CA on appeal from Commercial Court (Mr Justice Toulson) before Henry LJ; Potter LJ; Mr Justice Wall. 26th January 2001.

LORD JUSTICE POTTER:

INTRODUCTION

1. This is the latest in a series of decisions involving litigation between the parties arising out of proceedings brought by the claimant Standard Chartered Bank ("SCB") against Pakistan National Shipping Corporation ("PNSC"), the first defendants, and others, following the issue and presentation to SCB of a falsely dated bill of lading which induced SCB, as the confirming bank under a letter of credit established by a Vietnamese State bank ("Incombank"), to take up the documents and make payment to Oakprime Limited ("Oakprime"), the fourth defendants, who were the sellers of a cargo of Iranian bitumen to which the letter of credit related. On 1 April 1998 Cresswell J gave judgment for SCB against PNSC for damages to be assessed for deceit, conspiracy and negligent misrepresentation. He also gave judgment in similar terms against Mr Mehra, the fifth defendant, who was a director and the moving spirit of Oakprime. On 19 February 1999 Toulson J assessed SCB's damages in the sum of US$ 1,169,594.57 inclusive of interest. The judgment of Cresswell J against Mr Mehra was subsequently reversed by the Court of Appeal (see [2000] 1 Lloyds Rep 218) on the grounds that he was not personally liable for the misrepresentations made by Oakprime on the basis of SCB's pleaded case, which decision is currently the subject of a petition for leave to appeal to the House of Lords.

2. This is the appeal of PNSC, for whom Mr Timothy Young QC appears, against the findings of Toulson J on quantum. Mr Mehra, represented by Mr Akka, has also participated in the appeal against the event that the petition to the House of Lords may be successful. He has adopted the arguments of Mr Young and added an argument of causation relevant to Mr Mehra's position. Seaways Maritime Limited, the second defendants in the action take no part in this appeal. Proceedings against the former third defendants, SGS United Kingdom Limited, were discontinued prior to the hearing before Cresswell J. Oakprime were never made the subject of a judgment, being in insolvent liquidation. I shall deal first with the appeal of PNSC before turning to the point argued on behalf of Mr Mehra.

THE FACTUAL BACKGROUND

3. A full account of the facts appears from the judgments of Cresswell J on liability reported at [1998] 1 Lloyds Rep 684 and the judgment of Toulson J on quantum reported at [1999] 1 Lloyds Rep 747. A summary of the facts relevant to this appeal is as follows.

4. Oakprime agreed to sell 20,000 MT of Iranian bitumen to Vietranscimex (a state-owned company responsible for road maintenance in Vietnam) at a contract price of US$ 147 per MT. Payment for the bitumen was to be made by irrevocable letter of credit opened by Incombank and confirmed in London by SCB. Part of the cargo was to be shipped in the MV "*Lalazar*", a vessel owned by PNSC. Oakprime chartered the Lalazar from PNSC to carry 10,000 tons of bitumen from Bandar Abbas to Ho Chi Minh City. The last date for shipment under the letter of credit was 25 October 1993. When it became apparent that loading would not be completed by that date, PNSC agreed that false bills of lading would be issued showing that the goods had been so shipped. False bills dated 25 October 1993 were accordingly issued, and the bills and other documents called for were presented to SCB who, relying upon them, paid the sum of US$ 1,155,772.77 to Oakprime on 16 October 1993. SCB permitted late presentation of certain documents and failed to notice other discrepancies in the documents, which failure was described by Cresswell J as "*most regrettable*". However, having found that SCB's document checkers were negligent but honest, he accepted SCB's case that payment would not have been made to Oakprime but for the issue and presentation of the fraudulently dated bills.

5. SCB sought reimbursement from Incombank as the issuing bank under the letter of credit. Incombank rejected the documents on the grounds of discrepancies rather than late presentation. SCB's conduct in claiming indemnity against Incombank was described by the Court of Appeal as deceitful: see [2000] 1 Lloyd's Rep 218 at 223-5. However, it was held that the conduct criticised did not break the chain of causation between the fraud of PNSC and payment by SCB to Oakprime as beneficiaries.

6. On 5 January 1994 the Lalazar arrived at Ho Chi Minh City and gave notice of readiness. Mr Brinsden, the chief executive of SCB in Vietnam, quickly learned that Vietranscimex had instructed Vietnam Overseas Shipping Agency ("*VOSA*") who were agents for PNSC not to let the vessel dock until they had concluded a new agreement with Oakprime. On 6 January, Mr Brinsden wrote to Incombank correctly pointing out that Vietranscimex were only the notify party and not the consignee (which was Incombank), and thus had no right or title to the goods, nor any right to give instructions concerning the ship in which the goods were carried and that, as they had rejected the documents, the ownership of the goods remained in SCB for whom Incombank were in a trustee relationship in respect of the documents of title. Thus it was with SCB that Vietranscimex would have to negotiate any new agreement.

7. On 7 January 1994, Mr Brinsden had a meeting with representatives of Vietranscimex and Incombank during which his staff overheard discussion about Vietranscimex using the position to obtain a reduction in the price. As a result SCB decided to do all it could to ensure that the vessel did not discharge immediately and to order an SGS inspection to establish that the quality was that called for under the letter of credit. On 8 January, Mr Brinsden wrote again to Incombank to make the position clear to Vietranscimex that they would have to negotiate any future sale as a new and separate deal with SCB, who reserved the right to negotiate the sale of the goods at a fair market price which, given a recent increase in the world price of bitumen, might mean a higher price. He added:

"In principle, of course, we would be more than happy to settle for the original price but, if Vietranscimex are not able to reach a satisfactory agreement with us, we are free to find other buyers elsewhere, including outside Vietnam."

8. On 10 January 1994 the Lalazar docked and was visited by Mr Brinsden, representatives of Incombank and Vietranscimex, and surveyors from SGS. On questioning the master Mr Brinsden had his suspicions confirmed that the bills of lading had been falsely dated and reported back to Mr Bishop and Mr Griffiths the servants of SCB in London who were in day-to-day charge of the transaction:

"My impression …. is that the cargo is onboard and that the final solution will depend on the negotiations between ourselves and Vietranscimex as to price. We have some advantage as long as Lalazar does not unload (Vietranscimex and the owners are both trying to get this expedited) and, furthermore, the Vietranscimex officials are somewhat under fear of disciplinary action over this deal."

9. As a result of the SGS inspection it became apparent that there were difficulties with the cargo. Vietranscimex's contract with Oakprime not only contained a detailed specification in relation to the quality of the bitumen, but also required that it be packed in new 24 gauge steel drums as per ISO standards. The documents presented by Oakprime to SCB included certificates as to quality and the other requirements of the letter of credit. However SGS made it clear that while, from visual examination of sample drums taken from the top, the quality of the bitumen was probably as specified, the drums appeared to be clearly second-hand and generally poor and rusted. In depth examination of the cargo, particularly the lower level of the drums was recommended, but this was impossible before the vessel was unloaded. On 18 January, an SGS report based on two samples randomly drawn from the top layer of four holds found compliance with the contractual specification of the bitumen, although some figures were marginal (the reported figure for penetration was 60 as against a contractual requirement of 60-70).

10. On 21 January, Mr Brinsden wrote to Mr Long, the Director-General of Vietranscimex, offering to sell the cargo at the original contract price of US$ 147 per tonne, stating that this was a reasonable figure since the world price for the product had now risen to US$ 152 per tonne. On 26 January Vietranscimex countered with an offer to pay the price asked for contract quality cargo in new drums and US$ 130 per tonne for contract quality cargo in used drums of 24 gauge, stating that bitumen not meeting the contractual specification or in used drums which were not of 24 gauge would be rejected. Payment was to be 180 days after receipt. Mr Brinsden rejected that offer and pressed for an immediate answer whether Vietranscimex would take up the goods at the contract price, which was now below the current market price. On 28th January, Vietranscimex wrote offering as its *"ultimate decision"* terms which, translated into English, were as follows:

1. We accept the result of SGS's quality inspection you have sent us (though it showed REL DENSITY is only 1/006).

2. We accept the price US$ 147/mt for the bitumen in the new drums which are about forty per cent of the total shipment (that is the contractual price).

3. The price of the bitumen in the old drums which quality meets the contractual requirement is US$ 135/mt

4. The price of bitumen in old drums (not 24 gauge) will be settled later between the two parties.

5. Method of payment TTR after 180 days.

6. SGS is to inspect the quantity and number of drums

11. Mr Brinsden understood term 3 to mean that, if bitumen in an old drum was not of contractual quality, Vietranscimex would reject that drum. However, that was not explored with Vietranscimex because, in relation to that offer, Mr Bishop faxed Mr Brinsden as follows:

"Reference our telephone conversation re the latest letter from Vietranscimex making their final offer for the cargo of Lalazar.

The feeling in the UK is one of bitter disappointment, in view of the position the bank has taken in protecting the Vietnamese interest. The offer is totally unrealistic, in particular the open ended nature of item 4 in the expectation that we should finance them for a further 180 days with no security.

We endorse the view that we should seek an alternative buyer at US$ 147 Tonne with immediate effect."

On 28 January, Mr Brinsden passed on that reaction to Vietranscimex, informing them that he was now instructed to sell the cargo elsewhere and was arranging to do so.

12. On the same day SCB received advice from its solicitors in London which Mr Bishop recorded in a memorandum (apparently of a telephone call) as follows:

"a. Must ensure we take reasonable steps to mitigate loss.

b. Offering cargo on market right step to take.

c. Whoever buys cargo buys "sold as seen" and is responsible for delivery."

Thereafter Mr Brinsden consulted Continental Indochine, an organisation based in Vietnam which traded petroleum products in Cambodia and Laos about the possibility of finding a buyer for the bitumen in those countries, but they were only able to suggest the names of traders already known to Mr Brinsden. Mr Brinsden also spoke to a number of general traders to see if they knew of anyone who might be interested in buying bitumen which might or might not meet the full standards for Vietnam road building. However, no interest was expressed.

13. On 8 February 1994, on the instructions of Mr Bishop, Mr Brinsden put a further proposal to Vietranscimex (with whom he was in continuing contact) for sale at US$ 144 per tonne for the whole cargo on 180 days' credit, with the interest split so that SCB would bear the financing costs and interest for the first ninety days and Vietranscimex the interest for the second ninety days. As to quality, quantity and inspection it was suggested that at the time of discharge both parties should jointly appoint SGS to inspect the cargo *'re quality, quantity and*

drums'. After further negotiations, a contract was eventually concluded on 24th February 1994. SCB contracted to sell to Vietranscimex 55,132 drums of bitumen 60-70 weighing 868 tonnes gross, as per the specifications of the original contract packed in 24 gauge steel drums (not leaking or broken) save that the price was to be US$ 147 per tonne for bitumen of the specified quality in new 24 gauge drums, US$ 140 per tonne for bitumen of the specified quality in old 24 gauge drums and US$ 136 per tonne for bitumen of the specified quality in old drums not of 24 gauge. Vietranscimex had the right to reject bitumen which did not meet the specified quality and any leaking or broken drums.

14. There were then further delays, in particular because Vietranscimex's import license had expired. However, on 6 March 1994 Mr Griffiths arrived from London to oversee the unloading and disposal of the cargo. Unloading took place between 18 March and 31 March 1994, the drums being transported to Vietranscimex's *'warehouse'* which was in fact simply an open field. Unhappily, when SGS took samples of bitumen from nine drums of sound condition (three each of drums bearing three different types of marking) the analysis showed uniformly that the figure for penetration was 57 compared with a contractual specification of 60-70, and that the softening point was 43 compared with a contractual specification of 48-50. Three different types of drums were tested and were all found not to be of 24 gauge. Accordingly, on 25 April 1994 Vietranscimex rejected the entirety of the cargo on the grounds of its non-compliance with the contractual specifications. SCB entered into an agreement with Vietranscimex to rent its '*warehouse*' for up to three months at an agreed rate and to pay to Vietranscimex sums in respect of unloading and transport fees and import tax, while Vietranscimex undertook to act on behalf of SCB to sell the bitumen within one month. However they did little towards finding a buyer.

15. On 24 May, SCB obtained a further report on the quality of the bitumen from Inspectorate of Singapore which analysed twenty-five samples. This analysis yielded penetration figures of 51-69 with an average of 58. The report concluded that the material could no longer be classified as 60-70 grade, but could be re-classified as 50-70 grade, and that the loss of penetration was not significant enough to have an impact on the other qualities of the bitumen such as solubility.

16. In June 1994, SCB London received a visit in another matter from the Managing Director of a company called Tigon Industrial Limited ("Tigon"), a trading company based in London with Vietnamese staff and contacts in Vietnam. It had past experience of selling bitumen to Vietnamese clients. On 14 June, SCB appointed Mr Tran of Tigon as its agent to sell the cargo and. on 20 June reached an agreement with Tigon whereby Tigon agreed to buy the cargo as seen on site for US$ 85 per tonne, subject to its attaining local sale contracts. In effect, Tigon was granted an option to purchase the cargo at that price for a period of six weeks.

17. Tigon were suspicious of Vietranscimex's intentions, following a visit by their representative posing as a potential buyer who was informed that he should not make any deal with SCB. Accordingly, in July 1994 SCB transferred the cargo from Vietranscimex's warehouse to another storage yard. By this time the rainy season had arrived, so that many of the drums which were without lids were half full of rainwater and vegetation had grown up between them. Some were set fast into a layer of bitumen on the ground and it was impossible to use fork lift trucks, the drums having to be prised manually with levers, causing more leakage and damage. Mr Griffiths employed tallymen to count the drums transferred. On 18th July, he advised SCB London that in his estimation they were only likely to be able to move and sell five thousand tonnes, based upon his observations, manual inspection and counting, and upon the percentages of empty and torn, cracked and leaking drums previously reported by SGS.

18. By then Tigon had found a local buyer called Unimex, who agreed to buy the cargo as seen at site for US$ 120 per tonne, on the strength of the report of Inspectorate of Singapore. However, because of the state of the drums and the spillage, there was room for argument as to the saleable quantity and the accuracy of Mr Griffiths' estimate of 5,000-6,000 tonnes. The deliverable quantity was eventually settled between Unimex, Tigon and SCB at 6,000 tonnes, Tigon eventually agreeing to accept US$ 600,000 from Unimex, a reduction from the US$ 120 per tonne previously agreed. The price as between SCB and Tigon having been agreed at US$ 85 per tonne, SCB's share would have been US$ 510,000. SCB in fact agreed to accept the round figure of US$ 500,000, the waiver of US$ 10,000 being to encourage further business.

19. SCB accepted before the judge, that for the purposes of calculating damages it should be treated as having received US$ 510,000. SCB therefore claimed for the difference between the amount which it paid to Oakprime, US$ 1,155,772.77, and the figure of US$ 510,000 which it recovered on sale of the cargo plus its additional expenses incurred in trying to dispose of the cargo.

THE JUDGMENT OF TOULSON J.

20. At the trial before Toulson J, PNSC mounted a broad attack upon this method of calculation. It was contended that the bitumen had a 'market value' which was at all relevant times greater (or at any rate as great as) the amount paid by SCB to Oakprime and that SCB had failed to realise that market value through its own incompetence. It was submitted that the market price was the appropriate yardstick by which to measure SCB's damage and that SCB's decisions in relation to its disposal of the goods were to be regarded as its own independent business decisions, for which PNSC's fraud provided the context but not the cause. Alternatively, if SCB's decisions in relation to sale of the cargo could not as a matter of causation be regarded as independent of PNSC's wrong, they were unreasonable decisions which represented a failure by SCB properly to mitigate its loss. In that context PNSC submitted SCB's conduct to minute examination and multiple criticism. In the event however, Toulson J gave judgment for SCB on the basis of the calculations set out in paragraphs 18 and 19 above.

21. The judge rejected PNSC's first broad line of attack namely that there was an available market for disposal of the cargo by reference to which SCB's damages could and should be calculated. He took the view, against which PNSC do not appeal, that the condition and uncertainty as to the quality of the cargo was such that 'it was very far from being an ordinary cargo of bitumen for which there could be said to be a market price', and that the position of SCB in relation to it was that of a claimant 'locked in' to continuing to hold an asset until able to dispose of it at the best price reasonably obtainable: see ***Smith New Court Limited –v- Scrimgeour Vickers Asset Management Limited*** [1997] AC 254 per Lord Browne-Wilkinson at 266. He then proceeded to apply the principle, stated in that case to be applicable to the tort of deceit, that the plaintiff must take all reasonable steps to mitigate his loss once he has discovered the fraud (see p.267 per Lord Browne-Wilkinson) and that the principle had no special features in the context of deceit (see p.285 per Lord Steyn). That being so, the judge referred to and adopted the principles of mitigation of damage as set out by Robert Goff J in ***The Elena D'Amico*** [1980] 1 Lloyds Rep 75 at 88, and summarised the position thus:

"*The orthodox view is that the rule as to avoidable loss is merely an aspect of the fundamental principle of causation that a plaintiff can recover only in respect of damage caused by the defendant's wrong. The rule is not that the plaintiff owes any obligation to the wrongdoer to mitigate his loss (despite the much repeated use of the phrase "duty to mitigate"), but that he cannot recover for a loss avoidable by reasonable action on his own part, because, if he could reasonably have avoided it, it would not be regarded as caused by the wrongdoer.*" (p.758)

22. The principal findings of the judge going to the question of mitigation in relation to the sale of the cargo were as follows.

a) There was no market in the documents readily available to SCB while the vessel was en route and there was a dispute between the buyer and the seller. Thereafter, once the vessel had arrived and it was known that the bills of lading were fraudulently ante-dated, no self-respecting bank could have attempted to market the documents.

b) Nor was there a market readily available to SCB in respect of the cargo itself before or at the time of its arrival on 10 January 1994.

c) Following its arrival, it became clear that SCB had been deceived about the date of shipment, that many of the drums were second-hand and in poor condition contrary to the specification in the contract and the documents presented to SCB. While samples from drums on the top layer in each hold suggested that the contents were up to specification, the condition of the lower layers (drums and contents) was unknown; thus, the cargo could not be regarded as one with "*a standard market price*".

d) SCB's decisions from 10 January 1994 onwards about how to dispose of the cargo could not sensibly be regarded as decisions independent of PNSC's fraud in the sense used by Robert Goff J in the ***Elena D'Amico***

e) No valid criticism could be made of steps taken by SCB up to 28 January 1994, all steps prior to that date having been reasonable.

f) Mr Brinsden's evidence that he and his staff tried to discover what alternative buyers there might be *within* Vietnam without success was accepted and his view that the prospects were poor in that regard was reasonable.

g) As at 27 January 1994 it was reasonable for SCB to consider the amount being offered by Vietranscimex was unacceptable and that it should take immediate steps to seek an alternative buyer.

h) SCB's advice from its solicitor to offload the cargo on the market on a "*sold as seen*" basis was prudent because, although the SGS survey of 18 January provided hope that the bitumen met the standards specified in the original contract there was no certainty and Mr Brinsden was concerned about the condition of the lower drums in the holds.

i) Consequently, by entering thereafter into the contract with Vietranscimex on 24 February 1994 which provided that Vietranscimex were entitled to reject any part of the commodity which did not meet the original quality specification, SCB knowingly took a risk of the goods being rejected.

j) The only reasonable justification for SCB entering into a contract with Vietranscimex on the terms that it did would have been if SCB were unable to find a better offer elsewhere, despite taking all reasonable steps to find one. In this respect there was no satisfactory evidence that SCB had made reasonable efforts *outside* Vietnam.

k) It was common ground that the burden lay on PNSC as the defendants to establish not only that SCB acted unreasonably but that, if it had acted reasonably, its loss would have been reduced.

l) The defendants had failed so to establish.

m) In this respect the judge said:

"It may well be that a prospective purchaser would have wanted further tests done, but I do not think that it follows that no buyer could have been found for the cargo without SCB warranting its specification. I accept that the market in Vietnam was limited and that a buyer outside Vietnam would obviously have wanted a discount for all sorts of reasons – particularly the fact that the bitumen was from Iran, the known condition of the drums, the element of uncertainty as to the bitumen (despite such tests as might have been done), the cost of freight to an alternative destination (wherever it may have been) and the need for the buyer (probably a middleman) to be able to make a sufficient turn on the deal to make the purchase of the cargo attractive. How much an alternative buyer would have been willing to pay without a warranty of quality I find an enigma."

n) Having rejected the evidence and conclusions of Mr Berman the expert for PNSC as neither reliably based on personal trading experience nor on the calculations set out in his report, the judge stated:

"I have considered whether the material enables me to make a reasonable assessment of what figure might have been obtained from an alternative buyer, but I have concluded that any figure which I might come up with would in truth be nothing but a guess.

Mr Young submitted as a fall back position that the sale to Vietranscimex provided firm evidence that the realisable value of the cargo was not less than US$ 120 per tonne. But that was a re-sale price to a buyer in Vietnam. For SCB to have found an alternative buyer to Vietranscimex in Vietnam before the goods were landed would have been difficult. I accept Mr Brinsden's evidence that he and his staff tried to discover what alternative buyers there might be within Vietnam without success and he came to the reasonable view that the prospects were poor. In short, the defendants have not established as a matter of probability what the result would have been if SCB had taken all reasonable steps in January and February 1994 to try to find an alternative buyer for the cargo outside Vietnam."

o) Finally, the judge rejected any criticism made of SCB's contract with Tigon following rejection by Vietrancimex, stating that, by that stage SCB's position was desperate and it had not been established that it had any better opportunity available to it. He also accepted that, by July 1994, the state of the cargo was such that Mr Griffiths' estimate that there were only some 6,000 tonnes available for resale was genuine and reasonable and he held that SCB's settlement with Tigon on the basis of 6,000 tonnes at US$ 85 per tonne was also reasonable.

p) It followed therefore that PNSC had not established SCB's failure to mitigate its loss. PNSC's counterclaim, which was based on its proposition that SCB ought to have concluded an earlier contract, also failed.

23. The judge went on to make certain findings in relation to the consequential losses claimed by SCB. The only matter which it is necessary to mention in relation to this appeal is that relating to the claim for recovery in respect of Mr Griffiths' salary while he was in Vietnam. In that respect, the judge stated shortly:

"I consider that SCB is entitled to recover Mr Griffiths' salary while he was in Vietnam on the basis that during that time SCB was deprived of his services for the normal purposes for which he was employed and which it had to continue to pay him, and that it is reasonable to value those services at the rate at which he was paid."

THE GROUNDS OF APPEAL

Causation/Mitigation

24. The principal ground of PNSC's appeal as advanced by Mr Young has centred upon the finding of the judge that it was unreasonable for SCB to contract with Vietranscimex in February 1994, in the face of a recognised risk of non-compliance and rejection by Vietranscimex once the cargo was unloaded, without first ascertaining whether there was a market for the bitumen outside Vietnam before the goods left the ship. He relies upon the fact that in those circumstances SCB were put in a position of considerable (and acknowledged) disadvantage in marketing the goods thereafter, because the Vietranscimex contract involved the discharge of the cargo in Vietnam, which SCB had identified as something they should avoid because it might put them *'over a barrel'* in realising the full value of the cargo.

25. In that respect, Mr Young criticises the judge for approaching the facts and circumstances of the case without maintaining a distinction between the concepts of causation and mitigation. He submits that, whereas those concepts are often elided ("*these three aspects of mitigation are all really aspects … of the principle of causation*": per Goff J in the ***Elena D'Amico***, at p.88) they are in fact distinct, and that the question of mitigation did not logically arise (and the judge should not have proceeded to consider it) until the claimant discharged the burden of proving an unbroken chain of causation between the tort and the loss alleged to have resulted.

26. In this case, Mr Young submits, the claimant should have failed at the first hurdle of causation. He contends that SCB's recoverable loss was prima facie the difference between the amount paid out and the value of the goods received. In this respect that value is ordinarily "*closed out*" when the claimant makes a contract for resale of the goods. If the claimant does not recover the proceeds of the closing-out sale, the presumption is that such non-recovery is not the result of the tortfeasor's wrong but of the breach of contract of the new buyer (if he rejects in breach of contract) or the breach of contract of the claimant himself (if he takes the commercial risk of warranting dubious goods). The cause of any loss asserted by reference to events thereafter will only be the wrong of the original tortfeasor if *the claimant* discharges the onus of proving that the imprudent or broken contract did *not* in fact break the chain of causation. In this respect Mr Young submits that the price obtained in August represented a benefit the value of which had been diminished not by PNSC's original tort but by SCB's unreasonable conduct by making a contract with Vietranscimex, thereby putting SCB at an insuperable disadvantage in marketing the goods thereafter if they were rejected. The ultimate sale to Tigon was a product of that disadvantage and thus the result of SCB's unreasonable conduct, rather than the original fraud.

27. That being so, Mr Young submits that SCB, who as claimants bear the burden of proof in respect of causation, failed to discharge that burden. He complains that the judge did not expressly consider the issue of causation separately from the issue of mitigation, or even consider it at all, because he treated all his findings of fact as relevant to the question of mitigation in respect of which PNSC as defendants conceded that the burden of proof lay on them.

28. On the separate question of mitigation, Mr Young submits that, in addition to the findings which he made, on the evidence before him the judge should have concluded:

a) that the bitumen was marketable elsewhere in South-East Asia without SCB warranting its specification;

b) SCB acted unreasonably in negotiating only with Vietranscimex in Vietnam and on the basis of a right to reject for failure to comply with the specification, rather than on a sold 'as seen' basis, so creating the disadvantageous position of having to dispose of the bitumen once landed, whereby SCB became locked into the internal Vietnamese market.

c) SCB unreasonably failed to market the goods in South-East Asia or to seek expert assistance in that regard.

Notional resale outside Vietnam.

29. Finally, Mr Young criticises the judge (i) for declining to make a finding to the effect that, had SCB acted prudently in accordance with their solicitor's advice and had they diligently explored the market outside Vietnam before agreeing to sell to Vietranscimex, a sale would have been effected at a higher price than that ultimately obtained, thus reducing the sum recoverable by SCB; (ii) for failing in the light of the evidence to make a finding, however conservative, as to the amount of that price. Mr Young argues that, by declining to make such a finding on the ground that the price was 'an enigma', he failed to observe the requirement identified by Henry LJ in ***Flannery v Halifax Estate Agencies*** [2000] 1 WLR 377 at 382 that;

"Where the dispute involves something in the nature of intellectual exchange, with reasons and analysis advanced on either side, the judge must enter into the issues canvassed before him and explain why he prefers one case over the other. This is likely to apply particularly in litigation where, as here, there is disputed expert evidence; but it is not necessarily limited to such cases."

Mr Young submits that, had the judge listed the issues, analysed the evidence and made specific findings of fact, he would have appreciated that he had sufficient evidence to demonstrate that, on any view, a better price than US$ 85 per tonne would have been obtainable.

30. Mr Young further submits that the judge should have given weight to the fact that it was SCB's own conduct which produced the need to guess at a price, because SCB had (unreasonably, as the judge found) not explored the market outside Vietnam; thus no evidence of actual offers and tenders was available. Mr Young says the judge could and should have arrived at a figure on the basis of (a) the evidence before him as to market values for good/ordinary quality drummed bitumen; (b) the discounts likely to be applied in the face of the uncertainties; and (c) the actual prices obtained in the captive market of Vietnam. Such an exercise would have yielded a price substantially higher than the US$ 85 per tonne actually obtained.

31. The points made by Mr Young eventually crystallised into a submission that the judge should have held that the price which could have reasonably have been realised on an "*as seen*" basis was one of US$ 110-120 per tonne by either or both of two routes.

a) US$ 120 per tonne was the actual price negotiated by Tigon as experienced traders with Unimex, which represented a discount of US$ 40 per tonne against the market price for good quality bitumen in Vietnam by the time of the sale and reflected all the frailties of the goods as effectively a distressed cargo.

b) So far as the market outside Vietnam was concerned (on the assumption that the bitumen had remained aboard the Lalazar) it was the evidence of SCB's own expert that the FOB Singapore market price for Shell bitumen was US$ 140-145 per tonne in respect of which a discount of about US$ 15 per tonne would be necessary for Iranian bitumen, giving a price of US$ 125-130 per tonne. The February 1994 contract with Vietranscimex involved negotiated discounts for the drums on board of US$ 7 per tonne for old drums and US$ 4 per tonne for drums which were non-24 gauge. On the assumption that effectively all the drums were both old and non-24 gauge, that yielded a further discount of US$ 11 (say 10) per tonne to give a price of US$ 115 to US$ 120 for the notional resale, from which a further US$ 5 per tonne brokerage would fall to be deducted, to give a final price of US$ 110-115. Finally, in relation to the market outside Vietnam, he submitted that the judge should not have concerned himself with the impact of freight costs, (as to which the vessel's agent made an "*off the shelf*" estimate of £200,000). Mr Young submitted that no deduction was called for because ex hypothesi the goods would have remained aboard the Lalazar, which was owned by PNSC, any freight payable by SCB thus being recoverable back from PNSC as damages.

Consequential Expenses

32. Under this head, Mr Young argues (i) that, on the hypothesis that a sale "*as seen*" had been negotiated in February 1994, the various consequential costs attributable to the cargo being off-loaded pursuant to the February contract (i.e. the costs of almost US$ 250,000 for discharging, transporting, warehousing and insuring the cargo for several months, plus Mr Griffiths' costs) would be irrecoverable, (ii) that the judge in any event erred in allowing, as part of SCB's claim for consequential loss and expenses, the sum of US$ 30261.70 in respect of that proportion of Mr Griffiths' annual salary attributable to the period when he was in Vietnam, attending to the preservation and re-sale of the cargo of bitumen, such salary being in the nature of a business 'overhead' of SCB which was incurred in the course of its business in any event.

CAUSATION/MITIGATION

33. The first point to be made in respect of the judge's approach to the issue of mitigation is that it reflects the way the matter had been argued before him. The thrust of PNSC's case before the judge was first to attack SCB's claim in the same way as argued by the defendants in ***Smith New Court***, namely that the damage should be assessed on the basis of a 'market value' for the bitumen, which was at all relevant times greater than the amount paid by SCB to Oakprime, alternatively greater than the price realised by SCB, and that SCB failed to realise that market value through its own ineptitude. On the footing that there *was* an available market for the disposal of the cargo, it was submitted that that market price was the yardstick against which SCB's damages should be

assessed, the defendants' wrongdoing providing the context but not the cause for the incompetent action taken by SCB. In the alternative, it was argued that, in any event, SCB failed properly to mitigate their loss, in which respect it was expressly conceded that the burden of proving (a) that the failure to take reasonable steps to dispose of the cargo and (b) that the taking of such steps would have led to the loss being reduced, lay upon PNSC as defendants: see [1999] Lloyds Rep at 750 and 764.

34. Because of the form of the argument, the judge dealt with the question of causation in that part of his judgment headed 'Date for the Assessment of Damages', by contrasting SCB's contention that damages should be assessed at the date of trial (i.e. on the basis that the eventual disposal of the goods should form the basis of the calculation) and PNSC's contention that the damages should be assessed at various possible alternative earlier dates, but principally the date of the arrival of the Lalazar, when SCB first acquired knowledge of the false dating of the bills of lading (p.761). The judge rejected PNSC's contentions, in the course of which he stated that it was not 'sensible to regard SCB's decisions from January 10 1994 onwards about how to dispose of the cargo as decisions independent of the defendant's fraud'. He also referred to the speech of Lord Steyn in ***Smith New Court*** at 278-279 and, in particular, his observation that:

"the causative influence of the fraud is not significantly attenuated or diluted by other causative factors acting simultaneously with or subsequent to the fraud."

The judge concluded: "*In this case the defects in the quality of the bitumen drums existed at the time when SCB was fraudulently induced to accept the documents, and therefore the consequences of those defects lie (like the consequences of the horse's latent disease) with the defendants."*

35. I read as implicit in that conclusion a finding by the judge that, so far as causation was concerned, the subsequent inability of SCB to dispose of the cargo at a value sufficient to recompense them for the monies originally paid out against the documents, because of defects which existed in the cargo at the time of such payment, constituted damage directly caused by the original transaction, subject only to the issue of 'failure to mitigate', as to which PNSC accepted that the burden of proof lay on them.

36. In my view the judge was right in that conclusion. Although this case concerns payment by a bank against documents and its subsequent disposal of the relevant cargo, it is a claim based on deceit and, as such, subject and readily susceptible to application of the principles enunciated by Lord Browne-Wilkinson in ***Smith New Court*** at p.267 in relation to assessment of damages payable where the plaintiff has been induced by a fraudulent misrepresentation to buy property:

> *"(1) The defendant is bound to make reparation for all the damage directly flowing from the transaction; (2) although such damage need not have been foreseeable, it must have been directly caused by the transaction; (3) in assessing such damage, the plaintiff is entitled to recover by way of damages the full price paid by him, but he must give credit for any benefits which he has received as a result of the transaction; (4) as a general rule, the benefits received by him include the market value of the property acquired as at the date of acquisition; but such general rule is not to be inflexibly applied where to do so would prevent him obtaining full compensation for the wrong suffered; (5) although the circumstances in which the general rule should not apply cannot be comprehensively stated it will normally not apply where either (a) the misrepresentation has continued to operate after the date of the acquisition of the asset so as to induce the plaintiff to retain the asset or (b) the circumstances of the case are such that the plaintiff is, by reason of the fraud, locked into the property. (6) In addition the plaintiff is entitled to recover consequential losses caused by the transaction; (7) the plaintiff must take all reasonable steps to mitigate his loss once he has discovered the fraud."*

37. In this case, as the judge rightly held, it was not possible to compensate SCB on the basis of the 'market value' of the property as at the date of acquisition or, indeed, at any time, on the basis of an available market in bitumen which was subject to all the deficiencies and question marks of this particular cargo. SCB were therefore 'locked into' the cargo in the sense that it could not reasonably dispose of it unless or until it had made efforts and enquiries to find a purchaser willing to take it at the best price reasonably obtainable. At the same time, its disposal at a price which would inevitably involve a substantial loss, whether by way of discount from the original purchase price, or for any other consideration operative in the mind of a potential purchaser when deciding what price to offer, would plainly be damage directly flowing from the original transaction, (subject only to the necessity for SCB to take reasonable steps to sell at the best obtainable price).

38. It is trite law that the onus of proof on the issue of mitigation lies upon the defendant: see ***Roper v Johnson*** (1873) LRCP 8 167, confirmed by the House of Lords in ***Garnac Grain Co. v Faure & Fairclough*** [1968] AC 1130 at 1140. The interrelation of that issue with the general obligation upon the plaintiff to prove his damages has been clearly and succinctly stated by Sir Owen Dixon CJ in the High Court of Australia in ***Watts v Rake*** (1960) 108 CLR 158 as follows:

"The law of course places upon a plaintiff who sues in tort for unliquidated damages the burden of satisfying the tribunal of fact of the damages he has suffered both special and general and of the quantification in money that should be adopted in the sum awarded. That is the legal burden of proof which rests upon him throughout. Only in one respect is the burden of proof upon the defendant and this is when he sets up matters in mitigation of damages. ***If it appears satisfactorily that damage in a particular form or to a particular degree has been suffered by the plaintiff as a result of the wrong but the defendant maintains that the plaintiff might have avoided or mitigated that consequence by adopting some course which it was reasonable for him to take, it seems clear enough that the law places upon the defendant the burden of proof upon the question whether by the course suggested the damage could have so been mitigated and upon the reasonableness of pursuing that course*** *…"* (emphasis added)

39. Viewed as a practical matter of proof in a case of this kind, the position appears to me to be as follows. Where as a result of the fraud of the defendant the claimant has been induced to pay out monies which he would not otherwise have expended in respect of goods which he would not otherwise have acquired, and where the value of the goods in his hands is not susceptible of assessment by reference to the price paid for similar goods in an available market then, if (in pursuance of the general requirement to mitigate his loss) the claimant seeks out a purchaser and effects a sale of the goods for which he gives credit to the defendant for the value received, the loss sustained as a result of any shortfall between the price received and the monies he originally paid out is *prima facie* the measure of the claimant's damage, being loss directly flowing from the original transaction. If an issue is raised by the defendant that the price received was diminished by reason of the claimant's failure to take reasonable steps in negotiating the sale, or by effecting an alternative sale at a higher price, so that the loss suffered (or part of it) is attributable to such failure rather than to the original fraud, then the burden of that issue lies upon the defendant. That being so, it is part of that burden not merely to show that the plaintiff failed in some respect to act reasonably, but that his failure did in fact lead to a diminution in the price he could have obtained had reasonable steps been taken.

40. Before Toulson J the issue was whether SCB could, by taking reasonable steps, have obtained a greater sum for the cargo than it did and thereby reduce the amount for which PNSC would be liable. While he found that PNSC had demonstrated that it was not reasonable for SCB to enter into the contract with Vietranscimex in February 1994 unless it had taken reasonable steps (but been unable), to find a better offer from outside Vietnam, he also held that PNSC had failed to discharge the burden of proof on the question whether SCB would in fact had been in a financially more advantageous position if it had taken reasonable steps to find such a buyer.

41. Mr Young has sought to avoid the effect of that finding by arguing that the fact that SCB acted unreasonably in selling to Vietranscimex is sufficient in itself (a) to eliminate the direct causal connection between the fraud and the eventual sale, alternatively (b) to shift the burden back to SCB to prove that they could not have done better. I do not consider that his argument should succeed. So far as the issue of causation is concerned, I have already expressed the view that the judge was correct to find that, subject to the issue of mitigation, a direct causal link existed between the original fraud and the damage caused, namely the loss sustained on the re-sale of the goods which prima facie represents the amount of the benefit received as a result of the transaction. Insofar as Mr Young seeks to assert that the issues of causation and mitigation should be separated for the purposes of the incidence of the burden of proof, I consider he is in error. It seems to me that. in truth, causation and mitigation are two sides of the same coin, see per Robert Goff J in the ***Elena D'Amico*** at 88-89, to which Toulson J made reference at pp.758-9 of his judgment: see also ***Watts v Rake*** at paragraph 38 above. In every case where an issue of failure to mitigate is raised by the defendant it can be characterised as an issue of causation in the sense that, if damage has been caused or exacerbated by the claimant's unreasonable conduct or inaction, then to that extent it has not been caused by the defendant's tort or breach of contract. However, it seems clear that the burden of proving both unreasonable conduct and exacerbation of damage as a result rests upon the defendant. The doctrine of mitigation of damage is a rule as to *avoidable loss*. Indeed, it is discussed under that heading in the leading work of ***McGregor on Damages*** (16th Ed) at para 295 et seq. The task of proving that the claimant has suffered loss which was reasonably avoidable is not satisfied simply by demonstrating that he acted precipitately or unreasonably in entering into a contract of sale which collapsed. It is necessary also to prove that, had he not done so, his loss (or some part of it) would have been avoided. That, in turn, involves proof that on the balance of probabilities a better price, or at least a more profitable deal than that ultimately obtained, would have resulted. In that respect, the judge found that PNSC had failed.

NOTIONAL RE-SALE OUTSIDE VIETNAM

42. As to Mr Young's submissions in that respect, it does not seem to me that the additional findings for which he argued (as set out in paragraph 28 above) really add anything to his argument. As to (1) even if the judge had concluded that the bitumen was in fact marketable elsewhere in South-East Asia on an *'as is'* basis (and the finding he did make suggests he thought it may have been), the crucial question was: at what price? As to (2) there is no reason to suppose that the judge thought that Vietranscimex were interested in buying on an *'as seen'* basis, because they had originally purchased, and throughout continued to make clear, that their concern was to acquire bitumen which met the contractual specification, being the quality required for road building in Vietnam. As to (3), the judge did find in effect that, in the period prior to conclusion of the February contract, SCB unreasonably failed to explore the market in South-East Asia, but he still required satisfactory evidence that such explanation would have procured a better price (or at least a more certain profit) for SCB.

43. The judge dealt with the difficulties in that respect relatively shortly at p.764-5 of his reported judgment from which I have quoted at paragraph 22(13) and (14) above. It is plain that the cargo could not be sold "*as seen*" in any literal sense while it remained on the ship. No buyer would have been able to inspect it below the top layers while it remained on board. However, there was evidence that any prospective buyer would have wanted to have his own surveyor inspect the cargo and that, without unloading, it was not possible to inspect and take samples. In practice therefore, the alternatives remained that either SCB gave a warranty of specification (in which case similar problems to those encountered would probably have arisen if SCB had diverted the vessel to another country), or the cargo would have to be sold "*as seen*" on the basis of an incomplete inspection. In sum, it was a "*distressed*" cargo, in that it could not be sold on the basis of the original documents which were fraudulent, the drums were old and weak, a full inspection was impossible without discharging the vessel, and the cargo was off specification. If a buyer was to be found who did not require guarantees as to quality and packing it was

plain that only a knockdown price, (even before taking account of freight and demurrage) would be obtainable. Further, so far as delivery was concerned, SCB would still have had to pay substantial freight of some £200,000 quoted by the vessel's agent (i.e. over US$ 30 per tonne) and, as matters stood at the time, there was no assurance that such freight would be recoverable from PNSC.

44. When the judge characterised as *'an enigma'* the amount an alternative buyer outside Vietnam would have been willing to pay without a warranty of quality, I do not consider he was improperly resigning his task of seeking to calculate the appropriate measure of damage on a rough and ready basis. The question had been fully but inconclusively explored before him. He found PNSC's expert to have been discredited. In considering the elements to be taken into account as governing the likely price obtainable he plainly felt unable to effect the exercise urged upon him by Mr Young and repeated before us.

45. Turning to the position finally adopted by Mr Young (see paragraph 30 above), he has not persuaded me (contrary to the judge's finding) that there was persuasive evidence on which to find that the price obtainable from a trader outside Vietnam would have been better than the US$ 85 per tonne which Tigon was prepared to offer. Tigon bought as a middleman on a speculative basis as to what might be obtainable from a purchaser in Vietnam, but conditionally upon first finding that purchaser, and there was no intrinsic reason to suppose that a better sale outside Vietnam could be effected to a consumer rather than to a middleman who would also expect a substantial profit on resale.

46. Approaching the matter on the basis of the alternative route argued by Mr Young at paragraph 31(ii) above, the notional sale price eventually arrived at of US$ 110-115 (a) involves the assumption that a "*market value*" approach was valid on the basis simply of a discount per tonne in respect of the source of the bitumen (Iran), as opposed to its specific characteristics; (b) it ignores the fact that, in a notional sale negotiated prior to unloading and without the ability to sample, a prospective purchaser would have been bound to apply an additional discount for uncertainty in relation to its quality; (c) it omits any allowance for the consideration that the purchaser would be likely to be a middleman bent upon making a speculative profit which would require a further discount from the ordinary market price; (d) it leaves out of account the question of the negotiation and incidence of the freight costs which would fall to SCB's account, at least in the first instance.

47. Finally, it is necessary to bear in mind, that the question of mitigation of damage is a question of fact and not a question of law see ***Payzu v Saunders*** [1919] 2 KB 581 at 588 and 589 and ***The Solholt*** [1983] 1 Lloyd Rep 605 at 608. It is therefore rarely appropriate to interfere with the conclusions of the trial judge based as they are on the evidence (or lack of satisfactory evidence) before him. In my view that is the position in this case. The judge adverted to all the considerations which he took into account and rejected the evidence of PNSC's expert called specifically to deal with the issues of mitigation. The effect of his judgment was that PNSC had in all the circumstances failed to establish that SCB had incurred avoidable loss. Accordingly, I reject the principal ground of appeal advanced on behalf of PNSC.

CONSEQUENTIAL LOSS - THE SALARY OF MR GRIFFITHS

48. The claim for a proportion of Mr Griffiths' salary was made and allowed before the judge (and Mr Gruder QC for SCB has sought to justify it before us) simply upon the basis that, while in Vietnam, Mr Griffiths was unable to carry out the office tasks in which he was normally engaged for SCB in London. In this respect, Mr Gruder sought to rely upon a passage in the judgment of Forbes J in ***Tate and Lyle Distribution v Greater London Council*** [1982] 1 WLR 149 at 151C-152H in which he considered (though he did not in the event award) a sum claimed by the plaintiffs on the grounds that they had expended managerial and supervisory resources in attending to problems associated with dredging costs in respect of silt deposits which prevented access to their barge moorings as a result of negligence and nuisance on the part of the defendants. Forbes J stated:

"I have no doubt that the expenditure of managerial time in remedying an actionable wrong done to a trading concern, can properly form the subject matter of a head of special damage. In a case such as this it would be wholly unrealistic to assume that no such additional managerial time was in fact expended. I would also accept that it must be extremely difficult to quantify. But modern office arrangements permit of the recording of the time spent by managerial staff on particular projects. I do not believe that it would have been impossible for the plaintiff in this case to have kept some record to show the extent to which their trading routine was disturbed by the necessity for continual dredging sessions. In the absence of any evidence about the extent to which this occurred the only suggestion Mr Clarke can make is that I should follow Admiralty practice and award a percentage on the total damages … . While I am satisfied that this head of damage can properly be claimed, I am not prepared to advance into an area of pure speculation when it comes to the quantum. I feel bound to hold that the plaintiffs have failed to prove that any sum is due under this head."

49. It does not seem to me that either the passage quoted or the circumstances relating to the claim in ***Tate and Lyle*** justify the recovery of the proportion of Mr Griffiths' salary claimed in this case. No doubt it was true as the judge stated, that, in visiting Vietnam, Mr Griffiths was engaged in an unusual task. However, it is not suggested that his trip abroad, as an employee engaged in the business of SCB and in respect of whose responsibilities his salary was in any event payable, led to any significant disruption in SCB's business or any loss of profit or increased expenditure on SCB's part (save in respect of travel, subsistence and other out-of-pocket expenses which the judge awarded in any event). In certain situations, involving particular types of trading concern such a claim may be appropriate. In particular, building contractors who, by reason of delay, suffer increased costs attributable to a particular job which costs are irrecoverable elsewhere, may claim for a proportion of their fixed overheads,

(including head office salaries) as part of their claim for consequential loss. However, that is not this case. There is no suggestion that the business of SCB, or the system of charging upon which its profits depend, were in any way adversely affected by the diversion of Mr Griffiths to Vietnam. Accordingly, I would allow the appeal of PNSC in respect of this particular item.

MR MEHRA'S SEPARATE ARGUMENT ON CAUSATION

50. In addition to relying upon PNSC's arguments on causation, Mr Akka for Mr Mehra argues that the loss claimed by SCB, namely the sum they paid out against the documents presented, did not flow directly from Oakprime's fraud. He submits that the true cause of SCB's loss was the refusal of Incombank, as issuing bank, to reimburse SCB against that payment, not because of the fraud (of which both banks were unaware at the time of presentation of the documents), but because of the various discrepancies in the documents which SCB had negligently overlooked, but which gave SCB and Incombank the right to refuse the documents. He relies on SCB's admission at trial that the documents contained a number of patent discrepancies which SCB's checkers had failed to spot. Cresswell J. described that failure as "*undoubtedly negligent*" and "*most regrettable*": see [1998] 1 Lloyd's Rep. at 702-703. Further, such conduct by SCB was a breach of UCP 400, Article 15 ("*Banks must examine all documents with reasonable care to ascertain that they appear on their face to be in accordance with the terms and conditions of the credit ..*"), which breach disqualified SCB from claiming reimbursement from Incombank: see Articles 11(b) and 16(a).

51. As Mr Akka points out, when SCB, as the confirming bank unaware of the fraud at the time, paid Oakprime, it had the right as against Incombank to be reimbursed in full subject to the question of any discrepancies, even if Incombank was or had become aware of the fraud: see ***UCM -v- Royal Bank of Canada*** [1983] AC 168, ***Edward Owen Engineering Limited -v- Barclays Bank Limited*** [1978] QB 159 and UCP 400 (1983 revision) Articles 11(b) and 16(a). Incombank, as issuing bank, would in turn be entitled to reimbursement from its client Vietranscimex with the end result that Vietranscimex would have to have sued Oakprime. Thus, Mr Akka submits, SCB's loss flowed not from the fraud but from SCB's own negligence and failure to comply with their obligations under the UCP.

52. The flaw in that argument is that it fails correctly to identify SCB's loss. SCB suffered loss as soon as it paid out the money to Oakprime on 16 November 1993 in reliance on the false representations made to it by Oakprime through Mr Mehra. The cause of SCB's loss was the deceit. Even if SCB contributed to its own loss by its negligent failure to spot discrepancies, that is no defence to SCB's claim for deceit, see ***Edgington -v- Fitzmaurice*** (1888) 29 Ch D 459 and ***Barton -v- Armstrong*** [1976] AC 104. The fact that SCB was later unable to obtain reimbursement from Incombank, which would have extinguished its loss, was irrelevant to its claim against Mr Mehra because a claimant is not obliged to sue a second tortfeasor to recover damages which he is entitled to claim against the first: see ***The Liverpool (No 2)*** [1963] p 64.

53. In the appeal by PNSC and Mr Mehra against the judgment of Cresswell J, the Court of Appeal ruled upon the similar argument by PNSC that SCB had caused its own loss by willingly making payment to Oakprime, knowing that not all the documents had been presented in time. The Court of Appeal held that, although SCB's decision to waive late presentation was a cause of its loss, it was insufficient to break the chain of causation flowing from the deceit. The same must be true, as it seems to me, of a payment made despite discrepancies of which SCB (albeit negligent) was unaware. At paragraph 43 of the judgment on p. 227, Evans LJ stated:

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

54. Finally, Toulson J. found in any event that, at the time of Incombank's first rejection of the documents, possible fraud in the bills of lading was operating in its mind. In this respect he stated:

"Incombank's legal grounds for refusing to pay under the letter of credit were the discrepancies, but on Nov 25, 1993 (before Incombank's first rejection of the documents) Vietranscimex informed Incombank that it was beginning to suspect fraud on the part of Oakprime, because Oakprime had telexed Vietranscimex to notify the arrival of shipments of bitumen on Nov 15 and 23, but the ships did not appear. It was unsurprising that in such circumstances Vietranscimex would take any technical point available to it and (as Mr Brinsden was subsequently told) intended to witness the shipment before accepting discrepancies. To suggest, therefore, that possible fraud in the bills of lading was not one of the factors operating on the mind of Vietranscimex and Incombank at the time of their first rejecting of the documents, and thereafter, is contrary to the contemporaneous evidence."

55. If that was so, then the argument that SCB's loss was solely due to its failure to notice discrepancies, and not to the fraud of Oakprime/Mr Mehra, would in any event fail. For both the reasons I have stated, I reject the additional argument on causation of Mr Mehra.

PNSC's COUNTERCLAIM

56. PNSC counterclaimed against SCB for damages for loss of employment of the vessel during the period when it was detained in Vietnam at SCB's request. It was contended before us that the judge should have held that, if SCB had marketed the goods properly, they would have been able to sell the cargo within two weeks of the breakdown of negotiations with Vietranscimex on 27th January, so that discharge could and should have started in any event by 18th February instead of 18th March, thus leaving the vessel free to carry cargo four weeks

earlier than was in fact the case. Because, for the reasons already given, I would uphold the findings of the judge on the main point argued in this appeal, PNSC's appeal in respect of the counterclaim fails.

CONCLUSION

57. Accordingly, save that I would reverse the judge's finding as to the recoverability of the sum of $30,261.70 in respect of Mr Griffiths' salary, I would affirm the decision of the judge and dismiss this appeal.

MR JUSTICE WALL:

58. I agree.

LORD JUSTICE HENRY:

59. I also agree.

Order: Appeal dismissed except in regard to recoverability of $30,26.70 re Mr Griffiths' salary; costs and notice of appeal submissions to be made at later date.(This order does not form part of approved judgment)

Jeffrey Gruder Esq QC & Miss Zoe O'Sullivan (instructed by Messrs Lovell White Durrant for the Claimant)
Timothy Young Esq QC & Richard King Esq (instructed by Messrs Amhurst Brown Colombotti for the First Defendant)
Lawrence Akka Esq (instructed by Messrs Ashok Patel & Co for the Fifth Defendant)