

*Judgment of the Lords of the Judicial Committee of the Privy Council on the Appeal of The National Bank of Australasia v. Morris, from the Supreme Court of New South Wales ; delivered 13th February 1892.*

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Present :

LORD WATSON.

LORD HOBHOUSE.

LORD MACNAGHTEN.

~~LORD HANNEN.~~

SIR RICHARD COUCH.

[*Delivered by Lord Hobhouse.*]

The Respondent is the Plaintiff in the suit which has led to this appeal, and the Appellants are Defendants. The question is whether the Plaintiff can, as assignee in insolvency of Benjamin Braun, recover from the Defendants the sum of 2,062*l.* 17*s.* 6*d.*, being the amount of two cheques paid to the Defendants by Braun prior to the sequestration of his estate.

On the 17th April 1886 Braun opened an overdraft account with the Sydney branch of the Bank, whose head office is in Melbourne. His overdrafts were secured to the extent of 2,000*l.* by the guarantee of a gentleman named Davies, of whose solvency the Bank was confident. The cheques now in question were paid in by Braun on the 27th and 29th June 1887 ; a time when, as was admitted at the trial, Braun was insolvent. On the 8th September 1887 his insolvency was declared and the order for sequestration made.

It cannot be contended that under the Insolvency Act, 5 Vict., No. 17, Sections 8 or 12, the payments in question were valid against Braun's assignee. Indeed, it seems to have been found that payments to creditors were not sufficiently protected under that statute; for further provision for the purpose was made by the Statute 25 Vict., No. 8. It is thereby enacted that every payment made by any person before the sequestration of his estate to any creditor on account of any just debt due at the time of payment shall, except in the cases after mentioned, be deemed a valid payment. And then follows a proviso that such creditor shall not at the time of payment have known that the debtor was then insolvent.

There is no doubt that Braun's payment was on account of a debt justly due from him to the Bank. The sole question therefore is whether the Bank knew before the 27th June that Braun was insolvent.

The case was tried before Mr. Justice Windeyer and a jury, but the jury have only given a formal verdict. After the evidence had been taken the parties came to the following arrangement:—

“By consent it is agreed that a verdict be entered for Plaintiff, for 2,062*l.* 17*s.* 6*d.*, with leave by consent reserved to the Defendants to move the Full Court to set aside such verdict and to enter it for the Defendants, on the facts or on the law, and the Court to draw inferences of fact, and to give its decision on the facts as a jury might.”

The Defendants then moved the Court to set aside the verdict, and to enter either a verdict for themselves, or a nonsuit, or to grant a new trial, and they obtained a rule *nisi* for that purpose. On argument the Court discharged the rule, so that the verdict stands. The Defendants

appeal from that judgment. This Board has therefore to decide the question of fact whether or no the Bank knew before the 27th June 1887 that Braun was insolvent.

Their Lordships conceive that if the creditor who receives payment has knowledge of circumstances from which ordinary men of business would conclude that the debtor is unable to meet his liabilities, he knows, within the meaning of the Act, that the debtor is insolvent. In this case it is shown by the evidence of Mr. Balfour, the manager of the Sydney branch, and by the documents produced by him, that Braun's account was always overdrawn; that before the 27th June 1887 the Bank had refused on various grounds to honour cheques and notes presented on Braun's behalf, to the number of 34; and that especially five of Braun's promissory notes, for sums amounting to above 550*l.*, were dishonoured on the 15th, the 22nd, and the 25th June, all on the ground that, if paid, his overdrafts would have exceeded the amount covered by Davies's guarantee.

It further appears, not only that there was cause to believe Braun to be insolvent, but that the Bank were seriously uneasy about his debt to them. As early as the 8th March 1887 the head office at Melbourne wrote to the Sydney branch advising that the account should be gradually reduced. On the 10th March Balfour wrote to Braun requiring him to pay off his debt by instalments, to be completed by the 30th September; and on the 28th May Balfour wrote a more peremptory letter, requiring immediate payment.

Moreover, on the 22nd June, Davies called at the head office to ask that pressure should be brought to bear on Braun. He was informed by the manager that the Bank was doing this, and

would persevere. On which he expressed a hope that the Bank would exhaust Braun before coming on him. On this point it is argued by the Defendants, that Balfour, who received Braun's money at Sydney on the 27th June, did not know what passed at Melbourne on the 22nd June. But whatever may have been the state of Balfour's knowledge, it is the Bank who are sued, and they cannot get rid of knowledge which is brought home to them at Melbourne by alleging the ignorance of their agent at Sydney.

What have the Defendants to set against this strong evidence that the insolvency of Braun was apparent to them? First, that Balfour states that he did not believe or suspect that Braun was insolvent. We need not inquire nicely whether Balfour used the term 'insolvent,' as is suggested by a subsequent passage in his evidence, in a sense compatible with Braun's inability to meet his engagements. It is sufficient that he knew the facts which ought to have shown him clearly enough that Braun could not do so. Secondly, it is pointed out that on the 17th August Davies paid off the balance of the account, 170*l.* 16*s.* 4*d.*, and that Balfour then cancelled his guarantee, which, it is insisted, shows strongly that Balfour must have thought Braun to be solvent on the 27th June. Now with questions between Davies and the Bank their Lordships have nothing to do in this suit. It may be that Balfour thought that the Bank was safe, and that he might prudently release Davies. It may be that he erred in judgment as to Braun's position, or that he erred in law as to the right of the Bank to retain Braun's money. None of these suppositions go to displace the effect of the evidence, showing that before the 27th June, the Bank, through their agent Balfour, and from information at the

head office, knew matters showing clearly enough that Braun was an insolvent man.

The result is that their Lordships concur with the Supreme Court, and that the appeal must be dismissed with costs. They will humbly advise Her Majesty accordingly.

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