Privy Council Appeal No. 26 of 2000

Dextra Bank & Trust Company Limited *Appellant*

v.

Bank of Jamaica *Respondent*

FROM

THE COURT OF APPEAL OF JAMAICA

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JUDGMENT OF THE LORDS OF THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL,
Delivered the 26th November 2001

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Present at the hearing:-

Lord Bingham of Cornhill
Lord Goff of Chieveley
Lord Hobhouse of Woodborough
Sir Martin Nourse
Sir Patrick Russell

[Delivered by Lord Bingham of Cornhill and Lord Goff of Chieveley]

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1. On 19 January 1993 Dextra Bank & Trust Co Ltd ("Dextra") drew a cheque dated 20 January 1993 on its bankers Royal Bank of Canada (New York) in favour of the Bank of Jamaica ("the BOJ") for US$2,999,000. The BOJ received that cheque on 20 January 1993. On 25 January 1993 the BOJ negotiated the cheque by indorsement and delivery to Citibank International Ltd which duly collected payment from the Royal Bank of Canada. Dextra drew its cheque intending to lend the sum specified to the BOJ against the security of a promissory note executed by the BOJ. The BOJ for its part intended to buy the specified sum of United States dollars in exchange for the equivalent in Jamaican dollars, which it paid to individuals understood to be nominated on behalf of Dextra. Each party was deceived as to the intention of the other and the Jamaican dollar sums paid by the BOJ were received not by Dextra but by others who included those responsible for the deception.

2. Dextra sued the BOJ to recover the sum paid under its cheque, contending that the BOJ had converted the cheque or alternatively

that it (Dextra) was entitled to recover the proceeds of the cheque as money paid under a mistake of fact. Its claim failed in the Supreme Court of Judicature of Jamaica (Harrison J) and in the Court of Appeal (Forte, Patterson and Bingham JJA). It now appeals against the dismissal of its claims by leave of the Court of Appeal.

3. Since resolution of the issues in this appeal depends on a correct understanding of the facts it is necessary to recite the relevant history, much of it uncontroversial, in some detail.

4. Dextra is a bank registered in the Cayman Islands and licensed under Cayman law to carry on banking business. Its chairman was Mr Jack Ashenheim, a chartered accountant. He was also employed as a financial consultant and accountant by Myers & Alberga, a firm of Cayman attorneys, one of whose partners, Mr Darryl Myers, was a director of Dextra and acted as its attorney–at-law.

5. The BOJ is the central bank of Jamaica, established by statute. It has the ordinary functions of a central bank and is authorised to buy, sell and borrow foreign currency.

6. Until September 1991 exchange controls restricted the buying and selling of foreign currency in Jamaica. The foreign exchange system was then liberalised and it became possible for anyone to buy, sell, borrow or lend foreign currency from or to authorised dealers, although only those authorised could carry on the business of dealing in foreign currency. After September 1991 the BOJ became active in the market, employing a team of authorised agents to identify vendors of foreign currency and to make purchases on behalf of the BOJ. Among its agents authorised for this purpose were Messrs Richard Jones and Wycliffe Mitchell. The BOJ provided overdraft facilities on which agents could draw to make payment for their purchases up to a limit of Jamaican $5 million, later reduced to Jamaican $4 million, but the evidence is clear that these limits were very greatly exceeded. Within the BOJ a special unit responsible to Mr Rupert Straw, a Deputy Governor, supervised the purchase of foreign exchange in the open market.

7. Mr Orville Beckford was employed as Director of the Economic Co-operation Department of the BOJ from May to December 1992, when he was made redundant. He was however kept on to perform some services relating to his old department and occupied an office in the BOJ until his engagement was finally terminated on 8 February 1993, after the events giving rise to these proceedings had come to light. His duties did not at any time

involve the purchase of foreign currency or helping the authorised agents of the BOJ to do so. But it seems that Beckford would identify vendors of foreign currency and sell or arrange sales to certain of the BOJ's authorised agents. Such agents included Jones and Mitchell. There is no finding that Beckford was authorised by the BOJ to do this. But Jones' evidence was that he made arrangements with Beckford in August 1992 to assist in obtaining foreign currency. Thereafter Beckford supplied him with US$200,000 on a daily basis. Jones would pay for the sums supplied by Beckford with cheques drawn in favour of payees named by Beckford. Sometimes Jones would draw cheques and give them to Beckford before receiving the foreign currency he was buying.

8. Among those who sold foreign currency to the BOJ's authorised agents, either directly or indirectly through Beckford, were Messrs Michael Phillips and John Wildish. They sold such currency to Jones from 1991 until April 1992. After that date Jones did not buy directly from them but, as the trial judge put it, "Beckford subsequently provided the said currency, up to the time of purchase of [Dextra's] cheque". It was Beckford, Phillips and Wildish who perpetrated the fraud at the heart of this case.

9. On about 11 January 1993 Wildish approached Myers & Alberga asking for a short-term loan of US$3 million for three months on behalf, he said, of the BOJ. He did not represent himself to be an agent or employee of the BOJ, and in truth was neither. He had no authority of any kind from the BOJ. Myers spoke to the secretary of Dextra and then wrote to Dextra confirming the request for a loan. On about 12 January Phillips and Wildish personally represented to Dextra that they had been asked by Beckford, an officer of the BOJ, to try and obtain a loan. Again, they did not represent themselves to be servants or agents of the BOJ. On 13 January the board of Dextra passed a resolution agreeing to make a loan and authorising the chairman to negotiate and approve the terms of the loan and of a promissory note in consultation with Dextra's attorney. The secretary of Dextra told Myers of the resolution. Myers drafted a promissory note which he passed to Wildish for approval. Some amendments were made, it seems at the instance of Beckford. On 15 January Myers sent Wildish a draft of the promissory note and added:

> "I suggest 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."

He then gave Wildish instructions as to the signing of the promissory note:

> "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."

The BOJ knew nothing of any proposed loan or promissory note. No contact had been made with anyone acting on its behalf or with its authority.

10. At 1.30 pm on 19 January 1993 Ashenheim, as chairman of Dextra, met Myers and Phillips in Grand Cayman. Dextra's cheque for US$2,999,000 (representing US$3 million less a deduction of US$1,000 for legal costs), post-dated 20 January, drawn on Royal Bank of Canada, Dextra's bankers in New York, and payable to the BOJ, was handed to Phillips by Myers. Myers told him to take the cheque and two copies of the promissory note to the BOJ, to see personally that the note was signed by the Governor or the Deputy Governor and another authorised officer, to hand Dextra's cheque to the BOJ upon receipt of the signed note, to take the note to the Stamp Commissioner for stamping as exempt from stamp duty and to return the signed note to him by courier. Phillips did not follow these instructions.

11. According to Jones, whose evidence was accepted, Beckford told him, sometime before 20 January, that he was expecting to get US$3 million, payable to the BOJ, from a group of Caymanian investors. He would be asking Jones to buy US$2 million and Mitchell US$1 million. He would ask that payment be made "by way of a number of cheques to payees which he would provide". It appears that he later made this request. On 19 January Jones drew 7 cheques payable to a number of individuals. On the next day he drew another cheque, to make up the total of US$2 million. Mitchell drew four cheques, three on 18 January and one on 19 January, amounting in total to US$999,000. These cheques were given to Beckford, and all of them (with the exception of that dated 20 January) were presented and cleared on or before close of business on 19 January. None of these cheques was drawn in favour of Dextra. The Court of Appeal recorded:

> "… the undisputed fact is that certain of those cheques made payable to fictitious persons were lodged to the credit of Le Par Ltd 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 Phillips or Wildish in each case".

12. In drawing cheques in favour of payees (or fictitious payees) nominated by Beckford in anticipation of receiving the foreign currency they were buying Jones and Mitchell failed to comply with a term of their respective agency agreements with the BOJ which provided:

> "All payments for purchases by the Agent must be by way of cheques drawn in the name of the Vendor. Payment may only be made to the Vendor against immediate delivery of the cash items or effects to the Agent."

13. Late on 19 January, or possibly on the following day, Beckford handed Dextra's cheque to Jones in Jamaica. It was an unremarkable document. The only unusual feature of the cheque form was the inclusion of the printed word "For" and then a blank space in which the purpose of the cheque could be specified. This space was left blank.

14. The Jamaican dollar sums expended by Jones and Mitchell in buying the US dollars represented by the Dextra cheque were debited to their respective accounts and the accounts were promptly replenished. On 20 January the cheque was lodged to the credit of the BOJ and entered in the BOJ's records as a purchase of foreign exchange. A loan would have been differently recorded. As already recited, the BOJ indorsed the cheque to Citibank which presented the cheque for payment and it was paid.

15. In evidence at the trial Beckford testified to a course of events quite different from that narrated above (he said that the promissory note had been duly signed on behalf of the BOJ by Straw, the Deputy Governor, and the supposed promissory note was produced), but his evidence was roundly rejected and need not be summarised. It is not suggested that he had authority from the BOJ to borrow or buy US dollars from Dextra or that the BOJ held him out as having such authority. No finding was made below as to his legal role in this transaction beyond Patterson JA's description of him as a "mere human conduit, entrusted with the cheque to carry it from the drawer Dextra to its intended payee the BOJ". In contrast, the trial judge and all three members of the Court of Appeal were satisfied that Phillips acted as the agent of Dextra to hand over its cheque to the BOJ (although his authority was of course subject to clear limitations, never communicated to the BOJ) and this he did through Beckford as an intermediary.

16. No finding was made, nor was it suggested, that either Jones or Mitchell acted otherwise than in complete good faith at any stage of this transaction. Neither had notice of the limitations on Phillips' authority. The courts below made no significant criticism of the BOJ, although it is clear that the agents' overdraft limits were exceeded by a gross margin and the prescribed procedures for making payment to vendors of foreign currency were not followed. In contrast the trial judge criticised the conduct of Dextra as "less than prudent" in a number of respects which he listed but in particular in seeking to make a substantial loan without making contact with anyone representing the borrower, a criticism which the Court of Appeal adopted.

Dextra's claim in conversion

17. The tort of conversion, with special reference to bills of exchange, was authoritatively described by Diplock LJ in *Marfani & Co Ltd v Midland Bank Ltd* [1968] 1 WLR 956 at 970-971 in a passage too well-known to require repetition. It cannot be doubted that the recipient of a cheque who indorses it and negotiates it to a third party exercises the rights of an owner. He treats it as his. That is what the BOJ did here. So the BOJ committed the tort of conversion, unless the cheque in law belonged to it. Put another way, Dextra was entitled to exercise the rights of an owner if it was the owner, but not if it was not. So the fate of Dextra's claim in conversion must depend on whether in law the BOJ was or was not the owner of the cheque.

18. Bills of exchange are governed in Jamaica by the Bills of Exchange Act, which derives from an Act of 1893 and is in substance (although not in layout) indistinguishable from the British Bills of Exchange Act 1882. It is to the statute one must first look. Dextra's cheque was an unconditional order in writing, addressed by one person to another, signed by the person giving it, requiring the person to whom it was addressed to pay on demand a sum certain in money to or to the order of a particular person. It was thus a bill of exchange within the terms of sections 3 and 73 of the 1882 Act, to which (for convenience) further references will relate, and the material provisions of the Act apply to it. Section 21 of the Act provides:

> "(1) 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.

(2) 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 be 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.

(3) 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."

Subsection (1) lays down the cardinal rule that title to a bill passes on delivery. This reflects the commercial reality that cheques are treated as the equivalent of cash. "Delivery" is defined in section 2 of the Act to mean "transfer of possession, actual or constructive, from one person to another". There is no question of constructive possession here, since the BOJ acquired actual possession. Section 2 makes plain that a cheque is issued when it is first delivered, complete in form, to a person who takes it as a holder. "Holder" is defined to mean "the payee or indorsee of a bill or note who is in possession of it".

19. Section 21(2) is of obvious relevance to this appeal. The dispute here arises between the immediate parties to the cheque and the BOJ was not a holder in due course: *R E Jones Ltd v Waring & Gillow Ltd* [1926] AC 670. It is clear that in using the term "conditional" subsection (2)(b) is referring not to the terms of the bill, which must be unconditional to satisfy the definition in section 3(1), but to the terms on which possession is transferred to the transferee. Such transfer may be on terms which make clear that the transferee is not to treat the bill as his own unless or until a further event occurs, as where a bill is delivered in escrow. It seems clear that any condition or special purpose must be communicated by the transferor to the transferee, since the

commercial efficacy of the transaction depends on the transferee knowing that he may not, at least for the time being, present or negotiate the bill: see *Equitable Securities Ltd v Neil* [1987] 1 NZLR 233. There having been no such communication, it was accepted by Dextra that Beckford's delivery of the cheque to Jones was not conditional.

20. Argument in the appeal focused on the requirement in subsection (2)(a) that delivery "to be effectual must be made either by or under the authority of the party drawing". For Dextra it was strongly argued that delivery of its cheque to the BOJ was not made by it or under its authority as drawer because delivery was in fact made by Beckford who was not authorised by Dextra to make delivery. To this submission the BOJ countered that Phillips was authorised by Dextra to make delivery of the cheque to the BOJ, a task he was to undertake whether the transaction was one of loan (as Dextra thought) or purchase (as the BOJ thought): in either event the cheque was to be delivered and was to be immediately payable. The BOJ could not, it was said, be affected by any limitation on the authority of Phillips not disclosed to the BOJ. Nor did it make any difference that Phillips, as an agent authorised to make delivery, had chosen to employ Beckford as an intermediary. It was as if the cheque had been sent by post.

21. There is a surprising lack of authority on the construction of section 21(2)(a), and the Board's attention was not drawn to any authority factually indistinguishable from the present. It is accordingly necessary to decide whether, on the facts of this case, there was an effectual delivery of the cheque to the BOJ so as to constitute the BOJ a holder entitled to sue on the cheque.

22. Dextra drew the cheque payable to the BOJ. The cheque was regular and complete on its face. Dextra entrusted this cheque to Phillips whom it authorised to deliver it to the BOJ. Such authority was circumscribed by conditions relating to the obtaining of a promissory note, but subject to those conditions delivery was authorised. It is plain (and not, as it is understood, contested) that if Phillips had personally delivered the cheque to the BOJ, although without observing or notifying to the BOJ the conditions to which his authority to deliver was subject, the BOJ would have acquired good title to the cheque provided it gave value and had no notice of Phillips' limited authority. That is the effect of the decision in *Watson v Russell* (1862) 3 B&S 34; (1864) 5 B&S 968. The same result would follow if (as was the case here) Phillips had obtained the cheque from Dextra in fraud of Dextra, provided the BOJ had no notice of that fraud: *Clutton v George Attenborough & Son*

[1897] AC 90; *Talbot v Von Boris* [1911] 1 KB 854; *Hasan v Willson* [1977] 1 Lloyd's Rep 431.

23. Thus Dextra rested its conversion claim on a single point, the engagement by Phillips of Beckford to effect physical delivery of the cheque to Jones as the agent of the BOJ. The narrowness of this point can be demonstrated by considering varied factual hypotheses. Suppose Phillips had, as instructed, obtained a promissory note duly executed by the BOJ, had had it duly stamped and had returned it to Dextra by courier, and had then sent Dextra's cheque to the BOJ through the post or via a messenger. Could Dextra have resisted a claim on the cheque by the BOJ on the ground that there had been no effectual delivery? Plainly not. Or suppose no condition had been imposed by Dextra on Phillips with regard to a promissory note, but he had been clearly instructed to hand over a cheque personally and had instead posted it to the BOJ. Could Dextra have resisted a claim by the BOJ on the cheque on the ground that there had been no effectual delivery? Again, plainly not. These examples show that section 21(2)(a) is concerned with authority to deliver and not with the precise mode of delivery which is authorised. This distinction makes good sense. If a cheque is drawn in favour of a named payee and is placed in, for example, a file, from which it is abstracted by a thief or mischief-maker by whom it is handed to the payee, it seems just that the drawer should not be liable since he has never authorised delivery at all. But if the drawer prescribes delivery by one method and physical transfer is effected by another, in circumstances where the payee gives value and does not (and ordinarily could not) know of the method of transfer prescribed by the drawer, it would seem neither just nor consistent with the objective of achieving maximum certainty in mercantile transactions to deny the transferee a right to recover. It was accepted that the BOJ gave value for the cheque.

24. Here, Phillips was Dextra's agent with authority to hand over the cheque to the BOJ. He chose to do this through Beckford. It was not found, nor in view of the findings was it argued, that Beckford was the agent of the BOJ. It might well have been different if he had been, as it might well have been different in *R E Jones Ltd v Waring & Gillow* (above) if Bodenham had been the agent of Jones: see pp 695, 701. Beckford was a bailee of the cheque, with no right over it and no task in relation to it other than to carry it to the BOJ: he was aptly described as a "mere human conduit". It would be anomalous if his adventitious interposition into the chain of delivery had the legal effect for which Dextra contended, and the Board is satisfied that it did not.

25. For these reasons, which derive some support from *Midland Bank Plc v Brown Shipley & Co Ltd* [1991] 1 Lloyd's Rep 576 at 583 and *Yan v Post Office Bank Ltd* [1994] 1 NZLR 154, and which are essentially the grounds relied on by the Court of Appeal, Dextra's claim in conversion was rightly rejected. This conclusion makes it unnecessary to review a number of other arguments ventilated before the Board and in the courts below (estoppel, negligence, the rule in *Cocks v Masterman* (1829) 9 B&C 902 and the rights of a bona fide holder for value). The BOJ acquired good title to the cheque and did not convert it.

Dextra's Restitutionary Claim

26. Their Lordships turn to the second part of the appeal. This relates to the alternative claim which Dextra has advanced against the BOJ, that it is entitled to recover from the BOJ the sum of J$2,999,000, the amount of the cheque, as money paid under a mistake of fact, viz. the mistaken belief that the money was paid as a loan. The trial judge, Paul Harrison J, held that the money was paid under a mistake of fact; but he also held that the BOJ had changed its position in that the cheque was purchased by Jones and Mitchell, the BOJ's authorised agents, in good faith, and the BOJ reimbursed their accounts to the full value of the cheque. In these circumstances, he held that the defence of change of position was available to the BOJ, and that Dextra's claim on the ground of mistake must fail. His decision on this point was affirmed by Forte JA and Patterson JA in the Court of Appeal, on the ground that the BOJ acquired the cheque in good faith and for value in that the agents of the BOJ paid Beckford for the cheque by a number of cheques drawn on the BOJ which BOJ duly honoured, and that in these circumstances the BOJ was not unjustly enriched. The point does not appear to have been considered by Bingham JA.

27. This alternative claim is based upon the premise that the BOJ did acquire the title to the cheque (otherwise Dextra would have been able to recover in the tort of conversion); it is not a proprietary claim. It is a claim for money had and received as being money paid by Dextra to the BOJ under a mistake of fact. Dextra have therefore to establish that it was so paid. That is the first issue. The second relates to whether the BOJ have a defence to the claim on the ground of change of position. Their Lordships have had the benefit of well researched argument from counsel on both sides in relation to these two issues for which they are grateful. The particular facts of the present case have complicated the resolution of the issues. In relation to the question of mistake the salient feature is that Dextra mistakenly trusted their agents, in particular Phillips, to carry out their instructions and were let down by them.

In relation to the question of change of position, the complicating feature is one of timing. Jones and Mitchell did not wait until after they had received the Dextra US dollar cheque from Beckford before handing over the Jamaican dollar cheques drawn in favour of the various persons Beckford had specified. What they did also enabled the payees of the Jamaican dollar cheques to present them and obtain the payment of them by the BOJ before Jones had the Dextra US dollar cheque in his hands. The essential acts of change of position on which the BOJ would seek to rely as providing a defence to the claim of Dextra occurred earlier in time than BOJ's receipt of the Dextra cheque or its proceeds and in anticipation of such receipt.

Mistake of Fact

28. Their Lordships turn to Dextra's claim to recover its money as having been paid to the BOJ under a mistake of fact. To succeed in an action to recover money on that ground, the plaintiff has to identify a payment by him to the defendant, a specific fact as to which the plaintiff was mistaken in making the payment, and a causal relationship between that mistake of fact and the payment of the money: see *Barclays Bank Ltd. v W J Simms, Son and Cooke (Southern) Ltd.* [1980] 1 QB 677, 694. In the opinion of their Lordships, there are difficulties with regard to the second and third of these elements in the present case.

29. Their Lordships turn then to the second element, viz. that Dextra must have paid the money to the BOJ under a mistake of fact. It is the contention of Dextra that the money was paid under a mistake, in that Dextra had intended to make a loan. The difficulty with this proposition is that this does not appear to have been a mistake as to a specific fact, like for example a mistake as to the identity of the defendant, but rather a misprediction as to the nature of the transaction which would come into existence when the Dextra cheque was delivered to the BOJ, which is a very different matter: see Birks, *Introduction to the Law of Restitution*, pp. 147-8. In that passage, Professor Birks explains the rationale of this distinction in terms relevant to the present case, as follows:

> "The reason is that restitution for mistake rests on the fact that the plaintiff's judgment was vitiated in the matter of the transfer of wealth to the defendant. A mistake as to the future, a misprediction, does not show that the plaintiff's judgment was vitiated, only that as things turned out it was incorrectly exercised. A prediction is an exercise of judgment. To act on the basis of a prediction is to accept the risk of disappointment. If you then complain of having been

> mistaken you are merely asking to be relieved of a risk knowingly run …
>
> The safe course for one who does not want to bear the risk of disappointment which is inherent in predictions is to communicate with the recipient of the benefit in advance of finally committing it to him. He can then qualify his intent to give by imposing conditions, or sometimes by making a trust …"

Here, unfortunately, Dextra failed to communicate directly with the BOJ to make sure that the BOJ understood that the money was being offered as a loan. Instead, it left the communication of this vital matter to its agent, Phillips. Dextra's misplaced reliance on Phillips led it to assume that a loan would result; and this prediction proved to be mistaken. But a misprediction does not, in their Lordships' opinion, provide the basis for a claim to recover money as having been paid under a mistake of fact.

30. Dextra did however argue that it suffered under a mistake of fact when it was deceived by Wildish into believing that the BOJ had previously agreed to take a loan from Dextra. In fact, the BOJ had not so agreed. But, although this can be regarded as a mistake of fact on the part of Dextra, it cannot be said to have caused Dextra's payment to the BOJ. This is because it was overtaken by the specific instructions given by Dextra to Phillips that the cheque was not to be handed over to the BOJ except against the delivery to him of a promissory note evidencing the loan and its terms. It was upon the compliance by Phillips with this instruction that Dextra relied to ensure that a loan was made upon the terms acceptable to it. The significance of the earlier deception by Wildish was only that it contributed to Dextra instructing Phillips to ensure that the cheque was handed over as a loan. Dextra's payment was not however caused by any such mistake of fact as that now alleged by Dextra; it was caused by a misprediction by Dextra that Phillips would carry out his instructions and that a loan would eventuate.

31. Their Lordships have however considered whether Dextra could recover its money as having been paid under a mistake of fact not at the time of delivery of the cheque to the BOJ, but at the time of payment of the cheque, on the basis that, if Dextra had known what had happened, it would have stopped payment of the cheque by its bank, the Royal Bank of Canada; but, since it did not know the true facts, it did not do so. Their Lordships have however been driven to the conclusion that there are insuperable objections to any such conclusion.

32. Beckford delivered the cheque to the BOJ which gave value for it in good faith and without notice of any want of authority on the part of Beckford or his associates. The BOJ then negotiated the cheque by endorsement and delivery to its bank, Citibank, for the purpose of collecting payment from the drawees, the Royal Bank of Canada. Citibank itself indorsed the cheque and presented it to the Royal Bank of Canada for payment. The Royal Bank of Canada paid the cheque and debited Dextra's account. The payment of the cheque was authorised by Dextra, and indeed the Royal Bank of Canada was under a duty to Dextra to honour the cheque, the payment of which discharged the liability of Dextra under the cheque. Furthermore the BOJ, having (in the opinion of their Lordships) acquired a good title to the cheque and having given value for it, would have succeeded if it had had to sue Dextra on the cheque. The same of course applies to Citibank, which was a holder in due course. In presenting the cheque for payment Citibank was asserting its own rights under the cheque and received payment on its own behalf.

33. It follows that Dextra cannot succeed against the BOJ on a claim for money had and received based upon what happened at the time of the payment of the cheque. It can only succeed, if at all, on the basis of the circumstances in which the BOJ acquired the cheque; and these disclose not a relevant mistake of fact but a misprediction.

Change of Position

34. Even so their Lordships propose to consider whether, against this background, the BOJ would, if necessary, have been able to rely on the defence of change of position. The submission of the BOJ has been that it would have been entitled to do so because the Dextra cheque was purchased by the BOJ's authorised agents on its behalf in good faith and the BOJ reimbursed their accounts in full, and that this rendered it inequitable for Dextra thereafter to recover the money so received by the BOJ as having been paid under a mistake of fact. Dextra has responded that the actions so relied on by the BOJ as constituting a change of position were performed by the BOJ before it received the benefit in question, and so amounted to what has been called "anticipatory reliance" and as such could not amount to a change of position by the BOJ for the purposes of the law of restitution. Dextra's argument is that, for the act of the defendant to amount to a change of position, it must have been performed by the defendant in reliance on the plaintiff's payment, which cannot be the case if it was performed by him before he received the relevant benefit.

Anticipatory Reliance

35. The question whether anticipatory reliance of the kind just described can amount to an effective change of position has been much debated in the books. Their Lordships have studied the relevant material with interest and profit, and have also been much assisted by the arguments of counsel.

36. Their Lordships start with the broad statement of principle by Lord Goff of Chieveley in *Lipkin Gorman v Karpnale Ltd.* [1991] 2 AC 548 when he said, at p. 580:-

> "At present I do not wish to state the principle any less broadly than this: that the defence [of change of position] 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."

Their Lordships add that, although the actual decision in that case does not provide any precise guidance on the question now under consideration, since it was based upon the peculiar nature of gaming transactions, nevertheless the Appellate Committee in that case appears to have adopted a broad approach based on practical justice, and to have avoided technicality: see in particular [1991] 2 AC at pp. 581-583, per Lord Goff of Chieveley.

37. The response by the BOJ to Dextra's argument has been that it is no less inequitable to require a defendant to make restitution in full when he has bona fide changed his position in the expectation of receiving a benefit which he is fact receives, than it is when he has done so after having received that benefit. Of course, in all these cases the defendant will ex hypothesi have received the benefit, because the context is an action by the plaintiff seeking restitution in respect of that benefit. For those who support the distinction, however, their reply appears to be that, whereas change of position on the faith of an actual receipt should be protected because of the importance of upholding the security of receipts, the same is not true of a change of position in reliance on an expected payment, which does not merit protection beyond that conferred by the law of contract (including promissory estoppel).

38. Their Lordships confess that they find that reply unconvincing. Here what is in issue is the justice or injustice of enforcing a restitutionary claim in respect of a benefit conferred. In that context, it is difficult to see what relevant distinction can be drawn between (1) a case in which the defendant expends on some extraordinary expenditure all or part of a sum of money which he has received

from the plaintiff, and (2) one in which the defendant incurs such expenditure in the expectation that he will receive the sum of money from the plaintiff, which he does in fact receive. Since ex hypothesi the defendant will in fact have received the expected payment, there is no question of the defendant using the defence of change of position to enforce, directly or indirectly, a claim to that money. It is surely no abuse of language to say, in the second case as in the first, that the defendant has incurred the expenditure in reliance on the plaintiff's payment or, as is sometimes said, on the faith of the payment. It is true that, in the second case, the defendant relied on the payment being made to him in the future (as well as relying on such payment, when made, being a valid payment); but, provided that his change of position was in good faith, it should provide, pro tanto at least, a good defence because it would be inequitable to require the defendant to make restitution, or to make restitution in full. In particular it does not, in their Lordships' opinion, assist to rationalise the defence of change of position as concerned to protect security of receipts and then to derive from that rationalisation a limitation on the defence. The defence should be regarded as founded on a principle of justice designed to protect the defendant from a claim to restitution in respect of a benefit received by him in circumstances in which it would be inequitable to pursue that claim, or to pursue it in full. In any event, since (as previously stated) the context of a restitutionary action requires that the expected payment has in any event been received by the defendant, giving effect to "anticipatory reliance" in that context will indeed operate to protect the security of an actual receipt.

39. Before leaving this topic their Lordships think it right to refer to the decision of Clarke J in South *Tyneside B C v Svenska International* [1955] 1 All ER 545. There the defendant bank had entered into ultra vires swap transactions with the plaintiff local authority, but the bank had also entered into hedging transactions which would substantially cancel out its potential liability to the local authority under the swap transactions. In the result the local authority was the net payer under the void swap transactions, and claimed repayment of the money so paid by it. The bank was held liable to make restitution, but claimed to be entitled to set off the losses incurred by it under the hedging transactions on the ground that it had changed its position in good faith in reliance on the validity of the original swap contract by committing itself to the hedging transactions and by maintaining them thereafter. The local authority submitted that the bank should not be entitled to set off those losses, because it changed its position before receiving the payments in question. Clarke J's conclusion on this point was as follows (see p. 565d-g):-

> "In my judgment in circumstances such as these the bank is not entitled to rely upon the underlying validity of the transaction either in support of a plea of estoppel or in support of a defence of change of position. That is because the transaction is ultra vires and void. It is for that reason that in a case of this kind, save perhaps in exceptional circumstances, the defence of change of position is in principle confined to changes which take place after receipt of the money. Otherwise the bank would in effect be relying upon the supposed validity of a void transaction … It does not however follow that the defence of change of position can never succeed where the alleged change occurs before receipt of the money …"

It follows that the exclusion of anticipatory reliance in that case depended on the exceptional facts of the case; though it is right to record that the decision of Clarke J has been the subject of criticism - see, eg, Goff and Jones, Law of Restitution, 5th ed, 823-4.

The relevance of fault to the defence of change of position

40. It was a further submission of Dextra that, in cases in which the defendant invokes the defence of change of position, it is necessary to balance the respective faults of the two parties, because the object of the defence is to balance the equity of the party deprived with that of the party enriched.

41. Their Lordships approach this submission as follows. First, they cannot help observing that the courts below appear to have formed the view that the fault of Dextra greatly outweighed the fault, if any, of the BOJ. If that is right, this submission will, if successful, do little to advance Dextra's case. Even so, their Lordships turn to consider the point as a matter of principle.

42. They take as their starting point the statement of the law in *Lipkin Gorman v Karpnale Ltd*. [1991] 2 AC 548, where it was explained by Lord Goff of Chieveley that, for a defendant to be able to rely on his own conduct as giving rise to a change of position, he must have changed his position in good faith - see [1991] 2 AC 548 at pp. 579F-G, and 580C. No mention was made by him of the relevance of fault. On the other hand Lord Goff was careful to state (see p. 580C) that "nothing should be said at that stage to inhibit the development of the defence of change of position on a case by case basis, in the normal way", which left it open to the courts to consider matters such as the relevance of fault on a subsequent occasion. Their Lordships make the initial comment that, if fault is to be taken into account at all, it would

surely be unjust to take into account the fault of one party (the defendant) but to ignore fault on the part of the other (the plaintiff). The question therefore is whether it should be relevant to take into account the relative fault of the two parties.

43. In support of its submission, Dextra was able to invoke the law in two common law jurisdictions. First, in the United States of America, the Restatement of Restitution provides, in paragraph 142(2), that:

> "Change of circumstances may be a defense or a partial defense if the conduct of the recipient was not tortious and he was no more at fault for his receipt, retention or dealing with the subject matter than was the claimant."

The Restatement of Restitution is a remarkable work, of which the Reporters were two much respected jurists, Professor Warren A Seavey and Professor Austin W Scott. It was however a pioneering work, and much water has flowed under the bridge since its publication in 1937. In particular another much respected American expert in the law of restitution, Professor J P Dawson, was later to express his regret at the inclusion in paragraph 142(2) of the provision relating to relative fault: see (1981) 61 Boston U L Review 565, 571 et seq., referred to by Professor Birks at page 41 of his account of Change of Position and Surviving Enrichment in *The Limits of Restitutionary Claims: A Comparative Analysis*, ed. by William Swadling. Professor Dawson's comment on the relevant part of paragraph 142(2) of the Restatement is as follows:-

> "The introduction of these complex themes would have been, I believe, a real disservice. Fortunately they have been disregarded in court decisions."

44. Second, in New Zealand a defence of change of position was introduced by statute, in section 94B of the Judicature Act 1908, introduced into that statute in 1958. The statutory provision requires the court to have regard to all possible implications in respect of other persons when considering whether to deny relief, on the ground of change of position, in an action for the recovery of money paid under a mistake of law or fact. That provision was considered by the Court of Appeal of New Zealand in *Thomas v Houston Corbett & Co* [1969] NZLR 151, in which the Court held that it was entitled to look at the equities from both sides (see p. 164, lines 13-14, per North P) and, taking a number of matters into account including, it appears, matters going beyond "fault or neglect in the strict sense" on the part of the respondents (see p. 178, line 4, per McGregor J), held that the claim must be reduced. The quantum of the relief was treated as a matter of discretion on

which opinions might differ (see p. 178, line 26, also per McGregor J). More recently, in *National Bank of New Zealand Ltd v Waitaki International Processing (NI) Ltd* [1999] 2 NZLR 211 (on which see the valuable note by Professor Grantham and Professor Rickett in [1999] RLR 158) the Court of Appeal of New Zealand has given further consideration to section 94B. Following the decision of the Judicial Committee of the Privy Council in *Goss v Chilcott* [1996] 3 NZLR 385, the Court of Appeal concluded that section 94B did not exclude the operation of the common law defence of change of position, but went on to conclude that the common law defence was, like the defence under section 94B, an "equitable" defence which required the court to undertake a "balancing of the equities" by assessing the relative fault of the parties and apportioning the loss accordingly.

45. Their Lordships are however most reluctant to recognise the propriety of introducing the concept of relative fault into this branch of the common law, and indeed decline to do so. They regard good faith on the part of the recipient as a sufficient requirement in this context. In forming this view, they are much influenced by the fact that, in actions for the recovery of money paid under a mistake of fact, which provide the usual context in which the defence of change of position is invoked, it has been well settled for over 150 years that the plaintiff may recover "however careless [he] may have been, in omitting to use due diligence": see *Kelly v Solari* (1841) 9 M & W 54 at p. 59, per Parke B. It seems very strange that, in such circumstances, the defendant should find his conduct examined to ascertain whether he had been negligent, and still more so that the plaintiff's conduct should likewise be examined for the purposes of assessing the relative fault of the parties. Their Lordships find themselves to be in agreement with Professor Peter Birks who, in his article already cited on *Change of Position and Surviving Enrichment* at p. 41, rejected the adoption of the criterion of relative fault in forthright language. In particular he stated (citing *Thomas v Houston Corbett & Co.* [1969] NZLR 151) that the New Zealand courts have shown how hopelessly unstable the defence [of change of position] becomes when it is used to reflect relative fault. Certainly, in the case of *Thomas*, the reader has the impression of judges struggling manfully to control and to contain an alien concept.

46. For these reasons their Lordships are unable to accept the arguments advanced by Dextra in answer to the reliance by the BOJ on the defence of change of position.

<u>Bona fide purchase</u>

47. In the Court of Appeal, both Forte JA and Patterson JA dismissed Dextra's appeal not on the ground of change of position by the BOJ, but on the ground that the BOJ was a bona fide purchaser of the Dextra cheque. It is commonly accepted that the defence of bona fide purchaser is only available to a third party, which includes an indirect recipient, ie a person who received the benefit from somebody other than the plaintiff or his authorised agent. Here the BOJ received the cheque from Beckford who was acting without authority from Dextra in selling the cheque to the BOJ, so that the BOJ can properly be described as an indirect recipient; and the BOJ, through its agents Jones and Mitchell, paid for the cheque in accordance with the directions of Beckford. In so doing, the agents of the BOJ acted in good faith. In agreement with the majority of the Court of Appeal, their Lordships can see no reason why the BOJ should not be entitled to invoke the defence of bona fide purchase in answer to Dextra's restitutionary claim; though, on the view which their Lordships have taken of the case, it is not necessary for the BOJ to do so.

Conclusion

48. For the reasons they have given, their Lordships will humbly advise Her Majesty that the appeal of Dextra from the decision of the Court of Appeal of Jamaica should be dismissed with costs.