Privy Council Appeal No. 56 of 1986

Yuen Kun Yeu and Others *Appellants*

v.

The Attorney General for and on behalf of the Commissioner of Deposit-taking Companies *Respondent*

FROM

THE COURT OF APPEAL OF HONG KONG

JUDGMENT OF THE LORDS OF THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL, DELIVERED THE 10TH JUNE 1987

Present at the Hearing:

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

*[Delivered by **Lord Keith of Kinkel**]*

This is an appeal from an order of the Court of Appeal of Hong Kong made on 7th March 1986, whereby that court dismissed an appeal by the plaintiffs (the present appellants) against an order dated 9th July 1985 of Jones J. in the High Court of Hong Kong directing that the plaintiffs' statement of claim be struck out under R.S.C. Order 18 Rule 19 as disclosing no reasonable cause of action. The appeal is brought with leave of the Court of Appeal.

The appellants are four residents in Hong Kong who between August and December 1982 made substantial deposits with a registered deposit-taking company called American and Panama Finance Company Limited. The company went into liquidation on 25th February 1983 and as a result the appellants have lost all the money which they deposited with it. The respondent is the Attorney-General of Hong Kong as representing the Commissioner of Deposit-Taking Companies. The appellants' claim against him is for damages on the ground of negligence in the discharge of the Commissioner's functions under the Deposit-taking Companies Ordinance (Cap. 328). An alternative

ground of breach of statutory duty was not argued. The damages claimed are quantified by reference to the amount of the appellants' lost deposits with interest at the rates contracted for.

The Ordinance was originally enacted in 1976 and has since been amended on a number of occasions. The preamble reads:-

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

By section 3A of the Ordinance the Commissioner of Banking (appointed under section 4 of the Banking Ordinance) is appointed to be Commissioner of Deposit-taking Companies. Part III of the Ordinance places a number of restrictions on the taking of deposits, and these are fortified by criminal sanctions. In particular, section 6(1) prohibits the carrying on of the business of taking deposits except by a company which is either a registered deposit-taking company or a licensed deposit-taking company. Part IV deals with the registration of deposit-taking companies, requiring by section 9 that applications for registration should be accompanied by various documents relating to the company's business. Section 10(1) provides for the registration by the Commissioner of a company as a deposit-taking company on receipt of an application satisfying section 9, but section 10(2) requires him to refuse registration in a number of circumstances including, by paragraph (e), "if it appears to the Commissioner that, by reason of any circumstances whatsoever, the company is not a fit and proper body to be registered". Under section 12 the Commissioner is to maintain a register of deposit-taking companies. The register is to be open to inspection by members of the public, along with documents lodged by the company on application for registration or annually under section 17, which covers such matters as profit and loss accounts and balance sheets, with auditor's reports. Section 13 requires the Commissioner to publish in the Gazette at least once a year the names of all registered deposit-taking companies. Under section 14 the Commissioner may, subject to giving the company an opportunity of making representations, revoke the registration of a deposit-taking company in certain specified events. These include (paragraph (d)) "[if] it appears to him that (i) the company is not a fit and proper body to be registered".

Part V contains detailed provisions in regard to the obligations of deposit-taking companies, fenced with criminal sanctions. These include: section 17: to lodge accounts annually with the Commissioner;

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

Part VI of the Ordinance, headed "Miscellaneous" deals with a variety of matters, including secrecy (section 25), criminal liability for false or negligent misrepresentation (section 28), liability in tort for such misrepresentation (section 29), criminal liability of directors and other officers (section 31), examination by the Commissioner of the affairs of a deposit-taking company (section 31A), rights of appeal to the Governor in Council against refusal to register and revocation or suspension of registration (section 34), and investigation of a deposit-taking company by a person appointed by the Financial Secretary (section 38). It is to be observed that by amendment introduced in 1983, after the events giving rise to the present litigation, it

is provided (section 41) that no liability shall be incurred by the Financial Secretary or the Commissioner as a result of anything done or omitted to be done by him in the *bona fide* exercise of any functions under the Ordinance.

Part VII of the Ordinance contains a number of provisions concerned with the revocation and suspension of the registration of a deposit-taking company. Under section 45 the Commissioner may suspend the registration of a deposit-taking company for up to 14 days in circumstances of urgency, and under section 46 he may in other cases and subject to section 47 suspend registration for a period not exceeding 6 months. Section 47 requires an opportunity of being heard to be afforded to a company before its registration is revoked or suspended. Section 49 provides for publication in the Gazette of notice of revocation or suspension.

In their amended Statement of Claim, the averments in which must for present purposes be taken to be true, the appellants say that they made their respective deposits with the American and Panama Finance Company Limited "in reliance upon the fact that the Company had been registered by the Commissioner under the Ordinance and that (i) the Company was therefore a fit and proper body to be registered; (ii) the Company was therefore subject to the prudential supervision of the Commissioner; (iii) the Company would continue to be subject of such prudential supervision, and did so continue"; and also in reliance upon certain statements by the Financial Secretary and the Commissioner which led the appellants to believe in the financial probity of deposit-taking companies (including the Company) and in the Commissioner's powers actually to control and regulate them.

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

The allegations of fault against the Commissioner are, in substance, that he knew or ought to have known, had he taken reasonable care, that the affairs of the company were being conducted fraudulently, speculatively and to the detriment of its depositors; that he failed to exercise his powers under the Ordinance so as to secure that the company complied with the obligations and restrictions thereby imposed upon it (a considerable number of which are alleged to have been breached); and that he should either never have registered the company as a deposit-taking

company or have revoked its registration before the appellants made their respective deposits with it, so as to save them from losing their money when the company eventually went into liquidation.

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

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

The argument for the appellants in favour of an affirmative answer to the question started from the familiar passage in the speech of Lord Wilberforce in *Anns v. Merton London Borough Council* [1978] A.C. 728, 751:-

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

> considerations which ought to negative, or to reduce or limit the scope of the duty or the class of person to whom it is owed or the damages to which a breach of it may give rise:"

This passage has been treated with some reservation in subsequent cases in the House of Lords, in particular by Lord Keith of Kinkel in *Governers of the Peabody Donation Fund v. Sir Lindsay Parkinson & Co. Ltd.* [1985] A.C. 211, 240, by Lord Brandon of Oakbrook in *Leigh and Sillivan Ltd. v. Aliakmon Shipping Co. Ltd.* [1986] A.C. 785, 815, and by Lord Bridge of Harwich in *Curran v. N.I. Co-ownership Housing Assn.* [1987] 2 All E.R. 1, 17. The speeches containing these reservations were concurred in by all the other members of the House who were party to the decisions. In *Sutherland Shire Council v. Heyman* (1985) 59 A.L.J.R. 564 Brennan J., in the High Court of Australia, indicated his disagreement with the nature of the approach indicated by Lord Wilberforce, saying at p. 588:-

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

Their Lordships venture to think that the two stage test formulated by Lord Wilberforce for determining the existence of a duty of care in negligence has been elevated to a degree of importance greater than it merits, and greater perhaps than its author intended. Further, the expression of the first stage of the test carries with it a risk of misinterpretation. As Gibbs C.J. pointed out in *Sutherland Shire Council v. Heyman (supra)* at page

570, there are two possible views of what Lord Wilberforce meant. The first view, favoured in a number of cases mentioned by Gibbs C.J., is that he meant to test the sufficiency of proximity simply by the reasonable contemplation of likely harm. The second view, favoured by Gibbs C.J. himself, is that Lord Wilberforce meant the expression "proximity or neighbourhood" to be a composite one, importing the whole concept of necessary relationship between plaintiff and defendant described by Lord Atkin in *Donoghue v. Stevenson* [1932] A.C. 562, 580. In their Lordships' opinion the second view is the correct one. As Lord Wilberforce himself observed in *McLoughlin v. O'Brian* [1983] 1 A.C. 410, 420, it is clear that foreseeability does not of itself, and automatically, lead to a duty of care. There are many other statements to the same effect. The truth is that the trilogy of cases referred to by Lord Wilberforce each demonstrate particular sets of circumstances, differing in character, which were adjudged to have the effect of bringing into being a relationship apt to give rise to a duty of care. Foreseeability of harm is a necessary ingredient of such a relationship, but it is not the only one. Otherwise there would be liability in negligence on the part of one who sees another about to walk over a cliff with his head in the air, and forebears to shout a warning.

Donoghue v. Stevenson (supra) established that the manufacturer of a consumable product who carried on business in such a way that the product reached the consumer in the shape in which it left the manufacturer, without any prospect of intermediate examination, owed the consumer a duty to take reasonable care that the product was free from defect likely to cause injury to health. The speech of Lord Atkin stressed not only the requirement of foreseeability of harm but also that of a close and direct relationship of proximity. The relevant passages are at pp. 580, 581 and 582:-

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

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

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

Lord Atkin clearly had in contemplation that all the circumstances of the case, not only the foreseeability of harm, were appropriate to be taken into account in determining whether a duty of care arose.

Hedley Byrne & Co. Ltd. v. Heller & Partners Ltd. [1964] A.C. 465 was concerned with the assumption of responsibility. On the facts of the case no liability was held to exist because responsibility for the advice given had been disclaimed, but there was established the principle that a duty of care arises where a party is asked for and gives gratuitous advice upon a matter within his particular skill or knowledge and knows or ought to have known that the person asking for the advice will rely upon it and act accordingly. In such a case the directness and closeness of the relationship between the parties are very apparent.

Dorset Yacht Co. Ltd. v. Home Office [1970] A.C. 1004 was an example of the kind of situation where a special relationship between a defendant and a third party gives rise to a duty on the part of the defendant to take reasonable care to control the third party so as to prevent him causing damage to the plaintiff. Some Borstal boys, under the supervision of prison officers, were encamped on an island off which yachts were moored. Some of the boys, in an attempt to escape from the island, boarded a yacht and manoeuvred it so as to damage another. This was the very thing that might reasonably be foreseen as likely to happen if the prison officers did not take reasonable care to control the activities of the boys. The relationship of the officers to the boys was analogous to that between parent and children, a relationship described by Dixon J. in *Smith v. Leurs* (1945) 70 C.L.R. 256, at pages 261 and 262 as capable of giving rise to a duty of control, saying:-

> "... apart from vicarious responsibility, one man may be responsible to another for the harm done to the latter by a third person; he may be responsible on the ground that the act of the third person could not have taken place but for his own fault or breach of duty. There is more than one description of duty the breach of which may produce this consequence. For instance, it may be a duty of care in reference to things involving special danger. It may even be a duty of care with reference to the control of actions or conduct of the third person. It is, however, exceptional to find in the law a duty to control

> another's actions to prevent harm to strangers. The general rule is that one man is under no duty of controlling another man to prevent his doing damage to a third. There are, however, special relations which are the source of a duty of this nature. It appears now to be recognized that it is incumbent upon a parent who maintains control over a young child to take reasonable care so to exercise that control as to avoid conduct on his part exposing the person or property of others to unreasonable danger. Parental control, where it exists, must be exercised with due care to prevent the child inflicting intentional damage on others or causing damage by conduct involving unreasonable risk of injury to others."

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

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

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

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

The primary and all-important matter for consideration, then, is whether in all the circumstances of this case there existed between the Commissioner and would-be depositors with the Company such close and direct relations as to place the Commissioner, in the exercise of his functions under the Ordinance, under a duty of care towards would-be depositors. Among the circumstances of the case to be taken into account is that one of the purposes of the Ordinance (though not the only one) was to make provision for the protection of persons who deposit money. The restrictions and obligations placed on registered deposit-taking companies, fenced by criminal sanctions, in themselves went a long way to secure that object. But the discretion given to the Commissioner to register or deregister such companies, so as effectively to confer or remove the right to do business, was also an important part of the protection afforded. No doubt it was reasonably foreseeable by the Commissioner that if an uncreditworthy company were placed on or allowed to remain on the register, persons who might in the future deposit money with it would be at risk of losing that money. But mere foreseeability of harm does not create a duty, and future would-be depositors cannot be

regarded as the only persons whom the Commissioner should properly have in contemplation. In considering the question of removal from the register, the immediate and probably disastrous effect on existing depositors would be a very relevant factor. It might be a very delicate choice whether the best course was to deregister a company forthwith or to allow it to continue in business with some hope that, after appropriate measures by the management, its financial position would improve. It must not be overlooked that the power to refuse registration, and to revoke or suspend it, is quasi-judicial in character, as is demonstrated by the right of appeal to the Governor in Council conferred upon companies by section 34 of the Ordinance, and the right to be heard by the Commissioner conferred by section 47. The Commissioner did not have any power to control the day-to-day management of any company, and such a task would require immense resources. His power was limited to putting it out of business or allowing it to continue. No doubt recognition by the company that the Commissioner had power to put it out of business would be a powerful incentive impelling the company to carry on its affairs in a responsible manner, but if those in charge were determined upon fraud it is doubtful if any supervision could be close enough to prevent it in time to forestall loss to depositors. In these circumstances their Lordships are unable to discern any intention on the part of the legislature that in considering whether to register or deregister a company the Commissioner should owe any statutory duty to potential depositors. It would be strange that a common law duty of care should be superimposed upon such a statutory framework.

On the appellants' case as pleaded the immediate cause of the loss suffered by the appellants in this case was the conduct of the managers of the company in carrying on its business fraudulently, improvidently and in breach of many of the provisions of the Ordinance. Another cause was the action of the appellants in depositing their money with a company which in the event turned out to be uncreditworthy. Considerable information about the company was available from the documents required by the Ordinance to be open to public inspection, and no doubt advice could have been readily obtained from investment advisers in Hong Kong. Before the appellants deposited their money with the company there was no relationship of any kind between them and the Commissioner. They were simply a few among the many inhabitants of Hong Kong who might choose to deposit their money with that or any other deposit-taking company. The class to whom the Commissioner's duty is alleged to have been owed must include all such inhabitants. It is true, however, that according to the appellants' averments there had been

available to him information about the company's affairs which was not available to the public and which raised serious doubts, to say the least of it, about the company's stability. That raises the question whether there existed between the Commissioner and the company and its managers a special relationship of the nature described by Dixon J. in *Smith v. Leurs*, and such as was held to exist between the prison officers and the Borstal boys in the *Dorset Yacht* case, so as to give rise to a duty on the Commissioner to take reasonable care to prevent the company and its managers from causing financial loss to persons who might subsequently deposit money with it.

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

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

In *Hedley Byrne & Co. Ltd. v. Heller & Partners Ltd. (supra)* the House of Lords held that a negligent misrepresentation about a customer's credit-worthiness, given in answer to an inquiry, might give

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

Consideration is due to two cases in different jurisdictions which were founded on by the appellants. The earlier in date is *States of Guernsey v. Firth* No. 10 (Civil) (1981), a decision of the Guernsey Court of Appeal (Civil Division) upon the defendants' application to strike out the plaintiff's statement of claim as not disclosing any

cause of action. The Protection of Depositors (Bailiwick of Guernsey) Ordinance 1971 made it an offence to carry on the business of accepting money on deposit unless the person carrying on such business was registered by the States Advisory and Finance Committee. Section 13 of the Ordinance required the Committee from time to time to publish the names and addresses of all registered persons. According to the statement of claim a certain company was registered in 1972 and continued to be so till 31st December 1976. The Committee did not renew the company's registration for 1977, but did not at any time between 1st January 1977 and 31st December 1978 publish a list of registered persons. In the meantime the company continued to carry on business illegally and the plaintiff deposited money with it, which she lost when the company went into liquidation in December 1978. She sued the Committee for damages in respect of the loss on the ground of the latter's breach of their duty under section 13 of the Ordinance in failing to publish any list of registered persons during the two years in question. The Court of Appeal (Sir Godfray Le Quesne Q.C., J.J. Clyde Q.C. and L.H. Hoffman Q.C.) decided that on a proper construction of section 13 the Committee was under a mandatory duty to publish lists of registered persons as often as might be necessary to keep the public reasonably informed, and further, applying *Cutler v. Wandsworth Stadium* [1949] A.C. 398, that the section gave a right of action to any depositor who might suffer loss through its breach. Accordingly the plaintiff had a cause of action against the Committee. The decision was concerned with the construction of an enactment imposing a specific statutory duty which was alleged to have been breached. Their Lordships therefore do not consider it to be in point for the purposes of the present appeal, which is concerned with the existence of a common law duty of care, and do not think it appropriate to express any opinion as to its correctness.

The second case is *Baird v. The Queen* (1983) 148 D.L.R. (3d) 1, a decision of the Federal Court of Appeal in Canada. That case too was concerned with the question whether the plaintiff's pleadings should be struck out as not disclosing a reasonable cause of action. The question was answered in the negative, on the ground that it was not "plain and obvious beyond doubt" that the plaintiffs could not succeed. In that case also the plaintiffs had lost money which they had deposited with a company subject to licensing, inspection and regulation under statute, the Trust Companies Act 1970. That Act placed various duties and conferred certain functions in relation to companies within its scope upon the Minister of Finance and the Superintendent of Insurance. It was alleged that both these

functionaries had failed to perform or negligently performed their statutory duties in a number of respects as regards the company in question. A number of issues of principle were discussed in the judgment of Le Dain J., but he preferred to leave the final decision upon them until after trial on the merits. In these circumstances, and considering that the relevant legislation there was different in important respects from the Hong Kong Ordinance, their Lordships have not derived material assistance from the case.

The final matter for consideration is the argument for the respondent that it would be contrary to public policy to admit the appellants' claim, upon grounds similar to those indicated in relation to police forces by Glidewell L.J. in *Hill v. Chief Constable of West Yorkshire (supra)*. It was maintained that if the Commissioner were to be held to owe actual or potential depositors a duty of care in negligence, there would be reason to apprehend that the prospect of claims would have a seriously inhibiting effect on the work of his department. A sound judgment would be less likely to be exercised if the Commissioner were to be constantly looking over his shoulder at the prospect of claims against him, and his activities would be likely to be conducted in a detrimentally defensive frame of mind. In the result, the effectiveness of his functions would be at risk of diminution. Consciousness of potential liability could lead to distortions of judgment. In addition, the principles leading to his liability would surely be equally applicable to a wide range of regulatory agencies, not only in the financial field, but also, for example, to the factory inspectorate and social workers, to name only a few. If such liability were to be desirable upon any policy grounds, it would be much better that the liability were to be introduced by the legislature, which is better suited than the judiciary to weigh up competing policy considerations.

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

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