Appellant arranged for the remission to the bankers of the Respondent in Belgium of 6.964.222 Belgian francs being the equivalent in Belgian francs at the said rate of exchange of the amount of the first payment under contract 40,006 to which the Respondent was entitled. On the 11th July 1956 the Respondent's bankers in

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p.406 Ll.25-36

Belgium notified the Respondent in writing that the said amount had been remitted, the remitter being stated as the Authority and the payee as the Respondent.

10 45. When further cheques covering payments under Contract 40,006 were drawn by the Authority and sent to the Helios Company, the Helios firm, or Mr. Guler, by the Authority during the years 1957 and 1958 the Helios Company, Helios Firm, or Mr. Guler indorsed them and paid them into the Helios Company's said bank account. At first Mr. Guler remitted the equivalent in Belgian francs of the cheques paid by the Authority but later did no more than remit round sums.

20 46. There is no evidence that on any of the occasions when the other fourteen cheques were presented to the Appellant by the Helios Company, or Helios firm, or by Mr. Guler for collection on behalf of the Helios company, the Appellant had before it any evidence that the proceeds of the cheques presented would forthwith or at any time be remitted to Belgium for the credit of the account of the Respondent with its Belgian bankers.

30 47. All fifteen cheques bore irregular indorsements. The form of each indorsement appears from the cheques themselves. p.231

48. On the 26th day of July 1958 a Receiver and Manager of the Helios Company was appointed by the Appellant under an equitable mortgage over the assets of the Helios company by the Appellant.

40 49. Jules Etienne Guillery, a witness called by the Respondent, held the position as Manager for the export zone of the Respondent which included Australia from late 1954 to May 1960. His duties included the control, supervision and administration of the sale of all equipment of the Respondent in Australia and the supervision of the activities of the Respondent's representative in Australia. p.6 L.28 to p.8 L.9

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50. Mr. Guillery visited Australia in the course of his duties on several occasions, but in particular from February 1958 to 1959. Before Mr. Guillery came to Australia the Respondent had complained on many occasions to the Helios company, the Helios firm or Mr. Guler that insufficient information was being conveyed to the Respondent about the position of certain contracts including Contract 40,006 and the remission of monies to Belgium thereunder. 10
- p.12 L1.34-45
p.31 L.1
p.40 L.28
p.44 L.46
51. On the 23rd May, 1958 Mr. Guillery ascertained from the Authority for the first time that the said fifteen cheques had been drawn in favour of the Respondent. He later ascertained from the Appellant that the said cheques, having been irregularly indorsed as aforesaid had been paid into the said account of the Helios company with the Appellant. This information was conveyed by Mr. Guillery to the Respondent by written report of the 24th May, 1958. 20
- p.829 L.12 to
p.830 L.14
52. By letter dated the 26th April 1958 from Mr. Guillery to Mr. Callinan, the Chief Electrical and Mechanical Engineer of the Authority, Mr. Guillery informed him in effect that his investigations showed that everything was in order. The letter was marked "Private and Confidential" and was written by Mr. Guillery personally to Mr. Callinan personally. There was no evidence that the Appellant knew at any material time of the existence or contents of this letter. 30
- pp.235, 236
53. On or about the 28th May 1958, a document was executed by Mr. Guillery and Mr. Guler and later confirmed by the Respondent. The document was addressed to the Authority and, in effect, it directed the Authority to pay all future sums due to the Respondent under Contract 40,006 and to the Helios company under a contract number 40,019 which had been made between the Authority and the Helios company for the supply of certain lightning arrestors to be manufactured by the Respondent, to the credit of a banking account of the Respondent 40

10 with the Comptoir National d'Escompte de Paris at Sydney and acknowledged that all payments made by the Authority under both contracts up to the date of the document had been properly made and received by the Respondent and the Helios company on the said account. There is no evidence that the Appellant knew at any material time of the existence or contents of the said document. The said document was prepared by the Authority's legal advisers.

54. Mr. Guillery suspected that the Helios company or Helios firm or Mr. Guler had failed to remit moneys of the Respondent to it but at the time he wrote the letter mentioned in paragraph 52 hereof and at the time the document mentioned in paragraph 53 hereof was executed he thought the amount which had not been remitted was about £2800. p.15 Ll.31,32

20 SUBMISSIONS AS TO PRINCIPAL ISSUES

55. As to the first issue, the Respondent's contention was and is that no express authority to indorse cheques was given by the Respondent to the Helios company, the Helios firm or Mr. Guler either in writing, orally or both. p.212, Ll.1-14

30 56. In support of its case the Appellant relied on a cable dated 21st March and a letter dated 22nd March, 1955, and sent by the Respondent to the Authority. The Respondent's contention was and is that such documents were sent by the Respondent to the Authority at the express request of Mr. Guler after the tender for Contract 40,006 had been lodged by him with the Authority on or about the 13th December, 1954, and before it had been accepted by the Authority. During the period between the lodgment of the tender and its acceptance by the Authority negotiations took place between the Respondent and the Authority on a number of matters including certain variations and adjustments. Mr. Guler sent a cable and a confirmatory letter on the 21st March 1955 to the Respondent in p.613

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p.612, L1.6-26 which he requested the Respondent to notify the Authority 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 realising contracts made or sub-contracted by ourselves with our full technical and financial backing". The reason given by Mr. Guler to the Respondent in his said cable and letter for notifying the Authority as aforesaid was that "formality necessitates submission full credential with Federal Government re Snowy Tender". The Respondent complied with Mr. Guler's request and on the 21st March 1955 sent a cable and on the 22nd March 1955 a confirmatory letter to the Authority. 10

57. The Respondent's contention was and is that the word "realizing" in its cable of 21st March 1955 and the word "realization" in its letter of 22nd March, 1955, mean "performing" and "performance" respectively and did not give an authority for the Helios company, the Helios firm or Mr. Guler to indorse the Respondent's cheques payable under Contract 40,006 and pay them into the Helios Company's banking account. Mr. Guillery whose evidence was accepted by Mr. Justice Manning said, in the course of cross-examination, that the word "realization" meant "performing the contract" and that at the time the letter and cable was sent by the Respondent to the Authority the Respondent did not know that the Helios company, the Helios firm or Mr. Guler had previously received monies on behalf of the Respondent. 20 30

p.20 L.27 to
p.22 L.14

58. Mr. Guler said in his examination in chief that he had a discussion with a Mr. Chevalier, an officer of the Respondent, in October 1954 about the proposed contract with the Authority in which Mr. Guler said to Mr. Chevalier, "I will be responsible for all the delivery, transport, Customs Duty and other charges and I will obtain payments directly from the Snowy Mountains, 40

p.59 L.30 to
p.62 L.11

as was the case with E.60" to which Mr. Chevalier agreed.

10 59. E.60 is the description of a contract between the Respondent and the Electricity Commission of New South Wales under which cheques were drawn by the said Commission in favour of the Respondent, obtained by the Helios Company, the Helios firm or Mr. Guler and remitted through the Appellant to the Respondent's bankers in Belgium without passing through the banking account of the Helios Company, the Helios firm or Mr. Guler. p.61 L1.27-30

20 60. Mr. Guler said in examination in chief that in April, 1955 he said to a Mr. Haesaerts, on a visit of the latter to Australia from Belgium, he being an officer of the Respondent, "I will administer this contract (40,006) similar to the Western Australian contract, the Victoria contract" to which Mr. Haesaerts said that he had the authority to do so. p.64

61. The said Mr. Chevalier died before the hearing of this action. p.190 L.20 p.200 L1.1-12

62. Mr. Haesaerts gave evidence on behalf of the Respondent and denied the evidence given by Mr. Guler referred to in paragraph 60 hereof. p.175 L.33 to p.176 L.4

63. Mr. Justice Manning said of Mr. Guler:-

30 "I am satisfied that he is a man who is quite unreliable, whose commercial morality leaves much to be desired, and who sought to twist the facts, maliciously and dishonestly, with the intention of defeating the interests of the plaintiff company, which had been his principal.....
40 Not only did Mr. Guler conceal the facts from his principal but he acted in a cavalier and arrogant manner which satisfied me that his whole conduct was reprehensible and that in fact he had been using his principal's funds to his own p.215 L.23 to p.216 L.2

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personal advantage whilst concealing this from his principal at all times."

64. As to this issue Mr. Justice Manning said:-

p.219 Ll.26-31

"I think it sufficient to say that, reading the documents as a whole, I am unable to find any indication whatever of an authority from the plaintiff to the Helios company to indorse its cheques and to collect payment thereof."

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65. As to the second issue the Respondent's contention is, that notwithstanding that the Helios company was entitled to take possession of goods the subject of contracts between the Respondent and the customers after they had arrived in Australia, and that the Bills of Lading in respect of the goods were in the name of the Helios company and that the Helios Company as the holder of the relevant import licences of the goods was entitled to apply under the Foreign Exchange Regulations of the Commonwealth of Australia for permission to remit the monies payable under the contracts to the Respondent in payment for the goods, it does not follow that authority was thereby conferred upon the Helios company to indorse cheques of the Respondent and pay them into the Helios company's banking account.

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p.286 Ll.36-42

66. Contract 40,006 provided that "unless otherwise provided, all references to sums of money shall refer to Australian currency and all payments by the Authority under the Contract shall be made in Australia in Australian currency or as may be agreed upon."

67. The Respondent's contention was and is that the fact that moneys were payable under contract 40,006 in Australia and in Australian currency cannot be relied upon by the Appellant to show an authority by Respondent to the Helios company, the Helios firm or Mr.Guler to indorse cheques payable

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under the contract by the Authority to the Respondent.

10 68. The Helios company, Helios firm or Mr. Guler obtained cheques of the Respondent drawn by corporations in Australia covering payments to the Respondent under a number of contracts between the Respondent and various corporations in Australia but on no occasion save in the case of the said fifteen cheques were cheques of the Respondent indorsed by the Helios company, the Helios firm or Mr. Guler and paid into the banking account of the Helios company.

69. Mr. Justice Manning said:-

20 "It was further contended that the plaintiff company must have known from the nature of the pro forma of the claim required to be submitted to the Snowy Mountains Hydro-Electric Authority that cheques would be issued for payment of sums including money partly payable to the plaintiff and for which authority had been issued for the release of these funds for transmission to Belgium and partly payable in respect of local services rendered for which such authority could be obtained.

p.220 L.25 to
p.221 L.1

30 Here again I am satisfied that the details of what was being done in Australia were not known to the plaintiff.

40 The Helios Company was authorised to submit the appropriate claim forms and did so. Some contracts in this country were made by the Helios company in its own name as agent for the plaintiff, others, particularly those with the Electricity Commission of New South Wales and the Snowy Mountains Hydro-Electric Authority, were made with the plaintiff direct. So far as the evidence goes, the plaintiff

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company was quite unable to distinguish between the funds from any one contract and those received from any other except insofar as it was so informed by the Helios Company".

p.221 Ll.2-12 70. It was contended by the Appellant that many of the fifteen cheques included sums due in respect of machinery supplied by the Respondent and, in addition, other sums due in respect of local services provided by the Helios Company and that accordingly the cheques represented, in part, money due to the Respondent and, in part, money due to the Helios company, with the result that as an agent cannot be guilty of conversion of property he partly owned there was no conversion by the agent and accordingly no conversion by the Appellant. 10

Mr. Justice Manning said:-

p.221 Ll.12-48 "The fallacy in this argument is that the Helios company never owned any part of any monies paid by the Snowy Mountains Hydro-Electric Authority by cheques payable to the plaintiff It was the plaintiff company alone which was entitled to receive the whole of the sums paid even if after receipt thereof it was obliged to make certain payments to the Helios company. Whether or not any such obligation did, in fact, exist is not established by the evidence, although the bank records and the correspondence tend to show that the claims of the Helios company that it was owed any sum at all by the plaintiff were at least doubtful and the truth is that, at least in some respects, sums receivable on behalf of the plaintiff were paid to the credit of the account of the Helios company with the defendant Bank at a time when such account was overdrawn in excess of the agreed limit and that such sums were used, in some cases temporarily and in other absolutely, 20 30 40

for the benefit of the Helios company
and to the detriment of the plaintiff."

10 71. The Respondent contends that as
arrangements had been made by the Respondent
(mentioned in paragraphs 27, 28 and 29
hereof) to ensure that funds were available
to the Helios company, the Helios firm or
Mr. Guler for the purpose of meeting local
charges, the Respondent assumed that local
charges were being paid for by the Helios
company, the Helios firm or Mr. Guler under
such arrangements.

20 72. The Respondent contends that following
receipt of the credit advice from its
Belgian bankers, after the remission from
Australia of the amount of the first payment
by the Authority under Contract 40,006 in
which the remitter was stated to be the
Authority, the Respondent assumed that the
Authority was the remitter of the subsequent
payments thereunder.

73. As to the third issue the Respondent
contends that the facts and circumstances
relied on by the Appellant do not give rise
to an inference of ostensible authority to
indorse the cheques.

30 74. The Respondent's contention is that the
Appellant failed to observe the practice of
bankers stated by Paget in his "Law of
Banking" 5th edition at page 299 as follows:-

40 "The moral is that the practice of
collecting banks already fairly established,
not to collect for private account any
cheque which on the face of it or by
indorsement bears evidence of being the
property of or intended for the benefit
of a company, firm or other entity and
which is tendered for collection by a
person holding or purporting to hold a
fiduciary, official or subordinate
capacity in such company, firm or entity,
whether indorsed by him or not, and
whether crossed or not, should be

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rigorously adhered to in all cases, including the case of a cheque drawn by such company, firm or entity in favour of a named payee or order and tendered for collection, ostensibly indorsed, by a representative of such company, firm or entity, for his private account."

75. The Respondent further contends that as the indorsements on the cheques purported to be by delegated authority, and therefore by procuration, the Appellant is fixed with actual limitations upon the authority of the Helios company, the Helios firm or Mr. Guler to indorse the Respondent's cheques: Australian Bills of Exchange Act, 1909-1958, S.30; Midland Bank Limited v. Reckitt (1933) A.C.1; Paget on the Laws of Banking, 5th edition at page 297. 10
76. The Respondent further contends that Mr. Guler, as the representative in Australia of the Respondent, misused a wide authority in order to benefit himself by using his principal's money to discharge his own debts and that this is beyond the operation of ostensible authority: Midland Bank Limited v. Reckitt (1933) A.C.1; Lloyds Bank Limited v. Savory (E.B.) & Co., (1933) A.C. 201 at pages 229-230 per Lord Wright. 20
77. The Respondent relies on what was said by Mr. Justice Manning in this regard and set out in paragraph 70 hereof. 30
78. The account of the Helios Company with the Appellant was overdrawn in excess of the agreed limit when the second, third, fourth, fifth, sixth, seventh, ninth, tenth, eleventh, thirteenth, fourteenth and fifteenth cheques were deposited.
79. As to the fourth issue the Respondent's contention was and is that it did not ratify the conduct of the Helios Company, the Helios firm or Mr. Guler in indorsing its said cheques. 40

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80. As to the letter from Mr. Guillery to Mr. Callinan dated the 26th April, 1958 mentioned in paragraph 52 hereof, Mr. Justice Manning said:-

p.829 L.12 to
p.830 L.14

10 "Although some doubt exists in my mind as to whether a copy of this letter was properly tendered and admitted, a copy thereof which is dated 26th April, 1958, found its way into the file, Exhibit 4, tendered by the defendant. In the first place there was no doubt that Mr. Guillery was sent to Australia to investigate the position in relation to the Snowy Mountains Hydro-Electric Authority contract, at least partly because of the unsatisfactory information conveyed to the plaintiff by the Helios Company. I should have thought it would be impossible to argue that Mr. Guillery's authority would include power to ratify dealings with the company's cheques. Even if this were not the case, this letter is a personal letter marked "Private and Confidential" written by Mr. Guillery personally to Mr. Callinan personally and I am unable to understand how it can be said that such a personal and confidential communication could be regarded as being ratification by the plaintiff company".

p.223 L1.28-49

40 81. Mr. Guillery said in the course of being cross-examined that he had no authority to allow Mr. Guler to indorse cheques made payable to the Respondent or its order, that he never authorised Mr. Guler or a person by the name of Bevan or a person by the name of Holt to indorse cheques made payable to the Respondent or its order, that he never authorised or requested any employee of the Respondent to give such authority and that he never authorised Mr. Guler or the Helios company or the Helios firm or anybody on their behalf to pay any of the fifteen cheques the subject of the action into the account of the Helios Company.

p.10 L1.16-20

p.8 L1.17-20

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p.30 L.29 to 82. Mr. Guillery said that he ascertained
p.31 L.4 for the first time on the 23rd May 1958
p.40 L.28 that the said fifteen cheques had been paid
p.44 L.43 to into the account of the Helios Company with
p.45 L.4 the Appellant, that he did not know this at
the time he wrote the letter to Mr. Callinan
of the 26th April, 1958 and that he told the
Respondent in his report to it dated the 24th
May, 1958 that he had learnt for the first
time on the 23rd May 1958 that the fifteen
cheques had been paid into the account of the
Helios company with the Appellant. 10

83. The Respondent's contention was and is
that at the time the letter of the 26th
April 1958 was sent by Mr. Guillery to Mr.
Callinan, the Respondent did not have full
knowledge of all the material circumstances
in which the said fifteen cheques were paid
by the Authority under contract 40,006,
received by the Helios Company or Mr. Guler, 20
indorsed as aforesaid and deposited to the
credit of the account of the Helios Company
with the Appellant.

84. The Respondent's further contention was
and is that the said letter was never
intended and could not operate to ratify
the wrongful indorsement as aforesaid of the
Respondent's said fifteen cheques.

85. The Respondent's further contention is
that there is no evidence that the said
letter ever came to the knowledge of the
Appellant at any material time. Further, Mr. 30
Guillery complained to the Appellant after
the 23rd May 1958, that, in his view, it was
not correct for the Appellant to have paid
into the account of the Helios Company the
said cheques of the Respondent. There was no
evidence called by the Appellant to rebut this
evidence.

pp.235, 236 86. As to the document dated the 28th day of 40
May, 1958 mentioned in paragraph 53 hereof
Mr. Justice Manning said:-

p.224 Ll.14-27 "The document was addressed to the
Snowy Mountains Hydro-Electric

10 Authority and its prime purpose was to direct the Authority to pay all future sums due to the plaintiff to the credit of the plaintiff's Bank account with the Sydney branch of the Comptoir National d'Escompte De Paris and this authority not only extended to the principal contract with the Authority but also to payments to be made pursuant to another and comparatively minor contract which had been made with the authority by the Helios Company for the supply of certain lightning arrestors to be manufactured by the plaintiff."

20 87. The Respondent's contention was and is that the said document was prepared by the legal advisers of the Authority and executed by Mr. Guillery, Mr. Guler and by the Respondent at the request of Mr. Callinan so as to protect the Authority in relation to payments made in the past by the said fifteen cheques.

88. The Respondent's contention was and is that there is no evidence that the Appellant knew of the existence of the document of the 28th May, 1958 at any material time.

30 89. The Respondent's further contention is that at the time the document of the 28th May, 1958 was signed, Mr. Guillery and the Respondent believed that of the sums received by the Helios Company from the Authority the remittances to the Respondent were short by an amount of about £2800 and that at the time the document was executed the true facts were not known to the Respondent or Mr. Guillery.

p.15 L1.31-42

90. Mr. Justice Manning said:-

40 "Mr. Guillery gave evidence, which I accept, that at the time this document was signed he knew it was incorrect to say that all payments made by the authority under the main

p.224 L.41 to
p.225 L.25

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contract had been received by the plaintiff but that his belief was that out of the sums received by Helios Company the Snowy Mountains Hydro-Electric Authority Helios remittances were short by £2800. His belief at that time also was that in some cases delay occurred in the transfer of funds received by the Helios Company to Belgium due to the fact that the money was temporarily used for paying local expenses such as customs duty, rail transport, etc., but that as soon as the Authority reimbursed these expenses to the Helios Company the amounts received by them were immediately transferred. It is clear that investigations into the depredations of the Helios Company extended over many months and I accept that at the same time this document was executed the whole of the true facts were not known to the plaintiff or its representative. In the first place, I have no doubt that there was not the slightest intention on the part of Mr. Guillery or the Company which he represented to ratify any unauthorised signatures placed upon the plaintiff company's cheques by the Helios Company and I do not accept that any of the parties concerned treated this document as doing anything of the kind. As a matter of its ordinary construction I cannot agree that its effect is to do anything more than to commit the plaintiff company to an acknowledgment to the Snowy Mountains Hydro-Electric Authority - and to nobody else - that it had not nor would make any complaint about what had happened in the past."

pp.891-893

91. As to the letter from J.A. Meagher and De Coek Solicitors to Thomas Ismet Guler dated the 10th June, 1958, the Respondent's contention was and is that such letter was in substance a complaint by the said firm of Solicitors, who had been consulted by Mr.

Guillery, that moneys belonging to the Respondent had been improperly appropriated by the Helios Company, the Helios firm or Mr. Guler and demanding that the moneys misappropriated be repaid.

92. The Respondent's further contention was and is that Mr. Guillery had no authority to ratify dealings with the Respondent's cheques. p.10 L1.1-20

10 93. The Respondent's further contention was and is that there is no evidence that the Appellant knew of the said letter at any material time.

94. As to the said letter Mr. Justice Manning said:-

20 "Even if it be assumed that the solicitors who wrote this letter had not failed to appreciate the whole of the implications of what had been done (an assumption I would not be prepared to make) I cannot accept the submission that this statement is a ratification of the unauthorised indorsements. There is much to be said for the view that the letter did no more than to complain that the Helios Company, the Helios firm or Mr. Guler had improperly appropriated moneys belonging to the Plaintiff company. It seems to me quite 30 unreal to suggest such statement should be treated as a ratification". p.225 L.42 to p.226 L.5

95. As to the fifth issue, the Respondent's contention was and is that the Appellant did not establish that it acted without negligence in collecting the said cheques and accepting them for the credit of the account of the Helios Company. p.226 L.6 to p.228 L.43

40 96. The Respondent's contention was and is that the curious nature of the indorsements operated to put the Appellant on enquiry. The first cheque does not purport to be indorsed by the payee but merely by the Helios Company. The second and the third cheques p.231

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were expressed to be indorsed for the payee by Mr. Guler, other cheques were expressed to be indorsed for the payee by the Helios company by an individual. On the back of the cheque dated the 9th September 1957 appears an indorsement by the Appellant. A rubber stamp was used which carried the words "Indorsement Correct". The word "Correct" has been struck out and the word "Guaranteed" inserted and it has been signed by the Appellant. The tenth cheque dated the 19th December 1957 for the sum of £23,317.14.3. was first expressed to be indorsed by Mr. Guler in his own name. Mr. Guler then appears to have written underneath his signature "Helios Heavy Electrical Engineering and Contracting Co. Pty. Limited". On the back of the cheque in a different ink appears the indorsement "Ateliers de Constructions Electrique De Charleroi, per T.I. Guler" and this is followed by a stamp "Indorsement Correct" signed by the appellant. All the indorsements were irregular.

97. The Respondent's contention was and is that the indorsements purported to be made by delegated authority and were therefore by procuracy: Paget on the Laws of Banking, 5th Edition at page 297; Midland Bank Limited v. Reckitt (1933) A.C.1; Employer's Liability Assurance Corporation v. Skipper & East (1887) 4 T.L.R. 55; Smith v. McGuire (1858), 27 L.J. Ex. 465, at p.468.

98. Section 30 of the Australian Bills of Exchange Act, 1909 - 1958 provides:-

"A signature by procuracy operates as notice that the agent has but a limited authority to sign and the principal is only bound by such signature if the agent is so signing within the actual limits of his authority."

99. The Respondent's contention was and is that the Appellant is fixed with the actual limitations upon the authority of

the Helios Company, the Helios firm or Mr. Guler to indorse the Respondent's cheques.

100. The fact that the indorsements purported to be by procuracy therefore operated to put the Appellant on enquiry: Midland Bank Limited v. Reckitt (1933) A.C.1.

10 101. The Respondent's contention was and is that the fact that the Helios Company was seeking to deposit to the credit of its account a cheque payable to its principal operated to put the Appellant on enquiry. Knowledge by the Appellant that the Helios Company was the representative of the Respondent in Australia serves to highlight the warning to put the Appellant as the banker of the Helios Company on enquiry for it is the very fact of deposit of the principal's moneys to the credit of the account of the agent that creates the duty to enquire Lloyd's Bank v. Chartered Bank of India Australia and China (1929) I.K.B. 40 and Lloyd's Bank v. Savory (E.B.) & Co. (1933) A.C.201, at pages 229-230 per Lord Wright.

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102. The Respondent contends that the Appellant having been put upon enquiry, made no enquiries whatever to safeguard the interests of the Respondent. Mr. Dunstone seems to have assumed the existence of an authority to indorse from the fact of agency. The Appellant never wrote or otherwise got in touch with the Respondent to enquire as to the regularity of any of the indorsements. Mr. Guler admitted in evidence that he never before indorsed cheques of the Respondent and paid them into his bank account.

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pp.166-169

103. Mr. Justice Manning said:-

40 "I cannot believe other than that the bank realised quite well when it accepted these cheques for the credit of the account of the Helios company that what was being done was irregular and that in each case, the circumstances should have aroused doubts in

p.228 Ll.5-35

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the minds of the officers concerned so as to cause them to make enquiry. Furthermore I have no doubt that it was the circumstance that the bank knew the first cheque was in effect accompanied by the appropriate documents to enable the identical amount to be remitted to the principal in Belgium which served to allay those doubts. If it had not had these documents in hand at the time and if it had not been satisfied the remission was being made at once, then I have no doubt that it would have declined to collect the cheque for the Helios Company. The real error made by the bank was that it assumed because the amount of the first cheque was remitted to Belgium immediately that the same course would be followed with the remaining cheques. It was quite unsafe to make such an assumption and, as the facts proved remissions were not made at all times I have no doubt that having received the first cheque in the circumstances mentioned there was an equal obligation upon the bank to inquire in respect of each other cheque and if it had inquired it would have been obvious to the bank that remissions were being withheld".

104. The Respondent respectfully submits that this appeal should be dismissed with costs for the following, amongst other,

R E A S O N S

- (a) THE decision of Mr. Justice Manning was correct.
- (b) THE Respondent did not expressly authorise the Helios Company, the Helios firm or Mr. Guler to indorse the said cheques and pay them into its Bank account.
- (c) THE facts and circumstances do not establish that the Respondent gave any implied authority of the Helios Company, the Helios firm or Mr. Guler to indorse the said cheques and pay them into the bank account of the Helios Company.

- (d) THE facts and circumstances do not establish that the Helios Company, the Helios firm or Mr. Guler had ostensible authority to indorse the said cheques and pay them into the bank account of the Helios Company.
- 10 (e) The Appellant wrongly assumed from the fact of agency between the Helios Company, the Helios firm or Mr. Guler and the Respondent the existence of an authority to indorse the said cheques and pay them into the bank account of the Helios Company.
- (f) THE Appellant made no enquiry as to whether the Helios Company, the Helios firm or Mr. Guler had authority to indorse the said cheques on behalf of the Respondent and pay them in the bank account of the Helios Company.
- 20 (g) IT is not open to the Appellant to raise the question of ostensible authority as this is a case in which the Helios Company, the Helios firm or Mr. Guler as the agent of the Respondent misused a wide authority in order to benefit the Helios Company by using substantial sums of money the property of the Respondent to reduce its overdraft with the
- 30 Appellant.
- (h) None of the documents relied on by the Appellant to constitute ratification of the conduct of the Helios Company, the Helios firm or Mr. Guler in indorsing the Respondent's cheques, upon their proper construction, constitutes ratification.
- 40 (i) At the time of the alleged acts of ratification the Respondent did not have full knowledge of all the material circumstances in which the indorsements were made by the Helios Company, the Helios firm or Mr. Guler.
- (j) None of the documents relied on by the

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Appellant to constitute ratification are unequivocal or clear acts of ratification.

- (k) The curious nature of the indorsements, the fact that the indorsements were by procuration, the knowledge by the Appellant that the Helios company, the Helios firm or Mr. Guler was the agent of the Respondent and was depositing substantial sums of money the property of its principal to the credit of its own account, thus reducing its overdraft with the Appellant, all operated to put the Appellant on enquiry, but it failed to enquire and cannot therefore rely on the protection of Section 88 of the Australian Bills of Exchange Act, 1909-1958 which is substantially the same as Section 82 of the English Bills of Exchange Act, 1882.

10

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C. L. D. MEARES

J. S. LOCKHART

No. 10 of 1965

IN THE PRIVY COUNCIL

O N A P P E A L
FROM THE SUPREME COURT OF NEW SOUTH
WALES

B E T W E E N:

AUSTRALIA & NEW ZEALAND BANK LIMITED
... .. Appellant

- and -

ATELIERS DE CONSTRUCTIONS
ELECTRIQUE DE CHARLEROI Respondent

C A S E FOR THE RESPONDENT

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