HIGH COURT OF AUSTRALIA

FRENCH CJ,
GUMMOW, HAYNE, HEYDON AND KIEFEL JJ

PAUL UYSAL AKTAS APPELLANT

AND

WESTPAC BANKING CORPORATION LIMITED
& ANOR RESPONDENTS

Aktas v Westpac Banking Corporation Limited [2010] HCA 25
4 August 2010
S3/2010

ORDER

1. *Appeal allowed.*

2. *Set aside Order 1 of the orders of the Court of Appeal of the Supreme Court of New South Wales made on 9 February 2009 and in its place order that:*

   (a) *the appeal by Mr Aktas be allowed with costs;*

   (b) *set aside Order 1 of the orders made by Fullerton J on 7 November 2007 and in its place enter verdict and judgment for Mr Aktas for damages in the sum of $50,000 with interest.*

   (c) *set aside Order 2 of the orders made by Fullerton J on 29 November 2007 and in its place order that Westpac Banking Corporation Limited ("Westpac") pay the costs of the action by Mr Aktas.*

3. *Westpac to pay Mr Aktas's costs in this Court.*

4. *The parties are at liberty within 28 days to re-list the appeal for further orders if an agreement is reached respecting the interest to be added to the verdict of $50,000. In the absence of agreement, the question of interest will be remitted for determination by a Judge of the Supreme Court of New South Wales.*

On appeal from the Supreme Court of New South Wales

Representation

T S Hale SC with A T S Dawson for the appellant (instructed by Penhall & Co Lawyers)

J R Sackar QC with K P Smark SC and R J Hardcastle for the first respondent (instructed by Mallesons Stephen Jaques)

Submitting appearance for the second respondent

CATCHWORDS

Aktas v Westpac Banking Corporation Limited

Defamation – Defences – Qualified privilege – Common law – Respondent bank mistakenly dishonoured cheques of appellant and communicated dishonour to payees of cheques – Communication defamatory – Whether communication made on occasion of qualified privilege – Rationale for defence of qualified privilege – Whether reciprocity of interest between respondent bank and payees – Whether public interest in privilege attaching to occasion of such communication – Relevance of mistake leading to communication – Relevance of statutory obligations.

Words and phrases – "community of interest", "malice", "occasion of qualified privilege", "reciprocity of interest", "refer to drawer".

Cheques Act 1986 (Cth), ss 67, 69.
Defamation Act 1974 (NSW), s 11.
Property, Stock and Business Agents Act 1941 (NSW), s 36.

1 FRENCH CJ, GUMMOW AND HAYNE JJ. The appellant (Mr Aktas) was the sole shareholder and, from time to time, a director, of the second respondent ("Homewise"). Pursuant to franchising arrangements with Century 21 Australia Pty Ltd ("the franchisor"), Homewise carried on a real estate agency business under the name "Century 21 Homewise Realty" at Auburn in the State of New South Wales. The first respondent ("Westpac") was the banker to Homewise, which maintained three accounts at the Auburn branch of Westpac, including two trust accounts.

2 Homewise was obliged by the *Property, Stock and Business Agents Act* 1941 (NSW) ("the Business Agents Act"), as a licensee thereunder, to maintain a trust account on behalf of clients whose rental properties it managed. Section 36(2) of the Business Agents Act[1] protected trust account moneys from any attachment at the instance of a creditor of the licensee[2]. The significance of s 36(2) for this case will appear later in these reasons[3].

3 One of the most important conditions in the contract between a banker and a customer who conducts a current account is the obligation of the banker to honour the customer's cheques to the extent of the customer's credit[4]. Part II of the *Banking Act* 1959 (Cth) regulates by a licensing system the carrying on of banking business in Australia. The conduct of an accurate and efficient banking system is a matter of what may be called "the common convenience and welfare of society"[5].

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1 Section 36(1) required Homewise to conduct a trust account and s 36(2) read:

> "The moneys [held in a trust account] shall not be available for the payment of the debts of the licensee to any other creditor of the licensee, *or be liable to be attached or taken in execution under the order or process of any court at the instance of any such other creditor*." (emphasis added)

2 Cf *Plunkett v Barclays Bank Ltd* [1936] 2 KB 107, in which the Court of Appeal held that on receipt of a garnishee order against the trust account of a solicitor the proper procedure was for the garnishee bank to stop the trust account and inform the court of the circumstances.

3 The Business Agents Act was repealed and replaced by the *Property, Stock and Business Agents Act* 2002 (NSW). Similar provision to s 36(2) is now made by s 88(1).

4 *Joachimson v Swiss Bank Corporation* [1921] 3 KB 110 at 127; Collier, *Banking in Australia*, (1934) at 17.

5 *Macintosh v Dun* (1908) 6 CLR 303 at 305; [1908] AC 390 at 399.

4 On 1 December 1997 Homewise drew 30 cheques on one of the trust accounts. The appellant was one of the signatories on the cheques. The cheques were regular on their face and were either directly deposited to the nominated account of a client, or mailed to the client. Some of the nominated accounts were with Westpac itself, and others were with a collecting bank.

Cheques dishonoured

5 None of the 30 cheques was honoured by Westpac on presentation. It is critical to an understanding of the issues before this Court to appreciate that it was the reason given by Westpac for the notice of dishonour, not the mere fact of dishonour or the fate of the cheques in some general sense, which founded the action by Mr Aktas against Westpac and established the relevant relationship between Westpac and the recipients of the notice of dishonour.

6 Under cover of what was described in the evidence as "automatically generated correspondence" dated 3 December 1997, Westpac returned the cheques to its own customers with the endorsement "Refer to Drawer" stamped on the reverse side. In respect of cheques presented by a collecting bank, Westpac returned the cheques stamped "Refer to Drawer" with an automatically generated slip of paper marked in the same way. The *pro forma* letter sent to Westpac's customers was as follows:

> "On 1 December 1997 you deposited a cheque for [stated amount].
>
> The cheque [details supplied] has been returned unpaid with the answer 'Refer to Drawer'.
>
> The cheque is enclosed and the amount has been reversed from account number [number specified]. A fee of $9.00 is applicable and has been charged to the account number [as specified].
>
> If you would like to obtain information on this matter, please do not hesitate to call Westpac Telephone Banking on [number supplied]."

7 At no time were there insufficient funds in the trust account to meet the cheques. The failure to honour the cheques was in breach of the term in the contract of banker and customer between Westpac and Homewise that the customer's cheques be honoured to the extent of its credit. It is well accepted in

Australia[6] that the circumstances attending wrongful dishonouring may also found a defamation action.

8 The expression "Refer to Drawer", when used by a banker in the above circumstances, has long been widely understood in Australia to mean that there were insufficient funds to meet the cheque[7]. In the present case there was evidence that, in the first week of December 1997 and beyond, various people in Auburn (particularly, but not only, in the local Turkish community in which Mr Aktas moved) reacted adversely and with some hostility to Mr Aktas after it became known that trust account cheques had "bounced". When Mr Aktas attended the Auburn branch on 2 and 3 December 1997, he was given a less than satisfactory explanation of Westpac's error, and little confidence that the matter would be speedily resolved.

The litigation

9 The *Defamation Act* 1974 (NSW) ("the 1974 Act") was in force at the time of the events complained of, and despite its repeal by the *Defamation Act* 2005 (NSW), the 1974 Act continued to govern the litigation against Westpac instituted in the Supreme Court of New South Wales in 2002. Section 7A of the 1974 Act divided the functions of judge and jury in a fashion which differed from the procedures of the common law[8]. A jury determined that Westpac had published defamatory imputations in respect of Mr Aktas and Homewise. It fell thereafter to Fullerton J[9] to determine any defences, assess damages and determine the claims on the other causes of action pleaded by Mr Aktas and Homewise against Westpac.

10 The outcome was that (a) as noted above, the jury found proved imputations including those that Homewise had passed valueless trust account cheques and that Mr Aktas had caused this to happen; (b) absent a good defence by Westpac to their defamation actions, Fullerton J would have awarded Mr Aktas $50,000 and Homewise $117,000; (c) Westpac, however, had

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6 See, for an early example, *Miles v Commercial Banking Co of Sydney* (1904) 1 CLR 470; [1904] HCA 54.

7 Weaver & Craigie, *The Law Relating to Banker and Customer in Australia*, (1975) at 379.

8 *John Fairfax Publications Pty Ltd v Gacic* (2007) 230 CLR 291 at 303-304 [31]-[33]; [2007] HCA 28.

9 *Aktas v Westpac Banking Corporation Ltd* [2007] NSWSC 1261.

established before her Honour its defence of qualified privilege; (d) on its claim in contract, Homewise recovered $84,500, increased on its appeal to the Court of Appeal to $117,000; (e) the recovery by Homewise on its contract claim made it unnecessary for Fullerton J to determine its alternative claim in negligence.

11 The claims by Homewise are not before this Court, and it has filed a submitting appearance as second respondent. The appeal is brought by Mr Aktas against the dismissal by the Court of Appeal (Ipp and Basten JJA and McClellan CJ at CL)[10] of his appeal against the entry of the verdict for Westpac in his defamation action.

12 For the reasons which follow, the defence of qualified privilege was not made out by Westpac, and the appeal by Mr Aktas should be allowed.

Qualified privilege

13 Section 8 of the 1974 Act provided that slander, in the same way and to the same extent as libel, was actionable without special damage. Part 3 (ss 10-45) dealt with defences in civil proceedings. Sections 20-22 contained special provisions with respect to qualified privilege, but are not relevant to this appeal.

14 The effect of s 11 of the 1974 Act was to preserve the common law defence of qualified privilege. As a general proposition, the common law protects the publication of defamatory matter made on an occasion where one person has a duty or interest to make the publication and the recipient has a corresponding duty or interest to receive it; but the privilege depends upon the absence of malice[11]. The requirement of reciprocity of interest generally denies the common law privilege where the matter has been disseminated to the public at large[12].

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10 *Aktas v Westpac Banking Corporation Ltd* [2009] NSWCA 9.

11 *Theophanous v Herald & Weekly Times Ltd* (1994) 182 CLR 104 at 133; [1994] HCA 46; *Lange v Australian Broadcasting Corporation* (1997) 189 CLR 520 at 570 and 572; [1997] HCA 25.

12 *Theophanous v Herald & Weekly Times Ltd* (1994) 182 CLR 104 at 133; *Stephens v West Australian Newspapers Ltd* (1994) 182 CLR 211 at 261; [1994] HCA 45; *Lange v Australian Broadcasting Corporation* (1997) 189 CLR 520 at 570 and 572. Cf *Defamation Act* 2005 (NSW), s 30, where no reciprocity of interest is required.

Malice

15 Something should be said of the significance of malice for such a defence of qualified privilege. The generally accepted statement of principle by Parke B in *Toogood v Spyring*[13] uses the term in several senses. His Lordship said:

> "In general, an action lies for the malicious publication of statements which are false in fact, and injurious to the character of another (within the well-known limits as to verbal slander), and the law considers such publication as malicious, unless it is fairly made by a person in the discharge of some public or private duty, whether legal or moral, or in the conduct of his own affairs, in matters where his interest is concerned. *In such cases, the occasion prevents the inference of malice, which the law draws from unauthorized communications*, and affords a qualified defence depending upon the absence of actual malice. If fairly warranted by any reasonable occasion or exigency, *and honestly made*, such communications are protected for the common convenience and welfare of society; and the law has not restricted the right to make them within any narrow limits." (emphasis added)

16 In referring to malicious publication of false and injurious words, the opening words are linked to the statement in the second sentence that one of the two consequences of such an occasion is to prevent "the inference of malice" otherwise drawn from unauthorised communications. But even at the time when *Toogood* was decided, the development of the distinct tort of malicious falsehood, now known as injurious falsehood, was underway[14]. It was also becoming settled[15] that, where the falsity of defamatory matter was so charged in the declaration, the matter was then presumed to have been published maliciously[16]. The second of the two consequences identified by Parke B involved the protection of communications if "honestly made".

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13 (1834) 1 Cr M & R 181 at 193 [149 ER 1044 at 1049-1050].

14 *Palmer Bruyn & Parker Pty Ltd v Parsons* (2001) 208 CLR 388 at 405-406 [57]-[59]; [2001] HCA 69.

15 *Bromage v Prosser* (1825) 4 B & C 247 [107 ER 1051].

16 Bullen & Leake, *Precedents of Pleadings in Personal Actions in the Superior Courts of Common Law*, 3rd ed (1868) at 304.

17 Hence the now established position that (a) the averment that the matter in question was published maliciously is surplusage[17]; but (b) phrases such as "actual malice" and "express malice" identify a purpose or motive that is foreign to a privileged occasion and actuates the defamatory publication, so as to destroy what otherwise would be a defence of qualified privilege[18].

18 Of the passage in *Toogood* which is so often cited, it is the second consequence identified by Parke B, that the privileged occasion affords a qualified defence depending upon the absence of actual malice, which is of continued significance in the contemporary common law.

19 In the present case, there was no express malice in this sense on the part of Westpac. Fullerton J found that Westpac acted as it did by reason of the erroneous operation of its internal procedures. In its response to a garnishee order issued to it at the instance of the franchisor, which had been in dispute with Homewise, and which had recovered a default judgment against Homewise, Westpac acted without regard to the prohibition imposed with respect to the relevant Homewise trust account by s 36(2) of the Business Agents Act. The prohibition denied the liability of the trust account moneys to attachment under any garnishee order; the order obtained by the franchisor did not operate upon the Homewise trust moneys. However, Westpac responded by changing the designation of the trust account from "normal" to "PCO" (ie "post credits only"), with the effect that customer initiated debits were not to be honoured. That is the significance of what in submissions was called the "mistake" by Westpac.

20 However, mere carelessness or negligence is not indicative of malice[19]. The circumstances negated any ground for finding express malice which would destroy qualified privilege otherwise available to Westpac. But, as developed later in these reasons, it is significant that the error by Westpac in failing to observe the requirements of s 36(2) of the Business Agents Act itself did not supply a privileged occasion for the notice of dishonour.

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17 *Thompson v Australian Capital Television Pty Ltd* (1996) 186 CLR 574 at 619; [1996] HCA 38.

18 *Roberts v Bass* (2002) 212 CLR 1 at 30-31 [75]-[76]; [2002] HCA 57.

19 *Moore v Canadian Pacific Steamship Co* [1945] 1 All ER 128 at 133.

The rationale for the qualified privilege

21 The relevant principles were said by Gleeson CJ, Hayne and Heydon JJ in *Bashford v Information Australia (Newsletters) Pty Ltd*[20] to be stated in the earlier authorities "at a very high level of abstraction and generality". Another member of the majority, Gummow J[21], spoke to the same effect.

22 In *Justin v Associated Newspapers Ltd*[22], Walsh JA said that the "broad principle" underlying qualified privilege is that occasions exist in which it is desirable as a matter of public policy that freedom of communication should be given priority over the right of the individual to protection against loss of reputation. It also has been said that the categories (if there be utility in a system of categories) of occasions of qualified privilege are not closed and cannot be rendered exact[23]. Cases of reciprocity, or as Griffith CJ put it, "community of interest"[24], supply a recognised category, which in turn has an indeterminate reference. The limits of that range of reference in a given case are to be placed by regard to the "broad principle" identified by Walsh JA and to the remarks of Dixon J in *Guise v Kouvelis*[25] as follows:

> "But the very width of the principles governing qualified privilege for defamation makes it more necessary, in deciding how they apply, to make a close scrutiny of the circumstances of the case, of the situation of the parties, of the relations of all concerned and of the events leading up to and surrounding the publication."

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20 (2004) 218 CLR 366 at 373 [10]; [2004] HCA 5.

21 (2004) 218 CLR 366 at 416-417 [137].

22 (1966) 86 WN (Pt 1) (NSW) 17 at 32; [1967] 1 NSWR 61 at 75.

23 *London Association for Protection of Trade v Greenlands Ltd* [1916] 2 AC 15 at 22-23.

24 *Howe & McColough v Lees* (1910) 11 CLR 361 at 369; [1910] HCA 67.

25 (1947) 74 CLR 102 at 116; [1947] HCA 13.

The reasons of the Court of Appeal

23 The leading reasons were given by McClellan CJ at CL. After stressing "the importance of efficient and effective communication of a bank's dealing with a cheque, even if it has made an error", his Honour continued[26]:

> "In many cases the drawer's reputation may be injured from the erroneous refusal by the drawee bank to honour a cheque. However, unless communication is made, the payee will not only not receive the funds to which they are apparently entitled, but in the absence of any communication they would, at least for a time, be unable to address the problem. If a mistake has occurred and the payee does not receive the relevant funds the logical step for the payee is to raise the matter with the drawer. If a bank error is responsible for the communication it can be readily identified and remedied. Although the drawer's reputation may suffer, in most cases of error this will be transitory. Greater damage may be done, including damage to the payee, by a delay in the payee being made aware that the cheque has not been honoured. Even if occasioned by the bank's own mistake there are good reasons why the communication contemplated by the *Cheques Act* [1986 (Cth) ("the Cheques Act")] should be protected. To my mind those reasons are persuasive in the present circumstances."

24 The reference to the Cheques Act is to s 67(1)[27]. This obliges 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"; in default of so doing, the drawee bank loses what otherwise may have been the right to dishonour the cheque[28] and is liable to pay it to the holder.

25 In the present case, Westpac never had any right at all to dishonour the cheques. In the course of submissions to this Court, counsel for Westpac

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26 *Aktas v Westpac Banking Corporation Ltd* [2009] NSWCA 9 at [70].

27 The present short title was given to the *Cheques and Payment Orders Act* 1986 (Cth) by the *Cheques and Payment Orders Amendment Act* 1998 (Cth).

28 At the relevant time, s 69 stated:

> "A cheque is dishonoured if the cheque is duly presented for payment and payment is refused by the drawee bank, being a refusal that is communicated by the drawee bank to the holder or the person who presented the cheque on the holder's behalf."

correctly eschewed any continued reliance upon s 67(1) as a source of a legal duty which could found the necessary community of interest for qualified privilege[29]. Nevertheless, Westpac submitted that, having regard to the commerce between all the stakeholders, the 30 payees had sufficient reciprocity of interest with Westpac in receiving the communication that the cheques were dishonoured, albeit in circumstances where the dishonour was provoked by an erroneous understanding on the part of Westpac. That submission should not be accepted.

The issues

26 Was communication of dishonour of the cheques made on an occasion of qualified privilege? Was there an occasion where there was a duty or an interest in making and receiving the defamatory communications?

27 In each instance, by presenting its cheque for payment, the payee sought to have the bank on which it was drawn (Westpac) pay the amount of the cheque either to the payee's bank (if a bank other than Westpac) or to the payee's account (if that account was held by Westpac). This being so, there was a relationship between the paying bank (Westpac) and the payee. Further, it was in the interests (in the sense of being to the advantage) of each of the payee, the drawer of the cheque (Homewise, which was Westpac's customer) and Westpac (as the paying bank) for the cheque to be paid, if there were funds to meet it.

28 If there were funds to meet the cheque, and the cheque was otherwise regular on its face, there was no reason for Westpac, as the paying bank, to make any communication about the fate of the cheque. Westpac would meet the cheque, and the appropriate entries would be made either in an account that the payee maintained with Westpac or in the interbank settlement accounts for the day of payment. Only if Westpac, as paying bank, wished not to pay the cheque, was there any occasion for Westpac to make any communication with anyone about that cheque.

29 If Westpac, as paying bank, wished not to pay the cheque that was presented for payment, then s 67(1) of the Cheques Act obliged it to "dishonour the cheque as soon as is reasonably practicable". To dishonour the cheque, the paying bank had to refuse payment and communicate that refusal "to the holder or the person who presented the cheque on the holder's behalf"[30].

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29 Cf *Moore v Canadian Pacific Steamship Co* [1945] 1 All ER 128 at 133.

30 Cheques Act, s 69.

30 Each of the communications by Westpac of its refusal to pay the cheques in question in this matter was defamatory. There was no issue at trial about the communication of Westpac's refusal, and there was, therefore, no examination of whether the refusal was communicated to the holder of the cheque or to the person who presented the cheque on the holder's behalf. Nothing turns on that fact in this case.

No qualified privilege

31 In *Andreyevich v Kosovich*[31], Jordan CJ pointed out that in deciding whether society recognises a duty or interest in the publisher making, and the recipient receiving, the communication in question, it is necessary to "show by evidence that both the givers and the receivers of the defamatory information had a special and reciprocal interest in its subject matter, of such a kind that it was desirable as a matter of public policy, in the general interests of the whole community of New South Wales, that it should be made with impunity, notwithstanding that it was defamatory of a third party". An appeal to this Court (Latham CJ, Rich, Starke, McTiernan and Williams JJ) was dismissed for short reasons given orally by Latham CJ[32].

32 The point made by Jordan CJ may be put interrogatively, by adopting and adapting what Gummow J said in *Bashford v Information Australia (Newsletters) Pty Ltd*[33], so as to ask whether the particular relationship between Westpac and the persons receiving a notice of dishonour was one in which the advantages which the law deems are to be had from free communication within such a relationship should enjoy a significance over and above the accuracy of a defamatory imputation conveyed by a notice of dishonour, in this case that Homewise had issued a valueless cheque.

33 In assessing that question, it is, as remarked above, of the first importance to recognise that there will be a communication between a bank and the payee of a cheque drawn on that bank, if and only if the bank wishes to refuse to pay the cheque. That is, there will be an occasion for communication if and only if the cheque is to be dishonoured.

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31 (1947) 47 SR (NSW) 357 at 363.

32 *Kosovich v Andreyevich* unreported, High Court of Australia, 23 April 1947.

33 (2004) 218 CLR 366 at 412 [126].

34 What then are the advantages to society from providing for freedom of communication between bank and payee on such an occasion, which outweigh the need for accuracy in conveying a defamatory imputation? What is the special and reciprocal interest in the subject matter of the communication which makes it desirable as a matter of public policy that, in the general interests of the whole community, the communication should be made with impunity, notwithstanding that it is defamatory of a third party[34]?

35 Contrary to the opinion expressed in the Court of Appeal in the passage set out earlier in these reasons[35], considerations of promptness in communication of notice of dishonour are not to the point. They are not to the point because, unless a dishonour is made and communicated "as soon as is reasonably practicable", the paying bank remains liable to pay the cheque to the holder "unless it has become aware of a defect in the holder's title or that the holder has no title to the cheque"[36]. Of course it is important to the payee of a cheque that the payee should know the fate of that cheque promptly. But that interest is achieved by the provisions of ss 67 and 69 of the Cheques Act. No engagement of principles of qualified privilege in the law of defamation is necessary to achieve that end or will affect its implementation. Yet no other benefit or advantage to society was identified in argument.

Davidson v Barclays Bank Ltd

36 Instead, attention was directed to what was said by Hilbery J in *Davidson v Barclays Bank Ltd*[37] upon facts somewhat similar to the present. That case was decided against a statutory background provided by the *Bills of Exchange Act* 1882 (UK). In its application to cheques, s 49(12) of that Act required notice of dishonour to be given by the bank within a reasonable time thereafter. In *Davidson*, no general need was identified which required the engagement of principles of qualified privilege in respect of communication of a notice of dishonour.

37 The Editor of the All England Reports appended a note to the report of *Davidson*, stating that it did not appear that the defence of qualified privilege had been taken in any previous case where the dishonour was occasioned by the

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34 *Andreyevich v Kosovich* (1947) 47 SR (NSW) 357 at 363.

35 *Aktas v Westpac Banking Corporation Ltd* [2009] NSWCA 9 at [70].

36 Cheques Act, s 67(1).

37 [1940] 1 All ER 316.

mistake of a bank in keeping a customer's account. The bank had dishonoured a cheque drawn by the plaintiff, a credit bookmaker, after the bank had failed to comply with a stop order placed by the plaintiff on an earlier cheque. If the bank had implemented the stop order, there would have been funds available in the account to meet the cheque in question.

38 The action was tried by Hilbery J sitting alone, and on 25 January 1940 he delivered his reasons. His Lordship held[38] that there was no matter of common interest between the bank and the payee which called for a communication; there would have been such a matter of common interest only if the occasion had called for the rejection of the cheque. Where there were (or, here, should have been but for the error by the bank) sufficient funds to meet the cheque, the only matter of common interest had been in the bank paying the cheque.

39 Particular attention was focussed in argument in this Court upon the proposition stated in *Davidson*[39] that:

> "you cannot, by making a mistake, create the occasion for making the communication, and what the bank seek[s] to do here is to create an occasion of qualified privilege by making a mistake which called for a communication on their part".

Argument in the present matter proceeded by examining whether some general principle could be extrapolated from the proposition that has been quoted. Particular attention was given to what was meant by "mistake", what kinds of "mistake" mattered and what kinds of "mistake" did not matter to a determination of whether qualified privilege existed. The mistake here, on Westpac's case in this Court, was said to be an error in the interpretation of the garnishee order. More accurately, Westpac erred in failing to appreciate that, by reason of s 36(2) of the Business Agents Act, the garnishee order could not operate upon the Homewise trust account.

40 However, argument along these lines distracts attention from the context in which the particular proposition stated by Hilbery J was expressed. It also tends to obscure the importance of recognising, as his Lordship did, that there will be no communication between a paying bank and the payee of a cheque except in the case of a dishonour. More fundamentally, however, to focus upon notions of "mistake" distracts attention from the need to identify whether, as a

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38 [1940] 1 All ER 316 at 322-323.

39 [1940] 1 All ER 316 at 322.

matter of public policy, in the general interests of the whole community, qualified privilege should attach to the occasion of such a communication. No such public interest was identified in argument.

The absence of a public interest

41 The absence of such a public interest in *Davidson*, and in this case, can be demonstrated by the absence of any reciprocity of interests 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 of the cheque has funds sufficient to meet its payment. And where a notice of dishonour is defamatory, the defamation will lie in the assertion either that the cheque is not regular, or that the drawer does not have funds sufficient to meet the payment ordered on the cheque. When a notice of dishonour is defamatory, the communication goes beyond informing the recipient that the bank refuses to pay the cheque; the communication gives the bank's reason for refusal. The defamatory imputation will be found in that reason, not in the bare fact of refusal. That being so, it is wrong to identify some community of interest in the communication actually made as arising out of a need or desire on the part of the bank to say that payment is refused or as founded in some more general notion of the payee needing or wanting to know "the fate" of the cheque. As explained earlier, the bank acts as it does in what it perceives to be *its* interests. And for the payee of the cheque, there will be no need for any communication from the bank about the fate of the cheque, if it is met on presentation.

42 As indicated in the opening passages of these reasons, there is a large public interest in the maintenance of an efficient and stable banking system. That interest includes, but is not confined to, an interest in the stability of those who hold licences under the Banking Act. It also includes a very large and powerful interest in maintaining observance by licensees of other statutory requirements, such as those of s 36(2) of the Business Agents Act, and generally in the speed, accuracy and reliability of transactions conducted within the banking system. To hold that giving notice of dishonour of a cheque is an occasion of qualified privilege is not conducive to accuracy on the part of banks faced with the decision to pay or dishonour a cheque as soon as reasonably practicable. To hold banks responsible to their customers not only in contract, but also for damage to reputation, is conducive to maintaining a high degree of accuracy in the decisions that banks must make about paying cheques.

Order

43 The primary judge erred in upholding the claim of qualified privilege and the Court of Appeal erred in upholding that decision.

44 The appeal should be allowed. Mr Aktas should have his costs against Westpac. Order 1 of the orders of the Court of Appeal made on 9 February 2009 should be set aside and in place thereof the appeal by Mr Aktas should be allowed with costs. Order 2 made by the primary judge on 29 November 2007 should be set aside and replaced by an order that Westpac pay the costs of the action by Mr Aktas.

45 Order 1 made by Fullerton J on 7 November 2007 should be set aside. It should be replaced by a verdict and judgment for Mr Aktas for damages in the sum of $50,000 with interest.

46 The parties should have liberty within 28 days to re-list the appeal for further orders if an agreement is reached respecting the amount of interest to be added to the verdict of $50,000. In the absence of that agreement, the question of interest should be remitted for determination by a Judge of the Supreme Court of New South Wales.

47 HEYDON J. The appeal should be dismissed with costs for the following reasons.

The facts

48 The relevant events took place as long ago as 1997. In that year the second respondent carried on the business of a suburban real estate agency under the name of "Century 21 Homewise Realty" as franchisee of Century 21 Australia Pty Ltd. The appellant was well-known as the alter ego and chief executive of the second respondent.

49 The second respondent had three accounts with the first respondent. One of the accounts was a trust account named "Homewise Rent Trust Account". The second respondent managed, inter alia, rental properties for clients. The rent it collected on behalf of the clients went into that account, and the monies payable to the clients came out of that account.

50 On 1 December 1997 the second respondent drew 30 cheques on the Homewise Rent Trust Account. They were either directly deposited to the clients' accounts or forwarded by mail. On that day the first respondent refused payment of the cheques. The first respondent returned cheques payable to those of the second respondent's clients who had accounts with the first respondent directly to them, and it returned cheques payable to clients who banked with another bank to the collecting bank. Each of these returned cheques was endorsed with the words "Refer to Drawer". Why did the first respondent do these things?

51 In the previous months there had been financial disputes between Century 21 Australia Pty Ltd and the second respondent. As a result, Century 21 Australia Pty Ltd obtained a default judgment for $35,238.40 against the second respondent, and on 24 November 1997 a garnishee order was issued by the Fairfield Local Court to the first respondent attaching all debts due from the first respondent to the second respondent. In an attempt to comply with that order, at 5.17pm on 1 December 1997 officers of the first respondent changed the status of the Homewise Rent Trust Account from "normal" to "PCO" (ie, post credit only, signifying that only credits were allowed on the account, not customer-initiated debits). The change to PCO status rested on a mistake of law, since the Homewise Rent Trust Account was protected from garnishee orders by s 36(2) of the now repealed *Property, Stock and Business Agents Act* 1941 (NSW)[40].

52 There were at all times sufficient funds in the Homewise Rent Trust Account to meet the cheques. The first respondent's refusal to pay on the

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40 See [2] n 1 above.

cheques drawn on the account was a breach of an implied term of the contract between the first and second respondents under which the first respondent was to exercise all due and reasonable skill, care and diligence in respect of the Homewise Rent Trust Account.

53 The appellant alleged that he had been injured not only in his reputation but also in his feelings. Nearly five years later, he instituted the present proceedings against the first respondent for defamation, and four and a half years after that he had them brought on for the trial from which this appeal springs.

54 The trial judge in the Supreme Court of New South Wales (Fullerton J) found that the imputations suggested that the appellant was an incompetent and careless businessman, but not that he was dishonest, and that the reactions of members of the local community accusing him of theft, which embarrassed and hurt him, were not the result of the imputations[41]. The Court of Appeal agreed[42]. The trial judge also upheld a defence of qualified privilege, and the Court of Appeal agreed with her.

The legal issue

55 The relevant body of law applicable to the defamation in this appeal is the common law defence of qualified privilege, which was preserved by s 11 of the now repealed *Defamation Act* 1974 (NSW). Whether a communication is privileged for the purpose of that defence depends on the satisfaction of three conditions. First, the occasion on which the defamation was published must be a "privileged" one. Secondly, the defamation must be related to the occasion. Thirdly, there must not be malice[43]. There is thus a distinction between the question raised by the first condition – "was the occasion privileged?" – and the ultimate question – "was the communication privileged?"[44] In this appeal there is no controversy about the satisfaction of the second and third conditions. As to the second condition, if the occasion was privileged, the communications related to the occasion – although the first respondent did not concede this, it put no argument against it. As to the third condition, the defamation was made without malice: it was mistaken but it was honest. The controversy in this appeal relates to the first condition.

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41 *Aktas v Westpac Banking Corporation Ltd* [2007] NSWSC 1261 at [93] and [99]-[100].

42 *Aktas v Westpac Banking Corporation Ltd* [2009] NSWCA 9 at [92].

43 *Guise v Kouvelis* (1947) 74 CLR 102 at 117; [1947] HCA 13.

44 *Pullman v Walter Hill & Co Ltd* [1891] 1 QB 524 at 529, approved in *Guise v Kouvelis* (1947) 74 CLR 102 at 117.

56 It was common ground that a privileged occasion arose if the first respondent made the defamatory statement "in the discharge of some public or private duty, whether legal or moral, or in the conduct of [its] own affairs, in matters where [its] interest is concerned."[45] It was also common ground that there be reciprocity:

> "a privileged occasion is, in reference to qualified privilege, an occasion where the person who makes a communication has an interest or duty, legal, social or moral, to make it to the person to whom it is made, and the person to whom it is so made has a corresponding interest or duty to receive it."[46]

57 The appellant's submissions may be grouped under four headings.

Failure to scrutinise the circumstances

58 The first specific submission made by the appellant was that, contrary to an injunction of Dixon J, the courts below had failed to "make a close scrutiny of the circumstances of the case, of the situation of the parties, of the relations of all concerned and of the events leading up to and surrounding the publication."[47] That contention must be rejected. According to the appellant, the relevant facts were that there were sufficient funds in the Homewise Rent Trust Account, that there was no proper basis for dishonouring the cheques, and that the first respondent had a contractual obligation to pay on the cheques. These facts were in truth fully scrutinised and appreciated by the courts below.

Mistake as to existence of occasion of qualified privilege

59 *The appellant's submission.* In its second specific submission, the appellant contended that the first condition to be satisfied by a bank seeking to rely on qualified privilege in relation to communications about dishonouring a cheque is that the dishonour not arise from the bank's own mistake as to the existence of an occasion of qualified privilege. The appellant submitted that the first respondent "mistakenly believed it had reason to dishonour the cheques and

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45 *Bashford v Information Australia (Newsletters) Pty Ltd* (2004) 218 CLR 366 at 373 [9]; [2004] HCA 5, quoting *Toogood v Spyring* (1834) 1 Cr M & R 181 at 193 [149 ER 1044 at 1050] per Parke B.

46 *Adam v Ward* [1917] AC 309 at 334 per Lord Atkinson, approved in *Bashford v Information Australia (Newsletters) Pty Ltd* (2004) 218 CLR 366 at 373 [9].

47 *Guise v Kouvelis* (1947) 74 CLR 102 at 116, quoted with approval in *Bashford v Information Australia (Newsletters) Pty Ltd* (2004) 218 CLR 366 at 373 [10].

therefore mistakenly believed it needed to communicate that fact to the payees and the collecting banks."

60 It was submitted that the first respondent had no duty to communicate, or interest in communicating, with the payees or the collecting banks. The first respondent, it was said, could not create an occasion of qualified privilege by mistakenly thinking that a matter existed which, if it did exist, caused the occasion to be an occasion of qualified privilege, but not if the matter did not exist. That is, it was said that the first respondent could not create a duty or interest by falling into an error about whether it was open to it to dishonour the cheques. The appellant relied on *Davidson v Barclays Bank Ltd*[48] and *Pyke v The Hibernian Bank Ltd*[49].

61 *Authorities against the submission.* One difficulty with this submission is that there are unquestionably instances where the law recognises the existence of a privileged occasion notwithstanding the defendant's mistaken view of the circumstances. In *Pyke v The Hibernian Bank Ltd*[50] Black J took as one example:

> "the cases of communications made *bona fide* alleging misconduct on the part of public officials which turn out to be untrue. In such cases the occasion is privileged, although in many of them there would be no occasion to make *any* communication but for the mistake of the person making it."

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48 [1940] 1 All ER 316 at 321-323 per Hilbery J. Whatever its legal merits, this decision, printed as it is on wartime paper, yellowed now by the humidity of seventy sultry Sydney summers, at least illustrates the untruth, in common law systems, of the maxim "inter arma silent leges". There is much to admire in a legal system which, in the terrible year of 1940, ensured that one of its most senior judges devoted his energies to determining whether the dishonouring of a cheque for £2 15s 8d drawn by a credit bookmaker to settle a successful long odds bet on a horse race was actionable defamation, and deciding that the defendant should pay damages of £250 – another successful long odds bet, this time in the greater lottery of defamation litigation. Thus were traditional and fundamental cultural values, which had played so large a part in the rough island story, vindicated. Had Churchill, whose name is inextricably linked with 1940, been aware of the decision, he might have made the remark he made in another context: "It makes you feel proud to be British."

49 [1950] IR 195 at 207 per O'Byrne J (Geoghegan J concurring).

50 [1950] IR 195 at 222.

He gave another example[51]:

> "The same applies to *bona fide* communications charging a person with a crime, if made to officers of the law whose duty it is to detect and prosecute criminals. Yet, in most cases of the kind the maker of the communication would have no duty to make, or interest in making, any communication whatever about the person in question, were it not for his own mistake in thinking that person had committed a crime."

Black J also referred to Scrutton LJ's opinion that, if the friend of a ship's officer informs the owner of the ship of the officer's statement that the drunkenness of the ship's captain endangered the safety of the ship and the crew, qualified privilege applies even though the statement is false[52]. Black J accepted that in the categories of case he had referred to, "the privilege of the occasion is justified in the interest of public efficiency or safety or the prevention of crime, while there is not the same justification for communications made by a bank to the payee of a cheque drawn by its customer, whose mandatory the bank is."[53] But he rightly said[54]:

> "once the theory that a privileged occasion cannot be created by the mistake of the party seeking to rely on it has to be abandoned, as I think it has, then the principle that a privileged occasion exists wherever there is a reciprocity of duty or interest between the maker and receiver of the communication is wide enough to cover every case where that reciprocity is established."

62 *Elision of questions.* Another difficulty with the appellant's submission is that it elides two questions. One question is whether the communication was privileged. The other question is whether the occasion on which the communication was made was a privileged occasion. When a "statement" is made on a particular "occasion", the "occasion" is distinct from the "statement".

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51 [1950] IR 195 at 222.

52 [1950] IR 195 at 222. Scrutton LJ's opinion is stated in *Watt v Longsdon* [1930] 1 KB 130 at 146, recording his approval of the views of Tindal CJ in *Coxhead v Richards* (1846) 2 CB 569 at 596-598 [135 ER 1069 at 1080-1081], and of Willes J in *Amann v Damm* (1860) 8 CB (NS) 597 at 602 [141 ER 1300 at 1302] and Lindley LJ in *Stuart v Bell* [1891] 2 QB 341 at 347. See also *Davies v Snead* (1870) LR 5 QB 608 at 611 per Blackburn J.

53 [1950] IR 195 at 222.

54 [1950] IR 195 at 222.

The submissions and the authorities on which the appellant relied are open to the criticism that they[55]:

> "misconceive the nature of the occasion that created the privilege. The occasion was the drawing of the cheque. This created a relationship not only between the drawer and his bank but also between the bank and the person who had an interest in receiving the money from the bank, the payee or his bank. The bank did not misconceive the nature of its duty as a bank, nor did it send the information to someone who was not the payee or authorized to present the cheque. It made a mistake regarding the information it conveyed".

In short, the relevant "occasion" in this case commenced when cheques were drawn on the first respondent by the second respondent and continued at least until the time when the first respondent informed payees and collecting banks of its decision not to honour those cheques. The first respondent was not mistaken about those facts. A mistake underlay what it communicated to its customers and the collecting banks. But that mistake was not a mistake about the occasion.

63 *Privileged occasion without mistake.* As Kiefel J explains, if the first respondent had not been mistaken when it refused to pay the cheque, the occasion would have been privileged[56]. The appellant did not satisfactorily explain why the outcome should be different by reason of the first respondent having been mistaken.

64 *Conclusion.* The appellant's contention depends on a narrow identification of the "occasion". The wider identification of Fullerton J is preferable[57]:

> "The relationship [the first respondent] had with each of the payees and the collecting banks (namely, as the paying bank) warranted the communication of information about its attitude to the presentation of the cheques, notwithstanding that such information – but not the existence of the relationship between them and the reciprocity of interest they shared – was premised on a mistake."

65 The "occasion" did not only begin just after the first respondent's decision not to pay on the cheques. The "occasion" began when the cheques were drawn,

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55 Brown, *The Law of Defamation in Canada*, 2nd ed (1994), vol 1, par 13.2(5), n 68 at 679.

56 See [103] below.

57 *Aktas v Westpac Banking Corporation Ltd* [2007] NSWSC 1261 at [82].

because from that time a course of events unfolded which caused the first respondent to communicate something. Either it had to communicate willingness to pay, and this it would ordinarily do simply by the conduct of honouring the cheques. Or it had to communicate unwillingness to pay, because to fail to do so would be damaging to the payees and collecting banks for the reasons given below[58].

66 To conclude that the occasion on which the first respondent made the defamatory statements in this case was not a privileged occasion is to narrow the qualified privilege defence very greatly in relation to banks. A narrowing could be effected by denying that any qualified privilege defence can co-exist with negligent – or even non-negligent – mistakes. That would be to treat the word "malice" in this context as if it included "negligence", or non-negligent mistakes. The appellant did not urge that course, because he did not argue against the proposition that if the occasion in this case were privileged, the defamatory statements were related to it, and were made without malice. But the course which the appellant did urge involves an equally great narrowing of the qualified privilege defence. It would never be available where, in relation to a matter of fact or law, banks had made a "mistake" – an expression which the appellant did not limit to reckless mistakes, or negligent mistakes, but which extended to mistakes outside the control of banks, even mistakes caused by persons other than banks. It may be desirable to increase the pressure on banks to improve the extent to which their dishonouring of cheques approaches perfection. But to increase that pressure by denying them the defence of qualified privilege, which is open to all other persons, does not conform with principle and has very little support in authority.

Reciprocity of duty or interest

67 *The appellant's submission.* The appellant's third submission rested on s 67(1) of the *Cheques and Payment Orders Act* 1986 (Cth), which created a duty to pay or dishonour the cheques as soon as reasonably practicable. In view of that duty, the appellant argued that the first respondent had

> "no more than a private interest in making the [communications] for its own financial advantage. It has nothing to do with protecting its customer. Nor does it have anything to do with protecting the payee, because the payee is protected by the fact that the cheque must be honoured if the bank does not act promptly."

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58 At [69]-[71].

The private financial interest lay in avoiding liability under s 67. And the appellant similarly said that the first respondent had no duty to communicate to the payees and the collecting banks. That submission must be rejected.

68 *The law.* Dixon J said: "Where the defamatory matter is published in … protection of an interest …, the conception of a corresponding duty or interest in the recipient must be very widely interpreted."[59] There need not be "a common interest"; it is sufficient if there is "[c]ommunity of interest"[60]. The ideas of "social or moral duty" and "interest", according to Griffith CJ, "often overlap"[61]. He also said[62]:

> "The term 'moral duty' is not used in a sense implying that a man who failed to make the communication under the circumstances would necessarily be regarded by his fellows as open to censure, but in the sense implying that it was made on an occasion on which a man who desired to do his duty to his neighbour would reasonably believe that he ought to make it."

"Duties" in this sense are "moral and social duties of imperfect obligation."[63]

69 *The first respondent's duties and interests.* The first respondent had a greater interest in making the statements it made than the one described by the appellant in his submissions. And the first respondent was subject to a relevant duty. These considerations were briefly alluded to in argument, and in *Pyke v The Hibernian Bank Ltd*[64], a case on which both parties relied for various purposes. The first respondent was in a position of conflict between two duties: the statutory duty to pay or dishonour the cheques as soon as reasonably practicable, and, as its officers appeared mistakenly to view its legal obligations, its duty to avoid acting in contempt of court by complying with the garnishee

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59 *Mowlds v Fergusson* (1940) 64 CLR 206 at 214-215; [1940] HCA 38, repeated in *Guise v Kouvelis* (1947) 74 CLR 102 at 125.

60 *Howe & McColough v Lees* (1910) 11 CLR 361 at 369 per Griffith CJ; [1910] HCA 67.

61 *Howe & McColough v Lees* (1910) 11 CLR 361 at 368.

62 *Howe & McColough v Lees* (1910) 11 CLR 361 at 369.

63 *Harrison v Bush* (1855) 5 El & Bl 344 at 349 [119 ER 509 at 512] per Lord Campbell CJ. See also *Watt v Longsdon* [1930] 1 KB 130 at 144 per Scrutton LJ ("moral or social duties").

64 [1950] IR 195 at 221.

order. The first respondent did not rely on the first duty save as to background, but the second is relevant. If, in the circumstances as the first respondent viewed them, it had honoured the cheques, it would have been committing a knowing contempt of court. Having decided to comply with its understanding of the legal effect of the garnishee order, it had an interest in ensuring that the second respondent brought the account into order by paying the debt underlying the garnishee order. The first respondent also had an interest in ensuring that the payees, who were doubtless expecting and assuming that the cheques would be met, were informed of what had happened and why. The first respondent's interest lay in communicating not merely the fact of its refusal to pay on the cheques, but also the reason why – that the account did not contain funds available for transmission to payees of the cheques – so that, in Black J's words in *Pyke v The Hibernian Bank Ltd*, the payees "had better look to the drawer and need not waste time seeking payment from the [first respondent]."[65] In that case Black J also said[66]:

> "the bank would have a real interest in repudiating responsibility for the non-payment; for otherwise it might be thought that there was something wrong with them, or, at the least, that they were unfit for the duties a bank undertakes."

Black J also said a duty existed[67]:

> "when a bank as mandatory of its own customer, who draws a cheque upon it, justifiably refuses to carry out its mandate, one may fairly say it has a moral duty to the person whom its mandate directs it to pay to refer that person to the giver of the mandate, and, certainly, that it has an interest in so doing."

That reasoning is correct. The moral duty arises because persons of "ordinary intelligence and moral principle" would recognise that it was right to respond to the need of payees to know what the first respondent's position was[68]. A bank which desired to do its duty to those affected by its conduct would reasonably believe that it ought to make the communication[69]. The payees needed to know where they stood.

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65 [1950] IR 195 at 221.

66 [1950] IR 195 at 221.

67 [1950] IR 195 at 221.

68 *Stuart v Bell* [1891] 2 QB 341 at 350 per Lindley LJ.

69 *Howe & McColough v Lees* (1910) 11 CLR 361 at 369.

70 *The payees' interests.* The payees had a corresponding interest in knowing about the capacity of the first respondent to pay out of the account in question. They had an interest in being given information (directly, if they were customers of the first respondent, or indirectly, if they were customers of collecting banks who passed on the first respondent's communication) enabling them to approach the second respondent and either get the second respondent to clear up the position with the first respondent with a view to remedying any error made by the first respondent, or get the second respondent to provide payment in some other way. It was important that the payees knew that they would not receive funds from their cheques so that they could make alternative arrangements for payment. And as already noted, Black J persuasively said in *Pyke v The Hibernian Bank Ltd*[70] that: "the payee of the cheque would have a very distinct interest in being given timely intimation that he had better look to the drawer and need not waste time seeking payment from the bank." This was particularly so if, for example, the payees had despatched cheques of their own in reliance on the second respondent's cheques being met, for it would be necessary for them to contact their banks to seek temporary accommodation, or to contact the payees of their cheques to warn them to delay presentation until their accounts could be put in funds. These considerations were not nullified by the fact that the *Cheques and Payment Orders Act* 1986 (Cth) operated to some degree to serve similar purposes.

71 *The collecting banks' interests.* The collecting banks had a corresponding interest in receiving the information supplied by the first respondent so that they could inform their customers of the problem, with a view to enabling the customers to protect their interests in the ways just outlined.

The common convenience and welfare of society

72 *General principles.* The appellant advanced certain submissions turning on Parke B's reference to non-malicious defamatory statements being protected by qualified privilege where this was for the common convenience and welfare of society, which concluded with his statement that the law had not restricted the right to make statements of that kind within narrow limits[71]. The submissions concentrated on the words "the common convenience and welfare of society". The submissions appeared to assume that those words expressed a test which, if not satisfied, prevented qualified privilege from being established. McHugh J

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70 [1950] IR 195 at 221.

71 *Toogood v Spyring* (1834) 1 Cr M & R 181 at 193 [149 ER 1044 at 1049-1050].

expressed a contrary opinion in *Bashford v Information Australia (Newsletters) Pty Ltd*[72]:

> "It is of the first importance to understand that references to concepts such as 'the common convenience and welfare of society' and similar phrases record a result and explain why the communication and the relevant duty or interest gave rise to an occasion of qualified privilege. Such concepts are not the determinants of whether the occasion is privileged."

In the same case McHugh J also said[73]:

> "In determining the question of privilege, the court must consider all the circumstances and ask whether *this* publisher had a duty to publish or an interest in publishing *this* defamatory communication to *this* recipient. It does not ask whether the communication is for the common convenience and welfare of society."

This passage was quoted by the appellant for other purposes. But, as the first respondent pointed out, the last sentence contradicts the submissions which the appellant made under the present heading.

73 No detailed argument was directed to the status of McHugh J's pronouncements and their impact on the appellant's arguments. Since there are other grounds for rejecting the appellant's arguments, it is not necessary to consider these questions. The succeeding analysis of the common convenience and welfare of society is subject to the caveats which McHugh J has raised.

74 In the present field, no doubt what is most for the common convenience and welfare of society is the honouring of cheques of customers whose accounts are in funds or inside permitted overdraft limits, and are otherwise available to be drawn on – that is, that in this respect, as in all others, the banking system always works perfectly. A related aspect of that proposition is that it is for the common convenience and welfare of society that defamatory statements not be made. But the law contemplates that non-malicious defamatory statements will on occasion be made, and that it can be for the common convenience and welfare of society that this be so. If the terms of the appellant's submissions are legitimate ones, a question which they raise in the present context is whether it is for the common convenience and welfare of society that, if cheques are not thought by the banks on which they are drawn to be properly payable, information to that effect is given speedily to the persons most likely to put this information to effective use. In the present context, each of the relevant interests – that of the first respondent,

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72 (2004) 218 CLR 366 at 386-387 [55].

73 (2004) 218 CLR 366 at 389 [63] (emphasis in original).

those of the payees, and those of the collecting banks – is related to the interests of the others. In evaluating the conduct of the first respondent in relation to the intersection of those interests where it thought that a court order prevented payments out of the relevant account, one aspect of the common convenience and welfare of society is that each of the interests so described be accommodated: for in the circumstances as the first respondent thought them to be, the first respondent's course would increase the chance that credit would flow more speedily and into the correct channels.

75 The appellant submitted that rejection of his first three submissions[74] would be adverse to the common convenience and welfare of society in two ways.

76 *Contract and defamation.* First, he submitted that this would be so because that rejection would create disharmony between the first respondent's immunity in defamation and its liability in contract: "it is difficult to see that it is for the common convenience and welfare of society to permit its banks to enjoy the protection of qualified privilege for communications occasioned by their own errors when those same errors are in breach of their contractual obligations to their customers." The appellant submitted that the dishonouring of the cheques could not simultaneously be conduct constituting a breach of contractual duty and conduct pursuant to an interest.

77 One problem with this argument is that, if the legal position had been as the first respondent perceived it to be, its conduct would not have been in breach of contractual duty, but rather would have been in fulfilment of a court order. Another is that there is no contradiction between, on the one hand, conduct in breach of a bank's contractual duty and, on the other hand, conduct in advancement of the interests of the bank and persons other than the innocent party to the contract. If anything, the contractual outcome points against the appellant's argument in this case, because the vindication of the second respondent's contractual rights in the courts below tends to ameliorate the adverse effects of the first respondent's defamation defence on the appellant. It makes the law more harmonious, not less.

78 The appellant put another variant of this first submission thus. To uphold the qualified privilege defence would lead to inconsistent findings: on the one hand, the first respondent had a duty not to communicate dishonour (because its contractual duty was not to dishonour); on the other hand, if the defence applied, it was because of a duty to communicate. But the two "duties" do not directly collide. The second duty was to communicate the fact of dishonour *if* the cheques were dishonoured. The question whether there was a duty to honour the

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74 Discussed above in [58]-[71].

cheques is distinct from the question whether there was a duty to communicate the fact of dishonour if it took place. And the two duties are different in character. The duty to perform the contract was a legal duty of perfect obligation. The duty to publish was a social or moral duty of imperfect obligation.

79 *Qualified privilege as the driver of right conduct.* The second submission put by the appellant in relation to the common convenience and welfare of society was as follows. To deny banks the defence of qualified privilege would "provide a proper basis for a review by banks of the processes which lead to decisions to dishonour being made so as to ensure that those decisions are made with greater care and diligence. On any view, that is a better outcome for the general welfare of society."

80 The appellant's submission here moves away from the traditional analysis employed in the authorities which have flowed from Parke B's formulation in *Toogood v Spyring*[75] to a theme repeatedly employed in the appellant's submissions which saw the case as turning on "a matter of public policy", a "policy question", a "question of public policy", a "public policy" or a "public policy question". It is true that Jordan CJ, Evatt J and Walsh J, for example, have used that language[76]. The appellant's words are in a sense correct – but not in the sense in which the appellant used them. Thus Jordan CJ was speaking in the context of analysing the reciprocal interests of the givers and receivers of defamatory information. Neither he nor the other judges were suggesting that the law of qualified privilege be used as a means of achieving the best possible social results. Nor were they suggesting that public policy criteria could be employed so as to prevent the defence of qualified privilege from existing in particular fields. The appellant's submission that the law of qualified privilege should be so fashioned as to bring about particular social goals in the manner he advocated is novel. The best should not here be treated as the enemy of the good. And the submission rests on an assumption that the shrinking of the defence which is advocated would actually have the effects desired on any significant scale. The truth of that assumption was neither demonstrated nor substantiated.

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75 (1834) 1 Cr M & R 181 at 193 [149 ER 1044 at 1049-1050].

76 *Andreyevich v Kosovich* (1947) 47 SR (NSW) 357 at 363-364. See also *Telegraph Newspaper Co Ltd v Bedford* (1934) 50 CLR 632 at 657; [1934] HCA 15; *Justin v Associated Newspapers Ltd* (1966) 86 WN (Pt 1) (NSW) 17 at 32-33; [1967] 1 NSWR 61 at 75.

Conclusion

81 The decisions of Fullerton J and the Court of Appeal upholding the first respondent's defence of qualified privilege were correct.

82 KIEFEL J. The facts relevant to this appeal are set out in the reasons of French CJ, Gummow and Hayne JJ.

83 One of the accounts which the second respondent ("Homewise") operated with the first respondent ("Westpac") was the Homewise Rent Trust Account. Mr Aktas was a director, sole shareholder and chief executive of Homewise. He was the counter-signatory to 30 cheques which were drawn on that account on 1 December 1997. The cheques were returned that day by Westpac stamped "Refer to Drawer". Where a cheque had been presented for payment by a customer of Westpac a letter was also sent containing the same advice.

84 The cheques came to be stamped with the advice as a result of an error on the part of an employee of Westpac. That person had not realised that a garnishee order made by a Local Court, naming Homewise as the judgment debtor, could not be applied to the trust account. As a result of that mistake the status of the account was designated "PCO" ("post credits only"), which effectively prevented any cheques being paid from the account. The error was corrected the following day.

85 The actions of Westpac were in breach of its contract with Homewise and defamatory of it and Mr Aktas. It has long been accepted that the advice "Refer to Drawer" would commonly be understood to convey that there are insufficient funds in the relevant account to meet a cheque presented for payment. This was not in fact the case. At trial the jury found further imputations, but they do not assume relevance on the appeal. It was common ground between the parties that the publication of defamatory matter had occurred as a result of the cheques being stamped and returned. Westpac also acknowledged its liability for republishing the defamatory matter when the collecting banks passed on the information about the cheques to its customers.

86 Fullerton J awarded Homewise $84,500 in damages for breach of contract[77]. Had Homewise and Mr Aktas succeeded in their action for defamation, her Honour would have awarded damages at $117,000 and $50,000 respectively[78]. Those awards would have been higher had her Honour not taken into account the failure of the plaintiffs to accept an offer made by Westpac, in January 1998, to correct the error and apologise, albeit the offer was made after some unexplained delay[79]. Proceedings were brought by Homewise and Mr Aktas in November 2002.

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77 *Aktas v Westpac Banking Corporation Ltd* [2007] NSWSC 1261 at [147].

78 *Aktas v Westpac Banking Corporation Ltd* [2007] NSWSC 1261 at [138], [139].

79 *Aktas v Westpac Banking Corporation Ltd* [2007] NSWSC 1261 at [125].

87 As French CJ, Gummow and Hayne JJ have observed, the effect of s 11 of the *Defamation Act* 1974 (NSW) was to preserve the common law defence of qualified privilege and, under s 7A(4)(a) of the Act, it fell to Fullerton J to determine whether the defence could be availed of by Westpac. Westpac pleaded that the advice "Refer to Drawer" was published on an occasion of qualified privilege and gave as particulars that it had a duty to communicate with its customers and collecting banks as to the status of the cheques and that the recipients of the advices had an interest in receiving such advice. Her Honour upheld the defence[80]. The Court of Appeal[81] dismissed an appeal from her Honour's judgment. Their Honours held that[82]:

> "Having decided to refuse payment of the cheques Westpac had a duty to communicate its decision to the payees or their banks. The payees had the necessary interest in receiving that communication. The endorsement 'Refer to Drawer' was conventional advice using an expression common to banking arrangements. Its use by Westpac was relevant to the privileged occasion and accordingly the imputations which the jury found to arise were themselves privileged."

In my view that conclusion was correct and this appeal should be dismissed.

The defence of qualified privilege

The basis – public interest regarding communications

88 It cannot be denied that the statements made by Westpac about the cheques were defamatory of, and had adverse consequences for, Mr Aktas and Homewise. They were also statements made in the course of business and in terms which are usual where a bank has decided not to honour a cheque.

89 The law recognises that there is a public interest in maintaining freedom of communications which are necessary to everyday life. It has been regarded as preferable "that individuals should occasionally suffer than that freedom of communication between persons in certain relations should be in any way impeded."[83]

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80 *Aktas v Westpac Banking Corporation Ltd* [2007] NSWSC 1261 at [81], [82].

81 *Aktas v Westpac Banking Corporation Ltd* [2009] NSWCA 9 per McClellan CJ at CL, Ipp and Basten JJA agreeing.

82 *Aktas v Westpac Banking Corporation Ltd* [2009] NSWCA 9 at [86].

83 *Bowen v Hall* (1881) 6 QBD 333 at 343 per Lord Coleridge CJ.

90 In *Horrocks v Lowe*[84] Lord Diplock explained:

> "The public interest that the law should provide an effective means whereby a man can vindicate his reputation against calumny has nevertheless to be accommodated to the competing public interest in permitting men to communicate frankly and freely with one another about matters in respect of which the law recognises that they have a duty to perform or an interest to protect in doing so. What is published in good faith on matters of these kinds is published on a privileged occasion. It is not actionable even though it be defamatory and turns out to be untrue."

91 In the often quoted judgment in *Toogood v Spyring*[85] Parke B said that "[t]he business of life could not be well carried on" if communications, such as that in question, were restrained[86]. In the sphere of business, statements about the creditworthiness of individuals, in response to an enquiry, often feature in the cases[87]. In *London Association for Protection of Trade v Greenlands Ltd* Lord Parker of Waddington said[88]:

> "having regard to the way in which business is carried on in this country, occasions must arise in which it is not only legitimate but necessary for one trader to inquire into the financial circumstances and credit of another"

and observed that it is in the interests of society generally that a person asked for information should be able to respond without the fear of an action for libel.

92 It is consistent with the purpose of the defence that its scope should not be unduly restricted. In *Toogood v Spyring* Parke B said that[89]:

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84 [1975] AC 135 at 149.

85 (1834) 1 Cr M & R 181 [149 ER 1044].

86 *Toogood v Spyring* (1834) 1 Cr M & R 181 at 194 [149 ER 1044 at 1050].

87 See for example *Howe & McColough v Lees* (1910) 11 CLR 361; [1910] HCA 67; *London Association for Protection of Trade v Greenlands Ltd* [1916] 2 AC 15.

88 *London Association for Protection of Trade v Greenlands Ltd* [1916] 2 AC 15 at 42.

89 (1834) 1 Cr M & R 181 at 193 [149 ER 1044 at 1050].

> "If fairly warranted by any reasonable occasion or exigency, and honestly made, such communications are protected for the common convenience and welfare of society; and the law has not restricted the right to make them within any narrow limits."

93 This aspect of the judgment in *Toogood v Spyring* was regarded by Griffith CJ in *Howe & McColough v Lees*[90] as providing the key to an understanding of the real principle upon which the defence is founded. Clearly enough, communications are to be taken to qualify as being in the public interest if they are "fairly warranted by any reasonable occasion or exigency, and honestly made".

94 The public interest in freedom of communication, upon which the defence is based, does not require that what is communicated be accurate, so long as its maker and its recipient have a sufficient interest to warrant it being said. In *Bashford v Information Australia (Newsletters) Pty Ltd*[91] a question was whether the application of the defence to the making of a defamatory imputation, on what was otherwise a privileged occasion, was affected by inaccuracies in what was reported as court proceedings. Gummow J said[92]:

> "while the substantial accuracy of a report of judicial proceedings is deemed necessary in order efficiently to place the general public in the same position as those in attendance upon the relevant proceedings, it is well established that the inaccuracy of an imputation is no bar to the availability of qualified privilege arising out of a reciprocal duty or interest. This is because the particular relationship between the defendant and the person in receipt of the communication, and the advantages which the law deems are to be had from free communication within such a relationship, enjoy a significance over and above the accuracy of the defamatory imputation in question."

The occasion for publication – interests in making and receiving the communication

95 For the defence of qualified privilege to apply there must, in the circumstances surrounding the publication of the defamatory matter, be an "occasion" for the communication in question, as the passage from *Toogood v*

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90 (1910) 11 CLR 361 at 368.

91 (2004) 218 CLR 366; [2004] HCA 5.

92 *Bashford v Information Australia (Newsletters) Pty Ltd* (2004) 218 CLR 366 at 412 [126] (footnotes omitted).

Spyring cited above requires. In addition, the communication must be necessary to that occasion ("fairly warranted"[93]) and made with honest purpose.

96 In determining whether there was an occasion for the making of the statement communicated, attention is principally directed to the interest the defendant had in making it. Earlier in his judgment Parke B referred to such an occasion arising where the statement is[94]:

> "fairly made by a person in the discharge of some public or private duty, whether legal or moral, or in the conduct of his own affairs, in matters where his interest is concerned."

In such cases, he explained, the occasion allows for the qualified defence.

97 In *Howe & McColough v Lees*[95] Griffith CJ said that there will often be an overlap between a statement made in the discharge of some social or moral duty and the interest a party has in making or receiving the statement. This is apparent when consideration is given to the principle upon which the defence is founded – the protection of communications for the common convenience and welfare of society. But the reference to "society" does not mean, for the defence to apply, that the person making the communication was under an obligation to make it, nor does it mean that the person was entitled to make it to the public at large. The point, his Honour said, is that "the interests of society in general require that a communication made under such circumstances to the particular person should be protected."[96] In a case such as the present, the interests of society are in the making of statements in the ordinary course of business, albeit that they may contain defamatory imputations.

98 Many of the earlier cases which were concerned with the application of the defence of qualified privilege involved statements regarding the character of persons such as employees. Communications necessary to be made in the course of business may also reflect upon a person's reputation but are privileged on account of the interest of the maker and recipient in what is conveyed. In *Nevill v Fine Art and General Insurance Company*[97] the appellant was an agent of an insurance company and conducted that business from his own office. He

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93 See *Gatley on Libel and Slander*, 11th ed (2008) at 437 [14.1], 442 [14.3].

94 *Toogood v Spyring* (1834) 1 Cr M & R 181 at 193 [149 ER 1044 at 1049-1050].

95 (1910) 11 CLR 361 at 368-369.

96 *Howe & McColough v Lees* (1910) 11 CLR 361 at 368-369.

97 [1897] AC 68.

brought an action for libel when the company sent a notice to persons insured through the appellant, advising that the appellant's agency had "been closed by the Directors."[98] It was not suggested that the occasion was not privileged. As Lord Halsbury LC observed, the notice was nothing more than an attempt "to make a business communication to persons who had the right to receive [those] communications"[99].

99 Closer to the nature of the communication made in the present case are those to which reference was made earlier in these reasons, which concern imputations as to the financial standing or creditworthiness of a plaintiff. The case of *Howe & McColough v Lees* provides an example. The defendants were members of an association of stock and station agents. One of the defendants reported to the secretary of the association, as he was obliged to do under its rules, the name of the plaintiff as a purchaser who had not paid the purchase price within the time prescribed by the rules of the association. It was held that he had a duty to do so and the secretary then had a duty to advise members. The members shared an interest in knowing about the solvency of persons who might bid at further auctions[100]. The occasion was held to be privileged[101]. There being no misuse of the occasion, the defence was made out.

100 It was said in *Adam v Ward*[102] that the defence requires that the interests of the person making the communication and the person receiving it be in common. Griffith CJ in *Howe & McColough v Lees* considered the expression "community of interest" to be more accurate[103], suggesting that perfect correspondence was not necessary. In *Guise v Kouvelis*[104] Dixon J[105] suggested that it is possible to overstate the need for correspondence of interest, by pointing out that Parke B in

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98 *Nevill v Fine Art and General Insurance Company* [1897] AC 68 at 69.

99 *Nevill v Fine Art and General Insurance Company* [1897] AC 68 at 75.

100 *Howe & McColough v Lees* (1910) 11 CLR 361 at 370 per Griffith CJ, Barton J agreeing, 377-378 per O'Connor J, 396 per Higgins J.

101 Cf *Macintosh v Dun* [1908] AC 390. The rejection of the defence in this case might be explained on the basis that the provision of information was voluntary and therefore officious – see *Howe & McColough v Lees* (1910) 11 CLR 361 at 371 per Griffith CJ.

102 [1917] AC 309 at 318.

103 *Howe & McColough v Lees* (1910) 11 CLR 361 at 369.

104 (1947) 74 CLR 102 at 125; [1947] HCA 13.

105 In dissent.

Toogood v Spyring spoke of a person's interest in his own affairs, which demanded no community, reciprocity or correspondence of interest.

101 In *Howe & McColough v Lees* Griffith CJ explained the interest of the members in receiving the communication, which supported the defence, as[106]:

> "an interest in knowing the fact communicated, in other words, an interest in the subject matter to which the communication is relevant, as for instance the solvency of a probable customer."

102 The context for the giving of the advice "Refer to Drawer" in the present case was the conduct of the business of banking in which decisions must be made by banks as to whether to honour cheques. Westpac had an interest in advising its customers who had presented cheques and collecting banks of its decision. Its interest extended to doing so as soon as was reasonably practicable. So much follows from s 67(1) of the *Cheques Act* 1986 (Cth). Indeed it could be said that it came under an obligation to do so, given the interest of its customers and collecting banks in the status of the cheques[107]. To adapt the words of Griffith CJ[108], they had an interest in knowing the fact communicated, which is to say Westpac's decision not to honour the cheque. That interest is sufficient for the "community of interest" of which Griffith CJ spoke. It would clearly have been more advantageous to them if the communication was not made, and the cheque simply met. Nevertheless, given the fact of the bank's decision not to honour the cheques, they clearly had an interest in knowing of it.

103 The advice "Refer to Drawer" is an ordinary business communication which conveys the imputation mentioned. The factor which distinguishes it from other such advices is that the basis for it was erroneous. It was made as a result of a mistake on the part of Westpac's employee. The relevance of that mistake with respect to the interests of Westpac and the recipients of the advice may be tested in this way[109]. A first inquiry is whether customers or collecting banks could be considered to have a sufficient interest in the advice if the bank had not been mistaken when it refused to pay on the cheque. The answer must be in the affirmative. The question which then arises is whether the bank's mistake can then be said in law to have a bearing upon that duty or interest, which would

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106 *Howe & McColough v Lees* (1910) 11 CLR 361 at 369-370.

107 A view expressed in *Levy v Union Bank of Australia Ltd* (1896) 21 VLR 738 at 742-743 per Madden CJ, Williams and Hodges JJ with reference to *Laughton v The Bishop of Sodor and Man* (1872) LR 4 PC 495 at 504.

108 *Howe & McColough v Lees* (1910) 11 CLR 361 at 369.

109 An approach suggested by Black J in *Pyke v Hibernian Bank* [1950] IR 195 at 220.

otherwise give rise to an occasion of privilege. There is no obvious reason why it should. None is provided by the requirements for the privilege as stated in *Toogood v Spyring*. The fact that the mistake involved ignorance or a misunderstanding about a statutory provision and was made by the employee of a bank does not bear upon that question.

The qualifications – communication fairly warranted; honesty of purpose

104 The privilege upon which the defence is founded is not absolute. It may be lost if the occasion which gives rise to it is misused. It therefore follows that the motive with which a defamatory statement is made may often be crucial to the application of the defence[110]. This was explained by Dr Gatley in the first edition of his work[111]:

> "There are certain occasions on which a man is entitled to state what he believes to be the truth about another, and in which public policy requires that he should be protected in so doing provided that he made the statement honestly and not for any indirect or wrong motive. Such occasions are called occasions of qualified privilege, for the protection which the law affords is not an absolute protection, but depends entirely on the honesty of purpose with which the statement is made."

105 The requirement of honesty of purpose does not require that the statement made be accurate, but that the maker have an honest belief that what is said is true[112]. Lord Diplock in *Horrocks v Lowe*[113] pointed out that if a person publishes untrue defamatory matter recklessly, without considering whether it be true or not, he (or she) will be treated as if he (or she) knew it to be false, as in other branches of the law. But the law accepts that people may "leap to conclusions on inadequate evidence and fail to recognise the cogency of material which might cast doubt on the validity of the conclusions they reach."[114] Nevertheless, their belief may still be "honest". As his Lordship said, "[t]he law demands no more."

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110 As observed in *Horrocks v Lowe* [1975] AC 135 at 149 per Diplock LJ.

111 *Gatley on Libel and Slander*, (1920) at 167.

112 *Stuart v Bell* [1891] 2 QB 341 at 347 per Lindley LJ with reference to *Whiteley v Adams* 15 CB (NS) 418; *Nevill v Fine Art and General Insurance Company* [1897] AC 68 at 75.

113 [1975] AC 135 at 150.

114 *Horrocks v Lowe* [1975] AC 135 at 150.

106 To this point regard has been had to the requirement of honesty of purpose. The phrase in *Toogood v Spyring* also requires that what was said be "fairly warranted" by the occasion. This requirement may in some cases necessitate a further inquiry into the particular conduct of the defendant in making the statement, beyond that of the defendant's honesty[115]. The case of *Guise v Kouvelis* falls into this category.

107 In *Guise v Kouvelis* the plaintiff had been playing cards at a club of which the defendant was a member and committee member. The defendant, in a loud voice, accused the plaintiff of cheating. The majority of the Court appears to have accepted that members, and possibly also visitors, had an interest in the character of the persons attending the club, but held that this interest did not warrant broadcasting the accusation. As Latham CJ[116] said[117], the defendant could have told the plaintiff that he would report his conduct to the committee, without making any defamatory imputation. His Honour went on to say that the basis of the privilege is social welfare and it was not conducive to it that the privilege be extended to the expression of the defendant's opinion to persons in general. To hold to the contrary, he said, "would amount to granting a wide licence to officious and interfering mischief-makers."[118] What his Honour could not countenance was a situation where what was necessary for the occasion of that privilege was grossly exceeded. The defamatory imputation was not "fairly warranted"[119].

108 Dixon J came to a contrary view, holding that in the circumstances, which fairly warranted an honest challenge to the plaintiff's conduct, the defendant had a sufficient interest in speaking, thus providing the occasion for the privilege[120].

109 The imputation in this case did not go further than what is ordinarily conveyed in the situation where a bank has determined to dishonour a cheque. No inquiry into the particular circumstances surrounding its publication, touching upon the reasonableness of Westpac's conduct[121], is necessary.

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115 *Gatley on Libel and Slander*, 11th ed (2008) at 442 [14.3].

116 With whom McTiernan and Williams JJ agreed.

117 *Guise v Kouvelis* (1947) 74 CLR 102 at 111.

118 *Guise v Kouvelis* (1947) 74 CLR 102 at 112.

119 As observed by *Gatley on Libel and Slander*, 11th ed (2008) at 443 [14.3] and 437 [14.1].

120 *Guise v Kouvelis* (1947) 74 CLR 102 at 124.

121 *Gatley on Libel and Slander*, 11th ed (2008) at 442 [14.3].

110 The only requirement to be met, in addition to the identification of the necessary interests, was honesty of purpose on the part of Westpac. The case was conducted on the basis that no such issue was raised. Malice, in the nature of reckless indifference, was pleaded by way of reply but not pursued at trial. Leave to raise it later in the trial, and again on appeal, was refused. The basis upon which the case proceeded was that the employee had made an honest mistake. The appellant's argument must be that the defence is to be denied on that account.

Davidson v Barclays Bank Ltd[122]

111 Unlike defences such as that of fair and accurate reporting, the defence of qualified privilege does not depend upon the quality of what is said. This point was made in the joint reasons in *Bashford v Information Australia (Newsletters) Pty Ltd*[123]. The accuracy of what is conveyed has not been considered relevant to the operation of the defence. In the 11th edition of *Gatley on Libel and Slander* it is said that the fact that a defendant is mistaken as to the facts does not deprive him (or her) of the defence, for its very purpose is to allow the making, in good faith, of untrue statements[124]. In *Nevill v Fine Art and General Insurance Company* the statement made was factually accurate, but Lord Halsbury LC observed that even if it had been wrong, the defence would nevertheless have been available. The matter which was relevant to the operation of the defence was not its accuracy, but that the persons who made the statement believed in the truth of what they were saying[125].

112 The decision in *Davidson v Barclays Bank Ltd*, to which much attention was given in submissions on the appeal, is at odds with this understanding as to the operation of the defence. In that case Hilbery J held that the bank's mistake, leading to the dishonour of a cheque, could not create the occasion for making a statement which conveyed an imputation similar to that in question here. His Honour accepted that the bank's mistake was honest, but described it as one "which ought never to have been made."[126] So far as concerned the bank's obligation to convey its decision, Hilbery J identified the duty as that owed to its

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122 [1940] 1 All ER 316.

123 *Bashford v Information Australia (Newsletters) Pty Ltd* (2004) 218 CLR 366 at 380 [32].

124 *Gatley on Libel and Slander*, 11th ed (2008) at 455 [14.15].

125 *Nevill v Fine Art and General Insurance Company* [1897] AC 68 at 75.

126 *Davidson v Barclays Bank Ltd* [1940] 1 All ER 316 at 317.

customer to make a payment of the amount of the cheque; and the interest of the payee, in common with the customer, as an interest in seeing that payment was met. So understood, the bank had no duty to make any communication about the cheque.

113 Hilbery J's approach denies that a bank could have any interest in communicating its decision as to whether to honour a cheque. The duty owed to its customer, which Hilbery J identified as the relevant duty, would be maintained so long as the bank's consideration of the question whether to honour was not tainted by error. In truth, Hilbery J simply rejected the operation of the privilege in the event of mistake, whereas case law and commentary suggests to the contrary. Black J in *Pyke v Hibernian Bank*[127] pointed out that the approach taken in *Davidson v Barclays Bank Ltd* overlooks that there are many occasions where there would be no privileged occasion but for the mistake of the party[128]. In his Honour's view, one with which I agree, the approach of Hilbery J creates an exception, in the case of banker and customer, to the application of settled principle[129].

Conclusion

114 The advice in question "Refer to Drawer" was an ordinary business communication, but one which carried with it a defamatory imputation. The law recognises that there is a public interest in such communications being made freely, without fear of being sued for defamation. The interests which give rise to the occasion to make such a statement are, respectively, the interest of a bank in communicating its decision not to honour the cheque and that of a holder of a cheque or collecting bank in knowing of that decision. A "community of interest"[130] is therefore evident.

115 The statement went no further than was necessary, for the occasion was published only to those having an interest in what it conveyed. It was therefore fairly warranted by the occasion. In such circumstances, the only further requirement for the defence to operate is that the statement be made with honesty of purpose and absent malice. Those requirements presented no difficulties for Westpac in this case. However, it should not be assumed that recklessness will never be an issue for banks where wrong decisions are made concerning the dishonour of cheques. Much may depend upon the care taken to instruct

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127 [1950] IR 195.

128 *Pyke v Hibernian Bank* [1950] IR 195 at 221-222.

129 *Pyke v Hibernian Bank* [1950] IR 195 at 222.

130 *Howe & McColough v Lees* (1910) 11 CLR 361 at 369 per Griffith CJ.

employees about matters relating to the operation of accounts, including relevant statutory provisions. The awareness of banks that the defence might be denied should encourage the adoption of good practices. But in this case the plaintiff's allegation of reckless indifference on the part of Westpac was not pursued and cannot provide a basis for the denial of the defence.

116 The only feature which assumes relevance with respect to the communications in question in this case is that they resulted from a mistake as to the application of a garnishee order to the type of account in question. Here the law recognises the imperfection of human reasoning and understanding[131] and the possibility of carelessness[132]. Mistake does not deny the operation of the defence. The question is whether, given the honest belief of its employee that the account could not be utilised to pay cheques, the bank could fairly be said to consider itself obliged to communicate its decision, a decision in which others were necessarily interested. In my view the answer must be "yes".

117 The appeal should be dismissed with costs.

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131 *Horrocks v Lowe* [1975] AC 135 at 150 per Diplock LJ.

132 *Gatley on Libel and Slander*, 11th ed (2008) at 437 [14.1].