SUPREME COURT OF QUEENSLAND

CITATION:	*Port of Brisbane Corp v ANZ Securities* [2002] QCA 158
PARTIES:	**PORT OF BRISBANE CORPORATION** (plaintiff/respondent) **v** **ANZ SECURITIES LIMITED** ACN 004 997 111 (defendant/appellant) **PORT OF BRISBANE CORPORATION** (plaintiff/appellant) **v** **ANZ SECURITIES LIMITED** ACN 004 997 111 (defendant/respondent)
FILE NO/S:	Appeal No 11596 of 2001 Appeal No 11577 of 2001 SC No 8880 of 1998
DIVISION:	Court of Appeal
PROCEEDING:	General Civil Appeal
ORIGINATING COURT:	Supreme Court at Brisbane
DELIVERED ON:	10 May 2002
DELIVERED AT:	Brisbane
HEARING DATE:	4 April 2002
JUDGES:	McPherson and Davies JJA and Mullins J. Separate reasons for judgment by each member of the Court, each concurring as to the orders made.
ORDERS:	**Appeal No 11596 of 2001 allowed with costs and judgment set aside. In lieu, there be judgment for the defendant dismissing plaintiff's claim with costs including reserved costs if any of the action.** **Appeal No 11577 of 2001 dismissed but without any order as to costs.**
CATCHWORDS:	BANKING AND FINANCE - INSTRUMENTS - CHEQUES - GENERAL - cheque paid by the paying bank and collected by the collecting bank on behalf of the principal - whether the payer of the money is paying bank, or principal or true owner of the money BANKING AND FINANCE - INSTRUMENTS - CHEQUES - OTHER MATTERS - cheque written to agent

who does not see it nor have any reason to investigate who the drawer of the cheque is – whether the agent under a duty to investigate the identity of the drawer of the cheque - whether good faith is all that is required

EQUITY - TRUSTS AND TRUSTEES - CONSTITUTION AND CLASSIFICATION OF TRUSTS GENERALLY - CLASSIFICATIONS OF TRUSTS IN GENERAL - IMPLIED TRUSTS - RESULTING TRUSTS - GENERALLY - property of trust paid away according to the instructions of person believed to be entitled to give the instructions - payee holding no more trust property – whether a resulting trust can be declared

EQUITY - TRUSTS AND TRUSTEES - CONSTITUTION AND CLASSIFICATION OF TRUSTS GENERALLY - CLASSIFICATIONS OF TRUSTS IN GENERAL - IMPLIED TRUSTS - RESULTING TRUSTS - GENERALLY - payment made to trustee to be held on trust for a beneficiary - beneficiary not true owner of proceeds of trust - whether trustee becomes liable for breach of trust on payment to supposed beneficiary or only on becoming aware of identity of true beneficial owner

EQUITY - TRUSTS AND TRUSTS - POWERS, DUTIES, RIGHTS AND LIABILITIES OF TRUSTEES - LIABILITY FOR BREACH OF TRUST - WHAT CONSTITUTES A BREACH OF TRUST AND WHO MAY BE LIABLE - trustee not undertaking fiduciary duties to true owners - trustee was not aware of identity of true owner of trust property - whether fiduciary duties can be applied – whether a breach of trust

GENERAL CONTRACTUAL PRINCIPLES - PARTICULAR PARTIES - PRINCIPAL AND AGENT - RELATIONS BETWEEN AGENT AND THIRD PERSONS - IN RESPECT OF MONEY RECEIVED - money paid under mistake of fact to agent - money paid out on instructions of principal - whether only recourse is against principal - whether a stockbroker an agent of principal

RESTITUTION - GENERAL PRINCIPLES - payment is made and paid away on instructions of the payer - whether unjust enrichment has occurred

RESTITUTION - OTHER MATTERS - OTHER CASES - money paid to agent then paid out on instructions - whether defence of change of position available - whether in paying the money out agent was acting to its detriment “on the faith of the receipt”.

Australia and New Zealand Banking Corporation v Westpac Banking Corporation (1988) 164 CLR 662, applied
Barnes v Addy (1874) 9 Ch App 386, applied

Baylis v Bishop of London [1913] 1 Ch 127, considered
Black v Freedman (1910) 12 CLR 105, applied
Consul Development Pty Limited v DPC Estates Pty Ltd (1975) 132 CLR 373, applied
Currie v Misa (1875) LR 10 Ex D 153, applied
Daly v Sydney Stock Exchange (1986) 160 CLR 371, followed
David Securities Pty Ltd v Commonwealth Bank of Australia (1992) 175 CLR 353, followed
James v Oxley (1939) 61 CLR 433, distinguished
Lipkin Gorman v Karpnale Ltd [1991] 2 AC 548, applied
Lurgi (Australia) Pty Ltd v Sandess Pty Ltd [2000] VSC 278, applied
Moses v Macferlan (1770) 2 Burr 1005, considered
Parsons v The Queen (1999) 195 CLR 615, considered
Pavey & Matthews Pty Ltd v Paul (1987) 162 CLR 32, considered
Perel v Australian Bank of Commerce (1923) 24 SR (NSW 62, considered
Pollard v Bank of England (1871) LR 6 QB 623, applied
R v Vinogradoff [1935] WN 68, applied
Sinclair v Brougham [1914] AC 398, considered
State Bank of New South Wales Ltd v Swiss Bank Corporation (1995) 39 NSWLR 350, distinguished
Tresize v National Australia Bank Ltd (1994) 30 FCR 134, applied
United States Surgical Corporation v Hospital Products International Pty Ltd [1983] 2 NSWLR 157, applied
Westdeutsche Bank v Islington Local Borough Council [1996] AC 669, distinguished

COUNSEL: PD McMurdo QC, with TDOJ North SC, for the appellant in Appeal No 11596 of 2001 and for the respondent in Appeal No 11577 of 2001.
JC Sheahan SC, with LF Kelly, for the respondent in Appeal No 11596 of 2001 and for the appellant in Appeal No 11577 of 2001

SOLICITORS: Minter Ellison, for the appellant in Appeal No 11596 of 2001 and for the respondent in Appeal No 11577 of 2001
Allens Arthur Robinson for the respondent in Appeal No 11596 of 2001 and for the appellant in Appeal No 11577 of 2001

[1] **McPHERSON JA**: In 1996 Peter Hinterdorfer was employed by the plaintiff Port Corporation as a financial officer. One of his daily functions was to examine the plaintiff's accounts with a view to deciding how much of the Corporation's current funds were surplus to its immediate needs. Having determined that question, he invested the surplus and recorded details of the investments made. Because, as the trial judge found, these two functions were combined in a single individual, Hinterdorfer was able to defraud his employer of $4,500,000. This he did first by

arranging for the incorporation in the Turks and Caicos Islands, which is a British Associated Territory and former colony in the Caribbean, of a company Windermere Investments Limited in which he was the only shareholder and director. The incorporation of that company was effected by or through Sovereign Trust International Ltd of Hong Kong, which was a company that advertised itself in Australia as specialising in offshore companies and trusts for use in protecting assets and saving tax.

[2] At some time before 2 July 1996, Hinterdorfer approached a Mr Stuart Stobie of Sovereign and advised that he would put Sovereign in funds that he wished to invest. On 24 July 1996 Windermere, acting by Hinterdorfer, executed under its corporate seal a printed document entitled Custodian and Nominee Appointment. It was addressed to the defendant ANZ Securities Limited, which was a stockbroker and licensed securities dealer, appointing it to provide the services of custodian and nominee in respect of designated securities of Windermere to be held on its behalf as the client on the terms set out in the document. Those terms conferred on ANZ Securities authority to act in relation to the securities held in custody and "any matter to which these terms and conditions related" on the "electronic, written or verbal instructions" of Windermere. Specifically in the case of a corporation, ANZ Securities was given authority to act on instructions given by any director or other person authorised in writing by a director. The document contained a section headed **Third Party Instructions** by which Windermere authorised a named third party to act on its behalf in connection with the Appointment and enabled ANZ Securities to act on instructions from that person. The third party named was Mr Stuart Stobie of Sovereign, who signed in the space provided in the document and sent it to ANZ Securities on or about 20 August 1996. There was also provision for payment of ANZ Securities' fees and brokerage charges.

[3] Using, as it does throughout, the word "securities", the Appointment is not at first sight especially apt to include money, as distinct from share certificates and the like; but a further form of application for what was called a V2 Plus account was later signed and forwarded by Mr Stobie on 23 August 1996. Before the Appointment was received by ANZ Securities, Mr Stobie had on 20 August 1996 sent a facsimile message to Mr Tim Stewart, a stockbroker employed by ANZ Securities as a corporate stock broker and adviser. Mr Stewart, who gave evidence at the trial, said that he had done business with Stuart Stobie on an earlier occasion in connection with a company not associated with Windermere. He next heard from him again about a year later, in July 1996, when Stobie telephoned to say he wished to do some more business in the Australian stock market, and asked that an account be opened with the defendant. Stobie identified his principal as Windermere Investments Pty Ltd and arranged for Stewart at ANZ Securities to send the "paperwork" (which evidently referred to the application forms already mentioned) to Sovereign in Hong Kong. In the months that followed, all instructions and communications on behalf of Windermere to ANZ Securities emanated from Stobie, or, later on, his authorised alternate, who was Sir Hugo Cunliffe-Brooks, in Hong Kong. There is no suggestion that Sovereign was in any way a party to the fraud or that either it or Stobie or Cunliffe-Brooks acted otherwise than in good faith throughout the events which followed.

[4] Of perhaps more importance than the application forms was that on 20 August 1996 the facsimile message from Stobie to Stewart at ANZ Securities was received advising that:

> "Aus 4 million should be credited to the ANZ Securities Trust Account by the end of today. Can you utilise these funds to purchase the following stock:
>
> | **Code** | **Stock** | **Amount** | **Price** |
> |---|---|---|---|
> | CMG | Commonwealth Bank Receipts | 250,000 | At market price |
> | WBC | WestPac | 300,000 | At market price |
>
> Any surplus funds left over from these purchases are to be deposited into the V2 account. I will call you later today to confirm everything is acceptable."

The facsimile was signed by Stuart Stobie as "Authorised Signatory", and printed on letterhead entitled **Windermere Investments Limited** giving the address of Sovereign in Hong Kong. The workings of the V2 account had already been explained to Stobie by Stewart. It was a cash management or interest bearing deposit account maintained by ANZ Executors & Trustees Limited as a trust account on which ANZ Securities operated in carrying out stockbroking transactions on behalf of oversea clients. The message from Stobie was typed, but above the figure 4 in "Aus 4 million", someone had handwritten ".5" evidently to indicate that the amount would be 4.5 and not 4 million Australian dollars.

[5] Meanwhile, at the Port Corporation office, Hinterdorfer had prepared a form of cheque dated 20 August 1996 for $4.5 million drawn on the Commonwealth Bank of Australia at 233 Adelaide Street, Brisbane, which was where the Corporation maintained its bank account. The entries on cheque form were typed or printed into the spaces on its face and showed the payee simply as "ANZ". Hinterdorfer took the document in that form to two of the Corporation's general managers who had authority to sign, and they each signed it believing the payment to be destined for investment in an interest bearing deposit with the ANZ Banking Group. They also initialled the accompanying cheque voucher, which showed ANZ as the payee. Hinterdorfer then secretly altered the name of the payee in the cheque by adding after ANZ the words "Securities Ltd - Trust Account" in the same type. He also made entries on the cheque voucher, but in this instance incorporated the words "Banking Group", before taking the cheque to the head office of the ANZ Banking Group in Brisbane. There on 20 August 1996 Hinterdorfer deposited it for crediting to Windermere in ANZ Securities account no 7750 98197, which was the V2 trust account referred to in the facsimile message of that date from Stobie on behalf of Windermere. Its use for this purpose was formally confirmed by the terms of the application for the V2 account signed by Stobie on behalf of Windermere on 23 August 1996. The cheque was paid by the Commonwealth Bank and the proceeds credited by ANZ Banking Group as collecting bank to ANZ Securities account on 20 August 1996. On the same or the following day the proceeds were transferred to the credit of Windermere in the V2 account maintained by ANZ Executors & Trustees.

[6] Between 21 August and 20 September 1996, ANZ Securities bought and sold shares and securities on behalf of Windermere acting on instructions received from Stobie and, for that purpose, drawing on or, as the case may be, crediting the V2 account. On Sovereign's instructions acting on behalf of Windermere in September and October 1996 large amounts standing to the credit of Windermere were remitted

to the Hong Kong & Shanghai Banking Corporation in Hong Kong and, on 28 October 1996, the final balance was transmitted to that Bank for the credit of Windermere. Hinterdorfer was arrested on 16 November 1996, and later sentenced to a lengthy term of imprisonment for his crime. By a facsimile letter dated 16 November 1996, solicitors for the Port Corporation advised Sovereign that $4.5 million had been stolen from it on 20 August 1996 and "transmitted via ANZ Securities to an account with the Hong Kong and Shanghai Bank in Hong Kong". The letter referred to Windermere Investments Limited as an "intermediary" used to assist the fraud, and it put Sovereign on notice not to dispose of funds under its control until the matter had been resolved. On the same day, a similar letter was directed to the Hong Kong & Shanghai Bank and in Brisbane a receiver was appointed to protect those funds. Presumably ANZ Securities was also informed at about this time. Hinterdorfer later provided an affidavit which detailed a number of bank accounts and persons in Australia and Hong Kong to whom funds had been paid or directed. He had used the money mainly for gambling on a very large scale or for paying gambling debts. In the end, the Port Corporation recovered from Hong Kong and possibly other locations a total of $2,077,309.08 less costs of recovery amounting to $200,000.

[7] The remainder of the original sum of $4.5 million had been dissipated by Hinterdorfer and was evidently irrecoverable. On 24 September 1998 a writ was issued by the Port Corporation as plaintiff against ANZ Securities as defendant for the balance of the $4.5 million which had not been recovered. Following a trial in the Supreme Court, judgment was given against the defendant for $4,165,404.37, which included interest, as restitution for unjust enrichment or, as compensation for breach of trust by the defendant. It is against that judgment that ANZ Securities now appeals.

[8] It is convenient to consider the claim for restitution first. In collecting the proceeds of the Port Corporation's cheque for $4.5 million, ANZ Banking Group converted the piece of paper represented by that cheque. It might perhaps have been sued for damages for conversion of the piece of paper the value of which would have been measured by the amount of the cheque. See *Parsons v The Queen* (1999) 195 CLR 619, 631-632. Instead, and no doubt for good reason, Port Corporation chose to sue ANZ Securities directly as the recipient of the proceeds of the cheque. According to Lord Goff in *Lipkin Gorman v Karpnale Ltd* [1991] 2 AC 548, 572, cases in which such a claim has succeeded have been "very rare" and are "founded simply on the fact that, as Lord Mansfield said, the [recipient] third party cannot in conscience retain the money - or, as we say nowadays, for the third party to retain the money would result in his unjust enrichment at the expense of the owner of the money". Similarly, Lord Templeman in the same case said ([1991] AC 548, 560) that "the plaintiff victim must show that money belonging to him was paid by the thief to the defendant and that the defendant was unjustly enriched and remained unjustly enriched". The other Law Lords agreed with one or both of the speeches of Lord Templeman and Lord Goff.

[9] From this it will be seen that both of their Lordships, with whom the other Law Lords agreed, regarded *retention* of the money (Lord Goff), or *remaining* unjustly enriched (Lord Templeman) as elements of the cause of action in a case like this where the defrauded plaintiff claims restitution from a recipient of the money. In *Lipkin Gorman v Karpnale Ltd* the plaintiff's title to recover the money paid to the defendant was said by Lord Templeman to rest on the species of common law

tracing exemplified in *Banque Belge v Hambrouck* [1921] 1 KB 321: see Lord Templeman's speech in *Lipkin Gorman v Karpnale Ltd* 2 AC 548, 566; or as Lord Goff expressed it, ([1991] AC 548, 574), the ability of the plaintiff to trace its property "into its direct product", which, in the present case, would be the amount credited to Windermere in the V2 trust account on which ANZ Securities operated on behalf of Windermere. On either view (and they seem to me to be the same in their effect) there was, at the time when the proceedings now before us were instituted on 24 September 1998, or earlier when the Port Corporation first asserted its claim to that money in early November 1996, and indeed at all times after 28 October 1996 when the final balance was remitted to Hong Kong, no money standing to the credit of Windermere in that or any other account maintained by ANZ Securities.

[10] If these statements of their Lordships in *Lipkin Gorman* are applied literally, it is not altogether easy to see that the Port Corporation succeeded in establishing an essential element in its cause of action. On each of the dates referred to, ANZ Securities neither retained money to which the Port Corporation had title; nor (except perhaps to the extent that it had benefited from receiving commissions on stockbroking transactions conducted for Windermere) can it be said to have been or to have remained enriched, unjustly or otherwise, by receipt of money to which the Port Corporation was entitled. Having received and dealt with the money throughout, not beneficially, but as trustee for Windermere, ANZ Securities was never enriched by its receipt. Perhaps because of the common law origins of the action for restitution, trusts and beneficial ownership are, despite the *Judicature Act*, to be disregarded here. In any event, the difficulty is no doubt of my own making; for neither at the trial, nor on appeal, have the parties themselves seen any obstacle to the plaintiff's success in the respect referred to. Instead, the attention of everyone has focussed on the question whether ANZ Securities had made out the defence on which it relied, which was that it had acted to its detriment on the faith of the receipt of the sum of $4,500,000 having its source in the Port Corporation's account with the Commonwealth Bank. It becomes necessary now to consider that question.

[11] The common law on the subject of restitution has undergone a series of convolutions in the last two and half centuries. In *Moses v Macferlan* (1770) 2 Burr 1005, Lord Mansfield sought to reform the indebitatus counts by which the law allowed recovery of money paid by mistake under a fictitiously implied contract, and to substitute a system governed by a general doctrine of restitution based on notions of unjust enrichment derived from equity and the post-classical Roman law of Justinian's Digest. By the time of *Sinclair v Brougham* [1914] AC 398, those doctrines had been discredited and the earlier law restored. Then, beginning with *Australia and New Zealand Banking Corporation v Westpac Banking Corporation* (1988) 164 CLR 662, there was a reversion to Lord Mansfield's notions of restitution, which were adopted in Australia in *Pavey & Matthews Pty Ltd v Paul* (1987) 162 CLR 32, and in England in *Lipkin Gorman v Karpnale Ltd* [1991] 2 AC 548.

[12] What remains obscure is the extent to which some of the older rules of money had and received are still relevant, if at all, to the action for restitution. The recent developments in this form of claim have already required revision of a number of earlier decisions, including those rejecting defences that are now available to a recipient of the benefit of payments and other forms of enrichment which may be

the subject of restitutionary claims. In *David Securities Pty Ltd v Commonwealth Bank of Australia* (1992) 175 CLR 353, 385-386, the High Court said:

> "... a defence of change of position is necessary to ensure that enrichment of the recipient of the payment is prevented only in circumstances where it would be *unjust.* This does not mean that the concept of unjust enrichment needs to shift the primary focus of its attention from the moment of enrichment. From the point of view of the person making the payment, what happens after he or she has mistakenly paid over the money is irrelevant, for it is at that moment that the defendant is unjustly enriched. However, the defence of change of position is relevant to the enrichment of the defendant precisely because its central element is that the defendant has acted to his or her detriment on the *faith of the receipt*. The common element in all cases is the requirement that the defendant point to expenditure or financial commitment which can be ascribed to the mistaken payment … In no jurisdiction, however, can a defendant resort to the defence of change of position where he … has simply spent the money received on ordinary living expenses."

The question here is whether in paying the money out of the V2 account and remitting it to Windermere's account in Hong Kong, ANZ Securities acted to its detriment "on the faith of the receipt".

[13] It was accepted by the parties to the appeal that the words *on the faith of the receipt* (which are italicised in the original reasons for judgment of the High Court) refer to the act or process of receiving the money. To my mind, what is meant by this passage in the reasons of their Honours is that the defendant must have acted to its detriment on the faith of (meaning in reliance on) its having received the money. The phrase was considered by the New South Wales Court of Appeal in *State Bank of New South Wales Ltd v Swiss Bank Corporation* (1995) 39 NSWLR 350. It was a case in which $20 million was electronically transferred from the Swiss Bank in New York to the State Bank's branch in that city for transmission to State Bank in Sydney on overnight deposit. It was accompanied by a message that was construed by the Court to mean "Credit this to the account you keep for customers". The payment was brought about by a fraud at the New York end of the transaction, and the State Bank in Sydney disbursed the money it received to another company Essington Ltd, for which it mistakenly believed the sum was intended. When it was not returned by the end of the week, Swiss Bank sued State Bank to recover it in a restitutionary form of claim. In its defence State Bank relied on the passage from the judgment in *David Securities* claiming that, in paying the money to Essington Ltd, it had acted to its detriment on the faith of the receipt of the funds from New York honestly believing that Essington was entitled to them.

[14] The Court of Appeal affirmed the decision of the trial judge giving judgment for Swiss Bank and holding that the defence of change of position was not available to State Bank. In considering that question, the Court placed a slight gloss on the critical phrase in *David Securities* saying in effect that *on the faith of the receipt* meant in good faith, which must, the Court said, (39 NSWLR 350, 355):

> "… be linked to the payee acting *on the faith of the receipt* (repeating the emphasis in *David Securities Pty Ltd* (at 385). This is inherent in the passage where the italicised words appear. The court held that the critical moment for the payee is when payment is made, for it is then

> the unjust enrichment occurs. The critical moment for the payee is the moment of change of position but that, in order to be relevant, must be on the faith of the receipt.
>
> It seems to us that knowledge derived otherwise than from the payer cannot be relevant in deciding whether a change of position by the payee occurred on the faith of the receipt …".

[15] It is difficult to escape the impression that, in the end, the decision in *State Bank v Swiss Bank* rested on the straightforward proposition that, in paying out the $20 million, State Bank had simply exceeded the terms on which that sum had been received, and that a recipient of money may not claim the benefit of the defence if it has exceeded its instructions. This may be why special leave to appeal to the High Court was refused: the question at issue turned ultimately on the extent of the authority given to State Bank to dispose of the money. By contrast, in the present case ANZ Securities Ltd throughout acted strictly in accordance with, and within the limits of, the instructions it received from Stobie of Sovereign acting on behalf of Windermere. However, in applying the Court of Appeal's decision in the *State Bank* case, the learned trial judge in the proceedings under appeal here accepted Port Corporation's submission that it was not Windermere but Port Corporation that was the "payer" of the funds to ANZ Securities. His Honour also found that it was not reasonable for ANZ Securities to act on the instructions received from Windermere, which would add a further gloss to the proposition stated by their Honours in *David Securities v Commonwealth Bank*.

[16] This raises on this appeal the issue of who was the "payer" of the $4.5 million received by ANZ Securities. Strictly speaking, it was ANZ Banking Corporation, which as collecting bank had in fact received payment of the cheque from the Commonwealth Bank as paying bank, which for that purpose drew on and debited the credit in the Port Corporation's account on which the cheque was drawn. ANZ Banking Corporation credited the amount of the cheque to the account of ANZ Securities, which deposited it in the V2 account to the credit of Windermere. The present case differs from *State Bank v Swiss Bank*, where the transaction was "bank to bank", in that the payment was made by Swiss Bank and received by State Bank as the payer. Here the cheque for $4.5 million was collected by ANZ Banking Group and paid by the Commonwealth Bank. In doing so, however, it may be accepted that each of them acted as agent for their respective customers ANZ Securities and Port Corporation. To that extent, this case may be made to resemble *State Bank v Swiss Bank* as one of direct payment by Port Corporation to ANZ Securities.

[17] In my opinion, however, it is necessary to consider the character in which ANZ Securities *received* the payment from ANZ Banking Group. It did so not on behalf of Port Corporation, but as agent as well as trustee for Windermere, which was the principal for whom ANZ Securities as payee of the cheque had been appointed and agreed to act as stockbroker. It is this that distinguishes the present case from *State Bank v Swiss Bank*, where the money was received as agent or trustee for Swiss Bank. It is only by saying that the sum of $4.5 million was at all times the property of Port Corporation, and that the "payer" is always the owner or person entitled to the money, that it is possible to reach the conclusion contended for by the Port Corporation that it, and not Windermere, which deposited the cheque for collection and receipt by ANZ Securities for redirecting to the V2 account maintained by ANZ

Securities & Trustees, was the payer. To adopt the view that the true owner of the money is always the "payer" for the purpose of a restitutionary claim would involve the recipient in such an extensive a range of inquiries (to many of which would probably receive only inconclusive answers) about the source of the money as to make it virtually impossible for commerce to be carried on at all. A stockbroker who refused to receive or to deal with money from his client without first checking the client's title to it would soon find himself out of business. He is, after all, conducting a stockbroking business and not a detective agency. The same is true of a host of other activities, including the practice of accountants, solicitors and estate agents, in which funds are constantly being received from clients on trust to be applied for particular purposes. In many instances, the exigencies of the contemplated transaction would not permit a thorough, or indeed any, investigation as to the original source of the funds or their true ownership at the time of their receipt.

[18] Not having received an altogether favourable reception to this submission on appeal, Mr Sheahan SC for the Port Corporation moved to his alternative submission that it was the drawer of the cheque who was the "payer" of the funds received by ANZ Securities. But of the cheque or its drawer ANZ Securities knew nothing, having received the sum of $4.5 million not from the Commonwealth Bank, which would have retained the cheque (*Parsons v The Queen* (1999) 195 CLR 619, 634) but from ANZ Banking Group for crediting to Windermere in the V2 account. It was nevertheless submitted that it should have made inquiries to discover who had drawn the cheque, which it could have done by asking ANZ Banking Group to inquire on its behalf. Some support for the submission that the Port Corporation was the payer of the money to ANZ Securities was sought from *Perel v Australian Bank of Commerce* (1923) 24 SR (NSW) 62, 76, where cheques drawn by or on behalf of trustees and crossed "Not Negotiable Bank account Payee only" were held by Street CJ in Eq to create something in the nature of a trust account pending further instructions as to disposal of the amount for which the cheque was drawn. His Honour thought there could only be one answer to the question about whom the bank should look to for instructions, and that was the drawer of the cheque. But that was a case concerning questions of banking law and practice with respect to a cheque drawn on a trust account, and one in which the defendant bank had itself credited the cheque to the customer's account. It was therefore aware that it ought to consult the drawer before permitting drawings in a form that Street CJ in Eq regarded as equivalent to payments in cash. In our case ANZ Securities as stockbroker receiving client's funds had not seen the cheque and had no reason to suppose it was drawn by the Port Corporation or was to be held in trust for anyone but its client Windermere. That was throughout the footing on which it received and dealt with the cheque and its proceeds.

[19] It is true that there are statements in the reasons of the High Court in *James v Oxley* (1939) 61 CLR 433 which at first sight appear to lend colour to Port Corporation's submissions on this point. There trustees gave a cheque to a firm of solicitors for deposit in their trust account pending instructions as to its disposition. A managing clerk named Rees in the employ of the firm falsely represented to a partner in the firm that the money was deposited on behalf of a fictitious client named Murphy, which was an identity that Rees was using for his own fraudulent purposes, and by that means was able to induce the partner to sign two cheques drawn on the trust account in favour of Murphy and another. The firm was held liable to the trustees for the amount of the payment as money had and received. But

the ratio of the decision, as I understand it, is that the firm had drawn the money out on the faith of the statement by Rees, who was their servant or agent for whose actions they were legally responsible, and in doing so had been content to rely upon his representations without making any independent inquiry about the true identity of the persons entitled to the money which they held in trust. By contrast, in the present case, Windermere was, unlike Rees, not a servant or agent of ANZ Securities, and the fraud here was engineered in the offices of Port Corporation by someone who was its own employee and not an employee of ANZ Securities.

[20] In any event, the decision in *James v Oxley* (1939) 91 CLR 433 was not concerned with the meaning of the expression "on the faith of the receipt", or with the defence of change of position. In the judgment of Davidson J in the court below (38 SR (NSW) 361, 381, 384) there are references to the nature of an action for money had and received, and the possible responses that defendants might make to it; but, at that time, a defence of change of position was not generally available to a recipient of money paid away on the faith of its receipt, whereas now there is binding authority to the opposite effect.

[21] There are three reasons why I consider that the defence is available here to ANZ Securities. The first is that, if in law it is critical to the success of that defence, the "payer" of the money that found its way to ANZ Securities was Windermere and not the Port Corporation; and that, in making disbursements on the instructions of Windermere, ANZ Securities acted in good faith and to its detriment in reliance on the receipt of that money. It was Windermere acting by Hinterdorfer that deposited the cheque for crediting to the V2 account and the trial judge specifically found that ANZ Securities, believing that the money had been lawfully credited to that account on behalf of Windermere, acted in good faith in paying out the money on Windermere's instructions. However, he also found that ANZ Securities, in not making further inquiries about the source of the money, had not acted reasonably or with care, and the finding to that effect has not been challenged on appeal.

[22] That does not, however, serve to diminish the finding of good faith; and it was not a requirement imposed by the High Court in recognising the defence in *David Securities*. It might perhaps be capable of being considered a finding of constructive notice of facts that would or ought have been discovered on further investigation; but in commercial transactions, as Jordan CJ pointed out in *Oxley v James* (1938) 38 SR (NSW) 361, 375, means of knowledge are not actual knowledge; or, as Davidson J said (38 SR 361, 384), "as a general rule … the doctrine of constructive notice does not apply at common law". See also *Consul Development Pty Limited v DPC Estates Pty Limited* (1975) 132 CLR 373, 412-413, confining the doctrine to dealings with land and estates. See also *United States Surgical Corporation v Hospital Products International Pty Ltd* [1983] 2 NSWLR 157, 253*; Tresize v National Australia Bank Ltd* (1994) 30 FCR 134, 147. There is no reason to suppose that a common law action for restitution is outside this general rule, which is well settled and for good reason. Good faith is all that is needed, subject of course to cases at the extreme where a person deliberately shuts his eyes to matters that he realises will invest him with actual knowledge of fraud or impropriety. In my opinion, Windermere was the payer of the money and was treated as such by all who were concerned in dealing with it.

[23] The second reason for thinking that the defence of change of position is available to the defendant here is that ANZ Securities falls directly within the terms

of a passage in the judgment of the Court of Appeal in *State Bank v Swiss Bank* of which a portion has already been set out at para [14] of these reasons. That passage goes on to say (39 NSWLR 350, 355):

> "A bank which receives a mistaken payment and disburses it can only bring itself within the change of position defence if it shows that at the time of disbursement it knew or thought it knew more than the fact of receipt standing alone. This must be information which, if true, would entitle the payee to deal with the receipt as it did and that information must have come from the payer."

Given that, as I have concluded, Windermere was the payer, the defendant's case falls squarely within the terms of this proposition. By reason of the facsimile letter of 20 August 1996 and the communications with Stobie, ANZ Securities knew, or thought it knew, more than the mere fact of receipt of $4.5 million standing alone. It thought it knew that the money came from Windermere and was its to dispose of. This was information which, if true, would entitle ANZ Securities to deal with that receipt as it did, and it was information that came to it from the payer Windermere. In what the Court of Appeal said in *State Bank v Swiss Bank*, there is no suggestion that, in disbursing the money, the payee must have acted reasonably or with due care. What it must not do is to disregard the instructions received from its principal.

[24] The third reason for holding that the defence is available here is the one I prefer. It is settled law that where money has been paid under a mistake of fact to an agent, it may be recovered from that agent, "unless he has in the meantime paid to his principal or done something equivalent to payment to him, in which case the recourse of the party who has paid the money is against the principal only": *Pollard v Bank of England* (1871) LR 6 QB 623, 630-631, where Blackburn J cites the leading case of *Holland v Russell* (1861) 1 B & S 424; 121 ER 773. For that reason, it is sometimes described as the rule in *Holland v Russell*; but it has its origin much earlier than that decision, and goes back at least to the time of Lord Mansfield. It is referred to in the first edition (1966) of Goff & Jones, *The Law of Restitution*, at 494, as one of a special group of cases in which change of position is recognised as a defence, and in *Lipkin Gorman v Karpnale Ltd* [1991] 2 AC 548, 578-579, Lord Goff mentioned it as an example of such a defence. In *Baylis v Bishop of London* [1913] 1 Ch 127, if not before that decision, it was rationalised as a defence available only to an agent and not to a principal, as the defendant in that case was held to be, although in *Lipkin Gorman v Karpnale* [1991] 2 AC 548, 579, Lord Goff said it was "difficult to see the justification for such a rationalisation". As appears from the judgments in *Baylis v Bishop of London*, the explanation for not accepting such a defence at that time was that the courts had by then rejected Lord Mansfield's principle of unjust enrichment and reverted to the earlier theory of implied contract as the basis for restitutionary claims. See the reasons for judgment of Hamilton LJ in *Baylis v Bishop of London*, which, as Lord Sumner, he was to vindicate in the following year in his speech in the House of Lords in *Sinclair v Brougham* [1914] AC 398.

[25] When the reason for the law changes, so we are told does the law. Now that the law of restitution has changed, there is, as Lord Goff suggested, no longer any justification for confining the principle of *Holland v Russell* to the case of an agent accounting to his principal for money received. A stockbroker who is engaged to buy or sell shares on behalf of his client is an agent: see *Daly v Sydney Stock Exchange* (1986) 160 CLR 371, 384, and authorities cited there by Brennan J, in the

same way as is a solicitor acting for a client in carrying out his instructions to complete a particular transaction using for that purpose money paid by the client into his trust account. The fact that the stockbroker or solicitor is also a trustee of money received from and held for the client for that purpose in no way detracts from his character as agent. In any event, in Australia the principle in *Holland v Russell* is no longer confined to agents in the strict sense. In *Australia & New Zealand Banking Group Ltd v Westpac Banking Corporation* (1988) 164 CLR 662, which is the authority principally relied on by Mr McMurdo QC for ANZ Securities on this appeal, the High Court applied the principle in *Holland v Russell* to a bank which, after receiving a telegraphic transfer of a sum of money (which, by mistake of the paying bank, was larger than intended) acted on the receipt of that money by paying debts and liabilities of the customer for whose credit the funds had been transferred to it. Their Honours said (164 CLR 662, 673-674):

> "The prima facie liability to make restitution is imposed by the law on the person who has been unjustly enriched. In the ordinary case of a payment of money, that person will be the payee. However, when the person to whom the payment is directly made receives it as an intermediary (eg as agent for a designated principal), there may be uncertainty about the identity of the actual recipient of the benefit at the moment of payment. If the circumstances are such that the intermediary is to be seen as being himself the initial recipient of the benefit, his prima facie liability will ordinarily be displaced when he has handed the money received on to the person for whom he received it. In such a case he has, in the event, not retained the benefit of the windfall but been 'a mere conduit-pipe' (see per Collins MR, *Continental Caoutchouc & Gutta Percha Co v Kleinwort, Sons & Co* (1904) 9 Com Cas 240 at p 248) and 'the only remedy is to go against the principal': per Green MR, *Gower v Lloyds and National Provincial Foreign Bank Ltd* [1938] 1 All ER 766 at p 773".

[26] It follows that, if contrary to my earlier conclusion, ANZ Securities was acting not as agent but as principal when it received and disbursed the money credited to Windermere in the V2 account, it was certainly doing so as intermediary. It has not retained the benefit but handed it on to the person for whom it was received. The decision is authority for the further proposition that:

> "The rationale of such a general rule can be identified in terms of the law of agency and of notions of unjust enrichment. If money is paid to an agent on behalf of a principal and the agent receives it in his capacity as such and, without notice of any mistake or irregularity in the payment, applies the money for the purpose for which it was paid to him, he has applied it in accordance with the mandate of the payer who must look to the principal for recovery: see per Palles CB, *Fitzpatrick v McGlore* ([1897] 2 IR at p 551), and per Cockburn CJ, *Holland v Russell* (1861) 1 B&S 424 at 434; 121 ER 773, 777). In those circumstances, the benefit of the payment has been effectively passed on to the principal who will be prima facie liable to make restitution if the payment was made under a fundamental mistake of fact. If the matter needs to be expressed in terms of detriment or change of position, the payment by the agent to the principal of the money which he has received on the principal's behalf, of itself

> constitutes the relevant detriment or change of position. In that regard no relevant distinction can be drawn between payment to the principal or payment to another or others on behalf of the principal: cf *Gowers v Lloyds and National Provincial Foreign Bank Ltd* ([1938] 1 All ER at p 773)."

[27] The case of the appellant before us falls fairly within these terms. It received the sum of $4.5 million on behalf of Windermere and disposed of it in accordance with Windermere's instructions. It was not until some days after the final balance had, on Windermere's instructions, been remitted to Hong Kong on 28 October 1996 that it first became aware of any mistake or irregularity in the payment. On and at all times before that date, it had no notice of the source of the payment or the origins of the money that reached the V2 account on 20 August 1996. In my opinion, the Port Corporation's claim against ANZ Securities cannot be sustained on the basis of restitution, whether that is because ANZ Securities has not itself been enriched by receiving in good faith the benefit of the proceeds of the Port Corporation's cheque for $4.5 million; or because, having received that sum in good faith, it has on the faith of its receipt acted to its detriment by paying out the proceeds pursuant to Windermere's instructions. It follows that, in my respectful opinion, the Port Corporation's restitutionary claim against ANZ Securities ought to have been dismissed.

[28] From this I turn to the Port Corporation's alternative basis of recovery, which predicates the existence of a resulting trust in favour of the Corporation in respect of the sum of $4.5 million. The only question, according to Mr Sheahan's submission, is whether, given that ANZ Securities was confessedly a trustee of that sum, it held it on express trust for Windermere or on a resulting trust for Port Corporation. Because equity would not give effect to an express trust for the benefit of the wrongdoer Windermere, the trust on which ANZ held must, it is submitted, have been the resulting trust in favour of Port Corporation that came into existence immediately upon the money being credited to the V2 trust account.

[29] It is not altogether easy to fit the transfer of the money in the present case into any of the conventional classifications of resulting trust commonly used to define such a trust. However, in considering this submission, what again meets the eye is that, at the time at which Port Corporation's claim to the money was first asserted in early November 1996, and also when these proceedings were instituted to recover it and when judgment was given, there were no longer any trust assets in the hands of ANZ Securities. Has a defendant ever been held to be resulting trustee of assets or their proceeds that are no longer held by that defendant? I can find no authority for answering this question in the affirmative. The point does not seem to be the subject of any reported decision; but Chambers, *Resulting Trusts* (1999), at 2, says that, for a resulting trust, "there must be identifiable assets vested in the resulting trustee capable of being the subject matter of a trust"; and elsewhere (at 95) that the subject matter of the trust "is necessarily some form of residuum in the recipient's hands". Writing extrajudicially (114 *LQR* 399, 406), Sir Peter Millett (as he was then) has said that there cannot be a trust where there is no trust property, and "neither a constructive nor a resulting trust can be established unless (i) the property or its traceable proceeds are identifiable in the hands of the recipient, and (ii) the property was not freely available to the recipient as part of his general assets". Neither condition is satisfied in the present case.

[30] By fastening on the character of ANZ Securities as express trustee for Windermere of the credit in the V2 account, Port Corporation is seeking to substitute itself for Windermere as the beneficiary of the trust of that chose in action or the money it represented. This seems to involve an affirmation of the express trust while attempting to vary its terms. However that may be, the next step is to say that the first duty of a trustee is to ascertain the identity of the beneficiary, in this case Port Corporation, and that, having omitted to do so, ANZ Securities was in breach of its duty to the Corporation under the resulting trust that arose when the money was wrongly paid out of its account with the Commonwealth Bank for crediting to the V2 account. It is for breach of that trust by disbursing the money from that account to the wrong beneficiary that the Port Corporation was awarded compensation.

[31] This analysis faces difficulties, of which the most obvious is that ANZ Securities had no occasion to investigate the identity of the beneficiary of the express trust of which it was trustee. That beneficiary was Windermere, for whom alone ANZ Securities had agreed to undertake the responsibilities of acting as trustee of the money credited to Windermere in the V2 trust account. There is no known mechanism by which ANZ Securities' obligations as trustee under that express trust can be transformed into a trust in favour of Port Corporation without first setting aside the trust for Windermere under which ANZ Securities received those moneys. At least that was so at all the times before the Corporation asserted its claim to be the true beneficial owner of the trust assets. That did not happen until early November 1996, by which time the assets had been paid away under instructions from the beneficiary Windermere for which ANZ Securities had agreed to act. In terms of legal theory, this analysis may be justified by saying, like Lord Browne-Wilkinson *in Westdeutsche Bank v Islington Local Borough Council* [1996] AC 669, 705, that:

> "Since the equitable jurisdiction to enforce trusts depends upon the conscience of the holder of the legal interest being affected, he cannot be a trustee of the property if and so long as he is ignorant of the facts alleged to affect his conscience, ie until he is aware that he is intended to hold the property for the benefit of others in the case of an express or implied trust, or, in the case of a constructive trust, of the factors which are alleged to affect his conscience."

His Lordship's formulation has been the target of a good deal of criticism by commentators for the reason that it is well settled by authority that a person may be subject to a resulting trust even though ignorant of its existence; for example, in the case of an infant, as in *R v Vinogradoff* [1935] WN 68. It is, however, reminiscent of what was said by Barwick CJ in argument with counsel in *Consul Development Pty Ltd v DPC Estates Pty Ltd* (1975) 132 CLR 373, 375:

> "To whom did Consul become bound in conscience? … How can a person be bound in conscience to someone whose existence is not known at the date of purchase?"

[32] A preferable view is said to be that the resulting trust arises as soon as the property is transferred, but the transferee does not become subject to a fiduciary duty, or liable for breach of trust, until he is aware of his position: see Hanbury & Martin, *Modern Equity* (16th ed; 2001) at 239. This rationalisation has the support of Sir Peter Millett, and, indeed, may have been originated by him in a paper published in (1998) 114 *LQR* 399, 408, where he said that:

> "If the trustee is to be treated as a fiduciary this must be because he knowingly subjected himself to fiduciary obligations. These are not created by the separation of the legal and equitable titles, though they may be created by the same circumstances which give rise to the separation. But where the only relationship between the parties, who may not even know of each other's existence, is that one holds the legal title and the other is the equitable owner, there can be no fiduciary relationship."

A resulting trust, according to Sir Peter Millett, is not a fiduciary relation (114 *LQR* 399, 405). Whatever may be the correct resolution of these questions, it is in my opinion offensive to notions of equity and common sense to hold ANZ Securities liable for a supposed breach of trust as trustee for Port Corporation at a time when it had never undertaken and was not aware that any such obligation existed, but knew only that it had accepted appointment as express trustee for Windermere. As has been recognised by both Lord Browne-Wilkinson and Sir Peter Millett, the question is essentially one of semantics.

[33] In *Lurgi (Australia) Pty Ltd v Sandess Pty Ltd* [2000] VSC 278, §§74-75, at pp 26-27, Byrne J in the Supreme Court of Victoria was confronted with a case not unlike this, in which an employee named Gratz misappropriated money from his employer part of which was paid into a bank account operated jointly with his wife. Having held that the money was trust money, his Honour (§74, at p 26) said:

> "In *Black v Freedman* [(1910) 12 CLR 105, 109] the High Court treated stolen funds as being subject to a similar trust in favour of the true owner. Where, as in that case, the thief makes a gift of the funds to another, that other is amenable to equitable jurisdiction notwithstanding that the recipient had no notice of the theft for there is no valuable consideration for the payment [(1910) 12 CLR 105 at 110, per O'Connor J; *Menzies v Perkins* [2000] NSWSC 40 at [10] per Hunter J]. In that case, however, the recipient had no notice of the theft at the time of receipt but discovered it while the funds were still in her hands. In such a case the equitable obligation arises when this knowledge is acquired (*Agip (Africa) Ltd v Jackson* ([1990] Ch 265, a 291, per Millett J). The trust in such a case attaches only to stolen funds then in the hands of the recipient. Where these funds are no longer held by the recipient and tracing is possible, it would attach to other property in the hands of the recipient which had been purchased with those stolen funds [*Banque Belge Pour L'Estranger v Hambrouck* ([1921] 1 KB 321 at 330, per Scrutton LJ, and at 334-5 per Atkin J; *Menzies v Perkins* [2000] NSWSC 40 at [11] per Hunter J]. I was pressed with an argument to the effect that liability in equity for such a receipt arises immediately the stolen funds are received notwithstanding that the recipient is ignorant of the theft. I do not think that this is correct. In *Black v Freedman* Griffith CJ puts it this way:
>
> > 'I think that where a man pays a large sum of money to this wife, and no more appears, the inference is that it is a present. Therefore the doctrine of equity is applicable. The money is identified; it came into her hands as a volunteer, and she is liable to repay it. It was pointed out by Sir George Jessell, in a well known case, that a

> man may at a certain stage be innocent, but that, if he knows that he has got the advantage of a fraud to which he was no party and says he will keep it, then he becomes himself a party to the fraud and is liable to the jurisdiction of the Court of Equity'".

In this case the thief was Hinterdorfer or Windermere and the innocent recipient was ANZ Securities. As in *Black v Freedman*, there was a trust that required them, or one of them, to restore the stolen money, but it is not a trust imposed on ANZ Securities which was not aware of it.

[34] In *Lurgi (Australia) Pty Ltd v Sandess Pty Ltd* [2000] VSC 278, Byrne J went on in the following paragraph (§75, at p27) of his reasons to hold that the funds in the joint account, which represented the fruits of Gratz's fraud, were fixed with a trust in the hands of the account holders only when the source was known. It was always known to Gratz; but on the evidence, his Honour concluded that, when Mrs Gratz first acquired relevant knowledge of the fraudulent origins of the money the joint account was already overdrawn by $10,221.26, and that there was therefore "no property upon which the constructive trusts can fasten"; but that, after 16 April 1995, when Mrs Gratz first knew about her husband's fraud, further payments totalling $84,978 had been received into the joint account. They had since been disbursed, but Mrs Gratz remained liable to account for them.

[35] In that case Byrne J held Mrs Gratz to be liable as constructive trustee on the basis of the form of constructive trusteeship arising from knowing receipt of, or knowingly dealing with, the assets of a trust. That liability has its origin in *Barnes v Addy* (1874) 9 Ch App 386. In *Consul Development Pty Ltd v DPC Estates Pty Ltd* (1975) 132 CLR 373, 410-413, Stephen J, with whom Barwick CJ agreed, considered that, for that form of lability, actual knowledge of facts consisting dishonesty was required, and that, contrary to one or more English decisions, constructive notice did not suffice for that purpose. Here Mr Sheahan on behalf of Port Corporation on appeal acknowledged that no reliance was being placed on any constructive trust. His client's case is based firmly to the existence of a resulting trust in its favour which came into existence at the moment when the proceeds of the cheque from Port Corporation were received by ANZ Securities in the V2 trust account. In point of fact and law, they were received into that account by ANZ Executors & Trustees to the credit of Windermere, although subject to directions from ANZ Securities; but it will be assumed that that feature makes no difference to the outcome of the case.

[36] There is no direct authority on the question whether, as resulting trustee, ANZ Securities is liable for failing to identify itself as resulting trustee for Port Corporation, given that the Corporation did not at any time before the money was fully disbursed identify itself as the true beneficiary. Academic writers are opposed to the suggestion that any such liability exists or should be recognised. Chambers, *Resulting Trusts*, at 201, says it would be "quite remarkable" if recipients of property on resulting trusts could be required to compensate the trust beneficiaries for failing to perform duties which were not voluntarily undertaken and of which they are not aware. He quotes with approval Mr Hackney's statement that such a person can have none of the duties or powers of an express trustee "and ought to have only an obligation to restore the property on demand if still in possession of it". The learned editor of Hanbury and Martin, *Modern Equity* (16th ed; 2001), at

239, agree that the resulting trustee does not become subject to the duties of a resulting trustee until he is aware of the position. A certain amount of interbreeding is evident in these statements; nevertheless, I consider the basic proposition to be correct. If Port Corporation had never laid claim to the sum of $4.5 million, there would never have been any liability on the part of ANZ Securities for breach of trust. By the time it did so, the money had already been fully disbursed, as it had been received, in good faith and without notice of the corporation's claim to it.

[37] Accepting as I do that a resulting trust can exist or be declared only in respect of property remaining in the possession or control of a person to whom the beneficial ownership was transferred, or from whom it resulted, I cannot see how ANZ Securities, which took as, and throughout considered itself to be, trustee for another, can be charged with liability in equity as resulting trustee for the Port Corporation. In the words of Sir Peter Millett, it never took the funds as part of its general assets (114 *LQR* 399, 406). For my part, I would also add that it seems to me that ANZ Securities acquired legal title to the sum of $4.5 million not only in good faith and without notice, but for value. As regards ANZ Securities, it undertook and discharged both the responsibilities of trustee and the duties of stockbroker, which constituted a detriment to it, and one which is regarded as valuable consideration as it is traditionally defined (*Currie v Misa* (1875) LR 10 Ex D 153, 162, and which moved from ANZ Securities, even if it did not move to the Port Corporation.

[38] For these reasons in my opinion, Port Corporation's claims against ANZ Securities, whether for restitution of the sum of $4.5 million or for compensation in equity for breach of trust, cannot be sustained. The defendant's appeal should be allowed with costs; the judgment should be set aside with costs. Judgment for the defendant should be given in the action dismissing the plaintiff's claim, together with the costs of and incidental to the action including reserved costs if any.

[39] There was also another appeal (Appeal No 11577/01) by the defendant, which was brought against the order for costs made by the primary judge. Because this appeal has ceased to matter in consequence of the order on the main appeal, I would order that it be dismissed, but without any order as to costs.

[40] **DAVIES JA:** I agree with the reasons for judgment of McPherson JA and with the orders he proposes.

[41] **MULLINS J:** I agree with the reasons for judgment of and orders proposed by McPherson JA.