

CA on appeal from Commercial Court (Mr Justice Moore-Bick) before The President; Clarke LJ; Sedley LJ. 23rd October 2003

Lord Justice Clarke:

Introduction

1. There are two appeals before the court, brought by the fourth and fifth defendants respectively, against an order of Moore-Bick J dated 17 July 2002 made consequent upon a judgment dated 11 July 2002. In the judgment the third defendant ("Mr Mahdavi"), the fourth defendant ("CAI") and the fifth defendant ("SGS") were held jointly and severally liable to the first respondent ("Niru") and to the second respondent ("Bank Sepah"). By the order of 17 July judgment was given for the respondents jointly and severally against Mr Mahdavi, CAI and SGS, jointly and severally for US\$5,712,762 together with interest from 22 December 1998 to 17 July 2002 of US\$1,174,999 and costs. All questions of contribution were adjourned. On 19 July 2002 the judge gave CAI and SGS permission to appeal and on 20 September the judge refused Mr Mahdavi permission to appeal.
2. Although Niru and Bank Sepah played very different parts in the story, it was not suggested before the judge or before us that any distinction is to be drawn between them so far as the liability of any of the appellants is concerned. Their claim against Mr Mahdavi succeeded on several bases. The judge held that he was liable in the tort of deceit, as a constructive trustee of monies obtained from Bank Sepah by fraud and as an accessory to a breach of trust. In the event Mr Mahdavi has not proceeded with his application for permission to appeal. The claim against CAI failed in the tort of deceit but succeeded in restitution on the basis that the circumstances in which it paid money away did not afford it a defence to the respondents' claim. The claim against SGS succeeded on the basis that it was in breach of a duty of care.
3. In this appeal CAI appeals against that part of the judgment in which the judge found CAI liable to repay monies it had received from Bank Sepah and subsequently paid away to third parties on the instructions of Mr Mahdavi. SGS appeals against that part of the judgment in which the judge held that SGS was liable to the respondents for breach of a duty of care which he held it owed to Niru. These two appeals involve very different considerations. By respondent's notice, the respondents challenge the decision of the judge acquitting CAI of the tort of deceit. SGS also challenges the judge's conclusion on deceit, for reasons to which I return below.

The Facts

4. The facts are set out in admirable detail in the judgment of the judge. It is only necessary to refer to some of them for the purposes of resolving the issues which arise in this appeal. The facts set out below are for the most part taken from the judgment.
5. Niru entered into a contract with the first defendant ("Milestone") for the purchase of lead. Milestone was a subsidiary of Woralco Holdings Ltd ("Woralco"), which was an English company owned by a discretionary trust established for the benefit of Mr Mahdavi's family. Milestone was incorporated in the Republic of Ireland as a single purpose vehicle for entering into the contract with Niru. As the judge put it, it had no significant assets of any kind. The judge held that, although he was not a director of Milestone, Mr Mahdavi exercised effective control over the company as a de facto director.
6. The contract was on the terms of a pro forma invoice sent by Milestone to Niru on 2 February 1998 which provided for the sale by Milestone to Niru of 9,000 metric tons +/- 15% of lead ingots of Canadian origin C&F Bandar Abbas at a premium of US\$16 per metric ton over the LME price on a range of dates to be determined by Niru, basis FOB stowed. In the event, by the time the pricing period arrived the market price of lead had fallen and Niru was able to buy more lead than originally agreed with the foreign currency allocation which it had previously secured from the Central Bank of Iran. Milestone agreed to sell Niru a further 1,400 metric tons, with the result that the total contract quantity was 10,400 metric tons. The total contract price was US\$5,837,480.
7. Under the contract payment was to be by letter of credit opened by Bank Sepah Iran against presentation of a FIATA multimodal transport bill (or bills) of lading and (among other documents) an inspection certificate issued by SGS certifying that *"the quality and packing of the goods loaded are strictly complying with specifications of the goods indicated in the relative proforma invoice and the terms of the L/C"*.
As appears further below, that wording was prescribed by Iranian import regulations.
8. On 14 March 1998 Niru applied to Bank Sepah for the opening of a letter of credit in favour of Milestone in the sum of US\$5,838,000. The credit was opened the next day and was advised to Milestone through Bank Sepah's branch in London. The letter of credit called for the presentation of ocean bills of lading rather than FIATA bills, but Milestone immediately requested an amendment which was duly made.
9. Lead is regularly traded on the London Metal Exchange ("LME"), which operates a warrant system that is described in detail by the judge in paragraph 14 and following of his judgment. The lead is deposited by producers in LME approved warehouses in lots of 25 metric tons, each of which is individually identified and made the subject of a single warrant. The lead is traded by buying and selling the warrants, which are effectively documents of title. Physical delivery can only be obtained from the warehouse against presentation of the relevant warrant.
10. In order to perform the contract it was necessary for Milestone to identify suitable goods. There was no difficulty about the purity of the lead in LME warehouses because in order to qualify for delivery into a warehouse it was necessary for the lead to meet the standards of purity laid down by the LME. However, in order to obtain an SGS certificate in accordance with the terms of the contract, it was necessary for SGS to carry out a physical inspection

and sampling of the goods and in order to allow SGS to do that it was necessary for Milestone to obtain possession of the warrants covering the lead it intended to ship.

11. Mr Mahdavi approached CAI with a request to finance the 'borrowing' of 336 LME warrants covering 8,400 tonnes of lead in an LME warehouse in Gothenburg to enable the lead to be inspected and sampled. The proposal was for the bank to obtain warrants from one of the LME brokers, use them to make the metal available to Woralco for inspection and sampling by SGS and then return the warrants to the broker. The bank would have to pay for the warrants when it obtained them but would be reimbursed when it returned them to the broker. As the judge put it, this proposal left open the question of how Milestone would finance the purchase of the metal when the time came to make delivery.
12. There were discussions between CAI and Mr Mahdavi as a result of which the bank agreed to retain the warrants and finance the purchase of the lead by Milestone which it would eventually deliver to Niru. However, CAI was only willing to support the transaction on the basis that it would continue to hold the warrants as security pending reimbursement of the price. Because of difficulties in obtaining payment in hard currency from Iranian banks in the past, CAI was not willing to accept an assignment of the proceeds of a letter of credit issued by Bank Sepah as security. Nor, it seemed to the judge, was it willing to allow the goods to be delivered to a carrier in exchange for a document of title. As a result of those discussions, by 26 October 1998 CAI had purchased at Woralco's request warrants covering 10,400 metric tons of lead held in LME warehouses in Gothenburg and Helsingborg.
13. As the judge put it in paragraph 17 of his judgment, CAI's insistence on retaining the warrants as security for its advance put Milestone (and I think Mr Mahdavi) in a difficult position. The only source of the funds to pay for the lead was the letter of credit but, in order to obtain payment under the letter of credit, Milestone had to present documents to Bank Sepah which included a FIATA bill of lading (sometimes called an 'FBL'). However, an FBL could not be issued until the goods had passed into the control of the carrier or forwarding agent and that could not occur until the warehouse had released the goods. Since the warehouses would not release the goods without production of the warrants and the bank would not produce the warrants until it had been paid, Mr Mahdavi and Milestone were faced with an apparent impasse.
14. Again as the judge put it, Mr Mahdavi's solution was simple. He calculated that, if the forwarding agent could be persuaded to issue a bill of lading before the goods had formally passed into its control, SGS would issue its certificate, the documents could be presented to Bank Sepah, which would pay under the letter of credit, and Milestone would then be able to pay CAI and obtain possession of the warrants, which would in turn enable the forwarding agent to obtain delivery of the goods from the warehouses and put them on a ship to Iran.
15. Mr Mahdavi's scheme was implemented. On 5 November 1998, despite the fact that the warrants remained in the possession of CAI, Maritime Freight Services Ltd ("Maritime"), purporting to act as agent for the Islamic Republic of Iran Shipping Line ("IRISL"), issued a FIATA bill of lading 'FBL No A1089920' which it signed on behalf of IRISL. It named Milestone as consignor, the goods were said to be consigned to the order of Bank Sepah Iran and Niru was named as the notify party. The place of receipt of the goods was said to be 'Warehouse Gottenburg Sweden', although the total weight of the lead ingots was given as 10,425.777 metric tons and the total number of bundles as 8712. The shipment was stated to be by truck and by IRISL vessel IRAN JAHAD and the port of discharge was given as Bandar Imam Khomeini. The words "(GOODS EN ROUTE)" appeared on the front. The goods were expressed to be "taken in charge in apparent good order and condition, unless otherwise noted herein, at the place of receipt and delivery as mentioned above". The document thus on its face evidenced delivery of 10,425.777 metric tons of lead by the warehouse at Gothenburg to Maritime for shipment by truck and vessel to Iran. Moreover it stated that the goods were en route on 5 November. It was a false document.
16. On 6 November SGS issued a certificate which stated: "*In pursuance of current Import Regulations of the Islamic Republic of Iran, the goods described hereunder were presented to us:*"

There followed references to a number of details including the letter of credit and the insurance and named the shipper as Milestone and the notify party as Niru. The certificate continued:
*"Commodity: LEAD INGOTS %99.97 of LME Registered Brand
Method of Inspection: Checking of material and packing against L/C and Proforma Invoice
Findings: Ingots were stored in warehouse in Gothenborg and Helsingborg in Sweden
Marking: VEZARATE DEFA NIRU BATTERY MFG CO
Shipment: By Truck and [IRISL] vessel IRAN JAHAD under FBL No A1089920 dated 5 Nov 1998
Weight: 10,426.777 MT
No of Bundles: 8712
Based on the above, we hereby certify that the quality and quantity and packing of the goods loaded are strictly complying with specifications of the goods indicated in the relative proforma invoice and the terms of the L/C and any amendments made there to as presented to us by the buyer.
Above findings are limited to data and place of intervention only.
The Company is neither an insurer nor a guarantor and disclaims all liability in that capacity."*

It can thus be seen that the SGS certificate referred expressly to the bill of lading.
17. The bill of lading, the SGS certificate and other documents were presented to Bank Sepah by CAI on 13 November. The documents were presented under the letter of credit but it is correct to say, as the judge held, that CAI presented the documents in its own right and in presenting them represented that it believed them to be

genuine. Bank Sepah found a number of minor discrepancies and on 18 November it rejected the documents on that ground. At the request of Bank Sepah, a number of manuscript alterations were made to the documents, including I think the addition of a reference to the IRAN JAHAD as 'INTENDED VESSEL' on the bill of lading. The documents as so amended were re-presented to Bank Sepah and accepted.

18. Unfortunately Bank Sepah did not pay promptly under the letter of credit. On 19 November Bank Sepah in London wrote to its Chamran branch in Iran saying that it had taken up the documents but did not have sufficient funds to pay the beneficiary. CAI pressed for payment. So too did Milestone. On 25 November Milestone sent a fax to Niru informing it that Bank Sepah had accepted the documents and asking it to press the bank to pay immediately. This was the first that Niru knew of the presentation of the documents under the letter of credit. It expressed its concern at the non-payment to the bank's Chamran branch.
19. During November the price of lead fell to the point where CAI became concerned about the adequacy of its security. On 2 December, after consulting Mr Mahdavi but without telling Bank Sepah or Niru, CAI disposed of the warrants and credited the proceeds to the account of Nikam Metal Finance Ltd ("Nikam"), which was a company in Mr Mahdavi's group which had been formed some time earlier because Woralco had run into financial problems and it was thought that a new member of the group would not be afflicted by those problems. Neither CAI nor Mr Mahdavi informed Bank Sepah or Niru that the goods in respect of which they were pressing for payment had been sold elsewhere.
20. The documents reached Niru in Iran on 7 December. The person who considered them noted that they appeared to be in transit under the bill of lading, but he had no reason to study the documents carefully and did not do so.
21. In mid-December it appeared that funds would become available to Bank Sepah to make payment under the letter of credit. However, its London branch was concerned that because of the delay someone, probably Milestone, might take steps to impose some kind of lien or stop on the goods in support of a claim for damages once payment had been made. With that in mind it sent a fax to Maritime asking for confirmation that the lead was awaiting shipment in Gothenburg due to the fact that they were waiting for a vessel to be nominated by IRISL, that there was no other factors delaying shipment and that there was no lien on the cargo. On 21 December Maritime sent a fax confirming that the goods were waiting to be loaded at Gothenburg and that there was no lien on the cargo.
22. Meanwhile on 18 December Bank Sepah in London sent a fax to Milestone informing it that funds had been allocated for the payment of the letter of credit. It added that the goods, as it understood it, had not been shipped and said it would pay under the letter of credit if Milestone gave it a guarantee that the monies would be repaid if the goods were not shipped. On 21 December Milestone replied that it would return the monies if the goods were not shipped within 45 days.
23. On 21 December Mr Francis of CAI learned that Bank Sepah had obtained foreign currency and would be remitting the monies the next day. Mr Francis plays an important part in the issues in this appeal and I will return to his role in more detail. Suffice it to say at present that he was surprised at this news because he knew that the lead had been sold some weeks earlier and he assumed that no payment would be forthcoming. He thought that Bank Sepah must have made a mistake. The judge held that someone at CAI must have informed Milestone because later in the day Milestone sent CAI a message directing it to credit the funds to Nikam.
24. On 22 December Bank Sepah remitted the sum of US\$5,795,560.65 to CAI in settlement of its liability under the letter of credit. Mr Francis spoke to Mr Mahdavi and suggested that the funds should be returned to Bank Sepah, but Mr Mahdavi said that he was involved in negotiations with Niru and insisted that the money should not be returned in case it jeopardised the business. He threatened to take legal action unless the funds were dealt with in accordance with his instructions. After speaking to the head of the bank's legal department in circumstances to which I shall return below, Mr Francis decided to comply with Mr Mahdavi's instructions. On 23 December Nikam instructed CAI to remit the sum of US\$5,316,750 to a metal broker, GNI Ltd. Those instructions were carried out and the remaining funds were subsequently paid away in accordance with Mr Mahdavi's instructions.
25. On 4 January 1999 Milestone sent a fax to Niru complaining that it had suffered a loss of over US\$1.8 million as a result of Bank Sepah's failure to pay on time. The loss was said to comprise warehouse charges, a market loss, interest and the cost of transporting goods from the warehouse to the port and back. Later the same day Milestone offered to ship 7,000 metric tons of lead on the first available vessel and retain the balance as security for its losses pending a settlement. The judge said in paragraph 28:
"For a seller which had presented a false bill of lading and had failed to despatch any goods at all, this was indeed a brazen attempt to throw its buyer off balance in order to extricate itself from a difficult situation."
That seems to me, if anything, to be an understatement. The judge rejected Mr Mahdavi's evidence that he was not consulted and said that he had no doubt that his hand was behind the faxes. Thereafter Milestone made a number of further efforts to supply an alternative cargo to Niru but they came to nought and, as the judge put it, the money that had been obtained under the letter of credit was dissipated in the course of Woralco's other activities.
26. In the result no goods were delivered to Niru by Milestone, or by any other company under the Mahdavi umbrella. Niru was, however, out of pocket because, pursuant to its counter-indemnity, Bank Sepah had debited its account with the full amount of the payment. In short, Niru had been induced to part with the sum of US\$5.8 million and received nothing in return other than the sum of US\$116,760 which was paid under a performance guarantee provided by Milestone under the contract.

The Appeal

27. The appeal is concerned with three separate topics, of which one relates to the liability of SGS and the other two relate to the liability of CAI. It might be thought that SGS was only interested in its own liability. However that is by no means necessarily so, because of the position as between SGS and CAI. At the trial both CAI and SGS accepted that if they were both liable they could claim contribution from each other under section 1 of the Civil Liability (Contribution) Act 1978 ("the 1978 Act"). However, after the judge had handed down his draft judgment on liability in this case, his attention was drawn to the decision of the House of Lords in *Royal Brompton Hospital NHS Trust v Hammond* [2002] UKHL 14, [2002] 1 WLR 1397, in which Lord Steyn, with whom the other members of the House agreed, disapproved the approach of this court in *Friends' Provident Life Office v Hillier Parker May & Rowden* [1997] QB 85, which had underpinned the parties' approach to contribution. As a result the debate before the judge in the contribution proceedings, in which judgment was given on 8 May 2003, took a somewhat different course from that which it might otherwise have done. Also, in the meantime Niru had executed its judgment in full against SGS.
28. In the contribution proceedings Miss Andrews submitted that, notwithstanding the *Royal Brompton Hospital case*, SGS could claim contribution from CAI. The judge rejected that submission in paragraphs 16 to 27 of his May 2003 judgment. Her primary submission was, however, that, having satisfied the judgment, SGS was subrogated to Niru's rights against CAI and was entitled to a full indemnity in respect of the sum it had paid. After a detailed analysis of Miss Andrews' submissions for SGS and Mr Bloch's submissions for CAI, in paragraphs 28 to 56 the judge held that SGS was entitled to be subrogated to Niru's rights against CAI, although not in respect of costs. The judge also considered briefly the two further ways in which Miss Andrews put the case, namely recoupment and contribution at common law or in equity. In paragraphs 57 to 61 he expressed the view that, save as to costs, neither route enabled SGS to recover from CAI. However, as to costs he held that SGS was entitled to recover a contribution in respect of what it paid to Niru.
29. In the result, the judge held that, because of its subrogated rights, SGS was entitled to recover from CAI the whole amount of the principal and interest and that it was entitled to recover a contribution to its liability for costs, which he assessed at half.
30. It can thus be seen that there are a number of possibilities depending upon the outcome of the issues in the appeal.
- i) If CAI succeeds in its appeal against the finding that it is liable to Niru in restitution and the judge's judgment that it is not liable in deceit is upheld, that will put an end to the contribution proceedings and there will be no further appeal.
 - ii) If CAI succeeds in its appeal on the issue of restitution but is held liable in deceit and SGS' appeal fails, then, although both CAI and SGS will be liable to Niru, the basis for the contribution proceedings will have fundamentally changed because contribution between CAI and SGS will depend upon the 1978 Act. In that event it might be thought sensible to remit the issue of contribution to the trial judge.
 - iii) If SGS succeeds in its appeal and CAI fails on either part of the case, that would put an end to the contribution proceedings, although there might be some scope for further argument.
 - iv) If neither SGS nor CAI succeeds in its appeal, there is likely to be a full appeal by CAI in the contribution proceedings, which may include a cross-appeal by SGS on both recoupment and contribution under the 1978 Act. The precise scope of a contribution appeal would be a matter for some further debate if CAI were in addition to be held liable in deceit.
31. It was originally thought that it might be appropriate to have all the issues of both liability and contribution determined in one appeal but, because of the different possible permutations and the time available, it was decided that the issues of liability should be determined first. It can, however, be seen that SGS has a potential interest in the outcome of the issue of deceit and it is no doubt for that reason that Miss Andrews made submissions about it in addition to Mr Malek.
32. I turn to the issues in the appeal. The judge analysed the liability of Mr Mahdavi in some detail but it is not necessary for us to do so in order to determine the issues in this appeal. I should note in passing that the claims against Milestone and Maritime had previously been stayed because both had been struck off the register in their countries of incorporation. It is convenient to follow the approach of the judge and to consider first the appeal of SGS.

The SGS Appeal

33. The judge considered the case against SGS with his usual meticulous care between paragraphs 57 and 91 of his judgment. He held that SGS owed a duty of care to Niru which extended to taking reasonable care to ensure that any certificate issued by it was accurate with regard to those matters on which it had been instructed to report, which included reporting that the goods it had inspected had been loaded, which in this context meant delivered to the freight forwarder for carriage to the agreed destination. The judge further held that SGS was in breach of that duty in failing to take all reasonable steps to satisfy itself that the goods were under the control of the freight forwarder when it issued its certificate but, as he put it in paragraph 82, *"more importantly, such information as it did have did not provide reasonable grounds for issuing a certificate in the form required by the Iranian regulations. In issuing a certificate in that form it was in breach of its duty of care to Niru."* Finally, the judge held that SGS' breach of duty was an effective cause of the loss suffered by Niru, albeit not the only effective cause.

34. Miss Andrews submitted that each of those conclusions was wrong and I will consider them in turn.

Duty of Care

35. As summarised in SGS' skeleton argument, Miss Andrews submitted that the judge was wrong to hold that the scope of any duty of care owed by SGS to Niru in issuing its certificate extended to a duty to verify independently whether the contents of the FIATA bill of lading were true. For my part, I am not persuaded that that is an entirely fair way of putting it. Nevertheless the thrust of her submission was that a distinction should be drawn between the role of an inspection company like SGS in certifying the quality and quantity of the goods to be inspected on the one hand and the fact of their shipment on the other.
36. In paragraph 58 of his judgment the judge said that Miss Andrews rightly accepted that the purpose of providing for an independent surveyor to inspect the goods under a contract of this kind is to provide the buyer with an assurance that the seller has shipped goods that conform to the contract but added that she submitted that the function of such a certificate is to guard against the shipment of inferior goods, not to confirm that goods have been shipped or to guard against the issue of a dishonest bill of lading. He also noted her submission that in a transaction of this kind the buyer will not normally see the certificate until after he has paid for the goods.
37. The judge, in my opinion correctly, identified the relevant questions as what the surveyor was asked to do and in relation to what aspects of the seller's performance it assumed responsibility. I agree with the judge that there is no reason why, depending upon the circumstances, a surveyor should not be asked, for example, to verify whether the goods have in fact been loaded on a vessel and so to certify if appropriate. I also agree with the judge that, although a certificate will contain important statements about the quality and quantity of the goods, its primary importance lies in the very fact that it has been issued. As the judge put it in paragraph 60, possession of a certificate covering the required matters enables the seller to demand payment under the letter of credit and triggers the corresponding obligation of the buyer to indemnify the issuing bank. I agree with the judge that that is just as true if the surveyor is required to certify that the goods have been loaded as it is if he is required to certify that they are of contractual origin or quality.
38. The judge referred to statements in some of the cases that the various tests which have been developed by the courts to determine the existence and scope of a duty of care in different factual situations should be regarded as mutually supportive and likely to lead to the same conclusion, notably by Sir Brian Neill (with whom the other members of this court agreed) in *Bank of Credit and Commercial International (Overseas) Ltd v Price Waterhouse (No 2)* [1998] PNLR 564 and by Brooke LJ in *Parkinson v St James and Seacroft University Hospital NHS Trust* [2001] EWCA Civ 530, [2002] QB 166, at paragraphs 16 and 17.
39. However, the judge also stressed the importance of asking what responsibility was assumed in this class of case by reference to a number of authorities, including in particular: *Hedley Byrne & Co Ltd v Heller & Partners Ltd* [1964] AC 465, *Henderson v Merrett Syndicates* [1995] 2 AC 145 and *Williams v Natural Life Health Foods Ltd* [1998] 1 WLR 830. He was in my opinion correct to approach the matter in that way in the present case. Niru was not in direct contractual relations with SGS because SGS' contract was with the buyer, but the relationship between them arose out of a commercial contract and I agree with the judge that it was closely akin to a contractual relationship in which a duty of care would fill the gap left by the contractual doctrines of consideration and privity: see eg *Williams v Natural Life Health Foods* per Lord Steyn at page 837.
40. In a passage quoted by the judge in paragraph 62, in *Hedley Byrne v Heller* Lord Morris of Borth-y-Gest summarised the position in this way at pages 502-3:
"... it should now be regarded as settled that if someone possessed of a special skill undertakes, quite irrespective of contract, to apply that skill for the assistance of another person who relies upon such skill, a duty of care will arise. ... Furthermore, if in a sphere in which a person is so placed that others could reasonably rely upon his judgment or his skill or upon his ability to make careful inquiry, a person takes it upon himself to give information or advice to, or allows his information or advice to be passed on to, another person who, as he knows or should know, will place reliance upon it, then a duty of care will arise."
41. In *Henderson v Merrett Syndicates* Lord Goff emphasized that if a person assumes responsibility to another in respect of certain services there is no reason why he should not be liable in damages to that other in respect of his negligent performance of those services and there should be no need to embark upon any further enquiry into whether it is "fair, just and reasonable" to impose liability for economic loss. As I read it, that is because it is fair, just and reasonable to impose such liability if the defendant has assumed a responsibility to the claimant to give the advice or perform the service concerned.
42. Whether there has been an assumption of responsibility will depend upon an objective assessment of all the circumstances of the case: see eg per Lord Goff in *Henderson v Merrett Syndicates* at page 181 and per Lord Steyn in *Williams v Natural Life Health Foods* at page 835, where (in another passage quoted by the judge) he said:
"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 and done by the defendant or on his behalf. 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."
43. I did not understand anyone to submit that the judge was wrong to approach the present case in that way. In any event he was in my judgment correct to do so. The critical issue between the parties, both before the judge and before us, is whether, applying the objective approach, in the light of all the circumstances including what Lord

Steyn called the relevant contextual scene, SGS assumed a responsibility to Niru as buyer to take reasonable care to ensure before issuing a certificate to that effect that the goods had been loaded in the sense in which that expression is used in the certificate. I turn therefore to the relevant circumstances of the case.

44. It is common ground that there was no direct contact between Niru and SGS at any stage. While accepting that that was so, the judge expressed the view (in paragraph 65) that the fact that the purchaser was an Iranian company meant that in accepting instructions to act in this case SGS accepted the responsibility of carrying out its task in accordance with the requirements of the Iranian authorities of which it was aware. I agree.

45. In 1996 the Central Bank of Iran issued a circular no 60/1196 entitled "*the regulation on submission of inspection certificate for import goods*". The circular included an approved list of inspectors of which SGS, albeit SGS SA in Switzerland, was one. The circular included paragraph 3 as follows:

"The inspection company shall be free in selection of the required inspection procedure(s) and the place of commencement and completion of inspection (in terms of quantity and quality control operations and packaging by taking into account the type of goods.) However, inspection shall be completed by supervision on loading of goods and/or delivery thereof to the forwarder (for air freight and transport by railways). The inspection certificates should clearly state that the inspected goods are exactly the same goods which are loaded on board the carrier for shipment and they fully confirm (sic) to the seller's proforma invoice, the terms of the relevant L/C and any amendment made to the L/C. The date of issuance of the inspection certificate must be after or concurrent with the date of the bill of lading. Such confirmation must be specified in the terms of the L/C or sight draft (collectible bill of exchange)."

46. Appendix no 2 to the circular set out the terms in which, by paragraph 1 of the circular, the required English text of an inspection certificate was to be placed in letters of credit and the like as follows:

"The original inspection certificate issued not prior to B/L date by (the name of the Company) ... certifying that the quality, quantity and packing of the goods loaded are strictly complying with specifications of the goods indicated in the relative proforma invoice and the terms of the L/C and any amendments made thereto as presented to us by the buyer. ..."

It is plainly no coincidence that the letter of credit in this case contains a clause in precisely those terms.

47. Further, SGS produced a manual of "Iran Procedures" which, under the heading "Iranian Inspection Requirements" said this:

"As already mentioned, Bank Markazi requires mandatory inspection for all purchased goods imported into Iran whose value is more than USD 20,000. –

- *quality*
- *quantity*
- *packing*
- *loading"*

Paragraph 7.4 was in these terms:

"Loading

Circular no 60/1196 of January 21st 1996 of Bank Markazi states

"... inspection shall be completed by supervision of loading of goods and/or delivery thereof to the forwarder (for air freight and transport by railways)".

For all other means of transport, supervision of loading is mandatory.

If, for any reason whatsoever, this is not possible, a letter of discharge must be required from seller – indicating that the inspected goods (quality and quantity) have been shipped – attached to pictures taken during loading."

48. A document entitled "IMPORTANT NOTE", which was on the back of an SGS Iran inspection request form, included the following:

"In accordance with the Iranian Regulations on submitting Inspection Certificate for Imported Goods the issuance of Inspection Certificate means the goods shipped on board the export carrier are identified by the inspectors as goods for destination of Iran require supervision of loading in addition to any other expressed or implied instructions.

Please remember at all times that, when it comes to inspection of goods for Iran, the primary responsibility of the inspection body is towards the Iranian Government."

Finally in this regard, an SGS document in capital letters entitled "**REMINDER ON IMPORTANT POINTS ABOUT IRANIAN PROCEDURE**" included:

"SUPERVISION OF LOADING IS AN OBLIGATION FOR IRAN BECAUSE YOU HAVE TO CERTIFY THE CONFORMITY OF LOADED GOODS. SO, WHENEVER – DUE TO ANY REASON YOU ARE NOT ABLE TO DO THAT, GET A LETTER OF INDEMNITY FROM SELLERS INDICATING THAT THE GOODS INSPECTED ARE REALLY THE ONES THAT ARE SHIPPED."

49. Both the circular and the SGS manual to my mind made it clear that the Iranian authorities expected inspectors like SGS inspecting goods to be imported into Iran and issuing certificates to comply with standard terms of letters of credit, including notably the terms spelled out in appendix no 2 and quoted above, and thus to inspect the goods before 'loading' and to supervise the 'loading'. The judge held that SGS was well aware that it was expected to comply with the requirements of the circular and indeed the terms of its own manual. In my judgment, he was correct so to hold.

50. He rejected Miss Andrews' submission that the manual represented no more than SGS' subjective perception of the position, which was irrelevant as not crossing the line between the parties. The judge was, in my opinion, justified in rejecting that submission. The SGS manual made it clear that SGS was well aware that it was the buyer who nominated SGS to carry out the inspection and that, although it received its instructions from and expected to be paid by the seller, it regarded the Iranian importer as effectively its client. The judge expressed (to my mind justified) confidence that the manual reflected the position as it was understood by inspection companies the world over.
51. The judge explained the reasons for such inspections in clear terms in paragraph 66 of his judgment as follows:
"Inspection companies such as SGS are instructed in connection with documentary sales precisely because they are understood to have the necessary facilities and expertise to enable them to determine whether the seller has performed his contract in the relevant respect and are trusted to exercise independent judgment. Although an inspection company may receive its instructions from the seller, it will be aware that its certificate is likely to be required for presentation to the buyer or a bank as part of the documentation against which payment is made. It is aware, therefore, that the buyer, or a bank, which ultimately has recourse to a buyer, will rely on the existence and accuracy of its certificate in paying the price for the goods. The buyer is the person whom the inspection company should have in contemplation as the person most likely to be affected by any error in the certificate. This is a classic example of the situation envisaged by Lord Morris in Hedley Byrne v Heller in which a person known to have particular expertise is instructed to produce a report which he knows will be passed on to another who can be expected to rely on it. In my judgment, it is inherent in the nature of the task undertaken by the inspection company that it assumes responsibility to the buyer for what is stated in the certificate. That, after all, is the whole purpose of its employment."
- I entirely agree.
52. I quoted the terms of the certificate issued by SGS on 6 November 1998 in paragraph 16 above. It will be recalled that it begins by stating that it was issued in pursuance of "current Import Regulations" in Iran. Those must I think have included the circular, of which SGS was plainly aware. In these circumstances and in the light of the SGS manual, there can I think be no doubt that SGS assumed the responsibility of supervising the 'loading' to ensure that the goods loaded conformed to the contract and, perhaps more importantly, the responsibility of taking reasonable care to satisfy itself that the correct goods had been loaded before issuing a certificate in the form required by Appendix 2 to the circular and thus by the letter of credit.
53. I will return to the meaning of 'loading' and 'loaded' in this context, but should first refer to some of the other facts found by the judge, which may be summarised as follows. SGS was first approached by Milestone in July 1998. On 29 July Milestone asked Niru to make a number of amendments to the letter of credit, including an amendment to allow the inspection certificate to refer to goods 'inspected' instead of goods 'loaded'. Niru passed the request to Bank Sepah without objection but it was ignored by the bank. Milestone repeated the request on 18 August, Niru again passed it to Bank Sepah, which again ignored it.
54. On 19 August Mr Mahdavi on behalf of Milestone sent a fax to Mr Carr, who was the manager of the minerals division of SGS, asking whether SGS would agree to issue an inspection certificate without sampling the goods because they were of an LME registered brand and therefore of known purity. Mr Carr refused but suggested that Milestone ask Niru for a dispensation from the usual inspection requirements. Milestone therefore sent a fax to Niru asking for the letter of credit to be amended to permit presentation of a certificate certifying that the goods inspected were of LME registered brand. Niru was not, however, willing to dispense with analysis by SGS and did not pass on that part of the request to Bank Sepah.
55. At the end of August there were discussions in Iran between a local representative of SGS and Mr Sadri on behalf of Milestone relating to the amendments which Milestone had requested. The judge held that what was of most concern to all those involved was the need for sampling the cargo but that it was not a matter on which Niru was willing to give way and the request was dropped. The judge added in paragraph 70: *"There is nothing to suggest that Niru objected to the request to substitute 'inspected' for 'loaded', however, and I think that there can be little doubt that if Bank Sepah had been willing to make that amendment, Niru would have been content for the clause (and thus the certificate) to be modified in that way. In the event that departure from the established form was rejected by the Central Bank of Iran whose approval to the amendment had been sought by Bank Sepah."*
56. Miss Andrews placed some reliance upon the fact that Niru would have been willing to substitute 'inspected' for 'loaded' but, for my part I do not regard that fact as significant because the Central Bank of Iran objected to it, with the result that it remained a requirement of the letter of credit and there was no amendment to the nature of the certificate required by the letter of credit or to the nature of the responsibility assumed by SGS.
57. I should I think quote the judge's conclusions in paragraph 71 in full:
"In the event, therefore, the letter of credit, a copy of which was provided to SGS, simply called for the presentation of an inspection certificate issued by SGS not prior to bill of lading date certifying that the quality, quantity and packing of the goods conformed to the contract. Since the goods were being exported to Iran all concerned were aware that the inspection certificate would have to comply with the requirements of the Central Bank circular by referring to "the quality, quantity and packing of the goods loaded". Moreover, it is clear from the evidence of Mr Carr that it was understood on all sides that it was part of the inspection and certification procedure that the company should satisfy itself that the goods delivered to the carrier were those that had been inspected. In these circumstances I am satisfied that it was part of SGS's function in this case to certify that the goods it had inspected had been loaded and that the certificate should be construed accordingly."

58. I entirely agree. I can see that, if construed literally and without regard to their context, the words of the certificate might be construed as a certificate relating only to quality, quantity and packing and not extending to any certificate that the goods had in fact been loaded. I also see the force of Miss Andrews' submission that SGS was entitled to rely upon the bill of lading as correctly stating what had been loaded. However, when the certificate is viewed in the context of the requirements of the Iranian authorities and of the SGS manual and in the light of the events set out above, I agree with the judge that SGS assumed the responsibility of certifying that the goods had been 'loaded'.
59. It is and was accepted that SGS assumed a responsibility (and owed a duty of care to Niru) with regard to quality, quantity and packing but Miss Andrews submitted that no similar responsibility was assumed with regard to loading, which was incidental and not central to the function of SGS. She also submitted that it would not be fair, just and reasonable to impose such a duty in the case of loading. However, for my part I would not accept either submission in the light of the circumstances set out above. Moreover, I would accept Mr Malek's submission that it was entirely within SGS' own hands to decide what aspects of the shipment it chose to certify. If there was some aspect of the operation which SGS did not wish to certify, it could refuse to do so at the outset. It did not, no doubt because it could not have done so and provided the service required by the Iranian authorities. In these circumstances I see nothing unfair in imposing the duty found by the judge.
60. What then is meant by 'loading' or 'loaded' in this context? It cannot, in my judgment, mean loaded on to the ocean vessel. Although the FIATA bill of lading dated 5 November was a false document, it was in a standard form and does not to my mind evidence loading on the ocean carrier. As stated in paragraph 15 above, it asserted (in its printed part) that the goods were "*taken in charge in apparent good order and condition, unless otherwise noted herein, at the place of receipt and delivery as mentioned above*". On the back of the standard form "*taken in charge*" is defined as meaning "*that the goods have been handed over and accepted for carriage by the Freight Forwarder at the place of receipt evidenced in this FBL*". In a case of this kind that would ordinarily be the warehouse.
61. The judge held that the goods could be handed over, for example, when the goods were delivered to the freight forwarder's premises or when they were loaded on to a third party's truck at the shipper's premises. He concluded (in paragraph 72) that a freight forwarder could properly issue a standard FBL of this kind once the goods were under his control, even though they were not in his actual possession, which would presumably include a case in which the warrants were in his possession.
62. The judge concluded that, although SGS might fairly be expected to certify that the goods it had inspected were the goods delivered to the freight forwarder, it was more difficult to accept that the parties, if they had thought about it, could have expected SGS to confirm the shipment of the goods on an ocean-going vessel. He added that, in the context of the case, the word 'loaded' in Appendix 2 of the circular must be understood to mean "*delivered to the freight forwarder for carriage to the agreed destination*".
63. Mr Malek submitted that, if by that the judge meant that in order for the goods to be 'loaded' it was sufficient for the warrants to be transferred to the freight forwarder, he was wrong and that the word 'loaded' referred to the physical stage in the transport. He submitted that the concepts of 'loading' and '*taking in charge*' are different and that '*loading*' refers to the physical stage in the transport whereas '*taking in charge*' refers to control of the cargo. Thus he submitted that in a case of this kind the lead would only be 'loaded' when physically loaded on to the trucks for transport to the ocean vessel.
64. It appears to me that the judge held that, in order for the goods to be 'loaded' in the context of multimodal transport of LME lead, they did not have to be physically delivered on to trucks and that it was sufficient for the warrants which represented them to be delivered to the freight forwarder. There is scope for argument as to whether that is correct. It is not, in my judgment, necessary to resolve that question in order to decide the issues in this appeal because, in my opinion, SGS assumed a responsibility to take reasonable care to ensure that one or other had taken place before issuing a certificate in the form required by the letter of credit and, as appears below it is my view that SGS did neither. I will, however, briefly express my conclusion upon it.
65. I have not found this an easy question to resolve. There is much to be said for the judge's view that in order for the goods to be treated as 'loaded' it was sufficient for the warrants to be delivered to the freight forwarder. As I understand it, the warrants represented specific lead ingots in the LME warehouse so that delivery of the warrants can properly be regarded as delivery of the lead and it can therefore properly be said, in the context of the Iranian regulations, that SGS could properly issue a certificate that "*the quality and quantity and packing of the goods loaded*" strictly complied with the contractual specifications if it satisfied itself that the goods it had inspected were indeed loaded in the sense of being delivered to the freight forwarder. This would meet one of the underlying purposes of the certificate, which was to ensure that the goods delivered to the freight forwarder were the goods which had been inspected and which conformed to the contract.
66. I was initially attracted to that view. However, Mr Malek submitted that it is wrong because there is an important distinction between goods being loaded and goods being taken in charge. He submitted that 'loaded' ordinarily means placed in or on a means of conveyance whereas '*taken in charge*' naturally refers to the control of the cargo. He further submitted that the Iranian documents, including in particular the SGS manual, make it clear that the Iranian authorities required the inspection company to supervise the loading, which must be a reference to a physical operation.

67. On balance I prefer the submissions of Mr Malek to the conclusions of the judge, which were supported by Miss Andrews in her reply submissions. There would I think be no doubt that Mr Malek's submissions were correct in an ordinary case of multimodal transport, where the goods to be exported from a warehouse were not represented by LME warrants. It is certainly strongly arguable that the position is different in the latter case. However, on balance, I do not think that that is sufficient to make the difference because both the buyer and the Iranian authorities are naturally concerned to have independent confirmation that the goods inspected have at least begun their physical journey to Iran.
68. I should add that Miss Andrews further submitted that the court should not hold that SGS had assumed any responsibility to supervise the loading of the lead on to trucks because the loading would be likely to be a long operation and it would not be practicable or cost effective for SGS to supervise it. I would accept that supervision would not be entirely straightforward but the inspection company's duty would be to do no more than take reasonable care to satisfy itself that the goods it had inspected were the goods in fact loaded on to trucks before issuing a certificate to that effect.
69. Mr Carr accepted in evidence that in the ordinary case of cargo being shipped on to a vessel it would be part of SGS' responsibility to inspect the goods being loaded to ensure that they were the goods which had been inspected and which conformed to the contract. He also accepted that the same would be true in the case of a container. In that case SGS would inspect the stuffing of the container for the same purpose. I can see no reason in principle why it should be any different in the case of goods being loaded on to trucks at the beginning of their multimodal transport. Indeed, Mr Carr accepted in evidence that it would be possible.
70. Miss Andrews made a number of further submissions which may be summarised in this way. If SGS had any responsibility with regard to loading, the ambit of that responsibility would be narrow and limited to taking reasonable steps to make sure that the goods loaded on the vessel were the same as those inspected earlier. The purpose of SGS assuming any such responsibility was the possibility of inferior goods being substituted since SGS' inspection and not the possibility of no goods being shipped at all. SGS was not expected to be present when the freight forwarder took charge of the goods or when they were transferred from the warehouse to the first means of transport, which would in any event have been wholly impracticable. Moreover, in that regard SGS was entitled to rely upon statements made in the bill of lading and it cannot have been its responsibility to guard against fraud by the seller or its agent. If the bill of lading was false the buyer had a remedy against the person who issued it. The decision of the judge is inconsistent with the decision of this court in *Montrod Ltd v Grundkötter Fleischvertriebs GmbH* [2001] EWCA Civ 1954, [2002] 1 WLR 1975.
71. There is undoubted force in those submissions, as indeed there is in the point that Niru would probably have been willing to replace the reference to 'loading' in the letter of credit by a reference to 'inspection' to which I have already referred. Miss Andrews further submitted that there was evidence that Niru did not expect SGS to witness the loading of the goods at any time, whether on to trucks or on to a vessel.
72. Although I see the force in Miss Andrews' submissions, I prefer the reasoning of the judge and the submissions made by Mr Malek. In particular, the documents emanating from Iran show that supervision of loading was mandatory. No-one seems to suggest that it would not be practicable for SGS to supervise the loading of the lead on to a vessel and it seems to me that, if it wished it could have supervised loading on to trucks, at least to enable it to certify that "the goods loaded" conformed to the contract. It is important to note that it would not be necessary for SGS to take more than reasonable steps before issuing a certificate. In any event I can see no reason why it would have been impracticable for SGS to ask to see the warrants or copies of the warrants in order to satisfy itself that the goods which it inspected were represented by warrants in the possession of the freight forwarder.
73. I would accept Mr Malek's submission that certification of loading is not incidental but gives the buyer the assurance that conforming goods have left the control of the seller and that the carriage has commenced. It also identifies the goods delivered to the freight forwarder as the goods inspected by SGS. The certificate does not assert that the bill of lading stated that the goods loaded were those inspected by SGS. Indeed, the bill of lading does not so assert. It states that the goods were en route and that they were taken in charge by Maritime as the freight forwarder (or perhaps by IRISL). The certificate naturally means that the goods en route and taken in charge by the freight forwarder were those inspected by SGS. The bill of lading does not so assert. I can see no reason why SGS should not owe a duty to take reasonable care to ensure that that was the case before issuing a certificate in those terms,
74. The decision in *Montrod* does not seem to me to assist SGS. In that case this court decided that a beneficiary under a letter of credit does not owe a duty of care to the applicant (not the buyer) in presenting documents under the letter of credit. However the applicant's case was not based on a *Hedley Byrne* type assumption of responsibility (see the judgment of Potter LJ, with whom Sir Martin Nourse and Thorpe LJ agreed, at paragraph 67) and, in any event Potter LJ said at paragraph 68 that it was not a case where there had been an assumption of responsibility. Here SGS was issuing a certificate which it knew would be relied upon by Niru as evidence of the matters certified and would be relied upon by Bank Sepah in paying under the letter of credit.
75. For these reasons I would hold that the judge was correct to hold that SGS assumed a responsibility to Niru to take reasonable care to ensure that the certificate it issued was accurate with regard to those matters on which it had been instructed to report, which included reporting that the goods it had inspected had been loaded, which in

this context meant either physically loaded on to trucks or, if the judge's view is to be preferred, the control of which had been transferred to the freight forwarder.

Breach of Duty

76. The judge held that the certificate dated 6 November 1998 was inaccurate in two important respects. The first was that it stated that the goods were marked "VEZARATE DEFA NIRU BATTERY MFG CO", whereas they were not because while they remained in the warehouse under the control of CAI no steps could be taken to mark them in any way. It follows, as the judge observed, that the certificate did not adequately identify the goods to which it related. The second inaccuracy was that the certificate stated that the goods had been loaded, whereas they had not. Whatever the true meaning of 'loaded', the goods had not been physically loaded on to trucks and the warrants representing them had not been delivered to the freight forwarder.
77. SGS had inspected and sampled the lead in the warehouse at Gothenburg, which amounted to about 8,400 metric tons. It had agreed that it was not necessary to sample or inspect a further 2,000 metric tons in the warehouse at Helsingborg because it formed part of the same production as the lead at Gothenburg. There was some confusion within SGS as to what was required. Miss Kelly, who was an administration supervisor with SGS, had intended to arrange for the supervision of the loading of the lead on to the ocean vessel but was told by Mr Roberts of Woralco that since Maritime had issued a FIATA bill of lading it would not be necessary for SGS to supervise the loading of the goods at all.
78. On 6 November Mr Roberts sent Miss Kelly by fax a copy of the bill of lading issued by Maritime the previous day. Miss Kelly was not familiar with multimodal bills of lading and asked advice from a Mr Wilcox, also of SGS. He told her that SGS regularly accepted such bills of lading as evidence that the goods had been taken in charge by the freight forwarder and effectively loaded. Miss Kelly was not entirely convinced and sent a message to the Tehran Co-ordinating Office in Geneva pointing out that SGS had not supervised the loading of the goods and seeking further advice. The response she received was that she should follow the conditions and layout of the Iranian certificate, which, as the judge put it in paragraph 75 of his judgment, was less helpful than she might have expected. She telephoned Mr Carr for advice. He too was unsure of the position but, after speaking to Mr Wilcox, he authorised the release of the certificate. As the judge put it, it appears that Mr Wilcox was of the view that once a bill of lading had been issued the seller was entitled to have the certificate issued.
79. The judge, to my mind correctly, said (in paragraph 79) that as an international inspection company, SGS should have understood the nature of multimodal bills of lading. The judge expressed his conclusions in this way in paragraph 80:
"SGS understood well enough that the Iranian authorities insisted on their particular form of certification because they wanted confirmation that the goods delivered were the goods the surveyor had inspected, but in the present case no one at SGS seems to have stopped to think how that requirement could be met. If the letter of credit had called for an ocean bill of lading, I do not think that anyone at SGS would have doubted that it was necessary for an inspector to be present at the port to watch the goods being put on board. Indeed, that was what was originally contemplated in this case. The mere fact that a bill of lading had been issued by the ship would not have been regarded as sufficient. I find it difficult to understand, therefore, why in this case the fact that Maritime had issued a bill of lading should have been considered a sufficient basis for SGS to issue a certificate referring to goods "loaded". Here again the question of marking is relevant. In the absence of marks it was impossible, as Mr Carr conceded, to identify the goods to which the certificate related unless they had already been appropriated in some way as would be necessary for the purposes of passing control to the carrier. However, no one at SGS seems to have recognised that problem either."
80. Those conclusions seem to me to be entirely correct. Miss Andrews submitted to the judge and to us that SGS was entitled to rely upon the bill of lading as sufficient evidence that the control of the lead had passed to Maritime because it expressly stated that it had been "taken in charge" and, indeed, that the goods were en route. However, I would not accept that submission for the same reasons as the judge did not accept it. As he put it in the passage just quoted, SGS understood that the Iranian authorities insisted on the form of certificate set out in Appendix 2 of the circular because they wanted confirmation that the goods delivered to the carrier were the goods which SGS had inspected. It was accepted that in an ordinary case of carriage by sea, SGS could not properly issue a certificate that the goods were loaded merely by looking at the bill of lading. As it is put in SGS' manual, supervision of loading was mandatory. That was no doubt because it was appreciated that in such a case the Iranian authorities wanted independent confirmation by SGS. Mr Carr agreed in evidence that the purpose of such confirmation was to ensure that the goods inspected were the goods despatched and that there had been no switching of them. I agree with the judge that the same approach leads to the conclusion that it was not sufficient for SGS to certify that these goods were loaded in the sense of being taken in charge by Maritime or en route by simply looking at the bill of lading.
81. Miss Andrews submitted that SGS could not reasonably have been expected to do more than it did because if it had asked Maritime or Milestone what the position was, it would not have been told the truth. The judge saw the force of that (as do I) but held that SGS could reasonably be expected to have consulted the warehouse operator as to who held the warrants and to have asked Maritime when and how it had taken charge of the goods. He further held that the warehouse operator would have been able to confirm that it had received no instructions from the warrant holder to deliver the goods to Maritime.

82. In fact SGS did nothing other than rely upon the bill of lading. I agree with the judge that, just as in the case of an ocean bill of lading, mere inspection of the bill of lading did not provide reasonable grounds for issuing the certificate in the required form.
83. If the view I expressed above as to the meaning of 'loaded' is correct, there can be no doubt that SGS was in breach of duty. It had not taken any steps to check that the goods it had inspected were the same goods as were loaded on to trucks. It had taken no physical steps and for that reason should not have issued the certificate in the form it did. The position is precisely the same as the case of an inspector in a case of simple ocean carriage who does not physically check that the goods inspected are the goods loaded. However, even if SGS' duty was limited to taking reasonable steps to ensure that the goods had been taken in charge, a simple enquiry of the warehouse would have yielded the information that it had not received instructions from the holders of the warrants to load the lead on to trucks and that it had not done so.
84. In these circumstances, I would hold that the judge was justified in concluding that SGS was in breach if its duty of care in issuing the certificate without enquiring further. I also agree with him that it was in breach of its duty of care in stating that when the certificate was issued the goods were marked with the name of Niru.
85. I would add by way of postscript that I would not accept Miss Andrews' submission that it was not open to the judge to hold that SGS was in breach of duty in failing to contact the warehouse. In my judgment, that conclusion was open to him in the light of the evidence and argument before him.

Causation and Loss

86. The judge held that the breach of duty was causative of Niru's loss. First, he held that if SGS had discharged its duty of care it would not have issued a certificate in a form which complied with the letter of credit. He expressed his conclusions thus in paragraph 85:
"I think it very unlikely that it would have done so. There was, as I have already said, no basis for stating in the certificate that the goods were marked with Niru's name and if that had been recognised and the reference to marking deleted from the certificate, I think it likely that someone from SGS would have realised that it contained no other identification of the goods. That of itself would almost certainly have led someone to ask Maritime how the goods should be identified and would have led in turn to an enquiry about who had control over them. Moreover, if SGS had made proper enquiries about the location and control of the goods, I think it unlikely that it would have been satisfied that they were under Maritime's control. In these circumstances it could not properly have issued an inspection certificate referring to goods 'loaded'".
87. Miss Andrew submitted that those findings are not justified. She submitted that the judge should have held any enquiries of Milestone or Maritime would not have yielded the truth and that any enquiries of the warehouse would not have established who held the warrants. However, the judge was to my mind entitled to reach the conclusion he did.
88. On the basis of the conclusions reached above, namely that it was not sufficient to rely upon the FBL, it was the duty of SGS to take reasonable care to ascertain that the goods loaded on to the trucks were the goods it had inspected. If SGS had attempted to ascertain that fact by inspection, there can be no doubt that it would have discovered the true position. If it had done so by enquiry of the warehouse, it would have discovered that the lead represented by the warrants had not been loaded on to trucks but was still in the warehouse.
89. On the basis that the duty of SGS was limited to taking reasonable steps to ascertain whether the goods were taken in charge by the freight forwarder, Miss Andrews submitted that the suggestion that SGS should have enquired of the warehouse whether the freight forwarder had the goods under his control was contrary to the evidence of Mr Lundberg of Skandia, who said that it had never been asked to confirm any such thing. That seems to me to be a pointer to the conclusion that SGS' responsibility was to take reasonable steps to ascertain that the goods had been loaded on to the trucks as stated in the bill of lading. However that may be, on the footing that SGS was under a duty simply to take reasonable steps to ascertain that the goods were in the charge of Maritime, any enquiry of the warehouse would have led to the conclusion, either that Maritime did not hold the warrants or that Skandia did not know who did, which would in either event have led SGS to appreciate that the goods could not have left the warehouse and could not be en route as falsely stated in the FBL.
90. In short, the judge was in my opinion entitled to conclude that by one route or another it was likely (in the sense of more probable than not) that, if SGS had made proper enquiries about the location and control of the goods, it would not have been satisfied that they were under Maritime's control. In that event it is self-evident that SGS could not and would not have issued a certificate which complied with the terms of the letter of credit.
91. I should add that I reach that conclusion without relying upon the judge's conclusions as to the markings said to be on the goods. It is not therefore necessary to consider that part of the judge's reasoning and I shall not further lengthen this already overlong judgment by doing so.
92. Secondly, as to causation and loss, the judge held that an effective cause of Niru's loss was the provision of the certificate. Neither Niru nor Bank Sepah had any reason to think that the documents presented, including the FBL, were other than genuine. The act of SGS in issuing the certificate without taking proper care led to Bank Sepah paying under the letter of credit, which it would not otherwise have done: see the judgment at paragraph 87. In paragraphs 88 to 91 the judge explained why in his view none of the other events which occurred, namely the failure of Bank Sepah to honour its obligations promptly, the decision of CAI to realise its security, CAI's

subsequent failure to return the money received from Bank Sepah or Mr Mahdavi's failure to use the money to purchase another cargo, prevented SGS' breach of duty from being an effective cause of Niru's loss.

93. As the judge put it, although there were other causes of the loss, the inspection certificate was one of the keys to the funds represented by the letter of credit and the loss flowed from the original cause, namely the presentation of worthless documents. Miss Andrews did not I think challenge this part of the judge's reasoning but, in any event, I see no reason to disagree with it.
94. It follows that I would dismiss SGS' appeal against liability.

CAI – Deceit?

Introduction

95. The judge acquitted CAI of the tort of deceit. Niru and SGS submitted that he was wrong to do so. There was no dispute about the elements of the tort of deceit. They are set out, for example, by Cresswell J in *Standard Chartered Bank v Pakistan National Shipping Corporation* [1998] 1 Lloyd's Rep 684 at 704 as follows:
"The tort of deceit involves a false representation made by the defendant, who knows it to be untrue, or who has no belief in its truth, or who is reckless as to its truth. If the defendant intended that the plaintiff should act in reliance on such representation and the plaintiff in fact does so, the defendant will be liable in deceit for the damage caused."
Cresswell J quoted that passage from what is now the 18th edition of *Clerk & Lindsell on Torts* at paragraph 15-01.
96. The judge accurately summarised the claimants' case in paragraph 93 of his judgment as follows:
"The claimants say that in presenting the documents to Bank Sepah under the letter of credit CAI represented that the bill of lading was genuine, although it knew that it was in fact false, and did so with the intention that Bank Sepah should accept it as genuine and make payment accordingly."
The claimants' case was that the knowledge of Mr Francis was the knowledge of CAI and that he knew that the FBL was false or was reckless as to whether it was true or false. It was common ground that the knowledge of Mr Francis was the knowledge of CAI for this purpose. The issue was whether Mr Francis knew that the FBL was false or was reckless as to whether it was true or false when the documents, including the FBL, were presented to Bank Sepah for payment.
97. The judge rejected the claimants' case. He accepted Mr Francis' evidence that he did not appreciate that the FBL was not genuine and he held that Mr Francis was not reckless as to whether it was genuine or not. Niru, Bank Sepah and SGS challenge that conclusion in this appeal. In these circumstances, before considering the facts, I should say a word about the approach of this court to an appeal of this kind.

Approach of the Court of Appeal

98. The approach of this court to challenges of this kind has been considered in very many cases. I have considered it myself in recent times, in particular in *Assicurazioni Generali Spa v Arab Insurance Group* [2002] EWCA Civ 1642, [2003] 1 WLR 577, [2003] 1 All ER (Comm) 140. In paragraph 12 I set out what seemed (and seems) to me to be the correct approach of this court to challenges of this kind as follows:
*"Thus, for example, in cases in which the court was asked to reverse a judge's findings of fact which depended upon his view of the credibility of the witnesses, it would only do so if satisfied that the judge was plainly wrong. This can be seen from many cases, as for example *The Ikarian Reefer* [1995] Lloyd's Rep 455, where the court reversed the decision of the trial judge that the plaintiff insured shipowners had not deliberately scuttled their vessel or cast her away. Giving the judgment of the court, Stuart-Smith LJ addressed the correct approach as follows (at pp 458-9):*
"(1) The burden of showing that the trial Judge was wrong lies on the appellant. ...
*(2) When questions of the credibility of witnesses who have given oral evidence arise the appellant must establish that the trial Judge was plainly wrong. Once again there is a long line of authority emphasizing the restricted nature of the Court of Appeal's power to interfere with a Judge's decision in these circumstances though in describing that power different expressions have been used. In *SS Hontestroom v SS Sagaporak* ... [1927] AC 37 at p 47 Lord Sumner said:*
"None the less not to have seen the witnesses puts appellate Judges in a permanent position of disadvantage as against the trial Judge and unless it can be shown that he has failed to use or has palpably misused his advantage, the higher Court ought not to take the responsibility of reversing conclusions so arrived at merely on the results of their own comparisons and criticisms of the witnesses and of their own view of the probabilities of the case."
....
*Finally in *Mersey Docks and Harbour Board v Proctor* [1923] AC 253 at p 258, Viscount Cave LC said:*
"In such a case ... it is the duty of the Court of Appeal to make up its own mind not disregarding the judgment appealed from and giving special weight to that judgment in cases where the credibility of witnesses comes into question, but with full liability to draw its own inferences from the facts proved or admitted and to decide accordingly."
*(3) When a party has been acquitted of fraud the decision in his favour should not be displaced except on the clearest grounds. This proposition is not in contest and is supported by the House of Lords in *Akerhielm v De Mare* [1959] AC 789 at p 806, where the earlier authority of *Glazier v Rolb* (1889) 42 Ch D 436 is cited."*
99. I adhere to the view expressed in that case that those principles apply under the CPR just as they did under the RSC. I would only add that there have been cases in which this court has reversed the findings of the trial judge, though based on his view of the credibility of a witness or witnesses. *The Ikarian Reefer* was one example.

100. **The Ocean Frost** [1985] 1 Lloyd's Rep 1 was another example, where (at pages 56-7) Robert Goff LJ stressed the need to look at the objective facts and the overall probabilities. After referring to some of the leading cases which stress the principles set out above, including **Powell v Streatham Manor Nursing Home** [1935] AC 243, **Watt (Thomas) v Thomas** [1947] AC 484 and **Benmax v Austin Motor Co Ltd** [1955] AC 370, Robert Goff LJ said:
"It is implicit in the statement of Lord Macmillan in Powell v Streatham Nursing Home at p 256 that the probabilities and possibilities of the case may be such as to impel an appellate court to depart from the opinion of the trial Judge formed upon his assessment of witnesses whom he has seen and heard in the witness box. Speaking from my own experience, I have found it essential in cases of fraud, when considering the credibility of witnesses always to test their veracity by reference to the documents in the case, and also to pay particular regard to their motives and the overall probabilities. It is frequently very difficult to tell whether a witness is telling the truth or not and where there is a conflict of evidence such as there was in the present case, reference to the objective facts and documents, to the witness' motives, and to the overall probabilities, can be of very great assistance to a judge in ascertaining the truth."
101. On the other hand, we should also bear in mind the views of Lord Hoffmann in **Biogen Inc v Medeva plc** [1997] RPC 1 at page 45, which included the following:
*"The need for appellate caution in reversing the judge's evaluation of the facts is based upon much more solid grounds than professional courtesy. It is because specific findings of fact, even by the most meticulous judge, are inherently an incomplete statement of the impression which was made upon him by the primary evidence. His expressed findings are always surrounded by a penumbra of imprecision as to emphasis, relative weight, minor qualification and nuance (as Renan said, **la vérité est dans une nuance**), of which time and language do not permit exact expression, but which may play an important part in the judge's overall evaluation."*
102. In short, the question here is whether the decision of the judge was plainly wrong having regard to the advantage which he had in assessing the credibility of Mr Francis but taking account of all the circumstances of the case including the objective facts and the probabilities.

The Judgment and the Evidence

103. The judge correctly directed himself that the court will require cogent evidence before making a finding of dishonesty: see eg **In re H (Minors)** [1996] AC 563 per Lord Nicholls at pages 586-7.
104. The principal actors at CAI for present purposes were Mr Michallet and Mr Francis. Mr Michallet was the Deputy Head of Commodities and Trade Finance and Mr Francis was a relationship manager in Commodities and Trade Finance. It was not said that Mr Michallet was guilty of dishonesty. I turn, therefore to the state of mind of Mr Francis, it being accepted that by presenting the documents for payment CAI necessarily represented to Bank Sepah that it believed them to be genuine. That representation was repeated each time the documents were re-presented. Mr Malek divided his submissions into three phases, before 11 November 1998, on 11 November after receiving letters from Woralco and Milestone and after 11 November. It is convenient for me to focus on the same periods.

Before 11 November

105. As the judge found in paragraph 100 of his judgment, in June 1998 or earlier Mr Francis had been shown a copy of the letter of credit and knew at that stage that it called for an ocean bill of lading. The judge observed that Mr Francis made no secret of that knowledge but added that it was almost certainly at a time when Woralco was still operating under the existing facilities which it had intended to use to finance the purchase of lead from China. By the autumn of 1998 the position had changed and Mr Francis was well aware that CAI was only willing to support the transaction against the security of the LME warrants.
106. The judge noted that both Mr Francis and Mr Michallet said that they had made it clear to Mr Mahdavi that the bank would not support a transaction that required the presentation of a bill of lading under a letter of credit before the bank had received payment and that he would have to make some other arrangements with Niru which would allow the letter of credit to be operated without a document of title. They said that they had left it up to him to make whatever arrangements he liked and did not enter into any discussions as to how he might go about it. The judge added at the end of paragraph 101:
"Mr Francis said that he was told some time later that an amendment had been made to the letter of credit, but that he did not go into details and paid little or no attention to its precise nature. He said he gave no thought to what the letter of credit required in terms of documents to be presented under it."
107. In paragraphs 101 and 102 the judge made findings to the effect that Mr Mahdavi met Mr Francis and Mr Michallet for lunch but both Mr Francis and Mr Michallet denied that Mr Mahdavi made it clear to them what he had in mind, namely to persuade the forwarding agent to issue a multimodal bill of lading before the goods left the warehouse. The judge said that he had no hesitation in accepting their evidence (and rejecting that of Mr Mahdavi to the contrary) because Mr Mahdavi's plan was plainly dishonest and that he was sure that if Mr Michallet had been aware of what Mr Mahdavi proposed he would not have been willing for CAI to become involved in the transaction at all. The judge thought that the most likely explanation was that the lunchtime conversation was conducted in vague terms and that Mr Mahdavi did not make his fraudulent plans plain to CAI. He concluded that, although he knew that CAI would not release the warrants until it had been paid, Mr Mahdavi did not think that it would refuse to present the documents under the letter of credit if they did not contain an ocean bill of lading. In short the judge rejected the suggestion that CAI was aware that the documents which Mr Mahdavi intended to present to Bank Sepah included a bill of lading.

108. As already stated, it is not suggested that Mr Michallet knew that Mr Mahdavi's scheme was fraudulent. In these circumstances, it seems to me that the judge was entitled to hold that Mr Francis did not appreciate it either. He was to my mind entitled to hold that neither Mr Francis nor Mr Michallet gave detailed consideration to what documents Mr Mahdavi had arranged should be presented under the letter of credit.
109. Some scepticism about that was expressed on behalf of Niru and SGS but it must be seen in its context, which I am sure the judge had in mind. CAI had had a long business relationship with Mr Mahdavi during which it had at no time suspected that he might be guilty of fraud.
110. Moreover, as Miss Garner, who had been the Head of Group Legal since 1985, said in her statement, Mr Mahdavi was of Iranian origin and she had formed the view that the relationship between him and certain of his customers and the Iranian banks was fairly close. She said in evidence:
"We had quite a lengthy relationship with him over the years and he had always complied with his obligations, so I didn't feel the need to double check on him."
She also said that there were things called red clause letters of credit, which were pre-payment transactions.
111. In the same vein Mr Michallet said in his statement: *"In fact the use of such letters of credit (often calling for no more than some form of notification that the goods are in the warehouse or that the seller intends to ship but requiring no negotiable transport document) are commonplace in the metals industry. Indeed, it is now more common in the metals industry to have this type of prepayment arrangement than to negotiate shipping documents because the delays in producing transport documents in the right place at the right time can often make a transaction unworkable. Instead, buyers frequently accept FCRs, beneficiary's certificates, guarantees (whether or not backed by a bank), commitments to ship and other forms of comfort letters and inspection certificates which assure the buyer that goods have been identified even if they are some way off being shipped."*
112. Mr Malek and Miss Andrews relied upon a number of passages in Mr Francis' evidence in which he accepted that it was, as he said at one stage, *"usual if not invariable"* that a transport document would need to be presented under a letter of credit. He also said much the same in answer to the judge. However, against that must be put evidence to the following effect. When it was put to him that at the very least he simply shut his eyes to the obvious, namely that a transport document was going to come into existence, he said:
"No, because originally the LC did call for a transport document. I knew that and I said that the LC – the transaction couldn't proceed on that basis. The customer arranged for amendments to be made to that LC. Now in retrospect you can say: "Yes, why did you not ask what amendments they were and list them and get comfort with that?" But that was the situation, in my mind we had had an LC that had been amended, it was consistent with me holding LME warrants. I had done my job to make sure the bank was secure."
113. Mr Francis said that he did not ask Mr Mahdavi what arrangements he had made because he simply left it to him. It was put to him that he had no reason to believe that any amendment had been made and he replied:
"Well the customer told me – and this was a customer I'd had for 7-8 years, we'd lent hundreds of millions of dollars, probably made millions of dollars in revenue, it was a big customer of the bank, so – always made good its debts, so I'd no reason not to believe them, certainly."
114. In short, Mr Francis' evidence was that he did not enquire of Mr Mahdavi what arrangement he had made. He trusted him as a valued customer who had never let CAI down. Moreover he knew that Mr Mahdavi was dealing with an Iranian buyer and an Iranian bank and, as it were, left them to it. He was not concerned because he knew that the bank's security was safe.
115. Miss Andrews relied upon a passage in the cross-examination of Mr Francis by Mr Malek in which he agreed that neither a banker nor a trader would have made an unsecured loan of US\$5.8 million. I see the forensic value of that point but at the end of the day the question for the judge to decide was what was the state of mind of Mr Francis at the time. The passage relied upon by Miss Andrews and others relied upon by Mr Malek were part of the debate. Some of them undoubtedly supported the submission that Mr Francis acted dishonestly but none of them is conclusive. They were all pointers to be assessed together with the other evidence in the case.
116. For my part, I see no reason why the judge should not accept Mr Francis' evidence that he did not concern himself with the arrangements which Mr Mahdavi had made with Bank Sepah and Niru as true. In all the circumstances, the judge was in my opinion entitled to reject the suggestion that Mr Francis was aware that the documents Mr Mahdavi intended to present to Bank Sepah would include a bill of lading.

11 November

117. This was the key date. On 11 November Milestone and Woralco wrote almost identical letters to CAI which were sent round by bike. They were marked for the attention of Paul Francis and Nick Robson. The relevant parts for present purposes were identical and included the following:

*"1.0 We refer to above documentary credit ... and enclose following documents as called for under the credit:
1.0 Full Set 3/3 Original FIATA Multimodal Transport Bills of Lading and 4 Non Negotiable Copies ...
2.0 We request you to check enclosed documents against the credit and advise us of any discrepancies."*

The remainder of paragraph 1.0 listed the other documents required by the letter of credit. Paragraph 3.0 requested CAI to present the documents to Bank Sepah and asked for the net proceeds to be paid to CAI, paragraph 4.0 stated that all original amendments to the credit were attached and paragraph 5.0 of the letter

from Milestone asked CAI to pay the proceeds (after deduction of charges) into a Nikam account. Against that paragraph someone from the back office wrote: "No. See Paul/Nick before paying".

118. It was Niru's case before the judge and before us that Mr Francis must have read the letters and appreciated that the FBL referred to in paragraph 1.0 was false because, as he knew full well, CAI retained the warrants. It was, therefore, impossible for the goods to have passed into the hands of a forwarding agent or carrier. Despite that, Mr Francis not only passed the documents to the back office for checking and presentation under the letter of credit, but at a later stage himself wrote to Bank Sepah pressing for payment. Mr Malek's submissions as put before us may be summarised as follows:
- i) The evidence was that a document addressed to Mr Francis and/or Mr Robson would go first to Mr Francis who would look at it and pass it on if appropriate and that Mr Robson would consult Mr Francis throughout the day.
 - ii) It was significant that two letters were sent. No doubt Mr Francis would want to know the reason.
 - iii) In his first statement Mr Francis specifically referred to the two letters and gave no indication that he had not read them. On the contrary he remarked on the fact that there were two letters saying that he assumed that it was an over cautious approach. It follows that he both received the letters and applied his mind to them.
 - iv) In his supplementary statement and in his evidence in chief he gave no indication that he had not seen the letters.
 - v) His evidence in cross-examination was at best confused. He first said that he would probably not have read the letters because it was a documentary presentation which would be passed to the back office and was not something he would get involved with. Later he said that he might have seen the letter but he would not have "sat there and read the letter".
 - vi) He would have had to review the letters, even if briefly, in order to know what to do with them. The letters included front office instructions, as for example paying the proceeds into a Nikam account.
 - vii) The transaction involved a substantial sum, namely US\$5.8 million with an important customer. Moreover it was a transaction which CAI's head office had expressed concerns about only six days earlier. It was of great importance to CAI to obtain the proceeds of the letter of credit.
 - viii) A mere glance at the letter would have revealed that Milestone wanted CAI to present an original FBL.
 - ix) The probabilities suggest that Mr Francis would have been interested in the documents to be presented to Bank Sepah in order to obtain payment. As Mr Michallet pointed out, CAI would have been interested in knowing how payment under the letter of credit was to be triggered.
 - x) The judge does not explain how Mr Francis could not have appreciated the significance of the reference to the FBL.
 - xi) If the judge's view was that Mr Francis read the letters, or at least noticed the reference to the FBL, it was not open to him to conclude that Mr Francis did not appreciate its significance. If Mr Francis saw the letters, an alarm bell would have been set off, albeit one which Mr Francis chose to ignore.

119. I will consider these submissions after referring briefly to the period after 11 November.

After 11 November

120. On 24 November CAI Paris reported to London that they had decided not to pursue the Woralco/Nikam relationship and asked for details of outstanding finance. Mr Malek submitted that this put Mr Francis in an embarrassing position with the result that he wrote to Bank Sepah on 26 November pressing for payment under the letter of credit. He submitted that when he wrote that letter he cannot honestly have believed that the letter of credit was payable.
121. Mr Malek and Miss Andrews further relied upon what they said was dishonesty on the part of Mr Francis when, after CAI received payment from Bank Sepah under the letter of credit, it was decided to pay the monies away in accordance with Mr Mahdavi's instructions.
122. Given the relevance or potential relevance of the evidence relating to those events to this part of the case, it is appropriate to set out here the judge's findings of fact with regard to them. They are in paragraphs 111 to 121 of his judgment:

"111. I begin by setting out the circumstances in which the disposal of the funds occurred. CAI disposed of the warrants in consultation with Mr Mahdavi early in December 1998. Once that had been done any prospect of completing the transaction (as CAI understood it) disappeared because Milestone was no longer in a position to give delivery of the goods. The documents had been presented to Bank Sepah in trust for CAI and in theory could have been recalled. Indeed, both Mr Francis and Mr Michallet recognised that CAI should have taken steps to recall them. Had it done so, I have no doubt that the arrangements being made to enable Bank Sepah to make payment under the letter of credit would immediately have come to a halt, whether the documents had actually been returned or not. Apart from anything else, it would have become clear to Bank Sepah and Niru that no goods had been delivered to a carrier and that Milestone was no longer able to perform the contract. However, Mr Francis did not take steps to recall the documents, nor did he tell the back office to stop pressing for payment. That was not because he intended to obtain payment from Bank Sepah for goods which he knew could not be delivered, but simply because at that stage he did not give any thought to what Bank Sepah was doing and failed to make sufficient allowance for the fact that payment might still be made.

112. On 21st December CAI learned from Bank Sepah that the funds would be remitted the next day. CAI must have informed Mr Mahdavi immediately because on the same day he and Mr Ramanuj gave instructions by fax on behalf of Milestone for the funds to be credited to the account of Nikam. Mr Francis said that he was surprised when he learned that funds would be received from Bank Sepah. His immediate reaction was that the money ought to be returned because the transaction had come to an end. He thought that payment had simply resulted from the inefficiency of the Iranian banking system.
113. At that point Mr Francis decided to speak to Mr Mahdavi. He told Mr Mahdavi that in his view the money should be returned to Bank Sepah, but Mr Mahdavi became emotional and threatened legal action against CAI if it did not comply with his instructions. He told Mr Francis that he was in discussions with Niru for the shipment of a new consignment of lead and that the only matter still to be agreed was the precise quantity to be delivered. He did not want the money to be returned to Bank Sepah because that would imperil the whole business. Mr Francis thought that what Mr Mahdavi had told him was plausible but there were conflicting considerations at play: should he comply with the customer's instructions, or should he return the funds to Bank Sepah? He was in something of a quandary, so he went to see the head of CAI's Legal department, Miss Garner, for advice.
114. Unfortunately neither Mr Francis nor Miss Garner made any note of their conversation, but both said it was brief and I infer from their evidence that it was quite informal. According to Mr Francis, he told Miss Garner that funds had been received in respect of a transaction which he understood to have been abandoned and asked whether, in the light of what Mr Mahdavi had told him, he should follow his instructions. She told him that provided he was comfortable with the explanation given by Mr Mahdavi and if the instructions were for the funds to be transferred to a metal broker, he should do so.
115. Miss Garner's evidence was to essentially the same effect. She recalled the conversation as having been brief and very informal. Mr Francis had told her that he had suggested to Mr Mahdavi that the funds should be returned to Bank Sepah since the transaction would not go through, but that Mr Mahdavi had insisted that negotiations were going on with a view to completing the transaction on a revised basis. Mr Francis had wanted to know whether he should follow Mr Mahdavi's instructions and she had told him he should if he was satisfied with what he had been told.
116. Mr Mahdavi himself said he had no recollection of a conversation of the kind described by Mr Francis, but he did not dispute the account he had given, except for the suggestion that he had threatened to sue the bank.
117. I accept as reliable Mr Francis's account of his conversation with Mr Mahdavi.
118. In the light of all the evidence I am satisfied that Mr Francis did not give Miss Garner a full account of the circumstances which had led up to the receipt of the money or of the reasons why he thought it ought to be returned to Bank Sepah. Although he did give her to understand that he was concerned that Milestone might not have access to sufficient lead to satisfy its contract with Niru, he failed to make it clear that he understood the payment to have been made under a letter of credit in respect of specific parcels of lead that had since been disposed of by the bank, thereby making it impossible for that transaction to be completed. That had played a large part in causing him to think that the money should be returned, but he does not appear to have articulated the reasons for his concern very clearly. If he had, it would have been an easy matter for Miss Garner to check the file and I think she would probably have done so.
119. Mr Mahdavi had been a customer of CAI for a long time and had shown himself to be a successful trader who was adept at putting deals together. Mr Francis accepted his account of negotiations with Niru and decided that he should follow his instructions with regard to the disposal of the funds. He therefore gave instructions for the funds to be put at the disposal of Nikam from whose account they were shortly afterwards paid away on Mr Mahdavi's instructions.
120. Two aspects of these events strike me as particularly significant. First, I think it is clear, both from Mr Francis's recognition that the documents should have been withdrawn when the warrants were sold and from his concern on 22nd December that payment had been made in respect of a transaction that could no longer be completed, that he realised that Bank Sepah had paid on a false basis. He did not, of course, analyse the situation in legal terms, but he was aware that CAI should not have received the funds because by that time the contract had irretrievably broken down. Secondly, the grounds put forward by Mr Mahdavi for retaining the money were not that the original contract was still capable of being performed, but that he was in negotiations with Niru and had almost reached the point of agreeing terms for a new contract. The fact that Mr Mahdavi said that he did not want the money to be returned to Bank Sepah in case that put an end to the whole business simply emphasised the fact that the negotiations were still at a delicate stage. In fact, unbeknown to Mr Francis, no such negotiations were going on at that time. It was not until January 1999 that Milestone opened the bidding with its faxes to Niru of 4th January putting forward its claim for damages and offering to ship part of the goods pending the satisfactory settlement of its claims.
121. An important feature of the present case is the fact that the payment which CAI relies on as constituting a change of position was made after it had been recognised that Bank Sepah had probably been labouring under a mistake and had a strong claim to recover the payment it had earlier made. CAI did not, in Lord Goff's words in *Lipkin Gorman v Karpnale*, have "knowledge of the facts entitling the plaintiff to restitution" since Mr. Francis did not know that the documents against which the payment had been made included a false bill of lading, but it did have knowledge of other facts, namely the sale of the lead, which, on its own understanding of the position, made it impossible for the transaction to be completed and which, if known to Bank Sepah would have led it to withhold payment. A moment's reflection would have led Mr. Francis to realise that the reason given by Mr. Mahdavi for wishing to retain the payment did not justify the course he was asking the bank to take. He did not

suggest that the transaction pursuant to which the payment had been made had not broken down or that Bank Sepah or Niru were aware that the lead had been sold. He did not say that he had managed to reach agreement with Niru, or even that Niru had agreed that Milestone should retain the payment pending agreement. He simply said that he was in the throes of negotiating a substitute transaction with Niru and that the repayment of the funds on the grounds that the lead had been sold would prejudice those negotiations. Thus, on the facts as Mr. Francis understood them, nothing said by Mr. Mahdavi actually undermined Bank Sepah's right to repayment of the money."

123. I will return below to CAI's change of position defence. At this stage it is important to note that, while the judge was critical of Mr Francis, he did not hold that he acted dishonestly after Bank Sepah paid under the letter of credit. That is I think clear from the passages just quoted but is made absolutely plain in paragraph 13 of the judge's judgment of May 2003. He there first referred to the decision of the House of Lords in *Twinsectra Ltd v Yardley* [2002] UKHL 12, [2002] 2 AC 164, as authority for the proposition that in order for a person to be held liable on the grounds of dishonesty it was necessary to show, not only that his conduct fell short of ordinary standards of honesty but that he was aware of that fact. In other words, dishonesty involves "consciousness that one is transgressing ordinary standards of honest behaviour": per Lord Hoffmann at paragraph 20. The judge summarised his conclusion with regard to Mr Francis thus:

"It was that element of conscious wrongdoing that I found lacking in the present case. Although I was critical of the way Mr Francis dealt with the matter, I did not find that he was dishonest precisely because, having seen him in the witness box, I was not satisfied that he had consciously transgressed the standards to be expected of an ordinary honest banker. I see no ground for departing from that conclusion now."

The last sentence was added because Miss Andrews had submitted to the judge at the contribution hearing that CAI had dishonestly assisted in a breach of trust by Nikam and Mr Mahdavi. The judge rejected that submission.

Discussion

124. Mr Malek and Miss Andrews submitted that in that passage, as in his first judgment, the judge placed too much emphasis on the view he formed of Mr Francis in the witness box. They submitted that if the judge had considered the whole of Mr Francis' evidence and conduct, both before the documents were presented to Bank Sepah and after Bank Sepah had paid some weeks later, he would have concluded that Mr Francis acted dishonestly after receipt of the monies and that he must have known that the documents presented to Bank Sepah under the letter of credit included a false FBL or, at the very least, that he was subjectively reckless as to whether the documents presented were false or not. The judge rejected similar submissions.
125. He did so in paragraphs 103 to 107 of his judgment, which I should I think quote in full:
- "103. The letter from Milestone to CAI enclosing the documents set out a list of the documents enclosed, the first of which was a full set of original FIATA multimodal transport bills of lading. Mr Francis accepted that he ought to have seen a letter of this kind addressed to him and that if he had done so he would have had to read part of it in order to decide what action was required. He could not remember seeing this letter at the time, however, and was adamant that if he had done so, he had not appreciated the significance of the reference to the bill of lading. For him this was a documentary matter to be passed to the back office without further ado.*
- 104. It is appropriate at this stage to say something about Mr Francis and the way he gave his evidence. It is fair to say that although he was facing serious criticism for the way in which he handled this transaction, he gave his evidence in an unusually straightforward and open manner. He did not seek to evade the difficult question or bluster when under pressure, nor did he attempt to deflect an unwelcome line of questioning even when it was likely to place him in a difficult position. For example, he unhesitatingly accepted that the letter of credit provided Milestone's only source of funds, that it was almost invariably the case that a letter of credit required the presentation of a transportation document of some kind and that the bank's insistence on retaining possession of the warrants made it impossible for a genuine transport document to come into existence before the bank had been paid.*
- 105. The letters from Milestone and Woralco enclosing the documents were essentially of a routine kind and many such routine communications passed across Mr Francis's desk in the course of each day. Although it can no doubt be said that all letters coming into the bank should be read carefully and their contents fully digested before any action is taken, in practice this does not always happen even in the best regulated offices. I think it more likely than not that Mr Francis did see one or both of these letters, but I accept his evidence that he did not appreciate the significance of the reference to the bill of lading. That may have been due to carelessness on his part, but having seen and heard him give evidence I am not persuaded that he allowed the documents to be sent to the back office for checking and presentation to Bank Sepah knowing full well that the bills of lading were not genuine. Nor, I should make it clear, am I persuaded that he was reckless in that regard, in the sense that he realised something might be wrong but did not bother to investigate. I accept that the significance of the letter simply failed to register with him.*
- 106. The fact that the bank had agreed to finance this transaction against the security of the warrants was not something that would ordinarily be communicated to the back office whose role was limited to one of administration. It is not surprising, therefore, that none of those responsible for the checking and presentation of the documents was aware of the inconsistency between the existence of a bill of lading and the continued retention by the bank of the warrants covering the goods. On 26th November Mr Francis sent a fax to Bank Sepah complaining about its failure to pay for the documents and seeking urgent action on its part, but there*

was no need for him to review the documents for the purposes of sending that fax and nothing further had occurred in the meantime to alert him to the fact that the documents that had been presented included a bill of lading.

107. Mr Malek submitted that Mr Francis knew that the documents called for under the letter of credit included a transport document and that both he and Mr Michallet were willing for that to be the case despite the fact that such a document was bound to be false. For the reasons I have given I am unable to accept that. The claim against CAI in deceit must therefore fail."
126. Mr Malek and Miss Andrews submitted that the judge placed too much emphasis on the impression which Mr Francis made on him in the witness box and did not have regard to the probabilities or have sufficient regard to the whole picture. Thus they submitted that the judge should have taken account, not only of Mr Francis' evidence with regard to the events of 11 November and the periods immediately before and after it but also of his state of mind after CAI was paid by Bank Sepah and when it decided to pay the monies away in accordance with Mr Mahdavi's instructions.
127. I should note that, by contrast, Mr Bloch submitted that, having acquitted Mr Francis of dishonesty, the judge should not have held him or CAI guilty of sharp practice sufficient to defeat the defence of change of position in response to Bank Sepah's claim for the return of the money.
128. Given the emphasis placed by Mr Malek and Miss Andrews on the events of 22 December, it is perhaps convenient to focus on them first. Although it was accepted that the vast majority of the judge's findings of fact were correct, it was submitted that in paragraphs 112 to 115 of his judgment the judge did not refer to the evidence that, after being asked what to do by Mrs Ward in the back office (as a result of the instruction on the letter from Milestone of 11 November to "see Paul/Nick before paying"), Mr Francis authorised the money paid by Bank Sepah to be paid into Nikam's account before he sought advice from Miss Garner. It is true that the judge did not specifically mention those facts, but they seem to me to be of comparatively small importance.
129. The principal thrust of the argument may be summarised in this way, as it was powerfully put by both Miss Andrews and Mr Malek. The judge found that Mr Francis always thought that Bank Sepah had paid by mistake because CAI had already sold the warrants so that there could be no proper basis for paying for the lead under the letter of credit. He therefore thought that the money should be paid back to Bank Sepah. However, he was faced with a difficult customer who had had his longstanding relationship with the bank terminated and who was in essence threatening to sue the bank if the monies were paid back to Bank Sepah. He was saying, as Miss Andrews colloquially put it, "*I am negotiating for a substitute transaction on the lead with the Iranians, and if you pay the money back it may scupper the deal.*" In these circumstances Mr Francis was faced with a dilemma - on the one hand the money should go back to Bank Sepah, whereas on the other hand, if Mr Mahdavi was trusted to go into the market and buy some lead, it was hoped that lead could be supplied to the Iranians, who would be happy.
130. Miss Andrews submitted that in these circumstances an honest banker in the position of Mr Francis would have gone to the bank's lawyer, put the whole story frankly before him or her and sought advice. Instead, as the judge held in paragraph 118 quoted above, Mr Francis did not put the whole story before Miss Garner. Miss Andrews submitted that he did not do so because he must have known that, if he did, she would advise him to pay the money back to Bank Sepah and he would have had no alternative but to follow her advice. She further submitted that Mr Francis had a motive for taking the course he did: he was under pressure from head office because of the state of the accounts of Mr Mahdavi's companies and because there was evidence that he and Mr Michallet had gone ahead with the original scheme without head office approval.
131. As we have seen, the judge did not accept that Mr Francis acted dishonestly in the sense that he was aware or conscious that he was falling below the ordinary standards of honest behaviour. Mr Francis' account was that he owed no duty to Bank Sepah and that he was content with the advice that the money should be paid to a broker for the purchase of lead. He said that he did not recall whether he told Miss Garner that Bank Sepah had paid under the letter of credit in circumstances in which the underlying lead had been sold by CAI. He expressly denied the suggestion that the reason he did not tell her was because he knew that a false document had been presented to Bank Sepah, which was a fact which he wanted to hide from Miss Garner.
132. Miss Andrews submitted to us (and no doubt to the judge) that in all these circumstances a member of the public (say a juror) would have no difficulty in concluding that Mr Francis behaved dishonestly because, as she put it, if you look at all the inferences to be drawn from the collective story, it points inexorably to that conclusion.
133. For my part, I accept that Mr Francis certainly had a case to answer on dishonesty, just as he had a case to answer as to his knowledge of the FBL. However, both those questions were essentially questions of fact for the judge. The authorities show that this court should not interfere with the decision of a trial judge that those who alleged dishonesty and deceit had failed to prove it to the required standard unless persuaded that his decision was plainly wrong.
134. For my part I am not persuaded that the judge's decision that Mr Francis was guilty of neither dishonesty nor deceit was plainly wrong. They each involved a consideration of the evidence of Mr Francis and others set against the surrounding circumstances and the probabilities. That exercise involved the weighing up of many factors, which was essentially the role of the trial judge.
135. As to 22 December, the judge held that Mr Francis knew that Bank Sepah had made a mistake but thought that he had no duty to Bank Sepah and that he was entitled to comply with his customer's instructions. As appears

below, it is my view that CAI was under a duty to return the monies to Bank Sepah and that to allow it to avoid doing so now would be unconscionable, but it appears to me that the judge, having had the advantage of seeing Mr Francis give evidence and be cross-examined and having had the advantage of detailed submissions on the documents and the probabilities, was entitled to hold that he did not consciously transgress the standards of an ordinary honest banker.

136. I return to the question whether the judge was entitled to hold that it was not shown that he knew that a false bill of lading was presented to Bank Sepah or was reckless as to whether it was or not. I have already expressed the view that the judge was entitled to reject the suggestion that Mr Francis was aware before 11 November that the documents Mr Mahdavi intended to present to Bank Sepah would include a bill of lading. It can be seen from the summary of Mr Malek's submission set out in paragraph 118 above that the case that Mr Francis must have consciously observed from the letters of 11 November that the documents to be presented included an FBL and thus that he must have appreciated that a false document was to be presented to Bank Sepah depends upon a consideration of a number of different factors from which it is said that that inference should be drawn. The judge saw Mr Francis being cross-examined on all those points. He was in a far better position than this court to assess in the light of the probabilities whether Mr Francis was telling the truth when he said that he did not appreciate that the documents included a false bill of lading.
137. For my part, I would accept that the case against Mr Francis can be powerfully put, as it was before us and (I have no doubt) before the judge. On the other hand Mr Bloch put up a spirited defence of Mr Francis (and indeed the judge) before us. He relied upon a number of particular factors including the following:
- i) In paragraph 98 of his judgment the judge described the working of the front office and the back office, which, although there were separated only by a line of filing cabinets, operated independently. The front office was occupied by the relationships managers and others who were responsible for dealing with clients, whereas the back office was responsible for the administration of transactions such as documentary sales. In the ordinary way documents sent to the bank for checking and presentation would be delivered by the client to his contact in the front office, who would pass them to the back office for processing, as the judge put it, "often with very little or no prior scrutiny". The back office would then process the documents without further reference to the front office.
 - ii) In the present case the documents were passed to the back office "in the usual way": see the judgment at paragraph 99.
 - iii) Mr Francis was not expecting the documents to include a bill of lading: see paragraphs 105 to 116 above.
 - iv) As the judge put it in paragraph 103 (quoted above), Mr Francis accepted that he ought to have seen a letter of the kind received on 11 November and that, if he had done so, he would have read part of it in order to decide what action was required. He could not remember seeing the letter but was adamant that if he saw it he did not appreciate the significance of the reference to the FBL. For him it was a documentary matter to be passed to the back office without further ado.
 - v) Mr Francis accepted that it would not be possible for a genuine transport document to come into existence before CAI had been paid but the letter enclosing the documents for checking was "of a routine kind and many such routine communications passed Mr Francis' desk in the course of each day". Hence, while it was more likely than not that Mr Francis did see the letter, the judge accepted his evidence "that he did not appreciate the significance of the reference to the bill of lading": see paragraphs 104 and 105 of the judgment quoted above.
 - vi) That conclusion was entirely reasonable, given the large number of transactions which passed across Mr Francis' desk. As he put it in the course of his evidence, this was one routine transaction of thousands he would have handled in a year. He did not have the time to analyse the transaction in the detail which was carried out at the trial. The factors relied upon by Niru and SGS owe a considerable amount to hindsight.
 - vii) In the circumstances the judge was entitled to hold in paragraph 105 that the significance of the letter simply failed to register with him, especially given the previous relationship between Mr Mahdavi and CAI which gave rise to no suspicions of the risk of fraud: see eg the evidence of Mr Michallet and Miss Garner which corroborated that of Mr Francis, some of which is referred to in paragraphs 109 to 113 above. Mr Francis had no relationship with Bank Sepah and was unaware of the relationship between Mr Mahdavi and either Bank Sepah or Niru.
 - viii) There is no support for the suggestion that Mr Francis was willing to deceive his superiors and colleagues at CAI. Whatever pressure head office was exerting, the deliberate presentation of false documents would be likely to jeopardise Mr Francis' whole career if (as was likely sooner or later) the truth emerged.
 - ix) If Mr Francis knew that the FBL was false, it is inherently improbable that he would have failed to recall the documents from Bank Sepah once CAI had realised its security by selling the warrants. He would surely have cancelled the payment request, which he did not. His evidence was that he can have given no thought to calling the documents back, which is credible but would be incredible if he knew that he had presented a false bill of lading to Bank Sepah.
138. It follows from the above that each side was relying upon a series of disparate factors in support of its case as to the credibility of Mr Francis. One set of factors was said to point to the conclusion that his evidence that he did not know that a false transport document was presented to Bank Sepah was incredible, whereas another set of factors was said to point to the conclusion that his evidence was credible. In deciding where the truth lay, the

judge had to weigh up a whole series of factors and to form a view as to whether Mr Francis was telling the truth on the key point, notwithstanding the inconsistencies in his evidence on which Mr Malek and Miss Andrew relied.

139. The judge was also entitled to take account of the impression which Mr Francis made on him in the witness box. It is evident from paragraph 104 of the judgment that the judge did precisely that but it is plain from his detailed analysis of the case that the judge considered his evidence in its context and with regard to the probabilities, and that his conclusion was not the simplistic one of a judge who merely says that he saw a witness whom he thought was telling the truth without more. There is much more in the judge's careful judgment.
140. For my part, I have reached the conclusion that the judge was entitled to reach the conclusion he did. In paragraph 105 he said that he was not persuaded either that Mr Francis allowed the documents to be sent to the back office for checking knowing that they included a false document or that he was reckless in the sense that he realised that something might be wrong but did not bother to investigate. There was, to my mind, ample material which entitled the judge so to conclude.
141. I would reject the submission made at one stage that, if the judge concluded that Mr Francis read the letters of 11 November, it was not open to him to conclude that Mr Francis did not appreciate the significance of the reference to the bill of lading. Of course, if by 'read the letters' were meant read, marked, learned and inwardly digested them, I would see the force of the submission. In fact the judge said in paragraph 105 that he thought it more likely than not that Mr Francis did "see one or both of those letters". It seems to me that the judge's conclusion that, despite seeing the letter or letters, he did not appreciate the significance of the reference to the bill of lading can be justified on one of two bases, both of which accept that the letters were not read as carefully as they should have been before any action was taken, since the judge expressly recognised that that does not always happen even in the best regulated offices. On that footing, the judge was, as I see it, entitled to conclude that Mr Francis did not appreciate the significance of the reference to the bill of lading either because he did not consciously notice the reference to a bill of lading or, if he did, that he did not apply his mind to its significance, given that he had no reason to think that the matter had not been arranged between Mr Mahdavi, Bank Sepah and Niru.
142. I am conscious that I have not discussed every point made in the course of this appeal but, for the reasons I have given, I have reached the conclusion that the judge was entitled to reach the conclusion which he did on deceit. This is not one of those exceptional cases in which this court would be entitled to interfere with the conclusion reached by a trial judge acquitting a person of deceit and dishonesty. I would therefore dismiss the appeal on this point.

CAI – Change of Position

Introduction

143. As already stated, the judge held that CAI was liable to repay the amount which Bank Sepah had paid under the letter of credit. It was common ground before the judge that Bank Sepah paid under a mistake of fact and that it was liable to repay the monies unless it had a good defence of change of position. The judge held that the defence was not available to CAI on the facts. The issue in this part of the appeal is whether he was correct so to hold. It involves a consideration of the scope of the defence of change of position.
144. Mr Bloch's submissions on behalf of CAI can I think be reduced to three main propositions as follows:
- i) the defence is available in any case where the recipient of monies paid under a mistake of fact pays the monies away in good faith;
 - ii) a payment away made by the recipient is made in good faith unless it is made dishonestly; and
 - iii) since it was held that Mr Francis (and thus CAI) did not act dishonestly in paying the monies away, it follows that CAI was not liable to repay Bank Sepah and the judge should not have so held.

The Principles

145. The leading case on the defence of change of position is, of course, *Lipkin Gorman v Karpnale Ltd* [1991] 2 AC 548. As the judge observed in paragraph 109, Lord Templeman (with whom Lord Bridge, Lord Ackner and Lord Griffiths agreed), analysed the question primarily in terms of the unjust enrichment of the recipient, noting (at page 560) that an innocent recipient of money paid by mistake who has parted with it in good faith without retaining any of the benefit has ceased to be unjustly enriched and is therefore no longer under any liability to make restitution. I will return to what Lord Templeman meant by 'good faith' in a moment.
146. There are important passages in this regard in the speech of Lord Goff, with whom Lord Bridge, Lord Ackner and Lord Griffiths agreed. They include the following (at pages 579 and 580):
- "In these circumstances, it is right that we should ask ourselves: why do we feel that it would be unjust to allow restitution in cases such as these? The answer must be that, where an innocent defendant's position is so changed that he will suffer injustice if called upon to repay or to repay in full, the injustice of requiring him so to repay outweighs the injustice of denying the plaintiff restitution. If the plaintiff pays money to the defendant under a mistake of fact, and the defendant then, acting in good faith, pays the money or part of it to charity, it is unjust to require the defendant to make restitution to the extent that he has so changed his position. Likewise, on facts such as those in the present case, if a thief steals my money and pays it to a third party who gives it away to charity, that third party should have a good defence to an action for money had and received. In other words, bona fide change of position should of itself be a good defence in such cases as these. The principle is widely recognised throughout the common law world. ... [A number of examples are given] ... The time for its recognition in this country is, in my opinion, long overdue.*

I am most anxious that, in recognising this defence to actions of restitution, nothing should be said at this stage to inhibit the development of the defence on a case by case basis, in the usual way. It is, of course, plain that the defence is not open to one who has changed his position in bad faith, as where the defendant has paid away the money with knowledge of the facts entitling the plaintiff to restitution; and it is commonly accepted that the defence should not be open to a wrongdoer. These are matters which can, in due course, be considered in depth in cases where they arise for consideration. ... At present I do not wish to state the principle any less broadly than this: that the defence is available to a person whose position has so changed that it would be inequitable in all the circumstances to require him to make restitution, or alternatively, to make restitution in full."

147. There is to my mind no indication in the speech of Lord Goff or of Lord Templeman to suggest that the defence of change of position is only lost where the defendant is guilty of dishonesty or other wrongdoing, although it would of course be lost in those circumstances. The underlying principles to be derived from the speech of Lord Goff seem to me to be these:
- i) The question is whether it would be unjust to allow restitution (or restitution in full).
 - ii) It will be unjust to allow restitution where an innocent defendant's position has so changed that the injustice of requiring him to repay outweighs the injustice of denying the claimant restitution.
 - iii) The defence of change of position is not, for example, available to a defendant who has changed his position in bad faith, as where he has paid away the money with knowledge of the facts entitling the claimant to restitution.
 - iv) Nor is it available to a wrongdoer.
 - v) In general terms, the defence is available to a defendant whose position has so changed that it would be inequitable to require him to make restitution or to make restitution in full.
148. The emphasis in Lord Goff's speech is upon whether it would be unjust or inequitable to allow restitution. It is not upon whether the defendant has been dishonest. Thus, for example, Lord Goff gave as an example of bad faith the case where the defendant had paid away the money with knowledge of the facts entitling the claimant to restitution. It seems to me that such a person may not be dishonest in the *Twinsectra* sense. A similar approach can be seen in the speech of Lord Templeman. For example, he said (at page 560) that the reason why the donee of money from a thief must return the money was that he could not "in good conscience" rely on the bounty of the thief to deny restitution to the victim of the theft.
149. In short, as I read the speeches in *Lipkin Gorman*, the essential question is whether it would be inequitable or unconscionable, and thus unjust, to allow the recipient of money paid under a mistake of fact to deny restitution to the payer.
150. Mr Bloch submitted, by contrast, that the essential question is whether the recipient acts in good faith, that he acts in good faith unless he acts dishonestly and that the decision of this court in *Medforth v Blake* [2000] Ch 8 is authority for that proposition. In that case the question was whether a receiver and manager of a pig farm appointed by a mortgagee owed a duty to the mortgagor, over and above a duty of good faith. The plaintiff had alleged that the receiver was negligent in various respects. It was held that such a receiver owed duties in equity to the mortgagor and anyone else with an interest in the equity of redemption which included but were not necessarily confined to a duty of good faith.
151. The case was thus not directly concerned with the meaning of good or bad faith in that context but Mr Bloch relied upon the following dicta of Sir Richard Scott VC, with whom Swinton Thomas and Tuckey LJ agreed, at page 103:
- "I do not think that the concept of good faith should be diluted by treating it as capable of being breached by conduct that is not dishonest or otherwise tainted by bad faith. It is sometimes said that recklessness is equivalent to intent. Shutting one's eyes deliberately to the consequences of what one is doing may make it impossible to deny an intention to bring about those consequences. Thereapart, however, the concepts of negligence on the one hand and fraud on the other ought, in my view, to be kept strictly apart. ... In my judgment, breach of a duty of good faith should, in this area as in all others, require some dishonesty or improper motive, some element of bad faith, to be established."*
- That approach was followed by this court in the same context in *Kenneth Starling v Lloyds TSB Bank plc*, unreported, 29 October 1999, a decision to which Moore-Bick J was a party.
152. For my part, I would not apply that approach to the present class of case, where, as appears from *Lipkin Gorman*, the question is whether it would be inequitable or unconscionable to deny restitution. Mr Bloch submitted that it cannot be considered equitable to allow a claimant to recover from an innocent recipient monies which it has paid away on the directions of its customer or client with no dishonesty. I would not accept that submission. It appears to me that, where the recipient knows that the payer has paid the money to him as a result of a mistake of fact (or indeed a mistake of law), it will in general be unconscionable or inequitable to refuse restitution to the payer. In such a case I would not regard the recipient who has paid the money away as 'innocent' even though he was not guilty of dishonesty.
153. The principle identified in *Lipkin Gorman* seems to me to involve a balance between the interests of the payer and those of the payee and, in such a case, the balance of justice seems to me to fall on the side of the payer. If the payee who knows the facts which entitle the payer to repayment does not repay, perhaps, as here, because no proper advice is taken, justice requires that it repay the money. In my opinion, that approach is consistent with

that in *Lipkin Gorman* and is not inconsistent with the principles stated in *Medforth v Blake*, which was concerned with a very different situation.

154. It is an approach which seems to me to be consistent with the approach of this court to cases of knowing receipt in *Bank of Credit and Commerce International (Overseas) Ltd v Akindele* [2001] Ch 437. The court distinguished between cases of knowing receipt and cases of knowing or dishonest assistance. At page 448 Nourse LJ, with whom Ward and Sedley LJJ agreed, set out the essential requirements of knowing receipt from the judgment of Hoffmann LJ in *El Ajou v Dollar Land Holdings plc* [1994] 2 All ER 685, 700 as follows:

"For this purpose the plaintiff must show, first, a disposal of his assets in breach of fiduciary duty; secondly, the beneficial receipt by the defendant of assets which are traceable as representing assets of the plaintiff; and thirdly, knowledge on the part of the defendant that the assets he received are traceable to a breach of fiduciary duty."

155. Following *Belmont Finance Corporation Ltd v Williams Furniture Ltd (No 2)* [1980] 1 All ER 393, the court held that dishonesty is not a necessary ingredient of liability in knowing receipt. At page 450 Nourse LJ said that the point was made most clearly by Vinelott J in *Eagle Trust plc v SBC Securities Ltd* [1993] 1 WLR 484, 497:

"What the decision in Belmont (No 2) ... shows most clearly is that in a 'knowing receipt' case it is only necessary to show that the defendant knew that the monies paid to him were trust monies and of circumstances which made the payment a misapplication of them. Unlike a 'knowing assistance' case it is not necessary, and never had been necessary, to show that the defendant was in any sense a participator in the fraud."

156. After a detailed analysis of the authorities, Nourse LJ asked and answered what seems to me to be a question which is directly relevant to the present problem. He said (at page 455):

"What then, in the context of knowing receipt, is the purpose to be served by a categorisation of knowledge? It can only be to determine whether, in the words of Buckley LJ in Belmont Finance ... [1980] 1 All ER 393,405, the recipient can 'conscientiously retain [the] funds against the company' or, in the words of Sir Robert Megarry V-C in In re Montagu's Settlement Trusts [1987] Ch 264, 273 '[the recipient's] conscience is sufficiently affected for it to be right to bind him by the obligations of a constructive trustee'. But, if that is the purpose, there is no need for categorisation. All that is necessary is that the recipient's state of knowledge should be such as to make it unconscionable for him to retain the benefit of that knowledge."

For these reasons I have come to the view that, just as there is now a single test of dishonesty for knowing assistance, so ought there to be a single test of knowledge for knowing receipt. The recipient's state of knowledge must be such as to make it unconscionable for him to retain the benefit of the receipt."

157. Although I recognise that there are differences between the problems associated with knowing receipt and those with which we are concerned, they seem to me to have significant similarities, as indeed Nourse LJ recognised at pages 455-6, where he referred to an article or essay by Lord Nicholls entitled "Knowing Receipt: The Need for a New Landmark" in *Restitution Past, Present and Future* (1998) p 231. In that article (at page 242) Lord Nicholls recognised the point made by Lord Goff in *Lipkin Gorman* that the change of position defence would be available to a person whose position had so changed that it would be inequitable in all the circumstances to make restitution or, alternatively, to make restitution in full and that the ingredients of the defence remained to be worked out. He added (at p 243) that as the law develops, it will be important never to lose sight of the underlying purpose of restitution in this field, which is confined to stripping the recipient of an enrichment he should not have received, an enrichment that it would be unjust to allow him to keep. Although Nourse LJ did not agree with all the views expressed by Lord Nicholls in his article, he concluded his analysis in this way, after referring to *Lipkin Gorman*, (at page 456):

"Moreover, if the circumstances of the receipt are such as to make it unconscionable for the recipient to retain the benefit, there is an obvious difficulty in saying that it is equitable for a change of position to afford him a defence."

I respectfully agree.

158. This approach seems to me also to derive support from that of the majority of the House of Lords in *Kleinwort Benson Ltd v Lincoln City Council* [1999] 2 AC 349 where it was held that money paid under a mistake of law should be recoverable on the same footing as money paid under a mistake of fact, subject in the same way to the defences available in the law of restitution, which of course include the defence of change of position. Some consideration was given to the nature of that defence.

159. One of the issues considered was called "honest receipt". It involved the consideration by the House of a principle proposed by Brennan J in *David Securities Pty Ltd v Commonwealth Bank of Australia* (1992) 175 CLR 353, 359 as follows:

"It is a defence to a claim for restitution of money paid or property transferred under a mistake of law that the defendant honestly believed, when he learnt of the payment or transfer, that he was entitled to receive and retain the money or property."

If the defence of change of position were put as widely as that, it would suggest that dishonesty was required to defeat it. However, the House of Lords unanimously held that the law should not recognise a defence put as widely as it was put by Brennan J: see especially per Lord Goff at pages 384-5. That decision seems to me to suggest that Mr Bloch's submission also puts the defence too widely because, if correct, it would require dishonesty to defeat it.

160. We were also referred to the decision of the Privy Council in *Dextra Bank & Trust Co Ltd v Bank of Jamaica* [2002] 1 All ER (Comm) 193, where the judgment of the Judicial Committee was given by Lord Bingham and Lord Goff. The Privy Council rejected the propriety of introducing a concept of relative fault into a determination of whether the recipient of money paid under a mistake of fact or law was obliged to repay it: see the discussion at paragraphs 40 to 46. No-one suggested to us that it was sufficient to show that CAI was negligent in order to defeat a defence of change of position.

161. The view of the Judicial Committee can be seen from paragraph 45:

"Their Lordships are, however, most reluctant to recognise the propriety of introducing the concept of relative fault into this branch of the common law, and indeed decline to do so. They regard good faith on the part of the recipient as a sufficient requirement in this context."

The reference to good faith must, as I see it, be read in the light of the underlying principle identified in *Lipkin Gorman* to which I have already referred and which was stated in much the same way by Lord Bingham and Lord Goff at paragraph 38:

"The defence should be regarded as founded on a principle of justice designed to protect the defendant from a claim to restitution in respect of a benefit received by him in circumstances in which it would be inequitable to pursue that claim, or to pursue it in full."

162. I have reached the conclusion that the authorities support the proposition already stated in paragraph 149 above that the essential question is whether on the facts of a particular case it would in all the circumstances be inequitable or unconscionable, and thus unjust, to allow the recipient of money paid under a mistake of fact to deny restitution to the payer. As I read his judgment, the judge reached the same conclusion and was, in my opinion, correct to do so.

163. It follows that I would accept Mr Bloch's submission i) in paragraph 144 but would not accept his submission ii) because I do not accept that a payment away is made in good faith in this context unless it is made dishonestly.

164. The question remains in what circumstances a bank will be held to have acted otherwise than in good faith. The answer is of course that all depends upon the circumstances so that it is not possible to lay down absolute principles. However, the judge addressed the problem in paragraph 135 of his judgment, which included the following:

*"I do not think that it is desirable to attempt to define the limits of good faith; it is a broad concept, the definition of which, insofar as it is capable of definition at all, will have to be worked out through the cases. In my view it is capable of embracing a failure to act in a commercially acceptable way and sharp practice of a kind that falls short of outright dishonesty as well as dishonesty itself. The factors which will determine whether it is inequitable to allow the claimant to obtain restitution in a case of mistaken payment will vary from case to case, but where the payee has voluntarily parted with the money much is likely to depend on the circumstances in which he did so and the extent of his knowledge about how the payment came to be made. Where he knows that the payment he has received was made by mistake, the position is quite straightforward: he must return it. This applies as much to a banker who receives a payment for the account of his customer as to any other person: see, for example, the comment of Lord Mersey in *Kerrison v Glyn, Mills, Currie & Co* (1912) 81 LJKB 465 (HL) at page 472. Greater difficulty may arise, however, in cases where the payee has grounds for believing that the payment may have been made by mistake, but cannot be sure. In such cases good faith may well dictate that an enquiry be made of the payer. The nature and extent of the enquiry called for will, of course, depend on the circumstances of the case, but I do not think that a person who has, or thinks he has, good reason to believe that the payment was made by mistake will often be found to have acted in good faith if he pays the money away without first making enquiries of the person from whom he received it."*

I agree. As appears below, this is a case in which Mr Francis thought he had good reason to believe that the payment was made by mistake.

165. In paragraph 138 the judge also expressed this principle in the context of a bank which thought or knew that the payment was made by mistake. He said:

"The need to make enquiries of Bank Sepah is not a matter to be viewed in terms of a duty owed by one banker to another; it is a matter to be viewed in terms of a duty of good faith which a person who has received a payment that he has good reason to think was made under a mistake owes to the person who made it. If under those circumstances the payee fails to make enquiry of the payer before disposing of the money he can properly be described as failing to act in good faith because he acts in the knowledge that he may be infringing the rights of another despite having the means of avoiding that consequence."

Again, I agree.

The Facts

166. It follows from the conclusions stated above that the fact that Mr Francis was not adjudged to be dishonest does not automatically afford CAI a defence to Bank Sepah's claim for repayment or restitution. The question remains whether the judge was right to hold CAI liable on the facts.

167. I set out the judge's findings of fact in this regard in paragraph 122 above. On those findings, especially those in paragraphs 120 and 121 of the judgment, Mr Francis did not know that a false bill of lading had been presented to Bank Sepah in order to obtain payment under the letter of credit but he knew that CAI had sold the warrants (and thus the lead) which formed the basis of the transaction and that the transaction could not therefore

be completed. He therefore realised that Bank Sepah must have paid by reason of a mistake. Moreover, as the judge put it in paragraph 121 of his judgment, a moment's reflection would have lead Mr Francis to appreciate that the reason given by Mr Mahdavi for wishing to retain the money did not justify the course he was asking the bank to take. In these circumstances the judge was entirely justified in saying at the end of paragraph 121:

"Thus, on the facts as Mr Francis understood them, nothing said by Mr Mahdavi actually undermined Bank Sepah's right to repayment of the money."

168. In these circumstances, having realised that Bank Sepah had paid by mistake, to my mind, good faith required Mr Francis to enquire of Bank Sepah before paying the money away in accordance with Mr Mahdavi's instructions and the judge was correct so to hold. As I read his judgment, the judge acquitted Mr Francis of dishonesty because he did not consciously act in disregard of the standards to be expected of the ordinary honest banker. The judge I think took the view that Mr Francis' state of mind was that CAI owed no duty to Bank Sepah, which could look after itself, but that CAI did owe a duty to its customer and in those circumstances paid the money away in accordance with Mr Mahdavi's instructions. The judge thought that that was misguided but not dishonest. As indicated earlier, it is my view that the judge was entitled to reach those conclusions.
169. On the other hand, the judge concluded that good faith required a person in Mr Francis' position who realised that the money had been paid by mistake to make enquiries of Bank Sepah to ascertain the position and not to pay the money away in the meantime. I have reached the clear conclusion that he was correct so to hold. This is, at the very least, an example of the case of the kind of bad faith expressly mentioned by Lord Goff in *Lipkin Gorman* and quoted in paragraph 146 above, namely where a person "has changed his position in bad faith, as where the defendant has paid away the money with knowledge of the facts entitling the plaintiff to restitution". Here, on the judge's findings of fact, when the money was paid away, Mr Francis (and thus CAI) knew the facts which entitled Bank Sepah to restitution, namely that it had paid under a mistake of fact.
170. In all these circumstances the judge was in my opinion correct to hold that CAI did not act in good faith in paying the money away and that it would be inequitable or unconscionable to deny Bank Sepah a right to restitution by repayment of the monies paid under the letter of credit. I would dismiss CAI's appeal under this head.

CONCLUSIONS

171. I would like to end by apologising for the inordinate length of this judgment and by thanking all counsel for their invaluable assistance in this interesting but in some respects difficult case. In summary my conclusions are these:
- i) The judge was correct to hold that SGS was in breach of a duty of care owed to Niru and that Niru suffered loss as a result.
 - ii) The judge was entitled to hold that Mr Francis was not proved to have known or been reckless as to whether a false bill of lading was presented under the letter of credit. He was therefore entitled to hold that CAI was not liable in the tort of deceit.
 - iii) The judge was also entitled to hold that Mr Francis was not shown to be dishonest after CAI received money paid by Bank Sepah under the letter of credit.
 - iv) The judge correctly held that it is not necessary to show that a recipient of money was dishonest in order to defeat a defence of change of position in response to claim for restitution of money paid under a mistake of fact.
 - v) The essential question is whether on the facts of a particular case it would in all the circumstances be inequitable or unconscionable, and thus unjust, to allow the recipient of money paid under a mistake of fact to deny restitution to the payer.
 - vi) The judge was entitled to hold on the facts that it would be inequitable, unconscionable and unjust to deny restitution to Bank Sepah of the monies paid under the letter of credit.
 - vii) It follows that the judge was right to hold SGS liable for damages for breach of duty and CAI liable in restitution. He was also right to hold CAI not liable in deceit. All the challenges to the judgment therefore fail.

Lord Justice Sedley :

172. I agree that this appeal fails for essentially the reasons spelt out by Lord Justice Clarke. But I take the liberty of expressing my reservations about one aspect of the appeal, the finding about Mr Francis' honesty, and of setting out my own reasoning about another, the defence of change of position to a claim for restitution.

Honesty as fact

173. Whether a person has acted dishonestly or deceitfully is axiomatically a question of fact. Axiomatically too, an appellate court will require to be satisfied that the fact-finding tribunal must have erred before interfering with a finding it has made about someone's honesty. This is so even - perhaps especially - where the higher court has grave doubts whether it would have come to the same conclusion. The reticence is predicated on an assumption that the opportunity to observe a witness in the flesh gives the trial court an advantage which cannot be replicated on appeal.
174. But an assumption is all it is. For most of us, experience relentlessly and depressingly undermines the lawyer's self-congratulatory belief that forensic practice sharpens to near-infallibility the eye for prevarication and deceit. We have so far devised no moral geiger-counter. With luck, some objective piece of evidence will verify or falsify a witness's account; but alarmingly often it will show that a shifty witness has been telling the truth or that a credible one was wholly mistaken or lying. In other cases, the judge or the jury must fall back upon intuition. In these

instances, we know from those cases where objective evidence has falsified our tentative judgment of personality that the very proximity of the tribunal to the witness can as readily mislead as reveal.

175. It is never more so than when a judge has to decide whether a witness who has done something plainly improper, with access to all the facts that reveal its impropriety, has acted dishonestly. CAI relies, as it needs to, on the high threshold of dishonesty set in *Twinside* by the majority of the House: "consciousness that one is transgressing ordinary standards of honest behaviour". I do not conceal the difficulty I myself have in understanding how what Mr Francis did, in the circumstances in which he did it, was not dishonest even by this exacting standard. But I accept that my view is entitled to no greater weight than that of Moore-Bick J; for there is no reason to think, reading his careful and lucid judgment, that he was moved by any extraneous factor. Mr Francis may perhaps count himself fortunate, but the judge's evaluation of him should stand.

The Change of Position Defence

176. The judge having acquitted Mr Francis of dishonesty, Michael Bloch QC submits that nothing less can defeat the defence of change of position generated by CAI's payment away of the funds. *Twinside*, however, was a decision on the legal character of dishonest assistance. It has no direct bearing on the availability of the defence of change of position to a claim for restitution. Mr Bloch therefore seeks to link the two by the medium of bad faith.
177. Good faith and bad faith play no part either in their Lordships' reasoning in *Twinside* or in the reasoning of the Privy Council in *Royal Brunei Airlines v Tan* upon which *Twinside* builds. So it is from the decision of this court in *Medforth v Blake* that Mr Bloch seeks to derive a ubiquitous requirement of bad faith.

178. *Medforth* concerned a third kind of liability, that of a receiver of mortgaged property to persons with an interest in the equity of redemption. Sir Richard Scott V-C said at 102-3:

"In my judgment, in principle and on the authorities, the following propositions can be stated. (1) A receiver managing mortgaged property owes duties to the mortgagor and anyone else with an interest in the equity of redemption. (2) The duties include, but are not necessarily confined to, a duty of good faith. (3) The extent and scope of any duty additional to that of good faith will depend on the facts and circumstances of the particular case. (4) In exercising his powers of management the primary duty of the receiver is to try and bring about a situation in which interest on the secured debt can be paid and the debt itself repaid. (5) Subject to that primary duty, the receiver owes a duty to manage the property with due diligence. (6) Due diligence does not oblige the receiver to continue to carry on a business on the mortgaged premises previously carried on by the mortgagor. (7) If the receiver does carry on a business on the mortgaged premises, due diligence requires reasonable steps to be taken in order to try to do so profitably.

*I do not think that the concept of good faith should be diluted by treating it as capable of being breached by conduct that is not dishonest or otherwise tainted by bad faith. It is sometimes said that recklessness is equivalent to intent. Shutting one's eyes deliberately to the consequences of what one is doing may make it impossible to deny an intention to bring about those consequences. Thereapart, however, the concepts of negligence on the one hand and fraud or bad faith on the other ought, in my view, to be kept strictly apart. Equity has not always done so. The equitable doctrine of "fraud on a power" has little, if anything, to do with fraud. Lord Herschell in *Kennedy v De Trafford* [1897] A.C. 180 gave an explanation of a lack of good faith that would have allowed conduct that was grossly negligent to have qualified notwithstanding that the consequences of the conduct were not intended. In my judgment, the breach of duty of good faith should, in this area as in all others, require some dishonesty or improper motive, some element of bad faith, to be established."*

179. Mr Bloch seeks to articulate this reasoning with that of the House of Lords in *Lipkin Gorman*, where in particular Lord Goff at 579-80 held that "bona fide change of position should of itself be a good defence" to a claim for restitution. It follows, he submits, that bad faith is a necessary element both in establishing dishonest assistance and in rebutting the defence of change of position; so that nothing short of dishonesty will suffice to rebut the defence of change of position.

180. This syllogism in my view contains a series of fallacies.

181. First, *Lipkin Gorman* is not predicated on a bad faith threshold for defeating a change of position defence: it posits a calculatedly intermediate threshold of inequitability.

- Secondly, *Medforth* does not assimilate bad faith to dishonesty. On the contrary, it explains bad faith as including both dishonesty and improper motive, without – it should be noted – limiting it to these.
- Thirdly, even if bad faith were of a piece with dishonesty, it would not follow (at least outside the law of dishonest assistance) that the judge, by acquitting Mr Francis of dishonesty, had acquitted him of bad faith. It would just as logically follow that by finding that he had acted in bad faith the judge had found him to have acted dishonestly.

181. To understand the first of these propositions it is necessary to set out and to consider with some care Lord Goff's speech in *Lipkin Gorman*, cited in its material part by Lord Justice Clarke at paragraph 146 above.

182. It is simplistic to assume that by his reference to "bona fide change of position" Lord Goff meant to set up a good faith / bad faith dichotomy for the change of position defence. The remainder of the passage makes it evident that he was using the phrase as it is often used, especially in the United States, to indicate an innocent change of position, which is the concept used by Lord Templeman in his assenting speech at 560: he describes the donee to whom the defence of change of position may be available as an "innocent recipient". It also corresponds, as a bad faith limitation does not, with the test of inequitability at which Lord Goff arrives at the end of the cited passage.

183. The explicit purpose of this passage is to set nothing in stone but to point courts in the right direction for the future. The reference to "one who has changed his position in bad faith" is therefore not a bright line but an illustration of the kind of case in which it would be inequitable to allow a change of position defence to succeed. As it happens, the example given by Lord Goff – "where the defendant has paid away the money with knowledge of the facts entitling the plaintiff to restitution" – is this case.
184. If, however, Lord Goff's reasoning is to be understood as limiting inequity to bad faith, Mr Bloch's reliance on the strictures placed on the concept of good faith by this court in *Medforth* as a binding interpretation of inequity is insecure. *Medforth* was argued and decided without reference to *Lipkin Gorman*. It is not that this casts any doubt on this court's conclusions, but that it is unsafe to carry its reasoning about good and bad faith back into an antecedent decision of the House which uses the same phrase without necessarily according it the same meaning.
185. The present facts are such that it would plainly be inequitable to allow CAI to rely on a change of position defence to the claim for restitution. On his own candid evidence Mr Francis was not merely negligent in checking the documentation: he let a very large sum of money for which CAI had accepted responsibility be paid away when he had in his hands ample information to put CAI on its guard against doing so. "Inequitable" is the right word for the idea that CAI should be protected by its own casualness from the ordinary consequences of what it did. If more – for example an improper motive - is needed, there was such a motive here: Mr Mahdavi was a profitable customer of CAI whose business Mr Francis was keen to keep, and who was now threatening a lawsuit. It is an almost irresistible inference that this was why the documents which revealed the critical gaps were treated by Mr Francis with an insouciance that no ordinary customer would encounter.
186. Such a situation sufficiently rebuts a defence of change of position. The common sense of this approach, without reference to authority, is demonstrated by the judgment of the Court of Appeal of New South Wales in *State Bank of New South Wales v Swiss Bank Corporation* (1995) 39 NSWLR 350 :
- "A bank which receives a mistaken payment and disburses it can only bring itself within the change of position defence if it shows that at the time of disbursement it knew or thought it knew more than the fact of receipt standing alone. This must be information which, if true, would entitle the payee to deal with the receipt as it did and that information must have come from the payer."*
- "Looked at on its own terms State Bank of New South Wales' submission has an element of the fantastic about it. It says that it received this very large payment with a message from Swiss Bank saying: "Credit this to the account you keep for customers." Nothing more than that. State Bank of New South Wales' case involves the propositions: (a) that it was for it to decide which customer should be credited; and (b) that it credited Essington Ltd because Essington Ltd asked it to do so. On the judge's findings what State Bank of New South Wales did was not dishonest but on anybody's view it was not sensible and in our opinion it was not done on the faith of the receipt."*
187. This is an approach which rolls up the defence and the rebuttal. It requires the donee to show that it acted on real or reasonably supposed facts justifying payment away. Lord Goff's concept of a "bona fide change of position" is similarly unitary. Whatever content is now worked out case by case for the phrase, it is clear from what Lord Goff subsequently held in *Kleinwort Benson* that it is not only dishonest payment away which forfeits the defence. He said:
- "Issue (1B): Honest receipt*
- This issue arises from a principle proposed by Brennan C.J. (then Brennan J.) in David Securities Pty. Ltd. v Commonwealth Bank of Australia (1992) 175 C.L.R. 353, 399. It reads:*
- "It is a defence to claim for restitution of money paid or property transferred under a mistake of law that the defendant honestly believed, when he learnt of the payment or transfer, that he was entitled to receive and retain the money or property."*
- This principle was expressly proposed in order to achieve a degree of certainty in past transactions. As Brennan J. said, at p. 398: "Unless some limiting principle is introduced, the finality of any payment would be as uncertain as the governing law."*
- In this part of the law there has long been concern, among common law judges, about what is sometimes called the finality of transactions, and sometimes the security of receipts. This concern formed a significant part of the amalgam of concerns which led to the rule that money paid under a mistake of law was irrecoverable on that ground. Now that the rule has been abrogated throughout the common law world, attention has of course shifted to the formulation of appropriate defences to the right of recovery. The principle proposed by Brennan J. is, I believe, the most far-reaching of the defences to the right of recovery that has yet been proposed.*
- Anything which falls from Brennan J. is, of course, entitled to great respect. But I have to state at once that this proposal seems to have been stillborn. Of the judges who sat with Brennan J. on the David Securities case, none supported this proposal. I know of no judicial support which the proposal has since received, nor of any support from any of the Law Commissions which have considered this part of the law. The reason for this lack of support is, I believe, that the proposal is generally regarded as being wider than is necessary to meet the perceived mischief.*
- I start from the proposition that money paid under a mistake of law is recoverable on the ground that its receipt by the defendant will, prima facie, lead to his unjust enrichment, just as receipt of money paid under a mistake of fact may do so. There may of course be circumstances in which, despite the mistaken nature of the payment, it is not regarded as unjust for the defendant to retain the money so paid. One notable example is change of the defendant's position. Another is the somewhat undefined circumstance that the payment was made in settlement of an honest claim. Yet, Brennan J.'s proposed defence is so wide that, if it was accepted, these other defences would in practice cease to*

have any relevance in the case of money paid under a mistake of law. Moreover in many cases of this kind the mistake is shared by both parties, as for example in the case of the appeals now under consideration. In such cases, recovery by the plaintiff would automatically be barred by Brennan J.'s proposed defence. So sweeping is the effect of the defence that it is not perhaps surprising that it has not received support from the others.

In my opinion, it would be most unwise for the common law, having recognised the right to recover money paid under a mistake of law on the ground of unjust enrichment, immediately to proceed to the recognition of so wide a defence as this which would exclude the right of recovery in a very large proportion of cases. The proper course is surely to identify particular sets of circumstances which, as matter of principle or policy, may lead to the conclusion that recovery should not be allowed; and in so doing to draw on the experience of the past, looking for guidance in particular from the analogous case of money paid under mistake of fact, and also drawing on the accumulated wisdom to be found in the writings of scholars on the law of restitution. However, before so novel and far-reaching defence as the one now proposed can be recognised, a very strong case for it has to be made out; and I can discover no evidence of a need for so wide a defence as this. In particular, experience since the recognition of the right of recovery of money paid under a mistake of law in the common law world does not appear to have revealed any such need.

For these reasons, with all respect to Brennan J., I am unable to accept that the defence proposed by him forms part of the common law."

188. This is of a piece with the law of knowing receipt. In **BCCI v Akindele**, Nourse LJ, speaking for the court, said:

"So far as the law is concerned, the comprehensive arguments of Mr Sheldon and Mr Moss have demonstrated that there are two questions which, though closely related, are distinct: first, what, in this context, is meant by knowledge; second, is it necessary for the recipient to act dishonestly? Because the answer to it is the simpler, the convenient course is to deal with the second of those questions first.

Knowing receipt – dishonesty

As appears from the penultimate sentence of his judgment, Carnwath J proceeded on an assumption that dishonesty in one form or another was the essential foundation of the claimant's case, whether in knowing assistance or knowing receipt. That was no doubt caused by the acceptance before him (though not at any higher level) by Mr Sheldon, recorded at p. 677F, that the thrust of the recent authorities at first instance was that the recipient's state of knowledge must fall into one of the first three categories listed by Peter Gibson J in **Baden v Société Générale pour Favoriser le Développement du Commerce et de l'Industrie en France SA (Note)** [1993] 1 WLR 509, 575-576, on which basis, said Carnwath J, it was doubtful whether the test differed materially in practice from that for knowing assistance. However, the assumption on which the judge proceeded, derived as I believe from an omission to distinguish between the questions of knowledge and dishonesty, was incorrect in law. While a knowing recipient will often be found to have acted dishonestly, it has never been a prerequisite of the liability it should.

"**Belmont Finance Corp v Williams Furniture Ltd (No 2)** [1980] 1 All ER 393 is clear authority for the proposition that dishonesty is not a necessary ingredient of liability of knowing receipt. There have been other, more recent, judicial pronouncements to the same effect. Thus in **Polly Peck International plc v Nadir (no 2)** [1992] 4 All ER 769, 777D Scott LJ said that liability in a knowing receipt case did not require that the misapplication of the trust funds should be fraudulent. While in theory it is possible for a misapplication not to be fraudulent and the recipient to be dishonest, in practice such a combination must be rare. Similarly, in **Agip (Africa) Ltd v Jackson** [1990] Ch 265, 292A Millett J said that in knowing receipt it was immaterial whether the breach of trust was fraudulent or not. The point was made most clearly by Vinelott J in **Eagle Trust plc v SBC Securities Ltd** [1993] 1 WLR 484, 497:

"What the decision in **Belmont (No 2)** [1980] 1 All ER 393 shows is that in a 'knowing receipt' case it is only necessary to show that the defendant knew that the moneys paid to him were trust moneys and of circumstances which made the payment a misapplication of them. Unlike a 'knowing assistance' case it is not necessary, and never has been necessary, to show that the defendant was in any sense a participator in a fraud."

189. It would, as Ali Malek QC suggests, be strange if the analogous doctrines of knowing receipt and unjust enrichment carried different defences, the former defeasible simply by proof of material knowledge, the latter only by proof of dishonesty.
190. One further alley has been authoritatively explored since the decision in **Lipkin Gorman**. In **Dextra** the Privy Council (in a joint opinion of Lord Bingham and Lord Goff) rejected a balance of fault test for change of position defences. We have not been asked to take a different course in the present appeal, no doubt because of the cogency of their Lordships' reasoning at paragraphs 40-46. It may fall for consideration on another occasion whether the balance of fault is to be ignored even where the claimant is blameless and the defendant solely at fault. For the present, it must be assumed that the defence depends on the quality of the defendant's fault, so that mere negligence is not enough to defeat the defence. If it were, an action in negligence (which was pleaded in the present case but not pursued) would make restitution redundant. But it may be observed that, if an action lay in negligence in such cases, there would be no obvious reason why the Law Reform (Contributory Negligence) Act 1945 should not reduce the entitlement of a claimant whose neglect has contributed to the loss.
191. What their Lordships said in **Dextra**, however, reinforces the view that it is not only dishonesty which will defeat a defence of change of position. At paragraph 36 they characterise the decision taken in **Lipkin Gorman** as "a broad approach based on practical justice" and one which "avoided technicality". At paragraph 38 they said: "The defence should be regarded as founded on a principle of justice designed to protect the defendant from a claim to restitution in respect of a benefit received by him in circumstances in which it would be inequitable to pursue that claim, or to pursue it in full."

192. While this passage only echoes the coda, if one may call it that, of the key passage in *Lipkin Gorman*, it has the effect of elevating the coda to a theme. As a theme, it tells the courts to which it now falls to elaborate the defence case by case that they are not tied to a single rigid standard in deciding whether a defence of change of position succeeds. They are to decide whether it is equitable to uphold the defence. Since the doctrine of restitution is centrally concerned with the distribution of loss among parties whose rights are not met by some stronger doctrine of law, one is by definition looking for the least unjust solution to a residual problem. When Mr Mahdavi walks away, leaving the victims of his fraud to fight out who is to carry the loss he has caused them, it is a strange kind of equity which would make the innocent claimants bear their own loss because the defendant bank has paid away their money recklessly, venally and (as the judge has found) in bad faith, but not dishonestly.

Dame Elizabeth Butler-Sloss P

193. I agree with both judgments.

Order A3/2002/1883, A3/2002/1900: Appeal dismissed. Costs in relation to SGS agreed: SGS to pay claimant's costs with interim payment of £22,500. Costs in relation to CAI: CAI to pay 80 per cent of claimant's costs with interim payment of £22,500. Applications for permission to appeal to House of Lords refused. Draft order to be drawn up by Miss Andrews to effect that: any costs arguments that may arise in future to be reserved; date of contribution appeal to be fixed; contribution appeal to be heard before as many members of court who heard earlier appeal as is practical.

Mr Michael Bloch QC and Miss Tiffany Scott (instructed by Clyde & Co) for the Fourth Appellant/Defendant
Miss Geraldine Andrews QC and Miss Zoe O'Sullivan (instructed by Ashurst Morris Crisp) for the Fifth Appellant/Defendant
Mr Ali Malek QC and Mr David Quest (instructed by Richards Butler) for the Respondents/Claimants