CURRENT DEVELOPMENTS
Foreign Currency Transactions - Liability for Negligent Advice

QUESTIONS AND ANSWERS

Comment - David Allan (University of Melbourne & Mallesons Stephen Jaques:

Could I make a very quick comment rather than ask a question, by your leave, Mr Chairman?

Point one, I think that you have only to read the Financial Review or pick up the literature on the counter of any bank and it is impossible today for the banks to deny that they are holding themselves out as giving financial advice. If you accept that, then I think the Trade Practices Act covers the ground. Section 74 makes the giving of financial advice the provision of a financial service. I think that the person to whom the advice is tendered is a "consumer" within section 4B provided the "price" of the advice is under $40,000. There is then a duty to use reasonable skill and care in giving the advice and to see that it is reasonably fit to achieve the desired result.

If it is not possible to get an implied term into the contract, section 52 of the Trade Practices Act may provide a remedy. That section does not require negligence; all it requires is that the advice should be shown to be misleading and deceptive. If you have to rely on section 51A, although reasonable grounds for giving the advice is a defence, the burden of proof is on the defendant - the bank - to prove that there were such grounds.

On the question of loss, I think that, if the Australian dollar depreciates against the Swiss franc between the date of drawdown and the date of repayment, the only way you could possibly argue that there is not a loss would be if the loan were kept in Swiss francs for the whole of that time. Because you are suing on the basis of the bank's advice, if the bank was aware that the loan was to be converted into Australian dollars, then it knows that the borrower will need to repurchase Swiss francs using Australian dollars on the date of repayment, and to that extent has an exposure to foreign exchange risk. I think that is the measure of his loss and I think it is not too remote.

The only joy for the bank is the dictum of Rogers J. in Lloyd v. Citicorp Australia Ltd. to the effect that the standard of care is not very high or onerous in all the circumstances.

Comment - From the Floor:

Could I just say something in response to that and that is that anyone who is interested in the topic generally would have derived great benefit from the last speaker's paper on the topic in the Melbourne University Law Review of December last year.

Response - Martin Kriewaldt:

If you take the view that the brochure which my firm publishes says that we are experts in all sorts of wonderful things, that we give advice in all sorts of things, that does not mean to say that I hold myself out as giving that advice in all areas. I have an expertise in some areas, but I do not have it in all areas. Now in the context of the banking organisation which has a series of different departments which are there to provide that advice, I think it is fanciful for many of the borrowers to allege, as they do, that the person who should have been giving this advice, was some manager in the backblocks or some counter clerk that they happened to strike. And it is that area of the reasonableness of reliance upon the advice or whether in the circumstances this was false and misleading is where the problem for borrowers arises. In Kulac the fact that the person who gave the information professed not to have any expertise to the knowledge of the applicant was one of the decisive factors in the judgment and so I do not think that you can just say "look, have a look at the brochure", and therefore whoever it is in the bank who is dealing with you knows all things and will provide you with all things. I think you have got to go a little further than that.