
**Michaelmas Term**
[2018] UKPC 25
**Privy Council Appeal No 0053 of 2017**

# JUDGMENT

# Bahamasair Holdings Ltd (Appellant) *v* Messier Dowty Inc (Respondent) (Bahamas)

## From the Court of Appeal of the Commonwealth of the Bahamas

**before**

**Lord Kerr**
**Lord Wilson**
**Lord Hughes**
**Lady Black**
**Lord Lloyd-Jones**

## JUDGMENT GIVEN ON

## 8 October 2018

**Heard on 15 March 2018**

| *Appellant* | *Respondent* |
| --- | --- |
| Krystal D Rolle<br>Wallace I Rolle<br>(Instructed by ASB Law LLP) | Tim Marland<br>Koye Akoni<br>(Instructed by Holman Fenwick Willan LLP) |

**LORD KERR:**

*Introduction*

1. Bahamasair Holdings Ltd (Bahamasair) is the national airline of the Bahamas. Among its fleet was a DHC-8-301 aircraft, known as a Dash-8. It had been bought by Bahamasair in 1990. Messier Dowty Inc (Messier) is a manufacturer of aircraft landing gear. The Dash-8 aircraft which is the subject of these proceedings was fitted with landing gear which Messier had manufactured and supplied.

2. On 20 April 2007, the aircraft took off from New Providence, Bahamas on a flight to Governor's Harbour, Eleuthera, Bahamas. On touchdown, the left main landing gear collapsed. Fortunately, no-one was seriously injured but the aircraft was damaged beyond repair. Bahamasair claimed damages against Messier for the loss of the aircraft and the cost of investigating the cause of the accident.

3. At first instance the Chief Justice, Sir Michael Barnett, found that the landing gear was inadequate for the number of times that it was required to perform (referred to in the evidence as "cycles"). He found further that Messier, despite knowing that the landing gear was inadequate, had failed to warn Bahamasair of that inadequacy. He awarded Bahamasair the sums which they had claimed for the loss of the aircraft and the cost of the investigation. The Chief Justice also rejected a claim by Messier that the failure of the landing gear was due to the negligence of Bahamasair in relation to its maintenance.

4. The Court of Appeal reversed the Chief Justice's decision. It concluded that there was no warrant for his finding that Messier had failed to warn Bahamasair of the inadequacy of the landing gear. In any event, there was "no requirement for [Messier] to specifically send out notices or bulletins to individual operators specifically relating to [the mechanism which failed at the time of the accident]" - para 48 of the Court of Appeal judgment. As to the avowed inadequacy of the landing gear, the Court of Appeal considered that the respondent had "merely sought to improve on an already solid design" - para 29 of the judgment.

*The evidence at the trial and the findings at first instance*

5. The Chief Justice found that Messier regularly issued a component maintenance manual which provided guidance and instructions on the maintenance of landing gear.

It also provided service bulletins. These made specific recommendations in relation to maintenance and repairs of products. In 1996 a Dash-8 aircraft operated by Air Ontario had crashed. This, the Chief Justice found, was due to what was described by Messier as "the over-centring of the landing gear".

6. The landing gear comprises not only the wheels which support the aircraft's weight when it lands and is taxiing but also a shock strut assembly. Broadly speaking, the shock strut is made up of two parts referred to as the cylinder and the piston. It also has a component known as a torque link. It is attached to the cylinder and it stabilises the wheel. A damper or rebound ring is located at the top of the cylinder. It operates with an upper bearing. The damper ring sits on a groove in the upper bearing. The Chief Justice found that the over-centring of the landing gear in the aircraft operated by Air Ontario which crashed in 1996 had been caused by excessive wear of the cylinder bore. This, in turn, had brought about the failure of the damper ring and that had caused "extensive scoring" to the cylinder.

7. A number of investigations into the accident took place. The first of these was by a company known as Charles Taylor Aviation (CTA), which provides investigative, adjusting and surveying services in the field of aviation. CTA was retained by the insurers of Bahamasair. It issued its report on 11 May 2007. It suggested that it was "readily apparent" that the cause of the accident was the failure of the left main landing gear cylinder, which appeared to have cracked, allowing the torque links to go over the centre of and rest on the piston. Consequently, the shock strut housing cracked, allowing the piston and wheel assembly to detach from the landing gear assembly.

8. CTA stated in its report that an Airworthiness Directive No CF-2006-14, issued on 21 July 2006, had considered previous failures of the shock strut and stipulated that preventive inspection of this component should be carried out every 7,000 hours. Bahamasair maintenance records revealed that an inspection of this unit had taken place on 19 May 2006. At that time, there were 4,424 cycles remaining before the next scheduled inspection was due on 28 April 2008.

9. The Flight Inspectorate of the Department of Civil Aviation of the Bahamas (DCAB) carried out an investigation into the incident and issued a report in September 2007. Representatives of Messier and Bombardier (the manufacturer of the aircraft) participated in this investigation. The probable cause of the crash was found to be an over-centre torque link condition that culminated in a single cycle failure of the cylinder. Four possible causes for this were mooted. They were: (i) an under serviced shock strut (ie the level of hydraulic fluid necessary for the proper functioning of the strut was too low); (ii) a broken damper ring; (iii) there was no damper ring; and (iv) the damper ring had become disengaged.

10. Maintenance records examined by DCAB revealed that the left shock strut outer cylinder had been replaced by Bahamasair personnel on 19 May 2006. The unit that was installed was new. The shock strut piston assembly was removed from the outer cylinder that was being replaced and installed in the new outer cylinder. But no entry was found in the maintenance records that showed that, in replacing the shock strut outer cylinder, Bahamasair had followed the proper procedure and used the correct maintenance manual reference for the work that had been carried out. Various other deficiencies in the record-keeping of Bahamasair were identified.

11. A report commissioned by the lawyers for Bahamasair, dated 5 September 2013, was provided by David Hall, an expert in the investigation of "root cause failure analysis, especially in matters involving aviation". Mr Hall quickly scotched the suggestion that the accident might have been caused by the absence of a damper ring, pointing out that a photograph taken in the immediate aftermath of the accident "clearly shows a piece of the fractured damper ring on the runway in the exact position where the strut begins to fail due to overload and pieces are starting to exit the aircraft". Following a detailed examination of the evidence, Mr Hall concluded that "the damper ring was installed, installed properly and that the level of hydraulic oil in the strut was correct and per Messier-Dowty's specifications and procedures". He also reviewed maintenance records and file materials and concluded that these testified to an appropriate standard of care by Bahamasair maintenance personnel for the work performed on the left main landing gear of the aircraft.

12. The Chief Justice found that, following the Air Ontario crash in 1996, Messier had modified the upper bearing and damper ring used in the landing gear. The bearing area was increased; the material used was changed from aluminium alloy to steel; the locating ring for the damper ring had been redesigned; and the radial thickness of the ring had been increased. In the engineering instruction given to its engineers, Messier said that these steps had been taken in order "to improve the support for the damper ring to prevent failure due to excessive wear".

13. Despite this, so found the Chief Justice, the new damper ring (which became available in 1998 when production of the earlier upper bearing and damper ring used in the aircraft operated by Bahamasair was discontinued), Messier did not inform the appellant or any other user of the landing gear of the need to change the old upper bearing and damper ring.

14. In May 2006, after a crack and fluid leak in the left landing gear had been detected, Bahamasair replaced the strut cylinder. According to Winslow Moss, who was employed by Bahamasair to do this work, it was carried out on 19 May 2006 in accordance with instructions issued by Messier and the replacement cylinder was purchased from them. The existing upper bearing and damper ring were reinstalled in the landing gear.

15. Aaron Jones, a materials engineer, gave evidence on behalf of Bahamasair. He said that the design and materials of the original upper bearing were inadequate and lacked sufficient robustness for the damper ring support application. That lack of robustness resulted in damage to and fracture of the upper bearing and fracture and fragmentation of the damper ring. The redesigned upper bearing provided significantly more resistance to cracking and fracture of the bearing. That new design significantly decreased the likelihood of the damper ring separating or fracturing from the retaining groove on the upper bearing. Mr Jones further testified that the accident would have been avoided if the redesigned upper bearing and damper ring had been installed when the strut cylinder was replaced.

16. John Langston, director of maintenance for National Aircraft Services gave evidence on behalf of Messier. He said that it was likely that the damper ring was probably not installed when the strut was last repaired and assembled. The strut assembly was not serviced properly after the repair had been made to the strut; it might have been damaged after a tyre on the aircraft had burst in an earlier incident; and it was possible that heavy vibration from torque links that had been installed on the main landing gear strut had damaged the strut.

17. It is to be noted that Mr Langston's theories are essentially speculative. They were largely based on what he considered to be a lack of records maintained by Bahamasair. They were, in any event, directly contradicted by evidence called on behalf of the appellant. Tracy Cooper, the director of maintenance at Bahamasair, said that he was familiar with the work done and procedures carried out on the aircraft by Mr Moss on 19 May 2006. Having reviewed all the maintenance records relating to this work, he was satisfied that the work carried out by Mr Moss complied fully with Bahamasair's maintenance programme.

18. Mr Cooper referred to Transport Canada's airworthiness directive issued on 14 June 2006, almost one month after Mr Moss had carried out his work on the aircraft. The purpose of such a certificate was to identify a known safety issue that needed to be corrected if an aircraft to which it applied was to maintain its airworthiness certification. Compliance with the directive is mandatory. Consequently, as Bahamasair's director of maintenance, Mr Cooper was aware of its provisions and the need for it to be strictly complied with. The subject of the certificate was the "Main Landing Gear Shock Strut Over-Extension" and it applied to the aircraft involved in these proceedings. The directive stipulated that, at the time of future overhaul of the landing gear, or at the time of future repair and/or replacement of the existing upper bearing and damper ring, these should be replaced by new models. Significantly, in Mr Cooper's estimation, the directive did not require or recommend the immediate replacement of the old upper bearing and damper ring, and it did not recommend or suggest any additional maintenance inspections or procedures to determine the potential existence of damage to the upper bearing or seal carrier.

19. In the absence of any alert from Messier, therefore, there was no reason, said Mr Cooper, for Bahamasair to apprehend that these component parts needed to be replaced before the next scheduled maintenance date which was 30 April 2007.

20. Sir Michael Barnett summarised Bahamasair's case in para 26 of his judgment:

> "The plaintiff's case is that the over extension and collapse was caused by a defective upper bearing and damper ring. Those parts were not sufficiently robust to withstand the period of usage recommended by Messier. That during the recommended usage the ears and lugs of the upper bearing would break off and the damper ring would be dislodged and brake (*sic*) into pieces causing compromised and ultimately no damping. The defendant, it is asserted, was fully aware of the problem as it in 1997 modified the upper bearing and damper ring and discontinued the manufacture of the upper bearing and damper ring in its original design. The plaintiff asserts that the defendant had a duty to warn it of the dangers of the damper ring and upper bearing as used in the plaintiff's aircraft and that it may not withstand the recommended usage. The plaintiff asserts that had Messier warned it of the danger it could have changed the upper bearing and damper ring in its service in May 2006. The new modified upper bearing and damper ring would not have become dislodged and broken and the landing gear would not have collapsed."

21. In para 29, Sir Michael said that he had no doubt that "Messier had an obligation to warn the plaintiff of the danger that the design of the upper bearing and damper ring may not be robust enough to withstand the recommended usage of that existing bearing and ring. It was insufficient to simply advise them of the existence of the modified bearing and ring. They had an obligation to advise them of the dangers and risk of using the existing ring for the recommended cycles of usage".

22. Although he did not make an express finding to this effect, it is clearly implicit in the Chief Justice's judgment that he had concluded that the original design of the upper bearing and damper ring was deficient in that they might not be robust enough to last for the recommended number of cycles. In para 34 of his judgment, Sir Michael expressed himself as satisfied that, if Messier had warned of or made recommendations about the need to replace the old upper bearing and damper ring that Bahamasair would have done so. If these parts had been replaced, the Chief Justice found, accepting the evidence of Mr Jones, that the accident would not have happened. He held that Messier were under a duty to give such a warning.

23. It had been contended on Messier's behalf that, even if such a warning had been given, the accident would still have happened because of poor maintenance by Bahamasair. A number of allegations in relation to this had been made in the pleadings but, ultimately, two allegations formed the essential basis of Messier's case *viz*, that insufficient hydraulic fluid was present in the shock strut or that there was no damper ring at the time of the accident. No direct evidence to support either allegation was adduced. Indeed, the absence of a damper ring had not been pleaded and, according to the Chief Justice's judgment, although Mr Fischer, who was called as a witness on behalf of Messier, identified this as one of the bases of its defence, it was not in fact canvassed as a cause of the accident on trial. In any event, the Chief Justice accepted the evidence of Mr Moss that he had installed the damper ring.

24. In relation to the avowed lack of hydraulic fluid, both Mr Fischer and Mr Langston acknowledged that there was no direct evidence of that. The Chief Justice observed that Mr Moss had claimed that there was sufficient hydraulic fluid; that Messier had failed to establish that there was not; and, if there had been a lack of fluid, this would have become evident long before the date of the accident.

25. Notwithstanding the effective abandonment by Messier of the other lines of defence adumbrated in the pleadings, the Chief Justice examined each of these and found none of them to be established. The Board does not consider it necessary to review his discussion of these.

*The Court of Appeal's judgment*

26. The judgment of the Court of Appeal (Mrs Justice Allen, P, Mr Justice Conteh, JA and Mr Justice Isaacs, JA) was delivered by Isaacs, JA. At para 17 of the judgment he referred to the dictum of Lord Thankerton in *Watt v Thomas* [1947] 1 All ER 582, 587 where he said:

> "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 the court has not taken advantage of his having seen and heard the witness, and the matter will then become at large for the appellate court."

27. At para 19 of the judgment of the Court of Appeal, Isaacs JA stated that the court had concluded that the Chief Justice had not taken proper advantage of his having seen and heard the witnesses. He did not, certainly at this stage of the judgment, make clear how that conclusion had been reached. But he did say that "the matter [is now] at large for the appellate court".

28. Isaacs JA then embarked on an analysis of the evidence as if the Court of Appeal was a first instance tribunal. The Board does not consider it either necessary or appropriate to examine minutely each item of evidence which led the Court of Appeal to reverse the findings of the Chief Justice, for they consider that this was a fundamentally wrong approach. In short summary, the Court of Appeal was critical of the Chief Justice's treatment of the evidence of Mr Moss; that Sir Michael was wrong to conclude that the change in design in 1998 signified a deficiency in the original design of the upper bearing and the damper ring; that he had "relieved [Bahamasair] of its duty to prove there was a defect in the manufacturing process and to rely instead on a principle akin to res ipsa loquitur"; that the Chief Justice was wrong to conclude that Messier had failed to warn Bahamasair of the dangers represented by the original design of the upper bearing and damper ring; and that the representation that the landing gear would be effective for a stipulated number of cycles was merely a "guide".

29. Between paras 54 and 62 of his judgment, Isaacs JA considered an argument that the Chief Justice had fallen into error by failing to consider the applicability of the principle that "if a dangerous defect in a chattel is discovered before it causes any personal [injury] or damage to property, because the danger is known and the chattel cannot safely be used unless the defect is repaired, the defect becomes merely a defect in quality - *Murphy v Brentwood District Council* [1991] 1 AC 398. The Court of Appeal does not appear to have come to a firm or final conclusion on this argument and the Board does not consider that it requires further comment.

30. At para 63 of the judgment, Isaacs JA referred to the Chief Justice's conclusion that if there was insufficient fluid in the strut, it would have manifested itself long before the accident. This, he said, was a premise "not tested by the evidence". Again, however, this does not appear to be a consideration which was material to the Court of Appeal's decision and the Board makes no observation on it beyond saying that, as a matter of common sense, if insufficient hydraulic fluid had been inserted in the landing gear by Mr Moss in May 1996, one would have expected that some untoward indication would have become manifest in the 11 months that elapsed before the collapse of the landing gear in April 2007. In any event, the Chief Justice appears to have accepted Mr Moss's evidence that he had installed sufficient hydraulic fluid and there was no evidence on which that claim could be challenged.

31. Before turning to the correct approach to be taken by an appellate court to findings made by a trial judge, the Board makes these brief comments on the criticisms of the Chief Justice's judgment made by the Court of Appeal and summarised in para 28 above.

*(i) The evidence of Mr Moss*

(a) Mr Moss had accepted that the task card which should have been completed in relation to the work that had been carried out was blank. But, as both the Chief Justice and the Court of Appeal acknowledged, the failure to keep proper records did not inevitably establish that the work had not been carried out. Sir Michael accepted Mr Moss's evidence that it had been. He was entitled to make that finding.

(b) In a number of paragraphs in his witness statement, Mr Moss had referred to the Airworthiness Directive which had been issued a month after he had carried out the work on the landing gear as if it had applied at the time that that work took place. The Chief Justice, after hearing Mr Moss say that he was unable to offer an explanation for this, said, "I know that, unfortunately, lawyers prepare witness statements, and we tend, unfortunately, to sign things because the lawyers tell us to do so." The Court of Appeal described this as a creation by the Chief Justice of an explanation. The Board does not agree. They consider that this was an unexceptionable deduction by a trial judge. The Court of Appeal also stated that this was not a proper inference for the judge to draw because witness statements are prepared on information supplied by witnesses. It then made the remarkable claim, "[d]one any other way, would amount in our view to suborning perjury". This appears to the Board to be wholly unwarranted. The witness statement could just as easily be the result of misunderstanding by lawyer and witness alike. Indeed, this is far more likely to be the case, since the error, if error there was, could be immediately detected.

*(ii) The change in 1998 signified a deficiency in the original design*

(a) Mr Fischer had given evidence of the great number of flight cycles performed by aircraft such as that involved in this case, with only six "over centre conditions" before April 2007. This, he said, belied any suggestion that there was a design flaw. The Court of Appeal, apparently as a result of this evidence, concluded that Messier "merely sought to improve on an already solid design" and commented that "[e]xpending the effort to make your product better does not mean that the original is bad." - para 29. This conclusion must be considered in the light of Mr Fischer's cross examination on the issue (which the Court of Appeal quoted at para 27 of its judgment) and clarification sought by the Chief Justice (quoted at para 28).

(b) It was suggested to the witness that, having encountered "the Air Ontario scenario", and recognising that even with sufficient hydraulic fluid, there was "an overextension situation as a result of the damage to

the upper bearing and the damage to the damper ring" and that Messier had modified those parts with a view to providing better support for the damper ring. He confirmed that this was correct.

(c) The Chief Justice then asked, "The reason you had to improve on it was you found as a result of those instances that there was a problem. That it didn't do what you wanted it to do. I mean, that's what I read from the Air Ontario report. As a result of that, these were the production changes that you undertook as a result of what you found." Again, the witness confirmed that this was correct.

(d) The Court of Appeal highlighted the word, "improve" in this passage and its emphasis on this word seems to have been instrumental in prompting its conclusion that Messier had merely sought to improve on an already solid design.

(e) This ignores the evidence that Messier's experience of the problem called for better support for the damper ring. It also takes out of context the Chief Justice's use of the verb, "improve". What is important in both exchanges was that Messier had identified a problem and that measures were considered necessary to deal with that problem.

Insofar as the Chief Justice concluded that the change in 1998 signified a defect in the original design, the Board considers that this was a conclusion which he was perfectly entitled to reach.

*(iii) Reliance on a principle akin to res ipsa loquitur*

(a) The premise on which this criticism of the Chief Justice's judgment was made by the Court of Appeal was that he had given "credence to the existence of a damper ring fragmentation problem" and that this had "relieved [Bahamasair] of its duty to prove there was a defect in the manufacturing process". In the first place, the question of deficiency in the *manufacturing* as opposed to the *design* process was not in issue in this case. More pertinently, however, there was ample material on which the trial judge could conclude that there was a damper ring fragmentation problem as a consequence of the design defect. In the Board's view, there is no reason to suppose that he relied on a principle akin to res ipsa loquitur.

*(iv) Wrong to conclude that Messier had failed to warn Bahamasair of the dangers*

(a) The Court of Appeal's conclusion on this issue seems to the Board to be completely at odds with its statement in para 35 of its judgment:

> "The evidence of Mr Fischer is illuminating in as much as he admitted that the damper ring manufacturing process was changed since 1998 due to the fragmentation problem but at no time was the particular issue brought to the attention of the respondent directly, notwithstanding the relationship between the respondent and the appellant."

*(v) Representation as to the viability of the landing gear for a specified number of cycles merely a guide*

(a) In para 51 of its judgment the Court of Appeal stated that the landing gear did not endure for the period the manufacturer represented it would. Notwithstanding this, in the next para, the following assertion is made: "this representation could act as no more than a mere guide in the same manner that car manufacturers' representations as to their vehicles' travel distance for each gallon of gas amounts to no more than an estimate of how far their vehicle could travel on a single gallon of gas."

(b) The Board consider that this is a surprising conclusion and do not accept that the purported analogy is a sound one. It is, in any event, a matter entirely unexplored in the evidence. A representation that landing gear on an aircraft would be safe for a stipulated number of cycles is of a completely different order from a suggestion as to how far a particular car might travel on a specific amount of fuel. The former is critical to the safe functioning of an aircraft; the latter has nothing to do with the safety of travel in a vehicle.

*The proper approach to the review by an appellate court to the findings of a trial judge*

32. As was observed in *DB v Chief Constable of the Police Service of Northern Ireland* [2017] UKSC 7, para 78 the United Kingdom Supreme Court on a number of occasions recently has had to address the issue of the proper approach to be taken by an appellate court to its review of findings made by a judge at first instance. And, as was said in that case, perhaps the most useful distillation of the applicable principles is to be

found in the judgment of Lord Reed in the case of *McGraddie v McGraddie* [2013] UKSC 58; [2013] 1 WLR 2477.

33. In para 1 of his judgment Lord Reed referred to what he described as "what may be the most frequently cited of all judicial dicta in the Scottish courts" - the speech of Lord Thankerton in *Thomas v Thomas* [1947] AC 484 which sets out the circumstances in which an appeal court should refrain from or consider itself enabled to depart from the trial judge's conclusions. Lord Reed's comprehensive and authoritative discussion ranged over the speech of Lord Shaw of Dunfermline in *Clarke v Edinburgh & District Tramways Co Ltd* (1919) SC (HL) 35, 36-37, where he said that an appellate court should intervene only if it is satisfied that the judge was "plainly wrong"; the judgment of Lord Greene MR in *Yuill v Yuill* [1945] P 15, 19, and the speech of Lord Hope of Craighead in *Thomson v Kvaerner Govan Ltd* [2003] UKHL 45; 2004 SC (HL) 1, para 17 where he stated that:

> "It can, of course, only be on the rarest of 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."

34. Lord Reed then considered foreign jurisprudence on the subject in paras 3 and 4 of his judgment as follows:

> "3. The reasons justifying that approach are not limited to the fact, emphasised in *Clarke's* case and *Thomas v Thomas*, that the trial judge is in a privileged position to assess the credibility of witnesses' evidence. Other relevant considerations were explained by the United States Supreme Court in *Anderson v City of Bessemer* (1985) 470 US 564, 574-575:
>
> > 'The rationale for deference to the original finder of fact is not limited to the superiority of the trial judge's position to make determinations of credibility. The trial judge's major role is the determination of fact, and with experience in fulfilling that role comes expertise. Duplication of the trial judge's efforts in the court of appeals would very likely contribute only negligibly to the accuracy of fact determination at a huge cost in diversion of judicial resources. In addition, the parties to a case on appeal have already been forced to concentrate their energies and resources on persuading the trial judge that their account of the facts is the correct one; requiring them to persuade three

> more judges at the appellate level is requiring too much. As the court has stated in a different context, the trial on the merits should be 'the 'main event' … rather than a 'tryout on the road.'' … For these reasons, review of factual findings under the clearly erroneous standard - with its deference to the trier of fact - is the rule, not the exception.'

Similar observations were made by Lord Wilson JSC in *In re B* (A Child) [2013] 1 WLR 1911, para 53.

4. Furthermore, as was stated in 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 or rulings being challenged.'"

35. The Board adopts a similar approach. In their work, Privy Council Practice, Lord Mance and Jacob Turner at paras 5.46-5.53, state that the Judicial Committee of the Privy Council has the power to review factual findings. It will, however, review findings of fact based on oral evidence with great caution, and will not normally depart from concurrent findings of fact reached by the courts below.

36. The basic principles on which the Board will act in this area can be summarised thus:

> 1. "… [A]ny appeal court must be extremely cautious about upsetting a conclusion of primary fact. Very careful consideration must be given to the weight to be attached to the judge's findings and position, and in particular the extent to which, he or she had, as the trial judge, an advantage over any appellate court. The greater that advantage, the more reluctant the appellate court should be to interfere …" - *Central Bank of Ecuador v Conticorp SA* [2015] UKPC 11; [2016] 1 BCLC 26, para 5.

2. Duplication of the efforts of the trial judge in the appellate court is likely to contribute only negligibly to the accuracy of fact determination - *Anderson v City of Bessemer*, cited by Lord Reed in para 3 of *McGraddie*.

3. The principles of restraint "do not mean that the appellate court is never justified, indeed required, to intervene." The principles rest on the assumption that "the judge has taken proper advantage of having heard and seen the witnesses, and has in that connection tested their evidence by reference to a correct understanding of the issues against the background of the material available and the inherent probabilities." Where one or more of these features is not present, then the argument in favour of restraint is reduced - para 8 of *Central Bank of Ecuador*.

37. The Board considers that the Court of Appeal in the present case should have operated on these principles in reviewing the Chief Justice's findings made at first instance. It further finds that it failed to do so. Rather, because it disagreed with some of those findings, it considered that it was legitimate to set them aside and to examine the evidence de novo. Given that there was material before the Chief Justice on which he could make the factual findings which he did and that the inferences which he drew from them could properly be drawn, and that none of his conclusions was "plainly wrong", the Court of Appeal should not have conducted its own analysis.

*Conclusion*

38. The Board will humbly advise Her Majesty that the appellant's appeal should be allowed, that the order of the Court of Appeal be set aside and that the order of the Chief Justice be restored. The Board invites the parties to make submissions on costs within 21 days of this judgment.