Casenote

Liability of Company Officers for Company Torts:
Standard Chartered Bank v Pakistan National Shipping Corporation
[2002] UKHL 43; [2002] 3 WLR 1547, [2003] 1 All ER 173

Introduction

The recent collapse of major corporations in both the United States and Australia is of course a personal disaster for many shareholders of those companies. But the fate of the employees of those companies, or other parties who have dealt with or been injured by them, is also a major problem. Where a company becomes insolvent, and where the company has been underinsured or not insured at all, what remedy can a company employee, or a creditor, or someone who has a cause of action against the company in tort, obtain?

In this context the question of personal liability of company directors becomes increasingly important. Can a director be held financially accountable for board decisions which have led to damage to those whom the company has dealt with or injured?

Perhaps the natural reaction of those who know something about company law is that the fundamental principles of the "corporate veil" and "separate personality" should protect directors from actions based on company wrongs. After all, the basic principle of company law is that a company is a separate legal person from its members, and that the members of a company have their liability for company debts limited to their liability for the price of their shares. This principle was articulated clearly in the seminal case of *Salomon v A Salomon & Co Ltd.*[1]

[1] [1897] AC 22; although, as Meagher JA noted in *Briggs v James Hardie & Co Pty Ltd* (1989) 7 ACLC 841, 847, the principle of separate corporate personality had been well established long before *Salomon's* case. In Australia today the principles above are expressed clearly in the *Corporations Act* 2001 (Cth). Section 119 provides for the company to "come into existence" on registration, and s 124(1) provides that it has "the legal capacity and powers of an individual". Section 516 provides for the limited liability of shareholders.

A fundamental reason for the doctrine of separate legal identity of companies is the protection this provides to the personal funds of company members. Company money is put at risk in company decisions, but the houses and other personal assets of the shareholders are kept safe.

What this initial reaction ignores, however, is that it is shareholders, and not directors as such, who are protected by the "limited liability" provisions. Insofar as there is protection of directors from personal liability, this may flow as an implication from the doctrine of separate legal personality, but certainly does not result from a general principle that anyone associated with a company has limited liability.[2]

As Lord Steyn noted in *Williams v Natural Life Health Foods Ltd (Williams)*[3]

What matters is not that the liability of the shareholders of a company is limited but that a company is a separate entity, distinct from its directors, servants or other agents.[4]

From an early stage the courts have drawn the logical implications of "separate legal personality", and declined to find that individual directors of companies were personally liable for breaches of contract committed by the company. This is a fairly obvious implications – the company has been set up to operate in the commercial sphere, and it alone should be liable for its operation in that sphere.[5] But the courts have always been less certain that directors are exempt from liability for torts committed by the company. Enforcing contractual obligations against a company alone seems reasonable, but why should legal personality intervene when a wrong is done against another party?

As Pascoe and Anderson note in their recent summary of this area,[6] the courts have at different times offered three different approaches to

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2 Indeed, in an introductory aside to his recent major review of this area, Robert Flannigan challenges the normal view that shareholders can rely on limited liability for torts, and suggests that "the better view... is that shareholders (like any other actor) remain personally responsible for their own tortious conduct": Robert Flannigan, "The Personal Tort Liability of Directors," (2002) 81 *Canadian Bar Review* 247, 261.

3 [1998] 2 All ER 577.

4 Above n 4, 581j-582a. See also R Grantham and C Rickett "Director's Tortious Liability: Contract Tort or Company Law?" (1999) 62 *Modern Law Review* 133-139, 135: "The principle of limited liability protects the company's shareholders, and not the company or its officers. It thus has no bearing where a director is not a shareholder, and even where, as is common in small companies, directors are also shareholders it is far from clear why the individual's status as a shareholder should foreclose the normal consequences of other capacities in which the individual acts."

5 Even here, of course, there are occasions when courts have "pierced the corporate veil" to ascribe liability to individual shareholders. For recent comments on the general topic of piercing the veil see I M Ramsay and D B Noakes, "Piercing the Corporate Veil in Australia" (2001) 19 *Company and Securities Law Journal* 250-271; S Watson, "Who Hides Behind the Corporate Veil? Finding a Way out of 'The Legal Quagmire'" (2002) 20 *Company and Securities Law Journal* 198-214.

6 J Pascoe and H Anderson, "Personal Recovery Actions By Creditors Against Company Directors" (2002) 10 *Insolvency Law Journal* 205-228, especially at 212-220.

this question: the "direct and procure" test,[7] the "make the tort their own" test,[8] and most recently an apparently new test asking whether the director has "assumed responsibility" for the company's wrong. This third test is said to derive from the House of Lords decision in *Williams v Natural Life Health Foods*,[9] which effectively adopted the reasoning of the New Zealand Court of Appeal in the earlier decision of *Trevor Ivory Ltd and Trevor Ivory v Anderson (Trevor Ivory)*.[10] Importantly, both *Trevor Ivory* and *Williams* were cases involving the tort of negligent misrepresentation causing economic loss. The directors concerned were said to not be liable because they had not "assumed responsibility" for the actions of their companies.

The decision of the House of Lords in *Standard Chartered Bank v Pakistan National Shipping Corporation (Standard Chartered Bank)* offers a recent analysis of this question in the specific context of an action in the tort of deceit. In its decision the House offers a welcome clarification of an area which had become fairly confused following the Court of Appeal decision in the litigation. The decision will probably also have a substantial impact on the future development of Australian law in this area.

Facts

In a complicated chain of events involving false statements in a bill of lading, Mr Mehra, director of a company called Oakprime International Ltd, made various false statements on Oakprime letterhead (assisted by officers of the Pakistan National Shipping Corporation) which led to the Standard Chartered Bank ("SCB") paying Oakprime some $US1.5 million. Evans LJ in the Court of Appeal noted:

> The judgment [of the lower court] ... spells out in devastating detail the steps which Mr. Mehra on behalf of Oakprime then took in order to obtain a bill of lading and other documents which falsely stated that a full cargo answering

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7 Taken as originating in the decision of the House of Lords in *Rainham Chemical Works Ltd (In Liq) v Belevedere Fish Guano Company Ltd* [1921] 2 AC 465, and developed by Atkin LJ in *Performing Right Society Ltd v Ciryl Theatrical Syndicate Ltd* [1924] 1 KB 1, the test asks whether the director "directed and procured" the company's commission of the tort. This test has been adopted by a number of judges at first instance in Australia, following the persuasive decision of Lindgren J in *Microsoft Corporation v Auschina Polaris Pty Ltd* (1996) 71 FCR 231.

8 Articulated first in the Canadian decision of *Mentmore Manufacturing Co Inc v National Merchandising Manufacturing Co Inc* (1978) 89 DLR (3rd) 195, and adopted in the UK by Nourse J in *White Horse Distillers Ltd v Gregson Associates Ltd* [1984] RPC 61, this test requires a higher degree of personal involvement by a director in the company's wrong, to the extent that it can be said that he or she has "made the tort (their) own". The test was severely restricted (if not explicitly overturned) by the Court of Appeal in *C Evans & Sons Ltd v Spritebrand Ltd* [1985] 2 All ER 415. Support for this test in Australia was expressed by Beazley J in *King v Milpurrurru* (1996) 136 ALR 327, but has not been strong since.

9 Above n 3.

10 (1992) 6 NZCLC 67, 611.

> to the contract description was loaded by Oct. 25. ... There was a blatant attempt to produce false, and in some cases forged documents so that an appearance of conforming documents could be achieved by the latest date for presentation, Nov. 10. The Judge was left in no doubt but that the falsity was deliberate and that Mr. Mehra's evidence denying it, which he rejected, was manifestly false.[11]

The Bank lost their money as a result of these fraudulently prepared documents.[12] By the time the matter came to litigation, Oakprime was either in liquidation or, as Lord Rodger of Earlsferry put it, "not... worth powder and shot".[13] Mr Mehra, as director, was sued as personally liable.

First Instance

Creswell J at first instance found against Mr Mehra. He found that Mr Mehra was personally involved in the deception perpetrated against SCB in that he not only knew about it but orchestrated it. He held:

> In the present case Mr Mehra authorized, directed and procured the acts complained of with full knowledge that the acts complained of were tortious. He is accordingly personally liable.[14]

This finding against Mr Mehra seemed to be an obvious application of the previous law to the facts.[15]

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[11] [2000] 1 Lloyd's Rep 218, [12].

[12] An aspect of the litigation which is not considered in this Note is that SCB, in claiming reimbursement for the payment to Oakprime from another bank, Incombank, had falsely represented that the bill of lading was submitted in time. This led to an allegation that the doctrine of contributory negligence should lead to a reduction in the damages payable. Both in the Court of Appeal and the House of Lords this claim was rejected, the court ruling that the statutory provisions governing contributory negligence only applied where the doctrine would have operated at common law as a defence – in the House of Lords see Lord Hoffmann at [18], Lord Rodger of Earlsferry at [42], below n 37. In the case of a claim in the tort of deceit, contributory negligence had never been a defence, and hence did not now operate to reduce damages otherwise payable for deceit. The decision on this point of law is very similar to the earlier decision of the High Court of Australia in *Astley v Austrust Ltd* [1999] HCA 6 that contributory negligence was not available as a defence to a claim for breach of contract under the usual provisions of the State legislation governing the defence.

[13] Above n 11, [35].

[14] Quoted from the judgement at first instance, [1998] 1 Lloyd's Rep 684, at 706, in para [62] of the judgment of Evans LJ on appeal, above n 11.

[15] See, eg, *The Thomas Saunders Partnership v Harvey* (1989) 30 ConLR 103, where the director of a flooring company was held personally liable for a fraudulent statement made about the compliance of a floor he was to install with a particular standard. For a Canadian decision where directors of a company were held personally liable for fraud, see the decision of the British Columbia Court of Appeal in *BG Preeco I (Pacific Coast) Ltd v Bon*

Court of Appeal

The Decision of the Court of Appeal

But on appeal in *Standard Chartered Bank v Pakistan National Shipping Corporation (No 2)*[16] the Court of Appeal disagreed, and in doing so took the immunity of directors to what seemed to be a new level. In a fairly brief comment Evans LJ noted the approach of the House of Lords in *Williams,*[17] and concluded that:

> The House of Lords' judgment is based on the pre-eminence given to the separate legal personality of the company: see the commentary by Ross Grantham and Charles Rickett Director's Tortious Liability: Contract Tort or Company Law? (1999) 62 M.L.R. 133. It is thus necessary, in my view, to apply the principles of tortious liability strictly in accordance with this rule of company law.[18]

Aldous LJ gave the more extensive judgement on the issue of Mr Mehra's personal liability. But, with respect, his Lordship's judgement does not offer very cogent reasons for ignoring the active involvement in fraudulent behaviour by Mr Mehra. His Lordship commented, for example, about the misrepresentations that:

They are all on Oakprime headed paper or clearly stated to be from Oakprime. Mr Mehra's name appears as the person signing the documents as managing director of or on behalf of Oakprime. In my view the representations were made by Oakprime and all the evidence points to the conclusion that SCB relied upon them as being representations by Oakprime.[19]

But to conclude (as was undoubtedly right) that Oakprime bore responsibility for the statements made by Mr Mehra (whether vicariously or more directly), is not a reason for concluding that Mr Mehra himself is cleared of responsibility for those statements. Yet this is the step His Lordship seemed to take a few paragraphs later in his judgment, when he said:

> First, if a director or an employee himself commits the tort he will be liable. An example is the lorry driver who is involved in an accident in the course of

Street Developments Ltd (1989) 60 DLR (4th) 30, discussed in JW Neyers "Canadian Corporate Law, Veil-Piercing, and the Private Law Model Corporation" (2000) 50 *University of Toronto Law Journal* 173-240, 236-237. See also *Felton v Johnson* (2000) Aust Torts Rep ¶81-559 for a similar New Zealand decision.

16 Above n 11.

17 Ibid.

18 Evans LJ in ibid, [67].

19 Aldous LJ in ibid, [14].

20 Aldous LJ in ibid, [16].

> his employment. Although Mr. Mehra was the person who was responsible for making the misrepresentations, he did not commit the deceit himself. For reasons I have already stated the representations were made by Oakprime and not by him. Further, SCB relied upon them as representations by Oakprime and not as representations by Mr. Mehra. [20]

His Lordship did not offer any reason for distinguishing the case of the lorry driver who will be held personally liable for injuries, from that of Mr Mehra. Nor did his Lordship's other two suggested categories of personal liability, assumption of personal liability and "procuring and inducing",[21] seem to advance the argument.

True, a director will be liable if he has "assumed a personal liability", and the discussion in *Williams* shows that in dealings with others a director may "cross the line" in holding themselves out as the source of advice so that they may be sued. But that such a category of personal liability does exist, does not mean that other categories have been excluded. It seems that the Court of Appeal in this case, in focussing on *Williams*, were led to conclude that the *Williams* type of personal liability was now all that needed to be considered. But the better view would seem to be that while *Williams* represents the law in the specific area of economic loss caused by negligent misrepresentation (which has always borne a "quasi-contractual" nature), the decision has not over-turned the previously well-established line of authority on the personal responsibility of directors in other situations.

The third type of case where Aldous LJ conceded that there would be personal liability for a director was where the director "procures and induces another, the company, to commit the tort".[22] But His Lordship went on to say "there are good reasons to conclude that the carrying out of duties of a director would never be sufficient to make a director liable".[23] His Lordship's meaning was a little elusive. Perhaps he was suggesting that where the director believes he is acting as a director for the good of the company (rather than for merely personal gain) then he can never be liable for the company's torts. The question whether or not the director believes they are acting for the benefit of the company has been rejected as a criterion by the Canadian courts.[24]

In any event, on this third point in the *Standard Chartered Bank* case Aldous LJ held that the pleadings did not clearly allege that Mr Mehra was sued as a joint tortfeasor with the company (on the basis of "procuring and

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[21] Aldous LJ in ibid, [17], [20].
[22] Aldous LJ in ibid, [20].
[23] Aldous LJ in ibid, [21].
[24] See for example *ADGA Systems International Ltd v Valcom Ltd* (1999) 168 DLR (351.

inducing"), and that an amendment would not be allowed.[25] Technically His Lordship's judgement left open the possibility that a personal action against a director on this ground might succeed in the future.

Judicial Reaction to the Decision

Immediately after the decision of the Court of Appeal in *Standard Chartered Bank (No 2)* there were a number of expressions of judicial discontent with the decision.

One example was the decision of a differently constituted Court of Appeal in *SX Holdings Ltd v Synchronet Ltd.*[26] There the Court openly acknowledged the force of arguments made by counsel that the decision in *Standard Chartered Bank* might not be the last word on the subject. In that case Potter LJ, having cited the comments of Aldous LJ noted previously about the over-riding force of company law, commented:

> Mr Ashton {counsel for the appellants) has argued with force that, in cases of fraud and deceit, it is by no means easy to see as a matter of policy or logic why the hegemony to be accorded to the principle of company law concerning the separate personality of companies should lead to a "let out" of this kind for an individual who knowingly defrauds another in the name of a company in which he is interested, for his own financial benefit. Whereas liability for negligence is a liability imposed in respect of inadvertent damage caused to one's "neighbour" and/or upon the postulate that the defendant has assumed a personal responsibility towards an injured claimant, liability in deceit is imposed on the basis of harm deliberately (or recklessly) caused by a representor to a "targeted" representee. In this connection I observe that, in another context, Lord Steyn has made clear the strength of the rationale, in terms of deterrence and morality, which underlies the imposition of wider personal liability upon a defendant who is an intentional wrongdoer than that which is imposed upon one less blameworthy in the sliding scale of civil damages: see *Smith New Court Securities Ltd v Scrimgeour Vickers (Asset Management) Ltd* [1997] AC 254, [1996] 4 All ER 769, at p 279. Thus there is much to be said for the view that there are strong countervailing reasons of policy why personal liability should not be avoided simply on the basis that

[25] Indeed, it is possible that at least part of the confusion in the case resulted from the fact that the judge at first instance, Creswell J, while finding all the elements of the tort of deceit established against Mr Mehra personally, had concluded by finding that Mr Mehra "authorized, directed and procured" the torts. The pleadings, however, simply alleged that Mr Mehra was personally liable. Justice Creswell's words turned a finding of direct personal liability into a finding of secondary directorial liability, and on appeal the Court of Appeal then focussed on this secondary issue. See the sequence of events set out by Lord Rodger in the House of Lords, below n 37, [30]-[33].

[26] Court of Appeal (Civil Division), Potter, May, Tuckey LJJ: 10 October 2000; [2001] CP Rep 43.

> the representation was purportedly made, and understood to be made, in the representor's capacity as a company director, particularly when he is the controlling shareholder and moving spirit in relation to that company, use of whose name is adopted as part and parcel of his own fraudulent scheme.[27]

The Court of Appeal in *SX Holdings* allowed an amendment to the pleadings which added an allegation that the director of the company involved was liable as a joint tortfeasor for any tort of deceit committed by the company on the basis that he had procured and induced it (or its solicitors) to make the false representations relied on. The comments of Potter LJ, as noted, indicated that not all members of the Court of Appeal were entirely happy with the holdings in the *Standard Chartered Bank* case.

Other, academic, comment was more scathing. A note by P Watts[28] described the reasoning in the Court of Appeal in *Standard Chartered Bank* as "misconceived", noting that it had always been assumed in deceit cases that even where an agent had spoken on behalf of a principal, the agent remained personally liable. The case was described as an "egregious" example of decisions extending the immunity of directors.[29]

It may also be relevant to note the decision of the Court of Appeal in *Merrett v Babb*,[30] where Aldous LJ (dissenting) would have applied the reasoning in *Williams* to disallow an action by purchasers of a property who had relied on a report by a surveyor. His Lordship's reasoning was that, as the surveyor was employed by a surveying firm at the time, the purchasers relied on the firm, not the employee. May & Wilson LJJ, on the other hand, following the earlier House of Lords decision on almost identical facts, *Smith v Eric S Bush*,4[31] held that the surveyor owed a personal duty of care despite the fact of his employment. With respect, Aldous LJ's dissent in this case was an early indication that His Lordship had misunderstood *Williams*, and that the judgment in *Standard Chartered Bank* would be in doubt should the matter go further.[32]

For other examples where the Court of Appeal decision in *Standard Chartered* Bank was either doubted or carefully distinguished, see the judgement of Rimer J in the Chancery Division in MCA Records Inc v Charly Records Ltd,[33] (affirmed on appeal in MCA Records Inc v

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27 Ibid, [25].

28 "The Company's *Alter Ego*: An Imposter in Private Law" (2000) 116 *Law Quarterly Review* 525-530, 525-526.

29 See also a more detailed review of some recent New Zealand cases in P Watts, "The Company's Alter Ego- a Parvenu and Imposter in Private Law" [2000] NZLR 137-153.

30 [2001] EWCA Civ 214 (15 Feb 2001).

31 [1990] 1 AC 831.

32 The note by McKendrick and Edelman, "Employee's Liability for Statements" (2002) 118 LQR 4-11, supporting *Standard Chartered Bank* against *Babb* on this point is unconvincing. For a case following *Standard Chartered Bank* and distinguishing *Babb* see *Bradford & Bingley PLC v Hayes* (QBD, McKinnon J, 2001 WL 1560784).

33 [2000] EMLR 743 (22 March 2000).

Charly Records Ltd[34]), Noel v Poland[35], and Daido Asia Japan Co Ltd v Rothen.[36]

House of Lords

This course of judicial and academic doubt following the Court of Appeal decision was ultimately vindicated by the decision of the House of Lords on appeal from the decision, in *Standard Chartered Bank v Pakistan National Shipping Corporation.* The House overruled the Court of Appeal and held that Mr Mehra was personally liable for his deceit.

Lord Hoffmann signalled his thinking at the outset of his discussion of this issue by stating that the issue was simply "whether Mr Mehra was liable for his deceit". His Lordship's approach was to cut through much of the confusion in the case which had been generated by the idea that Mr Mehra was acting "as" the company in some sense, and rather to ask: had Mr Mehra's falsehoods led to damage?

His Lordship commented:

> Mr. Mehra says, and the Court of Appeal accepted, that he committed no deceit because he made the representation on behalf of Oakprime and it was relied upon as a representation by Oakprime. That is true but seems to me irrelevant. Mr Mehra made a fraudulent misrepresentation intending SCB to rely upon it and SCB did rely upon it. The fact that by virtue of the law of agency his representation and the knowledge with which he made it would also be attributed to Oakprime would be of interest in an action against Oakprime. But that cannot detract from the fact that they were his representation and his knowledge.[37]

His Lordship made it clear that the *Williams* case was distinguishable on the basis that the tort of negligent misrepresentation was "analogous to contract", and so it was reasonable to require a specific "assumption of responsibility". But:

> This reasoning cannot in my opinion apply to liability for fraud. No one can escape liability for his fraud by saying "I wish to make it clear that I am committing this fraud on behalf of someone else and I am not to be personally liable." Sir Anthony Evans framed the question ([2000] 1 Lloyd's Rep 218, 230) as being "whether the director may be held liable for the company's tort." But Mr. Mehra was not being sued for the company's tort. He was being sued for his own tort and all the elements of that tort were proved against him. Having put the question in the way he did, Sir Anthony answered it by saying that

[34] [2001] EWCA Civ 1441 (5 October 2001).
[35] 2001 WL 606328, Toulson J (14 June 2001).
[36] 2001 WL 825034, Lawrence Collins J, Ch D (24 July 2001).
[37] [2002] UKHL 43, [20].

> the fact that Mr. Mehra was a director did not in itself make him liable. That of course is true. He is liable not because he was a director but because he committed a fraud.[38]

Lord Rodger of Earlsferry delivered the only other substantive judgment in the case. His Lordship analysed the personal liability of directors by supporting the line of cases adopting the "direct and procure" test:

> The incorporation of companies is vitally important for commerce since it allows transactions to be entered into and carried out, property to be held and actions to be raised by, or against, a body which continues in existence despite changes in the individuals who conduct or invest in the business. The company is a separate entity, distinct from the directors, employees and shareholders. The law has rightly insisted that the distinction should be duly observed: *Lee v Lee's Air Farming Ltd* [1961] AC 12. In particular the company does not act as the agent of the directors and, in general, they do not incur personal liability for the acts of the company or its employees: *Rainham Chemical Works Ltd v Belvedere Fish Guano Co Ltd* [1921] 2 AC 465, 488 per Lord Parmoor. Directors may, however, be personally liable if they directed or procured the commission of a wrongful act. The exact scope of this type of liability has been discussed in a line of cases. *Performing Right Society Ltd v Ciryl Theatrical Syndicate Ltd* [1924] 1 KB 1, 14 per Atkin LJ and *C Evans & Sons Ltd v Spritebrand Ltd* [1985] 1 WLR 317 may serve as examples.[39]

His Lordship pointed out, however, that the decision in Mr Mehra's case need have nothing to do with the separate legal personality of the company, nor with the protection of limited liability:

> Although Aldous LJ referred to lifting the corporate veil, the question of the limited liability of shareholders is irrelevant to the present issue since Standard Chartered do not seek to make Mr Mehra liable as a shareholder in Oakprime. Nor do Standard Chartered seek to make Mr Mehra liable, by virtue of his position as a director, for the deceitful acts of Oakprime or its employees or other agents. Rather, they seek to do no more than hold him liable for deceitful acts that he himself performed. So no question arises as to whether he directed or procured the doing of tortious acts by others and the *C Evans & Sons Ltd v Spritebrand Ltd* line of cases is not in point...
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> Where someone commits a tortious act, he at least will be liable for the consequences; whether others are liable also depends on the circumstances... If he had been a mere employee of Oakprime and had done the same things and written the same letters on behalf of the company in that capacity, it could never have been suggested that Mr Mehra was not personally liable for his fraudulent acts. His status as a director when he executed the fraud cannot invest him with immunity.[40]

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[38] Ibid, [22].
[39] Ibid, [36].
[40] Ibid, [38], [40].

Indeed, his Lordship commented that, unlike the position in *Williams*, where the existence of a duty of care was the primary issue, there was no need to establish a duty where the claim was in deceit:

> There is no such requirement in the case of deceit. Liability for deceit is so self-evident that we do not consider it as resulting from a breach of duty (See Tony Weir, *Tort Law* (2002), at p 30). Mr Mehra set out by his fraudulent acts to make Standard Chartered pay under the letter of credit. He succeeded. He is accordingly personally liable for the loss which he thereby caused them.[41]

Conclusion – Implications for the future

This decision of the House of Lords is to be welcomed as offering clarification in area that had become confused. What has been clarified is that the *Williams* decision, despite what at first seem to be wide-ranging remarks about personal liability of directors in tort, is essentially a decision in the confined area of negligent misrepresentation causing economic loss. It does not establish a heirarchy where "corporate" law trumps "tort" law.[42] It is irrelevant to an action for deceit, where no duty of care needs to be separately established.

But the implications of the decision may go beyond the specific case of actions in deceit. Take a case of personal injury suffered by an employee of a company which subsequently becomes insolvent and is inadequately insured. Might a company director be sued as personally liable? It might previously have been argued that some sort of "assumption of responsibility" by the director was needed. But the decision of the House of Lords here implies that in a case which is not a claim for economic loss caused by negligent misrepresentation, that is irrelevant.[43]

Instead the implication of the decision is that there are at least three avenues by which a director may be found personally liable for commission of a tort. These are:

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[41] Ibid, [41].

[42] A view presented in R Grantham, "Attributing Liability to Corporate Entities: A Doctrinal Approach" (2001) 19 *Company and Securities Law Journal* 168, 178: "The doctrinal basis of the organic approach, however, suggests that where this approach is applied it does exclude the personal responsibility of the director", and especially at 179: "company law doctrines... must be accorded primacy to the extent that they preclude the normal incidents or consequences of... general rules". This view of course relies heavily on the decision of the Court of Appeal in *Standard Chartered Bank*, and must be seen as having been shown to be wrong by the House of Lords.

[43] Indeed, this view of the area of law concerned was apparent from the decision of Cooke P (as he then was) in the seminal case of *Trevor Ivory*, where his Honour said: "If the present case were in the personal injuries field, I might have been disposed in alignment with Willmer J in [*Yuille v B & B Fisheries (Leigh) Ltd* [1958] 2 Lloyd's LR 596] to have found a personal duty of care on Mr Ivory, on the basis of the very obvious risk to health in handling herbicides..." Above n 10, 524, lines 15-30.

(1) where the director is themselves guilty of commission of the relevant tort (which, in the case of negligence, means that a personal duty of care must be shown– a difficult but in light of some UK and Canadian decisions not an impossible task[44]);
(2) where the director has "directed and procured" the commission of the tort of negligence by the company (which presumably will be easier to show, given that a personal duty by the director will not have to be demonstrated);
(3) where the director would be liable as a "joint tortfeasor" under classic common law principles.[45]

The decision of the House of Lords in *Standard Chartered Bank* clears the way for further coherent development of the law in each of these areas by putting the *Williams* decision in its proper context, and bringing the focus back on the actions of the individual director, rather than allowing the corporate structure to operate as a shield for wrongdoing.

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[44] See *Yuille v B & B Fisheries (Leigh) Ltd* [1958] 2 Lloyd's LR 596, *Lewis v Boutilier* (1919) 52 DLR 383, *Berger v Willowdale AMC* (1983) 145 DLR (3rd) 247, *Medina v Danbury Sales (1971) Ltd* (1991) 30 ACWS (3rd) 770.

[45] See the discussion on this point by Lindgren J in *Microsoft Corporation v Auschina Polaris Pty Ltd* (1996) 36 IPR 225, 233, adopting comments by Gummow J in *WEA International Inc v Hanimex Corp Ltd* (1987) 7 FCR 274, 283. Liability as a joint tortfeasor under general principles involves a "common design" with the primary tortfeasor.