having suffered a similar loss of opportunity. Given that the equitable claims and the failed public law ground of recovery could not avail the Crown, the only remaining way to protect its interest in performance of the contract was to award restitutionary damages.

It is right that restitutionary damages should be a remedy of last resort, only available when other remedies for protecting the claimant's interest in performance of the contract are inadequate. The justification for awarding them is always weaker than for awarding expectation damages. Expectation damages are a kind of substituted performance which at least give the claimant the monetary value of the benefit for which he bargained. Restitutionary damages have no necessary correlation to the benefit that the claimant bargained to receive. Their deterrent effect is their strongest justification.

Restitutionary damages indirectly protect the claimant's interest in performance by removing any financial incentive for the defendant to renege on his bargain. However, deterrence is a relatively weak justification when the damage done by the breach of contract has already happened and when the award of restitutionary damages was, from the start, a matter of discretion. Bright-line rules of liability which are formulated in advance are a stronger deterrent to breach. The more substantial protection which the award against Blake gave to the Crown's interest in controlling disclosures of information was not to deter Blake himself but to deter other former spies from committing similar breaches of contract. The Crown's interest was a continuing one.

DAVID FOX

LOSS ALLOCATION FOR MATERIALLY ALTERED CHEQUES

IN the conjoined appeals *Smith* v. *Lloyds TSB Group plc; Jones* v. *Woolwich plc* [2000] 3 W.L.R. 1725 the Court of Appeal had the opportunity to consider the single issue of whether the true owner of a cheque or banker's draft, which it was accepted had been "materially altered", and so, subject to irrelevant exceptions, avoided within the terms of the Bills of Exchange Act 1882, s. 64, and subsequently converted, is entitled to damages equivalent to the face value of the instrument. In *Smith* the Insolvency Service drew a cheque crossed "account payee" in favour of the Inland Revenue, on behalf of the claimants, who were the joint liquidators of ILG Travel Ltd. An unknown third party stole the cheque, altered the payee's name to "Joseph Smitherman" and paid it into an account

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held in that name with the defendant, Lloyds Bank plc. The cheque was cleared before the fraud was discovered and the claimants sued the collecting bank for its conversion. The facts of *Jones* were in all material respects identical, save that the claim was brought against the paying bank in respect of a banker's draft. Applications were made for the summary disposal of both cases. In *Smith* Blofeld J. struck out the claim against the collecting bank ([2000] 1 W.L.R. 1225), but in *Jones* Judge Hallgarten Q.C. awarded the claimants the face value of the draft. A unanimous Court of Appeal (Pill, Potter and Stuart-Smith L.JJ.) held that the claimants in both cases were only entitled to nominal damages.

In reaching that conclusion, Pill L.J., giving the principal judgment, approved the well-established principle that the value of a valid cheque is deemed equivalent to the amount shown on its face and that, as a result, the face value of such an instrument represents the *prima facie* measure of damages for its conversion (*Lloyds Bank Ltd.* v. *Chartered Bank of India, Australia and China* [1929] 1 K.B. 40, 55–56). In *Smith*, however, his Lordship declined to apply this principle to a materially altered cheque, which had been avoided by virtue of the Bills of Exchange Act 1882, s. 64, since it was merely a "worthless piece of paper". This conclusion must be correct. As approved by his Lordship, the rationale for awarding the face value of a cheque as damages for its conversion stems from the fact that cheques "are potential instruments whereby the sums they represent may be drawn from [the drawer's] bankers, and, if they get into any other hands than his, he will be the loser to the extent of the sums which they represent" (*Morison* v. *London County and Westminster Bank Ltd.* [1914] 3 K.B. 356, 379 *per* Phillimore L.J.).

This rationale can have no application to a cheque that is avoided by a material alteration, since the drawer's bank will be discharged from its liability to pay against the presentation of the instrument. Furthermore, even if the drawer's bank were to pay against the presentation of such an instrument, it would have no entitlement to debit that amount from its customer's account, as that payment would have been outside its mandate to pay only upon the presentation of a genuine cheque. As a result, whether the drawer's bank pays or not, the drawer will not have suffered any loss as a result of the collecting bank's actions. This conclusion is of particular importance when one considers that the defence in the Cheques Act 1957, s. 4, is unlikely to be available to a collecting bank in respect of a materially altered cheque (*Slingsby* v. *District Bank Ltd.* [1932] 1 K.B. 44), and is entirely consistent with the previous authorities that had refused to impose liability on a

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collecting bank in such circumstances, whether in conversion (*Slingsby* v. *Westminster Bank Ltd.* [1931] 2 K.B. 583, 586 *per* Finlay J.) or in negligence (*Yorkshire Bank plc* v. *Lloyds Bank plc* [1999] Lloyds Rep. Bank. 191, 193 *per* H.H. Judge Pitchers).

The decision in *Smith* is not, however, without its difficulties. First, there is no indication that the effect of that decision is limited to situations involving alterations to the payee's name; it would appear to apply equally to other kinds of material alteration. If this is correct, it will no longer be possible to argue that a cheque, which has been materially altered by changing the figure shown on its face, retains a value equivalent to the unaltered figure (see Brindle and Cox, *The Law of Bank Payments*, 2nd ed. (1999), para. 7–200). Secondly, as *Jones* demonstrates, the reasoning in *Smith* is not limited to cheques crossed "account payee". This, therefore, raises the question (unanswered in *Smith*) of how one determines the value of a materially altered instrument that has passed through the hands of a holder in due course, who can avail himself of the proviso to the Bills of Exchange Act 1882, s. 64(1). Thirdly, it is unclear whether the reasoning in *Smith* will preclude a drawer from claiming the face value of a materially altered cheque, when the paying bank is entitled to debit the drawer's account because the drawer's negligence in drawing the cheque has facilitated the fraud (see *London Joint Stock Bank Ltd.* v. *Macmillan* [1918] A.C. 777). It is submitted that *Smith* should apply in this scenario. Although the drawer would have undoubtedly suffered a loss, it is difficult to see why the negligent drawer should be placed in a better position than the innocent drawer *vis-à-vis* the collecting bank. Fourthly, in the interests of consistency, it is submitted that the *Smith* approach should equally determine the measure of damages for the conversion of cheques bearing a forged drawer's signature. It has been suggested elsewhere that this may not be the case (Chalmers and Guest, *Bills of Exchange*, 15th ed. (1998), para. 572). Regardless of these uncertainties, however, *Smith* should be welcomed as a clear indication of where the losses should fall in a situation that is likely to become increasingly common.

CHRISTOPHER HARE

SALE OF GOODS—REMEDY OF REJECTION—HOW QUICKLY IS THE RIGHT LOST?

WHILE the precise time allowed for a buyer to reject faulty goods is by no means clear, it has been understood to be short. A buyer

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