Standard Chartered Bank v Pakistan National Shipping Corp No2 [1999] Int.Com.L.R. 12/03

CA on appeal from Commercial Court (Mr Justice Cresswell) before Evans LJ; Aldous LJ; Ward LD. 3rd December 1999

LORD JUSTICE EVANS:

1. The judge began his judgment with the following paragraph, which I agree with and would entirely endorse -

"Antedated and false bills of lading are a cancer in international trade. A bill of lading is issued in international trade with the purpose that it should be relied upon by those into whose hands it properly comes - consignees, bankers and endorsees. A bank, which receives a bill of lading signed by or on behalf of a ship owner (as one of the documents presented under a letter of credit), relies upon the veracity and authenticity of the bill. Honest commerce requires that those who put bills of lading into circulation do so only where the bill of lading, as far as they know, represents the true facts."

2. This requirement of honest commerce is stringently enforced by the English Courts. If a false bill of lading is knowingly issued by the master or agent of the shipowner, and if the claimant was intended to rely on it as being accurate, did rely upon it and as a result of doing so has suffered loss, then the shipowner is liable in damages for the tort of deceit.

3. The rule in ***Derry v. Peek*** (1889) 14 App. Cas. 337 applies, and it is no defence to the charge of knowingly making a false statement that the master or agent believed that he was justified in doing so or that in the circumstances no harm would result : ***Brown Jenkinson v. Percy Dalton (London) Ltd.*** [1957] 2 Q.B. 621.

4. It follows from this that a bank which pays the seller the price of goods under a letter of credit against presentation of bill of lading which falsely records that the goods were shipped on the carrying vessel by the specified date, when they were not, has no difficulty in recovering damages from the shipowner sufficient to idemnify it against loss, whether or not it can obtain repayment from the seller.

5. For the first time, so far as reported cases are concerned, this appeal raises another issue : does the same rigorous standard as to the accuracy of statements made in the course of the letter of credit transaction apply to the bank, as it applies to the master and agents of the shipowner? If it does, and the bank is liable or potentially liable for deceitful conduct, what is the effect, if any, on the bank's right to recover damages from the shipowner?

6. It should be made clear at the outset that the judge acquitted the bank, Standard Chartered Bank ("SCB."), and its servants of fraudulent or dishonest conduct, using these terms in the sense relevant to the criminal law. There is no appeal against that finding. But the appellants alleged that the evidence was clear that SCB knowingly deceived the Vietnamese bank by whom the letter of credit was issued, Incombank, as to the date when the documents were presented to it for payment. In fact, the presentation was late, outside the terms of the credit, and if Incombank had been told this, they would have been entitled to reject the documents on that ground. They did reject them, but on other grounds of discrepancy, with the result that, as will appear below, the problems of causation of SCB's loss become even more complex than they would have been in any event.

7. The appeal is from a judgment of Cresswell J. given on 1 April 1998 after an extended trial in the Commercial Court. SCB recovered damages from the shipowners, Pakistan National Shipping Corporation ("PNSC"), and from other defendants, including its customer Oakprime Ltd to whom the payment under the letter of credit was made, and Mr Arvind Mehra, a director of Oakprime. Oakprime is in liquidation and took no part in the trial or the appeal. PNSC and Mr Mehra both appeal against the judgment, raising the issues described generally above, and Mr Mehra further contends that the judge was wrong to hold him personally responsible for his activities as a director of Oakprime.

8. Proceedings were also brought against shipping brokers who acted for PNSC, Seaways Maritime Ltd. ("Seaways"), and the judge entered judgment against them. Seaways have played no part in the appeal.

9. The appeal has been attractively and persuasively argued by Mr Timothy Young Q.C. for the shipowners and Mr John Cherryman Q.C. for Mr Mehra and also by Mr Jeffrey Gruder Q.C. for the bank. Each was ably assisted by junior counsel and we are grateful to them.

Facts

10. The facts are fully set out in the judgment of Cresswell J. reported at [1998] 1 Lloyd's Rep. 684 at 687-695. The letter of credit was opened by Vietnamese buyers from Oakprime of 20,000 tonnes of bitumen to be delivered in two shipments c.i.f. named Vietnamese ports. Under the credit as finally amended, the latest date for shipment was 25 October 1993 and the last date for negotiation for documents was 10 November. The letter of credit was issued by Incombank and was duly confirmed by SCB.

11. Oakprime chartered two vessels from PNSC. The first, m.v. Lalazar, was chartered on 2 September and eventually berthed for loading at Bandar Abbas on 18 October. Loading proceeded slowly and with interruptions and in the result was not completed until 5 December. By 25 October, the latest date for shipment under the credit, only 1644 mt.tons were loaded. The second vessel m.v. Hunza also loaded at Bandar Abbas. Documents relating to that shipment were also presented to SCB. How they were handled by SCB is relevant as evidence of the bank's practices, but not otherwise.

12. The judgment at pages 688-694 spells out in devastating detail the steps which Mr Mehra on behalf of Oakprime then took in order to obtain a bill of lading and other documents which falsely stated that a full cargo answering to the contract description was loaded by 25 October. To satisfy the requirements of the letter of credit, Oakprime had to present to SCB not only a bill of lading but also surveyor's certificates and the like. The brokers, Seaways, and surveyors (S.G.S.) became involved. There was a blatant attempt to produce false, and in

some cases forged documents so that an appearance of conforming documents could be achieved by the latest date for presentation, 10 November. The judge was left in no doubt but that the falsity was deliberate and that Mr Mehra's evidence denying it, which he rejected, was manifestly false (p.700). Two of his findings should also be quoted :-

"It is clear that PNSC, Seaways and Mr Mehra appreciated that what they were doing amounted to deliberate deception of SCB and any other bank to whom the bills of lading, might be presented in order to obtain payment" (690").

*"PNSC for their part were willing to participate in what their brokers admitted to be "maritime fraud" provided they received a payment on account of freight and demurrage"(*690).

13. There was some suggestion by the brokers that occasionally bills might be backdated, if other parties agreed, but their managing director accepted that this transaction showed a complete breach of the principle of the Baltic Exchange that there should be honest and truthful dealing between members (691).

14. The parties to this unlawful agreement recognised that the falsity was not limited to the bill of lading alone. In the result, "the certificate of origin, invoice and packing list contained false information to the knowledge of Mr Mehra" (694). PNSC was not involved in falsifying those other documents, but without the antedated bill of lading they would have been of no avail.

15. So it came about that on 9 November documents purporting to record shipment by 25 October in compliance with the credit were presented to SCB under cover of a letter from Oakprime, signed by Mr Mehra as managing director on its behalf. The letter reads in part :-

"We enclose herewith all the documents required under the above Letter of Credit No. 0801C931C1025 with the exception of the S.G.S. Certificate which will be delivered to you within in [sic] the next few days.

.....

We will deliver the S.G.S. Certificate as soon as issued at which time, we would request you to discount the draft, value of USD 1,215,660.00 and pay the discounted proceeds to our account with National Westminster Bank.... ."

16. The letter was date-stamped as received by the bank on the same date, 9 November. The bill of lading was dated 25 October and stated that 55132 steel drums of bitumen with gross/net weights 8683.290 mt/8269.800 mt were shipped by that date on board m.v. Lalazar. A further letter, dated 10 November but not received until 11 November, states that the SGS Certificates were enclosed with it, but it also suggests that the certificates were not then available :-

"Please note that due to the time differences between Iran and the U.K., and the fact that SGS (Iran) is closed over the next two days, being the Iranian (Islamic) weekend. SGS (Iran) will communicate the reports to SGS (London) via SGS (London) via SGS (Geneva) on their next working day which is this Saturday, and UK/Switzerland being closed that day, being the Saturday/Sunday weekend. We are concerned that we will not be able to get the SGS Certificate till this coming Monday,. 15 November '93.

We would be deeply obliged if you could please permit us up to that time to submit these remaining documents."

For present purposes, this letter is significant because it establishes beyond any doubt that the documents presented before expiry of the letter of credit on 10 November were incomplete. The Certificates required by the credit were not presented until 11 November at the earliest, and possibly not until 15 November. The bank's internal document "Drawing under Letter of Credit" records on 12 November "SGS certs. taken to be amended" which the judge found was probably necessary because of a typographical error (judgment page 694 col.2). They were re-presented by November 15, which was a Monday.

17. An internal document entitled "*Drawing under letter of credit*" is dated 10 November, suggesting that it was brought into existence on that date. It includes -

"PRESENTATION : 10/11
EXPIRY : 10/11
Document checked : 12/11
Discrepancies noted .... "

followed by ten (10) numbered discrepancies, all of which were struck through in ink. There were three checks by different checkers in accordance with the bank's standard practice when the payment to be made was more than $500,000. These checks were carried out by Mr Scott Shepherd on 12 November, Mr Vincent Holley on 15 November and Mr Stephen Thompson (who described himself as the supervisor of a team of document checkers) on the same day. Also on 15 November, Mr Thompson initialled the box marked "payment authorised", and there was evidence that he transferred the document to the export import department. This was for two purposes. First, so that it could put in motion the machinery for payment of the sum due to Oakprime (the discounted amount of the bill of exchange drawn by Oakprime on the buyer of the goods under the contract of sale). Secondly, so that it could send forward the bank's claim for payment to the issuing bank, Incombank.

18. Both of these things were done. They were handled by Mrs Sharon Johnson whom the judge found was an entirely reliable witness. She said in her written statement that her duties were ministerial only :-

"Indeed, once documents were received by me in such circumstances, payment had already been approved by the document checking section and I simply completed the formality of paying the beneficiary and sending the documents to the issuing bank."

Mrs Johnson sent the documents to Incombank under cover of a letter in standard form, produced by a computer and signed by her on behalf of the bank. The text included this paragraph -

""Unless otherwise stated, documents were presented to us prior to the L/C expiry date and within the time allowed in accordance with UCP article 47 a (or article 48 as appropriate)."

The reference was to UCP 400 (the 1983 revision). Article 46 is in clear terms -

"Article 46

a. All credits must stipulate an expiry date for presentation of documents for payment, acceptance or negotiation.

b. Except as provided in Article 48(a), documents must be presented on or before such expiry date."

The statement in the letter that the documents were presented in due time was untrue, but Mrs Johnson was unaware of this. The documents, including the "Drawing" form completed by Mr Thompson and the other two checkers, did not record the incomplete or late presentation, as they ought to have done. By way of contrast, the corresponding form in respect of the second shipment on m.v. `Hunza' did record "L/C expired" as the first discrepancy, thus making it apparent from the bank's records that that had occurred. Mr Shepherd and Mr Holley were the checkers on that occasion also.

19. The fact that the letter to Incombank was dated 10 November has given rise to much concern, because it was clear from other evidence that the letter was in fact prepared and sent on 16 November and not earlier. There was a possible explanation, which was that the computer printed out the date of expiry of the credit rather than the date when the letter was produced, but in the result the discrepancy was not significant. Mr Thompson knew that the letter would be sent to Incombank on 16 November and that it would contain the statement as to timeous presentation, which was false. The earlier date on the letter, although it coincided with the expiry date of the credit, did not alter that fact.

20. When it received the documents, Incombank was unaware both that the bill of lading was false and that the documents were presented and negotiated outside the credit period. It knew nothing of the discrepancies which were noted by the bank's checkers but not relied upon by them as a ground for rejecting the tender. In the result, it refused payment by reference to other discrepancies which had not been noted by the bank, but which the bank now accepts were material (judgment p.702). The documents were returned to the bank which in due course sold the cargo for $500,000 (gross).

21. The judge found, and the bank does not dispute, that the three checkers who acted on behalf of the bank were incompetent and negligent to a remarkable degree. PNSC alleged that they, or at least Mr Shepherd or Mr Thompson, must have been "suborned" by Mr Mehra, but this was rejected by the judge. There remains, however, the question whether they were responsible for the bank making a false statement to Incombank, either knowingly or recklessly, with the intention that it should be relied upon by Incombank, so that a liability for the tort of deceit might arise.

Was the bank's conduct deceitful?

22. Because Incombank refused payment by reference to discrepancies, which it is admitted were material so as to justify rejection of the documents, without knowing that they were presented after the credit expired, it did not suffer any loss which could give rise to a claim for damages for deceit against SCB. But if SCB knowingly or recklessly made a false statement in order to induce payment by Incombank, then its conduct was such as to expose itself to liability for the tort of deceit, if the false statement was relied upon and damage resulted. Subject to that qualification, making the false statement was an unlawful act.

23. The statement was contained in SCB's letter to Incombank, sent on 16 November though wrongly dated 10 November. It was untrue, and untrue to the knowledge of Mr Thompson, who knew that the letter was being sent and caused it to be sent. These facts were accepted by Mr Thompson and the other SCB personnel. According to Mr Holley, there was a "conscious decision" not to tell the transmittal department (Mrs Johnson) about the late presentation (day 5, p.116), and Mr Thompson said that he would not have wanted Incombank to know about the late tender of documents (day 2 p.142). He said that he did not give the matter any thought.

24. These facts are not, or not seriously, in dispute. Much of the evidence, and large parts of the written and oral submissions to us, were taken up with the reasons why three SCB employees engaged in work of this sort had caused or permitted the false statement to be made to the issuing bank. The judge found that they were *"low level bank employees"* ; Mr Shepherd "*had very limited experience*" of document checking, and neither he nor Mr Holley "*had any formal qualifications in banking*". He doubted whether they had received adequate training. They were "*undoubtedly negligent",* but they were "*not in any sense fraudulent or guilty of fraudulent misrepresentation*" (p.703 paras. 5-8.) He concluded :-

"*They were almost certainly inadequately supervised. They acted incompetently and misguidedly but they were not fraudulent"* (p.704 para.12).

25. Their reasons and motives were thoroughly explored. Parts of their evidence were quoted by the judge : Mr Thompson "*It was a standard thing that we did to accept late presentation up to a day or two and we were a little more lenient in this case* "(698) ; Mr Shepherd "*...said he would not necessarily reject a set of documents outright because a document was a day or so late. The whole basis of checking documents in the department was that he would not necessarily reject a set of documents outright for that reason .... when asked how often the ethos of leniency extended to three working days"* he said "*Three working days is pushing the boundaries of it, so very, very rarely*"

(p.698). Mr Holley *"....the whole point of accepting (documents presented late) is because we are trying to speed up trade flows, not reject documents for the sake of it .... Most of the time there is an actual trade transaction behind a letter of credit, and it is in the interests of buyer and seller for the documentation to be speeded up ....."* (p.699). The judge commented "*Given the tension between the strict requirements of UCP 400 and a perhaps understandable concern to "facilitate trade" coupled perhaps with some pleading on the part of Mr Mehra to accept late presentation, it is possible to see how the most regrettable failures to comply with Art. 46 of UCP 400 came about*" (p.703 para.9).

26. None of this, however, is inconsistent with the appellants' submission that SCB's letter contained a statement which was false to the knowledge of its employees who caused it to be sent. The conditions of liability for the tort of deceit were established in ***Derry v. Peek*** (above) :-

"....fraud is proved when it is shown that a false representation has been made (i) knowingly, (ii) without belief in its truth, or (iii) recklessly, careless whether it be true or false ...." (per Lord Herschell at 374).

27. It is not necessary that the maker of the statement was "dishonest" as that word in used in the criminal law. The relevant intention is that the false statement shall be acted upon by a person to whom it is addressed. If the false statement was made knowingly and that intention is proved, then the basis for liability for the tort of deceit is established. That conduct and state of mind was described as "dishonest" in ***Derry v. Peek*** and may also be called *"fraudulent"* ; but that is not necessarily using those words in their criminal sense. The majority judgments in ***Brown Jenkinson*** show that neither the prevalence of a practice of issuing antedated bills of lading (per Morris L.J. at 632-3) nor the fact the person who proposed to issue the false bill "*not being actuated by bad intentions, did not realise the viciousness of the transaction"* (p.634) prevents the liability from arising : it was possible to approach that case "*with a measure of sympathetic understanding for them*" (p.635) ; and Pearce L.J. said "*The real difficulty .. is due to the fact that the plaintiffs, whatever may have been the defendants'[sic] intentions, appear from the evidence not to have contemplated that anybody would ultimately be defrauded. Theirs was a slipshod and unthinking extension of a known commercial practice to a point where it constituted fraud in law*" (p.638).

28. It is clear, in my judgment, that the shipowner would have no defence to the bank's claim if the master or agent issued a false ante-dated bill of lading in the genuine though careless belief that it would facilitate the particular transaction or maritime trade generally. In my judgment, the same standard of commercial honesty is required by the law from other parties to the letter of credit transaction, including and perhaps especially from a bank. I find it surprising that a leading commercial bank is suggesting that some lower standard of honesty should be applied to it.

29. SCB's submission, as I understand it, is two-fold. First, the document checkers were prepared to waive the late payment, as they were entitled to do on behalf of SCB, and having done so they ceased to regard it as a discrepancy which should be notified to Incombank. Secondly, "The Bank accepts that it could be criticised for sending a misleading letter. But this was a regrettable human error, not a product of fraudulent conspiracy" (Skeleton Argument, para.21). Coupled with the second submission is a contention that, because Mrs Johnson in the transmittal department was unaware that the letter dated 10 November (sent on 16 November) was false, as regards the date when the documents were presented, SCB could not be held liable in deceit for a false statement made by her ; the maker of the statement did not have the requisite guilty knowledge.

30. Once Mr Thompson admitted in evidence, as he did, that he knew that the letter would be sent to Incombank in the ordinary course of business and that it would contain a statement to the effect that the documents were presented in time, which he knew to be false (even if he thought it to be somehow irrelevant or unimportant) then, in my judgment, a false statement was made by SCB (on whose behalf the letter was signed) which was false to the knowledge of the person who authorised it to be sent (Mr Thompson). In those circumstances, SCB is liable if the remaining elements of the tort of deceit were established, and it is not a case such as ***Armstrong v. Strain*** [1952] 1 K.B. 232, where a principal was sought to be held liable in fraud for a statement made by one innocent agent which was false to the knowledge of another agent who did not know that the statement was being made.

31. For these reasons, I would hold on what are mostly undisputed facts that the false statement made by SCB in its letter (dated 10 November) to Incombank that the documents were presented within the period limited by the credit was false to the knowledge of the maker, or was made recklessly, in circumstances which exposed SCB to liability in deceit, if the statement was acted upon by Incombank who thereby suffered loss. This does not detract from the judge's findings that SCB's employees were not fraudulent or dishonest, for he was using those words in a different sense from their relevance to the tort of deceit.

32. There remains one aspect of this issue to which, rightly, much attention was paid. The clear inference from the evidence given by the SCB employees was that the responsible department in the bank operated on the relaxed basis, as regards late presentation of documents, which they described in the passages I have quoted above. Mr Thompson himself used the word "ethos" (witness statement para.121 ; judgment p.698). By letter dated 23 January 1997 SCB's solicitors said that its employees "*adopted a practice*" to that effect. PNSC asked for discovery but no order was made because counsel for SCB informed the Court that no such practice was relied upon. This was confirmed by some remarkable Particulars served on 5 September 1997 which listed various "*practices*" which "*the Plaintiff will not seek to contend*" had existed. When the witness statements were delivered, including Mr Thompson's, it was manifest that their evidence was to the effect that a practice existed, and their evidence confirmed this. I do not find it necessary to consider further whether the Particulars were accurate or misleading. They can stand as an example of tortuous and ultimately unhelpful pleading. Having regard to the

evidence given, the Particulars ought to have stated that there was a practice within SCB of acting contrary to the requirements of UCP 400 (Art.46).

Reliance

33. Mr Cherryman Q.C. for Mr Mehra submitted that SCB failed to prove that its employees relied upon the inaccurate statement of the loading date in the bill of lading, and therefore an essential ingredient of their tort of deceit was not made out.

34. This bold submission, which was not supported by Mr Young Q.C. on behalf of PNSC, does not challenge the judge's emphatic findings that Mr Thompson and his team of document checkers did rely upon the accuracy of the bill of lading date (judgment 704). Mr Cherryman relies upon the rule of law, reflected in UCP 400, that a confirming bank is not concerned with the veracity of documents, but only with the question of whether the documents tendered under the credit complied with the terms of the credit, citing ***United City Merchant v. Royal Bank of Canada*** [1982] 1 A.C. 168 at 184-8 (Lord Diplock).

35. That is correct, but it does not follow that the bank does not rely upon the customers' implied representation that the documents presented are, to his knowledge, both genuine and truthful. As against Mr Mehra, SCB relied on the accuracy not only of the bill of lading but also of other documents and upon Mr Mehra's breach of this undertaking in both respects (judgment 704). It is on that basis that the bank proceeds to consider whether or not the documents are in conformity with the credit.

Illegality

36. The appellant's second main contention is that SCB's conduct towards Incombank was unlawful and that SCB is therefore disentitled to recover damages from them for its loss, on grounds of illegality. They rely upon the principle most recently asserted in ***Tinsley v. Milligan*** [1994] 1 A.C. 340 where the House of Lords held unanimously (though the decision itself was by a majority) that "*a party is not entitled to rely on his own fraud or illegality in order to assist a claim*" (per Lord Jauncey at 366D). The underlying principle was stated by Lord Mansfield C.J. in ***Holman v. Johnson*** (1775) 1 Cowp. 341 -

"No Court will lend its aid to a man who founds his cause of action upon an immoral or an illegal act. If, from the plaintiff's own stating or otherwise, the cause of action appears to arise ex turpi causa, or the transgression of a positive law of this country, there the court says he has no right to be assisted" (343) (See per Lord Goff [1994] 1 A.C. at 54).

37. The principle has been applied by this Court to defeat a claim for damages in tort (***Clunis v. Camden and Islington Health Authority*** [1998] 2 W.L.R. 902) and the appellants submit that it operates to defeat SCB's claim in the present case.

38. In my judgment, as will appear below, proper resolution of this issue depends upon establishing the cause or causes of SCB's loss, as well as upon the nature of its claim to recover damages from the appellants, and so I will consider the question of causation first.

Causation

39. First, it is necessary to identify the loss. The claim is for damages equivalent to the payment made by SCB to Oakprime, giving credit for the proceeds of sale of the goods. Mr Gruder submits that the loss was suffered when the payment was made and therefore it preceded both the rejection of the documents by Incombank signifying its refusal to indemnify SCB, and the later discovery by SCB itself that the documents were falsely dated. In my judgment, that submission is correct insofar as it identifies the loss as occurring at that time ; the fact that SCB was expecting or even entitled to recover an indemnity from Incombank does not alter this. Compare ***Banque Keyser Ullman etc. v. Westgate Ins. Co. Ltd.*** [1991] 2 A.C. 249 per Lord Templeman at 275C and see ***SAAMCO (Banque Bruxelles S.A. v. Eagle Star*** [1997] A.C. 191) per Lord Hoffmann at 215. It remains necessary, however, to establish what the cause or causes were of that loss. Here, the distinction must be made between factual or `commonsense' causes, on the one hand, and the cause or causes which the law regards as relevant for the purposes of the particular claim. This emerges from recent House of Lords judgments, including ***SAAMCO*** (above), ***Smith New Court Securities Ltd v. Citibank N.A.*** [1997] A.C.254 and ***Platform Home Loan Ltd v. Oyston Shipways Ltd.*** [1999] 2 WLR 518. In particular, there is a different legal test for causation when fraud is proved than when the claim is for damages for negligence (***Smith New Court*** at 280D and 285F (Lord Steyn)).

40. In the present case, therefore, SCB as claimants against PNSC for damages for the tort of deceit have the benefit of the rule in ***Edgington v. Fitzmaurice*** (1888) 29 Ch. Div. 459 that "*It is not necessary to shew that the (deceitful) misstatement was the sole cause of acting as he did*" (per Cotton L.J. at 481) and that it was sufficient for the claimant to show that it "*materially contributed to his so acting*" (per Bowen L.J. at 482).

41. This rule does not mean that there were no other contributory causes which, fraud apart, would be capable of affecting the claimant's right to recover damages. Negligence by the claimant himself is the prime or most usual example. At common law, where the claimant's own negligence contributed to his loss, his claim for damages failed (Clerk & Lindsell 17 ed.para.3-09). But the claimant's position was ameliorated, and a fairer rule established, by the Law Reform (Contributory Negligence) Act 1945. In fraud cases, the claimant's negligence is ignored, notwithstanding that it was or may have been a contributory cause (cf. ***Edgington v. Fitzmaurice*** (above)). The policy reasons for imposing full liability on the fraudulent defendant are analysed in Lord Steyn's speech in ***Smith New Court*** (above).

42. In the present case, on the factual level, there were, in my judgment, two causes of SCB's loss, which cannot be regarded as too remote to be capable of being relevant as a matter of law. The first was SCB's reliance on the accuracy of the documents presented to it. The second was its own decision to accept the documents under the credit and to pay Oakprime when it was not obliged to do so. The fact that SCB made what was essentially a voluntary payment distinguishes the case, in my view, from the normal situation, where the documents are in order and are presented in accordance with the terms of the credit and the notifying or confirming bank pays because it is satisfied that it is bound to do so. In such a case, the fact that it expects, in due course, be indemnified by the issuing bank is not relevant to causation. If the documents are presented late, then usually no payment would be made unless the issuing bank agreed that the lateness should be waived. This was what SCB did, with Incombank, when the Hunza documents were presented late. Not so in the case of the Lalazar. By waiving the late presentation, SCB took the risk that Incombank, if and when it discovered the defect would refuse to indemnify it or would seek to recover the indemnity, if already paid. This is another way of saying, in my opinion, that SCB's decision to make the payment when it knew that it was not obliged to do so was a contributory cause of the loss it suffered when the payment was made to Oakprime. And it was a part of this decision that Incombank was not to be notified of the late presentation, which SCB was prepared to waive. As Mr Thompson said, he did not want Incombank to know about it (day 2 p.142). The decision to pay Oakprime was infected by that intended deceit.

43. A possible third cause, which has not been explored in argument, was SCB's failure to observe the discrepancies later relied upon by Incombank to justify payment, and which SCB accepts were material. If the failure was negligent, then in my view this too was a contributory cause of the loss which SCB sustained. There is no express finding of negligence in this respect, though it may well be covered by the judge's references to incompetence and gross negligence quoted above. Without a finding, this failure can only be identified as a possible third cause. Even if it was negligent, it does not provide a defence to the claim for damages for deceit, for the reasons given above.

Illegality (cont'd.)

44. The judge summarised the present state of the law, in my view impeccably, in eight paragraphs under the heading ex turpi causa ([1998] 1 Ll.R. at 705-6). He properly distinguished between cases where the defence is raised to a claim in contract and those where damages are claimed in tort. In contract cases, the claimant cannot "found his claim" on an unlawful act (Tinsley v. Milligan (above)). The quality of wrongdoing which may disentitle him from asserting his rights is not defined by the "public conscience" test, decisively rejected by the House of Lords in that case, but the authorities support the "pragmatic approach" described by Bingham L.J. in ***Saunders v. Edwards*** [1987] 1 W.L.R. 1116 -

"Where the plaintiff's action in truth arises directly ex turpi causa, he is likely to fail .... Where the plaintiff has suffered a genuine wrong, to which the allegedly unlawful conduct is incidental, he is likely to succeed" (1134).

Applying the principle to cases in tort, the judge said this -

"2. Evidence that the plaintiff is himself a wrongdoer will not of itself constitute a defence to an action in tort. The illegality or immorality of the plaintiff's own actions gives rise to a defence only where his claim arises directly ex turpi causa (Clerk & Lindsell on Torts. 17th ed. para.3-02 and see para.6 below).

A defence occasionally, and conveniently labelled ex turpi causa applies in tort. The nature of the test applicable to the defence remains unclear. Two theories referred to in the authorities should be mentioned. (1) There are circumstances in which the nature of the plaintiff's conduct and its connections with the alleged tortious conduct make it contrary to public policy to afford a remedy to the plaintiff. The Court must consider whether to afford relief to the plaintiff "would affront the public conscience or ... shock the ordinary citizen. (2) The nature of the plaintiff's conduct makes it impossible to set the appropriate standard of care (Clerk & Lindsell on Torts, 17th ed. para.3-04) .

*7. Whatever theory founds a defence of ex turpi, the defendant must establish (a) that the plaintiff's conduct is so clearly reprehensible as to justify its condemnation by the Court, and (b) that the conduct is so much part of the claim against the defendant (see 6 above) as to justify refusing any remedy to the plaintiff. Criminal conduct by the plaintiff most easily fulfils condition (a). The ex turpi causa defence is not however confined to criminal conduct (**Kirkham v. Chief Constable of Greater Manchester Police** [1990] 2 Q.B. 283 at p.291B. Lord Justice Lloyd) While exceptionally conduct other than criminal conduct will give rise to a defence of ex turpi, it is extremely difficult to identify categories of conduct sufficiently reprehensible or grossly immoral as to justify denial of a remedy (*Clerk & Lindsell on Torts, 17th ed. para.3-05).

8. However reprehensible the plaintiff's own wrongdoing, a plea of ex turpi will only succeed if the plaintiff's conduct is sufficiently connected with the injury of which he complains (see 6 above). The approach of the Courts tend to be pragmatic and dependent on the facts of the particular case (Clerk & Lindsell on Torts. 17th ed. para.3-06).

45. Since then, the Court of Appeal's judgment in ***Clunis v. Camden and Islington H.A.*** (above) has been reported. The claimant was convicted of manslaughter on grounds of diminished responsibility and was sentenced to detention accordingly. He had a history of mental disorder and, prior to the killing, was detained in a mental hospital from which he was released. He claimed damages from the health authority who, he said, were negligent in discharging him when they did. The claim failed. The claim arose out of the commission of a serious criminal offence (p.910H) for which the claimant was responsible, notwithstanding the statutory defence of diminished responsibility, and the Court was precluded from entertaining his claim.

"In the present case we consider the defendant has made out its plea that the plaintiff's claim is essentially based on his illegal act of manslaughter .... The Court ought not to allow itself to be made an instrument to enforce obligations alleged to arise out of the plaintiff's own criminal act ..... "(911H).

The Court held specifically that the defence arises in cases of tort -

""We do not consider that the public policy that the Court will not lend its aid to a litigant who relies on his own criminal or immoral act is confined to particular causes of action" (908F).

The claim arose out of the criminal act of manslaughter for two reasons. It was the kind of act which it was alleged the defendants ought to have foreseen. *"Further the foundation of the injury, loss and damage alleged is that, having been convicted of manslaughter .... the plaintiff will in consequence be detained under the Mental Act 1983 for longer than he otherwise would have been"* (908G). This judgment, in my view, is entirely consistent with the principles stated by Cresswell, J. in the present case.

Application

46. The judge having found that SCB's employees were not guilty of unlawful conduct, and in particular that they had not acted fraudently towards Incombank, proceeded to apply the principles of law to that factual situation. He held -

"(5) The three document checkers were not guilty of any criminal conduct. Nor were they guilty of conduct sufficiently reprehensible or grossly immoral as to justify denial of a remedy ....

(6) SCB's claim is not founded on an immoral or illegal act. SCB's claim does not arise "directly ex turpi causa". SCB has suffered a genuine wrong to which the conduct criticized by the defendants is incidental. The actions of the three checkers were not directly relevant to the harm of which SCB complains in connection with contract (v) above and the discounting. SCB's claim is not founded on an illegal act or agreement. Contracts (iii) and (v) above are not tainted by illegality. The nature of the conduct of the three document checkers and its connection with the tortious conduct of the first, second and fifth defendants does not make it contrary to public policy to afford a remedy to SCB. To afford relief to SCB would not affront the public conscience or shock the ordinary citizen. The conduct of the three document checkers is not so much part of the claim against the first, second and fifth defendants as to justify refusing any remedy to SCB. The conduct of the three document checkers is not sufficiently connected with the damage of which SCB complains."

He also observed that if the true position as to the antedated and false bill of lading been revealed to SCB at the time of presentation, then "SCB would (as I find) have rejected the documents at the outset and might well have informed the police. There would have been no question of accepting the document or discounting [the bill drawn by Oakprime]" (706).

47. If SCB did mislead Incombank, knowingly or recklessly, as to the date of presentation, with the intention that Incombank should be unaware that the documents having been presented late did not conform to the terms of the credit, then the unlawful act was committed which exposed SCB to liability in tort, if the statement was relied upon and damage resulted to Incombank. Since, in my judgment, this is what occurred, it becomes necessary to consider what effect, if any, SCB's unlawful or potentially unlawful conduct has upon its claim for damages for deceit against the appellants.

48. Mr Young, supported by Mr Cherryman, submitted that the quality of the acts of the SCB employees was such that the Court should take notice of it, and that the acts were, in the judge's words, "*sufficiently connected*" with the loss for which SCB claims damages from the appellants for the defence ex turpi causa to apply. As regards causation, he submitted that SCB's decision to make a voluntary payment to Oakprime, which it was not bound to make against late presentation, was such as to mean that its loss could not be regarded as the, or a, consequence of the misrepresentations made by PNSC and Mr Mehra.

49. Mr Gruder for SCB submitted that the defence can only be relied upon when the unlawful acts of the claimant are "*directly connected*" with the claim in deceit and when the claimant is forced to rely upon his own wrong as a foundation for his claim. He relied upon Clerk & Lindsell on Torts (17th ed.) para.3-02 -

"The illegality, or immorality, of the plaintiff's own actions give rise to a defence only where his conduct is directly relevant to the harm of which he complains".

As regards causation, Mr Gruder's submission was that SCB's cause of action was complete when it paid Oakprime in reliance on the false bill of lading. The presentation to Incombank, truthful or otherwise, came later and was of no relevance to the loss for which SCB is entitled to recover damages from the appellants. He relied upon the rule that where the claim is for damages for fraud "*the court does not allow examination into the relative importance of contributory causes*" (***Barton v. Armstrong*** [1976] A.C. 104 at 118 ; cf. ***Smith New Court*** (above)), hence the holding in ***Alliance and Leicester v. Edgestop*** [1993] 1 W.L.R. 1462 that contributory negligence is no defence to a claim in fraud). The rule applies a fortiori, he submitted, where what is relied upon as a contributory cause of SCB's loss is its later failure to recover an indemnity from a third party, Incombank.

Conclusions

50. The resolution of these submissions depends as so often, in my view, on establishing the cause, or causes, of SCB's loss. For the reasons I have already given, it seems to me that these were at least two : its reliance on the genuineness and accuracy of the bill of lading and other documents presented to it, and its own decision to pay Oakprime in circumstances where, due to late presentation, it was not bound to do so. If the payment was made without regard to SCB's prospects of recovering an indemnity from Incombank, then it was made at SCB's own risk

and the matter would have rested there. But that was not the case. In order to claim the indemnity, SCB falsely represented, knowingly or recklessly, to Incombank that the documents were presented in due time. The decision, conscious or otherwise, to claim the indemnity on this false basis was an integral part of the decision to make the payment to Oakprime. It was as influential a reason for making the payment as the assumption, for which the appellants were responsible, that the bill of lading and other documents were correct.

51. I would hold, therefore, that SCB's voluntary payment was a contributory cause of its loss, though not sufficient, as Mr Young submitted, to break the chain of causation flowing from the falsity of the documents. The relevant factor is not, as Mr Gruder suggested, the subsequent failure to recover an indemnity, but SCB's decision, which preceded payment, to seek the indemnity on a false basis. The fact that the attempt failed, for whatever reason, is not relevant.

52. What then is the situation in law where the claimant's loss was caused partly by the defendant's false statement and partly by its own decision to seek an indemnity, without which it would not make the payment, by unlawful means? The reason why the courts have applied a strict rule of causation in fraud cases, disregarding contributory causes including even the claimant's own negligence, is essentially the moral disapproval spelt out in ***Edgington v. Fitzmaurice*** and most recently in ***Smith New Court***. But there is no decided case, so far as I am, aware, where the rule has been applied in favour of a claimant whose own deceitful conduct was a contributory cause of his loss.

53. When the rule derived from ex turpi causa non oritur actio applies, then the claimant necessarily fails altogether. Losses arising from the transaction lie where they fall, regardless of the degrees of turpitude which the claimant and maybe the defendant also have displayed. This can be a harsh result for the claimant, but it is a necessary consequence of the Court's unwillingness to become involved in enforcing the bargain or to provide a remedy in tort for the claimant's loss. And it means that the rule is likely to be applied sparingly, so as not to defeat in particular cases what are perceived to be just or genuine claims. This leads to the conclusion that the requirements for the rule to apply should be strictly construed, whether the requirements are that the claim is "*founded upon*" the illegality or that it "*arises directly ex turpi causa*" rather than being incidental to it (per Bingham L.J. (above)).

54. Mr Young submitted that the rule could apply even if there was no causal connection between SCB's loss and its deceitful conduct, but I would reject that submission in the circumstances of this case. (***Clunis*** shows that other factors may arise.) However, in my view a causal connection is shown, and SCB's decision to pay Oakprime when it was not obliged to do so, whilst looking for an indemnity by means of a false statement to Incombank, was a contributory cause of the loss which it seeks to recover from the appellants.

55. The question therefore is, whether the fact that SCB, acting deceitfully though not towards the appellants, was partly the cause of its own loss, disentitles it from recovering full damages for deceit from them. The maxim ex turpi causa has to be applied. The pragmatic distinction described by Bingham L.J. has to be drawn. It becomes inevitable, in my view, that the relative turpitude of SCB's and of the appellants' conduct has to be taken into account, as well as the extent to which each was responsible for SCB's loss.

56. We have not been concerned with the contribution proceedings which also came before the judge, but we do have the judge's findings as between the parties in relation to the ex turpi causa issue (pp. 706-708). Having found that SCB had not conducted itself unlawfully, he naturally found that the balance weighed heavily against the appellants and in favour of SCB. The balance has to be re-struck if, as I have found, SCB was itself guilty of deceitful conduct, though not towards the appellants.

57. It seems to me that the situation of PNSC should be considered separately from that of Mr Mehra and Oakprime. The fraudulent scheme was devised and orchestrated by Mr Mehra, for his and the company's financial benefits, although PNSC became parties to it, again for their own financial reasons (judgment page 690). But the question is whether either of them can rely on the ex turpi causa defence against the claim by SCB. In my judgment, applying the test restrictively and in accordance with ***Tinsley v. Milligan*** they cannot do so. The conduct of SCB was not so egregious, though potentially unlawful, and its share of responsibility for its own loss was not so weighty that the Court should refuse to entertain the claim. I therefore would agree with the judge's conclusion that the defence fails.

58. The result, however, to my mind is profoundly unsatisfactory, if SCB is entitled to recover full damages from the appellants, because they were deceitful, when its own deceitful conduct was in part responsible for its loss. The pot calls the kettle black, and the law prevents the kettle from answering back, except in extreme cases. In the interests of condemning the deceitful defendant, the law is prepared to countenance and overlook deceitful conduct by the claimant which is incidental to but not wholly removed from his loss, and partly causative of it.

59. This is a further example of the common law's reluctance to apportion damages between wrongdoers, which has been remedied by statute so far as negligence is concerned. It has been held that contributory negligence is no defence to an action for damages for deceit (***Alliance and Leicester v. Edgestop***) (above)) and that the Law Reform (Contributory Negligence) Act 1945 does not apply (***Nationwide Building Society v. Thimbleby & Co.*** Blackburne, J. 1 March 1999 Ch. 1995 N No. 727, currently under appeal to this Court). But there remains the question whether contributory deceit disentitles the claimant from relying on the special rules of causation which favour innocent claimants against fraudulent defendants (***Edgington v. Fitzmaurice***), and so far as I am aware there is no authority on this point. If contributory deceit does have that effect, so that contributory causes may be recognised in an action for deceit, then there may be scope for the 1945 Act to apply. If it does not, then the pre-1945 common law rule as regards negligence might operate to bar the claim, but that would be inconsistent with the limited

scope given to the ex turpi causa defence. In compelling the Courts to reach an all-or-nothing conclusion, where the claimant has behaved unlawfully, the rule makes it necessary for them to adopt artificial views of causation such as resulted in the "last opportunity" so-called principle before 1945 in the field of negligence.

60. The present case, I should add, is not one where the claimant was deceitful towards the defendants, in circumstances where a counterclaim for damages might arise.

61. These matters have not been raised before us. For my part, I would prefer not to dismiss the appeals, and thus hold the appellants fully liable for SCB's loss, without first giving them an opportunity to argue the issue before us, if they are so advised.

Mr Mehra's personal responsibility

62. I agree with the judgment of Aldous L.J. and that we should allow Mr Mehra's appeal against the judge's finding that - *"In the present case Mr Mehra authorised, directed and procured the acts complained of with full knowledge that the acts complained of were tortious. He is accordingly personally liable"."*

63. The representations giving rise to liability in deceit were made by the company, notwithstanding that they were contained in letters signed by Mr Mehra on behalf of the company or that they arose from his conduct in presenting the documents on behalf of the company, as he did. Even when the director makes the false statement, and the requisite knowledge of its falsity and the intention that it shall be acted upon are both his, nevertheless the fact remains that for the purposes of civil liability (the position in criminal law may be different) the statement is attributed to the company. The question then arises whether in such a case the director is free from personal liability.

64. This is the converse of vicarious liability. The question is whether the director may be held liable for the company's tort. The mere fact that he is a director at the material time does not suffice, but he may be personally liable when he ordered or procured the acts of other persons which render the company liable : ***C. Evans Ltd. v. Spritebrand Ltd.*** [1985] 1W.L.R. 317, quoted by Aldous L.J..

65. It can well be argued that, if the director is liable when he orders or procures acts on behalf of the company by others of its agents or employees, then manifestly he must be liable when he commits those acts on behalf of the company himself.

66. If this is correct, however, it becomes necessary to consider why the same principle was not applied so as to render the director liable in ***Williams*** [1998] 1 W.L.R. 830. The House of Lords held that the relationship necessary to found a claim in negligence had existed only between the plaintiffs and the company defendant. The director was a stranger to that relationship (per Lord Steyn at 838H, rejecting a submission that the director and the company could be regarded as joint tortfeasors). The decision was concerned with the question whether the director owed a duty of care to the plaintiffs in the circumstances of that case. It appears to exclude, however, any suggestion that the director is necessarily personally liable whenever his acts are sufficient to make the company liable in tort.

67. The judge applied the principles stated in Clerk & Lindsell on Torts (17th ed.) para. 4.49 and C. ***Evans Ltd v. Spritebrand.*** He referred also to ***Williams*** but his judgment was given before the Court of Appeal's majority judgment was reversed by the House of Lords, on 30 April 1998. The House of Lords' judgment is based on the pre-eminence given to the separate legal personality of the company : see the commentary by Ross Grantham and Charles Rickett Director's Tortious Liability : Contract Tort or Company Law? (199) 62 M.L.R. 133. It is thus necessary, in my view, to apply the principles of tortious liability strictly in accordance with this rule of company law.

68. The pleaded allegation by SCB was that misrepresentations were made by Oakprime and Mr Mehra and that both were liable accordingly (Amended Points of Claim, paras. 29, 31 and 32). The judge's finding I have quoted above. It rested upon the distinct head of procurement liability which Mr Gruder accepts was not pleaded against Mr Mehra at the trial. Because the allegation is one of fraud, I agree with my Lords that leave to amend the claim should not be given now.

69. The separate claim for damages for conspiracy could give rise to different considerations, but it is unnecessary to reach a conclusion in this case.

Conclusion

70. Subject to one reservation (paragraph 61), I would dismiss the appeal by P.N.S.C. but allow the appeal by Mr Mehra.

LORD JUSTICE ALDOUS:

1. On this appeal against the judgment of Cresswell ([1998] 1 Lloyd's Reports 684), four questions arise for decision by this Court.
    1. Has the Standard Chartered Bank (SCB) a good cause of action in deceit?
    2. Is SCB's action in deceit enforceable against PNSC?
    3. Has SCB a good cause of action against Mr Mehra?
    4. Can PNSC obtain a contribution from SCB and, if so, how much?

    I will consider those issues in turn.

1. Has SCB a good cause of action in deceit?

2. Evans LJ has set out in full the facts and submissions of the parties. For the reasons he has given, I reject the submission by Mr Mehra that SCB did not rely upon the false statements made in the tendered documents. SCB established the elements of a cause of action in deceit.

2. Is SCB's action in deceit enforceable against PNSC?

3. Mr Young QC who appeared for PNSC submitted that SCB's action was not enforceable on the basis of the principle "*ex turpi causa non oritur actio*". His submissions are recorded by Evans LJ and therefore there is no need for me to repeat them in my judgment. I will therefore set out the reasons why I have concluded that the principle does not apply, even though I accept that SCB wrongly attempted to obtain payment from Incombank by deceit.

4. The basis for the principle was stated by Lord Mansfield CJ in ***Holman v Johnson*** (1775) 1 Cowp. 341 at 343 in the context where the court was considering whether to enforce a contract. He said:

"The objection, that a contract is immoral or illegal as between the plaintiff and defendant, sounds at all times very ill in the mouth of the defendant. It is not for his sake, however, that the objection is ever allowed: but it is founded in general principles of policy, which the defendant has the advantage of, contrary to the real justice, as between him and the plaintiff, by accident, if I may say so. The principle of public policy is this: ex dolo malo non oritur actio. No court will lend its aid to a man who founds his cause of action upon an immoral or an illegal act. If from the plaintiff's own stating or otherwise, the cause of action appears to arise ex turpi causa, or the transgression of a positive law of this country, there the court says he has no right to be assisted. It is upon that ground the court goes: not for the sake of the defendant, but because they will not lend their aid to such a plaintiff. So if the plaintiff and defendant were to change sides, and the defendant was to bring his action against the plaintiff, the latter would then have the advantage of it: for where both are equally in fault, potior est conditio defendentis."

5. The principle was applied to an action based in tort in ***Clunis v Camden and Islington Health Authority***[1998] 1 WLR 902. Beldam LJ giving the judgment of the Court said at page 908F:

"We do not consider that the public policy that the court will not lend its aid to a litigant who relies on his own criminal or immoral act is confined to particular causes of action. Although Mr Irwin asserted that in the present case the plaintiff's cause of action did not depend upon proof that he had been guilty of manslaughter, the claim against the defendant is founded on the assertion that the manslaughter of Mr Zito was the kind of act which Dr Sergeant ought reasonably to have foreseen and that breaches of duty by the defendant caused the plaintiff to kill Mr Zito. Further the foundation of the injury, loss and damage alleged is that, having been convicted of manslaughter, the plaintiff will in consequence be detained under the Mental Health Act 1983 for longer than he otherwise would have been. In our view the plaintiff's claim does arise out of and depend upon proof of his commission of a criminal offence. But whether a claim brought is founded in contract or in tort, public policy only requires the court to deny its assistance to a plaintiff seeking to enforce a cause of action if he was implicated in the illegality and in putting forward his case he seeks to rely upon the illegal acts."

6. In ***Tinsley v Milligan*** [1994] 1 AC 340, the House of Lords considered the application of the principle to a claim concerning property rights. Lord Goff, Lord Keith and Lord Browne-Wilkinson rejected the public conscience test that had surfaced in decisions in the early 1990's. Lord Browne-Wilkinson considered in depth the application of the principle in relation to claims to enforce property interests. He said at page 375:

"Although reference was made to Lord Eldon's principle, none of those cases was decided on the simple ground (if it were good law) that equity would not in any circumstances enforce a resulting trust in such circumstances. On the contrary in each case the rule was stated to be that the plaintiff could not recover because he had to rely on the illegality to rebut the presumption of advancement.

*In my judgment, the explanation for this departure from Lord Eldon's absolute rule is that the fusion of law and equity has led the courts to adopt a single rule (applicable both at law and in equity) as to the circumstances in which the court will enforce property interests acquired in pursuance of an illegal transaction viz., the **Bowmakers** rule [1945] KB 65. A party to an illegality can recover by virtue of a legal or equitable property interest if, but only if, he can establish his title without relying on his own illegality. In cases where the presumption of advancement applies, the plaintiff is faced with the presumption of gift and therefore and therefore cannot claim under a resulting trust unless and until he has rebutted that presumption of gift: for those purposes the plaintiff does have to rely on the underlying illegality and therefore fails."*

7. There is in my view but one principle that is applicable to actions based upon contract, tort or recovery of property. It is, that public policy requires that the courts will not lend their aid to a man who founds his action upon an immoral or illegal act. The action will not be founded upon an immoral or illegal act, if it can be pleaded and proved without reliance upon such an act.

8. The immoral or illegal act relied upon by PNSC was the attempted deception of Incombank. No doubt it is unethical for one bank to attempt to deceive another bank, but I doubt whether an unsuccessful attempt amounts to an act which would prevent a good cause of action in deceit being enforced. Certainly in equity there is authority for the proposition that where the unlawful act has not been carried into effect, the court is able to uphold, despite the attempted illegality, an equitable interest. (See *Tinsley v Milligan supra*. at page 257) In any case SCB's cause of action in deceit against PNSC does not require the attempted deceit to be pleaded nor does it involve any reliance upon it. Their case as pleaded and proved was that PNSC made false statements in the bill of lading that the goods had been shipped by 25th October 1993. That statement was made knowing it to be false. SCB relied on it and therefore suffered loss because it paid out over $1 million to Oakprime.

9. Mr Young submitted that but for the attempted deceit or the decision to deceive by SCB, there would have been no loss as there would have been no payment to Oakprime. SCB would not have paid unless they thought they would be able to obtain reimbursement from Incombank and to do that they must have known that they needed to deceive Incombank. Accepting that to be correct, it does not provide PNSC with a defence based upon the principle "ex turpi causa non oritur actio" as SCB's action is not founded upon the attempted deceit. The court, when upholding SCB's claim, is not lending its aid to enforcing an action which involves pleading or reliance upon an immoral or illegal act. The fact that damage may not have resulted but for a decision to deceive is irrelevant to the cause of action when pleaded and proved. It follows that the judge was right to hold SCB's claim against PNSC succeeded.

3. Has SCB a good cause of action against Mr Mehra?

10. SCB pleaded their case against Mr Mehra in deceit and conspiracy. They relied on misrepresentations contained in three classes of documents, the letter of credit, the shipping advice to SCB and the invoice and packing list. By those documents it was alleged that Mr Mehra had represented to SCB that the contents of the documents and information contained in them were true and accurate, that he genuinely believed that loading had been completed on 25th October 1993 in new 24 gauge steel drums and that he estimated that the cargo would arrive in Vietnam on 15th November 1993. The judge held that the representations made were known to be false and were relied upon in such a manner as to amount to deceit. That by itself would not be sufficient to make Mr Mehra liable. An action for deceit against Mr Mehra requires proof that he made the false statements and that SCB relied upon those false statements as being made by him.

11. The judge held: *"As against Mr Mehra (and Oakprime) SCB relies on the tendering of the false bills of lading as constituting a representation that the contents of the bills were true and accurate (in addition SCB also relies on the tendering of the shipping advice stating that the ETA of the vessel was Nov. 15, 1993, the invoice and the packing list as constituting an implied representation that Mr Mehra believed that loading had been completed on Oct. 25, 1993). For similar reasons to those that apply in the case of PNSC and Seaways, all the ingredients of the tort of deceit are made out against Mr Mehra (and Oakprime)."*

    He went on at page 706: "*Mr Mehra contends by way of defence that he is not liable for the acts of Oakprime. I refer to my detailed findings as to Mr Mehra's conduct set out above. The relevant principles are referred to in Clerk & Lindsell on Torts, 17 ed., par. 4-49,* ***C. Evans Ltd v Spritebrand Ltd*** *[1985] 1 WLR 317, and* ***Williams v Natural Life Health Foods Ltd*** *[1996] 1 BCLC 131. In the present case Mr Mehra authorized, directed and procured the acts complained of with full knowledge that the acts complained of were tortious. He is accordingly personally liable."*

12. Mr Cherryman QC who appeared for Mr Mehra submitted that the judge should not have concluded that Mr Mehra was liable as he had authorised, directed and procured the acts complained of as that had never been pleaded against him. I shall return later to that submission, but will consider first Mr Cherryman's submission that Mr Mehra had not committed the tort of deceit. He submitted that he had not made any false representation. The representations had been made by Oakprime and in any case SCB had relied on them as being statements by Oakprime not as statements of Mr Mehra. Mr Mehra had acted at all times as a director of Oakprime and was not liable for the deceit of Oakprime.

13. Oakprime was set up in 1989 and started to trade in 1990. Mr Mehra held 25% of the shares. Initially there were four directors and it had three full-time and two part-time employees. It went into liquidation due to litigation unrelated to this case.

14. Evans LJ has referred to documents relied on as containing the misrepresentations. They are all on Oakprime headed paper or clearly stated to be from Oakprime. Mr Mehra's name appears as the person signing the documents as managing director of or on behalf of Oakprime. In my view the representations were made by Oakprime and all the evidence points to the conclusion that SCB relied upon them as being representations by Oakprime.

15. Since ***Saloman v Saloman Co Ltd*** [1897] AC 22, companies have been recognised as separate legal entities to their shareholders, their directors and their employees. Leaving aside certain cases, not applicable in this case, where it has been held permissible to lift the corporate veil e.g. where the company is a mere facade, directors or employees acting as such will only be liable for tortious acts committed during the course of their employment in three circumstances.

16. First, if a director or an employee himself commits the tort he will be liable. An example is the lorry driver who is involved in an accident in the course of his employment. Although Mr Mehra was the person who was responsible for making the misrepresentations, he did not commit the deceit himself. For reasons I have already stated the representations were made by Oakprime and not by him. Further, SCB relied upon them as representations by Oakprime and not as representations by Mr Mehra.

17. The second way that a director or an employee will become liable is a branch of the first. A director or an employee may, when carrying out his duties for the company, assume a personal liability. An example where personal liability was assumed was ***Fairline Shipping Corporation v Adamson*** [1975] QB 180. A different conclusion was reached in ***Trevor Ivory Ltd v Adamson*** [1997] 2 NZLR 517. What amounts to such an assumption will depend upon the facts of the particular case. Guidance as to how to decide whether such an assumption took place can be obtained from ***Williams v Natural Life Ltd*** [1998] 1 WLR 830. In that case, the second defendant, Mr Mistlin, opened a health food shop in Salisbury and in 1986 formed Natural Life Health Foods Ltd as a vehicle to

franchise the concept of retail health food shops under the name "*Natural Life Health Foods*". The plaintiffs were interested and were encouraged by a brochure and a prospectus to enter into a franchise agreement. Their turnover was substantially less than predicted and they sued the company and Mr Mistlin for the negligent advice that had been given. The company was dissolved and thereafter the action proceeded against Mr Mistlin alone. Lord Steyn who gave the leading speech he said at page 834:

"It will be recalled that Waite LJ took the view that in the context of directors of companies the general principle must not ***"set at naught"*** *the protection of limited liability. In* ***Trevor Ivory v Anderson*** *[1992] 2 NZLR 517, 524, Cooke P. expressed a very similar view. It is clear what they meant. What matters is not that the liability of the shareholders of a company is limited but that a company is a separate entity, distinct from its directors, servants or other agents. The trader who incorporates a company to which he transfers his business creates a legal person on whose behalf he may afterwards act as director. For present purposes, his position is the same as if he had sold his business to another individual and agreed to act on his behalf. Thus the issue in this case is not peculiar to companies. Whether the principle is a company or a natural person, someone acting on his behalf may incur personal liability in tort as well as imposing vicarious or attributed liability upon his principal. But in order to establish personal liability under the principle of Hedley Byrne which requires the existence of a special relationship between plaintiff and tortfeaser, it is not sufficient that there should have been a special relationship such as with the principal. There must have been an assumption of responsibility such as to create a special relationship with the director or employee himself."*

He went on at p.835:

"The touchstone of liability is not the state of mind of the defendant. An objective test means that the primary focus must be on things said or done by the defendant or on his behalf in dealings with the plaintiff. Obviously, the impact of what a defendant says or does must be judged in the light of the relevant contextual scene. Subject to this qualification the primary focus must be on exchanges (in which term I include statements and conduct) which cross the line between the defendant and the plaintiff. Sometimes such an issue arises in a simple bilateral relationship. In the present case a triangular position is under consideration: the prospective franchisees, the franchiser company, and the director. In such a case where the personal liability of the director is in question the internal arrangements between a director and his company cannot be the foundation of a director's personal liability in tort. The inquiry must be whether the director or anybody on his behalf, conveyed directly or indirectly to the prospective franchisees that the director assumed personal liability towards the prospective franchisees. An example of such a case being established is ***Fairline Shipping Corporation v Adamson*** *[1975] QB 180. The plaintiffs sued the defendant, a director of a warehousing company, for the negligent storage of perishable goods. The contract was between the plaintiff and the company. But Kerr J held that the director was personally liable. That conclusion was possible because the director wrote to the customer, and rendered an invoice, creating the clear impression that he was personally answerable for the services. If he had chosen to write on company notepaper, and rendered an invoice on behalf of the company, the necessary factual foundation for finding an assumption of risk would have been absent. A case on the other side of the line is* ***Trevor Ivory Ltd v Andersen*** *[1992] 2 NZLR 517. This case concerned negligent advice given by a one-man company to a commercial fruit-grower. Despite proper application of the spray it killed the grower's fruit crop. The company was found liable in contract and tort. The question was whether the beneficial owner and director of the company was personally liable. The plaintiff had undoubtedly relied on the expertise of the director in contracting with the company. The New Zealand Court of Appeal unanimously concluded that the defendant was not personally liable. McGechan J, who analysed the evidence in detail, said, at p. 532, that there was merely "routine involvement" by a director for and through his company. He said that there "was no singular feature which would justify belief that Mr Ivory was accepting a personal commitment, as opposed to the known company obligation." That was the basis of the decision of the Court of Appeal. In his 1997 Hamlyn Lecture on* ***"Turning Points of the Common Law",*** *Lord Cooke of Thorndon commented that if the plaintiff in* ***Trevor Ivory v Anderson*** ***"had reasonably thought that it was dealing with an individual, the result might have been different"****: see* ***"A Real Thing, Taking Salomon Further",*** *p.18, note 50. Such a finding would have required evidence of statements or conduct crossing the line which conveyed to the plaintiff that the defendant was assuming personal liability."*

18. In those quoted passages, Lord Steyn had in mind that the cause of action relied on was negligence. However the principles stated are applicable to other torts, in particular to deceit. There must be an assumption of responsibility such as to create a special relationship by the plaintiff with the director or employee himself. Whether that exists is to be judged objectively with the primary focus on things said and done by the director or employee. It is necessary to enquire whether the director conveyed directly or indirectly to the plaintiff that he assumed a personal responsibility towards the plaintiff.

19. In the present case, Mr Mehra, by his actions or statements never led SCB to believe he was assuming personal responsibility for the misrepresentations. SCB believed they were dealing with Oakprime. It follows that Mr Mehra cannot be held liable on this ground.

20. The third ground of liability arises when the director does not carry out the tortious act himself nor does he assume liability for it, but he procures and induces another, the company, to commit the tort.

21. A person who procures and induces another to commit a tort becomes a joint tortfeasor (see ***Unilever Plc v Gillette (UK) Limited*** [1989] RPC 583 and ***Molnlycke v Procter & Gamble*** [1992] RPC 583. There is no reason why a director of a company should be in any different position to a third party and therefore it is possible that a director can be capable of becoming a joint tortfeasor by procuring and inducing the company, for which he works, to carry out a tortious act. However there are good reasons to conclude that the carrying out of duties of a

director would never be sufficient to make a director liable. That was the view of the Court of Appeal in ***C. Evans v Spritebrand Ltd*** [1985] 1 WLR 317. At page 323H Slade LJ, whose judgment was agreed by the other members of the Court, said:

*"The mere fact that a person is a director of a limited liability company does not by itself render him liable for torts committed by the company during the period of his directorship: see, for example, **Rainham Chemical Works Ltd v. Belverdere Fish Guano Co Ltd** [1921] 2 AC 465, 488 per Lord Parmoor; and **Prichard v Constance (Wholesale) Ltd v. Amata Ltd** [1924] 42 RPC 63. Nevertheless, judicial dicta of high authority are to be found in English decisions, which suggest that a director is liable for those tortious acts of his company which he has ordered or procured to be done.*

In ***Performing Rights Society Ltd v Ciryl Theatrical Syndicate Ltd*** [1924] 1 KB 1, Atkin LJ referred to a statement of principle by Lord Buckmaster in the ***Rainham Chemical Works*** case [1921] 2 AC 465, 476 and said, at p.14:

*"Prima facie a managing director is not liable for tortious acts done by servants of the company unless he himself is privy to the acts, that is to say unless he ordered or procured the acts to be done. That is authoritatively stated in **Rainham Chemical Works Ltd v. Belvedere Fish Guano Co. Ltd** [1921] 2 AC 465, where it was sought to make a company liable for an explosion upon their works in the course of manufacturing high explosives. The company was held liable on the principle of **Rylands v. Fletcher** (1868) LR 3 HL 330. It was also sought to charge two directors with liability. They were eventually held responsible because they were in fact liable on the ground that they were managing directors of the company, that the company was under their sole control as governing directors, and that they were responsible for the work done by their servants. Lord Buckmaster said [1921] AC 465, 476: **'I cannot accept either of these views. If the company was really trading independently on its own account, the fact that it was directed by cfMessrs. Feldman and Partridge would not render them responsible for its tortious acts unless indeed, they were acts expressly directed by them. If a company is formed for the express purpose of doing a wrongful act, or if, when formed, those in control expressly direct that a wrongful thing be done, the individuals as well as the company are responsible for the consequences, but there is no evidence in the present case to establish liability under either of these heads.'** Perhaps that is put a little more narrowly than it would have been if it had been intended as a general pronouncement without reference to the particular case; because I conceive that express direction is not necessary. If the directors themselves directed or procured the commission of the act they would be liable in whatever sense they did so, whether expressly or impliedly."*

22. Slade LJ went on to review the authorities. He concluded that the case before him was not one where the Court should attempt a comprehensive definition of the circumstances in which a director of a company will become liable as he procured and induced a tort (see also ***Williams v Natural Life*** *supra* at page 838G). For reasons to which I now come, there is no need to decide whether Mr Mehra's actions were such as to make him a joint tortfeasor.

23. The amended statement of claim did not allege that Mr Mehra was liable as a joint tortfeaser by procuring and inducing Oakprime to make the false representations. Thus it was submitted that the judge was wrong to find that he was liable upon that basis. Mr Gruder QC who appeared for SCB, supported by Mr Young, applied to amend to plead that Mr Mehra had procured and induced Oakprime to make the representations. He relied upon the facts and matters already pleaded. Mr Cherryman objected. He submitted that it was too late to amend and that it would be unjust to allow such an amendment as it could have affected the evidence that would have been given.

24. In my judgment it would be unjust to allow amendment to plead procurement and inducement by Mr Mehra. I cannot think of any evidence that was not before the judge that could have affected the decision that he arrived at and in that sense amendment could be considered to be a mere technicality. However the amendment would in reality amount to an allegation that Mr Mehra had procured and induced a fraud. That allegation should, if it was to be relied on, have been pleaded at the outset and I do not believe it right to allow such an allegation to be introduced at this stage. That means that the finding of the judge that Mr Mehra was liable upon that basis cannot stand.

25. It was also alleged that Mr Mehra had been guilty of conspiracy. As I understand the allegation, the unlawful act relied was the deceit practised by Oakprime on SCB. That was an act carried out by Oakprime but not with Mr Mehra who acted in his capacity as employee and director.

26. The question of contribution as between SCB and PNSC remains for further argument. I would allow the appeal by Mr Mehra, but otherwise would uphold the decision and order of the judge.

LORD JUSTICE WARD:

1. I have had the opportunity and benefit of reading in draft the judgments of Evans and Aldous L.JJ.

2. I agree with Evans L.J. that deceit is established against SCB. On the *ex turpi causa* question, my views coincide with the judgment of Aldous L.J. and I agree with Evans L.J. that the matter of contribution raises an interesting question on which I would wish to have further argument before coming to any final conclusion. For the reasons given by Evans and Aldous L.JJ. I would allow the appeal by Mr Mehra.

3. In the result I agree with my Lords as to the present disposal of these appeals.

Order: Appeal by Mr Mehra allowed; appeal by PNSC dismissed. The court directed that there be a further hearing on the "*apportionment issue*". That hearing to take place as soon as convenient during next term. Order does not form part of approved judgment.

MR TIMOTHY YOUNG QC/MR RICHARD KING (instructed by MESSRS AMHURST BROWN COLOMBOTTI, London, SW1Y 6BJ for the FIRST APPELLANT/FIRST DEFENDANT)

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MR JEFFREY GRUDER QC/MS ZOE O'SULLIVAN (instructed by MESSRS LOVELL WHITE DURRANT, London, EC1A 2DY for the RESPONDENTS/CLAIMANTS)