Mistaken Bank Payments: Commercial Certainty Counts

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A. Introduction

"The one great advantage of the common law is that, where it falls into trouble, it is never more than one great case away from pulling itself together."

A bank overlooks its customer’s “stop-payment” instruction and mistakenly honours the earlier payment instruction. The payment instruction relates to a valid debt owed by the customer, but the customer has decided not to pay the debt for the moment. Having paid out without authority, the bank cannot, it seems, debit the customer’s account. So it sues the payee to recover the money – and, according to the well-known case of Barclays Bank Ltd v WJ Simms, Son & Cooke (Southern) Ltd ("Barclays Bank"), the bank succeeds. The payee’s good faith receipt of the payment does not provide it with a defence; rather the payee must rely on general restitutionary defences, in particular that of change of position.

The reasoning in Barclays Bank attractively explains why mistaken payments are prima facie recoverable. And, if the bank’s payment is seen as a simple example of a mistaken payment, the result seems right. To the extent that the payee has not changed its position it does appear to have been enriched as a result of the bank’s mistake. But is the payment in this situation a simple example of a mistaken payment? I suggest that it is a more complex situation requiring the recognition of a new defence arising from the reasonable reliance which in these circumstances a payee places (and should be entitled to place) on the fact of payment by a bank.

A factor distinguishing the bank’s mistake from the typical example of a mistaken payment is that in the typical case no money is due to anyone. In contrast, in the stop-payment example, a debt is due to the payee. So, from the payee’s perspective, there is a good legal cause for retaining the money. Moreover payment has come from the debtor’s agent. The bank, the customer

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and the payee all work within a web of commercial relationships. The payee has a reasonable expectation that the payment will not be disturbed just because of a mistake which the bank makes in its own mind.

So, at least two significant public policy considerations – agency and finality of payment – support denying recovery to the bank. They suggest that the circumstances surrounding the (mistaken) payment warrant the courts treating the payee differently from other recipients of mistaken payments. It is suggested that the courts should recognise that the payee has a “good consideration” defence on the ground that he or she gave consideration for the receipt (by accepting the money in satisfaction of the debt owed by the customer). I call this the “reasonable expectation” approach.

The issue is topical, and recently Dr Schall has offered a different explanation of the “good consideration” defence and how it applies in this context.4 He justifies the result in Barclays Bank on the ground that there was no agreement (giving rise to consideration) between the bank and the payee. Dr Schall regards the contract between the customer and the payee as being insufficient to affect the bank. The implication is that the “good consideration” defence protects the contractual relationship between the two immediate parties to the contract, and has no wider ambit than that.5 I advance a much wider view of the “good consideration” defence. In so doing I re-appraise the approach in Barclays Bank.

Barclays Bank is not just another case. It heralded a number of “fundamental changes”6 in our law, and its reasoning has received general acceptance from both the judiciary7 and academics,8 albeit not universal acceptance.9 Part B provides a brief reminder of why Barclays Bank receives such a favourable reception.

In Part C I make my case for the “reasonable expectation” approach. I show why agency considerations and the need for finality in payment mechanisms justify the recognition of a new defence. I am not suggesting that the “reasonable expectation” approach applies whenever the bank overlooks a stop-payment instruction. In at least three situations considerations favouring recovery outweigh those of agency and finality of payment. The first situation is when, prior to receipt of the payment, the payee becomes aware of the stop-payment instruction. In this situation the payee is not misled by the fact of payment. The second situation is when the payee is a volunteer. Here, to state the obvious, the payee gives no consideration for the payment. The third (and last) situation is

5 ibid, 113-116.
6 Kleinworth Benson [1999] 2 AC 349, 373 (HL), per Lord Goff.
9 Westpac v Rae [1992] 1 NZLR 338, 346 (HC). See also Unjust Enrichment, above note 3, 97. Professor Birks questions the lack of protection English law currently provides for the payee who in good faith regards the payment as paying the debt and suggests that this is one area where the law should prefer the “reality to the technicality”, ibid, 77.
when the payment instruction was never valid, *ie* it was a forgery. In this situation the courts appear to regard the complete absence of mandate as a crucial factor which, when considering the respective positions of the bank and the payee, outweighs the payee’s reasonable reliance upon the payment.\(^\text{10}\)

The "reasonable expectation" approach is a departure from our current understanding of the law as it is expressed in *Barclays Bank*. For this reason it is insufficient merely to provide the positive case for adopting the "reasonable expectation" approach. I go further to analyse critically a number of assumptions underlying the reasoning in *Barclays Bank*. This occurs in Part D. In essence I suggest that the Court in *Barclays Bank* erred in applying the general principles it had developed without considering the context in which the bank made its mistake. Building upon suggestions in earlier academic writing,\(^\text{11}\) but admittedly contrary to the trend of current opinion, I suggest that in *Barclays Bank* the Court developed inappropriately an either-or approach to this situation, *ie* either unjust enrichment principles apply or contractual principles apply. This has the effect of overlooking agency principles and downplaying the need for commercial certainty in payment mechanisms. This is significant for both factors contribute to the payee’s expectation of finality, make that expectation a reasonable one to hold, and justify a departure from the general rule of recovery for mistaken payments.

B. The Attraction of *Barclays Bank*

1. Its attraction for lawyers

*Barclays Bank* is a landmark case. In it Goff J. identified some core principles, showed how they could rationalise the existing law, and indicated how they could provide a foundation for the law’s principled development. Mistaken payment cases, such as *Kelly v Solari*,\(^\text{12}\) provided (and may still do\(^\text{13}\)) the paradigm example of restitutionary relief. Nevertheless, prior to *Barclays Bank* the case-law appeared to be fragmented, even inconsistent; the "troublesome"\(^\text{14}\) cases were "notoriously difficult to harmonise."\(^\text{15}\) Steve Hedley’s observation, that *Barclays Bank* discarded "the constrained and irrational set of principles"\(^\text{16}\) which

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\(^\text{10}\) See text accompanying n97 – n103.

\(^\text{11}\) R Goode, "The Bank’s Right to Recover Money Paid on a Stopped Cheque" (1981) 97 LQR 254 (arguing "the payee was entitled to rely on the bank’s continued apparent authority to make payment, so that this was effective to discharge the drawer’s liability to the payee on the cheque" (his emphasis)); R Edwards, “The Liggett Defence and Apparent Authority” (2001) 31 HKLJ 224, 255-256. But see P Matthews, “Stopped Cheques and Restitution - Another View” [1982] JBL 281 and Goff & Jones, above note 8, para 4-038, n. 8.

\(^\text{12}\) (1841) 9 M & W 54; 152 ER 24 (Ex).

\(^\text{13}\) *Unjust Enrichment*, above note 3, 3.

\(^\text{14}\) *Holt v Markham* [1923] 1 KB 504, 513 (CA) per Scrutton LJ.

\(^\text{15}\) *Kelly v Solari* (1841) 9 M & W 54; 152 ER 24; H Luntz, “The Bank’s Right to Recover on Cheques Paid by Mistake” (1968) 6 Melb ULR 308, 321 (“Luntz”), (“[f]easons for and against allowing recovery vary greatly according to the circumstances ... and are seldom articulated by judges”).

had held sway, articulates the case for its general attraction. Moreover, with respect to stopped cheques, the results it predicated were consistent with (i) some dominant cases\textsuperscript{17} and emerging restitutionary theory dealing with a third party's payment of another's debt,\textsuperscript{18} and (ii) the inter-related question of why historically successful restitutionary claims arising from the conferral of benefits in kind, had been rare.\textsuperscript{19}

But Barclays Bank did more than illustrate how the principle of unjust enrichment could bring coherence to a fragmented area of the law and provide guidance in its development; it recognised that restitutionary principles require and justify a change of position defence.\textsuperscript{20} This development was more than the recognition of a new defence; it was the recognition of the definitive restitutionary defence.

As a result of Barclays Bank the law dealing with mistaken payments is now seductively simple. Subject to some exceptions,\textsuperscript{21} the receipt of a payment made because of a causative mistake\textsuperscript{22} unjustly enriches the recipient. The law seeks to return the parties to their former position by imposing an obligation upon the recipient to repay an equivalent sum. Hardship to innocent recipients is prevented through the change of position defence.

2. Its attraction for bankers

Bankers too must have found (and continue to find) the result in Barclays Bank attractive. By recognising a general right of recovery against the payee it heralded a positive practical change for bankers. Paget's Law of Banking\textsuperscript{23} provides a representative illustration of the pre - Barclays Bank understanding of the rights

\textsuperscript{17} Falcke v Scottish Imperial Insurance Co (1886) 34 Ch D 234 (CA); Re Cleadon Trust Ltd [1939] Ch 286 (CA).


\textsuperscript{20} For example, if the payer intended that the payee would have the money in all events: ibid.

\textsuperscript{21} While obiter dictum, the causative test has received judicial acceptance: Banque Financiere de la Cite v Parc (Battersea) Ltd [1999] 1 AC 221 (HL); Dextra Bank & Trust Co Ltd v Bank of Jamaica [2001] UKPC 50; [2002] 1 All ER (Comm) 193 (PC). Cf Unjust Enrichment, above note 3, 103 (arguing that the causation test, recovery for mistaken payment and the unjust factors should be rejected in favour of an 'absence of basis' approach); and Division and Ordering, above note 16, 32 (causation test too broad).

of bankers in this situation. While noting that the law was "in a somewhat
unsettled and indefinable condition", it suggested that a bank's mistaken belief
that it was obliged to its customer to make the payment "was not fundamental
and not such as to sustain a claim for recovery."25

For bankers the significance of Barclays Bank extends further. Banks prefer to
be seen as mere conduits for transferring their customer’s "funds", as opposed
to independent actors with distinct rights and responsibilities. And banks largely
have been successful in encouraging the legislature and courts to view them as
conduits. There are two prominent examples of this. First, there is the statutory
protection conferred on banks that honour a cheque presented to them by a
person who is not the cheque's true owner.26 The second example is the judicial
recognition that a bank can receive a mistaken payment as an agent for its
customer resulting in the application of the "payment over" defence.27 By
distancing the bank's mistake from the underlying dispute between its customer
and the payee Barclays Bank continues to view banks as a conduit; indeed,
recovery by the bank from the payee is seen as restoring the customer and payee
to their proper positions.28

Despite these positive aspects of the reasoning in Barclays Bank there is a
potentially negative aspect for bankers. Its reasoning questions the application
of the so-called "Liggett defence".29 In essence, this is a defence available to a
bank against its customer who seeks reimbursement for the bank's unauthorised
payment. The defence is based on the premise that the bank's payment has the
effect of paying the customer's legitimate debts. But according to Barclays Bank,
mere payment by the bank is insufficient to discharge the customer's debt; the
customer must also request the payment or ratify the bank's act. The result is to
restrict the application of the "Liggett defence"; some may say remove the defence.

But from a banker's perspective, even before Barclays Bank the "Liggett defence"
was problematic. On purely practical grounds it requires the bank to show that
the proceeds from the mistaken payment are used to pay the customer's
legitimate debts. And on theoretical grounds, since Re Cleadon Trust Ltd30 the
scope, if not legitimacy, of the "Liggett defence" is doubtful.31 So, from a banker's
perspective, the gains arising from the recognition of a direct claim against the
payee probably outweigh the loss of the "Liggett defence".

24 ibid, 343.
25 ibid, 347. Cf Luntz, above note 15, (his researches identified some Commonwealth
cases in which a bank did successfully bring a claim against the payee).
27 Continental Caoutchouc and Guuta Percha Company v Kleinwort, Sons and Co. (1904) 90
LT 474 (CA); Kleinwort, Sons and Co. v Dunlop Rubber Company (1907) 97 LT 263 (HL).
28 Barclays Bank [1980] QB 677, 703
30 [1939] Ch 286 (CA).
31 Subsequent English courts have expressed a preference for the Cleadon Trust
approach. See Crantrave Ltd (In Liq) v Lloyds Bank plc [2000] 3 WLR 877 (CA). This
is in contrast to Australian courts, see Majesty Restaurant Pty Ltd (In Liq) v
C. A Case For The “Reasonable Expectation Approach”

1. Overview

The Court’s reasoning in Barclays Bank is attractive. It explains why generally a mistaken payment is recoverable. But, as the Court recognises, there are situations when recovery is not appropriate.32 The “reasonable expectation” approach adds to the list of situations when recovery is not appropriate.

This recognition of a new exception is needed (and justified) because a payment arising from a bank’s failure to action a stop-payment instruction is a more complex situation than the typical mistaken payment. The payee is expecting payment in discharge of a debt. Payment then comes from the debtor’s agent. And the debtor’s agent is a bank. The bank’s involvement in the payment process is crucial. A key aspect of the bank-customer relationship is that the bank undertakes “to honour the customer’s cheques when the account is in credit”33 or within an agreed overdraft level. Similar undertakings apply to other payment instructions. These undertakings underlie the payee’s expectation that payment by the bank is the culmination of the payment process. Moreover they make this expectation a reasonable one to hold. As Hedley has observed, albeit in a different context, “no-one in the payee’s position could suppose that the payment was made other than on the basis that it discharged the bank’s duty to their client.”34

The bank’s agency is a significant policy consideration supporting the recognition of the “reasonable expectation” approach.35 In the next section the bank’s role as an agent is further explored. This leads into an examination of case law which illustrates judicial recognition that the fact of payment through an agent, as opposed to whether the payment was authorised, is an important consideration in determining the rights of an innocent payee.

A second significant policy consideration supporting the recognition of the “reasonable expectation” approach is the desirability of finality in payment of commercial transactions. There is an inter-relationship between this consideration and that of agency. The need for finality in bank payments is expressly recognised in U.S. law. The U.S. position and common law recognition of the need for finality is considered in the subsequent section.

2. The bank’s role as agent

The bank-customer relationship is a complex relationship. This is because it is comprised of a number of distinct relationships. Since Foley v Hill36 a “conventional[1]”37 starting point for analysing the bank – customer relationship is the contractual creditor – debtor relationship. But, as their Lordships in Foley

33 London Joint Stock Bank, Ltd v Macmillan [1918] AC 777, 789 (HL) per Lord Findlay LC.
34 Division and Ordering, above note 16, 20; Schall, above note 4, 129.
35 But see Robert Stevens, “Why do agents “drop out”?” [2005] LMCLQ 101 who argues that (at least) where the issue is whether the agent is their principal’s alter ego, agency does not provide policy reasons for modifying general legal principles.
36 2 HLC 28; 9 ER 1002 at 36-37; 1005-1006.
recognised, other relationships may arise. Another core relationship is that of mandate. As is noted earlier, the bank must honour its customer’s lawful payment instructions, funds permitting. The reasoning in Barclays Bank focuses on the presence or absence of the customer’s mandate. In so doing it downplays the significance of yet another core relationship: agency.

A bank acts as the customer’s agent when it collects a cheque or pays out on the customer’s cheque. Moreover, the bank is known by the payee to be performing an intermediary role when it pays out on its customer’s cheque or other payment instruction. Agency principles suggest that a payee who has given value for a payment, and is ignorant of the stop-payment instruction, should be entitled to rely on the bank’s ostensible authority to pay money on its customer’s behalf and retain the payment. So said the New South Wales Supreme Court in Majesty Restaurant Pty Ltd (In Liq) v Commonwealth Bank of Australia. There the bank paid out on its customer’s cheques drawn in favour of trade creditors, mistakenly overlooking that the cheques bore only one of the two required signatures.

Mainstream U.S. law also recognises the importance of the agency aspect of the bank – customer relationship. An example is the so-called “discharge for value” rule. This rule is considered in the next section. In essence it protects recipients of cheques mistakenly honoured by a bank contrary to a stop-payment instruction. As summarised in a leading text, the position in the U.S. is that:

“[w]here a bank receives in the ordinary course of business a che[que] drawn upon it, presented by a bona fide holder, who is without notice of the fact that payment has been stopped, and pays the amount of the che[que] to such holder, it cannot afterwards recover back the money as paid by mistake.”

Compared to the U.S. position, English courts (and courts applying English law) dealing with mistaken bank payments have been circumspect in their recognition of the importance of the agency component of the bank – customer relationship. For example the “rule in Price v Neal” (and its more modern interpretation, the “rule in Cocks v Masterman”) is consistent with a recognition of the bank’s agency role. But, despite this recognition, the courts have been

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38 2 HLC 28; 9 ER 1002 at 43-44; 1008.
41 Westminster Bank Ltd v Hilton (1926) 43 TLR 124, 126; Majesty Restaurant (1998) 47 NSWLR 593 (SC NSW), 601-602. It is because the bank is the customer’s agent, as opposed to an independent party with its own distinct liability on the cheque (ie an acceptor), that the customer has the ability to give a stop-payment order, see M Brindle and R Cox (ed), Law of Bank Payments, 3rd ed (Sweet & Maxwell, London, 2004), para 7-278. Bills of Exchange Act 1882, s 75.
44 (1762) 3 Burr 1355; 97 ER 871 (KB).
suspicious of the rule. As we shall see this suspicion is most apparent (and rightly so) when a forgery is involved.45

Despite their caution, there are cases in which the courts have recognised the importance of a payment being made by an agent. This section considers three of these cases: Dextra Bank & Trust Co Ltd v Bank of Jamaica46 ("Dextra Bank"), Watson v Russell,47 and RE Jones Ltd v Waring & Gillow Ltd.48 None of these cases involves a bank overlooking a stop-payment instruction. But they all involve analogous situations. All three cases involve mistaken payments. All involve three parties. And, an issue in all three cases is the ability of the recipient to retain the payment. In two of the cases one of the parties was an agent of another party and in implementing its principal’s payment exceeded its authority. The recipient was held entitled to retain the payment. In the third case there was no agent. Recovery was ordered. We start with the most recent case – Dextra Bank.

Dextra Bank

The facts of Dextra Bank are complex. Both Dextra and the Bank of Jamaica were the objects of a scam. Pursuant to the scam Dextra thought it was making a loan, while the Bank of Jamaica thought it was purchasing foreign currency. The case highlights the importance of an agent’s apparent authority to make a payment to determining the recipient’s liability.

Payment in that case was through the medium of a cheque. Dextra drew a cheque (for what it thought was a loan) and then gave possession of the cheque to its agent. Dextra specifically instructed its agent not to hand the cheque over to the Bank of Jamaica unless he received an executed promissory note in return.49 But the agent was part of the scam, and he did not follow these instructions.

In finding for the Bank of Jamaica (the payee) their Lordships, following the approach in Watson v Russell, considered it significant that the Bank did not know of the agent’s limited authority. The result was that the Bank of Jamaica was entitled to rely on the agent’s apparent authority and retain the payment.

The advice of the Privy Council in this case was given by Lord Goff and Lord Bingham. In so doing their Lordships expressly recognised the importance of agency principles. They suggested that agency principles may be a “stronger doctrine of law”50 capable of excluding the application of unjust enrichment principles. Alternatively, they suggested that agency principles are capable of modifying the application of unjust enrichment principles in particular circumstances. This recognition is important since in Barclays Bank the Court did not consider agency principles and suggested that either unjust enrichment

45 This is a consequence of English law’s subsequent treatment of Price v Neal, see text accompanying n91 – n99.
47 (1862) 3 B & S 34; 122 ER 14; affd (1864) 5 B & S 968, 122 ER 1090.
principles apply or contractual principles apply. This point is developed further in Part D.

Watson v Russell

Russell had chartered a ship to Keys. In turn Keys sub-chartered the ship to a third party. Keys did this through Watson. The hire to Russell was in arrears. Watson gave Keys a cheque for one half of the arrears and instructed Keys to conditionally deliver the cheque to Russell. The condition was that the cheque was tendered on the basis that Russell would not terminate the hire. For the purpose of delivering the cheque Keys was Watson’s agent. Keys omitted to inform Russell of the condition. Russell kept the cheque and terminated the hire. The Court concluded that Russell was entitled to do so. In delivering the Court’s judgment, Crompton J observed that the cheque was “one which [the holder] had[d] a right to take”.51 This illustrates judicial recognition that a payee’s reasonable reliance on the validity of a cheque or bill is an important factor in determining whether the payee has acquired rights to it.

RE Jones Ltd v Waring & Gillow Ltd

Dextra and Watson v Russell can be contrasted profitably with RE Jones Ltd v Waring & Gillow Ltd. There the result was different; the Court considered that the payee was not entitled to rely on the circumstances surrounding the payment to justify their continued retention of the payment. The key factual difference appears to be that the purported agent – Bodenham – was not the payer’s agent.52

Waring & Gillow Ltd were the recipients of a payment from RE Jones Ltd (“Jones”). In making this payment, Jones – encouraged by Bodenham’s false representations that he was an agent of a car manufacturer – believed that it was paying a deposit on the purchase of some cars. In fact Bodenham owed money to Waring & Gillow Ltd and, by falsely representing to Jones that Waring & Gillow Ltd was involved with the car manufacturer, he initiated a process by which Jones made a payment to Waring & Gillow Ltd. Upon learning the truth, Jones successfully recovered this payment from Waring & Gillow Ltd.53

This result, while different from those in Dextra Bank and Watson v Russell, is consistent with the reasoning in those cases. Collectively these three cases show the importance of payment occurring through the medium of an agent.

51 Watson v Russell (1862) 3 B & S 34; 122 ER 14; affd (1864) 5 B & S 968, 122 ER 1090 at 38-39.
53 An important development since this case is the recognition of the change of position defence. If recognised in 1926 this defence should have been available to Waring & Gillow Ltd. On receipt of the payment from Jones, Waring & Gillow Ltd had released goods to Bodenham which it had earlier repossessed. At the time these proceedings were brought the goods were much less valuable.
3. Commercial finality

Finality in payment of commercial transactions is a second significant policy consideration supporting the recognition of the “reasonable expectation” approach. *Dextra Bank* illustrates that the courts take into account this consideration. Their Lordships recognised that people of commerce regard, and rely on, a completed payment transaction (there a cheque) as being final: “the commercial reality [is] that cheques are treated as the equivalent of cash.” Indeed, looking beyond restitution generally, to the law of negotiable instruments and electronic fund transfers, one finds a shift in focus in which the law places more emphasis on finality of payment, especially when value has been given. This is particularly true in the U.S. where the “discharge for value” rule has received widespread recognition, for example, in the Restatement (First) of Restitution and in the Revised Uniform Commercial Code.

The U.S. “discharge for value” rule

This rule was considered recently by Dr Schall as part of his comparison of *Barclays Bank* with *Banque Worms v BankAmerica International*, a decision of the New York Court of Appeals. The facts in these cases are similar. Each bank had overlooked a customer’s stop-payment instruction and, from the payee’s perspective, each payment was one to which the payee was entitled. A minor

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55 *Esso Petroleum Co v Milton* [1997] 2 All ER 593 (CA).
56 Section 14 provides:
“(1) A creditor of another ... who has received from a third party any benefit in discharge of the debt ... is under no duty to make restitution therefor, although the discharge was given by mistake of the transferor as to his interests or duties, if the transferee made no misrepresentation and did not have notice of the transferor’s mistake.”
In addition section 33 provides:
“The holder of a check or other bill of exchange who, having paid value in good faith therefore, is under no duty of restitution to him although the drawer pays because of a mistaken belief that he is otherwise under a duty to pay.”
The Restatement of Restitution is in the process of being redrafted. Current drafts of what will be the Restatement (Third) of Restitution suggest there will be no fundamental change to its position on a discharge for value rule. See generally, Tentative Draft No. 1, § 7 cmt. d. linking the Restatement position to that of the RUCC § 3-418 (see text accompanying n122-n124).
57 Uniform Laws Annotated, § 3-418(a) provides:
“(a) Except as provided, in subsection (c), if the drawee of a draft pays ... the draft and the drawee acted on the mistaken belief that (i) payment of the draft had not been stopped pursuant to Section 4-403 or (ii) ... the drawee may recover the amount of the draft from the person to whom or for whose benefit payment was made ... Rights of the drawee under this subsection are not affected by failure of the drawee to exercise reasonable care in paying or accepting the draft.”
The 1991 Revision to §3-418 introduced the phrase “a person who in good faith took the instrument for value” omitting the former reference to “holder in due course.”
58 Schall, above note 4.
59 570 NE 2d 189 (1990, NY CA).
difference is the different payment mechanisms – a cheque (in Barclays Bank) in contrast to a wire transfer (in Banque Worms). The major difference is the result; in Banque Worms the payee was held entitled to retain the payment.60

Dr Schall has suggested that Banque Worms was wrongly decided.61 One of Dr Schall’s concerns is whether the debt in Banque Worms was discharged. Dr Schall considers that the “discharge for value” rule operates similarly to the “good consideration” defence recognised in Barclays Bank. The “good consideration” defence operates to protect a payee who has given consideration for the bank’s mistaken payment. Discharge of the customer’s debt constitutes consideration, but mere receipt by the creditor/payee of the payment is insufficient to do so. The Court in Banque Worms did not consider whether the debt was discharged. Dr Schall considers that the Court “must implicitly have assumed a valid discharge of the debt”.62 He regards this implicit discharge as “particularly doubtful”.63

Dr Schall may be right in suggesting similarities between these defences. But U.S. lawyers take a wider view of the scope of the “discharge for value” rule. In essence, U.S. courts do not seem to require the legal discharge of the debt. Rather the “discharge for value” rule is seen as responding to the creditor/payee’s receipt of payment from the debtor’s bank in circumstances where the debtor owes a debt to the payee. As a consequence, U.S. law does not require the debtor’s consent to, or subsequent ratification of, the payment. The reasoning in Banque Worms is consistent with this. The Court did not consider whether the creditor had requested or subsequently ratified the payment because it did not have to.

In a passage quoted by Dr Schall,64 the Court in Banque Worms referred to a payee who is “entitled to” the payment. But in so doing the Court was not considering whether the payee was entitled to the payment because the customer’s debt had been discharged. Rather it was drawing a distinction between volunteers and those who have given value. And, in this context, value has a wide meaning. As Palmer observes, “[i]n considering the defense of discharge for value, courts are almost wholly committed to the view that the receipt of the plaintiff’s funds in payment of or as security for the debt of a third person is value”.65 The result is that U.S. law gives much greater protection to non-voluntary payees than that conferred by the reasoning in Barclays Bank. Typically U.S. law provides relief for the bank by subrogating it to the payee’s claim against the customer.66 But this is just one of the rights U.S. law subrogates

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61 Schall, above note 4, 126.
62 ibid, 113.
63 ibid, 114.
64 ibid, 113.
66 Schall, above note 4, 115. Professor Birks has suggested that English law should recognise that the bank be “subrogated to the creditor’s unextinguished claim against the customer”, Unjust Enrichment, above note 3, 296.
to the bank. The effect of the Uniform Commercial Code\(^\text{67}\) is that the bank is “subrogated ... to whatever valid claims its mistaken payment may have happened to have discharged”.\(^\text{68}\) These claims may be that of the payee against the customer, and vice versa.\(^\text{69}\) Any shortfall is borne by the bank.

Not surprisingly a leading U.S. academic suggests that Barclays Bank was “wrongly decided”.\(^\text{70}\) Of course, “different societies can quite reasonably operate under different rules with no untoward consequences”.\(^\text{71}\) So the mere fact that U.S. law applies different principles is not decisive. But it does show that the result in Barclays Bank is not the only possible one. It also shows that the banking industry can cope with a different regime.

U.S. acceptance of the rule in Price v Neil

A factor which makes the U.S. “discharge for value” rule particularly significant for lawyers in the English law tradition is that U.S. lawyers regard the English case of Price v Neil both as the guiding influence behind the rule,\(^\text{72}\) and as underlying the general emphasis which U.S. law places on finality in payment.

Price was the drawee of two forged bills of exchange. The bills were indorsed to the defendant “for a valuable consideration”. Price paid out the first bill to the defendant and accepted the second bill. When the forgery was subsequently discovered Price unsuccessfully sought to recover the payments from the defendant.

Later English courts (and courts applying English law) have viewed Price v Neil with some suspicion. In contrast,\(^\text{73}\) U.S. courts have largely embraced Price

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\(^\text{67}\) Revised Uniform Commercial Code (1991), §4-407.


\(^\text{69}\) A practical problem with this solution is that the bank may seek to enforce rights of which it has little knowledge. A similar problem arises when a debt is sold. A solution is to require the customer’s participation (if necessary) in any proceedings, for example by supplying the bank with all the information it needs. U.S. law achieves that by requiring the customer to show the fact and amount of its loss arising from the bank’s failure to follow the stop-payment instruction, see Revised Uniform Commercial Code (1991), §4-403; E Rubin, “Efficiency, Equity and the Proposed Revision of Articles 3 and 4”, 42 Alabama L Rev 451, 578 (1991).

\(^\text{70}\) Kull, Restitution, above note 68, 1229.


\(^\text{72}\) Uniform Laws Annotated, §3-418, cmt. 1.

Illustrative of this, they have extended its operation beyond forged bills. In the U.S. the reasoning in Price v Neal applies to a range of transactions. These include: forged cheques; raised cheques; payment where there have been no funds or the account has been closed; and stopped cheques.\textsuperscript{74}

U.S. commentators advance a range of policy arguments in support of this expansion. Three are considered here. Of these, the need for commercial finality is seen as the strongest policy argument.\textsuperscript{75} Indeed, commentators have identified two factors which support the argument for finality. The first factor is that banks are viewed as sophisticated organisations, typically more sophisticated than the payee. Because of a bank’s sophistication, U.S. commentators recognise that its mistakes may be ”more complicated”\textsuperscript{76} than those of an individual. But they consider that this places the bank in a ”superior position”\textsuperscript{77} to set-off the cost of the mistake. Moreover they consider that a bank is more likely to respond to incentives to avoid making ”wasteful”\textsuperscript{78} mistakes. The second factor recognises both the reliance a payee places on payment from the debtor’s bank and the difficulty the payee may have in showing a change of position in reliance on the payment. The U.S. position can be seen as giving the payee ”a protected interest based on the likelihood of difficult-to-prove reliance on the mistaken payment”.\textsuperscript{79}

The remaining two policy arguments raised in support of the expansion in the application of Price v Neal are directed to specific concerns.\textsuperscript{80} First, so as to explain the expansion to forged cheques, it is argued that a bank is in a superior position to detect unauthorised transactions, especially forgeries. The last concern is directed to the situations of insufficient funds, no account and stopped cheques. It is argued that the bank has a superior ability to know the state of the customer’s account.

\textit{U.S. acceptance of the general approach in Barclays Bank}

A factor making Banque Worms of further interest for lawyers in the English law tradition, is, as Dr Schall observed, the court’s ”concentration on the conflict between ... colliding principles”\textsuperscript{81} – there the so-called ”mistake of fact doctrine” and the ”discharge for value” rule.

The ”mistake of fact doctrine” is the general response of New York law to mistaken payments. It is similar to Barclays Bank in that its two underlying premises are (i) that restitutionary relief should be available to recover payments made under a mistake of fact and (ii) that the change of position defence provides relief against injustice to the recipient. In contrast, the ”discharge for value” rule does not apply to all cases of mistaken payment, but rather to the so-called ”exotic cases”\textsuperscript{82} where a third party (typically a bank), in the mistaken belief that it is

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\textsuperscript{74} Palmer, Restitution, above note 65, § 14.24.
\textsuperscript{75} ibid.
\textsuperscript{76} E. Allan Farnsworth, Alleviating Mistakes (Oxford University Press, New York, 2004) ("Alleviating Mistakes"). 23.
\textsuperscript{77} ibid, 156.
\textsuperscript{78} ibid, 193.
\textsuperscript{79} ibid, 180 (his emphasis).
\textsuperscript{80} Palmer, Restitution, above note 65, § 14.24.
\textsuperscript{81} Schall, above note 4, 113.
\textsuperscript{82} Kull, Defenses, above note 60, 929.
\end{flushleft}
under a duty to a third party (typically the bank’s customer) to do so, makes a payment to another who is owed money by that third party.

In Banque Worms the Court rejected the application of the "mistake of fact doctrine" in favour of the "discharge for value" rule. In so doing the Court distinguished the cases supporting the "mistake of fact doctrine" on the ground that "for the most part" they "present[ed] issues involving more traditional aspects of mistake and restitution." It will be recalled that the payment in this case was implemented through a wire transfer. The Court also noted this fact to support its rejection of the "mistake of fact doctrine". The relative speed of electronic transfers was also mentioned. A third factor recognised by the Court as warranting the application of the "discharge for value" rule was to "establishing finality" in payment mechanisms. The ALI had considered finality to be "a singularly important policy goal" when it approved article 4A of the Uniform Commercial Code (which governs wire transfers).

The following extract from Banque Worms reveals the emphasis the Court places on "finality in business transactions". While the extract is directed to wire transfers, similar concerns apply to cheques. The Court observed:

"A consequence of this concern [for finality] has been the adoption of a rule which precludes recovery from a third person, who as the result of the mistake of one or both of the parties to an original transaction receives payment by one of them in good faith in the ordinary course of business and for a valuable consideration ... This rule is grounded in considerations of public policy and convenience for the protection and encouragement of trade and commerce by guarding the security and certainty of business transactions, since to hold otherwise would obviously introduce confusion and danger into all commercial dealings ....

The 'discharge for value' rule is consistent with and furthers the policy goal of finality in business transactions and may appropriately be applied in respect to electronic funds transfers. When a beneficiary receives money to which it is entitled and has no knowledge that the money was erroneously wired, the beneficiary should not have to wonder whether it may retain the funds; rather, such a beneficiary should be able to consider the transfer of funds as a final and complete transaction, not subject to revocation."

The common law response to the rule in Price v Neal

We return to English Law. As intimated earlier, Price v Neal's emphasis on finality has not received the same level of acceptance as it has in the U.S. Indeed, to the contrary, Price v Neal has been viewed with suspicion. Despite some early extension to the situation where a drawee's acceptance was forged and the drawee's banker had honoured the bill, subsequent judicial views have

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83 Banque Worms, 570 NE 2d 189, 193.
84 ibid.
85 ibid, 195.
86 ibid.
87 ibid, 195-196.
88 ibid.
89 Smith v Mercer (1815) 6 Taunt 76; 128 ER 961 (CP).
fluctuated on its merits, and its reasoning has been subsumed by a later case purporting to explain its operation – *Cocks v Masterman*. Nevertheless, the U.S. position, in particular its acceptance of *Price v Neal*, makes it worthwhile for lawyers in the English tradition to re-evaluate, with some caution, this line of authority.

To date English courts have struggled to formulate a rationale to explain the operation of the rules in *Price v Neal* and *Cocks v Masterman*; why is the payee protected? Various mixes of estoppel and negligence (*i.e.* for failing to detect the forgery) have been advanced. But with one noticeable exception, a commercial rationale, even a narrow one – *i.e.* to encourage the circulation of commercial paper – has not been advanced. The closest (and probably the high-point in the acceptance of *Cocks v Masterman*) occurs in *The London & River Plate Bank, Ltd v The Bank of Liverpool, Ltd.* In that case a bill contained some forged endorsements. The acceptor paid out, and then, some time later, discovered the forgeries. Stressing commercial considerations Mathew J held that the acceptor could not recover. The following passage is worthy of note:

> "That rule [Cocks v Masterman] is obviously, as it seems to me, indispensable for the conduct of business. A holder of a bill cannot possibly fail to have his position affected if there be any interval of time during which he holds the money as his own, or spends it as his own, and if he is subsequently sought to be made responsible to hand it back. It may be that no legal right may be compromised by reason of the payment. For instance, the acceptor may pay the bill and discover on the same day that the bill is a forgery, and so inform the holder of it, so that the holder would have time to give notice of dishonour to the other parties to the bill; but even in such a case it is manifest that the position of a man of business may be most seriously compromised, even by the delay of a day. Now that clear rule is one that ought not to be tampered with. It is one of the few rules of business which is perfectly clear and distinct at present, and, as it seems to me, is unimpeachable."

But this revival was short-lived. In *Imperial Bank of Canada v Bank of Hamilton* the amount of a certified cheque was fraudulently increased after certification. The innocent recipient deposited the cheque in his account. His bank allowed him to access these funds prior to the drawee bank honouring the cheque. Not wishing to extend the rule in *Cocks v Masterman* to this situation, the Privy Council labelled the rule as "stringent" and suggested that it applied only to negotiable instruments where notice of dishonour was required. Despite this reasoning, their Lordships' concern appears to have been directed to the operation of a finality rule where the recipient does not rely on the payment. But this appears to be confusing a finality rule with the change of position defence. U.S. law

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90 (1829) 9 B & C 902; 109 ER 335. This case narrowed the operation of *Price v Neal* to the situation where an acceptor pays a bill and allows the recipient to retain the payment for a day.

91 [1896] 1 QB 7 (QB). See also *Bank of Montreal v The King* (1907) 38 SCR 258 (SC Can).

92 *ibid*, 11-12.

93 [1903] AC 49 (PC).

94 *ibid*, 58.
recognises that the “discharge for value” rule and the change of position defence protect against different mischiefs.\(^{95}\) To repeat an earlier observation, U.S. commentators suggest that the “discharge for value” rule gives the payee “a protected interest based on the likelihood of difficult-to-prove reliance on the mistaken payment”.\(^{96}\)

The attack on Cocks v Masterman continued in National Westminster Bank Ltd v Barclays Bank International Ltd.\(^ {97}\) Here the drawer’s signature on a cheque was forged. Kerr J considered that the rule in Cocks v Masterman applied only to “negotiable instruments proper, ie instruments which are not mere forgeries in toto but contain at least one genuine signature and which have been negotiated to at least one innocent holder.”\(^ {98}\) More recently, and Barclays Bank\(^ {99}\) is an example, there has been an attempt to subsume Cocks v Masterman within a change of position defence.

This review may suggest that English courts (and courts applying English law) view a finality defence, especially with respect to cheques, with hostility. But care must be taken in drawing this conclusion. The cases involved forged cheques – shams – and not mistakenly paid stopped cheques. It can be argued that in dealing with forged cheques the courts regard the complete absence of any mandate as crucial – there is never a valid transaction between the purported drawer and payee. Forgery may be said to unravel everything. Moreover, as a general principle the law distinguishes between transactions that are never valid and those which are or can be valid. Consider the difference between void and voidable contracts,\(^ {100}\) for example, or converting a valid cheque\(^ {101}\) as opposed to forging a drawer’s signature\(^ {102}\) or materially altering the cheque.\(^ {103}\) For this reason the “reasonable expectation” approach recognises an exception for forged payment instructions.\(^ {104}\)

\(^{95}\) Kull, Defences, above note 60, 929.

\(^{96}\) Allievating Mistakes, above note 76, 180 (his emphasis).

\(^{97}\) [1975] QB 654.

\(^{98}\) ibid, 670. Another case involving a forged payee’s signature is The Imperial Bank of India v Ayebesighe (1927) Ceylon LR 257 (Gavin J dissenting).


\(^{100}\) Morison v London County and Westminster Bank Ltd [1914] 3 KB 356, 379, (CA); Lloyds Bank Ltd v Chartered Bank of India, Australia and China [1929] 1 KB 40, 55-56, (CA) (cheque is deemed to have a value equal to its face value).

\(^{101}\) Equity, above note 71, 189. “This distinction [between void and voidable contracts] is clearly important for third parties. They are better protected if the initial contract is voidable rather than void. This is as it should be, given that the initial contract appears to outsiders to be a perfectly proper contract.”

\(^{102}\) Arrow Transfer Co Ltd v Royal Bank of Canada (1972) 27 DLR (3d) 81, 87, 103-104, (SC Can) (holding that since the ‘cheque’ is not a valid cheque/ bill of exchange, a collecting bank has no liability for the amount for its face value).


\(^{104}\) This reflects a marked policy difference between English law and U.S. law. In the U.S. the importance of transactional finality is seen as warranting protection for the payee, at least where the payee “took the instrument in good faith and for value” (or has a change of position defence) (§ 3-418(c) RUCC), and had no
the presence or absence of the customer’s mandate, rather than whether a mandate ever existed is significant; it suggests that the approach in that case is unable to discern factors which have influenced courts.

To conclude this section, a court mindful of developing a finality defence applicable to a mistakenly overlooked stop-payment instruction need not be intimidated by the suspicion courts applying English law have given to Price v Neal and Cocks v Masterman. Indeed, to the contrary, in addition to emphasising the difference between a sham cheque and one that was initially valid, the cases reveal two important considerations – the giving of value and lack of notice of the irregularity. Both are reflected within the “reasonable expectation” approach.

D. Assumptions Underlying The Reasoning In Barclays Bank

1. The assumptions

Barclays Bank is such an important case that it is insufficient merely to provide the positive case for the “reasonable expectation” approach. This Part examines four questionable assumptions on which its reasoning and result are based. These assumptions are important for they have the effect of overlooking agency principles and downplaying the need for commercial certainty in payment mechanisms – considerations which underlie the “reasonable expectation” approach.

But first, three assumptions in Barclays Bank which the “reasonable expectation” approach either accepts or does not question directly should be noted. First, the “reasonable expectation” approach does not question the imposition of a prima facie restitutionary liability upon the payee to restore an equivalent sum of money. The bank does not intend to make a gift but believes it is discharging a liability, albeit to its customer. So even without the need to recognise a right of recovery for causative mistakes, the bank should have a prima facie right of recovery. But the “reasonable expectation” approach differs from Barclays Bank in recognising that the circumstances of the (albeit mistaken) payment justify the recognition of a defence. These circumstances include the fact the bank is making the payment as an agent and the general desirability for finality in the payment system.

Second, the “reasonable expectation” approach does not deny the assumption that the debtor’s request or subsequent ratification is required before a payment by a third party to a creditor can legally discharge the debt. Whether or not this is the law, or should be the law, is irrelevant for the “reasonable expectation” approach. But it should be noted that the apparent symmetry between the

knowledge that the signature was unauthorised. Despite this § 3-417 of the RUCC implies a number of so-called ‘presentment warranties’, which include a warranty that the person obtaining payment “has no knowledge that the signature of the drawer of the draft is unauthorised”; § 3-417(a)(3).

Division and Ordering, above note 16, 19; Goff & Jones, above note 8, paras 4-012 to 4-016.

Kleinwort Benson [1999] 2 AC 349, 388 per Lord Goff (particular sets of circumstances . . . [may] as a matter of principle or policy, . . . lead to the conclusion that recovery should not be allowed").
approach in *Barclays Bank* and current restitutionary theory as to the payment of another’s debt is bought at a price. In particular it encourages the assumption that in the absence of the change of position defence, the payee can only retain the payment if the debt is legally discharged. In so doing it precludes the recognition of other justifications for the payee retaining the money. On the “reasonable expectation” approach, the payee’s ability to retain the bank’s payment is not dependent on the customer’s debt being discharged. Rather, the circumstances surrounding the payment provide the justification.

Third, the “reasonable expectation” approach does not question the result predicted in *Barclays Bank* where the bank’s mistake is one of sufficiency of funds and the customer owes the money to the payee. This occurred in *Lloyds Bank plc v Independent Insurance Co Ltd.* The court held that the payee was entitled to retain the money. Earlier authorities support this result. *Barclays Bank* suggests that this result arises because the payee has given good consideration for the bank’s payment. Recently Dr Schall has criticised this aspect of *Barclays Bank*. This criticism appears sound. Just because a bank has its customer’s mandate to make a payment does not mean that it has their authority to discharge a debt. Typically the bank has no idea why a payment is being made; all it knows is that it has received (or believes it has received) instructions to make a payment. If the law is to regard the mistaken payment in this situation as non-recoverable something else must be present. Dr Schall suggests a “no duplication rule”. Whether that is correct, non-recovery is also the result predicted by the “reasonable expectation” approach.

2. Questionable assumptions

There are four inter-related assumptions in *Barclays Bank* which the “reasonable expectation” approach challenges. They involve:

(i) its classification of the bank’s claim as either restitutionary or as coming within a “contractual regime”;

(ii) its choices in determining the content of a category;

(iii) its emphasis on the customer’s mandate; and

(iv) its emphasis on the position of the paying bank.

An either-or approach

The approach in *Barclays Bank* regards as mutually exclusive the restitutionary regime dealing with mistaken payments and the contractual regime, which focuses on the customer’s mandate. Moreover since the approach in *Barclays Bank* considers that a customer’s revocation of its mandate precludes the

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107 [2000] QB 110 (CA). There a bank actioned a funds transfer given by its customer in the mistaken belief that cheques deposited into its customer’s account had cleared. The recipient was a creditor of the customer.

108 *Chambers v Miller* (1862) 32 LJCP 30 (CP); *Pollard v Bank of England* (1871) LR 6 QB 623 (CA).

109 Schall, above note 4, 116.

110 *ibid*, 124.

application of the contractual regime, the contractual regime does not apply in the stop-payment situation. The restitutionary regime must then apply. This is important because, unlike the contractual regime, the restitutionary regime discounts the need for finality in payment transactions. In contrast, through the "good consideration" defence, the contractual regime provides a limited recognition of this need for finality.

The fundamental problem with this 'either-or' approach is that it assumes the law can be neatly classified. The truth is that in many situations courts are faced with competing policies.\(^\text{112}\) For example a bank payment in ignorance of a stop-payment instruction can be classified in a number of ways. Three classifications come to mind. First, it can be classified as a mistaken payment. Second, it can be classified as a bank purporting to pay another's (its customer's) debts. Third, it can be classified as a situation where the bank is the customer's agent for the purposes of making payments and acts within its apparent authority when so doing. By classifying the stop-payment situation as coming within the restitutionary regime of mistaken payments, the Court in Barclay's Bank discounts the other possibilities, and the policy issues they raise.

The Court's treatment of the "rule in Cocks v Masterman"\(^\text{113}\) illustrates the power of classification to emphasize some policy considerations while discounting others. In Barclays Bank the Court offers a restitutionary explanation for this rule, by which its operation is subsumed within a change of position defence.\(^\text{114}\) The result is to reserve revoked payments solely for restitutionary principles; principles which, as perceived by the Court in Barclays Bank, are not sympathetic to all the competing policies and concerns which are present in this situation.

Creating the categories

An important preliminary step in classifying is identifying the dominant features (eg policy considerations and issues of principle) in a range of situations. These features define the membership of a category and distinguish that category from others. A risk in identifying the dominant features of a category (ie the law of restitution) or a sub-category thereof (ie mistaken payments) is that the importance of a particular feature can be overestimated. A feature can be misperceived as a mandatory feature when it is merely a common or typical feature. In this process other situations may be marginalised or required to conform to the typical one.

The typical mistaken payment arises in a two party situation. For example, I pay you mistakenly believing that I owe you this money. Kelly v Solari\(^\text{115}\) exemplifies this two party situation. In this context it may be "well settled"\(^\text{116}\) that the mistaken payor's carelessness in making the payment is irrelevant. But

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\(^{112}\) R J Sutton, "We Just Misplaced It: The Great Project and the Problem of Order in Private Law" (2005) 11 Otago LR 97, 103.

\(^{113}\) (1829) 9 B & C 902; 109 ER 335 (KB).


\(^{115}\) (1841) 9 M & W 54; 152 ER 24.

this does not mean that the payer’s carelessness is irrelevant in other types of mistaken payments, for example, mistakenly paid stopped cheques. Compared to the typical two party situation, the three party stop-payment situation is more complicated. Nevertheless, in Barclays Bank the Court analogises (inappropriately I believe) to the typical two party mistaken payment claim.

As a result the reasoning in Barclays Bank pays insufficient regard to the context in which the mistaken payment occurs in that case\textsuperscript{117} – the bank’s processing of its customer’s instruction to pay funds to the payee who is both expecting and is “entitled to receive the payment”,\textsuperscript{118} and in respect of which value has been given.\textsuperscript{119} The reasoning in Barclays Bank also places too much emphasis on some aspects of the bank-customer relationship (ie mandate) while overlooking other important aspects (ie agency). And, the reasoning in Barclays Bank downplays the need for certainty of receipt in commercial transactions.

The Court’s treatment of Aitken v Short\textsuperscript{120} in Barclays Bank further illustrates the danger of classification. Aitken v Short is not a typical two party situation. To the contrary it illustrates that mistakes occur in a range of contexts and the courts may respond to a number of policy considerations. In Aitken v Short a bank had a ‘second’ security over property which it and its debtor (Carter) believed was Carter’s. Short had the prior security. Short sought repayment of the debt and Carter “referred”\textsuperscript{121} him to the bank. The bank paid the debt confident that its own security would thereby be enhanced. The bank then discovered that the secured property did not belong to Carter. The bank unsuccessfully sought repayment from Short. Prior to Barclays Bank an explanation for this result was that the bank’s mistake (assuming it was mistaken) did not justify recovery. Support for this is provided by the well-known remarks of Bramwell B, suggesting that restitutionary recovery is not available where the “mistake did not lead him [ie the plaintiff payer] to believe that he was liable to pay the money to the defendant.”\textsuperscript{122}

But in Barclays Bank, the Court rejects this explanation. This is a consequence of the Court enlarging restitutionary recovery to causative mistakes.\textsuperscript{123} The Court offers the “good consideration” defence as the new explanation.\textsuperscript{124} This enables the Court to reconcile the result in Aitken v Short with that in Barclays Bank. There

\textsuperscript{117} A Tettenborn, Law of Restitution in England and Ireland, 3rd ed (Cavendish, London, 2002) “(Tettenborn, Restitution”), 69 (para 3-1) (suggesting that the context is all important and that “different mistakes may well need different treatment according to the circumstances and the type of benefit involved”).

\textsuperscript{118} Kleinworth Benson [1999] 2 AC 349, 408 (Lord Hope).

\textsuperscript{119} See generally Tettenborn, Restitution, above note, 117, 77 (para 3-15) for recognition that the circumstances surrounding the payment and its receipt are relevant considerations.

\textsuperscript{120} (1856) 1 H & N 210; 156 ER 188.

\textsuperscript{121} ibid, at 214; 181 per Pollock CB; at 215; 1182 per Platt B. From Carter’s perspective, his act of referring Short to the bank probably carried no legal significance; he did not have any funds to pay the debt, nor did he care if the bank paid the debt and, if so, why it did.

\textsuperscript{122} ibid, 215; 1182.

\textsuperscript{123} Barclays Bank [1980] QB 677, 688.

\textsuperscript{124} Unjust Enrichment, above note 3, 139.
is support in *Aitken v Short* for the “good consideration” explanation. In the last sentence of his speech, Pollock CB records that the “money was, in fact, paid by the Bank, as the agents of Carter”.

But other explanations for the result in *Aitken v Short* remain. Some explain the result on the basis that the bank made the payment to acquire the security.

Support for this explanation is present in all three of the brief judgments. But both Pollock CB and Platt B also note that Short had “a perfect right to receive the money” from Carter. The payment was made by Carter’s bank, so the result is consistent with the “reasonable expectation” approach.

The point is that *Aitken v Short* is a complex case. But through a process of classification the Court in *Barclays Bank* fits (or is it forces) *Aitken v Short* into the pattern of the typical two-party case.

*Emphasising the importance of the customer’s mandate*

Mandate is a key aspect of the bank-customer relationship. Save where exceptions or qualifications apply (ie sufficiency of funds), a bank’s primary function and duty is to honour its customer’s mandate. But the reasoning in *Barclays Bank* places too much emphasis on mandate. This arises as a by-product of the underlying assumption that the payee’s entitlement to retain the payment turns on the bank’s ability to debit the customer’s account, which in turn depends (at least initially) on its mandate to do so. If there is no mandate to pay, there is no contractual right to debit the account.

Having excluded the law of contract the dispute is then regarded as coming within the restitutionary regime. The Court in *Barclays Bank* concludes that any restitutionary claim has to be on the ground that by paying its customer’s debt the bank has enriched the customer. But save in special circumstances, the customer’s mandate (evidencing their request to pay what is their debt) is seen as required to legally discharge the debt. So, in the absence of a valid request the bank is dependent on subsequent ratification for authorisation to debit the account. The bank is treated as if it were an officious intermeddler purporting to pay another’s debt. Thus the bank is regarded as having no restitutionary claim against the customer. As a corollary, while the payee may regard the payment as

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125 *Aitken v Short* (1856) 1 H & N 210; 156 ER 1180, at 214; 1182.

126 Schall, above note 4, 117. A variation of this is that the bank made the payment in the belief that their security was adequate, see Birks, *A Bank’s Mistaken Payments: Two Recent Cases and their Implications* (2000) 6 NZBLQ 155, 158.

127 *Aitken v Short* (1856) 1 H & N 210; 156 ER 1180; at 214; 1181 per Pollock CB; 215; 1182 per Bramwell B.

128 Platt B recorded that he was “of the same opinion” as Pollock CB, *ibid*, 215; 1182.

129 *ibid*, 214; 1181.

130 *Dextra Bank* [2001] UKPC 50; [2002] 1 All ER (Comm) 193 (PC) at para [32].


132 This assumes that the mistake was not so fundamental so as to stop title to the money from passing.

133 *Ev Elall v Partridge* (1799) 8 Term Rep 308; 101 ER 1405.
repaying the customer’s debt, legally the debt remains, and so receipt of the payment constitutes neither a change of position nor good consideration.

The end result is a self-reinforcing logic whereby the result in Barclays Bank is seen as consistent with, if not required by, the law’s concern with ensuring that the bank follows the customer’s mandate. As a by-product, this emphasis upon mandate reinforces the view that a bank is acting as a conduit. This, in turn, supports an assumption of protection for banks against claims by others for their payment errors. The bank’s liability, if any, is to its customer for failing to honour their mandate. The problem is that this overlooks the complexity of the bank-customer relationship.

**Emphasising the payer’s position**

Having classified the bank’s payment as coming within the restitutionary category, the reasoning in Barclays Bank then assumes that payment should be treated as any other mistaken payment should be. In short it regards the bank’s payment as an “imperfect transaction” which needs to be unwound. But, by focusing on the bank and giving insufficient regard to the payee, this result is too “one-sided”. Hedley’s concern, that broadening recovery for mistaken payments results in “focu[sing] on the injustice of losing money by mistake, while playing relatively little heed to the injustice that is caused by rectifying that mistake”, is relevant here.

From the payee’s perspective, the reasoning in Barclays Bank recognises only two considerations which may displace their *prima facie* liability to restore the payment. Both considerations are specific to individual transactions rather than to stop-payments as a type of mistaken payment. The first is the potential application of the change of position defence. This consideration applies within the restitutionary regime. The second consideration is the customer’s mandate. If the customer has given their mandate to the payment the bank’s claim moves into the contractual regime. But having recognised the contractual regime, Barclays Bank effectively precludes its application to stop-payments, leaving the payee to rely on the change of position defence.

The reasoning in Barclays Bank proceeds on the assumption that the change of position defence provides an adequate defence against any injustice. Generally it does. But, as is illustrated by *K J Davies (1976) Ltd v Bank of New South Wales*, this defence may be insufficient in the context of a stop-payment. There the payee deposited a cheque into his business account unaware that payment had been

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134 This is particularly important for Electronic Funds Transfers where there is greater scope for error, i.e. late transfers, wrong account. In *Wells v First National Commercial Bank* [1998] Professional Negligence and Liability Reports 552 the Court of Appeal struck out a claim that a paying bank owed a duty of care to the recipient of a funds transfer.
135 Kull, Restitution, above note 68, 1194.
136 *Division and Ordering*, above note 16, 27. Similar concerns underlie Andrew Tettenborn’s criticism of the causation test championed in Barclays Bank; see Tettenborn, *Restitution*, above note 117, 76 (para 3-13).
stopped. In good faith, the payee used the proceeds in the normal course of his business. The Court rejected the payee’s claim that this constituted a change of position for the purposes of s 94B Judicature Act 1908 (a general statutory change of position defence for mistaken payments). The payee was seen as merely “bank[ing] the money to current account and us[ing] it in the ordinary course of business” as if “the drawer … had not stopped the cheque.”

Indeed, the reasoning in *Barclays Bank* makes it highly unlikely that in ordinary circumstances the payee can ever successfully raise a change of position defence. This follows from the assumption in *Barclays Bank* that the customer’s debt remains owing to the payee. Similar reasoning occurs in the *Davies* case. There the Court observed that following the mistake, the payee had “the use of the amount involved much earlier than it would have if it had to have recourse to civil proceedings against its debtor”. So, rather than the use of the money constituting an adverse change of position it was a change “for the better.”

Even if a payee has spent the money on an extraordinary item having no residual value, the reasoning in *Barclays Bank* suggests that the payee’s liability to restore the mistaken payment to the bank is, in a non-legal sense, offset as against the customer’s continuing liability to the payee.

But the problem is much more basic. The change of position defence provides inadequate protection to the payee. The reasoning in *Barclays Bank* pays insufficient regard to the legitimate interests of the payee for certainty of receipt. The payee does not regard their receipt of the payment as “temporary”; to the contrary they see it as the culmination of a legitimate payment process. For the same reason, even if the customer subsequently becomes insolvent the payment is not from the payee’s perspective an “undeserved windfall”; they did not deliberately accept the risk of the bank’s mistake. The point is that the reasoning in *Barclays Bank* disregards certainty of receipt as an important consideration for the law of restitution – recall its treatment of the rule in *Cocks v Masterman*.

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139 *ibid.* at 265. The result is particularly significant, for since *Thomas v Houston Corbett* [1969] NZLR 151, (CA) it has been considered that s94B requires a balancing of the equities between the mistaken payer and the recipient. It could be argued that the bank took the risk.

140 A situation where the change of position defence may be more successful is where the customer becomes insolvent shortly after the bank brings proceedings against the payee to recover the mistaken payment. The payee may be able to argue that if the payment had not been made it would have been able to recover the debt from the then solvent customer. Cf Schall, above note 4, 119.


142 *ibid.*

143 Cf *Kleinworth Benson* [1999] 2 AC 649, 359, 395 (Lords Browne-Wilkinson and Lloyd noting the importance of security of receipt and closure of transactions, and the inability of the change of position defence to provide this); 382 (Lord Goff recognising that new defences may be developed in the future to provide for “stability of closed transactions”).

144 Schall, above note 4, 119.

145 *ibid.* See also at 126.

146 Discussed in the text accompanying n112 – n113. Kull; Restitution, above note 68, 1234 (observing that by their very nature restitutionary claims are at odds with the policy of certainty of transactions).
Rather, certainty of receipt is seen as a consideration for the contractual regime and operates through the “good consideration” defence. Under the Barclays Bank approach, a payee seeking certainty of payment would be advised to seek express confirmation from the bank that they did not make a mistake so as to lay the foundation for an estoppel defence. So much for an efficient payment system!

E. Conclusion

Barclays Bank is a landmark case in the development of the law of restitution. But it develops a restitutionary approach best suited to the typical Kelly v Solari-type case of a mistaken payment where I pay you money mistakenly believing that I owe you it, rather than the more complex stop-payment situation. In the stop-payment situation different concerns are present (ie, agency considerations and the commercial need for finality in the payment system) and these outweigh those considerations which favour recovery in the two-party situation. Unfortunately the reasoning in Barclays Bank disregards these wider considerations.

This result arises because the reasoning in Barclays Bank is too restitutionary. By classifying mistaken payments arising out of a stop-payment situation as restitutionary and prescribing how restitutionary claims operate its reasoning precludes subsequent courts from taking into account other considerations. In so doing it produces a questionable result.

All recipients of cheques assume certain risks, ie forgery and insufficient funds in the account. These are inherent in any credit-type transaction and the payee can protect themselves against them. But it is harder to protect oneself against a bank mistakenly overlooking a stop-payment instruction. Not spending the money is not a real option. Nor is seeking confirmation that the payment is not a mistake. The reasoning in Barclays Bank makes it almost impossible to protect against this risk. By recognising the context in which this mistake occurs the “reasonable expectation” approach remedies this.

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147 Barclays Bank [1980] QB 677, 695. Cf Unjust Enrichment, above note 3, 139 (suggesting that the good consideration defence is not directed to certainty of receipt per se but a policy of upholding bargains); CEF Rickett and R Grantham, Enrichment and Restitution in New Zealand (Hart Publishing, London, 2000), 143.