Dubai Aluminium Co Ltd v Salaam (Livingstone, third parties)

Overview | [2002] UKHL 48, | **[2003] 2 AC 366**, | [2003] 1 All ER 97, | [2002] 3 WLR 1913, | [2003] 2 All ER (Comm) 451, | [2003] 3 LRC 682, | [2003] 1 BCLC 32, | [2003] 1 Lloyd's Rep 65, | [2003] IRLR 608, | [2003] 07 LS Gaz R 36, | (2002) Times, 6 December, | 146 Sol Jo LB 280, | [2002] All ER (D) 60 (Dec)

Dubai Aluminium Co Ltd v Salaam and others [2003] 2 AC 366

[2002] UKHL 48

House of Lords

Lord Slynn of Hadley, Lord Nicholls of Birkenhead, Lord Hutton, Lord Hobhouse of Woodborough and Lord Millett

2002 June 24, 25, 26, 27; Dec 5

Partnership — Liability of firm — Wrongful act or omission — Partner knowingly assisting in dishonest scheme — Claim against firm settled by other partners — Whether liability for wrongful acts or omissions confined to tortious acts — Whether partner acting in ordinary course of firm's business — Whether firm vicariously liable — Partnership Act 1890 (53 & 54 Vict c 39), s. 10

Damages — Contribution — Assessment — Plaintiff's claim for damages for fraud settled by defendants — Contribution proceedings — Whether personal innocence of vicariously liable defendant to be taken into account — Whether undisgorged profits of culpable defendants to be taken into account — Civil Liability (Contribution) Act 1978 (c 47), ss. 1(1), 2(1)

In settlement of the plaintiff's claim to recover commission and other payments to wrongdoers as a result of a fraudulent scheme involving sham contracts, the plaintiff received US$18m from each of the first defendant, S, and one of the third parties, T, and $10m from the third and fourth defendants, two firms of solicitors. The latter payment was made in settlement of the claim against the firms' partners other than A, the second defendant, who was S's solicitor, and in release of the claim against A. The co-partners of A were personally innocent of any wrongdoing, and A himself had not benefited from the fraud apart from relatively modest sums paid to his firms by way of fees. S and T had each benefited to the extent of about $20.3m and $16.5m respectively from the fraud. In contribution proceedings to determine the apportionment of the parties' liabilities to the plaintiff the judge assumed, pursuant to section 1(4) of the Civil Liability (Contribution) Act 19781, that the factual basis of the claim against A of dishonesty and knowing assistance in the fraudulent scheme could be established. That included the drafting of the agreements, involvement in the scheme's administration and other parts of a solicitor's business for S and giving direct advice and assistance to other wrongdoers who were not his or the firms' clients. The judge held that section 10 of the Partnership Act 18902 was wide enough to cover the firms' liability to the plaintiff for the alleged wrongful acts of knowing assistance by A, and further that A's acts were in the ordinary course of the firm's business. He concluded therefore that in respect of their payment to the plaintiff the firms were entitled to a full indemnity

from S and T in the proportion 75% and 25% respectively and that S and T should be jointly and severally liable to the firms up to $7.5m. S and T appealed. The Court of Appeal held that "any wrongful act or omission" in section 10 of the 1890 Act was wide enough to encompass all wrongful acts or omissions, but allowed the appeal on the grounds that, since the firms' partners had not authorised A to act as he did on their behalf and it was not in the ordinary course of the business of a solicitors' firm to plan, draft and sign sham agreements giving effect to a scheme known to be dishonest, the firms were not vicariously liable for A's acts and were therefore not entitled to claim contribution in respect of the sum paid to the plaintiff.

On appeal by the firms of solicitors and on cross-appeal by S and T—

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1 Civil Liability (Contribution) Act 1978, s. 1(4): see post, para **93**.

S 2(1): see post, para **145**.

2 Partnership Act 1890, s. 10: see post, para **8**.

Held, allowing the appeal and dismissing the cross-appeal, (1) that "any wrongful act" within the meaning of section 10 of the 1890 Act was not confined to common law torts but could include the equitable wrong of dishonest participation in a breach of trust; that one partner's wrongful act, although not authorised by his co-partners, could nevertheless be said to have been done "in the ordinary course of the business of the firm" if, for the purpose of the firm's liability to third parties, it could fairly and properly be regarded as done by the partner while acting in the ordinary course of the firm's business; that whether it could be so regarded was for the court to evaluate as a question of law based on an assessment of the primary facts; that drafting agreements for a proper purpose would be within the ordinary course of the business of a solicitors' firm and, on the assumed factual basis that A was acting in his capacity as a partner, his assistance in the fraudulent scheme by drafting the necessary agreements was so closely connected with the acts which he was authorised to do that for the purpose of the firm's liability he could fairly and properly be regarded as having acted in the ordinary course of the firm's business; that that assistance coupled with the dishonesty was sufficient to give rise to equitable liability on A's part; and that, accordingly, the defendant firms were vicariously liable for A's conduct (post, paras **10**, **22-26**, **34-36**, **39**, **65**, **66**, **68**, **103**, **112**, **116-119**, **122-131**, **144**).

Brydges v Branfill (1842) 12 Sim 369, *Hamlyn v John Houston & Co* [1903] 1 KB 81, CA and *Kooragang Investments Pty Ltd v Richardson & Wrench Ltd* [1982] AC 462, PC considered.

Mara v Browne [1896] 1 Ch 199, CA explained.

In re Bell's Indenture [1980] 1 WLR 1217 overruled in part.

(2)That, since the firms were vicariously liable for A's assumed wrongdoing, they stood in the shoes of A so that the personal innocence of his co-partners was not a relevant matter to be taken into account for the purposes of assessing liability to the plaintiff or in the contribution proceedings; that in terms of gravity of fault or potency of causal contribution S, T and A were equally liable for the plaintiff's loss and therefore there should be a substantial measure of equality between them in the distribution of the burden of liability; that in order to achieve that equality the court was entitled to have regard to the extent to which some parties to the fraud but not others

remained in possession of considerable sums of misappropriated moneys which were proceeds of the fraud, even after the plaintiff's claims had been met; and that, accordingly, it was just and equitable that in accordance with their respective responsibilities for the damage to the plaintiff, S and T should bring into the assessment sums they had retained from the fraud, that the firms should be entitled to a contribution of 100% from them, and that S and T should each bear the risk of the other's insolvency by being jointly and severally liable for the contribution (post, paras **49**, **53**, **58-64**, **65**, **66**, **75-79**, **154-160**, **163**, **164**, **166-169**).

Decision of the Court of Appeal [2001] QB 113; [2000] 3 WLR 910, CA reversed.

The following cases are referred to in the opinions of their Lordships:

Ashworth v Stanwix (1861) 3 E & E 701

Attorney General v Stannyforth (1721) Bunb 97

Barnes v Addy (1874) LR 9 Ch App 244

Barwick v English Joint Stock Bank (1867) LR 2 Ex 259

Bass Brewers Ltd v Appleby [1997] 2 BCLC 700, CA

Bazley v Curry (1999) 174 DLR (4th) 45

Bell's Indenture, In re [1980] 1 WLR 1217; [1980] 3 All ER 425

Brydges v Branfill (1842) 12 Sim 369

Bugge v Brown (1919) 26 CLR 110

Clarkson v Davies [1923] AC 100, PC

Coulthard v Disco Mix Club Ltd [2000] 1 WLR 707; [1999] 2 All ER 457

Credit Lyonnais Bank Nederland NV (now known as Generale Bank Nederland NV) v Export Credits Guarantee Department [2000] 1 AC 486; [1999] 2 WLR 540; [1999] 1 All ER 929, HL(E)

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Fisher v CHT Ltd (No 2) [1966] 2 QB 475; [1966] 2 WLR 391; [1966] 1 All ER 88, CA

Fryer, In re (1857) 3 K & J 317

Hamlyn v John Houston & Co [1903] 1 KB 81, CA

John v Dodwell & Co Ltd [1918] AC 563, PC

K v P (J, Third Party) [1993] Ch 140; [1992] 3 WLR 1015; [1993] 1 All ER 521

Kooragang Investments Pty Ltd v Richardson & Wrench Ltd [1982] AC 462; [1981] 3 WLR 493; [1981] 3 All ER 65, PC

Lister v Hesley Hall Ltd [2001] UKHL 22; [2002] 1 AC 215; [2001] 2 WLR 1311; [2001] 2 All ER 769, HL(E)

Lloyd v Grace Smith & Co [1912] AC 716, HL(E)

Mara v Browne [1896] 1 Ch 199, CA

Meekins v Henson [1964] 1 QB 472; [1962] 3 WLR 299; [1962] 1 All ER 899

Morris v C W Martin & Sons Ltd [1966] 1 QB 716; [1965] 3 WLR 276; [1965] 2 All ER 725, CA

Navarro v Moregrand Ltd [1951] 2 TLR 674, CA

Paragon Finance plc v D B Thakerar & Co [1999] 1 All ER 400, CA

Photo Production Ltd v Securicor Transport Ltd [1980] AC 827; [1980] 2 WLR 283; [1980] 1 All ER 556, HL(E)

Plumb v Cobden Flour Mills Co Ltd [1914] AC 62, HL(E)

Royal Brunei Airlines Sdn Bhd v Tan [1995] 2 AC 378; [1995] 3 WLR 64; [1995] 3 All ER 97, PC

Selangor United Rubber Estates Ltd v Cradock (No 3) [1968] 1 WLR 1555; [1968] 2 All ER 1073

St Aubyn v Smart (1868) LR 3 Ch App 646

Taylor v Davies [1920] AC 636, HL(E)

United Bank of Kuwait Ltd v Hammoud [1988] 1 WLR 1051; [1988] 3 All ER 418, CA

The following additional cases were cited in argument:

Agip (Africa) Ltd v Jackson [1990] Ch 265; [1989] 3 WLR 1367; [1992] 4 All ER 385

Armagas Ltd v Mundogas SA [1986] AC 717; [1986] 2 WLR 1063; [1986] 2 All ER 385, HL(E)

Royal Brompton Hospital NHS Trust v Hammond [2002] UKHL 14; [2002] 1 WLR 1397; [2002] 2 All ER 801; [2002] 1 All ER (Comm) 897, HL(E)

APPEAL and **CROSS-APPEAL** from the Court of Appeal

This was an appeal, pursuant to leave of the House of Lords (Lord Bingham of Cornhill, Lord Hoffmann and Lord Hope of Craighead) granted on 6 December 2000, by the third and fourth defendants, two firms of solicitors, Amhurst Brown Martin & Nicholson and Amhurst Brown Colombotti, and a cross-appeal by the first defendant, Hany Mohamed Salaam and the third third party, Mahdi Mohamed Al Tajir, from a decision on 7 April 2000 of the Court of Appeal (Evans and Aldous LJJ, Turner J dissenting) allowing the appeal of Mr Salaam and Mr Al Tajir from a decision of Rix J on 17 July1998 in contribution proceedings following the settlement of a claim by the plaintiff, Dubai Aluminium Co Ltd against Mr Salaam, Anthony Francesco Lorenzo Amhurst, the two firms of solicitors, Nillett Development Incorporated, and Japan Metal Sales Corporation, and as third parties, Ian David Livingstone, Glencore International AG and Mr Al Tajir.

The facts are stated in the opinions of their Lordships.

Jonathan Sumption QC and ***Philip Brook Smith QC*** for the defendant firms of solicitors.
Whether on the facts of this case the firms are liable turns

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on section 10 of the Partnership Act 1890. The first question which arises is: Does the principle of vicarious liability for a partner's wrongs have any application to liability as a constructive trustee on the basis of knowing assistance? The only possible answer to that question is "Yes".

The liability of a person as a constructive trustee is fault-based. It is an accessory liability arising out of dishonesty: see *Royal Brunei Airlines Sdn Bhd v Tan* [1995] 2 AC 378, 384, 392, 397. " Any wrongful act or omission" is not a synonym for "tortious". "Wrongful" refers to any conduct involving legal fault which leads to a breach of duty, including a duty to be honest which is owed to everyone with whom the firms deal. Dishonest conduct directed to the appropriation of another's property is a "wrongful act or omission" within the section.

Sections 11 and 13 of the 1890 Act are concerned with the liability of a constructive trustee only in cases of knowing receipt but that does not mean that section 10 cannot include liability as a constructive trustee in cases of knowing assistance. Knowing receipt is receipt-based and not fault-based. Sections 11 and 13 are necessary because the liability of a constructive trustee on the basis of knowing receipt is not necessarily based on wrongful conduct on his part. It is essentially an equitable remedy, restitutionary in nature, which gives effect to the proprietary right of the beneficiary.

Apart from the 1890 Act there is no juridical basis for the contention that a partnership cannot incur vicarious liability for knowing assistance on ordinary principles of law in the same way as it can vicariously incur any other kind of liability. Section 10, like most of the 1890 Act, was intended to be declaratory of the law and does not displace ordinary principles of law save in so far as they conflict with an express provision of the Act: see section 46. Section 10 reflects the mutual agency of partners and the concept of vicarious liability which flows from agency.

The next question is: If there was vicarious liability, were the acts alleged against the firm on the basis of Mr Amhurst's conduct done by him in the ordinary course of its business? It is accepted that he was not authorised to engage in dishonest acts. The real issue therefore is whether vicarious liability can extend to unauthorised acts. The effect of *Lloyd v Grace Smith & Co* [1912] AC 716 is that a principal is vicariously liable for the act of his agent if it was done within the course of his employment in the sense that it was the kind of act which he was employed to do. That is so notwithstanding that it was done in a defective, unauthorised or even a dishonest way to which the principal was not privy. The emphasis is on the class of acts rather than on the particular act, so that what matters for the purpose of vicarious liability is not whether Mr Amhurst was authorised to do the particular act but whether he was actually authorised to do that class of acts. If he was authorised to do the act honestly, he acted within the course of his firm's business in doing it dishonestly. His acts were a breach of his obligation not merely to his clients but also to his partners in the conduct of the partnership business. [Reference was made to *Plumb v Cobden Flour Mills Ltd* [1914] AC 62 and *Lister v Hesley Hall Ltd* [2002] 1 AC 215.]

Reliance on ostensible authority does not arise in most cases of vicarious liability, and it is never relevant when the act was the very thing that caused the loss. Mr Amhurst was not employed to draft sham agreements. [Reference was made to *Kooragang Investments Pty Ltd v Richardson & Wrench Ltd* [1982] AC 462; *Armagas Ltd v Mundogas SA* [1986] AC 717;

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Hamlyn v John Houston & Co [1903] 1 KB 81; *Mara v Browne* [1896] 1 Ch 199; *In re Bell's Indenture* [1980] 1 WLR 1217 and *Agip (Africa) Ltd v Jackson* [1990] Ch 265.]

Once it is accepted that the dishonest act of a partner is legally capable of being within the course of a partnership's business, it is a question of fact whether it is. The issue is whether the drafting of the agreements was a sufficient act to give rise to the presumption of knowing assistance. The Court of Appeal's reasoning proceeded on a misunderstanding of *Credit Lyonnais Bank Nederland NV (now known as Generale Bank Nederland NV) v Export Credits Guarantee Department* [2000] 1 AC 486. The act of using his professional skills to draft agreements and carry out administrative steps to deceive were acts Mr Amhurst did in carrying

on his business. The dishonest act of assisting in a theft is itself a breach of duty and is therefore wrongful for the purposes of section 10.

On the basis that Mr Amhurst's partners were liable for the same damage as the other defendants, their respective contributions fall to be determined in accordance with section 2 of the Civil Liability (Contribution) Act 1978. The apportionment of liability is properly a matter for evidence, and the question of what is just and equitable, though not strictly a matter of discretion, is nevertheless a matter of judgment and informed impression on which the function of an appellate court is necessarily limited. Therefore the decision of the trial judge should stand unless it is clearly wrong.

Section 2(1) of the 1978 Act requires the court to award contribution according to an assessment of the "responsibility" of those liable for the damage. The facts which are relevant to a person's responsibility for the damage are not necessarily the same facts which make him liable for the damage to the claimant. The degree of responsibility for another's loss depends mainly on gravity of fault and the potency of its causal contribution to the loss. On the assumed facts Mr Amhurst's partners are liable for the damage but are not responsible for it. They are answerable purely by virtue of being his partners and not by virtue of their own conduct. Moreover, they received nothing.

By comparison Mr Salaam and Mr Al Tajir were liable by virtue of their own dishonesty and received very large sums. Their responsibility wholly corresponded to their liability. Apart from the receipts, the same was true, on the assumed facts, of Mr Amhurst personally. If the only person liable had been Mr Amhurst the partners could have got indemnified against him personally. The distinction between personal and vicarious liability is not marginal or irrelevant. It is fundamental to any "just and equitable" assessment of their relative responsibilities.

The receipts of the participants in the fraudulent scheme are relevant because where money has been fraudulently abstracted from the claimant, the more a participant has taken, the greater is his responsibility for the loss. It goes directly both to the degree of fault and the causative potency of his acts. The object of contribution proceedings is to require a person to contribute to the loss in a just and equitable manner and that must take into account how the proceeds ended up with the wrongdoers.

The order will not properly reflect the parties' relative responsibilities if two of them are equally responsible and are ordered to contribute equally but the proceeds have all ended up in the hands of one party who is then left with a large undisgorged profit whereas the other party is out of pocket. If

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making a joint and several order gives effect to section 2 of the 1978 Act there is no reason why the judge should not make it. [Reference was made to *K v P (J, Third Party)* [1993] Ch 140.]

Ali Malek QC and ***Sara Cockerill*** for Mr Al Tajir. The statutory intention is that partners should not be vicariously liable for all claims against their co-partners. If section 10 of the Partnership Act 1890 has the meaning contended for by the firms, then sections 11 and 13 are redundant. [Reference was made to *Lister v Hesley Hall Ltd* [2002] 1 AC 215; *Lloyd v Grace Smith & Co* [1912] AC 716; *Morris v C W Martin & Sons Ltd* [1966] 1 QB 716; *Kooragang Investments Pty*

Ltd v Richardson & Wrench Ltd [1982] AC 462 and *Armagas Ltd v Mundogas SA* [1986] AC 717.] On the pleaded case the real issue under section 10 is whether Mr Amhurst when committing the alleged wrongful acts was acting in the ordinary course of the business of the firm. The only acts which can be relied on as being capable of being in the ordinary course of the firm's business were the drafting of the agreements and the routine administrative business of Mr Salaam's companies. However, the agreements were sham agreements and not ordinary effective contracts intended to regulate the rights of the parties, and Mr Salaam's companies were no more than money-laundering vehicles and recipients for his share of the proceeds of fraud. Therefore neither the drafting nor any knowing assistance in money laundering came within the ordinary and proper work of the firms. Mr Amhurst's wrongful acts cannot be characterised as so closely connected with the business which he was authorised as a solicitor to do that it is proper that vicarious liability should result. Nor were the wrongful acts calculated to achieve some proper objective of the firms.

As to contribution, it is erroneous to say that liability under section 1 of the 1978 Act and responsibility under section 2 are completely distinct. Section 1 uses "liable" as a trigger to come within the provisions of section 2. Section 2 uses "responsible" to denote the exercise the court must carry out. That exercise is not a general moral inquiry separate from the question of liability. The "innocent partners" argument is inconsistent with the rationale for vicarious liability. The co-partners, having chosen to be in partnership with someone who acted dishonestly, should collectively bear responsibility. They stand in Mr Amhurst's shoes and no distinction should be made between them. The words "just and equitable" in section 2 must be considered in their context. The court must do what it regards as justice between the parties on the basis of their respective responsibility for the damage. In the context of the 1978 Act responsibility means both blameworthiness and causative potency. Receipts should not enter into the overall question of responsibility. In a dishonest assistance case the disgorgement of proceeds is irrelevant to apportionment between the parties as opposed to an apportionment involving the victim. A party's blameworthiness is unaffected by his receipts. Nor are receipts necessarily relevant to causative potency, although it could indicate a greater role in the fraud and therefore a greater responsibility for the damage.

The judge erred in taking account of how well the parties behaved subsequently to the commencement of the plaintiff's attempt to recoup its loss. A party's unwillingness to acknowledge his misdeed does not change the character of the act which gave rise to the damage or the causative

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potency for the damage. Therefore a party's post-liability conduct cannot be relevant to the question which falls to the court to determine under section 2(1) of the 1978 Act.

The judge's receipts-based approach led to an apportionment which was wrong. Had the judge followed the correct approach to the 1978 Act he would have ordered equal apportionment which is right. Where all the parties were dishonest the court should be slow to depart from the principle of equality between the wrongdoers. That is also consistent with the general rule in equity that as between themselves trustees who are liable to make good a breach of trust should bear the burden equally.

The judge was also wrong to make a joint and several order for contribution against Mr Al Tajir.

It is implicit in the nature of the exercise which the court performs in apportioning liability that the duty to contribute is always several. There is no suggestion in any of the authorities that the liability to contribute can be joint.

Mark Simpson and ***Spike Charlwood*** for Mr Salaam. The submissions made on behalf of Mr Al Tajir in regard to the Partnership Act 1890 and the issues relating to contribution under the 1978 Act and the submissions of the firms of solicitors in regard to joint and several liability are adopted.

As to apportionment, if Mr Salaam is held liable to make any contribution to Mr Amhurst's co-partners he should then be entitled to recover that contribution or part of it from Mr Amhurst. The judge was wrong in principle to say Mr Salaam could recover nothing against Mr Amhurst. As a matter of construction of the 1978 Act Mr Salaam's receipts are irrelevant to his claim against Mr Amhurst, or are only one factor to be taken into account. Since claims for knowing receipt fall outside the 1978 Act the only relevant liability of Mr Amhurst's partners is for dishonest assistance. The judge gave too much weight to the receipts-based argument. Receipts are irrelevant to responsibility and blameworthiness. Section 1(4) of the 1978 Act works in favour of a person who has settled a claim.

If undisgorged receipts can be taken account of under the 1978 Act, that can only happen on the "just and equitable" basis. On the facts of this case it is not just and equitable to allow Mr Amhurst to escape liability. [Reference was made to *Royal Brompton Hospital NHS Trust v Hammond* [2002] 1 WLR 1397.]

Deterrence must be one purpose of making an order which hurts. Moreover, the public have a right to know that those who are in positions of trust such as solicitors and accountants are trustworthy. Punitive liability is the only way of achieving deterrence and public confidence.

Liability as between Mr Al Tajir and Mr Salaam should be joint and several.

George Leggatt QC for Mr Amhurst. Mr Salaam's claim for contribution against Mr Amhurst is misconceived. The 1978 Act does not permit a payment of contribution in respect of another payment of contribution such as Mr Salaam seeks. Even if he were entitled to such contribution, it would not be appropriate to make that order since the payment of contribution in respect of which contribution is claimed by Mr Salaam is a payment to Mr Amhurst's own partners. Once it is accepted that the risks shared by partners include the risk of intentional wrongdoing by one of their number

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when acting in the ordinary course of the firm's business, there can be no justification for treating claims under the 1978 Act any differently from any other third party claims arising out of such wrongdoing or assumed wrongdoing. The submissions of Mr Salaam would be a reason for declining to order him to pay contribution to the partners or for reducing the amount of such contribution, but not for requiring Mr Salaam to pay them contribution and then recovering it from Mr Amhurst.

The issue is not whether Mr Amhurst should be punished by way of payment of a contribution for his assumed wrongdoing. It is whether Mr Amhurst, who received nothing, should be ordered

to pay contribution to Mr Salaam, who received, and will in any event retain, a substantial sum from the proceeds of the fraud, thereby further enriching Mr Salaam.

Sumption QC replied.

Their Lordships took time for consideration.

5 December. LORD NICHOLLS OF BIRKENHEAD

1My Lords, these proceedings arise out of an elaborate fraud by which the plaintiff, Dubai Aluminium Co Ltd, was induced to pay out US$50m between September 1987 and March 1993 under a bogus consultancy agreement with Marc Rich & Co AG. The proceeds were shared out among the principal participants in the fraud under several equally bogus sub-agreements. Mr Hany Mohamed Salaam and His Excellency Mahdi Mohamed Al Tajir were found by the trial judge, Rix J, to have been dishonest participants in the scheme, together with Dubai Aluminium's chief executive, Mr Ian Livingstone. They benefited either directly or through companies controlled by them: to the extent of about $20.3m in the case of Mr Salaam, $16.5m in the case of Mr Al Tajir and $6.3m in the case of Mr Livingstone.

2Mr Salaam was a client of two successive firms of solicitors, Amhurst Brown Martin & Nicholson and Amhurst Brown Colombotti. Nothing turns on the distinction between these two firms, and it will be convenient to refer to them simply as "the Amhurst firm". Mr Salaam's affairs were dealt with mainly by Mr Amhurst, the senior partner in the Amhurst firm. Dubai Aluminium claimed that Mr Amhurst dishonestly assisted in the fraud. He did not benefit from the fraud, apart from comparatively modest amounts paid to his firm by way of fees. In addition to suing Mr Amhurst Dubai Aluminium sued the Amhurst firm, on the basis that the firm was vicariously liable in respect of some of Mr Amhurst's activities.

3It has always been common ground that Mr Amhurst's partners were personally innocent of any dishonesty. It is also right to note at the outset that, for a reason which will appear, the case has proceeded on the assumption that Mr Amhurst was guilty of dishonesty as alleged. He has always denied this allegation. This issue has never been tried, and there has never been any finding by a court that he acted dishonestly in any respect.

4At various stages in the course of the trial all the defendants settled with Dubai Aluminium on agreeing to make substantial payments. The claims against Mr Amhurst and the Amhurst firm were settled on payment by the Amhurst firm of $10m. These settlements left outstanding and unresolved contribution claims brought by some of the defendants against

each other and against third parties. So the contribution claims had to be decided by the judge, Rix J. The effect of the judge's decision was that the Amhurst firm, in respect of its payment of $10m, received contribution amounting to a full indemnity from Mr Salaam and Mr Al Tajir. More precisely, Rix J gave judgment in favour of the Amhurst firm for $7,781,093 jointly and severally against Mr Salaam and Mr Al Tajir, and in the further amount of $2,651,253 against Mr Salaam.

5Mr Salaam and Mr Al Tajir appealed to the Court of Appeal. The Court of Appeal, comprising Evans and Aldous LJJ and Turner J, allowed the appeal. The court held that the Amhurst firm

was not vicariously liable for Mr Amhurst's allegedly wrongful acts. So there was no basis on which it could obtain contribution from Mr Salaam or Mr Al Tajir in respect of its payment to Dubai Aluminium. The Amhurst firm then brought this further appeal to your Lordships' House, seeking restoration of the order of Rix J.

6These bare essentials will suffice as an introduction to the points of law of general importance raised by the contribution claims. The factual history of this matter, which is not without a degree of complexity, is more fully summarised by my noble and learned friend, Lord Millett. The judge's findings are reported [1999] 1 Lloyd's Rep 415 and the conclusions of the Court of Appeal [2001] 1 QB 113.

Section 10 of the Partnership Act 1890: "any wrongful act"

7The contribution claim made by the Amhurst firm in respect of its payment of $10m to Dubai Aluminium is based on the Civil Liability (Contribution) Act 1978. Section 1(1) of this Act ("the Contribution Act") provides that any person "liable" in respect of any damage suffered by another person may recover contribution from any other person liable in respect of the same damage. On the judge's findings Mr Salaam and Mr Al Tajir were liable in respect of Dubai Aluminium's loss. That is clear. In order to found a contribution claim the Amhurst firm had to show it, too, was "liable" in respect of the loss suffered by Dubai Aluminium. The Amhurst firm claimed it satisfied this prerequisite because, pursuant to section 10 of the Partnership Act 1890, it was liable for Mr Amhurst's alleged wrongdoing. Thus, so it claimed, the case falls squarely within the scope of section 1(1) of the Contribution Act.

8This was denied by Mr Al Tajir and Mr Salaam. They contended that the Amhurst firm is not entitled to make any contribution claim against them. Their case is that the Amhurst firm was not vicariously responsible for Mr Amhurst's alleged misconduct, on two grounds. The first ground is that the cause of action asserted by Dubai Aluminium does not fall within the scope of section 10 of the 1890 Act. This raises a question of interpretation of the statute. Section 10 provides:

> "Where, by any wrongful act or omission of any partner acting in the ordinary course of the business of the firm, or with the authority of his co-partners, loss or injury is caused to any person not being a partner in the firm, or any penalty is incurred, the firm is liable therefor to the same extent as the partner so acting or omitting to act."

9The case advanced by Mr Al Tajir and Mr Salaam runs as follows. The claim made by Dubai Aluminium against Mr Amhurst is not that he

committed a common law tort such as deceit or negligence. The claim is that he committed the equitable wrong of dishonest participation in a breach of trust or fiduciary duty. Mr Amhurst dishonestly procured or assisted Mr Livingstone in the breach of the fiduciary duties he owed to Dubai Aluminium. Although fault-based, this species of equitable wrong is not a "wrongful act or omission" within the meaning of section 10. Section 10 being inapplicable, the Amhurst firm was not liable for the acts of Mr Amhurst of which Dubai Aluminium complained.

10This argument was rejected by Rix J and the majority of the Court of Appeal. I agree with them. There is nothing in the language of section 10 to suggest that the phrase "any wrongful act or omission" is intended to be confined to common law torts. On the contrary, the reference to incurring a penalty points away from such a narrow interpretation of the phrase. The liability of co-partners for penalties incurred, for instance, for breach of revenue laws was well established

when the 1890 Act was passed: see *Lindley on Partnership*, 6th ed (1893), p 160, and *Attorney General v Stannyforth* (1721) Bunb 97.

11In addition to the language the statutory context points in the same direction. Section 10 applies only to the conduct of a partner acting in the ordinary course of the firm's business or with the authority of his co-partners. It would be remarkable if a firm were liable for fraudulent misrepresentations made by a partner so acting, but not liable for dishonest participation by a partner in conduct directed at the misappropriation of another's property. In both cases the liability of the wrongdoing partner arises from dishonesty. In terms of the firm's liability there can be no rational basis for distinguishing one case from the other. Both fall naturally within the description of a "wrongful act".

12In 1874 Lord Selborne LC's famous statement in *Barnes v Addy* (1874) LR 9 Ch App 244, 251-252, made plain that a stranger to a trust could be liable in equity for assisting in a breach of trust, even though he received no trust property. On the interpretation of section 10 advanced for Mr Al Tajir and Mr Salaam, a firm could never be vicariously liable for such conduct by one of their partners. I can see nothing to commend this interpretation of the statute.

Section 10 of the Partnership Act 1890: "acting in the ordinary course of the business of the firm"

13The second ground on which Mr Al Tajir and Mr Salaam contended that the Amhurst firm was not liable for Mr Amhurst's alleged acts is that these acts were not done by him while acting in the ordinary course of the business of the firm. I say "alleged acts", because Dubai Aluminium's claims against Mr Amhurst and the firm were settled before the trial judge made his findings of fact. Whether Dubai Aluminium's allegations against Mr Amhurst were well founded was never decided.

14The Contribution Act makes provision for what should happen in such a case. Where a defendant compromises a plaintiff's claim in good faith, the defendant is entitled to claim contribution under the Act without regard to whether he was liable for the damage in question but on the assumption that the factual basis of the claim alleged against him could be established: section 1(4). Thus the Amhurst firm's ability to seek

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contribution from others in respect of the payments it made to settle Dubai Aluminium's claims depends upon whether the firm would have been liable to Dubai Aluminium on the assumption that the factual basis of Dubai Aluminium's claim against the firm could have been established.

15The relevant facts alleged by Dubai Aluminium against the Amhurst firm as the basis of its vicarious liability are that the consultancy agreement between Dubai Aluminium and Marc Rich & Co and the sub-agreements were drafted by Mr Amhurst. This is said to have been done by way of dishonest assistance to Mr Livingstone to act in breach of the fiduciary duties he owed to Dubai Aluminium.

16Mr Sumption submitted that whether an act is done in the ordinary course of a firm's business is a question of fact. Here the allegation in the amended points of claim is that the agreements were drafted by Mr Amhurst "in his capacity as a partner" in the Amhurst firm. This, counsel

submitted, is an allegation of fact. For the purposes of the Amhurst firm's contribution claim this allegation is assumed to be well founded, pursuant to section 1(4) of the Contribution Act. That is the end of the matter.

17I do not think the issue of vicarious liability is quite so straightforward when, as here, the act in question was not authorised. In order to identify the crucial issue it is necessary first to be clear on what is meant in this context by "acting in the ordinary course of business".

18Partnership is the relationship which subsists between persons carrying on a business in common with a view of profit: section 1 of the Partnership Act 1890. Partnership is rooted in agreement, express or tacit, between the partners. So is the conduct of the partnership business. Clearly, the nature and scope of a business carried on by partners are questions of fact. Similarly, what the ordinary course of the business comprises, in the sense of what is the normal manner in which the business is carried on, is also a question of fact. So also is the scope of a partner's authority.

19Vicarious liability is concerned with the responsibility of the firm to other persons for wrongful acts done by a partner while acting in the ordinary course of the partnership business or with the authority of his co-partners. At first sight this might seem something of a contradiction in terms. Partners do not usually agree with each other to commit wrongful acts. Partners are not normally authorised to engage in wrongful conduct. Indeed, if vicarious liability of a firm for acts done by a partner acting in the ordinary course of the business of the firm were confined to acts authorised in every particular, the reach of vicarious liability would be short indeed. Especially would this be so with dishonesty and other intentional wrongdoing, as distinct from negligence. Similarly restricted would be the vicarious responsibility of employers for wrongful acts done by employees in the course of their employment. Like considerations apply to vicarious liability for employees.

20Take the present case. The essence of the claim advanced by Dubai Aluminium against Mr Amhurst is that he and Mr Salaam engaged in a criminal conspiracy to defraud Dubai Aluminium. Mr Amhurst drafted the consultancy agreement and other agreements in furtherance of this conspiracy. Needless to say, Mr Amhurst had no authority from his partners to conduct himself in this manner. Nor is there any question of conduct of this nature being part of the ordinary course of the business of the Amhurst firm. Mr Amhurst had authority to draft commercial agreements. He had

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no authority to draft a commercial agreement for the dishonest purpose of furthering a criminal conspiracy.

21However, this latter fact does not of itself mean that the firm is exempt from liability for his wrongful conduct. Whether an act or omission was done in the ordinary course of a firm's business cannot be decided simply by considering whether the partner was authorised by his co-partners to do the very act he did. The reason for this lies in the legal policy underlying vicarious liability. The underlying legal policy is based on the recognition that carrying on a business enterprise necessarily involves risks to others. It involves the risk that others will be harmed by wrongful acts committed by the agents through whom the business is carried on.

When those risks ripen into loss, it is just that the business should be responsible for compensating the person who has been wronged.

22This policy reason dictates that liability for agents should not be strictly confined to acts done with the employer's authority. Negligence can be expected to occur from time to time. Everyone makes mistakes at times. Additionally, it is a fact of life, and therefore to be expected by those who carry on businesses, that sometimes their agents may exceed the bounds of their authority or even defy express instructions. It is fair to allocate risk of losses thus arising to the businesses rather than leave those wronged with the sole remedy, of doubtful value, against the individual employee who committed the wrong. To this end, the law has given the concept of "ordinary course of employment" an extended scope.

23If, then, authority is not the touchstone, what is? Lord Denning MR once said that on this question the cases are baffling: see *Morris v C W Martin & Sons Ltd* [1966] 1 QB 716, 724. Perhaps the best general answer is that the wrongful conduct must be so closely connected with acts the partner or employee was authorised to do that, for the purpose of the liability of the firm or the employer to third parties, the wrongful conduct *may fairly and properly be regarded* as done by the partner while acting in the ordinary course of the firm's business or the employee's employment. Lord Millett said as much in *Lister v Hesley Hall Ltd* [2002] 1 AC 215, 245. So did Lord Steyn, at pp 223-224 and 230. McLachlin J said, in *Bazley v Curry* (1999) 174 DLR (4th) 45, 62:

> "the policy purposes underlying the imposition of vicarious liability on employers are served only where the wrong is so connected with the employment that it *can be said* that the employer has introduced the risk of the wrong (and is thereby fairly and usefully charged with its management and minimisation)." (Emphasis added.)

To the same effect is Professor Atiyah's monograph *Vicarious Liability* (1967), p 171: "The master ought to be liable for all those torts which *can fairly be regarded* as reasonably incidental risks to the type of business he carried on." (Emphasis added.)

24In these formulations the phrases "may fairly and properly be regarded", "can be said" and "can fairly be regarded" betoken a value judgment by the court. The conclusion is a conclusion of law, based on primary facts, rather than a simple question of fact.

25This "close connection" test focuses attention in the right direction. But it affords no guidance on the type or degree of connection which will normally be regarded as sufficiently close to prompt the legal conclusion that

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the risk of the wrongful act occurring, and any loss flowing from the wrongful act, should fall on the firm or employer rather than the third party who was wronged. It provides no clear assistance on when, to use Professor Fleming's phraseology, an incident is to be regarded as sufficiently work-related, as distinct from personal: see *Fleming*, *The Law of Torts*, 9th ed (1998), p 427. Again, the well known dictum of Lord Dunedin in *Plumb v Cobden Flour Mills Co Ltd* [1914] AC 62, 67, draws a distinction between prohibitions which limit the sphere of employment and those which only deal with conduct within the sphere of employment. This leaves open how to recognise the one from the other.

26This lack of precision is inevitable, given the infinite range of circumstances where the issue arises. The crucial feature or features, either producing or negativing vicarious liability, vary

widely from one case or type of case to the next. Essentially the court makes an evaluative judgment in each case, having regard to all the circumstances and, importantly, having regard also to the assistance provided by previous court decisions. In this field the latter form of assistance is particularly valuable.

27So I turn to authority, noting that the present appeal concerns dishonest conduct. Historically the courts have been less ready to find vicarious liability in cases of employee dishonesty than in cases of negligence. In turning to decisions concerned with dishonest conduct I leave aside cases where a firm or employer undertakes a responsibility to a third party and then entrusts the discharge of that responsibility to the dishonest partner or agent. A leading example of this type of case is *Morris v C W Martin & Sons Ltd* [1966] 1 QB 716, 736-737, per Lord Diplock, where the defendants' employee stole a fur delivered to the defendants for cleaning.

28I also leave aside cases where the wronged party is defrauded by an employee acting within the scope of his apparent authority. The classic instance of this is *Lloyd v Grace Smith & Co* [1912] AC 716, where Mrs Lloyd delivered the title deeds of her cottages at Ellesmere Port to the solicitors' fraudulent managing clerk. The critical feature in this type of case is that the wronged person acted in reliance on the ostensible authority of the employee.

29I can put aside both those types of case because there is no question in the present appeal of the Amhurst firm having undertaken any responsibility to Dubai Aluminium. Nor is there any question of Dubai Aluminium having dealt with Mr Amhurst in reliance on any apparent authority he may have had. There is no question of the firm having "held out" Mr Amhurst to Dubai Aluminium as having authority to do what he is alleged to have done. Nor need I enter upon the debate whether either of these two types of case is strictly to be regarded as vicarious liability at all.

30I turn, then, to cases such as the present where there is no question of reliance or "holding out", or of the employer having assumed a direct responsibility to the wronged person. Take a case where an employee does an act of a type for which he is employed but, perhaps through a misplaced excess of zeal, he does so dishonestly. He seeks to promote his employer's interests, in the sphere in which he is employed, but using dishonest means. Not surprisingly, the courts have held that in such a case the employer may be liable to the injured third party just as much as in a case where the employee acted negligently. Whether done negligently or dishonestly the

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wrongful act comprised a wrongful and unauthorised mode of doing an act authorised by the employer, in the oft repeated language of the "Salmond" formulation: see *Salmond, Law of Torts*, 1st ed (1907), p 83. As Willes J said, in *Barwick v English Joint Stock Bank* (1867) LR 2 Ex 259, 266:

> "It is true, [the master] has not authorized the particular act, but he has put the agent in his place to do that class of acts, and he must be answerable for the manner in which the agent has conducted himself in doing the business which it was the act of his master to place him in."

31In *Hamlyn v John Houston & Co* [1903] 1 KB 81, 85, one aspect of the business of the defendant firm of grain merchants was to obtain, by lawful means, information about its competitors' activities. Houston, a partner in the firm, obtained confidential information on the plaintiff Hamlyn's business by bribing one of Hamlyn's employees. The Court of Appeal held the firm was liable for the loss suffered by Hamlyn. Sir Richard Henn Collins MR said that if it was

within the scope of Houston's authority to obtain the information by legitimate means, then for the purpose of vicarious liability it was within the scope of his authority to obtain it by illegitimate means and the firm was liable accordingly. Sir Richard Henn Collins MR rested his decision on the broad "risk" principle: the principal having selected the agent, and being the person who will have the benefit of his efforts if successful, it is not unjust he should bear the risk of the agent "exceeding his authority in matters incidental to the doing of the acts the performance of which has been delegated to him".

32The limits of this broad principle should be noted. A distinction is to be drawn between cases such as *Hamlyn v John Houston & Co* [1903] 1 KB 81, where the employee was engaged, however misguidedly, in furthering his employer's business, and cases where the employee is engaged solely in pursuing his own interests: on a "frolic of his own", in the language of the time-honoured catch phrase. In the former type of case the employee, while seeking to promote his employer's interests, does an act of a kind he is authorised to do. Then it may well be appropriate to attribute responsibility for his act to the employer, even though the manner of performance was not authorised or, indeed, was prohibited. The matter stands differently when the employee is engaged only in furthering his own interests, as distinct from those of his employer. Then he "acts as to be in effect a stranger in relation to his employer with respect to the act he has committed": see Isaacs J in *Bugge v Brown* (1919) 26 CLR 110, 118. Then the mere fact that the act was of a kind the employee was authorised to do will not, of itself, fasten liability on the employer. In the absence of "holding out" and reliance, there is no reason in principle why it should. Nor would this accord with authority. To attribute vicarious liability to the employer in such a case of dishonesty would be contrary to the familiar line of "driver" cases, where an employer has been held not liable for the negligent driving of an employee who was employed as a driver but at the time of the accident was engaged in driving his employer's vehicle on a frolic of his own.

33In *Kooragang Investments Pty Ltd v Richardson & Wrench Ltd* [1982] AC 462, 473-475, Lord Wilberforce drew this distinction with his accustomed lucidity and authority. He rejected the broad proposition that so long as the employee is doing acts of the same kind as those it is within his

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authority to do, the employer is liable and he is not entitled to show the employee had no authority to do them. Lord Wilberforce said:

> "the underlying principle remains that a servant, even while performing acts of the class which he was authorised, or employed, to do, may so clearly depart from the scope of his employment that his master will not be liable for his wrongful acts."

In the *Kooragang case* the employee, authorised to carry out valuations, negligently carried out a valuation without authority from his employers and not on their behalf. In doing so he was not acting as an employee of the defendant company. The company was not liable for his wrongful acts. That was a case of negligence, but a similar approach is no less applicable in cases of dishonesty.

34With this illustrative guidance I turn to consider on which side of the line is the present case. In drafting the consultancy agreements was Mr Amhurst acting solely on his own behalf? Or was he acting, although misguidedly, on behalf of the Amhurst firm? Had the claims against Mr Amhurst and the firm been tried to a conclusion the judge would have made findings of fact on

what Mr Amhurst did, how he conducted his relevant business dealings with Mr Salaam and others, whether his conduct was dishonest, and whether he was acting for the firm or solely in his own interests. The court would have looked overall at all the circumstances. The court, and this House, would then have been properly equipped with the appropriate factual material with which to answer these questions. As it is, the only relevant plea in the particulars of claim is the compendious allegation that in doing what he did Mr Amhurst was acting in his capacity as a partner. In so far as this allegation is an allegation of fact, it is assumed to be correct.

35This is a factually meagre basis on which to decide a question of vicarious responsibility for assumed dishonest conduct. But there is no other factual material available. Perforce the House must do its best with this material. Proceeding on this footing, in this context "acting in his capacity as a partner" can only mean that Mr Amhurst was acting for and on behalf of the firm, as distinct from acting solely in his own interests or the interests of others. He was seeking to promote the business of the firm.

36On this assumed factual basis, I consider the firm is liable for Mr Amhurst's dishonest assistance in the fraudulent scheme, the assistance taking the form of drafting the necessary agreements. Drafting agreements of this nature for a proper purpose would be within the ordinary course of the firm's business. Drafting these particular agreements is to be regarded as an act done within the ordinary course of the firm's business even though they were drafted for a dishonest purpose. These acts were so closely connected with the acts Mr Amhurst was authorised to do that for the purpose of the liability of the Amhurst firm they may fairly and properly be regarded as done by him while acting in the ordinary course of the firm's business.

37I add two points for completeness. In the course of presentation of the oral arguments reference was made to evidential material which seems to support this characterisation of Mr Amhurst's activities. For instance, it appears that Mr Salaam was a client of the firm, and that a bill rendered to him by the firm included a charge for drafting the consultancy agreements.

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It would not be right to take into account matters such as these. They were not pleaded, and they were not the subject of adjudication by the court.

38Secondly, Mr Malek placed reliance on the wide range of facts pleaded against Mr Amhurst personally. They are summarised in the judgment of Rix J [1999] 1 Lloyd's Rep 415, 466. They appear to include his giving advice and assistance to Mr Livingstone and Marc Rich & Co, who were not his or the firm's clients. Mr Malek submitted that all these acts should be considered together. When so considered, it is apparent they cannot be characterised as so closely connected to the acts Mr Amhurst was authorised to do that they can properly be regarded as part of the ordinary course of business of the Amhurst firm. I am unable to accept this submission. The claims against Mr Amhurst and the firm having been compromised, the firm's entitlement to pursue a contribution claim against Mr Al Tajir and Mr Salaam must be determined on the basis only of the facts pleaded against the firm.

39A further point arises here. The additional facts pleaded against Mr Amhurst unwittingly led the Court of Appeal astray. Evans LJ stated that vicarious liability is not imposed "unless all of the acts or omissions which make the servant personally liable as a tortfeasor took place within the course of his employment": see [2001] QB 113, 133. Aldous LJ was of a similar view. I

respectfully consider this proposition, as it stands, is ambiguous. The ambiguity would be removed if the proposition were amended to read that vicarious liability is not imposed unless all the acts or omissions which *are necessary to* make the servant personally liable took place within the course of his employment. That is the present case. That was not the position in *Credit Lyonnais Bank Nederland NV (now known as Generale Bank Nederland NV) v Export Credits Guarantee Department* [2000] 1 AC 486, the case relied upon by the Court of Appeal: see Lord Woolf MR, at p 495. In the present case, drafting the consultancy agreement and other agreements were acts of assistance by Mr Amhurst and, coupled with dishonesty, they were sufficient in themselves to give rise to equitable liability on his part. That assistance was given by Mr Amhurst while acting in the ordinary course of the firm's business, as discussed above. The firm is liable accordingly. It matters not, for the purpose of establishing vicarious liability, that Mr Amhurst may have done other, additional acts while acting outside the ordinary course of the firm's business.

The case of Mara v Browne

40 I must also mention a passing dictum of Lord Herschell sitting in the Court of Appeal in *Mara v Browne* [1896] 1 Ch 199, 208, to the effect that it is not within the scope of the implied authority of a partner in a firm of solicitors that he should so act to make himself a constructive trustee, and thereby subject his partner to the same liability: see also A L Smith LJ, at p 212, and Rigby LJ, at p 214.

41 These dicta do not assist the respondents in the present case. The claim against Mr Amhurst is that he dishonestly procured or assisted Mr Livingstone to commit a breach of the fiduciary duty he owed Dubai Aluminium. Such misconduct by Mr Amhurst gives rise to a liability in equity to make good resulting loss: see *Royal Brunei Airlines Sdn Bhd v Tan* [1995] 2 AC 378, 392. The liability of a firms of solicitors in respect of acts

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of a partner which render him liable in this way depends upon an application of the ordinary principles relating to vicarious liability. There is no special rule of law applicable to this head of equitable liability.

42 I do not think Lord Herschell or the other members of the Court of Appeal can be taken as suggesting otherwise. Their statements in *Mara v Browne* should not be so read. In so far as Vinelott J did so read these statements, or did so decide, in *In re Bell's Indenture* [1980] 1 WLR 1217, 1230, I respectfully consider he fell into error. The statements in *Mara v Browne* were directed at a different question: whether acting as a trustee, although not having been so appointed, can be regarded as conduct within the scope of the business of a solicitor. Whether the views expressed by the Court of Appeal on this question are still good law, having regard to later developments in the principles relating to vicarious liability, is a matter I prefer to leave for another occasion.

Contribution and vicarious liability

43 On the footing that the Amhurst firm was liable to Dubai Aluminium for the same damage as Mr Amhurst, Mr Al Tajir, Mr Salaam, Mr Livingstone and Marc Rich & Co, their respective contributions fall to be determined in accordance with section 2 of the Contribution Act. Section 2(1) provides that the amount of the contribution recoverable from any person "shall be such as

may be found by the court to be just and equitable having regard to the extent of that person's responsibility for the damage". The contribution recoverable may amount to a complete indemnity: section 2(2).

44When directing that the Amhurst firm should recover from Mr Al Tajir and Mr Salaam contribution amounting to a complete indemnity, the combination of two matters in particular weighed with the judge: see [1999] 1 Lloyd's Rep 415, 476. The first was that the partners in the Amhurst firm, as distinct from Mr Amhurst himself, were personally innocent of any wrongdoing. This personal innocence of dishonesty was to be contrasted with the dishonesty of Mr Salaam and Mr Al Tajir. Rix J considered it would be unjust if a defendant who was vicariously liable for his employee's fraud could not have his innocence of dishonesty count in his favour: see [1999] 1 Lloyd's Rep 415, 472. In the Court of Appeal [2001] 1 QB 113 Evans LJ disagreed: see p 136.

45I prefer the conclusion of Evans LJ. On the approach of Rix J an employer is in a better position, vis-à-vis co-defendants, than the employee for whose wrong the employer is vicariously liable. A co-defendant is worse placed to resist a contribution claim from an employer than he is from the wrongdoing employee.

46This cannot be right. It would mean that a co-defendant's liability to make a contribution payment differs, according to whether contribution is being sought by the employer or the employee. An employer could obtain contribution from a co-defendant in circumstances where the wrongdoing employee himself could not. If an employee was one of two wrongdoers equally to blame, his "innocent" employer could look to the other, blameworthy wrongdoer for a contribution even though the employee could not. Or take a more extreme case, where an employee is four-fifths responsible for an accident and a co-defendant one-fifth. If the employer's

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blamelessness could be taken into account in contribution proceedings, the co-defendant could find himself saddled with responsibility for more than a one-fifth share of the damages. The personally "innocent" employer, vicariously responsible for the acts of the employee who bears most of the responsibility for the accident, could recover contribution amounting to an indemnity from the individual wrongdoer whose blameworthiness, as between the two individual wrongdoers, is assessed at only one-fifth.

47Examples such as these point irresistibly to the conclusion that vicarious liability involves the notion that, vis-à-vis third parties, the employer, although personally blameless, stands in the shoes of the wrongdoer employee. This is so, both for the purposes of liability to the plaintiff claimant and for the purposes of contribution proceedings. In both cases the employer's liability is vicarious, that is, substitutional, not personal. The employer is liable for the fault of another. This approach accords with everyday practice. No contrary authority was cited to your Lordships' House on this point.

48Rix J was minded to treat cases of dishonesty differently from cases of negligence. I can see no basis for drawing such a distinction. The consequences of vicarious responsibility do not differ according to the nature of the wrong, with the employer being able to rely on his personal blamelessness in a case of dishonesty but not in a case of negligence. Nor is there anything unjust in this approach. An employer is only required to assume vicarious liability for his

employee's dishonesty when the dishonest act was so closely connected with acts the employee was authorised to do that it may fairly and properly be regarded as done by the employee in the course of his employment.

49Accordingly, in my view the personal innocence of the partners in the Amhurst firm was not a relevant matter to be taken into account by the judge when deciding the contribution proceedings. The Amhurst firm, vicariously liable for Mr Amhurst's assumed dishonest wrongdoing, stands in his shoes for all relevant purposes. The judge therefore fell into error when taking the personal innocence of Mr Amhurst's partners into account: see [1999] 1 Lloyd's Rep 415, 476. Having misdirected himself in this regard it thus becomes necessary for this House to make its own assessment pursuant to section 2 of the Contribution Act.

Contribution and proceeds of wrongdoing

50The other major factor which weighed with the judge when deciding to direct that the Amhurst firm should be entitled to an indemnity was that Mr Salaam and Mr Al Tajir had still not disgorged their full receipts from the fraud. The judge considered it would not be just and equitable to require one party to contribute in a way which would leave another party in possession of his spoils: see [1999] 1 Lloyd's Rep 415, 475.

51Mr Salaam and Mr Al Tajir submitted that this approach is impermissible. Under section 2(1) of the Contribution Act the court is required to assess the amount of contribution recoverable from a person which is just and equitable "having regard to the extent of that person's responsibility for the damage". "Responsibility" includes both blameworthiness and causative potency. However elastically interpreted, "responsibility" does not embrace receipts.

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52I cannot accept this submission. It is based on a misconception of the essential nature of contribution proceedings. The object of contribution proceedings under the Contribution Act is to ensure that each party responsible for the damage makes an appropriate contribution to the cost of compensating the plaintiff, regardless of where that cost has fallen in the first instance. The burden of liability is being redistributed. But, of necessity, the extent to which it is just and equitable to redistribute this financial burden cannot be decided without seeing where the burden already lies. The court needs to have regard to the known or likely financial consequences of orders already made and to the likely financial consequences of any contribution order the court may make. For example, if one of three defendants equally responsible is insolvent, the court will have regard to this fact when directing contribution between the two solvent defendants. The court will do so, even though insolvency has nothing to do with responsibility. An instance of this everyday situation can be found in *Fisher v C H T Ltd (No 2)* [1966] 2 QB 475, 481, per Lord Denning MR.

53In the present case a just and equitable distribution of the financial burden requires the court to take into account the net contributions each party made to the cost of compensating Dubai Aluminium. Regard should be had to the amounts payable by each party under the compromises and to the amounts of Dubai Aluminium's money each still has in hand. As Mr Sumption submitted, a contribution order will not properly reflect the parties' relative responsibilities if, for instance, two parties are equally responsible and are ordered to contribute

equally, but the proceeds have all ended up in the hands of one of them so that he is left with a large undisgorged balance whereas the other is out of pocket.

54Rix J considered this was obvious. So did Ferris J, in *K v P* [1993] Ch 140, 149. I agree with them.

The contribution claims: overall assessment

55Mr Salaam was the largest beneficiary of the scheme, keeping about 41% of the receipts ($20.3m). Next to him was Mr Al Tajir, at 33% ($16.5m), and then Mr Livingstone, at 13% ($6.3 m). Marc Rich & Co retained nothing, and Mr Amhurst received nothing. Under the respective compromise agreements, Mr Salaam, Mr Al Tajir and Mr Livingstone each contributed about 23% to the principal sum claimed by Dubai Aluminium, and the Amhurst firm about 13%.

56This means that, in round figures, the net financial position of Mr Salaam and Mr Al Tajir was as follows. Taking 31 December 1997 as the date for the purpose of making comparisons, Mr Salaam's receipts, with interest, amounted to $30.2m. The value of his settlement payment was $17m. So he still retained net receipts of some $13m. Mr Al Tajir's receipts, with interest, amounted to $24.5m. The value of his settlement payment was $16.9m. Thus his retained net receipts amounted to some $7.5m. The position of the Amhurst firm was that it had made a settlement payment of $10m. No one pursued a contribution claim against Mr Livingstone or Marc Rich & Co.

57As matters have developed, the extant contribution claims are twofold. The Amhurst firm seeks contribution from Mr Salaam and Mr Al

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Tajir. Mr Salaam seeks contribution from Mr Amhurst in the event he is held liable to make a contribution to the Amhurst firm.

58I have no doubt that the appropriate order is an order in the terms directed by Rix J. The starting point is the judge's finding that in terms of the promotion, organisation and operation of the scheme there was little to choose between the five principal parties: Mr Salaam, Mr Al Tajir, Mr Livingstone, Marc Rich & Co and Mr Amhurst. The only exception was that Mr Amhurst's (assumed) responsibility was a little less than the others but not very much. Thus, there is little to choose between Mr Salaam, Mr Al Tajir and Mr Amhurst in terms of gravity of fault or potency of causal contribution to the loss.

59This suggests that a just and equitable distribution of the burden of liability calls for a substantial measure of equality between the three of them. In this regard an unusual, and notable, feature of this case is the extent to which some parties to the fraud, but not others, remain in possession of substantial amounts of misappropriated money even after the plaintiff's claims have been met. Taken together Mr Salaam and Mr Al Tajir are still net recipients to the extent of over $20m. If equality of burden is the goal, the Amhurst firm ought not to be left out of pocket in respect of its $10m settlement payment. The firm should not be out of pocket so long as Mr Salaam and Mr Al Tajir retain a surplus in hand. Unlike Mr Salaam and Mr Al Tajir, neither the Amhurst firm nor Mr Amhurst received any money from the fraud.

60Mr Simpson submitted it was a "greater evil" that Mr Amhurst, an assumedly dishonest

solicitor, should escape scot-free than that Mr Salaam should retain some of the money. I do not agree. The Contribution Act casts upon the court the task of adjudicating upon a just and equitable distribution of the burden of liability between all manner of wrongdoers. In the present case equality of burden among thieves can hardly be thought an exceptional approach.

61By the same token, I can see no occasion for the court to direct that Mr Amhurst personally should make a contribution payment to Mr Salaam. I reiterate that in these contribution proceedings the Amhurst firm is standing in the shoes of Mr Amhurst. The factors which make it right for the Amhurst firm to succeed against Mr Salaam equally make it right that Mr Salaam's claim against Mr Amhurst should fail.

62The judge split the contribution payments between Mr Salaam and Mr Al Tajir as follows. He considered that, in round figures, Mr Salaam should pay $7.5m to the Amhurst firm and Mr Al Tajir should pay $2.5m. This would leave them with almost equal undisgorged receipts. Mr Salaam would be left with $5.5m and Mr Al Tajir $5m. The judge considered that, to the extent of these undisgorged receipts, they should each bear the risk of the other's insolvency. To achieve this result he directed that each should be jointly liable with the other, but in the case of Mr Al Tajir up to a maximum of an additional $5m: see [1999] 1 Lloyd's Rep 415, 477.

63I can see nothing wrong with this reasoning or this result, once it is accepted, as I have accepted, that Mr Al Tajir and Mr Salaam should indemnify the Amhurst firm in respect of its settlement payment of $10m. In the ordinary way, orders for contribution payments are made severally against the persons concerned. But there is no reason in principle why the

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court should not make provision for what is to occur in the event of insolvency. That is the purpose and effect of the judge's order.

64I would allow the appeal of the Amhurst firm, set aside the order of the Court of Appeal, and restore the order of Rix J. The appeals of Mr Al Tajir and Mr Salaam should be dismissed.

65My Lords, I have had the advantage of reading in draft the speech of my noble and learned friend, Lord Nicholls of Birkenhead. For the reasons he has given, I would allow the appeal of the Amhurst firm, set aside the order of the Court of Appeal, and restore the order of Rix J. I would dismiss the cross-appeals of Mr Al Tajir and Mr Salaam.

66My Lords, I have had the advantage of reading in draft the speeches of my noble and learned friends, Lord Nicholls of Birkenhead and Lord Millett. I agree with them, and for the reasons which they give I would allow the appeal of the Amhurst firm, set aside the order of the Court of Appeal and restore the order of Rix J, and dismiss the appeals of Mr Al Tajir and Mr Salaam.

67My Lords, the present appeals all concern claims to contribution under the Civil Liability (Contribution) Act 1978. The questions which they raise derive from certain complicating factors present in this case. These are the treatment of settlements, the relevance of liability which is vicarious only, the treatment of multi-party cases, the ability to obtain a contribution from another wrongdoer, the equitable sharing of the loss.

68Upon the separate question arising on section 10 of the Partnership Act 1890, I do not wish to add anything to what is said in your Lordships' opinions.

Settlements

69Section 1(1) of the 1978 Act requires the person claiming a contribution to prove that he was a "person liable in respect of" the damage suffered by the injured party. But subsection (4) qualifies this where the person claiming the contribution has made a bona fide settlement or compromise of the claim against him, in which case all he need prove is that he would have been liable "assuming that the factual basis of the claim against him could be established". This raises the question: how is the factual basis of the claim against him to be identified? The answer to this question must obviously depend upon the circumstances. The claim may have been settled or compromised without the commencement of legal proceedings or it may only be settled later after the exchange of pleadings or during the trial. Some proceedings may be governed by strict procedural rules; others may allow a party to inform the other of the factual basis of his claim with greater informality. Pleadings may be dispensed with. In the Commercial Court factual allegations can be particularised informally in a number of ways.

70In the present case the factual allegations in the pleading were more than sufficient to lay the factual basis for a liability of the partnership under

section 10 of the Partnership Act 1890 in the tort of deceit. So, once it is appreciated that it is a case of the vicarious liability of the partnership for the tort committed by one of the partners in the course of the partnership business no further problem arises under this head. But I would not wish it to be thought that material other than pleadings may never have to be looked at. The variety of circumstances to which I have already referred demonstrates this. Further, if the state of the pleadings is to be decisive, a defendant wishing to compromise a case may have to insist that the claimant first amend his pleading so as to make express the basis of claim which justifies the settlement, even though neither would be taken by surprise nor able later to resist appropriate amendments. The purpose of subsection (4) is to facilitate bona fide settlements without prejudicing the rights of the paying party to claim a contribution from another. Of course the factual basis for the claim has to be identified in order to enable the remainder of section 1 to be applied but it would be mistaken to introduce inappropriate formalities into the criterion required by the subsection.

Multi-party cases

71In a simple case, say, injury to a passenger arising from a collision between two cars, both to blame, no problem arises. The court apportions the liability between the two drivers. But where, as in the present case, there has been a conspiracy to defraud involving a number of individuals, complications can arise. Only some of them may be before the court; some may be beyond the practical reach of the law; some may be insolvent; the routes by which liability has arisen may differ.

72Section 2 of the statute requires the court to order contribution in an amount which is "just and equitable having regard to the extent of that person's responsibility for the damage in question", the "person" being the person being ordered to contribute and the "damage in question" being

the damage suffered by the victim for which the persons claiming and paying contribution were both liable. The concept of what is just and equitable corresponds to the restitutionary principles applied elsewhere in the law, for example, contributions between sureties or between insurers. The right to a contribution arises from the fact that one person has borne a disproportionate burden which it is just that another should share (or even bear in full, section 2(3)). Likewise responsibility includes both the degree of fault and the causative relevance of that fault. The power given to the court is principled but not otherwise restricted. It is this power which the court must use to solve any problems and arrive at a just and equitable outcome.

Vicarious liability

73A possible problem is the distinction between actual and vicarious liability. There may be actual tortfeasors who have each committed a tort which has contributed to the causing of the victim's damage. But there may be behind them one or more employers or principals who are also liable in respect of the same damage but their liability is vicarious: they are only liable because of their servant or agent's fault. Is it just and equitable to distinguish between the actual fault of the former and the vicarious liability of the latter?

74As between the servant and his employer (or agent and his principal), clearly it is prima facie just and equitable to make a distinction. But it will not necessarily be as simple as that. The relationship between them will normally be contractual and include express or implied terms to the benefit of one or other party which have a decisive impact. For instance, there may be terms concerning the provision of insurance cover. The apportionment, as between them, will have to take such factors into account.

75As between the employer (or principal) and another tortfeasor, the answer is normally more simple. The vicariously liable employer has in law the same responsibility as his employee: the law attributes the responsibility of the employee to the employer. The only qualification is if, as is alleged against Mr Amhust in the present case, the employee's tortious acts included acts committed both within and without the scope of his employment, or if the employer has also been to some degree personally to blame, in which case the assessment of the employer's responsibility will have to be adjusted accordingly. But as against other tortfeasors, the employer cannot escape his legal responsibility for his employee's tort committed within the scope of his employment. The justice of attributing responsibility for the acts of an employee or agent to his employer or principal is equally cogent when considering apportionment as between tortfeasors and any other conclusion would lead to absurd and unjust results. The employer of a negligent lorry driver would be able to transfer to, say, another car driver the whole of its third party liability notwithstanding that as between the employer and the car driver, say in respect of damage to the car, the car driver would be able to hold the employer liable for the fault of his lorry driver.

Benefit

76The fraud involved stealing money from Dubal. Neither Mr Amhurst nor the partnership received any of the stolen money. But the two parties from which the partnership is claiming the contribution did receive large sums and have succeeded in retaining a substantial part of them. Mr Salaam and Mr Al Tajir are still net beneficiaries from the fraud. Their argument is that such advantageous retentions should be disregarded, that such enrichment should not be taken into account. There are two main answers to this argument. The 1978 Act is an application of the

principle that there should be restitutionary remedies for unjust enrichment at the expense of another. To allow Mr Salaam and Mr Al Tajir to retain these gains and resist a claim by the partnership for a contribution to the net loss of $10m which, by reason of its liability to Dubal, the partnership has incurred would be to allow them to be unjustly enriched at the expense of the partnership. Secondly, the reason why Dubal still had an unrecovered loss after settling with Mr Salaam and Mr Al Tajir is that Mr Salaam and Mr Al Tajir have wrongfully not returned to Dubal the full sums taken. Accordingly the responsibility of Mr Salaam and Mr Al Tajir for Dubal's loss must take into account this wrongful and continuing retention.

77The judge was right to hold that it was just and equitable and in accordance with their respective responsibilities for the damage to Dubal that Mr Salaam and Mr Al Tajir should bring into the assessment the sums which they had retained and that the partnership should be entitled to obtain

a 100% contribution from them, pro rata. The same logic applies to the cross-claim for a contribution against Mr Amhurst personally. It is true that should Mr Amhurst hereafter be proved to have been fraudulent, he would not be free from legal responsibility. But focusing on the question of arriving at a just and equitable distribution of the burden of the liability to Dubal, neither Mr Salaam nor Mr Al Tajir will, even after a 100% contribution to the partnership, be out of pocket and it follows that they can have no basis for claiming a contribution from Mr Amhurst.

Insolvency

78This is the final point. The judge's order took account of the fact that Mr Al Tajir might be insolvent. How should this be reflected in the order to be made in favour of the partnership? The judge's solution was the right one. It is just and equitable that if the partnership is unable to recover from Mr Al Tajir his share of the contribution, the partnership should be able to recover it from Mr Salaam. Mr Salaam will still be in pocket even if he has to contribute the full $10m. The inability of a person claiming a contribution from another tortfeasor to recover from a third is relevant as between the claimant and the respondent to the making of a contribution order and its amount. Here the availability of a recovery from Mr Al Tajir would go to reduce the order to be made against Mr Salaam. But if it is not possible to recover from Mr Al Tajir, there is no basis for making that reduction in favour of Mr Salaam.

Conclusion

79For these reasons and those given by your Lordships I agree with the orders proposed.

(1) The issues

80My Lords, the issues with which your Lordships are concerned arise in the course of contribution proceedings following the settlement of a major action in the Commercial Court. The action was brought to recover the proceeds of a substantial fraud. The defendants included not only dishonest participants in the scheme who had benefited personally from the fraud but also innocent parties who had not but were alleged to be vicariously liable for the dishonest activities of others. Those who contributed to the settlement included the innocent as well as the guilty. The terms of settlement left some of the guilty parties with undisgorged profits.

81Three main issues fall to be considered: (i) whether, and if so in what circumstances, a firm

and its innocent partners may be vicariously liable for a partner's dishonest assistance in a breach of trust; (ii) whether such partners may rely upon their personal innocence of wrongdoing to obtain an indemnity or contribution from the principal wrongdoers, or are to be treated as standing in the shoes of the partner for whose dishonest acts they are vicariously liable; (iii) whether the amount of any undisgorged profits in the hands of the principal wrongdoers may be taken into account in considering the ultimate incidence of liability among those who have contributed to the victim's recoveries.

---------- *[2003] 2 AC 366 at 390*

(2) The scheme

82The action was concerned with a fraudulent scheme to extract money from the plaintiff, Dubai Aluminium Co Ltd ("Dubal"), which operates an aluminium smelter in Dubai. As a result of the scheme Dubal was induced to pay out some $50m over a six-year period under a bogus consultancy agreement with Marc Rich & Co AG ("Richco"). Virtually the whole of the proceeds were passed on by Richco and shared out among the principal participants in the fraud under equally bogus subsidiary agreements. The trial judge (Rix J) found that the consultancy agreement was a sham device for abstracting money from Dubal. A remarkable feature of the case is that none of the parties to any of the agreements contended that they were genuine.

83The principals behind the scheme were Dubal's chief executive, Mr Ian Livingstone, acting in concert with Mr Hany Mohammed Salaam and His Excellency Mahdi Mohammed Al Tajir. Mr Salaam is an international businessman; Mr Al Tajir, who had had previous business dealings with Mr Salaam, was at one time a close confidant of the Ruler of Dubai and wielded considerable influence in the region. The three of them together with Mr Salaam's brother Mr Saad Salaam divided the spoils between them or companies which they controlled as follows:

Mr Salaam	$20.3m (40.5%)
Mr Al Tajir:	$16.5m (32.9%)
Mr Livingstone	$6.3m (12.5%)
Mr Saad Salaam	$6m (12%)

Only a minimal sum was retained by Richco. Of the sums taken by the three main participants, Mr Salaam and his companies received 47%, Mr Al Tajir 38%, and Mr Livingstone 15%.

(3) The proceedings

84Dubal brought proceedings against Mr Salaam and two of his companies, and joined as defendants Mr Anthony Amhurst, a London solicitor, and the two successive firms of solicitors of which he was senior partner at the relevant time. Nothing turns on the distinction between the two firms, and I shall refer to them indiscriminately as "Amhursts". Mr Salaam was a client of Amhursts, and Mr Amhurst was the partner who dealt with his affairs. Mr Salaam and Mr Al Tajir are the respondents to the present appeal. They are also cross-appellants. The appellants are

the partners of Amhursts other than Mr Amhurst. With Mr Amhurst they are also respondents to the cross-appeals.

85Dubal claimed that Mr Livingstone, in breach of his fiduciary duty and with the dishonest assistance of Mr Salaam, Mr Al Tajir and Richco, had misappropriated its funds; and that Mr Amhurst had dishonestly played a significant role in the fraud. It alleged that he was responsible for the drafting of the consultancy agreement and subsidiary agreements and for the administration of the scheme; and that he gave instructions to Richco for the payment of moneys due to the principal participants. Dubal accepted that Mr Amhurst did not benefit personally from the fraud, although his firm received relatively modest fees for the work done; but it was *Dubal's case* that his participation in the scheme was dishonest. This was vigorously denied by Mr Amhurst. For reasons which will become clear, the case has

been conducted on the assumption that he was dishonest; but it must be said at the outset that this has never been established. It is common ground that his partners were personally innocent of any wrongdoing, but Dubal sought to make them vicariously liable for his acts under section 10 of the Partnership Act 1890.

86Dubal did not join Mr Al Tajir as a defendant, although at trial it contended, and the judge found, that he was a dishonest participant in the scheme. The judge's finding in this regard was unsuccessfully challenged by Mr Al Tajir on appeal. Dubal did not join Mr Livingstone or Richco either, having previously settled its claims against them.

87Dubal claimed that Mr Salaam and Mr Amhurst were liable for knowing receipt as well as dishonest assistance, though it did not pursue its case for knowing receipt against Mr Amhurst at the trial. But its case in knowing receipt, like that in dishonest assistance, was founded on the allegations of dishonesty, and was thus also fault-based. Dishonest receipt gives rise to concurrent liability, since the claim can be based on the defendant's dishonesty, treating the receipt itself as incidental, being merely the particular form taken by the defendant's participation in the breach of fiduciary duty; but it can also be based simply on the receipt, treating it as a restitutionary claim independent of any wrongdoing: see *John v Dodwell & Co Ltd* [1918] AC 563.

88Amhursts brought third party proceedings against Mr Salaam, Mr Al Tajir, Mr Livingstone and Richco, for contribution under the Civil Liability (Contribution) Act 1978 in respect of any sum for which they might be held liable to Dubal. They did not claim contribution or indemnity from Mr Amhurst himself. Mr Salaam brought similar contribution proceedings against Mr Al Tajir as well as against Mr Amhurst and Amhursts, while Mr Al Tajir made a contingent claim to contribution from Mr Amhurst (though not from Amhursts) in case he might be found liable to make a contribution to Amhursts.

89During the course of the trial Mr Amhurst and Amhursts settled with Dubal by making a payment of $10m. Mr Amhurst made no contribution to this sum, which was paid by or on behalf of Amhursts alone, but it was expressly paid on terms that the claims and allegations against Mr Amhurst were withdrawn.

90At the end of the first part of the trial which was concerned with liability and before proceeding

to hear the various claims for contribution, the judge with the consent of the parties published what he called his "unreasoned findings". After the conclusion of the second part of the trial and at the request of the parties the judge deferred giving final judgment in order to allow negotiations for settlement to proceed. During the adjournment Mr Salaam settled Dubal's claim against him and his companies and Mr Al Tajir settled its claim against him in each case at a sum which the judge assessed at approximately $17m. The judge then proceeded to hear further submissions on the contribution issues in the light of his unreasoned findings before giving final judgment: [1999] 1 Lloyd's Rep 415.

(4) The decisions below

91The action having settled, the judge had only to deal with the outstanding claims for contribution. Amhursts did not pursue their claims

against Richco, since it was a term of their settlement with Dubal that this should be withdrawn, or against Mr Livingstone. They claimed contribution or indemnity from Mr Salaam and Mr Al Tajir in respect of the $10m which they had paid to settle Dubal's claim. Mr Amhurst faced a claim from Mr Salaam and a contingent claim from Mr Al Tajir. Mr Al Tajir faced claims for contribution from Amhursts and Mr Salaam and made a contingent claim against Mr Amhurst.

92Mr Salaam and Mr Al Tajir contended that they were not liable to contribute any part of the sum which Amhursts had paid to settle the action; but if they were then either Mr Amhurst or Amhursts should be required to make some contribution for the part which Mr Amhurst had played in the scheme.

93Any liability to contribute to Amhursts' settlement with Dubal is statutory and arises under the 1978 Act. So far as material, section 1 of that Act provides as follows:

> "1. *Entitlement to contribution*. (1) Subject to the following provisions of this section, any person liable in respect of any damage suffered by another person may recover contribution from any other person liable in respect of the same damage (whether jointly with him or otherwise).
>
> "(2) A person shall be entitled to recover contribution by virtue of subsection (1) above notwithstanding that he has ceased to be liable in respect of the damage in question since the time when the damage occurred, provided that he was so liable immediately before he made or was ordered or agreed to make the payment in respect of which the contribution is sought …
>
> "(4) A person who has made or agreed to make any payment in bona fide settlement or compromise of any claim made against him in respect of any damage (including a payment into court which has been accepted) shall be entitled to recover contribution in accordance with this section without regard to whether or not he himself is or ever was liable in respect of the damage, provided, however, that he would have been liable assuming that the factual basis of the claim against him could be established."

94It was not disputed that the payment of $10m was made by Amhursts "in bona fide settlement or compromise" of the claims made against them by Dubal, or that the claims made against Mr Amhurst were withdrawn as part of the settlement. The question, therefore, was whether, immediately before making the payment and assuming that the factual basis of Dubal's claim against Amhursts could be established, they would have been "liable in respect of the damage" suffered by Dubal. Such liability could only be vicarious.

95Section 10 of the Partnership Act 1890 provides for the vicarious liability of partners. It is in the following terms:

> "10. *Liability of the firm for wrongs*. Where, by any wrongful act or omission of any partner acting in the ordinary course of the business of the firm, or with the authority of his co-partners, loss or injury is caused to any person not being a partner in the firm, or any penalty is incurred,

> the firm is liable therefor to the same extent as the partner so acting or omitting to act."

96Mr Salaam and Mr Al Tajir contended that Amhursts were not liable for Mr Amhurst's participation in the fraud. According to them Amhursts had no need to settle the action and were not entitled to contribution in respect of the $10m they paid. Their primary argument was that this was a matter of law. Section 10 of the Partnership Act 1890, they said, is limited to torts or other wrongs actionable at common law, and does not cover wrongdoing formerly cognisable only by the courts of equity in the exercise of their exclusive jurisdiction. This argument was rejected by the judge and the majority of the Court of Appeal (Evans and Aldous LJJ, Turner J dissenting on this point). It has been revived before your Lordships.

97In the alternative Mr Salaam and Mr Al Tajir submitted that Amhurst's claim failed on the facts. They were not vicariously liable for Mr Amhurst's wrongdoing because, they said, he was not acting in the ordinary course of Amhursts' business as section 10 of the Partnership Act 1890 requires. The judge rejected this submission, but it was unanimously accepted by the Court of Appeal.

98As the claims against Mr Amhurst and Amhursts had been settled, Amhursts relied upon the assumption provided for by Section 1(4) of the 1978 Act that the factual basis of the claims against them could be established. The factual basis of Dubal's claim was (i) that Mr Amhurst dishonestly assisted Mr Livingstone to act in breach of his fiduciary duties to Dubal; (ii) that he did so dishonestly; and (iii) that he did so "in his capacity as a partner in [Amhursts]". By common consent these words have been taken to mean (as they were obviously intended to mean) "in the ordinary course of Amhursts' business". As against Amhursts, Dubal pleaded that, in his capacity as a partner, he drafted the relevant agreements or gave instructions for them to be drafted and carried out or gave instructions for the carrying out of certain administrative acts in relation to the distribution of the proceeds of the fraud. These activities lay at the heart of the fraud; they were fundamental to the operation of the scheme. The judge held that Mr Amhurst, who "must be treated as having dishonestly assisted the scheme", had done so "in his role as a solicitor" (i e in the ordinary course of Amhursts' business). In that role, he said, "he had played (i e must be assumed to have played) an important and substantial and not merely peripheral or incidental role in the scheme". Accordingly he held that, on the assumed facts, Amhursts were vicariously liable for Mr Amhurst's wrongdoing and were in principle entitled to contribution from Mr Salaam and Mr Al Tajir. He then proceeded to consider the principles on which the contributions of the various parties should be assessed.

99As the Court of Appeal observed, however, what Dubal alleged Mr Amhurst did in his capacity as a partner in Amhursts represented only part of the contribution which he made to the fraud: [2001] QB 113. As against him personally, Dubal alleged that he acted not only as a solicitor but also as a director of Mr Salaam's companies. Although receiving his instructions from Mr Salaam, he gave direct advice and assistance to other wrongdoers, specifically Mr Livingstone

and Richco, who were not clients of his or his firm. Indeed, he was so closely involved with Mr Livingstone in the negotiations that, in the judge's words, he "appeared to be part of the Dubal

team". He told Richco that it was required to concur in the scheme if it was to do business in Dubai or with Dubal, and gave Richco to understand that it was not expected to provide any services pursuant to the consultancy agreement. He dealt only with other parties to the dishonest scheme and all his work was done in the context of the scheme.

100 This persuaded the Court of Appeal to reverse the judge's decision. Evans LJ said [2001] QB 113, 133: "Vicarious liability is not imposed unless all of the acts or omissions which make the servant personally liable as a tortfeasor took place within the course of his employment." He claimed to derive this proposition from the decision of this House in *Credit Lyonnais Bank Nederland NV v Export Credits Guarantee Department* [2000] 1 AC 486. Since much of Mr Amhurst's conduct on which Dubal relied took place outside the ordinary course of their business, he held that Amhursts were not vicariously liable for his wrongdoing.

101 Aldous LJ based himself on the same proposition. He acknowledged that advising on and drafting legal agreements fell squarely within the ordinary course of business of a firm of solicitors, and that Amhursts would have been liable if this had been the full extent of Mr Amhurst's assumed participation in the scheme. But it was not. In the first place, much of Mr Amhurst's part in the scheme took place outside the course of Amhursts' business. In the second place, the judge had found that Mr Amhurst had "dishonestly assisted Mr Livingstone to act in breach of his fiduciary duties by conceiving, planning and assisting in giving effect to the scheme", and Dubal had alleged that all the relevant agreements "were sham agreements and were known to Mr Amhurst to be so". Aldous LJ [2001] QB 113, 142, concluded with the proposition that:

> "It is not and never has been part of the business of a firm of solicitors to plan, draft and sign sham agreements giving effect to a scheme known to be dishonest which he had helped to plan. Such actions could not have been carried out in the ordinary course of the business carried on by [Amhursts]".

102 The Court of Appeal accordingly held that Amhursts were not liable to Dubal in respect of Mr Amhurst's participation in the scheme, and were accordingly not entitled to contribution. They dismissed the contribution proceedings without having to consider the basis upon which the judge dealt with them.

(5) The scope of section 10 of the Partnership Act 1890

103 Like the judge and the Court of Appeal, I too reject the argument that section 10 of the Partnership Act 1890 is confined to torts or other common law wrongs. There is nothing to be said for such a limitation. The section is in the widest terms. It applies whenever injury is caused to a non-partner, or any penalty is incurred, "by any wrongful act or omission of any partner". The section is concerned only with fault-based liability, but there is nothing in its wording to indicate that the liability must arise at common law. On the contrary, the reference to penalties shows that the liability may be statutory. As my noble and learned friend, Lord Nicholls of Birkenhead, has observed, the liability of co-partners to penalties for breach of the

revenue laws was well established by 1890 when the Partnership Act was passed.

104 Moreover, the vicarious liability of partners for equitable wrongdoing was certainly known to the Court of Chancery at least as early as 1842: see *Brydges v Branfill* (1842) 12 Sim 369. The facts of that case bear a striking similarity to those of the present. The tenant for life of settled land embarked on an elaborate fraud to lay his hands on capital moneys. The scheme required a private Act of Parliament to be obtained to enable the estate to be sold under the direction of the court and the proceeds paid into court and invested in other land; a fictitious sale of the tenant for life's own lands to an associate of his; the application of the money in court in the purchase of the land from the associate at an excessive price; and the deliberate deception of the court to obtain an order under which part of the money in court was paid out to the tenant for life. He employed a firm of solicitors to act for him in obtaining the Act and the orders of the court and in every other proceeding under the Act. The partner who acted in the transactions (one Brooks) was privy to all the circumstances of the transactions, but neither of his partners was aware that there was any fraud or irregularity in them. Despite holding that their moral characters were unaffected by the transactions, Sir Lancelot Shadwell V-C held them jointly and severally liable with Brooks to make good the loss to the trust estate.

105 In that case Brooks dealt with the money by taking it out of court and paying it over to the tenant for life, much as Mr Amhurst is alleged to have acted in the present case, but this was not the ground on which the innocent partners were held liable. In dealing with the money Brooks was acting in a purely ministerial capacity under a power of attorney from the tenant for life, and he duly accounted to his principal. The money was not received in any sense by the firm or by Brooks on its behalf; the power of attorney was given to Brooks alone and not jointly with his partners, as in *St Aubyn v Smart* (1868) LR 3 Ch App 646. He was guilty of dishonest assistance, not of knowing or even dishonest receipt, and the only basis on which his partners could have been liable was that they were vicariously liable for his wrongdoing.

106 Vicarious liability of partners for tort seems to have entered English law at much the same time. It was certainly established by the middle of the 19th century: see *Ashworth v Stanwix* (1861) 3 E & E 701, where the Court of Queen's Bench treated it as settled law that innocent partners were vicariously liable for the torts of their co-partner. At all events it was considered to be sufficiently well established to be incorporated in the Partnership Act when this was enacted to codify the law of partnership. Section 10 assimilated the vicarious liability of partners to that of employers and adopted the same criterion: that the wrongful act or omission must have been performed in the ordinary course of the business of the party sought to be made vicariously liable. In *Meekins v Henson* [1964] 1 QB 472, 477 Winn J observed that section 10 of the Partnership Act 1890 produced "a necessary equation of a partnership firm with employers for this purpose". The necessity of such an equation is self-evident: it would be absurd if a professional firm were vicariously liable for the acts of an employee but would not be liable if the same acts had been committed by a partner.

107 Vicarious liability is a loss distribution device based on grounds of social and economic policy. Its rationale limits the employer's liability to

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conduct occurring in the course of the employee's employment. "The master ought to be liable for all those torts which can fairly be regarded as reasonably incidental risks to the type of business he carries on": see *Atiyah, Vicarious Liability* (1967), p 171; *Lister v Hesley Hall Ltd*

[2002] 1 AC 215. The *American Law Institute, Restatement of the Law, Agency*, 2d (1958), section 229 is to the same effect: "the ultimate question is whether or not it is just that the loss resulting from the servant's acts should be considered as one of the normal risks to be borne by the business in which the servant is employed." Since this is the underlying rationale of the doctrine there is no rational ground for restricting the liability to torts, or for excluding liability in equity, particularly when equitable liability often has its counterpart at common law. Why should a firm be vicariously liable if a partner procures or induces a breach of contract but not if he procures or participates in a breach of trust or fiduciary duty? If the risk of wrongdoing is one which can fairly be said to be reasonably incidental to the employer's business, why should it matter that the liability arises in equity and not at common law or by statute?

108 The vicarious liability of an employer for his employees' torts, however, was still in course of development in 1890, and the circumstances in which he could be liable for his employee's intentional and dishonest wrongdoing was still problematic. It was not settled until the decision of your Lordship's House in *Lloyd v Grace Smith & Co* [1912] AC 716: see in particular p 732, where Lord Macnaghten traced the development of the doctrine in relation to fraudulent and criminal wrongdoing. Wisely, and no doubt deliberately, section 10 was drafted in the widest terms to embrace every kind of wrong capable of causing damage to non-partners, so that there was no danger that the vicarious liability of partners (unlike that of employers) might be ossified by the terms of the statute and fail to keep step with future developments.

109 Mr Salaam and Mr Al Tajir supported their submissions by an elaborate analysis of the structure of the Partnership Act 1890, which they said showed that section 10 is confined to common law wrongs. Section 9, they said, is concerned with the liability of the firm for breach of contract, section 10 with its liability in tort, and sections 11 and 13 with liability in equity. Liability arising out of a breach of trust, they argued, is dealt with by sections 11 and 13 and not section 10; liability as a constructive trustee is dealt with by section 13, and the basic rule is non-liability. They went so far as to submit that, if section 10 applies to liability in equity, then sections 11 and 13 are redundant.

110 In my opinion this analysis is faulty. Section 9 is not concerned with the liability of the firm at all but with the liability of the individual partners. It provides that every partner in a firm is liable jointly with the other partners for all debts and obligations of the firm incurred while he was a partner. Section 12 makes every partner jointly and severally liable for loss for which the firm was liable under sections 10 and 11 while he was a partner in the firm. Where section 10 makes the firm vicariously liable for loss caused by a partner's wrongdoing, therefore, section 12 makes the liability the joint and several liability of the individual partners. Sections 11 and 13 are not concerned with wrongdoing or with vicarious liability but with the original liability of the firm to account for receipts. I explained the difference between the two sections in *Bass Brewers Ltd v Appleby* [1997]

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2 BCLC 700, 711. Section 11 deals with money which is properly received by the firm in the ordinary course of its business and is afterwards misappropriated by one of the partners. The firm is not vicariously liable for the misappropriation; it is liable to account for the money it received, and cannot plead the partner's wrongdoing as an excuse for its failure to do so. Section 13 deals with money which is misappropriated by a trustee who happens to be a partner and who in breach of trust or fiduciary duty afterwards pays it to his firm or otherwise improperly

employs it in the partnership business. The innocent partners are not vicariously liable for the misappropriation, which will have occurred outside the ordinary course of the firm's business. But they are liable to restore the money if the requirements of the general law of knowing receipt are satisfied.

111 Thus the structure of the Partnership Act 1890 provides no support for argument advanced by Mr Salaam and Mr Al Tajir. The critical distinction between section 10 on the one hand and sections 11 and 13 on the other is not between liability at common law and liability in equity, but between vicarious liability for wrongdoing and original liability for receipts. The firm (section 10) and its innocent partners (section 112) are vicariously liable for a partner's conduct provided that three conditions are satisfied: (i) his conduct must be wrongful, that is to say it must give rise to fault-based liability and not, for example, merely receipt-based liability in unjust enrichment; (ii) it must cause damage to the claimant; and (iii) it must be carried out in the ordinary course of the firm's business. The first two conditions are plainly satisfied in the present case, and I can turn to the third.

(6) In the ordinary course of the business of the firm

A question of law or fact?

112 If the actions of the party primarily liable are legally capable of being performed within the course of his employment or the ordinary course of his firm's business, the question whether they were so performed is a question of fact, not of law. Such a question was formerly left to the jury. It is not, of course, a question of primary fact, but a factual conclusion based on an assessment of the primary facts. This may involve questions of fact and degree, and in borderline cases the decision may properly go either way. Unless, however, the conclusion of the tribunal of fact is not legally capable of being derived from the primary facts or is contradicted by them, then its determination must be respected.

113 The question in the present case, therefore, is whether those activities of Mr Amhurst which I have previously described and which form the factual basis of Dubal's claim against Amhursts, are legally capable of being performed by a solicitor acting in the ordinary course of his firm's business.

The Court of Appeal's approach

114 The main reason why Evans and Aldous LJJ reversed the finding of the trial judge was that they considered that it was a condition of vicarious liability that all the wrongful acts for which the partner was responsible must have been committed by him in the course of his firm's business. This proposition cannot be derived from the *Credit Lyonnais Bank case* [2000] 1 AC 486, and is not the law. The claim in that case was in respect of the tort

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of deceit. The difficulty was that the acts of the employee which were performed within the course of his employment were not in themselves tortious, while the representation which was tortious was not made by the employee in the course of his employment. Indeed, it was not made by an employee of the defendants at all. The question was whether it is sufficient to make the employer vicariously liable for the acts of his employee if his acts do not amount to a tort but do so only when taken with other acts which were not performed in the course of his

employment. The House concluded that, before there can be vicarious liability, all the features of the wrong *which are necessary* to make the employee liable must have occurred in the course of the employment: see per Lord Woolf MR, at p 495. The claim failed because the employee's conduct, taken by itself, was not sufficient to constitute a tort. An essential element in the cause of action, viz the representation, was not made by the employee in the course of his employment.

115 The present case is quite different. It was sufficient to make Mr Amhurst personally liable for his dishonest participation in the scheme that he drafted the agreements by which it was carried out in the knowledge of the purpose to which they were to be put and that he caused his firm to manage the corporate vehicles through which the proceeds of the fraud were distributed. The factual basis of Dubal's claim against Amhursts was that these acts were performed by Mr Amhurst in the ordinary course of Amhursts' business. It does not follow from the fact that Mr Amhurst did other things as well, some of which may not have been performed in the ordinary course of Amhursts' business, that Amhursts are not vicariously liable for those acts which were.

116 In agreement with my noble and learned friend, Lord Nicholls, I would hold that, where the claim against the firm has been settled, its claim to contribution must be determined solely by reference to the facts pleaded against the firm itself. This is not a technical rule of pleading. It is because the factual basis of the claim against the firm has not been established by evidence but by force of the statutory assumption that the factual basis of the claim could be established; and this can be found only in the case pleaded against the firm. It cannot be found in the case pleaded against the partner personally.

117 Mr Salaam and Mr Al Tajir complain that this is unfair. Had the case proceeded to judgment, the character of Mr Amhurst's conduct would have been evaluated by reference to all the evidence as it emerged at the trial; and when his conduct was considered as a whole it might have become apparent that he was not acting in the ordinary course of his firm's business but was, in the time-honoured phrase, "engaged in a frolic of his own". Why, they ask, should they be prejudiced by the fact that Amhursts chose to settle the claim against them instead of defending it, perhaps successfully?

118 Of course, there is another side to this particular coin. If the case had not been settled, Dubal could have relied on whatever evidence was given at the trial to show that Mr Amhurst was acting in the ordinary course of his firm's business. This, Amhursts said, would have shown that Mr Salaam was a client of the firm, that Mr Amhurst drafted the agreements on his instructions, that the administrative acts which he carried out in relation to the distribution of the money consisted of handling invoices addressed to the firm and writing instructions on the firm's headed

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notepaper, and that the firm charged fees for all these services. None of this would have had to be pleaded.

119 But the short answer to the complaint that Mr Salaam and Mr Al Tajir have been prejudiced by the settlement of the claim against Amhursts, which they were powerless to prevent, is that there is nothing unfair to them in assuming that Mr Amhurst was acting in the course of the firm's business. As I shall explain later, defendants who, if found liable, may become involved in

proceedings for contribution are not concerned with the question whether a third party is or is not also vicariously liable to the plaintiff. It is nothing to do with them and does not affect their position.

Dishonest conduct

120 There remains for consideration the observation of Aldous LJ [2001] QB 113, 142 that "it is not and never has been part of the business of a firm of solicitors to … draft sham agreements giving effect to a scheme known to be dishonest which he had helped to plan". But it is equally not and never has been part of the business of a firm of solicitors to assist in obtaining an Act of Parliament and orders of the court in order to defraud the beneficiaries of a settled estate, yet Sir Lancelot Shadwell V-C in *Brydges v Branfill* 12 Sim 369, regarded these acts as the acts of the firm itself. It is not and never has been part of the business of a firm of solicitors to defraud its client by obtaining her instructions to sell her property and inducing her to execute conveyances in favour of one of its employees so that he could pocket the proceeds. Yet the firm was held vicariously liable for the fraud of its employee in these circumstances in *Lloyd v Grace Smith & Co* [1912] AC 716. It is not and never has been part of the business of a residential school to commit sexual assaults upon boys in its care. Yet in *Lister v Hesley Hall Ltd* [2002] 1 AC 215 the owners of the school were held to be vicariously liable for assaults carried out by its warden.

121 In that case I observed that it was no answer to a claim against the employer to say that the employee was guilty of intentional wrongdoing, or that his act was not merely tortious but criminal, or that he was acting exclusively for his own benefit, or that he was acting contrary to express instructions, or that his conduct was the very negation of his employer's duty. Vicarious liability for tortious and even criminal acts had been established well before the end of the 19th century. *Lloyd v Grace Smith & Co* [1912] AC 716, which Lord Steyn described as a breakthrough, finally established that vicarious liability is not necessarily defeated if the employee acted for his own benefit. The consequence, he said, at p 224, was that "an intense focus on the connection between the nature of the employment and the tort of the employee became necessary".

122 The vicarious liability of an employer does not depend upon the employee's authority to do the particular act which constitutes the wrong. It is sufficient if the employee is authorised to do acts of the kind in question: see *Navarro v Moregrand Ltd* [1951] 2 TLR 674, 680, per Denning LJ. This is equally true of partners, though it is perhaps less obvious in their case, since the relation between partners is essentially one of agency. An employer may authorise his employee to drive, but he does not authorise him to drive negligently. A firm of solicitors may authorise a partner to draft agreements for a client, but it does not authorise him to draft sham agreements. Lord

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Lindley wrote "it is obvious that it does not follow from the circumstance that such tort or fraud was not authorised, that therefore the principal is not legally responsible for it" cited in *Lindley & Banks on Partnership*, 17th ed (1995), pp 332-333.

123 In *Lister v Hesley Hall Ltd* [2002] 1 AC 215 several of your Lordships observed that the traditional *Salmond* test for determining whether an employee's act was in the course of his employment is not happily expressed when applied to the case of intentional or fraudulent

wrongdoing. Sexually assaulting a boy is not an improper mode of looking after him. It is an independent act in itself, not an improper mode of doing something else. To say that a solicitor drafted an agreement negligently is to describe the way in which he drafted it; it is to accuse him of having done an authorised act in a wrongful and unauthorised way. But to say that he drafted an agreement dishonestly, or that he drafted a sham agreement, does not describe either the way in which he drafted it or the nature of the document. Rather it describes the purpose for which he intended it to be used.

124 But these differences are immaterial. If regard is paid to the closeness of the connection between the employee's wrongdoing and the class of acts which he was employed to perform, or to the underlying rationale of vicarious liability, there is no relevant distinction to be made between performing an act in an improper manner and performing it for an improper purpose or by an improper means. In *Hamlyn v John Houston & Co* [1903] 1 KB 81 a partner obtained confidential information of a competitor's business by means of a bribe. Sir Richard Henn Collins MR said that if it was within the scope of his authority to obtain the information by legitimate means, then for the purpose of vicarious liability it was within the scope of his authority to obtain it by illegitimate means. In the Court of Appeal Evans LJ distinguished this case on the ground that the corrupt employee who received the bribe could have believed that the party who offered it to him had his firm's authority to do so. But it does not matter what he thought. The action was not brought in respect of a reliance-based tort, nor was it brought by the employee. It was brought by his employer who did not rely on the partner's authority and had no relevant dealings with the defendant firm at all.

125 In that case the partner who was personally liable acted for the benefit of the firm. It would not necessarily have made a difference had he acted for his own benefit; but taken with other circumstances it might conceivably have done so. The question whether the employee was acting in the course of his employment or was "engaged on a frolic of his own" is not necessarily determined by the fact that he was merely doing work of a kind he was employed to do. Even in such a case the employee may step outside the limits of his employment. The road accident deviation cases are examples of this.

126*Kooragang Investments Pty Ltd v Richardson & Wrench Ltd* [1982] AC 462 is another example. A valuer in the defendants' employ gave negligent valuations to former clients of theirs. He was doing work of a kind which he was employed to do. But the defendants were not liable. The valuer was moonlighting. He was acting, not as an employee of the defendants, but as an employee or associate of the former clients to whom he gave the valuations and on their instructions. He carried out the valuations

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at the premises of the former clients and using their staff. The defendants received no payment for the valuations and the director responsible knew nothing of them. The only connection between the valuations and the defendants was that the valuations were made on the defendants' stationery. As Lord Wilberforce said, at p 475: "A clearer case of departure from the course or scope of [the valuer's] employment cannot be imagined: it was total."

127 Unless the use by the valuer of the defendants' stationery in that case was enough to tip the scale, which it clearly was not, it merely amounted to a false representation that he was giving the valuations on their behalf. Since the representation was made by the valuer himself and not

by the defendants or with their authority, it did not render them liable for holding him out as having their authority to act on their behalf.

128 Such a case serves as a reminder that even the *Salmond* test is only that—a test. It is not a conclusive definition of the circumstances in which vicarious liability arises. Even if it is satisfied, the facts, taken as a whole, may nevertheless show that the employee was not acting in the course of his employment. But the mere fact that he was acting dishonestly or for his own benefit is seldom likely to be sufficient.

129 An employer has been held to be vicariously liable for the intentional wrongdoing of his employee in a wide variety of different circumstances. In some of the cases the employer has undertaken a duty towards the plaintiff and then delegated the performance of that duty to his employee: see *Morris v C W Martin & Sons Ltd* [1966] 1 QB 716; *Photo Production Ltd v Securicor Transport Ltd* [1980] AC 827; *Lister v Hesley Hall Ltd* [2002] 1 AC 215. The decisive factor in *Lloyd v Grace Smith & Co* [1912] AC 716 was that the employee who committed the fraud for his own benefit was the person to whom his employer invited the client to entrust her affairs. In all those cases the plaintiff was a client or customer of the employer. But that is not essential. It was not the case in *Hamlyn v John Houston & Co* [1903] 1 KB 81. The decisive feature in that case was that, in paying the bribe, the partner was merely using an improper means of obtaining information for his firm which it was his job to obtain. But the circumstances in which an employer may be vicariously liable for his employee's intentional misconduct are not closed. All depends on the closeness of the connection between the duties which, in broad terms, the employee was engaged to perform and his wrongdoing.

130 In the present case the principal participants in the fraud needed a solicitor to draw the agreements which were to be the instrument of carrying out their scheme. They instructed Mr Amhurst, a partner in Amhursts; and he is to be assumed to have carried out his instructions "in his role as a solicitor in the firm", that is to say he was not moonlighting but acting in the course of the firm's business. Drawing such agreements honestly and for a proper purpose would plainly be in the ordinary course of the firm's business. By drawing them dishonestly for an improper purpose and for his own benefit or the benefit of his confederates, the court might, on an overall assessment of the evidence at trial, have concluded that Mr Amhurst had sufficiently departed from the ordinary course of the firm's business to defeat Dubal's claim against Amhursts. He would have been engaged "on a frolic of his own" and not "acting in his role as a partner in the firm". But such a conclusion would not have been inevitable; deliberate and dishonest conduct

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committed by a partner for his own sole benefit is legally capable of being in the ordinary course of the business of his firm.

131 Accordingly, and subject only to the Court of Appeal's decision in *Mara v Browne* [1896] 1 Ch 199, with which I shall deal in the next section, the conclusion that Mr Amhurst was acting in the ordinary course of the firm's business would have been legally open to the trial judge had the case proceeded to trial. The case having settled, and this being the factual basis of the claim against Amhursts, the judge was entitled and bound to proceed on the assumption that it would have been established.

Liability as a constructive trustee: Mara v Browne

132 Mr Salaam and Mr Al Tajir submitted that, as a matter of law, it is no part of the business of a solicitor to constitute himself a constructive trustee. For this proposition they cited *Mara v Browne* [1896] 1 Ch 199, 208, where Lord Herschell said that: "it is not within the scope of the implied authority of a partner in … [a solicitor's] business that he should so act as to make himself a constructive trustee, and thereby subject his partner to the same liability." Rigby LJ spoke in similar terms, at p 214; and A L Smith LJ, at p 212, though he used the more specific expression "trustee de son tort" and not "constructive trustee".

133 These observations were obiter, since the Court of Appeal dismissed the claim against the partner personally responsible, so that there could be no question of vicarious liability. But they certainly represented the general understanding at that time. Although implicit, the reasoning would have been well understood in 1896. The courts distinguished between the acts of a solicitor when acting as solicitor to the trustees and acts done by him as an express trustee. The former were within the scope of the ordinary business of a solicitor; the latter were not: see *In re Fryer* (1857) 3 K & J 317. If so, it was equally no part of such a business for him to constitute himself "a constructive trustee" in the sense in which the Court of Appeal were using that term.

134 For my part, I do not think that these cases can be disposed of by saying that the scope of a solicitor's practice has changed since 1896. No doubt it has, but not in the requisite direction. The 19th century was the heyday of the family solicitor. Conveyancing and private client business formed the bulk of his work. He could expect to be appointed an executor and trustee of his clients' wills and settlements. This is much less common today. Solicitors' work has become more commercial. Private client business forms a far smaller part of their work than it did; many large firms undertake none at all. Trusteeship too has become more professional. Clients no longer look to their trustees to be philosophers, guides and friends. They expect them to be professional fund-managers and even, sometimes, businessmen. It is part of a solicitor's business to advise whether trust money may lawfully be invested in an overseas hedge fund or used to pay a discretionary beneficiary's school fees. It is still not part of his business to make the decision whether to do so or not. If it was not part of the ordinary business of a solicitor to act as an express trustee in 1857, I do not see how it can be part of it today.

135 But every statement in a judgment must be understood in the context in which it is made, and this is particularly the case if it employs

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expressions such as "constructive trust" or "constructive trustee", for they have more than one meaning, and meanings have changed over time. *Mara v Browne* [1896] 1 Ch 199 cannot be understood unless the sense in which Lord Herschell and Rigby LJ were using the expression "constructive trustee" is appreciated.

136 The case concerned a marriage settlement. The first defendant, whom I shall call HB, was a solicitor. He advised the persons who were acting as trustees, though not yet formally appointed as such. He suggested a series of investments for the trust funds. They were not proper investments for trustees to make. The money was to be lent on building property of a speculative character and the margin was unsatisfactory. The investments were made and the money was lost. Lord Herschell considered that, if the claimants had charged HB with negligence as a solicitor and brought the action in time, they might well have succeeded, in

which case both HB and his partner would have been liable. But any such action was barred by the Statute of Limitations. Accordingly the claimants alleged that HB had intermeddled with the trust and was liable as a trustee de son tort. They alleged that he had laid out the trust moneys at a time when there were no trustees, and therefore must be taken to have acted as a principal in the matter and not as a mere agent for the trustees. Such a claim was not statute-barred. The judge agreed with this analysis and held that both HB and his partner were liable.

137 The Court of Appeal took a different view of the facts. They held that it was not correct to say that at the relevant dates there were no trustees. But even if there had been none HB would not have been liable. He did not intend or purport to act as a trustee, and no one supposed that he was so acting. He purported to act throughout only as solicitor to the trustees and was understood by all concerned to be acting as such.

138 This summary is sufficient to show what Lord Herschell and Rigby LJ meant by "constructive trustee". They meant "trustee de son tort"; that is to say, a person who, though not appointed to be a trustee, nevertheless takes it upon himself to act as such and to discharge the duties of a trustee on behalf of others. In *Taylor v Davies* [1920] AC 636, 651, Viscount Cave described such persons as follows:

> "though not originally trustees, [they] had taken upon themselves the custody and administration of property on behalf of others; and though sometimes referred to as constructive trustees, they were, in fact, actual trustees, though not so named."

Substituting dog Latin for bastard French, we would do better today to describe such persons as de facto trustees. In their relations with the beneficiaries they are treated in every respect as if they had been duly appointed. They are true trustees and are fully subject to fiduciary obligations. Their liability is strict; it does not depend on dishonesty. Like express trustees they could not plead the Limitation Acts as a defence to a claim for breach of trust. Indeed, for the purposes of the relevant provision (section 25(3) of the Supreme Court of Judicature Act 1873 (36 & 37 Vict c 66)), which distinguished between property held on express trusts and other trusts, they were treated by the courts as express trustees. That is why the action in *Mara v Browne* was not statute-barred.

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139 In the same case, however, Viscount Cave identified a very different kind of "constructive trustee", at p 651:

> "But the position … of a constructive trustee in the usual sense of the words—that is to say, of a person who, though he had taken possession in his own right, was liable to be declared a trustee in a court of equity—was widely different …"

Taylor v Davies was not a case of fraud but it was followed and applied in *Clarkson v Davies* [1923] AC 100, which was. In the latter case the Lord Justice Clerk (Scott Dickson) explained, at p 110, that the distinction was between a trust which arose before the occurrence of the transaction impeached and a claim which arose only by reason of that transaction. In the former case the defendant is treated as a trustee even though not expressly appointed as such; in the latter case he is a stranger to the trust at the time of the transaction.

140 Referring to these cases in *Paragon Finance plc v DB Thakerar & Co* [1999] 1 All ER 400, 408-409 in the Court of Appeal, I drew attention to the fact, which was becoming increasingly overlooked, that the expressions "constructive trust" and "constructive trustee" were used by equity lawyers to describe two entirely different situations. One was the situation which the claimants unsuccessfully contended had arisen in *Mara v Browne*. The other is the situation which arose in present case.

141 Unlike HB in *Mara v Browne* [1896] 1 Ch 199, Mr Amhurst did not assume the position of a trustee on behalf of others. He never had title to the trust funds or claimed the right to deal with them on behalf of those properly entitled to them. He acted throughout on his own or his confederates' behalf. The claim against him is simply that he participated in a fraud. Equity gives relief against fraud by making any person sufficiently implicated in the fraud accountable in equity. In such a case he is traditionally (and I have suggested unfortunately) described as a "constructive trustee" and is said to be "liable to account as a constructive trustee". But he is not in fact a trustee at all, even though he may be liable to account as if he were. He never claims to assume the position of trustee on behalf of others, and he may be liable without ever receiving or handling the trust property. If he receives the trust property at all he receives it adversely to the claimant and by an unlawful transaction which is impugned by the claimant. He is not a fiduciary or subject to fiduciary obligations; and he could plead the Limitation Acts as a defence to the claim.

142 In this second class of case the expressions "constructive trust" and "constructive trustee" create a trap. As the court recently observed in *Coulthard v Disco Mix Club Ltd* [2000] 1 WLR 707, 731 this "type of constructive trust is merely the creation by the court … to meet the wrongdoing alleged: there is no real trust and usually no chance of a proprietary remedy". The expressions are "nothing more than a formula for equitable relief": *Selangor United Rubber Estates Ltd v Cradock (No 3)* [1968] 1 WLR 1555, 1582, per Ungoed-Thomas J. I think that we should now discard the words "accountable as constructive trustee" in this context and substitute the words "accountable in equity".

143 The distinction between the two kinds of constructive trustee is of critical importance in the present context. If, as I think, it is still not within the ordinary scope of a solicitor's practice to act as a trustee of an express

trust, it is obviously not within the scope of such a practice voluntarily to assume the obligations of a trustee and so incur liability as a de facto trustee or a constructive trustee of the first kind. But given that a solicitor may be guilty of deliberate and dishonest conduct while acting within the ordinary scope of his practice, there is no conceivable reason why his firm should not thereby incur vicarious liability for loss caused by the conduct which constituted him a constructive trustee of the second kind. Unfortunately Vinelott J applied *Mara v Browne* in *In re Bell's Indenture* [1980] 1 WLR 1217, a case of dishonest assistance like the present, and held that the firm was not vicariously liable. The decision is inconsistent with *Brydges v Branfill* 12 Sim 369. In my opinion it was wrongly decided and we should overrule it.

Conclusion

144I would allow Amhursts' appeal and uphold the judge's conclusion that Amhursts are entitled to claim a contribution towards the $10m they paid in settlement of Dubal's claim.

(7) Apportionment of liability

The statutory provisions

145 So far as material section 2 of the 1978 Act provides as follows:

"2. *Assessment of contribution*. (1) Subject to subsection (3) below, in any proceedings for contribution under section 1 above the amount of the contribution recoverable from any person shall be such as may be found by the court to be just and equitable having regard to the extent of that person's responsibility for the damage in question.

"(2) Subject to subsection (3) below, the court shall have power in any such proceedings to exempt any person from liability to make contribution, or to direct that the contribution to be recovered from any person shall amount to a complete indemnity."

The judge's approach

146 In considering the relative responsibility of the various parties to the proceedings for contribution, the judge had regard to their respective moral blameworthiness and "the causative potency" of their respective actions.

147 The judge found that in terms of the promotion, organisation and operation of the scheme there was little to choose between the five principal parties. He regarded Mr Livingstone, Mr Al Tajir and Mr Salaam as in effect partners, each of whom brought something indispensable to the scheme. Richco was not an originator, but was a necessary part of the scheme. Mr Amhurst was not a principal, nor an originator, but in his own way he was a necessary part of the setting up of the scheme and by his presence he lent a colourable respectability to it. The judge said of Mr Amhurst that he regarded his responsibility in the promotion, organisation and operation of the scheme as being "a little less than that of the others, but not by much".

148 Taking these and other factors into account, including the parties' gross receipts, i e, the amounts originally obtained by the parties from the scheme (see paragraph 83 above) and their subsequent conduct, the judge

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reached the interim conclusion that a fair allocation between the five principal parties would be:

Mr Salaam		36%
Mr Al Tajir		29%
Mr Livingstone	15%	
Richco		10%
Mr Amhurst		10%

He then considered three further matters. First, not everyone was claiming contribution or facing contribution claims. Secondly, there were the settlements already made. And thirdly there were the parties' net receipts, i e their respective financial positions taking into account the amount retained by them after repaying the sums needed to settle the action. Taking these factors into account he ordered that Mr Salaam and Mr Al Tajir should give Amhursts a complete indemnity in respect of the $10m they had paid to settle the action.

149 In reaching this conclusion the judge was influenced by two principal considerations. First, Amhursts (unlike Mr Amhurst) were personally innocent of any wrongdoing. This was to be contrasted with the dishonesty of Mr Salaam and Mr Al Tajir. The judge accepted that in terms of causative potency those vicariously liable probably had to stand in the shoes of the wrongdoer, but he said that it did not follow that they must necessarily do so in terms of blameworthiness. That might be so in the case of negligence, but dishonesty was different. It would, he said, be unjust if the defendant who was vicariously liable for his employee's fraud could not have his personal innocence of dishonesty count in his favour. He was answerable to the claimant for the fault of his employee, but he was entitled to invoke his own innocence of dishonesty when making or resisting a claim for contribution. In the Court of Appeal Evans LJ disagreed.

150 The judge did not, however, regard Amhursts' personal innocence by itself as entitling them to a full indemnity, nor did he say what contribution he would have ordered on this basis if it had stood alone. There was no need for him to do so, because any conclusion in this regard would be outweighed by the second matter which influenced him, viz, the parties' net receipts. The judge considered that it would not be "just and equitable" (to quote the words of the subsection) to require one party to contribute in a way which would leave another party in possession of his spoils.

151 In round figures and with interest to the end of 1997, Mr Salaam had received some $30m from the scheme and Mr Al Tajir $24.5m. The judge assessed the contributions which they had each made under their respective settlements on the same basis at approximately $17m. Amhursts had received nothing and contributed $10m. As at that date, therefore, Mr Salaam could contribute a further $13m and Mr Al Tajir a further $7.5m before either of them exhausted his net receipts. Since their undisgorged receipts substantially exceeded the amount of Amhursts' claim for contribution, the judge allowed the claim in full.

152 The remaining question was how their liability to indemnify Amhursts should be split between them. The judge thought that a fair allocation would be that Mr Salaam should pay $7.5m and Mr Al Tajir $2.5m. This would still leave Mr Salaam with $5.5m of his receipts inclusive of interest and Mr Al Tajir with $5m. In order to protect Amhursts against the risk of either Mr Salaam or Mr Al Tajir becoming insolvent while the

other was still in possession of undisgorged receipts, the judge ordered that Mr Salaam and Mr Al Tajir should be jointly and severally liable to the extent of $5m and that Mr Salaam should alone be liable for the balance.

Apportionment of responsibility and vicarious liability

153 Section 2(1) of the 1978 Act requires the court to have regard to the parties' responsibility for the damage. Amhursts submit that the judge's conclusion that they should receive a full indemnity from Mr Salaam and Mr Al Tajir sits comfortably with this requirement. On the assumed facts, Amhursts are liable for the damage but they were not responsible for it. They are answerable for Mr Amhurst's wrongdoing, not their own. Yet the judge would not have awarded Amhursts a full indemnity on this basis; were it not for the fact that Mr Salaam and Mr Al Tajir

had undisgorged receipts from the fraud, he would have left Amhursts to bear some reduced but unidentified part of the liability.

154 Something seems to have gone wrong. In my opinion, it was the judge's whole approach to the nature of Amhursts' liability. He recognised that vicarious liability does not depend upon fault, and took account of Amhursts' innocence of wrongdoing accordingly. But the feature of vicarious liability which is relevant to the apportionment of liability is not that the party concerned is liable without personal fault but that he is answerable for the fault of another.

155 The judge treated Amhursts as independently liable to Dubal, as if they had personally committed a legal wrong, albeit innocently. But that is not the nature of vicarious liability. It is, as I have said, a loss allocation device. The employer is not a wrongdoer; he is not liable in respect of his own conduct. He is answerable for his employee's wrongdoing, and his liability is coextensive with that of his employee. He is personally innocent, but he is liable because his employee is guilty.

156 It follows that in any contribution proceedings he must be treated as standing in his employee's shoes; the amount of his contribution should reflect his employee's share of responsibility for the damage, not his own. This can best be demonstrated by considering a commonplace situation without the complicating features of dishonesty and undisgorged receipts. Let it be supposed that proceedings are brought for negligence against two defendants, A and B. Judgment for damages is entered against both. They are jointly and severally liable. The claimant recovers damages from A alone, and A brings contribution proceedings against B. If the court finds that A and B were equally to blame, then other things being equal it will order B to contribute 50% of the sum which A has paid. This achieves the object of the 1978 Act, which is to avoid the injustice which would arise if the liability to meet the judgment depended on the whim of the claimant. He would consider only his own interests, and would proceed to enforce the judgment against whichever defendant had the deepest pocket or the most easily realisable assets. This is fair to the claimant but not to the defendants. Justice requires that the ultimate incidence of meeting the claim should be adjusted so that it is borne by defendants in whatever proportions are just and equitable as between them.

157 But suppose that B had been an employee acting in the course of his employment. A, having met the judgment in full, can bring contribution

---------- ***[2003] 2 AC 366 at 408***

proceedings against both B and his employer. They are both parties "liable in respect of the same damage". But it would make no sense if the availability of another source of contribution had the result of increasing the amount of the contribution which A obtained. It does nothing to reduce his share of responsibility for what happened. He was 50% to blame, and should bear 50% of the cost of meeting the judgment. This has nothing to do with the fact that B's employer is relatively blameless when compared with A. It is because B's liability is vicarious. He is answerable for B's wrongdoing, and any payment by him discharges B's liability pro tanto. It follows that B and his employer between them should bear 50% of the cost of meeting the judgment, and A should continue to bear his own 50% whether he recovers a contribution from B or his employer or both.

158 Now suppose that A had also been an employee acting in the course of his employment,

and that his employer has met the judgment in full and been indemnified by A. A now claims contribution from B and his employer. The position is the same. A's employer has dropped out of the picture. A is entitled to 50% contribution, whether he recovers it from B or his employer. It does not matter that A bore his share of the cost of meeting the judgment by indemnifying his employer instead of discharging it directly.

159 But why should it matter whether A's employer has obtained an indemnity from A? If he has not, then he will be the party claiming contribution. But this should not affect the amount of the contribution which he obtains. Both employers suffered judgment because they were answerable for their employee's negligence, and both employees are liable to indemnify their employers whether their employers choose to enforce the liability or not. As between A and his employer on the one hand and B and his employer on the other, the cost of meeting the judgment should be shared equally.

160 These considerations show that the correct approach is to consider the relative responsibility of the parties personally liable and apportion liability between them accordingly, whether contribution is ordered in favour of or against the employee or his employer or both. As between themselves, the employer and his employee are, of course, independent actors with rights and obligations inter se; but as between them and the other parties "liable for the same damage", they are to be identified with each other. This would certainly accord with commercial reality especially when, as is often likely to be the case, the contribution proceedings are brought for the benefit of insurers.

161 This is why I said earlier that defendants to an action who, if found liable, may find themselves bringing or resisting proceedings for contribution are not concerned with the question whether another party is or is not also vicariously liable for the same damage. The question may affect the identity of the party who brings or defends the claim for contribution but it should not affect the amount of the contribution which is ordered. Its relevance in the present case is due to the way in which Amhursts structured their settlement and the contribution proceedings. Had the settlement been differently expressed, and had Mr Amhurst been joined as an alternative claimant for contribution, Mr Salaam and Mr Al Tajir would not have been able to marshall the arguments they have advanced.

---------- ***[2003] 2 AC 366 at 409***

Taking account of net receipts

162 Mr Salaam and Mr Al Tajir argued that the judge was wrong to take their undisgorged receipts into account. They said that these had nothing to do with their responsibility for the damage suffered by Dubal, which was the only matter to which section 2(1) directs the court to have regard.

163 I cannot accept that submission. In a case like the present, the defendants' gains match the plaintiff's loss. The more a defendant has taken, the more the plaintiff has lost, and the greater is the degree of the defendant's responsibility for the loss. His gross receipts are directly relevant to the degree of his responsibility. But it would obviously be unfair not to give him credit for what he has repaid; it would also be wrong, for the amount repaid goes to reduce the plaintiff's loss and correspondingly to reduce the defendant's responsibility.

164 But in any case the statutory jurisdiction is to order contribution in an amount which the court finds is "just and equitable". I do not read the words which follow as limiting words. Where the wrongdoing has produced not only a loss to the plaintiff but a profit to the defendants, it is obviously just and equitable to direct that any contributions required to allocate the cost of meeting the claim fairly among those responsible should be paid first out of their retained profits. It is increasingly recognised today that the ends of justice sometimes go beyond compensating a plaintiff for his loss and may extend to stripping a defendant of his profits.

Other matters

165 This is sufficient to dispose of the cross-appeals, since if Amhursts are entitled to a contribution from Mr Salaam and Mr Al Tajir then neither of them can be entitled to claim contribution whether from Amhursts or from Mr Amhurst. However, two matters were canvassed in the course of argument with which I should deal briefly.

166 Amhursts argued that Mr Al Tajir's claim did not fall within the scope of the 1978 Act at all. It was not a contribution to Dubal's loss, but to his own contribution to the loss suffered by Amhursts. There could, it was said, be no contribution in respect of a contribution. I cannot accept this argument. Amhursts' payment of $10m was made in respect of the damage suffered by Dubal, and it follows that any payment which Mr Al Tajir may be ordered to pay to Amhursts is an indirect contribution in respect of the same damage.

167 Finally it was submitted by Mr Al Tajir (though not by Mr Salaam) that there was no proper basis for the joint and several order which the judge made. I cannot accept this submission either. His order was designed to ensure that Mr Salaam and Mr Al Tajir should each bear the risk of the other's insolvency, but only to the extent of their own undisgorged receipts. I can see nothing unfair in that. Nor do I see it wrong in principle. A defendant who is insolvent or who has no money simply passes out of the picture. The plaintiff may well not proceed against him at all; but whether he does or not the whole of the liability of meeting the judgment falls to be apportioned between the other defendants, as otherwise the deficiency arising from the insolvency is borne by whichever defendant happens to satisfy the judgment, a result which it is the purpose of the 1978 Act to

avoid: see *Fisher v CHT Ltd (No 2)* [1966] 2 QB 475. If the impact of a known insolvency can be taken into account in the assessment of contributions, it is difficult to see why the prospect of a possible future insolvency should not be reflected in the order; and there is academic authority for the proposition that it may be: see *Glanville Williams, Joint Torts and Contributory Negligence* (1951), pp 170-172. The author formulated a complex form of order for this purpose. The trial judge in the present case found a simpler and more elegant way to achieve the same result.

Conclusion in respect of contributions

168 The judge fell into error in the way in which he approached the nature of Amhursts' liability and their innocence of wrongdoing. But (although the judge's language is not entirely clear), I do not think that his error contributed to the result, which was ultimately based on the parties' net receipts. If he had adopted the correct approach the outcome logically would have been the

same. In these circumstances I do not think that we are obliged to set his decision aside and re-examine the question for ourselves. If, however, we must re-examine the matter for ourselves, then I too would uphold the judge's conclusion.

(8) Disposal of the case

169 I would allow Amhursts' appeal, set aside the order of the Court of Appeal, and restore the order of the trial judge. I would dismiss the cross-appeals.

Appeal allowed with costs.

Cross-appeals dismissed with costs.

Solicitors: Barlow Lyde & Gilbert; Pinsent Curtis Biddle; Reid Minty; CMS Cameron McKenna.

S H

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