10/87

IN THE SUPREME COURT OF SOUTH AFRICA
(APPELLATE DIVISION)

In the matter between:

THE SOUTH AFRICAN BANK OF ATHENS LIMITED

.... appellant

and

MERCABANK LIMITED .... respondent

Coram: CORBETT, HEFER, GROSSKOPF, JJA, NICHOLAS et KUMLEBEN, AJJA.

Date of appeal: 2 March 1987

Date of judgment: 12 March 1987

J U D G M E N T

CORBETT JA:

This is an appeal from a decision of GROSSKOPF J in the Witwatersrand Local Division. In the Court below the respondent, Mercabank Limited ("Mercabank"), sued the appellant, the South African Bank of Athens Limited

/ ("Bank................

("Bank of Athens"), for —

(1) payment of the sum of R3 000 000;

(2) interest on the said sum of R3 000 000 at the rate of 23% *per annum* as from 1 November 1982 to date of payment;

(3) payment of the sum of R1 750 000;

(4) interest on the said sum of R1 750 000 at the rate of 18% *per annum* as from 1 November 1982 to 8 November 1982, at the rate of 17,5% *per annum* as from 9 November 1982 to 23 November 1982, and at the rate of 17% *per annum* as from 24 November 1982 to date of payment;

(5) costs of suit.

Mercabank's claims were based upon an alleged oral agreement of loan in terms of which Mercabank advanced to the Bank of Athens the two capital sums stated

/ in....................

in claims (1) and (3). The interest claims, claims (2) and (4), represented the unpaid interest at the rates initially agreed to and, in the case of claim (4), also at the amended rates verbally agreed to by the parties thereafter from time to time. In its plea the Bank of Athens denied the agreement of loan, but in the alternative pleaded as follows:

> "9. Alternatively, in the event of the above Honourable Court finding that the plaintiff did lend and advance to the defendant the said several sums of R3 000 000,00 and R1 750 000,00 then the defendant avers and says —
>
> (a) That the loans aforesaid were subject to the following conditions, namely —
>
> (i) The defendant would immediately on receipt of the capital amounts of the said loans lend the capital amounts of the loans to a third party nominated by the plaintiff.

(ii) The said third party would assume sole liability and be solely liable to the plaintiff for the capital amount of the said loans, together with any interest payable in respect of these loans."

In addition, the Bank of Athens denied the authority of the bank official alleged to have contracted on its behalf to conclude such an agreement of loan. In its replication Mercabank joined issue on the plea and raised certain estoppels, mainly in regard to the question of authority.

After a lengthy trial, productive of a voluminous record, the trial Judge found in favour of Mercabank on these issues and made an order as prayed, the costs to include the costs of two counsel. With the leave of the trial Judge, the Bank of Athens comes on appeal to this Court against the whole of the judgment and order of the Court a quo. On appeal it was common cause between counsel

/ that..................

that the question of authority was no longer a matter of debate and that the alleged estoppels also fell away. In addition, it was conceded that the Bank of Athens had not substantiated the alternative defence raised in para. 9 of its plea. The sole issue was, therefore, whether Mercabank had established upon a preponderance of probability the agreement of loan alleged by it.

It is Mercabank's case that this agreement of loan was concluded between Mr H P de Beer, the money market manager of Mercabank, and Mr G Trail, the money market manager and chief accountant of the Bank of Athens, on 1 July 1982; and that the money, amounting in all to R4,75m, was advanced on the same day. As is to be expected in the circumstances De Beer and Trail became the main witnesses, and indeed the only witnesses of any real importance, in the case. I shall set forth, as briefly as possible, their respective versions of what occurred.

De Beer assumed the position of money market manager of Mercabank towards the end of June 1982, when the then money market manager, a Mr H Botha, left the employ of Mercabank. During the two years prior to this De Beer had acted as Botha's assistant. Mercabank is a merchant bank and it is the function of the money market manager to see to the funding of the bank by way of deposits, to handle the general run of money market transactions, including the buying and selling of money market securities such as bank acceptances, promissory notes, negotiable deposit certificates, treasury bills, Land Bank bills, government and municipal stock etc, and to lend or borrow money, either against security or otherwise. It is the aim of the money market manager to see that the bank's books balance at the conclusion of each day. To this end surplus funds are invested and, where there is a possible shortage, short term loans are negotiated to avoid an overdrawn bank account. De Beer, as money market

/ manager................

manager, had authority to lend money only to a specified list of banking and financial institutions.

De Beer explained that Mercabank's financial year ended on 30 June and that it was a standard instruction to the money market manager that all surplus funds placed on call on the money market should be called in as at that date. Accordingly De Beer arranged for certain loan moneys, plus outstanding interest, to be repaid on 30 June 1982. In addition, acting on instructions from the chief accountant of the bank, Mr C J Swanepoel, De Beer arranged for a deposit of R3m by the United Building Society ("UBS") with Mercabank to be repaid on the same date.

As at 30 June 1982 the Bank of Athens, a commercial bank, was a loan debtor of Mercabank in two capital accounts: an amount of R3m which had been advanced to it on 21 August 1981 (this was recorded in the books of Mercabank under account no 812) and an amount of R1,75m, which was the sum of various amounts which had been advanced to it in the period December 1980 to June 1981 and which had been "rolled over" after 30 June 1981 (this was recorded in the books of Mercabank under account no 840). Included in the loan moneys which De Beer called in on 30 June 1982 were these two accounts, together with unpaid interest.

According to De Beer, these two amounts were re-advanced on loan to the Bank of Athens on the following day, ie 1 July 1982. And this is the transaction which constitutes Mercabank's cause of action against the Bank of Athens. De Beer's account of what happened is as follows.

On 1 July 1982 Trail telephoned him (De Beer) and asked whether Mercabank could lend the Bank of Athens R4,75m. De Beer replied that Mercabank did not have sufficient available funds to provide so large a loan. Trail thereupon asked whether Mercabank would have sufficient

/ funds.................

funds if the UBS redeposited the R3m which had been repaid to it the day before. De Beer's response was that if the UBS was prepared to do this there would be sufficient funds for the proposed loan to the Bank of Athens. Trail stated that he would get into touch with either the UBS or Mrs Louise Lawrence of Magnum Acceptances Limited (De Beer could not in evidence recall which); and the conversation ended.

At this point I should digress to explain that Magnum Acceptances Limited was a member of what was known as the Magnum group of companies. This group ran into serious financial difficulties towards the end of 1982 and its members were eventually liquidated. This financial collapse resulted in certain revelations about the activities of the group and precipitated the dispute between the parties. For convenience I shall refer to the group as "Magnum" and I do not find it necessary to distinguish between the different companies comprising the group.

Two employees of Magnum who figure prominently in this case (although neither was called as a witness) are the aforementioned Mrs Lawrence and a Mr J D Pennington. Pennington had previously been the money market manager at the Bank of Athens and at the time of the events with which this case is concerned was evidently employed in the same capacity by Magnum. Mrs Lawrence also worked in the money market department of Magnum.

Magnum was not one of the financial institutions to which the money market department of Mercabank was permitted to lend money on call. Nevertheless money market transactions in the form of the buying and selling of negotiable securities and advances by Mercabank against the deposit of securities (known as "warehousing") did take place between Mercabank and Magnum. In addition Magnum on occasion acted as agent in the canvassing of deposits with

/ Mercabank.............

Mercabank. De Beer had come to know Mrs Lawrence in the course of transacting such business and he also met her socially on a few occasions.

I revert now to the events of 1 July 1982. Shortly after his conversation with Trail, De Beer was telephoned by Mrs Lawrence and asked to quote deposit rates for a deposit by the UBS so that she could pass on the information to the UBS. (It appears that Mrs Lawrence acted as agent in placing the original deposit by the UBS with Mercabank and renewing the deposit.) De Beer gave her the required information. Mrs Lawrence telephoned again later and a renewal of the deposit by UBS was arranged. The actual deposit was made the same day. After the renewal of the deposit had been arranged De Beer telephoned Trail to tell him that Mercabank was in a position to lend the Bank of Athens the full amount of R4,75m. It was then agreed between them that R3m of this amount would be advanced on

/ call..................

call at an interest rate of 23% _per annum_ and the balance of R1,75m for a fixed term until 2 August 1982 at an interest rate of 21% _per annum_ and thereafter on call at an interest rate to be agreed.

The loan thus made to the Bank of Athens was implemented the same day by De Beer. Following the normal procedure, he filled in a cheque requisition voucher giving the amount of the cheque (a single cheque in the sum of R4,75m was issued to cover both loans) and essential details of the transaction. On this voucher De Beer wrote the words "Haal af" which meant that the cheque would be collected by or on behalf of the payee. The voucher was then taken to the treasury section of the bank where a clerk typed out a cheque on the basis of the voucher and also completed in duplicate a remittance advice giving details of the transaction. The clerk then took the cheque requisition voucher, the typed (but unsigned)

/ cheque.................

cheque and the remittance advice to Mr G P Geldenhuys, the assistant accountant of the bank, who had signing powers in what was termed "the B category". Geldenhuys studied and checked the documents and on being satisfied that the transaction was properly authorized initialled the cheque requisition order and signed the cheque. The documents then went to the chief accountant, Mr Swanepoel (an "A" category signatory), who followed the same procedure and initialled the cheque requisition order and counter-signed the cheque. The documents were then taken back to the treasury section where they were separated into two bundles: the one, consisting of the cheque requisition voucher and the duplicate remittance advice, going to the administration section for analysis and posting; and the other, consisting of the cheque and the original remittance advice, being stapled together, and placed in an envelope ready for collection. Later the same day the

/ cheque................

cheque was collected. The loans were duly posted, the R3m transaction to a new account, no 969, and the R1,75m transaction to another new account, no 970. De Beer identified Exh. A as the cheque in question. It bears a Bank of Athens date stamp with the date 1 July 1982.

Neither loan was called up until early in December 1982. Over the period August to November 1982 Mercabank received cheques from the Bank of Athens in payment of interest due on the two loans of R3m and R1,75m. A co-signatory of these cheques was Trail. Accounts nos 969 and 970 were duly credited with these interest payments. The interest payable in respect of the R1,75m loan was varied from time to time by agreement between the parties. Upon the loans being called up and arrear interest demanded, the Bank of Athens denied liability. Action was instituted on 9 December 1982.

Trail's version of what happened - which forms the basis of the defence to the action - is as follows. He commenced employment with the Bank of Athens on 1 October 1978 as money market manager and early in 1982 he assumed also the position of chief accountant of the bank. As money market manager he had no authority to lend the bank's money to Magnum. In the early part of 1979 he met Pennington. He had dealings with Pennington in regard to the purchase and sale of securities, but the main form of transaction between them was (as Trail put it):-

> "..... the utilisation of the bank to channel funds from one company or set of persons to Magnum using the Bank of Athens as a channel".

This so-called "channelling" commenced about the beginning of 1981 and continued more or less until the financial collapse of Magnum at the end of November/beginning December 1982. According to Trail, this channelling scheme was originally suggested to him by Pennington and was designed to overcome the fact that Mercabank and other financial institutions, including the Bank of Athens, were not prepared to make unsecured loans to Magnum. In regard to each such transaction, the initial arrangements were made between Magnum (through the medium of Pennington or Mrs Lawrence, who was also involved) and the other financial institution concerned. The modus operandi would be that the institution's cheque representing the loan to Magnum would be made out in favour of the Bank of Athens, but handed over to a Magnum employee. The first Trail would hear of the transaction would be when he was notified, usually by Pennington or Mrs Lawrence, that a channelled cheque was on its way to him. The cheque would then be brought to him by a Magnum employee. He would thereupon issue a Bank of Athens cheque

/ in.....................

in favour of Magnum for an equivalent amount and this would be handed to the Magnum employee. The first cheque (in favour of the Bank of Athens) would be duly deposited and the Bank of Athens would receive payment thereof; and the second cheque in favour of Magnum would be duly met by the Bank of Athens. The only record of the transaction in the books of the Bank of Athens would be entries in the Bank of Athens head office bank cheque account showing that the cheque was received and the contra cheque issued. When the loan capital had to be repaid or when interest had to be paid a reverse procedure would be adopted. Magnum would deliver to Trail by messenger a Magnum cheque representing the amount of capital or interest, as the case may be, and he would hand over to the messenger a Bank of Athens cheque, which would be delivered by Magnum to the financial institution involved. The cheques would be paid in the normal course of business. The bank charged a commission for acting as go-between in these transactions and these commissions were allocated in the bank's books to an account styled "Capital Gains on Money Market Transactions". Although Trail refused to answer any question which might tend to incriminate himself, it is obvious (and this was conceded by counsel appearing for the Bank of Athens) that he had received financial inducement to assist Magnum in this way. It is also clear that Trail was not authorized to make such unsecured loans to Magnum and that he concealed his channelling dealings with Magnum from the senior management of the Bank of Athens, who remained in ignorance thereof until, as it was put, "the bubble burst".

Initially Trail said that there were "about a dozen" institutions involved in this channelling of funds to Magnum. Eventually he named six, including

/ Mercabank.............

Mercabank. It is a necessary inference from his evidence that someone in authority at each of these institutions, usually the money market manager, was willing to flout, in a clandestine manner, the rule that the institution concerned would not make unsecured loans to Magnum.

Turning to the transaction in issue in this case, Trail denied having had any telephone conversations with De Beer on 1 July 1982 and rejected any suggestion of negotiations between himself and De Beer concerning a loan of R4,75m by Mercabank to the Bank of Athens, let alone an agreement to that effect. On 1 July 1982 the Bank of Athens had no need to borrow R4,75m. The cheque for R4,75m drawn in favour of the Bank of Athens (exh. A) represented a channelling operation, arranged (Trail presumed) between De Beer and either Mrs Lawrence or Pennington. A messenger from Magnum would have brought the cheque to him and he would then have handed on the

/ bank's................

bank's contra cheque to the messenger. This contra cheque (exh. BBB), drawn in favour of Magnum in an amount of R4,75m and dated 1 July 1982, was produced and identified by Trail. It was signed by a Mr Dziamski, who was employed in the foreign exchange department of the Bank of Athens, and by Trail himself. With reference to the interest payments, Trail admitted having been a co-signatory of the relevant cheques. These cheques were also issued as part of the channelling operation and in each case only upon receipt from Magnum of a cheque which would have been either for a corresponding amount or for a larger amount in order to cover the bank's "handling fee" as well.

In substantiation of Trail's testimony as to channelling, evidence was placed before the Court _a quo_ which showed that in some nineteen or twenty instances, between the dates 13 January 1981 and 11 October 1982,

/ amounts...............

amounts received by cheque from Mercabank were simultaneously "passed on" to Magnum by the Bank of Athens; and that in over twenty instances between 31 July 1981 and 9 November 1982 amounts received by cheque by the Bank of Athens from Magnum were simultaneously "passed on" to Mercabank. Included in these amounts were not only the amount of R4,75m paid to the Bank of Athens on 1 July 1982 and the interest payments during the period August to November 1982, but also the original advances to the Bank of Athens of R3m and (in total) R1,75m which were called in on 30 June 1982.

Under cross-examination by counsel for the Bank of Athens De Beer denied any knowledge of moneys ostensibly lent to the Bank of Athens being passed on to Magnum. In every case in which he was involved it was his intention to lend the money to the Bank of Athens. It was only after the collapse of Magnum that he heard

/ about..................

about the channelling which had occurred.

De Beer was also cross-examined about two transactions which took place in October 1982. These transactions, and De Beer's subsequent efforts to cover them up when it seemed that they would come to the knowledge of his superiors at Mercabank, reflect very seriously upon his integrity and are, therefore, relevant in assessing his credibility as a witness. The facts, which were openly admitted by De Beer, were shortly as follows.

De Beer wished to purchase on the stock market shares in a company called Trumcor, which was a member of the Mercabank group. Because he was afraid of being accused of "insider-trading", De Beer purchased the shares through his broker on a cash account in order to conceal his identity as the purchaser. De Beer also needed to borrow money in order to pay for the shares. At about the end of September he approached Mrs Lawrence of Magnum for a personal loan of about R80 000. Magnum agreed to lend the money on the security of the shares which De Beer proposed to buy, plus certain other shares held by him. On 19 October 1982 De Beer's broker notified him that an amount of R44 839 was due in respect of certain shares purchased on his behalf. De Beer then telephoned Mrs Lawrence and asked for an advance of this amount against the loan which Magnum had agreed to grant him. Mrs Lawrence replied that Magnum did not then have sufficient funds to make the loan to him and asked whether Mercabank could not lend an amount of R100 000 to Magnum. Although forbidden to do so, De Beer agreed to make the loan and asked at what bank she intended to deposit the money; to which she replied the Bank of Athens. In order to conceal the fact that this was an unauthorized loan, De Beer completed the usual cheque requisition voucher as though it were a loan of R100 000 to the Bank of Athens.

/ As ....

As a result a cheque for this amount in favour of the Bank of Athens was duly signed and a corresponding remittance advice completed. On the same day De Beer signed a document acknowledging his indebtedness to Magnum in respect of the loan of R44 839 and ceding the shares as security for the repayment of the loan (exh. AA). At a certain stage after the cheque had been signed - it is not necessary to go into details - De Beer induced the typist who had typed the cheque to add after the name of the payee, ie the Bank of Athens, the words "Cr Magnum" (meaning credit Magnum). He sent the cheque and exh. AA to Mrs Lawrence. The cheque was deposited and credited to Magnum's account at the Bank of Athens. Thereafter a Magnum cheque for R44 839 was delivered to the stockbroker in exchange for the shares, which were retained by Magnum in terms of exh. AA. That was the first transaction.

/ On..................

On 28 October 1982 De Beer's broker informed him that a further amount of R47 269 was due in respect of shares purchased on his behalf. De Beer approached Magnum for another advance and this time was again told that Magnum was having a "cash flow problem" and required a loan from Mercabank, this time for R50 000. De Beer agreed to provide this. Mrs Lawrence also stated that there was a problem in regard to the holding of the shares in safe custody at Magnum's premises. It was then agreed that the shares be sent to De Beer for safe-keeping. De Beer followed the same procedure as before and a cheque for R50 000 drawn in favour of the Bank of Athens was altered after signature by the addition of the words "Cr Magnum". On this occasion De Beer sent to Magnum, together with the cheque, a document certifying that Mercabank was holding the shares in safe custody to the order of Magnum. Magnum then paid the broker and all the shares were delivered to De Beer, who put them in a file, which he placed in safe custody at the bank. That was the second transaction.

Early in December 1982, after the Magnum "bubble had burst", the cheques and other documentation relating to the loans of R100 000 and R50 000 to Magnum came to the knowledge of the senior management of Mercabank. On 6 December 1982 De Beer was confronted with the situation revealed in the documents by Dr C C Ferreira, the managing director of Mercabank, and he admitted that he had made these loans to Magnum without authorization. At that stage De Beer did not reveal the further ramifications relating to these loans. He continued in the employ of Mercabank.

At about the same time - De Beer is uncertain whether this happened before or after his interview with Dr Ferreira on 6 December 1982 - De Beer took steps to

/ cover..................

cover up his tracks. He executed a new document (exh. DD), addressed to Magnum, which he back-dated to 15 October 1982 and in which he, on behalf of Mercabank, certified that the bank was holding the shares in question to the order of Magnum, these shares —

> "being shares ceded to you as security by C.P. Nominees in terms of a loan agreement dated 15-10-1982 between yourselves and C.P. Nominees."

(C.P. Nominees was, I may say, a fictitious name for a non-existing entity.) At the same time De Beer also executed a new agreement (exh. EE) purporting to be a cession of the shares by C.P. Nominees to Magnum as security for a loan of R92 108 (the total amount paid to De Beer's broker) to C P Nominees and recording that at the request of Magnum the shares were being kept in safe custody by Mercabank. This document was also back-dated to 15 October 1982.

Exhs. DD and EE were delivered to Mrs Lawrence, who wrote "Agreed" at the bottom of exh. EE and signed it. At De Beer's request Mrs Lawrence returned exh. BB to De Beer and agreed to substitute the name of C P Nominees for that of De Beer in the books of Magnum reflecting the loan of R92 108.

At about the same time De Beer drew up two letters (Bundle 310 and 315), which were typed by his wife. The first, back-dated to 19 October 1982, purports to be addressed to Magnum by Mercabank and to confirm the loan that day of R100 000 by Mercabank to Magnum. The second, back-dated to 28 October 1982 purports to be a similar confirmation of a loan of R50 000. Both letters were signed on behalf of Mercabank by De Beer and counter-signed by Mrs Lawrence, she in each case dating her signature in accordance with the spurious date of the letter. These letters were placed on file

/ at ....

at Mercabank.

On 27 January 1983 De Beer paid an amount of R96,832 (comprising the loans plus interest) to the liquidator of Magnum, ostensibly on behalf of C P Nominees, and obtained the release of the shares.

De Beer's final touch, executed early in March 1983, was to tamper with the cheque requisition vouchers relating to the cheques for R100 000 and R50 000. In each case he added the words "Cr Magnum" after the name of the Bank of Athens, and also wrote at the top of the voucher "lewer af aan Magnum - L Lawrence".

In the end all De Beer's efforts to conceal his dishonesty were of no avail. During the first half of March 1983 as a result of information placed before an enquiry into the affairs of Magnum under the Companies Act, the link between the loans to Magnum and De Beer's

/ personal..............

personal share dealings was revealed. De Beer was again confronted by Dr Ferreira and admitted the link. He was summarily dismissed on 15 March 1983.

In his evidence Trail conceded that by no means all the transactions between Mercabank and the Bank of Athens were channelled ones. On the contrary there were a number of "legitimate" transactions, relating to the buying and selling of securities and to the lending and borrowing of money on a short-term basis. He was aware of an account in the books of the Bank of Athens in which Mercabank was reflected both as a lender and as a borrower.

To sum up at this stage, in my view the evidence clearly establishes (i) that Trail did channel moneys paid to the Bank of Athens by other financial institutions to Magnum, (ii) that Mercabank was one of the institutions thus involved, and (iii) that, as regards the R4,75m transaction, the capital amount was channelled through to Magnum and the interest payments were similarly channelled in reverse through to Mercabank. The fact that there was such channelling does not, however, conclude the matter. The crucial question in this case is whether or not De Beer, acting on behalf of Mercabank, was party to the channelling. In other words, on the evidence there are at least two possibilities. The first is that, as alleged or at any rate implied, by Trail, the R4,75m transaction was in truth a loan by Mercabank to Magnum arranged between De Beer and someone at Magnum probably Mrs Lawrence or Pennington, the Bank of Athens figuring merely as a cloak for the loan in the records of Mercabank and as a conduit for the payment of the money to Magnum. The second is that - and this in effect is De Beer's version of what occurred - the loan was a genuine one by Mercabank to the Bank of Athens, arranged

/ between ....

between De Beer and Trail, and that by an arrangement between Trail and either Mrs Lawrence or Pennington (in which De Beer played no part and of which he was in fact ignorant) the money was unauthorisedly channelled through to Magnum. The first possibility negates Mercabank's case that there was a loan to the Bank of Athens; the second possibility negates the case of the Bank of Athens that there was no loan to it. The case thus turns upon the conflicting versions of De Beer and Trail, bearing in mind that the overall onus to establish the loan to the Bank of Athens rests upon Mercabank.

The trial Judge accepted De Beer's version of what occurred in regard to the loan of R4,75m. He did so on the basis of his assessment of the credibility of De Beer and Trail as witnesses and also of the probabilities. With reference to De Beer, the learned Judge dealt at length with various criticisms levelled at De

/ Beer's................

Beer's evidence and at his conduct relating to what I shall call "the October transactions" (ie the unauthorized dealings with Magnum on 18 and 28 October 1982 and all that flowed therefrom) and certain other collateral transactions and concluded:

> "Despite the criticisms levelled at De Beer I am of the view that he was essentially a truthful and credible witness, and that his evidence on the conclusion of the loan agreement is reliable. His testimony regarding the loan agreement is also consistent with the relevant documents produced not only by the plaintiff, but also by the defendant. There are further no documents or entries in the books of the parties to substantiate the defendant's allegation that this was not a loan agreement."

Having similarly considered comprehensively Trail's evidence and the criticisms thereof, GROSSKOPF J stated:

/ "Mr Oshry ....

"Mr Oshry in my view fairly conceded on behalf of the defendant that the Court cannot really rely on Trail as an honest witness. In my opinion Trail was not a credible witness, but a dishonest and evasive witness whose evidence is untruthful and completely unreliable. I, therefore, do not intend placing any reliance on Trail's evidence unless it is properly corroborated. I may add that Trail was found to be 'wholly untruthful' in a similar case against the same defendant by COETZEE, J. in Apri 1984. That was in the case of Magnum National Life Assurance Company Limited (formerly known as Nelsa) v The South African Bank of Athens Limited. In my view Trail has done no better in this case."

These are very strong credibility findings in regard to the two witnesses upon whose evidence the case of each party really depends and the reluctance of the court, on appeal, to interfere with such findings, in the absence of misdirection, is well-known.

Before us appellant's counsel, Mr Oshry, for the most part repeated the arguments which were apparently addressed to the Judge *a quo* and which, in my view, were convincingly dealt with by him in his judgment. Mr Oshry did suggest, somewhat faintly, that there had been misdirections, but it seems that these merely amounted to contentions such as -

> "He (the trial Judge) did not give due and proper weight to the criticisms of the evidence of De Beer".

I doubt whether such a contention can be regarded as an alleged misdirection; and, in any event, I consider the contention to be unfounded since the learned Judge was very conscious of the criticisms of De Beer's evidence, discussed them at length and explained convincingly why, despite these criticisms, he was disposed to accept De Beer's evidence. And here I would merely repeat

/ what..................

what has been said on countless previous occasions, viz. that the trial judge has the advantage, over the court of appeal, that he sees and hears the witnesses giving evidence and is able to observe their demeanour, their appearance and their whole personalities.

I do not propose to deal in detail with all the arguments raised by appellant's counsel before us. As I have said, they were all dealt with convincingly by the trial Judge and I wish to avoid unnecessary repetition. I shall, therefore, confine myself to a statement of the main reasons which persuade me not only that no good ground has been advanced for interfering with the findings of the trial judge, but also that he came to the correct decision.

Firstly, as regards the relative credibility of the two main witnesses, De Beer and Trail, I have read their evidence with care and can find no reason to differ from the trial Judge's assessment of them. It is perfectly true that the October transactions reflect very seriously upon De Beer's integrity and, therefore, on his truthfulness as a witness. On the other hand, De Beer seems in evidence to have made a clean breast of all his misdeeds and indeed to have confessed to certain actions not previously known to Mercabank or its legal advisers, viz. the execution and filing of the spurious letters (bundle 310 and 315). De Beer's evidence reads well, it contains no serious contradictions and no portion of it was shown to be untruthful. Trail's evidence, on the other hand, was, in my opinion, fully deserving of the strictures on it expressed by the trial Judge in the passage from his judgment quoted above. Before this Court Mr Oshry did not concede quite as much as he apparently did before the trial Judge, but he did state (I quote from his heads of argument) —

/ "It ....

> "It is accepted that Trail was a completely dishonest person who was apparently in the pay of the Magnum Group and had, clearly, on a number of occasions betrayed the trust reposed in him by the appellant and his evidence has, therefore, to be approached with a considerable amount of caution."

Of course appellant's argument was that De Beer was equally unreliable and that, therefore, Mercabank, upon whom the overall onus lay, should fail.

Secondly, turning to the probabilities, it was as I have indicated, perfectly feasible for the channelling procedure to be operated merely by arrangement between Trail and Magnum: there was no need for the money market manager, or equivalent official, of the other institution concerned to be involved or even to have knowledge thereof. Moreover, it seems to me to be improbable that responsible officials in all the institutions named by Trail could have been induced by Magnum to participate in so fraudulent

/ a scheme..............

a scheme for no apparent advantage. And here I would emphasize that in the case of De Beer (unlike that of Trail) it was not suggested that he gained any personal benefit from his alleged participation in the channelling scheme.

Thirdly, the risks that such a money market manager would run if he participated in such a channelling scheme are manifest. Not only would it involve him in devious deceptions and the preparation of spurious documents; resulting in incorrect postings in the institution's books of account, but also, if anything went wrong, there could be serious difficulties in recovering the money. The institution would hold no documentary proof of the loan to Magnum; and the Bank of Athens could rightfully claim that it was not a borrower, but a mere conduit for the payment of the money. This emphasizes the unlikelihood of a number of money market managers becoming

/involved................

involved in such a scheme.

Fourthly, Trail insisted that, in the case of such channelled transactions, he had no dealings whatsoever with the institution concerned; and that this applied in particular to the transaction in issue. It seems to me to be somewhat improbable that Trail would be so insulated. I would have thought that, if officials at the named institutions did knowingly participate in this system of channelling, one or more of them (if not all) would at some stage have discussed the matter with Trail - if only to ensure that he was in truth party to the scheme and could be relied on to carry it out. And, of course, as stressed by the Judge a quo, the alternative plea is wholly inconsistent with this aspect of Trail's evidence. Indeed, it is difficult, in the light of Trail's evidence, to imagine what the basis of the alternative plea was.

Fifthly, there is the strange circumstance that when he came to implement the October transactions De Beer resorted, with some difficulty, to the stratagem of adding "Cr. Magnum" to the cheques. Although this point may not carry as much weight as some of the others mentioned, it is strange that, if De Beer was accustomed to the channelling system by then, he and Mrs Lawrence should not have employed the usual procedure (which would not have entailed any alteration to the cheques).

Finally there is the near-concession of Mercabank's case to be found in Trail's evidence under cross-examinationn. This was rightly relied upon to some extent by the Court _a quo_. It reads:

> "Tell me, with regard to an answer you gave, it is not an answer to a question I put to you - why did the third parties want the Bank of Athens cheques at all?---- I can only presume that they would not lend direct to Magnum.

/ But..............

But they would lend direct to you?--
Obviously.

And they would be repaid by you?--
Yes."

For these reasons I am of the opinion that the trial Judge reached a correct decision on the evidence in this case.

The appeal is dismissed with costs, including the costs of two counsel.

M M CORBETT.

HEFER JA)
GROSSKOPF JA)
NICHOLAS AJA) CONCUR.
KUMLEBEN AJA)