SUPREME COURT OF QUEENSLAND

CITATION:	*R v Johnson* [2006] QCA 362
PARTIES:	**R** **v** **JOHNSON, Mark** (appellant)
FILE NO/S:	CA No 51 of 2006 DC No 61 of 2005
DIVISION:	Court of Appeal
PROCEEDING:	Appeal against Conviction
ORIGINATING COURT:	District Court at Gympie
DELIVERED ON:	22 September 2006
DELIVERED AT:	Brisbane
HEARING DATE:	2 August 2006
JUDGES:	McMurdo P, Jerrard JA and Mullins J Separate reasons for judgment of each member of the Court, each concurring as to the order made
ORDER:	**Appeal against conviction dismissed**
CATCHWORDS:	CRIMINAL LAW – APPEAL AND NEW TRIAL AND INQUIRY AFTER CONVICTION – APPEAL AND NEW TRIAL – PARTICULAR GROUNDS – UNREASONABLE OR INSUPPORTABLE VERDICT – WHERE APPEAL DISMISSED – appellant was convicted of one count of fraud with a circumstance of aggravation – applicant was sentenced to 12 months imprisonment with 83 days in pre-sentence custody declared to be time already served – whether appellant was entitled to draw on a bank account in his name, which had a credit balance of $9,715 – whether withdrawing cash from an ATM or directly transferring funds via EFTPOS constituted dishonestly applying bank's property to the appellant's use CRIMINAL LAW – APPEAL AND NEW TRIAL AND INQUIRY AFTER CONVICTION – APPEAL AND NEW TRIAL – PARTICULAR GROUNDS – IMPROPER ADMISSION OR REJECTION OF EVIDENCE – OTHER CASES – whether the "expert" evidence of a witness who described the various methods by which internet fraud can be committed should have been admitted – whether a search warrant should have been admitted as evidence at the trial

Bank of New South Wales v Laing [1954] AC 135, considered
Capital and Counties Bank Ltd v Gordon [1903] AC 240, considered
Chan Man-sin v The Queen [1988] 1 WLR 196, followed
R v Capewell [1995] 2 Qd R 64, considered
Reg v Thompson [1984] 1 WLR 962, considered
Wille (1987) 86 Cr App R 296, considered

COUNSEL: B G Devereaux SC for the appellant
R G Martin SC for the respondent

SOLICITORS: Legal Aid (Queensland) for the appellant
Director of Public Prosecutions (Queensland) for the respondent

[1] **McMURDO P:** I agree with Jerrard JA's reasons for dismissing the appeal against conviction.

[2] **JERRARD JA**: On 22 February 2006 Mr Johnson was convicted after a trial of an offence of fraud with a circumstance of aggravation, and on 15 May 2006 he was sentenced to 12 months imprisonment, with 83 days in custody between 22 February 2006 and 15 May 2006 declared as time already served. He has appealed against that conviction.

[3] The indictment on which he was convicted charged that:

> "...on divers dates between the tenth day of November, 2004 and the twentieth day of November, 2004 at Gympie in the State of Queensland, MARK JOHNSON dishonestly applied to his own use a sum of money belonging to Suncorp Metway Ltd.
>
> And the sum of money was of a value of over $5,000.00, namely $9,715.00."

The principal point taken on the appeal was that Mr Johnson was entitled to draw on a Suncorp Metway account in his name, which had a credit balance as at 11 November 2004 of $9,715, and that neither withdrawing cash (debited to that account) from an ATM, nor directing the transfer of funds from that by EFTPOS, could constitute dishonestly applying Suncorp's property to Mr Johnson's use. There are also grounds complaining of the admission of the evidence of a witness Mr Andrew Barter describing methods by which internet fraud was committed, and a complaint about the admission of a search warrant into evidence.

The November transaction

[4] On 11 November 2004, $9,715 was transferred by recording a withdrawal from a Suncorp Metway account conducted by a Mrs and Mr Settree, directors of the company Romark Design Constructions Pty Ltd, and the credit was entered into Mr Johnson's. Both Mr and Mrs Settree were called by the prosecution, and each swore that they had not supplied their internet password to any third person, nor transferred the money from the account, nor authorised anyone else to do so. They had done nothing to authorise Suncorp to debit $9,715 from the company account. Neither of them knew Mr Johnson. Ms O'Keefe, a Suncorp Metway Banking Investigator, gave evidence, and produced supporting documents, establishing that

at 11:57:47 am on 11 November, a person using a Chinese-based internet provider logged into the account the Settrees conducted for the company, and after a few balance inquiries transferred $9,715 from that Suncorp account to Mr Johnson's Suncorp account. At 12:05:38 that person logged off. The prosecution also led evidence from a Ms Jenepher Green, supported by documents, establishing that at 1:24 pm on 11 November Mr Johnson made a balance inquiry on his Suncorp account, which now showed a credit of $9,747.25 (previously it was $32.25) and at 1:25 pm $500 was withdrawn. To withdraw that sum required the use of a card supplied to Mr Johnson. There were then a number of other withdrawals from that account on 11, 12, 13, 14, 15, 17, 18, and 19 November 2004 reducing the account to a credit of $7.70. Mr Johnson, who represented himself at the trial, did not contest that he made that account inquiry and all those withdrawals.

[5] Mr Johnson did not give evidence. The Crown evidence established that on 29 September 2004 Mr Johnson opened his account with Suncorp, into which there were regular pension and other social security payments. There were two exceptions to that pattern of regular, modest deposits and withdrawals. One was on 28 October 2004 when an amount of $4,870 was credited, that being reversed the next day by a corresponding debit, and the second, the subject of the indictment, was the credit on 11 November 2004 of $9,715. Other than the occasion on which the $4,870 was credited and reversed, the balance was usually small.

The October transaction

[6] The circumstances of the deposit and reversal of that $4,870 on 28 October 2004 were relevant to proof of Mr Johnson's dishonesty in withdrawing, as he did, the $9,715 on and between 11 November and 19 November 2004. Jenepher Green, a team leader of the Banking Investigations Department for Suncorp, was telephoned on 28 October 2004 by a member of the National Bank Internet Fraud Detection Team, who advised that there was a transfer being made from one of their customer's accounts into one of Suncorp's customer accounts of $4,870. It was apparent from her evidence that the National Bank Internet Fraud Detection Team member had said that the transfer from its customer's account to the Suncorp customer's was being effected by means of an internet banking fraud. Ms Green searched records available to her and ascertained that the account number into which the transfer was to be deposited was Mr Johnson's, and she phoned him. Her evidence was that on that occasion they had a conversation about internet fraud, and Mr Johnson told her he knew about it, and had previously assisted police and the Commonwealth Bank. She advised him that the $4,870 would be posted to his account on the night of 28 October, that she would be placing a "pledge" on it so that it could not be withdrawn, and that on 29 October the money would be reversed and the funds returned to the National Bank. Ms Green's evidence was that Mr Johnson, when told of the intended reversal of the credit he would receive, understood what was happening and told her that "this had happened to him before when he applied for a job online".[1]

[7] Ms Green's evidence explained that the $4,870 deposit would only be entered on the night of 28 October, because there was a delay when moneys were transferred from what she described as a "foreign institution" to a Suncorp account, and that she had agreed that Mr Johnson could withdraw some money from the account that afternoon, and she accordingly placed the "pledge" on the account in the very late

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1 At AR 69.

afternoon. Somewhere around 4:30 pm that day Mr Johnson telephoned her, and advised that he had received communications by email from a person named Lee Chusu, and Mr Johnson sent Ms Green copies of three emails timed at 9:38 am, 9:42 am, and 9:48 am on 28 October 2004, from Lee Chusu. The emails were ex 10. Their contents told Mr Johnson that his bank account had been sent a money transfer, and asked him to take five per cent of the money that would be banked, and to pay the remainder to an account in the name of David Rau of St Petersburg in Russia via a Western Union account. Then he was invited to keep $70 and place $4,800 in the Western Union account.

[8] Ms Green said that those emails forwarded by Mr Johnson were the normal ones that were coming out from Russia.[2] She was apparently referring to a variety of internet fraud in which recipients of funds placed in their accounts were asked to forward it via Western Union to St Petersburg, apparently less a small commission. The jury had already heard some evidence about that variety of internet fraud, involving Russia. Ms Tracey O'Keefe had earlier given evidence in which she described Suncorp's suspicion that the victim of the $9,715 deposit into Mr Johnson's account on 11 November 2004, the Suncorp customer Romark Design Constructions Pty Ltd, had had a "Trojan" on its computer. She explained that that suspicion was later "validated", and that a Trojan was a program that "sits on your PC and basically when you log into certain websites that it wants to track information for, it activates, records whatever keystrokes you make, and then sends that information back to whoever has put it there."[3] She said a Trojan ends up on a computer hard drive in a number of ways, sometimes by just going onto a website, and that sometimes:

> "[T]hey will set up dummy websites and get you to click on a link, and your computer won't actually go to any link or anything like that, it will just basically sit there, and that can put a Trojan on there. It can be from a pop up box when you are on a website. Sometimes the offenders will link them to a certain website and you will get a pop up box and that will download it on there, or sometimes you can open e-mails and if you click on a link it can download there."[4]

[9] When Mr Johnson cross-examined Ms O'Keefe, she agreed that in an earlier conversation with him (in late November 2004) she had explained that she suspected or believed that the people responsible for taking $9,715 from the Suncorp account operated by the Settrees in their company's name, and depositing it in Mr Johnson's, were related to the Russian mafia. She agreed she had told Mr Johnson that $1 million had been stolen in that way from Suncorp. In re-examination she explained that banks have seen a pattern in relation to transactions of that type, and that quite often an email was sent to unsuspecting people offering them employment. When the recipients applied for the employment, they provided their bank details, and at some later date money was then transferred into that account, and an email then sent to the recipient advising them of that fact, and asking them to forward the money via Western Union to a nominated addressee in Russia. She described the people conducting the accounts into which such money was deposited as "mules", and said that once internet abusers had obtained a number of "mules" who had supplied, for example National Australia Bank,

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2 At AR 70.
3 At AR 38.
4 At AR 39.

Suncorp, and Westpac account details, the offenders would use Trojans to target those institutions, trying to locate account holders within them who would be victims of withdrawals manipulated by the use of a Trojan. It was easier to transfer money from one Suncorp account via that method to another Suncorp account, or one Westpac account to another Westpac account, than, for example, from Suncorp to Westpac.[5]

[10] The prosecution also called a Mr Barter, the manager of Banking Fraud Investigations within Suncorp Metway, who both repeated the earlier evidence and gave more detail about Trojans and mules. He explained that a Trojan was used to describe a virus placed onto a recipient's computer unbeknown to the recipient, capable of retrieving the recipient's identification number and password used for internet banking. Mule customers were those whose accounts were deliberately used for the receipt of funds fraudulently transferred from accounts of innocent customers, the mules being required to send the money on to its final destination. Some mule accounts were obtained by offenders buying accounts through internet chat rooms, and some obtained simply by internet dialogue such as encouraging recipients to apply for jobs online. Offenders sometimes specifically shopped for people with accounts at various institutions.

What Mr Johnson said about November 2004

[11] On 26 November 2004 Mr Barter and Ms O'Keefe spoke with Mr Johnson by telephone, confirming his identity by reference to personal details, and asked about the credit of $9,715 on 11 November. Mr Johnson said he had received the money from a "mate"[6], and that:

> "about a year ago he had done a favour for a friend and he had lent him a couple of hundred dollars, and that a couple of weeks ago his friend rang him up and said that he had a big win and that he wanted to put some money back into his account as a thank you gesture. I asked him what his name was. He said Walter Krowkowski".[7]

[12] Mr Barter said that Mr Johnson said he had spent the money, and was willing to return it, and that Mr Johnson said he had gone to the Gympie Suncorp branch and asked if the funds were "cleared funds", and had been told "yes". Mr Johnson had then agreed to repay the money on 29 November, but did not. Mr Barter's evidence of that conversation was supported by Ms O'Keefe, and not challenged in cross-examination. Ms O'Keefe's evidence included that Mr Johnson had said in that phone conversation that Mr Krowkowski had had a win of $250,000 on a "scratchie", and that he had put the money into the account to say "thank you".[8]

[13] That account differed somewhat from what Mr Johnson told police officers who executed a search warrant on his residence on 3 December 2004. He told those officers that he was entitled to spend whatever was put in his bank account, and that he had been told that by a Justice of the Peace, a magistrate, and a barrister. He also said he had gone to Suncorp (presumably the Gympie branch), and had asked "Is this money in my account legal?", had been told it was, and had then gone and spent

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5 At AR 43.
6 At AR 48.
7 At AR 48 (the evidence did not show who provided that spelling).
8 At AR 36.

it. He also described that he had been told it was legal for him to spend the money, by Suncorp, when "they cleared my money".[9]

[14] In answer to questions by the police, he said he was expecting a cheque from Walter Krawtowski (spelling the name), who had been in contact with him on the internet, and he legitimately thought someone had been helping him out. He assumed that "Wally" was doing that, because "I looked after him a couple of years ago. He come up here and he was stuck on the beach and no where to live, so I give him – I give him a room in the garage."[10] He added that Mr Krawtowski had telephoned him, that when the money was put in his account he did not know where it had come from, that he knew "where they all are" and that all these "scams involve accounts in Russia."[11]

[15] He went on to describe a belief that the scams, as he described them, involved people obtaining a "card" in Australia, money going into an account, and then into the Treasury Casino, in Brisbane, where he said Mr Krawtowski could be found. Towards the end of the conversation with the police he described being sent messages by email about money, saying that the senders were operating locally and they "[were] talking of millions of dollars."[12]

[16] Those last statements were conceded by Mr Johnson's counsel on the appeal, Mr Devereaux SC, to be ones from which it was open to the jury to infer that Mr Johnson was aware that any unsolicited credit put into his account was put there for an unlawful purpose; and by unlawful means. That concession was realistic, because of the contents of a folder marked "fraud", located in computer equipment seized from Mr Johnson when the warrant was executed. A Mr Wright, a forensic computer analyst and a police officer, examined that folder, and reproduced some of the emails within it. His evidence, which appeared to have been accepted on this point by Mr Johnson, was that the file or folder would have had to have been manually created, and in his opinion by Mr Johnson. Its contents, ex 12 at the trial, included three emails, one dated 8 November 2004 and two dated 10 November 2004.[13] They purported to record a Walter Kotkowski advising Mr Johnson that he had applied for a job with HOPE Worldwide some time ago, and that $4,872 had been placed in his account; he should transfer those funds to a Western Union account; the third email included a reply, apparently from Mr Johnson, promising to provide an account into which the funds could be placed.

Conclusions open on the evidence

[17] Overall that evidence was capable of establishing to the jury's satisfaction that the $9,715 was fraudulently debited from the account the Settrees conducted, and credited to Mr Johnson's by those responsible for removing it, with the intention that Mr Johnson should in turn place most of it in a Western Union account; and that instead Mr Johnson simply took his chances against all concerned by just withdrawing the money and spending it himself. The evidence does not show that he knew from whose account it would come, or that it would be from a Suncorp account, but the jury could infer, as was conceded, that it was unlawfully, and fraudulently, obtained. Mr Devereaux also conceded in oral argument on the appeal

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9 At AR 212-213.
10 At AR 215.
11 At AR 217.
12 At AR 225.
13 At AR 195-196.

that the jury could find that it was dishonest of Mr Johnson to withdraw money from the account in those circumstances.

The argument on appeal

[18] But the argument pressed on the appeal was simply that Mr Johnson was entitled to draw on that credit, and that doing so could not constitute the offence of dishonestly applying Suncorp's property to Mr Johnson's own use. No point was taken on the appeal as to whether it would have been more accurate for the prosecution to have charged Mr Johnson with dishonestly obtaining money from Suncorp,[14] as opposed to charging him with dishonestly applying Suncorp's money to his own use;[15] the point taken was simply that the credit figure in his Suncorp account, after the $9,715 was recorded as a credit, gave him a chose in action against Suncorp Metway of which he was entitled to avail himself. That is what he had done and either any proven dishonesty was irrelevant to his right to enjoy the fruits of that chose in action, or the fact that he could do so prevented a conclusion that his conduct in withdrawing the funds amounting to that total could be characterised as dishonest. Mr Devereaux put the submission as being that the Crown had to prove that Mr Johnson had no right to withdraw the money, and that if he did, he could not do so dishonestly. He submitted that the directions the learned judge had given the jury were deficient in describing the real issue in the trial as being whether Mr Johnson was acting dishonestly when he applied that money to his use, as the judge put it; when, in Mr Devereaux's submission, the issue was whether Mr Johnson had a chose in action for the amount of the $9,715 against Suncorp Metway.

[19] Mr Devereaux presented an alternative submission, namely that it had not been established that Mr Johnson knew that the credit entry in his account had been fraudulently obtained, but that submission can be quickly rejected. The jury could conclude that Mr Johnson knew it had been so obtained because of the discussions he had had on 28 October with Ms Green; because of the folder marked "fraud" in his computer, which he effectively conceded he created in his cross-examination of the analyst Mr Wright, and its contents; because of the inconsistent accounts he gave of the favour he had performed for Mr Krowkowski, Kotkowski, or Krawtowski; and because of the simple fact that he claimed to believe genuine funds were deposited by cheque by a grateful friend when that was demonstrably not the source of the credit, and when the details about the alleged friend, including his name, were vague and contradictory. The jury was entitled to reject that claimed belief and find that Mr Johnson knew the credit was dishonestly created.

Support for the appellant's argument

[20] Returning to the principal submission, it relied very much on the judgment of McPherson JA in *R v Capewell* [1995] 2 Qd R 64. In that case that defendant was charged on an indictment which alleged that she had dishonestly applied a chose in action of the value of $3,500 belonging to her daughter, Fleur. The trial judge had described that chose in action as consisting of Fleur's right to enforce the obligation of a bank to honour a withdrawal application in the amount of the customer's credit balance.[16] The circumstances of that case were that an employee of a bank, intending honestly to transfer a $4,000 credit from one customer's account to another, mistakenly transferred it to a third one, the account conducted by the

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14 An offence against s 408C(1)(b) *Criminal Code 1899* (Qld).

15 An offence against s 408C(1)(a)(i) *Criminal Code*.

16 This description is in the judgment at [1995] 2 Qd R 64 at 65 (Macrossan CJ).

daughter Fleur. When the defendant and Fleur happened to call at another branch of that bank, and discovered to their surprise that Fleur's account had $4,000 credited to it, the defendant then instructed that $3,500 be transferred from Fleur's account into her own account with that same bank, and Fleur signed a transfer form to enable that to be done. The defendant then withdrew money to that amount from her own account over the next nine days. At her trial she swore that she thought the money (the $4,000) was deposited by someone, who owed money to her late husband, but as McPherson JA wrote, the verdict showed that the jury rejected that explanation, and they must instead have accepted that, in arranging to transfer the amount from Fleur's account to her own, the defendant was acting dishonestly; she knew there had been a mistake and proceeded to take advantage of it.

[21] The issue on that appeal was whether or not Fleur did have property consisting of a chose in action to the value of $3,500 immediately before the withdrawal of that sum from her account and the transfer of it into her mother's. Macrossan CJ wrote that the balance actually posted in a bank's ledgers, at least in the case when it is notified to the customer, is given a weight and effect of its own, citing authority; and that a bank is indebted to a customer in the amount shown as standing to the customer's credit in the bank's records. His Honour referred to the familiar right of the bank to consolidate a customer's account in debit with an account in credit subject to a liability in the bank, up to the time notice (of consolidation) is given, to honour any cheque drawn up to the limit of the balance in the account in credit.[17]

[22] Macrossan CJ wrote that he did not intend to convey any suggestion that a bank is not entitled to correct a credit entry mistakenly entered, and that what was involved in the appeal then heard was the nature of a customer's right in the period before the bank discovered its error and sought to correct it. He considered that the customer had a right in that interval conveniently and accurately described as a chose in action based on the credit balance shown in the bank's records, as notified to the customer, and the fact that the bank would be entitled to move unilaterally to correct the entry before the customer had drawn on or relied on it to not defeat that conclusion. Nor did the fact that if the customer had drawn the money out, the bank might independently recover it by an action for money had and received; Macrossan CJ said it should be accepted that the view on which both the Crown and defence cases were conducted, namely that there was a chose in action vested in Fleur at the time of the withdrawal of the money from her account and the crediting it to the defendant's, was correct; and that such a right at the relevant time existed.

[23] Importantly, he distinguished the decision in *Reg v Thompson* [1984] 1 WLR 962 (and 79 Cr App R 191), as a case in which entries electronically introduced into the bank's records were not made by the bank's officers but were fraudulently made by a wholly unauthorised outsider. Macrossan CJ wrote (of those entries):

> "They may have been a source of subsequent mischief but they could have no immediate effect on the rights inter se of banker and customer. Here the crediting of Fleur's account was deliberately carried out by the bank's own officer even if it was induced by an error on his part, and the notification of the resulting credit amount was deliberately communicated to Fleur and her mother again by an

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17 The Chief Justice cited Lord Cross in *National Westminster Bank Ltd v Halesowen Presswork & Assemblies Ltd* [1972] AC 785 at 810, also summarised by Mason J in *Inglis v Commonwealth Trading Bank* (1973) 47 ALJR 234 at 235.

> officer of the bank. The bank and its officers thus controlled these vital steps and that feature distinguishes the present circumstances from *Thompson's* case."[18]

[24] In describing the effect of balances actually posted in a bank's ledgers in a customer's favour, Macrossan CJ referred *inter alia* to *Bank of New South Wales v Laing* [1954] AC 135, *Capital and Counties Bank Ltd v Gordon* [1903] AC 240 at 249 and *Holland v Manchester and Liverpool District Banking Co Limited* (1909) 25 TLR 386. He referred to the description in *Bank of New South Wales v Laing* of the relationship between bank and customer as a "peculiar" one, which determines that the bank is indebted to the customer in the amount shown as standing to the customer's credit in the bank's record. Relevantly to the argument in the present appeal, I observe that the judgment of the Judicial Committee in that case records:

> "But a further 'peculiar incident' is that the bank is only indebted to the customer for the amount (which may be called 'a balance' when it is arrived at by deducting *authorized* withdrawals from sums paid in) standing to his credit as at the time of demand."[19] [Italics mine].

In *Capital and Counties Bank Ltd v Gordon* Lord Lindley, with whose judgment the other Lords largely agreed, wrote:

> "It must never be forgotten that the moment a bank places money to its customer's credit the customer is entitled to draw upon it, unless something occurs to deprive him of that right."[20]

[25] Those citations are a description of the significant evidentiary effect of a credit balance, honestly recorded. But they do not suggest in any way that the position is the same when the entries are forged. Moreover, Macrossan CJ's (obiter) conclusion was that fraudulently introduced entries could not affect the debt due from the bank to a customer.

[26] McPherson JA came to the opposite (obiter) conclusion, and the appellant relies on his judgment. It held that the bank's conduct had irrevocably acknowledged the validity of a chose in action or credit of $4,000 in Fleur's account, and that both the bank and the defendant had at all times recognised and acted on the footing that Fleur did have a chose in action in the form of a credit in her account at the relevant time, having a value of at least $3,500. His Honour held that the attitudes and actions of the bank accurately reflected the operations of the accounts and the rights and duties arising from them. He then went on to query the accuracy of the observations by the English Court of Appeal in *Reg v Thompson*, that:

> "We do not think that one can describe as a chose in action a liability which has been brought about by fraud, one where the action to enforce that liability is capable of immediate defeasance as soon as the fraud is pleaded."[21]

[27] McPherson JA suggested that if the reasons in *Reg v Thompson* suggested that entries in a bank account might simply be ignored if the transactions they record are a nullity capable of being reversed by the bank, then that was difficult to reconcile

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18 [1995] 2 Qd R 64 at 68.
19 [1954] AC 135 at 154.
20 [1903] AC 240 at 249.
21 *Reg v Thompson* [1984] 1 WLR 962 at 967 quoted at *R v Capewell* [1995] 2 Qd R 64 at 72 (McPherson JA).

with decisions in *Wille* (1987) 86 Cr App R 296 and in *Chan Man-sin v The Queen* [1988] 1 WLR 196. He wrote that in those cases convictions for theft of a customer's chose in action, consisting of the debt due from the bank, were upheld although the bank had no authority at all to debit the accounts and the customer was entitled to insist on the debit entry being reversed.

[28] Pincus JA dissented in *R v Capewell*. His dissenting judgment would have applied the observations in *Reg v Thompson*, that McPherson JA queried, to a case of a mistaken credit entry as well. The actual majority decision in *Capewell* necessitated only the holding that a credit, mistakenly created by honest error in the bank, created a chose in action for that amount until the bank discovered its error and reversed it, or until some other incident occurred. The majority view is authority for that. It was unnecessary for the Court to decide whether a fraudulently entered credit entry – or debit – could either create or discharge a chose in action. As to the latter situation, Macrossan CJ's judgment gave no support to criticism of *Reg v Thompson*, and I respectfully agree with the observations of Pincus JA that, relevantly:

> "... we would have to hold that a computer error adding, say, a few zeros to the balance in a customer's bank account substantially changes the amount of the debt due; I have found no authority in favour of that view."[22]

[29] Despite the submissions of Mr Devereaux, I consider that Mr Johnson did not have a chose in action for $9,715 simply because he knew a credit entry to that amount had been fraudulently inserted in his account, thereby misrepresenting to his knowledge the debt Suncorp owed him. As Pincus JA wrote in *R v Capewell*, the decisions in *Wille* and *Chan Man-sin* both turned on the definition, described in *Chan Man-sin* as artificial, of "appropriation" in s 3(1) of the *Theft Act 1968* (UK), which included as an appropriation "any assumption [by a person] of the rights of an owner". In both decisions it was held that the offender presenting a cheque – in one case a forged one, and in the other case a cheque signed by only one instead of two authorised persons, as required – was assuming the rights of an owner of the chose in action constituted by the credit upon which the cheque was drawn. The offender was assuming those rights by presenting the cheque and taking steps to see that the company's account was debited with the amount of it. The fact that the company could later insist on the debit being reversed did not mean the offender had not "appropriated" the chose in action, by assuming the right of an owner in respect of it. That reasoning does not support the proposition Mr Devereaux advances, that the fraud created a chose in action for Mr Johnson against Suncorp.

[30] Indeed the reasoning in *Chan Man-sin* is against the appellant. It includes the following:

> "The argument for the defendant is a simple one and is founded upon the proposition that a bank is not entitled in law, as against its customer, to debit the customer's account with the amount of any cheque which the bank has not in fact, any authority from the customer to honour. Thus, it is said, if the bank honours a forged cheque and debits the customer's account accordingly, the transaction is, quite simply, a nullity as a matter of law so far as the customer is concerned and the customer, on discovering the

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22 [1995] 2 Qd R 64 at 75.

> unauthorised debit to his account, is entitled to insist upon its being reversed. For this proposition reliance is, quite rightly, placed upon the decision of their Lordships' Board in *Tai Hing Cotton Mill Ltd v Liu Chong Hing Bank Ltd* [1986] AC 80." [23]

It seems clear from the judgment that the Privy Council accepted that as between the customer and the bank an unauthorised debit entry in a customer's account was a mere nullity, and the same would apply to the resulting unauthorised credit appearing in another customer's account to which that credit entry has been fraudulently moved. The judgment includes the further observation that:

> "It is, in their Lordships' view, entirely immaterial that the end result of the transaction may be a legal nullity for it is not possible to read into section 4(1) of the Ordinance any requirement that the assumption of rights there envisaged should have a legally efficacious result." [24]

The reference to the assumption of rights in the Ordinance was to the Theft Ordinance of Hong Kong, which the judgment describes as following, in all material respects, the provisions of the English *Theft Act 1968* (UK), particularly the artificial definition of "appropriation".

[31] That judgment clarified, if clarification was needed, that a genuine chose in action is not extinguished by a fraudulently created debit entry; and a fraudulently created credit entry creates only the illusion of a chose in action, and a false pretence of a right to payment by a bank of that amount of money. Fraud gives a right of action to the victim, not the perpetrator. Forged entries in bank documents, whether done by hand or through the internet, create nothing more than the opportunity to defraud. The bank's right to correct the forgeries by reversal entries, and the bank's right to sue for the recovery of money mistakenly paid out when relying on its own records as genuine, do not mean that before such reversal rights against the bank were created by the fraud. I accept that the position is different where the bank mistakenly and honestly made the error, because *R v Capewell* is authority for that, but that judgment does not bind this Court where internet forgeries create false credits and debit. Thus the company the Settrees conducted would be entitled to interest on its real chose in action against the bank for all of the period in which that account was incorrectly recording the withdrawal of $9,715. Mr Johnson was not entitled to any interest on that figure for any period in which it appeared in his account, and not entitled to withdraw against it, knowing it was fraudulently created.

[32] This appeal should suffer the same fate as the one in *Reg v Thompson*, where the English Court of Appeal, writing of similar dishonestly created debit and credit entries by the use of a computer, stated that:

> "We do not think that one can describe as a chose in action a liability which has been brought about by fraud, one where the action to enforce that liability is capable of immediate defeasance as soon as the fraud is pleaded. It is neither here nor there, we think, that the person defrauded, in this case the bank, may not have been aware that one of its employees had been fraudulent in this way until a later

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23 [1988] 1WLR 196 at 198.

24 [1988] 1WLR 196 at 200.

> time. The ignorance of the bank in no way, in our view, breathes life into what is otherwise a defunct situation brought about entirely by fraud. One has only to take a simple example. Discard for the moment the modern sophistication of computers and programmes and consider the old days when bank books were kept in manuscript in large ledgers. In effect all that was done by the appellant through the modern computer in the present case was to take a pen and debit each of the five accounts in the ledger with the relevant sums and then credit each of his own five savings accounts in the ledger with corresponding amounts. On the face of it his savings accounts would then have appeared to have in them substantially more than in truth they did have as a result of his forgeries; but we do not think that by those forgeries any bank clerk in the days before computers would in law have thus brought into being a chose in action capable either of being stolen or of being obtained by deception contrary to section 15 of the Theft Act 1968."[25]

I agree, and that reasoning is fatal to the appeal.

[33] In truth Mr Johnson actually accepted that, because he did not defend his conduct on the basis Mr Devereaux has argued. Mr Johnson did not suggest that, knowing the credit entry was fraudulent, he could honestly claim a right to withdraw any of it. Instead, he claimed to the police a belief that the credit reflected the genuine repayment of a favour. Far from dishonesty being irrelevant to any right to withdraw against the fraudulent credit, dishonesty was central to there being no right. The entry was dishonestly made, and Mr Johnson withdrew money within an hour and a half. If, as he said to the police, he did go to a Suncorp branch and speak with a teller, he did not reveal to that Suncorp employee what he knew, namely that the credit was the product of attempts by internet fraud to get money unlawfully from Suncorp. He did not suggest to the police he told any of that to the Suncorp employee, who he said told him he could withdraw the "cleared" money. Speaking to the Suncorp employee was just part of a charade, in which he represented that he believed it was a genuine credit, when he knew it was not. The jury could conclude that he knew the credit was fraudulent, and the attack on his conviction on this ground should fail.

[34] The other grounds can be briefly dealt with. One complained that Mr Barter was unnecessarily called to give irrelevant "expert" evidence about varieties of internet fraud. In fact both the other witnesses from Suncorp gave some similar evidence, and Mr Barter's evidence helped to explain some of the terms those witnesses used, and some of what Mr Thompson said to the police. Mr Barter's evidence took those matters only a little further, and was admissible. The last complaint was that the search warrant was put in evidence, without objection, when it ought not to have been, because of its potential to prejudice the jury. That complaint may be accurate, (the point was not really argued on the appeal), but if so I do not consider that admission of that document had any possible effect on the outcome of the trial. I would dismiss the appeal.

[35] **MULLINS J:** I agree with Jerrard JA.

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25 [1984] 1 WLR 962 at 967-968.