NMLS

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

IN COMMON LAW

SUIT NO. C.L. 1993/D46

BETWEEN	DEXTRA BANK & TRUST COMPANY	PLAINTIFF
A N D	BANK OF JAMAICA	DEFENDANT

Richard Mahfood, Q.C., Dennis Goffe Q.C. &
Mrs. Susan McGhie-Sang instructed by
Derek Jones of Myers, Fletcher & Gordon
for Plaintiff.

Dr. Kenneth Rattray Q.C., David Muirhead Q.C. &
Douglas Leys instructed by Mrs. Pamela Wright
for Defendant.

Heard: 6th, 7th, 8th, 20th, 28th, 29th and 30th June, 1994
1st and 7th July, 1994
12th, 13th, 14th, 18th, 19th, 20th and 21st October, 1994.
18th, 19th, 20th, 23rd, 24th, 25th, 26th, 27th 30th, and 31st October, 1995.
1st, 2nd, 3rd, 6th, 9th and 10th November, 1995.
10th, 11th, 12th, 13th, 14th, 17th, 18th, 19th, 21st, 25th and 27th June, 1996.
1st, 2nd, 3rd, 5th, 8th, 9th, 10th, 11th, 12th, 15th, 16th, 17th, 18th, 22nd, 23rd, 24th, 29th, 30th, and 31st July, 1996.
7th, 8th, 9th, 10th, 11th, 14th, 15th, 16th, 17th, 23rd, 24th, 25th, 28th, 29th, 30th, and 31st October, 1996,
1st and 4th November, 1996 and 16th October, 1997.

HARRISON P, J.

JUDGMENT

By writ of summons the plaintiff claims damages for conversion by the defendant of its cheque no. 4949 for U.S. $2,999,999.00 drawn by the plaintiff on its account with the Royal Bank of Canada in New York, in the name of the defendant, acting under a mistake of fact and intending to make a loan to the defendant and in exchange for a promissory note by the defendant for $3,000,000; the property in the cheque remained with the plaintiff, the defendant having denied the existence of a loan and contending that it purchased the cheque and gave full value for it. Alternatively, the plaintiff claims damages in the sum of US$2,999,000 for money had and received, being the proceeds of the said cheque recieved,

by the defendant for the use of the plaintiff. The plaintiff claims that the defendant's allegation that it purchased the cheque is false, the alleged purchase knowingly fictitious, that the defendant was negligent in the operation of its foreign currency transactions, the returns of its agents fictitious and that was the proximate cause of the defendant's act of payments in its alleged purchase, which could not confer title in the cheque on the defendant.

The defendant denies that it converted the plaintiff's cheque and contends that the plaintiff by making the cheque payable to the defendant intended that the property pass to the defendant and such property did pass when the cheque was delivered to the defendant, for which cheque the defendant gave valuable consideration in the course of a foreign currency purchase by foreign exchange agents; that there was no loan transaction; that the plaintiff owed a duty to the defendant and was negligent and in the circumstances the plaintiff's negligence is the proximate cause of its loss; that the plaintiff by its conduct is estopped from denying that it gave the defendant title to the said cheque, and it did not receive the said sum to the plaintiff's use to cause it to be obliged to repay it to the plaintiff, and it changed its position in circumstances in which it would be inequitable to ask it to make any repayment to the plaintiff.

The facts, inter alia, are as hereunder.

The plaintiff company (Dextra) which holds a bank licence under the laws of the Cayman Islands, at a meeting of its board of directors on the 13th day of January 1993, passed the following resolution, exhibit 1,

> "It is resolved that the bank provide a loan to the Bank of Jamaica for 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 Attorneys"

The resolution resulted from a pronouncement to the said board, by Peter Blackman, its director/secretary that he had

been,

> "... approached on an urgent basis by Myers & Alberga ..... to provide a loan of U.S. $3 million for 3 months to the Bank of Jamaica on a Promissory Note",

Messrs. Myers & Alberga, were attorneys-at-law, for Dextra, whose chairman Mr. Jack D. Ashenheim, the plaintiff's witness, was employed to Myers & Alberga as "... financial consultant and accountant."

Darryl Myers, attorney at law and partner in Messrs. Myers & Alberga and also director of the plaintiff, had spoken to Blackman by telephone on the 11th day of January 1993, and on the same date wrote to the plaintiff, referring to the telephone conversation,

> "...I confirm that this firm has been contacted by Mr. John Wildish, on behalf of the Bank of Jamaica, requesting a short term loan of US$3 million for three months at 16% per annum free of withholding tax .... evidenced by a promissory note signed by the Bank.
>
> There appears to be some urgency...."
> **Exhibit 2**

Blackman, on the 13th day of January 1993, advised Darryl Myers of the plaintiff's resolution.

On the instructions of Jack Ashenheim, Darryl Myers drafted a promissory note, (exhibit 4) which contained, inter alia, the names of the parties,

"Bank of Jamaica the Borrower" and "Dextra .... the Lender," the amonunt of the loan, "..Three Million United States Dollars (U.S. $3,000,000.00..", the duration of the said loan, and the rate of interest "...16%...", payable "...every thirty days."

Clause 3(c) exhibit 4, provided that the outstanding balance of the loan is repayable,

"(c) on the calling of a general election in Jamaica"

The said exhibit also provided that the interest should be net of taxes and that the law of the contract is the law of the Cayman Islands.

Exhibit 4 was given to one John Wildish who subsequently returned it to Myers with amendments. Exhibit 6, displays the amendments. Written onto the typed copy of the said document, are amendments to, the rate of interest, "24" which previously was "16%"; clause (e) was deleted; the law of the contract was stated as "Cayman Islands Jamaica" and the jurisdiction of the courts originally stated as "Cayman Islands", had the added words "and Jamaica."

Darryl Myers, on the 15th day of January 1993, sent to John Wildish, an telefax, exhibit 8, dated the said date, which read inter alia,

> "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 laws 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 and meaning 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 in-appropriate. A document cannot be

construed in accordance with the laws of two countries .....

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 your time."

Darryl Myers on the said 15th day of January, 1993, sent a further telefax message exhibit 9 to "Mr. John Wildish/ Mr. Michael Phillips", which reads,

"We have checked with Myers, Fletcher & Gordon so you need not trouble Noel Levy.

We have checked the Bank of Jamaica Act, and it seems to us that the Bank must sign:-

a. by the Governor or Deputy Governor and another director so authorised, affixing the seal, or

b. if the seal is not used (and it is not necessary to affix the seal to a promissory note) by the Governor or any other director or officer authorised to do so pursuant to a Board decision.

In either case, a resolution of the Board will be required to take the loan and to execute the promissory note. You must therefore get from the Bank a certified copy of the resolution unless Mr. Beckford, whom I assume has the authority, tells you that this is not necessary. There may be a general resolution already in effect. If not, this is going to cause a delay, but we have no choice. If we are to lend US$3 Million, we must be sure that the note is properly authorised and signed."

Another telefax, exhibit 16, dated the 18th day of January, 1993, was sent by Darryl Myers to John Wildish, it read,

"Please see attached promissory note."

Exhibit 5, is headed "Promissory Note", and contains, inter alia, the names of the parties, the amount of the loan, the rate of interest "24% payable every thirty days", and "... free and clear and net of all taxes", the mode of repayment, events which would require immediate repayment, the law of the contract, and the jurisdiction of the court to be Caymanian and dated "20th day of January 1993." This document bears a signature and notation "R E Straw" above the designation "Governor/Deputy Governor", and is signed by "O.W. Beckford."

It also bears a stamp "Bank of Jamaica, P.O. Box 621, Kingston, Jamaica, W.I." and is signed by a witness "K. Scott."

On the 19th day of January 1993, Jack Ashenheim, the plaintiff's witness met with Darryl Myers; one Michael Phillips was present.

Ashenheim said in evidence in chief:-

> "I instructed Dextra to draw a cheque payable to Bank of Jamaica for US$3,000,000 less $1,000 legal fees and send immediately to the offices of Myers & 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 Bank of Jamaica and see personally that note signed by the Governor or Deputy Governor and other authorised officer and on receipt of the said note to hand the cheque to Bank of Jamaica and take note and have it stamped by the Stamp Commissioner 'exempt stamp duty' and send note to Myers & Alberga."

The cheque no. 4949 exhibit 10 (copy) for U.S.$2,999,000.00, dated the 20th day of January 1993 payable to Bank of Jamaica, and drawn on the Royal Bank of Canada, New York, New York, was handed to Phillips on the 19th day of January, 1993.

The witness Ashenheim had known Phillips and Wildish since 1990 or 1991 - having met them in the offices of Myers & Alberga. He understood that they were "engaged buying foreign exchange." He had never met nor spoken to Orville Beckford, but was told that Beckford was,

> "... the czar of foreign exchange in Jamaica."

The witness Ashenheim, stated that in making loans, of whatever amounts the plaintiff's Board of Directors would pass a resolution approving the loan and then the plaintiff's attorney-at-law would "deal with" the borrower's attorneys-at-law, in order to agree on the documentation; that specimen signatures are not normally required in transactions with large enterprises; that if he is dealing with a large institution of which he knew nothing, he would ascertain who was authorised to sign,

that the absence of a specimen signature was a mere risk and not an imprudent act on the plaintiff's part; that he did not consider an interest rate of "36% gross" high, that is, 24% net of taxes, and so to alert him to make enquiries; that he assumed he was dealing with an officer of, and the Bank of Jamaica; that with hindsight it was more prudent and advantageous to make enquiries of directly, and to deal directly with Bank of Jamaica; that there was nothing on the face of the cheque, exhibit 10, to preclude a sale of it to Bank of Jamaica and that when he handed it to Phillips he could not ensure compliance with his instructions; that he intended Bank of Jamaica to have title to the cheque, exhibit 10, but on certain conditions, that, is, that Dextra was making a loan.

Orville Beckford, a former employee of the Bank of Jamaica, had held the posts of supervisor in the Exchange Control Department, Senior Supervisor in the administrative office and acting head of the Economic Cooperative Department in the Bank of Jamaica. He was made redundant in 1992 and re-employed on contract, until his services were terminated in February 1993. His duties involved, among others, contact with persons engaged in foreign currency earnings, and also, the monitoring of foreign currency inflows from loans from international lending agencies to bank and government agencies in Jamaica.

In September, 1991 there occurred a liberalization of the foreign exchange system. The Exchange Control Department of Bank of Jamaica was dissolved. Certain former officers of the Bank of Jamaica were appointed as purchasing agents of foreign currency on behalf of the Bank of Jamaica, namely, Richard Jones, Wycliffe Mitchell and others, as from December 1991.

Each such agent, designated an "authorised agent", was provided with an account and cheque book in his name. He would issue cheques on the account for foreign currency effects he purchased, lodge the said foreign currency effects along with a return showing the details of such purchase, daily,

with the Bank of Jamaica and the Bank of Jamaica would re-imburse his account with the Jamaican dollar equivalent of said foreign currency item. Each such agent had an overdraft limit of $5,000,000 which was reduced in January 1993 to $4,000,000. The Bank of Jamaica determined a range of rates at which the agents could purchase, up to August 1992, when the rate was fixed at $22.15 for the purchase of US$1.00; see exhibits 35 and 36.

A group of persons called sub-agents, comprising John Wildish and Michael Phillips and others, sold foreign currency to the authorised agents either directly or indirectly through Beckford.

Orville Beckford, the plaintiff's witness said in evidence-in-chief,

> "Deputy Governor Straw... approached me early 1992, to use my experience with foreign exchange entities to assist the authorised agents to purchase foreign exchange needed by the bank and the country.... Before and after I was asked by Mr. Straw, I would assist the authorised agents .... After Mr. Straw spoke to me in early 1992 - period difficult to get foreign exchange at $22.15 the Bank of Jamaica rate and as to how they would be paid, the amount they would sell and when .....
> The rate paid to sub-agents above the official rate was not to be put on the cheque given to sub-agents - as I told by Mr. Straw - we not want the public to know Bank of Jamaica buying above the official rate of $22.15." (emphasis added.)

Beckford then opened an account at the Century National Bank at its Mandeville Branch, in the name of FECON TRADING "meaning foreign exchange conversion...." in February 1992. He said further, in evidence,

> "This account was used to keep the differential between the official rate and the rate at which foreign exchange was bought from sub-agents. I was the only signatory to the account - the paper work was done at Century National Bank head office Kingston ... the Mandeville Branch was designated as I knew the manager very well - the nature of the transaction had to be with a manager, I had confidence in - in not betraying what being done by Bank of Jamaica.
>
> Cheques were issued by authorised agents drawn to Fecon on their account at Bank of Jamaica and paid into Fecon account at Century National Bank. Manager's cheques were then drawn on the Fecon account and paid to sub-agents at the full amount at which they were selling - hence a differential would remain in the Fecon amount." (Emphasis added.)

He said further, that Mr. Straw said the differential would be paid from some government account as soon as some mechanism could be arranged to do so; that the cheques paid to the sellers were higher than the cheques issued by the authorised agents and lodged to Fecon and that they were buying foreign currency from the sub-agents at the rate as high as $24 - $25 for US$1.00, and therefore the Fecon overdraft got high and the authorised agents' overdraft got high.

In November 1992, Mr. Caple Williams, the Vice President, of Century National Bank became aware of "an account operated by Orville Beckford and large cheques were presented in clearing drawn on **FECON** - Orville Beckford, trading as FECON Mandeville Branch", causing a high overdraft. There was another account operated by Beckford in respect of a company, Chicks Jamaica Limited. Williams voiced his concern to the manager at the said branch, "to see that the overdraft was covered."

The overdraft on the FECON account on 6th November, 1992 was $43,000,000.

Williamssaid in cross-examination,

> "In respect of the FECON account there was no credit arrangement, it should have operated in credit from the beginning. The account was opened in February 1992 - in the first month it was in debit $2,169,969.85. On 25th February, 1992 there was a high unsecured debit by Orville Beckford of $3,856,311.33. Account never had a credit balance - our manager should have been in frequent touch with Beckford re this account - security was first taken in November, 1992. That was not prudent banking on the part of Century National Bank."

As a result of Williams' concern, Beckford executed, on request,

(1) a promissory note dated 9th November, 1992 for a loan of $16,000,000 to Chicks Jamaica Limited, exhibit 42, and

(2) a mortgage instrument, dated 28th June, 1994, in respect of lots of land, at Vol. 932 Folio 41 and Vol. 932 Folio 341 the property of Chicks Jamaica Limited, to secure a loan at a rate of 70% interest. The mortgages to Century National Bank were registered on 11th January, 1995, exhibit 43.

The said loan of $16,000,000 was on 9th November, 1992 credited to the account of Orville Beckford, trading as Fecon. On 10th November, 1992, the overdraft was reduced to $10,156,381.60. At the end of November 1992 it rose to the level of $22,323,539.88 and on 11th December, 1992 the overdraft was $46,877,860.75, exhibit 79. Williams having spoken to the branch manager and the overdraft not having been reduced, he spoke to Beckford and arranged a meeting with Straw, the Deputy Governor, Laban Rhooms and Beckford in his Williams' office, "... to discuss the overdrawn Fecon account." Beckford did not attend.

Williams was of the opinion that Beckford was "buying foreign exchange on behalf of Bank of Jamaica because the overdraft arose because of the cheques (of the authorised agents) which acquired foreign exchange on behalf of Bank of Jamaica," exhibits 85 and 86.

The meeting with Straw and Rhooms was held in Williams' office of Century National Bank, Duke Street, Kingston. Williams said, in evidence,

> "I advised them that one of their agents' account was overdrawn substantially. Rhooms said he was aware of Fecon account and he would speak to Beckford and get back to me."

The overdraft was not reduced. Williams wrote a letter to Beckford on 15th January, 1993, exhibit 33(a) stating, inter alia,

> "Since mid 1992, you requested and our Bank agreed to provide you with a facility enabling the purchase of foreign exchange for the Bank of Jamaica, subject to settlement immediately you received these funds. This arrangement was in keeping with your being appointed to act as agent/sub-agent on behalf of the Central Bank.....
>
> We recall the various promises ... to inject various sums ... We further note your having indicated that with the sluggishness evident in the release of Jamaican dollars by the Central Bank, together with other factors that a promissory note from that Bank would be

> provided, as we continued to express our grave concern for the level of exposure of Century National Bank.
>
> In late December, we arranged a meeting to which we had invited yourself and Messrs. Rhooms and Straw, who are from the Bank of Jamaica, but, unfortunately, you were not in attendance.....
>
> We are extremely anxious to have this matter resolved immediately and expect that within the next twenty-four (24) hours, you will provide us with the funds to settle this amount fully and finally and to provide us with the promised Central Bank Promissory Note to cover indebtedness."

On the said 15th January, 1993 the witness Beckford sent a handwritten note dated 15th January 1993, to Century National Bank in reply to Williams letter, promising "to deliver the Promissory Note to Century National Bank by 12:00 noon on Monday, January 18, 1993..." expressing his "Thanks for the assistance given to the Central Bank....", exhibit 33(b). A promissory noted dated 15th January, 1993, exhibit 33 (a), was received and accepted by Century National Bank, to pay the sum of US$3,786,169.08 at the rate of 15%. This note bore the signature of "Straw" as Director of Bank of Jamaica, and was witnessed by "K. Scott", with a Bank of Jamaica stamp affixed.

The last "customer" lodgment to the Fecon account was on 22nd December, 1992 of an amount of $5,094,500 creating an overdraft of $60,707,289.85.

On 31st December, 1992 the overdraft on the Fecon account was $64,317,447.20; on 4th January, 1993 it was $64,299,447.21; on 29th January, 1993, it was $68,948,589.31, and on 30th June, 1993 the overdraft had rised to $99,347,226.79, the latter sum due, in addition, to the accumulated interest, exhibit 79.

By letter dated 19th April, 1993 from Caple Williams to the Governor, Bank of Jamaica, exhibit 88, referring to the 'Promissory Note from the Bank of Jamaica", the balances

as at December 24, 1993 on the following accounts..." were,

"(a) Orville Beckford trading as Fecon Trading	$65,801,852.85
Accrued interest on this Account	3,208,797.26
(b) Chicks Jamaica Limited	17,434,301.36
(c) Orville Beckford	2,530,021.90
	$88,974,973.37"

Beckford said in examination-in-chief,

> "Towards the end of 1992, the management of Century National Bank stated they not able to facilitate Bank of Jamaica any longer through account purchasing foreign exchange, account reached high limit. I spoke to Caple Williams and written to ..... I informed Straw what Williams told me re Fecon account. Straw told me to speak to Caple Williams... When Century National suspended Fecon I opened another account in my name at Island Victoria Bank, St. Lucia Avenue, New Kingston - used to faciliate purchase foreign exchange from sub-agents."

However, prior to November 1992, when Caple Williams intervened, Beckford already had a current account with Island Victoria Bank which he had opened on 15th May, 1992 in the name of Georgia and Orville Beckford, account no. 0141230516, exhibit 28(a). This account was being operated by Beckford during the currency of the Fecon account at Century National Bank. Another account no. 0141230516 in the name of Orville Beckford, exhibit no. 29, at Island Victoria Bank was opened on 15th October, 1992. Into this account fifteen (15) cheques, inter alia, were paid, exhibit no. 23. Some of these cheques, six in number were cheques drawn by the authorised agents Richard Jones and Wycliffe Mitchell on their account with Bank of Jamaica for the purchase of foreign currency.

Of these six cheques in exhibit 23 it reveals that

1. Century National Bank Manager's cheque no. 024009 dated 20th October, 1992 issued to Island Victoria Bank/Orville Beckford for $5,267,000.00 was lodged to "current account no. 014.80/30516 Gloria/Orville Beckford". at Island Victoria Bank, exhibit 29 (bank statement) on 20th October 1992 and a withdrawal of $4,870,000.00 was made from the latter account on the said day. The Fecon account, exhibit 79 shows a debit of $5,627,000.00 posted on 21st October, 1992.

2. Century National Bank Manager's cheque no. 024121 dated 21st October, 1992 issued to "Island Victoria/Orville Beckford" for $4,120,000.00, exhibit 23, lodged to "current account no. 014/80 30516 Gloria/Orville Beckford" at Island Victoria Bank, exhibit 29, on 21st October, 1992 and a withdrawal of $4,100,050.00 was made on the same day. The Fecon account, exhibit 79, shows a debit of $4,120,000.00 posted on 22nd October, 1992.

3. Century National Bank Manager's cheque no. 024700 dated 29th October, 1992 issued to "Island Victoria/ Orville Beckford" for $4,380,000.00, exhibit 23, lodged to "current account no. 014/80/30516 Gloria Orville Beckford" at Island Victoria Bank exhibit 29, on 29th October, 1992 and a withdrawal of $4,267,000 was made on the same day. The Fecon account, exhibit 79, shows a debit of $4,380,000.00 posted on 30th October, 1992.

4. Century National Bank Manager's cheque no. 025231 dated 10th November, 1992 issued to "Island Victoria/Orville Beckford "for $4,796,245.00, exhibit 23, lodged to "current account no. 014/80/301516 Gloria/Orville Beckford" and a withdrawal of $4,780,000.00 was made on the same day. The Fecon account, exhibit 69, show a debit of $4,796,245.00 posted on 11th November, 1992.

These four transactions convey a pattern of withdrawals of these sums from the Fecon account, (on Beckford's testimony, the account was being operated by him on behalf of the Bank of Jamaica) and a corresponding lodgment to his private account. with Island Victoria Bank and a withdrawal of a lesser amount, leaving a balance in his private account. These withdrawn sums were never re-credited to the Fecon account, neither were they used to pay the sub-agents because the Island Victoria Bank account was not used to pay sub-agents until the Fecon account was no longer utilized, i.e. after the meeting "towards the end of 1992 .... December 1992", according to the evidence of Beckford himself.

Certainly, seeing that the Fecon account was, according to Beckford, being operated on behalf of Bank of Jamaica these four transactions amounted to diversion of funds to his private accounts, thereby contributing to the expanding overdraft of the Fecon account.

Exhibit 23 reveals several other lodgments to Beckford's personal account with corresponding withdrawals from the Fecon account between the period October to December 1992.

Beckford opened a further current account with Island Victoria Bank on 23rd December, 1992, no. 014/80/32515 in the name of "Orville Beckford" revealing, at least one lodgment to the latter account from the Fecon account. This Island Victoria Bank account was functional up to February 1993.

He stated further,

> "I identified sellers of foreign exchange and introduced them to the authorised agents for money to be sold to Bank of Jamaica - up to an amount US$120,000.00 to US$130,000.00... The highest rate of exchange I negotiated with sellers was $24 to $25 Jamaican to US$1.00."

In January 1993 Beckford spoke to the said John Wildish who later brought him a promissory note, exhibit 4. Beckford made amendments to the said document, in his own handwriting. He admits he made notations of "24" - referring to the interest rate, "where Jamaica or Cayman", "... standard ..." and "no", see exhibit 6. Beckford must have known that he had no authority to do this.

Beckford said in examination-in-chief that,

> "Early January 1993 Mr. Straw told me Mr. Mason, Banking Operations Manager 'kicking up a storm' agents' Richard Jones high overdraft balances ... account could not be reduced by Jamaican dollars .... required foreign exchange instrument going to the account and I to seek out a couple of sub-agents and ask if they could put together loan to Bank of Jamaica to reduce the agents' overdraft ..... I told Wildish we had a crisis... and I told by Straw that I should seek a US dollar loan short term and I asking him to put together a loan of $3,000,000 to $5,000,000 US to assist the Bank of Jamaica."

Beckford said that he spoke to Mr. Straw in respect of the amendments in exhibit 6 and had negotiations with Wildish and sent to Straw a copy "...if my memory serves me right with the scribblings on it."

Beckford admitted in cross examination, that he deleted the election clause, in exhibit 6, that "telegraphic transfers are the normal way money is transmitted from bank to bank", that he knows that the system is that foreign loans to Bank of Jamaica are credited to Bank of Jamaica's account abroad, that "...loan negotiations are conducted by lawyers in the legal department of Bank of Jamaica", - he did not pass exhibit 6 through the legal department of Bank of Jamaica, nor did he have any discussions with them.

He said further that subsequently, he thinks, on the date on the cheque, exhibit 10, the "20th day of January, 1993", Phillips brought the said cheque to him along with the promissory note, exhibit 5, which he showed to Straw, who glanced at it and signed it; that he Beckford signed exhibit 5 and it was witnessed by his secretary "K. Scott", who affixed "a Bank of Jamaica stamp" to it. Photocopies were made.

Beckford handed two copies to Phillips, and the third copy, he said "was kept at Bank of Jamaica". Beckford said, of the promissory note, exhibit 5,

> " I handed it to Phillips either in my office - 8th floor or Phillips had returned downstairs to his car and I handed it there to him. Cheque, exhibit 10 was handed to me, the original, on the 8th floor Bank of Jamaica, on the date on the cheque."

He said that he called Straw and told him, and Straw instructed him to hand the said cheque, exhibit 10 to either Jones or Mitchell,

> "...so they could use it to liquidate some of their overdrawn accounts. I gave cheque to either Mitchell or Jones, probably Jones.
>
> (I) not get instructions from Wildish what to be done when it (cheque) came ... Phillips brought it to me ....(nor) how to deal with the promissory note."

The Dextra cheque, exhibit 10 for the amount of US $2,999,000.00, being US$3,000,000 less US $1,000.00 for legal fees, was introduced into the foreign currency purchase

system of the Bank of Jamaica by its authorised agents Richard Jones and Wycliffe Mitchell.

Previously, from April 1992, Jones was experiencing problems in acquiring foreign currency and therefore in August 1992, he approached Beckford to assist him in locating such currency. Beckford commenced doing so, providing amounts of approximately US $200,000 daily. Beckford then provided the sums at times US $20,000 short, from September 1992, causing a large overdraft in Jones' operating account. Jones had at times drawn cheques and given to Beckford in advance of receiving the related foreign currency. These shortages would be reduced subsequently.

Jones' operating account, exhibit 263, inter alia, showed balances on,

24th December 1992	-	$8,185,352.00	in credit,
30th December 1992	-	$10,092,346.00	in credit,
4th January 1993	-	$6,557,492.14	in credit, (exhibit 103)
7th January 1993	-	$2,879,683.00	in debit,
11th January 1993	-	$10,197,397.00	in debit,
14th January 1993	-	$11,640,240.20	in debit,
18th January 1993	-	$38,659,371.85	in debit,
19th January 1993	-	$41,357,755.06	in credit.

These balances existed before the advent of the plaintiff's cheque.

Jones said, in examination-in-chief, that prior to 20th January, 1993 Beckford told him that he was expecting US$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 he would be asking Mitchell to purchase the other US$1,000,000.

On 19th January, 1993 Beckford handed to Jones, US$2,999,000 draft, exhibit 10. Consequently, Jones drew, on his operating account, seven (7) cheques each dated 19th January, 1993,

and one cheque dated 20th January, 1993, in the names of payees provided by Beckford. Correspondingly, Wycliffe Mitchell drew four (4) cheques, three dated 18th January, 1993 and one dated 19th January, 1993. These cheques, exhibit 25, were given to Beckford. Jones completed a return form, exhibit 81, and along with Mitchell's return form, exhibit 80, and the plaintiff's cheque, exhibit 10, he sent it to the Banking Department of Bank of Jamaica for lodgment; they were received by Mrs. Vincent on 20th January 1993. She endorsed, the returns, exhibit 80 and 81, as receiving the cheque, exhibit 10, as a purchase in the foreign currency system on 20th January 1993.

The said cheques issued by Jones, were, exhibit 25, (a-h)

No. 448 - $6,822,200 dated 19.1.93 payable to Derrick Sampson.

No. 449 - $4,430,000 dated 19.1.93 payable to Henry Milton.

NO. 450 - $1,260,002 dated 19.1.93 payable to Oswald Walker

No. 451 - $4,873,000 dated 19.1.93 payable to Alfred Chang

No. 454 - $3,322,500 dated 19.1.93 payable to Donald Lyn

No. 456 - $6,645,000 dated 19.1.93 payable to O. Dunn

No. 457 - $6,645,000 dated 19.1.93 payable to O. Dunn

NO. 459 - $11,075,000 dated 19.1.93 payalbe to Donald Lyn.

The cheques issued by Mitchell were exhibit 25, (i to l)

No. 594 $6,645,000 dated 18.1.93 payable to Alphanso Reynolds

No. 595 $5,316,000 dated 18.1.93 payable to Carl Ricketts

No. 596 $4,430,000 dated 18.1.93 payable to Velma Leake

No. 597 $5,537,000 dated 19.1.93 payable to P. Leake

Both the operating accounts of Jones and Mitchell, exhibits 103 and 104, respectively, were debited with these cheques, exhibit 25, in the identical amounts stated on the respective cheque thereby verifying that they were valid debits; see exhibits 103 and 104. These transactions were further confirmed by the receipt of the cheque, exhibit 10, by the Bank of Jamaica on 20th January, 1993, recording in its records, "Proof of deposit", exhibit 93, the receipt of foreign currency "US$2,999,000" and the Jamaican dollar equivalent "$66,648,276". Exhibit 93 A(1), extract from the "General Ledger System, foreign assets transaction report for 20th January, 1993", also shows a lodgment to the Bank of Jamaica of the said foreign currency sum of U.S.$2,999,000 and the corresponding Jamaican dollar equivalent. This is evidence of a valid foreign currency purchase by Bank of Jamaica in its then existing system.

There are discrepancies between the returns of Jones and the bank statements, in some instances. For example,

(1) Exhibit 106 (Vol. 2, page 248 of the agreed bundle) records that on 19th January 1993 cheques nos. 442,445 and 446 were used to purchase the Jamaican dollar equivalent of $13,290,000.00 from sellers Davis, Moodie and Ballentine.

In contrast, exhibit 103, (Vol. 1 page 146) lists cheques nos. 443, 445 and 446 as debits to his account together totalling $12,182,500, a difference of $1,107,500.00.

(2) Exhibit 106(Vol. 2 page 291) records that on 20th January 1993 cheqe no. 462 was used to purchase the Jamaican dollar equivalent of $7,752,500 from sellers D. and W. Davis.

In contrast, exhibit 103 (Vol. 1 page 149) lists cheque no. 462 with a debit value of $6,780,000.00, a difference of $972,500.00.

In both instances, multiple items were recorded on cheques nos. 445 and 462. Cheque no. 465 also disclosed a discrepancy between the return and the bank statement.

Richard Jones' records of his transactions were less than reliable. Mr. W. G. Mason, Director of the Banking Department of the Bank of Jamaica wrote to him requesting that he conform to the operating procedures of his agreement exhibit 36, in respect of the serial numbers of his issued cheques being placed on his remittance sheets, see exhibit 117, letter dated 26th February 1992. A memorandum dated 30th November, 1992 from the Banking Department of the Bank of Jamaica, reported .... "serious anomalies which the Bank ought to pursue further...", between the amounts on cheques listed on the returns and the amounts debited to the account of Jones and went on to detail certain "Inferences", namely,

1. "Individual cheques are not issued specifically against individual sales.

2. The names of vendors on the cheques are not necessarily those on the cheques.

3. .....

4. The mechanism for purchasing and reporting effects which are agreed on is not being adhered to.

5. There is a serious lack of transparency in the operations of this Agent;

6. The method of reporting cheques issued lends itself to manipulation.....", exhibit 26, Vol. 1 page 198.

This said exhibit 26, details instances where three cheques nos. 372, 374 and 365 were issued for amounts in Jamaica dollar equivalent which differed from that which was stated in his Jones' daily return.

Jones operating account was suspended on 29th April, 1992 due to an "... outstanding amount of $3,351,366.20..." , see exhibit 252, memorandum De Peralto to Jones, dated 29th April, 1992, and also exhibit 251, memorandum dated 27th April, 1992. He was restored to operating status in May 1992, when his overall indebtedness to the Bank of Jamaica (overdraft) was satisfied,

from commissions payable to him leaving a sum due to him from Bank of Jamaica; see exhibit 253, letter Mason to Jones dated 5th May, 1992. Jones was finally suspended by Straw in February 1993, see exhibit 262.

The recording and operation of the accounts of agent Wycliffe Mitchell was also the subject of complaint by the Banking Department of Bank of Jamaica, see exhibit 27, Vol. 1 page 111.

Both before and after the purchase of the plaintiff's cheque, several cheques were drawn for the purchase of foreign currency and which were identical in amounts to some of the cheques used to purchase the plaintiff's cheque exhibit 106 (Vol. 2 pages 262 - 316).

In respect of the plaintiff's cheque, exhibit 10, Jones said, in cross-examination,

> ".... Dextra cheque sold to me by Beckford, he provided me with the names. I not know if they fictitious .... Not so I suggested some of these names and Beckford suggested some - he suggested the names in every case."

Authorised agents were consistently allowed to purchase foreign currency effects and submit them to Bank of Jamaica by the afternoon of the following day. Monies were advanced to Beckford by Jones for foreign effects to be acquired and Beckford would subsequently submit, the corresponding effects.

John Wildish and Michael Phillips were both engaged in selling foreign currency to Richard Jones from 1991 until April of 1992. After April 1992, because of the fixed band of rates, Jones was not able to purchase foreign currency from currency traders such as Wildish and Phillips. Beckford subsequently provided the said currency, up to the time of purchase of the plaintiff's cheque.

Of the twelve cheques, exhibit 25, issued for the purchase of the plaintiff's cheque, several were subsequently lodged in

accounts operated by foreign currency traders, such as Wildish and Phillips and one Troy McGill.

Le Par Limited is a limited liability company registered under the laws of the Cayman Islands. It opened a current account no. 10105216 at the New Kingston Branch of the Eagle Commercial Bank on 5th October, 1992; the signatories to, and the operators of the account in Jamaica, were John Wildish and Michael Phillips, exhibit 268. The address of the company is "P.O. Box 472, Georgetown, Grand Cayman."

Troy McGill opened a current account at the same branch of Eagle Commercial Bank on 1st December, 1992 in the names of Troy and Angella McGill - account no. 101053130, exhibits 275, 276 and 277. Everald Lloyd Chito, manager of the said branch said in evidence that he recognised the signatures of Wildish, Phillips and Troy McGill on the above documentary exhibits, relevant to the said accounts.

Cheque no. 457 - $6,645,000 dated 19th January, 1993 payable to "O'Neil Dunn", exhibit 25 (g), drawn by Richard Jones, in part payment of the purchase of the plaintiff's cheque, was lodged to both accounts nos. 101052165 (Le Par) and 101513130 (McGill), see reverse of exhibit 25 (g), on 19th January, 1993; $1,255,000 was deposited to the McGill account, exhibit 276 (b). The relevant bank statements, exhibits 264 and 265 respectively, confirm these transactions. Deposit slip, exhibit 266(b) is signed by John Wildish.

Cheque no. 594 - $6,645,000 dated 18th January, 1993 payable to "Alphanso Reynolds", exhibit 25 (j), drawn by Wycliffe Mitchell in part payment of the plaintiff's cheque, was lodged to account no. 101052165 (Le Par) on 18th January 1993, see reverse of exhibit 25 (j). Deposit slip exhibit 266 (c) was signed by Michael Phillips.

The relevant bank statement, exhibit 264, confirms this.

Cheque no. 595 - $5,316,000 dated 18th January, 1993 payable to "Carl Ricketts", exhibit 25(i), drawn by Wycliffe Mitchell in part payment of the said plaintiff's cheque, was lodged to both accounts nos. 10152165 (Le Par) and 101053130 (McGill), on 18th January, 1993, see reverse of exhibit 25(1); $436,000 was deposited to the Le Par account, exhibit 266(a) and $4,880,000 was deposited to the McGill account, exhibit 267 (a) - both deposit slips were signed by Michael Phillips. The relevant bank statements, exhibits 264 and 265, respectively, confirm this.

Le Par Limited was actively engaged in selling foreign currency to the authorised agents of the Bank of Jamaica, from October 1992, see exhibit 79.

The Bank of Jamaica as the Central Bank of Jamaica had the statutory authority to buy and sell, also to borrow foreign currency. After August 1992, on the repeal of the Exchange Control Act, anyone could then buy, sell, borrow or lend foreign currency, these arrangements included an authorised dealer. However, only the Bank of Jamaica or the authorised dealer could be engaged in the business of buying, selling, lending or borrowing foreign currency - so testified Thomas Theobalds, attorney-at-law and former head of the legal department of the Bank of Jamaica. I found his evidence reliable and helpful.

The procedure usually adopted in respect of loans to Bank of Jamaica by a private bank commences initially by direct communication with the Governor or Senior Deputy Governor followed by correspondence.

The Bank of Jamaica, if unaware of the bona fides of the lender, in particular, if a foreign entity, would consult a rating entity or similar organization or its ambassador for information.

If satisfied, the Governor or his designate or the Senior Deputy Governor, along with the legal department would then conduct negotiations; lower department heads could be involved to assist. Each member of the negotiating team would then commence a file, a term sheet would be generated containing basic facts of the lender's offer, e.g. the amount of loan, interest, conditions of repayment and request for legal opinion. The lender's and borrower's legal opinion would be included, as well as all matters in dispute. The lender sometimes requires documentation dealing with the Bank of Jamaica's state of financial affairs, and if an International Monetary Fund programme fund exists, the state of finances with the International Monetary Fund, indebtedness to other countries, major projects and major exports. The Board of the Bank of Jamaica would require legal submissions from the legal department during or at the end of the negotiations which would have been conducted either in the lender's or the borrower's country. The final decisions will be with the Governor, but at times the Financial Secretary may be involved. The legal submissions to the Board, setting out the details of the agreement would ask for a resolution approving the transaction and authorising a specific person to sign on behalf of the Bank of Jamaica, usually the Governor or the Senior Deputy Governor. If the lender requires the seal of the Bank of Jamaica on the loan agreement - the Board would authorise it, if necessary. Negotiations are never by telephone. The decision of the Board is minuted. Conditions precedent to disbursement would be stipulated in the term sheet for the benefit of the lender, for example, the legal opinion of the Bank of Jamaica's attorneys-at-law that the Bank of Jamaica is authorised to receive the loan and that the statutes have been satisfied. If any tax exemption is required, the relevant ministerial order or alternatively the agreement would read "net" and a certificate from the secretary of the Board verifying the signatures on behalf of the Bank

of Jamaica would be provided. The funds would then be disbursed, to an account number in a foreign bank, named by Bank of Jamaica, where it keeps it foreign currency reserves.

The witness Theobalds said, in examination-in-chief,

> "Not to my knowledge has Bank of Jamaica ever accepted cheques for loan agreement in foreign currency by delivery of cheque in Jamaica. I involved with loan agreements for the last 21 years ..... It would not happen."

Negotiations for a loan would not be conducted by the head of a department of the Bank of Jamaica - he would not have the authority. Straw could not validly have given Beckford such authority.

An interest rate of 16%, moreso 24% would not have been acceptable to Bank of Jamaica.

In January 1993 the Bank of Jamaica was offered a loan of US$25,000,000, by a consortium of European banks at an interest rate of 2½% above LIBOR rate, which was then 3.2% or 3.25%. Jamaica agreed to this rate but did not take the loan as it was not needed because in January 1993 its Net International Reserve, the balance of foreign currency in the Bank of Jamaica after deduction of standing liabilities, was satisfactory. The rate payable, if Jamaica had taken that loan would have been a maximum of 5.75%, a single digit rate, the usual rate for Bank of Jamaica borrowings of international loans then, in such circumstances.

However, between September 1991 and March 1992 Century National Bank Limited provided "loans" in U.S. currency to the Bank of Jamaica of rates of interest between 11% to 16%; the funds were transferred to "Federal Reserve Bank of New York, New York for credit Regular Account Bank of Jamaica", see exhibit 89. The witness Straw explains that these were deposits by the domestic bank to Bank of Jamaica and not

loans and the rate of interest co-incided with the then current domestic rate of interest. I accept this distinction.

The rate alternative to the LIBOR rate, is the U.S. prime rate, which was approximately 6% in January 1993; the ultimate agreed rate using the US prime would have been 1½% or 2% over the US. prime rate, that is 7½% to 8%.

The stamp "Bank of Jamaica" on exhibit 5, would not have been used on any "external document" of that nature from the Bank of Jamaica; it is used by secretaries in the Bank of Jamaica to identify incoming documents.

The promissory note, exhibit 5, was not brought to the attention of the witness Theobalds, he said,

> "The document was not brought to my attention as head of the legal department or in any capacity - prior to 20th January, 1993. I not know of its existence.
>
> If Bank of Jamaica borrowing money from foreign bank, negotiations would not be carried out on behalf of the Bank of Jamaica by someone who is not an agent or representative of the Bank of Jamaica.
>
> I know Orville Beckford ... as acting director of the Economic Co-operation Department ... he would not have the authority or capacity to negotiate a loan on behalf of the Bank of Jamaica...."

To the court, he said,

> "Straw could not have given Beckford authority to negotiate loan on behalf of the Bank of Jamaica..."

There was nothing on the face of the Dextra cheque, exhibit 10, to indicate that it was the subject of a loan. Banks do have systems in place to detect fraudulent documents and precautions are exercised to minimize loss due to wrongdoing.

Exhibit 10, with the Bank of Jamaica as payee, was the largest single item purchased by the authorised agents. Several other cheques drawn to payee "Bank of Jamaica" were purchased by the authorised agents, see exhibit 110 (a to k). These represented withdrawals by Beckford from his foreign currency

account no. 80-5001682 with the Century National Bank and purchases of a Century National Bank draft payable to "Bank of Jamaica." Subsequently, they were sold to Bank of Jamaica through its agents.

Although the Bank of Jamaica instructed its agents not to purchase foreign currency from unauthorised "dealers in the business of buying and selling currency", but from, in the words of the witness Theobalds,

> "(a) persons who, themselves earned foreign currency and
>
> (b) persons who received it either by gift or settlement or a debt from some person overseas",

there was some relaxation on its part. Purchasing by its agents from a person, if it is unknown whether or not it is in the "business of trading in foreign currency", or suspected that he is, may well have breached the rule. The act of purchase simpliciter was not a breach of the rule. Authorised dealers were appointed by the minister. The commercial banks, some building societies, some merchant banks and the Bank of Jamaica were also authorised dealers. Commercial banks were given authority to appoint agents to buy foreign currency. Several purchases by Bank of Jamaica's agents were from persons who were probably unauthorised currency traders - a clear display of ambivalence; see exhibits, 81 and 106.

The minutes of a meeting by Straw and Mason on behalf of the Bank of Jamaica with, its agents including, Jones and Mitchell, on the 17th day of December, 1991, exhibit 113, had noted that the said agents were purchasing foreign currency, at rates above that of the commercial banks. It was agreed that purchasing rates would be quoted by the Bank of Jamaica in specific bands. The meeting dealt with the prompt notification by the agents of their purchases each day, their commission, a "penalty for the funds purchased outside of the rates stipulated by the Trading Department", the quality of the agents' return, in that items thereon

should be properly summarised", and that "cheques were to be properly examined before acceptance by the agents." Exhibit 113 reads, inter alia,

> "The meeting concluded that the black market should be left alone except in cases of very large amounts."

In addition to the discrepancies in the monetary details on the agents' returns, exhibit 106, and the precise value of the agents' cheques on the relevant bank statement, exhibit 103, the authorised agents did commit several other breaches of the the agents' agreement in the operation of the foreign currency purchasing system. By a letter dated 10th November 1992 from the Managing Director of the Island Victoria Bank to the Bank of Jamaica, exhibit 92, information was provided that Wycliffe Mitchell had engaged the services of Orville Beckford to "assist (him) by purchasing foreign exchange on my behalf from time to time."

The said letter continued,

> "Mr. Beckford operates a current account with our Bank through which substantial Jamaican Dollar transactions pass on a regular basis."

This "appointment" was in breach of paragraph 5.1 of the agents' agreements, exhibit 35 and 36. The witness Theobalds so advised by memorandum dated 16th November, 1992, exhibit 249. Mitchell, by letter dated 16th November, 1992, exhibit 91, retracted from his former letter, exhibit 24, stating that Beckford was merely engaged to "assist me in the performance of my duties from time to time." Dr. Jefferson, Senior Deputy Governor, held a meeting with the legal officer, Mitchell, Peralto and Straw and discussed it.

Paragraph 32.2 of each of the said agreements stipulates that the agents' cheques should be drawn in "the name of the vendor" and that "Payment may only be made to the vendor." In so far as cheque no. 0000392 was drawn by Mitchell on his account with Bank of Jamaica to payee "Century National Bank account

00052000787 for $4,096,732.50", exhibit 132 (a), it was a breach; that account was the Fecon account.

The plaintiff's witness Caple Williams stated that in "mid 1992" on Beckford's request Century National Bank agreed to provide him with the facility to purchase "foreign exchange for the Bank of Jamaica, subject to settlement immediately you receive these funds." This arrangement was conditional "on you being appointed to act as an agent/sub-agent on behalf of the Central Bank." This was therefore a credit arrangment made between Beckford and Century National Bank not before "mid 1992". Williams stated that the Fecon account was opened in February 1992, he said in cross-examination,

> "In respect of the Fecon account there was no credit arrangement, it should have operated in credit from the beginning."

Beckford was therefore not representing to Century National Bank, nor purporting to be purchasing foreign currency on behalf of the Bank of Jamaica before "mid 1992"; he was not so representing in February 1992.

It is clearly an untruth and an afterthough contrived to deflect the blame from himself when the wrongdoing concerning the plaintiff's cheque was discovered that Beckford now maintains that "Deputy Governor Straw... approached me early 1992 ... to assist the authorised agents ..... period difficult to get foreign exchange at $22.15 the Bank of Jamaica rate...."

The foreign exchange market was liberalized in September 1991 and up to March 1992 there were no single fixed rate at which the authorised agents of Bank of Jamaica were restricted in the purchase of foreign currency; there was a band of rates within which purchases could be freely made.

In a meeting with the agents of Bank of Jamaica on 6th March, 1992, chaired by Straw, minutes, exhibit 118, the Deputy Governor of Finance and Administration De Peralto observed that there were "other authorised agents from other

commercial banks in the market." The minutes read,

> "It was discussed that there was a change in the market and that people were seeking the highest rates. It was noted that when the commercial banks buy, for example, the Pound sterling, they convert the proceeds to U.S. dollars before selling to the Bank of Jamaica.....
>
> ....Mr. Rhooms (then Senior Director, Foreign Exchange Trading and Budgeting) advised that Bank of Jamaica should continue to be aggresive with respect to rates etc. The agents agreed that a more realistic rate for the Board was needed, so that when the commercial banks move their rates, we could also move ours."

Therefore, in March 1992 the rate was not then fixed at $22.15, but Beckford had already opened the Fecon account, in February 1992. Of this period, March 1992, Straw said, in cross examination, that the rates were not then fixed at $22.15, the selling rate was in the region of $35.60 Jamaican to US$1.00, at which rate Bank of Jamaica was then buying it. I accept this as evidence of the truth.

An extract from the minutes of a meeting of the Board of Bank of Jamaica on 22th January, 1992, exhibit 83, reads,

> "The Board was provided with a report on the Bank's foreign exchange operations. The report showed the rates paid by the agents since operations started in December 1991. The report compared the rates at which the agents purchased foreign exchange with the weighted average buying rates and also compared the "high" rates paid by the agents with those of the commercial banks; and in every instance, the "highs" of the Bank's agents were lower than the "highs" paid by the commercial banks....
>
> When the foreign exchange market was liberalized in September 1991, the official arrears of the Bank stood at $27.7 million... .... By December 1991, the arrears had grown to US$54 million.
>
> It became clear that if the Bank continued to be inactive in the market, the Bank would reneging on all Government's debts.
>
> It was against that background that the foreign exchange agents were contracted."

The liberalization of the Jamaican foreign exchange system in September 1991 was statutorily recognized by, the Exchange Control (Removal of Restrictions) Order 1991, dated 31st September 1991 and published in the Jamaican Gazette Supplement (Gazette no. 65/91) No. 41. The preamble reads,

> "Whereas in the interest of the economy of Jamaica it is expedient to liberalize the foreign exchange system...."

In March and April 1992, the purchase of foreign currency was within a range of rates provided by the Bank of Jamaica.

The rate for the purchase of US$1 dollar was not fixed until August 1992 at the rate of $22.15 Jamaican to US$1.00. Beckford said, in examination in chief,

> "Deputy Governor Straw then approached me early 1992 to use my experience with foreign exchange earning entities to assist the authorised agents to purchase foreign exchange needed by the Bank and the country. I would contact the sub-agents as to rate and when they would sell, then contact the authorised agents and advise them. The rate paid to sub-agents above the official rate was not to be put on the cheque given to the sub-agents as I was told by Mr. Straw - we not want the public to know Bank of Jamaica buying above the official rate of $22.15. Therefore I opened an account at Century National Bank in the name Fecon Trading - foreign exchange conversion.
>
> This account was used to keep the differential between the official rate and the rate at which foreign exchange was bought from sub-agents. Manager's cheques were then drawn on the Fecon account and paid to sub-agents at the full amount at which they were selling, hence a differential would remain in the Fecon Account. Mr. Straw said the differential would be paid from some Government account as soon as they worked out a mechanism to do so."

In "early 1992" there was no single "official rate". There were bands of rates - see clause 10 of agreement, exhibits 35 and 36. There was no necessity to conceal from the public the fact that "Bank of Jamaica buying above the official rate of $22.15", because, in "early 1992" there was no single "official rate" of $22.15", that rate was not so fixed until August 1992.

The Fecon account opened by Beckford in February 1992 was therefore unconnected to such directions or arrangements as Beckford suggests, attributable to Rupert Straw. The basis for the opening of the Fecon account as stated by Beckford did not and could not have existed until August 1992 when the official rate was fixed at $22.15. Therefore Rupert Straw could not have approached Beckford in early 1992 and requested that he assist the authorised agents in the acquisition of foreign currency, as Beckford states he did, and for the reason that he said he did.

Beckford opened the Fecon account Century National Bank on 13th February, 1992 on his own initiative for his private purposes. By the following day he had incurred an overdraft of $1,132,120.00, which rose to $2,169,969.85 by the 28th of February 1992. On 31st March 1992 his overdraft was $3,431,648.82 having reached a high of $7,434,076.25 on 27th March, 1992. Caple Williams admitted in cross-examination that this was an unsecured debt, the account never had a credit balance,

> "Security was first taken in November, 1992. That was not prudent banking on the part of Century National Bank."

Beckford was accordingly permitted to accumulate a huge liability in the operation of his Fecon account, in multi-million dollar transactions. Why was he doing so, and allowed to do so by Century National Bank, without any apparent attempt, hope or "mechanism" to reduce this indebtedness? The management of Century National Bank, and in particular, the manager of the Mandeville branch whom Beckford "had confidence in" was reckless, to say the least, in facilitating him in his fraudulent transactions.

In April 1992 when Jones' account was suspended, a celebrated initiative was instituted and therefore the foreign currency exchange rate "came down." Jones' operating account was restored in May 1992, when, on reconciliation, taking into consideration the commission due to him from Bank of Jamaica, Bank of Jamaica was indebteded to him, see exhibits 251, 252 and 253. The relevant overdraft in his agency account of

$3,674,852.11 for which he was suspended was a debt due to Bank of Jamaica owed by him; he was obliged to and did re-pay Bank of Jamaica from his own earned commission.

The agents' overdraft was not the liability of the Bank of Jamaica. On the 30th April 1992 the overdraft balance on the Fecon account was $4,156,464.26. On 15th May 1992 Beckford opened an account no. 0141230516 at Island Victoria Bank in the name of "Georgia and Orville Beckford", exhibit - 28(a).

In "mid 1992", according to the evidence of the plaintiff's witness Caple William, when Beckford,

> "requested and our Bank agreed to provide you with a facility enabling the purchase of foreign exchange for the Bank of Jamaica.....",

Beckford was not validly doing so on behalf of Bank of Jamaica. The agents were still purchasing within a band of rates. The condition, as represented to Williams by Beckford ".... being appointed to act as an agent/sub-agent on behalf of the Central Bank" was untrue.

On 30th June, 1992 the Fecon account had an overdraft of $2,824,248.00, having risen to $11,111,671.84 on 23rd June, 1992.

In August 1992, Jones, who was ".... having difficulty in getting substantial flows from my normal sources from April 1992 " approached Beckford for his assistance in acquiring foreign currency. Jones had previously been acquiring foreign currency from Wildish and Phillips from 1991 until April 1992 when the rate was low and supplies ceased. Beckford did so, as from 21st August, 1992 supplying Jones with sums of U.S.$200,000 daily until February 1993, when the agency system was terminated by the Bank of Jamaica.

On 31st July 1992 the Fecon account was in overdraft in the sum of $4,458,553.28, none of which was caused by the alleged "differential." Jones testified that, commencing the middle of September 1992, Beckford consistently supplied

him with foreign currency US$20,000 less than what he should have delivered, creating an overdraft on his Jones' account.

Beckford confirms this, when he admitted, in cross examination,

> ".... at times the quantum of the instrument I intended to submit to the authorised agent was less than the equivalent, as the transaction did not take place at once. I would get some of the US dollars now and the rest later."

The rate at which U.S. dollars was purchased in August 1992 was then fixed at Jamaican $22.15 to US$1.00; the bands of rates were discontinued.

On 31st August 1992 the overdraft on the Fecon account was $4,394,964.05 and had risen to $7,236,960.70 on 30th September 1992.

On 15th October 1992 Beckford opened another current account no. 014/80/30156 at Island Victoria Bank in the name of "Mrs. G. Beckford/Mr. O. Beckford", exhibit 29. It was into this account cheques exhibit 23 drawn from the Fecon account and payable to Beckford, were lodged, and lesser amounts withdrawn on the same day, thereby leaving sums from the said cheques in this Beckford's personal account, exhibit 29. This activity by itself would add to the overdraft on the Fecon account, which on 30th October, 1992 had risen to $38,988,208.78.

Beckford was at this period of time supplying the agents with foreign currency. On the evidence, the agents' cheques reveal that they were purchasing the US currency at the rate of Jamaican $22.15 to U.S. $1.00. Bank of Jamaica was re-imbursing the agents of the rate of $22.15. There is no evidence that the agents or Bank of Jamaica were purchasing the U.S. currency in excess of $22.15.

The conduct of Beckford, when in November 1992 the witness Williams at Century National Bank, summoned a meeting of Straw, Rhooms and Beckford, which meeting Beckford did not

attend is explicable, in my view, in that he could not maintain the pretence, in the presence of Straw and Rhooms from Bank of Jamaica, that he Beckford was operating the account on the instructions of Straw and on behalf of the Bank of Jamaica.

Williams said, in evidence, that at the meeting,

> "I advised them that one of their agents' account had been overdrawn substantially,"

and not as suggested to Straw in cross examination which he denied,

> "...Williams disclosed to you that the owner of the Fecon account was Mr. Beckford."

Straw's account of the meeting is probably correct. The subsequent conduct of himself and others at the Bank of Jamaica in making enquiries of the identity of Fecon at the Registrar of Companies, of the agents and Century National Bank without success confirms this. He said that Williams did not disclose the information of the identity of Fecon until the 6th or the 8th day of February, 1993.

When in November, 1992 Beckford was asked by Williams of Century National Bank to provide security for the Fecon account, one would have expected Beckford to demand from Bank of Jamaica an indemnity and insist that Bank of Jamaica provide the required security. Beckford did not do so.

Beckford provided to the Century National Bank the promissory note dated 9th November 1992, exhibit 42, for the repayment of a loan of $16,000,000 at 70% interest per annum and a mortgage instrument in respect of the assets, two lots of land, of Chicks Jamaica Ltd., a company in which he was a shareholder. The other two shareholders, "his partners", owed no "allegiance" to the Bank of Jamaica nor to the Fecon account. The said loan of $16,000,000 was paid into the said account on the said day in reduction of the overdraft.

In addition, Beckford pledged to Century National Bank as the said security,

> (1) His life insurance policies, at insurance companies, Life of Jamaica, Island Life and Crown Eagle Life, "... not exceeding $2,000,000.00", and
>
> (2) $1,000,000.00 cash.

Of this latter amount he said to the Court, in evidence on 11th June, 1996,

> "I did not make a claim on Bank of Jamaica for these. I have not gotten around to this yet, Century has (the) title."

His conduct was that of a man who knew that the liability of the Fecon overdraft was his personal liability and assumed that liability - pledging not only his personal assets as security, but also that of his business partners. His conduct is inconsistent with one who was acting under instructions of a Senior Deputy Governor of Bank of Jamaica Rupert Straw to use the said account to absorb a "differential" in the purchase price of foreign currency on behalf of the Bank of Jamaica.

The overdraft on the Fecon account was $54,006,733.55 on 14th December, 1992, $66,908,278.85 on 17th December, 1992 and $64,317,447.21 on 31st December 1992.

Beckford's personal record, exhibit 44, with its dates, familiar recurring names, monies paid and owing, all portray an active involvement in foreign currency transactions, covering a period March 1992 to February 1993.

Beckford was using the Fecon account on his own to purchase foreign currency with reckless disregard of the increase in the overdraft. He was earning 50% of the agents' 25% commission on the amount of foreign currency he was providing to the authorised agents. He said, in evidence that he introduced

an amount of between U.S. $120,000,000 to $130,000,000 and earned a commission of about $7,900,000.00 Jamaican. He had no intention to repay the overdraft and intended that it be seen as the liability of the Bank of Jamaica. He said in re-examination,

> "At the end of December 1992 my personal liability on this account (Fecon) was $64,317,447.21.
>
> I did not expect to pay this $64 million from my own pocket. I would have expected this money to be repaid by Bank of Jamaica."

He also said,

> "The agents had to have a nil balance on the accounts December 1992 - so far the nil balance the agents had to get whatever instruments outstanding and so for them to clear their accounts to zero all foreign exchange instruments outstanding had to be given to Bank of Jamaica. All the overdraft being built up in the agents' account had to be cleared. This was done pre-dominantly from the Fecon account."

I believe Jones when he states that the shortages in the delivery of foreign currency by Beckford created a "running account" with him, which created an overdraft on his Jones' account, "invariably he would owe me money"; and that the amount of $38,677,091.85 overdraft, exhibit 103, although his liability, represented monies owed to him by Beckford.

"Foreign exchange outstanding" referred to by Beckford was more probably, amounts for which the authorised agents had already given Beckford their cheques in Jamaican currency, and which he had in return short supplied in foreign currency.

When on 15th January, 1993, Williams on behalf of Century National Bank wrote, exhibit 33(a) to Beckford, he was issuing an ultimatum for payment,

> "... we have been saying over, the past many days and weeks, we are unable to continue with the level of indebtedness which now exists ... We .... expect that within the next twenty-four (24) hours, you will provide us with the funds to settle this account fully and finally and/or provide us with the promised Central Bank Promissory note to cover the indebtedness."

Beckford's response, exhibit 33(b), by the handwritten noted,

> "... Thanks for the assistance given to the Central Bank.....",

is self serving and in keeping with his pretence. The relevant promissory note, exhibit 41, for US$3,786,169.08 was not signed by Straw, as alleged by Beckford.

The evidence of Straw is credible in the circumstances, that he did not at any time instruct Beckford to assist the authorised agents, that he regarded the overdraft of Beckford with Century National Bank as his Beckford's personal account, that he did not know that Beckford operated the Fecon account and that no loan was sought by the Bank of Jamaica.

Beckford said that he spoke to Wildish between the 1st and the 10th January in respect of the loan to the Bank of the Jamaica, after Straw told him that,

> "... the agents' accounts at Bank of Jamaica, Wycliffe Mitchell and Richard Jones and high overdraft balances and something had to be put in place quickly to avert a crisis .... it required foreign exchange instrument ... and I to seek out a couple of sub-agents ... if they could put together a loan to Bank of Jamaica to reduce the agents' overdraft - Mitchell and Jones ... I told Wildish ... and asking him to 'put together' a loan of US$3,000,000 to US$5,000,000 to assist the Bank of Jamaica."

Beckford did not say in evidence that Straw told him then, that the two agents' overdraft totalled US$3,000,000 to US$5,000,000. Between the 1st and the 10th day of January, 1993, the highest amount of the overdraft was,

Jones' $11,358,057.20 on 8th January, 1993

Mitchell's $13,557,295.43 on 8th January, 1993

making a total of $24,915,325.63; Beckford did not have this information.

It is unlikely that Straw could have told Beckford of the necessity to borrow Jamaican $66,000,000, an amount far in excess of the agents' personal liability then. It was a liability in any event that Straw never regarded as the liability of the Bank of Jamaica.

It is helpful to note that in April 1992, Jones' earned commission was appropriated by the Bank of Jamaica to offset the overdraft on Jones' account, such overdraft then construed both by the Bank of Jamaica and Jones to be his Jones' liability. The then existing contractual relationship was unchanged in January 1993. It is therefore unlikely that Straw would have had any reason in January 1993 to see the agents' liability for the said overdraft any differently than in April 1992, to necessitate the giving of instructions to Beckford, to seek a loan to pay off the overdraft on the agents' account.

Ironically, it was Beckford's own Fecon account which on 15th January, 1993 was secured by the "promissory note" for US$3,786,169.08, see exhibit 41, and showed an overdraft on 4th January, 1993 of Jamaican $64,317,447.21, see exhibit 79.

Cheques, exhibit 25, did purchase the Dextra cheque. The agents' accounts were debited with the said cheques and subsequently re-imbursed by the Bank of Jamaica with the Jamaican dollar equivalent.

It was quite inaccurate to suggest to the witness Jones, in cross examination that,

> "In making the return for the alleged purchase of the Dextra cheque you selected cheques issued that came close to the Jamaican dollar equivalent of the Dextra cheque and put this down in your returns as purchasing the Dextra cheque."

Jones denied this. There is no evidence to support this suggestion. All the cheques referred to by the learned queen's counsel for the plaintiff, as being identical in amount to cheques, part of exhibit 25, were themselves detailed, and properly debited to the respective agent's account and subsequently re-imbursed by the Bank of Jamaica with the Jamaican dollar equivalent; the similarity in amount of cheques is not an unusual feature, recurring as it does throughout the

said transactions. There was no such misrepresentation of purchase as suggested.

On 19th January 1993 Beckford received the Dextra cheque, exhibit 10 from Michael Phillips. Not suprisingly, Beckford said Phillips did not, neither did Wildish tell him "how to deal" with the cheque, exhibit 10, and the promissory note, exhibit 5.

Beckford admitted that he signed exhibit 5, and alleged that Straw also signed it. It was witnessed by his Beckford's secretary "K. Scott" who placed the Bank of Jamaica stamp on it. The document was never presented to the legal department of Bank of Jamaica by Beckford.

Two copies of exhibit 5 were handed to Phillips by Beckford,

> ".... either in my office on the 8th floor or Phillips had returned downstairs to his car and I handed (them) to him."

Beckford handed the cheque, exhibit 10, to Jones, who received it as a sale in the foreign currency transaction.

A third copy of exhibit 5, in the nebulous words of Beckford, ".... was kept at the Bank of Jamaica."

By letter dated 9th February 1993 from the Bank of Jamaica, signed by "R.E. Straw, Deputy Governor, Operations Divison" to "Dextra Bank and Trust Company Limited", exhibit 11, Straw said,

> "It has come to our attention that you are holding a document purporting to be a Promissory note evidencing a loan of U.S.$3 million made by yourselves to Bank of Jamaica, dated January 20, 1993 and purporting to be signed by the writer hereof and one other person."

He denied authorship of the document, stated that the signature purporting to be his was a forgery , that Beckford was not authorised to sign on behalf of Bank of Jamaica and that no loan transaction was contemplated by Bank of Jamaica.

The plaintiff company by letter dated 11th February 1993 from its attorneys, Messrs. Myers & Alberga, exhibit 12, in reply, claimed an immediate payment of the sum of US $2,999,000 plus interest, in repayment of the said loan.

The defendant maintained its posture, by its letter in reply dated 12th February 1993, exhibit 13, claiming that the said cheque,

> ".... was sold to us in the normal course of business and good and valuable consideration given thereof."

The writ was filed on the 11th day of March, 1993. Mr. Mahfood, Q.C. for the plaintiff submitted that the defendant, by taking possession of the plaintiff's cheque, exhibit 10, and lodging it to its account converted the said cheque which remained the property of the plaintiff, because no title passed, the defendant having denied that there was any valid loan transaction; consequently, the plaintiff had an immediate right to possession, subject to the completion of the loan transaction, **Bute (Marquess v. Barclays Bank [1955] 1 OB 202 and Lipkin Gorman v Karpnale Ltd. [1992] 4 All ER 512;** that there was no title in the vendor of the said cheque to the defendant because it was handed by Phillips to the defendant's officer Beckford conditionally, for a special purpose only, that is, for the completion of the loan transaction and its agents Jones and Mitchell could not acquire a good title from Beckford; there was no purchase of the said cheque, which was received by Jones and Mitchell from Beckford for the purpose of reducing their overdraft; that there was no valid delivery of the said cheque by or under the authority of section 21 of the Bills of Exchange Act, it having been handed to Beckford in disbursement of the loan and in exchange for the promissory note; that the plaintiff was acting under a mistaken belief that it was making a loan, therefore any alleged contract is void for mistake by the plaintiff

and title remained with the plaintiff; that there was no valid or voidable contract between the plaintiff and any third party who could pass title to defendant - **Anson's Law of Contract 25th edition;** that the Dextra cheque, not being a bearer cheque making it a negotiable instrument whose title is transferable by delivery, **Bechuanaland Exploration Co. v. London Trading Bank [1898] 2 QB 658** was payable to order, therefore its title is not transferable without indorsement and delivery - sec. 21 of the Bills of Exchange Act; neither was it a manager's nor a bank cheque **Yan vs. Post Office Bank Ltd. [1994] 1 NZL R 154;** that conversion is a tort of strict liability, that the defence of estoppel fails because the plaintiff owed no duty to the defendant as lender to borrower, neither was there any estoppel giving rise to negligence for its breach; there was no misrepresentation by the plaintiff that there was authority to sell the said cheque, nor did the agents or Bank of Jamaica rely on any representation to the latter's detriment. **Jones Ltd. vs. Waring and Gillow[1926] AC 670, Commercial Law Textbook, 4th edition by P.A. Read, page 166, Commercial Law by Bradgate and Savage (1911) page 297, Patent Safety Gun Cotton Co. vs. Wilson (1880) 49 LJQB 713;** that assuming there was negligence or carelessness on the plaintiff's part, it was not shown to have been in the transaction, nor to have been the proximate cause of any loss to the defendant - **Staple v. Bank of England [1887] 21 Q B 160, London Joint Stock Bank vs. McMillan & Arthur [1918] A.C. 777;** that the plaintiff is entitled to succeed, in the alternative, on its claim for money had and recieved, because the court should not permit the reliance on the equitable defence of change of position, because the proximate cause of any such alleged change of position was the wrongful actions and negligence of the defendant's officers in not suspending the overdraft facilities of the agent Jones, thereby enabling the purchase of the Dextra cheque - the defendant was not an innocent party - **Lipkin Gorman v. Karpnale, supra.**

Dr. Rattray, Q.C. for the defendant submitted that the plaintiff, having drawn the cheque, exhibit 10, in the name of the defendant and caused it to be delivered to the defendant as intended, the presumption is, that title passed to the defendant and therefore the claim in conversion fails, **Central Acceptance Ltd. vs. Smith Hughes & Robertson (1992) 3 N.I.L.R 413**; that a mistake of fact on the part of the plaintiff does not prevent title passing - **Barclays Bank vs. Simms (1980) 1 Q.B. 677**; that title passed when the said cheque, a bill of exchange, as defined by section 73 of the Bills of Exchange Act and as such a negotiable instrument transferable by delivery, payable to a named payee, Bank of Jamaica, was delivered, in accordance with section 2 of the said Act to the said payee; that by section 21 an unconditional delivery is presumed unless the contrary is proved; that any condition imposed by the plaintiff should be brought to the mind of the defendant - **Equitable Securities v. Neil (1987) 1 N.I.L.R. 223**, but there was no loan agreement to which it could be attached, therefore any condition is not applicable; that Wildish and Phillips, agents of the plaintiff did not communicate any condition to the defendant, thereby maintaining a "secret limitation of ostensible authority" and therefore the defendant was not bound but their principal, the plaintiff was bound by their actions - **Jones v. Waring and Gillow, supra**; that a principal is bound by the fraud of its agent, whether such principal benefits thereby or not - **Lloyd vs. Grace Smith & Co. (1912) A.C. 716**; that where no legal relationship exists between the plaintiff and defendant and the defendant receives money from a third party paid by the plaintiff under a mistake of fact to which the defendant was not a party, defendant may keep such money, if he is a bona fide purchaser for value - **Jones vs. Waring and Gillow, supra**; that the Dextra cheque, a negotiable instrument is irrecoverable by the Plaintiff on the basis of the rule in **Cocks vs. Masterman (1829) 9 B & C 902**, in that, money was paid on the said negotiable

instrument, to the defendant innocent of the mistake and who might be affected if he had to refund it - a rule indispensable in business; that a person is entitled to know on the day due whether or not a cheque will be dishonoured; that the cheque was paid by Royal Bank of New York without any notice of dishonour by Dextra; that the plaintiff is estopped because by issuing the cheque in the name of the defendant, was recklessly issuing it without regard to established principles in making a loan and placing it in the hands of its agent a seller of foreign currency, thereby representing to the defendant that it was entitled to payment; that the negligent conduct of the plaintiff in effecting the delivery of the cheque by handing it to its agent, to be received by defendant in the ordinary course of business, acting bona fide without notice and relying on the representation, was the proximate cause of the loss - **Yan v. Post Office Bank, supra, Lloyd's Bank v. Cooke (1907) 1 K.B. 794, Brown vs. Westminster Bank Ltd. (1964) Lloyd's List Reports 187, London Joint Stock Bank vs. MacMillan [1918] A.C. 777, Jacob v. Morris (1902) 1 Ch. 816;** that the proximate cause was not the operation and supervision of the foreign exchange system which had no causal connection with the negotiating and contracting of loans; that Bank of Jamaica changed its position by making the payment as a result of the reckless conduct of the plaintiff which resulted in the mistake alleged and it would be inequitable and unjust to require Bank of Jamaica to make restitution- **Lipkin Gorman v. Karpnale Ltd. [1991] 2 A.C. 548;** that the plaintiff who facilitated the deception and acted recklessly, and not the innocent party, the defendant, should sustain the loss, **Lloyd v Grace Smith, supra, Lickborrow vs. Mason (1878) 2 TR 63;** that the plaintiff as a financial institution engaged in lending owed a duty of care to a prospective borrower, the plaintiff did reasonably forsee damage to the defendant and it is just that liability be imposed

on the plaintiff - **Donoghue vs. Stevenson (1932) A.C. 562, Alcock v Chief Constable of South Yorkshire (1992) A.C. 310;** that there was no mistake of fact, but a payment with a condition imposed which not having been communicated, did not affect Bank of Jamaica, **Jones v. Waring and Gillow, supra.**

Several other authorities were relied on by counsel for each side.

Money paid by a person under a mistake of some fact is recoverable on the basis that had the true facts been known the payment would not have been made because the recipient would not be entitled thereto. This principle was long ago settled in **Kelly vs. Solari (1841 9 M and W. 54,** a claim for the recovery of monies from the executrix of the deceased paid out by a company on a policy which had been previously cancelled. Parke B said,

> **"... where money is paid out 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..... 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....."**

This right to restitution in the payer arises because his mind was not directed to the true facts when he made the payment. He may recover in a claim for conversion, a tort of strict liability, or for money had and received. The payer's near-absolute right to his property was described by Lord Wilberforce, in this way,

> **"English law has generally taken the robust line that a man who owns property is not under any general duty to safeguard it and that he may sue for its recovery any person into whose hands it has come;" Moorgate Mercantile Co. Ltd. vs. Twitchways [1976] 2 All E.R. 641.**

Conversion is defined as an intentional exercise of control over the chattel which so seriously interferes with the right of another to control it that the intermedler may justly be required to pay its full value - **Fleming, The Law of Torts, 7th Edition, page 50.** As to the title of the plaintiff in goods in a claim for conversion, the author in **Salmond on the Law of Torts, 14th edition,** at page 158, said,

> **"Whenever goods have been converted, an action will lie at the suit of any person in actual possession or entitled at the time of the conversion to the immediate possession of them.... Usually the defect in his right to immediate possession arises from an adverse right of possession in a third party...."**

The author in the **Law of Restitution by Goff and Jones (1993) 4th edition,** said, at page 78,

> **"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 plaintiff's proprietary 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 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 bona fide purchase, successful claims are rare."**

It is sufficient for the plaintiff to succeed in conversion if he proves that he had an immediate right to possession.

In **Bute (Marquess) vs. Barclays Bank Ltd [1955] 1 Q.B. 202** the plaintiff's farm manager, McGaw, having claimed for farm subsidies on behalf of the plaintiff received money warrants endorsed, "[Mr. D. McGaw] for the Marquess of Bute", after his employment ceased. He lodged the warrants in a personal account at his bank and drew on this account. It was held that it was not necessary for the plaintiff to establish that he was the true owner of the property but merely that at the time he had an immediate right to possession.

The plaintiff succeeded in conversion.

See also **International Factors Ltd, vs. Rodriquez [1971] 1 Q.B. 351 (C.A.)** in which it was held that the plaintiffs were entitled to the immediate right to possession of cheques paid by debtors to a company whose book debts the plaintiffs had purchased in a factoring agreement. The defendant, a director of the company, was guilty of conversion by receiving the cheques payable to the company, but instead of handing them to the plaintiffs, he lodged them to the company's account.

An agent with actual or ostensible authority to sell, can pass title in goods, but once the agency is terminated or limited to acts other than sale, a purchaser, with knowledge, or in some instances, innocent without knowledge of such limitation, commits conversion. A thief, or one who fraudulently deals with another's goods cannot pass title, and an innocent purchaser of such goods, even if the owner of such goods was careless in protecting such goods; gets no valid title and commits conversion - **Jerome vs. Bentley & Co. [1952] All E.R. 144.**

However, although a payment made under a mistake of fact is prima facie recoverable in a claim for conversion, in some circumstances, if the payee can show that he acquired title or that it would be inequitable to oblige him to repay the money, due to the conduct of the payer or his agent, and that he the payee was not aware of, nor contributed to the mistake, nor was guilty of any wrongdoing and he acted to his detriment on receipt of the payment, he had a valid defence to a claim for repayment.

Estoppel is a defence to a claim in conversion. It consists of a rule of evidence which precludes the plaintiff from alleging facts inconsistent with a representation made by him as to a certain state of affairs, which representation the defendant relied on and acted to his detriment. Such

a representation may be made by words or conduct.

The nature of the representation necessary to amount to an estoppel varies according to the circumstances of each case.

> **"The question whether a course of conduct, negligent or otherwise, amounts to a representation, or is such that a reasonable man would take to be a representation meant to be acted upon in a certain way, must vary with each particular case." Halsbury's Laws of England, 4th edition, page 1082.**

Estoppel by conduct may involve careless or even negligent behaviour on the part of the person to be estopped but "negligence" in such circumstances does not require proof of the existence of a duty owed, as is necessary in the tort of negligence; see the view taken in relation to the reliance on the plea of non est factum concerning documents by Lord Pearson in Gallie v Lee **[1971] A.C. 1004 (H.L.), at page 1038.** He said,

> **"Estoppel in the normal sense of the word does not arise from negligence: it arises from a representation made by words or conduct."**

Conduct which amounts to a neglect by a party to observe normal business practice may give rise to an estoppel, against a party who creates such an omission. In **Jacobs v. Morris [1902] 1 Ch 817,** the defendants, a firm of merchants, were estopped from recovering from the plaintiff a loan of £4,000 made by the defendants to the agent of the plaintiff, purportedly, but falsely for the benefit of the plaintiff, on the strength of a power of attorney, although proferred to the defendants by the agent, which power of attorney did not authorise the agent to effect loans on behalf of the plaintiff.

In **Avon County Council v. Howlett [1938] 1 All E.R. 1073 (C.A.)** the plaintiffs who, due to a mistake of fact had overpaid wages to the defendant who was absent from work over a period of two years, sought a repayment of the

of the said wages. The defendant argued that the plaintiffs had represented to him that he was entitled to the money, it was paid to him, and in reliance on that representation he spent it and he would not ordinarily have done so and he was not at fault. The plaintiffs were estopped from recovering the overpayment.

The author **Fridman on Restitution, 2nd edition, at page 454**, in relation to the defence of estoppel, said,

> "The plea of estoppel has been considered in the context of recovery of money paid under a mistake. However, estoppel, like the doctrine of change of position or change of circumstances, may be of more general application and relevance. There is no reason in principle why estoppel should not be asserted if the material elements of the defence are satisfied in any case as a defence to a claim for restitutionary relief. The defence may be raised whenever a party has so misrepresented the true state of affairs as to lead the other party to change his position or rely to his detriment on the truth of the misrepresentation. The party guilty of the misrepresentation will be prevented from denying the truth of his misrepresentation,
> .....
> as a defence three basic elements must be established. The plaintiff, by words or conduct must have made a representation of fact which has led the defendant to believe that he has a right to the money in question.....
>
> Second, the representation must have induced the defendant to act to his detriment ... without notice of the true facts .... must have acted to his detriment relying on the veracity of the statement or conduct of the plaintiff.....
> .....
>
> Third, it is inherent in the notion of prejudicial reliance that the defendant not be more at fault in regard to the payment being claimed by way of recovery than the party who made the payment."

The defence of estoppel was raised, in substance, in **Kleinworth, Sons & Co. vs. Dunlop Rubber Co. (1907) 97 L.T. 263 (H.L.)** in a claim to recover money paid under a mistake of fact. The respondents by mistake, paid money to the appellants for goods sold to them by one Kramrisch and Company, instead of to other mortgagees as directed.

The jury, in answer to a specific question put to them by the trial judge, said that, the defendants (appellants) were not led by the plaintiff's (respondents') mistake to alter their position to Kramrisch to their own disadvantage. Because of that finding of fact the defence of estoppel failed. The Lord Chancellor, in dismissing as immaterial the issue of whether the money had been received by the appellants as principals or agents, said, at page 264,

> **".... it is indisputable that, if money is paid under a mistake of fact and is redemanded from the person who received it before his position has been altered to his disadvantage, the money must be repaid in whatever character it was received. The finding of the jury disposes of the controversy raised at the trial on this head. Channel, J put the question very plainly to the jury, and explained to them the contention of the appellants ... that they would not have continued, as they did continue, to make advances to Kramrisch and Company, if it had not been for this payment..... This contention the jury refused to accept."**

In the case of **Jones Ltd. vs. Waring & Gillow, Ltd. [1926] A.C. 670 (H.L.)**, one Bodenham who was indebted to defendants (Waring & Gillow) for goods sold, in order to obtain money, went to the plaintiffs (Jones Ltd.) and misrepresented to them that he was agent for a firm of car manufacturers and convinced the plaintiffs to agree to be agents for new cars to be sold on the market. In accordance with the agreement, the plaintiffs paid £5,000 as a deposit on 500 cars by means of cheques, after Bodenham advised them that they could make the cheques payable to the order of the defendants who were financing this said firm. Bodenham, received the cheque and gave to the defendants, falsely, in payment for his debts. The defendants cashed the said cheque (which had been substituted for the earlier cheques handed to Bodenham), and returned to Bodenham his goods which had been seized. The fraud, was discovered and the plaintiffs sued the defendants for the

recovery of £5,000 as money paid under the mistake of fact. Bodenham was convicted.

The defence of estoppel was raised.

Both Viscount Cave, L.C. and Lord Atkinson, (the minority) found that the defence of estoppel ought to succeed. The majority held that the plaintiffs were entitled to recover. Lord Sumner while taking the view that the facts of the case did not amount to an estoppel said at page 692,

> **"How the case would have stood had all this been proved in fact, I need not, therefore, discuss."**

In addition, he was of the view that the Kleinworth case, did not "... go further on the question of estoppel....." He maintained that it did not go beyond the defence to the claim for money paid under a mistake of fact, which an agent could set up, if he had paid over money before discovery.

Negligent conduct on the part of the plaintiff is not by itself a defence but must be taken into consideration with the rest of the circumstances.

The conduct of a person who pays money under a mistake of fact, may amount to a misrepresentation of fact which, if the payee relying on those facts, not knowing that they are untrue, changed his position to his detriment. It gives rise to the defence of estoppel on behalf of the payee in a claim for the recovery of the money paid.

In the instant case, the fact that the plaintiff proceeded through the various stages of board resolution, drafting of the promissory note, exhibit 5, and its ultimate transmission together with cheque, exhibit 10, with the instructions given to Wildish, I conclude that its intention was to make a loan.

However the plaintiff behaved less than prudent in seeking to do so. I so conclude for the undermentioned reasons.

(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 a 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 a 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 unnecesary.

(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 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 Bank of Jamaica.

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 owner of goods is permitted to be as careless as he choses with his goods, and that conduct will not by itself give rise to a plea of estoppel due to a subsequent dealing by a thief. But the law, while excusing inadvertence which facilitates the thief does not countenance conduct which gives active aid and encouragement to the thief.

The cumulative effect of this conduct of the plaintiff is a misrepresentation of facts which led Bank of Jamaica to believe that it was not taking a loan but purchasing the plaintiff's cheque, exhibit 10. That conduct was the real cause of Bank of Jamaica paying out US$2,999,000 in purchasing the said cheque, thereby acting to its detriment.

The operation of the agency system by Bank of Jamaica with all its imperfections, exhibited breaches of an agreement between Bank of Jamaica and its authorised agents. The plaintiff was not a party to nor contemplated to be likely to be affected by the said agreement. Exhibit 10, if it had been loan proceeds would never have had to progress through the foreign currency purchasing system. The faults of the said system were irrelevant to the passage of the cheque, exhibit 10, and was not the proximate nor the cause of the payment by Bank of Jamaica in purchasing the cheque.

Beckford, said in evidence,

> "I, 'sourced' for Taylor and Gooden, authorised agents - a few times. I not 'source' for all authorised agents."

It would be incorrect to conclude that the suspension of the purchasing by the authorised agents Jones and Mitchell, would have prevented the cheque, exhibit 10 from being purchased in the foreign currency system. The only agents' accounts which were under criticism were Jones' and Mitchell's. Jones' account was suspended by Straw twice - before the final dissolution. Beckford still had free access to other areas of the foreign currency purchasing system. Furthermore, exhibit 10 was inherently acceptable and it would have been

approved and authority would have been given for it to be purchased - although it exceeded the $5,000,000 limit. It was the type of cheque Bank of Jamaica sought to purchase, it having originated from a reputable source, as stated in the evidence of Straw and Theobalds.

In any event the overdraft ceiling of US$5,000,000 reduced to US$4,000,000 imposed on the said agents was not immutable. Even if the agents had kept within the $5,000,000 overdraft limit, and the other breaches, as recited did not occur, exhibit 10 could have been purchased, using the said currency purchasing system - with approval of the Deputy Governor. The numerous instances on which Bank of Jamaica acquiesced in or ratified purchases creating an excess of the agreed maximum overdraft is ample evidence of the flexibility of both parties to the agreement.

I maintain that the overdraft maximum imposed was directed towards seeking to control the amount of funds in the hands of the said agents at a given time, rather than a rigid prohibition on purchasing.

Paragraph 6 of Annex A to exhibits 35 and 36 read,

> "Until further advised each agent is allowed an authorised overdraft limit of $5,000,000 at the Bank of Jamaica. Amounts in excess of this limit require prior approval from the Deputy Governor Operations Division. The Bank of Jamaica may also arrange for part of this Line of Credit to be accessed through a Commercial bank."

Rupert Straw, did verify in evidence the operation of Annex A above.

The defendant was not at fault and did not contribute to the mistake of fact under which the plaintiff operated.

I 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.

I am of the view also that the defendant should succeed on the basis of the principle in the case of **Watson vs. Russell (1862) 3 B & S 34 (Q.V.).** In that case one Keys chartered a ship from the defendant and sub-chartered it to a third party through the plaintiff. The charter money, payable every four weeks in advance was paid by Keys. The second payment was not made and the ship was in danger of being stopped by the defendant. Keys obtained a cheque from the plaintiff payable to the order of the defendant for half of the month's charter with the agreement that Keys should advise the defendant that the payment was made on condition that the ship continue to perform the charter. Keys paid the cheque to the defendant but omitted to inform him of the condition. The balance of the payment was not made and the defendant having cashed the cheque terminated the charter. The plaintiff's action against the defendant for money had and received failed. The court held that the action was not maintainable because there was no privity between the plaintiff and the defendant. In delivering the judgment of the majority, Crompton, J said, inter alia,

> **"Assuming that Keys, as between himself and the plaintiff, acted improperly and without authority in paying the cheque to the defendant, still if the defendant was the holder of it for value and without notice, that is, if he received it bona fide for valuable consideration, he would have had a right to sue the now plaintiff upon it.**
>
> **If A, by means of a false pretence or a promise or a condition which he does not fulfil, procures B to give him a note or cheque or acceptance in favour of C, to whom he pays it, and who recieves it bona fide for value, B remains liable on his acceptance. His acceptance imports value and liability prima facie, and he can only relieve himself from his promise to pay C by shewing that C is not holder for value or that he received the instrument with notice or not bona fide.....**
>
> **When the defendant received the cheque, and when he cashed it, he was a holder for value, and had clearly a right to the cheque and the cash. He took the note .... without notice and he took it for good consideration in part payment....(money) due on the contract.....**

> ..... 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 judgment was affirmed in **Exchequer Chamber, (1864) 5 B & S 969.**

Keys was seen as an agent of the plaintiff, who gave him the cheque with a condition to be communicated to the payee.

> "Agency is the relationship that exists between two persons when one, called the agent, is considered in law to represent the other, called the principal, in such a way as to be able to affect the principal's legal position in respect of strangers to the relationship by the making of contracts or the disposition of property." Fridman's Law of Agency 6th edition, page 9,

This relationship of agency may also arise from the conduct of the parties, in the particular circumstances of of the case by operation of law, by estoppel.

The said author Fridman, said of agency by estoppel, at page 98,

> "Estoppel means that a person who has allowed another to believe that a certain state of affairs exists, with the result that there is reliance upon such belief, cannot afterwards be heard to say that the true state of affairs was far different, if to do so would involve the other person in suffering some kind of deteriment. Applied to agency this means that a person who by words or conduct has allowed another to appear to the outside world to be his agent, with the result that third parties deal with him as his agent, cannot afterwards repudiate this apparent agency if to do so would cause injury to third parties, he is treated in the same position as if he had in fact authorised the agent to act in the way he has done..... If the agent exceeds his authority the

> **doctrine of estoppel may operate to bind the principal: for the ostensible or apparent authority of the agent can supplement his actual authority, and so broaden the scope of the relationship of principal and agent as to make it cover the unauthorised acts of the agent. This is true even if in fact the agent is really acting for his own benefit, not for the benefit of his principal."**

In **Lloyd v. Grace Smith & Co. [1912] AC 716** the principal was held to be liable for the fraudulent unauthorised acts of his clerk, who by his acts benefitted himself and not his principal.

In **Jones Ltd. vs. Waring Gillow, supra,** in distinguishing Watson vs. Russell as not applicable, all the judges in the House of Lords observed that the latter case did not involve a payment made as a result of a mistake of fact. In addition, the main point of departure was the fact that the rogue Bodenham in Jones vs. Waring Gillow was not the agent of the plaintiff Jones Ltd., as Keys was held to be of the plaintiff in Watson vs. Russell.

Lord Sumner, referring to the words of Scrutton L.J. describing Bodenham as, ".... an agent with a secret limitation of his ostensible authority which he disregarded ....", said, at page 695,

> "... Bodenham was in no sense an agent for Jones Ltd. ...."

Lord Carson said, at page 700,

> **"I find it impossible to come to the conclusion that Bodenham be treated, either as a matter of fact or as a matter of law, as the agent of the appellants in conveying the cheques to the respondent.....**
>
> **The case, therefore, (Watson v. Russell) is not one of money paid under a mistake of fact, but is one, ... 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 .....**
> **.....**
>
> **Of course if it could be shown that Bodenham was in any sense the agent of the appellants, the result would have been different....."**

It was held, by the majority, that Bodenham was not the agent of the plaintiff which was not estopped and therefore was entitled to recover its money paid to the defendant.

In the instant case the plaintiff describes John Wildish and Michael Phillips as its messengers. Curiously, between the 15th and the 18th day of January, 1993, Darryl Myers sent to Wildish three telefaxes, exhibits 8, 9 and 16, not merely as a "messenger" for delivery, simpliciter, but with specific instructions concerning amendments to terms of documents and in respect of the negotiations concerning the promissory note. What calibre of messenger would be given such authority and be seen to remain, so classified? In the plaintiff's eyes, despite the non-existence of a contract with the defendant, Wildish was more than a messenger. When Darryl Myers wrote,

> ".... I see you were successful with the interest rate....." exhibit 8;

he had in fact and in law elevated John Wildish beyond the tier of messenger. John Wildish was in fact and in law the agent of the plaintiff and commissioned to take the cheque exhibit 10, to the defendant with a condition to be communicated.

Wildish, as agent for the plaintiff, was given instructions and a condition to be communicated to the defendant, namely that the handing over of the cheque, exhibit 10, should be preceeded by the signing of the promissory note, exhibit 5. Wildish, along with Phillips, with the assistance of Beckford failed to communicate this condition to the defendant's agents Jones and Mitchell, when handing over the cheque exhibit 10. Jones, in the circumstances would probably have declined to take it, if the condition had been communicated to him; he was purchasing foreign currency.

On the evidence he had no mandate, nor intention, nor need to take a loan. Wildish, was therefore, unlike Bodenham as found in Jones v. Waring Gillow, "an agent with a secret limitation".

Lord Carson, quoted Scrutton L.J., as he described such an agent, at page 699,

> **"It appears to me that the facts here are the same as in a case where an agent with a secret limitation acts in excess of that limitation, and the person with whom he acts who is ignorant of the secret limitation, is not bound by the secret limitation and can treat him as having the authority which he professes to have."**

The plaintiff as principal, is bound by the acts of its agent Wildish. The condition was not communicated to the defendant and therefore the defendant is not bound by that secret limitation. The principle in Watson vs. Russell supra, applies.

My conclusion is not affected by the fact that in the latter case no mistake of fact arose. The conduct of Wildish towards his principal and in relation to the defendant satisfies the liability arising in such a situation. Crompton J. in Watson v. Russell said,

> **"If A by means of a false pretence or a promise or condition which he does not fulfil, procures B to give him a note or cheque or acceptance in favour of C, to whom he pays it; and who receives it bona fide for value, B remains liable on his acceptance ..... and he can only relieve himself from his promise to pay C by shewing that C is not holder for value, or that he received the instrument with notice or not bona fide."**

This instant case embraces both features of, money paid under a mistake of fact, not contributed to by the defendant, and money paid with a condition attached, not communicated to the defendant.

The plaintiff's agents Wildish and Phillips were perpetrating the "false pretence" even before the cheque, exhibit 10, was issued and signed by the plaintiff on 19th

January, 1993. There were three cheques drawn by the authorised agents for the payment of the purchase of exhibit 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 exhibit 10 was handed over at Bank of Jamaica.

These cheques are:

(1) Exhibit 25(b) no. 0000456 for $6,645,000 dated 19th January, 1993 and payable to "Oneil Dunn". The reverse of the cheque exhibit 25(b1), is indorsed "Oneil Dunn" and bears nos. 101252165 - the Le Par account and 10153130 an account in the name of Troy McGill.

Exhibit 264, the bank statement of Le Par, acknowledges this deposit on 19th January 1993. The balance on the said cheque, exhibit 25(b) was deposited to the McGill account.

(2) Exhibit 25(i), no. 0000595 for $4,316,000 dated 18th January, 1993 and payable to "Carl Ricketts." the reverse of the cheque, is indorsed "Carl Ricketts" and bears nos. "101053130-$4,880,000.00" and "10105265-$436,000.00", the McGill and Le Par accounts, respectively.

Exhibit 266(a) confirms that there was a part-deposit of $436,000 of a Bank of Jamaica cheque to the "Le Par account" at the Eagle Commercial Bank on 18th January, 1993 under the signature of Michael Phillips.

The balance on the said cheque exhibit 25(i) was deposited to the McGill account.

(3) Exhibit 25(j), no. 0000594 for $6,645,000 dated 18th January, 1993 and payable to "Alphanso Reynolds". The reverse of the cheque is indorsed "A. Reynolds" and bears a number "101052165", the Le Par account.

It is significant to note that, in addition, on the said reverse of this cheque are the notations, "101052165-$436,000.00" "1015...." and 101053130-$880,000.00". These latter notations were crossed out, by lines. They are identical to the existing notations on the reverse of cheque, exhibit 25(1), supra.

> Exhibit 266(b) confirms that there was a deposit of $6,645,000 of a Bank of Jamaica cheque to the "Le Par account" at the Eagle Commercial Bank on 19th January 1993 under the signature of John Wildish.
>
> Exhibit 264, the bank statement of Le Par, acknowledges this deposit on 19th January, 1993.

The plaintiff's agents and Orville Beckford had themselves "pre-sold", exhibit 10, the Dextra cheque, and were 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.

Richard Jones, the authorised agent, gave evidence in harmony with this fact of expecting the arrival of exhibit 10, when he said, in examination in chief,

> "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 19th January, 1993 I drew seven cheques in payment. On 20th January 1993 I drew one other cheque to complete the payment for US$2,000,000."

For the above reasons also, I maintain that the plaintiff's claim fails.

The ease of negotiability of bills of exchange, including cheques, is of special importance in banking and the wider field of commercial activity for the proper functioning of the system. A cheque is almost like cash which passes easily from hand to hand losing an identifiable character. But unlike cash because of its form or the way in which it is written, it has peculiar special characteristics.

Section 29 of the Bills of Exchange Act makes a "holder in due course" one with an inviolable title where he takes the bill without any notice of any defect, takes it in good faith and gave value therefor, when it "was negotiated to him." By section 2 of the Act "holder" means "payee".

The cheque, exhibit 10, is not a bearer cheque, which under section 31 is "negotiated by delivery", but is payable "to the order of ...." and therefore is negotiated by "the indorsement of the holder completed by delivery." No cheque was "negotiated" to the payee, nor did section 21 entitle the defendant to claim that a "valid and unconditional delivery" was made to him "as a holder in due course". The facts disprove that. He cannot therefore, prima facie, as the original payee, qualify as a "holder in due course" to justify his right to retain, exhibit 10, see **Jones vs. Waring and Gillow, supra, per Viscount Cave, at page 680.**

However, quite apart from the above, the said section 21 recites in broad terms,

> **"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."**

This initial presumption was probably displaced by the tenor of the evidence of the plaintiff's witness that it did not intend a "valid and unconditional delivery."

The said statutory provision in section 21 also provides,

> **"... 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 .... the delivery in order to be effectual -**
>
> **(a) must be made either by or under the authority of the party drawing (or) accepting ...."**

The plaintiff and defendant were "immediate parties", as regards exhibit 10, which was in the name of the defendant. The plaintiff intended the cheque, exhibit 10 to be "delivered" to the defendant, albeit on a condition; exhibit 10 was therefore "under the authority of the party drawing." When the "drawee", the Royal Bank of Canada, New York, honoured

exhibit 10, thereby giving,

> "notice to or according to the directions of the person entitled to the bill that he has accepted it ....."

the defendant's title to the cheque was complete.

In the interim, the cheque, exhibit 10, was not dishonoured nor countermanded, thereby maintaining its certainty of progress and final destination in such a commercial transaction. The rule in **Cocks vs. Masterman** applies.

It seems to me that there ultimately arose ".... a contract on a bill". The defendant was a "holder for value" within section 27 of the Act and accordingly acquired title in the circumstances, see also **Midland Bank vs. Brown Shipley [1991] 2 All ER 690 (Q.B. Com. Ct.).** The plaintiff's claim, in conversion, for this reason also, fails.

The plaintiff claims, in the alternative, money had and received to the use of the plaintiff. The defendant in its defence denied that it received the money to the plaintiff's use and stated that it changed its position in good faith and therefore it would be inequitable to permit the plaintiff to recover the said money.

Change of position is now recognized as a defence to all restitutionary claims while maintaining that no one should be unjustly enriched. If a person on receipt of a benefit changes his position in circumstances in which he would not have, but for the receipt of such benefit, thereby acting to his detriment, he has a good defence to the extent that he has disposed of the benefit. The law would not compel such a person to repay the benefit, if it would be inequitable to order him to repay it. However, the defence is not available in circumstances where, the recipient was at fault or had knowledge at the time he received the benefit, that he was not, and the payer was, entitled.

This equitable defence, unlike the defence of estoppel will be applied pro tanto. The author in Fridman on Restitution, 2nd edition, page 462, observed, in relation to change of position,

> **"The defence has most often been raised in relation to claims for the recovery of money paid under a mistake."**

In **Lipkin Gorman vs. Karpnale Ltd. [1991] 3 WLR 10 (H.L.)** a partner in a firm of solicitors, the plaintiffs, drew cheques on the firm's client account, as he had authority to do, but he had the cheques cashed at a bank and received the money, which he used to buy chips to gamble and buy refreshments at the club of the defendant; the partner was a compulsive gambler. All bets and winnings were made by chips and when a bet was lost the club retained the chips placed on the losing bet. This partner also bought a banker's draft, in the name of the plaintiffs, as he was authorised to do, but wrongly indorsed and changed it at the casino for chips. A calculation was made, making adjustments, and it was found that the club had won and the partner had lost overall £154,745, money stolen from the solicitors. The club acted innocently and was not aware that the money was derived from the plaintiff's client account. The plaintiffs claimed against the club and the bank for restitution of their money as money had and received to the use of the plaintiffs. It was held, reversing the Court of Appeal, that the plaintiffs as true owners of the stolen money was entitled to be repaid by the club the sum of £154,745, the extent to which it had been enriched and for which it had given no consideration, because exchanging money for chips or paying out on the winning bets, which were void in law, was no consideration. The defence of change of position in good faith was available in that the club would suffer an injustice if it had to repay the money to the extent that it had changed his position. The

solicitors were entitled to recover their money that the club won from the partner less the winnings paid to the partner; that the plaintiff was entitled to recover the bank's draft bought with the plaintiffs' money - the defendant by conversion having been unjustly enriched thereby.

In delivering his speech, Lord Goff at page 34, said,

> **"... where an innocent defendant's position is so changed that he will suffer an injustice if called upon to repay or to repay in full, the injustice of requiring him so to repay outweighs the injustice of denying the plaintiff restitution..... ..... 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 .....bona fide change of position ..... the defence is not open to one who has changed his position in bad faith, as where the defendant has paid away the money with knowledge of the facts entitling the plaintiff to restitution; and it is commonly accepted that the defence should not be open to a wrong doer...."**

In the instant case the plaintiff paid out its cheque exhibit 10, in the name of the defendant under a mistake of fact, that is, intending to make a loan. That mistake was not induced by the defendant nor did the defendant have any knowledge of the fraudulent acts of Orville Beckford and his accomplices John Wildish and Michael Phillips, the latter two being agents of the plaintiff. The defendant was not a wrongdoer in the transaction.

The clearest proof of the falsity of Beckford's claim that the Fecon account was created "early in 1992" - to fund the differential between the official rate of $22.15 and the rate at which the US$1 was in fact purchased by Bank of Jamaica is provided by the size of the overdraft itself. Beckford claimed that,

> **"Leading up to January 1993 I identified sellers of foreign exchange, introduced them to authorised agents for**

> money to be sold to Bank of Jamaica to amount $120 million - $130 million U.S."

Beckford further stated,

> "Highest rate of exchange I negotiated with sellers $24 - $25 Jamaican to U.S. $1.00."

No sum of money was ever paid into the Fecon amount for the purpose of reducing - the said overdraft, except for the said $16,000,000.

Using the minimum differential of $1.85 Jamaican ($24.00 - $22.15) and the minimum total purchase identified by Beckford, US$120,000,000.00, the overdraft build-up in the Fecon account should have reached and remained at $222,000,000! At no time was this phenomenon created. On 31st December 1992 the overdraft on the Fecon account was a "mere" $64,317,447.20. This overdraft on the Fecon account from February 1992 was therefore created otherwise than exclusively by the "differential" between the "official rate" and the actual rate of purchase of foreign currency by the authorised agents, as claimed by Orville Beckford.

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 re-imbursed its said agents' accounts to the full amount of the value of the plaintiff's cheque purchased, thereby changing its position to that extent. The defenant has not been unjustly enriched. I hold that the defence of change of position is available to the defendant in these circumstances and accordingly succeeds.

Despite the ease to which one has recourse to it, the dictum of Ashurst, J, in **Lickbarrow vs. Mason (1878) 2 TLR 63 at page 70,**

> **".... where one of two innocent persons must suffer by the acts of a third, he who has occasioned such third person to occasion the loss must sustain it."**

is applicable, in the circumstances of this case.

Consequently, the plaintiff's claim fails. There shall be judgment for the defendant with costs to be agreed or taxed.