All England Reporter/2006/April/Three Rivers District Council and others v Bank of England - [2006] All ER (D) 175 (Apr)

[2006] All ER (D) 175 (Apr)

Three Rivers District Council and others v Bank of England

[2006] EWHC 816 (Comm)

Queen's Bench Division (Commercial Court)

Tomlinson J

12 April 2006

Costs – Order for costs – Indemnity costs – Action brought against Bank of England by liquidators of failed BCCI – Liquidators alleging loss caused by Bank of England wrongly granting licence or wrongly failing to revoke deposit-taker's licence – Liquidators claiming damages for tort of misfeasance in public office – Claims being withdrawn after 256 days of trial – Whether liquidators liable for indemnity costs.

In 1980 the Bank of England granted a licence to BCCI to carry on business as a deposit-taking institution. In so doing, the Bank was acting in its capacity as the supervisory authority for United Kingdom deposit-takers under the Banking Act 1979. BCCI collapsed in 1991 owing to fraud on a vast scale perpetrated by its senior staff. Shortly afterwards, a non-statutory private inquiry was held by a Court of Appeal judge into the supervision of BCCI under the Banking Acts, which considered consider the action taken by the United Kingdom authorities. After the inquiry's report, proceedings were brought against the Bank by the liquidators, seeking to recover the sums lost on BCCI's collapse. They claimed that the Bank was liable in the tort of misfeasance in public office, contending that named senior officials had acted in a knowingly unlawful and, in important respects, wholly dishonest manner. They argued, inter alia, that the Bank had acted deliberately contrary to its statutory obligations, in a manner that they had known would probably cause loss to the depositors, or recklessly, knowing that there was a serious risk of such consequences. Officials of the Bank were accused of dishonestly misleading, among others, their own governors, HM Treasury and Parliament. An attempt by the Bank to strike out the claim was ultimately dismissed by the House of Lords (see [2001] 2 All ER 513), and the action was allowed to proceed. Two officials who gave evidence were accused of giving dishonest answers in the witness box. Further, officials were alleged to have created, on a vast scale, documents which dishonestly misrepresented the position or their contemporary understanding of it so as to create a false and misleading paper trail to cover their position. After 256 days of trial, however, the liquidators abandoned the action. By that stage, at least 42 of the Bank's officials stood accused of dishonesty. The Bank applied for all of its outstanding costs (including the application for costs itself) to be paid on an indemnity basis. It also invited the court to state that the allegations against the Bank and its officials and former officials were unfounded and wholly unsupported by the evidence.

The court ruled:

The entitlement of the Bank to indemnity costs could not have been more clearly made out. The litigation had had no chance of success. The grave allegations made against the 42 named officials had been unfounded. The allegations had been inconsistent and contradictory, and should never have been made.

The Bank would be entitled to indemnity costs.

The claimants did not appear and were not represented.

Nicholas Stadlen QC, Mark Phillips QC, Bankim Thanki QC, Ben Valentin, Henry King and Tom Smith (instructed by Freshfields Brukhaus Deringer) for the Bank.

James Wilson Barrister (NZ).

Judgment

[2006] EWHC 816 (Comm)

QUEEN'S BENCH DIVISION (COMMERCIAL COURT)

12 APRIL 2006

MR JUSTICE TOMLINSON

APPROVED JUDGMENT

I DIRECT THAT PURSUANT TO CPR PD 39A PARA 6.1 NO OFFICIAL SHORTHAND NOTE SHALL BE TAKEN OF THIS JUDGMENT AND THAT COPIES OF THIS VERSION AS HANDED DOWN MAY BE TREATED AS AUTHENTIC

MR JUSTICE TOMLINSON:

Introduction

1. On 2 November 2005, Day 256 of the trial, the English liquidators of Bank of Credit and Commerce International SA, “BCCI SA,” the Claimants in this action, to whom I shall refer as “the liquidators,” finally abandoned their attempt to prove that in its supervisory regulation of the activities of BCCI SA in the United Kingdom between 1980 and 1991 the Bank of England, “the Bank,” acted in a knowingly unlawful and in important respects wholly dishonest manner.

2. Over the course of twelve years of litigation the Bank, through its officers, was accused by the liquidators of an immense catalogue of outrageous behaviour. In addition to acting deliberately contrary to their statutory obligations, in a manner which they knew would probably cause loss to depositors in BCCI SA, or recklessly, knowing that there was a serious risk of such consequences, officials of the Bank were also accused of dishonestly misleading a number of persons and institutions, including even Parliament itself.

3. The liquidators accused officials of the Bank of dishonestly misleading their own Governors, which expression includes Deputy Governors of the Bank of England, of dishonestly misleading other overseas banking supervisors and of dishonestly misleading the independent Board of Banking Supervision which was a product of the 1987 Banking Act intended to provide some independent review of their actions. Next, officials of the Bank were accused of dishonestly misleading HM Treasury and of dishonestly misleading Parliament by means of providing ministers, including the Chancellor of Exchequer, with misleading briefings to which to speak in the House of Commons. Officials of the Bank were accused of dishonestly misleading the Treasury Select Committee.

4. In July 1991, after the Bank had revoked BCCI SA's banking licence, there was announced by the Prime Minister to the House of Commons the appointment of Lord Justice Bingham to conduct an independent inquiry into the supervision of BCCI under the Banking Acts. Bingham LJ is now Lord Bingham of Cornhill, the Senior Law Lord. Officials of the Bank who gave evidence before Bingham LJ were accused by the liquidators of giving dishonest answers to his questions.

5. Finally, the two officials of the Bank who gave oral evidence before me, Mr Brian Quinn and Mr Peter Cooke, were accused of giving dishonest answers in the witness box. It was made clear that any other official of the Bank, with the exception of the Governors or Deputy Governors, who gave evidence in accordance with his or her written statements submitted to the court would likewise be accused of dishonesty.

6. The accusations of dishonesty did not stop there. Officials of the Bank were alleged by the liquidators to have created, on a vast scale, documents which dishonestly misrepresented the position or their contemporary understanding of it so as to create a false and misleading paper trail to cover their tracks. The ever-changing personnel of the Banking Supervision Division and its predecessor the Banking and Money Markets Supervision Section were alleged to have carried out this feat from about the middle of 1978 right through until the demise of BCCI in 1991.

7. By the time that the liquidators' case had closed after first Mr Gordon Pollock QC and then Lord Neill of Bladen QC had addressed me on their behalf, at least 42 of the Bank's officials stood accused of dishonesty, a substantial uplift on the 22 identified in the liquidators' statements of case as having been dishonest. As Mr Nicholas Stadlen QC for the Bank has observed, keeping a tally of those whose names were to be added to the roll of dishonour became during the trial something of a parlour game. That notwithstanding, I do not overlook the distress which must have been caused to those who found themselves publicly accused of dishonesty in this manner, and particularly the distress caused to the families of those who were so accused after their death. Mr Pollock had already conceded before the trial began that the basis for alleging dishonesty against quite a few of the initial 22 officials was slender. It must have been apparent that the more names were added to this list the more implausible the allegations became.

8. Perhaps unsurprisingly given the scale of the Bank's alleged wrongdoing and turpitude the liquidators in December 2002 added to their statements of case a contention that the Bank should, in addition to paying normal damages and interest, be condemned to pay exemplary damages on the basis that its conduct throughout the entire period with which the claim was concerned was “oppressive, arbitrary and unconstitutional” and was conduct “meriting an award of exemplary damages.”

9. Wednesday 2 November 2005 would have been the 21st day of the cross examination of Mr Peter Cooke, formerly Head of Banking Supervision at the Bank and the person alleged to have orchestrated and to have

been at the very centre of the alleged wrongdoing. This wrongdoing however allegedly continued unabated after Mr Cooke's retirement from the Bank in October 1988 in order, apparently, to conceal the earlier wrongdoing for which, on the liquidators' case, he was principally responsible. The critical importance to the liquidators' case of bringing home against Mr Cooke allegations of outright dishonesty no doubt lay behind Mr Pollock's colourful but unfortunate reference on Day 1 of the trial to there being something in the idea of litigation being a blood sport wherein if the liquidators were to be characterised as the unspeakable, as the Bank from time to time did so characterise them, then Mr Cooke was to be characterised as the uneatable. Mr Cooke was in his place in the witness box to face the 21st day of his cross examination when Mr Pollock stood at 1030 to make the following announcement: -

“MR POLLOCK:	My Lord, as your Lordship knows, the liquidators are officers of the court and from time to time seek the guidance and direction of the Chancellor. The liquidators applied to the court for directions. That application came before the Chancellor and was heard over a period of three days. The Chancellor heard the arguments of the liquidators, the Luxembourg liquidators and the English Liquidation Committee. In a reserved judgment given earlier today, he held that it was no longer in the best interests of the creditors for the litigation to continue, and he directed that the action be discontinued..... The proceedings before the Chancellor are private, but he has authorised a statement in these terms, and I can say nothing more..... without running the risk of being in contempt of court.”
MR JUSTICE TOMLINSON:	I see. So the proceedings are at an end, subject to any further applications that may be made?
MR POLLOCK:	Yes, I should simply say that any such applications, my Lord, would have to be made in due course, and in proper form, because, of course, of the necessity of ensuring that the Chancellor has an opportunity to give any such directions as he would wish.
MR JUSTICE TOMLINSON:	Right. Do I follow from that that the formal position is that you will serve notice of discontinuance?
MR POLLOCK:	My Lord, we may already have done so. If not, it is being done. I think, as we speak, so I would simply ask your Lordship to rise so that we may clear our stuff away and leave, since we in fact have no more instructions, we are no longer instructed to stay here.”

10. I have probably already said enough to indicate that this was extraordinary litigation which came to an abrupt albeit long overdue conclusion in unusual circumstances. What appears to have occurred, although I was not told, is that on 23 September 2005 the English Liquidation Committee of BCCI, representing its biggest creditors, passed “a strongly worded resolution calling on Deloittes (the liquidators) to discontinue [the action] forthwith” - see a report in The Times Newspaper of 4 November 2005. The liquidators evidently did not comply with that resolution but instead applied to the Chancellor of the High Court, Sir Andrew Morritt, for directions. Mr Pollock told me that the Chancellor heard argument over a period of three days but he was unable to tell me or at any rate did not tell me whether the argument was adversarial and what position was adopted by whom. The fact that the Chancellor concluded that it was no longer in the best interests of the creditors for the litigation to continue and that he directed that it be discontinued speaks for itself. The Chancellor must have concluded that the liquidators had no worthwhile prospect of success. He would have been unlikely lightly to have condemned the liquidators to the payment of the substantial costs involved in a 256 day trial, an order to which effect would inevitably follow discontinuance.

11. The liquidators did not withdraw their allegations nor proffer any apology. They can be compelled to do neither and they may not wish to do so. However the position in which the Bank and the impugned officials

are left is unsatisfactory, as is likewise the position of the families of those impugned officials who are now dead. It is made worse by the fact that for their own purposes the liquidators have assiduously courted publicity in respect of their claim against the Bank. A public relations consultancy was retained by the liquidators to assist them in this regard. Helping the media “grasp the complexities” of “inter alia, ongoing litigation against the Bank” is described by that consultancy as one of the principal corporate projects on which it worked in 2003. As part of a campaign of this sort I have no doubt that the urge to make available to the Press selective extracts from documents was irresistible, as they could be deployed in a manner which apparently showed the Bank in a bad light. I make no criticism of those who published such extracts as they were given. As an exercise in objectivity however, this can be seen with the hindsight acquired from experience of the trial as a cynical and grotesque operation. Many of the documents which were deployed in this way formed part of an arcane debate on one or more obscure and highly technical topics concerning banking supervision. The documents and the annotations thereon by Bank officials could not properly be understood without careful study of the surrounding and associated material in order to immerse oneself in the debate to which they related, by definition a debate which took place a very long time ago. A wholly distorted picture of the Bank's conduct was thereby painted.

12. Moreover, the publicity courted by the liquidators included a number of public statements by them or on their behalf made before and during the trial which appeared to be intended to portray the Bank as being unreasonable in failing to negotiate a commercial settlement of the litigation. On the final day of the trial, following their discontinuance, the liquidators issued a Press Release which can only be described as lamentable. It was well summarised by Jeremy Warner, writing in The Independent newspaper on 3 November 2005: -

> “Unrepentant to the last, they [the liquidators] yesterday cynically blamed both the length and costs of the case on the supposed unreasonableness of the Bank, and tried to make out that the Bank's refusal to negotiate a commercial settlement was in some way a dishonourable approach to the matter. Dear oh dear.”

One passage in that Press Release read as follows: -

> “The Bank has invested a very substantial amount of money in its defence and this has increased the costs required to be spent by the Liquidators. The Bank's own costs have been running at approximately double the level of the Liquidators' costs. The case has continued far longer than anticipated, with far greater costs than expected, and it could continue for several years to come. The Bank has made it very clear that normal commercial considerations do not apply to this issue and it will not negotiate.”

In the Notes for Editors there appeared the following passage: -

> “The Liquidators have previously made a number of abortive attempts to negotiate a settlement. The Bank's position was that it would not negotiate any form of compromise.”

The inference which I derive from this document is that the liquidators pursued the claim for the length of time which they did in the belief, expectation or hope that the Bank would ultimately agree some form of compromise settlement in order to avoid the criticisms and embarrassment to which it would be exposed in a public trial. The public relations campaign was obviously designed to put pressure on the Bank to capitulate in that fashion.

The Bank's application after the liquidators' discontinuance

13. On 25 November 2005 the Bank issued an application which, so far as material, asked for an order: -

“1. That the Bank is entitled to be paid by BCCI SA (in liquidation) (“the Claimants”) all of its outstanding costs of the action (save for those listed in the Schedule hereto) on an indemnity basis on each of the following grounds and/or for such other reasons as to the Court seem just:

(i) the claim, in terms of its nature, scope and the manner in which it was conducted by the Claimants was exceptional and out of the norm;

(ii) the allegations made by the Claimants against the Bank and its officials were of the utmost gravity but were without any proper foundation in evidence or logic;

(iii) the Claimants' case, which had closed over a year before the action was discontinued, was without merit and would, if the matter had proceeded to judgment, have resulted in a resounding defeat for the Claimants;

(iv) the claim was framed with a wide and nebulous ambit and its basis shifted repeatedly as allegations were added, abandoned or reformulated in a manner which obscured the case which the Bank had to meet;

(v) numerous allegations were advanced which were inconsistent and/or scandalous and/or irrelevant and/or unpleaded;

(vi) the Claimants themselves accepted that some of the serious allegations of dishonesty made against individual Bank officials were only based on slender evidence and they made no attempt at trial to make good many of those allegations;

(vii) numerous documents of fundamental importance to central issues in the action, which were wholly inconsistent with the Claimants' case, were not drawn to the attention of the Court by the Claimants, notwithstanding that they were available to them;

(viii) the Claimants advanced for six months through one of their Leading Counsel a factual case which, even if it had been proved, would not, applying the legal submissions advanced by another of their Leading Counsel, have established misfeasance in public office or enabled the Claimants to succeed;

(ix) the manner in which the claim was conducted was inappropriate, including the unreasonable and inhumane approach to the length of cross examination, the priority which appears to have been given to obtaining a commercial settlement of the action and the offensive treatment of the Court, the Bank's officials, former officials and witnesses, the Bank and the Bank's legal representatives and other natural and legal persons involved in some way or other with BCCI SA or its associated companies;

(x) notwithstanding the absence of any proper foundation for the serious allegations against the Bank and its officials, the Claimants deliberately courted publicity for such allegations and for other matters calculated to embarrass the Bank before and during the trial; and

(xi) notwithstanding their discontinuance of the action, the Claimants failed to offer any apology to the Bank or to the Bank's officials or witnesses for the inconvenience and distress caused by the pursuit of their claim over the preceding twelve years, or to withdraw their allegations of dishonesty and acknowledge that they were unfounded, but sought instead publicly to criticise the Bank for the length of time which the claim had taken to reach the point at which it was eventually abandoned and also for failing to negotiate a compromise of the action.

2. That the Claimants do pay to the Bank all of its outstanding costs of the action (save for those listed in the Schedule hereto) on an indemnity basis, such costs to be the subject of a detailed assessment, if not agreed.

> 8. That the Claimants do pay the Bank's costs of this application on the indemnity basis, to be the subject of an assessment, if not agreed.

The Bank invites the Court to state that the allegations against the Bank and its officials and former officials were unfounded and wholly unsupported by the evidence and should not have been made and/or maintained by the Claimants and to give reasons for that conclusion."

The indemnity basis of assessment

14. The significance of costs being ordered to be paid on an indemnity as opposed to the standard basis is that, although the beneficiary of such an order will still only be paid costs which have been reasonably incurred, there is no requirement of proportionality and in cases of doubt on assessment it is for the payer to show that the costs were not reasonably incurred. Whilst an indemnity costs order does carry at least some stigma the purpose of such an order is not to punish the paying party but to give a more fair result for the party in whose favour a costs order is made: - see *Petrotrade Inc v. Texaco Ltd (Note)* [2002] 1 WLR 947, per Lord Woolf MR, at p.949 and *Victor Kermit Kiam II v. MGN Ltd* [2002] EWCA Civ 66 at paragraph 12 per Simon Brown LJ.

Correspondence between the issue of the Bank's application and the hearing of the application on 30 and 31 January 2006

15. On 28 November 2005 the liquidators offered to pay the Bank's costs of the action, but only on the indemnity basis insofar as incurred between 1 January 2003 and 31 December 2005. The letter in which that offer was made continued: -

> "We do not see any basis on which it is appropriate for indemnity costs to be awarded in relation to any parts of the action prior to the end of 2002 or early 2003 (being the appropriate date, on your analysis, on which it should have become apparent to the Claimants from the documents disclosed by the Bank that the action should have been discontinued).
>
> We comment briefly on the "invitation" to the court contained in paragraph 8 of your client's application. We do not see on what basis the court has jurisdiction to entertain such an application. If the Bank pursues this matter it does so at its own risk as to costs and the liquidators should under no circumstances be liable for any further costs in connection with such an application."

16. On 6 December 2005 the liquidators offered to pay the costs of the entire action and of the application up until 9 December 2005 on an indemnity basis. The offer was at this stage made "without prejudice save as to costs."

17. On 9 December 2005 the Bank, in accordance with a direction made by me on 11 November, served its Written Submissions on Indemnity Costs and Exoneration. This is a substantial and formidable document running to 350 pages together with additional annexes, upon which I have relied heavily in preparing this judgment and from which I have quoted extensively, often without attribution.

18. On 14 December 2005 the liquidators made an open offer to pay the costs of the action on an indemnity basis. However they did not accept that the Bank was in fact entitled to such costs. Their solicitors Messrs Lovells wrote: -

> "Whilst the liquidators have now made an open offer agreeing the Bank's claim for costs in its entirety they wish to make it plain that, contrary to what appears in the Bank's written submissions, they do not concede that the Bank is entitled to such an order by virtue of the matters advanced in paragraph one of the application or in the submissions themselves. Rather, the liquidators and the Liquidation Committee simply wish to rule a line under this litigation.

We will deal separately with the invitation to make a statement exonerating the Bank and its officials, with the claim for the ongoing costs of that invitation and with the suggestion that the judge ought to give assistance to the Costs Judge."

19. The separate treatment of the last two issues came in a letter addressed to my clerk on 23 December 2005. I should set out that letter in full: -

> "The purpose of this letter is to inform His Lordship as to the current state of affairs in these proceedings.
>
> We attach a copy of an open letter to Freshfields dated 14 December 2005 by which the Claimants have agreed to all the financial provisions as to costs requested by the Bank in its application up to 9 December 2005. The Claimants have agreed to pay the Bank's costs of its application on an indemnity basis up to that point, i.e. the date upon which the Bank's written submissions were served. There is therefore no outstanding contest as to costs and the action is at an end.
>
> As regards the Bank's invitation to His Lordship to conduct a further hearing to accede to the invitation at the end of the Bank's application Notice dated 25 November 2005, the position is as follows.
>
> Now that agreement has been reached on the financial provisions consequent upon the discontinuance, that is an end of this residual aspect of the proceedings and the Court no longer has any jurisdiction for any further hearings to deal with the Bank's invitation or to make a costs order in respect thereof. It follows from the fact that proceedings, including issues of costs, are at an end, that the Claimants have no continuing liability to the Bank under paragraph 8 of the Bank's application after 9 December 2005. They also reserve the right to object before the Costs Judge to much of the cost of the 350 pages of submissions served on us on 9 December 2005 which go well beyond what was required to deal with the basis of assessment of those costs which our clients had not agreed in our open letter of 28 November 2005 to pay on the indemnity basis.
>
> In the event that the Court concludes both that it has jurisdiction and that it is proper to entertain the Bank's invitation, the English Liquidators of BCCI SA find themselves in the position that they do not have the required sanction to take part and it is plain to the Liquidators that there is no realistic prospect of their obtaining such sanction. In particular the Claimants have no sanction to spend any money on:
>
> (a) filing evidence;
>
> (b) answering the Bank's written submissions dated 9 December 2005; and
>
> (c) appearing in court.
>
> It is obvious from merely glancing at the index to the 350 pages of submissions (not counting the file of annexures) that any effective answer to that document would require work by the Claimants and their full legal team on the scale of what would have been needed for the purposes of their final submissions at the end of the trial.

> On any view, as at 2 November 2005, this was a part-heard case in which the Claimants had not yet replied to the Bank's lengthy defence argument. The circumstances of this case are therefore entirely different from those in the case law relied on by the Bank.
>
> In these circumstances it is respectfully suggested that His Lordship should conclude that he is functus and that he therefore lacks jurisdiction to conduct the process which the Bank has invited him to undertake. Even if His Lordship were to take the view that he retains some jurisdiction he should conclude that it would be impossible for him to conduct the process on any fair or judicial basis. In any event, we note that His Lordship has already made certain remarks at the hearing on 2 November 2005 intended to exonerate Mr Cooke and the other Bank officials.
>
> In paragraph 8 of the application, the Bank seeks the costs of the proceedings after 9 December 2005 up to the hearing in January next year. Given, as noted above, that these proceedings are at an end and there is no jurisdiction to deal with the Bank's invitation, alternatively that it would not be appropriate for him to do so, the question of these costs simply does not arise.
>
> Finally, we address Section H of the Bank's written submissions (paragraphs 546 to 550) in which the Bank seeks further “assistance” for the Costs Judge. We maintain that it would not be appropriate for his Lordship to make generalised remarks designed to assist the Costs Judge. The Claimants accept that this was an extremely complex and weighty case but, beyond stating that accepted fact, we do not see what detailed assistance His Lordship could offer without conducting the type of enquiry which will be undertaken by the Costs Judge. One of the main issues will be whether it was appropriate for the Bank's legal team to incur costs at a level which was so very considerably higher than those of the Claimants. General statements by his Lordship will be of no real help in the detailed assessment and, in any event, no “assistance” furnished by his Lordship would bind the Costs Judge if he was otherwise of the view, for example, that the costs incurred by the Bank were neither reasonable nor reasonably incurred.”

20. Messrs Lovells wrote to my clerk again on 26 January 2006 in order to send to me a copy of a letter written that day to Freshfields. The letter to my clerk concluded: -

> “As you will see, the Claimants' position remains as set out in our letter to you of 23 December 2005 and they will not be represented at the hearing on 30 January 2006.”
>
> So far as material, the letter to Freshfields read: -
>
> “2. The relief sought by the Bank in paragraph 1 of its application is otiose given that no issue arises in relation to the basis of assessment of the Bank's costs, all of which have been agreed up to 9 December 2005. The Bank's claim for costs after that date is purely circular. It seeks to claim them on the basis that there are outstanding issues when in truth there are none save for the one minor point which we address below (assistance to be given to the Costs Judge). The Bank originally sought exoneration for itself and its officials in a judgment in respect of its claim for indemnity costs. Now that the basis of assessment has been agreed by the Claimants, it seeks to manufacture an issue in order to prolong these proceedings.
>
> 3. Your clients are maintaining their “invitation” to the Judge to exonerate the Bank and its officials and, in support of that application, you rely upon two cases (Donovan and Jordan) which are far removed from the facts in the present case. In Donovan, the parties had invited the Judge to dismiss the action as a judicial act. In those circumstances, the Judge clearly had continuing jurisdiction. Moreover, as we understand it, in Donovan all of the evidence of the main witnesses had been completed. In Jordan, the Judge had finalised his judgment and was about to deliver it following completion of all of the evidence and closing submissions at the time the notice of discontinuance was filed. We are not aware of any case in which there has

> been a separate hearing 3 months after an action has been discontinued and in circumstances where the evidence had not even been completed. Even if the Judge does have jurisdiction to hear this matter, it appears to us that the comments which he has already made amount to the exoneration which the Bank seeks.
>
> 4. In reality, there is only one small point outstanding and that is the Bank's request that guidance should be given to the Costs Judge. Given that the Liquidators do not have sanction to attend the hearing on 30 January 2006, this is a matter which could easily be dealt with on paper. Mr Justice Tomlinson now has the parties' submissions. In such circumstances there is no need to incur additional costs."

I note that the liquidators in this letter appear to accept that I do at the least retain jurisdiction to give guidance to the Costs Judge.

21. In these circumstances I have to consider whether I should accede to the Bank's invitation (a) to declare that it is actually entitled to the indemnity costs which the Claimants have agreed to pay (b) to exonerate the Bank's officials (c) to give guidance to the costs judge. These three points are in fact closely related.

The brief words of exoneration on 2 November 2005

22. Messrs Lovells observed in their letter to Freshfields of 26 January 2006 that the comments which I had already made appeared to them to amount to the exoneration which the Bank sought. They were referring to the comments which I made in court on 2 November 2005, after Mr Pollock had advised me of the liquidators' discontinuance. So far as material, I said this: -

> "I will just say this, Mr Cooke, there have been some very, very serious allegations made against you, and indeed against your colleagues. I have been studying the documents in this case now for a very long time, I have heard detailed submissions on them from both sides, I have heard you give evidence for, I think it is now twenty days, and I heard your former colleague Mr Quinn before you give evidence for twenty eight days.
>
> Although obviously I would have to consider further developments, had the trial continued, although obviously I would have had to consider further submissions in due course, my careful study of the documents and my consideration of them, and of all the inherent probabilities, and my consideration of Mr Quinn's evidence and of your evidence, have left me in no doubt that the very serious allegations of impropriety and dishonesty against you are wholly without foundation.....
>
> .....
>
> it follows, as night follows day, that the observations I have made about Mr Cooke and Mr Quinn apply equally to every officer of the Bank. I have seen no foundation for any allegation of dishonesty against any officer of the Bank at any stage."

I also said this at the end of Mr Stadlen's remarks on that day: -

> ".....I propose to say very little this morning for a number of reasons, but mainly because, as I anticipated would be the case, I am likely to be seised of yet further applications in which I shall have to consider the conduct of this action as a whole.....I would just say this, that it has been a matter of surprise to me for about a year now that the action was being pursued....."

23. It may be helpful if I explain what moved me to remark that it had been a matter of surprise to me for about a year that the action was being pursued. This reflects the fact that towards the end of November or at the beginning of December 2004, after I had been listening for many weeks to Mr Stadlen's opening submissions in answer to the liquidators' claim, I became so concerned about the case that I decided both to consult and to warn the Lord Chief Justice about it. I told the Lord Chief Justice, then Lord Woolf, that the case was a farce. I told Lord Woolf that it seemed to me that allegations of dishonesty were being levelled against officials or former officials of the Bank for no better reason than that if their conduct was presumed to have been honest it represented an insuperable obstacle to the liquidators proving their case. By the close of the liquidators' case the logic of that case as I have already pointed out had driven them to level accusations of dishonesty at over forty officials of the Bank. I told the Lord Chief Justice that the case as it was being pursued before me bore little or no relation to that which the House of Lords had considered fit to proceed to trial. I warned the Lord Chief Justice that I feared that the case had the capacity to damage the reputation of our legal system. This was after Mr Stadlen had drawn to my attention many, as I thought, highly relevant documents in the material disclosed by the Bank which I had not hitherto seen, and after he had ruthlessly exposed just some of the myriad hopeless inconsistencies and implausibilities in the liquidators' case. The Lord Chief Justice and I discussed whether there were any measures which might be taken either by me or by both of us together in order to persuade the liquidators of the folly of their enterprise. I take full responsibility for the conclusion, which was essentially mine anyway, that there was nothing which could usefully be done. The liquidators were represented by a legal team of the greatest eminence. What was apparent to me as a result of Mr Stadlen's exposition must have been as apparent to them, although unfortunately Lord Neill and Mr Pollock absented themselves from large parts of Mr Stadlen's address so that the immediate impact thereof may have been lost on them. In the event the trial then proceeded for very nearly another year, hence my remark on 2 November 2005.

Does the court have jurisdiction and should it exercise it?

24. In these circumstances I have to consider whether I have jurisdiction to say more and whether I should say more. I have no doubt that I have jurisdiction to entertain the Bank's application. As I have already observed the three points with which I am asked to deal are interrelated. One reason why it is appropriate to award indemnity costs is because there is some circumstance which takes the case out of the norm - see per Lord Woolf CJ in *Excelsior Commercial and Industrial Holdings Ltd v. Salisbury Hammer Aspden and Johnson (A Firm)* [2002] EWCA Civ 879 at paragraph 19. The pursuit of such hopeless but widely publicised allegations of dishonesty against so many officers of this country's central bank of itself takes the case out of the norm. Although the liquidators have offered to pay costs on an indemnity basis, they deny that the Bank is in fact entitled to such an order. This of itself as it seems to me creates a sufficient lis to justify my dealing with the Bank's application, quite apart from the fact that there is also an issue whether the Bank is entitled to its costs of this application after 9 December 2005. In this regard I derive support from the judgment of Bingham LJ in *National Coal Board v. Ridgeway* [1987] ICR 641 at p.668 EF. Furthermore, in *Adam Musa King v. Telegraph Group Ltd* [2004] EWCA Civ 613 Brooke LJ at paragraph 104 of his judgment suggested that a trial Judge “should express his views.....for the benefit of the Costs Judge, since the trial Judge will be much better able than the Costs Judge to identify those parts of a case in which costs have been wastefully or extravagantly incurred.” Those remarks were not directed towards costs incurred by a Defendant in dealing with the twists and turns of a hopeless claim, but they must be equally applicable thereto. It would be odd if a trial Judge's duty to assist the Costs Judge could be defeated by the potentially paying litigant simply offering to pay costs on an indemnity basis, whilst reserving to himself the possibility to argue that his opponent's expenditure of costs had been extravagant or unreasonable. Finally there is the more general consideration that there is a public interest in knowing what was revealed by the trial about the allegations of dishonesty made therein which were so widely publicised by the liquidators. In *Jordan Grand Prix Ltd v. Vodaphone Group* [2003] 2 Lloyds Rep. 874 the Claimant had discontinued shortly before judgment was due to be handed down, agreed to pay the Defendant's costs on an indemnity basis and informed the Court that the action being at an end there was no occasion on which the judgment could be handed down. In ruling that the Court was not only entitled to hand down a judgment, but that it was in the public interest to do so, Langley J made the following observations: -

> "So where, then, does the public interest lie? In my judgment, there can only be one answer. Jordan has chosen to make serious allegations against a public company and to question the veracity and motivation of one, or possibly two, indeed of its senior officers. It has done so in a public arena. It has done so in pursuit of a claim for millions of pounds. As Jordan must also have expected, it has done so in circumstances which were bound to attract, and have attracted, considerable media interest. Now, in effect, Jordan says no one should be told the outcome. "At the very last second, we have found a way in which we can run up the white flag and stifle the court from publicly announcing its decision on the allegations we have made [and] pursued to date."
>
> In my judgment that is designed to create a serious injustice, which this Court should not tolerate. Vodaphone and its officers are entitled to know the conclusions that the Court has reached on the matters alleged against them. The media also has a legitimate public interest in being informed of the outcome of the matter on which it has reported. Vodaphone and its officers are entitled, if so advised, publicly to comment on that outcome. If they are vindicated by the judgment, it would be unjust that they should not be able to have that publicly established.
>
> Unlike the Prudential case, where there was a countervailing public interest in supporting settlements, I can discern no public interest at all which would be served by the course which Jordan advocates. I would add that there are features of the evidence and conduct of these proceedings which of themselves make it in the public interest that the judgment should be delivered.
>
> In my judgment, therefore, not only am I entitled to proceed to hand down my judgment but it is right that I should do so."

The circumstances in which indemnity costs may be awarded

25. CPR 44.3(4) and (5) provide, so far as relevant: -

> "(4) In deciding what order (if any) to make about costs, the court must have regard to all the circumstances, including -
>
> (a) the conduct of all the parties;
>
> (b) whether a party has succeeded on part of his case, even if he has not been wholly successful....
>
> (5) The conduct of the parties includes -
>
> (a) conduct before, as well as during, the proceedings....
>
> (b) whether it was reasonable for a party to raise, pursue or contest a particular allegation or issue;
>
> (c) the manner in which a party has pursued or defended his case or a particular allegation or issue....."

I have already referred to the guidance given by Lord Woolf in the Excelsior case as to the circumstances in which an indemnity order may be appropriate - where there is some conduct or some circumstance which takes the case out of the norm. I agree with the Bank that the authorities, including *IPC Media Ltd v. Highbury Leisure Publishing Ltd* [2005] EWHC 283 (Ch)(Laddie J), *Cambridge Antibody Technology Ltd v. Abbot Biotechnology Ltd* [2005] EWHC 357 (Ch)(Laddie J), *Amoco (UK) Exploration Co v. British American Offshore Ltd* [2002] BLR 135 (Langley J) and *Cepheus Shipping Corporation v. Guardian Royal Exchange Plc*

[1995] 1 LL Rep. 647 (Mance J) demonstrate that the following principles should guide the Court's determination whether the Claimants should be required to pay the bank's costs of the action on an indemnity basis: -

(1) The court should have regard to all the circumstances of the case and the discretion to award indemnity costs is extremely wide.

(2) The critical requirement before an indemnity order can be made in the successful defendant's favour is that there must be some conduct or some circumstance which takes the case out of the norm.

(3) Insofar as the conduct of the unsuccessful claimant is relied on as a ground for ordering indemnity costs, the test is not conduct attracting moral condemnation, which is an a fortiori ground, but rather unreasonableness.

(4) The court can and should have regard to the conduct of an unsuccessful claimant during the proceedings, both before and during the trial, as well as whether it was reasonable for the claimant to raise and pursue particular allegations and the manner in which the claimant pursued its case and its allegations.

(5) Where a claim is speculative, weak, opportunistic or thin, a claimant who chooses to pursue it is taking a high risk and can expect to pay indemnity costs if it fails.

(6) A fortiori, where the claim includes allegations of dishonesty, let alone allegations of conduct meriting an award to the Claimant of exemplary damages, and those allegations are pursued aggressively inter alia by hostile cross examination.

(7) Where the unsuccessful allegations are the subject of extensive publicity, especially where it has been courted by the unsuccessful claimant, that is a further ground.

(8) The following circumstances take a case out of the norm and justify an order for indemnity costs, particularly when taken in combination with the fact that a defendant has discontinued only at a very late stage in proceedings;

(a) Where the claimant advances and aggressively pursues serious and wide ranging allegations of dishonesty or impropriety over an extended period of time;

(b) Where the claimant advances and aggressively pursues such allegations, despite the lack of any foundation in the documentary evidence for those allegations, and maintains the allegations, without apology, to the bitter end;

(c) Where the claimant actively seeks to court publicity for its serious allegations both before and during the trial in the international, national and local media;

(d) Where the claimant, by its conduct, turns a case into an unprecedented factual enquiry by the pursuit of an unjustified case;

(e) Where the claimant pursues a claim which is, to put it most charitably, thin and, in some respects, far-fetched;

(f) Where the claimant pursues a claim which is irreconcilable with the contemporaneous documents;

(g) Where a claimant commences and pursues large-scale and expensive litigation in circumstances calculated to exert commercial pressure on a defendant, and during the course of the

trial of the action, the claimant resorts to advancing a constantly changing case in order to justify the allegations which it has made, only then to suffer a resounding defeat.

26. The appropriate conclusion in this case is not difficult to reach. In truth, it is difficult to think of a case in which the entitlement to indemnity costs could more clearly be made out, as I hope hereafter to demonstrate insofar as it is not already apparent.

27. What further I should say by way of exoneration of the Bank's officials is more problematical. I can well understand why those against whom such serious allegations of dishonesty and impropriety have been made should want a reasoned refutation to show to the world. However I cannot deal with every allegation or even every major allegation against every official - so to do would require an enormous judgment which would be wholly disproportionate. On the other hand to offer something very much more limited by way of elaboration of what I have already said carries with it the risk of distortion and over-simplification of matters upon which notwithstanding the length of the trial I have not heard completed argument. The liquidators did not suggest that they had in fact sought sanction from either the English Liquidation Committee or The Chancellor to appear before me on the hearing of the Bank's application. I infer that the liquidators did not seek such sanction and that their absence was tactical, calculated to make it the more difficult for me to express views critical of their conduct of the action. But even had they appeared, they would inevitably not have attempted to answer in detail the entirety of the Bank's formidable 350 page written submission dealing with their conduct both in advance of and at the trial. I propose therefore to confine myself to dealing briefly with the major themes of the claim and of the trial, particularly insofar as they bear upon the question how the Bank had to set about defending itself against ever-changing allegations. As I have already remarked, the three issues which the Bank has invited me to address in a reasoned judgment are closely related. The hopelessness of the allegations and the manner in which they were pursued inform the decision on the appropriateness of an order for indemnity costs.

The liquidators' case in a nutshell

28. BCCI SA was established as a licensed bank in Luxembourg in 1972. It was a company registered in Luxembourg. It was a wholly owned subsidiary of BCCI Holdings SA, as also was its sister bank BCCI Overseas which was a company registered in the Cayman Islands. The holding company was also a Luxembourg company. It was not a bank, and so not subject to banking supervision. During the 1970s both BCCI SA and BCCI Overseas developed an extensive network of forty five branches throughout the United Kingdom. Pursuant to the request of the Bank on 1 January 1979 BCCI transferred the UK branches of BCCI Overseas to BCCI SA. All of this occurred prior to the coming into force of the Banking Act 1979 which established a new statutory regime of banking supervision to be administered by the Bank.

29. Under the new regime no person or company (apart from the Bank of England itself and subject to immaterial exceptions) could carry on a deposit taking business in the United Kingdom unless it was either a “recognised bank” or a “licensed institution.” Existing institutions carrying on a deposit taking business had until 1 April 1980 to apply either for recognition or for a licence. In order to obtain recognition or a licence an institution had to satisfy the Bank that it fulfilled certain criteria. In cases where the “principal place of business” of an institution applying for recognition or licensing was outside the United Kingdom, s.3(5) of the Act permitted the Bank to regard certain of the critera as fulfilled if the relevant supervisory authorities in the country where the institution's principal place of business was to be found informed the Bank that they were satisfied with the management of the institution and its overall financial soundness, and if the Bank was itself satisfied as to the nature and scope of the supervision exercised by those authorities.

30. The branches of BCCI SA in the United Kingdom had hitherto been regarded by the Bank as branches of an overseas deposit-taking institution, as had the branches of many other overseas institutions. The 1976 White Paper which preceded the Banking Act 1979, “The Licensing and Supervision of Deposit-Taking Institutions” Cmnd.6584 said this: -

> **“Branches of Overseas Deposit-Taking Institutions.**
>
> 15. Branches of overseas deposit-taking institutions operating in the United Kingdom will, like deposit-takers incorporated in this country, need to hold a licence or be recognised as a bank in order to take deposits. The Bank will be concerned to ensure that they conform to appropriate standards in the conduct of their business, but the arrangements for their prudential supervision will remain primarily a matter for the supervisory authorities in the country of origin. Branches of overseas deposit-taking institutions will not be required to have separate endowment capital in the UK. Branches of overseas deposit-taking institutions with head offices elsewhere in the EEC which are licensed in the UK may be entitled to use the banking names by which they are known in their country of origin.”

What this reflects is that the supervision of branches of overseas banks was not a primary mischief sought to be addressed by the 1979 Banking Act. There is no evidence that Parliament intended in that regard to deviate from the principles upon which the existing international supervisory regime was based. The country of origin of BCCI SA was Luxembourg. Nothing in the White Paper or said in debates in Parliament alerted the Bank to any suggestion that by using in s.3(5) the expression “principal place of business” Parliament intended to introduce a criterion which differed from the country of origin of the institution. It is however the use of that expression in s.3(5) which forms the bedrock of the liquidators' allegation that the Bank acted dishonestly. The draft of the Banking Bill published in November 1977 used this formulation. The liquidators say that Mr Peter Cooke, Head of Banking Supervision and others agreed as from about the middle of 1978 (this was something of a moveable feast) that the application of BCCI SA when in due course it was received would have to be dealt with corruptly. The liquidators say that Mr Cooke and others realised that, whatever its place of origin, the “principal place of business” of BCCI SA was by then to be found in London because of the extent to which its central mind and management was to be found in its Leadenhall Street branch in the City of London. They therefore determined that this conclusion would not be acknowledged. It would become a “non-issue.” The motive alleged for this approach seems to be two-fold. One alleged motive is that the Bank did not wish to have to refuse a licence to BCCI SA. It is suggested that, had the Bank attempted to satisfy itself about the relevant criteria without any entitlement to rely upon the satisfaction of the Luxembourg authorities as in certain respects determinative, it would have been unable to do so, but that it was unwilling to rock the international supervisory boat in the manner which a refusal would involve. It was suggested that this would involve an affront to a fellow member of the international supervisory club, Luxembourg. Secondly it is suggested that Mr Cooke and others thought that if they acknowledged that the “principal place of business” of BCCI SA was in London and yet wished to grant it a licence, they could only satisfy themselves as to the initial fulfilment of the criteria and carry out their supervisory function thereafter by assuming supervisory responsibility on a consolidated basis for the BCCI Group as a whole, including BCCI Overseas, the Cayman Islands company. This was something which, allegedly, they were determined not to do. It was the “running away from” this alleged responsibility which formed the backdrop for all of the liquidators' attack upon the Bank's conduct.

31. Against that background I have in an earlier judgment summarised the liquidators' case in this way: -

> “It is true that this litigation is concerned with events starting in the 1970s and continuing until the collapse of BCCI in 1991. In many ways, the most important of those events in terms of the Claimants' case is the licensing of BCCI SA in 1980 and the process which led thereto.
>
> It is said by the Claimants that the Defendants acted deliberately unlawfully in licensing BCCI SA in that they relied upon assurances from the Luxembourg Supervisory Authority in circumstances where they knew that the statute did not permit such reliance.
>
> It is said that they did so either knowing that, in consequence of their unlawful action, depositors in BCCI SA would probably suffer loss, or recklessly knowing that there was a serious risk of such a consequence.

> I should emphasise that I am only summarising. The precise formulation of the tort is a matter of controversy and I shall need, in due course, to address the issue in detail and with care. The foregoing will suffice for present circumstances and is not intended to be definitive.
>
> It is the need to conceal the unlawfulness of that initial exercise which is said to have informed, in large part, the conduct of Bank officials thereafter right through until ultimate closure of BCCI in 1991.
>
> The liquidators do, quite independently, assert that the Bank's supervision of BCCI SA was itself conducted in a knowingly unlawful manner.
>
> Put broadly, it is said that the Bank should have regarded itself as the primary, parent supervisor of BCCI SA, rather than simply the host supervisor of branches of an overseas bank, and that, in conducting the supervision of BCCI SA, the Bank should have taken greater steps to satisfy itself as to the soundness of the BCCI Group as a whole, of which BCCI SA and its branches in the UK formed an interdependent part. Again, I stress that this is intended only as a broad, non-definitive summary.
>
> It is the desire to avoid the responsibility for conducting this supervisory exercise which is said to have provided a, and perhaps the principal motive for dishonestly treating BCCI SA as an overseas bank in 1980 and for dishonestly expressing satisfaction with the nature and scope of Luxembourg supervision of BCCI SA, rather than acknowledging that, as is alleged, its principal place of business was in London, or not in Luxembourg, and acknowledging that the Bank for that reason, as is alleged, bore a statutory responsibility for assuming the primary supervisory role. Again, I summarise.
>
> It can be seen, therefore, that it is of the utmost importance to the liquidators to establish that the licensing exercise in 1980 was conducted in a knowingly unlawful manner.
>
> So far as concerns the post-licensing claim, the unlawfulness lies in part in the failure properly or adequately to include the Group as a whole within the supervisory purview of the Bank, but it is the reluctance ever to undertake that task which is said to have induced Bank officials to act unlawfully in the first place.
>
> Whilst that reluctance is said also to have informed the Bank's post-licensing conduct, much of what Bank officials did throughout the post-licensing period has been attacked as motivated by a desire to conceal from those outside the Bank's banking supervision division the known unlawfulness of the licensing exercise; in the jargon of the case, the guilty secret."

32. I have taken this distillation from my judgment of 27 June 2005 dealing with the permitted length of cross examination of Mr Brian Quinn. This is not quite how the case was pleaded nor yet how it was opened by Mr Pollock on the liquidators' behalf. It is true that Mr Pollock always emphasised that the liquidators' case was that the Bank "ran away from its responsibility" and failed to take sufficient steps to satisfy itself as to the soundness of the BCCI Group as a whole. However, for a long time it appeared that the liquidators had two more precisely defined complaints so far as concerned the post-licensing period.

The failure to revoke claim

33. The first of these complaints was the failure to revoke claim. This claim was to the effect that the Bank deliberately and in bad faith decided not to exercise the statutory discretion to revoke BCCI SA's licence once granted despite knowing that it was illegal not to do so and knowing that there was a probability or a serious risk, or being subjectively reckless as to the probability or serious risk, that BCCI SA would collapse causing loss to depositors if the Bank did not do so.

34. From April 1990 onwards the Bank was, by reason of its receipt of PriceWaterhouse's report of that date, aware that BCCI was in imminent danger of collapse with inevitable loss to depositors unless there was a real prospect of an effective rescue. The only possible source of any rescue was the majority shareholder, the Government of Abu Dhabi. As is well-known the liquidators' claim against the Bank was considered by the House of Lords in both January 2000 and January 2001. Speeches were delivered on 18 May 2000 and 22 March 2001 respectively. On the second occasion the majority of their Lordships were not persuaded that the liquidators had no realistic prospect of establishing that the Bank knew in this period, April 1990 onwards, that there would be no effective and comprehensive rescue or was reckless as to whether there would be one. The decision of the majority to allow this action to proceed to trial was heavily influenced by this consideration. Two members of the majority were plainly doubtful whether the Claimants could prove that, at the time of licensing, the Bank knew that loss was probable or that Bank officials had the state of mind regarding loss to depositors and potential depositors that amounted to recklessness - see per Lord Steyn at paragraphs 6 and 7 and Lord Hope at paragraphs 105 to 106, [2003] 2 AC 1 at p.238 and 263 - 4. As these passages demonstrate Lord Steyn and Lord Hope did not regard this aspect as unarguable - see also per Lord Hutton at paragraphs 147 - 150, p.279 of the report. It is however clear that the changed situation post April 1990 was a powerful if not decisive factor in informing their Lordships' decision to permit this action to proceed to trial. So far as concerns the Bank's knowledge of the risk of loss the PriceWaterhouse report of April 1990 plainly represented something of a watershed.

35. As I recorded in my judgment of 27 June 2005: -

> "The case as it has been presented before me has assumed a somewhat different aspect. The post-April 1990 claim has not been abandoned, but the Claimants recognise that, unless they can demonstrate that the Bank had been guilty of misfeasance, or perhaps misconduct, before then, their prospects of demonstrating some quite independent misfeasance in that period must be slight.
>
> Mr Pollock expressly so acknowledged in relation to the post-December 1990 period on Day 76, pp.180-181, and, indeed, on Day 78 at p.13, where he suggested that the Bank must have thought that Abu Dhabi would do whatever was necessary.
>
> If that is good for the post-December 1990 period, it must logically be good also for the post-April 1990 period. I have already observed that I do not know what case, if any, is going to be put to Mr Quinn in respect of this period on the assumption that no earlier misfeasance or misconduct had occurred."

36. It can be seen therefore that the straightforward allegation that the Bank wrongfully failed to revoke the banking licence of BCCI SA after April 1990, knowing that loss to depositors was probable if it did not or reckless as to that prospect, assumed less prominence at the trial than had before their Lordships House seemed likely. Of course at the post-April 1990 stage of the story loss to depositors was in fact inevitable if the licence was revoked. For the first three years of this litigation the Statement of Claim, as it then was, did not contain the allegation that the Bank deliberately and in bad faith decided not to exercise the statutory discretion to revoke BCCI SA's licence despite knowing that it was illegal not to do so and knowing that there was a probability or a serious risk, or being subjectively reckless as to the probability or serious risk that BCCI SA would collapse causing loss to depositors if the Bank did not do so. It was merely said that the Bank had failed to revoke knowing that the criteria for the grant of a licence were not fulfilled, which did not disclose a cause of action because it did not allege a conscious decision not to revoke or knowledge that the discretion could not lawfully be exercised against revocation.

37. Then, in response to pressure from the Bank and an intervention from Clarke J, who heard at first instance the application to strike out the claim, the Claimants pleaded that the Bank "knowingly, deliberately contrary to the statutory scheme.....purported to conclude that it had no discretion or power to revoke when

the Bank knew.....that the criteria.....had not been fulfilled at the time of the grant and remained unfulfilled.....and/or failed to exercise its discretion to exercise the power to revoke and/or failed to revoke when the Bank knew.....that there was no basis upon which the Bank's discretion could properly be exercised in favour of not revoking the licence."

38. On Day 130 of the trial in response to a question from me Lord Neill "fully accepted" that the question which the Court had to ask itself at every point was: can one identify a specific thing which the Bank should have done and which it was misfeasance to fail to have done? He agreed that that was the question "at every point,.....at each stage of the enquiry" and confirmed that "you have to know that there is something which your legal duty positively obliges you to do....and you are not doing it." The Claimants' case in their draft pleading put to the House of Lords was that on each and every day after licensing the specific thing which the Bank knew it should have done was to revoke the licence.

39. In the interlocutory stages before the trial I asked the Claimants to assist me in understanding their case by preparing a document simply summarising the "high points" of this aspect of the claim, that is to say the best examples of when the Claimants said that officials of the Bank unlawfully decided not to revoke. The response which I received from the Claimants simply gave occasions on which, the Claimants said, the position "ought to have been actively under consideration." I was pointed to no occasion upon which it was alleged by the Claimants that the Bank unlawfully decided not to revoke. Despite retaining the failure to revoke claim in the main body of the Amended Particulars of Claim, the Schedules thereto included a number of pleas that revocation and continued supervision were alternatives, from which it was evident that the Claimants could no longer seriously be advancing a case that the only lawful option open to the Bank at any particular point was revocation.

40. From Day 1 of the trial it was clear that the failure to revoke claim was no longer seriously pursued. Depending on the metaphor of the day, it was either on the back burner or it took a back seat. The reasons why the failure to revoke claim was no longer being pursued were obvious. They included the fact that the Claimants now wished to maintain not their pleaded case that at every point post-licensing "there was no basis upon which the Bank's discretion could properly be exercised in favour of not revoking the licence" but rather that the Bank had known that it had a choice, either to carry out consolidated supervision of the BCCI Group as a whole or to revoke the licence of BCCI SA. If this was to be seriously maintained, the consequence was that the failure to revoke claim had effectively to be dropped and the focus of the post-licensing claim inevitably had to be on the other limb of the alleged choice, namely the failure to do consolidated supervision. There was also the problem of the absence of any plausible motive for the alleged unlawful failure to revoke the licence. The Claimants' explanation given to their Lordships that the Bank wanted to avoid the loss to existing depositors which would be caused by closing down forty-five retail branches was quietly withdrawn after Lord Millett pointed out that it would be perfectly lawful and honest to seek to avoid such loss. Then there was the fact that the Claimants were confronted by numerous documents in the Bank's disclosure in which revocation was considered by Bank officials and the conclusion was reached either that there were no grounds upon which to revoke or that revocation would not be in the interests of depositors. There were documents expressing the view at an earlier stage that BCCI SA would soon reach a point where it was eligible for recognised status, the accolade beyond mere licence. There were myriad documents in which the bank official (or third party) authors assumed that BCCI would be around for the medium to long term. Finally, in the post-April 1990 period there were many documents demonstrating that the Bank officials concerned clearly considered that there were realistic prospects of achieving a proper rescue. As I put it to Mr Pollock, the Bank was clearly at this stage in "rescue mode."

41. On Day 76 of the trial Mr Pollock, although making the point that the allegation that the Bank should have revoked in December 1990 was "formally on the pleadings" accepted that it was "not realistic" to ask the court to make such a finding if the Claimants had not already established misfeasance by that stage. He later frankly acknowledged in relation to the last period of the story: "presumably at the end of the day, yes, Abu Dhabi would [do] whatever was necessary, must have been what they thought." As I later pointed out, in the 27 June 2005 judgment from which I have already quoted, the same logic applied to the period between April

1990 and December 1990. Thus, for the whole of the period between April 1990 and July 1991, when the Bank was in what I called “rescue mode,” the Claimants expressly and by implication acknowledged that there was no realistic case that the Bank had acted unlawfully in failing to revoke the licence of BCCI SA.

42. I commented on Day 201 of the trial that it was incomprehensible to me why the claim in respect of this period was not formally abandoned. The only possible explanation is that the Claimants were following a strategy of abandoning nothing, no matter how serious the allegation or how hopeless it was. Failure to revoke or failure properly to supervise were not in fact the most hopeless of the allegations made by the Claimants during the course of the litigation in respect of the post-April 1990 period. In 1998 Lord Neill submitted to the Court of Appeal that the Bank had commissioned the Section 41 report in March 1991 from PriceWaterhouse because it thought that “the collapse of BCCI with the consequence of enormous losses to depositors [was].....fairly near inevitable,” it “anticipated that it would have to explain why it had allowed BCCI to continue to take deposits for so long” and it wanted “to be able to point to a report which (it could say) informed it for the first time of the extent of the fraud and illegality within BCCI” - the plan being that the Bank would thereby “obtain....some degree of cover for itself when the inevitable collapse came.” This allegation that the commissioning of the Section 41 report in March 1991 was a dishonest cover-up was unpleaded and was simply made, in argument before the Court of Appeal, in response to a finding by Clarke J that the commissioning by the Bank of the Section 41 report was inconsistent with what the Claimants had to prove. This new allegation was unsupported by any evidence and inconsistent with much of the evidence relied upon by the Claimants. The allegation was rejected by the Court of Appeal and was thereafter abandoned by the Claimants in their submissions to the House of Lords and was not sought to be pleaded in the draft Particulars of Claim served in July 2000.

43. Another hopeless inconsistency in their case (and in their own conduct) with which the liquidators never made any attempt to grapple was that when the Bank did in fact revoke BCCI SA's licence in July 1991 the then provisional liquidators who became in due course the liquidators joined with the majority shareholders in obtaining a four month adjournment of the Bank's winding-up petition. They did so on the basis that that period was necessary in order to enable the possibility of a rescue by the Abu Dhabi Government to be further explored. Yet when closing the liquidators' case Mr Pollock formally adopted everything in the liquidators' pleadings, including therefore the allegation that the Bank had acted dishonestly and misfeasantly in failing to revoke the licence during the period April 1990 to July 1991 because it knew that there would be no effective and comprehensive rescue or was reckless as to whether there would be one. How that can be reconciled with the liquidators' actual approach when the licence was in fact revoked that further time was required to enable the possibility of a rescue to be explored defeats me. However the liquidators did not allow such inconsistencies to stand in their way. The case which they pursued against the Bank in this litigation was in important respects diametrically inconsistent with the case which they pursued against other parties in other litigation, notably against the auditors PriceWaterhouse and against Bank of America. The latter was a particularly striking example. It was said against the Bank that it was perfectly well aware, principally through Mr Cooke, of the “real reasons” for Bank of America divesting itself of its investment in BCCI. The allegation against Bank of America was that it had fraudulently concealed from the Bank its true reason for disinvestment, notwithstanding it knew it was “relied upon by regulators and the financial markets for information relating to BCCI.” It was said that in consequence Bank of America enabled and/or facilitated the carrying on of business by BCCI by enabling it to continue and/or expand its loss making and fraudulent operations. Interestingly Mr Pollock had by Day 256 of the trial in fact reached and gone past the point at which he might, if acting chronologically, have put the relevant allegations to Mr Cooke in cross examination, when dealing with a meeting which he had had with Mr Van Oenen in September 1978. Mr Van Oenen, once of Bank of America, was by then a director of BCCI. Mr Pollock did not put to Mr Cooke what the “real reasons” were for Bank of America's divestment of which he was allegedly aware. Perhaps he would have done so later. What I am afraid all this demonstrates is that the liquidators were prepared to make such allegation as suited their purposes at a particular time, without regard to whether for different purposes they were at other times and in other places advancing diametrically inconsistent allegations. This is certainly conduct relevant to the enquiry whether an order for indemnity costs is appropriate. Another comment which can be made is that these were serious allegations of impropriety both in the form they took as against Bank of America and in the form they took as against the Bank. There cannot have been reasonably credible grounds for advancing both sets of

allegations. It would overburden this judgment to detail the specific allegations of lying by senior officers of Bank of America made during this trial which Mr Pollock was forced later to abandon in the light of material which came forward by pure chance in late disclosure of documents by the liquidators as a consequence of the Bank of America proceedings.

44. To return to the history of the action therefore the position when the liquidators closed their case was that they formally maintained their allegation of a dishonest failure to revoke the licence on each and every day after it had been granted, but that that allegation had effectively been abandoned. On Day 130 of the trial I had the following exchange with Mr Stadlen: -

> "1 MR JUSTICE TOMLINSON: Again, I will be corrected if I am
>
> 2 wrong, but Mr Pollock effectively abandoned the failure
>
> 3 to revoke claim.
>
> 4 MR STADLEN: He did, yes.
>
> 5 MR JUSTICE TOMLINSON: And I do not think that Mr Pollock
>
> 6 attempted to identify any single day, or any single
>
> 7 incident, in the light of which it is the liquidators'
>
> 8 case that it was misfeasance either to fail to revoke or
>
> 9 to fail to threaten to revoke.
>
> 10 MR STADLEN: My Lord, I think that is right.
>
> 11 MR JUSTICE TOMLINSON: That being the case, that case has
>
> 12 gone."

Lord Neill was in court that day. He did not correct me. Mr Pollock addressed me on the Claimants' post-licensing case all afternoon on Day 146 and for much of the morning on Day 147. He did not suggest that I or for that matter the Bank was wrong to regard the failure to revoke claim as effectively having been abandoned.

45. Late on 2 February 2005, Day 150 of the trial, I received a copy of a most extraordinary letter from the liquidators' solicitors Messrs Lovells. It was addressed to Messrs Freshfields. It was copied to my clerk. It read as follows:-

> "We refer to the recent submissions of Mr Stadlen in relation to the status of the Claimants' post-licensing claim.
>
> Contrary to Mr Stadlen's assertion, nothing Mr Pollock said during the course of his submissions last week (on Days 146 and 147) was "new", or sought to raise a new case, and the Claimants have abandoned nothing, whether formally or effectively. No doubt the Bank will proceed with its opening submissions on this basis.
>
> Yours faithfully
>
> Lovells

cc. clerk to Mr Justice Tomlinson."

I shall have to return to that letter later. Not surprisingly it produced a discussion on the next day, Day 151, as to the precise meaning of the letter. Miss Clare Montgomery QC was then the senior counsel present on behalf of the liquidators. There took place the following exchange: -

"MR JUSTICE TOMLINSON:	Well, it raises a question as to quite what is meant in this letter, as to whether it meant nothing had been abandoned formally or effectively on Days 146 and 147, or nothing has been abandoned formally or effectively at any stage in the trial.
MR STADLEN:	Well, my learned friend Miss Montgomery is here. No doubt she can tell your Lordship.
MR JUSTICE TOMLINSON:	Miss Montgomery?
MISS MONTGOMERY:	My Lord, it meant that nothing has been abandoned. We have not abandoned our revocation claim, and we have not abandoned the consolidated supervision claim. We have adopted the policy, as we told your Lordship, and Mr Stadlen at the beginning of his address on two occasions, of seeking to answer in reply, rather than by way of interruption, points with which we disagree in the course of his opening of his case.
MR JUSTICE TOMLINSON:	Yes, but when this letter says that nothing has been abandoned effectively, am I to read that as meaning that the failure to revoke case has not effectively been abandoned?
MISS MONTGOMERY:	Your Lordship is.
MR JUSTICE TOMLINSON:	I see. Thank you.
MR STADLEN:	I was going to say there Your Lordship has it from the horse's mouth. The trouble is we have three horses, and that is not meant disrespectfully. It is simply meant to indicate that in this case your Lordship hears submissions from three leading counsel and, as we have seen, on points of vital importance your Lordship is told different things by different counsel on different occasions.
MR JUSTICE TOMLINSON:	Miss Montgomery, I expect you can understand from my point of view, can you not, that if in a trial of this sort I say in open court, in Lord Neill's presence, "I will be corrected if I am wrong that Mr Pollock effectively abandoned the failure to revoke claim", that I am a little puzzled to be told that I have that wrong two months later.
MISS MONTGOMERY:	My Lord, it is a question of policy. Your Lordship, and indeed Mr Stadlen, has said many things with which we profoundly disagree over the course of his very long opening of his case. We took the view, as we explained to your Lordship at the beginning, that it was not helpful, indeed it would smack of the Punch and Judy, for us to get up at every point and say, "No, we do not agree with that, no, we do not agree with this", and in those circumstances what we propose to so is at some appropriate moment deal with it in full by way of reply, because frankly it is very difficult to know where to start. Certainly we have taken the view that it is impossible to deal with many of Mr Stadlen's points by way of a truncated dialogue with your Lordship which is interleaved into his submissions.
MR JUSTICE TOMLINSON:	I can quite understand the desire not to interrupt Mr Stadlen, but if I say from the bench that I will be corrected if I am wrong, that this has effectively been abandoned, and it is plain, then, that I am putting some supplementary questions so as to understand what is left, one would have expected someone to put me out of my misery.
MISS MONTGOMERY:	My Lord, if we were mistaken in not rising on that occasion, we were wrong.

But, as I say, Day 87, page 180, Day 92, page 159, we did make it clear. When your Lordship asks us a direct question, we of course will answer, but absent a direct question we have thought it right to stay silent, because our experience has been that as soon as we rise and say anything, it just leads to a further reiteration of Mr Stadlen's openings.

MR JUSTICE TOMLINSON: Thank you, Miss Montgomery."

46. I regarded as unhelpful this unusual approach of the Claimants' Counsel. I can only think that it was inspired by a desire not to abandon any point, however bad, in an effort to keep the show on the road for long enough to be able to cross examine the Bank's witnesses. Apart from many other things I could say about it, it wasted time and it prevented the Bank (and me) from ever knowing quite what case it was expected to meet and meant that it had to prepare to meet all eventualities, even those which had been apparently abandoned. This has obvious implications for any assessment of the reasonableness of the Bank's expenditure.

47. On Day 153 I attempted to obtain from the Claimants clarification as to their case on failure to revoke. I explained why I considered that the failure to revoke claim had effectively been abandoned, and why I could not understand the intended thrust of Messrs Lovells' letter of 2 February 2005. Mr Pollock confirmed that he had not "set out to suggest ... that on any given day that is the manner in which the discretion should have been exercised" and that "we put this, as I said time and time again, on the back burner". Mr Pollock then explained that during what he referred to as the Claimants' opening (which had occupied 86 days):

> "We were put under considerable pressure by your Lordship to get a move on. ... If your Lordship had wanted us to do it on a much longer basis, taking every single one of these points at length, perfectly prepared to do it, that is why I said at the end: we are not abandoning anything, I am adopting everything that is in our pleadings... Now, if I am wrong to do that I am perfectly happy to go back and start some of it again."

I have to say that the suggestion that the failure to revoke claim had not been developed in argument because of some pressure of time brought to bear by me I regard as particularly absurd. The failure to revoke claim was effectively abandoned on Day 1 of the trial. It was not a question of "taking every single one of these points at length." Mr Pollock had failed to put forward any case, whether briefly or at length, that the Bank had committed misfeasance by failing to revoke, whether on identified occasions or otherwise, even on the occasions which might have been regarded as likely to be the high water mark of this allegation, viz the aftermath of the Treasury losses episode in 1986 and the post-Tampa January 1990 Review Committee. I then asked "so I am to assume, am I, then, that it is in fact your case that the Bank was in breach of duty, what, on every day from licensing onwards?" and I was given the answer:

"MR POLLOCK: Yes, because the Bank knew from every day fromlicensing onwards, and indeed from pre-licensing, that this was a dangerous institution that was not properly supervised and, therefore, ought not to be there. If I make that point good, then it must follow that in failing to revoke they were acting wrongfully. If I do not make that point good, it does not arise."

I leave on one side that that answer was inconsistent with the answer to an earlier question of mine given on Day 136 that on every day during the 1980s the Bank had a duty to conduct consolidated supervision of the BCCI Group. By the end of the Bank's opening submissions, Day 204, it appeared to me that the failure to revoke claim was now on the front burner. There occurred the following exchange on that day: -

“MR JUSTICE TOMLINSON:	So the misfeasance must lie in the failure, in the absence of a restructuring, the failure to revoke the authorisation to accept deposits.
MR POLLOCK:	At the end of the day, if the Bank cannot bring about a satisfactory supervisory situation, it has no choice but to revoke.
MR JUSTICE TOMLINSON:	Right. So that is on -
MR POLLOCK:	Because otherwise it is deliberately allowing an institution to continue to take deposits where it is not satisfied and cannot be satisfied -- whether by its own means or by reliance on another -- that the criteria are being met. The objective of the Act is that institutions which do not meet the criteria and cannot be brought to meet the criteria within a reasonable timeframe should not be allowed to take deposits.
MR JUSTICE TOMLINSON:	That means, I would have thought, with the greatest respect, that the failure to revoke is, therefore, on the front burner rather than the back burner.”

48. What of course underlies this lamentable history is that the failure to revoke claim, was as the documents amply demonstrated, quite hopeless. No doubt that is why it was initially put on the back burner.

The allegation of unlawful failure by the Bank to carry out consolidated supervision of the BCCI Group

49. I turn to the second of the liquidators' main allegations concerning the post-licensing period. Until Day 146 of the trial both the Bank and I were under the impression that it was the liquidators' case that on each and every day after licensing it was actionable misfeasance on the part of the Bank, and moreover dishonest conduct, to be failing to carry out consolidated supervision of the BCCI Group as a whole.

50. This was an odd allegation of misfeasance for very many reasons. The 1979 Act imposed no explicit duty to carry out ongoing supervision even of recognised or licensed institutions, so it would be surprising if the Bank was under a duty to conduct consolidated supervision of the Group as a whole when it was BCCI SA which was licensed to carry on business in the UK. Moreover, if there was a strategy being pursued dishonestly or in bad faith by the Bank, it is surprising to say the least that it lost no opportunity to tell all and sundry that one weakness in the supervision of BCCI SA was that no single supervisor had an overview of the affairs of the Group as a whole. When writing to BCCI SA, on 19 June 1980, to confirm the Bank's decision to refuse recognition but to grant a licence the Bank said this: -

> “Certain concerns about the structure of the Group do however remain at the present time over and above the shareholding of ICIC and the as yet unformed trusts which we have been discussing with you recently; the principal concern is that the Group operates in so many countries without the supervisory authorities in any one being in a position to take an overall view of the total operation.”

This was said by Lord Neill to be the high water mark of the liquidators' case so far as concerns the Bank's appreciation of the risk of loss consequent upon the absence of consolidated supervision of the Group. It was a document placed on the file and copied to the Chief Cashier Mr Page against whom no allegation of dishonesty was made. If the Bank knew that it was “running away” from a duty cast upon it with knowledge as to the likely consequences sufficient to render such conduct misfeasance it is to say the least odd that it advertised the source of that knowledge to BCCI itself. Herein lies another point with which the liquidators never sought to grapple. The liquidators made their allegations from the vantage point afforded by hindsight but without acknowledging that that was where they stood. Techniques of banking supervision were in the 1980s in their relative infancy. International supervisory cooperation was in its very early days. The key point

here is whether the risk of contagion from an unsupervised, or relatively unsupervised, sister institution, BCCI Overseas, within the BCCI Group under the umbrella of the Group non-bank holding company BCCI Holdings SA, was perceived as a danger against which it was the responsibility of the supervisors of BCCI SA to guard depositors in the institution. The question can be put more generally - should supervisors have regarded as unsafe any institution whose sister institutions were not subject to overall consolidated supervision by a single responsible supervisor. One can argue about what the answer to that question ought to have been, although to produce an answer uninfluenced by hindsight is difficult. However that is not the relevant question where the allegation against the Bank is not of negligence but of bad faith and dishonesty. The documentary evidence as to the contemporary approach was quite overwhelming. No international banking supervisor at the time regarded the situation which I have described as giving rise to an unacceptable danger to depositors against the risks inherent in which they had to be protected. To suggest that a failure to do what no other supervisor contemporaneously thought necessary or appropriate is of itself necessarily evidence of dishonesty is simply futile. Yet this was the liquidators' case. The full weight of the documentary evidence concerning the contemporary international approach to consolidated supervision and the risks inherent in its absence did not become apparent until Mr Stadlen opened the case for the Bank. It had all been disclosed by the Bank prior to the trial. Its impact upon me was correspondingly devastating. No doubt I was deficient in my comprehension of what little I had previously been shown. However, it rapidly became apparent to me during Mr Stadlen's exposition that at no stage during the Claimants' presentation of their case had I had a proper grasp of this subject, or of the weight of the documentation which bore thereon.

51. What was even more absurd about the allegation concerning the Bank's failure to carry out consolidated supervision of the Group, insofar as it was an allegation of dishonesty, is that both the Governors and the Independent Board of Banking Supervision were frequently and clearly told that no one was carrying out consolidated supervision of the BCCI Group. A November 1989 paper presented by the Banking Supervision Division to the Board of Banking Supervision said that “the absence of full consolidated supervision is a danger in itself since no one supervisor can see the Group in its entirety.” It was the liquidators' case that knowledge that no one was carrying out consolidated supervision of the Group was in itself and without more knowledge of sufficient danger to give rise to the duty to act, either by revoking or, presumably, by immediately setting out along a road which would lead in due course to the assumption of consolidated supervision of the Group, and of itself sufficient to give rise to the mental element as to loss required by the tort of misfeasance. In that latter regard it was the “high water mark” of the Claimants' case as presented by Lord Neill.

52. Given the way in which the Claimants put their case, I asked Mr Pollock on Day 204 how it could be that the Governor and the Deputy Governor were not themselves equally guilty of misfeasance. We had the following exchange: -

“MR JUSTICE TOMLINSON:	But given that the starting point is the need to put in place a proper system of supervision so that you have not got the invisible places, that is the starting point, now the Governor and the Deputy Governor knew perfectly well that there were these invisible places which were not subject to proper supervision; so why are not the Governor and the Deputy Governor from time to time equally guilty of misfeasance, knowing perfectly well that no effort was being made to grapple with that situation.
MR POLLOCK:	If they said to themselves - because we do not know what their state of mind was, my Lord, we do not have enough information. If my learned friend wishes to say that if we are right the Governor and Deputy Governor must equally have been misfeasant, that is fine by us.”

Pausing there, there are at least two difficulties with Mr Pollock's response. Perhaps it was not intended to be taken seriously. However the point is that on the liquidators' case the Governors and the Deputy Governors from time to time did have all the information that they required on this point because they knew that no one was attempting consolidated supervision. Mr Pollock's response appears to be contrary to the Claimants'

pleaded case that the impugned officials within the BSD concealed the true position from the Governors. This was reiterated in paragraph 2.4 of the Amended Reply which reads: -

> ".....So far as the Claimants are aware at present, the true position in relation to BCCI was at all material times withheld by the Bank's Supervision Division from Lord Richardson and Lord Kingsdown."

Furthermore on Day 84 Lord Neill summarised to me the submission that he had made to the House of Lords to the following effect -

> "....We never suggested in our pleading that the Governor had acted in bad faith or was responsible for these decisions. I was expressly asked the question in the House of Lords: are you making any charge of bad faith against either Governor? to which I replied "No." They were not kept posted with information. They did not know."

My exchange with Mr Pollock on Day 204 continued as follows: -

"MR JUSTICE TOMLINSON:	And all members of BOBS, because they knew about the absence of consolidated supervision. They knew about the unsupervised places.
MR POLLOCK:	Is your Lordship suggesting that if enough respectable people know that they are being misfeasant, it ceases to be misfeasant?
MR JUSTICE TOMLINSON:	No, I am not suggesting that for one moment. I am suggesting that it may cast light on whether it was perceived to be a duty to act in that way.
MR POLLOCK:	Not really, my Lord, because this is a matter of analysis of the state of mind of those people we are concerned with. There are other people whose state of mind may also be subject to analysis, if we wanted to do so, but it is not necessary. All that is necessary for us is to ask your Lordship to form a conclusion, having looked at the documents and heard the two witnesses that your Lordship is going to hear, as to whether or not, in particular in Mr Cooke's mind, he understood that the system was unsatisfactory, that something ought to be done about it, that the Bank was obliged to do something about it, and decided not to. If your Lordship comes to that conclusion, it really does not matter how many people might have shared that view, or perhaps did not share that view, because they could not be bothered to think about it or because they were too busy, or whatever. What matters is Mr Cooke's state of mind. If your Lordship comes and assumes that was his state of mind, no light on Mr Cooke's state of mind is shed by an analysis of what others might also have thought, because ex hypothesi your Lordship has come to the conclusion that Mr Cooke had a misfeasant state of mind.

It is interesting to note that by now the various allegations of misfeasance had resolved themselves to an allegation that Mr Cooke knew that the Bank was obliged to do something about an unsatisfactory system and decided not to do anything. It would be hard to square this approach with Lord Neill's acceptance of the correctness of the observation by Lord Hobhouse in his second speech in the House of Lords that the tort required, in the case of a failure to act, a failure to do a specific act which it was the legal obligation of the Defendant to do. It must have been unlawful for the Defendants not to take some particular step at any given time - see per Lord Hobhouse at paragraphs 167 and 172 of his speech, pp.286 and 288 of the report. Lord Hobhouse did not dissent from the rest of their Lordships as to the manner in which the requirements of the tort should be formulated but rather on the question whether the Claimants could show a sufficiently arguable case that they could prove facts satisfying the relevant requirements. In his argument before me Lord Neill

placed considerable reliance upon the manner in which Lord Hobhouse had expressed himself in his first speech. As it happens the observations to which I have just referred came in Lord Hobhouse's second, dissenting, speech. But that does not detract from their accuracy, as Lord Neill accepted. Mr Pollock's approach by this stage of the trial is impossible to reconcile with the legal analysis earlier espoused by Lord Neill. Leaving that point on one side I found simply astonishing the suggestion that the fact that the Governors and the members of the Board of Banking Supervision did not think that the situation as they knew it to be imposed upon the Bank a duty to carry out consolidated supervision of the Group cast no light upon whether the same situation was perceived by those in the Banking Supervision Division as giving rise to such a duty. If the absence of full consolidated supervision was “a danger in itself” such as to give rise to a duty to act and of itself sufficient to give rise to the mental element as to loss required by the tort of misfeasance it is impossible to see how an evaluation of the state of mind of the Governors and the members of the Board of Banking Supervision could not be relevant to an evaluation whether or not members of the Banking Supervision Division with the same knowledge had a misfeasant state of mind. As I remarked on the next day of the trial, it was at that point that I stopped asking questions.

53. The liquidators also never grappled with the fact that, as they had effectively pleaded, consolidated supervision of the Group was impossible without a wholesale restructuring of the Group. At one stage the liquidators attempted to resile from that proposition but that was unrealistic and, incidentally, contrary to the case which they had quite independently asserted in their action against the auditors PriceWaterhouse. It was the liquidators' pleaded case in this action that Mr Abedi could not have agreed to a restructuring such as would permit consolidated supervision without the insolvency of the Group and much malpractice becoming apparent. Contemporary documents, largely disclosed by the liquidators themselves, showed that Mr Abedi was not prepared to contemplate the restructuring essential before consolidated supervision could be effective even if that was a necessary precursor to the bestowal by the Bank of the accolade of recognition. Mr Abedi very quickly realised that his bank could grow unimpeded without that accolade however much he may once have craved it. This material alone should have alerted the liquidators to the implausibility of Mr Cooke's note of Mr Abedi's reaction to proposed restructuring at their April 1984 meeting being anything other than a faithful record of what transpired. It was said to be a deliberately misleading note produced by Mr Cooke for dishonest purposes, a point to which I shall have to return.

The questions posed on Day 130 of the trial

54. By Day 130 of the trial it was already apparent to me that the liquidators' post-licensing case was simply incoherent. I had by now reported to the Lord Chief Justice in the terms I have already described. In an effort both to clarify the position and to encourage the liquidators to face up to their difficulties I posed four questions to which I asked for answers in due course. Those questions were, with the appended answers which I received on Day 136 added for convenience: -

> “(1) Is it alleged that it was misfeasance by the Bank to fail to refuse a licence on the ground alone that it could not be satisfied about prudence because no supervisor was doing consolidated supervision of the group of which SA formed a part?”
>
> (Day 136 answer: Yes)
>
> (2) Suppose that the grant of the licence was not itself an act of misfeasance. Is it said to have been an act of misfeasance on the part of the Bank on every day after licensing to be failing to do consolidated supervision of the group as a whole?”
>
> (Day 136 answer: Yes)
>
> (3) If the answer to that is 'yes', ... assuming the grant of the licence was not itself misfeasance, is it accepted by the Liquidators that post-licensing the only way in which the Bank could have carried out consolidated supervision of the group would in fact have been if they were in a posi-

> tion to revoke the licence, either to revoke it or to threaten to revoke it in circumstances in which they could carry out the threat?"
>
> (Day 136 answer: No)
>
> (4) Is it alleged by the Liquidators that it was misfeasance by the Bank to fail to grant only a transitional licence in order that BCCI could in some way be given an opportunity to restructure so as to permit consolidated supervision?"
>
> (Day 136 answer: This is not how the case is put.)"

I explained that the point of the third question was that if the grant of the licence was not of itself an act of misfeasance, it seemed that the only way in which a case could be constructed that the Bank was acting illegally post-licensing in failing to do something different from what it was doing was if the Bank was misfeasant in failing to revoke or to threaten to revoke because otherwise it could not change the status quo. The consequence of that was that if the Claimants did not have a case that there was an occasion on which it was an act of misfeasance to fail to revoke the licence or to threaten to revoke the licence, there was, as I saw it, simply no cause of action in misfeasance subsequent to the grant of the licence based upon a failure to carry out consolidated supervision, which ex hypothesi required a restructuring before it could be done. It will be recalled that it was at this stage of the trial my uncontroverted and publicly expressed understanding that the liquidators had effectively abandoned the failure to revoke claim. It was on the very same day that I expressed that uncontroverted understanding that Lord Neill accepted that the question which I had to ask myself at every point was whether I could identify a specific thing which the Bank should have done and which it was misfeasance to fail to have done.

55. On Day 136 I received the answers which I have already set out, prefaced by the following comment: -

> "Now, we have assumed that in posing the questions which your Lordship has put to us that your Lordship has used 'consolidated supervision' in the same way as we have, which is not in any narrow or technical sense but as a convenient label to describe the process of securing the provision of adequate supervisory information on the BCCI Group as a whole, so that an informed view could be taken as to whether SA met or continued to meet the statutory criteria."

It is quite true that Mr Pollock had in opening said that the Bank had failed to secure the provision of adequate supervisory information on the BCCI Group as a whole which in turn meant that it could not come to an informed view as to whether BCCI SA met or continued to meet the statutory criteria. I had not myself understood that that was all that was meant by failure to do consolidated supervision, and I do not think that the Bank so understood the case against it either. If the Bank's post-licensing duty was so nebulous, it was difficult to think that there could be identified positive steps that the Bank knew its duty compelled it to take but which steps it was not taking. The Bank was constantly digging and delving. Ultimately the setting up of the College of Regulators in 1987 was accepted by Mr Pollock to be an adequate discharge of the Bank's duty in this regard, as I shall explain below. However that may be I would not have expressed questions two, three and four as I did if I had understood that that is all that the liquidators meant by their allegation of a failure to do consolidated supervision.

56. On Day 140 of the trial, by now January 2005, I indicated to Lord Neill, who was in court that day, that upon further reflection upon the answers to my questions about consolidated supervision, given by Mr Pollock before the Christmas break, I would be grateful for a little further assistance on question three. As I pointed out question three was directed to what would be the mechanism pursuant to which the duty would be imposed upon the Bank to carry out consolidated supervision which it was not already doing and how it would bring that about. As everyone would have appreciated, my puzzlement arose out of my failure to comprehend how, if consolidated supervision required first a restructuring, the Bank could have a duty to carry out consolidated supervision if it had no power to impose a restructuring. As I saw it, the Bank could not

compel a restructuring unless it was in a position either to revoke the licence or to threaten to revoke it in circumstances in which it could carry out the threat. Lord Neill told me that the Claimants had “of course prepared longer answers to all the questions,” and that elucidation would be forthcoming. Two days later Mr Pollock put a slightly different slant upon the matter. A longer answer had not in fact been prepared for question three. As to when elucidation would be forthcoming Mr Pollock cautioned me “my advice is for no one to hold their breath.”

57. This notwithstanding, Mr Pollock did return to court on Day 146 and spent the afternoon of that day and much of the following morning dealing with my request for assistance. The effect of what Mr Pollock said was that the answers to my questions one and two were now changed from “yes” to “no.” There emerged what in the lingua franca of the case came to be known as the voyage of discovery allegation. The concept of consolidated supervision was now described as “something of a red herring” in the case. In place of the allegation that the Bank had been under a duty to carry out consolidated supervision of the Group rather it was said the Bank was under a duty to embark upon a factual investigation which might or might not lead to consolidated supervision and which might but which would not necessarily have led to revocation of the licence. As I put it on that day, this meant that the post-licensing case was not actually a failure to supervise case but a failure properly to inform itself case. The Bank's post-licensing duty was now put as being that the Bank had to “carry out some form of investigation or supervision which went towards the idea of consolidated supervision.”

58. In reality this address from Mr Pollock on Day 146 and 147 signalled the complete collapse of the Bank's post-licensing case, a case which I emphasise was a case not of negligence but of misfeasance. However the significance of the retreat on Days 146 and 147 went rather further. Once it was accepted that the Bank had no immediate obligation to carry out consolidated supervision of the Group as a whole, it became the less plausible that the assurances given by the Luxembourg supervisory authority about the financial soundness of BCCI SA were to be regarded as unreliable on the ground alone that it, the Institut Monétaire Luxembourgeois or the Luxembourg Banking Commission as it had been in 1979, was not undertaking consolidated supervision of the BCCI Group as a whole. It also made it the less plausible that the contemporary realisation would be that the absence of full consolidated supervision of itself presented dangers to depositors against which it was the Bank's duty to guard them.

59. It was no doubt in recognition of and by way of reaction to the extent of the apparent collapse of their case that the liquidators' solicitors Messrs Lovells then wrote the letter of 2 February 2005 which I have set out above. Mr Stadlen described this as playing fast and loose with the court. During the trial I attempted to eschew such language since it seemed to me not best calculated to the preservation of harmonious relations between Counsel and the court such as is necessary if a long trial is to be manageable. It was quite sufficient to be getting on with that the relations between the two principal leading Counsel were not as one might have hoped. However it has to be said that Mr Stadlen's characterisation of what was going on was entirely fair. Messrs Lovells' letter was, again, as it seemed to me, informed by a desperation to keep the trial alive for long enough to expose the Bank's witnesses to cross examination which, as long ago as 24 September 2004, the liquidators' solicitor Mr Grierson of Messrs Lovells had told the Evening Standard would be “bloody.” I asked Mr Pollock to return to court to clarify what precisely was now the liquidators' case. He returned on Day 153. We had the following exchanges: -

“MR JUSTICE TOMLINSON:	.....Now I appreciate that you say that a proper performance of a duty to supervise in the general sense would have led ultimately either to consolidated supervision of the group by someone, or revocation, or possibly even to something else, but it follows, I think, from how you put it in on Days 146 and 147 that, contrary to the positive answer to question 2, it is not in fact now alleged that on every day after licensing the Bank was in breach of duty in failing itself to do prudential consolidated supervision of the group in the cajole, warn, et cetera, sense. That is what I understood to be effectively abandoned on Days 146 and 147 by the way in which you put it.

Now, am I not right about that?

MR POLLOCK: I will think about it.

MR JUSTICE TOMLINSON: Right, well then can I give you something else to think about, because you will appreciate that the letter says that that has not been effectively abandoned.

MR POLLOCK: Yes.

MR JUSTICE TOMLINSON: Well, that is how I am told I was to understand it.

MR POLLOCK: Yes, the letter is intended to indicate, my Lord, that we have not abandoned anything - -

MR JUSTICE TOMLINSON: Can I just deal with - -

MR POLLOCK: - - unless I have explicitly and expressly said so.

MR JUSTICE TOMLINSON: Well, if you have not explicitly and expressly said so, the way in which you have put it is inconsistent, in my current way of thinking, with the maintenance of the case that on every day there was a breach of the sort which I have described. If you want time to think about that, so be it. But that is as it seems to me, that it is wholly inconsistent.

"MR JUSTICE TOMLINSON: .....I am with you 100 per cent that one can over-analyse these issues in advance and that things sometimes look different at the end of the case, but I believe that, in relation to consolidated supervision, we have alighted on an important point of principle where it is very important for the witnesses to know in advance what is said, because either it is said against them, "Well, you had to carry out this informational process to see what needed to be done", or it is said against them, "You did appreciate from day one that you were under an obligation to carry out what we will call consolidated supervision of the group and you had to get yourself in a position in which either you did that or you just closed them down".

That, to my way of thinking, is two rather different attacks on them, and it is quite important for me to know which is the nature of the attack and I think it is equally important for the witnesses to know what is the nature of the attack on them before they go into the witness-box.

So I am still not 100 percent convinced that it is your case that on every given day they knew that they should be carrying consolidated supervision, because that seems to me wholly inimical to the way you put it on Days 146 and 147.

MR POLLOCK: Well, what I was trying to do on Day 146 and Day 147 was dispose of what I thought was an oddity which we suspected had crept into your Lordship's thinking which was that, as I put it, consolidated supervision was a fixed and immutable concept which required that if you were not on day one carrying out full blown consolidated supervision, including sitting in the office, whatever, on the other side of the world, telling them how to run their provisioning and so on, well, that had to be our allegation.

MR JUSTICE TOMLINSON: I thought it was your allegation.

MR POLLOCK: Well - -

MR JUSTICE TOMLINSON: I am not saying it has to be your allegation; I thought it was your allegation. I think Mr Stadlen thought it was your allegation.

Mr POLLOCK: Well - -

MR JUSTICE TOMLINSON: That is what he was here to meet. That is what he was - -

MR POLLOCK: So your Lordship is suggesting that it was genuinely thought that our case was that on whatever date it is in August, the first daty in which they have a licence, if the Bank was not standing in every single one of BCCI Group's worldwide offices cajoling, warning, advising, and so on, that we were say-

	ing that is what they had to have been doing on that day?
MR JUSTICE TOMLINSON:	That is exactly what we understood you to be saying, and that was why Mr Stadlen was saying we cannot understand why this case is put against us because, on anyone's showing, on anyone's case, it takes time to get to the position in which you can do it and, he would say, you may not ever be able to get there. That is why he was saying: it is an incomprehensible case, but that is it's case I have to meet. And I understood that to be the case. That is why I asked my question 2, because I could not understand how anyone could be advancing such a case, but you told me that you were. Would you like to go away and think about consolidated supervision a little more, Mr Pollock? For the moment, I am proceeding on the basis of what you said on Days 146 and 147. Which, to my way of thinking, means that the answer to question 2 is “no”, not “yes”.
MR POLLOCK:	Yes. Well, as long as your lordship does not expect me to rush back immediately, that is fine.”

60. Although Mr Pollock had always maintained that the Bank had failed properly to inform itself about the activities of the Group in so far as they affected BCCI SA as an interdependent part, this new emphasis on the “informational” aspect to the exclusion of the more precise allegations of failure to revoke and failure to carry out consolidated supervision was a forlorn attempt to salvage something from the wreckage of the liquidators' case. Whilst previously the Claimants' case had been that the Bank had known that the College of Regulators was not a solution, and that the only satisfactory solution was consolidated supervision of the Group conducted by the Bank itself, Mr Pollock now accepted that the “voyage of discovery” which he was advocating as the Bank's duty was one upon which effectively the College embarked. On Day 146 Mr Pollock said this: -

“MR POLLOCK:	One imagines, my Lord, that consolidated supervision frequently has to be carried out as a matter of cooperation.
MR JUSTICE TOMLINSON:	Yes.
MR POLLOCK:	Given that the world is divided up into a series of territorial jurisdictions, there may frequently be cases where you say: well, I, the supervisor sitting here in this particular jurisdiction, do not have a police power to go and batter down the doors over there, but I am supervising an institution which is connected. Now, how am I going to satisfy myself, and how am I going to supervise another institution if I think it is a good idea to do so? The answer is: well, you are going to have to go and talk to everyone and set up a system which will allow to you do so. Your Lordship will recall that effectively this is what the College set out to do.”

That being the case, there was no proper basis upon which the liquidators could continue to claim that the Bank was acting in knowing defiance of its legal duty between 1987, when the College was set up, and the arrival of the PriceWaterhouse report in April 1990. That allegation was not however withdrawn. But it went further than that. As early in the history as mid 1983 the Bank was told that the IML, the Luxembourg supervisory authority and the parental and primary supervisor of BCCI SA, intended to attempt to discover much more about what went on elsewhere within the Group by requiring of BCCI SA that it include in its periodical returns information on a consolidated Group basis, an exercise with which the Board of BCCI Holdings SA agreed to cooperate. When Mr Walton of the Bank's Banking Supervision Division subsequently reviewed extracts from the consolidated information which the IML had received he noted that “the information is sufficiently detailed to give us comfort that the Luxembourg authorities would have the necessary material to su-

pervise adequately on a consolidated basis if the information was available regularly." On Day 146 Mr Pollock accepted that it would not necessarily have been misfeasant on the part of the Bank to await the outcome of that exercise by the IML. In truth it was impossible to contend that the Bank had not already embarked upon a relevant voyage of discovery. Whether the voyage should have been undertaken with more urgency or with a different vessel was not the question which I had to determine. The liquidators' claim was, as it had to be if they were to demonstrate misfeasance as opposed to negligence, of a deliberate failure ever to contemplate setting out on the voyage for fear of what would be discovered in its course. I have already referred to the fact that there was constant digging and delving, as the history of Treasury visits, loan book reviews, systems and controls reviews, enhanced supervision, the College, Section 39 reports, the post-April 1990 investigation and finally the Section 41 report bear eloquent witness.

61. It was alleged to the very end of the trial that twenty two Bank officials (although not the entirety of those against whom allegations of dishonesty were made) were "in bad faith knowingly [participating] in unlawful conduct.....knowing or believing that depositors and potential depositors in BCCI would continuously sustain injury or harm consisting of the lack of supervision to which they were entitled under the 1979 and 1987 Acts, knowing or believing that the likely consequences of such unlawful conduct were losses to depositors and potential depositors in BCCI or wilfully disregarding the risk of those consequences or being recklessly indifferent to them." This composite allegation was never withdrawn. It was impossible to reconcile with Mr Pollock's various concessions which is no doubt why Messrs Lovells maintained that there had been none. The truth of the matter is that there was an ongoing debate within the Bank as to whether the Bank should, pro bono publico, and as an acknowledged leader in the quest for greater worldwide supervisory cooperation, undertake consolidated supervision of the BCCI Group, a debate which took as its starting point the absence of any legal duty so to do. This was a debate conducted in good faith in which, ironically, Mr Quinn identified Mr Cooke as probably the most enthusiastic exponent of the Bank voluntarily assuming the role of supervisor of the Group on a consolidated basis. Mr Eddie George, as he then was as Deputy Governor, was one who opposed such a move, and yet he was not accused of dishonesty. It is difficult to think of any consideration relevant to the question whether the Bank should, as a matter of statutory duty, assume this role which was not, at the material time, known as well to Mr George as it was, to, say, Mr Quinn. Yet the liquidators accused Mr Quinn of dishonesty in this respect, but not Mr George. Mr Quinn and Mr George were good friends as well as being long-standing colleagues in the Bank. For years they worked in rooms next door to each other at the Bank and were used to confiding the one in the other in the manner of professional colleagues who know in whom they can repose that trust. One of the more implausible of the allegations made in this case was that Mr Quinn set out systematically and dishonestly to deceive Mr George and to conceal relevant matters from him.

62. In its skeleton argument for the costs hearing the Bank puts it thus: -

> "Thus, in the 12 years between the first Statement of Claim and Day 153 of the trial, the Claimants' post-licensing claim evolved from (1) failing to revoke knowing the criteria were not fulfilled to (2) failing to revoke knowing every day for 11 years that the discretion could not lawfully be exercised against revocation to (3) revocation not being the only legal option open to the Bank, and (4) as a cause of action being on the back burner through the 1980s and unrealistic post-April 1990 when the Bank was in rescue mode; to (5) failure to do consolidated supervision of the Group every day for 11 years, to (6) failure to embark on a voyage of discovery notwithstanding that it was accepted that the College was a lawful example of a voyage of discovery."

The case continued for a further 103 days after Day 153. It also has to be remarked that the Bank had to prepare to meet the case on every basis on which it was put forward. The extraordinary manner in which the Claimants' case was made to change to fit the exigencies of the moment would alone justify an award of indemnity costs. It will also be highly relevant to any consideration by the Costs Judge of the reasonableness of the Bank's expenditure in preparing to meet these many and varied allegations.

The allegation that the grant of the licence was an act of misfeasance

63. At the trial it was the claim that the grant of the licence in 1980 had been an act of misfeasance which figured at the forefront of the liquidators' case. This is such a large topic that it is impossible to do it justice within a small compass. The allegation was however inherently implausible. I emphasise again that this was not an allegation of negligence or error of judgment by the Bank. It was an allegation of deliberate wrongdoing. In order to constitute misfeasance the Bank officials when deciding to grant the licence must have known that in consequence of their deliberately unlawful conduct in granting a licence to BCCI SA in circumstances where they knew that the statutory criteria were not satisfied depositors in BCCI SA would probably suffer loss or were at serious risk of suffering loss. In order to have this state of mind they would have to have thought either that BCCI SA would probably collapse or that it was at serious risk of collapse. If that is what they thought, why ever would the Bank officials grant BCCI a licence, knowing that it was unlawful for them to do so because the statutory criteria were not met, and knowing that there was a probability or a serious risk of a collapse which would in turn be bound to lead to an enquiry into their conduct? Mr Pollock never got as far as cross-examining Mr Cooke about the grant of the licence. However he did on the very last afternoon of his cross examination put a point which went to the alleged motive, or one of them, for the alleged desire of the Bank to grant a licence to BCCI SA come hell or high water. The following exchange took place: -

> "Q: I suggest, Mr Cooke, that this episode demonstrates an absolute determination on your part and indeed on the part of BAMMSS not to investigate in the case of BCCI in case you found out things that might make difficulties?
>
> A: No, not at all. Not at all. For what reason?
>
> Q: Well, why did you not?
>
> A: For what reason would we have taken that positive step not to do something?
>
> Q: Because you might then have had to refuse it a licence?
>
> A: Well, why would that have worried us?
>
> Q: You tell me.
>
> A: Well, I cannot.
>
> Q: Very well.
>
> A: It is a strange motive."

64. The House of Lords gave no support to the idea that the Claimants had any prospect of success on this aspect of the case. Lord Hope said this at paragraphs 104 - 105 of his second speech, p.263 of the report: -

> "104. 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 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, 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."

Lord Steyn at paragraph 7 of his second speech, p.238 of the report said: -

> "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."

Lord Hutton was if anything still less encouraging. At paragraph 138, pp.274-275 of the report he said this: -

> "In my opinion the Bank cannot validly contend that on the documentary evidence available to them the plaintiffs have no real prospect of succeeding in establishing that the Bank knowingly and in a deliberate way abused its statutory powers in failing to revoke BCCI's licence after it had been granted....."

And at paragraph 150, p.279 he continued: -

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

65. Although the Claimants spent a great deal of time trying to establish that the Bank knew that the statutory criteria for licensing were not satisfied, they made no real effort to establish that officials had at licensing the mental element as to the probability of loss which the House of Lords had held was required in order to render their conduct misfeasance. This is another feature of the case with which the liquidators simply failed to grapple. On Day 247 of the trial, Mr Pollock addressed me on why I should not limit the length of the cross examination of Mr Cooke but rather permit it, if necessary, to continue for the approximately 64 days which Mr Pollock suggested was necessary and justified. In this regard he emphasised that it was no part of the Claimants' case that the Bank's witnesses, including Mr Cooke, were generally or congenitally dishonest. Rather, he submitted, Mr Cooke, and the other Bank officials, knowingly bent the rules, "no doubt for reasons which at the time seemed good to them. The problem was it was the first step on a slippery slope....." As I mentioned in my subsequent judgment on the application to curtail the length of cross examination of Mr Cooke, on the Claimants' case the reasons which at the time seemed good to Mr Cooke and to his colleagues in the Banking Supervision Division must have co-existed with the knowledge on his and on their part that in consequence of his and their actions depositors in BCCI SA would probably suffer loss, or at least recklessness as to the serious risk that that would eventuate. In the absence of some compelling motive to behave in this way it is difficult to comprehend why rational people would do so. This submission by Mr Pollock was redolent of an earlier remark of his on Day 59 of the trial that the relevant Bank officials were all "perfectly decent people trying to do their job." The liquidators never grappled with the fact that the logic of their case compelled them to attribute to these perfectly decent people trying to do their job ever more disgraceful and dishonest conduct such as would not ordinarily be contemplated by perfectly decent people. Still less would it be contemplated by perfectly decent people if the only motive therefor was to cover up earlier dishonesty by other people in positions far senior to their own who, in some cases, they had almost certainly never met. However, I digress.

66. It was no doubt in recognition of the impossibility of establishing that at licensing Bank officials had the mental element as to loss as apparently spelled out by the House of Lords as necessary for the commission

of the tort that Mr Pollock at an early stage of his address sought to persuade me that knowledge of the mere possibility of the risk of loss was sufficient, and that even that knowledge did not need to be proved because it followed that a supervisor who appreciated that he was acting in breach of a statute designed to protect the public appreciated that he was deliberately choosing to expose depositors to the risk which it was the supervisors' duty to eliminate. This was said to be “a development of and an expansion of Lord Justice Auld's anti-Orwellian argument,” an argument developed by Auld LJ in his dissenting speech in the Court of Appeal to which Lord Hope made reference at paragraph 61 of his second speech in the House of Lords, pp. 251- 252 of the report. Thereafter Mr Pollock addressed the court on this basis pointing to evidence which he said demonstrated that the Bank was aware of the possibility of the collapse of BCCI SA.

67. I well understood why Mr Pollock adopted this approach. He hoped to persuade me that his approach was inherent in what Lord Hope had said in the House of Lords about self-imposed ignorance. No other approach to the facts of this case was realistic if the Claimants were going to have any hope of success in demonstrating that the officials of the Bank had at licensing or until April 1990 the mental element as to the probability of loss necessary for misfeasance. It seemed to me at the time that Mr Pollock's approach was almost certainly unsustainable in the light of a close study of all of their Lordships' speeches which bore on this point, but the stage had not been reached at which I had to decide how precisely the matter had been left by the House of Lords.

68. It was therefore something of a surprise when Lord Neill came to address me on the law at the conclusion of Mr Pollock's presentation of the Claimants' case that he accepted that what the Claimants had to prove was that the relevant Bank officials knew that their act or omission would probably injure the depositors, or were reckless as to a perceived serious risk of injury to the depositors resulting therefrom. It was not enough that they were reckless as to the possibility of loss, rather, as Lord Hope put it at paragraph 46 of his second speech, p.247 of the report, 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. The question for the court therefore was whether at any given point of time the risk was sufficiently serious to justify a finding of recklessness - that was a question of degree - see per Lord Hope at paragraph 76 of his second speech, p.255 of the report. As far as I recall Lord Neill never said in terms that he could not support Mr Pollock's approach, but it is plain from the totality of his exceptionally careful and measured submissions on this part of the case that he made no attempt to support that approach and indeed made submissions which demonstrated very clearly why Mr Pollock's approach could not be spelled out of their Lordships' speeches when read as a whole.

69. As I think I remarked in due course, the fact that two leading Counsel for the Claimants had made diametrically opposed submissions as to the principal legal issue in the case occasioned me no inconvenience because I would have had no difficulty in deciding which submission was correct. It was however, as I certainly did remark, a singular feature of the case. In fact it made my life very much easier, because it put into stark relief the Claimants' inability even to come close to establishing the mental element which they required in order to show that the licensing operation was an act of misfeasance, assuming that is that they could overcome the first hurdle of showing that there had been a conscious disregard of the requirements of the statute in granting the licence. However it cannot be every day that this approach to litigation is adopted and it is not to be encouraged. In retrospect it can be seen that much of Mr Pollock's 80 day address to the court was wasted in an effort to surmount a hurdle which was placed lower than Lord Neill acknowledged the law required the bar to be set. It is a point to be borne in mind by the Costs Judge when considering the eventualities for which the Bank had to cater in preparing its case.

70. Lord Neill described as “the biggest point of all” in relation to the Bank's appreciation of the risk posed by BCCI SA the absence of full consolidated supervision. I have already commented on this. I might add that I assume that when Lord Neill used the expression “full consolidated supervision” he did so in what Mr Pollock later castigated as a “narrow or technical sense” and not simply as a convenient label to describe the process of securing the provision of adequate supervisory information on the BCCI Group as a whole. If Mr Cooke, Mr Gent and the others regarded the absence of consolidated supervision as a factor which rendered

the grant of a licence unlawful, it is singularly unlikely that they would have spelled that out in a letter to BCCI SA, still less that they would have passed that letter to Messrs Freshfields in draft for legal advice. They did both of these things. However the broader point is as I have already pointed out that international supervisory techniques and cooperation were not at this stage sufficiently developed for lack of consolidated supervision to be perceived as in itself giving rise to risks to depositors against which it was the duty of supervisors to guard them. That position had not even been reached by the time that BCCI was closed down. In the light of the contemporary material which the Bank showed me on this topic the counter suggestion was risible. To impute bad faith or dishonesty as the only explanation for the failure by the Bank officials to reach or to acknowledge having reached a perception which other banking supervisors would not at that time have reached (and did not at that time reach) was similarly unrealistic. This was in truth the central point in the case. The Claimants' case on it was hopeless in principle as a matter of contemporary perception and hopeless on the facts - BCCI SA was seen by most who had to address the question as having a long term future as a part of the British and wider banking scene.

71. Another reason why the Claimants could not hope to establish that the Bank believed in 1980 that the then current supervision of BCCI SA was so deficient as to give rise to unacceptable risk to depositors was because the liquidators accepted as honest certain evidence given to Lord Justice Bingham by Mr Brian Gent concerning the licensing process, in particular the meeting of the Review Committee at which the application of BCCI SA was discussed. The Assessment Committee, the first stage in the process, had recommended that BCCI SA be refused recognition, the higher accolade, but granted a licence. The focus of debate at the next stage, the Review Committee, was therefore whether the decision of the Assessment Committee to deny recognition should be upheld. Mr Gent however, always a hawk on BCCI, questioned whether it was appropriate even to grant a licence. Mr Gent was effectively the manager within BSD with responsibility for BCCI SA. He probably knew more about BCCI than anyone else in the Division. It is worth setting out in extenso the evidence about this meeting which Mr Gent gave to Lord Justice Bingham. He said this:-

> “.... By the time it came to the Review Committee the first time, it came on the basis of a recommendation to grant a licence but refuse recognition. I was conscious that Mr Cooke had made his views fairly plain, that he expected it to be a licence without prejudging it, and he had written a note to the Governor to that effect before.
>
> Q: In April of 1979?
>
> A: Yes, I was conscious of that. Coming to it as a member of the Review Committee, I did raise the question in the Assessment Committee: are we sure we ought to give this thing even a licence?
>
> Q: In the Review Committee?
>
> A: In the Review Committee, yes. There was a discussion about that. First of all, Mr Cooke made the point that the Review Committee was primarily there to consider the recommendation to refuse recognition. Nevertheless, he did conduct a fairly brief discussion on the lines of “Brian, what ground would you have? I know you don't like this bank, I know you wish it wasn't here, but the Act does not say that we can just refuse a licence if we don't like it. If we hear a lot of worrying things about them we have to set out what our actual grounds would be.” I remember some discussion about “Just because you have a lot of press comment and worries by other banks who will not deal with them, that is not a ground; it would not stand up.” I remember commenting on the qualifications of the accounts of ICIC, I think it was that were based on the fact that the auditors could not satisfy themselves about the value of a significant figure in the balance sheet, and I said that might conceivably be quoted as grounds for saying that one of the controllers is not fit and proper. The general view, I think, in the rest of the Review Committee was that it was a very artificial argument and device to throw out of the United Kingdom, if you like, what apparently on the figures and everything else seemed to be a very profitable and expanding, well-capitalised bank, and that there was a general presumption in the way the

> Bank of England approached all applications from overseas banks as if this were regarded - - leaving aside the debate we have heard about, that was not an issue - - that it was the intention of the legislators and everybody else in Parliament that the Bank of England would not be carrying out detailed supervision of overseas banks. It would deal with the matter, as I said earlier, by relying on assurances where they were forthcoming, from overseas regulators, such as Luxembourg. So that when challenged in the Review Committee as to how one would deal with that we did briefly rehearse the possibilities. One could actually reject Luxembourg and say “I don't think they are in a position to know.” That was considered to be political. It would be very difficult and unlikely to succeed and the alternative would have been to say “Well, we don't have to rely on the assurance from Luxembourg, the Act does say 'may rely'”, but then I was faced with the question “Well, how else would you make up your mind? How else would you get the information which would enable you and lead you to reach a different conclusion from the one that Luxembourg had reached as a supervisor?” The fact is that I had to concede that we did not really have any contradictory information. It would theoretically have been open to the bank to make sufficient inquiries on its own account, saying “Luxembourg is not in a position to make this judgment, we are not going to take any notice of it; let us make our own inquiries.” It would have been extremely difficult in practice, we acknowledge that. We would have had to have replicated the Luxembourg attempts over the years in a very short period of time. Clearly we would have had to take account of their views, and we were sure that they would have been prayed in aid by BCCI had we sought to refuse. There was nowhere else, no other supervisor thinking at that time, that it would have been practical to consult. We had a brief discussion about taking the views of the UAE which was not in dispute. Generally it was clear to me after this discussion that I was going to be in a minority of one in hankering after a refusal for authority, and I think I was persuaded, and accepted, that it would be a very difficult high profile decision, unlikely to be upheld at appeal if we took it.
>
> Q: So somewhat reluctantly you acquiesced in the decision?
>
> A: Yes.”

72. That evidence was, as I have said, accepted by the liquidators as truthful. Indeed Mr Gent was described by Mr Pollock as “the lonely standard bearer of integrity.” That notwithstanding Mr Gent was said to have lied to Lord Justice Bingham in other respects and in particular when he said that the question of the principal place of business of BCCI SA simply did not arise as an issue. It seemed to me that the liquidators decided for tactical reasons to rely upon the truthfulness of Mr Gent's account of the meeting which I have set out above for the very reason that in that account the topic of principal place of business was not mentioned. This was because, said the Claimants, it had been dishonestly decided by Mr Cooke, Mr Gent and others that the principal place of business of BCCI SA would be a non-topic - it would not be mentioned. Needless to say this allegation of a dishonest agreement or understanding or decision was unpleaded. It was said that this decision had been reached by the middle of 1978 but not earlier. If Mr Gent had wanted to ensure that a licence was not granted to BCCI SA, he would surely, argued the liquidators, have played the trump card that the principal place of business of BCCI SA was not in Luxembourg. This demonstrated, said the liquidators, that Mr Gent was party to this dishonest plan to ensure that BCCI SA received a licence in circumstances where the Bank could not be satisfied that the criteria were met and knew that they were not entitled to rely upon assurances from the Luxembourg supervisors, since the principal place of business was not to be found in Luxembourg.

73. I leave out of account that the liquidators also alleged that it was dishonestly agreed or decided or that there was a dishonest understanding to the effect that the “nature and scope” of the Luxembourg supervision was also to be a “non-topic” and that the question whether BCCI SA satisfied the “four eyes” criterion (Banking Act 1979 Schedule 2 s.8) was likewise to be a non-topic. Mr Gent explicitly mentioned the nature and scope of the Luxembourg supervision at this meeting and questioned it. Not long after licensing Mr Cooke sent to the Governors, Mr McMahon, Mr Payton, the Chief Cashier and Mr Fforde, all very senior personnel, a memorandum which expressed his view that “Mr Abedi is the bank,” by which he meant BCCI. This would

have been strange conduct for a man party to an agreement that compliance with the four eyes criterion was to be a non-topic lest open discussion of it imperil the entitlement of BCCI SA to a licence.

74. In the light of Mr Gent's unchallenged evidence to Lord Justice Bingham about what transpired at the Review Committee the suggestion that there was a dishonest agreement or understanding that principal place of business was to be a non-topic in order to ensure that BCCI SA received a licence in reliance upon assurances from Luxembourg was foolish. For a start, the alleged conspirators can have had no way of knowing when they made their agreement or reached their understanding who in the event would be involved in the licensing process which took place almost two years later. Even when the Assessment and Review Committees were set up, long after the making of the alleged agreement, their composition when they met varied according to commitments. However of equal importance is that at the Review Committee Mr Gent did indeed question whether a licence should be granted and raised several grounds of objection. The fact that Mr Gent argued against the grant of a licence at all is inconsistent with the alleged dishonest decision or understanding the whole purpose of which is said to have been to ensure that BCCI SA was granted a licence. On the liquidators' case the entire discussion as described by Mr Gent had to be a charade, played out for whose benefit it is unclear since all those present at the Review Committee are alleged to have been dishonest with the possible exception of Mr Frank Hall, who, it was said, might not have been a party to the dishonest plan and may not have been sufficiently aware of the facts concerning BCCI SA to realise that an issue as to its principal place of business arose. Perhaps therefore the others present, Messrs Cooke, Barnes, Coleby and Gent put on the show for him. However Mr Pollock also submitted that Mr Gent was forced to argue at this meeting from a position of weakness, that he had felt that he had insufficient ammunition and that in consequence he had got nowhere. This presupposes a genuine as opposed to a contrived discussion and is tantamount to conceding that Mr Gent did not believe that the Bank could sustain a case to the effect that the statutory criteria were not satisfied. Prior to the licensing decision Mr Barnes had played no part in the supervision of BCCI. The only reason for accusing him of being complicit was apparently because he was present at the Assessment Committee, which he chaired, and at the Review Committee. Mr Coleby is a most unlikely conspirator. Only 6 years junior to Mr Cooke in the Bank, he had already been there 17 years by the middle of 1978, by which time he was Deputy Chief Cashier and Deputy Head of BAMMSS. Already he was carving out a career in monetary policy and operations, for which he ultimately became responsible as Executive Director in March 1990. By March 1980 he was already Head of the Money Markets Division and an Assistant Director of the Bank. Why ever would Mr Coleby wish to assist Mr Cooke in this grubby enterprise? Alleged to have been a party to the dishonest decision by at the latest June 1979, in January 1980 Mr Coleby wrote to Mr Cooke in the context of one of the anomalous banks, Banco Espanol en Londres, whose circumstances were very different to those of BCCI, pointing out that they had not yet in that context had an intended discussion concerning the question of country of incorporation versus country of principal place of business as the determinant of supervisory responsibility. This was not the act of a man who regarded it as essential to treat the topic of principal place of business as a non-issue lest the connection with BCCI SA be made. It was not the act of a man who thought or appreciated that the new Act mandated one approach rather than another. Nor incidentally was Mr Cooke's counter-annotation “accept if mutually agreed, otherwise place of incorporation determines. Raise in Basle” the act of a man who thought that the 1979 Banking Act had changed the hitherto accepted approach as to where primary supervisory responsibility lay. I shall have to return to this incident in greater detail, since it is of some significance.

75. This alleged plan to which senior personnel at the Bank were apparently committed as from the middle of 1978 could have come seriously unstuck at the Assessment Committee, which consisted of Messrs Barnes, Atkinson, Crook, Hall, Nicolle, Roper and Thompson. Mr Thompson was once said to have been a party to the dishonest “non-topic” decision and indeed to have acted dishonestly in other respects thereafter. However all allegations of dishonesty against Mr Thompson were in due course expressly abandoned, after some pressure from me, one of the few examples of allegations of dishonesty against Bank officials being expressly withdrawn during the trial. Apart from the fact that it was the right thing to do, the Claimants' decision expressly to abandon the allegations against Mr Thompson may have been influenced in part by the fact that he was dead and thus unable to defend himself against the accusation of dishonesty. However that may be, this decision left the Claimants in some disarray. Mr Thompson had been involved in the debate concerning the anomalous banks and was just the sort of person who, on the Claimants' case, could have had sufficient

background knowledge, if not directly of BCCI, to raise the issue of principal place of business at the Assessment Committee. Messrs Atkinson, Roper and Crook had had no involvement with the supervision of BCCI and there is no reason to believe that any of them knew anything concerning the circumstances of that bank. Mr Atkinson was identified as a conspirator, but Messrs Roper and Crooke were not. Apparently they "did not know the score" so far as concerns BCCI SA. But there was no reason to think that Mr Atkinson knew the score either. Any one of these three could have raised principal place of business as an issue, whether as a result of some knowledge of the BCCI set-up or simply more generally. Party to dishonesty at this stage, Mr Atkinson had to be presumed to be behaving honestly, and not to have blown the gaffe, when later in the story he assumed the role of Inspector of Banking in the Cayman Islands, a role in which his interests and those of the Bank did not always at that stage coincide.

The "dawn raid" in Basle, February 1980

76. Crucial to the success of the liquidators' attack upon the integrity of the licensing process was their attack upon the genuineness of Mr Cooke's professed contemporary belief before, during and after the licensing process that the 1979 Act had not altered what was, he said, the contemporary internationally accepted approach to the allocation of responsibility for the supervision of banks. In short, he said that his belief was that the Act had not undermined the contemporary approach which was that the principal responsibility for supervision lay with the authorities in the place of incorporation of the institution concerned. Recognising no doubt that the existence of such an entrenched contemporary and internationally accepted position represented an obstacle to their case, the liquidators set out to demonstrate not just that there was no such contemporarily accepted "place of incorporation rule" but that Mr Cooke had at a meeting in February 1980 attempted to hoodwink his fellow international banking supervisors into inadvertently accepting that there was such a rule in order to have upon the record of their proceedings a statement which would assist his dishonest enterprise in relation to BCCI.

77. Of all the allegations made in the trial this was by some measure that which left the most unpleasant taste in the mouth, not just because of its gravity when made in Mr Pollock's address, totally unforeshadowed by any pleading, but also because of the unattractive manner in which the liquidators' Counsel refused unequivocally to abandon it even after its lack of foundation had been exposed. I propose to deal with it in a little detail because it was some significance.

78. The history of this allegation, which became known in the lingua franca of the case as the "dawn raid," is that in 1974 in the aftermath of the collapse of the Herstatt and Franklin banks the Governors of the central banks of the G10 Group of countries established a committee which became known as the Basle Committee and, in due course, eponymously as the Cooke Committee. It was a "Committee on Banking Regulations and Supervisory Practices" to be a standing committee to make recommendations to the G10 Governors. For this purpose the central banks of the G10 Group in fact comprised a group of central banks and banking supervisory authorities from twelve countries, being the G10 countries, Belgium, Canada, France, Germany, Italy, Japan, the Netherlands, Sweden, the UK and the USA together with Luxembourg and Switzerland who were invited to join. George Blunden, in due course Deputy Governor of the Bank, was the first Chairman. I might add by way of digression that Sir George Blunden, as he became, is not a person against whom allegations of bad faith or dishonesty were made by the liquidators. His presence in the Bank in 1980 as an Executive Director and a trusted confidant of the Governor upon whom Lord Richardson was known to rely on matters of banking supervision militates strongly against any suggestion that Mr Cooke would attempt dishonestly to conceal from Lord Richardson information relevant to the eligibility of BCCI SA for a licence.

79. The original functions of the Basle Committee of which Mr Blunden was Chairman from its inception until 1977 were twofold - first, to act as an early warning body for the G10 Governors of problems developing in the international financial system and to secure cooperation among the member countries of the Basle Committee in dealing with such possible problems; and secondly, to act as a forum for the discussion of banking supervisory matters, to learn from each other's experiences and over time to develop best practice internationally on supervisory matters. At all times the Bank had two representatives on the Committee in

addition to the Chairman. In 1976 Mr Cooke joined the Committee as one of the Bank's representatives and in June 1977 he succeeded Mr Blunden as Chairman.

80. In 1975, before Mr Cooke's involvement, the Committee prepared a “Report to the Governors on the Supervision of Banks' Foreign Establishments.” Adopted by the G10 Governors in due course, this became known as “The Concordat.” It was regarded as of the first importance in establishing guidelines as to best practice in how banking regulators should carry out their supervisory responsibilities. Mr Cooke said in his evidence that the 1975 Concordat was a major determinant in his own thinking on the supervision of international banks. The documentary evidence demonstrated that it was a major determinant in the thinking of those from the central banks and banking supervisory authorities of all relevant countries at this time. Mr Cooke recorded in his evidence that the purpose of the 1975 Concordat was to allocate responsibilities between parent and host supervisors in relation to the supervision of a bank with international operations. Although the 1975 Concordat did not define “parent” and “host” Mr Cooke always understood that parent meant the country where a bank was incorporated and host meant a country where branches of a bank incorporated elsewhere were operating and carrying on business. Mr Cooke gave it as his view that this was the generally accepted understanding of the 1975 Concordat to which he believed the other Basle supervisors, including the Luxembourg supervisory authority, subscribed. The 1975 Concordat provided guidelines for the division of responsibility in relation to liquidity, solvency and foreign exchange. The guidelines were that the parent supervisor would be responsible for monitoring solvency and the host supervisor for monitoring liquidity and foreign exchange. However the Concordat acknowledged that there was a degree of overlap between these areas.

81. The genesis, discussion and drafting of the Concordat was examined exhaustively at the trial. It is clear that from the outset the focus was on the need to prevent a bank's “foreign” or “overseas” establishments from slipping through the supervisory net. The problem was not to identify which supervisory authority should have responsibility for supervision of the “main” or “parent” bank of which the foreign or overseas establishment was a part, whether branch or subsidiary. It is plain that in contemporary conditions there was a clear understanding that a bank would be the supervisory responsibility of the supervisory authorities in the country in which that bank was incorporated. I doubt if that was a proposition to which the framers of the Concordat or those who subscribed to it gave much thought. The “home” of most banks was the place in which it was incorporated, in the sense not just that that was where its mind and management was to be found but also that that was where the bulk of its business was transacted. Thus “parent” and “host” did not need to be defined, although interestingly in the French version of the Concordat, prepared probably in September 1975, strictly a “traduction” rather than a separate free-standing text, the expressions “parent supervisory authority” and “host supervisory authority” were rendered as “L'autorite du pays d'origine” and “d'accueil” respectively. This reflected the common understanding that the parent supervisory authority was regarded as being found in the country of origin, which was understood on all sides to mean the country of incorporation of the bank in question.

82. In view of the importance of the Concordat and the manner in which it shaped the Bank's thinking and in view of the liquidators' root and branch attack upon the existence of any such place of incorporation rule as enshrined therein it is worth setting out in a little more detail how the Concordat came into existence and the background to Mr Cooke “raising in Basle” the possibility of a departure from the rule which underlay it. I go into this detail because the liquidators' allegation of dishonesty against Mr Cooke in relation to these matters demonstrated, in my judgment, the desperate lengths to which they were obliged to go in suggesting that Mr Cooke and others consciously misapplied the statutory provisions in licensing BCCI SA. Once it was shown that the allegation that Mr Cooke set out to deceive his fellow supervisors as to the basis upon which the Concordat operated was, as Mr Stadlen subsequently put it, “beyond fantasy,” the liquidators' claim that the statutory provisions had been knowingly misapplied lay in ruins. The licensing claim was already hopeless in view not least of the failure of the liquidators to suggest that Mr Cooke and the other officials possessed at the time of licensing the mental element as to loss required for proof of commission of the tort. The “dawn raid” allegation went however to the first ingredient of the tort, the requirement to prove a conscious or reckless breach of duty. The unpleaded “dawn raid” allegation against Mr Cooke was ill-considered. The need to make it however spoke volumes for the poverty of the liquidators' case.

83. At the first meeting of the Basle Committee on 6 February 1975 Mr Huib Muller of De Nederlandsche Bank, a highly regarded person in international banking supervisory circles, remarked that from the intervention of other committee members it appeared that in several countries branches or subsidiaries of foreign banks were freed from domestic regulations or rules provided formal or informal pledges of support were obtained from the parent banks. He felt very strongly that the country granting such waivers should report this to the monetary authorities responsible for the parent banks which gave the pledge otherwise there might be an important gap in the system of banking supervision. He suggested that this topic merited further discussion by the Committee. At the end of the meeting it was agreed that one topic for further discussion was supervision of banks' foreign branches, subsidiaries and joint ventures. As part of the Committee's work on early warning systems, a specific mandate from the G10 Governors, Mr Muller agreed to circulate a paper on this subject.

84. His paper is dated 17 March 1975. It is written in the English language by a Dutchman. The subject was stated to be “responsibility for supervision of banks' overseas branches, subsidiaries and joint ventures.” Mr Muller identified early on in the paper that a principle of cooperation for international cooperation should be that it is unacceptable that an establishment of a bank is not supervised at all because both host and parent authorities trust the other is looking after the supervision. He put forward proposals to prevent the occurrence of a void in supervision. In his Introduction/Definitions section Mr Muller first noted that there were three different forms of banks' overseas “establishments” under consideration - branch, subsidiary and joint venture. He defined “branch” as “a legally dependent part” (office, agency) of a bank and “subsidiary, as “a legally independent bank, fully owned by another bank.” A joint venture was a legally independent bank, owned by two or more other banks. Then as the subject matter of the paper was “overseas” establishments he noted the distinction between “ host” authorities i.e. the authorities competent in the country where the “establishment” (sc.branch, subsidiary, or joint venture) is located and parent authorities “i.e. the authorities competent in the country where the main-office of the bank, or the parent-bank, with overseas establishments is located.”

85. It is plain that in using the two alternatives “main-office of the bank” and “parent-bank” Mr Muller was grappling with the difficulty that the English language does not readily offer a single word which immediately and adequately describes both a bank of which an overseas branch is a part and a bank of which an overseas legally independent bank is a subsidiary. He might have used the single expression “parent bank” but that would have been strictly inaccurate, for a bank in country A is not strictly the “parent” of its branches (not being legally independent corporations) in Country B. The concept which Mr Muller was attempting to get across in the use of the expression “the main-office of the bank” was akin to the thought that this was the “trunk” of the tree on which the branch depended. In my judgment it is completely fanciful to suggest, as the liquidators did, that, in the light of contemporary conditions and thinking, Mr Muller was seeking by the use of the expression “main-office” to distinguish between a bank's place of incorporation and its principal place of business. It would in 1975 have been a rare bank in respect of which there was such a distinction and the distinction was not one which had been identified by banking supervisors as requiring their attention. This is not just the overwhelming inference from such contemporary documents as there are, it is also an overwhelming inference from what happened thereafter, as I shall describe.

86. Furthermore it should be noted that the distinction drawn by Mr Muller, in several places in his paper, was between “the main-office of the bank” and “the parent-bank,” the first being relevant to a branch, the second relevant to a subsidiary. He did not draw a distinction between the main-office of the bank and the main-office of the parent-bank - the distinction is between main-office and parent. Thus in relation to subsidiaries he identifies the parent authorities as being the authorities competent in the country where the parent-bank is located. That is immediately suggestive of place of incorporation. In relation to branches the parent authorities are the authorities competent in the country where the main-office of the bank is located. If by using that expression Mr Muller was indicating a clear rejection of the place of incorporation as being the place where the parent authorities are to be found, why should it be regarded as appropriate to reject place of incorporation in the case of branches but to adopt it in the case of subsidiaries? In short, I can detect no

support whatever in the context for the suggestion that Mr Muller intended to identify a determinant criterion for identification of a parent authority anything other than the place of incorporation. Nor did anyone understand Mr Muller so to have intended.

87. Mr Muller's paper was discussed at the Basle Committee meeting on 24-5 April 1975. Mr Dealtry of the Bank for International Settlements which provided the Secretariat sent a copy of it to Mr Blunden between 17-24 March 1975. It must also have been circulated in advance of the meeting to all members of the Committee, including therefore Mr Galpin and Mr Byatt, at that time the Bank's representatives thereon. The April 1975 meeting was attended by Mr Blunden, Mr Galpin and Mr Byatt as well as by 22 representatives of the other eleven supervisory authorities. Monsieur Dondelinger represented Luxembourg and Mr Dahl was one of the representatives from the United States. Mr Muller spoke to his paper. There followed a long discussion, in the course of which no one said anything which remotely hinted at an understanding that the determinant for identification of primary supervisory responsibility should be anything other than the place of incorporation or that Mr Muller had suggested any such result. Mr Muller was asked to redraft some parts of his paper in the light of the discussion.

88. Mr Muller duly produced a second draft dated 23 May 1975. Unsurprisingly the Introduction/ Definitions section to which I have already referred contained no material revision.

89. Meanwhile on 17 March 1975 i.e. between the first and second meetings of the Basle Committee Mr Blunden gave a talk to a seminar on financial institutions organised in London by the Institute of European Finance of the University College of North Wales, Bangor. Two passages from his talk are worth reproducing: -

> “Now let us turn to recent developments. I said earlier that a number of events in the last decade have led to an intensification of our involvement in supervision. First there has been a great increase in the number of banks in London; foreign banks have opened branches and subsidiaries here or have joined together in the newly-emerging consortium banks to operate in the euro-currency market and, in the domestic sector, there has been the rapid growth of what have become generally known as secondary banks, made possible by the existence of the Sterling Interbank market. These growths have presented us with an obvious problem of workload but also with problems about who takes ultimate responsibility for different types of bank. But a more important associated problem springs from the nature of these new wholesale markets in sterling and in euro-currencies; they have allowed many institutions, including the new banks, to obtain funds for onward lending on a scale previously quite impossible for them and have meant that sickness in one bank could rapidly develop into an epidemic effecting a whole range of banks, even banks which did not have direct contact with the bank where the infection had first broken out.
>
> With the collapse of the property market in late 1973 some of these newly-developed lending books in sterling became of doubtful quality and very illiquid; lenders on the wholesale markets suddenly withdrew the deposits which had financed these lending books and there was a real chance of an epidemic of the type to which I have just referred affecting the whole system. This situation led us to review during 1974 our methods of support and supervision and the range of institutions coming within our preview.
>
> Also during 1974 a number of serious losses suffered by banks in different countries operating in the foreign exchange in euro-currency wholesale markets and the failure of one or two small banks among them led to similar reactions - withdrawals of funds and dangers of ripple reactions - in these markets. Once again we, in common with the similar supervisory authorities in other countries whose banks were active in these markets, were again forced to refine our supervisory techniques.

> Another factor contributing to more extensive supervision has been growing sensitivity about the protection of depositors; this has led to us taking a closer interest than hitherto in institutions low down on the ladder of recognition. Finally, joining the European Economic Community has led to discussion of harmonisation of our approach to supervision with that of our partner countries and so inevitably we have had to think again about how we operate.
> .....
>
> The next recent development to which I should refer is that we have clarified with banks in London associated with overseas banks, with their shareholder banks and with other shareholder banks, where responsibilities for supervision and responsibilities for support lie. Our contentions, which have been generally accepted by those banks, are; first, that branches of overseas banks here are integral parts of the banks to which they belong and are thus primarily the concern, not of us as the central bank of the host country, but of their parents and of their parents' central bank or other supervisory authorities for both supervision and support; second, that, whilst - on practical grounds - we accept supervisory responsibility for banks registered here but owned overseas, such ownership entails responsibility for support, whether the bank concerned is wholly owned or is owned by a consortium; and third, that British-owned banks - and we as their supervisory authority - must accept like responsibilities for their branches and subsidiaries overseas and for their investments in banks overseas."

It is plain that Mr Blunden's and thus the Bank's approach at this stage was that the criterion determining where supervisory responsibility lay was place of incorporation - of registration to use Mr Blunden's exact word.

90. Mr Muller's second draft was discussed at the meeting on 19-20 June 1975. The main points made in the discussion were incorporated in a third draft prepared by Mr Blunden and Mr Dealtry, dated 20 August 1975 and which was then circulated after being first sent on 17 July 1975 by Mr Dealtry to Mr Muller for his comments. In this third draft the definitions to which I have already referred were omitted and the compendious expression foreign parent bank used instead. This text was discussed at the fourth meeting of the Basle Committee on 25-26 September and a final version of the "Report to the Governors on the Supervision of banks' foreign establishments" dated 26 September 1975 was sent to the G10 Governors on 3 October 1975 and formally presented to them by Mr Blunden at their meeting of 13 October 1975. It was this which subsequently became known as the Concordat.

91. There is no evidence to suggest that anyone at the Bank other than Mr Blunden, Mr Galpin and Mr Byatt ever saw Mr Muller's original paper, although it is perhaps likely that someone in BAMMSS below the level of Mr Galpin may have done so, and likewise someone in the International Division other than Mr Byatt. There is however no reason to suppose that any of Mr Cooke, Mr Coleby, Mr Gent or Mr Barnes ever saw it or that if they did they understood it in the sense contended for by the liquidators.

92. By contrast with the French version the English text of the Concordat does not provide any real clue still less a definition or test for identification of the primary or parent supervisory authority. That is not either a problem or the problem to which it is directed. In my judgment it is clear that no one saw any need to provide such a definition or test for identification because the commonly shared assumption was that primary responsibility would lie in the country of incorporation. That view is simply reinforced by the manner in which the concepts were translated into the French language.

93. The 17th meeting of the Basle Committee was due to take place on 8/9 November 1979. Item VI on the agenda circulated in advance was "the division of supervisory responsibility" under the rubric of which appeared "Reconsideration of the Committee's report on the supervision of banks' foreign establishments (bs/75/44) [which was of course the Concordat] in the light of the July conference in London." The reference to the July conference is instructive. That was an International Conference of Banking Supervision held in London on 5 and 6 July 1979, hosted by Mr Cooke. The conference was truly international extending beyond

the countries represented on the Basle Committee, all of whose members were invited to attend. The evidence demonstrates that at least Mr Jaans of the Luxembourg supervisory authority attended. At the conference Mr Huib Muller delivered a paper dated 25 June 1979 on the subject of the Concordat. In that paper Mr Muller again grappled with the lack of a single English word adequately descriptive of the “parent” of both a branch and a subsidiary - this time instead of “main office” he used the expression “home office” and referred also to the supervisor “at home.” This paper is instructive in that it points out how the Concordat division of responsibility, which in retrospect seems obvious and essential, was at the time regarded as a major step forward in international supervisory cooperation. His paper bears out the suggestion that international supervisors saw the non-binding Concordat as nonetheless embodying a set of rules (even “five commandments”) by which they attempted to regulate their practice. He remarks also that in subsequent years new banking laws in different countries bore the stamp of these recommendations - he may well have had in mind the English Banking Act 1979, given Royal Assent less than three months before he wrote his paper. His tentative recommendation for the future, parent authorities allowing their banks to establish themselves only on foreign territories where the authorities would adhere to minimum standards of supervisory cooperation, seems to assume that a parent authority will have the sort of control over its “home” banks that only incorporation could bring. A draft amendment to the text of the Concordat proposed by Mr Coljé of the Netherlands is similar in tone.

94. Of equal significance is that four weeks before the November 1979 meeting Mr Cooke, by now of course Chairman, asked Mr Dealtry to pass on to each member of the Committee a request to re-read the Concordat in advance of the meeting and to consider in what ways it could or should be modified for possible endorsement by a wider group of supervisory authorities. The discussion at the meeting is interesting for its acknowledgement that consolidation was at that stage seen as an accounting device and not as a supervisory technique. I note also the recognition of the problem of branching in by institutions in whose parent countries supervision was considered inadequate. The recommendation by Monsieur Bonnardin in relation to that problem was not that in such circumstances a host country should acknowledge a need for greater scrutiny of the parent institution as a whole but rather that in such cases the host country should expressly reserve the right to submit branches or subsidiaries of foreign banks to the totality of domestic supervisory controls.

95. At this meeting Mr Dahl of the United States Federal Reserve mentioned that the Fed had just published for comment three other proposals stemming from US legislation, the International Banking Act 1978. The first concerned the regulations governing future inter-state banking by foreign banks; the second concerned a new form of annual report to be filed by foreign banks which would provide information on the foreign parent company similar to that which had to be filed by domestic banks; the third proposal concerned the provision of information on transactions between bank subsidiaries in the United States and their foreign parent companies. These proposals had been circulated to Committee Members for comments, which would be welcome by the closing date in mid-December. The second of these proposals proved controversial., although it was not discussed at this meeting. In fact the Fed had already written to the Governor of the Bank of England on 2 November 1979 seeking comments on the proposals, which would require of banks “foreign” to the US operating through branches or subsidiaries there the filing of prudential returns similar in amount and scope to that required of US banking organisations. The apparently unanimous hostile reaction to this proposal provides an interesting insight on contemporary thinking which was undoubtedly coloured by a belief that primary supervisory responsibility rested with the authorities in the place of incorporation of the parent organisation. The US proposal was widely seen as involving an invasion of sovereignty, not least because it might carry with it the risk, sometimes the certainty, that information would become public in the United States which was routinely denied to domestic depositors in the home countries of the institutions concerned.

Thus the Deputy General Manager of the Bank of Ireland wrote: -

> “As the regulatory authority for Irish banks, the proposals also raise a question of principle for the Central Bank of Ireland concerning the relative positions of national supervisory authorities. The requirement that Irish banks operating in the US disclose to the US supervisory authority quite detailed information relating to their non-US operations suggests that the information is to

> be used by your Board for the purpose of prudential regulation. Indeed, the preamble to your press release of 29 October stated that the revised reporting procedure was designed "to assure that the Board obtained sufficient financial information to assess the foreign organisations' consolidated operation, general financial condition, an ability to serve as a continuing source of strength to their US banking operations.
>
> Such an extension of the role of the US supervisory authority would appear to conflict with the principle agreed by the Governors of the G.10 countries and Switzerland in 1975, namely, that the primary responsibility for the supervision of banks incorporated in a particular country belongs to the central bank or other supervisory authority of that country."

On 11 March 1980 the Deutsche Bundesbank wrote: -

> "But the principles of the "Concordat" endorsed by the Central Bank Governors of the G/10 countries and Switzerland in 1975 should be applied, according to which the primary responsibility for supervising banks with establishments abroad rests with the supervisory authorities of the country in which the parent bank has its registered office."

In its reply the Dutch Central Bank used the language of "head-office or parent bank" regarding this as synonymous with "the supervisor at home." The Swiss response speaks directly of the violation of the sovereign rights of the parent country and continues "if such a system of banking supervision as the one proposed by the Federal Reserve Board prevailed, this would hardly raise the quality of prudential supervision; on the contrary, it would mean a redundant and unproductive overlapping in the work of the different supervisory authorities."

The response from the Banque de France was explicit in its assertion of its understanding that primary supervision lay with the authorities in the country of incorporation, Monsieur Richon writing: -

> " J'ajoute que cette attention semble peu compatible avec la declaration de principe approuvé par le Governeurs de Banque Centrales du Groupe de Dix en 1975, qui confiait aux authorités de tutelle du pays d'origine d'une banque l'essentiel de la surveillance d'un établissement."

Broadly similar if less explicitly expressed sentiments were communicated by the authorities in Italy, Canada and the European Union.

96. The US proposal generated considerable activity within the Bank of England and the preparation of various widely circulated notes. An early note to Mr Cooke from Mr Thompson talked of the Bank's responsibility to supervise and safeguard the prudential health of banks "within our jurisdiction" a form of words fully implying an understanding that the touchstone was place of incorporation. Mr Thompson encouraged the British Bankers Association to call a meeting on the subject, which they did on 13 December 1979.

97. On 7 November 1979 Mr Thompson prepared a briefing note for the Governor in the light of his impending visit to Hong Kong. He sent it to Mr Kirby. It was copied to Mr Cooke and Mr Coleby to be seen on their return - they were in Basle for the 17th meeting of the Basle Committee due to take place on 8/9 November. Mr Thompson's note included the following: -

> **"British Bank of the Middle East**
>
> BBME has applied to the Treasury for permission to transfer its head office from London to Hong Kong. The Bank faces a severe test of adjustment to the new political and trading environment in the Middle East and the move reflects a desire that its board and senior manage-

> ment should be more closely integrated with its parent, the Hong Kong and Shanghai Bank. It is intended that the transfer should be completed by the end of this year.
>
> BBME is incorporated in England by Royal Charter. This will not change following the transfer. A guiding principle of supervision is that primary responsibility should fall to the authorities of the country in which a bank is incorporated; in this case the British connection is emphasised by the trading name. However, although BBME will retain a London branch, the bulk of its business will be undertaken outside the UK and we will no longer have the same access to the officers directing the bank's affairs. This raises the question whether effective supervision can be exercised from London. It may be that that the main supervisory responsibility should pass to Hong Kong but before accepting this change we would wish to be assured that the Hong Kong authorities were in a position to carry it out satisfactorily."

On 12 November 1979 Mr Thompson sent to Mr Kirby a short note which read as follows: -

> "I should be grateful if you would replace the second paragraph on BBME in the Governor's Hong Kong brief with the following: -
>
> BBME is incorporated in England by Royal Charter. This will not change following the transfer. But a guiding principle of supervision is that primary responsibility should fall to the authorities of the country in which a bank maintains its principal place of business. Although BBME will retain a London branch, the bulk of its business will be undertaken outside the UK and we will no longer have the same access to the officers directing the bank's affairs. In principle, the main supervisory responsibility should pass to Hong Kong but before accepting this change we would wish to be assured that the Hong Kong authorities were in a position to carry it out."

This document was not copied to anyone. There is no evidence that Mr Cooke saw it. It is by no means clear what Mr Thompson meant by principal place of business. It is also unclear what he meant by " the bulk of its business will be undertaken outside the UK." Where he uses that expression in the first note, it seems to be describing the new situation which would follow the move of head office. Yet as its name suggests the bulk of BBME's business was in the Middle East, and in that respect the change of location of head office would change nothing. The interesting thing to note about both versions of the text is that Mr Thompson was not apparently under the impression that so far as concerned the incidence of responsibility for primary supervision the new Act mandated one result rather than another. This was a theme which he repeated in subsequent notes.

98. On 13 November 1979 Mr Nicolle prepared a note on Banco Espanol en Londres which he copied to Messrs Coleby, Barnes, Gent and Hall. Mr Gent and Mr Nicolle had had earlier dealings with this bank. Registered in Madrid, the whole of the bank's operations were carried out in the UK. BEL was owned as to 90% by Banco Exterior, a Spanish commercial bank which was in turn owned as to 62% by the Spanish Central Bank, Banco de Espana, 10% by INI, a state corporation and as to 28% by public shareholding. The Bank of England had been accustomed to treat BEL as the UK branch of a foreign bank. Certainly up until June 1978 BEL was not formally supervised by the Spanish authorities. It was understood by the Bank that in the course of 1978 the Banco de Espana had decided to carry out formal inspection of the bank's operations in London. Despite its unusual structure, because of the identity of its owners and the conservative nature of its business, largely financing the Anglo-Spanish fruit trade, it was not a bank which gave the Bank of England any cause for concern.

Mr Nicolle met representatives of the bank in March 1979. His note following the meeting contains the following passages: -

> "The whole of the bank's operations are carried out in this country. All that is in Madrid is a board and presumably duplicate books of account. We discussed the banking legislation. I

> pointed out that Clause 3(5) which enables us to take into account views of overseas supervisory authorities only applies where a bank has its principal place of business outside the UK. In Banco Espanol's case the principal place of business appeared to be in the UK. However I thought that in practice we would still look to the Banco de Espana to certify financial soundness etc. for us."

Pausing there it seems likely that what Mr Nicolle had in mind by principal place of business was that the bulk of the business or operations, indeed the whole of the business and operations was or were carried out in the UK. The presence of the board in Madrid might tend to suggest that central mind and management was located there rather than in London. The note continues: -

> "Monthly, head office reports to Banco Exterior the principal headings in the balance sheet. Problem loans are reported initially when the trouble arises and then quarterly a progress report follows. Profit and loss account is drawn up monthly and also reported in Madrid. The UK auditors are Spicer & Pegler who make a full inspection, including loan quality annually and report to Madrid. Half yearly they make a more cursory check. Within the UK a manager's assistant carries out some inspections of the branches reporting to the UK management. The inspection from the Spanish authorities seems to be made, not by the Banco de Espana as BSPG [Mr Gent] understood at the last interview, but Banco Exterior. This bank has recently engaged a roving international inspector so that these visits will become more regular in future. I tried but failed to understand the exact relationship between these visits and the Spanish supervisory authority. Whether the supervisors regard themselves as inspecting Banco Espanol I am not sure. This is a point we should take up with them in discussion. It is arguable that we should supervise Banco Espanol ourselves; we must ensure that there is complete understanding of whose responsibility it is."

Mr Nicolle's note of November 1979 was written consequent upon the new general manager of BEL being brought to the Bank for an introduction. Mr Nicolle's note began: -

> "Discussion turned to their Banking Act application. It is evident that they have done little thinking since I broached with them earlier this year the problem of their "principal place of business." I suspect that this is in the UK which I was told that it was for tax purposes, though Lopez would like to think, as indeed would I, that their registered Spanish office is legally their principal place. All of their operations, and their executive management are in London."

At this point there was an asterisk and a corresponding footnote which read: -

> "FLH [Hall] tells me that "principal place of business" is essentially synonymous, amongst company law experts, with "place of central management and control." This term is a little more consistent with Madrid, rather than London, being the principal place."

The text of the note continued: -

> "I asked my visitors to consult their lawyers before discussing their application with their masters in Madrid, which they intend to do in the next week or so. I made it clear that if they could not state that their principal place of business was outside the UK, we could not recognise them via a s.3(5) and that this might lead to us concluding that we might have to supervise BEL as a UK bank though this seemed to me an unwelcome result."

It speaks volumes that Mr Nicolle thought it appropriate to ask his visitors to consult their lawyers, sc. their Spanish lawyers, on the question of the location of their principal place of business. This was in fact a question governed by English law. It depended on the true construction of the Act. Once the relevant facts were established, it was a question about which the Bank had to satisfy itself, directing itself as to the meaning of

the expression in the Act. The views of the applicant bank and its lawyers were barely relevant, still less determinative. It is plain that Mr Nicolle had not analysed matters in this way, and plain that his own thinking on the meaning of the expression principal place of business was confused and inconclusive.

Mr Hall annotated this note as follows: -

> "It may be that the principal place of business - which I think is to be equated with place of central management and control - is in Spain and, in that case, the problem fades away. If not we must go the s.3(3) route. In that event we are not of course precluded from seeking the views of the Spanish authorities but would need, I think, to be satisfied that the specific terms of paragraphs three and six (or seven and ten) of Schedule 2 are fulfilled rather than rely on some general assertion from Banco de Espana about management and financial soundness. In that sense we arguably do have an enhanced duty of care under s.3(3) as opposed to s.3(5). I think this is what AWN [Nicolle] may be driving at in his first [illegible] paragraphs overleaf; and I share his reservations about going the s. 3(3) route unless we are prepared to accept BEL as a UK responsibility."

Mr Nicolle received conflicting advice from his senior colleagues. Mr Coleby said "let us set out on the 3(5) route." Mr Barnes by contrast said:-

> "I don't see any major practical difficulty in treating BEL as effectively a UK subsidiary and getting a comfort letter. Better that than creating an anomaly."

This was the 3(3) route. Mr Cooke did not see this note at that time.

99. On 21 November 1979 Mr Thompson circulated a note on BBME/NBNZ/Mercantile Bank, NBNZ being National Bank of New Zealand, a subsidiary of Lloyd's Bank. He addressed it to Messrs Wood, Coleby and Cooke with copies to Mr Hall and Mr Nicolle. He prefaced his remarks by observing that these three banks had in common that each was incorporated in the UK but had its head office and principal place of business abroad - in the case of BBME the head office was in fact still in London but was shortly to be moved to Hong Kong.

In August of 1978 the Bank had told the Hong Kong authorities that in the case of the two Hong Kong bank subsidiaries the Bank saw a primary supervisory responsibility as falling within the Bank's jurisdiction. Reference to the exchange which took place on that occasion is very instructive. Mr Cooke had plainly made clear to Mr Hutson of the Hong Kong authorities that the Bank regarded itself as responsible for the supervision of all British registered companies - this was of course a practical application of the place of incorporation rule. The reaction from the Hong Kong supervisors when this was reported back to their head office was that while they fully understood the Bank's concern to cover all British registered companies they felt that as the Board of Mercantile and the effective control of Mercantile's business were to be found in Hong Kong it would be more appropriate for prudential supervision purposes if Mercantile were supervised in the same way as the Hong Kong head office operation. Mr Cooke said that the Bank had no absolutely hard and fast position on this and that his principal concern was to ensure that all UK registered banking operations were adequately supervised.

Reverting to Mr Thompson's 21 November 1979 note after referring to this exchange of views in August 1978 he went on to point out that in the case of NBNZ the supervisory responsibility remained undefined. It was not supervised by the New Zealand authorities. NBNZ regarded the Bank as its supervisor although the Bank had not in practice sought to supervise it directly other than through Lloyd's consolidated position. The note continued: -

> "Two questions arise. First, is it sensible and practical to assume primary supervisory responsibility for these banks? Second, is the fact that we have not sought assurances from the Hong Kong and New Zealand supervisors for BBME and NBNZ likely to prove an impediment to their recognition?..... In justifying our desire to exercise primary supervisory authority for BBME and Mercantile we suggested that a guiding principle was that the responsibility should fall to the authorities of the country of incorporation. However, our experience with Mercantile demonstrates that without access to the management based overseas and without a regular set of returns covering non-UK business it is difficult effectively to exercise control. Mills, the London manager of Mercantile, who doubles as the manager of the Hong Kong Bank, could answer few of our questions about Mercantile's business except after lengthy correspondence with the Hong Kong head office. This suggests that our guiding principle should be to ascribe primary supervisory responsibility to the country of an institution's principal place of business. This would not prevent us having some supervisory role over institutions incorporated here but having their centre of operations elsewhere. Having established the willingness of the authorities where the head office is located to undertake the task in relation to the world wide commitments of the institution, our supervision would focus on its UK activities in the same way as we look at other branch operations. If this is accepted, we will need to approach our opposite numbers in Hong Kong and New Zealand."

The first thing to be said about this is that it perhaps explains the shift of emphasis as between the first and second versions of Mr Thompson's briefing note to the Governor written two weeks previously. It may have derived from practical experience with Mercantile. Secondly it again seems that for Mr Thompson principal place of business is being equated with centre of operations, which is perhaps the same as bulk of business.

Mr Coleby annotated the note as follows: -

> "I support CJT's [Thompson's] conclusion - namely that "principal place of business" rather than "place of incorporation" should be the main criterion for judging where the principal supervisory responsibility should lie. We need to ensure that in these cases the relevant authority accepts that responsibility - and, of course, that we continue to carry out such duties of supervision as arise through consolidation of subsidiaries of UK banks."

Again this does not suggest that Mr Coleby had in mind that the Act mandated any particular conclusion. Mr Cooke commented on Mr Coleby's annotation as follows: -

> "I am not sure I go along with your conclusion at least until I see more closely the impact it could have if applied to us. I think too it cuts across an implicit bit of the Concordat. My preference would be to hold our present position while floating over the Hong Kong and New Zealand authorities the questions in our mind."

100. This exchange between Mr Coleby and Mr Cooke is wholly inconsistent with their being party to some pre-existing agreement or understanding to treat principal place of business as a non-topic in the case of BCCI, which presupposes a clear understanding of the meaning of the expression principal place of business and of the implications of its use in the Banking Act. It is entirely consistent with Mr Cooke having had an understanding that whilst the Concordat did not spell it out, it was implicit therein that primary supervisory responsibility was to be found in the place of incorporation. The matter was evidently left upon the basis that it would be discussed, probably at a meeting.

101. Mr Thompson and Mr Hayward both attended the meeting of the British Bankers' Association on 13 December 1979 and Mr Hayward reported on the outcome to Mr Kirbyshire with copies to various others. In particular he reported under the rubric "Supervision": -

> “It was generally accepted that the responsibility for supervising banks lay with the supervisory authority where the parent was situated. It was contrary to this principle to require information about UK activities of a UK bank with a US branch, and, even more so, its activities elsewhere in the world, even when conducted through subsidiaries and partly owned associates.”

On the same day as producing this report Mr Hayward produced a first draft response for Mr Cooke to send to the Secretary of the Board of Governors of the Fed in response to his letter of 2 November 1979 to the Governor of the Bank to which I referred at paragraph 95 above. In it he wrote: -

> “ While in many respects it is, I believe, for the banks affected to comment on these proposals, there are aspects of principle raised by the proposals on reporting, which it is appropriate for me to deal with here. I have no comment on the proposal limiting inter-state deposit-taking.
>
> The most important is the now well established principle that it is the responsibility of the supervisory authority, where a bank's major activities are situated, to exercise primary supervisory authority over that bank and its overseas branches throughout the world.”

This is an interesting error, for it underscores Mr Hayward's belief that a bank's major activities were likely to be found in the place where it was situated, i.e. incorporated. In most cases these would coincide - neither necessarily corresponds with the principal place of business, assuming that to mean where central mind and management are to be found.

Mr Kirbyshire, with copy to the Governor's Private Secretary, Mr McMahon, Mr Payton, Mr Balfour, Mr Hayward and Mr Gilchrist corrected the error. On 19 December 1979 he proposed the following wording: -

> “In its present form these proposed requirements seems to us to run counter to the agreed principle that the primary responsibility for supervising banks incorporated in a particular country rests with the central bank or other regulatory authorities of that country.”

This is plainly a reference to the Concordat. Any assertion that, in putting forward this formulation Mr Kirbyshire, who had nothing to do with the supervision of BCCI, was seeking to mislead the Governor, or that he was motivated by a desire to establish this principle, contrary to what he knew to be the accepted or correct approach, in order to anticipate problems that would have to be addressed in the light of BCCI's application for recognition under the 1979 Act would be fanciful. My recollection is that Mr Kirbyshire was nonetheless accused of dishonesty in relation to this revision.

102. Mr Thompson amended the draft yet again at the end of December. He spelled out that the basic principle in question was one agreed by the Governors of the G10 countries and Switzerland in 1975, i.e., in the Concordat. Mr Cooke circulated this draft very widely to, amongst others, the Governor's Private Secretary, the Deputy Governor, Mr Fforde, Mr McMahon, Mr Blunden, the Chief Cashier, Mr Payton, Mr Dawkins, Mr Balfour, Mr Kirbyshire, Mr Weissmuller (the Governor's Chief Adviser on Banking Supervision), Mr Sangster, Mr Quinn, Mr Coleby, Mr Gent, Mr Hayward and Mr Thompson. He also proposed sending a copy to our EEC partners. He noted that the British Bankers' Association's deliberations were incomplete but saw no reason why the despatch of the letter should be held up awaiting the outcome thereof. It is again simply fanciful to suggest that Mr Cooke did this in full knowledge that the draft letter misrepresented the universally accepted effect of the Concordat, still less that he did so in order to pave the way for a knowingly incorrect approach to BCCI's application for recognition under the 1979 Act. On 11 January 1980 Mr Cooke sent the letter to the Fed, with copies to all G10 Governors.

103. It was also on 11 January 1980 that Banco Espanol delivered its draft application for recognition under the Banking Act. In answer to question 4 it was said that BEL had been granted no banking recognitions in Spain and that it did not come under the control of the Banco de Espana. In answer to question 5 it was said

that the bank's principal place of business was 60 London Wall. There were four other branch offices, three in London and one in Liverpool.

In connection with this draft application Mr Nicolle produced a note for the record dated 14 January. It read as follows: -

> "I spoke to Lopez about their draft application. He confirmed that they had cleared with their head office the answer to question four which said that Banco Espanol did not come under the supervision of the Banco de Espana. I asked him to make sure, before the application was finally sent in to us that the Banco de Espana were also aware of the answer. I also told him that if we were to become the supervisory authority for this bank then, following the receipt of the application, we would require further information under the Act in regard to their capital, profit and loss account etc. The result of this would almost certainly be that they would not appear on an early list."

Mr Coleby sent a copy of this note to Mr Cooke with the added annotation: -

> "We have not yet had the intended meeting to discuss the question of country of incorporation vs. country of principal place of business as the determinant of supervisory responsibility. This provides an example."

Again, this note is simply not consistent with any suggestion that Mr Coleby had, at this time, a clear understanding that in relation to overseas banks the Act mandated an approach which looked to the principal place of business rather than place of incorporation as a determinant criterion. Indeed the contemporary material suggests that until Mr Thompson's notes had suggested the possibility of a departure, by agreement, from the place of incorporation rule, it was place of incorporation which Mr Coleby regarded as being ultimately conclusive. That conclusion is particularly reinforced by a memorandum written by Mr Coleby in March 1978 on the topic of UK branches of overseas banks. He particularly had in mind BCCI and Banco Espanol. He spoke of cases where the UK branches conducted business which approached half or even more of the bank's total business. He expressed misgivings over ceding prime responsibility for supervision to the authorities of the home country however thorough going and effective their supervisory arrangements might be. By home country here he necessarily meant country of incorporation. His misgivings stemmed from the fact that the place of incorporation rule meant that the Bank was obliged to accept that primary supervisory responsibility lay in the country of incorporation. Had there been no such rule, there would have been nothing about which to have misgivings.

104. Mr Cooke responded to Mr Coleby's annotation with an annotation of his own which read: -

> "Accept if mutually agreed, otherwise place of incorporation determines. Raise in Basle."

What Mr Cooke was "accepting" was in fact Mr Thompson's suggestion in his note of 21 November 1979, with which Mr Coleby had expressed his agreement. What Mr Cooke was indicating was that he saw the possibility of departing from the place of incorporation rule if it was mutually agreed between the supervisory authorities in the place of incorporation and those in the principal place of business, but that in the absence of such agreement the place of incorporation would have to continue to be the determinant criterion. It can firstly be said that this would be an unlikely exchange of messages between two persons who were at the time engaged upon a strategy described to ensure that the application of BCCI went through without reference to the principal place of business issue, whatever principal place of business may have been thought to mean. Secondly, it is clear from the manner in which Mr Cooke did subsequently raise the matter in Basle that it was not at that stage established in his mind that principal place of business meant place of central management and control. When he did raise it, he raised it in terms of "true centre of operations" which he explicitly equated with a case where "by far the greater part of a bank's business was conducted" in a centre other than the place of incorporation. This he then described as the principal place of business.

105. In due course the British Bankers Association produced draft Comments on the Fed's proposals. Their draft included the following passage: -

> **“The Principle of Home Country Supervision**
>
> The banks support the view being taken by the supervisory authorities in the United Kingdom that each part of a banking group should be treated as an integral part of the whole for supervisory purposes and that it is the supervisory authority of the country where the head office is situated that should have prime overall responsibility. Thus, operations of United Kingdom banks in overseas territories would be considered as relevant to the Bank of England's assessment of whether a bank satisfied the requirements for recognition laid down by the UK Banking Act 1979. Discussions in the forum of the EEC and the group of 10 are also tending to lead in this direction.

The UK Banking Act also carries the principle further in s.5(sic) by allowing the supervisory authority to regard itself as satisfied, in the case of an institution whose principle (sic) place of business is in a country or territory outside the United Kingdom, that such criteria 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 overall financial soundness; and
>
> (b) the Bank is satisfied as to nature and scope of the supervision exercised by those authorities.”

On 7 February 1980 Mr Thompson proposed a redraft. He may well have had in mind Mr Kirbyshire's correction of Mr Hayward's draft response to the Fed - he will certainly have had in mind his own revision of Mr Kirbyshire's redraft. Relevant parts of his proposed redraft read as follows: -

> “The banks support the view taken by the supervisory authorities in the United Kingdom that the responsibility for the supervision of a particular bank should rest with the appropriate regulatory body of the country in which that bank is incorporated.
> .....
>
> We would draw to your attention and commend to you the practice of the UK authorities in assessing the financial soundness of branches of foreign banks in the UK. This has now been given statutory effect in the UK Banking Act, and allows the Bank of England discretion to consider that the criteria for the prudent operation of branches are fulfilled if
>
> (a) the relevant overseas supervisory authorities inform the Bank that they are satisfied with respect to the management of the institution and its overall financial soundness; and
>
> (b) the Bank is satisfied as to the nature and scope of the supervision exercised by those authorities.”

This was set out by Mr Thompson in a note for the record, a copy of which Mr R Brown of BAMMSS sent to Mr Cooke with the following annotation: -

> “For Basle you might like to be aware of Chris Thompson's comment on the BBA submission to the Fed on their proposed new reporting requirements for foreign banks. The BBA has got the point about home country supervision slightly confused.”

This was three weeks before the impending 18th meeting of the Basle Committee on 28 and 29 February 1980. At this stage neither Mr Thompson nor Mr Brown had anything whatever to do with BCCI and it is plain that they cannot have been motivated to mislead third parties by a realisation of the alleged problems which BCCI's application for recognition brought in its train.

106. What all this demonstrates is that the catalyst for Mr Cooke raising in Basle at the February 1980 meeting the question of a possible exception to the place of incorporation rule was nothing whatever to do with BCCI but rather the practical problems discussed in relation to Banco Espanol and the British overseas banks. No such practical problems had been encountered in relation to BCCI SA where Luxembourg accepted and discharged the role of primary, parent supervisor.

107. In advance of the meeting Mr Cooke wrote a note to Mr Brown and Mr Adams asking for a speaking note. A note dated 25 February 1980 was prepared by Mr Thompson in which Mr Thompson clearly and unequivocally recorded the belief that the place of incorporation determines primary supervisory responsibility.

108. The meeting of the Basle Committee on 28/29 February 1980 was attended by supervisors of each of the member countries and by three members of the BIS. These included some of the most experienced and pre-eminent banking supervisors in the world. Mr Cooke raised the possibility of introducing an exception to the place of incorporation rule. The informal record of the meeting, which was circulated to participants so that they had an opportunity to amend it, records Mr Cooke as having spoken as follows: -

> "In its consideration of the concept of parental responsibility, the Concordat defined the parent country as the country of incorporation. He believed, however, that the Committee might usefully consider some modification of that principle where a bank incorporated in one country based its true centre of operation in a different country. In such cases, it would seem logical to consider the country of operation as the parent country for the purposes of the Concordat.
>
> He therefore proposed that the Committee should agree that the country-of-incorporation rule should apply except in obvious cases where by far the greater part of a bank's business was conducted in another centre and where the supervisory authority of the country of incorporation and the supervisory authority in the country which was the principal place of business both agreed that responsibility should be taken over by the latter."

109. This drew responses from the other supervisors, several of whom expressly said that they agreed with Mr Cooke's proposals. No one is recorded as having said that Mr Cooke had misstated the place of incorporation rule. This discussion was, of course, irreconcilable with the Claimants' case. What is clear is that there was a consensus amongst the supervisors present that there was a place of incorporation rule. If that rule had not existed then the entire debate would have been a complete nonsense.

110. Mr Pollock alleged that Mr Cooke was hoping to get on the record a statement which he knew to be untrue to the effect that the country of incorporation had been the original definer of parental responsibility. According to Mr Pollock, "it seems absolutely inconceivable that someone as on the ball as Mr Cooke, who must have known the Concordat very well, could possibly have asserted that thinking it was true. You only need to pull the Concordat out and you can see it is not true. You only need to pull out Mr Muller's original draft to see that it was not even what lay behind it. So it is rather mysterious and it rather looks like as though Mr Cooke was hoping to get on the record a statement that the country of incorporation had been the original definer of parental responsibility. It is difficult to think of another explanation for this extremely weird mistake, if it were a mistake." He wanted to do this because he was "working at a way to being able to say that BCCI was incorporated in Luxembourg, therefore BCCI is Luxembourg's responsibility and it is not us." Mr Pollock went on:-

> "So, it is quite interesting, we would suggest, my Lord, that you have to try and analyse what Mr Cooke was up to. Why did Mr Cooke suddenly raise this issue with the Basle Committee? We

> have seen that the issue had arisen in the Bank and one rather suspects that one was that Mr Cooke was hoping that he could obtain some support from the members of the Cooke Committee for the position which we say he wanted to adopt, which was the primacy of the place of incorporation as the indicator, and we would say that was a BCCI driven point. Now, there was some urgency in this matter because, as your Lordship can see, the Basle Committee was due later in 1980 to have a meeting with supervisors from offshore centres..... So Mr Cooke's approach was to raise it, apparently without any advance warning, during the course of the discussion so that he could get a position on the record, we would say, before it had really been thought about."

Mr Pollock was not deterred in this submission by it being pointed out to him that for this strategy to work, Mr Coleby, Mr Barnes and Mr Byatt would need to have been squared in advance, lest they correct Mr Cooke, and also that Mr Dealtry of the BIS might have intervened had he thought something incorrect was being said. A measure of the lack of consideration apparently given to this allegation is that Mr Pollock was evidently unaware that Mr Barnes had been present at this meeting and, I suspect, unaware of Mr Byatt's presence too. Perhaps, he speculated, they might not have read the Concordat as recently as had Mr Cooke, perhaps Mr Barnes might not have read it at all.

111. The allegation that Mr Cooke set out to mislead his fellow supervisors was about as serious an allegation as could have been made against him. He rightly regarded his Chairmanship of the Basle Committee as the pinnacle of his career in banking supervision, a role in which he naturally took great pride. It was a wounding allegation, and of it the Bank says this in its closing submissions: -

> "The allegation that Mr Cooke was attempting, in the face of the other supervisors, to alter the entire basis on which the Basle Concordat operated and the basis on which possibly hundreds of international banks were supervised, in order to avoid responsibility for BCCI SA was always beyond fantasy.
>
> It is utterly inconceivable that if what Mr Cooke had said to the Committee was indeed wrong this would not have been corrected by the other members of the Committee, who were amongst the world's leading experts on banking supervision.
>
> Further, these members had specifically been asked to re-read the Concordat in advance of the November 1979 meeting and had discussed it at that meeting.
>
> It was also utterly inconceivable that Mr Cooke would have dared even to attempt to mislead his fellow supervisors knowing that they were experts in this area and, even less so, knowing that they had very recently been re-reading and discussing the Concordat at his own behest.
>
> The overwhelming evidence always showed that Mr Cooke was of course right in indicating that it was understood that the parent supervisor of a bank would be found in its country of incorporation. It was for this reason that he was not corrected by anyone else present. Moreover, the very nature of Mr Cooke's proposal which was to be discussed, namely, the "exception" to the place of incorporation "rule" itself proceeded on the basis that there was such a "rule" to which it would be an exception.
>
> In relation to motive, the contemporary documents clearly demonstrated that these statements from Mr Cooke directly resulted from the experiences in relation to Banco Espanol and the British overseas banks and had nothing at all to do with BCCI SA. Further, it was absurd to suggest that Mr Cooke was motivated by a desire to avoid responsibility for BCCI SA when the very exception which he was proposing might have led to such responsibility being laid at the door of the Bank. [i.e. because Luxembourg might suggest that the greater part of BCCI SA's business was conducted in another centre.]

> There was never a motive. This was one of the many defects in the Claimants' case to which it has always been obvious from the outset that there could never be an answer. If Mr Cooke's motive had been to ensure that primary responsibility for the supervision of BCCI SA should remain with the LBC, it would have been counter-productive for him to propose an exception to an existing rule which would have ensured that it did so."

112. I agree unreservedly with all of those points, to which is to be added the implausibility of Mr Coleby, Mr Barnes, Mr Byatt and Mr Dealtry being prepared to go along with so shabby an enterprise as the liquidators attribute to Mr Cooke. Unfortunately the liquidators' allegation did not stop there. The discussion at the February 1980 meeting of the Basle Committee led to the preparation by the BIS Secretariat of a paper for the next meeting which took place in June. This paper stated, amongst other things, that: -

> "The Concordat clearly regarded (although it did not specifically define) the parent country as the country of incorporation of the parent bank."

This led Mr Pollock to make the following submission:

> "No decision has been taken. All one has is Mr Cooke's untrue assertion, put forward out of the blue in February, that the Concordat defined it, which was now being toned down although we would say still misleadingly so, because either someone had pointed it out or Mr Cooke may well have thought himself that by the time the next meeting took place a lot of people would have read the Concordat."

Mr Pollock also said this:

> "When you come to look at the way he formulates it at the next meeting, he retracts it and says no, it was not defined. So someone has come to him and says: no, you are wrong. What he does is he goes to the line and says it may not have been defined but it was implicit.....it may mean that he was flying a kite and people did say no, you cannot do that."

113. The allegation that Mr Cooke may have thought that by the time of the next meeting a lot of people would have read the Concordat was a ludicrous allegation which the Claimants were ultimately forced to abandon, not least because the agenda for the February 1980 meeting indicated that it was intended to discuss the Concordat at that meeting and because Mr Dealtry's letter of 10 October 1979 showed that the members of the Committee had in fact been invited by Mr Cooke to re-read the Concordat in advance of the November 1979 meeting. Mr Dealtry's letter was disclosed only in June 2004 in consequence of the making of the unpleaded dawn raid allegation. Before the making of that allegation it would probably not have been regarded as of sufficient relevance to merit disclosure. This was not the only occasion on which the Bank was able to locate in its filing system a hitherto unsung and apparently anodyne document of no conceivable relevance to the pleaded issues which when produced convincingly disproved an opportunistic and unpleaded allegation of dishonesty made by Mr Pollock in the course of presenting the liquidators' case. The agenda for the February 1980 meeting had however been disclosed prior to the beginning of the trial. The liquidators said that they had overlooked it. Furthermore, the draft paper prepared for the June 1980 meeting itself stated that:

> "... the Committee is agreed that the country of incorporation rule should continue to prevail except in obvious cases where the major part of a bank's business is conducted in another centre and where the supervisory authority of the country of incorporation and the supervisory authority of the country which is the principal place of business both agree that parental responsibility should be taken over by the latter."

114. In the light of this evidence the liquidators conceded that they no longer ascribed any "malign motives" to Mr Thompson or to Mr Brown in relation to the re-draft of the submission of the British Bankers Associa-

tion to the Federal Reserve's proposals. The stated rationale behind this concession was that it was accepted that there was a principle, which was implicit in the Concordat, that in “conventional cases” the parent supervisor of a bank would be found in its place of incorporation. However the liquidators did not take the opportunity at the same time to withdraw the “dawn raid” allegation against Mr Cooke. The reason why I said at the outset of this discussion that this was the allegation that left the worst taste in the mouth was because of the unattractive manner in which the Claimants sought to maintain this serious allegation even after its initial implausibility had been confirmed by the overwhelming weight of documentary material just some of which I have summarised. On Day 110 of the trial I asked whether the liquidators maintained the allegation in the light of that evidence. On the next day I was told by Miss Montgomery that this apparently straightforward question could not be answered without a review of further documents and further research into the Bank's disclosure. When Mr Pollock came to give his response on Day 118 he introduced it thus:-

> “...I want to make it quite plain that what I am about to say to your Lordship is something that all of us have considered very carefully, and is adopted as a collegiate matter.”

I was under no illusion what Mr Pollock intended to convey by this minatory preface. He wanted to emphasise that on this sensitive issue where my enquiry might have suggested a question in my mind whether this allegation could responsibly be maintained the response which I was about to receive carried the imprimatur of Lord Neill. The answer I was given was as follows:

“MR POLLOCK:	The Claimants also submitted in opening that if Mr Cooke said that the Concordat defined the parent country as the place of incorporation, he did so knowing that statement to be untrue. This allegation is not withdrawn. If on the other hand, and as now seems likely, he said or intended to convey that the parent supervisor would normally be found in the bank's place of incorporation, this would not have been a knowingly untrue statement. In the latter case, the claimants would not allege that Mr Cooke was deliberately setting out to mislead his fellow supervisors as to the terms of the Concordat. The Claimants' case is that it appears from the terms of the record of the meeting that Mr Cooke was, first, raising for consideration with his fellow supervisors a problem of which he was acutely aware, namely that unless a fellow supervisor had access to a Bank's management and principal operations, he would almost certainly be incapable of carrying out adequate and effective supervision of that bank, and, second, proposing a method of dealing with the problem, which meant that there would be no presumption of supervisory responsibility for a bank incorporated in another country unless the supervisor in question had specifically agreed to assume responsibility. Mr Cooke knew that his proposal, if adopted, would minimise any pressure on the Bank to take responsibility for the supervision of BCCI or, for that matter, any other bank similarly circumstanced for which it did not wish to take responsibility.
MR JUSTICE TOMLINSON:	So you are not alleging that he deliberately set out to mislead them?
MR POLLOCK:	I hope I made it plain. We say that if he did say that the Concordat defined, yes. If, as we think it likely on the documents, he did not - but until Mr Cooke gives evidence about that what can one say? But your Lordship is quite right, we are saying it now seems likely he simply intended to convey that the parent supervisor would normally be found in the Bank's place of incorporation, no, he did not set out to mislead them. There it is. That is what I have said. We have tried to make it as clear as possible. If Mr Cooke comes into the witness box and says, “No, no, what I said was quite clear, I said the Concordat defines, explicitly defines, the parent country as the place of incorporation,” well, then I would cross examine him on the

basis that could not have made that statement knowing it to be true.

MR JUSTICE TOMLINSON: And that he was intending to mislead thereby?

MR POLLOCK: Well, yes, my Lord.

MR JUSTICE TOMLINSON: Dishonestly intending to mislead?

MR POLLOCK: Why does one make an untrue statement?

MR JUSTICE TOMLINSON: Right, thank you very much, Mr Pollock."

My immediate understanding was that the allegation had been withdrawn. However I reflected over the weekend upon the answer given and having studied it I realised that it was unsatisfactory. On Day 119 I said this: -

"15 This is an important point for a number of reasons.

16 It was put forward as an integral part of the claimants'

17 case to the effect that the contemporary international

18 understanding was not as Mr Cooke asserted it to be.

19 Subsequent reference to disclosed documents not shown to

20 me by the claimants has suggested that this is not

21 a sensible proposition. It is not an area in which I

22 shall receive any further evidence, concerned as I am on

23 this narrow point with the contemporary non-Bank of

24 England perception.

25 It was put forward as an example of the lengths to

10

1 which Mr Cooke was said to be prepared to resort in

2 order to further his dishonest purposes. The sting in

3 that allegation does not lie simply in the point whether

4 the definition of the rule was explicit or implicit; it

5 is a far more wide-reaching allegation of dishonest

6 conduct of a particularly disreputable and dishonourable

7 nature.

8 If, on the basis of the evidence as it stands, that

9 allegation is no longer made, it should be unequivocally
10 withdrawn. If it is pursued, that too should be
11 confirmed in unequivocal terms.
12 So the position is that the claimants have not
13 provided the clarification for which I asked. I would
14 like to know whether, as of now, the claimants assert
15 that at the Basle meeting in February, or in the paper
16 produced for the June 1980 meeting, Mr Cooke was
17 dishonestly setting out to mislead his fellow
18 supervisors by getting on to the record a statement of
19 the existing position which he knew to be in
20 substance -- and I emphasise “in substance” --
21 incorrect.
22 I shall expect a proper answer to this question when
23 the court convenes on Monday, 29th November.
24 I choose my words with care. It is a matter of
25 surprise, disappointment and concern that after
11
1 two weeks' deliberation a legal team of this calibre has
2 supplied to the court the answer which I was given last
3 Thursday.”

115. Mr Pollock responded on Day 123. The upshot of what Mr Pollock said on these two occasions was that the Claimants suggested that what Mr Cooke probably had said was something along the following lines: “Of course what we all assume is that in the ordinary case, in the vast majority of cases, the place of incorporation will be the place where you look to find the parent supervisor because that is where you will find headquarters, management, records, head office and all the rest of it.” If he had said that, then according to the Claimants he was not attempting to mislead. The problem with this approach was that it was obvious that that was not what Mr Cooke had said. He spoke of a rule. The paper prepared by the Secretariat for the June meeting contained the words which I have already set out and which I repeat: “.....the Committee is agreed that the country of incorporation rule should continue to prevail except in obvious cases.....” As I remarked to Mr Pollock on Day 123:-

“5 It is plain as a pikestaff from these documents what

6 was the general drift of what he was getting across:

7 hitherto, we have regarded ourselves as operating on the

8 basis that this is where the primary responsibility

9 lies, and I am suggesting that possibly we should depart

10 from that."

This discussion led me to conclude, as I made clear on Day 124, that the allegation against Mr Cooke had not been withdrawn at all, although Mr Pollock did on that day withdraw any allegation that Mr Cooke had had a dishonest purpose in preparing the paper for the June 1980 meeting, on the assumption that is that he had had a hand in the drafting. The result of all this was that Mr Cooke was left in the most unsatisfactory position of the Claimants seeking to put their case, and purporting to withdraw serious allegations which they had previously made, upon the basis that Mr Cooke had said something at the February 1980 meeting which both the record and the inherent probabilities demonstrated conclusively that he had not said. In the event that Mr Cooke went into the witness box and said that what he had said on that occasion was exactly what he was reported as having said the Claimants reserved the right to revive their allegation of dishonesty. This was an odd way of dealing with a point which was central to the liquidators' attack not just upon Mr Cooke but also upon the Bank as a whole. The Bank has submitted that it was also typical of the pattern whereby the Claimants were prepared to make wild fanciful allegations, which were plainly unsupported by and/or inconsistent with the documents and, when confronted by the hopelessness of an allegation, twisted and turned so as to preserve the allegation or the ability to put it in cross examination. I agree. The collapse of the "dawn raid" allegation signified the failure of the liquidators' attack upon the Bank's bona fides when it explained the thinking which informed its approach to the licensing of BCCI SA. It was of profound significance which no doubt explains the reluctance of the liquidators' Counsel to acknowledge unequivocally, as they should have done, that this grave allegation of disreputable, dishonourable and dishonest behaviour by Mr Cooke should never have been made.

Conclusions on the allegation of misfeasance at licensing

116. Alongside the Concordat, the other central element in international banking supervision in the period leading up to the licensing of BCCI SA was the First Banking Co-ordination Directive ("1BCD") which was adopted on 12 December 1977. This was the first step in a process intended to lead to "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". Critically, 1BCD was implemented into English law by the 1979 Banking Act and the evidence showed that 1BCD and the Act were intended to be consistent with each other.

117. This is not the place to discuss whether the expression "head office" as used in 1BCD means the place of incorporation in the case of an incorporated credit institution. Mr Cooke and Mr Quinn gave compelling evidence to the effect that they understood that the European legislation was intended to be consistent with the principles enunciated by the Basle Committee. In my judgment their understanding was in fact correct. They also gave clear and compelling evidence that their understanding was that under the Banking Act 1979 in the case of a foreign bank the Bank was entitled to rely upon assurances from the parent supervisor in the place of incorporation. Mr Cooke, who was not a lawyer - indeed there were no lawyers employed within the Bank in 1980 - did not focus on the term "principal place of business" but understood that in the case of foreign banks the Act permitted the Bank to rely upon the relevant overseas supervisor. Since the relevant overseas supervisor of BCCI SA, the supervisory authorities in Luxembourg, accepted their role and appeared to be discharging it in a satisfactory manner there was no occasion for Mr Cooke to question his understanding or assumption. The Concordat, 1BCD and the 1979 Act were on this aspect thought to be coincident. Thus in the licensing process BCCI SA was treated as being a Luxembourg bank which fell into the

category of overseas incorporated banks and was thereafter dealt with in the same way as all other overseas banks.

118. Had the action proceeded to judgment it would have been unnecessary for me to decide whether the Bank's understanding as to the effect of the 1979 Act was correct. It would have been enough to conclude that the Bank's approach was not informed by dishonesty or bad faith. In fact even that question would not strictly have arisen for decision since the liquidators made no effort to show that at licensing the bank officials had the relevant state of mind as to the probability of loss consequent upon their actions which was required to render their conduct misfeasant.

119. The liquidators had to concentrate their attack on the Bank's understanding of the meaning of the expression “principal place of business” because they could identify no other plausible or obvious source of a legal duty of which they could allege that the Bank was in breach. It has to be said however that in the overall scheme of things and in the context of any overall enquiry into why supervisory regulation did not prevent the commission of fraud by those at BCCI the question where was to be found the principal place of business of BCCI SA is a distinctly second order consideration. The liquidators focused on it because they had nothing else on which to focus, but a far more pertinent consideration would have been whether, even had the Bank concluded that it could not rely upon assurances from Luxembourg and had it concluded that it must satisfy itself as to the fulfilment by BCCI SA of the statutory criteria and even had it concluded that it must itself supervise BCCI SA if it was to allow it to operate in the United Kingdom, the ultimate outcome would have been any different or the supervision which it would have exercised would have been any more effective than was that of Luxembourg. Not the least of the unsubstantiated allegations in this trial was the liquidators' attack upon the efficacy of the supervisory authorities in Luxembourg, a country memorably and pejoratively referred to by Mr Pollock on the first day of the trial as a “chocolate box Ruritania.” One of the arresting features of the trial was the regularity with which it was proved, by reference to BCCI's own documents disclosed by the liquidators, just how extensive was the activity by way of supervision of BCCI SA offered by that much maligned authority. It was not for me to decide whether things could or should have been done differently - I was concerned only with the genuineness of the Bank's professed belief that the nature and scope of the Luxembourg supervision of BCCI SA was adequate. In many areas the Luxembourg requirements were more exacting than were those of the Bank itself. Any detailed comparison is futile because different regulators attempt to achieve their object in different ways, and comparatively more exacting requirements in certain areas may be counterbalanced by comparatively less exacting requirements in others, reflecting the methods and priorities of the supervisors concerned. However, given what I was conditioned by the liquidators to expect, the examination of the nature and extent of the supervision of BCCI SA afforded by the Luxembourg authorities was to me a constant revelation, the more marked because the extent of the activity was demonstrated by the liquidators' own documents the contents of which they seemed unwilling to explore. It was yet another example of a problem with which the liquidators simply failed to grapple.

Other allegations of dishonesty

120. I mentioned at the outset of my discussion that I could not hope to deal in detail with the very many allegations of dishonesty made against the impugned Bank officials. I hope that I have said enough to indicate why I formed the view that the Claimants' case, the structure upon which those allegations were hung, was itself most unsound. It was a structure built on occasion not even on sand but rather on air. It was inevitable that allegations of dishonesty made in support of such a case would themselves be without foundation, as I have already recorded.

121. Some of the more implausible of a raft of implausible allegations stick in the mind, such as the allegation of dishonesty lobbed at an American lawyer Mrs Sandy Richardson who joined the Bank in 1986 when her husband's job brought her to London. She had worked both in a Washington law firm and latterly in banking regulation. What conceivable motive she would have had to act dishonestly in ensuring that the Governor and the Board of Banking Supervision were misled it was difficult to fathom. Her misfortune like

that of others was that her contribution, if accepted at face value as honestly motivated, stood as an obstacle to the liquidators' success.

122. Another puzzling aspect was the rapidity with which, on the liquidators' case, those attached to the Banking Supervision Division of the Bank picked up the need to act dishonestly. Some such as Mr John Beverly were alleged to have behaved dishonestly in their very first major contribution to the BCCI debate. Mr Beverly became Deputy Head of BSD in April 1987 and in June he wrote a paper to Mr Quinn detailing his thinking on the current state of play of the supervision of BCCI SA's UK branches, following correspondence between the Bank and the IML in March to May of 1987. The paper contains within it the clearest possible evidence that Mr Beverly believed that BCCI SA had a long term future in the British banking firmament, not that it was in danger of collapse causing loss to depositors. This is of itself inimical to proof of the state of mind which the liquidators had to and did allege against Mr Beverly as part of their attempt to prove that he was in writing this paper acting in a misfeasant manner. Secondly the paper demonstrated that Mr Beverly had no desire to avoid responsibility - he advocated intensified supervision of the branches of BCCI SA in the UK and made proposals as to how this could be achieved within normal budgetary constraints. He advocated the devotion of additional resources to the task. If taken at face value these statements were destructive of the liquidators' case. So they were simply alleged to have been made dishonestly. No attempt was made to indicate by whom the baton of dishonesty was passed to Mr Beverly. As Mr Stadlen more than once remarked, the only plausible explanation seems to be that there was something in the water at Threadneedle Street.

123. Mr Beverly was criticised for the fact that his note contained the sentiment that in anything it did the Bank should be careful to avoid misleading depositors and counter-parties of BCCI SA and the outside world into the belief that the Bank was the primary supervisor of BCCI SA or the supervisor of the BCCI Group as a whole or that the Bank was in a position to deliver consolidated supervision of the BCCI Group. This was an entirely legitimate and indeed responsible line for the Bank to take where there was not thought either to be a legal obligation to take on responsibility for the supervision of the BCCI Group or to be any appreciable threat to the interests of existing depositors in BCCI SA. This was also Mr Quinn's view, an attitude about which he was cross-examined extensively and in respect of which his evidence was unwavering and entirely convincing, doubtless a consideration which influenced the English Creditors' Committee in calling upon the liquidators at the conclusion of his long cross examination to discontinue the action. Mr Quinn was by any standards an impressive witness, about whose complete integrity I never had a moment's doubt. The cross examination served rather to enhance Mr Quinn's standing than to call his actions into question.

124. There was another distinctly odd aspect of the attack upon Mr Beverly. He was alleged to have pitched into dishonesty with enthusiasm on his appointment as Deputy Head of BSD in April 1987, but not alleged to have participated in the earlier dishonesty. One reason why he cannot have participated in the earlier dishonesty is that during a highly relevant period, July 1978 to October 1980, he was the Private Secretary to the Governor. Yet he was alleged to have acted dishonestly from 1987 onwards in the belief that the Bank had acted knowingly unlawfully in granting a licence to BCCI SA in 1980, presumably appreciating that the reason why the earlier misfeasance had been concealed from him was because he had at the relevant time been the Governor's Private Secretary. Why in such circumstances would he wish to compromise himself seven years later?

125. I do not propose to multiply the examples of unfounded and casual allegations of dishonesty made by Mr Pollock in presenting the liquidators' case. However a particularly striking example is provided by the Claimants at paragraph 426(8) of their Written Submissions which I reproduce here: -

> “The Claimants sprayed around unpleaded allegations without restraint to the effect that a conspiracy had been dishonestly hatched at an internal meeting shown in Mr Cooke's and Mr Mallett's diaries as scheduled to take place at 11.30am on Friday 16 December 1983.

(a) The genesis of the meeting was said by Mr Pollock to be that because Mr Gent “and his team” were concerned that the Bank should take on the consolidated supervision of the BCCI Group and thought they would have to push Mr Cooke forward, Mr Gent had manoeuvred Mr Cooke into calling the meeting, in order to make sure that the legal position over PPOB was addressed and considered.

In fact, however, Mr Gent's note of 5 December 1983 had advocated not that the Bank undertake consolidated supervision of the BCCI Group, but that it require the UK operations to be incorporated as a UK subsidiary - as Mr Pollock had accepted on Day 43, page 106. Nor had Mr Lynas' note of 19 October been advocating consolidated supervision either; rather, it recommended that the Bank press for local incorporation of UK operations.

(b) Nevertheless, Mr Pollock alleged that Messrs Gent and Lynas appeared at the meeting to have pushed Mr Cooke into agreeing that the approach to the Governor should indicate that the ultimate goal was consolidated supervision of a restructured group by the Bank. (This was, needless to say, flatly contrary to the pleaded allegation that Mr Gent's motive for misfeasance was to avoid the Bank having to become the lead supervisor in relation to BCCI or the consolidated supervisor of the BCCI Group.)

(c) Mr Pollock's allegations as to what had happened at the meeting were:

(i)”Mr Gent ... must have been at this meeting reasonably persuasive because he and Mr Lynas appear to have been able to push Mr Cooke into agreeing that the approach to the Governor should indicate that the ultimate goal was consolidated supervision of a restructured group by the Bank”; and

(ii)that those at the meeting (whom he noted were “a very large number of people, including a couple from the legal department, Mr Cobbold and his colleague”) had decided to mislead the Governor both as to the question of meeting the criteria for recognition and by “[leaving] out of account the situation that arises under the Banking Act if the main place of business is in the UK”. So, a shockingly large conspiracy, involving for the first time people such as Mr Cobbold and Mr Thompson.

(d) It was a forensic necessity that some reason needed to be offered for why all these people should be prepared to deceive the Governor in this way. The Claimants' ludicrous suggestion was articulated by Mr Pollock in the following terms: “they were worried that if they told the Governor the truth ... they would find themselves moving at very considerable speed towards the idea that they had to go to Abedi and say, “You move your headquarters here in the sense of your top, legally incorporated bank, we take over full consolidated supervision, or else we close you down, that is your choice.” And that would have happened. Apart from that, in our respectful submission it is very difficult to see an acceptable reason for simply concealing this from the Governor...”

(e) Why would Mr Cobbold or Mr Thompson (who were from Group 1, not supervisors) care about that? Was not moving at very considerable speed towards consolidated supervision precisely what Mr Gent “and his team” had called the meeting in order to achieve? Was it not the Claimants' pleaded case that the strategy suggested in the resulting paper was of “incorporation of a United Kingdom holding company”?

Any of these questions would have been sufficient to hole this theory below the waterline. The question which the Court alighted upon was the one about Mr Thompson.

(i) Mr Thompson (who is now dead) was alleged to have been part of this conspiracy on the strength of his initials being in Mr Cooke's appointments diary for this meeting (though not in Mr Mallett's). Mr Pollock had no hesitation in accusing him of participation in the conspiracy:

> "Given that you have had a decision, this decision would have - approach it this way - had to be taken by a very large number of people, including a couple from the legal department, Mr Cobbold and his colleague, because they had all sat down on 16th December and talked this through at some length, ..."
>
> (ii) On **Day 108**, the Court queried how that allegation was to be understood, given that it appeared from Miss Montgomery's submissions the previous day that no "malign motives" were to be ascribed to Mr Thompson. The answer, after some wriggling, appeared to be that perhaps there was another meeting after the one in the diary at 11.30am, although Mr Pollock had of course said that Mr Lynas' subsequent note reflected the sense of that meeting, or at least Mr Lynas' understanding of it.
>
> (iii) The necessity for the Claimants to postulate an inner circle of conspiracy, from which Mr Cobbold, Mr Thompson and (Miss Montgomery said) "possibly" Mr Langley were excluded, was symptomatic not just of their willingness to spray allegations of misfeasance around at random, but of the way in which their conspiracy theories ran into the problem that too many people were involved for them to have any credibility. Again and again the Court was presented with conspiracies where the natural response was that that was surely rather a high-risk strategy of deceit, given that X, Y and Z would either have to be squared in advance or might have butted in to blow the gaffe. Here, the Claimants began, on the basis of two inconsistent diary entries, by asking the Court to find that there was a meeting at which all the participants decided for no rational reason whatsoever to deceive the Governor of the Bank of England, then, when asked how that could be so if one of the participants had done nothing wrong, suggested that maybe there had been a further meeting without that person."

126. Some of the liquidators' allegations of dishonesty were simply bizarre. There were allegations of dishonestly withholding from the Governors facts and matters of which they were already well aware. The Governor or in his absence the Deputy Governor presided over meetings of the independent Board of Banking Supervision. A feature of the allegation that the Board of Banking Supervision was misled was that on occasion officials of the Bank's Banking Supervision Division were accused of dishonestly misleading the Board of Banking Supervision by withholding from it information which had already been given to or was otherwise known to the Governor and the Deputy Governor who presided over the relevant meeting and who were not themselves accused of dishonesty.

127. Another puzzling allegation concerned a meeting which Mr Cooke and Mr Gent had with Mr Jaans, Mr Schaus and Mr Philippe of the Luxembourg supervisory authority in Luxembourg on 2 May 1980. This was an important meeting because it took place between the Bank indicating to BCCI SA that it was minded to refused recognition and to grant a licence and the final resolution by the Review Committee to uphold that decision notwithstanding the further representations made by BCCI SA urging recognition. It was a constant theme of the liquidators' case that I should regard the representatives of the IML as having on this occasion withdrawn the assurances about the integrity and competence of the management and overall financial soundness of BCCI SA which they had given in August 1979. This was an odd submission. There was a full discussion such as one would expect between fellow supervisors. A full note of the meeting was prepared by Mr Gent. Neither the English nor the Luxembourg contingent exhibited great warmth towards or enthusiasm about BCCI, an institution which presented unusual challenges to European regulators. But the gravamen of Mr Jaans' message to his English guests was that he was disappointed that the Bank seemed likely not to bestow the accolade of recognition upon BCCI SA. Of course one must take into account that Mr Jaans would naturally wish his own judgment in allowing BCCI SA to continue to operate as a Luxembourg bank to be vindicated by the attitude of the Bank of England. Even so, unless one attributes bad faith to Mr Jaans (as indeed later in the story Mr Pollock did) his comments as recorded in Mr Gent's note of the meeting if taken at face value do not amount to a withdrawal of his previous assurances. As late in the story as December 1988 the Luxembourg authorities in the shape of Mr Schaus and Mr Philippe gave similar assurances to the Securities and Investment Board. As I have already mentioned Mr Jaans did not show warmth towards BCCI

and he might have wished that it was not a Luxembourg institution but he recognised that there were no grounds on which now to arrest its development. It was “too large to kill off.” I suspect that this attitude is not far off that of many others at the time. BCCI SA and BCCI Overseas had become established in the UK in a manner permitted by the regulatory environment in force before the enactment of the 1979 Banking Act. Many might have regretted that that had occurred. No one in a responsible position at the Bank thought that the Bank had grounds upon which it could put back the clock. Mr Gent disliked BCCI. His evidence to Lord Justice Bingham that he had reluctantly accepted that there were no sustainable grounds upon which it could be refused a licence under the new regime was accepted by the liquidators to be correct.

128. Mr Gent presented a serious problem for the liquidators and they attempted to resolve it by characterising him as a person who alternated between honesty and dishonesty. Although he and Mr Cooke were of necessity the principal actors in the strategy of non-topics, the liquidators were reduced by the logic of their case to alleging, as I have already recorded, that on one occasion Mr Gent misled Mr Cooke in order to manoeuvre him into acting in a manner which he might not otherwise have done. What made this allegation particularly absurd was that the goal towards which Mr Gent was said to be manoeuvring Mr Cooke was the Bank taking on consolidated supervision of the BCCI Group. The pleaded motive for Mr Gent's participation in misfeasance was said to be in order to avoid the Bank becoming either the lead supervisor for BCCI SA or the consolidated supervisor of the BCCI Group. This inconsistency was not addressed.

Inconsistencies between the liquidators' case as presented orally and their pleaded case

129. I was led to believe that at the end of Mr Stadlen's opening for the Bank the Claimants would take the opportunity to amend their pleadings so as to deal with the respects in which the case as developed by Mr Pollock was completely contrary to the pleaded case. The example just given was not the only one. Another important example in an absolutely central part of the post-licensing case concerned the allegation that Mr Cooke's approach to the Governor in January 1984 and his subsequent meeting with Mr Abedi in April 1984 was coloured by his bad faith in having no intention of seeing through his proposal of the incorporation of the BCCI holding company in the UK, a proposal which the Governor endorsed but which Mr Abedi rebuffed. The pleading alleged that there had been such a strategy of incorporation of a UK holding company, which was of course a step on the road to the Bank assuming the role of consolidated supervisor but that it was pursued on only one occasion and abandoned at the insistence of Mr Abedi at the April 1984 meeting with Mr Cooke. This was a far cry from the suggestion made at trial that Mr Cooke had put up this proposal to the Governor in bad faith, never intending to follow it through, and that he had produced a corrupt note of his meeting with Abedi in order to disguise the fact that he had made no real effort to persuade Mr Abedi to go down that road.

130. What the Claimants also pleaded in relation to this was that “Mr Abedi could not, in fact, have agreed to the Bank's strategy of bringing the Group to the UK, merge BCCI SA and BCCI Overseas and expose the Group to consolidated supervision without its insolvency and much malpractice becoming apparent.” This was probably absolutely correct insofar as it relates to Mr Abedi's state of mind and it explains why, contrary to the liquidators' case as presented by Mr Pollock but consistent with their pleaded case, he rebuffed Mr Cooke at the April 1984 meeting. Whether the elaborate fraud within BCCI would have been uncovered earlier had the Bank's strategy been implemented is another question. What the liquidators pleaded about Mr Abedi in this regard supplies a pithy and powerful demonstration of why it is that the Bank would never have been allowed by Mr Abedi to achieve a structure of BCCI which was amenable to consolidated supervision in a manner which the liquidators asserted it was the Bank's duty without more to perform on every day after licensing. The liquidators also asserted in their pleading that one reason why the Bank refused to undertake consolidated supervision of the BCCI Group was because the Bank believed that it was probably impossible to supervise the Group effectively. The liquidators never grappled with the implications of this assertion. It was quite true that the Bank believed that effective consolidated supervision of the Group was impossible without restructuring. Since the Bank had no power to impose a restructuring of the Group it was plainly impossible without more to undertake effective consolidated supervision of the Group, and it would be surprising if the Bank had a duty to do the impossible. There is a danger of allowing oneself to be diverted into too

much detail but a significant feature of Mr Cooke's 11 January 1984 paper to the Governor, allegedly written by him in bad faith with no intention to carry through the strategy which it recommended, is what Mr Cooke therein told the Governor about matters germane to the identification of the principal place of business of BCCI SA, allegedly a matter about which salient facts were dishonestly concealed from the Governor. The draft prepared for Mr Cooke included the following sentence: -

> "Finally, and perhaps most important of all, arrangements currently being developed for consolidated supervision in Luxembourg ignore the reality that, with the Group Treasury located in London, the Group's mind and management is in the UK and the market increasingly thinks of the Group as UK-based."

In addition to allowing this to go forward to the Governor unchanged, Mr Cooke himself added a sentence to the draft which said of the main branch office in London (Leadenhall Street) - "This branch is for all practical purposes the group headquarters." He also added to the suggested observation that BCCI SA had little more than a Head Office in Luxembourg the qualification that the Head Office in Luxembourg was "nominal." These were not the actions of a man who had hitherto assiduously withheld information of this sort from the Governor lest the possible implications thereof be worked out.

131. At the close of the Bank's case Mr Pollock told me that on reflection the Claimants had determined that their pleadings did not require amendment, but that the case would be put to the witnesses as he had opened it, there having been ample opportunity for the witnesses to know what were the allegations which were being made. The untackled problem was of course that the allegations which were being made were inconsistent and contradictory, both with themselves and with the pleaded allegations. Sooner or later this would have caused the Claimants insuperable problems in cross examination. In the event the liquidators discontinued before they encountered them. It will be a feature to be borne in mind by the Costs Judge. Nothing in the Claimants' case was ever abandoned, and indeed on the one occasion when something apparently was abandoned it was then sought to reinstate it. Any suggestion that the Defendants incurred costs on an unreasonable scale will need to be tested against the background of litigation apparently conducted by the liquidators and their legal advisers by reference to standards which I did not recognise.

Further assistance to the Costs Judge

132. In that regard I shall give such further assistance to the Costs Judge in relation to the assessment as I reasonably can. The Claimants recognise that any such assistance will have to be given in a manner which is compliant both with the overriding objective, insofar as that impacts upon the requirement that my time should not be devoted disproportionately to these litigants in preference to others and with Article 6 of the European Convention on Human Rights, which requires that any process adopted must be transparent. I shall for example be happy, subject to my other commitments, to provide written answers to questions formulated by the Costs Judge after he has heard submissions thereon by the parties. It may even be that consideration will have to be given to my on occasion sitting with the Costs Judge should he think that such assistance would be appropriate and helpful.

133. I am also asked to give an indication of my views on certain matters which, even now, can be seen as possibly being controversial on detailed assessment. They are set out in a letter written by Messrs Freshfields to Messrs Lovells on 17 November 2005 as follows:

> "Having said this, we would not wish you or the Liquidation Committee to make the mistake of believing that there can be any genuine comparison between your clients' legal costs and the Bank's costs. There are a number of reasons why the Bank's legal expenses are greater than your clients', the most important of which is the fact that the Bank had to respond fully and accurately to each and every allegation made by your clients whether in its pleaded case, in its "Criticism Documents" or in the oral submissions made at trial by Mr Pollock QC. Numerous allegations were made by your clients, without any apparent regard to whether or not they were

supported by the evidence or whether or not they were consistent with other allegations which your clients were making. These allegations were often of the most serious kind, accusing Bank officials of acting dishonestly. The allegations were constantly changing and the case pursued by your clients at trial was not the case that your clients had pleaded. It was a necessary consequence of all of this that the Bank had to consider (and where necessary investigate), both by reference to contemporary documents and the recollection of the witnesses, all these allegations so that they could be accurately and fully answered. The burden placed on the Bank in having to respond carefully and painstakingly to countless vague and unparticularised allegations was a direct consequence of the way in which your clients put their case and inevitably added very considerably to the costs incurred by the Bank.

More particularly, there are a number of specific ways in which the burden of this action was borne by the Bank rather than by your clients, only the most obvious of which are set out below:

1. **Witness statements**: Your clients served no witness statements. The Bank served statements for 23 witnesses, many of considerable length, including two which were over 1,000 pages long. We enclose a list of those statements at Table D. The statements covered events over a period of 20 years. It was a massive exercise to identify the documents over 20 years relevant to each witness, then to provide each witness with the documents so that they could go through them and then to take them through not only the chronology as revealed by those documents but also through the relevant allegations in the 1,135 page Particulars of Claim. All of this was necessary prior to having meetings (often very many) with the witnesses which led to the production of draft statements which were themselves the subject of much detailed work as the witnesses reviewed and revised their statements at further meetings with the legal team until they were satisfied that the statements were, so far as possible, accurate. Further we then had to keep witnesses informed throughout the trial as yet further allegations were made.

2. **Defence**: The Bank had to undertake a very considerable exercise in the preparation of its Defence in order to correct the selective and misleading impression given by the 1,135 page Particulars of Claim, in which unparticularised allegations were scattered - rather in the same way that new unpleaded allegations were scattered by Mr Pollock during the course of the trial - in the hope that some would hit a target. The Bank had to respond to all such allegations and therefore had to deal with every single misleading allegation and omission in its Defence, which ran to no less than 2,250 pages of pure text.

3. **Bank's disclosure**: Since the trial comprised, in effect, an inquiry into the conduct of the Bank and its officials, the Bank's documents naturally formed the core of the Trial Bundle which comprised 192 lever arch files, as set out in Table E. Indeed 86% of the documents referred to at trial were disclosed by the Bank. It was a massive exercise for our firm to give disclosure of hundreds of thousands of documents and then to respond to various requests from you for yet further disclosure. It takes virtually no time to make these requests and yet a great deal of time to respond to them. Of course, we accept that the lawyers on your side had to read the documents that were disclosed but so did the lawyers on the Bank's side who were not themselves directly involved in the disclosure process.

4. **Liquidators' disclosure**: Although the Liquidators also provided a considerable volume of disclosure, the Bank quickly took the view that this was very largely useless - both in terms of its relevance to the case and the impenetrably poor way in which it had been listed and disclosed - and consequently made very few requests for further disclosure from the Liquidators. The way in which it was listed, by special dispensation of the Court and at your request, was very largely by box or file, thereby saving an enormous amount of time. Indeed, one of our assistants memorably looked into one box of disclosure to find that it only contained a broken chair leg. Moreover, the disclosure which was given by your clients seems in many cases to have been prepared by Deloittes, not your firm and, as we have said, we do not know whether

> you have included their costs in your £38 million figure. Furthermore, they had reviewed a large volume of BCCI's core documents and tagged these for disclosure in the Three Rivers case whilst reviewing those documents in the course of other earlier major litigation which they initiated, notably against the auditors and Bank of America, thus no doubt resulting in a saving of the costs which would otherwise have been attributable to the Three Rivers case.
>
> 5. **Trial**: At trial the Bank had to respond at great length to the submissions made by Mr Pollock QC in opening your clients' case. Given the partial, inaccurate and misleading submissions made on behalf of your clients it was necessary to address the court for 119 days by reference to the documents in the trial bundle, many of which had never been drawn to the court's attention. In relation to these oral submissions Mr Justice Tomlinson observed to Mr Stadlen QC on 2 November:
>
> "You addressed me at enormous length on the documents in this case, as a result of which I had a far better understanding than I might otherwise have had ...".

Not only was it necessary to address the Court orally at such length, but the Bank also handed up a further 195 documents during the course of its submissions (filling 14 or more lever arch files), the majority of which were written submissions specifically prepared in order to respond to allegations made by your clients."

134. With the exception of numbered paragraph 4, which deals with matters relating to the liquidators' disclosure which are for the most part outside my knowledge, I unreservedly endorse what is written by Freshfields in this letter. They are all points of the highest relevance both generally in relation to assessment and if the suggestion is made that the Bank's costs are by definition unreasonable because greater by a significant degree than those incurred by the liquidators, should that in fact be the case.

Conclusion

135. The foregoing are just some of the reasons for my conclusion that the entitlement of the Bank to indemnity costs could not be more clearly made out. The Bank also prayed in aid as one of many grounds upon which an order for indemnity costs is in this case appropriate "the offensive treatment of the Court, the Bank's officials, former officials and witnesses, the Bank and the Bank's legal representatives and other natural and legal persons involved in some way or other with BCCI SA or its associated companies." It will be apparent that the Bank has no need to rely upon this ground and I do not propose to dwell on it. Mr Pollock was only infrequently rude to me and I ignored it. Not everything said by Mr Pollock is intended to be taken seriously and sometimes his offensive remarks are the product of a well-intentioned but ill-judged attempt to lighten the mood. I propose to say no more about some of the things said in the course of the trial about the Bank, its officials and its legal advisers with the exception however of Mr Stadlen. Mr Pollock's sustained rudeness to his opponent was of an altogether different order. It was behaviour not in the usual tradition of the Bar and it was inappropriate and distracting. I should have done more to attempt to control it, although I doubt if I should have been any more successful than evidently were Mr Pollock's colleagues whom on at any rate one occasion I invited to attempt to exercise some restraining influence. Whether this is a ground upon which an award of indemnity costs should be considered I do not need to decide.

136. I should also make it plain that it should not be thought that as a result of my consideration of the evidence in this case I have concluded that the Bank is beyond criticism of the manner in which it discharged such duties as were cast upon it in consequence of its permitting BCCI SA to carry on business within the UK. It was not however my task to identify matters in respect of which the Bank could be criticised. It was not for me to identify areas where the Bank might arguably have been complacent or in respect of which it may have made errors of judgment or been negligent. That was the task of Lord Justice Bingham and he expressed various criticisms of the Bank in his report. It was my task to determine whether the Bank had as alleged by the liquidators approached its duties in a manner which amounted to the tort of misfeasance in public office. This is a very different inquiry. The liquidators alleged that the Bank by 22 of its officials had

acted deliberately unlawfully and in bad faith and that at least 42 of its officials had employed widespread dishonesty in order to ensure that this conduct could take place and that it would go undetected. In this judgment I have sought briefly to explain why in my view the Bank's officials should be exonerated of the grave allegations made against them.

137. There are two further costs issues. Firstly the cost of preparation of the Bank's Submissions on Indemnity Costs and Exoneration served on 9 December 2005. This is ultimately a matter for the Costs Judge as the liquidators have already accepted that they must pay on an indemnity basis the costs of this application incurred up to 9 December 2005. However for my part I should make it clear that I would repudiate the suggestion by the liquidators that the Submissions go well beyond what was required to deal with the basis of assessment of those costs which the liquidators had not agreed in Lovells' open letter of 28 November 2005 to pay on the indemnity basis. Firstly, this objection seems to proceed from the premise which I think unlikely to be correct that the Bank did not start preparing these Submissions until 28 November. It was on 11 November that I had ordered that they be served on 9 December and I would imagine that their preparation took some time. Secondly, the document does not go beyond what is required in order to demonstrate comprehensively why the Bank is entitled to the indemnity costs order which it sought. As I have already indicated I have found the Bank's document of the most enormous assistance. In their letter of 14 December 2005 the liquidators' solicitors made it clear that, whilst offering to pay the Bank's costs of the action on an indemnity basis, they did not concede that the Bank was entitled to such an order. This was in the circumstances not just unrealistic but absurd.

138. There remain the Bank's costs of this application incurred subsequent to 9 December 2005. In my judgment the Bank was fully entitled to pursue this application. It would have been an affront to justice and contrary to the public interest had the liquidators successfully stifled publication of the Court's conclusions. It was of itself unreasonable of the liquidators to deny the Bank's entitlement to the costs order which it sought. This application enabled the consequences of the liquidators' conduct fully to be worked out and in my judgment it is appropriate that the Claimants should pay the costs thereof on the same indemnity basis as they must pay the costs of the action.