Privy Council Appeal No. 43 of 1989

(1) **Kevin Francis Meates and**
(2) **Rowe and Company (New Zealand) Limited** *Appellants*

v.

(1) **Westpac Banking Corporation Limited and**
(2) **The Attorney General for New Zealand** *Respondents*

FROM

THE COURT OF APPEAL OF NEW ZEALAND

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

Present at the hearing:-

LORD TEMPLEMAN
LORD ROSKILL
LORD OLIVER OF AYLMERTON
LORD GOFF OF CHIEVELEY
LORD LOWRY

*[Delivered by **Lord Oliver of Aylmerton**]*

This is an appeal from so much of an order of the Court of Appeal of New Zealand dated 16th December 1988 as affirmed a judgment of Heron J. on 8th December 1986 dismissing the claim of the second appellant, Rowe and Company (New Zealand) Limited ("Rowe") against the respondent, the Attorney General for New Zealand, for contribution or indemnity in respect of claims made against Rowe by Westpac Banking Corporation Limited ("the Bank"), the plaintiff in an action reference A289/85, and by the first appellant, Kevin Francis Meates ("Mr. Meates"), the defendant in an action reference number A143/80.

The actions arise out of the failure of a project conceived by the Labour Government of New Zealand elected in 1973 for establishing new industrial undertakings on the West Coast of the South Island, an area which suffered considerable disadvantages as regards port and transport facilities. There is a lengthy and complicated background of negotiations between 1972 and 1974 which have been the subject matter of extensive investigation and detailed findings not only by Heron J. in the actions in which the

appeals arise but by Davison C.J. and the Court of Appeal in another action, *Meates v. Attorney-General* [1979] 1 NZLR 415; [1983] NZLR 308. For present purposes it is unnecessary to do more than summarise the principal events.

Mr. Meates is and was at all material times a businessman with interests in, *inter alia*, the plastics industry. In 1972 he was friendly with the late Norman Kirk, then the leader of the New Zealand Labour Party, which was campaigning for election on, among other things, a programme of regional development. Mr. Meates was persuaded to support this programme and to venture his and his family's resources in forming a new company, Matai Industries Limited ("Matai") which was to establish factories on the West Coast to which it was intended to transfer all or part of the undertakings carried on by Mr. Meates and his group of companies in Christchurch and Auckland. In an electioneering speech at Westport in November 1972 Mr. Kirk, who was then accompanied by Mr. Meates, pledged that, if elected, he would return within twelve months to open a new factory there. After the election, detailed proposals were put to the Department of Trade and Industry for five projects and, following discussions on 20th February 1973 at which were present the new Prime Minister and the New Zealand manager of the Bank, arrangements were made by the Bank for overdraft facilities to be granted to Rowe, a company owned and controlled by Mr. Meates, in order to enable preliminary purchases to be made of plant and equipment required for the venture and other necessary expenses to be defrayed. The overdraft was secured by Mr. Meates's personal guarantee. On the same day the Government came to a decision to support two of the five projects by guaranteeing the provision of loan capital and this decision was conveyed to Mr. Meates.

It seems that Mr. Meates was unhappy about the choice of projects and was also pressing for a commitment to the grant of a freight subsidy as an essential condition of the deal. He threatened to withdraw altogether unless such a subsidy was forthcoming but this was strongly resisted by the Government. Finally, on 27th February 1973, after three meetings between Mr. Meates, the Minister of Trade and Industry, Mr. Freer, and Government officials, agreement was reached on three approved projects and the Government undertook to enable the necessary finance to be raised by guaranteeing borrowings by the new company from the Bank to an amount equal to twice the amount of equity capital to be subscribed by Mr. Meates to the venture. The estimate at that time was that some $600,000 equity capital would be subscribed and that the Government's guarantee of the borrowings by the new company which had not yet been formed, would be $1.2m. This was to

be and was confirmed by the Government in a letter from Mr. Freer to the Bank dated 1st March 1973 which, so far as material, was in the following terms:-

> "I am writing to confirm that the Government has given Mr. K.F. Meates, as principal shareholder, an undertaking to guarantee loan finance extended by your bank for the purpose of proceeding with the following industrial development proposals:" (There follows a description of three proposed industries)
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> "The specific terms of the guarantee are now being drawn up by the Treasury for further discussion with Mr. Meates on his return from overseas in about ten days' time. Meanwhile an independent valuation of physical assets being transferred into the new company from existing enterprises is being arranged. Until this valuation is completed, to the satisfaction of both Mr. Meates and the Government, it will of course not be possible to determine the specific amount of the guarantee.
>
> You will appreciate that as certain elements of the undertaking with Mr. Meates are yet to be finalised in detail, including the value of shareholders' equity transferred, details of the approved projects will not be released to the public."

As mentioned, the new company which was to be the vehicle of the project had still not been incorporated. Nevertheless, if the timetable for opening the new factories in November was to be adhered to, it was necessary to arrange without delay for the acquisition of lands, buildings and plant and to incur other pre-incorporation expenses. This was channelled through Rowe with money borrowed from the Bank and secured by Mr. Meates's guarantee. Matai was not in fact incorporated until 9th July 1973, at which time the terms of the Government's guarantee of Matai's indebtedness to the Bank had not been settled. That guarantee was in fact executed on 1st August 1973 by which date the pre-incorporation expenditure incurred on its behalf by Rowe exceeded $1m.

From the inception Mr. Meates and members of his family owned or controlled the whole of the issued capital of Matai and Mr. Meates was a director. It seems that the amount guaranteed by the Government to the Bank was not in fact sufficient to enable Matai to repay the whole of the pre-incorporation expenditure incurred by Rowe on its behalf without running itself short of working capital. As a result, at the end of August 1973, Rowe was still substantially indebted to the Bank. On 31st August 1973 Rowe granted a debenture to the Bank and such debenture was secured by a further personal guarantee of Mr. Meates and his wife. Subsequently, on 13th December 1974, Mrs. Meates was released from her guarantee.

Pursuant to the election pledge given in November 1972, the factories were officially opened on 9th and 10th November 1973. However, even by that date, Matai was in serious financial difficulties and on 19th February 1974 the Bank, at the instance of the Government, appointed a receiver. It is possible that at that time a liquidation would have produced a surplus which would have enabled the shareholders of Matai to receive back at least a part of their equity investment but the Government was understandably anxious to avoid a humiliating debacle and that the business should continue. In the upshot, in consultation with Mr. Freer and other Government officials, the board of Matai agreed to the appointment of a receiver and a press statement was approved and published on 19th February 1974 in the following terms:-

> "Both the Government and the directors re-affirmed their confidence in the continuation of this industry on the West Coast in order to ensure the continued employment of staff and the growth of the region. They assured employees, creditors and shareholders that their interests would be safeguarded and that with the full support of both the Government and the directors every effort would be made to successfully reconstruct the business."

The receiver continued to trade with the Government's support and incurred substantial losses over the next few years with the result that when, in 1977, Matai finally ceased trading, something over $4m had been paid out by the Government under its guarantee. During the course of the receiver's trading substantial repayments were made to the appellant in respect of the expenses incurred prior to Matai's incorporation but Rowe alleges that a sum of $105,295.79 remained outstanding and unpaid at the date of the appointment of the receiver.

That is, in broad outline, the background of the litigation. The first action to be commenced was one begun on 25th March 1975 by the shareholders of Matai against the Government claiming a sum of $1m as damages for breach of an alleged contract between them and the Government based on the press statement already referred to under which the Government undertook to indemnify them against loss of the value of their equity investment in Matai. Alternatively, they claimed damages for negligence, it being alleged that the Government was in breach of a duty of care owed to them to ensure that the interests of shareholders would be safeguarded. That action was dismissed on 13th December 1978 by Davison C.J. but the plaintiffs appealed and on 17th October 1983 the Court of Appeal by a majority (Cooke J. dissenting) allowed the appeal, holding that the Government were in breach of a tortious duty of care. The plaintiffs were awarded a sum of $340,000 by way of damages, that

being assumed to be the value of their shareholding at the date of the appointment of the receiver.

So far as the present appeal is concerned, this action may appear to be of only historical interest but, as will appear hereafter, it has a significance in the light of the submissions which have been so ably addressed to their Lordships on the appellants' behalf by Mr. Atkinson.

This appeal arises out of two related proceedings. On 20th March 1973, the Bank made demand on Rowe for the amount due under the debenture of 31st August 1973 and, default having been made, commenced proceedings against Mr. Meates as guarantor on 16th May 1980. By a third party notice dated 21st February 1985 Mr. Meates joined Rowe as third party and on the 19th September 1985 Rowe joined the Attorney General as fourth party claiming an indemnity or contribution in respect of any monies for which Rowe should be held liable to Mr. Meates under the third party notice. It was Mr. Meates's case in these proceedings that, for various reasons, he was under no liability under his guarantee. Had that defence succeeded the action would have been dismissed without any judgment against Rowe, the principal debtor under the debenture, which was in the proceedings only as a third party and not as a defendant. It was, no doubt, for that reason that on 4th October 1985 the Bank commenced a separate action against Rowe claiming the outstanding balance due under the debenture. In that action, again, Rowe joined the Attorney General as third party, seeking indemnity and contribution in respect of any sums for which it might be held liable to the Bank. Finally on 19th March 1986 Mr. Meates, having unsuccessfully sought to raise by way of counterclaim claims for damages for breach of contract and negligence against the Bank, commenced a separate action against the Bank claiming this relief.

The three proceedings above-mentioned were consolidated and heard by Heron J. in April, May and July 1986. On 8th December 1986 Heron J. delivered a judgment in which he ordered payment by Mr. Meates of the sum claimed by the Bank under the guarantee of Rowe's debenture and dismissed both the counterclaim and the claim in Mr. Meates's action against the Bank. He dismissed Mr. Meates's claim against Rowe as third party and Rowe's claims against the Attorney General in both actions and entered judgment for the Bank against Rowe for the amount claimed by the Bank under the debenture. An appeal to the Court of Appeal by Mr. Meates and Rowe failed save that the court allowed Mr. Meates's appeal against the order dismissing his claim for indemnity and contribution from Rowe.

Rowe does not appeal against the allowance by the Court of Appeal of Mr. Meates's appeal against the

dismissal of his claim to indemnity and contribution from Rowe and thus the appeal to their Lordships is solely against the dismissal of Rowe's claims to indemnity and contribution against the Attorney General under the fourth party notice in the action by the Bank against Mr. Meates and under the third party notice in the action by the Bank against Rowe. Those claims have been forcefully and ingeniously argued by Mr. Atkinson on the appellants' behalf and they rest upon three alternative propositions.

First, it is said that from the events which occurred in the dealings of the parties between November 1972 and 31st August 1973, the date of the execution of the debenture, there is to be implied a contract between the Government and the appellants that the Government would indemnify Rowe against any liability which it incurred to the Bank in respect of monies expended towards the realisation of the West Coast projects. Alternatively, it is said that if, contrary to the appellants' contention, there was no such contract prior to 31st August 1973, nevertheless the events which led to the appointment of the receiver and the press statement issued on 19th February 1974 constituted a contract by the Government with Rowe to ensure that any sums then due from Matai to Rowe were paid. Finally, it is submitted that even if there was no contractual right in Rowe against the Government, the Government was under a duty of care in tort to Rowe to ensure that Rowe did not suffer loss as a result of the non-payment by Matai of any sums incurred by Rowe in respect of pre-incorporation expenses, that that duty has been broken and that Rowe has sustained damage as a result.

As to the first of these submissions, the precise terms of the contract to date have proved somewhat elusive. In Rowe's fourth party notice in the Bank's action against Mr. Meates, which is substantially the same as the third party notice in the Bank's action against Rowe, it is expressed thus:-

> "The third party alleges against you that, prior to the incorporation of Matai, it was agreed by the third party, the Government and the plaintiff that the third party should borrow from the plaintiff and pay or apply on behalf or on account of Matai the amounts necessary to establish or promote such projects to be undertaken by Matai as should be approved by the Government and that in the meantime the Government would guarantee the indebtedness of the third party to the plaintiff so arising."

It is unnecessary to rehearse in detail the events and correspondence from which it has been sought to construct such a contract. These were considered in great detail by Heron J. and by the Court of Appeal and the one thing which emerges with perfect clarity

is that, from first to last, what was under consideration was the form of the guarantee to be given to the Bank by the Government in respect of the indebtedness of Matai and of Matai alone and that the question of the guarantee by the Government of any indebtedness to the Bank incurred by Rowe was never mentioned either in discussion or in correspondence. The matter is succinctly summarised thus in the judgment of the Court of Appeal:-

> "All the documentation points to Matai, and not to Rowe and Co. The Government did not undertake to indemnify the bank in respect of advances to Rowe and Co. Any attempt to set up a joint venture to which Rowe and Co. was a party was bound to fail on the evidence. For these reasons, expressed at greater length by the judge, any claim by Rowe and Co. to an indemnity from the Crown as a party to an arrangement for a joint venture on the West Coast must fail."

Their Lordships respectfully agree.

In the end, the argument is compelled to fall back upon reliance upon that shadowy character whose presence is ever undetected by contracting parties and whose prescience is ever greater than their own - the officious bystander. In substance, the submission is that, because Rowe, in incurring expenditure for the purposes of the as yet unincorporated company, was incurring liabilities from which it had nothing to gain, it would have been only prudent and sensible to decline to proceed unless the Government undertook not only to guarantee loans to be made to the new company but also to guarantee repayment to the Bank of monies borrowed by the appellant. No doubt it would and no doubt the officious bystander, had he been there, would have shouted it aloud. But that is not what happened and whilst it may sometimes be possible, where there is an undoubted contract, to pray in aid this hypothetical character's percipience in order to imply a term, his undoubted abilities in this respect cannot extend to constructing a contract between persons who neither intended nor indicated any intention to make one. Whilst paying tribute to the ability with which the argument was pressed, their Lordships are, in the end, left in no doubt that Heron J. and the Court of Appeal were right to reject it.

The alternative contractual claim is attended by at least equal difficulty. This stems from the press announcement, to which the directors of Matai (including Mr. Meates) were themselves parties, that the interests of "employees, creditors and shareholders would be safeguarded", which, it is said, is to be construed as a contractual undertaking to creditors to see that their debts were paid. Rowe, it is said, was a creditor in an unspecified amount consisting of such part of the sums which it had borrowed from the Bank

as had been expended for the purposes of setting up Matai (other than expenditure on assets to be transferred as the consideration for the issue of equity capital). This is pleaded thus in Rowe's fourth party notice:

> "9. In the circumstances the Third Party and the Fourth Party agreed that in consideration of the Third Party not pursuing the recovery of the amount of the unsecured indebtedness of Matai to the Third Party or taking proceedings which would have led to the liquidation of Matai or prevented it from continuing to trade or maintain employment for its employees, the Government would pay the unsecured creditors of Matai, and in particular the Third Party. ...
>
> 11. In reliance on the assurance given to the creditors of Matai by the Fourth Party, the Third Party did not pursue against Matai its right to reimbursement of the sums which it had received from the plaintiff and which it had applied for the benefit of Matai."

This claim was rejected by Heron J. in terms which their Lordships find wholly convincing. He said:-

> "I do not think any of these allegations get off the ground. There was no agreement to guarantee Rowe and Co. There was an undertaking to pay the unsecured creditors of Matai. Rowe and Co. were given the opportunity of taking advantage of that. They took advantage of it to a limited extent, as was their entitlement, and I do not think that they had any more than that entitlement. They were certainly in a position where they could seek from the Government the amount that they were owed by Matai, having regard to the arrangements whereby they accumulated Matai assets pending Matai's incorporation. But all those amounts were properly payable by Matai, and in all respects they were paid. Indeed Matai paid a little more than $1m during its short duration to refund Rowe the money that it had expended. After receivership it paid a little more. There is a dispute as to whether it should have paid up to $105,000, but nowhere in the arrangements can I spell out any agreement, representation or undertaking to repay monies advanced by the Bank to Rowe and Co. in the way that is suggested. It is put forward that the residual indebtedness after the transfer of assets and the payment therefor remained the liability of the Government. That would be a strange arrangement indeed, and it is simply unsupported on the evidence. The suggestion that there was some forbearance to sue and that Rowe and Co. could have wound up Matai is likewise the subject of very little evidence indeed. Had that been the position, and in particular had it been spelt out that there

was a residual liability for overdraft remaining with the Government because Rowe and Co. had been the vehicle for Matai, then I would have expected to see it in the documentation in an unmistakable way. It simply is not there."

Moreover, as was pointed out by the Court of Appeal, the sum of $105,295.79 alleged to remain unpaid by Matai was never claimed at any time prior to the proceedings and was never established to have been owing by Matai to Rowe at the date when the receiver was appointed. It is also worth mentioning that a similar claim by the shareholders in their action against the Government to a contractual entitlement to have their interests "safeguarded" was rejected both by Davison C.J. and by the Court of Appeal.

Quite apart from this, however, it is worth observing how the claim was advanced in the proceedings. What was being claimed was a contractual undertaking to pay all unsecured creditors. Even assuming, therefore, that the sum now claimed was then due to Rowe, it became immediately payable on 19th February 1974 and could have been sued for. And, indeed, that was the basis of Rowe's claim in tort, where the damage pleaded as the foundation of the alleged tort is "failing in November 1974 when other unsecured creditors with the said Matai Industries Limited were paid to pay the Third Party in accordance with the agreement alleged in paragraph 9 hereof and when application was made by the Third Party for such payment". What is now said is that, following Heron J.'s judgment, in which he found that the sum claimed had not been demanded in 1975 (as had been previously alleged), a demand was in some way a condition precedent to the accrual of the cause of action so as to prevent time from running until demand was made. Even assuming that the press statement were capable of the construction which the appellants seek to place upon it, on no analysis could the obligation to pay the unsecured creditors be so conditioned. The Court of Appeal held accordingly that any claim based on this alleged contractual right was plainly barred by the provisions of the New Zealand Limitation Act 1950, which follows the English Limitation Act in prescribing a period of six years from the accrual of the cause of action for the commencement of proceedings. That conclusion is, in their Lordships' judgment, irresistible.

The third way in which the claim is advanced is on the footing that there arose, in the circumstances, a tortious duty in the Government to take reasonable care to do everything reasonably within its power to bring about the result contemplated in the press statement that the interests of creditors would be "safeguarded" or, to put it another way, that debts then outstanding would be paid. The short answer to this is that the same failure to establish that the sum now alleged to be

outstanding was due at the date of the receivership must defeat as much a claim based on a breach of duty in tort as it does a claim based on contract. There is, moreover, a serious question whether, in any event, Rowe ever was, strictly, a creditor for sums expended by it on Matai's pre-incorporation expenses.

These considerations apart, however, Mr. Atkinson submits that, the Court of Appeal having held in *Meates v. Attorney General* that such a duty of care existed, there is a sufficient identity of interest between Mr. Meates as a shareholder and director of Matai and Rowe, of which also Mr. Meates is the controlling shareholder and director, to create an issue estoppel which precludes the Government from raising in these proceedings any issue as to the existence of such a duty of care. That is contested by the respondent, who desires to submit, if necessary, that *Meates v. Attorney General* was wrongly decided. Their Lordships entertain considerable doubt whether the interests of Rowe as an unsecured creditor of Matai and the interests of Mr. Meates as a shareholder are in fact so coincident as to create an issue estoppel. They have, further, not found it altogether easy to follow the reasoning by which the Court of Appeal in *Meates v. Attorney General* reached the conclusion that a duty of care existed, more particularly in the light of the following passage in the judgment of Cooke J. [1983] NZLR 308 at page 384:-

> "The basic difficulty in the Matai operation seems to have been inadequate turnover; the promoters of the company, with their business backgrounds, should have been in as good a position as the Government, or a better position, to foresee this and to plan the project accordingly. If specific commitments from the Government of aid larger or different in kind than was in fact forthcoming were essential, the promoters took a serious risk in pressing on so fast without firm arrangements for such aid."

For present purposes, however, their Lordships are content to assume both that there is an issue estoppel and that, even if there were not, *Meates v. Attorney General* was correctly decided and should be followed. If that is assumed and if the circumstances of the issue of the press statement were such as, contrary to the views of Heron J. and the Court of Appeal in the instant case, to give rise to a duty of care, Rowe's cause of action accrued when the damage flowing from the breach of duty occurred. If the assurance in the press statement that "the interests of creditors would be safeguarded" had any meaning as a firm undertaking, the only way in which the postulated duty of care- that is, to do everything reasonably possible to bring about the contemplated result - could have been fulfilled was either to ensure that Matai paid its creditors immediately or for the Government itself to pay them. When, then, one asks, did the breach of

that duty occur and when was the damage suffered? Rowe's pleading provides its own answer, for the damage caused by the breach of duty is particularised as the failure in November 1974 to pay Rowe when other creditors of Matai were paid. Furthermore, in *Meates v. Attorney General* it seems to have been assumed that the damage which is the gist of the action in negligence was caused and the breach of duty occurred at the very time of the assurance - the damage being the acting by the shareholders on the assurance by refraining from then winding-up Matai. This seems to follow from the fact that the action, which succeeded, was commenced in March 1975 whilst Matai was still trading unless - which seems an impossible hypothesis - the assurance is construed as meaning that the value of the shareholders' funds would never at any time in the future fall below their value at the date of the appointment of the receiver. And if that date, or some other date prior to March 1975, was the date on which the shareholders' cause of action for negligence accrued, it is a little difficult to see why a similar cause of action by creditors arising out of the same assurance should accrue at some later date. The damage suffered in either case must, on this analysis, have been the failure, induced by the Government's assurance, to press claims to the point of liquidation. Whether or not this is right, it seems entirely clear that if Rowe ever had any cause of action against the Government for negligence, that cause of action must, on any possible analysis, have accrued prior to September 1979 (i.e. six years before the claim was first raised in these proceedings), by which time Matai had long since ceased active trading.

Their Lordships have considerable difficulty in grasping the concept of a duty in tort to take reasonable care to pay or procure payment of a sum which nobody is under any contractual obligation to pay, but, assuming the existence of so curious a duty, there must at every point of time after the assurance from which the cause of action stems, or at least after the expiry of a reasonable time, have vested in Rowe (which was, on this analysis, being kept out of the use of its money and thus suffering damage) a right to sue the Government for failure to do that which it was plainly within the Government's power to do. However one looks at it, any cause of action based on the assurance in 1974 must have been long since statute-barred before the claim was first raised in Rowe's third party notice.

Mr. Atkinson has ingeniously sought to escape from this dilemma by reliance upon section 14 of the Limitation Act 1950 which is in the following terms:-

> "For the purposes of any claim for a sum of money by way of contribution or indemnity, however the right to contribution or indemnity arises, the cause of action in respect of the claim shall be deemed

> to have accrued at the first point of time when everything has happened which would have to be proved to enable judgment to be obtained for a sum of money in respect of the claim."

The argument has an appealing simplicity. In the third party notice the claim is described as a claim to be indemnified by the Government against Rowe's liability to the Bank. But no money judgment under such a claim could be recovered before judgment by the Bank against Rowe. So, it is said, Rowe's claim never could become statute-barred - indeed time could not even begun to run - until the Bank or Mr. Meates recovered judgment against Rowe in one or other of the two actions. The fallacy in this is evident on examination. Any litigant claiming money from another person when he is being sued by a third person can, if he wishes, describe his claim as a claim to contribution or indemnity, but that does not preclude an analysis of the true nature of his claim. Where, as here, he is seeking to exert a cause of action which is entirely independent of the claim which is being made against him, his cause of action, if successfully pursued, serves as a contribution to or indemnity against the claim made against him only in the sense that it provides him with funds from which, if he wishes, he may meet that claim. But quite clearly the words "contribution or indemnity" in the section under consideration are not used in that sense. If authority were needed for such proposition it is to be found in the judgment of Bowen L.J. in *Birmingham and District Land Company v. London and North Western Railway Company* [1887] 34 Ch.D. 267 at page 274. Here the claim by Rowe in tort has nothing whatever to do with the indebtedness of the appellant to the Bank under its debenture. If it can be right to describe a claim based on such convoluted reasoning as "simple", this is a simple claim for damages for failure to discharge a debt due from Matai to the appellant. If Rowe's overdraft with the Bank had been discharged, the claim against the Government would have been entirely unaffected. If one takes the simple analogy of a trader with an overdraft who sues a debtor for the price of goods sold and delivered, by no stretch of imagination could it be said that the claim was a claim to indemnity against the Bank's claim on the overdraft. Nor could it make the slightest difference if the goods sold had been originally purchased by the plaintiff with monies which had been lent to him by the Bank. In essence, the present case is no different. Once any contractual claim by Rowe against the Government specifically related to the Bank overdraft is out of the way, this is no more than a simple claim for monies due as damages for tort. The fact that Rowe has chosen to raise it in the third party proceedings rather than by separate action and to describe it for that purpose as a claim to "contribution or indemnity" cannot possibly alter the nature of the cause of action so as to render a different period of limitation applicable and to revive a claim which has already become statute-barred.

This appeal represents the final stage of what has proved to be extremely expensive and protracted litigation which cannot but have had the regrettable effect of substantially distracting ministers, civil servants and businessmen from the pursuit of national and corporate interests. The claims which have been pursued have rested upon ignoring the express terms of the formal documents which have been executed and seeking to supplement and contradict them by reference to contracts and duties of care alleged to have arisen by implication from conversations, press statements and other unsuspected traps into which the parties are alleged to have fallen. To say that, as a general rule, governments and large corporations intend to be bound only by formal written engagements assumed after mature consideration, reflection and negotiation may seem something of a truism; but in the light of the history of this litigation, it may not be inappropriate to reiterate it and to stress that anyone impatient of official delays, whether avoidable or unavoidable, who anticipates the conclusion of negotiations does so at his own risk.

Their Lordships will humbly advise Her Majesty that this appeal ought to be dismissed.