CURRENT DEVELOPMENTS
Foreign Currency Transactions - Liability for Negligent Advice

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1. INTRODUCTION

Foreign currency transactions are multi-form. They range from a simple purchase or sale of foreign currency today or in the future through loans of foreign currency, interest rate and currency swaps, switching, forward exchange contracts in respect of both principal and interest, management of foreign exchange exposure both as to the transaction and the translation, hedges and the like. The advice which can be given in such an area is obviously wide ranging.

It may be helpful if I gave a brief (and hence inaccurate) summary of some of these transactions.

Purchase and Sale of Foreign Currency

Most are familiar with this. One simply exchanges so many Australian Dollars (AUD) for so many United States Dollars (USD), German Deutschmarks (DEM), Japanese Yen (JPY), Swiss Francs (CHF), Pounds Sterling (GBP), Singapore Dollars (SGDA or SGDB) or whatever. Similarly, one can exchange a bundle of foreign currency for AUD.

As a matter of calculation, the conversion rate of one currency to another is calculated by reference to the USD. Accordingly, conversion from AUD to CHF is a product of the CHF/USD and USD/AUD exchange rates. This is called the cross rate - and not because many people are very cross about it.

The transaction is simple to understand, It is a bit like buying a towel at Woolworths or Myers. If one were to wait until tomorrow one may get it cheaper at the Winter sale or it may be more expensive as the price has gone up. Advice whether to buy or wait could be attacked (whether successfully or not) if the price were to move the wrong way.

Off-Shore Loan Facility

This is like a normal banking loan, a contract whereby one borrows a quantity of funds, save that the funds are a foreign currency, and agrees to repay those funds at a fixed date - generally 5-10 years hence. One spends those funds on an investment, usually that investment is in Australia and paid for with AUD so the foreign currency is sold for one by the lending bank prior to use in Australia. The interest rate which is applicable to those foreign funds is generally far lower than in Australia and is a fluctuating interest rate fixed at each interest fixing date (called a rollover date). These dates are generally 3 or 6 months. Interest is paid in arrears.

Typically, because of the liability to repay foreign currency and the onshore security, the documentation has a number of clauses in it which allow the borrower and the lender to attempt to minimise potential losses. It allows the borrower to switch the currency of the borrowing at each interest fixing date, and, for the lender, provides that the security is calculated on a continuing basis and must maintain a requisite degree of comfort for the lender over and above the value of the loan (both converted to the one currency, generally AUD) with a promise by the borrower to furnish additional security or perhaps to repay a portion of the loan in order to maintain the prudential ratio.

There are many other boiler-plate provisions which are common to normal lending transactions. Perhaps the only additional one is that if the foreign exchange market were to become impossible in the opinion of the bank, the bank is entitled to ask the borrower to repay the loan forthwith. Some transactions have also involved a trigger mechanism which provides that if the exchange rate exceeds a pre-determined level then the loan must be repaid in full.

Because the amount to be repaid is a foreign currency, as the Privy Council observed in Euro-Pacific Finance Corporation v. Hielscher (1980) 54 ALJR 309 at 311:

> "Depending on fluctuations in the rates of exchange the amount repaid [expressed in AUD] might either exceed, or fall short of [the amount borrowed, expressed in AUD] but was unlikely to be exactly that amount."

If the borrower has converted those foreign funds to AUD and bought locally, it may require more AUD to repurchase the CHF on repayment date. That is also true if the borrower borrows AUD and converts that to CHF.

Currency Switching

This is a device where having borrowed money in say, CHF, one thinks the AUD will depreciate against CHF whereas, perhaps, the AUD will appreciate against the JPY. Accordingly, one moves the currency risk or the currency of account from CHF to JPY.

Currency Swaps and Interest Swaps

Currency swaps and interest swaps are simply that. A borrower, say, with a USD cash stream who wishes to have his loan denominated in USD in fact has his loan denominated in CHF. Provided a person with an equal and opposite borrowing and desire can be found, a back to back arrangement can be undertaken whereby each assumes the other's liability thereby removing the risk of a movement in the exchange rate to each party. If the interest porrtion of the contract is not swapped, interest is paid in the original denominated loan. It should be noted that at the end of such a transaction, because the exchange rate is unlikely to be the same as that at the start, one party will be worse off than if he had stuck with his original bargain and the other will be better off. Each will, however, have eliminated the risk and have converted his commitment to a fixed one in the currency of his other operations.

Forward Exchange Contracts (FEC)

These are contracts whereby A agrees with B that on a given date in the future A will deliver to B a certain quantity of specified foreign currency and B will deliver to A a different specified amount of a different foreign currency. As this is to take place in the future, there is generally a differential between the amounts fixed from that which would apply if the transaction were to be done today, that difference being described in the trade as "the margin" of "forward points".

At a simplistic level, if one has contracted to buy goods for a price payable in USD and those goods are to be delivered in the future, one is at the risk of the exchange rate movement if one waits until the due date to purchase USD. Using an FEC to purchase today the USD needed on delivery one can convert that uncertain fluctuating commitment to a fixed certain price in AUD. Of course if the rate gets better after the FEC is taken one does not benefit by that. Loosely one could assert one has "lost", but one has eliminated the risk which would otherwise have been attendant on the transaction. One can, for example, price the goods for sale with a known cost base, not risking the price soaring as the AUD takes another plunge.

As can readily be seen, an FEC could, if the rate moves appropriately, prove to be very valuable and it can, if desired, either be sold on for that value or maybe closed out at a profit.

It can also be seen that an FEC allows one to swap the currency of risk between rollovers of an offshore loan by timing the expiry of the FEC to the next rollover date.

More sophisticated approaches include taking out an FEC in respect of one of the two legs of the cross rate to the currency in which the loan is denominated. This can allow one to make a profit on favourable movements in that leg and, perhaps, also a

profit on reverse (but favourable) movements on the second leg as well.

A fundamental matter which must be understood in all of these transactions is that if one has an underlying loan and an FEC is taken out which mirrors the currency risk of the underlying loan of the borrower, and the quantum of the loan, any profit made on that FEC by reason of movements in the exchange rates will be roughly equal to the loss made by the borrower on the underlying loan. Conversely, any losses made on the FEC will mirror a profit made on the underlying loan.

There is one fundamental difference. Because the FEC is, save in rare exceptions, a maximum of six months, except in the termination phase of a foreign loan, the loss or gain on the FEC is a realised loss or gain whereas the loss or gain on the underlying loan is not realised. If it is a gain in the underlying loan, one needs to continue to use FECs to ensure that that underlying unrealised gain is not eliminated by a later adverse foreign currency movement.

Foreign Exchange Risk Management

This is a science or art using all of the above techniques (and others) to attempt to eliminate or minimise the risk and, perhaps, to make profits and improve the financial position.

Hedging

A hedge contract is rather like an FEC but it is a non-deliverable contract. Once again, the hedging contract can eliminate the risk of movement in exchange rates.

Hedging contracts can be thought of - quite inaccurately - in the same way as FECs although the process of settlement is somewhat more complicated because the hedge contract is not in fact delivered.

The word "hedging" is also used in the industry loosely to refer to conserving or eliminating risks. A borrower with a CHF risk may decide to eliminate that risk by moving it to AUD. He is said to "hedge his risk on-shore" although he is in fact unlikely to enter into a hedge contract. The cost of such hedging equals or exceeds the interest rate benefit gained by borrowing offshore.

With these transactions in mind, we turn to possible bases for liability.

2. BASES FOR LIABILITY

The possible grounds for liability for negligent advice in such a context may be enumerated:

2.1) Contract

2.2) Duty - Positive where advice is given

2.2.1) Tort - advice in response to a request

2.2.2) Tort - advice voluntarily provided or undertaken

2.3) Duty Negative - where advice was not given

2.3.1) Fiduciary relationship

2.3.2) Tort - duty imposed

2.4) Trade Practices Act

I do not propose to discuss all these areas in depth.

In each case the matter must be considered not only from the angle of actual advice tendered but equally from the frequently raised assertion that the banker owes a positive duty to advise whether asked to or not.

2.1 Contract

In the context of banker and customer, the nature of the relationship is clear. It is a contractual one. In the UK and Australian banking operation, the terms of the banker customer relationship are, usually, not spelt out with clarity and precision and are thus left to the general law, including that of implied terms or imputed terms.

A number of obligations have been grafted into the contract by the courts on grounds which may one day have to be rationalised: for example, for duties cast upon the banker see, Joachimson v. Swiss Bank Corporation [1921] 3 KB 110, 127 per Atkin L.J. pp.118-129 per Banks L.J.; Tournier v. National Provincial (etc) Bank [1924] 1 KB 461, and for duties cast upon the customer see, Tai Hing Cotton Mill Ltd v. Liu Chong Hing Bank [1986] AC 80; Canadian Pacific Hotels Ltd v. Bank of Montreal (1987) 77 NR 161 and Commonwealth Bank of Australia v. Sydney Wide Stores Pty Ltd (1981) 148 CLR 304.

Whether without the benefit of *stare decisis* those terms would be imported today *de novo* as terms of a contract must be respectfully doubted. The test for the implication of terms has until this year been quite settled and is contained succinctly in the passage of their Lordships in BP Refinery (Westernport) Pty Ltd v. Hastings Shire Council (1977) 52 ALJR 20 at p.26; 16 ALR 363 at p.376:

> "... for a term to be implied, the following conditions (which may overlap) must be satisfied: (1) it must be reasonable and equitable; (2) it must be necessary to give

> business efficacy to the contract so that no term will be implied if the contract is effective without it; (3) it must be so obvious that 'it goes without saying'; (4) it must be capable of clear expression; (5) it must not contradict any express term of the contract."

This statement has been adopted and applied (albeit with great debate as to the result) in Secured Income Real Estate (Australia) Ltd v. St Martins Investments Pty Ltd (1979) 144 CLR 596; Codelfa Construction Pty Ltd v. State Rail Authority of New South Wales (1982) 149 CLR 337; Hospital Products Ltd v. United States Surgical Corporation (1984) 156 CLR 41.

On this basis, it cannot be asserted that the contract of banker and customer includes an obligation to advise regarding the bank's products or the inherent risk of a project or course which the customer is proposing to undertake if for no other reason than it cannot be necessary to the business efficacy of the contract. It works perfectly well without it. The customer can pay for advice on these matters from people who have his interests at heart and do not have an interest in selling the product and making a profit from that. It certainly is not so obvious that it goes without saying: that the matter is debated is proof of that. Finally, if you were to ask the banker it is almost certain that he would answer testily "of course not".

There is one (or possibly two) gloss on the general rule. There may be an implied term which is a legal incident of a particular class of contract. The implication here depends "upon more general consideration" or as Lord Wilberforce put it in Liverpool v. Irwin [1977] AC 239 at pp.254: "Such obligations should be read into the contract as the nature of the contract itself implicitly requires, no more, no less; the test in other words of necessity."

According to his Lordship, such terms flow from: "The necessity to have regard to the inherent nature of the contract and to the relationship thereby established."

For such terms: "The touchstone is always the necessity and not merely reasonableness". (p.266 per Lord Edmund-Davies)

A term could only be implied if it is one without which the whole transaction would become "futile inefficacious and absurd" (p.263 per Lord Salmon).

The distinction is adopted by the High Court in Codelfa at pp.345-6 per Mason J. (Stephen and Wilson JJ. concurring).

The second possible gloss is that currently being championed by Deane J. in the High Court (see Hospital Products v. United States Surgical Corporation (1984) 156 CLR 41 at p.121 and Hawkins v. Clayton (unreported 8 March 1988) at pp.34-5 of the transcript). His Honour said in the latter case:

> "Care must be taken to avoid an automatic or rigid application of the ordinary cumulative criteria for determining whether a term should be implied in a written contract to a case where the contract is oral or partly oral or where it is apparent that the parties have never attempted to reduce their agreement to complete written form ... The cumulative criteria formulated or accepted in ... cases [of a complete written contract] cannot be automatically applied to cases ... where the parties have not attempted to spell out all the terms of their contract but have left most of them to be inferred or implied. Where that is so, there is no question of effectively altering the terms in which the parties have seen fit to embody their agreement; the function of the court is, as Lord Wilberforce pointed out in Liverpool City Council v. Irwin [1977] AC 239, at 254, 'simply ... to establish what the contract is, the parties not having themselves fully stated the terms'. In the performance of that function, consideration of what is 'reasonable' 'necessary to give business efficacy to the contract' and 'so obvious that "it goes without saying"' [authority cited] may be of assistance in ascertaining the terms which should properly be implied in the contract between the parties. There will not, however, be the need or the justification for the law to refuse to imply any imputed term which does not clearly satisfy all such requirements. This is particularly so where, as here, the contract has passed from the executory stage and has been executed by one or both parties."

His Honour's citation of the present Chief Justice in Codelfa Construction Pty Ltd v. State Rail Authority of NSW (1982) 149 CLR 337 at 345-347, of Liverpool City Council v. Irwin [1977] AC 239 and Lister v. Romford Ice & Cold Storage Co. Ltd [1957] AC 555 may indicate that this possible second gloss is in fact merely the first.

The precise basis of the implication of the term in these circumstances can itself be the matter of debate but it cannot be said that a positive duty to advise such as has been postulated is "necessary" "reasonable" "necessary to give business efficacy to the contract" "so obvious that it 'goes without saying'", or renders the contract "futile inefficacious or absurd" without it.

It is respectfully suggested that absent some custom which requires a contractual duty to proffer advice or express agreement to do so, a failure to proffer advice (without more) cannot give rise to a claim for breach of contract.

On the other hand, where advice is given in the context of a banker/customer or banker/borrower relationship, absent more, it is difficult to see the basis upon which a term could be suddenly created which requires that advice to be given with reasonable care. It is clear that it can be a term of the contract. In Woods v. Martins Bank Ltd [1959] 1 QB 72 the plaintiff became a

customer on the strength of a series of inducements as to the financial advice which could be offered to him. The judgment is unclear whether the duty to advise which Salmon J. found was in tort or contract but as the decision antidated Hedley Byrne [1964] AC 465 by some five years, it is submitted that the duty was contractual - but arising out of the rather remarkable promises in the defendant's advertisements and booklet lauding their services (see pp.70-71).

That being a term of the contract, the requirement to give that advice with reasonable care and skill is an inevitable consequence.

But what of the case where no such contract is made? If in law a tortious duty is created (as discussed below) then as Deane J. observes in Hawkins v. Clayton (supra) this "removes a large part of the basis and justification for the implication of ... a general contractual duty of care" (p.48).

To adopt Deane J.'s approach must, however, of necessity involve a rejection of the approach of the Privy Council in Tai Hing Cotton Mill Ltd v. Liu Chong Hing Bank [1986] AC 80 and the Canadian Supreme Court in Canadian Pacific Hotels Ltd v. Bank of Montreal (1987) 77 NR 161 which rejected the notion that, in a contractual context, a tortious duty can be created which produces a responsibility beyond those imposed by the contract.

A possible middle course is to create a separate contract for the advice - and imply a term as to its quality, for the parties will not have addressed this - but this will often fail for lack of consideration and is contrary to the presently received view of one contract between banker and customer with many facets.

It is submitted that the most satisfactory approach at a theoretical level is that posited by Deane J.

2.2 Duty - Positive where Advice is Given

2.2.1 Tort - Advice in Response to a Request

The familiar path of Hedley Byrne & Co. Ltd v. Heller & Partners [1964] AC 465 and Mutual Life & Citizens Assurance Co. Ltd v. Evatt (1970) 122 CLR 556 (H.C.A.) 628; [1971] AC 793 (P.C.) leads to a clear duty succinctly stated in Australia in Shaddock & Associates Pty Ltd v. Parramatta City Council (No. 1) (1981) 150 CLR 225 in the words of the present Chief Justice at 250:

> "... whenever a person gives information or advice to another upon a serious matter or in circumstances where the speaker realises, or ought to realise, that he is being trusted to give the best of his information or advice as a basis for action on the part of the other party and it is reasonable in the circumstances for the other party to act on that information or advice, the speaker comes under a

> duty to exercise reasonable care in the provision of the information or advice he chooses to give."

(See to similar effect Aickin J. at p.256 and Murphy J. at pp.255-256).

The first thing which is to be noted that the duty is to exercise reasonable care in the provision of the information or advice he chooses to give. This would seem to say that provided that advice or information is accurate as far as it goes, the duty is satisfied. However in Hawkins v. Clayton (supra) Gaudron J. expanded the duty dramatically at p.60:

> "Thus the duty to exercise in the imparting of information imports a right in the recipient to receive such information as would be possessed or ascertained by persons in the position of the information giver in the exercise of reasonable skill or knowledge."

It is respectfully suggested that the statement is too wide. However, it is a notion which found favour with the minority of the Board of Judicial Committee in The Royal Bank Trust Co. (Trinidad) Ltd v. Pampellonne [1987] 1 Lloyd's Rep. 218 who considered that to give out inadequate or dangerously deficient information without a further warning as to this was a breach of duty. The majority did not address this topic.

The second thing to notice is that the formulation applies to both information and advice. This is in contrast with the majority of the Privy Council in The Royal Bank Trust Co. (Trinidad) Ltd v. Pampellonne [1987] 1 Lloyd's Rep. 218 where the Privy Council differentiated between merely providing information such as was had and providing advice. In that case Mr and Mrs Pampellonne sought advice in respect of two specific companies. In respect of the first (Davies) details were provided together with a conclusion:

> "All our reports indicate that this company may be regarded as trustworthy for its ordinary business engagements. We trust this information will assist you in making up your mind as to the deposit ..."

There was over a year between the date upon which the letter regarding this investment was given and the date of the actual investment and under cross examination the plaintiff was driven to admit that he had not relied upon the skill and judgment of the bank in making his investment in the company.

Lord Goff who delivered the majority judgment said at p.221:

> "It is not to be forgotten, with regard to the finding that there was, in the circumstances, no duty of care owed by the Bank to the Pampellonnes, that not only was the visit made without any prior appointment or warning, but also that no

> fee was charged by the Bank; that no information was given by Mr Pampellonne regarding his own assets; that no document was signed by Mr Pampellonne regarding his alleged request for advice; and no indication was given by Mr Pampellonne of the amount of any sum which he then had available for investment, or as to how much might be invested in Davies; and that the letter ... was in obviously guarded terms, in that it closed with the words [above quoted]."

> "In all the circumstances, there was ample evidence to support the Judge's conclusion the effect of which was that following request by Mr Pampellonne to investigate Davies the Bank did no more than furnish him with the information contained in the letter ... and that the Pampellonnes when they subsequently invested in Davies did not rely on the skill and judgement of the Bank."

As to the second investment there was a dispute on the facts. The bank manager's view (which was accepted by the trial judge) was that on Mr Pampellonne's first visit he had a credit report from Dun & Bradstreet and he passed on the substance of that report and handed over a brochure and other literature about the company together with an application form provided for those who wish to make a deposit with the company. At the second meeting, the bank manager helped Mr Pampellonne to complete the necessary application form for 16250 (and interest).

Again, Lord Goff observed (p.222):

> "It is to be observed that on this, as on the previous occasion, there was no prior appointment (for either of the two visits); no fee was charged by the Bank; no information was given by the Pampellonnes regarding their assets (other than the amount which they proposed, on their second visit, to invest in Pinnock); and no document was signed by Mr Pampellonne concerning his alleged request for advice."

Again, the original investment for a term had expired and had been renewed prior to the failure of Pinnock.

At p.225, his Lordship said:

> "But once it was held, as the Judge held, that at a brief meeting the Bank was prepared to do no more than provide such information as was available to them, the Judge was entitled to form the opinion on the evidence before him that no duty arose, other than (no doubt) to pass such information accurately to Mr Pampellonne. For these reasons, in the opinion of their Lordships, the decision of Kelsick J.A. that a duty of care rested on the Bank in relation to advice concerning the Pinnock investments ... cannot stand."

Mr Pampellonne's counsel sought to expand the duty to include a duty to warn that the information supplied was not itself appropriate or sufficient or suitable as material on which to base a decision to invest and that, in the absence of such a warning, there was a breach of a duty by the bank.

The Privy Council noted that the matter had not been raised at the trial and evidence should have been called:

> "... and the Judge would then have been able to form a view, upon such evidence whether the circumstances were such as to impose a duty upon the Bank to give any such warning. It may very well be, for example, that since (as the Judge held) Mr Kennedy simply provided information to the Pampellonnes but tendered no advice, the information so given was tendered in such words, in such manner, and such circumstances, that it was plain that it was simply provided as the only information which was available to the Bank, and that it was for the Pampellonnes to make their own assessment of the company as a suitable recipient of their money by way of deposit, in which circumstances it might well have been inappropriate to conclude that any legal duty rested on the Bank to attach a warning to the information so provided."

Again it was asserted that the bank should have warned that the information would need to be updated regularly if the investment were retained or reinvested. In response, at p.226 their Lordships said:

> "But it cannot follow that in the present case, if the Bank had given advice regarding Pinnock, it should have stated that the advice was good for six months; indeed, any such advice might be extremely dangerous. Any sensible investor (and it is not to be forgotten that the Judge considered Mr Pampellonne to be a thrifty and careful man in matters of finance) must realise that, if advice is given regarding investment, it is given in the light of the circumstances then prevailing, and that such circumstances may change. In their Lordships' opinion there was no basis for interfering with the Judge's conclusion, particularly with regard to the re-investment of the initial sums invested by the Pampellonnes in Pinnock, and with regard to any further investments by them in Pinnock, that such investments were made by the Pampellonnes on their own initiative independently of any advice which might have been given by the Bank."

Lord Templeman and Sir Robin Cooke dissented. Their Lordships considered (p.227) that there was a duty of care arising by virtue of the fact that Mr Kennedy, the expert, supplied Mr Pampellonne, the layman, with information about Pinnock which influenced Mr Pampellonne to invest in Pinnock. Their Lordships do not however spell out that duty beyond that. Their Lordships stated (p.228) that the:

> "... duty of care could have been satisfied in a number of ways either by offering to study the literature fully and make any necessary further enquiries (no doubt for a fee) or to advise Mr Pampellonne to take other professional advice. At the very least, Mr Kennedy should have warned Mr Pampellonne that he had inadequate information to enable him to recommend the company as an investment and without further investigation had no means of knowing whether Pinnock was a safe haven for Mr Pampellonne's money or not."
>
> "In the circumstances, the duty naturally extended to warning Mr Pampellonne of the shortcomings of the information passed on by Mr Kennedy about Pinnock."

Their Lordships considered the information to be "inadequate to enable a decision about whether an investment in Pinnock would be prudent" and "useless" and "positively dangerous information" to someone who was unsophisticated.

In the end the information was characterised by their Lordships as "inadequate and misleading".

Their Lordships then embark upon a very effective demolition of the majority judgment (p.228):

> "On the existence of a duty of care the majority of the Board are impressed by the fact that Mr Pampellonne had no prior appointment for the first interview. That the existence of a duty of care on the part of Mr Kennedy can hardly depend on whether or not Mr Pampellonne telephoned the previous day and said he would like to have a word with Mr Kennedy at his convenience. The majority of the Board point out that no fee was charged by the Bank. But on principle and on ample authority a Bank is not absolved from a duty of care or from a breach of duty of care by the failure of the Bank Manager to charge for information or advice rendered by the Bank to a customer. The Bank is not absolved from the duty of care to give warning or advice where it is encumbered on them to do so. The same principles applied to the trust company. 'No information was given by the Pampellonnes regarding their assets'. But Mr Kennedy knew before it was too late that the Pampellonnes were entrusting 16250 to Pinnock and he had no reason to believe the financial position of the Pampellonnes justified them in gambling 16250 on the strength of the inadequate and misleading information which Mr Kennedy had given to the Pampellonnes."

With respect to the minority, their Lordships give too little weight to the fact that if someone walks in off the street and asks "what information do you have on X" and is supplied with such paper information as you have lying about, it must be as plain as pikestaff that, absent more, one is getting <u>someone else's</u> information, which may or may not be adequate for your

purpose. To have to spell out such a warning is to impose the duty of a nursemaid.

True each factor given by the majority, alone, is not determinative but, in the end the congeries is the relevant matter, not whether each, alone, would be irrelevant in some other case.

Nevertheless the case emphasises how sharply minds vary on such an issue. Their Lordships 3:2 reversed the Court of Appeal 2:1 who reversed the trial judge - a bare majority of one in nine.

2.2.2 Tort - Advice Voluntarily Provided or Undertaken

Where the bank voluntarily or unilaterally gives out information in circumstances where it know that the customer will be relying upon that information it must do so with reasonable care. Again, this category is well established and calls for no comment. It is simply an application of Shaddock.

Cases such as Box v. Midland Bank Ltd [1979] 2 Lloyd's Rep. 391; [1981] 1 Lloyd's Rep. 434 (on appeal on a different point) and Cornish v. Midland Bank PLC [1985] 3 All ER 513; [1985] financial L.R. 289 where advice was negligently given illustrate this.

In each of these cases, the bank had undertaken advice and was therefore under a duty to take reasonable care. In the former, the bank manager negligently predicated the outcome of an application for a loan. In the latter the bank misexplained the effect of a mortgage document. In each case the bank was liable.

2.3 Duty - Negative where Advice is Not Given

2.3.1 Fiduciary Relationship

The fiduciary duty obligation arising out of extraordinary cases such as Lloyds Bank Limited v. Bundy [1975] 1 QB 327 (as explained and limited in National Westminster Bank PLC v. Morgan [1985] AC 686) and Commercial Bank of Australia v. Amadio (1983) 151 CLR 447 can produce a duty to advise. Though much criticised, Lloyds Bank v. Bundy, on the facts as found, has been cited without disapproval in Amadio by Gibbs C.J. at 459, by Deane J. at 475 and by Dawson J. at 490, and with approval in Daley v. Sydney Stock Exchange Ltd (1986) CLR 371 at 385 by Brennan J.

At the expense of accuracy, where the bank's duty to its customer (as created) had conflicted with its own interests, the duty to explain fully or, better still, get another, independent person to explain fully is undoubted.

2.3.2 Tort - Duty Imposed

As noted above, it is an intriguing question (on which the High Court appears to be split) whether given an existing contractual relationship there is room for a tortious duty as well.

So far as customers were concerned, the Privy Council in Tai Hing Cotton Mill Ltd v. Liu Chong Hing Bank Ltd [1986] AC 80 asserted with little review or discussion that one could not.

The normal rule is that which is sauce for the goose is sauce for the gander but, in this case, as it is the bank that is the cooked goose, one cynically must realise that the normal rule will not apply.

The High Court moreover have shown a remarkable divergence of view of the matter. In their dissenting judgment in Hawkins v. Clayton (unreported 8th April 1988) Mason C.J. and Wilson J. said:

> "In determining the precise nature of the relationship giving rise to the alleged duty of care, we find it helpful to start with the contract under which the will was drawn and retained in the custody of the respondent. It is that contract which 'indicate[s] the nature of the relationship that gives rise to the common law duty of care'. ... It was said by Windeyer J. in Voli v. Inglewood Shire Council in the context of ascertaining the duty of care which an architect owes to one who is a stranger to the contract between the architect and the building owner, that the contract 'is not an irrelevant circumstance. It determines what was the task upon which [the architect] entered' so it is here."

On the other hand, Deane J. concluded that the contractual relationship did not necessarily prevent a parallel liability in tort but, in the context, having held that there was a duty of care, held that that told against the implication of a term into the contract (see pp.49-52 of the transcript).

Putting aside this interesting jurisprudential conclusion, the assertion that the mere relationship of banker and customer is sufficient to impose upon the banker a duty to advise him as to the wisdom of the transaction or explain fully the pitfalls which are inherent in the facility requested or offered is raised frequently in the foreign currency context.

A tortious duty on a banker to give advice to his customer about the transaction into which the customer was proposing to enter must rise, if at all from that shimmering elusive chimera the "sufficient relationship of proximity" between the banker and the customer. This phantom born in the 23rd Psalm of the Law - the speech of Lord Atkin in Donoghue v. Stevenson [1932] AC 532 is undergoing something of a midlife crisis. Like all great

revelations, lesser, later mortals have enshrined its literal meaning which can clearly be taken too far. In the United Kingdom Lord Wilberforce's equally famous (or infamous) re-statement in Anns v. Merton London Borough Council [1978] AC 728 has also drawn criticism.

In Australia the High Court has also had several attempts at the problem which, significantly for banks, centres around the instance where economic loss is caused. The rather unseemly wrangling between the Privy Council, House of Lords and the New Zealand High Court in Candlewood Navigation Corporation v. Milsui O.S.K. Lines [1986] AC 1, Leigh and Sullivan Ltd v. Aliakmon Shipping [1986] AC 728, N.Z. Forest Products v. A.G. [1985] NZLR 405, Caltex Oil (Aust) Ltd v. Dredge "Willemstad" [1976] 136 CLR 529 and San Sebastian Pty Ltd v. The Minister 162 CLR 340 has led to analysis and reanalysis of the essential requisites to create a duty of care in tort.

Further difficulties are added when the liability of the maker of a statement is considered. In the course of the San Sebastian judgment the joint judgment of Gibbs C.J. and Mason, Wilson and Dawson JJ. said:

> "When economic loss results from negligent misstatement, the element of reliance plays a prominent part in the ascertainment of a relationship of proximity between the plaintiff and the defendant, and therefore in the ascertainment of a duty of care. But when the economic loss results from a negligent act or omission outside the realm of negligent misstatement, the element of reliance may not be present. It is in this sphere that the absence of reliance as a factor creates an additional difficulty in deciding whether a sufficient relationship of proximity exists to enable a plaintiff to recover economic loss."

> "In cases of negligent misstatement, reliance plays an important role, particularly so when the defendant directs his statement to a class of persons with the intention of inducing members of the class to act or refrain from acting, in reliance on the statement, in circumstances where he should realize that they may thereby suffer economic loss if the statement is not true. In these situations Caltex, which related to economic loss caused by a negligent act or omission, should not be regarded as excluding the existence of a duty of care."

The most recent discussion is in the High Court in Hawkins v. Clayton (unreported 8th March 1988) which concerned - of all things - whether a duty existed on a solicitor holding a will to locate the executor and advise him of it.

In Hawkins v. Clayton (supra) Deane J. said (p.40):

> "... where the plaintiff's claim is for pure economic loss. In that area, the categories of case in which the requisite

> relationship of proximity is to be found are properly to be seen as special in that they will be characterised by some additional element or elements which will commonly (but not necessarily) consists of known reliance (or dependence) or the assumption of responsibility or a combination of the two."

(Citing Sutherland Shire Council v. Heyman (1985) 157 CLR 424 at pp.443-444, 466-468 and 501-502.)

Frankly, the imposition by courts of duties which the parties only dream up when their lawyers get into the act long after the event is a matter which ought to be discouraged. If a customer is going into a major undertaking he ought not to look to anybody he happens to deal with (his lawyer for conveyancing, his accountant for accounting purposes, his banker for money) and suggest that they should gratuitously advise on the risks or absence of wisdom in the proposal. Certainly the banker who is asked only to lend money (on his hypothesis) should be looking to his own interests - can it be repaid? That repayment may be out of a sale of the asset purchased - not necessarily out of intermediate cash flow.

The cases are delightfully inconsistent.

To begin with, Lloyds Bank v. Bundy [1975] 1 QB 327 is the start of a line of cases which appear to impose an additional duty by reference to an argument raised by counsel. The usual argument that judgment against the bank would seriously affect banking practice was raised and the response was the usual judicial:

> "With all respect to that submission, it seems necessary to point out that nothing in this judgment affects the duty of a bank in the normal case where it is obtaining a guarantee, and in accordance with standard practice explains to the person about to sign its legal effect and the sums involved." (per Sir Eric Sachs [1975] 1 QB 326 at 347A)

That passage was cited with approval and as "absolutely right" and "good sense and good law" by the House of Lords in National Westminster Bank PLC v. Morgan [1985] AC 686, 708-9. In Bundy's case, Mr Bundy was a customer of the bank. As was Mrs Morgan in the National Westminster case. In O'Hara v. Allied Irish Bank [1985] BCLC 52, Harman J. dismissed the notion that the sentence gave rise to a duty in a bank to advise a prospective guarantor who was not a customer. His Lordship said (p.53):

> "I cannot see that a stranger, invited to sign a guarantee (in respect of some matter which the stranger has a commercial interest) by a third party - perhaps a bank - who had advanced money to the person whose account is to be guaranteed, is owed any duty whatever at that point in time. It seems to me that at that point they are mere prospective contracting parties. There is at that date no contract

> between them. There is no relationship that I can see giving rise to a duty of care pre-contractual between one intending contracting party and another intending contracting party; short of course of fraud or some deliberate misrepresentation, or some existing fiduciary duty relationship, there is no duty of care."

His lordship doubtless would include an Amadio type exclusion in his judgment.

Again in Cornish v. Midland Bank [1985] 3 All ER 513; [1985] Financial L.R. 298 the plaintiff was also a customer of the bank. The case turned primarily upon a misrepresentation by the bank as to the extent of the liability under the guarantee which was signed.

In that case, however, it was asserted that merely because the wife was a customer, the bank had an obligation to advise. Croom-Johnson L.J. did not deal with the submission at all though distinguished the O'Hara case on the basis that advice was given to a customer. Glidewell L.J. (at p.520(g)) found it unnecessary to answer the question given that the bank undertook the duty to explain fully and properly the effect of the mortgage and failed to carry out that duty. Kerr L.J. having invited Croom-Johnson L.J. to read the first judgment deliberately decided to embark upon a discussion of that issue. His Lordship said at p.522(e) after citing Sir Eric Sachs in Bundy:

> "Nevertheless, it appears to be implicit in this sentence that, at any rate in relation to customers, banks may well be under a duty, 'in accordance with standard practice', to proffer an adequate explanation to persons about to sign a document in the nature of a guarantee."

His Lordship continued (p.522(j)):

> "I think that the same thought is implicit in the sentence from the judgment of Sachs L.J. which I have quoted. He assumed that banks would owe some duty to their customers in the situations to which he referred and that the standard practice of banks would support this assumption. This would equally have been my approach to the present case if it had been necessary to decide this issue. I think I would have been inclined to the view that in the circumstances of this case the bank owed a duty to the plaintiff, as the bank's customer, to proffer to her some adequate explanation of the nature and effect of the document which she had come to sign. If expert evidence had been called as to the standard practices of banks in situations such as the present, I think that this would have supported the conclusion that bankers themselves recognised that their proper professional standards would not be consistent with mere silence on their part in such situations."

Against that, in Williams & Glyn's Bank v. Barnes [1981] Commercial L.R. 205, Barnes borrowed money which he proposed to put into shares in a related company. In due course when requested to repay the money he asserted that the bank should have advised him against the borrowing. Gibson J. said (pp.207-8):

> "No duty in law arises upon the bank either to consider the prudence of the lending from the customer's point of view, or to advise with reference to it. Such a duty would arise only by contract, express or implied, or upon the principles of assumption of responsibility and reliance stated in Hedley Byrne or in cases of fiduciary duty. The same answer is to be given to the question even if the bank knows or ought to know that the borrowing and application of the loan, as intended by the customer, are imprudent ..."

> "The essential reason why the principle of Donoghue v. Stevenson cannot be extended to the transaction of lending in the way contended for by the defendant [Barnes] is that in this case the defendant asked for the loan; the Bank lent the money; the Bank did no act other than that which the Bank was asked to do. Neither the defendant nor [the company] was required to borrow. The suggestion that a Bank, dealing with a businessman of full age and competence, without being asked, or assuming the responsibility to advise, must consider the prudence from the point of view of the customer of a lending which the Bank is asked to make, as a matter of obligation upon the Bank, and in the absence of fiduciary duty, is in my judgment impossible to sustain."

Again, it was put that a relationship extending from the years 1965 to 1972 created a duty to carry out all the services which the bank performs for the company with due care including the careful consideration of financial information supplied by the customer to the bank, such as accounts, the decision by the bank whether to lend or not and the making available of money on overdraft for use by the customer. It was argued that these had to be performed with due regard to the interests of the customer quite apart from the question whether any oral advice was requested or offered. Here the customer had been a customer from 1965 to 1972 and Gibson J. did not understand how:

> "... a relationship between a bank and a customer, however prolonged, and however rich in the exchange of information and ideas and suggestions, congratulations or condolences, and yet does not give rise to any relevant contractual obligation, express or implied and which does not give rise to any fiduciary duty on the bank, can be 'special' in any relevant sense so as to give rise to the duties alleged in this case." (p.208)

> "... the Bank neither assumed, nor acted so as to place itself under duties to [the customer] of the nature alleged.

In short, the Bank did not become general financial advisor to [the company], The Bank remained in a relationship of clearing bank to customer and of lending bank to borrower. By reason of the size of the lendings, and the need for the Bank to be fully informed about [the customer] in the Bank's own interest, and because of the long continued relationship, the bank asked for and acquired a great deal of information about [the company]. If the Bank did on occasion assume to advise [the company] or to state a course of action which the Bank wished [the company] to follow the Bank did, in probability, assume the obligation to advise with proper care. I say in probability because in each case of the giving of such advice, it would be necessary to consider whether, the Bank having assumed no general obligation to advise, the particular facts show a particular assumption of responsibility."

In Redmond v. Allied Irish Bank PLC [1987] 2 FTLR (there is also a brief report Times 5th June 1987, and Financial Times 15th July 1987, International Banking Law Volume 6 p.25) a customer attended with an acquaintance with cheques crossed "not negotiable account payee only" made payable to someone other than the acquaintance (who in fact had no title). It was common ground that the bank was aware that the customer proposed to bank the cheques and give case to his acquaintance. Saville J. rejected the notion of duty to warn even assuming the customer was not a financially sophisticated person.

His Lordship said at p.226:

"I agree with [counsel] on behalf of the bank, who submitted that a duty to take reasonable care in interpreting, ascertaining and acting in accordance with instructions of a customer is something wholly different from the duty suggested by [counsel for the plaintiff] in the present case, which is to warn against, or advise on, the risks inherent in carrying through what the customer wants to do. In my view the banker/customer relationship creates no such duty, nor was any such duty created by any of the circumstances upon which Mr Wallace relied. Of course, if a customer seeks advice or is voluntarily given advice, then other considerations might well apply, as would also be the case where any fiduciary relationship arose as in Lloyds Bank v. Bundy. In a case such as the present, however, I can see no basis to advise or warn a customer that there are risks attendant upon something which the customer wishes to do. Such a duty, unlike the duty held to exist in Selangor's case is not required in order to give efficacy to the contractual relationship between the parties and I can find nothing to suggest that the circumstances were such that even disregarding the observations in Tai Hing Cotton Mill Ltd v. Liu Chong Hing Bank Ltd some duty in tort owed by the defendants to the plaintiff."

In a different context in Ormindale Holdings v. Ray Wolfe etc. (1980) 116 DLR 3d 346 the British Columbian Supreme Court noted that businessmen (who compromise most offshore borrowers) must remember that advice is only one opinion. They do not want to hear "on the one hand" "on the other". With opinions the contrary view can usually be held without negligence - even if the prognostication proves to be erroneous.

Against that there is a line of authorities from Woods v. Martins Bank Ltd [1959] 1 QB 55 where at 72, Salmon J. discussed whether in that particular case there was a duty to advise. An argument was made that the plaintiff was not a customer until after the relevant date, which was rejected on the facts. Salmon J. went on to say:

> "Nevertheless, even if he did not become a customer until later, the defendant would still, in my judgment, have been under a duty to exercise ordinary care and skill in advising him in relation to the 15,000 transaction. I have found that it is part of the defendant's business to advise customers and potential customers on financial matters of all kinds. ... The plaintiff was a potential customer and one whose custom the defendant Johnson was anxious to acquire and soon did acquire. The plaintiff had asked the defendant Johnson if he would become his financial advisor to which the defendant Johnson had replied that the defendant bank would be glad to take charge of his financial affairs."

The case cannot be taken as authority for the proposition that a bank generally does have such an obligation. The rationale of this decision is set out at page 71:

> "I find that it was and is within the scope of the defendant's business to advise on all financial matters and that, as they did advise him, they owed a duty to the plaintiff to advise him with reasonable care and skill in each of the transactions to which I have referred."

His Lordship went on:

> "No doubt the defendant Johnson could have refused to advise the plaintiff, but, as he chose to advise him, the law in these circumstances imposes an obligation on him to advise with reasonable care and skill."

It is submitted this is a case of an assumption of obligation to advise not an example of a general duty to advise.

In Kullack (supra) at p.23, Pincus J. said:

> "The statement of claim further raises a case in negligence, alleging that the respondents owed the applicant a duty to advise her carefully. I accept that, as contended by

[counsel for the applicant] such a duty may arise, even before any loan is made or money deposited - i.e. when the applicant is merely a potential customer: Woods v. Martin Bank Ltd."

After reference to San Sebastian his Honour continued (p.24):

> "The three conditions his Honour [Brennan J.] mentioned would have been satisfied here if the applicant had asked the bank for advice about offshore loans, their making and their management; had the bank accepted the position of advising her on those matters, a duty to take care may well have arisen. Senior counsel for the bank ... pointed to evidence which was given in this case to the effect that no formal advisory service with respect to relevant matters was established by the bank until considerably after this loan was negotiated. However, common sense in the evidence of Mr Mills [an officer of the bank], supports that the customers commonly are encouraged to, and do, rely upon bank managers for advice with respect to their financial affairs, and more particularly with respect to availability and characteristics of loans from or through the bank."

In the event, the applicant scored the trifecta. She did not satisfy the court that there had been any misrepresentation, she admitted that the person who was alleged to have given the misrepresentation claimed no special knowledge of offshore loans and finally she did not satisfy his Honour that she relied upon such advice.

Having made that conclusion, his Honour also concluded that the taking of a Swiss Franc loan was from the applicant's point of view an imprudent transaction because the size of the loan corresponded to more than half the value of the applicant's net assets (which were mostly real estate) and was therefore unreasonably hazardous. His Honour went on (p.26):

> "I have given consideration to the question whether it was negligent of the bank not positively to advise the applicant against the proposed loan transaction. Harwood, although he claims to have given warnings about exchange rate fluctuations, does not say he gave such advice. Whereas in some circumstances the failure positively to advise a customer against an offshore loan, the customer being one reliant on the bank for advice, might be negligent, in this case I am not satisfied that the applicant indicated any reliance on the bank for advice as to whether to borrow Swiss Francs and this allegation therefore also failed."

In National Australia Bank Limited v. Nobile (unreported - Full Court of the Federal Court 17th March 1988), the duty to advise was taken further by Mr Justice Davies. In that case (p.25 of the transcript) in discussion an Amadio situation with regard to a guarantee - and hence not strictly of relevance to this

discussion, his Honour was differentiating and contrasting factors in the case before his Honour with those in Amadio and said:

> "Moreover, there is an element in the present case that did not appear in Amadio's case and that is that Mr and Mrs Martelli were long time customers of the Zillmere branch of the bank. The fact that a person is a customer of a branch does not mean that the customer necessarily trusts or is understood to trust the bank manager. But it does mean that the customer and the bank manager have had contractual relationships which involved duties and dealing on the bank's part and that the customer has been entitled to rely on the bank's proper performance of those duties. It is not a great step to conclude that a customer who has dealt with a branch for a long time with mutual satisfaction on each side has come to trust the officers of the branch in their dealings with him. Mr and Mrs Martelli had been customers of the bank for 24 years and Mr Martelli had often sought and received assistance from the bank in relation to his financial affairs, not only in the form of loans which had been granted to him from time to time, but also in the writing out of his cheques and deposit slips. Having regard to the nature of the subject transactions into which Mr and Mrs Martelli entered, which was a transaction so disadvantageous to them, it is an easy inference to draw that Mr and Mrs Martelli entered into it not only because the trusted their son Carlo but also because they relied upon the bank and its manager, Mr Bannerman."

Whilst the context was, of course, completely different, the trend is obvious.

There are however some hopeful cases in the Australian context, especially given that his Honour now graces the High Court. In James v. ANZ Bank (1986) 64 ALR 347, Toohey J. said of an allegation that the bank failed to advise the applicants that a business conducted by them could not service the loan facilities and financial arrangements made by the bank for the applicants (p.385):

> "In my view there was no duty on the bank to give the applicants advice as to whether or not their business could service the loan, which I understand in this case to be a reference to the actual loan provided by the bank."

> "I am not to be taken as expressing some general principle that there is no duty on the part of a bank which is providing a loan to a customer to advise that customer of the prospects of meeting the obligations imposed by the loan. I speak only of the circumstances of this particular case."

His Honour then went on to detail those particular circumstances:

> "When the bank did provide the loan for the applicants, it was some seven months after the contract for the purchase of Bibiking had been executed and the loan was made to assist the applicants by reason of their inability to secure finance elsewhere. At the time the contract was executed the bank did not have the information necessary to make an assessment of the extent of the applicants' capacity to borrow and repay a substantial loan. When the bank made the advance to the applicants in February 1981, it was against the background that O'Toole had been advising the applicants on their situation and their potential to repay a loan."

There are a number of other heads of negligent conduct alleged against the bank in that case including various failures to advise and his Honour found that there was no duty on the bank to give the advice suggested. One passage which is an interesting contrast to Nobile is (p.385):

> "It is true that the bank had been involved with the applicants in the purchase of a number of farming properties over 20 years or so. But the applicants did not rely upon advice from the bank in deciding to make those purchases. The applicants made those decisions for themselves and then looked to the bank for financial assistance to complete the purchases."

Toohey J. also dealt with a similar situation in Stanton v. ANZ Banking Group Limited (1987) ATPR 40-755 at 48, 193:

> "The Stantons did not go to the bank to get advice about the arrangements suggested by Harris. They did not go to get advice as to whether or not they should borrow money. They (in particular Mr Stanton) had decided to buy the truck and enter into a co-operative arrangement with Harris. They went to the bank to negotiate a loan to enable them to buy the truck. They did not go to the bank to get information about Harris whether about his reliability or otherwise. Furthermore there is nothing to suggest that Mr Kirwan [the manager] knew any more about the proposed arrangements than did the Stantons ... whatever was said by Mr Kirwan was by way of opinion ... there is no reason to doubt that he believed what he said."

So there it is - all views are arguable in both the UK and Australia. The strict view is suggested (Canute-like) as the better but with no confidence it will prevail.

2.4 Trade Practices Act

Section 52 of the Trade Practices Act : False and Misleading Conduct - is also a fruitful ground for hard pressed borrowers. It seems frequently to be raised by way of counter manoeuvre to

slow down recovery proceedings launched by bankers which must be brought in the Supreme Court.

Reliance upon the conduct or statement with loss or damage is the gist of the action and the loss or damage is assessed on the basis of negligence rather than contract. My experience with the section 52 cases thus far is more that they are simply an alternative way of pleading negligent misstatement, the vital difference being that the statement must merely be in the course of trade or commerce rather than pursuant to a duty.

Whilst silence can amount to false and misleading conduct in a bad case (Buvidineuse v. Bevanere Pty Ltd (1984) 3 FCR 1; Herjo Investments v. Collins (1988) ALR 83) it is submitted that it is stretching matters a little far in the usual banking situation.

Another source under the Trade Practices Act is section 74(2) the implied warranty is the quality of services and the result those services are desired to achieve.

3. FUNNY ARGUMENTS

There are a number of "funny arguments" which have been raised by various borrowers in attempts to avoid their liability.

3.1 AUD Borrowings Only

The first and perhaps most obvious is that which suggests that as the only currency which the borrower physically controls at any given time was Australian currency the obligation to repay is that Australian currency hence there is no exchange rate risk. The argument is perhaps characterised for intellectual sophistry for which lawyers are well noted but, unfortunately, is not characterised by any substance. It has been rejected on at least two occasions, the first being an unreported decision of Wood J. in the New South Wales Supreme Court - Australia and New Zealand Banking Group Limited v. Douglas (Commercial Division No. 28167 of 1987, 11th November 1987) and the other an unreported decision of Pincus J. - Kullack v. Australia and New Zealand Banking Group Limited Qld. G. 7 of 1987 (4th December 1987). In the latter case, Pincus J. said (p.8):

> "I think that the applicant is a person of limited business knowledge and experience, but she must have been aware that there was some essentially different characteristic of an offshore loan which explained its being offered at an interest only about half that available domestically. I am satisfied that she appreciated from the outset that she had to repay either the amount of Swiss Francs borrowed or its Australian equivalent at the time of repayment. I do not believe her lack of commercial sophistication was so complete that she was able to convince herself that there was simply two alternative sources of loan capital, one at 8% and the other at 15%, the former having no substantial

> disadvantage but simply possessing the characteristic (irrelevant from the customer's point of view) that it was derived from a foreign source. I am inclined to think that the applicant exaggerated her commercial or pecuniary naivety."

In the former case, the precise activity of the bank in borrowing the foreign currency and selling it into the foreign exchange market and crediting the proceeds was gone into in some detail by his Honour Mr Justice Wood with the inevitable result of a liability in Swiss Francs.

3.2 Gambling

Another strange defence which has been developed was that a contract of borrowing offshore (and sometimes the management of that offshore risk) is one which alleges it is all null and void by reason of various Gaming and Wagering Acts. The contention was rejected in Midland International Australia Limited v. David Aitkens Enterprises Pty Ltd (unreported 17887 of 1987 Rogers J. Commercial Division 26th November 1987); Deutsche Bank v. Mitchell (unreported Needham J. 4898 of 1987 3.3.88) in respect of a loan with its risk denominated in a foreign currency. Agreement to trade in differences is a variation on a theme - see the pleading application in Aylward v. Westpac Banking Corporation (unreported Federal Court Qld G207 of 1987 judgment of Pincus J. 29th April 1988 and Full Court 8.8.88) in respect of the management of an offshore risk.

4. WHY CASES FAIL

So far, despite some advertising to the contrary all cases brought by borrowers against banks in this general field have failed. The reasons are various.

First, there is a curious naivete amongst those who would sue which has been called the Mediterranean influence - their understanding of the English language and of commerce and their business acumen diminish in direct proportion to the decline of the AUD against the currency of the loan. Each plaintiff so far has been found to have exaggerated his ignorance.

This is not surprising for given that these borrowings are for AUD$300,000 and upward and that prudential asset/loan ratios are of the order of 65-75 percent that indicates an ability to accumulate wealth beyond that of the average person. Coupled with that, invariably, is a brain of more than usual intelligence and the story just told does not ring true.

Second, most borrowers do not rely upon the banker's advice to engage in offshore loans. They make their own judgments based upon a range of information. The most powerful factor is generally some friend who "had one too". They are mesmerised by the low interest rate and often are victims of greed in that some early loans were immensely profitable.

Third, banks as traditional conservative operations normally document what happens. The customers almost never do. A bank manager from the banker's international department (who has no interest per se in whether the loan proceeds) with a diary note of warning is more often believed than the formerly lovestruck but now embittered applicant fighting for his financial future.

Fourth, in my experience, advice which is given in the area is not, despite what you hear, negligently given. It is a curious phenomenon of the mind that when one wants to do something, one hears only the good points and screens out the bad. Information that most of the market predict that the AUD will rise to a level X by day Y is remembered but the countervailing warning that the fundamentals indicate it should be falling or that the charts predict a plateau or fall will be lost. Further, having only oneself to blame one casts around for any scapegoat.

None has suggested that one must ensure that the customer has given due weight to all the competing considerations. Despite the trend to attempt to preserve idiots from themselves, such a suggestion has not found favour.

Fourth, because FX is a market, there is no sure answer. If there were, everyone would always make money (actually the market would cease as all would know what was to happen). The unpredictability of it all means that there is a very high risk that advice will be wrong. But that does not make the advice erroneous. If given with reasonable care and skill it is not. With such a market as this Rogers J. has held that the level of care is very low.