CURRENT DEVELOPMENTS
Foreign Currency Transactions - Liability for Negligent Advice

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In discussing this topic it is convenient first to identify the types of transactions in which foreign currency transactions are involved. The most commonly discussed transactions in recent times have been loans in foreign currency, because the decline in the Australian dollar has meant that the amount which borrowers have to repay has increased dramatically. It must be remembered, however, that there are many other types of transactions which involve foreign currency, and in relation to which liability for negligent advice may arise. Examples may readily be seen in contracts for the sale or purchase of minerals, or of other primary products, for the purchase of manufactured goods, for the provision of personal services (e.g. employees of foreign companies) or for the acquisition of less tangible rights, such as shares, franchises or intellectual property. Of course, before the dollar floated in December 1983 the effect of exchange rates on contracts for sale of primary produce was a very significant factor affecting the exchange rate fixed by the government from time to time.

It should be borne in mind also that not all foreign currency transactions involve only one foreign currency. It may well be that a double conversion is required, e.g. the amount to be paid or repaid as interest or principal on a loan, or otherwise, may be the United States dollar equivalent of another foreign currency, and in order to ascertain the number of Australian dollars necessary to fund the payment, it is necessary to make the further conversion from United States dollars to Australian dollars.

A second way in which foreign currency transactions may involve more than one currency is where one party, say borrower or lender, is given the right to change the currency of the transaction. For example a borrower may be given the right on each interest day to select the currency in which the loan is to be expressed for the next interest period. One party may also have the right to choose to change the currency of the transaction to Australian dollars.

These observations are introductory but they are intended to demonstrate the variety of circumstances in which there is the potential for "liability for negligent advice" to arise. Negligent advice, however, without there being loss arising from it, is a matter of scholarship and a useful starting point for present purposes is to consider the way in which such loss may arise.

The possibility of losses in relation to foreign currency transactions arises because - to state the trite - the value of one currency in relation to another changes. An Australian who is required to pay 1,250,000 Swiss francs will suffer, in Australian dollar terms, a "loss" if the number of Australian dollars necessary to buy the 1,250,000 Swiss francs increases between the time of the loan, and the time when it is necessary to repay it. Of course, leaving aside any decline in the purchasing power of the Swiss franc - which gives rise to different issues - there is no loss by the borrower if the transaction is considered in Swiss francs. By that I mean that he borrowed X francs. He has to repay X francs. What is the loss?

I would mention that this appears to give rise to some difficult questions.

For example an obligation to repay principal will ordinarily be expressed as an obligation to pay a specified number of Swiss francs. The number of Australian dollars required to buy those Swiss francs will vary from day to day. Thus at the date of the drawdown it may have been $A1.2m. but at the agreed date for repayment it may be $A1.9m., but at the date of judgment $A1.7m., or $A2m. Has the plaintiff suffered any loss and, if so, what is its amount?

Generally speaking the first of these questions would be answered, I think, by the application of the principle in The Despina R. [1979] AC 685, namely that "the plaintiff should be compensated for the expense or loss in the currency which most truly expresses loss".

In relation to the second question, it seems clear that if the plaintiff did not have to pay more Australian dollars than those obtained from the loan originally, he has suffered no loss. On the other hand, if he has suffered some loss as at that date, and the loan has remained in the foreign currency, the amount of the loss is difficult to ascertain. Should it be the number of dollars necessary to buy the foreign currency:

(a) at the date when repayment should have been made;

(b) at the date when judgment is given;

(c) at the date when payment is made.

I think that the only workable solution is to select the first of these dates.

The next question is that of the persons who may be liable for giving negligent advice.

There is probably no difficulty in identifying those persons, and they fall into categories:

(a) Professional advisors. Some clients engaging in foreign currency transactions have engaged lawyers, accountants, economists and those experienced in foreign exchange dealings to advise them in relation to whether they should enter into the transactions, and in relation to whether they should exercise options open to them in the transactions, e.g. whether to change currency, or to vary the length of an interest period. Professional advisors may be liable, of course, on the ordinary principles attaching liability to such advisors.

I should add that I include in the class of professional advisors those who, though not "retained" by a party, in fact give advice expecting it to be relied on.

(b) Other parties to the transaction. There are circumstances in which another party to the transaction giving rise to the loss is liable for negligent advice. For example, a lender may undertake to "manage" the loan, or to advise on whether the currency or interest period should be changed. The lender, and its relevant officers, may be liable.

Let me turn then to the possible bases for liability, and the circumstances in which liability may arise.

It may be thought to be unfashionable to say it, but it still remains the law that ordinarily speaking a lender is not liable to his borrower merely because the borrower has entered into a transaction which carries with it inherent risks. Also, and again ordinarily speaking, the documents of loan will not contain any contractual provision which might give rise to liability.
It is thus usually necessary to go to circumstances outside the instruments which constitute the transaction.

In this regard it is almost inevitable that a lender will have had some dealings with the borrower prior to the actual execution of the instruments of loan and these events may give rise to a liability. For example it would be surprising if there had not been some discussion concerning the way in which the currency was likely to fluctuate in the future.

A possible basis for liability is then s.52(1) of the Trade Practices Act 1974 which provides that a person shall not in trade or commerce engage in conduct which is misleading or deceptive or is likely to be misleading or deceptive. Statements made in the course of negotiations leading to a foreign currency loan, if incorrect, may give rise to a liability in damages under that provision. Again it may be possible to have the transactions reversed and brought to an end.

If the statements made are false and in fact led to the entry into the transaction there would also be a right to have them set aside under the general law of misrepresentation, but such statements if made without any honest belief in their truth will also give rise to a liability in fraud.

The statements which are made in such discussions, however, will often be statements not of existing facts but of predictions for the future. If the views are not honestly held then a liability may arise under the Trade Practices Act in respect of them. See s.51A as to the onus of proof.

Under s.82(1) of the Trade Practices Act the amount of any loss or damage suffered by a contravention of s.52(1) may be recovered from the principal involved or from "any person involved in the contravention". The persons falling within that description are those mentioned in s.75B, a section which includes a wide range of persons as parties, including persons who had controlled or procured, or have been directly or indirectly knowingly concerned in or party to the contravention.

There is also the possibility that the principle applied by the High Court in Commercial Bank of Australia Ltd. v. Amadio (1983) 151 CLR 447 might apply. That principle applies where circumstances have placed the borrower at a serious disadvantage vis-a-vis the lender, and where it is not in accordance with equity or good conscience that the lender should seek to enforce, or retain the benefit of, the dealing. It is possible that a borrowing of foreign currency might fall within the principle, although the circumstances would be atypical.

The circumstances in which a loss may arise from negligent advice in relation to foreign exchange transactions will also vary.

Advice given at the time of proposed entry into a transaction may give rise to loss, because of:

(a) predictions as to the likely course of currency values;

(b) advice about the desirability of accepting particular provision (e.g. onerous "claw-back" clauses);

(c) failure to advise on the risks involved.

Again, during the course of a transaction circumstances may arise which will attract liability. Some are:

(a) advising to change, or not to change, the currency of a loan;

(b) advising on the duration of an interest period; and

(c) advising, or not advising, hedging or paying out the loan when it would be prudent to do so.

Notwithstanding that the possibility of a successful action for damages for negligent advice may lie, they are actions which have their own difficulties.
The principal difficulty is that a foreign currency transaction is inherently risky, and it is unlikely that the borrower did not have some awareness of the risk. The extent of the awareness will vary, of course, but many borrowers will have been fully aware of the risk. That does not mean that an advisor will escape liability if the advisor created a sense of false security.

A second ground on which such actions may well fail is lack of reliance upon the advice.

Finally, the whole area is one where the determination of liability will depend on questions of fact, rather than questions of law.