[2014] UKPC 21
Privy Council Appeal No 0102 of 2012

JUDGMENT

Beacon Insurance Company Limited (Respondent) *v* Maharaj Bookstore Limited (Appellant)

From the Court of Appeal of the Republic of Trinidad and Tobago

before

Lord Mance
Lord Sumption
Lord Reed
Lord Toulson
Lord Hodge

JUDGMENT DELIVERED BY

Lord Hodge

ON

Wednesday 9 July 2014

Heard on 24 March 2014

Appellant
Peter Knox QC
Prem Prasad Maharaj

Robert Strang
(Instructed by Bircham Dyson Bell LLP)

Respondent
Michael A Quamina
(Instructed by Ross and Co Solicitors LLP)

LORD HODGE:

1. This appeal concerns an insurance claim arising out of a fire and the insurance company's rejection of that claim on the ground that part of it was fraudulent or had involved fraudulent devices. The principal issue is whether the Court of Appeal was entitled to overturn the findings of fact made by the judge at first instance.

2. Maharaj Bookstore Ltd ("MBL), which was controlled by Mr Seunarine Maharaj, operated a bookshop at 117 Southern Main Road, Marabella, Trinidad. On 29 September 2005 MBL took out a new insurance policy with The Beacon Insurance Co Ltd ("Beacon") against loss and damage by fire or other perils. The sum insured was $950,000, consisting of $900,000 on stock, such as books and stationery, and $50,000 on business equipment, furniture, fixtures and fittings. Before the policy was agreed, an officer of Beacon inspected MBL's stock and examined an inventory of stock as at 1 July 2005 ("the inventory"), which MBL had prepared at Beacon's request.

3. The fire, which occurred on 3 November 2005, destroyed the stock and other property on the premises. Mr Maharaj, who kept copies of MBL's files of purchases and sales at his home, prepared a document dated 28 November 2005 in which he claimed on behalf of MBL $32,800 for fixtures and fittings and $756,586.43 for stock. The value of the stock was calculated by (i) starting with the cost price of the stock at 1 July 2005 ($683,533.27), which was taken from the inventory, (ii) adding the value of stock purchased between 1 July and 27 October 2005 ($197,791.44) and (iii) subtracting the value of stock sold between 1 July and 31 October 2005 ($124,758.28).

4. By letter dated 7 November 2006, loss adjusters acting on behalf of Beacon repudiated liability under the policy, alleging that MBL had made false or fraudulent declarations in ten bills or invoices for new purchases with a value of $117,263.56, which it had submitted with its claim document. Condition 8 of the insurance policy states:

> "If any claim be in any respect fraudulent, or if any false declaration be made or used in support thereof, or if any fraudulent means or devices are used by the Insured or any one acting on his behalf to obtain any benefit under this Policy, … all benefit under this Policy shall be forfeited."

The documents, which Beacon challenged, were:

(a) four bills (totalling $59,580.04) from "K & S Bookstore" ("K&S"), which Beacon said did not exist;

(b) a statement from Unique Services to which a calculation had been added suggesting that $12,188.22 had been paid, when the correct sum was $2,985.72;

(c) a document from Lexicon Trinidad Ltd ("Lexicon") in the sum of $27,127.10, which was a quotation for books which MBL had not purchased;

(d) three bills from Caribbean Children's Press Ltd ("CCP") which totalled $11,641.60 in respect of purchases from CCP by another bookseller, S & R Bookstore ("S&R"), two of which had been altered to suggest that MBL was the purchaser; and

(e) a bill from Mohammed Bookstore in the sum of $6,726.60 in respect of purchases made by Moy's Bookstore ("Moy's") but altered to show MBL as the purchaser.

5. MBL responded by letter dated 22 January 2007. In that letter Mr Maharaj accepted that there had been an error of calculation in the statement by Unique Services (para 4(b) above) and that the correct balance was $2,985.72. He also accepted that the quotation from Lexicon (para 4(c) above) had been included in the tally of bills in error and attributed the mistake to MBL's clerk. He argued that the other bills were genuine. He explained that K&S (para 4(a) above)) was a name used by K & S Maharaj Bookstore, which was run by his brother, Krishendath Ganga-Bissoon, from whom MBL often bought books. He asserted that the books from CCP (para 4(d) above) had been bought by S&R on behalf of MBL and provided a statement signed by Mr Peter Ramnarine of S&R that confirmed this. Finally, he stated that Moy's had purchased the books from Mohammed Bookstore (para 4(e) above) on behalf of MBL and provided a statement signed by Mr Jin Hing Moy that confirmed this.

6. Beacon was not satisfied by those explanations and maintained its repudiation of liability under the policy. As a result MBL commenced legal proceedings on 6 February 2007.

The legal proceedings

7. The case went to trial before Mr Justice Prakash Moosai in March 2009. He heard evidence from Mr Maharaj and three supporting witnesses, namely Mr Ramnarine, Mr Ganga-Bissoon and Mr Moy. Beacon led the evidence of Mr Bertrand

Doyle, its consultant loss adjuster who adopted his witness statement and was not cross-examined. He spoke in his witness statement of his investigations into the documents listed in para 4 above. Written statements by Mr Archer Morris, investigator, Ms Leisha Manburgh of Lexicon, Mr Teddy Mohammed of Mohammed Bookstore and Mr Viren Annamunthodo of Unique Services were also tendered as evidence.

8. In a judgment dated 13 April 2010 Moosai J held that MBL had not made a fraudulent claim or used fraudulent devices and ordered Beacon to pay $753,056.83 with interest and costs. He accepted the substance of the evidence of Mr Maharaj and the witnesses who supported MBL's claim. He made findings on the individual claims as follows.

> (a) In relation to the K&S invoices, he accepted Mr Ganga-Bissoon's evidence that he and his wife traded interchangeably as K & S Bookstore, K & S Maharaj Bookstore and K & S Maharaj Variety Store, that he often sold books to his brother, and that he had sold MBL the books listed in the disputed invoices.
>
> (b) In relation to Unique Services, he accepted Mr Maharaj's evidence that he had tallied the items in the statement to make the calculations easier to understand and had made a mistake in calculation which was not intended to deceive.
>
> (c) In relation to the Lexicon quotation, he accepted Mr Maharaj's account that he had found it in the purchase file and had asked an employee if the books had been purchased. When told that they had been, he wrote "paid cash" on the quotation. The judge held that Mr Maharaj had been careless rather than reckless in including the quotation in MBL's tally.
>
> (d) In relation to the three CCP invoices, the judge accepted the evidence of Mr Maharaj and Mr Ramnarine that S&R often purchased books for MBL and that the invoices were for books which S&R had bought and then sold to MBL. The Judge accepted Mr Maharaj's evidence that he had altered the invoices to reflect the fact that MBL owned the books and not for any fraudulent purpose.
>
> (e) In relation to the invoice from Mohammed Bookstore, he accepted the evidence of Mr Maharaj and Mr Moy that Moy's had bought books, including those listed in the disputed invoice, for MBL, which was why MBL had the invoice. He accepted Mr Maharaj's evidence that he had put his name on the invoice to reflect the fact that he had paid for the books and that he had no fraudulent intention.

9. Beacon appealed this judgment. It argued that the judge had wrongly assessed the evidence and had come to conclusions of fact which the evidence did not support or conclusions which no reasonable tribunal could have arrived at if properly directed. The Court of Appeal (Kangaloo, Stollmeyer and Smith JJA) delivered its judgment on 29 February 2012, allowing the appeal. It overturned the trial judge's findings on each of the disputed documents. It did so principally on three grounds. First, it held that the trial judge had erred in law by failing to distinguish between a fraudulent claim and a fraudulent device to support a valid claim and failing to address the latter allegation. Secondly, it held that the judge had erred in law in treating as relevant to the materiality of a fraud Mr Maharaj's concession, after Beacon repudiated liability, that MBL's claim in respect of Unique Services was overstated and that its claim in relation to Lexicon was in error. Thirdly, it held that the trial judge had erred in failing to draw proper inferences from the evidence. It did not decide whether MBL's claim in relation to each set of documents was fraudulent or involved fraudulent devices, but contented itself in stating that it was one or the other.

10. MBL appeals to the Board with the leave of the Court of Appeal.

The role of an appeal court

11. It is important to recall the proper role of an appellate court in an appeal against findings of fact by a trial judge. This is relevant to the third of the grounds on which the Court of Appeal overturned the judgment of the trial judge.

12. In *Thomas v Thomas* [1947] AC 484, to which the Court of Appeal referred in its judgment, Lord Thankerton stated, at pp 487-488:

> "I Where a question of fact has been tried by a judge without a jury, and there is no question of misdirection of himself by the judge, an appellate court which is disposed to come to a different conclusion on the printed evidence should not do so unless it is satisfied that any advantage enjoyed by the trial judge by reason of having seen and heard the witnesses, could not be sufficient to explain or justify the trial judge's conclusion; II The appellate court may take the view that, without having seen or heard the witnesses, it is not in a position to come to any satisfactory conclusion on the printed evidence; III The appellate court, either because the reasons given by the trial judge are not satisfactory, or because it unmistakably so appears from the evidence, may be satisfied that he has not taken proper advantage of his having seen and heard the witnesses, and the matter will then become at large for the appellate court."

In that case, Viscount Simon and Lord Du Parcq (at pp 486 and 493 respectively) both cited with approval a dictum of Lord Greene MR in *Yuill v Yuill* [1945] P 15, 19:

> "It can, of course, only be on the rarest occasions, and in circumstances where the appellate court is convinced by the plainest of considerations, that it would be justified in finding that the trial judge had formed a wrong opinion."

It has often been said that the appeal court must be satisfied that the judge at first instance has gone "plainly wrong". See, for example, Lord Macmillan in *Thomas v Thomas* at p 491 and Lord Hope of Craighead in *Thomson v Kvaerner Govan Ltd* 2004 SC (HL) 1, paras 16-19. This phrase does not address the degree of certainty of the appellate judges that they would have reached a different conclusion on the facts: *Piggott Brothers & Co Ltd v Jackson* [1992] ICR 85, Lord Donaldson at p 92. Rather it directs the appellate court to consider whether it was permissible for the judge at first instance to make the findings of fact which he did in the face of the evidence as a whole. That is a judgment that the appellate court has to make in the knowledge that it has only the printed record of the evidence. The court is required to identify a mistake in the judge's evaluation of the evidence that is sufficiently material to undermine his conclusions. Occasions meriting appellate intervention would include when a trial judge failed to analyse properly the entirety of the evidence: *Choo Kok Beng v Choo Kok Hoe* [1984] 2 MLJ 165, PC, Lord Roskill at pp 168-169.

13. More recently, in *In re B (A Child)(Care Proceedings: Threshold Criteria)* [2013] 1 WLR 1911, Lord Neuberger (at para 53) explained the rule that a court of appeal will only rarely even contemplate reversing a trial judge's findings of primary fact. He stated:

> "This is traditionally and rightly explained by reference to good sense, namely that the trial judge has the benefit of assessing the witnesses and actually hearing and considering their evidence as it emerges. Consequently, where a trial judge has reached a conclusion on the primary facts, it is only in a rare case, such as where that conclusion was one (i) which there was no evidence to support, (ii) which was based on a misunderstanding of the evidence, or (iii) which no reasonable judge could have reached, that an appellate tribunal will interfere with it. This can also be justified on grounds of policy (parties should put forward their best case on the facts at trial and not regard the potential to appeal as a second chance), cost (appeals can be expensive), delay (appeals on fact often take a long time to get on), and practicality (in many cases, it is very hard to ascertain the facts with confidence, so a second, different, opinion is no more likely to be right than the first)."

14. The Board has adopted a similar approach in this jurisdiction. See *Harracksingh v Attorney General of Trinidad and Tobago* [2004] UKPC 3 in which it referred (at para 10) to the formulation of Lord Sumner in *SS Hontestroom (Owners) v SS Sagaporack (Owners)* [1927] AC 37, 47:

> "… not to have seen the witnesses puts appellate judges in a permanent position of disadvantage as against the trial judge, and, unless it can be shown that he has failed to use or has palpably misused his advantage, the higher court ought not to take the responsibility of reversing conclusions so arrived at, merely on the result of their own comparisons and criticisms of the witnesses and of their own view of the probabilities of the case.
>
> … If his estimate of the man forms any substantial part of his reasons for his judgment the trial judge's conclusions of fact should … be let alone."

15. There are further grounds for appellate caution. In *McGraddie v McGraddie* [2013] UKSC 58, [2013] 1 WLR 2477, 2014 SC (UKSC) 12, Lord Reed (at para 4) cited observations adopted by the majority of the Canadian Supreme Court in *Housen v Nikolaisen* [2002] 2 SCR 235, para 14:

> "The trial judge has sat through the entire case and his ultimate judgment reflects this total familiarity with the evidence. The insight gained by the trial judge who has lived with the case for several days, weeks or even months may be far deeper than that of the Court of Appeal whose view of the case is much more limited and narrow, often being shaped and distorted by the various orders and rulings being challenged."

16. In *Piglowska v Piglowski* [1999] 1 WLR 1360, 1372 Lord Hoffmann referred to the advantage that a judge at first instance had in seeing the parties and the other witnesses when deciding questions of credibility and findings of primary fact. He suggested that an appellate court should also be slow to reverse a trial judge's evaluation of the facts and quoted from his earlier judgment in *Biogen Inc v Medeva plc* [1997] RPC 1, 45:

> "The need for appellate caution in reversing the trial judge's evaluation of the facts is based upon much more solid grounds than professional courtesy. It is because specific findings of fact, even by the most meticulous judge, are inherently an incomplete statement of the impression which was made upon him by the primary evidence. His expressed findings are always surrounded by a penumbra of imprecision as to emphasis, relative weight, minor qualification and nuance … of

> which time and language do not permit exact expression, but which may play an important part in the judge's overall evaluation."

17. Where a judge draws inferences from his findings of primary fact which have been dependent on his assessment of the credibility or reliability of witnesses, who have given oral evidence, and of the weight to be attached to their evidence, an appellate court may have to be similarly cautious in its approach to his findings of such secondary facts and his evaluation of the evidence as a whole. *In re B (a Child)* (above) Lord Neuberger at para 60 acknowledged that the advantages that a trial judge has over an appellate court in matters of evaluation will vary from case to case. The form, oral or written, of the evidence which formed the basis on which the trial judge made findings of primary fact and whether that evidence was disputed are important variables. As Lord Bridge of Harwich stated in *Whitehouse v Jordan* [1981] 1 WLR 246, 269-270:

> "[T]he importance of the part played by those advantages in assisting the judge to any particular conclusion of fact varies through a wide spectrum from, at one end, a straight conflict of primary fact between witnesses, where credibility is crucial and the appellate court can hardly ever interfere, to, at the other end, an inference from undisputed primary facts, where the appellate court is in just as good a position as the trial judge to make the decision."

See also Lord Fraser of Tullybelton, at p 263G-H; *Saunders v Adderley* [1999] 1 WLR 884 (PC), Sir John Balcombe at p 889E; and *Assicurazioni Generali SpA v Arab Insurance Group (Practice Note)* [2003] 1 WLR 577 (CA), Clarke LJ at paras 12-17. Where the honesty of a witness is a central issue in the case, one is close to the former end of the spectrum as the advantage which the trial judge has had in assessing the credibility and reliability of oral evidence is not available to the appellate court. Where a trial judge is able to make his findings of fact based entirely or almost entirely on undisputed documents, one will be close to the latter end of the spectrum.

18. In this appeal, the courts below had the various impugned documents and knew of the alterations that Mr Maharaj had made to all but the K&S invoices. Those matters were not disputed. But the assessment of (i) the genuineness of the latter invoices and (ii) Mr Maharaj's motivation in altering the other documents depended fundamentally on an evaluation of the written and oral testimony of the witnesses whom Moosai J saw and heard. His assessment of the presence or absence of fraudulent intention on the part of Mr Maharaj could be displaced only on the clearest grounds: *Akerhielm v De Mare* [1959] AC 789, 805-806.

The judgment at first instance

19. In order to assess the judgment of the Court of Appeal it is necessary to examine the judgement at first instance in more detail. In his judgment, Moosai J identified the issue as whether there had been a breach of condition 8, entitling Beacon to avoid the insurance policy. He set out the law on the burden and standard of proof, the duty to make disclosure and the law relating to fraudulent devices, referring to and quoting Mance LJ's explanation of the distinction between a fraudulent claim and fraudulent devices in *Agapitos v Agnew* [2003] QB 556 (CA) at paras 30, 37 and 45.

20. In his assessment of the evidence, Moosai J expressed the view that MBL's high turnover of stock, both sales and replenishing purchases, between July and October 2005 was because those months were a peak season for booksellers when parents acquired school books for their children. He recorded Mr Maharaj's illness after the trauma of the loss of his business and his apparently satisfactory responses to the many demands by Beacon to vouch his financial circumstances.

21. His assessment of the credibility and reliability of Mr Maharaj and the witnesses whom he called in support of his case played a central role in his judgment. He criticised Mr Maharaj in two respects. First, he took account of his admission that he had breached the copyright of some publishers by having Unique Services print certain texts. Secondly, he expressed concern that his evidence that he had been blacklisted by wholesalers in the San Fernando area was overstated because it had become clear in oral evidence that CCP had not refused to sell him books. He also acknowledged the "somewhat inelegant drafting" of Mr Maharaj's witness statement. But he stated (para 36):

> "while there were areas in which Seunarine Maharaj was not as precise as he should have been, I have formed the view that he is generally to be regarded as a credible witness."

22. He recorded the evidence of Mr Moy that he had purchased books from Mohammed Bookstore at Mr Maharaj's request and remitted all of them to MBL. Mr Moy gave evidence that he had written on the invoice (para 4(e) above) to reduce the balance owed by MBL to him as he had taken other books worth $3,017.08 from MBL in exchange. Mr Moy also gave evidence that retailers sometimes sold wholesale to other retailers, for example where one retailer could get bigger discounts from a wholesaler than other retailers. Moosai J gave him a strong badge of credibility, stating (para 63):

> "this witness was one of the most honest witnesses that one can find, a reputable businessman of considerable experience who has carried on [a

> retail] business [for] the past 37 years and on whose testimony I place substantial reliance. This witness struck me as someone who was independent and would not perjure himself nor be complicit in any way in assisting the claimant to recover insurance monies to which it was not entitled."

The judge held that Mr Moy's testimony provided "a great deal of support" to Mr Maharaj's evidence that his alteration of the invoice to show MBL was the purchaser was designed not to deceive but to reflect the onward sale of the books from Moy's to MBL.

23. In relation to the four bills from "K & S Bookstore" (para 4 (a) above), the judge accepted the evidence of Mr Ganga-Bissoon that he used that trade name as well as "K & S Maharaj", that he had assisted MBL to obtain books from wholesalers by purchasing them on its behalf, and that the large order was explained by the busy season for books.

24. Beacon's challenge to the three bills from CCP to S&R (para 4(d) above) rested on Mr Maharaj's alterations to the invoices. The judge discussed those alterations. On two of them Mr Maharaj had added MBL's name and on one of the two he had obliterated the name and address of S&R on one page of the bill but not the second page. On the other of the two he had crossed out S&R's name and address, which remained legible. On the third bill he had made no alteration whatever. The judge rejected the generality of the assertion in Mr Maharaj's witness statement (para 22) that after about one year in business he had not been able to purchase from wholesalers to whom other retailers complained about his undercutting their retail prices. The judge pointed out that this assertion did not apply to CCP. He otherwise found his account to be credible. He accepted his evidence that he had made the alterations to the invoices not for any fraudulent purpose but to reflect the fact that MBL was owner of the goods which had been purchased for it. The judge held that that testimony was supported by the owner of S&R, Mr Ramnarine, who gave evidence that for eight years he had purchased books wholesale on behalf and at the request of Mr Maharaj and that he had purchased the books listed in the three invoices for MBL.

25. The judge attached considerable weight to the evidence he had seen given by the three retailers who testified in support of MBL's claim. He stated (para 93):

> "Having seen Moy, Ganga-Bissoon and Ramnarine, it seems inherently impossible that each individually, or all collectively, would have been willing to perjure themselves or been complicit in perpetrating a fraud on insurers."

26. In relation to the statement from Unique Services (para 4(b) above) the judge stated (para 43) that he had assessed Mr Maharaj's evidence in the context of the entirety of the evidence in the trial. He observed that the document was a statement showing both debits and credits and that Mr Maharaj had added up the balance column to reach the total which MBL had claimed and had written the word "paid" on the statement. He observed that Mr Maharaj's behaviour in relation to the statement fell to be assessed in the context of his having to process thousands of documents in relation to his insurance claim. The nature of the alterations on the document did not support a reasonable inference of an intention to deceive. He held that the error was a genuine one and that Mr Maharaj had not intended to deceive anyone.

27. Finally, he treated Mr Maharaj's submission of the Lexicon quotation (para 4(c) above) for textbooks which were not delivered as careless rather than demonstrating the recklessness which might support an allegation of fraud. He accepted his explanation that he had found the quotation in a purchase file and had asked a member of staff whether it had been paid. On receiving an affirmative answer, he had written "paid" on the quotation and had submitted it.

28. He concluded (a) that MBL had purchased the books from K&S, CCP and Mohammed Bookstore, (b) that the error in calculation in Unique Service's statement was not fraudulent and (c) that the submission of the Lexicon quotation amounted only to carelessness. As a result he held (para 104) that "the defendant has failed to produce evidence of such cogency before I could conclude that the claim is fraudulent" and that "the defendant could not reasonably argue, having regard to my findings, that the claimant has deployed fraudulent devices to improve or embellish the facts surrounding the claim in order to derive some benefit."

The Court of Appeal's judgment

29. The Board addresses first the two alleged errors of law before turning to the Court of Appeal's principal ground for reversing Moosai J's judgment, which was its assessment of the evidence.

30. The Board is persuaded that the Court of Appeal was wrong to conclude that the trial judge had failed to distinguish between a fraudulent claim and a fraudulent device and to address the latter allegation. He clearly identified the difference when he quoted from Mance LJ's judgment in *Agapitos v Agnew* [2003] QB 556. Further, in his findings of fact in relation to each of the impugned documents the trial judge expressly rejected any intention to mislead. Mance LJ, at para 30 of *Agapitos*, stated that "a fraudulent device is used if the insured believes that he has suffered the loss claimed but seeks to improve or embellish the facts surrounding the claim <u>by some lie</u>" (the Board's emphasis). While Mr Maharaj altered the documents to explain the facts as he

understood them and thus, by inference, to improve the processing of his claim, his so doing could not be fraudulent absent dishonest intent. There was therefore a proper basis for the trial judge's conclusion on fraudulent devices (para 24 above).

31. The Board is also satisfied that the trial judge did not err in law in his discussion of MBL's concession, after Beacon's repudiation of liability, of the errors in relation to the Unique Services and Lexicon documents. His discussion must been seen in the light of the defence's arguments which he was addressing. In para 35 of his judgment he recorded and rejected the Beacon's contention that MBL's pursuit of the entire claim in the legal action was evidence of its fraudulent design. He noted that, while MBL had sued for the full sum, it had set out its true position in a letter sent before it commenced the legal proceedings, by conceding the errors in relation to those documents, and had also adopted that correct position in its statement of case. The Board does not read the references in his judgment (at paras 35 and 53) as disclosing any erroneous belief that the subsequent retraction would alter the materiality of an earlier representation to an insurance company.

32. Beacon's counsel in his written submission to the Court of Appeal focused on (a) the impugned documents and the changes which Mr Maharaj made to them, (b) the allegation of fraudulent device, and (c) what he suggested were weaknesses or inconsistencies in the evidence of the witnesses who supported MBL's claim. The Court of Appeal followed that approach. It is readily understandable that a focus on what Beacon's counsel described as a "tampering" with the documents could support a prima facie case against MBL. But while foolish, such tampering was far from conclusive evidence of dishonesty on Mr Maharaj's part. What the appellate court had to address was the trial judge's conclusions (a) that MBL had in its possession the impugned invoices from K&S, CCP and Mohammed Bookstore, (b) that a determination of fraud in relation to those invoices involved finding that each of Mr Maharaj, Mr Moy, Mr Ganga-Bissoon and Mr Ranmarine was guilty of involvement in a conspiracy to defraud the insurance company, an inference which, having seen and heard the witnesses, he declined to make, and (c) that Beacon's case was not sufficiently cogent to support its charge of fraud.

33. The Court of Appeal rejected the evidence of Mr Maharaj, Mr Moy, Mr Ganga-Bissoon and Mr Ramnarine and treated them as liars on the basis that they supported an untruthful claim that wholesalers had blacklisted MBL. In the Board's view the evidence did not support that characterisation of their position. Mr Maharaj had conceded on cross-examination that CCP had not blacklisted MBL. None of the three supporting witnesses in their written witness statements had asserted that it had. Mr Moy and Mr Ramnarine both said that they were aware from their discussions with Mr Maharaj that he had difficulty in purchasing books for wholesalers who were upset that MBL sold books at below their retail price. Mr Ramnarine spoke in his statement of purchasing books for MBL from various wholesalers over a period of eight years. Mr Ganga-Bissoon gave similar evidence about wholesalers being upset that MBL undercut

their other customers. On cross-examination, Mr Moy explained that some wholesalers were unwilling to sell to MBL and that Mr Maharaj had told him that it was not easy for him to buy from Mohammed Bookstore. He gave evidence of another reason why retailers habitually bought books for each other and from each other: he spoke of retailers, including MBL and his business, buying for each other when one could obtain a bigger discount than another from wholesalers. Mr Ramnarine's explanation on cross-examination for purchasing from CCP on MBL's behalf was that when he went to purchase books in Port of Spain he would ask Mr Maharaj whether he needed to get anything when he was there. On cross-examination, Mr Ganga-Bissoon said that Mr Maharaj had asked him to buy some books for CCP and that he had inferred from the request that MBL had difficulty in buying from that company.

34. There was clear and uncontradicted evidence of retailers helping each other obtain books from wholesalers in order to obtain commercial advantage. The trial judge accepted that MBL had difficulty in purchasing from some wholesalers, but that CCP was not one of those wholesalers. There was no evidence to undermine the assertion that MBL had not been able or had difficulty in obtaining books from some wholesalers in the San Fernando area. Further, the Court of Appeal did not have the complete transcript of the trial and much of the cross-examination of Mr Maharaj on his difficulties with wholesalers was unavailable. In the Board's view, the Court of Appeal had no proper basis for its conclusion that the witnesses were lying about the transactions.

35. The findings that Mr Moy, Mr Ganga-Bissoon and Mr Ramnarine purchased books for, and delivered them, to MBL are primary findings of fact based on an assessment of the oral testimony of witnesses. It is evidence which an appellate court should have been very slow to reverse. In the view of the Board, the Court of Appeal did not exercise that caution and its judgment on that matter cannot stand. The Court of Appeal's treatment of Mr Moy's evidence is also marred by a clear error in its assertion (paras 33 and 36(a)) that he gave evidence that he had retained some of the books that he acquired from Mohammed Bookstore. In fact his evidence in chief and on cross-examination was to the contrary: he delivered all the books to MBL and took other books from MBL's stock in part exchange, with MBL paying the balance in cash. While there were inconsistencies in the evidence, for example as to whether transactions were paid for in cash in advance, they were not individually or collectively of sufficient significance to support a conclusion that the trial judge had clearly gone wrong in his assessment of the evidence of these witnesses.

36. The Board recognises that Mr Maharaj can justly be criticised for his lack of care in presenting the Lexicon quotation as a paid invoice and for his lack of clarity on which of his three staff had assured him that the books had been purchased. But the Court of Appeal gave no sufficient reason for rejecting the trial judge's finding of carelessness and substituting one of *Derry v Peek* recklessness ((1889) 14 App Cas 337). Contrary to the Court of Appeal's view in para 40 of its judgment, the Board does not read Mr

Maharaj's evidence in his statement or on cross-examination as asserting that MBL purchased any of the items in the quotation. His evidence did not contradict that of the loss adjuster and he did not go back on his concession, after Beacon's repudiation of liability, that the sums in the Lexicon quotation should not have been claimed. The suggestion that he may have bought books from Lexicon after the quotation was no more than an explanation for his confusion over the quotation. The boundary between an incompetent mistake and a lie may be a matter of impression which is usually best left to the trial judge who sees the witness give evidence.

37. In the Board's view, in the case of both the Lexicon quotation and the Unique Services statement, the Court of Appeal was influenced by its findings of fraud or fraudulent device in relation to the invoices of K&S, CCP and Mohammed Bookstore. The Board considers that, once one puts to one side the inferences which might have been made if those invoices had been shown to be fraudulent claims or fraudulent devices, the Court of Appeal in para 47 of its judgment has advanced no reason which could justify its substitution of a conclusion of dishonest recklessness for the trial judge's assessment of mere carelessness in relation to the Unique Services statement.

38. In summary, the Board is satisfied that the Court of Appeal had no proper basis for concluding that the trial judge had gone plainly wrong in his assessment of the evidence. It erred in substituting its views on the critical question of Mr Maharaj's mental state.

Conclusion

39. The Board directs that the order of the Court of Appeal should be set aside and that of Moosai J restored. Subject to any argument to the contrary, the respondents must pay the appellants' costs in the Court of Appeal and before the Board.