

## HOLDER IN DUE COURSE

### *Bank of China v. Syn Lee & Co. Ltd.*

When a banker credits the proceeds of crossed cheques into the customer's account, he is either a mere agent for collection or a discounteer, *i.e.* a holder in due course.<sup>1</sup> As a holder in due course, he holds the cheques free from any defects of title of prior parties. One of the ways in which a banker is constituted such a holder occurs when there is an agreement, express or implied, that the customer be allowed to draw against the amount of the cheques before clearance.<sup>2</sup> Such a problem has recently arisen in the case of *Bank of China v. Syn Lee & Co. Ltd.*<sup>3</sup> In that case the defendant wrote out two crossed cheques for the total sum of thirty-one thousand eight hundred and forty dollars in favour of one, Heng Moh & Co. Heng Moh & Co., whose account was overdrawn for the sum of thirty-six thousand five hundred and eighty-seven dollars and fifty-nine cents, deposited these cheques in their account with the plaintiff-bank. With the proceeds of these cheques the plaintiff-bank reduced, by agreement with Heng Moh & Co., their existing overdraft by ten thousand dollars, allowing them to draw on the balance. From the evidence, Hepworth J. was of opinion that there was a standing agreement that Heng Moh & Co. were allowed credit against crossed cheques prior to clearance. The cheques were dishonoured. The question to be decided was whether the plaintiff had the right to sue on the ground that the bank was a holder in due course.

The difficulty in the case lay in the fact that the customer was not given an overdraft against the amount of the cheques. Their proceeds were employed for reducing an existing overdraft before the cheques were cleared. Counsel for the defendant argued that this reduction was not equivalent to giving an overdraft, and that therefore the plaintiff bank did not become a holder in due course. Hepworth J. rejected this argument in the following words:—

It seems to me that the only difference that an overdraft makes where there has been such an agreement is that the credit is given, not in respect of the cheques subsequently presented for payment, but in respect of the reduction of the debit at the time of payment in. In other words the important point is that it is an agreement to give credit before clearance and whether the credit is given by permitting drawings before clearance or by permitting reduction of the overdraft before clearance does not affect the matter.<sup>4</sup>

18. 189 F. Supp. 922 (1960).

1. Provided the cheque is complete and regular on its face. See s.29, Bills of Exchange Ordinance, 1949, Federation of Malaya
2. *A.L. Underwood Ltd. v. Barclays Bank* [1924] 3 K.B. 775. See also *Re Farrow's Bank Ltd.* [1923] 1 Ch. 41; *Baker v. Barclays Bank* [1955] 2 All E.R. 571.
3. (1962) 28 M.L.J. 91.
4. (1962) 28 M.L.J. at p. 92.

From the above dictum, one can conclude that the determining factor is whether there is an agreement to allow credit before clearance between the bank and the customer. It is submitted that Hepworth J. came to the right decision. "It is a matter of account between them [bankers] and their customers. If putting it in the customer's account is not to make the bankers liable when the customer is in funds, it cannot make them liable when the customer happens not to be in funds."<sup>5</sup>

Hepworth J. further stated that a banker who, pursuant to a contract — express or implied — credits the customer with the amount of the cheques before clearance does in fact receive the sum for himself and not for the customer.<sup>6</sup> Yet, giving such credit does not deprive him of the protection under section 82(2) of the Bills of Exchange Ordinance, 1949.<sup>7</sup> This is so because, the fact that the banker has credited the account does not in itself constitute him a holder in due course. He remains an agent who is still entitled to the protection of a collecting banker.

Whether a banker becomes a holder in due course or not *is* a question of fact.<sup>8</sup> There must be a contract — express or implied — that the customer be allowed an overdraft against the amount credited in advance of clearance. The fact that he has, actually, been credited and allowed to draw before clearance is insufficient.<sup>9</sup> In the present case Hepworth J. decided that since there was such an agreement between Heng Moh & Co. and the plaintiff bank, the latter became a holder in due course of the cheques. The learned judge simply extended the principle in *A.L. Underwood Ltd. v. Barclays Bank*<sup>10</sup> to cases in which bankers agree to reduce pre-existing overdrafts for the amount of cheques deposited with them. It is felt that this decision *is* well reasoned and unexceptionable.

5. *Per Cave J. in Clarke v. London & County Bank* [1897] 1 Q.B. 552.
6. *Capitol & Counties Bank Ltd. v. Gordon* [1903] A.C. 240.
7. Federation of Malaya.
8. *Re Farrow's Bank Ltd., supra.*
9. *Re Farrow's Bank Ltd., supra*; see also *Underwood Ltd. v. Barclays Bank* [1924] 3 K.B. 775 where Atkin L.J. (as he then was)—at p. 805 — said: “the mere fact that the bank in their books enter the value of the cheques for collection does not, without more, constitute a banker holder for value.”
10. *Supra.*