Khoo Tian Hock and Another v Oversea-Chinese Banking Corp Ltd (Khoo Siong Hui, Third Party)
[2000] SGHC 178

Case Number : Suit 1451/1999

Decision Date : 01 September 2000

Tribunal/Court : High Court

Coram : Woo Bih Li JC

Counsel Name(s) : Kenneth Koh (Kenneth Koh & Co) for the plaintiffs; CS Rajah and Chew Kei-Jin (Tan Rajah & Cheah) for the defendants

Parties : Khoo Tian Hock; Another — Oversea-Chinese Banking Corp Ltd — Khoo Siong Hui

Bills of Exchange and Other Negotiable Instruments – Cheques – Forged signature on cheque – Whether standard of proof for forgery met

Banking – Cheques – Duties of bank and customer – Customer allowing person with history of fraudulent conduct to have access to cheques – Bank paying on forged cheques without calling customer to check – Whether customer owing duty of care to bank not to facilitate fraud – Whether customer breaching duty – Whether breach causing loss – Whether bank negligent in paying on cheques – Whether knowledge of bank officer of history of fraudulent conduct attributable to other bank officers

: ***Introduction***

In this judgment:

(a) an affidavit of evidence-in-chief will be referred to as `AEIC`,

(b) an affidavit used in the application for summary judgment will be referred to as `AISJ`,

(c) a reference to the notes of evidence will start with `NE` followed by the page number and the alphabet reference.

Background

The plaintiffs are husband and wife. Prior to 1996, the plaintiffs` business Kim Hwee Leong Agency & Co (`KHLA`) had an account with United Overseas Bank Limited (`UOB`). One of the officers who was servicing that account was Lim Poh Leong. The business was run by the first plaintiff. At some point in time, he was assisted by the third party who is a son of the plaintiffs.

In 1990 Lim Poh Leong left UOB to join Four Seas Bank Ltd.

On 21 August 1993, KHLA opened an account with Four Seas Bank Ltd at its main branch at Robinson Road.

In January 1994, the plaintiffs opened a joint personal current account with Four Seas Bank Ltd also at Robinson Road. The number of this account was 601-0584800-001 (`the account`). The mandate was for either one of the plaintiffs to sign cheques drawn on the account.

In February 1994, the plaintiffs were allowed to operate the account at the Jalan Sultan Branch of Four Seas Bank Ltd (in the course of the trial, this branch was also referred to as the Textile Centre

Branch). Since then, the third party has deposited money into the account and presented for payment cash cheques drawn on the account. This evidence came from an officer of the defendants Serene Cheong but she did not elaborate whether the third party had deposited cash into the account. On the other hand, the defendants did identify at least eight cheques from 17 July 1996 to 27 December 1997 which were encashed by the third party. The identification was from the I/C number and name written on the reverse of such cheques. The defendants` position is that the third party might have encashed more cash cheques prior to 3 July 1999 but the other cash cheques might not have the name or I/C number of the recipient clearly stated on the reverse thereof. The sums that the third party encashed up to 27 December 1997 from each of the eight cheques ranged from $18,240 to $385,000.

In July 1998, Four Seas Bank Ltd was merged into the defendants.

The account was transferred to the defendants` main branch at OCBC Centre at Chulia Street. However the plaintiffs were allowed to continue operating the account at the Jalan Sultan Branch.

On 4 June 1999,UOB contacted the first plaintiff to inform him that a payment was due from KHLA to UOB. UOB had granted letter of credit/trust receipt facilities to KHLA and the third party was authorised to operate such facilities. The third party had applied to UOB on behalf of KHLA for a letter of credit to be issued for $730,088. 58 without the authority of the first plaintiff. This letter of credit was in favour of another party in Johore Bahru which the first plaintiff knew nothing about. I will refer to this as `the UOB incident`.

Upon learning about the UOB incident on 4 June 1999 the first plaintiff instructed UOB to delete the third party as an authorised signatory for operating the credit facilities granted by UOB to KHLA. Presumably, this instruction was carried out by UOB.

On the same day, the first plaintiff also informed Lim Poh Leong about the UOB incident and gave a similar instruction in respect of credit facilities granted by the defendants to KHLA. This instruction was carried out.

Neither the first plaintiff nor Lim Poh Leong informed the Jalan Sultan Branch of the defendants about the UOB incident. The first plaintiff did not make a police report about the same at that time.

On or about 3 July 1999, the third party went to the Jalan Sultan Branch and opened a current account with the defendants. He informed one of the officers there, one Mdm Chew Soo Mooi that he was getting married soon and his father, the first plaintiff, was giving him money to buy a new home. Having completed the formalities of opening an account, the third party then presented three cheques drawn on the account purportedly signed by the first plaintiff. These cheques were:

(a) Cheque No 469701 dated 3 July 1999 for $51,500 payable to the third party or Bearer (`the first cheque`).

(b) Cheque No 469716 dated 3 July 1999 for $2,000 which was a cash cheque (`the secondcheque`).

(c) Cheque No 469742 dated 3 July 1999 for $82,000 payable to the third party or Bearer (`the third cheque`).

The moneys from the first and third cheques were credited into the third party`s account. The third party received cash from the second cheque.

On 5 July 1999, the third party went to the Jalan Sultan Branch and presented a fourth cheque drawn on the account again purportedly signed by the first plaintiff. This was cheque No 469748 dated 5 July 1999 for $350,000 and was a cash cheque (`the fourth cheque`). Although this was a cash cheque, the moneys from it were credited into the third party`s account.

Thereafter, on the same day, the third party went tothe defendants` main branch at OCBC Centre and withdrew from his own account $483,450, leaving a balance of $50.

On 9 July 1999, the third party went to the Jalan Sultan Branch. He presented a fifth cheque drawn on the account purportedly signed by the first plaintiff. This was cheque No 469845 dated 9 July 1999 for $125,000 and was a cash cheque (`the fifth cheque`).

On this occasion, the defendants tried to contact the first plaintiff to verify that he had signed the fifth cheque. However, they were not successful in reaching the first plaintiff. A decision was made to pay the moneys over the counter to the third party.

However soon thereafter and on the same day, the defendants managed to contact the first plaintiff to ask if he had issued the fifth cheque. The first plaintiff replied that he had not. Arising from that conversation, the first plaintiff proceeded to the Jalan Sultan Branch on the same day with the second plaintiff. He brought along five cheque books.

From the Jalan Sultan Branch the first plaintiff contacted Lim Poh Leong (who was at the head office). They discussed stopping payment on other cheques. A Stop Payment Instruction was prepared by the Jalan Sultan Branch and signed by the second plaintiff and then faxed to Lim Poh Leong from the Jalan Sultan Branch. The cheque numbers in the Stop Payment Instruction were inserted by Lim Poh Leong after he received the fax. There were two amendments made to the cheque numbers in the Stop Payment Instruction but it is unknown who made those amendments as Lim Poh Leong said he did not do so. The amendments must have been made by some other officer of the defendants but in any event they are not material.

From the Jalan Sultan Branch, the first plaintiff said he went to the Criminal Investigation Department and was told that he should report the matter to the police. He claimed that he then went home and called the police.

A police report was made by the first plaintiff on that same day, ie 9 July 1999.

Subsequent to 9 July 1999, the defendants arranged for the third party to come to the Jalan Sultan Branch on 19 July 1999 and then called the police whereupon the third party was arrested.

After the arrest, the second plaintiff put up bail to secure the release of the third party from police custody.

Parties` positions in the pleadings

I will try to summarise the parties` main positions as stated in the pleadings.

The plaintiffs alleged that the signatures on the five cheques were forgeries. If they are correct, then prima facie, the defendants have wrongly debited the account with the total amount of the five cheques.

The plaintiffs also asserted negligence against the defendants. However the statement of claim did not assert specifically that the defendants owe the plaintiffs a duty of care or what that duty was or whether the duty was based on an implied term in contract or tort or both.

The main thrust of the plaintiffs` case on negligence was that the defendants should have contacted the first plaintiff to verify if the plaintiffs had issued the cheques. This appeared to be based on an alleged practice between the first plaintiff and the defendants whereby the defendants would contact the first plaintiff to verify that a cash cheque had been issued by the plaintiffs before paying thereon if the first plaintiff did not first call the defendants to inform them about the cash cheque.

The plaintiffs also relied on the fact that Lim Poh Leong had been informed about the UOB incident on 4 June 1999 and sought to attribute this knowledge to the defendants generally so that the defendants could be said to be aware of the third party`s fraudulent conduct in relation to the UOB incident.

On the defendants` part, the forgeries were not admitted.

The defendants also asserted that the plaintiffs were estopped from setting up the forgeries or were negligent. However, like the statement of claim, their defence did not assert specifically that the plaintiffs owed a duty of care except to assert an implied duty regarding the drawing of cheques. This duty was irrelevant in any event as the fraud was not caused by careless drawing of the cheques. The defence also did not assert specifically what the duty of care attributed to the plaintiffs was or whether that duty was based on an implied term in contract or tort or both.

The defendants relied on the following matters for their assertions of estoppel and negligence:

> *16 Despite the matters referred to in paras 14 and 15 herein, the plaintiffs failed and/or neglected to:*
>
> *(i) inform and/or warn the defendants of such fraudulent and/or dishonest misappropriation of moneys belonging to the plaintiffs and/or the first plaintiffs` business; or*
>
> *(ii) otherwise put the defendants on notice that:*
>
> *(a) Khoo Siong Hui ought not to be carrying out any banking transactions for and/or on behalf of the plaintiffs; and/or*
>
> *(b) any cheque belonging to the plaintiffs and presented for payment by Khoo Siong Hui should first be verified with the plaintiffs before any payment is made thereon;*
>
> *(iii) make a Police Report at the material time; and*
>
> *(iv) ensure that Khoo Siong Hui had no access to the cheques or to any other cheques belonging to the plaintiffs.*

and

22 Further or in the further alternative:

(a) the plaintiffs failed to take such steps as were necessary to bring about the arrest of Khoo Siong Hui after making the police report of 9 July 1999. Khoo Siong Hui was only arrested by the police on 19 July 1999 after he went to the defendants` Chulia Street branch on that day and the defendants notified the police accordingly; and

(b) after his arrest, the second plaintiff obtained the released of Khoo Siong Hui from police custody by standing bail for him.

Main issues

The three main issues are:

(a) Were the signatures forgeries?

(b) Are the plaintiffs precluded from maintaining their claim by reason of estoppel or negligence?

(c) Were the defendants in any event negligent and if so, would that negligence cause them to be liable?

Persons who gave evidence

Only the first plaintiff gave evidence for the plaintiffs.

On the defendants` side, the following gave evidence:

(a) DW1 - Cheong Yu-Ling Serene. At all material times, she was a Customer Services Manager or Second Officer at the Jalan Sultan Branch.

(b) DW2 - Mdm Chew Soo Mooi. She was working in the Savings accounts section at the Jalan Sultan Branch until March or April 1999 when she moved to the Current accounts section at the Jalan Sultan Branch.

(c) DW3 - Lim Beng Choo. He is a relief officer. He was the officer who attended to the third party in respect of the fifth cheque and who tried to contact the first plaintiff on 9 July 1999 but without success. He was also the officer who authorised payment of cash (on the fifth cheque) over the counter to the third party.

(d) DW4 - Lim Liang Choon. He was an officer at the Jalan Sultan Branch up to March 2000 when he was posted to the North Branch (at North Bridge Road and near Parco Bugis).

(e) DW5 - Lim Poh Leong. He used to work in UOB before working in the defendant bank. The first plaintiff knew him from his days in UOB. Lim Poh Leong was at all material times at the head office of the defendants and not at the Jalan Sultan Branch. Furthermore he was in the defendants` Enterprise Banking department which deals with business accounts.

Were the signatures forgeries?

In **Yogambikai Nagarajah v Indian Overseas Bank** [1997] 1 SLR 258 , the Court of Appeal held that the burden of proving the forgery was on the party alleging the forgery (see [para] 39 of the report).

As regards the standard of proof, the Court of Appeal held, after citing a number of authorities, that where the allegation is as serious and grave as fraud or forgery, the standard of proof is more onerous than the ordinary civil standard (see [para] 44 of the report).

In that case, the point pertaining to the alleged forgery of a mandate letter or letter of authority was dominated by expert evidence from both sides as well as the court expert.

The trial judge found that the signature was not a forgery. The Court of Appeal was not persuaded to overturn this finding in view of a number of factors aside from the expert evidence:

(a) the plaintiff had lied in her letter to the defendants seeking documents, when she alleged she had lost all relevant documents pertaining to her account. The fact was that she never operated the account nor did she have custody of the documents pertaining to the account,

(b) there were inconsistencies in her evidence on another point,

(c) she had delayed commencing action against the bank,

(d) she inexplicably failed to make a police report.

In the present case before me, neither side produced any expert witness. Nor did the third party give evidence for either side.

The plaintiffs` assertion of forgery is found in para 4 of the statement of claim.

In the first plaintiff`s AISJ filed on 27 January 2000 at para 5, the first plaintiff alleges:

> *The plaintiffs did not draw nor authorise the drawing of the five cheques and I rely on the matters pleaded in the statement of claim ...*

His AEIC does not explicitly assert the forgeries.

However, in re-examination, he said that the signatures on the five cheques was that of the third party (NE 59D).

Although the first plaintiff had not told the truth on a number of other material points on which I shall elaborate later below, this does not necessarily mean that he had also failed to tell the truth regarding the signatures.

Against his failure to tell the truth on other material points, I considered the following:

(a) When the first plaintiff was eventually contacted on 9 July 1999 by Lim Liang Choon, his reaction

was one of surprise and alarm (see his AISJ filed on 27 January 2000 at paras 19 to 21). He was not challenged on this.

(b) Thereafter, he and the second plaintiff went to the Jalan Sultan Branch on the same day. He also brought along five cheque books from the office safe pertaining to the account.

(c) While at the Jalan Sultan Branch, he called Lim Poh Leong and they discussed about stopping payment on other cheques. As they were talking, the second plaintiff signed the Stop Payment Instruction which was faxed to Lim Poh Leong.

(d) The first plaintiff then went to CID and then eventually made a police report. The police report states:

> *On 4 June 1999 at about 10 plus in the morning, I discovered that my son had been signing some documents and made a total (sic) payments of S$730,088. 58 to a company in JB. I (sic) wished to state that I had no business dealing with that company and I had never received any goods that were supposing (sic) delivery to me.*
>
> *I (sic) wished to further state that my son on 5 July 1999 and 9 July 1999 had (sic) steal my cheques and (sic) withdrawal a total amount of S$475,000. He managed to do that by forging my signature. This two (sic) incident happened at the OCBC Bank at Jalan Sultan.*
>
> *My company is at 100 Lorong 23, Geylang [num]01-02.*
>
> *That`s all.*

Although the police report refers to events on 5 and 9 July 1999 and a total amount of $475,000 only (derived from the fifth and the fourth cheques), the first plaintiff explained that this was because on that day he was given copies of the fifth and fourth cheques only and he would be given more information and documents later. While there was some inconsistency in his evidence as to how many cheques he had received copies of on that day, the defendants` witnesses did not give a different version. I find this part of his evidence to be true.

What is more significant is that in the police report, the first plaintiff was prepared to and did accuse the third party of forging his signature (on the fifth and fourth cheques). This is not something which any parent would do if it were not true especially in the case of the first plaintiff (and the second plaintiff) who had, as I find, been rather indulgent with the third party.

The first plaintiff must also be aware that the third party is liable for prosecution by the authorities in respect of all five cheques if he maintains his position about the forgeries.

In the circumstances, I find that the plaintiffs have discharged the high burden of proof and the signatures were forgeries.

The second and third main issues

As regards the second and third main issues, there are overlapping allegations of fact some which are disputed and others which are not disputed. I will therefore deal with these two main issues together.

The alleged practice of the first plaintiff

The first plaintiff alleged that it was his practice to call certain officers of the Jalan Sultan Branch when a cash cheque was issued on the account and someone other than the plaintiffs would be encashing the cheque. The defendants were not prepared to accept that this was the practice of the first plaintiff. However the defendants` own witnesses confirmed this practice.

For example, at NE 82F to 83A, DW1 Serene Cheong said:

> *Q: Refer to your fifth affidavit, paras 4 and 5. With regard to para 4, do you know whether first plaintiff called to notify you in respect of cash cheques which would be presented for payment over the counter with regard to most of such cheques?*
>
> *A: Yes, he does call us most of the time.*
>
> *Q: How would you know that?*
>
> *A: I receive the calls personally, or Lim Liang Choon would tell me.*
>
> *Q: If on occasions he did not call you, would you know that he had not called you?*
>
> *A: I would not know.*
>
> *Q: Would it be possible that there were cash cheques issued by first plaintiff for payment over the counter for which he had not called you or Lim Liang Choon?*
>
> *A: Yes.*
>
> *Q: Would it therefore be possible that the occasions which he did not call you before-hand would exceed the number of times he did call you or Lim Liang Choon?*
>
> *A: Yes, it`s possible. `*

At NE 88A to C, she said:

> *Q: Would it therefore be possible that the occasions which he did not call you before-hand would exceed the number of times he did call you or Lim Liang Choon?*
>
> *A: Yes, it`s possible.*
>
> *Q: If that were so, then would it be correct to say that he called you or Lim*

Liang Choon in advance most of the time?

A: Yes, I would still say so.

Q: Is it possible that most of the time he did not call you or Lim Liang Choon in advance?

A: I guess it`s possible.

Although Serene Cheong said it was possible that most of the time the first plaintiff did not contact her or Lim Liang Choon when cash cheques were encashed by someone else other than the plaintiffs, she did not say that this was likely. There is a material difference between possibility and likelihood. The thrust of her evidence was that the first plaintiff called in advance most of the time.

The evidence of DW4 Lim Liang Choon was similar. At NE 101F to 102A, he said:

Q: Refer to paras 6 and 7 of your affidavit. Was it common for OCBC`s customers to telephone the Jalan Sultan branch whenever cash cheques are presented for payment by someone other than the drawer?

A: Not that common but first plaintiff made it a habit to call me. Other customers from time to time may call us up to give us time to get ready to prepare the cash in the denomination they want.

I find that the plaintiffs have established the first plaintiff`s practice with the qualification that it was something done most but not all the time as the first plaintiff himself had said (NE 46B). I would also mention that although the first plaintiff had said that he would call one of three officers Lim Liang Choon, Serene Cheong or Mdm Chew Soo Mooi as part of his practice of calling in advance, it transpired from the evidence that only Lim Liang Choon and Serene Cheong received such calls. Mdm Chew did not receive them.

The alleged practice of the defendants

The first plaintiff`s evidence was that when he did not call in advance in respect of cash cheques which were to be encashed by someone else, one of the same three officers of the Jalan Sultan Branch had the practice of calling him in respect of such cheques.

However, each of them denied having done so let alone having a practice of doing so.

As it turned out, the first plaintiff could not verify what he himself had alleged.

As regards Mdm Chew, I refer to the first plaintiff`s evidence at NE 35F to 37D:

Q: Ms Chew`s evidence is that she had never spoken to you on the phone, so why do you say that it is Ms Chew who comes to the phone when Serene is not there?

A: I am talking about the time when I issue cash cheques. I say, `Miss, will you allow the person to get the cash` and I will mention the amount.

Q: Ms Chew says she did not speak to you on the telephone.

A: That is her version.

Q: Is it your version that you spoke to her on the telephone?

A: Yes. Everyone in Textile Centre branch knows that I am familiar to the bank. The three of them have been very helpful to me.

Q: When is the first time that Ms Chew spoke to you on the telephone before 9 July 1999?

A: I cannot recall.

Q: Would it be six months before 9 July 1999?

A: I have not spoken to Ms Chew for one and a halfyears. Previously my shop was at Textile Centre and then I moved to Geylang. After I shifted to Geylang I had not called OCBC Bank for one and a half years.

Q: So for one and a half years prior to 9 July 1999, you never contacted OCBC Jalan Sultan in relation to any cash cheque?

A: I am talking about Ms Chew. For this one and a half years, I seldom called the bank.

Q: Did you speak to Ms Chew on the phone in the six months before 9 July 1999?

A: No.

Q: Did you speak to Ms Chew on the phone in the 18 months before 9 July 1999?

A: No.

Q: When do you think was the last time you spoke to Ms Chew on the telephone in relation to your account prior to 9 July 1999?

A: When my office was in Textile Centre, I spoke to Ms Chew. I cannot remember who I spoke to on the phone.

Q: You can`t remember whether you actually spoke to Ms Chew?

A: I can`t remember. It was a long time ago. I was there for more than ten years. `

As regards Serene Cheong, I refer to the first plaintiff`s evidence at NE 53C to 54D:

Q: Refer to Serene Cheong`s fifth affidavit. She has no recollection of having called you to check whether a cash cheque was drawn by you. Do you agree with her recollection?

A: I disagree.

Q: How many times did she call you?

A: Rarely.

Q: When was the last time she did so?

A: Cannot remember.

Q: Did she call you in the six months from 9 July 1999?

A: I cannot recall.

Q: Within 12 months?

A: I cannot remember.

Q: Within 18 months?

A: On one occasion, the date of which I cannot recall, Serene called me regarding my daughter`s share dividend. That was a long time ago, about two to three years ago. She called me to sign a document. It was a small amount.

Q: Was that the last time you remember she called you?

A: Cannot remember when was the last time she called me. She rarely called me.

Q: I suggest that Serene Cheong in fact never called you to check whether you or your wife had issued any particular cash cheque drawn on your account?

A: It is very difficult to answer your question.

(Mr Rajah repeats question.)

A: I disagree.

As regards Lim Liang Choon, I refer to the first plaintiff`s evidence at NE 54E to 55D:

Q: Refer to Lim Liang Choon`s affidavit, para 7. Do you agree with it?

A: I don`t agree.

Q: When was the last time that Lim Liang Choon called you to check whether a cash cheque drawn on your account was signed by you or your wife?

A: 9 July 1999.

Q: Before 9 July 1999?

A: Prior to 9 July 1999, he had not called me. When I moved to Geylang, I gave him my contact number and told him to contact me if there was anything. That was why he called me on 9 July 1999.

Q: So you agree that before 9 July 1999 that Lim Liang Choon had never called you to check whether a cash cheque drawn on your account was signed by you or your wife?

A: He had not called me.

Q: I suggest to you that no one else from OCBC had ever called you to check whether any cash cheque drawn on your account was signed by you or your wife?

A: That`s right. The OCBC Jalan Sultan branch never called me.

Accordingly, I find that the first plaintiff did not tell the truth about the alleged practice of the defendants and there was no such practice.

The defendants` Guide

The evidence for the defendants was that the defendants had their own guide which required them to call a customer to verify that he had issued a cash cheque where the amount on the cheque was $100,000 or more (`the defendants` Guide`). The defendants did not do this for all cash cheques in view of the volume of cheques involved.

Also, if the moneys from a cash cheque were actually credited into an account with the defendants, as opposed to being paid over the counter, no call would be made to the customer irrespective of the amount as the cash cheque was then treated as though it were not a cash cheque.

At this stage, it would be appropriate to list out the five cheques and what was done in respect of each of them:

Date	Cheque No	Description	Amount	What was done

3. 7. 99(`the first cheque`)	469701	Payee was the third party or Bearer	$51,500	Paid into third party`s account
3. 7. 99(`the second cheque`)	469716	Cash cheque	$2,000	Paid over the counter to third party
3. 7. 99(`the third cheque`)	469742	Payee was the third party or Bearer	$82,000	Paid into third party`s account
5. 7. 99(`the fourth cheque`)	469748	Cash cheque	$125,000	Paid into third party`s account
9. 7. 99(`the fifth cheque`)	469845	Cash cheque	$125,000	Paid over the counter to third party

It will therefore be seen that moneys from only the second and the fifth cheques were paid over the counter.

The second cheque was for $2,000 and therefore the Jalan Sultan Branch complied with the defendants` Guide of paying on a cash cheque of less than $100,000 without calling the customer.

The fifth cheque was for $350,000. Plaintiffs` counsel argued that the defendants did not contact the plaintiffs before paying the third party on this cheque. This argument must be considered in the context of what had transpired. The evidence of DW3 Lim Beng Choo was that he had examined the fifth cheque. The signature thereon appeared to be the same as the first plaintiff`s signature on the specimen signature card. However he did try to contact the first plaintiff anyway because the cheque was for more than $100,000. No doubt he was aware of the defendants` Guide.

Lim Beng Choo said he tried to contact the first plaintiff using the telephone number on the specimen signature card. He called once and the line was engaged. He waited and called again five or six minutes later. Again it was engaged.

In the circumstances, he authorised payment over the counter to the third party. After all, the fifth cheque appeared to be in order in that it appeared regularly drawn. Also, the signature appeared to be the same as that on the specimen signature card. Furthermore he knew that the third party is the plaintiffs` son.

Plaintiffs` counsel argued that since the defendants` Guide did not require their officers to call their

customers on every cash cheque, irrespective of the amount, the defendants have to take the risk of fraud.

It may well be true that the defendants take the risk of fraud subject to the argument about the plaintiffs` negligence and estoppel. However, that is a different point from saying that the defendants were negligent in not contacting the plaintiffs for every cash cheque.

There was no evidence to suggest that other banks contact their customers for every cash cheque, irrespective of the amount. Bearing in mind the volume of banking transactions, I do not think that the defendants` Guide was lacking.

Plaintiffs` counsel also argued that so long as the cheques were cash cheques, then the defendants` officers should have contacted the plaintiffs even though the proceeds thereof were paid into the third party`s account.

I do not agree. In such a situation, the cash cheques were effectively no longer cash cheques. The defendants` officers should not be faulted for treating them like non-cash cheques.

Plaintiffs` counsel also argued that the defendants did not notify the plaintiffs of the defendants` Guide which was limited to cash cheques of $100,000 or more.

I consider this argument to be without merit. There was no evidence to suggest that the plaintiffs would have acted differently if they had known of the defendants` Guide. Furthermore, the defendants` Guide was presumably meant for internal consumption as a safeguard. If circulars thereon were sent to customers, there was a greater risk that dishonest characters might come to know of it and tailor their fraudulent conduct to circumvent this safeguard.

Iam of the view that the defendants` payment of the fifth cheque over the counter without managing to contact the plaintiffs did not constitute negligence on the part of the defendants in view of the particular circumstances.

In the absence of express instructions to the contrary, a bank should not be required to defer payment indefinitely on a cash cheque which appears regular on the face of it, just because the bank is unable to contact its customer.

I am also of the view that the payment of the second cheque (which was for $2,000 only) over the counter without contacting the plaintiffs also did not constitute negligence on the part of the defendants.

As for the first, third and fourth cheques, they were payable to the third party or bearer and were not crossed. I am of the view that the defendants were not negligent in paying the moneys from these cheques into the third party`s account without first contacting the plaintiffs. They were treated like non-cash cheques. Although plaintiffs` counsel argued that there was no prior instance of the plaintiffs` cheques being paid into the third party`s account, this was neither here nor there. The defendants were not precluded from paying the moneys into the third party`s account even if there were no prior instance of this having been done before.

Were the defendants negligent in failing to inform other officers in Jalan Sultan Branch of the first plaintiff`s practice?

This allegation was not pleaded in the statement of claim or even in the reply. Yet this allegation was made in the plaintiffs` closing submissions (at paras 29 to 32) in the context of the fifth cheque.

During the period 3 to 9 July 1999, Lim Liang Choon was no longer in the Jalan Sultan Branch. Serene Cheong was on leave. It appeared that no one else in that branch knew about the first plaintiff`s practice, ie of calling in advance if a cash cheque drawn on the account was to be presented for payment over the counter and neither of the plaintiffs was encashing the cheque.

It was submitted by plaintiffs` counsel that if the first plaintiff`s practice had been made known to other officers atthe current account section of the Jalan Sultan Branch, the fraud involving the fifth cheque would have been prevented.

I have first to consider whether the defendants were negligent in failing to ensure that all their officers at that branch knew of the first plaintiff`s practice.

I am of the view that they were not negligent. With the benefit of hindsight it is easy to say that all of the officers of the Jalan Sultan Branch or of the current account section thereof should have been informed about the first plaintiff`s practice especially when Lim Liang Choon was no longer at the branch and Serene Cheong was on leave. However one must not look at events in isolation. Each branch must be dealing with hundreds or thousands of customers. Many of the customers must have their own practices and habits. Furthermore bank officers come and go and sometimes they are on leave. It is impossible for every officer to remember to disseminate the practice or habit of every customer to all of the officers in the branch or in a section of the branch.

If a customer considers a particular practice, like the first plaintiff`s practice, to be particularly important to him, then it is for him to instruct the bank that unless the practice is followed every time, no payment should be made. Such an instruction should be in writing. Here, no such instruction was given by the plaintiffs whether in writing or orally. It does not lie in the plaintiffs` mouths to say that the defendants should have done something which it was incumbent for the plaintiffs themselves to do.

Furthermore, even if this information had been disseminated to other officers, it did not necessarily follow that other officers would contact the first plaintiff if he did not call first. It must be remembered that where the first plaintiff did not call in advance on cash cheques to be encashed by someone else, Lim Liang Choon and Serene Cheong did not automatically call him. They followed the defendants` Guide and would call only if the cash cheques were for $100,000 or more and not because the first plaintiff failed to call in advance (NE 83C). Therefore in all probability, the other officers of the Jalan Sultan Branch would have done the same thing even if they were aware of the first plaintiff`s practice.

In addition, even if the defendants were negligent on this point, the fact is that only two of the five cheques were paid over the counter. In respect of the fifth cheque, Lim Beng Choo did try to call the first plaintiff because of the defendants` Guide, even though he was ignorant of the first plaintiff`s practice. He was unable to reach the first plaintiff.

Did the defendants` officers place too much weight on the relationship between the third party and the plaintiffs?

Plaintiffs` counsel argued that the defendants` officers had placed too much weight on the relationship between the third party and the plaintiffs and had let their guard down. Again, this was

not pleaded.

It is true that Lim Beng Choo had taken into account the relationship between the third party and the plaintiffs but that is not the only factor.

The fifth cheque appeared regularly drawn and the signature thereon did not appear irregular. He tried to contact the first plaintiff but failed.

It may be that if the bearer of the cheque was a stranger, Lim Beng Choo would have done something more before authorising payment.

However the bearer was not a stranger and he was entitled to take that into account.

Furthermore, the omission to take a further step is not in itself negligence. The fact of the matter was that there were no special circumstances to cause him to be more suspicious.

Plaintiffs` counsel argued that for one and a half years prior to July 1999, the third party had not been encashing the plaintiffs` cheques. This was premised on the fact that the defendants could identify cash cheques between 17 July 1996 to 27 December 1997 only as having been encashed by the third party prior thereto. This argument is also neither here nor there.

The fact is that the third party had, in the past, even though it may be as long as one and a half years ago, been encashing the plaintiffs` cheques. Indeed the last one, prior to July 1999 and which the defendants could identify as having been encashed by him, was on 27 December 1997 for $385,000.

Should Lim Poh Leong`s knowledge about the UOB incident be attributed to the defendants` officers in the Jalan Sultan Branch?

It is common ground that:

(a) the first plaintiff informed Lim Poh Leong on or about 4 June 1999 (who was stationed at the defendants` head office) about the UOB incident and that he instructed that the third party be deleted as an authorised signatory of the credit facilities granted by the defendants to KHLA and that this instruction was carried out.

(b) Lim Poh Leong did not inform any officer in the Jalan Sultan Branch about the UOB incident and the third party`s dishonesty. Nor did the first plaintiff do so.

The plaintiffs assert in the reply that in the light of Lim Poh Leong`s knowledge, the defendants were aware of the third party`s dishonesty.

It was submitted (although not pleaded) that accordingly the defendants should have verified all the five cheques with the plaintiffs before making any payment whether over the counter to the third party or to his account.

At NE 60C to 61C, the first plaintiff said:

> *Q: In your banking relationship with OCBC, who in OCBC was your contact person?*

A: You must let me know whether you are referring to head office or branch.

Q: Tell me head office and then branch.

A: For head office, I would liaise with Lim Poh Leong because he is in charge of my personal and company account. For the Textile Centre branch, I would liaise with heads of department like Lim Liang Choon, Serene and Mdm Chew.

Q: On 4 June 1999, when you learned of unauthorised issue of L/C from UOB, why did you choose to inform Lim Poh Leong and not someone from Textile Centre branch?

A: I called him because I have taken bank loans from these two accounts, my personal account and Lim Hwee Leong account. As my accounts are controlled by head office, so when someone presents a cheque at the Textile Centre branch and when they call me and cannot reach me, they should call head office. This applies to the other branches and not just that branch.

Q: What is Lim Poh Leong to you that you should call him about the 4 June 1999 incident?

A: I call him because the two accounts were controlled by him. He is the one who grants the loans. I called him because I wanted him to cancel Khoo Siong Hui`s name from Kim Hwee Leong Agency & Co account. So OCBC was the first to know. If he chose not to call all the OCBC branches, there is nothing I can do.

On the other hand, the evidence of Serene Cheong in her AISJ at para 14 was that:

Mr Lim Poh Leong is a Vice-President in the defendants` Enterprise Banking department. The defendants` Enterprise Banking department deals with business accounts. It does not handle personal accounts and it did not handle the account. The Enterprise Banking department handled the business account of and facilities granted to the plaintiffs` business.

Lim Poh Leong himself said in his AEIC at paras 7 and 8:

7 In July 1998, Four Seas Bank Ltd was merged into the defendants and I was transferred to the defendants` Enterprise Banking Department located at OCBC Centre in Chulia Street. I had been in a similar department at Four Seas Bank Ltd.

8 The first plaintiff used to call me on the telephone and give me instructions relating to KHLA`s TR/LC facilities with the defendants. I would pass on these instructions to the defendants` TR/LC Department.

If the defendants had granted a loan to the plaintiffs personally, there would have been documentary evidence to corroborate this. None was produced by the plaintiffs.

In any event, even if, for the sake of argument, the plaintiffs had been granted such a loan, it did not mean that Lim Poh Leong was in charge of the loan.

I also note that as regards the first plaintiff`s practice in relation to the account, he would call certain officers at the Jalan Sultan Branch and not Lim Poh Leong.

I find that Serene Cheong`s evidence made sense. Lim Poh Leong was not in a department which would have put him in charge of the account which was an account of individuals.

Lim Poh Leong himself said that the first plaintiff used to give him instructions relating to the credit facilities granted to KHLA (not in respect of the account). There was no mention by him of the first plaintiff ever calling him on the account until 9 July 1999.

I find that the first plaintiff had not told the truth when he asserted that Lim Poh Leong was controlling both the KHLA account and the account. The first plaintiff was simply trying to use the knowledge of Lim Poh Leong to render the defendants liable in the context of what had happened to the account.

Accordingly I do not agree that Lim Poh Leong`s knowledge should be attributed to that of the officers in the Jalan Sultan Branch.

Was Lim Poh Leong negligent in omitting to tell the Jalan Sultan Branch about the UOB incident?

It was submitted (although not pleaded) that Lim Poh Leong should have informed the defendants` branches about the third party`s dishonesty or take steps to protect the account or offer advice to the plaintiffs about protecting the account.

Plaintiffs` counsel relied on the following passages from the judgment of the Court of Appeal in **Yogambikai Nagarajah v Indian Overseas Bank** [1997] 1 SLR 258 (at p 273):

> *The relationship between the bank and the deposit account holder is premised on the debtor-creditor relationship. It carries with it the obligation on the part of the bank to honour the customer`s mandate as regards the payment of money from that account. The bank`s duty to pay on the demand of an account holder however coexists with a duty to take reasonable care in all the circumstances as agent of the account holder. The duty to take reasonable care in the discharge of its obligation under the contract between banker and customer includes withholding payment where there has been fraudulent conduct resulting in wrongful loss by a party ...The question in every case, including the present, is whether the bank behaved reasonably in view of all the circumstances and discharged its duty of care.*

and (at p 276):

> *The correct test, in our opinion, must be whether the reasonably prudent banker, faced with the same circumstances, would regard the course of action taken on the facts justifiable.*

To summarise, a bank must act with reasonable care. Whether a bank has behaved reasonably and discharged its duty of care must be viewed in all the circumstances.

Lim Poh Leong said that it did not occur to him to inform the Jalan Sultan Branch about the third party`s dishonesty regarding the UOB incident because the third party was not an authorised signatory for the account. I also note that there is no evidence as to whether Lim Poh Leong knew that the third party had been depositing moneys and withdrawing cash from the account.

On the other hand, the first plaintiff knew about the third party`s involvement with the account but yet he himself did not see it fit to tell the Jalan Sultan Branch about the third party`s dishonesty. Presumably the first plaintiff did not want to embarrass the third party or the family any more than was considered necessary. While this sentiment is understandable, it does not lie in the plaintiffs` mouths to accuse the defendants of negligence for Lim Poh Leong`s omission to tell the Jalan Sultan Branch about the UOB incident.

Indeed, had Lim Poh Leong done so, without specific instructions from the plaintiffs to do so, they might well have taken exception to his spreading the news.

I am of the view that Lim Poh Leong is not to be faulted for omitting to inform the Jalan Sultan Branch about the UOB incident.

As for the argument that Lim Poh Leong should have taken steps to protect the account or offer advice to the plaintiffs about protecting the account, I am of the view that he was not obliged to do so. He was given instructions about the KHLA account only and those instructions were carried out.

Was the first plaintiff negligent in omitting to file a police report about the UOB incident or in omitting to inform the Jalan Sultan Branch about the UOB incident or in omitting to inform the Branch that the third party ought not to be carrying out any banking transaction for the plaintiffs or any cheque belonging to the plaintiffs and presented for payment by the third party should first be verified by the plaintiffs before payment?

The first plaintiff did not report the UOB incident to the police at the time he learned about it, ie 4 June 1999. He mentioned it only when he reported the forgery of two of the five cheques on 9 July 1999.

In the first plaintiff`s second AISJfiled on 28 February 2000 at para 14 he alleged that the reason why he did not report the third party to the police when he had learned about the UOB incident was that he had relied on Lim Poh Leong`s advice to forgive the third party and not to lodge any report with the police.

In cross-examination, the first plaintiff gave a new version. He alleged that when he (the first plaintiff) was admitted to hospital on 20 June 1999, the third party had contacted him as he was concerned about his health. He said that the third party `asked for my forgiveness and said he would go to Malaysia to try and recover the money. For that reason, I did not lodge a police report`(NE 6C). He said that he had not reported the third party prior to 20 June 1999 as he was hoping that the third party would recover the money. He had asked some people to look for and speak with the third party (NE 8E).

After the lunch break on the first day of trial, the first plaintiff said that the only reason for not reporting the third party to the police on or about 4 June 1999 was because the third party had said he would try his best to collect money to pay the first plaintiff (NE 31D to 32A).

It was pointed out to the first plaintiff that this reason was different from what he had alleged in his second AISJ at para 14 thereof where he had said that Lim Poh Leong had advised him not to report the third party to the police on or about 4 June 1999. The first plaintiff could only say that he did not know if his lawyer had heard him wrongly or he had told his lawyer the wrong thing (NE 32C).

I would also add that Lim Poh Leong denied ever advising the first plaintiff not to report the third party to the police.

I am of the view that there was no misunderstanding between the first plaintiff and his lawyer on this point. In his second AISJ, the first plaintiff had given a false reason for not reporting the third party to the police at the time he had learned about the UOB incident.

I also do not accept his new version as to why he had not reported the UOB incident to the police at the material time. The real reason why he did not report it was that he, and the second plaintiff, did not want to get the third party into trouble.

However, I am of the view that the plaintiffs were not obliged to report the third party to the police or to inform the Jalan Sultan Branch about the UOB incident or to put them on notice that the third party ought not to carry out any banking transaction for the plaintiffs or that any cheque belonging to the plaintiffs and presented for payment by the third party should first be verified with the plaintiffs before any payment is made thereon.

The facts here are different from those in **Greenwood (Pauper) v Martins Bank, Ltd** [1933] AC 51. So long as the plaintiffs carried out adequate precautions, it would be unduly harsh to say that the plaintiffs were obliged to tell the Jalan Sultan Branch about the UOB incident or put the branch on notice as advocated by the defendants.

How the third party obtained the cheques

Prior to the UOB incident on 4 June 1999 the third party was working in KHLA. He was in charge of the Singapore office and the first plaintiff was in charge of the factory in Johore Bahru (NE 6F).

The first plaintiff said that after he learned on 4 June 1999 about the UOB incident, he immediately conducted a thorough check of the cheque books kept in the office safe pertaining to KHLA`s account with UOB and KHLA`s account with the defendants. He had also checked the cheque books pertaining to the account which were kept in the office safe. No cheque books or cheques were missing. He checked until past midnight (NE 9E to 10A, 10F to 12D and 13B).

The first plaintiff said that the safe could only be operated by a combination lock and a key. He alleged that the third party did not know the combination and only he (the first plaintiff) had the key to the safe.

When the first plaintiff returned home on the night of 4 June 1999, he tried to open a metal file cabinet in which other cheque books pertaining to the account were kept. He said that he was the only one who had the key to the metal cabinet. He tried to open it but could not do so. He left it at that and went to sleep. The next day he did not open the cabinet and did not do so until 9 July 1999

(NE 13E to 14D).

The first plaintiff said he had not seen his son who was in hiding for some time (NE 5F, 6B to E, 7B).

Subsequently on 9 July 1999, the first plaintiff received a call from Lim Liang Choon. It will be recalled that Lim used to be at the Jalan Sultan Branch until March 1999. Lim had come to call the first plaintiff that day in the following circumstances.

On 9 July 1999, after the moneys from the fifth cheque were paid to the third party, Mdm Chew Soo Mooi started to become curious. The third party had told her (when he was opening a current account for himself on 3 July 1999) that the first plaintiff was giving him money to buy a house. Yet he was withdrawing almost all the moneys he had received. It will be recalled that earlier on 5 July 1999 the third party had withdrawn $483,450 in cash on 5 July 2000 from the Main Branch (after the proceeds from the fourth cheque were deposited into his account). Mdm Chew knew about this because the Main Branch had informed her about this when they called her to confirm the total balance in the third party`s account on that day. She was also aware that he was receiving $125,000 in cash on 9 July 1999 although she was not the officer who authorised the payment. Mdm Chew spoke to the officer who authorised the payment, ie Lim Beng Choo, and learned that he had tried to contact the first plaintiff before making payment but without success.

It was Mdm Chew who then decided to call Lim Liang Choon to see if he knew how to contact the first plaintiff as he used to deal with the first plaintiff.

As it turned out, after Lim Liang Choon had left the Jalan Sultan Branch for the North Branch in March 1999, the first plaintiff contacted Lim for goodwill reasons and gave him his new telephone number as KHLA`s business had moved to Geylang prior to 9 July 1999 (NE 103D/E). However, the first plaintiff did not give his new telephone number to the Jalan Sultan Branch nor did he tell Lim Liang Choon to do so.

It is common ground that Lim Liang Choon also did not tell the Jalan Sultan Branch to update its records regarding the first plaintiff`s telephone number.

I digress briefly to say that I do not think that Lim Liang Choon was negligent in omitting to do this. He had learned about the new telephone number when the first plaintiff called him for a social purpose. Furthermore, there was no evidence that he knew that the first plaintiff had yet to inform the Jalan Sultan Branch (or the Main Branch for that matter) about his new number. The onus was on the first plaintiff to do so and he should have updated the defendants` Main Branch (where the account was maintained) or the Jalan Sultan Branch (where he had been operating the account) about his new contact number.

I should mention that the plaintiffs did not plead this omission nor did they rely on it in their submissions. I have dealt with it only for the sake of completeness.

In any event, even if Lim Liang Choon had provided the new telephone number of the first plaintiff to the Jalan Sultan Branch, this would be relevant in respect of the fifth cheque only as the defendants did not attempt to contact the first plaintiff in respect of the first four cheques.

I would at this stage deal with two other arguments of plaintiffs` counsel.

He argued that the defendants should have checked the third party`s story about how he was given money to buy a house. I do not agree. With the benefit of hindsight, the statement may now appear

important. However, it was made in a casual context although it may have been part of the third party`s ploy. Many casual statements are made in the course of one`s business and the banking business is no different. It would be too much to expect a bank officer to check on every casual statement that is made to him or her.

Plaintiffs` counsel also argued that on 9 July 1999, when Lim Beng Choo was unable to reach the first plaintiff, he should have asked the third party who was at the branch then for the first plaintiff`s contact number. This submission overlooks an important point. There is no evidence to suggest that at that time Lim Beng Choo knew that the telephone number of the first plaintiff had changed. Indeed the evidence is to the contrary. The entire branch did not know then. All Lim Beng Choo knew then was that he was unable to reach the first plaintiff but not the reason for this. It was only after Mdm Chew decided to contact Lim Liang Choon (who was no longer at the Jalan Sultan Branch) that Lim Liang Choon then contacted the first plaintiff at his new number. By then, the moneys on the fifth cheque had been paid to the third party.

When Lim Liang Choon contacted the first plaintiff on 9 July 1999 about the fifth cheque, this led to the discovery of the fraud of the third party initially in respect of the fifthand then the fourth cheque and eventually in respect of the rest.

After the telephone call, the first and second plaintiffs went to the Jalan Sultan Branch. The first plaintiff brought five cheque books in respect of the account. He spoke to Mdm Chew at the branch and then contacted Lim Poh Leong (who was at the head office). He and Lim discussed about stopping payment on unused cheques which were not in the first plaintiff`s possession. The branch prepared a Stop Payment Instruction which was signed by the Second plaintiff while the first plaintiff was still on the telephone with Lim Poh Leong. The cheque numbers of the cheques for which payment was to be stopped were not inserted then. They were inserted by Lim Poh Leong when he received the Stop Payment Instruction by fax.

The first plaintiff said that he did not give the serial numbers of the missing cheques to Lim Poh Leong. He believed that it was Mdm Chew who did so (NE 29E and 67D). Mdm Chew did not agree that it was she who gave Lim Poh Leong the serial numbers of the missing cheques.

Furthermore, Mdm Chew`s evidence was that when the plaintiffs came to the branch on 9 July 1999 after the telephone call by Lim Liang Choon, she had asked the first plaintiff how the third party had managed to get hold of the cheques which he had used. The first plaintiff had said to her that he had kept the cheque books in a safe which the third party had opened without his knowledge.

The first plaintiff did not deny he had a conversation with Mdm Chew on 9 July 1999. However he claimed to have told her that the five cheques came from cheque books that were kept in the home in a metal cabinet. He claimed he had used the Hokkien words `Ti Siew` when he spoke to Mdm Chew to refer to the metal cabinet or box (NE 44C to 45D).

Mdm Chew disagreed. She said he had used the Hokkien words `Poh Hiam Siew` (NE 90B and 96A to F) and not `Ti Siew`. She wrote the Mandarin equivalent which is exh D5. I disregarded that exhibit because the conversation was in Hokkien. If she had mis-heard the first plaintiff, the Mandarin version would simply have repeated what she thought she had heard.

The first plaintiff said that after he came home on the same day, ie 9 July 1999, he called the police. He said that the metal cabinet was not closed tightly. He assumed that the third party had opened it and did not close it tightly. He did not open the metal cabinet until the police arrived in case they wanted to look for fingerprints (NE 16E to 18F).

The first plaintiff also said that he believed the third party had sneaked back into the home since 4 June 1999 to take his personal belongings (NE 25D). He appeared to be implying that that was when the third party had stolen the cheque books from the home. He claimed that the five cheques came from two missing cheque books which had been kept in the metal cabinet at home.

During cross-examination, the first plaintiff reiterated time and again that:

(a) the serial numbers given to Lim Poh Leong on 9 July 1999 were not derived from any of the five cheque books that the first plaintiff had brought with him to the branch;

(b) the five cheque books with him had been kept in the safe in the office.

(c) there were no unused cheques which were missing from these five cheque books; and

(d) none of the five cheques in question came from these five cheque books but from cheque books kept in a metal cabinet at home

(see for example, 14E, 16B, 20D, 22A to 23A, 30D, 38E and F, 39D, 41A and E, 43F, 67D).

In summary, the first plaintiff`s version at trial as to how the third party got hold of the five cheques was that:

(a) The third party had been in hiding since, at least, 4 June 1999. The first plaintiff had asked people to look for and speak with the third party.

(b) On 4 June 1999, the first plaintiff had checked all the cheque books in the safe including those in respect of the account and there was no missing cheque.

(c) However the first plaintiff could not open the metal cabinet on 5 June 1999, and did not attempt to open it again, until 9 July 1999 when he learned of the fraud about some cheques and noticed that the metal cabinet was not closed tightly.

(d) Sometime between 4 June 1999 to 3 July 1999, the third party had sneaked back into the house and stolen two cheque books from the metal cabinet. The five cheques came from the two cheque books.

(e) The five cheques did not come from the five cheque books in the safe which the first plaintiff had brought to the Jalan Sultan Branch on 9 July 1999.

(f) The third party did not have the combination or key to the safe or the key to the metal cabinet.

I now come to Lim Poh Leong`s evidence. He said that the first plaintiff had called him from the Jalan Sultan Branch on 9 July 1999. The first plaintiff had told him that the third party had forged his signature on some cheques in respect of the account. Some cheques were missing from the cheque books and it was the first plaintiff (and not Mdm Chew) who gave him a list of the serial numbers from cheque books for the purpose of determining which other cheques to stop payment on.

Lim Poh Leong was able to produce his handwritten note of the serial numbers given to him by the first plaintiff in this conversation. This note is exh D6. It refers to the serial numbers of the five cheque books which the first plaintiff had brought with him to the Jalan Sultan Branch. The serial

numbers on the note were:

(1)		469751	-	469800
(2)		469801	-	469844
(3)		469651	-	469700
(4)		469601	-	469650
(5)		469701	-	469750

As can be seen, the serial numbers of the first to fourth cheques, being 469701, 469716, 469742 and 469748 came from the fifth cheque book mentioned in the list. The serial number of the fifth cheque being 469845 came from the second cheque book mentioned (which would end with the number 469850 as each cheque book had 50 cheques).

Exhibit D6 demonstrated conclusively that the five cheques came from two of the five cheque books which the first plaintiff had brought to the Jalan Sultan Branch on 9 July 1999. These had been kept in the office safe.

Plaintiffs` counsel had tried to suggest to Lim Poh Leong that the serial numbers were derived by him from some process of deduction and not from the first plaintiff. Lim disagreed. I believe him. Furthermore, the random manner in which the numbers were written were against the process of deduction which plaintiffs` counsel was trying to advance.

I also find that Mdm Chew`s version of what the first plaintiff had told her on 9 July 1999 to be true. When Mdm Chew asked the first plaintiff how the third party had obtained the five cheques, the first plaintiff`s instinctive response was that he had kept the cheque books in a safe which the third party had opened without his knowledge. This was the honest response and Mdm Chew did not mis-hear him. Subsequently, when he decided to sue the defendants, he weaved the version which I have mentioned as he knew that if he told the truth, the plaintiffs` claim would be in jeopardy.

Accordingly, I find that the first plaintiff had lied on this crucial point. Contrary to the first plaintiff`s evidence, the third party must have known the combination to the safe and had a key to the safe. This is reinforced by the fact that prior to 4 June 1999, it was the third party who was in charge of the Singapore office while the first plaintiff was in charge of the factory in Johore Bahru (NE 6F). Therefore, after the UOB incident, the third party still had access to the safe and hence to the cheques in the safe. The plaintiffs did not deny him such access.

I also do not accept that the third party was in hiding since 4 June 1999. No one was called to corroborate the first plaintiff`s evidence that the third party had been in hiding. Also no one testified that he or she had been asked by the first plaintiff to contact the third party.

The third party was walking in and out of the Jalan Sultan Branch on three days between 3 to 9 July 1999 quite openly. He went to the Main Branch on 5 July 1999 (to withdraw $483,450 in cash). After 9 July 1999, the defendants arranged for him to go to the branch on 19 July 1999 where he was arrested. If the third party had really been in hiding because of the UOB incident, then, a fortiori, he would have remained in hiding after 9 July 1999. Instead he apparently had no difficulty in turning up at the Jalan Sultan Branch on 19 July 1999.

In the circumstances, I also do not accept that the first plaintiff was unable to open the metal cabinet at home on 5 June 1999 or that although he was anxious to check the cheque books inside there at that time, he did not try again to open or to force open the metal cabinet for more than a month. This was just part of his fabrication that the cheques came from the cheque books in the metal cabinet to justify why he did not notice the missing cheques between 5 June 1999 and 9 July 1999.

Did the third party defraud the plaintiffs or the first plaintiff before the UOB incident?

During cross-examination, the first plaintiff had admitted that in 1990 or earlier, the third party had stolen money from him. defendants` Counsel assumed that there was only one such prior incident and that the UOB incident was the second incident. Hence at NE 33F to 34B:

> *Q: Was there an occasion in 1990 or prior to that when your son Khoo SiongHui had defrauded you?*
>
> *A: Yes, at the time my son had defrauded me by stealing small sums but that was a domestic matter.*
>
> *Q: So when he defrauded you in June 1999 regarding UOB account, that was the second time he had defrauded you?*
>
> *A: Yes.*

When I asked the first plaintiff how many times the third party had cheated him of his money or signed documents without his authority prior to the UOB incident, the first plaintiff gave a different answer. At NE 68C to F:

Ct to PW1:	Refer to AB14. Prior to 4 June 1999, how many times did your son Khoo Siong Hui cheat you of your money or sign documents without your authority?
A:	About this document, he signed it in February 1999 and the payment was due in June 1999.
Ct to PW1:	Aside from the document and prior to this incident, which you discovered on 4 June 1999, how many times did your son Khoo Siong Hui cheat you of your money or sign documents without your authority?
A:	He has not cheated me of money nor sign any document without my authority.

(AB14 is the police report 9 July 1999)

I find that the UOB incident was not the first time that the third party had defrauded his father.

Are the plaintiffs estopped from making their claim because they did not procure the arrest of

the third party after 9 July 1999 and/or because the second plaintiff stood bail for the third party after his arrest?

This argument can be simply disposed of.

There is no obligation on the part of the plaintiffs to procure the third party`s arrest.

In addition, there is nothing to preclude either of the plaintiffs from standing bail for the third party after his arrest, especially since they are, after all, his parents.

The customer`s duty of care

The allegation about the plaintiffs` negligence centres on their failure to deny the third party access to the cheque books in the safe.

Before the plaintiffs can be precluded from succeeding in their claim by reason of this alleged negligence, it is necessary to ascertain first whether the plaintiffs owe a duty of care to the defendants and if so what that duty is before considering whether they are in breach of that duty and whether the breach caused the loss.

Defendants` counsel initially relied on s 24 of the Bills of Exchange Act (Cap 23). The material part of s 24 states:

> *... where a signature on a bill is forged or placed thereon without the authority of the person whose signature is purports to be, the forged or unauthorised signature is wholly inoperative, and no right to retain the bill or to give a discharge therefor or to enforce payment thereof against any party thereto can be acquired through or under that signature,* ***unless the party against whom it is sought to retain or enforce payment of the bill is precluded from setting up the forgery or want of authority*** *... [Emphasis added.]*

However, defendants` counsel did not produce any authority to establish that the plaintiffs came within the expression `the party against whom it is sought to retain or enforce payment of the bill ...`.

Defendants` counsel also relied on the common law. I will now turn to the common law.

Tai Hing Cotton Mill Ltd v Liu Chong Hing Bank Ltd & Ors [1986] AC 80 is the case often cited to confine a customer`s duty to his bank within certain narrow perimeters. This was an appeal from the Court of Appeal in Hong Kong to the Privy Council.

In that case, an accounts clerk of the customer company had forged the managing director`s signature on about 300 cheques between November 1974 and May 1978 drawn on accounts with three banks. The banks honoured the cheques and debited the company`s accounts. The company`s system of internal financial control was not adequate to prevent or detect forgery and so the forgeries were not discovered until May 1978 when the company commenced action against the three banks claiming declarations that they were not entitled to debit the company`s accounts with the amounts of the forged cheques.

The court of first instance dismissed the company`s claims, except in relation to six cheques, holding that the company, by failing to challenge the debits shown in the bank statements, was estopped from asserting that the accounts had been wrongly debited.

The Court of Appeal of Hong Kong dismissed the company`s appeal and allowed a cross-appeal by one of the banks, holding, inter alia, that the company was in breach of a duty of care owed to the banks in contract and in tort.

Macmillan Greenwood On appeal to the Privy Council, it was held that the only duties owed by a customer to his bank in connection with the operation of a current account were:

(a) a duty to exercise due care in drawing cheques so as not to facilitate fraud or forgery, following the House of Lords` decision in **London Joint Stock Bank Ltd v Macmillan** [1918] AC 777 (``), and

(b) a duty to notify the bank immediately of any unauthorised cheques of which he became aware, following the House of Lords` decision in **Greenwood v Martins Bank Ltd** [1933] AC 51 (``).

The Privy Council held that there was no wider duty (as contended by the banks) requiring a customer to take reasonable precautions in the management of his business to prevent forged cheques being presented to the bank for payment nor even a narrower duty (as contended by the banks) to check periodic bank statements. It was also held that as there was no wider duty (generally) in contract, there was no wider duty under tort.

Lord Scarman, who delivered the judgment of the Privy Council, was of the view that, ` ***Macmillan*** `s case itself decisively illustrates that is not a necessary incident of the banker-customer relationship that the customer should owe his banker the wider duty of care` (at p 105).

In reaching this view, Lord Scarman cited certain passages of the judgment of Lord Finlay LC in the ***Macmillan*** case. He also mentioned that the ***Macmillan*** case had been cited with approval by the High Court of Australia in **Commonwealth Trading Bank of Australia v Sydney Wide Stores Pty Ltd** [1981] 55 ALJR 574 (` ***Sydney Wide Stores*** `) and the Court of Appeal in New Zealand in **National Bank of New Zealand v Walpole and Patterson Ltd** [1975] 2 NZLR 7 (` ***Walpole*** `).

Lord Scarman also said that the House of Lords in Macmillan had approved the judgment of Bray J in **Kepitigalla Rubber Estates Ltd v National Bank of India Ltd** [1909] 2 KB 1010 (` ***Kepitigalla*** `).

He then referred to a passage from a judgment by Atkin LJ in **Joachimson v Swiss Bank Corporation** [1921] 3 KB 110 at 127 and said (at p 105) that Atkin LJ clearly felt no difficulty in analysing the relationship upon the basis of the limited duty enunciated in ***Macmillan*** .

I should therefore review all these cases as well as other cases.

In **Young v Grote** [1827] 4 Bing 253; 130 ER 764, a customer of a bank delivered to his wife cheques signed by himself but with blanks for the sums thereof. He requested his wife to fill the blanks up according to the exigency of his business. She caused one to be filled and delivered it to the husband`s clerk. However the manner in which the figures and words for the sum were inserted allowed the clerk to alter the sum by increasing it. The bank paid on the cheque and the question arose as to who should bear the loss as between the bank and its customer.

Best CJ said,

> *Although I entertain no doubt on the subject, this is a case of considerable importance, and the question has been properly raised by the arbitrator. Undoubtedly, a banker who pays a forged check, is in general bound to pay the amount again to his customer, because, in the first instance, he pays without authority. Onthis principle the two cases which have been cited were decided, because it is the duty of the banker to be acquainted with his customer`s hand-writing, and the banker, not the customer, must suffer if a payment be made without authority.*
>
> *But though that rule be perfectly well established, yet if it be the fault of the customer that the banker pays more than he ought, he cannot be called on to pay again. That principle has been well illustrated by Potier, in commenting on the case put by Scacchia ...*
>
> *In the present case, was it not the fault of Young that Grote and Co paid Â£350 instead of Â£50?Young leave a blank check in the care of his wife. It is urged, indeed, that the business of merchants requires them to sign checks in blank, and leave them to be filled up by agents. If that be so, the person selected for the care of such a check ought at least to be a person conversant with business as well as trustworthy ... If Young, instead of leaving the check with a female, had left it with a man of business, he would have guarded against fraud in the mode of filling it up; he would have placed the word fifty at the beginning of the second line; and would have commenced it with a capital letter, so that it could not have had the appearance of following properly after a preceding word: he would also have placed the figure 5 so near to the printed Â£ as to prevent the possibility of interpolation. It was by the neglect of these ordinary precautions that Grote and Co. were induced to pay ... We decide here on the ground that the banker has been misled by want of proper caution on the part of his customer.*

It will be seen that the customer was found liable because of a want of caution on his part. Although the facts involved the careless drawing of a cheque, the court did not confine the duty of a customer only to the drawing of a cheque.

In **Bank of Ireland v Evans` Charities Trustees** [1855] 5 HL Cas 389; 10 ER 950 (` ***Evans` Trustees*** `) a corporate seal had been fraudulently affixed to five powers of attorney. Mr Baron Parks said (at 10 ER 950, 959):

> *Now, we all concur in opinion that the evidence given, which was only of a supposed negligent custody of their corporation seal by the trustees, in leaving it to the hands of Mr Grace, whereby he was enabled to commit the forgeries, is not sufficient evidence of that species of negligence which alone would warrant a jury in finding that the plaintiffs were disentitled to insist on the transfer being void. We concur with Mr Justice Jackson, and Justices Ball, Crampton, and Torrens, and the Chief Justice Lefroy, in thinking that the negligence which would deprive the plaintiff of his right to insist that the transfer was invalid, must be negligence in or immediately connected with the transfer itself.*
>
> *Such was the case of **Young v Grote** 4 Bing 253, on which great reliance was placed in the argument at your Lordship` Bar. In that case it was held to have been the fault of the drawer of the cheque that he misled the banker, on whom it was drawn, by want of proper caution in the mode of drawing the cheque, which admitted of easy interpolation, and consequently, that the drawer, having*

> *thus caused the banker to pay the forged cheque by his own neglect in the mode of drawing the cheque itself, could not complain of the payment.*
>
> *The present case is entirely different. If there was negligence in the custody of the seal, it was very remotely connected with the act of transfer. The transfer was not the necessary or ordinary or likely result of that negligence. It never would have been, but for the occurrence of a very extraordinary event, that persons should be found either so dishonest or so careless, as to testify on the face of the instrument that they had seen the seal duly affixed. It is quite impossible that the bankers could have maintained an action for the negligence of the trustees, and recovered the damages they had sustained by reason of their having made the transfer.*
>
> *If such negligence could disentitle the plaintiffs, to what extent is it to go?If a man should lose his cheque-book, or neglect to lock the desk in which it is kept, and a servant or stranger should take it up, it is impossible in our opinion to contend that a banker paying his forged cheque would be entitled to charge his customer with that payment. Would it be contended that if he kept his goods so negligently that a servant took them and sold them, he must be considered as having concurred in the sale, and so be disentitled to sue for their conversion on a demand and refusal?It is clear, we think, that the negligence in the present case, if there be any, is much too remote to affect the transfer itself, and to cause the trustees to be parties to misleading the bank in making the transfer on the forged power of attorneys. `*

In ***Evans` Trustees*** , the trustees were absolved from liability on the basis that even if there was negligent custody of their corporation seal, that did not cause the loss.

As regards the last paragraph which I have cited above, I am of the view that that was intended to apply to ordinary circumstances.

In **Bank of England v Vagliano Bros** [1891] AC 107 (` ***Vagliano*** `), 43 bills of exchange were accepted by the bank`s customer who was the plaintiff. The supposed payees had no interest in the bills and were in that sense fictitious payees. The bills were purportedly drawn by the plaintiff`s customers Vucina but the drawing and indorsements on the bills were forgeries or fictitious. The bank paid on these bills over a period of time, debited the customer`s account and the debits were entered in its passbook. The question was whether the bank was entitled to charge the plaintiff with the amount of the bills.

A majority of the House of Lords held that the bank was entitled to do so because of a certain provision in the Bills of Exchange Act 1882 which is not relevant for present purposes.

However, apparently, a majority of the House of Lords also thought that the conduct of the plaintiffs rendered it liable on the bills of exchange.

On the question of conduct, Lord Halsbury LC (one of the majority) said (at p 115):

> *My Lords, it seems to me impossible to dispute that this was, in fact, a misleading of the bankers. I pass by for the moment the question whose default it was, for the purpose of considering the proposition which has found favour with one of your Lordships, and which I will not dispute, that the carelessness of the customer, or neglect of the customer to take precautions, unconnected*

with the act itself, cannot be put forward by the banker as justifying his own default ...

However, he then went on to say (at pp 115 and 116):

But how can it be said in this case that the default is unconnected with the act? The very thing which the banker does is induced by the fault of the customer. Was not the customer bound to know the genuineness of Vucina`s draft?Was not the customer bound to know whether there was any real transaction between himself and Vucina, effected by the instrument in question?Was not the customer bound to know the contents of his own pass-book?Was not the customer bound to know the state of his account with Vucina?It certainly is very strange that it should be suggested that without any responsibility on his part he should be entitled to accredit forty-three documents to his bankers as genuine bills when he had the means of knowledge I have indicated that no one of them was a bill of exchange at all, or represented any transaction between Vucina and himself.

Lord Bramwell (one of the dissenting Law Lords) said (at pp 135 and 136):

The drawing and indorsements on them were forgeries, or fictitious. It is for the defendants to establish that they have a right to charge the plaintiffs with the amount of these bills.

The first ground on which they claim this right is that the plaintiffs, by their conduct, wilful, careless, or unskilful, or all, enabled the fraud to be committed as to the whole or part (the part after the first one or two) - in effect, that the plaintiffs caused the defendants to pay these bills. I think it is necessary for the defendants to shew that theplaintiffs ***caused*** *them to pay these bills as they did. It is not enough to shew that they gave occasion to their doing so - that different conduct would have prevented the fraud and the payment by the defendants.*

I think the result of the authorities, ***Robarts v Tucker*** *(1);* ***Young v Grote*** *(2);* ***Bank of Ireland v Trustees of Evans` Charities*** *(3);* ***Mayor, &c, of Merchants of England v Bank of England*** *(4), is, that the conduct of the bank`s customer to enable the bank to charge the customer must be conduct directly causing the payment.*

In **Lewes Sanitary Steam Laundry Co (Ltd) v Barclay, Bevan & Co** [1906] 11 Com Cas 255 (` ***Lewes*** `), the customer was a company. The directors had appointed the son of the chairman as secretary of the company. Four years prior to the appointment, the son had, to his father`s knowledge, committed a forgery of his father`s signature to a document but had since then, apparently lived a blameless life. Neither of the other two directors knew of the forgery. The son had the custody of the company`s cheque-book and bank pass-book. He forged the signature of a director on various cheques drawn on the company`s account first with one bank and then with another bank.

Kennedy J said (at pp 266 and 267):

> *Upon these facts, unless the defendants can make good their defence of estoppel, the plaintiffs are clearly entitled to succeed. The estoppel which is alleged is an estoppel created by the negligence of the plaintiffs. Negligence, to constitute an estoppel, implies the existence of some duty which the party against whom the estoppel is alleged owes to the other party. I think that the relation of bankers and customers does involve a duty on the part of the customer. It is not (as I understand) disputed that there might, as between banker and customer, be circumstances which would be an answer to the prima facie cause that the authority was only to pay to the order of the person named as payee upon the bill, and that the banker can only charge the customer with payments made pursuant to that authority.* ***Negligence on the customer`s part might be one of those circumstances****; the fact that there was no such payee might be another; and I think that a representation made directly to the banker by the customer upon a material point, untrue in fact though believed by the person who made it to be true, and on which the banker acted by paying money which he could not otherwise have paid, ought also to be an answer to that prima facie case (per Lord Selborne,* ***Bank of England v Vagliano*** *(1) at pp 123-124).* ***I assume that there is a duty to be careful not to facilitate any fraud*** *which, when it has been perpetrated, is seen to have, in fact, flowed in natural and uninterrupted sequence from the negligent act. (* ***Beven on Negligence in Law****, p 1,604). But, in order to relieve the banker from the consequence of paying money upon a forged cheque, it is not enough for the banker to show that the conduct of his customer, wilful, careless, or wasteful, or all, enabled the fraud to be committed. He must show that the customer* ***caused*** *him to pay the money upon the forged cheque. It is not enough to show that the customer gave occasion for his so paying - that different conduct would have prevented the fraud and the payment by the banker. (See per Lord Bramwell, in* ***Bank of England v Vagliano*** *(1), at p 135.)And the case of* ***Bank of Ireland v Trustees of Evans`s Charities*** *(2) establishes the proposition that negligence to make an estoppel must be in, or immediately connected with, the transaction itself which is complained of. `The carelessness of the customer or neglect of the customer to take precautions, unconnected with the act itself, cannot be put forward by the banker as justifying his own default` (per Lord Halsbury, in* ***Bank of England v Vagliano*** *(1), at p 115). [Emphasis added.]*

In my view, Kennedy J`s judgment is authority for the proposition that a customer does owe a duty to his bank not to facilitate any fraud. That duty is breached if the customer is negligent in respect of the duty. However, the negligent conduct must have caused the loss.

On the particular facts of that case, Kennedy J found that there was no negligence by the company and also that the conduct or omission of the company did not cause the loss.

In relation to two of the three points advanced by the bank there (the third being irrelevant to the present case before me), he said (at pp 268 to 269):

> *The defendants rely, first, on the fact that the appointment of William Gates, jun, was the appointment of a man who was known by the director, who was at the time chairman of the company, to have been guilty of a forgery some four years before. Secondly, upon the degree of confidence which the directors placed in their secretary, and especially in giving him possession of the cheque-book and not requiring its production for inspection;their want of care and insight in not discovering in the pass-book as it came from the bank`s custody in January, 1905, the three entries relating to the cheques forged for the amounts of Â£5, Â£25 and Â£152s 8d respectively; ...*

> *As to the first of these points, it appears to me that it could not in any case be successfully contended that if a customer employs in his office, in a position which enables him, in the course of his duty, to have possession of the employer`s cheque-book for the legitimate and necessary purposes connected with its use, a man whom the employer knows to have once forged a signature four years before, but who has since apparently lived a blameless life, the bank, which has paid a cheque forged by that servant out of his employer`s account, ought to be held entitled to base a successful defence upon the mere fact that the wrongdoer was known by the employer, who engaged him, once in the past to have forged a signature. In the case of a company such a contention appears to be still more unreasonable. Here no one of the directors, except Mr William Gates, sen, had either knowledge or suspicion of his son`s previous act of wrongdoing. In a case where one out of several members of a board of directors, who concur in the appointment of the company`s secretary, happens to know of some misconduct committed by the appointee in the past, and does not disclose it to his co-directors, I should hesitate a good deal before holding that in regard to dealings of the company with third parties in which the secretary was guilty of similar misconduct any sort of responsibility, on account of the mere fact of the secretary`s appointment under such circumstances, should be held to attach to the company. In regard to the absence of sufficient check upon the secretary`s conduct and the amount of supervision over his use of the company`s cheque-book, it seems to me that this want of care cannot be held to be negligence in the transaction itself, or that the crime of forgery on the part of the secretary flowed from it as a result in ordinary or natural sequence. ...*

In ***Kepitigalla*** , the secretary of a company forged the signatures of two of the directors of the company to a number of cheques and the defendant bank paid on the cheques so drawn. The forgeries extended over two months during which time neither the bank pass-book nor the cash-book of the company was examined by the directors.

The bank contended that it was the duty of the company to use reasonable care (a) in the issuing of mandates to the defendants and (b) in the carrying out of their business relating to the issuing of mandates.

Bray J agreed with the first part of the proposition but found no breach of that duty. As for the second part of the proposition, Bray J found it very vague. He paraphrased it to mean that, `a customer must, in the course of carrying on his business, take reasonable precautions to prevent his servants from forging his signature ... (at p 1023).

He said that he could find no authority for that proposition.

He referred to, inter alia, ***Vagliano*** .

At p 1023, he said:

> *Most reliance was placed by the defendants on **Bank of England v Vagliano** (4). It is necessary, therefore, to examine the judgments in that case. Lord Halsbury`s decision seems to me to be based on this, that Vagliano by his own acts in relation to the bills themselves misled the Bank. Two acts were mainly relied on - first, that Vagliano himself accepted the bills as genuine bills when in reality they were not bills at all; second, that by a separate writing, namely, the letter of advice, he told the Bank that the bills of exchange were coming due and would have to be paid out of his account, when in fact no such bills of*

> *exchange existed. But the learned Lord expressly states on p 115 that he does not dispute that the carelessness of the customer or the neglect of the customer to take precautions unconnected with the act itself cannot be put forward by the banker as justifying his own default. Then follows the passage on the top of p 116 which was much relied on by Mr Scrutton. The object of the statements made in that passage was to shew that in the case the default was not unconnected with the act or transaction. Those statements shew that most clearly when it is remembered that the acts which misled the Bank were the acceptance of the bills and the sending of the advice notes by or with the genuine authority of Vagliano himself. There are no circumstances in the present case that have any resemblance to the circumstances there stated,* ***except possibly the suggestion that Vagliano was bound to know the contents of his own pass-book, but here also the circumstances are quite different in the present case****. In that case there were 43 forged bills extending over a period from February to October. The pass-book was in the regular course of business, sent to the plaintiffs half-yearly, balanced up, and was sent during this period with all the entries of debit in respect of these bills and with the forged bills as vouchers, and it was returned by the plaintiffs without objection,* ***whereas in this case there was no half-yearly balance during the period of January and February, and no evidence to shew that the pass-book ever reached the company`s office****. [Emphasis added.]*

At p 1024, Bray J said:

> *Lord Bramwell, on p 135, emphatically negatives Mr Scrutton`s contention when he says, `I think it is necessary for the defendants to shew that the plaintiffs caused them (the defendants) to pay these bills as they did. It is not enough to shew that they gave occasion to their doing so - that different conduct would have prevented the fraud and the payment by the defendants. `It seems to me that so far from* ***Bank of England v Vagliano*** *(1) being in favour of Mr Scrutton`s contention, it is distinctly against it.*

In my view, the passage cited from Lord Bramwell`s judgment was on causation and not the extent of the duty of care owed by a customer of a bank.

At p 1025, Bray J went on to say:

> *There are other authorities which are also strongly against Mr Scrutton`s contention. They are* ***Swan v North British Australasian Co*** *(1),* ***Bank of Ireland v Trustees of Evans` Charities*** *(2),* ***Mayor, &c, of Merchants of the Staple of England v Bank of England*** *(3), and, finally,* ***Lewes Sanitary Steam Laundry Co v Barclay, Bevan & Co****(4). Without referring in detail to these cases, they can be summed up by saying that they lay down most clearly that the negligence must be in or immediately connected with the transaction itself and must have been the proximate cause of the loss. It is true that the first three of these cases are not cases between bankers and their customers, but they have always been treated as analogous. The last case, however, is a case of banker and customer and resembles the present case in many ways, and it would be quite sufficient for me to say that I am bound by that decision. `*

In my view, the summary by Bray J of ***Lewes`*** case is vague. It is unclear whether Bray J meant to focus on the duty of care and to suggest that it be circumscribed or to focus on the principle of

causation or both.

Apart from authority, Bray J said at pp 1025 and 1026:

> *I think Mr Scrutton`s contention equally fails when it is considered apart from authority. It amounts to a contention on the part of the bank that its customers impliedly agreed to take precautions in the general course of carrying on their business to prevent forgeries on the part of their servants. Upon what is that based?It cannot be said to be necessary to make the contract effective. It cannot be said to have really been in the mind of the customer, or, indeed, of the bank, when the relationship of banker and customer was created. What is to be the standard of the extent or number of the precautions to be taken?Applying it to this case, can it be said to have been in the minds of the directors of the company that they were promising to have the pass-book and the cash-book examined at every board meeting, and to have a sufficient number of board meetings to prevent forgeries, or that the secretary should be supervised or watched by the chairman?If the bank desire that their customers should make these promises they must expressly stipulate that they shall. I am inclined to think that a banker who required such a stipulation would soon lose a number of his customers. The truth is that the number of cases where bankers sustain losses of this kind are infinitesimal in comparison with the large business they do, and the profits of banking are sufficient to compensate them for this very small risk. To the individual customer the loss would often be very serious; to the banker it is negligible.*

In my view, the question is whether business efficacy would require a term to be be implied. I think that it would require a term to be implied that a customer is under a duty not to facilitate fraud otherwise customers can be as negligent or reckless as they like without any liability so long as their conduct is not in relation to the drawing of cheques.

Can it be said to be in the minds of a customer when he opens an account that he should not facilitate fraud on his own account?I am of the view that this can and should be said.

As for the argument that banks should expressly stipulate in their contracts with the customers the duty not to facilitate fraud if they wish to rely on such a duty, I find some force in such an argument.

However, if that be the case, then likewise banks should expressly stipulate in their contracts with the customers that they owe a duty to draw their cheques carefully so as not to facilitate fraud or forgery instead of imposing that duty as an implied term of contract or under tort.

In other words, either there should be an implied duty on the customer not to facilitate fraud or no such implied duty at all. To draw a distinction between the drawing of cheques on the one hand and other steps or omissions on the other hand is to create an artificial and unrealistic distinction. After all, fraud is not facilitated by the careless drawing of cheques alone.

Furthermore, it is precisely because a bank has not specifically stipulated (in the contract) a duty on the customer that the question of an implied term arises.

I would add that I do not think that banks in Singapore are reluctant to add such a contractual term because of the fear of losing business. More often than not,the omission to do so is because they have not revised their standard terms or because another bank has been taken over by or merged with them and they have omitted to revise the standard terms of that other bank. It may well be that

one should have no sympathy for a bank who fails to get its act together, but, on the other hand, I do not see why customers should get away with their conduct however negligent or reckless they may have been.

As for the policy reason that the losses of the kind sustained are infinitesimal to banks compared with the large business they do whereas to the individual customer the loss would often be very serious, I am of the view that such a consideration can be addressed by not being too quick to find that the customer has been negligent or that the negligent conduct has caused the loss.

In my view, the balance between the interests of the bank and the customer and the interests of justice would best be served if there is a wider duty of care but leaving the questions of negligence and causation to be determined according to the particular facts of each case.

I also note that in ***Kepitigalla*** , Bray J did consider whether there was any default by the customer, assuming that there was a duty on the part of the customer to take reasonable precautions to prevent fraud. On the facts in that case, he found that it was not in default.

I am of the view that the judgment of Bray J should be confined to ordinary circumstances where there is no special reason to suspect that fraud might be committed.

I now come to ***Macmillan*** . In that case, a firm was the customer of the bank. A clerk of the firm had presented a cheque to one of the partners to sign. The cheque was drawn in favour of the firm or bearer. In the space provided for the sum to be stated in writing, no such writing was inserted. Certain figures were inserted in the space intended for figures. After the partner had signed the cheque, the clerk altered the sum in figures by adding certain numerals which he was able to do in view of the spacing of the figures. He had also inserted the new amount in words.

The House of Lords held that the firm had been in breach of a duty of care in the drawing of the cheque.

It will be recalled that ***Macmillan*** was considered by ***Tai Hing*** to negate any wider duty of care.

I refer first to two passages in the judgment of Lord Finlay LC in ***Macmillan*** which were cited in ***Tai Hing*** .

At p 793, Lord Finlay LC said:

> *...The duty which the customer owes to the bank is to draw the cheques with reasonable care to prevent forgery, and if, owing to neglect of this duty, forgery takes place, the customer is liable to the bank for the loss.*

At p 795, Lord Finlay LC said:

> *Of course the negligence must be in the transaction itself, that is, in the manner in which the cheque is drawn. It would be no defence to the banker, if the forgery had been that of a clerk of a customer, that the latter had taken the clerk into his service without sufficient inquiry as to his character. Attempts have often been made to extend the principle of* ***Young v Grote*** *(1) beyond the case of negligence in the immediate transaction, but they have always failed.*

I note that the passage cited from p 793 does not actually say that the only duty on the customer is to draw cheques with reasonable care.

Although the passage cited from p 795 does suggest that the only duty is to draw the cheques with reasonable care, there are other passages in Lord Finlay LC`s judgment which suggest that the duty is not so limited.

For example, at p 789 he said:

> *It has been often said that no one is bound to anticipate the commission of a crime, and that to take advantage of blank spaces left in a cheque for the purpose of increasing the amount is forgery, which the customer is not bound to guard against. It has been suggested that the prevention of forgery must be left to the criminal law. I am unable to accept any such proposition without very great qualification. Every-day experience shows that advantage is taken of negligence for the purpose of perpetrating frauds. A warehouseman is bound to take precautions against theft, and if he fails to do so he will be liable to the owner if the goods are stolen. It would be idle for him to contend that he had trusted to the terrors of the criminal law for the prevention of theft.*

> *As the customer and the banker are under a contractual relation in this matter, it appears obvious that in drawing a cheque the customer is bound to take usual and reasonable precautions to prevent forgery. Crime, is indeed, a very serious matter, but every one knows that crime is not uncommon. If the cheque is drawn in such a way as to facilitate or almost to invite an increase in the amount by forgery if the cheque should get into the hands of a dishonest person, forgery is not a remote but a very natural consequence of negligence of this description.*

This passage demonstrates the learned Law Lord`s concern about fraud being committed as a result of negligence. Although the drawing of a cheque was mentioned in this passage as well, it was, in my view, mentioned as an illustration and not to exclude all other acts of negligence even if causation could be established.

At pp 799 to 800, Lord Finlay LC said:

> *The group of cases to which I have just referred (1855 to 1863) recognize the authority of the decision of **Young v Grote** (2), while establishing that it applies only to cases in which the negligence is in the transaction itself and has no application to cases where the fraud has been merely facilitated by negligence in the custody of the seal of a corporation or of transfers in blank. The principle which underlies these decisions is further illustrated in the cases of **Arnold v Cheque Bank** (1), **Baxendale v Bennett** (2), **Staple of England v Bank of England** (3), **Lewes Sanitary Steam Laundry Co v Barclay, Bevan & Co** (4), and **Kepitigalla Rubber Estates v National Bank of India** (5).*

I have to ask what is meant by negligence `in the transaction itself`. It has been construed to mean only the drawing of cheques. In my view it is merely a reference to the principle of causation and was not intended to limit the duty of care owed by a customer to his bank. Hence negligence in the custody of a seal of a corporation or transfers in blank might not per se meet the requirement of

causation (see ***Evans` Trustees***). However, what if there were other factors?

At p 801, Lord Finlay LC cites both ***Lewes*** and ***Kepitigalla*** with approval.

However, as I have mentioned, ***Lewes*** did not decide that the only duty was to draw cheques with reasonable care. Indeed, in my view, it decided that there was a duty not to facilitate fraud. It was the absence of negligence and causation, and not the absence of a duty of care on the customer, that resulted in the bank being held liable.

As for ***Kepitigalla*** , Bray J did not expressly say in terms that the duty of the customer was limited to the drawing of cheques with reasonable care.

I refer next to the judgment of Viscount Haldane in ***Macmillan*** . At pp 815 to 816 he said:

> *The obligation of the customer to avoid negligence in this regard was, I think, well expressed by Kennedy J in* ***Lewes Sanitary Steam Laundry Co v Barclay, Bevan & Co****(2) when that every accomplished judge defined it as including a `duty to be careful not to facilitate any fraud which, when it has been perpetrated, is seen to have, in fact, flowed in natural and uninterrupted sequence from the negligent act. `The limitation of the liability to that which flows directly from the act established as negligent was obviously introduced by Kennedy J because of what has been repeatedly laid down in the decided cases as essential, that the negligence should be of such a kind that the loss has resulted immediately from it, and not from some intervening cause which, although it was able to produce its effect because of what the customer had previously done or omitted to do, was not itself brought into existence as the immediate and natural outcome of his action. Thus a man may be imprudent in leaving his cheque-book and pass-book in the hands of his clerk, who is thereby enabled to forge a cheque. But he is not liable, for this reason, that the direct and real cause of the loss is the intervention of an act of wickedness on the part of the clerk, which the law does not call on him to anticipate* ***in the absence of obvious ground for suspicion****. In* ***Kepitigalla Rubber Estates v National Bank of India*** *(1) Bray J states the principle with conspicuous lucidity. [Emphasis added.]*

I will refer to the words underscored as `Viscount Haldane`s qualification`.

Therefore although ***Tai Hing*** said (at p 103) that the House of Lords in ***Macmillan*** had approved Bray J`s judgment in ***Kepitigalla*** , Viscount Haldane`s qualification clearly shows that the approval was not as unqualified as was thought.

As for the judgments of Lord Shaw of Dunfermline and Lord Parmoor in ***Macmillan*** , they recognise that there is a duty on the part of the customer to draw his cheques carefully but do not actually go so far as to say that there is no other duty.

In **Joachimson v Swiss Bank Corporation** [1921] 3 KB 110, Atkin LJ said (at p 127):

> *I think that there is only one contract made between the bank and its customer. The terms of that contract involve obligations on both sides and require careful statement. They appear upon consideration to include the following provisions. The bank undertakes to receive money and to collect bills for its customer`s account. The proceeds so received are not to be held in trust for the customer, but the bank borrows the proceeds and undertakes to repay them. The promise to repay is to repay at the branch of the bank where*

> *the account is kept, and during banking hours. It includes a promise to repay any part of the amount due against the written order of the customer addressed to the bank at the branch, and as such written orders may be outstanding in the ordinary course of business for two or three days, it is a term of the contract that the bank will not cease to do business with the customer except upon reasonable notice. The customer on his part undertakes to exercise reasonable care in executing his written orders so as not to mislead the bank or to facilitate forgery. ...*

This was the passage that Lord Scarman had referred to in ***Tai Hing*** (at p 105). After citing it, Lord Scarman had said:

> *Atkin LJ clearly felt no difficulty in analysing the relationship upon the basis of the limited duty enunciated in* ***Macmillan****`s case. `*

However, Atkin LJ did not say that that was the only duty of the customer. Furthermore, the issue in that case was not whether the customer had breached a duty of care but whether a prior demand by a customer must be made before initiating action against the bank.

Indeed the passage cited by Lord Scarman is followed immediately by the next sentence which reads:

> *I think it is necessarily a term of such contract that the bank is not liable to pay the customer the full amount of his balance until he demands payment from the bank at the branch at which the current account is kept.*

In ***Walpole*** , a clerk employed by the customer forged cheques and presented them for payment. The New Zealand Court of Appeal held that a customer is under no duty to exercise reasonable care in the general course of his business to prevent forgeries on the part of his employees. This is similar to the decision of Bray J in ***Kepitigalla*** .

The main judgment was given by Richmond J who was of the view that ***Macmillan*** is high authority for that proposition. At pp 17 and 18 he referred to passages from the judgments of Lord Finlay LC and Viscount Haldane which I have cited above. At p 18, Richmond J said:

> *The risk of paying a forged mandate ordinarily rests upon the banker, but there are exceptional instances in which a banker is entitled to charge the account of his customer, although the amount has been paid by him on a forged document. ...*
>
> *`The principle is well established that the negligence which would deprive the customer of his right to insist that payment on a forged cheque is invalid must be negligence in or immediately connected with the actual transaction:* ***Bank of Ireland v Trustees of Evans` Charities; Swan v North British Australasian Co****, per Blackburn J. Lord Halsbury in* ***Bank of England v Vagliano Brothers*** *says: "The carelessness of the customer, or neglect of the customer to take precautions, unconnected with the act itself, cannot be put forward by the banker as justifying his own default. "In the present instance, the negligence alleged on the part of the customer, if there has been negligence, is certainly immediately connected with the transaction itself, namely, in the preparation and issue of the cheque form for presentation to the banker` (ibid, 830, 834-*

835, per Lord Parmoor) .

> *There can be no doubt that **Macmillan**`s case is high authority for the proposition that as between banker and customer the customer is under no duty to exercise reasonable care in the general course of carrying on business to prevent forgeries on the part of employees. ...*

I have already commented on the judgments of Lord Finlay LC and Viscount Haldane in ***Macmillan*** . The passage cited by Richmond J from Lord Parmoor`s judgment in ***Macmillan*** pertained to causation and not the extent of the duty of care.

Another member of the New Zealand Court of Appeal, MacArthur J, said at pp 22 and 23:

> *In my opinion nothing has been advanced in this case to warrant a departure by this court from the principle established long ago in **Macmillan**`s case that the negligence that will deprive the customer of his right to insist that payment on a forged cheque is invalid must be negligence in or immediately connected with the actual transaction, that is, the preparation and issue of the cheque form.*

For the reasons I have mentioned, ***Macmillan*** is not authority for the proposition that the negligence is confined only to the drawing of cheques.

In any event, the facts in the ***Walpole*** case are different from those before me.

There the bank raised various allegations including the allegation that the customer failed to check its bank statements and had unreasonable trust in the clerk. The latter allegation was quickly disposed of as the Court of Appeal was not satisfied that the directors had any reason to suspect the clerk.

As for the former allegation, the Court of Appeal was not prepared to imply a term requiring the customer to check its bank statements.

An Australian case cited in ***Tai Hing*** was ***Sydney Wide Stores*** .

In that case, cheques of a customer were to be drawn in favour of an organisation called `Computer accounting Services`. However an acronym was used and the cheques were made out `Pay CAS or order`. The collecting and paying banks alleged that the customer`s employee had altered the cheques to add the letter `H` so that they read, `Pay CASH or order`.

One of the defences raised was that:

> *(b) ... the plaintiff owed a duty of care to the [bank] in relation to the drawing of cheques upon it.*
>
> *(c) the plaintiff acted negligently in relation to the subject cheque.*

The judge of first instance was asked to determine whether this could constitute a valid defence. He decided to follow the earlier Australian case of **Marshall v Colonial Bank of Australasia** [1904] 1

CLR 632 (` ***Marshall*** `) which was a decision of the High Court of Australia affirmed on appeal by the Privy Council. In ***Marshall*** , Sir Arthur Wilson who delivered the judgment of the Privy Council enunciated (at pp 577 and 578):

> *... the proposition that, whatever the duty of a customer towards his banker may be with reference to the drawing of cheques, the mere fact that the cheque is drawn with spaces such that a forger can utilize them for the purpose of forgery is not by itself any violation of that obligation.*

The High Court of Australia in ***Sydney Wide Stores*** had to decide whether ***Marshall*** should be followed or ***Macmillan*** . It will be recalled that in the latter, a customer was found to have been in breach of its duty of care because blank spaces in the cheques allowed the cheques to be altered.

The High Court decided that ***Marshall*** was wrong and made three criticisms of the judgment of the High Court in ***Marshall*** and the Privy Council. I will refer to the third criticism only (at p 578):

> *In the third place, the judgments [of the High Court of Australia and of the Privy Council in* ***Macmillan****] support the view expressed by Bovill CJ and Brett J in* ***Societe Generale****, and by the Lord Chancellor in* ***Scholfield****, that it is not the duty of a drawer of a cheque to guard against the possibility of a forgery, that this is a matter best left to the criminal law. This view does not conform to modern notions of the duty of care and the standard of care expected of the reasonable man.* ***It is now well settled that the reasonable man should in appropriate circumstances take account of the possibility that others will break the law and act accordingly****. [Emphasis added.]*

The High Court then noted that the existence of the duty on the part of the drawer of a cheque had been affirmed in Canada, New Zealand (citing ***Walpole*** `s case), India, Sri Lanka, and in South Africa. In the United States of America the duty was generally, but not universally acknowledged.

However it is important to bear in mind that contrary to what ***Tai Hing*** had thought, the High Court in ***Sydney Wide Stores*** did not negative any wider duty of care. What the High Court did was to affirm the existence of the duty on the part of the drawer of a cheque, without considering whether there was a need to go further.

After ***Tai Hing*** , the Supreme Court of Canada had occasion to address the question of a customer`s duty to his bank.

In **Canadian Pacific Hotels Ltd v Bank of Montreal** [1987] 40 DLR (4d) 385, the question was whether there was a wider duty than that stated in ***Tai Hing*** regarding the examination of bank statements, in the absence of a verification agreement.

The Supreme Court of Ontario said there was such a duty. It also held that a `sophisticated commercial customer` such as the plaintiff owed a duty to maintain an acceptable system of internal controls.

A majority of the Ontario Court of Appeal agreed.

However the Supreme Court of Canada disagreed that there was such a wider duty. The main judgment was that of Le Dain J. After reviewing various authorities, he was of the view that the wider

duty could not be implied under custom or usage or as necessary to give business efficacy to a contract or otherwise as a term which the parties would have assumed.

However, the facts in this Canadian case are also different from those before me which do not involve the question of examining bank statements.

In Australia, one of the earlier cases after ***Tai Hing*** is **Westpac Banking Corp v Metlej** [1987] ATR 80-102 (` ***Metlej*** `).

In that case, the bank account of a partnership required that all cheques bear two signatures. One of the authorised signatories was a solicitor. Since he was not always available, he used to sign some cheques in blank so that the other signature could be added when it was needed. One of the other signatories, Mr Metlej, brought the cheque book, containing the pre-signed cheques, with him while supervising building work. When he was not using it, he would leave the cheque book in his lunch box in his car. Some of the pre-signed cheques were stolen. A second signature was forged and the bank paid on the cheques. Mr Metlej sued the bank and one of its defences was that he was in breach of a duty of care owed to the bank.

The trial judge found in favour of the customer. The bank sought special leave to appeal to the High Court of Australia. This was refused because the High Court was of the view that the case should go to the New South Wales Court of Appeal. In passing, Gibbs CJ pointed out that as there was a contractual relationship, it was easy for the bank to impose conditions if it wanted to. This was the same point made by Bray J in ***Kepitigalla*** .

However, in the New South Wales Court of Appeal, the main judgment of Priestley JA is instructive. At pp 68,646 to 68,647 he said:

> *Appropriately for a case which, counsel for Westpac informed us, his client hoped to have decided in the High Court if unsuccessful in this, there was full citation and discussion of the course of authority leading up to the decision in* ***Tai Hing****. Westpac`s principal submissions were:*
>
> *(1) this court is not bound to follow* ***Tai Hing*** *;*
>
> *(2) this court would find that the duty owed by a customer to his bank was wider than that stated in* ***Tai Hing*** *;*
>
> *(3) there was a wider duty in the present case;*
>
> *(4) breach of that duty led to Westpac paying out funds without a mandate from its customer.*
>
> *Westpac`s submission (1) is, in my opinion, sound. I do not think what was said by the High Court in* ***Cook v Cook*** *(1986) Aust Torts Reports [para] 80-061 at p 68,135; (1986) 61 ALJR 25 at p 31 needs any elaboration. In my view it establishes submission (1).* ***Tai Hing*** *will become a precedent binding on this court if the High Court says so, and not otherwise. Should that happen, this court will then be bound, not by the authority of the Privy Council, but of the High Court.*
>
> *Despite Westpac`s efforts to persuade this court that it should decide this*

appeal by reference to submissions (2) and (3) I do not think it is necessary to do so. I should however record that the argument in support of those submissions, briefly stated, was that:

(i) there is no convincing reason for limiting the customer`s duty to the two situations spoken of in ***Tai Hing*** *; the emergence of those two duties is simply the result of historical accident rather than of the operation of any principle;*

(ii) recent decisions of the High Court support a more rational approach based on principle:in the immediate field ***Commonwealth Trading Bank of Australia v Sydney Wide Stores Pty Ltd*** *[1981] 148 CLR 304 was referred to; in the area of economic loss,* ***Jaensch v Coffey*** *(1984) Aust Torts Rep [para] 80-300; (1984) 155 CLR 549;* ***Council of the Shire of Sutherland v Heyman*** *(1985) Aust Torts Rep [para] 80-322; (1985) 157 CLR 424;* ***Stevens v Brodribb Sawmilling Co Pty Ltd*** *. (1986) Aust Torts Rep [para] 80-000; (1986) 60 ALJR 194;* ***San Sebastian Pty Ltd v Minister Administering the Environmental Planning and Assessment Act 1979*** *(1986) Aust Torts Rep [para] 80-060; (1986) 61 ALJR 41 and* ***Cook v Cook*** *(supra) were relied on. Submission (3) then went on to say that the true duty of care upon a customer is to take reasonable care in the conduct and working of the account.*

There seems to me to be some force in the approach contended for in submissions (2) and (3). It seems rather strange that two duties and two only could spring from the banker-customer relationship upon the customer:why those two?What gave rise to them?Could not the relation which gave birth to those duties in particular circumstances give rise to somewhat different duties in somewhat different circumstances?After the conclusion of the oral argument our attention was drawn (by consent of counsel) to ***West v Commercial Bank of Australia Limited*** *[1935] 55 CLR 315 which at least arguably provides an example of a different duty upon a customer arising out of the circumstances of that case.*

In opposition to my tentative view that there is much to be said for the approach of submissions (2) and (3) two other thoughts have to be borne in mind; banking practice has proceeded for a long time on a footing of customer`s duty no wider than that stated in* ***Tai Hing****; the reasons given in that case at pp 105H-106D perhaps provide a good explanation why. Even a final appellate court might not wish to disturb a long established and understood situation in order to impose upon bankers` customers by judicial statement a duty a bank can impose by contract but does not. Further, even if the duty contended for by Westpac in this case be held to be appropriate to impose upon a customer, for the reasons again, given in ***Tai Hing*** *at pp 105-106, it would appear to be a duty very easily discharged.*

However, as I have said, I do not think it necessary in this case to decide the validity of submissions (2) and (3). This is because, even if the duty upon the partnership in the conduct of the partnership account were as wide as Westpac contends I can see no sign in the facts of the case as found by Clarke J of any breach of that duty by the partnership.

On the question of causation, Priestley JA said:

> *Finally, even if there were a breach of a duty of care, I do not see how it caused Westpac`s loss in a sufficiently relevant way to make the partnership liable. What I would regard as the legal cause of the loss is Westpac`s failure to detect the forged signature on the cheques. (The question of cause is more complicated than I have made it sound, see* ***Mihaljevic v Longyear (Australia) Pty Ltd*** *(1985) Aust Torts Rep [para] 80-735 at p 69,311; (1985) 3 NSWLR 1 at p 25, but this does not seem the place to discuss it.)`*

Hope JA agreed with Priestley JA. However, Samuels JA, while agreeing with Priestley JA reserved his view on the question of causation.

Apparently the matter did not proceed to the High Court of Australia after the decision of the New South Wales Court of Appeal.

I refer next to **Les Edwards and Son Pty Ltd v Commonwealth Bank of Australia** (Unreported) . In that case (` ***Les Edwards*** `), an employee of a customer managed to encash fraudulently several cheques. Some of the cheques bore forged signatures but the payees of all were altered and then opened to cash by the forged signature or initials of an authorised signatory.

The customer sued the bank and the bank contended that there should be implied terms other than those stipulated in ***Tai Hing*** .

Giles J said,

> *... The plaintiff submitted that on the law as it presently stands it was not under any of the obligations framed by the defendant, whether pursuant to the implied terms or pursuant to a duty of care. In* ***Tai Hing Cotton Mill Ltd v Liu Chong Hing Bank Ltd****[1986] 1 AC (sic) ao it was held by the Privy Council that in the absence of express terms to the contrary the customer`s duty in relation to forged cheques is, and is limited to, exercising due care in drawing cheques so as not to facilitate fraud or forgery and informing the bank at once of any unauthorised cheques of which it becomes aware. There was specifically rejected a wider obligation (whether by an implied term or a duty of care) to exercise such precautions as a reasonable customer would take to prevent forged cheques being presented to the bank. If this be the position, then the implied terms and the duty of care for which the defendant contended must be rejected and the defendant must fail in its cross-claim.*

> *The limitation of the customer`s duty in* ***Tai Hing Cotton Mill Ltd v Liu Chong Hing Bank Ltd*** *has not been universally welcomed. The decision is trenchantly criticised by Ogilvie in (1985-6) 11* ***Canadian Business Law Journal*** *220-33, and more mildly by Moens in the* ***University of Queensland Law Journal*** *Vol 15 at 185-200 and by Professor Ellinger in 1984* ***Lloyd`s Maritime and Commercial Law Quarterly*** *134. The defendant submitted that there was no such limitation, and that it was open to me to hold that the implied terms and the duty of care sprang from the relationship of banker and customer, and from the particular relationship between the defendant and the plaintiff. Its position can be adequately stated, for present purposes, by reference to the observations of Priestley JA in* ***Westpac Banking Corporation Ltd v Metlej*** *[1987] Aust Torts Rep 80-102.*

Giles J also said later:

> *... Even if the duties of the customer are not limited to the two duties recognised in **Tai Hing Cotton Mill Ltd v Liu Chong Hing Bank Ltd**, it may be doubted whether they would go as far as the defendant`s submission required. It is unnecessary to go into this, as I have reached the view that even if the plaintiff was under what might be called a **Tai Hing** duty or a **Westpac** duty, or under obligations pursuant to any of the defendant`s implied terms or its duty of care, it was not in breach of any such obligation or obligations.*

Thus, Giles J was prepared to consider extending the duty of the customer beyond the limits of ***Tai Hing*** but on the facts before him, it was not necessary for him to decide whether to extend the duty or not.

The case of **Mercedes Benz (NSW) Pty Ltd v ANZ and National Mutual Royal Savings Bank Ltd** (Unreported) is another Australian case involving the fraud of an employee.

In that case (` ***Mercedes Benz*** `), the employee manipulated the payroll system of the customer for which she had day to day responsibility. This was not a case of forgery or alteration of cheques as the employee had the authority to require the bank to make various payments. So it was the customer who alleged that the bank was in breach of its duty to the customer.

Palmer J, in the Supreme Court of New South Wales, said:

> *... in a case involving fraud by an employee where fault is sought to be apportioned amongst innocent third parties it is essential, in my opinion, never to lose sight of the fact that the `fons et origo` [source and origin] of the losses which flow from the fraud out into the wider commercial community is the abuse of position as between employer and fraudulent employee. If the employer has been lax in protecting his own interests from the fraud of his employee, can he reasonably require that third parties, with their own legitimate commercial pressures and concerns to attend to, be more vigilant in his interest than he is himself?Even where a duty of care exists between the employer and a third party, such as may be owed by a bank paying or collecting the employer`s cheques, is it reasonable to exact a standard of care predicated upon the assumption that the employer will be lax in his vigilance against fraud by an employee so that the third party must, accordingly, be all the more alert for it?*
>
> *In considering these questions it is as well to remember the commonsense reasoning adopted as long ago as 1701 by that `perfect master of the common law`, Holt CJ in **Hern v Nichols** [1701] 1 Salk 289; 90 ER 1154, a case in which an innocent defendant was sued for the deceitful misrepresentation of his factor as to the quality of goods to be supplied. Lord Holt said: `Seeing somebody must be a loser by this deceit, it is more reason that he that employs and puts a trust and confidence in the deceiver should be a loser than a stranger. `The Earl of Halsbury said of this statement: `I should be very sorry to see a principle which appears to me of so great value shaken by any authority. No treatise on agency that I have ever come across has thrown any doubt on it ...`: **Lloyd v Grace, Smith and Co** [1912] AC 716 at 727.*

The customer was unable to establish its contentions against the bank.

The customer`s appeal to the New South Wales Court of Appeal was dismissed. In the circumstances,

it was unnecessary for the Court of Appeal to decide whether the customer was in breach of a duty of care to the bank.

National Australia Bank Ltd v Hokit Pty Ltd & Ors [1996] 39 NSWLR 377 (` ***Hokit*** `), involved forged cheques. The main judgment of the New South Wales Court of Appeal was delivered by Maloney P.

He referred to the relationship between banker and customer as one of debtor and creditor and said that the only qualifications to this principle were the two duties mentioned in ***Tai Hing*** . However he did qualify his views by saying:

> *Particular circumstances of estoppel apart ...: at p 384,*
>
> *(Special cases apart): at p 385, and*
>
> *Special cases apart: at p 389.*

Another member of the New South Wales Court of Appeal, Clarke JA was of the view that ***Tai Hing*** was to be followed. At pp 401 and 402, he said:

> *I would be extremely hesitant, sitting as a judge in an intermediate appellate court, to reject a principle accepted for so long and restated by courts of high authority in other Commonwealth countries as recently as the cases I have mentioned. I certainly would not do so in the absence of circumstances showing that the principle is no longer appropriate in this country. In my opinion not only has the bank failed to show that there are any circumstances which should lead courts in Australia to strike out on a different path but, as the helpful submissions of the Consumers Federation of Australia (appearing as amicus curiae) demonstrate, the recent passing by the Australian Parliament of the Cheques and Payments Orders Act 1986 (Cth) (the Act) in which no change was made to the substantive common law of banker and customer stands as a very strong factor favouring the retention of the established principle. In my view if the law in this question is to take a path different from that followed in the countries to which I have referred, then it should do so only after a binding decision of the ultimate court of appeal. I would, for this reason alone, be disinclined to accept the bank`s contention that the wider duty is to be found either in tort or as an implied term of the banker-customer contract.*

Therefore, the Supreme Court of New South Wales in ***Les Edwards*** and in ***Mercedes Benz*** appeared inclined to depart from ***Tai Hing*** .

The Court of Appeal of New South Wales in ***Metlej*** also appeared inclined to depart from ***Tai Hing*** whereas in ***Hokit*** , it was of the view that ***Tai Hing*** should be followed. However, even then, Maloney P in ***Hokit*** qualified his decision by referring to `special cases apart`.

The High Court in Australia has apparently not yet decided whether to follow ***Tai Hing*** or not.

In Singapore, the limited duties enunciated in ***Tai Hing*** were mentioned with approval by the High Court in **Consmat Singapore (Pte) Ltd v Bank of America National Trust & Savings Association** [1992] 2 SLR 828 at p 831. However the observations of the High Court were obiter as this point was

apparently not argued. The issue in that case was whether a particular provision in a general agreement relieved the bank from liability for its payment made under 15 forged cheques and the bank there appears to have accepted the limited duties enunciated in ***Tai Hing*** , apart from express agreement to the contrary.

Tai Hing (Unreported) judgment of the High Court of Singapore delivered on 13 October 1999 in ***Banque Nationale de Paris v Wuan Swee May & Ors*** and ***Wuan Swee May v Banque Nationale de Paris*** (Suits 2031/97 and 2073/97).

There the High Court dealt, inter alia, with the construction of certain express terms and negligence and estoppel.

As regards negligence and estoppel, the High Court said (at [para] 260 and 262):

> *260 It seemed to me that if there was any negligence, it was entirely contributed by the defendants, if indeed it were true (which I did not think was the case) that the first defendant had not known about the Yen loans nor had she given her consent for the draw downs in Yen. The proximate cause of the loss must in any event be placed squarely at the doorstep of the defendants themselves ... These practical difficulties in the way of the bank illustrated the necessity for an implied duty to be placed on the first defendant to answer questions posed in loan confirmation advices on whether there were discrepancies.*
>
> *...*
>
> *262 The submission by defendants` counsel, that there is no duty of any kind on the part of the first defendant to read her bank statements and to give confirmations when these were requested for, was with respect flawed. I reiterate that confirmations must not be seen as being only for the protection of the bank. It is also for the protection of the customer. An error need not necessarily produce a loss. It can also lead to a missed opportunity for a profit or a bigger profit for the customer. Thus, it would in my view be a necessary term for the operation of a banking relationship that customers do check bank records and statements, and respond to letters sent to them. It will be a waste of paper and effort if the only `obligation` of the customer so to speak, is simply to file them away without taking any trouble to read them and check their accuracy, or worse, throw them away without even reading them. If the customer does not bother to check or is negligent in checking, he will bear the risk of loss. Of course, if no records or statements are furnished to the customer, it will be a totally different situation altogether.*

The defendants` appeal to the Court of Appeal was dismissed.

The Law Relating to Banker and Customer in Australia by Weaver and Craigie (2nd Ed, 1990) states at p 2578:

> *The decision in the **Tai Hing** case was canvassed before the Committee headed by Professor RB Jack which had been appointed to advise the United Kingdom Government on aspects of banking (**Banking Services:Law & Practice, Report***

***by the Review Committee**, HMSO 1989). The Committee did not favour imposing a statutory duty on customers to examine bank statements or any `settled account` system, but did observe (para 6. 13) that:*

*`It does seem most unfair that customers who exhibit the degree of negligence shown by the plaintiff in the **Tai Hing** case should, in the eyes of the law, be entitled to sue their bank with impunity ... the bank is surely entitled to some protection against the most reprehensible negligence on its customer`s part. `*

In the result the Committee recommended (para 6. 14) that there be a statutory provision whereby, in an action against a bank in debt or for damages, arising from an unauthorised payment, contributory negligence may be raised as a defence, but only if the court is satisfied that the degree of negligence shown by the plaintiff is sufficiently serious for it to be inequitable that the bank should be liable for the whole amount of the debt or damages.

*The reactions of the United Kingdom Government to the recommendations of the Review Committee were contained in a White Paper entitled **BankingServices: Law&Practices** (MHSO, Cm 1026,1990). This paper indicated (para 7. 19) agreement on the part of the government that the law at present is unfair to banks, and disclosed a disposition to make the law more evenly balanced between banks and their customers. However, the whole of the law relating to contributory negligence was under review in the United Kingdom at the time when the White Paper was published and so the government indicated that it would defer any legislative intervention until it had received and considered the Law Commission`s final advice `when a much wider revision may be necessary`.*

I would add that since 1990, The Law Commission on Contributory Negligence as a Defence in Contract published its report dated 8 October 1993. Paragraphs 5. 19 to 5. 21 thereof said:

Particular contexts

Banking

5.19 In the consultation paper we considered the impact of the defence of contributory negligence in the context of banking. We explained that the customer does not owe, in the absence of an express agreement, any duty to take reasonable precautions to prevent forged cheques being presented to his bank, nor a duty to take reasonable steps to check his bank statements to detect cheques which have not been authorised by him. We also pointed out that the Report of the Review Committee on Banking Services Law, (`the Review Committee`) questioned whether it was right that the bank should be wholly liable in respect of forged cheques which it could only have identified by elaborate and expensive enquiries, when a customer could have prevented the fraud by elementary precautions. It recommended that the law should be reformed so that, in an action against a bank in debt or for damages arising from an unauthorised payment, the customer`s contributory negligence might be raised as a defence, but only if the court was satisfied that the degree of negligence shown by the customer was sufficiently serious for it to be

inequitable that the bank should be liable for the whole amount of the debt or damages.

5.20 Under our recommendations, the customer`s contributory negligence could be raised as a defence by a bank where the bank is liable for damages for breach of a contractual duty of care, but not where the bank owed a strict duty to the customer, for example, in an action in debt. Banks are subject to an implied contractual duty to carry out the banking service with reasonable care and skill. The customer`s contributory negligence will be relevant where the bank is in breach of that duty. However, for the most part actions against banks concern breach of mandate by the bank, for example, where third party fraud has resulted in an unauthorised payment which the bank has debited against the customer`s account. The duty of a bank to adhere to the terms of its mandate is strict. Appointment on the grounds of the customer`s contributory negligence will not be available in respect of breach of this duty.

5.21 Our recommendations for reform do not, therefore, deal with the problem identified by the Review Committee. However, as we pointed out in the consultation paper, it is open to banks to stipulate in their contracts, subject to UCTA, that the customer should take reasonable precautions to prevent forged cheques being presented, or to check bank statements. As we have already said, a number of respondents thought that this point was important and suggested that the reason that banks did not do this was fear of losing business in a competitive market. Fears were also expressed that banks were usually in the stronger bargaining position and that, if apportionment were available, they would be encouraged to raise technical defences to valid claims. We consider that these points have some merit, and we see no reason in the context of banking to depart from our conclusion that the defence of contributory negligence should not be available where a defendant is liable for breach of a strict contractual duty.

After much deliberation, I have come to the conclusion, for the reasons that I have given, that ***Tai Hing*** should not be followed as regards the customer`s limited duties of care.

As regards the consideration that banking practice has for a long time proceeded on the footing of ***Tai Hing*** , I would say that although banks may be aware of ***Tai Hing*** and its consequences, I doubt if many customers are.

Furthermore, I very much doubt that a customer who would have been inclined to take precautions would stop doing so merely because of ***Tai Hing*** .

As for the consideration that ***Tai Hing*** represents settled law, I am of the view that it had, with respect, misconstrued ***Kepitigalla*** , and ***Macmillan*** .

Furthermore, the argument that a certain principle has stood the test of time should not be pushed too far.

For example, at one time, the principle that there is no duty to avoid pure economic loss appeared to hold sway in the United Kingdom as well as in Singapore.

That principle has been changed somewhat in Singapore since the Court of Appeal`s decisions in **RSP Architects Planners & Engineers v Ocean Front Pte Ltd** [1996] 1 SLR 113 and in **RSP Architects Planners & Engineers (Raglan Squire & Partners FE) v MCST Plan No 1075 & Anor** [1999] 2 SLR 449 .

In addition, the facts in cases like ***Walpole*** (New Zealand Court of Appeal) and ***Canadian Pacific Hotels Ltd v Bank of Montreal*** (Supreme Court of Canada) which favour the same limited duties as were stated in ***Tai Hing*** involved the examination of bank statements, just like the facts in ***Tai Hing*** . The case before me does not involve such examination and are quite different.

If ***Tai Hing*** is to be followed, then, as the English Review Committee had said, a customer would be entitled to sue its bank with impunity regardless of the most reprehensible negligence on the customer`s part. This cannot be right even though the business of banking is that of the bank and not the customer (see Lord Scarman`s judgment in ***Tai Hing*** at p 106 at C).

It is also telling that plaintiffs` counsel did say that if there was a track record of forgery by the third party, then perhaps ***Tai Hing*** should be departed from.

In my view, if one is prepared to consider exceptional circumstances to depart from ***Tai Hing*** , then in the first place, ***Tai Hing*** should not be followed.

The general principle should be and is that the customer owes a duty not to facilitate fraud. This duty arises as an implied term in the contract between a bank and its customers. From there, the court then considers on the facts of each case, whether there is a breach of that duty and if so, whether the breach caused the loss.

This approach is preferable to having a general principle stating that there are only two limited duties and then considering whether exceptions should be made to that general principle. Such an approach would be a contradiction in terms.

In the circumstances, it is not necessary for me to decide whether there is a similar duty of care under tort.

Did the plaintiffs breach their duty and, if so, did the breach cause the loss?

The facts in the case before me are also different from those in Lewes. There, a fraudulent act had been committed some four years ago and was known to only one of several board members. There was no reason to suspect that the defrauder had not turned over a new leaf.

In the case before me, the fraudulent act regarding the UOB incident was committed a month or so before 3 July 1999. It was discovered on 4 June 1999 about a month before the first forged cheque dated 3 July 1999.

In the circumstances, can it be said to have been in the minds of the plaintiffs that the third party could no longer be trusted and that he should be denied access to the cheques?

I need refer only to the first plaintiff`s own words in his AISJ at para 8, ie since 4 June 1999, the third party `could not be trusted`.

It should also be recalled that the 4 June 1999 incident was not the only prior incident of fraudulent conduct by the third party.

In addition, the first plaintiff`s own evidence was that immediately upon learning about the UOB incident, he had checked the cheque books of both the KHLA account and the account (NE 12D). He would not have done so unless he was immediately concerned that the third party might have forged his signature on cheques.

The fact that the first plaintiff fabricated his evidence as to how the third party had obtained the cheques is also telling. The first plaintiff must have realised that he had been negligent in failing to deny the third party access to the cheques especially when he was aware that the third party knew the combination and had the key to the safe. It should not have been difficult to change the combination and/or the lock of the safe and indeed no such difficulty was suggested.

Plaintiffs` counselargued that the culpability of the plaintiffs is real if the cheque books had been handed to the third party. In my view, the fact that the third party knew the combination and had a key to the safe, was tantamount to handing him the cheque books.

I find that the plaintiffs were in breach of their duty to the defendants.

As regards causation, the facts before me are different from those in ***Evans` Trustees*** where mere negligence in the custody of the seal was insufficient to render the customer liable.

I need only reiterate Viscount Haldane`s qualification in ***Macmillan*** . Here the circumstances were such that the plaintiffs should have anticipated the subsequent fraudulent conduct of the third party in relation to the five cheques.

Furthermore, the first plaintiff`s evidence that he did check the cheque books of the account demonstrates the anticipation.

The fraudulent acts of the third party did not break the chain of causation since such acts should have been anticipated. The fact that a crime was necessary to bring about the loss does not prevent its being the natural consequence of the carelessness (per Lord Finlay LC in ***Macmillan*** at p 794).

I find that the plaintiffs` breach did cause the loss.

Summary

In summary, I find that the signatures on the five cheques were forged.

However, the plaintiffs owed a duty to the defendants not to facilitate fraud. In the particular circumstances of the case, they should have denied the third party access to the safe where the cheque books (from which the five cheques were obtained) were kept. In failing to do so, they were in breach of their duty. That breach caused the loss.

I do not find the defendants negligent.

Therefore the plaintiffs` claim against the defendants is dismissed. Consequently, the defendants` claim against the third party is also dismissed.

I will hear parties on costs.

Outcome:

Plaintiffs` claim dismissed.