立法會
Legislative Council

立法會LS88/04-05號文件

《2005年收入(取消遺產稅)條例草案》委員會文件

政府根據《遺囑認證及遺產管理條例》擬議第VA部的法律責任

引言

在2005年6月16日法案委員會會議上，委員詢問，倘若民政事務局局長(下稱"局長")錯誤地發出《遺囑認證及遺產管理條例》(第10章)新訂第60C條所指的需要檢視銀行保管箱證明書，容許該證明書的持有人從死者租用的保管箱接管文件，政府有否任何法律責任。

條例草案第9條內《遺囑認證及遺產管理條例》擬議第VA部

2. 根據新訂第60C(5)條建議修訂的版本，凡在依據第(2)款被檢視的保管箱內找到有關檢視證明書內指明的任何文件，銀行須容許該證明書的持有人在根據第60E(1)條對該證明書附加的條件(如有的話)的規限下，接管該文件。委員諒會察悉，委員會審議階段修正案亦建議：

(a) 在新訂第60C條加入第(3A)款，訂明除非符合某些條件，否則不得在檢視證明書內指明某文件，該等條件包括局長信納取走該文件不會損害任何第三者就有關死者的遺產而有的權益的；

(b) 在新訂第60E條加入第(1A)款，訂明如某條件可能會損害有關遺產的受益人的權益，則局長不得對支用款項證明書或檢視證明書附加該條件；及

(c) 加入新訂第60H條禁止擅自處理遺產。

疏忽

3. 樞密院在*Yuen Kun-Yeu and others v Attorney General of Hong Kong [1987] 2 All ER 705* (參閱**附件A**)一案中作出的決定，與現時的討論內容最為有關。香港的接受存款公司監理專員根據《接受存款公司條例》負責各項規管職能，包括廣泛的酌情權，把他認為並非接受存款的適合及妥當機構的公司拒絕註冊或撤銷註冊。上訴人把大量存款存放於一家名為American and Panama Finance Co. Ltd.的註冊接受存款公司，該公司其

後清盤。上訴人針對當時代表監理專員的律政司提出訴訟，對監理專員在履行其職能時的疏忽申索損害賠償。

4. 上訴被駁回，樞密院並認為：

(a) 由於監理專員對接受存款公司的日常管理並無控制權，因此僅對損害有可預見性本身並不造成監理專員與準存款人之間有足夠的緊密性，以致產生謹慎責任。在決定是否撤銷某家公司的註冊時，須考慮現有存款人的處境。監理專員與該公司或監理專員與準存款人之間並無特別關係，以致能夠產生謹慎責任；

(b) 該條例並無訂立一個廣泛及嚴格的監督制度，例如有理由假設所有註冊接受存款公司都是穩健和十足可信，因此，上訴人對註冊的依賴作為該公司是穩健的保證，既不合理亦沒有理由支持；倘若所述依賴是存在的，也不應合理地預期監理專員知悉這種依賴。

5. 樞密院未能覺察立法機關有任何意向，即監理專員在考慮是否把某家公司註冊或撤銷註冊時，須對潛在存款人負上任何法定責任。樞密院認為，把普通法的謹慎責任附加在法定架構，將會令人覺得奇怪。對於公共政策是否需要免除不履行責任的法律責任的問題，由立法機關權衡各項對立政策考慮因素將會比司法機構更為合適。

6. 本部的意見是，問題的關鍵在於立法機關的意向。經修訂的條例草案，似乎會在局長與就有關死者的遺產而有權益的第三者之間構成特別關係，以致能夠產生謹慎責任；而且局長的擬議權力可能訂立一個監督制度，保障他們就有關死者的遺產而有的權益。

以公職身份作出失當行為

7. 為了有較全面的考慮，議員可留意普通法近期的發展，就是英國上議院在*Three Rivers District Council and others v Bank of England* *[2001] 2 All ER 513* (參閱**附件B**)一案中作出的決定。在該宗個案，英倫銀行批出牌照予國際商業信貸銀行(BCCI)以接受存款機構經營業務，但BCCI因其高層人員作出詐騙導致於1991年倒閉。存款人起訴英倫銀行以公職身份作出失當行為的侵權，存款人提出的上訴得直。

8. 以下是上議院認為以公職身份作出失當行為的必要因素：

(a) 公職人員在行使權力時作出的違法作為或不作為；

(b) 該作為或不作為必須在規定的心理因素下作出；

(c) 該作為或不作為必須是本着不真誠作出：不真誠的表現是公職人員明知頗有可能出現的損失或他不理會風險以致罔顧後果。

9. 把這些原則適用於現時的條例草案，倘若能夠證明局長不合法地行使權力，不論是明知非其權力而且頗有可能導致申索人蒙受損失而故意地行使權力，或罔顧後果地行使權力，因為雖然他知悉有嚴重的風險，申索人將會因他明知是不合法的作為或不作為而蒙受損失，但他蓄意選擇不理會上述風險，局長將會負有法律責任。

<u>結論</u>

10. 委員可因應本部在上文第6段所載的意見，考慮《遺囑認證及遺產管理條例》新訂第VA部的影響，以及研究倘若產生謹慎責任，公共政策是否需要免除局長的法律責任。

法律事務部
助理法律顧問
黃思敏
2005年6月23日

classes of benefit specified in s 2(1) of the Law Reform (Personal Injuries) Act 1948, as amended. Despite the interesting argument of counsel for the defendant with regard to the question whether or not this type of benefit would be deductible from an award for loss of earnings were it not for the effect of the section, I have no doubt that this appeal raises solely questions of construction of that section and is not concerned with the wider issues which would arise outside the ambit of the section. The fact that, on the plaintiff's submissions, and on the finding of the judge, the deductions to be set against the lost earnings are very seriously limited, and that, thus, the plaintiff, in effect, receives a windfall in the form of double recovery, is not particularly startling to my mind in view of the fact that double recovery occurs in many other instances, such as pensions (see *Parry v Cleaver* [1969] 1 All ER 555, [1970] AC 1).

In my view the reasoning which impelled the judge to the conclusion that he reached, that this case is indistinguishable from that of this court in *Hultquist v Universal Pattern and Precision Engineering Co Ltd* [1960] 2 All ER 266, [1960] 2 QB 467 is correct. In that case the court held that where an injured plaintiff was awarded an industrial disablement gratuity 'for life', only that part of the lump sum so awarded as related to the remainder of the five-year period should be taken into account, the balance which could not be so apportioned being not deductible. This seems to me to support precisely the proposition which the judge accepted, that only that part of the invalidity benefit as related to the five-year period was deductible. For my part, I am unable to accept either of the distinctions which counsel for the defendant sought to draw between this case and the decision in *Hultquist*, namely that the lump sum in *Hultquist v Universal Pattern and Precision Engineering Co Ltd* was to be regarded as a 'one-off' payment, and thus not deductible, or that such a payment was of a nature of a solatium for the pain and suffering and general disability which the injured person would sustain over the remainder of his life, or the period over which the payments might continue. Such a lump sum was not, and cannot be, regarded as such a solatium against general damages. It was a payment which fell within the ambit of s 2(1), and is of the nature specifically referred to in s 2(6) of the Act.

I share Peter Pain J's difficulty, expressed by him as part of his judgment in *Denman v Essex Area Health Authority* [1984] 2 All ER 621, [1984] QB 735, as to how meaning can be given to this subsection if the construction of s 2(1) is that for which the defendant contends.

Accordingly, I agree with the construction of s 2(1) expressed by Fox LJ, reinforced as it seems to me that that construction is by the authorities cited, and in particular, by the decision of this court in *Hultquist v Universal Pattern and Precision Engineering Co Ltd*.

I agree that this appeal should be dismissed.

Appeal dismissed. Sum of £16,000 to be paid to plaintiff's solicitors, with interest.

Solicitors: *Hatchett Jones & Kidgell*, agents for *Lyons Davidson*, Bristol (for the defendant); *Townsends*, Swindon (for the plaintiff).

Diana Procter Barrister.

Yuen Kun-yeu and others v Attorney General of Hong Kong

PRIVY COUNCIL

LORD KEITH OF KINKEL, LORD TEMPLEMAN, LORD GRIFFITHS, LORD OLIVER OF AYLMERTON AND SIR ROBERT MEGARRY

5 MAY, 10 JUNE 1987

Negligence – Duty to take care – Existence of duty – Test to establish whether duty existing – Statutory powers – Regulatory powers – Hong Kong – Commissioner of Deposit-taking Companies having regulatory powers in regard to deposit-taking companies – Commissioner having power to refuse or revoke registration if company not fit and proper to be registered – Plaintiffs relying on registration when depositing money with company – Company operated fraudulently, speculatively and to detriment of depositors – Company going into liquidation and plaintiffs losing deposits – Whether commissioner owing duty of care to plaintiffs – Deposit-taking Companies Ordinance 1976 (Hong Kong).

The Commissioner of Deposit-taking Companies in Hong Kong was charged under the Deposit-taking Companies Ordinance 1976 with various regulatory functions in relation to deposit-taking businesses in Hong Kong. It was a precondition of carrying on a deposit-taking business in Hong Kong that a company proposing to do so be registered and licensed under the ordinance and the commissioner had wide discretionary powers under the ordinance to refuse to register, or to revoke the registration of, a company which he considered not to be a fit and proper body to take deposits. The appellants were four Hong Kong residents who had made substantial deposits with a registered deposit-taking company which subsequently went into liquidation causing the plaintiffs to lose their money. The appellants claimed that the company had been run fraudulently, speculatively and to the detriment of depositors, and that although he had cogent reason to suspect that the company had been so run the commissioner had failed to take any action to protect depositors. The appellants brought an action against the Attorney General, as representing the commissioner, claiming damages for negligence by the commissioner in the discharge of his functions. The appellants contended that they had relied on the fact of registration as indicating that the company was a fit and proper body and was under the prudential supervision of the commissioner, that the commissioner knew or ought to have known that the affairs of the company were being conducted fraudulently, speculatively and to the detriment of depositors, and that he should either never have registered the company or should have revoked its registration before they deposited their money. The High Court of Hong Kong struck out their claim as disclosing no cause of action and on appeal its decision was upheld by the Hong Kong Court of Appeal. The appellants appealed to the Privy Council.

Held – The factors required to establish a duty of care in negligence were foreseeability of harm (which, although a necessary ingredient, could not by itself, and automatically, lead to a duty of care) and a close and direct relationship of proximity between the parties apt to give rise to such a duty, and only rarely would the further question of whether public policy required the exclusion of liability for breach of such a duty fall to be considered. On the facts, the crucial question was whether there existed between the commissioner and would-be depositors such a close and direct relationship as to place the commissioner, in the exercise of his powers under the ordinance, under a duty of care towards would-be depositors. Although it was reasonably foreseeable that if an uncreditworthy company were to be placed on or allowed to remain on the register persons who might deposit money with it would be at risk of losing their money, mere foreseeability of that harm did not of itself create sufficient proximity between the

附件 A Annex A

commissioner and would-be depositors for a duty of care to arise, since the commissioner had no control over the day-to-day management of deposit-taking companies and also had to consider the position of existing depositors in deciding whether to deregister a company. Accordingly, there was no special relationship between the commissioner and the company or between the commissioner and would-be depositors capable of giving rise to a duty of care owed by the commissioner to the appellants. Furthermore, the ordinance had not instituted a far-reaching and stringent supervision system such as to warrant an assumption that all registered deposit-taking companies were sound and fully creditworthy, and accordingly the appellants' reliance on the fact of registration as a guarantee of the soundness of the company was neither reasonable nor justifiable, nor should the commissioner reasonably be expected to know of such reliance if it existed. The appeal would therefore be dismissed (see p 710 *f* to *j*, p 712 *c d j* to 713 *f* to 714 *c h* to *j*, post).

Donoghue (or M'Alister) v Stevenson [1932] All ER Rep 1, *Smith v Leurs* (1945) 70 CLR 256, *Hedley Byrne & Co Ltd v Heller & Partners Ltd* [1963] 2 All ER 575, *Home Office v Dorset Yacht Co Ltd* [1970] 2 All ER 294, dictum of Lord Wilberforce in *Anns v Merton London Borough* [1977] 2 All ER at 498, *Junior Books Ltd v Veitchi Co Ltd* [1982] 3 All ER 201, *Sutherland Shire Council v Heyman* (1985) 60 ALR 1 and *Hill v Chief Constable of West Yorkshire* [1987] 1 All ER 1173 considered.

Notes

For negligence in relation to statutory functions and the duty to take care, see 34 Halsbury's Laws (4th edn) paras 4–7, and for cases on the subject, see 36(1) Digest (Reissue) 17–55, 34–117.

Cases referred to in judgment

Anns v Merton London Borough [1977] 2 All ER 492, [1978] AC 728, [1977] 2 WLR 1024, HL.
Baird v R (1983) 148 DLR (3d) 1, Fed CA.
Curran v Northern Ireland Co-ownership Housing Association Ltd [1987] 2 All ER 13, [1987] 2 WLR 1043, HL.
Cutler v Wandsworth Stadium [1949] 1 All ER 544, [1949] AC 398, HL.
Donoghue (or M'Alister) v Stevenson [1932] AC 562, [1932] All ER Rep 1, HL.
Hedley Byrne & Co Ltd v Heller & Partners Ltd [1963] 2 All ER 575, [1964] AC 465, [1963] 3 WLR 101, HL.
Hill v Chief Constable of West Yorkshire [1987] 1 All ER 1173, [1987] 2 WLR 1126, CA.
Home Office v Dorset Yacht Co Ltd [1970] 2 All ER 294, [1970] AC 1004, [1970] 2 WLR 1140, HL.
Jaensch v Coffey (1984) 54 ALR 417, Aust HC.
Junior Books Ltd v Veitchi Co Ltd [1982] 3 All ER 201, [1983] 1 AC 520, [1982] 3 WLR 477, HL.
Leigh & Sillavan Ltd v Aliakmon Shipping Co Ltd, The Aliakmon [1986] 2 All ER 145, [1986] AC 785, [1986] 2 WLR 902, HL.
McLoughlin v O'Brian [1982] 2 All ER 298, [1983] 1 AC 410, [1982] 2 WLR 982, HL.
Peabody Donation Fund (Governors) v Sir Lindsay Parkinson & Co Ltd [1984] 3 All ER 529, [1985] AC 210, [1984] 3 WLR 953, HL.
Rondel v Worsley [1967] 3 All ER 993, [1969] 1 AC 191, [1967] 3 WLR 1666, HL.
Smith v Leurs (1945) 70 CLR 256, Aust HC.
States of Guernsey v Firth (1981) (No 10 (Civil)), Guernsey CA.
Sutherland Shire Council v Heyman (1985) 60 ALR 1, Aust HC.

Appeal

The plaintiffs, Yuen Kun-yeu, Lau Ka-kei, Ting Ah-lam and Liem Jen-djiang, appealed with leave of the Court of Appeal of Hong Kong given on 1 May 1986 from the decision of the Court of Appeal (Huggins V-P, Fuad and Kempster JJA) on 7 March 1986

dismissing their appeal from the judgment of Jones J in the Supreme Court of Hong Kong on 9 July 1985 ordering that their statement of claim alleging negligence against the respondent, the Attorney General of Hong Kong, acting on behalf of the Commissioner for Deposit-taking Companies, be struck out on the ground that it disclosed no reasonable cause of action. The facts are set out in the judgment of the Board.

Michael Beloff QC, *Nicholas Pirie* (of the Hong Kong Bar) and *Paul Stinchcombe* for the appellants.
The Attorney General of Hong Kong (*Michael Thomas* QC), *Nigel Jacobs* with him, in his own behalf.

10 June. The following judgment of the Board was delivered.

LORD KEITH OF KINKEL. This is an appeal from an order of the Court of Appeal of Hong Kong (Huggins V-P, Fuad and Kempster JJA) made on 7 March 1986, whereby that court dismissed an appeal by the plaintiffs (the present appellants) against an order dated 9 July 1985 of Jones J in the High Court of Hong Kong directing that the plaintiffs' statement of claim be struck out under RSC Ord 18, r 19 as disclosing no reasonable cause of action. The appeal is brought with leave of the Court of Appeal.

The appellants are four residents in Hong Kong who between August and December 1982 made substantial deposits with a registered deposit-taking company called American and Panama Finance Co Ltd. The company went into liquidation on 25 February 1983 and as a result the appellants have lost all the money which they deposited with it. The respondent is the Attorney General of Hong Kong as representing the Commissioner of Deposit-taking Companies. The appellants' claim against him is for damages on the ground of negligence in the discharge of the commissioner's functions under the Deposit-taking Companies Ordinance (cap 328). An alternative ground of breach of statutory duty was not argued. The damages claimed are quantified by reference to the amount of the appellants' lost deposits with interest at the rates contracted for.

The ordinance was originally enacted in 1976 and has since been amended on a number of occasions. The title reads:

> 'To regulate the taking of money on deposit and to make provision for the protection of persons who deposit money and for the regulation of deposit-taking business for monetary policy purposes.'

By s 3A of the ordinance the Commissioner of Banking (appointed under s 4 of the Banking Ordinance) is appointed to be Commissioner of Deposit-taking Companies. Part III of the ordinance places a number of restrictions on the taking of deposits, and these are fortified by criminal sanctions. In particular, s 6(1) prohibits the carrying on of the business of taking deposits except by a company which is either a registered deposit-taking company or a licensed deposit-taking company. Part IV deals with the registration of deposit-taking companies, requiring by s 9 that applications for registration should be accompanied by various documents relating to the company's business. Section 10(1) provides for the registration by the commissioner of a company as a deposit-taking company on receipt of an application satisfying s 9, but s 10(2) requires him to refuse registration in a number of circumstances including, by para (*e*), 'if it appears to the Commissioner that, by reason of any circumstances whatsoever, the company is not a fit and proper body to be registered'. Under s 12 the commissioner is to maintain a register of deposit-taking companies. The register is to be open to inspection by members of the public, along with documents lodged by the company on application for registration or annually under s 17, which covers such matters as profit and loss accounts and balance sheets, with auditors' reports. Section 13 requires the commissioner to publish in the Gazette at least once a year the names of all registered deposit-taking companies. Under

s 14 the commissioner may, subject to giving the company an opportunity of making representations, revoke the registration of a deposit-taking company in certain specified events. These include (para (*d*)) '[if] it appears to him that (i) the company is not a fit and proper body to be registered'.

Part V contains detailed provisions in regard to the obligations of deposit-taking companies, fenced with criminal sanctions. These include: s 17: to lodge accounts annually with the commissioner; s 18: to exhibit accounts at each place of business; s 19: to notify the commissioner of certain changes by the company in its business; s 19A: to report to the commissioner if the company is likely to be unable to meet its obligations or if it is about to suspend payment; s 20: to submit monthly returns to the commissioner showing its assets and liabilities together with such further information as the commissioner may require, including auditor's certificates; s 20A: to inform the commissioner, if so required, of shareholdings in any company exceeding 20% of the share capital; s 21: to refrain from representing that the company has been in any respect approved by the government, the Financial Secretary or the commissioner, subject to the proviso that this prohibition is not contravened by reason only that a statement is made to the effect that a company is registered or licensed under the ordinance; s 21A: to maintain certain reserves; s 21B: to restrict the payment of dividends if certain financial criteria are not satisfied; s 21C: to refrain from making advances against the security of the company's own shares; s 22: to refrain from making to any one person or group of companies advances exceeding a certain proportion of the deposit-taking company's paid-up capital and reserves; s 22A: to refrain, when so required by the commissioner, from making advances to a foreign bank; s 23: to limit the amount of advances made to a director of the company and certain other persons; s 23A: to limit the amount of advances made to any one of the company's employees; s 23B: to limit the holding of shares in any other company or companies so as not to exceed in value 25% of the paid-up share capital of the deposit-taking company; s 23C: to limit the holding of any interests in land so as not to exceed in aggregate value 25% of the paid-up share capital and reserves of the deposit-taking company; s 24A: to maintain at all times a minimum holding of certain specified liquid assets.

Part VI of the ordinance, headed 'Miscellaneous', deals with a variety of matters, including secrecy (s 25), criminal liability for false or negligent misrepresentation (s 28), liability in tort for such misrepresentation (s 29), criminal liability of directors and other officers (s 31), examination by the commissioner of the affairs of a deposit-taking company (s 31A), rights of appeal to the Governor in Council against refusal to register and revocation or suspension of registration (s 34) and investigation of a deposit-taking company by a person appointed by the Financial Secretary (s 38). It is to be observed that by amendment introduced in 1983, after the events giving rise to the present litigation, it is provided that no liability shall be incurred by the Financial Secretary or the commissioner as a result of anything done or omitted to be done by him in the bona fide exercise of any functions under the ordinance (see s 41).

Part VII of the ordinance contains a number of provisions concerned with the revocation and suspension of the registration of a deposit-taking company. Under s 45 the commissioner may suspend the registration of a deposit-taking company for up to 14 days in circumstances of urgency, and under s 46 he may in other cases and subject to s 47 suspend registration for a period not exceeding six months. Section 47 requires an opportunity of being heard to be afforded to a company before its registration is revoked or suspended. Section 49 provides for publication in the Gazette of notice of revocation or suspension.

In their amended statement of claim, the averments in which must for present purposes be taken to be true, the appellants say that they made their respective deposits with the American and Panama Finance Co Ltd—

> 'in reliance upon the fact that the Company had been registered by the Commissioner under the Ordinance and that (i) the Company was therefore a fit and proper body to be registered; (ii) the Company was therefore subject to the prudential supervision of the Commissioner; (iii) the Company would continue to be subject of such prudential supervision, and did so continue . . .'

and also in reliance on certain statements by the Financial Secretary and the commissioner which led the appellants to believe in the financial probity of deposit-taking companies (including the company) and in the commissioner's powers actually to control and regulate them.

The statement of claim goes on to detail a large number of matters connected with the affairs of the company between 1980 (when it was registered by the commissioner) and the end of 1982 which are alleged to indicate that these affairs were being conducted fraudulently, speculatively and to the detriment of depositors with it.

The allegations of fault against the commissioner are, in substance, that he knew or ought to have known, had he taken reasonable care, that the affairs of the company were being conducted fraudulently, speculatively and to the detriment of its depositors; that he failed to exercise his powers under the ordinance so as to secure that the company complied with the obligations and restrictions thereby imposed on it (a considerable number of which are alleged to have been breached) and that he should either never have registered the company as a deposit-taking company or have revoked its registration before the appellants made their respective deposits with it, so as to save them from losing their money when the company eventually went into liquidation.

The issues in the appeal raise important issues of principle, having far-reaching implications as regards the potential liability in negligence of a wide variety of regulatory agencies carried on under the aegis of central or local government and also to some extent by non-governmental bodies. Such agencies are in modern times becoming an increasingly familiar feature of the financial, commercial, industrial and social scene.

The foremost question of principle is whether in the present case the commissioner owed to members of the public who might be minded to deposit their money with deposit-taking companies in Hong Kong a duty, in the discharge of his supervisory powers under the ordinance, to exercise reasonable care to see that such members of the public did not suffer loss through the affairs of such companies being carried on by their managers in a fraudulent or improvident fashion. That question is one of law, which is capable of being answered on the averments, assumed to be true, contained in the appellants' pleadings. If it is answered in the negative, the appellants have no reasonable cause of action, and their statement of claim was rightly struck out.

The argument for the appellants in favour of an affirmative answer to the question started from the familiar passage in the speech of Lord Wilberforce in *Anns v Merton London Borough* [1977] 2 All ER 492 at 498, [1978] AC 728 at 751:

> 'Through the trilogy of cases in this House, *Donoghue v Stevenson* [1932] AC 562, [1932] All ER Rep 1, *Hedley Byrne & Co Ltd v Heller & Partners Ltd* [1963] 2 All ER 575, [1964] AC 465 and *Home Office v Dorset Yacht Co Ltd* [1970] 2 All ER 294, [1970] AC 1004, the position has now been reached that in order to establish that a duty of care arises in a particular situation, it is not necessary to bring the facts of that situation within those of previous situations in which a duty of care has been held to exist. Rather the question has to be approached in two stages. First one has to ask whether, as between the alleged wrongdoer and the person who has suffered damage there is a sufficient relationship of proximity or neighbourhood such that, in the reasonable contemplation of the former, carelessness on his part may be likely to cause damage to the latter, in which case a prima facie duty of care arises. Secondly, if the first question is answered affirmatively, it is necessary to consider whether there are any considerations which ought to negative, or to reduce or limit the scope of the duty or the class of person to whom it is owed or the damages to which a breach of it may give rise . . .'

This passage has been treated with some reservation in subsequent cases in the House of Lords, in particular by Lord Keith in *Governors of the Peabody Donation Fund v Sir Lindsay Parkinson & Co Ltd* [1984] 3 All ER 529 at 534, [1985] AC 210 at 240, by Lord Brandon in *Leigh & Sillavan Ltd v Aliakmon Shipping Co Ltd* [1986] 2 All ER 145 at 153, [1986] AC 785 at 815 and by Lord Bridge in *Curran v Northern Ireland Co-ownership Housing Association Ltd* [1987] 2 All ER 13 at 17, [1987] 2 WLR 1043 at 1047–1048. The speeches containing these reservations were concurred in by all the other members of the House who were party to the decisions. In *Sutherland Shire Council v Heyman* (1985) 60 ALR 1 Brennan J in the High Court of Australia indicated his disagreement with the nature of the approach indicated by Lord Wilberforce, saying (at 43–44):

> 'Of course, if foreseeability of injury to another were the exhaustive criterion of a prima facie duty to act to prevent the occurrence of that injury, it would be essential to introduce some kind of restrictive qualification—perhaps a qualification of the kind stated in the second stage of the general proposition in *Anns*. I am unable to accept that approach. It is preferable, in my view, that the law should develop novel categories of negligence incrementally and by analogy with established categories, rather than by a massive extension of a prima facie duty of care restrained only by indefinable "considerations which ought to negative, or to reduce or limit the scope of the duty or the class of person to whom it is owed". The proper role of the "second stage", as I attempted to explain in *Jaensch v Coffey* ((1984) 54 ALR 417 at 437), embraces no more than "those further elements [in addition to the neighbour principle] which are appropriate to the particular category of negligence and *which confine the duty of care within narrower limits* than those which would be defined by an unqualified application of the neighbour principle".' (My emphasis.)

Their Lordships venture to think that the two-stage test formulated by Lord Wilberforce for determining the existence of a duty of care in negligence has been elevated to a degree of importance greater than it merits, and greater perhaps than its author intended. Further, the expression of the first stage of the test carries with it a risk of misinterpretation. As Gibbs CJ pointed out in *Sutherland Shire Council v Heyman* (at 13) there are two possible views of what Lord Wilberforce meant. The first view, favoured in a number of cases mentioned by Gibbs CJ, is that he meant to test the sufficiency of proximity simply by the reasonable contemplation of likely harm. The second view, favoured by Gibbs CJ himself, is that Lord Wilberforce meant the expression 'proximity or neighbourhood' to be a composite one, importing the whole concept of necessary relationship between plaintiff and defendant described by Lord Atkin in *Donoghue v Stevenson* [1932] AC 562 at 580, [1932] All ER Rep 1 at 11. In their Lordships' opinion the second view is the correct one. As Lord Wilberforce himself observed in *McLoughlin v O'Brian* [1982] 2 All ER 298 at 303, [1983] 1 AC 410 at 420, it is clear that foreseeability does not of itself, and automatically, lead to a duty of care. There are many other statements to the same effect. The truth is that the trilogy of cases referred to by Lord Wilberforce each demonstrate particular sets of circumstances, differing in character, which were adjudged to have the effect of bringing into being a relationship apt to give rise to a duty of care. Foreseeability of harm is a necessary ingredient of such a relationship, but it is not the only one. Otherwise there would be liability in negligence on the part of one who sees another about to walk over a cliff with his head in the air, and forbears to shout a warning.

Donoghue v Stevenson established that the manufacturer of a consumable product who carried on business in such a way that the product reached the consumer in the shape in which it left the manufacturer, without any prospect of intermediate examination, owed the consumer a duty to take reasonable care that the product was free from defect likely to cause injury to health. The speech of Lord Atkin stressed not only the requirement of foreseeability of harm but also that of a close and direct relationship of proximity. The relevant passages are:

> 'Who, then, in law is my neighbour? The answer seems to be—persons who are so closely and directly affected by my act that I ought reasonably to have them in contemplation as being so affected when I am directing my mind to the acts or omissions which are called in question.'

(See [1932] AC 562 at 580, [1932] All ER Rep 1 at 11.)

> 'I think that this sufficiently states the truth if proximity be not confined to mere physical proximity, but be used, as I think it was intended, to extend to such close and direct relations that the act complained of directly affects a person whom the person alleged to be bound to take care would know would be directly affected by his careless act.'

(See [1932] AC 526 at 581, [1932] All ER Rep 1 at 12.)

> 'There will no doubt arise cases where it will be difficult to determine whether the contemplated relationship is so close that the duty arises.'

(See [1932] AC 562 at 582, [1932] All Rep 1 at 12.)

Lord Atkin clearly had in contemplation that all the circumstances of the case, not only the foreseeability of harm, were appropriate to be taken into account in determining whether a duty of care arose. *Hedley Byrne & Co Ltd v Heller & Partners Ltd* [1963] 2 All ER 575, [1964] AC 465 was concerned with the assumption of responsibility. On the facts of the case no liability was held to exist because responsibility for the advice given had been disclaimed, but there was established the principle that a duty of care arises where a party is asked for and gives gratuitous advice on a matter within his particular skill or knowledge and knows or ought to have known that the person asking for the advice will rely on it and act accordingly. In such a case the directness and closeness of the relationship between the parties are very apparent. *Dorset Yacht Co Ltd v Home Office* [1970] 2 All ER 294, [1970] AC 1004 was an example of the kind of situation where a special relationship between a defendant and a third party gives rise to a duty on the part of the defendant to take reasonable care to control the third party so as to prevent him causing damage to the plaintiff. Some borstal boys, under the supervision of prison officers, were encamped on an island off which yachts were moored. Some of the boys, in an attempt to escape from the island, boarded a yacht and manoeuvred it so as to damage another. This was the very thing that might reasonably be foreseen as likely to happen if the prison officers did not take reasonable care to control the activities of the boys. The relationship of the officers to the boys was analogous to that between parents and children, a relationship described by Dixon J in *Smith v Leurs* (1945) 70 CLR 256 at 261–262 as capable of giving rise to a duty of control, saying:

> '... apart from vicarious responsibility, one man may be responsible to another for the harm done to the latter by a third person; he may be responsible on the ground that the act of the third person could not have taken place but for his own fault or breach of duty. There is more than one description of duty the breach of which may produce this consequence. For instance, it may be a duty of care in reference to things involving special danger. It may even be a duty of care with reference to the control of actions or conduct of the third person. It is, however, exceptional to find in the law a duty to control another's actions to prevent harm to strangers. The general rule is that one man is under no duty of controlling another man to prevent his doing damage to a third. There are, however, special relations which are the source of a duty of this nature. It appears now to be recognized that it is incumbent upon a parent who maintains control over a young child to take reasonable care so to exercise that control as to avoid conduct on his part exposing the person or property of others to unreasonable danger. Parental control, where it exists, must be exercised with due care to prevent the child inflicting intentional

damage on others or causing damage by conduct involving unreasonable risk of injury to others.' a

It is true that in the *Dorset Yacht* case a question arose whether the decision of the Home Office to give borstal boys a measure of freedom in order to assist in their rehabilitation fell within the ambit of a discretionary power the exercise of which was not capable of being called in question. But that question did not reach into the conduct of the officers who were in charge of the boys in the circumstances prevailing on the island. Having b regard to these circumstances, it was not difficult to arrive, as a matter of judgment, at the conclusion that a close and direct relationship of proximity existed between the officers and the owners of the yachts, sufficient to require the former, as a matter of law, to take reasonable care to prevent the boys from interfering with the yachts and damaging them.

The second stage of Lord Wilberforce's test is one which will rarely have to be applied. c It can arise only in a limited category of cases where, notwithstanding that a case of negligence is made out on the proximity basis, public policy requires that there should be no liability. One of the rare cases where that has been held to be so is *Rondel v Worsley* [1967] 3 All ER 993, [1969] 1 AC 191, dealing with the liability of a barrister for negligence in the conduct of proceedings in court. Such a policy consideration was invoked in *Hill v Chief Constable of West Yorkshire* [1987] 1 All ER 1173, [1987] 2 WLR d 1126. In that case the mother of the last victim of a notorious murderer of young women, who was not apprehended until after he had perpetrated 13 murders and 8 attempted murders, sued the chief constable of the area on the grounds of the negligence of his force in failing to apprehend the murderer before the death of her daughter. The Court of Appeal struck out the statement of claim as disclosing no reasonable cause of action, on the principal ground that no relationship of proximity had existed between the police e and the deceased girl. Glidewell LJ, however, in a judgment concurred in by Sir Roualeyn Cumming-Bruce, said ([1987] 1 All ER 1173 at 1183, [1987] 2 WLR 1126 at 1140):

> 'If the police were liable to be sued for negligence in the investigation of crime which has allowed the criminal to commit further crimes, it must be expected that f actions in this field would not be uncommon. Investigative police work is a matter of judgment, often no doubt dictated by experience or instinct. The threat that a decision, which in the end proved to be wrong, might result in an action for damages would be likely to have an inhibiting effect on the exercise of that judgment. The trial of such actions would very often involve the retrial of matters which had already been tried at the Crown Court. While no doubt many such g actions would fail, preparing for and taking part in the trial of such an action would inevitably involve considerable work and time for a police force, and thus either reduce the manpower available to detect crime or increase expenditure on police services. In short, the reasons for holding that the police are immune from an action of this kind are similar to those for holding that a barrister may not be sued for negligence in his conduct of proceedings in court: see *Rondel v Worsley* [1967] 3 All h ER 993, [1969] 1 AC 191.'

In view of the direction in which the law has since been developing, their Lordships consider that for the future it should be recognised that the two-stage test in *Anns* is not to be regarded as in all circumstances a suitable guide to the existence of a duty of care.

The primary and all-important matter for consideration, then, is whether in all the j circumstances of this case there existed between the commissioner and would-be depositors with the company such close and direct relations as to place the commissioner, in the exercise of his functions under the ordinance, under a duty of care towards would-be depositors. Among the circumstances of the case to be taken into account is that one of the purposes of the ordinance (though not the only one) was to make provision for the

protection of persons who deposit money. The restrictions and obligations placed on a registered deposit-taking companies, fenced by criminal sanctions, in themselves went a long way to secure that object. But the discretion given to the commissioner to register or deregister such companies, so as effectively to confer or remove the right to do business, was also an important part of the protection afforded. No doubt it was reasonably foreseeable by the commissioner that, if an uncreditworthy company were placed on or allowed to remain on the register, persons who might in the future deposit b money with it would be at risk of losing that money. But mere foreseeability of harm does not create a duty, and future would-be depositors cannot be regarded as the only persons whom the commissioner should properly have in contemplation. In considering the question of removal from the register, the immediate and probably disastrous effect on existing depositors would be a very relevant factor. It might be a very delicate choice whether the best course was to deregister a company forthwith or to allow it to continue c in business with some hope that, after appropriate measures by the management, its financial position would improve. It must not be overlooked that the power to refuse registration, and to revoke or suspend it, is quasi-judicial in character, as is demonstrated by the right of appeal to the Governor in Council conferred on companies by s 34 of the ordinance, and the right to be heard by the commissioner conferred by s 47. The commissioner did not have any power to control the day-to-day management of any d company, and such a task would require immense resources. His power was limited to putting it out of business or allowing it to continue. No doubt recognition by the company that the commissioner had power to put it out of business would be a powerful incentive impelling the company to carry on its affairs in a responsible manner, but if those in charge were determined on fraud it is doubtful if any supervision could be close enough to prevent it in time to forestall loss to depositors. In these circumstances their e Lordships are unable to discern any intention on the part of the legislature that in considering whether to register or deregister a company the commissioner should owe any statutory duty to potential depositors. It would be strange that a common law duty of care should be superimposed on such a statutory framework.

On the appellants' case as pleaded the immediate cause of the loss suffered by the f appellants in this case was the conduct of the managers of the company in carrying on its business fradulently, improvidently and in breach of many of the provisions of the ordinance. Another cause was the action of the appellants in depositing their money with a company which in the event turned out to be uncreditworthy. Considerable information about the company was available from the documents required by the ordinance to be open to public inspection, and no doubt advice could have been readily g obtained from investment advisers in Hong Kong. Before the appellants deposited their money with the company there was no relationship of any kind between them and the commissioner. They were simply a few among the many inhabitants of Hong Kong who might choose to deposit their money with that or any other deposit-taking company. The class to whom the commissioner's duty is alleged to have been owed must include all such inhabitants. It is true, however, that according to the appellants' averments there h had been available to him information about the company's affairs which was not available to the public and which raised serious doubts, to say the least of it, about the company's stability. That raises the question whether there existed between the commissioner and the company and its managers a special relationship of the nature described by Dixon J in *Smith v Leurs* (1945) 70 CLR 256, and such as was held to exist between the prison officers and the borstal boys in the *Dorset Yacht* case [1970] 2 All ER j 294, [1970] AC 1004, so as to give rise to a duty on the commissioner to take reasonable care to prevent the company and its managers from causing financial loss to persons who might subsequently deposit with it.

In contradistinction to the position in the *Dorset Yacht* case, the commissioner had no power to control the day-to-day activities of those who caused the loss and damage. As has been mentioned, the commissioner had power only to stop the company carrying on

business, and the decision whether or not to do so was clearly well within the discretionary sphere of his functions. In their Lordships' opinion the circumstances that the commissioner had, on the appellants' averments, cogent reason to suspect that the company's business was being carried on fraudulently and improvidently did not create a special relationship between the commissioner and the company of the nature described in the authorities. They are also of opinion that no special relationship existed between the commissioner and those unascertained members of the public who might in future become exposed to the risk of financial loss through depositing money with the company. Accordingly, their Lordships do not consider that the commissioner owed to the appellants any duty of care on the principle which formed the ratio of the *Dorset Yacht* case. To hark back to Lord Atkin's words, there were not such close and direct relations between the commissioner and the appellants as to give rise to the duty of care desiderated.

The appellants, however, advanced an argument based on their averment of having relied on the registration of the company when they deposited their money with it. It was said that registration amounted to a seal of approval of the company, and that by registering the company and allowing the registration to stand the commissioner made a continuing representation that the company was creditworthy. In the light of the information in the commissioner's possession that representation was made negligently and led to the appellant's loss.

In *Hedley Byrne & Co Ltd v Heller & Partners Ltd* [1963] 2 All ER 575, [1964] AC 465 the House of Lords held that a negligent misrepresentation about a customer's creditworthiness, given in answer to an inquiry, might give rise to a claim for damages at the instance of the party making the inquiry who had foreseeably relied on the representation and suffered financial loss thereby. Likewise in *Junior Books Ltd v Veitchi Co Ltd* [1982] 3 All ER 201, [1983] 1 AC 520 it was held that a nominated specialist sub-contractor might be liable for economic loss caused to the building owner by negligent performance of the sub-contracted work, in circumstances where the building owner had, to the sub-contractor's knowledge, relied on his skill and experience. These decisions turned on the voluntary assumption of responsibility towards a particular party, giving rise to a special relationship. Lord Devlin in the *Hedley Byrne* case [1963] 2 All ER 575 at 611, [1964] AC 465 at 530 proceeded on the proposition that wherever there is a relationship equivalent to a contract, there is a duty of care. In the present case there was clearly no voluntary assumption by the commissioner of any responsibility towards the appellants in relation to the affairs of the company. It was argued, however, that the effect of the ordinance was to place such a responsibility on him. Their Lordships consider that the ordinance placed a duty on the commissioner to supervise deposit-taking companies in the general public interest, but no special responsibility towards individual members of the public. His position is analogous to that of a police force, which in *Hill v Chief Constable of West Yorkshire* [1987] 1 All ER 1173, [1987] 2 WLR 1126 was held to owe no duty towards individual potential victims of crime. The ordinance was designed to give added protection to the public against unscrupulous or improvident managers of deposit-taking companies, but it cannot reasonably be regarded, nor should it have been by any investor, as having instituted such a far-reaching and stringent system of supervision as to warrant an assumption that all deposit-taking companies were sound and fully creditworthy. While the investing public might reasonably feel some confidence that the provisions of the ordinance as a whole went a long way to protect their interests, reliance on the fact of registration as a guarantee of the soundness of a particular company would be neither reasonable nor justifiable, nor should the commissioner reasonably be expected to know of such reliance, if it existed. Accordingly their Lordships are unable to accept the appellants' arguments about reliance as apt, in all the circumstances, to establish a special relationship between them and the commissioner such as to give rise to a duty of care.

Consideration is due to two cases in different jurisdictions which were founded on by

the appellants. The earlier in date is *States of Guernsey v Firth* (1981) (No 10 (Civil)), a decision of the Guernsey Court of Appeal (Civil Division) on the defendants' application to strike out the plaintiff's statement of claim as not disclosing any cause of action. The Protection of Depositors (Bailiwick of Guernsey) Ordinance 1971 made it an offence to carry on the business of accepting money on deposit unless the person carrying on such business was registered by the States Advisory and Finance Committee. Section 13 of the ordinance required the committee from time to time to publish the names and addresses of all registered persons. According to the statement of claim a certain company was registered in 1972 and continued to be so until 31 December 1976. The committee did not renew the company's registration for 1977, but did not at any time between 1 January 1977 and 31 December 1978 publish a list of registered persons. In the mean time the company continued to carry on business illegally and the plaintiff deposited money with it, which she lost when the company went into liquidation in December 1978. She sued the committee for damages in respect of the loss on the ground of the latter's breach of their duty under s 13 of the ordinance in failing to publish any list of registered persons during the two years in question. The Court of Appeal (Sir Godfray Le Quesne QC, J J Clyde QC and Leonard Hoffmann QC) decided that on a proper construction of s 13 the committee was under a mandatory duty to publish lists of registered persons as often as might be necessary to keep the public reasonably informed, and further, applying *Cutler v Wandsworth Stadium* [1949] 1 All ER 544, [1949] AC 398, that the section gave a right of action to any depositor who might suffer loss through its breach. Accordingly the plaintiff had a cause of action against the committee. The decision was concerned with the construction of an enactment imposing a specific statutory duty which was alleged to have been breached. Their Lordships therefore do not consider it to be in point for the purposes of the present appeal, which is concerned with the existence of a common law duty of care, and do not think it appropriate to express any opinion as to its correctness.

The second case is *Baird v R* (1983) 148 DLR (3d) 1, a decision of the Federal Court of Appeal in Canada. That case too was concerned with the question whether the plaintiff's pleadings should be struck out as not disclosing a reasonable cause of action. The question was answered in the negative, on the ground that it was not 'plain and obvious beyond doubt' that the plaintiffs could not succeed. In that case also the plaintiffs had lost money which they had deposited with a company subject to licensing, inspection and regulation under statute, the Trust Companies Act, RSC 1970. That Act placed various duties and conferred certain functions in relation to companies within its scope on the Minister of Finance and the Superintendent of Insurance. It was alleged that both these functionaries had failed to perform or negligently performed their statutory duties in a number of respects as regards the company in question. A number of issues of principle were discussed in the judgment of Le Dain J, but he preferred to leave the final decision on them until after trial on the merits. In these circumstances, and considering that the relevant legislation there was different in important respects from the Hong Kong Ordinance, their Lordships have not derived material assistance from the case.

The final matter for consideration is the argument for the Attorney General that it would be contrary to public policy to admit the appellants' claim, on grounds similar to those indicated in relation to police forces by Glidewell LJ in *Hill v Chief Constable of West Yorkshire* [1987] 1 All ER 1173, [1987] 2 WLR 1126. It was maintained that, if the commissioner were to be held to owe actual or potential depositors a duty of care in negligence, there would be reason to apprehend that the prospect of claims would have a seriously inhibiting effect on the work of his department. A sound judgment would be less likely to be exercised if the commissioner were to be constantly looking over his shoulder at the prospect of claims against him, and his activities would be likely to be conducted in a detrimentally defensive frame of mind. In the result, the effectiveness of his functions would be at risk of diminution. Consciousness of potential liability could lead to distortions of judgment. In addition, the principles leading to his liability would surely be equally applicable to a wide range of regulatory agencies, not only in the

financial field, but also, for example, to the factory inspectorate and social workers, to name only a few. If such liability were to be desirable on any policy grounds, it would be much better that the liability were to be introduced by the legislature, which is better suited than the judiciary to weigh up competing policy considerations.

Their Lordships are of opinion that there is much force in these arguments, but as they are satisfied that the appellants' statement of claim does not disclose a cause of action against the commissioner in negligence they prefer to rest their decision on that rather than on the public policy argument.

For these reasons their Lordships will humbly advise Her Majesty that the appeal should be dismissed.

Appeal dismissed.

Solicitors: *Philip Conway Thomas & Co* (for the appellants); *Macfarlanes* (for the Attorney General).

Mary Rose Plummer Barrister.

Guinness Peat Properties Ltd and others v Fitzroy Robinson Partnership (a firm)

COURT OF APPEAL, CIVIL DIVISION
SLADE, WOOLF LJJ AND SIR GEORGE WALLER
7, 8, 15 APRIL 1987

Discovery – Legal professional privilege – Communication between defendant and insurers – Dominant purpose for which document coming into existence – Defendant receiving notice of claim from plaintiffs – Defendant notifying insurers of claim – Defendant required under terms of indemnity policy to notify insurers of claim – Whether defendant writing to insurers to fulfil policy requirements or to enable legal advice to be obtained to defend claim – Whether letter to insurers privileged.

Privilege – Loss of privilege – Inadvertent disclosure of document on inspection – Whether privilege lost if document inadvertently disclosed as the result of obvious mistake.

The first plaintiffs, who were building developers, engaged the defendants to act as architects for the construction of an office building, which was later let to the second plaintiffs. Subsequently, on 18 June 1984, the first plaintiffs notified the defendants of an alleged design fault in part of the building and stated that they intended to hold the defendants responsible for the cost of remedying the defect. On 27 June, in accordance with the terms of their professional indemnity policy, the defendants wrote to their insurers enclosing a copy of the first plaintiffs' claim and other relevant memoranda. The defendants also expressed their own views on the merits of the claim and estimated the cost of repairs at £50,000. The plaintiffs later issued a writ against the defendants claiming the costs of repairs and loss of rent. In the course of discovery in the action the defendants' solicitors inadvertently failed to claim privilege for the defendants' letter of 27 June to the insurers and left it in the files of correspondence disclosed to the plaintiffs' solicitors and experts, one of whom took a copy of the letter. When the defendants' solicitors realised that the letter had been disclosed they applied for an order restraining the plaintiffs from making any use of it at the trial. The judge held that the letter was privileged and that that privilege had not been lost by reason of the fact that the letter had been disclosed and inspected. The plaintiffs appealed, contending (i) that the

defendants were not entitled to claim privilege for the letter because the dominant purpose for which it was written was to comply with the requirements of their indemnity policy, not for the purpose of obtaining legal advice or to assist in the conduct of litigation, and (ii) that once a privileged document was disclosed and inspected privilege was irretrievably lost.

Held – The appeal would be dismissed for the following reasons—

(1) The dominant purpose for which a document was written was not necessarily to be determined by reference to the intention of the person who actually composed it. Since the genesis of the letter was the insurers' need to receive immediate notification of possible claims so that they could obtain legal advice, the dominant purpose for which the letter was written was to obtain legal advice or to conduct or provided assistance in the conduct of litigation which was at the time of its production in reasonable prospect; and the fact that the defendants, who wrote the letter, did so with the intention of complying with the indemnity policy was irrelevant. Accordingly, the defendants would have been entitled to claim privilege in respect of the letter (see p 723 *c* to *g*, p 724 *a b*, p 725 *d* to *g* and p 731 *g h*, post); dictum of Barwick CJ in *Grant v Downs* (1976) 135 CLR at 677, *Waugh v British Rlys Board* [1979] 2 All ER 1169 and *Re Highgrade Traders Ltd* [1984] BCLC 151 applied; *Jones v Great Central Rly Co* [1910] AC 4 distinguished.

(2) Although the general rule was that once a document had been inspected it was too late to claim privilege, the court had power, under its equitable jurisdiction, to intervene if the inspection had been procured by fraud or if the inspecting party realised, on inspection, that he had been permitted to see the document only because of an obvious mistake. On the facts, the defendants had not lost the right to claim privilege for the letter by reason of the fact that it had been disclosed and inspected by the plaintiffs in the course of discovery, since the plaintiffs' solicitors must have realised that they had been permitted to see the document because of an obvious mistake by the defendants' solicitors and the defendants, on realising the mistake, had acted promptly in claiming privilege for the letter. It followed that the defendants were entitled to an injunction restraining the plaintiffs from using or relying on the letter (see p 730 *j* to 731 *h*, post); *Lord Ashburton v Pape* [1911–13] All ER Rep 708 and *Goddard v Nationwide Building Society* [1986] 3 All ER 264 applied; *Great Atlantic Insurance Co v Home Insurance Co* [1981] 2 All ER 485 and *Re Briamore Manufacturing Ltd (in liq)* [1986] 3 All ER 132 considered.

Notes

For communications between a party and non-professional agent, employee or third party, see 13 Halsbury's Laws (4th edn) para 78, and for cases on the subject, see 18 Digest (Reissue) 117–120, 902–924.

For waiver of privilege, see 13 Halsbury's Laws (4th edn) para 84.

Cases referred to in judgments

Ashburton (Lord) v Pape [1913] 2 Ch 469, [1911–13] All ER Rep 708, CA.
Briamore Manufacturing Ltd (in liq), Re [1986] 3 All ER 132, [1986] 1 WLR 1429.
Buttes Gas and Oil Co v Hammer (No 3) [1980] 3 All ER 475, [1981] QB 223, [1980] 3 WLR 668, CA; *on appeal* [1981] 3 All ER 616, [1982] AC 888, [1981] 3 WLR 787, HL.
Calcraft v Guest [1898] 1 QB 759, [1895–9] All ER Rep 346.
Crompton (Alfred) Amusement Machines Ltd v Customs and Excise Comrs (No 2) [1973] 2 All ER 1169, [1974] AC 405, [1973] 3 WLR 268, HL.
English and American Insurance Co Ltd v Herbert Smith & Co (1987) 137 NLJ 148.
Goddard v Nationwide Building Society [1986] 3 All ER 264, [1986] 3 WLR 734, CA.
Grant v Downs (1976) 135 CLR 674, Aust HC.
Great Atlantic Insurance Co v Home Insurance Co [1981] 2 All ER 485, [1981] 1 WLR 529.
Highgrade Traders Ltd, Re [1984] BCLC 151, CA.

and s 2(1) of the Human Rights Act 1998, such cases are covered by the earlier paragraphs of this Direction. a

Kate O'Hanlon Barrister.

a Three Rivers District Council and others v Bank of England (No 3)

[2001] UKHL/16

b HOUSE OF LORDS

LORD STEYN, LORD HOPE OF CRAIGHEAD, LORD HUTTON, LORD HOBHOUSE OF WOODBOROUGH AND LORD MILLETT

15–18 JANUARY, 22 MARCH 2001

c *Bank – Deposit-taking business – Control by Bank of England – Bank's supervisory role over commercial banks in the United Kingdom – Depositors with licensed deposit-taker suffering loss when deposit-taker failing because of fraud – Depositors alleging loss caused by Bank of England wrongly granting licence or wrongly failing to revoke deposit-taker's licence – Depositors claiming damages for tort of misfeasance in public office – Judge concluding that claim bound to fail on basis of report into collapse of* d *deposit-taker – Whether judge erring in relying on inquiry report – Whether claim having no real prospect of success.*

In 1980 the Bank of England granted a licence to BCCI to carry on business as a deposit-taking institution. In so doing, the Bank was acting in its capacity as e the supervisory authority for United Kingdom deposit-takers under the Banking Act 1979. BCCI collapsed in 1991 owing to fraud on a vast scale perpetrated by its senior staff. Shortly afterwards, a Court of Appeal judge was invited to conduct a non-statutory private inquiry into the supervision of BCCI under the Banking Acts, to consider whether the action taken by the United Kingdom authorities was timely and to make recommendations. His report (the f Bingham report) contained an account of the entire sequence of events based on oral and written evidence from a large number of witnesses, including representatives from the Bank and BCCI's auditors. It also contained numerous findings of fact and expressions of opinion relevant to the questions comprised within the inquiry's terms of reference. Subsequently, several thousand depositors g brought proceedings against the Bank, seeking to recover the sums which they had lost on BCCI's collapse. They claimed that the Bank was liable in the tort of misfeasance in public office, contending that named senior officials had acted in bad faith by licensing BCCI when they knew that was unlawful, by shutting their eyes to what was happening at BCCI after the licence was granted and by failing to take steps to close BCCI at least by the mid-1980s. On the hearing of h preliminary issues, the judge, relying heavily on the Bingham report's findings and conclusions, held that the material before him contained no arguable support for the depositors' case and that there were no reasonable grounds for supposing that further evidence relating to the Bank's state of mind would become available. Accordingly, he concluded that the claim was bound to fail and j therefore struck it out. That decision was upheld by the majority of the Court of Appeal who followed the judge's approach to the Bingham report. On the depositors' appeal to the House of Lords, their Lordships determined the proper test for misfeasance in public office, and adjourned the appeal for further argument. Subsequently, the depositors served new draft particulars on the Bank. When the matter came back before the House of Lords, the Bank submitted that the claim was plainly and obviously unsustainable, that the decision to strike out

附件 B Annex B

the claim should therefore be upheld and that it should be given summary judgment under CPR Pt 24.

Held – (Lord Hobhouse and Lord Millett dissenting) When determining whether a claim should be struck out, a court was not entitled to treat a report of the findings of a non-statutory private inquiry as conclusive on the questions a judge had to answer in the litigation or to conclude that all the available material evidence on those questions had been gathered in. Neither the report nor any of its findings or conclusions would be admissible at any trial. Accordingly, in the instant case the judge and the majority of the Court of Appeal had been wrong to rely on the findings and the conclusions of the Bingham report when determining whether the claim should be struck out. The depositors had not been represented before the inquiry, the case against the Bank had not been put by counsel and the investigation had been carried out behind closed doors. It followed that it was open to their Lordships to take a fresh look at the issue of strike-out, and to reconsider the depositors' draft new particulars. When examining those particulars, it was necessary to consider some of the essential elements of the tort of misfeasance in public office. First, there had to be an unlawful act or omission done or made in the exercise of power by the public officer. Secondly, as the essence of the tort was an abuse of power, the act or omission had to have been done or made with the required mental element. Thirdly, the act or omission had to have been done or made in bad faith. Where the allegation was one of untargeted malice, the required mental element was satisfied if the act or omission was done or made intentionally by the public officer in the knowledge that it was beyond his powers and that it would probably cause the claimant to suffer injury, or recklessly because, although he was aware that there was a serious risk that the claimant would suffer loss due to an act or omission which he knew to be unlawful, he wilfully chose to disregard that risk. As regards that form of the tort, the fact that the act or omission was done or made without an honest belief that it was lawful was sufficient to satisfy the requirement of bad faith. Bad faith would be demonstrated by knowledge of probable loss on the part of the public officer or by recklessness on his part in disregarding the risk. The facts pleaded by the depositors in their fresh pleadings were capable of meeting the requirements of the tort. There was an unequivocal plea that the Bank was acting throughout in bad faith and any question as to whether the evidence pointed to negligence rather than to misfeasance in public office was a matter which had to be judged not on the pleading, but on the evidence, which was a matter for decision by the trial judge. The question whether the Bank knew that loss to the depositors was probable or was reckless in the relevant sense could not be answered satisfactorily without hearing oral evidence. It could not be said, therefore, that the claim had no real prospect of success, and justice required that the depositors be given an opportunity to present their case at trial so that its merits might be assessed in the light of the evidence. Accordingly, the Bank's application for summary judgment would be rejected and the depositors' appeal would be allowed (see [1], [5], [6], [8], [42]–[46], [56], [77]–[86], [95], [106]–[111], [125]–[129], [132], [133], [137]–[139] and [144]–[152], post).

Decision of the Court of Appeal [1999] 4 All ER 800n reversed in part.

Notes

For deliberate abuse of public office or authority, see 1(1) *Halsbury's Laws* (4th edn reissue) para 203.

Cases referred to in opinions

Armitage v Nurse [1997] 2 All ER 705, [1998] Ch 241, [1997] 3 WLR 1046, CA.
Ashmore v Corp of Lloyd's [1992] 2 All ER 486, [1992] 1 WLR 446, HL.
Belmont Finance Corp Ltd v Williams Furniture Ltd [1979] 1 All ER 118, [1979] Ch 250, [1978] 3 WLR 712, CA.
Bourgoin SA v Ministry of Agriculture Fisheries and Food [1985] 3 All ER 585, [1986] QB 716, [1985] 3 WLR 1027, QBD and CA.
British Airways Pension Trustees Ltd v Sir Robert McAlpine & Sons Ltd (1994) 45 Con LR 1, CA.
Bullivant v A-G for Victoria [1901] AC 196, [1900–3] All ER Rep 812, HL.
Davey v Bentinck [1893] 1 QB 185, [1891–4] All ER Rep 691, CA.
Davy v Garrett (1878) 7 Ch D 473, CA.
Dellow's Will Trusts, Re, Lloyds Bank Ltd v Institute of Cancer Research [1964] 1 All ER 771, [1964] 1 WLR 451.
Drummond-Jackson v British Medical Association [1970] 1 All ER 1094, [1970] 1 WLR 688, CA.
Dunlop v Woollahra Municipal Council [1981] 1 All ER 1202, [1982] AC 158, [1981] 2 WLR 693, PC.
H (minors) (sexual abuse: standard of proof), Re [1996] 1 All ER 1, [1996] AC 563, [1996] 2 WLR 8, HL.
Harris v Bolt Burdon [2000] CPLR 9, CA.
Jarvis v Hampshire CC [2000] 2 FCR 310, CA; *rvsd* [2000] 4 All ER 504, [2000] 3 WLR 776, HL.
Jonesco v Beard [1930] AC 298, [1930] All ER Rep 483, HL.
Manifest Shipping Co Ltd v Uni-Polaris Shipping Co Ltd [2001] UKHL/1, [2001] 1 All ER 743, [2001] 2 WLR 170, HL.
Margulies v Margulies [2000] CA Transcript 444.
McDonald's Corp v Steel [1995] 3 All ER 615, CA.
McPhilemy v Times Newspapers Ltd [1999] 3 All ER 775, CA.
Medcalf v Mardell (2001) Times, 2 January, [2000] CA Transcript 2015.
Monsanto plc v Tilly (1999) Times, 30 September, [1999] CA Transcript 1924.
Moor v Lawson (1915) 31 TLR 418, CA.
Morris v Bank of America National Trust [2000] 1 All ER 954, CA.
Northern Territory of Australia v Mengel (1995) 185 CLR 307, Aust HC.
Purdy v Cambran [1999] CPLR 843, CA.
Sinclair v Chief Constable of West Yorkshire [2000] CA Transcript 2189.
Steamship Mutual Underwriting Association Ltd v Trollope & Colls Ltd (1986) 6 Con LR 11, CA.
Swain v Hillman [2001] 1 All ER 91, CA.
Taylor v Midland Bank Trust Co Ltd [1999] CA Transcript 1200.
Wallingford v Mutual Society (1880) 5 App Cas 685, HL.
Wenlock v Moloney [1965] 2 All ER 871, [1965] 1 WLR 1238, CA.
White v White [2001] UKHL/9, [2001] 2 All ER 43, [2001] 1 WLR 481, HL.
Williams and Humbert Ltd v W & H Trade Marks (Jersey) Ltd, Rumasa SA v Multinvest (UK) Ltd [1986] 1 All ER 129, [1986] AC 368, [1986] 2 WLR 24, HL.

Appeal

The claimants, Three Rivers District Council and 6,018 other depositors with the Bank of Credit and Commerce International SA (in liquidation), appealed with leave from the decision of the Court of Appeal (Hirst and Robert Walker LJJ, Auld LJ dissenting) on 4 December 1998 ([1999] 4 All ER 800n, [2000] 2 WLR 15)

dismissing their appeal from the decision of Clarke J on 1 April and 10 May 1996 ([1996] 3 All ER 558) and 30 July 1997 striking out proceedings for damages for misfeasance in public office and breach of Council Directive (EEC) 77/780 brought by them against the defendant, the Bank of England. On 18 May 2000 ([2000] 3 All ER 1, [2000] 2 WLR 1220) the House of Lords dismissed the appeal in respect of the claim under the directive, determined the requirements of the tort of misfeasance in public office and adjourned the appeal for further argument in respect of the misfeasance claim. The facts are set out in the opinion of Lord Hope of Craighead.

Lord Neill of Bladen QC, Richard Sheldon QC, Robin Dicker QC, Dominic Dowley and *Barry Isaacs* (instructed by *Lovells*) for the claimants.
Nicholas Stadlen QC, Mark Phillips QC, Bankim Thanki and *Ben Valentin* (instructed by *Freshfields Bruckhaus Deringer*) for the Bank.

Their Lordships took time for consideration.

22 March 2001. The following opinions were delivered.

LORD STEYN. My Lords,

[1] For the reasons given by my noble and learned friends, Lord Hope of Craighead and Lord Hutton, I would also allow the appeal. While it is unnecessary for me to cover the same ground, I must state in outline the principal factors that proved decisive in my approach to the case.

[2] It is right at the outset to emphasise that in substance one is dealing with a striking-out application. The Bank of England (the Bank) submitted that the claims are plainly and obviously unsustainable. In aid of this submission the Bank deployed a written case of no less than 737 pages, amplified by many pages of written aids and lengthy oral argument. It was hardly a simple and obvious case for a striking out. At the end of the argument my views were that the Bank had not succeeded in establishing that it would be right and fair to strike out the claims. Having studied with care the judgments below, as well as the draft speeches on the appeal to the House, I am reinforced in my first view by a combination of the dissenting judgment of Auld LJ in the Court of Appeal, and by the majority speeches of Lord Hope and Lord Hutton.

[3] It is necessary to test the question whether the action should be struck out against the new draft particulars of claim drafted and served after the first hearing (see [2000] 3 All ER 1 at 13, [2000] 2 WLR 1220 at 1236).

[4] The case fell into two distinct parts. The first question was whether the plaintiffs have pleaded a reasonable cause of action. In essence this was a demurrer point. With due deference to contrary views I have to say that I was unimpressed by the Bank's technical arguments under this heading. The new draft particulars of claim plead the case in misfeasance in public office in clear terms and in sufficient detail to enable the Bank to prepare a defence. The Bank does not need any further particulars. I would reject the Bank's arguments under this heading.

[5] The second question was whether the action is an abuse of the court's process in that it has no realistic prospect of success. This is the more difficult and controversial aspect of the appeal. The Court of Appeal was divided on the issue. The dissenting judgment of Auld LJ is an impressive one. The judgments of Clarke J at first instance ([1996] 3 All ER 558 and 30 July 1997 (unreported)) and of the majority (Hirst and Walker LJJ) in the Court of Appeal ([1999] 4 All ER 800n,

[2000] 2 WLR 15) are detailed and careful. Unfortunately, however, the use made by the judge and by the majority in the Court of Appeal of the Bingham report of October 1992 (*Inquiry into the Supervision of the Bank of Credit and Commerce International* (HC Paper 198 (1992–93))) was not permissible. The report is self-evidently an outstanding one produced by an eminent judge. But in law the judge and the majority erred in relying on positive conclusions and findings, and absence of conclusions and findings, of Bingham LJ. Not only was such use of the report ruled out by settled principles of law but on broader grounds it was also unfair to the claimants. After all, the report was the outcome of a private inquiry, the claimants were not represented before Bingham LJ and the case against the Bank was not put by counsel. And the appendices to the report, which recount the history in greater detail, were not published and have never been seen by those representing the claimants.

[6] In these circumstances it is necessary for the House to consider the matter entirely afresh. Since I share the views of Lord Hope and Lord Hutton I do not propose to revisit the battleground. But I must emphasise that it is indisputably the case that the Bank knew from April 1990 onwards that BCCI was in imminent danger of collapse with inevitable loss to depositors unless there was a real prospect of an effective rescue package. The Bank has failed to persuade me that the claimants have no realistic prospect of establishing that the Bank knew that there would be no effective and comprehensive rescue or was reckless as to whether there would be one. Moreover, I do not share the confidence of the judge and the majority in the Court of Appeal that discovery and cross-examination will not produce significant materials assisting the claimants. It is a case that should be examined and tested with the procedural advantages of a fair and public trial.

[7] My conclusion is therefore strongly influenced by the events from April 1990. On the other hand, I also take the view that the earlier part of the history cannot be excised. The interests of justice require that the entire action should be permitted to go to trial. This conclusion involves no judgment about the likely outcome of the case but merely a finding that the threshold requirement for striking out has not been satisfied.

[8] I would, therefore, allow the appeal, dismiss the cross-appeal and give leave to the claimants to amend their pleading in terms of the new draft particulars of claim. Like Lord Hope I regard the supplementary directions sought by the claimants as entirely reasonable, but on balance I would also leave it to the commercial judge to give appropriate directions. I apprehend that he will wish to proceed to trial with due despatch and a minimum of technical interlocutory hearings. And in proceeding to trial it is axiomatic that the trial judge will have to approach this case in a neutral fashion and without preconceptions. He will have to ignore expressions of opinion *on the facts* in any of the speeches.

[9] At the request of the Bank the issue of costs is reserved. Written submissions on costs are invited within 21 days.

LORD HOPE OF CRAIGHEAD. My Lords,

[10] At the previous hearing of this appeal your Lordships were concerned only with two questions of law. The first related to the ingredients of the tort of misfeasance in public office on which the plaintiffs' first ground of action depends. The second was whether the Bank of England (the Bank) was capable of being liable to the plaintiffs in damages for violation of the requirements of the First Council Banking Co-ordination Directive, Council Directive (EEC) 77/780 of 12 December 1977, on the co-ordination of laws, regulations and administrative

provisions relating to the taking up and pursuit of the business of credit institutions (OJ 1977 L322 p 30) (the directive). For the reasons given in your Lordships' judgment of 18 May 2000 ([2000] 3 All ER 1, [2000] 2 WLR 1220) the second question was answered in the negative. It is not necessary to give any further consideration to the Community law issues. They no longer form any part of the plaintiffs' case against the Bank. At the further hearing of the appeal with which this judgment deals your Lordships' task has been to consider whether the facts alleged or capable of being alleged by the plaintiffs meet the test for the tort of misfeasance in public office which were identified by your Lordships in answer to the first question. The question, in short, is whether the order of the Court of Appeal upholding the order of Clarke J that the action should be struck out should be upheld on the ground that the plaintiffs have no reasonable prospect of succeeding on the claim at trial.

[11] Your Lordships have been assisted by the oral arguments which were advanced at the further hearing by Lord Neill of Bladen QC for the plaintiffs and by Mr Stadlen QC for the Bank and by the very substantial amount of written material which has been provided by each side. The issues which have had to be resolved are far from easy. Some indication of their complexity can be gathered from the fact that the written cases for the plaintiffs (including their reply) and for the Bank (including a detailed response on the facts but excluding two appendices) run to 385 and 737 pages respectively. There are two bundles of contemporaneous documents extending to 661 pages and a supplementary bundle of documents which extends to about 300 pages. The amount of material that must be read and understood to see whether the claim should be struck out is formidable. It will be necessary for me before I address the competing arguments to set out some of the facts by way of background.

[12] There are a number of preliminary points. (1) At a procedural hearing which was held on 27 June 2000 nine issues were identified for determination at the further hearing of the appeal. But it became clear in the course of the argument that there was a considerable amount of overlap between one issue and another and that it was more likely to be helpful for them to be looked at cumulatively rather than separately. So I do not propose to examine those issues one by one in this judgment. (2) In his judgment after the first hearing of this appeal my noble and learned friend Lord Steyn said ([2000] 3 All ER 1 at 13, [2000] 2 WLR 1220 at 1236) that at the further hearing there should be available a new draft pleading by the plaintiffs reflecting the position which was recorded in your Lordships' judgments. At the procedural hearing on 27 June 2000 the plaintiffs were required to serve their new draft pleading on the Bank by 17 July 2000, and they duly did so on that date. That new draft pleading is contained in a document entitled 'New draft particulars of claim'. For reasons which I shall explain later in more detail (see section (4)) it is to that document, which I shall call 'the new draft particulars', that I shall for the most part direct my attention when I am discussing the question whether the facts pleaded meet the requirements of the tort. (3) These proceedings were issued before 29 April 1999 under the Rules of the Supreme Court (RSC), which were still in force when the case was in the Court of Appeal. On 29 April 1999 the Civil Procedure Rules 1998, SI 1998/3132 (the CPR) came into force. This case is therefore subject to the transitional arrangements set out in the Practice Direction made under CPR 51.1 (Practice Direction—Transitional Arrangements). In accordance with the general principles which are set out in that practice direction the case is to proceed in the first instance under the previous rules, but any new step taken on or after 26 April 1999 is to be taken under the CPR (see Practice Direction supplementing Pt 51, paras 3, 11).

[13] The parties are agreed that the service of the new draft particulars on the Bank was a new step, and that it follows that the question whether the claim on the ground of misfeasance in public office should be struck out must now be determined under the CPR. As the CPR require that the word 'claimant' be used rather than the word 'plaintiff', I propose to adopt the same terminology from now on throughout this judgment. Rule 3.2 provides, so far as relevant to this case, that the court may strike out a statement of case if it appears to the court (a) that it discloses no reasonable cause of action or (b) that it is an abuse of the court's process. There is no exact dividing line between these two grounds (see *Civil Procedure* (2000 edn) vol 1, para 3.4.2). Mr Stadlen did not attempt to maintain an exact separation between them and in the end, as I shall explain below (in section (5)), he invited your Lordships to give summary judgment against the claimants under CPR 24.2.

[14] I propose to deal with the various matters that require to be considered at this stage in this order: (1) introductory narrative, to include (a) outline chronology, (b) the Bingham report (*Inquiry into the Supervision of the Bank of Credit and Commerce International* (HC Paper 198 (1992–93))) and (c) history of the proceedings to date; (2) the requirements of the tort; (3) whether the facts pleaded by the claimants are capable of meeting those requirements; (4) the decision of the courts below to strike out; (5) the test for summary judgment under CPR 24.2; (6) whether, applying that test, the claim should be summarily struck out; (7) the Bank's cross-appeal; and (8) conclusion and further procedure.

[15] I should also make it clear at the outset that, although I shall be using the expression 'the Bank' throughout this judgment, the claimants' position as explained in their written case is that those who were principally responsible for the regulation and supervision of BCCI SA were the officials of the Banking Supervision Division formed by the Bank in March 1980 for the purpose of implementing the Banking Act 1979 whose names are given in Sch 1 to the particulars to the new draft particulars.

(1) INTRODUCTORY NARRATIVE

(a) *Outline chronology*

[16] The history of the rise and fall of the Bank of Credit and Commerce International SA (BCCI SA) can conveniently be divided up for the purposes of this action into four periods: (1) the period prior to the grant of a full licence under the Banking Act 1979 on 19 June 1980; (2) the period from the grant of the full licence to December 1986; (3) the period from December 1986 to April 1990; and (4) the period from April 1990 to closure in July 1991. This history was set out in great detail by Clarke J in his third judgment of 30 July 1997 (unreported), in which the history was divided up into the same four periods, and it was reviewed again in Pt III of the judgment of the majority in the Court of Appeal of 4 December 1998 ([1999] 4 All ER 800n, [2000] 2 WLR 15) (Pt III of which is also unreported). I do not propose to set out that history all over again. No significance is to be attached to the fact that I have mentioned some events in the course of this narrative and omitted others. What follows is not intended to be a complete or definitive account of what happened. But for the purposes of this judgment it is necessary to provide an outline of the chronology and to identify some of the more important details in that history.

[17] BCCI SA was incorporated under the laws of Luxembourg on 21 September 1972. In November it established its first office in the United Kingdom and commenced its business in this country as a deposit-taker. Two years later the structure of BCCI was altered by the incorporation on 13 December 1974 of BCCI Holdings SA (Holdings) in Luxembourg of which BCCI SA became a subsidiary. On 25 November 1975 another subsidiary of Holdings called BCCI Overseas (Overseas) was incorporated in the Cayman Islands. Overseas opened its first branch in the United Kingdom in June 1976. At this stage a substantial part of the issued share capital of Holdings was owned by the Bank of America. Although the group was trading through various branches in the United Kingdom it was not subject to any regulatory system in this country. But Holdings was subject to regulation in Luxembourg by the Luxembourg Banking Commission (LBC) which at that time was that country's regulatory authority. At the end of 1977 the Bank of America decided to withdraw from its relationship with BCCI. It sold its holding of shares in Holdings to International Credit and Investment Co Ltd (ICIC) which at that time was BCCI's largest shareholder.

[18] Prior to the enactment of the 1979 Act banking in the United Kingdom was not subject to any formalised system of regulation. Control was exercised in an informal way by the Bank and in an indirect manner by means of various statutory provisions which gave privileges to banks which were recognised by the Board of Trade and by the Bank. Following the publication of a White Paper in 1976 (*The Licensing and Supervision of Deposit-Taking Institutions* (Cmnd 6584)) and the directive steps were taken to establish a new statutory system of banking supervision in the United Kingdom. This was contained in the 1979 Act, which came into force on 1 October 1979. It provided for the recognition of banks under s 3(1) if they satisfied the criteria in Sch 2, Pt I, and for the licensing of deposit-taking institutions under s 3(2) if they satisfied the less stringent criteria in Sch 2, Pt II. Section 3(5) of that Act provided that, in the case of an institution whose principal place of business was in a country or territory outside the United Kingdom, the Bank might regard itself as satisfied that the criteria in Sch 2 regarding those responsible for the management of the business and the prudence with which its business was being conducted were fulfilled if the relevant supervisory authorities informed the Bank that they were satisfied with respect to them and the Bank was satisfied as to the nature and scope of the supervision exercised by those authorities.

[19] On 1 October 1979 BCCI SA applied to the Bank for recognition as a bank under the Act. On 19 June 1980 the Bank refused recognition as a bank but granted to BCCI SA a full licence under the 1979 Act as a deposit-taker. By that date its principal place of business was in the United Kingdom. Nevertheless the Bank decided to rely under s 3(5) of the 1979 Act on the supervision of its activities by LBC. The claimants' case is that when the Bank granted the licence; (a) it did so knowingly deliberately contrary to the statutory scheme, or (b) it was recklessly indifferent to whether it was acting in accordance with the scheme, or (c) it wilfully disregarded the risk that it was not acting in accordance with that scheme, (i) in bad faith, and (ii)(a) in the knowledge that the likely consequences were losses to depositors and potential depositors, or (b) that it wilfully disregarded the risk of the consequences, or (c) that it was recklessly indifferent to those consequences (para 31 of the new draft particulars).

[20] During the period from June 1980 to December 1986 the activities of the BCCI Group expanded dramatically not only in the United Kingdom but throughout the world. Officials of the Bank pointed out that it was unsatisfactory for it as the supervising authority of BCCI SA in the United Kingdom to rely, as it had been doing under s 3(5) of the 1979 Act, on the views of LBC as to the activities of the holding company in Luxembourg. They recognised that, as the activities of BCCI continued to expand, pressure was likely to grow for its recognition as a bank under that Act. Various possible solutions were considered including, on the one hand, a proposal for the Bank to supervise the whole institution and, on the other, the incorporation of Holdings in the United Kingdom to improve the effectiveness of the Bank's supervision of the group's activities in this country. In September 1984 the effectiveness of the existing statutory regime was called into question by the collapse of Johnson Matthey bankers. In the light of that debacle a further White Paper was produced (*Banking Supervision* (Cmnd 9695) (1985)) and the enactment of a new statute, which was to become the Banking Act 1987, was proposed. The system introduced by the 1979 Act was to be both strengthened and simplified. In place of the dual system of recognition and licensing a single system of authorisation was to be introduced with restrictions on the use of banking names. The Bank was to be required to establish a committee to be known as the Board of Banking Supervision which was to include six independent members as well as three members ex officio. Various other changes were to be made to the powers and duties of the Bank as regulatory authority.

[21] Meantime the Bank continued to rely on the views of the Luxembourg regulatory authority. In May 1983 the responsibilities of regulatory authority in that country had passed from the LBC to L'Institute Monetaire Luxembourgeois (IML). Further memoranda passed between officials of the Bank drawing attention yet again to the fact that the real place of business of the BCCI SA was in London and that effectively the Bank and not IML was its prime supervisor. Concern was expressed about heavy losses resulting from BCCI SA's central treasury activities which had been identified by BCCI SA's auditors but not been reported to the Bank and BCCI's lack of candour about its decision to relocate its central treasury operation from London to Abu Dhabi.

[22] The claimants' case regarding this period, which follows the same pattern as that set out in para 31 of the new draft particulars which relates to the first period, is that the Bank was continuing to rely on assurances from LBC and IML and, that despite its knowledge of the illegality of this arrangement and the likelihood of losses to depositors, it failed in bad faith to take steps to revoke BCCI SA's licence under s 7 of the 1979 Act.

[23] The next period was marked by a number of changes in the supervisory regime and further expressions of concern about the activities of BCCI. The 1987 Act came into force on 1 October 1987. Section 3(5) of the 1979 Act was replaced by an equivalent provision in s 9(3) of the 1987 Act. BCCI SA was deemed to be authorised under the 1987 Act by s 107 of that Act and Sch 5, para 2. An international co-operative group, known as 'the College', was established to enable the various national supervisors of the operations of the BCCI Group to meet twice yearly to discuss its financial condition. Concern was expressed at meetings of the College about a large concentration of exposures due to the group's lending and the effect on the group's activities of the arrest of seven of its officials in Tampa, Florida in October 1988 on charges of drug trafficking, money-laundering and conspiracy. Further consideration was given to proposals for the restructuring of the group's activities with a view to achieving effective consolidated supervision in London by the Bank. On 30 January 1990 the Bank decided to continue BCCI SA's authorisation following a decision of the Tampa prosecutor to enter into a

plea-bargain agreement, approved by the court, by which BCCI SA and Overseas pleaded guilty to all counts of money-laundering and conspiracy. Concerns were expressed to the Bank by the group's auditors, Price Waterhouse, about the probity of BCCI's senior management.

[24] The claimants' case regarding this period contains three specific allegations about decisions by the Bank not to withdraw the authorisation from BCCI SA. These are said to have been taken: (1) after the Bank had learned in May 1986 that BCCI, which had been dealing on a massive scale in the financial and commodity markets through its central treasury in London, had incurred losses amounting to some $US285m (new draft particulars, Sch 5, paras 26 and 27); (2) after a paper prepared by the Bank for the Board of Banking Supervision in November 1989 had revealed serious defects in the group's structure and the existing supervisory regime and the extent to which BCCI's activities in the United Kingdom were dependent upon what happened elsewhere in the group which was largely unsupervised (new draft particulars, Sch 6, para 19); and (3) after the officials of BCCI had pleaded guilty in Tampa, Florida in January 1990 to charges of money-laundering and conspiracy (new draft particulars, Sch 6, para 24).

[25] The final period from April 1990 to closure in July 1991 began with expressions of concern to the Bank by Price Waterhouse about the group's serious financial problems and reports about efforts which were being made to obtain financial support from the majority shareholders. On 18 April 1990 Price Waterhouse reported to the board of Holdings that they were unable to sign the 1989 accounts. Later that month they felt able to do so in the light of expressions of support for the group by the Abu Dhabi government. In early June 1990 IML, recognising that they were no longer in a position effectively to supervise their activities, gave notice to Holdings and to BCCI SA that they must leave Luxembourg within the next 12 to 15 months. These matters were discussed at a meeting of the College on 19 June 1990 when IML repeated its ultimatum and the Cayman supervisor said that, if BCCI SA had to leave Luxembourg, Overseas would have to leave Cayman. Further consideration was given to the need for a clear group structure, consolidated supervision of its activities, relocation of the group to Abu Dhabi and the need for a clear and substantial commitment by the Abu Dhabi government of its support for it.

[26] In October 1990 Price Waterhouse reported to Holdings' audit committee that an urgent investigation was needed to quantify the group's liabilities and its need for financial support. On 5 October 1990 a letter was produced to the College on behalf of the majority shareholders undertaking to provide support to the level indicated by Price Waterhouse. But IML refused to extend its deadline unless certain conditions were met and the supervisors did not regard the shareholders' proposals for support as acceptable. By December 1990 a revised support package had been put together which Price Waterhouse regarded as acceptable, but later that month Price Waterhouse became aware of the extent to which BCCI's financial problems were due to fraudulent activities on the part of management. On 4 March 1991 the Bank commissioned Price Waterhouse to investigate and report to it under s 41 of the 1987 Act on malpractice within BCCI. Price Waterhouse delivered their report to the Bank on 24 June 1991. It contained a comprehensive account of widespread frauds and deceptions which had been perpetrated by BCCI. Four days later the Bank decided that the proposed reconstruction of the group could not be pursued and that to protect depositors BCCI SA had to be closed down. On 5 July 1991 the Bank presented a petition for the appointment of a provisional liquidator.

[27] The claimants' case regarding this period, as explained by Lord Neill in oral argument, is based on general allegations that the Bank failed in bad faith to face up to its responsibilities as a supervisor to take decisions that would protect the interests of depositors and potential depositors when it was aware that there was a serious and immediate threat that unless it was rescued by the Abu Dhabi government BCCI would collapse.

(b) *The Bingham report*

[28] The closure of BCCI on 5 July 1991 provoked widespread concern in the financial community on the ground that this action was long overdue, yet the action that was taken was criticised by depositors, employees and shareholders as precipitate. In a prompt response to that concern Bingham LJ was invited to conduct an inquiry into the supervision of BCCI under the Banking Acts, to consider whether the action taken by all the United Kingdom authorities was timely and to make recommendations. The establishment of the inquiry was announced on 19 July 1991. Bingham LJ submitted his report to the Chancellor of the Exchequer and the Governor of the Bank in July 1992. Among the questions which he understood to call for consideration by his terms of reference were the following. What did the United Kingdom authorities know about BCCI at the relevant times? Should they have known more? And should they have acted differently?

[29] The report (*Inquiry into the Supervision of the Bank of Credit and Commerce International* (HC Paper 198 (1992–93)) contains a masterly and eminently readable account of the entire sequence of events from the establishment of BCCI in the United Kingdom in 1972 to its closure in July 1991. Bingham LJ took evidence both orally and in writing from a large number of witnesses and he had access to many documents. In his covering letter he paid tribute to the very high level of co-operation which he had received from, among others, the Bank and the United Kingdom firm of Price Waterhouse, who acted from June 1987 to July 1991 as the group's auditors. He said that in deciding what was said and done during BCCI's 19-year history he had relied heavily on contemporary notes and minutes of meetings and conversations between the Bank and Price Waterhouse. His report contains numerous findings of fact and expression of opinion relevant to the questions which he understood to have been comprised within his terms of reference. The report was published in October 1992, but eight appendices to the report were not published.

[30] Much of the claimants' pleading has been based upon material taken from that report. This is unsurprising, in view of the fact that the claimants have not yet had the benefit of discovery of documents or the obtaining of answers to interrogatories. The assumption can properly be made at this stage that the narrative which the report contains will in due course be capable of being established by evidence once the claimants have obtained access to the relevant documents. But there are important limitations on the use which can be made of this document. I shall have to deal with this matter in more detail later when I come to the arguments relating to strike-out, but I should like to make the following observations at this stage.

[31] The first point that has to be borne in mind is that neither the report itself nor any of its findings or conclusions will be admissible at any trial in this case. At this stage, when the only material that is available for consideration apart from the pleadings is the report and an incomplete bundle of relevant documents, it is tempting to fill in the gaps by reference to Bingham LJ's findings and the conclusions

which he was able to draw from his review of the evidence. Nevertheless a sharp dividing line must be observed between, on the one hand, his narrative of the evidence and, on the other hand, his findings and conclusions in the light of that evidence.

[32] It can, as I have said, be assumed that if the claim is not struck out the claimants will in due course have access to the evidence which provides the source material for that narrative, and that that evidence will be capable of being led by them at the trial. But, as Bingham LJ's findings and conclusions based on that narrative are inadmissible, they must be held to be incapable either of being led in evidence at the trial or of being used by either side in any other way in support of the competing arguments. As Hirst LJ observed in the Court of Appeal ([2000] 2 WLR 15 at 91), no comparable statutory provisions to those which are to be found in s 441 of the Companies Act 1985 apply to the Bingham report. The investigation which Bingham LJ conducted was a private and not a statutory inquiry. The rigorous attention which must be paid to the distinction between what would and what would not be admissible has not always been observed in the written cases, and I had the impression that it was not always being observed during the oral argument. Nor, for reasons which I shall explain later, do I think that it was always observed either by Clarke J or by the majority in the Court of Appeal in their judgments on the issues relating to the question of strike-out. This has an important bearing on the question whether those judgments were soundly based and should be upheld or whether, because they were not soundly based, the question of strike-out is now at large for your Lordships' reconsideration.

[33] A further point that should be noted at this stage about the findings and conclusions in the Bingham report is that they were the result of an investigation that lacked the benefit of statutory powers and was conducted behind closed doors. The claimants were not present nor were they represented. In the conduct of his fact-finding exercise Bingham LJ was, as he said in his covering letter, greatly assisted by the co-operation which he received especially from the Bank and Price Waterhouse. But he had no power to compel the attendance of witnesses or to require the production of documents, and there was no counsel to the inquiry. As the appendices have not been published, the claimants have not had access to all the material which Bingham LJ had before him. None of these observations are intended to suggest that the investigation was incomplete or that the report, for the purposes for which it was prepared, is in any way open to criticism. But it is plain that it cannot be suggested that Bingham LJ was in a position to conduct a fair trial of the issues relating to the tort of misfeasance in public office which the claimants are seeking to raise against the Bank in this case. In these circumstances I agree with the views which Auld LJ expressed in the Court of Appeal (at 180) in his minority judgment when he said that it would not be right to treat the Bingham report as effectively conclusive on the questions that arise in this litigation or to conclude that all the available evidence on those questions has been gathered in.

(c) *History of proceedings to date*

[34] The claimants' writ of summons was issued on 24 May 1993. On 19 July 1995 Clarke J made an order for the following questions to be tried as preliminary issues. (1) Is the defendant capable of being liable to the plaintiffs for the tort of misfeasance in public office? (2) Were the plaintiffs' alleged losses caused in law by the acts or omissions of the defendant? (3) Are the plaintiffs entitled to recover for

the tort of misfeasance in public office as existing depositors or potential depositors?

[35] On 19 July 1995 Clarke J gave the claimants leave to amend their pleadings for the purposes of these preliminary issues. On 21 August 1995 the claimants lodged a reamended statement of claim. Following Clarke J's first and second judgments of 1 April 1996 and 10 May 1996 ([1996] 3 All ER 558 and 634) in which he expressed his preliminary conclusions on the three preliminary issues, the claimants applied for leave to re-reamend their statement of claim and the Bank made an application for the statement of claim to be struck out. Clarke J heard argument on these applications in November and December 1996. The claimants then proposed a series of further amendments to their proposed re-reamended statement of claim, and an eighth draft was lodged on 6 January 1997.

[36] After a further hearing in April 1997 when he considered the claim as then formulated Clarke J delivered a judgment on 30 July 1997 (unreported) in which he held that, on the basis of the evidence then available, the claim was bound to fail; that, as there was no reasonable possibility that the claimants would obtain evidence in the future which might enable them to succeed, the claim was bound to fail in the future; that in these circumstances it would be an abuse of process or vexatious or oppressive to allow the action to proceed; that the application to re-reamend the statement of claim should be refused; and the action should be struck out.

[37] When he was expressing his conclusions in his third judgment on the present material, Clarke J said:

> 'I have reached the firm conclusion that on the material available at present the plaintiffs have no arguable case that the Bank dishonestly granted the licence to BCCI or dishonesty failed to revoke the licence or authorisation in circumstances when it knew, believed or suspected that BCCI would probably collapse. There is nothing in the Bingham report or in the documents which I have seen to support such a conclusion and there is much to contradict it.'

[38] In regard to the future, he recognised that Bingham LJ was not conducting a trial but an inquiry, that he did not see a number of Bank officials, that the witnesses whom he did see were not cross-examined in an adversarial process and that there was no right of appeal. But he then went on to say that there was in his judgment no realistic possibility that he had not correctly set out the state of mind of the Bank at each stage. He concluded:

> 'In these circumstances I accept Mr Stadlen's further submission that there is no realistic possibility of more evidence becoming available, whether by further investigation, discovery, cross-examination or otherwise, which might throw light upon the state of mind of the Bank or any of its relevant officials during the period in which BCCI was operating.'

[39] In the Court of Appeal the majority (Hirst and Robert Walker LJJ) upheld the order pronounced by Clarke J. They asked themselves the question whether the claimants had an arguable case that the Bank actually foresaw BCCI's imminent collapse at each relevant stage. They said that they agreed with the judge's conclusion that, on the material then available, the plaintiffs did not have an arguable case that the Bank actually foresaw BCCI's imminent collapse at each relevant stage. They also agreed with him that ([2000] 2 WLR 15 at 101), in all the circumstances, it was now for all practical purposes inconceivable that new

material would emerge of such significance as to alter that conclusion. Auld LJ dissented as to the test to be applied. He (at 166) did not consider that a claimant in an action for misfeasance in public office who could establish dishonesty in the sense of a knowing and deliberately or recklessly unlawful act by the defendant need also establish some knowledge on the officer's part of consequential damage, whether in the form of foresight or foreseeability. But he (at 175) went on to consider and give his view on the question whether the claim should be struck out on the assumption that the claimants had to establish that the Bank knew, believed or suspected that its conduct would probably cause loss. He said (at 180) that there were no exceptional circumstances to justify departing from the normal rule of leaving the matter to the trial judge.

[40] On 21 January 1999 the Court of Appeal gave leave to the claimants to appeal to the House of Lords on the claimants' undertaking to apply to your Lordships for a direction that the correct test for misfeasance in public office should be determined before any consideration of whether the facts alleged or capable of being alleged were capable of meeting that test. On 12 May 1999 your Lordships gave the claimants leave to appeal against the refusal of leave to re-reamend the statement of claim. On 17 July 2000, as they were directed to do at the procedural hearing on 27 June 2000 which followed the delivery of your Lordships' first judgment, the claimants served the new draft particulars on the Bank.

(2) THE REQUIREMENTS OF THE TORT

[41] The correct test for misfeasance in public office was established by your Lordships' judgment following the previous hearing of this appeal ([2000] 3 All ER 1, [2000] 2 WLR 1220). I do not wish to repeat or to analyse what your Lordships said in that judgment. But there are two matters with which I must deal. In the first place it is necessary for me to identify my understanding of the various elements in the light of which the question whether the facts pleaded by the claimants in the new draft particulars satisfy its requirements must be tested. In the second place I must examine Mr Stadlen's argument that the claimants' pleadings are based on a misunderstanding of those requirements.

[42] The following are the essential elements of the tort which are relevant to the examination of the new draft particulars. First, there must be an unlawful act or omission done or made in the exercise of power by the public officer. Second, as the essence of the tort is an abuse of power, the act or omission must have been done or made with the required mental element. Third, for the same reason, the act or omission must have been done or made in bad faith. Fourth, as to standing, the claimants must demonstrate that they have a sufficient interest to sue the defendant. Fifth, as causation is an essential element of the cause of action, the act or omission must have caused the claimants' loss.

[43] As to standing, the interest to sue of those who were already depositors with BCCI is not in doubt. A question has been raised about the interest to sue of potential depositors. This is because a widespread economic effect resulting from the misfeasance does not give a cause of action to the public in general. But the Bank, while reserving the right to pursue the issue at trial, accepts that it is capable of being liable for the tort to claimants who were potential depositors with BCCI at the time of any relevant act or omission of misfeasance by the Bank. As to causation, the Bank submits that it is not capable of having caused loss to depositors or potential depositors where the proximate cause of the loss was the deliberate act of a third party—in this case, fraudulent acts of individuals within

BCCI. But questions of fact are raised by this argument which are unsuitable for summary determination at this stage.

[44] The first, second and third requirements lie at the heart of the argument. No further explanation is required as to the test which must be met to satisfy the first requirement. As to the second and third requirements, the claimants do not allege that the Bank did or made the acts or omissions intentionally with the purpose of causing loss to them. The allegation is that this is a case of what is usually called 'untargeted malice'. Where the tort takes this form the required mental element is satisfied where the act or omission was done or made intentionally by the public officer; (a) in the knowledge that it was beyond his powers and that it would probably cause the claimant to suffer injury, or (b) recklessly because, although he was aware that there was a serious risk that the claimant would suffer loss due to an act or omission which he knew to be unlawful, he wilfully chose to disregard that risk. In regard to this form of the tort, the fact that the act or omission is done or made without an honest belief that it is lawful is sufficient to satisfy the requirement of bad faith. In regard to alternative (a), bad faith is demonstrated by knowledge of probable loss on the part of the public officer. In regard to alternative (b), it is demonstrated by recklessness on his part in disregarding the risk. The claimants rely on each of these two alternatives.

[45] At the first hearing Mr Stadlen argued that recklessness was not sufficient to satisfy the required mental element. Your Lordships rejected this submission, with the result that it must be assumed for the purposes of the argument at this stage that the claimants are entitled to include this alternative as part of their case. His argument at the further hearing was that as one of the essential requirements of the tort was knowledge, belief or suspicion that the act or omission would probably cause loss to depositors or potential depositors, in order to achieve harmony between the two alternatives, knowledge, belief or suspicion of 'probable loss' was a necessary element in the case of the alternative of recklessness. He submitted that without evidence to support this requirement there could be no liability under the second, or 'untargeted malice', limb of the tort.

[46] I would reject these submissions also. The effect of your Lordships' decision following the first hearing is that it is sufficient for the purposes of this limb of the tort to demonstrate a state of mind which amounts to subjective recklessness. That state of mind is demonstrated where it is shown that the public officer was aware of a serious risk of loss due to an act or omission on his part which he knew to be unlawful but chose deliberately to disregard that risk. Various phrases may be used to describe this concept, such as 'probable loss', 'a serious risk of loss' and 'harm which is likely to ensue'. Although I have used the phrase 'serious risk of loss', I do not think that for present purposes it is necessary to choose between them. Further attempts to define their meaning would raise issues of fact and degree which are best considered at trial. The absence of an honest belief in the lawfulness of the conduct that gives rise to that risk satisfies the element of bad faith or dishonesty.

(3) WHETHER THE FACTS PLEADED ARE CAPABLE OF MEETING THE REQUIREMENTS OF THE TORT

[47] The question to which I now turn relates to the adequacy of the pleadings. This is the first of the two broad grounds on which the Bank say the claim should be struck out. The issue here is directed to the sufficiency of the particulars. It is whether, assuming the facts alleged to be true, a case has been made out in the pleadings for alleging misfeasance in public office by the Bank. If it has, then

the question whether the pleading is supported by the evidence is normally left until trial. In *McDonald's Corp v Steel* [1995] 3 All ER 615 at 621 Neill LJ said:

'It is true that a pleader must not put a plea of justification (or indeed a plea of fraud) on the record lightly or without careful consideration of the evidence available or likely to become available. But, as counsel for the plaintiffs recognised in the course of the argument, there will be cases where, provided a plea of justification is properly particularised, a defendant will be entitled to seek support for his case from documents revealed in the course of discovery or from answers to interrogatories.'

I shall deal later (in section (3)) with the question to which Mr Stadlen directed the main part of his argument. This is whether there are reasonable grounds for thinking that evidence to support the allegations is or is capable of being made available. The question with which I propose to deal at this stage is whether the grounds for the claim have been properly particularised.

[48] The Bank makes much of the fact that the claimants have received numerous warnings of the need for particulars to be given of the facts relied on in support of their allegations and of the many opportunities that they have been given to amend their statement of claim. Your Lordships are invited to infer from the absence of particulars, and in the light of the available evidence, that the claimants are not able to make good their allegations and that on this ground alone Clarke J was right to order that the claim should be struck out. On the other hand the claimants say that the Bank is well aware of the case that they seek to bring and that the Bank's argument is calculated to place an insuperable obstacle in their path.

[49] In my judgment a balance must be struck between the need for fair notice to be given on the one hand and excessive demands for detail on the other. In *British Airways Pension Trustees Ltd v Sir Robert McAlpine & Sons Ltd* (1994) 45 Con LR 1 at 4–5 Saville LJ said:

'The basic purpose of pleadings is to enable the opposing party to know what case is being made in sufficient detail to enable that party properly to prepare to answer it. To my mind it seems that in recent years there has been a tendency to forget this basic purpose and to seek particularisation even when it is not really required. This is not only costly in itself, but is calculated to lead to delay and to interlocutory battles in which the parties and the court pore over endless pages of pleadings to see whether or not some particular point has or has not been raised or answered, when in truth each party knows perfectly well what case is made by the other and is able properly to prepare to deal with it.'

[50] These observations were made under the old rules. But the same general approach to pleadings under the CPR was indicated by Lord Woolf MR in *McPhilemy v Times Newspapers Ltd* [1999] 3 All ER 775 at 792–793:

'The need for extensive pleadings including particulars should be reduced by the requirement that witness statements are now exchanged. In the majority of proceedings identification of the documents upon which a party relies, together with copies of that party's witness statements, will make the detail of the nature of the case the other side has to meet obvious. This reduces the need for particulars in order to avoid being taken by surprise. This does not mean that pleadings are now superfluous. Pleadings are still

required to mark out the parameters of the case that is being advanced by each party. In particular they are still critical to identify the issues and the extent of the dispute between the parties. What is important is that the pleadings should make clear the general nature of the case of the pleader. This is true both under the old rules and the new rules.'

[51] On the other hand it is clear that as a general rule, the more serious the allegation of misconduct, the greater is the need for particulars to be given which explain the basis for the allegation. This is especially so where the allegation that is being made is of bad faith or dishonesty. The point is well established by authority in the case of fraud.

[52] In *Wallingford v Mutual Society* (1880) 5 App Cas 685 at 697 Lord Selborne LC said:

'With regard to fraud, if there be any principle which is perfectly well settled, it is that general allegations, however strong may be the words in which they are stated, are insufficient even to amount to an averment of fraud of which any Court ought to take notice.'

In the same case Lord Watson said (at 709):

'My Lords, it is a well-known and a very proper rule that a general allegation of fraud is not sufficient to infer liability on the part of those who are said to have committed it. And even if that were not the rule of the Common Law, I think the terms of Order XIV. would require the parties to state a very explicit case of fraud, or rather of facts suggesting fraud, because I cannot think that a mere statement that fraud had been committed, is any compliance with the words of that rule which require the Defendant to state facts entitling him to defend. The rule must require not only a general and vague allegation but some actual fact or circumstance or circumstances which taken together imply, or at least very strongly suggest, that a fraud must have been committed, those facts being assumed to be true.'

[53] The Bank says that, as an allegation of misfeasance in public office involves an allegation of dishonesty or bad faith on the part of the public officer, particulars must be given of the facts which, if proved, would justify the allegation. It is also said that it is not enough to aver facts which are consistent either with dishonesty or with negligence. Dishonesty or bad faith must be proved, so the facts relied on must point distinctly to dishonesty. Reference was made to *Davy v Garrett* (1878) 7 Ch D 473 at 489 where Thesiger LJ said:

'It may not be necessary in all cases to use the word "fraud"—indeed in one of the most ordinary cases it is not necessary. An allegation that the Defendant made to the Plaintiff representations on which he intended the Plaintiff to act, which representations were untrue, and known to the Defendant to be untrue, is sufficient. The word "fraud" is not used, but two expressions are used pointing at the state of mind of the Defendant—that he intended the representations to be acted upon, and that he knew them to be untrue. It appears to me that a Plaintiff is bound to shew distinctly that he means to allege fraud. In the present case facts are alleged from which fraud might be inferred, but they are consistent with innocence. They were innocent acts in themselves, and it is not to be presumed that they were done with a fraudulent intention.'

[54] It seems to me that it can no longer seriously be maintained by the Bank that they do not have sufficient notice of the case which is being made against them. It is abundantly clear that what the claimants are seeking to prove is misfeasance in public office. As my noble and learned friend Lord Hutton has pointed out, the draft new particulars contain detailed allegations to the effect that the Bank acted in bad faith. It has all along been common ground that the claimants cannot base their claim against the Bank in negligence. As Hirst LJ observed in the Court of Appeal ([2000] 2 WLR 15 at 32), the immunity which the Bank enjoys under s 1(4) of the 1987 Act unless it is shown that the act or omission was in bad faith goes a long way to explaining why the claimants have undertaken the burden of seeking to prove misfeasance in public office.

[55] In my view this point alone is a sufficient answer to the criticism based on Thesiger LJ's remarks in *Davy v Garrett*. The principle to which those remarks were directed is a rule of pleading. As the Earl of Halsbury LC said in *Bullivant v A-G for Victoria* [1901] AC 196 at 202, [1900–3] All ER Rep 812 at 814, where it is intended that there be an allegation that a fraud has been committed, you must allege it and you must prove it. We are concerned at this stage with what must be alleged. A party is not entitled to a finding of fraud if the pleader does not allege fraud directly and the facts on which he relies are equivocal. So too with dishonesty. If there is no specific allegation of dishonesty, it is not open to the court to make a finding to that effect if the facts pleaded are consistent with conduct which is not dishonest such as negligence. As Millett LJ said in *Armitage v Nurse* [1997] 2 All ER 705 at 715, [1998] Ch 241 at 256, it is not necessary to use the word 'fraud' or 'dishonesty' if the facts which make the conduct fraudulent are pleaded. But this will not do if language used is equivocal (see *Belmont Finance Corp Ltd v Williams Furniture Ltd* [1979] 1 All ER 118 at 131, [1979] Ch 250 at 268 per Buckley LJ). In that case it was unclear from the pleadings whether dishonesty was being alleged. As the facts referred to might have inferred dishonesty but were consistent with innocence, it was not to be presumed that the defendant had been dishonest. Of course, the allegation of fraud, dishonesty or bad faith must be supported by particulars. The other party is entitled to notice of the particulars on which the allegation is based. If they are not capable of supporting the allegation, the allegation itself may be struck out. But it is not a proper ground for striking out the allegation that the particulars may be found, after trial, to amount not to fraud, dishonesty or bad faith but to negligence.

[56] In this case it is clear beyond a peradventure that misfeasance in public office is being alleged. There is an unequivocal plea that the Bank was acting throughout in bad faith. The Bank says that the facts relied on are, at best for the claimants, equally consistent with negligence. But the substance of that argument is directed not to the pleadings as such, which leave no doubt as to the case that is being alleged, and the basis for it in the particulars, but to the state of the evidence. The question whether the evidence points to negligence rather than to misfeasance in public office is a matter which must be judged in this case not on the pleadings but on the evidence. This is a matter for decision by the judge at trial.

[57] The Bank nevertheless submits that the facts pleaded fail to meet the requirements of the tort. Three reasons are advanced in support of this argument. The first is that the claimants have failed to allege the requisite mental element as to loss. Mr Stadlen said that it was not enough for the claimants to show that the Bank knew that depositors and potential depositors were at risk. As he put it, nothing short of a properly particularised allegation of knowledge or recklessness

of probable loss, known or suspected, would satisfy the test. The second is that the pleadings do not contain a properly particularised allegation that the Bank in the person of identified officials committed acts or omissions of misfeasance dishonestly in the sense of committing them with subjective bad faith. Mr Stadlen submitted that it was well understood that an allegation of dishonesty had to be supported by particulars from which the inference of dishonesty could be drawn. A failure to satisfy this requirement was in itself a ground for a strike-out. The third is that the pleadings do not contain a properly particularised allegation that Bank officials took conscious decisions capable of amounting to acts or omissions of misfeasance. Mr Stadlen directed this part of his argument to what he described as the revocation claim. He accepted that the initial decision to licence BCCI SA was particularised. But he said that only three instances were given of decisions not to revoke, and that in the case of only one of these instances—the Bank's decision in October 1986 not to revoke notwithstanding the scale of the central treasury losses—was there any attempt to suggest that the decision was taken dishonestly.

[58] I would reject the first of these three arguments on the ground that it was based on a misunderstanding of the requirements of the tort. The claimants' case on the pleadings is that at each stage in the history the Bank knew that the likely consequences were that depositors and potential depositors would suffer losses, wilfully disregarded the risk of the consequences or was recklessly indifferent to the consequences (new draft particulars, paras 31–35). Knowledge that the depositors were likely to suffer loss is averred. But the claimants are also offering in the alternative to prove reckless indifference to the risk of loss. As I have already said (in section (2)) I do not think that it is necessary for present purposes to choose between the various phrases that may be used to describe the nature or degree of the risk. This would be to raise issues of fact and degree that are best considered at trial. It was not suggested that, if there was a case to be made on knowledge of probable loss, the pleading as to recklessness should be struck out at this stage. The Bank's position, as explained in its written case, is that it will not be possible to identify with precision which allegations should be struck out until the parties have seen your Lordships' judgment and that for the time being this exercise is premature.

[59] Mr Stadlen said that the essential difference between the parties on this part of the case at this stage is on the question whether knowledge, belief or suspicion of probable loss has to be established where the allegation is that the act or omission was done or made recklessly. He accepted that an allegation of knowledge that loss was 'likely' was, in effect, the same as an allegation that it was 'probable'. He also accepted that the words used in the new draft particulars to describe the tort, although not precisely the same as those used in your Lordships' judgment, were formulated with sufficient accuracy. But he maintained that the material referred to in the particulars did not support an allegation of knowledge, belief or suspicion of likely or probable loss. He said that none of this material came near to meeting that test, and that there was no indication in the Bingham report that material which would do so was available. At best it supported an allegation of knowledge that there was a risk of loss. But this was not enough to satisfy the test of knowledge that loss was probable.

[60] As I have already said more than once, I do not think that it is appropriate at this stage to attempt to define the required state of mind more precisely. This is a matter which is so bound up with the facts that it is best left until trial. It is a question of fact and degree. The greater the risk of loss the easier it is likely

to be to say that loss was probable and the easier it will be to find that where that risk was known, believed or suspected there was recklessness. The statutory powers of supervision were conferred on the Bank for the protection of depositors and potential depositors. As the fourth recital of the directive puts it, supervision of a credit institution is needed 'in order to protect savings'. The system is based on the assumption that, where that protection is lacking, deposits are likely to be at risk. The question whether at any given point of time that risk is sufficiently serious to justify a finding of recklessness on the part of a supervisor, who knows that the statutory requirements are not fulfilled, is aware of the risk but takes no action to withdraw authorisation or otherwise limit the activities of the deposit-taker, is one of degree. I would hold that it is essentially a question of fact for the trial judge. I do not think that a view on this matter can safely be formed at this stage by a reading of the available documents.

[61] I should add, in order to emphasise the importance which I attach to seeing this as a question of fact and degree, that I see much force in Auld LJ's observation in his dissenting judgment about the Orwellian illogicality of sharpening the test of foresight of probable damage for the purposes of the strike-out application to one of foresight of probable (imminent) collapse of BCCI. He said:

> 'If such a test is to survive it will enable a banking regulator who deliberately and knowingly does not supervise a bank as it should do (as is conceded to be arguable here), with resulting damage to its depositors, to defeat a misfeasance claim simply by saying "because I did not make the inquiries that I should have done, I did not suspect that the plaintiff would *probably* suffer loss." In short it enables a banking regulator to rely on its own deliberate and knowing illegality as a justification for its lack of foresight that it would cause damage. If "policy" and "principle" are to be invoked, it must be against providing such an incentive to a banking regulator, or any public body exercising a supervisory function over institutions in the interest of persons for whom they provide a service, not to do their duty. And to load a plaintiff/depositor with the further burden of proving that, despite the regulator's self-imposed ignorance, it foresaw damage in the particular form in which it occurred seems to me, with respect, even more illogical and unjust in a common law remedy the purpose of which is to provide a remedy for abuse of public duty.' (See [2000] 2 WLR 15 at 177.)

[62] The second argument on the pleadings is that the claimants have failed to give particulars of their allegation of dishonesty and to link those allegations with particular officials of the Bank. Here again regard must be paid to the fact that the claimants rely in the alternative on the concept of recklessness. I refer to the comments which I made in the previous section about Mr Stadlen's submission that an allegation of dishonesty in the sense of subjective bad faith is an essential element. The effect of your Lordships' decision following the first hearing is to the contrary. Recklessness is demonstrated where it is shown that the public officer was aware of a serious risk of loss due to an act or omission on his part which was unlawful but chose deliberately to disregard that risk. That is sufficient to establish that he did not have an honest belief in the lawfulness of the conduct which, to his knowledge, gave rise to that risk. Recklessness about the consequences, in the sense of not caring whether the consequences happen or not, will satisfy the test. In this context there is no additional element of dishonesty or bad faith that requires to be satisfied. As for the particular officials against whom the

allegation is made, I consider that the Bank has been given sufficient notice of the claimants' case against their officials in the particulars when read with the documents.

[63] It is alleged in para 31 of the new draft particulars that the Bank in bad faith at all times from 1979 onwards purported to rely pursuant to s 3(5) of the 1979 Act, and subsequently s 9(3) of the 1987 Act, upon assurances given by LBC/IML concerning the management and financial soundness of BCCI SA. Particulars are then given in that paragraph of the matters about this arrangement which are said to have been known to the Bank or about which it was recklessly indifferent. These are that the principal place of business of BCCI SA was in the United Kingdom, that LBC/IML did not and could not assure the Bank that it was satisfied with the management and overall financial soundness of BCCI SA, and that for various reasons that are specified LBC/IML had declared itself unable to carry out adequate supervision of both BCCI SA and the BCCI Group. It is also said that the Bank knew that the consequence of its unlawful reliance upon LBC/IML was that BCCI SA would be and would continue to be unlawfully licensed, and subsequently authorised, and that it was recklessly indifferent to the risk that this presented to depositors and potential depositors. In para 37 of the new draft particulars, under reference at each stage in the history to the facts and matters set out in Schs 2 to 7 of the particulars, details are given of the respects in which the motives of the Bank for breaching its statutory duties as regulator were in bad faith. It seemed to me at first sight that these particulars give ample notice to the Bank of the case which is being made against it as to the requirement of bad faith. But the point requires further examination in the light of further points in Mr Stadlen's argument.

[64] The claimants are taken some distance down the road they must travel by a concession which the Bank made to Clarke J which the judge recorded in his third judgment in these terms:

> 'With one exception I shall assume that they can establish that the Bank knew, believed or suspected at each stage that its proposed act or its omission was unlawful. With that one exception, the Bank has conceded that it cannot show that the plaintiffs' case that it knew, believed or suspected that its acts or omissions were unlawful is doomed to failure. That exception is the way that s 3(5) of the Banking Act 1979 was applied.'

[65] In the Court of Appeal, as appears both from the majority judgment and that of Auld LJ ([2000] 2 WLR 15 at 92, 179), it was understood to be common ground that there was an arguable case that the Bank was aware of illegality in its supervision of BCCI SA. Mr Stadlen objected to these passages on the ground that the extent of the Bank's concession was being misrepresented. He said that the Bank made one very narrow concession only, which was that for the purposes of the preliminary issue it was arguable that the Bank knew, believed or suspected that it was not entitled to rely, for the purpose of ongoing supervision of BCCI SA, on assurances given by LBC/IML because after, but not before, the licence was granted it knew, believed or suspected that its principal place of business was not in Luxembourg. I am content to accept Mr Stadlen's assurance that the concession was limited to this point. Nevertheless it seems to me to be a significant one. It limits the areas for discussion to the granting of the licence on the one hand, as to which all issues remain in play, and to the Bank's ongoing supervision on the other hand, as to which the issue relates to the question whether the pleadings reveal an arguable case as to recklessness about the consequences.

[66] With regard to the question whether the claimants have sufficiently alleged dishonesty or bad faith when the Bank granted the licence in the first place, the majority in the Court of Appeal (at 92) agreed with Clarke J's finding in his third judgment that there was material from which it was at least arguable that the Bank must have known at that stage that LBC were not regulating BCCI SA properly and that it did not have the resources to do so in the future. I agree, and I also consider that sufficient notice of the facts on which the claimants propose to rely is given in Sch 2 to the new draft particulars. As for Mr Stadlen's argument that the documents read in the light of the Bingham report do not provide any support for these particulars, I consider that issues of fact are raised here which, subject to further arguments about abuse of process, I would not expect to be answered satisfactorily in advance of a trial. As for the later stages in the history, the issue of dishonesty or bad faith is so bound up with the broad issue of recklessness that here too, subject to further arguments about abuse of process, I would hold that the issue raises questions of fact and degree which are best left for decision by the trial judge in the light of the evidence.

[67] The third argument is that there was a failure to provide particularised allegations in regard to the revocation claim. Mr Stadlen accepted that the initial decision to licence BCCI SA was particularised. But he said that, despite Clarke J's warning that particulars had to be given of the decisions that were said to amount to misfeasance, the claimants' case was still largely based on alleged omissions. He said that only three instances could be identified in the new draft particulars where it was alleged that decisions had been taken by the Bank not to revoke. These were the decision in October 1986 not to revoke the authorisation despite its knowledge of the scale of BCCI SA's central treasury losses, the decision not to revoke in December 1989 in the light of the criticisms expressed in the paper prepared by the Banking Supervision Department for the Board of Banking Supervision in November of that year and the decision not to revoke in January 1990 following the plea bargain which led to the settlement of the Tampa indictment (new draft particulars, Sch 5, para 27 and Sch 6, paras 19 and 24). He maintained that this was a fundamental defect in the revocation claim, as a conscious decision was needed to support a case of misfeasance in public office. It was not open to the claimants to rely on a general reference to the Bank's omission to act day-by-day over the entire period, as the tort required proof of acts done by the public official intentionally.

[68] In my opinion this argument is based on a misconception of the thrust of the claimants' allegations and on a misunderstanding of the requirements of the tort. The claimants' case, as Lord Neill explained, is that the Bank deliberately ran away from its responsibility as the relevant supervisory authority throughout the history of BCCI SA's activities in this country to safeguard the interests of depositors and potential depositors. He said that a series of events could be identified in the particulars to show that the Bank deliberately failed to take steps which it might have taken to deal with the situation despite its awareness of facts or circumstances which revealed the extent of the risk to those interests. I agree that particulars are given throughout the pleadings of events which are arguably of this character. Examples of such events are given in the new draft particulars (Sch 5, paras 17 and 34–35), and there are many more.

[69] Furthermore, as Lord Neill pointed out, the tort extends to decisions not to exercise powers as well as decisions to exercise them. In the early days, when the tort was largely confined to disputes over voting rights, it was invoked to deal with the improper exercise of official power. Later, it was invoked in other areas

of official regulation through licensing and other controls of that kind. Again the typical complaint was of the improper exercise of the power. That remains true in the majority of the more modern cases. *Bourgoin SA v Ministry of Agriculture Fisheries and Food* [1985] 3 All ER 585, [1986] QB 716 is an example, as that case was concerned with the withdrawal of a licence. But, as Brennan J said in *Northern Territory of Australia v Mengel* (1995) 185 CLR 307 at 357 in a passage which was approved in your Lordships' previous judgment in this case, any act or omission done or made by a public official can found an action for misfeasance in public office. If it were otherwise, a banking regulator would be able to defeat a misfeasance claim simply by resorting to inaction in the face of obvious and immediate risks despite the fact that it knew, believed or suspected that its reckless and deliberate course of inaction was likely to result in damage to depositors and potential depositors. For these reasons I would reject the argument that proof of conscious decisions to act or not to act is required. In my view the tort extends to a deliberate or wilful failure to take those decisions.

[70] For these reasons I would hold that the facts pleaded by the claimants in the new draft particulars are capable, if proved, of meeting the requirements of the tort. I must now turn to the alternative ground for striking out, which was that of abuse of process.

(4) THE DECISION OF THE COURTS BELOW TO STRIKE OUT

[71] Clarke J said that he understood it to be common ground between the parties that in appropriate circumstances the court had power to strike an action out under its inherent jurisdiction and under RSC Ord 18, r 19. The question which he then asked himself was whether the Bank had shown that the claimants' case was bound to fail on the material presently available and that there was no reasonable possibility of evidence becoming available to them, whether by further investigation, discovery, cross-examination or otherwise sufficiently to support their case and to give it some prospect of success. As he put it, if the Bank were to discharge that burden, it would follow that the claim was bound to fail (third judgment). He then embarked on a detailed examination of all the material which was available to the claimants to support their claim. I agree with the majority in the Court of Appeal ([2000] 2 WLR 15 at 90) that this was a vastly difficult undertaking.

[72] Clarke J's conclusion, after examining the available material over many days, was that the claimants had no arguable case on the material then available that the Bank dishonestly licensed BCCI SA or dishonestly failed to revoke the licence or authorisation in circumstances when it knew, believed or suspected that it would probably collapse without being rescued (third judgment). The Court of Appeal ([2000] 2 WLR 15 at 88, 90) agreed with the judge that it was right, in the exceptional circumstances of this case, to conduct this exercise. After reviewing the judge's conclusion in great detail, the majority agreed (at 101) with the judge that all the evidence indicated that up to April 1990 the Bank did not actually foresee BCCI SA's imminent collapse, and thereafter that it did but properly relied on the prospect of a rescue.

[73] Concurrent findings of fact are not normally open to review in your Lordships' House. For the like reasons as those on which this rule is based I would not have thought that it was appropriate for your Lordships to interfere with the concurrent findings of the judge and the majority in the Court of Appeal after conducting such a detailed and time-consuming exercise unless some flaw in their reasoning could be demonstrated. There are, however, two grounds on

which it was contended they misdirected themselves. The first relates to the requirements of the tort. The second relates to the use which they made of the Bingham report.

[74] It is not necessary for me to deal in detail with the differences which have emerged between your Lordships and the courts below as to the requirements of the tort. For the most part Clarke J's conclusions as to the legal principles to be applied which he summarised at the end of his first judgment ([1996] 3 All ER 558 at 632–633) were approved in the judgment given by your Lordships after the first hearing of this appeal ([2000] 3 All ER 1, [2000] 2 WLR 1220). The majority in the Court of Appeal said ([2000] 2 WLR 15 at 67, 101) that they were in broad agreement with the judge's conclusions on the tort and that they had adopted the same approach as he had taken when they were considering whether the claimants' case was bound to fail. But there is one point of difference which is of obvious importance, as it lies at the heart of the argument between the parties. This relates to the state of knowledge of the public officer about the prospect of loss that has to be demonstrated where the claim is based on the concept of recklessness.

[75] In his formulation Clarke J said that ([1996] 3 All ER 558 at 633) for the purposes of the requirement that the officer knows that his act will probably injure the claimant, it is sufficient if he has actual knowledge that his act will probably damage the claimant or, in circumstances in which he believes or suspects that his act 'will probably' damage the plaintiff, he does not ascertain whether that is so or fails to make inquires as to 'the probability' of such damage. In the Court of Appeal ([2000] 2 WLR 15 at 101) the majority asked themselves whether the claimants had an arguable case that the Bank 'actually foresaw' BCCI's imminent collapse at each relevant stage. They went on to say (at 102) that that formulation might have been too favourable to the claimants and that, in view of the stringent requirements of the tort of misfeasance in public office, the more appropriate question might be whether the Bank 'knew' that its decision would cause loss to the claimants. I would not regard the fact that the latter observation is not supported by your Lordships' judgment as important, as the majority do not say that they based their decision on this view. But it is clear that the theme of knowledge of probable loss informed the approach which was taken throughout these judgments to the question whether the claim should be struck out.

[76] Mr Stadlen sought to support this approach. But, for the reasons which I have already given, I would hold that it is not consistent with the effect of your Lordships' judgment following the first hearing. As I have already said when I was reviewing the requirements of the tort in an earlier section of this judgment (section (2)), the state of mind which amounts to subjective recklessness is demonstrated where it is shown that the public officer was aware of a serious risk of loss due to an act or omission on his part which he knew to be unlawful but chose deliberately to disregard that risk, and the question whether at any given point of time that risk is sufficiently serious to justify a finding of recklessness is one of degree. I consider that this point alone is sufficient to justify taking a fresh look at the question whether the claimants have a seriously arguable case directed to the issue of recklessness.

[77] Then there is the use which was made in their judgments by Clarke J and the majority in the Court of Appeal of the findings and conclusions in the Bingham report. Clarke J said (in his third judgment) that he recognised that Bingham LJ was not conducting a trial but an inquiry, that he did not see a number

of Bank officials, that the witnesses whom he did see were not cross-examined in an adversarial process and that there was no right of appeal. But he went on to say:

> 'On the other hand, it is plain that in addition to questioning witnesses Bingham LJ considered in detail all the relevant internal documents in the possession of the Bank, which involved a perusal of a mass of documentation. As I have already said, it is clear from the terms of Bingham LJ's covering letter to the Chancellor of the Exchequer, and indeed from many passages in the report itself, that he was applying his mind to question what was the state of mind of the Bank at each stage. In these circumstances I accept Mr Stadlen's submission that it is inconceivable that Bingham LJ was aware of material which was materially at odds with his conclusions as to the state of mind of the Bank. There is, in my judgment, no realistic possibility that he has not correctly set out the state of mind of the Bank at each stage.
>
> While it is, of course, true that I have seen only the report and not the appendices, the published report is a summary of an even more detailed narrative in the appendices. Since, as just stated, Bingham LJ was expressly considering the state of mind of the Bank at each stage, it is in my judgment inconceivable that there is in the appendices material which would or might support the conclusion that the Bank had the state of mind which the plaintiffs must establish. If there was, Bingham LJ would have referred to it, even if only to dismiss it. He would certainly not have disregarded it. As I have tried to indicate, at no doubt inordinate length, there is nothing in the material which I have seen which gives arguable support for the plaintiffs' case. I would, however, go further. There is nothing in that material which gives reasonable grounds for supposing that there might be other evidence which might in the future support the plaintiffs' case. In these circumstances I accept Mr Stadlen's further submission that there is no realistic possibility of more evidence becoming available, whether by further investigation, discovery, cross-examination or otherwise, which might throw light upon the state of mind of the Bank or any of its relevant officials during the period in which BCCI was operating.'

[78] The Court of Appeal said that, while the judge seemed to them to be putting the matter too high in the first of the two paragraphs which I have quoted from his judgment, they agreed with him that there was no realistic possibility that the picture which would emerge if officials of the Bank were to give evidence which was tested by cross-examination would be fundamentally different. In that respect the report was, despite its informal status, an invaluable aid to distinguishing between what was a practical possibility and what was fanciful and inconceivable ([2000] 2 WLR 15 at 91). Auld LJ disagreed with this approach. In his view Clarke J was not entitled to treat the Bingham report effectively as conclusive on the questions that arise in this litigation or to conclude that all the available evidence about the Bank's state of knowledge had been gathered in or properly tested. He said (at 180) that there were no exceptional circumstances to justify departing from the normal rule of leaving the matter to the trial judge.

[79] As I said in a previous section of this judgment (section (1)(b)), there are important limitations on the use which can be made of the Bingham report in these proceedings. A sharp dividing line must be observed between Bingham LJ's narrative of the evidence, which is a legitimate source to which reference can be made for the purposes of the motion to strike out, and his findings and conclusions in the light of that evidence. It is not just that those findings and conclusions would

not be admissible at trial. Fairness to the claimants requires that proper weight is given to the nature of Bingham LJ's inquiry and its limitations. He was not asked to determine the issues relating to the tort of misfeasance in public office which the claimants now seek to raise. These issues were not on trial in those proceedings. There is no doubt that Bingham LJ was chosen to conduct the inquiry because of his outstanding qualities as a judge and the weight of authority which his findings and recommendations would command. But those considerations must not be allowed to affect the rigorous distinction that must be maintained between those parts of the report that are and are not relevant to the Bank's motion to strike out.

[80] As I have already said, Clarke J made it clear that he recognised these limitations (in his third judgment). Nevertheless I have formed the clear impression that his view that the claim should be struck out was materially influenced by findings and conclusions and the absence of findings and conclusions in the Bingham report, and that he did not confine himself, as I consider he should have done, strictly to the narrative. I do not leave out of account the fact that he was responding to the way in which the claimants had presented their case. It is clear that they were drawing on those aspects of the report that suited them. It is not surprising that the Bank replied by pointing out those parts of the report that did not, and that the judge in his turn was drawn into this argument. Nevertheless the claimants are, in my view, entitled to say that Bingham LJ's findings and conclusions ought not to be used against them in this way. Bingham LJ's findings and conclusions about the availability of further evidence coming to light were made in proceedings to which they were not parties, and they could not challenge them on appeal. Cogent though these findings and conclusions may appear to be, the claimants are entitled to a fair trial of the claim which they have made against the Bank.

[81] In the following passage of his third judgment Clarke J explained his general approach to the Bingham report before he embarked upon a detailed consideration of the various stages in the history:

> 'Mr Stadlen submits that there is no support anywhere in the Bingham report for the conclusion that the Bank acted dishonestly, or that it knew that it was acting unlawfully or that it suspected that its acts or omission would probably cause loss to depositors or potential depositors. For the reasons already stated I shall focus only on the last of these, but I accept the submission that there is no statement in the report which gives any support for the conclusion that at any stage the Bank suspected that depositors and potential depositors would probably suffer loss as a result of the Bank's action or inaction. Yet, as stated on page iii of the covering letter to which I have already referred, it is clear that Bingham LJ was considering the Bank's state of mind at every stage. In my judgment, if Bingham LJ had formed the view that at any stage the Bank suspected that its action or inaction would probably injure depositors or potential depositors he would have said so. Thus, if he had thought that the Bank suspected that BCCI would probably collapse so that new depositors would probably lose their money at any stage of the story from 1979 to 1991 he would have said so. Yet, not only did he not say so, but his observations on the evidence are inconsistent with any such conclusion.'

[82] Thereafter during his examination of the history he made frequent reference to findings or conclusions, or to the absence of conclusions and findings, in

the Bingham report. His purpose in doing so was to explain why he was of the opinion that there was nothing in the material he had seen which gave reasonable grounds for supposing that other evidence might become available to throw light on the state of mind of the Bank during the relevant period: see the conclusion, already quoted, which he expressed. The following passage, in which he dealt with the claimants' submission that the Bank must have known when it granted the licence that the principal place of business of BCCI was in the United Kingdom and not in Luxembourg, illustrates this point:

> 'However, the difficulty with the plaintiffs' submission is that Bingham LJ held in para 2.23 that the Bank never addressed the question what was meant by principal place of business. It assumed wrongly that the principal place of business was in the country of incorporation. Further Bingham LJ says in para 2.24 that the Bank never inquired where the principal place of business was, in the sense of where the mind and management of the company and its central direction resided. The Bank thus treated s 3(5) of the Act as applicable and applied it. In para 2.25 Bingham LJ says that he read nothing sinister in that approach. Moreover, on the footing that the principal place of business was in the United Kingdom, under s 36 BCCI was not entitled to describe itself as a bank, but Bingham LJ says in para 2.33 that it was not until after the licence had been granted that the Bank recognised that fact. There is, in my judgment, no material available to the plaintiffs or to the court to lead to any different conclusion.'

[83] Among the other passages that might be quoted are those where the judge referred to a conclusion in para 2.66 of the report in support of the view that there was no evidence that the Bank suspected in June 1986 following the central treasury losses that BCCI would probably collapse, let alone that it would probably collapse because of an absence of remedial steps; where he referred to a conclusion in para 2.154 of the report to the same effect as to the Bank's state of mind in December 1989; and where he referred to paras 2.333 and 2.337 of the report as to the Bank's state of mind in March 1991 when it commissioned Price Waterhouse to investigate and report on malpractice within the group under s 41 of the 1987 Act.

[84] In their written submissions to the Court of Appeal (para 61) the claimants said that they did not object to the court having regard to the report. But they pointed out that its contents would not be admissible in any trial and that it was odd that the judge considered it permissible or appropriate to determine factual issues by reference to it and to strike out the action in reliance upon it. Nevertheless it is clear that the majority in that court followed Clarke J's approach, and that to a material extent their decision to dismiss the appeal was based on the same view as that which the judge had formed in the light of the findings and conclusions that Bingham LJ expressed.

[85] That there was a fundamental difference of view in the Court of Appeal on this point is clear from Auld LJ's dissenting judgment. He noted ([2000] 2 WLR 15 at 179) the fact that Clarke J relied heavily on the Bingham report as a justification for taking the exceptional course of striking out the claim as doomed to fail. After pointing out the different functions of that inquiry from those involved in this litigation and the disadvantages that were inherent in that procedure, he said (at 180):

> 'In the circumstances, I am of the view that Clarke J. was not entitled to treat Bingham L.J.'s report effectively as conclusive on the questions he, the

judge, had to answer in this litigation or to conclude, as he did, that all the available material evidence on those questions had been gathered in. Given the greater generality of the questions in the Bingham inquiry, the limitations of it as a fact-finding exercise when compared with litigation, his acknowledgement of a number of challenges to some of his factual conclusions and the emergence of additional material since the inquiry indicating the Bank's state of knowledge as to the Gokal unrecorded loans, I can see no basis for Clarke J.'s confidence in this extraordinary and complex case for concluding that Bingham L.J. had seen and fully tested all the material evidence available or likely to become available on the issues confronting the court in this case.'

[86] I respectfully agree with and would indorse these observations. In my judgment the extent to which the opinions expressed by both Clarke J and the majority in the Court of Appeal were dependent upon passages in the Bingham report which are irrelevant to the issue of strike-out provides a further reason for taking a fresh look at this critical issue. For the same reasons I consider that the claimants' motion for leave to re-reamend the statement of claim is open to reconsideration by your Lordships. The draft re-reamended statement of claim has now been superseded by the draft new particulars, and it is to that document that I shall direct my remarks on the question whether leave should now be given.

(5) THE TEST FOR SUMMARY JUDGMENT UNDER CPR 24.2

[87] Clarke J ordered that the action should be struck out under RSC Ord 18, r 19 on the grounds that the reamended statement of claim disclosed no reasonable cause of action and that it would be an abuse of process or vexatious or oppressive to give leave to re-reamend. The parties are agreed that if the question whether the claim should be struck out is to be reconsidered it must now be determined under the Civil Procedure Rules 1998, SI 1998/3132: see the general principle stated in the Practice Direction supplementing CPR Pt 51, para 11 (Practice Direction—Transitional Arrangements). The power which is given to the court to strike out under CPR Pt 3, which is concerned with the court's case management powers, is expressed in r 3.4(2) in these terms:

> 'The court may strike out a statement of case if it appears to the court—(a) that the statement of case discloses no reasonable grounds for bringing or defending the claim; (b) that the statement of case is an abuse of the court's process or is otherwise likely to obstruct the just disposal of the proceedings; or (c) that there has been a failure to comply with a rule, practice direction or court order.'

[88] The parties also agree that, if Clarke J were to be held to have applied the wrong test when he ordered the action to be struck out, the relevant rules under the CPR are not confined to the provision for striking out in CPR 3.4. In *Margulies v Margulies* [2000] CA Transcript 444 the judge's decision to strike out was given pursuant to RSC Ord 18, r 19 before the coming into effect of the CPR. Nourse LJ said (at para 63) that, if the judge wrongly applied the test, the Court of Appeal would have to determine the matter pursuant to CPR 24.2. I would not go so far as to say that your Lordships are obliged to treat the Bank's motion to strike out as an application for summary judgment under r 24.2. It would, I think, be more accurate to say that your Lordships have power to do so, and that the question is whether your Lordships should exercise that power

(see *Taylor v Midland Bank Trust Co Ltd* [1999] CA Transcript 1200, *Civil Procedure* (2000 edn) vol 1, para 3.4.6). CPR 24 sets out various procedural requirements which do not apply to r 3.4. But the claimants do not object to the application of r 24.2 on procedural grounds. So I would accept Mr Stadlen's submission that it is appropriate for the Bank's application for the claim to be struck out to be treated as if it were an application for summary judgment.

[89] CPR 24.2 provides:

> 'The court may give summary judgment against a claimant or defendant on the whole of a claim or on a particular issue if—(a) it considers that—(i) that claimant has no real prospect of succeeding on the claim or issue; or (ii) that defendant has no real prospect of successfully defending the claim or issue; and (b) there is no other reason why the case or issue should be disposed of at a trial.'

[90] The test which Clarke J applied, when he was considering whether the claim should be struck out under RSC Ord 18, r 19, was whether it was bound to fail (see the third judgment). Mr Stadlen submitted that the court had a wider power to dispose summarily of issues under CPR Pt 24 than it did under RSC Ord 18, r 19, and that critical issue was now whether, in terms of CPR 24.2(a)(i), the claimants had a real prospect of succeeding on the claim. As to what these words mean, in *Swain v Hillman* [2001] 1 All ER 91 at 92, Lord Woolf MR said:

> 'Under r 24.2, the court now has a very salutary power, both to be exercised in a claimant's favour or, where appropriate, in a defendant's favour. It enables the court to dispose summarily of both claims or defences which have no real prospect of being successful. The words "no real prospect of being successful or succeeding" do not need any amplification, they speak for themselves. The word "real" distinguishes fanciful prospects of success or, as Mr Bidder QC [counsel for the defendant] submits, they direct the court to the need to see whether there is a "realistic" as opposed to a "fanciful" prospect of success.'

[91] The difference between a test which asks the question 'is the claim bound to fail?' and one which asks 'does the claim have a real prospect of success?' is not easy to determine. In *Swain*'s case Lord Woolf MR (at 92) explained that the reason for the contrast in language between r 3.4 and r 24.2 is that under r 3.4, unlike r 24.2, the court generally is only concerned with the statement of case which it is alleged discloses no reasonable grounds for bringing or defending the claim. In *Monsanto plc v Tilly* (1999) Times, 30 November, Stuart Smith LJ said that r 24.2 gives somewhat wider scope for dismissing an action or defence. In *Taylor*'s case he said that, particularly in the light of the CPR, the court should look to see what will happen at the trial and that, if the case is so weak that it had no reasonable prospect of success, it should be stopped before great expense is incurred.

[92] The overriding objective of the CPR is to enable the court to deal with cases justly (see r 1.1). To adopt the language of art 6.1 of the European Convention for the Protection of Human Rights and Fundamental Freedoms (Rome, 4 November 1950; TS 71 (1953); Cmd 8969) (set out in Sch 1 to the Human Rights Act 1998) with which this aim is consistent, the court must ensure that there is a fair trial. It must seek to give effect to the overriding objective when it exercises any power given to it by the rules or interprets any rule (see r 1.2). While the difference between the two tests is elusive, in many cases the practical effect will be the same.

In more difficult and complex cases such as this one, attention to the overriding objective of dealing with the case justly is likely to be more important than a search for the precise meaning of the rule. As May LJ said in *Purdy v Cambran* [1999] CPLR 843 at 854:

> 'The court has to seek to give effect to the overriding objective when it exercises any powers given to it by the rules. This applies to applications to strike out a claim. When the court is considering, in a case to be decided under the Civil Procedure Rules, whether or not it is just in accordance with the overriding objective to strike out a claim, it is not necessary or appropriate to analyse that question by reference to the rigid and overloaded structure which a large body of decision under the former rules had constructed.'

[93] In *Swain*'s case Lord Woolf MR gave this further guidance:

> 'It is important that a judge in appropriate cases should make use of the powers contained in Pt 24. In doing so he or she gives effect to the overriding objectives contained in Pt 1. It saves expense; it achieves expedition; it avoids the court's resources being used up on cases where this serves no purpose, and, I would add, generally, that it is in the interests of justice. If a claimant has a case which is bound to fail, then it is in the claimant's interests to know as soon as possible that that is the position. Likewise, if a claim is bound to succeed, a claimant should know this as soon as possible ... Useful though the power is under Pt 24, it is important that it is kept to its proper role. It is not meant to dispense with the need for a trial where there are issues which should be investigated at the trial. As Mr Bidder put it in his submissions, the proper disposal of an issue under Pt 24 does not involve the judge conducting a mini-trial, that is not the object of the provisions; it is to enable cases, where there is no real prospect of success either way, to be disposed of summarily.' (See [2001] 1 All ER 91 at 94–95.)

(6) WHETHER THE CLAIM SHOULD BE SUMMARILY STRUCK OUT

[94] For the reasons which I have just given, I think that the question is whether the claim has no real prospect of succeeding at trial and that it has to be answered having regard to the overriding objective of dealing with the case justly. But the point which is of crucial importance lies in the answer to the further question that then needs to be asked, which is—what is to be the scope of that inquiry?

[95] I would approach that further question in this way. The method by which issues of fact are tried in our courts is well settled. After the normal processes of discovery and interrogatories have been completed, the parties are allowed to lead their evidence so that the trial judge can determine where the truth lies in the light of that evidence. To that rule there are some well-recognised exceptions. For example, it may be clear as a matter of law at the outset that even if a party were to succeed in proving all the facts that he offers to prove he will not be entitled to the remedy that he seeks. In that event a trial of the facts would be a waste of time and money, and it is proper that the action should be taken out of court as soon as possible. In other cases it may be possible to say with confidence before trial that the factual basis for the claim is fanciful because it is entirely without substance. It may be clear beyond question that the statement of facts is contradicted by all the documents or other material on which it is based. The simpler the case the easier it is likely to be take that view and resort to what

is properly called summary judgment. But more complex cases are unlikely to be capable of being resolved in that way without conducting a mini-trial on the documents without discovery and without oral evidence. As Lord Woolf MR said in *Swain*'s case [2001] 1 All ER 91 at 95, that is not the object of the rule. It is designed to deal with cases that are not fit for trial at all.

[96] In *Wenlock v Moloney* [1965] 2 All ER 871, [1965] 1 WLR 1238 the plaintiff's claim of damages for conspiracy was struck out after a four-day hearing on affidavits and documents. Danckwerts LJ said of the inherent power of the court to strike out:

> '... this summary jurisdiction of the court was never intended to be exercised by a minute and protracted examination of the documents and facts of the case, in order to see whether the plaintiff really has a cause of action. To do that, is to usurp the position of the trial judge, and to produce a trial of the case in chambers, on affidavits only, without discovery and without oral evidence tested by cross-examination in the ordinary way. This seems to me to be an abuse of the inherent power of the court and not a proper exercise of that power.' (See [1965] 2 All ER 871 at 874, [1965] 1 WLR 1238 at 1244.)

Sellers LJ said ([1965] 2 All ER 87 at 874, [1965] 1 WLR 1238 at 1243) that he had no doubt that the procedure adopted in that case had been wrong and that the plaintiff's case could not be stifled at that stage, and Diplock LJ agreed.

[97] In the Court of Appeal the majority said ([2000] 2 WLR 15 at 86) that 'this somewhat rigid position' had been modified in *Williams and Humbert Ltd v W & H Trade Marks (Jersey) Ltd, Rumasa SA v Multinvest (UK) Ltd* [1986] 1 All ER 129, [1986] AC 368, where Lord Templeman said ([1986] 1 All ER 129 at 139, [1986] AC 368 at 435–436) that if an application to strike out involves a prolonged and serious argument the judge should, as a general rule, decline to proceed with the argument unless he not only harbours doubts about the soundness of the pleading but, in addition, is satisfied that striking out will obviate the necessity for a trial or will substantially reduce the burden of preparing for the trial or the burden of the trial itself (see also [1986] 1 All ER 129 at 142–143, [1986] AC 368 at 441 per Lord Mackay of Clashfern). But they were satisfied that this case fell within the exceptional class for the same reasons as those explained in the *Williams and Humbert* case, and that Clarke J was right to embark upon the exercise. I too would not criticise the judge for undertaking the exercise. But I would also pay careful regard to what the Court of Appeal in *Wenlock*'s case regarded as objectionable. In *Morris v Bank of America National Trust* [2000] 1 All ER 954 at 966 Morritt LJ said that *Wenlock*'s case illustrated a salutary principle. He then said:

> 'In the *Three Rivers DC* case the Court of Appeal upheld the decision of Clarke J to strike out a complicated claim for damages for misfeasance in a public office made against the Bank of England for authorising BCCI to carry on the business of banking. In that case all the evidence then available to the plaintiff was before the court because all the facts had been investigated by Bingham LJ as he then was ... Obviously the fact of a recent inquiry is a material distinction.'

For reasons already explained (in section (4)), I do not think that the investigation that was conducted by Bingham LJ justifies a departure from the principle. I consider that both Clarke J and the majority in the Court of Appeal were wrong to approach

this case on the basis that all the facts that are relevant to the claim that is being made in this case had been investigated.

[98] The present case is, as everyone concerned with it has recognised, one of a quite exceptional character. The issues of fact which the claimants seek to raise are highly complex. They relate to matters in which they were not directly involved, as they were third parties to the system of regulation which was set up to protect them. They involve meetings and discussions between many parties at which they were not represented and they extend, through no fault of theirs, over a very long period. The issues of law are also complex, as the claim depends on an assessment of the state of mind of the Bank's officials at each of the various stages in the history. Much of what was passing through their minds can be discovered by examining the documents. But the court is normally reluctant to draw inferences of the kind that need to be drawn in this case without seeing and hearing the witnesses. Bingham LJ had that advantage. The court, so far, has not.

[99] My approach to this issue can therefore be summarised against this background as follows. For the reasons which I have already given (in section (3)), I consider that the claimants' pleadings give sufficient notice to the Bank of the case which they wish to present and that the facts pleaded are capable of satisfying the requirements of the tort. That being so, I would be inclined to hold that this highly complex case should not be decided on the documents without hearing oral evidence but should go to trial. This view is reinforced by what I have said about the Bingham report. I would leave out of account the findings and conclusions in that report which the parties are agreed would at any trial be inadmissible. It is not just that, strictly speaking, they are irrelevant to any decision that might be made by the trial judge. I also believe, for the reasons that I have just given, that it would be contrary to the overriding requirement of fairness for them to be taken into account in reaching a decision as to whether this case can be decided without hearing oral evidence.

[100] I would also examine the question whether the claim has no real prospect of succeeding at the outset from a totally neutral standpoint. By that I mean that I would not make any assumptions either one way or the other about the competence or integrity of the Bank or its officials as a prelude to examining the available evidence. I accept that conduct amounting to misfeasance in public office is not to be inferred lightly. That is true as a general proposition, whatever may be the task or status of the impugned public officer. But I think that it would be to risk pre-judging the case to attempt to evaluate the action's prospects of success by considering at this stage, before hearing evidence, whether the claimants' case against the Bank as regulator is inherently implausible or scarcely credible. These factors, taken as a whole, seem to me to point clearly against giving a summary judgment in the Bank's favour under CPR Pt 24.

[101] I turn then to the state of the evidence. I shall deal with this matter briefly. It is clear, as my noble and learned friend Lord Steyn has indicated, that the facts must be left to the trial judge if the case is to go to trial. As I said in my introduction (section (1)(a)), the history can conveniently be divided up into four periods: (a) prior to the grant of the licence in June 1980, (b) June 1980 to December 1986, (c) December 1986 to April 1990, and (d) April 1990 to closure in July 1991.

[102] In regard to the period prior to the grant of the licence in June 1980 the majority in the Court of Appeal said that they agreed with Clarke J that there was material from which it could be said to be at least arguable that the Bank must have known that the Luxembourg regulators were not regulating BCCI SA properly

and did not have the resources to do so. They were against the claimants on the question whether there was an arguable case on foresight of loss during this period ([2000] 2 WLR 15 at 92). Clarke J said, in his third judgment, that it seemed to him to offend common sense to conclude that it actually knew, believed or suspected that if it licensed BCCI SA it would, or even might, collapse. By April 1990, however, the picture had, in their view, entirely changed. The majority in the Court of Appeal said (at 99) that the Price Waterhouse report to the board of BCCI Holdings of 18 April 1990 was highly significant, as it marked a date after which it would be impossible in their judgment to contend that there was no arguable case that the Bank was aware of a very serious and very immediate threat to depositors of BCCI SA. Clarke J said that it is plain that the Bank appreciated that in the absence of remedial steps BCCI would probably collapse. His conclusion, however, was that at no time between April 1990 and June 1991 did the Bank believe or suspect that the majority shareholders would probably not save the Bank. At this point therefore, as the majority in the Court of Appeal observed (at 99), the prospect of a rescue operation being promoted by the Abu Dhabi government, and the Bank's perception of the various possible outcomes, assumes central importance. The majority said (at 101) that they agreed with the judge that the claimants had no arguable case that the Bank dishonestly failed to revoke the authorisation of BCCI SA in circumstances when it knew, believed or suspected that the company would probably collapse without being rescued.

[103] These views were, as can be seen from the judgments, heavily influenced by passages in the Bingham Report which I consider to be irrelevant to the question whether the claim should be struck out. I have examined the available material from a different standpoint. I have left those passages out of account. I have asked myself whether, in regard to each of the four periods, the available material can be taken to have been fully examined and tested at this stage. The limitations which are inherent in this exercise are obvious. All we can do is read the material and compare it with the case that is being made in the new draft particulars. In a simple case this may be all that needs to be done in order to reach a clear view that the claim has no real prospect of succeeding. If one can reach that view, it follows as night follows day that all the usual fact-finding exercises of discovery, interrogation and cross-examination of witnesses will achieve no purpose and the claim should be struck out. But I am not persuaded this exceptional case falls into that category.

[104] I agree that there is material in the documents that are already available to support the pleading in Sch 2 of the new draft particulars that the Bank knew that before the grant of the full licence to BCCI SA that it was not entitled to rely on the Luxembourg regulator. Given that starting point, I cannot say that the claimants have no real prospect of proving that the Bank knew that their initial act in licensing BCCI SA was unlawful, that its licence and authorisation remained unlawful throughout the remaining three periods and that all subsequent omissions to revoke the licence and authorisation were affected by the same illegality. I have more difficulty with the question whether there is material to support the pleading in Sch 3 that at the time of licensing the Bank knew that loss was probable or that it had the state of mind regarding loss to depositors and potential depositors that amounted to recklessness. There is no direct evidence of this in the available documents, and I am not confident that they contain any material which suggests that contemporary documentary evidence to this effect is

likely to become available. At best for the claimants, it appears that is a matter which will have to be inferred from other evidence.

[105] But it seems to me that, as events unfold, this part of the case gathers momentum and that the available material makes it clear that the Bank knew by April 1990 at the latest that, unless a rescue could be put in hand in time by the Abu Dhabi government, BCCI would collapse and that serious loss to depositors would then be inevitable. The pattern of events during this final period is complicated, as the majority in the Court of Appeal recognised (at 100). For reasons already given I would leave out of account the fact, relied on by the majority (at 101), that the conclusion in the Bingham report was that rescue was feasible and collapse not inevitable. In my opinion the documents alone do not tell the full story, and the question whether the Bank knew that loss to depositors was probable or was reckless in the relevant sense cannot be answered satisfactorily without hearing oral evidence.

[106] I agree with my noble and learned friend Lord Hobhouse that the overriding objective of dealing with cases justly includes dealing with them in a proportionate manner, expeditiously, fairly and without undue expense. As he says, each case is entitled only to an appropriate share of the court's resources. Account has to be taken of the need to allot resources to other cases. But I do not believe that the course which I favour offends against these important principles. The most important principle of all is that which requires that each case be dealt with justly. It may well be that the claimants, on whom the onus lies, will face difficulties in presenting their case. They must face the fact that each and every allegation of bad faith will be examined rigorously. A trial in this case will be lengthy and it will be expensive. There is only so much that astute case management can do to reduce the burdens on the parties and on the court. Nevertheless it would only be right for the claim to be struck out if it has no real prospect of succeeding at trial. I do not think that one should be influenced in the application of this test by the length or expense of the litigation that is in prospect. Justice should be even-handed, whether the case be simple or whether it be complex. It is plain that the situation in which the claimants find themselves was not of their own making, nor are they to be blamed for the volume and complexity of the facts that must be investigated. I would hold that justice requires that the claimants be given an opportunity to present their case at trial so that its merits may be assessed in the light of the evidence.

[107] I have taken one other factor into account. The decision which your Lordships are being asked by the Bank to take is to give summary judgment in its favour on the entire claim. It would only be right to strike out the whole claim if it could be said of every part of it that it has no real prospect of succeeding. That would mean that even the latest depositors who were entrusting their money to BCCI SA up to the very end of the final period would be left without a remedy. I think that that is too big a step to take on the available material. Conversely, I consider that if one part of the claim is to go to trial it would be unreasonable to divide the history up and strike out other parts of it. A great deal of time and money has now been expended in the examination of the preliminary issues, and I think that this exercise must now be brought to an end. I would reject the Bank's application for summary judgment.

(7) THE BANK'S CROSS-APPEAL

[108] The cross-appeal by the Bank is directed to the second and third of the three questions which in his order of 19 July 1995 Clarke J said should be tried as

preliminary issues. The first question was whether the Bank is capable of being liable to the claimants for the tort of misfeasance in public office. That is the question to which the main part of this judgment has been directed. For the reasons which I have given I consider that it cannot be answered until the facts have been established at trial. The second and third questions were whether the claimants' alleged losses were caused in law by the acts or omissions of the Bank, and whether the claimants are entitled to recover for the tort of misfeasance in public office as existing or potential depositors. The Court of Appeal ([2000] 2 WLR 15 at 68–70) held that it would be premature to decide these points conclusively in the Bank's favour until the facts have been established. I respectfully agree. As I said earlier (at [34]), the Bank, while reserving the right to pursue the issue at trial, accepts that it is capable of being liable for the tort to potential depositors and questions of fact are raised by the issue about causation which are unsuitable for summary determination at this stage.

(8) CONCLUSION AND FURTHER PROCEDURE

[109] For these reasons I would allow the appeal and I would dismiss the cross-appeal. I would set aside the order that the reamended statement of claim be struck out, and I would give permission to the claimants to amend their particulars of claim in terms of the new draft particulars.

[110] The claimants invited your Lordships to direct the Bank to serve an amended defence within two months of the date of this order and the claimants to serve a reply, if so advised, within six weeks of service of the amended defence, and to direct the parties to arrange a case management conference with the Commercial Court within four weeks of the date for service of the reply with a view to determining further progress of this action and establishing all necessary timetables and directions for bringing the case on for trial at the earliest date the Commercial Court considers feasible. These proposals seem to me to be entirely reasonable. Like Lord Steyn, I anticipate that the court will wish to exercise its powers of case management with a view to bringing the case to trial with due despatch in accordance with the overriding objective and that further delay due to the hearing of interlocutory applications will now be kept to a minimum. But on balance I think that it is preferable to leave it to the commercial judge in charge of the case to make the appropriate directions.

LORD HUTTON. My Lords,

[111] I have had the advantage of reading in draft the speech of my noble and learned friend Lord Hope of Craighead and I gratefully adopt his account of the factual and statutory background to this appeal and of the course of the proceedings in the High Court and the Court of Appeal. I am in general agreement with his conclusions and with the reasons which he gives for them, but because of the importance of the issues which have arisen for decision I propose to state the reasons which have led me to the conclusion that the plaintiffs' appeal should be allowed and that the action should not be struck out.

[112] In his first judgment dated 1 April 1996 Clarke J ([1996] 3 All ER 558) stated the ingredients of the tort of misfeasance in public office. In his second judgment dated 10 May 1996 ([1996] 3 All ER 558 at 634) the learned judge held that the amended statement of claim as pleaded at that date did not allege the necessary knowledge of, or recklessness as to, the probability of loss, and that accordingly if that statement of claim were not further amended the plaintiffs' claim would fail and should be dismissed. But the judge gave leave to the plaintiffs

to apply to amend further the statement of claim. The plaintiffs then brought an application before the judge for leave to reamend the statement of claim and by his third judgment dated 30 July 1997 (unreported) the judge held that even if all the proposed amendments to the statement of claim were permitted the plaintiffs' claim was bound to fail. The judge stated:

> 'I have reached the firm conclusion that on the material available at present the plaintiffs have no arguable case that the Bank dishonestly granted the licence to BCCI or dishonestly failed to revoke the licence or authorisation in circumstances when it knew, believed or suspected that BCCI would probably collapse. There is nothing in the Bingham report [*Inquiry into the Supervision of the Bank of Credit and Commerce International* (HC Paper 198 (1992–93))] or in the documents which I have seen to support such a conclusion and there is much to contradict it.'

Accordingly the judge ordered that the action be struck out, but the judge made it clear that, but for the conclusion which he had reached that the plaintiffs' action was bound to fail, it is likely that he would have allowed all, or almost all, the proposed amendments to the statement of claim.

[113] The Court of Appeal (Auld LJ dissenting) upheld the decision of Clarke J and, delivering the joint judgment of himself and Robert Walker LJ, Hirst LJ stated:

> 'The judge reached the firm conclusion, in his third judgment, that, on the material then available, the plaintiffs had no arguable case that the Bank dishonestly licensed B.C.C.I. S.A. or dishonestly failed to revoke the licence or authorisation in circumstances when it knew, believed or suspected that the company would probably collapse without being rescued. We agree with that conclusion. We also agree that, in all the circumstances of this extraordinary case, it is now for practical purposes inconceivable that new material would emerge of such significance as to alter that conclusion. The tort alleged is a tort of dishonesty, and the plaintiffs' claim must be rigorously assessed on their pleaded case and the evidential material shown to be available to support it.' (See [2000] 2 WLR 15 at 101.)

In his dissenting judgment, Auld LJ stated (at 180):

> 'As the authorities to which Hirst and Robert Walker L.JJ. have referred indicate, it is normally only in clear and obvious cases that a court should strike out a claim as incapable of proof at the interlocutory stage and before full discovery. In cases, such as this, of great legal and factual complexity, it requires a justified confidence that the plaintiffs' case is and will remain incapable of proof and most exceptional circumstances to justify stifling it at an early stage. For the reasons that I have given, I do not consider that the court can be confident that all the evidence material to Clark J.'s conclusion about the Bank's state of knowledge has been gathered in or, which is as important, properly tested.'

[114] In giving judgment on the legal issues relating to the nature of the tort of misfeasance in public office the House directed that the plaintiffs should prepare a new draft pleading ([2000] 3 All ER 1 at 13, [2000] 2 WLR 1220 at 1236) and accordingly the plaintiffs have prepared and served a new pleading consisting of particulars of claim which, with a few additions, largely contain the allegations

pleaded in the reamended statement of claim and in the re-reamendments which the plaintiffs sought leave to make from Clarke J.

[115] Before the House in the present hearing the plaintiffs submitted that the new particulars of claim disclosed a cause of action on which they were entitled to proceed to trial. The Bank of England (the Bank) advanced two main submissions. The first was that the plaintiffs' claim, whether as formulated in the reamended statement of claim or in the re-reamendments which Clarke J considered in his third judgment, or as formulated in the new particulars of claim, disclosed no reasonable cause of action so that the action should remain struck out. The Bank's second submission was that the plaintiffs' claim, in whatever way it was formulated, was frivolous and vexatious and/or an abuse of process and on that ground also the action should remain struck out.

[116] The issues which arose before Clarke J and the Court of Appeal as to whether the pleadings disclosed a reasonable cause of action and/or were frivolous and vexatious and/or an abuse of process were issues which were governed by RSC Ord 18, r 19(1)(a)(b) and (d). I think that in applications under the RSC a clear distinction was not always drawn between an application under Ord 18, r 19(1)(a) to strike out a statement of claim on the ground that it disclosed no reasonable cause of action and an application under Ord 18, r 19(1)(b) and (d) to strike out a statement of claim on the ground that it was frivolous or vexatious and/or an abuse of the process of the court, and, in practice, there were cases where it was difficult to draw or give effect to this distinction. But in a complex case such as the present one I think it is helpful to recognise the distinction.

[117] *The Supreme Court Practice 1999*, vol 1, para 18/19/10 stated with reference to r 19(1)(a):

> 'A reasonable cause of action means a cause of action with some chance of success when only the allegations in the pleading are considered (*per* Lord Pearson in *Drummond-Jackson v. British Medical Association* ([1970] 1 All ER 1094, [1970] 1 WLR 688)). So long as the statement of claim or the particulars (*Davey v. Bentinck* ([1893] 1 QB 185)) disclose some cause of action, or raise some question fit to be decided by a Judge or a jury, the mere fact that the case is weak, and not likely to succeed, is no ground for striking it out (*Moore v. Lawson* ((1915) 31 TLR 418); *Wenlock v Moloney* ([1965] 2 All ER 871, [1965] 1 WLR 1238)) ...'

Therefore if a plaintiff would be entitled to judgment if he were successful in proving the matters alleged in his pleadings, the statement of claim could not be struck out under Ord 18, r 19(1)(a) on the ground that he had no prospect of adducing evidence to prove the matters which he alleged. If a defendant wished to strike out a statement of claim and to obtain an order for the dismissal of the action on the ground that the plaintiff had no prospect of proving the case which he alleged in his statement of claim he had to do so under RSC Ord 18, r 19(1)(b) and/or (d). A case which illustrates this (although the application was to strike out, not a statement of claim, but a plea of justification in a defence) was the application made in *McDonald's Corp v Steel* [1995] 3 All ER 615 where the Court of Appeal considered the correct approach to an application under Ord 18, r 19(d) to strike out a pleading for abuse of process and held (at 623) that the power to strike out was a draconian remedy which was to be employed only in clear and obvious cases where it is possible to say at an interlocutory stage and before full discovery that a particular allegation was incapable of being proved.

[118] In the present case when Clarke J struck out the action he did so on the ground that even with all the proposed re-reamendments the plaintiffs' claim was bound to fail and that in those circumstances it would be an abuse of the process or vexatious or oppressive to allow the action to proceed (paras 6 and 7 of his third judgment).

[119] The applications before Clarke J and the Court of Appeal were governed by the RSC but those rules have now been replaced by the Civil Procedure Rules 1998, SI 1998/3132. I think that r 3.4(2)(a) of the new rules corresponds in a broad way to RSC Ord 18, r 19(1)(a) and r 3.4(2)(b) and r 24.2(a)(i) correspond in a broad way to Ord 18, r 19(1)(b) and (d). CPR 3.4(2) provides:

> 'The court may strike out a statement of case if it appears to the court—(a) that the statement of case discloses no reasonable grounds for bringing or defending the claim; (b) that the statement of case is an abuse of the court's process or is otherwise likely to obstruct the just disposal of the proceedings ...'

CPR 24.2(a)(i) provides:

> 'The court may give summary judgment against a claimant or defendant on the whole of a claim or on a particular issue if—(a) it considers that—(i) that claimant has no real prospect of succeeding on the claim or issue ...'

[120] The new particulars of claim, served pursuant to the direction of the House, were served after the new CPR came into force, and therefore if Clarke J and the majority of the Court of Appeal erred in their approach to the application to strike out the action the question whether the action should remain struck out falls to be determined by the House under the wording of the new rules. In the present case I think it is desirable, as I have stated, to distinguish between the two grounds on which the Bank submits that the action should remain struck out. Using the terminology of the new rules one ground is that the statement of case (looking only at the pleadings themselves) discloses no reasonable ground for bringing the claim (which I shall term 'the attack on the pleadings point'), and the other ground is that, taking into account the evidence available to the plaintiffs to adduce at a trial, they have no real prospect of succeeding on the claim (which I shall term 'the no real prospect of success point').

The attack on the pleadings point

[121] My Lords, the essential ingredients of the tort of misfeasance in public office were stated in the judgment of the House following the previous hearing ([2000] 3 All ER 1 at 8–10, [2000] 2 WLR 1220 at 1230–1233) and I do not propose again to restate those elements with precision. But it is clear that a plaintiff must prove: (1) an abuse of the powers given to a public officer; (2) that the abuse was constituted by a deliberate act or deliberate omission by the public officer with knowledge that the act or omission was wrongful or with recklessness as to whether or not the act or omission was wrongful; (3) that the public officer acted in bad faith; and (4) that the public officer knew that his act or omission would probably injure the plaintiff or was reckless as to the risk of injury to the plaintiff. In addition the plaintiff must prove that the act or omission caused him loss, but issues of causation do not arise at this stage. As to the first and second matters to be proved, I consider that the particulars of claim sufficiently allege that the Bank deliberately abused its statutory powers in licensing BCCI and in failing to revoke the licence after it had been granted. Paragraph 33, for example, alleges:

> '*No revocation of the licence under the 1979 Act* The Bank, knowingly, deliberately contrary to the statutory scheme or recklessly indifferent to whether it was acting in accordance with the statutory scheme or wilfully disregarding the risk that it was not acting in accordance with the statutory scheme and in bad faith:
>
> 33.1 purported to conclude that it was still entitled to rely upon assurances from the LBC/IML and/or that it had no discretion or power to revoke the full licence when the Bank knew or was recklessly indifferent as to whether or wilfully disregarded the risk that, as was the case:
>
> 33.1.1 the criteria under paragraphs 7 (fit and proper), 8 (four eyes) and 10 (prudent manner) of Schedule 2 to the 1979 Act had not been fulfilled at the time of the grant of the full licence and remained unfulfilled at all times thereafter;
>
> 33.1.2 BCCI SA was illegally calling itself a bank contrary to subsection 36(1) of the 1979 Act;
>
> 33.1.3 BCCI SA had conducted and continued to conduct its affairs in a way which threatened the interests of its depositors;
>
> 33.1.4 the Bank's continued reliance upon assurances from the LBC/IML as to BCCI SA's management and financial soundness was unlawful, and the Bank further knew that the likely consequences were that depositors and potential depositors would suffer losses or the Bank wilfully disregarded the risk of the consequences or was recklessly indifferent to the consequences; and/or ...'

[122] Bad faith is an essential element in the tort of misfeasance. In accordance with a well-established rule it is necessary that bad faith (or dishonesty—the term used in some authorities) should be clearly pleaded. In *Davy v Garrett* (1878) 7 Ch D 473 at 489 Thesiger LJ said:

> 'There is another still stronger objection to this statement of claim. The Plaintiffs say that fraud is intended to be alleged, yet it contains no charge of fraud. In the Common Law Courts no rule was more clearly settled than that fraud must be distinctly alleged and as distinctly proved, and that it was not allowable to leave fraud to be inferred from the facts. It is said that a different rule prevailed in the Court of Chancery. I think that this cannot be correct. It may not be necessary in all cases to use the word "fraud"—indeed in one of the most ordinary cases it is not necessary. An allegation that the Defendant made to the Plaintiff representations on which he intended the Plaintiff to act, which representations were untrue, and known to the defendant to be untrue, is sufficient. The word "fraud" is not used, but two expressions are used pointing at the state of mind of the Defendant—that he intended the representations to be acted upon, and that he knew them to be untrue. It appears to me that a Plaintiff is bound to shew distinctly that he means to allege fraud. In the present case facts are alleged from which fraud might be inferred, but they are consistent with innocence. They were innocent acts in themselves, and it is not to be presumed that they were done with a fraudulent intention.'

I would observe that the last two sentences in this passage have to be read together with the sentence which immediately precedes them. In *Belmont Finance Corp Ltd v Williams Furniture Ltd* [1979] 1 All ER 118 at 130–131, [1979] Ch D 250 at 268 Buckley LJ stated:

'In the present case, do the facts alleged in the statement of claim suffice to bring home to the defendants or any of them a charge that (a) the object of the alleged conspiracy was a dishonest one; and (b) that they actually knew, or must be taken to have known, that it was so? An allegation of dishonesty must be pleaded clearly and with particularity. That is laid down by the rules and it is a well-recognised rule of practice. This does not import that the word "fraud" or the word "dishonesty" must necessarily be used: see *Davy v Garrett* (1878) 7 Ch D 473 at 489 ... per Thesiger LJ. The facts alleged may sufficiently demonstrate that dishonesty is allegedly involved, but where the facts are complicated this may not be so clear, and in such a case it is incumbent upon the pleader to make it clear when dishonesty is alleged. If he uses language which is equivocal, rendering it doubtful whether he is in fact relying on the alleged dishonesty of the transaction, this will be fatal; the allegation of its dishonest nature will not have been pleaded with sufficient clarity.'

[123] In the present case paras 36, 37 and 38 of the particulars of claim allege:

'36. *Failure to supervise* The Bank, knowingly, deliberately contrary to the statutory scheme or recklessly indifferent to whether it was acting in accordance with the statutory scheme or wilfully disregarding the risk that it was not acting in accordance with the statutory scheme and in bad faith failed in the respects set out in these particulars of claim to supervise either BCCI SA or BCCI Overseas when: (36.1) the Bank knew that it had a duty to supervise under the 1979 and 1987 Acts; (36.2) the Bank's motives in deliberately failing to supervise were those pleaded in paragraph 37; (36.3) the Bank knew that the consequences of BCCI SA and/or BCCI Overseas being unsupervised was that depositors and potential depositors would suffer losses or was recklessly indifferent to the consequences or wilfully disregarded the risk of the consequences. In support of these contentions the claimants will rely, prior to disclosure, on the facts and matters set out in Schedules 2 to 7.

THE BANK'S MOTIVES FOR BREACHING ITS STATUTORY DUTIES

37. The motives of the Bank in acting as pleaded above were improper and unlawful and in the premises the Bank acted in bad faith. The Bank's motives were: (37.1) to avoid having to comply with its duty to make, review and, if necessary revise its own express evaluation of the relevant statutory criteria in relation to BCCI SA, the Bank at all times knowing or suspecting that such criteria were not satisfied (as pleaded above); (37.2) to avoid having to become the lead supervisor in relation to BCCI or the consolidated supervisor of the BCCI Group, even though it knew that it was the only supervisor capable of performing those roles; (37.3) to avoid the risks attaching to the Bank from taking on responsibility for becoming lead supervisor or in undertaking consolidated supervision of the BCCI Group including: (37.3.1) the risk of blame; and (37.3.2) the risk of Her Majesty's Treasury having to act as a lender of last resort; (37.4) to avoid the substantial political and diplomatic problems which would have been generated by the refusal or revocation of BCCI SA's licence or authorisation and the closure of its 45 branches in the United Kingdom; (37.5) as to the use of a bank name by BCCI, to perpetuate a situation, which the Bank had favoured since as early as 1978, that regardless of any statutory requirements, BCCI SA should continue to be permitted to use the word "bank" as part of its corporate

description in the United Kingdom; (37.6) to avoid having to comply with its statutory duty whereby it should have required BCCI Overseas forthwith to apply for and obtain a full licence under the 1979 Act or to cease trading in the United Kingdom.

38. The claimants' case is that in determining the Bank's motives the Bank must be considered in the round as the body made responsible by the 1979 and 1987 Acts for providing the supervisory regime mandated by those Acts for banks. The motives attributed to the Bank pleaded above are a matter of inference from the primary facts pleaded in Schedules 2 to 7. Further particulars will be given following disclosure.'

[124] In *Armitage v Nurse* [1997] 2 All ER 705 at 715, [1998] Ch 241 at 256 Millett LJ said:

'It is not necessary to use the word "fraud" or "dishonesty" if the facts which make the conduct complained of fraudulent are pleaded; but, if the facts pleaded are consistent with innocence, then it is not open to the court to find fraud.'

Later in his judgment Millett LJ said:

'I am of opinion that, as at present drawn, the amended statement of claim does not allege dishonesty or any breach of trust for which the trustees are not absolved from liability by cl 15.' (See [1997] 2 All ER 705 at 718, [1998] Ch 241 at 259.)

In *Taylor v Midland Bank Trust Co Ltd* [1999] CA Transcript 1200 Buxton LJ referred to the first observation of Millett LJ and said:

'That, however, was an observation about pleading, not about substance. If (unlike the pleader in our case) the claim does not expressly allege dishonesty, but stands on facts alone, those facts on their face will meet the requirement of a specific allegation of dishonesty only if they can bear no other meaning.'

But in the present case, unlike in *Armitage*'s case, the pleader does expressly allege bad faith because para 37 pleads that 'the motives of the Bank in acting as pleaded above were improper and unlawful and in the premises the Bank acted in bad faith' and the paragraph sets out particulars in support of that allegation. In my opinion those particulars are not consistent with mere negligence.

[125] I further consider that if a plaintiff clearly alleges dishonesty or bad faith and gives particulars, the statement of claim cannot be struck out under CPR 3.4(2)(a) because the facts he pleads as giving rise to an inference of dishonesty or bad faith may at the trial, after a full investigation of the circumstances, be held not to constitute proof of that state of mind. If a defendant applies to strike out an action on the ground that the plaintiff has no prospect of adducing evidence at the trial to establish the case which he pleads the application should be brought under CPR 3.4(2)(b) or CPR 24.2(a)(1).

[126] Mr Stadlen QC, for the Bank, submitted that the pleadings were defective because they did not allege that identified or identifiable bank officials took conscious decisions to do acts or to refrain from doing acts with the requisite guilty state of mind. I do not accept that submission. It is clear from the authorities that a plaintiff can allege misfeasance in public office against a body such as a local authority or a government ministry (see *Dunlop v Woollahra Municipal Council*

[1981] 1 All ER 1202, [1982] AC 158 and *Bourgoin SA v Ministry of Agriculture Fisheries and Food* [1985] 3 All ER 585, [1986] QB 716). Therefore I consider that the plaintiffs are entitled in their pleadings to allege in the manner they have done misfeasance in public office against the Bank without having to give particulars of the individual officials whose decisions and actions they claim combined to bring about the misfeasance alleged.

[127] The fourth element which the plaintiff must prove to establish the tort is that the public officer knew that his act or omission would probably injure the plaintiff or was reckless as to the risk of injury to the plaintiff. Mr Stadlen submitted that the judgments of the House after the earlier hearing established that to prove recklessness the plaintiff must not merely establish that the officer was aware that there was a risk of injury to the plaintiff but that he believed or suspected that his act or omission would probably injure the plaintiff and was recklessly indifferent to that probable injury. Mr Stadlen further submitted that in pleading recklessness in a number of places in the particulars of claim the plaintiffs had failed to plead that the Bank believed or suspected that its act or omissions would probably damage the plaintiffs and was recklessly indifferent to that injury and merely pleaded that the Bank 'wilfully disregarded the risk of the consequences or was recklessly indifferent to the consequences': see for example the last four lines of para 33.1 which I have set out above.

[128] Having expressly pleaded that 'the Bank further knew that the likely consequences were that depositors and potential depositors would suffer losses' the plaintiff then pleaded 'or the Bank wilfully disregarded the risk of the consequences or was recklessly indifferent to the consequences', and in my opinion the distinction between so pleading and pleading that the Bank believed or suspected that its acts or omissions would probably damage the plaintiffs and was recklessly indifferent to that probable injury is such a fine one that an argument based on the distinction cannot constitute a ground for a strike-out under r 3.4(2)(a). In *British Airways Pension Trustees Ltd v Sir Robert McAlpine & Sons Ltd* (1994) 45 Con LR 1 the plaintiffs' statement of claim alleged that defects in a development constructed by McAlpine and designed by Project Design Partnership had diminished its value. The defendants applied to strike out the statement of claim on the ground (inter alia) that it failed to identify which of the alleged defects had caused which part of the alleged diminution in value. In the Court of Appeal Saville LJ (at 4–5) stated:

> 'The various defects alleged by the plaintiffs might not all be attributable to all the defendants, the cost of remedying the individual defects was not given and no attempt was made to ascribe to each defect the amount by which it contributed to the alleged diminution in value. At the same time I have some difficulty in seeing how the defendants could fairly be said to be seriously prejudiced by these omissions. The pleading alleges that the defects respectively attributable to McAlpine and PDP each caused the alleged diminution in value. The alleged defects themselves were set out in some detail, McAlpine and PDP had been on site for a considerable time after practical completion and so had their own means of knowledge of the alleged defects. Thus it seems to me that it can hardly be said that these defendants were in any real fashion placed in a position where they were unable to know what case they had to meet or were facing an unfair hearing ... The basic purpose of pleadings is to enable the opposing party to know what case is being made in sufficient detail to enable that party properly to prepare to answer it. To my mind it seems that in recent years there has been a tendency to forget this basic purpose and to seek particularisation even when it is not really required. This is not only costly in itself, but is calculated to lead to delay and to interlocutory battles in which the parties and the court pore over endless pages of pleadings to see whether or not some particular point has or has not been raised or answered, when in truth each party knows perfectly well what case is made by the other and is able properly to prepare to deal with it. Pleadings are not a game to be played at the expense of the litigants, nor an end in themselves, but a means to the end, and that end is to give each party a fair hearing.'

And in considering the purpose of pleadings under the CPR in *McPhilemy v Times Newspapers Ltd* [1999] 3 All ER 775 at 793 Lord Woolf MR stated: 'What is important is that the pleadings should make clear the general nature of the case of the pleader. This is true both under the old rules and the new rules.'

[129] In the present case where the plaintiffs plead that the Bank knew that the likely consequences were that depositors and potential depositors would suffer loss and then, in the alternative, plead recklessness, I do not consider that the omission to plead in the context of recklessness that the Bank believed or suspected that injury was likely could prejudice the Bank; and if the ultimate outcome of the trial were to depend on the precise elements necessary to constitute recklessness, I do not consider that the state of the pleadings would prejudice the Bank in advancing any arguments available to it.

The no real prospect of success point

[130] The decision by Clarke J, upheld by the majority of the Court of Appeal, that the action was bound to fail and therefore should be struck out was based on two principal conclusions. One was that there was before him all the evidence which was at that time available to the plaintiffs and that there was no reasonable possibility of the plaintiffs obtaining more evidence in the future, whether by further investigation, discovery, cross-examination of the Bank's witnesses or otherwise which might enable them to succeed. The second conclusion was that on the basis of the evidence before him the plaintiff's claim was bound to fail (see Clarke J's third judgment).

[131] It is apparent from the judgments of Clarke J and the majority of the Court of Appeal that in ruling that the plaintiffs' claim was bound to fail they took into account the findings and conclusions of Bingham LJ set out in his report. Thus in his third judgment Clarke J stated:

> 'Mr Stadlen submits that there is no support anywhere in the Bingham report for the conclusion that the Bank acted dishonestly, or that it knew that it was acting unlawfully or that it suspected that its acts or omissions would probably cause loss to depositors or potential depositors. For the reasons already stated I shall focus only on the last of these, but I accept the submission that there is no statement in the report which gives any support for the conclusion that at any stage the Bank suspected that depositors and potential depositors would probably suffer loss as a result of the Bank's action or inaction. Yet, as stated on page iii of the covering letter to which I have already referred, it is clear that Bingham LJ was considering the Bank's state of mind at every stage. In my judgment, if Bingham LJ had formed the view that at any stage the Bank suspected that its action or inaction would probably injure depositors or potential depositors he would have said so.

Thus, if he had thought that the Bank suspected that BCCI would probably collapse so that new depositors would probably lose their money at any stage of the story from 1979 to 1991 he would have said so. Yet, not only did he not say so, but his observations on the evidence are inconsistent with any such conclusion.'

There are other passages in his judgment where it is clear that Clarke J was influenced by findings or conclusions arrived at by Bingham LJ, and these have been referred to by my noble and learned friend Lord Hope in his speech.

[132] Bingham LJ is a judge of the greatest eminence and distinction and his report sets out the entire history of BCCI from its establishment in the United Kingdom until its liquidation and the Bank's relationship to it with the greatest clarity and with much detail. It was therefore inevitable that the plaintiffs would make use of the information contained in the report in drafting their statement of claim. However, notwithstanding the distinction of its author, it is clear that under well-established principles the findings and conclusions of Bingham LJ as to the actions and motives of the Bank would be inadmissible on the hearing of the action: it would be the duty and responsibility of the trial judge to decide for himself, on the evidence which he heard, what were the actions and motives of the Bank. And notwithstanding that it appears that both before Clarke J and the Court of Appeal the plaintiffs themselves sought to rely on certain passages of the Bingham report which they thought supported their case, I consider that it was also impermissible for the judge and the majority of the Court of Appeal in deciding at this interlocutory stage whether there was no real prospect of the action succeeding to be influenced by the findings and conclusions of Bingham LJ. Therefore I am in respectful agreement with the observation of Auld LJ ([2000] 2 WLR 15 at 180) in his dissenting judgment: 'In the circumstances, I am of the view that Clarke J was not entitled to treat Bingham LJ's report effectively as conclusive on the questions he, the judge, had to answer in this litigation ...'

[133] Therefore I am of the opinion that by taking into account the findings and conclusions of Bingham LJ, Clarke J and the majority of the Court of Appeal erred in considering the issue whether the plaintiffs' claim was bound to fail and that accordingly the House must itself address its mind to the issue (using the terminology of CPR 24.2(a)(i)) whether the plaintiffs have no real prospect of succeeding in their claim.

[134] In *Swain v Hillman* [2001] 1 All ER 91 at 92 Lord Woolf MR said:

> 'The words "no real prospect of being successful or succeeding" do not need any amplification, they speak for themselves. The word "real" distinguishes fanciful prospects of success or, as Mr Bidder QC [counsel for the defendant] submits, they direct the court to the need to see whether there is a "realistic" as opposed to a "fanciful" prospect of success.'

And (at 95):

> 'Useful though the power is under Pt 24, it is important that it is kept to its proper role. It is not meant to dispense with the need for a trial where there are issues which should be investigated at the trial. As Mr Bidder put it in his submissions, the proper disposal of an issue under Pt 24 does not involve the judge conducting a mini-trial, that is not the object of the provisions; it is to enable cases, where there is no real prospect of success either way, to be disposed of summarily.'

[135] Mr Stadlen submitted that an action should be struck out if it was apparent that at the trial the plaintiff could adduce no evidence to establish the case which he pleaded and he relied on the judgment of Neill LJ in *McDonald's Corp v Steel* [1995] 3 All ER 615 at 621:

> 'It is true that a pleader must not put a plea of justification (or indeed a plea of fraud) on the record lightly or without careful consideration of the evidence available or likely to become available. But, as counsel for the plaintiffs recognised in the course of the argument, there will be cases where, provided a plea of justification is properly particularised, a defendant will be entitled to seek support for his case from documents revealed in the course of discovery or from answers to interrogatories. In recent times there has been what I regard as a sensible development whereby pleadings in libel actions are treated in the same way as pleadings in other types of litigation. It is therefore instructive to refer to a short passage in the judgment of May LJ in *Steamship Mutual Underwriting Association Ltd v Trollope & Colls Ltd* (1986) 6 Con LR 11 at 27, where, on an application by a firm of structural engineers that the claim against them should be struck out, he said: "In my opinion, to issue a writ against a party ... when it is not intended to serve a statement of claim, and where one has no reasonable evidence or grounds on which to serve a statement of claim against that particular party, is an abuse of the process of the court." Actions for defamation take many forms. The allegations complained about may vary from the moderately serious to the very grave. It may therefore be unwise to put forward a formula which will match all occasions. Nevertheless I am satisfied that before a plea of justification is included in a defence the following criteria should normally be satisfied: (a) the defendant should believe the words complained of to be true; (b) the defendant should intend to support the defence of justification at the trial; and (c) the defendant should have reasonable evidence to support the plea or reasonable grounds for supposing that sufficient evidence to prove the allegations will be available at the trial.'

[136] Mr Stadlen submitted that in this case the plaintiffs have no reasonable evidence to support their allegations of deliberate abuse of power in bad faith with knowledge of probable loss to the depositors or potential depositors, and he further submitted that the plaintiffs have no reasonable grounds for supposing that sufficient evidence to prove the allegations would be available at the trial. However, in considering this submission, it is necessary to take into account a later passage in the judgment of Neill LJ (at 622–623):

> 'It is to be remembered, however, that the evidence on which a defendant may be entitled to rely at trial may take a number of different forms. It may include: (a) his own evidence and the evidence of witnesses called on his behalf, (b) evidence contained in Civil Evidence Act statements, (c) evidence contained in his own documents or in documents produced by third parties on subpoena, (d) evidence elicited from the plaintiff or the plaintiff's witnesses in the course of cross-examination, (e) answers to interrogatories and (f) evidence contained in documents disclosed by the plaintiff on discovery.
>
> *At the outset of the trial*
>
> I understand that it has become the practice in actions for defamation to consider at the outset of the trial whether some parts of the defence should be struck out on the basis that it has become apparent that some of the

matters pleaded are not going to be supported by evidence. I can understand that in an appropriate case this is a sensible course which is likely to shorten the trial. On the other hand there may be cases where a defendant pleads some matter which he believes to be true but which he may still be unable to prove by admissible evidence otherwise than by eliciting an answer in cross-examination. Each case will have to be considered on its own facts.'

[137] Clarke J and the majority of the Court of Appeal were of the opinion that Bingham LJ had conducted such a thorough examination of the Bank's dealings with BCCI that it was unrealistic to think that any further material of relevance would emerge and that accordingly the question whether there was reasonable evidence to support the plaintiffs' case was to be determined on the basis of the evidence referred to in the Bingham report. Mr Stadlen submitted that Clarke J and the majority of the Court for Appeal were right to hold that that evidence provided no support for an allegation that the Bank had acted dishonestly or in bad faith or with knowledge of probable loss to depositors. I am unable to accept that submission. Both Clarke J and the majority of the Court of Appeal found that by April 1990 the Bank knew that BCCI would probably collapse with consequential loss to depositors and potential depositors in the absence of a rescue package. Clarke J, referring to April 1990, said in his third judgment:

'Bingham LJ concludes that he did not think that any informed reader of the report could have failed to read it as seriously impugning the honesty with which the group had been run. However, according to para 2.186, with the possible exception of Mr Beverly, no one did. Indeed in para 2.187 Bingham LJ concludes that in April 1990 and for a number of months afterwards the Governors, the Board of Banking Supervision, Mr Quinn and Mr Barnes were unaware of the serious doubts thrown by Price Waterhouse on the integrity of the Bank's most senior management. Sir Patrick submits that that conclusion is incredible. He submits that senior representatives of the Bank must have appreciated that that was the position. I see the force of that submission, but, for present purposes, the question is not whether the Bank appreciated that there had been fraud within BCCI but whether it suspected that BCCI would probably not be rescued and nevertheless dishonestly failed to revoke its authorisation. It is plain that the Bank appreciated that in the absence of remedial steps BCCI would indeed probably collapse.'

And in the judgment of the majority of the Court of Appeal Hirst LJ said ([2000] 2 WLR 15 at 99):

'The report of 18 April 1990 was not therefore a totally unheralded shock for the Bank. Nevertheless it is highly significant as marking a date after which it would be impossible, in our judgment, to contend that there was no arguable case that the Bank was aware of a very serious and very immediate threat to depositors of B.C.C.I. S.A. At this point, therefore, the prospect of a rescue operation being promoted by the Abu Dhabi ruling house, and the Bank's perception of the various possible outcomes, assumes central importance.'

And (at 101):

'Throughout the preceding four sections we have adopted the same approach as that taken by the judge, and asked ourselves whether the plaintiffs have an arguable case that the Bank actually foresaw B.C.C.I.'s imminent collapse at each relevant stage. We have agreed with the judge's conclusion that all the evidence indicates that up to April 1990 it did not, and that thereafter it did, but properly relied on the prospect of a rescue. That is sufficient to dispose of the case in the Bank's favour.'

[138] In my opinion the Bank cannot validly contend that on the documentary evidence available to them the plaintiffs have no real prospect of succeeding in establishing that the Bank knowingly and in a deliberate way abused its statutory powers in failing to revoke BCCI's licence after it had been granted. A memorandum dated 19 October 1983 from an official in the Bank's banking supervision division to a number of senior officials of the Bank states:

'This note reviews our approach to the supervision of BCCI, arguing that our present approach fails to satisfy the requirements of the Banking Act and recommending that we should press BCCI for local incorporation of UK operations ... However, these problems are less serious than the present deficiencies in our supervisory approach in the light of the Banking Act's requirements. The problem with regard to the Section 36 contraventions is more difficult, particularly with regard to the branches of BCCI SA, to which there seems no practicable alternative to turning a blind eye.'

And in a note of a meeting of Bank officials dated 17 December 1985, after a team from the Bank had visited the BCCI offices in Leadenhall Street, the following comment by an official is noted:

'There is no doubt in my mind that BCCI has centralised its management, control and operations in the City. This is a UK-based bank, with its White House encompassing two buildings fronting Leadenhall Street and three at the rear. There is absolutely no way that we should continue the pretence that Luxembourg are the prime supervisors. Luxembourg is prehistoric; Grand Cayman is a tax haven; and it is the Bank of England who are the lender of last resort. If UK incorporation of the UK branch network means the movement of the Treasury Support Organisation from London to Abu Dhabi, the Bank must encourage Abedi all the way. This surely is the only route to effective supervision.'

[139] I observed in my speech after the earlier hearing that I considered that, in the context of misfeasance, 'in bad faith' is a preferable term to 'dishonesty' (see [2000] 3 All ER 1 at 41–42, [2000] 2 WLR 1220 at 1266). In relation to the element of bad faith the plaintiffs plead in para 37 of the particulars of claim that the Bank's motives set out in that paragraph constitute bad faith. Lord Neill of Bladen QC, for the plaintiffs, submitted that an inference can be drawn from a number of the Bank's documents that it was reluctant to face up to the difficulties and responsibilities involved in an adequate supervision of BCCI and that it placed its own interests before the discharge of its duty to protect depositors and that this constituted bad faith on its part. It is relevant to emphasise that this is the case made by the plaintiffs. They do not make the case that the officials of the Bank were dishonest, in the sense that they acted improperly for their own financial gain. Therefore I consider, with respect, that the point that it is inherently improbable that in the absence of some financial incentive bank officials would act dishonestly does not assist the Bank's case.

[140] Lord Neill referred (inter alia) to a letter dated 8 April 1987 from a senior official of the Bank to a senior official of the Commissariat au Controle des Banques

in Luxembourg written after the Bank had been informed that it was no longer possible for Luxembourg to carry out the consolidated supervisory role which it had accepted in the last few years. In the letter the official said:

> 'The precise formulation set out in your letter poses a particular problem for us. This is that having decided not to take a leading supervisory role, we believe that the incorporation of the 45 UK branches here, combined with the presence in London of a large part of BCCI's overall administration, is likely to draw us in practice into the position of lead supervisor which we seek to avoid. In those circumstances, our ability to do the job effectively would be even more restricted than if we had assumed the role officially from the outset. In any case we are not at all certain that we would feel able to grant a licence by applying the criteria under the UK Banking Act, to any part of the operation at this stage. This is because we have to be satisfied under our new legislation not only that an institution will be prudently run but that it will be run with integrity—and our experience with BCCI in the past make such a judgment difficult.'

[141] In respect of the need for the plaintiffs to show material to support their allegation that the Bank knew of probable loss to depositors or was reckless as to whether there would be loss to depositors, Lord Neill referred to certain paragraphs in the affidavit of a senior Bank official sworn in July 1991 in support of the Bank's petition to wind up BCCI. The official stated:

> '20. The Bank is seriously concerned that BCCI has been managed and may still be being managed in a dishonest and fraudulent manner. The Bank is and continues to be concerned that the true financial position of BCCI has been and continues to be concealed by BCCI from the Bank and other regulatory authorities which are part of the "college". It appears from the Price Waterhouse report that the accounting records have completely failed and continue to fail to meet the standards required of institutions authorised under the Banking Act. It further appears that there is no proper or adequate system or controls for managing the business of BCCI. The management of BCCI have acted without integrity and with a lack of skill. Notwithstanding the fact that it might be said of some of the senior managers that they were not directly involved in the fraudulent activity described in the Price Waterhouse report, management have as a whole been involved in keeping that activity and its consequences concealed from the Bank and other regulatory authorities. As a result of the information provided to it, the Bank has no trust or confidence in the senior management of BCCI which is essential to the relationship between the regulator and the regulated bank.
>
> 21. As a supervisor of BCCI the Bank is concerned that the interest of depositors will be jeopardised if the affairs of BCCI are left in the hands of its managers and it has formed the view that the interest of depositors will be best served by the winding-up of BCCI. In these circumstances the Bank believes that it would be just and equitable to wind up BCCI ...
>
> 24. In April 1990 it became apparent that BCCI had a substantial portfolio of US$4 billion of problem loans. In the 1989 year-end accounts substantial provisions were first raised against a US$4 billion portfolio of problem loans in the Group, many of which were booked in BCCI. On 22 May 1991 a financial support arrangement was entered into by BCCI whereby these problem loans were transferred to new companies which were either owned directly by the Government of Abu Dhabi, or if not, largely guaranteed by the Government of Abu Dhabi. In return for the loan assets BCCI received promissory notes in US$ and UAE Dhirams equivalent in face value to US$3,061 million. However, from the report it appears that the loan assets can be reassigned to BCCI in the event of any breach of warranty that the loan assets do not involve any activity which is criminal or illegal and which, if revealed might be expected to damage the international reputation of the Abu Dhabi Government. At a meeting held on 5 October 1990 the Abu Dhabi Government said that if fraud was detected there could be a serious problem about the continuation of the support of the Abu Dhabi Government. Whilst the Abu Dhabi Government has said that it has no present intention to reassign the loan assets, there must be a risk that it will do so. If it does, the problem portfolio will revert to BCCI. In July 1991 the Abu Dhabi Government indicated to Price Waterhouse that it was not prepared to commit itself to providing further funds for BCCI to m[e]et all its liabilities on an unqualified basis. Given the present uncertainty surrounding BCCI's liabilities it is fair to conclude that there is no real prospect of sufficient funds being made available within such time as the relevant regulators might require.'

[142] Lord Neill submitted that the concerns of the Bank set out in paras 20 and 21 had been known to the Bank for a number of years, as evidenced by the letter dated 8 April 1987 to the official in Luxembourg in which the senior official of the Bank stated that the Bank had to be satisfied that BCCI would be run with integrity, 'and our experiences with BCCI in the past make such a judgment difficult'. Lord Neill also referred to a memorandum to the governors of the Bank dated 15 July 1983 from a senior official of the Bank in which he said that the Bank's officials had become increasingly concerned about the ineffectiveness of the present arrangements for the overall supervision of BCCI and that he attached a note setting out possible ways of dealing with 'what has now become, in our view, an unacceptable position'. The note, which was headed 'WHY HAS BCCI BECOME A PROBLEM? WHY IS ACTION NOW URGENTLY REQUIRED?', stated that it was clear that the principal place of BCCI was not Luxembourg but was, administratively, the United Kingdom and that being so, and in the light of the Luxembourg authorities' admission that their resources were no longer up to the task of supervising BCCI's operations, the Bank was in 'a vulnerable position'. The note further stated that the Bank's knowledge of the activities of BCCI in the United Kingdom and its limited knowledge of the BCCI group as a whole did not inspire confidence in the soundness of BCCI's worldwide operations. The note went on to state:

> 'As noted, the present arrangements are wholly unsatisfactory and it is not therefore considered an option to sit back and do nothing. This leaves two basic choices:—(a) to try to have BCCI closed down, either worldwide or just the UK region; (b) to arrange for its supervision on a satisfactory basis.'

Lord Neill further referred to a paper of the Board of Banking Supervision dated 3 September 1987 which stated that at their last meeting they had expressed concern about whether the UK depositors with BCCI SA were receiving adequate protection from the supervisory regime in place, or in prospect. The board asked whether the UK depositors might not be better protected if BCCI were only permitted to take deposits in the UK via a UK subsidiary. They questioned

whether the formation of such a subsidiary would increase the 'moral hazard' of the UK supervisors in relation to the whole BCCI group and whether, even if it did, the interests of the UK depositors should not be paramount. The paper went on to state that the cause of the concern did not stem from any obvious weakness in the BCCI group. The concern was rather one of scepticism towards a large, shadowy and swift-growing bank with no natural geographic base. The paper then stated:

> 'The BCCI group is frequently subject to rumours which suggest that it or its clients operate at the margin of legality. Many observers accordingly have developed a gut feeling that the bank might suddenly run into serious difficulties without warning. The fact that so much of the group's business is booked in centres where supervision is less professional, particularly in relation to the type of business which BCCI undertakes, makes the absence of warning all the more likely.'

Lord Neill submitted that in July 1983, in September 1987 and in April 1990 the Bank took no steps to arrange for supervision of BCCI on a satisfactory basis but was reckless as to the serious risk of loss to depositors.

[143] There are passages in the documents which support the Bank's case that whilst, prior to April 1990, it had concerns about the soundness of BCCI's operations, none the less it recognised that its overriding duty was to protect the interests of depositors and that its decisions and its conduct towards BCCI were intended to discharge that duty, so that the allegation of bad faith on its part cannot be established. Thus in the note sent to the governors of the Bank dated 15 July 1983 its author states:

> 'The closure route could only be pursued if it could be shown, with reasonable certainty, that the Group's operations were fundamentally unsound; and that continued existence posed a greater threat to depositors' money than a winding up. Without a very wide ranging investigation and the fullest co-operation of other supervisory authorities it would not be possible to state, categorically, that the Group's operations are unsound to the extent of endangering depositors.'

But at this stage in the proceedings a court is not concerned to try to assess which side will probably succeed if there is a trial: the question is whether there is material which shows that there are issues which should be investigated at a trial, and in my opinion the material does show this.

[144] As regards the prospect from April 1990 onwards of a rescue operation by the Abu Dhabi government I would not take the view that the plaintiffs have no real prospect of establishing that the Bank knew that it was probable, or was reckless as to the probability, that that government, notwithstanding its stated willingness to rescue BCCI, would not commit itself fully to meet all its liabilities as more information became available as to the extent of its liabilities and as to the dishonesty of its managers. In differing from the opinion of Clarke J and the majority of the Court of Appeal that the plaintiffs have no real prospect of success, I take into account two further considerations. One is that I think that it is reasonably possible that further material may become available to the plaintiffs before trial, and I am in respectful agreement with the view of Auld LJ of his judgment:

> 'In addition to the different function of Bingham L.J.'s inquiry from the more focused issues for determination in this litigation, there are several obvious disadvantages of his procedure when compared with the court's process for determining the truth of the matter and its legal significance. His was not a statutory inquiry, so he had no power to compel the attendance of witnesses or require the production of documents; he heard the evidence of some, but not all, relevant and important players in the story; there was no counsel to the inquiry and no opportunity for adversarial discovery, interrogation or cross-examination of witnesses; and, as I have said, he acknowledged that most of his criticisms and a number of his factual conclusions were challenged, the validity of such challenges not capable of being tested on appeal. In the circumstances, I am of the view that Clarke J. was not entitled ... to conclude, as he did, that all the available material evidence on those questions had been gathered in. Given the greater generality of the questions in the Bingham inquiry, the limitations of it as a fact-finding exercise when compared with litigation, his acknowledgement of a number of challenges to some of his factual conclusions and the emergence of additional material since the inquiry indicating the Bank's state of knowledge as to the Gokal unrecorded loans, I can see no basis for Clarke J.'s confidence in this extraordinary and complex case for concluding that Bingham L.J. had seen and fully tested all the material evidence available or likely to become available on the issues confronting the court in this case.'

(See [2000] 2 WLR 15 at 180.)

[145] Secondly, I consider that the material already available to the plaintiffs provides reasonable grounds for thinking that they may be able to advance their case by the cross-examination of the Bank's officials.

[146] In the *McDonald's Corp* case Neill LJ recognised that the prospect of evidence emerging on cross-examination was a matter to be taken into consideration. Mr Stadlen relied on the judgment of Chadwick LJ in *Jarvis v Hampshire CC* [2000] 2 FCR 310 at 338 where he said:

> '... it is an abuse of the process of the court to make allegations of [dishonesty and deliberate abuse of power] in circumstances in which they cannot be supported by particulars; no less so when they are inconsistent with the substantial documentary material which is available. It is not enough to assert, as counsel for the claimant did assert before us, that—if the matter were allowed to go to trial—something might emerge through cross-examination. That is not a proper basis on which to make allegations of dishonesty. The judge was right to strike out those allegations.'

[147] But the assessment whether it is reasonable to take the view that evidence may emerge in cross-examination depends on the particular facts of the case. In *Jarvis'* case it was clear that the allegations were groundless and could not be given any substance by the cross-examination of the defendant's witnesses. But in the present case, where there is an arguable case that the Bank had increasing concern about BCCI for a number of years prior to April 1990 and knew from April 1990 onwards of the imminent collapse of BCCI unless there was a rescue, I think that justice requires that the plaintiffs, after discovery and interrogation, should have the opportunity to cross-examine the Bank's witnesses as to their concerns before 1990 and as to their belief from April 1990 onwards that there would be a rescue operation.

[148] The fact that a plaintiff does not have direct evidence as to the belief or foresight or motives of the defendant is not in itself a reason to strike out the

action. In *Taylor v Midland Bank Trust Co Ltd* [1999] CA Transcript 1200 the plaintiff alleged dishonest breach of trust and the defendant applied for the dismissal of the claim without trial under r 24.2(a)(i). Upholding the decision of Carnwath J to dismiss the application, Buxton LJ stated:

'[Counsel for the defendant] appeared at one stage to argue that the case must be made good by direct evidence, and could not rely, as it does, on inference. If that was the submission, I cannot agree with it. Where the motives or knowledge of a party is in issue, it may often be necessary to rely on inference rather than direct statements or admissions by that party. There is nothing objectionable in principle in that, however much an inference may be less cogent than an admission. Nor is it right that, in drawing inferences, a court can only infer this form of dishonesty if the primary evidence admits of no other explanation. That puts the test too high. The process of reasoning should be constrained only by the court's appreciation of the seriousness of the charge and the substantiality of the evidence therefore necessary to make it good.'

[149] In their judgment the majority of the Court of Appeal stated:

'Were officials of the Bank to give evidence which was fully tested by cross-examination in the adversarial process of a trial, it is not merely possible, but even likely, that a clearer and somewhat different picture would emerge as to the Bank's corporate state of mind from time to time, as constituted by the states of mind of a small number of its responsible officials. But we would agree that there is no realistic possibility that the picture which emerged would be fundamentally different. In that respect the Bingham report is, despite its relatively informal status, an invaluable aid to distinguishing between what is a practical possibility and what is fanciful or inconceivable.' (See [2000] 2 WLR 15 at 91.)

I am in full agreement with the first sentence of that passage, but I am, with respect, unable to agree with the last two sentences and I do not share the majority's confidence that though in cross-examination it is likely that a somewhat different picture would emerge, there is no realistic possibility that a fundamentally different picture would emerge.

[150] The Bank's application has been to strike out the entire action. The Bank's case that the plaintiffs have no reasonable prospect of success can be more strongly advanced in respect of the allegations relating to the earlier part of the history of the Bank's dealings with BCCI. But having regard to the extent to which the allegations in respect of the entire period from 1979 to 1991 are interwoven and interrelated I consider that it would not be appropriate to consider striking out certain parts of the claim and that the entire action should be permitted to proceed to trial.

[151] Because of the large number of documents which were referred to by counsel and the detailed and lengthy submissions which were advanced to the House I have thought it right to state my views at much greater length than is usual when an appellate court considers a strike-out application, particularly when the appellate court decides that the action should proceed to trial. But I wish to state my agreement with the observation of my noble and learned friend Lord Steyn as to the duty of the trial judge in para [8] of his speech. The judge will have to decide the case after the examination and cross-examination of witnesses on the evidence which he hears and he should not be influenced by any parts of the speeches of the House in this hearing which may appear to express any opinion on the facts of the case.

[152] Accordingly, for the reasons which I have given I would allow this appeal. I would dismiss the Bank's cross-appeal for the reasons given by my noble and learned friend Lord Hope and I would make the order proposed by him.

LORD HOBHOUSE OF WOODBOROUGH. My Lords,

[153] It has been estimated that the trial of this action will occupy a whole year; I sincerely hope that this is too pessimistic. But, on any view, the continuation of the action will involve the application of very substantial resources both at the trial and in preparation for it by both of the parties and the system of justice. The volume of paper, forensic and evidential, is already formidable and the events which will have to be trawled over extend over some 15 years. The investigation of those events gave rise to a report (*Inquiry into the Supervision of the Bank of Credit and Commerce International* (HC Paper 198 (1992–93))) (the Bingham report) which runs to 218 printed pages together with eight volumes of (unpublished) appendices recounting the history in greater detail. It was thus understandable that it should have been thought right to examine whether such a trial and such proceedings were really appropriate and necessary in order to determine the just outcome to the parties' dispute. Indeed, under Pt 1 of the Civil Procedure Rules 1998, SI 1998/3132, now in force it is the overriding objective, and the duty of the courts and the parties, that cases should be dealt with justly and that this includes dealing with cases in a proportionate manner, expeditiously and fairly, without undue expense and by allotting only an appropriate share of the court's resources while taking into account the need to allot resources to other cases. This represents an important shift in judicial philosophy from the traditional philosophy that previously dominated the administration of justice. Unless a party's conduct could be criticised as abusive or vexatious, the party was treated as having a right to his day in court in the sense of proceeding to a full trial after having fully exhausted the interlocutory pre-trial procedures.

[154] There were limited exceptions to this traditional approach. One was the RSC Ord 14 procedure for summary judgment. This was not a procedure for an informal trial; it was a procedure for enabling judgment to be entered for the plaintiff where there was no issue to be tried, in the words of the rule, no 'issue or question in dispute which ought to be tried' or 'other reason' why there ought to be a trial. It was to avoid delaying tactics on the part of a defendant and enable speedy judgment to be given for the plaintiff where that was appropriate and just notwithstanding that the defendant asserted that he had a defence. One of the court's powers under Ord 14 was to order the defendant to pay money into court as a condition of being permitted to defend. Order 14 was available to the plaintiff alone; there was no equivalent procedure for summary judgment in favour of the defendant. This procedure was not the same as the striking out jurisdiction which had two aspects. One was the striking out of a party's pleading (or part of it) because the conduct of the party was objectionable, ie abusive or vexatious. For this purpose evidence was relevant and admissible. The other was the demurrer procedure which had completely different origins and served a different purpose. It derived from the formal distinction between law and fact. It provided a mechanism for testing the propositions of law upon which the party (plaintiff or defendant) was relying; it was decided upon the pleadings alone and no evidence was admissible. The court could in its discretion deal with the issue of

law as a matter of striking out, or by directing the trial of a preliminary point of law, or by directing that the decision of the point of law should be left over to the full trial. In principle, though not always in practice, the striking out procedure should be used only where the point of law was not reasonably arguable. Warnings against the inappropriate use of the striking out procedure to decide arguable points of law were given by Lord Templeman and Lord Mackay of Clashfern in *Williams & Humbert Ltd v W & H Trade Marks (Jersey) Ltd* [1986] 1 All ER 129 at 139, 143, [1986] AC 368 at 435–436, 441; but the motive of simplifying procedures and saving costs was applauded and may, in the end, show that the procedure adopted was appropriate.

[155] Another exception in practice was the policy of the Commercial Court to assist the expeditious and efficient determination of disputes of commercial parties by adopting relatively informal procedures, usually at an early stage of the case, to identify the real points at issue and, by deciding them, enable the dispute to be resolved. Often this was an aspiration rather than a reality. Commercial disputes often involve lengthy and costly investigations and trials which defeat these aspirations. At times commercial litigation has been allowed to drift into over elaborate and drawn-out procedures which overlook any other priority than investigating every nook and cranny and ensuring that every angle receives the full forensic exposure. In *Ashmore v Corp of Lloyd's* [1992] 2 All ER 486 at 493, [1992] 1 WLR 446 at 453–454, Lord Templeman objected strenuously to the practice of taking 'every point conceivable and inconceivable without judgment and discrimination' and exhorted judges and appellate courts to control the conduct of proceedings. Lord Roskill agreed with him saying:

> 'The Court of Appeal appear to have taken the view that the plaintiffs were entitled of right to have their case tried to conclusion in such manner as they thought fit and if necessary after all the evidence on both sides had been adduced. With great respect, like my noble and learned friend, I emphatically disagree. In the Commercial Court and indeed in any trial court it is the trial judge who has control of the proceedings. It is part of his duty to identify the crucial issues and to see they are tried as expeditiously and as inexpensively as possible ... Litigants are not entitled to the uncontrolled use of a trial judge's time. Other litigants await their turn.' (See [1992] 2 All ER 486 at 488, [1992] 1 WLR 446 at 448.)

[156] There is always an exercise of judgment to be undertaken by the judge whether the perceived short-cut will turn out to have been beneficial and, inevitably, in a proportion of cases expectations will be confounded. Caution is required. But it is simplistic to suppose that in complex litigation the exercise should never be attempted. The volume of documentation and the complexity of the issues raised on the pleadings should be the subject of critical scrutiny and should not without more deter the judge from considering whether it is really necessary to commit the parties and the court to a lengthy trial and all the preparatory steps which that will involve. Indeed it can be submitted with force that those are just the sorts of case which most strongly cry out for the exclusion of anything that is unnecessary for the achievement of a just outcome for the parties.

[157] The present case illustrates these considerations. The commercial judge was faced with an action dependent upon a cause of action of which the parameters were not wholly certain and a statement of claim which may or may not have disclosed a case sufficient in law to enable the plaintiffs to succeed.

He ordered the trial of preliminary questions of law. He was clearly right to do so even though the decision of those questions has led to appeals to your Lordships' House. However, difficulties then arose with the plaintiffs' pleadings. At each level the plaintiffs have re-pleaded their case to accommodate the fresh thinking about the elements of the tort of misfeasance in public office. Further, the courts at each level have been called on to adjudicate upon the proposed revised pleading, your Lordships included. This has led to an unsatisfactory state of affairs. Any skilful pleader should be able to draft a pleading which sufficiently makes the minimum allegations to support the legal definition of the tort and I have detected no lack of skill in the lawyers acting for either side in this litigation. The question then becomes whether the particulars given provide realistic support for the primary allegations. This has in turn led to a detailed examination both in the courts below and before your Lordships of these allegations. I will have to comment upon the suitability of that course in your Lordships' House. It was probably inevitable before the judge and may have been so before the Court of Appeal where questions of leave to amend were also debated. It was complicated in the Court of Appeal by the fact that Auld LJ did not agree with the majority on the law. Before the judge and in the Court of Appeal the decision was given on the basis of the RSC not the CPR.

[158] This leads me back to the CPR. As previously noted, CPR Pt 1 adopts a philosophy similar to that enunciated in *Ashmore*'s case. It is followed through into the new version of RSC Ord 14. It is CPR Pt 24. It authorises the court to decide a claim (or a particular issue) without a trial. Unlike Ord 14, it applies to both plaintiffs (claimants) and the defendants. It therefore can be used in cases such as the present where the application for judgment without trial is being made by the defendant. The court may exercise the power where it considers that the 'claimant has no real prospect of succeeding on the claim' and 'there is no other reason why the case or issue should be disposed of at a trial'. The concluding phrase corresponds to the similar phrase used in RSC Ord 14, r.3(1) and has not been relied upon in the present case. The important words are 'no real prospect of succeeding'. It requires the judge to undertake an exercise of judgment. He must decide whether to exercise the power to decide the case without a trial and give a summary judgment. It is a 'discretionary' power, ie one where the choice whether to exercise the power lies within the jurisdiction of the judge. Secondly, he must carry out the necessary exercise of assessing the prospects of success of the relevant party. If he concludes that there is 'no real prospect', he may decide the case accordingly. I stress this aspect because in the course of argument counsel referred to the relevant judgment of Clarke J as if he had made 'findings' of fact. He did not do so. Under RSC Ord 14 as under CPR Pt 24, the judge is making an assessment not conducting a trial or fact-finding exercise. Whilst it must be remembered that the wood is composed of trees some of which may need to be looked at individually, it is the assessment of the whole that is called for. A measure of analysis may be necessary but the 'bottom line' is what ultimately matters. CPR Pt 24 includes provisions covering various ancillary matters, at what stage the application can be made (r 24.4), the filing of evidence (r 24.5) and supplementary powers of the court (r 24.6). The practice direction which was originally appended (Practice Direction—The Summary Disposal of Claims) filled out some of what is in the rules:

> '4.2 Where a defendant applies for judgment in his favour on the claimant's claim, the court will give that judgment if either: (1) the claimant has failed

to show a case which, if unanswered, would entitle him to judgment, or (2) the defendant has shown that the claim would be bound to be dismissed at trial.

4.3 Where it appears to the court possible that a claim or defence may succeed but improbable that it will do so, the court may make a conditional order as described below.'

The criterion which the judge has to apply under CPR Pt 24 is not one of probability; it is absence of reality. The majority in the Court of Appeal used the phrases 'no realistic possibility' and distinguished between a practical possibility and 'what is fanciful or inconceivable' ([2000] 2 WLR 15 at 91). Although used in a slightly different context these phrases appropriately express the same idea. CPR Pt 3 contains similar provisions in relation to the court's case management powers. These include explicit powers to strike out claims and defences on the ground, among others, that the statement of case discloses no reasonable ground for bringing or defending the claim.

[159] Before your Lordships it was accepted by counsel that this part of the appeal should be decided under CPR Pt 24 applying the criterion 'no real prospect of success'. An exchange of correspondence has confirmed this. (A similar criterion is also appropriate where there is an application for leave to amend to add a new case.) Recent statements in the Court of Appeal concerning CPR Pt 24 bear repetition:

> 'The words "no real prospect of succeeding" do not need any amplification, they speak for themselves. The word "real" distinguishes fanciful prospects of success or, as [counsel] submits, they direct the court to the need to see whether there is a "realistic" as opposed to a "fanciful" prospect of success ... It is important that a judge in appropriate cases should make use of the powers contained in Pt 24. In doing so he or she gives effect to the overriding objectives contained in Pt 1. It saves expense; it achieves expedition; it avoids the court's resources being used up on cases where this serves no purpose and, I would add, generally, that it is in the interests of justice. If a claimant has a case which is bound to fail, then it is in the claimant's interests to know as soon as possible that that is the position.' (See *Swain v Hillman* [2001] 1 All ER 91 at 92, 94 per Lord Woolf MR.)

> 'The CPR are a procedural code with the overriding objective of enabling the court to deal with cases justly including saving expense and ensuring that it is dealt with expeditiously and fairly. The court must seek to give effect to the overriding objective when it exercises any power given to it or interprets any rule. I take this into account when considering the application under Part 24.2 ... [The language of Part 3.4] is very akin to that in the now extinct RSC Ords 18 and 19 and under which this application was commenced (and as good as succeeded) at the first hearing. This part includes "a claim which raises an unwinnable case where continuance of the proceedings is without any possible benefit to the respondent and would waste resources on both sides".' (See *Sinclair v Chief Constable of West Yorkshire* [2000] CA Transcript 2189 per Otton LJ, and see *Harris v Bolt Burdon* [2000] CPLR 9.)

There is no point in allowing claims to proceed which have no real prospect of success, certainly not in proceeding beyond the stage where their hopelessness has clearly become apparent.

[160] The difficulty in the application of the criterion used by CPR Pt 24 is that it requires an assessment to be made in advance of a full trial as to what the

outcome of such a trial would be. The pre-trial procedures give the claimant an opportunity to obtain additional evidence to support his case. The most obvious of these is discovery of documents but there is also the weapon of requesting particulars or interrogatories and the exchange of witness statements may provide a party with additional important material. Therefore the courts have in the present case recognised that they must have regard not only to the evidence presently available to the plaintiffs but also to any realistic prospect that that evidence would have been strengthened between now and the trial. Indeed, it was the submission of Mr Stadlen QC, for the defendants, that Clarke J had applied the right test when he said:

> 'In my judgment the question in the instant case is whether the bank has persuaded the court that the plaintiffs' case is bound to fail on the material at present available and that there is no reasonable possibility of evidence becoming available to the plaintiff, whether by further investigation, discovery, cross-examination or otherwise sufficiently to support their case and to give it some prospect of success. If the bank discharges that burden, it will follow that the plaintiffs' claim is bound to fail. In that event to allow the action to proceed would serve no useful purpose. It would only involve the expenditure of time and money—in this case a very great deal of both. Neither party would have any legitimate interest in such expenditure because it could not benefit either.'

It is possible that this test, in its reference to cross-examination, may be rather too favourable to the plaintiffs. It is derived from what was said in relation to a plea of justification by Neill LJ in *McDonald's Corp v Steel* [1995] 3 All ER 615, a defamation action. He included cross-examination no doubt because in a defamation action, although the burden of proving justification is upon the defendant, the publisher of the libel, it is normal for the plaintiff to call his evidence first; justification is a defence. Where an allegation of dishonesty is being made as part of the cause of action of the plaintiff, there is no reason why the rule should not apply that the plaintiff must have a proper basis for making an allegation of dishonesty in his pleading. The hope that something may turn up during the cross-examination of a witness at the trial does not suffice. It is of course different if the admissible material available discloses a reasonable prima facie case which the other party will have to answer at the trial.

[161] The judge's assessment has to start with the relevant party's pleaded case but the enquiry does not end there. The allegations may be legally adequate but may have no realistic chance of being proved. On the other hand, the limitations in the allegations pleaded and any lack of particularisation may show that the party's case is hopeless. The tort of misfeasance in public office is a tort which involves bad faith and in that sense dishonesty. It follows that to substantiate his claim in this tort, first in his pleading and then at the trial, a plaintiff must be able to allege and then prove this subjectively dishonest state of mind. The law quite rightly requires that questions of dishonesty be approached more rigorously than other questions of fault. The burden of proof remains the civil burden—the balance of probabilities—but the assessment of the evidence has to take account of the seriousness of the allegations and, if that be the case, any unlikelihood that the person accused of dishonesty would have acted in that way. Dishonesty is not to be inferred from evidence which is equally consistent with mere negligence. At the pleading stage the party making the allegation of dishonesty has to be prepared to particularise it and, if he is unable to do so, his

allegation will be struck out. The allegation must be made upon the basis of evidence which will be admissible at the trial. This commonsense proposition has recently been re-emphasised by the Court of Appeal in *Medcalf v Mardell* (2001) Times, 2 January, in which Peter Gibson LJ said: 'The material evidence must be evidence which can be put before the court to make good the allegation.' Evidence which cannot be used in court cannot be relied upon to justify the making of the allegation of dishonesty. I mention this because it shows the principle to be applied and not because there is any suggestion in the present case that there is any inadmissible material which would support allegations of dishonesty in the present case. It is normally to be assumed that a party's pleaded case is the best case he can make (or wishes to make). Therefore, in the present case, the particulars given provide a true guide to the nature of the case being made by the plaintiffs (claimants).

[162] I agree with my noble and learned friend Lord Hope that in substance Clarke J asked himself the right questions and that, as he expressed it, he directed himself correctly as to the relevance of the Bingham report. My noble and learned friend and those who agree with him are, however, critical of the actual use made by Clarke J and the majority of the Court of Appeal of the report. I consider that with minor exceptions these criticisms are not fair to Clarke J nor to Hirst and Robert Walker LJJ. The relevant exercise was as I have said earlier not one of making findings of fact or comparable to a trial on admissible evidence. It was to make a predictive assessment. To use the report as an aid was clearly appropriate and proper. Further, as the plaintiffs themselves said, their pleading and its particularisation was substantially taken from the facts set out in the report. They were using the report to plead their case: 'With one principal exception, the statement of claim is pleaded on the basis of the Bingham report' (per Clarke J). It was therefore not only permissible but also pertinent to compare their selection from the history recounted in the report with the whole and the conclusions drawn in the report. If the plaintiffs seek to infer bad faith which Bingham LJ declined to infer or even contradicted, is it realistic to suppose that a judge will hereafter be persuaded to do so? The report is in reality at the present stage the context in which the plaintiffs' particulars must be read and their viability assessed. The approach of Clarke J was careful and fair to the plaintiffs. He distinguished between the presently available material and that which might become available in the future. He said:

> 'I have reached the firm conclusion that on the material available at present the plaintiffs have no arguable case that the Bank dishonestly granted the licence to BCCI or dishonestly failed to revoke the licence or authorisation in circumstances when it knew, believed or suspected that BCCI would probably collapse. There is nothing in the Bingham report or in the documents which I have seen to support such a conclusion and there is much to contradict it ... There is nothing in [the report] which gives reasonable grounds for supposing that there might be other evidence which might in the future support the plaintiffs' case. In these circumstances I accept Mr Stadlen's further submission that there is no realistic possibility of more evidence becoming available, whether by further investigation, discovery, cross-examination or otherwise, which might throw light upon the state of mind of the Bank or any of its relevant officials during the period in which BCCI was operating.'

He therefore concluded that the plaintiff's case would be bound to fail and that he could see no justification for allowing the action to continue: 'To do so would be to require an enormous expenditure of time and money to no avail.' For myself, I see nothing to criticise in this methodology or chain of reasoning. The critical matter is whether one agrees with his assessment of the inevitability of failure. Were this appeal simply about whether Clarke J had misdirected himself or acted improperly in some way in the exercise of his discretion, I would regard it as improper to allow the appeal. But that is not the manner in which this appeal has been argued. The defendants have accepted that your Lordships' House should re-assess the decision to dismiss the plaintiffs' claim using CPR Pt 24 and it is to that that I now turn albeit with the apprehension that your Lordships may have been over-influenced by the plaintiffs' submissions about the relevance of the Bingham report.

The cause of action

[163] This was the subject of the earlier hearing and decision of your Lordships ([2000] 3 All ER 1, [2000] 2 WLR 1220). It is easy to forget that the reason why the plaintiffs have to rely upon the tort of misfeasance in public office is that they cannot allege that the defendants owed them a duty of care. If the plaintiffs were able to rely upon the tort of negligence, their claim would be easy to formulate and, whether or not it would ultimately succeed, would undoubtedly have to go to trial. But, in the present context, to formulate and sustain a claim in the tort of misfeasance in public office is not straightforward, hence a need to have regard to its constituents.

[164] In the speeches of your Lordships, in which I joined, delivered in May of last year, the essential constituents of that tort were explained. The tort is exceptional in that it is necessary to prove the requisite subjective state of mind of the defendant in relation not only to his own conduct but also its effect on others. That state of mind is one equivalent to dishonesty or bad faith and knowledge includes both direct knowledge and what is sometimes called 'blind eye' knowledge. ('Blind eye' knowledge has since been discussed in different contexts by your Lordships in *Manifest Shipping Co Ltd v Uni-Polaris Shipping Co Ltd* [2001] UKHL/1, [2001] 1 All ER 743, [2001] 2 WLR 170 and *White v White* [2001] UKHL/9, [2001] 2 All ER 43, [2001] 1 WLR 481.) These features are referred to in the speeches.

> 'It involves bad faith inasmuch as the public officer does not have an honest belief that his act is lawful ... [The nineteenth-century] decisions laid the foundation of the modern tort; they established the two different forms of liability; and revealed the unifying element of conduct amounting to an abuse of power accompanied by subjective bad faith.' (See [2000] 3 All ER 1 at 8, [2000] 2 WLR 1220 at 1231 per Lord Steyn.)

> 'My Lords, I consider that dishonesty is a necessary ingredient of the tort, and it is clear from the authorities that in this context dishonesty means acting in bad faith.' (See [2000] 3 All ER 1 at 41, [2000] 2 WLR 1220 at 1266 per Lord Hutton.)

> 'The official concerned must be shown not to have had an honest belief that he was acting lawfully ...' (See [2000] 3 All ER 1 at 44, [2000] 2 WLR 1220 at 1269 per Lord Hobhouse of Woodborough.)

'The policy underlying it is sound: reckless indifference to consequences is as blameworthy as deliberately seeking such consequences. It can therefore now be regarded as settled law that an act performed in reckless indifference as to the outcome is sufficient to ground the tort in its second form.' (See [2000] 3 All ER 1 at 9, [2000] 2 WLR 1220 at 1232 per Lord Steyn.)

'The official does the act intentionally being aware that it risks directly causing loss to the plaintiff or an identifiable class to which the plaintiff belongs and the official wilfully disregards that risk ... His recklessness arises because he chooses wilfully to disregard that risk ... Subjective recklessness comes into the formulation at the first and last stage because it is in law tantamount to knowledge and therefore gives rise to the same liability ...' (See [2000] 3 All ER 1 at 45, [2000] 2 WLR 1220 at 1270 per Lord Hobhouse.)

[165] Having carefully considered the submissions of the parties on both sides, the material which has been placed before us, what further material may reasonably be expected to become available to the plaintiffs before the time of the trial and the judgments of the courts below, I have come to the conclusion that the appeal should be dismissed. Like my noble and learned friend Lord Millett, my assessment is that the plaintiffs' claim does not have a real prospect of success. The majority of your Lordships are, however, of a different view and would allow the appeal and direct that the case proceed to a full trial on the alleged liability in tort. Under these circumstances, whilst it is my duty to state what my decision would have been and briefly give my reasons, it is inappropriate that I should say anything which will prejudge the conduct or outcome of that trial when it occurs. The outcome will be a matter for the trial judge in the light of the ruling which your Lordships have earlier given on the law, the evidence adduced at the trial and the submissions of the parties. It is the trial judge who will have to decide how the trial should be conducted and what findings of fact to make.

[166] To turn now to the reasons for my assessment of the prospects of the claim, I will structure what I say applying the law as stated last May and applying it to the facts in two periods, first, that period ending with the grant of the licence in June 1980, secondly, that from July 1980 to the collapse of BCCI in July 1991. The plaintiffs' complaint in these two periods is different. In the first period it is that the defendants wrongly licensed BCCI under s 3 of the Banking Act 1979 when they were forbidden by the statute from doing so. In the second period the complaint is that the defendants failed to supervise BCCI as they were required to do by the 1979 Act and its successor, the Banking Act 1987, and failed to perform an obligation under those Acts to revoke the licence. I will take the law as stated in my speech, not because it is materially different from what was said by Lord Steyn, but because its analysis is unifying and therefore easier to apply in the discussion of these two periods and was, indeed, the formulation primarily relied upon by the plaintiffs.

[167] The commission of the tort has two stages. The first is the act done by the defendant. The act must be an unlawful act, not in the sense that it is itself tortious but in the sense that it is contrary to the law for the defendant to have done what he did. In the case of a failure to act it must be a failure to do a specific act which it was the legal obligation of the defendant to do and which was therefore unlawful. In either case there must be unauthorised or forbidden conduct. The conduct must be accompanied by either actual or subjectively reckless, or 'blind eye', knowledge that it is unauthorised or forbidden. The second

stage is that which relates to the defendants' appreciation of the consequences of his conduct. This may arise from his purpose in doing what he did (my first 'limb', Lord Steyn's first form of the tort) or from his appreciation that the plaintiff will in the ordinary course be caused loss or his consciously and wilfully turning a blind eye to the possibility of such loss (my second and third 'limbs', Lord Steyn's second form of the tort). Therefore, in making the assessment required by this appeal, one must apply this two-stage test to the plaintiffs' case for the two periods.

The first period

[168] The 1979 Act introduced a system of licensing for deposit-takers which was new. The task of the defendants was not easy since they were faced with having to decide for the first time and within a relatively short time-scale whether to grant or refuse a licence to a substantial number of institutions which were already established businesses. The refusal of a licence would mean that the institution could no longer accept deposits and would have to go out of business (see s 1(1)). However, the defendants' statutory obligation was clearly stated. In s 3(3)(b) and Sch 2, Pt II criteria are laid down which must be met unless sub-s (5) applies. In any other case the defendants were forbidden from granting the licence. The defendants purported to grant the licence under sub-s (5). For this to apply, the principal place of business of the institution must be in a country outside the United Kingdom *and* the supervisory authority in that country must have informed the defendants that they are satisfied with respect to the management of the institution and its overall financial soundness *and* the defendants must be satisfied with the nature and scope of the supervision exercised by those authorities. I consider that the plaintiffs clearly have a fully arguable case that these criteria were not satisfied and that the officials acting for the defendants cannot have believed that these criteria were satisfied. Therefore the plaintiffs have an arguable case on the first stage of the legal test. The courts below were of the same opinion and Mr Stadlen for the defendants only faintly argued the contrary.

[169] The plaintiffs failed in the courts below on the second stage. Clarke J said:

'Both BCCI SA and the group appeared to be profitable, the shareholders appeared to be supportive and willing to supply more capital when asked, the auditors were giving unqualified opinions on the accounts and the LBC continued to give favourable opinions. [Bingham] also refers to the attitude of the Bank of America, to which I shall return. In these circumstances, it cannot fairly be said that at this stage the Bank suspected that BCCI would probably collapse ... In all the circumstances I have reached the clear conclusion that on the evidence available at present, either as referred to in the Bingham Report or as contained in the documents to which I have been referred, the plaintiffs' case that the Bank knew, believed or suspected that if it gave BCCI a licence it would probably collapse is bound to fail.'

'I must say that, however critical one is of the Bank (and there is plenty of scope for criticism), it seems to me to offend common sense to conclude that before it licensed B.C.C.I. S.A. in 1980 it actually knew, believed or suspected that if it licensed B.C.C.I. S.A., B.C.C.I. S.A. would (or even might) subsequently collapse.' (Cited [2000] 2 WLR 15 at 91–92.)

In the Court of Appeal ([2000] 2 WLR 15 at 92), the majority agreed that there was no arguable case on foresight of loss. Auld LJ based his view on the application of a

different view of the constituents of the tort, a view which has been held to be wrong by your Lordships.

[170] It is not suggested that the defendants granted the licence with the purpose of causing loss to any of the plaintiffs. The plaintiffs' case is, rather, that the officials consciously closed their eyes to what might be the consequences to present and future depositors of granting and not refusing the licence. There is no direct evidence to support this improbable allegation. The main evidence which is said to support the allegation is in part the self-evident proposition that the officials probably had in mind that one of the main purposes of the regime introduced by the 1979 Act was to protect depositors as is stated in the preamble of that Act plus the proposition that if the safeguards in the Act were not observed before granting a licence there must be a risk that depositors will not be effectively protected; and partly that the officials had already learnt some very disturbing facts about the conduct of the BCCI, for example, from the publicity surrounding the withdrawal of the Bank of America. But there is no evidence to support the appreciation of the officials of the risk they were running nor that, having appreciated it, they wilfully chose to disregard it and hazard the depositors. At the relevant time BCCI appeared to be a flourishing and successful, though to some extent controversial, institution with very many satisfied depositors. The evidence both at the time and subsequently is that the officials thought that they would look silly if they raised difficulties for the approval of BCCI and that if they did they would not have been supported if challenged on an appeal. The objective fact is that no depositor actually lost any money until many years later after much else had happened, including the passing of a new Act in 1987. Problems of proving legal causation will obviously also arise.

[171] There is simply no evidence of any contemplation at this stage that depositors with BCCI would lose their money. There is no evidence whatsoever, nor any allegation, of any corruption of any official of the defendants, either at this time or subsequently. The evidence of the requisite *subjective* state of mind is not there and there is no reasonable basis for believing that it ever will be. The case of the plaintiffs is in reality one in negligence supported by *objective* criteria and this does not suffice for the tort upon which they have to rely. This is as I see it an insuperable difficult for them on this part of the case.

The second period

[172] Here the difficulties which the plaintiffs have to overcome are more fundamental. The foundation of the tort is that the relevant person has done something (in the positive or negative sense) which is contrary to the law. The statutory provisions upon which the plaintiffs rely are ones which give the defendants powers in respect of licenced institutions. Their case is that they constitute a statutory scheme which included a duty to supervise the deposit-taker which the defendants failed to perform adequately. Their more specific case is that the defendants failed to make use of the statutory power given to them under s 11 of the 1987 Act to revoke the authorisation of BCCI, or to exercise one or more of the lesser powers given by sections such as s 12 (restriction of authorisation) or s 19 (directions) of that Act. The difficulty for the plaintiffs here is that they are unable to sue in the tort of negligence and that the failures of the defendants which they allege do not have the character of unlawfulness. They all involve the exercise of discretions and judgment. There is no allegation which the plaintiffs can make that the statute made it *unlawful* for the defendants not to take some particular step at any given time.

[173] This ties in with the plaintiffs' next difficulty. There is no evidence that the defendants and their officials were doing anything other than their best to handle the developing situation in a responsible manner in accordance with the Act. The officials may have been out of their depth. They may have been more optimistic than was justified now that all the facts are known. But, particularly in the later stages, they were faced with a delicate situation where there were a number of conflicting interests to be taken into account and where any overreaction would have caused BCCI to collapse without hope of rescue and with far greater losses to its creditors than ultimately occurred. It is easy to overlook the fact that the defendants' forbearance led to the injection in 1990 of substantial additional shareholder funds (how much these were and what happened to them is apparently questioned). The situation developed over the years. In the earlier years, the problem was indiscipline without the anticipation of a threat of default. Later, that situation developed into one which included a growing threat of failure, at first remote, finally grave and imminent. But in all these situations the defendants had to exercise judgment. The wrong step on their part would only make things worse. In 1988 the 'College' was constituted and an international approach adopted in which the defendants participated; the defendants would have been irresponsible not to have done so. The plaintiffs have sought to identify some four occasions when they submit that the defendants knew that they had grounds for exercising one or more of their statutory powers and decided not to. Their inaction may be open to criticism. It can be argued that they should have acted differently but that is not the same as arguing that they acted unlawfully and, naturally, there is no evidence that they knew or even suspected that they might be acting unlawfully. The plaintiffs wish to present a case of dishonesty but they have not got the material to justify the allegation and have no realistic prospect of ever obtaining it. Instead, their case seeks to proceed from the proposition that the defendants were under a statutory duty to supervise BCCI to an allegation that the defendants were aware that they were not exercising effective supervision and thence to the allegation that it was unlawful for the defendants not to have exercised one or more of certain powers given to them under the Act. This is a non sequitur. The powers remain discretionary. It does not follow from the proposition that it would have been lawful to exercise one or more of those powers that not to exercise them was unlawful.

[174] The same applies to the second stage of the test. There is no evidence that the defendants were setting out to cause anyone loss. In the earlier stages they did not foresee the disaster that was to come. In the later stages they were striving to avoid disaster and, if it proved not possible to avoid it, to limit the losses which would in that event inevitably be suffered. The officials had nothing to gain. All the evidence is that they were doing their best. Once they realised the scale of the problem with BCCI, they did not close their eyes to the consequences of a failure; they attempted to avoid precipitating that collapse which would clearly have been the consequence of the wrong kind of intervention. One can illustrate the general point from the plaintiffs' own pleading (Sch 5, para 27(ii)): the decision not to revoke the full licence in October 1986 was taken because the officials concluded that 'there appeared to be no immediate danger to depositors and it seemed unlikely that there were grounds for revoking BCCI SA's licence outright'.

[175] The hearing before your Lordships has been concerned with whether the plaintiffs have a real prospect of success in the action. On any view they face

very serious difficulties in presenting and substantiating their case. The burden of proof is upon them. The tort upon which they must rely is one which requires the plaintiffs to prove serious allegations of actual bad faith—dishonesty—against the officials. It is an abuse of process to make the allegations unless the plaintiffs have material to support at least a prima facie case that the allegations are correct. They do not have that material. For the action to be allowed to proceed on the speculation, not backed up by any real expectation, that they may before trial find evidence to support their allegations is vexatious. It is also contrary to the procedural rules now in force. These rules are based upon sound principles of the administration of justice. Doing justice includes bringing to a conclusion highly expensive and long drawn-out litigation procedures, inevitably complex, which have no real prospect of success. The real grievance of the actual plaintiffs is that they believe that the law ought to allow actions in negligence against regulators but they accept through their counsel that it does not. I would dismiss the appeal.

LORD MILLETT. My Lords,

[176] The Bank of Credit and Commerce International SA (BCCI) was incorporated under the laws of Luxembourg and obtained a banking licence from the Luxembourg Banking Commission (the LBC) in 1972. In the years which followed it carried on a worldwide business as a bank and deposit-taking institution. Shortly after it received the licence from the LBC it established an office in London which eventually became its principal place of business. By 1979 it had 45 branches in the United Kingdom through which it offered a full range of banking services to members of the public.

[177] The Banking Act 1979 came into force in October 1979. That Act made the Bank of England (the Bank) formally responsible for supervising banks and other deposit-taking institutions in the United Kingdom and conferred wide regulatory powers upon the Bank to enable it to discharge its functions. For the first time authorisation was required for a banking or deposit-taking business to be carried on in the United Kingdom. The 1979 Act applied to companies like BCCI which was already carrying on an existing business in the United Kingdom as well as to those which wished to commence business here.

[178] In 1980 the Bank granted BCCI a licence to accept deposits. Withholding the licence would have compelled the closure of BCCI's business in the United Kingdom (and in all likelihood elsewhere), with virtually certain loss to depositors. In granting the licence the Bank relied on the judgment of the LBC and made no independent judgment of its own whether the statutory criteria for authorisation were satisfied. It was not entitled to do this because BCCI's principal place of business was in the United Kingdom. Thereafter BCCI continued to carry on business in the United Kingdom and elsewhere for a further 11 years before it was closed down in July 1991 by regulatory action taken by the Bank. Depositors, most of whom must have become depositors or increased their deposits after 1980, have suffered substantial losses. They blame the Bank for its supervisory failures and seek to hold it responsible for their losses. They believe that the Bank was grossly negligent in granting the licence in the first place and in failing to revoke it or take other regulatory action long before it did.

[179] Unfortunately for the depositors, a regulatory authority cannot be held liable in English law for negligence, however gross, in the exercise of its supervisory functions. So the depositors have been forced to base their claim on a very different cause of action. They allege that the Bank has been guilty of misfeasance in public office. This is an intentional tort. It involves deliberate or

reckless wrongdoing. It cannot be committed negligently or inadvertently. Accordingly, it is not enough for the depositors to establish negligence, or even gross negligence, on the part of the Bank. They must establish some intentional or reckless impropriety. As your Lordships ruled unanimously at an earlier stage of these proceedings ([2000] 3 All ER 1, [2000] 2 WLR 1220), and in the absence of what has been described as 'targeted malice' (which is not alleged), the tort has two elements. In the present case the depositors must prove: (i) not merely that the Bank acted unlawfully, that is to say in excess of its powers or for an improper purpose, but that it did so *knowingly* (or recklessly not caring whether it had the necessary power or not); and (ii) that the Bank *knew* that its actions would probably cause loss to depositors (or was recklessly indifferent to the consequences of its actions). Such conduct in a public official is grossly improper and equates to dishonesty in a private individual.

[180] Seen in this light, the depositors' case is a most implausible one. A bank regulator has a very difficult task and one which may call for an exercise of judgment of some nicety, since it must seek to protect future depositors against the risk of loss without sacrificing the interests of existing depositors. No responsible regulator would contemplate closing down a bank or other deposit-taking institution (or taking other action which risked a run on it) with inevitable loss to existing depositors unless there was no alternative, ie unless it considered that collapse was virtually inevitable. A regulator's task has often to be performed on incomplete information and is highly judgmental. Even an action based on negligence would face formidable difficulties. But it is scarcely credible that, unless corrupt, public officials should have been guilty of intentional wrongdoing or have been indifferent to the consequences of their actions to the very people they were supposed to protect. It is not beyond the bounds of possibility, of course, but in the absence of any incentive to act in this way it is in the highest degree unlikely. Certainly such conduct cannot lightly be inferred.

[181] But the present case goes far beyond this. The Bank was formally concerned with the supervision of BCCI for more than 11 years (and informally for a further eight years) and the supervisory attention which it paid to BCCI during this time was very great. The depositors are alleging deliberate or reckless wrongdoing on the part of a large number of officials at different levels of seniority over a long period. This would involve wholesale wrongdoing on a spectacular scale in the public service. Absent any plausible motive for such conduct it is an extravagant allegation. It will require evidence of the most compelling kind to establish. As Lord Nicholls of Birkenhead observed in *Re H (minors) (sexual abuse: standard of proof)* [1996] 1 All ER 1 at 17, [1996] AC 563 at 586:

> 'The more improbable the event, the stronger must be the evidence that it did occur before, on the balance of probability, its occurrence will be established. Ungoed-Thomas J expressed this neatly in *Re Dellow's Will Trusts, Lloyds Bank Ltd v Institute of Cancer Research* [1964] 1 All ER 771 at 773, [1964] 1 WLR 451 at 455: "The more serious the allegation, the more cogent is the evidence required to overcome the unlikelihood of what is alleged and thus to prove it."'

In the absence of evidence to support the allegation, it would be an abuse of process to make it. It is not at all surprising that the depositors have striven hard to avoid pleading any such case until they were compelled to do so, preferring instead to argue that it was not necessary.

[182] In describing the depositors' case as 'implausible' or 'scarcely credible', I should not be taken as making any assumptions about the integrity of the Bank and its officials or as departing from the proper judicial stance of neutrality and impartiality. I do not take the view that the Bank can do no wrong or that public officials are incapable of acting in bad faith. But we are called upon to evaluate the action's prospects of success, and that exercise involves an impartial consideration of the inherent plausibility of the allegations and the strength of the evidence needed to establish them. The scales of justice must be evenly balanced at the commencement of such an operation; but they should not be incapable of movement while the operation is being undertaken. It is not unfair to observe that, in the absence of some financial or other incentive, a charge of dishonesty against professional men and public officials is possible but inherently improbable.

THE PLEADINGS: DEMURRER

[183] Having read and re-read the pleadings, I remain of opinion that they are demurrable and could be struck out on this ground. The rules which govern both pleading and proving a case of fraud are very strict. In *Jonesco v Beard* [1930] AC 298 at 300, [1930] All ER Rep 483 at 484 Lord Buckmaster, with whom the other members of the House concurred, said:

> 'It has long been the settled practice of the Court that the proper method of impeaching a completed judgment on the ground of fraud is by action in which, *as in any other action based on fraud, the particulars of the fraud must be exactly given and the allegation established by the strict proof such a charge requires.*' (My emphasis.)

[184] It is well established that fraud or dishonesty (and the same must go for the present tort) must be distinctly alleged and as distinctly proved; that it must be sufficiently particularised; and that it is not sufficiently particularised if the facts pleaded are consistent with innocence: see *Kerr on the Law of Fraud and Mistake* (7th edn, 1952) p 644, *Davy v Garrett* (1878) 7 Ch D 473 at 489, *Bullivant v A-G for Victoria* [1901] AC 196, [1900–3] All ER Rep 812, *Armitage v Nurse* [1997] 2 All ER 705 at 715, [1998] Ch 241 at 256. This means that a plaintiff who alleges dishonesty must plead the facts, matters and circumstances relied on to show that the defendant was dishonest and not merely negligent, and that facts, matters and circumstances which are consistent with negligence do not do so.

[185] It is important to appreciate that there are two principles in play. The first is a matter of pleading. The function of pleadings is to give the party opposite sufficient notice of the case which is being made against him. If the pleader means 'dishonestly' or 'fraudulently', it may not be enough to say 'wilfully' or 'recklessly'. Such language is equivocal. A similar requirement applies, in my opinion, in a case like the present, but the requirement is satisfied by the present pleadings. It is perfectly clear that the depositors are alleging an intentional tort.

[186] The second principle, which is quite distinct, is that an allegation of fraud or dishonesty must be sufficiently particularised, and that particulars of facts which are consistent with honesty are not sufficient. This is only partly a matter of pleading. It is also a matter of substance. As I have said, the defendant is entitled to know the case he has to meet. But since dishonesty is usually a matter of inference from primary facts, this involves knowing not only that he is alleged to have acted dishonestly, but also the primary facts which will be relied upon at trial to justify the inference. At trial the court will not normally allow proof of primary facts which have not been pleaded, and will not do so in a case of fraud.

It is not open to the court to infer dishonesty from facts which have not been pleaded, or from facts which have been pleaded but are consistent with honesty. There must be *some* fact which tilts the balance and justifies an inference of dishonesty, and this fact must be both pleaded and proved.

[187] In *Davy v Garrett* Thesiger LJ in a well-known and frequently cited passage stated:

> 'In the present case facts are alleged from which fraud might be inferred, but they are consistent with innocence. They were innocent acts in themselves, and it is not to be presumed that they were done with a fraudulent intent.' (See (1878) 7 Ch D 473 at 489.)

This is a clear statement of the second of the two principles to which I have referred.

[188] In *Armitage*'s case the plaintiff needed to prove that trustees had been guilty of fraudulent breach of trust. She pleaded that they had acted 'in reckless and wilful breach of trust'. This was equivocal. It did not make it clear that what was alleged was a dishonest breach of trust. But this was not fatal. If the particulars had not been consistent with honesty, it would not have mattered. Indeed, leave to amend would almost certainly have been given as a matter of course, for such an amendment would have been a technical one; it would merely have clarified the pleading without allowing new material to be introduced. But the Court of Appeal struck out the allegation because the facts pleaded in support were consistent with honest incompetence: if proved, they would have supported a finding of negligence, even of gross negligence, but not of fraud. Amending the pleadings by substituting an unequivocal allegation of dishonesty without giving further particulars would not have cured the defect. The defendants would still not have known why they were charged with dishonesty rather than with honest incompetence.

[189] It is not, therefore, correct to say that *if there is no specific allegation of dishonesty* it is not open to the court to make a finding of dishonesty if the facts pleaded are consistent with honesty. If the particulars of dishonesty are insufficient, the defect cannot be cured by an unequivocal allegation of dishonesty. Such an allegation is effectively an unparticularised allegation of fraud. If the observations of Buxton LJ in *Taylor v Midland Bank Trust Co Ltd* [1999] CA Transcript 1200 are to the contrary, I am unable to accept them.

[190] In the present case the depositors (save in one respect with which I shall deal later) make the allegations necessary to establish the tort, but the particulars pleaded in support are consistent with mere negligence. In my opinion, even if the depositors succeeded at the trial in establishing all the facts pleaded, it would not be open to the court to draw the inferences necessary to find that the essential elements of the tort had been proved.

THE EVIDENTIAL MATERIAL: PROSPECTS OF SUCCESS

[191] But I prefer to decide this appeal on the broader and simpler ground that the action has no real prospects of success. In reaching this conclusion I have not relied upon the Bingham report or its findings. My reasons are as follows.

1. *The grant of the licence*

(1) It is clear that the Bank was not entitled to grant the licence in reliance on the LBC. So the depositors can prove that the Bank acted unlawfully. However, it was not unlawful for the Bank to grant a licence, but only to do so without first

making its own independent inquiries. It must now be a matter of speculation whether the Bank would still have granted the licence if it had made its own inquiries, so there is a difficult (though I am willing to assume not insuperable) question of causation. The burden of proving this lies with the depositors.

(2) It is arguable that the Bank knew the facts which deprived it of the power to grant the licence in reliance upon the LBC and without making its own inquiries. But knowledge of facts which deprive a party of the power to take a particular course of action is not the same as knowledge that it is acting in excess of power. There is no reason to suppose, and not a shred of evidence to suggest, that any official of the Bank appreciated the position, or that any official suspected it but turned a blind eye. If the Bank had realised or suspected that it was not entitled to rely on the LBC, it would obviously have made its own inquiries. It had not the slightest reason not to do so. The facts pleaded, and all the evidence we have seen, are entirely consistent with an honest but (possibly) negligent failure to appreciate the legal consequences of the known facts. This is insufficient to sustain the claim, since the first element of the tort is lacking.

(3) Even if the depositors could establish the first element of the tort, they have no prospect of establishing the second. There is no case for supposing that in 1980 BCCI was in fact already insolvent or likely to collapse; and even if it was the Bank obviously had no knowledge or suspicion that it was. As Clarke J said: it defies common sense to suppose that regulators would licence a bank which they foresaw would probably (or be at all likely to) collapse.

2. *The failure to revoke the licence prior to 1990*

(1) The tort is concerned with the *abuse* of power by public officials who act in excess of their powers to the injury of the subject. It is not concerned with their failure to exercise the powers they do have, particularly when they have a discretion whether to exercise them or not.

(2) The Bank had a *power* to revoke the licence in certain circumstances. But it had no *duty* to do so unless the circumstances were such that (objectively) the discretion could only be exercised in favour of revocation. This was never the case, nor is it alleged that it was. Even if the Bank appreciated (after the event) that it had acted in excess of its powers when granting the licence, this did not impose a duty (as distinct from a power) to revoke the licence. It follows that the Bank never acted unlawfully in failing to exercise its power to revoke the licence.

(3) In any case, the Bank's internal documents show that it never believed that it had grounds to revoke the licence, and considered that even if it did revocation would not be justified. There is no reason to suppose (and there is nothing pleaded which would justify a finding) that these views were not honestly (even if erroneously) held. Accordingly, the first element of the tort is lacking.

(4) The real problem was that, as the Bank knew, BCCI was effectively unsupervised. The depositors laid considerable emphasis on this, and rightly so; but they did not face up to the consequences. It meant that the Bank did not know enough to justify either letting BCCI continue or closing it down. It was not unlawful to abstain from revoking the licence in these circumstances. The real charge against the Bank is that it never got to grips with the problem of supervision. This may have been negligent, but it did not amount to deliberate wrongdoing or bad faith.

(5) The right course may have been to impose restrictions. This never entered anyone's head. The failure to take a step which was never even considered may be negligent but cannot possibly amount to deliberate (or reckless) wrongdoing.

3. *The failure to revoke the licence: 1990–1991*

(1) By 1990 the Bank knew that BCCI was insolvent and fraudulently run. So it knew (for the first time) that there were grounds for closing it down. But it still had to consider whether this was in the interests of depositors, both present and future.

(2) No regulator would close down a bank in such circumstances while there was any reasonable prospect of a rescue. The first question is whether, objectively and without the benefit of hindsight, there was a reasonable possibility of a rescue (with new funds and new management) until the s 41 report put paid to it. If so, the Bank was not acting unlawfully in exercising its discretion not to revoke the licence, and the first element of the tort would be lacking.

(3) But even if the depositors satisfy the court that there was in fact no reasonable prospect of a rescue, this is not enough. The essential question is whether it was the Bank's honestly held view that there was. There is no reason to suppose and not a shred of evidence from which it could be inferred that the Bank did not honestly believe that a rescue was a reasonable possibility. All the documents we have seen show that this was why the Bank stayed its hand. There is no hint of any other reason. As soon as it received the s 41 report, and realised that there would be no rescue, it moved to close the business down.

(4) The depositors do not even plead the necessary averment. They still plead only that (negatively) the Bank did not believe that there would probably be a rescue. This is remarkable given that Clarke J told them that what they needed to allege and prove was that (positively) the Bank knew or suspected that there would probably *not* be a rescue. There can be only one reason for their failure to plead the necessary averment: it is because they know that they cannot. In the absence of the necessary pleading (supported by proper particulars), it is not open to the court to find that the Bank knew that depositors would probably suffer loss. The second element of the tort is lacking.

(5) The depositors' case is that a regulator has a legal duty to close down an insolvent bank even if it believes that there is a reasonable prospect of a rescue, unless it also believes that a rescue is likely. It is only necessary to formulate the proposition to see that it must be rejected. Nothing could be more inimical to the interests of depositors than to place such a restriction on the regulator's power in their interests to explore every alternative to closure. Not to do so would display the very reckless indifference to their interests of which the depositors in the present case complain.

CONCLUSION

[192] I agree with my noble and learned friend Lord Hope of Craighead that, while cases should in principle be disposed of as expeditiously and cheaply as the circumstances permit, the most important principle of all is that justice should be done. But this does not mean justice to the plaintiff alone. It is not just to a plaintiff to strike out his claim without a trial unless it has no real prospect of success. It is not just to defendants to subject them to a lengthy and expensive trial to defend their integrity when there is no foundation in the evidence for the attack upon it.

[193] In my opinion the depositors cannot establish the requisite elements of the tort in respect of any matter of complaint. They have either failed to make the necessary allegations, or where they have done so they have pleaded insufficient facts in support to entitle the court to draw the necessary inferences. They have produced no document which supports their case, and every document

which they have produced and on which they have placed reliance is either neutral or more often contradictory of their case. When in addition regard is had to the seriousness and sheer improbability of their case and the cogency of the evidence required to prove it, the conclusion is inescapable that it has no real prospects of success.

[194] In agreement with my noble and learned friend Lord Hobhouse of Woodborough, I would dismiss the appeal and strike out the action.

Appeal allowed in part.

Dilys Tausz Barrister.

I v Director of Public Prosecutions
M v Director of Public Prosecutions
H v Director of Public Prosecutions

[2001] UKHL/10

HOUSE OF LORDS

LORD BINGHAM OF CORNHILL, LORD CLYDE, LORD HUTTON, LORD HOBHOUSE OF WOODBOROUGH AND LORD SCOTT OF FOSCOTE

29, 30 JANUARY, 8 MARCH 2001

Criminal law – Affray – Public place – Elements of offence – Threat of unlawful violence towards another – Whether overt possession of weapon capable of constituting threat of violence when not used or brandished in violent manner – Whether threat of violence having to be directed to person present at scene – Public Order Act 1986, s 3(1).

In response to an anonymous telephone call, a number of police officers were despatched to a block of flats in a marked police carrier. On arrival, the police saw a group of 40 to 50 youths outside the block. Eight or nine of them were carrying petrol bombs, but none of the fuses had been lit. When the carrier came into view, the group immediately dispersed and no violence was shown or threatened towards the police officers. Nobody else was present at the scene. The police pursued some of the group and arrested the three defendants who, before capture, had thrown away the petrol bombs they had been holding. The defendants were charged with affray contrary to s 3(1)[a] of the Public Order Act 1986 which provided that a person was guilty of that offence if he used or 'threatens unlawful violence towards another' and his conduct was such as would cause a person of reasonable firmness 'present at the scene' to fear for his personal safety. That provision had replaced the common law offence of affray, and had implemented a recommendation in a Law Commission report, subsequently accepted in a government White Paper. The defendants were convicted by a stipendiary magistrate, and they appealed by way of case stated. The Divisional Court dismissed the appeals, holding (i) that the visible carrying in public of primed petrol bombs by a large number of youths 'obviously out for no good' was clearly capable of constituting a threat of unlawful violence; and (ii) that although there had to be someone at or in the vicinity towards whom the threat of violence could be said to be directed, in the special circumstances of the case the overt carrying of petrol bombs, highly dangerous and untargeted in their effect if exploded, constituted a threat of violence to anyone in the vicinity, including the police on arrival at the scene. On the defendants' appeal to the House of Lords, two issues arose, namely (i) whether the overt possession of a weapon could constitute a threat of violence for the purpose of affray when it was not used or brandished in a violent manner, and (ii) whether the threat of unlawful violence had to be towards a person or persons present at the scene.

Held – (1) For the purposes of s 3(1) of the1986 Act, the carrying of dangerous weapons such as petrol bombs by a group of persons could, in some circumstances,

a Section 3 is set out at [9], post