"The Duty of Care of a Bank to its Corporate Customers —are Recent Developments Justified by the Authorities, or by Modern Banking Practice?"

by

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I. Introduction

Selangor United Rubber Estates v. *Cradock*[1] is a case well known to company lawyers—so well known, in fact, that its significance in other areas of the law has tended to be overlooked. Scant attention has been paid to the effect of Ungoed—Thomas J.'s decision on the relationship between banks and their corporate customers. *Karak Rubber Co. Ltd* v. *Burden*,[2] a decision of Brightman J., is less celebrated, at least amongst company lawyers; perhaps understandably so, as at first reading the decision may appear to embody a mere restatement of the conclusion reached in *Selangor*. But from the viewpoint of the banker, the latter case may well represent a more explicit statement of the charges wrought in his relationship with a corporate customer by the *Selangor* decision.

The effect of the decisions in *Selangor* and *Karak* has been to call into question the underlying nature of the contract between a corporate customer and its bank. Prior to 1968, the terms of such a contract could be delineated with reasonable succinctness;[3] any implied terms were readily identifiable and subject to change only so far as a particular banker-customer relationship demanded or as banking practice changed. The contractual duty of care owed by a bank was recognisably breached by a limited catalogue of defined situations; it

[1] [1968] 1 W.L.R. 1555.
[2] [1972] 1 W.L.R. 602.
[3] See e.g. Bright, *Banking Law and Practice in New Zealand* (2nd ed., 1969).

is arguable whether the *Selangor* case imposes a new duty as to inquiry when the circumstances require it, or merely regenerates a duty allowed to degenerate previously by analogy with that placed on a collecting bank by section 5 of the Cheques Act 1960.[4] In any event, the onus now placed on a banker is seen by the textbook authors to be oppressive and perhaps novel. Paget states:[5]

> "Hitherto, a paying banker was not called upon to consider whether or not he should comply with his mandate and it may be thought to be a dangerous departure to require him in the face of a clear instruction to weigh up the facts of a situation with a view to a possible breaching of his contract. . . . It is submitted that this decision (*Selangor*) raises impossibly high the burden on a bank not to be negligent, in requiring its officers to be expert in finance as well as banking."

Be that as it may, it is clear that a duty of the kind imposed by *Selangor* may well conflict with other aspects of the banker-customer relationship. For example, Halsbury queries whether such a duty to inquire will justify dishonour of a cheque and so release a banker from liability.[6]

It will be shown, however, that by whatever means the contractual import of *Selangor* and *Karak* may be restricted, by far the more dangerous aspect of the decisions so far as bankers are concerned lies in the development and application of constructive trusteeship. The commentators, in concentrating on what appears to be a major alteration to the contractual relationship, have substantially missed the more important point.

It will be convenient to set out first the basic practice followed by banks in New Zealand; then to deal separately with the contractual and constructive trusteeship aspects of the cases together with previous authorities; and finally to offer some tentative conclusions.

II. Banking Practice in New Zealand

Present banking practice in New Zealand would seem to be concerned primarily with maintaining full records of a company's financial position. Banks will require the balance sheet and profit and loss account to be placed on their records each year and will take fairly close note of the status and value of any assets over which they may have a security, to the extent of in some instances requiring frequent stocktaking to ensure that debentures are secured to their full value.

[4] Cheques Act 1960 (N.Z.).
[5] *Paget's Law of Banking* (8th ed., 1972), 289.
[6] *Halsbury's Laws of England* (4th ed., 1973-) iii, 39, para 50.

However, the *Selangor* and *Karak* decisions are concerned not with the ongoing financial stability of a company and the credit extended, but with the mechanics of operation of a current account.

In opening an account for a company, the banker will insist on the completion and return of a form of letter setting out the name of the company, its registered office, the names and signatures of every person authorised to operate the account and a certified copy of the company's resolution to that effect. Beyond this the banker will require a copy of the memorandum and articles of association. The practice of most bankers is for the bank's legal section to summarise the pertinent parts of the memorandum and articles and place the precis on the particular branch file. The bank is therefore accorded actual knowledge as to whether a particular transaction is intra vires the powers or objects of a company and in accordance with the articles; it is, however, clearly more concerned with ensuring that the company has power to borrow and give security since at the end of the day a banker will probably not be able to ascertain whether a particular payment, for example to a creditor, is intra vires or not; the company may in fact be trading in an area in which it is not empowered to engage, but there will be little indication of this on the face of a single cheque or draft.

While some concern may be seen with the articles and memorandum, it appears that the banks operating within New Zealand place little emphasis on investigating the possibility of illegal transactions. Apart from such situations as payment by a director of a cheque payable to his company into his own account, the rigour of a banker's inquiry will depend on the amount being transferred.

For example, section 61 of the Companies Act 1955,[7] deals with the payment of commissions, discounts and brokerage on the allotment of shares. Is a drawee banker entitled to assume that a single cheque payable to a stockbroker is lawful, or is he thereby put on inquiry? It will be shown that the effect of the *Selangor* decision may well be to put the banker on inquiry in such a situation; and certainly if the bank has been itself involved in the issue of shares or *semble* if the cheque in question is a large one, his duty will be quite clear.

The bank by its very nature will be more concerned that all is in order when financing a transaction about to be entered into. Banking practice is to set monetary limits on the credit to be extended at any particular point in the managerial hierarchy, the protective element being that the more the bank is placed at risk, the more rigorously the transaction will be investigated. If nothing else, the *Karak* and

[7] Companies Act 1955 (N.Z.).

Selangor cases demonstrate the dangers to a banker of allowing a minor official to deal with a transaction which is outside the normal scope of his employment or experience. Certainly, within the Bank of New South Wales, which is the only trading bank to have made information available to the writer, the limits to which a branch manager may extend loan facilities without Head Office approval are surprisingly low, although they are of course flexible as to the location of the branch and the type of account with which it is dealing. It was suggested that loan facilities of $500,000 or more would in fact require the approval of the bank's board of directors sitting in Sydney. A transaction of this magnitude would presumably be investigated to some extent by the bank's legal department and a report sent to the board.

It appears also that branches without ready access to the bank's own solicitors are able to obtain legal advice from local solicitors where necessary. This, however, must be considered an unsatisfactory arrangement, bearing in mind that a country solicitor is unlikely to be versed in the intracacies of banking law or indeed the financial intricacies of the Companies Act. Moreover this arrangement relies on the judgment of the particular branch manager in deciding to refer a problem for legal opinion.

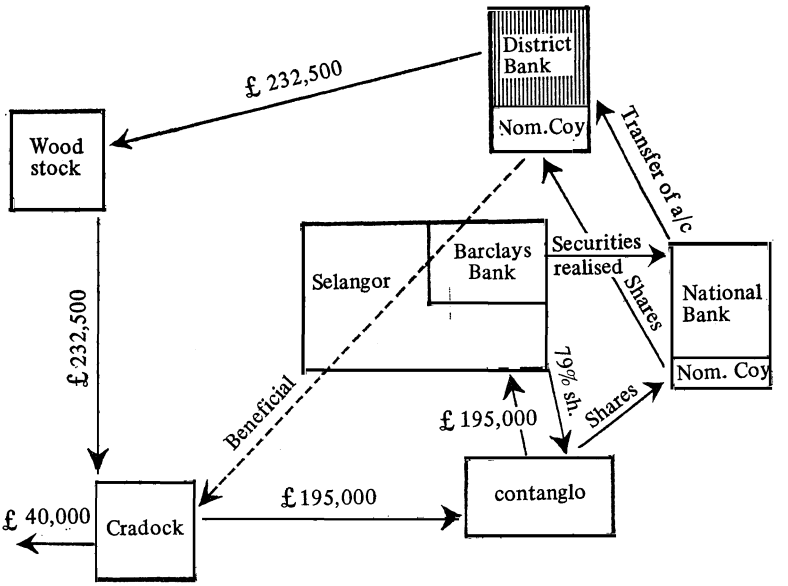
It is submitted also that transactions at branch level up to the manager's jurisdiction are likely to be entered into with little regard to legal ramifications except perhaps a cursory examination to ensure that all is in accordance with the company's memorandum and articles. The New Zealand banks apparently feel that such an arrangement offers the best balance of economy and caution; but as will be shown later, far more realistic protection is available if the banks were to avail themselves of it. It may be, however, that the accumulation to a bank of any more protection than presently obtains would be regarded with some disfavour by the legislature.

That this section may be deficient in factual context is due to the reluctance of the New Zealand banks generally to release details of their mode of operation, and more specifically of the methods they employ to protect themselves from liability to corporate customers.

III. The Facts

A. *Selangor United Rubber Estates* v. *Cradock*

The facts of this case were extraordinarily complex and may best be illustrated by means of a diagram.



The action took place against the background of section 54 of the Companies Act[8] which provides:

> "(1) Subject as provided in this section, it shall not be lawful for a company to give, whether directly or indirectly, and whether by means of a loan, guarantee, the provision of security, or otherwise, any financial assistance for the purpose of or in connection with a purchase or subscription made to or to be made by any person of or for any shares in the company, or, where the company is a subsidiary company, in its holding company:"

Then follows a series of provisos not relevant to either *Selangor* or *Karak*.

The plaintiff company had liquid assets of £232,500 with Barclays Bank. Contanglo Ltd acting on behalf of Cradock made a takeover offer to the plaintiff which was accepted. Contanglo obtained an overdraft facility of £235,000 from the National Bank and paid for the shareholding which they then transferred to the National Bank's nominee company. Contanglo's nominee directors then resolved to transfer the plaintiff company's account to the National Bank.

Cradock had a very small account with the District Bank. District accepted a transfer of the plaintiff's account from National pursuant to an arrangement made by Cradock and the Selangor board (Contanglo's nominees). The Selangor board then drew a cheque on District Bank payable to Woodstock Ltd who endorsed it to Cradock. Cradock then repaid Contanglo, hiving off about £40,000 for himself

[8] Companies Act 1948 (U.K.) 11 & 12 Geo. 6 c.38. In New Zealand see Companies Act 1955 s. 62.

in the process. The shares held by the National Bank's nominee company were transferred to a District company as nominees for Cradock.

The Oxford Street branch of the District Bank which dealt with the transaction consisted of only eight persons and was completely inexperienced in takeover transactions. It was not disputed by the Bank that at the crucial moment of debiting the company's account and crediting Cradock's the Bank knew that the money came indirectly from the plaintiff company to Cradock. Nor was it disputed that the draft drawn on the company's account was also to cover the reimbursement of Contanglo. The only defence relied on by the District Bank was that they did not know that the draft was in fact cover for the purchase of shares by Cradock.

The District Bank had despatched a relatively junior official to the Selangor board meeting at which most of the transaction was concluded. He took with him a draft drawn on Cradock's account payable to Contanglo and should have received in return a draft drawn on the National Bank in favour of Cradock; instead he brought back a cheque drawn on the company payable to Woodstock and endorsed to Cradock, in addition to an undertaking by National to transfer the shareholding in Selangor from its nominee company to District's. No importance was attached to the undertaking, District merely being concerned to ensure that the endorsement of the cheque to Cradock was in order since . . . "the branch had bank instructions about conversion of cheques and the dangers of endorsements. They had no such instructions about the dangers of payments, if in accordance with a mandate to the bank;"[9] the latter point was taken up in the *Karak* case.

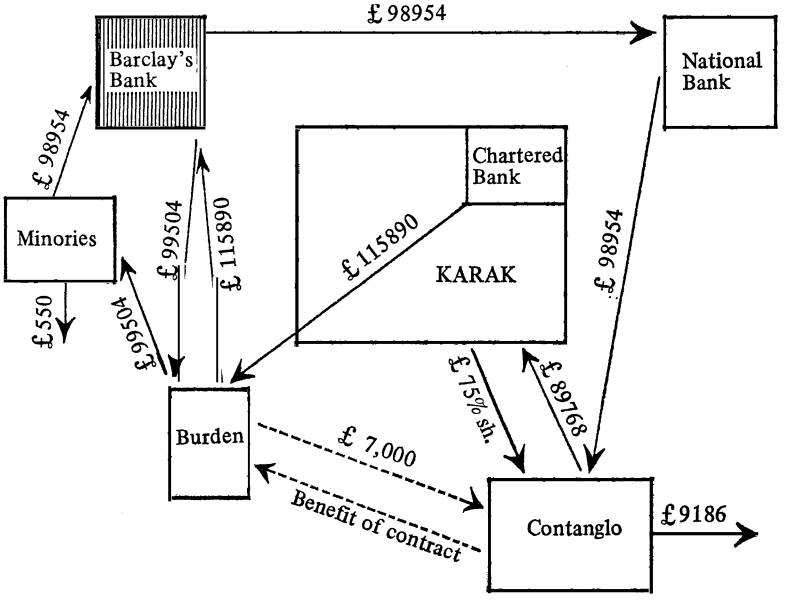
The second transaction with which the case was concerned was rather less complex. Cradock decided to relieve his indebtedness to the company by way of Woodstock and at the same time transfer his shareholding to one Burden. Burden and a friend were appointed directors of Selangor and an account opened with the Nova Scotia Bank where both Burden and Cradock already had accounts. Cradock drew a cheque for the amount of Woodstock's indebtedness in favour of the company; the company drew a cheque payable to Burden signed by Burden and Sinclair (the friend) in accordance with the mandate given the bank for the same amount; and Burden drew a cheque payable to Cradock. All three cheques were presented to the Bank by the company's solicitor who represented that they were merely a matter of internal accounting. The Bank duly made the appropriate debit and credit entries. Although in this transaction the Bank never caught sight of the fact that the shareholding was in fact changing

[9] [1968] 1 W.L.R. 1555, 1629.

hands, it was aware that it was dealing with a cheque drawn on the company's account and signed by Burden, which was also payable to Burden.

B. *Karak Rubber Company* v. *Burden*

Again the facts may best be demonstrated in diagrammatic form.



Contanglo Ltd made an offer to purchase the shareholding of Karak which was accepted. They then assigned the benefit of their contract to Burden and continued to act throughout the transaction as agents for an undisclosed principal. Minories, a merchant banker, arranged on behalf of Burden, whom they represented to Barclays as being ". . . chairman of a public company, a chartered accountant and a man of importance and integrity",[10] that Barclays would take a bank draft payable to Contanglo to a meeting of the Karak board and receive in return a draft in their favour. Barclays handed over their draft before the board meeting, whereupon an undertaking was given to pay the Karak shareholders. A cheque for the total assets of the plaintiff company was handed to Burden who had been constituted a director. Burden then proceeded to open an account for Karak with Barclays, gave them a mandate to operate on his signature and made out a cheque to cover the original Barclays draft. The Bank staff had no

[10] [1972] 1 W.L.R. 602, 623.

previous experience of takeover transactions and were merely concerned to cover the amount of their original draft, with the added incentive of gaining a public company as a customer. One Cooper, who had been present as the Bank's representative at the board meeting where the formalities of transfer had been completed, was not aware of any impropriety nor of the nature of the transaction underlying the exchange of funds. It is noted, however, that the arrangement was quite out of keeping with the usual services provided by Barclays to Minories, although the ground had been well-prepared by the latter arranging a similar although innocuous transfer of drafts some few days previously.

The grounds on which the judgments of both Ungoed-Thomas J. in the *Selangor* case and Brightman J. in the *Karak* case proceed fall into two broad parts. The argument for the plaintiff companies was put both on the grounds of contractual negligence and constructive trusteeship. Although the availability of a remedy on both grounds will be shown to be closely interrelated and many of the evidentiary considerations were common to both aspects, it will be convenient to treat each basis separately as the authorities and sources have quite different origins.

IV. Breach of Contractual Duty of Care

A. *The Authorities*

The classic statement distinguishing negligence in tort and negligence arising out of contract is that of Greer L. J.[11] cited by Ungoed-Thomas J.:[12]

> ". . . where the breach of duty alleged arises out of a liability independently of the personal obligation undertaken by contract, it is a tort, and it may be tort even though there may happen to be a contract between the parties, if the duty in fact arises independently of that contract. Breach of contract arises where that complained of is a breach of duty arising out of the obligations undertaken by the contract."

There is no suggestion in that judgment of Greer L. J. that the standard of care concomitant with the contractual duty will be influenced by its origin in tort or contract. Indeed in *Hilton* v. *Westminster Bank*[13] Atkin L. J. said:[14]

> "I think it is the duty of the bank, arising out of the contract to exercise reasonable care and skill in dealing with the communications which the customer sends to them in relation to his banking business."

In the same case Bankes L. J. referred to the contractual term as a duty to take "reasonable care".[15] But such a term is in most cases

[11] *Jarvis* v. *Moy, Davies, Smith, Vandervell & Co.* [1936] 1. K.B. 399, 405.
[12] *Ibid.*, 1592.
[13] (1926) 135 L.T. 358.
[14] *Ibid.*, 362.
[15] *Ibid.*, 358.

implicit in the banker-customer contract. Although the test as to standard should be no different from that pertaining to the tort of negligence, the courts have, it is submitted, been misled by the process of dealing with an implied term. In *Bank of England* v. *Vagliano Brothers*[16] Lord Halsbury L. C. specifically looked to the practice of other bankers in determining the standard of care to be imposed.[17] The House of Lords in that case seemed to proceed on the basis that because a term was implied from the relationship between the parties to the contract, the court could *a fortiori* look to the practice of one of the parties in order to determine a standard of care. Such an approach is clearly in error.

And yet the error is compounded by the approach adopted by courts in dealing with other aspects of negligence on the part of a banker. In *Ladbroke & Co.* v. *Todd*[18] Bailhache J. said:[19]

> "But I am not left to my own views on this point, because I had the evidence of two gentlemen . . . both of whom said it was the practice of banks in a case of this kind to make enquiries. . . . That being the evidence of the ordinary practice of bankers, I am not left to form my own conclusions."

Recent cases are equally replete with such clear abdications from judicial responsibility. In *Marfani & Co.* v. *Midland Bank*[20] Diplock L. J. stated:[21]

> "The question in this case, therefore, is whether they had taken all reasonable care. . . . This is to be judged by the practice of careful bankers."

There should be, it is submitted, no principle allowing a different test of negligence to be imposed when a duty originates in contract rather than tort. Perhaps the courts have been misled by the often expressed intention to give commercial efficacy to business contracts.[22]

It seems then that, prior to *Selangor*, the duty of care imposed on a bank depended to a large extent on current banking practice.

What, then, is the standard of care imposed on a bank?

> "Every authority from *Foley* v. *Hill*[23] to *Joachimson* v. *Swiss Bank Corporation*[24] and the Bills of Exchange Act[25] alike recognise that the banker's primary function and duty is to honour his customer's cheques, provided the state of the account warrants his doing so, and there is no legal reason or excuse to the contrary."[26]

[16] [1891] A.C. 107.
[17] *Ibid.*, 117.
[18] (1914) 111 L.T. 43.
[19] *Ibid.*, 44.
[20] [1968] 1 W.L.R. 957.
[21] *Ibid.*
[22] See e.g. *New Zealand Shipping Co. Ltd* v. *Satterthwaite & Co. Ltd* [1974] 1 N.Z.L.R. 505, 511 per Lord Wilberforce.
[23] (1848) 2 H.L. Cas. 28.
[24] [1921] 3 K.B. 110.
[25] Bills of Exchange Act 1882 (U.K.) 45 & 46 Vict. c.61.
[26] *Paget's Law of Banking op. cit.*, 312.

Therein lies a conflict which is not resolved in either *Karak* or *Selangor*:

> "It must always be remembered that a bank can be sued just as much for failing to honour a cheque as for cashing a cheque that had been stopped,"[27]

or, *semble*, for failing to make justified inquiries.

In *A. L. Underwood Ltd* v. *Bank of Liverpool and Martins Bank*[28] cheques were drawn in favour of a company, endorsed by a sole director duly authorised to endorse the company's cheques, and paid by him wrongly into his private account in the defendant bank. The company sued the defendant as collecting bank for conversion and the bank relied on section 82 of the Bills of Exchange Act 1882.[29] The issue was whether the bank had established under that section that it acted without negligence. Atkin L. J. commented:[30]

> "Underwood (the director) was not acting within the ordinary scope of his authority, but was doing something unusual which ought to have attracted the attention of the bank's servants."

To similar effect was *Morison* v. *London County and Westminster Bank Ltd*[31] where it was said that certain transactions were: "so out of the ordinary course that they ought to have aroused doubts."[32]

The most recent decision on point prior to *Selangor* and *Karak* was *Orbit Mining and Trading Co. Ltd* v. *Westminster Bank*[33] in which Harman L. J. said:[34]

> ". . . the test of negligence is whether the transaction of paying in any given cheque was so out of the ordinary course that it ought to have aroused doubts in the bankers' minds, and caused them to make enquiry."

There are two elements to be distinguished in Harman L. J.'s test. The first is the point at which the banker's duty of care crystallises, that is when a transaction is out of the ordinary course of business. Although this is taken as axiomatic in the judgments cited, it is apparent that the test will be applied in the context of the ordinary practice of bankers. The test, then, is whether in ordinary practice bankers do in fact regard such transactions as outside the normal course of business, and not whether a reasonable banker would so regard it. This point is taken in both *Selangor* and *Karak*.

The second element is self-explanatory. Once the duty of care has crystallised, the banker must protect himself from breaching the duty by making inquiries. Harman L. J. proceeded to set down that the requisite inquiries are those derived from the ordinary practice of

[27] *Westminster Bank* v. *Hilton* (1926) 136 L.T. 309, 316 per Lord Dunedin.
[28] [1924] 1 K.B. 775.
[29] 45 & 46 Vict. c.61.
[30] [1924] 1 K.B. 775, 793.
[31] [1914] 3 K.B. 356.
[32] *Ibid.*, 369 per Buckley L. J.
[33] [1963] 1 Q.B. 794.
[34] *Ibid.*, 822.

bankers. Again little comment is called for—it appears that the court will look to the banks to determine what inquiries should have been made rather than determine the standard on an objective basis.

Marfani's case[35] is apotheotic of the law on this point. One Kureshy wanted to open an account at the defendant bank. He was well-dressed and spoken and said he intended to open a restaurant business. He was not asked for any document of identification or about his present or past occupation or employment or about any other bank accounts. He gave the names of two referees—the bank did not seek to contact one of these, the other merely said that he had known Kureshy "for a time"—in fact for only a few weeks. It was held that it did not constitute any lack of reasonable care on the part of the bank to refrain from making inquiries of a customer which it was improbable would lead to detection of a dishonest purpose. Cairns J.[36] expressed the view that the bank had only just exercised sufficient care. Diplock and Danckwerts LJJ. had no such qualms. It was also suggested obiter that if the nature of the inquiries would not in any event have revealed the fraud, then the bank would still (as collecting bank) be entitled to the protection of the Cheques Act.[37] Although the *Marfani* case concerned the protection of a collecting bank, the point is nevertheless taken at some length by Ungoed-Thomas J. in *Selangor.*

The pre-*Selangor* authorities, then, all point to the courts' adopting a standard of care which is not that of the reasonable banker but rather a standard which arises from the "ordinary practice of careful(?) bankers".[38]

The *Selangor* judgment prima facie purports to reimpose a reasonable banker test not only on the basis of contractual and tortious principles but by tying the decision very carefully to a similar test imposed in respect of constructive trusteeship, the second limb of the judgment. *Selangor* is chronologically the leading decision. The *Karak* case will be shown to be less of a burden on bankers in that the constructive trusteeship point is obiter, weakening the thrust of the contractual points.

B. *The Decision in Selangor*

The question falling to be decided in *Selangor* was ". . . what is the liability of a bank which pays out of its customer's account to that customer in negligence?"[39] Ungoed-Thomas J. stressed that ". . . the principles of the law of contract applicable to banking are the

[35] *Marfani & Co. Ltd* v. *Midland Bank Ltd* [1968] 1 W.L.R. 968.
[36] *Ibid.*, 981-982.
[37] Cheques Act 1957 (U.K.) c.f. Cheques Act 1960 (N.Z.).
[38] [1968] 1 W.L.R. 968, 975 per Diplock L. J.
[39] [1968] 1 W.L.R. 1555, 1592.

principles of the general law of contract."[40] Hence His Lordship was led to the inescapable conclusion that the duty of care arising out of a contract will be constructed on a reasonable banker test. On a factual basis the test will not crystallise automatically when a transaction is out of the ordinary course, but all relevant circumstances will be considered. The key passage to this aspect of the judgment is to be found at page 1608:

> ". . . a bank has a duty under its contract with its customer to exercise 'reasonable care and skill' in carrying out its part with regard to operations within its contract with its customer. The standard of that reasonable care and skill is an objective standard applicable to bankers. Whether or not it has been attained in any particular case has to be decided in the light of all the relevant facts, which can vary almost infinitely."

Clearly, then, although the practice of bankers will remain a relevant fact, that practice will not alone determine the standard of care applicable to the banker. Thus Ungoed-Thomas J. has restored to the notion of negligence arising out of a banking contract an objective standard which, it is submitted, is in accordance with basic principles of tort and contract. As Charlesworth maintains:[41]

> "Once it has been shown that a duty to take care arises, it becomes necessary to enquire how much care the law requires to be exercised. The standard of care is a question of law. Whether that standard has been attained in any given case is a question of fact. The standard is objective."

Little can be added to the learned judge's formulation of the test for negligence. However, it is suggested that once the standard of care is established, it may be breached in one of two ways:

> "So if District (the defendant bank) knew, or the facts were such that a reasonable banker would have known, the said purposes, the plaintiff is entitled to succeed in equity and in negligence. But if the facts were such as only to put a reasonable banker on inquiry, then the plaintiff would succeed (on proof of other essential allegations) in negligence but not in equity."[42]

That statement is one of the most difficult passages in the judgment, bearing as it does on the correlation of the claims against the District Bank in equity and at common law. Moreover it does not square with other dicta in the judgment.

It will be remembered that the Court of Appeal in the *Marfani* case maintained that it did not constitute any lack of reasonable care to refrain from making inquiries of a customer which it was improbable would lead to detection of that customer's dishonest purpose. It is perhaps unfortunate that *Marfani* was not cited in the instant case, but it was in fact before the Court of Appeal at the same time as *Selangor* was being heard. Hence Ungoed-Thomas J. dealt only with previous authority. He referred to statements of Lord Wright and Greer L. J.

[40] [1968] 1 W.L.R. 1555, 1607.
[41] Charlesworth, *Negligence* (5th ed., 1971) 120, para 180.
[42] [1968] 1 W.L.R. 1555, 1625.

in *Lloyds Bank* v. *E. B. Savory and Co.*[43] to the effect that it is no answer to negligence to say that an inquiry would have been fruitless. Diplock L. J. had distinguished this case on the very dubious grounds that it was thirty years old.

In *Baker* v. *Barclays Ltd*[44] Devlin J. stated, obiter, in the case of a defence under section 82 of the Bills of Exchange Act 1882[45] that:

> ". . . there is at the very least, a heavy burden on him to show that such inquiries could not have led to any action which could have protected the interests of the true owner. . . ."[46]

Diplock L. J. was not prepared to disapprove unequivocally that dictum; Danckwerts L. J. expressed no real opinion; but Cairns L. J. wholeheartedly approved. Both the headnote and Charlesworth on Negligence[47] cite Cairns L. J.'s statement as part of the ratio of *Marfani.* From the same two authorities Ungoed-Thomas J. drew the opposite conclusion. His view is on principle, it is submitted, to be preferred. He stated that:

> ". . . failure to make inquiry is not excused by the conviction that the inquiry would be futile, or that the answer would be false."[48]

It may also be noted that *Marfani* concerned the negligence of a collecting bank, *Selangor* that of a paying bank; even if more weight is to be accorded the view of the Court of Appeal, the judgments might well be distinguished on this basis.

The duty of care which Ungoed-Thomas J. finally extracted from the authorities is expressed thus:[49]

> ". . . it (the duty) extends over the whole range of banking business within that contract."

C. *Karak Rubber Co.* v. *Burden*

As remarked earlier Brightman J. put his judgment on the basis of an implied duty of care in the banker-customer contract. His decision as to constructive trusteeship was obiter.

The proposition put by the defendant bank was simple:[50]

> "The primary obligation of a paying bank in relation to a cheque which is presented for payment, and is clear and unambiguous on its face, and is authenticated by the proper signature or signatures, and is covered by available funds, is to pay the cheque on demand. Subject to two apparent exceptions so far as a corporate customer is concerned, the paying bank has no right or duty to exercise any care, skill or judgment in deciding

[43] [1933] A.C. 201, 233.
[44] [1955] 2 All E.R. 571.
[45] 45 & 46 Vict. c.61.
[46] [1955] 2 All E.R. 571, 584.
[47] *Op. cit.*, 264, para 265.
[48] [1968] 1 W.L.R. 1555, 1608.
[49] [1968] 1 W.L.R. 1555, 1608.
[50] [1972] 1 W.L.R. 602, 626.

> whether it will or will not comply with the unambiguous, properly authenticated instructions of its customer."
> "The two exceptions admitted in the case of a corporate customer . . . are (a) if the payment is, to the actual, conscious knowledge of the bank, a wrongful application of the company's money, or (b) if the payment is for a purpose known to the bank, but such purpose (unknown to the bank) is precluded by the articles or memorandum."[51]

This is clearly the proposition New Zealand banks rely on in regard to the practice they adopt in dealing with corporate customers.

Brightman J. felt it axiomatic that with regard to the first of the corporate exceptions, a banker could never maintain an absolutely unqualified duty to pay and no duty to inquire despite a deep suspicion that the company's funds were being misapplied. Once that position was disclaimed, he felt there was no rational stopping point short of ". . . a contractual duty to exercise such care and skill as would be exercised by a reasonable banker in similar circumstances."[52] He adopted then the same objective starting point as did Ungoed-Thomas J. in *Selangor*.

As to inquiry, Brightman J. also relied heavily on *Selangor*, ignoring the dicta in *Baker* v. *Barclays Bank*:[53]

> "The proper question . . . is whether the banker is to exercise reasonable care and skill in transacting the customer's banking business, including the making of such inquiries as may, in given circumstances, be appropriate and practical if the banker has, or a reasonable banker would have, grounds for believing that the authorised signatories are misusing their authority for the purposes of defrauding their principal or otherwise defeating his true intentions. The answer to that question is so obvious that I forbear to give it."[54]

Thus, although he maintained otherwise, His Lordship was spared the necessity of analysing the plethora of decisions which Ungoed-Thomas J. brought to bear on the *Selangor* facts. One argument with which he dealt de novo and which was apparently not put in *Selangor*, bears further analysis.

It is admitted that a bank will be prima facie liable for wrongful dishonour of its customer's cheque. How then is the bank, in the short time available to it, to make satisfactory inquiries, or does the duty of care and skill expressed in *Selangor* and *Karak* modify that liability? Brightman J. was faced obliquely with only the first aspect of that question. He found in fact that the defendant bank had time enough to make any inquiries necessary—to this end he subjected the clearing procedures of English banks to lengthy scrutiny. It would appear open to a New Zealand court to do likewise, but it is suggested that the practice in New Zealand of reserving to the bank three days in which to reverse a credit entry would on the basis of *Karak* provide

[51] [1972] 1 W.L.R. 602, 627.
[52] [1972] 1 W.L.R. 602, 629.
[53] (1955) 2 All E.R. 571, 584.
[54] [1972] 1 W.L.R. 602, 627.

time enough to make any inquiry called for. It does seem, however, that there might be some problem when a cheque is presented over the counter to a paying bank.

It is submitted that this might be one circumstance in which the bank's duty could be limited. In *Selangor* the learned judge laid some emphasis on the fact that a court ought to look to all the relevant facts before finding a breach of the standard of care. Although the bank's duty was expressed in wide terms, it was certainly not expressed to be absolute no matter what the circumstances. Thus although the standard of care is that of the reasonable banker, that standard may be lower in some circumstances: for example, when the time available for inquiry is strictly limited. There is no real conflict with the bank's duty not to dishonour. It seems that a court faced with this problem may deal with it either by delimiting the duty of care in that particular situation, or by finding as a fact that there is no breach of the duty. *Karak* and *Selangor* would only need to be distinguished on their facts to enable the former solution.

V. Constructive Trusteeship

A. *The Authorities*

It has long been established that a banker is not trustee for his customer of the amount to his credit in his bank account.[55] In some circumstances the banker may, however, be a constructive trustee. There are two categories of constructive trustees: first, those who, although not appointed a trustee, take it on themselves to act as such and, secondly, those whom a court of equity will treat as trustees by reason of their action, of which complaint is made. Following *Foley* v. *Hill*, circumstances in which a bank will have imposed upon it constructive trusteeship of the first kind will be exceedingly rare, if they exist at all. In both *Selangor* and *Karak* the plaintiff companies put their case on the basis of the second category.

Barnes v. *Addy*[56] is the leading authority in this area. Barnes was the husband of the life-tenant of a trust. He was appointed sole trustee by Addy who relinquished his own trusteeship. Barnes subsequently misappropriated the trust fund and the Court of Appeal was called upon to decide whether the solicitors engaged in respect of the appointment were liable to make good the monies subject to the misappropriation. Lord Selborne L. C. felt that the responsibility of express trustees could be extended in equity to others if they are

[55] See *Foley* v. *Hill* (1848) 2 H.L. Cas. 28.
[56] (1874) 9 Ch. App. 244.

found either making themselves *trustees de son tort* or actually participating in any fraudulent conduct of the trustee.

The following statement, however, has engendered a dispute of which *Selangor* and *Karak* represent merely one facet:[57]

> ". . . strangers are not to be made constructive trustees merely because they act as the agents of trustees in transactions within their legal powers, transactions, perhaps of which a court of equity may disapprove, unless those agents receive and become chargeable with some part of the trust property, or unless they assist with knowledge in a dishonest and fraudulent design on the part of the trustees."

The banking cases will be seen to turn on what may be imputed as knowledge. In *Shields* v. *Bank of Ireland* Porter M. R. said:[58]

> "You must show that the bankers knew of and concurred in the intention to misapply, a knowledge which will be easily presumed if the banker derives a personal benefit from the transaction."

Thus it seems that a knowledge of the circumstances in which the breach of trust took place will be sufficient to justify the imposition of a constructive trusteeship.

Snell[59] characterises this aspect of the second category of constructive trusteeship as "knowing assistance" and cites with approval the statement of Lord Selborne L. C. Unfortunately the author of that text is of little further assistance with the authorities as he then goes on to adopt the interpretation of knowledge formulated by Ungoed-Thomas J.

Of some assistance is *Gray* v. *Lewis*.[60] Sir Richard Malins V. C. dealt specifically with the concept of knowledge, declaring that:[61]

> "I am of the opinion that the transaction was one of so unusual and extraordinary a character that it became their duty to inquire and investigate as to the rights of this company to enter into such a transaction. . . . I must therefore treat the bank as having had express notice that what was being done was a gross breach of trust."

This passage approaches very closely the test imposed in *Morison* v. *London County and Westminster Bank*[62] by Buckley L. J. as to the point at which a bank's contractual duty of care crystallises. In this aspect of the bank's liability there is little doubt as to the effect of a failure to make inquiry. In *Berwick-upon-Tweed Corporation* v. *Murray*[63] Lord Cranworth L. C. expressed the opinion that it would never lie in the mouth of a defendant to say that inquiries would not have revealed the truth. In any event Ungoed-Thomas J. appeared to decide that inquiries did not enter into consideration—that once the relationship of constructive trustee was imposed, inquiries would not

[57] (1874) 9 Ch. App. 244, 251.
[58] [1901] 1 I.R. 222, 232.
[59] Snell, *Principles of Equity* (27th ed., 1973), 187.
[60] (1869) L.R. 8 Eq. 526.
[61] *Ibid.*, 543.
[62] [1914] 3 K.B. 356.
[63] (1856) 7 De G.M. & G. 497.

alleviate a breach of trust. That, however, was only obiter at best, and may be seen to conflict with at least one other passage in his judgment. Perhaps this merely points to the jurisprudential basis on which English law will impose a constructive trust; it is seen as a relationship to be imposed by a court from which a remedy may or may not flow. The better developed American view is more realistic in seeing the imposition of constructive trusteeship as a remedy in itself.

There is, it must be admitted, one case standing apparently squarely in the way of imputing to the bankers in *Selangor* and *Karak* the requisite knowledge to render them liable as constructive trustees. The case is *Re Blundell, Blundell* v. *Blundell*.[64] Stirling J. said that:[65]

> "A stranger is not liable as a constructive trustee unless there are facts brought home to him which show that to his knowledge the money is being applied in a manner which is inconsistent with the trust."

The case was only at first instance and many of the leading authorities were not in fact cited to Stirling J. It was also noted by Ungoed-Thomas J. that the case was of persuasive value only and not binding on him.

The only authority remaining to be considered was cited and discussed at some length before Brightman J. in the *Karak* case. It was not cited in *Selangor*. That case is *Williams* v. *Williams*.[66] In that case, Kay J., faced with a plaintiff who put his case on negligence arising out of a contractual duty and on constructive trusteeship, considered them to be entirely separate questions and formulated the test for each question in different terms. However, the law of negligence has developed somewhat since the date of that case and in this lies the probable explanation. But Kay J. also said that the defendant would be liable in two circumstances: first, if he had actual knowledge of a breach of trust; and secondly, if he wilfully shut his eyes to a breach of trust. It is submitted that this decision was obiter in that the misfeasance of which the defendant was aware did not in fact amount to a breach of trust. The case may more dubiously be distinguished on other grounds, as Brightman J. demonstrates.

B. *The Selangor Decision*

Ungoed-Thomas J. was at some pains to make clear that he was dissociating this part of his judgment from any criminal sanctions to which the defendant directors of the Selangor company may have rendered themselves liable. He reconstitutes in the same sense but in

[64] (1884) 40 Ch. D. 370.
[65] *Ibid.*, 381.
[66] 17 Ch. D. 437.

different terms the concept of equitable fraud discarded early in the development of company law:[67]

> ". . . there may be actions dishonest and fraudulent in the eyes of equity, yet not punishable under the criminal law. . . .
> [I]t is according to the plain principles of a court of equity which this court is . . . that what is 'dishonest and fraudulent' has to be judged."

The judgment was thus put squarely in the second category of constructive trust, the category dominated by *Barnes* v. *Addy*.[68] The only problem then was to determine whether sufficient knowledge could be imputed to the bank to bring it within the formula. His Honour relied heavily on the statement of Porter M. R. in *Shields* v. *Bank of Ireland*[69] referred to above. However, the definitive statement which enabled Ungoed-Thomas J. to develop his formula for constructive knowledge is found in the statement of Lord Cairns L. C. in *Lloyd* v. *Banks*,[70] that knowledge is founded on proof that:[71]

> ". . . the mind of the trustee has in some way been brought to an intelligent apprehension . . . so that a reasonable man would act upon the information and would regulate his conduct by it. If it can be shown that in any way the trustee has got knowledge . . . which would operate upon the mind of any rational man, or man of business, and make him act with reference to the knowledge he has so acquired, then I think the end is attained and that there has been fixed upon the conscience of the trustee . . . a security."

It is equity's concept of attaching upon conscience which is important to the concept of constructive knowledge. As noted in the analysis of the facts of *Selangor* the representative of District Bank was present throughout the board meeting at which the first illegal transaction took place. Furthermore the bank's nominee company was involved in holding the plaintiff company's shares, albeit on trust for Cradock. Thus the bank had knowledge of circumstances which should have indicated that an illegal transaction was being committed or should at least have put the bank on inquiry. Moreover there are strong dicta suggesting that because liability for breach of trust is strict,[72] once knowledge is imputed to the bank which should put it on inquiry, the bank will be liable for any breach of trust notwithstanding that it makes such inquiry and receives satisfactory answers. This proposition arises, it is submitted, out of the conceptual basis in English law of the constructive trustee—that this is a pre-remedial relationship. However accurate the dicta may be in respect of constructive trusteeship, it is submitted that not only does this place an almost intolerable burden on a bank, but it is also an incorrect formulation in the context of this judgment. The problem arises because Ungoed-Thomas J. put

[67] See *Lagunas Nitrate Co.* v. *Lagunas Nitrate Syndicate* [1889] 2 Ch. 392.
[68] (1874) 9 Ch. App. 244.
[69] [1901] 1 I.R. 222.
[70] (1868) 3 Ch. App. 488.
[71] *Ibid.*, 490-491.
[72] See e.g. *Phipps* v. *Boardman* [1967] 2 A.C. 46.

his decision equally on two bases—the contractual and trusteeship concepts. But he also proposed that the same test should suffice as to whether that banker has satisfied his duty of care. Thus the constructive imputation of knowledge in respect of the imposition of trusteeship is carried over to the contractual test; the court does not look to whether the banker has sufficient knowledge at common law to make inquiry necessary to discharge his duty of care, but will rather impute that knowledge on the basis of an equitable concept. This, as can clearly be seen, is an uncalled-for blurring of equitable and common law concepts. Although the objective test reconstituted in relation to the contractual duty of care is correct, the circumstances which will give rise to that duty of care may be thus seen as too widely drawn. For as Pearce L. J. observed in *Archbolds (Freightage) Ltd* v. *Spanglett Ltd*:[73]

> "In so many cases of deception it is hard even for persons deceived to imagine in retrospect how they could have made such a mistake, yet the fact remains that people are misled into foolish errors."

In essence, the District Bank had knowledge of all relevant details of the illegal transaction, but the inexperience of the bank officials was such that they were not able to determine the overall scheme. The same is true of the second transaction and the defendant Nova Scotia Bank. That, coupled with the fact that the bank derived benefit in various ways from the transaction, was sufficient to make them liable as a constructive trustee. With that there can be little quarrel, but the danger of this aspect of the judgment must lie in its correlation with contractual liability. It is conceivable that facts could arise on which a banker might be liable in contract but not equity—the constructive knowledge test might then work unfairly. The only difference may lie in whether inquiry can affect the outcome of liability in either respect.

Ungoed-Thomas J. concluded his summation of the District Bank's liability with remarks which seem eminently sensible:[74]

> "(The Bank) is liable as claimed in equity because it paid the Woodstock cheque out of the plaintiff's moneys in circumstances known to District before the payment and in which a reasonable banker would have concluded that the payment was to finance the purchase by Cradock of the stock in the plaintiff, even though (the Bank) did not then realise that the payment was being so used. This does not seem to me exacting for a bank, or to require from it any unreasonable standard of care, or cause any substantial inconvenience to the conduct of its affairs, as was suggested. . . ."
>
> ". . . I can see no substantial difficulty in banks providing against such exceptional transactions, involving substantial amounts, as in this case, being carried through by officials completely inexperienced in such transactions and unqualified to deal with them."

At this point the outline of banking practice referred to above[75]

[73] [1961] 1 Q.B. 374, 383.
[74] [1968] 1 W.L.R. 1555, 1633.
[75] Section II, ante.

becomes relevant. The banks apparently attempt to deal with such inexperience by limiting the monetary levels at which a particular branch may operate. This is not entirely satisfactory. Although it will probably restrict the amount for which a bank may be liable, it does nothing to provide for recognition of such a transaction at its inception. It will still be open to construct a scheme which involves the illegal use of a company's money in such a way that payment is by instalment and thus kept within the authority of a particular branch manager. Alternatively, the bank may be lulled into a false belief in its safety as was done in *Karak.*

C. *Karak Rubber* v. *Burden*

As remarked above, Brightman J. put his decision as to constructive trusteeship on an obiter basis. Hence the wide circumstances in which knowledge was imputed by Ungoed-Thomas J. in his judgment both in equity and at common law are not as readily available. Clearly, however, Brightman J. did not see his judgment as limited in this way. He was happy to apply the extended knowledge test to the contractual situation unfortified by the duality of a strong basis in equity.

His Lordship did further develop the *Barnes* v. *Addy* category of constructive trusteeship by subdivision into two distinct streams, approving in the process the distinction referred to by Snell.[76] This was necessary to his consideration of a decision of the Court of Appeal which followed closely on the heels of *Selangor* and which counsel for the defendant bank strongly argued had the effect of at least impliedly over-ruling Ungoed-Thomas J. This submission was made on the basis of *Carl Zeiss Stiftung* v. *Herbert Smith and Company (No. 2).*[77] That case was a dispute between the Carl Zeiss company of Jena (the East German company) and the Carl Zeiss company of Württemburg (the West German company). In the principal action the East German company were claiming that the assets and property of the West German company were held on trust for the former. The defendants were a firm of solicitors who acted for the West German company and had disposed on their behalf of some of the disputed property. The East German company subsequently issued a writ against the solicitors claiming that funds which the solicitors handled for the West German company were trust funds and that they had notice of this from the pleadings of the main action. The East German company sought to claim that the solicitors were in breach of a constructive trust. The claim was based on a submission

[76] Snell, *op. cit.*, 186-187.
[77] [1969] 2 Ch. 276.

that a person receiving trust property which he knows or ought to know is inconsistent with the terms of the trust is accountable to the beneficiaries of that trust. The submission was thus on the same basis as that advanced in both the *Selangor* and *Karak* cases. In the *Zeiss* case, however, the submission failed on the grounds that the solicitors only had knowledge of a disputed claim that the assets of the West German company were trust property—they did not have knowledge that such assets were in fact subject to a trust.

Prima facie, the judgment seems to have been put on the basis of actual knowledge. Sachs L. J. said, ". . . whatever be the nature of the knowledge or notice required, cognisance of what has been termed 'a doubtful equity' is not enough."[78] Thus it would seem that the case may be readily distinguished on the grounds which Brightman J. employed—that this is not a case dealing with constructive knowledge. As mentioned above, the learned judge further divided the second category of constructive trustee into cases where constructive knowledge will be imputed to the constructive trustee, and cases where the constructive trustee has actual knowledge or wilfully averts his eyes so as not to acquire that knowledge. It is, however, arguable that the real effect of the Court of Appeal's decision is to abrogate entirely Brightman J.'s first category, for Sachs L. J. also said:[79]

> ". . . I am inclined to the view that a further element has to be proved, at any rate in such a case as the present one. That element is one of dishonesty or of consciously acting improperly, as opposed to an innocent failure to make what a court may later decide to have been proper enquiry. That would entail both actual knowledge of the trust's existence and actual knowledge that what is being done is improperly in breach of that trust."

That statement may be distinguished on the grounds that His Lordship was referring to notice under section 199 of the Law of Property Act 1925[80] but on the other hand it is clear that the learned judge himself did not think it was so limited, for he also said:[81]

> "Out of deference to the conclusions reached by Ungoed-Thomas J. and to the fact that the *Selangor* case is under appeal, it now seems best, however, for me not to state a final view in this matter, especially when the instant case concerns agents who may thus be in a different position to other strangers."

Sachs L. J. appeared to overlook the fact that a principal and agent relationship is also superimposed upon the banker-customer relationship, although basically as to the collection of cheques.[82] Perhaps the last mode of distinction may lie in there being no agency relationship

[78] [1969] 2 Ch. 276, 296.
[79] *Ibid.*, 298.
[80] 15 & 16 Geo. 5 c.20.
[81] [1969] 2 Ch. 276, 299.
[82] See *Joachimson* v. *Swiss Bank Corp.* [1921] 3 K.B. 110.

in the *Selangor* situation, although there clearly was in *Karak*—this point Brightman J. missed entirely.

Moreover, it may well be that the *Zeiss* case was wrongly decided and that the House of Lords would, given the opportunity, overrule it accordingly. A lengthy discussion of this possibility is outside the scope of this paper but the learned author of Snell suggests as much;[83] the case has also been roundly condemned by some commentators.[84]

The better conclusion then would seem to be that the distinction drawn by Brightman J. will certainly be available and that the judgment of Sachs L. J. did not in terms overrule or restrict the *Selangor* principle, notwithstanding Brightman J.'s misapplication of the decision to the questions posed in the *Karak* case.

VI. Tentative Conclusions

It seems that whatever the situation may be as regards the negligence of collecting banks, *Selangor* and *Karak* may now be regarded as definitive of the standard of care imposed on a paying bank, at least in respect of its corporate customers. Certainly the banks do not appear to protect themselves on this basis; but it is to be hoped that the lack of judicial responsibility inherent in the judgment of Bailhache J. in *Ladbroke and Company* v. *Todd*[85] has been laid to rest. When the necessity for an objective test of negligence is realised, it is obvious that the *Selangor* duty of care should not be justified by banking practice; rather banking practice should be dependent on the standard of care determined objectively by the courts, admittedly with reference to the practice of a reasonable banker as merely one factor going to that standard as it may be modified to suit a particular situation.

The *Selangor* case was clearly the springboard from which *Karak* developed. Ironically, however, the strength and weakness of the former both lie in the careful proximation of both aspects of the decision against the banks. The contractual aspects are strengthened by the formulation of the same test for the imposition of constructive trusteeship and vice versa—the rigour of the duty of care imposed on the paying bank also rests on the bringing into effect of that duty by the implication of constructive knowledge. And therein lies the possible weakness if an appellate court should decide to follow the *Zeiss* case. The objective test would still remain but its rigour would be markedly reduced by limited application.

[83] *Op. cit.*, 187.
[84] See e.g. Gordon, *Notice or Knowledge of a Trust — A Critique of the Carl Zeiss Case* (1970) 44 A.L.J. 261.
[85] (1914) 111 L.T. 43.

However, Snell considers the principle well established and cites *Selangor* and *Karak* for the proposition that the requisite knowledge precedent to the imposition of a constructive trust is:[86]

> ". . . knowledge of circumstances which would indicate to an honest, reasonable man that such a design was being committed or would put him on enquiry, which the stranger failed to make, whether it was being committed."

Karak, because of the misapplication of *Carl Zeiss Stiftung* v. *Herbert Smith and Co.* and other factors outlined above must be considered considerably weaker authority. The *Selangor* case, however, would seem to be well within the available authorities; indeed the authorities cited and examined are outstanding in their depth and diversity.

VII. Protection for the Paying Bank

As has been demonstrated, the paying banker affords himself little real protection in the corporate context by the practices adopted, at least in New Zealand. Such practices may represent the best available protection when weighed against the cost of more detailed examination of every payment, but it would seem that there are other means available to the banker.

A. *The Contractual Duty of Care*

The obvious course open to a bank in this respect is the use of an exception clause. While it is realised that the legislature would probably take none too kindly to the prospect of banks excluding all liability for negligence, especially in view of the special statutory protection already given the collecting bank,[87] it is submitted that banks could readily construct a clause limiting their liability to gross or wilful negligence. Another useful method might be to insert a clause in contracts between corporate customers and the bank providing that the bank should not be liable on a failure to make inquiry.

Such a clause would not of course give any relief from the strict liability for breach of trust which will attach to a bank held to be a constructive trustee.

B. *Breach of Constructive Trust*

On the basis of *Selangor* and *Karak* it would seem that a bank might well be liable if it, with constructive knowledge, assisted in the disposition of any trust funds in breach of trust even though the

[86] *Op. cit.*, 187.
[87] See Cheques Act 1960 (N.Z.).

trustees themselves might be acting bona fide without any fraudulent design. Has the bank any protection in such a situation?

It is submitted that there is protection available. Section 73 of the Trustee Act 1956 gives a court power to relieve a trustee from personal liability:

> 73 "If it appears to the Court that a trustee, whether appointed by the Court or otherwise, is or may be personally liable for any breach of trust, whether the transaction alleged to be a breach of trust occurred before or after the commencement of this Act, but has acted honestly and reasonably, and ought fairly to be excused for the breach of trust and for omitting to obtain the directions of the Court in the matter in which he committed the breach, then the Court may relieve him either wholly or partly from personal liability for the same."

By section 2 of the same Act:

> " 'Trust' . . . extends to implied and constructive trusts . . . and trustee has a corresponding meaning and includes a trustee corporation."

A banker caught in the situation outlined, or indeed in the *Selangor* situation, may apply for relief under this section which is extended by the definition section to include constructive trustees. However, the banker must prove not only that he acted honestly but also that he acted reasonably—it would seem then that in the *Selangor* situation no relief would be forthcoming under this section. But Ungoed-Thomas J. suggested that a bank could be liable for breach of a constructive trust notwithstanding that inquiries had been made which proved to be fruitless. In that event, it is submitted, section 73 might well be applied to relieve the bank of liability. Above all, it is submitted, section 73 will allow a court to weigh competing equities, so long as the banker has acted reasonably.

There have been very few reported cases on the circumstances in which section 73 will be applied and the courts, naturally enough, have been loathe to lay down any general guidance on the basis of so few cases. The only general statement of any applicability is found in the judgment of Woodhouse J. in *Standard Insurance* v. *Sidey*.[88] His Honour suggested that the discretion will generally be exercised where the plaintiff has suffered no loss, or when relief is available against another party who has not acted honestly and reasonably.[89] Above all, His Honour stressed, ". . . there is the general public interest to be considered."[90]

It may well be in the public interest to ensure that banks are not financially crippled and customers' funds lost by being subject to the imposition of a constructive trust in every case where they have with a very minor degree of imputed knowledge "assisted" in the misapplication of funds subject to trust.

[88] [1967] N.Z.L.R. 86.
[89] *Ibid.*, 92.
[90] *Ibid.*