

IN THE HIGH COURT OF THE REPUBLIC OF SINGAPORE

[1994] SGHC 171

Suit 463/1991

Between

Bintai Kindenko Pte Ltd

... Plaintiff

And

Sanwa Bank Ltd
Another

... Defendant

GROUND OF DECISION

Banking — Cheques — Altered; Banking — Cheques — Altered; Bills of
Exchange and Other Negotiable Instruments — Collecting banker; Contract
— Contractual terms — Exclusion clauses

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Bintai Kindenko Pte Ltd v Sanwa Bank Ltd and Another

[1994] SGHC 171

Suit 463/1991
Goh Joon Seng J
24 June 1994

1 The plaintiffs are a trading company. On 4 September 1979 they applied to the first defendants for the opening of a current account. By the said application which was accepted, the plaintiffs agreed `to observe the clauses of the agreement on the back hereof and undertake to hold your bank free from any loss whatsoever resulting through my/our failure to abide by such clauses` (the opening clause). Among the clauses on the reverse side are:

(i) Clause 2(a): `I/we am/are to comply with the requests printed on the cover of the cheque book.` (ii) Clause 13: `I/we will not hold the bank liable in any way for any loss whatsoever incurred by me/us as a result of the operation of any account opened by me/us with the bank save where such loss is directly attributable to the bank acting otherwise than in good faith.`

2 The requests so far as relevant and referred to as `caution` on the cover of the cheque book (AB14) read:

All cheques to be filled up in ink. Any alteration to be confirmed by the full signature of the drawer in filling up a cheque the amount to be written in words, commencing on the left hand side close to the word `Dollars` without any space between the words, and the figures made close to the `\$` and as plainly as possible.

3 For your security in sending cheques through the post, or otherwise paying them away, you should `cross` them thus:

& Co

They can then only be paid through some bank, and when you are acquainted with the name of the bank of the person to whom you send or pay a cheque, you should write the name of that bank in the crossing before the words `& Co` and the cheque will then be paid only to that particular bank.

This book to be kept in a place of security, and when a new book is required the printed request form to be filled up and signed and presented or sent to the bank.

Do not write anything in the 5/8" band at the bottom-edge of the check [sic]. Do not mutilate your checks [sic]. It is also advisable not to fold your checks [sic]. Do not leave staples or pins attached to your checks [sic].

4 On or about 10 May 1990, the plaintiffs issued a cheque crossed `Not Negotiable. A/C Payee Only` No 391542 (the said cheque) in the sum of \$260 payable to GD Printing Services. The said cheque drawn on the first defendants was handed to the receptionist for posting to GD Printing Services on 11 May 1990. It never arrived. The amount was eventually altered to \$126,260 and the payee to one `Chong Sau Kam IC No 7494646`.

5 On or about 14 May 1990, a female purporting to be `Chong Sau Kam` opened a savings account at the Bukit Timah branch of the second defendants.

6 On 15 May 1990, the said cheque was deposited into the account of `Chong Sau Kam` at the second defendants` Robinson Road branch for collection. The second defendants as collecting bank cleared the cheque for collection. On 16 May 1990 the first defendants paid over to the second defendants the sum of \$126,260 and debited the plaintiffs accordingly.

7 On 17 May 1990 `Chong Sau Kam` made a withdrawal of \$900 at the second defendants` Bukit Panjang branch followed by a further withdrawal of \$95,000 at the second defendants` Bukit Timah branch, thus leaving a balance of \$30,360 in that account.

8 Upon receiving from the first defendants the statement of account for the relevant period, this matter came to light and the plaintiff notified the first defendants that they did not authorize the debit. A report was then made to the police. Pending direction of the court or disposal enquiry, the \$30,360, under an order of seizure by the police, now remains `frozen` in the account of `Chong Sau Kam`.

9 On 7 March 1991, the plaintiffs commenced these proceedings claiming:

(i) against the first defendants, a declaration that the purported debit to the plaintiffs` account of \$126,260 and interest thereon was without authority and of no effect and, alternatively, payment of the sum of \$126,260, interest and costs; (ii) against the second defendants, damages for conversion in the said sum of \$126,260 and alternatively payment of the same as money had and received. The plaintiffs also claimed interest and costs.

10 As against the first defendants, the plaintiffs` case is that a banker who pays on a materially altered cheque does so without the customer`s mandate. In **Hall & Anor v Fuller & Ors** , a cheque for Â£3 was altered by the holder to Â£200 in such a way that no one in the ordinary course of business could have observed it. It was held that the bank could not charge the customer anything beyond the sum for which the cheque was originally drawn. In giving his judgment, Bayley J said at p 757:

The banker, as the depository of the customer`s money, is bound to pay from time to time such sums as the latter may order. If, unfortunately, he pays money belonging to the customer upon an

order which is not genuine, he must suffer, and to justify the payment he must show that the order is genuine, not in signature only, but in every respect. This was not a genuine order for the customer never ordered the payment of the money mentioned in the cheque.

11 In the present case, not only was the amount altered, the payee's name was also altered. The first defendants, however, denied liability contending that:

(i) having acted in good faith and without negligence, they are protected by s 80 of the Bills of Exchange Act (Cap 23) (the Act); (ii) the plaintiffs themselves were in breach of their duty to exercise reasonable care in drawing up the said cheque, thereby facilitating the alterations, and the plaintiffs are therefore estopped; (iii) they are excluded from liability by the exclusion clauses.

12 On (i), s 80 of the Act reads:

Where the banker, on whom a crossed cheque is drawn, in good faith and without negligence pays it, if crossed generally, to a banker, and if crossed specially, to the banker to whom it is crossed, or his agent for collection, being a banker, the banker paying the cheque, and, if the cheque has come into the hands of the payee, the drawer, shall respectively be entitled to the same rights and be placed in the same position as if payment of the cheque had been made to the true owner thereof.

13 The alterations to the said cheque were clearly material alterations in the light of s 64(2) of the Act. The said cheque was thus avoided by s 64(1) of the Act.

14 Section 64 of the Act reads:

(1) Where a bill or acceptance is materially altered without the assent of all parties liable on the bill, the bill is avoided except as against a party who has himself made, authorized or assented to the alteration, and subsequent indorsers:

Provided that where a bill has been materially altered, but the alteration is not apparent, and the bill is in the hands of a holder in due course, such holder may avail himself of the bill as if it

had not been altered, and may enforce payment of it according to its original tenor.(2) In particular the following alterations are material, namely, any alteration of the date, the sum payable, the time of payment, the place of payment, and, where a bill has been accepted generally, the addition of a place of payment without the acceptor's assent.

15 In *Slingsby & Ors v District Bank Ltd*, the plaintiffs, executors of a will, kept an executors' account with the defendants, and retained a firm of solicitors, Cumberbitch & Potts, who used to assist them in matters connected with their testator's estate. The acting member of the firm was one James Cumberbitch. The plaintiffs, in conference with James Cumberbitch, decided to invest through John Prust & Co, stockbrokers, a sum of 5000 £, part of the estate lodged on deposit with the defendants. James Cumberbitch accordingly drew out a form of cheque for signature by the plaintiffs. It was in the form 'Pay John Prust & Co or order' and was drawn on the plaintiffs' deposit account with the defendants. The cheque was signed by the plaintiffs and left with James Cumberbitch to be posted to John Prust & Co with instructions to invest the money. James Cumberbitch instead of posting the cheque to John Prust & Co fraudulently inserted the words 'per Cumberbitch & Potts' in the blank space between the payees' name and the words 'or order'; he then indorsed the document with the names 'Cumberbitch & Potts' and paid it so altered and indorsed into the Westminster Bank to the credit of a company in which he was interested and which had an account at that bank. The document was accepted without question by the Westminster Bank and passed through the clearing house, and the account of the plaintiffs with the defendants was debited, and that of the company with the Westminster Bank was credited, with the amount on the face of the document. In an action by the plaintiffs against the defendants for conversion, negligence and breach of duty, the Court of Appeal in dismissing the appeal by the defendants held, inter alia, that the cheque had been 'materially altered' within the meaning of s 64 of the Bills of Exchange Act

1882, (the English Act) and was avoided as between the plaintiffs and defendants by that section, and that, therefore, the defendants could not rely upon ss 60 and 80 thereof as excusing them for paying the cheque and that, in leaving a blank space between the name of the payee and the words `or order`, the plaintiffs were not guilty of any breach of duty towards the defendants.

16 In the course of his judgment, Scrutton LJ said, at p 559:

This cheque, having been signed by the executors in a form which gave Cumberbirch no rights, was fraudulently altered by Cumberbirch before it was issued and, it was not disputed, altered in a material particular, by the addition of the words `per Cumberbirch & Potts`. The cheque was thereby avoided under s 64 of the Bills of Exchange Act ...

17 The protection given by ss 80 and 82 is excluded in my opinion by the fact that the alteration has made the paper a null and void document, no longer a cheque.

18 Another member of the court, Greer LJ, said at p 562:

I think, in the first place, that s 80 only applies to a case where the true owner is somebody other than the drawer, and, in the second place, I think that it does not apply to a cheque which has been avoided by a material alteration before its issue.

19 Sections 64 and 80 of the English Act are in pari materia with the corresponding sections of the Act.

20 Accordingly, I hold that the first defendants are not entitled to rely on s 80 of the Act.

21 On (ii), the customer owes a duty to his banker to exercise reasonable care and take reasonable precaution against fraud. The duty has been stated by

Lord Finlay LC in ***London Joint Stock Bank Ltd v Macmillan & Arthur*** , at p 789, as follows:

The relation between banker and customer is that of debtor and creditor, with a superadded obligation on the part of the banker to honour the customer's cheques if the account is in credit. A cheque drawn by a customer is in point of law a mandate to the banker to pay the amount according to the tenor of the cheque. It is beyond dispute that the customer is bound to exercise reasonable care in drawing the cheque to prevent the banker being misled. If he draws the cheque in a manner which facilitates fraud, he is guilty of a breach of duty as between himself and the banker, and he will be responsible to the banker for any loss sustained by the banker as a natural and direct consequence of this breach of duty.

22 At p 810 he said:

The question whether there was negligence as between banker and customer is a question of fact in each particular case, and can be decided only on a view of the cheque as issued by the drawer, with the help of any evidence available as to the course of dealings between the parties or otherwise.

23 Thus whether the plaintiffs had exercised reasonable care and taken reasonable precaution against fraud in drawing the said cheque is one of fact taking into account the course of dealings between them and the first defendants.

24 From the evidence, following the plaintiffs' standard procedures, a payment voucher in favour of GD Printing Services was prepared by the assistant accounts officer, Miss Lo Hee Hoon. The voucher was then checked by the accounts manager, Madam Koh Chye Ngoh, then certified by the assistant vice-president, Mr Shiomi, and finally approved by Mr Haw Thar Heong, the senior vice-president. The approved voucher then went back to Madam Koh Chye Ngoh who made out the said cheque in favour of GD Printing Services. For the amount to be written in words she used a cheque printer to print after the word 'Dollars' of 'Singapore Dollars' the words 'the sum of 260

DOLS 00 cts`. She then wrote in figures `260.00` in the box after the `S\$` sign. The said cheque attached to the payment voucher and approved invoice was then signed by Mr Shiomi and Mr Haw Thar Heong. It was then handed to the receptionist for posting to the payee. The main criticism by the first defendants is that there were spaces between the word `Dollars` and the printed amount and between `\$` sign and the written amount in figures. But this is not even supported by the evidence of their own manager, bank office, Mr Lim Wee Hian (1DW1) on their course of dealings with the plaintiffs and with other customers.

Q: So you do not insist on each and every caution?

A: It is for the protection of the customer.

Q: You said you yourself must have some regard to the caution?

A: We will honour the cheques even if they do not comply with the caution.

Q: Except for cheques written in pencil or blank paper?

A: Yes.

Q: You said in those two cases because they are abnormal and suspicious?

A: Yes.

Q: Would you accept the cheque if I do not use any figures in the box?

A: We will accept.

Q: It is not extraordinary or suspicious?

A: No.

Q: Most banks will accept cheques with no figures in the box?

A: I do not know about [other] banks but we accept.

Q: So strictly your customer can expect the cheque without the figures, that cheques will be honoured?

A: Yes.

Q: Cheques without the figure do not comply with your caution?

A: It is for the protection of the customer.

Q: But it does not comply with the caution?

A: Correct.

Q: A lot of cheques do not comply with the caution `do not write anything in the 5/8 band`?

A: Yes.

Q: If you see AB20-69, the right signature crosses this 5/8 band all the time?

A: Yes.

Q: So notwithstanding the caution, this customer will come to expect you to honour this cheque although he signs beyond the 5/8 band?

A: Yes, crossing this line is not material.

Q: It is common to see cheques stapled with paper?

A: Yes.

Q: You don't reject them because they are stapled, notwithstanding AB14, the last line?

A: Correct.

Q: Would you accept a cheque written with a ball point?

A: Yes.

Q: Ball point ink is also written in ink?

A: Yes.

Q: You have never rejected a cheque written with a ball point?

A: I cannot remember having rejected one.

Q: If all the technicalities are in order, you will not reject a cheque because it is written with ball point pen?

A: Correct.

25	Cheque	printing	machine
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Q: You agree that it is common practice by customers to use cheque printing machine in Singapore?

A: Yes.

Q: Most banks use cheque printing machines in writing out cashier's order?

A: I don't know about other banks' practice. We use cheque printing machine.

Q: Your bank would not reject a cheque because it was written with a cheque printing machine?

A: Yes.

Q: AB93, what is this?

A: This is first defendants' cashier order. A cheque printing machine was used.

Q: As far as you know no cashier's order of first defendants has been rejected because a cheque printing machine was used?

A: Correct.

...

Q: Would you personally agree that a cheque printing machine can be considered a writing or printing in ink?

A: Yes.

Q: So this is different from the situation when the cheque is written in pencil?

A: Yes.

Q: See AB98. What is that?

A: It is a cashier order of Amex where a cheque printing machine was used.

Q: You will not reject AB98 because it used a cheque printing machine?

A: Yes.

Q: AB14 says all cheques to be filled in ink?

A: Yes.

Q: As a reasonable bank officer, do you agree that cheques in which a cheque printing machine is used sufficiently comply with this requirement?

A: Yes.

Q: See AB94-124, they are all printed with cheque printing machine?

A: Yes.

Q: You agree when a cheque printing machine is used, the amount is expressed in figures not in words?

A: Yes.

Q: See AB93, your cashier order, the amount is also stated in figure?

A: Yes.

Q: This method using a cheque printing machine does not strictly comply with the caution because the amount is not expressed in words?

A: Yes.

Q: Notwithstanding what is stated in the caution your customers will expect their cheques using a printing machine to be honoured?

A: Yes.

26 **Failing to write the amount in figures in the box and leaving too wide a gap**

Q: See AB118, the box is left blank, you would accept this cheque?

A: Yes.

Q: Also AB116 and 117, 113, 121, 124, 104, 103, 102, 99, you will accept these cheques although the box is left blank with no figures?

A: Yes.

Q: You will accept them notwithstanding they are not in compliance with the caution in that no figures were filled in opposite the '\$' sign?

A: Yes.

27 If the first defendants were prepared to accept cheques with the amount
in the box after the `S\$` sign left blank, it is surprising that they should be heard
to complain that the amount in figures in the box in the said cheque was not

written close enough to the `S\$` sign. On the complaint that the words `The sum of ...` were not printed close enough to the word `Dollars`, an examination of the said cheque will show these words as originally written were close to the word `Dollars` but had been erased and rewritten well past the word `Dollars`.

28 Accordingly, it is my view that the plaintiffs, following the previous course of dealings between them and first defendants, had exercised reasonable care and had taken reasonable precaution in drawing up the said cheque.

29 Even if the said cheque had been drawn up leaving spaces facilitating the alterations, the alterations were apparent. This is the evidence of Ms Jean Tham Mun Yee (1DW2), the first defendants' assistant officer in the payment and receipt department in charge of clearing of cheques.

Q: Now, having scrutinized the cheque in court, is there anything in P1 that will evoke an enquiry or raised your level of alertness?

A: There is erasure on the name, the IC number. I am not talking about the ink. I am talking about the paper surface having been erased before.

Q: These erasures appear below the name and the IC number?

A: Yes.

Q: Anything else?

A: The amount `the sum of 126,260 dols 00 cts`, the background is not as clear as the rest.

Q: What about the word `the`, is it smaller than the other words?

A: Yes.

Q: 1DW1 said the words `the sum of` are larger than `dols` and `cts`. Do you agree?

A: Yes.

Q: So there are erasures on the paper and some words are not of the same size, would that not put you on enquiry, if you have the chance to see all these in the course of your duty?

A: Yes.

Q: See the figure in the box. You said because the customer uses the cheque printer you would honour the cheque even if the box is not filled?

A: Yes.

Q: See the figure '\$126,260.00', the full stop is out of alignment with the rest?

A: Yes.

Q: The '6' in '126' is straight while the '6' in '260' is slanting?

A: Yes.

Q: The '2' in '260' has a wider loop at the bottom compared to '2' in '126'?

A: Yes.

Q: The '1' in '126' is larger than the rest?

A: Yes.

Q: The '2' of '260' is larger than the '2' of '126'?

A: Yes.

Q: If you have noticed all these additional features, it would definitely put you on enquiry?

A: Yes.

Q: If all these had been pointed out to an officer in your bank, someone in your bank would have called the customer?

A: Yes.

Q: 1DW1 said putting IC numbers in cheques is more common in uncrossed cheques than in crossed cheques. You agree?

A: Yes.

Q: He said the reason for putting the IC number on an uncrossed cheque is so that the bank will know it is paying to the right person when paying over the counter?

A: Yes.

Q: 1DW1 said since crossed cheques cannot be encashed over the counter, it would be pointless to put in IC number, you agree?

A: Yes.

Q: P1, a crossed cheque, has an IC number?

A: Yes.

30 1DW1 upon his attention being drawn by counsel for plaintiffs to the discrepancies on the said cheque also agreed as follows:

Q: Having looked at the amount in words and figures, would you as a reasonable bank officer noting these discrepancies agree that they give rise to suspicion?

A: Yes.

Q: These discrepancies were apparent to you now that you have some time to examine it?

A: Yes.

Q: The discrepancies do not require the use of microscope to discover them?

A: Yes [agreeing].

31 In **Leeds and County Bank Ltd v Walker**, the defendant, in satisfaction of a debt, gave the plaintiffs two Bank of England notes, for Â£100 each. The date and number on one of the notes had been altered but the plaintiffs and defendants were not aware of the alterations. Payment on the note was refused by the Bank of England, and the plaintiffs sought to recover the amount of the note from the defendants. The defendants relied on, inter alia, s 64 of the English Act. In rejecting the defence, Denman J said at pp 90-91:

*I think there are several answers to this ground of defence. In the first place the statute in question, by s 2, contains a definition of the words 'bill' and 'note'. The former means 'bill of exchange', the latter 'promissory note'. The [English] Act there contains several provisions relating wholly to 'bills', ss 3 to 72 inclusive. These constitute Pt II of the [English] Act. Then follow ten clauses wholly relating to cheques on bankers. These constitute Pt III of the [English] Act. Then follow the provisions of Pt IV (ss 83, 89) headed 'promissory notes', and, by s 89, it is provided that the provisions of the [English] Act relating to bills apply with the necessary modifications to promissory notes. It appears to me that this clause was never intended to cover, and has not the effect of covering, such a document as a Bank of England note, altered fraudulently so as to fall within the decision of **Suffell v Bank of England** (1882) 9 QBD 555. Bank of England notes differ in many respects from ordinary promissory notes. They are payable without indorsement to any holder who may present*

them. They are a legal tender for the amounts represented by them. I think that one 'necessary modification' in applying s 64 of the [English] Act to promissory notes is a modification amounting to an exclusion of Bank of England notes altogether from the operation of s 64 of the [English] Act. But, even if this be not so, s 64 only applies where the alteration is 'not apparent'. In the present case I think it was apparent. By the word 'apparent' I do not think it is meant that the holder only should not have had the means of detecting the alterations. If the party sought to be bound can at once discern by some incongruity on the face of the note and point out to the holder that it is not what it was, that is to say, that it has been materially and fraudulently altered, I think the alteration is an 'apparent' one, even if it is not an obvious one to all mankind.

32 Where the alterations are apparent, the **Macmillan** case does not apply to relieve the bank from liability - **Paget's Law of Banking** (10th Ed), pp 222-223:

*Where the alteration is obvious or discoverable by the exercise of reasonable care, or where the state of the cheque raises suspicion of its having been tampered with and payment is made without inquiry, the **Macmillan** case offers no relief.*

33 Accordingly, I hold that the first defendants are not entitled to rely on the plea of estoppel against the plaintiffs.

34 On (iii), the first defendants relied on the exclusion clauses in the opening clause and cl 13 supra.

35 On the construction of exclusion clauses, **Chitty on Contracts, General Principles**

36 (26th Ed), para 945 states:

*Exemption clauses must be expressed clearly and without ambiguity or they will be ineffective. The clause must clearly express what its intention is. In **Alison (J Gordon) & Co Ltd v Wallsend Shipway and Engineering Co Ltd** (1927) 4 TLR 323, a cylinder was sold by the defendants to the plaintiffs 'subject to our usual guarantee clause'. The clause usual in the*

trade `guaranteed` the purchaser against defects discovered within six months of delivery, but excluded liability for consequential damage. It was held that the defendants were not protected, for `if a person was under a legal liability and wished to get rid of it, he could only do so by using clear words.` Exemption clauses will therefore be construed strictly, and the degree of strictness appropriate to their construction may properly depend upon the extent to which they involve departure from the implied obligations ordinarily accepted by the parties in entering into a contract of a particular kind

37 On the opening clause read with cl 2(a), it is my view that the plaintiffs had exercised reasonable care and had taken reasonable precaution in drawing up the said cheque. The loss could not be attributed to the plaintiffs` failure to abide by the clauses on the reverse side of the agreement because these clauses had been disregarded by the first defendants in their course of dealings with the plaintiffs and their other customers.

38 On cl 13, to exclude liability including liability for negligence in failing to detect the said alterations, the clause must clearly say so without ambiguity. Thus, in ***Moran v Lipscombe*** , the plaintiff left his car at the defendant`s garage and instructed him to adjust the headlights of the car. In the garage was exhibited a notice, seen by the plaintiff, reading `Cars garaged and driven at owner`s risk - Every care but no responsibility`. The defendant drove the car on the road to test the headlights when a collision caused by the defendant`s negligence damaged the car. In an action by the plaintiff for damages, it was held that the notice did not amount to an unequivocal and unambiguous notification to the plaintiff that the car was being accepted by the defendant on terms that the defendant was not to be liable for the consequences of his own negligence in driving and therefore the defendant was liable. At p 15 Macfarlan J said:

It is argued that the words of the present notice, `at owner`s risk` and `no responsibility` would, in a contract of carriage, have ample room to operate without excluding negligence, in as much as the common carrier is at common law an insurer; that a bailee

is at common law liable only for negligence; and therefore the notice is inoperative unless it be construed to exclude negligence. This argument written out means not that the notice did convey to the bailor, or would convey to the average intelligent layman that the garage proprietor was exempt from negligence, but that, if the plaintiff knew the law as to bailments, he would know that the garage proprietor was not liable in any event except for negligence, and, if he argued correctly, and if he assumed that the notice was intended to cut down the common law liability, he would conclude that the notice was intended to exempt from liability for negligence; and that he must be taken to know the law, and so must be taken to have agreed to exempt the garage proprietor from liability for negligence. Applied to a notice of this kind, such an argument appears to us to be little less than grotesque.

39 Clause 13 was not sufficiently clear to exclude liability for failure to detect the alterations. I therefore hold that the first defendants are liable to the plaintiffs in the amount of the claim.

40 I now turn to the plaintiffs' claim against the second defendants. It is based on conversion of the said cheque and money had and received in the sum of \$126,260. In **Marfani & Co Ltd v Midland Bank Ltd**, at p 578, Diplock LJ said:

A banker's business, of its very nature, exposes him daily to this peril. His contract with his customer requires him to accept possession of cheques delivered to him by his customer, to present them for payment to the banks on which the cheques are drawn, to receive payment of them and to credit the amount thereof to his own customer's account either on receipt of the cheques themselves from the customer or on receipt of actual payment of the cheques from the banks on which they are drawn. If the customer is not entitled to the cheque which he delivers to his banker for collection, the banker, however, innocent and careful he might have been, would at common law be liable to the true owner of the cheque for the amount of which he receives payment either as damages for conversion or under the cognate cause of action, based historically on assumpsit for money had and received.

41 The second defendants, however, contended that since the said cheque had been avoided by virtue of s 64 of the Act by the material alterations, it was a valueless piece of paper and there could be no conversion of the same; alternatively, any conversion must be of the original value of the said cheque, that is, \$260. The second defendants relied on the judgment of Finlay J in ***Slingsby & Others v Westminster Bank Ltd***. In that case, Finlay J held that the plaintiffs could not recover against the defendants who were the collecting bank. He said at pp 585-586:

Whatever may be the rights, so it was argued, of the plaintiffs against their own bank, who have debited them, they can have no right to recover against the defendants - not in conversion of the cheque because the cheque was by reason of the alteration a mere valueless piece of paper, not in conversion for 5000 £ because there was no conversion of any money of the plaintiffs, not for money had and received because the money was not the money of the plaintiffs.

42 I have come to the conclusion that this submission is right and ought to prevail. It seems clear that the document, when it came into the hands of the defendant bank, was not a valid cheque at all. It had been avoided by the material alteration made in it. This being so, it seems to me that no action can be brought upon it against the defendants. They have not dealt either with a cheque or the money of the plaintiffs, and on this short ground I think this action must fail.

43 It was after having failed against the collecting bank, that Slingsby brought an action against his paying bank on the same cheque in ***Slingsby v District Bank Ltd***. Wright J gave judgment for the plaintiff and his judgment was upheld on appeal by the Court of Appeal. At p 558, Scrutton LJ expressly overruled Finlay J:

[referring to Finlay J's judgment supra] ... I cannot understand this. There are, of course, difficulties as to how in law you should

*deal with money claimed by a customer from a bank because the bank has collected it from the customer's bank on a document which does not authorise such collection, but I thought that all those difficulties had been settled by the decision in **Morison's** case [1914] 3 KB 356, followed by this court in **Underwood's** case [1924] 1 KB 755; in the **Lloyds Bank** case [1929] 1 KB 40; and in **Reckitt v Midland Bank**, lately affirmed in the House of Lords (1932) 48 TLR 271. **Slingsby v Westminster Bank** is, in my opinion, wrongly decided and should not be followed by any court in preference to these decisions of the Court of Appeal.*

44 In **Midland Bank Ltd v Reckitt & Ors**, Lord Terrington, a solicitor, had from a client a power of attorney entitling him to draw cheques on the client's banking account and to apply the moneys for the purposes of his client. Lord Terrington for his own purposes fraudulently drew 15 cheques on his client's account with the Barclays Bank, signing the cheques by using a rubber stamp which had on the upper line the name of the client and on the lower line 'his attorney' and by placing his own signature between the lines. Lord Terrington paid the cheques into his own account with the Midland Bank, the defendants, with whom he had an overdraft. On discovering the facts, the client brought an action against the defendants for damages for conversion of the cheques, and the defendants relied on s 82 of the English Act [in pari materia with s 85 of the Act], alleging that the cheques were crossed cheques and that they had received payment of them in good faith and without negligence. It was admitted that the defendants had acted in good faith.

45 It was held that, except in the case of two of the cheques, the defendants, in presenting and receiving payment for the cheques, had converted them, and that, as the defendants had, from the form of the cheques, notice as to the money not being Lord Terrington's money, they were negligent in making no inquiry as to Lord Terrington's authority to make these payments into his own account, and, therefore, the action succeeded.

46 Lord Atkins, with whom the other Law Lords concurred, in delivering his judgment said, at pp 273-274:

*In these circumstances, I have no doubt that the bank, in presenting and receiving payment for the cheques converted them. I venture to quote words of my own used in **Underwood**'s case (40 TLR 302; [1924] 1 KB 774, at p 795) merely because they seem to me applicable and I cannot express the idea in simpler language:*

'The bank so disposed of the chattels, the cheques, as to deprive both themselves and the true owners of the dominion over them, and, in exchange for the pieces of paper, constituted themselves the debtors of the customer. I cannot imagine a plainer case of conversion.'

*It is quite irrelevant to the issue of conversion that, after payment, the pieces of paper came into possession of the paying bank to be held as vouchers on account of the true owner, Sir Harold Reckitt. This position existed in the case of **Morison v London County and Westminster Bank Ltd** (30 TLR 481; [1914] 3 KB 356), where the collecting bank were held to have converted the cheques.*

47 In the light of these authorities, I hold that the second defendants are liable to the plaintiffs in conversion for the amount of \$126,260.

48 Against the claim for conversion, the second defendants also claimed statutory protection under s 85 of the Act. Section 85 reads:

(1) Where a banker, in good faith and without negligence - (a) receives payment for a customer of an instrument to which this section applies; or (b) having credited a customer's account with the amount of such an instrument, receives payment thereof for himself;

and the customer has no title, or a defective title, to the instrument, the banker does not incur any liability to the true owner of the instrument by reason only of having received payment thereof. (2) This section applies to the following instruments, namely: (a) cheques;

49 In ***Bank of Ceylon v Kulatilleke***, the amount of a cheque crossed `not negotiable` was subsequently altered fraudulently by a third party. In a suit by the drawer, the collecting banker`s reliance on s 82 of the Bills of Exchange Ordinance of Ceylon [also in pari materia with our s 85] was rejected. Basnayake CJ, delivering his judgment, said at p 189:

In the instant case, the defendant claims the benefit of s 82 of our Bills of Exchange Ordinance. The learned district judge has held that the defendant is not entitled to the benefit of that section on the ground that a cheque the amount of which is fraudulently raised is not a `cheque` within the meaning of the expression in that section. It speaks of a cheque to which the customer `has no title or a defective title`. Those words presuppose that the cheque is a good and valid cheque and that the only question is one of title to it. The section applies to cheques which do not have the taint of forgery or fraudulent alteration, a cheque which is the drawer`s cheque in all respects and which carries the authority of the drawer. A cheque which has been altered fraudulently, as in this case by raising the amount, is invalid. I agree with the learned trial judge that, in the instant case, the defendant is not entitled to the benefit of s 82.

50 This decision is consistent with English authorities dealing with statutory protection given to a paying banker. See ***Slingsby v District Bank Ltd***, where Scrutton LJ said (at p 559):

I agree with the view on this point expressed by Sir John Paget at p 225 of his work. The protection given by ss 80 and 82 is excluded in my opinion by the fact that the alteration has made the paper a null and void document, no longer a cheque.

51 Accordingly, I hold that the second defendants are not entitled to statutory protection under s 85 of the Act.

52 Against the plaintiffs` claim for money had and received, the second defendants contended that, as collecting bank for \$126,260 on behalf of their customer `Chong Sau Kam`, they had paid over \$95,900 to her with the balance

being `frozen` on an order of seizure by the police in the account of `Chong Sau Kam`. Accordingly, they are not liable.

53 In his ***Modern Banking Law*** (1987 Ed), Prof EP Ellinger states (pp 412-413):

*A bank that collects a cheque for a person who has no title to it, or whose title is defective, faces the hazard of an action by the true owner of the instrument. Two causes of action are available to substantiate such an action. The first is an action in conversion, for the purposes of which the cheque is treated as a chattel. The bank converts it by receiving it for the collection and by presenting it for payment. The second cause of action is based on the waiver of the tort involved. In ***Morison v London County and Westminster Bank Ltd***, in which an agent misused his authority by drawing on his principal's account cheques payable to his own order and by arranging for their collection for the credit of his personal account, Reading CJ explained the basis of this second cause of action as follows: The plaintiff is entitled to waive the tort and sue for the same amount as money had and received to his use.*

54 From a practical point of view, the cause of action in conversion is to be preferred to the quasi-contractual action based on waiver of tort. The reason for this is that the collecting bank receives the funds as its customer's agent. It is established that an agent who in good faith has paid over to his principal money to which it is subsequently discovered that the principal has no right cannot be required to return the money to the payor. This doctrine applies to a collecting bank that has received the proceeds of cheques collected by it on behalf of a customer. Once the money is paid to the customer, the bank has changed its position and, being a mere agent, is no longer answerable in an action in money had and received. However, the doctrine in question applies only where the action is brought under this heading and is thus based on the wrongful receipt of the funds.

55 Having considered the statement, I accept it as a correct statement of the law. Accordingly, I hold that the second defendants are not liable for money had and received but they are liable in conversion.

56 There will thus be judgment for the plaintiffs in the sum of \$126,260 plus interest wrongly debited against them thereon calculated to date of judgment and costs. As both defendants are liable for the same loss and both are equally to blame in that they failed to detect the alterations, I apportion liability between them equally. As between the defendants there will be no order as to costs.

57 ***Plaintiffs' claims allowed.***

Goh Joon Seng J

Low Chai Chong and Tan Joo Thye (Rodyk & Davidson) for the
plaintiffs
NM Mahtani and L Kuppanchetti (Arthur Loke & Pnrs) for the first
defendants
Chee Wei Lin (PK Wong & Advani) for the second defendants
