# CURRENT DEVELOPMENTS: FOREIGN CURRENCY LOANS

## QUESTIONS AND ANSWERS

**Comment - Professor David Allan (University of Melbourne):**

When we are talking about foreign currency loans made by banks, the plaintiff will be the borrower, the customer of the bank. Therefore there is going to be a contractual relationship. In the light of the Privy Council decision in Tai Hing, which we discussed here last year, when contracts and tort overlap, you can forget the tortious analysis and concentrate on the contractual analysis.

I agree that there is very rarely any documentation about the terms of that contract. It is not a matter of implying them from necessity on the ground of business efficacy. It is a question of inferring them from the conduct of the parties, from the practice of banks. I think it would be very difficult today for a bank to deny that the business of banking includes giving advice on financial transactions. If you doubt that all you have to do is to switch on the radio or the television on any commercial channel since the banks became competitive, and see how close to the wind some of them sail.

If you rely on contract, the saving grace is, as Tim Hammon said, you can exclude or you can disclaim; and as, Rogers J. said in the Marac case, even if you are in breach, in most cases the standard of care you will require from the bank is not very onerous. That is not a criticism of the banks, it is a criticism of the situation in which they are placed in foreign currency transactions.

The real danger I think lies in s.52 and s.51A of the Trade Practices Act. There are two defences for that. I think the first one is to tailor your advice so that it is not misleading and deceptive: "In a volatile situation we give you this as our opinion, but you must form your own judgments and determine it for yourself." And the second one, is as Tim Hammon said, lack of causation. I would like to qualify this a bit. I think it is very difficult to establish causation, because the loss really flows from the volatility of the exchange rates and the fall of the dollar. The loss for which banks are going to be liable is the loss which ensues after the bank ought to advise the customer to bring the loan back on shore and it fails to do so.