Privy Council Appeal No. 15 *of* 1953

Bank of New South Wales – – – – – – *Appellant*

v.

Walter Richard James Laing – – – – – – *Respondent*

FROM

THE FULL COURT OF THE SUPREME COURT OF NEW SOUTH WALES

JUDGMENT OF THE LORDS OF THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL, DELIVERED THE 7TH DECEMBER, 1953

Present at the Hearing:

LORD PORTER
LORD REID
LORD TUCKER
LORD ASQUITH OF BISHOPSTONE
LORD COHEN

[*Delivered by* LORD ASQUITH OF BISHOPSTONE]

This is an appeal by the defendant in the action, against a judgment of the Full Court of the Supreme Court of New South Wales given on 7th October, 1952. By that decision the Full Court dismissed an appeal from a judgment of 19th and 20th May, 1952, of Mr. Justice McClemens, in an action in which the jury was by consent dispensed with at the trial. Mr. Justice McClemens found a verdict and entered judgment for the plaintiff for £19,412 10s. 9d. in circumstances hereinafter appearing.

From January, 1947, to February, 1951, the plaintiff was a customer of the defendant bank and had a current account with it, into which in that period he from time to time paid sums amounting in the aggregate to over £100,000. At intervals during this period cheques were presented to the bank drawn on this account, and were met by the bank. By the 8th February, 1951 (indeed, earlier, in October, 1950), the plaintiff had come to believe or suspect that some of the cheques debited to his account had been forged. These were eight cheques totalling £19,412 10s. 9d. The effect of debiting these cheques to the plaintiff's account was to reduce the credit balance, by 8th February, 1951, to about £18. On that date the plaintiff presented to the defendant bank through the Bank of Australasia eight other cheques for amounts exactly corresponding to that of those which he claimed were forged. If they were forged, the bank should not have honoured them, and if it had not done so, there would, on 8th February, 1951, have been £19,412 10s. 9d. in the account and about £18 to spare; and the eight cheques of that date could accordingly have been met. The bank returned the eight cheques of 8th February, 1951, to the Bank of Australasia endorsed "refer to drawer: *bona fide* dispute arising alleged forgeries". The plaintiff customer thereupon, by specially indorsed writ of 16th February, 1951, claimed £19,412 10s. 9d.

as money "received by the defendants to the use of the plaintiff". Particulars followed of the amounts of the "forged" cheques totalling £19,412 10s. 9d.

The real issue raised by these events was whether the eight suspect cheques were in fact forged or in fact genuine and authorised mandates to draw on the plaintiff's account, and it might not unreasonably have been expected that the parties, or that one of them on whom the onus lay, would give evidence in the box to deny or to affirm the authenticity of the signatures on these cheques of the plaintiff as drawer. However, in the events which happened the pleadings were so framed as, in the view of both parties, to make it unnecessary for either of them to give oral testimony at all. The case was made to turn on a point of pleading. This seems to their Lordships a regrettable development.

The case cannot be understood without bearing in mind that New South Wales has retained the system of pleadings which obtained in England before the Judicature Acts, in fact, that established under the Common Law Procedure Act of 1852; the provisions of which, and the rule made thereunder, are in substance reproduced in the Common Law Procedure Act (New South Wales) of 1899, and the Rules made under that Act. In pursuance of this procedure the plaintiff, on 1st March, 1951, filed a declaration based on the old "*indebitatus assumpsit*" count, in the following terms:—"For money payable by the defendant to the plaintiff for money received by the defendant for the use of the plaintiff and for money payable by the defendant to the plaintiff for money lent by the plaintiff to the defendant." And the plaintiff claimed the sum of £19,412 10s. 9d.

It may be noted, though their Lordships are of opinion that this does not influence the result: (1) that there was a "variance" between the writ and the declaration, since the declaration relied on money had and received and money lent, and the writ, originally, on the former only. This was adjusted by an amendment at the trial, adding to the writ the words "for money lent by the plaintiff to the defendant and" before the words "for money received by the defendants to the use of the plaintiff . . ."; (2) that the particulars given under the writ as it originally stood, as particulars of money had and received, and stating that certain sums were subtracted from the plaintiff's account by forged cheques, could hardly stand as particulars of "money lent" after the writ was amended, except possibly as to the total specified of £19,412 10s. 9d. The amount "lent" to the bank might be measured or particularised by the gross amounts paid in, or by the credit balance at a given time, but assuredly not by the amounts (rightly or wrongly) debited to the account by the bank. However, no application was made based on the insufficiency of the particulars in relation to the added claim for money lent either for further and better particulars or for a stay or for an order to strike out the writ: and their Lordships think nothing turns on this insufficiency.

To the declaration framed on the *indebitatus* count for money lent and money had and received the bank filed the plea of "Never indebted". By his replication the plaintiff joined issue on this plea.

At the trial at Nisi Prius before McClemens, J. and a jury of four, the jury, as already stated, having been dispensed with by consent at a certain stage, neither party gave or called oral evidence. The plaintiff, having called on the defendant bank to furnish a copy of his current account, tendered it (Exhibit A) in evidence, and also relied on the letter of the defendant bank to the Bank of Australasia, p.53.R. The current account showed credits over a long period amounting in the aggregate to over £100,000, and debits which (including the eight disputed cheques) reduced the balance, as on 8th February, 1951, to £18 odd. The letter

from the defendant bank to the Bank of Australasia, dated 12th February, 1951, reads as follows:—

"DEAR SIR,

W. R. J. Laing.

With reference to certain cheques itemized hereunder, bearing date 8th February, 1951, drawn by W. R. J. Laing, presented by you for payment and returned to you herewith with the answer "Refer to Drawer—*Bona fide* dispute state of account arising alleged forged cheques" endorsed thereon, we advise that certain funds which the drawer may have considered were at his disposal and which would have been sufficient to meet such cheques are the subject of a *bona fide* dispute arising out of alleged forgeries.

No.	841474,	for	£2,950	
,,	841471,	,,	2,950	
,,	841473,	,,	2,210	18*s.* 9*d.*
,,	841472,	,,	2,950	
,,	841475,	,,	2,338	0*s.* 8*d.*
,,	841476,	,,	890	15*s.* 8*d.*
,,	841477,	,,	2,225	5*s.* 4*d.*
,,	841478,	,,	2,897	10*s.* 4*d.*

You are authorised to communicate this information to your client."

These documents were tendered by the plaintiff and admitted in evidence (together with other letters which are immaterial to the issue. The letters are to be found in the record under the heading "Exhibit B"). The plaintiff also tendered the eight cheques of 8th February, 1951 (Exhibit C), referred to in the letter of 12th February, 1951, solely as evidence of a "demand", which under the decision of the English Court of Appeal in *Joachimson* v. *Swiss Bank Corporation* (1921) 3 *K.B.* 110 is an essential precondition of a customer's cause of action when suing a bank for a debt due from it in respect of a current account. It is clear that the plaintiff relied on A, B and C cumulatively as admissions by the Bank sufficient to entitle him to succeed. The argument is somewhat elliptically recorded, the formula "argument ensued" occurring repeatedly. Plaintiff's counsel seems to have claimed in the Court of first instance (as he certainly did on appeal to the Full Court) that he had paid money into his current account in excess of the sum claimed and that the last-named sum had been demanded by the cheques of 8th February, 1951, for £19,412. Defendant's counsel, at the close of the plaintiff's case, asked for a non-suit, but this issue was neither argued nor persisted in, since defendant's counsel resiled from it and proceeded to ask instead for a "direction verdict", viz. a direction to the jury that the plaintiff had made out no case. Defendant's counsel proceeded to argue that on 8th February, 1951, there were no funds in the plaintiff's account sufficient to meet the eight cheques then presented. Counsel for the plaintiff then, as already indicated, asked for leave to amend the writ (which had been limited to "money had and received") so as to read "amount due by the defendant to the plaintiff for money lent by the plaintiff to the defendant and for money had and received by the defendant and dealt with in the manner following:—". Then followed particulars of the eight cheques said to have been forged. Counsel for the bank did not oppose this amendment, subject to costs. Counsel for plaintiff made it clear that he was not suing for the dishonour as such of these eight cheques. He merely relied on the presentation of another eight cheques of the same amounts on 8th February, 1951, as a "demand".

The jury were then discharged by consent and the learned judge, on 20th May, 1952, gave judgment for the plaintiff, having reached the conclusion that he could not have directed a jury that the plaintiff had made out no case. After observing that the real issue in the case, viz. the genuineness *vel non* of the eight (earlier) cheques had been burked or

evaded by the parties and that the result of their doing so was to reduce the issue in the main to a technical point of pleading, he proceeded to summarise the arguments presented before him and to hold that there was some evidence (on the pleadings as they stood) to submit for consideration by a jury that " money was lent, that the money was demanded back, and has not been paid " (R. p. 14). The learned judge indicated that in his view the proper plea in such a case as that before him was not " never indebted " but " payment ": an issue which loomed large in the decision, later on, of the Full Court of the Supreme Court. It would seem to follow from this opinion that in the absence of a plea of " payment ", no evidence could be given of drawings on the account which would in law amount to part repayments of the loan or loans. Notwithstanding this, the learned Judge, as reported (R. pp. 12 and 13), disagreed with the plaintiff's submission that while the credit items in the account are admissions by the Bank and evidence for him, the debit items are " not evidence for the Bank, or against " the plaintiff; and says that the plaintiff, having put in this document, must take the document as it stands as a whole. Yet when on the second day of the hearing the Bank puts forward this contention he appears to reject it, and adheres to the decision which he had adumbrated in favour of the plaintiff: basing himself on (1) the presentation of the eight cheques on the 8th February, 1951, and the notation of the Bank thereon (2) the Bank's letter of the 12th February, 1951, as affording some evidence, on the pleadings as they stood, to go to a jury that money was " lent, demanded back, and not repaid " (R. p. 16). He seems at this stage to have treated the account, of which he had ruled that both sides—debits as well as credits—were equally valid and binding, either as affording no evidence in favour of the Bank, or as affording no evidence in favour of either party.

Counsel for the plaintiff does not seem to have relied exclusively on these factors, (1) and (2), either before the trial judge or the Full Court. He relied also on the account, Exhibit A. He alleged in effect that on the common count for " money lent ", the money lent was represented by the gross payments in to the credit side of his account: and that this, plus a demand for an amount not exceeding the payments in, was (on a plea of " never indebted ") the sole precondition of the bank's liability to repay him that amount. He argued further that the only matters which could be raised in answer to such a claim under the plea of " not indebted "—the only plea entered in this case—were either that the money was not " lent " (in the sense above indicated) or that no demand was made. On a plea of " payment " the depletion of the account by authorised withdrawals could be proved: but not under a mere plea of " never indebted ".

The learned judge, having decided for the plaintiff on the ground indicated, the defendant, by notice of appeal filed on 28th May, appealed to the Full Court of the Supreme Court of New South Wales (Street, C.J., Owen and Herron, J.J.).

In his judgment (with which in substance though not in detail the other two judges agreed), Street, C.J. accepted the submission that on an *indebitatus* count for money lent, to which " never indebted " and nothing else was pleaded, the onus on the plaintiff is as follows:—

> " Coming now to the pleadings in the action, the relationship of the parties being that of creditor and debtor, the cause of action was properly framed as an action in debt in the form of a count for money lent. To this count there might be many and various defences, but the only plea put on the file was one of ' never indebted ' and this defined the issue between the parties. The count for money payable for money lent involves the allegation that money was in fact lent to the defendant under a contract, express or implied, in terms capable of giving rise to a presently payable debt, and it involves also the allegation that in fact the money was payable at the time when the action was brought. The plea of ' never indebted ' in the

case of an express contract denies the contract of loan, that is, it denies that the money was lent on a promise *capable of requiring repayment at the date when the action was brought*. (The italics are their Lordships'.)

" In the case of an implied contract, such as the present, which arises out of the proved relationship of banker and customer, it denies the matters of fact from which a promise to repay was capable of being inferred. In other words, it denies the loan, and nothing more. Though the money is owed by the bank when it has been received from the customer, it is not in fact repayable until demand is made, but the assertion of the making of the necessary demand is contained in the allegation that the money was 'payable', as this performs the same function as the allegation in a count framed in *assumpsit* that 'all conditions were fulfilled and all things happened and all times elapsed necessary to entitle the plaintiff' to sue. A plea of '*non assumpsit*' does not put this allegation of performance of conditions precedent in issue any more than it puts in issue the breach alleged. No question arises here, however, in this respect, as the respondent in fact proved the demand, and having proved the relationship of banker and customer and the deposit of large sums of money, far more than sufficient to meet the cheques of the 8th February, 1951, he thereby provided *prima facie* proof of a debt payable at the time of action brought."

" The Bank now argues that the respondent, having put in evidence the whole of the Bank's statements relating to his account, both the credit and the debit sides, he must fail because he has proved that at the date of the demand the Bank only owed him a balance of £18. The appellant's argument is that the Bank's statement shows that there was not sufficient money owing to the respondent at the crucial date to meet the cheques drawn on the 8th February, 1951. This argument is fallacious. Constant reference was made to the balance shown in the books of the Bank on the 8th February, but this means nothing by itself. It does not represent a deposit by the respondent nor a payment by the Bank. It is merely the arithmetical result of a mechanical addition of both the debit and the credit entries, and is a mere summary of the arithmetical effect of those entries. It results from the fact that the books purport to show that while large sums have been paid in by the Respondent, other large sums have also been paid out to him by the Bank, and the balance is reached by reason of the assertion that, while the Bank admits receiving money, it also paid out to the respondent practically the same total as that paid in. It is true that there are cases where both sides of an account, even if tendered by a party for the purpose of using one side only, must be taken into account also in favour of the other party; but these are cases where both sides of the account are relevant to the issues raised between the parties by the pleadings."

" The plea which was filed denying the loan by the respondent is, on the Bank's own books, admittedly unsupportable, for they record the payments to the Bank relied upon by the respondent. To seek to assert that, despite these substantial payments to the Bank, only £18 was owed on the 8th February, 1951, involves necessarily the assertion that money had been repaid to the respondent in such amounts as to reduce his credit balance to that figure."

The gist of this judgment is that the implied contract between customer and banker is to this extent on all fours with the contract between any other creditor and debtor: each payment into the account is a loan and creates a debt. The plea " never indebted " merely puts in issue the payments in—the credit side of the account.

It is quite true that the debtor bank may prove if it can that the amount credited has been reduced by authorised withdrawals to vanishing point (or in the case of an overdraft below that point) and that it suffices

for a bank, refusing to meet a demand for £x, to show that by the time of the demand it has thus been reduced to a point where it falls short of £x. But, so the argument runs, the bank must, in order to prove this, set up a plea, not of " never indebted " but of " payment "—the appropriate plea where a debt is alleged to have been repaid in part or in whole, and no such plea was set up in this case originally, nor was any request for leave to amend in that sense ever asked for, though it would have been granted on terms, as certainly as the plaintiff's amendment of his writ.

The relevant rules under the Common Law Procedure Act of New South Wales may here with advantage be set out—

" Rule 64—

In all actions on simple contract, except as hereinafter excepted, the plea of *non assumpsit*, or a plea traversing the contract or agreement alleged in the declaration, shall operate only as a denial in fact of the express contract, promise, or agreement alleged, or of the matters of fact from which the contract, promise, or agreement alleged may be implied by law.

Exempli gratia.—In an action on a warranty, such pleas will operate as a denial of the fact of the sale and warranty having been given, but not of the breach ; and, in an action on a policy of insurance, of the subscription to the alleged policy by the defendant, but not of the interest, of the commencement of the risk, of the loss, or of the alleged compliance with warranties.

In actions against carriers and other bailees for not delivering or not keeping goods safe, or not returning them on request, and in actions against agents for not accounting such pleas will operate as a denial of any express or implied contract to the effect alleged in the declaration but not of the breach.

Rule 65—

To causes of action to which the plea of ' never was indebted ' is applicable, as provided in the Third Schedule to the Common Law Procedure Act, 1899, and to those of a like nature, the plea of *non assumpsit* shall be inadmissible, and the plea of ' never was indebted ' will operate as a denial of those matters of fact *from which the liability of the defendant arises.* (The italics are their Lordships'.)

Exempli gratia.—In actions for goods bargained and sold, or sold and delivered, the plea will operate as a denial of the bargain and sale, or sale and delivery, in point of fact ; in the like action for money had and received, it will operate as a denial both of the receipt of the money and the existence of those facts which make such receipt by the defendant a receipt to the use of the plaintiff.

Rule 67—

In every species of action on contract, all matters in confession and avoidance, including not only those by way of discharge, but those which show the transaction to be either void or voidable in point of law, on the ground of fraud or otherwise, shall be specially pleaded.

Exempli gratia.—Infancy, coverture, release, payment, performance, illegality of consideration either by statute or Common Law, drawing, indorsing, accepting, &c., bills or notes by way of accommodation, set-off, mutual credit, unseaworthiness, misrepresentation, concealment, deviation, and various other defences must be pleaded.

Rule 73—

Payment shall not be received in evidence, in any case in reduction of the debt or claim, without a plea of payment. Provided that in respect of any sum for which the plaintiff has specifically given credit in his particulars of demand, or in the special indorsement, if any, on the summons, no such plea shall be necessary."

The case seems to their Lordships to depend on the answer to two questions:

A. What does a plea of "never indebted" and what does it not, put in issue? In particular, does it put the plaintiff to proof of the performance of conditions precedent to the present payability of the debt?

B. Whatever onus it throws on the plaintiff, did the plaintiff discharge that onus in this case?

On these issues their Lordships are indebted to counsel on both sides for much interesting and helpful argument.

A. As to the first issue, there is curiously little English case law which is directly in point. In the 3rd Edition of Bullen and Leake on Pleadings, of 1868, at the top of p. 463, the following passage occurs under the heading of "Indebitatus Counts":—

"If the plaintiff relies on an express contract which was subject to any conditions before the absolute liability of the defendant attaches, he is bound to prove under an issue raised by this plea the happening or performance of those conditions."

And cf. ibidem, pp. 35-37 and p. 462.

The principle here stated was applied by cases such as *Hudson* v. *Bilton* (6 E and B 563) and *Bromfield* v. *Smith* (1 M and W 542). In *Hudson* v. *Bilton* a liquidated sum in money was payable when a certain ship "sailed". The count was an *indebitatus* count, and the plea was "never indebted". The ship put out over the bar and put back, the captain being still ashore. The question was whether this amounted to her "sailing". The plaintiff failed because on these facts he did not establish that the ship had sailed; but this decision clearly assumed that proof of this fact, on the pleadings, rested on him. In *Bromfield* v. *Smith* (*supra*) there was an *indebitatus* count for the price of goods sold and delivered and a plea of "never indebted". There was no plea in confession and avoidance. The sale and delivery were proved: but there was a term in the contract that the goods were sold on a period of credit and at the time of the claim this period was unexpired. The plaintiff succeeded before the Court of first instance, but failed on appeal, because the expiration of the period of credit was held to be a condition precedent to his cause of action and he had not established it. If the plaintiff's proposition had been well founded the defendant could not have succeeded on a plea of "never indebted", because performance of the conditions precedent (in this case expiration of the period of credit), would have been presumed in his favour. (See also *Scott* v. *Parker*, 1 Q.B. 809, where it is true the plea was non-assumpsit, though the count was an indebitatus count, and *Simmons* v. *Swift*, 5 B and C 857.)

Their Lordships are of opinion that not only these cases but the wording of Rule 65 make it plain that on an issue of "never indebted" the onus of proving the fulfilment of conditions precedent is on the plaintiff. They think the words at the end of Rule 65 "from which the liability of the defendant arises" (contrasting with the wording of the preceding rule) are significant.

The Judgment of Street, C.J., in effect holds that in such circumstances proof of the performance of conditions precedent to a presently payable debt is not on the plaintiff. His language, when he speaks of a "contract capable of giving rise to a presently payable debt", implies in the plaintiff's favour the presumption that a potential debt has, through fulfilment of conditions precedent, become an actual one. Their Lordships venture, with great respect, to think this is a misconception of the onus of proof on the Pleadings as they stood in this case. The plaintiff must prove that the potential liability has ripened into an actual and present one.

The question what it is that the plea of "never indebted" to an *indebitatus* count puts in issue can be approached on different lines. What is, for this purpose, a "debt" (the debt which is denied)? No doubt for some purposes and in some sense if B has lent £5 to A and A is under an obligation to repay B £5 in a week from now, this is in the interval a debt in the sense of *debitum in praesenti, solvendum in futuro.* But is this the type of debt to which the *indebitatus* counts are directed? Their Lordships think not. The counts are directed to a debt *solvendum in praesenti:* a debt "presently payable": and it is such a debt which the plea "never indebted", filed in answer to an *indebitatus* count, denies and puts in issue. A common money count is not available unless the debt is presently payable, and "never indebted" puts in issue its present payability. This plea does not put in issue the original contractual promise, which may have been subject to a condition precedent. It puts in issue the promise implied by law to pay presently, which only arises if and when such conditions have been performed, and consequently, as the two cases cited above show, puts in issue the performance of those conditions and puts the proof of these on the plaintiff. (This is borne out by the language of Rule 65.) In a customer and banker case one such condition precedent is the existence in the customer's account of funds sufficient to meet the demand on them. It is for the customer to establish this sufficiency as subsisting at the time of demand.

Their Lordships are fortified in the belief that this view is sound by the formulation by counsel for the plaintiff of the "special" count which would in the circumstances of this case have been appropriate if an *indebitatus* count had not been resorted to. It reads as follows:—

> "The Plaintiff sues the defendant for that the plaintiff lent to the defendant £100,000 and the defendant promised that it would pay to or to the order of the plaintiff such sums as the plaintiff might from time to time demand, provided that at the time of any such demand there were sufficient funds in the plaintiff's account to meet the same. And the defendant paid the plaintiff on the demand of the plaintiff from time to time, certain specific sums *and no more:* so that at the time of the demand hereinafter referred to, there were left in plaintiff's account more than sufficient sums to meet the said demand and the plaintiff demanded £19,000 from the defendant which defendant has not paid nor has he paid any part of it."

Such is the obligation where it is pleaded on a special *assumpsit.*

Their Lordships are of opinion that whether or not an *indebitatus* count is used to recover money lent, where the creditor is a customer and the debtor a bank on current account, the "peculiar incidents" of that relationship govern the legal position and determine what the plaintiff must prove. This is admitted as regards the necessity of demand; a requirement which, in the absence of special agreement, does not attach where an ordinary creditor-debtor relationship exists, and the debtor must "seek out" his creditor. But a further "peculiar incident" is that the bank is only indebted to the customer for the amount (which may be called "a balance" when it is arrived at by deducting authorised withdrawals from sums paid in) standing to his credit as at the time of demand. Of course, if the customer can prove that at this time the "balance" suffices to pay his demand, he succeeds. If the "balance" falls short of doing so, even by a penny, he fails altogether, another distinction which rails off the creditor-debtor relationship in the case of a customer and banker from that relationship in other cases.

B. *On this footing, did the plaintiff discharge the onus on him?*

Their Lordships consider that he did not. If he had gone into the box and sworn that the eight disputed cheques were forged, and had been believed, he would unquestionably have discharged it. He would equally have shifted the onus to the bank if he had gone into the box and testified that only cheques A, B and C drawn on the account were genuine and

that after deducting these, there were still sufficient funds to meet the demand. He did neither. The only evidence before the Court consisted of two documents: (i) the current account, produced by the bank ; (ii) the bank's letter to the Bank of Australasia.

Neither of these documents in themselves, nor the two in combination, amount to an admission by the bank that at the date of demand, 8th February, 1951, the plaintiff's account contained sufficient funds to meet the demand for £19,412 odd.

In these circumstances their Lordships have no choice but humbly to advise Her Majesty that the appeal should be allowed. In so doing they cannot repress a regret that a matter of substance should have been allowed to turn on a question of technical form.

The plaintiff-respondent should pay the costs of this appeal and of the proceedings in the Australian Courts.

(20163) Wt. 8267—824 125 12/53 D.L.

In the Privy Council

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WALTER RICHARD JAMES LAING

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