IN THE SUPREME COURT OF SOUTH AFRICA
(APPELLATE DIVISION)

In the matter between:

INTERNATIONAL SHIPPING COMPANY (PROPRIETARY) LIMITED..... Appellant

and

CLIFFORD FREDERICK BENTLEY..... Respondent

CORAM: CORBETT, CJ, BOTHA, HEFER, SMALBERGER, JJA, et FRIEDMAN, AJA.

DATES OF HEARING: 25 and 26 September 1989.

DATE OF JUDGMENT: 10 November 1989

J U D G M E N T

CORBETT, CJ:

The appellant, International Shipping Company (Proprietary) Limited ("International"), is a company carrying on the business of financiers and shippers and having its principal place of business in Johannesburg. It is part of the Trade and Industry Group, which operates in a number of different countries. Early in 1976 International agreed to make certain financial facilities available to

the Deals Group of Companies ("the Deals Group" or "Deals"). These facilities included the leasing of fixed assets, the discounting of hire-purchase and rental agreements in terms of certain block discount agreements, the confirmation of overseas orders, the funding of the importation of goods and the funding of local purchases. International continued to provide these facilities until the liquidation of the companies comprising the Deals Group in April 1981. It is claimed by International that as at the time of liquidation the total indebtedness of the Deals Group to it amounted to R977 318. Of this sum R593 826 was recovered (or must be deemed to have been recovered) by International from various sources, including an offer of compromise and a concurrent dividend in liquidation. International thus sustained a loss, alleged to amount to R383 492, together with interest thereon.

The respondent, Mr C F Bentley, is a chartered

accountant and auditor, practising under the name Bentley, Bollingbroke and Company. In about November 1977 respondent was appointed auditor to the Deals Group. On 20 March 1979 and in the execution of his duties as auditor, the respondent issued reports in respect of the financial statements of each of the companies comprising the Deals Group, as well as the Group financial statements, for the year ended 20 December 1978. In each of these reports, which were not qualified in any way, respondent stated that he had examined the financial statements in question and had complied with the requirements of sec 300 of the Companies Act 61 of 1973; and that in his opinion the statements fairly represented the financial position of the company concerned as at 20 December 1978 and the results of its operations for the period then ended, in the manner required by the Companies Act.

In April 1982 International instituted an action

for damages against respondent in the Witwatersrand Local Division. In its particulars of claim International alleges in effect that the aforementioned financial statements, upon which respondent reported on 20 March 1979, were materially false and misleading in a number of respects; that in so reporting the respondent acted fraudulently or, alternatively, negligently towards International; that the financial statements and the reports were transmitted by the Deals Group to International, which relied thereon in reviewing and deciding to maintain in part and increase in part, then and from time to time thereafter, the facilities accorded to the Deals Group; that had the 1978 financial statements fairly presented the financial position of the Deals Group and its constituent companies and the results of their operations, International would, on receipt thereof, have terminated the facilities, have required the Group to make good its

indebtedness to International and have recovered such indebtedness; that the loss sustained by International as a result of the liquidation of the companies comprising the Group and the partial irrecoverability of the amounts owing to International by the Group constitutes damage suffered by International as a result of the aforesaid fraud or negligence of respondent; and that respondent is accordingly liable to compensate International for such loss.

The case was tried by Goldstone J, who for reasons which I shall elaborate in due course dismissed International's action with costs. With leave of the trial Judge, International now appeals to us against the whole of this judgment.

International's action is a two-pronged one. It comprises (a) a claim for damages for fraudulent misrepresentation, and (b) an alternative claim for damages

based upon economic loss caused by a negligent misstatement. The misrepresentation under claim (a) and the misstatement under claim (b) are alleged to be the auditors' report, read together with the 1978 financial statements. (Although strictly there are a number of such reports, relating to the various financial statements within the Group, the reports are all in substantially the same terms and I shall for convenience speak merely of a single auditors' report.) At common law, in order to succeed in this action International had to prove:-

(a) that the financial statements in question were in fact materially false and misleading;

(b) that in reporting on the financial statements as he did the respondent acted fraudulently;

(c) or, alternatively to (b), that in so reporting the respondent acted unlawfully and negligently vis-a-vis International; and

(d) that respondent's fraud, or negligence, caused International's eventual loss.

(see Siman & Co (Pty) Ltd v Barclays National Bank Ltd 1984 (2) SA 888 (A), at 904 D-G, 911 B-C). In argument before us reference was also made to sec 26(5) of the Public Accountants' and Auditors' Act 51 of 1951. In its original form, this sub-section placed an embargo on actions against an auditor in respect of any opinion expressed or certificate given or report or statement made or statement, account or document certified by him, unless it was proved that he acted maliciously or negligently. This provision is negative in its effect and does not appear to restrict or otherwise modify the ordinary common law liability of an auditor in any material respect. It is, therefore, necessary to examine the common law to determine positively the requisites for liability. In 1982 a new sub-sec (5) was substituted by sec 1 of Act 42 of 1982. This is far

more elaborate and, inter alia, prescribes positively the grounds of liability to third parties, but as the sub-section came into effect only after the occurrence of the events with which this case is concerned, it is not of relevance.

I now proceed to consider in turn whether the four elements of International's cause of action, as listed (a) to (d) above, were established at the trial.

Financial statements materially false and misleading

Before considering International's complaints in regard to the financial statements, I must say something about the Deals Group, its mode of trading and its financial standing prior to and during the 1978 financial year.

At the time the Group comprised a holding company, Deals Furnishers (Pty) Ltd ("Deals Furnishers"), and four subsidiaries - Deals Rent-A-TV (Pty) Ltd ("Deals TV"), Deals

Furnishers (Natal) (Pty) Ltd ("Deals Natal"), Deals Contracts (Pty) Ltd ("Deals Contracts") and Impact Furnishers (Pty) Ltd ("Impact"). The business of the Group, which was carried on in the Transvaal and Natal, consisted of the sale, through stores, of furniture, furnishings, carpets, household appliances, television and radio sets and allied merchandise; the making-up of curtains, bedspreads etc; the execution of contracts for the supply of hotel and other major furniture, carpet and furnishing contracts; the supply and installation of TV antennae; and the rental and servicing of television sets. The television side of the business, especially the sale and rental of television sets, was conducted by Deals TV. This was embarked upon in 1976. As it was intended in the main to lease out television sets rather than sell them, the Group, and Deals TV in particular, needed a large amount of capital and it was in these circumstances that International was approached for

financial assistance.

At the time of this approach International, acting through certain executives constituting its credit committee (which considered new applications for facilities and monitored the ongoing facilities granted to clients and the credit-worthiness of clients), made an assessment of the Deals Group, its profitability, business reputation, the quality of its administration and its future potential. In general the assessment was a favourable one though it drew attention to "the highly geared situation" of the Group, meaning that the ratio of outside liabilities to shareholders' equity was higher than was desirable (sometimes referred to as "over-trading"); and it was agreed initially to provide "a local facility" of R100 000, pending the provision by the Deals Group of further information and the completion of certain formalities.

The chairman and managing director of the Deals

Group was then a Mr Brian Cunningham; and he was in effect in sole control of the Group. The shareholders at that stage were Brian Cunningham and his brother, Graham Cunningham. Subsequently, on 30 June 1978, Graham Cunningham severed his connection with the Group and his shareholding was taken over by Brian Cunningham. All future references to "Cunningham" will mean Brian Cunningham.

The terms upon which facilities would be granted and the amount thereof, totalling R450 000, were finally settled and recorded by the parties in August 1976. One of the terms was that Deals would furnish International with its audited financial statements as soon as these became available after the end of each financial year and in addition with monthly operating statements of the Group and any other additional information which International might from time to time reasonably require.

It appears that during the latter half of 1976 trading conditions in the markets in which the Deals Group was engaged became very difficult. This was attributed to the so-called "Soweto Riots" of June 1976 and the aftermath of political unrest which ensued for some time. In February 1977 Cunningham informed International that the Deals Group could not meet its commitments "in the next week or two" and described the January and February 1977 turnovers as "disastrous". International did not, however, regard the situation as being sufficiently serious to warrant the termination of the facilities accorded to the Deals Group.

In October 1977 International received from Deals the first audited financial statements covering the period when International commenced to provide financial facilities. Owing to the fact that the Deals Group had decided to change its year-end from 31 August to 20 December

the statements covered the period 1 September 1975 to 20 December 1976. A financial analysis or investigation ("FI") of these accounts prepared by a Mr Greg Miller, a financial analyst employed by International, and laid before the credit committee, revealed, inter alia, that the shareholders' equity had declined, that the debt-to-equity ratio had worsened and that the trading results (after tax) showed a loss of R4 595. This worsening in the Group's financial position was attributed to its entry into the television market. The FI concluded that up to December 1976 the Group was not viable and subsequently not in a good financial condition; the Group's budget for the six months ending June 1977, however, predicted a greatly improved situation. According to Mr A J Walraven, financial director of the Trade and Industry Group, who gave evidence at the trial, the picture conveyed by the report was "not a very healthy one", but, taking account of the

fact that the economy had not fully recovered from the Soweto riots, the situation, though needing to be watched, did not call for "desperate action". He stated that his company's policy was to try, if possible, to assist a client when times were bad rather than to terminate the facility. At the time there was no justification for closing the Deals account.

On 22 November 1977 a meeting took place between Cunningham and his accountant and certain representatives of International, at which Cunningham proposed that Deals be granted additional facilities. This was refused, but International accepted additional security offered by Deals. The existing facilities of R400 000 for block discounting and R100 000 for local purchasing were to remain unchanged. At the same time Deals undertook to furnish International with the 1977 audited financial statements by not later than February 1978.

In fact, these financial statements, audited by respondent, were submitted to International only on 2 June 1978. These showed a substantially improved figure for shareholders' equity, a slightly better debt/equity ratio and a profit after tax of R14 445. Nevertheless, the overall view was that the statements reflected, as Walraven put it, a "dismal financial picture". An FI dated 23 June 1978 and prepared by Miller speaks of the Group being in "a shocking financial condition" and concludes with the following paragraph under the heading "VIABILITY":

> "As can be seen the Company has not been viable over the last 2 years due to numerous reasons but mainly to the bad management of the Group which went into different aspects of the furniture business i.e. T.V. rental and did not foresee the consequences of writing H P paper which has to be planned in great detail."

But the credit committee which considered these

financial statements also had before it figures for the first four months of trading in the ensuing year, ie up to 20 April 1978. These showed a total income of R838 000, compared with R378 000 for the corresponding period in the 1977 financial year, and this persuaded International to continue to grant the facility, which at that stage totalled R600 000. International did, however, stipulate that Deals's indebtedness should be reduced at the rate of R10 000 per month until the facility had been reduced to R500 000.

A few days later Deals's banker, Barclays National Bank Limited, decided, on the strength of the audited financial statements for 1977, to terminate the overdraft facilities afforded by it to Deals. After negotiation, Deals was given time to liquidate this overdraft. International was informed of this. The action taken by Barclays Bank put the Deals Group under further financial

pressure. Subsequently Cunningham persuaded International to agree to continue the facility of R600 000, but to postpone the commencement of the monthly reduction of R10 000 to November 1978.

At the end of August 1978 Deals presented International with audited financial statements for the six months ended 20 June 1978. These showed an increase in shareholders' equity from R438 680 to R597 145 and a profit after tax (for the six-month period) of R95 311. Nevertheless, after an analysis of the figures Miller reported (in an FI dated 29 September 1978) -

> ".... that in actual fact there has been no improvement in the financial condition of the Group and they are still grossly overtrading and illiquid."

He concluded (under "VIABILITY") that the viability of the Group had improved "slightly".

In a monthly report on the Group's performance for the month ended 20 December 1978 (dated 31 January 1979) Cunningham, however, struck an optimistic note, saying -

> "The Group's 1978 audited results will undoubtedly reveal all-time record profits... and current indications (despite an exceptionally poor start to 1979) indicate that this trend will continue through to 1980."

Despite this Cunningham thereafter requested additional financial facilities from International, which were granted to the tune of R80 000, upon certain conditions.

On about 20 March 1979 International received the audited financial statements relating to the Deals Group for the 1978 financial year. Miller subjected them to the usual financial analysis. Among the "highlights" of these statements - as Walraven put it - are (i) an increase in shareholders' equity to R714 866 (1977: R438 680); (ii) an

increase in profit after tax to R201 329 (1977: R14 445) and (iii) the fact that total liabilities have remained constant at approximately R1,2m. Miller's summation on viability was:

> "The group are now viable, a sharp improvement on the previous year's results."

The same feeling of optimism is to be found in the chairman's review contained in the Group financial statements. Having referred to various factors which precluded a profit forecast, Cunningham added this quaint metaphoric admixture:

> "....other than to say that the winds of change brewing through your Group at present paint an extremely rosy picture."

Asked (in evidence-in-chief) to comment on the difference in the position of the Group at the end of 1978, as compared with that at the end of 1977, as reflected in the financial statements for those years, Walraven stated -

"The position as reflected at 20 December in accordance with the audited accounts reflected, the statistics and figures and ratios relating to a strongly capitalised, highly viable company with good liquidity ratios and all-in-all a company that would be worthwhile backing for any financier, whereas conversely the position as reflected in the 1977 financials, showed a slightly overgeared company, weaker liquidity ratios, a small liquidity surplus and effectively no viability. A company that had to be watched if facilities were to be continued in the hope that matters would improve and therefore the belief in the company would be justified."

Walraven's evidence continued -

"Mr Kuper: Were you entitled as at March 1979.... what view did you take concerning that as at March 1979?-- My view and that of the Credit Committee was that the company was well worthwhile supporting and we were happy to approve the facilities of whatever was detailed in the approval form."

With this factual background I turn now to International's complaint that the 1978 financial statements were false and misleading in a number of material respects. I shall deal in turn with each of these complaints.

(a) Doubtful debt reserves

This complaint is confined, at this stage at any rate, to the provisions made for doubtful debts in the financial statements of the subsidiaries in the Group. It appears that identical amounts were provided for in the case of each subsidiary in the 1977 and the 1978 financial statements. Furthermore, in each set of 1978 accounts there appeared a note, under the heading "Doubtful debt reserve", in the following terms:

> "The accounting policy of the company is to provide a reserve equal to 60% of the value of the total doubtful debt owing by those customers who are more than two instalments in arrears on their payments on

instalment accounts; or who have not paid for more than 120 days on open accounts."

It is common cause that the amounts provided for in the financial statements did not accord with the policy stated in the note and that, had this policy been applied, the provisions would have been substantially larger. On the other hand, it is conceded by International that the provisions actually made were adequate. The gravamen of International's complaint, therefore, is the discrepancy between the amounts actually provided for and the policy stated in the note. It no longer contends that it was in any way misled by this inconsistency, but merely cites it as evidence of fraud or negligence on respondent's part.

(b) Taking to income the proceeds of merchandise sold but not delivered

It is not in dispute that the various companies constituting the Deals Group did, in their respective

financial statements, reflect as part of income earned the proceeds of merchandise sold to customers before the end of the financial year, but delivered only thereafter. This was done as a matter of policy. In fact, the same practice had been observed in the 1977 financial statements. The gross amount involved in 1978 was R103 822. It is accepted by the respondent that this was an incorrect accounting procedure and that the practice of so dealing with incomplete sales should at least have been disclosed by a note to the financial statements.

The actual effect of this procedure on the 1978 financial statements was, however, not established. The figure of R103 822 represents gross proceeds and does not apparently take account of correlative costs; and it is not possible to make the necessary adjustment in respect of similar transactions included in the 1977 financial statements which ought to have been reflected in the 1978

statements, because the figures were not proved.

Again International concedes that there is no question of it having been misled in this regard. It had previously been told of this practice. Accordingly the complaint is also merely cited as evidence of fraud or negligence on the part of the respondent.

(c) Inter-company manipulation in regard to turnover and expenses

It is conceded by respondent that the 1978 financial statements reflect a manipulation of turnover as between companies in the Group in the sense that portion of the turnover actually earned by one company was arbitrarily transferred to the credit of another company, thereby diminishing on paper the profits of the former company and boosting those of the latter. In this way an amount of R100 000 was "transferred" from the turnover of Deals TV to that of Deals Furnishers. This had the effect of

converting what would otherwise have been a net loss in the income statement of Deals Furnishers into a net profit and of correspondingly reducing the net profit of Deals TV as shown in its income statement. The object of this manipulation was to evade taxation.

It is also alleged by International that in similar fashion and for similar reasons expenditure was "transferred" from Deals Furnishers to various members of the Group, thereby boosting the profits of the holding company and reducing those of the subsidiaries concerned. Respondent, on the other hand, contends that it has not been shown that these transfers, or "allocations", of expenditure were not permissible and appropriate. The trial Judge appears to have found against respondent on this issue. I do not find it necessary to decide this issue, but will assume in appellant's favour that the inter-company transfers of expenditure were as unjustified as the

manipulation of turnover.

A further issue raised by respondent was whether, even if these manipulations were potentially misleading, International was in fact misled in any material sense. Respondent contended that it was not. In this regard respondent's counsel made two points. The first was that the Deals Group was managed and run as a single business and International regarded it as such. The re-allocation of turnover and expenditure as between members of the Group did not affect the financial results of the Group as a whole; and this was all that interested International. The second, and perhaps more telling, point is that International, through certain of its executives, notably Walraven, Rivkind, Hagger and Jacobson (all members of the credit committee), knew all along that Cunningham made a practice of manipulating the Group's financial statements in this way. In this connection counsel referred to an FI

(C526) dated 4 October 1977, which was seen by all the gentlemen mentioned. The FI refers to a telephonic communication from Cunningham to Hagger in the course of which Cunningham told him that "for our edification only" the "true trading results" of various companies in the Group for the 14 months to 31 December 1976 were as follows: (then followed against the names of the companies certain figures representing profit or loss, as the case may be). Walraven, Rivkind, Hagger and Jacobson were all cross-examined on C526 and none of them appears to have been able to explain it satisfactorily on an innocent basis. Counsel also pointed to the FI comprising Miller's assessment of the 1978 financial statements (C759), which contains the following statement:

> "Included in creditors is an amount of R50 000 which was fictitious and was done to hide profits".

The trial Judge appears to have found that International was misled by these inter-company manipulations. At the same time the learned Judge indicated that he was not impressed with the evidence of Walraven, Rivkind, Hagger and Jacobson. He found that they were clearly biased in favour of International's case and attempted, whenever possible, to interpret events and opinions reflected in the documentary evidence in a manner most favourable to International's case. And, in fact, he decided to approach the evidence of these and certain of International's other witnesses with caution and to rely thereon/-

> "....only where their evidence is supported by other acceptable evidence and, in particular, documents which have been proved".

At this point it is also pertinent to note that respondent closed his case without leading any evidence.

Neither he nor Cunningham (nor any other person connected with the Deals Group) gave evidence at the trial. There was, however, before the Court the record of portion of the evidence given by respondent at an enquiry held in terms of sec 417 of the Companies Act 61 of 1973 during July 1981. This record was held by the trial Judge to be admissible in terms of sub-sec 2(b) of sec 417. That ruling has not been challenged on appeal.

Bearing in mind the trial Judge's above-mentioned credibility findings, I think that there is much to be said for the view that International, through certain key executives (all members of the credit committee), was aware of the fact that the financial statements of the Deals Group were subject to inter-company manipulations of the nature described above. On the other hand, there is no suggestion that International had any knowledge of the manner in which, and extent to which, the 1978 financial statements had been

manipulated. Walraven stated that they were always advised when Cunningham "changed the picture"; and, in the absence of any such advice, he would have assumed that the financial statements "showed the correct picture". Rivkind gave evidence to the same effect. It is also of some significance that the only manipulation mentioned in Miller's FI on the 1978 financial statements was the inclusion of a fictitious amount of R50 000 in the "creditors" figure.

In regard to the question as to whether the individual trading results of companies within the Group were of material interest to International, Walraven averred that they were; and I must say that common sense would seem to support this averment. The different companies in the Group were engaged in various business activities and I would imagine that a creditor in the position of International would be interested in the relative

profitability, or otherwise, of these different enterprises.

All in all I am not persuaded that the learned trial Judge erred in holding that the inter-company manipulations contained in the financial statements were materially misleading as far as International was concerned.

(d) The categorization of non-refundable deposits

This seems to be a very minor and unimportant complaint. The lessee of a television set leased by Deals TV was obliged to pay at the inception of the lease a "non-refundable deposit", which entitled him to a three-month rent-free period at the end of the lease. The total amount of such deposits was reflected in the balance sheets of Deals TV and of the Group as part of shareholders' equity, whereas it should have been shown as income or deferred income and provision should have been made for expenditure likely to be incurred at the end of each lease. Moreover,

the categorization of these deposits as part of share-holders' equity did not conform to a note which appeared in the financial statements of the Group and Deals TV.

Again, however, it is conceded that International was not misled by this treatment of the deposits in the financial statements concerned and it was referred to by appellant's counsel only in the context of proof of fraud or negligence.

(e) The accrual to income of future television rental

In regard to this complaint the learned trial Judge said the following:

> "It is not in dispute that in the case both of discounted and pledged agreements, the full amount of future rentals payable under such agreements were brought to account in the 1978 financial statements as income. Furthermore, no expenses to match such income

were brought to account.

On the undisputed evidence, the amount of future rental brought to account as income was the sum of R400 333,33. Of that amount some R72 000 represented agreements discounted by the TV company with the plaintiff. The balance was pledged paper.

The calculation of the amounts thus brought to account appears from a document found in the defendant's working papers, Exhibit B192. The defendant's counsel did not dispute this interpretation of the document or that the defendant would have realised the effect thereof had he read it. I do not propose, therefore, to attempt to describe the details appearing on Exhibit B192."

The learned Judge then proceeded to refer to the expert evidence given by the accountant witnesses:

"The expert evidence was equivocal as to whether it would constitute proper accounting practice to bring to account as income the proceeds of a genuine sale of television

rental agreements. There can be no doubt that where, as in the present case, the TV company remained liable to maintain the television sets, there were matching expenses which should have been set off against that income. There can also be no doubt that the fact of such a practice should, at least, have been referred to in a note to the financial statements. I shall assume, however, in favour of the defendant, that the inclusion in income of the proceeds of the agreements discounted was an acceptable accounting procedure. That, however, accounts only for some 70% of the amount in question."

And he concluded:

"With regard to this issue, the defendant's counsel, quite correctly in my opinion, did not seek to justify the taking to account of the future rental in respect of rental agreements pledged as security to the plaintiff."

Before us appellant's counsel supported the

findings of the trial court on this issue and submitted that the evidence established that the amount of such future rental brought to account as income was R400 333, of which an amount of approximately R72 000 represented the proceeds of agreements discounted (ie "sold") by Deals TV to International and the balance of R338 333 pledged paper.

Respondent's counsel, on the other hand, submitted (in oral argument) that the evidence failed to establish any of these facts. In elaborating this argument, counsel criticized the use made by the trial Court (and appellant's counsel) of the exhibit B192 and pointed to various gaps in the evidence. He further submitted that the inference that a substantial amount from the proceeds of pledged paper was wrongly taken to income in the relevant financial statements could be drawn only if it were established -

(1) that the amount of R400 333, which appears on B192, was in fact included as revenue in the

financial statements concerned;

(2) that this amount was made up entirely of the proceeds of television rental agreements, ie did not include the proceeds of television hire-purchase agreements; and

(3) that the proceeds of television rental agreements discounted (or "sold") amounted to R72 000.

And he argued that none of these propositions had been established in evidence.

As regards (1) above, B192 is admittedly a cryptic and equivocal document. The only witness who purported to be able to interpret it properly was Jacobson, when resuming his re-examination after an 8-month adjournment of the trial. Jacobson was a particularly unconvincing witness and I am sceptical of this evidence. Nevertheless, the argument of respondent's counsel was somewhat weakened by the fact that in respondent's heads of argument it is stated

that it is common cause that, inter alia, the proceeds of the "sales" of television agreements -

> ".... amounted to R400 333 as calculated in document B192".

Moreover, this proposition does not appear to have been seriously disputed in the Court below. Similarly, the question as to whether this amount of R400 333 included the proceeds of hire-purchase agreements does not appear to have been canvassed in cross-examination in the Court below.

To establish proposition (3), International relied upon evidence given by Walraven to the effect that from International's own internal records it appeared that the total proceeds for the year in question, derived from television rental agreements discounted (ie "sold") by Deals to International, amounted to R72 328. Walraven also mentioned a figure of R146 000 which was given to him by Cunningham and which apparently included the proceeds of

paper discounted with other financial institutions. The evidence is not very clear as to what this figure of R146 000 comprised. At all events, it was Walraven's contention that the balance (ie the difference between R400 333 and either R146 000 or R72 328) represented the proceeds of paper pledged which had been wrongly taken to account as income.

Respondent's counsel criticized this evidence on various grounds. One was that it failed to take account of the proceeds of hire-purchase paper discounted, the amount of which was unknown. Another criticism was that B192 contains the following notation:

> "Future commitment 400,333,33 Not accr.
> Future commitment 13 175,09 Accr.
> To Sales 413 509,42
> Reversal of F.C. to Income
> because contracts have been sold."

(The abbreviation "accr" evidently stands for "accrued" and "F.C." for "future commitment"".) This notation, for what it is worth, appears to suggest that the whole of the R400 333 represented the proceeds of contracts "sold".

Generally, the evidence leaves me in substantial doubt as to whether International did establish the three propositions upon which its case on this aspect of the matter rests. Nevertheless, I do not find it necessary to decide this issue and I shall assume in International's favour that it was shown that the relevant financial statements reflected as income a substantial amount (R250 000 to R300 000 was Walraven's estimate) representing the proceeds of rental paper pledged by Deals. Upon this assumption, the financial statements would, to this extent, have been false and misleading. There is no suggestion that International was in fact not misled in this respect.

Fraud or Negligence

In his judgment the trial Judge considered very thoroughly the question as to whether it had been shown that in reporting on the 1978 financial statements of the Deals Group (with their various defects) respondent had acted fraudulently or, alternatively, negligently. The learned Judge came to the conclusion that fraud had not been established, but that in regard to two of the complaints, viz. the inter-company manipulation of turnover and expenses and the taking to income of future rentals accruing under pledged paper, the respondent had acted negligently and that had he carried out his duties with proper diligence these complaints would probably not have arisen - in the sense, presumably, that these defects in the financial statements would have been detected and either eliminated or drawn to the attention of International by way of a qualification to the statements.

Appellant's counsel and respondent's counsel delivered lengthy arguments on these issues: the former in an attempt to show that the learned Judge should have found fraud and the latter in an attempt to show that negligence ought not to have been found. I do not propose to refer to these arguments in any detail. I have carefully considered them all and remain unpersuaded that the trial Judge erred in making the finding which he did.

Unlawfulness

In order for respondent to be held liable to International for his reporting as auditor on the 1978 financial statements of the Deals Group it is necessary for International to show not only that he acted negligently in so reporting, but also that he acted unlawfully, ie in breach of a legal duty owed to International not to report incorrectly on the financial statements. Goldstone J came to the conclusion that the following facts and

considerations established such a legal duty:

"(a) The statutory duty upon the defendant to furnish his report on the financial statements: s300 of the Act. More particularly, his duty was to satisfy himself as to the matters referred to in Section 301 of the Act and to express an opinion as to whether the financial statements fairly presented the financial position of the company and its subsidiaries;

(b) The nature and context of the relationship between the parties created a direct link between the plaintiff and the defendant;

(c) The defendant was aware that in monitoring and reviewing the facilities of the Deals Group, the plaintiff would rely upon the financial statements in a serious and business context;

(d) There are no considerations of public policy which should induce the Court to deny liability in a case such as the present."

I agree that these circumstances do create such a duty and I did not understand respondent's counsel to dispute this.

I am also satisfied that, in view of the defects in the financial statements referred to in the previous section on fraud or negligence, viz the inter-company manipulation and the accrual to income of future rentals in respect of pledged paper, respondent acted in breach of that duty in reporting on the financial statements as he did. Clearly the statements did not, in these respects, fairly represent the financial position of the companies concerned and it would also be incorrect to say that he (respondent) had properly complied with all the requirements of sec 300 of the Companies Act. Unlawfulness was, therefore, established.

Causation

International's case on the aspect of causation, as I apprehend it, may be summed up as follows:

(1) In his auditor's report respondent negligently and unlawfully certified the correctness of the financial statements.

(2) In fact the financial statements were incorrect and misleading in various material respects, viz those respects resulting from the inter-company manipulations of turnover and expenses and those resulting from the taking to income of future rentals accruing under pledged paper.

(3) Acting on the information contained in these statements and relying upon respondent's report, International decided in March 1979 to continue to provide the Deals Group with financial facilities.

(4) Had respondent not so acted negligently and unlawfully the true financial position of the

Deals Group would have been revealed to International.

(5) Had International known the true financial position of the Deals Group in March 1979 it would have decided to discontinue the provision of financial facilities, and would have recovered from Deals the amount owing to it.

(6) In the circumstances it would not have suffered the loss which it ultimately did.

(7) Consequently such loss is directly traceable to respondent's negligent report on the financial statements.

Propositions (1) and (2) have already been dealt with: they were established. As regards (3), it is not in dispute that International relied on the financial statements and respondent's report thereon when it decided on or about 30 March 1979 to maintain and, in part increase,

the Deals facility. The total facility then allowed was R700 000. Nor is it seriously disputed that had respondent not acted negligently the true financial position of the Deals Group would have been revealed to International (see (4) above).

As to (5) above, the learned trial Judge referred to B3, which was a column in a financial analysis constituting annexure "C" to International's particulars of claim, as amended (see also exhibit 13). In column B3 are shown the figures reflected in the 1978 financial statements for the Group, adjusted in order to correct the false bringing to account as revenue of the future television rentals. The trial Judge compared certain of these adjusted figures in B3 with the corresponding figures in the 1977 financial statements. This comparison demonstrates that had International been provided with 1978 Group financial statements drawn along the lines of B3 it would

have noted that (as compared with the previous year) there was a substantial decline in total shareholders' equity, in net profit after tax and in the profit-sales percentage and a marked increase (from 2,39:1 to 3,84:1) in the debt/equity ratio (and here it is to be observed that a ratio of more than 2:1 would indicate an unsatisfactory, over-geared situation). In addition, had there not been a manipulation of turnover and expenses in the audited 1978 financial statements, Deals Furnishers, the holding company, would have shown a substantial trading loss for the year.

After carefully reviewing the evidence the trial Judge concluded that it had been demonstrated as a matter of "substantial probability" that -

> "...if the 1978 audited accounts had shown the figures reflected in Annexure B3 and in addition the loss in the holding company (i e without the manipulation of turnover), the facility of the Deals Group would, indeed,

> have been terminated by the Plaintiff. Apart from the poor financial condition of the Group which would have been reflected, the management figures provided by Cunningham would have been shown to have been wholly and materially unreliable. And, indeed, the dishonesty of the management of the Deals Group would have been apparent to the plaintiff."

Before us respondent's counsel attacked this finding, the main argument being that since International was prepared to continue the facility after receiving the 1977 audited financial statements (the figures of which were "broadly comparable" with those reflected in the 1978 financial statements adjusted along the lines of B3 - I shall call these "the B3 figures") it would probably have continued the facility even if confronted in March 1979 with the B3 figures. I cannot agree. As I have shown in my review of the facts, the responsible officers of International were very unimpressed by the 1977 audited

financial statements (received in June 1978), but were persuaded to continue the facility largely because of the prospect of radical improvement held out by the trading figures for the four months up to 20 April 1978. It seems to me to be unlikely that if this expected improvement had been shown by the 1978 financial statements (reflecting B3 figures) to have been ill-founded and the true position revealed as one of substantial decline in the financial condition of the Group and if at the same time Cunningham's large-scale deceptions had thus been brought to light, International would have continued the facility. I agree, with respect, with the finding of the trial Judge on this issue.

It is not disputed that had International discontinued the facility in March 1979, or shortly thereafter, it would have recovered in full the amount owing to it by Deals.

I come now to consider propositions (6) and (7) above. It is in this context that Goldstone J non-suited International, broadly on the ground that in law the necessary causal connection between respondent's unlawful and negligent act and International's ultimate loss did not exist. Before considering in more detail the trial Court's reasons for coming to this conclusion and the arguments pro and con addressed to us by counsel for the parties, I must make brief reference to the course of events between March 1979 and April 1981, when the companies in the Deals Group were placed under provisional liquidation.

During the remainder of 1979 not much information in regard to the financial position of the Group appears to have been forthcoming. Together with the 1978 financial statements, Deals submitted a budget for 1979 which optimistically forecast a Group profit prior to taxation of

R241 909. In November 1979 Walraven circulated an FI in which he noted that no updated figures were available, as monthly figures had not been prepared by their client. He also noted "inefficient administration", resulting in a number of cheques emanating from the Group being returned R/D.

In December 1979 Cunningham approached Mr J R Kneen, an officer of International, for a restructuring of the Deals Group's facilities. Kneen wrote an FI (dated 6 December 1979), which is highly critical of Cunningham and the Group. It includes the following statements:

> "He (referring to Cunningham) has not provided us with any concrete evidence of where the total earnings of this group, approximately R600 000 have gone during the past year's trading. There has been no substantial increase in debtors, no substantial increase in stock and no substantial decrease in current liabilities.

> One can only draw the following conclusion, that he is blowing a smoke screen on the profitablility of the company or else he is grossly overstocked with stock that is not being written off and is therefore dead stock or, alternatively, there are loss areas which are not being disclosed.
>
> .....
>
> The main points to bear in mind regarding this company are as follows:
>
> 1. We do not believe in Brian Cunningham
> 2. We do not believe he is making the profits which he continues to say he is.
> 3. We do not believe that he is able to meet our commitments.
> 4. We do not believe in his administrative ability
> 5. As a result of 1. to 4. above we must do our utmost to get out of this account as rapidly as possible in the current financial climate which appears amenable to the sale of such a group."

Walraven stated in evidence that he disagreed with many of these comments, but his evidence in this regard is not very convincing. What does emerge from this and other subsequent FI's is that the Deals Group seemed to be

perennially beset by illiquidity problems and that it was becoming increasingly apparent that the Group was poorly administered.

In January 1980 Deals TV sold its television business to a company referred to in the evidence as "Teljoy" and it was arranged that part of the proceeds of the sale would be paid to International in reduction of the indebtedness of Deals to it.

In April 1980 there occurred a curious episode. According to an FI by Kneen (dated 14 April 1980), a meeting of the credit committee was held on 12 April 1980 and at this meeting it was agreed that the Deals account would be terminated "forthwith". The FI also records that Kneen had consulted with International's attorneys, who had provided the text of a letter of termination. What is curious is that this decision was never implemented and the letter of termination was never sent to Deals. Moreover,

Walraven professed not to know about the decision; Rivkind said that no such decision was intended - it was merely "a strategic move"; and Jacobson stated that he did not recall the decision to terminate.

A telex dated 17 April 1980 from Cunningham to Kneen records the substance of a telephone conversation between them during which Cunningham gave reasons for not being able to provide management accounts as at December 1979, but assured Kneen that as at 20 December 1979 the capital employed was in excess of R1 000 000 (1978: R817 948) and would be "a lot higher" when the proceeds of the Teljoy transaction were brought into account. The evident lack of liquidity in the Deals Group and the failure of Cunningham to produce up-to-date figures and accounts was obviously a source of concern to International at that stage, for in reply Kneen telexed that after discussion with his colleagues a decision had been arrived at which

entailed, inter alia, all future payments from Teljoy being made to International, Deals providing International with various items of information and International's auditors, Messrs Alex Aiken and Carter, making a current evaluation of, and preparing draft accounts for, the Group.

An FI of 8 May 1980 drafted by Kneen and giving a résumé of the Deals account over the previous two weeks again stresses the illiquidity of the Group and contains the cryptic sentence -

> "He requires R75 000 from Teljoy or else we must take an Order. If we don't, somebody else will."

(The "order" referred to was apparently a judicial management order.)

A telex from Cunningham to International dated 11 June 1980 reveals that Deals was again having liquidity problems and gives a number of reasons why International

should give further financial support to the Group. The alternative possibility of a judicial management order is again alluded to. In brief, what Deals asks for is an immediate injection of R50 000, a further R50 000 on 21 June 1980 and a third R50 000 to be made available "in case of need" on 1 July 1980.

At about the same time (ie early in June) International received from Deals a document (C685) headed "Conservative estimate of the Assets and Liabilities of the Deals Group as at 20th April 1980", which had been prepared by Cunningham. It is essentially a balance sheet of the Group, with the comparative figures from the 1978 accounts. Generally, the picture presented is of a sound financial position.

In May 1980 International's auditors, Messrs Alex Aiken and Carter, were instructed by International to investigate and report on the quality and quantity of the

security held by International in respect of the Deals Group's indebtedness to it. They reported verbally on 17 June 1980 to the effect that the security was satisfactory and that it provided one-and-a-half times cover. The total amount of the Deals indebtedness at that stage was approximately R475 000 and the approved facility R600 000. It was conceded by both Walraven and Jacobson that had the Deals account been terminated at that stage no loss would have been incurred.

Towards the end of June 1980 International decided (through the medium of its credit committee) to embark upon what has been described as a "support programme", or a "salvage operation", with reference to the Deals Group. This was in response to Cunningham's telex of 11 June 1980, requesting additional facilities of (potentially) R150 000. At that stage it must have been apparent to International that Deals was suffering chronically from illiquidity

problems and that there was a serious administrative breakdown within the Group. No audited financial statements had been forthcoming since the 1978 statements, received in March 1979. This was partly because Deals again changed its year-end, this time from 20 December to 28 February. Consequently, the next set of audited financial statements was not expected until about the end of April 1980, but by the end of June, despite frequent reports from Walraven, nothing had been produced. Indeed no such statements were available at any time prior to liquidation in April 1981. One of the reasons given by Deals for the inability to produce financial statements was a "bug" in the computer which prevented figures for debtors being accurately determined. An undertaking, given by Cunningham in writing in February 1979, to provide monthly management accounts had never been properly adhered to and as at June 1980 no up-to-date financial information about the Group,

save for C865 (which contained no trading figures), was available to International. This failure to provide management accounts was also attributed to administrative problems.

In terms of the "support programme" decision, International agreed to pay Deals salaries for the month of June (the Group evidently did not have the ready cash to do so) and to make available the additional financial facilities requested. It was further arranged that International would provide consultancy and management services to Deals in order to assist the Group in rectifying its administrative and financial position, at a fee of R2 500 per month. Respondent's appointment as auditor to the Group had in the meanwhile been terminated and as part of the support programme International nominated the firm of Willem du Toit and Partners in his place. The firm was immediately commissioned to write up the books of the Group,

to overcome the debtors problem and to produce the overdue financial statements. Although both International and Willem du Toit and Partners spent much time and effort on these appointed tasks, the administrative and accounting mess (described by Walraven as "chaotic") was never cleared up and at the time of liquidation it had not been possible to produce a set of financial statements. As a consequence of this International was unable (after March 1979) to undertake its usual annual review of the financial position of the Deals Group and generally was denied proper insight into the affairs of the Group until it was too late.

After the commencement of the support programme, the general picture presented by the evidence is one of an ever-mounting indebtedness of the Deals Group to International, of an inability to solve the administrative and financial problems of the Group, of a general defaulting by Deals in regard to its obligations towards International

and an apparent indifference on the part of International to such defaults. While on paper the approved credit facility of the Deals Group remained fixed at R600 000, the actual indebteness of the Group had risen by the end of July 1980 to approximately R669 000; and by the end of November 1980 it stood at R890 000 and by the end of March 1981 at R976 000. In the result International's security cover dropped substantially below the desired 150%. During this period no security analyses appear to have been done and credit continued to be granted in increasing amounts on extremely lenient terms. Walraven likened it to a period of judicial management. International appeared to abandon its accepted practices in dealing with a client.

During the second half of 1980, and with encouragement from International, Deals embarked upon what was referred to in the evidence as the "Mr Space Cupboard venture", essentially a new line of business. This

entailed a capital outlay of R200 000 and absorbed a major portion of the Group's cash flow. By the time of liquidation this venture had not generated any significant amount of income: it had merely resulted in an increase pro tanto in the indebtedness of the Group. Also during the second half of 1980 Impact sold the African side of its business to Freedom Stores Limited, in which 40% of the shareholding was held by the manager of Impact and 60% by Cunningham.

On the evidence the trial Judge concluded that the decision taken in June 1980 to support the Deals Group was not simply a further implementation of the decision taken in March 1979 (on the strength of the 1978 audited financial statements) to give further financial assistance to the Group. He stated:

> "The statements by Walraven that reliance was still placed on the 1978 financial statements in the light of the

events which had taken place, appears to me to be highly suspect and improbable. However, even if that is so, it does not assist the plaintiff if the decision of June 1980 to support the Deals Group was not a decision in the implementation of the facility agreed in March 1979. In particular, as Walraven himself agreed, the June 1980 situation presented the Plaintiff with a choice: either terminate the facility and liquidate the Deals Group or proceed with the support operation. The plaintiff chose the latter course and, in doing so, was not only more lenient with regard to the terms given to the Deals Group but, (and this is of fundamental importance), knowingly allowed its security to drop significantly below the 150% level it had previously insisted upon. Generally, as the defendant's counsel put to the relevant witnesses, the manner in which the Deals Group was supported after June 1980 was anything but in accordance with the plaintiff's usual policy.

.....

In all the circumstances, I have come to the conclusion that the decision of June

> 1980 was a new departure and not a direct consequence of the decision in March 1979 to continue the facility of the Deals Group. It is at this point that the plaintiff's case must fail.
>
> I would add, that even if this conclusion is incorrect, and if the plaintiff, in June 1980 was acting in consequence of the March 1979 decision, I am of opinion that such ultimate loss was too remote to be recovered by the plaintiff."

This reasoning was attacked by appellant's counsel and supported by respondent's counsel.

As has previously been pointed out by this Court, in the law of delict causation involves two distinct enquiries. The first is a factual one and relates to the question as to whether the defendant's wrongful act was a cause of the plaintiff's loss. This has been referred to as "factual causation". The enquiry as to factual causation is generally conducted by applying the so-called

"but-for" test, which is designed to determine whether a postulated cause can be identified as a causa sine qua non of the loss in question. In order to apply this test one must make a hypothetical enquiry as to what probably would have happened but for the wrongful conduct of the defendant. This enquiry may involve the mental elimination of the wrongful conduct and the substitution of a hypothetical course of lawful conduct and the posing of the question as to whether upon such an hypothesis plaintiff's loss would have ensued or not. If it would in any event have ensued, then the wrongful conduct was not a cause of the plaintiff's loss; aliter, if it would not so have ensued. If the wrongful act is shown in this way not to be a causa sine qua non of the loss suffered, then no legal liability can arise. On the other hand, demonstration that the wrongful act was a causa sine qua non of the loss does not necessarily result in legal liability. The second enquiry then arises, viz

whether the wrongful act is linked sufficiently closely or directly to the loss for legal liability to ensue or whether, as it is said, the loss is too remote. This is basically a juridical problem in the solution of which considerations of policy may play a part. This is sometimes called "legal causation". (See generally Minister of Police v Skosana 1977 (1) SA 31 (A), at 34 E - 35 A, 43 E - 44 B; Standard Bank of South Africa Ltd v Coetsee 1981 (1) SA 1131 (A), at 1138 H - 1139 C; S v Daniëls en 'n Ander 1983 (3) SA 275 (A), at 331 B - 332 A; Siman & Co (Pty) Ltd v Barclays National Bank Ltd 1984 (2) SA 888 (A), at 914 F - 915 H; Mokgethi en Andere v Die Staat, a recent and hitherto unreported judgment of this Court, pp 18 - 24). Fleming, The Law of Torts, 7th ed at 173 sums up this second enquiry as follows:

> "The second problem involves the question whether, or to what extent, the defendant should have to answer for the consequences

> which his conduct has actually helped to produce. As a matter of practical politics, some limitation must be placed upon legal responsibility, because the consequences of an act theoretically stretch into infinity. There must be a reasonable connection between the harm threatened and the harm done. This inquiry, unlike the first, presents a much larger area of choice in which legal policy and accepted value judgments must be the final arbiter of what balance to strike between the claim to full reparation for the loss suffered by an innocent victim of another's culpable conduct and the excessive burden that would be imposed on human activity if a wrongdoer were held to answer for all the consequences of his default."

In Mokhethi's case, supra, Van Heerden JA referred to the various criteria stated in judicial decisions and legal literature for the determination of legal causation, such as the absence of a novus actus interveniens, proximate cause, direct cause, foreseeability and sufficient causation

("adekwate veroorsaking"). He concluded, however, as follows:

> "Wat die onderskeie kriteria betref, kom dit my ook nie voor dat hulle veel meer eksak is as 'n maatstaf (die soepele maatstaf) waarvolgens aan die hand van beleidsoorwegings beoordeel word of 'n genoegsame noue verband tussen handeling en gevolg bestaan nie. Daarmee gee ek nie te kenne nie dat een of selfs meer van die kriteria nie by die toepassing van die soepele maatstaf op 'n bepaalde soort feitekompleks subsidiêr nuttig aangewend kan word nie; maar slegs dat geen van die kriteria by alle soorte feitekomplekse, en vir die doeleindes van die koppeling van enige vorm van regsaanspreeklikheid, as 'n meer konkrete afgrensingsmaatstaf gebruik kan word nie."

It must further be borne in mind that the delictual wrong of negligent misstatement is relatively novel in our law and that in the case which in effect brought it into the world, Administrateur, Natal v Trust Bank

Bank van Afrika Bpk 1979 (3) SA 824 (A), Rumpff CJ emphasized, with reference to the fear of the so-called "limitless liability", that this new cause of action could be kept within reasonable bounds by giving proper attention to, inter alia the problem of causation (see p 833 B).

In the present case International's loss arose from its inability to recover in full the amount owed to it by the Deals Group upon the liquidation in April 1981 of the companies forming the group. Respondent's negligent report on the 1978 audited financial statements unquestionably constituted a causa sine qua non of such loss since, as I have indicated, a proper, ie non-negligent, performance by respondent of his duties as auditor would have revealed the true financial state of the Deals Group to International in March 1979; and, had this occurred, International would then have discontinued providing the Group with financial facilities and would have recovered from Deals the amount

owing to it, which was then about R620 900 (as against an approved facility of R650 000). In that way the ultimate loss would have been obviated. In other words, but for respondent's negligent report and postulating hypothetical lawful (ie non-negligent) conduct on respondent's part, International's loss would not have ensued.

There remains the final and much-debated question as to whether International established legal causation. Here there are a number of factors which tend to separate cause and effect.

(1) The time factor.

About two years elapsed between the respondent's negligent reporting on the financial statements and the loss sustained by International. As Fleming (op. cit. p 198) remarks, "..... liability does not reach into infinity in time". Two years is, of course, nowhere near infinity, but

in a situation such as the present one it does permit of other facts to intervene and it does tend to dissipate the effect of the original wrongful act. By itself this is not a decisive factor, but it is one to be considered when viewing the overall picture.

(2) The decision to provide a support programme.

This decision in June 1980, which was referred to in the evidence as a "watershed decision", does appear to have played a crucial role in International sustaining the loss which it did. The picture at that stage was fairly bleak. The Deals Group was chronically illiquid, its administration was in a mess, proper figures, particularly relating to debtors, were unobtainable, it was regularly defaulting on its obligations, there were threats of judicial management, and it now wanted more financial support. As the learned trial Judge correctly pointed out, International had then to decide whether to terminate the

facility (which would undoubtedly have resulted in liquidation) or proceed with a support programme. It chose the latter option. Had it chosen the former, there seems little doubt that even then it would have recovered what Deals owed it in full.

(3) Indebtedness allowed to escalate.

A conspicuous and decisive feature of the support programme was the manner in which Deals's indebtedness to International was allowed by the latter to escalate over the period June 1980 - April 1981 from under half-a-million rand to nearly a million rand; and this in disregard of formally authorized credit limits, of adequate security cover and of financial defaults by Deals and in ignorance of the Group's true financial state. It was this uncontrolled (and unexplained) escalation which was the real and immediate cause of International's loss, for had Deals's indebtedness been kept within authorized limits little or no loss would

have been incurred.

(4) The changed relationship between the parties.

As a result of the implementation of the support programme International and the Deals Group ceased to be creditor and debtor dealing at arm's length. International, through its own employees and through the auditors nominated by it, became intimately involved in the administration of the Group. It gained greater insight into the administration - or lack thereof - and in effect, as Walraven conceded, credit terms granted were so lenient that it became a kind of unofficial judicial management.

(5) Cunningham's fraud.

Walraven conceded that with hindsight he realised that Cunningham had been dishonest in his dealings with International: that comparing the picture which he (Cunningham) had painted of the financial position of the Group in 1979 and 1980 - and even in 1981 - with the true

position as revealed on liquidation, it became apparent that International had been deliberately lied to. To some extent the executives of International must have been aware of his dishonesty, as for example his practice of manipulating inter-company accounts in order to evade taxation, but it is clear that they were deceived all along during the fateful period from March 1979 to April 1981, by Cunningham's reports as to the financial position of the Group and his sanguine forecasts of future profits, which he must have known were ill-founded. His decision in 1980 to again postpone the Group's year-end for accounting purposes smacks of a stratagem to gain time and avoid having then to produce audited financial statements. In addition, there were at least two instances of double discounting, ie Deals discounting the same agreements twice over on different dates. Cunningham's deceptions over this period obviously played an important part in causing the financial loss which

International ultimately incurred.

(6) Non-reliance on 1978 financial statements.

It was submitted on appellant's behalf that International did not rely on the 1978 audited financial statements solely in deciding in March 1979 to maintain and increase the financial facilities afforded to Deals but that International further relied upon the statements in its dealings with Deals in the 1980/81 period. Indeed this was the main thrust of appellant's argument on the causation issue. The trial Judge found Walraven's evidence to this effect "highly suspect and improbable". I agree. It was not pertinently pleaded that International placed such reliance on the 1978 statements; obviously by June 1980 those statements were very much out of date; there were some other sources of information available to International, and, in any event, the support programme, in its execution, does not appear to have taken much account of

facts and figures.

(7) The foreseeability of the support programme.

I have described the general features of the support programme - the uninhibited granting of credit facilities, the involvement of International in the running of the Group, the dispensing with regular accounts or financial analyses or security analyses and so on, which contrasted starkly with International's modus operandi prior to June 1980. And as I have stated, it was this uninhibited lending without adequate security that was the real cause of International's loss. Such a situation was, in my view, hardly foreseeable in March 1979.

Having regard to all these factors I am of the opinion that the ultimate loss suffered by International was too remote - there was not a sufficiently close connection between respondent's negligence and the loss - for legal liability on respondent's part to arise. I, therefore,

agree with the conclusion reached by the Court a quo and with the order made dismissing International's action with costs.

The appeal is dismissed with costs, including the costs of two counsel.

M M CORBETT

BOTHA JA)
HEFER JA)
SMALBERGER JA) CONCUR
FRIEDMAN AJA)