

6-1-1996

## National Australia Bank Ltd v Hokit Pty Ltd - Greenwood, Macmillan and Tai Hing Revisited

David Morrison

Patrick Quirk  
*Bond University*

---

### Recommended Citation

Morrison, David and Quirk, Patrick (1996) "National Australia Bank Ltd v Hokit Pty Ltd - Greenwood, Macmillan and Tai Hing Revisited," *Bond Law Review*: Vol. 8: Iss. 1, Article 5.  
Available at: <http://epublications.bond.edu.au/blr/vol8/iss1/5>

This Commentary is brought to you by the Faculty of Law at [ePublications@bond](mailto:EPublications@bond). It has been accepted for inclusion in Bond Law Review by an authorized administrator of [ePublications@bond](mailto:EPublications@bond). For more information, please contact [Bond University's Repository Coordinator](#).

---

# National Australia Bank Ltd v Hokit Pty Ltd - Greenwood, Macmillan and Tai Hing Revisited

## **Abstract**

The appeal decision of National Australia Bank Ltd v Hokit Pty Ltd raises significant points of law surrounding one of the most common of legal relationships, that of banker and customer. This paper considers the issues raised by Hokit's case, particularly the ambit of the implied contractual duties owed by a customer to a bank. Whilst previous Australian courts have considered customers' duties in relation to the conduct of the customer's account and dealings with the bank, Hokit's case considered the extent of the duty in the wider context of the particular customer's business practices including, for example, whether a customer owed a duty to prevent irregular banking transactions. Accordingly this paper will first consider the facts of Hokit's case and the judgment of Giles CJ and then the decision of the New South Wales Court of Appeal's consideration of the matter, commenting on the various issues raised.

## **Keywords**

National Australia Bank Ltd v Hokit Pty Ltd, banks, bank customer duties

NOTES

NATIONAL AUSTRALIA BANK LTD V HOKIT PTY LTD - GREENWOOD,  
MACMILLAN AND  
TAI HING REVISITED

By  
**David Morrison**  
Faculty of Business  
Queensland University of Technology

and

**Patrick Quirk**  
School of Law  
Bond University

## Introduction

The appeal decision of *National Australia Bank Ltd v Hokit Pty Ltd*<sup>1</sup> raises significant points of law surrounding one of the most common of legal relationships, that of banker and customer. This paper considers the issues raised by *Hokit's* case, particularly the ambit of the implied contractual duties owed by a customer to a bank. Whilst previous Australian courts have considered customers' duties in relation to the conduct of the customer's account and dealings with the bank,<sup>2</sup> *Hokit's* case considered the extent of the duty in the wider context of the particular customer's business practices including, for example, whether a customer owed a duty to prevent irregular banking transactions.<sup>3</sup> Accordingly this paper will first consider the facts of *Hokit's* case and the judgment of Giles CJ and then the decision of the New South Wales Court of Appeal's consideration of the matter, commenting on the various issues raised.

---

1 NSW Commercial Division 50220/94 decision, 7 July 1995 per Giles CJ in *Hokit Pty Ltd and Ors v Banno and Ors*; NSW Court of Appeal CA 40542/95, 17 June 1996 per Mahoney P, Clarke JA and Waddell AJA, on appeal from the first instance. Hereinafter referred to as *Hokit's* case.

2 The High Court in *Commonwealth Trading Bank of Australia v Sydney Wide Stores Pty Ltd* (1981) 148 CLR 304 considered the fraudulent alteration of the payee's name upon a cheque after the cheque had been duly signed. In that case the High Court found the ambit of the contract between banker and customer implied (at page 317) 'a duty upon the customer to take usual and reasonable precautions in drawing a cheque to prevent a fraudulent alteration which might occasion loss to the banker.'

3 The conduct in question included forged signatures on cheques, cheques signed in blank and laxness in the preparation, monitoring and auditing of company accounts.

## **The Facts**

The Cordony family ran a hairdressing business in Sydney through a series of companies including Hokit Pty Ltd ('Hokit'), Ryntip Pty Ltd ('Ryntip') and Maurice A. Cordony and Sons Pty Ltd ('Cordony').<sup>4</sup> All of these companies kept a cheque account with the National Australia Bank Ltd (the 'Bank').

In February 1990 the family took on a new bookkeeper and office administrator who subsequently commenced forging Hokit company cheques primarily by forging the signature of authorised signatories. The forgeries involved alteration of Hokit records and comprised the following innovations:

- (i) drawing and negotiating cheques and then subsequently making an accounting adjustment to note that the cheques were in fact cancelled<sup>5</sup>
- (ii) drawing cheques in favour of one payee and recording the name of a different payee on the cheque butt;
- (iii) drawing cheques for one sum of money and recording a different sum of money on the cheque butt;<sup>6</sup>
- (iv) drawing cheques for legitimate business expenditure for correct sums, accurately recorded but with forged signatures.<sup>7</sup>

Upon discovery of the forgery Hokit sued both the bookkeeper and the Bank. The bookkeeper did not defend Hokit's claim and Giles CJ found in favour of Hokit.<sup>8</sup> The Bank defended the claim made with respect to the relevant transactions, namely the cheques signed by the bookkeeper and the unsigned cheques.

Particularly the Bank gave a three tiered defence<sup>9</sup> by alleging first that although some of the cheques were not in fact signed by the relevant signatory, Mr Mark Cordony, these cheques were signed under his authority. Second, it was alleged that Mr Mark Cordony had full knowledge of the bookkeeper's fraud and took no action thereby precluding Hokit's later claim that the cheques were signed without authority. Third, the Bank alleged breach of a duty on the part of Hokit to take care to prevent the

---

4 Hereinafter referred to collectively as 'Hokit'.

5 In these cases the cheque butts noted the cheque as cancelled.

6 Including cheques payable to 'cash'.

7 Including the drawing of cash cheques for payment of wages.

8 Particularly that the bookkeeper was 'liable to the plaintiff [Hokit] in respect of the cheques bearing forged signatures and...two unsigned cheques' the latter having been paid to the bookkeeper's benefit. See Giles CJ at page 6 of original report.

9 See generally Giles CJ at page 6.

(1996) 8 BOND L R

irregular transactions. It was alleged that in respect of this breach the duties arose either as an implied term of the banker-customer relationship or generally in tort.

### **Decision at first instance**

After consideration of Australian and foreign authorities, Giles CJ of the Supreme Court of New South Wales at first instance made an overall finding for the plaintiffs.

#### *First defence*

The Bank's first line of defence, that some of the cheques were in fact signed with authority, was successful and relieved it of liability in that respect. These cheques, which had been drawn to 'cash' and were used to pay head office wages, were found to have been drawn with relevant authority. This conclusion was based partly on a finding that Mark Cordony 'knew that (the bookkeeper) was signing head office wages cheques in his name'.<sup>10</sup>

#### *Second defence*

The second defence, relating to knowledge of and acquiescence in signing, was unsuccessful.<sup>11</sup> On the evidence before him, Giles CJ accepted that the Cordonys were unaware of the bookkeeper's forgeries.<sup>12</sup>

His Honour, having determined that Mr Mark Cordony gave the bookkeeper authority to sign wages cheques in his name and with his authority<sup>13</sup> and having found that Mr Mark Cordony was otherwise ignorant of the bookkeeper's forgeries<sup>14</sup> then gave consideration as to whether Mr Mark Cordony's knowledge and acquiescence of the bookkeeper's drawing of wages cheques precluded Hokit from 'denying the regularity of all the other cheques signed by [the bookkeeper] in his name'.<sup>15</sup> His Honour distinguished the case of *West v Commercial Bank of Australia Limited*<sup>16</sup> where a customer was precluded from denying the regularity of cheques

---

10 Giles CJ at page 9 noted that, 'In particular...in order that the head office wages were duly paid on the many occasions when Mr Mark Cordony did not sign the cheque, including for weeks on end, the most likely explanation is that [the bookkeeper] signed the cheque in his name with his authority'.

11 Giles CJ at page 12 made a distinction between 'cheques for legitimate expenses of [Hokit]' and those cheques drawn for the bookkeeper's benefit. With respect to cheques of the former type, His Honour noted at page 12 that 'it was apparent that Mr Mark Cordony did not keep up with the detail of such payments, and I do not think that he had such familiarity with the state of the accounts...that he...realised that payments were being made otherwise than on his signature'. For those cheques not drawn for legitimate expenses of Hokit, Giles CJ stated that 'it is unlikely that Mr Mark Cordony knew that [the bookkeeper] was appropriating a lot of what was in substance his money and did not put a stop to it'.

12 Giles CJ at page 13 was not persuaded that Mr Mark Cordony 'knew of and acquiesced in [the bookkeeper] signing in his name cheques other than for head office wages'.

13 Giles CJ at page 9.

14 See Footnote 12.

15 Giles CJ at page 14.

16 (1935) 55 CLR 315.

signed by only one signatory when two were required. In that case the High Court held that:

Departure from an assumption upon which another person has acted to his detriment is not permitted to a party who, knowing or believing the other labours under a mistake in adopting it, has refrained from correcting him when it was his duty to do so.<sup>17</sup>

Giles CJ saw the difference between *West's* case and the present one as being

that in the present case there was no reason to conclude that the Bank had any view about the signatures which its customer's silence caused it to put aside. There was no evidence that the Bank had recognised that signatures in the name of Mr Mark Condony were not genuine and laboured under the mistake that all cheques bearing similar non-genuine signatures might be properly or safely paid out of the plaintiff's accounts.<sup>18</sup>

His Honour found that there was no evidence of, or argument for, detriment to the Bank other than the payment of the forged cheques.<sup>19</sup> Accordingly, Giles CJ distinguished *West v Commercial Bank of Australia Limited*<sup>20</sup> on the basis that:

The Bank laboured under the mistake that all cheques bearing similar non-genuine signatures might be properly or safely paid out of the plaintiffs' accounts. From the viewpoint of Mr Mark Cordony, the highest assumption known to him could have been that the Bank believed that it could properly and safely pay the cheques for head office wages signed in his name by [the bookkeeper].<sup>21 22</sup>

### *Third defence*

The Bank's third defence was that Hokit owed the Bank the following implied duties arising from the banker-customer relationship:

- (a) to exercise reasonable precautions to prevent forged cheques being presented to the Bank;

---

17 Ibid at page 322 per Rich, Starke, Dixon and McTiernan JJ.

18 Giles CJ at page 15.

19 Giles CJ at page 14.

20 (1935) 55 CLR 315.

21 Giles CJ at page 15.

22 In the course of this discussion Giles CJ cited principles laid down in *Greenwood v Martin's Bank Ltd* [1933] AC 51, *Silovi Pty Ltd v Barbaro* (1988) 13 NSWLR 466, *Commonwealth v Verwayen* (1990) 170 CLR 394, *Brown v Westminster Bank Ltd* (1964) 2 LIR 187 and *Tina Motors Pty Ltd v Australian and New Zealand Banking Group Ltd* (1977) VR 205.

(1996) 8 BOND LR

- (b) to have in place, and implement, systems by which senior management of the plaintiffs could ascertain within a reasonable time whether their accounts were being debited with amounts not authorised by the plaintiffs;
- (c) if the plaintiffs' accounts were not audited by external accountants, to carry out audits or checks by appropriately qualified officers of the plaintiffs; and
- (d) if the directors of the plaintiffs were not sufficiently qualified or experienced to carry out an audit or check of the accounts, to engage external accountants to carry out audits.

On the other hand Hokit submitted that the only duties owed by a customer to its banker in this context are (i) the duty to report forgeries as soon as they become known and (ii) the duty to take reasonable precautions in the drawing of cheques in order to prevent fraud or forgery (the so-called *Greenwood*<sup>23</sup> and *MacMillan*<sup>24</sup> duties). Giles CJ noted that the Privy Council in *Tai Hing Cotton Mill Ltd v Liu Chong Hing Bank Ltd*:<sup>25</sup>

rejected the existence of a duty to exercise such precautions as a reasonable customer in his position would take to prevent forged cheques being presented to the Bank, and of a lesser duty to check periodical bank statements so as to be able to notify the Bank of any unauthorised transactions. It was held that neither duty was to be implied as a necessary incident of the banker-customer relationship or imposed by the general law of tort.<sup>26</sup>

His Honour also noted cases from other jurisdictions which supported the Privy Council's decision, particularly the New Zealand Court of Appeal in *National Bank of New Zealand v Walpole and Patterson Ltd*<sup>27</sup> and the Supreme Court of Canada in *Candian Pacific Hotels Ltd v Bank of Montreal*.<sup>28</sup>

Giles CJ further noted that the above line of authority had been criticised by various commentators,<sup>29</sup> however his Honour followed those expressed views.<sup>30</sup> In doing so he noted the observation of Priestly JA in *Westpac Banking Corporation v Metlej*<sup>31</sup> where Priestly JA stated that:

---

23 *Greenwood v Martin's Bank Ltd* [1933] AC 51.

24 *London Joint Stock Bank Ltd v MacMillan and Arthur* [1918] AC 777.

25 [1986] 1 AC 80.

26 Giles CJ at page 18.

27 [1975] 2 NZLR 7.

28 (1987) 40 DLR (4th) 385.

29 Giles CJ at page 18.

30 Acknowledging that His Honour was not bound by them, there being no binding Australian authority.

31 His Honour cited *Cook v Cook* (1986) 162 CLR 376 at 390, *Chappell v TCN Channel Nine Pty Ltd* (1988) 14 NSWLR 153 at 161-2 and *Ballina Shire Council v Ringland* (1994) 33 NSWLR 680 at 688 in support. Despite counsel for the plaintiffs urgings, his Honour did not consider the reasoning of the High Court in *Commonwealth Trading Bank of Australia v Sydney Wide Stores*

It seems rather strange that two duties and two only could spring from the banker-customer relationship upon the customer: why those two? What gave rise to them? Could not the relations which gave birth to those duties in particular circumstances give rise to somewhat different duties in somewhat different circumstances?<sup>33</sup>

His Honour also stated that without being exhaustive, the following matters may be considered:

A bank is under a heavy obligation to its customer, in that if it pays a forged cheque it is prima facie liable to its customer because it has acted in the absence of a mandate, no matter how skilful the forgery: *London and River Plate Bank v Bank of Liverpool* [1886] 1 QB 7; *London Joint Stock Bank v MacMillan*. The days when the banker-customer relationship was a personal relationship, in which the banker was likely to be familiar with and able to verify his customer's signature, are long gone, and the volume of cheque transactions in modern times is such that it is unrealistic to expect a bank always to detect forgery. That a customer owes at least a limited duty to the bank in relation to the drawing of cheques is recognised in the cases culminating in *Tai Hing Cotton Mill Ltd v Liu Chong Hing Bank Ltd*, and it may fairly be asked why a duty to exercise reasonable care in the manner of drawing a cheque is a necessary incident of the banker-customer relationship but a duty (say) to exercise reasonable care to prevent the unauthorised drawing of a cheque is not.<sup>34</sup>

#### *Duty in tort*

Giles CJ considered that a more equitable balance between banker and customer<sup>35</sup> might be possible by finding a customer to owe a tortious duty in the event that an implied contractual duty, arising from the customer-banker contract, could not be found.<sup>36</sup> His Honour stated that such a duty of care required by a customer 'might be found in particular circumstances on the general principles relating to duty of care to avoid economic loss'.<sup>37</sup>

Notwithstanding the possibility of tortious obligations arising from the relationship between banker and customer his Honour found that a wider duty did not exist and if appropriate, that issue might be determined by an

---

*Pty Ltd* (1981) 148 CLR 304, which was binding upon him, to have excluded an expansion of the relevant duty.

32 (1987) Australian Torts Reports 80-102 at page 68,643.

33 Ibid at page 68, 646.

34 Giles CJ at page 20.

35 Giles CJ at page 21.

36 His Honour noted that this was possible by application of the authority in *Hawkins v Clayton* (1988) 164 CLR 539.

37 *Jaensch v Coffey* (1984) 155 CLR 549, *Council of the Shire of Sutherland v Heyman* (1985) 157 CLR 424, *San Sebastian Pty Ltd v The Minister administering the Environmental Planning and Assessment Act 1979* (1986) 162 CLR 340.



(1996) 8 BOND L R

appellate court.<sup>38</sup> The following reasons were given by Giles CJ for following existing authority:

- (i) a well established accepted position in England, Canada and New Zealand;
- (ii) the desirability of 'uniformity in banking law';<sup>39</sup>
- (iii) the need for careful consideration before altering existing well-established legal principles;
- (iv) the ability of the bank to expressly alter the terms of the contract between itself and the customer;
- (v) the difficulties of imposing a tortious duty upon a customer where those duties cannot be stated with sufficient certainty; and
- (vi) the unfairness of imposing such tortious duties upon customers with widely differing abilities to deal with such matters.<sup>40</sup>

*The extent of the plaintiff's breach - useful findings of fact*

To assist any appeal court's deliberations on the matter the trial judge made extensive findings of fact. In particular he found that the plaintiffs 'were in breach of the (assumed) elements of the duty for which the Bank contended'.<sup>41</sup> More specifically, he found that Mr Mark Cordony had no relevant qualifications which would have enabled him to check the activities of the bookkeeper, that he was rarely in the office, that he in fact did not check the activities of the bookkeeper and did not engage anyone else to do so, and that bank statements were never checked against a cash book or even against cheque butts.<sup>42</sup> In addition, many of the family companies had not prepared financial statements for a number of years and those which were prepared were not audited. The parties themselves admitted to often leaving signed blank cheques in the custody of the bookkeeper and not verifying their proper completion or application. Monthly income and expenditure statements were checked - but inadequately and not against primary records.<sup>43</sup> Giles CJ stated that:

If the duty be no greater than as submitted by the plaintiffs, there was no breach of duty on their part. If, on the other hand, there was a duty as submitted by the Bank, it was breached by the plaintiffs in each of its elements.<sup>44</sup>

---

38 Giles CJ at page 22.

39 Giles CJ at page 22.

40 Giles CJ at page 21 was also alert to the impact any new rule would have on a 'wide variety of customers from the major, well resourced and knowledgeable to the minor and all but illiterate'.

41 Giles CJ at page 24.

42 Giles CJ at page 23.

43 Giles CJ at page 24.

44 Giles CJ at page 22.

*Other matters*

Hokit also made a claim against its bookkeeper for misappropriated cash<sup>45</sup> and a cross-claim was made by the Bank against the bookkeeper.<sup>46</sup>

The Bank then appealed the decision of Giles CJ and the matter was heard in the Supreme Court of New South Wales by Mahoney P, Clarke JA and Waddell AJA.

## Court of Appeal decision

The basis of the Bank's appeal was to:

- (i) extend the narrow exceptions for bank liability in the event of forged cheques to impose upon a customer a responsibility to take care;

and

- (ii) seek application of the doctrine of estoppel to prevent Hokit from denying the regularity of all of the cheques drawn by the bookkeeper.

*Mahoney P*

On appeal the Bank argued that the existing implied duties relating to forgery in the banker-customer relationship be extended to include Hokit's conduct. Mahoney P noted that this essentially amounted to a request by the Bank 'to change the law'.<sup>47</sup> His Honour noted the essential debtor-creditor nature of the banker-customer relationship<sup>48</sup> and the application of the doctrine of estoppel or contrary intervention by the customer which might change the bank's obligation to repay the debt. Mahoney P reinforced the 'traditional' duty of the customer with respect to forgery and the qualifications to this duty.<sup>49</sup> His Honour referred to the facts of *Tai Hing Cotton Mill Ltd v Liu Chong Hing Bank Ltd*<sup>50</sup> noting the similarity with Hokit as to the customer's lack of proper accounting procedures and controls.<sup>51</sup> In that case Mahoney P noted that the bank had:

---

45 This claim was not raised at the initial hearing but arose subsequently with the result that judgment for a further \$1,764.70 was made in favour of Hokit Pty Ltd. There was nothing remarkable in this finding save that the trial judge was prepared to act upon hearsay evidence which he described as having a 'high degree of reliability'.

46 This matter was also not raised at the initial hearing. The Bank cross-claimed against the bookkeeper in deceit and was successful on the basis that, following general principles, a forger can be liable to a paying bank.

47 Mahoney P at page 1.

48 Mahoney P at pages 8-9 citing *Foley v Hill* (1848) 2 HLC 28 and *London Joint Stock Bank v MacMillan and Arthur* [1918] AC 777 at page 814 and page 830 with approval.

49 Mahoney P at pages 9-10.

50 [1986] AC 80.

51 Mahoney P at page 10.

(1996) 8 BOND LR

contended that "... the obligations of care placed upon banks in the management of a customer's account which the courts have recognised have become with the development of banking business so burdensome that they should be met by a reciprocal increase of responsibility imposed upon the customer..."<sup>52</sup>

This plea was not accepted by the Privy Council who reaffirmed the 'traditional' view,<sup>53</sup> and indeed Mahoney P noted that 'there is no decision of the High Court to the contrary'.<sup>54</sup>

In considering the question whether Hokit owed some additional duty to the Bank, his Honour considered that the proposed obligation 'would be implied as a term of the contract if otherwise the whole transaction would become 'inefficacious, futile and absurd'.<sup>55</sup> Mahoney P had difficulty in accepting the proposition that the basis of the relevant customer obligations were grounded in the tort of negligence.<sup>56</sup> Accordingly, his Honour found it 'difficult to determine precisely the relationship between the mischief suggested and the remedy proposed'<sup>57</sup> and therefore Mahoney P refused to extend the obligations of Hokit to the Bank to include any greater obligation of conduct by the customer based on either the contractual nature of the relationship banker-customer or in tort.<sup>58</sup> His Honour noted that in order for the Court to consider such a determination it was necessary to definitively determine 'four things: what is the nature of the duty the Court is asked to create or extend; why the customer's existing duties are to be changed; what is the additional duty proposed; and what are the benefits and burdens which will result from the imposition of it'.<sup>59</sup>

Accordingly, Mahoney P dismissed the Bank's appeal.<sup>60</sup>

*Clarke JA*

Clarke JA cited Lord Finlay in *London Joint Stock Bank v MacMillan and Arthur*<sup>61</sup>

of course the negligence must be in the transactions itself, that is, in the manner in which the cheque is drawn. It would be no defence to the banker, if the forgery had been that of a clerk of a customer, that the latter had taken the clerk into his service without

---

52 Mahoney P at page 11 from *Tai Hing Cotton Mills Ltd v Liu Chong Hing Bank Ltd* at pages 105-106.

53 Mahoney P at page 11.

54 Mahoney P at page 13.

55 Mahoney P at page 14.

56 Various propositions were presented for the Court's consideration including customer banker proximity and the duty to avoid negligence, the latter in Mahoney JA's view being grounded in estoppel. See Mahoney P at pages 14-17.

57 Mahoney P at page 18.

58 Mahoney P at page 22.

59 Mahoney P at page 13.

60 Waddell AJA agreed with the judgment of Mahoney P.

61 [1918] AC 777, also referred to by Mahoney P at pages 15-16.

NATIONAL AUSTRALIA BANK LTD V HOKIT PTY LTD -  
GREENWOOD, MACMILLAN AND TAI HING REVISITED

sufficient enquiry as to his character. Attempts have often been made to extend the principle of *Young v Grote*<sup>62</sup> beyond the case of negligence in the immediate transaction, but they have always failed.<sup>63</sup>

His Honour continued to consider various authorities<sup>64</sup> and concluded that the Bank's contention to widen the duty owed by the customer to the bank in contract or tort should fail because:

not only has the bank failed to show that there are any circumstances which should lead courts in Australia to strike out on a different path but ... the recent passing ... of the *Cheques and Payment Orders Act* 1986 in which no change was made to the substantive common law of banker and customer stands as a very strong factor favouring the retention of the established principle.<sup>65</sup>

Clarke JA made further comment in respect of a duty of care which Hokit may have owed the Bank to prevent economic loss,<sup>66</sup> denying any liability to Hokit on the basis that the Bank had failed 'to establish any relevant reliance for the purposes of the imposition of the duty'.<sup>67</sup> In any event his Honour felt 'both as a matter of fairness and policy<sup>68</sup> a clear rule was preferable 'to the imposition of a duty of care which may conceivably lead to much uncertainty in application<sup>69</sup> and that this view was supported by 'commercial considerations'.<sup>70</sup>

Clarke JA noted that in seeking to widen the duty, the Bank:

did not argue that the term was implied as a matter of law. Nor did it argue that the implied term arose out of custom or usage. Rather it submitted that the term should be implied as representing the intention of the parties.<sup>71</sup>

His Honour found the Bank's submission to be without substance since it was in his Honour's view impossible 'to contend that the term is necessary to give business efficacy to the contract'.<sup>72</sup>

As to estoppel, Clarke JA followed Giles CJ at first instance and found that even though Hokit knew and acquiesced in the bookkeeper signing certain cheques, this did not constitute a representation by Hokit to

---

62 [1827] 4 Bing 253; 130 ER 764.

63 Clarke JA, page 7.

64 Clarke JA, pages 9-13.

65 Clarke JA, page 14.

66 Clarke JA, pages 14-20.

67 Clarke JA, page 19.

68 Clarke JA, page 20.

69 Clarke JA, page 21.

70 Clarke JA, page 21.

71 Clarke JA, page 22.

72 Clarke JA, page 22.

(1996) 8 BOND L R

the Bank for the drawing of all fraudulent cheques.<sup>73</sup> In any event his Honour was of the view that:

The failure to call evidence on matters which were solely within the knowledge of the Bank [was] fatal to the estoppel (see *Jones v Dunkel* (1959) 101 CLR 298).<sup>74</sup>

Accordingly Clarke JA dismissed the Bank's appeal.

## Policy

Whilst Giles CJ made passing reference to issues of policy,<sup>75</sup> Clarke JA noted the policy issues raised by the written submissions of the Consumer's Federation of Australia and his Honour's previous comments with respect to the *Cheques and Payment Orders Act* (Cth) 1986<sup>76</sup> 'which did not alter the common law in relevant respects, which also supports my rejection of the duty'.<sup>77</sup>

It seems that the underlying policy issue is best expressed by Murphy J in *Commonwealth Trading Bank of Australia v Sydney Wide Stores Pty Ltd*<sup>78</sup> where his Honour suggested that:

In terms of social policy, there is a real question whether it would be better to let the loss continue to fall on the banking industry. Although the standard of care habitually observed by cheque drawers may fairly be described as low, I am not satisfied that any considerable burden has been imposed on banks by the application of the *Marshall* decision. If in practice, the losses, which to individual bank customers would be onerous, are cumulatively only slight for the banking system in comparison with the vast amount of business done by cheque, a sensible system of loss spreading would be to continue as before. Further if the cumulative losses are now slight, it would be absurd to impose a standard of care such that every drawer of cheques would have to regard employees and associates as potential forgers.<sup>79</sup>

These sentiments underly the 'deep pockets' policy approach of the Appeal Court in *Hokit*. Whilst the decision in *Hokit* clearly follows the established authorities, this does not diminish the importance of the policy considerations herein. Indeed such policy considerations are consistent with the legal result as stated by Murphy J in *Sydney Wide*:

---

73 Clarke JA, page 24.

74 Clarke JA, page 24.

75 Giles CJ, page 20 referred to, inter alia, the nature of the customer's mandate and the bank's 'heavy obligation' to its customer. See footnote 34 above.

76 See footnote 65 above.

77 Clarke JA, page 21.

78 (1981) 148 CLR 304.

79 Ibid at pages 317-318.

NATIONAL AUSTRALIA BANK LTD V HOKIT PTY LTD -  
GREENWOOD, MACMILLAN AND TAI HING REVISITED

This branch of the law can be brought into harmony with other areas (and with the law on this subject in other countries) and undesirable consequences also avoided, by adoption of a standard of care which would not require us to turn into a suspicious society.<sup>80</sup>

## **Conclusion**

Thus the Appeal Court has followed Giles CJ in refusing to be drawn into the interesting question as to whether the ambit of customer obligation towards the banker should be extended in whatever manner. Clarke JA particularly noted, as an intermediate appellate judge, his hesitation in overturning such long accepted principles for the allocation of loss in the event of cheque forgery. Accordingly, the relevant duties remain settled until the Australian High Court is asked to consider them. In the event that this topic remains debated and not considered by the High Court, then perhaps it will be necessary for the legislature to make changes which it considers appropriate. It is our view that there is no immediate need for such change.

---

80 Ibid at page 318.