DEVELOPMENTS IN FOREIGN CURRENCY LOANS LITIGATION

THE HONOURABLE MR JUSTICE ANDREW ROGERS

Chief Judge Commercial Division
Supreme Court of New South Wales

In an article by P.W. Lowe and R.G. Trevor in the *Australian Economic Review* 4 Quarter 1987, after analysing the weekly forecasts of foreign exchange dealers published in 1985 the authors concluded that "forecasters of the exchange rate have much about which to be modest." It is not fair to confine this criticism of participants in the debacle which befell borrowers in foreign currencies in Australia in the 80s to forecasters of currency movements. Greed fuelled by ignorance might have to take some of the blame. Now it is the turn of the lawyers and the courts to attempt to display their skill in dealing with the litigious aftermath. Borrowers are likely at best to be lukewarm in their appreciation of our endeavours.

In the last two months, two decisions, from differently constituted Full Courts of the Federal Court, dealing with claims arising from foreign currency loans, have been published. In the first one, *Westpac Banking Corporation v Spice*, (unreported 4 April 1990) the primary judge's verdict in favour of the borrower was upheld. In the later decision, *David Securities Pty Ltd v Commonwealth Bank of Australia* (unreported 10 May 1990) the primary judge's decision in favour of the bank was upheld. What was it that led to the difference in result?

There was one significant and overwhelming difference between the two cases. In *Spice*, the trial judge found that the borrower had relied on positive representations made by the bank officer that "there is no catch" in a foreign currency borrowing that it is "very much the thing to do." That finding of fact was not disturbed on appeal and led to the result favourable to the borrower. In contrast, both the trial judge and the Full Court found in *David* that there had been no reliance by the borrower on any statement made by a bank officer. Furthermore the judge found that the statement, which he found was made and which, if left unqualified, he held was misleading and deceptive, was subsequently appropriately corrected. Whilst the bank officer did say that a foreign currency loan was "cheap money" he did explain that the rate of exchange could move adversely which would result in repayments larger than the original borrowing. It is entirely too easy to say that the difference in result may be explained simply by the different findings of fact.

The decision of the Full Court in *Spice* was based purely on factual considerations, and their Honours found it unnecessary to deal with the submissions of law which presumably were put to them. In contrast, the plaintiffs' case in *David* called for important rulings of law, both at first instance and on appeal, which I will discuss later.

In order to properly discuss the issues, it is necessary, in my view, to put the foreign currency loan litigation in an appropriate factual and legal setting. At the outset, it should be recognised that for some time now the banker/customer relationship in Australia has been basically that of a vendor and purchaser of a commodity - money. For any number of reasons the personal relationship that used to subsist has substantially disappeared. It is fair to say that the erosion of the relationship has been replicated in the decreasing reliance placed by customers on their bank other than simply as suppliers of credit facilities. On the other hand the judgment of Foster J in *Chiarabaglio v Westpac Banking Corporation* (1989) ATPR 50, 602 gives an interesting portrait of a customer of the old school who "regarded Westpac as a friendly and conservative guide."

The law recognises that the relationship of banker and customer does not in itself give rise to any duty of care. (cf. *Burnett v Westminster Bank Ltd* (1966) 1QB 742, 760). Generally speaking, a customer wanting a loan goes to a bank to ask for it, not to seek advice. A good example is *Stanton v Australia & New Zealand Banking Group Ltd* (1987) ATPR 48191. That of course was not a case of foreign currency borrowing. The point lies in the finding by Toohey J, then a Judge of the Federal Court of Australia, that the Stantons did not go to the bank to get advice about the arrangement suggested by Harris. They did not go to the bank to get advice as to whether or not they should borrow money. As his Honour said:

> "They had already reached a decision to do so (borrow) and went to the bank as a possible source of finance".

Recent comments question whether even if a customer goes to a bank and specifically requests a loan in a foreign currency but makes no other inquiry, there may be a duty on the bank to do more than say yes or no? At first instance in *Spice v Westpac Banking Corporation* (unreported 1 September 1989) Foster J deferred this question until it actually fell for decision because on the facts before him it did not arise (p 57). In *Abound Catering Conventions and Receptions P/L v National Australia Bank Ltd* (unreported 26 October 1989) Tadgell J posed two alternative situations (p 9):

> "did Mr Kratzer seek advice from the defendant's officers as to whether he should borrow in foreign currency, or did he seek advice or information on the means by which a borrowing in foreign currency could be made?"

He concluded that it was the latter that was discussed. Notwithstanding that no advice was sought on the first question, in accordance with the bank's internal directive, the bank manager arranged for Mr Kratzer to have a discussion with the manager of the International Banking section. The plaintiff made no complaint of any failure by the defendant to give proper advice or warning of the risks of entering into a foreign currency loan. Relevantly to the point under discussion, notwithstanding that Tadgell J had concluded that the plaintiff had not gone to the bank for advice, he said that "it would have been unreasonable not ... to have explained the risks inherent in the currency fluctuation." (p 26).

A loan from a bank to a customer, in a commercial context, is a transaction in which, generally speaking, the bank is entitled to seek and obtain the best terms that it can (but cf. "The Economics of Lender Liability" (1989) 99 *Yale L.J.* 131). The comments of Gleeson CJ delivering the judgment of the court in *Lam v Austinel Investments Australia Pty Ltd* (1990) ATPR 50866 are instructive in this regard. His Honour said (p 50880):

> "Where parties are dealing at arms length in a commercial situation, in which they have conflicting interests, it will often be the case that one party will be aware of information which, if known to the other, would or might cause that other party to take a different negotiating stance. This does not in itself impose any obligation on the first party to bring the information to the attention of the other party, and failure to do so would not, without more, ordinarily be regarded as dishonesty or even sharp practice. It would normally only be if there were an obligation of full disclosure that a different result would follow. That could occur, for example, by reason of some feature of the relationship between the parties, or because previous communications between them gave rise to a duty to add to or correct earlier information."

Primarily, the duty of a bank to a customer lies in contract. However, in some circumstances a duty of care may arise otherwise than in contract. Quite apart from a duty in tort, an obvious case is where the parties are in an unequal bargaining situation. Indeed, it has been argued that in some circumstances fiduciary duties may be imposed upon a bank (see "Bankers' Fiduciary Duties and Negligence" 12 *C.B.L.J.* 145).

The setting in which the nature and extent of the duty has to be determined is of crucial importance and relevance. Thus, a bank may hold itself out by its advertisements as providing financial advice. In *Woods v Martins Bank Ltd* (1959) 1 QB 55 Salmon J said (p 71):

> "It is at any rate remarkable that the defendant bank, who seemed to be keen competitors with other banks to obtain custom, and who, in order to do so, apparently spent large sums of money in advertising that one of the advantages that

> they offer is expert advice in all financial matters without obligation, are taking the point in this court that they are under no duty to use any care or skill in giving such advice."

In *Foti v Banque Nationale de Paris* (unreported 17 March 1989) Legoe J held (p 123):

> "I am of the opinion that the defendant Bank had involved itself far more closely with the plaintiffs than a mere arm's length agreement to lend a sum of money. Furthermore, the relationship was not just that of acting as a banker on behalf of its customer. There was both the professional banking element in the transaction and the personal rights and duties of a bank lending money to a group of people in the particular way in which this transaction was set up. The proximity of the parties to each other in their respective rights and duties arising from the negotiations, letters, respective executed mortgages, guarantees, deed and verbal agreements, was as to the actual performance of the several transactions, clearly giving rise to a duty of care in the circumstances."

A bank having entered upon the task of advising an intending borrower is obliged to provide a full and proper explanation of the nature and effect of the transaction (see *Cornish v Midland Bank* (1985) 3 AER 513 Glidewell LJ at 520; Kerr LJ at 521). The standard of care to be exercised increases proportionately to the seriousness of the risk involved in any breach of the duty (*Northwestern Utilities Ltd v London Guarantee & Accident Co Ltd* (1936) AC 108 Lord Wright 186; *Swinton v The China Mutual Steam Navigation Co Ltd* (1951) 83 CLR 553, 556).

As well, if in the course of negotiations, advice is sought and given, or volunteered, in circumstances where it is clear to the bank that reliance would be and was placed upon it, the bank may incur obligations both, under the general law to exercise reasonable care and skill, and also under the *Trade Practices Act* to abstain from misleading or deceptive conduct, or conduct which is likely to mislead or deceive.

The hypothetical situation which I posited earlier in this paper of a customer who simply requests a loan in a foreign currency but makes no other inquiry and is given no information, is one that seldom actually arises in a litigious context. Nonetheless, the question is useful in that it throws into high relief the proposition which represents the high water mark of borrowers' cases for relief. The submission now frequently put forward is that a loan in a foreign currency is such a dangerous product that in no circumstances can it be made available to a borrower without full warning of the dangers attending it. The proposition has been rejected both by Hill J, at first instance, and on appeal in *David*. It will be convenient to return to this question after a little further background.

In the more usual situation where, in response to inquiry, or voluntarily, the bank gives information as to a foreign currency borrowing what is its duty? The question needs to be examined in context. In more recent cases the defendant banks have produced, on discovery, a great deal of internal bank documentation which has attracted considerable attention in judgments at first instance. The documents, which were not tendered before Hill J in *David* were tendered before the Full Court but appeared to make no particular impact (Supra p 37).

The documents, from a number of banks, reveal that for some years after 1982 the Australian banks operated under considerable constraints. There were, from time to time, restrictions on the local funds which were permitted to be lent. Local interest rates were high. In contrast there were almost unlimited funds available from overseas sources at rates eight to ten percent lower than locally. The fees attaching to such loans were very attractive to banks. Nonetheless the difficulties confronting the banks in marketing such loans were indeed forbidding. Internal bank documents make clear that these difficulties were recognised at the higher levels of bank management. In my opinion the recognition of the difficulties and problems involved reflect on the duty of care owed by the banks to borrowers.

Included in these difficulties were:

> First, the risk of depreciation of the Australian dollar against the foreign currency in which the liability of the borrower had to be repaid.
>
> Second, the inability and, therefore, unwillingness of the banks to manage customers' exposures to foreign currency fluctuations. That meant that customers were left to their own devices in meeting the admitted risk.
>
> Third, the banks' front-line staff up to and including branch managers were substantially innocent of any real knowledge of the difficulties attaching to foreign currency borrowings. Whilst charged by higher management with the task of promoting such loans they were not equipped to explain to borrowers either the risks attaching to such loans, or the measures that were available and required to contain the risk. Experience has shown that even when bank managers called in "experts" from regional offices the difficulties continued. Higher management was advised that true expertise was restricted to staff of the banks' International Branches.

Notwithstanding the awareness of bank management of the difficulties, attention appeared to focus on ensuring that the security taken from borrowers was maintained at the appropriate ratio in the event of depreciation of the Australian currency and that letters of offer to customers contained appropriate disclaimers of liability on the part of the bank. It is only fair to say that the memoranda recognised both the need to make customers aware of the risks and the inability of the bank staff to satisfy the need. The question has to be posed whether in those particular circumstances there arose any particular obligation on the part of banks? The point I am making is that it is one thing to go ahead with transactions permeated by the risk element where there is a fully informed client. Is it permissible to go ahead where it is known that those who should be making the risk known to the customer and therefore obtaining the customer's consent are insufficiently equipped to do so?

A picture has emerged, at least in some cases, of customers engaged in discussions concerning borrowing in a foreign currency, in the following setting:

1. The bank knew that such a borrowing was pregnant with the danger of large capital loss unless precautions were taken.

2. The bank knew that its staff was ill-equipped to explain the risk to the borrower.

3. The bank knew that staff was ill-equipped to explain the nature of the available precautions to be taken.

4. The bank was unwilling to accept the task of management even at a fee, and thereby undertake the task of implementing appropriate safety precautions as and when required.

5. The customer was unaware of the extent of the possible risk and of the available precautions which could be taken and the techniques for implementing such precautions.

6. The bank was aware of this lack of knowledge on the part of the customer.

7. The customer relied on the fact that the bank gave no warning of any of the foregoing matters. By reason of the omission to warn of the extent of the risk the customer relied on the belief that any risk was limited or slight.

The knowledge of the bank of the matters I have attempted to summarise played an important role in the reasoning process of Foster J, at first instance, in *Spice* and of Sheppard J in appeal. After setting out the text of some of the internal bank memoranda Sheppard J said (Supra p 20):

> "A reading of these various letters and memoranda and of some others written within the same period discloses a tension between the desire of the Bank to take advantage of what it saw as profitable business and its concern that borrowers might find themselves in financial difficulty, particularly if their foreign exchange loans were not adequately monitored and managed. There are also to be found in some of the documents indications that the Bank thought that the form of its warnings of risk to potential borrowers in foreign currencies should be made clearer and

> more emphatic than had been the case especially as many of the borrowers were quite unsophisticated."

The usual case presented by a disappointed borrower in foreign currencies has relied on some alleged representation on the part of bank staff as to the advantages of borrowing in a foreign currency. Thus for example, allegations have been made that borrowers were informed that borrowing in a foreign currency constituted a "cheap loan". It is then alleged that such a representation was incorrect in that, properly assessed, the loan was not cheap or alternatively, that the statement was incorrect by reason of the omission to draw attention to matters of the kind I have earlier mentioned.

The primary argument advanced by the borrowers in *David* was more far reaching. It was that a borrowing in a foreign currency was intrinsically so dangerous that there arose a peculiar duty to take precautions. Rejecting the submission the Full Court said (Supra p 34):

> "It is clear that the rule as to things dangerous in themselves can have no direct application here. Nor, in our view, can the rule as to things inherently dangerous provide an appropriate analogy in the case of a borrowing in a foreign currency. It may be accepted that there will always be a risk of an adverse movement in the rate of exchange. But it does not follow that a foreign loan transaction is something 'dangerous', let alone 'dangerous in itself', or anything analogous to such a special thing. Speaking generally, all that can be said is that it is possible that such a transaction may result in some economic gain in certain events, or in some economic loss if other contingencies occur. A foreign borrowing is not itself dangerous merely because of opportunities for profit, or loss, may exist."

With great respect, I would suggest that the foregoing statement may be susceptible to criticism for two reasons. First, it may not sufficiently recognise the vagaries of the foreign exchange market. As I ventured to say in *Lloyd v Citicorp Aust Ltd* (1987) 11 NSWLR 286 at 287:

> "In determining the extent of the duty, it is essential to have regard to the nature of the market to which the plaintiff committed his financial future. There is no scientific basis upon which accurate forecasts can be made of movements in currency. Although some operators in the market are better equipped to give advice than others, ultimately it is a gamble. It is a gamble because unpredictable factors may have immediate and violent repercussions. A rumour of the death of the United States President, the MX missile crisis, dismissal of an oil minister cannot be predicted or guarded against. Yet they may have immense impact on the foreign currency market. De-regulation has brought in its train volatility of

> proportions previously unknown. As in every true gamble, returns can be very high but so can losses."

The notion that a borrowing in a foreign currency was, in the conditions obtaining in Australia in the 80s, akin to gambling, was supported by expert evidence before Foster J in *Spice*. His Honour said (p 72):

> "In reaching this decision I have been much assisted by the evidence of Mr Allaway, a Vice President of Citibank Ltd, with considerable experience in the area of foreign exchange borrowings. He was of the view that foreign exchange borrowing was *basically a gamble*, but that at the relevant period he had not been expecting a major devaluation of the Australian dollar. However, it is clear from his evidence that Mr Allaway in dealing with an unsophisticated borrower would have at the relevant time taken steps to ensure that the borrower was apprised of the fact that an off-shore loan *was essentially a gamble* which involved taking a long term view of the currency 'because it is very difficult, because they are not sitting in the market to manage and monitor a short-term position. They do not have access to information showing second movements on the exchange rate from minute to minute and they do not have access to go into the market to execute.'" (emphasis added).

On the other hand another expert, Mr Butler, who gave evidence for the borrower, before Hill J, at first instance, in *David* said (Supra p 46):

> "He rejected the suggestion that involvement in the foreign exchange market was a gamble, preferring to call it 'making informed judgments' notwithstanding that there were unpredictable factors and that people sometimes made mistakes.
>
> Mr Butler conceded that there was no scientific basis upon which accurate forecasts of foreign exchange movement could be made and that no one could sensibly predict how far the market would go in any direction."

I am afraid that, in my ignorance, I cannot understand how "informed judgments" can be made in the context of unpredictable factors.

In *Abound Catering* Tadgell J said (Supra p 27) that it was unnecessary for banks to characterise the risk as a "gamble". At the risk of being branded an economic ignoramus I remain unrepentant in my description of borrowing in a foreign currency without constant and instant access to information and the market.

Secondly, the statement of the Court in *David* does not acknowledge the importance and relevance of the Bank's positive refusal to accept responsibility for advising borrowers on the management, insofar as that was possible, of the risk. Everybody who has ever spoken on the topic has acknowledged the importance of managing the risk. It is true that there is a difference in view as to the knowledge required to manage the risk and the extent to which risk of loss can be reduced. Nonetheless absence of knowledge and as Mr Allaway pointed out, constant access to up to date information has to be taken into account in confronting the submission. Finally there is the lack of sophistication in this field of the majority of the small borrowers. In the circumstances the exposure of the unsophisticated small borrower was truly immense and it is no exaggeration to say the loans were dangerous. One may look at the figures to which borrowings were shown to have blown out in the contested cases to question the basis for the rejection of the submission.

The next question for consideration is whether there was an obligation to tell the customer of the magnitude of the risk. It must be recognised that an affirmative answer places a bank in a difficult quandary. On the one hand, explaining the full extent of the risk might destroy the chances of making the loan and therefore the fee the bank is hoping to attract. On the other hand, failure could bring in its train potentially immense liabilities. Justice Wood recognised the difficulty in *Davkot Pty Ltd v Custom Credit Corporation* (unreported 27 May 1988) when he said (p 118):

> "I would not go so far in the instant case as to hold that Custom Credit should have advised the plaintiffs not to take up the facility. That would be excessive and commercially unrealistic. On my assessment, the duty was one requiring Custom Credit to place the plaintiffs in a position where they were sufficiently informed as to the transaction, ie. as to how management would operate and as to potential benefits and risks attaching to what was a novel facility which might qualify its apparent advantages, so as to permit an informed decision."

The very real difficulty is compounded if the view adopted by Hill J in *David* be correct. His Honour accepted (p 53) that the bank did not point out specifically the possibility of selective hedging, borrowing in a variety of currencies, stop loss orders, or like measures, available to contain the exposure to loss. Justice Hill said that the failure could only constitute misleading and deceptive conduct "if the person remaining silent had a duty to speak." There is certainly authority to this effect in the Federal Court but there is also recognition of another view to which his Honour did not refer. It is fair to say that the passage from the judgment of the Chief Justice in *Lam*, which I quoted earlier, may support the view taken by Hill J. Although Foster J in *Spice* made it clear that he was speaking in the context of a finding of positive misrepresentation he said, (p 72), that it would have been appropriate to bring to the borrower's attention all the matters that would demonstrate the possible magnitude of the risk should things go wrong and also the nature and difficulty of the decisions that the borrower might need to make to deal with the risk. In that context Foster J said (p 73):

> "He (Mr Allaway of Citibank) would have pointed out to such a customer that he could eliminate his risk 'at any point in time by calling up a bank and purchasing the amount borrowed, the Swiss franc amount borrowed, to ... next roll-over date.'
>
> I further gather from his evidence that he would have made sure that an unsophisticated customer realised that data as to the past performance of the Australian dollar exchange rate could not be sensibly used to quantify the extent of risk in the future and that such risk could be 'enormous'. I am satisfied, further, that, as a matter of practice, he would have gone on to explain methods of protection against the risk. He would have explained hedging, and regular monitoring of the loan 'because exchange rates are volatile and if you do not keep a close eye on it obviously if the exchange rate did fall dramatically you could be well out of money without knowing about it.'
>
> Also, I am confident that in providing a full and sufficient explanation of what the borrower might have done to mitigate risk he would have explained, though probably not recommended, 'stop-loss orders' by which a borrower could eliminate risk at a particular pre-determined point by the buying of an appropriate amount in Swiss francs. The borrower would then have eliminated risk at a particular point but would have the problem 'that the next day or the next hour or the next week the exchange may appreciate dramatically' and the borrower would then be faced with the question 'do I go back in again? Is the exchange rate going to continue to fall or is it going to continue - or is it going to retrace ... All you have done is convert your borrowing costs into Australian dollar borrowing costs. If you come back on-shore permanently you have got to come up with cash to pay out the losses.' In light of these problems, Mr Allaway indicated to the Court, and, I am satisfied would have indicated to a potential borrower that 'stop-loss' procedures were 'not commonly used to manage long-term positions.'
>
> I have mentioned these aspects of Mr Allaway's evidence in some detail as they have *demonstrated to me quite clearly the topics that could ordinarily be expected to arise in the course of what, on the evidence, I would regard as a reasonable explanation of risk associated with off-shore borrowing*, in circumstances where a potential borrower seeking advice indicates expressly or impliedly a lack of appreciation of the true risk involved.
>
> *I consider that the bank officers, in fulfilling their obligation to advise in the circumstances of this case, should have entered into explanations of this kind.* Their

> failure to do so, at least when coupled with the positive words of encouragement uttered to Mr Spice, constituted a breach of the duty of care. Had these explanations been given, I am satisfied Mr Spice would not have incurred the obligations of the loan. He would have taken a loan in Australian dollars." (emphasis added).

In my respectful view, even in the absence of a positive misrepresentation, simply to say that there was a risk would be regarded by many as insufficient. This view may be taken on the basis that a bank's knowledge of the enormity of the risk and its knowledge that the borrower did not realise it, coupled with the refusal to manage the risk, imposed a duty to speak. On this approach, whatever view one takes of the requirements for misleading and deceptive conduct, all the ingredients are there.

The Full Court approached the question somewhat differently from Hill J. Their Honours said (p 36):

> "Short of taking over the *management* of the appellants' foreign currency dealings itself, and this was never contemplated, the most that the Bank could reasonably be expected to do was to indicate to the appellants, *in a general way, that there were risks, that hedging was available at a price and that independent expert assistance should be sought. This the Bank did.*" (emphasis added).

The gulf between that statement of the duty, which in any event the Full Court only assumed existed for the purposes of the discussion, and that accepted by Foster J in *Spice* could hardly be wider. The Full Court did not refer to the decision of the English Court of Appeal in *Cornish* (Supra) summarised by Wood J in *Davkot* as follows:

> "In his reasons for judgment, Glidewell LJ referred to the duty of the bank officer to 'explain fully and properly' the matter at hand. Lord Justice Kerr said at 521, that having embarked on an explanation, the plaintiff 'was entitled to an explanation of the nature and effect of the mortgage which was adequate in all circumstances.'"

Perhaps I may be permitted the respectful observation that the controversy has not been put to rest by the decisions in *Spice* and *David*.

Generally speaking, borrowers' actions have been based on allegations of breach of contract, tort and breach of the provisions of s 52 of the *Trade Practices Act*. As well as denials, banks, at least in some cases, have relied on contributory negligence and absence of causation in relation to the damage claimed, and, at least in some cases, on the contention that any damage that might otherwise have been relied upon had not yet crystallised. Oddly enough, perhaps flushed by success, the banks have neglected to claim the benefit of the three year limitation period provided for in s 82(2) of the *Trade*

Practices Act. In a recent case (after the close of addresses) an application for leave to amend was made to plead the provisions of the sub-section. The application was refused, but an examination of the provisions has shown that there are very substantial difficulties in its operation.

There is a division of views as to whether the sub-section operates as a condition precedent or, by way of defence. The better view seems to be that it provides a defence. Were the former view to be the correct one, then in both cases where Foster J, at first instance, found that cause of action made out should have been decided the other way. I hasten to say it would not have affected the result. Even if the sub-section operates only by way of defence, it poses great difficulties. There is no specific provision for granting any extension of time. Yet, in many cases, the existence of a cause of action may not become manifest to the borrower until after the expiry of the three year period from the time when damage was first suffered. Once again, the better view seems to be that even concealed fraud would not prevent the operation of the section in its terms. One reason for the apparently harsh operation of the section is that I do not think the Parliament ever contemplated the widespread use which the section has gained in commercial litigation. Even though the recent decision of the High Court in *Concrete Constructions Pty Ltd v Nelson* (unreported 3 May 1990) has restricted, to some extent, the scope for the operation and utilisation of s 52, it is still available in many more cases than those responsible for its drafting or enactment were likely to have contemplated.

It has been usual for banks, in this type of litigation, to claim that even if liable for some damage, borrowers should not be allowed to claim beyond the first roll over date, when they should have repatriated their borrowing to Australia, or at least taken out a hedging contract for the balance of the term of the loan. In those few cases where verdicts were given in favour of borrowers these submissions were rejected. That is not to say that the calculation of damages has proved easy.

Justice Foster, in *Spice*, rejected the argument that the plaintiff could have crystallised his loss by bringing the loan back on shore on any of the roll over dates. His Honour was satisfied (p 77) that it was reasonably foreseeable by the bank that a borrower when faced with the rapidly declining value of the Australian dollar against the Swiss franc, might reasonably decide to keep the loan off shore in the hope that the exchange rate would improve. In those circumstances, his Honour held that the decision of the applicant to remain in Swiss francs could not operate as an intervening cause severing the legal link between the bank's breaches and the plaintiff's damage.

In *Spice* it was also submitted to Foster J that any calculation of damages prior to the date for the repayment of the loan would be purely speculative. His Honour rejected that submission but in any event granted relief in a form I will mention shortly.

The reasons for the rejection of defences of contributory negligence have been the same as in relation to causation. For example, in *Chiarabaglio* the bank claimed that the borrower should have paid off the loan when losses were still quite low and he had the finances to do so. However, it was only hindsight that proved this would have been the sensible thing to do, and the Judge rejected the submission. In *Spice*, Foster J refused to accept the argument that the borrower should have been aware of the dangers of drawing down the loan due to contemporaneous forecasts in newspapers and financial journals of the dollar's imminent fall. His Honour found that the borrower had behaved reasonably in relying on the bank to advise him of such possibilities (p 55).

Another aspect of calculation of damage that still awaits resolution is whether the capital gain which has been made by some borrowers on the investment to which the borrowing had been applied should be set off in diminution of any amount recovered by way of damages. The reasoning simply is that absent the borrowing, the plaintiff would not have purchased the particular investment, and would not have made the profit realised upon the increase in value or on resale. However, it seems to me that this argument breaks down simply on a factual basis. The borrower could have made the borrowing in Australian dollars, paying the higher rate of interest, and so justice would be done if they are set off against any amount by way of damages, the additional interest that the borrower would have had to pay had the borrowing been made in local currency. There are some rare cases, however, where a borrower would not have been able to obtain a loan in local currency because the income stream available was insufficient to satisfy the interest payments that would have had to be made on a loan in local currency (cf. *Quade v Commonwealth Bank of Australia* unreported Morling J 12 october 1989). In those circumstances, where the only way that the borrowing could be effected and the profit on the investment realised, or obtained, was by a borrowing in a foreign currency, there is an extremely difficult question to resolve. In this context s 87 of the *Trade Practices Act* is a helpful provision. The section allows, inter alia, for the remoulding of contracts between the parties and for the imposition of conditions for the grant of relief. Thus, for example, if a contract were to be declared void ab initio nonetheless conditions could be imposed to achieve fairness between the parties.

In *Spice*, Foster J achieved, by grant of injunctive relief, a situation whereby the plaintiff was put in the same position as if he had originally borrowed the amount in question in local currency.

I acknowledge that I am open to the criticism that I have written with all the advantages of perfect 20/20 hindsight. My answer is to point to the banks' internal memoranda. Informed people, at the time, wrote of the risk. In the event the risk may have thrown up greater losses than anticipated. The question I should like to leave with you is whether that justifies the conduct of which the borrowers complain?