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**Documentary sanctity in international trade  
*R (Greenpeace Limited) v Secretary of State for the  
Environment, Food and Rural Affairs***

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# ANALYSIS AND COMMENT

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## DOCUMENTARY SANCTITY IN INTERNATIONAL TRADE AND THE PROTECTION OF ENDANGERED SPECIES

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*R (Greenpeace Limited) v Secretary of State for the Environment, Food and Rural Affairs*  
[2002] EWCA Civ 1036, English Court of Appeal

### Facts

A consignment of Brazilian bigleaf mahogany had been shipped by SEMASA, a Brazilian company, to its agents, AlanThomas Craig Ltd, in the United Kingdom. The cargo arrived at Birkenhead on 27 December 2001. Bigleaf mahogany is listed under the Convention on Trade in Endangered Species of Wild Fauna and Flora (CITES), of which the EU and Brazil are signatories. Brazil has listed mahogany under Appendix III of CITES. That appendix relates to 'all species which any Party identifies as being subject to regulation within its jurisdiction for the purpose of preventing or restricting exploitation, and as needing the co-operation of other Parties in the control of trade'. Under the Convention, species listed under Appendix III may only be exported subject to the issue of an export permit. The issue of the export permit is subject to:

- (a) the satisfaction of the state of export that the specimen was not obtained in contravention of the laws of that state for the protection of fauna and flora;
- (b) satisfaction that the any living specimen will be prepared and shipped with the least risk of injury, damage to health or cruel treatment.

The Brazilian environmental authority, IBAMA, was not satisfied that that species of mahogany had been logged lawfully. They had refused to issue permits to many mahogany exporters, including SEMASA. However, the exporters challenged that decision in the Brazilian courts. A ruling was made by the Brazilian court to the effect that the IBAMA's treatment of the exporter could amount to a flagrant contravention of the Brazilian Constitution. Export permits were then granted under protest by IBAMA. The goods then promptly left Brazil for Birkenhead.

In the meantime, IBAMA appealed against the ruling and sought a declaration that their refusal was justified. The situation was considered both by the CITES Secretariat and by the European Commission. Both concluded that IBAMA was right to refuse export permits.

When the goods arrived at Birkenhead, UK Customs and Excise declined to prevent entry of the goods. Greenpeace sought a judicial review of Customs and Excise's decision to clear the goods. That application was heard and dismissed by Scott Baker J in the High Court. Since then the goods have been admitted into the country. Greenpeace appealed to the Court of Appeal for a declaration that Customs and Excise had acted unlawfully.

The issue was whether under the CITES (and EU Regulation 338/97 which implements it) the importing state is obliged to accept an export permit which is in conformity on the face of it despite some knowledge that the exporting state's authority responsible for issuing the permit was not entirely 'satisfied that the specimen was not obtained in contravention of the laws of that state for the protection of fauna and flora'.

### Decision

The Court of Appeal was split two to one. The majority held that Customs and Excise need not inquire into the circumstances surrounding the issue of the export permit. To require Customs and Excise to go beyond the face of the document would generate uncertainty in international trade. The majority was of the opinion that the enabling Regulation and the CITES both do not envisage the duty of the importing

state to exceed documentary checks. In support of this construction, Dyson LJ pointed out that the export permit is required primarily for Appendix III species – the 'least endangered of the . . . classes of species' provided for under the CITES. Under the CITES, Appendix I species are those whose export is absolutely banned and Appendix II are those which the Convention has listed as under serious threat of extinction. Appendix III species are those which *any* contracting state identifies as needing supervision. On a practical front, the majority noted that the decision to accept or reject an importation is often made by an official at port or border. It could not be the intention of the drafters of the Convention and the Regulation that such officials would be faced with issues of this kind.

Laws LJ gave the dissenting judgment. His Lordship accepted that in general the CITES required no more than a documentary examination of the export permits. However, he found that the circumstances were so unusual that 'considerations of ecology and the protection of the environment' should necessitate the rejection of the importation as Customs and Excise were clearly aware that IBAMA was not satisfied with the exportation. His Lordship also doubted whether 'in the real world' such an approach is likely to cause disruption to international trade and went on to say:

. . . in the end, I have to say that I regard it as an incident of trade in flora or fauna of the kind in question here that the tradespeople take the risk of inconveniences and disruptions to their legitimate business, so far as they are a necessary incident of a robust environmental law.

### Comment

Both the majority's and Laws LJ's interpretations of the CITES and the Regulation were plausible. The majority argued that the provisions required no more than a documentary examination of the export permit. Laws LJ concurred that documentary checks are generally sufficient but where there exist circumstances suggesting that the state of export was not satisfied that the requirement under the CITES had been met, the importing state has a duty to make further inquiries and refuse importation if satisfied that the export permit did not truly evince the exporting state's state of mind. The choice between the two interpretations may be perceived as coming down to a question of principle: is trade in endangered species about the environment or international trade?

It may be said that the majority's view is too conservative and does not reflect the environmental interests of international trade. It may also be argued that international traders are generally becoming more sensitive to environmental needs and interests and, as such, the law should reflect this change in attitude. Nevertheless, while it is easy to be critical of the majority's view, the practical fairness of the majority's decision should not be ignored. After all, the court's first duty surely is to do substantive justice for the litigants and only, second, should it be concerned with policies of wider concern.

It might be borne in mind that Laws LJ's solution required an assessment of the importing official's state of mind and knowledge. Not only is it difficult to test whether, and to what extent, the official had knowledge of the state of mind of the exporting authority but also, inquiries would have to be made to satisfy himself or herself of the circumstances surrounding the issue of the export permit. To what lengths should such inquiries be made? To go beyond the documentary basis of the CITES and the Regulation would lead to inconsistent approaches by different contracting states, ultimately jeopardising the current smooth implementation of the Convention among its signatories.

Another aspect of the case which should not be ignored is that the Convention places the primary duty to protect Appendix III species on the exporting state. The fact that the export permit had been issued under pressure from the Brazilian courts is irrelevant as far as the importing state is concerned and rightly so. It is inappropriate for the importing authorities to inquire into the rightness of legal, judicial and political forces impacting on the issue of an export permit.

## CONTRIBUTORY NEGLIGENCE OF THE CONFIRMING BANK IN A DOCUMENTARY CREDIT ARRANGEMENT

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*Standard Chartered Bank v (1) Pakistan National Shipping Corp (2) Seaways Maritime Ltd (3) SGS (UK) Ltd (4) Oakprime International Ltd and (5) Arvind Mehra*  
[2002] UKHL, House of Lords

### Facts

The action revolved around a letter of credit issued by Incombank ('IB'), a Vietnamese bank in the favour of Oakprime ('O'). It was confirmed by Standard Chartered Bank ('SCB'). The credit stipulated that shipment of the bitumen should not be later than 25 October 1993 and the last date for the negotiation of the letter of credit was 10 November 1993.

M, the managing director of O, had arranged for the bills of lading to be backdated in order to secure payment under the letter of credit. Presentment was late but that was waived by SCB who authorised payment of US\$1.15million on 15 November 1993.

SCB then sought reimbursement from IB but in order to do so, had falsely represented to IB that the documents had been presented before the expiry date. IB though misled had rejected the documents on the basis of other discrepancies not noticed by SCB. SCB then sued the shipowners ('PNSC'), O and M for deceit.

PNSC appealed against the award of damages ordered against it by Cresswell J on the basis that the loss suffered by SCB had been partly the result of its own 'fault' within the meaning of section 1 (1) of the Law Reform (Contributory Negligence) Act 1945. Section 1 (1) reads:

Where any person suffers damage as the result partly of his own fault and partly of the fault of any other person or persons, a claim in respect of that damage shall not be defeated by reason of the fault of the person suffering the damage, but the damages recoverable in respect thereof shall be reduced to such extent as the court thinks just and equitable having regard to the claimant's share in the responsibility for that damage . . .

'Fault' is defined in s. 4 as 'negligence, breach of statutory duty or other act or omission which gives rise to a liability in tort or would, apart from [the] Act give rise to the defence of contributory negligence'.

The majority of the Court of Appeal found that SCB's conduct was not 'fault' as defined in s. 4 because it was not at common law a defence to an action in deceit. PNSC appealed to the House of Lords but later settled with SCB before the hearing. As far as M was concerned, his appeal against Cresswell J's judgment against him succeeded on the ground that he had made the fraudulent representation on behalf of O and was not personally liable. SCB were ordered to pay a large part of M's costs. SCB appealed against that decision. M argued in cross-appeal that even if he were found liable, the damages should be reduced on account of SCB's contributory negligence.

### Decision

Lord Hoffmann, in giving the main speech of the court, found that under section 4 of the Law Reform (Contributory Negligence) Act 1945, a claimant could not be at 'fault' within the meaning of the Act unless it gave rise to a defence of contributory negligence at common law. Lord Hoffmann, relying on Lord Hope's analysis in *Reeves v Commissioner of Police of the Metropolis* [2000] 1 AC 360, confirmed the view that the definition of 'fault' is divided into two limbs, one of which is applicable to defendants and the other to claimants. In the case of a defendant, fault means 'negligence, breach of statutory duty or other act or omission' which gives rise to a liability in tort. In the case of a claimant, it means 'negligence, breach of statutory duty or other act or omission' which gives rise (at common law) to a defence of contributory negligence. The court was of the view that that interpretation is consistent with the rationale of the Act which was to relieve claimants whose actions would previously have failed and not to reduce the damages which previously would have been awarded against the defendants.

In deciding whether M's appeal that SCB's damages should be reduced according to SCB's contributory negligence, the House of Lords held that the authorities on the subject were clear (*Alliance & Leicester Building Society v Edgestop and Others* [1993] 1 WLR 1462, *Corporacion Nacional del Cobre de Chile v Sogemin Metals Ltd and Others* [1997] 1 WLR 1396 and *Nationwide Building Society v Thimbleby & Co* [1999] EGCS 34). The position was that contributory negligence could not be a defence to a claim in deceit. It was common ground that although SCB would not have paid if they had known the bill of lading to be falsely dated, they would also not have paid if they had not mistakenly and negligently thought that they could obtain reimbursement. Be that as it may, Lord Hoffmann stated quite unequivocally that the law would take no account of these other reasons for payment. The court went on to say that it would not be just that a fraudulent defendant's liability should be reduced on the grounds that, for whatever reason, the victim should not have made the payment which the defendant successfully induced him to make.

Finally, as to whether M was personally liable for the misrepresentation, the Court of Appeal had held that all the evidence indicated that M had made the representation *on behalf of O*; as such he was not personally liable. The Court of Appeal relied on the authority in *Williams v Natural Life Health Foods Ltd* [1998] 1 WLR 830 (House of Lords), a claim based on the principle in *Hedley Byrne v Heller* [1964] AC 465 (negligent misrepresentation). There, the House of Lords held that just as an agent can contract on behalf of another without incurring personal liability, so an agent can assume responsibility on behalf of another for the purposes of the *Hedley Byrne* rule without assuming personal responsibility. Lord Hoffmann however held in the present case that that authority does not apply to liability for fraud. As far as his Lordship was concerned, no one can escape liability for his fraud simply by saying 'I wish to make it clear that I am committing this fraud on behalf of someone else and I am not to be personally liable.'

It was also obvious that Sir Anthony Evans in the Court of Appeal had thought that the action was about suing M for the company's tort. That was not the case according to Lord Hoffmann. The matter was not one founded on the doctrine of separate personality in company law. M was liable not because he was a director but because he lied.

### Comment

The House of Lords has made clear a number of hitherto problematic issues in this case. First, the definition of 'fault' in s. 4 of the Law Reform (Contributory Negligence) Act 1945. The House of Lords' approach was very much one based on policy. Lord Hoffmann considered that although the loss suffered by SCB was largely caused by its negligence in paying against discrepant documents, the bills had been falsely dated through M's conduct. M's conduct itself is sufficient to defeat a claim that contributory negligence should reduce the amount of damages. It was not just for a defendant to claim a reduction in damages on the basis that the SCB should have been more careful when accepting discrepant documents. While the policy basis is clearly evident, that approach is not entirely free from difficulty. In the authorities cited (*Edgington v Fitzmaurice* (1885) 29 Ch. D. 459), the 'victim' was careless (or acting unreasonably, as Lord Hoffmann said) but ignorant of the deceit being practised on them. What if the victim (for example, the confirming bank, SCB) was in fact aware of the 'deceit' and/or privy to the enterprise to secure payment from the issuing bank? Indeed, it might be argued that SCB in the present case was aware of at least some aspects of the 'deceit'. Should the rule in *Edgington* still apply?

The issue relating to whether M's conduct in procuring a false bill of lading would attract personal liability or not is also an interesting one. It was very much a matter of the appropriate characterisation of the issue. The Court of Appeal saw the question as whether M could be sued for the torts of the company and decided the matter on the basis of *Williams*. That, according to the House of Lords, was misdirected for two reasons:

- the claim in *Williams* was one based on negligent misrepresentation, not fraud;
- the claim made by SCB was not based on M's actions as a director but as an individual (had it been made on the basis of his directorship, the court would have been justified in maintaining the veil of incorporation).

One could understand how the Court of Appeal approached the issues as it did. The allegations of fraud were raised in a civil matter and, given the authority in *Williams*, it is all too easy to deem the matter to be one governed by normal rules of civil liability, especially when the 'fraud' might be perceived as being 'technical'. However, fraud in English civil disputes has always been given a disapprobation not often associated with other civil lapses as was reconfirmed here by the House of Lords.

JC