had different legislative histories; and, thirdly, it was in keeping with a purposive, pro-consumer interpretation to construe the phrase broadly with reference to a seller and narrowly in the case of a buyer.

With the first of these observations one need have no great quarrel, but the remaining two seem not a little shaky, given that the section on which the *R. & B.* decision was based uses "in the course of a business" *twice* in a single sentence, referring first to a buyer and then to a seller. If a higher court is to uphold *Stevenson* v. *Rogers,* it would seem that *R. & B.* will have to be overruled.

As a postscript, if we may return to the 1890s, the expression "redundant type-writer" would then have been spelt with a hyphen and had an entirely different meaning—namely, the individual who worked the machine and not the machine itself!—see *Pullman* v. *Hill* [1891] 1 Q.B. 524.

L.S. Sealy

COLLECTING BANKS, CONVERSION AND CONFUSION

The collection of cheques can be a risky business. The collecting bank is exposed to the risk of liability if the person who delivers the cheque for collection has no title, or a defective title, to the instrument. A prime example is where the cheque has been stolen. The "true owner" of the cheque (usually the person who owned the cheque at the time of the theft) may claim damages from the bank for conversion of the piece of paper on which the cheque is written, when it is deemed to have a value equal to the amount for which the cheque is drawn; alternatively, he may claim recovery of the proceeds of the cheque received by the bank in an action for money had and received. In either case the collecting bank's liability is strict.

Facing liability at common law, the collecting bank invariably turns to section 4 of the Cheques Act 1957. This provides the bank with a complete defence to the true owner's claim if it can prove that it acted "in good faith and without negligence". Most cases turn on whether or not the bank was negligent. However, there is some controversy as to what is meant by "negligence" in this context. It has been interpreted by some, most notably by Diplock L.J. in *Marfani & Co. Ltd.* v. *Midland Bank Ltd.* [1968] 1 W.L.R. 956, 972, in terms of a breach of a duty of care owed by the bank to the true owner of the cheque. Others reject the notion that the statutory reference to "negligence" involves any duty of care to the true owner, and interpret the expression in terms of a failure by the bank to achieve a certain standard of conduct in its business (see, *e.g. Lloyds Bank Ltd.* v. *E.B. Savory & Co.* [1933] A.C. 201, 221, *per* Lord

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Warrington). Whichever view is preferred, it does not alter the standard of care expected of the bank, a question of fact to be assessed with regard to all the circumstances of the case, but it could make a difference where the bank claims that its negligence should be disregarded because it is not shown to have had any causative effect on the loss suffered by the true owner.

In *The Honourable Society of the Middle Temple v. Lloyds Bank plc* [1999] 1 All E.R. (Comm.) 193, the Middle Temple drew a crossed cheque, marked "a/c payee only", for £183,000 in favour of its insurers, Sun Alliance. The cheque was stolen in the post. A few days later it turned up in Turkey bearing the forged indorsement of Sun Alliance. There it was presented for collection to a Turkish bank, Sekerbank, by someone who was not an existing customer of that bank but who was allowed to open an account in his own name for the purpose of receiving the proceeds of the cheque. Sekerbank sent the cheque to Lloyds Bank in London for collection. This was the first time that Sekerbank had asked Lloyds to act as its collecting agent in such a transaction. The cheque was dealt with routinely by Lloyds, although it was referred to Lloyds' management when Sekerbank asked for collection to be expedited as "our [customer] is indeed in a difficult position". The proceeds of the cheque were received by Lloyds and remitted to Sekerbank, from whom they were withdrawn and dissipated. When the Middle Temple discovered the theft, it started proceedings against Lloyds and Sekerbank for conversion of the cheque. Both banks sought to rely on the section 4 defence, each claiming that it acted in good faith and without negligence.

The case came before Rix J., who held that both banks were liable for conversion, but that Lloyds were entitled to a full indemnity from Sekerbank. Rix J. held that Sekerbank had been grossly negligent in accepting an English cheque payable to an English company in sterling for a large sum from a stranger without making further inquiries. The case against Lloyds raised more complex issues. The cheque in question was crossed "a/c payee only". As a result of changes made by the Cheques Act 1992, amending the Bills of Exchange Act 1882, a cheque crossed "account payee" or "a/c payee", either with or without the word "only", is now non-transferable and only valid as between the original parties thereto. This means that a bank which collects an "a/c payee" cheque for anyone other than the named payee will almost always be held to be negligent and so fall outside the section 4 defence. However, Lloyds argued that, as it acted as the collecting agent of a foreign correspondent bank, it had no concern with identifying, and therefore could not be negligent in failing to identify, whether or not the cheque was in fact being

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collected for the account of the named payee. That was entirely the responsibility of Sekerbank, who alone knew who its customer was. Rix J. rejected that argument, and in so doing came down firmly in favour of the *Marfani* view that a collecting bank, or a clearing bank acting as the collecting agent for another (non-clearing) bank, owes a duty of care to the true owner of the cheque.

Rix J. drew a distinction between the situation where a bank acts as an agent for collection (where the bank is essentially the point of entry into the cheque clearing system) and branch collection where a bank is acting for its own individual customer. In the latter case the bank has the opportunity to do at least two things which are not open to the agent for collection: first, it can vet its customer at the time the account is opened and subsequently; secondly, it can compare the customer's name on the paying-in slip and the payee's name on the cheque. With this distinction in mind, Rix J. held that a bank acting as agent for collection was entitled to rely on its own customer, the collecting bank, to know the identity of the ultimate customer who presented the cheque for collection, unless there was something exceptional which brought the cheque to the agent's notice, or ought to have done so, and which should then have put it on inquiry (Rix J. held that Lloyds should have been put on inquiry through the combination of a number of factors, including the fact that Sekerbank had told Lloyds that its customer was "in a difficult position", something which did not square with the payee being Sun Alliance). However, Rix J. further distinguished between a bank acting as agent for collection of a domestic bank and one acting on behalf of a foreign correspondent bank. The agent for collection was entitled to assume that the domestic collecting bank knew of its own responsibilities under the Cheques Act 1992, but the same assumption could not be made of the foreign collecting bank. Lloyds was negligent because it ought to have informed Sekerbank of the effect of the Cheques Act 1992 but had failed to do so. It did not matter that Sekerbank had been informed of this by at least one other English bank. Following the *Marfani* line, and without reference to those English and Commonwealth cases which point the other way (*e.g., Thackwell* v. *Barclays Bank plc* [1986] 1 All E.R. 676, 684), Rix J. accepted that a bank could still rely on the section 4 defence where it could prove that its negligence had no causative effect on the loss suffered by the true owner. Lloyds had simply failed to prove lack of causation.

It submitted that Rix J., like Diplock L.J. before him, fell victim of the confusing use of the expression "negligence" in section 4. By getting bogged down in the language of duty of care and causation, it is too easy to lose sight of the fact that the true owner's cause of

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action is in conversion or for money had and received. Liability is strict and the bank is only offered an escape route if it can bring itself within the wording of section 4. If the bank fails to establish that it acted "without negligence", the section does not apply and issues of causation seem quite irrelevant. Surely it is time to remove the real villain of the piece and replace the reference to "negligence" in section 4 with one to "carelessness".

RICHARD HOOLEY

SORRY, WE'VE SOLD YOUR HOME: MORTGAGEES AND THEIR POSSESSORY RIGHTS

ROPAIGEALACH v. *Barclays Bank plc* (not yet reported) is another case that attempts to define precisely the relationship between a mortgagee's right to possession of mortgaged premises following default by the mortgagor and the court's ability to defeat or defer this right under its statutory powers. More than that, the *Ropaigealach* decision illuminates brightly the true extent of a mortgagee's possessory rights and may, if other mortgagees cannot resist the temptation to follow its lead, require the further intervention of Parliament to protect mortgagors of dwelling houses.

Following default by Mr. and Mrs. Ropaigealach, the joint mortgagors, Barclays Bank made valid but unsatisfied demands for payment and informed the mortgagors that it proposed to realise its security by selling the property at auction. Significantly, the mortgagors were not in possession at this time, as the premises were being refurbished. The mortgagee either knew of this, or believed the mortgagors had quit, but in any event the Bank did not seek an order for possession from the court. The property was sold and the title transferred to the purchaser. Mr. Ropaigealach then sought to deny that the mortgagee had the right to sell the property without first obtaining a court order for possession. The simple point is that such an application would have given the mortgagors an opportunity to apply for relief under the Administration of Justice Act 1970, s. 36. For its part, the Bank denied that it had ever taken possession, and argued that, in any event, it did not need a court order to do so, having a right to possession as mortgagee that was neither limited by its own contract nor abrogated by statute.

There are two important issues here. First, assuming the mortgagee had taken possession, was this legitimate without order of the court? With considerable reluctance, all three members of the Court of Appeal held that because the mortgagee had a *right* to possession derived from the manner in which legal mortgages of land are created, there was nothing to prevent it taking possession without

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