

# SUPREME COURT OF QUEENSLAND

CITATION: *Spillane v Commonwealth Bank of Australia* [2002] QSC 367

PARTIES: **JOHN WILLIAM SPILLANE**  
**(plaintiff)**  
**and**  
**THE COMMONWEALTH BANK OF AUSTRALIA**  
**(defendant)**

FILE NO/S: 8524 of 2002

DIVISION: Trial

PROCEEDING: Claim

ORIGINATING COURT: Supreme Court at Brisbane

DELIVERED ON: 13 November 2002

DELIVERED AT: Brisbane

HEARING DATE: 23, 26 September 2002

JUDGE: Atkinson J

ORDER: **Judgment is given for the defendant**

CATCHWORDS: EMPLOYMENT LAW – WRONGFUL DISMISSAL – where plaintiff employee signed as a witness without seeing signatures and signed a name without authority – where plaintiff resigned after interview with employer – whether termination of employment was a constructive dismissal – whether employer had right of summary dismissal

DAMAGES – FUTURE ECONOMIC LOSS – where plaintiff alleged entitlement to redundancy payment – whether plaintiff could be compensated for prospective loss

*Brott v The Queen* (1992) 173 CLR 426, considered  
*Burazin v The Blacktown City Guardian* (1996) 142 ALR 144, considered  
*Concutt Pty Ltd v Worrell* (2000) 176 ALR 693, applied  
*Gunton v Richmond-upon-Thames LBC* [1981] 1 Ch 448, followed  
*Malec v JC Hutton Pty Ltd* (1990) CLR 638, applied  
*Williams v Printers Trade Services* (1984) 7 IR 82, applied

COUNSEL: C E Hampson QC, with K F Watson, for the plaintiff  
G C Martin SC for the defendant

SOLICITORS:                   Connolly Suthers for the plaintiff  
  Mullumby Lawyers for the defendant

- [1] John Spillane worked for the Commonwealth Bank of Australia (“the bank”) for almost 29 years from 14 November 1960 until 20 September 1989. His employment was terminated on 20 September 1989 when he signed a letter of resignation. Mr Spillane claims damages because of the circumstances in which he lost his employment. Whether or not he is entitled to damages depends on precisely what occurred and the legal characterisation of those events.

### **Background facts**

- [2] Most of Mr Spillane’s working life with the bank had been in North Queensland. In 1984 and 1985 he was the Operations Manager for the bank in Mt Isa. At that time David Jang and Keith Hegarty purchased a produce business in Mt Isa. Mr Spillane had known Mr Jang for some thirty years since they were at school together. He knew that Mr Jang and Mr Hegarty were in a produce business together in Townsville called Lamberts Produce Townsville.
- [3] From 1986 to the end of 1988, Mr Spillane was seconded to serve the bank in Port Moresby. At that time he suggested to Mr Hegarty and Mr Jang that there was an opportunity for their produce business in Port Moresby. Mr Hegarty visited Papua New Guinea several times over the next two years.
- [4] When Mr Spillane returned to Australia in December 1988 there was no position available for him in Townsville or the immediate area and he was informed that he would be required to go to Brisbane for re-training until something of a more permanent nature became available. Mr Spillane was not pleased with that response as he did not want to disrupt his children’s education. Without re-training, there was no position available for him in North Queensland commensurate with his standing or seniority. He therefore applied for leave without pay but was told that he would have to use up his long service leave before he would be permitted to take leave without pay. Mr Spillane elected to take six months’ long service leave on half pay.
- [5] At that time, Mr Jang was ill and asked Mr Spillane to assist his partner, Mr Hegarty, on a casual basis and to do anything required to be done with Lamberts Produce apart from signing documents. Lamberts Produce was operated as a partnership with Mr and Mrs Jang and Mr and Mrs Hegarty being the four partners. In Townsville, Lamberts Produce did not have a Commonwealth Bank account.
- [6] Mr Spillane informed the North Queensland Regional Manager, John J Hoey, that he would be taking up a position assisting Lamberts Produce although he did not inform him of the terms on which he would be doing so. Mr J J Hoey did not object to this course although he did not specifically agree to it. Mr Spillane received no payment for his work with Lamberts Produce at that time except for payment in kind by way of fruit or vegetables or other products and occasional trips away.

Mr Spillane took over Mr Jang's responsibilities – looking after the creditors and debtors, banking, making up wages and other activities of that sort.

- [7] In the meantime, Mr Hegarty and another man, Jim Fitzgerald, had together engaged in a separate enterprise whereby they leased a Kenworth truck with a convertible trailer to carry grain in Southern Queensland. They opened a bank account at the Hermit Park branch of the bank for the receipt of revenue to meet the repayments for the lease which was with the Commonwealth Bank Financing Corporation ("CBFC"). CBFC is a subsidiary of the bank. Mr Hegarty received notice there were insufficient funds in the account to meet the payments, and found that Mr Fitzgerald had disappeared. He was, however, able to find the truck and the trailer which had been abandoned and organised their return to Townsville.

### **The Lamberts Produce lease**

- [8] Mr Hegarty then arranged to have Lamberts Produce take over the operation of the truck and trailer for the carting of fruit and vegetables. The lessor was CBFC and the lessees were then described as "Keith Hegarty, Rhonda Joy Hegarty, David Werner Jang and Judith Suzanne Jang trading as Lamberts Produce Townsville 50 Ingham Road, Townsville Qld 4810 produce agency". The lease appears on its face to have been signed by each of the four partners, Mr and Mrs Hegarty and Mr and Mrs Jang, on 20 July 1989. The signatures are apparently witnessed by Mr Spillane. However in fact Mr Hegarty was the only partner who affixed his own signature and, whilst Mr Spillane signed the lease as purported witness, he did not see any signatures other than that of Mr Hegarty affixed to the lease.
- [9] Mr Hegarty and Mr Spillane took the lease to the Hermit Park branch of the bank. Mr Spillane said that before they left for the bank, Mr Hegarty told him that the others had signed the document. Mr Spillane said that Mr Hegarty told him that it had been signed by the appropriate people. He said in evidence that he therefore presumed the signatures were affixed by the principals (being the partners) of Lamberts Produce. Mr Hegarty, however, said that he did not say anything about the three signatures that were already on the document as he had no reason to tell him anything. I accept that there was no conversation about the signatures which were already affixed to the document. Had there been, it would have been likely to reveal the dishonest way in which Mr Hegarty had obtained or applied the other three signatures on the lease. It was also unlikely that he mentioned anything to Mr Spillane because it appears that Mr Hegarty often affixed others' signatures to documents of this type. It was not unusual for him and therefore did not, in his mind, warrant comment.
- [10] When Mr Hegarty was asked who signed the lease he said that it was:  
 "Dave, myself – well, actually, Dave didn't sign it, somebody signed it for him 'cause he was crook but Rhonda – well, I signed hers, which I always did – and myself. Four signatures that were required were on there".

Later he said:

“Well, Dave actually didn’t sign it nor did Judy ‘cause Dave always signed Judy’s name and I always signed my wife’s name because you could never get a hold of them ... So, this was a practice we done for many, many years”.

When he was cross-examined, Mr Hegarty said that he signed his wife’s name. He thought that Annie, his “office girl”, had signed Mrs Jang’s name and that he had signed Mr Jang’s name.

- [11] Mr Hegarty agreed that of the four signatures on the lease, the only genuine one was his. Mr Hegarty knew at all times that the three signatures on the lease before he signed it were not authentic. They were not the signatures that they purported to be. He well knew that the bank and CBFC required all four partners to sign important financial documents. He had often complained to the bank about how inconvenient it was as neither Mrs Hegarty or Mrs Jang actually worked in the business. The bank however was in my view being prudent in requiring the signatures of all partners. Although Mr Hegarty complained in his evidence, “Why do we all have to go chasing our wives all the time to sign these bloody documents”, that situation was caused by the business structure chosen by Mr Hegarty and Mr Jang and the financial prudence and caution which was properly exercised by the bank.
- [12] Mr Spillane and Mr Hegarty went to the Hermit Park branch of the bank together and were ushered into the office of the Loans Officer, Margaret Ross. Ms Ross has no memory of the incident.
- [13] Mr Spillane said that Mr Hegarty sat down and he stood up. Mr Hegarty signed the lease, his being the top signature of the four. The other signatures were already there and then Mr Spillane “witnessed” the signatures. Mr Spillane said that all of this took place in the presence of Ms Ross and nothing was said. Ms Ross accepted the document on behalf of the bank.
- [14] What was the significance of witnessing these signatures? Mr Spillane agreed that in his 29 or so years with the bank, he had witnessed many signatures. Each time he witnessed a signature, he understood that by signing his name he was, in effect, stating, “I saw this person sign his or her name.” He admitted that he witnessed signatures on the lease document that he had not seen being signed. When asked if, when he was an employee of the bank, in a senior managerial role, he would have regarded that as being serious misconduct on behalf of a bank officer, had a bank officer done that, he equivocated and said it would depend on the circumstances.
- [15] Mr Spillane agreed that by witnessing a signature the witness represents that he or she saw the other person sign the document; that a lease document is a very important financial document; and that the persons who are parties to that lease have very serious obligations under the lease. He agreed that it is reasonable for a finance company to require that the persons who are named on the lease are the ones who actually sign it; and that one way of establishing that the persons who are named on the lease are the persons who have signed it is by having someone witness their signature. After at first denying that his action was misleading,

Mr Spillane agreed that by witnessing signatures that he had not seen being signed, he was misleading the CBFC.

- [16] By placing his signature on the lease he attested that he had seen the four persons attach their signatures to the lease. The assertion in the attestation was false. While to do so was not to commit the crime of forgery, it did convey misrepresentations of fact about the document.<sup>1</sup> The misrepresentations were that the signatures on the lease were those of Mr and Mrs Jang and Mr and Mrs Hegarty and that Mr Spillane had seen them sign the lease. The latter misrepresentation was untrue to the certain knowledge of Mr Spillane at the time he signed the lease. The bank did not allege in these proceedings that Mr Spillane had committed the criminal offence of forgery but did rely on the misrepresentation of fact made by Mr Spillane by purporting to witness the signatures on the lease.
- [17] A financial institution is entitled to rely on a bank manager's attestation that a document has been signed by each person who at least purports to be the person whose signature is attached.
- [18] Mr Spillane agreed that the bank is quite right to insist on strict integrity and honesty in the conduct of its employees; and that it requires that sort of honesty to be displayed with all dealings concerning the bank. He agreed that he was aware that it is appropriate for managerial staff to set an example to more junior staff on those sorts of questions. He also agreed that as a member of managerial staff he had been at training seminars conducted by the bank where emphasis had been put on the need for care in obtaining correct signatures and having documents witnessed and executed properly.
- [19] There can be no doubt that Mr Spillane knew that witnessing signatures which he had not seen affixed was a serious matter inconsistent with his duties and responsibilities as an experienced employee of the bank. He knew Mr Hegarty through the business and therefore would have been well aware, at the very least, that he was a very rough and ready character who did not place any great store by care and rectitude if it was inconvenient. By purporting to witness the signatures on the CBFC lease, Mr Spillane engaged in behaviour which the bank was entitled to regard as serious misconduct. It was in breach of the terms of his employment with the bank that required him to observe high standards of personal integrity and conduct.

### **Variation to the lease**

- [20] The next incident concerned a variation to the CBFC lease. The trailer, the subject of the lease, was to be sold and a flat top trailer bought to replace it. That transaction required a variation of the lease. Mr Spillane said that he went to the Hermit Park branch of the bank with Mr Hegarty on 30 August 1989 with regard to that variation. He said that Mr Hegarty had received instructions by telephone that

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<sup>1</sup> *Brott v The Queen* (1992) 173 CLR 426 at 436, 443.

the relevant document was at the bank requiring signatures. Mr Hegarty said that the variation letter came in the post and that he and Mr Spillane took it into the bank.

[21] The document itself is a letter from an officer of the CBFC dated 30 August 1989 addressed to the proprietors of Lamberts Produce Townsville. It referred to the lease agreement dated 21 July 1989 between Keith Hegarty, Rhonda Hegarty, David Jang and Judith Jang trading as Lamberts Produce as lessee and CBFC as lessor then referred to the agreement to vary the terms of the lease to change the description of the goods covered by the lease. It requested the addressees to signify their acceptances of that amendment to the lease by signing and returning the original of the letter. There followed four lines for signatories.

[22] At the bank there were conversations between Deidre Walsh of the bank, Mr Spillane and Mr Hegarty. Each gave evidence of those conversations. It is necessary to consider each version to determine what actually did occur. Mr Spillane said that Mr Hegarty and he went to the inquiry centre and were attended by Ms Walsh. Mr Hegarty said, "We're here to sign a document ... I'm here to sign it and John's here to sign for David". By "John", he was referring to Mr Spillane and by "David", he was referring to Mr Jang. Mr Spillane said in evidence that Mr Jang had asked him to sign the letter of variation on his behalf. Mr Hegarty then signed the letter of variation and then Mr Spillane signed "for David". Ms Walsh then took the document away and Mr Hegarty and he engaged in social conversation with Mr Hegarty's mother. Mr Spillane said that about 10 or 15 minutes later Mr Hegarty asked Ms Walsh to fax the letter of discharge to Lamberts Produce. They then left the bank.

[23] Mr Hegarty's evidence was:

"I went into the Hermit Park branch. We then said to John, "Come on, we got to go and bloody sign these documents" – you know?"

Who did you see there? -- We seen Deidre Walsh.

Yeah?-- 'Cause I went up to the counter and I said – she was 2IC there, I think, at the – the time. I said, 'Deidre, I got these bloody' – I stood at – right at the front counter ... I said to John, 'Come on, we got to go up and sign these bloody documents'. So I went up and said, 'Deidre, here to sign these documents. John's going to sign for Dave' – bingo."

"Now, signatures were put on then – and that top one, is that yours, again – have I got that correct?-- That's mine.

And the second signature, D W Jang?-- I don't know. It looks like – if that's the one Dave signed ... not Dave, John signed or not".

[24] Deirdre Walsh gave evidence of what occurred on that day. Her evidence was carefully given and she was a most impressive witness. On the following day she made a written note of what had happened while it was still very fresh in her

memory. Where the evidence given by Mr Spillane or Mr Hegarty varies from hers, I have tended to prefer her account.

[25] It appears from Ms Walsh's evidence that two copies of the lease variation were received by the bank in the morning mail together with a request to phone CBFC when they were signed so that a letter of discharge could be faxed through. The letter of discharge was required so that the sale of the trailer could be finalised. As no details were given of whose signatures were required, Ms Walsh telephoned Russell Brady of CBFC who told her that the signatures of both Keith Hegarty and David Jang were required. During the morning Keith Hegarty and John Spillane came into the branch. Ms Walsh asked Mr Hegarty to sign the document. He signed it and she then said that it also had to be signed by David Jang. Then Mr Spillane turned the document around and signed it "D W Jang". After he had signed it, he then pushed it towards Ms Walsh and asked how long would it be before the confirmation would come through from CBFC. Ms Walsh recalls that she was quite amazed at the fact that "he had actually forged somebody's signature on there".

[26] Mr Martin SC who appeared for the bank then asked Ms Walsh:  
"Did you say anything to Mr Spillane after he signed the name D W Jang?—I'm of the opinion that I said something like, 'I don't believe what I'm seeing here'."

She was clearly shocked by what she saw.

[27] She then took the documents and faxed them to CBFC and reported to Doug McDonald, the branch manager, that she was most unhappy with what had happened and that she would not be witnessing the document. Mr McDonald gave evidence of recalling this event and that Ms Walsh, who was normally a fairly confident sort of a person and fairly well in control of everything, had seemed agitated, disturbed and surprised. She rang Mr Brady at CBFC to inform him of what had occurred.

[28] After about ten minutes, Ms Walsh returned to the counter and told Mr Hegarty and Mr Spillane that the letter of discharge had not arrived. Mr Spillane told Ms Walsh that he and Mr Hegarty would return to the office of Lamberts Produce and call to collect it later. Shortly after they left the bank, Mr Brady telephoned Ms Walsh and said that CBFC would not accept the signature and that he would ring Mr Hegarty and advise him of this.

[29] Mr Spillane said that later that day he received a phone call at Lamberts Produce from Mr Brady. Mr Brady and Mr Spillane knew one another. Mr Brady told Mr Spillane that the letter was not acceptable and would require the signature of another partner. Mr Spillane told Mr Hegarty who arranged for his wife to sign the document.

[30] Mr Spillane said he went to the Hermit Park branch of the bank with Mrs Hegarty. They went to the inquiry counter; the letter of variation was again produced; and

Mr Spillane said to Mrs Hegarty, “Obviously, that’s Keith’s signature. I signed for David, you’re to sign that”. She then signed the document.

- [31] Mr Spillane asserted in evidence for the first time, that he had authority to sign Mr Jang’s name. Initially, he said, Mr Jang asked him to assist Mr Hegarty in any way apart from signing documents. Later, Mr Jang organised an authority for Mr Spillane to operate the bank accounts of Lamberts Produce but not the bank account at Hermit Park or the CBFC account. On 10 November 1989, Mr Jang wrote to the bank asserting he had asked Mr Spillane to sign the letter of variation on his behalf. The bank did not receive Mr Jang’s letter of 10 November 1989 until after Mr Spillane’s resignation on 20 September of that year. There was no authority lodged with the Hermit Park branch of the bank or with CBFC at the time the lease was signed by Mr Spillane. Mr Spillane knew that such written authority was generally required before the signature of one person could be accepted for that of another. He also knew that the forms for such an authority, generally known as procuration forms, were readily available. There was in fact no written authority of any kind for Mr Spillane to sign the variation of lease with Mr Jang’s name. For a person in Mr Spillane’s position to do so without proper authority was also a matter the bank was entitled to regard as serious misconduct. When added to the conduct of purporting to witness signatures on the original lease which he had not in fact witnessed, such behaviour was in clear breach of his contractual duties as an employee of the bank.
- [32] On 18 September 1989, the CBFC determined that it was necessary to re-document the lease and letter of variation to ensure their legal validity and enforceability. Each would require the signatures of all the persons whose signatures were falsified to confirm the contracts. Each was to be witnessed by two bank officers including a senior classified bank officer. CBFC reported the irregularities to the bank for its attention on the same date.

### **The bank’s investigations**

- [33] Mr Mortimore, who was at that time a bank inspector, gave evidence that he was doing an inspection in Central Queensland when he received a phone call on or about 19 September 1989 from the acting senior manager, personnel, in Brisbane who, like the Townsville regional manager, was also, quite coincidentally, called John Hoey. His full name was John Owen Hoey. Mr J O Hoey has little recollection of the conversation. However Mr Mortimore has a detailed recollection which I accept. Mr Mortimore is now retired and not in very good health but retains the meticulous approach which would appear to have been the hallmark of his bank career. He was therefore a reliable witness to the events in which he took part.
- [34] Mr Mortimore said that Mr J O Hoey provided him with the background of what had happened and Mr Spillane’s history of employment with the bank. Mr J O Hoey told Mr Mortimore that one of the principals of Lamberts Produce, a Mr Hegarty, and Mr Spillane had called at Hermit Park branch where there was a letter of variation to a lease agreement to be executed. There were four partners of Lamberts Produce, as he recalled, Mr Hegarty and his wife and a Mr Jang and his wife. Mr Hegarty was asked to sign the variation agreement which meant that the goods under the original lease were being changed and, at that stage, the interviewing officer, Ms Walsh, said that it would require David Jang’s signature as well, upon



which Mr Spillane took the document from her and signed “D Jang” or “D W Jang” on the form in front of her. Ms Walsh had not been prepared to accept this and had referred it to CBFC and to her manager, Doug McDonald.

- [35] This had raised concerns about what else might have gone on with the documents for Lamberts Produce, so CBFC searched back through previous leases and documentation. Mr J O Hoey told Mr Mortimore that CBFC had found two previous leases where, after comparison of the signatures with other documents, they were quite certain that some of the signatures on these other two documents were forgeries. One was the original lease to which this variation advice pertained, which was for a prime mover. CBFC’s investigations had revealed that while the signature of Mr Hegarty was a correct signature, the other three signatures were forgeries. The document appeared to be witnessed by John Spillane. They had checked his signature to the signing officers’ book and they believed that his signature was probably genuine.
- [36] There was a previous variation of goods advice dated earlier that year in which a couple of the signatures also appeared to be forgeries, but Mr Spillane had not had any involvement with that so far as CBFC could see, and they were not going to pursue that issue. Mr J O Hoey went on to say that he had discussed the matter with the general manager at the time, Mr Alf Long, and they both agreed that if Mr Spillane’s conduct in placing Mr Jang’s signature on this variation advice was as stated, and if he had in fact witnessed a false document with three forged signatures on it, then his position in the Commonwealth Bank was untenable, and that if the bank launched a full code of conduct<sup>2</sup> investigation into him and considered disciplinary action, then he would almost certainly have been dismissed for misconduct.
- [37] Mr Mortimore said that he was then told that if there had been no money stolen, a far more compassionate approach would be, if Mr Spillane admitted to these things, to ask him for his resignation so that he could resign with his position and his reputation intact, and he would not suffer the stigma of having been dismissed.
- [38] Mr Mortimore remembered these conversations well because he said that it was a most unusual occurrence to have a bank officer walk into a bank and sign someone else’s signature in front of a witness. It was, he said a “standout thing”. He had to retrieve the files over the years during the course of the litigation and each time he had to refresh his memory on what had happened. This meant that the events had been kept fresh in his mind over the years.
- [39] Mr Mortimore said he was given a direction to go to Townsville and to consider the matters of the signatures on the leases, and who had witnessed them, and the signatures on the variation advice, and to conduct an interview with Mr Spillane. He was to give Mr Spillane the opportunity to confirm or deny that he had done these two specific things: that he had falsely placed the signature of David Jang on a letter of variation advice, and that he had borne false witness to false signatures on

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<sup>2</sup> The Code of conduct is referred to in more detail in paras [67] – [70].

the original lease of July 1989, which, as Mr Mortimore said, was the only reason that allowed CBFC to go ahead and fund this lease for over \$80,000, which would not have happened if Mr Spillane had not witnessed it as a bank officer. If he admitted to those two things, Mr Mortimore said he was then to ask him for his resignation. If he had not admitted to them, the bank would have had to consider a formal full code of conduct investigation and consider what action to take. Mr Mortimore's instructions did not cover conducting a code of conduct inquiry.

- [40] Mr Mortimore said that had a formal disciplinary code of conduct inquiry been required he would probably have been asked to conduct such an inquiry. He would have had to review the whole matter and interview people including, if they agreed, the partners of Lamberts. The bank would probably have had to look into Mr Spillane's financial affairs as, in Mr Mortimore's experience, such behaviour was often an example of a wider problem. They would have had to look very seriously into whether the lease was genuine. All of those things would have had to be gone into in considerable depth.
- [41] Mr J O Hoey also gave evidence that had Mr Spillane not resigned, the most likely course of conduct would have been that the bank would have conducted an investigation under the code of conduct. Mr J O Hoey had been involved in several such investigations and thought in this case such an investigation would take about four or five weeks to complete.
- [42] Following his telephone conversation with Mr J O Hoey, Mr Mortimore flew to Townsville. He went to the office of the regional manager, who, although not related, as I have already mentioned, was also called John Hoey. His full name was John James Hoey. Mr J J Hoey had documents that had been sent or faxed to him. These documents included previous leases and the copy of the lease that was in question. Other documents were made available to Mr Mortimore, such as a diary memorandum from CBFC and a diary memorandum completed by Ms Walsh. Following that, Mr Mortimore himself checked the signatures on the original lease against various other bank documents which purported to have the correct signatures of the partners of Lamberts Produce on them. Upon checking those signatures, it was apparent to him that the signature of Mr Hegarty was a genuine signature. The other three signatures bore very little resemblance to the previous specimens that Mr Mortimore was able to compare them with and were, in his opinion, quite blatant forgeries. Mr Mortimore said he checked the signature of John Spillane on the original lease witnessing those signatures, and that signature appeared to be a genuine signature. He also checked the signatures on the variation advice that was signed in front of Ms Walsh, and determined that the signature of Mr Hegarty appeared to be genuine. The signature of "DW Jang", in his opinion, was an obvious forgery. He had been told that Mrs Hegarty had gone to the Hermit Park branch and had signed underneath those signatures on the variation advice. Her signature appeared genuine. Mr Mortimore said he made inquiries and there was no written authority for Mr Spillane to sign on behalf of Mr Jang. He did not speak to any of the other persons involved such as Mr Jang or Mr and Mrs Hegarty.

**Interview on 20 September 1989**

- [43] The next factual matter to be determined is what occurred in the interview on 20 September 1989 after which Mr Spillane signed a letter of resignation. There were three people who were able to give evidence about this: Mr Spillane, Mr Mortimore and the Townsville Regional Manager, Mr J J Hoey. Mr Mortimore's recollection was assisted by a type-written record of the interview that he conducted with Mr Spillane in the presence of Mr J J Hoey.
- [44] Mr Spillane was telephoned at Lamberts Produce to come into a meeting at the regional manager's office of the bank in Flinders Mall in the centre of Townsville. Mr Spillane protested that he was too busy to come in immediately but was then directed to attend. There was a dispute in the evidence about who had made the call to Mr Spillane. Mr Spillane believed that the call had come from Mr Mortimore, whereas Mr Mortimore believed that Mr J J Hoey had called Mr Spillane. Mr J J Hoey said he thought that Mr Mortimore had rung Mr Spillane rather than himself. On balance, I am prepared to accept that the telephone call was made by Mr Mortimore.
- [45] Mr Mortimore prepared a list of questions. This was his invariable practice. It enabled him to ask the questions that elicited the important facts that had to be established and to avoid saying anything that ought not be said. Mr Mortimore hand wrote the questions then had them typed by the regional manager's personal secretary. They were typed in a format which left gaps for written answers and for any additional questions that had to be inserted as the interview progressed. He then took the typed copy of the questions with spaces for the answers into the interview with Mr Spillane.
- [46] Mr Mortimore said that he read from the prepared script of his questions. He wrote Mr Spillane's answers as accurately as possible in long hand on his script of questions as the interview progressed. Mr J J Hoey confirmed that Mr Mortimore wrote down Mr Spillane's answers during the interview.
- [47] After the interview was completed he took the document to the regional manager's secretary and asked her to type up that document. Mr J J Hoey and Mr Mortimore then both checked the written answers and both signed to say it was a true and correct record of the interview.
- [48] Mr Spillane said that Mr Mortimore did not write any notes of the conversation. He said the only pieces of paper that Paul Mortimore had were the letter of variation and subsequently the typed letter of resignation. This was clearly untrue.
- [49] Mr Mortimore commenced the interview with his standard introduction adjusted to the particular interview. He said, "John, as you would be aware, my name is Paul Mortimore. I'm a branch inspector of the Commonwealth Bank. I am here to investigate certain matters that occurred in the signing of documents for Lamberts Produce at Hermit Park branch". He continued, "It will be a formal interview at which I will be asking you questions and recording your answers. You are entitled

to have a third party with you to accompany you during the interview if you wish to do so.” Mr Spillane denied that he was informed he could have a third party present but Mr Mortimore did, in my view, say that and correctly recalls Mr Spillane’s response to that information. Mr Spillane said that he would not need anyone with him. Mr Mortimore said that when Mr Spillane said that he felt “a little bit of grudging respect for him”.

- [50] Mr Mortimore continued, “You are cautioned that you are not required to answer any of these questions, unless you wish to do so, but anything you do say may be taken down and could be used in evidence. Do you understand?” Mr Spillane denied that he was given that warning. However, it is recorded in the typewritten record of the interview and I am satisfied that the warning was given. Mr Mortimore then said “Please be sure to tell the truth. Your full name is John William Spillane and you joined the Commonwealth Bank on 11 November 1960.”<sup>3</sup>
- [51] Mr Mortimore then produced the letter of variation and said, "Please look at the document dated 30 August 1989 which is a variation advice for goods covered by CBFC lease number 4-45-628579 in the name of Lamberts Produce, Townsville. Did you sign the name of 'D W Jang' at the foot of this form?" Mr Spillane agreed he signed the name 'D W Jang' at the foot of the letter of variation.
- [52] Mr Mortimore then said, "John, there is also some concern at your actions in witnessing CBFC lease agreement dated 20 July 1989 for Lamberts Produce. I have compared the signatures of R J Hegarty, D W Jang and J Jang to recent specimen signatures of theirs. There is considerable doubt these are genuine signatures and I believe this could easily be proved by police hand-writing experts. Why did you witness these signatures?"
- [53] Mr Spillane’s recollection of this part of the conversation was slightly, but not significantly, different from Mr Mortimore’s. In examination in chief, for example, he twice said that Mr Mortimore said, with regard to the signatures, “Well, there is some doubt and we have compared the signatures and a hand-writing expert in [his] opinion would prove the signatures were not genuine.” However I accept Mr Mortimore’s version of what he said including references to a “police hand-writing expert”.
- [54] Mr Spillane then said, "I know these people did not sign the documents themselves. The principals of Lamberts would have signed them. I did not, but I witnessed them.” This was, as Mr Mortimore thought at the time, an evasive answer. It rather suggested that Mr Spillane was in fact aware of Mr Hegarty’s manner of obtaining signatures on documents which was fully revealed for the first time on the cross-examination of Mr Hegarty during this trial.
- [55] Mr Mortimore then said, "John, you would be well aware that your position in the Commonwealth Bank has become untenable because of your actions and, in the

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<sup>3</sup> In fact Mr Spillane commenced employment with the bank on 14 November 1960 but nothing turns on this fact.

circumstances, I have been directed to ask for your resignation as at close of business today." Mr Spillane said that in addition to those words Mr Mortimore said to him that his position with the bank was on shaky grounds in view of what he had done, and that he had been directed by the State manager to obtain Mr Spillane's resignation. If he did not have that within 24 hours, the police would be involved and Mr Spillane would be charged with forgery which would bring a sentence of 2 to 14 years. Mr Mortimore absolutely denied saying this. Mr J J Hoey did not recall anything like this being said. He said that he did not think that Mr Spillane was threatened in any way. His tone when he gave that answer was quite incredulous. I do not accept that Mr Mortimore threatened Mr Spillane with police involvement in this way or that he said that he would be charged with forgery nor that any possible sentence for forgery was mentioned.

[56] In response to Mr Mortimore's request for his resignation, Mr Spillane said, "I am left with little option but to resign. I would like it placed on record that the partners in Lamberts are fully aware of everything I have done, which was simply to help them. Mr and Mrs Jang are both very ill and not available much of the time. I realise none of this changes the fact that I forged a document and witnessed incorrect signatures. I would like to get the partners to send a statement in that I acted with their concurrence."

[57] I do not accept the version of this statement given by Mr Spillane which was that he said, "I would like to make it quite clear and make you both aware that I had the approval of the partners of Lamberts Produce to do what I did and it was not for personal gain or - there was no criminal intent involved at all. It was simply to help David Jang, who was a very close friend."

[58] Mr Spillane then signed a letter of resignation which had already been typed. He said in evidence that he was not willing to resign but was in a state of shock and concerned with the effect of publicity on his family if he was to be charged with forgery. However this answer was quite disingenuous. Faced with the bank's knowledge of his wrongdoing in witnessing signatures which he had not seen put on the lease and signing another's name without formal authority, his resignation must have been, to his knowledge, the only way of avoiding the ignominy of dismissal. He said that the main catalyst for his resignation was that he had been threatened with police action, that is, to be charged with forgery that could bring a sentence from two to 14 years. However as in my view no such threat was made, it could not have been, and was not, the reason for his resignation. I do not accept that the mention of a police handwriting expert, which Mr Spillane does not even recall being said, was sufficient to turn a voluntary resignation into a constructive dismissal.

[59] Mr Mortimore said that after he finished his prepared formal interview he stood to signify that the interview was over. He expected Mr Spillane to stand too but he did not. He sat there for some time and then he said, "Can we talk about this without you writing anything down because I don't want to cause any more problems for the partners." Mr Mortimore said, "That's okay."

- [60] Mr Spillane said, "Well, are the bank going to take any legal action against myself or the partners for the forging of that lease?" Mr Mortimore said, "Well, John, ... I don't know. There's going to have to be negotiation with CBFC and the partners. Do you think they're going to honour the lease?" Mr Spillane replied, "Oh, look, yes, they will. They do things like this but at the end of the day they will rally round and support each other and I'm pretty sure they'll honour the lease." Mr Mortimore then said, "Well, look, who did sign, who did forge those signatures? You've told me you didn't. Are you sure you didn't?" Mr Spillane replied, "No, I didn't sign them. Hegarty signed them." Mr Mortimore said, "Well, why would he do such a thing, it is a ... legal document." Mr Spillane said, "Well, he's a bit of a cowboy at times. They do things like this but Mrs Hegarty gets upset if she's asked to sign documents borrowing money and the Jangs have health problems." Mr Mortimore then said, "How do you know Hegarty signed them? Did you see him?" Mr Spillane said that he did not see anyone sign them. Mr Hegarty simply produced the document to him with the four signatures on it and he felt obliged to sign to witness the signatures. This does not appear to have been quite true as Mr Spillane did see Mr Hegarty sign it. Mr Spillane asked Mr Mortimore, "What would have happened to me if I hadn't resigned? Would I have been sacked?" Mr Mortimore answered carefully, "Well look, John, that certainly wouldn't be my decision to make." He said that it was a very serious issue, but it would be a decision for the bank's administration.
- [61] At that point Mr J J Hoey chipped in and said, "Well, John, there'll be things to arrange if you have got a housing loan that you are going to need refinanced now you are leaving the bank. Don't worry about giving me a ring. We'll see if things can be arranged to help out there." Mr Spillane stood and Mr J J Hoey and Mr Mortimore said words to the effect, "Good luck in the future and we hope things work out for you", and he left.
- [62] Mr Spillane denied any of this conversation took place after he signed the letter of resignation. However apart from my reliance on Mr Mortimore's credibility much of the conversation has the ring of truth about it. The views expressed by Mr Spillane about Mr Hegarty conform with what I would expect particularly after seeing Mr Hegarty as a witness. This further conversation suggests that in witnessing the lease Mr Spillane knew both that he had not seen the document signed by each of the partners and also that most of those signatures were false.
- [63] Mr Spillane found himself in a very difficult situation. He had engaged in behaviour which he knew was unacceptable in a person whose employment with the bank required the utmost honesty and integrity. "Banking", as the introduction to the bank's code of conduct says, "is a profession founded on very high standards of personal integrity and conduct which require absolute honesty, particularly in relation to financial matters involving the bank and its customers." It is a condition of employment both at common law and under the bank's code of conduct that those standards be observed. Faced with what he had done, Mr Spillane made the choice to resign. He did so voluntarily. Certainly he knew that if he did not resign, dismissal would be the probable consequence of his misconduct but that does not mean that he was threatened or coerced into resigning. It was not a constructive dismissal.

[64] Had he been constructively dismissed, it follows from what I have found, that the bank would have been entitled to dismiss him summarily for serious misconduct. Such dishonest behaviour in an experienced bank officer who was a member of the managerial staff would on balance have been sufficient to warrant summary dismissal. Summary dismissal is a serious matter with detrimental consequences for the employee,<sup>4</sup> and not a matter which can or should be approached lightly; but there are circumstances where it is justified. These circumstances will depend on a number of factors including the nature of the employer, the position occupied by the employee, the type of employment undertaken, the seniority of the employee, the express and implied terms of the contract of employment, the genesis of the misconduct, the gravity of the misconduct, and whether there is a single act of misconduct or acts of misconduct which can be considered cumulatively. The conduct of the employee must be quite inconsistent or incompatible with the continuing relationship of employer and employee.<sup>5</sup> As Kirby J held in *Concut Pty Ltd v. Worrell*<sup>6</sup>

“Whatever the position may be in relation to isolated acts of negligence, incompetence or unsuitability, it cannot be disputed (statute or express contractual provision aside) that acts of dishonesty or similar conduct destructive of the mutual trust between the employer and employee, once discovered, ordinarily fall within the class of conduct which, without more, authorises summary dismissal. Exceptions to this general position may exist for trivial breaches of the express or implied terms of the contract of employment. Other exceptions may arise where the breaches are ancient in time and where they may have been waived in the past, although known to the employer. Some breaches may be judged irrelevant to the duties of the particular employee and an ongoing relationship with the employer. But these exceptional cases apart, the establishment of important, relevant instances of misconduct, such as dishonesty on the part of an employee ... will normally afford legal justification for summary dismissal. Such a case will be classified as amounting to a relevant repudiation or renunciation by the employee of the employment contract, thus warranting summary dismissal.”

[65] The onus is on the employer to establish that the circumstances are sufficiently serious to justify summary dismissal.<sup>7</sup> If, contrary to my view, the circumstances were such as could be characterised as a constructive dismissal, then the bank has satisfied the onus of showing that summary dismissal was open to it in these circumstances.

[66] There was no duty on the bank to conduct a formal enquiry or investigation under the bank’s code of conduct. The code of conduct does not itself make such an investigation or enquiry mandatory when serious misconduct has been admitted by the employee. There was, therefore, no implied term of the contract of employment between Mr Spillane and the bank that if any breach of the code of conduct was

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<sup>4</sup> See for example *Rankin v Marine Power International Pty Ltd* [2001] VSC 150 at [247] – [249].

<sup>5</sup> *Rankin v Marine Power International Pty Ltd* [2001] VSC 150 [250] – [257]

<sup>6</sup> (2000) 176 ALR 693 at 707; See also at 700.

<sup>7</sup> *Williams v Printers Trade Services* (1984) 7 IR 82 at 84; 26 AILR at [170].

suspected, then the bank would be obliged to hold an enquiry under the code rather than affording the employee the right or opportunity to resign. As the plaintiff himself admitted, the bank retained the right to summarily dismiss for serious misconduct. Any provisions in the code of conduct for dismissal would usually be regarded as designed to augment rather than to restrict or remove any common law right to summarily dismiss an employee.<sup>8</sup> Mr Spillane admitted to his wrong doing and resigned. Had he not done so, the bank would have been entitled to dismiss him summarily.

- [67] The plaintiff submitted that, even though the code of conduct does not, on its face, require its procedures be followed in any case of suspected or admitted misconduct, nevertheless such an investigation is mandatory. It was submitted that this can be seen from the history of the code of conduct which represented a major departure from established disciplinary procedures of the bank, not the least of which was the removal of legislative backing.
- [68] The legislative backing was a reference to Division 5 of Part VIII of the Commonwealth Bank Act 1959 (Cth). In Division 5, s107 provided that if it was found that an employee had been guilty of misconduct, after inquiry as directed by the bank, then the bank could, inter alia, dismiss the employee from the bank. An inquiry required that the employee be informed of the nature of the alleged misconduct and be given an opportunity of furnishing a statement in relation to the matters alleged to constitute the misconduct. However it did not require a formal hearing. Misconduct was defined in subsection 107(10). An appeal was permitted pursuant to s108 against any decision to dismiss an employee. These sections were repealed on 1 July 1988.
- [69] The code of conduct was introduced so that it came into effect from 1 November 1988. Mr Scott, who was formerly the federal secretary of the Commonwealth Bank Officers' Association and, upon that association's amalgamation with the Finance Sector Union ("the Union"), became the joint national secretary of the Union, gave evidence that he had helped to negotiate the code of conduct. It was submitted that the Union acting on behalf of the officers of the bank would not have agreed to a procedure which significantly diluted the rights that had been granted to the bank officers under the repealed legislation. This is however an inference which is not supported by any facts.
- [70] It is notorious that the Commonwealth Bank changed from being a Commonwealth statutory corporation to a shareholder owned organisation. It is therefore not surprising that statutory provisions relating to bank employees were repealed. In spite of the fact that Mr Scott was called by the plaintiff, he was not asked any questions about whether he negotiated equal protection for employees to that which they had enjoyed under the statutory regime. On its face, it does not appear that the code of conduct provides this protection and I would not rely on surmise to assume that, because a union was involved in the negotiations, the employees' rights under the disciplinary regime must have been equal to what they had been under a statutory code. Apart from the logical unsatisfactoriness of the reasoning suggested

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<sup>8</sup> *Concut Pty Ltd v Worrell* (2000) 176 ALR 693 at 699 – 700.



by the plaintiff, one would have to look at the whole of the negotiations between the parties as often, in such a situation, there is a trade off of losses in one area against gains in another. There is no evidentiary basis for making the inference I have been asked to make.

- [71] It would be contrary to common sense to suggest that, even when an employee admitted serious wrong doing and sought to resign, the bank would be obliged to hold a formal investigation and enquiry under the code of conduct in order to determine whether the bank should dismiss the employee. The bank in this case took the more compassionate approach of giving Mr Spillane the opportunity to resign if he wished to do so instead of setting in motion the formal disciplinary proceedings which would almost inevitably have led to his dismissal. In acting as it did, it was not in breach of any duty cast on an employer not to conduct itself, without reasonable cause, in a manner likely to damage or destroy the relationship of confidence and trust between the parties as employer and employee.<sup>9</sup> In this case it was the employee who had destroyed the relationship of trust and confidence between the parties by purporting to witness signatures he had not in fact witnessed and by signing in another's name when he had no proper authority to do so, on important financial documents for CBFC, on the bank's premises.

## Damages

- [72] It follows in my view that the plaintiff has no action for damages against the defendant bank. If, contrary to my view, he was constructively dismissed then the bank had the right to dismiss him summarily for serious misconduct and in such circumstances he would not be entitled to damages. The bank is entitled to have any damages assessed on the assumption that it would have exercised any power it had to bring the contract to an end in the way most beneficial to itself, that is to say, that it would have determined the contract summarily where it could properly do so.<sup>10</sup>
- [73] The only circumstance in which he would be entitled to damages would be if contrary to my findings he was constructively dismissed in circumstances where a code of conduct enquiry was mandatory. In such a situation, Mr Spillane would almost inevitably have faced dismissal after the enquiry and so would only be entitled to the salary to which he would have become entitled for the time it would have taken to complete that enquiry. The evidence suggested that an investigation and enquiry under the code of conduct would have taken four to five weeks to complete. Even allowing a similar period for any appeal which might have been lodged to be concluded and a margin for possible delay, he would only have become entitled to a further twelve weeks salary.<sup>11</sup>

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<sup>9</sup> See *Burazin v The Blacktown City Guardian* (1996) 142 ALR 144 at 151; *Malik v Bank of Credit and Commerce International SA (In Liq)* [1998] AC 20 at 35; *Johnson v Unisys Ltd* [2001] 2 WLR 1076 at 1088; *Thomson v Orica Australia Pty Ltd* [2002] FCA 939 at [146] – [147].

<sup>10</sup> *Bostik (Aust) P/L v Gorgevski* (1992) 36 FCR 20 at 32; *Gunton v Richmond-upon-Thames LBC* [1981] 1Ch 448 at 469.

<sup>11</sup> See *Gunton v Richmond-upon-Thames LBC* [1981] 1Ch 448 at 469-470.

- [74] In my view there is so little chance that Mr Spillane would have retained his employment after this time, it is unnecessary to consider the prospect that he might have been offered a redundancy in 1993 or 1994 when the bank allowed some of its employees to take a redundancy. Such a possibility is at best purely speculative. It depends upon findings, contrary to those made, that Mr Spillane did not resign, that he was dismissed in circumstances in which the bank had no right to dismiss him, and that he would have retained his employment in spite of his serious misconduct after an investigation, enquiry and appeal.
- [75] If all of those matters had been resolved in Mr Spillane's favour, then in my view there would have been a slightly better than even chance that he would have been identified as a person suitable for redundancy. If that had occurred then he would be entitled to the loss of the chance<sup>12</sup> of receiving a redundancy at 60% and the loss of chance of remaining with the bank until retirement on 25 April 1994 at the age of 50 at 40%. I do not accept that he would have been likely to stay with the bank after the age of 50.
- [76] In assessing the loss of chance of receiving a redundancy, I have had regard to evidence of this matter given during the trial. The evidence of Mr J O Hoey who was the bank officer responsible for approving redundancies said that it was not possible to say whether Mr Spillane would have been likely to receive a redundancy. Mr Spillane otherwise had an unblemished long record of service which showed him to have been a capable bank officer. Mr Spillane said he had intended to remain with the bank. He said he saw his future with the bank and not with Lamberts Produce where he had started working. Had he resumed work with the bank after his long service leave, he would have been placed on the relieving staff, retrained and placed in a permanent position at the first available opportunity. On the other hand, Mr Scott from the Union ventured the opinion that it was highly likely that Mr Spillane would have been offered a redundancy had he remained in the bank's employ. Mr Spillane said that if a suitable position had not become available, he would have expected a redundancy to be offered to him. He had returned from Papua New Guinea with an M2 classification and there was no position available for him in North Queensland at that classification.
- [77] He would not have been eligible for a redundancy until 1993. It was common ground that he was not eligible for a redundancy in 1989. In 1993, many bank employees were given the opportunity to express an interest in redundancy. The bank reserved the right to determine who would in fact be retrenched. If Mr Spillane had been offered a redundancy, this would have been the time when it was most likely to happen.
- [78] Expert evidence was called by the plaintiff from an accountant, Angelo Coco, as to the amount that Mr Spillane would have received had he been made redundant or retired on various dates. Although there was some minor disagreement about figures, this evidence was not fundamentally challenged. None of those dates corresponds to the dates to which have referred. This means I have not been able to precisely calculate the figure that damages would have been if the plaintiff had been

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<sup>12</sup> See *Malec v JC Hutton Pty Ltd* (1990) 169 CLR 638 at 643

successful. I agree however with the methodology used by Mr Coco in his evidence subject to the criticisms made by A J Mullumby of the bank.

- [79] However it follows from the findings I have made that the plaintiff's claim should fail and judgment be entered for the defendant. I shall hear submissions as to costs and as to the precise amount of damages that would have been awarded in the event that the plaintiff had been successful in his claim.