

## Case Note

*Aktas v Westpac Banking Corporation Limited* [2010] HCA 25 (4 August 2010)

by



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Warning to banks not to dishonour cheques flippantly, with the majority of the High Court finding that by communicating a mistaken dishonour to an intended payee, a Bank had defamed the customer/drawer, who was thus entitled to be compensated by an award of damages.

### **Background**

Mr Aktas was a shareholder and employee/director of a real estate business called Homewise in New South Wales. Homewise maintained three accounts at Westpac Banking Corporation Limited's (the **Bank**) Auburn branch, including two trust accounts. Homewise was required by the *Property, Stock and Business Agents Act 1941* (NSW) (**BBAct**) to maintain a trust account on behalf of clients whose rental properties it managed. The statute protected those trust account monies from any attachment/garnishee at the instance of a creditor of Homewise.

In December 1997, Homewise drew 30 cheques on the trust account. Notwithstanding there being sufficient funds in the trust account, upon presentation not one of the cheques was honoured by the Bank. Furthermore, and importantly, the Bank, under cover of what was described as an “*automatically generated correspondence*”, returned the cheques to the bearers with the words “*Refer to Drawer*” either stamped or attached. It was accepted (by the majority) that that expression was understood, in such circumstances, to mean that the account had insufficient funds to meet the cheque.

This mistake followed as a result of the erroneous operation of the Bank's internal procedures. In short, the Bank had failed to accord Homewise's trust account the protection provided by the BBAct, by applying a garnishee order (in favour of an unrelated third party creditor of Homewise) to that trust account in such a manner that caused for all Homewise-initiated debits (including cheques) to be dishonoured.

The evidence was that various people (particularly, but not exclusively, within the Turkish community in which Mr Aktas moved) reacted negatively towards Mr Aktas after it became known that the trust account cheques had not been honoured<sup>1</sup>. And at trial the jury determined that the Bank had indeed published defamatory imputations in respect of both Mr Aktas and Homewise.

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<sup>1</sup> When Mr Aktas attended upon the Bank to seek an explanation, he received “*a less than satisfactory explanation of [the] error, and little confidence that the matter would be speedily resolved*” [at 8].

Despite this, at both trial level and upon appeal, the Bank avoided liability for damages upon the ground that it was entitled to protection under the common law defence of qualified privilege, which had been preserved by the *Defamation Act* 1974 (NSW). Mr Aktas appealed to the High Court.

### ***The majority of the High Court***

Chief Justice French and Justices Gummow and Hayne<sup>2</sup> allowed the appeal, essentially upon the basis that the defence of qualified privilege could not be made out in circumstances where the offending publication was made as a consequence of an error by the Bank.

Their Honours summarised the defence as protecting:

*“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. The requirement of reciprocity of interest generally denies the ... privilege where the matter has been disseminated to the public at large”<sup>3</sup>.*

After considering the twin themes of inferred malice and actual malice, it was determined that the circumstances did not support a finding of malice capable of destroying any qualified privilege otherwise available to the Bank. Accordingly, the case turned upon the existence of corresponding duties.

Their honours described the appropriate approach to this question in the following way:

*“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 be made with impunity, notwithstanding that it was defamatory of a third party’ ”<sup>4</sup>.*

Importantly, the relevant form of communications (between a Bank and payee) would only arise when a cheque was to be dishonoured. The question was thus reduced to whether there was sufficient advantage to society in protecting the freedom of such communications, to outweigh the need for accuracy in conveying defamatory imputations.

The majority rejected the NSW Court of Appeal’s reasoning that society’s interest in promptness in communication of notice of dishonour was sufficient to outweigh the need for accuracy, noting that any such interest was adequately achieved by statute binding upon the Bank (the *Cheques Act* 1986 (Cth)). Furthermore, although the Bank may have an interest in communicating its refusal to pay, a payee could not be said to have any interest in receiving a communication of refusal to pay a cheque where the drawer had sufficient funds to meet its payment.

Since no other benefit or advantage could be identified, it was determined that, in circumstances where the Bank had made an error in dishonouring the cheque, no reciprocity of interest existed

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<sup>2</sup> Justices Heydon and Kiefel agreed with the trial Justice and Court of Appeal, and would have dismissed the appeal.

<sup>3</sup> At [14].

<sup>4</sup> At [31]. Quoting Jordan CJ in *Andreyevich v Kosovich* (1947) 47 SR (NSW) 357 at 363.

between the Bank and the payee capable of founding the qualified privilege defence to defamation. The appeal was thus allowed, and damages were awarded in Mr Aktas' favour.

The majority judgment concluded with the following remarks:

*“there is a large public interest in the maintenance of an efficient and stable banking system. That interest includes ... 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 the BBAAct] ....”*

*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” [emphasis added].<sup>5</sup>*

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<sup>5</sup> At [42].