CA on appeal from Commercial Court (Mr Justice Cresswell) before Aldous LJ; Ward LJ; Sir Anthony Evans. 27th July 2000.

SIR ANTHONY EVANS:

Background

1. Shipowners PNSC issued a bill of lading which to their knowledge gave a false shipment date. They knew also that the date stated in the bill of lading would or might be relied upon as the date of actual shipment by banks or other persons to whom the bill of lading might be presented under a letter of credit transaction, against payment for the goods.

2. That is what occurred. Mr Mehra on behalf of his company Oakprime presented the falsely antedated bill of lading to London bankers, SCB, under a Letter of Credit issued by Incombank of Vietnam and confirmed by SCB. SCB relied upon the bill of lading date as being accurate, and it follows that PNSC are liable to them in damages for the tort of deceit in respect of any loss they suffered in consequence of doing so: ***Brown Jenkinson v. Percy Dalton (London) Ltd.*** [1957] 2 Q.B. 621.

3. But that was not the whole story. The shipping documents included not only the bill of lading, but also Survey Certificates which were not presented to SCB until after the letter of credit expired. So they were not obliged to pay the amount of the credit to Oakprime, and it was outside the scope of their authority from the issuing bank, Incombank, to do so.

4. The usual course for the confirming bank to take in these circumstances is to inform the issuing bank of the late presentation and to request its instructions before making any payment to its customer, by whom the documents are presented. If it chooses to make the payment without obtaining the issuing bank's authority, then it does so as a volunteer, between itself and the customer, and the issuing bank is not obliged to indemnify it.

5. In the present case, SCB chose to make the payment and, as we have found (see ***Standard Chartered Bank v Pakistan National Shipping Corporation (No. 2)*** [2000] 1 Ll. LR) 218, they claimed repayment from Incombank on the basis of a false statement that the documents were presented to them in time. Had Incombank paid them the indemnity which they claimed, then they would have been liable to Incombank to repay the amount as damages for deceit, when the true facts as to late presentation were discovered.

6. That situation never arose, because Incombank refused payment on the distinct ground that the documents presented did not conform with the terms of the credit, a fact which SCB, probably negligently, failed to notice.

7. So SCB are out of pocket, and they claim their loss as damages from PNSC, as having been caused by the false statement in the bill of lading (and elsewhere) as to the shipping date. But they would never have made the payment to Oakprime if they had not believed that they would be indemnified by Incombank, and it was in order to maintain that claim for an indemnity that they falsely concealed the fact of late presentation from them.

8. In these circumstances, as we have held, SCB's decision to claim an indemnity on this false basis was a cause of the loss which they suffered in consequence of making the payment to Oakprime and failing to recover the indemnity from Incombank.

9. Because Incombank rejected the documents on other grounds and made no payment to SCB, they never sought to hold SCB liable. Had they done so, relying on SCB's representation that the documents were presented timeously under the letter of credit, they would have been entitled to recover the amount as damages for the tort of deceit. This is not to say that Incombank did not rely upon the representation, because presumably their checkers accepted that the documents were presented in time. If they had not done so, they were entitled to reject the documents on that ground alone. If further enquiries had been made, the falsity of the shipment date would probably have been discovered.

10. Instead, there was correspondence between Incombank and SCB regarding other discrepancies, which led to the ultimate rejection of the documents. So it is arguable that Incombank did rely upon SCB's representation and did suffer some small expenses in consequence of doing so. But it is sufficient for present purposes, in my opinion, that SCB's conduct towards Incombank was unlawful and was a contributory cause of their own losses, which they now seek to recover in full from PNSC.

The Issue

11. The issue therefore is whether the claim, which is admitted by PNSC, should be reduced to take account of SCB's partial responsibility for its own loss. Apportionment was never viewed favourably by the common law, one reason being that the substantive right to recover damages was constrained by the straitjacket of pleading and other procedural rules that continued until the Judicature Acts 1873-5. Even after those Acts were passed, there remained two rules which are directly relevant for present purposes. First, the claimant could not recover damages for loss which was even partly caused by his own fault, even if the loss was otherwise caused by the defendant's breach of duty towards him. This rule was abrogated by the Law Reform (Contributory Negligence) Act 1945, but not before artificial rules of causation were devised in order to ameliorate the injustice which the rule could cause for claimants. The best-known example of this strained approach was the "*last opportunity*" rule ascribed to ***Davies v. Mann*** (1842) 10 M & W 546. By providing for the apportionment of loss in such circumstances, the 1945 Act made such artificial rules unnecessary, and the Courts were enabled to adopt a more common-sense approach towards issues of causation generally.

12. The second rule which is directly relevant in the present case is now exemplified by the House of Lords' decision in ***Tinsley v. Milligan*** [1994] 1 A.C. 340. PNSC relied upon this rule in its defence, arguing that SCB were disqualified from recovering damages by reason of their own unlawful conduct which had caused or contributed towards their loss. As we have held, the defence fails, because its scope is limited to cases where the claimant has to assert and rely upon his own unlawful conduct in order to establish his claim against the defendant (the so-called "*reliance principle*"). This limitation of the rule presents possible injustice where an injured claimant might be disqualified from recovering damages by reason of some illegal conduct of his own which was not causative of his loss. The modern rule however is still of the all-or-nothing kind. The claimant either recovers damages in full or is disqualified by reason of his own misconduct and recovers nothing.

13. It should be noted at this point that the origins of the ***Tinsley v. Milligan*** line of authorities lie in considerations of public policy which are distinct from the question of the desirability or otherwise of the Court being able to apportion loss to which the claimant as well as the defendant has contributed. The Court should not be seen to recognise or approve illegal behaviour, and there is no injustice in refusing to exercise the Court's powers in favour of such a claimant, even against a defendant who would otherwise be held liable towards him.

14. The present case exposes, in unusual circumstances, a different situation. On our findings, the claimant's (SCB's) unlawful conduct does not disqualify him under the rule in ***Tinsley v. Milligan***, but it was a contributory cause of the loss which he seeks to recover from the defendants, PNSC. If both parties were negligent and no more, the 1945 Act would permit and require an apportionment of damages. Does it apply in the present case?

15. In deference to the detailed submissions we have received from both parties, I shall attempt a brief historical survey of the Court's power to reduce damages which is found in the Law Reform (Contributory Negligence) Act 1945.

Before 1945 - common law and admiralty

16. Reported cases show the Courts grappling with problems of causation when accidents occurred, both on land and at sea. It was recognised in both jurisdictions, common law and admiralty, that the law was concerned with direct or immediate, rather than remote, causes, and that there could be cases where there was not one cause, but two. Both the injured claimant and the defendant from whom he sought to recover damages could be regarded as having caused or contributed towards his loss. In such cases, the Admiralty Court apportioned liability between the parties, but the common law rule was that the claim failed. It was sufficient to disentitle the claimant that he was the part-author of his own misfortune. This rule was commonly ascribed to the judgment of the Court of King's Bench in ***Butterfield v. Forrester*** (1809) 11 East 60. It led to the supposed rule of "*last opportunity*" attributed to *Davies v. Mann* (above) which was devised in order to prevent the common law rule from producing an unjust result. It was, in fact, no more than a test of causation, and a fallacious one at that (per Denning L.J. in ***Davies v. Swan Motor Co. (Swansea) Ltd.*** [1949] 2 K.B. 291). The unsatisfactory nature of the rule was expounded by Lindley L.J. in ***The Bernina*** (1887) 12 P.D. 58 at 89 (affirmed by the House of Lords (1888) 13 App. Cas. 1).

Eighth Report of the Law Revision Committee (June 1939 Cmd. 6032)

17. The Committee's members who were of the utmost distinction recommended that the common law rule should be abolished and the common law assimilated to that of the Court of Admiralty. Their Report was concerned almost exclusively with the common law and with the parties' negligence, which effectively was treated as being synonymous with fault. There was no reference to breach of statutory duty either as a ground of liability or as giving rise to the defence of contributory negligence, and the only references to statutory liabilities were in a different context (pages 18-19). The Report did not contain a draft statute. As regards torts other than negligence, it said only the following -

    "Negligence may be either an independent tort, or one of the possible modes in which other torts may be committed e.g. it is possible to commit trespass or defamation negligently as well as intentionally. In some of these torts, e.g. certain trespasses to land and to goods and to defamation, it is immaterial whether the tort be committed intentionally or negligently, and in such cases contributory negligence would be impossible as a defence; but in others e.g. accidental harm arising from trespasses on or from the highway, negligence is relevant and, consequently, so is contributory negligence.

    There seems to be no reason why apportionment should not be allowed in all torts in which contributory negligence is a relevant defence" (page 18).

18. Finally, the Report referred in passing to the "*somewhat similar*" common law rule that no contribution could be allowed between tortfeasors, which was abrogated by the Law Reform (Married Women and Tortfeasors) Act 1935 (now the Civil Liability (Contribution) Act 1978).

The 1945 Act

19. The common law rule identified by the Committee was abolished by section 1(1). Instead, the Court is required to *reduce the claimant's damages in cases where previously the claim was dismissed* -

    "1(1) Where any person suffers damage as the result partly of his own fault and partly of the fault of any other person or persons, a claim in respect of that damage shall not be defeated by reason of the fault of the person suffering the damage, but the damages recoverable in respect thereof shall be reduced to such extent as the Court thinks just and equitable having regard to the claimant's share in the responsibility for the damage."

20. The word "*fault*" appears twice in the sub-section, once in relation to the claimant and once to the defendant. A compendious definition is given in section 4.*"**fault**' means negligence, breach of statutory duty or other act or omission which gives rise to a liability in tort or would, apart from this Act, give rise to the defence of contributory negligence."*

21. Three points may be noted. First, the legal rules as to causation were not changed. They were the same at common law and in Admiralty (Report page 14). Secondly, the basis for reducing damages was the claimant's share in the responsibility for his loss. This reflects the Committee's emphasis on causation in its discussion of the authorities. Thirdly, the definition of *"fault"* includes express references to "*breach of statutory duty*" and to *"liability in tort"* which show that the statutory definition is wider than the terms of the Report.

Joint Torts and Contributory Negligence (1949)

22. Professor Glanville Williams' celebrated monograph appeared in 1949. He drew attention both to the passage, quoted above, in which the Committee referred to torts other than negligence, describing it, respectfully, as "not very lucid" and one which "invites a good deal of discussion" (page 197). He similarly described the statutory definition of fault as "not very elegant" (page 318), for it becomes necessary to decide whether the whole or only parts of the definition apply to the claimant's and the defendant's conduct respectively. In this he was prescient of the considerable amount of judicial and academic debate which has followed.

23. Both parties in the present case rely upon passages from Professor Glanville Williams' book. At pages 197 and following he discusses the availability of the defence of contributory negligence when the tort committed by the defendant involves or may involve intentional as distinct from negligent conduct, including the tort of deceit (pages 198-9) Citing Lord Lindley in ***Quinn v. Leathem*** [1901] A.C. 495 at 537, the author says -

    "As the law now stands, if the consequences of which the plaintiff complains were intended by the defendant, contributory negligence is out of the case" (page 318)."

    He attributes this exclusion of the defence to reasons of policy (to repress flagrantly wrongful conduct) and to *"the ordinary human feeling that the defendant's wrongful intention so outweighs the plaintiff's wrongful negligence as to efface it altogether"* (ibid).

24. With regard to the tort of deceit, he describes the rule as an *"apparent, but not an actual, example of the same principle"*. The rule is that *"it is no defence in deceit, which is generally a tort of wrongful intention [but may be reckless], that the defendant was unusually gullible, or carelessly omitted to verify the statements*" (page 198). He points out, however, that the same rule applies in cases of innocent misrepresentation. It cannot, therefore, depend upon intentional wrongdoing. Rather, the basis is that the defendant, who made a representation intending that the claimant should rely upon it, cannot say that the claimant was not entitled to do so, without further inquiry. If he takes the statement at its face value, he cannot be said to have been "*guilty of culpable disregard of his own interests*" (page 199).

25. The appellants rely on the following sentence in this section of the book -"*Although contributory negligence is ruled out of Court in an action for original intention on the part of the defendant, contributory intention should be a defence"* (page 199).

Post 1945 authorities

26. The House of Lords has held that damages should be reduced under the Act when the plaintiff's injuries were caused by breaches of statutory duty, both by the plaintiff and the defendant, though neither was negligent: ***Boyle v. Kodak*** [1969] 2 All E.R. 439. It has held, very recently, that the defence of contributory negligence was available to the defendants in an action brought by representatives of a prisoner who committed suicide whilst in their care: ***Reeves v. Commissioner of Police*** [1999] 3 All E.R. 897. The defendants were in breach of their duty to safeguard him from injury: the prisoner's act, although intentional and although he was of sound mind, was within the definition of "fault" for the purposes of the Act.

27. In the Court of Appeal, Lord Denning M.R. held in ***Froom v. Butcher*** [1976] 1 Q.B. 286 that the defence is available when the severity of the claimant's injuries sustained in a road accident was increased by his failure to wear a seatbelt, notwithstanding that the failure did not cause or contribute to the accident (see page 292G), and he stated in ***Murphy v. Culhane*** [1977] 1 Q.B. 94 that the damages might be reduced under the Act when an action claiming damages for unlawful assault was brought by the personal representatives of a man who died as the result of an attack in the course of a fight. The defendant alleged that the attack took place during a criminal affray which was initiated by the deceased person. Lord Denning distinguished two earlier decisions on the ground that "*in the present case the conduct of the deceased man may well have been such as to make him liable in tort"* (page 99B).

28. There have been three decisions at first instance where judges have held that the defence of contributory negligence is not available to a defendant who is liable for so-called "*intentional"* torts: ***Alliance & Leicester Building Society v. Edgestop*** [1993] 1 WLR 1462 (Mummery, J.) (deceit), ***Corp. Nacional etc. v. Sogemin Metals*** [1997] 1 W.L.R. 1396 (Carnwath J.) (conspiracy and bribery), and ***Nationwide B.S. v. Thimbleby*** [1999] Ll. L.R. 359 (Blackburne, J.) (deceit) (where the point was conceded by the defendant: p.17). These judgments, which are relied upon as direct authority by counsel for SCB, will be referred to further below.

29. Although not directly relevant in the present case, reference should also be made to judgments of high authority on the question whether the defence of contributory negligence can be raised in actions based on contract. Differing answers have been given by the House of Lords in ***Fors. Vesta v. Butcher*** [1989] A.C. 879 and by the High Court of Australia in ***Astley v. Austrust*** [1999] 73 AJLR 403. These judgments are relevant to the construction of the statutory definition of "fault" in section 4 of the 1945 Act. The construction issue is raised in the present case, but since ultimately in my view it is unnecessary to decide it I shall state and consider it shortly here.

Construction issue

30. This arises because the single definition of *"fault"* in section 4 has to serve both occasions on which the word appears in section 1(1), first in relation to the claimant's conduct and secondly in relation to the defendant's.

31. The concluding words "*or would, apart from this Act, give rise to the defence of contributory negligence*" can only refer to the conduct of the claimant. This phrase has come to be known as the second part of the definition, and on any view of the matter separate consideration has to be given to the question whether PNSC can raise the defence in the circumstances of this case.

32. The preceding words, or the first part of the definition, begin with "negligence" and "breach of statutory duty". These words, followed by "*or other act or omission which gives rise to a liability in tort*", clearly refer to "*fault"* of the defendant, meaning the conduct which makes him liable to the claimant. But it is unclear whether they also refer to the conduct of the claimant. If they do, then "*negligence"* and "*breach of statutory duty*" (neither of which is relevant in the present case) amount to "*fault"* of the claimant for the purposes of section 1(1), and it is unnecessary to inquire further whether the second part of the definition also applies. Equally, "*other act or omission which gives rise to a liability in tort",* if it defines fault by the claimant, makes further inquiry unnecessary. PNSC submits that SCB's conduct gave rise to a liability in tort, meaning a potential claim against it by Incombank. SCB replies inter alia that the liability referred to in the definition must be towards the defendant. But SCB's primary contention is that these words in the first part of the definition have no application to the fault of the claimant, so that PNSC must show that the defence of contributory negligence is available to it, apart from the Act, under the second part of the clause.

33. Professor Glanville Williams' view in 1949 was that there are in reality two definitions, one in relation to original [defendant's] fault and one in relation to contributory fault. As applied to the issue of original fault, the definition is presumably to be read as "*negligence, breach of statutory duty or other act or omission which gives rise to a liability in tort"*. As applied to the issue of contributory fault, it is presumably to be read as "*negligence, breach of statutory duty or other act or omission which ... would, apart from this Act, give rise to the defence of contributory negligence"* (page 318).

34. This is in substance the position which has been arrived at in the English authorities. In *Reeves v. Commissioner of Police for the Metropolis* (above) Lord Hope referred to two New Zealand judgments (***Rowe v. Turner Hopkins & Partners*** [1980] 2 NZLR 550 per Prichard J. at 555, approved by O'Connor L.J. in England in ***Fors. Vesta v. Butcher*** [1989] A.C. 852 at 866, and ***Mouat v. Clark Boyce*** [1992] 2 NZLR 559 per Cooke P. at 564-5), where differing views were expressed as to the meaning of the first limb of the definition, but he continued -

"But [Cooke P.] did not disagree with the underlying analysis, which makes it clear that the question whether the deceased was at fault in this case must be considered with reference to the words used to describe the second limb" (915g).

I shall therefore adopt the same approach in the present case. The issue is whether SCB's conduct was such as to give rise to the defence of contributory negligence, "apart from the Act".

Submissions

35. These are best expressed in terms of the issues which are raised -

(1) Does intentional or reckless, as opposed to negligent, misconduct give rise to the defence of contributory negligence at common law?

(2) Is the defence available when the defendant is liable for the tort of deceit, which SCB submits is a tort of intention rather than negligence, so that the defence is excluded under the authority of ***Redgrave v. Hurd*** (1881) 20 Ch.D. 1 and ***Edgington v. Fitzmaurice*** (188r) 29 Ch.D. 459. The judgments in those cases established that a defendant who intended that the claimant should rely on the statement which he made to him cannot contend that the claimant was careless in failing to check the accuracy of the statement. PNSC responds that these authorities do not exclude the defence of contributory negligence when the claimant's loss was partly caused by his own fault in another, independent respect.

Conclusion

36. As regards the first issue, I would hold that intentional or reckless misconduct, as well as negligence, may give rise to the defence of contributory negligence at common law. This was the view expressed by Professor Glanville Williams and it has now been upheld by the House of Lords in ***Reeves v. Commissioner of Police of the Metropolis*** (see especially the speech of Lord Hoffman at 903-4). The respondents argue that the 1945 Act, like the Law Revision Committee's Report, was concerned only with negligence as fault, extended to include breach of statutory duty which is regarded as "*akin to negligence*" (cf. ***Caswell v. Powell Duffryn Associated Collieries Ltd.*** [1940] A.C. 152). I would reject this argument. The scope of the Act clearly is wider than that of the Report, as I have noted above, and in any event it should be interpreted in a common-sense way: per Lords Hoffman and Jauncey in ***Reeves,*** at pages 904j and 910h respectively. In the words of the former, "*the 1945 Act provides the means of reflecting this division of responsibility in the award of damages*".

37. The second issue is whether ***Redgrave v. Hurd*** is authority for a rule of law that contributory negligence (or intention) can never be a defence in a claim for damages for the tort of deceit. As I read it, the judgment of Mummery J. in ***Alliance & Leicester v. Edgestop*** does not go so far as this. Rather, it followed ***Redgrave v. Hurd*** in a case where the defendant alleged that the claimant was at fault in relying on the representation he had made (see the commentary by A.J. Oakley [1994] Cambridge L.J. 218).

38. Mummery J. also made the further point that, if the defence was available to the tort of deceit, then before 1945 an innocent though negligent claimant would have failed altogether against a fraudulent defendant, even when his own share of the responsibility was small. But this would only apply in cases where the claimant was negligent in some way other than failing to check the accuracy of the defendant's statement, which under ***Redgrave v. Hurd*** he was not required to do, and such cases (as the dearth of authority illustrates) are rare. Moreover, where the claimant was himself deceitful, even towards a third party, the comment loses some of its force, and in any event any residual unfairness was due to the nature of the common law rule, which the Committee itself recognised.

39. It is unnecessary for me to set out the passages from the judgments in ***Redgrave v. Hurd*** and ***Edgington v. Fitzmaurice*** which lead to the proposition I have stated above, namely, that the defendant who is liable for the tort of deceit cannot contend that the claimant was at fault in failing to check the accuracy of his statement, even when a prudent and careful man would or might have done so. As Professor Glanville Williams pointed out, the same rule applies in cases of innocent misrepresentation. In my judgment, these authorities do not compel the conclusion that the defence of contributory negligence is never available to a defendant who is liable in deceit. The claimant's fault, however, must be independent of his reaction to the defendant's statement. He is entitled to rely on the accuracy of the statement, if the defendant intended that he should. It does not follow from this, however, that he should recover full damages when his own independent fault, intentional or negligent, has partly caused his loss and it is just and equitable that the damages should be reduced.

40. The respondents rely also on the passage from the Report which I have quoted above, where the availability of the defence in cases of intentional torts was discussed, including Lord Lindley's dictum in ***Quinn v. Leathem*** "*The intention to injure the plaintiff negatives all excuses*" ([1901] A.C. at 537). I do not think that this statement can be applied, without asking what the relevant intention was. The only intention alleged against the defendant in the tort of deceit is that he intended that his statement should be relied upon. And even where there was an intention to cause physical injury, the defence of contributory negligence may be available to a defendant charged with assault (***Murphy v. Culhone*** above). That is because the Act on its true construction may apply, even in such a case. But, however that may be, Lord Lindley's dictum does not preclude the operation of the Act in a case where the claimant's fault was both partly causative of his loss and wholly independent of the reliance he placed on the correctness of the defendant's representation to him.

41. For these reasons, I would hold that the defence of contributory negligence is available to PNSC in the present case. The conclusion is supported, in my opinion, by the judgments in ***Downs v. Chappell*** [1997] 1 WLR 426 where the Court of Appeal held that a fraudulent defendant may recover a contribution from a negligent co-defendant, jointly liable for the same loss (described as a "*somewhat similar*" situation by the Law Revision Committee; Report page 4), and in ***Gran Gelato v. Richcliff*** [1992] Ch. 560 where Lord Nicholls as Vice-Chancellor applied the 1945 Act to reduce damages claimed under section 2(1) of the Misrepresentation Act 1967 where the defendant was liable as if the misrepresentation, which was innocent, was made fraudulently.

42. Further justification is found, in my opinion, in the judgment of the House of Lords in ***Smith New Court v. Citibank*** [1997] A.C. 254. This upheld the rule that a stricter test of causation applies when the defendant has been deceitful, rather than negligent. He may be held liable for all losses suffered by the claimant, including any that would not have occurred "but for" the defendant's fraud. He thus becomes liable to restore the claimant financially to the position he was in when the false statement was made (cf. ***Swindle v. Harrison*** [1997] 4 All E.R. 705). The policy reasons and moral underpinning for this rule were explained by Lord Steyn at page 280, including its deterrent effect. When the claimant himself has been deceitful he cannot claim this moral high ground, in relation to his own conduct unconnected with the truth or otherwise of the statement made by the defendant.

Apportionment

43. PNSC cannot deny, in my judgment, that the misstatement in the bill of lading, that the full cargo was loaded by the date when the bill was issued, when it was not, was by far the major cause of the losses which SCB suffered. Without that misstatement, no bill would have been issued, no documents presented and no payment requested and made under the credit. Both SCB and Incombank relied upon that statement, as they were entitled to do. In the words of the Act, PNSC's share of the responsibility for SCB's loss must be measured accordingly.

44. SCB's own fault, however, was entirely independent of the truth or otherwise of the bill of lading statement. If it had checked the documents carefully, it would have detected the discrepancies which led Incombank to refuse payment. It would not have made the payment to Oakprime, without first obtaining express instructions from Incombank. Above all, its decision to conceal the fact of late presentation from Incombank, and even to misrepresent that the documents were presented in time, was entirely independent of the bill of lading date. Again, if SCB had not sought to deceive Incombank, as it succeeded in doing, it would not have made any payment to Oakprime; and no loss would have been suffered. SCB's share in the responsibility, in my judgment, was substantial though not equal with that of PNSC.

45. SCB submits that the fault for which it is liable was the error or misconduct of relatively junior employees, whereas PNSC's conduct was dishonest and at the highest level. I can accept that these are material factors, but there is an unanswered question as to whether the practice of overlooking late presentation in the supposed interests of maritime trade was approved or even inaugurated by more senior employees (cf. paragraph 32 of my earlier judgment). I would make little allowance on this ground.

46. The Act requires a reduction in the amount of damages which is no more than just and equitable having regard to the claimant's own share in the responsibility for the damage. Taking account both of the deception of Incombank and SCB's negligence in failing to note the discrepancies which entitled Incombank to refuse payment, I would reduce the damages by 25 per cent.

47. To that extent, I would allow the appeal by PNSC accordingly.

Mr Mehra

48. Counsel for Mr Mehra adopted PNSC's submissions on this issue and made no separate submissions of their own. No formal order is called for in his case, and we have not heard submissions as to what reduction, if any, might be appropriate if SCB obtained judgment against him.

ALDOUS LJ:

49. In the judgments of this Court of 3rd December 1999, the conclusion reached by Cresswell J that the Standard Chartered Bank (SCB) had established a good cause of action against Pakistan National Shipping Corporation (PNSC) was upheld. It was noted that SCB had made false statements to Incombank as a result of negligent acts of SCB's employees. Those false statements were not actionable at the suit of Incombank as they had refused payment because of certain discrepancies and therefore had not relied upon the statements to their detriment. PNSC, however, submitted that the attempted deception of Incombank by SCB was a relevant factor in determining whether PNSC should be liable to pay the full amount of damages claimed. They contended that the court could and should reduce the amount payable pursuant to section 1 of the Law Reform (Contributory Negligence) Act 1945. That issue was left to be argued after judgment.

50. The background to the 1945 Act was succinctly set out in the eighth report of the Law Revision Committee, Cmd. 6032 of June 1939. The report said at page 4:

"... the Admiralty Rule differed from the old Common Law Rule under which if the fault of each party contributed to an accident neither party could recover from the other (however little the one and however greatly the other was to blame) for the damage which was done, provided always that there was negligence on the part of both which to some appreciable extent could be said to be a cause of that damage.

The Common Law Rule has often been criticized; perhaps the best known example is contained in the judgment of Lindley, L.J. in ***The Bernina****, (1887) 12 P.D. 58. at p. 89, where he says,* ***"But why in such a case the damages should not be apportioned, I do not profess to understand."***

Whatever its shortcomings the Common Law Rule has long been established and its origins are to be found in the historical development of the English Law. Until comparatively recent times the question which arose when a plaintiff sued a defendant was not ***"Has the defendant broken any duty which he owed to the plaintiff?"*** *but* ***"Has the plaintiff any form of action against the defendant, and if so what form?".*** *Most forms of action in tort began in trespass and developed through trespass on the case and an action on the case. To such a writ the proper plea in the defence was* ***"not guilty"****. Under such a plea the defendant must be found guilty or not guilty; it was not possible for him to be partly guilty and partly not guilty, and therefore there was no method by which liability could be divided between plaintiff and defendant. It was all or nothing - the plaintiff must wholly succeed or wholly fail."*

51. A somewhat similar approach was applied in respect of tortfeasors until the passing of the Law Reform (Married Women and Tortfeasors) Act 1935. Thus until the passing of the 1945 Act, contributory negligence remained a complete defence to an action in tort. It was immaterial that the fault of the claimant was slight and that of the defendant great. The 1945 Act remedied that injustice by allowing the courts to reduce the claimant's damages. Section 1(1) provided:

"Where any person suffers damage as the result partly of his own fault and partly of the fault of any other person or persons, a claim in respect of that damage shall not be defeated by reason of the fault of the person suffering the damage, but the damages recoverable in respect thereof shall be reduced to such extent as the court thinks just and equitable having regard to the claimant's share in the responsibility for the damage:

Provided that -

(a) this subsection shall not operate to defeat any defence arising under a contract;

(b) where any contract or enactment providing for the limitation of liability is applicable to the claim, the amount of damages recoverable by the claimant by virtue of this subsection shall not exceed the maximum limit so applicable."

52. The word "fault" was defined in section 4 as follows: *"**'fault'** means negligence, breach of statutory duty or other act or omission which gives rise to a liability in tort or would, apart from this Act, give rise to the defence of contributory negligence."*

53. The definition of fault in section 4 has given rise to considerable discussion as it has two limbs. Fault is defined as:

(a) negligence, breach of statutory duty or other act or omission which gives to a liability in tort (the first limb);

(b) negligence, breach of statutory duty or other act or omission which gives rise to the defence of contributory negligence (the second limb).

54. Mr Young QC, counsel for PNSC, submitted that the words "*which give rise to a liability in tort*" in the first limb, only qualified the words "*or other act or omission*". Thus the first limb covered the attempted deceit resulting from the negligence of SCB's employees, even though the deceitful statements were not actionable. I reject that submission as being contrary to the natural meaning of the words of the definition. They require that the

negligence, breach of duty or other act or omission be actionable. That is, I believe, the accepted view in this country. Professor Glanville Williams in his book *Joint Torts and Contributory Negligence* (1951) drew attention to the fact that the word "*fault*" appeared twice in section 1. He said at page 318, section 76:

"Reading this definition back into s. 1(1), it will be seen that the word 'fault' is there twice used. Where it first occurs it refers to the fault of the plaintiff or the other claimant (contributory fault). Where it occurs the second time it refers to the defendant's fault (conveniently called original fault). In the first context it refers to a matter of defence, in the second to the issue of liability. The above definition attempts to provide for both these diverse cases in the same sentence. The result is not very elegant, for it is clear that the whole definition cannot apply to the original fault. Were the whole definition to apply to the original fault, it would mean that an action could now be brought for damages for a fault that at common law would not have given rise to liability but merely to the defence of contributory negligence. Since contributory negligence did not at common law presuppose a duty of care, the result of this construction would be to allow an action for damages for a fault that would not at common law have been a breach of a duty of care. It would, in short, allow an action for damages for contributory negligence. It cannot be supposed that this was the intention of the Act. The method of avoiding such a consequence is to hold that the definition of 'fault' is in reality two definitions, one in relation to the original fault and one in relation to contributory fault. As applied to the issue of original fault, the definition is presumably to be read as 'negligence, breach of statutory duty or other act or omission which gives rise to a liability in tort. As applied to the issue of contributory fault, it is presumably to be read as 'negligence, breach of statutory duty or other act or omission which .... would, apart from this Act, give rise to the defence of contributory negligence'."

55. A similar view was expressed by O'Connor LJ in ***Forsikringsaktieselskapet Vesta v Butcher and others*** [1989] AC 852 at page 862:

*"The opening words of section 1(1) are very wide: **"Where any person suffers damage as a result partly of his own fault and partly of the fault of another person or persons ...."** When considering the **"fault of any other person or persons"** it is the first part of the definition in section 4 that applies: **"negligence, breach of statutory duty or other act or omission which gives rise to a liability in tort**." In my judgment the phrase "which **gives rise to a liability in tort**" defines the kind or type of negligence etc. which is to rank as **"fault"** when considering **"the fault of any other person or persons**."*

When considering the fault of the person who suffers damage both parts of the definition apply. The second part is necessary because, whereas the defendant cannot be at fault unless in breach of duty owed to the plaintiff, the plaintiff's contributory negligence may or may not involve a breach of duty owed to the defendant. Thus the drivers of two motor cars which collide at crossroads because both failed to keep a good look out are both within the first part of the definition, regardless of which is plaintiff and which defendant. In contrast, the injured front seat passenger not wearing a seat belt is at fault only within the second part of the definition (at all events vis-à-vis the driver of the car in which he was not a passenger; I say that lest it be suggested that he owed a duty to his own driver not to damage the windscreen).

I appreciate that, when considering the fault of the plaintiff, if the fault is within the first part of the definition it will also be within the second part."

56. O'Connor LJ went on to cite with approval this passage of a judgment of Pritchard J in ***Rowe v Turner Hopkins and Partners*** [1980] 2 NZLR 550:

*"To my mind, the Act provides its own interpretation if it is acceptable to regard the definition of 'fault' in section 2 as comprising two limbs - the first referable to the defendant's conduct, the second to the plaintiff's conduct. Section 2 defines **'fault'** as meaning **'negligence, breach of statutory duty, or other act or omission which gives rise to a liability in tort' (**the first limb). It then goes on to include any act or omission which **'would, apart from this Act, give rise to the defence of contributory negligence'** (the second limb). In my view, the first limb of the definition is plainly directed to defining 'fault', as it relates to the conduct of the defendant - in other words, as it relates to the plaintiff's cause of action. This phrase is qualified by the expression **'which gives rise to a liability in tort'**. It follows that no negligence, breach of statutory duty and no other act or omission of the defendant will bring section 3(1) into play unless it is one which gives rise to liability in tort. In other words, the Act applies only when the plaintiff's cause of action is in respect of some act or omission for which the defendant is liable in tort. Conceivably, the defendant may be concurrently liable in contract - but that is immaterial - the sine qua non is conduct creating liability in tort.*

The second limb of the definition is concerned with and is referable only to the conduct of the plaintiff. It relates not to any cause of action but to conduct which, prior to the Act, would give rise to the defence of contributory negligence and which is now to be regarded as that conduct on the part of a plaintiff which will lead not to a complete defence but to a reduction in damages. Before the enactment of the Contributory Negligence Act, the defence of contributory negligence was a complete defence in tort: it was not a defence in contract - where the issue was more likely to be simply causation.

I therefore conclude in the absence of any clear authority to the contrary, that the first limb of the definition of section 2 determines the meaning of the word 'fault' as it relates to the plaintiff's cause of action: that accordingly, the Contributory Negligence Act cannot apply unless the cause of action is founded on some act or omission on the part of the defendant which gives rise to liability in tort: that if the defendant's conduct meets that criterion, the Act can apply - whether or not the same conduct is also actionable in contract. By the same token - the second limb of the definition means simply and logically that no act or omission of the plaintiff will entitle the defendant to a reduction of damages unless it amounts to the sort of conduct which, prior to the enactment of the Contributory Negligence Act, would have afforded a defence of contributory negligence."

57. Mr Young accepted that SCB had not committed any negligent act or other act or omission which gave rise to a liability in tort. It follows from my rejection of his construction of the first limb that PNSC's claim for a reduction of the damages payable must depend upon establishing that SCB's acts, which can be termed deceitful, gave *"rise to the defence of contributory negligence"*. He submitted that they did.

58. Mr Gruder QC who appeared for SCB submitted to the contrary. He submitted that the words *"contributory negligence*" had in 1945 a recognised meaning. Before 1945 contributory negligence was a defence to a claim in negligence or a claim considered to be akin to negligence, such as breach of statutory duty. The 1945 Act was an act to remedy the injustice of such a defence when the parties were both at fault. Importantly, contributory negligence was not a defence to an action for deceit. In the case of deceit, the sole issue was whether the deceit was an inducement or cause of the plaintiff acting to his detriment. If that was established, the plaintiff succeeded irrespective of whether there were other causes for the plaintiff acting to his detriment, including the plaintiff's negligence, even though that negligence resulted in the plaintiff failing to discover the untruth of the false representation.

59. Mr Young agreed that the mischief which the 1945 Act sought to remedy was to alleviate the injustice of a defence of contributory negligence, but he submitted that there was no authority before 1945 which held that the defence of contributory negligence was never available to a fraudulent defendant. Also there was no case of a plaintiff being able to recover for loss which in part resulted from his own attempted deceit on another. It followed that there was no compulsion in law to hold that a defence, relying upon SCB's deceitful conduct, would not have operated as a defence in the circumstances of this case. As a matter of justice and general principle, if the plaintiff's "*fault"* was in part the cause of the loss which he sought to recover, on normal common law principles the plaintiff's "*fault"* was a defence which could fall within the words *"contributory negligence*".

60. In the present case, it is not necessary to try and define the words "*contributory negligence*" in the second limb of the definition in section 4. That section refers to acts which give rise to the defence of contributory negligence. Thus the first question is to decide whether the deceitful acts of SCB, directed as they were to obtaining payment from Incombank, would, as of 1945, have provided PNSC with a defence. If they did, then it will become necessary to go on to consider whether that defence was one which would be termed *"contributory negligence*".

61. For my part I cannot conceive that the deceitful conduct of SCB would in 1945 have given PNSC a defence. It was established in the action that SCB could recover from PNSC in respect of the untruthful statements made. Thus SCB had relied upon those statements when making the payments to PNSC. No doubt SCB believed that they would recover the money paid from Incombank, but the failure to do so was not the consequence of the deceitful conduct of SCB. It therefore seems that the attempted deceit by SCB of Incombank was not causative of any part of the damage suffered by reason of PNSC's deceit. They could not complain about the actions of SCB, except perhaps a failure by them to mitigate, an allegation that was not made. But also, and importantly, it has always been the law that a defendant who has been found liable in deceit cannot establish a defence based upon the contributory fault of the plaintiff.

62. In ***Reynell v Sprye*** (1852) 1 De G.M & G 660 Lord Cranworth LCJ said at page 729:

"... it is no answer to the charge of imputed fraud to say that the party alleged to be guilty of it recommended the other to take advice, or even put into his hands the means of discovering the truth. However negligent the party may have been to whom the incorrect statement has been made, yet that is a matter affording no ground of defence to the other. No man can complain that another has too implicitly relied on the truth of what he has himself stated. This principle was fully recognized in the case of ***Dobell v Stevens*** *(3 B&C. 625), referred to by my learned brother in the course of the argument.*"

63. ***Redgrave v Hurd*** (1881) 20 Ch Div 1 was a case where the negligence of the plaintiff was alleged to provide a defence to an action based on deceit. That allegation was rejected by the Court of Appeal. Jessel M.R. said at page 13:

"There is another proposition of law of very great importance which I think it is necessary for me to state, because, with great deference to the very learned Judge from whom this appeal comes, I think it is not quite accurately stated in his judgment. If a man is induced to enter into a contract by a false representation it is not a sufficient answer to him to say, ***"If you had used due diligence you would have found out that the statement was untrue. You had the means afforded you of discovering its falsity, and did not choose to avail yourself of them."*** *I take it to be a settled doctrine of equity, not only as regards specific performance but also as regards rescission, that this is not an answer unless there is such delay as constitutes a defence under the Statute of Limitations. That, of course, is quite a different thing. Under the statute delay deprives a man of his right to rescind on the ground of fraud, and the only question to be considered is from what time the delay is to be reckoned. It has been decided, and the rule was adopted by the statute, that the delay counts from the time when by due diligence the fraud might have been discovered. Nothing can be plainer, I take it, on the authorities in equity, than that the effect of false representation is not got rid of on the ground that the person to whom it was made has been guilty of negligence. One of the most familiar instances in modern times is where men issue a prospectus in which they make false statements of the contracts made before the formation of a company, and then say that the contracts themselves may be inspected at the offices of the solicitors. It has always been held that those who accepted those false statements as true were not deprived of their remedy merely because they neglected to go and look at the contracts."*

64. Lush LJ was of a similar view. He said at page 24: *"...where a false representation has been made it lies on the party who makes it, if he wishes to escape its effect in avoiding the contract, to shew that, although he made the false*

representation to the Defendant, the other party, did not rely upon it. The onus probandi is on him to shew that the other party waived it, and relied on his own knowledge."

65. ***Edgington v Fitzmaurice*** (1885) 29 Ch Div 459 was a case which turned on the misstatement of the intention of the defendant. It was held to be a misstatement of fact actionable at the suit of the plaintiffs. The Court of Appeal, upholding the judgment of the judge, held that that misstatement rendered the directors liable to an action of deceit. Fry LJ at page 485 said:

"Then this question has been raised: the Plaintiff admits that he was induced to make the advance not merely by this false statement, but by the belief that the debentures would give him a charge on the company's property, and it is admitted that this was a mistake of the Plaintiff. Therefore it is said that the Plaintiff was the author of his own injury. It is quite true that the Plaintiff was influenced by his own mistake, but that does not benefit the Defendant's case. The Plaintiff says: I had two inducements, one my own mistake, the other the false statement of the Defendants. The two together induced me to advance the money. But in my opinion if the false statement of fact actually influenced the Plaintiff, the Defendants are liable, even though the Plaintiff may have been also influenced by other motives. I think, therefore, the Defendants must be held liable."

66. In **Peek v Derry** (1887) 37 Ch. Div 541, the Court of Appeal made it clear that provided the false statement was relied upon by the plaintiff, it did not matter that there were other causes for the damage incurred by the plaintiffs. Cotton LJ said at page 574:

"Was the Plaintiff induced by this statement to take the shares? Now I think here one must state a further point of law with reference to a matter like this. As I understand the law, it is not necessary that the misstatement should be the motive, in the sense of the only motive, the only inducement to the party who has acted to his prejudice so to act. It is quite sufficient if the statement is a material inducement to the party to act upon it. Of course it would be almost impossible to say it was the only inducement. There must be so many matters which enter into a man's mind in considering whether or no he shall take shares or whether he shall do any similar act. But, in my opinion (and I need not refer to the dicta of various Judges which have been to the same effect), it is quite sufficient if it is a material inducement to the party who has suffered loss to take the shares."

67. To like effect were the judgments of the Court of Appeal in ***Oliver v The Governor and Company of the Bank of England*** [1902] 1 Ch 610. Sterling LJ said at page 630:

"It has often been held in actions for misrepresentation that where a misrepresentation is proved and is shown to have been relied upon, that is enough, although the person who enters into the transaction on the faith of the misrepresentation may have also had other inducements to enter into the transaction. There is an instance of that in the case of ***Edgington v Fitzmaurice***."

68. In ***Barton v Armstrong*** [1976] A.C. 104, the House of Lords decided that a contract, entered into under duress, could be set aside under the equitable rule that enabled a contract entered into as a result of fraudulent misrepresentation to be set aside. Lord Cross said at page 118:

"Had Armstrong made a fraudulent misrepresentation to Barton for the purpose of inducing him to execute the deed of January 17, 1967, the answer to the problem which has arisen would have been clear. If it were established that Barton did not allow the representation to affect his judgment then he could not make it a ground for relief even though the representation was designed and known by Barton to be designed to affect his judgment. If on the other hand Barton relied on the misrepresentation Armstrong could not have defeated his claim to relief by showing that there were other more weighty causes which contributed to his decision to execute the deed, for in this field the court does not allow an examination into the relative importance of contributory causes."

69. Whatever be the reason, it is clear from the authorities that an action for deceit could not be and cannot be defeated by raising the defence that there were acts or omissions which contributed to the damage. To those cases have to be added the views of three judges sitting in the Chancery Division. First Mummery J expressed in ***Alliance and Leicester Building Society v Edgestop Limited*** [1993] 1 WLR 1462. In that case he refused to allow the defendants to amend their defence so as to rely upon the second limb of the definition of fault in the 1945 Act as grounds for reducing a claim for deceit. I believe that he came to the right conclusion for the right reasons. Having reviewed the authorities including those cited to him from Commonwealth courts he concluded at page 1477:

"In my judgment, neither the Act of 1945 nor any decision on it affects the general principles laid down by Sir George Jessel M.R. on the unavailability of the defence of negligence to an action of deceit. That view is taken in the textbooks. In my opinion, it is correct: see ***Winfield and Jolowicz*** *on Tort 13th ed. (1989) and* ***Clerk & Lindsell*** *on Torts, para. 1-143, p. 100. In brief, a person liable for deceit, whether personally or vicariously, is not entitled as a matter of law to deny by a plea of contributory negligence, that his deceit was the sole effective cause of the damage suffered by his victim. Nothing in the Act or on authority entitles a person liable for deceit to plead contributory negligence.*"

70. The judgment of Mummery J in the *Alliance and Leicester* case was followed by Carnwath J in ***Corporacion Nacional del Cobre de Chile v Sogemin Metals Ltd*** [1997] 1 WLR 1396 and by Blackburne J in ***Nationwide Building Society v Thimbleby and Co*** [1999] Ll. L.R. 359. In the ***Nationwide Building Society*** case it was submitted that the ***Alliance and Leicester Building Society*** case was decided upon incomplete citation of authority and should not be followed. Blackburne J rightly rejected that submission.

71. For those reasons I have concluded that the deceitful conduct of SCB does not fall within the definition of "*fault*" in section 4 of the 1945 Act and that there are no grounds for reducing the damages recoverable by SCB.

WARD LJ:

72. I have now had the benefit of reading in draft the judgments of Evans and Aldous L.JJ. It is a pity that pressure of time will not permit me to do full justice to the careful arguments presented by both sides or to some sixty or so authorities to which reference has been made.

The Material Facts

73. Standard Chartered Bank (the claimant) have established their claim against Pakistan National Shipping Corporation (the defendant) for damages for deceit in issuing a bill of lading giving a false shipping date in the knowledge it would be relied upon by the claimant in making payment under the letter of credit. The claimant was negligent - or for present purposes can be taken to have been negligent - in failing to spot that the documents presented did not conform with the terms of the credit. Had they appreciated that, they would probably never have embarked upon their own scandalous attempt to deceive the issuing bank on the basis of a false statement that the documents were presented to them in time.

The Issue

74. Are the damages due to the claimant liable to be apportioned because of the claimant's own negligence in failing to notice the discrepancies and/or in their attempted deception of the issuing bank?

The Statutory Framework.

75. The case turns upon the proper construction of the Law Reform (Contributory Negligence) Act 1945. Section 1(1) provides:-

"Where any person suffers damage as a result partly of his own fault and partly of the fault of any other person or persons, a claim in respect of that damage shall not be defeated by reason of the fault of the person suffering the damage, but the damages recoverable in respect thereof shall be reduced to such extent as the court thinks just and equitable having regard to the claimant's share in the responsibility for that damage ..."

76. Four elements fall for consideration: 1. damage, 2. causation, 3. fault and 4. just and equitable apportionment.

77. Firstly damage: as the opening words indicate the damage with which the section is concerned is the damage suffered by the claimant. In this case the damage was suffered by making payment to Oakprime. That damage is the only damage with which the section is concerned. So: (a) that damage must be suffered partly as a result of the claimant's own fault and partly of the fault of the defendant; (b) the claim "in respect of *that* damage" is not defeated by the fault of the person suffering it (that damage); (c) but the damages recoverable "in respect thereof" (i.e. in respect of that very same damage) may be reduced; (d) having regard to the claimant's share in the responsibility for "the damage" which he has suffered.

78. Secondly causation: the opening clause makes it plain that the combined fault of claimant and defendant must cause the claimant's damage.

79. Thirdly, fault: there must be fault on the claimant's own part as well as fault on the defendant's part.

80. Fourthly, apportionment: the claim will be reduced to the extent it is just and equitable to do so having regard to the claimant's share "in *the responsibility for* the damage he suffered. "Responsibility" has a different connotation from "fault".

81. So far, so good; but difficulties arise out of the meaning to be given to "fault".

"Fault"

82. This is defined in Section 4 as follows:-

"... "Fault" means negligence, breach of statutory duty or other act or omission which gives rise to a liability in tort or would, apart from this Act, give rise to the defence of contributory negligence ..."

83. If I were allowed to approach the matter afresh and untrammelled by authority I would construe Article 4 as follows:-

1. It breaks into two parts. Fault means:-

   Either

   (i) Negligence, breach of statutory duty or other act or omission which gives rise to a liability in tort,

   Or

   (ii) Negligence, breach of statutory duty or other act or omission which would, apart from the Act, give rise to the defence of contributory negligence.

   Thus the first part covers the defendant's fault and the second part cover the claimant's own fault. So construed it adapts well to the separate notions of claimant's fault and defendant's fault which must be separately assessed for Section 1 purposes;

2. I do not read it to mean:

   (a) Negligence,

   (b) Breach of statutory duty, or

   (c) Other act or omission which gives rise to a liability in tort, or

   (d) Other act or omission which would apart from the Act give rise to the defence of contributory negligence. To limit that which apart from the Act gave rise to the defence of contributory negligence only to some other act or omission seems an unnaturally confined qualification. It makes little sense when, as the name of

the defence itself implies, negligence is its essence and one would therefore expect that "*negligence*" would be the first in the list of items which would be within the qualifying group of fault factors which, in the language of Section 1, defeat the claim.

Fault as construed by the Authorities

84. There seems to be universal agreement that the definition is indeed in two parts, the first part referring to the fault of the claimant which Professor Glanville Williams calls "*contributory fault*" and the second part referring to the defendant's fault which he calls "*original fault*". This was the view of Prichard J. in ***Rowe v Turner Hopkins & Partners*** [1980] 2 N.Z.L.R. 550, 555:-

"To my mind, the Act provides its own interpretation if it is acceptable to regard the definition of ***"fault"*** *in section 2 as comprising two limbs - the first referable to the defendant's conduct, the second to the plaintiff's conduct. Section 2 defines* ***"fault"*** *as meaning* ***"negligence, breach of statutory duty, or other act or omission which gives rise to a liability in tort"*** *(the first limb). It then goes on to include any act or omission which* ***"would, apart from this Act, give rise to the defence of contributory negligence"*** *(the second limb). In my view, the first limb of the definition is plainly directed to defining fault as it relates to the conduct of the defendant - in other words, as it relates to the plaintiff's cause of action. This phrase is qualified by the expression* ***"which gives rise to a liability in tort"****. It follows that no negligence, breach of statutory duty and no other act or omission of the defendant would bring Section 3(1) into play unless it is one which gives rise to liability in tort. In other words, the Act only applies when the plaintiff's cause of action is in respect of some Act or omission for which the defendant is liable in tort. Conceivably, the defendant may be concurrently liable in contract - but this is immaterial - the sine qua non is conduct creating liability in tort.*

The second limb of the definition is concerned with and is referable only to the conduct of the plaintiff. It relates not to any cause of action but to conduct which, prior to the Act, would give rise to the defence of contributory negligence and which is now to be regarded as that conduct on the part of a plaintiff which will lead not to a complete defence but to a reduction in damages. Before the enactment of the Contributory Negligence Act, the defence of contributory negligence was a complete defence in tort: it was not a defence in contract - where the issue was more likely to be simply causation.

I therefore conclude, in the absence of any clear authority to the contrary, that the first limb of the definition in Section 2 determines the meaning of the word ***"fault"*** *as it relates to the plaintiff's cause of action: that accordingly, the Contributory Negligence Act cannot apply unless the cause of action is founded on some act or omission on the part of the defendant which gives rise to liability in tort: that if the defendant's conduct meets that criterion, the Act can apply - whether or not the same conduct is also actionable in contract. By the same token - the second limb of the definition means simply and logically that no act or omission of the plaintiff will entitle the defendant to a reduction of damages unless it amounts to the sort of conduct which, prior to the enactment of the Contributory Negligence Act, would have afforded a defence of contributory negligence."*

85. In ***Forsikringsaktieselskapet Vesta v Butcher*** [1989] 1 A.C. 852 O'Connor L.J. in preferring the construction of the Act given to it by Prichard J. said that "*for practical purposes (it) coincides with my own*". In ***Barclays Bank Plc v Fairclough Building Ltd.*** [1995] Q.B. 214, 228 Beldam L.J. said:- "*It is generally agreed that the first part of the definition relates to the defendant's fault and the second part to the plaintiff's ...*"

86. Finally, I note that in ***Reeves v Commissioner of Police of the Metropolis*** [2000] 1 A.C. 360, 383, Lord Hope of Craighead said:- *"Next there is the analysis of the definition in Section 4 into two limbs. I do not disagree with this analysis.*"

87. It seems to me, therefore, that there is a clear preponderance of authority in favour of the view that Section 4 must be broken into two parts - the first defining the defendant's fault and the other the claimant's own fault.

The Nature of the Defendant's Fault

88. This cannot admit of much doubt. It consists of negligence which, breach of statutory duty which or some other act or omission which gives rise to a liability in tort.

The Nature of the Claimant's own Fault

89. Here there is unfortunately no unanimity of view and a good deal of room for debate. I have stated my preference to be "*negligence, breach of statutory duty or other act or omission which ... would, apart from this Act, give rise to the defence of contributory negligence*". That I believe is the considered view of no less an expert than Professor Glanville Williams, *Joint Torts and Contributory Negligence* (1951), page 318. I do not regard his view as less weighty because he says "*it is presumably read as"* the way I have set it out. It is also the judgment of the Australian High Court in ***Astley v Austrust Ltd.*** (1999) 73 A.L.J.R. 403, 412:-

"When first used in s. 27A(3), the ***"fault"*** *is that of the plaintiff and the term* ***"fault"*** *identifies* ***"negligence, breach of statutory duty or other act or omission"*** *which would, apart from the Wrongs Act,* ***"give rise to the defence of contributory negligence"*** *... When used for the second time in s.27A(3) the* ***"fault"*** *is that of the defendant and the term* ***"fault"*** *identifies the* ***"negligence, breach of statutory duty or other act or omission which gives rise to a liability in tort"****.*

90. Prichard J. construes it differently as appears from the passage I have cited. In his judgment "*which*" qualifies only the words "*other act or omission*" and so the second part refers only to any act or omission which would, apart from the Act, give rise to the defence of contributory negligence. Although in ***Vesta,*** O'Connor agreed with him, he then went slightly further and said at p. 862:-

"When considering the fault of the person who suffers damage both parts of the definition apply. The second part is necessary because, whereas the defendant cannot be at fault unless in breach of duty owed to the plaintiff, the plaintiff's contributory negligence may or may not involve a breach of duty owed to the defendant. Thus the drivers of two motor cars which collide at cross-roads because both fail to keep a good look out are both within the first part of the definition, regardless of which is plaintiff and which defendant. In contrast, the injured front seat passenger not wearing a seat belt is at fault only within the second part of the definition (at all events vis-à-vis the driver of the car in which he was not a passenger; I say that lest it be suggested that he owed a duty to his own driver not to damage the windscreen).

I appreciate that, when considering the fault of the plaintiff, if the fault is within the first part of the definition it will also be within the second part."

91. In my respectful view it is not necessary to apply both parts. If "*negligence*" (and breach of statutory duty) are read into the second part, "*negligence*" can be construed for this purpose as a want of care for one's own safety (for example in not wearing a seat belt).

92. In ***Mouat v Clark Boyce*** (1992) 2 N.Z.L.R. 559, 564/5, Sir Robin Cooke said:-

*"There is an ambiguity in that the words **"other act or omission which gives rise to a liability in tort"** can be taken to imply that the earlier word **"negligence"** is similarly confined to negligence which gives rise to a liability in tort. But grammatically that restriction is not essential: **"negligence"** can be read as standing on its own. Indeed that appears to be the more natural interpretation when the structure of the definition is analysed. Undoubtedly it is necessary to read together the words **"or other act or omission which gives rise to a liability in tort or would, apart from this Act, give rise to the defence of contributory negligence"**. That is to say, the definition falls into three limbs, namely (i) negligence, (ii) breach of statutory duty, or (iii) other act or omission etc. The third limb is not designed to limit the meaning of the first. This interpretation also seems preferable as it gives a wider and more useful scope to the Act."*

I do not agree with this analysis: the definition has two "*limbs*", though each limb has three parts.

93. In ***Barclays Bank v Fairclough Building*** Beldam L.J. referred to the Law Commission's Working Paper No. 114, Contributory Negligence as a Defence in Contract - which he may well have written. The Law Commission view was this:-

"3.2 ... Section 4 provides a single definition of fault, although it appears to be generally agreed that the first part relates to D's fault and the second part to P's fault. Thus:

(i) D's fault consists of "negligence, breach of statutory duty or other act or omission which gives rise to a liability in tort". Usually, this will not refer to P's fault because P can be contributorily negligent without his fault being actionable.

(ii) P's fault consists of "other act or omission which ... would, apart from this Act, give rise to a defence of contributory negligence". This does not refer to D's fault because such an act or omission might not be actionable ..."

94. Beldam L.J. commented at p. 228 that the:- *"... debate has focused on the words "or other act or omission which gives rise to a liability in tort" in the first part and "other act or omission which ... would, apart from this Act, give rise to the defence of contributory negligence"* in the second part.

The court was there dealing with a claim to apportion damages for breach of contractual terms.

95. Whilst I cannot fail but note that Simon Brown and Nourse L.JJ. agreed with Beldam L.J., I am not at all sure that the true ambit of the second part was part of the ratio since the subject matter for decision in the case was whether or not the particular claim for damages for breach of contract came within the first part of the definitions as they were there adopted. It may be said, therefore, that this question has not been finally resolved. I feel free, therefore, to apply my construction. At the end of the day it will make no crucial difference to the outcome of this case if I am bound by the Law Commission's view as I shall explain when I turn to the application of the definition to this appeal.

Was the Defendant at fault?

96. On behalf of the claimant, Mr Gruder Q.C. submits that:- "*Before the 1945 Act, contributory negligence was only a defence to claims in negligence or claims which were considered to be akin to negligence such as breach of statutory duty*".

97. In support of that submission he refers to the Law Revision Committee's 8th Report at page 18 and to ***Caswell v Powell Duffryn Associated Collieries*** [1940] A.C. 152 which was an action in respect of injuries caused by a breach of statutory of duty which Lord Wright at p. 178 classified as follows:- *"The cause of action is sometimes described as statutory negligence and it is said that negligence is conclusively presumed*".

98. I do not doubt that historically something akin to negligence was a feature of the pre-1945 approach but that does not help to answer whether the Act has made a difference. Since the Act has come into force it has been applied to breaches of statutory duty where no negligence was proved: see ***Boyle v Kodak Ltd.*** [1969] 2 A.E.R. 439. Given the ordinary and natural meaning of the words, all that is required is some "*act or omission which gives rise to a liability in tort*". It is not necessary to confine that tortious liability to torts which involve negligence or something akin to negligence. The words are wide enough to cover torts intentionally committed. Lord Denning certainly thought it was arguable in ***Murphy v Culhane*** [1977] Q.B. 94. For my part I would not disallow apportionment under the Act in a claim for damages for deceit simply on the basis that the deceitful defendant is not at "*fault*" within the meaning of the Act.

Was the Claimant also at fault?

99. The main thrust of the argument was addressed to this area of fault. I deal firstly with the bank's negligence. It is common ground that contributory negligence does not depend on a breach of duty by the claimant to the defendant or a liability to him (or perhaps anyone else) in tort. Contributory negligence is constituted by the claimant's failure to take reasonable care to look after himself and that is a different concept from the negligence in the first part which is negligence giving rise to a liability in tort. There is abundant authority for this proposition: see, for example, ***Davies v Swan*** [1949] 2 K.B. 291, and ***Froom v Butcher*** [1976] 1 Q.B. 286. It is perhaps sufficient to quote from ***Nance v British Columbia Electric Railway Co. Ltd.*** [1951] A.C. 601, 612 where Viscount Simon, delivering the opinion of the Privy Council, said:-

*"It is perhaps unfortunate that the phrase **"contributory negligence"** uses the word **"negligence"** in a sense somewhat different from that which the latter word would bear when negligence is the cause of action. It may be pointed out that in the Law Reform (Contributory Negligence) Act, 1945, the United Kingdom Parliament (8 and 9 Geo. 6, c 28) the contrast between the two meanings is recognised, for that Act, which provides for a sharing of responsibility for damage where a person suffers damage as a result partly of his own fault and partly of the fault of any other person or persons, defines **"fault"** as **"negligence, breach of statutory duty or other act or omission which gives rise to a liability in tort or would, apart from this Act, give rise to the defence of contributory negligence"**."*

100. It would seem to me that the failure to notice the discrepancies was *"negligence*" in the sense that the bank ought reasonably to have foreseen that, if it did not act as a reasonably prudent bank, it might miss the discrepancies and so miss the opportunity to refuse payment, thereby avoiding its loss.

101. If I am bound by authority to say that the word "*negligence"* does not fall within the second part of the definition, then it seems to me it must still amount to *"some other act or omission*" on the bank's part which, *if* it qualifies as a defence, will lead to apportionment. I will consider whether it does so qualify in a moment.

102. The next and much debated question is whether deceit can constitute such an act or omission. That seems to me to be conclusively answered by *Reeves v Commissioner of Police of the Metropolis*. The police were at fault being in breach of a duty of care to take reasonable steps to look after the prisoner in their custody. He committed suicide. There was a plea of contributory negligence and the question was whether "*fault"* within the meaning of the Act could include intentional acts of the claimant as well as negligence. Lord Hoffmann said at p. 369/370:-

*"Plainly Mr Lynch's act in committing suicide would not have given rise to liability in tort. That part of the definition is concerned with fault on the part of the defendant. The question is whether, apart from the Act, it would have given rise to a defence of contributory negligence. I recognise, of course, that it is odd to describe Mr Lynch as having been negligent. He acted intentionally and intention is a different state of mind from negligence. On the other hand, the **"defence of contributory negligence"** at common law was based upon the view that a plaintiff whose failure to take care for his own safety was a cause of his injury could not sue. One would therefore have thought that the defence applied a fortiori to a plaintiff who intended to injure himself. The late Professor Glanville Williams, in his book **Joint Torts and Contributory Negligence** (1951), p. 199, expressed the view that **"contributory intention should be a defence"**. It is not surprising that there is little authority on the point, because the plaintiff's act in deliberately causing injury to himself is almost invariably regarded as negativing causal connection between any prior breach of duty by the defendant and the damage suffered by the plaintiff. The question can only arise in the rare case, such as the present, in which someone owes a duty to prevent, or take reasonable care to prevent, the plaintiff from deliberately causing injury to himself. Logically, it seems to me that Professor Glanville Williams is right*".

103. Lord Jauncey of Tullichettle said at p. 377:-

*"... the law should be interpreted and applied so far as possible to produce a result which accords with common-sense. To take an example A working beside a tank of boiling liquid which is inadequately guarded negligently allows his hand to come in contact with the liquid and suffers damage; B for a dare plunges his hand into the same liquid to see how long he can stand the heat. It would be bordering on the absurd if A's entitlement to damages were reduced but B could recover in full for his own folly. B's responsibility for the damage which he suffered is undeniable. I see no reason to construe Section 4 of the Act of 1945 to produce such a result and I agree with Lord Bingham of Cornhill C.J. that the word **"fault"** in that section is wide enough to cover acts deliberate as to both performance and consequences.*"

104. Lord Hope of Craighead said at p. 383:-

*"It seems to me that the definition of **"fault"** in Section 4 is wide enough, when examined as a whole and in its context, to extend to the plaintiff's deliberate acts as well as to his negligent acts. This reading of the word would enable the court, in an appropriate case, to reduce the amount of damages to reflect the contribution which the plaintiff's own deliberate act of self-harm made to the loss.*"

105. He went on to cite the point which has been "*well made*" by *Prosser and Keatton on Torts*, 5th Ed. (1984), p. 453, Section 65:- *"It is perhaps unfortunate that contributory negligence is called negligence at all. **"Contributory fault"** would be a more descriptive term*".

106. My conclusion is that if the intentional act of suicide is capable of amounting to contributory negligence, then I cannot see why intentionally deceiving the bank should not also be capable of constituting contributory negligence subject to it meeting the qualifying words in Section 4 that it is an act or omission "*which would, apart from this Act, give rise to the defence of contributory negligence"*. That becomes the next important question to consider.

Apart from this Act, would the Bank's negligence and/or attempted deception give rise to the defence of Contributory Negligence?

107. There is no authority that either *did* constitute such a defence. In my view that, by itself, does not answer the question which is, *would* it have done so? I do not construe Section 4 so as to confine the court to a trawl through the pre-1945 authorities to ascertain whether the facts of the case did amount to a defence: the word "would" indicates the freedom still to engage in creative judging applying the established principles to the current facts. That, after all, is what the House of Lords was doing in *Reeves*. Thus it is necessary to go back to some first principles applying in this area.

108. I can take the general principles from the judgment of Lindley L.J. in ***The Bernina*** (1887) 12 P.D. 58, 89:-

"1. *A. without fault of his own is injured by the negligence of B., then B. is liable to A.*

2. *A. by his own fault is injured by B. without fault on his part, then B. is not liable to A.*

3. *A. is injured by B. by the fault more or less of both combined then the following further distinctions have to be made:-*

(a) If, notwithstanding B.'s negligence A. with reasonable care could have avoided the injury, he cannot sue B.: ***Butterfield v Forrester; Bridge v Grand Junction Ry. Co.; Dowell v General Steam Navigation Co.***

(b) If, notwithstanding A.'s negligence B. with reasonable care could have avoided injuring A., A. can sue B.: ***Tuff v Warman; Radley v London & North Western Ry. Co.; Davies v Mann:***

(c) If there has been as much want of reasonable care on A.'s part as on B.'s, or, in other words if the proximate cause of the injury is the want of reasonable care on both sides, A. cannot sue B. In such a case A. cannot with truth say that he has been injured by B.'s negligence, he can only with truth say that he has been injured by his own carelessness and B.'s negligence, and the two combined give no cause of action at common law. This follows from the two sets of decisions already referred. But why in such a case the damages should not be apportioned, I do not profess to understand. However, as already stated, the law on this point is settled and not open to judicial discussion."

109. To elaborate shortly, Lord Campbell C.J. stated the rule as follows in ***Dowell v General Steam Navigation Co.*** (1855) 5 E.L. & B.L. 195, 206:- "*According to the rule which prevails in the Court of Admiralty in a case of collision, if both vessels are in fault the loss is equally divided: but in a court of common law the plaintiff has no remedy if his negligence in any degree contributed to the accident.*"

110. In ***Tuff v Warman*** (1858) 5 C.B. (N.S.) 573, 585 Wightman J. delivering the judgment of the Exchequer Chamber said:- *"It appears to us that the proper question for the jury in this case, and indeed others of the like kind, is, whether the damage was occasioned entirely by the negligence or improper conduct of the defendant, or whether the plaintiff himself so far contributed to the misfortune by his own negligence or want of ordinary and common care and caution, that, but for such negligence or want of ordinary care and caution on his part, the misfortune would not have happened. In the first place the plaintiff would be entitled to recover, in the latter not; as, but for his own fault, the misfortune would not have happened.*"

111. Applying that question to an action for damages for deceit the issue would become whether or not the damage was occasioned entirely by the improper deceitful conduct of the defendant or whether but for the claimant's own want of care or for his own reasons the misfortune would not have happened to him. It boils down to a matter of causation.

112. The law of causation in deceit was and is well established. So long as the defendant's fraudulent misrepresentation was a cause of the loss suffered by the claimant, the claimant recovered in full even though there were other factors causing the claimant's loss. There is a long line of authority to support that proposition. In ***Reynell v Sprye*** (1852) 1 De G.M. & G. 660, Lord Cranworth said at p. 710:- "*However negligent the party may have been to whom the incorrect statement has been made, yet that is a matter affording no ground of defence to the other.*"

113. This is such a powerful statement that one cannot readily accept the appellant's submission that the remarks have to be understood in the context of, and limited to, the next sentence of his judgment to the effect that:- "*No man can complain that another has too implicitly relied on the truth of what he himself has stated.*"

114. For my part I cannot regard the case to be authority for no more than the limited proposition that only a negligent failure to check on the accuracy of that which was fraudulently represented amounts to no defence whereas negligence in some other respect may well afford a defence. Lord Cranworth had earlier made it plain that this is a matter of causation saying at p. 708:-

"Where, therefore, in negotiation between two parties, one of them induces the other to contract on the faith of the representations made to him, any one of which has been true, the whole contract is in this court considered as having been obtained fraudulently. Who can say that the untrue statement may not have been precisely that which turned the scale in the mind of the party to whom it was addressed?"

115. Mr Young argues that an *inducement* to enter the contract is not the same as the *cause* of a loss, still less with the plaintiff's "*fault*" being an operative *cause of that loss*. I cannot agree. If one is induced by misrepresentation to enter into a contract which causes loss, then the loss is caused by the misrepresentation. If the misrepresentation was a form of *"fault"*, then the fault caused the loss. In cases of deceit, the authorities show that the deceit is held to be the *only* cause of the loss.

116. That appears again in ***Redgrave v Hurd*** (1881) 20 Ch.D. 1. Lush L.J. at p. 24 expresses what he considers to be "*the correct view of the law*" in pure causation terms as follows:- "*... where a false representation has been made it lies on the party who makes it, if he wishes to escape its effect in avoiding the contract, to shew that, although he made the false representation to the defendant, the other party, did not rely upon it.*"

117. Harking back to the contributory negligence rules and to Parke B.'s observation in ***Butterfield v Forrester*** (1809) 11 East 60 that "if by ordinary care he might have avoided (the consequences of the defendant's negligence), he is the author of his own wrong", I note how Fry L.J. spoke in similar terms in ***Edgington v Fitzmaurice*** (1885) 29 Ch.D. 459, 485:-

"The prospectus was intended to influence the mind of the reader. Then this question has been raised: the plaintiff admits that he was induced to make the advance not merely by this false statement but by the belief that the debentures would give him a charge on the company's property, and it is admitted that this was a mistake of the plaintiff. Therefore it is said that the plaintiff was the author of his own injury. It is quite true that the plaintiff was influenced by his own mistake but that does not benefit the defendants' case. The plaintiff says: I had two inducements, one my own mistake, the other the false statement of the defendants. The two together induced me to advance the money. But in my opinion if the false statement of fact actually influenced the plaintiff, the defendants are liable, even though the plaintiff may have been influenced by other motives. I think, therefore, the defendants must be held liable."

So acting for another reason in addition to relying on the representation does not make one the author of one's own misfortune.

118. ***Peek v Derry*** (1887) 37 Ch.D. 541 was a case of an action for damages for deceit. Cotton L.J. said p. 574:- "*As I understand the law, it is not necessary that the mis-statement should be the motive, in the sense of the only motive, the only inducement of a party who has acted to his prejudice so to act. It is quite sufficient if the statement is a material inducement to the party to act upon it."*

119. Although ***Barton v Armstrong*** [1976] A.C. 104 is a case of duress, deceit principles were applied by the majority and Lord Cross was of the opinion stated at p. 118:-

"If it were established that Barton did not allow the representation to affect his judgment then he could not make it a ground for relief even though the representation was designed and known by Barton to be designed to affect his judgment. If on the other hand Barton relied on the misrepresentation Armstrong could not have defeated his claim to relief by showing that there were other more weighty causes which contributed to his decision to execute the deed ***for in this field the court does not allow an examination into the relative importance of contributory causes***". My emphasis added.

120. That review of the authorities satisfies me that the claimant's contributory fault would not have been permitted to defeat the claimant's claim for damages for deceit had the question arisen before the Contributory Negligence Act 1945 came into operation. I am comforted in my conclusion to see that this was the view of three judges at first instance whose judgments I commend, Mummery J. in ***Alliance & Leicester Building Society v Edgestop Ltd.*** [1993] 1 W.L.R. 1462, Carnwath J. in ***Corporacion Nacional del Cobre de Chile v Sogemin Metals Ltd.*** [1997] 1 W.L.R. 1396 and Blackburne J. in ***Nationwide Building Society v Thimbleby & Co.*** [1999] Ll. L.R. 359. Even if I am wrong, it is necessary to apply the Act according to its own terms, and so I turn to the next important question.

Assuming both the claimant and the defendant are at "fault" within the meaning of Section 4, has their combined fault caused the claimant damage to bring Section 1 into effect?

121. In his skeleton argument Mr Young suggested that the approach should revert to the simple one: *"as a matter of fact, did the* ***"fault"*** *of both defendant and plaintiff contribute to the loss or its causation?"* Unfortunately I do not think it is as simple as that because the answer is not only a matter of fact but a matter of law as well. Causation has assumed its special character in deceit as I have attempted to analyse. As a matter of law it seems to me, the sole cause of the damage is the defendant's deceit and any reason operating on the plaintiff's mind which causes him to act as he did pales into legal irrelevance. If that analysis is right then the claimant's own fault has no causative effect upon his suffering his loss. Thus the defendant fails to establish that the claimant is a person who *"suffers damage as a result partly of his own fault".*

122. In any event it is incumbent upon the defendant to show that the claimant's fault caused the loss which the claimant has suffered. The loss the bank suffered was their payment to Oakprime. That was not caused by their negligently failing to spot the discrepancies, except in the most roundabout way. The Bank's argument is: "*We would not have paid Oakprime if we had not already decided to deceive Incombank and we would not have embarked upon that deception had we thought there was a real risk that the issuing bank could have refused to pay up and now, unfortunately, we learn they can refuse to reimburse us in view of the discrepancies which we negligently failed to spot. If we had not been negligent we would not have taken a chance with our own little fraudulent scheme".* One only has to state it in those terms to see not only how unattractive the position is but also how the negligence had no causative operation on the decision to pay Oakprime. The simple fact is the Bank paid because it thought it would get its money back: it is not a case of paying up because it was negligent. Turning to the attempted deceit of Incombank, the question is whether that fraudulent conduct caused the payment to Oakprime. In my judgment it did not. That deceit would have given rise to wholly different damage. Deceit practised on Incombank would cause damage to Incombank, not damage to Standard Chartered Bank themselves. I prefer to look at it in terms of causation of damage (which, on principles set out in ***Banque Bruxelles*** in ***Lambert S.A. v Eagle Star Insurance Co. Ltd*** [1997] AC 191, presupposes the correct identification of the breach of duty) rather than to

focus, as some of the argument before us did solely on whether or not the duty not to deceive was owed to the claimant or to Incombank.

Apportionment

123. Even if I am wrong all along the line so far, the final question remains whether or not the damages recoverable should be reduced by such extent as the court thinks just and equitable having regard to the claimant's share in the responsibility for the damage. I have made plain my distaste for the bank's conduct. They have brought dishonour upon themselves and upon the City. It is quite another question whether the dishonest shipowners can benefit from the attempted fraud.

124. I start with the judgment of Sir Donald Nicholls V.C. in **Gran Gelato Ltd. v Richcliff (Group) Ltd.** [1992] Ch.D. 560, 574:-

"In my view it would not be just or equitable to make any reduction in Gran Gelato's damages. The essential feature of the present case is that Gran Gelato's claim, both at common law and under the Act of 1967, is based on misrepresentation. Richcliff intended, or is to be taken to have intended, that Gran Gelato should act on the accuracy of the answers provided by Gershon Young. Gran Gelato did so act. In those circumstances it would need to be a very special case before carelessness by Gran Gelato (the representee) would make it just and equitable to reduce the damages payable to compensate Gran Gelato for loss suffered by it in consequence of doing the very thing which, in making the representation, Richcliff intended should happen, viz., that Gran Gelato should rely on the representation. In principle, carelessness in not making other enquiries provides no answer to a claim when the plaintiff has done that which the representor intended he should do."

125. That view was taken in a case of negligent misrepresentation. There are good policy reasons for taking a stronger view in a case of deceit. They are expressed by Lord Steyn in ***Smith New Court Securities Ltd. v Citibank N.A.*** [1997] A.C. 254, 279:-

"The justification for distinguishing between deceit and negligence.

That brings me to the question of policy whether there is a justification for differentiating between the extent of liability for civil wrongs depending on where in the sliding scale from strict liability to intentional wrongdoing the particular civil wrong fits in. It may be said that logical symmetry and a policy of not punishing intentional wrongdoers by civil remedies favours a uniform rule. On the other hand, it is a rational and defensible strategy to impose wider liability on an intentional wrongdoer. Such a policy of imposing more stringent remedies on an intentional wrongdoer serves two purposes. First it serves a deterrent purpose in discouraging fraud. Counsel for Citibank argued that the sole purpose of the law of tort generally, and the law of deceit in particular, should be to compensate the victims of civil wrong. That is far too narrow a view. Professor Glanville Williams identified four possible purposes of an action for damages in tort: appeasement, justice, deterrence and compensation: see ***"The Aims of the Law of Tort"*** *(1951) 4 C.L. P. 137. He concluded, at p. 172:*

> *"Where possible the law seems to like to ride two or three horses at once; but occasionally a situation occurs where one must be selected. The tendency is then to choose the deterrent purpose for tort of intention, the compensatory purpose for other torts."*

And in the battle against fraud civil remedies can play a useful and beneficial role. Secondly, as between the fraudster and the innocent party, moral considerations militate in favour of requiring the fraudster to bear the risk of misfortunes directly caused by his fraud. I make no apology for referring to moral considerations. The law and morality are inextricably interwoven. To a large extent the law is simply formulated and declared morality. And, as ***Oliver Wendell Holmes, The Common Law*** *(Ed. N. De W. Howe) p. 106, observed, the very notion of deceit with its overtones of wickedness is drawn from the moral world."*

126. I have accepted that the claimant does not emerge as a shining innocent. Nevertheless it is necessary to focus on the extent to which its loss suffered as it was by the defendant's deceit should be apportioned for its share in the responsibility for the damage. In my judgment the responsibility for the damage is wholly that of the defendant. It was the defendant who set out to deceive and succeeded in deceiving. The mixed motives of the claimant do not mitigate that dishonesty. Commercial fraud must be condemned. It can only be properly condemned by an award of the whole of the damage which the defendant intended to cause. Highwaymen in commerce forfeit the right to just and equitable treatment. In my judgment in the law of deceit there is to be no apportionment. If the parties were *in pari delicto* then the claimant would fail to recover anything. In this field it is all or nothing. In my judgment the claimant is entitled to recover all its damage and I, too, would dismiss the appeal.

Order: Appeal dismissed; all matters as to costs reserved; permission to appeal to the House of Lords refused; counsel to lodge a draft minute of order. (Order does not form part of approved judgment.)

Timothy Young QC and Richard King (instructed by Amhurst Brown Colombotti for the First Defendants/Appellants)
John Cherryman QC and Lawrence Akka (instructed by Ashok Patel & Co for the Fifth Defendants/Appellants)
Jeffrey Gruder QC and Zoe O'Sullivan (instructed by Lovells for the Plaintiffs/Respondents)