Privy Council Appeal No. 41 of 1984

Tai Hing Cotton Mill Limited — *Appellant*

v.

(1) Liu Chong Hing Bank Limited
(2) The Bank of Tokyo Limited
(3) Chekiang First Bank Limited — *Respondents*

FROM

THE COURT OF APPEAL OF HONG KONG

JUDGMENT OF THE LORDS OF THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL, DELIVERED THE 3RD JULY 1985

Present at the Hearing:

LORD SCARMAN
LORD ROSKILL
LORD BRANDON OF OAKBROOK
LORD BRIGHTMAN
LORD TEMPLEMAN

*[Delivered by **Lord Scarman**]*

This is an appeal by a company against a decision of the Court of Appeal in Hong Kong whereby its action to recover from three banks sums of money alleged to have been wrongfully debited against its current account with each was dismissed. The appeal raises a question of general principle in the law governing the relationship of banker and customer. Additionally, the appeal calls for consideration of a number of questions arising from the particular circumstances of the appellant company's business relationship with each of the three respondent banks.

The company was a customer of the banks, and maintained with each of them a current account. The banks honoured by payment on presentation some 300 cheques totalling approximately HK$5.5 million which on their face appeared to have been drawn by the company and to bear the signature of Mr. Chen, the company's managing director who was one of the company's authorised signatories to its cheques. The banks in each instance debited the company's current account with the amount of the cheque. These cheques, however, were not the company's cheques.

They were forgeries. On each the signature of Mr. Chen had been forged by an accounts clerk employed by the company, Leung Wing Ling. The central issue in the appeal is upon whom the loss arising from Leung's forgeries is to fall, the company or the banks. The question of general principle is as to the nature and extent of the duty of care owed by a customer to his bank in the operation of a current account.

Very briefly, the company's submission is that, unless banker and customer agree otherwise, the customer's duty is limited to two sets of circumstances. First, the customer must exercise reasonable care in drawing his cheque. If a breach of this duty causes the bank to pay on the cheque, the customer bears the loss. Otherwise, if the signature on the cheque is forged, it is not his cheque and the bank has no authority to pay it or to debit it to the customer's account. The loss falls on the bank. Secondly, the customer must notify the banks of any forgery of which the customer becomes aware so as to enable the bank to take adequate precautions against future loss.

Put with equal brevity, the submission of the respondent banks on the general question is that the relationship of banker and customer gives rise in contract and in tort to a duty owed by the customer to the bank to exercise such precautions as a reasonable customer in his position would take to prevent forged cheques being presented to the bank ("the wider duty"); or, if that be too wide, at the very least to check his monthly (or other periodic) bank statements so as to be able to notify the bank of any items which were not, or may not have been, authorised by him ("the narrower duty"). Both the appellant and the respondent banks accept that Hong Kong law on the point is the same as English law: but they differ fundamentally as to what the law of England is.

If the banks fail on the general point of principle, they have submissions to make which arise from the particular circumstances of their respective relationships with the company. They rely on their banking contracts with the company and, if they cannot escape by contract, they seek protection by way of estoppel, submitting that the company is estopped by its own conduct from asserting that the various current accounts were incorrectly debited.

Finally, if the company succeeds in obtaining an order for the repayment of any of the sums debited to its account by any of the banks, there is an issue as to whether the bank is liable to pay interest on the sums so debited.

The Facts

The appellant company, Tai Hing Cotton Mill Ltd, is a textile manufacturer carrying on business in Hong Kong. The managing director is Mr. Chen who came from Shanghai and started the company in Hong Kong in 1957. The company was described by the trial judge, Mantell J. as medium-sized and reasonably successful. It showed a profit on its trading for every year but one between 1957 and 1978, the year in which the forgeries were exposed.

The company conducts its business in divisions. During the period 1957 to 1978 the company included five manufacturing divisions. The appeal concerns three of them:- the garment division, which used the company's current account with the Dah Sing Bank (Dah Sing not being a party to the litigation) and later the current account with the Chekiang First Bank ("Chekiang"), the third respondent: the texturising division, which used the current account with the Bank of Tokyo ("Tokyo"), the second respondent: and the spinning and weaving division which used the current account with the Liu Chong Hing Bank ("Liu Chong Hing"), the first respondent.

Towards the end of 1972 the company took into its employment Leung Wing Ling as an accounts clerk. Leung was dishonest: but he was trusted until 1978 when he was exposed. At first he was given responsibility for the books of account of the garment and texturising division. Almost at once he began to steal from the company. He opened bank accounts in names similar to those of real suppliers to the company and persuaded Mr. Chen to sign cheques in their favour by producing to him forged documents as evidence of transactions with these fictitious suppliers. The trial judge, Mantell J. records that between 4th December 1972 and 31st January 1974 Leung stole HK$317,068.04 from the company's bank account with Dah Sing. He stole also from the company's accounts with Tokyo and Chekiang during the same period and by the same method.

There came a time when he adopted another, and he may have thought a safer, method of stealing his employer's money, that of forging the signature of Mr. Chen on cheques purporting to be drawn by the company. It is with this method of stealing, and these forged cheques, that the appeal is concerned. At first, he passed forged cheques through the company's accounts with Tokyo and Chekiang. In November 1977 Leung's superior, Mr. Wang, retired through ill-health and Leung assumed the additional responsibility of managing the current account with Liu Chong Hing used by the spinning and weaving division. He immediately began to draw forged cheques for substantial sums upon this account.

Between 1972 and 1978 Leung made away with some HK$7 million by fraud and forgery. The forged cheques accounted for some HK$5.5 million of the loss. The trial judge summarised his defalcations in a few simple words:-

> "the defalcations remained undetected for over five years. They involved approximately 500 cheques of which about 300 were forged. The total face value of the cheques was approximately HK$7 million."

The trial judge then asked himself this question:-how was Leung able to get away with it for so long? The judge's answer to his own question is now accepted. Leung was trusted. He was in a position to manipulate the accounts for which he was responsible; and the company's system of internal control was ill-adapted either to prevent fraud or to find out about it afterwards. There was no division of function, Leung being responsible for, and in almost sole control of, the receipts and payments made through the accounts for which he was responsible; and there was substantially no supervision. Specifically, the judge found that there was a failure to check or supervise Leung's reconciliation of the monthly bank statements with the cash books of the company. Mr. Wang, until ill health forced him to retire in November 1977, was supposed to undertake the task of checking and supervising but did not. After Wang retired, Leung assumed sole control of the accounts for which he was responsible. The judge summed up his view of the company's system of internal financial control as unsound and, from the point of view of preventing or detecting fraud, inadequate.

The frauds were uncovered in May 1978 when a newly appointed accountant entered upon the simple, though tedious, task which had not previously been under-taken, of reconciling bank statements with the company's account books. He realised almost at once that something was seriously wrong. He reported to Mr. Chen. Leung was interrogated and admitted the frauds.

The Litigation

The company now acted with some alacrity. On 15th May 1978 it issued a writ against the three banks, Leung, and his wife Wance Cheng in which it claimed repayment of sums totalling approximately HK$7 million. A modest recovery has been obtained from the wife by a negotiated settlement. Leung has fled to Taiwan, leaving the company and the banks to fight out who of the innocent victims of his crimes are to bear the financial loss. The litigation is, so far as it concerns the banks, limited to the cheques bearing the forged signature of Mr. Chen, the total of which is of the order of HK$5.5 million.

The trial judge, Mantell J. basing himself on the fundamental premise that a forged cheque is no mandate to pay and that, *prima facie*, the customer is entitled to be relieved of the loss arising from a bank's payment upon a forged cheque, held that the banks must establish affirmatively that in this case they were entitled to debit their customer's current account with the amounts of the forged cheques. The judge negatived a defence that the company was vicariously liable for Leung's fraud: and that point is no longer pursued.

On the question of general principle the judge accepted the company's submission and rejected both of the two alternative formulations of duty put forward by the banks. He held that English law had been settled as submitted by the company as long ago as 1918 by the decision of the House of Lords in *London Joint Stock Bank Ltd. v. Macmillan and Arthur* [1918] A.C. 777 and that it was not for him at first instance to reject law ascertained and settled for so long a time. He considered a submission made on behalf of the banks that, even if their formulation of the customer's duty could not be implied into the banking contract, it could nevertheless arise in tort and held that, where parties are in a contractual relationship, their rights and duties as between themselves cannot be more extensive in tort than they are in contract.

Turning to the particular defences raised by the banks, he rejected the submissions of the respondent banks that their terms of business, which he accepted were contractual and to which their Lordships will refer as "the banking contracts", should be construed as ousting the common law rule which he had held to be as submitted by the company.

The judge then turned to the defence of estoppel raised by each bank. This defence had been put to him in two ways: first, that the company was estopped by its negligence in the management of its bank accounts from asserting that the accounts had been wrongly debited; and secondly, that the company was estopped by a representation to be implied from its course of conduct that the periodic bank statements were correct. He rejected estoppel by negligence but held that in the case of each bank the company, by failing to challenge the debits shown on the bank statements, had represented to each bank that the debits had been correctly made. He held that Tokyo and Chekiang had acted in reliance upon the representations so made by their willingness to continue operating their respective accounts and to expose themselves to the risk of paying out on forged cheques. He did not find the same prejudice had been suffered by Liu Chong Hing as it only became exposed to the fraud in November 1977, the first

representation to it not being made until the company's failure to query the December 1977 statement of account. The judge found that the chance of recovery from Leung had not been substantially diminished during the period (December 1977 to May 1978) during which it could be said that the estoppel was operative.

The judge accordingly gave the company judgment against Liu Chong Hing but dismissed its claims against the other two banks. The company appealed, and Liu Chong Hing cross-appealed. The Court of Appeal differed from the trial judge on the general question. Cons J.A. and Hunter J. delivered judgments, with which Fuad J.A. agreed, to the effect that the banker/customer relationship is such as to give rise to a general duty of care in the operation of its banking accounts. They held that the company was in breach of the duty which they held it owed to the banks and must bear the loss. The duty they held arose in tort as well as in contract. The judges were not, however, agreed as to the true effect of the banking contracts. Cons J.A. construed the contracts as meaning that if the customer did not object within the time specified in the contracts the bank statements were "final" as between customer and banks; in other words, that the statements became conclusive evidence of the correctness of the debits recorded therein. Hunter J., with whom Fuad J.A. agreed, held that none of the banking contracts could be construed as including a term requiring the monthly statements to be treated after a period of time or at all as conclusive evidence of the state of the account. All three judges, however, agreed that the company was estopped by its own negligence from challenging the correctness of the bank statements.

The banks, therefore, emerged from the Court of Appeal with total success. The company suffered total defeat, and now appeals to Her Majesty in Council. The company submits that, save in respect of the estoppel point, the judgment of the trial judge was correct in law and, save on estoppel, should be restored. The respondent banks seek to hold the judgment which they obtained in the Court of Appeal for the reasons, which they submit are sound, developed in the judgments of Cons J.A. and Hunter J.

The Question of General Principle

The question can be framed in two ways. If put in terms of the law's development, it is whether two House of Lords' decisions, one in 1918 and the other in 1933, represent the existing law. If put in terms of principle, the question is whether English law recognises today any duty of care owed by the customer to his bank in the operation of a current account beyond, first, a duty to refrain from drawing

a cheque in such a manner as may facilitate fraud or forgery, and, secondly, a duty to inform the bank of any forgery of a cheque purportedly drawn on the account as soon as he, the customer, becomes aware of it. The first duty was clearly enunciated by the House of Lords in *London Joint Stock Bank Ltd. v. Macmillan*, *supra*, and the second was laid down, also by the House of Lords, in *Greenwood v. Martins Bank Ltd* [1933] A.C. 51.

The respondent banks accept, of course, that both duties exist and have been recognised for many years to be part of English law. Their case is that English law recognises today, even if it did not in 1918 or 1933, an altogether wider duty of care. This is, they submit, a duty upon the customer to take reasonable precautions in the management of his business with the bank to prevent forged cheques being presented to it for payment. Further, and whether or not they establish the existence of this wider duty, they contend that the customer owes a duty to take such steps to check his periodic (in this case, monthly) bank statements as a reasonable customer in his position would take to enable him to notify the bank of any debit items in the account which he has not authorised. They submit that, given the relationship of banker and customer and the practice of rendering periodic bank statements, the two duties for which they contend are "necessary incidents" of the relationship. The source of obligation, they say, is to be found both in the contract law as an implied term of the banking contract and in the tort law as a civil obligation arising from the relationship of banker and customer.

They accept that the reasoning to be found in *Macmillan*'s case appears at first sight to negative the existence of both the duties for which they contend: but they offer the explanation that the law of contract and the tort law were significantly different in 1918 from the state of the relevant modern law. In particular, they point to developments in the law relating to the circumstances in which the courts will now imply a term into a contract, and to the changes in tort law both as to the range of relationships giving rise to liability in tort and as to the circumstances in which loss or damage will be held to result from breach of a duty of care. Their implied term point they base on the decision of the House of Lords in *Liverpool City Council v. Irwin* [1977] A.C. 239; and their two tort points on decisions of the House in *The Wagon Mound* [1961] A.C. 388 and *Anns v. Merton London Borough Council* [1978] A.C. 728.

The Court of Appeal accepted the respondent banks' submissions. Cons J.A. was led "after a great deal of hesitation" to conclude:-

> "that in the world in which we live today it is a necessary condition of the relation of the banker and customer that the customer should take reasonable care to see that in the operation of the account the bank is not injured."

He, therefore, held that, in the absence of express agreement to the contrary, the duty would be implied into the banking contract as a necessary incident of the relationship between customer and banker. Turning to tort, he based himself on the now famous passage in the speech of Lord Wilberforce in *Anns v. Merton London Borough Council*, *supra*, at page 751:-

> "Through the trilogy of cases in this House - *Donoghue v. Stevenson* [1932] A.C. 562, *Hedley Byrne & Co. Ltd. v. Heller & Partners Ltd.* [1964] A.C. 465, and *Dorset Yacht Co. Ltd. v. Home Office* [1970] A.C. 1004, the position has now been reached that in order to establish that a duty of care arises in a particular situation, it is not necessary to bring the facts of that situation within those of previous situations in which a duty of care has been held to exist. Rather the question has to be approached in two stages. First one has to ask whether, as between the alleged wrongdoer and the person who has suffered damage there is a sufficient relationship of proximity or neighbourhood such that, in the reasonable contemplation of the former, carelessness on his part may be likely to cause damage to the latter - in which case a *prima facie* duty of care arises. Secondly, if the first question is answered affirmatively, it is necessary to consider whether there are any considerations which ought to negative, or to reduce or limit the scope of the duty or the class of person to whom it is owed or the damages to which a breach of it may give rise: see *Dorset Yacht* case [1970] A.C. 1004, per Lord Reid at p. 1027."

He held that in the relationship of banker and customer there was a sufficient degree of proximity to give rise to the duty for which the banks contend.

Hunter J., in the course of an elaborate and learned judgment, drew heavily on the law of tort in concluding that the duty contended for by the banks exists in the modern law. He expressed the opinion that the source of the obligation was not so important as the recognition of its existence and scope: and he referred to a comment by Lord Roskill in *Junior Books v. Veitchi* [1983] A.C. 520, at page 545, that the issue is not "whether the proper remedy should lie in contract or in tort" but depends upon the answer to the two questions posed by Lord Wilberforce in the passage already quoted from his speech in *Anns'* case.

If the Court of Appeal was correct in law to rule as it did, the appeal must be dismissed. For there is no challenge to the finding of the trial judge that, if either of the two duties for which the banks contend exists, the appellant company was in breach of its obligations to the banks.

First, it is necessary to determine what *Macmillan*'s case decided. Upon this point their Lordships are in no doubt. The House held that the customer owes his bank a duty in drawing a cheque to take reasonable and ordinary precautions against forgery. "The duty ... is to draw the cheques with reasonable care to prevent forgery, and if, owing to neglect of this duty, forgery takes place, the customer is liable to the bank for the loss": Lord Finlay L.C. at page 793. In so formulating the duty the House excluded as a necessary incident of the banker-customer relationship any wider duty, though of course it is always open to a banker to refuse to do business save upon express terms including such a duty. Lord Finlay L.C. expressly excluded any such duty, saying at page 795:-

> "Of course the negligence must be in the transaction 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 sufficient inquiry as to his character."

And the House approved the judgment of Bray J. in *The Kepitigalla Rubber Estate Ltd v. The National Bank of India Ltd* [1909] 2 K.B. 1010. In that case the learned judge held that, while it is the duty of a customer in issuing his mandates (i.e. his cheques) to his bank to take reasonable care not to mislead the bank, there is no duty on the part of the customer to take precautions in the general course of carrying on his business to prevent forgeries on the part of his servants. Put in the terms of the banks' submission in this case, Bray J. negatived the existence of the two duties for which the respondent banks contend, and the House of Lords in *Macmillan*'s case agreed with him.

So far as English law is concerned, *Macmillan*'s case has until now been accepted as a binding precedent on the question under consideration, though it would be true to say that leading writers on banking law, notably Sir John Paget, and many of the banking community have never extended it a very warm welcome. The trial judge, correctly in their Lordships' view, held himself bound to follow the decision. He noted that it had been followed as recently as 11th March 1983 by McNeill J. at first instance in the unreported case of *Wealden Woodlands*

(Kent) Ltd v. National Westminster Bank Ltd; that it has been cited with approval in the High Court of Australia, and followed by the Court of Appeal in New Zealand: *Commonwealth Trading Bank of Australia v. Sydney Wide Stores Pty. Ltd* [1981] 55 A.L.J.R. 574; *National Bank of New Zealand Ltd. v. Walpole and Patterson Ltd* (1975) 2 NZLR 7. In the New Zealand case Richmond J., who delivered the judgment of the Court, summarised the law as settled in 1918 in succinct terms on page 19:-

> "The *Kepitigalla* case was cited with approval by Lord Finlay LC in the *Macmillan* case and also by Viscount Haldane in the passage which I have already cited. I know of no sufficient reason why we should not retain, in New Zealand, the principle so clearly laid down by the House of Lords that the only type of negligence on the part of a customer which will remove from the banker the risk of paying on a forged cheque is negligence in or immediately connected with the drawing of the cheque itself."

It appears also that the courts of Hong Kong took the same view of the law prior to the decision of the Court of Appeal now under review: *Asien-Pazifik Merchant Finance Ltd. v. Shanghai Commercial Bank Ltd* [1982] HKLR 273, and *Lam Yin-fei trading as Wah Shing Garment Manufacturing Co. & Another v. Hang Lung Bank Ltd*. [1982] HKLR 215.

The respondent banks seek to attack the authority of the *Macmillan* ruling in a number of ways. Their Lordships take first their least plausible attack: the submission that the decision can be reviewed because it proceeded on a now outmoded and rejected view of the nature of the causal link which the law requires to be proved between breach of duty and damage if a plaintiff is to recover damages in an action based on the tort of negligence. It is, of course, true that *Macmillan*'s case was decided before the House of Lords in *The Wagon Mound*, *supra*, substituted "foreseeability" for "direct cause" as the test of liability in such cases. But, in their Lordships' view, it is a travesty of the House's reasoning in *Macmillan*'s case to suggest that causation in the law of tort had anything to do with their limiting the duty of care of the customer to the transaction of drawing the cheque. Indeed their Lordships read the speeches in *Macmillan*'s case as proceeding upon the basis, which their Lordships have no doubt is correct, that the relationship between banker and customer is contractual and that its incidents, in the absence of express agreement, are such as must be implied into the contract because they can be seen to be obviously necessary.

Their Lordships turn now to the weightier submissions advanced by the banks on the general question. There are two: that a wider duty (a term which in this context covers both of the duties for which the respondent banks contend) must be implied into the contract, alternatively that such a duty arises in tort from the relationship between banker and customer.

Implied Term

Their Lordships agree with Cons J.A. that the test of implication is necessity. As Lord Wilberforce put it in *Liverpool City Council v. Irwin*, *supra*, at page 254, "such obligation should be read into the contract as the nature of the contract implicitly requires, no more, no less: a test of necessity". Cons J.A. went on to quote an observation by Lord Salmon in the *Liverpool* case to the effect that the term sought to be implied must be one without which the whole transaction would become "inefficacious, futile, and absurd" (page 262).

Their Lordships accept as correct the approach adopted by Cons J.A. Their Lordships prefer it to that suggested by Hunter J. which was to ask the question:- does the law impose the term? Implication is the way in which necessary incidents come to be recognised in the absence of express agreement in a contractual relationship. Imposition is apt to describe a duty arising in tort, but inept to describe the necessary incident arising from a contractual relationship.

Their Lordships, however, part company with Cons J.A. in his conclusion (reached only after great hesitation, he said) that it is necessary to imply into the contract between banker and customer a wider duty than that formulated in *Macmillan*'s case. *Macmillan*'s case itself decisively illustrates that it is not a necessary incident of the banker-customer relationship that the customer should owe his banker the wider duty of care.

The relationship between banker and customer is a matter of contract. The classic, though not necessarily exhaustive, analysis of the incidents of the contract is to be found in the judgment of Atkin L.J. in *Joachimson v. Swiss Bank Corporation* [1921] 3 K.B. 110 at page 127:-

> "I think that there is only one contract made between the bank and its customer. The terms of that contract involve obligations on both sides and require careful statement. They appear upon consideration to include the following provisions. The bank undertakes to receive money and to collect bills for its customer's account.

> The proceeds so received are not to be held in trust for the customer, but the bank borrows the proceeds and undertakes to repay them. The promise to repay is to repay at the branch of the bank where the account is kept, and during banking hours. It includes a promise to repay any part of the amount due against the written order of the customer addressed to the bank at the branch, and as such written orders may be outstanding in the ordinary course of business for two or three days, it is a term of the contract that the bank will not cease to do business with the customer except upon reasonable notice. The customer on his part undertakes to exercise reasonable care in executing his written orders so as not to mislead the bank or to facilitate forgery."

Atkin L.J. clearly felt no difficulty in analysing the relationship upon the basis of the limited duty enunciated in *Macmillan*'s case. And in *Macmillan*'s case itself the protracted discussion, which is now only of historical interest, as to the true *ratio decidendi* of *Young v. Grote* (1827) 4 Bing. 253 reveals vividly that the House was aware of the possibility of a wider duty but rejected it.

The argument for the banks is, when analysed, no more than 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: and they cite *Selangor United Rubber Estates Ltd v. Cradock* [1968] 1 WLR 1555 (Ungoed-Thomas J.) and *Karak Rubber Co. Ltd v. Burden* [1972] 1 WLR 602 (Brightman J.). One can fully understand the comment of Cons J.A. that the banks must today look for protection. So be it. They can increase the severity of their terms of business, and they can use their influence, as they have in the past, to seek to persuade the legislature that they should be granted by statute further protection. But it does not follow that because they may need protection as their business expands the necessary incidents of their relationship with their customer must also change. The business of banking is the business not of the customer but of the bank. They offer a service, which is to honour their customer's cheques when drawn upon an account in credit or within an agreed overdraft limit. If they pay out upon cheques which are not his, they are acting outside their mandate and cannot plead his authority in justification of their debit to his account. This is a risk of the service which it is their business to offer. The limits set to the risk in the *Macmillan* and *Greenwood* cases can be seen to be plainly necessary incidents of the relationship.

Offered such a service, a customer must obviously take care in the way he draws his cheque, and must obviously warn his bank as soon as he knows that a forger is operating the account. Counsel for the banks asked rhetorically why, once a duty of care was recognised, should it stop at the *Macmillan* and *Greenwood* limits. They submitted that there was no rational stopping place short of the wider duty for which they contended. With very great respect to the ingenious argument addressed to the Board their Lordships find in certain observations of Bray J. in *Kepitigalla*'s case a convincing statement of the formidable difficulties in the way of this submission. Bray J. said, at page 1025,:-

> "I think Mr. Scrutton's contention equally fails when it is considered apart from authority. It amounts to a contention on the part of the bank that its customers impliedly agreed to take precautions in the general course of carrying on their business to prevent forgeries on the part of their servants. Upon what is that based? It cannot be said to be necessary to make the contract effective. It cannot be said to have really been in the mind of the customer, or, indeed, of the bank, when the relationship of banker and customer was created. What is to be the standard of the extent or number of the precautions to be taken? Applying it to this case, can it be said to have been in the minds of the directors of the company that they were promising to have the pass-book and the cash-book examined at every board meeting, and to have a sufficient number of board meetings to prevent forgeries, or that the secretary should be supervised or watched by the chairman? If the bank desire that their customers should make these promises they must expressly stipulate that they shall. I am inclined to think that a banker who required such a stipulation would soon lose a number of his customers. The truth is that the number of cases where bankers sustain losses of this kind are infinitesimal in comparison with the large business they do, and the profits of banking are sufficient to compensate them for this very small risk. To the individual customer the loss would often be very serious; to the banker it is negligible."

Their Lordships reject, therefore, the implied term submission.

Tort

Their Lordships do not believe that there is anything to the advantage of the law's development in searching for a liability in tort where the parties are in a contractual relationship. This is

particularly so in a commercial relationship. Though it is possible as a matter of legal semantics to conduct an analysis of the rights and duties inherent in some contractual relationships including that of banker and customer either as a matter of contract law when the question will be what, if any, terms are to be implied or as a matter of tort law when the task will be to identify a duty arising from the proximity and character of the relationship between the parties, their Lordships believe it to be correct in principle and necessary for the avoidance of confusion in the law to adhere to the contractual analysis: on principle because it is a relationship in which the parties have, subject to a few exceptions, the right to determine their obligations to each other, and for the avoidance of confusion because different consequences do follow according to whether liability arises from contract or tort, e.g. in the limitation of action. Their Lordships respectfully agree with some wise words of Lord Radcliffe in his dissenting speech in *Lister v. Romford Ice and Cold Storage Co. Ltd* [1957] A.C. 555. After indicating that there are cases in which a duty arising out of the relationship between employer and employee could be analysed as contractual or tortious Lord Radcliffe said, at page 587:-

> "Since, in any event, the duty in question is one which exists by imputation or implication of law and not by virtue of any express negotiation between parties, I should be inclined to say that there is no real distinction between the two possible sources of obligation. But it is certainly, I think, as much contractual as tortious. Since in modern times the relationship between master and servant, between employer and employed, is inherently one of contract, it seems to me entirely correct to attribute the duties which arise from that relationship to implied contract."

Their Lordships do not, therefore, embark on an investigation as to whether in the relationship of banker and customer it is possible to identify tort as well as contract as a source of the obligations owed by the one to the other. Their Lordships do not, however, accept that the parties' mutual obligations in tort can be any greater than those to be found expressly or by necessary implication in their contract. If, therefore, as their Lordships have concluded, no duty wider than that recognised in *Macmillan* and *Greenwood* can be implied into the banking contract in the absence of express terms to that effect, the respondent banks cannot rely on the law of tort to provide them with greater protection than that for which they have contracted.

For these reasons their Lordships answer the general question by accepting the submission of the appellant company that in the absence of express terms to the contrary the customer's duty is in English law as laid down in *Macmillan* and *Greenwood*. The customer's duty in relation to forged cheques is, therefore, twofold: he must exercise due care in drawing his cheques so as not to facilitate fraud or forgery and he must inform his bank at once of any unauthorised cheques of which he becomes aware.

Their Lordships cannot leave the general question without making some comment on a matter of some importance which was discussed in argument before them.

It was suggested, though only faintly, that even if English courts are bound to follow the decision in *Macmillan*'s case the Judicial Committee is not so constrained. This is a misapprehension. Once it is accepted, as in this case it is, that the applicable law is English, their Lordships of the Judicial Committee will follow a House of Lords' decision which covers the point in issue. The Judicial Committee is not the final judicial authority for the determination of English law. That is the responsibility of the House of Lords in its judicial capacity. Though the Judicial Committee enjoys a greater freedom from the binding effect of precedent than does the House of Lords, it is in no position on a question of English law to invoke the Practice Statement of July 1966 pursuant to which the House has assumed the power to depart in certain circumstances from a previous decision of the House: [1966] 1 WLR 1234. And their Lordships note, in passing, the Statement's warning against the danger of disturbing retrospectively the basis on which contracts have been entered into. It is, of course, open to the Judicial Committee to depart from a House of Lords' decision in a case where, by reason of custom, statute, or for other reasons peculiar to the jurisdiction where the matter in dispute arose, the Judicial Committee is required to determine whether English law should or should not apply. Only if it be decided or accepted (as in this case) that English law is the law to be applied will the Judicial Committee consider itself bound to follow a House of Lords' decision. An illustration of the principle in operation is afforded by the recent New Zealand appeal, *Hart v. O'Connor* (Judgment delivered on 22nd May 1985), in which the Board reversed a very learned judgment of the New Zealand Court of Appeal as to the contractual capacity of a mentally disabled person, holding that because English law applied, the duty of the New Zealand Court of Appeal was not to depart from what the Board was satisfied was the settled principle of that law.

The Express Terms of Business

The appellant company, it is now accepted, operated its current account with each bank pursuant to the bank's printed terms and conditions.

Chekiang. The company opened an account with the bank in September 1957. Chekiang was authorised to pay cheques on behalf of the company if signed by Mr. Chen or by any two of four named signatories. By his request to open the account Mr. Chen agreed on behalf of the company to comply with the bank's "rules and procedures in force from time to time governing the conduct of the account". Mr. Chen had notice of the rules current when he made the request. Rule 7 provided, so far as material:-

> "A monthly statement for each account will be sent by the bank to the depositor by post or messenger and the balance shown therein may be deemed to be correct by the bank if the depositor does not notify the bank in writing of any error therein within ten days after the sending of such statement ..."

From the opening of the account until March 1978 the company returned, upon receipt of its periodic bank statement, a confirmation slip signed by two authorised signatories. No cleared cheques were ever returned to the company.

Tokyo. The company opened an account with the bank in November 1961. By letter of 17th November 1961 Mr. Chen agreed on behalf of the company to observe the provisions of an agreement appearing on the back of the bank's pro-forma letter. The company accordingly undertook to hold the bank free from any loss resulting from a failure by it to abide by the provisions of the agreement. Clause 10 provided:-

> "The bank's statement of my/our current account will be confirmed by me/us without delay. In case of absence of such confirmation within a fortnight, the bank may take the said statement as approved by me/us."

The bank was authorised to pay the company's cheques if signed by Mr. Chen or two authorised signatories. Periodic bank statements were rendered by the bank, but cleared cheques were not returned. No bank statement relevant to this case was ever confirmed by the company.

Liu Chong Hing. The company opened an account with the bank in November 1962. By his letter of request dated 8th November 1962 Mr. Chen stated that the company wished to open the account subject to the bank's rules and regulations. Rule 13 provided:-

"A statement of the customer's account will be rendered once a month. Customers are desired:

(1) to examine all entries in the statement of account and to report at once to the bank any error found therein.

(2) to return the confirmation slip duly signed.

In the absence of any objection to the statement within seven days after its receipt by the customer, the account shall be deemed to have been confirmed."

The bank was authorised to pay cheques if signed by Mr. Chen or by any two authorised signatories. The bank never did send any confirmation slips to the company; nor did it return cleared cheques. The company never sent the bank any confirmation slip.

Their Lordships agree with the views of the trial judge and Hunter J. as to the interpretation of these terms of business. They are contractual in effect, but in no case do they constitute what has come to be called "conclusive evidence clauses". Their terms are not such as to bring home to the customer either "the intended importance of the inspection he is being expressly or impliedly invited to make", or that they are intended to have conclusive effect against him if he raises no query, or fails to raise a query in time, upon his bank statements. If banks wish to impose upon their customers an express obligation to examine their monthly statements and to make those statements, in the absence of query, unchallengeable by the customer after expiry of a time limit, the burden of the obligation and of the sanction imposed must be brought home to the customer. In their Lordships' view the provisions which they have set out above do not meet this undoubtedly rigorous test. The test is rigorous because the bankers would have their terms of business so construed as to exclude the rights which the customer would enjoy if they were not excluded by express agreement. It must be borne in mind that, in their Lordships' view, the true nature of the obligations of the customer to his bank where there is no express agreement is limited to the *Macmillan* and *Greenwood* duties. Clear and unambiguous provision is needed if the banks are to introduce into the contract a binding obligation upon the customer who does not query his bank statement to accept the statement as accurately setting out the debit items in the accounts.

Estoppel

Their Lordships having held that the company was not in breach of any duty owed by it to the banks, it is not possible to establish in this case an estoppel

arising from mere silence, omission, or failure to act.

Mere silence or inaction cannot amount to a representation unless there be a duty to disclose or act: *Greenwood*'s case, *supra*, page 57. And their Lordships would reiterate that unless conduct can be interpreted as amounting to an implied representation, it cannot constitute an estoppel: for the essence of estoppel is a representation (express or implied) intended to induce the person to whom it is made to adopt a course of conduct which results in detriment or loss: *Greenwood*'s case, *supra*.

The company, it is accepted, did not know of the forgeries until the exposure of Leung in May 1978. Had the company been under either of the duties (the "wider" or the "narrower") for which the banks contend, it is plain that the company would have been in breach of such duty during substantially the whole period covered by Leung's frauds, in which event an estoppel could have arisen. But in that event the estoppel question would have been of academic interest only. For the breach of duty by the customer and the resultant loss of the banks would have afforded the banks a defence by way of set-off or counterclaim.

For the same reason the banks gain nothing from their submission that an estoppel arises from their terms of business. The trial judge clearly thought that two of the banks could show that they had suffered loss by relying on the failure of the company to raise objection to the debit items shown in the bank statements. He held that, while their terms of business could not be construed so as to impose a contractual duty upon the company to accept in the absence of objection the monthly statements as accurate in so far as they related to debit items, their contractual effect was "to turn failure to respond into a representation" that the bank statements were correct. Their Lordships cannot agree. The contractual effect of the terms of business was that on the expiry of the time limit without objection raised by the company either the bank statements became conclusive as to the correctness of the debit items or they did not. Once it is held that they were not conclusive, silence, i.e. in this case failure to object, cannot be interpreted as a representation that the statements were correct for the simple reason that the company was not precluded by the terms of business from asserting that they were incorrect.

The same position is therefore reached. Either there was a duty to accept that bank statements to which no objection had been raised were correct in which event failure to object could be relied on

either as a breach of duty causing loss or as an implied representation of their correctness estopping the company from asserting otherwise; or there was no such duty, in which event failure to object could not be interpreted as a representation that they were correct.

For these reasons their Lordships hold that, if the banks fail to establish either of the two duties of care for which they contend, they have no fall-back defence in the doctrine of estoppel.

Interest

Their Lordships respectfully agree with the trial judge in his rejection of the submission that because the sums wrongly debited were in non-interest bearing accounts interest is not recoverable. The company has lost the opportunity of placing the money at interest as a result of the unauthorised debits made by the banks to the respective current accounts. Interest is, therefore, payable. In the circumstances of this case interest should run from 15th May 1978: for by issuing its writ on that day the company required the banks to eliminate the unauthorised debits from the relevant current accounts and to repay what was due.

For these reasons their Lordships will humbly advise Her Majesty that the appeal should be allowed and an order made in the following terms:-

"1.(i) The judgment of the Court of Appeal of Hong Kong dated 27th January 1984 ought to be reversed;

(ii) The judgment of the High Court of Hong Kong dated 12th July 1983 ought to be set aside save in relation to the sum of $187,195.74 thereof;

(iii) Judgment ought to be entered for the appellant for declarations that the respondents were not entitled to debit the appellant's account with the following sums and that the respondents ought to pay to the appellant such sums, namely:

First respondent	-	H.K. $3,082,214.30
Second respondent	-	H.K. $ 809,804.80
Third respondent	-	H.K. $1,599,070.20

together with interest on the above sums at the rate of 1½% over the prime rate in force in Hong Kong from time to time, to be calculated from 15th May 1978 to the date of payment.

2. As against each of the respondents

(i) the costs of the action, the costs of the appeal to the Court of Appeal and the costs

of the appeal to the Judicial Committee of the Privy Council to be taxed and paid by the respondents to the appellant;

(ii) the orders for costs in favour of the 1st, 2nd, and 3rd Respondents made by the High Court on 12th July 1983 and by the Court of Appeal on 27th January 1984 to be set aside and such costs, if any, paid by the appellant to the respondents, or any of them, to be repaid to the appellant together with interest, if any, earned thereon.

3. Certificate for 3 counsel."