



# Insight

Commercial Dispute Resolution

25 August 2010

## Cheque your facts! Bank found liable in defamation for erroneously dishonouring cheques

The recent decision in the High Court case of *Aktas v Westpac Banking Corporation* [2010] HCA 25 suggests that corporations and persons may seek redress against banks for erroneously dishonouring cheques. When a bank dishonours a cheque, it is imputed that the corporation or person has insufficient funds to satisfy payment of the cheque. If a corporation or person has sufficient funds to satisfy payment of the cheque but the bank nonetheless dishonours the cheque and issues notice of the fact to customers, the bank may be liable in defamation.

*"What then are the advantages to society from providing for freedom of communication between bank and payee on such an occasion, which outweigh the need for accuracy in conveying a defamatory imputation?"<sup>1</sup>*

This was a question considered by the majority of the High Court in the recent case of *Aktas v Westpac Banking Corporation* [2010] HCA 25 in determining whether Westpac Bank should be held liable in defamation for mistakenly providing notice of the dishonour of Aktas' cheques.

In reaching its decision that Westpac was liable in defamation, the High Court stated that holding banks responsible to their customers for damage to reputation is conducive to ensuring that banks maintain a high level of accuracy in the decisions they make about paying cheques.

This case has important implications for those who provide information to third parties about the financial position or credit worthiness of their customers.

### Background

Mr Aktas was the sole shareholder and some time director of Homewise Realty Pty Ltd (Homewise). Homewise carried on a real estate agency business in which it managed properties for clients and collected rent on behalf of those clients. Such monies were deposited into a trust account maintained by Westpac Bank (Westpac). Homewise maintained two other accounts with Westpac, including a second trust account and an office account.

In late 1997, a default judgment was obtained against Aktas in relation to a money claim and a garnishee order was issued to Westpac against the office account of Homewise.

In an attempt to comply with the order, an employee of Westpac erroneously changed the status of all three accounts from "normal" to "post credit only" in circumstances where the order could not apply to the trust accounts. The change of the status prevented any cheques being paid from those accounts.

Homewise drew 30 cheques from the trust account which were forwarded to Homewise clients or deposited into their bank accounts. All of these cheques were subsequently dishonoured by Westpac. The cheques were endorsed with the words "Refer to Drawer" and were returned to the relevant customer with an automatically generated letter that also stated "Refer to Drawer".

Homewise commenced proceedings against Westpac for breach of contract, negligence and defamation. Aktas also commenced proceedings against Westpac for defamation.

After the Court of Appeal dismissed his defamation action, Aktas was granted leave to appeal the decision of the Court of Appeal to the High Court on 11 December 2009. A majority of the High Court agreed with Aktas that the Court of Appeal had incorrectly held that Westpac's communication of dishonour of the cheques was made on an occasion of qualified privilege.

This article will focus on the issues arising from the defamation action commenced by Aktas.

1. *Aktas v Westpac Banking Corporation* [2010] HCA 25 at 11

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### Defamation

Aktas claimed that the local community acted adversely and with hostility after it became known that the trust account cheques had been dishonoured.

The act of dishonouring a cheque is not in itself defamatory. However, the court took the position that the automatically generated letter was defamatory as the expression "Refer to Drawer" is an ordinary business communication which conveys the imputation that there are insufficient funds in the relevant account to meet a cheque presented for payment.

Where a notice of dishonour is defamatory, the defamation lies in the assertion that the cheque is irregular or that the drawer has insufficient funds to meet the payment ordered on the cheque.

In this case, the notice of dishonour was defamatory as there were in fact sufficient funds in the trust account to meet the cheques presented for payment.

### Defences

Westpac relied upon the common law defence of qualified privilege.

Qualified privilege arises where a person has a legal, social or moral duty to publish a statement.<sup>2</sup> The rationale underlying qualified privilege is that "occasions exist in which it is desirable as a matter of public policy that freedom of communication should be given priority over the right of the individual to protection against loss of reputation".<sup>3</sup>

The court considered whether qualified privilege applied to the communications between Westpac and the customers.

The court was not satisfied that there was a public interest in protecting the communications between Westpac as customers have no interest in receiving a notice of a refusal to pay a cheque where the drawer has sufficient funds to meet the payment.

Accordingly, the court held that Westpac could not rely on qualified privilege as a defence to the defamation claim.

### Damages

Westpac was ordered to pay Aktas \$50,000 with interest and costs.

### Implications for individuals and corporations

This High Court decision should be read in light of the uniform defamation legislation which was passed in each of the states in 2005. The current law of defamation provides that corporations that employ more than 10 persons are not able to sue for defamation.

The High Court decision, however, has some important implications:

1. A person or corporation with fewer than 10 employees may be able to bring a claim for defamation against a bank or person who makes an adverse statement about its credit position or credit worthiness to a third party in circumstances where it has no proper grounds to do so (for example, the information is false).
2. On some occasions a business may be required to make statements regarding the financial position of an individual or corporation (e.g. the creditworthiness of a person). Organisations should exercise care when making statements as to a person's financial or credit position to ensure the accuracy of those statements so as to minimize the risk of an action for defamation.

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2. *Toogood v Spyring* (1934) 1 Cr M & R 181 at 193.

3. *Justin v Associated Newspapers Ltd* [1967] 1 NSW 61, per Walsh JA at 75.



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