



Neutral Citation Number: [2026] EWCA Civ 1259

Case No: CA-2025-001931

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS OF ENGLAND AND WALES

BUSINESS LIST (ChD)

Mr Justice Rajah

[2025] EWHC 1569 (Ch)

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 7 October 2026

Before :

LORD JUSTICE BAKER

LORD JUSTICE NUGEE

and

LADY JUSTICE FALK

Between :

RASMALA TRADE FINANCE FUND

Claimant /
Appellant

- and -

TRAFIGURA PTE LTD

Defendant/
Respondent

Jonathan Adkin KC and Adil Mohamedbhai (instructed by Hill Dickinson LLP)

for the Appellant

Neil Kitchener KC and James Nadin (instructed by Reed Smith LLP)

for the Respondent

Hearing dates: 30 June and 1 July 2026

Approved Judgment

This judgment was handed down remotely at 10.30am on 7 October 2026 by circulation to the parties or their representatives by e-mail and by release to the National Archives.

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Lord Justice Nugee:

Introduction

1. This appeal from the High Court concerns a claim by the Appellant, Rasmala Trade Finance Fund (“**Rasmala**”), to recover money paid by mistake to the Respondent, Trafigura Pte Ltd (“**Trafigura**”).
2. Between August 2017 and March 2018 Rasmala made 5 payments to Trafigura totalling over \$22.6m (save for references to A\$ (Australian \$), all references to \$ are to US\$) in the belief that it was financing particular coal trading contracts for the supply of coal by Trafigura to a coal trader called Farlin Energy & Commodities FZE (“**Farlin**”). In fact Farlin had committed a fraud on Rasmala and none of the supposed contracts were valid. Rasmala sought restitution of the moneys it had paid from Trafigura.
3. The claim was tried by Rajah J (“**the Judge**”) in March and April 2025 and he handed down judgment on 23 June 2025 at [2025] EWHC 1569 (Ch) (“**the Judgment**”). He accepted that Rasmala only made the payments because of its mistaken belief that it was making payments on genuine contracts and that Trafigura had been enriched at its expense. Nevertheless the claim failed because Trafigura had a defence of change of position. If it had not received the payments (which it believed were valid and that it could apply to Farlin’s outstanding indebtedness) Trafigura would not have continued to trade with Farlin because further deliveries would have exceeded Farlin’s credit limit. In fact it entered into a series of new contracts with Farlin between September 2017 and May 2018 with an invoice value of just under \$60m, and when it eventually stopped trading with Farlin, Trafigura was owed slightly more than it had been before receiving the first payment. The Judge held that in those circumstances it would be inequitable to require Trafigura to make any repayment. He therefore dismissed the claim.
4. Rasmala appeals with permission granted by Miles LJ. We heard from Mr Jonathan Adkin KC and Mr Adil Mohamedbhai for Rasmala; and from Mr Neil Kitchener KC and Mr James Nadin for Trafigura.
5. For the reasons that follow I prefer the submissions for Trafigura and would dismiss the appeal.

Facts

6. The facts were to some extent contentious at trial but I can take them from the findings made by the Judge in the Judgment. These can be summarised as follows.
7. Trafigura is an international commodities trader incorporated in Singapore. One of its customers was Farlin, which had been a customer of Trafigura since September 2015. In 2016 Trafigura granted Farlin an open credit limit of approximately \$2m. In December 2016 Trafigura increased the limit to \$11m, supported by insurance cover for 50% of the limit. Trafigura made some small adjustments in 2017 and early 2018 and thereafter the limit was between \$10m and \$11m. By July and August 2017 Farlin was struggling to remain within the limit and was late in making payments.
8. Farlin was seeking to obtain financing and was introduced to Rasmala. On 16 July 2017 Rasmala and Farlin entered into a 1-year Murabaha Facility Agreement (a Sharia-

compliant arrangement) in the amount of \$20m which could be used for coal trading. Farlin could request a drawdown for a specific contract. If Rasmala approved the transaction, it was to be structured as a purchase of the relevant coal by Rasmala and its subsequent sale to Farlin for the purchase price and an agreed profit rate for Rasmala. Rasmala was reluctant to enter into purchases directly and by an Agency Agreement appointed Farlin to enter into purchase contracts (once approved by Rasmala) on its behalf as undisclosed agent. Each drawdown was to be up to 85% of the purchase price with Farlin providing the balance. Under the terms of the Facility Farlin was supposed to pay its 15% deposit to Rasmala which would then make payment to the supplier (that is, Trafigura). But that did not in fact always happen, Rasmala permitting Farlin to pay its 15% direct to Trafigura.

Payment 1 – \$6,840,000 (21 August 2017)

9. The first transaction took place in August 2017. Farlin notified Rasmala of a proposed purchase of coal from Trafigura with an 80% advance payment (amounting to \$6.84m) with the balance payable on delivery. Farlin provided Rasmala with a sales contract numbered 1475551 that purported to represent an agreement between Farlin and Trafigura dated 4 July 2017. There was in fact no such agreement and the contract was a forgery.
10. On 17 August 2017 Farlin paid Rasmala \$1,999,000. Rasmala treated that as Farlin's 15% deposit for the first and second sales. On 21 August 2017 Rasmala paid \$6.84m to Trafigura ("**Payment 1**"). It sent Farlin a remittance confirmation letter to be provided to Trafigura confirming that the payment had been made on behalf of Farlin and represented the 80% advance payment with respect to sales contract 1475551. Farlin passed this on but before doing so removed the reference to the payment being the advance payment for contract 1475551. But the relevant managers at Trafigura (Mr Gaurav Gupta, Trafigura's Coal Operations Manager, and Mr Saurabh Gokhale, his immediate superior) did understand that the payment related to future deliveries.
11. It was then Trafigura's practice where it received a payment from a third party on behalf of a customer to require the customer and third party to enter into an agreement, called a Third Party Agreement or TPA, confirming their agreement to Trafigura's proposed use of the payment. Trafigura's in-house lawyer, Ms Alexandra Gordon, was asked to draft a TPA. She drafted it on the basis that the funds paid were to be applied towards specific future shipments. But she was asked to re-draft it so as to allow the funds to be used to cover outstanding payments due. The trader who dealt with Farlin, Mr Harsh Jasani, sent the redrafted TPA to Farlin drawing attention to the fact that although it was drafted on the basis that the funds received were for future shipments, it provided that they could be used to offset old outstanding amounts, including demurrage. Farlin initially pushed back, a Mr Samdani of Farlin sending an e-mail of 23 August 2017 which included a statement that Rasmala was just financing the deal and:

"They will never sign any tripartite agreement allowing offset of this money again[st] existing liability including demurrages etc."

But after further discussions Mr Samdani relented, and eventually confirmed that Rasmala had agreed to the allocation of Payment 1 to Farlin's outstanding dues.

12. Farlin sent back the draft TPA with amendments, one of which provided that Trafigura

was authorised to communicate only with Farlin, such communications being deemed to be received by Rasmala. On 28 August 2017 Farlin provided Trafigura with a final version of the TPA (“TPA 1”) signed by Farlin and purportedly signed by Rasmala. In fact Rasmala was oblivious to these communications about the TPA and its signature had been forged.

13. Trafigura applied Payment 1 to the discharge of Farlin’s oldest debts (ie on a first in first out, or FIFO, basis). The effect of this was to bring Farlin’s exposure within the credit limit set by Trafigura, and so Trafigura continued to trade with Farlin.

Payment 2 – \$4,362,880 (18 September 2017)

14. Payments 2 to 5 followed the same pattern (subject to one potentially significant difference in relation to Payment 5). Farlin made a request under the Facility in relation to a forged or manipulated contract. Rasmala made a payment to Trafigura. Farlin provided Trafigura with a TPA authorising the use of the funds on a FIFO basis. The TPA was purportedly signed by Rasmala, but its signature was forged. Trafigura applied the funds towards payment of Farlin’s existing indebtedness.
15. For Payment 2, Farlin provided Rasmala with a forged sale contract (based on a genuine contract but fraudulently altered), and on 18 September 2017 Rasmala paid Trafigura \$4,362,880. It was suggested at trial that Mr Gokhale and Mr Gupta would have known from certain references that Rasmala had made the payment to fund Farlin’s liabilities under specified contracts. But the Judge accepted their evidence that after Payment 1 and TPA 1, they did not realise that Rasmala was making its payments in respect of a specific contract to be performed in the future.
16. Mr Gupta identified the invoices to which the payment should be allocated on a FIFO basis and asked Farlin to provide a TPA confirming this allocation. Farlin duly provided TPA 2, with forged execution by Rasmala.

Payment 3 – \$2,788,000 (5 February 2018)

17. For Payment 3 Farlin again provided Rasmala with a forged contract, based on a genuine contract but fraudulently altered. On 5 February 2018 Rasmala paid \$2,788,000 representing 85% of the advance payment under the purported contract. Again there was material which might have led Mr Gokhale and Mr Gupta to identify the relevant contract, but the Judge found that they did not notice these details and that Mr Gupta by this stage believed that Trafigura and Farlin had a process in place whereby he would check with the treasury team that the funds had “hit” Trafigura’s account, and he would then proceed to allocate the payment to outstanding invoices, which would be confirmed in a TPA provided by Farlin and Rasmala.

Payment 4 – \$4,245,750 (8 March 2018)

18. For Payment 4, Farlin again provided Rasmala with a forged contract. Before proceeding Rasmala required Payments 1 and 2 to be repaid by Farlin, as repayment was overdue. This was done. After receipt of the repayment, Rasmala on 8 March 2018 paid \$4,245,750 to Trafigura. Mr Gupta allocated the payment to outstanding debts and requested, and received, a TPA from Farlin. This was again purportedly executed by Rasmala but its purported execution was a forgery.

Payment 5 – \$4,386,000 (21 March 2018)

19. For Payment 5, Farlin once more provided Rasmala with a forged sales contract. On 21 March 2018 Rasmala paid \$4,386,000 to Trafigura. Mr Gupta requested a TPA from Farlin. He never received one despite follow-up requests. Trafigura decided to allocate the payment to Farlin's outstanding debts. The Judge said that it seemed from Mr Gokhale's evidence that Trafigura assumed that a TPA would be forthcoming eventually from Farlin.
20. After Payment 5, Trafigura's trading relationship with Farlin slowed and then ceased as Farlin quickly reached its credit limit. There were two further contracts between Trafigura and Farlin after Payment 5, the last on 8 May 2018. Farlin eventually stopped trading. At that point Trafigura was owed some \$11.9m on 5 contracts and there were further charges of about \$3m for demurrage, making a total of about \$15m. That was slightly more than Farlin's exposure before Payment 1 which had been somewhere between \$12m and \$14m.
21. The Judge made some other relevant findings which I will refer to as appropriate below.

The Judgment

22. After setting out the facts, the Judge first considered, and dismissed as hopeless, a contention that Mr Jasani (and hence Trafigura) had acted dishonestly. Rasmala does not have permission to appeal this.
23. He then considered Rasmala's claim in unjust enrichment. At [78] he summarised the requirements for such a claim, namely that the claimant must prove (1) that the defendant has been enriched; (2) that the enrichment was at the claimant's expense; and (3) that the enrichment at his expense was unjust. If the claimant does so, it is then for the defendant to prove that there is a defence, such as the provision of good consideration or a change of position. None of this is controversial.
24. The fact that Trafigura was enriched was not disputed (at [79]). Trafigura did dispute that the enrichment was at Rasmala's expense, contending that Rasmala made the payments as Farlin's agent pursuant to the TPAs and discharged Farlin's debts to Trafigura, and hence that the payments were made at Farlin's expense rather than Rasmala's (at [81]). The Judge rejected this: the payments were made by Rasmala as intended principal; Trafigura believed that Rasmala had agreed to the application of the payments on a FIFO basis, but Rasmala knew nothing about the TPAs, Farlin had no authority to bind it to them, and its signature was forged; hence as between Trafigura and Rasmala, Farlin's unauthorised and fraudulent holding out of Rasmala as Farlin's paying agent had no legal effect (at [82]-[85]). The payments were therefore not made by Farlin and did not discharge Farlin's debts (at [86]). Hence Trafigura's enrichment was at Rasmala's expense, not Farlin's (at [87]).
25. As to whether the enrichment was unjust, the Judge had no difficulty finding that it was. Payment under a mistake of fact is a long established unjust factor, and Rasmala made the payments because of its mistaken belief that it was making advance payments on genuine contracts (at [88]-[89]).
26. He next considered a suggested defence of good consideration. Trafigura argued that

the payments were applied to discharge Farlin's debts, that the debts were in fact discharged and that Trafigura therefore gave good consideration. The Judge rejected this. When it made the payments, Rasmala did not intend to discharge Farlin's old debts – it intended to purchase coal pursuant to the Murabaha arrangements – and the TPAs, which it did not sign, had no legal effect on Rasmala. Rasmala was not Farlin's agent and the payments did not discharge Farlin's debts (at [92]).

27. That left the defence of change of position. The Judge summarised the principle as follows (at [93]): the defence is established in respect of a mistaken payment if the defendant has in good faith changed his position in some way which, but for the payment, he would not have done, and he would now suffer substantial detriment if required to repay all, or alternatively part, of the sum received.
28. He first considered (under the heading "*But for*") whether there was a sufficient causal connection between the enrichment and the change of position. Rasmala contended that Trafigura relied on the TPAs to discharge Farlin's historic debts and so its change of position was caused by the TPAs and not receipt of the payments. The Judge rejected this. He accepted (at [98]) the evidence of Trafigura's witnesses that if the payments had not been made, further deliveries to Farlin would not have been made because they would have exceeded Farlin's credit limit. But because the payments were received a further 15 new contracts were entered into for the supply of coal by Trafigura to Farlin between September 2017 and May 2018 with an invoice value of just under \$60m. He continued (at [99]):

"TPAs are not common or standard practice in the industry, but it is Trafigura's policy to have them whenever it receives a payment from a third party... But had there been no payment there would have been no TPA. A TPA was simply a step Trafigura required to process the payment it had received or was to receive. What caused Trafigura to continue to trade with Farlin was that it had received a payment on what it considered were satisfactory terms as to how it could use that payment. That is a sufficient causal connection between the enrichment and the change of position."

29. He also said (at [102]) that:

"the absence of a TPA for Payment 5 does not prevent Trafigura having a change of position defence. The change of position is its continued trading with Farlin because of the payment."

30. He next (under the heading "*Detriment*") considered whether Trafigura had established a sufficient detriment to make it inequitable to require any repayment. He accepted Trafigura's evidence that immediately before Payment 1 Farlin had reached the extent of its credit limit with Trafigura (some \$10m or \$11m). Trafigura also then had an additional exposure on demurrage of between \$1.7m and \$3m, making a total exposure of approximately \$12m to \$14m. When Trafigura eventually stopped trading with Farlin it was owed approximately \$12m and about \$3m in demurrage – a total of about \$15m. So its overall exposure was slightly worse than before Payment 1.
31. Trafigura was able to make some recoveries from Farlin, and to claim on the credit insurance, which reduced its overall loss to \$7m to \$7.5m. Credit insurance would also

have been available if Trafigura had stopped trading with Farlin before Payment 1 and sought to recover the outstanding sum but (at [104]):

“It is impossible to say with certainty whether it would have been able to make greater or lesser recoveries if it had stopped trading with Farlin before Payment 1 was received.”

32. He then considered the profit made by Trafigura on the continued trading. The margins on a sale of coal were small – they might be half a per cent or one per cent. That would suggest Trafigura had made less than \$600,000 in profit from the 15 further contracts.

33. On these facts he concluded as follows (at [106]):

“When one looks at these figures, it is obvious that Trafigura would be financially worse off if it was required to repay the Payments in full or even in part. It has continued to trade with Farlin since Payment 1 and continued to supply coal. If it must repay Rasmala, then it will incur a loss of a further \$22 million on top of the \$15 million which it was owed when it ceased trading – \$37 million. That compares to its exposure of \$12 to \$14 million before Payment 1. (In these figures, I have ignored the profit on the 15 contracts for the purposes of simplicity as it is too small to make any significant difference).”

34. Trafigura had also lost the opportunity to stop trading with Farlin before Payment 1 and to take steps to recover its then debts. On this he said as follows (at [107]):

“It is impossible to say what recoveries Trafigura might have achieved if it had followed that course, but it is possible that it would have been able to make greater recoveries than it was able to make when Farlin eventually failed. This is not a remote possibility. Farlin had access to several sources of financing and it is not fanciful to suggest that if Trafigura had demanded repayment Farlin would have found funds from elsewhere to repay, so that it could keep trading with other suppliers. This is irreversible detriment which is substantial. While I do not accept Mr Nadin’s submission that unquantifiable detriment provides Trafigura with a trump card which makes its change of position defence unanswerable, I accept that substantial and irreversible detriment may mean that the retention of a payment made by mistake is not a disproportionate or unfair outcome.”

35. In those circumstances he concluded (at [108]) that it would be inequitable to require Trafigura to make any repayment of the payments.

36. He then considered whether Trafigura had acted in good faith for the purposes of the change of position defence, and concluded that it had: Trafigura’s acceptance of the payments, and continued trading with Farlin in consequence, was without knowledge or suspicion of anyone at Trafigura that the TPAs were invalid or the payments were repayable, and was in good faith for the purposes of a change of position defence (at [113]).

37. He therefore held that Rasmala’s claims for restitution in unjust enrichment, and in the

alternative that Trafigura held the payments on constructive trust, failed (at [114]).

38. By an Order dated 23 June 2025 the Judge therefore dismissed the claim.

Grounds of Appeal

39. Rasmala appeals with permission granted by Miles LJ. It had sought permission to appeal on seven grounds, but Miles LJ refused permission on Grounds 5 and 6 which raised challenges to the Judge's fact-finding exercise. The remaining grounds, for which he granted permission, can be summarised as that the Judge erred in the following respects:

- (1) (Ground 1) in concluding that Trafigura was entitled to keep the payments and treat them as its own money;
- (2) (Ground 2) in finding a sufficient causal connection between the payments and Trafigura's change of position;
- (3) (Ground 3) in concluding that it was inequitable to order restitution when he should have concluded that Trafigura took the risk of the invalidity of the TPAs;
- (4) (Ground 4) in applying the wrong test as to whether Trafigura had acted in good faith; and
- (5) (Ground 7) in holding that it was inequitable to order restitution of Payment 5 in circumstances where no TPA was obtained.

40. Mr Adkin confirmed in the course of his oral submissions that Rasmala was not pursuing Ground 1. Rasmala did however apply to rely on an additional ground of appeal, namely that the Judge was wrong to find that Trafigura had suffered a detriment. Trafigura opposed the application. We heard argument on this ground ("**the Additional Ground**") on a provisional basis. As appears below I would permit Rasmala to rely on the Additional Ground, but would dismiss this ground as well as the others.

Quantum of Rasmala's claim

41. There is one further point that it is convenient to note here. The total of Payments 1 to 5 was \$22,622,630. Rasmala accepted in its pleadings that it would give credit for the sum of \$1,026,000 in respect of a deposit made by Farlin towards Payment 1. This had the effect of reducing its claim for Payment 1 from \$6,840,000 to \$5,814,000, and its total claim to \$21,596,630.

42. But as referred to above (see paragraph 18) Rasmala had in 2018 required, and received, payments from Farlin towards the repayment of Payments 1 and 2 before it would agree to Payment 4. The amount received was \$10.56m. Rasmala allocated this at the time to repayment of Payments 1 and 2. In December 2019, Rasmala decided that it could re-allocate these payments to other debts owed by Farlin (in respect of non-Trafigura transactions). One of the questions at trial was whether it could do so.

43. The Judge held that this did not arise (at [114]). But, he continued:

“No term of the [Facility Agreement] was identified, and no authority was cited by Rasmala to support its claimed entitlement to re-allocate a payment made by a debtor to discharge a specified debt towards the discharge of another debt. I would have found that it was not open to Rasmala to reallocate a payment made by Farlin for the discharge of a specific debt it owed Rasmala without Farlin’s agreement.”

44. Rasmala does not seek to challenge that conclusion on this appeal. The result is that Rasmala has been repaid \$10.56m in respect of Payments 1 and 2, reducing Rasmala’s overall claim to some \$11m. Mr Adkin accepted that this meant that Rasmala could not pursue restitution in relation to Payment 1, or in relation to Payment 2 to the extent to which that had also been repaid. That assumed that the \$10.56m was not quite enough to repay the whole of Payment 2, but once account is taken of the deposit of \$1,026,000 for which credit was given against Payment 1, the payment of \$10.56m was in fact sufficient to discharge the whole of Payments 1 and 2. Rasmala’s appeal is therefore limited to Payments 3 to 5.

Overview

45. Before coming to the detailed arguments on the particular grounds of appeal, it is helpful to stand back and look at the case as a whole. Rasmala’s pleaded case was that it was the victim of a fraud, and that Trafigura was party to the fraud; it made various allegations of complicity in the fraud against Mr Gupta, Mr Gokhale and Mr Jasani. At the beginning of the trial it withdrew the bulk of its allegations of dishonesty but maintained them against Mr Jasani, its case being that Mr Jasani suspected that Rasmala had not consented to the TPAs but had dishonestly turned a blind eye. As referred to above, the Judge roundly rejected this case.
46. Once the dishonesty case had failed, what was left was the familiar case of two innocent parties who have each been the victim of a fraud committed by a third person. Farlin deceived Rasmala into thinking that it was making payments on specific contracts (on its own behalf as undisclosed principal). Farlin deceived Trafigura into thinking that Rasmala was a financier making payments on behalf of Farlin and that they could be allocated to Farlin’s existing liabilities. Farlin was able to carry out both limbs of its fraud because there was no direct communication between Rasmala and Trafigura.
47. Mr Adkin sought to place the blame for this on Trafigura, arguing that it could and should have contacted Rasmala directly to ask whether it approved the use of the funds. This was the foundation of his argument on Ground 4 (good faith), and I will consider it in detail when considering that, but it is perhaps worth noticing at this stage that Rasmala too could have contacted Trafigura directly and told it what it was making the payments for. It did not do that, but left it to Farlin to deal with Trafigura. This is not to seek to ascribe blame to either party – as I will come to, the availability of the defence of change of position does not involve an inquiry into the relative blameworthiness or fault of the parties – but it does explain how Farlin was able to deceive Trafigura into believing that the monies were paid on behalf of Farlin and could be used to pay off Farlin’s historic debts. On the Judge’s findings, Trafigura did believe this, and no-one at Trafigura either knew or suspected that the TPAs were invalid or that the payments were repayable, or in other words that they were anything other than valid payments which Trafigura was entitled to keep. That is why it continued trading with Farlin, instead of stopping trading in August 2017 and taking steps to recover its then debts.

The result was that it increased its exposure to Farlin.

48. To anticipate, this seems to me a classic case of a recipient of payments changing its position to its detriment in good faith in the belief that it was entitled to the payments. I will have to consider below the various arguments put forward on behalf of Rasmala as to why this is wrong, but, as will appear, in the end I think that this simple analysis is the right one, and that the Judge was entirely right to find that the defence of change of position was made out.

Ground 4 (good faith)

49. Mr Adkin argued the grounds of appeal in the order in which I have set them out above. But I find it convenient to start with Ground 4 and the question whether Trafigura was acting in good faith.
50. The requirement that a defendant relying on a change of position defence must have acted in good faith was identified by the House of Lords when it first recognised the general availability of the defence in *Lipkin Gorman v Karpnale Ltd* [1991] 2 AC 548 (“*Lipkin Gorman*”). Lord Goff gave the most detailed consideration to the defence (at 578F-581B), but Lord Templeman also gave a reasoned speech, and the other members of the House agreed with both of them. The facts are well-known: Mr Cass, a dishonest solicitor, stole money from the plaintiff firm and over a period of some 10 months gambled it away at the defendant club which ran a casino. He won substantial sums but overall lost more than he won, the club winning a net sum of £174,745, of which it was agreed that at least £154,695 was derived from money stolen by Mr Cass from the firm’s client account. There was no doubt that the club received the money in good faith (per Lord Goff at 574H). Lord Goff’s discussion of the general principle includes the following (at 579E-G):

“In these circumstances, it is right that we should ask ourselves: why do we feel that it would be unjust to allow restitution in cases such as these? The answer must be that, where an innocent defendant’s position is so changed that he will suffer an injustice if called upon to repay or to repay in full, the injustice of requiring him so to repay outweighs the injustice of denying the plaintiff restitution. If the plaintiff pays money to the defendant under a mistake of fact, and the defendant then, acting in good faith, pays the money or part of it to charity, it is unjust to require the defendant to make restitution to the extent that he has so changed his position. Likewise, on facts such as those in the present case, if a thief steals my money and pays it to a third party who gives it away to charity, that third party should have a good defence to an action for money had and received. In other words, bona fide change of position should of itself be a good defence in such cases as these.”

Then at 580B-D he added this:

“I am most anxious that, in recognising this defence to actions of restitution, nothing should be said at this stage to inhibit the development of the defence on a case by case basis, in the usual way. It is, of course, plain that the defence is not open to one who has changed his position in bad faith, as where the defendant has paid away the

money with knowledge of the facts entitling the plaintiff to restitution; and it is commonly accepted that the defence should not be open to a wrongdoer. These are matters which can, in due course, be considered in depth in cases where they arise for consideration. They do not arise in the present case. Here there is no doubt that the respondents have acted in good faith throughout, and the action is not founded upon any wrongdoing of the respondents.”

51. Lord Goff therefore draws a distinction between the innocent defendant, acting in good faith or bona fide, and one who has changed his position in bad faith, as where he knows the facts entitling the plaintiff to restitution. Lord Templeman similarly refers (at 560B) to the case of a donee who:

“innocently expends the stolen money in reliance on the validity of the gift before the donee receives notice of the victim’s claim for restitution”

and (at 560D) to the club as having “in good faith allowed Cass to gamble with the solicitors’ money”.

52. As Lord Goff envisaged would happen, the requirement of good faith has been elucidated in subsequent cases. The next decision we were referred to is the decision of the Privy Council in *Dextra Bank & Trust Co Ltd v Bank of Jamaica* [2002] 1 All ER (Comm) 193 (“*Dextra*”). That was another case where two innocent parties had been deceived by a third. Dextra Bank had drawn a US\$ cheque in favour of the Bank of Jamaica, thinking it was going to make a loan against a promissory note. The Bank of Jamaica had received the US dollars thinking it was buying them in return for the equivalent in Jamaican dollars, which it paid to individuals it thought were Dextra’s agents, but who were in fact not. Dextra brought a claim against the Bank of Jamaica for restitution on the grounds that it had paid the money by mistake, and the Bank of Jamaica relied on the defence of change of position. Lord Bingham and Lord Goff, giving the joint advice of the Board, in fact held that Dextra could not establish that it had paid under a relevant mistake (at [28]-[35]), but nevertheless went on to consider the defence of change of position. Dextra had submitted that where a defendant invoked the defence, it was necessary to balance the respective faults of the two parties, the object of the defence being to balance the equity of the party deprived with that of the party enriched (at [40]). Lord Bingham and Lord Goff rejected that as follows (at [45]):

“Their Lordships are, however, most reluctant to recognise the propriety of introducing the concept of relative fault into this branch of the common law, and indeed decline to do so. They regard good faith on the part of the recipient as a sufficient requirement in this context. In forming this view, they are much influenced by the fact that, in actions for the recovery of money paid under a mistake of fact, which provide the usual context in which the defence of change of position is invoked, it has been well settled for over 150 years that the plaintiff may recover ‘however careless [he] may have been, in omitting to use due diligence’: see *Kelly v Solari* (1841) 9 M & W 54 at 59, [1835–42] All ER Rep 320 at 322 per Parke B. It seems very strange that, in such circumstances, the defendant should find his conduct examined to ascertain whether he had been negligent, and still more so that the plaintiff’s conduct should likewise be examined for the purposes of assessing the relative fault of

the parties.”

53. The next relevant decision is *Niru Battery Manufacturing Co v Milestone Trading Ltd* [2002] EWHC 1425 (Comm), [2002] 2 All ER (Comm) 705 (“*Niru Battery*”). Here the second claimant, Bank Sepah, opened a letter of credit in connection with the purchase of lead ingots. Having been presented with documents including a (false) bill of lading, it paid money under the letter of credit to the fourth defendant, Credit Agricole Indosuez (CAI). CAI had itself already disposed of the warrants for the lead elsewhere, but was persuaded by its customer (Milestone) not to return the money but to deal with it in accordance with Milestone’s instructions. When Bank Sepah sued CAI for money paid under a mistake, CAI sought to rely on change of position. Moore-Bick J held that CAI could not do so as it had not acted in good faith. That decision was upheld on appeal.
54. At [120] Moore-Bick J said that he thought it clear that the relevant individual at CAI (a Mr Francis) realised that Bank Sepah had paid on a false basis, as he recognised that the documents should have been withdrawn when the warrants were sold; and at [121] that the payment which CAI relied on as constituting a change of position was made after it had been recognised that Bank Sepah had been labouring under a mistake and had a strong claim to recover the payment it had made. CAI submitted that nevertheless it had not acted in bad faith as that was to be equated with dishonesty, and Mr Francis had not been dishonest as that concept was then understood in the light of *Twinsectra Ltd v Yardley* [2002] UKHL 12, [2002] 2 AC 164, namely that the person alleged to be dishonest had acted in a way that he knew ordinary people would regard as dishonest (at [131]). Moore-Bick J (at [125]) noted that the decision of the Privy Council in *Dextra* was authority for the proposition that mere negligence on the part of the defendant is not sufficient to deprive him of the defence of change of position; and at [134] referred to what Lord Templeman and Lord Goff respectively had said in *Lipkin Gorman* about a change of position after the payee “receives notice of the victim’s claim for restitution” or “with knowledge of the facts entitling the plaintiff to restitution”. He continued at [135]:

“In the light of these observations, and having regard to the nature of the principles underlying the right to restitution in the case of a mistaken payment and the defence of change of position, I do not think that dishonesty in the sense identified in the *Twinsectra* case is the sole criterion of the right to invoke the defence of change of position. I do not think that it is desirable to attempt to define the limits of good faith; it is a broad concept, the definition of which, in so far as it is capable of definition at all, will have to be worked out through the cases. In my view it is capable of embracing a failure to act in a commercially acceptable way and sharp practice of a kind that falls short of outright dishonesty as well as dishonesty itself. The factors which will determine whether it is inequitable to allow the claimant to obtain restitution in a case of mistaken payment will vary from case to case, but where the payee has voluntarily parted with the money much is likely to depend on the circumstances in which he did so and the extent of his knowledge about how the payment came to be made. Where he knows that the payment he has received was made by mistake, the position is quite straightforward: he must return it. This applies as much to a banker who

receives a payment for the account of his customer as to any other person (see, for example, the comment of Lord Mersey in *Kerrison v Glyn, Mills, Currie & Co* (1912) 81 LJKB 465 at 472, [1911–13] All ER Rep 417 at 424). Greater difficulty may arise, however, in cases where the payee has grounds for believing that the payment may have been made by mistake, but cannot be sure. In such cases good faith may well dictate that an inquiry be made of the payer. The nature and extent of the inquiry called for will, of course, depend on the circumstances of the case, but I do not think that a person who has, or thinks he has, good reason to believe that the payment was made by mistake will often be found to have acted in good faith if he pays the money away without first making inquiries of the person from whom he received it.”

On the facts he held that CAI had not acted in good faith, for the reasons that he gave at [138]. The need for CAI to make inquiries of Bank Sepah was a matter to be viewed in terms of a duty of good faith which a person who has received a payment “that he has good reason to think was made under a mistake” owes to the person who made it. If such a person fails to make inquiry before disposing of the money he can properly be described as failing to act in good faith “because he acts in the knowledge that he may be infringing the rights of another despite having the means of avoiding that consequence.” The present case was even stronger as Mr Francis “had no real basis for thinking that Milestone was entitled to receive or retain the funds that had been remitted by Bank Sepah”. Although he did not consciously act in disregard of the standards to be expected of an ordinary honest banker, Mr Francis “was willing in the circumstances to accept the risk that releasing the money might infringe Bank Sepah’s rights”.

55. An appeal to this Court was dismissed: *Niru Battery Manufacturing Co v Milestone Trading Ltd* [2003] EWCA Civ 1446, [2004] QB 985. Reasoned judgments were given by Clarke LJ and Sedley LJ, each of whom rejected the suggestion that the defence of change of position is only lost where the defendant is guilty of dishonesty; Butler-Sloss P agreed with both judgments. Clarke LJ held that the essential question was whether it would be inequitable or unconscionable to allow the recipient of money paid under a mistake to deny restitution (at [149] and [162]), although he also accepted a submission by Mr Bloch for CAI that “the defence is available in any case where the recipient of moneys paid under a mistake of fact pays the moneys away in good faith” (see at [144] and [163]). He also said that if the payee “who knows the facts which entitle the payer to repayment does not repay” justice requires that it repay the money (at [153]). At [164]–[165] he cited the passages from Moore-Bick J’s judgment at [135] and [138] respectively and said he agreed with them. On the facts he said at [168] that:

“having realised that Bank Sepah had paid by mistake, to my mind, good faith required Mr Francis to inquire of Bank Sepah before paying the money away in accordance with Mr Mahdavi’s instructions and the judge was correct so to hold.”

56. Sedley LJ agreed that the essential test was one of inequity (rather than a simple good faith/bad faith dichotomy (see at [182])) and at [185] said:

“The present facts are such that it would plainly be inequitable to allow CAI to rely on a change of position defence to the claim for restitution. On his own candid evidence Mr Francis was not merely negligent in

checking the documentation: he let a very large sum of money for which CAI had accepted responsibility be paid away when he had in his hands ample information to put CAI on its guard against doing so.”

At [186] he referred to the decision of the Court of Appeal of New South Wales in *State Bank of New South Wales Ltd v Swiss Bank Corpn* (1995) 39 NSWLR 350 (“*State Bank of NSW*”), and at [187] said of this decision that:

“It requires the donee to show that it acted on real or reasonably supposed facts justifying payment away.”

At [188] he drew a parallel with the law of knowing receipt, referring to *Bank of Credit and Commerce International (Overseas) Ltd v Akindele* [2001] Ch 437 where at 450E-F Nourse LJ endorsed the observation of Vinelott J in *Eagle Trust plc v SBC Securities Ltd* [1993] 1 WLR 484 at 497 that in a knowing receipt case “it is only necessary to show that the defendant knew that the moneys paid to him were trust moneys and of circumstances which made the payment a misapplication of them.” He continued at [189]:

“It would, as Ali Malek suggests, be strange if the analogous doctrines of knowing receipt and unjust enrichment carried different defences, the former defeasible simply by proof of material knowledge, and the latter only by proof of dishonesty.”

57. We were also referred to a decision of my own at first instance, *Webber v Department for Education* [2014] EWHC 4240 (Ch) (“*Webber*”). Mr Webber had taken early retirement as a teacher and received a pension. But he had then taken up employment which had the effect that his salary and pension together exceeded his salary prior to retirement; under the relevant regulations applicable to his pension, this meant that his pension should have been reduced. Because he did not tell Teachers Pensions (TP), who administered the scheme, of his earnings, his pension was not reduced as it should have been and he was overpaid. When TP found out, they sought repayment of the excess. Mr Webber relied on a change of position defence. The Deputy Pensions Ombudsman (DPO) found as a fact that although Mr Webber might not have known that an overpayment was definitely building up, he must have been aware that there was a possibility that this could happen yet he still failed to furnish TP with the necessary information, and at the very least he turned a blind eye in the hope that if there was an overpayment building up that would go unnoticed. I concluded (at [57]-[58]) that those were findings that were open to the DPO. Mr Webber submitted that these findings were consistent with negligence or making a simple mistake, but I rejected that (at [60]): what the DPO was saying was that although Mr Webber may not have known that he was being overpaid, he did appreciate that there was a possibility he was, and chose not to ask TP if that was the case. After reference to what Moore-Bick J and this Court had said in *Niru Battery*, I concluded (at [62]):

“In my judgment it follows that on the DPO’s factual findings, her conclusion that the defence of change of position was unavailable to Mr Webber cannot be faulted. If a person appreciates that the payment he is receiving may be an overpayment (or in other words that the payer may be mistaken), and can make a simple enquiry of the payer to check whether this is so but chooses not to do so, I do not see anything wrong

in the conclusion that the defence is not open to him. He knows that there is a risk that he may not be entitled to the money, but is willing to take that risk. If it turns out that the payment was indeed an overpayment, it would be inequitable or unconscionable for such a person to deny restitution by relying on a change of position defence.”

58. What does this survey of the authorities tell us? First, mere negligence is not enough to deprive a defendant of the defence; something more is needed. That emerges clearly from what Lord Bingham and Lord Goff said in *Dextra*. That is no more than one would expect from the contrast drawn by Lord Goff (and to some extent Lord Templeman) in *Lipkin Gorman* between good faith and bad faith. “Good faith” is one of those concepts that can have a slightly different meaning in different contexts, but in English law the question whether a person has acted in good faith usually depends on what they actually knew or suspected, not what they should reasonably have known or suspected. A person may act carelessly or incompetently, but nevertheless in good faith. This is perhaps especially the case if good faith is explicitly contrasted with acting in bad faith, which generally denotes some conscious impropriety.
59. Second, the cases illustrate that the focus is on what the defendant knew or appreciated or understood. In *Niru Battery* Moore-Bick J discusses this at [135] where he says “much is likely to depend on the circumstances in which he [ie the payee] did so [ie parted with the money] and the extent of his knowledge about how the payment came to be made”. If he knows that the payment is made by mistake, he must return it; if he has grounds for believing that it may have been made by mistake but cannot be sure, he may need to make inquiries; and (at [138]) if he has good reason to think the payment was made under a mistake but fails to make inquiry, that defeats the defence as he acts in the knowledge that he may be infringing the rights of another. In *Webber* the DPO found that Mr Webber was aware that there was a possibility that he was being overpaid; that was sufficient to defeat the defence because the defence is not open to a person who appreciates that the payment he is receiving may be an overpayment, and can make a simple enquiry of the payer to check whether this is so, but chooses not to do so.
60. Third, although I acknowledge that Sedley LJ (certainly) and Clarke LJ (to some extent) in *Niru Battery* in this Court preferred a test of “inequitability” to a simple good faith/bad faith dichotomy, there is nothing to suggest that either intended thereby to shift attention from what the defendant actually knew or understood to what a reasonable person might have discovered. On the contrary Clarke LJ expressly agreed with Moore-Bick J’s analysis; the judgments are replete with references to what the defendant knows; and on the facts both regarded it as a clear case where Mr Francis “realised that Bank Sepah had paid by mistake” (per Clarke LJ) or “had in his hands ample information to put CAI on guard” (per Sedley LJ).
61. Those being the principles, how do they apply in the present case? That depends on the careful findings of the Judge, which are not open to challenge on this appeal. There are a number of findings throughout the Judgment as to Trafigura’s understanding of the payments as follows:

“43. ...I accept their [ie Mr Gokhale’s and Mr Gupta’s] evidence that, rightly or wrongly, after Payment 1 and TPA 1, they did not realise that Rasmala was making its payments in respect of a specific contract to be

performed in the future.”

“47. ...Mr Gupta explained that by this stage [Payment 3] he believed that Trafigura and Farlin had a process in place whereby he would check with the treasury team that the funds had “hit” Trafigura’s account, and he would then proceed to allocate the payment to outstanding invoices, which would be confirmed in a TPA provided by Farlin and Rasmala.”

“84. Trafigura understood that it was dealing with Farlin as principal in relation to contracts for the supply of coal. By the TPAs Farlin agreed with Trafigura that Rasmala was Farlin’s payment agent and authorised Trafigura to use the sums received from each Payment in the manner specified in the TPAs.”

“85. ...Trafigura believed Rasmala was providing finance to Farlin and had agreed to the application of the Payments on a FIFO basis pursuant to the TPAs.”

“101 ...It [the money paid by Rasmala] was paid with the intention, and received with the understanding, that it was to be used to meet Farlin’s obligations to Trafigura and that it would become Trafigura’s money.”

62. Then, when specifically dealing with the question of good faith, the Judge made the following findings:

“110. Trafigura’s insistence on TPAs was good commercial practice. No one at Trafigura knew the terms of the Murabaha financing, and this was as Rasmala intended, having authorised Farlin to act as its undisclosed [agent]. As far as Trafigura was aware, Rasmala was simply providing finance to Farlin. I accept the evidence of Trafigura’s witnesses that they would not normally deal directly with a customer’s financiers and that they thought they were dealing with Rasmala through Farlin. The TPAs appeared on their face to resolve any doubt as to how Trafigura could use the Payments. The fact that Rasmala made further payments after Payment 1 simply reinforced the belief that all was in order.

111. Rasmala says that Trafigura was on inquiry as to whether Rasmala had consented to the TPAs. This is because Trafigura understood that Rasmala had made Payment 1 in respect of future deliveries and the email sent initially by Farlin when presented with TPA 1 was that Rasmala would “never” sign a TPA permitting the application of Payment 1 to historic debts (see [35], [36] and [75(iii)] above). Rasmala also relies on the fact that there were other anomalies. Trafigura’s Treasury team were clearly unable to match the Payments to existing invoices and asked to which debts they should be allocated. Further Trafigura’s standard practice of copying in the third party in communications and its standard practice as to which bank account payments were made to were not followed ([36] and [57] above). In failing to make enquiries of Rasmala directly, Rasmala says that Trafigura’s approach was casual and insouciant and not as a reasonable person would have acted.

112. I reject that submission. These matters fall a long way short of establishing that anyone at Trafigura had knowledge of facts which gave them, or should have given a reasonable person, reason to believe that the TPAs had not been signed by Rasmala or that the Payments were repayable. The “never” email, which is the high point of why Rasmala says Trafigura was or should have been on inquiry, is (as discussed above at [75(iii)]) an unremarkable example of the to-and-fro of commercial negotiation and it did not have the immutable status to which Rasmala sought to elevate it. The fact that Farlin relented and later said it had managed to persuade Rasmala to enter TPA1 was not a red flag.

113. I am satisfied that Trafigura’s acceptance of the Payments and continued trading with Farlin in consequence was without knowledge or suspicion of anyone at Trafigura that the TPAs were invalid or the Payments were repayable and was in good faith for the purposes of a change of position defence.”

63. It can be seen that the Judge concluded that Trafigura did not know about the Murabaha financing; understood that it was dealing with Farlin as principal and that Rasmala was simply providing finance to Farlin; received the money with the understanding that it was to be used to meet Farlin’s obligations and that it would become Trafigura’s money; did not have knowledge of facts which gave anyone at Trafigura – or should have given a reasonable person – reason to believe that the TPAs were invalid or the payments repayable; and did not know or suspect this.
64. On the face of it these findings are a complete answer to the suggestion that Trafigura did not act in good faith for the purposes of the change of position defence. As explained above, for this purpose Trafigura’s conduct is to be measured by what it knew or understood or suspected. Unlike Mr Francis of CAI in *Niru Battery*, Trafigura on the Judge’s findings did not realise that Rasmala had paid the money on a false basis; unlike Mr Webber in *Webber*, Trafigura did not appreciate that the payments might have been made by mistake. Indeed the Judge goes further and finds that Trafigura not only did not in fact suspect this, but did not have knowledge of facts that would have given a reasonable person reason to believe this.
65. What then is the argument that Trafigura nonetheless cannot avail itself of the defence? Mr Adkin concentrated on the statement by Moore-Bick J in *Niru Battery* at [135] that the concept of good faith “is capable of embracing a failure to act in a commercially acceptable way”. His submission was that Trafigura failed to act in a commercially acceptable way because it was a party which received unheralded into its account monies from an unknown third party which it was told by someone else was to be used for their benefit, but who failed to contact the payer directly to make sure of this. Where a party receives a very substantial sum into its bank account from someone it has never heard of and has never had any dealings with before, and one of its debtors says “That’s for me”, the recipient, Mr Adkin submitted, can be expected to check with the payer that the money is indeed for the debtor and not just rely on the say-so of the debtor itself, especially in circumstances where it would be very easy to check with the payer.
66. I do not accept this submission. In the first place it assumes that when Moore-Bick J said in *Niru Battery* that the concept of good faith (or rather lack of it) is “capable of

embracing a failure to act in a commercially acceptable way and sharp practice of a kind that falls short of outright dishonesty as well as dishonesty itself”, he meant that it could embrace two different types of conduct, namely (i) sharp practice and (ii) failing to act in a commercially acceptable way (whether or not sharp practice). I am not at all sure that that is what he meant. There is of course a danger in any event in construing words in a judgment as if they were a statute. And it is trite law that any judgment must be read in the context of the issues in the particular case. The issue in that case was whether, as Mr Bloch had submitted for CAI, a defendant only lost a change of position defence if he had acted dishonestly. What Moore-Bick J was saying at [135] was that something short of dishonesty would do. He did not need to define precisely what that would be, because on the facts it was very easy to conclude that Mr Francis had acted in a wholly improper way, paying away money on Milestone’s instructions when he actually realised that Bank Sepah must have paid on a false basis (see at [120]), and when he had no real basis for thinking that Milestone was entitled to receive or retain the funds remitted by Bank Sepah (see at [138]). On any view that was both commercially unacceptable and sharp practice, and although short of dishonesty, not by very much – indeed it is clear from Sedley LJ’s judgment in this Court at [175] that he himself found it difficult to understand why what Mr Francis did was not dishonest and thought he was fortunate not to be so found. In these circumstances I am not sure that Moore-Bick J intended to suggest that a defendant could lose a change of position defence either when guilty of sharp practice or when acting in some less improper but still commercially unacceptable way; I think it quite possible that he was using the phrase “failure to act in a commercially acceptable way and sharp practice” as a compendious way of describing a single type of conduct that fell short of dishonesty but not by much. If that is right, then there seems to me no basis at all for regarding Trafigura as having been guilty of sharp practice – a concept easier to recognise than define – nor did Mr Adkin suggest that there was.

67. But I will assume that this is wrong, and that failing to act in a commercially acceptable way is enough to deprive the defendant of the defence. How then does one tell what is commercially acceptable? Mr Adkin when asked said that one has to use one’s commercial common sense. But I prefer the submission of Mr Kitchener, which is that this depends on all the circumstances and can therefore often be informed by the evidence.
68. I should refer at this point to some more of the Judge’s factual findings. He dealt with the initial receipt of Payment 1 by Trafigura as follows:

“26. On 21 August 2017, Rasmala made a payment of USD \$6,840,000 to Trafigura’s account with Deutsche Bank (“Payment 1”).

27. Rasmala sent Farlin a letter dated 21 August 2017 to be provided to Trafigura (“the remittance confirmation letter”) in relation to Payment 1 confirming that it had made Payment 1 on behalf of Farlin and that it represented “the 80% advance payment with respect to sales contract no. 1475551”.

28. For Trafigura, Payment 1 was unheralded. Mr Gokhale’s evidence was that after receipt of Payment 1, a phone call took place between Mr Jasani and a Mr Samdani at Farlin. Mr Gokhale says that Mr Jasani told him that he had learnt that Rasmala had made a payment to Trafigura on

behalf of Farlin and that Rasmala was some kind of financier.

29. On 21 August 2017, Mr Pinto of Farlin emailed Mr Gokhale (as well as Mr Jasani) to send Rasmala's KYC documents as well as the remittance confirmation letter and payment SWIFT message. However, the remittance confirmation letter from Rasmala was manipulated by Farlin to remove the reference to the payment representing the 80% advance payment for the 551 Contract. This version of the letter therefore did not suggest that Payment 1 was made for any particular contract or purpose."

69. In other words when Trafigura received the payment it was indeed "unheralded". But Trafigura did not simply keep the money and decide for itself what to do with it. It made inquiries of Farlin, from which it understood that Rasmala was some kind of financier. It received a letter signed by Rasmala confirming that it had made the payment on behalf of Farlin. (This letter was not only on Rasmala's headed notepaper but had been actually signed by Rasmala; it is true that the version sent by Farlin had been doctored by Farlin, but it is not suggested that Trafigura knew or suspected that, or had any reason to do so.) And it then followed that up with seeking, and (as far as it knew) obtaining, a TPA signed by Rasmala: see the facts as set out in paragraphs 11 and 12 above. On its face this TPA, executed as a deed, provides for the appointment by Farlin of Rasmala as its payment agent to settle payment in respect of certain historic shipments of coal (including demurrage), and for the acceptance by Rasmala of that appointment. The Judge unsurprisingly found (at [110]) that the TPAs appeared on their face to resolve any doubt as to how Trafigura could use the payments; and that the fact that Rasmala made further payments after Payment 1 simply reinforced the belief that all was in order. He went on to find that no-one at Trafigura knew facts which gave them reason to believe that the TPAs had not been signed by Rasmala, and that Trafigura did not know or suspect that they were invalid (at [112]-[113]). So, as Mr Kitchener pointed out, this is not a case of Trafigura receiving an unexplained sum of money and helping itself to it without making inquiries about it. Nor is it a case where it simply took Farlin's word that the money was for Farlin. It had a letter signed by Rasmala saying in terms that the payment was made on behalf of Farlin. It had secured – or at any rate thought it had secured – a deed confirming the position, apparently executed by both Farlin and Rasmala. It had no reason to doubt that that was genuine. To pick up what Sedley LJ said in *Niru Battery* by reference to *State Bank of NSW* (see paragraph 56 above) Trafigura may not have acted on real facts, but it did act on "reasonably supposed facts" justifying its use of the money.
70. Mr Adkin said that that was not enough and that it should have communicated with Rasmala directly. But what the duty of good faith, or the dictates of commercial acceptability, require must depend on the circumstances of the individual case, and here the Judge heard some very relevant evidence. This showed three things. First, that Rasmala itself had been responsible for the fact that all communications with Trafigura went through Farlin; second, that Trafigura would not normally expect to deal directly with a customer's financier; and third, that Trafigura went further than was normal in the market to ascertain what the payment was for.
71. As to the first, Mr Douglas Bitcon of Rasmala confirmed, under cross-examination by Mr Kitchener, that the terms of a contract between a financier and its commercial customer are generally something that is private between them; that Farlin acted as

undisclosed agent and Rasmala as undisclosed principal; that although Farlin would have to (as he put it) “disclose Rasmala within the transaction” so that Trafigura would know that Rasmala was the financier, it was prohibited by the Agency Agreement between it and Rasmala from disclosing Rasmala’s role as principal because Rasmala wanted to protect itself from liability on the contracts; and that Rasmala put in place the structure where it was Farlin that communicated with Trafigura. This is shown by the following exchange:

“Q. And you understood, I think you have said that you understood, that Farlin was going to have to say something about Rasmala to Trafigura. In making those communications, Farlin was making communications as your agent, wasn’t it; the person you trusted to conduct those communications?

A. That is correct.

Q. And Rasmala chose, didn’t it, to put in place a structure where only Farlin, its agent, would communicate with the supplier?

A. Yes, that’s correct.

Q. And you did that because that was important to protecting your perceived legal interests? That’s right; yes?

A. It was there to protect ourselves from possible liability.”

72. As to the second, the Judge accepted the evidence from Trafigura’s witnesses that they would not normally deal directly with a customer’s financiers and that they thought they were dealing with Rasmala through Farlin (at [110]): see paragraph 62 above.

73. As to the third, Mr Bitcon accepted this in terms as follows:

“Q. And asking for third party agreements wasn’t standard practice at the time, was it?

A. No, we didn’t receive any other tripartite agreements, requests from anyone, at that point.

Q. Yes. So Trafigura might say, mightn’t it, that it went further than was normal in the market to try and make sure that it was aware of the true nature and scope of its right to utilise the payment; would that be fair, given your knowledge of how the market operated at the time?

A. Yes, I would say that that is accurate.”

74. In the light of this evidence, I reject the submission that the inquiries Trafigura made were inadequate, or that it acted in a commercially inappropriate way, or indeed that it came anywhere close to acting other than in good faith. Those inquiries, as I have said, led to it securing a deed apparently executed by Rasmala itself confirming the use of the monies. This was something that went beyond market practice, and Trafigura had no reason to suspect that there was anything wrong with the TPA, or any doubt over

the payment or its entitlement to keep the monies. That seems to me to put Trafigura's conduct firmly on the right side of the line of good faith, and the Judge's conclusion at [113] that Trafigura's acceptance of the payments and continued trading with Farlin in consequence was in good faith for the purposes of a change of position defence seems to me entirely justified and completely unassailable.

75. I would therefore dismiss this ground of appeal.

Ground 2 (causation)

76. There is no dispute that the defence of change of position requires a causal connection between the relevant payment and the facts relied on as constituting the change of position. The Judge dealt with this in the Judgment at [94] to [102], concluding at [99] that there was a sufficient causal connection between the enrichment and the change of position, and at [102] that the same was true of Payment 5 despite the absence of a TPA: see paragraphs 28 and 29 above.
77. Mr Adkin's case was that the Judge had wrongly assumed that all that was required to be shown was that but for the payments having been made the change of position would not have happened. He submitted that the "but for" approach was inapposite in a case like this: what caused Trafigura to carry on trading with Farlin, and hence change its position, was not the fact of the payments, but Trafigura's belief, brought about by the TPAs (or, in the case of Payment 5, the assumption that a TPA would be forthcoming) that the monies could be and had been properly paid down against Farlin's accrued debt.
78. Mr Kitchener said that in a case like this, the Judge was right to apply the "but for" test.
79. I consider the authorities in detail below, but I will say straightaway that I do not think either submission is quite right. I think the position is as follows. There are some cases where the defendant relies on a change of position which is not brought about by his own voluntary action, the paradigm example being where the property transferred to him is stolen before the claimant asks for it back. There has been some debate over whether the defence is available in such cases (although, as appears below, the trend of authority is that the defence *is* available in these circumstances), but we are not concerned with this question, and it can be put to one side. In the present case, as in most cases, we are concerned with a case where the change of position relied on consists of the voluntary actions of the defendant himself. In such a case I agree with Mr Adkin that a "but for" test is too simplistic because it is not difficult to find cases where a "but for" test would be satisfied but the defence is nevertheless not available: see the discussion below of *Rose v AIB Group (UK) plc* [2003] EWHC 1737 (Ch), [2003] 1 WLR 2791 ("**Rose**"), and *Haugesund Kommune v Depfa ACS Bank* [2010] EWCA Civ 579, [2012] QB 549 ("**Haugesund**").
80. But I do not accept Mr Adkin's submission that what is needed is the identification of *the* cause, so that one has to choose between the cause being the payments and the cause being the TPAs. What is required in a case like the present is I think best summarised by saying that the payee must act "on the faith of" the payment, which I understand to mean in the (bona fide) belief that the payment is valid and that he can deal with the money as his own. Such a test (which is in fact very much in line with some submissions of Mr Adkin's) is in my view both (as will appear) justified by the

authorities, and right as a matter of principle, and seems to me sufficient. I should make it clear that I do not mean to decide whether it is not only sufficient but always necessary; nor am I purporting to endorse it as a test for all cases, as restitution for unjust enrichment is in principle available in a wide variety of different situations and it is dangerous to seek to promulgate anything in the way of a universal test. I only mean that this is enough to satisfy the requirement for a causal connection in a case like the present where the payee, Trafigura, received money “with the understanding that it was to be used to meet Farlin’s obligations to Trafigura and that it would become Trafigura’s money” (Judgment at [101], set out at paragraph 61 above). In short, in a case such as this and involving a voluntary change of position, bona fide action on the faith of the validity of the payment is a sufficient relevant connection, whatever the precise limits of the causal requirement in other cases.

81. But on that test, one does not need to choose, as Mr Adkin would have us choose, between the cause of Trafigura’s change of position being the payments and the cause being the TPAs (or assumption that there would be a TPA). Mr Adkin showed us evidence from Trafigura’s witnesses to the effect that Trafigura would have returned the money if a TPA had not been forthcoming, and I accept that this is so, so that Trafigura would not have acted as it did without the TPAs (or in the case of Payment 5, the assumption that a TPA would be forthcoming). But this does not affect the fact that Trafigura acted as it did because it understood that the payments were valid payments made by Rasmala on behalf of Farlin, and that the money became Trafigura’s to do what it liked with. Indeed, as the discussion of good faith above shows, the very process of seeking and obtaining the TPAs reinforced and justified Trafigura’s bona fide belief that it could not only treat the payments as valid but use them to discharge Farlin’s debts on a FIFO basis. Seen in this light, Trafigura’s reliance on the TPAs, far from destroying its case that it acted as it did on the faith of the payments, simply confirms that that is precisely what it did. As Mr Kitchener put it, making the inquiries that Trafigura did cannot possibly be regarded as breaking the chain of causation, those inquiries being for the very purpose of satisfying itself that the payments could be relied on. When it received what appeared to be valid confirmations signed by Rasmala in the shape of the TPAs, that does not mean that it was not relying on the validity of the payments. It explains why it believed it was justified in doing so.
82. That is sufficient to explain why I would dismiss this ground of appeal, but I should deal with the authorities.
83. I can start, again, with *Lipkin Gorman*. Lord Templeman refers at 560B to the case where a thief gives stolen money to a friend and the donee innocently spends the stolen money “in reliance on the validity of the gift” (see paragraph 51 above); and gives two examples (the donee buying a car he would not otherwise have bought, or taking a trip round the world) of which he says in each case (at 560C and again at 560D):

“it seems to me that the donee has altered his position on the faith of the gift”.

Lord Goff, when discussing the historical position, refers (at 578G-H) to two groups of cases that could arguably be said to rest on change of position, the first of which he describes as follows:

“where an agent can defeat a claim to restitution on the ground that,

before learning of the plaintiff's claim, he has paid the money over to his principal or otherwise altered his position in relation to his principal on the faith of the payment."

So although I accept that neither Lord Templeman nor Lord Goff said anything about what sort of causal connection was required, it can be seen that they referred quite naturally to cases of a recipient altering his position "in reliance on the validity of" or more simply "on the faith of" the gift or payment as the case may be.

84. The need for a causal connection was considered by this Court in *Scottish Equitable plc v Derby* [2001] EWCA Civ 369, [2001] 3 All ER 818 ("**Scottish Equitable**"). This was another case where a person was overpaid his pension and the payer sought repayment on the grounds that he had been overpaid by mistake. Mr Derby had a policy with Scottish Equitable. He took certain early retirement benefits from the policy in 1990 when he was aged 59, and in 1995 asked Scottish Equitable what his remaining rights under the policy were worth. Scottish Equitable by mistake failed to take account of the benefits already paid and quoted a figure of just over £200,000. In fact the true figure was just under £30,000. Mr Derby received about £50,000 in cash, of which he spent about £41,000 on paying off about two-thirds of his mortgage, and the balance (£9,662) on modest improvements in his lifestyle, which the judge found were not irreversible. The rest of the money (about £150,000) was paid to Norwich Union to fund a pension for Mr Derby and his wife. Scottish Equitable sought restitution of the overpayment of about £170,000. At trial they conceded that they would not seek to recover the £9,662. Subject to that concession, the trial judge rejected Mr Derby's defence of change of position, and that was upheld by this Court for the reasons given by Robert Walker LJ (with whom Keene LJ and Simon Brown LJ agreed, the latter adding a short judgment of his own).
85. For present purposes what is of interest is what Robert Walker LJ says of the requirement for a causal connection between the enrichment and the change of position. This is found at [30]-[32] as follows:

"30. The judge noted the view, put forward by Andrew Burrows (*The Law of Restitution* (1993) pp 425–428) that there is a narrow and a wide version of the defence of change of position, and that the wide view is to be preferred. The narrow view treats the defence as 'the same as estoppel minus the representation' (so that detrimental reliance is still a necessary ingredient). The wide view looks to a change of position, causally linked to the mistaken receipt, which makes it inequitable for the recipient to be required to make restitution. In many cases either test produces the same result, but the wide view extends protection to (for instance) an innocent recipient of a payment which is later stolen from him (see *Goff and Jones* p 822, also favouring the wide view).

31. In this court Mr Stephen Moriarty QC (appearing with Mr Richard Handyside for Scottish Equitable) did not argue against the correctness of the wide view, provided that the need for a sufficient causal link is clearly recognised. The fact that the recipient may have suffered some misfortune (such as a breakdown in his health, or the loss of his job) is not a defence unless the misfortune is causally linked (at least on a 'but for' test) with the mistaken receipt. In my view Mr Moriarty was right

to make that concession. Taking a wide view of the scope of the defence facilitates ‘a more generous approach ... to the recognition of the right to restitution’ (Lord Goff in the *Lipkin Gorman* case [1992] 4 All ER 512 at 534, [1991] 2 AC 548 at 581; and compare Lord Goff’s observations in *Kleinwort Benson Ltd v Lincoln City Council* [1998] 4 All ER 513 at 541, [1999] 2 AC 349 at 385).

32 ... I think it may be useful to note that when a person receives a mistaken overpayment there are, even on the narrow view as to the scope of the defence, a variety of conscious decisions which may be made by the recipient in reliance on the overpayment. Some are simply decisions about expenditure of the receipt: the payee may decide to spend it on an asset which maintains its value, or on luxury goods with little second-hand value, or on a world cruise. He may use it to pay off debts. He may give it away. Or he may make some decision which involves no immediate expenditure, but is nevertheless causally linked to the receipt. Voluntarily giving up his job, at an age when it would not be easy to get new employment, is the most obvious example. Entering into a long-term financial commitment (such as taking a flat at a high rent on a ten-year lease which would not be easy to dispose of) would be another example. The wide view adds further possibilities which do not depend on deliberate choices by the recipient.”

86. But on the facts, beyond the £9,662 which Scottish Equitable conceded, there was nothing which could count as a change of position. Norwich Union was willing to unwind the pension to what it would have been had the correct sum been paid; paying off the mortgage was not a detriment; and the fact that the demand for repayment must have come as a bitter disappointment to Mr Derby did not permit the Court to proceed other than on principle. As Simon Brown LJ put it at [54]:

“In my judgment there is no legal principle properly entitling the court to disallow recovery here by Scottish Equitable to the extent ordered below. That leaves Mr Derby with the benefit of an enhanced standard of living for the 16 months it took to notify him of the mistake—since to that extent he had changed his position by increased spending—but deprives him of any further benefit from the overpayment—since on the judge’s findings, once he learned of the mistake, he would be no worse off having paid the amount ordered to be repaid than if the mistake had never been made.”

This is incidentally helpful on the question of whether Trafigura suffered a sufficient detriment and I will come back to it in that connection.

87. Mr Kitchener submitted that this case was authority for the “but for” test. But I do not think this is so. At [30] Robert Walker LJ explains the difference between the narrow view and the wide view, the latter for example enabling the change of position defence to be extended to the case of theft. At [31] he records that Mr Moriarty did not argue against the wide view provided that the need for a sufficient causal link was recognised; the “but for” test at least must be satisfied. Robert Walker LJ then says that Mr Moriarty was right to make “that concession”. Two comments may be made. First “that concession” must be the concession that the wide test should be adopted not the narrow

test. That does not necessarily amount to an endorsement of what Mr Moriarty said about the “but for” test. Second Mr Moriarty in any event was not concerned to argue whether the test should be “but for” or something else. His point was that there had to be *some* causal connection. That is why he said that it had to *at least* satisfy the “but for” test. He did not need to go any further and identify whether the “but for” test would always be enough, as his argument on the facts was that the matters relied on by Mr Derby – summarised by Robert Walker LJ at [34] as “beset as he now is by financial problems, matrimonial problems and health problems” – had no causal connection at all to the overpayment. That was accepted by the Court and that was enough for Mr Moriarty’s purposes.

88. What can be said is that Robert Walker LJ, when discussing the sort of conscious (or voluntary) decisions that may count (at [32]), uses the phrase “in reliance on the overpayment”. That I think encapsulates the same point as Lords Templeman and Goff in *Lipkin Gorman*: the essential question is whether the recipient has acted on the faith of, or in reliance on, the payment, in the sense of believing it to be a valid payment, and one which entitles him to deal with the money as his own.
89. That would appear to be confirmed by *Dextra*. There the Bank of Jamaica relied for its change of position defence on the fact that it had paid out Jamaican dollars for what it thought was the purchase of the US dollars from Dextra. But it had done so before it received Dextra’s cheque, and one of the points argued was whether this made any difference. Lords Bingham and Goff discussed this under the heading “*Anticipatory reliance*” at [35]-[39], concluding that it did not. In the course of their consideration they said this (at [38]):

“Here what is in issue is the justice or injustice of enforcing a restitutionary claim in respect of a benefit conferred. In that context, it is difficult to see what relevant distinction can be drawn between (1) a case in which the defendant expends on some extraordinary expenditure all or part of a sum of money which he has received from the plaintiff, and (2) one in which the defendant incurs such expenditure in the expectation that he will receive the sum of money from the plaintiff, which he does in fact receive. Since *ex hypothesi* the defendant will in fact have received the expected payment, there is no question of the defendant using the defence of change of position to enforce, directly or indirectly, a claim to that money. It is surely no abuse of language to say, in the second case as in the first, that the defendant has incurred the expenditure in reliance on the plaintiff’s payment or, as is sometimes said, on the faith of the payment. It is true that, in the second case, the defendant relied on the payment being made to him in the future (as well as relying on such payment, when made, being a valid payment); but, provided that his change of position was in good faith, it should provide, *pro tanto* at least, a good defence because it would be inequitable to require the defendant to make restitution, or to make restitution in full.”

It can be seen that here too we find the relevant concept being expressed as the incurring of expenditure “in reliance on” the payment or “on the faith of the payment”, as well as reference to the defendant relying on such payment being a valid payment.

90. The next case is *Rose*. The defendant bank, AIB, was banker to a company called Tain.

A winding up petition was presented against Tain in February 1997 but AIB did not learn of it until September 1997 and in the meantime operated Tain's accounts as normal. In February there had been some £50,000 owing from Tain to AIB on its accounts, secured by a personal guarantee from a director and a charge on his house, but by September this had all been paid off. In 1999 the director asked AIB to release the charge, which it did. Tain's liquidator sought repayment of the amounts credited to the account since February (on the grounds they were void under s. 127 of the Insolvency Act 1986). AIB relied on its change of position in releasing the charge. Mr Nicholas Warren QC, sitting as a Deputy High Court Judge, held that the defence was not available.

91. There was no doubt that AIB had only released the charge because it had received the payments from Tain which eliminated (or appeared to eliminate) Tain's indebtedness. So if the "but for" test were the correct test, AIB's change of position would have been caused by the payments. But this was not the analysis adopted by Mr Warren. At [43] he said that it was clear that a payee cannot rely on a change of position defence if he knows, when he changes his position, that the payment to him was invalid, adding:

"It might be said that this is because he is not acting in "good faith" or not acting on "the faith of the receipt"."

At [47] he said that there was nothing to suggest that AIB acted other than in good faith, whatever view one might take of the care with which it acted. At [49] he said that because AIB's alleged change of position took place as a result of its own act in releasing the charge, it therefore "still needs to show that it changed its position "on the faith of the validity of the receipt". Then at [55] he gave his conclusions as follows:

"55. ...I do not think that the Bank can be said to be relying on the validity of the credits to the overdrawn accounts when they were made. Rather, it has to recognise that it knew that the Liquidator had a good restitutionary claim, alternatively that it knew at least of a significant risk that he had such a claim; and has to accept that it took the view that, as a result of the matters relied on by Mr Cherryman, that claim was not going to be asserted rather than that it never was a good claim. In my judgment, the change of position in releasing the charge was not made in reliance upon the initial validity of the credits to the overdrawn accounts, but was made in reliance on an assumption that no claim would be made to assert that initial invalidity. Without reliance on the initial validity, there is no change of position defence to the restitutionary claim.

56. ...in the present case, the Bank, which must be taken to have known of the initial invalidity of the credits to the overdrawn accounts, or at least of a significant risk that that was so, cannot be heard to say that it relied on the validity of the credits: it knew the credits were open to challenge but formed the view that they would not in fact be challenged, the only justification the Bank could have had for assuming that nothing was owing to it."

As can be seen this analysis is entirely in line with the other cases in referring to a change of position made on the faith of the validity of the receipt. Since AIB knew by

the time it released the charge that the receipts were invalid, or were at least open to challenge, it could not rely on the defence.

92. Mr Warren had an alternative analysis based on AIB taking a risk that no claim would be made, which I will come back to under Ground 3 (risk allocation).
93. The next case is *Commerzbank AG v Price-Jones* [2003] EWCA Civ 1663 (“*Commerzbank*”). Mr Price-Jones was a highly-paid investment banker employed by Commerzbank (the Bank). His contract entitled him to a minimum bonus of £250,000 for the 2000 performance year, paid no later than 31 December 2000. A subsequent letter said that he would receive a minimum bonus of £265,000 for the 2000 performance year, paid no later than 31 March 2001. Mr Price-Jones read this as entitling him to a further £265,000 making £515,000 in all for 2000. The judge (Mr David Phillips QC sitting as a Deputy High Court Judge) agreed with him. But this Court disagreed: on its true construction (as the Bank had intended) the £265,000 bonus replaced the £250,000. Nevertheless the Bank in fact paid him both by mistake. When it realised its mistake it asked for the £250,000 overpayment back. Mr Price-Jones relied on a change of position defence, namely that in June 2000, thinking that he would receive both bonuses, he decided to stay with the Bank rather than seek employment elsewhere.
94. This defence failed in this Court. Mummery LJ (with whom Sedley LJ agreed) said (at [40]) that it was not inequitable to require Mr Price-Jones to make restitution of the overpayment. There had been no “disenrichment” (an ungainly word that does not appear to be in the OED, but no doubt a convenient one whose sense is clear): he had still got the money. The fact that he would have obtained employment elsewhere was not sufficiently significant, precise or substantial to be treated as a change of position making restitution inequitable. Then at [41]-[44] he considered causation. At [43] he said this:
- “There was discussion during oral argument about the approach to causation in cases of change of position. In my judgment, it is neither necessary nor desirable to carry across to the issue whether it is inequitable to require restitution and to impose on it all the mass of learning on causation questions generated by the cases on the recoverability of damages for tort. Change of position is based on a principle of justice. It is a broad defence to a claim for restitution, which is itself based on a broad principle of unjust enrichment. In deciding whether the particular circumstances render it inequitable to require the recipient of an overpayment to make full restitution, the need for a sufficient causal link should not be narrowly applied. The important point is that there should be a relevant connection between the change of position and the actual or anticipated payment. As was said by Jonathan Parker J in the *Philip Collins* case [*Philip Collins Ltd v Davis* [2000] 3 All ER 808] at p. 827 the change of position must in some way be “referable to” the actual or anticipated payment of money by which the recipient is enriched.”
95. On the facts, he held that there was no relevant connection between Mr Price-Jones’s decision to stay in the Bank’s employment and what the Bank actually promised to pay him. His decision was based on his own erroneous belief that he would receive two

bonus payments, something for which the Bank was not responsible.

96. Munby J gave a concurring judgment. He referred (at [49]-[53]) to the fact that in both *Lipkin Gorman* and *Dextra* change of position was based on a broad and untechnical approach, the focus being on whether it would be an injustice or inequitable to require the overpaid recipient to make restitution. At [54] he said that he agreed with this Court's acceptance in *Scottish Equitable* of the wide approach rather than the narrow one. Then at [58]-[59] he considered the question of causation. He accepted that some causal link had to be shown, but said that he would be very concerned to see the question translated into a "legal analysis of the principles of causation that already bedevils too many areas of the common law or into a theoretical debate as to what particular test of cause and effect is appropriate or what causal link has to be established"; he too preferred the approach of Jonathan Parker J in the *Philip Collins* case that "the change of position ... must, on the evidence, be referable in some way to the payment of [the] money." There should be a relevant connection between the change of position and the actual or anticipated payment.
97. On the facts, he too held that Mr Price-Jones's decision to stay, long before any actual overpayment by the Bank, was not in any way caused or contributed to by anything done or not done by the Bank, but was based entirely on his own erroneous understanding of what the Bank's letter meant (at [77], [83]).
98. These judgments are useful reminders both of the dangers of overanalysis, and of the fact that in the end the question is whether the defendant's change of position is sufficiently causally connected with, or referable to, the payment so as to make it inequitable to require him to make restitution. If, as in *Commerzbank* itself, there is no causal connection at all, that is enough to deny the defence. But it does not answer the question that arises in cases like the present as to what qualifies as a sufficient connection. For the reasons I have tried to give, in such a case I think a sufficient connection is found if the recipient acts, as Trafigura did, on the faith of the payment in the sense that I have explained.
99. The next case is *Haugesund*. Two Norwegian local authorities (the *kommunes*) entered into swaps contracts with a bank (Depfa) under which Depfa advanced them capital sums on terms that they would in due course be repaid. The *kommunes* invested the monies received in various financial instruments which proved disastrous. Tomlinson J held the swaps contracts to be void on the ground that they were loans which the *kommunes* had no capacity to enter into, but that Depfa had a restitutionary claim to recover the money, rejecting the *kommunes*' argument that they had a change of position defence. That was upheld on appeal.
100. The leading judgment was given by Aikens LJ (with whom Pill LJ agreed; Etherton LJ gave a judgment in which he also agreed on this issue). The *kommunes* relied on the fact that they had taken out the investments which they would not have done but for the receipt of the sums from Depfa. Aikens LJ accepted that that was so, but nevertheless held that that was not sufficient. At [123] he said that the cases drew a clear distinction between two types of case, as follows:

"The first is where the defendant obtains (or, as in the *Dextra Bank* case, is about to obtain) money in circumstances where he understands, in good faith, that it is his to keep and do what he likes with. Then that

defendant spends the money, in good faith, on the basis of that understanding. The second type of case is where a defendant obtains money and, at the time of receipt, he understands that he will have to repay that sum at some stage in the future, which point has usually been identified between the payer and the payee, usually in a contract or what was, at the time, thought to be a valid contract.”

At [124] he said that the present case was an example of the second type: the kommunes understood that they would have to repay the money and at no stage did they think they had received a gift that would never have to be repaid. He continued:

“125. I would accept that the kommunes would not have made the investments via Terra that they did, “but for” the receipt of the sums from Depfa. I also accept that the kommunes acted in good faith in making the investments and that any question of negligence or other criticism of those investments is irrelevant to this defence. But the kommunes made those investments without any involvement by Depfa and the kommunes made them on the understanding, at that stage in the history, that they had to repay the principal and interest to Depfa whatever happened to the investments. As Professor Virgo puts it in his book *The Principles of the Law of Restitution*, 2nd ed (2006), p 707, it is a question of “risk allocation”. The kommunes took the risk in this case. There is no basis on which the defence of change of position can succeed.

126. So, it seems to me that the question here is: where lies the justice of the case; in favour of the party that received the money and took the risk (in good faith) that the investments might go down rather than up; or in favour of the party that paid over the money and had nothing to do with it thereafter, but thinking it was to be repaid in due course. Like Tomlinson J, I think that the answer to this question is obvious. The scales fall heavily in favour of Depfa recovering the full amount that it paid over to the kommunes.”

101. This therefore is another case where a simple “but for” causation test would be satisfied but the defence was nevertheless not available. The justice of the result seems undeniable, because the kommunes could never have thrown the consequences of their disastrous investments onto Depfa if the swaps contracts had been valid, and it seems obvious that they should not be in a better position when they acted in the belief that they were valid.
102. What is notable however is that at [123] Aikens LJ describes the first type of case as one where the defendant spends money “on the basis of” his understanding, in good faith, that the money he has received “is his to keep and do what he likes with.” That is our case, and is entirely in line with what I have suggested is a sufficient causal connection.
103. The final case we were referred to on causation is *Delta Petroleum (Caribbean) Ltd v British Virgin Islands Electricity Corpn* [2020] UKPC 23, [2021] 1 WLR 5741. Under a supply agreement Delta agreed to sell fuel to the BVI Electricity Corporation. Delta had a right in certain circumstances to claim relief from further performance. It claimed

to exercise the right. Its entitlement to do so was disputed and the trial judge in the BVI, Byer J, held that it had lost the right by election and granted an order for specific performance in favour of the Electricity Corporation. That was upheld by the Court of Appeal of the Eastern Caribbean Supreme Court. On further appeal to the Privy Council the order was reversed on the ground that Delta's rights were not such as to engage the principle of election. Delta submitted that the Electricity Corporation should be required to restore to it the value of fuel supplied under the order for specific performance insofar as that exceeded the contract price. Lord Leggatt JSC, giving the advice of the Board, held (at [50]) that there was power to make such an order: where an appellate Court has decided that an order appealed from should not have been made, it was necessary, in order to give practical effect to the decision, to reverse transfers of money or other property made pursuant to the order set aside on appeal. Such a claim however is restitutionary, and the Electricity Corporation relied on what was in effect a change of position defence, namely that the benefit of the order had been passed on to its customers under the relevant By-Laws which regulated the amount that it could charge by reference to the cost of fuel.

104. The Board rejected this on the ground that the Electricity Corporation could only be regarded as worse off if any additional cost it was required to pay as a result of the reversal of the order could not be recovered from its customers. That would no doubt require an amendment to the By-Laws but there was no reason to think that that could not be done if thought necessary or expedient (at [63]).

105. So far as concerns causation, it was argued for Delta that the defence was only available where the defendant had changed its position in reliance on receipt of the relevant benefit, and that the Electricity Corporation could not say that it had relied on the order for specific performance when it knew that the order was being appealed. Lord Leggatt's response was as follows (at [62]):

“The Board does not accept the premise of this argument. In the Board's view, there is no reason why relevant changes in position should be restricted to those which have come about through decisions made and steps taken voluntarily in reliance on the receipt of a benefit. It is sufficient that receiving the benefit has caused the change of position: see *Goff & Jones: The Law of Restitution*, 9th ed, para 27-35; *Burrows, A Restatement of the English Law of Unjust Enrichment* (2012), p 19; *Scottish Equitable plc v Derby* [2001] 3 All ER 818, paras 30—31. In this case the Buyer does not suggest that it took any relevant action in reliance on the order for specific performance. It is therefore unnecessary to consider whether any such action could have given rise to a defence. The Buyer's argument is that its position has materially altered, not because of any action that it voluntarily took, but because of the way in which its prices are fixed by law. The Board accepts that such an impediment to restoration of the defendant's position could in principle provide a basis for refusing to order restitution.”

106. This therefore is an example of a case where the change of position relied on was not the voluntary act of the defendant but something that had happened automatically without any decision by the defendant. It approves the “wide view” of causation rather than the “narrow view” (as Robert Walker LJ had done (albeit without argument) in *Scottish Equitable*, and Munby J had in *Commerzbank*). It would doubtless be followed

in English law. But none of this affects the view I have expressed that where the change of position relied on *is* the result of a voluntary act of the defendant, what is required or at any rate sufficient, at least in a case like the present, is that the defendant should act on the faith of the payment in the way that I have explained above.

107. Although we were not addressed on this, it appears from *State Bank of NSW* at 352C-E that a similar view has been taken in Australia. In *David Securities Pty Ltd v Commonwealth Bank of Australia* (1992) 175 CLR 353, which drew on the principles in *Lipkin Gorman*, the High Court said that there were strong grounds for accepting the defence of change of position in Australia and at 385 said this:

“... From the point of view of the person making the payment, what happens after he or she has mistakenly paid over the money is irrelevant, for it is at that moment that the defendant is unjustly enriched. However, the defence of change of position is relevant to the enrichment of the defendant precisely because its central element is that the defendant has acted to his or her detriment *on the faith of the receipt*.”

(Italicised in original.)

108. For the reasons I have given, in the present case Trafigura did alter its position (by continuing to trade with Farlin) on the faith of the payments, and that is to my mind a sufficient causal connection for the purposes of the change of position defence.
109. I would therefore dismiss this ground of appeal.

Ground 3 (risk allocation)

110. Mr Adkin’s case under Ground 3 was as follows. The question is which party, Rasmala or Trafigura, should bear the risk of the invalidity of the TPAs; and Trafigura should bear the risk because it knew it needed Rasmala’s consent before it could apply the payments as it did. It knew, or must be taken to have known, that if the TPAs were invalid, it would have to return the monies and it was the only party that could mitigate that risk.
111. There are certainly cases where the question whether the recipient of a payment bears a relevant risk is discussed. I think four of the cases put before us refer to risk in this context. First, in *Niru Battery Moore-Bick J* at [138] said that Mr Francis, although not consciously acting in disregard of the standards to be expected of an ordinary honest banker, “was willing in the circumstances to accept the risk that releasing the money might infringe Bank Sepah’s rights” (see paragraph 54 above).
112. Second, in *Webber* I said at [62] that someone who, like Mr Webber, appreciates that a payment he is receiving may be an overpayment but chooses not to make enquiries is not entitled to the defence because he “knows that there is a risk that he may not be entitled to the money, but is willing to take that risk” (see paragraph 57 above).
113. Third, in *Rose* Mr Warren gave an alternative reason for holding that AIB was not able to rely on a change of position defence, as follows (at [58]):

“If, contrary to the views which I have expressed, it goes too far to say that the bank did not, in changing its position, rely at all on the validity

of the credits to the overdrawn accounts, there is an alternative approach which leads to the same result and which I would adopt. Under this approach, the bank (although it may have acted in good faith) cannot rely on the change of position *as a defence* because it took a risk: aware of the risk, it cannot complain when the risk becomes a reality. This risk was that the assumption, based on the conduct of the liquidator, that no claim would be made against it, was wrong.”

114. Fourth, in *Haugesund* Aikens LJ (at [125]-[126]) said that the kommunes took the risk that their investments might go down rather than up (see paragraph 100 above).
115. I do not think any of these cases are comparable to the present one. In *Niru* and *Webber* the recipients (Mr Francis and Mr Webber) knew that there was (at the lowest) a question mark over the validity of the payments, but went ahead anyway. Those are examples of the recipient consciously deciding to take a risk which they know is a real possibility, something which, as the discussion above shows, can be very relevant to the question of good faith. But that has no application here. Trafigura did not know, or suspect, or have any reason to suspect, that there was any question mark over the validity either of the payments or of the TPAs, and I have already concluded that it acted in good faith.
116. *Rose* was also a case where AIB on Mr Warren’s analysis consciously ran a known risk, although it was of a different nature. The risk in *Rose* was not that the payments might be invalid, as by the time AIB released the charge it knew that Tain had been wound up and that any payments made since the presentation of the petition would be void (unless validated). The risk was a different one, namely that the liquidator would not in fact pursue a claim. There is nothing comparable to that in the present case.
117. That leaves *Haugesund* on which Mr Adkin particularly relied. But again the risk in that case was both a known risk, consciously run by the kommunes, and of an entirely different type, namely that their investments might go down as well as up. That was obviously a risk that they ran, and as I have said above, they could never have expected to be able to throw that risk onto Depfa if the swaps contracts had been valid, so it is unsurprising that they could not throw that risk onto Depfa when they acted in the belief that they were valid (wrongly, as it turned out). I do not think that anything in the present case is in any way analogous to that.
118. In short, Trafigura did not to my mind run any relevant risk at all. In one sense it can be said that anyone who receives a payment and assumes it to be valid is running at least a theoretical risk that it might turn out to have been paid by mistake or as a result of a fraud. But that cannot be enough to disentitle them from relying on a defence of change of position as it would always be the case. One might equally say that Rasmala, in trusting Farlin, was, when it made the payments, taking a risk that Farlin had defrauded it. But that would not disentitle it from relying on the payments as having been made by mistake. Mr Kitchener submitted that the allocation of risk is not a separate part of the legal test for change of position. I think that is right. Some risks (a real risk of invalidity appreciated by the payee (*Niru Battery*, *Webber*), a risk that the payer will not pursue a claim known to exist (*Rose*), a risk which the payee would run in any event even if the payment had been valid (*Haugesund*)), may assist in the analysis either because they inform the question of good faith, or because they affect the question of causation, or because they affect the overall question whether it is

inequitable to require the payee to make restitution. But there is not I think some free-standing requirement that obliges the Court in every case to decide how the risks of the transaction were allocated.

119. That is enough to explain why I am not persuaded by this ground of appeal. But there is in fact a further reason why I think Mr Adkin's argument is wrong. It is premised on the assumption that the relevant question is whether the TPAs were valid or not. But I do not think that is the relevant question. The TPAs were not essential to the validity of the payments. Trafigura had a practice of requiring them, and I have already said that I accept the evidence that Trafigura would in fact have returned the payments if no TPAs had been forthcoming. But what made the payments invalid was not the fact that Rasmala did not sign the TPAs. What made the payments invalid was that Rasmala had been defrauded by Farlin into making them. But there is no question of Trafigura running *that* risk, which was nothing to do with it, nor did Mr Adkin suggest that there was. Trafigura believed, and was reasonable in believing, that Rasmala intended to pay the money to Trafigura on behalf of Farlin (which is what Rasmala's own letter had said in terms); it had no reason to think that Farlin was defrauding its own financier.
120. That is why the Judge said (at [101]) that the money was "received with the understanding that it was to be used to meet Farlin's obligations to Trafigura and that it would become Trafigura's money" (see paragraph 61 above). So although the payments came from Rasmala, they were paid, as far as Trafigura was concerned, on behalf of Farlin. As a matter of law it is well established that if a debtor owes two or more debts to a creditor, it can allocate a payment to whichever debt it wishes, but that in default of an allocation by the debtor, the creditor can allocate the payment. No doubt if a third party such as Rasmala makes a payment on behalf of a debtor, it can stipulate how it is to be used, but on the Judge's findings Rasmala did not effectively do so, and Trafigura did not realise that Rasmala was making its payments in respect of specific contracts. In the absence of any such effective stipulation by Rasmala, allocation of a payment was a matter first for Farlin as debtor and in default for Trafigura. Farlin did sign and return the TPAs. If the payments had been valid, I cannot see any reason why that would not have been an effective allocation by Farlin, whether or not Rasmala also signed. But even if that is wrong, and the forgery of Rasmala's signature made the TPAs of no effect at all, that would not by itself invalidate the payments, and Trafigura as the creditor would still have been entitled to allocate them to the historic debts, there being on this view no allocation by Farlin. All of this assumes of course that the payments were valid in the first place (which we now know was not in fact the case), but this just goes to show that what is relevant is the validity of the payments, not the validity of the TPAs. If the payments had been valid, the validity or invalidity of the TPAs would have made no legal difference to Trafigura's ability to allocate them as it wished.
121. In those circumstances even if Trafigura could be said to have run the risk of the TPAs being invalid, I do not think it would make any difference. It would still have acted in the bona fide and justified belief that the payments were valid, and that is enough to make out its change of position defence.
122. I would therefore dismiss this ground of appeal.

Ground 7 – Payment 5

123. Under Ground 7, Mr Adkin submitted that whatever the position with Payments 1 to 4, the change of position defence should fail in relation to Payment 5 where there was in the event no TPA. He put this in three ways:
- (1) In terms of causation, the change of position in relation to Payment 5 was not caused by the payment but by an erroneous assumption on the part of Trafigura that it could allocate the payment in the way it did because it was going to get a TPA.
 - (2) In terms of risk allocation, Trafigura took the risk that its allocation would not be authorised.
 - (3) In terms of good faith, it was not commercially acceptable to allocate the payment that you get from a third party without authorisation.
124. I can take this very shortly. Underlying all of Mr Adkin’s submissions on this ground was the assertion that Trafigura, as he put it, needed to obtain Rasmala’s authority to allocate. As I have just explained that is not the law; assuming, which Trafigura did bona fide assume, that the payments were valid and the money was paid on behalf of Farlin and received by Trafigura as its own money, it could be allocated as it wished unless Rasmala had effectively stipulated how it was to be used or Farlin had already allocated it to particular debts, which it had not. The fact that Farlin had originally said in the context of Payment 1 that Rasmala would never agree to the money being used for historic debts does not alter this; Farlin later relented (to use the Judge’s word) and as far as Trafigura was concerned, Rasmala had shown itself willing to sign the TPAs allowing payment of historic debts. By the time of Payment 5, Trafigura can have had no reason to doubt that Rasmala was content with this practice.
125. Nor does the fact that Trafigura had a practice of requiring TPAs, something that it was not obliged to do, and that was not standard in the industry, but which it chose to do for its own protection, alter this. The Judge’s findings on this (at [99]) are as follows:
- “TPAs are not common or standard practice in the industry, but it is Trafigura’s policy to have them whenever it receives a payment from a third party. They gave Trafigura a contractual right as against Rasmala and Farlin to treat payment from Rasmala as payment on behalf of Farlin in respect of a specified contract. They avoided misunderstanding and provided transparency as to how Trafigura would deal with the monies it had received.”
126. But, as I have already said, the fact that the TPAs were invalid had no bearing on the validity of the payments. Nor did the absence of one for Payment 5.
127. In terms of the three ways that Mr Adkin put this ground:
- (1) In terms of causation, the change of position is the continued trading with Farlin in the belief that the payments were Trafigura’s to keep, and that they kept Farlin within its credit limit. That, for reasons already given under Ground 2, was caused by the bona fide and justified belief that the payments were valid

payments on behalf of Farlin and that the money was Trafigura's; and the fact that Trafigura sought and obtained the TPAs (or in the case of Payment 5 assumed that one would be forthcoming) does not displace that. That is as true of Payment 5 as of the other payments.

- (2) In terms of risk allocation, Trafigura can be said to have taken the risk that the TPA for Payment 5 would not be forthcoming, but this makes no difference to the fact that its continued trading was caused by the belief that Payment 5, like the other payments, was a valid payment on behalf of Farlin which reduced Farlin's overall indebtedness.
- (3) In terms of good faith, since TPAs were not in any way legally necessary or standard in the industry, but merely something that Trafigura had a practice of requiring for its own protection, I do not see how the lack of one can make Trafigura's actions commercially unacceptable, or its change of position other than in good faith.

128. I would therefore dismiss this ground of appeal as well.

Additional Ground – detriment

129. This ground was argued by Mr Mohamedbhai for Rasmala and by Mr Nadin for Trafigura.
130. The applicable legal principles were not in dispute, and I can take them from a helpful summary by Mr Nadin. First, the overall principle is that the recipient will have a defence where his "position has so changed that it would be inequitable in all the circumstances to require him to make restitution, or alternatively to make restitution in full": per Lord Goff in *Lipkin Gorman* at 580E-F. Lord Templeman put the matter slightly differently: the recipient is not liable unless he was not only unjustly enriched by the payment but remains unjustly enriched (at 560A). In many cases this will produce a similar result, but not in all, and it is Lord Goff's formulation that has been adopted in subsequent cases. Lord Templeman's analysis is I think best regarded as a useful cross-check where the detriment relied on is that the recipient has spent the money or a quantifiable part of it.
131. Second, the relevant detriment does not need to be financial or even capable of being measured in pecuniary terms: *Scottish Equitable* at [32] per Robert Walker LJ, *Commerzbank* at [39] per Mummery LJ, and at [65]-[70] per Munby J. See in particular at [65] where Munby J rejected the submission that there could be no change of position without financial detriment, or at least some detriment capable of measurement in pecuniary terms, in characteristically trenchant fashion, describing the point as not only unsupported by authority but completely unsound in principle.
132. Third, a lost opportunity can constitute a relevant detriment even if it is not quantifiable, as long as it is substantial and irreversible. That was as I say not in dispute, Mr Mohamedbhai accepting both that a lost opportunity can count as a detriment, and, at any rate for the purposes of this appeal, that it is not necessary for that detriment to be precisely quantifiable. For that proposition Mr Nadin referred us to the decision of the High Court of Australia in *Australian Financial Services and Leasing Pty Ltd v Hills Industries Ltd* [2014] HCA 14 ("*AFS*").

133. That was a case quite similar on the facts to the present, in which the claimant (AFS) was defrauded into making payments to each of the two defendants (Hills and Bosch). These were treated by them as discharging debts owed by a customer (TCP), with the result that Hills and Bosch ceased pursuing TCP for payment as they were in the process of doing, and continued trading with TCP. There were three judgments, all of which agreed in concluding that Hills and Bosch had a complete defence. The first was given by French CJ. At [24] he endorsed irreversible detriment as a more useful and flexible guiding criterion than an attempt to assess the quantum of disenrichment. At [26] he rejected as too general AFS's central proposition that where the change of position is a form of economic loss, including loss of opportunity, the defence only operates to the extent of that value, which the Court should determine as best it can. At [30] he said that any attempt to value the detriment suffered by Hills and Bosch would involve the consideration of more than one counterfactual with varying degrees of probability, adding:

“The extent of the defence of change of position is not to be determined according to the outcome of an exercise which can only be undertaken long after demand is made and which involves an elaborate and potentially expensive process of assessment. I agree also with the rejection in the joint reasons of the contention that it is appropriate to apply to a detriment constituted by loss of economic opportunity, the kind of valuation approach undertaken in an assessment of damages for loss of opportunities. Such assessments are undertaken upon an entirely different basis from that which informs the change of position defence.”

134. The second judgment was a joint judgment of five judges (Hayne, Crennan, Kiefel, Bell and Keane JJ). They too rejected AFS's argument that it was necessary and appropriate to assess the value of TCP's debts to Hills and Bosch, or their prospects of recovery, in order to measure the extent to which they remained enriched, saying (at [84]) that under Australian law, a mathematical assessment of enduring economic benefit does not determine the availability of restitutionary remedies.
135. The third judgment was given by Gageler J (now the Chief Justice of Australia). At [157] he said this:

“The defence of change of position is established where a defendant proves the existence of two conditions. The first condition is that the defendant has acted (that is, done something the defendant would not otherwise have done) or refrained from acting (that is, not done something the defendant would otherwise have done) in good faith on the assumption that the defendant was entitled to deal with the payment which the defendant received... The second condition is that, by reason of having so acted or refrained from acting, the defendant would be placed in a worse position if ordered to make restitution of the payment than if the defendant had not received the payment at all. The detriment constituted by that difference in position need not, in every case, be financial or pecuniary. If financial or pecuniary, it need not, in every case, be established with precision. It can be an opportunity forgone. It must, in every case, be shown by the defendant to be substantial.”

136. He dealt with the facts by reference to the position of Hills, that of Bosch not being

materially different. TCP had before AFS's payment owed Hills A\$308,000. After AFS paid that sum to Hills (which Hills treated as discharging the debt), Hills carried on trading with the result that when the fraud was discovered TCP owed it a further A\$21,739.03 (which it could not pay). At [165] Gageler J said that this continued trading was an undoubted source of detriment to Hills, but that it could be precisely quantified as the A\$21,739.03; standing alone that would not give rise to an entitlement on the part of Hills to retain more than that amount. He continued at [166]:

“By ceasing to take the steps it had proposed of engaging lawyers and seeking security and repayment of the \$308,000 debt owed to it by TCP, however, Hills gave up a commercial opportunity the substantial value of which Hills has now lost by reason of the intervening liquidation of TCP. Having given up that opportunity, Hills would be placed in a worse position if ordered to make restitution of the \$308,000 paid to it by AFSL than if Hills had not received that payment at all. That is enough to entitle Hills to retain the whole of the payment unless it were to appear that the value of the commercial opportunity forgone was able to be quantified as some other, lesser amount. It is not necessary for Hills to go so far as to show that it has been placed in a position of being unable to demonstrate what would or may have happened if it had not so acted on the faith of the payment.”

137. It was not suggested to us that English law takes, or should take, any different approach. Indeed in *Banca Intesa Sanpaolo SpA v Comune di Venezia* [2022] EWHC 2586 (Comm), [2023] Bus LR 384, Foxton J (as he then was) cited *AFS* and followed it: see at [416]-[419] and his conclusion at [419] that:

“I am satisfied that mere difficulty in ascertaining the extent of any change of position is not in itself an answer to an asserted change of position defence.”

His decision was appealed to this Court (at [2023] EWCA Civ 1482, [2024] 2 All ER (Comm) 23), but not on this issue.

138. The Judge dealt with the question of detriment in the Judgment at [103] to [108], which I have summarised at paragraphs 30 to 35 above. As there appears, the salient facts are that in 2017 before Payment 1 Farlin owed Trafigura a total of some \$12m to \$14m (\$10m to \$11m for coal and \$1.7m to \$3m for demurrage etc), whereas when it eventually stopped trading in 2018 it owed a total of some \$15m (\$12m for coal and \$3m for demurrage). Trafigura was however able to make some recoveries, both from Farlin and from its credit insurance, which reduced its overall loss to \$7m to \$7.5m. The Judge said at [104] that it was impossible to say with certainty whether Trafigura would have been able to make greater or lesser recoveries if it had stopped trading with Farlin before Payment 1 was received. He expanded on this at [107] where he said that the opportunity to stop trading with Farlin and take steps to recover its then debts was a lost opportunity which was substantial; it was impossible to say what recoveries Trafigura might have achieved if it had followed that course, but it is possible that it would have been able to make greater recoveries than it was able to make when Farlin eventually failed. He added “This is not a remote possibility” and “it is not fanciful to suggest that if Trafigura had demanded repayment Farlin would have found funds from elsewhere to repay, so that it could keep trading with other suppliers.”

139. Mr Mohamedbhai took the Judge's figures as his starting point and said that if one were to compare the position before the receipt of Payment 1 (in August 2017) with the position after receipt of Payment 5, Trafigura was in a better position after the receipt of Payment 5 than it was before the receipt of Payment 1 because the Judge found that the loss before Payment 1 was in the region of \$12m to \$14m, and its loss after it had stopped trading with Farlin was in the region of \$7m to \$7.5m. If one were to stop the analysis there, therefore, Trafigura could not say that it had suffered detriment as a result of its change of position as it was better off by an amount of \$4.5m to \$7m. It should therefore be required to make a payment of that amount (taking the mid-point of \$5.75m) to Rasmala (that is, in effect, to prevent its continuing enrichment). As to the possibility that Trafigura might have made recoveries if it had stopped trading with Farlin before Payment 1, Mr Mohamedbhai said that the Judge's findings that this was "not a remote possibility" and that it was "not fanciful to suggest" were far too weak and vague to count as a substantial lost opportunity.
140. I do not think this is a fair characterisation of the position. In the first place, on any view Trafigura would suffer a very substantial detriment if it had to repay the entirety of the \$11m odd claimed. That is because such detriment is measured by asking whether the defendant would be worse off if it had to repay the money than it would have been if the money had never been paid in the first place. That is easy to see with the simple case where A mistakenly pays B £10,000, and B in good faith spends £2,000 of it on a holiday he would not otherwise have taken. If B is required to repay the whole £10,000 he will be out of pocket by £2,000 as compared with the position he would have been in had he never received it. This is the way in which it was put by Simon Brown LJ in *Scottish Equitable* at [54], namely that Mr Derby "would be no worse off having paid the amount ordered to be repaid than if the mistake had never been made" (see paragraph 86 above); and to similar effect is what Gageler J said in *AFS* at [157], namely that "the defendant would be placed in a worse position if ordered to make restitution of the payment than if the defendant had not received the payment at all" (see paragraph 135 above).
141. Here if Trafigura were required to repay the whole \$11m, it would be out of pocket to the tune of some \$18 to \$18.5m, which would self-evidently be a worse position than it would have been in had the payments never been made (the Judge made this point at [106], although by reference to \$22m rather than the \$11m now in issue (see paragraph 33 above)). Now I accept that that is not what Mr Mohamedbhai suggests should happen, but it shows that this ground of appeal is not concerned with *whether* Trafigura has established that it would suffer a substantial detriment if required to make restitution, but with the *quantum* of it.
142. Second, the Judge did not find that "the loss before Payment 1 was in the region of \$12m to \$14m". He found that the amount then outstanding from Farlin was \$12m to \$14m, which is a different thing. If one compares the amounts outstanding at the two dates, the \$12m to \$14m in 2017 had grown slightly to \$15m outstanding in 2018. That demonstrates that the receipt of the payments did nothing to reduce Farlin's overall indebtedness, and that on the face of it Trafigura was in a slightly worse position in 2018 than it had been in 2017, even before paying back any of the money to Rasmala. These figures illustrate that in effect, as Mr Kitchenier pointed out, Trafigura had used the \$22m received from Rasmala not to reduce Farlin's overall indebtedness but to buy coal to sell to Farlin.

143. Third, if one is going to compare the final overall loss to Trafigura of \$7m to \$7.5m with the position in 2017, it is self-evidently necessary to compare it with the loss that Trafigura would have suffered if it had stopped trading with Farlin in 2017, taking account of any recoveries that it would then have made. To compare the final overall loss after such recoveries in 2018 with the headline amount outstanding in 2017 is, as Mr Rajat Maroo (Trafigura's Regional Credit Manager) said in cross-examination, not to compare apples to apples. There are obvious difficulties in quantifying the likely recovery in 2017 with any precision, because it depends on a number of counterfactuals. But this is where the principles discussed in *AFS* come in. Put shortly, it is not necessary, nor indeed appropriate, to attempt an "elaborate and potentially expensive process of assessment" of the kind undertaken in an assessment of damages. It is enough if the defendant shows the opportunity foregone to be substantial.
144. Fourth, the Judge did not say, nor can he be fairly read as meaning, that he thought it impossible to say whether Trafigura would have recovered anything at all in 2017. When he said "This is not a remote possibility", he was not referring to the possibility of Trafigura making any recovery but to the possibility, which he regarded as a real one, that Trafigura would have been able to make greater recoveries than it did in 2018. Similarly when he said "it is not fanciful to suggest", he was referring to the possibility, which he again regarded as a real rather than a fanciful one, that Farlin would have "found funds from elsewhere to repay so that it could keep trading with other suppliers". I read that as meaning that Farlin might have found the funds to make either a full, or at least a significant, repayment as that is the only way it could satisfy Trafigura and be assured of being able to continue trading with others. To read these statements, as Mr Mohamedbhai suggested we should, as if the Judge had said that everything was so speculative that anything could have happened, and that it is impossible to say whether Trafigura suffered a detriment or not, is not to my mind a fair reading of the relevant passage in the Judgment, which must of course be read as a whole. What the Judge said was that the lost opportunity was not quantifiable, but it was nevertheless an "irreversible detriment that is substantial". On the basis of the principles as explained in *AFS*, that was enough, or at any rate, the Judge was entitled to take the view that it was enough.
145. Fifth, we were shown some of the evidence which makes it clear that the Judge was entirely justified in coming to this conclusion. As in 2018 there would have been two sources of repayment in 2017: whatever could be extracted from Farlin, and the credit insurance. So far as the first is concerned, it is noticeable that Trafigura was in the event able to obtain a significant sum of money from Farlin in 2018: Mr Maroo said that of the \$12m odd owed for coal, Trafigura was able to make some recoveries from Farlin and so only claimed on the insurance policy for about \$9m. That means that some \$3m must have been recovered from Farlin, as Mr Maroo confirmed in cross-examination. There is nothing to suggest that Farlin would have been any less able to pay in 2017; debtors who run into difficulties in paying their debts usually become increasingly financially stressed rather than the other way round. And it is clear that despite its problems, Farlin did have access to other sources of money: it was able to find over \$10.5m in early 2018 to repay Rasmala for Payments 1 and 2 (see paragraphs 18 and 42 above), and the fact that Trafigura transacted nearly \$60m of business with Farlin after Payment 1 (see paragraph 28 above), even though Rasmala only provided finance of some \$22m, further suggests that that it had access to other sources of money.

146. As to the credit insurance, this covered 50% of the amounts outstanding in respect of coal (but not the demurrage or interest). Mr Mohamedbhai suggested that Trafigura would have been reluctant to claim on it, relying on a statement in Mr Maroo's witness statement that claiming on a policy "could impact Trafigura's ability to insure other counterparties." But Mr Maroo's evidence has to be taken as a whole, taking account not only of his witness statement but also of his explanations in cross-examination. When this is done, it is clear that he was not saying that Trafigura would not have claimed, and indeed in cross-examination he said in terms that:

"if hypothetically Trafigura had decided not to continue with business with Farlin, we would have – and Farlin had not paid, we would have still made a claim under the insurance; and the insurance recovery would have been 50%."

147. Even without any recovery from Farlin that would have left Trafigura in much the same position as it was in 2018. On the basis of a coal debt of \$10m to \$11m, and demurrage etc of \$1.7m to \$3m, a recovery from the policy at 50% would be \$5m to \$5.5m against a total exposure of \$11.7m to \$14m, leading to an overall net loss of \$6.7m to \$8.5m. That is not so very different from the actual loss in 2018 of \$7m to \$7.5m. And Trafigura would only need to have recovered \$2m from Farlin to bring its overall net loss down to \$5.7m to \$7.5m (after taking account of the fact that the policy would only pay out 50% of the debt irrecoverable from Farlin and so a payment by Farlin of \$2m would have reduced the amount receivable from the policy by \$1m). I do not find it at all surprising in the circumstances that although the Judge said it was impossible to say with certainty what recoveries Trafigura would have made, he found that the loss of the opportunity to seek such recoveries was a substantial and irreversible detriment. That was enough to justify his conclusion that it would be inequitable to require Trafigura to make any repayment to Rasmala.
148. I would therefore dismiss this ground of appeal.
149. In the light of my conclusion no useful purpose would be served by examining at any length the question whether Rasmala should be granted permission to amend its grounds to rely on this additional ground. It is true that this is a late amendment and no good reason has been advanced why it is late; but where an appeal is on foot anyway, and a new ground of appeal, arising out of the same material as the existing grounds and closely related to them, can be accommodated within the existing hearing without any real prejudice to the respondent, the demands of finality are much reduced compared to what they would be if, for example, an appellant sought to bring a whole appeal out of time. In the present case the additional ground focused on another aspect of the question which was going to be argued on the appeal in any event, namely whether Trafigura could avail itself of a defence of change of position; and the addition of this ground did not cause Trafigura any substantial prejudice, Mr Nadin being more than capable of responding to it. I would in those circumstances formally grant permission to Rasmala to amend, but dismiss this ground as I have said.

Conclusion

150. Although I have felt it appropriate to deal in some detail with the various points so ably advanced on behalf of Rasmala, in the end I remain of the view that this is a relatively simple case of the recipient of money acting in good faith in reliance on the payments

being valid, and that the Judge was entirely right to conclude that it would be inequitable for Trafigura to have to make any repayment to Rasmala for the reasons that he well expressed in his lucid and cogent Judgment.

151. I would therefore dismiss the appeal.

Lady Justice Falk:

152. I agree.

Lord Justice Baker:

153. I also agree.