SUPREME COURT OF QUEENSLAND

CITATION:	*Voss & Anor v Suncorp-Metway Ltd & Ors* [2003] QCA 252
PARTIES:	**ERIC KENNETH VOSS** and **BETTY JOAN VOSS** (plaintiffs/appellants) v **LIONEL JAMES DAVIDSON** and **THOMAS MICHAEL SULLIVAN** **trading as DAVIDSON & SULLIVAN (a firm)** (first defendant) **NICHOLAS WEBSTER RIPPER** (second defendant) **SUNCORP-METWAY LIMITED** ACN 010 831 722 (third defendant/respondent)
FILE NO/S:	Appeal No 10159 of 2002 SC No 8188 of 1997
DIVISION:	Court of Appeal
PROCEEDING:	General Civil Appeal
ORIGINATING COURT:	Supreme Court at Brisbane
DELIVERED ON:	24 June 2003
DELIVERED AT:	Brisbane
HEARING DATE:	14 May 2003
JUDGES:	Davies and Williams JJA and Wilson J Separate reasons for judgment of each member of the Court, each concurring as to the orders made
ORDER:	**1. Appeal allowed** **2. Set aside judgment below of 10 October 2002 in favour of the respondent** **3. In lieu, judgment for the appellants against the respondent for $577,000 with interest at 10 per cent per annum from 23 May 1996 and costs to be assessed, such costs being on an indemnity basis after 10 December 2001** **4. That the respondent pay the appellants their costs of the appeal to be assessed on an indemnity basis**
CATCHWORDS:	BANKING AND FINANCE - BANKS - LIABILITIES OF BANKS - CONVERSION - where appellants made out a cheque in the name of Southern Pacific Equities Unit Trust - where appellants handed cheque to accountant to deposit - where accountant fraudulently caused a trust deed to be

executed in above name with himself as sole trustee and sole beneficiary - where accountant opened account with respondent in name of trust - where bank deposited cheque into above account - whether bank dealt with cheque in a manner repugnant to appellants' rights and therefore converted cheque

BANKING AND FINANCE - BANKS - DUTIES OF BANKS - DUTY TO MAKE INQUIRIES - where cheque dated one day prior to date of trust deed and one day prior to date account opened at respondent bank - where accountant named as sole trustee and sole beneficiary of trust - where accountant was sole signatory on account - where cheque was for unusually large amount - whether the above matters ought to have put the respondent on inquiry - whether by failure to inquire the respondent acted negligently

ESTOPPEL - ESTOPPEL IN PAIS - THE REPRESENTATION - IN GENERAL - where appellants wrote cheque for $600,000 in favour of Southern Pacific Equities Unit Trust - where appellants did not investigate existence of trust - where appellants gave cheque to accountant to bank - where accountant fraudulently caused a trust deed to be executed in the name of above trust with himself as sole trustee and sole beneficiary - where accountant subsequently misappropriated funds for his own use - whether appellants should be estopped from denying authority of accountant to pay cheque into above account

EQUITY - GENERAL PRINCIPLES - FRAUDULENT AND INNOCENT MISREPRESENTATION - THE REPRESENTATION - GENERALLY - where appellants made out cheque in name of Southern Pacific Equities Unit Trust and handed it to accountant to bank - where no trust of that name in existence at that time - where accountant opened trust in that name with himself as sole trustee and sole beneficiary - where accountant banked proceeds of cheque into account opened in name of trust - whether bank acted upon a representation by the appellants or the accountant

Cheques Act 1986 (Cth), s 98

Commonwealth Trading Bank of Australia v Sydney Wide Stores Pty Ltd (1981) 148 CLR 304, distinguished
Lloyds Bank v The Chartered Bank of India, Australia and China [1929] 1 KB 40, considered
London Bank of Australia Ltd v Kendall (1920) 28 CLR 401, applied
London Joint Stock Bank Ltd v Macmillan and Arthur [1918] AC 777, applied
Marfani & Co Ltd v Midland Bank Ltd [1968] 2 All ER 573; [1968] 1 WLR 956, applied

Savings Bank of South Australia v Wallman (1935) 52 CLR 688, considered
Smith v Prosser [1907] 2 KB 735, cited
Young v Grote (1827) 4 Bing 253; (1827) 130 ER 764, distinguished

COUNSEL: J C Sheahan SC, with S E Brown, for the appellants
W Sofronoff QC, with D A Kelly, for the respondent

SOLICITORS: James Conomos Lawyers for the appellants
Allens Arthur Robinson for the respondent

DAVIES JA:

1. The appeal

[1] This is an appeal by Mr and Mrs Voss ("Voss")[1] against a judgment of the Supreme Court on 10 October 2002 dismissing a claim by them for $577,000 damages for conversion against Suncorp-Metway Limited ("Suncorp"). Claims in the action against other defendants, who were solicitors, were also dismissed but there is no appeal against that order.

[2] The facts relevant to the claim against Suncorp are in short compass and were carefully and accurately stated by the learned trial judge. It is sufficient, at the outset, to state those facts relevant to the prima facie case in conversion and to the defence of estoppel. In doing so I shall also state some facts relevant to Suncorp's defence based on s 98 of the *Cheques Act* 1986 (Cth). However it will be necessary to state some further facts relevant to that defence when I come to discuss it.

2. Some relevant facts

[3] On 22 May 1996 Voss, who was a farmer, went to the office of his accountant Mr Ripper ("Ripper") for advice about investing the proceeds of sale of his farm. They were about $691,000.

[4] In March Voss had consulted Ripper with a view to the investment of proceeds of sale of a harvesting contract. Ripper had advised him to invest it "overseas", thereby obtaining a lower rate of tax. Ripper advised that he always dealt through Ernst & Young in making such investments. Voss took his advice and, on Ripper's instructions, deposited to a numbered account at Advance Bank, a sum of a little over $220,000. He received a receipt from Ripper headed "Southern Pacific Equities Unit Trust" apparently indicating that the sum had been invested in a trust of that name and which described the type of investment as "Asian Superannuation Trust Fund". The term and rate of interest was also stated in that receipt.

[5] When Voss went to Ripper on 22 May 1996 he assumed he was making a similar investment. Ripper advised him to deposit the cheque which he had received, which was for about $691,000, to the credit of Voss' account with Suncorp and then, after clearance of that cheque, to obtain a Suncorp cheque for $600,000 payable to "Southern Pacific Equities Unit Trust" and to bring it to Ripper. This he did,[2]

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1 Mr Voss conducted the relevant transactions on behalf of both himself and his wife. In referring to Voss hereafter I am referring to Mr Voss, acting on behalf of both.

2 The Suncorp cheque was drawn on Westpac.

apparently on the same day. It was this sum of $600,000, less $23,000 which Ripper repaid, for which Voss sued.

[6] At no time did Voss make any independent inquiries with a view to ascertaining the existence of a trust of the above name or that Ripper was dealing "through" Ernst & Young. He assumed on 22 May 1996 and thereafter that "Southern Pacific Equities Unit Trust" was an existing trust through which he had already invested $220,000 overseas as Ripper had advised and that Ernst & Young were involved in that investment.

[7] As it turned out, Ripper was a swindler, intent on defrauding Voss of his money. There was, on 22 May no known trust in existence of the name "Southern Pacific Equities Unit Trust". However on the following day one Edwin Dean, a solicitor in Toowoomba executed as settlor a document purporting to be a trust deed in which it was said he settled a sum of $10 upon Ripper as trustee of a trust called "Southern Pacific Equities Unit Trust". However the sole beneficiary described in the trust deed was Ripper.

[8] On the same day, 23 May, Ripper applied to Ms Haeusler, a co-manager of the relevant branch of Suncorp, to open a "Savings Plus" account in the name "Southern Pacific Equities Unit Trust" by completing an application form which indicated, amongst other things, that he was to be the only signatory of the account. He produced to her the document purporting to be the trust deed and she kept a copy of it. On the same day the account was opened by Ripper depositing the cheque for $600,000.

[9] Also on the same day Ripper was permitted by Ms Haeusler to and did make a number of withdrawals from that account, the largest being for $500,000 in favour of Westpac Bank. The total of those sums approximated the total of $600,000 deposited that day. Suncorp did not collect payment of the cheque for $600,000 until some days later.

3. Conversion

[10] The learned trial judge rejected Voss' claim in conversion holding that Suncorp did not deal with the cheque in a way unauthorized by Voss; it did what Voss had actually or apparently authorized, the depositing of the cheque into an account in the name of "Southern Pacific Equities Unit Trust". His Honour had earlier concluded that Voss was the true owner of the cheque. On the hearing of this appeal Mr Sofronoff QC, for the respondent, conceded that that conclusion was correct.

[11] His Honour accepted, correctly in my view, Sir Owen Dixon's definition of conversion as "a dealing with a chattel in a manner repugnant to the immediate right of possession of the person who has the property or special property in the chattel".[3] It is now received law that a cheque is a chattel the value of which, for the purpose of the tort of conversion, is the money received under it.[4]

[12] The central question in determining whether, leaving aside for the moment the defences raised of estoppel and absence of negligence, Suncorp converted Voss'

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3 *Penfolds Wines Pty Ltd v Elliott* (1946) 74 CLR 204 at 229.

4 *Lloyds Bank v The Chartered Bank of India, Australia and China* [1929] 1 KB 40 at 55 - 56.

cheque is whether the fact that it received the cheque into an account in the same name as that on the face of the cheque meant that it did not deal with the cheque in a manner repugnant to Voss' rights. The principle in this respect was comprehensively stated by Diplock LJ in *Marfani & Co Ltd v Midland Bank Ltd*[5] in the following terms:

> "At common law one's duty to one's neighbour who is the owner, or entitled to possession, of any goods is to refrain from doing any voluntary act in relation to his goods which is a usurpation of his proprietary or possessory rights in them. Subject to some exceptions which are irrelevant for the purposes of the present case, it matters not that the doer of the act of usurpation did not know, and could not by the exercise of any reasonable care have known, of his neighbour's interest in the goods. This duty is absolute; he acts at his peril.
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> A banker's business, of its very nature, exposes him daily to this peril. His contract with his customer requires him to accept possession of cheques delivered to him by his customer, to present them for payment to the banks on which the cheques are drawn, to receive payment of them and to credit the amount thereof to his own customer's account, either on receipt of the cheques themselves from the customer, or on receipt of actual payment of the cheques from the banks on which they are drawn. If the customer is not entitled to the cheque which he delivers to his banker for collection, the banker, however, innocent and careful he might have been, would at common law be liable to the true owner of the cheque for the amount of which he receives payment, either as damages for conversion or under the cognate cause of action, based historically on assumpsit, for money had and received."[6]

[13] Plainly Ripper held the cheque on Voss' behalf. He was not beneficially entitled to it and had no authority to pay it into an account to which he was solely entitled beneficially. Yet that is what he did. And if he had no entitlement to it when he delivered it to Suncorp for collection, Suncorp, however innocent and careful it might have been, was, subject to the specific defences referred to later, liable in conversion to Voss as the true owner for the amount of which it received payment.

[14] In his oral submissions to this Court Mr Sofronoff QC did not contend to the contrary. However he relied on two defences either of which, he submitted, negatived this prima facie conclusion. The first of these was estoppel. And the second was s 98 of the *Cheques Act* 1986.

4. Estoppel

[15] The primary submission in this Court on Suncorp's behalf was that, as against Suncorp, Voss was estopped from denying that Ripper was authorized to pay the cheque for $600,000 into the account which he did and consequently from asserting that Suncorp converted the cheque in doing what it did. In this Court

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5 [1968] 2 All ER 573 at 578.

6 See also *Hollins v Fowler* (1875) LR 7 HL 757; *The Fine Art Society v The Union Bank of London Ltd* (1886) 17 QBD 705; *The Great Western Railway Company v The London and County Banking Company* [1901] AC 414; *Citibank Limited v Papandony* [2002] NSWCA 375, BC200206922.

Mr Sofronoff QC relied solely on the acts of purchasing the cheque in the form in which it was and handing it to Ripper as clothing Ripper with that authority and thereby creating the estoppel. The learned trial judge, referring to *Young v Grote*[7] and *Commonwealth Trading Bank of Australia v Sydney Wide Stores Pty Ltd*[8] and accepting that the principle in *Young* was based on estoppel,[9] found estoppel on the basis of Voss entrusting Ripper with the cheque in the form in which it was.[10] Mr Sofronoff also relied on *Young v Grote* and, especially, *London Joint Stock Bank Ltd v Macmillan and Arthur*.[11]

[16] *Young* and *Sydney Wide Stores Pty Ltd* which followed it rest on a narrow principle; an apparent exception to the general rule that, in the contractual relationship between banker and customer, the banker is entitled to make debits to the customer's account only in accordance with the customer's authority.[12] The exception, it was said in *Sydney Wide Stores*, arises where the negligence of the customer in the manner of drawing a cheque facilitates a fraudulent alteration of the amount of the cheque which would not have been made but for the careless manner in which the cheque was drawn.[13] It is plain that it is the existence of the contractual relationship between banker and customer which is the foundation of the duty of the customer to exercise reasonable care.[14] Here there was no relevant contractual relationship between Voss and Suncorp; it was Ripper, not Voss, who was relevantly Suncorp's customer. Indeed in this Court Mr Sofronoff QC conceded that there was no relevant contract between Voss and Suncorp and that Voss owed no relevant duty of care to Suncorp. Moreover the action here was one in conversion and, at common law, negligence by the true owner would be no defence to such an action.[15]

[17] Nor was the negligence alleged here negligence in the manner of drawing the cheque.[16] Rather it was said to have been in handing to Ripper a cheque in that form without first independently ascertaining that there was a unit trust, called the "Southern Pacific Equities Unit Trust", administered by Ernst & Young, the trustees of which invested overseas. For both of those reasons, therefore, the principle in *Young* has no application to the facts of this case.

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7 (1827) 4 Bing 253; 130 ER 764.

8 (1981) 148 CLR 304.

9 Relying on *National Australia Bank Ltd v Hokit Pty Ltd* (1996) 39 NSWLR 377 at 388.

10 Having concluded that Suncorp did not convert the cheque, his Honour did not need to deal with the defences of estoppel or absence of negligence. However he quite properly did so.

11 [1918] AC 777.

12 *Sydney Wide Stores* at 310. As to the general rule, see also *Hokit* at 396 - 397.

13 *Sydney Wide Stores* at 310. The only two qualifications to that general rule are stated by Mahoney P in *Hokit* at 385.

14 Ibid at 315; *Macmillan* at 807.

15 *Wilton v Commonwealth Trading Bank of Australia* [1973] 2 NSWLR 644 at 665 - 666; *Day v Bank of New South Wales* (1978) 19 ALR 32 at 42 - 45.

16 As to which see *London Joint Stock Bank* at 795, 799 - 802, 815 and 834; and the other authorities, cited in *Hokit* at 397, 399.

[18] That the principle in *Young* has no application to this case does not necessarily exclude a defence based on estoppel. In *Macmillan* both Viscount Haldane[17] and Lord Parmoor[18] cited with approval the statement by Fletcher Moulton LJ in *Smith v Prosser*[19] that "if a person signs a piece of paper and gives it to an agent with the intention that it shall in his hands form the basis of a negotiable instrument, he is not permitted to plead that he limited the power of his agent in a way not obvious on the face of the instrument". Several of their Lordships in *Macmillan* gave, as an example of this, a cheque signed in blank, handed by the drawer to his agent and thought that their conclusion in that case could be based on that principle as well as on the principle in *Young*.[20]

[19] Whether this is put on the basis of apparent or ostensible authority or on the wider basis of estoppel by representation, I am prepared to accept that such principle may apply, against the true owner of a cheque, in favour of a collecting bank where the true owner has entrusted the cheque to a person who has fraudulently deposited it in an account at the collecting bank for his own benefit. But this would be so only where the true owner has so acted as to mislead the collecting bank into the belief that the person so depositing the cheque was entitled to do so.[21] The application of that principle to the facts of this case does not avail Suncorp.

[20] By purchasing the cheque in the form in which it was and handing the cheque to Ripper, Voss did not represent to Suncorp, and plainly did not do so clearly and unambiguously,[22] that Ripper was authorized to pay the cheque into a bank account which was, in effect, his own personal account; nor did he in any other way act so as to mislead Suncorp into believing that. On the contrary his representation, which was on the face of the cheque, was that Ripper had a limited authority to deposit the cheque only in the account of the trustee of a unit trust described as "Southern Pacific Equities Unit Trust". The account into which it was deposited was not that of a unit trust or even of a trust.

[21] Nor did Voss in fact mislead Suncorp. Suncorp would have acted in the same way even if there had been a genuine trust of that name already in existence; and would have acted in the same way even if Ripper had stolen the cheque. Suncorp, in acting in the way in which it did, relied solely upon Ripper's fraudulent representation, by his production of a sham trust deed, that the account which Ripper opened was the trust account of the unit trust named in the cheque.

[22] Suncorp's negligence, discussed in more detail below, in failing to observe that Ripper, if acting lawfully, would become the sole owner of the cheque upon its deposit in the account, a cheque which was drawn in favour, not of him, but of a unit trust of the above name, also precluded it from relying upon any such

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17 At 819.

18 At 831.

19 [1907] 2 KB 735 at 752.

20 Lord Finlay at 811 - 812; Viscount Haldane at 817 - 818, 819 - 820; Lord Parmoor at 830 - 832.

21 See, for example, *London Joint Stock Bank v Simmons* [1892] AC 201 at 215.

22 See eg *Low v Bouverie* [1891] 3 Ch 82 at 106; *Legione v Hateley* (1983) 152 CLR 406 at 435.

estoppel.[23] Had Suncorp observed this it would have put it upon inquiry as to whether Ripper was the intended payee of this cheque. And an independent inquiry would have revealed that he was not.

[23] Ripper's fraudulent conduct and Suncorp's own negligence were, in my opinion, the sole causes of its acts in receiving the cheque, paying out to Ripper's benefit on the faith of that cheque and collecting it. This is the obverse of the statement that Voss did not mislead Suncorp into believing that Ripper was entitled to deposit the cheque into the account which he opened.[24] For these reasons, in my opinion, Voss is not estopped, as against Suncorp, from denying that Ripper was authorized by him to deposit the cheque into that account and, consequently, to draw upon it as he did.

5. Section 98 of the *Cheques Act*

[24] In the alternative Suncorp contends that it did not incur any liability to Voss by reason only of having received payment of the cheque because it acted in good faith and without negligence. In making that submission it relied on s 98(1) of the *Cheques Act* 1986[25] which relevantly provides:

> "**Protection of non-bank financial institution collecting cheque for customer**
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> **98(1)** Where -
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> (a) a non-bank financial institution, in good faith and without negligence -
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> (i) receives payment of a cheque for a customer; or
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> (ii) receives payment of a cheque and, before or after receiving payment, credits a customer's account with the sum ordered to be paid by the cheque; and
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> (b) the customer has no title, or has a defective title, to the cheque,
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> the non-bank financial institution does not incur any liability to the true owner by reason only of having received payment of the cheque."

[25] It was never contended that Suncorp acted other than in good faith. To obtain the protection of this section Suncorp was also bound to take whatever precautions in the interest of the true owner the circumstances as they presented themselves to it reasonably required.[26] The test of whether, in the absence of precautions, Suncorp was negligent is:

> "Was the transaction of paying in the given cheque, coupled with the circumstances antecedent and present, so out of the ordinary course

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23 *AL Underwood Ltd v Bank of Liverpool* [1924] 1 KB 775 at 788 - 789, 797 - 798; *Houghton & Co v Nothard, Lowe and Wills Ltd* [1927] 1 KB 246 at 260; cf *Commonwealth v Verwayen* (1990) 170 CLR 394 at 445; Spencer Bower and Turner, *Estoppel by Representation*, 3rd Edn, 1977 at 133 - 134.

24 Cf *Tobin v Broadbent* (1947) 75 CLR 378 at 396 - 398.

25 Then the *Cheques and Payment Orders Act* 1986.

26 *London Bank of Australia Ltd v Kendall* (1920) 28 CLR 401 at 410.

> that it ought to have aroused doubts in the bankers' minds and caused them to make inquiry?"[27]

[26] The only guiding principle to determine what inquiry should have been made is:

> "… where doubt is once aroused as to the nature and true ownership of the cheque, the nature and extent of the inquiry proper to allay it must be measured by what, in the circumstances, a fair-minded banker, paying due regard to the reasonable exigencies of banking business in relation to the person depositing the cheque, would consider it prudent to do in order to protect the interests of the true owner whoever he might be."[28]

[27] In order to decide whether Suncorp proved that it did not act negligently in collecting and paying out the proceeds of the cheque, some further facts must be stated.

6. Some further facts

[28] An endorsement on Ripper's application to open the account, certifying the sighting of original documents, signed by two officers of Suncorp including Ms Haeusler, certified only to the sighting of Ripper's driver's licence. This was, presumably, to identify Ripper as the account holder. However Ms Haeusler also sighted and took a copy of the trust deed document already referred to. On its face it showed Ripper as both the trustee and the sole beneficiary of that trust. Leaving aside entirely the effect which this had on the validity of the trust,[29] it is plain that, had Ms Haeusler perused the trust deed, she would have seen that Ripper was the sole trustee of and so controlled the trust property and also its sole beneficiary. And she knew that he was to be the sole signatory of the account which he sought to open in the name of the purported trust. In other words she would have seen, had she looked, that any money paid into that account would be for Ripper's benefit only and that Ripper alone could control its disposition.

[29] Had Ms Haeusler perused the trust deed she would also have seen that it was executed on 23 May 1996, the day on which the account was sought to be opened and, more significantly, one day after the date of the cheque which in fact opened the account. Ms Haeusler could not recall whether she noticed this.

[30] The cheque for $600,000 was what Suncorp's officers called a "counter cheque". Suncorp was at the relevant time a building society; it could not draw bank cheques. However a customer of Suncorp could obtain a counter cheque if he or she held an existing account with Suncorp and held cleared funds to the amount of the cheque in his or her Suncorp account. Suncorp would then debit that account and provide its own cheque in that amount, in this case drawn on Westpac, to the customer's designated payee. The cheque therefore indicated to Ms Haeusler that there were funds of $600,000 against which cheques could be drawn. But Ms Haeusler made no inquiry as to who had purchased the counter cheque or what

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27 Ibid.

28 *London Bank of Australia Ltd v Kendall* supra at 417.

29 As to which, see *Jacobs on Trusts*, 6th Edn par 107; *DKLR Holding Co (No 2) Pty Ltd v Commissioner of Stamp Duties (NSW)* (1982) 149 CLR 431 at 463 - 464.

the relationship was of that person to Ripper. Nor did she make any inquiry about Ripper save, possibly, verifying that, as he said in his application, he was an existing customer of Suncorp.[30]

[31] Ms Haeusler acknowledged that the opening of a trust account with Suncorp was an unusual transaction. She did not think she had opened one before. She also acknowledged that $600,000 was an unusually large sum of money to be paid into a Suncorp account. Neither of these facts caused her to take any action other than, apparently, sighting and taking a copy of the trust deed, sighting Ripper's driver's licence and, possibly, verifying that Ripper was already a customer of Suncorp.

[32] On 23 May, the day on which the account was opened and the cheque for $600,000 paid in, Ripper obtained a counter cheque from Suncorp on the account which had just been opened, in the sum of $500,000 in favour of Westpac Bank. Westpac Bank then drew a bank cheque in favour of the trust account of a solicitor who was acting in the conveyancing transaction for Ripper's wife. On the same day further amounts totalling $94,850 were withdrawn from the account. The immediate drawing by Ripper on this account, and the apparent clearing of a cheque by him to obtain the counter cheque from Suncorp for $500,000, was permitted, Ms Haeusler thought, notwithstanding that the cheque for $600,000 had not been cleared, because the money coming into the account had been by a counter cheque of Suncorp.

[33] No further inquiries or precautions were taken before those transactions were permitted. Almost the whole of the $600,000 paid into the account in the name of "Southern Pacific Equities Unit Trust" on 23 May 1996 was paid out of that account for the personal benefit of Ripper or his wife on the same day.

[34] The question then is whether the application of the principles which I have stated to those facts, together with the facts earlier stated, negatived negligence on the part of Suncorp either in receiving $600,000 into an account to the benefit of and under the control of Ripper or in paying almost the whole of that money out of that account to the benefit of Ripper or his wife.

7. The application of the law to the above facts

[35] Applied to the facts of this case the question is whether there were facts which were known or ought to have been known to Suncorp which would have caused a reasonable banker to appreciate that any moneys paid into the bank account would be beneficially owned by and that the bank account was controlled by Ripper; and to suspect that Ripper was not the true owner of the cheque for $600,000 in which the designated payee was "Southern Pacific Equities Unit Trust".[31] In considering that question it must be borne in mind that "it is evident that the purpose of opening a new account may be to obtain payment of a cheque dishonestly come by, and experience has shown that frauds are not uncommonly perpetrated in this manner".[32] In other words there is a risk that the sole purpose of opening a new account may be to fraudulently obtain the proceeds of a cheque made payable to the person or entity

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30 Ripper was in fact already a customer of Suncorp.

31 *Marfani* at 579.

32 *Savings Bank of South Australia v Wallman* (1935) 52 CLR 688 at 695.

in whose name the account is opened. How real that risk is, and consequently what precautions should be taken to guard against it, will depend on the circumstances surrounding the opening of the account.

[36] The matters which arguably ought to have put Suncorp on inquiry, before it paid out the proceeds of the cheque for $600,000, as to whether Ripper was the true owner of that cheque, were:

1. that the cheque was for an unusually large amount and to be paid into an account of an unusual kind, namely a trust account;
2. that the cheque was made payable to "Southern Pacific Equities Unit Trust" thereby indicating that the payee of the cheque was the trustee of a unit trust of that name;
3. that the cheque was crossed "Not Negotiable" and marked "Credit Account Payee Only" and therefore, in order to be paid, had to be deposited in an account in the name of the named payee;[33]
4. that in order to open the account Ripper, on 23 May, produced the cheque dated 22 May and a trust deed, dated 23 May, purporting to create a trust in the name of the payee of the cheque but of which he was the sole trustee and beneficiary;
5. that Ripper was to be the sole signatory on the account; and
6. that the intention of Ripper plainly was to pay out virtually the whole of the proceeds of the cheque immediately after it was put into the account; as the events of 23 May demonstrated.

[37] These matters together, in my opinion, ought to have put Suncorp upon inquiry, from some source other than Ripper, as to whether this cheque was intended by its purchaser to be paid into an account, opened after the cheque was drawn, in the name of the entity which came into existence only after the cheque was drawn, but of which Ripper had sole control and in which he had sole beneficial interest. Any such inquiry would have led to Voss who would immediately have said that Ripper was not the intended beneficial owner of the cheque.[34]

[38] Against that, Suncorp submitted that it acted at all times in accordance with generally accepted banking practices. What was a generally accepted practice in such circumstances by a person in Suncorp's position is relevant but not determinative of that question.[35] Mr Trimboli was a person, the only person, who gave evidence about banking practice in such circumstances.

8. Mr Trimboli's evidence

[39] Mr Trimboli was a Bachelor of Commerce (Accountancy). From 1971 to 1989 he was employed by the ANZ Bank. He started as a teller and ended up as manager, commercial accounts, Victorian Northern Region. Over that period he became familiar with the practice of the ANZ Bank relating to the opening of accounts. He also had occasion to deal with and consequently became aware of the practice of other banks in respect of opening accounts. They were, he said, very similar to those of ANZ. Moreover during his period with ANZ that bank took over the Bank of Adelaide and he became conversant with that bank's practices in that respect

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33 See *Cheques Act* s 54, s 55.

34 Contrast the facts in *Savings Bank of South Australia* at 695 - 696.

35 *Rogers v Whitaker* (1992) 175 CLR 479; see now, however, *Civil Liability Act* 2003 (Qld) s 22.

which were similar to those of ANZ. He continued to familiarize himself with banking procedures during his term with Hong Kong Bank. However he appeared to know little or nothing about trusts including that more than one trust could be created in the same name.

[40] Mr Trimboli expressed the opinion that Suncorp's internal procedures, evidenced by its Branch Operations Manual, were consistent with standard banking procedures. However those procedures do not advert to matters of the kind, referred to earlier, which might cause a reasonable person in Ms Haeusler's position to make some independent inquiry, at least before the money paid into the account was dispersed. Indeed those procedures, by omission, permitted staff to be so ignorant of the nature of a trust, as Ms Haeusler was, and as Mr Trimboli himself appears to have been, as to fail to see that what should be a trust account of a unit trust was no more than Ripper's personal account.

9. Conclusion on negligence

[41] There is nothing contained in those procedures designed to alert an officer of Suncorp to the possibility of dishonesty on the part of a person who opens an account, in the name of a trust which implies beneficial interest in a number of people ("Unit Trust") but which is in fact owned and controlled by one person only, for what appears to be the sole purpose of receiving and immediately dispersing, for the benefit of that person, the proceeds of a cheque executed before the trust was constituted; and who proceeds to implement that purpose. The procedures, in my opinion, were inadequate to satisfactorily guard against the possibility of such dishonesty.

[42] As appears from what I have said, the warning signs were numerous and obvious. The failure by Suncorp, in the circumstances I have outlined, to make further inquiries from the person who had purchased the cheque for $600,000, in my opinion, constituted negligence on its part. Such inquiries would have revealed the fraud. I would therefore conclude that Suncorp failed to prove that it was not negligent and therefore failed in its defence under s 98.

10. Conclusion

[43] It follows that this appeal must be allowed and that Voss is entitled to damages in conversion in the sum of $577,000.

11. Costs

[44] The respondent must pay the appellants' costs of the appeal and of the trial. On 10 December 2001 the appellants offered to settle upon payment of $500,000 and costs to that date. The respondent did not respond to that offer. Accordingly, the respondent having failed to demonstrate that another costs order was appropriate in the circumstances, the appellants' costs should be assessed on an indemnity basis after 10 December 2001.

Orders

1. Allow the appeal.
2. Set aside the judgment of the learned trial judge of 10 October 2002 in favour of the respondent.
3. In lieu, judgment for the appellants against the respondent for $577,000 with interest at 10 per cent per annum from 23 May 1996 and costs to be assessed, such costs being on an indemnity basis after 10 December 2001.

4. That the respondent pay the appellants their costs of the appeal to be assessed on an indemnity basis.

[45] **WILLIAMS JA:** All relevant facts are set out in the reasons for judgment of Davies JA which I have had the advantage of reading. Although I agree fully with all that he has said, it is appropriate that I add some brief observations of my own.

[46] The approach of the Court of Appeal in *Morison v London County & Westminster Bank Ltd* [1914] 3 KB 356 as to the conversion of a cheque was confirmed in the later decision of that Court in *Lloyds Bank v The Chartered Bank of India, Australia and China* [1929] 1 KB 40. Scrutton LJ said at 55-6:

> "As no specific coins in a bank are the property of any specific customer there might appear to be some difficulty in holding that a bank, which paid part of what it owed its customer to some other person not authorised to receive it, had converted its customer's chattels; but a series of decisions . . . have surmounted the difficulty by treating the conversion as of the chattel, the piece of paper, the cheque under which the money was collected, and the value of the chattel converted as the money received under it."

[47] That approach was confirmed by the High Court in *Parsons v The Queen* (1999) 195 CLR 619 at 632.

[48] How the general law relating to conversion applies when a cheque is presented to a bank for collection is clearly stated by Diplock LJ in the passage quoted by Davies JA from his reasoning in *Marfani & Co Ltd v Midland Bank Ltd* [1968] 1 WLR 956 at 970-1. The approach of Diplock LJ was expressly approved of by the High Court in *Parsons* at 632.

[49] In this case, as the learned trial judge held (and as was conceded by counsel for the respondent on appeal) the appellants were at all material times the true owners of the cheque, there can be no doubt that in the circumstances the respondent converted the cheque in question. The learned trial judge came to a different conclusion because "Suncorp did what Mr and Mrs Voss had actually or apparently authorised: the depositing of the cheque into an account in the name of Southern Pacific Equities Unit Trust." His reasoning appears to have been that in doing what it did there was no "unauthorised assumption [by the respondent] of the powers of the true owner."

[50] In most of the cases where it has been held that a cheque has been converted by a collecting bank, the cheque in question has been deposited into an account meeting the description of the named payee. That was certainly the position in cases such as *Lloyds Bank v The Chartered Bank of India* and *Marfani*. As Diplock LJ said in the passage referred to above, conversion is a tort "of strict liability in which the moral concept of fault in the sense of either knowledge by the doer of an act that is likely to cause injury, loss or damage to another or lack of reasonable care to avoid causing injury, loss or damage to another plays no part." It follows that in the present case the respondent converted the cheque in question according to principles of common law.

[51] I agree with all that Davies JA has said on the issue of estoppel and do not wish add anything thereto.

[52] The most important issue raised at the trial in my view was whether or not s 98(1) of the *Cheques Act* 1986 afforded the respondent a defence. Given the reasoning in cases such as *London Bank of Australia Ltd v Kendall* (1920) 28 CLR 401, *Savings Bank of South Australia v Wallman* (1935) 52 CLR 688, *Lloyds Bank v The Chartered Bank of India*, and *Marfani* I have come to the conclusion that the respondent did not discharge the onus of establishing that it received payment of the cheque "in good faith and without negligence". The six matters particularised in the reasons for judgment of Davies JA clearly ought to have put the respondent on enquiry as to whether Ripper was the true owner of the cheque.

[53] It follows that the appeal should be allowed and orders made as proposed by Davies JA.

[54] **WILSON J:** I agree with the reasons for judgment of Davies JA and with the orders he proposes.