JUDGMENT : The Honourable Mr. Justice Evans-Lombe : Chancery Division. 9th February 2001

1 On 26th January, 2001 I concluded the hearing, which started on the 22nd January, of an application by the claimants in these two actions, Barings PLC ("PLC"), BishopsCourt (BS) Limited ("BSL") and Barings Futures (Singapore) PTE Limited ("BFS") and ING Baring Securities (Japan) Limited ("BSJ"), a Third Party in those proceedings, (together ***"the Applicants")*** against the Defendants, Coopers & Lybrand London ("C & LL"), Coopers & Lybrand Singapore ("C & LS") and Deloitte & Touche Singapore ("D & T"). By their application the Applicants seek to strike out the whole or parts of three expert reports filed on behalf of the Defendants directed to banking management issues.

By an interlocutory order made on the 14th April 1999 I gave liberty to the parties in both actions to call expert evidence directed to ***"banking management"*** which was intended to mean that the parties were at liberty to call expert evidence directed to the conduct by Barings of a derivatives trading business through BFS primarily dealing on the Singapore futures market known as SIMEX.

That order limited the Defendants to one such expert between all of them. By an order dated the 2nd November 1999 I varied the order of the 14th April so that each Defendant should be at liberty to call two experts on issues in that order described as ***"banking management and settlements issues".***

I altered the nature of the leave given to call expert evidence in this field to ***"preliminary"*** leave so that the Applicants should have the opportunity to see the nature of the expert evidence which the Defendants sought to call before themselves being put to the cost of answering it. This was designed to give the Applicants the opportunity to apply to the Court to strike out the whole or any part of such expert evidence before answering it. The Applicant's application before me was such an application.

2. At the conclusion of the hearing on the 26th January I ruled that the three expert's reports directed to banking management namely those of Mr Kenneth Cunningham and Dr Desmond Fitzgerald, filed on behalf of D & T and that of Mr John Giannotti filed on behalf of C & LS and C & LL, were admissible under section 3 of the Civil Evidence Act 1972 and that I was not prepared, at that stage, to order that they should not be admitted either in whole or in part. I informed the parties that I would give my reasons for arriving at that conclusion in writing later. These are those reasons.

3. I refer to my earlier interlocutory judgments for the background facts of this litigation. The expert evidence in question was filed in support of a defence of lack of causation or contributory negligence to the Claimant's claims and in support of a third party claim against BSJ by D & T. Broadly the reports are directed to the question of whether various officers or employees of the Claimants or BSJ ought to have become aware of Leeson's unauthorised trading without the assistance of the auditor defendants and taken action to stop him, in BSJ's case, as one of the alleged controllers of Leeson's trading, by alerting the Claimants.

4 The Applicants, however, adopt varying positions. Neither of the Claimants criticise Dr Fitzgerald's report. They accept that his report sufficiently deals with an area of technical complexity, namely, the assessment of risk and reward in derivatives trading in which Dr Fitzgerald is an accepted expert, to preclude any challenge to his report. By contrast BSJ attacks this report on some of the grounds on which the Claimants attack the other reports. The scope of his report is set out on page five of it. Dr Fitzgerald describes the key question which it addresses as:- ""The key question that is addressed is whether a competent derivatives manager, examining the size and profitability of Leeson's reported trading, should have realised that the patterns of risk and reward observed were incredible or, at the very least, so unusual as to merit extensive and detailed examination."

5 The report of Mr Giannotti is of no concern to BSJ being put in by the Defendants C & LL and C & LS who make no third party claims against BSJ. BFS' primary position is that the whole of this report is objectionable on the ground that the subject matter is not properly the subject of expert evidence being directed to generalised management failings by Barings where criticism is not based on any objective standards but only upon Mr Giannotti's own experience. PLC accepts that part of Mr Giannotti's report is admissible but large sections are not as being inappropriate to be put forward as expert evidence. Neither of the Claimants challenge part 2 of Dr Cunningham's report on the ground that it covers the same ground as Dr Fitzgerald's. They both challenge part 1 on the same grounds as they challenge Mr

Giannotti's report in particular those parts of Mr Cunningham's report headed "**comment**" as finding facts and usurping the functions of the Court.

6 As part of the introduction to his report at paragraph 2.11 Mr Giannotti, having listed the *"**critical banking management issues**"* to which his report is directed says:- *"In each area, I assess the events and practices within Barings (as I understand them) as against good business practise in the industry...."*

7 Mr Giannotti criticises the overall pattern of Barings management as it applied to Barings operations in Singapore. This was the ""Matrix System" whereby at each centre of operations of the Barings group, the trading operations and the support operations, including such things as settlement and accounts, were separately managed with different reporting channels. See paragraph 3.1, 3.29 and 3.35 of the report. His criticisms were directed rather to the execution by the various officers and employees of the functions assigned to them by the Management system see paragraph 10.4.

8 Mr Giannotti deals with the management structure in part 3 of his report. He has various unflattering ""observations" to make on how the system was put into effect, such as lack of clarity in the assigning of responsibilities to staff, (paragraph 3.9), no local risk control function (paragraph 3.17), the effective control of both the front and back offices, that is the trading and settlements functions, by Leeson as general manager (paragraph 3.19). He comments on the lack of punch of the control systems which did operate over the operations of BFS and on an apparent rivalry between the different control centres (paragraphs 3.21 and 3.25). At paragraph 3.32 onwards Mr Giannotti describes and comments upon the Barings Group's systems for the control of risk. He sets out 4 criteria which should guide the constitution and methods of risk control committees and his views on how the relevant Barings risk control committees failed to live up to those criteria.

9 Part 4 of Mr Giannotti's report deals with the control system and monitoring of BFS and Leeson. At part C (paragraph 4.16) onwards he sets out various "parameters" that should be embraced by any such control system particularly where the business to be controlled is situated in a distant place. He emphasises the necessity of such things as credit and trading limits and proper channels of reporting. In particular he emphasises the necessity that the control system maintains its independence from traders. At part D Mr Giannotti describes Barings' control system from the factual sources which have been supplied to him. He comments (at paragraph 4.28) that the organisation of risk management at Barings was adequate. His criticism is directed to how the control system operated in practice. In particular the lack of any independent monitoring of Leeson's trading, the failure to interrogate levels of reported profits (the particular subject of Dr Fitzgerald's report), the breakdown in the integrity of the funding control mechanism and the failure of the control mechanism personnel to act on the information that they received which should have put them on inquiry.

10 Part 5 of Mr Giannotti's report deals with the provision of funding. At paragraph 5.7 onwards he sets out four "***tenets***" which should guide management in the control of funding for a trading operation. What follows at part C (paragraph 5.24) onwards is not a criticism of the organisational structure but how it was operated by those comprised in it and how they broke these prescribed "***tenets***". In particular Mr Giannotti criticises the failures of staff to react to indicia from Leeson's funding requests that he was conducting unauthorised trading.

11 Between July and August 1994 an internal audit review was conducted of BFS trading by the internal audit department of BSL. This report set out a number of the weaknesses in the monitoring and control of BFS' operations. At part 6 of his report Mr Giannotti describes his view of the proper scope and function of internal audits, how internal audit departments should be set up and run and how the reports of internal audit departments should be treated and reacted to. He then goes on to criticise the failure of Barings' staff to react with sufficient vigour to this internal audit report.

12 In part 7 of his report Mr Giannotti deals with what is referred to throughout the litigation as the "***SLK receivable***". This was a stratagem whereby Leeson sought to conceal the substantial deficit resulting from the losses incurred by his unauthorised trading from the auditors auditing the 1994 accounts. The means was the invention of a fictitious debtor whose payment was overdue at the year end but whose indebtedness was made to appear to have been paid shortly after the year end. Mr Giannotti describes

the facts from the sources made available to him. In particular he points out those aspects of the surrounding facts of which Barings management in London and / or in Singapore were aware on his reading of the facts.

Thus for example at paragraph 7.7(5) Mr Giannotti states that *"Management in London where aware that BSL had no record of such a transaction."* The remainder of part seven comprises a critique of the reaction of Barings staff in London and in Singapore to what they came to know of the surrounding facts of the transaction. At paragraph 7.26 onwards he sets out his reasons why he arrives at the conclusion summarised in the first sentence of that paragraph as follows:- *"In my opinion, management's response to the control and integrity issues raised by C & LS's discovery of the SLK receivable fell far short of both the urgency and thoroughness which good business management practice requires."*

13 Part 8 of the report deals with an exchange of correspondence between BFS and SIMEX in January / February 1995 concluding with a letter of the 27th January 1995 in which SIMEX seek confirmation from BFS of its ability to meet its obligations to the market. Mr Giannotti criticises the failure of BFS' staff to react to the contents of these letters and also the staff of Barings in London to react effectively to the letter of the 27th January a copy of which was received in London.

14 Part 9 of the report deals with the failure of Barings' staff to react to various market rumours circulating in early 1995 concerning the deficits which were building up resulting from BFS trading on the SIMEX market.

15 Mr Giannotti's conclusions at part 10 consist of a description and a critique of the *"prevailing management attitude"* of Barings at all levels and of its failure to react to the events of 1992 to February 1995. At paragraph 10.30 having in the previous paragraph set out *"the key attributes required of the Management team"* he concludes that:- *"Barings' management fell short of all these criteria in the period leading to the firm's collapse. Senior management, the control mechanism, product managers and local management should have taken a variety of actions which would have uncovered Leeson's true activities at an early enough stage to have avoided the collapse and averted the vast majority of the losses."*

16 The pattern of Mr Giannotti's report is consistent throughout. Save as to part 3 each part contains a paragraph or paragraphs setting out the sources from which his description of relevant facts comes. In part 3 the sources are reasonably clear from the text itself. Mr Giannotti also describes his sources at the commencement of the report at paragraph 1.9. Where specific facts are referred to they are noted, as to their source by reference to "***endnotes***" appearing in Schedule 4 to the report.

17 The first part of Mr Cunningham's report covers much the same ground as Mr Giannotti's report in somewhat less detail. The pattern of his report is to set out criteria which he says should guide the actions of the management of a "***well-managed bank***" and to follow these with "***comments***" in which he sets out his judgments as to whether those standards have been breached in the event that certain facts are established at the trial.

18 Beginning at the last two lines on page two of his report Mr Cunningham says:- *"There are some common elements in the nature of the oversight and the structures and procedures that applied generally to any reasonably well managed bank. This report will focus on these common elements in the context of activities conducted in a remote subsidiary, even though the comments generally apply to activities conducted in units of the large bank and in the domestic market where the head office is located.*

19 On the 18th January of this year Mr Cunningham made a witness statement after having sight of the skeleton arguments to be put before me on behalf of the Claimants and BSJ. The relevant paragraphs of that witness statement are paragraphs 5 and 6 which read:-

> *"5 In the light of what is said in those skeleton arguments, I would like to confirm, although I believe that it is clear from my report, that I am of the opinion that there are accepted standards of conduct or best practices for the senior management of Banks like Barings bank. These standards arise from their widespread usage and they have been increasingly made explicit as they relate to many banking activities, by industry bodies and regulators since the early 1990's. The Group of 30 Report on derivatives markets best practices was one of the earliest examples.*

6. Further, the Comment sections of part 1 of my report are not expressly or by implication or in fact statements of what I would have done in certain circumstances, had I been managing Barings. These sections are comments on assumed facts (it has been explained to me that I was not to act as a fact finder) made by applying the accepted standards of conduct for Bank's senior management established by common usage referred to above."

20 In the unreported decision of the Court of Appeal on the 27th November 1995 in **United Bank of Kuwait v Prudential Property Services Limited** at page 4 of the transcript the Court of Appeal defines the purpose of expert evidence as being *"that the Court should reach a fully informed decision"*.

The Court's powers to control evidence generally derives from CPR 32.1 and to control the evidence of experts, in particular, from CPR 35. It is for the party seeking to call expert evidence to satisfy the Court that expert evidence is available which would have a bearing on the issues which the Court has to decide and would be helpful to the Court in coming to a conclusion on those issues.

The evidence of experts will always be exchanged and filed well in advance of the hearing. It clearly serves the purposes of effective case management that, as far as possible, issues relating to the admissibility of expert evidence be disposed of well before the trial starts so that significant costs can be saved. See **Woodford & Ackroyd v Burgess** 1999 Lloyd's (PN) p231.

21 Despite their varying approaches to this application each of the Claimants and BSJ submit that the expert's reports in question are inadmissible in whole or in part because the reports, or parts of the reports, criticised deal with matters which are not properly the subject of expert evidence. I have rejected this submission for the reasons which follow.

22 Whether expert evidence is admissible is now governed by section 3 of the Civil Evidence Act 1972 which provides:- *"3 (1) Subject to any rules of Court made in pursuance of Part 1 of the Civil Evidence Act 1968 or this Act, where a person is called as a witness in any civil proceedings, his opinion on any relevant matter on which he is qualified to give expert evidence shall be admissible in evidence ... (3) In this section "relevant matter" includes an issue in the proceedings in question."*

23 As the authorities make clear, the fact that an expert report comes within the meaning of the words "***expert evidence***" as used in section 3(1) does not mean that the Court must admit it in evidence and it will not be admitted unless it is relevant to any of the issues which the Court has to decide, relevant meaning "***helpful***" to the Court in arriving at its conclusions.

24 The leading case on the admissibility of expert evidence is the decision of Oliver J in **Midland Bank Trust Company Limited v Hett Stubbs & Kemp** 1979 1 CH p384. The case concerned a claim for damages arising from the negligence of a solicitor instructed in a conveyancing transaction. The much quoted passage from the judgment of Oliver J, which has been affirmed in the Court of Appeal, appears at page 402 of the report where the Judge deals with an issue involving the scope of a solicitor's duty upon which extensive expert evidence had been led in the course of the trial.

He says this:- *"I must say that I doubt the value, or even the admissibility, of this sort of evidence, which seems to be becoming customary in cases of this type. The extent of the legal duty in any given situation must, I think, be a question of law for the Court. Clearly if there is some practice in a particular profession, some accepted standard of conduct which is laid down by a professional institute or sanctioned by common usage, evidence of that can and ought to be received. But evidence which really amounts to no more than an expression of opinion by a particular practitioner of what he thinks that he would have done had he been placed, hypothetically and without the benefit of hindsight, in the position of the Defendants, is of little assistance to the Court; whilst evidence of the witness' view of what, as a matter of law, the solicitor's duty was in the particular circumstances of the case is, I should have thought, inadmissible, for that is the very question which it is the Court's function to decide"*

25 It seems to me to be clear that by this passage in his judgment Oliver J was not confining expert evidence to evidence directed to the rules and practices of *"professional institutes". The relevant words are "some accepted standard of conduct which is ... sanctioned by common usage ..."*

26 In the Bank of Kuwait case ibid, as appears from page 3 of the transcript, the second issue with which the Court of Appeal was dealing was whether the Judge at first instance was wrong to reject a defence of contributory negligence where a bank was suing a firm of surveyors and valuers for negligently valuing

a property upon the security of which the Bank was to make advances.

The allegation of contributory negligence was that the Bank failed *"to carry out any or any sufficient inquiries, investigations or analysis of the ability of Sallows Development's Limited to service and / or to repay the debt."* Expert evidence was directed to this issue. In the result the Defendant's expert did not give evidence of sufficient strength to back up the Defendant's case on contributory negligence. Nonetheless the Judge at first instance was invited to find the Bank contributorily negligent from other evidence in the case but without the assistance of expert evidence. The issue before the Court of Appeal was whether the Judge was right to reject this submission.

27 The Court of Appeal dealt with the admissibility of expert evidence starting at page 4 of the transcript in the judgment of Evans LJ where he says this:- *"In all cases it is admissible to inform the Court of relevant practices in an area where the conduct on the particular occasion is said to have been negligent. In other words such as no reasonably competent practitioner would undertake. Sometimes, however, it may be unnecessary so to inform the Court....*

The decision whether or not there was negligence is always one for the Court. So the question raised by Mr Walker's submission is this: can there never be cases where the expert can say what he would have done or not done or would have expected to have been done if he had been placed in the relevant situation? Clearly there are cases where such evidence is admitted. One might say that it happens every day, especially in medical cases where, for example, an allegation of negligence is made against a surgeon. It may be that in practice this kind of evidence would be indistinguishable, although not always necessarily so, from the expert witness evidence of what current good practices require.

Section 3 of the Civil Evidence Act 1972 establishes that opinion evidence of this kind is properly admissible. That was held by this Court in the recent case of Glaverbell SA v British Coal Corporation and anr [1995 RPC p 255 a case to which I was referred] ... conversely in another recent judgment, Stuart-Smith LJ has emphasised that expert evidence is unnecessary and should be discouraged in what one might call the ordinary case of a claim for personal injuries arising out of a road accident ...

I would hold that it is a mistake to attempt to include all experts in one category. They range from, for example, the translator of foreign languages to a person who can explain advanced scientific concepts and from describing practices in highly technical areas, including surgery, to those in other areas where the Court has sufficient personal experience of its own.

The interpretation of accounts, perhaps, comes midway in this scale. The Courts, meaning individual judges, may have some understanding of them but they cannot be confident. Therefore expert evidence is potentially admissible under both heads, that is to say as to practise and of opinion because it is helpful in assisting the Court to reach a fully informed decision which, in my judgment is the overriding principle ..."

28 At page 9 of the transcript Evans LJ continues:- *"It therefore becomes necessary for this Court to consider what standard of care is required for the purposes of the Contributory Negligence Act in circumstances such as these. In any case where negligence is alleged the Court has to consider whether the Defendant failed to conduct himself as a reasonable man would have done in his situation. When one is in a specialised field of business such as banking it therefore becomes necessary to consider whether a reasonably prudent banker would have behaved in the same way as the Defendant did. In the present case, would a prudent banker, placed as the plaintiffs were, have made this loan, first, when they agreed to make it in July 1990 and, secondly, when they allowed to be drawn down on October 19th? ... As already stated the allegation of negligence in the amended defence was supported by voluntary further and better particulars in the course of the trial. These concentrate on the bank's assessment of the financial information provided, first, in June and then, secondly with the accountants letter in October. The Defendants say that the Plaintiffs and, in particular, Mr Manning the lending officer were negligent at both stages, particularly when they say that "**obvious or glaring warning signals were ignored**" that phrase being taken from the evidence of the plaintiff's expert ..."*

29 Then at page 16 of the transcript Evans LJ describes various questions which the admitted expert evidence dealt with for example:- *"As regards October, there were two questions: what kind of exercise would a prudent banker have carried out? On that the position is clear in my judgment. It was not an occasion for a reappraisal nor a reassessment of the risks. In answer to the first question: should approval of the draw down have*

*been withheld? The answer is, only if the deficiencies "**leapt from the page**"... The second question: was it really apparent that greater risks were involved than had been apparent in June? ... It does seem to a non expert eye that the guarded terms of the accountants letter and the different picture painted by the October cashflow figures, compared with June, could well be regarded as warning signals that the group was or was about to be in some financial difficulties, especially in depressed market conditions, as they were, at least for residential properties at that time. But on the evidence this was not a reappraisal. It was a drawdown under an already approved loan. Mr R [the Plaintiff's expert] was quite clear on this. The question was whether the documents gave obvious or glaring warning signals which Mr Manning should not have ignored. He said that they did not."*

30 In my judgment this decision strongly supports the Defendant's resistance to the application since it must be taken as proceeding on the basis that a prudent banker would have the expertise to recognise from various indicia, such as a change in cashflow forecasts, that a customer's financial position was deteriorating so as to make an advance to him imprudent an expertise which expert evidence was admissible to prove.

31 The decision of the Court of Appeal in **Bown v Gould & Swain** 1996 PNLR p 130 was one upon which the Applicants placed reliance. In it the Court of Appeal was considering another Solicitor's negligence action arising from a conveyancing transaction. At page 135 of the report Simon Brown LJ is reported as saying:- *"What solicitors should properly do in the very particular and highly individualistic circumstances of this case is by no means a matter of practice. It is a matter of law to be resolved by the Judge.*

Each of the several respects in which the appellant solicitor's first Affidavit sought to contend that expert evidence would assist the Court proves, on analysis, to involve either a question of law or a question of fact. None of those matters can sensibly be regarded as inviting a view as to ""some practice in (the solicitors) profession, some accepted standards of conduct.. laid down.. or sanctioned by common usage".

I entirely share the view of the Judge below that, on the contrary, the evidence here sought to be adduced falls foul of Oliver J's dictum. It would amount to no more than an expression of opinion by the expert, either as to what he himself would have done, which could not assist, or as to what he thinks should have been done, which would have been the very issue for the Judge to determine."

32 In his judgment Millett LJ at page 136 says this:- *"None of this requires the assistance of expert evidence. In the Affidavit in support of the application for leave to call such evidence, the Appellants submit that an expert conveyancer would assist the Court in establishing a number of matters. It is not necessary to read them all, but three of them are as follows: (1) good practice in establishing the existence of the right of way; (3) the need for a site visit; and (7) was there anything to put the Defendants on notice?*

Good practice in establishing the existence of a right of way is the ordinary machinery of investigating title. That is a matter of law and not practice. It does not require to be established by an expert witness. It is also a question of law whether the purchasers solicitor was under a duty to inspect the property.

Item (7) (was there anything to put the Defendants on notice of the want of title) puts the question the wrong way round. It was the Respondent's duty to investigate the vendors' title and to satisfy themselves that they had deduced title; the presence or absence of notice is irrelevant. All these are matters of law, not practice."

33 It does not seem to me that this case is authority for the proposition that there cannot be a body of expertise in the management of investment banks from which expert evidence can emerge capable of assisting a Court considering claims for negligence arising from the management of such a bank. I will return to consider the last above quoted paragraph in Simon Brown LJ's judgment when I deal with the detailed criticisms of the contents of Mr Giannotti's report later in this judgment.

34 In **re M and R (minors)** 1996 4 AER p239 the Court of Appeal was considering the admissibility of expert evidence in a child abuse case. At page 253 of the report Butler-Sloss LJ delivering the judgment of the Court was examining a reported case where the evidence of an expert had been excluded. She said this:- *"The reason for that lay in the fact that the primary evidence did not involve technical matters (such as length of skid marks) that required expert interpretation, but simply the evaluation of eye witness accounts, on which the so-called expert had nothing to contribute that was outside the competence and experience of a layman. His evidence was inadmissible because it was not relevant. Had the evidence been relevant (i.e. going to a matter on which a layman would require instruction on the essentials of the necessary field of expertise to make a properly*

informed decision) then section 3 (of the 1972 Act) makes clear that such evidence is admissible, whether or not it goes to an issue (or even in appropriate circumstances the ultimate issue) in the litigation ...

So the passing of the Act should not operate to force the Court to, in Wigmore's words, ""waste its time in listening to superfluous and cumbersome testimony" provided that the Judge never loses sight of the central truths: namely that the ultimate decision is for him, and that all questions of relevance and weight are for him. If the expert's opinion is clearly irrelevant, he will say so. But if arguably relevant but in his view ultimately unhelpful, he can generally prevent its reception by indicating that the expert's answer to the question would carry little weight with him. The modern view is to regulate such matters by way of weight, rather than admissibility.

But when the Judge is of the opinion that the witness's expertise is still required to assist him to answer the ultimate questions (including where appropriate, creditability) then the Judge can safely and gratefully rely on such evidence, while never losing sight of the fact that the final decision is for him."

35. Another case upon which the Applicants placed substantial reliance was the decision of Mance J in **The Ardent** 1997 2 Lloyds's Law Reports Page 547 In that case the Judge was dealing with the question of whether expert evidence was admissible and required for the Court to arrive at a conclusion whether two ship brokers had acted negligently in their recommendation that the Claimant should purchase a particular second-hand tanker. At page 597 the Judge quoted from the report of an Australian criminal case, **R v Bonython** 1984 SASR p45 at page 46 where Chief Justice King is reported as saying:- *"Before admitting the opinion of a witness into evidence as expert testimony, the Judge must consider and decide two questions. The first is whether the subject matter of the opinion falls within the class of subjects upon which expert testimony is permissible. This first question may be divided into two parts: (a) whether the subject matter of the opinion is such that a person without instruction or experience in the area of knowledge or human experience would be able to form a sound judgment on the matter without the assistance of witnesses possessing special knowledge or experience in the area and (b) whether the subject matter of the opinion forms part of a body of knowledge or experience which is sufficiently organised or recognised to be accepted as a reliable body of knowledge or experience, a special acquaintance with which of the witness would render his opinion of assistance to the Court. The second question is whether the witness has acquired by study or experience sufficient knowledge of the subject to render his opinion of value in resolving the issue before the Court."*

36. Mance J then continues:- "*The issues before me do not involve questions of compliance with accepted standards of conduct laid down by any Institute or, so far as appears, by common usage. They involve questions of the reasonableness of business conduct in specific situations. The words of Mr Justice Oliver (in the* ***Midland Bank*** *case) are pertinent."*

37. The Judge then sets out the passage which I have quoted above from Oliver J's judgment. He then continues:- *"That was said in the context of litigation against a firm of solicitors and evidence given by a solicitor. It applies a fortiori where as here there is no recognised profession with established rules and standards involved. The case concerns the business activity of providing shipping advisory and management services and the suggestion is in effect that I need to hear evidence from other advisers or managers as to what they would have done hypothetically and with hindsight in the present situation. Such evidence would be bound to lead to extensive cross-examination to ascertain whether they had ever been in or had ever experienced, the situation presently under consideration. Even then it would not derive from any objectively ascertainable standard or consensus within a recognised profession."*

38. **R v Bonython** was not, of course, decided under section 3 of the 1972 Act. However the passage from the quoted extract from Chief Justice King's judgment beginning at (b) and the "***second question***", constitute a good description of what would qualify as expert evidence under that section. The passage headed (a) is a description of the Court's residual power to admit or exclude expert evidence admissible under section 3 but which is not "***relevant***" to the issue to be decided.

39. In the Ardent case itself the Bank of Kuwait case does not appear to have been cited to the Judge. In the present case the expert evidence is directed to defining standards to be observed by reasonably competent managers of a derivatives trading business, in particular, what such a manager ought to have concluded and what actions he should have taken on receiving certain information. If Mance J would have categorised this as "*the reasonableness of business conduct in specific situations*" and so excluded expert

evidence directed to recognised standards of competence for managers of such businesses, in my view and with respect, his decision would run contrary to the judgment of the Court of Appeal in the Bank of Kuwait case. That would also be the case if by the words *"profession with established rules and standards"* Mance J would have excluded managers of investment banks and, in particular, such managers overseeing derivatives trading operations.

40. It is convenient at this point to examine the decision of Judge Toulmin in **Pine Valley Food Ltd v Hall and Partners** in the Technology and Construction Court unreported, which was given on the 19th April 2000 on which reliance was placed by the Applicants. The Judge in that case heard expert evidence on project management and came to the conclusion that they provided *"little or no assistance"*. This is not, therefore, a decision that such expert evidence was not admissible under section 3 of the 1972 Act but an indication that the Judge, adopting the "***modern approach***" of **re M & R Minors** had given it no weight. If the passage at the top of page 14 of the transcript is to be read as meaning that for expert evidence to be admissible there must be a ""recognisable profession", in that case of project managers, then it seems to me that it is contrary to the decision in the Bank of Kuwait case.

41. In **re Barings plc (No. 5)** Jonathan Parker J was dealing with applications under the Company Directors Disqualification Act 1986 brought against various Barings directors. In those proceedings it was sought to adduce expert evidence of Sir John Craven to establish that Mr Tuckey's conduct had not been of a kind as would justify his disqualification under section 6 of that Act. In his judgment at page 492 of the report the Judge says this:- *"Miss Gloster submits that in the circumstances of the instant case there is no question of any professional practice or "**accepted standard of conduct**", such as might serve to bring Sir John Craven's evidence within the parameters set by Oliver J in Midland Bank. She submits that in this case the Court is not addressing the question whether the respondents conduct fell short of some accepted practice: rather, the issue is whether, in the particular circumstances of this case, they discharged their duty incompetently. She submits that Sir John Craven's opinions are irrelevant to that issue ...*

*In the **Routestone Limited** case [**Routestone Limited v Minories Finance Limited** 1997 BCC page 180 a case cited to me and to which I will return] the Plaintiff mortgagor claimed that the mortgaged property had been sold at an undervalue as a result of negligent advice given by estate agents retained by the mortgagee. An issue arose whether expert evidence was admissible on the question whether the estate agents had been guilty of an error of the kind that would not have been made by a reasonably competent estate agent professing himself to have the same standard and type of skill and acting with ordinary care. Whilst accepting, in accordance with Midland Bank, that the opinion of an expert as to what is the legal test is inadmissible, Jacob J held that the opinion of an expert on the question whether or not the test had been satisfied was admissible pursuant to section 3 of the Civil Evidence Act 1972 (the 1972 Act), although the court was not bound to accept that opinion....*

*For my part I do not read section 3 of the 1972 act as rendering relevant that which is irrelevant. Had it done so, then Oliver J's dictum in **Midland Bank** and the Court of Appeal decisions in **Bown v Gould** (to say nothing of the many other decision since **Midland Bank** in which Oliver J's dictum has been adopted and followed) would have been per incuriam. The effect of section 3, as I read it, is to render expert evidence admissible in relation to (among other things) an issue in the proceedings, but subject always to the overall requirement that the evidence is relevant to that issue. Expert evidence as to what is the legal test in any particular case must, by definition, be irrelevant, notwithstanding that there may be an issue as to that very matter. On the other hand, expert evidence on the question whether that test has been satisfied in any particular case may be relevant (e.g. if it relates to matters such as those to which Oliver J specifically referred in his dictum in **Midland Bank**). But it will not be relevant if on analysis it amounts to no more than an expression of opinion as to what the expert would himself have done in similar circumstances".*

42. Mr Justice Jonathan Parker continues at page 494:- *"I agree with Miss Gloster that Sir John Craven's opinion evidence falls foul of Oliver J's dictum in Midland Bank and of the Court of Appeal decision in Bown v Gould & Swain. In particular I agree with her that the issue in this case is not whether the conduct of the respondents fell below some accepted practice in investment banking. The question for the Court is whether the Respondents acted incompetently. With all respect to Sir John Craven, his opinions on that question are of no relevance."*

43. Mr Justice Jonathan Parker's judgment was reviewed in the Court of Appeal on appeal from his order with relation to another of the Barings directors, Mr Baker. The case in the Court of Appeal is reported at

2000 1 BCLC page 523. On the question of the admissibility of expert evidence three points were argued before the Court of Appeal the first being to the effect that the Secretary of State was unable to discharge the onus resting on him if he did not adduce expert evidence. At page 536 of the report Morritt LJ deals with that point in this way:- *"With regard to the first of them we agree with the reasoning of the Judge. The issue is not whether Mr Baker was an incompetent operator in the financial product or derivatives market. It is wrong to equate disqualification proceedings with a professional negligence claim. The standard of competence to be shown by a person as a director is a different question and is one of law. Whether the Respondent failed to achieve that standard is a question for the Court on which only exceptionally could the evidence of an expert be admissible."*

44. It is clear from the judgments of Jonathan Parker J and the Court of Appeal that expert evidence was ruled out in that case on the ground that such evidence, if directed to the standard of competence to be shown by a director was irrelevant because that was a question of law for the Court. However the passage which I have quoted from the judgment of Jonathan Parker J clearly illustrates that the test whether expert evidence in any particular case is to be received is a two stage test, the first stage being whether the evidence is admissible as "***expert evidence***" for the purposes of section 3 of the 1972 Act, and the second stage whether the Court should admit it as being relevant to any decision which the Court had to arrive at, that is, helpful to the Court for that purpose. Sir John Craven's evidence was admissible within section 3 but was not admitted because it was not relevant in that sense. It is clear also from both judgments, but in particular the judgment of Morritt LJ that the Judges contemplated that expert evidence might be relevant on the question of standards of professional competence required of Barings' directors where the Court was concerned with a claim against them for damages for professional negligence.

45. In my judgment the authorities which I have cited above establish the following propositions: expert evidence is admissible under section 3 of the Civil Evidence Act 1972 in any case where the Court accepts that there exists a recognised expertise governed by recognised standards and rules of conduct capable of influencing the Court's decision on any of the issues which it has to decide and the witness to be called satisfies the Court that he has a sufficient familiarity with and knowledge of the expertise in question to render his opinion potentially of value in resolving any of those issues. Evidence meeting this test can still be excluded by the Court if the Court takes the view that calling it will not be helpful to the Court in resolving any issue in the case justly. Such evidence will not be helpful where the issue to be decided is one of law or is otherwise one on which the Court is able to come to a fully informed decision without hearing such evidence.

46. Just as the Court of Appeal in the Bank of Kuwait case found that there was a body of expertise with recognised standards in relation to the management of lending banks, I am satisfied that, a fortiori, there is such a body of expertise with recognised standards in relation to the managers of investment banks conducting or administering the highly technical and specialised business of futures and derivatives trading.

47. It is, in my view, very significant that this is an area of commerce which is highly regulated, practitioners in which are required to be licensed by the regulator and in respect of which the regulator has prescribed standards of required competence. Some of the Barings directors have been summoned before a Disciplinary Tribunal of the Securities and Futures Authority (""the SFA") to answer disciplinary charges. I have been shown the transcript of the judgment of the Disciplinary Appeal Tribunal, presided over by Lord Bridge of Harwich, on appeal from the Disciplinary Tribunal which dealt with charges brought against Mr Baker by the SFA. The charges brought against Mr Baker were, first, that he "***failed to act with due skill, care and diligence"*** in breach of Principal 2 of the SIB's [Securities and Investment Board's] Statements of Principle in that he failed properly to understand and monitor the proprietary trading activity undertaken by BFS or to ensure that this was done, which is an act of misconduct; secondly that he ""failed to organise and control the internal affairs of the Financial Products Group" in breach of principal 9 of the SIB's Statements of Principle in that he failed to ensure that there be adequate arrangements for the proper supervision of staff and that there be well-defined compliance procedures, which is an act of misconduct; and thirdly that he ""has ceased to be fit and proper to be registered by

SFA as a director". The tribunal found the case against Mr Baker on the first count proved but dismissed counts 2 & 3.

48. At page 4 of the transcript Lord Bridge, giving the tribunal's judgment, said this about the first count:- *"The gravamen of the SFA's case in support of charge 1, to the extent that it was upheld by the Tribunal, was that the profits of the switching business, as reported to Barings in London from Singapore, between January 1994 and February 1995, was so suspiciously large that they should have alerted Mr Baker to the danger that the switching business was not being legitimately conducted and that the steps taken by Mr Baker to monitor Leeson's activities, by investigating how these profits were being generated, fell short of what was required."*

49. That passage has a familiar ring to anyone who has read the expert reports in question in this case.

50. At page 10 of the transcript, Lord Bridge says this in discussing the Tribunal's approach to the case:- *"The conclusion in each case is that Mr Baker failed adequately to investigate Leeson's conduct of the switching business. The reasoning which supports the conclusion in each case is two fold. What calls for investigation is the size of the reported profits (the first consideration), but what emphasises the need for that investigation is the fact, known to Mr Baker, that Leeson remained in charge of both the front and back office in Singapore and hence of both trading and settlement functions (the second consideration).*

51. These are again familiar matters. In expressing the reasons for the decision of the Appeal Tribunal to allow the appeal, Lord Bridge said this at page 21 of the transcript:- *"The "**profession**" practised by Mr Baker was, it seems clear, one requiring a high degree of specialisation and an exceptional expertise. How then was it to be shown that he fell short of the standard required of a reasonably competent member of that profession and that in the situation which confronted him in January 1995, any competent member of the profession would have taken steps to monitor Leeson's conduct of the switching business beyond those which Mr Baker had taken and which the Tribunal appeared to have accepted as adequate "**throughout 1994**". It was, of course, for the Tribunal to find the primary facts which confronted Mr Baker. But by what criteria were they to judge what the response should have evoked from "**reasonably competent members of the profession who had the same rank and professed the same specialisation as the defendant?**" It seems to us that such a judgment must necessarily depend on the evidence of other members of the same profession qualified to speak as witnesses having the same expertise."*

52. Before me no attempt was made to show that any of Messrs Fitzgerald, Cunningham or Giannotti did not have sufficient knowledge or familiarity with the expertise which I am satisfied exists, although I was told that an attempt may be made to do so at the trial. In the absence of any such attack, it follows, that I must treat their expert evidence as admissible within section 3 of the Civil Evidence Act 1972. The next question is whether that evidence should nonetheless be excluded at this stage. I have concluded that it should not be excluded.

53. Mr Aldous for PLC advanced a number of objections to the reports of Messrs Cunningham and Giannotti, particularly that of Mr Giannotti. His first objection was that the reports are studded with examples of the experts giving their opinions as to what conclusions the Court should arrive at on particular issues in the case including the "***ultimate issue***", namely, whether the Defendants were negligent. Particular reliance was placed on the second paragraph from the judgment of Simon Brown LJ in the Bown case which I have set out above. Reliance was also placed on the Pine Valley case on this point in which the Bank of Kuwait case was cited.

54. It seems to me that this part of Simon Brown LJ's judgment is to be treated as obiter since the conclusion of the court was that the relevant expert evidence should not be admitted because it was directed to what amounted to a point of law see the judgment of Millett LJ the relevant extract of which I have set out. If that is wrong it is inconsistent with the earlier decision of the Court of Appeal in the **GlaverBell** case to which I have referred where Staughton LJ concluded that a submission that section 3 of the 1972 Act had the effect of abrogating any rule that evidence of expert opinion should not be allowed on the very issue which the Court has to decide, was correct. In the judgment of the Court in the M & R (minors) case the following passage appears at page 249 of the report:- *"At one time it was thought that an expert witness could not give evidence of his opinion on an issue in the case, especially not when it was the ultimate issue, determinative of the case. To give such evidence was said to "**usurp the function of the jury**", a reason*

Wigmore was particularly scornful of ... first, the witness is not attempting to "usurp" the judge or jury's function--at worst he is simply offering as evidence that which is not, and second he could not usurp it if he would because no power could compel the judge or jury to accept it, and they know the decision is theirs."

55. The Court went on in the passage from the judgment which I have already quoted to agree with the conclusion of Staughton LJ. This was the conclusion of Jacob J in the **Routestone** case as recognised by Jonathan Parker J in the passage from his judgment in **Barings No. 5** which, again, I have set out. Judge Toulmin's judgment in the Pine Valley case is not consistent with this approach; see the passage at the bottom of page 12 of the transcript where the Judge deals with the **Bank of Kuwait** case. In my judgment Mr Aldous' first objection is contrary to authority

56. Mr Aldous then criticised some of the passages in Mr Giannotti's report where he summarises the background facts to the conclusions which he arrives at. He sought to demonstrate that the sources from which Mr Giannotti made his description of the facts were biased in favour of the Defendant's case and did not take account of the description of the same facts appearing in the Claimants witnesses' witness statements and other sources. Further he contended that the sources relied on by Mr Giannotti could be shown to include those which the Defendants were aware were being challenged as inadmissible by the Claimants such as extracts from the "***Carecraft statements***" given by Barings directors in the Company Directors Disqualification Act proceedings brought against them. The result, he contended, was a mistaken reconstruction of the background facts and thus an unbalanced opinion.

57. Mr Aldous' contentions as to the sources upon which Mr Giannotti based his description of the background facts were not accepted by the Defendants. It does not seem to me to be necessary for me to come to a conclusion as to whether they were justified or not. It is frequently the case that experts are instructed to give their opinion based on a statement of the relevant facts prepared by their instructing solicitor without reference to any sources. When experts come to give their evidence they may be cross-examined and in the course of that cross- examination their description of the background facts may be challenged, and if successfully challenged, the authority of their conclusions undermined. It must be borne in mind that the experts will normally be giving evidence after the conclusion of all the factual evidence in the case. The expert evidence in this case will not depart from that norm. I cannot accept these objections as justifying my striking out any part of Mr Giannotti's expert report.

58. Mr Aldous then criticised Mr Giannotti's report as being inappropriately tendentious. He said it amounted to a "***forensic exercise***". In their reports both Mr Giannotti and Mr Cunningham give their opinions as to why, in their view, certain officers and employees of the Barings companies have fallen below the standards which they consider established usage has prescribed for the functions which they were performing. On occasions they used forceful language. However the language used is hardly less forceful than that used to criticise the conduct of the Defendants officers and employees in the Claimant's expert reports on accounting practice. Mr Fitzgerald uses forceful language in criticising the conduct of Barings staff in his report but that is not criticised by the Claimants. If it emerges from the cross- examination of the Defendants experts on banking practice that the views they have expressed are overly tendentious and partisan that would go to undermine the authority of those views in the eyes of the Court. These objections are not a reason for striking out any part of the Defendant's expert reports at this stage.

59. Both Mr Aldous for PLC and Mr Brindle for BFS submitted that Mr Giannotti's opinions and those expressed by Mr Cunningham in the first part of his report were inadmissible as not being made by reference to any objective standards but were expressions of opinion based simply on their own experience as investment bankers. Mr Brindle submitted that mere assertion by an expert of the existence of particular standards is not enough. He criticised the reports on the ground that the experts, in defining a standard, did not do so by express reference to outside sources. The Defendants' response was that both reports make reference to outside sources from which particular standards can be derived. In Mr Giannotti's case appendices 5-7 of his report consist of the Derivatives Report of an Internal Working Group published by the Bank of England in April 1993, Derivatives: Practices and Principles published by the Global Derivatives Study Group of Thirty dated July 1993 and Risk Management of Financial Derivatives published by the US Office of the Controller of the Currency in October 1993.

However, it does not seem to me that it is necessary for me to decide whether such references as appear in the two reports are sufficient to meet the criticism. I accept Mr Gaisman's submission for D & T that it is not necessarily a valid objection to expert evidence that the relevant standards do not appear in some written code or codes. I agree that such a requirement is not to be found in the passage from Oliver J's judgment in the Midland Bank case which I have set out above. The very absence of a written code is, in many cases, the reason why it is necessary to call expert evidence to assist the Court as to what the accepted practices and standards established by common usage in a particular area of commerce or skill actually are. It is not insignificant, as Mr Gaisman pointed out, that the vast majority of the criticisms of the Defendants made by the Claimants' audit experts were not by reference to provisions of the accountants' SSAPs. Both Mr Giannotti and Mr Cunningham in their reports and in Mr Cunningham's case in a separate witness statement set out their intention as being to describe standards of practice and competence established by common usage amongst managers of investment banks. In the absence of cross- examination and answering reports or evidence, I am not prepared to hold at this stage that they are wrong.

60. At one stage in the argument Mr Brindle submitted that the word *"**fault**"* in section 1(1) of the Law Reform Contributory Negligence Act 1945 imported a wider concept than the tort of negligence. Thus, he suggested, a number of matters, not specifically negligent, might be taken into account in pursuing a defence of contributory negligence. Thus, he said, expert evidence was not appropriate to be called. I am not sure that I thoroughly followed this contention. In any event the contention seems to be inconsistent with the passage in the 18th edition of Clerk & Lindsell on Torts at paragraph 3-23. It is also to be observed that the issue on expert evidence which arose in the Bank of Kuwait case arose in relation to a plea of contributory negligence.

61. Finally Mr Aldous for PLC drew attention to the burden that the Claimants would face in answering the expert evidence in question. He said this was particularly so because since Mr Giannotti's report was based on the "***Schedule of management failings***" contained in 10 lever- arch files of documents. It would be necessary for the Claimants to go through those files and answer each allegation separately by reference to that and other material. I can see no reason why answering these experts reports should be especially burdensome to the Claimants or to BSJ. Those parties must, by now, know what their case is on the facts. If they do not accept the description of the facts contained in the Defendant's expert reports and it is necessary to correct them in order to complete answering reports, all they need do is to set out their cases on the facts without necessarily referring to any sources. The reports of experts may summarise the facts as seen through the eyes of a party but they cannot constitute proof of the facts there summarised.

62. As to the points of principle dealt with in this judgment I do not understand the criticisms by BSJ of the reports of Mr Cunningham and Mr Fitzgerald to extend beyond those which have been made by the Claimants. It is BSJ's contention that because Mr Cunningham's report in its first part is directed to the role of "***senior management***" only and the individuals whose conduct is criticised in that part of the report, who were officers or employees of BSJ, were not senior management as defined in the report, then Mr Cunningham's report cannot support a case against BSJ of negligence. This is not accepted by D & T. In any case it does not seem to me to afford a ground for striking out any part of Mr Cunningham's report at this stage.

63. These are the reasons upon which I came to the view that this application should be dismissed.

Charles Aldous QC/Rhodri Davies QC (instructed by Slaughter & May for PLC)
Michael Brindle QC/Craig Orr (instructed by Ashurst Morris Crisp for BFS)
David Garland (instructed by Lovell White Durrant for BSJ)
Jonathan Gaisman QC/Christopher Butcher/David Bailey (instructed by Clifford Chance for D & T)
Mark Howard QC/John Lockey (instructed by Barlow Lyde & Gilbert for C & LL)
Richard Field QC/ James Aldridge (instructed by Herbert Smith for C & LS)