



HIGH COURT OF AUSTRALIA

4 August 2010

AKTAS v WESTPAC BANKING CORPORATION LIMITED & ANOR [2010] HCA 25

In December 1997, Westpac Banking Corporation Limited ("Westpac") dishonoured 30 cheques drawn by Homewise Realty Pty Ltd ("Homewise"), of which Mr Aktas was sole shareholder and sometime director. The cheques were returned to the payees or collecting banks stamped "Refer to Drawer". The dishonour was the result of Westpac's mistake and Mr Aktas and Homewise sued it for defamation. The High Court today held that the communications were not protected by the common law defence of qualified privilege.

Homewise carried on a real estate agency under the name of "Century 21 Homewise Realty". It maintained three accounts with Westpac, including two trust accounts. In late 1997, default judgment was entered against Homewise in respect of a money claim. A garnishee order applicable to Homewise's accounts with Westpac was issued to Westpac. By law, however, the order could not apply to the two trust accounts. Nevertheless, on 1 December 1997, a Westpac employee acted on a mistaken understanding of the effect of the order and changed the status of all three of Homewise's accounts to "PCO" (standing for "post credits only"). The effect of this status was that customer initiated debits were not to be honoured.

On the same day, a Homewise employee drew 30 cheques on one of the trust accounts which were then forwarded to Homewise clients or deposited in their bank accounts. On 2 December 1997, the Westpac employee was made aware of the error regarding Homewise's two trust accounts and removed their PCO status. However, in correspondence dated 3 December 1997, Westpac returned the cheques to the payee or the collecting bank, each endorsed with the words "Refer to Drawer". The trial judge found that the return of the cheques had occurred because the reversal of the trust accounts' PCO status had not been notified to the department responsible for correspondence.

Mr Aktas and Homewise brought proceedings against Westpac in the Supreme Court of New South Wales, including a claim for damages for defamation. A jury determined that Westpac had, by the words "Refer to Drawer", published defamatory imputations in respect of Mr Aktas and Homewise. The trial judge, however, held that Westpac had established the common law defence of qualified privilege. Her Honour held that the relationship Westpac had with each of the payees justified the communication of information about its attitude to the presentation of the cheques, even though that information was based on a mistake. Absent the defence, her Honour would have awarded Mr Aktas \$50,000 and Homewise \$117,000 in damages. Mr Aktas and Homewise appealed to the Court of Appeal of the Supreme Court of New South Wales. That part of the appeal concerning the defamation claim was dismissed.

Mr Aktas was granted special leave to appeal to the High Court on 11 December 2009. Mr Aktas's sole ground of appeal was that the Court of Appeal had erred in holding that the defamatory material was published on an occasion of qualified privilege.

A majority of the Court agreed. The relevant question, in determining whether an occasion for qualified privilege arose, was whether the relationship between Westpac and the payees of the cheques was one in which the advantages to be had from free communication outweighed the importance of the accuracy of the defamatory imputation. One supposed advantage identified by the Court of Appeal was prompt advice to the payee that the cheque had not been honoured. While recognising the importance of prompt advice, the High Court considered that this end was achieved by ss 67 and 69 of the *Cheques Act* 1986 (Cth) (which oblige the drawee bank to pay to the holder a cheque duly presented for payment, or to dishonour the cheque "as soon as is reasonably practicable").

The absence of a public interest in protecting the communication was demonstrated by the absence of any reciprocity of interest between bank and payee. The bank has an interest in communicating because it refuses to pay. But the payee has no interest in receiving a communication of refusal to pay a cheque which is regular on its face in a case where the drawer has funds sufficient to meet its payment. For the payee, there is no need for any communication from the bank about the fate of the cheque, if it is met on presentation. Further, to hold that giving a notice of dishonour is an occasion of qualified privilege is not conducive to maintaining accuracy in the decisions banks must make about paying cheques.

The Court allowed the appeal and ordered that the verdict of the trial judge be replaced by a verdict and judgment for Mr Aktas with damages in the amount of \$50,000 with interest.

- *This statement is not intended to be a substitute for the reasons of the High Court or to be used in any later consideration of the Court's reasons.*