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# BANK CHEQUES: A GUARANTEE OF PAYMENT?

LLM RESEARCH PAPER
BANKING AND EXCHANGE CONTROL (LAWS 503)

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1994

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## ABSTRACT

This paper examines the law of bank cheques and focuses on the recent Court of Appeal decision in Yan v Post Office Bank Limited [1994] 1 NZLR 154, the leading authority on bank cheques in this country.

The writer concludes that, through custom and banking practice, bank cheques have acquired a peculiar and unique status as a banking instrument that is said to be the equivalent of cash. The writer examines the Bills of Exchange Act that has traditionally regulated banking instruments and concludes that the provisions of the Act are not truly applicable to the bank cheque.

It is argued that the case is sufficient that a new legal framework needs to be provided to regulate bank cheques. Any such framework will need to recognise the bank cheque's peculiar characteristics. Only then will the bank cheque achieve, with the appropriate certainty, its unique status as a guarantee of payment.

The text of this paper (excluding contents page, footnotes, and bibliography) comprises approximately 14,000 words).

## I. INTRODUCTION

> "A [bank cheque] circulates in the commercial world as the equivalent of cash ... People accept a [bank cheque] as a substitute for cash because the bank stands behind it, ..."[1]

In modern economies, there are, in general terms, two kinds of cheques[2] in daily use. The first kind is the ordinary personal cheque, a cheque which is drawn on a bank by the bank's customer. The second kind is the bank cheque, a cheque which is drawn by a bank on itself.

Both kinds of cheques have developed as banking instruments to transfer funds. They have the essential advantage over cash in that they are less subject to the risk of theft or other loss. However, the ordinary personal cheque is subject to its own risks which prevent it from being the complete cash substitute. First, there is the risk that the drawer of a personal cheque may have insufficient funds to meet the cheque. Therefore the bank, as it is quite entitled to do, will refuse to make payment. Second, there is the risk that the drawer of a personal cheque may, for whatever reason, countermand his or her instruction to the bank and stop payment on the cheque.

Despite these risks, along with their resultant costs, personal cheques are widely used in everyday business. Most businesses will accept payment by way of a personal cheque, although now often following appropriate identification and/or credit verification. The costs of having payment not honoured have to be built in as a cost to the business.

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1 National Newark Essex Bank v Giordano 268 A.2d 327 at 329 (1970). The words "bank cheque" have been substituted for "cashier's check", the American equivalent to a bank cheque. See p.50 of this paper for further analysis.

2 At this stage references to "cheques" are in the generic sense as commonly understood. An analysis of whether in fact bank cheques are cheques at all follows. In addition, there are, of course, traveller's cheques which are not the subject of this paper.

However, there are some transactions where a seller will not be prepared to accept any risk. The transaction may be too important or too valuable to the seller to accept a personal cheque. But, on the other hand, the seller, and indeed the buyer, may not be prepared to run the obvious risks involved in using cash.

More recently, credit cards and electronic funds transfer systems have become, in some circumstances, an available compromise. Credit card companies will, for a fee, assume some of the risks involved in a credit card transaction. Electronic funds transfer systems, by an immediate debit and credit of the respective parties' bank accounts, have the potential to remove the risks involved in the more traditional methods of payment. However, until such time as these newer systems become universally available, it is the bank cheque that business people look to provide certainty of payment.

Bank cheques are ideally suited to minimise the risks inherent in the use of cash or personal cheques. Bank cheques are not as susceptible to theft or other loss as cash[3]. The risk that the bank may not have sufficient funds to meet a bank cheque, i.e. the risk of the bank's solvency, "can be discarded as a realistic possibility."[4] And the risk that the buyer may stop payment of a bank cheque is also minimised. This is because a bank cheque is not the buyer's cheque to stop. A bank cheque is a cheque which is drawn by a bank on itself.[5]

The use of bank cheques has now become commonplace in the settlement of important commercial transactions. Indeed, often payment by way of bank cheque is a condition of settlement. Undoubtedly, the business community's perception of bank cheques is that they are a guarantee of payment. Certainly,

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3 Cash being easier to disperse and therefore less traceable.

4 Casey J in Williams v Gibbons [1994] 1 NZLR 273 at 276. See p.31 of this paper for further analysis.

5 While there is no New Zealand authority on point, it is suggested that it can be safely stated that the bank's customer, the remitter, has no right to order a bank to stop payment on a bank cheque. The point is considered further in the context of American authorities at p.52 of this paper.

that was the perception of a Mr Ricky Yan who was the payee of a bank cheque drawn by Post Office Bank Limited (Post Bank"):

> "... I thought a bank cheque made out to me was, namely the nearest equivalent to cash that could be obtained being dependant only on the strength of the bank."[6]

However, to Mr Yan's surprise, Post Bank would not honour the bank cheque in question on presentation. The resultant court case was the first time the New Zealand courts have had to consider the question of whether, and if so when, a bank may dishonour a bank cheque. Accordingly, the Court of Appeal decision in Yan v Post Office Bank Ltd[7] is the leading authority on bank cheques in this country.

This paper examines the law of bank cheques, such that it is, and will focus on the Court of Appeal's decision in Yan. However, first, it is necessary to consider, just what is a bank cheque?

## II. THE HISTORY AND BANKING PRACTICE OF BANK CHEQUES

### A. History

> "The term "bank cheque" is a technical expression that has gained a popular meaning by the practice of Australian [and New Zealand] banks over a long period of time, the practice having commenced about the 1890s. The term is peculiar to Australia [and New Zealand]. In the United States they are called "cashiers' cheques" and in the United Kingdom and Canada the equivalent is the "bank draft"."[8]

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6 Yan v Post Office Bank Ltd (Unreported) High Court (Wellington Registry) CP 114/92 Master Williams Q.C. at 4.

7 [1994] 1 NZLR 154

8 W S Weerasooria "The Australian Bank Cheque - Some Legal Aspects" (1976) 2 Monash L. Rev. 180 at 181

Just how the banking practice of issuing bank cheques (or their equivalent) commenced is not entirely clear. However, it appears that the bank cheque gradually took over the place of the "marked" or "certified" cheque.

> "[With a marked or certified cheque], the bank on which the cheque is drawn certifies that the drawer's account is sufficiently in funds to provide for payment of the cheque. This is affected by writing "marked good for payment" or "certified good" across one corner of the customers cheque and adding the bank's official stamp initialled by the teller."[9]

The legal effect of such a marking was:

> "...to give the cheque additional currency by [showing] on the face that it is drawn in good faith on funds sufficient to meet its payment, and by adding to the credit of the drawer that of the bank on which it is drawn."[10]

Today, the banking practice of marking cheques, except by the banks themselves for clearance purposes, has largely disappeared. Indeed, in 1920, the Committee of London Clearing Bankers resolved:

> That the practice of marking or certifying at the request of a customer his cheques or drafts upon a clearing bank be discontinued, and that if such a request be made, the banks should issue to their customer in exchange for his cheque either a draft on themselves or on the Bank of England."[11]

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9 Ibid

10 Gaden v The Newfoundland Savings Bank [1899] AC 281 at 285, also Imperial Bank of Canada v Bank of Hamilton [1903] AC 49 at 54 and Bank of Baroda Ltd v Punjab National Bank Ltd [1944] AC 176 at 187.

11 M Megrah & F Ryder Paget's Law of Banking (10th ed) Butterworths 1989 London at 209

But the need for a banking instrument with certainty of payment remained. The use of bank cheques steadily grew and by 1921 the Privy Council in Union Bank of Australia Ltd v McClintock observed:[12]

> "It is common in Australia for banks, when requested, to issue to customers "bank cheques" in form drawn by themselves on themselves, in favour of a named payee or order or bearer."

Similarly, in New Zealand the use of bank cheques became common and it is interesting that the Court of Appeal in Williams v Gibbons[13] commented that "... it is common knowledge that bank cheques have been used [in conveyancing transactions] for decades."[14] The American cashier's cheque (or "check") appears to have a similarly long history. In Clark v Chicago Title Trust Co[15] the Supreme Court of Illinois referred to the appellant receiving "what is called a cashier's check"[16] on 3 April 1897.

## B. Banking Practice

Bank cheques evolved from the need to have, as a substitute for cash, a banking instrument that had certainty of payment. But, the regulation of bank cheques has largely been left to the banks themselves. There is no express statutory recognition of bank cheques in New Zealand. However, as a matter of banking practice, the banks themselves have developed a reasonably consistent regime in respect to bank cheques.

In New Zealand bank cheques take the form of an order to pay a sum of money, addressed by a bank to itself. They are made up in books of standard forms. Practices vary from bank to bank but as a rule they are signed by two

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12 [1922] 1 AC 240 at 245

13 [1994] 1 NZLR 273. See p.31 of this paper for further analysis.

14 Ibid at 275

15 57 N.E. 1061 (1990)

16 Ibid. See n130

officers of the bank from a list designated by the branch manager of the bank for that purpose. Bank cheques for small sums (e.g. not exceeding $1,000) may be signed by one officer from the list. It is usual that it is the delegated responsibility of the officers (or officer) signing the bank cheque to ensure that:

(i) all instructions regarding the application for and the completion of the bank cheque have been complied with; and

(ii) funds are in hand to pay for the bank cheque before it is issued.

The particulars of the bank cheque (i.e. the date, amount payable and payee's name) are typed on the instrument prior to its issuance to the bank's customer. Banking manuals direct that a bank cheque must be drawn to an identifiable payee.[17] Therefore, bank cheques drawn to cash are not permitted. As a matter of banking practice, in New Zealand, bank cheques are not drawn payable to bearer.[18]

Similarly, banking manuals direct that a bank cheque should be crossed and marked "not negotiable".[19] A charge is made, e.g. $5.00, inclusive of cheque duty. Typically, a bank cheque remains current for six years from date of issue. Although, if the cheque remains unpresented for a lengthy period of time (e.g. more than three months from the date of issue) the bank will make

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17 Section 3(1) of the Bills of Exchange Act requires that a bill of exchange must be payable to or to the order of a specified person.

18 There appears to be no statutory impediment in New Zealand as to why a bank cheque cannot be drawn payable to bearer. The practice then is probably only historical. Much of New Zealand's banking practices are derived from the United Kingdom and in the United Kingdom it is unlawful to make the English equivalent of a bank cheque payable to bearer. See p.43 of this paper.

19 There is no statutory requirement that a bank cheque must be crossed and marked not negotiable. Presumably the banking practice is to afford the issuing bank the protection of s.81 of the Bills of Exchange Act. Eg. if the bank's customer obtains the bank cheque by fraud and negotiates the cheque to a holder in due course that person will not obtain good title.

enquiries of the customer. Bank cheques are usually collected through the bank's general clearing system.[20]

## III. AN ANALYSIS OF YAN v POST OFFICE BANK LIMITED

### A. The Background Facts

"The facts as set out in the High Court judgment disclose a series of transactions involving members of the Chinese community who appear to have been the victims of a Mr Lam, also known as Mr Wong, and conveniently referred to by counsel and by the Master as "Lam/Wong". He is said to have since disappeared leaving behind a large number of similar frauds. A number of the Masters findings were not challenged on the appeal, and it is sufficient for present purposes to set out only that part of the narrative which is relevant to the issues argued on the appeal.

A cheque for $2 million was drawn by Lam/Wong on a bank in Auckland and credited to the account of a Mr Wah at a bank in Wellington. It was said that Mr Wah believed Lam/Wong was intending to make a substantial investment with him, which would involve a number of restaurants. Mr Wah then drew a cheque for $250,000 payable to a Mr Deng. Mr Deng told Mr Yan that this money had been given to him to use as Lam/Wong required for a number of business ventures which were to include Mr Yan's and also Mr Deng's acquaintance Mr Chan. Mr Deng deposited the cheque in his account with Post Bank. Mr Deng and Lam/Wong, identified by photographs taken by the bank's surveillance system, then attended other branches of Post Bank to make withdrawals from Mr Deng's account. One of these was by way of the bank cheque in question. The cheque was for $50,000 payable to "Far East International or order". Far East International is the trading name of one of Mr Yan's businesses.

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20 This information is based on advices given to the writer by officers of various banks. However, any errors are, of course, the writer's.

Lam/Wong then gave this bank cheque to Mr Yan, persuading Mr Yan to give him $32,000 cash in exchange. Mr Yan says he expected certain other dealings to follow, notably the sale of his business to a consortium of Hong Kong Chinese whom Lam/Wong claimed to represent. Mr Yan thought the difference between the amount of the cheque and the cash which he paid was to be an earnest of good faith and ultimately a deposit on the sale of his business. He relied on the cheque as being a bank cheque and therefore the nearest equivalent to cash, being dependent only on the strength of the bank.

In the meantime the cheque for $2 million drawn by Lam/Wong and deposited in Mr Wah's account had been dishonoured. Mr Wah's cheque for $250,000 deposited to Mr Deng's account was then dishonoured in turn. This meant that Mr Deng did not have in his account the funds on which he had relied to obtain the bank cheque in favour of Far East International. Post Bank therefore stopped payment on the bank cheque."[21]

Ignoring the cheques for $2 million and $250,000, the position can be shown thus:

| | Bank Cheque | | Bank Cheque | | Bank Cheque | |
|---|---|---|---|---|---|---|
| Post Bank | ----------> | Deng | ----------> | Lam/Wong | ----------> | Yan |
| | <-----//----- | | | | <---------- | |
| | $50,000 | | | | $32,000 | |

Mr Yan issued summary judgment proceedings against Post Bank for (inter alia) wrongful dishonour of the bank cheque. Post Bank defended the claim arguing it was entitled to stop payment because:

(i) it had issued the cheque at the request of a customer for a consideration which had wholly failed;

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21 n7 at 156, 157

(ii) the person from whom Mr Yan obtained the cheque did not have good title to it;

(iii) Mr Yan did not receive the cheque honestly and in good faith.

In the High Court, Master Williams Q.C. upheld the first of these grounds and dismissed Mr Yan's application for summary judgment. The second and third grounds were rejected after the High Court ruled that certain evidence tendered by Post Bank was inadmissable.[22] Mr Yan appealed the High Court's decision to the Court of Appeal.

## B. The Nature of the Bank Cheque

The term "bank cheque" is a misnomer. Despite the everyday usage of the term and that such instruments are prominently labelled as such, the Court of Appeal agreed with the High Court that a bank cheque is, in fact, not a cheque at all. Nor indeed is it a bill of exchange ("bill").

This follows from ss3 and 73 of the Bills of Exchange Act 1908 ("NZBEA"). Sections 3(1) and 3(2) of the NZBEA provide:

> "3(1) A bill of exchange is an unconditional order in writing, addressed by one person to another signed by the person giving it, requiring the person to whom it is addressed to pay on demand, or at a fixed or determinable future time, a sum certain in money to or to the order of a specified person, or to bearer.
>
> 3(2) An instrument that does not comply with these conditions, or that

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22 Post Bank sought to adduce evidence that purported to show that Mr Yan did not obtain the bank cheque honestly, in good faith, for value and with no notice of any defect in title. However, both the High Court and the Court of Appeal ruled that the evidence was inadmissible on the grounds of hearsay.

> orders any act to be done in addition to the payment of money, is not a bill of exchange."

The underlining is the writer's.

And, s73(1) of the NZBEA provides:

> "73(1) A cheque is a bill of exchange drawn on a banker payable on demand."

The Court noted that, while a bank cheque follows the form of a cheque, it is not an order addressed by one person to another, as is required by s3(1) of the NZBEA. Rather, a bank cheque is addressed by a bank to itself. Therefore, pursuant to s3(2) of the NZBEA, a bank cheque cannot be a bill of exchange. Nor can it be a cheque because, pursuant to s73(1) of the NZBEA, a cheque must be a bill of exchange.[23]

The Court also referred to Commercial Banking Co of Sydney Ltd v Mann[24] where the Privy Council said:[25]

> "Bank cheques are similar to "bank drafts" as known in the United Kingdom and are commonly used by solicitors in the settlement of conveyancing and by other persons engaged in commercial transactions where it is inconvenient to use cash but the creditor wishes for some further assurance of payment than the debtor's personal cheque. They are in legal significance promissory notes made and issued by the bank."

Promissory notes ("notes") are defined in s84(1) of the NZBEA:

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23 There is little doubt about this finding. While the Court of Appeal did not refer to any authority, it has long been the position in the United Kingdom. See Capital and Counties Bank Limited v Gordon [1903] AC 240 at 251, 252.

24 [1961] AC 1

25 Ibid at 7

> "84(1) A promissory note is an unconditional promise in writing made by one person to another, signed by the maker, engaging to pay on demand, or at a fixed or determinable future time, a sum certain in money to or to the order of a specified person or to bearer."

One might question how a bank cheque can be a promissory note when the instrument contains no actual promise. However, there is old authority that no precise words of contract are essential in a promissory note,[26] providing that the legal effect of the note is an unconditional promise.[27]

While not being a bill of exchange nor a cheque, nevertheless, as a promissory note, bank cheques are still subject to certain provisions of the NZBEA. By s90, Part I of the NZBEA applies to notes. And by ss1, 5(2)(e) and 6 of the Cheques Act 1960, ss76 to 81 in Part II of the NZBEA also apply to notes.

As the Court explained:[28]

> "[The Cheques] Act is by s1 to be read with and to form part of the Bills of Exchange Act. Section 5 provides protection in certain cases to a banker collecting payment of a cheque in good faith and without negligence. By subs (2)(e), the section is to apply to "Any draft payable on demand drawn by a banker upon himself." Section 6 then goes on to provide that the provisions of the principal Act relating to crossed cheques shall, so far as applicable, have effect in relation to instruments other than cheques to which s5 applies. The effect of these provisions is that the instrument with which we are concerned, although not within the definition of "cheque" in s73, is nevertheless made subject to the provisions applying to cheques which follow in ss76 to 81."

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26 Brooks v Elkins (1836) 2 M & W 74

27 Sibree v Tripp (1846) 15 M & W 23, Syndic in Bankruptcy of Nasrallah Khoury v Khayat [1943] 2 All ER 406.

28 n7 at 158

By s90(2) of the NZBEA, the "maker" of a promissory note is deemed to correspond with the "acceptor" of a bill of exchange. It follows then that, for the purposes of Part I of the NZBEA, Post Bank as the maker of the note (bank cheque) had the liabilities of an acceptor of a bill.

Accordingly, the Court distinguished the term "acceptor" in the NZBEA from the term "acceptance", as the provisions in the NZBEA relating to "acceptance" do not apply to notes by s90(3). This distinction, if correct, provides rather odd results. For example, therefore s21(1) of the NZBEA applies to notes insofar as the section refers to "acceptor", but the proviso to the section does not apply to notes because it only refers to "acceptance".

The Court also noted s5(2) of the NZBEA. In particular, that where in a bill the drawer and drawee are the same person, as is the case in a bank cheque, the holder of the bill may treat the instrument, at his or her option, either as a bill of exchange or as a promissory note. On the facts of the Yan case, there was no evidence that Mr Yan had treated the bank cheque as a bill and therefore the Court considered the provisions of the NZBEA dealing with notes. Therefore, of particular importance was s85 of the NZBEA:

> "85 A promissory note is incomplete until delivery thereof to the payee or bearer."

Accordingly, the bank cheque was incomplete until handed to Mr Yan by Lam/Wong. The Court found that, in the absence of any other evidence, by handing over the bank cheque to Mr Deng, Post Bank had impliedly authorised Mr Deng to deliver the cheque to Mr Yan which he did through Lam/Wong. The Court found the fact that delivery was effected through Lam/Wong was immaterial.

Furthermore, s21(4) of the NZBEA provided that where a bill (or a note by s90) is no longer in the possession of the party who has signed it (Post Bank) a valid and unconditional delivery is presumed until the contrary is proved. Insofar as the evidence that was allowed to be heard, Post Bank were unable to prove to the contrary.

Prima facie, the Court found:

(i) Post Bank was the maker of a note in favour of Mr Yan[29] and had authorised it to be delivered to him;

(ii) the note was delivered to Mr Yan as the named payee and that delivery was presumed to be valid and unconditional (s21(4));

(iii) by s90 Post Bank was deemed to be the "acceptor" for the purposes of s54 of the NZBEA and had therefore engaged that it would pay the note according to its tenor;

(iv) by s90 Post Bank was deemed to be the "drawer" for the purposes of s55 of the NZBEA and therefore had engaged in terms of that section that the note would on presentation be accepted and paid and that the holder would be compensated if it was dishonoured.

Accordingly, Post Bank was liable unless it could raise some other defence.

## C. Was Mr Yan a Holder in Due Course?

Prima facie, every holder of a bill (bank cheque) is deemed to be a holder in due course.[30] And, in terms of s29 of the NZBEA, the Court of Appeal found the bank cheque in question:

(i) was complete and regular on its face;

(ii) was not overdue;

(iii) had not been previously dishonoured;

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29 The Court had no difficulty that the named payee was "Far East International" rather than Mr Yan himself.

30 s30(2) NZBEA

(iv) was obtained by Mr Yan in good faith and for value and with no notice of any defect in title.[31]

Traditionally a holder in due course enjoys the fullest possible rights over a negotiable instrument.[32] Therefore, one might have thought that, given the Court's findings, Mr Yan should enjoy the fullest possible rights over the bank cheque. However, it was not available to Mr Yan to argue he was a holder in due course and indeed his counsel in the Court of Appeal did not do so.

This was because under s29(1)(b) of the NZBEA, a holder in due course is a person to whom a bank cheque is negotiated. The bank cheque in the Yan case was payable to order (as traditionally New Zealand bank cheques are). Accordingly, under s31 of the NZBEA, such a bank cheque can only be negotiated when it is transferred from one person to another in such a manner as to constitute the transferee the holder of the cheque, and by the indorsement of the holder completed by delivery.[33] In the Yan case, the bank cheque was not negotiated to Mr Yan. Neither Mr Deng nor Lam/Wong could as a matter of law negotiate the cheque. This is because, by definition, neither could be a "holder"[34] of the cheque. Neither Mr Deng nor Lam/Wong were the payee or the indorsee of the bank cheque. The bank cheque in question was not indorsed by anyone.

Furthermore, s38 of the NZBEA, which sets out the rights and powers of a holder in due course, refers in paragraph (b) to holding the bill free from any defect in the title of prior parties. In the Yan case, there were no prior parties.

It could be argued that the part of s29(1)(b) which reads "..., and that at the time the bill was negotiated to him he had no notice of any defect in the title

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31 Insofar as the admissible evidence showed. See n22.

32 J H Farrer & A Borrowdale Butterworths Commercial in New Zealand (2nd ed) Butterworths 1992 Wellington at 344

33 s31(3) NZBEA

34 s2 NZBEA

of the person who negotiated it" is disjunctive. And, accordingly, the definition requires, only if negotiation has occurred, that the transferee had no notice of any defect. However, in the writer's view, that is not an ordinary reading of the definition and, further, it is noteworthy that s29(1)(a) includes the words "if such was the fact" while s29(1)(b) does not.

In addition, there is House of Lords authority consistent with the Court of Appeal's interpretation. The Court referred to the judgment of Cave LC in R E Jones Ltd v Waring & Gillow Ltd[35] The facts of this case detail on elaborate fraud. A man named Bodenham owed 5,000 pounds to Waring & Gillow Limited (Waring). Having no means to pay the debt, Bodenham represented to R E Jones Limited (Jones) that he was the agent of a firm of motor car manufacturers, who were putting a new car on the market. Bodenham persuaded Jones to sign an agreement appointing it as agents for the sale of the car on terms that Jones would purchase 500 cars and pay a deposit of 5,000 pounds. Bodenham told Jones that Waring was financing the motor car manufacturers and that the 5,000 pounds should be paid direct to Waring. After some discussions regarding the method of payment Jones posted to Waring a cheque for 5,000 pounds payable to Waring or order. Waring presented the cheque and returned to Bodenham certain goods that Waring had seized under a hire purchase agreement. It transpired that no such firm of motor car manufacturers existed and when the fraud was discovered Jones sued the defendants for the 5,000 pounds as money paid under a mistake of fact. Waring argued that it was a holder in due course of the cheque. Cave LC rejected the argument and said:[36]

> "I do not think that the expression "holder in due course" includes the original payee of a cheque. It is true that under the definition clause of the Act (s2) the word "holder" includes the payee of a bill unless the context otherwise requires; but it appears from s29, sub-s.1, that a "holder in due course" is a person to whom a bill has been "negotiated", and from s31 that a bill is negotiated by being transferred from one

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35 [1926] AC 670. Affirmed in Hasan v Willson (1977) 1 Lloyds Rep. 431.

36 Ibid at 680.

person to another and (if payable to order) by indorsement and delivery. In view of these definitions it is difficult to see how the original payee of a cheque can be a "holder in due course" within the meaning of the Act."

The Court of Appeal in Yan did note s30(2) of the NZBEA by which every holder of a bill is prima facie deemed to be a holder in due course. However, the Court found that the considerations set out in the judgment of Cave LC, i.e. that by the definition of a holder in due course Mr Yan could not qualify, outweighed the prima facie presumption created by s30(2)[37]

There is then a certain tension between ss29 and 30(2) of the NZBEA. But, in the writer's opinion the Court of Appeal was right to prefer s29. Section 29 provides an exhaustive definition of "holder in due course", while s30(2), as a deeming provision, must be considered in the context of the purpose for which it was introduced.[38] In the context of s30(2), Yan was not a case where the bank cheque was affected with fraud, duress, or force and fear, or illegality[39]; nor was the cheque drawn as a credit contract.[40] There was then no shifting of the burden of proof for the purposes of s30(2).

Because of the wording of ss29 and 31 of the NZBEA, the Court of Appeal in Yan (and indeed the House of Lords in RE Jones Ltd) had little option but to find that the payee of an order cheque is unlikely to qualify as a holder in due course. The question therefore arises, is there any good reason for this? In the writer's view, the answer must surely be no because, somewhat strangely, on the facts of Yan, Mr Yan would have quantified as a holder in due course if the bank cheque had been payable to bearer.

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37 n7 at 161

38 JF Burrows Statute Law in New Zealand Butterworths, 1992, Wellington at 200 citing Muller v Dalgety & Co Ltd (1909) 9 CLR 693

39 s30(2)(a) NZBEA

40 s30(2)(b) NZBEA

This is because a bank cheque payable to bearer is negotiated by delivery alone.[41] Accordingly, if Lam/Wong had delivered to Mr Yan such a bank cheque, the cheque would have been negotiated. Indeed, on the facts of Yan that would have been the third negotiation of a bearer cheque. The first negotiation would have been when the bank issued the bank cheque to Mr Deng[42] . And the second negotiation would have been when Mr Deng delivered the cheque to Lam/Wong. It is because a bank cheque payable to bearer is negotiated by delivery when it is transferred from one person to another in such a manner as to constitute the transferee the holder of the cheque.[43] "Holder"[44] includes the "bearer" of a bank cheque and "bearer"[45] means the person in possession of a bank cheque payable to bearer.

It is difficult to think of any good reason why the rights of a transferee of a cheque should differ depending on whether the cheque is made out to order or to bearer. In the context of the Australian bank cheque, Edwards thought it "faintly ridiculous"[46] It is also difficult to think of any good reason why, if Mr Yan had indorsed the bank cheque and delivered it to another person, thereby negotiating the cheque, that person should be able to qualify as a holder in due course[47] when Mr Yan could not.

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41 s31(2) NZBEA

42 Delivery is defined in s2 of the NZBEA as meaning "transfer of possession, actual or constructive from one person to another." Accordingly, it is argued that when the bank officer handed over the counter the cheque to Mr Deng, there is delivery (as defined) and therefore negotiation (as defined) of a bearer cheque.

43 s31(1) NZBEA

44 s2 NZBEA

45 Ibid

46 R Edwards "The Form of Bank Cheques" (1991) 3 Bond L. Rev 174 at 183

47 Providing that person met the criteria of s29 of the NZBEA.

There is then a curious lacuna in the NZBEA. Despite meeting all the requirements of s29 of the NZBEA, Mr Yan could not qualify as a holder in due course. Indeed, even if Mr Deng had indorsed the cheque, thereby purporting to negotiate it, Mr Yan still would not have so qualified. This is because Mr Deng was not a holder [48] of the cheque and a bank cheque payable to order is negotiated by the indorsement of the holder completed by delivery.[49] Of course, the position is not confined to bank cheques as the R E Jones Ltd case well illustrates. It applies to the payee of all banking instruments that are on order paper.

It is suggested that there is simply no logic to this. It appears to be only the consequence of an accident of drafting. A minor amendment to the NZBEA is all that would be required to remedy the position.

## D. Did Mr Yan have Good Title?

One of Post Bank's main arguments in the Yan case was that it was entitled to dishonour on the bank cheque pursuant to s81 of the NZBEA. As discussed earlier,[50] s81 applies to bank cheques by ss1, 5(2)(e) and 6 of the Cheques Act. Section 81 provides that a person who takes a crossed cheque with the indorsement "not negotiable" cannot have a better title to the cheque than the person from whom he or she took it had. The bank cheque in the Yan case was so crossed and marked. Post Bank argued that as neither Mr Deng nor Lam/Wong had good title to the cheque, therefore neither could Mr Yan. But the Court rejected this argument as:[51]

> "... irrelevant. There was no purported negotiation of the note, and no transfer of it from the original payee [Mr Yan]."

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48 s2 NZBEA

49 s31(3) NZBEA

50 See n28

51 n7 at 164

The Court's rejection of this argument has been questioned by De Silva:[52]

> "What is questionable though is His Honour's finding, that delivery is not complete until the cheque is received by the payee. Section 2 of the Bills of Exchange Act provides "delivery means transfer of possession, actual or constructive, from one person to another". Therefore when the customer - who nominates the payee to the bank, because payment is owing to the payee from him - obtains the cheque, there is "constructive delivery to the payee", and the instrument is complete- whether it is treated as a bill of exchange, or a promissory note. What is more important in dealing with a bank cheque, is the effect of s81 of the Bills of Exchange Act. Section 81 simply states that a person who takes a crossed cheque with the endorsement "not negotiable", cannot have a better title than the person who gave it to him had. The section uses the words "the person who takes" and the "person from whom he took", and therefore refers to the immediate transferee and transferor and not necessarily to the parties to a cheque. In the case of a bank cheque, it could be argued, that the customer always remains the transferor of the cheque to the payee - whether first having obtained the cheque from the bank and then delivering it to the payee, or by impliedly appointing the bank as his agent to do so. Bank cheques being always endorsed "not negotiable", this would result in the payee's rights for payment against the bank always subject to any defenses the bank may have against the customer for non-payment (see also the author's comment on the High Court decision in [1993] NZLJ 236)."

De Silva goes on to conclude that the Yan decision could, "... greatly undermine the importance of s81 of the Act as a protection for drawers."[53] This is probably correct but the writer doubts that the Court's finding is in fact wrong. De Silva's analysis is to emphasise "delivery" at the expense of "negotiation" and "title". The purport of s81 is that a crossed cheque bearing the words "not negotiable" does not possess the quality of negotiability which

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52 P. De Silva "The Bank Cheque Resurrected" (1994) NZLJ 84, 85

53 Ibid at 85

confers upon a holder in due course[54] a good title to payment according to the tenor of the cheque and irrespective of defects in the title of the transferor.[55]

Section 81 certainly uses the words "a person takes" and "person from whom he took" which could refer to the immediate transferee and transferor and not necessarily to the parties of a cheque. But as a rule the NZBEA does not make provision for persons who merely have possession of an order cheque. It would seem unlikely that it was intended that s81 is an exception. The better view, in the writer's opinion, is that s81 deals with negotiation and a cheque is negotiated when it is transferred from one person to another in such a manner as to constitute the transferee the holder of the bill.[56] In the case of an order cheque, such as the one in Yan, negotiation requires the indorsement of the holder and delivery.[57] As the Court said, "there was no purported negotiation"[58] of the bank cheque. Therefore s81 is simply irrelevant in the circumstances. Further, the Court did not find "that delivery is not complete until it is received by the payee"[59] as De Silva suggests. Rather the Court found that the bank cheque is not complete until it is delivered to the payee[60], which is not the same thing.

But the real point is, in the writer's opinion, that, like the definition of a holder in due course, s81 is uncertain as to its application to the original payee of an instrument payable to order. Again, it is difficult to think of any good reason why s81 should be limited in its application to where a bank cheque has been negotiated from the original payee or where it has made payable to bearer. Again, a small amendment to the NZBEA is all that would be required to make the position uniform.

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54 s29 NZBEA

55 s38 NZBEA

56 s31(1) NZBEA

57 s31(3) NZBEA

58 n7 at 164

59 n52 at 85

60 n7 at 159 and 164

## E. Failure of Consideration

Another of Post Bank's main arguments was that there had been a total failure of consideration between itself and Mr Deng, as Mr Deng had insufficient funds to meet the bank cheque. As a question of fact this was undeniable and was the primary basis for the High Court's decision in favour of Post Bank. The High Court had found that the bank cheque, as with any cheque issued against uncleared funds, was subject to dishonour for failure of consideration. The Court of Appeal agreed that this was undoubtedly true as between the immediate parties to a personal cheque, namely the drawer and payee. And, it was also true as between the drawer and a subsequent holder of a cheque (or indeed any bill of exchange) where the cheque is marked "not negotiable". This is because of the operation of s81 of the NZBEA. "Such a cheque cannot be negotiated (s.8) so as to make the holder a holder in due course (s.29) with a title free of prior defects (s.38)"[61]

But what was not clear was whether Post Bank could rely on failure of consideration in the circumstances of a bank cheque, i.e. when Mr Deng was not a party to the bank cheque and Mr Yan, with no knowledge of the failure of consideration, gave consideration for the cheque in good faith.

The Court of Appeal accepted that Post Bank as the acceptor of a bill of exchange, or as the maker of a promissory note, had the ability to avoid liability on the ground of total failure of consideration as a general proposition of the common law applicable to contract.[62] The Court of Appeal did not elaborate on this point. However, it is well accepted in New Zealand that a bill of exchange is to be treated as the equivalent of cash and the range of defences available on a dishonoured bill is limited to total failure of consideration, quantified partial failure of consideration, illegality, invalidity and

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61 n7 at 162

62 n7 at 162

fraud.[63] But as the High Court found[64], the traditional bill writ cases are not particularly relevant to the rights of a payee of a bank cheque. Essentially, this is because of the very nature of a bank cheque. A bank cheque is an instrument of the bank's not of one of the immediate parties. And the bank's customer is not a party to a bank cheque. Nor strictly is the payee. However, the Court of Appeal said it was important to note that there were in fact three separate contracts involved.

**The contract between Post Bank and Mr Deng**

The first contract was between Post Bank and Mr Deng. As between Post Bank and Mr Deng, Post Bank was not bound. Upon the dishonour of the Wah cheque, Mr Deng had insufficient funds to meet the bank cheque. Therefore there was a total failure of consideration as between Post Bank and Mr Deng.

**The Contract between Lam/Wong and Mr Yan**

The second contract was between Lam/Wong and Mr Yan. Lam/Wong gave the bank cheque to Mr Yan in return for $32,000. The Court of Appeal did not appear to question the bona fides of this contract.

**The Contract between Post Bank and Mr Yan**

The third contract was between Post Bank and Mr Yan. This contract was "constituted"[65] by the bank cheque. The immediate parties to it were Post Bank as drawer and Mr Yan as payee. The Court found that, under s85 of the NZBEA, the contract came into existence on delivery of the cheque to Mr Yan. Mr Yan came into lawful possession of the cheque and gave good consideration for it to Lam/Wong.

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63 International Ore & Fertilizer Corporation v East Coast Fertiliser Co Ltd [1987] 1 NZLR 9.

64 n6 at 8. Presumably the Court of Appeal agreed not bothering to discuss the point further.

65 n7 at 162

The concept of a contract between Post Bank and Mr Yan is interesting. Certainly it is difficult to analyse the relationship between Post Bank and Mr Yan in terms of offer and acceptance and intention to create legal relations. The reality of most transactions involving bank cheques is that the bank will have no knowledge of the identity of the payee[66] and the payee may well have no knowledge of the identity of the remitter's bankers, at least until delivery of the cheque. In fact, typically, the only link between the bank and the payee, will be through the engagement of the bank cheque itself.

An analysis of the relationship between Post Bank and Mr Yan in terms of contract has a further difficulty. In particular, whether Mr Yan's payment to Lam/Wong was good consideration for the cheque as to the contract between Post Bank and Mr Yan?

In this regard, the Court said:[67]

> "The learned authors of Byles on Bills (26th ed, 1988) at p224, say that between the immediate parties - that is, between the drawer and the acceptor, between the payee and drawer, between the payee and maker of a note, between the indorsee and indorser - the only consideration is that which moved from the plaintiff to the defendant, and the absence or failure of this is a good defence to the action. Here the consideration provided by Mr Yan as payee went not to the other party to the note, Post Bank, but to Lam/Wong. At common law the essential requirement is that there is consideration moving from the plaintiff, not that the consideration is received by the defendant as the other contractual party. It must, however, be a consideration stipulated for by the defendant, so as to be given pursuant to the contract. In this case Post Bank had no knowledge of the transaction between Lam/Wong and Mr Yan. It had authorised the delivery of the note to Mr Yan, thereby making it complete, and by its actions it had enabled Lam/Wong to

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66 Apart from the advice of the bank's customer.

67 n7 at 162

> obtain money from Mr Yan, but it had not authorised him to obtain that money as consideration for its promise to pay."

Therefore, the Court found that, at common law, Mr Yan's payment of $32,0000 to Lam/Wong was irrelevant to the contract between Post Bank and Mr Yan.[68] At this stage, it appeared that an analysis of the relationship between Post Bank and Mr Yan in terms of contract was not going to assist Mr Yan. However, the Court then referred to s27(2) of the NZBEA which provides:

> "27(2) Where value has at anytime been given for a bill, the holder is deemed to be a holder for value as regards the acceptor and all parties to the bill who become parties prior to that time."

By some unexplained leap in logic, it appears that the Court reasoned that, as Mr Yan had given $32,000 to Lam/Wong (i.e. value given at any time for a bill), by virtue of s27(2), Mr Yan had given good consideration in the contract between himself and Post Bank. In other words it appears that the Court used s27(2) as a kind of mechanism to get around the common law position against Mr Yan, i.e. that his payment to Lam/Wong was irrelevant consideration for the contract between him and Post Bank.

The Court then went on to state:[69]

> "There were two separate contracts, as has been pointed out, one between Post Bank and its customer Mr Deng by which Mr Deng obtained merely the possession of the paper on which the as yet incomplete note was written, and a separate contract between Post Bank and the payee which arose on the note itself when it became complete on delivery. The first contract involved a total failure of consideration, but the second contract did not. Mr Yan gave consideration to a person lawfully in a position to deliver the note to the payee named in it.

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68 Ibid at 163

69 Ibid at 164

> We therefore do not think that the failure of consideration as between Mr Deng and Post Bank, or any rights of rescission of the contract between Mr Deng and Post Bank have any effect on the separate contract between Post Bank and Mr Yan constituted by the note and completed on delivery of it to Mr Yan."

## F. Application of Section 27(2)

With respect, it is difficult to follow the Court's reasoning in respect to the application of s27(2). Section 27(2) essentially provides that where value has at anytime been given for a bill, the holder of the bill is deemed to be a holder for value. Its application can be shown by the following example. A draws a cheque in favour of B and gives it to B for value. B indorses the cheque to C for value and C indorses the cheque to D as a gift. The position can be shown thus:

A -----> B -----> C -----> D
value value gift

As value has at any time been given for the cheque, D is a holder for value. Certainly, D is a holder for value as against A as clearly A signed the cheque prior to value having been given by C. D's right against B would depend on whether B indorsed the cheque prior to value having been given by C. D has no rights against C because clearly C did not become a party to the cheque until after value had been given by B.

As the above example shows, the application of s27(2) is somewhat removed from the fact situation in Yan. A further difficulty is that, under the provisions of the NZBEA, little appears to follow from achieving the status of a holder for value. Only, under s28(2) of the NZBEA, is an "accommodation party", as defined by s28(1), liable to a holder for value. However, on the facts of Yan, the Court had little difficulty in finding that Post Bank was not an accommodation party, as defined.[70]

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70 Ibid

Further, the Court found that a holder for value has no special statutory rights unless he or she is a holder in due course, which Mr Yan was not.[71] This finding is probably wrong because it overlooks s28(2) that an accommodation party is liable on a bill to a holder in value as opposed to a holder in due course. In fact, the Court of Appeal appears to repeat its error at page 164 of the judgment where it states:

> "...in any event an accommodation party is only liable to a holder in due course."

But s28(2) apart, if the Court of Appeal is correct that a holder for value has no special statutory rights unless he or she is a holder in due course, which Mr Yan wasn't, it is difficult to understand how s27(2) actually allowed the Court to get around the common law position against Mr Yan.

The Court did, however, refer to the English case of Diamond v Graham,[72] which the Court of Appeal said considered the meaning of the corresponding s27(2) in the United Kingdom Bills of Exchange Act. In this case a man named Herman asked Diamond for a loan. Diamond agreed provided that Graham made out a cheque to him for the amount of the loan. Graham duly made out the cheque and handed it to Herman to give to Diamond. In turn Diamond gave his cheque to Herman. It transpired that Herman had previously given Graham a cheque for the loan amount which was dishonoured. In turn Graham's cheque was dishonoured and Diamond, having made the loan to Herman as agreed, sued Graham on the dishonoured cheque. Graham argued that no consideration had passed between him and Diamond.

The English Court of Appeal rejected this argument finding that consideration had been furnished by Diamond by him releasing his cheque to Herman inferentially at the implied request of Graham. But the English Court of Appeal also referred to the English equivalent of s27(2) and said:[73]

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71 Ibid

72 [1968] 1 WLR 1061

73 Ibid at 1064

> "There is nothing in [s27(2)] which appears to require value to have been given by the holder as long as value has been given for the cheque, ...".

However, the reference to s27(2) in the decision of Diamond v Graham has been the subject of adverse comment. Robert Goff J. (as he was then, now Lord Goff of Chieveley) discussed Diamond in Hasan v Willson.[74] The importance of Hasan v Willson is not the case itself, but Robert Goff J's discussion on the merits of the reference to s27(2) in Diamond v Graham. Robert Goff J said: [75]

> "Although [Diamond v Graham] therefore arose between immediate parties to a cheque, nevertheless it was for some reason considered under s27(2) ..."

Robert Goff J then referred to the passage in Byles on Bills[76] (referred to by the Court of Appeal in the Yan case) and after noting that the passage had appeared in every edition of the text since its inception in 1829 went on to state:[77]

> "However, in the 23rd edition (of Byles on Bills) for the first time some doubt is expressed about the accuracy of this passage. The learned editors state that in light of the judgment of Lord Justice Danckwerts in Diamond v Graham the passage must be treated with some reserve. The part of the judgment of Lord Justice Danckwerts which the editors had in mind occurs at page 1064 of the report, when he said that there was nothing in s27(2) which appears to require value to have been given by the holder as long as value has been given for the cheque. In my judgment, however, this statement does not constitute part of the ratio decidendi of the case which, as I have already indicated, appears to have

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74 (1977) 1 Lloyds Rep 431

75 Ibid at 441

76 n67

77 n74 at 442

> been that consideration for the cheque was furnished by the holder, i.e. the plaintiff, Mr Diamond, by his releasing his cheque to Mr Herman, inferentially at the implied request of the defendant. If Lord Justice Danckwerts is to be understood as having stated that, as between immediate parties to a bill, valid consideration may move otherwise than from the promisee, that I have to say, with the greatest respect, that I find it impossible to reconcile this statement with the analysis of the law by the Court of Appeal in Oliver v Davis.[78] In my judgment the passage I have quoted from Byles on Bills which has appeared in all editions of the work, is in accordance with basic principle and with authority, and accurately represents the law."

The analysis of the law by the English Court of Appeal in Oliver v Davis referred to by Robert Goff J is summarised by Ellinger:[79]

> "The better view is that an antecedent debt or liability of a third party does not constitute value for the negotiation of a bill of exchange."

There is some authority at odds with Oliver v Davis.[80] But, in none of these cases was s27(2) or its equivalent directly relied upon. And, certainly the Court of Appeal in Yan made no reference to them.

In summary then, Diamond v Graham is questionable authority for the application of s27(2) in the way of the Court of Appeal in Yan used it. Lord Justice Danckwerts reference to s27(2) may in fact be only obiter and has been doubted by one of England's most distinguished judges. It is interesting that the Court of Appeal did refer to Hasan v Willson in its judgment[81], but appears to have overlooked Robert Goff J's reservations about Diamond v Graham.

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78 [1949] 2 KB 727, [1949] 2 All ER 352

79 E P Ellinger Modern Banking Law Clarendon Press 1987 Oxford at 508

80 Ie Bonior v Siery Ltd [1986] NZLR 254, Walsh and Ors v Hoag & Bosch Pty Ltd [1977] VR 178, Wragge v Sims, Cooper & Co (Australia) Pty Ltd (1933) 50 CLR 483.

81 n7 at 162

With respect, it is suggested that s27(2) was simply not available to the Court of Appeal to be used in the manner it was. And, it is not helpful to analyse the relationship between the drawer and the payee of a bank cheque in terms of contract. The Court of Appeal's approach to s27(2) is an enigma. On the one hand, the Court found that it could use s27(2) as a mechanism to get around the common law position that Mr Yan's payment of $32,000.00 to Lam/Wong was not good consideration for the contract between Mr Yan and Post Bank. Yet, on the other hand, the Court of Appeal found that Mr Yan as a holder for value had no statutory rights under the NZBEA. It is suggested that the two findings are both wrong and irreconcilable.

The Court finally concluded:[82]

> "Matters such as total failure of consideration which will entitle a bank to dishonour a bank cheque as between itself and its customer will not avail the bank when its cheque is made out to a named payee, and the bank entrusts the cheque to its customer so that he can deliver it to that payee, and the payee takes it in good faith and gives value for it."

It is interesting that, in the final event, the Court should refer to the payee taking the bank cheque in good faith and giving value for it. Of course they are the essential ingredients in the definition of a holder in due course.

## G. An Equivalent to Cash?

The Court of Appeal's task in deciding Yan was not made easier by its finding that there was an absence of direct authority on the point in any of the New Zealand, English or Australian cases. Indeed, the Court expressed surprise at this.[83] Accordingly, the Court looked at the position in Canada and the United States. Following what is a somewhat cursory discussion of Canadian and

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82 Ibid at 166

83 Ibid at 165. But see p.38 of this paper

American authorities, the Court appears to have been reinforced in its decision that the certainty of payment of bank cheques is paramount. The Court concluded:[84]

> "Post Bank must be taken to be aware of the fact that bank cheques are commonly relied upon in commercial transactions as being almost equivalent to cash, and that the purpose of obtaining a bank cheque rather than the customer proffering his own cheque, is to enable the payee to have the added assurance of payment. This would be futile if the bank's cheque were to be no better than the customer's cheque against which it was issued."
>
> and
>
> "The use of bank cheques payable to order is commonplace for the settlement of commercial and conveyancing transactions, and they are generally treated as equivalent to cash to the extent that the only risk is that of the solvency of the bank. It is clear that they are not the same as cash, but if they are at the risk of dishonour because of a failure of consideration as between the bank and its customer, the trust which the market places on them would be misplaced and their usefulness substantially diminished."

It is understood that Mr Yan produced no evidence before the Court of Appeal as to the common usage of bank cheques in New Zealand. Accordingly, the Court's findings were based on the Court's own knowledge and experience. But that the Court's decision was what the business community wanted is in no doubt.

On behalf of the business community, the National Business Review reported on 10 September 1993:[85]

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84 Ibid at 164, 165

85 "Chinese businessman helps to ensure bank cheques are OK" by Graeme Hunt at 58

> "The Court of Appeal's reputation for radicalism has been tempered in the past month by two sound judgments on banking law [one of which was Yan] ..."

On behalf of the legal profession, John Greenwood, the convener of the New Zealand Law Society Property Law and General Practice Committee, wrote:[86]

> "The Court of Appeal in the Yan case was given credence and legal substance to the convention, in the absence of any clear statutory rule or bank code of practice rule, and is to be congratulated for its common sense approach in its judgment delivered by Justice McKay."

And a leading Australian academic commentator on banking law, Robin Edwards, in "New Zealand Lesson on Bank Cheques: Ricky Yan v Post Office Bank Ltd, 1/9/93",[87] in the context of New Zealand teaching Australia a lesson on bank cheques, referred to the Court's "refreshing vigour"[88] and "robust approach."[89]

And, the Court of Appeal itself has already affirmed the standing of the Yan decision in Williams v Gibbons.[90] In this case a vendor's solicitor had refused to accept a bank cheque offered in settlement of the sale and purchase of a farm property. One of the issues on appeal was whether a bank cheque is good tender in settlement and whether the refusal to accept the cheque amounted to a breach of the agreement by the vendor. The Court found:[91]

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86 Common Sense on Sanctity of Bank Cheques, Council Brief, October 1993 at 9

87 Journal of Banking and Finance Law and Practice, March 1994 at 39

88 Ibid at 41

89 Ibid

90 [1994] 1 NZLR 273

91 Ibid at 277

> " ... that in contracts for the sale of land there is an implied term that tender of a bank cheque in settlement shall be good tender of the amount expressed thereon."

Accordingly, the tender of the bank cheque was wrongly refused and the vendor was not entitled to cancel the contract. As to the standing of the Yan decision, Casey J said:[92]

> "It can now be confidently accepted following the recent judgment of this Court in Yan v Post Office Bank Ltd [1994] 1 NZLR 154 that the only risk entailed in taking a bank cheque is that of the issuing bank's solvency. That can be discarded as a realistic possibility."

With respect, this is an exaggeration. It is to overlook:

(i) where the bank cheque is forged or counterfeit; or

(ii) where the bank cheque has been materially altered; or

(iii) where the bank cheque has been reported lost or stolen; or

(iv) if there is a Court order restraining payment; or

(v) where there has been a failure of consideration for the issue of the bank cheque and:

(a) the holder of the cheque is the bank's customer; or

(b) the holder has given no value for the cheque; or

(c) the holder has given value for the cheque but had, at the time of giving value, knowledge of the failure of consideration; or

(vi) fraud.

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92 Ibid at 276

It is suggested that all the above can still be considered risks entailed in taking a bank cheque.

## H. Conclusion

There can be little argument that the Court of Appeal's decision on the facts of Yan was the right one.[93] However, this paper has attempted to show that the Court's decision is in fact not really supported by the provisions of the NZBEA nor is it supported by the common law. It is argued that the bulk of the Court's reasoning is redundant. In reality, the Court was concerned as to the practical consequences of the High Court's decision. The business community's faith in bank cheques, as a guarantee of payment, shaken by the High Court decision, needed to be restored. The Court of Appeal's decision, was to recognise the bank cheque's unique status, as a banking instrument that is the equivalent, or perhaps it is better to state the next to equivalent, to cash. This status does not originate from the NZBEA or indeed any statutory regime. It is a status that has developed through custom and banking practice. The Courts, particularly in the United States of America, have come to recognise this status and gradually it has become part of the law of bank cheques. The Yan decision is then really only the first opportunity for the New Zealand courts to recognise, what has already been recognised in other jurisdictions for some time.

# IV. OTHER JURISDICTIONS

## A. Australia

As explained earlier, the term "bank cheque" is peculiar to Australia and New Zealand. However, the Australian bank cheque is different to New Zealand's for three essential reasons.

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93 In so far as the admissable evidence showed and as long as one ignores Post Bank's and the High Court's reservations about Mr Yan's bona fides

First, bank cheques have express statutory recognition in Australia. Second, traditionally bank cheques issued in Australia are payable to bearer. Third, following the decision of the New South Wales Court of Appeal in Commonwealth Trading Bank of Australia v Sidney Raper Pty Ltd,[94] the Australian Bankers' Association published a number of assurances regarding the dishonouring of bank cheques.

1. **Statutory Recognition/Payable to Bearer**

Section 73(c)(ii) of the Commonwealth Electoral Act 1918 requires candidates for election to the Australian House of Representatives to make a deposit of $100. The deposit may be paid by legal tender or by a "banker's cheque". The meaning of "banker's cheque" was considered by the Australian High Court in Fabre v Ley.[95]

Shortly before nominations closed for the 1972 Australian elections, Fabre submitted a nomination paper nominating himself as a candidate along with his own personal cheque in the sum of $100. The Returning Officer refused to accept the nomination on the ground that Fabre's cheque was not a "banker's cheque" as required by s73(c)(ii). Fabre argued that the term "banker's cheque" as used in the Act could equally mean a cheque drawn by a banker (i.e. a bank cheque) or a cheque drawn on a banker (i.e. a personal cheque). Fabre further argued that the term "banker's cheque" did not mean the same thing as the term "bank cheque" which the Court found to be a term commonly used in banking practice in Australia.

The Court rejected Fabre's arguments. While conceding that the term "banker's cheque" may be somewhat wider in meaning than "bank cheque", in that it may include a cheque drawn by a bank upon another bank, the Court found that it was clear that both expressions "banker's cheque" and "bank cheque" refer only to a "cheque" which is drawn by a bank.[96]

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94 (1975) 2 NSWLR 227

95 (1972) 127 CLR 665

96 Ibid at 671

Of wider significance, since 1 July 1987, cheques in Australia have been regulated by the Australian Cheques and Payment Orders Act 1986 (Cth) ("CPOA"). Section 5(1) of the CPOA expressly recognises bank cheques by providing that, unless a contrary intention appears, with exceptions, a reference in the CPOA to a cheque includes a reference to a bank cheque. Section 5(2) further provides that, with exceptions, nothing in the CPOA shall be taken to affect any liability that a bank would have in relation to a bank cheque. However the reality is that the CPOA provides very little assistance in establishing the rights of the various parties to a bank cheque as will be shown.

Let us consider the facts of the Yan case and how that case would be decided in Australia under the CPOA. In Australia bank cheques are traditionally issued payable to bearer.[97] This is of significance because a bank cheque payable to bearer is negotiated by delivery alone.[98] Accordingly, if Lam/Wong had delivered to Mr Yan an Australian bank cheque, the cheque would have been negotiated. This position is the same under both New Zealand and Australian law. As was explained earlier, it is because a bank cheque payable to bearer is negotiated by delivery when it is transferred from one person to another in such a manner as to constitute the transferee the holder of the cheque.[99] "Holder"[100] includes the "bearer" of a bank cheque and "bearer"[101] means the person in possession of a bank cheque payable to bearer.

Under New Zealand law, Mr Yan would have qualified as a holder in due course if the bank cheque in question had been payable to bearer. However, in Australia, somewhat surprisingly, under the CPOA, the position is further

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97 n8 at 189 and n46 at 174, 183. Although the bank cheque in Union Bank of Australia Ltd v McClintock [1992] 1 AC 240 was payable to order.

98 s40(3) COPA/s31(2) NZBEA

99 s40(1) CPOA/s31(1) NZBEA

100 s3 CPOA/s2 NZBEA

101 s3 CPOA/s2 NZBEA

complicated. Section 50(1)(a)(iii) of the CPOA contains an additional requirement to qualify as a holder in due course. In particular, that the cheque must not bear a crossing of the kind referred to in paragraph 53(1)(b) of the CPOA.

Paragraph 53(1)(b) provides:

> "Where a cheque clearly bears across the front of the cheque the addition of 2 parallel transverse lines with the words "not negotiable" between, or substantially between, the lines, the addition is a crossing of the cheque, and the cheque is a crossed cheque."

As bank cheques in Australia (as in New Zealand) are universally crossed and marked "not negotiable" Mr Yan could not therefore qualify as a holder in due course as defined by the CPOA. Indeed, there is even a further impediment. Section 49(2)(a) of the CPOA provides that a holder in due course "holds the cheque free from any defect in the title of prior indorsers...". But as already discussed, bearer cheques are negotiated by delivery alone. There is no requirement to indorse a bearer cheque. Obviously then s49(2)(a) is designed to apply to order cheques. When one couples this with paragraph 53(1)(b) it appears that the rights of a holder in due course only apply to the holders of order cheques that are not crossed and marked "not negotiable". However, as far as bank cheques are concerned, such a cheque does not exist as a matter of Australian banking practice.

There appears to be no clear reason why bank cheques issued in Australia are payable to bearer. This is at odds with the practice in the other jurisdictions considered in this paper. Weerasooria[102] suggests it may amount to no more than an oversight and a failure to appreciate s44 of the Australian Reserve Bank Act.[103] Whatever is the reason, it certainly produces odd results when coupled with the provisions of the CPOA.

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102 n7 at 189,190

103 Which provides "A person shall not issue a bill or note for the payment of money payable to bearer on demand and intended for circulation".

## 2. Bankers' Association Assurances

The decision of the New South Wales Court of Appeal in the Sidney Raper case[104] shook the Australian business community's faith in bank cheques. In this case, the bank's customer, a Mr Jacobsen, obtained a cashier's check drawn on an American bank and made payable to himself. Mr Jacobsen deposited the cashier's check into an account with the Commonwealth Trading Bank of Australia, and obtained from that bank a bank cheque payable to Sidney Raper or bearer. Sidney Raper was a real estate agent and Mr Jacobsen gave the bank cheque to Sidney Raper to hold in his trust account. In the meantime, the cashier's check was dishonoured following a tax lien being placed on the American bank by the United States Treasury. Accordingly, the Commonwealth bank dishonoured its own bank cheque on presentment by Sidney Raper. The New South Wales Court of Appeal were agreed that the bank could dishonour the bank cheque, but for differing reasons. Moffit P and Glass JA found that there was a total failure of consideration for the bank cheque and, therefore, the bank was not liable. However, Hutley JA did not find that there was a failure of consideration, but that the failure of the cashier's check enabled the bank to rescind the contract between it and Mr Jacobsen.

In order to alleviate concerns about what now was the role of the Australian bank cheque, the Australian Bankers' Association published a number of assurances regarding the dishonouring of bank cheques.[105] The most relevant assurance for the purposes of this paper is in respect to failure of consideration:[106]

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104 n94

105 Law Society Journal, July 1985 at 430

106 Ibid. Other assurances related to forged, altered, stolen or lost bank cheques and Court orders restraining payment.

"Failure of consideration for the issue of a bank cheque; the issuing bank may dishonour the cheque only if either:

- the holder has not given value for the bank cheque; or

- if the holder has given value, the holder had, at the time of giving value, knowledge of the failure of consideration for the issue of the bank cheque."

What legal status the Australian Bankers' Association's assurances have is arguable.[107] And, apparently, not all Australian banks belong to the Association.[108] But on the face of the assurances, the holder of a bank cheque is given some comfort. However, it would still be open to a bank to argue that "value" must be given to the bank.[109]

In short, it seems unsatisfactory that a bona fides holder of a bank cheque should be limited in his or her remedy to an action under the Australian Banker's Assurances rather than under the CPOA which purports to provide a code in respect of cheques [including bank cheques] in Australia.

### 3. An Equivalent to Cash?

Surprisingly, the Court of Appeal in Yan did not refer to a considerable body of Australian authority to support the proposition that bank cheques are to be treated as the equivalent to cash. In Perel v Australian Bank of Commerce[110], the bank had issued bank cheques in exchange for forged cheques of the trustees of the estate of a deceased person. In finding that the bank had been negligent in issuing the bank cheques to the fraudster in the way he

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107 In n87 Edwards suggests a cause of action under s52 of the Australian Trade Practices Act at 43

108 n46 at 185

109 Along the lines of the reasoning of Robert Goff J in n74

110 (1923) 24 S.R. (NSW) 62

wanted them, Street C.J. of the Supreme Court of New South Wales observed:[111]

> "Bank cheques payable to bearer are to all intents and purposes equivalent to cash,..."

And, on the appeal of the same case, the Privy Council said:[112]

> "A bank cheque so issued by a responsible bank is treated as equivalent to cash, and is used by the customer for any purpose for which cash or its equivalent is required, such as completing a purchase, paying taxes, etc."

In Fabre v Ley[113] the Australian High Court had to consider the meaning of "banker's cheque" as found in s73(c)(ii) of the Commonwealth Electoral Act. The Court said:[114]

> "The plain intention of the Parliament in enacting s73(c)(ii) is that cash or its equivalent shall be deposited with the nomination paper."

The underlining is the writer's.

And in Commercial Banking Co of Sydney Ltd v Mann[115] the Privy Council was told by counsel for the bank that the questions before the Court were:[116]

> "...of such importance to bankers in Australia, where bank cheques are

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111 Ibid at 75

112 (1926) AC 737 at 740

113 n95

114 Ibid at 671

115 n24

116 Ibid at 4

> treated as equivalent to cash, that the [bank], in the event of success, does not ask for costs in this appeal."

As Weerasooria comments:[117]

> "Counsel's statement before the Privy Council was a clear admission that the Australian banks also [as well as the business community] regard their bank cheques as being equivalent to cash."

## B. Canada

The Canadian equivalent of a bank cheque is called a bank draft. However, it should be noted that, in Canada, the term "bank draft" can include other forms of banker's instruments, for example, money orders.

Insofar as they are bills of exchange, promissory notes or cheques, Canadian bank drafts are governed by the Canadian Bills of Exchange Act[118] ("CBEA"). Generally, the provisions of the CBEA are similar to those of the NZBEA. There is one essential difference, however. There is no Canadian equivalent to our Cheques Act 1960. Therefore, the provisions of the CBEA relating to crossed cheques[119] do not extend to the Canadian bank draft. This means that, on the facts of Yan, Post Bank's argument that Mr Yan did not have good title to the bank cheque would not have been available to it under Canadian law. Section 174 of the CBEA (the Canadian equivalent of s81 of the NZBEA) applies only to cheques and, similarly to the position in New Zealand, the Canadian bank draft is not a cheque.[120]

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117 n8 at 185

118 R.S.C. 1985, c.B-4

119 ss168-174 CBEA (ss76-81 NZBEA)

120 Because:
- i) a cheque is a bill of exchange (s165 CBEA); and
- ii) a bill of exchange must be addressed by one person to another (s17(1) CBEA); and
- iii) a bank draft is not addressed by one person to another. It is addressed by a bank to itself.

In contrast to the United States, it appears that the Canadian bank draft has rarely troubled the Canadian courts nor has it excited academic comment.

> "Almost nothing has been written about these [bank drafts] in Canada."[121]

The best discussion of the Canadian bank draft is found in Crawford and Falconbridge's Banking and Bills of Exchange[122] which the Court of Appeal well summarises in Yan:[123]

> "The position in Canada is discussed in Crawford and Falconbridge's Banking and Bills of Exchange (8th ed, 1986) 1005, s3902, under the heading "Remittance Instruments" at pp 1006-1007, which they define as payment instruments purchased for the purpose of making a remittance. The holder's rights are stated as follows:
>
> > "It seems that the payee of a remittance instrument has a stronger claim to be regarded as a holder in due course than has the payee of an instrument generally. This question of the status of the payee, so simple in principle, has become unduly complicated by authority. We review the problem in s5102.7. In simple terms, it means that so long as the payee gives value to the remitter, the instrument is enforceable by the payee against the issuing bank, whether or not the consideration given for it to the bank by the remitter wholly or partially fails."
>
> In s5102.7, the authors point out that the named payee in such an instrument, although appearing to be an immediate party, is not in fact linked to the drawer or maker by any contract other than the engagement of the bill itself. They argue that the payee should logically

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121 M H Ogilvie Canadian Banking Law, Carswell, 1991, Toronto at 676.

122 (8th ed) Canada Law Book Inc, 1986, Toronto

123 n7 at 165

be recognised as able to qualify for holder in due course status if he can achieve it, either by presumption or proof, notwithstanding the decision of the House of Lords in R E Jones Ltd v Waring & Gillow Ltd.[124] In their discussion of failure of consideration in s5302.9, they state the general rule as being that such defences are available only in an action between the immediate parties to the underlying transaction."

The learned authors' argument is compelling, however, like Mr Yan, the payee of the Canadian bank draft is unlikely to qualify as a holder in due course. Like s29(1)(b) of the NZBEA, s55(1)(b) of the CBEA provides that a holder in due course is a person to whom a bank cheque is negotiated. The Canadian bank draft is universally issued payable to order.[125] And, like s31(3) of the NZBEA, s59(3) of the CBEA provides that a bill payable to order is negotiated by the endorsement of the holder. Despite what the learned authors say, as in New Zealand under the NZBEA, the strength of the claim of the payee of a remittance instrument to be regarded as a holder in due course is not recognised by the CBEA.

## C. The United Kingdom

In the UK the equivalent of a bank cheque is one of two types of "bankers drafts" or "bank drafts". In Commercial Banking Co of Sydney Ltd v Mann[126] the Privy Council observed that Australian bank cheques "... are similar to "bank drafts" as known in the United Kingdom ..."[127]. Of the two types of bank draft, one is a draft drawn by one bank upon another. The second type is a draft where the same bank is both drawer and drawee. It is this second type of draft that resembles a bank cheque.

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124 See n35

125 B. Geva "Irrevocability of Bank Drafts, Certified Cheques and Money Orders" (1986) 65 Canadian Bar Review 107 at 109.

126 n24

127 n25

As is the position in New Zealand, this second type of bank draft is not, by definition, a cheque nor is it a bill of exchange.[128] This is because it is not addressed by one person to another. It is addressed by a bank to itself. However, the holder of such a draft may treat the draft, at his or her option, either as a bill of exchange or a promissory note.[129]

New Zealand's Bills of Exchange Act 1908 and Cheques Act 1960 were closely modelled on the English Bills of Exchange Act 1882 and Cheques Act 1957. In fact, many of the provisions are identical. There is one difference however. In New Zealand bank cheques are traditionally issued payable to order although there does not appear to be any statutory impediment as to why they could not be issued payable to bearer. But in the UK a bank draft must not be made payable to bearer. This is because s11 of the Bank Charter Act 1844 makes it unlawful for any banker to draw, accept, make or issue, in England or Wales, any bill of exchange or promissory note, or engagement for the payment of money payable to bearer on demand. Accordingly, the English bank draft is issued payable to order.

## D. United States of America

In the USA, bank cheques are called "cashier's cheques", or "cashier's checks"[130] the cashier of a bank being traditionally the chief executive officer of an American bank.[131] Cashier's checks are regulated by Federal Reserve Board Regulation CC and by the Uniform Commercial Code ("UCC").

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128 ss3 and 73 UK Bills of Exchange Act. The position in New Zealand is exactly the same. Also Capital and Counties Bank Ltd v Gordon [1903] AC 240 at 251, 252.

129 s5(2) UK Bills of Exchange Act. Again, the New Zealand statute is identical

130 In the United States cashier's checks, teller's checks and certified checks are collectively known as bank checks. A teller's check, also known as a bank draft, is a check drawn by a bank upon another bank. A certified check is a customer's personal check that a bank has certified or accepted. A cashier's check, like the New Zealand bank cheque, is a check drawn by a bank on itself.

131 Merchants' National Bank v State National Bank 10 Wall. 604, 19 L.Ed 1008 (1913) 30 BLJ 594 cited in Banking Law Journal Digest (7th ed) (Vol. 1) Warren, Gorham & Lamont, 1982, Boston at 138

## 1. Regulation CC

Barkley Clark explains the impact of Regulation CC as follows:[132]

> "In times past, the law of bank deposits and collections could be derived primarily from Articles 3 and 4 [of the UCC] with Federal Reserve Board Regulation J taking a distant back seat. State law predominated in this area. As of September 1, 1988, those times are history. On that date, Federal Reserve Board Regulation CC became effective, forever changing the legal landscape and imposing a new regime of federal regulation that overlays the UCC ... The lawyer advising a bank about a check collection problem must now focus on Regulation CC every bit as much as Articles 3 and 4 of the UCC."

Regulation CC is intended primarily to cut down on "check holds" imposed by depositary banks[133]. A "check hold" being when the depositor's account is frozen until the bank ensures that the deposited check has been honored. The term "cashier's check" is defined in Regulation CC 229.2(i) as a check that is:

(i) drawn on a bank
(ii) signed by a officer or employee of the bank on behalf of the bank as drawer
(iii) a direct obligation of the bank
(iv) provided to a customer of the bank or acquired from the bank for remittance purposes.

Or to put it simply, a cashier's check is a check drawn by a bank on itself.[134]

If a check qualifies as a cashier's check, and providing certain other conditions are met, it is eligible for "next day availability" under Regulation

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132 Barkley Clark The Law of Bank Deposits, Collections and Credit Cards (3rd Ed) (1993 Cumulative Supplement No. 2) Warren Gorman Lamont 1990 Boston at 6-4

133 Ie collecting banks. Ibid at 6-5.

134 Ibid at 6-47

CC 229.10(c). Generally "next day availability" means that the depositary bank must make funds available not later than the business day after the banking day on which the cashier's check was deposited. This equates with the cashier's check's status as a "cash equivalent" since it is the direct obligation of a bank, not of the remitter.[135]

Accordingly, the provisions of Regulation CC increase the risks for the depositary bank by allowing the customer to withdraw deposits that have yet to be finally collected from the paying bank. Next day funds must be provided upon the deposit of a cashier's check. If the check turns out to be forged, then the depositary bank may well be left with only an empty cause of action against the forgerer.

2. **The Uniform Commercial Code**

The UCC has been described as "a comprehensive modernization of the law governing commercial transactions. It is designed to simplify and clarify the law, and to secure uniformity in the adopting states."[136]

Despite the purport of the UCC, prior to 1990, there was no express reference to cashier's checks in the UCC, except in Section 4-211(1) which included cashier's checks in a list of types of payment that a collecting bank may take in settlement.

In December 1990, Articles 3 and 4 of the UCC were completely rewritten. Generally the purposes of the 1990 rewrite ("the Revision") were:

(i) to clarify points of ambiguity
(ii) to make the UCC dovetail better with implementing Regulation CC
(iii) to companion a new Article 4A
(iv) to create a legal framework more in tune with technological developments and modern banking and business practices.[137]

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135 Ibid at 6-24

136 Atlas Thrift Co v Horan 59 ALR 3ed 389 at 393 (1972) cited in Anderson Uniform Commercial Code 1 (3rd ed) at 3

137 n 132 at S15-2

Although there was argument[138] that the UCC should include express provisions regulating cashier's checks the Revision did not attempt to do so. Instead it only provided a definition of a cashier's check as follows:

> "(f) "Check" means:
>
> ...
>
> (ii) a cashier's check .....
>
> ...
>
> (g) "Cashier's check" means a draft with respect to which the drawer and drawee are the same bank or branches of the same bank."[139]

Strangely this definition is not the same as the definition of a cashier's check in Regulation CC. However, generally there does not appear to have been any attempt to standardise the definitions.[140] In any event, it would seem that the inclusion of a definition of cashier's check in the UCC will make little difference to the law on cashier's checks.

> "Much of the law of cashier's checks as it developed in the courts will continue to be recognised under revised Article 3, as that Article merely defines but does not make a complete regulation of all aspects of cashier's checks"[141]

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138 Eg. L. Lawrence "Making Cashier's Checks and Other Bank Checks Cost Effective": A Plea for Revision of Articles 3 and 4 of the Uniform Commercial Code 64 (1979-80) Minnesota L. Rev. at 275

139 UCC Article 3-104 [1990 Revision]

140 For example, the definitions of "check", "teller's check" and "traveler's check" are different as well

141 Anderson Uniform Commercial Code 6 (3rd ed) Cumulative Supplement at 272. The cases cited in this paper are classic cases decided prior to the Revision. Accordingly, the sections of the UCC referred to are prior to the Revision as well.

## 3. American Case Law

In contrast to the other jurisdictions, the American cashier's check has been subject to a bewildering amount of litigation. It is beyond the scope of this paper to summarise adequately all the cases but, in general terms, there have been two discernable approaches by the Courts to cashier's checks.

### (i) The Ordinary Negotiable Instrument Approach

The first approach, adopted by the minority of the Courts,[142] has been to treat cashier's checks as ordinary negotiable instruments and apply the provisions of the UCC. However, some of the Courts taking this approach have considered cashier's checks to be promissory notes,[143] while other courts have considered them to be accepted drafts.[144] The difference has largely proved to be irrelevant [145]because, in either event, the Courts have determined the liability of the bank in

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142 n138 at 286

143 Eg. TPO Inc. v FDIC 487 F.2d 131 (1973), Banco Ganadero y Agricola v Society Nat'l Bank 418 F. Supp 520 (1976), State Bank v American Nat'l Bank 266 N.W. 2d 496 (1978). These cases refer to section 3-118(a) of the UCC which provides that a draft drawn on a drawer is to be treated as a note.

144 Eg. Swiss Credit Bank v Virginia Nat'l Bank 538 F.2d 587 (1976), Munson v American Nat'l Bank & Trust Co 484 F.2d 620 (1973), Bank of Niles v American State Bank 303 N.E. 2d 186 (1973). These cases conclude that a cashier's check is "accepted" upon issuance and therefore any stop order is too late under Section 4-303 of the UCC which provides, in part:

> "Any knowledge, notice of stop-order received by, legal process served upon or setoff exercised by a payor bank, whether or not effective under other rules of law to terminate, suspend or modify the bank's right of duty to pay an item or to charge its customer's account for the item, comes too late to so terminate, suspend or modify such right or duty if the knowledge, notice, stop-order or legal process is received or served and a reasonable time for the bank to act thereon expires or the setoff is exercised after the bank has done any of the following:
> (a) accepted or certified the item ...."

145 Because section 3-413(1) of the UCC provides that the contracts of acceptors of drafts and of makers of notes are identical.

accordance with section 3-305 of the UCC relating to the rights of a holder in due course.

Section 3-305 provides:

> "To the extent that a holder is a holder in due course he takes the instrument free from -
>
> (1) all claims to it on the part of any person; and
>
> (2) all defenses of any party to the instrument with whom the holder has not dealt except
>
> (a) infancy, to the extent that it is a defense to a simple contract; and
>
> (b) such other incapacity, or duress, or illegality of the transaction, as renders the obligation of the party a nullity; and
>
> (c) such misrepresentation as has induced the party to sign the instrument with neither knowledge nor reasonable opportunity to obtain knowledge of its character or its essential terms; and
>
> (d) discharge in insolvency proceedings; and
>
> (e) any other discharge of which the holder has notice when he takes the instrument."

For example, in Laurel Bank and Trust Company v City National Bank of Connecticut,[146] a Mr Maisto had two accounts with Laurel Bank and one account with City Bank. Mr Maisto purchased a cashier's check from City Bank, paid for, in part, by a check drawn on one of his accounts with Laurel Bank. Prior to issuing the cashier's check, an officer of City Bank telephoned an officer of Laurel Bank and was assured that Mr Maisto's account had sufficient funds to meet the check. Mr Maisto deposited the cashier's check in the second of his accounts with Laurel Bank which substantially reduced an overdrawn balance. However, the first of Mr Maisto's accounts with Laurel Bank had insufficient funds to meet Mr Maisto's check and Laurel Bank dishonoured it. In turn, City

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146 365 A.2d 1222 (1976)

Bank dishonoured the cashier's check and claimed the defense of total failure of consideration.

The Supreme Court of Connecticut determined that Laurel Bank as the transferee of a cashier's check was a holder in due course[147] and therefore City Bank was precluded under section 3-305(2) of the UCC from raising the defence of failure of consideration.[148] In dicta, the Court added that, under section 3-306(b) of the UCC[149], City Bank could have raised the defense of failure of consideration against a party not having the rights of a holder in due course.[150]

And, in State of Pennsylvania v Curtiss National Bank of Miami Springs, Florida,[151] a syndicate used a cashier's check issued by Curtiss Bank to purchase stock of a company. The syndicate discovered that part of the stock had been stolen and, on instructions from the syndicate's solicitors, the bank dishonoured the check. Before the United States Court of Appeal, the bank contended that the consideration given for the cashier's check included the stolen stock so that when the stolen nature of the stock was discovered, there was a failure of consideration for the cashier's check.

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147 Ibid at 1225

148 Ibid at 1226

149 Section 3-306(b) provides, in part:

> "Unless he has the rights of a holder in due course any person takes the instrument subject to
>
> ...
>
> (b) all defenses of any party which would be available in any action on simple contract; and
>
> ... "

150 Ibid at 1225

151 427 F.2d 395(1970)

The Court found the bank's argument was completely misconceived. The cashier's check had been paid for by another check for the same amount which had been honoured. That check was good consideration for the cashier's check. The issue regarding the stolen stock was irrelevant. However, what is of importance is that, the Court said that had it not found good consideration for the cashier's check, it would have allowed the bank to raise the defense of failure of consideration against a party not having the rights of a holder in due course.[152]

(ii) The Cash-Equivalent Approach

The second approach, adopted by the majority of the Courts,[153] has been to treat cashier's cheques as the equivalent of cash. The classic case most commonly cited as authority for this approach is National Newark & Essex Bank v Giordano.[154] The Superior Court of New Jersey said:[155]

> "A cashier's check circulates in the commercial world as the equivalent of cash. ... People accept a cashier's check as a substitute for cash because the bank stands behind it, rather than an individual. In effect, the bank becomes a guarantor of the value of the check and pledges its resources to the payment of the amount represented upon presentation. To allow the bank to stop payment on such an instrument would be inconsistent with the representation it makes in issuing the check. Such a rule would undermine the public confidence in the bank and its checks and thereby deprive the cashier's check of the essential incident which makes it useful. People would no longer be willing to accept it as a substitute for cash if they could not be sure that there would be no difficulty in converting it into cash."

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152 Ibid at 399

153 n138 at 289

154 n1. The facts of this are set out in p.52 of this paper.

155 Ibid

This is not to say that the Courts adopting the cash equivalence approach have ignored the provisions of the UCC. Most of these courts have adopted the position that cashier's checks are accepted drafts. But, in determining the liability of the banks, they have not looked to whether the holder of the check qualifies as a holder in due course. Instead, they have imposed on the banks an almost absolute obligation to honour a cashier's check. There is no express provision in the UCC to support this. Essentially, it is derived from the business community's perception as to what is the nature of a cashier's check.

The cash equivalence approach may have received it's furtherest extension in Bank One, Merrillville, NA v Northern Trust Bank/Du Page.[156] In this case, a check drawn on Bank One was given in exchange for a check drawn on Northern Trust. A bank officer of Bank One, knowing that the check drawn on Bank One would be dishonoured, decided to personally deliver the Northern Trust check to Northern Trust and obtained in exchange a Northern Trust cashier's check. When the cashier's check was presented, Northern Trust refused payment on the grounds that the Bank One check had been dishonoured. The Federal District Court in Illinois held that, despite the bank officer's fraud, a cashier's check is a cash equivalent and Northern Trust had to honour the check, then seek to recover the funds, just as would have been the position if cash had been used.

It is suggested that the Bank One decision takes the cash equivalence approach too far. A better view is that the bank issuing the cashier's check should still be able to raise the defence of fraud on behalf of the holder.

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156 775 F. Supp 266 (1991)

## V. OTHER TRANSACTIONS

The fact situation in Yan raised the issue of whether a bank may raise defences of its own to the payment of a bank cheque. The Court of Appeal, in its search for authority on the point, referred to the position in the United States. In particular, the Court referred to the texts of two commentators[157] and the case of National Network & Essex Bank v Giordano.[158] However, the Giordano case and the two commentaries are not really authority for the issue at the heart of the Yan case. They were concerned with the much more common situation, at least in the American context, where the bank's customer, the remitter, has a claim or defence in respect of the transaction between the remitter and the payee and requests the bank to stop payment of a cashier's check. The facts of the Giordano case provide a good example. Mr Giordano borrowed $9,500 from the bank to purchase two trucks from a Mr Fiero. The bank took a security over the trucks and issued to Mr Giordano a cashier's check payable to Mr Fiero. Mr Giordano delivered the check to Mr Fiero and took possession of the trucks. The following day Mr Giordano discovered the trucks were defective and requested the bank to stop payment of the cashier's check. The bank refused, claiming it could not stop payment of its own check.

The Court agreed with the bank. Mr Giordano had no right to order the bank to stop payment on the check. Nor did the bank have any right not to honour the check. Mr Giordano's dispute with Mr Fiero was not assertable by the bank.

In addition to the Giordano case, there is a considerable body of American

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157 Ie Michie on Banks and Banking 1992 Replacement Volume, The Michie Company, 1992, Charlottesville and SR Shapiro "Uniform Commercial Code": Bank's Right to Stop Payment on its Own Uncertified Check or Money Order" 97 ALR 3d 714 (1992 Supplement), see n7 at 165, 166

158 n1

case law[159] to support this conclusion although Barkley Clark[160] notes that the various Courts have taken "slightly different paths"[161] to it and "litigation continues apace on this issue."[162] But the point is that these cases are not really analogous to the Yan case. The Court of Appeal appears to have recognised this[163] but a more complete survey of the American authorities would have disclosed much more relevant authority. Perhaps the best example is Neve Welch Enterprises, Inc v United Bank.[164] In this case Neve Welch sold goods to a company named Tri-Power Electronics. In order to pay for the goods, the President of Tri-Power Electronics telephoned the defendant bank, and upon oral assurances that deposits would be made, the bank issued a cashier's check payable to Neve Welch. Tri-Power Electronics delivered the check to Neve Welch who immediately deposited it in its own account with another bank. But the promised deposits by Tri-Power Electronics were not made and the bank stopped payment on the check claiming failure of consideration. The Supreme Court of Utah found that Neve Welch had no knowledge of Tri-Power Electronics' failure to have sufficient funds to cover the check and took the check for value since it was obtained in payment of an antecedent debt. Although Neve Welch was the payee of the check, it qualified as a holder in due course[165] and the Court was able to find in favour of Neve Welch as a matter of ordinary negotiable instruments law.

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159 Eg. Moon Over the Mountain Ltd v Marine Midland Bank 386 NYS 2d 974 (1976), Dziurak v Chase Manhattan Bank, NA. 406 NYS 2d 30 (1978), Taboada v Bank of Babylon 408 NYS 2d 734 (1978) to name but a few.

160 n132. See n143 and 144.

161 Ibid at 2-112

162 Ibid

163 n7 at 165

164 628 P2d 1295 (1981)

165 Section 70A-3-302 Utah Code Ann.

## VI. CONCLUSION

It will be recalled that Mr Yan could not qualify as a holder in due course under the provisions of the NZBEA. Accordingly, it was not available to the Court of Appeal to find in favour of Mr Yan as a matter of ordinary negotiable instruments law. The Court of Appeal purported to do so by its somewhat dubious application of s27(2) of the NZBEA but it is suggested that, in the final event, the Court decided the case using a cash equivalence approach.

The difference between the Neve Welch case and the Yan case well illustrates the need in New Zealand for a more satisfactory legal framework to regulate bank cheques. As has been suggested earlier in this paper, there is simply no logic to the payee of an instrument payable to order not being able to qualify as a holder in due course. The unworthiness of the position is shown by the fact that Mr Yan would have so qualified if the cheque had been payable to bearer or alternatively indorsed to him. Therefore, to achieve the right result, the Court of Appeal had to resort to the somewhat nebulous concept of cash equivalence.

The provisions of the NZBEA, based on the United Kingdom's Bills of Exchange Act 1882, are now over 100 years old. As a code of the law relating to negotiable instruments, the NZBEA has served well. But most of the NZBEA's provisions are inappropriate to regulate the relatively simple but somewhat different banking instrument that is the bank cheque.

In August 1993 the Reserve Bank circulated a discussion paper mooting a review of the law relating to cheques. Among the proposals discussed was the separation of the law of cheques from the Bills of Exchange Act, along the lines of the Australian CPOA. Also discussed is the creation, by statute, of a simple non-transferable cheque, similar to that created by the UK Cheques Amendment Act 1992. While the bank cheque is not a cheque the writer suggests that the bank cheque too should receive statutory recognition and be included in any such new Act.

Any new legal framework to regulate bank cheques will need to recognise the bank cheque's peculiar status as a cash equivalent. What cash equivalence really means will need to be carefully defined. Certainly, it is not suggested that "cash equivalence" should impose an absolute obligation on the banks. That may be to make bank cheques better than cash. But the exceptions suggested earlier[166] need to be made clear and available. Only then will the bank cheque achieve with the appropriate certainty its unique status as a guarantee of payment.

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166 See text accompanying n92

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