

IN THE PRIVY COUNCIL

No. 41 of 1984

ON APPEAL  
FROM THE COURT OF APPEAL OF HONG KONG

B E T W E E N:

TAI HING COTTON MILL LIMITED

Appellant

and

LIU CHONG HING BANK LIMITED  
THE BANK OF TOKYO LIMITED  
CHEKIANG FIRST BANK LIMITED

1st Respondent  
2nd Respondent  
3rd Respondent

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CASE FOR THE 2ND RESPONDENT

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Record

1. This is an appeal by the Appellant  
(Plaintiff) ("Tai Hing") from a judgment of  
the Court of Appeal of Hong Kong (Cons V-P,  
Fuad JA and Hunter J) given on the 27th  
January 1984 whereby they dismissed with  
costs an appeal by Tai Hing against a  
judgment dated the 12th July 1983 of the  
High Court (Mantell J) and allowed with  
costs the cross-appeal of the 1st Respondent  
(Defendant) Bank ("LCH"). By his judgment  
Mantell J dismissed with costs Tai Hing's  
claims against the 2nd and 3rd Respondent  
(Defendant) banks ("Tokyo" and "Chekiang"),

P.614-660

P.568-595

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P.597 11.18-20 and declared as against LCH that it was not entitled to debit Tai Hing's account with the sum of \$187,195.74.

2. Tai Hing's claims against LCH, Tokyo and Chekiang were for wrongful debiting of forged cheques in its current accounts maintained with them respectively. The cheques in question were forged by Leung Wing Ling ("Leung") a member of Tai Hing's own accounts staff. From December 1972, shortly after commencing his employment as an accounts clerk, he began to steal from Tai Hing. His forgeries involved over 300 cheques of over HK\$5 million extending from November 1974 to March 1978. The forgeries on the Tokyo account were from the 30th January 1975 to the 1st February 1978. The debits for the forged cheques were shown on the monthly statements which Tokyo sent to Tai Hing. Had Tai Hing taken reasonable, indeed elementary, precautions Leung's forgeries would have been prevented and in any event would have been discovered by Tai Hing within days from receipt of the monthly bank statement showing the debit of the first forged cheque.

P.571 11.30-49 10

P.572 11.1-10

P.574 11.1-5

P.572 11.6-49 20

P.573 11.1-12

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3. Tai Hing's contention is that it owed no duty to its bankers to take such elementary precautions and that its failure to do so could not give rise to any legal consequences. Thus, Tai Hing maintains that in respect of forged cheques its bankers are under an absolute liability to it and are effectively its free insurers.

10 4. The basic question in this appeal is whether the Court of Appeal was right in rejecting Tai Hing's contention that Tokyo was entitled to debit its account in the amounts of the forged cheques.

The facts

5. Tokyo adopts as part of its case the relevant facts and findings set out in paragraphs 5 to 8, and 12 to 23 of LCH's Case.

20 6. By its letter dated the 17th November 1961 Tai Hing requested Tokyo to open a current account and agreed to observe the terms of the Agreement appearing on the reverse of the letter ("the Tokyo Terms"). In its letter Tai Hing further agreed to

Part II p.63  
Part II p.64

hold Tokyo free from any loss whatsoever resulting from Tai Hing's failure to abide by the Tokyo Terms, ("the Indemnity"). Pursuant to its request, Tokyo opened Tai Hing's current account. Its authorised signatories were Chen alone or two of a number of nominated signatories who, from the 27th February 1978, included Leung. The Tokyo account was used initially by the spinning and weaving divisions. By the time Leung came to be employed in October 1972 the Tokyo account was used by the texturizing division. By November 1975 the texturizing division had ceased to operate. Clause 10 of the Tokyo Terms provided:

Part II p.65, 66,67,69,70  
P.222 11.20-30  
P.250 11.20-26  
P.251 11.9-22  
Part II p.64

"10. 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."

P.574 11.48-49  
P.251 11.32-39  
Part II p.155

7. Tokyo sent monthly statements to Tai Hing, which would have been received on or about the date shown on the statement. They were sent out within one or two days of the end

of each month. Tokyo's statements until the 30th April 1975 bore the following warning: Part II pp.78-105

"The Bank will assume the correctness of this statement unless an advice to the contrary is received within 7 days".

Tokyo's statements from the 1st May 1975 to the 31st January 1978 bore the following warning: Part II pp.106-138

"Please notify the Bank immediately of any discrepancies". Tokyo

10 expected all customers to check their

statements and to notify Tokyo of any

Part II p.155

discrepancy. In the absence of query Tokyo took the statements as correct. Tai Hing did not send confirmation of any bank statement to Tokyo. Tai Hing did not query any of the statements.

8. The total inadequacy of Tai Hing's system and its lack of care are exemplified by the following:

20 (a) It was not the practice of Tai Hing to compare its official journal with bank statements to see whether any unauthorised cheque had been paid.

P.193 11.20-30

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- P.168 11.1-4  
Part II p.154
- (b) Chen did not require to see suppliers' invoices before signing the cheques which would have avoided any mistake in the corporate names.
- P.157 11.27-30  
P.370 11.9-15
- (c) Chen signed cheques without striking out "or bearer" with the consequent risk of abuse.
- P.236 11.2-6
- (d) It was not the practice of Tai Hing to check the ledger against the documents.
- P.351 11.30-40
- (e) Leung had easy access to the chequebook of Tai Hing and no record was kept of when he took it. 10
- P.252 11.20-26  
P.437 11.24-40  
P.321 11.15-17
- (f) Many cheque counterfoils were not completed by Leung and a careful person would have been alerted by this to the possibility of fraud. Unless unrecorded cheques are correctly listed a bank reconciliation is of no value.
- P.199 11.34-40
- (g) Chen did not check to see whether cheque numbers were in sequence. 20
- P.238,239,240
- (h) Tai Hing failed to notice that 66.61% in money terms of the transactions

passing through the Tokyo account from  
the 1st January 1975 to the 30th April  
1978 represented forged cheques.

Part II p.153

Issues

9. The issues in this appeal are:

- (a) whether Clause 10 of the Tokyo Terms  
and/or the Indemnity provide a complete  
defence to Tokyo.
- (b) whether the wider or narrower duty  
10 should be implied into the contract  
between Tai Hing and Tokyo.
- (c) whether Tai Hing owed to Tokyo the  
wider or narrower duty in tort.
- (d) whether Tai Hing is estopped by its  
negligence and/or its representations  
from asserting that its account had been  
wrongly debited with the amounts of the  
forged cheques.



Clause 10 of The Tokyo Terms and the Indemnity

Part II p.63  
 p.64  
 P.587 11.2-11  
 P.630 11.12-20

10. It is clear that the Tokyo Terms for current accounts formed part of the contract between Tokyo and Tai Hing. Tai Hing undertook to observe the provisions of the agreement on the reverse of the letter of request dated the 17th November 1961. The Indemnity and the Tokyo Terms were intended to have contractual force. The Tokyo Terms were to govern a commercial relationship. The Judge so held and was affirmed by the Court of Appeal.

11. Clause 10 of the Tokyo Terms establishes a true account stated and should be construed according to its plain and ordinary meaning. In the absence of any objection by Tai Hing to the monthly statements containing debits for the forged cheques within a fortnight of receipt the statement was deemed to have been approved. Tokyo submits that, even without Clause 10, the bank statements gave rise to an account stated. Where there is an express term the

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conclusion is irresistible. In Bishund Chand Firm v. Setti Sidhari Lal (1934) 50 L.T.R. 465 at p. 469, Lord Wright in his opinion made it clear that such an agreement could unquestionably be made between banker and customer.

12. Alternatively, Tokyo submits that Clause 10 constitutes a verification agreement consequent upon a conclusive  
 10 evidence clause. This is the formulation adopted by the Canadian Courts. The Canadian cases are reviewed and culminate in Arrow Transfer Co. v. Royal Bank of Canada (1971) 27 D.L.R. 81. In that case and in a line of earlier cases it was held that verification agreements protected bankers in cases of forged cheques. Tokyo submits that there is no reason to limit the plain meaning of Clause 10. Cons V-P  
 20 held that it provided a complete P.634 11.18-27 defence. Tokyo submits that the Judge (Mantell J) and Hunter J (with whom Fuad JA P.590 11.19-27 agreed) erred in holding that Clause 10 was P.659 11.14-25 not sufficiently clear to cover entries P.638 11.30-36 relating to forged cheques.

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13. In failing to object to the bank statements within a fortnight of receipt Tai Hing was in breach of Clause 10. By the Indemnity, Tai Hing agreed to hold Tokyo free from any loss whatsoever resulting from Tai Hing's failure to observe the Tokyo Terms. If Tai Hing had objected, Tokyo would not have paid on any future forged cheques. Tokyo's loss, in respect of which it is entitled to be indemnified, is that which Tai Hing now claims. Tai Hing's claim should fail for circuitry of action.

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#### Implied Term

14. Tokyo adopts as part of its case the arguments on the implied term issue, mutatis mutandis, set out in paragraphs 29 to 39 of LCH's case.

#### Tort

15. Tokyo adopts as part of its case the arguments on the tort issue, mutatis mutandis, set out in paragraphs 40 to 48 of LCH's case.

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American and Canadian authorities

16. Tokyo adopts as part of its case the arguments set out in paragraph 49 of LCH's case.

Authorities against

17. Tokyo adopts as part of its case the arguments set out in paragraphs 50 to 53 of LCH's case.

Estoppel

- 10 18. As the Court of Appeal held, reversing the Judge, Tai Hing is estopped by negligence P.637 11.29-32 from asserting that its account had been P.638 11.30-36 wrongly debited with the amounts of the P.659 11.38-39 forged cheques. It owed to Tokyo the wider or narrower duty. Its conduct constituted a representation to Tokyo which was intended to be acted upon by Tokyo and was acted upon by Tokyo to its detriment.
19. Even if Tai Hing did not owe any duty to  
20 Tokyo, Tokyo submits that the Judge was right P.593 11.17-40 in deciding that Clause 10, coupled with the P.594 1.1

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absence of any objection, amounted to a representation that the monthly statements were correct. The word "approved" is used to give rise to a legal consequence and cannot be read as precatory only.

20. Clause 10, representing as it does the intention of the Parties, must have been intended by Tai Hing to be acted upon by Tokyo because otherwise there would have been no purpose in including it. Tokyo acted upon it to its detriment. Tokyo

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Part II p.155

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expected all customers to check their bank statements and notify Tokyo of any query.

In the absence of query, Tokyo took the statements to be correct. If Tai Hing had notified Tokyo, Tokyo would have discovered any subsequent forgeries. Tokyo would have been able to take early action against Leung.

P.595 11.1-2

21. Tokyo submits that the Judge was right in holding that such representation gave rise to an estoppel, the other elements of estoppel being present. The Court of Appeal did not rule on this estoppel.

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22. On the 14th February 1984 the Court of Appeal of Hong Kong granted Tai Hing provisional leave to appeal to Her Majesty in Council. Final leave was granted on the 27th July 1984.

23. Tokyo submits that this appeal should be dismissed with costs for the following amongst other:

REASONS

- 10 1. BECAUSE, Clause 10 of the Tokyo Terms and/or the Indemnity provide a complete defence to Tokyo.
2. BECAUSE, the wider and/or narrower duty should be implied into the contract between Tai Hing and Tokyo.
3. BECAUSE, Tai Hing owed to Tokyo the wider and/or narrower duty.
4. BECAUSE, Tai Hing is estopped by its negligence and/or its representations from  
20 asserting that its account had been wrongly debited with the amounts of the forged cheques.

14.

5. BECAUSE, the Judgment of the Judge on estoppel by representation was right.

6. BECAUSE, the Judgments of the Court of Appeal, save in the respects specifically referred to above, were right.

NEVILLE THOMAS QC

JOHN JARVIS

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