JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CIVIL APPEAL 130/ 97

BEFORE: THE HON. MR. JUSTICE FORTE, J.A.
THE HON. MR. JUSTICE PATTERSON, J.A.
THE HON. MR. JUSTICE BINGHAM, J.A.

BETWEEN DEXTRA BANK & TRUST COMPANY LIMITED APPELLANT

AND BANK OF JAMAICA RESPONDENT

Richard Mahfood Q.C. with Minette Palmer
instructed by Myers Fletcher & Gordon for the appellant

Kenneth Rattray, Q.C., Solicitor General, David Muirhead, Q.C.
and Douglas Leys for the respondent instructed by Pamela Wright

20th, 21st, 22nd, 23rd, 26th, 27th, 28th, 29th, 30th October, and
2nd, 3rd, 4th, 5th, 23rd, 24th, 25th, 26th, 27th, 30th November, and
1st, 2nd, 3rd, 4th, 7th and 8th December, 1998 and 30th July, 1999

FORTE J.A.

The plaintiff sued the defendant in conversion and in the alternative for moneys had and received to the use of the plaintiff, in the sum of Three Million US dollars (US$3,000,000). In its further amended Statement of Claim, the plaintiff alleged the following:

"(1) The plaintiff has suffered damage by the defendant wrongfully depriving the plaintiff of its cheque No. 4949 for US$2,999,000 drawn on the plaintiff's account with the Royal Bank of Canada in New

York, payable to the Defendant, and the Defendant converting the same to its own use."

Then the following particulars were pleaded:

"(a) The aforesaid cheque was drawn by the Plaintiff in favour of the Defendant with the intention of making a loan to the defendant in exchange for and in consideration of the issue of a Promissory Note by the defendant for Three Million United States Dollars (US$3,000,000. The plaintiff received such note dated the 20th January, 1993 bearing the name of the defendant.

(b) The defendant lodged the cheque, the property of the plaintiff, to its account with Citibank for its own use and benefit.

c) The cheque remained the property of the Plaintiff and the Defendant had no right to lodge the cheque to its account with Citibank since the defendant has denied the existence and/or validity of the loan transaction.

(d) The Defendant lodged the cheque to its account with Citibank in violation of the Plaintiff's proprietary legal rights and wrongly claiming to have acquired the property in the cheque from O. Dunn."

The appellant then alleged that the respondent wrongfully converted the said cheque to its own use and wrongly deprived the appellant thereof, whereby the appellant has suffered damage in the amount of the said cheque. In the alternative, the plaintiff/appellant claimed for

money received by the defendant/respondent for the use of the appellant, the money being the proceeds of the cheque which was cashed and converted into money by the defendant/respondent. It should be noted that the allegations made in para 1 (a) in respect of a promissory note, was subsequently discontinued by the appellant and the claim did not proceed on that basis. After a trial lasting eighty one (81) days and spanning a period from the 6th June, 1994 to the 4th November, 1996, judgment having been reserved, was entered on the 16th October, 1997 for the defendant. It is from this order that the plaintiff/appellant now appeals.

Before outlining the issues which are for resolution, a brief summary of the facts is necessary. I should note, that at the trial, a great deal of evidence concerning matters, which in my view are of no relevance to the issues, occupied a great deal of time , and to some extent, a rehearsal of that evidence was allowed before us. In giving my opinion on the issues, I intend to refer only to such aspects of the facts which I consider relevant to the determination of those issues.

The plaintiff/appellant is a Bank registered in the Cayman Islands and carrying on business there. It holds an unrestricted bank licence which allows it to conduct the following business:

(i) lending money outside of Cayman;

(ii) all other normal functions of banking business except retail banking and dealing with residents in Cayman.

The respondent is the Central Bank of Jamaica. At the time when the occurrencies which led to this action were taking place, Jamaica was having difficulty accessing foreign currency. As a result the respondent took the decision to become more aggressive in the market to bring in foreign currency into the Central Bank... (the "Bank" /"BOJ") In order to accomplish this, certain agents were appointed to pursue the foreign dollars and to purchase them on behalf of the Bank,

and of course to turn them over to the Bank. These agents were facilitated with advance cash to enable them to purchase the dollars. This was done by opening accounts with the Bank in their names to the extent of J$5M which was later reduced to $4M. The agents would use the amounts in the accounts to purchase the dollars, and after the dollars were deposited with the respondent, the accounts would be replenished by payment to the agents of an amount equivalent to what they had paid for the dollars. In purchasing the dollars the agents would of course pay by cheque drawn in favour of the vendor of the dollars, or in the name requested by the vendor.

There were two agents appointed at this time, who were involved in dealing with the cheque, the subject of this action. They are Richard Jones, and Wycliffe Mitchell. These persons quite unauthorised, dealt with others, who would seek out dollars for sale to the agents. Two of these with whom they dealt were John Wildish and Michael Phillips.

It is the deeds of these two gentlemen that planted the seed out of which this case grew. In short, they went to Cayman, and spoke with Darryl Myers of the legal firm of Myers and Alberga, indicating to him that the BOJ was in need of a loan of U$3M, and that they were asked to make representations to the appellant Bank "Dextra" for such a loan. Mr. Myers, being a director of Dextra, approached the Board as a result of which a resolution was passed by the Board as follows:

> "It is resolved that the bank provide a loan to the Bank of Jamaica for three (3) months on a Promissory Note and that the Chairman be and is hereby authorised to negotiate and approve the terms of the loan and Promissory Note in consultation with the Bank's Attorney".

In keeping with the resolution, Mr. Myers drafted a promissory note, describing the BOJ as the borrower and Dextra, the lender of the sum of $3M with interest at 16% per annum. The rest of the note is of no relevance here, as the note could only have been admitted to support the

appellant's contention that the appellant had always intended the cheque to pass only as a loan to the respondent and not for any other purpose. However, the manner in which Wildish and Phillips dealt with it, and the plaintiff/appellants' conduct in a transaction which they considered to be a loan are matters which will be of great significance when the issues in the appeal are to be examined and resolved.

After the Promissory Note was drafted, it was given to Wildish who in due course returned it to Myers with amendments allegedly made by the respondent. Then the following correspondence is of importance. On the 15th January, 1993, Myers sent to Wildish a telefax which reads as follows:

> "As lawyers for Dextra Bank, we comment as follows on the amendments to the promissory note proposed by the Bank of Jamaica:-
>
> (1) "Clause 1 - I see you were successful with the interest rate.
>
> (2) Clause 3 (d) - The reference is to the Companies Law of the Cayman Islands ... clause 9 says that the note is to be construed in accordance with the law of the Cayman Islands
>
> (3) Clause 3(e) - the deletion of this sub-clause is not acceptable and this point is non-negotiable.
>
> (4) Clause 4 - We believe that the person who vetted this document on behalf of the Bank of Jamaica has misunderstood the purpose of clause 4 ....
>
> (6) Clause 6 - The remaining amendments to this clause are not acceptable as Dextra requires receipt of its interest net of all taxes in Jamaica... Dextra must get the agreed rate of interest in its hands.
>
> (7) Clause 9 - These amendments are inappropriate. A document cannot be construed in accordance with the laws of two countries..."

The above correspondence demonstrates that the appellant Bank treated with Wildish and Phillips as its agents. If this was not enough to confirm this, then the following testimony of Jack Ashenheim, the Chairman of the appellant Bank leaves no doubt:

> " I instructed Dextra to draw a cheque payable to BOJ for US$3,000,000 less $1,000 legal fees and send immediately to the offices of Myers and Alberga. When the cheque arrived I gave it to Myers who handed it and two copies of the note to Phillips. Myers instructed Phillips to take the two copies of the note and cheque to BOJ and see personally that the note was signed by the Governor or Deputy Governor and other authorised officers and on receipt of the said note to hand the cheque to BOJ and take note and have it stamped by the Stamp Commissioner 'exempt stamp duty -' and sent note to Myers and Alberga".

Phillips did no such thing. Instead he brought the cheque to Jamaica, and together with Orville Beckford and John Wildish offered the cheque to Jones and Mitchell for sale to the BOJ, using the procedures put in place by the BOJ for buying dollars on the open market. Beckford is a former employee of the BOJ who at the time though still employed to the BOJ had no authority from it to engage in the purchase of foreign currency. It was Beckford, in keeping with his usual practice to obtain US dollars on the market for Jones, who offered the subject cheque of $2,999,000 to Jones to purchase US$2M, and Mitchell to purchase the balance. The offer was accepted by the Bank of Jamaica agents, who by virture of the advance provided by the BOJ, purchased the cheque on behalf of the Bank, paying therefor several cheques written in the names of various persons for the Jamaica equivalent value of the Dextra cheque. No mention of the promissory note was ever made to the respondent, who through its agents Jones and Mitchell purchased the cheque and gave value in Jamaica dollars for the same. The promissory note when returned to Myers purported to have been signed by Straw, a Deputy Governor of the BOJ, but he denied signing

same, and the appellants' decision not to proceed on that basis suggests an acceptance by it, that the signature on the promissory note is indeed a forgery.

In the end, the Dextra Bank, was the subject of a scam, instigated and performed by Beckford, Wildish and Phillips and it may be that the BOJ faired no less, as it too paid value for the cheque, which depending on the resolution of the issues may have to return to the appellant.

CONVERSION

Did the appellant pass title in the cheque to the respondent when it came into the hands of the respondent ?.

The appellant could only have succeeded in its claim for conversion, if at the time the respondent received the cheque, the appellant had not passed a valid title in the cheque to the respondent. The appellant contended that the cheque was passed to Beckford, who had no authority at the BOJ to accept the cheque and consequently when he passed it to "Jones", he could not pass title in the cheque to Jones. The respondents, however contended that Beckford acted in concert with Wildish and Phillips who were agents of the appellants, and consequently the transferral of the cheque to Jones was a handing over by the agents of the appellant, whose officers intended that the cheque should be delivered to the BOJ.

The evidence accepted by the learned judge, supports the conclusion that Beckford was acting in collusion with Phillips and Wildish. In evidence accepted by the learned judge, Jones alleged that prior to the 20th January, 1993 (the date when the cheque was received), Beckford told him that he was expecting U$3,000,000 from a group of Caymanian investors payable to Bank of Jamaica and he was asking him to purchase US$2,000,000 and that he would be asking Mitchell to purchase the other US$1,000,000. Here is specifically, the evidence of Jones found to be true by the learned judge:-

> "Prior to 20th January, 1993, Orville Beckford informed me that he was expecting funds from a group of Caymanian investors that they were selling Bank of Jamaica US$3,000,000 and he was asking me to purchase $2,000.000 and he would ask Wycliffe Mitchell to purchase $1,000,000. He said the payee would be Bank of Jamaica and that I pay for these funds with a number of cheques and he would provide the payees. On the 19th January, 1993. I drew seven cheques in payment. On the 20th January, 1993, I drew one other cheque to complete the payment of US$2,000,000."

On this and other evidence which will be hereunder related, the learned judge found:-

> "The plaintiff's agents and Orville Beckford had themselves 'pre-sold' Ex. 10, the Dextra cheque, and was wrongfully in possession of its proceeds confidently awaiting the advent of the said cheque. This cheque was not delivered to Beckford at Bank of Jamaica until 20th January, 1993".

In arriving at this conclusion, the learned judge traced the destination of some of the cheques delivered by Jones on the 19th January, 1993, the day before the cheque was handed to him by Beckford.

He concluded:

> "The plaintiff's agents, Wildish and Phillips were perpetrating the 'false pretences' even before the cheque Ex. 10, was issued and signed by the plaintiff on the 19th January, 1993. There were three cheques drawn by the authorised agents for the payment of the purchase of Ex. 10, which three cheques, not payable to either 'Wildish, Phillips or Le Par were lodged to the credit of the 'Le Par account no. 101052165 operated by the plaintiff's agents John Wildish and Michael Phillips at the Eagle Commercial Bank before Ex. 10 was handed over at Bank of Jamaica".

On this evidence alone, the learned judge was entitled to conclude that the agents of the appellant, Wildish and Phillips were part of a plan to sell the Dextra cheque, and never intended to negotiate a loan transaction on behalf of Dextra, with the Bank of Jamaica. That they were able to

do this, was as the learned judge found contributed to by the conduct of the appellant in the purported loan transaction.

The appellant, having passed a resolution to approve a loan to the Bank of Jamaica, appointed Mr. Ashenheim, one of its directors to proceed with the negotiations. It is worthy of note, that the resolution was passed without any application in writing from the Bank of Jamaica, and only on the oral representations made by Mr. Wildish and Mr. Phillips who were known not to have any or any official position with the respondent . To compound it, Mr. Ashenheim admits in evidence, that he knew those persons to be engaged in the business of buying and selling foreign currency. Throughout the so called negotiations no officer of the appellant Bank ever contacted an officer of the respondent bank. This led the learned judge to find quite correctly, based on the evidence, the following:-

"(1) Without any written request from or direct communication with any officer of the Bank of Jamaica, the plaintiff proceeded to pass a board resolution, exhibit 1, to make the loan of US$3,000,000 to Bank of Jamaica, the central bank of the sovereign state of Jamaica.

(2) The plaintiff had no reason to believe that John Wildish, a foreign currency trader, had any authority to negotiate on behalf of Bank of Jamaica.'... a short term loan of US$3,000,000 for three months ...' The plaintiff was reckless having been induced by the false statements of John Wildish.

(3) Darryl Myers, an attorney-at-law and director of the plaintiff and partner in Messrs. Myers, Alberga, the attorneys-at-law for the plaintiff on the instruction of Jack Ashenheim, drafted the promissory note, exhibit 4, without making any prior contact with or negotiations with Bank of Jamaica as Bank of Jamaica would have expected.

(4) Myers gave exhibit 4 to Wildish, avoiding any direct communication with Bank of Jamaica, as Bank of Jamaica would have expected, in bona fide loan negotiations. Wildish returned, exhibit 4, with several handwritten

amendments including an amendment which read that the law of the contract was "Cayman Island Jamaica" – two simultaneous jurisdictions.

(5) Myers sent a telefax message, exhibit 8:

> " As lawyers for Dextra bank…"

not to the attorneys-at-law for Bank of Jamaica, as Bank of Jamaica would have expected, in dealing with loan negotiations and the proposed draft of the 'promissory note, but to 'John Wildish' commenting on and discussing with Wildish the substance of the amendments.

(6) Myers sent telefax message, exhibit 9, not to Bank of Jamaica or its attorneys-at-law, but to 'Wildish/Phillips'.

This message indicates,

(a) Communications, with a firm of attorneys-at-law 'Myers, Fletcher & Gordon';

(b) Myers' awareness of the requirements of the Bank of Jamaica Act, as regards authority to sign and the use of the seal;

(c) Knowledge in Myers of the need for a Board resolution of the Bank of Jamaica authorising the loan;

This is conduct of the plaintiff displaying deliberate course of avoidance of any contact with the legal department of the Bank of Jamaica. This contact, Bank of Jamaica would have expected to have been effected, if Bank of Jamaica was in fact negotiating a loan.

(d) A baseless assumption that Beckford had the authority to say that the Board resolution was unnecessary.

(7) Myers sent a further telefax, exhibit 16 to Wildish, attaching promissory note, exhibit 5, instead of to the borrower.

(8) The witness Jack Ashenheim, knew that Wildish and Phillips were'... engaged in buying foreign exchange...' and was told that Beckford was

'The czar of foreign exchange in Jamaica'

the latter title being dubious at best, in the context of trading in foreign currency in Jamaica then. The plaintiff did not know Beckford to have been officially authorised by Bank of Jamaica to negotiate loans but took no steps to make the necessary direct communications with Bank of Jamaica.

(9) The plaintiff sent the cheque no. 4949 for US$2,999,000.00 exhibit 10, to the Bank of Jamaica not directly, nor by telephone wire transfer to a bank at which Bank of Jamaica maintained its account, but by handing it to Michael Phillips, a courier, a trader in foreign currency and who was not known to be associated officially or at all with the Bank of Jamaica."

Having stated these findings, the learned judge concluded:-

" I am of the view that the plaintiff behaved with a studied consistency in avoiding any direct contact with the Bank of Jamaica, the Central Bank of the sovereign state of Jamaica, and neglected to follow the normally acceptable procedures expected by the Bank of Jamaica, and used in normal lending transactions with large foreign institutions. The plaintiff pursued a course of conduct to route its cheque, exhibit 10, away from a direct transmission to the defendant, thereby leading the defendant to believe that the transaction was one in which it was not accepting a loan but engaging in a sale transaction involving the said cheque. The total absence of the procedural steps described by the witness Thomas Theobalds, when a loan is being negotiated with a foreign financial institution would have lulled Bank of Jamaica into that belief".

The latter statement is a reference to the evidence of Mr. Theobalds, the respondent's Legal Counsel, who in his evidence outlined the normal procedure adopted by the BOJ when negotiating loans, such as the purported loan by the appellant and ruled out any possibility of the respondent

undertaking any loan or entering into any loan agreement in the manner described by the appellant.

The factual situation, then is that the appellant fell innocent victims to the fraudulent conduct of Wildish and Phillips whom the learned judge found correctly to be its agents.

On the other hand, the Bank of Jamaica through its agents acted without knowledge of the intended fraud by Beckford, Wildish and Phillips, when it purchased the cheque giving the equivalent in Jamaican dollars for it.

In those circumstances, can it be said that the respondent converted the cheque to its own use? The answer most certainly must depend on whether the appellant intended to relinquish title in the cheque, when it delivered it to Phillips for the purpose of handing it over to the respondent. The cheque was made payable to the Bank of Jamaica, and the evidence does disclose that the representative for the appellant intended that it would be delivered to the respondent. Phillips, being the agent of the appellant, had the authority of the appellant to deliver the cheque to the BOJ, whom, the appellant intended to get the proceeds of the cheque. In this regard the provisions of Section 21 of the Bills of Exchange Act are applicable.

It states:-

> "**21.** Every contract on a bill, whether it be the drawer's, the acceptor's or an indorser's is incomplete and revocable, until delivery of the instrument in order to give effect thereto:
>
> Provided that where an acceptance is written on a bill and the drawer gives notice to or according to the directions of the person entitled to the bill that he has accepted it, the acceptance then becomes complete and irrevocable.
>
> As between immediate parties, and as regards a remote party other than a holder in due course, the delivery in order to be effectual -
>
> (a) must be made either by or under the authority of the party drawing, accepting or indorsing, as the case be;

(b) may be shown to have been conditional or for a special purpose only, and not for the purpose of transferring the property in the bill.

But if the bill is in the hands of a holder in due course a valid delivery of the bill by all parties prior to him so as to make them liable to him is conclusively presumed.

Where a bill is no longer in possession of a party who has signed it as drawer, acceptor or indorser, a valid and unconditional delivery by him is presumed until the contrary is proved."

That the above provisions apply to a cheque, is made clear by the provisions of Section 73 of the Act which reads:

"**73.** A cheque is a bill of exchange drawn on the banker payable on demand.

Except as otherwise provided in this Part, and in section 93, the provisions of this Act applicable to a bill of exchange payable on demand apply to a cheque".

In the instant case, application of Section 21 would depend on whether the 'Dextra' cheque was delivered by or under the authority of the appellant bank. On this question, both sides sought the assistance of the case of ***Midland Bank v Brown Shipley*** [1991] 1 Lloyds Law Report 576. The headnote is set out in full as it captures in summary form the facts of the case.

"Citibank acted as bankers for Economou Co. Ltd. and for Neptune Maritime of Monrovia for whom Economou were agents. Neptune had two accounts with Citibank and by letter dated March 25, 1980 the mandate on behalf of Neptune in respect of these accounts specified four Swiss gentlemen as signatories. By letter dated August 31, 1982 Neptune authorised Citibank to transfer funds between accounts on the -
...telephonic instructions from a person identifying himself as G. Economou, or A. Economou, T. Radin, L. Ryall... All instructions given to you... will be confirmed in writing by authorised signatories.

Economou also had an account or accounts at Citibank and the authorised signatories were George Economou , Angelo Economou, Miss Ann Lynch, Richard Radin and E. Firman.

John Willmott Administration Ltd. Of Hitchin Road Shefford Bedfordshire were customers of Midland Bank. On May 1, 1987 the company's name was changed to Willmott Dixon Administration and the authorised signatories did not include either a Peter Willmott or a John Bayliss. There were substantial funds in the Administration's account on August 5/6, 1986.

Certain fraudsters, probably the same fraudsters, managed to induce Citibank on three occasions (only two of which were relevant) and then Midland Bank to issue bankers' drafts in favour of the defendants Brown Shipley.

The letters to Citibank confirming the telephone instructions was patently not in accordance with any mandate from Neptune; they contained signatures which were not in accordance with any mandate even from Economou and contained signatures which Citibank did not trouble to check against the genuine signatures that they held.

The letter to Midland confirming the instructions did not comply with the mandate held by Midland, neither John Willmott nor Peter Bayliss were authorised signatories for the Administration account and no one at Midland checked either the terms of Midland's authority or whether the signatures were the actual signatures of those individuals.

Brown Shipley made some checks on each occasion with the issuing banks to ensure that the drafts were in order. Brown Shipley then collected payment and paid out very substantial sums in cash to the fraudsters.

Citibank and Midland sought to recover from Brown Shipley the value of the drafts as damages in conversion. They argued that title in the drafts was never transmitted to Brown Shipley and therefore the act of presenting them for payment was a conversion and the correct measure of damages was the face value of the drafts.

Brown Shipley contended that title did pass alternatively they argued that during the checks with the issuing banks representations were made giving rise to an estoppel.

Citibank countered the estoppel alleging that if any representations were made Brown Shipley should have made certain disclosures and as a result were dis-entitled from relying on any representations.

The issues for decisions were (1) did the title of the drafts at all times remain in Citibank or Midland? (2) If so did Citibank and/or Midland make representations which (subject to (3) would give rise to an estoppel? (3) Were Brown Shipley prevented from relying on those representations for failure to reveal facts to Citibank or Midland?

HELD, so far as is relevant to the instant case as follows:

(1) The key issue was whether there was any authority to deliver the bankers' drafts to Brown Shipley; the presumption was in favour of there being authority; neither Midland nor Citibank were under any mistake or misapprehension as to whom the draft was to be delivered and neither had established to the degree required that it was fundamental that the bailee i.e. the messenger was a particular person about whom they were mistaken as opposed to a person whose attributes did not include authority from their customer as they believed; once there was authority title to the bankers' drafts was transmitted directly from Citibank or Midland to Brown Shipley on the drafts becoming valid instruments as a result of delivery through whomever was the messenger.

(2) Brown Shipley did not convert the drafts presenting them for payment".

In the appeal before us, the appellant bank drew the cheque payable to BOJ and sent it by its agent Phillips for direct delivery to the respondent. Phillips therefore had the authority to deliver the cheque to the BOJ and in doing so passed possession and title from Dextra to the BOJ.

In coming to his conclusion in the ***Brown Shipley*** case (supra) Waller J at pg.583 on the question of authority said the following with which so far as it states the law I agree:

> "So far as authority is concerned, it will usually be very difficult for A to establish that it was of crucial importance to him who actually physically transported the draft to B. In this case for example delivery might have been done by or other of the Bank's messengers. It might have been done by some other messenger. It so happened that in this case that it was done by someone thought to be the customer or his messenger but that was not of crucial importance. That being so, the authority as it seems to me albeit induced by fraud would not be void; the authority would be actual, even if voidable".

In the instant case the person delivering the cheque, was known and indeed was expressly appointed especially by the appellant through its representatives to deliver the cheque to the respondent. Mr. Ashenheim admitted as found by the learned judge that he gave the cheque to Phillips with specific instructions to deliver it to the BOJ albeit on his understanding that his Bank was making a loan to BOJ, based on a promissory note from the BOJ, which by concession at trial was found to be forgery. In those circumstances, it cannot be said that the respondent converted the proceeds of the cheque when it deposited it into its bank account and subsequently withdrew the amount from the bank upon which the cheque was drawn i.e. Royal Bank of Canada in New York.

<u>MISTAKE OF FACT</u>

Though an examination of the statement of claim reveals no claim in respect of moneys paid under a mistake of fact considerable argument was allowed in the Court below, and consequently at this hearing.

In projecting the appellant's claim on this ground, Mr. Mahfood Q.C. relied on certain dicta in the case of ***R.E. Jones vs Waring and Gillow Ltd*** [1926] A.C. 670 in which the case of ***Kelly v Solari*** [1841] 9M & W 54 was approved.

In order to see the relevance of the passages which will be cited later from this case, an outline of the facts, as recorded in the headnote is set out hereunder:-

> "B being indebted to the defendants under hire-purchase agreement in a sum of 5000*l*, which he had no means of paying, represented to the plaintiffs that he was the agent of a firm of motor manufacturers, who were putting on the market a new car, and persuaded the plaintiffs to sign a form of agreement appointing them on behalf of the firm agents for the sale of the car on the terms that the plaintiffs should purchase 500 cars and pay 5000 , as a deposit. On the plaintiffs objecting to pay this sum to B, or to the firm, B. told them that the defendants were financing the firm and were his principals, and suggested that the 5000*l* might be paid to them. The plaintiffs then drew two cheques to the order of the defendants, one for 2000*l* and one post-dated for *3000l.* and handed them to B, who handed them to the defendants in payment of his debt. The defendants H.L. objected to the cheques as being irregular in form, and as the result of a conversation through the telephone between the defendants and the plaintiffs, no mention being made of the purpose of the payment, the plaintiffs took back the irregular cheques and posted to the defendants a new cheque for 5000*l* duly signed. The defendants cashed the cheque and returned to B. goods which they had seized under the hire-purchase agreement. No such motor firm or car as alleged existed. On discovery of the fraud the plaintiffs sued the defendants for the recovery of the 5000*l.* as money paid under a mistake of fact."

In his speech supporting the majority judgment which ruled that the plaintiffs were entitled to recover on the principle of ***Kelly v Solari*** [1841] 9M & W 54, Lord Shaw of Dunfermline at pg. 688 uttered the following words upon which the appellant relies:-

> "...it is important to note exactly the principle of cases of refund on account of mistake in fact, as that principle was authoritatively expounded by Parke B, in ***Solari's.*** Said that very learned judge: 'I think that where money is paid to another under the influence of a mistake, that is, upon the supposition that a specific fact is true, which would entitle the other to the money, but which fact is untrue, and the money would not have been paid if it had been known to the payer that the fact was untrue, an action will

> lie to recover it back, and it is against conscience to retain it; though a demand may be necessary in those cases in which the party receiving may have been ignorant of the mistake. The position that a person so paying is precluded from recovering by laches, in not availing himself of the means of knowledge in his power, seems, from the cases cited, to have been founded on the dictum of Mr. Justice Bayley in the case of ***Milnes v Duncan(1827)6B.&C.671***; and with all respect to that authority, I do not think it can be sustained in point of law. If indeed, the money is intentionally paid, without reference to the truth or falsehood of the fact, the plaintiff meaning to waive all inquiry into it, and that the person receiving shall have the money at all events, whether the fact be true or false, the latter is certainly entitled to retain it; but if it is paid under the impression of the truth of a fact which is untrue, it may, generally speaking, be recovered back, however, careless the party paying may have been, in omitting to use due diligence to inquire into the fact. In such a case the receiver was not entitled to it, nor intended to have it".

Bodenham was not the agent of ***R.E. Jones Ltd,*** and for that reason can be distinguished from the instant case, where it was conceded by the appellant that Phillips under the authority of the appellant transported the cheque to Jamaica, and who in collusion with Beckford handed it over to the Bank of Jamaica in a sale transaction and not as directed by the appellant. Indeed Lord. Carson in his speech (at pg. 701) took note of the fact that different considerations would apply if Bodenham was the agent of ***R.E. Jones Ltd.***

> "Of course, if it could be shown that Bodenham was in any sense the agent of the appellants (Jones) the result would have been different and indeed that was conceded in the course of the argument by the counsel on behalf of the appellants".

Viscount Cave, though dissenting on other grounds, in distinguishing that case from the case of ***Watson v Russell*** 3 B & S 34, also recognised that Bodenham was not an agent, and therefore the principles in the ***Watson*** case would not apply.

He stated at pg 681:

> "No doubt Bodenham (like Keys in the case cited) was commissioned by the drawers of the cheques for 2000*l* and 3000*l*. to carry them to the payees, his mandate being coupled with the condition - plainly to be inferred from the admitted facts - that he should hand them to the payees as a deposit on the cars; and this condition he failed to perform. So far the cases are very similar. But, on the other hand, there was not in ***Watson's*** case , as there was in this case, a mistake of fact on the part of the drawers of the cheques; and I am impressed by the circumstance - to which some of your Lordships have called attention - that ***Watson's*** case has been treated in the books as applying only where an agency exists, and that in the present case there was no agency in any real sense of the word. It is to be observed also that the effective cheque, the cheque for 5000*l*., did not pass through Bodenham's hands at all".

The case of ***Waring and Gillow*** (supra) was decided on the issue of mistake of fact but no where in the judgments of the Learned Law Lords, was it ever suggested that title had not passed to ***Waring and Gillow,*** when the cheque was sent to them by ***R.E. Jones Ltd.*** The case was decided on the bases of the restitutionary remedy of money paid under a mistake of fact, and I would echo the opinion stated by Waller J in the ***Brown Shipley*** case (at pg. 584) on the ***Jones*** case (supra) as follows:-

> "I think it would have been a matter of surprise if it had been suggested W & G did not get title to the two cheques on delivery by B albeit possibly a voidable title. Of course, in ***Jones v Waring & Gillow,*** the two cheques were ultimately exchanged for one cheque sent direct to Waring & Gillow. Mr. Hirst, Q.C. submitted that the position on title might be different as between cheques delivered by the rogues and cheques sent direct. That would seem to me to be illogical, and to emphasize that on analysis the rogues were in no different position than a mere messenger".

In any event, where money is paid under a mistake of fact, invariably title would have passed when the money is paid over. In the case of ***Barclays Bank v W.J. Simms Ltd*** [1980]

1Q.B. 677, Goff J at pg. 689 at page 689 in commenting on the case of ***Chambers v Miller*** 13 CBNS 125 offered the following opinion with which I agree:

> " It was part of the defendant's argument that the money was recoverable, as having been paid under a mistake of fact. However, that was as at least two members of the court recognised (see p. 135, per William J., and pp 136-137, per Byles J.), irrelevant to the question whether the property had passed; indeed, where an action is brought to recover money paid under a mistake of fact, property will almost invariably have passed to the defendant, the effect of the action, if successful, being simply to impose on the defendant a personal obligation to repay the money. Furthermore, the kind of mistake that will ground recovery is, as Parke B's statement of the law in ***Kelly v Solari,*** 9 M& W. 54 shows, far wider than the kind of mistake which will vitiate an intention to transfer property".

I would conclude, that when the appellant's agent in collusion with Beckford, handed over the cheque to Jones, the agent of the BOJ, [the respondent] the appellant had passed title albeit voidable title in the cheque to the respondent.

MONEY HAD AND RECEIVED

The appellant's claim for moneys had and received was based, it seems on the fact that the cheque was paid over to the BOJ as a result of mistake of fact. i.e. that the appellant sent the cheque to the respondent, as a loan which should have been secured by a promissory note, and not to be traded with the respondent for the equivalent in Jamaican dollars. In its defence the respondent pleaded, specifically the following:

> "**14 A** If which is denied, the defendant received the said money or any part of it, it did not do so to the use of the Plaintiff or under any circumstances such as would entitle the plaintiff to recover it from the Defendant as alleged in the statement of claim, or at all.
>
> 15. Still the defendant states that on the premises:-

(i) it changed its position as stated in paragraphs 2, 4, 9, 11 and 12 in good faith and that it would be inequitable to require it to make payment as claimed.

(ii) It was a bonafide purchaser for value without notice of any claim or interest by the plaintiff in the amount claimed or any sum.

(iii) The plainfiff is estopped from claiming title to the cheque and/or from obtaining the sum claimed or other sum from the defendant.

1. **CHANGE OF POSITION**

This defence was recognised by Goff J in the case of ***Barclays Bank v W.J. Simms Ltd.*** (supra) when having examined a series of authorities, on the question of monies paid under a mistake of fact he said (pg.695):

> " From this formidable line of authority certain simple principles can, in my judgment, be deduced: (1) If a person pays money to another under a mistake of fact which causes him to make the payment, he is prima facie entitled to recover it as money paid under a mistake of fact. (2) His claim may however fail if (a) the payer intends that the payee shall have the money at all events, whether the fact be true or false, or is deemed in law so to intend; or (b) the payment is made for good consideration, in particular if the money is paid to discharge, and does discharge, a debt owed to the payee (or a principal on whose behalf he is authorised to receive the payment) by the payer or by a third party by whom he is authorised to discharge the debt; or (c) the payee has changed his position in good faith, or is deemed in law to have done so."(emphasis added).

Then in the case of ***Lipkin Gorman v Karpnale*** [1992] 4 All E.R. 512, the following was held in the House of Lords (at pg. 513):

Held:

> "Where the true owner of stolen money sought to recover it from an innocent third party in an action for money had and received, the recipient of the stolen money was under

> an obligation to restore an equivalent sum to the victim if he had not given full consideration for it and thus had been unjustly enriched by it at the expense of the true owner, unless he could show that he had altered his position in good faith so that it would be inequitable to require him to make restitution or restitution in full". (emphasis added).

Lord Goff of Chieveley then dealt with the defence of change of position as follows (at pg. 532) :

> "Whether change of position is, or should be, recognised as a defence to claims in restitution is a subject which has been much debated in the books. It is, however, a matter on which there is a remarkable unanimity of view, the consensus being to the effect that such a defence should be recognised in English law. I myself am under no doubt that this is right. "

After referring to cases which he opined could be said to 'rest upon change of position' he continues (at pg. 533):

> "There has, however, been no general recognition of any defence of change of position as such; indeed, any such defence is inconsistent with the decisions of the Exchequer Division in ***Durrant v Ecclesiastical Comrs for England and Wales***[1880] 6QBD 234, and of the Court of Appeal in ***Baylis v Bishop of London*** [1913] 1 Ch 127 [1911 - 13] All E.R. Rep. 273. Instead, where change of position has been relied upon by the defendant, it has been usual to approach the problem as one of estoppel: see eg. ***R E Jones Ltd. v Waring & Gillow Ltd.*** [1926] AC 670, [1926] All E.R. Rep 36 and ***Avon CC v Howlett*** [1983] 1 All E.R. 1973, [1983] 1 WLR 605. But it is difficult to see the justification for such a rationalisation. First, estoppel normally depends upon the existence of a representation by one party, in reliance upon which the representee has so changed his position that it is inequitable for the representor to go back upon his representation. But, in cases of restitution, the requirement of a representation appears to be unnecessary. It is true, in cases where the plaintiff has paid money directly to the defendant, it has been argued (though with difficulty) that the plaintiff has represented to the defendant that he is entitled to the money; but in a case such as the present, in which the money is paid to an innocent donee by a thief, the true owner has made no representation whatever to the defendant. Again, it was held by the Court of Appeal in ***Avon CC v Howlett*** that estoppel cannot operate pro tanto, with the effect that if, for example, the defendant has innocently changed his position by disposing of part of the money, a defence of estoppel would provide him with a defence to the whole of the claim. Considerations such as

> these provide a strong indication that, in many cases, estoppel is not an appropriate concept to deal with the problem.
>
> In these circumstances, it is right that we should ask ourselves: why do we feel that it would be unjust to allow restitution in cases such as these? The answer must be that, where an innocent defendant's position is so changed that he will suffer an injustice if called upon to repay or repay in full, the injustice of requiring him so to repay outweighs the injustice of denying the plaintiff restitution. If the plaintiff pays money to the defendant under a mistake of fact, and the defendant then, acting in good faith, pays the money or part of it to charity, it is unjust to require the defendant to make restitution to the extent that he had so changed his position. Likewise, on facts such as those in the present case, if a thief steals my money and pays it to a third party who gives it away to charity, that third party should have a good defence to an action for money had and received. In other words, bonafide change of position should of itself be a good defence in such cases as these.
>
> A prominent example will, no doubt, be found in those cases where the plaintiff is seeking repayment of money paid under a mistake of fact; but I can see no reason why the defence should not also be available in principle in a case such as the present, where the plaintiff's money has been paid by a thief to an innocent donee, and the plaintiff then seeks repayment from the donee in an action for money had and received. At present I do not wish to state the principle any less broadly than this: that the defence is available to a person whose position has so changed that it would be inequitable in all the circumstances to require him to make restitution, or alternatively to make restitution in full. I wish to stress, however, that the mere fact that the defendant has spent the money, in whole or in part does not of itself render it inequitable that he should be called upon to repay, because the expenditure might in any event have been incurred by him in the ordinary course of business."

I have quoted extensively from the speech of Lord Goff to demonstrate the reasoning for recognising the defence of change of position in these type of cases. In the instant case the appellant without any direct communication with the respondent bank, paid over the cheque in the respondent's name as payee, and with the intention that the respondent should be the beneficiary of the proceeds of the cheque, albeit for a purpose which, as the learned judge found the respondent was entirely unaware. The cheque having found its way, into the regular business

transactions of the respondent bank, through the dishonesty of its (the appellant's) own agent was received by the respondent, who gave value for it to the extent of the Jamaican dollar value equivalent to the US dollar for which it was drawn. When the respondent purchased the cheque with its funds not only was it influenced by the cheque to change its position by expending funds which it would not otherwise have spent in relation to that cheque, and having done so, it could not be said that the respondent was unjustly enriched.

As for the question of unjust enrichment, the words of Lord Templeman speaking in the ***Lipkin Gorman*** case (supra) demonstrates in clear terms by the example he gives, what circumstances would amount to unjust enrichment. He states at pg. 517:

> "In my opinion, in a claim for money had and received by a thief, the plaintiff victim must show that money belonging to him was paid by the thief to the defendant and that the defendant was unjustly enriched and remained unjustly enriched. An innocent recipient of stolen money may not be enriched at all; if Cass had paid 20,000 pounds derived from the solicitors to a car dealer for a motor car priced at 20,000 pounds the car dealer would not have been enriched. The car dealer would have received 20,000.00 pound for a car worth 20,000.00 pounds But an innocent recipient of stolen money will be enriched if the recipient has not given full consideration".

In the instant case, it is conceded that full consideration was given by the respondent for the proceeds of the cheque and consequently there was no unjust enrichment.

2. **BONA- FIDE PURCHASE FOR VALUE**

The finding of the learned judge that the respondent paid the value for the proceeds of the cheque and that the respondent did so in good faith and without notice, that is to say, on a genuine belief that the cheque payable to it, was for sale, places the respondent in the position of a bonafide purchaser for value.

Before the appellant can succeed in such an action it must first prove that it has title to the cheque. See Goff and Jones on the Law of Restitution (4th edition) pgs. 77-78 where the learned author states:

> "A money claim was at common law enforceable by an action for money had and received or occasionally in trover. Either action results in a personal judgment, based on the plaintiffs proprietory right against the defendant. Since the claim is based on the claimant's legal title, it is not necessary to inquire whether there is in existence a fiduciary relationship.
>
> The claim can only succeed if the plaintiff can demonstrate that the defendant received his money and that he did not, as a result of that receipt, obtain good title to it. Given the defence of bonafide purchaser, successful claims are rare".

We have seen earlier in this judgment, that title did pass to the respondent for the reasons heretofore set out, and consequently having received title by way of a bonafide purchaser for value, the appellant's claim would be doomed to failure.

EFFECT OF FRAUD

Of relevance are the following words with which I agree of the authors of Chalmers and Guest on Bills of Exchange, (14th Ed) page 341:-

> "It does, indeed, appear that, as the authorities now stand, if the issue of a bill, cheque or note, or its acceptance is affected by fraud or duress on the part of a third party, this cannot be raised in a defence against the original payee of the instrument who has received it as a holder in good faith and for value without notice of the defect. Moreover, in one respect, the position of the payee - holder is more formidable than that of a holder to whom the instrument has been negotiated, since section 30 (2) of the Act (which shifts the burden of proof to the holder in certain circumstances) does not apply to the case of the original payee of the instrument, the party sued on the instrument bearing the burden of proof that the payee took it with notice of the fraud or duress".

Lord Halsbury L.C. in delivering his speech in the House of Lords in the case of

Clutton v Attenborough & Sons [1897] AC 90, 93 opined that fraud did not affect the rights of a bonafide holder for value when he said:

> " The facts are now beyond doubt, that the person who drew this cheque intended to draw a cheque, that he intended this cheque to be paid, and that he handed this cheque to his clerk. It is perfectly immaterial that he was induced to draw this cheque and to hand it to his clerk by fraud. What has that to do with the validity of the cheque against a bonafide holder for value when it gets into the hands of that bonafide holder for value? It seems to me that if this case was treated as if it were possible to raise that question, it would be a most serious blow against the currency of negotiable instruments - that is to say, if you are to go into the history of every negotiable instrument, in itself perfectly genuine, in respect of the person who drew it and the person who issue it".

Lord Shand agreed (pg. 95):

> "By a system of fraud these cheques passed out of the hands of one clerk into the hands of another, and ultimately into the hands of the respondents in return for full value. My Lords, it appears to me that cheques which have been signed and intended by the drawer to be issued, and which were parted with by him and so issued, although parted with and issued in consequence of fraud practised on the drawer, must in the hands of a bonafide holder for value be valid and effectual".

Those words could accurately describe the circumstances of this case. The appellant drew the cheque, and intended it to be issued and delivered to the respondent, who accepted it in good faith and for value. Consequently the appellant in spite of the fraud committed upon it, cannot rely on that fact to defeat the title in the respondent.

I would hold, that the learned judge was correct in holding that the defences to the claim for money had and received are valid.

Although the above would be sufficient to dismiss this appeal, in deference to the arguments, I should state that in my opinion, the appeal would also fail, having regard to the acceptance of the learned judge of Phillips and Wildish as agents of the appellant, whose conduct on two bases would defeat the appellant's claim.

Firstly on the basis of the principles set down in ***Watson v Russell*** 3 B &S 34. It is sufficient for my purposes to refer to the principle as seen by Lord Shaw in ***Jones v Waring and Gillow*** (supra) at pg. 687:

> "I propose to explain in a few words that I think ***Watson v Russell*** applies to a different set of circumstances from the present. And it belongs to a different class of case. It has not, in my opinion, any real bearing upon cases depending upon payments having been made under a mistake in fact. The class of case ruled by ***Watson v Russell*** is confined solely to that of payments made under a condition not communicated to the receiver, a condition as to the further conduct which it was hoped, expected or stipulated should follow payment."

Lord Carson's views are also helpful (pg. 701):

> "The case [***Watson v Russell***] therefore, is not one of money paid under a mistake of fact, but is one, like many others that were cited in the course of the argument before us, where an agent acts either in excess of his duty, or contrary to his instructions, or even fraudulently, and the loss, if any such occurs, has to be borne, not by the payee, but by the principal, and that, I think, will be found to be the distinguishing feature in all the cases that have been cited in aid of the case put forward by the respondents".

It was the appellant's case that the cheque was given to Phillips, its agent, for delivery to the respondent, with the specific instructions that it was not to be delivered unless and until the respondent executed the promissory note which the appellant had drafted. The promissory note proved to be a part of the fraudulent scheme of the appellant's agents and others, and so was never communicated to the respondents, who would certainly not have accepted the cheque on that condition.

The learned judge was correct in concluding that this was a secret condition, which was never communicated to the respondent, and consequently the respondent, could not be liable on that account. This leads me to the second basis upon which the appellant's claims could also be defeated.

A principal is liable for the fraud of his agent acting within the scope of his authority, whether the fraud is committed for the benefit of the principal or for the benefit of the agent. See *Lloyds v Grace Smith & Co.* [1912] A.C. 716 where at pg. 735 Lord McNaghten said:-

> "Lord Blackburn's view of the judgment in ***Barwick's*** case requires no explanation. It is clear enough. After referring to the ***Barwick's*** case he expresses himself as follows: 'I may here observe that one point there decided was that, in the old forms of English pleading, the fraud of the agent was described as the fraud of the principal, though innocent. This no doubt was a very technical question'; and then come these important words: 'The substantial point decided was, as I think, that an innocent principal was civilly responsible for the fraud of his authorized agent, acting within his authority, to the same extent as if it was his own fraud'.
>
> That, my Lords, I think is the true principle. It is, I think, a mistake to qualify it by saying that it only applies when the principal has profited by the fraud".

It was the fraud of the appellant's agents that caused the cheque to be transacted in the way in which it was, instead of the manner in which the appellant intended and directed it to be. The appellant is responsible for the acts of its agents, and must therefore stand the losses of the fraud committed by its agents.

There have been other arguments advanced including the defence of estoppel and negligence which with apologies to the obvious depth of research, and hard work by counsel, I find it unnecessary to address, given the conclusions already arrived at above.

In the event, I would dismiss the appeal and affirm the order of the Court below. Consequently there will be no need to discuss the issue of interest which also arose in the arguments.

The respondent should have the costs of the appeal to be taxed, if not agreed.

PATTERSON, J.A.:

This is an appeal from a judgment of Harrison (P.), J. (as he then was) in which he rejected the plaintiff's claim against the defendant for damages for wrongful conversion of its cheque for US$2,999,000 and, alternatively, for payment of the said sum as money had and received by the defendant to the use of the plaintiff, with interest, and gave judgment for the defendant with costs.

The Background

The appellant, Dextra Bank and Trust Company Limited ("Dextra"), holds a 'B' class bank and trust licence under The Banks and Trust Companies Law of the Cayman Islands and carries on the business, inter alia, of banking, including the lending of money at interest. Its principal place of business is at Mary Street, Georgetown, Grand Cayman, Cayman Islands, British West Indies. Jack Ashenheim, a chartered accountant and executive director, is the Chairman of the Board of Directors of Dextra. Darryl Myers, a partner in Myers & Alberga, Attorneys-at-law in the Cayman Islands, is a director of Dextra and acts as its attorney-at-law. Peter Blackman is director/secretary of Dextra. Jack Ashenheim is employed to Myers & Alberga as financial consultant and accountant.

The Bank of Jamaica ("The BOJ") is the Central Bank of Jamaica, established by the Bank of Jamaica Act. One of its principal objects is "to influence the volume and conditions of supply of credit so as to promote the

fullest expansion in production, trade and employment, consistent with the maintenance of monetary stability in Jamaica and the external value of the currency" [s. 5)] and it acts as banker to the Government of Jamaica [s. 5]. For the purpose of the performance of its functions, the BOJ is authorised to "buy and sell foreign currencies" [s. 23(g)]. The Bank is also authorised to "make arrangements or enter into an agreement with any bank or financial institution within or outside Jamaica to borrow in such manner, at such rates of interest and upon such other terms and conditions as it may think fit, any foreign currency, which the Board may think it expedient to acquire" [s. 23(i)].

Prior to 1991, under the provisions of the Exchange Control Act, the buying and selling of foreign currency within Jamaica was strictly controlled. In September, 1991, the foreign exchange system was liberalised and, as a consequence, anyone could now buy, sell, borrow, or lend foreign currency from or to authorised dealers, but only authorised dealers could carry on the business of dealing in foreign currency.

After September, 1991, the BOJ's trade in foreign currency became more active, and five agents, designated as "authorised agents", were appointed to source and purchase foreign currency for and on behalf of the Bank. Richard Jones and Wycliffe Mitchell were two such authorised agents. The BOJ provided overdraft facilities for its agents against accounts

in their names in the BOJ for them to purchase foreign currency, limited at first to $5million, but later reduced to $4million.

One Orville Beckford was appointed with effect from May 1, 1992, to act as Director of the Economic Co-operation Department of the BOJ. His employment was terminated on December 14, 1992, by reason of redundancy. However, from that date, he was contracted to the BOJ to provide certain services in relation to the transfer of functions of the Economic Co-operation Department to the Ministry of Finance. He occupied an office on the BOJ building. His contract was terminated on February 8, 1993. His duties did not at anytime involve the harnessing of foreign currency through projects. He was required to participate in the negotiations of loans and lines of credit. His contractual duties did not involve foreign currency purchases or assisting authorised agents in making purchases or otherwise. Nevertheless, Beckford would source foreign currency and sell to certain of the authorised agents of the BOJ, including Jones and Mitchell. This came to the knowledge of the Deputy Governor of the BOJ after February 8, 1993.

Michael Phillips and John Wildish were persons who sold foreign currency to the authorised agents either directly or indirectly through Orville Beckford. They were both engaged in selling foreign currency to Richard Jones from 1991 until April, 1992. After that date, Jones did not purchase

directly from them, but the learned judge found that "Beckford subsequently provided the said currency" up to a certain date.

Le Par Limited is a limited liability company registered in the Cayman Islands. Its postal address is "P.O. Box 472, Georgetown, Grand Cayman", which, incidentally, is the same postal address as that of Darryl Myers of Myers & Alberga, attorneys-at-law for Dextra. Le Par Limited opened a current account No. 101052165 at the New Kingston Branch of the Eagle Commercial Bank Jamaica on 5th October, 1992. John Wildish and Michael Phillips were the signatories to and the operators of the account. Le Par Limited was actively engaged in selling foreign currency to the authorised agents of the BOJ from October, 1992.

Troy McGill opened an account at the New Kingston Branch of the Eagle Commercial Bank on the 1st December, 1992, in the joint names of Troy McGill and Angella McGill -- account No. 101053130.

Rupert E. Straw was the Deputy Governor, Operations Division, BOJ. His functions included the supervision of the issue and redemption of notes and coins, Currency Department; the operations of the Banking Department, which is banker to the Government, and to the commercial banks; the operations of the Marketing Department which is the department concerned with investment and banking accounts overseas, and the overseas bank accounts. In 1991, a section called The Trading Unit was established, headed by one Mr. Rhooms who reported directly to Rupert Straw. That was

the unit designed to ensure active participation in the purchase of foreign currency on the open market. The unit would collate the information from the agents and from the commercial banks, reporting the amounts purchased each day.

The Facts

There are certain uncontroverted or admitted facts in this case, quite apart from the findings of facts by the learned trial judge. A basic fact is that a cheque, No. 4949 for US$2,999,000, was drawn on Dextra's account with the Royal Bank of Canada in New York in favour of the BOJ. The cheque was dated January 20, 1993, and was received by the BOJ in its ordinary course of business in purchasing foreign currency, and subsequently negotiated. The sequence of events leading up to the negotiation of the cheque must now be examined.

On or about January 11, 1993, John Wildish contacted the firm of Myers & Alberga requesting a short term loan of US$3million for three months which he said was on behalf of the BOJ. Darryl Myers spoke with Peter Blackman of Dextra and then wrote confirming the request for the loan and enquiring if Dextra wished to proceed with the request. On or about January 12, Michael Phillips, accompanied by John Wildish, made representations to Dextra that they had been requested by Orville Beckford, an officer of the BOJ, to "try and obtain a loan." The following day, the Board of Directors of Dextra passed a resolution confirming the loan, and

authorising the Chairman "to negotiate and approve the terms of the loan and promissory note in consultation with the Bank's Attorney." Blackman advised Myers of the resolution. Myers proceeded with dispatch to draft a promissory note, which was presented to Wildish for approval. Certain amendments were made and on January 15 Myers sent by telefax to Wildish a draft of the promissory note with the following comments:

> "I request you show this letter to the Bank of Jamaica and if they have any further problems with the document let them call us direct to discuss them as going through you as intermediary is a waste of time."

That was followed by another telefax to Wildish and Phillips with instructions as to the signing of the promissory note. I think it is important to quote the relevant section of the telefax:

> "A resolution of the board will be required... you must therefore get from the bank a certified copy of the resolution unless Mr. Beckford, who I assume has the authority, tells you it is not necessary... if not this is going to cause delay... we must be sure that the note is properly authorised and signed."

On January 19, the Chairman of Dextra, Jack Ashenheim, met with Darryl Myers and Michael Phillips at about 1:30 p.m. The cheque No. 4949 dated January 20, 1993, along with two copies of the note were handed to Phillips by Myers who "instructed Mr. Phillips to take two copies of the note and the cheque to the Bank of Jamaica, to see personally that the note was signed by either the Governor or the Deputy Governor and another

authorised officer and upon receipt back of the signed note to hand the cheque to the Bank of Jamaica and to take the note to the Stamp Commissioner and have it stamped as being exempted from stamp duty and then to return the signed note to Mr. Myers by courier."

It is clear that up to the time that Dextra handed over the cheque to Phillips, Dextra had not received any communication from the BOJ or from any officer acting on its behalf. There was no formal request for a loan emanating from the BOJ. The oral request was made by Wildish, and Ashenheim admitted he had no knowledge as to whether Wildish had any relationship with the BOJ or not; he did not know his occupation in Jamaica, but he "knew he said that he sold foreign currency to the Bank of Jamaica." Ashenheim also admitted that it was his "understanding that Mr. Phillips was engaged in the same business as Mr. Wildish, that is, selling foreign exchange to the Bank of Jamaica." So the position up to this point in time is that the Chairman of Dextra, who was entrusted by the Board to "<u>negotiate and approve</u>" the terms of the loan to BOJ, negotiates with persons whom he understands to be sellers of foreign currency to the BOJ, and entrusts a cheque payable to BOJ to the custody of one such person for delivery to the BOJ, albeit on condition that the promissory note should be first signed. His knowledge of Orville Beckford was even more limited. He had never met Beckford, but he made enquiries "through certain friends in Jamaica" and he was told that Beckford "was the czar of foreign exchange in Jamaica." He

did not make enquiries of the BOJ, but he was still under the impression that he was dealing with the BOJ.

It is pertinent to examine at this stage the manner in which authorised agents Jones and Mitchell purchased foreign currency. Each was provided by the BOJ with a chequing account in his name, and each used cheques from that account to pay for any foreign currency that was purchased. Each agent was required to record the purchase and to deliver to the BOJ the daily purchases. The purchases were then deposited in the BOJ's account and the agent's account would be credited with the Jamaican dollar equivalent. When the agents commenced purchasing currency in 1991, they were allowed to do so within a band of rates approved by the BOJ, but after August, 1992, the rate was fixed at $22.15 for each United States dollar. Each agent received a commission based on the amount of purchases made.

Jones said he made arrangements with Beckford in August, 1992, to assist in sourcing foreign currency. Thereafter, Beckford supplied him with the sum of US$200,000 on a daily basis. He would pay for the amounts supplied by Beckford by cheques drawn to payees named by Beckford. Sometimes, Jones would draw cheques and give to Beckford in advance of receiving the equivalent in foreign currency.

Jones said that sometime prior to January 20, 1993, Beckford told him that he was expecting to get US$3,000,000 payable to the BOJ from a group

of Caymanian investors, and he was asking him to purchase US$2,000,000 from it and that he would be asking Mitchell to purchase the remaining US$1,000,000. On January 19, Beckford handed him a cheque for US$2,999,000 drawn by Dextra Bank & Trust Company Limited, on Royal Bank of Canada, New York, and made payable to Bank of Jamaica. Jones testified that Beckford asked him to pay "by way of a number of cheques to payees which he would provide. On that day I drew seven cheques in payment for this sum and the following day, the 20th I drew one other cheque to complete payment for this sum." Straw testified that the BOJ's record of purchases disclosed that Mitchell purchased US$999,000 and Jones US$2,000,000 of the cheque for US$2,999,000 and paid by a number of cheques from their accounts made payable to various persons. The learned trial judge found as a fact that "cheques, exhibit 25, did purchase the Dextra cheque. The agents' accounts were debited with the said cheques and subsequently reimbursed by the Bank of Jamaica with the Jamaican Dollar equivalent." The "Dextra cheque for $2,999,000 was lodged to the credit of the BOJ on January 20, 1993", and the learned judge found that "this is evidence of a valid foreign currency purchase by Bank of Jamaica in its then existing system." This finding of fact is fully supported by the entry in the BOJ's "General Ledger System - Foreign Assets Transaction Report for 20/01/93", which was admitted in evidence as exhibit 93 AI. Section 24(g) of

the Bank of Jamaica Act gives statutory authority to the BOJ to "buy and sell foreign currencies" for the purpose of the performance of its functions.

Orville Beckford testified that he was handed the Dextra cheque by Phillips "as the loan from Dextra Bank that I had spoken sometime earlier to Mr. Wildish about and that we were in discussion on." He also got the promissory note which he said "had to be executed before the cheque could be handed over." He was then in his office on the 8th floor. He sought out Straw; they met downstairs by the escalator and Straw "bended over on the rail downstairs and affixed his signature." He took the promissory note up to his office, affixed his signature below that of Straw, and then asked his secretary "to witness my signature, and I also asked her to affix the Bank of Jamaica stamp." He said he then "handed the document back to Mr. Phillips - I gave him a copy and a copy was kept at the BOJ." All this he said took place on the "date on the cheque" -- but he did not "remember exactly what that date was." Beckford said that when he received the cheque, he called Straw to let him know, and that Straw instructed him "to give it to Mitchell and/or Jones", so that they could use it to liquidate some of their overdrawn accounts. He said, "When I got the cheque, I gave it to Mr. Richard Jones. If my memory serves me correct, it was either Jones or Mitchell, but I am more to Jones than Mitchell, but it was either Jones or Mitchell." I need not say anything more about the promissory note, as the learned judge accepted Straw's evidence that he did not sign it, nor did he have any argument with

Beckford about his procuring a loan or about anything to do with the cheque. Dextra is not relying on the promissory note in its claim for conversion or moneys had and received. The learned judge found that "the plaintiff's cheque, exhibit 10, was purchased by Richard Jones and Wycliffe Mitchell, the defendant's authorised agents, bona fide, in its foreign currency purchasing system, giving value therefor, exhibit 25. The defendant reimbursed its said agents' accounts to the full amount of the value of the plaintiff's cheque purchased." In my view, this finding is supported by the evidence. There can be no doubt that Beckford was acting in concert with Michael Phillips and John Wildish to procure the Dextra cheque which was sold to the BOJ through its agents Jones and Mitchell. Certain cheques that the BOJ agents used to pay for the foreign currency were made out in names that Beckford said he knew to be fictitious, although he did not admit that those cheques were used to purchase the Dextra cheque. Nevertheless, the undisputed fact is that certain of those cheques made payable to fictitious persons were lodged to the credit of Le Par Limited in the account at the New Kingston branch of the Eagle Commercial Bank. Phillips and Wildish were the signatories to and operators of that account. Certain other cheques used in purchasing the Dextra cheque were lodged to the Troy McGill account. The lodgment slips were signed by Philips or Wildish in each case.

Another finding of fact is that Phillips and Wildish were agents of Dextra. Phillips was commissioned to take the cheque to the BOJ with

instructions that the promissory note, evidencing a loan, should first be signed and returned to him before the cheque was handed over. Phillips dealt with Beckford who was not authorised to negotiate loans on behalf of the BOJ. At no time did Beckford tell the BOJ or its authorised agents that the Dextra cheque was intended to be a loan. On the face of the cheque, there was nothing to identify it as a loan, although Dextra intended it to be paid to BOJ as a loan. The cheque was made payable to the Bank of Jamaica; but that section on the face of it marked "For", that was intended to be followed by a notation to signify the purpose for which the cheque was paid, was left incomplete. The evidence clearly established that Dextra, intending to make a loan to the BOJ, handed a cheque made payable to the BOJ to a known dealer in foreign currency, its agent Phillips, for him to convey to the BOJ. But the learned judge expressed the view, and rightly so I think, "that the plaintiff behaved with studied consistency in avoiding any direct contact with the Bank of Jamaica, the Central Bank of the sovereign state of Jamaica, and neglected to follow the normally acceptable procedures expected by the Bank of Jamaica, and used in normal lending transactions with large foreign institutions. The plaintiff pursued a course of conduct to route its cheque, exhibit 10, away from a direct transmission to the defendant, thereby leading the defendant to believe that the transaction was one in which it was not accepting a loan but engaging in a sale transaction involving the said cheque."

purpose only and not for the purpose of transferring property in the cheque." The special purpose was the completion of the loan transaction, and that was well known to Phillips and Beckford. It seems clear to me that the finding of the learned judge that Phillips was Dextra's agent is sound. Dextra expressly authorised Phillips to complete a loan transaction on its behalf by having the authorised persons at the BOJ properly execute the promissory note and thereafter to deliver the cheque to the BOJ. There can be no doubt that Phillips was acting in concert with Beckford to deceive the authorised agents of BOJ, that the cheque was for sale as foreign currency. The agents of BOJ were not told and had no means of knowing that Dextra intended the cheque to be a loan to the BOJ. The BOJ gave full value for the cheque bought in the ordinary course of its business, without knowledge of Dextra's intention to make a loan. The position, therefore, is that Dextra honestly believed it had made a loan to the BOJ and the BOJ made a bona fide purchase of the cheque in its ordinary course of business and gave value without notice of an intended loan from Dextra being communicated to it.

The learned judge expressed the view that in the instant case, the plaintiff paid out its cheque, exhibit 10, in the name of the defendant under a mistake of fact intending to make a loan. I do not think that the question of a mistake of fact arises on the evidence as between Dextra and the BOJ. Mistake of fact is irrelevant to the claim in conversion, the issue being whether or not the property in the cheque had passed. Dextra did not base

This view, in my mind, is fully supported by the evidence. The learned judge listed nine reasons extracted from the evidence in support of his views.

Prudent people of business do not conduct their business in the way that Dextra did in this case. On the other hand, the BOJ acted bona fide in purchasing the cheque and gave value for it without any notice of Dextra's intention to make a loan.

The Claim in Conversion

Mr. Mahfood, Q.C. submitted that the respondent converted the appellant's cheque for US$2,999,000, drawn on the appellant's account at the Royal Bank of Canada in New York, by taking possession of the cheque with intent to exercise dominion over it. He said the cheque remained the property of the appellant and the respondent had no right to lodge it to its account since the respondent denied the existence and/or validity of the loan. It should be noted, however, that the denial of a loan by the BOJ did not arise until sometime after the Dextra cheque had been negotiated by the BOJ. In February, 1993, Wildish brought a copy of the promissory note to the BOJ, and Straw testified that that was the first time he was seeing the document. Straw wrote to Dextra on February 9, 1993, refuting the authenticity of the promissory note and denying the loan transaction evidenced by it. Nevertheless, Mr. Mahfood, Q.C. contended that Dextra handed the cheque to Phillips for the sole purpose of completing the loan transaction, and that Beckford received it "conditionally" and for "a special

its action on a claim for the recovery of money paid under a mistake of fact. Dextra intended to pay the cheque to the BOJ under certain conditions, which their agent failed to communicate to the BOJ.

Jack Ashenheim made it quite clear that Dextra intended the BOJ to have title to the cheque "on certain conditions." The cheque was made payable to Bank of Jamaica and "Mr. Myers instructed Mr. Phillips to take two copies of the note and the cheque to the Bank of Jamaica, to see personally that the note was signed by either the Governor or the Deputy Governor and another authorised officer and upon receipt back of the signed note to hand the cheque to the Bank of Jamaica and take the note to the Stamp Commissioner and have it stamped as being exempted from stamp duty and then to return the signed note to Mr. Myers by courier." The delivery of the cheque to the Bank of Jamaica through its authorised agents was made without any condition being communicated to the BOJ. The cheque was intended for delivery to the BOJ and no other person. The appellant contends that Dextra retained title to the cheque "as the cheque was drawn by the plaintiff in favour of the defendant under a mistake of fact, namely, that it was making a loan to the defendant in exchange for and in consideration of the issue of a promissory note by the defendant." It seems, therefore, that Dextra's reliance on a mistake could only be in support of their contention that title in the cheque did not pass to the BOJ. But as Goff,

J. so aptly put it in ***Barclays Bank Ltd. v. W. J. Simms, Son & Cooke (Southern) Ltd. & anor.*** [1980] 1 Q.B. 677 (at page 689):

> "Where an action is brought to recover money paid under a mistake of fact, property will almost invariably have passed to the defendant, the effect of the action, if successful, being simply to impose on the defendant a personal obligation to repay the money. Furthermore, the kind of mistake that will ground recovery is, as Parke B's statement of the law in ***Kelly v. Solari*** 9 M. & W. 54 shows, far wider than the kind of mistake which will vitiate an intention to transfer property."

The crucial question to be answered is whether the title to the cheque remained in Dextra, on the facts of this case, so that by taking possession of it and dealing with it with intent to exercise dominion over it, the BOJ converted it. There can be no doubt that Wildish and Phillips conspired with Beckford to perpetrate a fraud on Dextra by selling Dextra's cheque to the BOJ, and that BOJ bought the cheque in the ordinary course of its business as buyers and sellers of foreign currencies. Counsel for the appellant argued that since Beckford had no authority to sell the cheque, by doing so he committed an act of conversion. Accordingly, the immediate right to possession of the cheque reverted to Dextra, and BOJ could not acquire title to it. Counsel for the BOJ countered in defence that title did pass to the BOJ on the facts and "independently of estoppel"; alternatively, Dextra made representations which gave rise to an estoppel.

We were referred to a number of authorities which each party claimed supported his arguments. However, I do not intend to analyse all those

authorities because of the views that I have formed. The general proposition of law applicable in actions for conversion was aptly expressed by Diplock, L.J. in ***Marfani & Co. Ltd. v. Midland Bank Ltd.*** [1968] 1 W.L.R. 956 at 970-971:

> "At common law one's duty to one's neighbour who is the owner or entitled to possession, of any goods is to refrain from doing any voluntary act in relation to his goods which is a usurpation of his proprietary or possessory rights in them. Subject to some exceptions... it matters not that the doer of the act of usurpation did not know, and could not by the exercise of any reasonable care have known of his neighbour's interest in the goods. This duty is absolute; he acts at his peril."

Nevertheless, there are certain exceptions to the general law that have been created by statute, and in certain circumstances a non-owner in possession of goods may confer a good title on a transferee to whom he delivers the goods by way of sale, pledge or otherwise. The non-owner may be liable to the true owner, but the transferee would have a valid title, if he took the goods in good faith for value and without notice of the defect of title in the transferor, and therefore, he would not be liable for conversion. The statutes relevant to this issue are primarily the Bills of Exchange Act and to a lesser extent the Sale of Goods Act. The transferee of a bill who is a holder in due course obtains a good title to the bill if he took it bona fide and for value, notwithstanding any defects in the title of the transferor or other predecessors. This proposition is fully supported by many of the authorities cited. Likewise, the true owner of property who by his conduct allows an

innocent buyer to give value to a third party who holds out himself as having the right to sell such property, will be estopped from denying such third party's right to sell the property. However, the true owner will not be held to be estopped unless his conduct is unequivocal. The issue as to whether or not title to the cheque remained in Dextra so as to give rise to an act of conversion by BOJ must now be examined in light of the enactments.

The Dextra cheque is "a bill of exchange drawn on a banker payable on demand" (section 73 of the Bills of Exchange Act) ("The Act") and the provisions of the Act applicable to a bill of exchange payable on demand apply to it. The Act defines a Bill of Exchange as:

> "...an unconditional order in writing, addressed by one person to another, signed by the person giving it, requiring the person to whom it is addressed to pay on demand, or at a fixed or determinable future time, a certain sum in money to or to the order of a specified person, or to bearer." (Section 3).

The Dextra cheque fulfilled all the form and requirements of a bill of exchange. The drawer who signed is Dextra Bank & Trust Company Limited; the drawee is the Royal Bank of Canada, New York, N.Y., and the payee specified therein as "Pay to the order of Bank of Jamaica."

A Bill of Exchange is a negotiable instrument; accordingly, the title to it passes on delivery, and a bona fide holder for value takes free from any defect in the title of his predecessors. Mr. Mahfood, Q.C. submitted that, notwithstanding the generality of section 73 of the Act, the provisions of

sections 17 to 21 do not apply to cheques. The provisions of sections 17 to 20 may not be essential on the facts of this case. A cheque is not usually accepted in the sense that the holder does not usually seek the signification by the drawee of his assent to the order of the drawer, before the cheque is presented for payment.

The Act

I must now examine in detail the submissions of Mr. Mahfood, Q.C. as they relate to section 21 of the Act. That section reads as follows:

> "**21.** Every contract on a bill, whether it be the drawer's, the acceptor's or an indorser's is incomplete and revocable, until delivery of the instrument in order to give effect thereto:
>
> Provided that where an acceptance is written on a bill, and the drawee gives notice to or according to the directions of the person entitled to the bill that he has accepted it, the acceptance then becomes complete and irrevocable.
>
> As between immediate parties, and as regards a remote party other than a holder in due course, the delivery in order to be effectual--
>
> (a) must be made either by or under the authority of the party drawing, accepting or indorsing, as the case may be;
>
> (b) may be shown to have been conditional or for a special purpose only, and not for the purpose of transferring the property in the bill.
>
> But if the bill is in the hands of a holder in due course, a valid delivery of the bill by all parties prior to him so as to make them liable to him is conclusively presumed.

> Where a bill is no longer in the possession of a party who has signed it as drawer, acceptor or indorser, a valid and unconditional delivery by him is presumed until the contrary is proved."

The appellant's submissions on this issue are important enough for me to quote them:

"**SECTION 21 OF THE BILLS OF EXCHANGE ACT**

42. Having found that Phillips, Wildish and Orville Beckford had themselves 'pre-sold' Exhibit 10, the Dextra cheque, to Richard Jones, the Defendant/Respondent's authorised agent, the Learned Judge erred in holding, **inter alia**, that the cheque was delivered to the Defendant/Respondent 'under the authority of the party drawing' the cheque. The only proper and reasonable conclusions on the evidence and the pleadings were that:

(a) the cheque was delivered by Beckford to Jones, the Defendant/Respondent's authorised agent, pursuant to a contract of sale between Beckford and Jones; or

(b) the delivery to Richard Jones was ineffectual because it was not made either by or under the authority of the plaintiff. The delivery was made by Beckford who was not the agent of the plaintiff. In so far as Phillips and Wildish are concerned, they did not effect any delivery to Jones. Furthermore, the evidence is clear that neither Phillips nor Wildish had actual authority to deliver to Jones. In so far as ostensible authority is concerned, Dextra can only rely on ostensible authority of Phillips and Wildish if Dextra held them out as having that authority and Jones relied on it. No evidence of holding out or reliance by Jones.

(c) the cheque was 'delivered' to the Defendant/Respondent as 'foreign currency purchases' by Richard Jones pursuant to his contractual obligations under Clauses 3.5 and 3.9 of the Agency Agreement (Exhibit 36).

Neither of these was a 'delivery' by or under the authority of the Plaintiff/Appellant. Consequently, Section 21 of the Bills of Exchange Act cannot assist the Defendant/Respondent in acquiring title to the cheque.

43. The learned Judge erred in failing to hold that when the Dextra cheque was in the hands of Michael Phillips and Orville Beckford, with the intention of selling the cheque to Richard Jones, the person with the immediate right of possession and who could maintain an action for conversion against Phillips, Beckford and Jones or any other person such as the Defendant/Respondent exercising dominion over the cheque, was the Plaintiff/Appellant. The sellers as well as the purchaser Jones or any subsequent purchaser were liable for conversion. Jones could not acquire title from Wildish, Phillips or Beckford. Having converted the cheque, any authority Phillips had to deliver the cheque to the Defendant/Respondent terminated as a matter of law. Furthermore, Phillips did not deliver the cheque to the Defendant/Respondent. It was 'delivered' by Richard Jones as 'foreign currency purchases' pursuant to his contractual obligation. (See ***Arnold v The Cheque Bank*** [1876] 1 CPD 578), and ***Boxendale v Bennett*** [1878] 3 QBD 525).

44. Further and/or alternatively, the delivery by the Plaintiff/Appellant was conditional or for a special purpose only, namely, the completion of the intended loan transaction. The cheque was a mere escrow. Beckford converted the cheque by selling it to Richard Jones and the Plaintiff/Appellant is entitled to sue Beckford and any other person including the Defendant/Respondent, other than a holder in due course, who dealt with the cheque inconsistent with the right of the Plaintiff/Appellant for conversion of the cheque, or since the cheque was collected, the Plaintiff/Appellant may sue for the proceeds as money had and received.

45. The finding of the Learned Judge that the Defendant/Respondent acquired title through the operation of Section 21 of the Bills of Exchange Act is unreasonable, unsupported by evidence and contrary

> to law. Section 21 cannot operate to transfer title under a contract between the Plaintiff/Appellant and Defendant/Respondent which is void for mistake.
>
> The case of ***Midland Bank v. Shipley*** (1991) 1 Lloyd's Law Reports 576 relied on by the Respondent, does not assist the Bank of Jamaica since:
>
> i) It acknowledges that the result would have been different if the underlying transaction was vitiated by mistake;
>
> ii) The delivery by Phillips to Beckford, the only delivery for which Dextra can in any way be held responsible, was clearly conditional. This is established by the oral and documentary evidence and the finding of the Learned Judge that the cheque was given to Phillips on the footing that it would be exchanged for a promissory note signed by the appropriate person. Phillips and Beckford must be taken to have known of the condition since the effect of the Judge's finding is that they orchestrated the fraud. There is no principle of law or equity under which Dextra can be held responsible for any subsequent 'delivery' by Beckford, BOJ's employee.
>
> An employer cannot hold a third party responsible for the dishonesty of his own employee orchestrated in the employer's own office. This turns the principle of holding out on its head.

The pith and marrow of Mr. Mahfood's submissions on this issue are that the learned judge erred in holding that the cheque was delivered to the BOJ "under the authority of the party drawing" it, and that the BOJ acquired title thereto through the operation of section 21 of the Act.

It is quite clear that the BOJ being the payee of the Dextra cheque did not qualify as a holder in due course within the meaning of section 29 of the

Act. (***R. E. Jones Ltd. v. Waring and Gillow Ltd.*** [1926] A.C. 670). Accordingly, even though the BOJ gave value for the bill, there is no conclusive presumption of a valid delivery by virtue of section 21. However, the BOJ (being the payee and, additionally, having given value) became a holder and, as such, a rebuttable presumption of a valid and unconditional delivery of the Dextra cheque arose through the operation of section 21. The onus of proving that there was no delivery or that the delivery was defective fell on Dextra.

In my view, Dextra failed to discharge that onus. The fact that Phillips, who had the authority to deliver the cheque to the BOJ, did so through Beckford to the authorised agent of the BOJ, Jones, does not rebut the presumption of a valid delivery. Further, Phillips, the agent of Dextra, failed to disclose to the BOJ the condition that Dextra had placed on the delivery of the cheque; therefore, Dextra cannot rely on any such condition in proof of a defect in the BOJ title. Dextra voluntarily parted with the cheque payable to the BOJ, intending that it should be delivered to the BOJ by its agent, Phillips, albeit as a loan. But no such condition was disclosed, and the BOJ took delivery by purchasing the cheque for value. The BOJ as holder negotiated the cheque by indorsement and delivery to Citibank International Limited of Miami, Florida on January 25, 1993.

Counsel for the appellant submitted that when Beckford delivered the cheque to Jones, Jones could not get a better title from Beckford than what

he had. It is good law that a holder for value (as opposed to a holder in due course) takes a bill, subject to any defect of title attaching to the bill at the time it is negotiated to him, regardless of whether or not he had notice of the defect. However, in the instant case, neither Phillips nor Beckford acquired title to the cheque. Dextra made the cheque payable to the order of the Bank of Jamaica. Dextra intended that it should be delivered to the BOJ and that title should pass to the BOJ and no other. The cheque having been made payable to the BOJ, the BOJ had the immediate right to possession of it against any other person, including Phillips and Beckford. (See ***Lipkin Gorman (a firm) v. Karpnale Ltd. and anor.*** [1992] 4 All E.R. 512). The passage of title is a question of intention. In the circumstances, Phillips may be considered as the agent of Dextra and Beckford a mere human conduit, entrusted with the cheque to convey it from the drawer Dextra to its intended payee the BOJ. It seems clear, therefore, that the BOJ, through its agents Jones and Mitchell, took the cheque without any prior defect in title. In my judgment, the BOJ, having purchased the cheque for value through its agents Jones and Mitchell, acquired a good title, and accordingly, the finding of the learned judge in this regard cannot be faulted.

The views that I have expressed are not without support from the decided cases. In ***Yan v. Post Office Bank Ltd.*** [1994] 1 N.Z.L.R. 154, Mr. Lam/Wong persuaded a Mr. Wan to pay a cheque for $250,000 to a Mr. Deng, well knowing that there was no funds in the bank to cover it. Mr. Deng

deposited the cheque to his account at Post Office Bank Limited and got a bank cheque for $50,000 payable to "Far East International or order", the business name of a Mr. Yan. Mr. Deng gave Mr. Lam/Wong the cheque who delivered it to Mr. Yan in exchange for $32,000 in cash with the balance being a deposit as earnest towards the purchase price of Yan's business. The fraudulent scheme against Mr. Yan was discovered, and the Post Office Bank Limited stopped payment on their bank cheque before presentment, but after Yan lodged it to his own bank. Post Office Bank claimed it was entitled to stop payment on the cheque. The bank cheque did not qualify as a "cheque or other bill of exchange" within the meaning of the Bills of Exchange Act, but it qualified as a promissory note, and was therefore subject to section 21 of the Bills of Exchange Act which deals with delivery. McKay, J., in delivering the judgment of the court, said this (at page 160):

> "Where, as in this case, a promissory note is contemplated by the maker in favour of a named payee or order and is then handed over by the maker to a third person, that must surely, in the absence of other evidence, be sufficient to authorise that third person to deliver the note to the named payee. The note was of no value to anyone other than the named payee, and there could be no point in handing it to Mr. Deng unless for the purpose of delivery to the named payee. The fact that delivery was effected through Lam/Wong cannot have been material. We note that a similar conclusion was reached by Walker, J. in ***Citibank N.A. v. Brown Shipley & Co. Ltd.*** [1991] 2 All E.R. 690, 699, 702."

A quick look at the ***Citibank N.A.*** case (supra) extracted from the above judgment (at page 164) is sufficient:

> "There a fraudster obtained a banker's draft by forging the signature of an authorised signatory on a company's account. The draft was in favour of another bank, which received it in good faith and paid the fraudster in overseas cash. The issuing bank sued the payee bank alleging that the payee bank acquired no title. Walker, J. concluded (at p. 702) that the payee named in the banker's drafts obtained a good title transmitted directly from the issuing bank on the drafts becoming valid instruments as a result of delivery, through whomever the messenger was and not withstanding that he was a fraudster."

Another relevant conclusion arrived at by Walker, J. is as follows (see ***Midland Bank v. Brown Shipley*** (1991) 1 Lloyd's Law Report 576 at page 585):

> "Returning now to the facts of the instant case, it seems to me that the key lies in whether there was any authority to deliver the banker's draft to Brown Shipley. The presumption is in favour of there being authority. The ***Cundy v. Lindsay*** [1878] 3 App. Cas. 459) principle could be applied so as to negative that authority (as per ***Lake v. Simmons***) but only if the precise identity of the bailee and possibly also the identity of the person to whom the banker's draft was to be delivered were mistaken and proved to be of fundamental importance. Neither ***Midland*** nor ***Citibank*** were under any mistake or misapprehension as to whom the draft was to be delivered. Furthermore, the bailee who physically carried the draft was a messenger whose precise identity was unimportant. Even if it could be suggested that it is going too far to say his precise identity was unimportant, it seems to me that neither ***Citibank*** nor ***Midland*** have established to the degree required that it was fundamental to them that the

> bailee was a particular person about whom they were mistaken, as opposed to a person whose attributes did not include authority from their customer as they believed. Once there was authority, title to the bankers' drafts was (as I see it) transmitted directly from ***Citibank*** or ***Midland*** to Brown Shipley, on the drafts becoming valid instruments as a result of delivery through whomever the messenger was."

Another case that supports the views that I have expressed is ***Clutton v. George Attenborough & Son*** [1897] A.C. 90. A clerk fraudulently caused cheques to be drawn by his employers payable to the order of a fictitious person. The clerk then got hold of the cheques when they were passed out for postage. He endorsed and encashed them with the respondents. The cheques were afterwards paid by the appellants' bankers and the respondents' bankers. The appellants having discovered the fraud, brought an action against the respondents to recover the amounts as money paid under a mistake of fact. The appellants were unsuccessful at first instance and on appeal to the Court of Appeal. Before their Lordships' House, the appellants contended, inter alia, that by section 21 subsection 1 of the Bills of Exchange Act, every contract on a bill or cheque is incomplete and revocable until "delivery" and that "delivery" cannot mean delivery by a thief. Such delivery, as existed, was "conditional or for a special purpose only" within the meaning of section 21 subsection 2(b). Lord Halsbury, L.C. expressed the following opinion (at page 93):

> "The facts are now beyond doubt, that the person who drew this cheque intended to draw a cheque, that he intended this cheque to be paid, and that

> he handed this cheque to his clerk. It is perfectly immaterial that he was induced to draw this cheque and to hand it to his clerk by fraud. What has that to do with the validity of the cheque as against a bona fide holder for value when it gets into the hands of that bona fide holder for value?"

Lord Shand expressed a similar opinion when he said (at page 95):

> "My Lords, it appears to me that cheques which have been signed and intended by the drawer to be issued, and which were parted with and issued in consequence of fraud practiced on the drawer, must in the hands of a bona fide holder for value be valid and effectual."

These authorities strongly support the contention of the respondent. I see no reason why I should depart from them by finding that the learned judge was wrong in his judgment on the issue of conversion. Nevertheless, the respondent argued in the alternative that title passed to the BOJ by the effect of estoppel, and I will now consider that defence.

Estoppel as a defence

Mr. Mahfood, Q.C. rightly conceded, in my view, that the learned judge was correct in stating in a general way the law applicable to this defence. This is what was said:

> "Estoppel is a defence to a claim in conversion. It consists of a rule of evidence which precluded the plaintiff from alleging facts inconsistent with a representation the defendant relied on and acted to his detriment. Such a representation may be made by words or conduct."

The learned judge followed up the general statement of the defence with due consideration of the conduct of the appellant, and painstakingly reviewed the evidence and the authorities which led him to find:

> "...that the said cumulative effect of the conduct of the plaintiff was a misrepresentation which was acted upon by the defendant who was not at fault. The defendant acted to its detriment. The plaintiff is therefore estopped from denying the existence of the state of affairs which it created."

Implicit in that finding is that the appellant's claim in conversion failed. Mr. Mahfood, Q.C. submitted that the finding was unreasonable, not supported by evidence, and contrary to law. This is how his principal ground of appeal on this issue reads:

> "In relation to the claim for conversion and the defence of estoppel the burden of proof was on the Defendant/Respondent to establish on the facts that the Plaintiff/Appellant was estopped by words or conduct from asserting its title to the cheque. The Defendant/Respondent failed to discharge this burden of proof since, inter alia:
>
> a) There is no evidence to support a finding that the Plaintiff/Appellant, by its words or conduct represented that Beckford, Phillips or Wildish were the true owners of the cheque, or had the Plaintiff/Appellant's authority to sell;
>
> b) There is no evidence that the Defendant/Respondent or its authorised agent, Richard Jones, relied on any representation made by the Plaintiff/Appellant or any agent acting on its behalf."

It seems quite clear to me that the evidence supported the finding that Wildish, Phillips and Beckford were acting in concert to perpetrate a fraud on the appellant. As I have said before, Dextra knew of the existence of Beckford. Ashenheim testified that he was told that Beckford was "the czar of foreign exchange in Jamaica." Dextra knew that both Wildish and Phillips were dealers in foreign currency. Wildish, Phillips and Beckford all knew that the BOJ was actively engaged in purchasing foreign currency. Wildish and Phillips in the past sold foreign currency to the BOJ through its authorised agents, but latterly, they sold through Beckford. Some days before the 20th January, 1993, the day the BOJ received the cheque, Beckford told Jones, the authorised agent of the BOJ, "that he was expecting funds from a group of Caymanian investors, that they were selling Bank of Jamaica US$3,000,000." The plot is plain -- Beckford said the funds were from a group of persons, "the payee would be the Bank of Jamaica", and payment for the cheque should be made with a number of cheques payable to persons that he would name. There is evidence which clearly established that Beckford supplied Jones with names of fictitious persons. Jones drew cheques to purchase the Dextra cheque in those fictitious names. Those cheques were given to Beckford and some of them were lodged to the Le Par Limited account in the Eagle Commercial Bank in Jamaica. The Le Par Limited account is operated by Wildish and Phillips and the address of the company is the same as that of the attorneys-at-law for Dextra. I think,

therefore, that the conduct of any one of the conspirators is attributable to the others -- they were all in it together. They all knew that Dextra intended to make a loan, and that Philips had special instructions from Dextra to see to it that the promissory note was properly executed before handing over the cheque to the BOJ. The condition attached to the delivery of the cheque to the BOJ was never communicated to the BOJ -- the promissory note was not executed by the BOJ or any of its authorised agents. The question of a loan from Dextra was never in the contemplation of the BOJ at any time, and the BOJ had not requested a loan from Dextra. All that was known to Phillips, Wildish and Beckford. The learned judge found as a fact that Phillips was the agent of Dextra, entrusted by them to deliver the cheque to the BOJ only on the condition that I have earlier stated. Phillips made the delivery through Beckford to the BOJ without any mention of the condition. So, coming back to the defence founded on the law of estoppel, the pertinent questions are: Was there a representation made by Dextra or its duly constituted agent which the BOJ relied on and acted to its detriment? Did Dextra conduct its affairs so as to induce the BOJ that the Dextra cheque was being offered for sale as foreign currency and that the BOJ was free to buy it as such? It is said that the doctrine of estoppel by negligence arose in the instant case. I do not agree for the simple reason that that doctrine may only be invoked if the BOJ could establish that Dextra owed it a legal duty of care. (See ***Mercantile Bank of India Ltd. v. Central Bank of India Ltd.*** [1938] 1 All

E.R. 52). Such a duty does not arise through carelessness. A person may be as careless with his property as he likes, and his negligence will not give rise to the operation of an estoppel (***Farquharson Bros. & Co. v. L. King & Co.*** [1902] A.C. 325).

Further, the BOJ would be required to establish that in breach of that duty of care, Dextra was negligent and that the negligence was the proximate or real cause of the BOJ being induced to purchase the Dextra cheque. I do not think that the BOJ established that Dextra owed it a legal duty of care, and so that defence fails.

But the BOJ also put forward the doctrine of estoppel by representation. Estoppel by representation is established where the owner of property has by his conduct or words represented that the seller has the owner's authority to sell the property. In other words, for the defence to succeed the evidence in the instant case must clearly establish that Dextra had by its conduct represented that Phillips and/or Beckford had its authority to sell the cheque as foreign currency, and that BOJ acted on that representation and altered its position. Simple delivery of possession is not sufficient to invoke the doctrine, and further, BOJ did not take delivery of the cheque before acting to its detriment by giving cheques in payment for it. Richard Jones gave cheques in part payment on the 18th and 19th January, 1993, but the Dextra cheque did not come to his hands until the 20th January, 1993. It is clear, therefore, that the physical cheque did not bring

about a representation which caused the BOJ to act to its detriment. It has been said that a plaintiff who pays money directly to a defendant represents to the defendant that he is entitled to the money and, accordingly, the defence of estoppel by representation could arise. But where, as in this case, the money is paid to an innocent third party by a fraudster, the true owner has made no representation whatsoever to the innocent third party, and the doctrine of estoppel will not arise. In the final analysis, it could be argued that BOJ did not act to its detriment since it gave value for the Dextra cheque and then negotiated it, thus recouping the amounts spent in purchasing it.

The question as to whether or not the doctrine of estoppel is applicable as a defence in any given case is always a difficult and complex one. Estoppels may arise on various grounds, and the learned judge, in the instant case, reviewed a number of authorities on the subject. But estoppel in the context of commercial law is seldom relied on as a defence and often is not successful. The case of ***R. E. Jones Ltd. v. Waring and Gillow Ltd.*** (supra) illustrates the views that I have expressed above. I need not rehearse the facts of that case. Suffice it to say that their Lordships were divided on the question of whether the doctrine was applicable in circumstances where money had been paid under a mistake of fact, and the plaintiffs sued the defendants for the recovery of the money as "money paid under a mistake of fact." It was held by Lord Shaw of Dunfermline, Lord

Sumner and Lord Carson (Viscount Cave, L.C. and Lord Atkinson dissenting), "that the plaintiffs were entitled to recover on the principle of ***Kelly v. Solari*** (1841) 9 M & W 54." It was held by Viscount Cave, L.C. (with the concurrence of Lord Atkinson) that "the plaintiffs having by their conduct induced the defendants to believe that the plaintiffs were indebted to them in the amount of the cheque, and the defendants having acted to their detriment on the faith of that belief, the plaintiffs were estopped from recovering the money."

A material difference in the principles applicable to the present case and that applicable to the ***R. E. Jones Ltd.*** case (supra) may be adduced from their Lordships' judgment in the ***R. E. Jones Ltd.*** case (supra). Their Lordships were there distinguishing the principles laid down in ***Watson v. Russell*** (1882) 3 B & S 34; 5 B & S 968 (which in my view is applicable in the present case) and the ***R. E. Jones Ltd.*** case (supra). This is what Lord Carson said (at page 701):

> "The case, therefore [i.e. ***Watson v. Russell*** (supra)] is not one of money paid under a mistake of fact, but is one, like many others that were cited in the course of the argument before us, where an agent acts either in excess of his duty, or contrary to his instructions, or even fraudulently, and the loss, if any such occurs, has to be borne, not by the payee, but by the principal, and that, I think, will be found to be the distinguishing feature in all the cases that have been cited in aid of the case put forward by the respondents."

Dealing specifically with the ***R. E. Jones Ltd.*** case (supra), his Lordship said:

> "Of course, if it could be shown that Bodenham was in any sense the agent of the appellants, the result would have been different and indeed that was conceded in the course of the argument by the counsel on behalf of the appellants."

In ***Watson v. Russell*** (supra), Cockburn, C.J. in his judgment said:

> "I consider the law to be now quite settled that if a person puts his name to a paper, which either is, or by being filled up or endorsed may be converted into, a negotiable security, and allows such paper to get into the hands of another person, who transfers the same to a holder, for consideration and without notice, such party is liable to such bona fide holder, however fraudulent, or even felonious, as against him, the transfer of the security may have been."

The Exchequer Chamber affirmed the judgment. Erle, C.J. said:

> "The plaintiff's cheque was a negotiable security, and, as such, having been taken by the defendant for value without notice, he has a right to keep it, although the plaintiff may be the true owner as between himself and Keys."

In my judgment, the state of the facts in the instant case do not give rise to the defence of estoppel. There is no representation sufficient to raise an estoppel and Dextra did not owe the BOJ a duty of care so as to give rise to the operation of estoppel by negligence.

Money Received

Dextra pleaded as follows, "Alternatively, the plaintiff claims against the Defendant US$2,999,000.00 received by the Defendant for the use of the Plaintiff." The particulars are stated as:

> "The money received was US$2,999,000.00 the proceeds of the cheque which was cashed and converted into money by the Defendant."

This alternative claim is invariably included in actions for conversion. It is not dependent on the claim for conversion; a plaintiff may elect to forego to sue for damages for conversion and sue instead for the said sum as money had and received by the defendant to the use of the plaintiff. The claim is based on the plaintiff's proprietary right, and generally it will only succeed if the plaintiff can show that the defendant received his money and did not, as a result of that receipt, obtain a good title to it. The usual type of cases where the plaintiff has been successful are those where money is paid under a mistake of fact, and what they seek is to recover the plaintiff's money and prevent the defendant's unjust enrichment. The principles upon which such money is recoverable are succinctly stated by Robert Goff, J., in ***Barclays Bank Ltd. v. W. J. Simms Son & Cooke (Southern) Ltd. & anor.*** [1980] 1 Q.B. 677. But, as I have already opined, the facts in the instant case do not give rise to a mistake of fact. The claim is for the recovery of money "received by the defendant for the use of the plaintiff." "If a person pays money to another under a mistake of fact which causes him to make the

payment, he is prima facie entitled to recover it as money paid under a mistake of fact." (Emphasis supplied) (per Robert Goff, J. in the ***Barclay's*** case (supra) at page 645). The plaintiff Dextra, in the instant case, did not plead a mistake of fact. Counsel for Dextra placed great reliance on the ***R. E. Jones Ltd.*** case (supra), but, in so far as his arguments may have been directed at recovery based on payment made on a mistake of fact, I think it is quite irrelevant to the issue raised on the pleading that I have set out above. In the ***R. E. Jones Ltd.*** case (supra), the plaintiffs' action was pleaded as four claims in the alternative as follows:

> **1.** "By reason of the premises the plaintiffs claim from the defendants the sum of £5000 as money had and received by the defendants to the use of the plaintiffs,"
>
> **2.** "...as money paid as and for a consideration that has failed."
>
> **3.** "...as money paid under a mistake of fact."
>
> **4.** "...that the defendants were guilty of negligence whereby the plaintiffs have suffered damage."

The arguments advanced before their Lordships' House by the appellants centred on the appellants' entitlement to recover the money as having been paid under a mistake of fact and their Lordships have based their judgment on that premise. But what we have to consider is, whether when the BOJ negotiated the cheque and received the sum of US$2,999,000, therefor, it received it to the use of the plaintiffs. It is of

crucial importance to bear in mind that the BOJ was a buyer of foreign currency in the course of its statutory functions, and that the evidence clearly established that the Dextra cheque was bought in those circumstances and lodged to the BOJ foreign currency account at Citibank International, Miami, Florida, on January 25, 1993.

Defence of Purchaser for Value

As I said before, a claim for money had and received is based on the plaintiff's proprietary right against the defendant. A successful claim will result in a personal judgment. But the claim will normally fail if the defendant is a bona fide purchaser for value, and has obtained title to the money. I must now consider whether the equitable doctrine of a bona fide purchaser will defeat the plaintiff's claim in the instant case. Let me reiterate my opinion that, in the instant case, legal title in the cheque passed to the BOJ. Accordingly, if the evidence shows that the BOJ gave value in purchasing the cheque and had no notice of the condition that Dextra imposed on its delivery, and that that was still the position when the cheque was lodged to its account in the Citibank International, Miami, and the BOJ received its equivalent in United States currency, then equity will not aid Dextra. The uncontradicted evidence, as I have already stated, established beyond doubt that Beckford sold the Dextra cheque to the authorised agents of the BOJ. It was argued that any value that may have been given for it was given before the cheque was delivered to the BOJ. That may be so, but the giving of

value need not be simultaneous with the transfer of the property in the cheque. What is important is that at the time that the BOJ received the proceeds of the cheque, the BOJ was not fixed with notice of an equitable interest. The learned judge found as a fact that Dextra intended to make a loan. Phillips, Dextra's agent, had strict instructions of the conditions precedent to the delivery of the cheque as a loan. Those conditions were not fulfilled. Instead, the cheque was sold to the BOJ and delivered on January 20, 1993 -- property passed then. The fraud perpetrated on Dextra by Wildish, Philips and Beckford was not discovered by either Dextra or the BOJ until early February, 1993. The BOJ had negotiated the cheque on January 25, 1993. There can be no doubt that the BOJ was a bona fide purchaser of the Dextra cheque, and gave value therefor.

The question of whether or not the BOJ had notice or can be fixed with notice must now be considered. If it can be shown that the BOJ, in conscience, can be said to have been affected by notice of the equitable interest of Dextra, its legal title would be of no avail. The onus was on the BOJ to show that its conscience was not so affected by notice. It must show that it acted honestly. Section 90 of the Act echoes the common law by providing:

> "A thing is deemed to be done in good faith within the meaning of this Act, where it is in fact done honestly whether it is done negligently or not."

Equity has a more generous approach, and as the learned authors of ***The Law of Restitution***, 4th edition, at page 761, states:

> "A defendant may be deemed to have constructive or imputed notice if he deprives himself of actual knowledge by failing to carry out or by abstaining from carrying out the usual and proper inquiries which would have been conducted by a reasonable and prudent purchaser. He has imputed notice of equitable interest of which his agent has actual or constructive notice, provided that the agent acquired such notice in the course of the particular transaction or purchase."

Up to the time the BOJ received the proceeds of the cheque, certain facts relevant to the question of notice emerged. Before the cheque was seen, Beckford told Jones, the agent of the BOJ, that he was expecting funds from a group of Caymanian investors, and that they were selling the BOJ US$3,000,000. Now Beckford had been selling United States currency to the BOJ on a regular basis, but it does not appear that at any one time did he sell such a large amount. It was suggested that the very amount of the cheque should have placed the BOJ on its enquiry. But it seems to me that the only reasonable inference to be drawn from the fact of Beckford's notification to Jones is that it was intended to and did in fact obviate a number of questions that may have been asked about such a vast amount. The fact that Beckford supplied a number of names of persons (some fictitious) to whom the cheques in payment should be made, was intended to give credence to his story. Then the cheque itself, although provision was made for its purpose to be stated on the face of it, that was not done. It is

true that Dextra was the drawer of the cheque, but that could not prove unequivocally that Dextra was making a loan to the BOJ. Dextra made no enquiries whatsoever to ascertain from the BOJ if it had requested the loan as Wildish said it did. The evidence established that the holder of an account with Dextra could request Dextra to pay a third party and that Dextra would effect payment in the name of that third party. That is common banking practice, and having regard to the fact that the BOJ was an active purchaser of foreign currency, in the course of its business, I think it would be unreasonable to expect it to make enquiries as to the title of all those from whom it bought foreign exchange. Lindley, L.J. recognised such a limitation to the doctrine of constructive notice as valid when he said in ***Manchester Trust v. Furness*** [1895] 2 Q.B. 539 (at 545):

> "In dealing with estates in land title is everything, and it can be leisurely investigated; in commercial transactions possession is everything, and there is no time to investigate title; and if we were to extend the doctrine of constructive notice to commercial transactions we should be doing infinite mischief and paralysing the trade of the country."

In my judgment, there is ample evidence to support a finding that the BOJ was a bona fide purchaser of the Dextra cheque; that it gave value for it, and negotiated it honestly; that it deposited the said cheque to its account; and that up to the time it received the sum of US$2,999,000 in exchange for the cheque, neither it nor its agents was fixed with notice, actual or

constructive, or imputed notice of any equitable interest affecting the cheque or its proceeds.

Defence of Change of Position

The BOJ relied on the alternative defence of change of position. It pleaded that it changed its position in good faith and that it would be inequitable to require it to make payment as claimed. This is a legitimate defence to a claim for restitution in an action for money had and received, and the leading case is ***Lipkin Gorman (a firm) v. Karpnale Ltd. and anor.*** (supra). It is sufficient at this stage to state the headnote in part:

> "**Held**--(1) Where the true owner of stolen money sought to recover it from an innocent third party in an action for money had and received, the recipient of the stolen money was under an obligation to restore an equivalent sum to the victim if he had not given full consideration for it and thus had been unjustly enriched by it at the expense of the true owner unless he could show that he had altered his position in good faith so that it would be inequitable to require him to make restitution or restitution in full." [Emphasis supplied]

Lord Goff of Chieveley, in his opinion in the ***Lipkin Gorman*** case (supra), considered in depth the defence of change of position put forward in that case, and the underlying principles. The short facts, in so far as they are relevant to this issue, are as follows: Norman Cass was a partner in a firm of solicitors, Lipkin Gorman. He was authorised to draw cheques upon the firm's client account and he misappropriated large sums from that account by various methods. Most of the money was used by Cass to

exchange for gaming chips which he would use to gamble at a casino club. The chips remained the property of the club, and those that he had not lost in gambling he would exchange for cash. When his fraud was discovered, the firm of solicitors, Lipkin Gorman, commenced proceedings against the club, Karpnale Limited, for the money taken from the client account and gambled away at the club. That claim for money had and received failed at first instance and on appeal and again before their Lordships' House. Lord Goff had this to say (at page 532):

> "I accept that the solicitors' claim in the present case is founded upon the unjust enrichment of the club, and can only succeed if, in accordance with the principles of the law of restitution, the club were indeed unjustly enriched at the expense of the solicitors."

Then at page 534 his Lordship continued:

> "At present I do not wish to state the principle any less broadly than this: that the defence is available to a person whose position has so changed that it would be inequitable in all the circumstances to require him to make restitution, or alternatively to make restitution in full."

And a little further on, his Lordship continued:

> "The defence of change of position is akin to the defence of bona fide purchase; but we cannot simply say that bona fide purchaser is a species of change of position. This is because change of position will only avail a defendant to the extent that his position has been changed; whereas where bona fide purchase is invoked, no inquiry is made (in most cases) into the adequacy of the consideration."

There can be no doubt that on the facts of the instant case the BOJ gave value for the cheque. The evidence is that the BOJ was buying one United States dollar for Jamaican twenty-two dollars fifteen cents. The authorised agents of the BOJ paid to Beckford a number of cheques drawn on the BOJ to cover the purchase price of the Dextra cheque at the exchange rate above, and the BOJ honoured those cheques. It seems clear, therefore, that it cannot be maintained that the BOJ was unjustly enriched at the expense of Dextra or at all; the BOJ gave full consideration. Accordingly, on this ground also, I think that it would be inequitable to require the BOJ to return the US$2,999,000 claimed by Dextra as money had and received to the use of Dextra.

CONCLUSION

In my judgment, this appeal (on both the substantive and alternate claims) should be dismissed and the judgment of the learned judge affirmed. The respondent should have the costs of the appeal.

BINGHAM, J.A.:

The facts and the arguments in this appeal have been fully set out in the judgments of Forte and Patterson, JJA, and in this regard does not call for any repetition on my part.

Before us, as in the court below, the appellant contended that the title to the cheque never left the appellant but remained with the appellant. Such authority, as was given to Michael Phillips to deliver the cheque to the principals at the Bank of Jamaica, was conditional upon the Central Bank's acceptance of the offer of the loan which required the proper officer at the Central Bank executing and sealing the promissory note evidencing the said loan. Once Phillips, in keeping with the fraudulent scheme hatched by Wildish, Orvillle Beckford and himself formed the intention to sell the Dextra cheque for three million dollars as a foreign exchange purchase to the authorised agents of the Central Bank; the loan contract became void *ab initio* and no title could pass to the Central Bank

As the facts clearly established, however, title in the cheque did pass to the Bank of Jamaica. This was so as:

> **1.** The appellant's cheque was made payable to the Bank of Jamaica.
>
> **2.** The appellant intended that the said cheque be paid to the said Bank.
>
> **3.** The appellant was not mistaken as to the identity of the Bank of Jamaica in whose favour the cheque was drawn and to whom the cheque was to be delivered.

> **4.** The appellant caused delivery of the said cheque to be made to the Bank of Jamaica.

The mere fact that the cheque was intended by the appellants as a loan and not a foreign exchange transaction would not have affected the question of property in the cheque passing to the Bank of Jamaica. As the authorities clearly establish whether property in goods passes or not is a matter of intention. Mistake or fraud (as the situation here relied on by the appellant) notwithstanding would not prevent title to the cheque from passing to the Bank of Jamaica.

As Goff, J. observed in ***Barclays Bank v. Simms*** [1980] 1 Q.B. 677 at 689, whether there was a mistake of fact was:

> "...irrelevant to the question whether property had passed, indeed where an action is brought to recover money paid under a mistake of fact, property will almost invariably have passed to the defendant, the effect of the action if successful being simply to impose upon the defendant a personal obligation to repay the money."

Also in ***Midland Bank v. Brown Shipley*** (1991) 1 Lloyd's Law Report 576, Waller, J. at page 584, in dealing with an argument raised that title would not pass because of the mistaken nature of the transaction in ***Jones v. Waring and Gillow*** [1926] A.C. 671, observed thus:

> "I think it would have been a matter of surprise if it had been suggested that ***Waring and Gillow*** did not get a title to the two cheques on delivery by Bodenham albeit possibly a voidable title."

As the evidence in this case clearly showed, the Bank of Jamaica through its two foreign exchange agents received the cheque in the ordinary course of business, the said cheque being a negotiable instrument transferable by delivery to the said bank and they proceeded to give full value for the said cheque.

Moreover, as the appellants admitted throughout the entire period from the initial approach made to them by Wildish, a foreign exchange trader purporting to represent the Bank of Jamaica, no attempt was made to establish some form of contact with the principals of the Central Bank to determine the genuineness of the request for the alleged loan. As to what resulted subsequently, therefore, the fault can only be laid at the door of the appellant.

Given the fact that the Bank of Jamaica had never had any prior dealings with the appellant, it must have been obvious to the management of the appellant bank that a Central Bank of a sovereign state would hardly rely on foreign exchange traders to negotiate a loan of whatever nature on its behalf. The whole conduct of Dextra's management and their attorneys, Myers and Alberga, Daryl Myers himself being a director of the appellant was what led the learned trial judge to remark that:

> "I am of the view that the plaintiff behaved with a studied consistency in avoiding any direction to act with the Bank of Jamaica, the Central Bank of the sovereign state of Jamaica and neglected to follow the normally acceptable procedures expected by the Bank of Jamaica and used in normal lending transactions with large foreign institutions. The plaintiff sought to route its cheque, Exhibit 10, away from transmission to the defendant thereby leading the defendant to believe that the transaction was not

> one in which it was accepting a loan but engaging in
> a sale transaction involving the said cheque."

While also recognising the fact that this conduct on the appellant's part would not give rise to a defence of estoppel, the learned judge, in my view, quite rightly recognised that "the law while excusing inadvertence which facilitates the thief does not countenance conduct which gives active aid and encouragement to the thief."

By paying out the Jamaican dollars equivalent of US$2,999,000, the Bank of Jamaica gave full value for the Dextra cheque acting in the belief thereby that it was purchasing the appellant's cheque. The respondents were accordingly entitled to rely on the rule in ***Cocks v. Masterman*** [1829] 9 B and C 902 as having altered their position to their detriment.

Having regard to the manner in which the Dextra cheque was issued, and passed through the respondent's foreign exchange system, the arguments advanced by the appellants that it was breaches of the respondent's agency agreement that led to the purchase of the Dextra cheque is devoid of merit. Dextra was concerned in negotiating an alleged loan with the Bank of Jamaica through a foreign exchange trader a fact unknown to the principals at the Central Bank. It was their failure to communicate with the Bank of Jamaica which resulted in the cheque being issued in the first place and subsequently dealt with in the manner that it was by Wildish, Phillips and Beckford. Accordingly, it was Dextra's conduct that led to the loss of the proceeds of the cheque, and the

foreign exchange system at the Bank of Jamaica had nothing to do with that loss.

In the circumstances, title to the cheque having passed to the Bank of Jamaica who gave full value for it, the learned trial judge was correct in rejecting the claim in conversion and for money had and received.

Conclusion

An examination of the arguments before the learned judge below and before this court shows that it was, as the respondent contended, the conduct of the appellant bordering on the reckless manner in which they dealt with the cheque drawn in favour of the Bank of Jamaica without making any contact with the principals at the Central Bank that created the opportunity for the fraudsters Wildish, Phillips and Beckford to dispose of the cheque to foreign exchange agents at the Central Bank as a foreign exchange purchase. Phillips, unlike Bodenham in ***Jones v. Waring and Gillow*** (supra), cannot be seen as "a boy messenger" devoid of any authority to pass title in the Dextra cheque. As the evidence established, he was the appellant's agent with a secret limitation which he failed to communicate to the principals at the Bank of Jamaica. This meant that in failing to communicate the fact that the cheque was for delivery to the Bank of Jamaica conditional on their acceptance of the offer of a loan on the terms as stipulated in the promissory note, the Central Bank was not bound by the condition.

For reasons to which I have already adverted, the property in the said cheque having passed to the Bank of Jamaica upon delivery and being received into its foreign exchange system for which the Central Bank gave full value in Jamaican dollars in purchasing the cheque, the Bank of Jamaica was both legally and morally justified in retaining the sum of US$2,999,000 received.

Also pressed into argument at the close of the submissions before us was the question of interest. In the light of the conclusion reached, however, the necessity to deal with this question did not arise.

I would, therefore, join with my brethren in upholding the judgment of Harrison, J. and dismissing the appeal with an order for costs in terms of the order as set out in the judgment of Forte, J.A.