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House of Lords

# Three Rivers District Council and Others *v* Governor and Company of the Bank of England (No 3)

1998 July 9, 10; 14, 15, 16, 17; 21, 22, 23, 24; 28, 29; 31; Dec 4 — Hirst, Auld and Robert Walker LJJ

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2000 Jan 24, 25, 26, 27; May 18 — Lord Steyn, Lord Hope of Craighead, Lord Hutton, Lord Hobhouse of Woodborough and Lord Millett

2001 Jan 15, 16, 17, 18; March 22 — Lord Steyn, Lord Hope of Craighead, Lord Hutton, Lord Hobhouse of Woodborough and Lord Millett

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*Tort — Cause of action — Misfeasance in public office — Bank of England's regulatory functions — Licensed deposit-taker collapsing as result of fraud — Whether recklessness sufficient to establish liability — Whether necessary to establish foresight of actual consequences of particular failure in supervision*

*Banking — Deposits — Deposit-taking business — Whether depositors or potential depositors acquiring rights against regulatory body under Community law — First Council Banking Co-ordination Directive (77/780/EEC)*

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Following the collapse of BCCI, a licensed deposit-taker, and its associated companies in July 1991 with huge deficiencies, much of which resulted from fraud on a very large scale, its affairs were the subject of an official report which showed that until April 1990 the Bank of England, which had principal responsibility for supervising banking activities in the United Kingdom, had been unaware that BCCI was heading for collapse. The plaintiffs, some 6,000 former depositors with BCCI's UK branch, brought an action against the Bank. Although by section 1(4) of E the Banking Act 1987[1] the Bank was not liable in damages for acts or omissions in the discharge of its regulatory functions in the absence of bad faith, the plaintiffs alleged that the Bank was liable to them for misfeasance in public office in that it had either wrongly granted a licence to BCCI or had failed to revoke BCCI's licence when it knew, believed or suspected that it would probably collapse without being rescued. The Bank denied the claim. The judge decided as a preliminary issue that the Bank was not capable of being liable to the plaintiffs for misfeasance in public office since F the plaintiffs' alleged losses were not in law capable of being caused by the Bank's acts or omissions. He also held that the plaintiffs were not entitled to rely upon any rights given to them by Community law since they had no right to recover damages against the Bank for breach of duty either under the Banking Act 1979 or the Banking Act 1987 or under the First Council Banking Co-ordination Directive (77/780/EEC)[2]. The judge accordingly refused leave to re-re-amend the statement of claim and struck out the plaintiffs' re-amended statement of claim. The Court of Appeal upheld the G judge's definition of the tort of misfeasance in public office and his decision on Community law, but went on to hold that, until the facts were established, it would be premature to rule against the plaintiffs on causation or to decide that they were unable to sue in the capacity of potential depositors. However, the court struck out the statement of claim on the grounds that, even if it were amended, there was no realistic possibility of it becoming arguable. The plaintiffs appealed against the decisions on the scope of the tort of misfeasance in public office and Community law

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[1] Banking Act 1987, s1(4): see post, pp 198D–E.
[2] First Council Banking Co-ordination Directive (77/780/EEC), art 3: see post, p 211E–G.
Art 6(1): see post, p 214B–D.
Art 7(1): see post, p 215C–D.
Art 8(1)(2): see post, p 217A–C.
Art 10(1)(3)(4): see post, p 212C–F.

and the refusal of leave to re-re-amend the statement of claim. The Bank cross-appealed against the decisions on causation and potential depositors. The House first heard argument on the legal issues with the appeal on the factual issues to follow if necessary. A

On hearing the appeal on the legal issues and determining the scope of the tort of misfeasance in public office and the obligations imposed by the Directive—

*Held*, referring the appeal and cross-appeal back to the House for further argument, (1) that the tort of misfeasance in public office involved an element of bad faith and arose when a public officer exercised his power specifically intending to injure the plaintiff, or when he acted in the knowledge of, or with reckless indifference to, the illegality of his act and in the knowledge of, or with reckless indifference to, the probability of causing injury to the plaintiff or persons of a class of which the plaintiff was a member; that subjective recklessness in the sense of not caring whether the act was illegal or whether the consequences happened was sufficient; that a deliberate omission involving an actual decision not to act might also give rise to liability; that only losses which had been foreseen by the public officer as a probable consequence of his act were recoverable; and that such a formulation of the tort struck the appropriate balance between providing adequate protection for the public and protecting public officers from unmeritorious claims (post, pp 192B–C, 195H–196C, 197B–C, 222G–223C, 224H, 226F–227B, 230B–231D, 235A, 236C–F). B C

*Bourgoin SA v Ministry of Agriculture, Fisheries and Food* [1986] QB 716, Mann J and CA considered.

(2) Dismissing the appeal in so far as it related to European Community law, that whether the Directive of 1977 gave rights to individual depositors and potential depositors had to be determined by examining the terms of the Directive itself; that the recitals showed that it was intended to be the first step in a continuing process to co-ordinate the supervision of credit institutions; that the protection of savings was merely a matter to which regard had to be had, along with the creation of equal conditions of competition, in the process of co-ordination; that since BCCI had already been legitimately carrying on business in the United Kingdom before the Directive came into force the Bank had not been obliged by article 3(1) to require it to obtain authorisation as a condition of continuing to carry on business in the United Kingdom; that, although articles 6 and 7 were concerned with supervision, their purpose was to ensure co-ordination between the supervisory authorities of the member states and the only duty which they imposed was a duty to co-operate; that article 8(1) allowed the withdrawal of authorisation in limited circumstances but its terms were restrictive rather than obligatory; that, read as a whole, the Directive placed duties of co-operation on the supervisory authorities of member states but stopped short of prescribing any duties of supervision; that, consequently, it was not possible to discover provisions entailing the granting of rights to individuals as such rights were not necessary to achieve the results which were intended to be achieved by the Directive; and that, accordingly, the interpretation of the Directive was acte clair and it would not be appropriate to make a reference to the European Court of Justice (post, pp 196F, 207F–G, 209B–C, 213G–214B, 216F–H, 219B–C, 228D–F, 232A–F, 233B–F). D E F G

Decision of the Court of Appeal post, p 17G et seq; [2000] 2 WLR 15 affirmed in part.

At a further hearing on 15, 16, 17 and 18 January 2001 the House heard argument on the factual aspects of the appeal and on 22 March 2001 (Lord Hobhouse of Woodborough and Lord Millett dissenting) allowed the appeal of the plaintiffs, granted them leave to amend their particulars of claim and dismissed the defendants' cross appeal (post, 237G et seq). H

Decision of the Court of Appeal reversed.

The following cases are referred to in their Lordships' opinions:

*Ackerley v Parkinson* (1815) 3 M & S 411

A *Algemene Transport- en Expeditie Onderneming van Gend & Loos (NV) v Nederlandse administratie der belastingen* (Case 26/62) [1963] ECR 1, ECJ
*Allen v Flood* [1898] AC 1, HL(E)
*Ashby v White* (1703) 14 StTr 695; 2 LdRaym 938; 3 LdRaym 320; 1 Smith's LC (13th ed) 253
*Barnard v Restormel Borough Council* [1998] 3 PLR27, CA
*Beaudesert Shire Council v Smith* (1966) 120 CLR 145
B *Becker v Finanzamt Münster-Innenstadt* (Case 8/81) [1982] ECR 53, ECJ
*Bourgoin SA v Ministry of Agriculture, Fisheries and Food* [1986] QB 716; [1985] 3 WLR 1027; [1985] 3 All ER 585, Mann J and CA
*Bradford Corpn v Pickles* [1895] AC 587, HL(E)
*Brasserie du Pêcheur SA v Federal Republic of Germany; R v Secretary of State for Transport, Ex p Factortame Ltd (No 4)* (Joined Cases C-46/93 and C-48/93) [1996] QB 404; [1996] 2 WLR 506; [1996] All ER (EC) 301; [1996] ECR I-1029, ECJ
C *Calveley v Chief Constable of the Merseyside Police* [1989] AC 1228; [1989] 2 WLR 624; [1989] 1 All ER 1025, HL(E)
*Carbonari v Università degli studi di Bologna* (Case C-131/97) [1999] ECR I-1103, ECJ
*Commission of the European Communities v Council of the European Communties* (Case 45/86) [1987] ECR 1493, ECJ
D *Commission of the European Communities v Federal Republic of Germany* (Case C-131/88) [1991] ECR I-825, ECJ
*Commission of the European Communities v Federal Republic of Germany* (Case C-298/95) [1996] ECR I-6747, ECJ
*Cullen v Morris* (1819) 2 Stark 577
*Davis v Bromley Corpn* [1908] 1 KB 170, CA
*Davis v Radcliffe* [1990] 1 WLR 821; [1990] 2 All ER 536, PC
E *Dillenkofer v Federal Republic of Germany* (Joined Cases C-178, 179 and 188–190/94) [1997] QB 259; [1997] 2 WLR 253; [1996] All ER (EC) 917; [1996] ECR 4845, ECJ
*Drewe v Coulton* (1787) 1 East 563n
*Dunlop v Woollahra Municipal Council* [1982] AC 158; [1981] 2 WLR 693; [1981] 1 All ER 1202, PC
*Ferguson v Earl of Kinnoull* (1842) 9 Cl & Fin 251, HL(E)
F *Francovich v Italian Republic* (Joined Cases C-6/90 and 9/90) [1995] ICR 722; [1991] ECR I-5357, ECJ
*Garrett v Attorney General* [1997] 2 NZLR 332
*Germany (Federal Republic of) v European Parliament* (Case C-233/94) [1997] ECR I-2405, ECJ
*Harman v Tappenden* (1801) 1 East 555
*Henly v Lyme Corpn* (1828) 5 Bing 91
*Hillegom (Municipality of) v Hillenius* (Case 110/84) [1985] ECR 3947, ECJ
G *Jones v Swansea City Council* [1990] 1 WLR 54; [1989] 3 All ER 162, CA; [1990] 1 WLR 1453; [1990] 3 All ER 737, HL(E)
*Lam v Brennan and Torbay Borough Council* [1997] PIQR P488, CA
*Leur-Bloem v Inspecteur der Belastingdienst/Ondernemingen Amsterdam 2* (Case C-28/95) [1998] QB 182; [1998] 2 WLR 27; [1997] ECR I-4161, ECJ
*Lonrho Ltd v Shell Petroleum Co Ltd (No 2)* (unreported) 6 March 1981, Parker J; Court of Appeal (Civil Division) Transcript No 51 of 1981; [1982] AC 173;
H [1981] 3 WLR 33; [1981] 2 All ER 456, HL(E)
*Norbrook Laboratories Ltd v Ministry of Agriculture, Fisheries and Food* (Case C-127/95) [1998] ECR I-1531, ECJ
*Northern Territory v Mengel* (1995) 185 CLR 307; 69 ALJR 527
*Racz v Home Office* [1994] 2 AC 45; [1994] 2 WLR 23; [1994] 1 All ER 97, HL(E)
*Rawlinson v Rice* [1997] 2 NZLR 651

*Rechberger v Austrian Republic* (Case C-140/97) [1999] ECR I-3499, ECJ
*R v Bowden* [1996] 1 WLR 98; [1995] 4 All ER 505, CA
*R v Caldwell* [1982] AC 341; [1981] 2 WLR 509; [1981] 1 All ER 961, HL(E)
*R v Chief Constable of the North Wales Police, Ex p AB* [1999] QB 396; [1997] 3 WLR 724; [1997] 4 All ER 691, DC
*R v Cunningham* [1957] 2 QB 396; [1957] 3 WLR 76; [1957] 2 All ER 412, CCA
*R v Dytham* [1979] QB 722; [1979] 3 WLR 467; [1979] 3 All ER 641, CA
*R v Lawrence (Stephen)* [1982] AC 510; [1981] 2 WLR 524; [1981] 1 All ER 974, HL(E)
*R v Secretary of State for Transport, Ex p Factortame Ltd (No 5)* [2000] 1 AC 524; [1999] 3 WLR 1062; [1999] 4 All ER 906, HL(E)
*Romanelli, Criminal proceedings against* (Case C-366/97) [1999] ECR I-855; [1999] All ER (EC) 473, ECJ
*Société Civile Immobilière Parodi v Banque H Albert de Bary et Cie* (Case C-222/95) [1997] ECR I-3899; [1997] All ER (EC) 946, ECJ
*Taylor v Nesfield* (1854) 3 E & B 724
*Tozer v Child* (1857) 7 E & B 377
*Turner v Sterling* (1671) 2 Vent 25
*Verein für Konsumenteninformation v Österreichische Kreditversicherungs AG* (Case C-364/96) [1998] ECR I-2949; [1999] All ER (EC) 183, ECJ
*W v Essex County Council* [1999] Fam 90; [1998] 3 WLR 534; [1998] 3 All ER 111, CA
*Wagner Miret v Fondo de Garantía Salarial* (Case C-334/92) [1993] ECR I-6911, ECJ
*X (Minors) v Bedfordshire County Council* [1995] 2 AC 633; [1995] 3 WLR 152; [1995] 3 All ER 353, HL(E)
*Yuen Kun Yeu v Attorney General of Hong Kong* [1988] AC 175; [1987] 3 WLR 776; [1987] 2 All ER 705, PC

The following additional cases were cited in argument in the House of Lords:

*Agip (Africa) Ltd v Jackson* [1990] Ch 265; [1989] 3 WLR 1367; [1992] 4 All ER 385
*Alberta (Minister of Public Works, Supply and Services) v Nilsson* 70 Alta LR (3d) 267
*Alford v Canada* (1997) 31 BCLR (3d) 228
*Amministrazione delle Finanze dello Stato v Simmenthal SpA* (Case 106/77) [1978] ECR 629, ECJ
*Amministrazione delle Finanze dello Stato v SpA San Giorgio* (Case 199/82) [1983] ECR 3595, ECJ
*Armitage v Nurse* [1998] Ch 241; [1997] 3 WLR 1046; [1997] 2 All ER 705, CA
*Atkinson v Newcastle and Gateshead Waterworks Co* (1877) 2 ExD 441, CA
*Attorney General v Newspaper Publishing plc* [1988] Ch 333; [1987] 3 WLR 942; [1987] 3 All ER 276, Sir Nicolas Browne-Wilkinson V-C and CA
*Baker, In re* (1890) 44 Ch D 262, CA
*Bassett v Godschall* (1770) 3 Wils KB 121
*Bennett v Comr of Police of the Metropolis* The Times, 24 October 1997; (1998) 10 Admin LR 245
*Berkovitz v United States* (1988) 486 US 531
*Brasyer v Maclean* (1875) LR 6 PC 398, PC
*Bromage v Prosser* (1825) 4 B & C 247
*Bullo and Bonivento, Criminal proceedings against* (Case 166/85) [1987] ECR 1583, ECJ
*Burgoyne v Moss* (1768) 1 East 563n
*Burdett v Abbott* (1811) 14 East 1
*Candlewood Navigation Corpn Ltd v Mitsui OSKLines Ltd* [1986] AC 1; [1985] 3 WLR 381; [1985] 2 All ER 935, PC
*Cannock Chase District Council v Kelly* [1978] 1 WLR 1; [1978] 1 All ER 152, CA

A *Comitato di Coordinamento per la Difesa della Cava v Regione Lombardia* (Case C-236/92) [1994] ECR I-483, ECJ
*Commission of the European Communities v Federal Republic of Germany* (Case 29/84) [1985] ECR 1661, ECJ
*Commission of the European Communities v Federal Republic of Germany* (Case 205/84) [1986] ECR 3755, ECJ
*Commission of the European Communities v Federal Republic of Germany* (Case
B C-361/88) [1991] ECR I-2567, ECJ
*Commission of the European Communities v Federal Republic of Germany* (Case C-237/90) [1992] ECR I-5973, ECJ
*Commission of the European Communities v Italian Republic* (Case 300/81) [1983] ECR 449, ECJ
*Commission of the European Communities v Italian Republic* (Case C-287/91) [1992] ECR I-3515, ECJ
C *Commission of the European Communities v Italian Republic* (Case C-365/97) [1999] ECR I-7773, ECJ
*Commission of the European Communities v Kingdom of Belgium* (Case 42/89) [1990] ECR I-2821, ECJ
*Compania Maritima San Basilio SA v Oceanus Mutual Underwriting Association (Bermuda) Ltd* [1977] QB 49; [1976] 3 WLR 265; [1976] 3 All ER 243, CA
*Dorset Yacht Co Ltd v Home Office* [1970] AC 1004; [1970] 2 WLR 1140; [1970]
D 2 All ER 294, HL(E)
*Ealing London Borough Council v Metha* (unreported) 24 April 1997; Court of Appeal (Civil Division) Transcript No 1449 of 1997, CA
*Elguzouli-Daf v Comr of Police of the Metropolis* [1995] QB 335; [1995] 2 WLR 173; [1995] 1 All ER 833, CA
*Elliott v Chief Constable of Wiltshire* The Times, 5 December 1996
*Emmott v Minister for Social Welfare* (Case C-208/90) [1993] ICR 8; [1991] ECR
E I-4269, ECJ
*Everett v Griffiths* [1920] 3 KB 163, CA; [1921] 1 AC 631, HL(E)
*Farrington v Thomson and Bridgland* [1959] VR 286
*Flanagan v Comr of the Australian Federal Police* (1996) 60 FCR 149
*Germany (Federal Republic of) v European Parliament* (Case C-233/94) [1997] ECR I-2405, ECJ
*Gerrard v Manitoba* (1992) 98 DLR (4th) 167
F *Gibbs v Rea* [1998] AC 786; [1998] 3 WLR 72, PC
*Gizzonio v Chief Constable of Derbyshire* The Times, 29 April 1998; Court of Appeal (Civil Division) Transcript No 559 of 1998, CA
*Gollins v Gollins* [1964] AC 644; [1963] 3 WLR 176; [1963] 2 All ER 966, HL(E)
*Horrocks v Lowe* [1975] AC 135; [1974] 2 WLR 282; [1974] 1 All ER 662, HL(E)
*Institute of Chartered Accountants in England and Wales v Customs and Excise Comrs* [1999] 1 WLR 701; [1999] 2 All ER 449, HL(E)
G *Irish Aerospace (Belgium) NV v European Organisation for the Safety of Air Navigation* [1992] 1 Lloyd's Rep 383
*J L Holdings Pty Ltd v Queensland* (unreported) 26 May 1995, Federal Court of Australia
*Jones v Gordon* (1877) 2 App Cas 616, HL(E)
*Julius v Oxford (Bishop of)* (1880) 5 App Cas 214, HL(E)
*Kolpinghuis Nijmegen BV, Criminal proceedings against* (Case 80/86) [1987]
H ECR 3969, ECJ
*Lithgow v United Kingdom* (1986) 8 EHRR 329
*Lloyd v McMahon* [1987] AC 625; [1987] 2 WLR 821; [1987] 1 All ER 1118, CA and HL(E)
*Lonrho plc v Fayed* [1992] 1 AC 448; [1991] 3 WLR 188; [1991] 3 All ER 303, HL(E)

*McC (A Minor), In re* [1985] AC 528; [1984] 3 WLR 1227; [1984] 3 All ER 908, HL(NI) A
*McGillivray v Kimber* (1915) 26 DLR 164
*McLoughlin v O'Brian* [1983] 1 AC 410; [1982] 2 WLR 982; [1982] 2 All ER 298, HL(E)
*McMahon v Ireland* [1988] ILRM 610
*Madden v Madden* (1996) 65 FCR 354
*Marks & Spencer plc v Customs and Excise Comrs* (unreported) 14 December 1999; Court of Appeal (Civil Division) Transcript No 2126 of 1999, CA B
*Mattiazzo, Criminal proceedings against* (Case 422/85) [1987] ECR 5413, ECJ
*Micosta SA v Shetland Islands Council* [1984] 2 Lloyd's Rep 525
*Mighell v Reading* [1999] 1 CMLR 1251, CA
*Milward v Sargeant* (1786) 1 East 567
*Minories Finance Ltd v Arthur Young* [1989] 2 All ER 105
*Mogul Steamship Co Ltd v McGregor, Gow & Co* [1892] AC 25, HL(E)
*Odhavji v Woodhouse* (unreported) 30 December 1998, Ontario Court of Justice (General Division) C
*Owen and Gutch v Homan* (1853) 4 HLC 997, HL(E)
*Padfield v Minister of Agriculture, Fisheries and Food* [1968] AC 997; [1968] 2 WLR 924; [1968] 1 All ER 694, CA and HL(E)
*Peek v Gurney* (1873) LR 6 HL 377, HL(E)
*R v Allsop* (1976) 64 Cr App R 29, CA
*R v Bembridge* (1783) 3 Doug 327 D
*R v Borron* (1820) 3 B & Ald 432
*R v HM Treasury, Ex p British Telecommunications plc* (Case C-392/93) [1996] QB 615; [1996] 3 WLR 203; [1996] All ER (EC) 411; [1996] ECR I-1631, ECJ
*R v Hyam* [1975] AC 55; [1974] 2 WLR 607; [1974] 2 All ER 41, HL(E)
*R v International Stock Exchange of the United Kingdom and the Republic of Ireland Ltd, Ex p Else (1982) Ltd* [1993] QB 534; [1993] 2 WLR 70; [1993] 1 All ER 420, CA E
*R v Grantham* [1984] QB 675; [1984] 2 WLR 815; [1984] 3 All ER 166, CA
*R v Llewellyn-Jones* [1968] 1 QB 429; [1967] 3 WLR 1298; [1967] 3 All ER 225, CA
*R v Medicines Control Agency, Ex p Smith & Nephew Pharmaceuticals Ltd; Primecrown Ltd v Medicines Control Agency* (Case C-201/94) [1996] ECR I-5819, ECJ
*R v Ministry of Agriculture, Fisheries and Food, Ex p Hedley Lomas (Ireland) Ltd* (Case C-5/94) [1997] QB 139; [1996] 3 WLR 787; [1996] All ER (EC) 493; [1996] ECR I-2553, ECJ F
*R v Moloney* [1985] AC 905; [1985] 2 WLR 648; [1985] 1 All ER 1025, HL(E)
*R v Nedrick* [1986] 1 WLR 1025; [1986] 3 All ER 1, CA
*R v Parmenter; R v Savage* [1992] 1 AC 699; [1991] 3 WLR 914; [1991] 4 All ER 698, HL(E)
*R v Scott* [1975] AC 819; [1974] 3 WLR 741; [1974] 3 All ER 1032, HL(E)
*R v Secretary of State for Social Security, Ex p Sutton* (Case C-66/95) [1997] ICR 961; [1997] All ER(EC) 497; [1997] ECR I-2163, ECJ G
*R v Secretary of State for the Environment, Ex p Hackney London Borough Council* [1983] 1 WLR 524; [1983] 3 All ER 358, DC
*R v Secretary of State for the Home Department, Ex p Ruddock* [1987] 1 WLR 1482; [1987] 2 All ER 518
*R v Sinclair* [1968] 1 WLR 1246; [1968] 3 All ER 241, CA
*R v Terry* [1984] AC 374; [1984] 2 WLR 23; [1984] 1 All ER 65, HL(E)
*Roncarelli v Duplessis* (1959) 16 DLR(2d) 689 H
*Rookes v Barnard* [1964] AC 1129; [1964] 2 WLR 269; [1964] 1 All ER 367, HL(E)
*Rowling v Takaro Properties Ltd* [1988] AC 473; [1988] 2 WLR 418; [1988] 1 All ER 163, PC
*Royal Brunei Airlines Sdn Bhd v Tan* [1995] 2 AC 378; [1995] 3 WLR 64; [1995] 3 All ER 97, PC

A *Sanders v Snell* (1998) 157 ALR 491
*Simpson v Attorney General (Baigent's Case)* [1994] 3 NZLR 667
*Smith v East Elloe Rural District Council* [1956] AC 736; [1956] 2 WLR 888; [1956] 1 All ER 855, HL(E)
*Smith New Court Securities Ltd v Scrimgeour Vickers (Asset Management) Ltd* [1997] AC 254; [1996] 3 WLR 1051; [1996] 4 All ER 769, HL(E)
*Stovin v Wise* [1996] AC 923; [1996] 3 WLR 388; [1996] 3 All ER 801, HL(E)
B *Sutton v Johnstone* (1786) 1 Durn & E 493
*Tee v Lautro Ltd* (unreported) 16 July 1996, Ferris J
*Thomson (D C) & Co Ltd v Deakin* [1952] Ch 646; [1952] 2 All ER 361, CA
*United States v Gaubert* (1991) 499 US 315
*Van Duyn v Home Office* (Case 41/74) [1975] Ch 358; [1975] 2 WLR 760; [1975] 3 All ER 190; [1974] ECR 1337, ECJ
*von Colson v Land Nordrhein-Westfalen* (Case 14/83) [1984] ECR 1891, ECJ
C *Welham v Director of Public Prosecutions* [1961] AC 103; [1960] 2 WLR 669; [1960] 1 All ER 805, HL(E)
*Westminster City Council v Croyalgrange Ltd* [1985] 1 All ER 740, DC
*Whitelegg v Richards* (1823) 2 B & C 45
*Wilkinson v Downton* [1897] 2 QB 57
*Williams v Lewis* (1797) Peake Add Cas 157
*Williams v Solicitor to the Department of Social Security* (unreported) 11 June 1997; Court of Appeal (Civil Division) Transcript No 1183 of 1997, CA
D *Woolwich Equitable Building Society v Inland Revenue Comrs* [1993] AC 70; [1992] 3 WLR 366; [1992] 3 All ER 737, HL(E)

The following cases are referred to in the judgments in the Court of Appeal:

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*Agip (Africa) Ltd v Jackson* [1990] Ch 265; [1989] 3 WLR 1367; [1992] 4 All ER 385
E *Algemene Transport- en Expeditie Onderneming van Gend & Loos (NV) v Nederlandse administratie der belastingen* (Case 26/62) [1963] ECR 1, ECJ
*Allen v Gulf Oil Refining Ltd* [1981] AC 1001; [1981] 2 WLR 188; [1981] 1 All ER 353, HL(E)
*Amministrazione delle Finanze dello Stato v Simmenthal SpA* (Case 106/77) [1978] ECR 629, ECJ
*Anns v Merton London Borough Council* [1978] AC 728; [1977] 2 WLR 1024; [1977] 2 All ER 492, HL(E)
F *Ashby v White* (1704) 14 St Tr 695; 2 LdRaym 938; 3 LdRaym 320; 1 Smith's LC (13th ed) 253
*Baden v Société Générale pour Favoriser le Développement du Commerce et de l'Industrie en France SA (Note)* [1993] 1 WLR 509; [1992] 4 All ER 161
*Baird v The Queen* (1983) 148 DLR (3d) 1
*Banque Bruxelles Lambert SA v Eagle Star Insurance Co Ltd* [1995] QB 375; [1995] 2 WLR 607; [1995] 2 All ER 769, CA
G *Barnard v Restormel Borough Council* [1998] 3 PLR 27, CA
*Bassett v Godschall* (1770) 3 Wils KB 121
*Beaudesert Shire Council v Smith* (1966) 120 CLR 145
*Becker v Finanzamt Münster-Innenstadt* (Case 8/81) [1982] ECR 53, ECJ
*Bennett v Comr of Police of the Metropolis* [1998] 10 Admin LR 245
*Bourgoin SA v Ministry of Agriculture, Fisheries and Food* [1986] QB 716; [1985] 3 WLR 1027; [1985] 3 All ER 585, Mann J and CA
H *Bradford Third Equitable Benefit Building Society v Borders* [1941] 2 All ER 205, HL(E)
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*Brasserie du Pêcheur SA v Germany* [1997] 1 CMLR 971
*Brasyer v Maclean* (1875) LR 6 PC 398, PC
*Bullo and Bonivento, Criminal proceedings against* (Case 166/85) [1987] ECR 1583, ECJ
*Burgoyne v Moss* (1768) 1 East 563n
*CIA Security International v Signalson SA* (Case C-194/94) [1996] ECR I-2201; [1996] All ER(EC) 557, ECJ
*Calveley v Chief Constable of the Merseyside Police* [1989] AC 1228; [1989] 2 WLR 624; [1989] 1 All ER 1025, HL(E)
*Candlewood Navigation Corpn Ltd v Mitsui OSK Lines Ltd* [1986] AC 1; [1985] 3 WLR 381; [1985] 2 All ER 935, PC
*Carbonari v Università degli Studi di Bologna* (Case C-131/97) [1999] ECR I-1103, ECJ
*Comitato di Coordinamento per la Difesa della Cava v Regione Lombardia* (Case C-236/92) [1994] ECR I-483, ECJ
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**APPEAL** from Clarke J

By a notice of appeal dated 20 October 1997 the plaintiffs, Three Rivers District Council and some 400 other creditors of the Bank of Credit and Commerce International SA ("BCCI") together with the Bank of Credit and Commerce International SA (in liquidation), appealed from those parts of an order made on 2 October 1997 by Clarke J in the Commercial Court of the Queen's Bench Division whereby he (i) declared that on the facts pleaded in the plaintiffs' re-amended statement of claim dated 21 August 1995 the defendant, the Governor and Company of the Bank of England, was not capable of being liable to the plaintiffs for the tort of misfeasance in public office and that the plaintiffs' alleged losses were not capable in law of being caused by the defendant's acts or omissions, (ii) struck out the re-amended statement of claim as disclosing no reasonable cause of action and refused leave to re-re-amend the statement of claim on the grounds that the draft G H

A was frivolous and vexatious and (iii) dismissed the plaintiffs' action with costs.

The grounds of the appeal were (i) that the judge was wrong in law and should have held that on the pleaded facts the defendant was capable of being liable to the plaintiffs for the tort of misfeasance in public office for its failure to carry out duties placed upon it by the Banking Acts 1979 and 1987; (ii) that the judge ought to have held that liability for misfeasance in B public office would arise where a public officer acted or omitted to act otherwise than in an honest attempt to perform his duty and such act or omission caused loss to the plaintiff; (iii) that the judge was wrong to hold that it was necessary for the plaintiffs to show that the public officer knew, suspected or believed that his act or omission was unlawful and ought to have held that it was sufficient for the plaintiff to show that the public officer C was reckless or indifferent as to whether his act or omission was lawful, such recklessness or indifference being inconsistent with an honest attempt to perform his duty; (iv) that the judge ought to have held that the defendant was, on the pleaded facts, capable of being liable to the plaintiffs for misfeasance in public office; (v) that the judge was wrong to hold that it was also necessary for the plaintiff to show that the officer had actual knowledge that his act or omission would probably damage the plaintiff or a person in a D class to which the plaintiff belonged or, where the defendant believed or suspected that his act or omission would probably damage the plaintiff, that he did not ascertain whether or not that was so, or failed to make such inquiries as an honest and reasonable man would have made, and that the judge ought to have held either that questions of foreseeability of loss or damage to the plaintiff were irrelevant or that it was sufficient for a plaintiff E to show that loss or damage to him was a foreseeable result of the defendant's acts or omissions or that it was sufficient for the plaintiff to show that the public officer was reckless or indifferent as to whether his acts or omissions would cause loss; (vi) the judge was wrong to hold that it was necessary for the plaintiffs to show that the defendant knew the managers or operators of BCCI would probably act fraudulently; (vii) the judge ought to have held that on any test the defendant was on the pleaded facts capable of F being liable to the plaintiffs; (viii) the judge ought to have found that the plaintiffs' losses were capable of being caused by the acts or, omissions of the defendant; (ix) that the judge was wrong to hold that the plaintiffs enjoyed no relevant rights under Council Directive (77/780/EEC) ("the Directive of 1977") or were not entitled to rely on any rights given to them by EC law, that the directive did not intend that member states should be bound to G confer legally enforceable rights on savers or potential savers if the supervisory authority should fail to comply with its duties; (x) that the judge was wrong in holding that the plaintiffs could not obtain damages for the damage caused to them by the failure of the United Kingdom, through the defendant as an emanation of the state, to implement effectively in practice the provisions of the Directive of 1977; (xi) that the judge was wrong in H failing to hold that the pleaded facts were sufficient to render the defendant capable of being liable in damages to the plaintiffs for breach of duties imposed by or resulting from EC law; (xii) that the judge ought to have held there was a direct causal link between the defendant's pleaded breaches of duties imposed by EC law and the plaintiffs' rights under the Directive of 1977 on the one hand and the loss and damage suffered by the plaintiffs on

the other; (xiii) the judge should have held that, if the defendant was capable of being liable for breach of rights enjoyed by the plaintiffs by virtue of EC law, plaintiffs who were either existing or potential depositors at the time of such breaches would be entitled to recover in respect of losses caused by such breaches; (xiv) the judge was wrong to hold that there was nothing in EC law which should affect the common law approach to the question of the ingredients of the tort of misfeasance in public office; (xv) the judge was wrong to strike out the re-amended statement of claim as frivolous and vexatious in a case which was not plain and obvious; (xvi) the judge ought not to have struck out the statement of claim since his decision was premised on wrong conclusions as to the law; (xvii) the judge was wrong to conclude that on the pleaded facts the defendant was incapable of being liable to the plaintiffs for misfeasance in public office; (xviii) the judge, having found that the EC law issues merited a reference to the European Court of Justice, was wrong in law to strike out the plaintiffs' pleadings in so far as they raised EC law issues; (xix) the fact-finding exercise which the judge performed by reference to the Bingham report (Inquiry into the Supervision of the Bank of Credit and Commerce International (HC Paper (1992–1993) No 198) was one that was not open to him and he was wrong to treat the Bingham report as constituting conclusive proof of matters recorded therein; (xx) the judge's conclusion that there was no realistic possibility that Bingham LJ had not correctly set out the state of mind of the Bank at each stage and that there was no realistic possibility of more evidence coming to light of the Bank's state of mind was wrong and irrational.

By a respondent's notice dated 10 November 1997 the defendant contended that the judge's decision should be affirmed on the following additional or alternative grounds: (i) misfeasance in public office required an actual purpose or intention on the part of the defendant to injure the plaintiff; (ii) misfeasance in public office required an act aimed at or targeted at the plaintiff; (iii) the tort required actual knowledge by the defendant that its acts or omissions would inevitably or necessarily injure the plaintiff; (iv) whether the tort required knowledge by the defendant that its acts or omissions would inevitably and necessarily injure the plaintiff, or, as the judge found, knowledge that they would probably injure the plaintiff or a person in a class of which the plaintiff was a member, nothing less than actual knowledge would suffice; (v) misfeasance in public office required knowledge by the defendant that it had no power to do the act complained of and nothing less than actual knowledge would suffice; (vi) in order to maintain an action in misfeasance in public office the plaintiff had to have had a pre-existing legal right or interest which had been interfered with by the defendant; (vii) the Directive of 1977 imposed no liability on national competent authorities sounding in damages and granted no rights to any class of which the plaintiffs had been or were members; (viii) the Directive of 1977 imposed no duty on the bank, breach of which would sound in damages; (ix) the material before the judge clearly revealed that there was no common view among the member states to the effect that the banking supervisory authority owed any duty to persons in the position of the plaintiffs; (x) article 8 of the Directive of 1977 imposed a duty on the Bank only as to the grounds on which authorisation issued to a credit institution could be withdrawn; (xi) the plaintiffs could not claim under or as a result of EC law to the extent that they were merely potential depositors at the time

A when the defendant's alleged acts or omissions took place; (xii) if, contrary to the judge's findings, the Directive of 1977 intended to confer rights on the plaintiffs, any cause of action would lie against the United Kingdom as having failed to implement the directive, and not on the Bank: see *R v HM Treasury, Ex p British Telecommunications plc* (Case C-392/93) [1996] QB 615; (xiii) there had been no actionable failure to implement on the part B either of the UK or the Bank; (xiv) the plaintiffs' case on causation amounted to no more than an allegation that but for the Bank's alleged acts or omissions they could not have had deposits with BCCI when it collapsed: the alleged acts or omissions did no more than provide the occasion for the plaintiffs to suffer loss; (xv) the plaintiffs' alleged loss was caused by the deliberate acts or omissions of third parties; (xvi) the immediate cause of the plaintiffs' loss was the fraud of BCCI SA's managers; (xvii) the plaintiffs' C alleged losses were not capable under EC law of having been caused by the defendant; (xviii) the defendant was incapable of being liable to the plaintiffs for misfeasance in public office to the extent that they were merely potential depositors with the second plaintiff at the dates of the acts or omissions of the defendant which were alleged to constitute the tort of misfeasance in public office; (xix) liability to potential depositor plaintiffs would expose the D defendant to potential liability in an indeterminate amount for an indeterminate time to an indeterminate class and would therefore be contrary to public policy; (xx) the defendant was incapable of being liable to the plaintiffs under or as a result of EC law to the extent that they were merely potential depositors with the second plaintiff at the date of the acts or omissions of the defendant which were alleged to give rise to that liability E because, if as was denied any relevant right was conferred on any class of persons by EC law, it was conferred on the class comprising persons who were depositors at the time when the alleged acts or omissions took place. The defendant also sought to affirm the judge's decisions to strike out the re-amended statement of claim and to refuse to give leave to re-re-amend the statement of claim on additional grounds.

The facts are stated in the judgment of Hirst and Robert Walker LJJ.

F

*Lord Neill of Bladen QC, David Vaughan QC, Richard Sheldon QC, Robin Dicker* and *Dominic Dowley* for the plaintiffs.

*Nicholas Stadlen QC, Paul Lasok QC, Mark Phillips, Bankim Thanki, Rhodri Thompson* and *Ben Valentin* for the defendant.

*Cur adv vult*

G

4 December 1998. The following judgments were handed down.

**HIRST LJ**

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## INTRODUCTORY

### I

*Introductory sketch*

This is the joint judgment of myself and Robert Walker LJ, to which we have both contributed.

This is an appeal (with the leave of the judge) from an order of Clarke J made on 2 October 1997. The order struck out the plaintiffs' re-amended statement of claim and dismissed the action. It also made declarations which reflected the judge's three successive judgments (delivered on 1 April 1996, 10 May 1996 and 30 July 1997). The first two of those judgments (reported at [1996] 3 All ER 558 and 634) dealt with three preliminary issues of law which had been directed by the judge's order of 19 July 1995. The third judgment considered various further amendments to the plaintiffs' statement of claim which had been proposed, and concluded (on the assumption that

A the earlier judgments were correct) that the plaintiffs' claim was bound to fail, and should be struck out.

The plaintiffs (the appellants in this court) consist of over 6,000 persons from all over the world who were depositors with United Kingdom branches of Bank of Credit and Commerce International SA ("BCCI SA") together with BCCI SA (in liquidation) as equitable assignee of the depositors' claims. B The defendant (the respondent in this court) is the Governor and Company of the Bank of England ("the Bank"). As is notorious, BCCI SA and its associated companies collapsed in July 1991 with huge deficiencies, much of which resulted from fraud on a very large scale. As Bingham LJ said in the published summary of the report of his Inquiry into the Supervision of the Bank of Credit and Commerce International (HC Paper (1992–93) No 198 ("the Bingham report"), p 29, para 2.3: "the systematic frauds now thought C to have been practised in BCCI were on a scale which had never been known before . . ."

BCCI SA was incorporated in Luxembourg, as was its holding company. The other principal company in the group, Bank of Credit and Commerce Overseas Ltd ("Overseas") was incorporated in the Cayman Islands. In this judgment we will use "BCCI" to refer to the group or its managers generally, D in contexts where it is unnecessary or inappropriate to refer to any particular group company. No group company was incorporated in any part of the United Kingdom. Nevertheless BCCI SA carried on a large-scale business as a deposit-taker in this country, and after a few years it became clear that its principal place of business was in London. Responsibility for supervision of its activities in this country was borne by the Bank (concurrently in some respects with the regulatory authorities in Luxembourg) under the Banking E Acts of 1979 and 1987, which are referred to further in section II below.)

The first plaintiff, Three Rivers District Council (a local authority which made deposit with BCCI SA), and its co-plaintiffs other than BCCI SA itself commenced proceedings by a writ issued on 24 May 1993. BCCI SA was not joined as a claiming plaintiff until 30 November 1994, and then only after interlocutory skirmishing which reached this court [1995] 4 All ER 312. F The plaintiffs' essential claim was for damages for the tort of misfeasance in public office.

On 19 July 1995 the judge directed that the following questions as later reformulated should be tried as preliminary issues, on the assumption of the truth of the facts pleaded in the re-amended statement of claim. (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 capable of being G 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?

These are the first, second and third preliminary issues referred to in the three judgments which resulted in the order under appeal. The judge's conclusions on these preliminary issues, and the further hearings leading up H to the judgment of 30 July 1997, are summarised in section IV below. The issues on the appeal (as they appear from the plaintiffs' lengthy notice of appeal and the Bank's even lengthier respondent's notice) are summarised in section V below.

Before coming to those matters, however, it is necessary to give a brief outline of domestic and European legislation relating to banking supervision

(section II) and the rise and fall, between 1972 and 1991, of BCCI SA and its associated companies (section III). This outline of the history will have to be filled in with more detail at a later stage. It is heavily indebted to the Bingham report, although the extent to which either party can rely on what that report says about controversial issues is a point to which it will be necessary to return.

II

*Banking regulation*

Until the enactment of the Banking Act 1979 there was no formal and systematic regulation of banking in the United Kingdom. Regulation and supervision depended on the Bank's informal influence and on a disparate collection of statutory provisions, including schedule 8 to the Companies Act 1948, under which banks recognised by the Board of Trade and the Bank obtained certain accounting privileges. The secondary banking crisis of 1973–74 was one matter prompting legislative activity in this area; another was the impact of what is now the European Union ("EU", which we use to include the EEC and the EC).

The 1979 Act was preceded by a White Paper in 1976 and also by the First Council Banking Co-ordination Directive of 12 December 1977, Council Directive (77/780/EEC). The Directive of 1977 was the first important step taken by the EU on the road to creating a common market in banks and other credit institutions. That is common ground between the parties, but there is acute controversy as to whether the Directive of 1977 conferred any (and if so what) directly enforceable rights on depositors. The plaintiffs rely particularly on articles 3, 7 and 8, which are in Title II (Credit institutions having their head office in a member state and their branches in other member states). Article 3 begins:

> "(1) Member states shall require credit institutions subject to this Directive to obtain authorisation before commencing their activities. They shall lay down the requirements for such authorisation subject to paragraphs (2), (3) and (4) and notify them to both the Commission and the Advisory Committee. (2) Without prejudice to other conditions of general application laid down by national laws, the competent authorities shall grant authorisation only when the following conditions are complied with: the credit institution must possess separate own funds, the credit institution must possess adequate minimum own funds, there shall be at least two persons who effectively direct the business of the credit institution. Moreover, the authorities concerned shall not grant authorisation if the persons referred to in the third indent of the first sub-paragraph are not of sufficiently good repute or lack sufficient experience to perform such duties."

Paragraphs (3) and (4) of article 3 contain further provisions relating to authorisation, including (article 3(3)(d), first indent) the security of savings as one of the aims of the general criteria for authorisation. Article 6 also refers to the protection of savings. Article 7 requires the competent authorities of the member states concerned to collaborate closely in the supervision of credit institutions with their head offices in one member state and their branches in another. They are to supply one another with

A information needed to facilitate supervision and monitoring of liquidity and solvency. Article 8 deals with the circumstances in which the competent authorities may withdraw an authorisation already granted. These include article 8(1)(c) and circumstances in which the institution no longer fulfils the conditions for authorisation, or no longer possesses sufficient own funds or can no longer be relied on to fulfil its obligations to its creditors.

B The 1979 Act gave effect to the Directive of 1977, but went further than the Directive of 1977 required in establishing a new statutory system of banking supervision in the United Kingdom. The 1979 Act drew a distinction between banks (which might be recognised under section 3(1) if satisfying the criteria in Schedule 2, Part I) and deposit-taking institutions (which might be licensed under section 3(2) if satisfying the criteria in Schedule 2, Part II). In order to be recognised as a bank an institution had to C provide either a wide range of banking services or a highly specialised banking service. It had to enjoy a high reputation and standing (Schedule 2, Part I, paragraph 1); its business had to be carried on with integrity, prudence and professional skill (paragraph 3); the business had to be effectively directed by at least two individuals (paragraph 4—the "four eyes" criterion); and it had to have and maintain net assets to a specified minimum value (paragraph 5). The criteria for licensing a deposit-taking institution D were comparable but in some respects less stringent, including (Schedule 2, Part II, paragraphs 7 and 10) the requirement that every director, controller and manager should be a fit and proper person and that the business should be conducted prudently. "Controller" was widely defined so as to include anyone who (alone or with associates) had 15% of the voting power over an institution. Section 3(5) provided:

E

> "In the case of an institution whose principal place of business is in a country or territory outside the United Kingdom, the Bank may regard itself as satisfied that the criteria in paragraphs 3 and 6 of Schedule 2 to this Act or, as the case may be, paragraphs 7 and 10 of that Schedule are fulfilled if—(a) the relevant supervisory authorities inform the Bank that they are satisfied with respect to the management of the institution and its F overall financial soundness; and (b) the Bank is satisfied as to the nature and scope of the supervision exercised by those authorities."

Section 4 required the Bank to make an annual report listing recognised and licensed institutions and stating the principles on which the Bank was acting. Section 36 prohibited any person who was not a recognised bank (or within other limited exceptions) from using banking names, but section 36(8) G largely lifted that prohibition for a licensed institution with its principal place of business outside the United Kingdom. The 1979 Act gave the Bank powers to revoke recognition or a licence (subsections (6) to (8)); various investigative powers (subsections (16) to (17)); and the ultimate sanction of a winding up petition (section 18). Part II (subsection (21) ff) established a funded deposit protection scheme. In order to perform its functions under H the 1979 Act the Bank formed, in March 1980, a new Banking Supervision Division ("BSD"). Mr W P Cooke became its first head, with Mr Brian Gent as his deputy.

The system of banking supervision introduced by the 1979 Act was within five years tested and shaken by the failure of Johnson Matthey Bankers Ltd. The Bank mounted a rescue operation which was in part

financed by the Bank itself. This serious failure led to various committees, a new White Paper and a new statute, the Banking Act 1987. Meanwhile in 1983 the Basle Committee of central bank governors, following the failure of the Banco Ambrosiano, reached the so-called Basle Concordat of 1983 as to the supervision of foreign establishments of international banks. It is not necessary to go into the details of the Concordat but it is another element in the history of the matter.

The 1987 Act repealed and replaced the 1979 Act almost in its entirety. In place of the previous dual system of recognised banks and licensed deposit-takers it established a single system of authorisation of deposit-taking institutions (Part I) but reinforced by restrictions on the use of banking names which in practice preserved at least some trace of the dual system (Part III). The deposit protection scheme was enlarged and continued (Part II). The Bank was (section 1(1)) to "have the powers conferred on it by this Act and the duty generally to supervise the institutions authorised by it in the exercise of those powers," and also (section 1(2)) to have the duty "to keep under review the operation of this Act and developments in the field of banking which appear to it to be relevant to the exercise of its powers and the discharge of its duties". Section 1(4) contained an immunity which is of importance to this case and goes a long way to explaining why the plaintiffs have undertaken the arduous burden of seeking to prove misfeasance in public office:

> "Neither the Bank nor any person who is a member of its Court of Directors or who is, or is acting as, an officer or servant of the Bank shall be liable in damages for anything done or omitted in the discharge or purported discharge of the functions of the Bank under this Act unless it is shown that the act or omission was in bad faith."

The Bank was required (section 2) to establish a committee to be known as the Board of Banking Supervision, with three ex officio members and six independent members. The immunity in section 1(4) extended to each member of the Board.

The minimum criteria for authorisation were set out in Schedule 3 to the 1987 Act. For an institution not incorporated in the United Kingdom there were five basic requirements: (i) every director, controller and manager was to be a fit and proper person; (ii) the "four eyes" requirement; (iii) the institution's business was to be conducted in a prudent manner; (iv) it was to be carried on with integrity and professional skill; and (v) the institution had to have net assets of at least £1m. Section 9 provided for the grant or refusal of authorisation and section 9(3) was in the following terms, reproducing section 3(5) of the 1979 Act:

> "In the case of an application by an applicant whose principal place of business is in a country or territory outside the United Kingdom the Bank may regard itself as satisfied that the criteria specified in paragraphs 1, 4 and 5 of [Schedule 3—points (i), (iii) and (iv) above] are fulfilled if—(a) the relevant supervisory authority in that country or territory informs the Bank that it is satisfied with respect to the prudent management and overall financial soundness of the applicant; and (b) the Bank is satisfied as to the nature and scope of the supervision exercised by that authority."

A In Part III (Banking names and descriptions) section 68(5) corresponded to section 36(8) of the 1979 Act, but the effect of section 68(3) was to permit BCCI SA (as an institution incorporated and carrying on business, albeit on a small scale, in Luxembourg) to call itself a bank when carrying on business in the United Kingdom.

It is to be noted that several years before the coming into force of the 1987 B Act the Bank (in the person of Mr Gent) had become satisfied that BCCI SA's head office was at its London premises, 100, Leadenhall Street (see his memorandum of 15 July 1983). It seems likely (although it is not common ground) that Mr Gent was right in his view, and that a banks head office (as the effective centre of management control of its business) was to be equated with its principal place of business. The implication is that section 3(5) or C section 36(8) of the 1979 Act did not apply if (as seems likely) the office at 100, Leadenhall Street was the head office when BCCI SA was first licensed. However the transitional provisions of the 1987 Act made it unnecessary for BCCI SA to make a fresh application under the 1987 Act.

Section 11 of the 1987 Act dealt with the revocation of authorisation. The Bank had power to revoke the authorisation of an institution in any of D the five sets of circumstances set out in section 11(1), of which the first (in paragraph (a)) was that it appeared to the Bank that "any of the criteria specified in Schedule 3 to this Act is not or has not been fulfilled, or may not be or may not have been fulfilled, in respect of the institution". Section 11(1)(e) referred to the interest of depositors or potential depositors being threatened in any other way. Sections 16 and 17 (statement of principles and E annual list), 40 (information), 41 (investigation) and 92 (winding up) corresponded to sections 4 and 16 to 18 of the 1979 Act. Section 47 was a new provision enabling a bank auditor to act as a "whistle-blower" to the Bank despite any duty of confidentiality. Section 107 and Schedule 5 contained transitional provisions.

When BCCI SA was first incorporated in 1972 the regulatory authority in F Luxembourg was the Commissariat au Contrôle des Banques or Luxembourg Banking Commission ("LBC"), which in May 1983 became the Institut Montaire Luxembourgeois ("IML"). As the business of the BCCI group grew in volume and geographical extent the LBC/IML made no secret of its inability to exercise effective supervision over a worldwide group whose presence within Luxembourg was little more than nominal.

G The Directive of 1977 was followed by other directives, the most important of which are listed in paragraph 436 of the Bank's written submissions. In particular, the Second Banking Co-ordination Directive, Council Directive (89/646/EEC) aimed at a "passport" approach under which a bank authorised in one member state could open a branch or carry on banking business in another member state without further authorisation. H However the period for compliance by member states with the Directive of 1989 expired only on 1 January 1993.

[Section III of their Lordships' judgment dealt with "The Rise and Fall of BCCI" and has been omitted from this report.]

IV

*The proceedings before Clarke J*

The first judgment of Clarke J, handed down on 1 April 1996, addressed the three preliminary issues set out in section I above. The judge's conclusions are summarised [1996] 3 All ER 558, 632–633 and were (with a little further abbreviation) as follows.

1. The first issue (misfeasance in public office) (1) The tort is concerned with deliberate and dishonest abuse of power by a public officer. (2) Malice (in the sense of an intention to injure) and relevant knowledge on the part of the officer are alternative (not cumulative) requirements, since to act with such knowledge is to act maliciously. Relevant knowledge is knowledge (i) that the officer has no power to act in that way and (ii) that the act will probably injure the plaintiff. (3) For the first element of relevant knowledge (unlawfulness) it is sufficient if the officer has actual knowledge that that act was unlawful or if, suspecting that he has no power to do it, he does not ascertain, or fails to take such steps as an honest and reasonable man would take to ascertain, the true position. (4) The test for the second element of relevant knowledge (probable injury) is the same. (5) If the states of mind at (3) and (4) above do not amount to actual knowledge, they amount to recklessness. (6) If the plaintiff establishes that the defendant was a public officer or entity and (i) intended to injure the plaintiff or a class including the plaintiff (limb one) or (ii) had relevant knowledge of the unlawfulness of his act and of probable injury to the plaintiff or a class including the plaintiff (limb two), and the plaintiff had suffered loss caused by the wrongful act, he can recover damages.

The judge also held that the plaintiffs had no relevant rights under EU law, and that there is nothing in the principles of EU law which alters the ingredients of the tort of misfeasance in public office. He recorded, at p 625, that one of the few points on which the parties were agreed was that he should not refer the meaning and effect of the Directive of 1977 to the Court of Justice under article 177 of the Treaty. The judge therefore saw his answer to the question posed by the first issue as depending on and coinciding with his answer on the second issue, and he provisionally answered both questions in the negative, but he gave the parties the opportunity of making further submissions.

2. The second issue (causation). Subject to further submissions the judge answered this question in the negative: the plaintiff's alleged losses were not in law caused by the Bank's acts or omissions.

3. The third issue (claim as depositors or potential depositors). In principle, the judge would have decided this question in favour of the plaintiffs.

The second judgment was given on 10 May 1996 after the judge had heard further submissions. It was largely concerned with the contents of the statement of claim as it then stood. Because further amendments have since been formulated and debated it is unnecessary to go further into the details of the second judgment. The judge concluded, at pp 639–640, that the statement of claim as it then stood did not allege the necessary knowledge of or recklessness as to probable loss, and he confirmed his provisional negative answers on the first and second issues. He added that it did not follow that

A the plaintiffs' claim must be dismissed; he contemplated that it might be kept alive by further amendment of the statement of claim.

There were then further hearings of an application by the plaintiffs for leave to make further amendments, and an application by the Bank to strike out the whole of the statement of claim. On 30 July 1997 the judge handed down a long judgment (it runs to 172 pages of transcript) concluding that B the plaintiffs' claim was bound to fail, and that the statement of claim should be struck out and the action dismissed. The general structure of the third judgment is a summary of the procedural history, the judge's legal conclusions and the evolution of the proposed amendments. Then there is a discussion of the material (including the Bingham report) available or likely to become available to the plaintiffs in order to make good their claim, and general observations as to the court's task in deciding whether a claim is C bound to fail. There is a summary of the crucial paragraphs of the statement of claim. Then comes a detailed consideration of the pleaded allegations (and proposed amendments of them) arranged in chronological order in four main sections (which are themselves subdivided): (1) the grant of a licence under the 1979 Act; (2) June 1980 to December 1986; (3) December 1986 to April 1990; and (4) April 1990 to July 1991. Then came the judge's D conclusions and a summary.

V

*Issues on the appeal*

By their notice of appeal the plaintiffs seek to have the judge's order of 2 October 1997 set aside. Instead they seek declarations that on the basis of E what is pleaded in the existing statement of claim, or alternatively on the basis of draft amendments dated 6 January 1997 (which they seek leave to make): (1) the Bank is capable of being liable to the plaintiffs for misfeasance in public office; (2) the Bank is capable of being liable to the plaintiffs for breaches of EU law; and (3) the plaintiffs' alleged losses are capable of being caused in law by the Bank's acts or omissions.

There are 21 numbered paragraphs of the grounds of appeal. Some are by F way of introduction or summary, and some raise detailed points as to the adequacy of particular passages in the existing or draft pleadings. The main points of principle which arise are, in relation to the tort of misfeasance in public office, in paragraphs 2, 3 and 5 (which put forward a wide formulation of the essentials of the tort, and criticise the judge's view of recklessness and his requirement of knowledge of or recklessness as to G probable loss). In relation to EU law the main point of principle, elaborated in paragraph 9, is that the judge was wrong to hold that the Directive of 1977 did not confer enforceable rights on depositors. Paragraphs 12 and 13 are concerned mainly with causation in the context of EU law, and paragraph 14 contends that EU jurisprudence should in any event influence (and reduce the burden of establishing) the tort of misfeasance in public office. In relation to the striking-out order paragraphs 15, 16 and 18 criticise H it as inappropriate because this was not a clear case, because it is said to have been based on mistaken premises (viz as to the ingredients of the tort) and because of the possibility of an article 177 reference (although neither side favoured a reference). Paragraphs 19 and 20 criticise the judge for the way in which he used and relied on the Bingham report, and for his conclusion

that there was no realistic possibility of more evidence becoming available, by any means, to cast light on the state of mind of the Bank or any of its officials.

The respondent's notice (partly to affirm the judge's order on other grounds and partly to vary it) contains no fewer than 40 numbered paragraphs. Its general effect can be summarised: (1) as to misfeasance in public office, the notice seeks to uphold the judge's conclusion on the first preliminary issue on the additional grounds that the tort requires a more stringent test of the defendant's mental state, being limited (on one formulation) to "targeted malice" (paragraphs 1 to 5) and that the plaintiff must have had a pre-existing legal right or interest (paragraph 6); (2) as to EU law, the notice seeks to uphold the judge's conclusion on the additional grounds, elaborated in various ways, that the Directive of 1977 did not impose enforceable duties on national regulators (paragraphs 7 to 11); and that if there were an actionable breach the proper defendant would be the Attorney General (paragraphs 12 to 13); (3) as to causation, the notice seeks to uphold the judge's conclusion on the second preliminary issue on additional grounds negativing causation either under English law or under EU law (paragraphs 14 to 17); (4) as to the third preliminary issue the notice seeks to vary the judge's order on the grounds (paragraphs 18 to 20) that the plaintiffs were not an existing or ascertainable class and had no existing rights or interests; paragraph 19 echoes the well known saying of Cardozo CJ in *Ultramares Corpn v Touche* (1931) 255 NY 170, 179; (5) as to the judge's decision to strike out the whole statement of claim, the notice seeks to uphold the judge's order on all the additional grounds in paragraphs 1 to 20, and also on nine further grounds (paragraphs 21 to 29) of which the first and the last assert a failure to plead dishonesty and bad faith with sufficient particularity; (6) as to the judge's refusal of leave for further amendment of the statement of claim, the notice seeks both to uphold and to vary the judge's order on the ground (paragraph 30) that the proposed amendments were an abuse of process, and (paragraph 31 and paragraphs 32 to 40) on the same grounds as those relied on (in relation to the strike-out) in paragraphs 21 to 29 of the notice.

The appeal as a whole does therefore raise important issues of principle as to the tort of misfeasance in public office, as to causation and the rights of an indeterminate body of depositors and as to EU law. It also raises issues as to striking out and amending pleadings. Those issues are addressed below in that order.

## MISFEASANCE IN PUBLIC OFFICE

## VI

*The issues and arguments in broad outline*

We have already summarised Clarke J's conclusions in his first judgment [1996] 3 All ER 558, 632–633, which were based on a very painstaking and thorough consideration of the authorities, at pp 564–594: see section IV above.

Proposition (1) ("the tort is concerned with deliberate and dishonest abuse of power by a public officer") is uncontroversial, and indeed Lord Neill was at pains to emphasise that the hallmark of the tort is dishonesty. However there was a wide gulf between the parties as to the meaning in this

A context of dishonesty, which Lord Neill categorised as no more than a failure on the part of the bank to make an honest attempt to fulfil its statutory duty, whereas Mr Stadlen interpreted it in a more traditional manner, applying what he described as an ordinary jury test.

On proposition (2) there was no dispute as to the first limb of the tort which is that the defendant intended to injure the plaintiff and that the B plaintiff had suffered loss as a result. (i e targeted malice). The dispute centred on the second and alternative limb of the tort as identified by Clarke J, viz: that the defendant had actual knowledge not only of the unlawfulness of his act, but also (critically) of probable injury to the plaintiff, and that the plaintiff had suffered loss as a result.

Lord Neill's primary submission was that there was no need for the plaintiff to prove any mental state at all as to ensuing loss, on the footing that C the tort of misfeasance is an action on the case which is actionable upon proof of special damage. That he submitted is the approach adopted in all the long catalogue of misfeasance cases up until *Bourgoin SA v Ministry of Agriculture, Fisheries and Food* [1986] QB 716. Alternatively, basing himself on the ipsissima verba of the *Bourgoin* case, he submitted that in the second limb the correct test is not that the defendant had actual knowledge D of probable injury, but rather an objective test that such injury was reasonably foreseeable.

He epitomised his submissions:

> "The plaintiffs' case in relation to the nature and requirements of the tort of misfeasance in public office in English law (ignoring at this stage, the impact of the Directive of 1977) can be summarised as follows. E (1) The tort of misfeasance in public office is concerned with an abuse, or deliberately wrongful use, of the powers given to a public officer. The tort provides a remedy against dishonest administration by public officers. (2) There are two well established and alternative limbs of the tort, viz malice, in the sense of an intention to injure (the first limb), and knowledge by the defendant that he has no power to do the act complained of (the second limb). (3) However, liability will arise in any F case where there has been an abuse, or a deliberately or recklessly wrongful use, of the powers given to a public officer. (4) The boundaries of the tort are not tightly drawn and there is scope for further development. (5) The tort involves deliberate conduct. It requires the plaintiff to establish that the defendant knowingly acted unlawfully in the sense indicated above. To this extent it is also an intentional tort. A G defendant can always avoid liability by choosing not to act in a way that he knows is unlawful. In this sense the tort is sharply different from the torts of negligence or breach of statutory duty. (6) For the purpose of the requirement of the second limb, that the public officer knows that he has no power to do the act complained of, it is sufficient that the officer had actual knowledge that the act was unlawful or deliberately shut his eyes or recklessly failed to make the type of inquiries that a public officer H honestly intending to carry out his statutory duties would have made. (7) There is no justification, either in principle or on the authorities, for holding (as Clarke J held in this case) that, in addition to knowing that he was acting unlawfully, an officer must also have known that his actions *would probably* injure the plaintiff or a person in a class of which the

plaintiff is a member. (8) Questions of the foreseeability of, or the public officer's knowledge, belief or suspicion as to, loss or damage to the plaintiff or to persons in a class of which the plaintiff was a member are irrelevant. (9) Alternatively, it is sufficient for a plaintiff to show that loss or damage to him or to a person in a class of which he was a member were a foreseeable result of the public officer's acts or omissions or that the public officer's acts or omissions created a foreseeable risk of such loss or damage. (10) Alternatively it is sufficient for the plaintiff to show that the public officer was reckless or indifferent as to whether his acts or omissions would or might result in loss or damage to the plaintiff or to a person or persons in a class of which the plaintiff was a member. There is no public policy in protecting a public officer who acted in a manner that he knew to be unlawful. The concern is, and should only be, to ensure that a public officer who makes an honest attempt to exercise his powers but who, as a result of some mistake, acts unlawfully, is protected from liability. Imposing liability on a public officer who knowingly acts unlawfully will not have a chilling effect on the actions of public officers. Nor will it open any floodgates."

Mr Stadlen sought to uphold Clarke J's formulation of the tort, which was based on the judge's interpretation of the *Bourgoin* case, and was content to present his case on that foundation. However, he did not abandon the argument which he presented before Clarke J, that the formulation should be considerably narrower, i e restricted to cases where the public officer has the purpose of injuring the plaintiff (targeted malice) or actually knows that his act will necessarily injure the plaintiff, and in either case only when the plaintiff enjoyed an antecedent legal right or interest which was interfered with by the defendant.

He epitomised his submissions:

"Clarke J was correct to reject the plaintiffs' submissions for the reasons given in his judgment and the reasons set out below. (1) On several occasions, the English Court of Appeal, Divisional Court and High Court have expressly or implicitly approved Clarke J's analysis of the tort. (2) The ratios and dicta of the older English cases show that intention to injure and/or wilfully injuring the plaintiff are essential elements of the tort. The older cases are inconsistent with the plaintiffs' proposition that foreseeability of loss (reasonable or otherwise) or objective recklessness as to loss is sufficient to found liability. (3) At the very lowest, there is no support for that proposition in any of the older English cases: (a) there is no case in which the ratio was that foreseeability/objective recklessness is sufficient; (b) there is no case in which there are even obiter dicta to that effect; (c) there is no case in which a claim in misfeasance succeeded without proof of actual intention to injure the plaintiff and actual knowledge that he would necessarily suffer loss. (4) There is no support for the proposition in the *Bourgoin* case. The ratio in the *Bourgoin* case was very narrow: actual foresight that the plaintiff will necessarily suffer loss is sufficient to make good a claim in misfeasance even if it is not pleaded that the public officer acted with the purpose of inflicting such loss on the plaintiff. If that represented an extension in the ambit of the tort from that to be deduced from the older English cases, which the Bank does not accept, it was minimal."

A There was also a significant divergence between Lord Neill and Mr Stadlen as to the meaning of recklessness in this context, which led to a consideration of a number of criminal cases where recklessness was in issue.

Both sides, albeit from different standpoints, emphasised sharply the contrast between this tort and negligence, it being well established by two recent Privy Council cases cited in detail below that, in comparable B circumstances, a regulator owes no duty of care to depositors or potential depositors. This is of course of crucial significance in the present case, since (as the Bingham report shows, and as Mr Stadlen concedes) there would otherwise be a very powerful case in negligence against the Bank. Indeed one of Mr Stadlen's principal objections to Lord Neill's primary submission (that the tort constitutes an action on the case on proof of special damage) was that it would result in a liability being imposed on a regulator in C circumstances substantially, if not entirely, similar to those in which a bank regulator's liability in negligence has been so firmly rejected by the Privy Council.

A further key element in Mr Stadlen's argument is the stress which he lays on the need to prove actual dishonesty under both limbs of the tort, and he submits that Lord Neill, while paying lip service to the requirement of D dishonesty, waters it down impermissibly. Lord Neill for his part also proposed a far more fundamental development in the law as it affects state liability, obviating the need to prove misfeasance. We shall of course be returning in greater detail to these various themes, and to the range of authorities relied upon by both sides in support of their respective contentions.

E

VII

*The authorities in broad outline*

The tort of misfeasance in public office has a very long history in English law, dating back to the end of the 17th century. During the 18th century and the first part of the 19th, there were several important cases, the majority of F which were claims by eligible electors that they had been maliciously denied the right to vote by returning officers or similar authorities. Both sides seek comfort from this line of cases in support of their respective arguments.

There is then a long gap of over 100 years until the second half of the present century. During the last 40 years, and especially in the last two decades, there have been several important cases both here and in the G Commonwealth. *Bourgoin SA v Ministry of Agriculture, Fisheries and Food* [1986] QB 716 is a landmark decision and it has been discussed at length in some of the Commonwealth cases. The judgment of Clarke J now under appeal has already been referred to in several reported cases, some in this court.

The most notable cases during the second half of the 20th century are as follows (in chronological order). It will be necessary to return to several of H them in more detail.

(1) In *Smith v East Elloe Rural District Council* [1956] AC 736 the House of Lords considered the plaintiff's complaint that a compulsory purchase order for her house (made by the local authority and confirmed by the minister) had been made in bad faith. In rejecting a strike-out application in

relation to the claim against the clerk to the local authority Viscount Simonds said, at p 752: A

"Here the appellant by her writ claims against the personal defendant a declaration that he knowingly acted wrongfully and in bad faith in procuring the order and its confirmation, and damages, and that is a claim which the court clearly has jurisdiction to entertain."

B

(2) In *Roncarelli v Duplessis* (1959) 16 DLR (2d) 689 the defendant was the Premier and Attorney General of Quebec. The plaintiff was a restaurateur who had held a liquor licence for 30 years. He was also a Jehovah's Witness and he antagonised the provincial government by repeatedly standing bail for Jehovah's Witnesses accused of public order offences; but he was not personally involved in any questionable activities. The defendant put pressure on a supposedly independent licensing commission to cancel the plaintiff's liquor licence. The Supreme Court of Canada held him liable in damages. Rand J said, at p 706: C

"it was a gross abuse of legal power expressly intended to punish him for an act wholly irrelevant to the [licensing] statute, a punishment which inflicted on him, as it was intended to do, the destruction of his economic life as a restaurant keeper within the province." D

(3) *Farrington v Thomson and Bridgland* [1959] VR 286 is the first important Australian case. The police had purported to use statutory powers to close a hotel when (as it was found, to their knowledge) they had no power to do so. Smith J discussed the authorities and said, at p 293:

"the rule should be taken to go this far at least, that if a public officer does an act which, to his knowledge, amounts to an abuse of his office, and he thereby causes damage to another person, then an action in tort for misfeasance in a public office will lie against him at the suit of that person." E

(4) In *Tampion v Anderson* [1973] VR 715 the Supreme Court of Victoria was concerned with claims by a teacher of Scientology against persons who had been involved in different ways in an official inquiry into Scientology. The judgment of the Full Court referred to *Farrington v Thomson and Bridgland* [1959] VR 286 and added, at p 720: F

"But to be able to sustain an action upon this basis a plaintiff must not only show damage from the abuse; he must also show that he was a member of the public, or one of the members of the public, to whom the holder of the office owed a duty not to commit the particular abuse complained of." G

This reference to a particular duty has been commented on, but not perhaps fully explained, in later cases. If there is a need for a particular duty it might be the correlative of the antecedent right for which Mr Stadlen contends.

(5) *Dunlop v Woollahra Municipal Council* [1982] AC 158 was an appeal to the Privy Council from New South Wales. The appellant plaintiff complained of economic loss caused by the local authority's imposition of building controls. The local authority's actions had been invalid but not in bad faith. Lord Diplock said, at p 172: H

A "in the absence of malice, passing without knowledge of its invalidity a resolution which is devoid of any legal effect is not conduct that of itself is capable of amounting to such 'misfeasance' as is a necessary element in this tort."

(6) In *Bourgoin SA v Ministry of Agriculture, Fisheries and Food* [1986] QB 716 the Court of Appeal, upholding Mann J at first instance, held on the B trial of a preliminary issue that the plaintiffs, most of whom were French turkey producers, had by their claim disclosed a cause of action in misfeasance against the minister, based on the withdrawal of a general licence for the import of turkeys from France. It is important to note that it was accepted by the minister, for the purpose of the preliminary issue, that he knew at the time of the revocation that his act infringed article 30 of the EEC Treaty and would and was calculated to injure the plaintiffs in their C businesses. The case also raised an important question of Community law, on which the court was divided, with Oliver LJ dissenting from the majority view expressed by Parker and Nourse LJJ; however the court was unanimous on the point presently in issue, on which Oliver LJ gave the leading judgment.

Mann J, having cited several of the old cases, stated in his reserved D judgment, at p 740:

"I do not read any of the decisions to which I have been referred as precluding the commission of the tort of misfeasance in public office where the officer actually knew that he had no power to do that which he did, and that his act would injure the plaintiff as subsequently it does. I read the judgment in *Dunlop v Woollahra Municipal Council* [1982] AC E 158 in the sense that malice and knowledge are alternatives. There is no sensible reason why the common law should not afford a remedy to the injured party in circumstances such as are before me. There is no sensible distinction between the case where an officer performs an act which he has no power to perform with the object of injuring A (which the defendant accepts is actionable at the instance of A) and the case where an F officer performs an act which he knows he has no power to perform with the object of conferring a benefit on B but which has the *foreseeable and actual consequence* of injury to A (which the defendant denies is actionable at the instance of A). In my judgment each case is actionable at the instance of A . . ." (Emphasis added.)

In the Court of Appeal, Oliver LJ having quoted the above passage from G Mann J's judgment, stated, at p 777:

"For my part, I too can see no sensible distinction between the two cases which the judge mentions. If it be shown that the minister's motive was to further the interests of English turkey producers by keeping out the produce of French turkey producers—an act which must necessarily injure them—it seems to me entirely immaterial that the one purpose was H dominant and the second merely a subsidiary purpose for giving effect to the dominant purpose. If an act is done deliberately and with knowledge of its consequences, I do not think that the actor can sensibly say that he did not 'intend' the consequences or that the act was not 'aimed' at the person who, it is known, will suffer them. In my judgment the judge was right in his conclusion also on this point."

The proper interpretation of the *Bourgoin* case [1986] QB 716 has been one of the main points of controversy, in particular as to whether Mann J, when he said "*foreseeable*", really meant what he said, or whether, as Clarke J held and Mr Stadlen submitted, this was a slip of the tongue for "*foreseen*". Thus the crux of the dispute in relation to the *Bourgoin* test is whether the probability of damage must be *actually foreseen*, or whether it is enough to show that it was *reasonably foreseeable*.

(7) and (8) The next important cases are two decisions of the Privy Council ruling against any possible liability in negligence of a public authority discharging statutory functions as a bank regulator. Those decisions, *Yuen Kun Yeu v Attorney General of Hong Kong* [1988] AC 175 (an appeal from Hong Kong) and *Davis v Radcliffe* [1990] 1 WLR 821 (an appeal from the Isle of Man) are not directly concerned with misfeasance and are considered in section XII below.

(9) In *Northern Territory v Mengel* (1995) 69 ALJR 527 the High Court of Australia considered a claim by cattle station owners whose stock had been placed in quarantine by stock inspectors who had imposed the restrictions without power to do so, but in good faith. The judgment of the plurality said, at p 540:

> "The cases do not establish that misfeasance in public office is constituted simply by an act of a public officer which he or she knows is beyond power and which results in damage. Nor is that required by policy or by principle. Policy and principle both suggest that liability should be more closely confined . . . it is sufficient for present purposes to proceed on the basis accepted as sufficient in *Bourgoin*, namely, that liability requires an act which the public officer knows is beyond power and which involves a foreseeable risk of harm."

It should however be noted that it had been found as a fact at trial (see p 544) that the inspectors caused the plaintiff's financial loss and that they knew that the imposition of quarantine directions would cause such a loss. Brennan and Deane JJ concurred in the result and gave separate judgments which also call for careful attention.

(10) In *Garrett v Attorney General* [1997] 2 NZLR 332 the plaintiff's claim was that she had been raped in a police station by a police officer and that the matter had not been properly dealt with by the police, either by the sergeant who originally investigated the matter or by more senior officers when the plaintiff made a formal complaint three months later. She claimed damages for loss of reputation and also for loss of her job (as a result of being supposed to have made a false allegation of rape). At trial the jury found that the sergeant had failed in his duty but had not been actuated by malice, and that the formal complaint had been properly dealt with.

The plaintiff's appeal (seeking a new trial) was heard by the New Zealand Court of Appeal (specially constituted with five members). The judgment of the court contains a very full discussion of the *Bourgoin* case [1986] QB 716, *Mengel's* case, 69 ALJR 527 and the judgment of Clarke J now under appeal. The Court of Appeal of New Zealand agreed with Clarke J that when Mann J used the word "foreseeable" in *Bourgoin* he must have meant "foreseen". The court said, at p 348:

A "Clarke J pointed out that Mann J had three times earlier in his judgment referred to 'foreseen' or to knowledge of the consequences. It was also an agreed fact that the minister knew his act would injure the plaintiffs and it was not therefore being suggested that foreseeability was enough. We agree with Clarke J also that Oliver LJ's remarks are limited to a situation in which the defendant must have appreciated the obvious B consequence of a deliberate unlawful act."

And, at p 350:

"The purpose behind the imposition of this form of tortious liability is to prevent the deliberate injuring of members of the public by deliberate disregard of official duty. It is unnecessary, to attain this objective, to extend the tort to catch an act which, though known to be wrongful, is C done without a realisation of the consequences for the plaintiff."

And, at p 351:

"The common law has long set its face against any general principle that invalid administrative action by itself gives rise to a cause of action in damages by those who have suffered loss as a consequence of that action. D There must be something more. And in the case of misfeasance of public office that something more, it seems to us, must be related to the individual who is bringing the action. While the cases have made it clear that the malice need not be targeted there must, as we have said, be a conscious disregard for the interests of those who will be affected by the making of the particular decision."

E (11) In *Rawlinson v Rice* [1997] 2 NZLR 651 the Court of Appeal of New Zealand considered the striking-out of a claim for misfeasance against a district judge in the conduct of family litigation. Following *Garrett's* case [1997] 2 NZLR 332, the majority took the view that the pleadings (prepared by a litigant in person) sufficiently alleged reckless indifference on the part of the district judge. The appeal was adjourned for hearing by a F five-judge court on the issue of judicial responsibility.

That is a bird's eye view of the most important modern authorities. In addition there are some recent cases in which the House of Lords or this court has made general observations about the tort of misfeasance in public office. In *Calveley v Chief Constable of the Merseyside Police* [1989] AC 1228, 1240 Lord Bridge of Harwich said:

G "I do not regard this as an occasion where it is necessary to explore, still less to attempt to define, the precise limits of the tort of misfeasance in public office. It suffices for present purposes to say that it must at least involve an act done in the exercise or purported exercise by the public officer of some power or authority with which he is clothed by virtue of the office he holds and which is done in bad faith or (possibly) without H reasonable cause."

In *Racz v Home Office* [1994] 2 AC 45, 55 Lord Jauncey of Tullichettle referred to the "apparent uncertainty as to the precise ambit of the tort of misfeasance in public office". In *Elguzouli-Daf v Comr of Police of the Metropolis* [1995] QB 335, 347 Steyn LJ referred to the possibility of further



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development in this corner of the law, under the direct or indirect influence of the jurisprudence of the European Court of Justice.

These dicta by judges of high authority (all concurred in by the other members of the House or the court) tend in our judgment to suggest that the law on misfeasance in public office is not set in stone, and that it is susceptible of judicial development in the time-honoured tradition of the common law, particularly as the tort has a potential application in such a wide variety of circumstances affecting an extensive range of authorities. It follows that in our judgment we should not be unduly prescriptive in defining the ingredients of the tort.

VIII

*The old cases*

As already stated, both sides relied on these old cases from their different standpoints, particularly with reference to the meaning of malice in this context, and to the existence and scope (if any) of the second limb. Mr Stadlen submitted that these cases demonstrate that malice means an actual intention to injure, or, at least, the deliberate and wilful doing of an act which will necessarily injure the plaintiff, thus confining the concept of malice within very narrow boundaries, and in effect restricting the tort to the first limb. Lord Neill on the other hand submitted that on a proper reading of the cases malice has a much wider connotation, namely a wrongful act done intentionally without just cause or excuse, which would thus include acts done with any improper or indirect motive; he also submitted that none of the old cases at any stage disclosed any recognition of the need to prove that damage was either foreseen or foreseeable.

The earliest case identified was *Turner v Sterling* (1671) 2 Vent 25, when the plaintiff alleged irregularity in an election for the post of bridgemaster in the City of London, and the majority of the judges in the Court of Common Bench held that where an officer does anything against the duty of his place and office, and damage thereby accrues to the plaintiff, an action lies.

The next authority in point of time is the famous case of *Ashby v White* (1704) 14 St Tr 695, 799, culminating in a resolution of the House of Lords, which was apparently based on the advice of Holt CJ:

> "It is resolved by the Lords spiritual and temporal in Parliament assembled, that by the known laws of this kingdom, every freeholder, or other person, having a right to give his vote at the election of members to serve in Parliament, and being wilfully denied or hindered so to do by the officer who ought to receive the same, may maintain an action in the Queen's courts against such officer, to assert his right, and recover damages for the injury."

In a sequence of other cases towards the turn of the 18th century similar claims were rejected on the ground that there was no proof of malice. Thus in *Harman v Tappenden* (1801) 1 East 555, 562–563 Lawrence J held:

> "There is no instance of an action of this sort maintained for an act arising merely from error of judgment. Perhaps the action might have been maintained, if it had been proved that the defendants contriving and intending to injure and prejudice the plaintiff, and to deprive him of the benefit of his profits from the fishery, which as a member of this body he

A was entitled to according to the custom, had *wilfully and maliciously* procured him to be disfranchised, in consequence of which he was deprived of such profits. But here there was no evidence of any wilful and malicious intention to deprive the plaintiff of his profits, or that they had disfranchised him with that intent, which is necessary to maintain the action."

B Kenyon CJ's judgment, at pp 561–562, was to the same effect, and in the course of their judgments the judges cited two earlier unreported cases, namely *Burgoyne v Moss* (1768) and *Drewe v Coulton* (1787), both of which are reported as footnotes to *Harman v Tappenden* 1 East 555, 563. In the latter case Wilson J, having cited *Turner v Sterling* 2 Vent 25, said, at pp 564–565:

C "In all the cases put the misbehaviour must be wilful, and by wilful I understand, contrary to a man's own conviction . . . I do not mean to say that in this kind of action it is necessary to prove *express* malice. It is sufficient if malice may be implied from the conduct of the officer; as if he had decided contrary to a last resolution of the House of Commons; there I should leave it to the jury to imply malice."

D A similar test was propounded by Lord Kenyon CJ in *Williams v Lewis* (1797) Peake Add Cas 157, 164, where he held that the returning officers were not liable "unless they acted against the clear conviction of their own minds . . ."

In *Cullen v Morris* (1819) 2 Stark 577 Abbott CJ, having upheld the submission on behalf of the returning officers that the action would only lie if it appeared that the refusal of a right to vote resulted from a malicious and
E improper motive, directed the jury, at p 589:

"The question for your consideration is, whether the refusal of the vote in this instance, was founded on an improper motive on the part of the defendant, it is for you to pronounce your opinion, whether the defendant's conduct proceeded from an improper motive, or from an honest intention to discharge his duty acting under professional advice. If
F he intended to do prejudice either to the plaintiff or to the candidate for whom he meant to vote, the plaintiff is entitled to your verdict; if on the other hand he acted in the best way he could according to his judgment, your verdict ought to be for the defendant."

In the final election case, *Tozer v Child* (1857) 7 E & B 377, Lord Campbell CJ's direction to the jury as summarised in the bill of exceptions
G was, at p 379:

"And thereupon the said Lord Chief Justice directed the said jury that the defendants were not necessarily liable in this action, although the plaintiff, notwithstanding his non-payment of the said church rate, was qualified and entitled to vote, and to be a candidate at the said election, as
H he alleged: and that it was incumbent on the plaintiff to make out that the acts of the defendants complained of were malicious; and that malice might be proved, not only by evidence of personal hostility or spite, but by evidence of any other corrupt or improper motive: and that, if the defendants committed the acts and grievances in either counts of the declaration complained of bona fide, and acting upon advice which they

believed sound, the defendants were not guilty as alleged, and that they the said jury ought, as to each of the counts of the declaration, to find and give their verdict for the defendants upon the first issue within joined between the said parties, unless, upon the evidence, they were of opinion that the defendants, in committing and occasioning the acts, grievances and omissions in such count of the declaration alleged, had acted mala fide and dishonestly."

This direction was upheld by a very powerfully constituted Court of Exchequer Chamber (Cresswell J and Martin, Bramwell and Watson BB), at pp 382–383.

*Whitelegg v Richards* (1823) 2 B & C 45 was a case alleging abuse of power by the clerk to the Court of Relief of Insolvent Debtors in wrongfully and maliciously releasing a debtor from custody despite non-payment to the plaintiff of his damages and costs. The plea alleged that the defendant "wrongfully and maliciously intending to injure the plaintiff" caused the debtor to be discharged out of custody without payment. In his judgment Abbott CJ stated, at p 52:

"On the argument before us, some authorities were quoted to show, that an action upon the case may be maintained against an officer of a court for a falsity or misconduct in his office, whereby a party sustains a special damage; and that, in this case, a damage was plainly shown by the loss of the means of enforcing payment from the debtor, as in actions against sheriffs or gaolers for an escape."

In *Henly v Lyme Corpn* (1828) 5 Bing 91 the plaintiff, who owned property in Lyme Regis, claimed that he had suffered loss in consequence of the decay of the sea wall in the vicinity of the Cob at Lyme Regis, which the corporation had been directed to repair under the. terms of a grant from the Crown, conveying the sea walls etc. to the corporation with tolls. The plaintiff was successful before Littledale J and a jury at the Dorchester Spring Assizes in 1828, the plea being that the defendants

"well knowing the premises, and not regarding the said letters patent, or their duty in that behalf, but contriving and wrongfully and unjustly intending to injure, prejudice, and aggrieve the plaintiff, and to deprive him of the use of [his property], permitted [the sea wall] to be and continue . . . ruinous, prostrate, fallen down, washed down, out of repair, and in great decay . . ."

On appeal, Best CJ stated, at pp 107–108:

"Now I take it to be perfectly clear, that if a public officer abuses his office, either by an act of omission or commission, and the consequences of that, is an injury to an individual, an action may be maintained against such public officer. The instances of this are so numerous, that it would be a waste of time to refer to them. Then, what constitutes a public officer? In my opinion, every one who is appointed to discharge a public duty, and receives a compensation in whatever shape, whether from the Crown or otherwise, is constituted a public officer. Bishops, certainly, are paid by the Crown, not in money, but by estates which have been granted to them; and in consequence of the grant of such estates certain duties have been imposed on the bishops; such, for instance, as holding

A ecclesiastical courts. Does any man doubt, if a bishop, by neglect to hold an ecclesiastical court, prevents an individual from obtaining probate of a will, by which he sustains an injury, an action might be maintained against such bishop for the consequence of that neglect? Clergymen are public servants to a certain extent, although undoubtedly they are not paid by the public. The emoluments which they receive have not been derived from the public; they have been derived from the owners of B particular lands, who have endowed them with the glebe or tithes which they possess; yet they have duties cast on them as the consequence of the tenure of those lands and tithes, such as, for instance, to administer the sacrament; and it has been decided, that if a clergyman refuse to administer the sacrament to a man who is thereby prejudiced in his civil rights, an action is maintainable against the clergyman. So if a clergyman C were to neglect to register a person brought to be baptised, and in consequence of that, such person should lose an estate, does any man doubt an action could be maintained against him? If the Bank of England, refuse to transfer stock, an action may be maintained against them. Lords of manors hold courts, which courts they are obliged to hold, as one of the considerations on which the lands have been granted D to them. If a lord of the manor were to refuse or neglect to hold a court, by which a copyholder should be prevented from having admission to his copyhold, does any man doubt an action could be maintained against such lord? It seems to me that all these cases establish the principle, that if a man takes a reward—whatever be the nature of that reward, whether it be in money from the Crown, whether it be in land from the Crown, whether it be in lands or money from any individual—for the discharge of E a public duty, that instant he becomes a public officer; and if by any act of negligence or any act of abuse in his office, any individual sustains an injury, that individual is entitled to redress in a civil action. If that be so, then it is quite clear that the plaintiff in this case is entitled to maintain this action. The plaintiff may say to the corporation, 'you have a compensation from the Crown for discharging the duty which you have F neglected to discharge; and in consequence of that neglect have I sustained an injury; I am, therefore, entitled to have a compensation from you'."

Gaselee J concurred.

Reviewing these cases in the round, we consider that there is plainly substance in Lord Neill's submission that none of them mentions expressly G the need to prove that loss was foreseen or foreseeable. However we do not attach great significance to this, since it is obvious that the denial to an elector of his right to vote would be foreseen, or at least foreseeable, to be likely to cause him loss of his constitutional right. Indeed, it deprived him of that right without any room for further discussion of cause and effect. That was in an era where the suffrage was very narrowly based, all the election cases we have cited other than *Tozer v Child* 7 E & B 377 having preceded H the Reform Bill of 1832 (the Representation of the People Act 1832 (2 & 3 Will 4, c 45)).

*Whitelegg v Richards* 2 B & C 45 and *Henly v Lyme Corpn* 5 Bing 91 undoubtedly lend support to Lord Neill's submission that this tort comprises an action on the case upon proof of special damage; but it seems unlikely

that Abbott and Best CJJ can have intended, sub silentio, to overturn the requirement of malice so clearly laid down in all the earlier cases, and it may well be, in the light of the pleas in those two cases which we have quoted, that this requirement was taken for granted. Thus we accept Mr Stadlen's submission that these cases do not carry the day in favour of Lord Neill so far as the second limb of the tort is concerned. However, so far as the ingredients of malice are concerned, we are unable to accept that these cases restrict them as narrowly as Mr Stadlen submits.

On the contrary, a number of them recognised a wider connotation for malice, in particular the description of the defendant acting "contrary to his own conviction" in *Drewe v Coulton* 1 East 563n and in *Williams v Lewis* Peake Add Cas 157, the references in Abbott CJ's judgment in *Cullen v Morris* 2 Stark 577 to an "improper motive", and Lord Campbell CJ's mention in *Tozer v Child* 7 E & B 377 of "any other corrupt or improper motive." Consequently we consider that Lord Neill was correct in his submission that the concept of malice here is similar to that which figures in the law of defamation, namely where the defendant either did not honestly believe that what he said was true (in the sense that he was either aware that it was not true or indifferent to its truth or falsity) or (even when he positively believes in the truth of what he published) was actuated by some improper or indirect motive: see Lord Diplock's classic judgment in *Horrocks v Lowe* [1975] AC 135, especially at pp 150 and 152.

IX

*Bourgoin SA v Ministry of Agriculture, Fisheries and Food* [1986] QB 716

We have already quoted the salient parts of the judgments of Mann J at first instance and of Oliver LJ in the Court of Appeal. Both sides have subjected the decision to the most minute textual analysis in support of their respective contentions.

Lord Neill rightly stressed that Mann J was most meticulous in his choice of language throughout his judicial career both at first instance and in the Court of Appeal. He was thus unlikely to have made such an elementary slip as to use "foreseeable" if he meant "foreseen", and it was equally improbable that Oliver LJ would have specifically quoted and approved what Mann J said, without making the correction, when he came to consider the crucial part of Mann J's judgment.

Mr Stadlen on the other hand submitted that this was an isolated and discordant reference to "foreseeable" in a judgment which elsewhere makes it abundantly clear that the only point in issue was whether actual foresight of loss was sufficient. In support of that argument he cited six references from Mann J's judgment which, he contended, show that the only proposition he was approving was the limited one that actual foresight of loss coupled with actual knowledge of illegality is sufficient to establish liability. These comprise references from which we shall quote two which are illustrative of the rest:

> "For the purpose of the preliminary issue the defendant accepted the plaintiffs' allegations that . . . the minister knew at the time of revocation that his act would and was calculated to injure the plaintiffs in their businesses": see pp 734–735.

A

> "The wrong described before me is that of an act performed by a public officer with actual knowledge that it is performed without power and is so performed with the known consequence that it would injure the plaintiffs": see p 740.

So far as the Court of Appeal is concerned, Mr Stadlen directed attention to the second paragraph quoted above from Oliver LJ's judgment, and in
B particular to the words "with knowledge of its consequences."

In our judgment it is very important to bear in mind that no issue arose in *Bourgoin SA v Ministry of Agriculture, Fisheries and Food* as between the two rival concepts, seeing that actual knowledge of the consequences was conceded by the minister. There was no need either for Mann J or for the Court of Appeal to focus any attention on the resolution of the dilemma.
C Thus in the particular circumstances of the case Mann J's choice of the adjective "foreseeable" was not critical, and indeed there appears to be no reference in the argument to this aspect.

Furthermore, we agree with Mr Stadlen that this was an isolated and discordant reference in a judgment otherwise abounding with references to actual knowledge, as was to be expected in view of the minister's concession. These considerations tend seriously to weaken the force of Lord Neill's
D argument, which at first sight seemed very powerful.

X

*The Commonwealth cases*

*Northern Territory v Mengel* 69 ALJR 527 was a claim by the owners of two cattle stations whose plans to sell cattle worth approximately $A1m.
E were frustrated by the action of two inspectors of the Northern Territory Department of Primary Industries and Fisheries, who quarantined the stock notwithstanding the absence of any statutory or other authority. One of several causes of action relied upon by the plaintiff was misfeasance in public office, and the question arose whether, as the plaintiff submitted, it was sufficient to show that the inspectors knew that their actions were beyond
F their powers, or whether there was an additional requirement.

One central issue in the case was whether the inspectors had actual knowledge of the consequences of their actions, and it was held that they did. Another was whether they had knowledge of the illegality of their actions.

Having cited the *Bourgoin* case [1986] QB 716, the judgment of the plurality (Mason CJ, Dawson, Toohey, Gaudron and McHugh JJ)
G proceeded, at p 540:

> "The cases do not establish that misfeasance in public office is constituted simply by an act of a public officer which he or she knows is beyond power and which results in damage. Nor is that required by policy or by principle. Policy and principle both suggest that liability should be more closely confined. So far as policy is concerned, it is to be
> H borne in mind that, although the tort is the tort of a public officer, he or she is liable personally and, unless there is de facto authority, there will ordinarily only be personal liability. And principle suggests that misfeasance in public office is a counterpart to, and should be confined in the same way as, those torts which impose liability on private individuals

for the intentional infliction of harm. For present purposes, we include in that concept acts which are calculated in the ordinary course to cause harm, as in *Wilkinson v Downton* [1897] 2 QB 57, or which are done with reckless indifference to the harm that is likely to ensue, as is the case where a person, having recklessly ignored the means of ascertaining the existence of a contract, acts in a way that procures its breach. It may be that analogy with the torts which impose liability on private individuals for the intentional infliction of harm would dictate the conclusion that, provided there is damage, liability for misfeasance in public office should rest on intentional infliction of harm, in the sense that that is the actuating motive, or on an act which the public officer knows is beyond power and which is calculated in the ordinary course to cause harm. However, it is sufficient for present purposes to proceed on the basis accepted as sufficient in *Bourgoin*, namely, that liability requires an act which the public officer knows is beyond power and which involves a foreseeable risk of harm."

In a separate judgment Brennan J stated, at p 546:

"I respectfully agree that the mental element is satisfied either by malice (in the sense stated) or by knowledge. That is to say, the mental element is satisfied when the public officer engages in the impugned conduct with the intention of inflicting injury or with knowledge that there is no power to engage in that conduct and that that conduct is calculated to produce injury. These are states of mind which are inconsistent with an honest attempt by a public officer to perform the functions of the office. Another state of mind which is inconsistent with an honest attempt to perform the functions of a public office is reckless indifference as to the availability of power to support the impugned conduct and as to the injury which the impugned conduct is calculated to produce. The state of mind relates to the character of the conduct in which the public officer is engaged—whether it is within power and whether it is calculated (that is, naturally adapted in the circumstances) to produce injury."

This passage is in line with the view of the plurality, and when, later in his judgment Brennan J stated, at p 547, that "causation of damage is relevant; foreseeability of damage is not", he was clearly speaking in the context of negligence rather than misfeasance.

Finally, in another separate judgment, Deane J stated, at p 554:

"In the context of misfeasance in public office, the focus of the requisite element of malice is injury to the plaintiff or injury to some other person through an act which injuriously affects the plaintiff. Such malice will exist if the act was done with an actual intention to cause such injury. The requirement of malice will also be satisfied if the act was done with knowledge of invalidity or lack of power and with knowledge that it would cause or be likely to cause such injury. Finally, malice will exist if the act is done with reckless indifference or deliberate blindness to that invalidity or lack of power and that likely injury. Absent such an intention, such knowledge and such reckless indifference or deliberate blindness, the requirement of malice will not be satisfied."

A This case undoubtedly lends some support to Lord Neill's interpretation, but only to a very limited extent seeing that (as in the *Bourgoin* case [1986] QB 716 itself) there was no debate between the two concepts, which would in any event have been otiose since (as already noted) it was held that the inspectors had actual knowledge of the loss that would be suffered by the plaintiffs.

B In *Garrett v Attorney General* [1997] 2 NZLR 332 the New Zealand Court of Appeal (Richardson P, Gault, Henry, Keith and Blanchard JJ) considered a case where the plaintiff's claim was for misfeasance in public office against a police sergeant who was in charge of a police station, on the ground that he had failed to investigate and properly deal with her complaint that she had been raped by a police constable attached to that police station. The court held that the case was bound to fail because there C was no evidence whether the sergeant had actual appreciation that his breaches of duty (such as they might have been) were going to lead to the plaintiff suffering harm.

The judgment of the court was delivered by Blanchard J and at the outset of the discussion of the ingredients of the tort he stated, at p 344:

> "Proceedings for the tort of misfeasance in public office, also known as D abuse of public office, have never been common. Early in its development an essential ingredient was malice on the part of the defendant: a deliberate and vindictive act by a public official involving a breach of duty and directed towards the plaintiff. This has come to be known as 'targeted malice.' But the tort is no longer so confined. It can also be committed by an official who acts or omits to act in breach of duty E knowing about the breach and also knowing harm or loss is thereby likely to be occasioned to the plaintiff. As will appear from the following discussion, 'knowing' in relation to both the breach and its effect on the plaintiff includes acting recklessly, in the sense of believing or suspecting the position and going ahead anyway without ascertaining the position as a reasonable and honest person would do."

F There followed extensive discussion of and citation from the judgments in the *Bourgoin* case [1986] QB 716 and *Northern Territory v Mengel* 69 ALJR 527, and of Clarke J's judgment in the present case. He then concluded [1997] 2 NZLR 332, 349–351:

> "We are in respectful agreement with Clarke J that it is insufficient to show foreseeability of damage caused by a knowing breach of duty by a G public officer. The plaintiff, in our view, must prove that the official had an actual appreciation of the consequences for the plaintiff, or people in the general position of the plaintiff, of the disregard of duty or that the official was recklessly indifferent to the consequences and can thus be taken to have been content for them to happen as they would. The tort has at is base conscious disregard for the interests of those who will be affected H by official decision making. There must be an actual or, in the case of recklessness, presumed intent to transgress the limits of power even though it will follow that a person or persons will be likely to be harmed. The tort is not restricted to a case of deliberately wanting to cause harm to anyone; it also covers a situation in which the official's act or failure to act is not directed at the injured party but the official sees the consequences as

naturally flowing for that person when exercising power. In effect this is no more than saying the tort is an intentional tort. In this context, a person intends to bring about the known consequences of his or her actions or omissions, even if other consequences from the primary motive. *Bourgoin* is an example. The concept of attributing intention by necessary inference in this way is well established. The purpose behind the imposition of this form of tortious liability is to prevent the deliberate injuring of members of the public by deliberate disregard of official duty. It is unnecessary, to attain this objective, to extend the tort to catch an act which, though known to be wrongful, is done without a realisation of the consequences for the plaintiff . . . In our view this intentional tort should not be allowed to overflow its banks and cover the unintentional infliction of damage. In many cases the consequences of breaking the law will be obvious enough to officials, who can then be taken to have intended the damage they caused. But where at the time they do not realise the consequences they will probably not be deterred from exceeding their powers by any enlargement of the tort. As Clarke J observes, they may well think that they are acting in the best interests of those persons whom they actually have in mind. In any modern society administration of central or local government is complex. Overly punitive civil laws may oftentimes deter a commonsense approach by officials to the use of enforcement of rules and regulations. We prefer to err on the side of caution and not to extend the potential liability of officials for causing unforeseen damage. To do so may have a stultifying effect on governance without commensurate benefit to the public . . . The common law has long set its face against any general principle that invalid administrative action by itself gives rise to a cause of action in damages by those who have suffered loss as a consequence of that action. There must be something more. And in the case of misfeasance of public office that something more, it seems to us, must be related to the individual who is bringing the action. While the cases have made it clear that the malice need not be targeted there must, as we have said, be a conscious disregard for the interests of those who will be affected by the making of the particular decision."

The tort was again considered in New Zealand by the Court of Appeal (McKay, Barker and Tipping JJ) in *Rawlinson v Rice* [1997] 2 NZLR 651. McKay J stated, at p 658:

"A deliberate act knowingly or recklessly in excess of one's powers is sufficient. As has now been decided in *Garrett v Attorney General* [1997] 2 NZLR 332, it must also be shown that the defendant knew that the conduct would cause damage to the plaintiff, or was recklessly indifferent to the consequences."

Later he stated, at p 661: "What must be established, however, is that this was actually foreseen, or that the defendant was reckless as to possible damage."

Barker J in a judgment which dissented on the result but not on the ingredients of the tort, stated, at p 663:

"*Garrett v Attorney General* [1997] 2 NZLR 332 discusses the ingredients of the tort of misfeasance in public office. The official must exhibit 'malice' in the sense of being recklessly indifferent, both as to the

A exercise of his jurisdiction and as to the consequences for the person harmed. There must be a *presumed intent* to transgress the limits of power, even though it will follow that the person is likely to be harmed. Mere foreseeability of deleterious consequences is insufficient; the defendant must be reckless as to possible damage."

Tipping J stated, at p 665:

B "In the present case the cause of action is misfeasance in public office. That tort has a variety of manifestations. Sometimes actual malice in the form of spite or ill will is alleged but not in this case. It is sufficient for the plaintiff to show that the defendant knew he/she was acting outside the limits of power or was recklessly indifferent to whether that was the case. The same concepts of knowledge or reckless indifference must be C shown in relation to the harm likely to be caused by the defendant's conduct: *Garrett v Attorney General* [1997] 2 NZLR 332. To sustain the tort in the form alleged Mr Rawlinson has to satisfy the following criteria: (1) That he has standing to sue. (2) That the respondent held and was acting in the course of a public office. (3) That the respondent knew, or is presumed to have known (showed reckless indifference to whether) he was acting outside the limits of his power. (4) That the respondent knew, D or is presumed to have known (in the same sense as above) that his conduct was likely to harm the plaintiff as an individual or as a member of a class. (5) That the respondents conduct did in fact cause the plaintiff qualifying harm."

Later in his judgment he proceeded, at p 667:

E "On the premise that the facts alleged in the pleadings and described in the briefs of evidence are capable of demonstrating the necessary knowledge or reckless indifference in relation to criterion (3), it is for completeness necessary to consider whether the same applies in relation to criterion (4), i e likelihood of harm being suffered by Mr Rawlinson. If the respondent was recklessly indifferent as to his powers it seems to me to be a short step to infer that he was recklessly indifferent to the harm F that he might cause Mr Rawlinson by acting outside those powers."

Lord Neill at one stage in his argument tended to suggest that the clear statements in *Garrett v Attorney General* [1997] 2 NZLR 332 were somehow limited or obscured by *Rawlinson v Rice* [1997] 2 NZLR 651, but in our judgment the above quotations show that there was no disharmony, and in any event the court in the latter case was bound by the former.

G It is thus apparent that, from the point of view of comity, there is no consistent Commonwealth line of authority to guide us. However, we do find it helpful to bear in mind that in *Garrett's* case, unlike *Northern Territory v Mengel* 69 ALJR 527, the dilemma was the subject of careful (and to our mind very cogent) consideration, which leads us to draw more assistance from the New Zealand case.

H

XI

*The English cases subsequent to Clarke J's decision*

These cases were strongly relied upon by Mr Stadlen as authoritative endorsements of Clarke J's decision. Lord Neill on the other hand submitted

that in none of them was Clarke J's judgment subjected to any detailed analysis, and that in particular there was no specific consideration of the foreseeable/foreseen issue.

At the appellate level the cases are as follows.

(i) In *Lam v Brennan and Torbay Borough Council* [1997] PIQR P488 the Court of Appeal (Potter and Brooke LJJ) struck out a claim in negligence against a planning authority on the footing that the authority owed the plaintiff no duty of care. In the judgment of the court they also refused an application by the plaintiff for leave to amend to add a plea of misfeasance in public office (which was described as "an ill-considered attempt to create a long-stop"), on the footing that the pleadings disclosed no material to support "what is essentially a tort of malice (albeit malice in the extended sense contemplated in the *Bourgoin* case [1986] QB 716, and further expanded by Clarke J in *Three Rivers District Council v Bank of England* [1996] 3 All ER 558)".

(ii) In *R v Chief Constable of the North Wales Police, Ex p AB* [1999] QB 396 the Divisional Court (Lord Bingham of Cornhill CJ and Buxton J) cited Clarke J's judgment as "a most helpful summary" and quoted his first two propositions. Lord Bingham CJ then proceeded, at p 413:

> doq;It is unnecessary to list the other ingredients of this tort, since it cannot be suggested that in the present case the NWP. acted with a deliberate and dishonest intention to abuse their powers and with an intention to injure the applicants or with knowledge that they had no power to disclose information to the site owner. All the evidence shows that they acted in a bona fide belief that disclosure was necessary, to the extent made, in the public interest."

(iii) In *Barnard v Restormel Borough Council* [1998] 3 PLR 27 the Court of Appeal (Buxton LJ and Sir John Knox) struck out, inter alia, a claim for misfeasance against the defendant borough council; Buxton LJ, giving the leading judgment with which Sir John Knox agreed, referred to the "detailed and thorough judgment" of Clarke J, which, he held, accurately summarised the elements of the tort as laid down in the *Bourgoin* case [1986] QB 716. Buxton LJ then quoted with approval Clarke J's first two propositions. Later, he described bad faith or dishonesty as the "operative requirement" as laid down both by Clarke J and by the *Bourgoin* case.

(iv) In *Ealing London Borough Council v Metha* (unreported) 24 April 1997; Court of Appeal (Civil Division) Transcript No 1449 of 1997 (Beldam LJ and Bennett J) there is a reference to the present case as being "distinguished by an erudite judgment by Clarke J."

There are also two decisions at first instance, both of Sir Richard Scott V-C, where Clarke J's judgment was considered. In *Elliott v Chief Constable of Wiltshire* The Times, 5 December 1996 the Vice-Chancellor refused to strike out a claim for misfeasance in public office and, having cited *Calveley v Chief Constable of the Merseyside Police* [1989] AC 1228, he commented that "the boundaries of this tort have not been and perhaps should not be precisely defined". He then proceeded to cite in detail both *Northern Territory v Mengel* 69 ALJR 527 and Clarke J's judgment, which he said provided the measure of the ingredients of the tort against which the plaintiff's pleading should be assessed. In *Bennett v Comr of Police of the*

A *Metropolis* 1998 10 Admin LR 245; The Times, 24 October 1997 Sir Richard Scott V-C upheld a striking-out application, again applying *Mengel's* case and Clarke J's judgment as "two . . . recent cases which have illuminated the ingredients of the tort".

We should add that we have left out of account two other misfeasance cases cited by Mr Stadlen, where the Court of Appeal refused leave to B appeal, since they do not in our judgment carry the matter any further.

We accept Lord Neill's submission that none of these subsequent cases is conclusive in Mr Stadlen's favour; none the less we do consider that they, like *Garrett v Attorney General* [1997] 2 NZLR 332, lend very significant support to Mr Stadlen's interpretation which, for the reasons we have already given, does not subject the judgments in the *Bourgoin* case [1986] QB 716 to undue strain.

C In the final analysis, we find it helpful to go back to the fundamental concepts of the tort of misfeasance, and to bear in mind that the second limb is an alternative to the targeted malice comprised in the first limb. The two limbs should be broadly in harmony, as they will be if the test is actual foresight; a test of mere foreseeability, on the other hand, would be a somewhat jejune alternative, introducing considerations more appropriate D to negligence.

For all these reasons we would uphold Clarke J's decision that actual foresight is the correct test.

XII

*No duty of care—the two Privy Council cases*

E Before proceeding to the remaining issues which arise under the general heading of misfeasance in public office, it is convenient to consider these two Privy Council cases, which have some bearing on those issues.

In *Yuen Kun Yeu v Attorney General of Hong Kong* [1988] AC 175 the plaintiffs, who had lost money they had deposited with a deposit-taking company registered by the Comr of Deposit-Taking Companies in Hong Kong, claimed damages for negligence alleging that they had made F deposits in reliance upon the company's registration and that the commissioner knew or ought to have known, had he taken reasonable care, that the company's affairs were being conducted fraudulently, speculatively and to the detriment of its depositors. One of the allegations in the statement of claim, which of course was assumed to be true for the purpose of the striking-out application, was that information about the G company giving rise to the suspicion that its business was being conducted fraudulently was available to the commissioner but not to members of the public.

Giving the judgment of the Board (Lord Keith of Kinkel, Lord Templeman, Lord Griffiths, Lord Oliver of Aylmerton and Sir Robert Megarry) Lord Keith stated, at p 190:

H "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 fraudulent or improvident fashion. That question is one of law, which is capable of being answered upon the averments assumed to be true, contained in the plaintiffs' pleadings. If it is answered in the negative, the plaintiffs have no reasonable cause of action, and their statement of claim was rightly struck out."

Lord Keith went on to consider the leading authorities, including *Anns v Merton London Borough Council* [1978] AC 728, *Hedley Byrne & Co Ltd v Heller & Partners Ltd* [1964] AC 465, *Dorset Yacht Co Ltd v Home Office* [1970] AC 1004 and *Hill v Chief Constable of West Yorkshire* [1988] QB 60 (the Court of Appeal decision subsequently upheld in the House of Lords [1989] AC 53). Lord Keith then proceeded, at pp 194–196:

"The primary and all-important matter for consideration, then, is whether in all the 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 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 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 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 upon companies by section 34 of the Ordinance, and the right to be heard by the commissioner conferred by section 47. The commissioner did not have any power to control the day-to-day management of any 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

A 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 upon 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 Lordships are unable to discern any intention on the part of the legislature that in considering whether to register or deregister B 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 upon such a statutory framework.

"On the plaintiffs' case as pleaded the immediate cause of the loss suffered by the plaintiffs in this case was the conduct of the managers of the company in carrying on its business fraudulently, improvidently and C in breach of many of the provisions of the Ordinance. Another cause was the action of the plaintiffs 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 obtained from investment advisers in D Hong Kong. Before the plaintiffs 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 plaintiffs' averments there had been E 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, 261–262, and such as was held to exist between the F prison officers and the Borstal boys in *Dorset Yacht Co Ltd v Home Office* [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 money 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 G 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 circumstance that the commissioner had, on the plaintiffs' averments, cogent reason to suspect that the company's business was being carried on fraudulently and improvidently did not create a special relationship H 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 risk of financial loss through depositing money with the company. Accordingly their Lordships do not consider that the commissioner owed to the plaintiffs

any duty of care on the principle which formed the ratio of the *Dorset Yacht* case. To hark back to Lord Atkin's words in *Donoghue v Stevenson* [1932] AC 562, 581, there were not such close and direct relations between the commissioner and the plaintiffs as to give rise to the duty of care desiderated."

Lord Keith concluded his judgment, at p 198:

"The final matter for consideration is the argument for the Attorney General of Hong Kong that it would be contrary to public policy to admit the plaintiffs' claim, upon grounds similar to those indicated in relation to police forces by Glidewell LJ in *Hill v Chief Constable of West Yorkshire* [1988] QB 60, 75. 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 upon 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 plaintiffs' statement of claim does not disclose a cause of action against the commissioner in negligence they prefer to rest their decision upon that rather than upon the public policy argument."

In *Davis v Radcliffe* [1990] 1 WLR 821 a similar claim was brought against the Treasurer of the Isle of Man and members of the Finance Board who were the regulatory authority in the Isle of Man. The judgment of the Board (Lord Keith of Kinkel, Lord Brandon of Oakbrook, Lord Templeman, Lord Goff of Chieveley and Lord Lowry) was delivered by Lord Goff, who stated, at p 826, that the case was for all practical purposes indistinguishable from the *Yuen* case. Lord Goff then proceeded, at pp 826–827:

"It is against this background of authority that their Lordships approach the present case, in which it is submitted that, on the facts pleaded, the Treasurer and the members of the Finance Board owed a duty of care to persons in the position of the plaintiffs, breach of which may render them liable in damages to such persons in respect of loss suffered by them through having deposited money with a bank such as SIB which has become insolvent. There are, in the opinion of their Lordships, certain considerations, each of which militates against the imposition of any such duty, and which taken together point to the inevitable conclusion that no such duty should be imposed.

A "First, it is evident that the functions of the Finance Board, and indeed of the Treasurer, as established by the Finance Board Act 1961, are typical functions of modern government, to be exercised in the general public interest. These functions are, as already indicated, of the broadest kind, for which parallels can doubtless be drawn from other jurisdictions. The functions vested in the Treasurer, and in the Finance Board, by the Banking Act 1975 must be seen as forming part of those broader B functions. No doubt, in establishing a system of licensing for banks, regard was being had (though this is not expressly stated in the long title of the Act) to the fact that the existence of such a licensing system should provide an added degree of security for those dealing with banks carrying on business in the Isle of Man, including in particular those who deposit money with such banks. But it must have been the statutory intention C that the licensing system should be operated in the interests of the public as a whole; and when those charged with its operation are faced with making decisions with regard, for example, to refusing to renew licences or to revoking licences, such decisions can well involve the exercise of judgment of a delicate nature affecting the whole future of the relevant bank in the Isle of Man, and the impact of any consequent cessation of the D bank's business in the Isle of Man, not merely upon the customers and creditors of the bank, but indeed upon the future of financial services in the island. In circumstances such as these, competing considerations have to be carefully weighed and balanced in the public interest, and, in some circumstances, as Mr Kentridge observed, it may for example be more in the public interest to attempt to nurse an ailing bank back to health than to hasten its collapse. The making of decisions such as these is a E characteristic task of modern regulatory agencies; and the very nature of the task, with its emphasis on the broader public interest, is one which militates strongly against the imposition of a duty of care being imposed upon such an agency in favour of any particular section of the public.

"A further consideration which militates against the imposition of a duty of care upon persons in the position of the defendants in the present F case is that it is being sought to make them liable in negligence for damage caused to the plaintiffs by the default of a third party, SIB. In the case of physical damage caused by the deliberate wrongdoing of a third party, such liability will only be imposed in limited classes of case, a matter which was recently explored in the speeches of the House of Lords in *Smith v Littlewoods Organisation Ltd* [1987] AC 241. Here it is suggested that such liability should be imposed for purely financial loss G flowing from the negligence of a third party. It must be rare that any such liability will be imposed; but in any event it is difficult to see that, in the present case, the defendants possessed sufficient control over the management of SIB to warrant the imposition of any such liability: cf *Smith v Leurs* (1945) 70 CLR 256, 261–262, per Dixon J. Certainly, *Anns v Merton London Borough Council* [1978] AC 728 does not H provide an instance of the imposition of such liability, since the damage in that case was treated as falling within the description of physical damage. Yet another consideration militating against the existence of the alleged duty of care in the present case is that it is said to be owed to an unlimited class of persons including not only the depositors of money with SIB but also those considering whether to deposit their money with SIB. Their

Lordships wish to add that, in the case of the members of the board, it would be most remarkable if they should be under any such duty of care, bearing in mind that not only do they constitute a Board of Tynwald, responsible to Tynwald, but also that the membership of the board changes from time to time (as indeed it did during the relevant period in the present case) and that different views may be expressed by different members of the board present at any particular meeting."

These considerations, which also underlay the decision in *Yuen Kun Yeu v Attorney General of Hong Kong* [1988] AC 175, have a significant bearing on the remaining matters which we are about to consider.

XIII

*Dishonesty, knowledge and recklessness*

It is common ground that dishonesty is an essential ingredient of the tort of misfeasance in public office. We need not repeat or multiply citations to that effect. The requirement for knowledge (of some sort) of illegality and for knowledge (or foresight) of consequent injury is a theme of all the main authorities from and after *Bourgoin SA v Ministry of Agriculture, Fisheries and Food* [1986] QB 716 (see Mann J, at p 740, and Oliver LJ, at p 777). Recklessness was not referred to in the *Bourgoin* case (which is not surprising, in view of the minister's concessions of actual knowledge) but it is referred to in the recent Commonwealth cases.

It may be helpful to give a brief summary of those references.

(1) In *Northern Territory v Mengel*, 69 ALJR 527 (in which actual foresight of loss was found as a fact, and awareness of illegality was the crucial issue) all the members of the High Court favoured reckless indifference on the part of the defendant to the illegality of his conduct as meeting the requirement (the plurality, at pp 540–541, Brennan J, at pp 546–548, and Deane J, at p 554) while rejecting mere "constructive knowledge".

(2) In *Garrett v Attorney General* [1997] 2 NZLR 332 (in which the main concern was with foresight of loss) the Court of Appeal of New Zealand discussed *Mengel's* case (without giving unqualified support to it) but, at p 349, approved actual foresight or reckless indifference to consequences as the appropriate test.

(3) In *Rawlinson v Rice* [1997] 2 NZLR 651 the Court of Appeal of New Zealand expressly and unanimously (though in three separate judgments) approved reckless indifference as an appropriate test both as to illegality and as to consequences (McKay J, at pp 658 and 661, Barber J, at p 663, and Tipping J, at p 665).

The interrelationship between dishonesty, knowledge (or foresight) and recklessness was carefully considered by the judge in his first judgment [1996] 3 All ER 558, 579–583. Both sides have criticised different aspects of his reasoning and conclusions. We shall approach this part of his judgment by referring to some well known cases in two quite different areas of the law (constructive trusteeship and the criminal law relating to offences against the person and against property) which counsel's indefatigable industry placed before Clarke J and again before this court.

We begin with the constructive trust cases. A defendant may be fixed with liability as a constructive trustee under two heads, often labelled as

A "knowing receipt" and "knowing assistance". However the implicit reference in these labels to knowledge immediately leads into difficulties. Whatever may be the position on knowing receipt (the state of authority was reviewed by Vinelott J in *Eagle Trust plc v SBC Securities Ltd* [1993] 1 WLR 484, 489 et seq), a defendant cannot be made liable under the head of knowing assistance unless he has acted dishonestly.

B In *Baden v Société Générale pour Favoriser le Développement du Commerce et de l'Industrie en France SA (Note)* [1993] 1 WLR 509 Peter Gibson J was concerned with a very complicated sequence of events arising out of the OIS investment scandal in the 1970s. Those events might have produced claims under either head of constructive trusteeship but in the event only knowing assistance was pursued. Peter Gibson J mentioned, at pp 575–576, five different mental states (formulated not by himself but by C counsel) which might be relevant in establishing constructive trusteeship under the knowing assistance head. That formulation was partly based on authority, and indeed the same sort of language was used over a century ago by Lord Blackburn in *Jones v Gordon* (1877) 2 App Cas 616, 629 in his well known comments on the difference between good faith and bad faith in the holder of a bill.

D However this fivefold classification has attracted criticism, largely for its over-elaboration. In *Agip (Africa) Ltd v Jackson* [1990] Ch 265, another knowing assistance case, Millett J referred to the classification and adopted it, but at the same time warned against over-refinement. He said, at p 293: "The true distinction is between honesty and dishonesty. It is essentially a jury question."

In a recent knowing assistance case heard by the Privy Council, *Royal* E *Brunei Airlines Sdn Bhd v Tan* [1995] 2 AC 378, Lord Nicholls of Birkenhead, delivering the opinion of the Board, went further and in defining the essentials of liability stated, at p 392: "Knowingly is better avoided as a defining ingredient of the principle, and in the context of this principle the *Baden* [1993] 1 WLR 509 scale of knowledge is best forgotten." The reason for this admonition appears a little earlier in the opinion. At the end of F important sections on "Dishonesty" and "Taking risks" (to which we will refer again) Lord Nicholls stated, at p 391, that to ask whether a defendant had dishonestly assisted in what was later held to be a breach of trust was a meaningful question:

> "This is not always so if the question is posed in terms of 'knowingly' assisted. Framing the question in the latter form all too often leads one G into tortuous convolutions about the 'sort' of knowledge required, when the truth is that 'knowingly' is inapt as a criterion when applied to the gradually darkening spectrum where the differences are of degree and not kind."

These were all cases dealing with the law of fiduciary obligations. But it has not been suggested to us that their discussion of dishonesty, and of the H states of mind that amount to dishonesty, are not relevant to the determination of this appeal. The concept of dishonesty is indeed so basic that it must have the same meaning in every branch of the law.

We were also referred, as Clarke J was, to a number of criminal cases in which recklessness was discussed, either as an express ingredient of a statutory offence or as imported by the word "maliciously" used in a statute.

In chronological order the principal cases were the following: (1) *R v Cunningham* [1957] 2 QB 396, the case of the man who stole a gas meter from an empty house, with the result that the occupant of the neighbouring house inhaled escaping gas; the thief was charged with maliciously administering a noxious substance contrary to section 23 of the Offences against the Person Act 1861 (24 & 25 Vict c 100); (2) *R v Lawrence (Stephen)* [1982] AC 510, a prosecution for the now-repealed offence of causing death by reckless driving; (3) *R v Caldwell* [1982] AC 341, the case of the resentful ex-employee who, while drunk, set fire to a hotel where residents were sleeping and was prosecuted under section 1(2) of the Criminal Damage Act 1971, an offence which includes "being reckless as to whether the life of another would be thereby endangered"; and (4) *R v Parmenter; R v Savage* [1992] 1 AC 699, the case of the woman who deliberately threw beer in her rival's face, but let go of the glass as well and caused her injury.

The judge did not find it necessary to discuss the criminal cases at length. Nor do we. They were all concerned with statutory offences of differing antiquity and provenance. The general conclusion which we derive from them is that to draw any sharp distinction between "subjective" and "objective" tests may not be helpful; that the more obviously dangerous the defendant's activity is (such as driving at not less than 60 m p h in a built-up area) the more difficult it will be for him to avoid the jury finding that he was at least reckless as to the consequences; and that, by contrast, the greater the gap (in space or time, or both) between the defendant's act or omission and the injurious consequences, the more evidence will be required to establish that the defendant actually foresaw the consequences or was recklessly indifferent to them to a degree that amounts to dishonesty.

The judge [1996] 3 All ER 558, 579, after a very full discussion of the *Bourgoin* case [1986] QB 716 and *Northern Territory v Mengel*, 69 ALJR 527 turned to consider the difference between knowledge, turning a blind eye and recklessness. He found helpful, as we do, some observations on the meaning of "privity of the assured" (in section 39(5) of the Marine Insurance Act 1906) made by Lord Denning MR and Geoffrey Lane LJ in *Compania Maritima San Basilio SA v Oceanus Mutual Underwriting Association (Bermuda) Ltd* [1977] QB 49, 68, 76–77 in which "privity" was held to connote knowledge, belief or deliberately turning a blind eye, but not mere negligence.

The judge then turned to the constructive trust cases. He cited the fivefold classification in *Baden's* case [1993] 1 WLR 509 and noted the observations on it made by Millett J in the *Agip* case [1990] Ch 265 and Lord Nicholls in the *Royal Brunei* case [1995] 2 AC 378. Nevertheless he found the classification of considerable value in relation to misfeasance because (as he stated [1996] 3 All ER 558, 581) "the cases show that knowledge is material". He then went to refer briefly to the criminal cases and concluded that recklessness (in the "subjective" sense), as well as actual knowledge, was a sufficient basis for establishing misfeasance. He said, at pp 581–582:

> "The reason why recklessness was regarded as sufficient by all members of the High Court in *Mengel*, 69 ALJR 527 is perhaps most clearly seen in the judgment of Brennan J It is that misfeasance consists in the purported exercise of a power otherwise than in an honest attempt to

A perform the relevant duty. It is that lack of honesty which makes the act an abuse of power. In my judgment a public officer who falls within any of the categories (i) [actual knowledge], (ii) [wilfully shutting one's eyes to the obvious]) and (iii) [wilfully and recklessly failing to make such inquiries as an honest and reasonable man would make] is guilty of an abuse of power of the kind that the court had in mind in *Mengel*. B Anything less than knowledge or recklessness of that kind would not in my judgment be consistent with the essence of the tort, namely the deliberate and dishonest abuse of power."

That statement of principle has been very largely approved by the Court of Appeal of New Zealand in *Garrett v Attorney General* [1997] 2 NZLR 332 and *Rawlinson v Rice* [1997] 2 NZLR 651, and we too think that it is a C correct statement of law. We would however add some comments and qualifications.

First, in the passage just cited from the judgment of Clarke J he was right to emphasise the central importance of dishonesty in the ingredients of the tort. The same emphasis appears in the first point of the judge's five-point summary [1996] 3 All ER 558, 582, and in the first point of his very similar six-point summary, at pp 632–633. It is important to bear in mind that this D first point informs and permeates the other points.

Secondly (and following on from the first point), we think that the judge might have paid rather more attention to the observations in the *Royal Brunei* case [1995] 2 AC 378 about moving on from the *Baden* [1993] 1 WLR 509 test. The classification is over-elaborate (and its point (iii) in effect defines recklessness in a circular manner). Dishonesty and knowledge E (of some sort) are rather like the chicken and the egg, but Lord Nicholls's reference to a "gradually darkening spectrum" explains the difficulties inherent in the "sort" of knowledge required.

Thirdly, whether a defendant has acted honestly or dishonestly is, as Millett J said, a jury question. Nevertheless some guidance may be needed, and such guidance has been given by Lord Nicholls in the *Royal Brunei* case [1995] 2 AC 378. All the observations in the opinion, at pp 389–391, merit F careful study. We call attention in particular to Lord Nicholls's emphasis, at p 391, on assessing a person's conduct in the context of the surrounding circumstances:

> "when called upon to decide whether a person was acting honestly, a court will look at all the circumstances known to the third party at the time. The court will also have regard to personal attributes of the third G party, such as his experience and intelligence, and the reason why he acted as he did."

Fourthly (and following on from the third point), we note that the test of state of mind which the judge prescribed for awareness of illegality (point (3) in each summary) is for practical purposes identical with that which he H prescribed for awareness of consequences (point (4) in each summary). We agree that the authorities establish that actual knowledge or reckless indifference is (in shorthand) the test for the dishonest state of mind on each point. But in every case it will be necessary to look carefully at the facts in order to apply the test. Suppose that A, a civil servant, accepts a bribe from B for causing either his (B's) or some other person's (C's) name and address

to be improperly deleted from, or added to, an official database. The consequences of such improper action might range from B obtaining some grant or subsidy to which he was not entitled, to some third party, C, being harassed by official demands which ought not to have been made. A may be either a young and inexperienced clerk, or an experienced officer in a responsible managerial position. In either case A would be hard put to contend that taking a bribe was not dishonest (and that would, of course, give rise to criminal liability). But whether A knew of, or was recklessly indifferent to, injury to C so as to incur civil liability to C would depend on all circumstances. That would be so whether the claim was against A personally or was against the government department where A worked.

Lord Neill submitted, basing himself on what Lord Nicholls said in the *Royal Brunei* case, at p 389 ("acting dishonestly . . . means simply not acting as an honest person would in the circumstances"), that any knowing departure from the Bank's statutory obligations as a regulator is in the circumstances sufficient to constitute dishonesty. In the context of supervision of banks and deposit-takers it is very likely—indeed almost inevitable—that, if there is a question mark over an institution which had already been authorised, the Bank will find itself in a dilemma as between the interests of current and future depositors, as was pointed out in the clearest terms by Lord Keith in *Yuen Kun Yeu v Attorney General of Hong Kong* [1988] AC 175, 195 and by Lord Goff in *Davis v Radcliffe* [1990] 1 WLR 821, 827. It must have been the statutory intention that the regulatory system should be operated in the interests of the public as a whole, and regulatory decisions will generally involve the exercise of delicate judgments. Lord Neill faced up squarely to this, and submitted that any knowing departure from statutory obligations imports dishonesty, regardless of any particular circumstances which give rise to a dilemma.

We cannot accept that submission. We would agree that the Bank's statutory obligations as regulator were obligations of a grave nature. Moreover they were not (except perhaps as to "principal place of business") obligations that were expressed in obscure or complicated language, or hedged about with very lengthy rules and regulations. Nevertheless we consider that the honesty or dishonesty of any breach of a statutory obligation (where the person in breach is conscious of the breach, or suspects it, or chooses not to inquire into it) must depend on all the circumstances. We agree with what was said by Sir Louis Blom-Cooper QC in *R v Newham London Borough Council, Ex p Watkins* (1994) 26 HLR 434, 451:

> "There is always a spectrum of possibilities in which to the place the particular non-compliance, along a continuum from the trivial default, which can properly be overlooked, to the flagrant defiance of a statutory obligation, which cannot be condoned or even countenanced. The latter end of the continuum is tantamount to bad faith."

That is especially so in a case in which the plaintiffs seek to make the Bank liable, not vicariously but as a principal tortfeasor, for acts and omissions on the part of a number of individual officials who held different posts for different parts of the relevant period. Those officials are to be identified (as Lord Neill submitted and Mr Stadlen did not seriously dispute) in accordance with the principles laid down by the Privy Council in *Meridian*

A *Global Funds Management Asia Ltd v Securities Commission* [1995] 2 AC 500.

XIV

*Proximity*

This issue was dealt with largely by written submissions but is B nevertheless an issue of considerable importance. This is on any view an exceptional action. The fact that there are more than 6,000 plaintiffs from all over the world is not merely an interesting statistic; it demonstrates the extraordinary range of the duty which the plaintiffs assert, and for breach of which (over a long period) they seek to recover damages. It makes the plaintiffs' claim different from almost every successful (or potentially C successful) claim for misfeasance in public office to which we have been referred. The only cases which are even remotely comparable are *Henly v Lyme Corpn* 5 Bing 91 and the *Bourgoin* case [1986] QB 716, to which we will again return.

With the possible exception of those cases, all the successful claims for misfeasance in public office—and indeed most of the unsuccessful claims—were concerned with a direct and proximate relationship between the D plaintiff and the public officer responsible for the acts or omissions complained of. The directness and proximity of the relationship was mirrored in the directness and inevitability, or near-inevitability, of the loss suffered. In the old election cases there was often (as appears from the pleadings) a physical confrontation at the hustings, and when the returning officer (or similar officer) prevailed the plaintiff's loss of his vote was the E immediate and inevitable consequence. Similarly the court clerk who wrongfully discharged the debtor from custody in *Whitelegg v Richards*, 2 B & C 45 thereby caused immediate economic loss to the plaintiff, the disappointed creditor.

The 20th century authorities include a preponderance of licence cases, reflecting increasing official regulation of economic activity in the interests of health, safety and public order (the earliest licence case seems to be F *Bassett v Godschall* (1770) 3 WilsKB 121, which would not be decided in the same way today: see *David v Abdul Cader* [1963] 1 WLR 834). The licensee of a restaurant (*Roncarelli v Duplessis* 16 DLR (2d) 689), an hotel (*Farrington v Thomson and Bridgland* [1959] VR 286) or a cinema (*David v Abdul Cader* [1963] 1 WLR 834) who loses his livelihood through the wrongful withdrawal of his licence would naturally and almost inevitably G suffer economic loss. So would the widow whose house was compulsorily purchased for £3,000 in *Smith v East Elloe Rural District Council* [1956] AC 736. So would the cattle station owners in *Northern Territory v Mengel* 69 ALJR 527 who were prevented from selling their cattle by the quarantine invalidly imposed by inspectors who knew that their actions would cause the plaintiffs financial loss. In none of these cases can the public officer have been in any doubt about who would be injured by his act or omission, nor H can there have been much room for uncertainty about the consequence of financial loss. In all the cases in which liability was established (or potentially established) there was (as it was put in *Garrett v Attorney General* [1997] 2 NZLR 332, 349) "a conscious disregard for the interests of those who will be affected by official decision making".

In *Henly v Lyme Corpn* 5 Bing 91 the class of persons capable of suffering injury to property in consequence of non-repair of the sea defences must have been quite numerous. It appears that the plaintiff owned premises which were "abutting on or near the sea shore". The pleadings contain a more or less ritual averment of the defendants' "contriving and wrongfully and unjustly intending to injure, prejudice and aggrieve the plaintiff". There seems to have been no discussion of this point either in the course of argument or in the judgments.

In *Bourgoin SA v Ministry of Agriculture, Fisheries and Food* [1986] QB 716 there were seven plaintiffs, one of whom was a trade association of French turkey producers. The licence granted under the Diseases of Animals Act 1950 (and withdrawn by the minister with effect from 1 September 1981) was a general licence. It is likely that it affected, directly or potentially, a large number of French turkey producers, some of them persons of whose identities the minister was unaware. But the scope of the issues to be decided in the *Bourgoin* case was drastically restricted because (as already noted) the minister accepted, for the purpose of the preliminary issue, that he knew that his revocation of the general licence infringed article 30 of the EEC Treaty, and knew that revocation would and was calculated to injure the plaintiffs in their businesses. In making those concessions of actual knowledge the minister was adopting the high-risk strategy of contending that the purpose of inflicting injury (targeted malice) was a necessary ingredient of the tort, so that the preliminary issue (so far as it related to misfeasance) turned on that single point. It seems unlikely that the minister intended to concede, even for the purpose of the preliminary issue, that his revocation of the general licence had been dishonest or in bad faith.

While recognising that there may have been potentially several plaintiffs in *Henly v Lyme Corpn* 5 Bing 91 and the *Bourgoin* case [1986] QB 716, we remain of the view that this case is unprecedented in the breadth of the duty, and the range of possible plaintiffs, asserted against the Bank. The injury of which the plaintiffs complain is grievous, but it arises from a situation utterly different from the proximate relationship between the voter and the returning officer face to face at the hustings, the hotelier ordered to close his business premises, or the cattle station owners forbidden to move their cattle. The claim is more like that which might have been made (on a variation of the facts in *Northern Territory v Mengel* 69 ALJR 527) if inspectors had taken a bribe *not* to exercise their power to halt the movement of cattle which *were* infected with brucellosis, and consumers somewhere in the world had suffered harm as a result of eating meat which ought never to have reached the market.

Counsel on both sides reminded us, more than once, that a claim for misfeasance in public office is concerned with a tort fundamentally different from negligence; therefore, they urged—although with opposite aims in view—the notion of foreseeability has no part to play in misfeasance (except for Lord Neill's fallback position as set out in paragraph (9) of his summarised submissions). We have well in mind that the plaintiffs' claim is not a claim for negligence, and that there may be policy reasons for adopting a different and sterner attitude to deliberate wrongdoing. As Lord Steyn said in *Smith New Court Securities Ltd v Scrimgeour Vickers (Asset Management) Ltd* [1997] AC 254, 279:

A "It may be said that logical symmetry and a policy of not punishing intentional wrongdoers by civil remedies favour a uniform code. On the other hand, it is a rational and defensible strategy to impose wider liability on an intentional wrongdoer."

That was said in relation to the measure of damages for deceit, liability to the plaintiff having been established. It seems to us much more questionable B whether the court should act on the same principle in extending the classes of persons to whom a public officer may be liable for misfeasance.

Furthermore there is at least a narrow line of authority suggesting that the court should identify a duty owed to a particular plaintiff. That was the view taken in *Tampion v Anderson* [1973] VR 715, although in *Northern Territory v Mengel* 69 ALJR 527, 546 Brennan J expressly disagreed. The C plurality of the High Court of Australia in *Mengels* case thought that there was "some additional requirement" which might be found in the duty posited in *Tampions* case. The Court of Appeal of New Zealand in *Garrett v Attorney General* [1997] 2 NZLR 332, 346 disapproved *Tampion's* case if it was importing a duty *of care*, but nevertheless observed, at p 351, that "that something more, it seems to us, must be related to the individual who is bringing the action".

D These passages suggest to us that the notion of proximity should have a significant part to play in the tort of misfeasance, as it undoubtedly has in the tort of negligence.

XV

*Conclusions*

E Trying to stand back and assess the large volume of authorities and submissions placed before us, we see the tort as having developed, like the tort of negligence, by a process which has been partly incremental and partly marked by more abrupt (and often not fully explained) extensions.

In the days when the tort was virtually confined to disputes over voting rights, the simple formula of a dishonest abuse of official power damaging F the plaintiff (the would-be voter) was adequate. The dishonesty of the defendant (if proved) lay in his deliberately making an improper exercise of his power, and it did not matter whether the defendant's purpose was to harm the plaintiff, or to favour the plaintiff's rival, or simply to line his own pocket. The requirement to plead malice was more than a ritual incantation, but it covered all these states of mind. The injury to the plaintiff was not physical. In some cases (such as that of the bridgemaster who was entitled to G valuable perquisites) the plaintiff suffered economic loss. In other cases he was deprived of a constitutional right (in times before there was universal suffrage).

In the second half of this century (paradoxically, soon after civil actions for misfeasance in public office in connection with elections had been ended by the Representation of the People Act 1949) the tort came to life again in H connection with other official powers, especially in areas of official regulation of private economic activity through systems of licensing or similar controls. The simple formula used in the old cases was still apposite in cases where the plaintiff had been deprived of a licence (*David v Abdul Cader* [1963] 1 WLR 834, *Farrington v Thomson and Bridgland* [1959] VR 286, *Roncarelli v Duplessis* 16 DLR (2d) 689, the *Bourgoin* case [1986]

QB 716) or otherwise subjected to official power (*Smith v East Elloe Rural District Council* [1956] AC 736, *Dunlop v Woollahra Municipal Council* [1982] AC 158, *Northern Territory v Mengel* 69 ALJR 527) in circumstances in which consequent economic loss to the plaintiff was for practical purposes both immediate and inevitable.

Lord Diplock's statement in *Dunlop v Woollahra Municipal Council* [1982] AC 158 has been frequently cited in later cases as establishing "malice" and "knowledge" as alternative ingredients of the tort. It should however be noted that it occurs in a short section at the end of the opinion of the Privy Council in an appeal in which the respondents were not called on. The opinion was concerned mainly with the so-called *Beaudesert* principle (see *Beaudesert Shire Council v Smith* (1966) 120 CLR 145) which is no longer regarded as good law. Lord Diplock did not explain exactly what he meant by "malice" or "knowledge".

The *Bourgoin* case [1986] QB 716 stands out as a case of particular importance, as Clarke J recognised. With hindsight it is possible to feel surprise that the defendant minister was ready to make such wide concessions as he did, especially since (i) the revoked licence was a general licence and (ii) the plaintiffs included a French turkey producers' trade association (which presumably represented not only current but also potential future exporters of turkeys from France to the United Kingdom). Moreover it is very questionable whether the minister intended by his concessions to accept (even for the purpose of the preliminary issue) that he had acted dishonestly and in bad faith. None of these points seems to have been explored in the *Bourgoin* case, in which counsel's submissions concentrated, understandably, on the important points of European Community law which arose. So far as the tort of misfeasance was concerned the minister adopted the high-risk strategy of relying solely on the point that injury to French producers was not the *purpose* of revocation of the licence. We consider that Clarke J was right in his conclusion, after a careful analysis of the *Bourgoin* case, that it is binding authority only for a very limited proposition, that is that the minister's high-risk strategy had failed.

However the *Bourgoin* case has had a profound influence which is reflected in the later cases. *Dunlop v Woollahra Municipal Council* [1982] AC 158 and the *Bourgoin* case together seem to have led to what we regard as a rather rigid distinction between two supposed limbs of the tort (targeted malice and other cases). That is surprising, since neither Mann J nor Oliver LJ could see any sensible distinction between the two cases: see [1986] QB 716, 740, 777. The supposed distinction between the two limbs may have tended to blur the need to establish deliberate and dishonest abuse of power in every case. It may also have led Clarke J into an analysis of the requirements for the second limb which may be (in our respectful view) rather too elaborate as regards the defendant's state of mind, and insufficiently responsive to the relationship between the parties, to be acceptable as a completely general test. But in any event we do not consider that the judge stated the principles in a way that was too favourable to the Bank.

We are indeed in broad agreement with the judge's conclusions on the tort, as set out in the first judgment [1996] 3 All ER 558, 632–633, subject

A only to the qualifications and doubts tentatively expressed in the last three sections of this judgment.

It necessarily follows from this conclusion, and from our conclusions (which follow) as to the effect of the Directive of 1977, that we cannot accept Lord Neill's very far-reaching submission that the need to prove a guilty state of mind on the part of an official body is now out of date and B unjustifiable, particularly in the light of the jurisprudence of the European Court of Justice. The correctness of the *Bourgoin* case [1986] QB 716 on the issue of European Community law argued in that case was questioned by Lord Goff (without his Lordship expressing a concluded view) in *Kirklees Metropolitan Borough Council v Wickes Building Supplies Ltd* [1993] AC 227, 281–282 and Steyn LJ in *Elguzouli-Daf v Comr of Police of the Metropolis* [1995] QB 335, 347 referred to the English legal system possibly C having the capacity for further development under the direct or indirect influence of the European Court of Justice.

But in our view (for reasons which follow) European Union law does not assist the plaintiffs in this case. The development which Lord Neill urges would be a very radical change in the law going far beyond incremental development of the existing tort. It would be inconsistent with section 1(4) D of the 1987 Act. It would also be inconsistent with the decisions of this court and with clear expressions of view in the House of Lords. If such a change were to be made otherwise than through the superior authority of EU law, it should be enacted by Parliament and not effected by judicial extension of the common law.

## THE OTHER TWO PRELIMINARY ISSUES

E Since the outcome of the two issues would turn significantly on the ultimate findings of fact, we strongly question whether either was appropriate to be decided as a preliminary issue. We shall therefore deal with them very briefly.

## XVI

F *Causation of loss*

Clarke J's conclusion was [1996] 3 All ER 558, 629:

> "There is, so far as I know, no authority which has considered this question, but I can see no reason why, if the plaintiffs prove that the Bank knew that any particular act or omission would probably cause loss to a G depositor or potential depositor (as a member of the class of depositors or potential depositors), it should not follow that the loss was caused by the act or omission complained of. Common sense suggests that in those circumstances there would be a direct and effective causal link between the act or omission and the loss. That would in my opinion be even on the basis (as is the case on the facts) that another cause of the loss was fraud on the part of the managers . . . it is not sufficient to say that no duty of H care was owed to the plaintiffs or that it makes no difference to the question of causation whether the Bank acted honestly or dishonestly."

However, since he concluded that the plaintiffs' statement of claim as it then stood had not put forward the necessary allegation as to knowledge of loss, he answered this question in the Bank's favour, adding that, had the

ingredients of the tort been as the plaintiffs submitted (i e, reasonably foreseeable loss), there would have been considerable force in the Bank's submission.

The Bank's submission was that it was well established that a defendant should not be responsible in law for the deliberate wrongdoing of others, and that this applied particularly in the present case because: (i) the Bank did not have control over the operations of BCCI; (ii) the Bank owed no duty to the plaintiffs to guard against the fraud of the operators of BCCI SA and so had not assumed any responsibility for its acts; and (iii) the cause of any loss to the plaintiffs was BCCI SA's fraud, not any breach of duty on the part of the Bank.

The locus classicus on causation in the present context is to be found in the well known judgment of Lord Sumner in *Weld-Blundell v Stephens* [1920] AC 956, 986:

> "In general . . . even though A is in fault, he is not responsible for injury to C which B, as a stranger to him, deliberately chooses to do. Though A may have given the occasion for B's mischievous activity, B then becomes a new and independent cause . . . he insulates A from C."

This was explained by Lord Goff of Chieveley in *Smith v Littlewoods Organisation Ltd* [1987] AC 241, 272:

> "This dictum may be read as expressing the general idea that the voluntary act of another independent of the defender's fault, is regarded as a novus actus interveniens which, to use the old metaphor, 'breaks the chain of causation'. But it also expresses a general perception that we ought not to be held responsible in law for the deliberate wrongdoing of others. Of course, if a duty of care is imposed to guard against deliberate wrongdoing by others, it can hardly be said that the harmful effects of such wrongdoing are not caused by such breach of duty. We are therefore thrown back to the duty of care."

There are of course exceptions to this general rule, namely where the defendant has assumed the responsibility for the act of a third party (e g *Haynes v Harwood* [1935] 1 KB 146), or where the defendant is deemed to have assumed responsibility for such acts, for example where he has control over the third party whose acts directly caused the plaintiff's loss (e g *Dorset Yacht Co Ltd v Home Office* [1970] AC 1004).

The nub of Mr Stadlen's submission was that the case falls within the general category laid down in *Weld-Blundell v Stephens* [1920] AC 956 and that neither of the exceptions applies. He also points strongly to the passages in *Yuen Kun Yeu v Attorney General of Hong Kong* [1988] AC 175 and *Davis v Radcliffe* [1990] 1 WLR 821, quoted above, where the Privy Council dealt with causation in the regulatory context. These in our judgment are all very powerful submissions, but it must be borne in mind that all the authorities just referred to were negligence cases in which the crucial question was whether the defendant owed to the plaintiff a duty of care.

Here the cause of action is quite different, and, on the hypothesis that the plaintiffs were able to prove facts to satisfy the very heavy burden resting upon them to make good a claim for misfeasance in public office, it does not seem to us beyond the bounds of possibility that the establishment of such

A facts would also make good the plaintiffs' case on causation. All depends on these findings of fact, and, until they are established, it would in our view be premature to give a preliminary ruling on causation adverse to the plaintiffs.

XVII

*Potential depositors*

B The question here is whether the plaintiffs are entitled to sue in the capacity of potential depositors, even though they were unidentifiable at the time of the alleged misfeasance. The judge answered this question in the affirmative, and this is challenged by the Bank.

In support of his argument, Mr Stadlen stressed that this is a claim for economic not physical loss, and he pointed to a number of instances where C the courts have emphasised the need for a control mechanism to limit liability in respect of economic loss: e g per Lord Fraser in *Candlewood Navigation Corpn Ltd v Mitsui OSK Lines Ltd* [1986] AC 1, 17.

He then went on to submit that an affirmative answer to the third preliminary issue would come close to exposing regulators to precisely the kind of indeterminate liability which the Privy Council in *Yuen Kun Yeu v Attorney General of Hong Kong* [1988] AC 175 and *Davis v Radcliffe* D [1990] 1 WLR 821 considered to be against public policy: the less protection afforded by the inherent requirements of the tort, the greater the need for such protection to be provided by a control mechanism which confines liability at most to members of a class identifiable at the date of the misfeasance.

We consider this also to be a very powerful argument, reflecting as it does E some of the points we have already touched on in connection with proximity. But, at the preliminary issue stage, it founders for the same reason as causation, namely that until the facts are found, it would be premature to decide the point conclusively in the Bank's favour.

In reaching our conclusions on these last two preliminary issues, we have very much in mind Lord Wilberforce's words of caution in *Allen v Gulf Oil Refining Ltd* [1981] AC 1001, 1010–1011 quoted by Lord Bridge of F Harwich in *Lonrho plc v Fayed* [1992] 1 AC 448, 470:

> "My Lords, I and other of your Lordships have often protested against the procedure of bringing, except in clear and simple cases, points of law for preliminary decision. The procedure indeed exists and is sometimes useful. In other cases, and this is frequently so where they reach this House, they do not serve the cause of justice . . . The present is such an G example. The fact is that the result of the case must depend upon the impact of detailed and complex findings of fact upon principles of law which are themselves flexible. There are too many variables to admit of a clear-cut solution in advance."

EUROPEAN UNION LAW

H XVIII

*Introduction*

The parties' written and oral submissions on EU law reveal that there is no agreement even as to what the essential issues are. The Bank says that the plaintiffs' submissions are fundamentally flawed, especially as it is not part

of the plaintiffs' case that the Directive of 1977 has been incorrectly transposed into the law of the United Kingdom. The plaintiffs reply that EU law has been developing fast, even since the judge's first judgment delivered on 1 April 1996, and that the Bank is aiming at a target which has moved. In the face of this extensive disagreement it is appropriate to restate some elementary principles of EU law. Elementary though these principles are, their implications are still not fully developed, and it will be necessary to refer to a number of recent decisions of the European Court of Justice ("ECJ") and opinions of Advocates General given since the first judgment.

The primacy of EU law over the national legal systems of member states, amounting to a "new legal order", has been clear at least since the seminal decision of the ECJ in *NV Algemene Transport- en Expeditie Onderneming van Gend & Loos v Nederlandse administratie der belastingen* (Case 26/62) [1963] ECR 1 recognising that an individual may have rights under Community law which he can enforce directly in his national court. However (as Mr Paul Lasok for the Bank has demonstrated in his clear and helpful submissions) that general proposition needs a good deal of qualification and explanation, especially in relation to (i) the source of those rights, (ii) the quality (or content) of the rights and (iii) the type of recognition and enforcement sought in the national court. These points are considered in turn.

The primary sources of obligations and rights under EU law are the EC Treaty and its associated treaties; regulations (of the Council or the Commission); directives (normally issued by the Council to all member states); and decisions. Article 189 of the Treaty provides:

> "In order to carry out their task and in accordance with the provisions of this Treaty, the European Parliament acting jointly with the Council, the Council and the Commission shall make regulations and issue directives, take decisions, make recommendations or deliver opinions. A regulation shall have general application. It shall be binding in its entirety and directly applicable in all member states. A directive shall be binding, as to the result to be achieved, upon each member state to which it is addressed, but shall leave to the national authorities the choice of form and methods. A decision shall be binding in its entirety upon those to whom it is addressed. Recommendations and opinions shall have no binding force."

A directive is typically the means by which the Council requires member states to introduce, within a set period of time, any legislation necessary to give effect to the social or economic policies embodied in the directive. In the United Kingdom primary or secondary legislation (sometimes under section 2 of the European Communities Act 1972) may be required in the fields of (among others) agriculture, consumer protection, customs duties, employment, fisheries and food, health and safety at work, medicine and pharmacy, public health, and trade and industry.

Article 189 states expressly that regulations are directly applicable in all member states. A national law which is in conflict with an EU regulation must therefore be disregarded by the national court: *Amministrazione delle Finanze dello Stato v Simmenthal SpA* (Case 106/77) [1978] ECR 629. The position is the same with obligations created by the Treaty itself, but only if the Treaty provision has direct effect. Familiar provisions of the Treaty

A which do have direct effect include article 52 (forbidding restrictions on rights of establishment, as in *R v Secretary of State for Transport, Ex p Factortame Ltd (No 4)* (Case C-48/93) [1996] QB 404), article 12 (forbidding any increase in customs duties between member states, as in *NV Algemene Transport- en Expeditie Onderneming van Gend & Loos v Nederlandse administratie der belastingen* (Case 26/62) [1963] ECR 1) and
B article 30 (forbidding restrictions on imports from other member states, as in *Brasserie du Pêcheur SA v Federal Republic of Germany* (Case C-46/93) [1996] QB 404). An example of a provision of the Treaty which does not have direct effect is article 5 (requiring member states to take all appropriate measures to fulfil their obligations under EU law); it does not meet the test of being "clear and unconditional and not contingent on any discretionary implementing measure": see *Hurd v Jones* (Case 44/84) [1986] QB 892, 946,
C para 47.

The position in relation to the effect of directives was very clearly explained by the ECJ in *Becker v Finanzamt Münster-Innenstadt* (Case 8/81) [1982] ECR 53. Mrs Becker was a self-employed credit negotiator. The sixth directive on the harmonisation of value added tax (77/388/EEC) provided for the exemption of credit transactions. The period for the
D Federal Republic of Germany to comply with the directive (as extended) terminated on 1 January 1979 but it was not implemented in Germany until a year later. Mrs Becker brought proceedings against the Münster tax authorities and sought to rely on the directive. On a reference under article 177 of the Treaty the ECJ referred to the third paragraph of article 189 and continued in a passage which is very frequently cited and referred to, at pp 70–71:

E

> "18. It is clear from that provision that states to which a directive is addressed are under an obligation to achieve a result, which must be fulfilled before the expiry of the period laid down by the directive itself.
>
> "19. It follows that wherever a directive is correctly implemented, its effects extend to individuals through the medium of the implementing measures adopted by the member state concerned (judgment of 6 May
> F 1980 in *Commission of the European Communities v Kingdom of Belgium* (Case 102/79) [1980] ECR 1473).
>
> "20. However, special problems arise where a member state has failed to implement a directive correctly and, more particularly, where the provisions of the directive have not been implemented by the end of the period prescribed for that purpose.
>
> G "21. It follows from well-established case law of the court and, most recently, from the judgment of 5 April 1979 in *Pubblico Ministero v Ratti* (Case 148/78) [1979] ECR 1629, that whilst under article 189 regulations are directly applicable and, consequently, by their nature capable of producing direct effects, that does not mean that other categories of measures covered by that article can never produce similar effects.
>
> H "22. It would be incompatible with the binding effect which article 189 ascribes to directives to exclude in principle the possibility of the obligations imposed by them being relied on by persons concerned.
>
> "23. Particularly in cases in which the Community authorities have, by means of a directive, placed member states under a duty to adopt a certain course of action, the effectiveness of such a measure would be diminished

if persons were prevented from relying upon it in proceedings before a court and national courts were prevented from taking it into consideration as an element of Community law.

"24. Consequently, a member state which has not adopted the implementing measures required by the directive within the prescribed period may not plead, as against individuals, its own failure to perform the obligations which the directive entails.

"25. Thus, wherever the provisions of a directive appear, as far as their subject matter is concerned, to be unconditional and sufficiently precise, those provisions may, in the absence of implementing measures adopted within the prescribed period, be relied upon as against any national provision which is incompatible with the directive or in so far as the provisions define rights which individuals are able to assert against the state."

Some further explanation of this principle (and especially its basis in a sort of estoppel) was given by Advocate General Mischo in *Criminal proceedings against Kolpinghuis Nijmegen BV* (Case 80/86) [1987] ECR 3969, 3976–3977, paras 1–9.

Because the principle arises in that way, it permits an individual to obtain a remedy in his national court if (and only if) the person responsible for the breach is an entity which is an emanation of the state, and the other conditions in paragraph 25 of the judgment in *Becker v Finanzamt Münster-Innenstadt* (Case 8/81) [1982] ECR 53, 71 ("the *Becker* conditions") are satisfied. EU directives are addressed to member states and it is upon member states that they impose obligations: see the opinion of Advocate General Slynn in *Marshall v Southampton and South West Hampshire Area Health Authority (Teaching)* (Case 152/84) [1986] QB 401, 412–413, followed by the ECJ, at pp 421–422, paras 46–50. That case, and later cases on other English entities, show how widely the concept of emanation of the state has been interpreted, and that no distinction is to be drawn between a state body as employer and the same body in another capacity; see also *Foster v British Gas plc* (Case C-188/89) [1991] 1 QB 405 and *National Union of Teachers v Governing Body of St Mary's Church of England (Aided) Junior School* [1997] ICR 334. In this case it is not in dispute that the Bank of England is an emanation of the state.

Cases in which a directive is enforced in the national court against a state body are commonly referred to as cases of "vertical direct effect," as opposed to the horizontal effect mentioned by Sir Gordon Slynn in the opinion already cited. In *Marshall's* case [1986] QB 401 a female senior dietician was dismissed on attaining the age of 62 in circumstances where a male employee would not have been dismissed. The ECJ (on a reference by the Court of Appeal under article 177) held that her dismissal breached EU law (as embodied in Council Directive (76/207/EEC), the Equal Treatment Directive) and that section 6(4) of the Sex Discrimination Act 1975 (which permitted discrimination in relation to retirement) was inconsistent with the directive and provided no defence in the national court. Where the employer was not a state body, the result was different, as in the case of the female plaintiff who lost her job in similar circumstances in *Duke v Reliance Systems Ltd* [1988] AC 618. The United Kingdom Government had not amended the Sex Discrimination Act 1975 so as to comply with the Equal

A Treatment Directive because that directive was not perceived as prohibiting different normal ages of retirement for men and women, and there was no horizontal direct effect between the individual employee and the non-state employer.

The other two qualifications can be noted more briefly, since they have been mentioned in the passage from *Becker's* case [1982] ECR 53, 71, B para 25 already cited. The rights must be "unconditional and sufficiently precise". That does not mean that they must be spelt out in exact detail, since a directive does almost by definition leave the choice of form and methods to member states. Mrs Becker succeeded even though the Federal Republic had a measure of discretion over such matters as provisions against abusive tax avoidance. But there must be a basic minimum of clarity and certainty.

C As to the type of recognition or enforcement sought in the national court, there is a distinction between relying on a Treaty provision with direct effect, or a regulation, to nullify some incompatible provision of national law (on the one hand) and relying on EU law as giving a right to reparation (in terms of English law, damages) for breach of an obligation under EU law. The distinction is reflected in the alternative formula in *Becker's* case, at p 71, D para 25, of a provision of a directive being relied on "as against any national provision which is incompatible with the directive or in so far as the provisions define rights which individuals are able to assert against the state".

In the context of a member state's failure to implement a directive correctly (or at all) state liability may take the form of the estoppel-based liability of an emanation of the state (such as the health authority's liability E to Miss Marshall for sex discrimination) or may be the liability of the state itself under the principle in *Francovich v Italian Republic* (Case C-6/90) [1995] ICR 722. *Francovich's* case has recently been followed and applied in *Dillenkofer v Federal Republic of Germany* (Joined Cases C-178, 179 and 188–190/94) [1997] QB 259. *Francovich's* case concerned Italy's failure to implement a directive protecting workers' rights in the event of their F employer's insolvency. *Dillenkofer's* case concerned Germany's failure to implement a directive for consumer protection in the field of package holidays. The judgment of the ECJ in *Dillenkofer's* case (given on 11 July 1996, after the judge's first judgment dealing with issues of EU law) set out the principles [1997] QB 259, 291–292:

> "20. The court has held that the principle of state liability for loss and G damage caused to individuals as a result of breaches of Community law for which the state can be held responsible is inherent in the system of the Treaty: *Francovich v Italian Republic* (Case C-6/90) [1995] ICR 722, 772, para 35; *Brasserie du Pêcheur SA v Federal Republic of Germany; R v Secretary of State for Transport, Ex p Factortame Ltd (No 4)* (Joined Cases C-46/93 and C-48/93) [1996] QB 404, 496, para 31; *R v HM Treasury, Ex p British Telecommunications plc* (Case C-392/93) [1996] H QB 615, 654, para 38 and *R v Ministry of Agriculture, Fisheries and Food, Ex p Hedley Lomas (Ireland) Ltd* (Case C-5/94) [1997] QB 139, 160, para 24. Furthermore, the court has held that the conditions under which state liability gives rise to a right to reparation depend on the nature of the breach of Community law giving rise to the loss and



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damage: *Francovich* [1995] ICR 722, 772, para 38; *Brasserie du Pêcheur* [1996] QB 404, 497, para 38, and *Hedley Lomas* [1997] QB 139, 160, para 24.

"21. In *Brasserie du Pêcheur*, at p 499, paras 50 and 51; *British Telecommunications* [1996] QB 615, 655, paras 39 and 40, and *Hedley Lomas*, at p 160, paras 25 and 26, the court, having regard to the circumstances of the case, held that individuals who have suffered damage have a right to reparation where three conditions are met: the rule of law infringed must have been intended to confer rights on individuals, the breach must be sufficiently serious, and there must be a direct causal link between the breach of the obligation resting on the state and the damage sustained by the injured parties.

"22. Moreover, it is clear from the *Francovich* case which, like the present cases, concerned non-transposition of a Directive within the prescribed period, that the full effectiveness of the third paragraph of article 189 of the Treaty requires that there should be a right to reparation where the result prescribed by the Directive entails the grant of rights to individuals, the content of those rights is identifiable on the basis of the provisions of the Directive and a causal link exists between the breach of the states obligation and the loss and damage suffered by the injured parties.

"23. In substance, the conditions laid down in that group of judgments are the same, since the condition that there should be a sufficiently serious breach, although not expressly mentioned in *Francovich*, was nevertheless evident from the circumstances of that case."

The total failure by a member state to implement a directive addressed to it will almost invariably, it seems, be regarded as seriously (that is, manifestly and gravely) in breach. Conversely there may be no actionable breach if a member state has made a venial error in transposing an ambiguous directive (*R v HM Treasury, Ex p British Telecommunications plc* (Case C-392/93) [1996] QB 615) or where the transposition of the directive requires legislative activity in which the member state has a comparatively wide margin of appreciation. But in any case intentional fault or negligence is not an essential precondition of liability: see the judgment of the ECJ in *R v Secretary of State for Transport, Ex p Factortame Ltd (No 4)* (Case C-48/93) [1996] QB 404, 502–503, paras 75–80. *Brasserie du Pêcheur SA v Federal Republic of Germany*; *R v Secretary of State for Transport, Ex p Factortame Ltd (No 4)* (Joined Cases C-46/93 and C-48/93) [1996] QB 404 were concerned, not with failure to implement a directive, but with breaches by national legislative action of member states' obligations under articles 52 and 30 respectively of the Treaty, articles which have long been recognised as having direct effect. They are therefore more readily classified as direct effect cases than true *Francovich*-type cases of state responsibility for failure to implement a directive (though to refer to "true" *Francovich*-type liability begs some questions, and the ECJ's judgment in *Dillenkofer v Federal Republic of Germany* (Joined Cases C-178, 179 and 188–190/94) [1997] QB 259 in the passage already quoted, shows some inclination to assimilate the two heads of the liability; and the breadth of the principles stated in *Francovich's* case [1995] ICR 722 was also emphasised by Lord Goff in *Kirklees Metropolitan Borough Council v*

A *Wickes Building Supplies Ltd* [1993] AC 227, 281–282, expressing doubt as to whether the *Bourgoin* case [1986] QB 716 was correctly decided on the point of EU law).

Indeed the plaintiffs go so far as to submit that the doctrine of direct effect in the traditional sense is now of limited importance to the question of state liability. They rely on *Dillenkofer's* case [1997] QB 259 and on some B general observations of the ECJ in the *Factortame* and *Brasserie du Pêcheur* cases [1996] QB 404, 495, paras 20–22, in the context of the right to reparation. They also rely on the decisions of the ECJ in *CIA Security International v Signalson SA* (Case C-194/94) [1996] ECR I-2201 and *Verein für Konsumenteninformation v Österreichische Kreditversicherungs AG* (Case C-364/96) [1998] ECR I-2949.

Since *Francovich's* case [1995] ICR 722, it has been recognised that an C individual may have the right to reparation (in this country, damages) for non-implementation of a directive, even though the *Becker* conditions are not satisfied. State liability to make reparation to an individual for non-implementation of a directive can be seen as subdivided into *Becker*-type liability and *Francovich*-type liability, the practical requirements for which are (as *Dillenkofer's* case [1997] QB 259 shows) closely analogous. In that D sense the doctrine of direct effect does not, in this context, have the same paramount importance as it had before *Francovich's* case.

Nevertheless there still appears to be an important distinction (recognised by Schiemann LJ in *National Union of Teachers v Governing Body of St Mary's Church of England (Aided) Junior School* [1997] ICR 334, 338) between cases in which an emanation of the state may be directly liable (or may be deprived of a defence) because of a breach of a directly effective E provision of Community law (as in *Marshall's* case [1986] QB 401) and cases in which the state itself is liable (as in *Francovich's* case [1995] ICR 722) for failure to transpose a directive (and so, in effect, to give the wronged individual a right of action and a remedy against some other defendant). The point is well illustrated by the facts of *Francovich's* case. Employees of two insolvent Italian companies were unable to obtain arrears F of wages from guarantee institutions because Italy had failed to implement Council Directive (80/987/EEC). The first issue raised by the first question was simple direct effect, on which the ECJ said, at pp 767–768:

> "11. As the court has consistently held, a member state which has not adopted the implementing measures required by a directive within the prescribed period may not, against individuals, plead its own failure to G perform the obligations which the directive entails. Thus wherever the provisions of a directive appear, as far as their subject matter is concerned, to be unconditional and sufficiently precise, those provisions may, in the absence of implementing measures adopted within the prescribed period, be relied upon as against any national provision which is incompatible with the directive or in so far as the provisions of the directive define rights which individuals are able to assert against the H state: see *Becker v Finanzamt Münster-Innenstadt* (Case 8/81) [1982] ECR 53.
>
> "12. It is therefore necessary to see whether the provisions of Directive 80/987 which determine the rights of employees are unconditional and sufficiently precise. There are three points to be considered: the identity

of the persons entitled to the guarantee provided, the content of that guarantee and the identity of the person liable to provide the guarantee. In that regard, the question arises in particular whether a state can be held liable to provide the guarantee on the ground that it did not take the necessary implementing measures within the prescribed period."

The ECJ held that the identity of the persons entitled to the guarantee (in the event of their employer's insolvency) and the content of the guarantee were sufficiently precise and unconditional, but that the identity of the person liable to give the guarantee was not. The guarantor might have been an emanation of the state, but that could not be assumed. The ECJ then went on to the second issue raised by the first question, in an important and much cited passage part of which is set out in the speech of Lord Goff in *Kirklees Metropolitan Borough Council v Wickes Building Supplies Ltd* [1993] AC 227, 281–282. The ECJ's judgment summarises the conditions for state liability for failure to transpose a directive [1995] ICR 722, 772:

"39. Where, as in this case, a member state fails to fulfil its obligation under the third paragraph of article 189 of the Treaty to take all the measures necessary to achieve the result prescribed by a directive, the full effectiveness of that rule of Community law requires that there should be a right to reparation provided that three conditions are fulfilled.

"40. The first of those conditions is that the result prescribed by the directive should entail the grant of rights to individuals. The second condition is that it should be possible to identify the content of those rights on the basis of the provisions of the directive. Finally, the third condition is the existence of a causal link between the breach of the state's obligation and the loss and damage suffered by the injured parties.

"41. Those conditions are sufficient to give rise to a right on the part of individuals to obtain reparation, a right founded directly on Community law."

As already noted, in *Dillenkofer's* case [1997] QB 259, 292, para 23 the ECJ added that the seriousness of the breach, although not expressly mentioned in *Francovich*, was evident from the facts of the case.

One practical implication of the distinction between *Becker*-type liability and *Francovich*-type liability is in the identity of the defendant. The member state and the particular emanation of the member state, although assimilated in the eyes of EU law, are likely to be quite different persons so far as concerns procedure in the national court: see on this point the observations of Lord Goff in *Kirklees Metropolitan Borough Council v Wickes Building Supplies Ltd* [1993] AC 227, 282, and of Lord Keith in *R v Secretary of State for Employment, Ex p Equal Opportunities Commission* [1995] 1 AC 1, 32, identifying the Attorney General as the proper defendant to a *Francovich*-type claim.

The main difference between the parties, as to the basic principles to be applied, is as to whether a directive, once transposed into national law, ceases to be the immediate source of rights enforceable by an individual claimant in his national court (and is supplanted by rights under the national law). Mr Lasok submits that that is a clear and well-established principle relying on *Becker's* case [1982] ECR 53 itself (see p 70, para 19 of the ECJ judgment), *Felicitas Rickmers-Linie KG & Co v*

A *Finanzamt für Verkehrsteuern, Hamburg* (Case 270/81) [1982] ECR 2771, 2786, para 24, and *Kampelmann v Landschaftsverband Westfalen-Lippe* (Joined Cases C-253/96 to C-258/96) [1997] ECR I-6907, 6939, para 42, which states:

"Since the date on which [Council Directive (91/533/EEC) on an employer's obligation to inform employees of the conditions applicable to B the contract or employment relationship] was transposed, individuals can no longer rely on those provisions unless the national implementing measures are incorrect or inadequate in the light of the Directive."

Against that Lord Neill submits that EU law has been developing in this area, and that a directive can be the immediate source of enforceable rights even if it has been transposed (and correctly transposed) into national law. C He relies on *Verein für Konsumenteninformation v Österreichische Kreditversicherungs AG* (Case C-364/96) [1998] ECR I-2949 and on *Norbrook Laboratories Ltd v Ministry of Agriculture, Fisheries and Food* (Case C-127/95) [1998] ECR I-1531. He also relies on *Commission of the European Communities v Federal Republic of Germany* (Case C-237/90) [1992] ECR I-5973, 6005 where Advocate General Jacobs said:

D "The Commission is of course right when it says that it is not sufficient simply to incorporate the terms of a directive into national legislation; in addition, member states must ensure that the legislation is applied in practice."

This point is also touched on in the opinion of Advocate General Léger in *R v Ministry of Agriculture, Fisheries and Food, Ex p Hedley Lomas* E *(Ireland) Ltd* (Case C-5/94) [1997] QB 139 180, paras 112 et seq; note also the references to the *Bourgoin* case [1986] QB 716 and misfeasance in public office, at pp 185–186, paras 138–141.

*Verein für Konsumenteninformation v Österreichische Kreditversicherungs AG* (Case C-364/96) [1998] ECR I-2949 does not assist the plaintiffs. It is simply an illustration (on the interpretation of Council F Directive (90/314/EEC) on package holidays) of the familiar principle that, because the national court will always try to construe implementing legislation in conformity to the directive which it is intended to implement, it may still be necessary to obtain a ruling from the ECJ as to the meaning of an implemented directive. Nor does *CIA Security International v Signalson SA* (Case C-194/94) [1996] ECR I-2201 significantly assist the plaintiffs. But the *Hedley Lomas* case [1997] QB 139 and the *Norbrook* case [1998] ECR G I-1531 call for more extended discussion.

With two exceptions, all the cases mentioned in this part of the judgment were concerned with breaches of EU law occasioned by acts of omission or commission in the enactment of primary or secondary legislation by a member state. The exceptions are the *Hedley Lomas* and *Norbrook* cases, which were concerned with administrative acts.

H The *Hedley Lomas* case [1997] QB 139 was decided by the ECJ on 23 May 1996 (that is, after delivery of the judge's first judgment). The facts were that the Ministry of Agriculture, Fisheries and Food ("MAFF") refused (between April 1990 and January 1993) to issue licences for the export to Spain of live animals for slaughter. The reason for this policy was the belief or suspicion (which was not substantiated) that a number of Spanish

slaughterhouses were not complying with the requirements of Council Directive (74/577/EEC) which had been implemented in Spain in 1987. MAFF's refusal was at first sight an infringement of article 34 of the Treaty; in the ensuing proceedings by an exporter MAFF relied on article 36 (which qualified article 34 by reference to, among other things, the protection of animal health and life).

The case is notable for the length of the opinion of Advocate General Léger and the brevity of the judgment of the ECJ The judgment decided that the United Kingdom could not rely on article 36 in a situation where harmonisation was already provided for by a directive, and that on the three-stage test laid down by the ECJ in the earlier cases (rights conferred on individuals; sufficiently serious breach; and direct causal link) the United Kingdom could not avoid liability to pay damages. In its judgment the ECJ said, at p 204, para 28:

> "As regards the second condition, where, at the time when it committed the infringement, the member state in question was not called on to make any legislative choices and had only considerably reduced, or even no, discretion, the mere infringement of Community law may be sufficient to establish the existence of a sufficiently serious breach."

The *Norbrook* case [1998] ECR I-1531 was concerned with the Medicines Act 1968 (which relates to veterinary as well as human medicinal products), with statutory instruments which not only supplemented but also amended the primary legislation, and with Council Directives (81/851 and 852/EEC) on the approximation of laws of member states relating to veterinary medicinal products. Norbrook Laboratories manufactured in Northern Ireland a product popularly known as "Pen & Strep" (after its two active ingredients). "Strep" was dihydrostreptomycin ("DHS") which was itself manufactured from streptomycin sulphate ("SS"). Norbrook manufactured its own DHS. MAFF, the competent authority for the grants of a marketing authorisation, sought information about the manufacturer of the SS from which Norbrook made its DHS. A dispute arose early in 1991 and judicial review proceedings ensued. The issue (elaborated in seven separate questions on a reference under article 177) was whether MAFF's requirement for that information infringed EU law.

The case is rather confusing because at first instance in Northern Ireland the judge, by consent of the parties, referred directly to Council Directives (81/851 and 852/EEC) rather than looking at the primary and secondary legislation then in force in Northern Ireland. Moreover that legislation was amended (in such a way as to refer explicitly to the directives) by a statutory instrument which came into force on 19 October 1993, before the article 177 reference by the Court of Appeal in Northern Ireland in March 1995. Those points are made clear by the terms of the reference, paragraphs 20 and 21. Paragraph 33(k) shows that Norbrook was contending that MAFF's imposition of the requirement (and consequent failure to grant a marketing authorisation) was a breach of the directives, and in particular article 41 of Directive 81/851. Article 41 (set out at p 1541, para 26 of the opinion of Advocate General Léger) provided that no decision to withhold, withdraw or suspend marketing authorisation might be taken on grounds other than those in the directive. The Advocate General's opinion stated, at p 1563, para 134:

A "Therefore, where, in breach of the third paragraph of article 189 of the Treaty, a member state incorrectly transposes *or misapplies* sufficiently clear and precise provisions of the aforementioned directives, that member state manifestly and gravely disregards the limits on the exercise of its powers." (Emphasis supplied.)

The words emphasised express the Advocate General's view that article 189 B may require a directive not only to be transposed by a legislative process, but also to be given continuing practical application by administrative processes. Submissions to the same effect are also recorded in the report for the hearing, at pp 1553–1554, paras 86, 87 and 89. Paragraph 89 speaks of no distinction being drawn between non-implementation and misimplementation in a context which suggests that "misimplementation" is C not limited to a legislative process.

The judgment itself casts little light on these points. Paragraph 20, at p 1575, refers to the directives having "been deemed to have been implemented by the Medicines Act 1968, as amended, and subordinate legislation", a choice of words which is explained by the parties agreement as to how the case should be dealt with. The general effect of the ECJ's answers to) the first six questions was that the directives prescribed in a D complete and comprehensive way, what information was to accompany an application for a marketing authorisation, and that the competent authority could not, consistently with the directives, ask for more information about the provenance of the SS. In relation to the seventh question the ECJ, at pp 1598–1600, paras 105–112, restated the principles in *Dillenkofer's* case [1997] QB 259 in very much the same terms, but with an added reference to E the requirement for equivalence and effectiveness of remedies in the national court.

It has been necessary to refer to the *Norbrook* case [1998] ECR I-1531 at some length because very different submissions were made as to its significance. It is an unusual and inconclusive case, partly because of the odd basis on which it was argued in the national court. The outcome on the issues of interpretation (that the directives were a comprehensive code) F suggests some deviation from the spirit of article 189 ("shall leave to the national authorities the choice of form and methods"). The *Norbrook* case [1998] ECR I-1531 does not in our judgment displace the general principle (in *Becker's* case [1982] ECR 53, *Felicitas Rickmers-Linie KG & Co v Finanzamt für Verkehrsteuern, Hamburg* (Case 270/81) [1982] ECR 2771 and *Kampelmann v Landschaftsverband Westfalen-Lippe* (Joined Cases G C-253/96 to C-258/96) [1997] ECR I-6907) that a correctly transposed directive gives rise to rights under national law, enforceable in the national court. But it does suggest that there may be a category of directives in relation to which a member state's obligation of proper implementation is not restricted to a once-for-all legislative process, but also requires a continuing administrative process.

H In such a case, it may not always be right to assume that the range of choice (or margin of appreciation) for administrative action is necessarily much more restricted than for legislative action. That was the case in the *Hedley Lomas* case [1997] QB 139 (see p 204, para 28 of the judgment already quoted), and in the *Norbrook* case [1998] ECR I-1531 the detailed and comprehensive prescription in the directives left the member states and

the competent authorities with virtually no discretion, legislative or administrative. But not every administrative act of government requires the exercise of little or no discretion; the Bank stresses the sensitive and difficult judgments which any national bank regulator is called upon to make from time to time. That leads on to the central issue of whether the Directive of 1977 did in the relevant sense confer rights on individuals.

XIX

*Did the Directive of 1977 confer rights on depositors?*

The judge identified this central issue as depending on the meaning and effect of the Directive of 1977. He was influenced in his approach to the issue by the two decisions of the Privy Council in *Yuen Kun Yeu v Attorney General of Hong Kong* [1988] AC 175 and *Davis v Radcliffe* [1990] 1 WLR 821, to which we have already extensively referred. He noted [1996] 3 All ER 558, 600–601 three salient points discussed by the judge. First, in the Privy Council cases (as in this case) the regulator had no day-to-day control of the deposit-taker. Second, the real cause of the depositors' loss was fraud on the part of the deposit-taker's manager. Third, the performance by a regulator of its statutory supervisory function requires the regulator to make delicate judgments balancing the interests of existing and potential depositors, as well as the general public interest in a sound financial system. The making of those judgments might be inhibited if the regulator (in Lord Keith's words) "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": [1998] AC 175, 198. Those considerations argued strongly against the imposition on a regulator of a duty of care in favour of any particular section of the public.

These three points helped to lead the judge to his conclusion [1996] 3 All ER 558, 615 that the Directive of 1977 did not create enforceable rights for depositors or potential depositors. The plaintiffs criticise that as the wrong approach. It is an approach rooted in the need to find (before recognising that individuals have enforceable rights) a duty of care in favour of a limited and ascertainable class of prospective plaintiffs who stand in a proximate relationship to the prospective defendant, and whose claims ought as a matter of policy to be recognised by the law. It is an approach which readily accepts that the prospective defendant should not be exposed to "liability in an indeterminate amount for an indeterminate time to an indeterminate class": see *Ultramares Corpn v Touche* 255 NY 170, 179. It is an approach which has a natural appeal to most lawyers brought up in the common law tradition.

Nevertheless there is much force in the plaintiffs' submission that decisions of the ECJ (going back over 30 years and more to *NV Algemene Transport- en Expeditie Onderneming van Gend & Loos v Nederlandse administratie der belastingen* (Case 26/62) [1963] ECR 1) take a markedly different approach. The jurisprudence of the ECJ shows no reluctance to find rights enforceable by very large and ill-defined groups of individuals, if a provision of the Treaty (such as article 12 in the *van Gend & Loos* case) or a directive is found, on a purposive construction, to impose an obligation capable of giving rise to correlative rights. The interest of the group of individuals may be as employees (as in *Marshall's* case [1986] QB 401 and

A *Francovich's* case [1995] ICR 722), as consumers (as in *Dillenkofer's* case [1997] QB 259), as traders (as in the *van Gend & Loos* case [1963] ECR 1, *Amministrazione delle Finanze dello Stato v Simmenthal SpA* (Case 106/77) [1978] ECR 629, the *Factortame* case (Case C-48/93) [1996] QB 404, the *Brasserie du Pêcheur* case (Case C-46/93) [1996] QB 404 and the *Hedley Lomas* case [1997] QB 139) or simply as inhabitants with an interest in a clean and healthy environment.

B The last point is strikingly illustrated by a series of actions brought by the Commission against Germany for failing to transpose directives concerning air quality and water quality. The fact that these proceedings were commenced by the Commission, and not by individuals, might seem an important point of distinction, but the ECJ appears to have taken the view that the directives did confer rights on individuals. The point appears most C clearly from the opinion of Advocate General Jacobs in *Commission of the European Communities v Federal Republic of Germany* (Case C-237/90) [1992] ECR I-5973, 6005:

> "As regards liability towards individuals, the circumstances in which an action for damages may be brought by an individual in respect of a member state's failure to implement a directive were defined in paragraph D 40 of the judgment in *Francovich v Italian Republic* (Case C-6/90) [1995] ICR 722, 772. In particular, the directive must be such as to confer rights on individuals. It may be inferred from paragraph 14 of the judgment in *Commission of the European Communities v Federal Republic of Germany* (Case C-58/89) [1991] ECR I-4983, 5023 that the directive in issue in the present proceedings does indeed confer rights on individuals, in so far as its purpose is to protect public health and a failure to comply E with it might endanger public health."

Both Directive 75/440 and Directive 80/778 (considered in *Commission of the European Communities v Federal Republic of Germany* (Case C-58/89) [1991] ECR I-4983 and *Commission of the European Communities v Federal Republic of Germany* (Case C-237/90) [1992] ECR I-5973 F respectively) laid down detailed requirements as to water quality, non-compliance with which could endanger public health, and those concerned (Case C-58/89, at p 5023, para 14) "should be able to rely on mandatory rules in order to enforce their rights".

However in another environmental case, *Comitato di Coordinamento per la Difesa della Cava v Regione Lombardia* (Case C-236/92) [1994] ECR I-483, the ECJ reached the opposite conclusion on Council Directive G (75/442/EEC) (relating to waste disposal). The claimants objected to the creation of landfill sites in Lombardy, and contended that the Italian Government was at fault in not having required facilities for recycling waste to be provided. The relevant provisions of the directive are set out or summarised in the opinion of the Advocate General Darmon. The recitals showed that the directive had twin objectives: the economic objective of H harmonising national legislation so as to avoid obstruction of trade and the social objective of protecting health and the environment: see p 488, para 21 of the opinion. Article 3 required member states to take appropriate steps to encourage the prevention, recycling and processing of waste, but it did not impose any particular obligation. Article 4 was mandatory but unspecific, requiring member states to take the necessary measures to ensure that waste

was disposed of without endangering human health and without harming the environment. Articles 5 to 11 imposed a number of particular requirements, none of which referred to recycling. The Advocate General observed, at p 489, para 24, that the sole purpose of article 4 was "to define the objectives of the more specific measures contained in articles 5 to 11, but it cannot, in isolation, constitute a measure of that kind", i e impose a specific obligation.

The judgment of the ECJ proceeded on the same lines. It concluded, at p 503, para 14:

> "Thus, the provision at issue must be regarded as defining the framework for the action to be taken by the member states regarding the treatment of waste and not as requiring, in itself, the adoption of specific measures or a particular method of waste disposal. It is therefore neither unconditional nor sufficiently precise and thus is not capable of conferring rights on which individuals may rely as against the state."

If the obligation had been sufficiently clear and certain the width and open-endedness of the class benefited would not, it seems, have been an obstacle.

The plaintiffs' submissions on this issue start with the proposition that a purpose, and an important purpose, of the Directive of 1977 was the protection of depositors and their savings. This submission is supported by various points both on the actual text of the Directive of 1977 and on associated material. It is not necessary to set them out in detail since the Bank does not dispute that one of the directive's purposes was the protection of depositors. The ECJ said in *Société Civile Immobilière Parodi v Banque H Albert de Bary et Cie* (Case C-222/95) [1997] ECR I-3899, 3922–3923, para 22, a decision on the Directive of 1977 which postdates the judge's first judgment:

> "It must be recognised in this regard that the banking sector is a particularly sensitive area from the point of view of consumer protection. It is, in particular, necessary to protect the latter against the harm which they could suffer through banking transactions effected by institutions not complying with the requirements relating to solvency and whose managers do not have the necessary professional qualifications or integrity."

In the *Parodi* case, at p 3923, para 24 the ECJ described the Directive of 1977 as "no more than a first step" towards mutual recognition by member states of each other's authorisation of credit institutions.

The plaintiffs submit that the fact that the Directive of 1977 has another important aim—that is, the eventual establishment of a common banking market with full mutual recognition of authorisations—is in no way inconsistent with the conferment of enforceable rights on individuals. They rely on *Dillenkofer's* case [1997] QB 259, in which the ECJ said, at p 294, para 39, in rejecting the arguments of the German and United Kingdom Governments: "The fact that [Directive 90/314/EEC] is intended to assure other objectives cannot preclude its provisions from also having the aim of protecting consumers."

The provisions of Directive 90/314 were clear and certain in requiring a travel organiser to "provide sufficient evidence of security for the refund of

A money paid over and for the repatriation of the consumer in the event of insolvency". Mr Dillenkofer and his fellow claimants had lost the prepaid cost of holidays when a tour operator became insolvent, and the directive had not been transposed into German law within the permitted period. The ECJ, taking a purposive approach to the directive, had little difficulty in rejecting the argument (put forward by Germany and the United Kingdom) that the production of evidence of security did not imply that it had to be B actually available for disappointed customers.

The sort of dual purpose described in *Comitato di Coordinamento per la Difesa della Cava v Regione Lombardia* (Case C-236/92) [1994] ECR I-483 and *Dillenkofer's* case [1997] QB 259 is in fact central to, and characteristic of, most of the directives considered in the authorities. The directives are aimed at a social purpose (typically, the protection of employees, consumers C or inhabitants generally) and they are also aimed at the economic purpose of free and fair competition by ensuring that all employers and all traders throughout the EU have to bear the cost of meeting the minimum social standards which the directives require. That is the context in which the ECJ in the *Parodi* case [1997] ECR I-3899, 3922, para 21 spoke of requirements being "objectively necessary in order . . . to guarantee the protection of the recipient of services". There are similar references in cases on the insurance D directive (Council Directive (78/473/EEC) on the co-ordination of laws etc. relating to Community co-insurance) on which the plaintiffs rely: *Commission of the European Communities v France* (Case 220/83) [1986] ECR 3663, 3709, para 20; *Commission of the European Communities v Federal Republic of Germany* (Case 205/84) [1986] ECR 3755, 3809, para 49 and in the *Norbrook* case [1998] ECR I-1531, 1568, para 3 of the E ECJ judgment, illustrating the duality in the recitals to Directive 81/851.

The judge did not obtain much assistance from the insurance cases: see [1996] 3 All ER 558, 621 et seq. But they are of some interest since they were concerned with the same sort of triangular relationship (competent regulatory authority, regulated service provider and customer as under the Directive of 1977. In *Commission of the European Communities v Federal Republic of Germany* (Case 205/84) [1986] ECR 3755, 3809, para 49 the F ECJ said:

> "It follows from the foregoing that the requirement of authorisation may be maintained only in so far as it is justified on the grounds relating to the protection of policy-holders and insured persons relied upon by the German Government. It must also be recognised that those grounds are G not equally important in every sector of insurance and that there may be cases where, because of the nature of the risk insured and of the party seeking insurance, there is no need to protect the latter by the application of the mandatory rules of his national law."

The passage as a whole implies that in some sectors of insurance policy-holders would have enforceable rights in respect of the requirement of H authorisation. But the point is by no means clear.

Another case concerned with a triangular relationship, on which the Bank strongly relies, is *R v International Stock Exchange of the United Kingdom and the Republic of Ireland Ltd, Ex p Else (1982) Ltd* [1993] QB 534. In that case the triangle consisted of the Stock Exchange Committee on Quotations, Titaghur plc (a company which had lost its official listing) and

investors (that is the applicants, who were shareholders in Titaghur). The applicants sought to rely on Council Directive (79/279/EEC), which was concerned with co-ordinating rules for the listing of securities. Article 15 required member states to ensure that decisions of the competent authorities refusing or terminating a listing should be subject to the right to apply to the national court. When Titaghur's listing was terminated that company did not challenge the decision but two of its shareholders sought to do so by way of judicial review, arguing that the directive was intended to protect investors, that delisting was damaging to investors, and that article 15 therefore conferred on the shareholders (as well as on the company) the right to seek judicial review of the decision.

This court (Sir Thomas Bingham MR, McCowan and Leggatt LJJ) partially accepted some of the steps in the argument but rejected its conclusion. For present purposes it is most relevant to note that Sir Thomas Bingham MR relied on (among other points) the fact that the directive was concerned with relations between competent authorities and companies or issuers; that to extend rights to investors would gravely restrict the discretion of the competent authorities; and that the class of investors was not defined, especially in point of excluding or including potential investors: see pp 550–551. Leggatt LJ said, at p 554:

> "[Counsel for the shareholders] argues that because the directive is for the protection of investors it is they who must have a right to apply to the court. That is a non sequitur. Nothing in the language of the directive accords such a right to investors . . ."

The relationship to which a directive (or part of a directive) is addressed has also been treated as significant in other recent cases, notably *R v Medicines Control Agency, Ex p Smith & Nephew Pharmaceuticals Ltd; Primecrown Ltd v Medicines Control Agency* (Case C-201/94) [1996] ECR I-5819, 5835, per Advocate General Léger, and the very recent case of *AGS Assedic Pas de Calais v Dumon* (Case C-235/95) [1998] ECR I-4531, 4567, para 32 of the judgment of the ECJ.

In our judgment it is reasonably clear that the Directive of 1977 does confer enforceable rights on credit institutions which are to be supervised under its provisions. In particular, a credit institution which was refused authorisation for reasons incompatible with article 3, or which had its authorisation withdrawn for reasons incompatible with article 8, would (in the event of non-transposition of the Directive of 1977) most probably have had a right to challenge the Bank's decision on the basis that the *Becker* conditions [1982] ECR 53 were satisfied. But there is not in our judgment any sufficient clarity or certainty in the position of depositors (or other customers of credit institutions). The fact that the directive is in general terms for the benefit of depositors cannot be conclusive: cf Leggatt LJ in *Ex p Else (1982) Ltd* [1993] QB 534, 554. Had intended rights been precisely and unconditionally defined, the large size and indefinite character of the class benefited would not have been conclusive against the conferment of enforceable rights. But we accept the Bank's submission that this is a case like *Comitato di Coordinamento per la Difesa della Cava v Regione Lombardia* (Case C-236/92) [1994] ECR I-483 or *Ex p Else (1982) Ltd* [1993] QB 534 in which the *Becker* conditions would not be satisfied even if there were a clear case of non-transposition.

A

XX

*Conclusions on EU law*

For these reasons we do not consider that the plaintiffs are assisted by reliance on the Directive of 1977 or on principles of EU law. Because the *Becker* conditions are not satisfied, we need not consider the plaintiffs' argument based on the Bank's alleged failure to achieve continuing B administrative implementation of the transposed directive. We do perceive some traces of such a principle developing in the jurisprudence of the ECJ, but it is by no means fully developed.

If administrative non-implementation were of critical importance we would most probably think it right to refer that issue to the ECJ under article 177 of the Treaty. As regards *Becker*-type liability we do not regard the C point as acte clair, but as a matter of discretion this court decided not to make a reference under article 177. The parties' rare unanimity in asking this court not to make a reference has been a significant factor (but not the only factor) in that decision.

STRIKING OUT

XXI

D *Principles*

By the time the judge came to adjudicate on the merits of the striking-out application, he had before him the plaintiffs' proposed re-re-amendments to the statement of claim, and rightly considered that it was proper to consider whether their case was indeed doomed to failure even if leave was granted to make those proposed amendments.

E He ruled, correctly, that the court's power to strike out an action both under its inherent jurisdiction to prevent abuse of its process, and under RSC Ord 18, r 19, should only be exercised in very exceptional circumstances and in plain and obvious cases: *Lawrance v Lord Norreys* (1890) 15 App Cas 210.

He then considered a number of the leading authorities cited below, and F concluded:

> "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 G 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. H As the necessity for Lord Woolf's reforms shows, the time of the courts is not unlimited and should not be used in the consideration of what can be seen to be obviously hopeless cases. To allow such an action to proceed would be to permit an abuse of process. It follows that the question is whether the Bank has shown that the plaintiffs' claim is doomed to failure. As already stated, it will only be able to do so if it shows that the

court has available to it all the evidence which is at present available to the plaintiffs, that the plaintiffs' case is bound to fail on the basis of that evidence and that there is no realistic possibility of the plaintiffs obtaining further evidence to support their case in the future, whether by further investigation, discovery, cross-examination or otherwise. I turn therefore to the circumstances of the plaintiffs' claim, which will of course involve a consideration both of the relevant legal principles and of the facts."

In *Wenlock v Moloney* [1965] 1 WLR 1238, a case on which the plaintiffs strongly relied, the Court of Appeal considered a case where an action had been struck out after consideration of a large number of affidavits with no oral evidence or cross-examination. Danckwerts LJ stated, at p 1244:

> "There is no doubt that the inherent power of the court remains. But 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. The master stated the relevant principles and practice correctly enough and then, I am afraid, failed to apply them to the present case. In my view, the way in which this case has been dealt with is quite contrary to the practice of the court, and is thoroughly undesirable."

Sellers LJ delivered a concurring judgment, and Diplock LJ agreed.

This somewhat rigid position was however modified by the House of Lords in *Williams and Humbert Ltd v W & H Trade Marks (Jersey) Ltd* [1986] AC 368, which was a very heavy trade marks case involving difficult questions of domestic and international law. After a six-day hearing Nourse J in a reserved judgment struck out the defences, and his decision was upheld both by the Court of Appeal and by the House of Lords. Lord Templeman stated, at pp 435–436:

> "My Lords, 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 trial or the burden of the trial itself. In the present case, the general rule would seem to require a refusal by the judge to embark on the problems of international law involved in the present appeal, leaving those problems to be solved at the trial if they became material. If at the trial the appellants were cleared of any impropriety in their management of the affairs of the Rumasa group, then the problems of international law would not arise. Moreover, even if those problems did arise I do not believe that the length of time, namely seven days, occupied by the judge in deciding to strike out the pleadings would have been added to the time required to decide other issues. But there are special circumstances

A which, in my view, made it right for the judge to proceed and to make the order which he made. If the appellants' pleadings and particulars had not been struck out the appellants would have proceeded to demand discovery before trial and to lead evidence at the trial, harassing to the plaintiffs and embarrassing to the court and designed to support the allegations and insinuations of oppression and bad faith on the part of the B Spanish authorities which appear in the amended defences and particulars. These allegations are irrelevant to the trade marks action and the banks' action and are inadmissible as a matter of law and comity and were rightly disposed of at the first opportunity."

Lord Mackay of Clashfern stated, at p 441:

C "If on an application to strike out it appears that a prolonged and serious argument will be necessary there must at the least, be a serious risk that the court time, effort and expense devoted to it will be lost since the pleading in question may not be struck out and the whole matter will require to be considered anew at the trial. This consideration, as well as the context in which Ord 18, r 19 occurs and the authorities upon it, justifies a general rule that the judge should decline to proceed with the D argument unless he not only considers it likely that he may reach the conclusion that the pleading should be struck out, but also is satisfied that striking out will obviate the necessity for a trial or will so substantially cut down or simplify the trial as to make the risk of proceeding with the hearing sufficiently worth while. I agree with the view that the course taken by the judge in the present case was justified by the very special E circumstances to which [Lord Templeman] has referred. The fact that at the end of a sustained argument in which other questions were discussed than those which have occupied you Lordships in the four days of the hearing of this appeal in this House he reached a conclusion that the impugned pleading should be struck out in the trade marks action and should not be allowed as an amendment in the banks' action, a decision in F which the majority of the Court of Appeal and all your Lordships agree, shows that the judge's exercise of his discretion early in the argument has been shown to be right."

The other three members of the Appellate Committee agreed.

In *McDonald's Corpn v Steel* [1995] 3 All ER 615, which was a libel action, Neill LJ with whom Steyn and Peter Gibson LJJ agreed, held, at G p 623, that the power to strike out was a draconian remedy which was to be employed only in clear and obvious cases where it was possible to say at the interlocutory stage and before full discovery that a particular allegation was incapable of being proved. Thus, in the case of a plea of justification, the defendant should not only intend to support that defence at the trial but should also have reasonable evidence to support the plea or reasonable grounds for supposing that sufficient evidence to prove the allegations will H be available at the trial. He went on to point out that the evidence on which the defendant may rely may include many forms in addition to his own evidence, including evidence produced by third parties on subpoena, evidence elicited from the plaintiff or the plaintiff's witnesses in cross-examination, and evidence contained in documents disclosed by the plaintiff

on discovery. The correct approach, Neill LJ said, at p 623, was to consider whether or not the defendant's case was incurably bad.

Lord Neill strongly urged that the judge erred in principle in embarking on the striking out exercise at all. We unhesitatingly accept that for him to do so in a very complex case of this kind must be the exception rather than the rule, as was stated so clearly in the two speeches quoted above from *Williams and Humbert Ltd v W & H Trade Marks (Jersey) Ltd* [1986] AC 368.

However, we are satisfied that this case, like the *Williams and Humbert* case, falls within the exceptional class for similar reasons as those explained in the *Williams and Humbert* case. The pleadings involve imputations against a considerable number of Bank officials who held various posts of responsibility at different times during a period of over 10 years. The trial, if it took place, would be extremely long and expensive. An estimated duration of a year was mentioned, and that does not seem to us likely to be an overestimate. Justice may of course require a full trial, however great the trouble and expense involved; but the burden on the parties and their witnesses is one of the factors to be taken into account in discerning what course, in exceptional circumstances, best meets the requirements of justice. We would therefore uphold the course taken by the judge, and would also note that the approach he adopted in the second paragraph quoted above is fully in line with principles enunciated by Neill LJ in *McDonald's Corpn v Steel* [1995] 3 All ER 615.

XXII

*The plaintiffs' pleaded case*

The statement of claim was first served on 21 June 1993. It was amended on 30 November 1994 (with leave of this court) to add BCCI SA (in liquidation) as a plaintiff. It was re-amended on 21 August 1995 (with leave of Clarke J) after the order for preliminary issues and with a view to making the plaintiffs' case battle-ready, as it were, for the hearing of the preliminary issues. We will summarise the statement of claim as it stood after that re-amendment, deferring for the present reference to the draft pleading (with further proposed amendments) finally formulated (after other drafts had been put forward) in January 1997 (and rejected by the judge in his third judgment as incapable of salvaging the plaintiffs' claim).

The general form of the re-amended statement of claim appears from the index at the end of the pleading. The index has 11 headings:

| | | |
|---|---|---|
| 1. | BCCI | paragraphs 1–10 |
| 2. | The plaintiffs? | 10A–12A |
| 3. | The defendant | 13 |
| 4. | The LBC and IMC | 14 |
| 5. | The supervisory regime | 15–31 |
| 6. | BCCI SA and BCCI Overseas in the UK | 32–38 |
| 7. | Misfeasance by the Bank | 39–44 |
| 8. | The Bank's motives for breaching its statutory duties | 45–4 |
| 9. | Damages | 47 |
| 10. | Interest | 48 |
| [11] | Prayer | 49 |

A That summary might give the impression that the pleading of the acts or omissions said to amount to misfeasance is fairly short. Any such impression would be wholly mistaken. Paragraphs 39, 40 and 41 of the pleading are copiously divided and subdivided (to an extent which sometimes makes it difficult to identify passages in the pleading) and these three paragraphs together occupy 90 pages of the pleading.

B The final draft proposed further extensive additions, including lengthy additions in paragraphs 40 and 45, an important addition to paragraph 47, and entirely new paragraphs 48 to 52 inclusive (those new paragraphs particularising the averment in the proposed paragraph 47.3A(b)(i) of the Bank's knowledge, belief or suspicion at various times).

The task of reviewing these exceedingly complex pleadings is made a little less burdensome—although it is still far from an easy task—because as the C judge said, with 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 section 3(5) of the Banking Act 1979 was applied. I shall return to this point below. However, with that exception, the only question which I shall consider D under this head is whether the plaintiffs are bound to fail to establish the second stage of the second limb of the tort. The question for decision at each stage is whether the Bank has shown that there is no realistic possibility of the plaintiffs establishing that the Bank knew, believed or suspected that the depositors or potential depositors would probably suffer loss if it did the act complained of or if it failed to do what the plaintiffs say that it ought to have done."

E The judge went on to analyse the statement of claim. His conclusions can be summarised (omitting some inessential detail) as follows. (1) The essential acts and omissions alleged to amount to misfeasance on the part of the Bank were its authorising BCCI SA as a deposit-taker in March or June 1980 and its failure to revoke BCCI SA's authorisation under the F 1979 Act or (after it came into force) the 1987 Act (paragraph 39 of the statement of claim, as expanded by paragraphs 39A, B and C). (2) Paragraphs 40 to 46 of the statement of claim, although highly relevant to the issue of the Bank's awareness of illegality, were not relevant to the issue of the Bank's foresight of loss, with the (very important) exception that paragraph 48 referred to, and incorporated into itself, a large number of sub-paragraphs of paragraph 40. (3) Paragraphs 47 to 51 contained G the key allegations, paragraph 48 to 52 being wholly new since the judge's second judgment. Paragraphs 48 to 52 were intended to make good the crucial allegations contained in sub-paragraphs 47.3A and 47.3B in the form in which the plaintiffs sought to re-amend them. In recognition of their importance the judge set out those two complex sub-paragraphs in an appendix to his third judgment. He commented that it H was a historical accident that they occurred in a part of the pleading headed "Damages."

The judge then proceeded to consider, by reference to the plaintiffs' pleaded case including the proposed further amendments, whether the plaintiffs' case was bound to fail in relation to different periods of time, beginning with the authorisation of BCCI SA in 1980 and going on to the

final period after Price Waterhouse's* ("PW") stark warning to Mr Barnes, on 11 April 1990, that the survival of BCCI was at stake. We have in an earlier section of this judgment considered whether the judge was right to embark on that vastly difficult undertaking and we have concluded that in doing so he did not err in the exercise of his discretion. Having by then devoted many weeks to the case, both in court and out of court, he may have felt that there would be some element of abdication of responsibility not to reach a definite conclusion on the strike-out application. On that basis, we have to review the judge's conclusion that the plaintiffs' case was bound to fail.

In our review we shall follow the same chronological pattern as the judge, who divided the sequence of events into four periods: (i) original authorisation; (ii) June 1980 to December 1986; (iii) December 1986 to April 1990; (iv) April 1990 to July 1991. Our review will involve some repetition of material in section III above but that seems preferable to continual references back to the beginning of the judgment. But before undertaking that review we must make some general observations about the Bingham report. The judge made copious references to that report in his third judgment, and it is entirely understandable that he did so, since it is a conspicuously clear guide to an exceptionally complex history. But it is necessary to have in mind the status of the report and the purposes for which it could properly be relied on.

XXIII

*The Bingham report*

The Bingham report has, predictably, been extensively cited and relied on by both sides in the course of the appeal. The submissions based on it have not always been wholly consistent. There is some force in the Bank's comment that the information and conclusions in the report are vital to the plaintiffs' case, but that the plaintiffs distance themselves from the report when it suits them to do so. It is therefore appropriate for us to clarify the significance of the Bingham report to the issues which we have to decide.

The report (which runs to nearly 200 pages, without the further eight appendices which are not published) represents the outcome of an inquiry which, momentous though it was, was essentially a private inquiry instituted by the Bank of England and the Treasury, the Bank having "chosen to delegate to an independent inquiry the review of the adequacy of its supervision of BCCI," as it was put by Millett J in *Price Waterhouse v BCCI Holdings (Luxembourg) SA* [1992] BCLC 583, 599. It was not a statutory inquiry under the Tribunals of Inquiry Act 1921. Bingham LJ had no power to compel the attendance of witnesses or the production of documents and there was no counsel to the inquiry (although witnesses were permitted to have their own legal advisers present). The Bank and the United Kingdom firm of Price Waterhouse did (as Bingham LJ gratefully recorded in his letter presenting the report) show a very high level of co-operation. The position of the liquidators of BCCI SA (as recorded in the same letter) was that for a

* *Reporter's note.* Price Waterhouse were, in the mid-1980s, the auditors of Overseas (but not of BCCI SA) and were commissioned by BCCI SA at the instance of the IML in October 1985 to review the treasury operations.

A variety of reasons they did not feel able to take the opportunity to comment on factual passages and opinions in the report. Several individuals who were deeply involved in the matter did not give oral evidence to the inquiry, the most conspicuous absentee being Mr Abedi (see paragraph 2.101 of the Bingham report).

The scope of Bingham LJ's inquiry was therefore limited by the extent of B his powers as well as by his terms of reference. His report has undoubtedly been a most fruitful source of information and lines of inquiry for the plaintiffs (as they acknowledge). But to suggest that Clarke J was trying a case which had already been tried by Bingham LJ would be totally misconceived. The judge had that well in mind (see his third judgment). If any analogy is to be proposed a closer one would be an investigation of the affairs of a company by inspectors appointed by the Secretary of State under C section 432 of the Companies Act 1985 (though inspectors do have powers of compulsion under sections 434 and 436 of that Act). Such an investigation might or might not be followed by civil proceedings against directors of the company for misfeasance or breach of fiduciary duty. The inspectors' report, when published, might give the liquidators useful information and suggest lines of inquiry for any subsequent litigation. But D the report would be admissible in evidence only because of the special provisions in section 441 of the Companies Act 1985 (as amended), and only for the limited purposes there mentioned. No comparable statutory provision applies to the Bingham report.

Having correctly recognised the limited scope of Bingham LJ's inquiry Clarke J said in his third judgment:

E "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 F was applying his mind to the 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."

G

That, with great respect both to the judge and to Bingham LJ, seems to be putting the matter too high. 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 H 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.

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## XXIV

*The original authorisation*

The judge decided that the plaintiffs' case as to the Bank's foresight of loss was bound to fail in relation to the original authorisation granted to BCCI SA under the 1979 Act. He expressed his conclusion roundly:

> "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 BCCI SA in 1980 it actually knew, believed or suspected that if it licensed BCCI SA, BCCI SA would (or even might) subsequently collapse."

B

The judge elaborated on that. We are in full agreement with the judge's analysis and conclusions on this point, including his comment that the case made is really one of fault or negligence, and not of the necessary knowledge or suspicion. We also agree with the judge when he said (in relation to the original authorisation) that there was material from which it was at least arguable that the Bank must have known that the LBC and IML, the Luxembourg regulators, were not regulating BCCI SA properly and did not have the resources to do so. We are therefore against the Bank's submission that the plaintiffs have no arguable case on the section 3(5) point (the only point on which the Bank did not concede that the plaintiffs had an arguable case on awareness of illegality). But as we agree with the judge that there is no arguable case on foresight of loss during this period we need not go further into the section 3(5) point.

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D

## XXV

E

*June 1980 to December 1986*

This part of the history of the Bank's supervision of BCCI SA is marked by a number of important documents, copies of which have been produced by the Bank in the course of the litigation. Almost all of them are referred to and discussed in the Bingham report. Some are memoranda addressed to the Bank's Head of Banking Supervision by his deputy or by subordinate officials in that department (during the period under consideration the Head was Mr Cooke, succeeded by Mr Quinn, and the deputy who dealt with BCCI was Mr Gent). Others are notes which were made to record meetings, and then circulated. A few of these documents were circulated to the Bank's governor or deputy governor and one (a memorandum dated 11 January 1984 prepared by Mr Cooke) was endorsed with the governor's initials. It is at least arguable that all these documents are material evidence as to the Bank's corporate state of knowledge on the test in *Meridian Global Funds Management Asia Ltd v Securities Commission* [1995] 2 AC 500.

F

G

These documents were extensively referred to by Clarke J and some have already been referred to in section III of this judgment. They are in our view candid, and not self-serving documents. They do not attempt to disguise anxiety which officials of the Bank felt about the shortcomings of supervision by the Luxembourg authorities or dissatisfaction which they felt about the lack of frankness of Mr Abedi and his top managers. They clearly spell out the Banks growing awareness that BCCI SA's principal place of business was in the United Kingdom (see especially Mr Gent's memorandum of 15 July 1983 and Mr Walton's of 16 December 1985) and of the

H

A consequences of that (see especially Mr Lynas's memorandum of 19 October 1983, which actually speaks of the Bank turning a blind eye). It is no doubt because of these documents that Mr Stadlen has conceded that there is an arguable case that the Bank was aware of illegality in its supervision of BCCI SA.

But there is in our view a striking contrast between the Bank's ready B acknowledgement of problems in performing its supervisory duties, and the almost complete absence of any acknowledgement of dire financial consequences which might follow. On the contrary, BCCI SA's business appeared to the Bank to be going from strength to strength. In Mr Gent's memorandum of 9 June 1982 he wrote of audited figures "which show a large international bank well capitalised, profitable and maintaining conservative ratios". Mr Gent wrote (referring to BCCI SA's wish to be C upgraded from a licensed deposit-taker to a recognised bank) that the Bank "could probably fend them off for another year". Mr Cooke wrote to the governor on 11 June 1984 that

> "the bank's initial rapid growth has been consolidated without serious problems coming to light, the balance sheet appears strong, adverse publicity has subsided, and the group now enjoys lines with all the D clearers, Standard Chartered, and many foreign banks."

He also wrote: "as BCCI's strength and standing in markets grow, our bargaining position will weaken." That last remark reflects a certain defensiveness (or even lack of self-esteem) which runs through many of the Bank's internal documents, and it may well suggest that the Bank ought to have had a much livelier awareness of the interests of depositors, and of the E Banks powers to act in their interests; but again that would go to negligence, not actual foresight or reckless indifference.

The only direct reference to the interests of depositors made in the Bank's disclosed documents during this period appears to be in an annex accompanying Mr Gent's memorandum of 15 July 1983. Under the headings "How to deal with the problem—options" and "Closure" he F wrote:

> "This course seems neither practicable or justifiable on the basis of our present knowledge of the group. It is not so much that BCCI is an undesirable force in banking as such but rather that no one can be certain that it is properly controlled and prudently run. The closure route could only be pursued if it could be shown, with reasonable certainty, that the G 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. We should have to be very sure of our facts before approaching other supervisory authorities or launching a separate H assault under the Banking Act. This would probably necessitate the employing of independent investigating accountants whose appointment could well be misunderstood and trigger off a crisis of confidence. So far as the co-operation of other supervisors was needed there could be the further problem of political pressure. Such pressure has already made its

presence felt in the case of the UAE (inspection) and Zimbabwe and Jamaica (entry)."

The judge quoted most of this passage, together with two further paragraphs. He commented (and we agree) that there was no evidence that the memorandum did not represent the genuine views of Mr Gent and his department. He concluded that in the light of the memorandum it was not arguable that the Bank knew or suspected, at that time, that if BCCI SA was not closed down it would probably collapse and cause loss to depositors.

We have carefully reviewed that conclusion. It might be said that, although Mr Gent (who is now dead) thought that danger to depositors could not be asserted "categorically", he must have regarded danger as a possibility, and if available to be cross-examined he might have agreed that he thought at the time that it was a probability. But it is clear from the memorandum that Mr Gent was also well aware, at the time, of the risk to depositors involved in closure (or even independent investigation) of BCCI SA Bearing in mind that misfeasance in public office is a tort involving dishonesty, we—like the judge—find it inconceivable that Mr Gent could be proved to have shown the "conscious disregard" (*Garrett v Attorney General* [1997] 2 NZLR 332) for the interests of depositors which is an essential ingredient of the tort.

This period ended with the belated disclosure to the Bank of BCCI SA's treasury losses, and the company's failure to discuss with the Bank, or even inform the Bank in advance, of the move of its treasury operations to Abu Dhabi. The Bank was rightly indignant; in a memorandum dated 22 October 1986 Mr Mallett called the move "another quite appalling example of BCCI failing to be straightforward with us". These episodes are discussed by the judge. As he indicates there is no suggestion in the papers relating to the treasury losses that the Bank saw the interests of depositors as threatened. PW reported that the losses were the result of lack of experience and the exceptional loss was to be made good by a shareholders subvention. The Bank was assured that new systems were being put in place to ensure that there would be no recurrence.

Nor is there any sustained suggestion in the papers that during this period anyone in the Bank suspected (still less knew of) fraud on the part of Mr Abedi and his associates. It is arguable that officers of the Bank had material on which they should have suspected fraud, but that is a different matter. They saw the men behind BCCI as undisciplined, secretive and coming from a different banking culture, but not as criminals. The first hint of suspicion of something worse appears in a manuscript note which Mr Quinn added to Mr Butt's memorandum of 27 May 1986, that the group's recourse to the staff trust fund of ICIC* "raises questions of legality and probity". At about the same time a Member of Parliament raised with the Bank concerns about the BCCI group being involved in fraudulent transactions affecting West Africa.

* *Reporter's note.* "ICIC" is a reference to International Credit and Investment Co Ltd, a Liechtenstein company which was initially the largest shareholder in BCCI, and to its later replacement, two Cayman companies, International Credit and Investment Co (Overseas) Ltd and its holding company, ICIC Holdings Ltd.

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XXVI

*December 1986 to April 1990*

This very important period was considered by the judge. The salient events of this period included (i) a continuing dialogue during 1987 between the Luxembourg regulators and the Bank leading to the decision (at the end of 1987) to establish the small international group of supervisors which became known as the college; (ii) the appointment of PW as group auditors, replacing the previous split of responsibility between Ernst & Whinney and PW; (iii) the coming into force of the 1987 Act which established the Board of Banking Supervision ("BBS") (consisting of the governor, the deputy governor and an executive director of the Bank and six independent members; the BBS began operating on a "shadow basis" before the 1987 Act was actually in force); (iv) Mr Abedi's disabling heart attack in February 1988; (v) meetings of the college at regular intervals from June 1988; (vi) the Tampa arrests and indictments in October and November 1988; (vii) an important paper presented to the BBS by the Bank in November 1989; and (viii) formal consideration by the Bank's review committee, in January 1990, whether BCCI SA should continue to be authorised despite the Tampa incident.

During this period of a little over three years officials of the Bank were confronted with an increasing number of indications of serious lack of probity in the operations of BCCI Some of these indications were vague and unsubstantiated, but others (such as those mentioned at paragraphs 2.94–2.98 of the Bingham report) were specific and serious. Officials of the Bank were aware that they could not perceive or assess the whole picture of the group's worldwide operations. Hindsight reveals that the true picture was far worse than even the most sceptical critic could have suspected. It is impossible to avoid the question (posed more than once, explicitly or implicitly, in Lord Neill's submissions): if the Bank, through its responsible officers, did not foresee the risk of the group collapsing and the probability of loss to depositors, why not?

The documentary evidence shown to the court as bearing on that issue was not as plentiful, in relation to the period now under consideration, as that relating to the previous period. Nor does it strike us as being so transparently candid; most of the important documents are not purely internal notes and memoranda, but documents prepared for submission to the BBS or the college, both bodies which had a majority of members from outside the Bank. That is not to say, however, that the documents are not very important contemporaneous evidence of the state of mind of the Bank's responsible officials.

On 8 April 1987 Mr Galpind wrote to Mr Jaans (of IML) an important letter from which we have already (in section III above) quoted an extract. It stated plainly that the Bank would have difficulty in licensing BCCI SA under the criteria in the 1987 Act, especially as regards the statutory requirement for integrity in the running of a licensed institution.

On 6 August 1987 the Bank's BSD presented a paper on the BCCI group (and, in particular, its United Kingdom operations) for consideration by the BBS. It had a diagram of group structure and fairly detailed information as to branches of BCCI SA in the United Kingdom. It summarised group

footings in 1986 (£17·5 billion, of which £6·3 billion were those of BCCI SA). In relation to shareholders it stated:

"The shareholding structure of the group has always been somewhat opaque but the majority shareholders are the Crown Prince of Abu Dhabi, the Bin Mahfouz brothers, the Pharaon family and the Abu Dhabi Investment Authority."

The memorandum clearly acknowledged the shortcomings of supervision in and from Luxembourg.

Under the heading "Market perceptions of the BCCI group" the memorandum referred to the market as being very wary about the group. It also referred to a widespread view that the group was a United Kingdom bank for which the Bank had primary responsibility. It stated:

"Other supervisors with major BCCI group operations are nervous and are looking for comfort and they often tend to look to the Bank. We judge that, given the nature of the group, the market may not see the Bank as providing any lender of last resort underpinning. We believe, however, that some blame would be attached to the Bank in the event of serious problems emerging."

So the likely consequences of "serious problems" (of an unspecified nature) were viewed in terms of blame for the Bank rather than loss to depositors. It reveals an unattractively introverted and defensive attitude, but it is consistent with Mr Stadlen's submission that at that stage the Bank's officers simply did not foresee the prospect of such loss, and that there is no arguable case that they did.

The BSD was asked to prepare a further paper for the next meeting of the BBS in September 1987. A further paper was prepared, dated 3 September, annexing an additional memorandum signed by Mr Gent. It is of particular importance because it addressed concerns expressed by the BBS as to the protection of United Kingdom depositors. The BBS had inquired whether such depositors might not be better protected by the formation of an United Kingdom subsidiary as the only licensed deposit-taker.

Both the main paper and Mr Gent's annexure argued against local incorporation. Again, both papers seem to have concentrated (despite the expressed concerns of the BBS) on the risk of the Bank being exposed to criticism rather than on the risk of depositors being exposed to loss. The main paper contained a statement (already quoted in section III above) as to the Bank's limited power to continue authorisation of BCCI SA Lord Neill criticised that statement, in our view with justification, as a travesty of both the legal and the factual position. Mr Gent's annexure referred, revealingly, to local incorporation having

"very considerable disadvantages. First, we would be required to make a conscious decision that BCCI (UK) Ltd would, on the evidence before us, be run prudently. I find that a very difficult conclusion to come to at the moment and though we would no doubt ask for a great deal of information . . . I suspect we would in the end be forced into reaching a conclusion *against our better judgment*."

The last words (to which emphasis has been supplied) are a remarkable echo of "contrary to a man's own conviction" in the old case of *Drewe v Coulton*,

A 1 East 563n; but they go to awareness of illegality (in a hypothetical situation), not to foresight of loss.

The Bingham report, at paragraph 2.90, records that at the September meeting of the BBS:

> "There was again a lively discussion, during which the deputy governor expressed his disagreement with the main paper which, he felt, B was too heavily influenced by concern for the Bank's position and too little by concern for that of UK depositors."

Hindsight confirms that the deputy governor's concerns were only too apposite.

The apparent lack of anxiety in the BSD about depositors' interests seems to have depended partly on financial statements audited by PW in their new C capacity as group auditors, and on information provided by that firm. The 1987 accounts showed a small group profit of $37m, but after a reappraisal an additional provision of $100m was made. In May 1988 PW produced a substantial report for the college. This is dealt with in paragraphs 2.108–2.110 of the Bingham report. The PW report drew attention to some questionable points relating to ICIC, but (in the words of D the Bingham report) the reasons for PW's concern "were not spelt out in the report, or even flagged". The report as a whole did not sound a note of warning.

In April 1989 PW gave their audit opinion on the 1989 group accounts, which showed a loss of $49m after loan loss provisions of $145m. The accounts were qualified because of the uncertainty caused by the Tampa incident. PW also prepared another substantial report for the third meeting E of the college held in July 1989. The PW report drew attention to various matters of concern, some of which were long-standing problems (such as the high concentration of lending to a small number of borrowers including the Gokal group) and other relatively new (such as Tampa and the questionable transaction involving ICIC). They also reported that a capital injection in April 1989 had raised the risk–asset ratio (on adjusted end-1988 figures) to F 1% above the Basle minimum.

The third meeting of the college is described in paragraphs 2.127–2.129 of the Bingham report. The meeting was chaired by Mr Barnes and Mr Naqvi (who had succeeded Mr Abedi) gave long and discursive answers to questions. PW thought that college meetings had become too large and formal to be effective. The Bank (principally in the person of Mr Barnes) G was, as paragraph 2.131 of the Bingham report states, more sanguine.

That was the background to the report dated 1 November 1989 which the BSD prepared for the BBS. It contained up-to-date facts and figures and by now familiar complaints that (despite the establishment and operations of the college) there was not full transparency:

> "In summary the present position is unsatisfactory. The action we H have taken to date . . . has brought some improvement. But there is still no effective consolidated supervision, and much of the group's activity remains opaque."

As the Bingham report states, at paragraph 2.154, the fundamentals of the problem had not changed over the preceding decade.

Under the heading "The way forward" the paper of 1 November 1989 identified three options: inaction, revocation of authorisation under the 1987 Act and full consolidated supervision of the group by the Bank. The report recommended the third as the long-term aim (which was by itself an indication, Mr Stadlen submitted, that the Bank cannot have foreseen any early collapse) while recommending formation of a local subsidiary as an interim solution. As to the revocation option the report stated: "Given our knowledge of the UK region, there are no grounds for revocation which we can determine. A section 11(1)(e) case alleging a general threat to depositors' interests"—i e that the interests of depositors or potential depositors of the institution are in any other way threatened, whether by the manner in which the institution is conducting or proposes to conduct its affairs or for any other reason—"would be tenuous in the extreme." In this passage the Bank's officials were looking to the possibility of a decision to withdraw authorisation being challenged through the statutory appeal procedure, and they no doubt had in mind that they would have to produce solid reasons to justify their action. In relation to the decision actually taken soon afterwards in relation to section 11(1)(a) of the 1987 Act, and in relation to the Tampa incident, the Bingham report, at paragraph 2.160, rightly criticised the Bank for being too much influenced by the fear that an appellate body might disagree with its decision. But even allowing for that, we see the passage which we have quoted as significant evidence of the state of mind of the Bank's officials at the end of 1989. Despite all the warning signs, they appear not to have considered the collapse of the BCCI group and the infliction of heavy losses on depositors as a real risk, rather than a theoretical or hypothetical possibility.

The last event calling for detailed discussion, during this period, was the fourth meeting of the college held in London on 1 December 1989. This meeting, and events following from it, are discussed in some detail both in the Bingham report, at paragraphs 2.148–2.154, and in the judge's third judgment. Part of the meeting was taken up with a presentation by American lawyers instructed on behalf of the BCCI group in connection with the Tampa incident. They explained that corporate criminal liability was easily established in the USA and that a plea bargain was advisable despite (as they asserted, and as the Bank and the rest of the college seem to have accepted) the absence of complicity on the part of any of the top management of BCCI The rest of the meeting was taken up with discussion of the lack of organic growth of profits within the group, the continuing problem of concentrations of loans and non-performing loans, and the Bank's latest proposal for the incorporation of two United Kingdom subsidiaries, one to house the central treasury and the other to house the United Kingdom branches.

After the meeting Mr Beverly of the BSD telephoned PW to make sure that the auditors were well aware of the supervisors' concerns. The Bank wished to know in advance if the next accounts were liable to be qualified. When the BBS received a report on the fourth college meeting the governor (in the words of the Bingham report, paragraph 2.153) "pointed to the need for greater urgency in pressing forward the separate incorporation of the UK business in order to build a firewall around the UK depositors".

Mr Barnes, in his evidence at the Gokal trial, said that ring fences did not really work, because in the event of liquidation they got "blown apart" by

A international insolvency legislation. This matter is covered in proposed amendments to paragraphs 40.34 and 40.69 of the statement of claim, both of which refer to "the imminent peril of financial ruin envisaged by the governor".

The judge accepted the submission on behalf of the Bank that that there was no evidential basis on which the governor's foresight of "imminent peril of financial ruin" could be alleged. We have reviewed the evidential material B again and we have reached the same conclusion. The governor rightly wanted to see a firewall put in place as a matter of urgency, as a protection for United Kingdom depositors against the possibility of a dangerous conflagration elsewhere in the BCCI group. Whether such a firewall would have protected them is, for present purposes, immaterial. The essential point, to our minds, is that the governor's urgently expressed wish is not C evidence that he knew or believed or suspected that a huge conflagration was already blazing, and that loss to United Kingdom depositors would follow in the absence of rescue. On the contrary, it is inconsistent with such a conclusion. It is consistent with a belief that the situation was unsatisfactory but manageable, and that the plan for local incorporation was feasible and would improve the situation.

D At this point, as so often in the course of this appeal, we have to remind ourselves that the Bank is charged, not with negligence, but with misfeasance in public office, which is a tort requiring dishonesty, and either actual foresight of, or reckless indifference to, the infliction of damage on the plaintiff. Where such a state of mind is alleged against a corporation, the case must be pleaded with some particularity. The plaintiffs' statement of claim (with its extensive past and proposed amendments) puts their case in E great detail, and no doubt as clearly and as convincingly as it can be put. But in relation to the period down to April 1990 we agree with the judge that the case is not arguable on the basis of the material now available, and that there is no realistic prospect of the position being significantly changed by new material.

F

## XXVII

*April 1990 to July 1991*

The final period is dealt with in detail in paragraphs 2.174–2.484 of the Bingham report and in the third judgment. The period opens with the PW's report dated 18 April 1990 to the board of BCCI Holdings and it ends, for practical purposes, with PW's draft section 41 report (delivered to the Bank G on the night of Saturday, 22 June 1991) and its immediate aftermath.

The Bingham report says of the PW report of 18 April 1990, at paragraph 2.174:

> "The most striking point in the report was PW's indication that the group required financial support estimated at a minimum of $1·8 billion, with unfunded support for unsecured loans of about $400m. PW said H that they could not sign the accounts as they stood. This point therefore went to the survival of the group."

The report also referred to false or deceitful accounting transactions and to PW's belief that loan transactions involving ICIC were improper. The Bingham report, at paragraphs 2.180–2.187, indicates that the financial

crisis facing the BCCI group made more impact on the Banks officers than the questions raised as to the integrity of Mr Naqvi and Mr Abedi. Paragraph 2.181 comments:

> "It is eminently understandable that a financial crisis which threatened the survival of the group was the major preoccupation of PW and the Bank. But I do not think any informed reader of the report, which was relatively brief, could have failed to read it as seriously impugning the honesty with which the group had been run."

Yet the report was not at that stage shown or even mentioned to the BBS or any of the Banks governors.

The report cannot have come as a total surprise to the senior officials of the BSD, since Mr Hoult and Mr Cowan of PW had during February and March taken the exceptional course of coming to the Bank for private discussions with Mr Barnes and Mr Beverly. At a meeting on 2 March the Bank had learnt for the first time of PW's unnamed informant within BCCI SA. On 11 April Mr Hoult and Mr Charged had indicated to Mr Barnes and Miss Jones the very high level of shareholder support that would be required in order to rescue the group.

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 BCCI SA. 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.

We think it is helpful to pause in the narrative at this point and take stock again of the plaintiffs' pleaded case. An enormous amount of skilled labour has gone into that pleading, but its complexity makes it very difficult, at times, to see the wood for the trees. However the general effect of paragraph 47.3A(a)(i)(1) and (2), taken with (b)(i)(1) and (2) and the copious particulars which are incorporated, is that from November 1989 (or an earlier date which we have already ruled out) the Bank knew, believed or suspected (or was recklessly indifferent to the prospect) that depositors and potential depositors would (in the absence of adequate and speedy remedial steps) suffer loss as the inevitable or probable consequence of the Bank's conduct, and also knew, etc, that such steps would probably not be taken.

The conduct of the Bank which is impugned by this pleading must be its conduct at the time when it had (through its responsible officers) the requisite state of mind. The Bank's failure to withdraw authorisation in (say) 1988 immediately after the Tampa incident cannot become tortious as the result of knowledge which the Bank obtained 18 months later.

That point (which is obvious, but still worth making) leads potentially to some very difficult issues of causation. Those issues were discussed in the judge's first judgment [1996] 3 All ER 558, 626–631, which was of course handed down long before the last set of proposed amendments was formulated. We have already considered issues of causation briefly in section XVI above. We see serious difficulties on causation in the path of very many of the plaintiffs, whose losses would appear to have been caused by fraud on an unprecedented scale which had been on foot long before

A 1990. Nevertheless it seems very probable that there must be a class of depositors (that is, those who first became depositors in the last year before the eventual collapse, whose claims would not founder on causation if it could be shown that, during the final year, the Bank knowingly stood by and failed in its duty to close down a doomed business. That is reflected in our observations in section XVI. The judge's decision to strike out the plaintiffs action in its entirety, even in respect of the latest depositors, must therefore B stand, if it is to stand, not on causation, but on the Bank's perception, during this final period, of the relative probabilities of a successful rescue operation or a ruinous collapse.

The complicated pattern of events during the final period is clearly summarised in the Bingham report. The judge's third judgment adds some comment on material not available to be considered in the Bingham report, C notably the evidence of Mr Barnes, who said at the Gokal trial:

> "The most difficult balance that you have to strike as a regulator is striking the balance between the existing depositors and potential depositors. It is almost always in the interests of existing depositors that a solution which does not involve liquidation is more in their interests. The very difficult balance one has to strike is the interest of the potential D depositors, the people who may in the future decide to deposit in that bank."

We do not find it necessary to discuss in detail the events between April 1990 and July 1991. The principal landmarks during 1990 were as follows. (i) There were 10 days of intense activity immediately after the PW report of 18 April, ending with the decision of the Abu Dhabi Government, in E principle, to promote a rescue operation. (ii) The fifth meeting of the college was held on 19 June, at which the IML delivered the ultimatum that BCCI SA must leave Luxembourg. (iii) PW made three visits to Abu Dhabi between then and October. (iv) PW reported to the BCCI audit committee on 30 October (and copied the report to the Bank) identifying the need for further support of the order of $1·5 billion. (v) The BBS met on 4 October and the sixth meeting of the college took place on the following day. F (vi) There was sporadic contact between the Bank, PW and the US Federal Reserve Board, but their communications had by November and December reached a position satisfactory to neither side. The principal landmarks during 1991 were: (i) delays caused by questions over the $600m loan portfolio in January; (ii) doubts about the attitude of the majority shareholders in February, and PW's so-called "Doomsday Report" of G 25 February, quantifying the total support required at between $4·4 billion and $5·6 billion; (iii) PW's contentious meeting with the board of BCCI SA on 1 March; (iv) the Bank's commissioning from PW of the section 41 report on 4 March; (v) the seventh meeting of the college on 4 April; and (vi) the signature of the majority shareholders' support package on 22 May.

There is a bitter irony in the fact that the majority shareholders' support, H so arduously obtained over a period of about 13 months during which one unpleasant shock followed another, failed to achieve the rescue of BCCI. But the fact that it was obtained, just a month before PW's section 41 report finally led the Bank to take drastic action and close BCCI SA, seems to us striking confirmation of what emerges from the totality of the documentary evidence, that is that the Bank hoped and expected, on

reasonable grounds, that a rescue operation would succeed. Further confirmation is also provided by the criticism which was subsequently aimed at the Bank for its eventual decision to close BCCI SA. The Bingham report discusses the decision and concludes, at paragraph 2.478: "It cannot be plausibly argued, in my opinion, that the course which the Bank took was not an appropriate one, even though it was not the only possible course." The following six paragraphs contain some trenchant comments on the events of the final period, which is described, at paragraph 2.480, as "a tragedy of errors, misunderstandings and failures of communication". The Bingham report plainly considers that rescue was feasible and collapse not inevitable.

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 BCCI SA 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.

XXVIII

*Conclusions*

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 BCCI'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.

That formulation, however, may have been too favourable to the plaintiffs. In view of the stringent requirements of the tort of misfeasance in public office, the more appropriate question may be: "Is it reasonably arguable that the Bank at any stage made an unlawful and dishonest decision knowing at the time that it would cause loss to the plaintiffs?" To that question, in the light of our analysis of the evidence, the answer is plainly "No."

We would therefore dismiss the appeal.

**AULD LJ**

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*Summary of judgment*

For the reasons summarised below, I would allow the plaintiffs' appeal E and dismiss the Bank of England's cross-appeal on the matters in issue, save as set out in paragraph 9.

1. A right to a remedy in damages enforceable in the courts of member states may arise from a clearly defined obligation imposed by an EEC Directive, even though the right is not expressly identified in it, and does so where failure to acknowledge the right would deprive those for whose F protection the obligation is imposed of a full remedy for its breach (post, pp 117A–128E).

2. The First Council Banking Co-operation Directive of 12 December 1977 (77/780/EEC) imposed clearly defined obligations on member states and on their regulatory bodies. In doing so, it gave rise to corresponding Community law rights in depositors to enforce those obligations by an action for damages in a United Kingdom court (post, pp 128F–136C).

G 3. Such Community law rights prevail over United Kingdom law, in particular section 1(4) of the Banking Act 1987 and the common law action for misfeasance in public office, to the extent that United Kingdom law conflicts with or purports to impede the effective enforcement by depositors of their Community law rights (post, pp 100F–H and 135H–136C).

4. In the context of this case, the Directive, with a view to protecting the H customers of banks trading in this country, imposed obligations on the Bank of England to prevent such banks from trading if they failed to meet the criteria laid down by the Directive and/or effectively to supervise them with a view to ensuring their compliance with such criteria (post, pp 132F–133B).

5. The plaintiffs, as depositors of BCCI at the material time, have an arguable Community law claim in damages against the Bank of England for

losses caused by a "sufficiently serious breach" by it of its regulatory and supervisory obligations under the Directive (post, pp 136C–137C).

6. The essence of the common law tort of misfeasance in public office is dishonesty in the form of abuse of public office. Such dishonesty may, but does not necessarily, include as an essential ingredient some appreciation by the public officer of the injurious consequence of his act. The tort may be committed in two distinct ways: by an act of "targeted malice", that is, one intended to harm the plaintiff; or by an intentional and knowingly unlawful act which does harm him. As to the latter, it is enough if the officer dishonestly disregards his plain duty or does not honestly attempt to do it (post, pp 137E–139F and 157C–163G).

7. If, in the second form of the tort, it is necessary to prove some appreciation by a public officer of the injurious consequences of his act, reasonable foreseeability of injury, not foresight in the form of knowledge, belief or suspicion of probable injury, is the most that is required (post, p 163D–G).

8. The plaintiffs, as depositors of BCCI at the material time, have an arguable case, subject to proving the matters of fact on which they rely and seek to rely, against the Bank of England for damages for misfeasance in public office by reason of its alleged intentional and knowingly unlawful conduct in failing to regulate and supervise BCCI as required by the Banking Acts 1979 and 1987 (post, p 163G).

9. Matters of causation of the plaintiffs' damage and whether all the plaintiffs come within the class of persons entitled to claim against the Bank of England for misfeasance in public office should be determined after a trial on the facts (post, pp 166B–170B).

10. The judge should not have struck out the plaintiffs' claim on the basis that, on the evidence which he considered would be available at trial if there were one, the claim would be bound to fail. This legally and factually complex case is particularly unsuitable for such a ruling and is not of the very exceptional kind required to justify such a course (post, pp 170B–176A).

*The issues*

Hirst and Robert Walker LJJ have summarised the factual history giving rise to the plaintiffs' claim, and of its progress, against the Bank of England ("the Bank") in respect of their losses resulting from the failure of BCCI. Their appeal and the Bank's cross-appeal from the several judgments of Clarke J culminating in his striking out of their claim raise the following issues: (1) whether, on the assumption that the facts the plaintiffs plead and propose to plead are, true, they have an arguable (i) Community law claim under or derived from the Directive of 1977, (ii) common law claim for misfeasance in public office, (iii) common law claim for administrative failure regardless of abuse of power, (iv) case under any of the first three heads that the Bank caused such damage as they suffered from the incompetence or dishonesty of BCCI and (v) claim to be an existing or ascertainable body of persons so as to entitle them to recover under any of the first three heads; and (2) whether the judge was entitled to strike out their claim for misfeasance in public office as one bound to fail.

I shall deal first with the Community law claim, because if the plaintiffs were to succeed under that head the only possible surviving impediments to

A the matter proceeding to trial would be issues (1)(iv) and (v). Before doing so, and for convenience of reference, I shall briefly introduce the Directive of 1977 and the Banking Acts 1979 and 1987, returning to them in more detail where appropriate later in the judgment.

*The Directive of 1977 and the Banking Acts 1979 and 1987*

B Before the 1979 Act there was no formal system in this country for the regulation and supervision of banks. It had been left to the Bank of England and the "twitch of its governors' eyebrows" to encourage prudential practices by those bodies holding themselves out as banks. The European Community's First Council Banking Co-ordination Directive of 12 December 1977 (77/780/EEC) changed all that. Its full title described it as for "the co-ordination of laws, regulations and administrative provisions relating to the C taking up and pursuit of the business of credit institutions".

In outline the directive obliged member states to require banks to obtain authorisation before commencing their activities (article 3) and, through their "competent authorities", only to grant such authorisation if: the bank had separate and adequate minimum capital; its business was effectively directed by at least two persons (the "four eyes requirement"); and the two D persons were of sufficiently good repute and had sufficient experience for the purpose.

It also required the competent authorities of member states to establish certain financial operating criteria for banks with a view to monitoring their solvency and liquidity (article 6) and member states to collaborate closely in the supervision of banks with branches in more than one member state (article 7). Finally, for the purpose of this brief summary, it provided for the E withdrawal of authorisation on a number of grounds, including failure by a bank to continue to fulfil the conditions under which it was granted and/or lack of sufficient own funds or because it could no longer be relied upon to fulfil its obligations (article 8).

The directive, by article 189 of the EEC Treaty, was not directly applicable, but it was "binding" on each member state "as to the result to be F achieved", leaving to each "the choice of form and methods". The United Kingdom's form and methods were the Banking Act 1979, the material parts of which came into force on 1 October 1979. I have summarised the material provisions of the Act in an appendix to this judgment [not set out in this report]. In even briefer summary here, it prohibited the carrying on of a banking business, referred to in the Act as "a deposit-taking business" (section 1), save for a two-tier system of exemption to be granted by the G Bank, namely "recognition as a bank" or by the grant of "a full licence to carry on a deposit-taking business" (sections 1–3). The Act set out various criteria of probity and financial prudence and standing for each form of exemption. The main difference between the criteria was that, to obtain recognition as a bank, the applicant had to satisfy the Bank, inter alia, that it enjoyed, and had done so for a reasonable period of time, "a high reputation H and standing in the financial community" and that it provided or would provide a wide range of banking services or a highly specialised banking service (section 3(3) and Schedule 2).

In addition, the Act provided that in the case of an institution whose "principal place of business" was out of the country the Bank, instead of satisfying itself of the institution's compliance with the statutory criteria,



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could rely on assurances of the supervisory authority in the country of its principal place of business as to its management and overall financial soundness, providing that it, the Bank, was satisfied about the supervision exercised by that authority (section 3(5)).

The Bank's control of banks under the Act consisted in the powers of grant and revocation of recognition or of a full licence as the case may be. It also had extensive powers of supervision through the media: first, of the grant of a conditional licence, that is, one subject to such conditions as it considered necessary to protect depositors (sections 7(1)(b) and 10), and/or, second, of a requirement of the bank to furnish it with information and documents about its affairs (section 16) and/or, third, by ordering an investigation of the conduct of its business (section 17).

As BCCI SA and BCCI Overseas were already carrying on deposit-taking businesses in this country when the main provisions of the 1979 Act came into force on 1 October 1979, they required recognition as banks or licensing as deposit-taking institutions to enable them to continue in business. SA applied for recognition. The Bank rejected the application, but on 19 June 1980 granted it a full licence, which it retained until the licence was automatically converted into an authorisation under the 1987 Act. Overseas did not apply for recognition or licensing at any time and was never granted either.

The plaintiffs maintain and the Bank accepts as arguable that SA's principal place of business was always in the United Kingdom. However, the Bank relied, purportedly under section 3(5) and later under section 9(3) of the 1987 Act, on assurances as to its soundness from the LBC/IML, the supervisory authority in Luxembourg, as a proxy for satisfying itself, that SA met the statutory criteria for a full licence/authorisation. Overseas, notwithstanding its lack of recognition or licence, traded in London as a bank and a deposit-taking business until the removal of the BCCI group's central treasury from London to Abu Dhabi in October 1986.

The Banking Act 1987, the material parts of which came into force on 1 October 1987, begins by defining the functions and duties of the Bank. It expressly identified its supervisory role (section 1(1)) and required it to establish a committee to be known as the Board of Banking Supervision (section 2). It also introduced a statutory exemption from liability for the Bank and its officers and employees in respect of that supervisory role in the absence of proof of bad faith. Section 1 provides:

> "(1) The Bank of England . . . shall have the powers conferred on it by this Act and the duty generally to supervise the institutions authorised by it in the exercise of those powers . . . (4) Neither the Bank nor any person who is a member of its Court of Directors or who is, or is acting as, an officer or servant of the Bank shall be liable in damages for anything done or omitted in the discharge or purported discharge of the functions of the Bank under this Act unless it is shown that the act or omission was in bad faith."

The system of control under the new Act was much the same as that under the 1979 Act. However, it dispensed with the two-tier system of recognition and licensing, substituting for it a single authorisation as a bank. Recognised and licensed institutions under the former regime became authorised banks.

A The minimum criteria of probity and financial prudence and standing for authorisation were similar to those in the 1979 Act, though more specific (section 9 and Schedule 3). The, new Act also contained, in section 9(3), a continuation of the section 3(5) power under the old Act, in the case of institutions whose principal place of business was in a country outside the United Kingdom, for the Bank to rely on information of the relevant B supervisory body in that country as to prudent management and overall financial soundness if it was satisfied as to the supervision exercised by that authority.

The new Act contained similar but broader powers of revocation. Section 11(1) provided that the Bank "may" revoke an authorisation "if it appears to" it that:

C "(a) any of the [relevant] criteria . . . is not or has not been fulfilled, or may not be or may not have been fulfilled . . . (b) the institution has failed to comply with any obligation imposed on it by or under [the] Act . . . (e) the interests of depositors or potential depositors of the institution are in any other way threatened, whether by the manner in which the institution is conducting or proposes to conduct its affairs or for any other reason."

D It also continued the possibility of conditional or, as it calls it, "restricted", authorisation (section 12).

*The Community law claim*

The plaintiffs' claim in Community law is derived from the Directive of 1977.

E *Introduction and summary*

Article 189 of the EC Treaty binds each member state to achieve the result stipulated in a directive but leaves to the authorities of the member state how it is to do that. The overlapping but more general article 5 of the Treaty requires each member state "to take all appropriate measures . . . to ensure fulfilment" of obligations arising out of the Treaty and, inter alia, of F directives.

The European Court has developed a principle of "direct effect" for directives similar to that of direct applicability expressly provided by article 189 for regulations. The principle, which is a right to invoke Community law against a member state or its emanation to protect interests for which a directive makes provision, owes its origin to the court's concern to ensure G that member states should not be able to deprive individuals of Community law rights derived from a directive, simply by failing to implement or by mis-implementing it: *Felicitas Rickmers-Linie KG & Co v Finanzamt für Verkehrsteuern, Hamburg* (Case 270/81) [1982] ECR 2771; *Marshall v Southampton and South West Hampshire Area Health Authority (Teaching)* (Case 152/84) [1986] QB 401.

H The court has held that a member state may not plead, as against an individual, its own failure properly to implement the directive: *Becker v Finanzamt Münster-Innenstadt* (Case 8/81) [1982] ECR 53, 71, para 24. In that case the court, at para 25, specified two, not necessarily mutually exclusive, purposes for which he could rely upon it: first, "as against any national provision which is incompatible with" it; and second, "in so far as

[its] provisions define rights which individuals are able to assert against the state".

Whichever of the two purposes for which an individual may rely on a directive—defensive or aggressive—the court, in *Becker's* case, at p 71, para 25, has stipulated that the provisions upon which he relies must be "unconditional and sufficiently precise" as to three matters: first, the identity of the persons entitled to the right ("the eligible plaintiff point"); second, the content of the right ("the contents point"); and, third, the identity of the person against whom the right may be asserted ("the damages point"). See also *Francovich v Italian Republic* (Case C-6/90) [1995] ICR 722, 738, paras 11 and 12; and *Brasserie du Pêcheur SA v Federal Republic of Germany* (Joined Cases C-46/93 and C-48/93) [1996] QB 404. Blackburne J observed in *Griffin v South West Water Services Ltd* [1995] IRLR 15, 30 that the concept of the test "unconditional and sufficiently precise" is "somewhat elusive"; he went on nevertheless to venture a simple test which I find as good as any: "One at least of the elements of unconditionality and precision which the provisions of a directive must exhibit . . . is that it should be clear what it is that the body is required to do."

The European Court from its earliest days has also developed, albeit more slowly, a broader principle of liability in damages to individuals of which, it seems to me, the *Becker* direct effect rule may now be regarded a part. It is a fundamental principle of Community law inherent in the system of the Treaty, including articles 5 and 189, that national courts must provide remedies to individuals to protect their Community law rights, if necessary by removing national procedural or substantive rules which prevent or impede such remedies: see *Francovich's* case [1995] ICR 722, 771–773, paras 28–46; see also *NV Algemene Transport- en Expeditie Onderneming van Gend & Loos v Nederlandse administratie der belastingen* (Case 26/62) [1963] ECR 1; *Costa v Ente Nazionale Energia Elettrica* (Case 6/64) [1964] ECR 585; *Amministrazione delle Finanze dello Stato v Simmenthal SpA* (Case 106/77) [1978] ECR 629, 643, 644, paras 16 and 21; *R v Secretary of State for Transport, Ex p Factortame Ltd (No 2)* (Case C-213/89) [1991] 1 AC 603, 643–644, para 19.

A right to damages under the *Francovich* head only exists where: first, the obligation giving rise to it is clearly defined on a similar basis to that required to give a directive direct effect, namely so as to confer clearly identifiable rights in the event of its breach; second, the breach is "sufficiently serious" in the sense that the member state "manifestly and gravely disregarded the limits on its discretion"; and third, there is a direct causal link between the breach of the obligation and the claimed loss: see *Francovich's* case [1995] ICR 722, 772, para 40; and the *Brasserie du Pêcheur* case [1996] QB 404, 499, paras 51 and 55. As Clarke J observed [1996] 3 All ER 558, 622, the *Becker* and *Francovich* requirements as to conferral of rights under a directive are much the same.

If the plaintiffs can establish their claimed right in Community law to damages against the Bank, section 2(1) of the European Communities Act 1972 entitles them to enforce it in the courts of the United Kingdom. However, in doing so the courts must set aside, if necessary, any conflicting provisions of our domestic statutory or common law, in particular, in this context, the requirement of proof of bad faith in section 1(4) of the 1987 Act and in the tort of misfeasancer in public office.

A The plaintiffs' claim against the Bank is for damages for loss caused to them by its failure to comply with obligations to them derived from the Directive of 1977. It is not a claim against the United Kingdom based on failure to implement the directive in the sense of not transposing it into national legislation, but against the Bank as its emanation for failing to apply it.

B The plaintiffs maintain that their claim does not depend on whether the directive itself expressly confers on them a right and remedy arising from the Bank's breach of its obligations. They say that it is sufficient to derive from its terms firm and precise obligations to protect depositors from which, if it is to achieve its purpose, a corresponding right in them to damages for breach of such obligations must follow. That, they say, is a right founded directly in Community law. As to the obligations, and corresponding rights, they C maintain that they are sufficiently firm and precise to meet the broadly corresponding formulations in *Becker's* case: [1982] ECR 53 and *Francovich's* case [1995] ICR 722, that the breaches are "sufficiently serious" to give them a remedy in damages and that they have caused them direct loss.

Under both heads of claim the plaintiffs rely on recent jurisprudence of the European Court which, they contend, shows that a directive does not D cease to be a source of Community law obligations giving rise to corresponding rights, or to have direct effect, in a member state once that state has implemented it. They say that, whether implemented or not, it may impose obligations on a member state, or an emanation of it as appropriate, giving rise to corresponding rights under Community law. Thus, Community law provides a remedy for failure to apply an implemented E directive as well as for failure to implement it.

As to breach by the Bank of its obligations under the directive, the plaintiffs maintain that the Bank, knowing at all material times that BCCI did not meet the minimum legal criteria for licensing or authorisation, failed to meet its obligations in one or more or all of three respects, namely: in licensing or authorising it to trade as a bank; in failing to supervise it to F ensure that it met the criteria for licensing or authorisation; and in failing to revoke or withdraw its licence or authorisation, as the case may be, or to take steps short of such revocation or withdrawal to protect depositors.

The plaintiffs maintain that the facts and matters that they plead and seek to plead, including that the Bank knew it was acting unlawfully, more than satisfy the requirements that I have just summarised as necessary to entitle them to recover damages from it for breaches of Community law. They add G that, to the extent that section 1(4) of the 1987 Act or the English law of misfeasance in public office calls for proof of more, in particular, of bad faith or, as Clarke J added, of knowledge, belief or suspicion that the acts or omissions complained of would probably cause them damage, it is incompatible with Community law. That is because it is "tantamount to calling in question the right to reparation founded on the Community legal order": see the *Brasserie du Pêcheur* case [1996] QB 404, 502–503, para 79.

H The Bank's case is, first, that the plaintiffs cannot succeed, however they put their claim, because the directive neither expressly confers upon them any right or remedy in damages against banking regulators for breach of it nor provides any basis for an obligation to them from which any such rights could be derived. In the *Becker* formula, it did not "define" any such rights,

nor were its terms unconditional or sufficiently precise to give it direct effect. In *Francovich* terms it did not confer identifiable rights on individuals in the category of the plaintiffs. It was nothing more than the first of a series of Community directives providing for the gradual harmonisation of national laws so as to eliminate discrimination in competition in the provision of banking services. The Bank maintains that such Community legislation did not expressly confer any rights to compensation until 1995, when the Community, by directive, provided for a harmonised system of minimum and maximum levels of compensation in the form of deposit guarantee schemes: Council Directive (94/19/EC) of 30 May 1994.

Second, the Bank says that there is no authority for the *Francovich* type claim based on state liability against an emanation of the state, still less against a regulatory authority for failure properly to carry out its duties.

Third, the Bank says that the United Kingdom has fully and properly implemented the Directive of 1977 and it is, therefore, no longer a source of or a means of identifying rights in Community law; the plaintiffs cannot, therefore, pray in aid the *Becker* principle of direct effect, and their sole remedy if any, is under English common law.

Fourth, the Bank says that the only basis on which Community law might be of value would be as an aid to interpretation of the United Kingdom's implementing legislation, or as comparative material for consideration of future legislation, but that Community law provides no such interpretative or comparative material.

Fifth, the Bank says that, even if it is in breach of an obligation capable of giving rise to rights of action by the plaintiffs for damages, its breach is not "sufficiently serious" to confer such rights in the circumstances of the case.

Sixth, the Bank maintains that it has not, by its conduct as regulator, caused any direct loss to the plaintiffs.

Clarke J [1996] 3 All ER 558, 603 held that the plaintiffs could not show that the Directive of 1977 was intended to confer upon them rights enforceable by an action for damages against a banking supervisory body. He agreed with the Bank's case that the directive imposed no duty on it to supervise and that its immediate purpose was a first step towards harmonisation. He acknowledged that an important underlying purpose of the directive was to protect existing and future depositors. However, he ruled, at p 602, that that was not enough to impose on the Bank any obligation which gave rise to rights on the part of the plaintiffs to claim damages for breach of it. He said, at pp 614–615:

> "In my judgment the Directive of 1977 was not intended to confer rights upon savers, even though the underlying purpose of supervision of credit institutions was to be for their benefit. It is true that articles 3 and 7, and probably also article 8, impose duties upon the supervising authority, but it does not seem to me to follow from that that it was intended that savers or any particular class of person were to have rights of action in damages against that authority."

His reasoning was the same under both heads of the Community law claim, namely that the provisions of the directive were not sufficiently precise as to the identity of the persons entitled to the right claimed, or as to the content of the right, or as to the identity of the person obliged. He was influenced, in particular, by the absence from the directive of any "remedies

A provision" of the sort found in *von Colson v Land Nordrhein-Westfalen* (Case 14/83) [1984] ECR 1891 and *Marshall v Southampton and South West Hampshire Area Health Authority (Teaching)* (Case 152/84) [1986] QB 401; see [1996] 3 All ER 558, 616–618. As to *Francovich* liability, as distinct from that giving rise to direct effect, he said, at p 622:

> "if the plaintiffs cannot establish a sufficient right or interest to enable B them to rely upon the directive as having direct effect, they equally cannot succeed by relying upon the principle in *Francovich* because here too it is necessary to establish the same right or interest."

In so ruling, the judge applied to the Directive of 1977 the reasoning of the Privy Council in relation to domestic legislation in the negligence cases of *Yuen Kun Yeu v Attorney General of Hong Kong* [1988] AC 175 and *Davis* C *v Radcliffe* [1990] 1 WLR 821, that public regulators who had discretionary powers to stop deposit-taking institutions from carrying on business, but no day-to-day control or supervision of them, had no legal responsibility to depositors or potential depositors for default of those institutions made possible as a result of their regulatory decisions, even though one of their functions was to protect depositors. In so reasoning the Judicial Committee relied on three matters which Clarke J considered, at pp 600–602 and 615, D applied to the Directive of 1977: the regulator had no day-to-day control or supervisory responsibility over the institutions; the immediate cause of the loss was the default of third parties, namely fraud by the managers of the institutions; and the regulator's role was a discretionary one, namely to balance a number of different factors in the interest of the public: generally as well as that of existing and future depositors. As to the last, the judge E considered [1996] 3 All ER 558, 601 that it might be that depositors would be sufficiently protected by, criminal sanctions against the fraudsters themselves or by the establishment of a supervisory system such as the Board of Banking Supervision introduced by section 2 of the 1987 Act.

*The purpose and terms of the Directive of 1977*

F It is a fundamental and general principle of Community law inherent in the Treaties that national courts must protect the rights which individuals derive from Community law. The first question for decision, at its broadest, is whether the directive, purposively construed, imposed obligations on the Bank to protect depositors, the breach of which conferred on them a right to claim damages against it.

It is plain that one of the purposes of the directive was the protection of G depositors. The plaintiffs say it was the main purpose. The Bank, to the extent that it recognises it as a purpose of the directive at all, says it was subsidiary to that of beginning the process of harmonisation. As I have mentioned, the judge regarded it as an important underlying purpose.

Purposive construction of the directive requires consideration of the relative importance it gives to the protection of depositors as well as to the content and precise formulation of the articles in it upon which the plaintiffs H rely. As always in Community instruments, the title and recitals are important. Also of importance when considering the precision, or lack of it, in the articles themselves, is the extent to which their criteria for authorisation and withdrawal of authorisation allowed the Bank a discretion in determining whether such criteria were met or as to what it

could do if it was of the view they were not. In particular, it is of value to look for what, if any, scope it allowed in that exercise for consideration of other factors of the sort mentioned by Lord Goff in *Davis v Radcliffe* [1990] 1 WLR 821, 827B–C, to which I shall return, namely the effect of a decision one way or the other on other depositors, creditors and other customers of the bank and possibly on the wider provision of financial services in the community.

The title of the directive is "the co-ordination of laws, regulations and administrative, provisions relating to the taking up and pursuit of the business of credit institutions", which, the Bank contends, summarises its main purpose—harmonisation. However, the plaintiffs say that looking at the directive as a whole, and in the light of its legislative basis as the court should, its purposes were the immediate protection of depositors and the progressive co-ordination of the laws of member states to achieve the same minimum level of protection throughout the Community.

Reference to the legislative basis for the directive mentioned in the preamble to it, in particular article 57(2) of the Treaty and the opinion of the Economic and Social Committee ("ECOSOC"), indicates that harmonisation without regard to content was not and could not sensibly have been an end in itself. Article 57(2) required the Council before the end of a transitional period to issue directives for the co-ordination of the laws of member states as to the taking up and conduct of professions and businesses, including that of banking. And ECOSOC, in drawing up its opinion on the proposal for the directive, included a number of passages clearly relevant to the degree of protection to be provided for depositors as well as to its uniformity in the specific provisions proposed: see the report of ECOSOC (OJ 1975 C263, p 25). The opinion, which gave rise to an amendment to the directive, included the following passage:

> "1.1.3 . . . the lack of harmonisation of member states' legislation, whose main purpose in each country is to provide security for depositors and to protect savings, is liable to create serious disparities with regard to that objective, indeed even certain dangers."

As to the recitals, Clarke J has helpfully rehearsed all of them, at pp 607–608. Recitals 1, 2 and 9 refer to the need to remove discrimination between member states in the establishment and provision of banking services. Recital 3 refers to the need for the introduction by "successive stages" of a system which, when read with the other provisions in the directive, would plainly provide both immediate supervision within each member state and, in the long term, consolidated supervision by home member states in consultation with host member states, that is

> "overall supervision of a credit institution operating in several member states by the competent authorities in the member state where it has its head office, in consultation, as appropriate, with the competent authorities of the other member states concerned."

Among the other recitals, no. 4 refers to the need for measures "to co-ordinate credit institutions . . . both in order to protect savings and to create equal conditions of competition between" them. No 8 contains the same duality in providing:

A "Whereas the *eventual* aim is to introduce uniform authorisation requirements throughout the Community for comparable types of credit institution; *whereas at the initial stage* it is necessary, however, to specify only certain minimum requirements to be imposed by all member states." (My emphasis.)

See also recitals 5 and 12.

B A directive may have two or more purposes and, regardless of their relative importance, may impose obligations advancing both or all of them. In my view, it is an arid exercise to seek to attribute greater importance to one or other of the two purposes of immediate protection of depositors and progressive harmonisation. It is clear from the directive, looked at as a whole and in its legislative context, that there were two such purposes here C and that they were interdependent, each serving the other and as a start specifying certain minimum requirements for the protection of depositors. I am content to adopt Clarke J's conclusion, at p 609, that while "the immediate purpose of the directive was a first step towards . . . harmonisation . . . a key purpose of controlling and supervising credit institutions was to protect . . . savers by the protection of their savings".

D The articles of the directive, particularly articles 3, 6, 7 and 8 upon which the plaintiffs rely, must be read in the light of its recitals and the legislative background. By way of preliminary, it should be noted that, although the directive, in its title and in article 2, applies it to "the taking up and pursuit of business of credit institutions", it is plainly also, and perhaps primarily, concerned with institutions that receive deposits. Article 1 defines "credit institution" as "an undertaking whose business is to receive deposits or other E repayable funds from the public and to grant credits for its own account".

As I have mentioned, article 3 set out certain conditions of authorisation of credit institutions to trade as such. It imposed duties variously on member states and on their competent authorities. It obliged member states to require credit institutions to obtain authorisation before trading and their competent authorities to grant authorisation only on certain minimum F conditions. It provided, so far as material:

"(1) Member states shall require credit institutions subject to this directive to obtain authorisation before commencing their activities. They shall lay down the requirements for such authorisation subject to paragraphs (2), (3) and (4) . . . (2) Without prejudice to other conditions G of general application laid down by national laws, *the competent authorities shall grant authorisation only when the following conditions are complied with*: the credit institution must possess separate own funds, the credit institution must possess adequate minimum own funds, there shall be at least two persons who effectively direct the business of the credit institution . . . *the authorities* concerned shall not grant authorisation if the [two] persons . . . are not of sufficiently good repute H or lack sufficient experience to perform such duties . . . (4) Member states shall also require applications for authorisation to be accompanied by a programme of operations setting out inter alia the types of business envisaged and the structural organisation of the institution." (My emphasis.)

Article 3, in paragraph (3), also prohibited competent authorities when considering authorisation under those provisions from having regard to the economic needs of the market, subject where appropriate to a transitional period of 7 to 12 years before the prohibition took effect. However, it is interesting to note that within that transitional period paragraph (3)(d) provided that the criterion of economic need must be aimed at promoting, amongst other things, "security of savings".

Article 6 deals with supervision. In my view, and contrary to that of Clarke J, at p 616, it imposed on regulators immediate duties of a technical banking nature to "ensure that savings are protected", and it did so in advance of the process and achievement of co-ordination. It is clear from the wording of the article and the context of the directive as a whole, concerned as it is with "the taking up *and pursuit* of the business of credit institutions" (my emphasis), that the intended purpose of the supervision was to ensure, as a minimum, continuing compliance with the requirements of authorisation under article 3. It provided:

> "(1) Pending subsequent co-ordination, *the competent authorities* shall for the purposes of observation and, if necessary, in addition to such coefficients as may be applied by them, establish ratios between the various assets and/or liabilities of credit institutions with a view to monitoring their solvency and liquidity and the other measures which may serve to ensure that savings are protected. To this end, the Advisory Committee"—established under article 11—"shall decide on the content of the various factors of the observation ratios referred to in the first sub-paragraph and lay down the method to be applied in calculating them. Where appropriate, the Advisory Committee shall be guided by technical consultations between the supervisory authorities of the categories of institutions concerned. (2) The observation ratios established in pursuance of paragraph (1) shall be calculated at least every six months. (3) The Advisory Committee shall examine the results of the analyses carried out by the supervisory authorities referred to in the third sub-paragraph of paragraph (1) on the basis of the calculations referred to in paragraph (2). (4) The Advisory Committee may make suggestions to the Commission with a view to co-ordinating the coefficients applicable in the member states." (My emphasis.)

An associated provision, article 7, was also directed at the mechanics of supervision, obliging banking regulators to have regard to such matters in their supervisory role. I do not agree with Clarke J, at p 614, where he said that this article requires competent authorities merely to "collaborate closely in order to supervise" but does not of itself "impose a duty to supervise". It provided:

> "(1) The *competent authorities* of the member states concerned shall collaborate closely in order to supervise the activities of credit institutions operating, in particular by having established branches there, in one or more member states other than that in which their head offices are situated. They shall supply one another with all information concerning the management and ownership of such credit institutions that is likely to facilitate their supervision of and the examination of the conditions for their authorisation and all information likely to facilitate the monitoring

A of their liquidity and solvency. (2) *The competent authorities* may also, for the purposes and within the meaning of article 6, lay down ratios applicable to the branches referred to in this article by reference to the factors laid down in article 6. (3) The Advisory Committee shall take account of the adjustments necessitated by the specific situation of the branches in relation to national regulations." (My emphasis.)

B See also article 12(3), which acknowledges as one of the purposes for which banking regulators may use information provided as a result of collaboration required by the directive, the examination of: "the conditions for the taking up *and pursuit* of the business of credit institutions, to facilitate monitoring of the liquidity and solvency of those institutions . . ." (My emphasis.)

C I should add that, in my view, it follows from the obligations to supervise and collaborate over supervision that regulators were also bound to take steps where necessary to obtain information and to take appropriate action if, as a result of their attempts to supervise, they were not satisfied that the criteria for authorisation and as required under article 6 were still met. As Lord Neill submitted, without such an obligation, those of supervision, monitoring and collaboration would be otiose.

D Article 8(1) provided for withdrawal by banking regulators of authorisation in a number of circumstances, including failure by a bank to continue to fulfil the conditions under which authorisation was granted. The article reads:

"(1) *The competent authorities may* withdraw the authorisation issued to a credit institution subject to this directive or to a branch authorised E under article 4 only where such an institution or branch: (a) does not make use of the authorisation within 12 months, expressly renounces the authorisation or has ceased to engage in business for more than six months, if the member state concerned has made no provision for the authorisation to lapse in such cases; (b) has obtained the authorisation through false statements or any other irregular means; (c) *no longer fulfils* F *the conditions under which authorisation was granted, with the exception of those in respect of own funds*; (d) *no longer possesses sufficient own funds* or can no longer be relied upon to fulfil its obligations towards its creditors, and in particular no longer provides security for the assets entrusted to it; (e) falls within one of the other cases where national law provides for withdrawal of authorisation." (My emphasis.)

G The provision is in general terms permissive in the various circumstances specified. One can see why that should be so for some of them, but not for those in paragraph (c) or (d)—failure to comply with conditions of authorisation or other financial malaise fatal to its continued handling of other people's money. In my view, in those respects the article should be read as imposing a duty on competent authorities to withdraw H authorisation. Clarke J acknowledged, at p 614, the force of Lord Neill's argument to that effect. It is inconceivable that the directive, should be read so as to require banking regulators to insist on certain minimum requirements of authorisation and to supervise to ensure continued satisfaction of them, yet leave them with a discretion, unspecified as to

criteria, to permit continuance of trading without check or condition when those requirements are no longer met. I am not deterred from that conclusion by the mandatory terms of paragraph 8(2), relating to branch authorisations:

> "In addition, the authorisation issued to a branch under article 4 *shall* be withdrawn if the competent authority of the country in which the credit institution which established the branch has its head office has withdrawn authorisation from that institution." (My emphasis.)

One of five decisions of the European Court on the Directive of 1977, *Municipality of Hillegom v Hillenius* (Case 110/84) [1985] ECR 3947, is of some interest on the question whether articles 6, 7 and 8 of the directive impose a duty to supervise, as distinct from just a duty to collaborate over supervision. It concerned the obligation imposed by article 12 on member states to ensure that members of their regulatory authorities complied with their obligation of professional secrecy. An investor, seeking to claim in the Dutch courts against the Dutch banking regulator for losses incurred as a result of its failure to supervise, sought to examine a number of its staff. They resisted examination, relying on article 12. The Advocate General, Sir Gordon Slynn, and the court, in considering that narrow issue, made some general observations on the matter of supervision. In doing so they made plain that they regarded the directive as imposing on regulators a supervisory role. Thus, Sir Gordon Slynn said, at p 3948: "credit institutions are subject to continuing supervision and under article 8 the supervisory authority may withdraw the authorisation issued to a credit institution in certain circumstances." Later, at p 3950, he spoke of the necessity of the relaxation of the obligation of secrecy as between regulators provided by article 12(2) of the directive, since it was "obviously necessary if the supervision and collaboration intended by the directive [were] to be effective". The court made similar observations in its judgment, at p 3963:

> "26. An analysis of the general aims of the directive and the context of article 12(1) shows that, in order to create the legislative conditions required for a common market for credit institutions, the directive is designed to facilitate the overall monitoring of credit institutions operating in more than one member state by the competent authorities of the member state in which the credit institution has its head office . . .
> "27. If the monitoring of banks through supervision within a member state and exchanging of information by the competent authorities is to function properly, it is necessary to protect professional secrecy . . ."

There is also an interesting observation of the court to like effect in *Criminal proceedings against Bullo and Bonivento* (Case 166/85) [1987] ECR 1583, 1595, para 9, though this time in relation to conditions of authorisation imposed by article 3(4) in particular: "article 3(4) . . . is formal in nature and is designed to *secure* effective *supervision* of the activities of those institutions with a view to the protection of their customers . . ." (My emphasis.)

The first and principal issue between the parties, whether the matter is considered as one of *Becker* or *Francovich* liability, is whether, as a result of the directive imposing obligations on the Bank for the protection of depositors, it conferred corresponding enforceable rights on them against

A the Bank. The plaintiffs say that, regardless of the absence of any express conferral in the directive, such rights result logically and necessarily from the obligations if the latter are to have any practical effect. They say, with particular reference to the direct effect route to liability, that the second limb of the *Becker* test, requiring definition of such rights does not require them to be spelt out in the directive. The Bank says that the test means just that, that *Francovich* type of liability, if it exists at all against an emanation of the state B exercising a regulatory function, is no less specific and that, as this directive says nothing about depositors' rights, the plaintiffs' claim for damages must fail. They add that there are other means of securing the benefit of such obligation as the Bank has to protect them.

Before examining the jurisprudence of the European Court bearing on this central issue there is some ground clearing to be done.

C

*Yuen Kun Yeu v Attorney General of Hong Kong and Davis v Radcliffe*

First, there is Clarke J's and the Bank's heavy reliance on the reasoning of the Judicial Committee of the Privy Council in *Yuen Kun Yeu v Attorney General of Hong Kong* [1988] AC 175 and *Davis v Radcliffe* [1990] 1 WLR 821. In my view, those authorities are distinguishable in a number of D important respects and provide little or no guidance on the question whether Community law duties of the Bank derived from the directive confer on depositors Community law rights of action against the Bank.

It does not seem to me appropriate to pray in aid common law principles and public policy considerations going to the existence of a duty of care when determining as a matter of construction what, if any, obligations and corresponding enforceable Community law rights are to be derived from E Community legislation. The primary question in both Privy Council cases was whether there was a duty of care: the *Yuen* case, per Lord Keith, at p 190C–D; *Davis v Radcliffe*, per Lord Goff, at pp 825–826, 826–827. In both the Judicial Committee determined it according to common law criteria as to the presence or absence of "a close and direct relationship" between regulator and depositors and of "a special relationship" between the F regulator and the deposit-taking institutions concerned, and by reference to public policy considerations governing the exercise by a public body of a discretion. Here, the directive imposed a number of clearly defined obligations—duties—on the Bank to ensure the compliance with certain minimum requirements by banks seeking the grant and retention of authorisation. The critical question is whether, as a matter of construction of the directive and Community law principles, those undoubted duties G conferred enforceable rights of action on the plaintiffs.

Second, it was an important consideration in *Yuen* and in *Davis v Radcliffe* that the domestic legislation in question gave the regulators little or no supervisory powers, still less any day-to-day control. In *Yuen*, at p 195C, Lord Keith described the regulator's powers, under the Hong Kong Deposit-taking Companies Ordinance, as being limited to putting the institution in H question "out of business or allowing it to continue". In *Davis v Radcliffe* the regulator's powers under the Isle of Man banking legislation were, as Lord Goff said, at p 830C, "somewhat wider", but not materially so. Whether a supervisory role is of such a nature as to impose in common law or Community law a duty to depositors must be a matter of fact and degree turning on the precise form and level of supervision prescribed in each case.

Lord Keith acknowledged as much in *Yuen* when distinguishing the Court of Appeal's decision in *States of Guernsey v Firth* (unreported) 14 May 1981; Court of Appeal of Guernsey (Civil Division) (Appeal No 10 Civil), that a depositor had a cause of action against a public authority statutorily responsible for publishing lists of bodies registered to accept deposits, by reason of his loss resulting from its failure to publish a list. Lord Keith said, at p 197:

> "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 I do not think it appropriate to express any opinion as to its correctness."

He took a similar stance in relation to a decision of the Canadian Federal Court of Appeal in *Baird v The Queen* (1983) 148 DLR (3d) 1, that a depositor had a cause of action against the Canadian Government in respect of alleged breaches by it of various supervisory duties imposed upon it by statute.

Lord Keith's acknowledgement that the decision in *Yuen* depended as much on its own facts as on broad principle was underlined by Saville J in the following passage from his judgment in *Minories Finance Ltd v Arthur Young* [1989] 2 All ER 105, 111:

> "Counsel submitted that this case was conclusive authority against the proposition that the Bank of England owed a duty of care to depositors in this country. Although this submission is formidable, I am not persuaded that it is so strong that the contrary argument can simply be dismissed as unsustainable. The Privy Council were concerned with a Hong Kong ordinance; the present case concerns a different supervisory banking authority in a different country exercising, according to the third party notices, powers and functions over and above those to be found in the Banking Act 1979, the then equivalent in this country of the Deposit-taking Companies Ordinance. It is noteworthy that the Privy Council itself distinguished the Canadian case of *Baird v The Queen*, 148 DLR (3d) 1, where the Federal Court of Appeal concluded that a similar claim should not be struck out as disclosing no reasonable cause of action, on the ground that the legislation and the circumstances under consideration in Canada were different from those in the Hong Kong case."

Here, whilst it cannot be said that the directive imposed a duty of "day-to-day control" by the Bank, articles 6 and 7, when read with article 8, clearly imposed supervisory duties on it which go beyond those considered in the *Yuen* case and *Davis v Radcliffe*. "Day-to-day control" cannot, in my view, be the touchstone or the necessary minimum for a common law duty of care by a regulator, still less for a right of action against a regulator for breach of a Community law obligation to supervise. It is a notion taken from the wholly different circumstances under consideration in *Dorset Yacht Co Ltd v Home Office* [1970] AC 1004, and should not be given general application regardless of context.

Third, similar considerations govern the second concern in *Yuen* and *Davis v Radcliffe* that a court should be slow to impose upon a regulator a

A duty to depositors to protect them against default of third parties, in particular, against fraud by banks or their staff. Again, as Lord Keith made clear in the *Yuen* case, at p 195–196, this goes to the issue whether there was a duty of care to depositors to protect them against such default, including whether there was "a special relationship" between the regulator and the institution concerned to give rise to such a duty. It all depends upon the form B and level of supervision a regulator is required to provide in the circumstances of each case. If a banking regulator is required to supervise banks then, depending on its precise statutory powers and duties, I can see no reason in principle why it should not be liable to depositors if they lose their funds through fraud or other culpable behaviour of the institutions or their staff made possible by its failure properly to supervise.

Fourth, there are the public policy considerations, referred to by Lord C Keith and Lord Goff in *Yuen* and *Davis v Radcliffe* respectively, against allowing public bodies' discretionary decisions to be influenced by fear of litigation resulting from susceptibility to claims in negligence arising out of their decisions: see *Yuen*, per Lord Keith, at pp 194–195, 198; and *Davis v Radcliffe*, per Lord Goff, at pp 826–827.

Whether and the extent to which such considerations come into play, D either as a matter of common or Community law, depends on whether and to what extent the duties imposed upon a public body allow it a margin of discretion or judgment in its exercise of them. This type of case is far removed from that of a police officer's exercise of his professional judgment in the investigation of crime which gave rise to *Hill v Chief Constable of West Yorkshire* [1988] QB 60, and the observations of Glidewell LJ, at pp 75–76, so often cited in this context and referred to by Lord Keith in the E *Yuen* case, at p 198. Moreover, the force of that exclusionary principle may require some re-examination in the light of the European Court of Human Rights' recent decision in *Osman v United Kingdom* (1998) 29 EHRR 245. The directive's provisions as to authorisation, supervision and withdrawal of authorisation are specific and focused entirely on each individual institution's state of compliance with the prescribed criteria. Whatever may F have been the effect of the Hong Kong ordinance in the *Yuen* case, there is less scope in the Directive of 1977 for balancing interests of the sort mentioned by Lord Keith, at pp 194–195:

> "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 G 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 in business with some hope that, after appropriate measures by the management, its financial position would improve."

Similarly, there does not appear to be much scope here for consideration H of wider interests, including the general well-being of the financial community of the sort that Lord Goff spoke of in *Davis v Radcliffe*, at pp 826–827. In that case the regulators' statutory powers and duties were broadly described, far more broadly than those of regulators governed by the Directive of 1977. This is how Lord Goff summarised them, at p 825:

> "Under the Banking Act 1975, it became an offence to carry on a banking business in the Isle of Man without a licence, or otherwise than in accordance with ther terms of a licence. Detailed provision is made in the 1975 Act for the licensing of banks and other related matters. Applications for a licence to carry on a bank have to be made to the Treasurer, in whom is vested the power to issue such a licence, with or without conditions; to refuse a licence; or to revoke a licence previously granted. *However the Finance Board is given the power to give to the Treasurer such directions as it thinks fit with regard to the exercise of such powers.* The Treasurer is vested with other powers under the Banking Act 1975, including power (with the authority of the Finance Board) to suspend or discontinue the business of the bank; and power to inspect books and other documents of a bank (with power of entry for that purpose) and to take copies of such documents, *as to the exercise of which powers the Finance Board may again give such directions to the Treasurer as it thinks fit.*" (My emphasis.)

It was on those facts that Lord Goff went on, at p 826, to make his observation about the relevance and importance of the interests of the financial services community as a whole:

> "There are, in the opinion of their Lordships, certain considerations, each of which militates against the imposition of any such duty, and which taken together point to the inevitable conclusion that no such duty should be imposed. First, it is evident that the functions of the Finance Board, and indeed of the Treasurer, as established by the Finance Board Act 1961, are typical functions of modern government, to be exercised in the general public interest. These functions are . . . of the broadest kind, for which parallels can doubtless be drawn from other jurisdictions. The functions vested in the Treasurer, and in the Finance Board, by the Banking Act 1975 must be seen as forming part of those broader functions. No doubt, in establishing a system of licensing for banks, regard was being had (though this is not expressly stated in the long title of the Act) to the fact that the existence of such a licensing system should provide an added degree of security for those dealing with banks carrying on business in the Isle of Man, including in particular those who deposit money with such banks. But it must have been the statutory intention that the licensing system should be operated in the interests of the public as a whole; and when those charged with its operation are faced with making decisions with regard, for example, to refusing to renew licences or to revoking licences, such decisions can well involve the exercise of judgment of a delicate nature affecting the whole future of the relevant bank in the Isle of Man, and the impact of any consequent cessation of the bank's business in the Isle of Man, not merely upon the customers and creditors of the bank, but indeed upon the future financial services in the island. In circumstances such as these, competing considerations have to be carefully weighed and balanced in the public interest, and, in some circumstances, as Mr Kentridge observed, it may for example be more in the public interest to attempt to nurse an ailing bank back to health than to hasten its collapse. The making of decisions such as these is a characteristic task of modern regulatory agencies; and the very nature of the, task, with its emphasis on the broader public interest, is one which

A militates strongly against the imposition of a duty of care being imposed upon such an agency in favour of any particular section of the public."

Fifth, the *Brasserie du Pêcheur* [1996] QB 404 requirement of a "sufficiently serious" breach for recovery of damages by an individual against a state or its emanation for breach of a Community law obligation, indicates that that legal regime provides its own distinct threshold or brake B of a public policy nature on the award of damages in such cases.

For those reasons, I consider it unhelpful, indeed positively misleading, to take as a starting point the decisions on the facts and the reasoning of the Privy Council in the *Yuen* case and *Davis v Radcliffe* as to the absence of a duty of care for the wholly different question here, whether as a matter of Community law depositors have a right of action against a banking C regulator for breach of its obligations under a directive. In short, as the plaintiffs maintained, adoption of the *Yuen* case and *Davis v Radcliffe* reasoning in this context could negate the protection that the Directive of 1977 was intended to provide.

*The legislative basis of the Directive of 1977*

D The second piece of ground clearing is as to the legislative basis of the Directive of 1977 as indicated by subsequent Community legislation, on which the Bank places much reliance. It points to the whole legislative programme of which the directive was part, and characterises it as no more than a modest first step towards harmonisation imposing no obligations on member states' regulators and conferring no rights on individuals against them. It says that the programme demonstrates that protection of depositors E was not the directive's sole or even its main object. It refers to the following general description of it by the European Court in its judgment in *Commission of the European Communities v Italian Republic* (Case 300/81) [1983] ECR 449, 455, para 3:

"Council Directive 77/80 constitutes the first step in the harmonisation F of banking structures and the supervision thereof. The purpose of such harmonisation is to permit the gradual attainment of freedom of establishment for credit institutions and the liberalisation of banking services. In that respect the directive introduces minimum conditions for the authorisation of credit institutions which all member states must observe. In order to facilitate the taking up and pursuit of business as a credit institution the directive aims in particular to reduce the discretion G enjoyed by certain supervisory authorities in authorising credit institutions."

As the third sentence in that passage and the terms of article 3 of the directive plainly indicate, it did at least make some immediate provision of a protective nature concerning the authorisation of credit institutions. However, the Bank's case is that nearly another 20 years were to elapse and H many more directives were to follow before supervisory obligations and some limited rights for depositors began to emerge. After a detailed examination of some 11 directives on the supervision of credit institutions between 1977 and 1995, the Bank summarises its contentions on this legislative development as follows.

It has taken the Community some 20 years to develop an increasingly sophisticated harmonised system of banking regulation and supervision. It was not until Directive 94/19 that the Community provided (from 1 July 1995) any specific remedy to depositors. And then it was in the form of a minimum financial guarantee provided through a harmonised system of deposit-guarantee schemes, not through a harmonised system of rights of action again member states or their competent authorities. The recitals to the Directive of 1994 "expressly disavow" any intention to impose additional liability on member states or on their competent authorities where their respective deposit protection schemes comply with the requirements of the directive. It is, therefore, impossible to read any such additional liability into the Directive of 1977, which made no express provision for consumer protection at all.

The Bank referred to the ruling of the European Court and the opinion of Advocate General Léger in *Federal Republic of Germany v European Parliament* (Case C-233/94) [1997] ECR I-2405, indicating that, though consumer protection was one of the objects of the Directive of 1994, it did not enable member states to invoke it in order to impede the activities of credit institutions authorised in other member states. It also relied on certain observations of the court in *Société Civile Immobilière Parodi v Banque H Albert de Bary et Cie* (Case C-222/95) [1997] ECR I-3899, 3922–3924, paras 22–26, to which I shall return, which, it maintains, indicate the limited role of the Directive of 1977.

The plaintiffs agree that the Directive of 1977 was a first step towards the harmonisation of authorisation procedures. However, they say that as a first step it was directed at both protection of depositors and elimination of restrictions on competition; as to protection of depositors it established minimum requirements of authorisation, supervision and withdrawal of authorisation, the last of which goes also to effective supervision; the system has remained essentially unchanged since the Directive of 1977 and the developments made by subsequent: directives are not great.

As to the following directives on which the Bank placed much reliance, the plaintiffs, maintain: the Second Council Directive of 1989 (89/646/EEC) adds to, but does not replace, the minimum requirements going to supervision contained in articles 6, 7 and 8 of the Directive of 1977; the Directive of 1983 (83/350/EEC) and the Directive of 1992 (92/30/EEC) are concerned with consolidation of supervision, not the requirement of supervision already established by the Directive of 1977, as acknowledged by, inter alia, recital 5 to the Directive of 1992, to the terms of which I shall refer shortly; as to the introduction by the Directive of 1994 (94/19/EC) of a harmonised system of consumer protection in the form of deposit guarantee schemes, it was not intended to be the only protection for depositors, but, as recital 25 to the directive states, "an indispensable *supplement* to the system of supervision of credit institutions on account of the solidarity it creates among all the institutions in a given financial market in the event of failure of any of them". (My emphasis.)

The European Court had considered the Directive of 1977 in five cases before Clarke J gave his judgment. As he found, they confirm, or do not contradict, what is evident from the plain words of the directive, that one of its underlying purposes was to protect the interests of savers: see *Commission of the European Communities v Italian Republic* (Case 300/81)

A [1983] ECR 449; *Commission of the European Communities v Kingdom of Belgium* (Case 301/81) [1983] ECR 467; *Municipality of Hillegom v Hillenius* (Case 110/84) [1985] ECR 3947; *Criminal proceedings against Bullo and Bonivento* (Case 166/85) [1987] ECR 1583 and *Criminal proceedings against Mattiazzo* (Case 422/85) [1987] ECR 5413.

The judge, while acknowledging that protection of depositors was an B important underlying purpose of the directive, held that its "immediate purpose" was a first step towards harmonisation and did not impose any obligations on the Bank giving rise to enforceable rights against it by individuals. In so holding, he likened it to the directive for co-ordination of the conditions for the admission of securities to official stock exchange listing (Council Directive 79/279/EEC) considered by the Court of Appeal in *R v International Stock Exchange of the United Kingdom and the Republic* C *of Ireland Ltd, Ex p Else (1982) Ltd* [1993] QB 534. There, the court held that the primary purpose of the directive was to co-ordinate listing practices of competent authorities in member states and not directly to provide additional protection for investors so as to enable them to challenge the Stock Exchange's cancellation of a company listing.

I respectfully disagree with the judge's reliance on that case as an analogy D and support for his approach to his decision in this case. First, neither the recitals nor the substantive provisions in the Listing Directive were directed at the protection of investors with the same focus as those in the Directive of 1977 in favour of depositors. The Listing Directive was made under articles 54(3)(g) and 100 of the Treaty requiring co-ordination of "safeguards . . . for the protection of the interests of members and others" of companies or firms and was of direct effect. The long title of the directive, like that of the E Directive of 1977, indicated that its purpose was one of co-ordination, that is, of "the conditions for the admission of securities to official stock exchange listing". And recital 5 to the directive included within that general purpose the provision of equivalent protection for investors at Community level, and a number of articles referred to the interest of protection of investors.

F The Listing Directive made specific and detailed provision for challenges to listing decisions, but did not expressly identify the persons entitled to make those challenges. All three members of the court, Sir Thomas Bingham MR and McCowan and Leggatt LJJ, after a close analysis of its provisions, one article in particular setting out the machinery of challenge, concluded as a matter of construction that investors had no right of challenge. Sir Thomas Bingham MR concluded, at p 549F, that the primary purpose of the directive G was "not, in any direct way, to provide *additional* protection for investors" (my emphasis). That cannot be said about the Directive of 1977; see *Société Civile Immobilière Parodi v Banque H Albert de Bary et Cie* (Case C-222/95) [1997] ECR I-3899. Sir Thomas Bingham MR and Leggatt LJ also spoke of the great difficulties that could arise if companies and their members were in conflict over listing decisions.

H The case is thus readily distinguishable from this one, being concerned as it was with the construction of the detailed provisions of a different directive. It is not to be taken as an authority for a general proposition excluding a remedy to an individual for whose protection a directive is intended, simply because its primary or an important purpose is co-ordination. It all depends on the terms of each instrument and the extent to which, if at all, it makes

detailed and practical provisions for both purposes. As the subsequent jurisprudence of the European Court on the Directive of 1977 (see in particular the *Parodi* case, at pp 3922–3923, paras 22 and 23) and similar directives in other fields illustrate, different considerations apply here.

The mere fact that a directive is a first step in harmonisation or that it has an immediate purpose as such does not mean that it cannot also have an immediate purpose of protecting individuals, such as depositors. Indeed, it does not prevent it from immediately imposing obligations or conferring or giving rise to corresponding rights. As Advocate General Léger observed in his opinion in *Federal Republic of Germany v European Parliament* (Case C-233/94) [1997] ECR I-2405, 2419, para 39 on the competing demands of protection of depositors and harmonisation under Directive 94/19: "the requirement as regards protection may chronologically precede harmonisation." In that case Germany sought annulment of Directive 94/19, of a deposit guarantee scheme on the ground that it wrongly failed to increase protection for depositors by applying to all member states the highest level of protection required by any one of them. The court, at pp 2448–2451, paras 10, 19 and 20, rejected that contention, observing that consumer protection was one, but not the sole or paramount, objective of the directive. However, it acknowledged that the object of promoting the right of establishment and freedom to provide banking services necessarily carried with it "a high level of consumer protection" and "a considerable improvement in the protection of depositors within the Community". And, as I shall mention again, the important recent authority of *Norbrook Laboratories Ltd v Ministry of Agriculture, Fisheries and Food* (Case C-127/95) [1998] ECR I-1531 is an example of "a first stage" directive which, the European Court held, imposed obligations and conferred rights; see also as to more than one objective *Dillenkofer v Federal Republic of Germany* (Joined Cases C-178, 179 and 188–190/94) [1997] QB 259, 294, para 39.

Accordingly, I prefer the plaintiffs' submissions on the light thrown on the issue as to conferment of rights on individuals by the legislative programme introduced by the Directive of 1977. In my view, it is clear from the directive on its own terms, looked at as a whole and in its legislative context, that it had as *an* immediate purpose the protection of depositors and that such protection extended to supervision as well as to the grant and withdrawal of authorisation. That the framers of the directive and of the subsequent legislation were of that view is plain from recital 5 to the Directive of 1992, which states:

> "Whereas the member states can . . . refuse or withdraw banking authorisation in the case of certain group structures considered inappropriate for carrying on banking activities, *in particular because such structures could not be supervised effectively*; whereas in this respect the competent authorities have the powers mentioned in article 8(1)(c) of [the Directive of 1977] and in articles 5 and 11 of the [Second Council: Directive of 1989] in order to ensure the sound and prudent management of credit institutions." (My emphasis.)

The plaintiffs' point about the Directive of 1994, introducing the harmonised system of deposit guarantee schemes, is also telling, namely its clear reference in recital 25 to such scheme being a "supplement" to the existing "system of supervision of credit institutions," in contrast to the

A provision considered by this court in *R v International Stock Exchange of the United Kingdom and the Republic of Ireland Ltd, Ex p Else (1982) Ltd* [1993] QB 534.

*Francovich liability*

The essential question is whether the directive imposes obligations on the B Bank from which, as a matter of Community law, rights are conferred on individuals in the position of the plaintiffs. Whether the matter is considered under this head or as one of direct effect, I am content to adopt the broad thrust of Clarke J's approach [1996] 3 All ER 558, 605 that, to establish obligations in a directive giving rights under Community law, it must be possible on a fair reading of it, construed purposively, to conclude that it was intended to give rise to such rights. However, I do not agree with his C reasoning, at pp 616–618, that the absence of any expression of such rights in the text of the directive is a "pointer" to the conclusion that they were not intended.

In determining whether, regardless of other hurdles, the Directive of 1977 was sufficiently specific to enable the plaintiffs to rely on *Francovitch* liability, it is necessary to examine two fundamental provisions of the Treaty D and the original and, now, rapidly developing jurisprudence under this head to see what it does and does not require.

As to the Treaty, articles 5 and 189 of it are clearly directed at the effectiveness of Community law obligations by securing their "fulfilment". Thus, in *von Colson v Land Nordrhein-Westfalen* (Case 14/83) [1984] ECR 1891, which concerned a directive requiring equal treatment in employment but not specifying a right to compensation in the event of a breach, the court E held that, if a member state chose to penalise breach by an award of compensation, such compensation had to be adequate to ensure the effectiveness of the requirement. In so holding, the court said, at pp 1906, 1909:

> "15 . . . Although [article 189 of the Treaty] leaves member states to choose the ways and means of ensuring that the directive is implemented, F that freedom does not affect the obligation imposed on all the member states to which the directive is addressed, to adopt, in their national legal systems, all the measures necessary to ensure that the directive is fully effective . . ."
>
> "26 . . . the member states' obligation arising from a directive to achieve the result envisaged by the directive and their duty under article 5 G of the Treaty to take all appropriate measures, whether general or particular, to ensure the fulfilment of that obligation, is binding on all the authorities of member states including, for matters within their jurisdiction, the courts. It follows that, in applying the national law and in particular the provisions of a national law specifically introduced in order to implement [the directive], national courts are required to interpret their national law in the light of the wording and the purpose of H the directive in order to achieve the result referred to in the third paragraph of article 189."

See also *Francovich's* case [1995] ICR 722, 772, para 36 and *Marshall v Southampton and South West Hampshire Health Authority (Teaching) (No 2)* (Case C-271/91) [1994] QB 126, 164, para 17.

The European Court has recognised from the earliest days the close connection in Community law between the imposition of obligations on member states and/or their emanations and making those obligations effective by the conferment on individuals of rights corresponding to them. That is so even when such rights are not expressly stated or clearly defined in the particular instrument creating or giving rise to the obligations. The critical question is whether the instrument, be it Treaty provision, regulation or directive, identifies sufficiently clearly an obligation which, if it is to be effective, must have a correlative right of the kind sought to be enforced and by the institution or individual claiming it.

The starting point for that broad proposition is the direct effect case of *NV Algemene Transport- en Expeditie Onderneming van Gend & Loos v Nederlandse administratie der belastingen* (Case 26/62) [1963] ECR 1, an article 177 reference on the question whether article 12 of the Treaty had direct application so as to give rise to Community rights in individuals which national courts must protect. The court in the following well known passage, at p 12, declaring the new Community legal order, held that Community law did confer such rights:

> "In addition, the task assigned to the Court of Justice under article 177, the object of which is to secure uniform interpretation of the Treaty by national courts and tribunals, confirms that the states have acknowledged that Community law has an authority which can be invoked by their nationals before those courts and tribunals. The conclusion to be drawn from this is that the Community constitutes a new legal order of international law for the benefit of which the states have limited their sovereign rights, albeit within limited fields, and the subjects of which comprise not only member states but also their nationals. Independently of the legislation of member states, Community law therefore not only imposes obligations on individuals but is also intended to confer upon them rights which become part of their legal heritage. These rights arise not only where they are expressly granted by the Treaty, but also by reason of obligations which the Treaty imposes in a clearly defined way upon individuals as well as upon the member states and upon the institutions of the Community."

As to article 12, the court said, at p 13:

> "The implementation of article 12 does not require any legislative intervention on the part of the states. The fact that under this article it is the member states who are made the subject of the negative obligation does not imply that their nationals cannot benefit from this obligation . . . It follows . . . that, according to the spirit, the general scheme and the wording of the Treaty, article 12 must be interpreted as producing direct effects and creating individual rights which national courts must protect."

In *Van Duyn v Home Office* (Case 41/74) [1975] Ch 358, 376–377, para 12, another direct effect case, the European Court applied the same reasoning to a directive:

> "where the Community authorities have, by directive, imposed on member states the obligation to pursue a particular course of conduct, the useful effect of such an act would be weakened if individuals were

A prevented from relying on it before their national courts and if the latter were prevented from taking it into consideration as an element of Community law."

The court added, as a precursor to the more specific requirements it was later to express and apply in 1982 in *Becker's* case [1982] ECR 53 and in 1991 in *Francovich's* case [1995] ICR 722: "It is necessary to examine, in every case, B whether the nature, general scheme and wording, of the provision in question are capable of having direct effects on the relations between member states and individuals." See also *Marshall v Southampton and South West Hampshire Health Authority (Teaching) (No 2)* (Case C-271/91) [1994] QB 126.

Before continuing with the jurisprudence of the European Court C introducing and developing *Francovich* liability, I should say something of that case itself. It concerned claims for damages by individuals arising from the failure of a member state, Italy, to implement within the prescribed period a directive which the European Court found was intended to confer guarantees on the employees of companies in the event of the companies' insolvency. The court held that the claimants could not recover under the head of direct effect because the directive, though otherwise sufficiently D precise, did not identify the person or body responsible for providing the guarantees. The court held, however, that the plaintiffs were entitled to recover against the state because it had failed to comply with its obligations under the directive, and pursuant to articles 5 and 189 of the Treaty, to achieve the result prescribed by the directive, namely the provision of guarantees, and, therefore, the claimants had a right to reparation against it.

E There was no difficulty in concluding from the terms of the directive the identity of the persons intended to benefit from the required guarantees or as to the nature and scope of that benefit. In that circumstance Advocate General Mischo was able to assert [1995] ICR 722, 747, para 42 of his opinion:

> "if the payment of compensation is the sole means in the particular F circumstances of ensuring effective protection, the member state is under an obligation by virtue of Community law to make available to individuals an appropriate remedy enabling them to claim compensation."

And see the judgment of the court, pp 768–769, paras 14 and 17–20.

As to the broader basis on which the court upheld the claim, it began by G reaffirming the principles it had stated in *NV Algemene Transport- en Expeditie Onderneming van Gend & Loos v Nederlandse administratie der belastingen* (Case 26/62) [1963] ECR 1 and *Costa v Ente Nazionale Energia Elettrica* (Case 6/64) [1964] ECR 585, observing [1995] ICR 722, 771, para 31:

> H "Just as it imposes burdens on individuals, Community law is also intended to give rise to rights which became part of their legal patrimony. Those rights arise not only where they are expressly granted by the Treaty but also by virtue of obligations which the Treaty imposes in a clearly defined manner both on individuals and on the member states and the Community institutions . . ."

Referring to its judgments in *Amministrazione delle Finanze dello Stato v Simmenthal SpA* (Case 106/77) [1978] ECR 629 and *R v Secretary of State for Transport, Ex p Factortame Ltd (No 2)* (Case C-213/89) [1991] 1 AC 603 as to the primacy of directly applicable Community law over national law where the two conflict, it went on to stress the importance of effective imposition of obligations and the securing of corresponding rights of redress in the event of breach [1995] ICR 722, 771–772:

> "32 . . . national courts whose task it is to apply the provisions of Community law in areas within their jurisdiction must ensure that those rules take full effect and must protect the rights which they confer on individuals . . .
>
> "33. The full effectiveness of Community rules would be impaired and the protection of the rights which they grant would be weakened if individuals were unable to obtain redress when their rights are infringed by a breach of Community law for which a member state can be held responsible . . .
>
> "35. It follows that the principle whereby a state must be liable for loss and damage caused to individuals as a result of breaches of Community law for which the state can be held responsible is inherent in the system of the Treaty."

In *Kirklees Metropolitan Borough Council v Wickes Building Supplies Ltd* [1993] AC 227, 281–282 Lord Goff, with whom the other members of the Committee agreed, commented on the generality of that reasoning and indicated that a right of such redress would apply to a breach of the Treaty as it would to a directive. In so indicating, he expressed doubt about the correctness of the majority judgment of the Court of Appeal in *Bourgoin SA v Ministry of Agriculture, Fisheries and Food* [1986] QB 716 that a breach of article 30 of the Treaty would not of itself give rise to a claim in damages to the injured party.

Under the heading "The conditions for state liability" the court in *Francovich's* case [1995] ICR 722 then set out the conditions—the degree of particularity in an instrument claimed to impose obligations and give rise to rights—required to establish a case for reparation. I have summarised these conditions at the beginning of this section of my judgment but I had better set them out in the court's own words, at pp 772–773:

> "38. Although state liability is . . . required by Community law, the conditions under which that liability gives rise to a right to reparation depend on the nature of the breach of Community law giving rise to the loss and damage.
>
> "39. Where, as in this case, a member state fails to fulfil its obligation under the third paragraph of article 189 of the Treaty to take all the measures necessary to achieve the result prescribed by a directive, the full effectiveness of that rule of Community law requires that there should be a right to reparation provided that three conditions are fulfilled.
>
> "40. The first of those conditions is that the result prescribed by the directive should entail the grant of rights to individuals. The second condition is that it should be possible to identify the content of those rights on the basis of the provisions of the directive. Finally, the third

A condition is the existence of a causal link between the breach of the state's obligation and the loss and damage suffered by the injured parties.

"41. These conditions are sufficient to give rise to a right on the part of individuals to obtain reparation, a right founded directly on Community law.

"42. Subject to that reservation, it is on the basis of the rules of national law on liability that the state must make reparation for the consequences of the loss and damage caused. In the absence of Community legislation, it is for the internal legal order of each member state to designate the competent courts and lay down the detailed procedural rules for legal proceedings intended *fully* to safeguard the rights which individuals derive from Community law . . .

"43. Further, the substantive and procedural conditions for reparation of loss and damage laid down by the national law of the member states . . . must not be so framed as to make it virtually impossible or excessively difficult to obtain reparation . . ." (My emphasis.)

I pause to draw attention to three features of this opening, important and broad statement of principle as to entitlement to reparation for breach of obligation.

First, the court made it in the context of a member state's failure to implement a directive requiring the provision of guarantees to individuals. Thus, its detailed formulation of the principle was in relation to the breach of obligation by the state and the right to recover reparation against it. However, as is plain from paragraph 31 of the court's judgment, at p 771, it contemplated that obligations imposed on others, including individuals, would be capable of giving rise to rights of reparation against them. Given the breadth of the principle stated, there can be no logical reason why that should not be so where, by reason of a conflict between Community law and domestic law, an individual would otherwise lose against another, whoever that other may be, a protection given to him by Community law.

Second, the conditions set out in paragraph 40, though *Becker*-like as to the "eligible plaintiff" and "contents" requirement, have been broadly and flexibly interpreted and applied by the European Court.

Third, the judgment, like those in *von Colson's* case [1984] ECR 1891 and *Marshall's* case [1994] QB 126, emphasises, in paragraphs 42 and 43, the entitlement of an individual to the safeguard of his rights by "full" reparation. Thus, the availability of alternative sanctions, such as criminal proceedings, or limited rights of recovery, such as deposit guarantee schemes subject to limits which may fall short of full recovery (such as that in the deposit protection scheme introduced in the United Kingdom in February 1982 by Part II of the 1979 Act or as introduced into Community law by the Directive of 1994), does not satisfy the *Francovich* principle.

It is true, as Clarke J observed [1996] 3 All ER 558, 617, that the only way in which the directive in *Francovich's* case [1995] ICR 722 could be performed was by providing a guarantee to pay the amounts due and that that all depends upon the terms of the particular instrument in question. If, however, contrary to his view, the Directive of 1977 does impose an obligation on the Bank, breach of which does give to depositors rights of reparation for loss of their deposits, they are rights of full reparation, closely analogous to the guarantee in *Francovich*.

A The European Court affirmed its reasoning in *Francovich* in the *Brasserie du Pêcheur* case [1996] QB 404 in 1996, adding what it later described in *Dillenkofer's* case [1997] QB 259, 292, para 23, as "evident from the circumstances" of *Francovich*, the requirement of "a sufficiently serious breach". Each of the joint cases in *Brasserie du Pêcheur* involved a direct conflict between a provision of the Treaty and national legislation and the question whether individuals were entitled to reparation from their B respective member states for damage resulting from their breach of Community law. The court emphasised [1996] QB 404, 495, para 22, the importance of an individual's ability to seek reparation, even if the provisions on which he relies may not satisfy all the requirements of the *Becker* test, where: "the right to reparation is the necessary corollary of the direct effect of the Community provision whose breach caused the damage sustained." C

*Dillenkofer's* case [1997] QB 259, given after Clarke J's judgment, concerned an unimplemented directive (90/314/EEC) or, more precisely, one not implemented within the prescribed period. Article 1 of the directive stated its purpose to be the approximation of the laws of member states governing package holidays, a stated purpose similar, apart from the subject matter, to that described in the title of the Directive of 1977. It also referred D in its recitals to the purpose of protecting consumers and, in article 7, required member states to ensure that package tour operators would "provide sufficient evidence of security" for the refund of moneys paid to them by consumers and for their repatriation in the event of the operators becoming insolvent. In article 2 it defined "consumer" generically, and so far as material, as "the person who takes or agrees to take the package . . ."

E The court rejected the contentions of Germany, Netherlands and the United Kingdom that the directive was aimed only at ensuring freedom of competition. It had regard, not only to article 7, but also to the recitals, and held that the purpose of article 7 was to protect consumers, imposing on the operators an obligation to provide, not just evidence of security, but also the security itself and, in consequence conferring on consumers a right to be reimbursed or repatriated in the event of insolvency of their holiday F operator. The court's reasoning, in particular its relaxed application of the *Francovich* requirement of identification of the right in question and of the persons entitled to it, is shown in the following paragraphs of its judgment, at pp 293–295:

> "34. According to the actual wording of article 7, this provision prescribes, as the result of its implementation, an obligation for the G organiser to have sufficient security for the refund of money paid over and for the repatriation of the consumer in the event of insolvency.
>
> "35. Since the purpose of such security is to protect consumers against the financial risks arising from the insolvency of package travel organisers, the Community legislature has placed operators under an obligation to offer sufficient evidence of such security in order to protect consumers against those risks. H
>
> "36. The purpose of article 7 is accordingly to protect consumers, who thus have the right to be reimbursed or repatriated in the event of the insolvency of the organiser from whom they purchased the package travel. Any other interpretation would be illogical, since the purpose of

A the security which organisers must offer under article 7 of the directive is to enable consumers to obtain a refund of money paid over or to be repatriated . . .

"40. Similarly, the German and United Kingdom Governments' argument that the actual wording of article 7 shows that this provision simply requires package travel organisers to provide sufficient evidence of B security and that its lack of reference to any right of consumers to such security indicates that such a right is only an indirect and derived right must be rejected.

"41. In this regard, it suffices to point out that the obligation to offer sufficient evidence of security necessarily implies that those having that obligation must actually take out such security. Indeed, the obligation laid down in article 7 would be pointless in the absence of security C actually enabling money paid over to be refunded or the consumer to be repatriated, should occasion arise.

"42. Consequently, it must be concluded that the result prescribed by article 7 of the directive entails the grant to package travellers of rights guaranteeing the refund of money that they have paid over and their repatriation in the event of the organiser's insolvency . . .

D "44. The persons having rights under article 7 are sufficiently identified as consumers, as defined by article 2 of the directive. The same holds true of the content of those rights. As explained above, those rights consist in a guarantee that money paid over by purchasers of package travel will be refunded and a guarantee that they will be repatriated in the event of the insolvency of the organiser. In those circumstances, the purpose of article 7 of the directive must be to grant to individuals rights whose content: is E determinable with sufficient precision."

As to the obligation on Germany, as distinct from that on the travel operators, the court held, at p 295, paras 49–51, that it was to implement the directive within the required period so as to "guarantee" its object of ensuring the provision of security to consumers in the circumstances prescribed. See to the same effect a subsequent case concerned with the F interpretation of the same provision, *Verein für Konsumenteninformation v Österreichische Kreditversicherungs AG* (Case C-364/96) [1998] ECR I-2949, 2963, para 18.

Clarke J, although without the advantage of the European Court's judgments in thos cases, was referred to the opinion of Advocate General Tesauro in *Dillenkofer's* case [1997] QB6 259 that the directive granted G rights. He said [1996] 3 All ER 558, 621 that he regarded it as of no assistance on the question whether the Directive of 1977 granted rights to individuals, because it turned "upon the wording and purpose of the directive" which he regarded as "very different . . . from the Directive of 1977".

With respect to the judge, I do not see what is so very different about the two provisions, apart from their subject matter and the party against whom H the claimants respectively sought and seek to enforce them. Both had the dual purpose of protection of consumers and harmonisation. In both the consumers were readily identifiable customers of particular types of trader, in *Dillenkofer's* case [1997] QB 259, a "person who takes or agrees to take" a package holiday, in the case of the Directive of 1977, depositors of banks.

As to obligations, the *Dillenkofer* directive was, if anything, less direct and less precise than the Directive of 1977. It referred only to a requirement on operators to provide evidence of security for refund of money paid and/or for repatriation, which the court, in the absence of implementation, saw as an obligation on the state to guarantee protection against their default. As to rights, neither directive expressly conferred any.

The Directive of 1977, on the reasoning of the court in *Dillenkofer's* case, at p 294, paras 35–36, and in *von Colson's* case [1984] ECR 1891, could only serve one of its purposes, that of fully protecting depositors against default by banks with which they had deposited their moneys, if the Bank, as a "competent authority", carried out its responsibilities of authorisation, supervision and withdrawal of authorisation in accordance with the criteria prescribed in the directive to protect depositors against such defaults. In both cases the defaults, the subject of the protection, could result from misfortune and/or mismanagement and/or fraud. The parallels are not exact, but in the context of identifying obligations and corresponding rights, they are close. (I shall deal separately with the issue whether *Francovich* liability may arise against an emanation of the state acting in an administrative capacity as a regulator.)

There are further decisions of the European Court delivered since Clarke J's judgment, which illustrate the readiness of the court to derive a right in favour of an individual from an obligation in a directive, although the directive does not expressly refer to such a right. Thus, in *R v Ministry of Agriculture, Fisheries and Food, Ex p Hedley Lomas (Ireland) Ltd* (Case C-5/94) [1997] QB 139 the court held that the United Kingdom's refusal by way of an administrative decision to issue an export licence contrary to article 34 of the Treaty, which prohibits quantitative restrictions on imports, created rights for individuals which the national courts must protect. See also *R v Secretary of State for Social Security, Ex p Sutton* (Case C-66/95) [1997] ICR 961, 992–994, paras 25, 30, 33 and 34 and *Société Civile Immobilière Parodi v Banque H Albert de Bary et Cie* (Case C-222/95) [1997] ECR I-3899, which is the most recent and most significant of the European Court's judgments on the purpose and effect of the Directive of 1977.

The facts of the *Parodi* case were that a French company sought to escape liability under a mortgage loan granted to it by a Dutch bank authorised only under Dutch law, contending that the loan was unlawful under French law. The question for the court was whether the requirements of French law in relation to the authorisation of banking were compatible with article 59 of the Treaty (free movement of services) if and in so far as they went beyond the Directive of 1977.

The court ruled that article 59 precluded member states from imposing further requirements unless they were "justified on grounds of public interest, such as consumer protection" and were non-discriminatory and proportionate. However, the court was not able to determine whether the French national law was intended to protect borrowers or savers. In the course of its judgment, given on 9 July 1997, it made a number of general observations on the Treaty and on the directive underlining the latter's purpose of consumer protection and making plain that, although it was a "first step" in a process of harmonisation, it imposed certain minimum conditions in the nature of a "guarantee" of protection. It held that

A restrictions on the freedom to provide banking services are permissible if they "are objectively necessary in order to ensure compliance with professional rules and to guarantee the protection of the recipient of the services". (p 3922, para 21); that protection of consumers is particularly important in the banking sector; ". . . It is, in particular, necessary to protect . . . [consumers] against the harm which they could suffer through B banking transactions effected by institutions not complying with the requirements relating to solvency and whose managers do not have the necessary professional qualifications or integrity" (pp 3922–3923, para 22); that the importance of such protection gave rise to the Directive of 1977 as a first step towards co-ordination (p 3923, paras 23 and 24); that it imposed minimum conditions on member states obliging them to require authorisation of credit institutions subject to those conditions (p 3923, C para 25). Finally, in observing that it did not have information about the purpose of France's legislation on the matter, it again used the word "guarantee":

> "the national provisions applicable in the main proceedings do not appear to be specifically designed to protect borrowers but rather to give effect to prudential rules intended to *guarantee* that the banks are solvent D in regard to savers": p 3924, para 28 (my emphasis).

In my view the *Parodi* case puts beyond doubt that an important purpose of the Directive of 1977 was to protect depositors from risks associated with the deposits of their funds by imposing obligations on member states and their banking regulators and by conferring corresponding rights on depositors to secure that end. Such risks must, for example, include those of E losses from failure to comply with the directive's requirements as to solvency and/or to employ managers with the necessary integrity and experience. It is true, as Mr Stadlen and Mr Lasok, on behalf of the Bank, have emphasised, that the *Parodi* case does not deal with the question whether depositors have a right of action against a banking regulator or, indeed anyone else. However, as Lord Neill submitted, adopting the court's reasoning in the *van Gend & Loos* case [1963] ECR 1, *Francovich's* case [1995] ICR 722 and F *Dillenkofer's* case [1997] QB 259, such protection would be illusory if a depositor who has suffered harm as a result of a member state's breach of the obligations in the directive cannot obtain full redress for it.

Where is the full redress where a bank has failed causing loss to its depositors for want of proper supervision by the regulator? Mr Stadlen's answer was that there are others to provide protection and other means of G providing it. He suggested that the court's use in the *Parodi* case [1997] ECR I-3899 of the word "guarantee" in this context is inconsistent with the fact that Community legislation now encourages protection of depositors by means of deposit guarantee schemes. But, as I have said, the limited schemes provided by the Acts of 1979 and 1987 and introduced by the Directive of 1994, do not meet the fundamental requirement under the *Francovich* and H *von Colson* principles that breach of a Community law obligation carrying with it a right of reparation means full reparation.

The European Court's characterisation in the *Parodi* case of the Directive of 1977 as providing a protection in the form of a "guarantee" for depositors is of a piece with its similar treatment of the insurance directives, most of which, like that directive, were issued pursuant to the provisions for co-

ordination in article 57(2) of the Treaty: see *Commission of the European Communities v France* (Case 220/83) [1986] ECR 3663; *Commission of the European Communities v Federal Republic of Germany* (Case 205/84) [1986] ECR 3755, 3803–3809, paras 30, 38, 42–46 and 49; *Commission of the European Communities v Kingdom of Denmark* (Case 252/83) [1986] ECR 3713; *Commission of the European Communities v Republic of Ireland* (Case 206/84) [1986] ECR 3817. See also Sir Thomas Bingham MR's summary description of the first insurance directive in *Society of Lloyd's v Clementson* [1995] CLC 117, 123.

These directives were clearly designed to do the same job in the insurance field as the Directive of 1977 in its field, begin the process of co-ordination and in the meantime establish a body of minimum obligations to protect consumers. In so doing they also established a Community obligation on member states to provide effective supervision to achieve that protection. It is noteworthy that the court in the *Parodi* case [1997] ECR I-3899 relied on one of them, *Commission of the European Communities v Federal Republic of Germany* (Case 205/84) [1986] ECR 3755, when referring, at p 3801, paras 21–23 of its judgment, to the Directive of 1977 as ensuring the provision of a "guarantee [of] the protection of the recipient of services".

Further and compelling examples of the same approach are to be found in "the German environmental cases", a number of claims brought by the Commission against Germany for failure to implement directives as to requirements to be observed by member states concerning the quality of water and air: see *Commission of the European Communities v Federal Republic of Germany* (Case C-131/88) [1991] ECR I-825, 867, para 7 ("The purpose of those provisions . . . is . . . to create rights and obligations for individuals"—repeated in similar form as indicated in the following cases); *Commission of the European Communities v Federal Republic of Germany* (Case C-361/88) [1991] ECR I-2567, 2601–2602, paras 16 and 20; *Commission of the European Communities v Federal Republic of Germany* (Case C-59/89) [1991] ECR I-2607, 2631–2632, paras 18, 19 and 23; *Commission of the European Communities v Federal Republic of Germany* (Case C-58/89) [1991] ECR I-4983, 5023, para 14 (relied upon by the court in *Dillenkofer's* case [1997] QB 259, 295, para 48; *Commission of the European Communities v Federal Republic of Germany* (Case C-237/90) [1992] ECR I-5973, opinion of Advocate General Jacobs, at p 6005; and *Commission of the European Communities v Federal Republic of Germany* (Case C-298/95) [1996] ECR I-6747, p 6760, paras 15 and 16.

Each of the directives required member states to take specific measures to ensure that water or air was of the quality prescribed by the directive, but said nothing about conferment of rights on individuals. The court held, nevertheless, that each directive, in seeking to protect the community's health and/or the quality of its environment by imposing on member states specific and detailed obligations as to water and air, conferred rights on individuals. Lord Neill, in his submissions, commented on the great width of the class of persons potentially granted rights by virtue of those directives; it includes every inhabitant of the European Union. In the most recent of the cases, *Commission of the European Communities v Federal Republic of Germany* (Case C-298/95) [1996] ECR I-6747, 6760 the court said:

A "15 . . . one of the purposes of the directives . . . is to protect human health . . .

"16. In those circumstances, it is particularly important that directives should be transposed by measures which are indisputably binding. In all cases where non-implementation of the measures required by a directive could endanger human health, the persons concerned must be in a B position to rely on mandatory rules in order to be able to assert their rights . . ."

The plaintiffs have also referred to decisions of the European Court in other fields adopting similar reasoning.

The Bank has attempted to deflect the impact of the reasoning in these cases. It maintains that they were concerned with the degree of particularity C with which a directive must be implemented, not with the question whether individuals should have rights in damages against a national regulator. It says that in some instances there are suggestions that the directives were insufficient to confer rights without further particularity (such particularity to be derived from national legislation). It refers to another environmental case, *Commission of the European Communities v Federal Republic of* D *Germany* (Case C-431/92) [1995] ECR I-2189, 2220, paras 23–26, in which the court distinguished between the obligation to implement a directive and whether it gave rise to rights in individuals. However, that distinction does not seem to me to dent the European Court's now well established statement of general principle, that clearly defined obligations, where the context plainly intends it, give rise to rights in individuals to reparation for loss caused by breach of those obligations. The Bank also maintains that, in any E event, the references are to *Francovich* liability of member states for failure to implement directives, not against their emanations for failing as regulators to apply them, and that remedies are in general a matter for national law. I shall deal with that issue in a moment.

In my judgment, none of the Bank's arguments meets the essential thrust of the reasoning in the German environmental cases. It is that the directives, F by the mandatory and specific nature of their requirements, imposed obligations which gave rise to rights to those whose health was endangered by breach of them, regardless of the directives' lack of mention of such rights. Professor Sacha Prechal, writing in 1995 in her study, *Directives in European Community Law*, just after the first flush of these cases, stated, at p 138: "A number of relatively recent judgments suggest that the court is G rather easily satisfied that a directive provision also intends to protect individual interests." See also her concluding paragraph, at p 139.

Finally, there is *Norbrook Laboratories Ltd v Ministry of Agriculture, Fisheries and Food* (Case C-127/95) [1998] ECR I-1531. This recent decision of the European Court is important on a number of issues, including the derivation, from obligations expressed in a directive, of rights that are not so expressed. It concerned Council Directives (81/851/EEC) and H (81/852/EEC) on the approximation of laws of the member states relating to veterinary products, directives which the United Kingdom maintained, and Advocate General Léger seemingly accepted, at p 1542, para 32 of his opinion, had been implemented by virtue of earlier domestic legislation. The primary purpose of the directives was to safeguard public health; they

imposed detailed obligations on member states' "competent authorities" to that end, but said nothing about corresponding rights.

The issue before the court was whether Norbrook was entitled to a remedy of damages against the United Kingdom's selected "competent authority", the ministry, for its unlawful administration of the provisions of the directives in making an unauthorised demand for information from the company when considering the grant of a licence to it to manufacture and sell a particular product. The court held, at p 1600, para 111, that Norbrook was entitled to such a remedy "on the basis of rules of national law on liability" subject to the condition, inter alia, that such rules must "not be so framed as to make it in practice impossible or excessively difficult to obtain reparation". In so holding, the court said, at p 1599, para 108, with regard to the first *Francovich* condition of a clear intention to confer rights:

> "in providing that an application for marketing authorisation may be refused only for the reasons set out . . . [the] directive *gives individuals the right* to obtain authorisation if certain conditions are fulfilled. Those conditions are . . . laid down precisely and exhaustively in [the directives]. The scope of the right conferred on applicants for marketing authorisation may therefore be adequately identified on the basis of those directives." (My emphasis.)

It is apparent that the European Court has in the last few years been moving towards a ready application of the *Francovich* principle that where a Community law obligation is imposed with clear intent to protect individuals, Community law will protect them by conferring on them rights of reparation in the event of a sufficiently serious breach of the obligation. In my view, that principle, as developed by the court in its jurisprudence in several contexts, in particular, in the recent authorities to which I have referred, shows that, contrary to Clarke J's reasoning, a right to a remedy in damages, even though not expressly provided for in a directive, may arise from an obligation in it, and does so where failure to acknowledge the right would deprive those for whose protection the obligation is imposed of full reparation for its breach.

*Francovich liability of a regulatory body*

In my view, the Directive of 1977 imposed clearly defined obligations on member states and on their regulatory bodies and, in doing so, gave rise to corresponding Community law rights in individuals in the position of the plaintiffs to enforce those obligations, if necessary by an action for damages. It was designed, amongst other things, to safeguard the savings of depositors whom the European Court clearly regards as a sufficiently identifiable body of persons for the purpose. In particular, the directive imposed express and clear administrative obligations on regulators, "the competent authorities", in relation to the authorisation and supervision of banks.

I have already referred to the Bank's contention that *Francovich* rights of redress, to the extent that they arise at all, do not lie against an emanation of a member state, in its capacity as a banking regulator in respect of its obligation to apply a fully implemented directive. It is well established that a non-implemented directive clearly imposing an obligation on an emanation of a member state can be enforced directly against that emanation under the *Becker* principle of direct effect. However, it does not seem to me, on

A authority or as a matter of logic, that non-implementation is critical to the issue of liability of an emanation of a state exercising an administrative function. Where there has been implementation of a directive the general principle of Community law is that each member state is primarily responsible for meeting the Community obligations imposed but that how it does so is usually a matter for it. However, once a member state has, by its domestic law devolved or delegated the specific obligations to some organ or B emanation, such bodies are directly obligated. That is so whether the obligations are regarded as matters of Community law or as matters of national law construed in accordance with Community law; procedural matters not detracting from those Community obligations are, of course, solely matters of national domestic law. Thus the European Court in *von Colson's* case [1984] ECR 1891, 1909, para 26 said:

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> "the member states' obligation arising from a directive to achieve the result envisaged by the directive and their duty under article 5 of the Treaty to take all appropriate measures . . . to ensure the fulfilment of that obligation, is binding *on all the authorities of member states* including, for matters within their jurisdiction, the courts. It follows that, in applying the national law and in particular the provisions of a national D law specifically introduced in order to implement Directive No 76/207, national courts are required to interpret their national law in the light of the wording and the purpose of the directive in order to achieve the result referred in the third paragraph of article 189." (My emphasis.)

It follows that where there has been implementation coupled with devolvement of the relevant powers and obligations to an emanation of the E state, the Community obligations are enforceable against that body. As Professor Prechal has observed in *Directives in European Community Law*, p 70:

> "the answer to the question of which organ or authority of a member state is actually bound by a directive will, depending on the subject matter of the directive at issue, vary from member state to member state, F according to the internal distribution of tasks and competences."

See also her citations, at p 70, of *Pescatore, L'Ordre juridique des Communautés Européennes, Étude des sources du droit communautaire* (1971), p 91; and the opinion of Advocate General Mancini in *Commission of the European Communities v Kingdom of Belgium* (Joined Cases 227–230/85) [1988] ECR 1, 6, para 2 and *Federal Republic of Germany v* G *Commission of the European Communities* (Case 8/88) [1990] ECR 2321, 2359, para 13. Cf the different, outcome where a directive imposing an obligation on member states without reference to its fulfilment through any particular body has not been implemented and the plaintiffs rely on direct effect: *Mighell v Reading* The Times, 12 October 1998; Court of Appeal (Civil Division) Transcript No 1378 of 1998.

H It is worth remembering the context of *Francovich's* case [1995] ICR 722 itself—non-implementation of a directive on the approximation of the laws of the member states for the provision of a guarantee of protection to employees in the event of insolvency of their employers. The whole problem there was that, although the directive was specific as to the individuals entitled to the protection of the guarantee and as to its content, it did not

identify who was obliged to provide it. In such circumstance the only candidate for liability—under the eponymous *Francovich* principle—was the Italian state. Thus, the questions put to the court were limited to the liability of "the state itself": [1995] ICR 722, 727, 767; the question of application of the principle to emanations of the state did not arise for consideration. Nevertheless, there are indications in the opinion of Advocate General Mischo and in the general statements of principle in the judgment of the court, which I have set out and which are derived from the *van Gend & Loos* case [1963] ECR 1 and other authorities, that it was not confined to state liability in respect of its legislative function only. Thus, the Advocate General said [1995] ICR 722, 747, 758:

> "42 . . . if the payment of compensation is the sole means in the particular circumstances of ensuring effective protection, the member state is under an obligation by virtue of Community law to make available to individuals *an appropriate remedy* enabling them to claim compensation.
> "66 . . . where the court has held that a member state has failed to fulfil its obligations by failing to implement provisions of a directive in national law, even provisions which do not have direct effect, that member state *is obliged to make available to the individuals on whom the directive was intended to confer rights appropriate judicial remedies to enforce those rights, where necessary by means of an action for damages against the state.*" (My emphasis.)

Similar indications are to be found in more recent decisions of the court. As the plaintiffs submit, there is nothing in the *Norbrook* case [1998] ECR I-1531, for instance, to suggest that the fact that the United Kingdom's selected competent authority in that case was the ministry made any difference to the court's decision. See also the *Hedley Lomas* case [1997] QB 139, in which the European Court held that the United Kingdom was liable in damages to a company for an administrative decision by a ministry official in breach of article 34 of the Treaty, refusing it a licence to export sheep to a Spanish slaughterhouse. In my view, it is inconceivable that, if the decision had been made by "an emanation of the state" instead of a "state authority" (see e g *Griffin v South West Water Services Ltd* [1995] IRLR 15, per Blackburne J, a "first limb" *Becker* case), the court would not have held the emanation similarly liable. See also *R v Medicines Control Agency, Ex p Smith & Nephew Pharmaceuticals Ltd; Primecrown Ltd v Medicines Control Agency* (Case C-201/94) [1996] ECR I-5819 (the *Primecrown* case), in which the body whose liability was under consideration was the Medicines Control Agency.

The court in *Dillenkofer's* case [1997] QB 259, 295 adopted the same approach in response to the German Government's plea that, although it might have been able to introduce legislation within the prescribed period transposing the directive's requirements for the provision of the prescribed security to holiday makers, it was dependent for its operation on the collaboration of third parties, namely travel organisers, insurers and banks:

> "49 . . . in providing that the member states were to bring into force the measures necessary to comply with the directive before 31 December 1992, article 9 required the member states to adopt all the measures

A necessary to ensure that the provisions of the directive were fully effective and so guarantee achievement of the prescribed result.

"50 . . . in order to ensure full implementation of article 7 of the directive, the member states should have adopted, within the prescribed period, all the measures necessary to provide purchasers of package travel with a guarantee that, as from 1 January 1993, they would be refunded money paid over and be repatriated in the event of the organiser's B insolvency.

"51. *It follows that article 7 would not have been fully implemented if, within the prescribed period, the national legislature had done no more than adopt the necessary legal framework for requiring organisers by law to provide sufficient evidence of security.*" (My emphasis.)

C See also the *Norbrook* case [1998] ECR I-1531, 1563, para 134 of the opinion of the Advocate General.

It makes sense that, if a Community instrument such as a directive imposes in Community law an obligation on a member state carrying with it a right in an individual to damages if that obligation is breached, the state must not only implement the Community law in a legislative sense, it must also, through a ministry or an appropriate emanation, apply it. Thus D Advocate General Jacobs said in *Commission of the European Communities v Federal Republic of Germany* (Case C-237/90) [1992] ECR I-5973, 6005, para 14: "it is not sufficient simply to incorporate the terms of a directive into national legislation; in addition, member states must ensure that the legislation is applied in practice." In my view, the Advocate General's reasoning has even greater force where, as here, all the relevant articles of the E directive expressly and directly impose duties on the member states' "competent authorities."

It is true, as the Bank has repeatedly emphasised, that there is no reported authority in Community or common law affirming the derivation from the Directive of 1977 of individuals' rights against a banking regulator. However, that is neither a juridical nor a logical impediment to applying a clear general principle to the instrument if a national court is of the view that F its purpose and effect require it. Nor should such a court be deterred by the "floodgates" argument in this age of environmental and product liability. The European Court's own robust disregard of such a consideration in the German environmental cases points the way as does its firm assertion in the *Parodi* case [1997] ECR I-3899 of the right of bank customers to protection—all coupled with the *Brasserie du Pêcheur* public policy G requirement of a "sufficiently serious" breach as an element of restraint in the Community law context.

It is noteworthy that the court, in the *Parodi* case, spoke in terms of an obligation to provide "a guarantee" of protection. Now that may be putting it a bit high as against a regulator: the directive does not oblige it to guarantee, in the sense in which common lawyers use that word, compliance of banks with the various criteria. However, it clearly obliges the regulator H to perform its functions of authorisation, supervision and, if necessary, withdrawal of authorisation in a manner designed to protect depositors from risks associated with their deposit of funds. Such risks include that of a bank failing to comply with the directive's requirements as to solvency and liquidity and/or as to its effective direction by persons of integrity and

experience. The directive would not achieve its purpose if it did not also confer corresponding rights on depositors to enforce that obligation against the regulator by actions for damages where appropriate. I return briefly to the relevant articles.

As I understand it, the Bank accepts that the article 3 criteria for authorisation may have been unconditional and sufficiently precise to impose on it an obligation to apply them, though it says that it does not follow that depositors have a right of action against it for breach of that obligation. I have expressed the view that the undoubted purpose and effect of the provision were to ensure minimum standards of consumer protection, and that there was clearly an obligation on the Bank to comply with them when considering authorisations.

As to supervision and withdrawal of authorisation, I have already said that I reject the Bank's submissions that articles 6 and 7 did not impose on it an obligation to supervise but merely a general obligation to collaborate and exchange information with regulators of other member states, or that the provisions for withdrawal in article 8 are merely permissive. A duty to collaborate with others over supervision cannot exist without a duty to supervise. Article 6 clearly provided the minimum basis on which regulators could—and without which they could not have been bound under article 7 to—collaborate effectively with each other. Its purpose, when read with articles 3, 7 and 8 and also article 5 of the Directive of 1992, was to "ensure that savings were protected". The only way in which it could achieve that purpose was by imposing a continuing obligation on regulators to hold authorised banks, as a minimum, to the conditions of their authorisation and to withdraw it or subject it to conditions in the event of their failure to adhere to them.

As to article 8, despite its use of the word "may", I reject, as I have said, the Bank's contention that it merely identified or limited the circumstances in which a regulatory body had power to withdraw authorisation. Such an interpretation would defeat the clear purpose, particularly of paragraph 1(c) of it, as recognised by recital 5 to the Directive of 1992, of ensuring "the sound and prudent management of credit institutions."

There is then the question whether those obligations give rise to corresponding rights in depositors in the form of a remedy in damages against a regulator in the event of its breach of them. The terms of articles 3, 6, 7 and 8 of the Directive of 1977 are similar to, and if anything more precise than, those of article 7 of the directive in *Dillenkofer's* case [1997] QB 259, not least in their direct imposition of obligations on the Bank as a "competent authority"; and both have similar recitals indicating that protection of the consumers to whom they respectively relate is a purpose of the instrument. I can see no reason why they should be given any different effect as to the conferral and enforceability of rights because, here, the body on whom the obligation to regulate is imposed is a regulator as distinct from the state itself. Nor can I see any material distinction between the conferral of rights on individuals derived from obligations on member states, acting through regulatory bodies, to protect their health, as in the German environmental cases, from that of rights of depositors derived from obligations on member states' banking regulators to protect them financially in their dealings with their banks.

A In my view, on the clear wording of the directive and having regard to the jurisprudence of the European Court, the obligations imposed by the directive on the Bank are sufficiently clear and precise to give depositors a right of redress against it in the event of breach of that obligation. I add that, in reaching that conclusion, I have considered and rejected the possibility that such rights as the directive conferred might be limited to banks themselves, whether as applicants or holders of authorisations or their B competitors. First, that would not serve one of the two important purposes of the directive or meet the *Francovich* test in this context, the effective protection of depositors against defaulting banks. Second, the case upon which the Bank relied in suggesting that possibility, *R v Medicines Control Agency, Ex p Smith & Nephew Pharmaceuticals Ltd; Primecrown Ltd v Medicines Control Agency* (Case C-201/94) [1996] ECR I-5819, 5853–C 5854, 5859, paras 17 and 35–38, was one in which the only issue under consideration was the respective entitlements of competing authorised sellers of similar products, not the welfare of those to whom they were selling them.

*Direct effect—implementation*

D The arguments of the parties have proceeded largely on the basis that the Acts of 1979 and 1987—legislatively at any rate—have fully implemented the Directive of 1977. The plaintiffs say, as an alternative to their *Francovich* claim, that that does not prevent them from relying on it against the Bank as a matter of direct effect if it satisfies the *Becker* criteria. The Bank says that implementation does deprive the plaintiffs of recourse to the directive under this head and that, for reasons I have already discussed and E rejected, they cannot rely on *Francovich* liability. If I am right about the *Francovich* claim, the debate about this is academic. There are two further reasons why, in my view, it does not assist the Bank.

First, it is open to question whether the Bank can, in any event, properly adopt the plaintiffs' seeming stance that the directive has been fully implemented so as to oust their reliance on *Becker* liability. It could F reasonably be said that the precondition of liability for damages of bad faith on the part of the Bank or its officers in a common law action for misfeasance in public office and as introduced in section 1(4) of the 1987 Act, to the extent which they derogate from the directive, "misimplement" it. In a common law jurisdiction, judge-made law as well as domestic legislation may be an agent of misimplementation. Such a precondition of liability goes beyond the *Brasserie du Pêcheur* criterion of "a sufficiently G serious breach" for recovery of damages, certainly in a case like this where, in my view, the directive left the Bank with little discretion in the application of its minimum requirements for permitting banks to trade.

In the *Brasserie du Pêcheur* case [1996] QB 404, 502–503, para 79 the court said:

H "The obligation to make reparation for loss or damage caused to individuals cannot . . . depend on a condition based on any concept of fault going beyond that of a sufficiently serious breach of Community law. Imposition of such a supplementary condition would be tantamount to calling in question the right to reparation founded on the Community legal order."

See also *R v Secretary of State for Transport, Ex p Factortame Ltd (No 5)*, The Times, 28 April 1998; Court of Appeal (Civil Division) Transcript No 1585 of 1998, in which the court, in the following passage, indicated that a requirement of proof of intentional or negligent "fault" could, depending on the circumstances, go impermissibly beyond a "sufficiently serious breach". The court said:

> "Pursuant to the national legislation which it applies, *reparation of loss or damage cannot be made conditional upon fault (intentional or negligent)* on the part of the organ of the state responsible for the breach, going beyond that of a sufficiently serious breach of Community law."

Although the Acts of 1979 and 1987 must be interpreted as far as possible to conform to the meaning and purpose of the Directive of 1977, it seems to me that even the most flexible exercise in interpretation could not reconcile section 1(4) of the 1987 Act with the Community remedy of damages for a "sufficiently serious" breach derived from the directive.

Second, the origin of the *Becker* principle of direct effect lay in the European Court's concern to ensure that member states could not escape their obligations under directives by failing to implement them or by mis-implementing them: see *Becker's* case [1982] ECR 53, 71, paras 23 and 24 and *Criminal proceedings against Kolpinghuis Nijmegen BV* (Case 80/86) [1987] ECR 3969, 3977, 3978, paras 8 and 15. As Judge Pescatore, who wrote the court's judgment in *Becker's* case, put it in [1980] Recueil Dalloz Sirey 171–176, its basis was a form of estoppel: see the *Kolpinghuis* case [1987] ECR 3969, 3977, opinion of Advocate General Mischo, para 7. A complementary view of the court's approach to direct effect, as distinct from direct applicability under the second paragraph of article 189, is that expressed by Josephine Steiner in "Direct Applicability in EEC Law—A Chameleon Concept" (1982) 98 LQR 229, 239, namely that it:

> "was developed by the European Court ad hoc, from expediency rather than principle. The reasoning employed to justify the doctrine was pragmatic, based on the 'effet utile' argument. If Community law were to work, it must be applied uniformly. Its useful effect would be weakened if individuals were unable to invoke it before their national courts."

See also Steiner, "Coming to Terms with EEC Directives" (1990) 106 LQR 144.

Accordingly, it does not follow from that starting point that non- or mis-implementation should be regarded as a precondition for direct reliance on a directive. In my view, Clarke J was wrong so to suggest [1996] 3 All ER 558, 603, in reliance on *Felicitas Rickmers-Linie KG & Co v Finanzamt für Verkehrsteuern, Hamburg* (Case 270/81) [1982] ECR 2771: "Once a directive has been correctly implemented there is no question of direct effect because, by: definition, effect has already been given to it . . ." The European Court in that case did not put it in quite that way. It said, at p 2787, para 26, that where a directive has been implemented its, effects could reach individuals "through the intermediary of the implementing measures" and that it was, therefore, "unnecessary" to consider whether it meets the criteria for giving it direct effect in the event of non-implementation. It is unnecessary because as a result of full implementation the directive and the national law, *as to Community obligations*, are the

A same. It follows that, whether a national court approaches those obligations, as distinct from its own procedural means of observing them, via the directive or through its national legislation properly construed in accordance with the directive, the answer should be the same.

In my view, therefore, non- or mis-implementation of a directive is a *reason* for giving a directive direct effect; it should not be a *condition* of giving it effect, either on its own terms or on those of a national measure B fully implementing it. The principle of direct effect was devised by the European Court to ensure access to Community law when not implemented, not to hinder access to it when implemented.

Recent decisions of the European Court indicate that in the main it is indifferent to the precise route by which it gives effect to a directive. In *Dillenkofer's* case [1997] QB 259, which concerned a member state's failure C to implement a directive within the prescribed period, the court disposed of the matter without reference to direct effect. In the article 177 reference in *Verein für Konsumenteninformation v Österreichische Kreditversicherungs AG* (Case C-364/96) [1998] ECR I-2949, where there had been implementation of the directive in question, the court interpreted the directive and its requirements without reference to the doctrine; see also the *Primecrown* case [1996] ECR I-5819, 5850, para 7; *CIA Security* D *International v Signalson SA* (Case C-194/94) [1996] ECR I-2201, 2246–2248, paras 44–50 and the *Norbrook* case [1998] ECR I-1531. On the other hand there are still signs the other way: see, for example *Kampelmann v Landschaftsverband Westfalen-Lippe* (Joined Cases C-253/96 to C-258/96) [1997] ECR I-6907, 6938–6940, paras 40–45, 47, where the Fifth Chamber of the court (four of whose members sat in the full court in *Dillenkofer's* case E and three in the *Norbrook* case) stressed non- or mis-implementation as conditions of direct effect; and *Carbonari v Università degli Studi di Bologna* (Case C-131/97) [1999] ECR I-1103 the opinion of Advocate General Léger, at paras 21–27, the most recent statement on the subject.

Neither the 1979 Act nor the 1987 Act transposed the directive word for word. Thus, for example, article 3(2) imposed as a condition of authorisation that the persons who effectively direct the business of the bank F should be of "good repute" and of "sufficient experience", whereas the 1979 Act, in Schedule 2, paragraphs 7 and 1 respectively required all directors, controllers and managers to be "fit and proper" and, in the case of recognised banks that they as institutions, rather than those who directed them should be of "high reputation". And the 1979 Act, unlike the 1987 Act, did not expressly impose on the Bank a duty to supervise; neither Act G mentions the obligations in article 6 as to the establishment of regular recalculation and observation of ratios and the monitoring of solvency and liquidity; and neither Act expressly transposes the obligations of collaboration with other regulators provided for by article 7. Those in the main are comparatively trivial differences. More important are the rights of redress derived from the obligations the directive imposes, rights which are wider than those dependent on proof of bad faith as required by section 1(4) H of the 1987 Act and the common law action of misfeasance in public office.

Now, one approach to those and other differences is to say that the United Kingdom legislation, if properly construed so as to give effect to the requirements of the directive, in accordance with article 189 of the Treaty and sections 2(1) and (4) and 3(1) of the 1972 Act, effectively implemented

it: see, for example, the "generous" interpretative approach of the House of Lords in *Garland v British Rail Engineering Ltd* [1983] 2 AC 751, *Pickstone v Freemans plc* [1989] AC 66 and *Litster v Forth Dry Dock & Engineering Co Ltd* [1990] 1 AC 546. Another approach is to say that the legislation did not fully implement the directive and, therefore, United Kingdom courts should have direct recourse to it. As Josephine Steiner observed in "Coming to Terms with EEC Directives", 106 LQR 144, 146, the question whether a directive has been correctly implemented can only be assessed by reference to the directive itself, with the result that it can rarely be disregarded. Clearly, as a result of the court's ready application of the *Francovich* principle, the two approaches can shade into one another. Whichever route is taken, the answer on matters of *Community law* should be the same, with the result that it should prevail over United Kingdom law, including the common law as to misfeasance in public office and section 1(4) of the 1987 Act, where the latter frustrates it: see *Amministrazione delle Finanze dello Stato v Simmenthal SpA* (Case 106/77) [1978] ECR 629, 643–645, paras 16–26; the *Brasserie du Pêcheur* case [1996] QB 404, 502, paras 72–73.

*Sufficiently serious breach*

The question is whether the pleaded or sought to be pleaded breaches of the rights derived from the Directive of 1977 are "sufficiently serious" to confer on the plaintiffs a remedy in damages against the Bank: see the *Factortame* case [1996] QB 404, 499, paras 50, 51, 54–55. The court distinguishes between breaches where, on the one hand, the provision of Community law is imprecise or complex or leaves the member states with some discretion as to how to implement it and, on the other hand, where the provision makes clear what the member states have to do and leaves them with little or no discretion as to how to do it.

In the former case, particularly where a member state has a discretion, the "decisive test" of sufficient seriousness is whether the member state has "manifestly and gravely disregarded the limits on its discretion:" see the *Brasserie du Pêcheur* case [1996] QB 404, 499, para 55, and see generally pp 498, 502–504, paras 43 and 77–89. The court said that there should be taken into account, inter alia:

> "the complexity of the situations to be regulated, difficulties in the application or interpretation of the texts and, more particularly, the margin of discretion available to the authors of the act in question": see p 498, para 43.

See eg *R v HM Treasury, Ex p British Telecommunications plc* (Case C-392/93) [1996] QB 615.

In the latter case where the Community provision makes plain what has to be done and leaves the member states with little or no discretion, mere infringement, whether legislative or administrative, may suffice: see *Dillenkofer's* case [1997] QB 259, 292–293, paras 25, 26 and 28 (failure to implement a directive); the *Hedley Lomas* case [1997] QB 139, 204, para 28 (administrative decision in breach of Treaty provision); the *Norbrook* case [1998] ECR I-1531, 1599–1600, para 109 (administrative decision in breach of directive).

Here, although the Bank had judgments to make in the exercise of its duties of authorisation, supervision and withdrawal of authorisation, they

A were administrative decisions governed closely by the detailed criteria for authorising and permitting banks to trade prescribed by the directive (cf the *Norbrook* case). The requirements were not difficult to understand. Nor, in the main, did they require an exercise of discretion—more an assessment of the facts. And, as I have already said, there was little or no scope for a balancing exercise of the sort considered by Lord Goff in *Davis v Radcliffe*
B [1990] 1 WLR 821. The Bank's role was essentially to determine as a matter of fact according to the regime laid down by the directive whether BCCI at any stage satisfied the prescribed criteria for authorisation, and/or continuation of its authorisation to trade as a bank.

To the extent, if at all, that the plaintiffs may have to prove more than mere infringement, my view is that they plead and seek to plead matters which, if they prove them, are capable of amounting to manifest and grave
C disregard of the limits of the Bank's scope for discretion or assessment.

*Causal link*

Whether there was a direct causal link between breach and damage is a matter to be determined by the English court in accordance with English domestic law, whilst safeguarding the full effectiveness of Community law:
D see the *Brasserie du Pêcheur* case [1996] QB 404, 501, para 65; and *Brasserie du Pêcheur SA v Germany* [1997] 1 CMLR 971.

*Conclusion*

It follows from my reasoning that the plaintiffs have an arguable Community law claim against the Bank.

E

*Common law claim for misfeasance in public office*

*The two forms of the tort*

The issue is the nature and ambit of the tort of misfeasance in public office and whether the plaintiffs' case accords with it. Despite its antiquity, or perhaps because of it, the precise boundaries of the tort of misfeasance in
F public office are unclear. However, English and Commonwealth jurisprudence indicates two main themes.

First, as Steyn LJ put it in *Elguzouli-Daf v Comr of Police of the Metropolis* [1995] QB 335, 347B, "The essence of the tort is the abuse of public office." Abuse in this context necessarily connotes dishonesty or bad faith by a public officer either in the performance of his office or in an
G absence of an honest attempt at it: see *Jones v Swansea City Council* [1990] 1 WLR 54, 71, per Slade LJ; see also *Northern Territory v Mengel*, 69 ALJR 527, 547, per Brennan J.

The second theme is that abuse of power for this purpose may take one or other or both of two forms. I put it in this way rather than saying that there are two alternative "limbs" to the tort, because the notion of alternative limbs when used as part of a definition of something from which each limb
H springs seems to me to invite confusion. The first form of the tort is what is now called "targeted malice", that is, use or non-use of a power with the predominant intent of damaging a person, and which causes such damage. The second form is an intentional and knowingly or recklessly unlawful act or omission which causes damage to a person.

The early English authorities, in their then customary loose use of the word "malice" and on their particular facts, are no basis for seeking, as the Bank does, to confine the tort to acts done with an intention to injure: see *Bourgoin SA v Ministry of Agriculture, Fisheries and Food* [1986] QB 716, 776, per Oliver LJ And there is much recent and highly authoritative judicial support for these alternative forms of the tort: see *Dunlop v Woollahra Municipal Council* [1982] AC 158, 172, per Lord Diplock; *R v Secretary of State for the Environment, Ex p Hackney London Borough Council* [1983] 1 WLR 524, 539, per May LJ; *Micosta SA v Shetland Islands Council* [1984] 2 Lloyd's Rep 525, 543, per Lord Ross; *Bourgoin SA v Ministry of Agriculture, Fisheries and Food* [1986] QB 716, 740, per Mann J: "I read the judgment in *Dunlop v Woollahra Municipal Council* in the sense that malice and knowledge are alternatives." Mann J was upheld by the Court of Appeal on this part of the case, per Oliver LJ, at p 777, and approved by Slade LJ in *Jones v Swansea City Council* [1990] 1 WLR 54, 69 (a "targeted malice" case) obiter:

> "The recent decision of this court in *Bourgoin* has reaffirmed the existence of the tort and made it clear that malice, in the sense of an intent to injure, and knowledge by the doer that he has no power to do the act complained of are merely alternative, not cumulative, ingredients of the tort."

In *Elguzouli-Daf v Comr of Police of the Metropolis* [1995] QB 335, 347 Steyn LJ said: "as the law stands, the plaintiff has to establish either that the holder of the public office maliciously acted to the plaintiff's detriment or that he acted knowing that he did not possess the relevant power." In *X (Minors) v Bedfordshire County Council* [1995] 2 AC 633, 731 Lord Browne-Wilkinson described the tort as: "the failure to exercise, or the exercise of, statutory powers either with the intention to injure the plaintiff or in the knowledge that the conduct is unlawful."

Taylor J aptly and neatly noted the distinction between the two forms of the tort in *R v Secretary of State for the Home Department, Ex p Ruddock* [1987] 1 WLR 1482, 1500C, as between "an ulterior motive" and a "deliberate flouting of . . . criteria". So also did Hirst J in *Irish Aerospace (Belgium) NV v European Organisation for the Safety of Air Navigation* [1992] 1 Lloyd's Rep. 383, 401, when identifying the tort as a "malicious or conscious action beyond [a public body's] powers".

Since dishonesty lies at the heart of both forms of the tort, I do not consider it necessary to complicate consideration of the second form, deliberate and knowing illegality, with elaborate discussion of the role of recklessness, its subjective and objective forms and so on. The basis of this form of the tort, put at its lowest, is that a public officer has not honestly attempted to perform his duty. Dishonesty in that or more direct form, as the Privy Council said in *Royal Brunei Airlines Sdn Bhd v Tan* [1995] 2 AC 378, 389–391, means simply not acting as an honest person would act in the circumstances. It is an objective standard, though it has to be assessed in the light of what the person concerned actually knew at the time; an honest person does not "deliberately close his eyes and ears, or deliberately not ask questions, lest he learn something he would rather not know, and then proceed regardless"; and "Acting in reckless disregard of others' rights or possible rights can be a telltale sign of dishonesty."

A The critical question on this part of the appeal is whether a plaintiff seeking damages for injury caused by a deliberate and knowingly or recklessly unlawful act is required to prove any further, and, if so, what, mental element. It cannot be necessary to prove a predominant intention to injure because that would confine the tort to the single form of "targeted malice."

B The plaintiffs' case is that the Bank was guilty of misfeasance in public office by its dishonest breach of the 1979 Act in granting a full licence to BCCI, and under both Acts in failing to supervise its conduct of its business and/or to revoke (withdraw) the full licence (authorisation). They maintain that it is a sufficient plea of the tort of misfeasance in public office to allege dishonest breach of duty in any of those respects causing damage. They say that they do not need to allege any mental ingredient as to damage but that if C they do, the most that is required is foreseeability of, or recklessness as to, damage. The Bank maintains that it is necessary for the plaintiffs to prove that it knew at the material times that its conduct would "necessarily" injure them or at the very least that it foresaw that its conduct would probably cause them damage.

Before the *Bourgoin* case [1986] QB 716 the question of foresight or foreseeability of injury did not arise for consideration in any of the reported D authorities—it did not require consideration in the *Bourgoin* case. The early commentators' descriptions of the tort contain no references to such mental states as an integral part of the wrong. Smith J in the Australian case of *Farrington v Thomson and Bridgland* [1959] VR 286, 293, helpfully summarised them:

> E "That an action on the case lay for such a misfeasance was established at a relatively early period. In *Comyns' Digest*, tit 'Action on the Case for Misfeasance (A1)', there is the statement: 'an action on the case lies for misfeasance; as, if an officer misdemean himself by any falsity . . . or otherwise misbehave himself in his office' . . . In *Bacon's Abridgment*, 'Offices and Officers (N)', it is said that all officers, whether such by the common law or made pursuant to statute, are punishable for oppressive F proceedings by an action at the suit of the party injured."

In the early English cases, the injury flowing from the alleged misfeasance was usually so obvious as not to occasion debate.

*"Policy" and "principle"*

Before considering the *Bourgoin* case [1986] QB 716 and other recent G English and Commonwealth authorities on the point, it may be helpful to consider the place of the tort of misfeasance in public office in the range of remedies available to an individual for a wrong done to him by a public body. In doing so it is possible to discern what are and are not valid policy conditions affecting its ambit.

First, the civil wrong, which has as its twin the criminal offence of H misfeasance in public, office, carries with it two elements which together distinguish it from most other civil wrongs, dishonesty and conduct in public office. Those combined elements attract particular public censure. As Lord Neill submitted, there can be no public policy in protecting a public officer who acts dishonestly in his office as distinct from one who makes an honest but negligently mistaken decision. There is thus no sensible basis for

restricting the scope of the tort by reference to public policy considerations restricting the ambit of other civil wrongs with different characteristics.

For example, the concern of the New Zealand Court of Appeal in *Garrett v Attorney General* [1997] 2 NZLR 332, 350 that an overly punitive form of the tort would stultify public administration is an inappropriate application to this tort of the reasoning of the Privy Council in *Yuen Kun Yeu v Attorney General of Hong Kong* [1988] AC 175 and *Davis v Radcliffe* [1990] 1 WLR 821 against imposing a duty of care on banking regulators in the circumstances of those cases. The same would apply to the courts' careful restriction of actions for breach of statutory duty to those breaches where the statute plainly intended there should be such a remedy. My observations on the inapplicability of such reasoning to the question of the existence of a Community law remedy apply a fortiori to the more stringent requirements of the common law remedy of misfeasance. Its distinctive feature is that it is a dishonest abuse by a public officer of his office, in which the dishonesty may take the form of a deliberate failure honestly to perform the duties of that office.

In my view, and contrary to Mr Stadlen's submission, there is no distinction for this purpose between a dishonest performance of a public function and a dishonest failure to attempt to perform it. I also respectfully disagree with his submission and Clarke J's reasoning [1996] 3 All ER 558, 578 that the dishonesty is removed if a public officer knowingly exceeds his powers but does so in what he may regard as the best interests of someone. Would dishonesty for this purpose be measured by his subjective view of the propriety of his deliberate breach of the law or by some objective standard involving a balancing of interests? Either way and apart from anything else, logic would suggest that much would then depend on: the seriousness of the power breached and/or of the breach; and/or the magnitude of the risk of injury and/or of the injury risked; and, in any event, the relative importance to one or more of those factors of the interest prompting the breach. Such an uncertain exercise would be plainly undesirable and unworkable, both for public officers and for the courts, in determining the ambit in any particular case of a civil wrong the purpose of which is to deter abuse of public office and to compensate those who suffer from it.

Moreover, it would run contrary to the very existence of the second and distinct form of the tort, in which the malice lies in a public officer's deliberate breach of the law causing damage, whatever his perceived justification for doing so: see e g the decision of the Supreme Court of Canada in *Roncarelli v Duplessis* 16 DLR (2d) 689, to which I refer again below. For the same reason, I respectfully disagree with the majority of the Australian High Court in *Northern Territory v Mengel* 69 ALJR 527, 541 that where unintended harm is involved the imposition of liability for misfeasance involves no purpose where there is a duty of care to avoid the risk in question and anomalous where there is not; the suggested anomaly is clearly removed by the dishonesty of the public officer in that capacity, whether in the form of intentionally unlawful conduct or conduct recklessly indifferent to its unlawfulness.

There can be no public policy in the interests of sound administration in permitting a public officer knowingly or recklessly to act illegally in his office and in freeing him from liability for the consequences of such dishonest conduct.

A Equally, misfeasance in public office is not to be equated with the tort of conspiracy where there may well be a need to confine its extent when it takes the form of an agreement by anyone, regardless of office, to do an unlawful act where the predominant intention is not to harm; see per Parker J's expression of concern in *Lonrho Ltd v Shell Petroleum Co Ltd (No 2)* (unreported) 6 March 1981. Similarly, it is of little value to look at the tort B of deceit where it is an integral part of the tort that a statement is "made with the intention that it should be acted on by the plaintiff": see *Bradford Third Equitable Benefit Building Society v Borders* [1941] 2 All ER 205, 211, per Viscount Maugham and *Peek v Gurney* (1873) LR 6 HL 377.

If a plaintiff is required to prove, not only dishonesty of conduct, but also foresight of injury or of probable injury, so that the tort of misfeasance will not "overflow its banks", as the New Zealand Court of Appeal put it in C *Garrett v Attorney General* [1997] 2 NZLR 332, 350, it is difficult to see where the tort comes in the spectrum of civil fault. The serious wrong of dishonesty, and by a public officer, would carry with it a penalty for the injured claimant not present in the less heinous wrongs of negligence or simple breach of statutory duty committed by anyone, public officer or no. He would be required to show, in addition to dishonest abuse of public D office, not merely foreseeability of injury but its inevitability or, at the lowest, its probability.

What possible public policy could there be in such a penalty, and what purpose could there be in the tort even in cases, such as here under section 1(4) of the 1987 Act, when liability for negligence but not for dishonesty ("bad faith") is expressly excluded? On the Bank's submission, it would only have acted dishonestly ("in bad faith") in knowingly or recklessly acting E unlawfully if it knew that its conduct would or would probably, as distinct from knowing that it might, damage BCCI's depositors. When a statutory duty is imposed on a regulator to perform its functions so as, inter alia, to prevent such damage, a public policy protecting it from its failure to discover the inevitability or probability of harm because of its wilful disregard of that duty would be strange indeed.

F The recourse to "policy" and "principle" of the Australian High Court in *Northern Territory v Mengel* 69 ALJR 527 and of the New Zealand Court of Appeal in *Garrett v Attorney General* [1997] 2 NZLR 332 was prompted by the lack of authority before the *Bourgoin* case [1986] QB 716 as to what, if any, mental element as to damage is required for the second form of the tort. However, in their identification of what they considered to be the relevant public policy considerations, both courts assumed the mental element for G which they were searching—an intention, actual or presumed, to injure. Thus, in *Mengel's* case, the majority said, at p 540:

> "The cases do not establish that misfeasance in public office is constituted simply by an act of a public officer which he or she knows is beyond power and which results in damage. Nor is that required by policy or by principle. Policy and principle both suggest that liability H should be more closely confined. So far as policy is concerned, it is to be borne in mind that, although the tort is the tort of a public officer, he or she is liable personally and, unless there is de facto authority, there will ordinarily only be personal liability. And principle suggests that misfeasance in public office is a counterpart to, and should be confined in

the same way as, those torts which impose liability on private individuals for the intentional infliction of harm. For present purposes, we include in that concept acts which are calculated in the ordinary course to cause harm, as in *Wilkinson v Downton* [1897] 2 QB 57 or which are done with reckless indifference to the harm that is likely to ensue . . ."

A

As to the only element of policy identified by the court in that passage, concern for the personal liability of the public officer of whose conduct complaint is made, the tort is capable of being committed by a public body as well as an officer of a public body where, as here, those responsible are effectively the directing minds of the body: see *Meridian Global Funds Management Asia Ltd v Securities Commission* [1995] 2 AC 500. But in any event, there may be vicarious liability for a public officer's unauthorised, as well as authorised, acts of misfeasance in public office: see *Racz v Home Office* [1994] 2 AC 45, 50–53, per Lord Jauncey of Tullichettle, with whom the other members of the Appellate Committee agreed.

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As to the suggestion of "principle," I do not know to what principle the court is referring in suggesting that the tort of misfeasance is a "counterpart to, and should be confined in the same way as, those torts which impose liability on private individuals for the intentional infliction of harm". That is merely an assertion of a proposition, not supported by case law, which the court then proceeded to rely upon to characterise the tort as possibly analogous to one of intentional infliction of harm. As an assertion, it fails to have regard to the distinctive combination of ingredients of the tort of misfeasance, dishonesty in the performance of a public office. And the court, by turning to the aspect of intentional infliction of harm, seemingly concentrated on the first form of the tort, "targeted malice" and paid little regard to the second, "deliberate and knowing illegality".

D

E

The New Zealand Court of Appeal in *Garrett v Attorney General* [1997] 2 NZLR 332 appears, with respect, to have adopted a similar circular form of reasoning in the following passage, at pp 349–350, namely an assertion, albeit in reliance on its reading of the *Bourgoin* case [1986] QB 716 and following Clarke J's judgment, that the tort is akin to one of intentional injury in order so to confine it:

F

"The tort has at its base conscious disregard for the interests of those who will be affected by official decision making. There must be an actual or, in the case of recklessness, presumed intent to transgress the limits of power even though it will follow that a person or persons will be likely to be harmed . . . In effect this is no more than saying the tort is an intentional tort . . . The purpose behind the imposition of this form of tortious liability is to prevent the deliberate injuring of members of the public by deliberate disregard of official duty. It is unnecessary, to attain this objective, to extend the tort to catch an act which, though known to be wrongful, is done without a realisation of the consequences for the plaintiff. The law may still provide a remedy in negligence if the situation is one of those in which it is appropriate to impose a duty of care or, if the plaintiff is someone intended by statute to have the particular benefit or protection of an Act of Parliament or subordinate legislation, the plaintiff may have a remedy in the form of an action for breach of statutory duty; or the circumstances may give rise to another of the traditional tort actions, for instance, false imprisonment or assault . . . In our view this

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H

A intentional tort should not be allowed to overflow its banks and cover the unintentional infliction of damage . . . We prefer to err on the side of caution and not to extend the potential liability of officials for causing unforeseen damage. To do so may have a stultifying effect on governance without commensurate benefit to the public."

The clear public policy behind the tort is to achieve an honest and fair B public administration, by encouraging public officers not to abuse their position and to compensate those who suffer if they do. In *Ashby v White* 2 Ld Raym 938, 956 Holt CJ said: "If public officers will infringe mens rights, they ought to pay greater damages than other men, to deter and hinder other officers from like offences." For more modern judicial expression of the same principle, see per Slade LJ in *Jones v Swansea City* C *Council* [1990] 1 WLR 54, 71:

"The essence of the tort, as I understand it, is that someone holding public office has misconducted himself by purporting to exercise powers which were conferred on him not for his personal advantage but for the benefit of the public or a section of the public, either with intent to injure another or in the knowledge that he was acting ultra vires . . . It is the D abuse of a public office which gives rise to the tort."

A further consideration of policy is that regard must be had to the nature and extent of the public office in respect of which misfeasance is alleged. The tort has many modern applications going well beyond the limited and highly personal form of the conduct of elections in which it had its roots. It may, as here, concern a public body's responsibility to regulate or supervise the E conduct of others. The knowledge of such a body of the probable or possible consequences of any failure by it to perform its regulatory or supervisory functions will almost always depend on the fact and extent of that failure. It does not make sense to maintain, as does the Bank, that if its deliberate and knowingly unlawful failure to regulate and/or supervise was such that it only foresaw the possibility, not the probability, of damage to BCCI's depositors it should not and cannot be guilty of misfeasance in public office. If such F were the law, the Bank could always escape responsibility by disabling itself from learning sufficient of the facts by deliberately not doing its duty. It is plain that one of the important purposes of regulation and/or supervision by a banking regulator is to enable it, by the proper exercise of such functions, to guard against damage to the depositors of the banks it supervises. It cannot, by hiding behind a self-drawn curtain of ignorance, escape liability G when it must have known at least that it was possible that its want of proper regulation or supervision would result in such damage.

*The old authorities*

So much for policy and principle; I now return to the authorities and examine them, against the respective submissions of Mr Stadlen and Lord H Neill: namely that the essence of the tort is an intention to injure or foresight of injury; or it is dishonest conduct which may take one of two forms, the first of which is intentional injury and the second of which is deliberate action or inaction knowing it to be unlawful.

As to the old authorities, there is, as one would expect, frequent reference to malice as an ingredient. That is not because they were mainly cases of

spite, "targeted malice" or "predominant intention" to injure the plaintiff; but rather because pleaders and judges tended to equate the term "maliciously" with "wilfully", that is, wrongfully, intentionally and without just cause or excuse, even when using both words: see e g *Ferguson v Earl of Kinnoull* (1842) 9 Cl & Fin 251, 431, per Lord Brougham.

As I have said, the seed bed of the tort lay in a series of election cases starting in the 18th century. The most commonly cited starting point for the tort is the celebrated case of *Ashby v White* 2 Ld Raym 938; 3 Ld Raym 320; 1 Smith's LC (13th ed) 253, a claim against borough constables for wrongfully preventing the plaintiff from voting. Ashby's claim included an allegation of malice, and Holt CJ's revised version of his judgment and his contribution to the House of Lords' Committee's report on the matter referred to malice as an ingredient of the action. However, it is clear from the facts and the resolution of the House of Lords upholding his dissent that the alleged wrong lay not in the constables' spite or ill will against Ashby but in their concern that he would become a burden on the parish.

Holt CJ's invocation of the principle ubi jus, ibi remedium in his dissenting judgment, 2 Ld Raym 938, 954, was directed at the right of redress for abuse of public powers whatever the motive, and his references to malice were clearly intended in the broad sense of the constables intending not to do their duty. The terms of the House of Lords' resolution was equally broad:

> "every . . . person, having a right to give his vote . . . and being *wilfully* denied or hindered so to do by the officer who ought to receive the same, may maintain an action . . . to assert his right and recover damages for the injury." (My emphasis.)

The same equation of "malice" with "wilfulness" is to be found in a number of election cases in the latter half of the 18th century and continuing into the early part of the 19th century: see *Burgoyne v Moss* (1768) reported in *Harman v Tappenden* (1801) 1 East 555, 563; *Bassett v Godschall* 3 Wils KB 121; *Milward v Sargeant* (1786) 1 East 567; *Drewe v Coulton* 1 East 563n (where, as Clarke J observed [1996] 3 All ER 558, 587, the only possibility canvassed was targeted malice), per Wilson J, at pp 563–564:

> "This is in the nature of it an action for misbehaviour by a public officer in his duty. Now I think that it cannot be called a misbehaviour unless maliciously and wilfully done, and that the action will not lie for a mistake in law . . . In all the cases put the misbehaviour must be wilful, and by wilful I understand, contrary to a man's own conviction."

*Harman v Tappenden* 1 East 555; *Cullen v Morris* 2 Stark 577, 587, 589, per Abbott CJ, contrasting "improper motive" with "an honest intention to discharge . . . duty":

> "On the part of the defendant it has been contended, that an action is not maintainable for merely refusing the vote of a person who appears afterwards to have really had a right to vote, unless it also appears that the refusal resulted from a malicious and improper motive, and that if the party act honestly and uprightly according to the best of his judgment, he is not amenable in action for damages. I am of the opinion, that the law, as it has been stated by counsel for the defendant, is correct."

A Finally, in *Tozer v Child* 7 E & B 377, 379, the Court of Exchequer Chamber left undisturbed the following direction of Lord Campbell CJ to the jury:

> "it was incumbent on the plaintiff to make out that the acts of the defendants complained of were malicious; and that malice might be proved, not only by evidence of personal hostility or spite, but by B evidence of any other corrupt or improper motive . . ."

There are two further early 18th century cases which suggest that malice in the sense of an intention to injure or foresight of injury was not a necessary ingredient of the tort.

The first is *Whitelegg v Richards* 2 B & C 45, which concerned a creditor's claim against the clerk of the Court of Relief of Insolvent Debtors C for wrongfully and maliciously releasing a debtor, thereby depriving the creditor of the means of recovering his debt. Abbott CJ, giving the judgment of the court, said, at p 52:

> "On the argument before us, some authorities were quoted to show, that an action upon the case may be maintained against an officer of a court for a falsity or misconduct in his office, whereby a party sustains a D special damage; and that, in this case, a damage was plainly shown by the loss of the means of enforcing payment from the debtor, as in actions against sheriffs or gaolers for an escape."

There, as in his judgment in *Cullen v Morris* 2 Stark 577, Abbott CJ expressed himself in a way which might suggest that all the necessary malice in the action lay in the improper conduct of the officer regardless of any E intention to injure the plaintiff or of knowledge of its likelihood. However, as in the election cases, the strong likelihood of injury was plain.

The second case is *Henly v Lyme Corpn* 5 Bing 91, in which the plaintiff, an inhabitant of Lyme, claimed that the corporation had unlawfully and with intent to injure him failed to maintain the Cob at Lyme with the result that nearby land of his was damaged by the sea. On appeal from a jury's verdict in the plaintiff's favour, Best CJ, with whom Gaselee J agreed, F described the tort of misfeasance in terms unconstrained by a need for an express allegation of an intention to injure. He said, at p 107:

> "Now I take it to be perfectly clear, that if a public officer abuses his office, either by an act of omission or commission, and the consequence of that is an injury to an individual, an action may be maintained against such public officer."

G

Then, after mentioning a number of examples of the application of that rule, he continued, at p 108:

> "It seems to me that all these cases establish the principle, that if a man takes a reward . . . for the discharge of a public duty, that instant he becomes a public officer; and if by any act of negligence"—by which he H clearly meant wilful neglect to act—"or any act of abuse in his office, any individual sustains an injury, that individual is entitled to redress in a civil action."

Mr Stadlen submitted that these older cases do not support the plaintiffs' argument that malice in the sense of some intention to injure is not an

essential ingredient of the tort. He suggested that they amounted to no more than this: where malice or wilfulness was mentioned it was in the sense of wrongfully intending to injure; and where it was not, there was no need for a comprehensive judicial definition of the tort because the intention was taken for granted and the sole issue was whether the defendant had acted dishonestly and/or without just cause. Similar arguments were addressed to and rejected by this court in the *Bourgoin* case [1986] QB 716, Oliver LJ observing, at p 776:

> "There are in certain of the older cases phrases in the judgments or pleadings which might be taken to suggest that 'targeted malice' was regarded as essential. I say 'might', because in my judgment they are entirely inconclusive. There are also strong indications in the other direction, particularly in the older election cases."

I respectfully agree with the assessment that the old cases are, at best for the Bank, inconclusive. In none of the election cases in particular was there evidence to suggest that, in preventing the plaintiff from voting, the defendant had a predominant intention to injure him; and in all of them the deprivation of the right to vote necessarily injured the plaintiff. Even in *Whitelegg v Richards* 2 B & C 45 and *Henly v Lyme Corpn* 5 Bing 91, where the allegations, respectively, were of an implied and an express intention to injure, the issue of malice in the sense of such an intention simply did not feature in the judges' formulation of the wrong. There is much in the language of the various judgments to indicate that the notion of malice was used in a different and much broader sense, that is, doing or omitting to do a public act wilfully, and in bad faith. Mr Stadlen's submission, in any event, ignores the developing nature of the cause of action over the next two centuries; as he himself observed, the old authorities were decided at a time when it had not been analysed as a tort with two forms.

Before moving forward to the *Bourgoin* case [1986] QB 716 in 1986 I should mention two other cases, *Brasyer v Maclean* (1875) LR 6 PC 398 and *Smith v East Elloe Rural District Council* [1956] AC 736, which point away from the need to prove malice in the sense of an intention to injure.

*Brasyer v Maclean* LR 6 PC 398 was an appeal to the Privy Council against the nonsuiting by the Supreme Court of New South Wales of a claimant for damages against a sheriff from the sheriff's false return resulting in his attachment and arrest. One of the issues in the case was whether the claimant was required to prove, in addition to the sheriff's knowing falsity of the return, that he had "acted maliciously and without reasonable cause". Sir Barnes Peacock, giving the judgment of the Board, said, at pp 405–406:

> "This is not a case which falls within the general rule which has been laid down, that no action lies for damage or inconvenience sustained in consequence of process of law, unless it be alleged and proved that the party who occasioned it was actuated by malice. This is a case of a misfeasance by a public ministerial officer in the discharge of his duties. The sheriff was intrusted with the power of making a return to the court which would be considered conclusive by the court as to the truth of the facts stated in the return. He was enabled, therefore, by virtue of his office, to make a return to the court in this particular instance, which was

A conclusive in that stage of the proceedings . . . and he therefore had the power, and he exercised the power of doing that which rendered the plaintiff liable to an attachment for a contempt of court without being allowed to show that the facts returned were untrue. It appears, therefore, to their Lordships that the sheriff in this case was guilty of a misfeasance in the exercise of the powers which were intrusted to him by law and in the discharge of his duty as a public ministerial officer, and that B in respect of that misfeasance he is liable to an action for the damage which resulted from that act, notwithstanding it was not proved against him that he was actuated by malicious motives. The mere fact of the misfeasance and the damage resulting from it by reason of the attachment issuing upon the return as conclusive evidence against the plaintiff was sufficient damage to enable the plaintiff to maintain an action against the C sheriff for that misfeasance, and to recover the damage which he has sustained in consequence of it."

In *Smith v East Elloe Rural District Council* [1956] AC 736 the House of Lords held unanimously that an action could proceed against the clerk to a local authority for a declaration and damages in respect of his knowingly, wrongfully and in bad faith procuring the making by the authority of a D compulsory purchase of the claimant's land. Viscount Simonds said, at p 752:

> "Here the appellant by her writ claims against the personal defendant a declaration that he knowingly acted wrongfully and in bad faith in procuring the order and its confirmation, and damages, and that is a claim which the court clearly has jurisdiction to entertain. I am far from saying E that the claim has any merit. Of that I know nothing. But because the court can entertain it, I think that the Court of Appeal . . . were wrong in striking out the whole writ . . ."

*Bourgoin SA v Ministry of Agriculture, Fisheries and Food*

None of the English authorities, ancient or modern, before *Bourgoin SA v* F *Ministry of Agriculture, Fisheries and Food* [1986] QB 716 support the proposition that it is a necessary ingredient of the second form of the tort that the public officer knew or foresaw, or even that he should have foreseen the possibility of, harm from his unlawful act. As to the *Bourgoin* case, I do not regard it as an authority for the proposition that either foresight of probable harm, as held by Clarke J, or foreseeability of harm is a necessary ingredient of the tort.

G In the *Bourgoin* case, a decision of Mann J on a preliminary issue, the defendant had conceded that he had known his conduct was unlawful and that it would injure the plaintiffs. The only issue was whether, as he maintained, the plaintiffs had to prove that that was his predominant intention, i e "targeted malice". The case concerned a claim by French turkey producers against a government minister for having knowingly H unlawfully prohibited the importation of turkey meat from France with the intention of protecting English turkey producers, and in the knowledge that his prohibition would injure the French producers. The minister maintained that, as his predominant motive was to benefit English producers, he could not be held liable in misfeasance and that his appreciation that it would necessarily harm French producers did not constitute malice for the purpose.

Mann J, after reviewing the authorities, held that proof of malice and proof of knowledge of unlawfulness were alternative methods of proving the tort. In doing so, he expressed himself by reference to the minister's concession before him that he had foreseen that his act would cause injury to the French turkey producers. This is how he put it, at p 740, referring both to the minister's conceded foresight and to the foreseeability of the injury in question:

> "the words 'aimed at him' . . . wholly appropriate in the context of the disgraceful conduct of the respondent in *Roncarelli*'s case 16 DLR (2d) 689 . . . do not preclude another path towards liability; that is to say, knowledge that an act is invalid coupled with foresight that, its commission would damage the plaintiff . . . The wrong described before me is that of an act performed by a public officer with actual knowledge that it is performed without power and is so performed with the known consequence that it would injure the plaintiffs. I do not read any of the decisions to which I have been referred as precluding the commission of the tort of misfeasance in public office where the officer actually *knew* that he had no power to do that which he did, and *that his act would injure the plaintiff* as subsequently it does. I read the judgment in *Dunlop v Woollahra Municipal Council* [1982] AC 158 in the sense that malice and knowledge are alternatives. There is no sensible reason why the common law should not afford a remedy to an injured party in circumstances such as are before me. There is no sensible distinction between the case where an officer performs an act which he has no power to perform with the object of injuring A (which the defendant accepts is actionable at the instance of A) and the case where the officer performs an act which he knows he has no power to perform with the object of conferring a benefit on B but which has the *foreseeable* and actual consequence of injury to A (which the defendant denies is actionable at the instance of A). In my judgment each case is actionable at the instance of A . . ." (My emphasis.)

On appeal to this court, Oliver LJ, with whom Parker and Nourse LJJ agreed on this part of the case, said, at p 777:

> "For my part, I too can see no sensible distinction between the two cases which the judge mentions. If it be shown that the minister's motive was to further the interests of English turkey producers by keeping out the produce of French turkey producers—an act which must necessarily injure them—it seems to me entirely immaterial that the one purpose was dominant and the second merely a subsidiary purpose for giving effect to the dominant purpose. If an act is done deliberately and with knowledge of its consequences, I do not think that the actor can sensibly say that he did not 'intend' the consequences or that the act was not 'aimed' at the person who, it is known, will suffer them. In my judgment, the judge was right in his conclusion also on this point."

Clarke J held [1996] 3 All ER 558, 578, that foreseeability of damage was not enough to satisfy the second form of the tort. He expressed the view, at p 568, that when Mann J referred in his judgment to the "foreseeable" consequence of injury he must have meant "foreseen", observing that in that case no one had suggested that foreseeability of damage was enough and

A that Mann J had not applied his mind separately to that question. He paraphrased, at p 569, the Court of Appeal's approach:

> "Thus, even if it was not absolutely necessary to do so for the purposes of the actual decision in *Bourgoin* [1986] QB 716, the Court of Appeal was approving the proposition that there are two alternative ways in which the tort can be established, namely (a) where a public officer B performs an act with the object of injuring the plaintiff (which may be called targeted malice), and (b) where he performs an act which he knows that he has no power to perform and which he knows will injure the plaintiff."

Mr Stadlen submitted that the ratio of the *Bourgoin* case is that, in the absence of targeted malice, misfeasance can be established on proof of C knowledge of illegality coupled with actual foresight of loss to the plaintiff. He adopted Clarke J's view that Mann J must have meant foresight, not foreseeability. He said that there was no previous English authority or even any obiter statement in support of the proposition that foreseeability, reasonable or otherwise, of loss was enough. He suggested that in the *Bourgoin* case the only point in issue between the parties and the only point D to which Mann J's judgment, and that of Oliver LJ approving it, were directed was whether foresight of loss was sufficient. He said that it was implicit in both judgments that they considered an intention, though not necessarily a predominant intention, to injure was a necessary ingredient of the tort, provable in the second form of the tort by knowledge of necessary loss. He said that the only logical premise of Oliver LJ's reasoning in the E passage quoted was that, as a minimum, proof of a subsidiary intention to injure was necessary. Otherwise the defendant's concession that he knew he was acting unlawfully would have been sufficient to dispose of the preliminary issue in favour of the plaintiff. He said that the ratio of the decision was that, in the absence of a predominant intention to injure, a public officer is liable for misfeasance if he has both knowledge of illegality and knowledge that his conduct will necessarily cause loss.

F In support of that understanding of the ratio he prayed in aid *R v Secretary of State for the Home Department, Ex p Ruddock* [1987] 1 WLR 1482, in which Taylor J, at p 1498, set out his understanding of the ingredients of the tort as stated in the *Bourgoin* case [1986] QB 716, namely: "(1) that a public officer knew he had not power to do that which he did; (2) that he knew his act would injure the plaintiff; and (3) that it in fact did G so."

Lord Neill submitted that it is clear from Mann J's consideration of the authorities that he was concerned throughout with the question whether knowledge of illegality on its own was sufficient. He said that his use of the word "foreseeable" in the critical passage was more consistent with that consideration than was "foresight"; that it was clearly deliberate, and neither Mann J nor the Court of Appeal in approving this part of the H judgment could possibly have overlooked its mistaken significance if "foresight" had been intended and was part of the ratio; and that his use of the word "foresight" elsewhere in the judgment was all in the context of the minister's concession that he had indeed foreseen harm to the plaintiffs as a result of his conduct.

The courts of Australia and New Zealand have interpreted Mann J's words differently. The majority of the High Court of Australia in *Northern Territory v Mengel*, 69 ALJR 527, 540, and the Federal Court of Australia in three subsequent decisions following *Mengel's* case have read it as "foreseeable": see *J L Holdings Pty Ltd v Queensland* (unreported) 26 May 1995; *Madden v Madden* (1996) 65 FLR 354 and *Flanagan v Comr of the Australian Federal Police* (1996) 60 FCR 149. However, the New Zealand Court of Appeal in *Garrett v Attorney General* [1997] 2 NZLR 332 concluded that he had meant to say "foresight".

I do not regard Mann J's references to "foresight" or "foreseeability" in the passage from his judgment that I have set out, or his earlier references to foresight or its equivalent when rehearsing the rival contentions of the parties, as anything more than a factual setting in the case for the clear and well established proposition of law that he confirmed, namely that targeted malice and knowledge of unlawfulness are two alternative forms of the tort. And, given the concession made by the minister for the purpose of the preliminary issue, I certainly do not regard Mann J's references to foresight or foreseeability of injury as part of the ratio, still less that in using the word "foreseeable" he made a mistake and must have meant "foreseen", as Clarke J concluded. Oliver LJ appears to have been content to approach the case in the same focused way, namely that, given the minister's concession that he knew his unlawful act would injure the French producers, he could not say that he did not intend it because his dominant motive was to benefit the English producers. Either way, Mann J's and Oliver LJ's references to the minister's appreciation of the consequences of his act were obiter, save to the extent that he could not escape liability by denying a predominant intention to injure.

In the result, I do not consider the *Bourgoin* case an authority for the proposition that, where a claimant who has been injured by the deliberate and knowing illegality of a public officer, foresight or foreseeability of damage is an essential ingredient of the second form of the tort. As there was no issue or argument in the case as to the need for either, it is unfortunate that it has been treated as the starting point and basis for subsequent judicial interpretation on the point.

*The Commonwealth authorities*

In Australia there was a line of modern authority suggesting that it is not necessary to show malice in the sense of an intention to injure or foresight or foreseeability of injury, and that proof of knowledge of illegality would do. Its starting point was *Farrington v Thomson and Bridgland* [1959] VR 286, a decision of the Supreme Court of Victoria. The issue in the case was whether two police constables, who knowingly unlawfully, but in what they considered to be the public interest, ordered a hotel keeper to close his hotel and cease supplying liquor, were liable for misfeasance in public office for damage he suffered as a result of obeying their order. Smith J held that they were so liable. He said, at p 293, after reference to some of the early English authorities, including *Brasyer v Maclean* LR 6 PC 398 and *Smith v East Elloe Rural District Council* [1956] AC 736, that:

> "Some of the authorities seem to assume that in order to establish a cause of action for misfeasance in public office it is, or may be, necessary

A to show that the officer acted maliciously, in the sense of having an intention to injure . . . It appears to me, however, that this is not so and that it is sufficient to show that he acted with knowledge that what he did was an abuse of his office . . . In my view, therefore, the rule should be taken to go this far at least, that if a public officer does an act which, to his knowledge, amounts to an abuse of his office, and he thereby causes damage to another person, then an action in tort for misfeasance in a B public office will lie against him at the suit of that person."

Although that plain statement of rule contains no reference to foresight or foreseeability of injury as a necessary ingredient of the tort in that form, it does not follow that Smith J rejected the need for some such mental element. He was concerned—as was Mann J later in the *Bourgoin* case [1986] QB C 716—only with the question whether the plaintiff had to prove an intent to injure; the circumstances of the case made plain that the officers must have foreseen that in ordering the plaintiff to close his hotel they would cause him loss. The same comment can be made about the Supreme Court of Victoria's reliance on that general statement in two other cases of alleged knowing illegality, namely, no allegation of an intention to injure but obvious foresight of damage from the alleged conduct, *Tampion v Anderson* [1973] D VR 715, 720 and *Little v Law Institute of Victoria (No 3)* [1990] VR 257.

As I have indicated, the High Court of Australia has recently considered the tort in some detail in *Northern Territory v Mengel* 69 ALJR 527, which concerned a farmer's claim against a public authority in the Northern Territory for loss resulting from its unlawful restriction of the movement of his cattle. The only issue of law on the claim of misfeasance was as to the E requisite knowledge of the authority of the unlawfulness of its conduct. However, in considering and ruling on that issue the court bound in with it some observations as to the foreseeability of damage.

On the issue of lawfulness of conduct all seven judges held that recklessness as to the extent of powers would do. On the matter of knowledge of damage, the majority (Mason CJ, Dawson, Toohey, Gaudron and McHugh JJ) were of the view that, on the facts of the case, and as they F appear to have understood the *Bourgoin* case [1986] QB 716, liability was established on proof of a foreseeable risk of harm. They added that it might be necessary for a plaintiff to show that the act in question "was calculated in the ordinary course to cause harm", that is, as in *Wilkinson v Downton* [1897] 2 QB 57, "calculated" in an objective sense. Deane J held, 69 ALJR 528, 554, that the plaintiff could only succeed by establishing that the public G authority knew that its conduct was an unlawful act and that it would, or was likely to, cause injury or was reckless as to the invalidity "and that likely" injury; Brennan J held that foreseeability of, or recklessness as to, injury were not necessary ingredients of the tort.

The majority took Mann J in the *Bourgoin* case [1986] QB 716 as having suggested foreseeability as an additional or "sufficient" ingredient to the knowledge of unlawfulness form of the tort. They stated, 69 ALJR 527, H 540:

"it is sufficient for present purposes to proceed on the basis accepted as sufficient in the *Bourgoin* case, namely that liability requires an act which the public officer knows is beyond power and which involves a foreseeable risk of harm."

In a passage that I have already cited, they added recklessness as a further and alternative ingredient (in relation to knowledge of both illegality and damage) to their concept of the tort as one of intentional infliction of harm.

Lord Neill placed great reliance on the minority judgment of Brennan J, in particular, on his focus on the absence of an attempt by a public officer to perform his duty as the heart of the tort. This is how Brennan J put it, at pp 546–547:

> "The history of the tort shows that a public officer whose action has caused loss and who has acted without power is not liable for the loss merely by reason of an error in appreciating the power available. Something further is required to render wrongful an act done in purported exercise of power when the act is ultra vires. The further requirement relates to the state of mind of the public officer when the relevant act is done or the omission is made . . . It has now been accepted that if a public officer engages in conduct in purported exercise of a power but with actual knowledge that there is no power to engage in that conduct, the conduct may amount to an abuse of office . . . I respectfully agree that the mental element is satisfied either by malice (in the sense stated) or by knowledge. That is to say, the mental element is satisfied when the public officer engages in the impugned conduct with the intention of inflicting injury or *with knowledge* that there is no power to engage in that conduct and *that that conduct is calculated to produce injury*. These are states of mind which are inconsistent with an honest attempt by a public officer to perform the functions of his office. Another state of mind which is inconsistent with an honest attempt to perform the functions of a public office is reckless indifference as to the availability of power to support the impugned conduct and as to the injury which the impugned conduct is calculated to produce. The state of mind relates to the character of the conduct in which the public officer is engaged—whether it is within power and *whether it is calculated (that is, naturally adapted in the circumstances) to produce injury*. In my opinion, there is no additional element which requires the identification of the plaintiff as a member of a class to whom the public officers owes a particular duty, though the position of the plaintiff may be relevant to the validity of the public officer's conduct . . . *It is the absence of an honest attempt to perform the functions of the office that constitutes the abuse of the office. Misfeasance in public office consists of a purported exercise of some power or authority by a public officer otherwise than in an honest attempt to perform the functions of his or her office whereby loss is caused to a plaintiff. Malice, knowledge and reckless indifference are states of mind that stamp on a purported but invalid exercise of power the character of abuse of or misfeasance in public office. If the impugned conduct then causes injury, the cause of action is complete . . . Foreseeability of damage to another by one's own conduct is the factor which warrants the imposition of a duty of care to the other when engaging in the conduct. But the tort of misfeasance in public office is not concerned with the imposition of duties of care. It is concerned with conduct which is properly to be characterised as an abuse of office and with the results of that conduct. Causation of damage is relevant; foreseeability of damage is not*." (My emphasis.)

A In assessing the effect of *Mengel's* case on what, if any, role knowledge as to damage plays in the tort of misfeasance in public office, the following aspects of the case are important.

(1) The issue was as to the defendant's knowledge of the unlawfulness of its conduct, not of the damage to the plaintiffs that would or might result from it. It was clear, as the majority observed, at p 534, that, although the defendant had not intended to harm the plaintiffs, it was "aware of the B predicament which . . . [they] faced if they could not sell their cattle as planned". Therefore, as in the *Bourgoin* case [1986] QB 716, it was unnecessary to consider foresight and foreseeability, still less to decide between them. The court's observations as to foreseeability of, and recklessness as to, damage were obiter.

(2) I have already challenged the considerations of "policy" and C "principle" upon which the majority relied in venturing their view that a mental element of some sort as to injury was an ingredient of the tort. But, in any event, their reasoning falls short of a decision that foreseeability of loss was an essential ingredient of the tort, and even further short of Clarke J's view [1996] 3 All ER 558, 576, namely that the tort consists of foresight of, or a reckless indifference to, the damage that would probably ensue.

D (3) The majority's view in *Mengel's* case 69 ALJR 527 was not only obiter, but a diffidently expressed and incidental view drawn principally from the equally obiter and incidental reference by Mann J to foresight and foreseeability of injury in his formulation of the second form of the tort in the *Bourgoin* case [1986] QB 716. The majority, after observing, 69 ALJR 527, 539, that the precise limits of misfeasance in public office were still E undefined, and before referring to the non-issue of knowledge as to damage, stated their understanding of the core meaning of the tort:

> "the weight of authority here and in the United Kingdom is clearly to the effect that it is a deliberate tort in the sense that there is no liability unless either there is an intention to cause harm or the officer concerned knowingly acts in excess of his or her power."

F They then went on, at p 540, to identify as unclear what, if any, role in the tort knowledge as to damage played:

> "One aspect of misfeasance in public office that lacks precise definition is whether, assuming damage, it is sufficient to establish that the public officer knows that he or she is acting without authority or whether there is some additional requirement."

G After stating that it had been "suggested" in the *Bourgoin* case [1986] QB 716 that there was an additional requirement of foreseeability of damage and resorting, in the passages that I have set out, to "policy" and "principle", the majority concluded that it was "sufficient for present purposes to proceed on the basis accepted as sufficient in *Bourgoin*".

H In short, *Mengel's* case 69 ALJR 527 is no more an authority than the *Bourgoin* case [1986] QB 716 for the proposition that an essential ingredient of the tort is some mental element as to damage. However, it is of a piece with it in suggesting that foreseeability is, at any rate sufficient. Its additional contribution, that recklessness was also sufficient, was the view of all the judges, and, in my view, it is plain that they were referring to

recklessness in an objective sense. In addition, Brennan J's powerful judgment, concentrating as it did, on the need to prove conduct "inconsistent with an honest attempt by a public officer to perform the functions of . . . [his] office", is an important reminder of the origin and special role of this form of action. As he indicated by way of examples in the passage from his judgment that I have set out, such dishonesty or abuse of office may be established in various ways and without reference to foresight or foreseeability of harm.

The New Zealand case of *Garrett v Attorney General* [1997] 2 NZLR 332, which was decided after Clarke J's judgment, appears to be the first reported case in which the issue of knowledge as to damage in the second form of the tort has been considered. The case concerned a woman's claim for damages against the police for failing properly to investigate her complaint of rape. Blanchard J, giving the judgment of a five-judge Court of Appeal, held that the claim was bad because the claimant had not alleged or proved that the police knew of or were recklessly indifferent to the harmful consequences to her of the conduct of which she complained; foreseeability of such consequences, he said, was not enough. In so holding he said that the court regarded misfeasance in public office as an intentional tort both as to the unlawfulness of the conduct complained of and as to its consequences. He said that reasonable foreseeability of damage is insufficient to found the wrong and that Mann J, in his use of the word "foreseeability" in the *Bourgoin* case [1986] QB 716 must have meant "foresight". He stated [1997] 2 NZLR 332, 344:

> "[The tort of misfeasance in public office] can . . . be committed by an official who acts or omits to act in breach of duty knowing about the breach *and also knowing harm or loss is thereby likely to be occasioned to the plaintiff*. As will appear from the following discussion, 'knowing' in relation to both the breach and its effect on the plaintiff includes acting recklessly, in the sense of believing or suspecting the position and going ahead anyway without ascertaining the position as a reasonable and honest person would do." (My emphasis.)

Later he said, at pp 349–351:

> "We are in respectful agreement with Clarke J that it is insufficient to show foreseeability of damage caused by a knowing breach of duty by a public officer. *The plaintiff, in our view, must prove that the official had an actual appreciation of the consequences for the plaintiff, or people in the general position of the plaintiff, of the disregard of duty or that the official was recklessly indifferent to consequences and thus can be taken to have been content for them to happen as they would.* The tort has at its base conscious disregard for the interests of those who will be affected by official decision making. There must be an actual or, in the case of recklessness, presumed intent to transgress the limits of power even though it will follow that a person or persons will be likely to be harmed. The tort is not restricted to a case of deliberately wanting to cause harm to anyone; it also covers a situation in which the official's act or failure to act is not directed at the injured party but the official sees the consequences as naturally flowing for that person when exercising power. In effect this is no more than saying the tort is an intentional tort. In this context, a

A person intends to bring about the known consequences of his or her actions or omissions, even if other consequences form the primary motive . . . *The purpose behind the imposition of this form of tortious liability is to prevent the deliberate injuring of members of the public by deliberate disregard of official duty.* It is unnecessary, to attain this objective, to extend the tort to catch an act which, though known to be wrongful, is done without a realisation of the consequences for the B plaintiff . . . In our view this intentional tort should not be allowed to overflow its banks and cover the unintentional infliction of damage. In many cases the consequences of breaking the law will be obvious enough to officials, who can then be taken to have intended the damage they have caused. But where at the time they do not realise the consequences they will probably not be deterred from exceeding their powers by any C enlargement of the tort . . . *The common law has long set its face against any general principle that invalid administrative action by itself gives rise to a cause of action in damages by those who have suffered loss as a consequence of that action. There must be something more.* And in the case of misfeasance of public office that something more, it seems to us, must be related to the individual who is bringing the action. While the D cases have made it clear that the malice need not be targeted there must, as we have said, be a conscious disregard for the interests of those who will be affected by the making of the particular decision." (My emphasis.)

Although the case is of significance as the first reported decision on the issue of a requirement of some form of knowledge of potential damage in the second form of the tort, it is, with respect, unsatisfactory in a number of E respects. First, it fails to have regard to the core purpose of the tort, the prevention and reparation of harm from abuse of public office. Second, in equating the tort with those of intentional infliction of harm, it ignores the now well established different forms that the tort can take, "targeted malice" and deliberate and knowing unlawfulness, the purpose of the latter plainly being to provide for cases where the injury was not intentional. Third, in its expression of concern about the tort being "allowed to overflow its banks" F and of the need for "something more" where the only complaint is of an "invalid administrative action", the court has again disregarded the fundamental and distinguishing features of this civil wrong—the "something more", as Brennan J said in *Mengel's* case 69 ALJR 527, is dishonesty—the abuse of power—by a public official. Fourth, as Lord Neill has pointed out, the court, in its various references to the state of knowledge necessary or G sufficient to establish the second form of the tort, left no clear indication of the threshold of knowledge required.

The same court, differently constituted, in *Rawlinson v Rice* [1997] 2 NZLR 6510 broadly followed the same reasoning, though it spelt out more precisely what a plaintiff must prove on the issue of knowledge of damage. In separate judgments all three members of the court plainly treated *Garrett v Attorney General* [1997] 2 NZLR 332 as an authority for H the proposition that knowledge of, or reckless indifference to, damage was an additional requirement of the second form of the tort. McKay J said [1997] 2 NZLR 651, 658:

"A deliberate act knowingly or recklessly in excess of one's powers is sufficient. As has now been decided in *Garrett*, it must also be shown that

> the defendant knew that the conduct would cause damage to the plaintiff, or was recklessly indifferent to the consequences."

Tipping and Barker JJ said much the same, Barker J observing, at p 663: "Mere foreseeability of deleterious consequences is insufficient; the defendant must be reckless as to possible damage." However, Tipping J perceptively added, at p 667: "If the respondent was recklessly indifferent as to his powers it seems to be a short step to infer that he was recklessly indifferent to the harm he might cause . . . by acting outside those powers."

In my view, the two New Zealand decisions, though on the point, were essentially concerned with recklessness in the sense of reckless indifference both as to unlawfulness and as to consequences, both of which, as a matter of practicality, were likely to go hand in hand, as Tipping J observed. However, although the court took its line from Clarke J, it did not, in either decision, adopt his qualification of recklessness by reference to the further ingredient that the public officer had to have known, believed or suspected that his unlawful act would probably harm the plaintiff. In my view, and with respect to the New Zealand Court of Appeal, it was wrong in importing into the second form of the tort a requirement to prove foresight or reckless indifference as to damage. As with the High Court of Australia in *Northern Territory v Mengel* 69 ALJR 527, its error lay in its fundamental misconception of the role of the tort, equating it to other torts of intentional injury by private individuals and disregarding its special characteristic of dishonesty in the form of abuse of a public office.

I should also refer to two of the Canadian authorities.

The first was *McGillivray v Kimber* (1915) 26 DLR 164, in which the Supreme Court of Canada held, by a majority, that a pilot could recover damages against a pilotage authority for dismissing him in breach of statutory requirements. The precise legal basis of the award is not entirely clear from the judgments. However, it seems to have been a case in which the defendants knowingly acted without authority and in which they clearly knew that they would injure the pilot by preventing him from earning his living. There was also some evidence that they had acted out of "motives other than zeal for the public welfare": see per Anglin J, at pp 183–184.

The second authority was *Roncarelli v Duplessis* 16 DLR (2d) 689, in which the Supreme Court of Canada awarded damages against the Prime Minister of Quebec for unlawfully directing the cancellation of a restaurant owner's liquor licence because he had provided bail on many occasions for fellow Jehovah's Witnesses who were then unpopular with the Quebec authorities. The case is important because, although the Prime Minister clearly knew that his conduct would injure the restaurant owner, he maintained that he was not liable in misfeasance because he had not acted maliciously, but in the best interests, as he perceived them, of the public; cf the *Bourgoin* case [1986] QB 716. The court held that, whatever his motivation, his deliberate and intentionally unlawful conduct was malicious for the purpose. Rand J said 16 DLR (2d) 689, 706–707:

> "what could be more malicious than to punish this licensee for having done what he had an absolute right to do in a matter utterly irrelevant to the Alcoholic Liquor Act? *Malice in the proper sense is simply acting for a reason and purpose knowingly foreign to the administration*, to which was added here the element of intentional punishment by what was

A virtually vocation outlawry . . . 'Good faith' in this context . . . means carrying out the statute according to its intent and for its purpose; it means good faith in acting with a rational appreciation of that intent and purpose and not with an improper intent and for an alien purpose . . ." (My emphasis.)

Abbott J added, importantly, at p 730:

B "I have no doubt that in taking the action which he did, the respondent was convinced that he was acting in what he conceived to be the best interests of the people of his province but this, of course, has no relevance to the issue of his responsibility in damages for any acts done in excess of his legal authority."

C *English authorities since Clarke J's judgment*

There have been a number of English decisions approving or following Clarke J's analysis of the tort of misfeasance. However, in none of them did an issue arise as to the knowledge of injury required for proof of the second form of the tort; or the nature of the proceedings was such that it was not fully argued. The courts have been content, without further analysis of the D issue and often with words of warm approval of Clarke J's judgment, to take from the *Bourgoin* case [1986] QB 716 as interpreted by him the proposition that a plaintiff must prove at least suspicion of probable damage or recklessness as to damage, suspecting its probability. I trust that the authors of those judgments will not regard my mere citation of the references to them without further comment as a mark of disrespect: *Tee v Lautro Ltd* (unreported) 16 July 1996; *Elliott v Chief Constable of Wiltshire* The Times, E 5 December 1996; *Ealing London Borough Council v Metha* (unreported) 24 April 1997; Court of Appeal (Civil Division) Transcript No 1449 of 1997; *Williams v Solicitor to the Department of Social Security* (unreported), 11 June 1997; Court of Appeal (Civil Division) Transcript No 1183 of 1997; *Lam v Brennan and Torbay Borough Council* [1997] PIQR P488; *Bennett v Comr of Police of the Metropolis* (1998) 10 Admin LR 245; The Times, F 24 October 1997; *R v Chief Constable of the North Wales Police, Ex p AB* [1999] QB 396, DC; *Barnard v Restormel Borough Council* [1998] 3 PLR 27; *W v Essex County Council* [1999] Fam 90.

*Conclusion*

I hope that it is clear from my brief review of the main English and G Commonwealth authorities that, until Clarke J's judgment and that of the New Zealand Court of Appeal in *Garrett v Attorney General* [1997] 2 NZLR 332, there was no reported authority the ratio of which was that foresight or even foreseeability of damage was an essential ingredient of the second form of the tort. Equally, as Mr Stadlen emphatically put it, there was no reported authority to the effect that neither was necessary. Such H recent judicial pronouncements, including that of Clarke J, as there are now on the point rest largely on the insecure basis of Mann J's judgment in the *Bourgoin* case [1986] QB 716—insecure because his observations on the point were in passing, the matter not being in issue before him. The Australian High Court in *Northern Territory v Mengel* 69 ALJR 527, obiter and somewhat diffidently, gave further impetus to the notion that some

such knowledge was required, stating that foreseeability was "sufficient". The New Zealand Court of Appeal in *Garrett's* case, heavily relying on Clarke J's interpretation of the *Bourgoin* case and his own reasoning on the matter, appears to have proceeded on the basis that some knowledge of injury was necessary, concluding on what I have ventured to suggest was a flawed basis that foresight or recklessness, not foreseeability, is required. Given the lack of binding English authority and the conflict of Commonwealth authority, I take the view that it is for this court to determine the matter as best it can.

To that end I return to the core of misfeasance in public office, abuse of power, and to its bifurcated development, that is, dishonesty in the form of an act of "targeted malice" or by an intentionally unlawful act as in *Roncarelli v Duplessis* 16 DLR (2d) 689. The element of dishonesty in a public office, either in a deliberate disregard of duty or, as Brennan J put it in *Mengel's* case 69 ALJR 527, failure to make an honest attempt to perform the duty, has a special place in the range of civil remedies available to an individual. It is exemplified and recognised by Parliament in a case such as this by section 1(4) of the Act of 1987, reserving as it does a right of action against the Bank in respect of its acts or omissions committed in "bad faith".

If, as I believe, dishonesty is the critical test of misfeasance in public office, there is no need, as Millett J said in *Agip (Africa) Ltd v Jackson* [1990] Ch 265, 293, to complicate what is essentially a jury question with fine analysis of the gradations of knowledge and recklessness. That applies both as to knowledge of illegality and, where appropriate, to knowledge of it consequences. I include the latter because in some cases, such as this, the two may be hard to disentangle. This is not just an application of Tipping J's common sense mention in *Rawlinson v Rice* [1997] 2 NZLR 651 of the often short step between reckless indifference to powers and to their consequences.

A banking regulator's conduct may be unlawful in one or both of two ways. The first is by dishonestly failing to supervise a bank as it should, with the result that it does not know what is going on and what harm may be in store for that bank's depositors. The second is by dishonestly failing to perform its duty to prevent harm when it does know of such potential harm. In short the dishonest unlawful conduct may lie in a failure to supervise and/or it may lie in actual knowledge of potential harm giving rise to a duty to take preventative action. Whether and what conduct is dishonest in such circumstances will not be assisted by elaborate tests of recklessness, objective or subjective and so on, which have disfigured so many other branches of the law. That is especially so in the context of knowledge of injury where, on Clarke J's analysis, following *Garrett v Attorney General* [1997] 2 NZLR 332 and *Rawlinson v Rice* [1997] 2 NZLR 651, the courts would also have to grapple with the overlapping notion of foresight.

I can do no better than cite the now well known words of Millett J in *Agip (Africa) Ltd v Jackson* [1990] Ch 265 and of Lord Nicholls of Birkenhead, giving the opinion of the Board in *Royal Brunei Airlines Sdn Bhd v Tan* [1995] 2 AC 378. Though, in each case they are concerned with dishonesty giving rise to a constructive trust, they are equally applicable in this context.

In the *Agip* case Millett J was concerned with defendant accountants who, he found, at p 294, "must have realised at least that their clients might be involved in a fraud on the plaintiffs". He said, at p 293:

A "Knowledge may be provided affirmatively or inferred from circumstances. The various mental states which may be involved were analysed by Peter Gibson J in [*Badenr v Société Générale pour Favoriser le Développement du Commerce et de l'Industrie en France SA (Note)* [1993] 1 WLR 509] as comprising: (i) actual knowledge; (ii) wilfully shutting one's eyes to the obvious; (iii) wilfully and recklessly failing to make such inquiries as an honest and reasonable man would make; (iv) B knowledge of circumstances which would indicate the facts to an honest and reasonable man; and (v) knowledge of circumstances which would put an honest and reasonable man on inquiry. According to Peter Gibson J, a person in category (ii) or (iii) will be taken to have actual knowledge while a person in categories (iv) or (v) has constructive notice only. I gratefully adopt the classification but would warn against over C refinement or a too ready assumption that categories (iv) or (v) are necessarily cases of constructive notice only. The true distinctionn is between honesty and dishonesty. It is essentially a jury question. If a man does not draw obvious inferences or make the obvious inquiries, the question is: why not? If it is: because, however foolishly, he did not suspect wrongdoing or, having suspected it, had his suspicions allayed, D however unreasonably, that is one thing. But if he did suspect, wrongdoing yet failed to make inquiries because 'he did not want to know' (category (ii)) or because he regarded it as 'none of his business' (category (iii)), that is quite another. Such conduct is dishonest, and those who are guilty of it cannot complain if, for the purpose of civil liability, they are treated as if they had actual knowledge."

E In *Royal Brunei Airlines Sdn Bhd v Tan* [1995] 2 AC 378, 390–391 Lord Nicholls indicated some of the considerations bearing on a person's honesty which, despite the different context, serve as valuable reminders:

"Acting in reckless disregard of others' rights or possible rights can be telltale sign of dishonesty. An honest person would have regard to the circumstances known to him, *including the nature and importance of the* F *proposed transaction, the nature and importance of his role, the ordinary course of business, the degree of doubt . . . and the seriousness of the adverse consequences . . .* Likewise, when called upon to decide whether a person was acting honestly, a court will look at all the circumstances known to the third party at the time. The court will also have regard to personal attributes of the third party, such as his experience and intelligence, and the reason why he acted as he did." (My emphasis.)

G As to recklessness, Clarke J, in following the lead of all the judges in *Mengel's* case 69 ALJR 527, stressed the importance of the element of dishonesty. He said [1996] 3 All ER 558, 581:

"The reason why recklessness was regarded as sufficient by all members of the High Court in *Mengel* is perhaps most clearly seen in the judgment H of Brennan J It is that misfeasance consists in the purported exercise of a power otherwise than in an honest attempt to perform the relevant duty. It is that lack of honesty which makes the act an abuse of power."

He held that the plaintiffs' case on the Bank's recklessness as to the lawfulness of its conduct was sufficiently pleaded. But there is an issue as to

his formulation of the test of recklessness for this purpose. He defined it, at pp 581 and 632–633, as either a public officer's wilful shutting of eyes to the obvious ("turning a blind eye") or wilfully and recklessly failing to make such inquiries as an honest and reasonable man would make, adding as provisos "that the officer believes or suspects (a) that his act is beyond his powers and (b) that his act will probably cause . . . damage". But for these provisos, the judge's approach followed Peter Gibson and Millett JJ's respective analyses of actual knowledge to found liability as a constructive trustee in *Baden v Société Générale pour Favoriser le Développement du Commerce et de l'Industrie en France SA (Note)* [1993] 1 WLR 509 and *Agip (Africa) Ltd v Jackson* [1990] Ch 265.

The plaintiffs say that even if—which they challenge—Clarke J was correct in introducing to the second form of the tort an alternative of recklessness as to consequences, his proviso makes it too narrow a test and is contrary to the normal meaning of the word "reckless" in its various contexts, both civil and criminal. Lord Neill referred in particular to the classic formulations of Lord Diplock in *R v Caldwell* [1982] AC 341, 354 and *R v Lawrence (Stephen)* [1982] AC 510, 526, of a failure to give any thought to the possibility of an obvious risk or, having recognised the risk, nevertheless going on to take it. He submitted that Clarke J's proviso excluded from liability Lord Diplock's first category, failure to give any thought to the possibility of obvious risk, and thus excluded from the tort cases where a public officer recklessly made no honest attempt to perform his duty.

The Bank says that "objective" recklessness is not enough and would blur the boundary between misfeasance and negligence, since the second form of the tort consists in both a deliberate disregard of public duty and a deliberate injuring of someone. Thus, it contends, adopting Clarke J's test, that, even where a plaintiff alleges that a public officer deliberately shut his eyes or failed to make inquiries, he must also establish that the officer at least suspected that he was acting unlawfully and that, in doing so he would *probably* cause damage to him.

In my view, the judge's test for which the Bank contends is inappropriate because, in focusing on consequences of conduct, it is capable of excluding plainly dishonest conduct. The critical thing about the role of recklessness in misfeasance in public office is that it is a manifestation of a public officer's abuse of his office, that is to say, of his bad faith or dishonesty in not attempting honestly to perform it. If, contrary to my view, some discrete test of recklessness as to consequences is applicable in this case, I prefer Lord Neill's formulation of it, namely whether there was an obvious and serious risk of causing financial loss to depositors by not supervising BCCI properly, and, if so, whether the Bank failed to give any thought to it, or having recognised it, went on to take the risk?

I do not consider that a plaintiff in an action for misfeasance in public office who can 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. There is force in the submission of Lord Neill that, as the primary focus of the tort is on whether a public officer made an honest attempt to perform his duty, not on any intention to injure, if he knew that he was not performing his duty he was sufficiently dishonest.

A Echoing the reasoning of Rand J in *Roncarelli v Duplessis* 16 DLR (2d) 689 and Brennan J in *Northern Territory v Mengel* 69 ALJR 527 in the passages that I have cited, he added that if the officer also knew, believed or suspected that his conduct might cause injury to persons whose interests he was required to protect and who otherwise would be unprotected, that could add to the overall dishonesty, but is not a prerequisite of it.

B Clarke J approached the matter by drawing from the authorities, particularly the *Bourgoin* case [1986] QB 716 and *Northern Territory v Mengel* 69 ALJR 527 that an essential of the second form of the tort was proof of some mental state of the defendant as to injury consequent on his unlawful act. He said [1996] 3 All ER 558, 578:

> "On the basis of the cases to which I have so far referred I have reached C the clear conclusion that foreseeability of damage is not enough to satisfy the second limb. For ther reasons which I have already given, once Mann J's decision is properly understood, there is no support in *Bourgoin* for the suggestion that reasonable foresight [sic] is sufficient at the second stage. There is no other support for it in the recent cases and in my opinion it is not supported by either principle or policy. As Mr Stadlen points out, an officer may do something knowing it to be unlawful and in D circumstances where it was reasonably foreseeable that a class of persons might suffer loss, but he might nevertheless do it in the best interests either of another class of persons or indeed of the plaintiff or of the class of persons of whom the plaintiff is one. In my judgment such a person would not be acting in abuse of power, whereas it is abuse of power which is the essence of the tort. It follows that, as was expressly held by E the majority in *Mengel*, it is not sufficient to prove simply knowledge of the unlawful nature of the act and that the act caused the plaintiff's loss."

Later, after concluding on the other hand that proof of knowledge of inevitability of damage was not necessary to establish liability, knowledge of probability of injury would do, he, said, at p 583:

> "The purpose of the tort as I see it is to give compensation to those who F have suffered loss as a result of improper abuse of power. That being so, knowledge that the relevant person will probably suffer damage is surely sufficient."

Why any knowledge as to the consequences of deliberate and knowingly unlawful conduct by a public officer is necessary to bring home a claim of abuse of power, or why it should be knowledge of probable rather than G merely possible damage, is not apparent from the judge's reasoning. It may possibly be found in his suggestion that a public officer may with impunity deliberately and knowingly breach his duty for what he perceives to be a good reason even though in doing so he appreciates that it "might", as distinct from "probably would", cause injury to the plaintiff. There is also his implied acceptance, at p 582, of the applicability to foreseeable, but H apparently not to foreseen, injury of the public policy considerations mentioned by the Privy Council in *Yuen Kun Yeu v Attorney General of Hong Kong* [1988] AC 175 and *Davis v Radcliffe* [1990] 1 WLR 821 against unduly fettering the exercise of executive discretion.

Such reasoning is contrary to the clear understanding of "malice" in the modern authorities, perhaps best exemplified in the facts of *Roncarelli v*

*Duplessis* 16 DLR (2d) 689 and the words of Rand and Abbott JJ in it, at pp 706–707, 730, that I have cited, namely as including acting knowingly and intentionally in excess of power or contrary to legal duty.

Moreover, to permit dispensation by a public officer of his duty on such a distinction is quite unreal, ignoring as it does the essential "jury" issue of dishonesty. Can it reasonably be said that a public officer could ignore his duty in favour of some other perceived proper interest when he knows that in doing so the consequences might, rather than probably would, cause very serious injury to very many people, as, for example, the BCCI depositors in this case? Put another way, and applying the *Agip* [1990] Ch 265 and *Royal Brunei Airlines* [1995] 2 AC 378 test, can it be said, particularly in advance of a trial on the facts, that such conduct is not dishonest? And, as I have already said, if appreciation of consequences is relevant at all to that question, the magnitude of the power breached, of the breach, of the possible injury risked and of the risk itself would also be relevant factors to weigh against the perceived proper interest in assessing dishonesty.

As for the *Yuen Kun Yeu* [1988] AC 175 and *Davis v Radcliffe* [1990] 1 WLR 821 public policy considerations going to the non-existence of a duty of care, for the reasons that I have given in relation to the Community law claim, they are as inapplicable to a public officer's dishonest disregard of duty resulting in foreseeable harm as they are to that resulting in foreseen harm.

It follows that, in my view, the test of abuse of power—dishonesty—by a public officer does not necessarily include as an essential ingredient some appreciation by the officer of an injurious consequence. A public officer who dishonestly disregards his plain duty or who does not honestly attempt to do it, acts at his peril, and if injury results he is liable for it.

But, even if I am wrong about that, I can see no basis, whether as a matter of interpretation of Mann J's judgment in the *Bourgoin* case [1986] QB 716 or otherwise, for requiring a plaintiff in a claim for misfeasance in public office to prove foresight in at least the form of suspicion of probable harm. That would be a much more onerous burden than that imposed on a plaintiff in a negligence claim, where the defendant is not necessarily a public officer and the claimant has not had to go to the lengths of proving dishonesty. Interestingly, it could also be more onerous than that in a tort of intentional injury such as fraudulent misrepresentation. In *Smith New Court Securities Ltd v Scrimgeour Vickers (Asset Management) Ltd* [1997] AC 254, 279–280 Lord Steyn drew attention in the following passage from his speech to the well established policy of English law of imposing a more extensive liability on intentional wrongdoers than on careless defendants:

> "On any view it is clear that, if Cockburn CJ [in *Twycross v Grant* (1877) 2 CPD 469, 544–545] is right, the law imposes liability in an action for deceit for some consequences that were unforeseen and unforeseeable when the tortfeasor committed the wrong. And if that is right it may tell us something about the correct disposal of the present case.
>
> "*The justification for distinguishing between deceit and negligence*
>
> "That brings me to the question of policy whether there is a justification for differentiating between the extent of liability for civil wrongs depending on where in the sliding scale from strict liability to

A intentional wrongdoing the particular civil wrong fits in. It may be said that logical symmetry and a policy of not punishing intentional wrongdoers by civil remedies favour a uniform rule. *On the other hand, it is a rational and defensible strategy to impose wider liability on an intentional wrongdoer.* As *Hart and Honoré, Causation in the Law*, 2nd ed (1985), p 304 observed, an innocent plaintiff may, not without reason, call on a morally reprehensible defendant to pay the whole of the loss he
B caused. The exclusion of heads of loss in the law of negligence, which reflects considerations of legal policy, does not necessarily avail the intentional wrongdoer. Such a policy of imposing more stringent remedies on an intentional wrongdoer serves two purposes. First it serves a deterrent purpose in discouraging fraud . . . And in the battle against fraud civil remedies can play a useful and beneficial role. Secondly, as
C between the fraudster and the innocent party moral considerations militate in favour of requiring the fraudster to bear the risk of misfortunes directly caused by his fraud. I make no apology for referring to moral considerations. The law and morality are inextricably interwoven. To a large extent the law is simply formulated and declared morality . . .

"*For more than 100 years at least English law has adopted a policy of*
D *imposing more extensive liability on intentional wrongdoers than on merely careless defendants.* This policy was trenchantly spelt out by Lord Blackburn in *Livingstone v Rawyards Coal Co* (1889) 5 App Cas 25." (My emphasis.)

Finally, if there is a requirement of at least foreseeability of damage, the way in which abuse of power or dishonesty may damage an individual or
E class of individuals, the extent to which it may do so and the effect of the abuse on the public body's appreciation, if any, of its consequences will vary according to the public function abused. It is straightforward enough when an electoral officer unlawfully deprives an elector of his right to vote or a licensing authority unlawfully removes a licensee's right to trade. The certainty or strong likelihood of injury in each case is obvious to the misfeasor and requires no mention as a necessary ingredient of the wrong.
F Equally, where the function of a public body is to protect individuals from damage from the conduct of others, its exposure of them to such damage by its failure to protect from it is in clear and obvious disregard of their interests. The public body's knowledge of probable or possible damage from the defaults of those whom it should be supervising will depend largely on the assiduity with which it performs its duties. The less it does the less it is
G likely to know of or suspect any particular defaults capable of resulting in damage; but it cannot be unaware of the increased potential for such damage because of its lack of supervision. In the field of banking: regulation above all, damage to depositors from defaults by unsupervised banks is clearly foreseeable by a regulator knowingly not doing its job.

Accordingly, I am of the view that the plaintiffs have an arguable case, subject to matters of evidence the subject of the final issue on this appeal,
H against the Bank in misfeasance in public office.

*"The third way"—reformulation of the tort of misfeasance in public office*

The plaintiffs refer to the antiquity of the tort and contend that its principles, having their origin in jurisprudence governing the conduct of

public officers in the 18th and 19th centuries, are not apt for the late 20th century. They submit that, while it may be appropriate for individual public officers to be protected from liability unless it can be shown that they acted in bad faith, a requirement that a plaintiff should have to prove such bad faith on the part of an administrative department or organ of a modern state before he can obtain reparation is unjustifiable. It is unjustifiable, they say, because it imposes too high a burden on plaintiffs, as the European Court has held as a matter of Community law, and because it may enable public authorities to hide behind arguments, such as that advanced by the Bank here, that plaintiffs must prove personal bad faith on the part of the ultimate decision maker.

Lord Neill referred the court to Recommendation No R (84) 15 of the Committee of Ministers of the Council of Europe of September 1984, to which the United Kingdom was a signatory, recommending the governments of all member states to be guided by certain principles in their law and practice relating to public liability. Principles I and II, so far as material, were:

> "I. Reparation should be ensured for damage caused by an act due to a failure of a public authority to conduct itself in a way which can reasonably be expected from it in law in relation to the injured person. Such a failure is presumed in case of transgression of an established legal rule.
>
> "II. Even if the conditions stated in Principle I are not met, reparation should be ensured if it would be manifestly unjust to allow the injured person alone to bear the damage, having regard to the following circumstances: the act is in the general interest, only one person or a limited number of persons have suffered the damage and the act was exceptional or the damage was an exceptional result of the act . . ."

Lord Neill, in an argument not pleaded in the present or proposed pleading of the plaintiffs and not argued before Clarke J, submitted that the requirement of proof of bad faith in the common law action of misfeasance in public office is inconsistent with those principles, and that the common law touching the liability of the state and its departments to make reparation for losses caused by administrative failures should be adapted so as remove as conditions of reparation proof of a guilty mind, whether as to the lawfulness of the act or omission or as to the likelihood of damage.

Mr Stadlen suggested that this attack on Clarke J's judgment was a mark of desperation, highlighting the limits presently set on the tort of misfeasance in public office by the leading English and Commonwealth authorities and not indicated by such authority as there is for developing or extending the tort. He said that the Council of Europe Recommendation has no status in English law and that Principle I of it appears to contemplate the imposition of liability independently of any breach of the existing law and automatically where a breach of statute is proved. He said that it was reminiscent of the discredited *Beaudesert* principle (*Beaudesert Shire Council v Smith* 120 CLR 145) of an innominate liability for damages for harm caused by an intentional and unlawful act of another (rejected by Lord Diplock in *Lonrho Ltd v Shell Petroleum Co Ltd (No 2)* [1982] AC 173, 187, as part of the law of England and by the Australian High Court in *Mengel's* case 69 ALJR 528, 538). He submitted that this notion, liability without

A proof of knowing unlawfulness or fault, is alien to the common law and its requirement of at least dishonesty. He relied, in particular, on the observation of Blanchard J in the New Zealand Court of Appeal in *Garrett v Attorney General* [1997] 2 NZLR 332, 350 that, as a matter of policy, the tort should not be allowed to overflow its banks and cover the unintentional infliction of damage. In short, he submitted that there is no English or Commonwealth authority or reason of policy for creation of a new tort. He B said that such an extreme and novel basis for liability could only become part of English law by legislation.

There is authoritative judicial support for the proposition that the boundaries of the tort are not tightly drawn: see *Racz v Home Office* [1994] 2 AC 45, 55, per Lord Jauncey of Tullichettle; *Northern Territory v Mengel* 69 ALJR 527, 546; *Elliott v Chief Constable of Wiltshire* The Times, C 5 December 1996, per Sir Richard Scott V-C, and *Bennett v Comr of Police of the Metropolis* 10 Admin LR 245 per Sir Richard Scott V-C: "The precise boundaries of this tort have not been (and perhaps it would be inadvisable that they should be) precisely defined . . ." But even if, as a matter of domestic law, the boundaries were clear, the effect of Community law may be to loosen them. In *Elguzouli-Daf v Comr of Police of the Metropolis* D [1995] QB 335, 347 Steyn LJ said:

> "In this corner of the law our legal system possibly has a capacity for further development, notably under the direct or indirect influence of the jurisprudence of the European Court of Justice: see *Francovich v Italian Republic* (Case C-6/90) [1995] ICR 722 and *Kirklees Metropolitan Borough Council v Wickes Building Supplies Ltd* [1993] AC 227, 281–282, per Lord Goff of Chieveley."

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However, to rely on such reasoning does not, it seems to me, justify the plaintiffs' argument for a "third way" as a further alternative to their submissions on the first two preliminary issues. Where Community law imposes obligations carrying corresponding rights enforceable in the domestic laws of member states, in the event of a conflict between the two. F regimes Community law must prevail save if and to the extent that Community law permits member states a discretion in the matter. If I am right in concluding that the plaintiffs' case as pleaded is capable, if proved, of giving them an enforceable Community law right in damages against the Bank, the English common law of misfeasance, to the extent that it purports to restrict or impede the enforcement of that right, must bend before it: see pages 100G–101G, 133A–C and 135H–136C of this judgment and, e g, the G reasoning of Advocate General Léger in *R v Ministry of Agriculture, Fisheries and Food, Ex p Hedley Lomas (Ireland) Ltd* (Case C-5/94) [1997] QB 139, 185–186, 190, 198, paras 139–141, 162 and 206 and section 2(1) of the Act of 1972. It is noteworthy that Lord Goff's expression of doubt in *Kirklees Metropolitan Borough Council v Wickes Building Supplies Ltd* [1993] AC 227, 281–282 about the correctness of the Court of Appeal's H majority decision in the *Bourgoin* case [1986] QB 716 on the Community law point was based on his view that, as a result of *Francovich's* case [1995] ICR 722, there was, in the case before their Lordships, a Community law right enforceable in the English courts.

If I am wrong about the plaintiffs' entitlement to rely on Community law, either because there is no relevant Community obligation on the Bank or

none matched by a corresponding right in the plaintiffs to damages for its breach, I cannot see on what basis the English courts could properly develop the law of misfeasance by reference to Community law. For the court to purport to sweep away, without a Community law imperative for doing so, the common law's requirements of a guilty mind whether in the form of "targeted malice" or as to the lawfulness of the act or (as the Bank would contend) as to consequent injury, would be to usurp the function of the legislature. Accordingly, I agree with Hirst and Robert Walker LJJ that the plaintiffs' appeal should fail under this head.

*Causation*

This preliminary question is whether, on the assumption of the facts pleaded by the plaintiffs, their claimed losses are capable in law of having been caused by the acts or omissions of the Bank. Put shortly, can the Bank be liable for its failure to protect the plaintiffs from loss caused by the incompetence or dishonesty of BCCI?

As I have said, the question of causation, whether under Community law or English law is for the English court to decide. As to Community law, the plaintiffs say that the very purpose of the provisions of the Directive of 1997 as to authorisation and supervision is to secure depositors effective protection against losses of the type suffered by the plaintiffs.

Causation is essentially a question of fact and common sense: see *Galoo Ltd v Bright Grahame Murray* [1994] 1 WLR 1360, 1374–1375, per Glidewell LJ. The question here, as Clarke J said [1996] 3 All ER 558, 626, is whether a jury, properly directed, could conclude that the Bank, by the alleged "sufficiently serious breaches" of its Community law obligations to the plaintiffs and/or by the alleged various repeated acts of misfeasance, caused loss to the plaintiffs. It is sufficient to establish liability if the plaintiffs prove that those acts or omissions were an effective cause; they do not have to prove that they were the only or main cause: see *Banque Bruxelles Lambert SA v Eagle Star Insurance Co Ltd* [1995] QB 375, 406, per Lord Bingham of Cornhill CJ. I question the wisdom of putting this matter to Clarke J as a preliminary issue, since so much must turn on the findings of fact in the case.

The judge held that, as a matter of common sense and notwithstanding that the immediate, cause of losses may have been the dishonesty of BCCI, the alleged misconduct of the Bank was capable of being an effective cause of the plaintiffs' losses. He seems to have tied that conclusion to his ruling that to establish misfeasance the plaintiffs had to prove that the Bank knew or believed or suspected that its misconduct would probably cause loss to them, though why that should make any difference on the issue of causation is not clear. He said, at pp 629–630:

> ". . . I can see no reason why, if the plaintiffs prove that the Bank knew that any particular act or omission would probably cause loss to a depositor or potential depositor (as a member of the class of depositors or potential depositors), it should not follow that the loss was caused by the act or omission complained of. Common sense suggests that in those circumstances there would be a direct and effective causal link between the act or omission and the loss. That would in my opinion be so even on the basis (as is the case on the facts) that another cause of the loss was

A fraud on the part of the managers. In these circumstances I do not think that it is helpful to try to analyse the many cases to which I was referred, but which do not discuss the question for decision. I do not think that in this context the issue of causation can be resolved in the way suggested by Mr Stadlen. Thus it is not sufficient to say that no duty of care was owed to the plaintiffs or that it makes no difference to the question of causation B whether the Bank acted honestly or dishonestly. Those points would I think have had force if the ingredients of the tort were as submitted on behalf of the plaintiffs, namely an act or omission which the Bank knew was unlawful and which foreseeably caused the loss. But on the view of the tort which I have expressed, the correct approach to causation in the case of the second limb is more akin to the approach to causation in the case of the first limb . . . In the present case, where the immediate cause C of the loss was the fraud of the managers, it appears to me that if it can be proved that the Bank knew that the managers would probably be guilty of fraud and, thus would probably cause the loss, the Bank would be liable on the basis that its misfeasance was an effective cause of the loss . . . common sense seems to me to lead to that result."

D Given that foreseeability may be one, though not a necessarily conclusive, factor in determining causation, in particular whether there has been a novus actus interveniens, it seems to me that it and all the other usual circumstances would fall for consideration on the facts at a full trial: see *Clerk & Lindsell on Torts* 17th ed (1995), p 55, para 2-26.

The plaintiffs' case is that a jury would have no difficulty in concluding E that, on the pleaded facts, the Bank's conduct was an effective cause of their losses. They say that the duties imposed on, and powers given to, the Bank by the Directive of 1977 and the Acts of 1979 and 1987 were intended to enable it to prevent or guard against depositors being put at risk as a result of incompetence or dishonesty by banks. The Bank's failure to comply with its duties resulted in its authorisation of BCCI to trade as a bank in this country and to continue to trade here with the result that BCCI attracted deposits F which, by reason of its incompetence and/or dishonesty it became unable to repay. But for the Bank's failures the plaintiffs would not have deposited moneys or would not have maintained their deposits with BCCI and so would not have suffered the claimed losses. Such losses were the likely consequence of the Bank's conduct and precisely the consequence which the duties imposed on the Bank had been intended to prevent.

G The Bank's case is that a defendant is not liable for losses caused by the independent acts of a third party unless he has assumed, or is deemed to have assumed, such a responsibility. Mr Stadlen put at the heart of his argument the following well known observation of Lord Sumner in *Weld-Blundell v Stephens* [1920] AC 956, 986:

H "In general (apart from special contracts and relations and the maxim respondeat superior), even though A is in fault, he is not responsible for injury to C which B, a stranger to him, deliberately chooses to do. Though A may have given the occasion for B's mischievous activity, B then becomes a new and independent cause . . . in a word, he insulates A from C."

A However, as Lord Neill pointed out, there are many reported cases since then in which a defendant has been held to have been an effective cause of a loss the immediate and direct cause of which was the voluntary and, even, unlawful act of a third party: see e g *De la Bere v Pearson Ltd* [1908] 1 KB 280; *London Joint Stock Bank Ltd v Macmillan and Arthur* [1918] AC 777; *Stansbie v Troman* [1948] 2 KB 48; *Davies v Liverpool Corpn* [1949] 2 All ER 175; *Dorset Yacht Co Ltd v Home Office* [1970] AC 1004 and *Ward v* B *Cannock Chase District Council* [1986] Ch 546. Bingham LJ in *Slipper v British Broadcasting Corpn* [1991] 1 QB 283, 298 indicated that the proposition of Lord Sumner "must today be treated with some reserve". As Lord Neill also observed, Lord Sumner was one of a bare majority in that case; and leading textbook writers regard it as a possible exception to the general rule "that a defendant is not relieved of liability by a foreseeable C intervening act, or, to use which it is submitted is a preferable formulation, by an intervening act which is in accordance with human nature": *McGregor on Damages* 15th ed (1988), pp 101–102, para 165.

In any event, as the issue is whether a defendant's conduct was an effective cause of claimed loss, Lord Sumner's dictum cannot logically apply to a case where the claim is that the defendant is in breach of duty, of supervision or otherwise, to guard against or prevent the act of a third party D causing the very loss that the duty was intended to prevent. As Lord Neill put it, common sense could not result in a conclusion that the Bank's failure to perform its duty was not an effective cause of the plaintiffs' losses. In *Smith v Littlewoods Organisation Ltd* [1987] AC, 241, 272 Lord Goff, after referring to the general idea in Lord Sumner's dictum that a person "ought not be held responsible in law for the deliberate wrongdoing of others", said:

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> "Of course, if a duty of care is imposed to guard against deliberate wrongdoing by others, it can hardly be said that the harmful effects of such wrongdoing are not caused by such breach of duty. We are therefore thrown back to the duty of care."

Although Lord Goff spoke in terms of a duty of care, because that F happened to be the basis for the cause of action in the case, there is no logical reason to limit its application as a matter of causation to cases of negligence; see also *Dorset Yacht Co Ltd v Home Office* [1970] AC 1004, 1030A–D, per Lord Reid and *Lamb v Camden London Borough Council* [1981] QB 625, 642D, per Oliver LJ.

*Yuen Kun Yeu v Attorney General of Hong Kong* [1988] AC 175 and *Davis v Radcliffe* [1990] 1 WLR 821 are not authorities to the contrary G because in each the issue was whether the regulator defendant owed a duty of care to depositors and potential depositors, not whether they had caused their losses. Nor is *Galoo Ltd v Bright Grahame Murray* [1994] 1 WLR 1360, in which an auditor of a company was held not liable in negligence to an investor in the company for alleged losses sustained as a result of relying on the company's audited accounts. The primary issue on the audited H accounts in that case was whether the auditor owed the investor a duty of care, and there is an obvious distinction between the role of an auditor facing a claim in negligence and a regulatory body like the Bank facing a claim in Community law and/or of misfeasance. An auditor lacks both the power and duty of the latter to control whether the relevant institution trades or not and, if it does trade, to subject it to restrictions.

A In my judgment, it follows that it is likely that the conduct of the Bank, as pleaded by the plaintiffs, would be capable, if proved, of having caused the plaintiffs' losses. For this purpose it is not necessary for them to prove that Bank had control over BCCI's day-to-day activities. It is sufficient that the Bank had a duty to guard against the occurrence of conduct of BCCI objectively likely to cause such losses, which, the plaintiffs claim, it could have done by its extensive powers of control in the Directive of 1977 and/or B under the Acts of 1979 and 1987: see *Lamb v Camden London Borough Council* [1981] QB 625 , 642D, per Oliver LJ However, as I have said, I do not regard this issue of causation as suitable for a preliminary determination.

*Potential depositors*

This preliminary question, on which the Bank cross-appeals, is whether C those plaintiffs who were merely potential depositors at the time of the alleged misfeasance causing their losses are entitled to recover damages for them.

The Bank's case is that the tort requires an interference with an antecedent right or interest of the plaintiff. Mr Stadlen submitted that, as a matter of policy, it would be wrong to permit right of recovery in respect of D future rights or interests by persons coming within the same class since it would expose the Bank to "liability in an indeterminate amount for an indeterminate time to an indeterminate class".

The plaintiffs' case is that there can be no public policy in protecting a public officer who has acted in a manner that he knew to be unlawful and who, in doing so, has caused widespread damage. The concern should only be to ensure that a public officer who made an honest attempt to do his duty E but who, as a result of some mistake, acted unlawfully is protected from liability. Imposing liability for losses to potential members of the class of persons affected by the misfeasance of public officers would not inhibit them in the performance of their duty any more than the imposition of liability to those who are actually members of the class at the time. A defendant can always avoid liability by choosing not to act in a way that he knows is F unlawful.

Clarke J [1996] 3 All ER 558, 632 rejected the Bank's policy argument, so far as misfeasance in public office is concerned, in the following words:

> "In the present context the defendant seems to me to be sufficiently protected by the stringent requirements of the tort, but if a public officer is guilty of an abuse of power, in circumstances where he knows that what G he is doing is unlawful and where he also knows that persons in the class of which the plaintiff is a member will probably suffer damage, I see no reason of either principle or policy why such a person should not recover his loss if he further proves that that abuse of power was an effective cause of his loss."

He left open the possibility that different considerations might apply to the H claim for damages for breach of a Community law obligation.

In view of Clarke J's narrow definition of the second form of the tort of misfeasance, he was probably right in concluding that potential depositors could, if they satisfied its "stringent requirements", recover damages against the Bank. However, his reasoning might well have been different if he had taken the view of the tort that I have taken. I am not saying that it should

have been, and I am not impressed with Mr Stadlen's recourse again to the public policy considerations in the negligence cases of *Yuen Kun Yeu v Attorney General of Hong Kong* [1988] AC 175 and *Davis v Radcliffe* [1990] 1 WLR 821. However, I respectfully share the view of Hirst and Robert Walker LJJ that this issue, like that of causation, would be more appropriately determined after a full trial on the facts.

*The July 1997 judgment striking out the claim*

I gratefully adopt, and cannot usefully add to, the helpful summary of the history of the matter by Hirst and Robert Walker LJJ, drawn, like the necessarily longer summary of Clarke J in his July 1997 judgment, from Bingham LJ's report. In that judgment Clarke J considered, on the pleadings, the report and some further documents shown to him, whether it would be impossible for the plaintiffs to establish, after further pleadings, documentary discovery and by way of interrogatories, further investigations and trial, that the Bank knew, suspected or believed that its alleged wrongdoing would probably cause them loss. He concluded that it would be impossible and, in consequence, dismissed the action on the grounds that it would be an abuse of process or vexatious or oppressive to allow it to proceed. He summarised his conclusions:

> "There is before the court all the evidence which is at present available to the plaintiffs. On the basis of that evidence the plaintiffs' claim is bound to fail. Having regard to all the circumstances of the case, but principally because of the work done by Bingham LJ and the contents of his 1992 report, there is 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 issue of the correctness of that ruling only falls to be determined if Clarke J rightly held that the plaintiffs have no cause of action under Community law and that they can only succeed in their claim for misfeasance in public office if they can prove that the Bank at least suspected that its wrongdoing would probably cause them damage. For the reasons I have given, I would hold that he was wrong in both respects and, therefore, that he was not entitled to dismiss the action for that reason. However, I consider and give my view on the issue against the possibility of further appeal, assuming for the purpose that the plaintiff must establish that the Bank knew, believed or suspected that its conduct would probably cause loss.

It is common ground for the purpose of this issue that, with one exception, the plaintiffs have a pleaded and arguable case that the Bank, at all relevant times and in relevant respects, knew, believed or suspected that its conduct or omissions in relation to BCCI were unlawful. That is one step further than Bingham LJ went, or considered it necessary to go, in his inquiry and report.

The exception is the question whether the Bank knowingly acted in breach of section 3(5) of the 1979 Act in granting BCCI a full licence, and thereafter in not revoking it, in reliance on the LBC's or IML's assurances, as a proxy for satisfying itself, that BCCI satisfied the statutory criteria for the grant when BCCI's "principal place of business" was not in Luxembourg,

A but in the United Kingdom. Clarke J found, in favour of the Bank, that, although BCCI's principal place of business at the material time was "almost certainly" in the United Kingdom, there was no material before him to lead him to disagree with Bingham LJ's conclusion in paragraphs 2.23–2.25 and 2.33 that the Bank made an innocent error in not appreciating that. Clarke J also found that, although there was material from which it was at least B arguable that the Bank must have known it could not be satisfied, as required by section 3(5)(b), "as to the nature and scope of the supervision exercised by" the LBC, there was no evidence that, if it had looked at the matter itself, it would have suspected the probability of damage to BCCI depositors.

I respectfully agree with Hirst and Robert Walker LJJ that the plaintiffs have an arguable case on the knowledge of illegality point under section 3(5). There was material before Clarke J that the Bank knew: that BCCI's C principal place of business was in London, not Luxembourg; that the LBC/IML could not supervise BCCI effectively; that the LBCs/IML's assurances were inadequate; and that BCCI did not meet the minimum statutory criteria for which those assurances were to stand proxy. However, unlike Hirst and Robert Walker LJJ, I shall consider the effect of this and the other alleged unlawful conduct of the Bank on the question whether it at least suspected D the probability of damage to BCCI depositors.

Clarke J [1996] 3 All ER 558, 633 had put the test, at its lowest for the plaintiffs in just that way, "suspects that his act will probably damage the plaintiff" or "a person in a class of which the plaintiff is a member". In his July 1997 judgment on the issue of striking out, he introduced his task in substantially the same terms:

E > "The question for decision at each stage is whether the Bank has shown that there is no realistic possibility of the plaintiffs establishing that the Bank knew, believed or suspected that the depositors or potential depositors would probably suffer loss if it did the act complained of or if it failed to do what the plaintiffs say that it ought to have done . . . that involves considering whether at each stage it knew, believed or suspected F that appropriate remedial steps would probably not be taken by others."

However, when he went on, stage by stage in the history of the matter, to consider whether Bingham LJ's report and the material before him met the test he had set, he asked himself a narrower and, from the plaintiffs' point of view, stricter question, namely, whether the Bank suspected that BCCI "would probably collapse". Later in the story, when remedial steps and G rescue packages were being considered, he variously expressed the question as whether the Bank suspected that "BCCI would probably collapse in the absence of . . . [such] steps" or that "BCCI would probably not be rescued" or, in relation to the "rescue" by the Abu Dhabi government in April 1990, whether it "must have known that losses to depositors or potential depositors were probable at or indeed from that time". Hirst and Robert Walker LJJ have suggested and adopted as correct a further tightening by H Clarke J of his original test, namely whether the Bank "actually foresaw BCCI's *imminent* collapse at each relevant stage" (my emphasis).

Before I consider the respective cases of the parties on the question whether Clarke J was entitled to strike out the plaintiffs' claim, I must again express my unease about his test—in both its original and varied forms.

First, I have great difficulty in giving practical application to the double-jointed notion in his original formulation of it [1996] 3 All ER 558, 633, of "suspicion" of "probable" damage as, presumably, something less than "actual knowledge" of "probable" damage, but not "actual knowledge" of "possible" damage. Also, I also do not understand his conjunction of "suspicion" of "probable" damage with the notion of recklessness in the form of failure to ascertain whether there is such probability, as distinct from an actuality. It is all very complicated, and, as the judge's reasoning in his July 1997 judgment suggests, his thought process, whatever his original formulation of the test, was as to whether the Bank knew of probable, as distinct from possible, damage.

Second, and more fundamentally, I have already expressed my disagreement with the judge's original test of foresight of probable damage, especially in the context of a misfeasance claim against a regulator. Sharpening the test, as he and Hirst and Robert Walker LJJ have done to one of foresight of probable (imminent) collapse of BCCI, simply drives home, in my view its Orwellian illogicality. 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.

Third, in my view, even if Clarke J's original formulation in his April 1996 judgment of suspicion of probable "damage" was correct, his approach in his July 1997 judgment of confining "damage" for this purpose to collapse, imminent or not, of BCCI was far too narrow and somewhat unreal. See, for example, his conclusion that the Bank's (possible) appreciation of Bank of America's assessment of its investment in BCCI as "potentially hazardous" because of sub-standard, doubtful or loss producing loans to over 3·5 times BCCI's capital, fell short of a recognition by the Bank that "BCCI . . . [would] probably collapse". There are many ways short of collapse of a bank which can result in damage to its depositors: it may not flourish so that it cannot pay the interest on such deposits in a timely way or in the amount undertaken; it may not be able to effect transactions on behalf of its depositors in as prompt or orderly a way as normal banking conventions demand or as customers had reason to expect when making the deposits; there may be delay in obtaining access to deposited funds because of the need to take steps to obtain support for the bank or due to arrangements short of winding up, such as composition with creditors or the appointment of a receiver or the taking possession by a debenture holder. All of those eventualities, damaging in different ways and degrees as they are

A to the integrity of a bank and to its customers, are the sort of damage against which the Acts of 1979 and 1987, in particular, the criteria for revocation in sections 6 and 11 respectively, were designed to provide protection. I draw particular attention to the "sweep-up" provision in each of those provisions. Act of 1979, section 6(1):

> "(h) the institution has failed to comply with any obligation imposed B by this Act; or (i) the institution has *in any other way* so conducted its affairs as *to threaten the interests of its depositors*."

Act of 1987, section 11(1):

> "(b) the institution has failed to comply with any obligation imposed on it by or under this Act . . . (e) *the interests of depositors or potential depositors* of the institution are *in any other way* threatened, whether by C the manner in which the institution is conducting or proposes to conduct its affairs or for any other reason." (My emphasis.)

I could not accept, certainly on an application to strike out the proceedings and without a full trial of the matter on the facts, that unless the Bank suspected the ultimate and most extreme form of damage to depositors D of BCCI, namely its collapse as a result of its arguable lack of supervision, it would not be liable for loss resulting from the occurrence of such an event. So to limit the plaintiffs' entitlement to recover would be a further and, in my view, unwarranted imposition on a plaintiff claiming damages for misfeasance in public office.

The plaintiffs' case is that, if necessary, they have arguably sufficient evidence to support the state of mind originally described by Clarke J, or that E there are reasonable grounds for supposing that sufficient evidence to prove it will become available for trial. In consequence, they say, their claim is not incurably bad. They maintain that the judge's review of the claim and his heavy reliance on Bingham LJ's report in determining that the claim was incurably bad was without precedent and inappropriate, and that his decision was irrationally wrong.

F The Bank's case is that the plaintiffs' submissions on the materials and evidence before the judge are wrong or misleading or speculative and that he was entitled to conclude on all the material before him that the case as pleaded, and as pleadable on such further material as there might be, was doomed to fail.

Clarke J explained his decision to strike out the claim in his July 1997 judgment:

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> "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 . . . 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 was applying his mind to the question what was the state of mind of the Bank at each stage. H In these circumstances . . . 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 . . . 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 . . . 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 during which BCCI was operating." (My emphasis.)

Given that heavy reliance by Clarke J on Bingham LJ's report as a justification for taking the exceptional course of striking out the claim as doomed to fail, it is important to consider Bingham LJ's terms of reference and the factual content of his report. He stated his understanding of his terms of reference "as calling for consideration of five broad questions":

> "(1) What did the United Kingdom authorities know about BCCI at all relevant times? (2) Should they have known more? (3) What action did the United Kingdom authorities take in relation to BCCI at all relevant times? (4) Should they have acted differently? (5) What should be done to prevent, or minimise the risk of, such an event recurring in the future?"

Whilst those questions encompassed some of the issues in this litigation, they did not invite, and Bingham LJ did not venture, any focused conclusions as to possible civil responsibility in whatever form in respect of any of his findings of deficient supervision by the Bank. Indeed, it is clear that he would not have regarded such an inquiry as an appropriate medium of reaching or expressing such conclusions, not least because, as he observed in his letter of submission of the report: "It should be made clear . . . that most of the criticisms made, and a number of factual conclusions, remain the subject of challenge."

In particular, save as to the applicability of section 3(5) of the 1979 Act (Report, paras 2.22–33), he did not in general comment expressly on the lawfulness of the Bank's conduct of its supervisory role, still less as to its knowledge at the time of any unlawfulness. Such lack of express finding of deliberate and knowing illegality is, in any event, of no assistance to the Bank on this issue, since it is common ground that the plaintiffs have an arguable case on that aspect of the case.

As to knowledge or suspicion of probable damage, it is plain from many comments of Bingham LJ in the report that his view was that, if the Bank, had done its job properly, it would have found out more about BCCI's dangerously unsatisfactory financial position earlier and might thus have averted much loss: see, in particular, his summary on this aspect in paragraph 2.484 of the report. He did not examine, or need to examine, in

A the same way as Clarke J did subsequently in this case, the gradations, and their legal significance, of the Bank's state of mind, from knowledge of probable damage through suspicion of probable damage to knowledge or suspicion of possible damage, or to probe, as he might have done, the overlapping implications of recklessness. On occasions, after expressing obvious scepticism about the Bank's inaction, he has, like Clarke J in his July 1997 judgment, confined his conclusion to there being no indication: that it B foresaw the collapse of the Bank (see e g Report, paras 2.329, 2.333 and 2.426), or he has left the matter by expressing doubt as to whether the Bank, in the light of its knowledge, could have averted such collapse (see e g report, paras 2.362 and 2.484), a matter of causation.

In addition to the different function of Bingham LJ's inquiry from the more focused issues for determination in this litigation, there are several C 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 D 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 treat Bingham LJ'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 E 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 F case for concluding that Bingham LJ had seen and fully tested all the material evidence available or likely to become available on the issues confronting the court in this case.

As the authorities to which Hirst and Robert Walker LJJ 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 G 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 Clarke J's conclusion about the Bank's state of knowledge has been gathered in or, which is as important, properly tested. In addition, quite separately from my rejection H of the judge's requirement of the need for proof of foresight of the probability of harm, I do not consider that he has posed the correct question in expressing it as one of the Bank's foresight of BCCI's probable collapse. In my view, there are no exceptional circumstances of the *Williams and Humbert Ltd v W & H Trade Marks (Jersey) Ltd* [1986] AC 368 sort or

otherwise to justify departing from the normal rule of leaving it to the trial judge. A

Accordingly, I would allow the plaintiffs' appeal and dismiss the Bank's cross-appeal on the matters in issue, save on the issues of causation and potential depositors, which I consider should be determined at trial.

[An appendix summarising the relevant provisions of the Banking Act 1979 is not set out in this report.] B

*Appeal dismissed with costs.*

21 January 1999. The court, on the plaintiffs' undertaking to apply to the House of Lords for a direction that the legal issues as to 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, granted them leave to appeal and the defendant leave to cross-appeal subject to the grant of leave to appeal on the facts being reserved to the House of Lords following their determination of the correct test for misfeasance in public office. C

12 May. The Appeal Committee of the House of Lords (Lord Steyn, Lord Hope of Craighead and Lord Millett) granted a petition by the first plaintiff and Bank of Credit and Commerce International SA (in liquidation) for leave to appeal on whether the facts alleged or capable of being alleged met the correct test for misfeasance in public office. D

*Solicitors: Lovell White Durrant; Freshfields.*

E

J R S

The plaintiffs, Three Rivers District Council and some 6,000 other creditors of the Bank of Credit and Commerce International SA ("BCCI") together with the Bank of Credit and Commerce International SA (in liquidation) appealed and the defendant, the Governor and Company of the Bank of England, coss-appealed. Leave to appeal and cross-appeal against its ruling on the preliminary issues was granted by the Court of Appeal on 21 January 1999. The House of Lords (Lord Steyn, Lord Hope of Craighead and Lord Clyde) granted the plaintiffs' petition for leave to appeal against the refusal of leave to re-re-amend the statement of claim on 12 May 1999. This was the hearing of the appeal on the legal issues. F

The facts are stated in the opinion of Lord Steyn. G

*Lord Neill of Bladen QC, David Vaughan QC, Richard Sheldon QC, Robin Dicker* and *Dominic Dowley* for the plaintiffs.

The First Council Banking Co-ordination Directive (77/780/EEC) required the Bank of England, as the United Kingdom "competent authority" to apply in practice its provisions concerning the authorisation and supervision of banks. Although there were discretionary aspects in many respects the provisions were imperative. H

The 1977 Directive was intended and designed to protect the savings of depositors. Indeed the predominant purpose of the Directive was the protection of depositors: see *Société Civile Immobilière Parodi v Banque*

A *H Albert de Bary et Cie* (Case C-222/95) [1997] ECR I-3899; *Criminal proceedings against Romanelli* (Case C-366/97) [1999] All ER (EC) 473; *Commission of the European Communities v Federal Republic of Germany* (Case 205/84) [1986] ECR 3755. In order to achieve this it imposed certain well defined obligations on the competent authorities of member states in relation to the authorisation and supervision of banks. It conferred on B depositors and potential depositors corresponding rights to have those obligations fulfilled. The Directive was enacted having regard in particular to article 57(2) of the EEC Treaty (now article 47 EC). The original text of article 57(2) made specific mention of "measures concerned with the protection of savings, in particular the granting of credit and the exercise of the banking profession". There is no warrant for saying that the many Directives adopted "having regard to" article 57(2) which are self evidently C concerned with the protection of savings are to be interpreted on the basis that they are incapable of conferring any rights on savers or depositors. The purpose of an authorisation/supervisory regime is not to equalise competition between banks but to ensure that depositors are protected: see *Institute of Chartered Accountants in England and Wales v Customs and Excise Comrs* [1999] 1 WLR 701. The recitals and articles of the Directive D itself emphasise the purpose of protecting depositors: see recitals 3, 4, 5 and 12 and articles 1, 2(1), 3, 4, 6, 7, 8, 12 and 14. On the correct interpretation of the word "may" in article 8: see *Julius v Bishop of Oxford* (1880) 5 App Cas 214; *In re Baker* (1890) 44 Ch D 262; *Padfield v Minister of Agriculture, Fisheries and Food* [1968] AC 997. Where a member state voluntarily accepts obligations under Community law it cannot escape its liabilities on the grounds that it need not have assumed them in the first place: see *Wagner* E *Miret v Fondo de garantía salarial* (Case C-334/92) [1993] ECR I-6911.

One of the purposes of the Banking Act 1979 and the Banking Act 1987 was to transpose into United Kingdom domestic law the provisions of the 1977 Directive. Neither Act literally transposes the wording of the Directive but, the source of the Acts being the Directive and their purpose being to achieve the result intended to be achieved by the Directive, the Acts are to be F and may properly be construed so as to give effect to the requirements of the Directive. There is nothing in either Act which prevents it being construed in such a way. The United Kingdom legislation thus provides the legal certainty and results required by the Directive in fact. However, notwithstanding that transposition the Bank failed in practice to apply the 1977 Directive and therefore breached its Community law obligations.

Article 189 EC provides that a Directive shall be binding "as to the results G to be achieved". It is not enough for member states simply to pass domestic legislation enacting the terms of a Directive. They are required to ensure that the results prescribed are in fact achieved: see *Commission of the European Communities v Federal Republic of Germany* (Case 29/84) [1985] ECR 1661; *Emmott v Minister for Social Welfare* (Case C-208/90) [1993] ICR 8; R *Commission of the European Communities v Kingdom of Belgium* H (Case 42/89) [1990] ECR I-2821; *Commission of the European Communities v Italian Republic* (Case C-287/91) [1992] ECR I-3515; *Commission of the European Communities v Federal Republic of Germany* (Case C-237/90); *Dillenkofer v Federal Republic of Germany* (Joined Cases C-178, 179 and 188–190/94) [1997] QB 259; *Norbrook Laboratories Ltd v Ministry of Agriculture, Fisheries and Food* (Case C-127/95) [1998] ECR

I-1531; *Carbonari v Università degli studi di Bologna* (Case C-131/97) [1999] ECR I-1103. See also the opinion of Advocate General Slynn in *Municipality of Hillegom v Hillenius* (Case 110/84) [1985] ECR 3947, 3951.

The long standing jurisprudence of the European Court of Justice recognises a close connection between the imposition of obligations on member states, including emanations or agencies of the states, and making those obligations effective by conferring upon individuals enforceable rights which correspond to them: see *Algemene Transport- en Expeditie Onderneming van Gend & Loos (NV) v Nederlandse administratie der belastingen* (Case 26/62) [1963] ECR 1; *Van Duyn v Home Office* (Case 41/74) [1975] Ch 358; *Becker v Finanzamt Münster-Innenstadt* (Case 8/81) [1982] ECR 53; *Francovich v Italian Republic* (Joined Cases C-6/90 and 9/90) [1995] ICR 722; *Brasserie du Pêcheur SA v Federal Republic of Germany*; *R v Secretary of State for Transport, Ex p Factortame Ltd (No 4)* (Joined Cases C-46/93 and C-48/93) [1996] QB 404; *Woolwich Equitable Building Society v Inland Revenue Comrs* [1993] AC 70. Community legislation, in particular Directives, can now be assumed to create rights unless there is some compelling reason to the contrary: see *Dillenkofer v Federal Republic of Germany* (Joined Cases C-178, 179 and 188–190/94) [1997] QB 259; *Verein für Konsumenteninformation v Österreichische Kreditversicherungs AG* (Case C-364/96) [1998] ECR I-2949; *Rechberger v Republic of Austria* (Case C-140/97) (unreported) 15 June 1999; *R v Secretary of State for Social Security, Ex p Sutton* (Case C-66/95) [1997] ICR 961; *Norbrook Laboratories Ltd v Ministry of Agriculture, Fisheries and Food* (Case C-127/95) [1998] ECR I-1531. A series of Directives dating from the late 1970s required member states to take necessary or appropriate measures to ensure the water or air was of a quality laid down by the Directive which Germany failed to implement. In each case, albeit the Directive in question said nothing in express terms about the conferment of rights, the court stated that the Directive was intended to create rights for individuals: see *Commission of the European Communities v Federal Republic of Germany* (Case C-131/88) [1991] ECR I-825; *Commission of the European Communities v Federal Republic of Germany* (Case C-361/88) [1991] ECR I-2567; *Commission of the European Communities v Federal Republic of Germany* (Case C-298/95) [1996] ECR I-6747.

It is a fundamental principle of Community law that national courts must protect rights which individuals derive from Community law: see *Amministrazione delle Finanze dello Stato v Simmenthal SpA* (Case 106/77) [1978] ECR 629; *Marks & Spencer plc v Comr of Customs and Excise* (unreported) 14 December 1999; Court of Appeal (Civil Division) Transcript No 2126 of 1999. The 1977 Directive gives rights to depositors to ensure that they are safeguarded from loss arising out of a failure to regulate effectively by the regulating authority. Depositors who suffer damage as a result of such failure are entitled to an effective remedy. The only possible effective remedy they have is an action for damages against the Bank. The Court of Appeal was wrong to rely on *R v International Stock Exchange of the United Kingdom and the Republic of Ireland Ltd, Ex p Else (1982) Ltd* [1993] QB 534 in concluding that it was not sufficiently clear that the 1977 Directive conferred rights on investors.

A The criteria which are required to be fulfilled for there to be liability to make reparation for harm caused by breaches of Community law are: (1) that the provision of Community law infringed was intended to confer rights on individuals; (2) that the infringement was sufficiently serious: see *R v Secretary of State for Transport, Ex p Factortame Ltd (No 5)* [2000] 1 AC 524; *R v HM Treasury, Ex p British Telecommunications plc* (Case C-392/93) [1996] QB 615; (3) that there was a direct causal link between the
B infringement and damage sustained by the injured party: see *Francovich v Italian Republic* (Joined Cases C-6/90 and 9/90) [1995] ICR 722; *Brasserie du Pêcheur SA v Federal Republic of Germany*; *R v Secretary of State for Transport, Ex p Factortame Ltd (No 4)* (Joined Cases C-46/93 and C-48/93) [1996] QB 404; *R v Ministry of Agriculture, Fisheries and Food, Ex p Hedley Lomas (Ireland) Ltd* (Case C-5/94) [1997] QB 139; *Dillenkofer v*
C *Federal Republic of Germany* (Joined Cases C-178, 179 and 188–190/94) [1997] QB 259. Those conditions are all satisfied in the instant case.

The only exception in the transposition of the 1977 Directive into English law is contained in section 1(4) of the 1987 Act which, for the first time in the banking legislation, seeks to prevent any claim by any person harmed as a result of the Bank's failure to carry out its obligations unless bad faith is shown. That provision is plainly inconsistent with Community law and
D must be disapplied: see *Brasserie du Pêcheur SA v Federal Republic of Germany; R v Secretary of State for Transport, Ex p Factortame Ltd (No 4)* (Joined Cases C-46/93 and C-48/93) [1996] QB 404; *Amministrazione delle Finanze dello Stato v SpA San Giorgio* (Case 199/82) [1983] ECR 3595.

The focus of the tort of misfeasance in public office is on the actions of public officers. Powers are conferred on public officers solely in order that
E they may use them, as intended, for the public good. The tort is concerned with an abuse of those powers: see *Jones v Swansea City Council* [1990] 1 WLR 54; *Elguzouli-Daf v Comr of Police of the Metropolis* [1995] QB 335; *Northern Territory v Mengel* (1995) 69 ALJR 527. Liability will arise in any case where a public officer fails to make an honest attempt to perform his duty or otherwise acts in bad faith, thereby causing loss. The
F nature of the necessary wrongful conduct has been expressed in a variety of ways in the cases as abuse of office, bad faith, improper motive, knowledge of unlawfulness, malice, misfeasance or as an absence of an honest attempt to perform the functions of the office: see, for example, *Smith v East Elloe Rural District Council* [1956] AC 736; *Dunlop v Woollahra Municipal Council* [1982] AC 158; *Calveley v Chief Constable of the Merseyside Police* [1989] AC 1228. The language used in the cases reflects the underlying basis
G of the tort. It emphasises that the basis of the liability is the absence of an honest attempt by the public officer to do his duty rather than any intention to injure: see *Northern Territory v Mengel* 69 ALJR 527; *Royal Brunei Airlines Sdn Bhd v Tan* [1995] 2 AC 378; *Cannock Chase District Council v Kelly* [1978] 1 WLR 1. It is well established by the authorities that malice, in the sense of an intention to injure (targeted malice) and knowledge by the
H defendant that he has no power to do the act complained of are alternative, not cumulative, grounds for liability. Either will be sufficient to ground liability for the tort: see *Dunlop v Woollahra Municipal Council* [1982] AC 158; *Bourgoin SA v Ministry of Agriculture, Fisheries and Food* [1986] QB 716; *R v Secretary of State for the Environment, Ex p Hackney London Borough Council* [1983] 1 WLR 524; *Jones v Swansea City Council* [1990]

1 WLR 54; *Elguzouli-Daf v Comr of Police of the Metropolis* [1995] QB 335; *X (Minors) v Bedfordshire County Council* [1995] 2 AC 633. If both forms required an intention to injure it would be illogical for the second form, but not apparently the first form, to require also that the public officer knew that he was acting unlawfully.

"Malice" as used in the early cases covered not merely spite or ill will but also improper motive. It had a precise legal meaning: see *Bromage v Prosser* (1825) 4 B & C 247; *Allen v Flood* [1898] AC 1; *Ferguson v Earl of Kinnoull* (1842) 9 Cl & Fin 251; *Sutton v Johnstone* (1786) 1 Durn & E 493. For a recent discussion of the legal meaning of malice: see *Gibbs v Rea* [1998] AC 786, 80, 87. The development of the tort can be seen from the early authorities: see *Turner v Sterling* (1671) 2 Vent 25; *Ashby v White* (1703) 14 St Tr 695; 2 Ld Raym 938; 3 Ld Raym 320; 1 Smith's LC (13th ed) 253; *Drewe v Coulton* (1787) 1 East 563n; *Williams v Lewis* (1797) Peake Add Cas 157; *Cullen v Morris* (1819) 2 Stark 577; *Whitelegg v Richards* (1823) 2 B & C 45; *Henly v Lyme Corpn* (1828) 5 Bing 91; *Tozer v Child* (1857) 7 E & B 377. There has been a gradual historical change in the usual meaning of malice. The legal meaning has been used less. Malice is now more generally taken to mean targeted malice. Thus when malice is now used in the first of the two forms of the tort it does mean an intention to injure. Three influential Commonwealth cases were: *Brasyer v Maclean* (1875) LR 6 PC 398; *Roncarelli v Duplessis* (1959) 16 DLR(2d) 689; *Farrington v Thomson and Bridgland* [1959] VR 286.

Imposing liability where a public officer fails to make an honest attempt to perform his duty or acts in bad faith is consistent with (1) the intention of Parliament: see section 1(4) of the Banking Act 1987; *In re McC (A Minor)* [1985] AC 528; *Lloyd v McMahon* [1987] AC 625; (2) Community law: see the opinion of Advocate General Léger in *R v Ministry of Agriculture, Fisheries and Food, Ex p Hedley Lomas (Ireland) Ltd* (Case C-5/94) [1997] QB 139, paras 141, 162, 206; *Brasserie du Pêcheur SA v Federal Republic of Germany; R v Secretary of State for Transport, Ex p Factortame Ltd (No 4)* (Joined Cases C-46/93 and C-48/93) [1996] QB 404; and (3) appropriate as a matter of principle and policy: see *Smith New Court Securities Ltd v Scrimgeour Vickers (Asset Management) Ltd* [1997] AC 254; *Everett v Griffiths* [1920] 3 KB 163.

The tort of misfeasance in public office is not to be equated with those torts which impose liability on private individuals for the intentional infliction of harm: see *Sanders v Snell* (1998) 157 ALR 491. There is also a clear distinction between torts based on negligence and those such as misfeasance which are based on deliberate wrongdoing: see *Rowling v Takaro Properties Ltd* [1988] AC 473, 503; *Northern Territory v Mengel* (1995) 69 ALJR 527, 547; *McMahon v Ireland* [1988] ILRM 610. Both *Yuen Kun Yeu v Attorney General of Hong Kong* [1988] AC 175 and *Davis v Radcliffe* [1990] 1 WLR 821 were concerned with whether a supervisor ought to be liable for a negligent breach of duty. They were not concerned with cases of deliberate wrongdoing. See also *Dorset Yacht Co Ltd v Home Office* [1970] AC 1004.

None of the cases prior to *Bourgoin SA v Ministry of Agriculture, Fisheries and Food* [1986] QB 716 described or discussed the tort in a way which suggested that it was necessary for the plaintiff to prove that loss was foreseeable, let alone that the public officer actually foresaw loss: see

A *Wilkinson v Downton* [1897] 2 QB 57. The only ratio of the case is that targeted malice is not required for the tort. Neither Mann J nor the Court of Appeal suggested that it was necessary, as opposed to sufficient, for the public officer who knew he was acting unlawfully, also to have foreseen that his action would cause loss. In none of the English cases which followed was there any indication that the tort now required targeted malice or knowledge that loss would occur: see *Calveley v Chief Constable of the Merseyside* B *Police* [1989] AC 1228; *Jones v Swansea City Council* [1990] 1 WLR 54; *Elguzouli-Daf v Comr of Police of the Metropolis* [1995] QB 335.

Some of the subsequent Commonwealth authorities, particularly in New Zealand, have wrongly proceeded on the basis that the rationale for the tort is the prevention of intentional injury by public officers and that what was merely held to be sufficient in the *Bourgoin* case [1986] QB 716 was in fact a C necessary ingredient of the tort: see *Micosta SA v Shetland Islands Council* [1984] 2 Lloyd's Rep 525; *Garrett v Attorney General* [1997] 2 NZLR 332. In *Rawlinson v Rice* [1997] 2 NZLR 651 the court indicates that liability will arise if loss was known to be likely or if the officer was recklessly indifferent to loss.

The Australian case *Northern Territory v Mengel* 69 ALJR 527 was D concerned with knowledge of unlawfulness. Any comments on a need to show knowledge of loss on the part of the public officer were therefore obiter. However, the majority held that it was sufficient to proceed on the basis, accepted in the *Bourgoin* case [1986] QB 716, that liability requires an act which the public officer knows involves a foreseeable risk of harm.

For the American approach: see *Berkovitz v United States* (1988) 486 US 531.

E There is no case in any jurisdiction which goes as far as Clarke J so as to hold that to establish liability it is necessary to show not merely that the public officer knew that he was acting unlawfully but also that he knew that his unlawful act would probably cause loss.

The authorities on the common law offence of misfeasance in public office show that criminal liability is established when it is established that a public F officer failed to make an honest attempt to perform his duty and there is no requirement to prove that he knew that loss to any individual was probable: see *R v Bembridge* (1783) 3 Doug 327; *R v Borron* (1820) 3 B & Ald 432; *R v Llewellyn-Jones* [1968] 1 QB 429; *R v Dytham* [1979] QB 722; *R v Bowden* [1996] 1 WLR 98. The crime and the tort should move hand in hand.

The "probable loss" requirement introduced into the tort by Clarke J would confer an unwarranted protection and, in effect, an G immunity upon public officers who have exercised public powers in the full knowledge that they were acting unlawfully. Under section 1(4) of the Banking Act 1987 there is no added requirement that knowledge, belief or suspicion of probable loss to the plaintiff must be shown in addition to bad faith. For the courts to introduce this further requirement would be to gloss the statute and to proceed in a manner contrary to the European Convention H for the Protection of Human Rights and Fundamental Freedoms. For the relevant principles: see *Lithgow v United Kingdom* (1986) 8 EHRR 329.

It is not necessary to show knowledge on the part of the officer as to the consequences of his actions, let alone knowledge that his actions would probably injure the plaintiff. Alternatively, if the ingredients of the tort do require a reference to loss it is sufficient for a plaintiff to show either (1) that

loss to him or to a person in a class of which he was a member was a foreseeable result of the public officer's acts or omissions or (2) that the public officer was reckless or recklessly indifferent as to whether his acts or omissions would or might result in loss to the plaintiff or a person in a class of which the plaintiff was a member. For the definition of recklessness: see *R v Caldwell* [1982] AC 341; *R v Lawrence (Stephen)* [1982] AC 510. See also: *R v Sinclair* [1968] 1 WLR 1246; *R v Grantham* [1984] QB 675; *R v Allsop* (1976) 64 Cr App R 29, *Welham v Director of Public Prosecutions* [1961] AC 103.

If the Bank was guilty of misfeasance in public office its conduct was an effective cause of loss to potential depositors, but the issue is unsuitable for determination at this stage.

*Nicholas Stadlen QC, Paul Lasok QC, Mark Phillips QC, David Anderson QC, Bankim Thanki, Rhodri Thompson* and *Ben Valentin* for the defendant. From the early cases taken as a whole misfeasance in public office emerged as a tort with three essential ingredients or defining characteristics: (1) An unlawful act intended to injure the plaintiff: see *Milward v Sargeant* (1786) 1 East 567; *Drewe v Coulton* (1787) 1 East 563n; *Harman v Tappenden* (1801) 1 East 555. Alternatively the deliberate and wilful doing of an act which will to the defendant's knowledge necessarily injure the plaintiff: see *Ashby v White* (1703) 14 St Tr 695; 2 Ld Raym 938; 3 Ld Raym 320; 1 Smith's LC (13th ed) 253; *Bassett v Godschall* (1770) 3 Wils KB 121; *Drewe v Coulton* 1 East 563n. Even in the cases where intention to injure or wilful injury to the plaintiff was not expressly referred to those elements were implicit in the facts: see *Cullen v Morris* (1819) 2 Stark 577; *Tozer v Child* (1857) 7 E & B 377; *Whitelegg v Richards* (1823) 2 B & C 45. (2) A dishonest abuse of power by a public officer: see *Ashby v White* (1703) 14 St Tr 695; 2 Ld Raym 938; 3 Ld Raym 320; 1 Smith's LC (13th ed) 253; *Burgoyne v Moss* (1768) 1 East 563n; *Williams v Lewis* (1797) Peake Add Cas 157; *Harman v Tappenden* 1 East 555; *Drewe v Coulton* 1 East 563n; *Cullen v Morris* 2 Stark 577; *Whitelegg v Richards* 2 B & C 45; *Tozer v Child* (1857) 7 E & B 377. (3) Interference with the plaintiff's enjoyment of an antecedent legal right: see *Ashby v White* 14 St Tr 695; 2 Ld Raym 938; 3 Ld Raym 320; 1 Smith's LC (13th ed) 253; *Bassett v Godschall* 3 Wils KB 121; *Drewe v Coulton* 1 East 563n; *Burdett v Abbott* (1811) 14 East 1; *Cullen v Morris* (1819) 2 Stark 577.

It is clear from the early cases that the requirement of malice was understood as requiring a positive mental element which had to be proved rather than the mere absence of just cause or excuse. It is also clear that the requirement was of a specifically dishonest mental element referable to the defendant's motive. Neither *Bromage v Prosser* (1825) 4 B & C 247 nor *Ferguson v Earl of Kinnoull* (1842) 9 Cl & Fin 251 was a misfeasance case. The approach in those cases has been expressly rejected: see *Atkinson v Newcastle and Gateshead Waterworks Co* (1877) 2 Ex D 441.

The ratio of *Bourgoin SA v Ministry of Agriculture, Fisheries and Food* [1986] QB 716 goes no further than that in the absence of a predominant intention to injure (targeted malice) a public officer can be liable for misfeasance if he has both knowledge of illegality and knowledge of loss that will necessarily be caused to the plaintiff by his actions. Thus if it is helpful to talk of the tort having two limbs, the second limb recognised by English

A law represents only a very narrow extension of the first. In fact the case does not justify a rigid distinction between two supposed limbs, targeted malice and other cases, as there is no sensible distinction between the two. It is implicit in the judgments of both Mann J and Oliver LJ that they considered an intention to injure the plaintiff to be a necessary ingredient in the tort and one which therefore has to be established in the second no less than the first limb, albeit that in the second limb it can be established by an oblique or B subsidiary intention to injure in contrast to targeted malice. Clarke J, the Court of Appeal and the Court of Appeal of New Zealand in *Garrett v Attorney General* [1997] 2 NZLR 332 were correct to conclude that seen in the context of other references in his judgment, when Mann J referred to the "foreseeable" consequence of injury, he must have meant "foreseen". It was an isolated discordant reference in a judgment otherwise abounding with C references to actual knowledge. The ratio, the dicta and the reasoning in the case provide no support for the proposition that there can be liability based on knowledge of illegality coupled with reasonable foreseeability or objective recklessness as to loss without the need to prove foresight of loss. There is no support for the proposition that earlier cases had already established that there could be such liability: see *Dunlop v Woollahra Municipal Council* [1982] AC 158; *R v Secretary of State for the* D *Environment, Ex p Hackney London Borough Council* [1983] 1 WLR 524; *Micosta SA v Shetland Islands Council* [1984] 2 Lloyd's Rep 525. Later cases do not contradict such an interpretation of the *Bourgoin* case: see *R v Secretary of State for the Home Department, Ex p Ruddock* [1987] 1 WLR 1482; *Jones v Swansea City Council* [1990] 1 WLR 54; *Irish Aerospace (Belgium) NV v European Organisation for the Safety of Air Navigation* E [1992] 1 Lloyd's Rep 383; *Elguzouli-Daf v Comr of Police of the Metropolis* [1995] QB 335; *X (Minors) v Bedfordshire County Council* [1995] 2 AC 633.

On several occasions since Clarke J's judgment his analysis of the tort has been approved by the Court of Appeal, Divisional Court and High Court: see *Tee v Lautro Ltd* (unreported) 16 July 1996; *Bennett v Comr of Police of the Metropolis* The Times, 24 October 1997; [1998] 10 Admin LR 245; *Elliott v* F *Chief Constable of Wiltshire* The Times, 5 December 1996; *Lam v Brennan* [1997] 3 PLR 22; *Ealing London Borough Council v Metha* (unreported) 24 April 1997; Court of Appeal (Civil Division) Transcript No 1449 of 1997; *R v Chief Constable of the North Wales Police, Ex p AB* [1999] QB 396; *Williams v Solicitor to the Department of Social Security* (unreported) 11 June 1997; Court of Appeal (Civil Division) Transcript G No 1183 of 1997; *Barnard v Restormel Borough Council* [1998] 3 PLR 27; *W v Essex County Council* [1999] Fam 90; *Gizzonio v Chief Constable of Derbyshire* (unreported) 26 March 1998; Court of Appeal (Civil Division) Transcript No 559 of 1998. The most recent case in which the House has made reference to the tort are *Calveley v Chief Constable of the Merseyside Police* [1989] AC 1228 and *Racz v Home Office* [1994] 2 AC 45. In neither case was the tort analysed or the authorities reviewed.

H The judgment in *Garrett v Attorney General* [1997] 2 NZLR 332 unequivocally rejected the proposition that reasonable foreseeability of loss is sufficient to found misfeasance and was expressly followed in *Rawlinson v Rice* [1997] 2 NZLR 651. See also: *Rowling v Takaro Properties Ltd* [1988] AC 473; *Simpson v Attorney General (Baigent's Case)* [1994] 3 NZLR 667.

The High Court of Australia in *Northern Territory v Mengel* (1995) 69 ALJR 527 in referring to acts done with "reckless indifference" to the harm which was likely to ensue had in mind recklessness in the subjective sense i e based on actual belief or suspicion as to loss. For clarification of Deane J's minority judgment see his reliance on *Owen and Gutch v Homan* (1853) 4 HL Cas 997. The majority expressly disapproved Smith J's dictum in *Farrington v Thomson and Bridgland* [1959] VR 286, 293 and *Brasyer v Maclean* (1875) LR 6 PC 398. See also the approach in *Sanders v Snell* (1998) 157 ALR 491; *Flanagan v Comr of the Australian Federal Police* (1996) 60 FCR 149; *Madden v Madden* (1996) 65 FLR 354, *J L Holdings Pty Ltd v Queensland* (unreported) 26 May 1995.

The Canadian authorities show that until recently a heavy emphasis was placed on acts aimed at the plaintiff. They do not provide support for the plaintiffs' definition of the tort: see *Gerrard v Manitoba* (1992) 98 DLR (4th) 167; *Alford v Canada* (1997) 31 BCLR(3d) 228; *Alberta (Minister of Public Works, Supply and Services) v Nilsson* (unreported) 3 June 1999; *Odhavji v Woodhouse* (unreported) 30 December 1998; *McGillivray v Kimber* (1915) 26 DLR 164; *Roncarelli v Duplessis* (1959) 16 DLR(2d) 689.

The central role of dishonesty both as a free standing ingredient of the tort and as underlying the requirement of knowledge of loss is fatal to the plaintiffs' claim. The material available does not support and is inconsistent with an arguable claim either that the Bank acted dishonestly or that it foresaw the plaintiffs' losses as a consequence of any unlawful acts or omissions on its part. There is overwhelming support in all the misfeasance authorities that dishonesty is an essential ingredient of the tort: see *Lam v Brennan* [1997] 3 PLR 22; *R v Chief Constable of the North Wales Police, Ex p AB* [1999] QB 396; *Barnard v Restormel Borough Council* [1998] 3 PLR 27.

Auld LJ concluded that policy does not require foresight of loss as a control mechanism and justified that by emphasising the need to prove dishonesty as a control mechanism in itself. However, Auld LJ regarded objective recklessness as necessarily dishonest. That reasoning is inconsistent with the decision in *Royal Brunei Airlines Sdn Bhd v Tan* [1995] 2 AC 378, the early misfeasance cases in which subjective bad faith is required and the long established principle that gross negligence may be evidence of bad faith but does not in itself amount to bad faith: see *Armitage v Nurse* [1998] Ch 241. If nothing more is required than mere knowledge or objective recklessness as to illegality, the absence of foresight of loss as a requirement would mean that there was no effective control mechanism: see *Candlewood Navigation Corpn Ltd v Mitsui OSK Lines Ltd* [1986] AC 1. Liability on the sparse foundation of mere knowledge of illegality would render the second limb of the tort unrecognisable as an alternative form of the first limb of targeted malice.

The Bank's primary case is that an intention to injure the plaintiff is a necessary ingredient of the tort. Where it is sought to prove oblique intention by reference to knowledge of consequences, nothing short of knowledge of necessary or inevitable loss, as distinct from probable loss, will suffice: see *R v Moloney* [1985] AC 905; *R v Nedrick* [1986] 1 WLR 1025; *Gollins v Gollins* [1964] AC 644; *Lonrho plc v Fayed* [1992] 1 AC 448; *Gerrard v Manitoba* (1992) 98 DLR (4th) 167; *Lonrho Ltd v Shell Petroleum Co Ltd (No 2)* (unreported) 1 December 1980, Parker J: 6 March

A 1981, Court of Appeal (Civil Division) Transcript No 51 of 1981; *Lonrho Ltd v Shell Petroleum Co Ltd (No 2)* [1982] AC 173; *DC Thomson & Co Ltd v Deakin* [1952] Ch 646; *Rookes v Barnard* [1964] AC 1129; *Horrocks v Lowe* [1975] AC 135; *Westminster City Council v Croyalgrange Ltd* [1985] 1 All ER 740.

Subjective recklessness as to loss is not sufficient to give rise to liability for B misfeasance: see *Attorney General v Newspaper Publishing plc* [1988] Ch 333. However, if some form of recklessness is sufficient to satisfy the requirements of the tort, i e dishonesty, only subjective, not objective, recklessness is sufficient. What converts failure to inquire or reckless indifference into dishonesty is actual anticipation of what such an inquiry would reveal if it were to be made: see *Owen and Gutch v Homan* (1853) C 4 HL Cas 997; *Jones v Gordon* (1877) 2 App Cas 616; *Agip (Africa) Ltd v Jackson* [1990] Ch 265; *Royal Brunei Airlines Sdn Bhd v Tan* [1995] 2 AC 378; *Compania Maritima San Basilio SA v Oceanus Mutual Underwriting Association (Bermuda) Ltd* [1977] QB 49. In *Northern Territory v Mengel* 69 ALJR 527 and *Garrett v Attorney General* [1997] 2 NZLR 332, where the question of recklessness was addressed, the line was drawn above objective recklessness or reckless indifference. For the meaning of D recklessness in the context of criminal proceedings: see *R v Cunningham* [1957] 2 QB 396; *R v Hyam* [1975] AC 55; *R v Scott* [1975] AC 819; *R v Terry* [1984] AC 374; *R v Parmenter; R v Savage* [1992] 1 AC 699.

It has always been a fundamental requirement of the tort of misfeasance that the public officer should interfere with the enjoyment by the plaintiff of an antecedent legal right or interest: see *Mogul Steamship Co Ltd v* E *McGregor, Gow & Co* [1892] AC 25. A person who was only a potential depositor with BCCI at the date of any alleged act of misfeasance does not have a cause of action in misfeasance.

The conclusions of the majority in the Court of Appeal in Chapter XIV of their judgment on the question of proximity are adopted. Proximity has a dual role in the tort. It is a free standing requirement for establishing F liability. It also explains why there is a requirement for (a) intention to injure the plaintiff or knowledge that the plaintiff will suffer loss and (b) interference with the plaintiff's antecedent legal right or interest. The plaintiffs' reliance on *Smith New Court Securities Ltd v Scrimgeour Vickers (Asset Management) Ltd* [1997] AC 254 is misplaced. See also: *Peek v Gurney* (1873) LR 6 HL 377.

G The change in the law advocated for by the plaintiffs would have an unquantifiable adverse impact on the public purse. First, the losses suffered by the victims of fraudulent acts of third parties would be transferred through the public purse to the innocent taxpayer. Second, there is an inevitable financial cost to the kind of defensive administration which would be likely to result from a wide ranging extension of liability for public officers across the spectrum of public bodies: *Stovin v Wise* [1996] AC 923; H *Yuen Kun Yeu v Attorney General of Hong Kong* [1988] AC 175. Judicial development of tortious liability should proceed incrementally: see *McLoughlin v O'Brian* [1983] 1 AC 410; *Minories Finance Ltd v Arthur Young* [1989] 2 All ER 105. For the approach in the United States: see *United States v Gaubert* (1991) 499 US 315.

*Lasok QC*, following. There is no relevant Community law obligation which was imposed on the Bank in the 1977 Directive. When properly construed the articles relied on by the plaintiffs do not impose obligations on the Bank not to licence BCCI, to supervise BCCI or to revoke BCCI's licence. Although there have been obiter remarks in which the European Court of Justice has noted that certain provisions in the 1977 Directive operate within a supervisory framework there has been no decision that the Directive actually imposed an obligation to supervise on the competent domestic authorities: see *Municipality of Hillegom v Hillenius* (Case 110/84) [1985] ECR 3947; *Criminal proceedings against Bullo and Bonivento* (Case 166/85) [1987] ECR 1583; *Criminal proceedings against Mattiazzo* (Case 422/85) [1987] ECR 5413. Voluntary incorporation of European Union provisions does not create obligations on member states: see *Wagner Miret v Fondo de garantía salarial* (Case C-334/92) [1993] ECR I-6911; *Leur-Bloem v Inspecteur der Belastingdienst/Ondernemingen Amsterdam* 2 (Case C-28/95) [1998] QB 182.

The problem addressed by the Directive was not any inadequacy in the protection of depositors by national law but problems arising from the fact that member states had their own differing protective systems for application in the banking sector. These could be used for protectionist purposes. Credit institutions which were subject to less stringent requirements enjoyed a competitive advantage over those subject to more stringent requirements. Also there was no assurance that a credit institution which was authorised in one member state could lawfully operate in another member state. The purpose of the Directive was to take a first step towards solving those problems: see the recitals to the Directive and *Commission of the European Communities v Italian Republic* (Case 300/81) [1983] ECR 449. The interests of investors were not paramount. The most that can be said is that the protection of savings was one of the objectives: see *Criminal proceedings against Romanelli* (Case C-366/97) [1999] All ER (EC) 473. The situation has not changed under subsequent legislation: see *Federal Republic of Germany v European Parliament* (Case C-233/94) [1997] ECR I-2405. The existence or otherwise of some obligation requiring the competent domestic authorities always to act in the interests of depositors was entirely a matter for domestic law and was not governed by European Community law.

In any event, the purpose of a Directive may be of assistance in construing the various obligations which it contains but it cannot be invoked for the purpose of inserting into the Directive obligations that find no reflection in the effective part of the Directive itself.

A Directive can only be relied upon before a national court as a source of individual rights where its provisions are unconditional and sufficiently precise as regards: (a) the content of the rights; (b) the identity of the persons entitled to those rights and (c) the identity of the state body against which the rights are claimed. That is so regardless of the route pursuant to which liability is asserted: see *Van Duyn v Home Office* (Case 41/74) [1975] Ch 358; *von Colson v Land Nordrhein-Westfalen* (Case 14/83) [1984] ECR 1891; *Becker v Finanzamt Münster-Innenstadt* (Case 8/81) [1982] ECR 53; *Francovich v Italian Republic* (Joined Cases C-6/90 and 9/90) [1995] ICR 722; *Brasserie du Pêcheur SA v Federal Republic of Germany; R v Secretary of State for Transport, Ex p Factortame Ltd (No 4)* (Joined

A Cases C-46/93 and C-48/93) [1996] QB 404; *R v Ministry of Agriculture, Fisheries and Food, Ex p Hedley Lomas (Ireland) Ltd* (Case C-5/94) [1997] QB 139; *R v HM Treasury, Ex p British Telecommunications plc* (Case C-392/93) [1996] QB 615; *Dillenkofer v Federal Republic of Germany* (Joined Cases C-178, 179 and 188–190/94) [1997] QB 259; *Comitato di Coordinamento per la Difesa della Cava v Regione Lombardia* (Case C-236/92) [1994] ECR I-483; *Carbonari v Università degli studi di Bologna* B (Case C-131/97) [1999] ECR I-1103; *Mighell v Reading* [1999] 1 CMLR 1251; *R v International Stock Exchange of the United Kingdom and the Republic of Ireland Ltd, Ex p Else (1982) Ltd* [1993] QB 534; *R v Medicines Control Agency, Ex p Smith & Nephew Pharmaceuticals Ltd; Primecrown Ltd v Medicines Control Agency* (Case C-201/94) [1996] ECR I-5819; *Criminal proceedings against Kolpinghuis Nijmegen BV* (Case 80/86) C [1987] ECR 3969. None of those conditions is satisfied with regard to the 1977 Directive.

Reference to other Directives are of no assistance, particularly the environmental directives, under which the Commission can bring an action but there is no right of individual action. The distinction between individual and Commission actions is vital: see *Commission of the European Communities v Italian Republic* (Case C-365/97) [1999] ECR D I-7773. More precise terms are required if there is to be a right of individual action.

Of particular importance, given that the plaintiffs seek to assert a directly effective right to reparation, is the absence from the 1977 Directive and all subsequent European Union legislation, of any reference to any right for anybody to be compensated for failure of supervision.

E *Lord Neill of Bladen QC* replied.

Their Lordships took time for consideration.

18 May 2000. **LORD STEYN**

My Lords, before 1979, with limited exceptions, a deposit-taking F institution in the United Kingdom required no licence or other authorisation before it commenced business. There was no statutory regulation of its subsequent performance. But the Bank of England operated an informal system of supervision. The Banking Act 1979, enacted to give effect in domestic law to the First Council Banking Co-ordination Directive of 12 December 1977 (77/780/EEC), introduced a statutorily based licensing system. Subsequently, the Banking Act 1987 replaced that system. For the G purposes of the First Council Banking Co-ordination Directive of 12 December 1977 (77/780/EEC), the Banking Act 1979 and the Banking Act 1987 the Bank of England was the supervisory authority in the United Kingdom. On 1 June 1998, pursuant to the Bank of England Act 1998, the Financial Services Authority assumed the Bank's powers and responsibilities under the Banking Act 1987, for the supervision of deposit-taking institutions.

H The Bank of Credit and Commerce International SA ("BCCI"), a Luxembourg corporation, had carried on business in the United Kingdom as a deposit taking institution before the 1979 Act came into force. When the 1979 Act came into force BCCI came under the aegis of the new system. In June 1980 the Bank of England granted a licence to carry on business as a

deposit-taking institution to BCCI. Until 5 July 1991 BCCI carried on business at its principal place of business in the City of London, and at many branches elsewhere in the United Kingdom. On this date, the Bank petitioned the High Court to appoint joint provisional liquidators to BCCI. The order was duly made. This resulted in the closure of BCCI in the United Kingdom, and led to the collapse of associated companies of BCCI in many jurisdictions. Thousands of depositors in the United Kingdom and elsewhere suffered substantial losses. The principal cause of the collapse of BCCI was fraud on a vast scale perperated at a senior level in BCCI.

The plaintiffs are more than 6,000 persons who claim to have been depositors with United Kingdom branches of BCCI. The action was started in May 1993. It is unnecessary to trace the earlier procedural history of this litigation. By August 1995 the claim was formulated in a re-amended statement of claim. This is a detailed and complicated pleading. It runs to 133 pages. In outline there are two alleged causes of action. The first is based on the tort of misfeasance in public office. The plaintiffs allege that named senior officials of the Banking Supervision Department of the Bank, but not two successive Governors of the Bank, acted in bad faith (a) in licensing BCCI in 1979, when they knew that it was unlawful to do so; (b) in shutting their eyes to what was happening at BCCI after the licence was granted; and (c) in failing to take steps to close BCCI when the known facts cried out for action at least by the mid 80s. The second cause of action is based on alleged breaches of Community law, and in particular breaches of the requirements of the Directive of 1977. The alleged breaches cover the initial licensing of BCCI, failure to supervise BCCI and failure to revoke the licence of BCCI. The total damages claimed are apparently of the order of £550m, plus interest. In a defence the Bank comprehensively denied the material allegations under both heads of claim.

On an application by the Bank, which was opposed by the plaintiffs, Clarke J ordered preliminary questions to be tried. This order was made on 19 July 1995 at a stage when discovery had not yet taken place. The judge directed that the questions should be tried on the assumption that the facts pleaded in the re-amended statement of claim were true. The preliminary issues were designed to test whether, if the pleaded facts are true, the causes of action based on the tort of misfeasance in public office and on breaches of community law are sustainable in law. The principal legal issues for decision were the precise ingredients of the tort of misfeasance in public office and whether the Directive of 1977 conferred rights of compensation on depositors.

The judge tried the preliminary issues as subsequently reformulated in stages. He delivered judgments on 1 April 1996, 10 May 1996 and 30 July 1997. The first two judgments are reported: [1996] 3 All ER 558 and 634. These impressive and careful judgments dealt with the preliminary issues. The judge ruled that both causes of action were unsustainable. The third is an unreported judgment which considered further proposed amendments to the plaintiff's statement of claim. The judge concluded (on the assumption that his earlier rulings were correct) that the plaintiff's claim was bound to fail and that it should be struck out. On 2 October 1997 Clarke J struck out the re-amended statement of claim and dismissed the action. He gave leave to appeal.

A By a majority (Hirst and Robert Walker LJJ) the Court of Appeal, ante, p 17 dismissed an appeal and for broadly similar reasons affirmed the decisions of Clarke J Auld LJ dissented. These judgments are lengthy and carefully reasoned.

The present appeal to the House, described as the plaintiffs' legal appeal, is brought by the plaintiffs with the leave of the Court of Appeal given on 21 January 1999. The order of the Court of Appeal contemplated that the B House would determine "the legal issues as to the correct test for misfeasance in public office . . . before any consideration of whether the facts alleged or capable of being alleged are capable of meeting that test". At the same time the legal appeal requires the House to consider whether properly construed the Directive of 1977 confers rights on depositors. Being the court of last resort in the United Kingdom the House may only determine C the Community law issue if the matter is truly acte clair.

In a disappointingly uninformative joint statement of facts and issues the issues arising on the appeal are formulated as follows. (1) Whether on the assumption that the facts pleaded in the re-amended statement of claim are true the Bank is capable of being liable to the plaintiffs for the tort of misfeasance in public office. (2) Whether on the assumption that the facts pleaded in the re-amended statement of claim are true, the Bank is capable of D being liable to the plaintiffs in damages for violation of the requirements of the First Council Banking Co-ordination Directive of 12 December 1977 (77/780/EEC). (3) Whether on the assumption that the facts pleaded in the re-amended statement of claim are true, the plaintiffs' losses are capable of having been caused in law by the acts or omissions of the Bank. (4) Whether on the assumption that the facts pleaded in the re-amended statement of E claim are true, the Bank is capable of being liable for the tort of misfeasance in public office to plaintiffs who were potential depositors at the time of any relevant act or omission of misfeasance by the Bank.

A strategy which differentiates between the issues affecting the tort of misfeasance in public office and the Community law issues is necessary. It is certainly possible to state, so far as is relevant, the ingredients of the tort of F misfeasance in public office. What will not be possible at this stage is to embark on the exercise contemplated by the agreed issues viz to test at this stage the sustainability of the case pleaded in the re-amended statement of claim against the requirements of the tort as stated by the House. In granting leave to appeal the Court of Appeal realistically foreshadowed that it would be necessary to postpone the question "whether the facts alleged or capable of being alleged are capable of meeting that test" i e the tort enunciated by G the House. That exercise will indeed require exploration at a further hearing. On the other hand, the Community law issue raises the question of interpretation whether the Directive of 1977 conferred rights of reparation on depositors. If the matter is acte clair, the House can rule dispositively on this part of the case.

H *Misfeasance in public office*

*The early history*

The history of the development of the tort has been described by Clarke J and in the judgments in the Court of Appeal: see also *Arrowsmith, Civil Liability and Public Authorities* (1992), pp 226–234. It is traceable to

the 17th century: *Turner v Sterling* (1671) 2 Vent 25. But the first solid basis for this new head of tort liability, based on an action on the case, is to be found in *Ashby v White* (1703), best reported in 1 Smith's LC (13th ed) 253. The view ultimately prevailed that an action would lie by an elector who was wilfully denied a right to vote by a returning officer. Despite the recognition of the tort in a number of cases in the 18th and 19th centuries, the Court of Appeal in 1907 denied the existence of the tort in *Davis v Bromley Corpn* [1908] 1 KB 170. But by 1981 the Privy Council described the tort as "well established": *Dunlop v Woollahra Municipal Council* [1982] AC 158, 172F. An examination of the ingredients of the tort was still required. The first step towards that goal was the judgments in the Court of Appeal in *Bourgoin SA v Ministry of Agriculture, Fisheries and Food* [1986] QB 716. The present case is the first occasion on which the House has been called on to review the requirements of the tort in a comprehensive manner. Your Lordships are however not asked to prepare an essay on the tort of misfeasance in public office but to state the ingredients of the tort so far as it may be material to the concrete disposal of the issues arising on the pleadings in this case.

*The matrix of the tort*

The coherent development of the law requires the House to consider the place of the tort of misfeasance in public office against the general scheme of the law of tort. It is well established that individuals in the position of the depositors cannot maintain an action for compensation for losses they suffered as a result of the Bank's breach of statutory duties: *Yuen Kun-Yeu v Attorney General of Hong Kong* [1988] AC 175; *Davis v Radcliffe* [1990] 1 WLR 821. Judicial review is regarded as an adequate remedy. Similarly, persons in the position of the depositors cannot sue the Bank for losses resulting from the negligent licensing, supervision or failure to withdraw a licence: *Yuen Kun-Yeu v Attorney General of Hong Kong*; *Davis v Radcliffe*. The availability of the tort of misfeasance in public office has been said to be one of the reasons justifying the non-actionability of a claim in negligence where there is an act of maladministration: *Calveley v Chief Constable of the Merseyside Police* [1989] AC 1228, 1238F. It is also established that an *ultra vires* act will not per se give rise to liability in tort: *X (Minors) v Bedfordshire County Council* [1995] 2 AC 633. And there is no overarching principle in English law of liability in tort for "unlawful, intentional and positive acts": see *Lonrho Ltd v Shell Petroleum Co Ltd (No 2)* [1982] AC 173, 187G in which the House refused to follow *Beaudesert Shire Council v Smith* (1966) 120 CLR 145, which was subsequently overruled by the Australian High Court in *Northern Territory v Mengel* (1995) 69 ALJR 527. The tort of misfeasance in public office is an exception to "the general rule that, if conduct is presumptively unlawful, a good motive will not exonerate the defendant, and that, if conduct is lawful apart from motive, a bad motive will not make him liable": *Winfield & Jolowicz on Tort,* 15th ed (1998), p 55; *Bradford Corpn v Pickles* [1895] AC 587; *Allen v Flood* [1898] AC 1. The rationale of the tort is that in a legal system based on the rule of law executive or administrative power "may be exercised only for the public good" and not for ulterior and improper purposes: *Jones v Swansea City Council* [1990] 1 WLR 54, 85F, per Nourse LJ; a decision reversed on the facts but not on the law by the House of Lords [1990] 1 WLR 1453, 1458.

A The tort bears some resemblance to the crime of misconduct in public office: *R v Bowden* [1996] 1 WLR 98.

*The ingredients of the tort*

It is now possible to consider the ingredients of the tort. That can conveniently be done by stating the requirements of the tort in a logical
B sequence of numbered paragraphs.

*(1) The defendant must be a public officer*

It is the office in a relatively wide sense on which everything depends. Thus a local authority exercising private-law functions as a landlord is potentially capable of being sued: *Jones v Swansea City Council* [1990]
C 1 WLR 54. In the present case it is common ground that the Bank satisfies this requirement.

*(2) The second requirement is the exercise of power as a public officer*

This ingredient is also not in issue. The conduct of the named senior officials of the Banking Supervision Department of the Bank was in the exercise of public functions. Moreover, it is not disputed that the principles
D of vicarious liability apply as much to misfeasance in public office as to other torts involving malice, knowledge or intention: *Racz v Home Office* [1994] 2 AC 45.

*(3) The third requirement concerns the state of mind of the defendant*

The case law reveals two different forms of liability for misfeasance in
E public office. First there is the case of targeted malice by a public officer, i e conduct specifically intended to injure a person or persons. This type of case involves bad faith in the sense of the exercise of public power for an improper or ulterior motive. The second form is where a public officer acts knowing that he has no power to do the act complained of and that the act will probably injure the plaintiff. It involves bad faith inasmuch as the
F public officer does not have an honest belief that his act is lawful.

The distinction, and the availability of an action of the second type, was inherent in the early development of tort. A group of cases which began with *Ashby v White* (1703) 1 Smith's LC (13th ed) 253, concerned the discretionary refusal of voting rights: see also *Drewe v Coulton* (1787) 1 East 563n; *Tozer v Child* (1857) 7 E & B 377; *Cullen v Morris* (1819) 2 Stark 577. In the second group of cases the defendants were judges of inferior
G courts, and the cases concerned liability of the judges for malicious acts within their jurisdiction: *Ackerley v Parkinson* (1815) 3 M & S 411; *Harman v Tappenden* (1801) 1 East 555; *Taylor v Nesfield* (1854) 3 E & B 724. These 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
H subjective bad faith. In the most important modern case in England the existence of the two forms of the tort was analysed and affirmed: *Bourgoin SA v Ministry of Agriculture, Fisheries and Food* [1986] QB 716. Clarke J followed this traditional twofold classification. He expressly held that the two forms are alternative ways in which the tort can be committed. The majority in the Court of Appeal commented on "a rather rigid

distinction between the two supposed limbs of the tort" and observed that there was "the need to establish deliberate and dishonest abuse of power in every case": ante, p 58F–G. As a matter of classification it is certainly right to say that there are not two separate torts. On the other hand, the ingredients of the two forms of the tort cannot be exactly the same because if that were so there would be no sense in the twofold classification. Undoubtedly there are unifying features, namely the special nature of the tort, as directed against the conduct of public officers only, and the element of an abuse of public power in bad faith. But there are differences between the alternative forms of the tort and it is conducive to clarity to recognise this.

The present case is not one of targeted malice. If the action in tort is maintainable it must be in the second form of the tort. It is therefore necessary to consider the distinctive features of this form of the tort. The remainder of my judgment will be directed to this form of the tort.

The basis for the action lies in the defendant taking a decision in the knowledge that it is an excess of the powers granted to him and that it is likely to cause damage to an individual or individuals. It is not every act beyond the powers vesting in a public officer which will ground the tort. The alternative form of liability requires an element of bad faith. This leads to what was a disputed issue. Counsel for the Bank pointed out that there was no precedent in England before the present case which held recklessness to be a sufficient state of mind to ground the tort. Counsel argued that recklessness was insufficient. The Australian High Court and the Court of Appeal of New Zealand have ruled that recklessness is sufficient: *Northern Territory v Mengel*, 69 ALJR 527; *Garrett v Attorney General* [1997] 2 NZLR 332; *Rawlinson v Rice* [1997] 2 NZLR 651. Clarke J lucidly explained the reason for the inclusion of recklessness [1996] 3 All ER 558, 581:

> "The reason why recklessness was regarded as sufficient by all members of the High Court in *Mengel* is perhaps most clearly seen in the judgment of Brennan J. It is that misfeasance consists in the purported exercise of a power otherwise than in an honest attempt to perform the relevant duty. It is that lack of honesty which makes the act an abuse of power."

The Court of Appeal accepted the correctness of this statement of principle, ante, pp 52–53. This is an organic development, which fits into the structure of our law governing intentional torts. 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.

Initially, counsel for the plaintiffs argued that in this context recklessness is used in an objective sense. Counsel said that the distinction was between subjective or advertent recklessness in the sense used in *R v Cunningham* [1957] 2 QB 396 and objective recklessness as explained in *R v Caldwell* [1982] AC 341 and *R v Lawrence (Stephen)* [1982] AC 510. The latter ingredient is present where in a case of an obvious risk the defendant failed to give any thought to the possibility of its existence: see *Smith & Hogan, Criminal Law*, 9th ed (1999), pp 60–69. *Smith & Hogan* trenchantly observed, at p 67:

A "The *Caldwell* test fails to make a distinction which should be made between the person who knowingly takes a risk and the person who gives no thought to whether there is a risk or not. And, on the other hand, it makes a distinction which has no moral basis. The person who, with gross negligence, fails to consider whether there is a risk is liable; but the person who considers whether there is a risk and, with gross negligence, B decides there is none, is not liable. The right solution, it is submitted, is to go back to the *Cunningham* test which appears to have been entirely trouble-free in practice."

Counsel argued for the adoption of the *Caldwell* test in the context of the tort of misfeasance in public office. The difficulty with this argument was that it could not be squared with a meaningful requirement of bad faith in C the exercise of public powers which is the raison d'être of the tort. But, understandably, the argument became more refined during the oral hearing and counsel for the plaintiffs accepted that only reckless indifference in a subjective sense will be sufficient. This concession was rightly made. The plaintiff must prove that the public officer acted with a state of mind of reckless indifference to the illegality of his act: *Rawlinson v Rice* [1997] 2 NZLR 651. Later in this judgment I will discuss the requirement of D reckless indifference in relation to the consequences of the act.

*(4) Duty to the plaintiff*

The question is who can sue in respect of an abuse of power by a public officer. Counsel for the Bank argued that in order to be able to claim in respect of the second form of misfeasance, there must be established "an E antecedent legal right or interest" and an element of "proximity". Clarke J did not enunciate a requirement of proximity. He observed [1996] 3 All ER 558, 584:

"If an officer deliberately does an act which he knows is unlawful and will cause economic loss to the plaintiff, I can see no reason in principle F why the plaintiff should identify a legal right which is being infringed or a particular duty owed to him, beyond the right not to be damaged or injured by a deliberate abuse of power by a public officer."

The majority in the Court of Appeal held that "the notion of proximity should have a significant part to play in the tort misfeasance, as it undoubtedly has in the tort of negligence": ante, p 57D. Counsel for the G Bank argued that both requirements are essential in order to prevent the tort from becoming an uncontrollable one. It would be unwise to make general statements on a subject which may involve many diverse situations. What can be said is that, of course, any plaintiff must have a sufficient interest to found a legal standing to sue. Subject to this qualification, principle does not require the introduction of proximity as a controlling mechanism in this corner of the law. The state of mind required to establish the tort, as already H explained, as well as the special rule of remoteness hereafter discussed, keeps the tort within reasonable bounds. There is no reason why such an action cannot be brought by a particular class of persons, such as depositors at a bank, even if their precise identities were not known to the bank. The observations of Clarke J are correct.



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In agreed issue 4 the question is raised whether the Bank is capable of being liable for the tort of misfeasance in public office to plaintiffs who were potentially depositors at the time of any relevant act or omission of misfeasance by the Bank. The majority in the Court of Appeal and Auld LJ held that this issue is unsuitable for summary determination. In my view this ruling was correct.

*(5) Causation*

Causation is an essential element of the plaintiffs cause of action. It is a question of fact. The majority in the Court of Appeal and Auld LJ held that it is unsuitable for summary determination. That is plainly correct. This conclusion disposes of agreed issue 3 so far as it relates to the tort of misfeasance.

*(6) Damage and remoteness*

The claims by the plaintiffs are in respect of financial losses they suffered. These are, of course, claims for recovery of consequential economic losses. The question is when such losses are recoverable. It would have been possible, as a matter of classification, to discuss this question under paragraph 3 in which the required state of mind for this tort was examined. It is, however, convenient to consider it under the traditional heading of remoteness.

On the assumption that the other requirements can be established, counsel for the plaintiffs argued that the plaintiffs should be able to recover all reasonably foreseeable losses suffered by them. In support of this argument he had the advantage of a powerfully reasoned dissenting judgment by Auld LJ Counsel for the Bank argued that the rule is more restrictive. He supported the conclusion of the majority in the Court of Appeal. The judge had held that the plaintiffs must prove that the Bank actually foresaw the losses to the plaintiff as a probable consequence. This part of the judgment at first instance provided the reason for the judge refusing to allow the proposed amendments and striking out the claims. The majority observed, ante, p 94F–G:

> "[The] formulation, however, may have been too favourable to the plaintiffs. In view of the stringent requirements of the tort of misfeasance in public office, the more appropriate question may be: 'Is it reasonably arguable that the Bank at any stage made an unlawful and dishonest decision knowing at the time that it would cause loss to the plaintiffs?' To that question, in the light of our analysis of the evidence, the answer is plainly 'No.'"

Counsel adopted this formulation as his primary submission. In the alternative he submitted that the test stated by Clarke J should be adopted.

It will be necessary to give a brief account of the decisions in which this issue was considered. It was first touched on in *Bourgoin SA v Ministry of Agriculture* [1986] QB 716. At first instance Mann J had spoken of foreseeable losses. Oliver LJ quoted and endorsed the relevant passage. In *Northern Territory v Mengel*, 69 ALJR 527, 540 the majority in the Australian High Court adopted a test of "a foreseeable risk of harm" for which it relied on the *Bourgoin* case. In the present case Clarke J concluded

A that in using the word "foreseeable" in the *Bourgoin* case Mann J must have meant "foreseen" and that the same applies to the adoption of the relevant passage by Oliver LJ. Before the judgments in the Court of Appeal in the present case the Court of Appeal of New Zealand adopted the conclusions of Clarke J as well as his explanation of the *Bourgoin* case: *Garrett v Attorney General* [1997] 2 NZLR 332; *Rawlinson v Rice* [1997] 2 NZLR 651. In B England the Court of Appeal and Divisional Court have on a number of occasions approved the reasoning of Clarke J. These decisions include the following: *Lam v Brennan and Torbay Borough Council* [1997] PIQR P488; *R v Chief Constable of the North Wales Police, Ex p AB* [1999] QB 396; *Barnard v Restormel Borough Council* [1998] 3 PLR 27; *W v Essex County Council* [1999] Fam 90. While it is unnecessary to discuss these decisions it is relevant to point out that in the *North Wales Police* case Lord Bingham of C Cornhill CJ expressed agreement with the view that the tort is only established if the officer had knowledge that he had no power to do the act complained of and that the act would probably injure the plaintiff. He paid tribute to the "extended consideration and most helpful summary" by Clarke J at [1999] QB 396, 413B.

The issues have been canvassed in great depth in written and oral D argument. Taking into account all the matters advanced the choice before the House can be narrowed down. So far as the majority was minded to adopt a stricter test that Clarke J, encapsulated in the words "knowing at the time that [the decision] *would* cause damage to the plaintiffs", they went too far. A test of knowledge or foresight that a decision *would* cause damage does not readily fit into the standard of proof generally required in the law of tort, and specifically in the case of intentional torts. Moreover, this test E unnecessarily emasculates the effectiveness of the tort. The real choice is therefore between the test of knowledge that the decision would probably damage the plaintiff (as enunciated by Clarke J) and the test of reasonable foreseeability (as contended for by counsel for the plaintiffs).

It is now necessary to return to the *Bourgoin* case. While all judges are prone to error and imprecise language from time to time, it is difficult to say F that Mann J and Oliver LJ used the word "foreseeable" when they meant "foreseen". It is sufficient to point out, as the majority of the Court of Appeal did [2000] 2 WLR 15, 48D, that there was no focus in the *Bourgoin* case on the choice which is now before the House. In these circumstances the observations in the *Bourgoin* case on this particular issue do not greatly assist.

It is true that Clarke J made new law. He relied on the special nature of G the tort. He reasoned from legal principle. It is true that the earlier decision of the majority in the *Mengel* case runs counter to the conclusion of Clarke J. But apart from the *Mengel* case there has however been no judicial support for a foreseeability test. And there has been no academic criticism of the view of Clarke J that a test of foreseeability is not enough in this tort. Given that his ground-breaking first instance judgment has been pored over by H many judicial and academic eyes, this is a factor of some significance. Nevertheless, it is necessary to consider the merits of the competing solutions from the point of view of principle and legal policy.

Enough has been said to demonstrate the special nature of the tort, and the strict requirements governing it. This is a legally sound justification for adopting as a starting point that in both forms of the tort the intent required

must be directed at the harm complained of, or at least to harm of the type suffered by the plaintiffs. This results in the rule that a plaintiff must establish not only that the defendant acted in the knowledge that the act was beyond his powers but also in the knowledge that his act would probably injure the plaintiff or person of a class of which the plaintiff was a member. In presenting a sustained argument for a rule allowing recovery of all foreseeable losses counsel for the plaintiffs argued that such a more liberal rule is necessary in a democracy as a constraint upon abuse of executive and administrative power. The force of this argument is, however, substantially reduced by the recognition that subjective recklessness on the part of a public officer in acting in excess of his powers is sufficient. Recklessness about the consequences of his act, in the sense of not caring whether the consequences happen or not, is therefore sufficient in law. This justifies the conclusion that the test adopted by Clarke J represents a satisfactory balance between the two competing policy considerations, namely enlisting tort law to combat executive and administrative abuse of power and not allowing public officers, who must always act for the public good, to be assailed by unmeritorious actions.

It is undoubtedly right, as counsel for the plaintiffs pointed out, that the mental element required for the tort of misfeasance in public office means that it is not an effective remedy to deal with state liability for breaches of Community law: *Brasserie du Pêcheur SA v Federal Republic of Germany; R v Secretary of State for Transport, Ex p Factortame Ltd (No 4)* (Joined Cases C-46/93 and C-48/93) [1996] QB 404. This consideration cannot, however, affect the decision of the House on the tort. If there is a gap it must be for Community law to fill it. And our courts will loyally apply Community law.

*Conclusion on misfeasance in public office*

For the reasons given the requirements of the tort are as set out.

*Community law*

My Lords, I have had the advantage of reading in draft the speech of Lord Hope of Craighead. He has demonstrated with compelling logic that the Directive of 1977 was not intended to confer rights on individual depositors. I am persuaded that the matter is truly acte clair.

*Future course of the proceedings*

It will be necessary to take account of the following matters. (1) The question whether the existing re-amended statement of claim reveals a sustainable cause of action based on the tort of misfeasance in public office will have to be considered at a further hearing of the Appellate Committee. (2) The next hearing will include the questions whether the Court of Appeal was right to affirm the decisions of Clarke J who refused to allow proposed amendments and struck out the action. (3) The shape of the case has been altered. The requirements of the tort, so far as relevant to the present case, have today been authoritatively stated. The allegations of breaches of Community law can no longer found a cause of action. (4) In these circumstances I take the view that at a further hearing there should be available a new draft pleading by the plaintiffs reflecting the altered position.

A And I draw attention to the fact that the Court of Appeal referred to "the facts alleged or capable of being alleged", that being a reference to the circumstances in which it is proper to strike out all action.

Given this untidy procedural position, it may be necessary when the parties are ready for an Appeal Committee to consider the future progress of the matter.

B

*Disposal*

For the reasons given by Lord Hope of Craighead, I would dismiss the appeal on Community law issues. In the light of my statement of the requirements of the tort of misfeasance in public office I would adjourn this part of the appeal for further argument.

C **LORD HOPE OF CRAIGHEAD** My Lords, I have had the advantage of reading in draft the speeches prepared by my noble and learned friends, Lord Steyn and Lord Hutton. As regards the tort of misfeasance in public office, I am in full agreement with what they have said as to the essential elements of the tort and the requirements which must be satisfied. The question with which I wish to deal is whether the plaintiffs have a basis for an action of D damages against the Bank in Community law.

*Community law*

The appellants' claim that they are entitled to damages for losses caused by breaches of Community law is based upon the following allegations. First, it is alleged that in June 1980 the Bank granted to BCCI SA a full E licence to carry on business as a deposit-taker deliberately contrary to the scheme laid down by the First Council Banking Co-ordination Directive (77/780/EEC) 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 ("the Directive of 1977") and the Banking Act 1979 when it knew that the relevant criteria in Schedule 2 to the 1979 Act were not fulfilled. Then it is alleged that, at all times after the grant F of the licence in June 1980 until the eventual closure of BCCI SA, the Bank continued to act contrary to the scheme laid down by the Directive of 1977, the 1979 Act and the Banking Act 1987 in the respects described in paragraphs 40–44 of the re-amended statement of claim. The essence of this further allegation is that, contrary to the scheme laid down by the Directive of 1977, the 1979 Act and the 1987 Act, the Bank concluded that it had no G discretion or power to revoke the licence to carry on business as a deposit-taker when it knew that BCCI SA had conducted and was conducting its affairs in a way which threatened the interests of its depositors. Furthermore, it permitted BCCI. Overseas to carry on a deposit-taking business when it knew that the business of that company was carried on in a manner which might affect the soundness of BCCI SA and place its depositors at risk. It is also alleged that throughout this period the Bank H failed to supervise both BCCI SA and BCCI Overseas to the detriment of the depositors.

Shortly put, and based upon these allegations, the plaintiffs' Community law argument proceeds along these lines. Under the EEC Treaty the Directive of 1977 has direct effect in the United Kingdom. The United

Kingdom discharged its obligations under the Directive by enacting the Banking Acts of 1979 and 1987. The Bank was at all material times the supervisory authority in the United Kingdom for the purposes of both the Directive of 1977 and the 1979 Act and the 1987 Act. The Bank as an emanation of the state is liable to the depositors for failing in its functions as supervisory authority to give full effect to the Directive of 1977. National courts are required by Community law to protect the rights which individuals derive from Community law, including those which are derived from a Directive. Accordingly the plaintiffs are entitled, as parties who were intended to benefit from the Directive of 1977, to rely upon its terms against the Bank in order to obtain damages.

The plaintiffs maintain that the Directive of 1977 was intended and designed to protect the savings of depositors. They say that, in order to achieve this purpose, it imposed certain well-defined Community law obligations on the competent authorities of member states in relation to the authorisation and supervision of banks, and that it conferred on depositors and potential depositors corresponding Community law rights against the competent authorities to have these obligations fulfilled. That being so, their Community law rights under the Directive of 1977 must prevail over the requirement in national law to prove bad faith or dishonesty as a prerequisite of the tort of misfeasance in public office under the common law. And they must prevail over the Bank's right to seek exemption from liability under section 1(4) of the Banking Act 1987, which provides:

> "Neither the Bank nor any person who is a member of its Court of Directors or who is, or is acting as, an officer or servant of the Bank shall be liable in damages for anything done or omitted in the discharge or purported discharge of the functions of the Bank under this Act unless it is shown that the act or omission was in bad faith."

The main issue of Community law which arises in this appeal from these allegations is whether the Bank is capable of being liable to the plaintiffs in damages for violations of the Directive of 1977, on the assumption that the facts pleaded in the re-amended statement of claim are true.

*The conditions of liability*

There appeared to be no real dispute between the parties on this point in the course of the argument which was presented to your Lordships, and both the majority judgment in the Court of Appeal, ante, pp 61–72 and the judgment of Auld LJ, ante, pp 99–103 have dealt with the whole matter in great detail and with admirable clarity. Nevertheless I think that it is necessary for me to explain at the outset of this chapter the criteria which must be fulfilled before a Directive can be relied upon as a source of rights before a national court.

Community law, as it has been developed by the European Court of Justice, is capable of conferring upon individuals the right to claim damages from a national authority by one or other or both of two distinct routes. The purpose of the right to claim damages is to ensure that provisions of Community law prevail over national provisions. This is because the full effectiveness of Community law would be impaired if individuals were unable to obtain redress in the national courts of the relevant member state when their rights were infringed by a breach of Community law: *Brasserie*

A *du Pêcheur SA v Federal Republic of Germany*; *R v Secretary of State for Transport, Ex p Factortame Ltd (No 4)* (Joined Cases C-46/93 and C-48/93) [1996] QB 404, 495, para 20. The first route by which the right to claim damages against the state or an emanation of the state for the non-implementation or misimplementation of a Directive may be asserted is based upon the principle of direct effect. This is the principle which was established in Community law by B *NV Algemene Transport- en Expeditie Onderneming van Gend & Loos v Nederlandse administratie der belastingen* (Case 26/62) [1963] ECR 1. The second route is based upon the principle of state liability.

In the *van Gend & Loos* case it was held that article 12 of the EEC Treaty (now article 25 EC) prohibiting customs duties on imports and exports had to be interpreted as producing direct effects and creating individual rights C which national courts must protect. The decision in that case has been applied by the European Court in a large number of cases to other articles of the Treaty which the court has construed as having direct effect in member states. Later decisions of the European Court have made it clear, in the light of the provisions of the third paragraph of article 189 of the EEC Treaty (now article 249 EC) which provides that a Directive shall be binding as to the result to be achieved upon each member state, that Directives as well as D articles of the Treaty are capable of conferring directly effective rights upon individuals provided certain conditions are satisfied. In *Becker v Finanzamt Münster-Innenstadt* (Case 8/81) [1982] ECR 53, 70–71 the court made the following observations as to the conditions for the application of the direct effect principle to a Directive:

E "22. It would be incompatible with the binding effect which article 189 ascribes to Directives to exclude in principle the possibility of the obligations imposed by them being relied on by persons concerned.

"23. Particularly in cases in which the Community authorities have, by means of a Directive, placed member states under a duty to adopt a certain course of action, the effectiveness of such a measure would be diminished if persons were prevented from relying upon it in proceedings F before a court and national courts were prevented from taking it into consideration as an element of Community law.

"24. Consequently, a member state which has not adopted the implementing measures required by the Directive within the prescribed period, may not plead, as against individuals, its own failure to perform the obligations which the Directive entails.

G "25. Thus, wherever the provisions of a Directive appear, as far as their subject matter is concerned, to be unconditional and sufficiently precise, those provisions may, in the absence of implementing measures adopted within the prescribed period, be relied upon as against any national provision which is incompatible with the Directive or in so far as the provisions define rights which individuals are able to assert against the state."

H Two things should be noted about the observations which the European Court made in paragraph 25 of its judgment. The first is that in order for there to be liability under this principle, which the Court of Appeal in the judgments in this case has described as *Becker*-type liability, the rights said to have been conferred by the Directive must be "unconditional and

sufficiently precise". The second is that a distinction is made between relying upon a Directive to nullify some provision in national law which is incompatible with the Directive in order to give effect to rights under Community law, and relying upon Community law itself to give a right to claim damages in the national courts for breach of an obligation of Community law. The plaintiffs seek to rely on each of these two branches in this case.

In *Francovich v Italian Republic* (Joined Cases C-6/90 and C-9/90) [1995] ICR 722 the European Court established the conditions for state liability, which is described in the judgments in the Court of Appeal as *Francovich*-type liability. The European Court had to deal with two issues in that case. The first concerned the direct effect of the provisions of Council Directive (80/987/EEC) which determined the rights of employees in the event of their employers' insolvency and which Italy had failed to implement: this was *Becker*-type liability. The second concerned the existence and scope of the liability of the state for damage resulting from Italy's breach of its obligations under Community law: this was *Francovich*-type liability. In regard to the direct effect route the court said, at p 768, para 12, that there were three points to be considered, in order to see whether the provisions of the Directive which determined whether the rights of employees were, in *Becker*-type liability terms, "unconditional and sufficiently precise" to enable them to recover under this route. These were: "the identity of the persons entitled to the guarantee provided [by the Directive] the content of that guarantee and the identity of the person liable to provide the guarantee."

In regard to the conditions for state liability for failure to implement a Directive, the European Court made these observations, at p 772:

> "39. Where, as in this case, a member state fails to fulfil its obligation under the third paragraph of article 189 of the Treaty to take all the measures necessary to achieve the result prescribed by a Directive, the full effectiveness of that rule of Community law requires that that there should be a right to reparation provided that three conditions are fulfilled.
>
> "40. The first of these conditions is that the result prescribed by the Directive should entail the grant of rights to individuals. The second condition is that it should be possible to identify the content of those rights on the basis of the provisions of the Directive. Finally, the third condition is the existence of a causal link between the breach of the state's obligation and the loss and damage suffered by the injured parties.
>
> "41. Those conditions are sufficient to give rise to a right on the part of individuals to obtain reparation, a right founded directly on Community law."

As Lord Slynn of Hadley said in *R v Secretary of State for Transport, Ex p Factortame Ltd (No 5)* [2000] 1 AC 524, 538, state liability is conditional on there being a grant of rights to individuals by the Directive, that the contents of these rights is clear and that the loss suffered is shown to be caused by the state's breach.

In *Dillenkofer v Federal Republic of Germany* (Joined Cases C-178, 179 and 188–190/94) [1997] QB 259 the court restated the conditions for state liability in the light of a number of cases with which it had dealt subsequently to the *Francovich* case. It did so in a manner which, in

A paragraph 22 of the judgment, applied the tests which *Francovich* had laid down for the direct effect, or *Becker*-type, route to the state liability, or *Francovich*-type, route. The relevant paragraphs are set out in the judgment, at pp 291–292:

> "20. The court has held that the principle of state liability for loss and damage caused to individuals as a result of breaches of Community law B for which the state can be held responsible is inherent in the system of the Treaty: *Francovich v Italian Republic* (Joined Cases C-6/90 and C-9/90) [1995] ICR 722, 772, para 35; *Brasserie du Pêcheur SA v Federal Republic of Germany*; *R v Secretary of State for Transport, Ex p Factortame Ltd (No 4)* (Joined Cases C-46/93 and C-48/93) [1996] QB 404, 496, para 31; *R v HM Treasury, Ex p British* C *Telecommunications plc* (Case C-392/93) [1996] QB 615, 654, para 38 and *R v Ministry of Agriculture, Fisheries and Food, Ex p Hedley Lomas (Ireland) Ltd* (Case C-5/94) [1997] QB 139, 160, para 24. Furthermore, the court has held that the conditions under which state liability gives rise to a right to reparation depend on the nature of the breach of Community law giving rise to the loss and damage: *Francovich* [1995] ICR 722, 772, para 38; *Brasserie du Pêcheur* [1996] QB 404, 497, D para 38, and *Hedley Lomas* [1997] QB 139, 160, para 24.
>
> "21. In *Brasserie du Pêcheur*, at p 499, paras 50 and 51; *British Telecommunications* [1996] QB 615, 655, paras 39 and 40, and *Hedley Lomas*, at p 160, paras 25 and 26, the court, having regard to the circumstances of the case, held that individuals who have suffered damage have a right to reparation where three conditions are met: the E rule of law infringed must have been intended to confer rights on individuals, the breach must have been sufficiently serious, and there must be a direct causal link between the breach of the obligation resting on the state and the damage sustained by the injured parties.
>
> "22. Moreover, it is clear from the *Francovich* case which, like the present cases, concerned non-transposition of a Directive within the prescribed period, that the full effectiveness of the third paragraph of F article 189 of the Treaty requires that there should be a right to reparation where the result prescribed by the Directive entails the grant of rights to individuals, the content of those rights is identifiable on the basis of the provisions of the Directive and a causal link exists between the breach of the state's obligation and the loss and damage suffered by the injured parties.
>
> G "23. In substance, the conditions laid down in that group of judgments are the same, since the condition that there should be a sufficiently serious breach, although not expressly mentioned in *Francovich*, was nevertheless evident from the circumstances of that case."

In the Court of Appeal it was observed in the majority judgment, ante, p 68G–H that the main difference between the parties, as to the basic H principles to be applied, was as to whether a Directive, once it has been transposed into national law, ceases to be the immediate source of rights enforceable by an individual claimant in his national court. For the Bank it was submitted that there is a clear and well-established principle that the Directive is supplanted at that stage by rights under the national law. For the plaintiffs it was submitted that, as the obligation on member states is to

ensure that the Directive is applied in practice, a Directive can be the immediate source of enforceable rights under the *Becker*-type principle even if it has been transposed, and correctly transposed, into national law. This is in order to ensure its effectiveness as to the result to be achieved in conformity with the third paragraph of article 249 (ex 189) EC.

The majority in the Court of Appeal, ante, p 71G found some support in *Norbrook Laboratories Ltd v Ministry of Agriculture, Fisheries and Food* (Case C-127/95) [1998] ECR I-1531 for the view that there may be a category of Directives in relation to which a member state's obligation of proper implementation is not restricted to a once-for-all legislative process, but also requires a continuing administrative process. Auld LJ, who was of the opinion that the plaintiffs were entitled to rely on *Francovich*-type liability, regarded the debate on this point as academic: ante, p 133E. But, in the course of his development of this point, ante, pp 133C–136C, he gave two further reasons for rejecting the Bank's argument that implementation of the Directive deprived the plaintiffs of recourse to the Directive under the *Becker*-type principle of liability to which, in my view, great weight should be attached. Although the debate on this issue did not receive the same prominence in the arguments which were presented to your Lordships, as Mr Lasok for the Bank addressed the main part of his submissions to the terms of the Directive, I think that Auld LJ's observations are worth recording here in order to set the scene for an examination of the Directive.

The first point which Auld LJ made was that it could be said that the precondition of liability for damages of bad faith on the part of the Bank or its officers in a common law action for misfeasance in public office and as introduced in section 1(4) of the Banking Act 1987, to the extent that they derogate from the Directive, "misimplement" the Directive: p 133E–F. His second point was that recent decisions of the European Court, including the *Norbrook* case, indicate that in the main the court is indifferent to the precise route by which it gives effect to a Directive. As he pointed out, at p 135E–H, neither the 1979 Act nor the 1987 Act transposed the Directive of 1977 word for word, and the rights of redress which he found in the Directive were wider than those dependent on proof of bad faith as required by section 1(4) of the 1987 Act and the common law action of misfeasance in public office. Having noted the differences between the two approaches—one that the United Kingdom legislation properly construed effectively implemented the Directive, the other that it did not fully implement the Directive with the consequence that the United Kingdom courts must have direct recourse to it—he concluded, at p 136A–C:

> "As Josephine Steiner observed in 'Coming to Terms with EEC Directives' (1990) 106 LQR 144, 146, the question whether a Directive has been correctly implemented can only be assessed by reference to the Directive itself, with the result that it can rarely be disregarded. Clearly, as a result of the court's ready application of the *Francovich* principle, the two approaches can shade into one another. Whichever route is taken, the answer on matters of *Community law* should be the same, with the result that it should prevail over United Kingdom law, including the common law as to misfeasance in public office and section 1(4) of the 1987 Act, where the latter frustrates it: see *Amministrazione delle Finanze dello Stato v Simmenthal SpA* (Case

A 106/77) [1978] ECR 629, 643–645, paras 16–26; the *Brasserie du Pêcheur* case [1996] QB 404, 502, paras 72–73."

In the result, although the appellants' case under Community law is put in different ways and is based upon both types of liability, the conditions which the plaintiffs must satisfy in order to establish a right to damages against the Bank under each route are so closely analogous that they can be taken to be, B at this stage of case, the same. The critical questions in this appeal, following the language of paragraph 22 of the judgment in the *Dillenkofer* case, are whether the Directive of 1977 entails the grant of rights to individual depositors and potential depositors and whether the content of those rights is identifiable on the basis of the provisions of the Directive.

C *The legislative basis and purpose of the Directive of 1977*

Clarke J [1996] 3 All ER 558, 602A held, contrary to the submissions which Mr Stadlen for the Bank had made to him, that an important underlying purpose of the Banking Acts 1979 and 1987 was to protect savers, including both existing savers and future savers, and that the same was true of the Directive of 1977. But he went on to say, at p 602B, that this was not enough to impose any obligation on the Bank which gave rise to a D right in the savers to claim damages for a breach of it. Having examined the terms of the Directive, he held at p 614J, that it was not intended to confer rights upon savers, even although the underlying purpose of supervision of credit institutions was to be for their benefit. In the Court of Appeal, ante, p 74D the majority understood the Bank's position to be that it did not dispute that one of the Directive's purposes was the protection of depositors. E Auld LJ, at p 103F–G, put the matter in this way:

"It is plain that one of the purposes of the Directive was the protection of depositors. The plaintiffs say it was the main purpose. The Bank, to the extent that it recognises it as a purpose of the Directive at all, says it was subsidiary to that of beginning the process of harmonisation. As I have mentioned, the judge regarded it as an important underlying F purpose."

It was suggested by the plaintiffs in the course of the hearing before your Lordships that the Bank had changed its position on this point having realised, as Lord Neill put it, that once the concession was made that one of the purposes of the Directive was the protection of depositors it was on a slippery slope from which it now wished to extricate itself. In my view G however the position which the Bank has adopted both in its written case and in the oral argument advanced on its behalf by Mr Lasok is based upon a more substantial argument than that which might be thought to have been suggested by that criticism. I am not convinced that there has been, in substance, any change of position on the part of the Bank from its position as Auld LJ understood it to be. There is however a more important point. The plaintiffs still rely, and take as their starting point on this whole issue, on the H proposition that one of the purposes of the Directive was to protect depositors. This is a significant step in the argument which they then advance that the Directive also imposed obligations on the Bank which conferred corresponding rights upon which they are entitled to base their claim of damages. The question which the Bank has raised is not only as to

the accuracy of the plaintiffs' description of the purpose of the Directive but also as to its relevance as a starting point to an examination of the articles of the Directive in order to discover what rights, if any, they conferred on depositors.

The plaintiffs' submission is that it is evident from the legislative background to the Directive, its terms and cases decided by the European Court that a principal purpose of the Directive of 1977 was the protection of depositors. They rely on article 57(2) of the EEC Treaty with reference to which the Directive of 1977 was enacted, on observations in the opinion of the Economic and Social Committee ("ECOSOC") mentioned in the preamble to the Directive, on recitals and articles set out in the Directive and on several decisions of the European Court of which the most important is *Société Civile Immobilière Parodi v Banque H Albert de Bary et Cie* (Case C-222/95) [1997] ECR I-3899.

I do not think that the plaintiffs derive any assistance from article 57(2) of the EEC Treaty (now, in a revised form, article 47(2) EC). Its relevance is not in doubt. Article 253 EC (formerly article 190) requires Community instruments such as Directives to state the reasons on which they are based and to refer to any proposals or opinions which were required to be obtained pursuant to the Treaty. The duty to give reasons will normally require specification of the Treaty article on which the measure was based: *Craig and de Búrca, EU Law, text, cases and materials*, 2nd ed (1998), p 120. In *Commission of the European Communities v Council of the European Communities* (Case 45/86) [1987] ECR 1493 (the Tariff Preferences case) a Council measure was annulled in part by the European Court because the legal basis of the measure had not been specified. In this case the only article of the Treaty which is referred to by the Directive of 1977 is article 57. This is one of a group of articles which appear in Title III (free movement of persons, services and capital), Chapter 2 (Right of Establishment) of the Treaty. Paragraphs (1) and (2) of article 57, in the terms which were in force in 1977, provided:

> "1. In order to make it easier for persons to take up and pursue activities as self-employed persons, the Council shall, on a proposal from the Commission and after consulting the Assembly, acting unanimously during the first stage and by a qualified majority thereafter, issue Directives for the mutual recognition of diplomas, certificates and other evidence of formal qualifications. 2. For the same purpose, the Council shall, before the end of the transitional period, acting on a proposal from the Commission and after consulting the Assembly, issue Directives for the co-ordination of the provisions laid down by law, regulation or administrative action in member states concerning the taking up and pursuit of activities as self-employed persons. Unanimity shall be required on matters which are the subject of legislation in at least one member state and measures concerned with the protection of savings, in particular the granting of credit and the exercise of the banking profession, and with the conditions governing the exercise of the medical and allied, and pharmaceutical professions in the various member states. In other cases, the Council shall act unanimously during the first stage and by a qualified majority thereafter."

A The purpose to which reference is made in the first line of article 57(2) is that of the mutual recognition of qualifications which is the subject of article 57(1). The plaintiffs base their argument that a purpose of the Directive was to protect "savers" on the reference to the protection of "savings" in the second sentence of article 57(2). But this reference appears in provisions which laid down those matters in regard to which proposals were to be dealt with unanimously and those which could be dealt with by B qualified majority. The granting of credit and the exercise of the banking profession are taken as two examples of "measures concerned with savings." This seems to me to be no more than a recognition that an ability to protect savings is one of the qualifications which member states will normally require those who wish to grant credit or exercise the banking profession to satisfy. Recognition that this was so, that such measures would need to be C co-ordinated throughout member states and the making of provision for the voting formula to be adopted in regard to such matters is one thing. A purpose to direct that provision must be made for the protection of savers and depositors under Community law over and above the protections available under the national law of each member state is quite another. I do not find anything in the wording of the article as a whole to suggest that the protection of individual depositors and potential depositors against D loss could be regarded as a purpose for which Directives were to be issued under it.

In *Federal Republic of Germany v European Parliament* (Case C-233/94) [1997] ECR I-2405 the European Court made certain observations about article 57(2) of the Treaty. This was in the context of a challenge to the Deposit Guarantee Scheme Directive (94/19/EEC) by Germany on the E ground that, contrary to its preamble, article 57 could not constitute the sole legal basis for the Directive as it did not merely regulate banking operations but was aimed at increasing protection for consumers. The fact that the court rejected this challenge might seem at first sight to provide support for the view that the protection of consumers was a purpose for which Directives could be issued under article 57. But the background to the Directive is important to a proper understanding of the reason why the F challenge to its legal base did not succeed. The court had held in earlier cases that member states were entitled in certain circumstances to adopt or maintain measures which were justified on public interest grounds, such as the protection of consumers, which constituted an obstacle to free movement within the Community: p 2450, paras 16 and 17. The court said, at p 2456, para 41, that article 57(2) of the Treaty authorised the Parliament G and the Council to issue Directives with a view to abolishing obstacles of this kind. It was apparent that such an obstacle was to be found in the fundamental differences between the deposit-guarantee systems existing in the various member states, so the laws on those systems were to be harmonised in order to facilitate the activity of credit institutions at Community level. The court held, at p 2459, para 48, that there had to be a H high level of consumer protection concomitantly with the right of establishment and the freedom to provide services which the Directive aimed to promote. It referred to "the general result" which the Directive sought to achieve, which was a considerable improvement in the protection of depositors within the Community. In that particular context it was legitimate for the Directive to adopt measures which would render the

domestic measures for the protection of consumers otiose. The special circumstances which led to that decision are absent in this case.

Consultation with ECOSOC was required by the second paragraph of article 100 of the EEC Treaty (now article 94 EC) prior to the issuing of the Directive. But the observations in its opinion on which the plaintiffs rely do not seem to me to advance their argument. In paragraph 1.1.3 the point was made that

> "the lack of harmonisation of member states' legislation, whose main purpose in each country is to provide security for depositors and to protect savings, is liable to create serious disparities with regard to that objective, indeed even certain dangers."

In paragraph 1.4.1 it was stated that the ultimate aim was to harmonise the authorisation requirements for financial institutions in all the member states. The plaintiffs say, under reference to these and other passages in the opinion that the committee recognised that the main purpose of legislation concerning banking regulation was to provide security for depositors and to protect savings. I am willing to accept that this is so. No doubt the committee recognised that the protection of savings is a necessary part of every system at national level for the regulation of credit institutions whose business it is to receive from the public deposits and other forms of repayable funds. But the point to which it was drawing attention in its opinion was the need for the harmonisation of authorisation requirements, without which there would be likely to be serious disparities between the member states. The Community law purpose which was indicated by its observations was that of the harmonisation of regulatory measures affecting the right of establishment with a view to eliminating these disparities. I do not find any indication here that the committee saw the purpose of the Directive as being to confer Community law rights on individual depositors.

In the *Parodi* case [1997] ECR I-3899, 3923, paras 24–25 the European Court said that the Directive of 1977 was no more than a first step towards the mutual recognition by member states of authorisations issued by each of them to credit institutions, and that it confined itself to imposing a number of minimum conditions on member states. Member states were to be obliged to require authorisation of all credit institutions wishing to commence banking activity within their territory of origin, but this was to be subject to minimum requirements and without prejudice to other conditions of general application laid down by national laws. The question which was raised in that case was whether national legislation requiring authorisation in order to supply banking services was precluded by the Treaty where the bank concerned was already established and authorised in another member state. The court said, at p 3922, paras 20–22 that, in view of the special nature of certain provisions of services, specific requirements imposed on the provider that were attributable to the application of rules governing that type of activity could not be regarded as incompatible with the Treaty, and that the banking sector was a particularly sensitive area from the point of view of consumer protection. The following observation was made, at p 3924, para 26:

> "It must therefore be accepted that, as Community law stood at the time of the facts in the main proceedings, there were within the banking

A sector imperative reasons relating to the public interest capable of justifying the imposition by the member state of destination of conditions regarding access to the activity of credit institutions and their supervision which could go beyond the minimum conditions required by the first banking Directive and already implemented in the member state of origin."

B The conclusion in the *Parodi* case was that member states were entitled to apply their own consumer protection measures in the banking sector, pending the entry into force of the measures in the Second Council Directive 89/646/EEC on the co-ordination of laws, regulations and administrative provisions relating to the taking up and pursuit of the business of credit institutions and amending the Directive of 1977 which rendered the national measures otiose. C The plaintiffs rely on the observations in the judgment about the need to protect consumers in the banking sector in support of their argument as to the purpose of the Directive of 1977. But, as I read these observations, they were made, not with reference to the purpose of the Directive of 1977, but in order to justify the application of national measures by a member state during the period prior to the entry into force of the Directive of 1989. The purpose of the Directive of 1977 was to begin the D process of harmonisation of national laws so as to remove barriers to the provision of banking services throughout the single market, but without weakening or impairing the protection of depositors. The protection of depositors was seen therefore not as a purpose of the Directive but as a constraint on the provision of banking services to the public which had to be recognised.

E In *Criminal Proceedings against Romanelli* (Case C-366/97) [1999] ECR I-855, 861, para 12, the court said that it was clear from the Directive of 1977 and the Directive of 1989 that the protection of savings constituted one of the objectives of the measures taken to co-ordinate credit institutions. Here again, taken in its context, this observation seems to me to do no more than recognise the point already made in the *Parodi* case [1997] ECR I-3899, 3922, para 21 that, as a matter of fundamental principle, restrictions on the F freedom to provide services under the Treaty must be justified by imperative reasons in the public interest which are objectively necessary to guarantee the protection of the recipient of services and which do not exceed what is necessary to attain these objectives. I do not find in these observations support for the argument that a purpose of the Directive of 1977 was to promote or protect the interests of individual depositors.

G In my opinion the question whether the Directive of 1977 granted rights to individual depositors and potential depositors must be answered by examining the recitals and the articles of the Directive itself without any preconception as to its purpose based upon these extrinsic materials.

*The recitals and articles of the Directive of 1977*

H The Directive of 1977 contains fifteen recitals and fifteen articles. The plaintiffs rely in particular on the third, fourth, fifth and twelfth recitals and on articles 3, 6, 7 and 8. Article 3 is relevant to their allegation that the Bank acted contrary to the Directive when it granted a full licence to BCCI SA to carry on business as a deposit-taker. Articles 6 and 7 are relevant to their allegation that it failed in its duty under the Directive to supervise

BCCI SA and BCCI Overseas. Article 8 is relevant to their allegation that it had a duty under the Directive to revoke the licence which it had granted to BCCI SA. But it is necessary to have regard to some of the other recitals and articles in order to understand the overall effect of the Directive. The question in the case of each of the allegations against the Bank is whether, in terms of the conditions for *Becker*-type liability which were applied to *Francovich*-type liability in paragraph 22 of the *Dillenkofer* case [1997] QB 259, 292:

> "the result prescribed by the Directive entails the grant of rights to individuals, the content of those rights is identifiable on the basis of the provisions of the Directive and a causal link exists between the breach of the state's obligation and the loss and damage suffered by the injured parties."

As Lord Neill pointed out, the plaintiffs do not need to show that depositors were the only persons in whose favour obligations were imposed or on whom rights were conferred by the Directive. But in order to satisfy the *Dillenkofer* conditions they must be able to demonstrate that the result to be achieved by the Directive entailed the grant of rights to depositors and potential depositors as well as to the credit institutions operating in several member states whose activities were to be authorised and supervised by the competent authorities. A triangular or tripartite relationship is implied by this argument, between the competent authorities and the credit institutions on the one hand and the competent authorities and the depositors on the other. It is not too difficult to see, as the majority in the Court of Appeal observed, ante, p 76E–F that the Directive conferred rights on the credit institutions which were affected by it. What the plaintiffs have to do is to show that third parties to these arrangements, depositors and potential depositors, were also granted rights by the Directive on the application to its terms of the *Dillenkofer* test.

The first two recitals record the fact that the Treaty prohibited any discriminatory treatment from the end of the transitional period and that, in order to make it easier to take up and pursue the business of credit institutions, it was necessary to eliminate the most obstructive differences between the laws of the member states as to the rules to which these institutions were subject. The third, fourth and fifth recitals are in these terms:

> "Whereas, however, given the extent of these difference, the conditions required for a common market for credit institutions cannot be created by means of a single Directive; whereas it is therefore necessary to proceed by successive stages; whereas the result of this process should be to provide for overall supervision of a credit institution operating in several member states by the competent authorities in the member state where it has its head office, in consultation, as appropriate, with the competent authorities of the other member states concerned; Whereas measures to co-ordinate credit institutions must, both in order to protect savings and to create equal conditions of competition between these institutions, apply to all of them; whereas due regard must be had, where applicable, to the objective differences in their statutes and their proper aims as laid down by national law; Whereas the scope of these measures should

A therefore be as broad as possible, covering all institutions whose business is to receive repayable funds from the public whether in the form of deposits or in other forms such as the continuing issue of bonds and other comparable securities and to grant credits for their own account; whereas exceptions must be provided for in the case of certain credit institutions to which this Directive cannot apply."

B The plaintiffs rely upon the reference to the overall supervision of credit institutions in the third recital, upon the phrase "in order to protect savings" in the fourth recital and the reference in the fifth recital to the receipt of repayable funds from the public as indications that it was a purpose of the Directive to protect depositors. Taken in their context however these recitals seem to me to show that the Directive had a quite different purpose. C This was, as the first step in a process which would have to proceed by successive stages, to co-ordinate the conditions for the supervision of all institutions of the kind mentioned in the fifth recital operating in several member states, bearing in mind the need for the co-ordinating measures to protect savings on the one hand and for them to create equal conditions of competition on the other.

The sixth to ninth recitals declare that the eventual aim of the D harmonisation process was to introduce uniform authorisation requirements throughout the Community for comparable types of credit institution and that, while at the initial stage it was necessary to specify only certain minimum requirements to be imposed by all member states, the eventual aim could be achieved only if the particularly wide discretionary powers which certain supervisory authorities had for authorising credit establishments E were progressively reduced. The tenth and eleventh recitals state that the purpose of co-ordination was to achieve a system whereby credit institutions having their head office in one of the member states were exempt from any national authorisation requirement when setting up branches in other member states, but that a measure of flexibility might nonetheless be possible in the initial stage. The twelfth recital, which explains the means by which the gradual approximation of the systems for the monitoring of F solvency and liquidity of credit institutions established by the member states was to be brought about, begins with this proposition on which the plaintiffs rely: "Whereas equivalent financial requirements for credit institutions will be necessary to ensure similar safeguards for savers and fair conditions of competition between comparable groups of credit institutions . . ." Here again however the point being made with regard to safeguards for savers and G fair conditions of competition between institutions seems to me to be directed to the two requirements which the measures of co-ordination which the Directive was to lay down would have to satisfy, bearing in mind the fact that these measures would to some degree restrict the fundamental principle of freedom of establishment. Nothing turns on the wording of the remaining three recitals.

The first two articles of the Directive are comprised in Title I which deals H with definitions and the scope of the Directive. Article 1 contains a number of definitions, including those of the expressions "credit institution" and "branch." It is worth noting that there is no definition of any expression referring to individuals in whose favour rights might be said to have been intended to be created by the Directive. If the result to be achieved was to

entail the granting of rights to individuals such as savers or depositors, I would have expected a definition such as that included in article 2 of the Directive (90/314/EEC) concerning package travel, package holidays and package tours which defines the expression "consumer". The meaning and effect of this Directive was considered in the *Dillenkofer* case [1997] QB 259, in *Verein für Konsumenteninformation v Österreichische Kreditversicherungs AG* (Case C-364/96) [1998] ECR I-2949 and in *Rechberger v Austrian Republic* (Case C-140/97) [1999] ECR I-3499. In each of these cases the European Court held that article 7 of the Directive gave "consumers" a right to be reimbursed or repatriated in the event of the insolvency of the tour operator. The absence of a definition of that kind from the Directive of 1977 suggests that it was not the intention when the Directive was being drafted to grant rights under the Directive in favour of individuals or any group or class of individuals.

In a series of cases, referred to as "the German environmental cases", claims were brought by the Commission against Germany for its failure to implement Directives which laid down various requirements to be observed by member states in relation to water and air quality: e g *Commission of the European Communities v Federal Republic of Germany* (Case C-131/88) [1991] ECR I-825; *Commission of the European Communities v Federal Republic of Germany* (Case C-298/95) [1996] ECR I-6747. As Auld LJ noted, ante, p 126G, each of these Directives required member states to take specific measures to ensure that water or air was of the quality prescribed by the Directive, but they said nothing about the conferment of rights on individuals. Nevertheless the European Court held that the purpose of certain of the provision of these Directives was to create rights and obligations for individuals. In Case C-131/88 [1991] ECR I-825, 867 in para 7 the court said:

> "The Directive at issue in the present case seeks to protect the Community's groundwater in an effective manner by laying down specific and detailed provisions requiring the member states to adopt a series of prohibitions, authorisation schemes and monitoring procedures in order to prevent or limit discharges of certain substances. The purpose of those provisions of the Directive is thus to create rights and obligations for individuals."

I agree with the plaintiffs that these cases demonstrate that the potential width of the class of persons granted rights does not militate against the conclusion that the relevant provisions of these Directives were intended to create rights. This does not in itself mean that the persons intended to be granted rights are not sufficiently identifiable. But the cases also demonstrate that the question whether provisions in a Directive create rights and obligations for individuals depends in each case on the subject matter of the Directive, on the context and on the nature and purpose of the provisions which are in issue. The environmental cases were concerned with the protection of human health. This is a matter of concern to everybody, as we all share the environment in which we live. So the absence of a definition of the individuals who were granted rights by the Directives was of no importance. As the court said in Case C-298/95 [1996] ECR. I-6747, 6760:

A "15. As the Commission points out, one of the purposes of the Directives at issue is to protect human health through the monitoring of the quality of waters which support, or could support, fish suitable for human consumption . . .

"16. In those circumstances, it is particularly important that Directives should be transposed by measures which are indisputably binding. In all cases where non-implementation of the measures required by a Directive B could endanger human health, the persons concerned must be in a position to rely on mandatory rules in order to assert their rights . . ."

Article 2 of the Directive of 1977 begins with the proposition that the Directive "shall apply to the taking up and pursuit of the business of credit institutions". It then sets out a number of exceptions and qualifications, but C these are not significant for present purposes.

The articles on which the plaintiffs mainly rely are in Title II of the Directive, which bears the headnote "Credit institutions having their head office in a member state and their branches in other member states" and comprises articles 3 to 8. But it is necessary to have regard also to article 10 which is included among the general and transitional provisions in Title IV, as the Bank's contention is that when article 3 is read together with D article 10 it is clear that it did not apply to BCCI SA which had already taken up business as a credit institution before the coming into force of the Banking Act 1979. Title III deals with the situation where credit institutions which have their head offices outside the Community have branches in a member state. There is nothing in article 9, which is the only article in Title III, which is relevant to this case.

E The first two paragraphs of article 3 provide:

"1. Member states shall require credit institutions subject to this Directive to obtain authorisation before commencing their activities. They shall lay down the requirements for such authorisation subject to paragraphs 2, 3 and 4 and notify them to both the Commission and the F Advisory Committee. 2. Without prejudice to other conditions of general application laid down by national laws, the competent authorities shall grant authorisation only when the following conditions are complied with—the credit institutions must possess separate own funds—the credit institutions must possess adequate minimum own funds—there shall be at least two persons who effectively direct the business of the credit institution. Moreover, the authorities concerned shall not grant G authorisation if the persons referred to in the third indent of the first sub-paragraph are not of sufficiently good repute or lack sufficient experience to perform such duties."

The words "before commencing their activities" in paragraph 1 of article 3 indicate that its function was to deal with the authorisation of credit institutions with their head offices in one member state which were seeking H to carry on business in another member state after that member state had implemented the Directive. The plaintiffs claim in their re-amended statement of claim that BCCI SA was incorporated in Luxembourg in 1972, that it carried on business there as a bank under an authorisation issued by the Luxembourg authorities and that it established an office in London in the

same year through which it had been carrying on business as a banker and deposit-taker for several years before it was granted a licence under the Banking Act 1979 by the Bank. On these facts it is plain that, as BCCI SA had already commenced its activities as a credit institution in the United Kingdom prior to the implementation of the Directive in domestic legislation by the Banking Act 1979, article 3 did not apply to it. The Bank says that no authorisation procedure was required by the Directive to enable it to continue with its activities. The fact that BCCI SA was granted a licence under the Banking Act 1979 which required all credit institutions to submit to the licensing procedure was a matter of domestic law only, not of Community law.

The Bank submits that this conclusion is confirmed by the first sub-paragraph of paragraph 1 and paragraphs 3 and 4 of article 10, which provide:

> "1. Credit institutions subject to this Directive, which took up their business in accordance with the provisions of the member states in which they have their head offices before the entry into force of the provisions implementing this Directive shall be deemed to be authorised. They shall be subject to the provisions of this Directive concerning the carrying on of the business of credit institutions and to the requirements set out in the first and third indents of the first sub-paragraph and in the second sub-paragraph of article 3(2) . . . 3. If a credit institution deemed to be authorised under paragraph 1 has not undergone any authorisation procedure prior to commencing business, a prohibition on the carrying on of its business shall take the place of withdrawal of authorisation. Subject to the first sub-paragraph, article 8 shall apply by analogy. 4. By way of derogation from paragraph 1, credit institutions established in a member state without having undergone an authorisation procedure in that member state prior to commencing business may be required to obtain authorisation from the competent authorities of the member state, concerned in accordance with the provisions implementing this Directive. Such institutions may be required to comply with the requirement in the second indent of article 3(2) and with such other conditions of general application as may be laid down by the member state concerned."

The plaintiffs claim in their reply to this submission that the head office of BCCI SA was in London, not Luxembourg. They point out that there were no authorisation procedures for credit institutions in the United Kingdom prior to the coming into force of the Banking Act 1979. Furthermore all credit institutions were required to undergo the licensing procedure under that Act, irrespective of whether they had previously taken up business in the United Kingdom. The plaintiffs also say that, even if in making that requirement the United Kingdom was exercising its right of derogation under article 10(4), this would not affect the Bank's obligation to grant authorisation only on the conditions permitted by the Directive.

On the assumption that the facts stated in the re-amended statement of claim are true, there may be some force in the plaintiffs' argument that deemed authorisation under article 10(1) does not apply to BCCI SA as there were no "provisions" regulating the business of credit institutions when it commenced its activities in this country. But on balance it seems to me that this is to construe the word "provisions" too narrowly. An institution which

A was legitimately carrying on business here under the system of law in force at the time, as BCCI SA was doing because there was no prohibition to the contrary, could be said to be doing so "in accordance with the provisions" of the member state within the meaning of article 10(1). That provision does not stipulate any particular requirements which those provisions had to satisfy. In any event, this still leaves article 10(4), which clearly does apply to BCCI SA as it had not undergone an authorisation procedure in the B United Kingdom before commencing business here. The derogation provided by this paragraph, which permits a member state to require credit institutions which are legitimately carrying on business in that state to obtain authorisation on such conditions as may be laid down by that member state, is inconsistent with the view that BCCI SA, which was already legitimately carrying on its activities as a credit institution in the United C Kingdom, required to be authorised under article 3(1).

The plaintiffs submit as a general principle that, where a member state voluntarily accepts obligations under Community law, it cannot escape its liabilities by saying that it need not have assumed these obligations in the first place. In support of this proposition they rely on *Wagner Miret v Fondo de Garantía Salarial* (Case C-334/92) [1993] ECR I-6911, which concerned D Directive 80/987 relating to the protection of employees in the event of the employer's insolvency. The Directive permitted member states to exclude certain categories of employee from the scope of the protection, and a list of the excluded categories of employee was set out in an annex to the Directive. Spain requested the exclusion of one category of employee only, and the exclusion of that category was entered in the list. It did not request the exclusion of the category of employee to which Mr Wagner Miret belonged. E The European Court held that he was entitled to the protection of the Directive, and that it was no answer to say that Spain could have excluded that category from that protection if it had chosen to exercise the option to do so. It seems to me that that case provides no support for the argument that, in the reverse situation which arises under the Directive of 1977, the United Kingdom was obliged to require an institution which was already F legitimately carrying on business here to be authorised. A requirement made under article 10(4) is voluntary, not obligatory. The exercise of the option to make that requirement cannot affect the scope of the obligation under article 3. I think that it is clear, as a matter of principle, that the voluntary incorporation by a member state of a provision in a Directive into national law which it is not obliged to incorporate under Community law does not give rise to a Community law obligation. The scope of that provision is a G matter for determination by the national courts as a part of the domestic law of the member state. The European Court may assist the national court in construing the Directive, but it does not follow that the obligation in question is a Community law obligation: see *Leur-Bloem v Inspecteur der Belastingdienst/Ondernemingen Amsterdam 2* (Case C-28/95) [1998] QB 182, 209, paras 33–34.

H For these reasons I would hold that the Bank was not obliged by article 3(1) of the Directive to require BCCI SA to obtain authorisation as a condition of continuing to carry on its business in the United Kingdom. But even if it was obliged to do so as a matter of Community law, I do not find a sufficient indication, in the conditions for authorisation of credit institutions which are set out in article 3(2), that the result to be achieved by the

Directive entailed the granting of rights to individuals or groups of individuals affected by their activities. The purpose of article 3(1), as indicated by the first, second and eighth recitals, was to take the first step towards the introduction of uniform authorisation requirements for comparable types of credit institution having their head office in one member state and their branches in other member states. The obligations which it imposed were designed to bring to an end, in a manner which was consistent with the nature of the business carried on by credit institutions, any discriminatory treatment as between the laws of member states with regard to establishment and the provision of these services.

Article 6(1) provides:

> "1. Pending subsequent co-ordination, the competent authorities shall, for the purposes of observation and, if necessary, in addition to such coefficients as may be applied by them, establish ratios between the various assets and/or liabilities of credit institutions with a view to monitoring their solvency and liquidity and the other measures which may serve to ensure that savings are protected. To this end, the Advisory Committee shall decide on the content of the various factors of the observation ratios referred to in the first sub-paragraph and lay down the method to be applied in calculating them. Where appropriate, the Advisory Committee shall be guided by technical consultations between the supervisory authorities of the categories of institutions concerned."

The plaintiffs rely on this article as the basis for their claim that the Bank were under on obligation owed to the depositors to supervise the activities of BCCI SA and BCCI Overseas at all times during the relevant period. Auld LJ said ante, p 106B–C:

> "Article 6 deals with supervision. In my view, and contrary to that of Clarke J [1996] 3 All ER 558, 616, it imposed on regulators immediate duties of a technical banking nature to 'ensure that savings are protected', and it did so in advance of the process and achievement of co-ordination. It is clear from the wording of the article and the context of the Directive as a whole, concerned as it is with 'the taking up *and pursuit* of the business of credit institutions' (my emphasis), that the intended purpose of the supervision was to ensure, as a minimum, continuing compliance with the requirements of authorisation under article 3."

In my opinion however article 6, although concerned with supervision, had a more limited purpose in view. As the twelfth recital indicates, it imposed a duty on the supervisory authorities, pending subsequent co-ordination, to formulate structural ratios which would make it possible for the national authorities to co-operate with each other in the setting of standards, or coefficients, to ensure the sound management of credit institutions which in due course would be co-ordinated between member states. The ultimate aim was to set equivalent financial standards which would, in terms of the recital, achieve the twin requirements noted by ECOSOC of ensuring "similar safeguards for savers and fair conditions of competition between comparable groups of credit institutions". It did not impose a duty of supervision. The assumption on which it proceeds is that the competent authorities in each member state would be performing that function under the national law of that member state. No minimum

A standards of supervision or other criteria are laid down in the article. The whole emphasis is on co-operation between the supervisory authorities, with a view to harmonisation in due course of the means by which the performance of credit institutions carrying on business in more than one member state could be monitored. The protection of savings was assumed to be the purpose of the monitoring system. But it was not necessary in order to establish observation ratios and their co-ordination between member B states to impose a Community law duty of supervision or to grant rights in that regard to individuals or groups of individuals.

Article 7 is also concerned with supervision. Here again Auld LJ was of the view that it imposed a duty to supervise: ante, p 106F–G. But I think that the duty which it imposed was one of co-operation between the supervisory authorities. Paragraph 1 of the article provides:

C

> "The competent authorities of the member states concerned shall collaborate closely in order to supervise the activities of credit institutions operating, in particular by having established branches there, in one or more member states other than that in which their head offices are situated. They shall supply one another with all information concerning the management and ownership of such credit institutions that is likely to D facilitate their supervision and the examination of the conditions for their authorisation and all information likely to facilitate the monitoring of their liquidity and solvency."

As in the case of article 6, article 7 assumed the existence in each member state of a competent authority or competent authorities whose function it was to supervise the activities of credit institutions in that member state.

E Prior to the implementation of the Directive of 1977 there were no supervisory authorities in either the United Kingdom or Denmark. So it was necessary, to give effect to the Directive, for authorities to be set up with the function of supervising credit institutions operating in those member states. An obligation to do so is not expressed in article 7. It is to be found in the third paragraph of article 189 of the EEC Treaty (now article 249 EC), which provides that a Directive is to be binding as to the result to be achieved F but leaves the choice of form and methods to each member state. Here again however it is necessary to distinguish between the duty under Community law for an authority to be set up under the national law of each member state whose function it was to supervise and the duty under article 7 of the supervisory authorities of each member state to co-operate. I do not think that article 7, which refers to the sharing of information "likely to facilitate" G supervision, examination and monitoring, imposed a duty under Community law to supervise. The absence from the article of any prescribed system of supervision, and of any criteria or standards to be applied by the supervisory authority, is an indication to the contrary. It is noteworthy that, although the plaintiffs claim that there was a general duty to supervise, they do not point to the breach by the Bank of any particular duties of supervision imposed by either article 6 or article 7.

H The plaintiffs rely upon the observations of Advocate General Sir Gordon Slynn in *Municipality of Hillegom v Hillenius* (Case 110/84) [1985] ECR 3947, 3948, where he said that article 7 of the Directive of 1977 "provides that the supervisory authorities of the various member states shall collaborate closely in order to supervise credit institutions operating in more

than one member state". I do not think that this comment, which simply repeats the wording of paragraph 1 of the article, is in any way inconsistent with the view which I have formed, that the duty under article 7 is a duty to collaborate in order to assist the competent authorities in the performance of their supervisory functions under national law. The observations which the European Court made in its judgment, at p 3963, paras 26 and 27, to the effect that the Directive was designed to facilitate the overall monitoring of credit institutions operating in more than one member state by the competent authorities of the member state in which the credit institution has its head office and about the need for the monitoring of banks through supervision within a member state and the exchange of information by the competent authorities to function properly, do not go to the length of suggesting that the court saw the Directive as entailing the grant of rights to individual depositors.

The plaintiffs also rely on *Carbonari v Università degli studi di Bologna* (Case C-131/97) [1999] ECR I-1103. That was a case which was concerned with the direct effect of provisions in two Directives (82/76/EEC amending 75/362/EEC and 75/363/EEC). The first of which related to training periods and remuneration of doctors. Detailed provisions were included about the training requirements, and there was a provision in the Annex to the Directive of 1975 that the posts which specialists were to hold while in full-time training were to be "subject to appropriate remuneration". The European Court, at pp 1133–1134, paras 44–47 of its judgment applied the first limb of the *Becker* test. The right of the medical students to appropriate remuneration during their training period was in itself unconditional and sufficiently precise. But the Directives were not unconditional as to which institution was to bear the obligation to pay the remuneration. They did not include any Community definition of the remuneration which was to be regarded as appropriate or the methods by which it was to be fixed to enable the national court to determine the body liable to pay it or the level at which it was to be paid. Such definitions were to be a matter for the member states when they were implementing the Directive. In other words, as the Directive did not itself define as a matter of Community law what was appropriate remuneration or lay down a Community law method to fix that amount, the medical students had no Community right which they could enforce to obtain payment.

The plaintiffs say that the *Carbonari* case supports their claim that articles 6 and 7 imposed a duty of supervision notwithstanding that the precise methods or forms of supervision are not specified in the Directive. In my opinion however the case tends to support the Bank's argument. None of the provisions in articles 6 and 7 of the Directive of 1977 define any categories of individual on whom rights were being conferred, nor do they state in obligatory terms that the credit institutions "shall be subject to appropriate supervision" by the competent authorities. Even if such an obligation in general terms could be said to be implied, the absence of even the slightest amount of detail as to the system of supervision required by Community law which was to be adopted and enforced by the national courts would make it impossible to say that, as matter of Community law, the obligation to supervise was unconditional and sufficiently precise to satisfy the *Becker*-type liability test.

A The plaintiffs also rely on article 8 which deals with the withdrawal of authorisation. Paragraphs 1 and 2 of this article provide:

> "1. The competent authorities may withdraw the authorisation issued to a credit institution subject to this Directive or to a branch authorised under article 4 only where such an institution or branch: (a) does not make use of the authorisation within 12 months, expressly renounces the B authorisation or has ceased to engage in business for more than six months, if the member state concerned has made no provision for the authorisation to lapse in such cases; (b) has obtained the authorisation through false statements or any other irregular means; (c) no longer fulfils the conditions under which authorisation was granted, with the exception of those in respect of own funds; (d) no longer possess sufficient C own funds or can no longer be relied upon to fulfil its obligations towards its creditors, and in particular no longer provides security for the assets entrusted to it; (e) falls within one of the other cases where national law provides for withdrawal of authorisation. 2. In addition, the authorisation issued to a branch under article 4 shall be withdrawn if the competent authority of the country in which the credit institution which established the branch has its head office has withdrawn authorisation D from that institution."

In my opinion the key word in paragraph 1 is the word "only" which precedes the list of the various situations in which authorisation may be withdrawn. It seems to me that this is a limiting provision, as indicated by the second recital, with a view to eliminating differences between the laws of member states. The reference in sub-paragraph (e) to cases where "national E law provides for withdrawal of authorisation" ensures that the matter is not left to the administrative discretion of the competent authority in that member state.

Auld LJ said, ante, p 107G–H, that he recognised the fact that, while paragraph 2 was obligatory, paragraph 1 was in general terms permissive in the various circumstances specified. But his view was that the article should F be read as imposing a duty on competent authorities to withdraw authorisation in the circumstances referred to in sub-paragraphs (c) and (d). He added this explanation, at pp 107H–108A:

> "It is inconceivable that the Directive should be read so as to require banking regulators to insist on certain minimum requirements of authorisation and to supervise to ensure continued satisfaction of them, G yet leave them with a discretion, unspecified as to criteria, to permit continuance of trading without check or condition when those requirements are no longer met."

On my reading of the Directive as a whole however, it is to be regarded as laying down a series of provisions with a view to the harmonisation of the criteria to be applied to credit institutions having their head office in a H member state and their branches in other member states. That being so, there is nothing surprising in an approach to the withdrawal of authorisation in the circumstances referred to in paragraph 1 which permits withdrawal in these, and only these, circumstances but provides that withdrawal in the situation mentioned in paragraph 2 is to be obligatory. I do not think that there is anything here which entails the grant of rights to

individuals to insist upon the withdrawal of authorisation in the circumstances mentioned in paragraph 1. For their part, the credit institutions could hardly object to a decision to withdraw authorisation in the circumstances mentioned in sub-paragraphs (c) and (d) of paragraph 1 which, in order to protect savings, it was obviously necessary to include in the list of circumstances in which the withdrawal of authorisation was to be permissible.

*Conclusion*

Looking back at the Directive as a whole, the key to a proper understanding of its purpose and effect seems to me to lie in the fact that it was the first step in a process of harmonisation of provisions for the regulation of credit institutions carrying on business within the Community. It was about the removal of barriers to the right of establishment under article 52 of the EEC Treaty (now article 43 EC). It confined itself to imposing a number of minimum conditions and prohibitions on member states as to the authorisation and supervision of credit institutions having their head offices in another member state or having their head offices outside the Community. It was based upon an appreciation of the fact that credit institutions require regulation in order to protect savings. So any measures of harmonisation had to meet the twin requirements of protecting savings on the one hand and creating conditions of equal competition between credit institutions operating in more than one member state on the other. It placed duties of co-operation on the competent authorities where a credit institution was operating in one or more member state other than that in which its head office was situated. But it stopped short of prescribing any duties of supervision to be performed by the competent authority within each member state. It is not possible to discover provisions which entail the granting of rights to individuals, as the granting of rights to individuals was not necessary to achieve the results which were intended to be achieved by the Directive.

For these reasons I am unable, with great respect, to agree with Auld LJ's conclusions, ante, pp 95E–96A, that the Directive of 1977 imposed clearly defined obligations on member states and on their regulatory bodies and that in doing so it gave rise to corresponding Community law rights in depositors to enforce those obligations by an action of damages. I prefer the views of Clarke J [1996] 3 All ER 558, 616, where he said:

> "The true position, as it seems to me, is that the Directive was not intended to require the imposition of a duty to supervise upon the supervisory authority because, whatever the underlying purpose of the system of supervision, the immediate purpose of the Directive, rather like that in *R v International Stock Exchange of the UK and the Republic of Ireland Ltd, Ex p Else (1982) Ltd, R v International Stock Exchange of the UK and the Republic of Ireland Ltd, Ex p Roberts* [1993] QB 534, was a first step towards harmonisation of the systems in the member states, which were assumed to and no doubt did exist. Its purpose was not to lay down the duty to supervise or radically to alter existing systems, but, even if was, it was not (as I see it) to confer rights upon either savers or other creditors."

The majority in the Court of Appeal did not examine the provisions of the Directive in detail. But they said, ante, p 76E–G:

A "In our judgment it is reasonably clear that the Directive of 1977 does confer enforceable rights on credit institutions which are to be supervised under its provisions. In particular, a credit institution which was refused authorisation for reasons incompatible with article 3, or which had its authorisation withdrawn which for reasons incompatible with article 8, would (in the event of non-transposition of the Directive of 1977) most probably have had a right to challenge the Bank's decision on the basis that the *Becker* conditions [1982] ECR 53 were satisfied. But there is not in our judgment any sufficient clarity or certainty in the position of depositors (or other customers of credit institutions)."

Subject to the qualifications that I have substituted the *Francovich* test as applied in *Dillenkofer* for the *Becker* test, on the view that it is more precise and covers both types of liability, and that I do not accept that credit institutions were to be "supervised under" the provisions of the Directive, I agree with the conclusions of the majority on this issue. I would therefore dismiss the appeal on the Community law claim.

In the courts below neither party asked for a preliminary reference under article 234 EC (ex article 177 EEC) on the issues relating to the plaintiffs' claim under Community law. Clarke J said [1996] 3 All ER 558, 625E–F, that he would have referred the matter as to the meaning and effect of the Directive of 1977 had the parties not requested him to give a judgment on the Community law issue without doing so. In the Court of Appeal the majority said, at p 77B–C, that they did not regard the question of *Becker*-type liability as acte clair, but that as a matter of discretion the court had decided not to make a reference. The parties' unanimity in asking the court not to make a reference had been a significant factor in that decision. That unanimity was departed from in your Lordships' House. The plaintiffs, having regard to the observations in the courts below, to the fact that there was dissenting judgment in the Court of Appeal and to what they saw as a change of position by the Bank as regards the purpose and intent of the Directive of 1977, have asked for a reference under article 234 EC (ex article 177 EEC) on the question whether the Directive conferred rights, and if so what rights, on depositors which they can exercise against the competent authority designated by the member state for the purpose of carrying out that member state's obligations under the Directive.

I am of the opinion that it would not be appropriate for a reference to be made to the European Court on the critical question in this case, which is whether the Directive of 1977 entailed the granting of rights to individual depositors and potential depositors. I consider that this matter, on which I understand your Lordships to be unanimous and on which we have had the benefit of very full and helpful submissions both orally and in writing from both sides, is acte clair. So I would decline the plaintiffs' request that we should make a reference in this case.

I would make the same order as that proposed by my noble and learned friend, Lord Steyn.

**LORD HUTTON** My Lords, the action for misfeasance in public office has long been recognised by English law. In some of the cases in the 18th and 19th centuries there are statements that the plaintiff must establish that the defendant was actuated by malice towards him and intended to injure him in

the way in which he discharged his public duty; in modern cases this is referred to as "targeted malice". In *Harman v Tappenden* (1801) 1 East 555, Lawrence J said, at pp 562–563:

> "There is no instance of an action of this sort maintained for an act arising merely from error of judgment. Perhaps the action might have been maintained, if it had been proved that the defendants contriving and intending to injure and prejudice the plaintiff, and to deprive him of the benefit of his profits from the fishery, which as a member of this body he was entitled to according to the custom, had *wilfully and maliciously* procured him to be disfranchised, in consequence of which he was deprived of such profits. But here there was no evidence of any wilful and malicious intention to deprive the plaintiff of his profits, or that they had disfranchised him with that intent, which is necessary to maintain the action."

But other cases suggest that an unlawful act done with an improper motive is sufficient to constitute the tort.

In *Tozer v Child* (1857) 7 E & B 377, 379 Lord Campbell CJ directed the jury that:

> "the defendants were not necessarily liable in this action, although the plaintiff, notwithstanding his non-payment of the said church rate, was qualified and entitled to vote, and to be a candidate at the said election, as he alleged: and that it was incumbent on the plaintiff to make out that the acts of the defendants complained of were malicious; and that malice might be proved, not only by evidence of personal hostility or spite, but by evidence of any other corrupt or improper motive . . ."

In *Bourgoin SA v Ministry of Agriculture, Fisheries and Food* [1986] QB 716 the issue was debated whether the defendant must intend to injure the plaintiff and it was held that damages could be recovered for misfeasance in public office where the defendant acted deliberately, not with the intent to harm the plaintiff, but with knowledge that he had no power to act as he did and that his action would injure the plaintiff. In that case the Minister of Agriculture, knowing that he had no power to do so, prohibited the importation of French turkeys into the United Kingdom knowing that the prohibition must necessarily injure French turkey producers but acting with the motive, not of injuring them, but of benefiting English producers. French producers claimed damages for misfeasance in public office.

Mann J rejected the argument that an intent to injure the plaintiff was an essential ingredient of the tort and stated, at p 740:

> "I do not read any of the decisions to which I have been referred as precluding the commission of the tort of misfeasance in public office where the officer actually knew that he had no power to do that which he did, and that his act would injure the plaintiff as subsequently it does. I read the judgment in *Dunlop v Woollahra Municipal Council* [1982] AC 158 in the sense that malice and knowledge are alternatives. There is no sensible reason why the common law should not afford a remedy to the injured party in circumstances such as are before me. There is no sensible distinction between the case where an officer performs an act which he has no power to perform with the object of injuring A (which

A the defendant accepts is actionable at the instance of A) and the case where an officer performs an act which he knows he has no power to perform with the object of conferring a benefit on B but which has the foreseeable and actual consequence of injury to A (which the defendant denies is actionable at the instance of A). In my judgment each case is actionable at the instance of A . . ."

B His judgment on this point was upheld by the Court of Appeal and Oliver LJ stated, at p 777:

"For my part, I too can see no sensible distinction between the two cases which the judge mentions. If it be shown that the minister's motive was to further the interests of English turkey producers by keeping out the produce of French turkey producers—an act which must necessarily C injure them—it seems to me entirely immaterial that the one purpose was dominant and the second merely a subsidiary purpose for giving effect to the dominant purpose. If an act is done deliberately and with knowledge of its consequences, I do not think that the actor can sensibly say that he did not 'intend' the consequences or that the act was not 'aimed' at the person who, it is known, will suffer them."

D The principal issue which arises for determination on the present appeal is whether in order to succeed the plaintiffs must prove that the public officers of the Bank of England knew that their unlawful acts or omissions would probably injure them or persons in a class of which they were members or that the officers were subjectively reckless as to such likely injury.

In a learned judgment [1996] 3 All ER 558, 632–633, after a full and detailed consideration of the authorities, Clarke J summarised his E conclusions as to the ingredients of the tort:

"1. Misfeasance in public office. (1) The tort of misfeasance in public office is concerned with a deliberate and dishonest wrongful abuse of the powers given to a public officer. It is not to be equated with torts based on an intention to injure, although, as suggested by the majority in *Northern Territory v Mengel* 69 ALJR 527, it has some similarities to them. F (2) Malice, in the sense of an intention to injure the plaintiff or a person in a class of which the plaintiff is a member, and knowledge by the officer both that he has no power to do the act complained of and that the act will probably injure the plaintiff or a person in a class of which the plaintiff is a member are alternative, not cumulative, ingredients of the tort. To act with such knowledge is to act in a sufficient sense maliciously: G see the *Mengel* case 69 ALJR 527, 554, per Deane J. (3) For the purposes of the requirement that the officer knows that he has no power to do the act complained of, it is sufficient that the officer has actual knowledge that the act was unlawful or, in circumstances in which he believes or suspects that the act is beyond his powers, that he does not ascertain whether or not that is so or fails to take such steps as would be taken by an honest and reasonable man to ascertain the true position. (4) For the H purposes of the requirement that the officer knows that his act will probably injure the plaintiff or a person in a class of which the plaintiff is a member it is sufficient if the officer has actual knowledge that his act will probably damage the plaintiff or such a person or, in circumstance in which he believes or suspects that his act will probably damage the

plaintiff or such a person, if he does not ascertain whether that is so or not or if he fails to make such inquiries as an honest and reasonable man would make as to the probability of such damage. (5) If the states of mind in (3) and (4) do not amount to actual knowledge, they amount to recklessness which is sufficient to support liability under the second limb of the tort. (6) Where a plaintiff establishes (i) that the defendant intended to injure the plaintiff or a person in a class of which the plaintiff is a member (limb one) or that the defendant knew that he had no power to do what he did and that the plaintiff or a person in a class of which the plaintiff is a member would probably suffer loss or damage (limb two) and (ii) that the plaintiff has suffered loss as a result, the plaintiff has a sufficient right or interest to maintain an action for misfeasance in public office at common law. The plaintiff must of course also show that the defendant was a public officer or entity and that his loss was caused by the wrongful act."

In the judgments of the Court of Appeal on appeal by the plaintiffs there was again a learned and comprehensive review of the authorities. The majority of the court, Hirst and Robert Walker LJJ, expressed broad agreement with the conclusions of Clarke J and dismissed the appeal. In his dissenting judgment Auld LJ held that as the core of misfeasance in public office is abuse of power it is sufficient for a plaintiff to prove that the abuse of power was an effective cause of his loss and that there is no requirement for the plaintiff to prove foresight of probable harm on the part of the public officer. Auld LJ stated, ante, p 162D–F:

"It follows that, in my view, the test of abuse of power—dishonesty—by a public officer does not necessarily include as an essential ingredient some appreciation by the officer of an injurious consequence. A public officer who dishonestly disregards his plain duty or who does not honestly attempt to do it, acts at his peril, and if injury results he is liable for it. But, even if I am wrong about that, I can see no basis, whether as a matter of interpretation of Mann J's judgment in the *Bourgoin* case [1986] QB 716 or otherwise, for requiring a plaintiff in a claim for misfeasance in public office to prove foresight in at least the form of suspicion of probable harm. That would be a much more onerous burden than that imposed on a plaintiff in a negligence claim, where the defendant is not necessarily a public officer and the claimant has not had to go to the lengths of proving dishonesty. Interestingly, it could also be more onerous than that in a tort of intentional injury such as fraudulent misrepresentation."

Before this House the principal submission of Lord Neill, on behalf of the plaintiffs, was that the *Bourgoin* case established that there was a second limb of the tort, separate and distinct from the limb constituted by abuse of power with the intent to injure, and that the second limb was constituted by a public officer abusing his power by knowingly acting unlawfully. When such an abuse of power is established and where it is also proved that the abuse has caused loss to the plaintiff the law does not require, and there is no reason why it should require, that for liability to arise there should be foresight by the public officer that loss will probably occur to the plaintiff or

A to a class of persons to whom the plaintiff belongs, or that there should be subjective recklessness as to such likely loss.

My Lords, I am unable to accept this argument for two principal reasons. The first reason is that I consider that the second limb of the tort cannot be viewed in isolation from the first limb and that the concept of targeted malice which is the underlying principle of the first limb exercises a B restrictive effect on the ambit of the second limb. This is implicit in the passage of the judgment of Oliver LJ in the *Bourgoin* case [1986] QB 716, 777 which I have quoted above because Oliver LJ said:

> "If an act is done deliberately and with knowledge of its consequences, I do not think that the actor can sensibly say that he did not 'intend' the consequences or that the act was not 'aimed' at the person who, it is C known, will suffer them."

Therefore it was his opinion that if a person acts deliberately, knowing that his action will injure another person, he must be taken to intend the consequences and is equated with the person who acts with the intent to cause injury. This is a view which is inconsistent with a liability which arises where there is an abuse of power without knowledge that it will probably D injure the plaintiff but where the abuse is an effective cause of such injury.

The judgments of the High Court of Australia in *Northern Territory of Australia v Mengel*, 69 ALJR 527 and the judgment of the Court of Appeal of New Zealand in *Garrett v Attorney General* [1997] 2 NZLR 332 are the second factor which leads me to reject the wider ambit of the second limb of the tort contended for by the plaintiffs. In those two cases there was a full discussion of the issue now before this House (save that in the *Mengel* case E the distinction between foresight by the public officer and objective foreseeability was not directly considered) and in both cases it was held that it was insufficient for the plaintiff to show a knowing breach of duty by a public officer coupled with resultant injury.

In the *Mengel* case stock inspectors employed by the defendant, without statutory or other authority, wrongly quarantined the plaintiffs' cattle F whereby the plaintiffs suffered loss. Before the High Court of Australia the plaintiffs contended that they were entitled to succeed on a claim for misfeasance in public office, and they argued that the mental element of that tort is made out if the public officer either knows or ought to know that he is acting without authority and the unlawful exercise of the power results in damage. This argument was rejected by the High Court. In their joint judgment Mason CJ, Dawson, Toohey, Gaudron and McHugh JJ stated, G at p 540:

> "The cases do not establish that misfeasance in public office is constituted simply by an act of a public officer which he or she knows is beyond power and which results in damage. Nor is that required by policy or by principle. Policy and principle both suggest that liability should be more closely confined. So far as policy is concerned, it is to be H borne in mind that, although the tort is the tort of a public officer, he or she is liable personally and, unless there is de facto authority, there will ordinarily only be personal liability. And principle suggests that misfeasance in public office is a counterpart to, and should be confined in the same way as, those torts which impose liability on private individuals

for the intentional infliction of harm. For present purposes, we include in that concept acts which are calculated in the ordinary course to cause harm, as in *Wilkinson v Downton* [1897] 2 QB 57, or which are done with reckless indifference to the harm that is likely to ensue, as is the case where a person, having recklessly ignored the means of ascertaining the existence of a contract, acts in a way that procures its breach. It may be that analogy with the torts which impose liability on private individuals for the intentional infliction of harm would dictate the conclusion that, provided there is damage, liability for misfeasance in public office should rest on intentional infliction of harm, in the sense that that is the actuating motive, or on an act which the public officer knows is beyond power and which is calculated in the ordinary course to cause harm. However, it is sufficient for present purposes to proceed on the basis accepted as sufficient in the *Bourgoin* case, namely, that liability requires an act which the public officer knows is beyond power and which involves a foreseeable risk of harm."

Brennan J stated, at p 546:

"I respectfully agree that the mental element is satisfied either by malice (in the sense stated) or by knowledge. That is to say, the mental element is satisfied when the public officer engages in the impugned conduct with the intention of inflicting injury or with knowledge that there is no power to engage in that conduct and that that conduct is calculated to produce injury. These are states of mind which are inconsistent with an honest attempt by a public officer to perform the functions of the office. Another state of mind which is inconsistent with an honest attempt to perform the functions of a public office is reckless indifference as to the availability of power to support the impugned conduct and as to the injury which the impugned conduct is calculated to produce. The state of mind relates to the character of the conduct in which the public officer is engaged—whether it is within power and whether it is calculated (that is, naturally adapted in the circumstances) to produce injury."

Deane J stated, at p 554:

"In the context of misfeasance in public office, the focus of the requisite element of malice is injury to the plaintiff or injury to some other person through an act which injuriously affects the plaintiff. Such malice will exist if the act was done with an actual intention to cause such injury. The requirement of malice will also be satisfied if the act was done with knowledge of invalidity or lack of power and with knowledge that it would cause or be likely to cause such injury. Finally, malice will exist if the act is done with reckless indifference or deliberate blindness to that invalidity or lack of power and that likely injury. Absent such an intention, such knowledge and such reckless indifference or deliberate blindness, the requirement of malice will not be satisfied."

The judgment of Deane J is important because, as in the judgment of Oliver LJ in the *Bourgoin* case [1986] QB 716, it emphasises that the second limb of the tort is a species of malice, and that the requirement for malice is satisfied where the public officer knows that the abuse of power will cause injury, or is recklessly indifferent or deliberately blind to the likely injury.

A Lord Neill relied on a passage in the judgment of Brennan J where he said, at p 547:

> "It is the absence of an honest attempt to perform the functions of the office that constitutes the abuse of the office. Misfeasance in public office consists of a purported exercise of some power or authority by a public officer otherwise than in an honest attempt to perform the functions of his B or her office whereby loss is caused to a plaintiff. Malice, knowledge and reckless indifference are states of mind that stamp on a purported but invalid exercise of power the character of abuse of or misfeasance in public office. If the impugned conduct then causes injury, the cause of action is complete."

But in my opinion this passage cannot be read in isolation and must be read C together with the earlier passage, at p 546, which I have quoted.

In *Garrett v Attorney General* [1997] 2 NZLR 332 the plaintiff claimed that there had been an abuse of power by a police sergeant who had failed to investigate properly her complaint that she had been raped by a police constable in a police station. The Court of Appeal held that to succeed in a claim for misfeasance in public office the plaintiff had to prove that the D public officer knew that his disregard of his duty would injure the plaintiff or that the officer was recklessly indifferent to the consequences for the plaintiff.

In its judgment the Court of Appeal set out Clarke J's summary of his conclusions which I have set out earlier in this judgment and stated their agreement with them, at pp 349–350:

> "We are in respectful agreement with Clarke J that it is insufficient to E show foreseeability of damage caused by a knowing breach of duty by a public officer. The plaintiff, in our view, must prove that the official had an actual appreciation of the consequences for the plaintiff, or people in the general position of the plaintiff, of the disregard of duty or that the official was recklessly indifferent to the consequences and can thus be taken to have been content for them to happen as they would. The tort has at its base conscious disregard for the interests of those who will be F affected by official decision making. There must be an actual or, in the case of recklessness, presumed intent to transgress the limits of power even though it will follow that a person or persons will be likely to be harmed. The tort is not restricted to a case of deliberately wanting to cause harm to anyone; it also covers a situation in which the official's act or failure to act is not directed at the injured party but the official sees the G consequences as naturally flowing for that person when exercising power. In effect this is no more than saying the tort is an intentional tort. In this context, a person intends to bring about the known consequences of his or her actions or omissions, even if other consequences form the primary motive. *Bourgoin* is an example. The concept of attributing intention by necessary inference in this way is well established."

H The court also stated the reasons why it considered that the tort should not be extended to cover a wrongful act done without a realisation of the consequences for the plaintiff and stated, at pp 350–351:

> "The purpose behind the imposition of this form of tortious liability is to prevent the deliberate injuring of members of the public by deliberate



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> disregard of official duty. It is unnecessary, to attain this objective, to extend the tort to catch an act which, though known to be wrongful, is done without a realisation of the consequences for the plaintiff. The law may still provide a remedy in negligence if the situation is one of those in which it is appropriate to impose a duty of care or, if the plaintiff is someone intended by statute to have the particular benefit or protection of an Parl Actiament or subordinate legislation, the plaintiff may have a remedy in the form of an action for breach of statutory duty; or the circumstances may give rise to another of the traditional tort actions, for instance, for false imprisonment or assault . . . In our view this intentional tort should not be allowed to overflow its banks and cover the unintentional infliction of damage. In many cases the consequences of breaking the law will be obvious enough to officials, who can then be taken to have intended the damage they caused. But where at the time they do not realise the consequences they will probably not be deterred from exceeding their powers by any enlargement of the tort. As Clarke J observes, they may well think that they are acting in the best interests of those persons whom they actually have in mind. In any modern society administration of central or local government is complex. Overly punitive civil laws may oftentimes deter a commonsense approach by officials to the use or enforcement of rules and regulations. We prefer to err on the side of caution and not to extend the potential liability of officials for causing unforeseen damage. To do so may have a stultifying effect on governance without commensurate benefit to the public . . . The common law has long set its face against any general principle that invalid administrative action by itself gives rise to a cause of action in damages by those who have suffered loss as a consequence of that action. There must be something more. And in the case of misfeasance of public office that something more, it seems to us, must be related to the individual who is bringing the action. While the cases have made it clear that the malice need not be targeted there must, as we have said, be a conscious disregard for the interests of those who will be affected by the making of the particular decision."

The opinion of the New Zealand Court of Appeal, in agreement with Clarke J, that it is insufficient for the plaintiff to show objective foreseeability that the breach of duty will probably cause damage and that it must be proved that the public officer himself foresaw the probability of damage, or was reckless as to the harm which is likely to ensue, is the same as the view taken by Deane J in the *Mengel* case 69 ALJR 527. I also consider that the opinion of Brennan J is not inconsistent with it as, at p 546, he referred to "conduct . . . calculated to produce injury". In the *Bourgoin* case [1986] QB 716 the minister knew that the prohibition would harm French turkey producers and therefore the issue as between foresight and foreseeability did not have to be determined by Mann J, but as Clarke J pointed out in his judgment [1996] 3 All ER 558, 568, Mann J had previously referred more than once to the public officer knowing that his act would injure the plaintiff, and I agree with Clarke J that Mann J must have meant "foreseen" [1986] QB 716, 740F in the passage of his judgment which I have quoted above.

I further consider that the judgment in the *Garrett* case provides an answer to the submission that if there is a deliberate or reckless abuse of power which

A causes harm the injured party is entitled to recover damages whether or not the officer foresaw the harm. This view of the tort separates the abuse of power from the resultant harm and regards the unlawful exercise of the power, viewed in isolation from its consequences, as the essence of the tort, whereas the New Zealand Court of Appeal, rightly in my opinion, does not detach the unlawful conduct from its consequences but regards the abuse of power as consisting in the unlawful exercise of a power by a public officer B with knowledge that it is likely to harm another citizen, when the power is given to be exercised for the benefit of other citizens. As the court stated [1997] 2 NZLR 332, 349: "The tort has at its base conscious disregard for the interests of those who will be affected by official decision making."

In the present case Clarke J and the Court of Appeal were of opinion that to constitute the tort of misfeasance there must be a dishonest abuse of C power by the public officer. In the course of his submissions that the tort is established under the second limb in the *Bourgoin* case when a public officer knowingly acts unlawfully in the purported exercise of his power and the unlawful exercise of the power causes loss to the plaintiff, Lord Neill accepted that an improper motive is an essential ingredient and said that improper motive was alleged by the plaintiffs. On behalf of the Bank Mr Stadlen submitted that it was a requirement of the tort in every case that D the public officer should have acted dishonestly. In considering this point it is necessary to recognise, as Mr Stadlen did in his submissions, that in most cases, as a matter of reality, a finding by the tribunal of fact that a public officer knew that he was acting unlawfully and that his actions would probably injure the plaintiff would lead to a finding that he was acting dishonestly. Mr Stadlen submitted that in most cases the element of E dishonesty would permeate a finding of knowledge of unlawfulness and probability of harm, but he contended that dishonesty was an element which was always necessary and that there might be exceptional cases where, notwithstanding knowledge of unlawfulness and probability of harm, the plaintiff would fail in his action because he failed to prove dishonesty.

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 F acting in bad faith. In some cases the term "dishonesty" is not used and the term "in bad faith" or acting from "a corrupt motive" or "an improper motive" is used, or the term "in bad faith" is used together with the term "dishonesty". In *Cullen v Morris* 2 Stark 577, 589 Lord Abbott CJ in directing the jury said:

> G "The question for your consideration is, whether the refusal of the vote in this instance, was founded on an improper motive on the part of the defendant, it is for you to pronounce your opinion, whether the defendant's conduct proceeded from an improper motive, or from an honest intention to discharge his duty acting under professional advice."

The judgment of Buxton LJ in *Barnard v Restormel Borough Council* [1998] 3 PLR 27 is a modern example of how the terms "dishonesty" and "bad H faith" are used interchangeably. In that case where misfeasance in public office was alleged Buxton LJ in delivering his judgment said, at p 33: "We bear in mind the need to establish dishonesty" and later, at p 37, he referred to the strong emphasis placed "in the tort of misfeasance on the requirement of subjective bad faith". However, as the term "dishonesty" in some

contexts implies a financial motive, I consider that the term "in bad faith" is a preferable term to use and, as I have stated, I consider that it is an essential ingredient in the tort. A

I agree with the opinion of Clarke J [1996] 3 All ER 558, 583A, that the tort can be constituted by an omission by a public officer as well as by acts on his part. As Brennan J stated in the *Mengel* case 69 ALJR 527, 545: "Any act or omission done or made by a public official in purported performance of the functions of the office can found an action for misfeasance in public office." But whether the public officer is sued in respect of an act or an omission, it must be a deliberate one involving an actual decision and liability will not arise from injury suffered by mere inadvertence or oversight. I also agree with the opinion of Clarke J [1996] 3 All ER 558, 583B, D that it is sufficient for the plaintiff to prove that the public officer foresaw that his action would probably injure the plaintiff; to require foresight of certainty of harm would be unrealistic and, being very difficult to prove, would give inadequate protection against abuse of power. B C

I further consider that if the public officer knows that his unlawful conduct will probably injure another person, or is reckless as to that consequence, the plaintiff does not need to show, before liability can arise, some other link or relationship between him and the officer. The requirement of foresight of probable harm to the plaintiff, or recklessness as to such harm, is sufficient to ensure that the tort is confined within reasonable bounds. D

I have had the advantage of reading in draft the speeches which have been prepared by my noble and learned friends, Lord Hope of Craighead and Lord Millett, and for the reasons which they give and with which I am in agreement, I would dismiss the appeal on the Community law claim and I would make the same order as that proposed by my noble and learned friend, Lord Steyn E

**LORD HOBHOUSE OF WOODBOROUGH** My Lords, this appeal has raised two questions of law. The first is that relating to the alleged breach of the First Council Banking Co-ordination Directive (77/780/EEC) of 1977. I agree that the claim under this head cannot succeed in law for the reasons given by my noble and learned friend, Lord Hope of Craighead, and that the appeal under this head should be dismissed. F

The second is that relating to the definition of the tort of misfeasance in public office. On this, subject to what I will say in this speech, I am in substantial agreement with the views expressed by my noble and learned friends, Lord Steyn and Lord Hutton. None of your Lordships are willing to accept the main submissions of the plaintiffs on this aspect but it will be necessary, as your Lordships propose and I agree, to hear further submissions upon the actual pleaded allegations of the plaintiffs before deciding what order to make. On the hearing of the appeal your Lordships have heard full argument upon what are the constituents of the tort. Their correct identification is of an importance which extends beyond the present case. Your Lordships have been greatly assisted by the judgments in this case of Clarke J and the Court of Appeal which contain a careful examination of the authorities as have the written and oral submissions of counsel to which tribute should be paid. I am also indebted to the re-examination of the G H

A authorities in the speeches of my noble and learned friends, Lord Steyn and Lord Hutton.

The tort, concerning as it does the acts of those vested with governmental authority and the exercise of executive powers, has developed over the centuries as circumstances have changed. Terminology still tends to be used which is of little assistance to anyone not familiar with the legal history. The use of the word "malice" also causes confusion both as to its meaning in B relation to this tort and the role it has in the analysis of the tort. The particular elements emphasised as being of the essence of the tort have varied from time to time. There has been little consistency of language. It is therefore right to take the opportunity to attempt to draw together the threads and assist a more definitive view to be taken. It is not necessary for this purpose to repeat the review of the authorities.

C I will start by putting the tort in its legal context. Typically, a tort involves the invasion by the defendant of some legally protected right of the plaintiff, for example, trespass to property or trespass to the person. Conversion is another example. Such conduct on the part of the defendant is actionable as such and the belief of the defendant as to the legality of what he did is irrelevant. It is no defence for the defendant to say that he believed that he had statutory or other legal authority if he did not. The legal justification D must actually exist otherwise he is liable in tort: *Northern Territory v Mengel*, 69 ALJR 527, 547.

On the other hand, where the plaintiff is not entitled to complain of the invasion of such a right but bases his claim on some loss which he has suffered consequentially upon some act of the defendant which the defendant mistakenly believed was authorised by the law, the defendant's E honest belief provides him with an answer to the plaintiff's claim notwithstanding any actual illegality. Thus the holder of a public office who acts honestly will not be liable to a third party indirectly affected by something which the official has done even if it turns out to have been unlawful. Illegality without more does not give a cause of action: *Lonrho Ltd v Shell Petroleum Co Ltd (No 2)* [1982] AC 173, 189; *Dunlop v Woollahra Municipal Council* [1982] AC 158, 172; the *Mengel* case, 69 F ALJR 527, 546. There is no principle in English law that an official is the guarantor of the legality of everything he does; but he is liable if he injures another by an act which is itself tortious if not justified and he is unable to justify it, however honestly he may have acted.

The subject matter of the tort of misfeasance in public office operates in the area left unoccupied by these limits. It does not, and does not need to, G apply where the defendant has invaded a legally protected right of the plaintiff. It applies to the holder of public office who does not honestly believe that what he is doing is lawful, hence the statements that bad faith or abuse of power is at the heart of this tort. Similarly, it covers the situation where the plaintiff has suffered some financial or economic loss and therefore raises the question what relationship between the plaintiff's loss and the defendant's bad faith is required: hence the use of such expressions H as "targeted malice". It is necessary to locate these words and concepts in the right places in the analysis of the constituents of the tort otherwise confusion can and does occur.

My Lords, features of this tort have to be found both in the origin and in the consequence. The official must have dishonestly exceeded his powers

and he must thereby have caused loss to the plaintiff which has the requisite connection with his dishonest state of mind. The correct formulation of this nexus is one of the points of difficulty coupled with the formulation of what state of mind of the official has to be shown.

It is not necessary to discuss further who comes within the description "holder of a public office". It is a broad concept (*Calveley v Chief Constable of the Merseyside Police* [1989] AC 1228, *Henly v Lyme Corpn* 5 Bing 91, 107–108) and has been further extended by recognising that there may be a vicarious liability of the relevant governmental authority for the acts of the public official (*Racz v Home Office* [1994] 2 AC 45).

The argument before your Lordships has touched upon the question whether omissions as well as acts can give rise to the liability in this tort. I would answer this question by saying that the position is the same as in the law of judicial review. If there is an actual decision to act or not to act, the decision is amenable to judicial review and capable of providing the basis for the commission of the tort. If there is a legal duty to act and the decision not to act amounts to an unlawful breach of that legal duty, the omission can amount to misfeasance for the purpose of the tort: *R v Dytham* [1979] QB 722; the *Henly* case 5 Bing 91, 107. What is not covered is a mere failure, oversight or accident. Neglect, unless there is a relevant duty of care, does not suffice and the applicable tort would then be negligence not misfeasance and different criteria would apply: *X (Minors) v Bedfordshire County Council* [1995] 2 AC 633, the *Mengel* case 69 ALJR 527, 547.

The relevant act (or omission, in the sense described) must be unlawful. This may arise from a straightforward breach of the relevant statutory provisions or from acting in excess of the powers granted or for an improper purpose. Here again the test is the same as or similar to that used in judicial review.

The official concerned must be shown not to have had an honest belief that he was acting lawfully; this is sometimes referred to as not having acted in good faith. In the *Mengel* case, at p 546, the expression honest attempt is used. Another way of putting it is that he must be shown either to have known that he was acting unlawfully or to have wilfully disregarded the risk that his act was unlawful. This requirement is therefore one which applies to the state of mind of the official concerning the lawfulness of his act and covers both a conscious and a subjectively reckless state of mind, either of which could be described as bad faith or dishonest.

The next requirement also relates to the official's state of mind but with regard to the effect of his act upon other people. It has three limbs which are alternatives and any one of which suffices.

First, there is what has been called "targeted malice". Here the official does the act intentionally with the *purpose* of causing loss to the plaintiff, being a person who is at the time identified or identifiable. This limb does not call for explanation. The specific purpose of causing loss to a particular person is extremely likely to be consistent only with the official not having an honest belief that he was exercising the relevant power lawfully. If the loss is inflicted intentionally, there is no problem in allowing a remedy to the person so injured.

Secondly, there is what is sometimes called "untargeted malice". Here the official does the act intentionally being aware that it will in the ordinary course directly cause loss to the plaintiff or an identifiable class to which the

A plaintiff belongs. The element of knowledge is an actual awareness but is not the knowledge of an existing fact or an inevitable certainty. It relates to a result which has yet to occur. It is the awareness that a certain consequence will follow as a result of the act unless something out of the ordinary intervenes. The act is not done with the intention or purpose of causing such a loss but is an unlawful act which is intentionally done for a different B purpose notwithstanding that the official is aware that such injury will, in the ordinary course, be one of the consequences: *Garrett v Attorney General* [1997] 2 NZLR 332, 349–350.

Thirdly there is reckless untargeted malice. 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. What the official is here aware of is that there is a risk of C loss involved in the intended act. His recklessness arises because he choses wilfully to disregard that risk.

It is necessary to add some footnotes. I have used the word "intentionally". This relates to the doing of the act and covers a similar point to that referred to earlier in relation to acts and omissions. It indicates that the mind must go with the act. It does not require any specific intent D (except in so far as having a specific purpose under the first limb imports an intent).

The tort is historically an action on the case. It is not generally actionable by any member of the public. The plaintiff must have suffered special damage in the sense of loss or injury which is specific to him and which is not being suffered in common with the public in general. The three alternative E limbs reflect this. The plaintiff has to be complaining of some loss or damage to him which completes the special connection between him and the official's act.

The use of the word "directly" has a similar connotation. The act of the official may have a widespread economic effect, indirectly affecting to some extent a wide range of diverse persons. This does not suffice to give any of them a cause of action. The relevant plaintiff must be able to bring himself F within one of the three alternative limbs.

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 the *Mengel* case 69 ALJR 527, 554. The word "reckless" is not normally used in relation to this tort; other words are used including "blind disregard". At the first stage the phrase "without an honest G belief" in the lawfulness of his conduct best conveys the requisite state of mind covering both actual knowledge and dishonest disregard. At the last stage, the phrase "wilful disregard" best describes the element of subjective recklessness in the third limb and the word "risk" is the appropriate word to use in conjunction with it.

The use of the words foreseen or foreseeable is to be avoided. They are concepts borrowed from the law of negligence. This tort concerns deliberate H acts. Thus in the first limb the criterion is having a specific purpose, a different concept from foresight. In the second limb the concept is acting intentionally with the knowledge that the act will have a particular consequence in the ordinary course. This is like foresight but represents rather a state of mind which colours the intentional or deliberate act.

LORD MILLETT My Lords, A

*1. The Community law claim*

I have had the advantage of reading in draft the speech of my noble and learned friend Lord Hope of Craighead. I propose to set out my own reasons for agreeing with him that this claim must fail.

*The objects of the Directive* B

In my opinion it is plain that the Directive does not have as one of its objects the protection of depositors. That is the function of the various national banking laws of the member states. In order to achieve their purpose these place restrictions on the freedom to provide banking services. Such restrictions are inherently anti-competitive and thus contrary to article 59 of the EEC Treaty (now article 49 EC), but (as the recitals to the Directive itself expressly recognise) some restrictions are necessary if the interests of depositors are to be properly safeguarded. As they are imposed by national legislatures such restrictions vary from one member state to another, and this inevitably has a distorting effect on the operation of the single market. The object of the Directive was to begin the process of co-ordination of the national laws in order to remove anti-competitive barriers to the free provision of banking services throughout the single market so far as this could be achieved without weakening or impairing the protection of depositors. Thus the adequate protection of depositors was not an object of the Directive but rather operated as a constraint upon the extent to which its object could be achieved. That this is the case is in my opinion confirmed by the judgment of the Court of Justice in *Société Civile Immobilière Parodi v Banque H Albert de Bary et Cie* (Case C-222/95) [1997] ECR I–3899.

The identification of the object of the Directive, however, is only of marginal relevance in the present case, where the question is whether the Directive confers rights on individuals. That question must be determined by reference to the particular provisions of the Directive which are relied on. What is decisive is not the interest which a Directive as a whole seeks to protect, but the interest sought to be protected by the provisions which are alleged to have been breached: see *Sacha Prechal*, *Directives in European Community Law* (1995), p 138. Attempting to identify "the underlying object" or "main object" of a Directive and to distinguish it from other subsidiary objects is in my opinion as unprofitable as it is illusory.

There is a further consideration. The question whether a particular provision of a Directive confers rights on individuals is a secondary question. It does not arise until a breach of the provision in question has first been established. In the present case the plaintiffs allege breaches of articles 3, 6, 7 and 8 of the Directive. Unless the plaintiffs can establish a breach of any of these articles, the question whether it confers rights on individuals does not arise.

*Article 3: breach of the alleged obligation to withhold initial authorisation* H

As every banking supervisor would recognise, there is a critical difference between (i) withholding authorisation from a credit institution which is about to commence business and (ii) withholding authorisation from or revoking the authorisation of a credit institution which is already carrying

A on business. The former cannot injure anyone, not even the credit institution itself; it merely deprives it of an opportunity for profit. The latter damages and may destroy an established business and cause irreparable injury to the institution and its existing depositors. In the case of an existing business, there is a perennial conflict between the need to protect potential depositors and the interests of existing depositors, and difficult questions of judgment are inevitably involved.

B The Directive is careful to draw this distinction. It lays down precise requirements which must be met by a credit institution before it commences business; but it recognises that it would be inappropriate and potentially harmful to the interests of existing depositors to fetter the discretion necessary to deal with an institution already carrying on business.

Article 3(1) imposes an obligation on member states to require credit C institutions to obtain authorisation *before commencing their activities*.The Directive is not retrospective. BCCI had commenced its activities in the United Kingdom before the Directive came into force, and accordingly article 3(1) has no application to it. Article 3(2), which limits the power of the member state to grant authorisation, deals with the same subject-matter, viz the authorisation of credit institutions proposing to carry on business in a member state. It requires the member state to withhold authorisation from a D credit institution which does not comply with the relevant criteria. In the context of article 3 this does not include an institution like BCCI which is already carrying on business in the member state concerned. If the article applied to credit institutions already carrying on business in the member state, it would be inconsistent with the provisions of article 10(4).

Credit institutions which commenced business in a member state before E the Directive came into force are dealt with by article 10. Such institutions are deemed to be authorised and are subject to modified requirements. Whereas article 3(1) *obliges* member states to require credit institutions to obtain authorisation before commencing their activities, article 10(4) *permits* them to require institutions which are legitimately carrying on business without authorisation to obtain authorisation for the future. The United Kingdom could have exempted BCCI and other credit institutions which had F commenced business in the United Kingdom before the Directive came into force from any requirement to obtain authorisation. It did not do so, but went further than the Directive required (though not further than it permitted) by obliging such institutions to obtain authorisation. In these circumstances an unlawful grant of authorisation in breach of the provisions of the Banking Act 1979 will amount to a breach of United Kingdom law but G not of Community law.

The plaintiffs rely on *Wagner Miret v Fondo de garantía salarial* (Case C-334/92) [1993] ECR I-6911 for the proposition that where a member state voluntarily assumes obligations laid down by a Directive it cannot escape liability by reason of the absence of any Community requirement to assume them. But that case dealt with the converse situation. There the Directive applied, but permitted member states to exclude certain categories H of case from its scope. Spain did not exercise this power, and accordingly the Directive applied. The Court of Justice held that the fact that Spain could have excluded the operation of the Directive was no defence to a claim under Community law when it had not done so. The fact that the legal obligation had been voluntarily assumed did not alter its source, which was

Community law. But in the present case there is no applicable Community law: article 3(1) of the Directive does not apply. The United Kingdom was not obliged by Community law to require BCCI to obtain authorisation or to withhold authorisation from it. The United Kingdom chose to impose its own requirements. Any obligation to enforce those requirements arises from national law, not Community law.

*Articles 6 and 7: failure to provide continuous and effective supervision*

I cannot see that these articles impose any such obligation. They impose obligations of co-operation and the establishment of appropriate ratios with a view to eventual standardisation. They take the existence of supervisory regimes in the member states for granted.

But it is not necessary to decide this, because it is obvious that an obligation to provide "continuous and effective supervision" is far too imprecise and leaves far too great a margin of appreciation in member states to be capable of conferring rights on individuals in accordance with the jurisprudence of the Court of Justice.

*Article 8: failure to revoke authorisation*

Lastly the plaintiffs allege a breach of an obligation said to be imposed by article 8 of the Directive to revoke an authorisation in certain defined circumstances. But the article imposes no such obligation. It provides that the competent authorities "may withdraw the authorisation . . . *only*" in the circumstances prescribed. The word "only" is critical to the meaning. "May" sometimes means "must"; but "may only . . . if" means "must not . . . unless". The article is not permissive, let alone obligatory. It is prohibitory. It forbids the member state to withdraw authorisation from a credit institution, with the attendant risk of loss to existing depositors, except in the circumstances prescribed. Where those circumstances exist, the article does not interfere with the power of the member state to withdraw authorisation at its discretion. But it does not oblige it to do so without regard to any of the countervailing considerations to which I have referred.

*Conclusion*

When properly understood, the scheme of the Directive makes sound regulatory sense. A member state *must* withhold authorisation from an institution wishing to commence business in the member state unless the criteria prescribed by article 3(2) are met. A member state is, however, free to select its own criteria for allowing an institution to continue to carry on an existing business. A member state may not withdraw authorisation or prohibit an institution from carrying on an existing business except in prescribed circumstances. Where those circumstances exist it is left to the member state to have regard to any countervailing considerations in exercising its own discretion whether to withdraw authorisation or close down an existing business.

It follows that the plaintiffs are unable to allege any breach of article 3 (which does not apply to BCCI) or article 8 (which does not impose a relevant obligation), while neither article 6 nor 7 confers rights on individuals.

A 2. *Misfeasance in public office*

I have had the advantage of reading in draft the speeches of my noble and learned friends, Lord Steyn and Lord Hutton, with which I am in full agreement. It may, however, be helpful if I set out in my own words what I consider to be the elements of the tort of misfeasance in public office.

The tort is an intentional tort which can be committed only by a public B official. From this two things follow. First, the tort cannot be committed negligently or inadvertently. Secondly, the core concept is abuse of power. This in turn involves other concepts, such as dishonesty, bad faith, and improper purpose. These expressions are often used interchangeably; in some contexts one will be more appropriate, in other contexts another. They are all subjective states of mind.

It is important to bear in mind that *excess* of power is not the same as C *abuse* of power. Nor is breach of duty the same as abuse of power. The two must be kept distinct if the tort is to be kept separate from breach of statutory duty, which does not necessarily found a cause of action. Even a deliberate excess of power is not necessarily an abuse of power. Just as a deliberate breach of trust is not dishonest if it is committed by the trustee in good faith and in the honest belief that it is for the benefit of those in whose D interests he is bound to act, so a conscious excess of official power is not necessarily dishonest. The analogy is closer than may appear because many of the old cases emphasise that the tort is concerned with the abuse of a power granted for the benefit of and therefore held in trust for the general public.

The tort is generally regarded as having two limbs. The first limb, traditionally described as "targeted malice", covers the case where the E official acts with intent to harm the plaintiff or a class of which the plaintiff is a member. The second is said to cover the case where the official acts without such intention but in the knowledge that his conduct will harm the plaintiff or such a class. I do not agree with this formulation. In my view the two limbs are merely different ways in which the necessary element of intention is established. In the first limb it is established by evidence; in the F second by inference.

The rationale underlying the first limb is straightforward. Every power granted to a public official is granted for a public purpose. For him to exercise it for his own private purposes, whether out of spite, malice, revenge, or merely self-advancement, is an abuse of the power. It is immaterial in such a case whether the official exceeds his powers or acts according to the letter of the power: see *Jones v Swansea City Council* [1990] G 1 WLR 1453. His deliberate use of the power of his office to injure the plaintiff takes his conduct outside the power, constitutes an abuse of the power, and satisfies any possible requirements of proximity and causation.

The rationale of the second limb is not so transparent. The element of knowledge which it involves is, in my opinion, a means of establishing the necessary intention, not a substitute for it. But intention does not have to be H proved by positive evidence. It can be inferred. Proof that the official concerned knew that he had no power to act as he did and that his conduct would injure the plaintiff is only the first step in establishing the tort. But it may and will usually be enough for the necessary intention, and therefore of the requisite state of mind, to be inferred. The question is: why did the official act as he did if he knew or suspected that he had no power to do so

and that his conduct would injure the plaintiff? As Oliver LJ said in *Bourgoin SA v Ministry of Agriculture, Fisheries and Food* [1986] QB 716, 777:

> "If an act is done deliberately and with knowledge of its consequences, I do not think that the actor can sensibly say that he did not 'intend' the consequences or that the act was not 'aimed' at the person who, it is known, will suffer loss."

As that case demonstrates, the inference cannot be rebutted by showing that the official acted not for his own personal purposes but for the benefit of other members of the public. An official must not knowingly exceed his powers in order to promote some public benefit at the expense of the plaintiff.

It will be seen from this that the real difference between the two limbs lies in the starting point. If the plaintiff can establish the official's subjective intention to exercise the power of his office in order to cause him injury, he does not need to establish that the official exceeded the terms of the powers conferred upon him. If, on the other hand, the plaintiff can establish that the official appreciated that he was acting in excess of the powers conferred upon him and that his conduct would cause injury to the plaintiff, the inference that he acted dishonestly or for an improper purpose will be exceedingly difficult and usually impossible to rebut. Moreover, as Blanchard J pointed out in *Garrett v Attorney General* [1997] 2 NZLR 332, 350, the consequences of his actions will usually be obvious enough to the official concerned, who can then be taken to have intended the damage he caused. I also agree with him that intention includes subjective recklessness, that is to say (to adopt his words at p 349) a "conscious disregard for the interests of those who will be affected by" the exercise of the power.

It is not, of course, necessary that the official should foresee that his conduct will certainly harm the plaintiff. Nothing in life is certain. Equally, however, I do not think that it is sufficient that he should foresee that it will probably do so. The principle in play is that a man is presumed to intend the natural and probable consequences of his actions. This is the test laid down by Mason CJ writing for the majority of the High Court of Australia and Brennan J in *Northern Territory v Mengel* 69 ALJR 527, viz that it should be calculated (in the sense of likely) in the ordinary course of events to cause injury. But the inference cannot be drawn unless the official did foresee the consequences. It is not enough that he ought to have foreseen them if he did not do so in fact.

In the present case most (and perhaps all) of the complaints made by the plaintiffs are of the Bank's failure to act. Even their complaint that the Bank of England ought not to have granted BCCI initial authorisation is essentially a complaint that officials of the Bank failed to exercise an independent judgment and to apply the relevant criteria.

The parties are agreed that there is no conceptual difference between sins of omission and sins of commission. This may be so; but factually there is a great difference between them. It is no accident that the tort is misfeasance in public office, not nonfeasance in public office. The failure to exercise a power is not in itself wrongful. It cannot be equated with acting in excess of power. The tort is concerned with preventing public officials from acting beyond their powers to the injury of the citizen, not with compelling them to

A exercise the powers they do have, particularly when they have a discretion whether to exercise them or not. There seems to be only one case in the books where a failure to exercise a power gave rise to the tort: *R v Dytham* [1979] QB 722, 727G, where Lord Widgery CJ said in terms that the neglect must be "wilful and not merely inadvertent". *Ferguson v Earl of Kinnoull* (1842) 9 Cl & Fin 251 and the cases there cited were all cases of wilful breach of duty. *Henly v Lyme Corpn* 5 Bing 91 was in my opinion a case of B breach of statutory duty, not of misfeasance in public office.

In conformity with the character of the tort, the failure to act must be deliberate, not negligent or inadvertent or arising from a misunderstanding of the legal position. In my opinion, a failure to act can amount to misfeasance in public office only where (i) the circumstances are such that the discretion whether to act can only be exercised in one way so that there is C effectively a duty to act; (ii) the official appreciates this but nevertheless makes a conscious decision not to act; and (iii) he does so with intent to injure the plaintiff or in the knowledge that such injury will be the natural and probable consequence of his failure to act.

Although we heard argument directed to the requirement of proximity and in particular the suggested need for the plaintiff to establish "an antecedent legal interest" or, as I would prefer to put it, "a legally protected D interest", I cannot see that this presents a problem in the present case. The statutory powers in question were conferred on the Bank of England for the protection of actual and potential depositors, and any member of either class can satisfy the requirement.

*Conclusion*

E I agree with the order which your Lordships propose.

*Appeal and cross-appeal referred back for further argument save that appeal dismissed so far as relating to European Community law.*
F *No order as to costs.*

*Solicitors: Lovells; Freshfields.*

B L S

*Lord Neill of Bladen QC, Richard Sheldon QC, Robin Dicker QC, Dominic Dowley* and *Barry Isaacs* for the plaintiffs.

G *Nicholas Stadlen QC, Mark Phillips QC, Bankim Thanki,* and *Ben Valentin* for the defendant.

22 March 2001. **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 H 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 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 of Craighead 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.

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 and of the majority (Hirst and Walker LJJ) in the Court of Appeal 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 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 of Craighead 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 of Craighead 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

A 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 submission on costs are invited within 21 days.

LORD HOPE OF CRAIGHEAD

B 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 was capable of being liable to the plaintiffs in damages for violation of the requirements of the First Council Banking Co-ordination Directive of 12 December 1977 (77/780/EEC). For the reasons given in your C Lordships' judgment of 18 May 2000 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 D 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 for the plaintiffs and by Mr Stadlen 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 E 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.

F 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 G said 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: ante, p 196H. 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 H 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 ("CPR") came into force. This case is therefore subject to the transitional arrangements set out in the Practice Direction—Transitional

Arrangements made under CPR rule 51.1. 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: 51PD-003, 011.

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: Civil Procedure 2000, 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, rule 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 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 rule 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 Schedule 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 31 July 1997 (unreported), in which the history was divided up into the same four periods, and it was reviewed again in Part III of the judgment of the majority in the Court of Appeal of 4 December 1998 (Part 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

A 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 B 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 Banking Act 1979 banking in the United Kingdom was not subject to any formalised system of regulation. Control was exercised in an informal way by the Bank of England and in an indirect manner by means of various statutory provisions which gave privileges to banks which were C recognised by the Board of Trade and by the Bank. Following the publication of a White Paper in 1976 and the First Council Banking Co-ordination Directive (77/780/EEC) steps were taken to establish a new statutory system of banking supervision in the United Kingdom. This was contained in the Banking Act 1979, which came into force on 1 October 1979. It provided for the recognition of banks under section 3(1) if they satisfied the criteria in Schedule 2, Part I, and for the licensing of deposit-taking institutions under section 3(2) if they satisfied the less D stringent criteria in Schedule 2, Part II. Section 3(5) of the 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 Schedule 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.

E 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 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 section 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 F 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: see paragraph 31 of the new draft particulars.

20 During the period from June 1980 to December 1986 the activities of the G 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 section 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 H 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 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 paragraph 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 section 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 section 9(3) of the 1987 Act. BCCI SA was deemed to be authorised under the 1987 Act by section 107 of that Act and Schedule 5, paragraph 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 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 ("PW"), 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 $285 million: new draft particulars, Schedule 5, paragraphs 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 UK were dependent upon what happened elsewhere in the group which was largely unsupervised: new draft particulars, Schedule 6, paragraph 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, Schedule 6, paragraph 24.

A 25 The final period from April 1990 to closure in July 1991 began with expressions of concern to the Bank by PW 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 PW 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 B 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 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 C commitment by the Abu Dhabi Government of its support for it.

26 In October 1990 PW 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 PW. 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 PW regarded D as acceptable, but later that month PW 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 PW to investigate and report to it under section 41 of the Banking Act 1987 on malpractice within BCCI. PW 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 E 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 F 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 G an inquiry into the supervision of BCCI under the Banking Acts, to consider whether the action taken by all the UK 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 UK authorities know about BCCI at the relevant times? Should they have known H more? And should they have acted differently?

29 The report (Inquiry into the Supervision of the Bank of Credit and Commerce International (HC Paper (1992–93) No 198) contains a masterly and eminently readable account of the entire sequence of events from the establishment of BCCI in the UK 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 UK 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, no comparable statutory provisions to those which are to be found in section 441 of the Companies Act 1985 apply to the Bingham report: ante, p 83A–D. 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' re-consideration.

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

A 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 in his minority judgment when he said that B 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: ante, p 175D–E.

*(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 C 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 re-amended statement of claim. Following Clarke J's first and second D 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-re-amend 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-re-amended statement of claim, and an eighth draft was lodged on 6 January 1997.

E 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-re-amend the F 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 G 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 H 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), ante, p 17 et seq, 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, 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: ante, p 94B–D. Auld LJ dissented as to the test to be applied. He 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 foreseeablility, ante, p 160G–H. But he 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: ante, p 170F. He said that there were no exceptional circumstances to justify departing from the normal rule of leaving the matter to the trial judge: ante, pp 175A–176D.

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-re-amend 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. 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

A 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 B 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 C 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 D 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 E 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 F 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 G 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. H 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 Corpn v Steel* [1995] 3 All ER 615, 621E–F 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) 72 BLR 26, 33–34 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, 792J–793A:

"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 statement, 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.

A 52 In *Wallingford v Mutual Society* (1880) 5 App Cas 685, 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."

B In the same case, at p 709, Lord Watson said:

"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 C 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 D 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, 489 where Thesiger LJ said:

"It may not be necessary in all cases to use the word 'fraud'—indeed in one of E 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 show distinctly that he means to allege fraud. In the present case facts F 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 G 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, ante, p 22C–D, the immunity which the Bank enjoys under section 1(4) of the Banking Act 1987 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.

H 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 Attorney General for Victoria* [1901] AC 196, 202, 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* [1998] Ch 241, 256G, 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: *Belmont Finance Corpn Ltd v Williams Furniture Ltd* [1979] Ch 250, 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, paragraphs 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

A 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 B 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 C 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 D 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 First Council Banking Co-ordination Directive E (77/780/EEC) 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 F 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 ante, p 172C–E:

G "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 H '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."

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 paragraph 31 of the new draft particulars that the Bank in bad faith at all times from 1979 onwards purported to rely pursuant to section 3(5) of the 1979 Act, and subsequently section 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 UK, 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 paragraph 37 of the new draft particulars, under reference at each stage in the history to the facts and matters set out in Schedules 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 section 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, 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: ante, pp 85A, 174G. 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

A 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 B 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 agreed with Clarke J's finding in his third judgment C 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: ante, p 84C. I agree, and I also consider that sufficient notice of the facts on which the claimants propose to rely is given in Schedule 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 D 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 E 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 F 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, Schedule 5, paragraphs 27 and Schedule 6, paragraphs 19 and 24. He maintained that this was a fundamental defect in the revocation claim, as a conscious decision was needed to G 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 H 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, Schedule 5, paragraphs 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* [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) 69 ALJR 527, 545 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, pp 6–7. 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 that this was a vastly difficult undertaking: ante, p 82A.

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, p 166. The Court of Appeal agreed with the judge that it was right, in the exceptional circumstances of this case, to conduct this exercise: ante, pp 80B–D, 82A. After reviewing the judge's conclusion in great detail, the majority agreed 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: ante, p 94E.

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

A 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, B 632G–633E were approved in the judgment given by your Lordships after the first hearing of this appeal. The majority in the Court of Appeal said 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: ante, pp 58H, 94E. 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 C 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, 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" D of such damage: [1996] 3 All ER 558, 633A–B. In the Court of Appeal the majority asked themselves whether the claimants had an arguable case that the Bank "actually foresaw" BCCI's imminent collapse at each relevant stage: ante, p 94E. They went on to say at p 94F–G 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 E 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 F 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 G 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 this.

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"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: ante, p 83H. 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 that there were no exceptional circumstances to justify departing from the normal rule of leaving the matter to the trial judge: ante, pp 175D–176A.

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. 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

A 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 B 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 in 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:

C "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 D 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 E 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 F 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. 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 G in paragraph 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 paragraph 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 section 3(5) of the Act as applicable and applied it. In paragraph 2.25 Bingham LJ says that he read nothing H sinister in that approach. Moreover, on the footing that the principal place of business was in the United Kingdom, under section 36 BCCI was not entitled to describe itself as a bank, but Bingham LJ says in paragraph 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 at p 89, where the judge referred to a conclusion in paragraph 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; at p 110, where he referred to a conclusion in paragraph 2.154 of the report to the same effect as to the Bank's state of mind in December 1989; and at pp 153 -154, where he referred to paragraphs 2.333 and 2.337 of the report as to the Bank's state of mind in March 1991 when it commissioned PW to investigate and report on malpractice within the group under section 41 of the 1987 Act.

84 In their written submissions to the Court of Appeal 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 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: ante, p 174C–D. 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 p 175D–F:

> "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 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 LJ 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 endorse 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-re-amend the statement of claim is open to re-consideration by your Lordships. The draft re-re-amended 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 r 24.2*

87 Clarke J ordered that the action should be struck out under RSC Ord 18, r 19 on the grounds that the re-amended 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-re-amend. 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

A Civil Procedure Rules 1998: see the general principle stated in *Practice Direction—Transitional Arrangements*, 51PD-011. 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 rule 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 B 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 r 3.4. In *Margulies v Margulies* (unreported) 16 March 2000 the judge's decision to strike out was given C pursuant to RSC Ord 18, r 19 before the coming into effect of the Civil Procedure Rules. Nourse LJ said at paragraph 63 that, if the judge wrongly applied the test, the Court of Appeal would have to determine the matter pursuant to CPR Pt 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 rule 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 (No 2)* (unreported) 21 July 1999: Court of Appeal (Civil D Division) Transcript No 1200 of 1999. *Civil Procedure 2000*, 3.4.6. CPR Pt 24 sets out various procedural requirements which do not apply to rule 3.4 But the claimants do not object to the application of rule 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 r 24.2 provides:

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"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 F should be struck out under RSC Ord 18, r 19, was whether it was bound to fail: see p 171 of the third judgment. Mr Stadlen submitted that the court had a wider power to dispose summarily of issues under CPR Part 24 than it did under RSC Ord 18, r 19, and that critical issue was now whether, in terms of CPR rule 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, 92, Lord Woolf MR said:

G "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 submits, they direct the court to the need to see whether there is a 'realistic' as opposed to a 'fanciful' prospect of success."

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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 v Hillman*, at p 4, Lord Woolf explained that the reason for the contrast in language between rule 3.4 and rule 24.2 is that under rule 3.4, unlike rule 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* The Times, 30 November 1999; Court of Appeal (Civil Division) Transcript No 1924 of 1999; Stuart Smith LJ said that rule 24.2 gives somewhat wider scope for dismissing an action or defence. In *Taylor v Midland Bank Trust Co Ltd* 21 July 1999 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: rule 1.1. To adopt the language of article 6(1) of the European Convention for the Protection of Human Rights and Fundamental Freedoms 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: rule 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* (unreported) 17 December 1999: Court of Appeal (Civil Division) Transcript No 2290 of 1999:

> "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 to analyse that question by reference to the rigid and overloaded structure which a large body of decisions under the former rules had constructed."

93 In *Swain v Hillman* Lord Woolf gave this further guidance, at pp 94 and 95:

> "It is important that a judge in appropriate cases should make use of the powers contained in Part 24. In doing so he or she gives effect to the overriding objectives contained in Part 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 Part 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 Part 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."

*(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

A 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 to take B 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 said in *Swain v Hillman*, at p 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] 1 WLR 1238 the plaintiff's claim of damages for conspiracy was struck out after a four day hearing on affidavits and documents. C Danckwerts LJ said of the inherent power of the court to strike out, at p 1244B–C:

> "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 D power of the court and not a proper exercise of that power."

Sellers LJ said, at p 1243C–D, 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, ante, p 78E-F the majority said that "this somewhat rigid position" had been modified in *Williams and Humbert Ltd v W & H Trade Marks (Jersey) Ltd* [1986] AC 368, where Lord Templeman said at pp 435H–436A E 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 Lord Mackay of Clashfern, at p 441E–F. But they were satisfied that this case fell within the exceptional class for the same reasons as those explained in the *Williams and* F *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 v Moloney* [1965] 1 WLR 1238 regarded as objectionable. In *Morris v Bank of America National Trust* [2000] 1 All ER 954, 966B Morritt LJ said that *Wenlock's* case illustrated a salutary principle. He then said, at p 966B–C:

> G "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 H 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 rule 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: ante, p 84C–D. 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 that the PW 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: ante, p 92D. Clarke J said that it is plain that the Bank appreciated that in the absence of remedial steps BCCI would probably

A 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 p 92D, 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 p 94E, that they agreed with the judge that the claimants had no arguable case that the Bank dishonestly failed to B 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 C 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.

D 104 I agree that there is material in the documents that are already available to support the pleading in Schedule 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 E 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 Schedule 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 F 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 G the majority in the Court of Appeal recognised: ante, p 93B. For reasons already given I would leave out of account the fact, relied on by the majority at p 94B, 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 H 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 held that it would be premature to decide these points conclusively in the Bank's favour until the facts have been established; ante pp 59E–61H. I respectfully agree. As I said earlier (see paragraph 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 re-amended 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

A 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 B 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 C 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 stated the ingredients of the tort of misfeasance in public office. In his second judgment dated 10 May 1996 D 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 re-amend the statement of claim and by his third judgment dated 30 July 1997 the judge held that even if all the E 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 F 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."

Accordingly the judge ordered that the action be struck out, but the judge made it clear, at p 169, 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 G delivering the joint judgment of himself and Robert Walker LJ, Hirst LJ stated, ante, p 94B–D:

> "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 BCCI SA or dishonestly failed to revoke the licence or authorisation in circumstances when it knew, believed or suspected that the H 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."

In his dissenting judgment, ante, p 175F–G Auld LJ stated:

> "As the authorities to which Hirst and Robert Walker LJJ 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, ante, p 196H 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 re-amended statement of claim and in the re-re-amendments 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 advanced two main submissions. The first was that the plaintiffs' claim, whether as formulated in the re-amended statement of claim or in the re-re-amendments 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 Ord 18, r 19(1)(a)(b) and (d) of the Rules of the Supreme Court. I think that in applications under the Rules of the Supreme Court 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 1999 White Book stated at 18/19/10 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 WLR 688; [1970] 1 All ER 1094, CA). 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, CA; *Wenlock v Moloney* [1965] 1 WLR 1238; [1965] 2 All ER 871, CA). . ."

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 rule 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 rule 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

A justification in a defence) was the application made in *McDonald's Corpn 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 p 623E–F, 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.

B 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-re-amendments 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 (see paragraphs 6 and 7, at p 172, of his third judgment).

119 The applications before Clarke J and the Court of Appeal were governed by the Rules of the Supreme Court but those Rules have now been replaced by the Civil C Procedure Rules. I think that r 3.4 (2)(a) of the new Rules corresponds in a broad way to 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). Rule 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 D otherwise likely to obstruct the just disposal of the proceedings . . ."

Rule 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 Civil Procedure Rules came into force, and therefore if Clarke J and the majority of the Court of Appeal erred in their approach to the E 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 F 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 G were stated in the judgment of the House following the previous hearing 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 H 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:

"33. 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, 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 show 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 Corpn Ltd v Williams Furniture Ltd* [1979] Ch D 250, 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* 7 Ch D 473, 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

A 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 paragraphs 36, 37 and 38 of the particulars of claim allege:

B "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 C 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 D 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 E 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 F 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 G 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* [1998] Ch 241, 256G Millett LJ said: "It is not H 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, at p 259G, he 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 clause 15." In *Taylor v Midland Bank Trust Co Ltd*

(unreported) 21 July 1999 Buxton LJ referred to the first observation of Millett LJ, at p 256G, 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 v Nurse*, the pleader does expressly allege bad faith because paragraph 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 rule 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 rule 3.4(2)(b) or rule 24.2(a)(1).

126 Mr Stadlen, 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* [1982] AC 158 and *Bourgoin SA v Ministry of Agriculture, Fisheries and Food* [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 paragraph 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 rule 3.4(2)(a). In *British Airways Pension Trustees Ltd v Sir Robert McAlpine & Sons Ltd* (1994) 72 BLR 26 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

A 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 stated, at pp 33–34:

> "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 B 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 C 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 D 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."

E And in considering the purpose of pleadings under the Civil Procedure Rules in *McPhilemy v Times Newspapers Ltd* [1999] 3 All ER 775, 793B 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 F 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.

G *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 H 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 plaintiff's 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 of Craighead 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 in his dissenting judgment, ante, p 175D: "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 rule 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, 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 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 p 95:

"Useful though the power is under Part 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

A issues which should be investigated at the trial. As Mr Bidder put it in his submissions, the proper disposal of an issue under Part 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 B pleaded and he relied on the judgment of Neill LJ in *McDonald's Corpn v Steel* [1995] 3 All ER 615, 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 C 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, 27, where, on an D 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 E 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."

F 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 pp 622H–623A:

G "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 H 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 plaintiff's 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 paragraph 2.186, with the possible exception of Mr Beverly, no-one did. Indeed in paragraph 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 [b]ank'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 ante, p 92C–D:

"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 BCCI SA. 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 p 94E:

"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 BCCI'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

A 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 B 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 C 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 D 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, ante, pp 227E–228A that I considered that, in the context of misfeasance, "in bad faith" is a preferable term to E "dishonesty". In relation to the element of bad faith the plaintiffs plead in paragraph 37 of the particulars of claim that the Bank's motives set out in that paragraph constitute bad faith. Lord Neill, 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 F 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 G 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 H 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 paragraphs 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

A 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 B 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 C 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 D 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 E 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 F 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 G 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, nonetheless 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 H 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, ante, p 175B–F of his judgment:

> "In addition to the different function of Bingham LJ'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 LJ had seen and fully tested all the material evidence available or likely to become available on the issues confronting the court in this case."

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 *McDonald's Corpn v Steel* [1995] 3 All ER 615 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 County Council* The Times, 23 November 1999; Court of Appeal (Civil Division) Transcript No 1908 of 1999 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."

A 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 v Hampshire County Council* 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, B 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* 21 July 1999 the plaintiff alleged dishonest C breach of trust and the defendant applied for the dismissal of the claim without trial under rule 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 D 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."

E 149 The Court of Appeal stated, ante, p 83G–H:

> "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 F 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."

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 G 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 H 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 paragraph 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 of Craighead 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 (the Bingham report: 1992 HC Paper 198) which runs to 218 printed pages together with 8 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 Part 1 of the Civil Procedure Rules 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 pretrial 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 Order 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, i e 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

A 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 and Humbert v W & H Trade Marks* [1986] AC 368, 435–436 and 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 B 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 C forensic exposure. In *Ashmore v Corpn of Lloyd's* [1992] 1 WLR 446, 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, at p 448, 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 D 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 . . ."

E 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 F 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 dependant upon a cause of action of which the parameters were not wholly certain and a statement of claim which may or may not have G 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 H 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 Rules of the Supreme Court not the Civil Procedure Rules.

158 This leads me back to the CPR. As previously noted, Part 1 adopts a philosophy similar to that enunciated in *Ashmore v Corpn of Lloyd's* [1992] 1 WLR 446. It is followed through into the new version of RSC Ord 14. It is Part 24. It authorises the court to decide a claim (or a particular issue) without a trial. Unlike Order 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, i e 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 Part 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. Part 24 includes provisions covering various ancillary matters, at what stage the application can be made (24.4), the filing of evidence (24.5) and supplementary powers of the court (24.6). The Practice Direction which was originally appended 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 Part 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" (ante, p 83H). Although used in a slightly different context these phrases appropriately express the same idea. Part 3 of the CPR 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 Part 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 Part 24 bear repetition:

> "The words 'no real prospect of being successful or succeeding' do not need any amplification, they speak for themselves. The word 'real' distinguishes

A 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 Part 24. In doing so he or she gives effect to the overriding objectives contained in Part 1. It saves expense; it achieves expedition; it avoids the court's resources being used up on cases where this serves no purpose and, B 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." (*Swain v Hillman* [2000] 1 All ER 91, 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 C 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 Ord 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'." (*Sinclair v Chief Constable of West* D *Yorkshire* Transcript No L189 of 2000, per Otton LJ. See also *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 Part 24 is that it requires an assessment to be made in advance of a full trial as to what the outcome of E 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 F strengthened between now and the trial. Indeed, it was the submission of Mr Stadlen 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 plaintiffs, whether by further investigation, discovery, cross-G 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 H favourable to the plaintiffs. It is derived from what was said in relation to a plea of justification by Neill LJ in *McDonald's Corpn 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 common sense proposition has recently been re-emphasised by the Court of Appeal in *Medcalf v Mardell* [2001] Lloyd's Rep PN 146, in which Peter Gibson LJ said, at paragraph 40: "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:

A "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 B 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 C 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 D defendants have accepted that your Lordships' House should reassess the decision to dismiss the plaintiffs' claim using CPR 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 report.

*The cause of action*

E 163 This was the subject of the earlier hearing and decision of your Lordships. 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 F a need to have regard to its constituents.

164 In the speeches of your Lordships, in which I joined, delivered in May 2000, 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* G *Ltd v Uni-Polaris Insurance Co Ltd* [2003] 1 AC 469 and *White v White* [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 19th 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 H subjective bad faith." (Lord Steyn, ante, p 191E–G)

"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." (Lord Hutton, ante, p 227E–F)

"The official concerned must be shown not to have had an honest belief that he was acting lawfully;" (Lord Hobhouse, ante, p 230E)

"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." (Lord Steyn, ante, p 192F–G)

"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:" (Lord Hobhouse, ante, p 231B–F)

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 section 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.

A *The First Period*

168 The Act of 1979 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: section 1(1). However the B defendants' statutory obligation was clearly stated. In section 3(3)(b) and Part II of the Second Schedule, criteria are laid down which must be met unless subsection (5) applies. In any other case the defendants were forbidden from granting the licence. The defendants purported to grant the licence under subsection (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 C 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.

D 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."

E "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 F before it licensed BCCI SA, in 1980 it actually knew, believed or suspected that if it licensed BCCI SA, BCCI SA would (or even might) subsequently collapse."

In the Court of Appeal, the majority agreed that there was no arguable case on foresight of loss: ante, p 84D. 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 G 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 the Act plus the proposition that if H 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 section 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 section 12 (restriction of authorisation) or section 19 (directions). 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 over-reaction 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

A 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 B 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 C 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, schedule 5, paragraph 27(ii): the decision not to revoke the D 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 E 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 F 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,

G 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 world-wide 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 H of the public.

177 The Banking Act 1979 came into force in October 1979. The 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



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in the United Kingdom. The 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, 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, i e 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 8 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

A Birkenhead observed in *In re H (minors) (Sexual abuse: Standard of proof)* [1996] AC 563, 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 *In re Dellow's Will Trusts* [1964] 1 WLR 451, 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'."

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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 C 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 D 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 E pleading and proving a case of fraud are very strict. In *Jonesco v Beard* [1930] AC 298 Lord Buckmaster, with whom the other members of the House concurred, said, at p 300:

> "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* F *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 Fraud and Mistake*, 7th ed (1952), p 644; *Davy v Garrett* (1878) 7 Ch D 473, 489; *Bullivant v Attorney General for* G *Victoria* [1901] AC 196; *Armitage v Nurse* [1998] Ch 241, 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 H "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* 7 Ch D 473, 489 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." This is a clear statement of the second of the two principles to which I have referred.

188 In *Armitage v Nurse* [1998] Ch 241 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* (unreported) 21 July 1999, 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.

A (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 B 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 C 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 D 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 E 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.

F (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.

G (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.

H (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 section 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 section 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*
*Cross-appeal dismissed.*

*Solicitors: Lovells; Freshfields*

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