

ALERT

10 AUGUST 2010

To what extent will a bank be liable in defamation for making an incorrect decision to dishonour a cheque?

Case note: *Aktas v Westpac Banking Corporation Limited* [2010] HCA 25

Introduction

A recent case handed down on 4 August 2010 by the High Court has awarded a former real estate agent \$50,000 in damages for defamation arising from Westpac's mistaken dishonouring of his company's cheques.

The decision has clarified the law of defamation in relation to whether a bank may rely on the defence of qualified privilege when it has mistakenly dishonoured cheques.

Facts

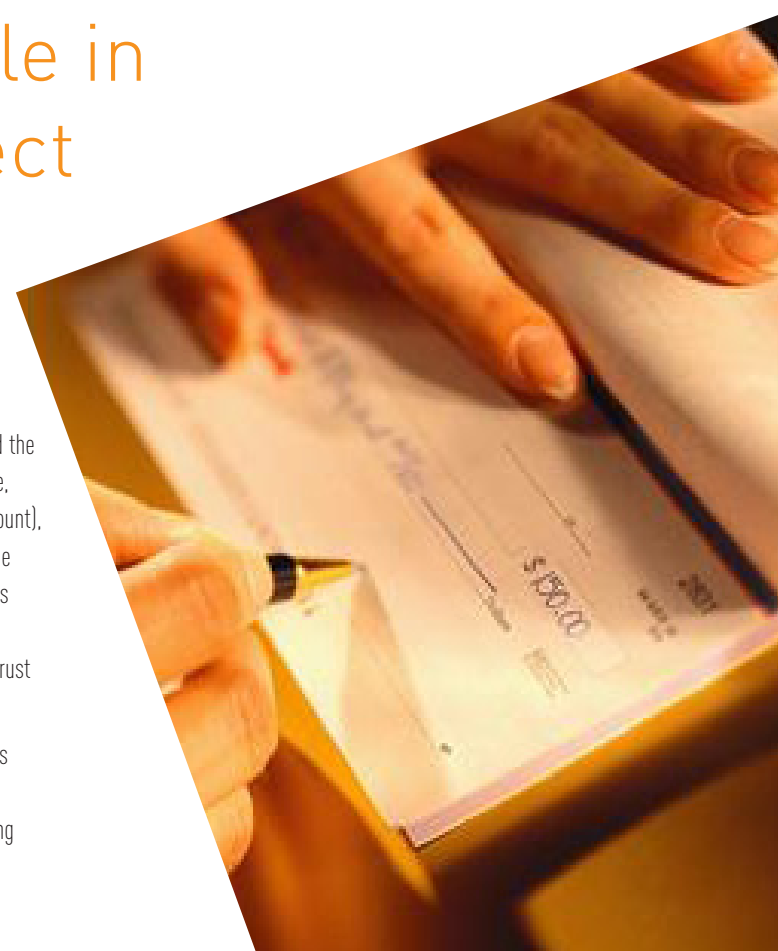
In 1997 Mr Aktas carried on the business of a suburban real estate agency through Homewise Real Estate Agency (**Homewise**) in Auburn, NSW.

Homewise managed properties for clients and collected rent on behalf of the clients, which went into a trust account (**Homewise Rent Trust Account**). Monies payable to clients came out of that account also.

At the time, a garnishee order (to demand that an individual's bank deduct money to repay a debt) was issued against Homewise in relation to a dispute with its franchisor.

In an attempt to comply with that order, officers of Westpac changed the status of the Homewise Rent Trust Account from 'normal' to 'PCO' (ie, post credit only, signifying that only credits were allowed on the account), effectively preventing any drawings. Westpac erroneously changed the status of account to PCO since the Homewise Rent Trust Account was protected from garnishee orders by the law in effect at that time. In fact, there were at all times sufficient funds in the Homewise Rent Trust Account to meet any payments made to clients of Homewise.

Subsequently, Westpac dishonoured the cheques presented by clients drawn from the Homewise Rent Trust Account. Westpac returned the cheques and provided automatically generated correspondence stating 'Refer to Drawer' as the answer.



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In the first week of December 1997 and beyond, various people in Auburn reacted adversely and with some hostility to Mr Aktas after it became known that trust account cheques had 'bounced'.

Law

While the failure to honour the cheques was in breach of the term in the contract of banker and customer between Westpac and Homewise that the customer's cheques be honoured to the extent of its credit, the circumstances attending wrongful dishonouring also founded a defamation claim.

The court held that the act of dishonouring a cheque did not give rise to the defamation claim. Rather, it was the notice of dishonour that was defamatory, as a communication that went beyond informing the recipient that the bank refused to pay the cheque. It gave the bank's reason for refusal. The defamatory imputation was found in that reason because the expression 'Refer to Drawer', when used by a bank in the above circumstances, has long been widely understood to mean there were insufficient funds to meet the payment of the cheque.

Wider issues

In making its decision, the court considered the advantages to society in providing for freedom of communication between bank and payee on such an occasion, which outweigh the need for accuracy in conveying a defamatory imputation, noting that considerations of promptness in communication of notice of dishonour are not to the point. The large public interest in the maintenance of an efficient and stable banking system was also considered.

The court emphasised the 'very large and powerful interest in maintaining observance by licensees of other statutory requirements... and generally in the speed, accuracy and reliability of transactions conducted within the banking system'.

Result

Westpac was ordered to pay Mr Aktas \$50,000 with interest plus costs. Banks should ensure that all statutory requirements which may affect its business are incorporated into its processes when it comes to restricting the payment of cheques drawn from a customer's account. The High Court has commented that banks must maintain a 'high degree of accuracy' in the decisions made about paying out cheques. If not, banks will be exposed to claims not only in contract, but also for damage to reputation.

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