30,1960

IN THE PRIVY COUNCIL No. 33 of 1960

ON APPEAL
FROM THE SUPREME COURT OF NEW SOUTH WALES

BETWEEN

THE COMMERCIAL BANKING COMPANY OF SYDNEY LIMITED
... ... (Defendant) Appellant

- and -

EDVAL ROFF MANN (Plaintiff) Respondent

CASE FOR THE RESPONDENT

RECORD

1. This appeal is brought pursuant to final leave to appeal to Her Majesty in Council granted by the Supreme Court of New South Wales by Rule dated the 6th day of June 1960. p.35

2. The action in which this Appeal is brought was heard on the 9th March, 1960 in the Supreme Court of New South Wales as a Commercial Cause by His Honour Mr. Justice Walsh, sitting without a jury. His Honour found a verdict for the Respondent upon each of two counts in the sum of £3505.0.0. and directed that judgment might be entered accordingly.

3. The Respondent had claimed to recover from the Appellant the sum of £3505.0.0. upon each of two alternative causes of action; the one, that the Appellant had received the sum of £3505 to the use of the Respondent, (the first count); the other, that the Appellant had converted thirteen documents the property of the plaintiff described in the Respondent's declaration as "bank cheques", (the second count). The said "bank cheques" were, in fact, promissory notes made and issued by Australia & New Zealand Bank Limited. p.3 l.15 p.3 l.20

4. "Bank cheques", as they are described in New South Wales, are similar to "bank drafts" as known in the United Kingdom. They are, in Australia, commonly used by solicitors in the settlement of conveyancing transactions and by

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other persons engaged in commercial transactions where it is inconvenient to use cash, but necessary or desirable that a further assurance of payment be obtained than the debtor's personal cheque.

5. The defences relied upon by the Appellant at the trial, were, in answer to the count for
p.5 l.14 "money had and received" - that it never was indebted as alleged and, in answer to the count for
p.5 l.31 "conversion" - that the relevant "bank cheques" were not the property of the Respondent, and that
p.5 l.28 the Appellant did not convert them.

Other defences to each count framed in reliance upon certain provisions of the Bills of Exchange Act 1909/1958 (Commonwealth) were abandoned at the hearing.

SUMMARY OF EVIDENCE

6. The Respondent was, at all material times,
p.12 l.1-6 a solicitor practising that profession in Sydney in partnership with one Gordon Arthur Richardson under the firm name, "E.R. Mann & Co." The Appellant carried on the business of banking within the Commonwealth of Australia.

7. The Respondent and Richardson, in accordance
p.12 l.14 with the provisions of Part VII of the Legal Practitioners Act 1898-1954 (New South Wales), maintained, at all material times, a banking account called for the purposes of the aforesaid Act a "trust account" with the Pitt and Hunter Street Branch, at Sydney, of Australia and New Zealand Bank Limited in the name of the partnership.

p.12 l.32 8. The partnership agreement subsisting between
p.13 l.22-33 the Respondent and Richardson provided that all the assets of the partnership, including all money to the credit of any bank account in the partnership name, should be and remain the property of the
p.13 l.1-21 Respondent and that Richardson should be entitled to the income of the partnership, save for small weekly drawings by the Respondent.

The partnership agreement further provided that cheques might be drawn upon the aforesaid banking account by either partner and that the Respondent was to give the "necessary authorities" to the bank for this purpose. The authority of Richardson to

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draw cheques and otherwise operate upon the aforesaid account of the partnership with the Australia and New Zealand Bank Limited and the fact that the firm (of which Richardson was a partner) carried on business as solicitors were known to that Bank.

9. Between the 6th August, 1954 and 8th May, 1956 Richardson, drew (inter alia) thriteen documents purporting to be "cheques" upon the trust account of the partnership with the Australia and New Zealand Bank Limited. In each case, after the printed word "Pay", in the printed form of cheque was written, "Bank cheque favour H.Ward" or "Bank cheque H.Ward": the printed words "or bearer" were not struck out. (Exhibit "E"). In each case, an application, upon a printed form, for a "bank cheque" in favour of "H.Ward" for an amount equal to the amount of the aforesaid "cheques" was completed and signed "E.R.Mann & Co. per G. Richardson". (Exhibit "D"). These documents were taken to the Australia and New Zealand Bank Limited (whether by Richardson or some other person does not appear from the evidence at the trial); in each case, the Bank debited the trust account of the partnership with the amount of the cheque and contemporaneously issued a "bank cheque" for an amount equal to the amount of the aforesaid cheque in the form "Pay H.Ward or bearer". (Exhibit "C"). Each "bank cheque" was taken to the branch at Maroubra, Sydney, of the Appellant, The Commercial Banking Co. of Sydney Limited, by a person named Ward who had with that branch of that Bank a personal banking account. At that branch of the Appellant each "bank cheque" was delivered across the counter to the Appellant which paid to Ward in exchange therefor the face value of each "bank cheque". In due course each of the said "bank cheques" was paid by the Australia and New Zealand Bank Limited to the Appellant against delivery thereof.

p.21 l.13-16

p.21 l.16-22

10. Ward was not and had never been a client of the partnership nor did the partnership hold any money or securities for him or on his behalf. No client of the partnership had authorised or directed the partnership to pay or transfer any money to Ward or to Richardson. Richardson caused fictitious debits to be raised in the books of the partnership in respect of each of the aforesaid cheques drawn by him upon the partnership trust account for the purpose of concealing the true

p.17 l.10-24

p.15 l.16-28

p.16 l.26-31

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nature of his dealings. Richardson's dealings, in each of the aforesaid 13 transactions, were found to be in fraud of the Respondent.

p.2 l.29-30

THE TRIAL JUDGE'S REASONS

11. His Honour Mr. Justice Walsh found a verdict for the Respondent upon each cause of action in the sum of £3505.0.0. being in each case an amount equal to the total of the face value of the 13 "bank cheques".

p.33 l.34-35

His Honour held:-

(a) that as between the Australia and New Zealand Bank Limited and the Respondent Richardson had authority to draw the relevant cheques upon the partnership trust account, and to obtain "bank cheques" for the like amount;-

p.23 l.23-26

(b) that the said "bank cheques", when issued, were the property of the Respondent;

p.24 l.5-6

(c) that the Respondent had the right to the immediate possession of each of the same;

p.22 l.42

(d) that the said right to immediate possession was sufficient to found an action for conversion;

(e) that none of the dealings with the "bank cheques" which thereafter occurred - were authorised by the Respondent;

p.25 l.14-16
p.33 l.1-26

(f) accordingly, that each of the said dealings, including the transfer of the said "bank cheques" by the Appellant to Australia and New Zealand Bank Limited in exchange for the amount of the face value of the said "bank cheques" was a conversion of property of the Respondent;

p.20 l.2-9
l.17-22

(g) that the measure of damages for the conversion of a "bank cheque" is, prima facie, the face value of that "bank cheque";

p.22 l.3-6

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(h) alternatively, upon the cause of action for money had and received, that the Appellant received to the use of the Respondent, the amount of money paid to the Appellant by the Australia and New Zealand Bank Limited, that is, the face value of the bank "bank cheque" in each case. p.22 l.18-20

THE APPELLANT'S CONTENTIONS AND THE TRIAL JUDGE'S REASONS FOR REJECTING THE SAME

12. The Appellant contended before His Honour:-

(i) that the evidence did not establish that the Australia and New Zealand Bank Limited was authorised, as between itself and the Respondent to issue "bank cheques" to Richardson.

(ii) that, accordingly, the Respondent did not have a title to any of the said "bank cheques" sufficient to support an action for conversion unless he ratified the action of Richardson in procuring the issue of each of the said "bank cheques".

(iii) that ratification as aforesaid by the Respondent necessarily involved ratification of the transfer of the said "bank cheques" by Ward to the Appellant, and of the acceptance thereof by the Appellant in exchange for cash paid over the counter by the Appellant and of the receipt of the proceeds thereof by the Appellant; that accordingly the Appellant did not commit any act of conversion.

13. The reasons given by His Honour in rejecting each of these arguments were as follows:-

His Honour said (inter alia):-

(i) Upon the issue of Richardson's authority to obtain "bank cheques":-

"There is, indeed, no express evidence in this case that the authority to draw cheques carried with it or was accompanied by an authority to obtain a "bank cheque", but I p.23 l.26-36

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consider that this can properly be inferred, particularly, when one is dealing with a Solicitors' Trust Account. There was no attempt by cross-examination or evidence to dispute that this was so. Richardson was a partner in the firm. He had authority to sign cheques without obtaining any other signature".

(ii) Upon the issue of the Respondent's title to the "bank cheques" obtained by Richardson:-

p.31 l.48 "An argument which has been submitted here is that when Richardson, having Mann's money in his possession (in the sense of having authority to operate on the bank account) exchanged that money for other property, namely the bank cheques, that other property did not become instantly, the property of Mann. He had a right, when he discovered the facts, to elect to take the property or to repudiate the transaction and hold Richardson to account. Until he did so, on this argument, no property vested in him. I should have thought that this line of reasoning had no application to the facts of the present case. If Richardson had, by means of the cheques, drawn cash from the bank, I feel no doubt that the money would have belonged to Mann. If then Richardson had used that money to buy some other property, e.g. a piano, it may well be that the property in the piano would pass from the vendor to Richardson and would not pass instanter to Mann. But that is not what happened. Richardson did not draw cash and then buy other property with it. Instead of drawing cash, he obtained, for the Trust Account cheque, a bank cheque. This is not really a case of exchanging one form of property for another form of property, by any independent transaction of a kind which would divest title from the owner of that other form of property and vest it in Richardson. It was a case in which the bank, at the request of the firm of E.R.Mann & Co., handed bank cheques to that firm, the hand which took them being the hand of Richardson. In such circumstances, although indeed his act

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in making that request was not authorised as between himself and Mann, I am of opinion that the cheque belonged to Mann. I consider that confusion may easily arise from a failure to keep steadily in mind the distinction between what was "authorised" as between Mann and the bank, and what was "authorised" as between Mann and Richardson". p.32 l.7

(iii) Upon the issue of the extent of ratification required of the Respondent (assuming for the purposes of this issue, that ratification became necessary):-

"If, however, he had to rely upon that doctrine, I consider he would nevertheless succeed. The vital question would then be whether Mann can be treated as having ratified the act of Richardson in obtaining the bank cheques and, at the same time, can be permitted to disavow the further act of the passing of these cheques to Ward. I am of opinion that this queation should be answered in favour of the plaintiff. As in McClintock's case, it may have been essential if actual payment, in the ordinary way, of the bank cheques was to be obtained, that they should go to a bank for collection. But I see no reason why it was essential that they should be passed on to Ward. There is evidence which is not disputed, that the issuing bank would have taken back such bank cheques and placed the amounts of them to the Trust Account credit. Further, I cannot see that a bank cheque expressed to be payable to "H. Ward or Bearer" could not be collected through a bank other than one in which Ward had an account. Therefore, upon this view of the case I consider, that the facts are distinguishable from those in McClintock's case, in which the author of the fraud paid the bank cheques directly to a bank. Here there was the intervention of Ward before the cheques got to a bank. The handing over of the cheques to Ward should, in my opinion, be regarded as "a fresh departure" (see (1922) 1 A.C. at 248), and I consider that it is not necessary to treat Mann as having adopted this fresh departure, by reason of his having adopted the act of obtaining the cheques". p.33 l.26

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(iv) Upon the issue of damages:-

p.22 l.2-18

"If the plaintiff can establish that cause of action (conversion), I am of opinion that he can obtain by way of damages, the amount represented by the face value of the bank cheques, although what was actually converted was the pieces of paper and not the money of the plaintiff ..... The theoretical arguments raised before me against the validity of (this proposition) cannot prevail against the authorities. See Morison v. London County etc. Bank (1914) 3 K.B. 356 at 365, 379. Lloyds Bank v. Chartered Bank of India (1929) 1 K.B. 40 at 55.

THE RESPONDENT'S SUBMISSIONS.

14. The submissions of the Respondent are as follows:-

(i) That Richardson had authority to draw cheques upon the partnership trust account with the Pitt and Hunter Street Branch of the Australia and New Zealand Bank Limited and to obtain "bank cheques" from that Bank by reason either:-

(a) of the authority contained in Exhibit "G"; or

(b) of his position as a partner of the firm of solicitors "E.R.Mann & Co."

(ii) That, upon issue by the Australia and New Zealand Bank Limited, "bank cheques" so obtained were the property of the Respondent in consequence of the partnership agreement. Exhibit "F".

(iii) That, at all material times the Respondent had:-

(a) possession thereof; or

(b) the right to immediate possession thereof;

(iv) That the right to immediate possession of a "bank cheque" is a sufficient title to found an action for conversion thereof.

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Cundy v. Lindsay 3 App. Cas. 459.

(v) That upon the evidence it was established and His Honour found as a fact that neither Richardson, Ward, nor the Appellant at any material time had authority from the Respondent to deal with the said "bank cheques" in the manner in which they were dealt with in fact.

(vi) That upon the evidence it was established and His Honour found as a fact that:

(a) upon acceptance by the Appellant of delivery by Ward of each of the said "bank cheques" in exchange for payment to Ward of an amount of cash equal to the face value of each of the said "bank cheques".

(b) upon delivery by the Appellant of each of the said "bank cheques" to the Australia and New Zealand Bank Limited in exchange for payment to it of the amount of the face value thereof

the Appellant converted each of the said "bank cheques".

Metcalf v Lumsden 1844 1 Car. & Kir. 309

Arnold v Cheque Bank 1 C.P.D. 578

(vii) That each of the findings of His Honour set forth in (v) and (vi) hereof was correct upon the evidence.

(viii) The evidence established

(i) that the partnership trust account had been debited with the amounts of the face value of each of the said "bank cheques" when the same were issued; and

(ii) that the Australia and New Zealand Bank Limited would have credited the partnership trust account with the face value of each of the said "bank cheques" if the Respondent had returned the same to it and requested it so to do. The conversion of the "bank cheques" prevented the Respondent from so doing. p.17 l.30-37

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(ix) That the receipt by the Appellant of each of the respective amounts of the face value of the aforesaid "bank cheques" was a receipt of money to the use of the Respondent.

(x) That the measure of damages upon the cause of action for conversion of the "bank cheques" as aforesaid is an amount equal to the face value of the same because:-

(a) that is the proper measure of damages for the conversion of such a chattel.

Morison v London County & Westminster Bank (1914) 3 K.B. 356

Restatement of the Law (U.S.A.) "Torts" Section 242.

(b) the Respondent, in the circumstances of this case was deprived of the opportunity of himself obtaining payment or credit for the face value thereof.

(c) each of the said "bank cheques" is itself an instrument which contains an independent obligation of the said value.

(d) each of the said "bank cheques" is itself an instrument which evidences a title to property of the said value.

(e) each of the said "bank cheques" constitutes an instrument which is transferable by delivery whereby the holder may obtain, prima facie, the amount of the face value thereof.

15. The respondent accordingly submits that the appeal ought to be dismissed for the following, amongst other, reasons:-

R E A S O N S

16. A. BECAUSE the Appellant converted property of the Respondent to the value of £3505.0.0.

B. BECAUSE the Appellant received the sum of £3505.0.0. to the use of the Respondent.

RUSSELL BAINTON

NO. 33 of 1960

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ON APPEAL

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BETWEEN

THE COMMERCIAL BANKING COMPANY OF SYDNEY LIMITED (Defendant)Appellant

- and -

EDVAL ROFF MANN (Plaintiff)Respondent

CASE FOR THE RESPONDENT

LIGHT & FULTON,
24 John Street,
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Respondent's Solicitors