JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CIVIL APPEAL NO. 63/2008

CLAIM NO. 2208 HCV/00970

BEFORE: **THE HON. MR JUSTICE PANTON, P**
THE HON. MR JUSTICE MORRISON, J.A.
THE HON. MRS JUSTICE McINTOSH, J.A. (Ag.)

BETWEEN **CAPITAL SOLUTIONS LIMITED** **APPELLANT/DEFENDANT**

AND **ROSH MARKETING CO. LTD** **RESPONDENT/CLAIMANT**

Paul Beswick and Christopher Dunkley, instructed by **Phillipson Partners,** for the appellant

Miss Carol Davis for the respondent

21 April and 30 July 2009

PANTON, P

I have read in draft the judgment of Morrison J.A. I agree with his reasoning and conclusion. I have nothing more to add.

MORRISON, J.A:

The background

1. This is an appeal from a judgment of Daye J given on 7 May 2008, whereby he made an order granting summary judgment in favour of the respondent for US$300,000.00, with interest and costs and dismissing the respondent's application for summary judgment against the appellant.

2. The respondent claimed as payee of two cheques for US$100,000.00 and US$200,000.00 drawn by the appellant on its account with the Sun Trust Bank in Florida in the United States of America. Upon presentation of these cheques for encashment, they were both dishonoured, the reason given being insufficient funds. The action as framed was a simple action on the cheques, the respondent claiming to recover the total amount of US$300,000.00, with interest at 10% per annum.

3. On 17 March 2008, shortly after being served with the claim form and particulars of claim (both dated 25 February 2008), the appellant applied for summary judgment on the respondent's claim, on the basis that the respondent had no real prospect of succeeding on its claim against the appellant. In the affidavit filed in support of the application, it was stated that the appellant was not a creditor of the respondent and had had, prior to the issuing of the said cheques, no dealings of any kind with the respondent.

4. On 7 April 2008, that application was met by the respondent's own application for summary judgment against the appellant, on the basis that, as drawer of the cheques in question, the appellant had no real prospect of successfully defending the claim. This application was supported by the affidavit of the respondent's managing director, Mr Ravi Rochlani, who stated that the respondent from time to time required

United States dollars ("US dollars") for the purposes of its business and to this end would purchase the required amounts from a company known as Money Express (it subsequently appeared that the full name of this company was Money Express Financial Services Ltd), which would in turn provide the foreign currency by way of cheques drawn on its own account. However, in late 2007 the respondent had received cheques from Money Express which had been dishonoured, as a result of which, when the respondent in December of that year again approached Money Express for the purpose of purchasing foreign exchange, it expressly stipulated that, in exchange for its Jamaican dollars, it was only prepared to accept "either United States dollars in cash, or a manager's cheque".

5. It is in these circumstances that, the respondent having paid over the requisite amount of Jamaican dollars to Money Express, the two cheques for the equivalent in US dollars which are the subject matter of this claim were delivered by Money Express to the respondent. Before accepting the cheques, according to Mr Rochlani, he examined them and noted that they were both drawn on the Sun Trust Bank Account of the appellant, which he knew to be "an approved financial institution". Had it not been for the involvement of such an institution, he said, he "would never have accepted the cheques".

6. But when these cheques were presented for encashment they were returned unpaid with the notation "Return Reason – A - Not sufficient funds". Despite correspondence from its attorneys-at-law demanding payment of the sum of US$300,000.00, the respondent remained unpaid, incurring overdraft interest charges as a result, and it therefore filed suit against the appellant to recover the amount of the cheques, plus interest.

7. The appellant's application for summary judgment was also supported by affidavit evidence, from Ms Vanceta Ramsay, its Acting Chief Executive Officer. She described the appellant as "an Asset Management Dealer and a Cambio operator duly licensed by the Financial Services Commission".

8. Money Express was the holder of an investment account with the appellant. From time to time, Money Express would instruct the appellant "to issue cheques to third parties on their behalf, being its clients, suppliers and other financial institutions". Ms Ramsay stated that these cheques were issued "on a third party basis only and without liability to the said third parties", and that "Money Express was accordingly obliged to place [the appellant] in a position to settle whatsoever items were requested by Money Express to be issued to their intended recipients".

9. It is pursuant to this arrangement, Ms Ramsay stated, that in December 2007 Money Express gave instructions to the appellant to issue a number of cheques, including the cheques in question, drawn on its Sun

Trust Bank account in Florida. Ms Ramsay's account of what then happened, the cheques in question having been duly issued, was as follows:

> "At that time Money Express failed to make good on its obligations to cover the necessary funding to place [the appellant] in a position to honour its payment instructions to their third party payees resulting in the non-payment of the above cheques to those third party payees, to include the [respondent]".

10. Ms Ramsay further asserted that any and all financial dealings that preceded the issuance of the cheques in question "were between and exclusively within the knowledge of Money Express and entirely outside the knowledge of [the appellant]", save for Money Express' request that the appellant issue the said cheques to the respondent. On this basis, therefore, Ms Ramsay asked the court to grant the appellant's application for summary judgment.

11. On 11 April 2008, the appellant filed a defence to the claim, generally along the lines foreshadowed in Ms Ramsay's first affidavit and, in a second affidavit filed on 15 April 2008, Ms Ramsay sought "to give details of [Money Express'] fraud on our company". She explained that in November 2007, Money Express presented several cheques to the appellant for lodgment to its account. These cheques "were scanned by the [appellant's] data capture unit, which is linked to the [appellant's] bank in the United States of America, allowing for the crediting of value in

real time". Subsequent to this, in December 2007, the appellant's overseas bank "began reversing the credits previously deposited by data capture...[and the appellant]...was not therefore in a position to honour or to subsequently permit the honouring" of the two cheques presented for payment by the respondent. It turned out, Ms Ramsay further stated, that Money Express had itself previously received value for the same cheques lodged to its account with the appellant, hence the reversal of the credits by the appellant's overseas bankers.

Daye J's judgment

12. Daye J, in a careful, considered judgment, applied the test for summary judgment set out in rule 15.2(a) and (b) of the CPR, which is to say, to consider whether either the respondent (claimant) or the appellant (defendant) had "no real prospect" of succeeding on or successfully defending the claim or issue. In this regard, he also adopted the reasoning of the Court of Appeal of England in ***Swain v Hillman*** [2001]1 All ER 91 ("The word 'real' distinguishes fanciful prospects of success", per Lord Woolf MR at page 92) and of this court in ***Stewart et al v Samuels*** (Supreme Court Civil Appeal No. 2/05, judgment delivered 18 November 2005) ("The prime test being 'no real prospect of success requires that the ...judge do an assessment of the party's case to determine its probable ultimate success or failure," per Harrison P, at page 7).

13. From his analysis of the affidavit evidence, Daye J identified five "undisputed facts" as follows:

> "1. Capital Solutions draw two (2) cheques in favour of Rosh Marketing Ltd amounting to US$300,000.00.
>
> 2. These cheques were dishonoured and Rosh Marketing has not received any payment at all.
>
> 3. Rosh Marketing Ltd. had paid Money Express and Ricardo Azan the Jamaican equivalent of US$300,000.00 as payment for foreign exchange needed for its business.
>
> 4. Rosh Marketing Ltd did not have any business dealings with nor paid Capital Solutions Ltd any money at no time.
>
> 5. Capital Solutions facilitated Money Express from time to time by issuing cheques to its customers and clients including Rosh Marketing Ltd."

14. The judge then went on to assess the legal position and concluded that the appellant was liable to the respondent on the two cheques on the following bases:

(i) The payee of a cheque that is dishonoured generally has a cause of action against the drawer.

(ii) The respondent, as payee, was a holder for value of the two cheques. There was sufficient consideration given for the cheques within the meaning of section 27 of the Bills of

Exchange Act ("the Act") by the respondent having given the equivalent Jamaican dollars to Money Express. That section "does not require the value has to be made to the drawer "(citing ***Diamond v Graham*** [1968] I WLR 1061).

(iii) The appellant qualified as an accommodation party to the cheques within the meaning of section 28 of the Act and the respondent, as a holder for value of the cheques, therefore also had a real prospect of succeeding against the appellant on its action on the cheques on this ground.

(iv) The appellant as the drawer of the cheques undertook obligations to a holder of the cheques (pursuant to sections 34 and 55 of the Act), in the light of which the appellant had no real prospect of successfully defending the action.

(v) The respondent qualified as a holder in due course of the cheques within the meaning of section 29 of the Act.

15. The judge also noted that, although on the pleadings no question of "fraud, duress, force, fear, unlawful means, illegal consideration or breach of faith" was raised, the appellant in its submissions had nevertheless "sought to prove some fraudulent conduct on the part of Ricardo Azan of Money Express". He therefore gave some consideration to the allegation of fraud and concluded that the appellant had not

proved fraud sufficient to displace the presumption that the respondent was a holder in due course of the cheques.

16. In the result, the judge dismissed the appellant's application for summary judgment and granted the respondent's application, giving judgment to the respondent for US$300,000.00 with interest at 10% per annum from 26 December 2007 to the date of judgment.

The grounds of appeal

17. Dissatisfied with this result, the appellant filed eight grounds of appeal as follows:

> "1. The Learned Judge in Chambers erred in failing to find that the Respondent's Affidavit in Support of its application for Summary Judgment lacked any evidence of valuable consideration given to support its contention that the cheques at issue were enforceable bills of exchange and as such, did not establish valuable consideration in law or in fact as required by *section 27 of the Bills of Exchange Act,* ("the Act").
>
> 2. The Learned Judge in Chambers erred in failing to properly consider or at all the Respondent's admission that the alleged valuable consideration was in fact received by a third party, Money Express, in exchange for Money Express cheques given to the Respondent.
>
> 3. The Learned Judge in Chambers erred in failing to find that the Claimant's assertion that the Defendant's cheques were received in replacement of the "uncleared cheques" of Money Express was evidence of the absence of valuable consideration required for an enforceable Bill of Exchange.
>
> 4. The Learned Judge in Chambers erred in giving Judgment to the Respondent without evidence of the outcome or whereabouts of these items from Money

Express cheques received by the Respondent on the basis that the Respondent's failure to account for the outcome of the "uncleared" cheques rendered their loss uncertain, and the Respondent's Summary Judgment application untenable.

5. The Learned Judge in Chambers erred in failing to give any or any sufficient weight to the Respondent's admission that at the time of its receipt of the Appellant's cheques, it had notice of the third party's previously dishonoured ("uncleared") cheque items, placing itself outside of Section 29 of the Act as a holder in due course,

6. The Learned Judge in Chambers erred in failing to find that as the value claimed by the Respondent passed in consideration of Money Express' cheques, the Appellant was not a party at that time as required by Section 27 of the Act.

7. The Learned Judge in Chambers erred in not finding that there is no evidence that the Appellant lent its name to the third party, as an accommodation party, as required by section 28 of the Act.

8. The Learned Judge in Chambers erred in failing to properly consider or at all that under section 30 of the Act, fraud duress or force and fear or illegality shifts the burden of proof away from the issuer to the holder and undoes the value of a Bill of Exchange in the hands of a holder".

The issues and the submissions

18. These grounds give rise, in my view, to three main issues, viz, whether there was any evidence of consideration having been given for the cheques by the respondent, within the meaning of section 27 of the Act ("issue (i) - consideration"); whether the appellant is liable to the respondent as an accommodation party within the meaning of section 28

of the Act ("issue (ii) - accommodation parties"); and whether the respondent was a holder in due course of the cheques, within the meaning of section 29 of the Act ("issue (iii) – holder in the due course").

19. The appellant filed detailed skeleton arguments, which were ably supplemented by Mr Paul Beswick, who appeared for the appellant at the hearing. He took issue at the outset with the third of Daye J's "undisputed facts", which was that the respondent "had paid to Money Express and Ricardo Azan the Jamaican equivalent of US$300,000.00 as payment for foreign exchange for its business". This was, Mr Beswick submitted, no more than "an unsubstantiated claim", unsupported by any documentary evidence and certainly not admitted by the appellant.

20. On issue (i), Mr Beswick submitted that the respondent had not established that it had given any valuable consideration for the cheques within the meaning of section 27 of the Act. In particular, the "antecedent debt or liability" referred to in section 27(1)(b) of the Act must be that of the drawer of the cheque and not of a third party. In this regard, Mr Beswick referred us to ***Oliver v Davis and Another*** [1949] 2 KB 727 and ***Hasan v Willson*** [1977] 1 Lloyd's Rep. 431. He pointed out that ***Diamond v Graham*** [1968]1WLR 1061, upon which Daye J relied in his judgment, had been treated with some reservation in the subsequent case of ***Hasan v Willson*** and was in any event distinguishable on its facts from the instant case.

21. On issue (ii), Mr Beswick submitted that there was no evidence that the appellant ever intended to lend its name to meet the obligations of Money Express. A party such as the appellant can only lend its name so as to qualify as an accommodation party within the meaning of Section 28 of the Act, Mr Beswick submitted further, by design and not by accident.

22. On issue (iii), Mr Beswick submitted that the judge's finding that the respondent was a holder in due course within the meaning of section 29 of the Act was vitiated by the fraud perpetrated against the appellant by Money Express, as described in Ms Ramsay's second affidavit. Further on this issue, Mr Beswick also pointed out that the authorities establish that the original payee of a cheque cannot be a holder in due course (***Jones v Waring & Gillow*** [1926] AC 670).

23. Miss Davis responded to Mr Beswick's opening salvo on the judge's finding of "undisputed facts" by pointing out that Mr Rochlani's statement in his affidavit that he had given Jamaican dollars to the appellant in exchange for the two US dollar cheques was in fact not disputed in any of the affidavit evidence that was before Daye J. In these circumstances, she submitted, the judge was entitled to find, as he did, that this was indeed an undisputed fact.

24. On issue (i) she submitted that section 27 did not require consideration to move from the drawer to the holder of a cheque and

that the judge had been correct to rely on ***Diamond v Graham,*** which had not been overruled, in this regard. She submitted further that the instant case was not a case of "antecedent debt or liability", but fell within section 27(a) of the Act, consideration having been given by the respondent to Money Express. In these circumstances, neither ***Oliver v Davis*** nor ***Hasan v Willson*** was applicable on the facts of the instant case.

25. On issue (ii) Miss Davis submitted that the appellant was clearly an accommodation party within section 28 of the Act, in the light of Ms Ramsay's evidence. She referred us to Byles on Bills of Exchange (25th edition), for a discussion (at pages 244-245) on the requirements of section 28 in this regard.

26. And finally, on issue (iii), Miss Davis submitted that Daye J had considered the issue of fraud, despite his comment that the timing of the allegations of fraud (in submissions, rather than on the affidavit evidence) "put it outside the Summary application". She pointed out that the judge then went on to make a clear finding that "it cannot be said Capital Solutions issued these two cheques as a result of fraud", which was sufficient to dispose of the assertion that the respondent could not be a holder in due course within section 29.

The approach to summary judgment

27. It must be borne in mind that this is an appeal from an order made on an application for summary judgment. This court is therefore

concerned to see whether Daye J applied the appropriate test and came to the correct conclusion in his application of that test to the actual case before him. As I have already pointed out (at paragraph 12 above), the learned judge sought to apply the language of the rules as interpreted by the relevant authorities.

28. There is no suggestion on appeal that the judge fell into error in adopting this approach. I consider that he was correct to do so and am therefore content to approach the matter on the same basis.

Some important definitions

29. Section 73 of the Act provides that "a cheque is a bill of exchange drawn on a banker payable on demand". A bill of exchange is defined by section 3 as follows:

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

30. A bill is not rendered invalid because it does not specify the value given for it or that any value has been given for it (section 3).

31. Chitty (Chitty on Contracts, 30th edition, volume 2, paragraph 34-010) conveniently summarises some other important definitions in the Act in this way:

> "'**Drawer**', '**drawee**', '**acceptor**', '**payee**', '**indorser**' **and** '**holder**'...First the person who

> draws the bill is known as 'the drawer'. Secondly, the person on whom the bill is drawn i.e. the person to whom the drawer's order is directed, is known as 'the drawee'. If the drawer agrees to comply with the instruction of the drawer he may 'accept' the bill. By doing so he promises to honour the bill and become an 'acceptor'. Thirdly, the person to whose order the bill is payable is known as the 'payee'. Fourthly, the payee, or any subsequent transferee, may warrant that the bill be duly honoured by signing his name at the back of the bill. Such a signature is known as an 'indorsement' and the person so signing becomes an 'indorser'. Finally, the payee of a bill, who has its physical possession, and any other person who subsequently obtains its possession either under an indorsement completed by delivery or – in the case of a bearer bill – by mere delivery, is known as 'the holder'. If the holder has given value, i.e. consideration for the bill, he is a holder for value'. If, in addition, he satisfies the requirements of s.29 of the Act, he is a 'holder in due course'. It is important to emphasise that a person cannot become a holder - let alone a holder for value or a holder in due course - except insofar as he acquires the possession of the bill as payee, as indorsee or as bearer...".

Issue (i) - consideration

32. This issue raises the question whether there was any consideration in the relevant sense for the cheques drawn by the appellant. Section 27 of the Act provides that valuable consideration for a bill may be constituted by (a) any consideration sufficient to support a simple contract and (b) an "antecedent debt or liability". Such debt or liability is deemed valuable consideration whether the bill is payable on demand or at a future time.

33. Section 30 provides that every party whose signature appears on a bill "is prima facie deemed to have become a party thereto for value", thereby creating in relation to bills a presumption of consideration unless or until the contrary appears.

34. While what can amount to consideration within section 27(a) is not generally problematic, section 27(b) has attracted a fair amount of judicial attention over the years, as the trio of cases referred to by both parties to this appeal demonstrates. In ***Oliver v Davis***, the plaintiff lent the first defendant £350 and obtained from him a post-dated cheque for £400. Before the presentment of this cheque, the first defendant persuaded the second defendant to draw a cheque for £400 in favour of the plaintiff. The cheque was forwarded to the plaintiff, but before its presentment, it was countermanded by the second defendant, who did not receive any consideration for the cheque from either the plaintiff or the second defendant. It was held that no valuable consideration within the meaning of section 27 was given for the cheque.

35. Evershed MR, who delivered the leading judgment in ***Oliver v Davis*** (and with whom both Somervell and Denning LJJ, as they then were, agreed), said this (at page 735):

> "I think for myself that the proper construction of the words in (b) 'antecedent debt or liability' is that they refer to an antecedent debt or liability of the promisor or drawer of the bill and are intended to get over what would otherwise have

> been prima facie the result that at common law the giving of a cheque for an amount for which you are already indebted imports no consideration, since the obligation is past and has already been incurred".

36. On the other hand, where, as in the earlier case of ***Crears v Hunter*** 19 QBD 314, the cheque is given to meet the antecedent debt or liability of a third party, there may be good consideration if it can be shown that the cheque was given in exchange for a promise of forbearance to sue the third party, whether express or implied, on the part of the recipient of the cheque in regard to the third party's antecedent debt or liability. In such a case, as Somervell LJ pointed out in ***Oliver v Davis*** (at page 742), the consideration for the cheque would have to be found in section 27(a) (as a simple contract between the drawer of the cheque and the recipient) and not in section 27(b), which refers to an antecedent debt or liability of the drawer of the cheque.

37. The learned editors of Chitty submit (at paragraph 34-062) that Evershed MR's analysis in ***Oliver v Davis*** nevertheless overlooked an important aspect of section 27, which is that "[it] does not modify the well-known principle that consideration must move from the promisee". But before turning to ***Hasan v Willson***, which Chitty cites in support of this submission, I should mention ***Diamond v Graham***, which is really the high-watermark of the respondent's case. That was a case in which the plaintiff agreed to lend £1,650 to a Mr Herman, on condition that Mr

Herman undertook to procure a cheque for £1,665 from the defendant, so that the plaintiff could have the defendant's cheque in his possession before his cheque was presented. The plaintiff gave his cheque to Mr Herman, but Mr Herman was unable to get in touch with the defendant, so the plaintiff stopped payment on the cheque. The next day, Mr Herman obtained a cheque from the defendant in favour of the plaintiff for £1,665.00 and at the same time gave the defendant a cheque for the same amount. The plaintiff then paid the defendant's cheque into his bank and authorised payment of the cheque he had drawn in Mr Herman's favour. The defendant's cheque was dishonoured and Mr Herman's cheque in favour of the defendant was also dishonoured.

38. The plaintiff's action against the defendant on his cheque succeeded. All members of the court (Danckwerts, Diplock and Sachs LJJ) held that consideration had been given for the cheque under section 27(a) (by, as Byles explains, the plaintiff "releasing his cheque to Herman, inferentially at the implied request" of the defendant: Byles on Bills of Exchange, 27th edition, paragraph 19-15). However, Danckwerts LJ, who delivered the leading judgment, also expressed the view (at page 1064) that "There is nothing in [section 27(b)] which appears to require value to have been given by the holder so long as value has been given for the cheque ...". Diplock and Sachs LJJ delivered brief concurring judgments, though both judges, while expressing agreement with Danckwerts LJ,

appear to have based their conclusions on section 27(a) (see pages 1064-1065).

39. ***Hasan v Willson*** was a case about commission payments relating the proposed sale of a large stock of coins being sold by one foreign government to another. In connection with the proposed sale, one Mr Smith had rendered himself liable to pay the plaintiff £50,000.00. Based on Mr Smith's false representation to the defendant that he had funds in a certain company, the defendant agreed to give a cheque for £50,000.00, payable to the plaintiff, in exchange for a cheque payable to him drawn on the company's bank account. It was quickly discovered that the company's cheque would be dishonoured, so the defendant stopped payment on his cheque, as a result of which the plaintiff brought action against him on the cheque. The defendant pleaded that the consideration for his cheque had wholly failed and Robert Goff J (as he then was) held that the defence succeeded.

40. It was not argued by the plaintiff that the case fell within section 27(1)(a) or that any question of forbearance to sue arose. Rather, it was submitted to Robert Goff J, in reliance on ***Diamond v Graham***, that the "antecedent debt or liability" referred to in section 27(1)(b) need not be the antecedent debt or liability of the promisor or drawer of the bill. This is how Robert Goff J dealt with this submission (at pages 441-42):

> "First, as I have said, of the Court it was only Lord Justice Danckwerts who held that provision of the cheque by Mr. Herman constituted good consideration for the defendant's cheque: the other members of the Court (Lord Justice Diplock (as he then was) and Lord Justice Sachs), regarded only the provision by the plaintiff of his cheque to Mr. Herman as poor [sic] consideration, no doubt on the ground that the plaintiff provided such cheque at the implied request of the defendant and so the case fell within s. 27(1)(a), to which sub-section both Lord Justice Diplock and Lord Justice Sachs expressly referred. Second, there is nothing in the case to show that s. 27(1)(b) was at any time considered by the Court, and it appears that Oliver v Davis was not even cited to the Court. I cannot believe that there was any intention by the Court to depart from the construction of s. 27(1)(b) of the Act unanimously adopted in Oliver v Davis; if there were any inconsistency between the two decisions, I would feel it my duty to follow and apply the law laid down in Oliver v Davis".

41. It was therefore held, applying ***Oliver v Davis***, that the antecedent debt or liability referred to in section 27(1)(b) must be an antecedent debt or liability of the promisor or drawer of the bill, and not that of a stranger. But there was also, Robert Goff J observed, "a more fundamental point", that is, the "fundamental principle of the law of contract that consideration must move from the promisee" (page 442). The learned judge then went on to observe that if Danckwerts LJ was to be understood as having stated in ***Diamond v Graham*** that, as between immediate parties to a bill, valid consideration may move other than from the promisee, then he would feel obliged to say that that view was

"impossible to reconcile...with the analysis of the law by the Court of Appeal in ***Oliver v Davis***" (page 442).

42. Finally, on this point, both Byles and Chitty **(**at paragraphs 19-17 and 34-067 respectively) make reference to ***MK International Development Ltd v The Housing Bank*** [1991] 1 Bank L.R. 74, in which Mustill LJ is reported to have observed that the clear current of authority was "in favour of the view that s. 27(1)(b) applied only to the antecedent debt or liability of the promisor, and that the mere existence of debts owed by a third party was not sufficient" (Byles, paragraph 19-17).

43. From this very brief survey of the cases, it appears to me that the following emerges:

(i) There is a presumption that valuable consideration has been given for a cheque, unless the contrary appears.

(ii) Forbearance by the promisee to sue a stranger to a cheque at the request, express or implied of the drawer may constitute good consideration for the cheque, under section 27(a). But this is a matter of evidence.

(iii) For an antecedent debt or liability to constitute valuable consideration within the meaning of section 27(b), it must be the antecedent debt of the drawer of the cheque.

(iv) In any event, the rule that consideration must move from the promisee applies as between immediate parties to a bill or cheque.

44. In paragraphs 7 and 8 of its defence filed on 11 April 2008, the appellant pleaded the following:

> "...
> 7. The Defendant denies paragraph 4 and state that the Claimant is not a creditor of the Defendant and as such has no basis on which to recover against the Defendant. The Claimant's relief must rely directly against the undisclosed third parties.
>
> 8. The Defendant was not privy and remained unaware of any particulars regarding the relationship between the Claimant and the aforementioned third parties, and its Claim fails to disclose the basis for any indebtedness or at all between the parties".

45. While it cannot be said that in these paragraphs the appellant raised the issue of want of consideration with complete precision, it is clear from Ms Ramsay's first affidavit that this was the appellant's position from the outset ("we have received no monies, payment on account or any other property or thing of value that would render Capital Solutions indebted to Rosh Marketing Ltd" – see paragraph 17 Ms Ramsay's first affidavit). And this certainly appears to be how Daye J understood the defence, hence his reliance on ***Diamond v Graham*** and his own conclusion that "An antecedent debt or liability is valuable consideration to a bill [cheque]".

46. The editors of the Encyclopedia of Banking Law state (at F(92)) that "the holder of a dishonoured bill is normally able to obtain [summary] judgment against the parties liable on it...". However, in a summary of the

defences available to an action on a bill or cheque, the following appears (at F(94)(f):

> "...
> (f) absence of, or total failure of, consideration is a defence to an action on a bill (para. 63(5)). As between immediate parties, partial failure of consideration may be relied on as a pro tanto defence but only where the amount involved is ascertained and liquidated. Failure of consideration does not constitute a defence against a holder in due course. Nor is it a defence against a holder for value **(unless the plaintiff and defendant are immediate parties)**. Consideration for a bill may be constituted by any consideration sufficient to support a simple contract, or an antecedent debt or liability. The debt must however be that of a party to the bill, not a third party, (though consideration may consist of the payee or holder's forbearance to sue the third party)" (emphasis supplied, and, to similar effect, see **Bullen & Leake & Jacob's Precedents of Pleadings**, 13th edition, page 1062).

47. The question is, therefore, whether on the facts of the instant case, Daye J was correct in concluding that the appellant had no real prospect of successfully defending the claim on this issue. In my view, he was not. In the first place, his conclusion that the antecedent debt or liability, presumably of Money Express to the respondent, constituted valuable consideration as between the appellant and the respondent, though deriving some support from the dictum of Danckwerts LJ in ***Diamond v Graham,*** appears out of line with both earlier and subsequent judicial and

textbook opinion. On this basis, it cannot be said that the appellant's position on the matter is fanciful or unrealistic and therefore bereft of any real prospect of success. Further, it is clear that the judge gave no consideration either to the rule that consideration must move from the promisee or to the question of whether there was any evidence to suggest that there was any request, whether express or implied from the appellant that the respondent should forbear to sue Money Express in consideration of the appellant paying the debt of US$300,000.00. If there was in fact no consideration for the cheques, it would mean that the respondent was not a holder for value and not therefore entitled to enforce payment against the appellant.

48. I therefore think that the appellant is entitled to succeed on this issue and that the order granting summary judgment is liable to be set aside for the reasons given above.

Issue (ii) – accommodation parties

49. Section 28 provides as follows:

> "**Accommodation bill or party**
>
> An accommodation party to a bill is a person who has signed a bill as drawer, acceptor or indorser, without receiving value therefor, and for the purpose of lending his name to some other person.
>
> An accommodation party is liable on the bill to a holder for value; and it is immaterial whether, when such holder took the bill, he

> knew such party to be an accommodation party or not."

50. The question of the consideration or value given for the cheques is in my view equally relevant to this issue, as it is clear that the appellant can only be liable to the respondent if the latter is a holder for value. While Daye J may well have been correct (and I express no view on this) in thinking that "The explanation Capital Solutions Ltd. give [sic] in its defence and the affidavit of Vanceta Ramsay aptly describe and qualifies Capital Solutions Ltd. as an accommodation party", he proceeds in this section of his judgment on the basis that the respondent was a holder for value. As my conclusion on issue (i) shows, I cannot say that the appellant has no real prospect of successfully defending the action on the ground that it was not a holder for value.

Issue (iii) – holder in due course

51. By definition, a holder in due course must be a holder for value (section 29 (b)). In addition, it is well established that the original payee of a bill cannot be regarded as a holder in due course (***Jones v Waring & Gillow,*** supra). It is therefore clear that the respondent, quite apart from the still moot question whether it could be said to be holder for value, cannot as the original payee be regarded as a holder in due course. Accordingly, I do not think that Daye J was correct in his conclusion that "the presumption that Rosh Marketing is a 'holder in due course' stands".

Conclusion

52. For all the above reasons, I think that the appellant is entitled to succeed in this appeal and I would accordingly order that the judgment in favour of the respondent be set aside, with costs both here and in the court below to the appellant, to be taxed if not sooner agreed. The matter should now proceed to case management, with a view to a trial date being fixed in due course.

McINTOSH, J.A. (Ag)

I too have read the draft judgment of Morrison J.A. I agree with his reasoning and conclusion. There is nothing further that I wish to add.

PANTON, P

ORDER

The appeal is allowed. The judgment in favor of the respondent is set aside, with costs both here and in the court below to the appellant to be taxed if not agreed.

The matter is to proceed to Case Management, with a view to a trial date being fixed in due course.