YELDHAM PRICE O'BRIEN LUSK

NARROWING QUALIFIED PRIVILEGE

Introduction

The High Court has recently considered whether a bank can rely on qualified privilege as a defence to a defamation claim brought by a drawer of mistakenly dishonoured cheques.[1] By a majority of three to two, the High Court overturned the decisions of both the trial judge and the Court of Appeal, and held that the defence is not available in such circumstances.

Facts

The appellant, Mr Aktas, was the sole shareholder and director of a real estate agency Homewise Realty Pty Ltd (**Homewise**). Homewise maintained three accounts with Westpac Banking Corporation Limited (**the Bank**), including two trust accounts.

In 1997, an unrelated party obtained a garnishee order against Homewise. The garnishee order was then issued to the Bank. By law, the garnishee order could not be applied to trust accounts.[2] Nonetheless, the Bank mistakenly applied the order to all of Homewise's accounts, including its trust accounts.

Without knowledge of the Bank's mistake, Homewise drew 30 cheques on its trust accounts and forwarded them to its clients. All of the cheques were dishonoured and the Bank returned them to the payees or the collecting bank, each endorsed with the words '*Refer to Drawer*'. It was alleged that Homewise's clients reacted adversely after it became known that cheques had '*bounced*'. As a result, Mr Aktas brought proceedings against the Bank, including in defamation.[3]

At first instance

Pursuant to s7A of the now repealed *Defamation Act* 1974 (NSW) (which was in force at the time of the trial), a jury was entitled to determine the question whether the Bank had published defamatory imputations, and the judge was entitled to determine any defences and assess damages.

At first instance, the jury determined that the Bank had, by the words '*Refer to Drawer*', published defamatory imputations.[4] The phrase '*Refer to Drawer*' was commonly understood to mean that the bank account had insufficient funds to meet the payment of a cheque.

The trial judge, Fullerton J, however found that the publication was protected by the common law defence of qualified privilege. This defence applies if there is a reciprocal duty and/or interest on the part of the publisher and the recipient in the publication being made.

Fullerton J held that the relationship between the Bank and the payees justified a publication in respect of its refusal to pay the cheques. In other words, her Honour considered that the Bank had an interest to provide, and the payees had a corresponding interest to receive the relevant publication, namely the endorsement of the cheques with the words '*Refer to Drawer*'. This was despite the fact that the publication was premised on a mistake.[5]

---

[1] *Aktas v Westpac Banking Corporation Limited* [2010] HCA 25.

[2] Section 36(2) of the *Property, Stock and Business Agents Act* 1941 (NSW).

[3] Both Mr Aktas and Homewise also brought proceedings in breach of contract and negligence. However, this article deals only with the issues arising from the defamation action. It should be noted that prior to the *Defamation Act* (NSW) 2005, a corporation generally had no cause of action for defamation in New South Wales.

[4] It is important to note that the act of dishonoring a cheque did not give rise to the defamation claim. Instead, it was the notice of dishonour that was defamatory.

[5] For more details regarding the first instance decision, see *Aktas v Westpac Banking Corporation* [2007] NSWSC 1261.

Mr Aktas appealed to the Court of Appeal of New South Wales.

Court of Appeal

On 9 February 2009, the Court of Appeal (Ipp JA, Basten JA and McLellan CJ) unanimously dismissed the appeal.[6] Their Honours affirmed that the Bank had a duty to communicate its decision to refuse payment of the cheques to the payees. At the same time, the payees had an interest in receiving that communication. In this respect, the defamatory imputations which the jury found to arise were protected by qualified privilege.

Their Honours further noted that public interest required that the duty and interest of the Bank and the payees should be preferred to the protection of Mr Aktas' reputation. In this respect, McClellan CJ, who gave the leading judgment, stated:

> '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 should be protected. To my mind those reasons are persuasive in the present circumstances.'

The *Cheques Act* obliges a bank either to pay the holder of a cheque duly presented or to dishonour the cheque '*as soon as is reasonably practicable*'.[7] In other words, the publication by the Bank was made in the furtherance of the statutory scheme, and was necessary to provide prompt advice to the payees that the cheques had not been honoured. The Court of Appeal considered that promptness in the Bank's advice to the payees justified a necessary public interest for qualified privilege.

High Court

On 11 December 2009, Mr Aktas was granted special leave to appeal to the High Court. The sole ground of appeal was that the Court of Appeal had erred in holding that the Bank's publication was published on an occasion of qualified privilege. A majority of the High Court (French CJ, Gummow J and Hayne J) held in favour of Mr Aktas.

It was common ground between the parties that the imputation of the phrase '*Refer to Drawer*' was defamatory. The issue before the High Court was whether an occasion existed in which it was preferable, in the interest of public policy, that freedom of communication between the Bank and the payees should be given priority over the protection of Mr Aktas against loss of reputation. In determining this question, the majority considered the following factors in their joint judgment.

Firstly, their Honours found that there were at all relevant times sufficient funds in Mr Aktas' trust accounts to meet the cheques, and the cheques were otherwise regular on their face. In this respect, the Bank never had any right at all to dishonour the cheques. It follows that the Bank could not place any reliance upon s67(1) of the *Cheques Act* as a source of a legal duty which could found the necessary public policy interest for qualified privilege.[8]

Secondly, one supposed public interest identified by the Court of Appeal was prompt advice to the payee that the cheque had been dishonoured. Whilst recognising the importance of prompt advice, their Honours considered that this end would be achieved by the relevant sections of the *Cheques Act*, and there was no need to engage the legal principles of qualified privilege in order to effect its implementation.

Thirdly, reliance was placed on the UK decision of *Davidson v Barclays Bank*[9] in which it was held there should be a communication between a bank and the payee of a cheque, if and only if, the bank wished to dishonour the cheque. For the payees, there would be no need for any communication from the bank regarding the fate of the cheque, if it was met on presentation.

---

[6] For a more details of the Court of Appeal decision, see *Aktas v Westpac Banking Corporation* [2009] NSWCA 9, and YPOL publication '*Defamation and qualified privilege'* by Robert Finnigan dated March 2009.

[7] See s67(1) of the *Cheques Act* 1986 (Cth).

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

[9] [1940] a All ER 316.

Again, given that there were sufficient funds in Mr Aktas' trust accounts, and that the cheques were regular on their face, their Honours considered that there was no reason for the Bank to make any communication about the fate of the cheque to the payees.

Fourthly, no other public interest or advantage to society was identified in the Bank's argument. Indeed, the majority found the absence of a public interest was demonstrated by the absence of any reciprocity of interest between the Bank and the payees of the cheques. Their Honours acknowledged that the Bank had an interest in communicating because it refused to pay. However, the payees had no reciprocal interest in receiving that communication, given that the cheques were regular on their face, and that there were sufficient funds in the drawer's accounts to meet the payments. In other words, the Bank made the communication on the basis of what it perceived to be *its* interests. However, for the payees of the cheques, there was no need for any communication from the Bank about the fate of the cheques, if the cheques were (and which they should have been) met on presentation.

Lastly, their Honours noted that, in the interests of the community, qualified privilege ought not attach to the occasion of such communication. On the other hand, to hold banks responsible to their customers for defamation would be conducive to maintaining an efficient and stable banking system, and a high degree of accuracy in the banks' decisions in relation to paying or dishonouring cheques.

Based on the above reasons, the majority of the High Court allowed the appeal and entered a verdict for Mr Aktas with damages in the amount of $50,000 with interest plus costs.

Dissenting judgments

Contrary to the view of the majority, Heydon J and Kiefel J held that the Bank had a duty and interest to give notice of dishonour, and the payees had a corresponding interest in receiving that notice.

Heydon J held that the Bank's duty and interest arose from its obligations to ensure proper compliance with the garnishee order, and to ensure that the payees, who were expecting the cheques would be met, were notified of what had happened and why. On the other hand, the payees had a reciprocal interest in knowing about the capacity of Homewise to pay out of the trust accounts, and in being given information enabling them to approach Homewise with a view to remedying any error in relation to payment of the cheques.

Kiefel J held that the reciprocity of interest arose from the simple fact that the Bank had an interest in communicating its decision not to honour the cheques, and that the payees had an interest in knowing that decision. The communication in question, '*Refer to Drawer'* was an ordinary business communication, and the law recognises that there is a public interest in such communications being made freely, without fear of incurring liability in defamation.

Their Honours further held that the fact that the communication was premised on a mistake did not deny the operation of the qualified privilege defence. In particular, Heydon J acknowledged that there are ample legal authorities which recognise the existence of a privileged occasion despite the defendant's mistaken view of the circumstances.[10] Similarly, Kiefel J noted that the law recognises the imperfection of human reasoning and understanding, and the possibility of carelessness.[11] In this respect, mistakes do not deny the operation of the defence.

Observations

It was expected that this judgment would clarify and confirm the law in respect to the application of the defence of qualified privilege in circumstances where it is raised to defeat a claim for defamation based upon a publication made in error, but where there were public policy grounds for making the publication. The Court of Appeal's judgment (in favour of the application of the defence to this claim) was seen as a positive development for defendants because it clarified the circumstances in which defendants may avail themselves of the

---

[10] See for example, *Pyke v The Hibernian Bank Ltd* [1950] IR 195 at 222.

[11] See for example, *Howe & McColough v Lees* HCA 67; (1910) 11 CLR 361 at 369 per Griffith CJ, and *Horrocks v Lowe* [1975] AC 135 at 150 per Diplock LJ.

defence of qualified privilege (particularly those, including professional advisers and directors and officers of corporations, who by the nature of their business publish material to third parties on behalf of, or in connection with, their obligations to clients).

The High Court's judgment has been regarded in some quarters as somewhat surprising. The rationale for narrowing the defence is based on an assumption that the public benefit of imposing greater discipline on banks' communications concerning creditworthiness is of greater value than the public benefit of encouraging freedom of communication between banks and the public. However, the strong divergence of opinion between the majority and minority judgments demonstrates the differing public policy approaches to this issue. Whilst it might be said that this particular case may be confined to the banking industry, it arguably has a broader application to all potential defamation defendants who make communications concerning their clients to third parties. The judgment reinforces the responsibility for ensuring that communications are accurate in all circumstances and sends a clear message that the law will hold publishers to account for erroneous communications even where there are obligations to make the communication (such as the statutory obligation under the *Cheques Act* which applied in these circumstances). Thus, the decision heralds a narrowing of the defence of qualified privilege, but it is unlikely to represent the court's final word on the topic.

In the balance between accountability to clients and the extent of communication with third parties, the former prevailed in this case. It remains to be seen how far this principal can and will be extended beyond the banking industry.

September 2010

This article was prepared by Farah Meldrum and Robert Finnigan.

For further assistance with defamation matters, please contact Robert Finnigan, Senior Associate (t: 9231 7018, e: rfinnigan@ypol.com.au) or Farah Meldrum, Solicitor (t: 9231 7058, e: fmeldrum@ypol.com.au).

LEVEL 2, 39 MARTIN PLACE
SYDNEY NSW 2000

DX 162 SYDNEY

T: +61 2 9231 7000
F: +61 2 9231 7005
WWW.YPOL.COM.AU

YPOL PTY LTD TRADING AS
YELDHAM PRICE O'BRIEN LUSK
ACN 109 710 698