

MODERN BANKING LAW



E. P. ELLINGER

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To my wife

Preface

The last two decades have seen some major changes in the English banking world and in its practices. Mergers of certain clearing banks during the late sixties and early seventies led to the emergence of giants with extensive networks of branches in England and Wales. During the same period, there has been a steady influx of foreign banks into the City, in which about six hundred banks now operate. The structure of banking in England and Wales has effectively undergone a metamorphosis. Practice has had to adapt itself and some new legal regimes were required. The introduction of the statutory regulation of the acceptance by banks of deposits from the public is but one example.

A further major impact on banking practice was occasioned by the contemporary advances in communications, in electronics and in computer technology. The clearing of cheques has become a largely automated process and new, fully automated, systems such as BACS, CHAPS, and SWIFT were developed for the handling of periodic payments and of international money transfers. Other important developments include the abolition of exchange control at the end of 1979 and the beginning of the drive for the de-regulation of the banking system. By and large, the changes in the patterns of banking during the last twenty years have overshadowed the developments that had taken place during the preceding sixty years.

In this work I have sought to re-examine the principles of banking law in the light of the developments of these last, definitive, two decades. I hope that the book will be of use to all persons interested in English banking law. But my main aim has been to provide a new text suitable for students. Whilst the book is meant primarily for the English market, I have discussed many cases decided by courts in Commonwealth countries which have a similar system of banking and of banking law. It is, therefore, anticipated that the book will be useful also in countries such as Australia, New Zealand, and Singapore.

The present volume deals with domestic banking law. It is divided into three parts, examining respectively the structure of banking and the regulation of banking law in the United Kingdom, the bank's position as its customer's paying and collecting agent and the bank's position as a credit provider. A second volume, dealing with international banking and banking law, is in preparation.

All three parts of the present volume discuss banking law in the light of modern banking practice. Thus, the chapters discussing the banks as monetary agencies with a central role in the settlement of payments in England

and Wales include a detailed description of the clearing systems currently in use. The third part, concerning the banks' role as credit providers, deals with overdrafts and loans and discusses the security devices used in modern practice. The provisions of regulatory legislation, such as the Consumer Credit Act 1974, are considered in detail where relevant. Generally, I have sought to discuss the applicable legal concepts in the context of their economic background.

The division of the work into two volumes, to be published separately, gave rise to problems respecting the discussion of topics which are relevant to both domestic and international banking. Thus, bills of exchange and other negotiable instruments, which are used extensively in international sales, are also utilized in certain inland transactions. My solution was to include in the present volume a general discussion of bills of exchange and other negotiable instruments with a view to covering specific aspects, relevant mainly to international transactions, in the second volume. In the case of guarantees, which are another facility used extensively in both inland and international transactions, I decided, after some hesitation, to incorporate the relevant chapter in the second volume with the object of bringing together the analysis of ordinary guarantees and indemnities and of the modern types of performance bond and first demand guarantee.

Another problem which I encountered was how much space to devote to subjects which, though pertinent to banking law, fall mainly within the scope of some other legal domain. Thus, the problems respecting floating charges are of importance to banks but, in effect, are a facet of the general principles of company law rather than of banking law. Similarly, the common clauses found in bankers' lending agreements are also used in standard forms of other financial institutions. My solution has been to highlight in the discussion of such topics the aspects which are of specific relevance to banks. For instance, I decided to cover overdrafts—the typical bankers' lending facility—in detail, but to leave out a discussion of all the standard clauses used in lending agreements. A specific problem of this type arose in respect of land mortgages. A detailed discussion of this subject would, of course, be out of place in a book on banking law. However, for the sake of overseas readers who may not wish to consult comprehensive works on English land law, I have included a section on land mortgages and a basic review of English land law.

It is a mark of the volatile nature of banking law in recent years, that my manuscript had to be revised thoroughly twice as a result of reforms introduced at the time the work was nearing completion. Initially, the text had to be updated in order to take into account the relevant provisions of the Companies Act 1985 and the Insolvency Act 1985. When this task was completed I had to revise the manuscript again upon the passing of the Insolvency Act 1986 and of some less cardinal, but all the same important,

Acts, such as the Building Societies Act 1986. Unfortunately, I have been unable to give a full account of the Banking Act 1987, which has repealed and replaced the Banking Act 1979. But chapter 2, which deals with bank supervision, includes references to the relevant White Paper and to the Banking Bill. I propose to prepare in due course a supplement, so as to give a full account of the 1987 Act and of new and important judgments delivered since going to press. At present, the law is generally stated as it was on 1 September 1986, although, wherever possible, I have included references to later authorities and statutes.

My thanks are due to the many bankers who provided me with information on banking practice generally and on the clearing systems in particular, to colleagues who have helped me greatly with their comments, to research assistants both at Monash University and at the National University of Singapore who assisted me in checking sources and references, to administrative personnel who converted an illegible manuscript into a neat typescript and to the Press and its staff. I am indebted to all of them and in particular like to express my gratitude to Mr M. N. Karmel of the CLSB, to Messrs Martyn Yorke and Bill Dale of the Royal Bank of Scotland, to Mr J. W. Bullock of Lloyds Bank, to Mr J. D. Davies of St Catherine's College Oxford, for his immense help with the section on land mortgages, and last but not least to Professor A. G. Guest, Q.C., of King's College London, who had encouraged me to write this book and who assisted me throughout with all matters concerning the Consumer Credit Act. My thanks are also due to the Royal Bank of Scotland for permitting me to reproduce some of their standard banking forms in the Appendix and to Mr D. A. Greenwood who had actually selected the forms and prepared them for publication. Naturally, all mistakes in the text are my sole responsibility.

The National University of Singapore
Kent Ridge
31 July 1987

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