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Abstract
It is the custom of banks when issuing bank cheques to have them made over to the name of the payee or bearer crossed and marked 'not negotiable'. The practice of banks in England is, however, to have cheques made out to the name of the payee or order, crossed and marked 'not negotiable'.

The argument of the article is that the form of bank cheques and the wording of some sections in the Cheques and Payment Orders Act places the payee in an invidious position vis-a-vis the drawer, the bank.

Keywords
bank cheques, Cheques and Payments Orders Act

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THE FORM OF BANK CHEQUES

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It is the custom of banks when issuing bank cheques to have them made over to the name of the payee *or bearer* crossed and marked 'not negotiable'. The practice of banks in England is, however, to have cheques made out to the name of the payee *or order*, crossed and marked 'not negotiable'.

The argument of the article is that the form of bank cheques and the wording of some sections in the *Cheques and Payment Orders Act* places the payee in an invidious position vis-à-vis the drawer, the bank.

The situation that is of some concern (overlooking for a moment the undertakings given by the Australian Bankers Association) is where the person 'buying' the bank cheque does not provide the bank issuing and drawing the bank cheque with consideration, but where the person to whom the bank cheque is handed - usually the payee - provides his or her transferor by delivery with consideration eg. A rogue 'buys' a bank cheque with counterfeit notes and the bank issues a bank cheque made out to X or bearer, crossed and marked 'not negotiable'. The rogue, being the bearer, transfers it to X in exchange for goods.

Lack of Consideration between Payee and Drawer

The first obstacle that X has to overcome is the problem of consideration. If the payee provides consideration to the person who hands him the cheque, what rights does he have against the drawer of the bank cheque if no value has been provided by the 'purchaser' of the bank cheque?

Is the contractual principle that consideration has to move from the person who wishes to enforce the promise immutable in regard to cheques? There is a respectable line of authority that suggests that consideration does not have to move directly from the payee to the drawer.

Thus in *Bonior v Siery Ltd*,[1] an individual owed money to Bonior and when pressed arranged for a company which he in effect controlled, Siery Ltd, to give a cheque to Bonior. The defendant company then argued that the plaintiff could not show consideration moving from him to the drawer of the cheque. The court accepted the idea that:

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1 (1986) NZLR 254.

> In some cases the relationship between antecedent debt of the third person (Siery, the individual) and the giving of the bill to the creditor is so close that as a result it amounts to consideration ie. benefit to the drawer (Siery Ltd) or detriment to the promisee (Bonior).

The court said that the cessation of the harassment of Siery, one of the main shareholders in the company, by Bonior, the creditor, would be a benefit to the company. Moreover, the payment of the debt by the company would entitle it to the appropriate contra against Siery's account with the company which would also be a benefit to the company.[2]

Similarly, in *Wragge v Sims Cooper & Co (Australia) Pty Ltd*,[3] Dixon J made the following comments:

> Bills of exchange and promissory notes are not governed entirely by the rules of common law which prescribed the requisites for consideration for the formation of simple contracts. As a matter of history, the rights of the parties to bills of exchange were referred to the custom of merchants. It was clear that the doctrine of consideration could not be applied to these bills in the same manner as it was applied to ordinary simple contracts. For instance, an acceptor was liable to an original payee or an indorsee, though no consideration had moved from such payee or indorsee to the acceptor. (Holdsworth, History of English Law, Vol. VIII., p 168). The very notion of a past consideration or pre-existing liability seems at variance with the principle upon which it is required in simple contracts that the consideration shall move from the promisee, for that principle means that he must incur a detriment. That this requirement is absent in the case of bills of exchange and promissory notes is a matter to which attention is particularly called by the learned author in Willis's Law of Negotiable Securities, 4th ed., (1923), p 61. He refers to it as 'a peculiarity with respect to the consideration for a bill of exchange. If there be consideration for it, it does not matter from whom it moves'. [4]

In the case of *Walsh and Others v Hoag & Bosch Pty Ltd* [5] ,one has a somewhat analogous situation to the scenario of the issuing of a bank cheque. The vendor owed commission to a real estate agent. At the behest of the vendor the solicitors acting for the vendor drew a cheque on their trust account payable to the real estate agent. The solicitors were then requested by the vendor to stop payment on this cheque. The solicitors when sued by the payee, the firm of real estate agents, argued that they had not been provided with any consideration. The full court of the Supreme Court of Victoria was divided. Two judges (Young CJ and Jenkinson J) were of the view that the antecedent debt or liability of a third party was capable of constituting consideration. Lush and Jenkinson JJ decided that the solicitors were agents for the vendors and that the cheque was accepted by the firm of real estate agents as a conditional discharge of the vendor's indebtedness.

These cases are, however, out of line with the leading English case of

2 Above at 257.
3 (1933) 50 CLR 483
4 Above at 493.
5 [1977] VR 178.

Oliver v Davis & Another.[6] Here Davis owed money to Oliver. Davis was a rogue and had tricked the sister of the second defendant, Mary, into giving him her savings by promising to marry her. Mary, to prevent Oliver suing her sister's fiancee, the rogue Davis, drew a cheque in favour of Oliver. Subsequently she stopped payment of the cheque when she learnt that Davis was a rogue. Oliver sued Mary on the cheque.

The Court of Appeal held that the plaintiff could not sue on the cheque because of lack of consideration. Byles J B[7] sums up the English position as follows:

> If the instrument is payable immediately, it is conceived that the pre-existing debt of a stranger could not be a consideration, unless the instrument was taken in satisfaction, or unless credit has been given to the original debtor at the maker's request.

Similarly, Ellinger[8] comments:

> 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.

It is not easy to reconcile these two opposing lines of authority, but some comfort to the payee who provides his immediate transferor by delivery with consideration may be found in s 37 of the *Cheques and Payment Orders Act* 1986 which provides that:

> Where value has at any time been given for a cheque, the holder shall, as **regards the drawer and indorsers who became indorsers before that time, be conclusively presumed to have taken the cheque for value.** (emphasis added).

In effect s 37 makes a statutory exception to the rule that consideration must move from the person who wishes to enforce the promise of the drawer. With the bank cheque the payee or subsequent holder will rarely provide consideration directly to the drawer, the bank. Nevertheless, it can be argued that the drawer, the bank, must still view the payee as a holder for value, as long as the payee has provided some consideration to the person who hands him the bank cheque. Therefore, the payee or holder, as long as he or she provides consideration to the person who transfers it, may be viewed as a holder for value vis-à-vis the drawer, the bank.

There are few judicial illustrations of how this section works. The case of *Diamond v Graham*[9] is an example, albeit somewhat complicated, of how the payee can use s 37 to his advantage. The case involved three cheques. Herman wanted a temporary loan. He asked Diamond to give him, Herman, a cheque for £1,650. Diamond agreed on condition that Herman obtained for Diamond's benefit, a cheque for a similar amount from a third party,

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6 (1949) 2 All ER 352.

7 *Bills of Exchange* 23rd edition at 210.

8 *Modern Banking Law* 1987 at 508.

9 [1968] 2 All ER 909.

Graham. Diamond handed his cheque over to Herman, but the latter failed to obtain the cheque for Graham by the agreed date. As a consequence Diamond requested his bank to stop payment. Then Herman shortly after obtained the cheque from Graham, made out to Diamond, by giving his own cheque to Graham. Once Diamond was given Graham's cheque he lifted the stop payment on his cheque to Herman. Thus there were three cheques: one drawn by Diamond in favour of Herman; one drawn by Herman in favour of Graham; and another drawn by Graham in favour of Diamond.

Only Diamond's cheque in favour of Herman was met on presentation - the other two cheques were dishonoured. Herman was insolvent. Diamond brought an action against Graham on the cheque which was made out to him, Diamond. Graham, the drawer of the cheque argued that he was not provided with any consideration from Diamond, the payee. Dankwerts L J said[10] in response to this argument, that:

> There is nothing in the subsection[11] which appears to require value to have been given by the holder as long as value has been given for the cheque.

The court said value was given twice over: when Diamond removed the stop-payment on the cheque to Herman and when Herman gave his cheque to Graham. In so far as the finding that Herman's cheque could be viewed as good consideration the case, as authority, is somewhat dubious since Herman's cheque failed.

Nevertheless, the wording of s 37 and the Australian and New Zealand cases which support the notion that consideration does not have to move directly from the payee to the drawer provided a fairly sound basis for the argument that in our example of the bank cheque the payee or subsequent holder who gives value to the person who transfers it to him can be considered as a holder for value vis-à-vis the drawer, the bank.

Holder for Value versus Holder in due course

One of the main differences between a holder for value as opposed to a holder in due course is that the holder for value takes subject to defects in title and arguably personal defences between the immediate parties to the cheque whereas a holder in due course takes free from these. Can the payee or holder of a bank cheque qualify as a holder in due course vis-à-vis the drawer, the bank?

One apparent barrier is the crossing that bank cheques normally bear: *ie* a crossing with the words not negotiable between or substantially between the lines of the crossing. Setting aside for a moment the effect of this and exploring some of the other requirements that are necessary to constitute a holder in due course we can appreciate what is singular and different about the standard bank cheque.

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10 Page 911.

11 S 27(2) of the English *Bills of Exchange Act* 1882 which is the equivalent of s 37 of the *Cheques and Payment Orders Act* 1986.

Firstly, to qualify as a holder in due course the cheque must be *negotiated* to the holder.[12] Normally a cheque is *issued* to the payee not *negotiated* to him.[13] But this is not to say that a payee can never be a holder in due course. If a cheque is issued to a payee but later on is negotiated back to the payee then it is possible for the payee to qualify as a holder in due course.[14]

What of our situation where the payee is not directly given the cheque by the drawer (the bank) but is given it by the person who buys the cheque from the bank? Normally a bank cheque is made out to the name of the payee or bearer. Thus one can say that the bank cheque is issued to the customer or person who buys it - this person is the bearer; such a person then negotiates it[15] to the payee. In *Commonwealth Bank v Sidney Raper Pty Ltd*,[16] both Glass J and Hutley J accepted the idea that the payee had the bank cheque negotiated to it. Glass J said:[17]

> It was made payable to Sidney Raper Pty Ltd, or bearer, and was handed to P Jacobsen who then delivered it to the payee. It followed that P Jacobsen was the first holder and the immediate party to the bill and the plaintiff payee was a remote party taking title by delivery.

The requirement of consideration has already been explored and it was noted that s 37 may be used to help the payee qualify as holder for value. Section 50 of the *Cheques and Payments Orders Act* 1986, however, refers to a holder in due course as being a holder who takes the cheque for value. Most academic writers take the view that a holder, to qualify as a holder in due course, must himself provide value directly to the drawer. In other words, it may be that to qualify as a holder in due course s 37 cannot be invoked. There appear to be no cases directly on this point. Logically, there seems to be no reason why this should be the case. The wording of s 37 'have taken the cheque for value' and s 50 ...'took the cheque...for value'... seem consonant and therefore, it is suggested, the deeming should be allowed in regard to s 50.

The other requirements of s 50 - good faith, complete and regular on the face of the cheque, not being a stale cheque, no notice of defects or dishonour - can be passed over since they do involve any contentious issues.

Returning, however, to the effect of the not negotiable crossing, brings us back to the heart of the problem with bank cheques, the issue of consideration.

Section 50 of the *Cheques and Payment Orders Act* 1986 provides that one cannot be a holder in due course on a cheque which bears such a crossing. The effect of a 'not negotiable' crossing is explained in s 55 in the following terms:

12 S 50 (1)(a) *Cheques & Payment Order Act* 1986.

13 See *R E Jones Ltd v Waring & Gillow Ltd* (1926) AC 670.

14 See *Jade International Steel Stahl and Eisen & Co v Robert Nicholas* (Steels) Ltd [1978] 3 All ER 104.

15 See s 40 *Cheque Payment Orders Act* 1986.

16 (1975) 25 FLR 217.

17 At p 245.

> Where a cheque that bears a crossing of a kind referred to in paragraph 53(1)(b) is transferred by negotiation to a person, the person does not receive, and is not capable of giving, a better title to the cheque than the title that the person from whom the first mentioned person took the cheque had.

In other words the holder takes subject to defects in title.

Where the person who acquires the bank cheque gives no consideration to the bank or the consideration fails, does this amount to a defect in title?

Section 3 gives some examples of what may amount to defects in title, namely, where a person obtains a cheque by fraud, duress or other unlawful means or for an illegal consideration. But these are not to be read as limiting the situations in which title is defective.[18]

In the *Sidney Raper* case[19] an American couple bought a bank cheque with the US equivalent of a bank cheque, a cashier's cheque. This latter cheque was stopped by US authorities. The Australian bank then stopped payment of the Australian bank cheque when it was in the hands of a real estate agent. Glass J A seems to be indicating that the failure of consideration provided by the Jacobsens, the American couple, did constitute a defect in title.[20]

> The crossing of the cheque (the 'not negotiable' crossing) means that negotiability in its full sense does not exist. A prior defect in title is transmissible.

Moffit P does not appear to have considered the question. However, Hurley J A took quite a different view on the issues of value from the Jacobsens for the bank cheque. Basically his view was that there was consideration provided at the time when the bank cheque was handed over since the failure of the US cashier's cheque only rendered the contract between the Jacobsens and the bank rescindable ab initio.

> ...until the rescission actually takes place as between the parties it cannot be said that there is no consideration and in a case such as this where the instrument got into the hands of a holder before there was an effective rescission, this taking place when the account in Australian pounds in the name of the second third party was opened. As this occurred after the bank cheque was in the hands of the holder, it is not correct to say that there was no consideration given for the bank cheque. It seems to me that when the bank cheque reached the plaintiff it was a cheque for which value had been given. [21]

However, Hurley J took the view that since the bank had the right to set aside the transaction and to repudiate liability on the cheque and since the cheque was crossed not negotiable this right enured against the plaintiff.[22]

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18 See s 3(4).
19 Above n 16.
20 Above at 19, see p 246.
21 Above at p 240.
22 Above at p 240.

This view is perhaps somewhat debatable. The thorny issue it raises is this: when s 55 of the *Cheques and Payment Orders Act* 1986 talks of a cheque bearing a not negotiable crossing acquiring no better title, does it mean that the holder is subject to personal defences available between the drawer and the person acquiring the cheque?

By implication, the answer would seem to be in the positive since s 49(2) of the *Cheques and Payment Orders Act* 1986 talks of a holder in due course taking:

> Free from any defect in the title of prior indorsers as well as from *mere personal defences available to the drawer* and prior indorsers against one another.

Therefore if a holder is not a holder in due course because of the not negotiable crossing, it would seem logical that the holder would take subject to such rights of the drawer. Against this, it must be admitted that s 55 only talks about defects of title and makes no explicit mention of personal defences or equities.

Cases that support the proposition that the person taking a cheque crossed and marked not negotiable take subject to defences which are available between prior parties are as follows: *Fisher v Roberts*[23]; *Union Bank of Australia v Schulle*[24]; *Radford v Ferguson.*[25] Cases that go the other way are as follows: *Bank of New South Wales v Ross; Stuckey & Morowa;*,[26] *Roberts v Malouf.*

One could come to the following tentative conclusions in our scenario (ie. when the payee has provided consideration to the person who negotiated the cheque to him but when no consideration or value has been provided to the bank by the person buying the bank cheque): the payee on such a bank cheque may well be able to qualify as a holder for value vis-à-vis the bank as drawer but the existence of a not negotiable crossing will prevent him from qualifying as a holder in due course. He takes subject to defects in title which, it may be argued covers lack of, or failure of, consideration. Thus he will not be able to enforce the bank cheque against the bank.

A contrary argument is as follows: section 37 allows the payee to be viewed as a holder for value vis-à-vis the drawer, the bank. Ellinger[28] expresses the idea as follows:...'some defences cannot be raised against a holder for value because he has furnished consideration for the bill. Thus, the absence of consideration between prior parties does not constitute a valid defence against him'. Ellinger quotes the English equivalent of s 37 to support this and *Mills v Barber*[29] and *Barber v Richards.*[30]

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23 [1890] 6 TLR 354.
24 [1914] VLR 183.
25 [1948] WALR 14.
26 [1974] 2 Lloyds Rep 110.
27 (1929) 29 SR (NSW) 179.
28 *Modern Banking Law* 509.
29 (1836) 1 M & W 425 at 430 - 1.
30 (1851) 6 Ex 63.

Ellinger elaborates further:[31]

> One authority suggests that total failure of consideration does not constitute a defence to an action brought by a holder for value who is a remote party (*Watson v Russell* (1864) 5 B&S 968). This view deserves support. As a remote party who is a holder for value has furnished consideration for the bill, it seems irrelevant that a consideration furnished by prior parties has failed.

Moreover there is some Australian authority to suggest that a failure of consideration is *not* a defect in title. In *Roberts v Malouf*,[32] M drew a cheque crossed 'not negotiable' payable to D or order and delivered to D in payment of money won from him by D under a wagering contract. D indorsed the cheque to R but upon presentation to M for payment it was dishonoured. It was held that the cheque having been given for a consideration which by virtue of the *Gaming and Betting Act* 1912 was not illegal, but merely void, D had acquired a good title to it and that therefore R was entitled to recover its value from M.

The result of this contrary argument is as follows: the payee on a bank cheque who has provided consideration to the customer or holder who negotiates it to him is a holder for value; as such, he **can** enforce payment against the bank as drawer by virtue of s 37 and those cases that support the proposition that consideration does not have to move directly to the drawer; and, moreover, as a holder for value he is **not** affected by the failure of, or lack of, consideration from the customer to the bank since this does not amount to a defect in title. On this view the 'not negotiable' crossing is not fatal.

Crossed Bank Cheque not Marked 'not negotiable'

It is submitted, however, that the most desirable form of a bank cheque from the point of view of the payee or subsequent holder is a crossed bearer cheque **without** the words not negotiable written on it. A bank cheque written this way has several advantages.

At first the payee seems in a vulnerable position since the words not negotiable do not appear on the cheque. Consequently if he lost the cheque and it finished up in the hands of a holder in due course then the holder in due course would prevail over the payee. However s 23 (1) of the *Cheques and Payment Orders Act* 1986 allows the holder to convert a bearer cheque into an order cheque by clearly indicating on the front of the cheque that it is payable to order (the easiest way to do this is to strike out the words or bearer) and then to make the appropriate indorsement on the back of the cheque. Although this section is prima facie intended to be used for the transfer of cheques there is no reason why the payee could not indorse it to his bank for collection and credit to his account. If such a cheque was lost and found by a rogue then the rogue would have to forge the indorser's signature to pass it on. A forged indorsement would be ineffective to pass title.[33] Admittedly s 23 (1)

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31 At p 510.

32 Above n 27

33 See s 32 of *Cheques and Payment Orders Act* 1986.

is something of a nightmare for collecting banks since they can be confronted with cheques with an apparent gap in the chain of indorsements from the payee onwards. Banks might even refuse to collect such cheque for fear of conversion. Arguably s 23 ought to be repealed. However until it is repealed there is no reason why the payee could not protect his title in the manner described. Perhaps a simple way along the same lines would be to simply strike out the words 'or bearer' and then not bother to indorse it. Although this strictly falls outside the wording of s 23 (1) there is no apparent reason why it would not be effective to make the cheque an order one since the Act only prohibits fraudulent and material alterations[34] and such an alteration could hardly be described as fraudulent.

An easier way altogether for the payee to protect his title would be to simply add the words 'not negotiable' to the crossing. Section 57(2) expressly allows a holder to do this.

What is the advantage of a payee taking a bearer bank cheque without the words 'not negotiable' written on it when the customer fails to provide consideration to the bank issuing the bank cheque?

One could be forgiven for thinking that the payee or holder of such a bank cheque would qualify as a holder in due course if the words not negotiable did not appear. As previously argued, all the elements of s 50 appear to have been complied with.

What then are the rights of the holder in due course? The stock answer is to take the cheque free from defects in title and free from personal defences or equities between the immediate parties. However a closer examination of the rights of the holder in due course in s 49 of the *Cheques and Payment Orders Act* 1986 reveals that there can be two sorts of holders in due course under the *Cheques and Payment Orders Act* 1986. A comparison of s 49(2) with s 43(1)(b) of the *Bills of Exchange Act* 1909 reveals a significant difference.

Section 43(1)(b) of the *Bills of Exchange Act* 1909 states that:

> Where he (the holder of a bill) is a holder in due course, he holds the bill free from any defect of title of prior parties, as well as from mere personal defences available to prior parties among themselves, and may enforce payment against all parties liable on the bill.

Thus if there was a bearer cheque that did not have the words not negotiable written on it and it was lost by the payee, found by a rogue who passed it onto a holder in due course, then the latter would obtain a good title and prevail over the payee. Such was the position under the *Bills of Exchange Act* 1909.

Consider now the position with the same situation under s 49(2)(a) of the *Cheques and Payment Orders Act*. Section 49(2)(a) refers to a holder in due course holding the cheque 'free from any defect in the title of prior indorsers...'.

34 S 78 (2) above.

It appears that under the current cheques legislation the person who fulfils all of the requirements of s 50 defining a holder in due course will, in the case of a **bearer** cheque, take subject to defects in title. It is only when the cheque is an order cheque and is indorsed to the holder in due course that the latter take free of defects in title.

It will be recalled that bank cheques are traditionally made out to the payee/s name or bearer. If the customer, the bearer, does not provide consideration to the issuing bank and/or there is fraud (and assuming that this constitutes a defect in title), then, if the bank cheque is passed onto the payee, even if the words 'not negotiable' do **not** appear on the bank cheque, the payee will take subject to defects in title.

It appears faintly ridiculous that the *Cheques and Payment Orders Act* 1986 results in different rights to holders in due course depending upon whether a cheque is a bearer or an order cheque. The words in s 49(2)(a) should be changed to prior parties rather than prior indorsers.

If this change was effected then the plight of the payee or holder to whom a bank cheque that is not marked 'not negotiable' is transferred when there is some defect in title or dispute between the customer and the bank that issues it would be ameliorated. He would be a holder in due course, taking free from defects in title and personal defences between prior parties. He could then subsequently protect his title by adding the words not negotiable to the crossing.

Recovery of monies with a paid bank cheque

It is suggested that if the bank cheque takes the form suggested above i.e. made out to payee or bearer crossed but not marked 'not negotiable' at the time when the payee takes it (and if s 49(2)(a) of the CPOA was amended as suggested); then, it would appear that the payee would also be in a strong position if the bank seeks to recover the proceeds from the payee.

This can be seen from the recent case of *Midland Bank PLC v Brown Shipley & Co Ltd, Citibank NA v Same.*[35] Here the rogues tricked the drawer banks into writing out bank cheques to the defendant bank which specialised in providing cash by means of bogus telephone conversations and the use of headed letter paper fraudulently signed. The plaintiff banks had no mandate whatsoever to debit their customers accounts. The bank cheques were handed over to a messenger (presumably one of the rouges) in exchange for the confirming letters. The rogues then took the bank cheques to the defendant bank and obtained cash with them.

The plaintiffs' case against the defendant banks was based primarily on the tort of conversion.[36] This in turn depended upon whether the title in the bank cheque passed to the defendant bank. The plaintiffs' argument was that there was a void 'contract' because of a unilateral mistake as to the identity of the messenger, such a mistake being induced by the fraudulent actions of the

35 [1991] Vol 1 Lloyd's Law Reports p 576.

36 See Aitken *The Banker and Voidable Title*, Aug 1991 7 BLB for more details.

rogues. The court found on the facts that there was not a mistake as to identity as required and that, as a consequence, title passed to the defendant bank.

If the bank cheque was made out as suggested above then arguably no such action of conversion would lie against the payee bank since it could argue that it was holder in due course. One presumes that the bank cheques in question were made out in the usual English fashion i.e. payee or order, crossed and marked 'not negotiable'. The payee on an English bank cheque invariably does not have the bank cheque negotiated to him and cannot qualify as a holder in due course. The payee on an Australian bank cheque invariably does have the cheque negotiated to him and were it not for the marking 'not negotiable' would usually qualify as a holder in due course.

It is significant that the plaintiff banks in the case never sought to recover the monies as payment made under a mistake of fact. Presumably this action was barred because the defendant had changed its position in good faith by providing cash in exchange for the bank cheques.

It would appear that generally speaking the payee on a bank cheque where payment has been made will be in a stronger position than where payment on the bank cheque has been stopped since in many cases he may be able to argue change of position. In these circumstances it would appear to be of little relevance whether the bank cheque is an order one or a bearer one.

Australian Bankers Association Assurances

Following the *Sidney Raper* case[37] the Australian Bankers Association gave a number of assurances regarding dishonour of bank cheques. The most relevant one to our discussion relates to failure of consideration:

> Where there has been 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.

As to the first part of the statement one could not criticise it in terms of the legal position of a payee on a bank cheque. It may even go further than the law provides since, as we have seen, the payee of a typical bank cheque - a crossed bearer cheque marked not negotiable - may not be able to enforce the bank cheque against the bank where there has been lack of, or a failure of, consideration relating to the issue of the bank cheque due to the not negotiable crossing. This poses the question of whether it is desirable that the holder of a bank cheque who is roughly in the same position as a bona fide holder for value without notice should have to rely on such a letter of comfort. It would surely be more reassuring if the legal position of the payee or holder in such circumstances was that he could, if necessary, enforce it in a court of law against the bank as drawer rather than rely upon the largesse of the banks.

37 Above at n 16.

Although purporting to bind banks it would not be too difficult for a bank to extricate itself from the assurance. For example, it refers to the holder having not given value; the bank could always argue that this means value to the bank. As we have seen there is some authority[38] to support such an argument.

The second part of the statement above is a qualification to liability that on the face of it, it appears fair and aimed at stopping someone who is in cahoots with the rogue from being able to enforce it against the bank. In practice it could, however, work out unfairly since the burden would be on the payee or holder, if the bank stopped payment, to provide that he had no knowledge of the failure of consideration. Such a possibility does not inspire much confidence in bank cheques.

It is debatable whether the Australian Bankers Association's assurances are legaly binding. For a start not all banks belong to the Association, although the majority do. Moreover it does not cover building societies.[39] There is also evidence that assurances given by the Australian Bankers Association do not always filter down to the level at which decisions on stopping bank cheques are made.[40]

The banks' stance on stolen or lost bank cheques can also be criticised. The Association's statement includes the following:

> Where a bank is informed and is satisfied that a bank cheque was lost or stolen the bank may not honour it if the bank cheque is presented for payment by or on behalf of a party who has no title to it.

To what degree must the bank be satisfied? Will the word of the customer that he has lost it suffice? Or should the bank require some statement or statutory declaration that the payee has never received it? Again the not negotiable crossing could cause an injustice here. If a lost or stolen bank cheque finishes up in the hands of someone who would otherwise qualify as a holder in due course but for the not negotiable crossing, such a person will have a defective title or no title to it. The assurance states that the bank may not honour it. Perhaps this is a hint that despite the not negotiable crossing banks may honour the bank cheque if it finishes up in the hands of someone who has given value for it to the person who negotiates it to him and takes it without notice that it has been lost or stolen.

The other assurance that warrants comment is that pertaining to altered bank cheques. The Association's assurance states as follows:

> A bank may dishonour a bank cheque which has been materially altered. Banks will readily co-operate with any holder or prospective holder who may want to verify the authenticity and content of any instrument purporting to have been issued by them.

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38 *Oliver v Davies* above at n 6.

39 Non-bank financial institutions can issue payment orders drawn on themselves and signed by them which are in their nature like bank cheques.

40 *BE Val Enterprises v NAB* - unreported Magistrate's Court case. Details available from writer.

This actually goes further than the law. Section 78(2) of the *Cheques and Payment Orders Act* 1986 states that:

> A cheque is also discharged if the cheque is fraudulently and materially altered by the holder.

Thus if a cheque is innocently but materially altered, for example if the holder converts a bank bearer cheque to an order cheque by striking out the words or bearer, this would be a material alteration that would prima facie, according to the above Australian Bankers Association assurance, entitle the bank to stop payment on it. Clearly the Association stance is at odds with s 78(2) of the Act since it was written before the introduction of that Act and reflects the old position under the s 69 of the *Bills of Exchange Act* 1909.

Although the assurances are meant to provide comfort, it should be remembered that they are a policy statement which is not quite the same as a legally enforceable obligation. Indeed the very vagueness of the assurance allows the banks quite a bit of latitude. One is still forced to recall the salutary warnings of Moffitt P in the *Sidney Raper* case:[41]

> A bank cheque, in common with other types of negotiable instruments, according to the financial dependability of those who are liable upon it or them in practical terms closely approximates in many respects to monetary currency. For this reason many persons have little reason other than to regard them as the equivalent of/or as good as cash, but these circumstances do not change the nature of the bank cheque or other negotiable instrument. A bank cheque or any other cheque with apparently impeccable backing is still a cheque and not cash....

41 Above at n 6 at p 222-223.