Privy Council Appeal No. 34 of 1989

(1) Robert William John Davis and
(2) Joan Irene Davis — *Appellants*

v.

(1) Percy Radcliffe
(2) Geoffrey Crellin
(3) Thomas Edward Kermeen
(4) Edgar John Mann
(5) David Lancelot Moore and
(6) William Dawson — *Respondents*

FROM

THE HIGH COURT OF JUSTICE IN THE ISLE OF MAN STAFF OF GOVERNMENT DIVISION

JUDGMENT OF THE LORDS OF THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL, DELIVERED THE 5TH APRIL 1990

Present at the hearing:-

LORD KEITH OF KINKEL
LORD BRANDON OF OAKBROOK
LORD TEMPLEMAN
LORD GOFF OF CHIEVELEY
LORD LOWRY

*[Delivered by **Lord Goff of Chieveley**]*

This is an appeal from an order dated 29th June 1989 of the Staff of Government Division of the High Court of Justice of the Isle of Man, by which the Division dismissed an appeal by the appellants from an order made by the Acting Deemster (Judge Wingate-Saul Q.C.) dated 7th April 1989, which (1) directed that the appellants' statements of claim and statement of case in two consolidated actions (numbered CLA 1986/35 and CLA 1987/42 respectively) be struck out as disclosing no reasonable cause of action, and (2) dismissed the appellants' application for leave to amend their statement of case. By consent, the Staff of Government Division dismissed the appellants' appeal from the order of the Acting Deemster without argument, and granted leave to appeal to the Privy Council. Effectively, therefore, the appeal to their Lordships is from the reasoned judgment delivered by the Acting Deemster.

The matter has arisen as follows. Savings and Investment Bank Ltd. ("SIB") was incorporated in the Isle of Man on 18th December 1965. Following the coming into force, on 20th May 1975, of the Banking Act 1975 of the Isle of Man ("the Banking Act"), which established a system of licensing banks in the Island, a banking licence was issued to SIB on 24th November 1975. Thereafter SIB carried on business internationally from the Isle of Man, its banking licence being renewed from year to year, until 25th June 1982 when its licence was revoked. On 2nd August 1982 SIB was ordered to be wound up. It was found to have a deficit in excess of £40,000,000.

Many persons, both individuals and corporate bodies, had deposited money with SIB. They came from many countries, but most of them were resident in the Isle of Man. Among them were the two appellants, Robert William John Davis and Joan Irene Davis. They had deposited £7,000 with SIB on 13th April 1982, for one month. The deposit was renewed on 14th May and on 14th June; and the money was still on deposit with SIB when its banking licence was revoked. It appears that they will recover no more than a small dividend from the liquidator.

The appellants then commenced proceedings by action 1986/35 against eight defendants, claiming damages in respect of their financial loss, which they allege to have been caused by negligence and/or breach of statutory duty on the part of the respondents in connection with the exercise of their duties under the Banking Act. The first seven defendants were individuals who were, at various times, members of the Finance Board of the Isle of Man; the eighth defendant was at all material times the Treasurer of the Isle of Man. It will be necessary in due course to consider the nature of the duties imposed upon the members of the Finance Board and upon the Treasurer under the Banking Act. Subsequently the appellants commenced action 1987/42 against the same defendants, the significant difference between the actions being that the second action was in representative form, being brought on behalf of the appellants and other depositors with SIB whose deposits had not been repaid. Proceedings against two members of the Finance Board were later discontinued. The remaining six defendants are the respondents in this appeal.

Their Lordships turn to the legislative background. The Finance Board was brought into existence by the Finance Board Act 1961. It consists of a Chairman and two other members of Tynwald, to be elected by Tynwald (see section 2(1)). Although the Finance Board is therefore a Board of Tynwald, it was provided (by section 1(3)) that the provisions of the Boards of Tynwald Acts 1952 and 1957 should not apply to the Finance Board; from this it follows that the Finance Board is not a corporate body. The duties of the Board (laid down in section 3) are very wide, including

preparing and submitting to the Governor draft proposals for inclusion in the Budget Statement, and considering all matters of financial policy affecting the present and future prosperity of the Island and advising the Governor thereon. The office of Treasurer was established by section 8. It is there provided that the Treasurer shall be an officer of the Isle of Man Civil Service, to be appointed by the Governor; and by section 9(1) it is provided that the Treasurer shall be adviser to the Governor and the Board on all financial matters.

Under the Banking Act, it became an offence to carry on a banking business in the Isle of Man without a licence, or otherwise than in accordance with the terms of a licence. Detailed provision is made in the Act for the licensing of banks and other related matters. Applications for a licence to carry on a bank have to be made to the Treasurer, in whom is vested the power to issue such a licence, with or without conditions; to refuse a licence; or to revoke a licence previously granted. However the Finance Board is given the power to give to the Treasurer such directions as it thinks fit with regard to the exercise of such powers. The Treasurer is vested with other powers under the Banking Act, including power (with the authority of the Finance Board) to suspend or discontinue the business of a bank; and power to inspect the books and other documents of a bank (with power of entry for that purpose) and to take copies of such documents, as to the exercise of which powers the Finance Board may again give such directions to the Treasurer as it thinks fit. On 30th July 1975 the Finance Board, in the exercise of powers conferred upon it by section 11 of the Act of 1975, issued the Banking Licence Regulations 1975 which were concerned with applications for banking licences, renewal of banking licences, the form of a banking licence, and other related matters. From time to time the Treasurer published guidance notes on applications for banking licences.

Their Lordships turn next to the allegations advanced by the appellants against the respondents in their statement of case (leaving on one side the allegations sought to be advanced by the amendments disallowed by the Acting Deemster). The appellants alleged that the Treasurer and the Board owed statutory duties and/or common law duties to depositors of monies with SIB and to persons who were minded to deposit monies with SIB. These alleged duties were fully particularised. They included, in the case of the Treasurer, a wide variety of duties in relation to the licensing of SIB and the renewal of its licence, and various other duties (including a duty adequately to supervise SIB) to enable him properly to exercise his powers under the Act of 1975 in relation to SIB. The members of the Finance Board were alleged to have owed, to the same persons, the same duties as the Treasurer; further or

alternatively they were in particular under a duty to ensure that the Treasurer discharged his duties. Serious breaches of these alleged duties were alleged, in particulars running to some four pages of the pleadings; and it was alleged that, if such breaches had not occurred, the appellants would not have deposited their money with SIB, or would not have continued their deposits with SIB; alternatively, their deposits would have been repaid in full.

Their Lordships feel great sympathy for those who, like the appellants, have deposited substantial sums of money with a bank in the confident expectation that a bank is a safe place for their money, only to find that the bank has become insolvent and that the most they can expect to receive is a small dividend payable in its winding-up. But when it is sought to make some third person responsible in negligence for the loss suffered through the bank's default, the question whether that third person owes a duty of care to the depositor has to be decided in accordance with the established principles of the law of negligence. In the present case the Acting Deemster, having reviewed the authorities with care, concluded that neither the members of the Finance Board nor the Treasurer owed any such duty to the appellants, and so struck out their statement of case as disclosing no reasonable cause of action. Their Lordships are in no doubt that the Acting Deemster was right to reach that conclusion, substantially for the reasons given by him. Indeed they are in agreement with him that the present case is, for all practical purposes, indistinguishable from the decision of their Lordships' Board in *Yuen Kun Yeu v. The Attorney-General for Hong Kong* [1988] A.C. 175. For this reason, they can express their reasons relatively briefly.

Since the decision of the House of Lords in *Anns v. London Merton Borough Council* [1978] A.C. 728, there have been a number of decisions of the House of Lords and of the Privy Council in which the basis for liability for negligence has been reassessed and restated. It is now clear that foreseeability of loss or damage provides of itself no sufficient criterion of liability, even when qualified by a recognition that liability for such loss or damage may be excluded on grounds of policy. On the contrary, as appears in particular from the speech of Lord Keith of Kinkel in *Governors of The Peabody Donation Fund v. Sir Lindsay Parkinson & Co. Ltd.* [1985] A.C. 210 at pages 240-241, it is also necessary to establish what has long been given the label of "proximity" - an expression which refers to such a relation between the parties as renders it just and reasonable that liability in negligence may be imposed on the defendant for loss or damage suffered by the plaintiff by reason of the act or omission of the defendant of which complaint is made. Furthermore it has also been reasserted that it

is not desirable, at least in the present stage of development of the law, to attempt to state in broad general propositions the circumstances in which such proximity may or may not be held to exist. On the contrary, following the expression of opinion by Brennan J. in *The Council of the Shire of Sutherland v. Heyman and Another* (1985) 59 A.L.J.R. 564, at page 588, it is considered preferable that "the law should develop novel categories of negligence incrementally and by analogy with established categories". This process, which is of particular importance in cases where the plaintiff is claiming damages in respect of purely financial loss, has been seen at work in a number of recent cases.

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

First, it is evident that the functions of the Finance Board, and indeed of the Treasurer, as established by the Finance Board Act 1961, are typical functions of modern government, to be exercised in the general public interest. These functions are, as already indicated, of the broadest kind, for which parallels can doubtless be drawn from other jurisdictions. The functions vested in the Treasurer, and in the Finance Board, by the Banking Act must be seen as forming part of those broader functions. No doubt, in establishing a system of licensing for banks, regard was being had (though this is not expressly stated in the long title of the Act) to the fact that the existence of such a licensing system should provide an added degree of security for those dealing with banks carrying on business in the Isle of Man, including in particular those who deposit money with such banks. But it must have been the statutory intention that the licensing system should be operated in the interests of the public as a whole; and when those charged with its operation are faced with making decisions with regard, for example, to refusing to renew licences or to revoking licences, such decisions can well involve the exercise of judgment of a delicate nature affecting the whole future of the relevant bank in the Isle of Man, and the impact of any consequent cessation of the bank's business in the Isle of Man, not merely upon the customers and creditors of the bank, but indeed upon the future of financial services in the Island. In circumstances such as these, competing considerations have to be carefully

weighed and balanced in the public interest, and, in some circumstances, as Mr. Kentridge observed, it may for example be more in the public interest to attempt to nurse an ailing bank back to health than to hasten its collapse. The making of decisions such as these is a characteristic task of modern regulatory agencies; and the very nature of the task, with its emphasis on the broader public interest, is one which militates strongly against the imposition of a duty of care being imposed upon such an agency in favour of any particular section of the public.

A further consideration which militates against the imposition of a duty of care upon persons in the position of the respondents in the present case is that it is being sought to make them liable in negligence for damage caused to the appellants by the default of a third party, SIB. In the case of physical damage caused by the deliberate wrongdoing of a third party, such liability will only be imposed in limited classes of case, a matter which was recently explored in the speeches of the House of Lords in *Smith v. Littewoods Organisation Ltd.* [1987] A.C. 241. Here it is suggested that such liability should be imposed for purely financial loss flowing from the negligence of a third party. It must be rare that any such liability will be imposed; but in any event it is difficult to see that, in the present case, the respondents possessed sufficient control over the management of SIB to warrant the imposition of any such liability (cf. *Smith v. Leurs* 70 C.L.R. at pages 256-262, per Dixon J.). Certainly, *Anns v. London Merton Borough Council (supra)* does not provide an instance of the imposition of such liability, since the damage in that case was treated as falling within the description of physical damage. Yet another consideration militating against the existence of the alleged duty of care in the present case is that it is said to be owed to an unlimited class of persons, including not only the depositors of money with SIB but also those considering whether to deposit their money with SIB. Their Lordships wish to add that, in the case of the members of the Board, it would be most remarkable if they should be under any such duty of care, bearing in mind that not only do they constitute a Board of Tynwald, responsible to Tynwald, but also that the membership of the Board changes from time to time (as indeed it did during the relevant period in the present case) and that different views may be expressed by different members of the Board present at any particular meeting.

It is at this point that their Lordships turn to *Yuen Kun Yeu v. The Attorney-General for Hong Kong, (supra)*. That case was concerned with a deposit-taking company in Hong Kong, which went into liquidation. Under the Deposit-taking Companies Ordinance of Hong Kong, there was a system of registration of deposit-taking companies, for which the Commissioner of

Deposit-taking Companies was responsible. The plaintiffs had deposited money with the company in question, which was registered by the Commissioner pursuant to the Ordinance. They brought an action for damages against the Attorney General for Hong Kong, representing the Commissioner. They claimed that the Commissioner ought not to have registered the company, or alternatively that he should have revoked its licence; and that by reason of his negligent failure so to act, they had lost their money. A judge of the High Court of Hong Kong ordered that the plaintiffs' statement of claim be struck out as disclosing no reasonable cause of action. His decision was affirmed by the Court of Appeal of Hong Kong, whose decision was in turn affirmed by their Lordships' Board. In delivering the advice of the Board, Lord Keith of Kinkel said (at pages 194-6):-

> "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 plaintiffs' case as pleaded the immediate cause of the loss suffered by the plaintiffs in this case was the conduct of the managers of the company in carrying on its business fraudulently, improvidently and in breach of many of the provisions of the Ordinance. Another cause was the action of the plaintiffs in depositing their money with a company which in the event turned out to be uncreditworthy. Considerable information about the company was available from the documents required by the Ordinance to be open to public inspection, and no doubt advice could have been readily obtained from investment advisers in Hong Kong. Before the plaintiffs deposited their money with the company there was no relationship of any kind between them and the commissioner. They were simply a few among the many inhabitants of Hong Kong who might choose to deposit their money with that or any other deposit-taking company. The class to whom the commissioner's duty is alleged to have been owed must include all such inhabitants. It is true, however, that according to the plaintiffs' averments there had been available to him information about the company's affairs which was not available to the public and which raised serious doubts, to say the least of it, about the company's stability. That raises the question whether there existed between the commissioner and the company and its managers a special relationship of the nature described by Dixon J. in *Smith v. Leurs* (1945), 70 C.L.R. 256-262, and such as was held to exist between the prison officers and the Borstal boys in *Dorset Yacht Co. Ltd. v. Home Office* [1970] A.C. 1004, so as to give rise to a duty on the commissioner to take reasonable care to prevent the company and its

managers from causing financial loss to persons who might subsequently deposit money with it.

In contradistinction to the position in the *Dorset Yacht* case, the commissioner had no power to control the day-to-day activities of those who caused the loss and damage. As has been mentioned, the commissioner had power only to stop the company carrying on business, and the decision whether or not to do so was clearly well within the discretionary sphere of his functions. In their Lordships' opinion the circumstance that the commissioner had, on the plaintiffs' averments, cogent reason to suspect that the company's business was being carried on fraudulently and improvidently did not create a special relationship 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 plaintiffs any duty of care on the principle which formed the ratio of the *Dorset Yacht* case. To hark back to Lord Atkin's words in *Donoghue v. Stevenson* [1932] A.C. 562, 581, there were not such close and direct relations between the commissioner and the plaintiffs as to give rise to the duty of care desiderated."

Now it is true that certain differences can be discerned between that case and the present. On the one hand, the preamble to the Deposit-taking Companies Ordinance, from which the Commissioner derived his functions, reads as follows:-

"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."

No comparable preamble is to be found in the Act of 1975 in the present case. On the other hand the powers of the Commissioner under the Ordinance are, apart from registration, limited to refusing registration, or suspending or revoking registration; whereas, as already indicated, the powers of the Treasurer under the Banking Act are somewhat wider. This was a distinction upon which Mr. Heyman sought to build in his submission to their Lordships on behalf of the appellants. It is however a distinction of which too much can be made. The Commissioner, who has it in his power to suspend or revoke registration, has in practice the ability to induce change without going so far as to exercise either of those powers; and it cannot be said of the Treasurer, or indeed the Board, in the present case that either of them has, any more

than the Commissioner has in relation to the deposit-taking companies, any power to control the day-to-day management of a bank. There is in this respect no material distinction between the two cases.

Mr. Heyman's second ground of distinction was founded upon the fact that the present case is concerned with a bank, as opposed to a deposit-taking company; he suggested that there was a vast difference between banks and deposit-taking companies, and that those who deposited money with a deposit-taking company, as opposed to a bank, were more ready to take risks, with the consequence that depositors with banks were entitled to receive greater protection. Their Lordships however can see nothing in this distinction. In truth, in their Lordships' opinion, there is no material distinction between the two cases.

For these reasons the Acting Deemster was, in their Lordships' opinion, right to hold that the appellants' statement of case disclosed no reasonable cause of action based upon negligence. The Acting Deemster also dismissed, in a terse paragraph, an alternative plea based upon breach of statutory duty, on the principle set out in *Cutler v. Wandsworth Stadium* [1949] A.C. 398. Their Lordships entirely agree with the Acting Deemster's conclusion on this point, which was plainly right.

Their Lordships turn finally to the application by the appellants for leave to amend their statement of case, which was dismissed by the Acting Deemster. The proposed amendments were as follows. First, the appellants sought to add a paragraph 6(9), alleging that the Treasurer supplied a list of licensed banks to the appellants before they made their deposits, and a new paragraph 14A (headed "Reliance of Certain Depositors") alleging that the appellants and certain other depositors made or maintained their deposits with SIB in reliance on the fact that SIB was and remained licensed under the Act and/or the fact that the respondents would competently and diligently exercise their powers and carry out their functions thereunder. Second, they sought to add a new paragraph 6(10), alleging that the Treasurer frequently and publicly stated that the respondents supervised and scrutinised the activities of licensed banks and referred to the confidence generated by the Governor's determination to maintain a high standard of supervision over banks and to protect depositors' interests. They also sought to add a new paragraph 14B (headed "Misrepresentation") alleging that the respondents by stating as aforesaid made a false representation that they owed duties to the depositors or to potential depositors, or that they made a false and negligent misrepresentation that they were carrying out their duties competently and diligently, and closely and adequately supervising SIB; and further alleging that the appellants were induced to make and/or to maintain

their deposits with SIB by reason of one or both of such misrepresentations.

The Acting Deemster refused to allow any of these amendments. The relevant Rule of the High Court is Order 22, Rule 1 which provides as follows:-

> "The Court may, at any stage of the proceedings, allow either party to alter or amend his pleadings in such a manner and on such terms as may be just and all such amendments shall be made as may be necessary for determining the real question in controversy between the parties."

That Rule of Court is in substantially the same terms as the relevant rule of the Supreme Court (Order 20, Rule 5) in force in England before 1964. It was however established in England, at least since *Weldon v. Neal* (1887) 19 Q.B.D. 394, that an amendment would not be allowed setting up a cause of action which, if the writ were issued at the date of the amendment, would be time-barred: see *Marshall v. London Passenger Transport Board* [1936] 3 All.E.R. 83, and *Batting v. London Passenger Transport Board* [1941] 1 All E.R. 228. Even so, in *Gaskell and Chambers Ltd. v. Majestic Hotel Ltd.* 1987-89 M.L.R. 258, the Staff of Government Division held that Order 22, Rule 1 of the Rules of the High Court was "wider and more liberal in scope than the equivalent English rules, which provide specifically for amendments which add a statute-barred cause of action". It is plain however that the Staff of Government Division was referring to the new Order 20, Rule 5(5), which came into force in 1964 and provides as follows:-

> "(5) An amendment may be allowed under paragraph (2) notwithstanding that the effect of the amendment will be to add or substitute a new cause of action if the new cause of action arises out of the same facts or substantially the same facts as a cause of action in respect of which relief has already been claimed in the action by the party applying for leave to make the amendment."

But the Order 20, Rule 5 in force before 1964 made no reference to amendments which add a new cause of action, being in substantially the same form as the Isle of Man rule; and the rule of practice to which their Lordships have referred was given effect to in relation to the pre-1964 rule. It follows that the Staff of Government Division erred in thinking that Order 22, Rule 1 was wider and more liberal in scope than the equivalent English rule. On the contrary, the purpose of the new Order 20, Rule 5(5) of the Rules of the Supreme Court was to widen the court's discretion to grant leave to amend, making it possible to give such leave in certain circumstances despite the expiry of the relevant limitation period. If it is thought right to confer a similar jurisdiction on the High Court in the

Isle of Man, a similar amendment to the High Court Rules will, in their Lordships' opinion, be necessary.

The attempt by the appellants to introduce the misrepresentation issue by amending their statement of case to add paragraphs 6(10) and 14B plainly involved the raising of a new cause of action, after the relevant limitation period had expired. It follows that, for that reason alone, the Acting Deemster was justified in refusing leave to amend to make these amendments (he in fact refused leave on other grounds). So far as the amendments in new paragraphs 6(9) and 14A are concerned, it was held by the Acting Deemster (and is accepted by the respondents) that these did not purport to raise a new cause of action. Even so, in their Lordships' opinion the Acting Deemster was justified in refusing leave to make these amendments. As to paragraph 6(9), this was founded only upon a letter emanating not from the respondents but from the Government Secretary, relating simply to a general enquiry about living in the Isle of Man. Paragraph 14A did not add any material allegation, because the mere fact of reliance upon the Banking Act and on the respondents' proper and careful performance of their duties under the Act is not of itself enough to create liability: see *Yuen Kun Yeu v. The Attorney-General for Hong Kong, (supra)* at pages 187-189, per Lord Keith of Kinkel.

For these reasons, their Lordships will humbly advise Her Majesty that the appeal should be dismissed. The appellants must pay the respondents' costs.