Uzinterimpex JSC v Standard Bank Plc [2008] Int.Com.L.R. 07/15

CA on appeal from Commercial Court (Mr. Justice David Steel) before Sir Anthony Clarke MR; Laws LJ; Moore-Bick LJ. 15th July 2008

Lord Justice Moore-Bick :

Background

1. This is an appeal against an order made by David Steel J. following the trial of the action giving judgment for the claimant, Uzinterimpex J.S.C. (then known as FBC Innovatsia), against the defendant, Standard Bank Plc, for US$916,267.36. The claim arose out of a contract for the sale by Uzinterimpex, an Uzbek state company, to an English cotton trader, A. Meredith Jones & Co Ltd, of 50,000 m.t. of cotton and the arrangements made with Standard Bank to obtain the finance needed to pay for the goods. The contractual arrangements are succinctly summarised in the following paragraphs of the judgment of David Steel J. which I gratefully adopt:

   "1. Uzinterimpex is an Uzbek state cotton trading company. It was formerly known as JSC Innovatsia ("Innovatsia"). The defendant ("SBL") is a London Bank which, at the material time, acted as bankers to an English cotton purchasing company, A. Meredith Jones & Co Ltd ("AMJ"). SBL was also the agent and issuing bank for a syndicate of banks including itself ("the Syndicate") which, pursuant to a written Facility agreement dated 24th October 1997 ("the Facility"), made a pre-export finance facility available to AMJ for the purchase of cotton from Uzinterimpex.

   2. The Claimant and AMJ had earlier entered into a written sale contract dated 20 September 1997 ("the sale contract"), pursuant to which the Claimant agreed to sell, and AMJ agreed to buy, a series of consignments of cotton ("the cotton") on FOB terms totalling 50,000 mt. The sale contract required AMJ to make an advance payment to the Claimant in respect of 90% of the value of the cotton, with the balance of the payment to be by letter of credit. AMJ was also to arrange for an advance payment guarantee with the National Bank of Uzbekistan ("NBU") for the total value of the advance payment.

   3. AMJ and SBL (as an agent of the Syndicate) entered into a security deed dated 24 October 1997 pursuant to which, as security for the performance of its obligations under the facility, AMJ assigned to SBL all its rights, title and interest under the sale contract and in the cotton, although AMJ was to be free to deal with and sell the cotton in the ordinary course of its business, provided that there was no default under the facility.

   4. On 5 November 1997 NBU opened the advance payment guarantee ("APG") in favour of the defendant in the sum of US$65,674,688.40. The APG was subject to UCP 458 and was to be construed in accordance with English law. It expressly provided that the amount of the APG was automatically reduced by 90% of the value of each consignment of cotton delivered to AMJ on the basis of tested telexes sent by SBL to the NBU, delivery to be proved (and this was a crucial feature of the subsequent dispute) by the presentation by NBU or by AMJ of the shipping documents and commercial invoices as required by the letter of credit. (Because of a fall in the cotton market, the 90% figure was later amended to 100%, in line with the similar amendment to the sale contract.)

   5. On 7 November 1997 SBL opened an irrevocable letter of credit on the instructions of AMJ in favour of the Claimant ("the LOC"). The LOC required certain documents to be presented at the counters of the Bank. These included a full set of three bills of lading (or a waybill or warehouse certificate), together with a certificate of origin, a quality certificate and a certificate of acceptance.

   6. On 12 November 1997 SBL duly made an advance payment to the Claimant's account at NBU in the amount of the APG, thereby activating it."

2. In this judgment I shall refer to the claimant as "*Uzinterimpex"*, Standard Bank as *"the Bank"*, A. Meredith Jones & Co Ltd as *"AMJ"*, the National Bank of Uzbekistan as "NBU" and the advance payment guarantee simply as "*the guarantee"*.

3. The Facility Agreement provided that AMJ would remit the entire proceeds of the sale of the cotton to a *'Transaction Account'* at the Bank from which it would be distributed to the members of the Syndicate (including the Bank itself) and to AMJ insofar as the sub-sale had been made at a profit. It will be necessary at a later stage in this judgment to consider the status of that account and the character in which the Bank received the funds paid into it.

4. The contract provided that the goods were to be shipped at the rate of 8,000 m.t. a month between October and December 1997 and at the rate of 8,666 m.t. a month between January and March 1998. It was the buyer's obligation to ship the goods within 21 days of notification of their arrival at the port and to bear the cost of storage if shipment did not occur within that period. Moreover, if the goods had not been shipped within 21 days, payment was to be made against documents which included in place of a bill of lading a warehouse certificate showing that the cotton was held to the order of the buyer or its nominee.

5. The material parts of the guarantee provided as follows:

   ". . . . . we, the National Bank of Foreign Economic Activity of the Republic of Uzbekistan, Tashkent (Uzbekistan), hereby irrevocably undertake and guarantee to refund to you on first demand, irrespective of the validity, enforceability and the effects or any subsequent variation or amendment to the above mentioned contract and waiving all rights of objection, defence, subrogation or suretyship arising therefrom, and free from counterclaim, setoff, deduction and taxes, the advance payment in the amount of USD 65.674.688,40 (sixty five million six hundred seventy four thousand six hundred eighty eight US Dollars and forty cents) upon receipt of your ('STANDARD BANK LONDON LIMITED', London) duly signed request for payment stating that [Uzinterimpex] have failed to fulfil their contractual deliver obligations.

The total amount of this indemnity will be reduced by any payment effected hereunder . . . . .

The amount of this guarantee will automatically be reduced in proportion by 90PCT of the value of each consignment which is delivered to 'A. Meredith Jones and Co. Ltd', Great Britain, on the basis of tested telexes send by ('STANDARD BANK LONDON LIMITED' to us that guarantee may be redused to the shipment(s) effected by USD . . . . . (USD amount to be indicated). Each delivery shall be proved by the presentation by the National Bank for Foreign Economic Activity of the Republic of Uzbekistan or by 'A. Meredith Jones and Co. Ltd', Great Britain, at the counters of 'STANDARD BANK LONDON LIMITED' of the shipping documents and the original of the relative commercial invoices as are required under your letter of credit issued in favour of [Uzinterimpex].

Our guarantee is valid until 31.07.98 (31st. of July 1998) and expires in full and automatically if your claim has not been made on or before that date, regardless of such date being a banking day or not . . . . . .

This guarantee is subject to UCP 458 . . . . . "

6. Between October 1997 and September 1998 a number of parcels of cotton were delivered by Uzinterimpex at the various ports or places provided for in the sale contract. In some cases documents were tendered to the Bank which conformed to the terms of the letter of credit or which the Bank was willing to accept (no doubt on the instructions of AMJ) despite the fact that they did not. In such cases the Bank took the steps necessary to reduce the amount of the guarantee in accordance with its terms. However, from the outset both sides experienced difficulties in performing the contract. AMJ failed to give instructions for the shipping of cotton in the amounts and at the times required and Uzinterimpex was unable or unwilling to make prompt presentation under the letter of credit of documents complying with its terms.

7. AMJ's response to Uzinterimpex's failure to present documents promptly in respect of goods that were already afloat or in warehouses awaiting shipment was to take steps to obtain control of the goods without waiting to receive the documents. In some cases it achieved that by persuading its own forwarding or shipping agents, Mediterranean Chartering and Trading Inc., to issue a second set of bills of lading in respect of the cargo naming AMJ as shipper and a sub-buyer as consignee which could then be used to by AMJ to obtain payment under its contract with the sub-buyer. However, since the sub-buyer could not obtain delivery from the carrier against tender of what were in every sense false bills of lading, it was necessary to provide a letter of indemnity in order to obtain the release of the goods. It is highly regrettable that at various times from January 1998 onwards the Bank was willing to assist AMJ by countersigning letters of indemnity in respect of the delivery of such cargoes without production of the true bills of lading. Similar problems were experienced in obtaining documents relating to cotton held in warehouses. Again, the Bank assisted AMJ to obtain control of the goods by executing letters releasing cotton to the order of AMJ. When the documents covering the goods were presented they were accepted if they conformed to the terms of the letter of credit, but if they did not, they were in many cases rejected, despite the fact that AMJ had already taken delivery of the goods and resold them; and if the documents were not accepted, the Bank did not operate the machinery necessary to reduce the amount of the guarantee. As a result, when on 20th October 1998 the Bank made a call on the guarantee and received the full amount then outstanding, it effectively recovered the price that AMJ had paid in respect of some goods which it had not only taken into its own control but had sold and delivered to its own customers. In that sense it can be said that the Bank received the value of the goods twice: once in the form of the proceeds of the sub-sale which had been remitted to the Transaction Account and once in the form of a recovery of the price.

8. When the Bank made its call on the guarantee it was still holding documents of title to 8,170 m.t. of cotton which had been presented by Uzinterimpex for payment but which did not conform to the letter of credit. The Bank asked AMJ whether it was willing to accept the documents, but it declined to do so. On the same day AMJ commenced arbitration against Uzinterimpex under the auspices of The Liverpool Cotton Association seeking damages for non-delivery of part of the cotton sold under the contract. At the same time it obtained without notice an injunction restraining Uzinterimpex from dealing with any of the cotton covered by the documents of title held at the Bank's counters. In fact less than a half of the cotton covered by the documents still remained in warehouse; AMJ had already managed to obtain delivery of the rest. The injunction remained in place until 17th April 2000 when it was discharged by consent following an admission by AMJ that it had sold about 5,455 metric tonnes of the cotton before the application had been made, a matter which it had entirely failed to draw to the attention of the court. However, notwithstanding the discharge of the injunction, the Bank refused to release the documents on the grounds that, although the loan had by then been repaid, it was entitled to retain them as security for any further liability AMJ might have under the Facility Agreement, including any liability that might arise as a consequence of the claim then being made by Uzinterimpex.

9. The arbitrators published two awards in April and July 2000, the effect of which was that Uzinterimpex was held to be entitled to recover from AMJ the sum of US$8,123,916.23 together with interest and costs. However, since AMJ went into insolvent liquidation in February 2001, Uzinterimpex has no prospect of recovering any significant part of the amount due under them. It is not surprising, therefore, that it turned its attention elsewhere and in July 2004 it took an assignment from NBU of any rights of action it might have against the Bank.

10. Uzinterimpex felt, and continues to feel strongly, that it was wrong of the Bank to make a call under the guarantee to recover payments made in respect of the price of cotton which its customer, AMJ, had already taken and delivered to third parties. It also felt, and continues to feel strongly, that it was wrong of the Bank to refuse to release to it documents of title relating to the goods still in warehouse once they had been rejected as not conforming to the letter of credit. Accordingly, on 13th October 2004 Uzinterimpex brought these proceedings

against the Bank seeking to recover the amount it had received under the guarantee in excess of the amount it considered to have been properly due and damages for conversion of the cotton covered by the documents which the Bank had refused to release following the discharge of the injunction.

11. Uzinterimpex put its case in relation to what it described as "double recovery" in a variety of ways, but only three are of any relevance for the purposes of the present appeal. Its primary claim was for damages for deceit on the grounds that in making its demand under the guarantee the Bank had by implication represented that it believed the amount claimed to be properly payable, whereas in fact it knew that it was not (or was reckless as to that fact) because it knew that part of the cotton to which the demand related had been accepted and sold by AMJ and that the documents could therefore not properly be rejected. In the alternative Uzinterimpex alleged that it was an implied term of the guarantee that, if any demand made under it should exceed the loss sustained by AMJ or the Bank or otherwise be excessive, the Bank would repay the excess. As a further alternative Uzinterimpex contended that the Bank was liable to account to it as a constructive trustee of the proceeds of sale of cotton in respect of which documents of title had not been taken up because it had received them in the knowledge that AMJ had obtained possession or control of the goods wrongfully. In addition to the claim based on double recovery Uzinterimpex made a claim in conversion against the Bank in respect of the parcels of cotton covered by the documents of title which the Bank had refused to release following the discharge of the injunction.

The judgment of David Steel J.

12. The judge rejected the claim in deceit. He held that the Bank had not made a false statement when making its demand under the guarantee because Uzinterimpex was in default and because the amount which the Bank demanded was due in accordance with its terms having regard to the value of the consignments in respect of which Uzinterimpex had failed to present conforming documents. He also rejected Uzinterimpex's suggestion that the Bank was "institutionally corrupt", a submission based on the willingness of the Bank to conspire with AMJ to obtain delivery of goods without payment while preserving its right to make a demand under the guarantee for the return of the price. There is no appeal against the judge's decision on those issues.

13. The judge rejected the claim based on an implied term. He considered that to imply a term of the kind suggested by Uzinterimpex would subvert the autonomy of the guarantee and introduce a substantial degree of uncertainty into the operation of both the guarantee and Facility Agreement. The judge also rejected the claim based on knowing receipt of trust property on the grounds that the Bank had received the proceeds of sale as agent for the Syndicate and could therefore not be held liable as a constructive trustee, following the decision of Millett J. in *Agip (Africa) Ltd v. Jackson* [1990] Ch 265. He also held that the Bank's state of mind at the time it received the proceeds of sale was not such as to make it unconscionable for it to retain them.

14. Uzinterimpex fared somewhat better in its claim in conversion. The judge held that by refusing to release the documents the Bank had converted the goods to which they related and was liable in damages. However, he did not accept that Uzinterimpex was entitled to recover the full amount of its claim. While it remained in warehouse the cotton was liable to deteriorate in quality; it was also liable to fluctuate in value in accordance with movements in market prices. Moreover, it continued to incur substantial storage charges. In order to minimise the effect of all these the Bank suggested on 9th August 2000 that the goods should be sold and the proceeds held in a blocked account to await the outcome of the dispute. However, Uzinterimpex refused to agree to that course of action, so the goods remained in warehouse for many months until it managed to procure their release by other means. By that time they had deteriorated in value and the storage costs had risen very substantially. The judge found that Uzinterimpex's refusal to agree to a sale of the cotton was unreasonable and accordingly he held that it had failed to mitigate its loss and could not recover the storage charges incurred after that date or the subsequent fall in the value of the cotton itself.

The appeal

15. On the appeal Uzinterimpex sought to overturn the judge's decision on the three issues to which I have just referred and in addition put forward two additional arguments. The first was based on the assertion that it had title to the proceeds of sale of cotton wrongfully obtained by AMJ and was entitled to recover them from the Bank as its own property. That argument found a place in Uzinterimpex's written closing submissions at the trial, but does not appear to have been pursued with any vigour in oral argument and was not considered by the judge. The second was put forward for the first time in the course of the appeal and was based on the proposition that by taking control of the goods AMJ had precluded both itself and the Bank from rejecting the documents of title relating to them.

(a) Implied term

16. Mr. Gruder submitted that a term was to be implied into the guarantee to prevent double recovery by the Bank. At first sight that might appear to be a reasonable proposition, but I think it is necessary to begin by considering the nature of the guarantee and the part it was intended to play in the transaction as a whole. The sale contract originally required AMJ to pay 90% of the price in advance and the remaining 10% by letter of credit against documents of title. AMJ made the advance payment by means of a bank transfer from the Bank to NBU using the funds provided under the Facility Agreement. Presentation of contractual documents gave rise to an obligation on the Bank to pay the balance of the price; and correspondingly a failure on the part of Uzinterimpex to tender conforming documents entitled AMJ to recover the price of the goods that had not been delivered. In the ordinary way AMJ might have wanted security for the delivery of the goods in the form of a performance guarantee from Uzinterimpex's bank, but since the advance payment had been made using funds provided by the Syndicate, the

Syndicate had at least as strong an interest in recovering any overpayment of the price as AMJ. It is not surprising, therefore, that the sale contract specifically called for a guarantee to be opened by NBU in favour of AMJ's nominated bank or that when issued it took the form of a direct undertaking by NBU to the Bank. As goods were delivered the amount recoverable in respect of a failure to perform fell to a corresponding extent and therefore express provision was made for the amount of the guarantee to be reduced. The reduction in the purchase price and consequent reduction in the value of the letter of credit did not affect the nature of those arrangements; the presentation of contractual documents remained an essential element of contractual performance and an essential element in the machinery for the reduction in the value of the guarantee.

17. Both the letter of credit and the guarantee are documents of a kind that are well-recognised in the commercial world as giving rise to independent obligations and as being intended to operate strictly in accordance with their terms. Although the guarantee took the form of an undertaking to refund the advance payment of the purchase price, in common with most performance bonds it was conditioned on receipt by NBU of a demand from the Bank supported by a statement that Uzinterimpex had failed to fulfil its contractual obligations. In substance, therefore, it did not differ from the established form of performance bond which takes the form of a demand guarantee. Moreover, as the judge observed, the guarantee in the present case was expressly subject to the Uniform Rules for Demand Guarantees (ICC publication 458) which provide in article 2(b) as follows:

"Guarantees by their nature are separate transactions from the contract(s) or tender conditions on which they may be based, ... The duty of a Guarantor under a Guarantee is to pay the sum or sums therein stated on the presentation of a written demand for payment and other documents specified in the Guarantee which appear on their face to be in accordance with the terms of the Guarantee."

18. It is important to appreciate, therefore, that the letter of credit and the guarantee gave rise to obligations that were independent of, and collateral to, the sale contract. Accordingly, if Uzinterimpex had failed to deliver the full quantity of cotton provided for in the contract and if NBU had for any reason failed to meet a demand under the guarantee, AMJ would still have had a right to recover from Uzinterimpex that part of the price which related to the goods that had not been delivered. Similarly, if the documents had been accepted and the Bank had failed to pay the balance of the price in accordance with the letter of credit, Uzinterimpex would have been entitled to recover it from AMJ: see *Benjamin's Sale of Goods*, 7th ed., §23-098 and *Jack, Malek & Quest, Documentary Credits,* 3rd ed., §3.56.

19. It is against that background that the argument put forward by Uzinterimpex falls to be considered. The implied term for which it contended in its particulars of claim was that

"in the event that any demand [on the guarantee] should ultimately be found to have exceeded the loss sustained by AMJ and/or the defendant or was otherwise found to have been excessive, the defendant should repay to NBU the amount exceeding such loss or the amount by which such demand was excessive."

That was reformulated slightly by the end of the trial as follows:

"that the Bank [would] account to NBU (or the claimant as its assignee) in circumstances where the Bank had received both the proceeds of the guarantee and the proceeds of the cotton to which it related."

It was said that such a term was to be implied by law or that it was necessary in order to give business efficacy to the contract or to reflect the obvious intentions of the parties. If it were not, it was said, the Bank would obtain a windfall.

20. In my view there is no basis for saying that a term of that kind is to be implied by law and Mr. Gruder did not seriously pursue that aspect of the argument. Indeed, he expressly disavowed any suggestion that such a term is to be implied into every performance bond, which effectively rendered the argument untenable. Nor, in my view, can it be said that it is necessary to imply a term of that kind in order to give business efficacy to the contract. The guarantee stands as an independent contract between NBU and the Bank and is capable of operating effectively without the need for such a term. If a demand under the guarantee resulted in the wrongful refund of part of the price due to the seller, the seller would have a remedy against AMJ under the contract of sale. It is well established, as indeed Mr. Gruder recognised, that in the ordinary case a performance bond is intended to provide a provisional remedy and that in the absence of clear language in the contract pursuant to which it is issued either party can seek to recover from the other the additional amount of its loss or the amount by which the amount paid under the bond exceeds its true liability. There will, in other words, usually be room for an accounting between the parties to reflect their rights and liabilities under the underlying contract: see *Cargill* ***International S.A. v Bangladesh Sugar & Food Industries Corp***. [1996] 2 Lloyd's Rep 524 and ***Comdel Commodities Ltd v Siporex Trade S.A***. [1997] 1 Lloyd's Rep. 424. That provides the answer to the *'windfall'* argument, despite the fact that in this case the remedy may be of little practical value because AMJ is insolvent.

21. Although the guarantee in this case takes the form of a contract between NBU and the Bank, its underlying purpose was to provide security for the recovery by AMJ of the price paid in advance for goods that were not delivered. One would naturally expect, therefore, that following a call on the guarantee it would remain open to the parties to the sale contract to resolve between themselves, by arbitration if necessary, any dispute over AMJ's right to recover part of the price reflected in the demand. Mr. Gruder sought to draw some assistance from the case of ***Tradigrain S.A. v State Trading Corporation of India*** [2006] 1 Lloyd's Rep. 216 in which Clarke J., having held that accounting was required, discussed (obiter) the mechanism by which that should take place in that

particular case. There is nothing in the case, however, which provides any support for the implication of a term of the kind for which Uzinterimpex contended.

22. The contractual arrangements represented by the sale contract, the letter of credit and the guarantee should have ensured that goods were not released to AMJ otherwise than against acceptance of documents of title and a corresponding reduction in the amount of the guarantee. Similarly, unless any discrepancies in the documents were waived, a failure on the part of Uzinterimpex to present conforming documents involved a failure to deliver in accordance with the contract that would eventually lead to a demand under the guarantee if there were a failure to deliver the full contract quantity. It follows, therefore, as Mr. Gruder accepted, that, if the documentary elements of the arrangements were operated in accordance with their terms, it would be impossible for AMJ to obtain delivery of the goods without accepting and paying for the documents and there could be no excessive demand under the guarantee. That very fact, however, makes the argument for an implied term very difficult to sustain because a term of that kind is only necessary if the parties have failed to comply in some way with their obligations under the contractual arrangements. If one leaves aside terms implied by law (which in substance amount to incidents of particular types of contract), terms are normally implied to give effect to the parties' intentions as to the manner of performance, since there is generally a common understanding of the way in which the contract is to work. In that context it may not be difficult to imply a term on one or other of the recognised bases to supplement the express terms. It is much more difficult, however, to imply a term which is relevant only to circumstances which have been brought about by their departure from the terms of the contract, since such a term cannot easily be said to reflect their original intentions or to be necessary to give efficacy to the arrangements embodied in the contract. In the present case the parties clearly did not turn their minds to the possibility of excessive recovery resulting from a failure of one or more of them to adhere to the contractual scheme and there is no reason why they should have done so. If they had, express provision would surely have been made for it. It is impossible in those circumstances to say that the term put forward in this case is to be implied either because it reflects the parties' intentions or because it is necessary to make the contract work properly.

23. However, in my view there are other, and perhaps even stronger, reasons why this argument must be rejected. It is essential to the maintenance of international commerce, much of which is supported by undertakings of this kind given by banks and other financial institutions, that the documents by which those undertakings are given should operate in accordance with the terms which appear on their face. Banks can be expected to examine the documents and demands made under them (together with any supporting documents) to satisfy themselves of their obligations. Thus article 9 of the Uniform Rules for Demand Guarantees provides that

    "All documents specified and presented under a Guarantee, including the demand, shall be examined by the Guarantor with reasonable care to ascertain whether or not they appear on their face to conform with the terms of the Guarantee. Where such documents do not appear so to conform or appear on their face to be inconsistent with one another, they shall be refused." (Emphasis added).

    However, they cannot be expected to be aware of, or to implement, terms that do not appear on the face of the documents. The implied term for which Uzinterimpex contends would have the potential effect of imposing on the Bank a liability which could not be identified from the face of the document and which would be very uncertain in its effect, since as pleaded the term leaves it wholly unclear when or by whom the demand is to be found to have exceeded the loss sustained by AMJ or might otherwise be found to be excessive.

24. Moreover, it is important in this context to bear in mind that NBU's liability under the guarantee was entirely distinct from the relationship between the Syndicate and AMJ under the Facility Agreement and from the relationship between Uzinterimpex and AMJ under the sale contract. NBU was concerned only with the presentation of a valid demand under the guarantee. If such a demand was made it became liable to pay in accordance with the instrument; it was not concerned with whether the Bank had or had not received any funds from AMJ from any particular source or with the terms on which it held the proceeds of the demand. The fact that the Bank held the proceeds as security for the advance made under the Facility Agreement was not relevant to NBU's liability. A term linking the scope of the obligation under the guarantee to the receipt of funds by the Bank from other sources would be inconsistent with the nature of the instrument.

25. For all these reasons I am satisfied that this ground of appeal must be rejected.

(b) The alternative argument

26. It is convenient to consider at this point the new point mentioned earlier which Mr. Gruder put forward for the first time in the course of the appeal. He submitted that on the true construction of the guarantee the Bank was bound to reduce the amount payable under it by the relevant proportion of the invoice price of any consignment in respect of which AMJ had taken possession of the goods, whether or not conforming documents had been presented to the Bank, if the Bank knew, or had the means of knowing, that AMJ had accepted the goods. The argument proceeds on the proposition that by taking delivery of the goods AMJ accepted them and thereby waived any discrepancies in the documents.

27. In cases where AMJ managed to obtain delivery of cotton without accepting documents of title it appears to have done so by persuading the carrier or warehouse keeper to act in breach of duty to the person to whose order the goods were held. On the face of it, therefore, both of them became liable in conversion. Although AMJ had already paid for the goods in advance, the existence of the guarantee meant that payment was in effect conditional upon the presentation of documents of title. In such cases Uzinterimpex could not simply retain the payment and shrug its shoulders (assuming it was aware of what had gone on) because if it failed to present

contractual documents the Bank could recover the price from NBU who would no doubt recover it from Uzinterimpex itself. In such cases, therefore, it had a choice: it could either tender conforming documents, render the payment unconditional and cause the Bank to reduce the value of the guarantee, or it could withhold the documents and sue AMJ and the carrier in conversion.

28. Mr. Gruder's argument proceeds on the proposition that by taking control of the goods AMJ accepted delivery of them under the contract, thereby waiving any discrepancy in the documents and rendering itself liable to pay the price in any event, a proposition for which support is found in *Benjamin* at paragraph 23-109. In a footnote to that paragraph reference is made to the decision of the High Court of Australia in ***Saffron v Société Minière Cafrika*** [1958] HCA 50; (1958) 100 CLR 231, a case which is of some interest in the context of the present dispute. It concerned a contract for the sale of ore on f.o.b. terms, the price being payable under a letter of credit against presentation of a bill of lading evidencing shipment of the contract quantity. The seller loaded less than the minimum quantity called for under the contract and allowed the buyer to obtain a bill of lading in such terms as he wished. As a result the buyer obtained a bill of lading consigned to order naming himself as shipper, the seller thereby lost control over the goods, the bank rejected the documents and the seller remained unpaid. The court held that by taking delivery of the goods the buyer accepted them, even though they fell short of the contractual quantity, and became liable for the price unless the contract on its true construction provided to the contrary. The court held that the provision for payment by letter of credit rendered the credit the primary, but not the exclusive, method of payment and that the buyer was therefore liable to pay for the goods.

29. In the case of a documentary sale it is necessary, as that case shows, to distinguish between the seller's right to obtain payment from the bank under the letter of credit and his right to obtain payment from the buyer where for some reason the mechanism provided by the letter of credit fails. As the decision in ***Saffron v Société Minière Cafrika*** demonstrates, acceptance of the goods by the buyer may render him liable for the price and may to that extent involve a waiver on his part of discrepancies in the documents that would otherwise have entitled him to reject them, but it is not sufficient to render the bank liable under the letter of credit to pay the seller against documents that do not conform to its requirements. The present case is one degree further removed. AMJ did not accept delivery of the goods under the contract; it obtained delivery of them outside the contract and contrary to its terms. Whatever may be the position as between Uzinterimpex and AMJ, that did not oblige the Bank as between itself and NBU to treat the documents as a sufficient basis for reducing the amount of the guarantee, assuming the facts had been drawn to its attention. The terms of the guarantee were explicit: the Bank was obliged to reduce the amount by the relevant proportion of the sale price of any goods in respect of which Uzinterimpex presented conforming documents and for that purpose any documents which the Bank accepted on AMJ's instructions were to be regarded as conforming. However, they are not capable of applying to a case where AMJ has failed or refused to authorise the acceptance of the documents. This argument comes very close to an attempt on the part of Uzinterimpex to imply a different term into the guarantee to prevent double recovery and in my view it faces insuperable obstacles similar to those facing the proposed implied term. Not only does it seek to re-write in a significant manner the terms of the guarantee itself, it introduces an element of uncertainty which is inimical to contracts of this kind. It is, perhaps, worth noting that a very similar argument was addressed to the judge by the Bank in response to the claim in conversion and rejected: see paragraph 175 of the judgment below.

30. Quite apart from all these difficulties, the judge's findings make it clear that the Bank was not in a position to relate the funds remitted by AMJ to specific cargoes of cotton: see paragraph 177(v) of the judgment, to which it will be necessary to return in the context of the claim based on knowing receipt of trust property. It was therefore unable to identify with any confidence which consignments had been delivered to AMJ and (on that basis) which documents were to be accepted.

31. For all these reasons I am satisfied that this argument must fail.

(c) Claim to the proceeds of sale

32. There was no dispute that in some, if not all, of those cases in which AMJ had obtained delivery of parcels of cotton without taking up and paying for the documents it had remitted the proceeds of the sub-sale to the Bank. Mr. Gruder submitted that in those circumstances Uzinterimpex was entitled to recover from the Bank the funds received from AMJ which had been derived from those sources or an amount equal to them. He put the case in two ways: that the funds were Uzinterimpex's property and could be recovered as such; alternatively that the Bank was liable by virtue of its knowing receipt of funds which were impressed with a trust in favour of Uzinterimpex.

(i) The funds as Uzinterimpex's property

33. In his written skeleton argument Mr. Gruder submitted that in cases where AMJ obtained delivery of the cotton without taking up the documents it did not obtain title to the goods which remained in Uzinterimpex. For the reasons given above I think that is correct. He then submitted that the proceeds of sale remained the property of Uzinterimpex which it was entitled to recover from the Bank. Although this argument found a place in Uzinterimpex's written closing submissions at trial, it had not been pleaded and the judge did not deal with it in his judgment, all of which leads me to think that it may not have been developed very fully in oral argument. The judge did not give permission to appeal on this point and in the event Mr. Gruder did not seek to develop it in oral argument, preferring to concentrate on the claim based on knowing receipt. In these circumstances I am doubtful whether it is appropriate for us to entertain the point at all. Nonetheless, I propose to explain as briefly as I can why I am persuaded that it is not sound.

34. Mr. Gruder's argument was based on the decision in *Trustee of the Property of F.C. Jones v Jones* [1997] 1 Ch 159. In that case the wife of a bankrupt used money drawn from his bank account to trade in potato futures. She made a profit in doing so and placed the resulting funds to the credit of a deposit account opened in her own name with another bank. It appears that no other funds were paid into that account. Her husband's trustee in bankruptcy claimed title to the funds and the bank interpleaded. The court held that the trustee could recover the money as his own property. On the adjudication of bankruptcy the effect of the Bankruptcy Act 1914 was to divest the bankrupt retrospectively of any title to the money that had been used by his wife for her trading. She acquired no title to it, nor did she acquire any title to the proceeds of their use and therefore the funds standing to the credit of the deposit account were to be regarded as the property of the trustee. As is clear from the judgment of Millett L.J., the decision in that case turned on the fact that the wife acquired no legal or beneficial interest in the money taken from the bankrupt's account with which the funds in the deposit account could be identified. She was not a constructive trustee of the funds because she acquired no legal title to them.

35. The decision in ***Trustee of the Property of F.C. Jones v Jones*** has been the subject of some criticism and also of some approbation, but in any event we are bound by it for what it decides. However, the present case differs in two important respects. AMJ obtained control over some of Uzinterimpex's goods and sold them to third parties. The common law rules governing the passing of property normally prevent a seller from giving a better title than he has himself (***'nemo dat quod non habet'***) but they do not prevent him from obtaining title to the proceeds of the sale even though he does not himself give a good title. When the seller pays the proceeds of sale into his bank, he becomes the owner of the debt represented by the credit balance on his account. In my view, therefore, when AMJ sold to its customers cotton over which it had obtained control but to which it had not acquired title, the legal title to the proceeds of sale vested in AMJ itself, but it held them in trust for Uzinterimpex for the reasons explained by Lord Browne-Wilkinson in ***Westdeutsche Landesbank Girozentrale v Islington London Borough Council*** [1996] A.C. 669 at page 716C-D.

36. The Transaction Account into which the proceeds of sale were paid in this case was not a deposit account opened to receive a single sum of money, nor was it a simple current account in the name of AMJ. It was an account established primarily for the purpose of repaying the debt due under the Facility Agreement. It will be necessary to consider at a later stage the precise character in which the Bank received the funds remitted to it, but for reasons which will become apparent later I consider that the overriding intention was to transfer the beneficial, if not the legal, interest in the bulk of the funds to the Syndicate. Moreover, the funds paid into the account were derived from different sources – some from the sale of cotton to which AMJ had acquired title and some from the sale of cotton to which it had not – and in most cases were distributed within a few days of their receipt. It is doubtful, to say the least, whether it would have been possible at any stage to identify the whole of the funds standing to the credit of the account as being the proceeds of one or more wrongful sales of cotton, but in any event no attempt was made to do so. It is not possible, therefore, as it was in ***Trustee of the Property of F.C. Jones v Jones,*** to identify the amount standing to the credit of the account with misappropriated cotton from which it had been derived. For all these reasons I do not think that that it is possible to bring this case within the principles applied in that case.

(ii) Knowing receipt of trust property

37. Uzinterimpex's alternative ground of claim against the Bank arising out of what is said to be double recovery is that the Bank is bound to account as a constructive trustee for the proceeds of the sale of goods which were misappropriated and sold by AMJ. The Bank accepted in argument that AMJ had received the proceeds of sale as a constructive trustee for Uzinterimpex, but submitted that it had not itself acted in such a capacity or with such knowledge as to render it liable to account as a constructive trustee.

38. Liability to account as a constructive trustee on the grounds of knowing receipt of trust property depends on receipt by the defendant of trust property otherwise than in a ministerial capacity with the necessary degree of knowledge. Each of these elements of liability was in dispute in the present case. Mr. Phillips Q.C. submitted that although the proceeds of sale were paid into the Transaction Account, the Bank did not receive them in a capacity which rendered it liable to account as a knowing recipient, even if it was aware of the source from which they had been derived. His argument was based on the well-known passage in the judgment of Millett J. in ***Agip (Africa) Ltd v Jackson*** in which the judge drew a distinction between a bank collecting money for a customer whose account is in credit and a bank collecting money for a customer whose account is overdrawn so that it receives the money for its own benefit: see page 292A-B. He submitted that in the present case the Bank received the funds as agent for the Syndicate and not in any beneficial capacity.

39. It has long been recognised that a distinction is to be drawn between one who receives trust property merely as agent and one who receives it in a beneficial capacity: see *Snell's Equity*, 31st ed. §28-46 which is supported by the dictum of Sir James Bacon V.-C. in ***Lee v Sankey*** (1873) 15 L.R. Eq. 204, 211 and the decision of Bennett J. in ***Williams-Ashman v Price & Williams*** [1942] 1 Ch. 219. The ground of distinction, as I understand it, is that a person who receives property merely as an agent has no interest of any kind in it himself and must simply account to his principal for it. Receipt by him is the equivalent of receipt by the principal. When a person opens a current account at a bank he authorises the bank to receive payments from third parties on his behalf and therefore payment by a third party to the customer's account at the bank is payment to the customer. However, it has long been established that the relationship between banker and customer is one of creditor and debtor: see ***Foley v Hill*** (1848) 11 H.L.C. 28. The customer whose account is in credit lends the money to the bank for use by it in its business. The distinction drawn in ***Agip v Jackson*** between receipt by a bank into an account that is in credit and

receipt into an account that is overdrawn has been criticised on the grounds that the nature of the relationship between banker and customer is such that the bank always has the benefit of using the customer's money for its own purposes until such time as it is called upon to repay the debt: see in particular Bryan, ***Recovering Misdirected Money from Banks: Ministerial Receipt at Law and in Equity*** published in *Restitution and Banking Law* (1998), ed. Rose. Mr. Gruder adopted the arguments in that paper as the basis for challenging the judge's decision in this case.

40. In my view there is a good deal of force in Dr. Bryan's criticism of the decision in ***Agip v Jackson***, but it is unnecessary for the purposes of this appeal to decide whether it is well-founded because whatever may be the position with regard to money paid into an ordinary current account which is in credit, the Transaction Account was not of that kind. It was an account opened specifically for the purposes of receiving the proceeds of the sale of cotton purchased by AMJ and as such was an integral part of the machinery for the repayment of the loan. As such it was, in effect, a blocked account out of which the Bank was to pay its own fees and expenses, the amounts due the members of the Syndicate (including itself) from time to time in repayment of the loan and an amount to AMJ in respect of profits generated by the sub-sales.

41. The Bank was described in the Facility Agreement as "*the Agent*" acting in the capacity as "*agent and security agent*" for the Syndicate. It is clear from the reference in the definition section of the agreement to the guarantee itself and NBU as the guarantor that the parties understood that the guarantee was made in favour of the Bank as security agent and trustee for the Syndicate. Clause 15 of the Facility Agreement governed the relationship between the Bank and the other members of the Syndicate. The material parts provided as follows:

"15.1.1 Each Bank and the Issuing Bank hereby irrevocably appoints the Agent to act as its agent in connection with the administration of the Facility and to act as its agent and trustee in connection with the Security Documents and for such purposes irrevocably authorises the Agent to take such action and to exercise and carry out all the discretions, authorities, rights, powers and duties as are specifically delegated to the Agent in this Agreement and each Security Document together with such powers and discretions as are incidental thereto.

15.2.1 The Agent will promptly account to the Issuing Bank or the Lending Office of each Bank for the Issuing Bank's or such Bank's due proportion of all sums received by the Agent for the Issuing Bank or such Bank's account, whether by way of repayment or prepayment of principal or payment of interest, fees or otherwise.

15.9.1 In performing its functions and duties under this Agreement, the Agent shall act solely as the agent for Issuing Bank and the Banks and save as expressly provided herein and in the Security Documents shall not be deemed to be acting as trustee for the Issuing Bank or any Bank and shall not assume or be deemed to have assumed any obligation as agent or trustee for, or any relationship of agency or trust with the Borrower."

42. Mr. Phillips submitted that the Bank's relationship with the other members of the Syndicate was one of pure agency, relying principally on clause 15.9.1 of the Facility Agreement, but it is difficult to reconcile that with the terms of clause 7 which deals with the operation of the Transaction Account. Funds paid into that account were held by the Bank for distribution in accordance with a complicated formula which provided in certain events for part of them to be paid out to AMJ. Moreover, the Bank held the security documents (which included the guarantee) as trustee for itself and the other members of the Syndicate and in those circumstances I find it difficult to accept that the Bank did not also hold any proceeds of the guarantee as a trustee. Mr. Phillips submitted that the Bank received any funds remitted to the Transaction Account merely as agent for the Syndicate. For the reasons given earlier, I do not think that can have been the position in relation to the funds received under the guarantee (which were also paid into the Transaction Account) and I very much doubt that it was in fact the position in relation to any funds remitted to the Transaction Account by AMJ, which I think were held by the Bank on trust to be distributed in accordance with clause 7. However, if Mr. Phillips' argument is correct, the funds in the Transaction Account were received and held jointly by all the members of the Syndicate as principals of the Bank for the purposes set out in the Facility Agreement and it cannot be said that prior to their distribution the Bank had no beneficial interest in them. In my view, whether the Bank received funds paid into the Transaction Account as a trustee or simply as agent for the Syndicate, it received them in a capacity which gave it a sufficient interest to render it liable as a constructive trustee if it had the required degree of knowledge.

43. In ***Bank of Credit and Commerce International (Overseas) Ltd v Akindele*** [2001] Ch. 437 Nourse L.J., with whom Ward and Sedley L.JJ. agreed, concluded after an examination of authorities both in this country and abroad that there is a single test of knowledge for knowing receipt, namely, that the recipient's state of mind must be such as to make it unconscionable for him to retain the benefit of the property. At the trial Uzinterimpex's primary case was that the Bank had acted dishonestly when making its demand under the guarantee and for that reason attention was directed primarily to the state of its knowledge at that time. It was to be expected that the amounts paid into the Transaction Account would exceed the amount by which the guarantee had been reduced because everyone contemplated that AMJ would sell the cotton at a price sufficient not only to cover the purchase price and the interest on the loan but also to provide an element of profit. However, Mr. Gruder was able to point to passages in the documents and the evidence of the witnesses which tended to show that in late September or early October 1998, shortly before the demand was made under the guarantee, the Bank was aware that the funds paid into the Transaction Account by AMJ exceeded the amount by which the guarantee had been reduced by far more than could have been expected. The Bank already knew that at an early stage in the performance of the sale contract AMJ had contrived to obtain possession of cotton for which it held no documents of title; indeed the Bank itself had been party to arrangements enabling it to do so. In the light of its previous experience, he submitted, the Bank had every reason to think that AMJ had continued to act in the same way, obtaining

control over goods for which it had not paid and to which it had no title and selling them on to its customers, as was indeed the case.

44. The judge rejected all the allegations of dishonesty made against the Bank and in doing so rejected any suggestion that it had become aware that AMJ was selling goods to which it had no title. He recorded that it was common ground that it was necessary for Uzinterimpex to establish at least that the Bank entertained a clear suspicion that AMJ was not entitled to the proceeds of sale in order to render it unconscionable for it to retain them, but noted that no such case had been advanced other than in relation to the proceeds of the sale of cotton in respect of which the Bank itself had countersigned letters of indemnity or provided releases. Those cargoes had by then ceased to be of any relevance because all claims in respect of them had been settled. In addition he made a finding in paragraph 177(v) that even if there had been grounds for suspicion the Bank "was not in a position to carry out a reconciliation of such proceeds as were not matched by a reduction in [the guarantee]", by which I understand him to mean that the Bank was unable to match the proceeds of sale to the documents presented by Uzinterimpex in order to identify which particular goods had been sold. The difficulties of carrying out any such reconciliation were compounded by the fact that in many cases documents were presented and accepted long after the goods to which they related had been sold.

45. Mr. Gruder challenged the judge's observation that Uzinterimpex had not sought to argue that the Bank entertained a clear suspicion that AMJ was not entitled to the proceeds of sale, but I think he misunderstood what the judge was saying in paragraph 177(v). Uzinterimpex did argue that by October 1998 the Bank realised that AMJ had sold goods to which it had no title, but, except in those cases where it had countersigned letters of indemnity or issued releases, it did not seek to show that at the time the Bank received any particular remittance of funds from AMJ it had grounds for suspecting that they had been derived from a tainted source and the finding in paragraph 177(v) is inconsistent with any such conclusion. Funds flowed into the Transaction Account in various amounts at irregular intervals and in general were distributed within a few days of receipt. The Bank's understanding of the position no doubt developed over the course of time and I would accept that it must have been aware that AMJ was willing to resort to improper means to obtain control over consignments of cotton so as to enable it to sell them on to its own buyers. However, for the purposes of this argument it is necessary to consider its state of mind at the time of each receipt of funds and if the judge's finding stands, it is fatal to the suggestion that the Bank had grounds for suspicion that any particular remittance represented the fruits of an unlawful transaction.

46. Mr. Gruder sought to persuade us that the judge's finding was wrong, but the main difficulty facing him is the fact that the evidence at trial was not directed to the Bank's state of mind at any time other than that at which it made its call under the guarantee. The documents may show that by October 1998 the Bank had some grounds for thinking that things might have gone awry and consistently with that its witnesses were cross-examined in general terms about the propriety of making a demand in circumstances where there might be a double recovery, but no attempt was made to investigate the state of mind of the relevant employees at the time of any particular receipt of funds. That is perhaps not surprising given the nature of Uzinterimpex's primary case, but it means that there is no evidential basis for asking this court to find that the Bank received any particular funds paid into the Transaction Account with knowledge of a kind that would make its retention of them unconscionable. Nor is there any evidential basis for a finding that it acquired such knowledge before they were distributed. For this reason the claim based on knowing receipt of trust property must fail. For the same reasons the submission that the Bank dishonestly assisted in a breach of trust by AMJ cannot succeed either.

(c) The claim in conversion - mitigation

47. The judge held that, although by refusing to release the documents of title to cotton still held in warehouses in various ports in Europe and the Middle East the Bank had converted the goods, Uzinterimpex had acted unreasonably and in breach of its duty to mitigate by refusing to agree to the sale of the goods and the payment of the proceeds of sale into a joint account to abide the resolution of the dispute. He therefore held that that it was not entitled to recover damages in respect of any loss incurred after mid-September 2000 when it should have agreed to the Bank's proposal.

48. In seeking to challenge that aspect of the judge's decision Mr. Gruder submitted that there was no duty on Uzinterimpex to co-operate with the Bank in the disposal of its own property. He submitted that Uzinterimpex was entitled to maintain its demand for the return of the goods and that the Bank failed to comply with it at its peril. He also submitted that the judge was wrong to find that it had acted unreasonably having regard to the circumstances then existing and the nature of the relationship between the parties.

(i) Did Uzinterimpex fail to act reasonably?

49. It is convenient to dispose of the second of these two arguments first. As a general rule the victim of an unlawful act has a duty to take reasonable steps to ensure that any damage he suffers as a result is kept to a minimum. This is described in *McGregor on Damages*, 17th ed. paragraph 7-015 as 'the rule as to avoidable loss', for which the well-known passage in the speech of Viscount Haldane L.C. in ***British Westinghouse Co. v Underground Railway*** [1912] A.C. 673 at 689 is cited as authority. Whether any duty to mitigate arose in the present case is a question of law to which I shall return, but if it does, whether Uzinterimpex acted reasonably to avoid loss depends on the circumstances of the case and is therefore a matter of fact. Thus **in *Payzu Ltd v Saunders*** [1919] 2 K.B. 581 Bankes L.J. said at page 588

"It is plain that the question what is reasonable for a person to do in mitigation of his damages cannot be a question of law but must be one of fact in the circumstances of each particular case."

and Scrutton L.J. said at page 589

"Mr. Matthews has contended that in considering what steps should be taken to mitigate the damage all contractual relations with the party in default must be excluded. That is contrary to my experience. In certain cases of personal service it may be unreasonable to expect a plaintiff to consider an offer from the other party who has grossly injured him; but in commercial contracts it is generally reasonable to accept an offer from the party in default. However, it is always a question of fact. About the law there is no difficulty."

50. In the present case the cotton was held in warehouses where it was incurring storage charges and was also at risk of deterioration. It was a commercial commodity, Uzinterimpex's only interest in it being to realise its value on the open market, and as in the case of all such commodities, fluctuations in the market could also be expected to affect its value. The present dispute as to ownership of the goods arose in a purely commercial context and is of a kind that is often encountered in international trade. It most commonly takes the form of a dispute between buyer and seller as to whether goods or documents tendered under a contract conform to its terms. The solution frequently adopted is to sell the goods 'for the account of whom it may concern' and for the parties or their legal representatives to hold the proceeds in a secure manner pending the resolution of the dispute. In the present case the dispute lay between the seller and the bank financing the purchase, but in substance it was of the same kind and amenable to the same solution. Whether it was unreasonable for Uzinterimpex to refuse to agree to a sale of the cotton was a matter of judgment based on an evaluation of all the evidence and on a matter of that kind an appellate court cannot properly interfere with the judge's decision unless it is satisfied that it was plainly wrong.

51. There was a suggestion in Mr. Gruder's submissions that the judge had placed too high a burden on Uzinterimpex when considering whether it had acted reasonably in all the circumstances. It is trite law, however, that the burden on the victim of a wrongful act to take steps to minimise his loss is not a heavy one – see the well-known passage in the speech of Lord MacMillan in ***Banco do Portugal v Waterlow*** [1932] A.C. 452 at page 506 – and I am confident that the judge had the principle well in mind. He thought that the question whether the Bank had a proprietary interest of some kind in the cotton was not straightforward. I am not sure I would agree with that. Having rejected the documents, the Bank could only hold them for Uzinterimpex's account, as the arbitrators subsequently held, and therefore Uzinterimpex had some justification for thinking that the Bank had embarked on a cynical attempt to improve its own position. It had, after all, adopted contradictory positions, first insisting that it had no interest in the cotton, then at the last minute asserting that it had. However, I do not think that significantly affects the matter. Self-interested conduct of that kind, though unattractive, is not unknown in the world of commerce and rarely justifies a complete breakdown in relations. Commercial institutions, including banks and those who trade in commodities, are in business to make money and in the absence of fraud generally find it more rewarding to maximise their profits and minimise their losses in whatever way is open to them rather than to stand on principle.

52. Equally, I do not think that there is much force in the argument that it was unreasonable to expect Uzinterimpex to enter into negotiations with a thief (to use Mr. Gruder's own expression). However badly the Bank may be thought to have behaved, it was asserting an interest in the goods, had not permanently deprived Uzinterimpex of them and was not seeking to extort money from it as the price of their release. It was merely suggesting that the goods be converted into money so as to preserve their value for the benefit of whichever party should ultimately prove to be entitled to them. The cotton itself had no intrinsic quality other than that of a commodity whose value could be realised by sale in the open market and it is unlikely that the court would have granted an order for specific delivery in any event. The fact that the Bank had made a claim under the guarantee to recover the price paid in advance seems to me to be neither here nor there when it came to deciding how best to preserve the value of the cotton as a commercial asset.

53. The judge found that Uzinterimpex's attitude to the Bank was coloured by a lack of faith and confidence and one can see why that should have been so. I can understand, moreover, why Mr. Gruder submitted that the relationship was further soured by the tone of the correspondence emanating from the Bank's solicitors. Nonetheless, it would have been a simple matter to arrange for the proceeds of sale to be paid into an account over which neither party had independent control, thereby ensuring that Uzinterimpex's position was fully protected. Similarly, Uzinterimpex's concern about the manner and timing of any sale need not have prevented the disposal of the cotton if the parties had been willing to co-operate in a sensible way. In the end the judge had to decide whether objections based on practical considerations of that kind were strong enough, taken in conjunction with Uzinterimpex's other objections, to justify its refusal to accede to the disposal of the goods. He came to the clear conclusion that they were not, and I am not persuaded that on the evidence before him his decision was wrong.

(ii) Does conversion give rise to a duty to mitigate?

54. Although there was a dispute about the date on which the Bank had converted the goods, the judge accepted Uzinterimpex's argument that the wrongful act had occurred on 17th April 2000 when the injunction was discharged and the Bank first asserted a right over them. He therefore took their value on that date as the starting point for calculating the loss which took two forms: the direct loss arising from the interference with Uzinterimpex's rights in the goods themselves and consequential losses in the form of deterioration, market losses and the storage charges which continued to accrue while Uzinterimpex was prevented from dealing with them.

55. Mr. Gruder's primary argument was that Uzinterimpex was under no duty to mitigate its loss in this case because of the nature of the wrongful act on which the claim is based. If that is right, it can only be because there is a special rule applicable to the tort of conversion or because the nature of the loss is not capable of being reduced by any subsequent actions of the victim. To say that a person whose goods have been wrongfully seized by another is not obliged to negotiate with the person who has taken them, which is one way in which Mr. Gruder put the submission, has some attraction, but only because in many cases it will be unreasonable to expect him to do so. That is particularly true if one takes as an example the person whose property is stolen by a thief. Is he obliged to negotiate with the thief to purchase its return? Probably not, because it would be offensive to ordinary notions of morality to expect him to do so, but, if he had the chance to recapture his property without risk to himself, he might reasonably be expected to take it. All this indicates that arguments of the kind under consideration are not really directed at the existence of a duty to mitigate but at the nature of the duty and the kind of action that the victim can reasonably be expected to take to avoid or reduce his loss.

56. There was a certain amount of debate in the course of argument about whether mitigation should be understood in terms of causation. For my own part I accept that it can be viewed in that way, but I am not sure that to do so adds greatly to one's understanding of the principles. If one analyses a failure to mitigate in terms of a new event which breaks the chain of causation between the wrongful act and the subsequent loss, it is necessary to recognise that the way in which the test of a new supervening cause has traditionally been formulated must be adapted or applied so as to take into account the relatively undemanding level of the duty to mitigate which the law imposes on the victim of a wrongful act. It may be that in this case it sharpens one's appreciation of the issues to view mitigation through the prism of causation, but Mr. Gruder's primary purpose in doing so was to provide him with a way in to an argument based on section 11 of the Torts (Interference with Goods) Act 1977.

57. Section 11 of the Torts (Interference with Goods) Act 1977 provides that contributory negligence is no defence in proceedings founded on conversion. Approaching the question as one of causation, therefore, Mr. Gruder sought to draw a distinction between cases in which the wrongdoer's action remains a cause of continuing loss and cases where the victim's failure to mitigate represents the *sole* cause of the continuing loss. He submitted that in this case the conversion was a continuing act and that therefore while the Bank retained the documents its action remained a continuing and effective cause of loss, even if Uzinterimpex's refusal to agree to a sale of the goods also had some causative effect. He therefore submitted that any failure on the part of Uzinterimpex to act reasonably in response to the Bank's action is therefore properly to be categorised as negligence which contributes to the damage rather than a new intervening cause, but since section 11 requires the court in an action for conversion to ignore negligence which merely contributes to the eventual loss, it must therefore disregard any failure to mitigate.

58. That is an ingenious argument, but one that I am unable to accept. In my view the primary purpose of section 11 was to settle any doubt as to whether a claimant's failure to take care of his own property provides a partial defence to a claim in conversion against a person who appropriates it without any right to do so. A classic example might be the person who carelessly leaves his bicycle unlocked, thereby enabling a thief to steal it. However, whether that is right or not, I do not think that section 11 can have any bearing on the existence of a duty to mitigate. If one analyses mitigation in terms of causation, a failure to mitigate must be viewed as a new intervening cause which breaks the link between the wrongful act and the continuing loss, thereby releasing the wrongdoer from liability for subsequent loss. The concept of contributory negligence, on the other hand, rests on the assumption that the fault of the original wrongdoer and the fault of the victim both contribute to the loss and are both causally related to it. Contributory negligence and the failure to mitigate are therefore mutually inconsistent concepts as regards the same loss.

59. An important plank in Mr. Gruder's argument was his submission that a person whose property is converted is not bound to relinquish his title to the property in mitigation of his loss, in support of which he drew our attention to the case of ***Strutt v Whitnell*** [1975] 1 W.L.R. 870. That case concerned the sale of a house under a contract providing for vacant possession on completion, notwithstanding that it was in fact occupied by a protected tenant who in the event declined to leave. The vendor offered to accept a reconveyance of the house, but that offer was refused by the purchaser who brought an action for breach of contract. The vendor contended that the purchaser had failed to mitigate by refusing his offer to accept a reconveyance, but the court rejected that argument on the grounds that where the purchaser's only remedy was to recover damages for breach of contract he was not bound to take steps that would deprive him of his right to retain the property and recover damages for the breach of contract.

60. The decision in ***Strutt v Whitnell*** was criticised by this court in ***Sotiros Shipping Inc. and Aeco Maritime S.A. v Sameiet Solholt (The 'Solholt')*** [1983] 1 Lloyd's Rep. 605 which regarded it as *"a decision which turned on reasonableness and its own special facts."* It cannot, therefore, be regarded as authority for any general proposition of law, simply as an example of the operation in particular circumstances of the general duty on the claimant to take reasonable steps to mitigate his loss. Nonetheless, it is worth noting that the vendors' offer, if accepted (and assuming that it was an offer to accept a reconveyance at the market price), would not truly have reduced the purchaser's loss at all; it would merely have provided him with a remedy of equal value in a different form by giving the him the full value of the house with vacant possession in cash instead of leaving him with the property subject to a protected tenancy and the difference in cash. Cairns L.J. made the point in the following way at page 873B-D:

"The circumstances here were that the only remedy in law which the plaintiff initially had for the breach of contract was a right of action in damages. If it be said that an alternative remedy was offered to him by the defendants of selling the house back to them I would say that the plaintiff was not bound to choose between the two remedies. It

*seems to me that if Mr. Scrivener's contentions were right it would logically follow that if the offer that had been made by the defendants had been not "**We will take the house back**" but "We **will pay you £1,900 damages**" and the plaintiff had then, for some reason, refused that offer and had brought an action for damages it could be said that he ought to have accepted the offer and thereby mitigated his damages and therefore he was entitled to nothing at all. That cannot be. Clearly what would happen in those circumstances would be that the defendants, if they were wise, would make a payment into court of the £1,900 and the plaintiff would suffer in respect of costs. But it could not possibly be suggested that the refusal to accept the offer, even if such refusal were wholly capricious, was something that deprived the plaintiff of his right to substantial damages altogether."*

61. For the same reason I would accept Mr. Gruder's submission that a person whose property has been stolen is not bound *in the exercise of his duty to mitigate* to accept an offer from the thief to pay him the value of the property, since such an offer does not mitigate the loss; it merely involves an acknowledgment of the thief's liability and an offer to pay damages accordingly. Even in a case where the claimant seeks an order for delivery up of the property, it does no more than offer an alternative remedy of the same monetary value. The claimant is not bound to choose between these two remedies because to do so would not reduce his loss, though as Cairns L.J. pointed out, he might well incur liability for the costs of any proceedings if the outcome was not more advantageous than that which he had been offered. However, considerations of that kind do not arise in this case and in my view little assistance can be derived from ***Strutt v Whitnell***.

62. In ***General and Finance Facilities Ltd v Cooks Cars (Romford) Ltd*** [1963] 1 W.L.R. 644 at pages 648-651 Diplock L.J. described the distinctions between the causes of action at common law in detinue and conversion. He described conversion as a personal action based on a single wrongful act which gave rise to a judgment for damages normally assessed by reference to the value of the goods at the date of the conversion. A claim in detinue, on the other hand, gave rise to an order for delivery up of the goods or payment of their value and might eventually lead to an order for specific delivery in a case where damages were not an adequate remedy. However, it would be unusual for the court to make such an order in respect of goods whose only value is as a commercial commodity.

63. If that description of the position remained correct, notwithstanding the abolition of detinue and the extension of the remedies for conversion brought about by sections 2 and 3 of the Torts (Interference with Goods) Act, it might be argued that following the conversion of his goods the claimant came under no duty to mitigate the proprietary element of his loss since he is to be regarded as having been deprived of his property once and for all at the time of the conversion, a consequence that no subsequent action on his part could undo. However, that would be to ignore the fact that in many cases (of which the present is an example) the claimant is deprived of his property temporarily rather than permanently. It has long been recognised that if the claimant in conversion recovers his property or any part of it, he must give credit for the value of what he has recovered. That being the case, it is difficult to see why a person who has been deprived of his property should not be expected to take reasonable steps to recover it, thereby reducing the loss that he would otherwise suffer. Moreover, in the light of sections 2 and 3 of the Act it may now be more appropriate to regard a temporary interference with goods of the kind that occurred in this case as a new form of continuing conversion. As a matter of principle, therefore, there would seem to be no reason why a duty to mitigate the proprietary element of the loss should not arise whenever property is converted, although in many cases there will be little that the claimant can or can reasonably be expected to do to recover his property or ensure that its value is not diminished if and when he is able to recover it. The position in relation to consequential loss is even clearer: there is no reason in principle why the claimant should not take all reasonable steps to ensure that the losses he suffers as a result of being deprived of his property, whether permanently or temporarily, are kept to a minimum and every reason why he should.

64. Quite apart from that, however, developments in the law relating to the assessment of damages for conversion have rendered any argument based on a strict proprietary view of the nature of the cause of action unsustainable. The changes brought about by the Torts (Interference with Goods) Act added weight to the view that had been expressed in earlier authorities that damages for proprietary torts should reflect the loss suffered by the claimant as a result of the wrong and should not be subject to artificial rules based on the value of the goods at any particular date. In ***IBL v Coussens*** [1991] 2 All E.R. 133 the claimant sought to recover from the defendant two cars which had been provided for his use while he was employed as its managing director. Following the termination of his employment he failed to return the cars to the company which sued him in conversion seeking to recover the vehicles. The claimant contended that damages should be assessed by reference to the value of the vehicles at the date of judgment; the defendant contended that they should be assessed by reference to their value at the date of conversion, being the date on which he first refused to redeliver them to the company. Neill L.J. considering the effect of the Act said at page 139:

*"An examination of the provisions of the 1977 Act in the light of the existing rules of the common law indicates that when making an award of damages under s 3 of the 1977 Act the court is faced with a number of competing considerations. These considerations include: (a) the fact that the tort of detinue has been abolished, (b) the fact that the remedies now available for the tort of conversion (hitherto a purely personal action) have in effect extended the scope of the tort so that a proprietary claim can be asserted; (c) the general rule that where goods have been irreversibly converted their value is assessed at the date of conversion. It may be noted, however, that even where goods are articles of ordinary commerce the damages may be assessed by reference to the cost of replacement goods if the cost has increased between the date of conversion and the date when the plaintiff, acting reasonably, ought to have obtained the replacement: cf **Emp Exportadora de Azucar v Industria Azucarera Nacional SA, The Playa***

Larga and Marble Islands *[1983] 2 Lloyd's Rep 171; (d) the former general rule that in detinue the value of the goods detained was assessed at the date of judgment; (e) the fact that after conversion the value of goods may fall instead of rise.*

I have come to the conclusion that if one takes account of all these considerations and the fact that several different remedies are available under s 3 of the 1977 Act it is not possible, or indeed appropriate, to attempt to lay down any rule which is intended to be of universal application as to the date by reference to which the value of goods is to be assessed. The method of valuation and the date of valuation will depend on the circumstances."

65. Nicholls L.J. expressed himself in similar terms as follows at page 144:

"Once it is kept in mind that there is no absolute rule regarding the date as to which the goods are to be valued, the difficulties in the interpretation and application of s.3 substantially disappear. The sum to be specified in the present case as payable by the defendant as the alternative to returning the two cars is to be calculated by reference to the value of the cars at such date as will fairly compensate the plaintiff for its loss if the defendant chooses to pay the sum and keep the cars.

This conclusion involves interpreting the references in s 3 to ***'damages by reference to the value of the goods'*** *as not compelling the court always to assess such damages by reference to the up-to-date value of the goods. In other words, for it comes to much the same, the statute leaves at large the date as at which the value of the goods is to be determined. In my view that is the proper construction of this section. Nowhere does the Act expressly state a date as at which the value of the goods is to be assessed. To construe the references to the value of goods as being by implication references only to the up-to-date value would fly in the face of the need for damages to be assessed in a sum which represents the true loss suffered by the plaintiff by reason of the defendant's act."*

66. When the matter arose for consideration by the House of Lords in ***Kuwait Airways Corpn v Iraqi Airways Co (Nos 4 & 5)*** [2002] 2 A.C. 883 Lord Nicholls (with whom Lord Hoffmann and Lord Hope agreed), having referred to ***IBL v Coussens***, affirmed the approach taken in that case to the assessment of damages for conversion in these terms:

"67. I have no hesitation in preferring and adopting this view of the present state of the law. The aim of the law, in respect of the wrongful interference with goods, is to provide a just remedy. Despite its proprietary base, this tort does not stand apart and command awards of damages measured by some special and artificial standard of its own. The fundamental object of an award of damages in respect of this tort, as with all wrongs, is to award just compensation for loss suffered. Normally ("prima facie") the measure of damages is the market value of the goods at the time the defendant expropriated them. This is the general rule, because generally this measure represents the amount of the basic loss suffered by the plaintiff owner. He has been dispossessed of his goods by the defendant. Depending on the circumstances some other measure, yielding a higher or lower amount, may be appropriate. The plaintiff may have suffered additional damage consequential on the loss of his goods. Or the goods may have been returned."

67. Once it is accepted that the correct measure of damages in a case of conversion is that which will provide just compensation for loss suffered by the claimant having regard to the particular circumstances of the case, it is impossible to ignore the claimant's own conduct in relation to that loss, since, if he has failed to take advantage of an opportunity reasonably available to him to avoid it in whole or in part, it will be difficult for him to justify requiring the defendant to pay compensation for a loss that could not fairly be attributed to his wrongful act.

68. Finally, it should be noted that Mr. Gruder's argument assumes that a claimant in conversion has an inalienable right to recover the property in question, but in fact that is generally not the case. As Diplock L.J. pointed out in his judgment in ***General and Finance Facilities Ltd v Cooks Cars (Romford) Ltd***, to which I referred earlier, historically the cause of action in conversion was a claim in personam which gave rise to a money judgment only, and although the remedies for conversion now include an order for specific delivery, it would be unusual for the court to make such an order in respect of goods whose only value is as a commercial commodity. Even a successful claim in detinue would not necessarily lead to a judgment for delivery up of the goods. In general the law provides a monetary remedy in the form of damages, except in those cases where the nature of the property in issue renders that inadequate.

69. For these reasons I have reached the conclusion that in principle a duty to avoid or minimise loss arises when goods are converted in the same way as in the case of other legal wrongs. Whether it will be possible to achieve that end will depend on the circumstances of the case and the nature of the loss flowing from the wrongful act, but the person whose goods have been wrongfully interfered with must do what he reasonably can to keep the loss to a minimum. The duty to avoid or minimise, where possible, the loss flowing from a wrongful act is an important principle of the common law and I can see no reason why it should be subject to an exception in this case.

70. For these reasons I would dismiss the appeal.

Lord Justice Laws:

71. I agree.

Sir Anthony Clarke MR:

72. I also agree.

Mr. Jeffrey Gruder Q.C. and Miss Philippa Hopkins (instructed by Stitt & Co) for the appellant
Mr. Stephen Phillips Q.C. and Mr. Michael Lazarus (instructed by Jones Day) for the respondent