BANKERS' LIABILITY FOR FINANCIAL ADVICE

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[*Before 1985, a number of Australian farmers and businesses were encouraged to borrow overseas in order to take advantage of the lower interest rates payable overseas. When in 1985 the Australian dollar fell sharply in value against European and Japanese currencies, these borrowers were faced with substantially higher repayments than they had anticipated and they sustained heavy losses. In 1986 and 1987 a number of actions have been brought against banks and other financial advisers seeking damages in respect of the losses incurred. This article examines the conceptual basis for the liability of a banker in respect of advice tendered, or not tendered, to his customers; and asks whether this liability can be avoided by appropriate disclaimers by bankers and other financial advisers and intermediaries.*]

I. *THE PROBLEM TO BE EXAMINED*

The duty of a bank to tender financial advice to its customers is the subject matter of this article.[1] The examination is concerned with the circumstances in which the duty may arise; the nature of the duty and, in particular, the standard of care it imposes; the remedies that will lie for breach of the duty, including the method of quantification of damages; and whether the bank can disclaim the duty. It also enquires what a prudent banker should do.

The problem is examined in a broad context. Hence 'banker' is taken to include not merely those who carry on the general business of banking for the purposes of the Banking Act, but includes generally 'financers': those whose business it is to provide financial services. Similarly, the enquiry is not limited to advice given to customers or clients but includes also advice given gratuitously to persons who do not stand in a contractual relationship with the banker or financer but who, to the knowledge of the banker or financer, will receive and act upon his advice. Cases to be examined include those where the duty may be owed to a borrower or a guarantor or an investor. The enquiry will be pursued in particular in the context of the banker–financer's duty to the customer who is making transactions in foreign currency, and also in relation to 'status opinions' given by bankers.

II. *THE LEGAL SOURCE OF THE DUTY TO ADVISE*

There can be no liability for a failure to tender advice unless there exists a legal duty to advise, nor for the quality of that advice unless there is a duty to exercise some measure of skill and professional competence in formulating it.

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The existence of a legal duty of a banker–financer to tender advice to his customers and other parties concerning financial transactions into which, through his intermediacy, they are entering, and his responsibility to them if the advice should turn out not to be sound, depends on the interaction of a number of factors. Some of these factors turn on the factual relationship between the parties; others turn on the legal basis on which the injured party frames his cause of action. So, no conclusions can be formulated unless there has first been enquiry about the circumstances of the parties and the circumstances in which they were brought into a commercial or financial relationship. The key to the problem lies very much in the surrounding circumstances of the transaction, and most of the cases will be found to be decisions that turn on their own facts.[2] For example, did the investor seek out the banker–financer or did the initiative come from the latter? Did the banker–financer hold himself out to the investor (or at all) to be in the business of giving advice? Are there any written documents relating to the transaction or the relationship of the parties (standard form or *ad hoc*) and what did they provide? Was there a previous relationship between the parties or did the investor 'walk in off the street'? If there was a previous relationship, what was its nature and what expectations arose from it? What were the relative experience and sophistication of the parties? Was other advice available to the investor? There may be a considerable difference in the approach of the law where the injured party is a large corporate borrower or investor and where it is a small family company or a natural person.

Depending on the factual relationship and circumstances of the case, the aggrieved party may be able to frame a legal action against the banker–financer on any of several different legal bases or causes of action, which often may run together or overlap. Nevertheless, it will be vital for the parties to establish what the legal basis of the complaint is, because (as will be demonstrated) the legal remedies available to the aggrieved party will vary depending on the cause of action. Furthermore, the ability of the banker–financer to modify or to disclaim altogether his duty may depend on whether that duty was imposed by law (common law, equity or statute) or was assumed voluntarily by the banker–financer.

Accordingly, it may be possible to spell out legal duties concerning the giving of and responsibility for advice, arising out of the status of the parties as banker and customer or even as financial adviser and client. Or, the duty may arise from a contract between the parties containing express terms relating to the giving of advice and to liability or non-liability in respect of it. There may also be terms implied in the contract, either to give it business efficacy or as required by

[2] See *e.g.* the emphasis placed by Toohey J. on surrounding circumstances of this nature in *Stanton v. Australian and New Zealand Banking Group Ltd* (1987) A.T.P.R.#40-755, particularly at p. 48,193: 'The Stantons did not go to the bank to get advice about the arrangement 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 to 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 arrangement 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.'

statute. The parties may be in a fiduciary relationship with one another, giving rise to duties in equity independently of contract and more akin to status. Obligations may arise from the fact that one party has employed duress or undue influence or unconscionable conduct in its dealings with the other. The circumstances may give rise to an operative mistake affecting the contract or may amount to an actionable misrepresentation (innocent or fraudulent), giving rise under the general law to remedies against the contract and collateral transactions, restitutionary relief or damages in tort. There may be liability in tort, apart from fraudulent advice, for negligence — *i.e.* a failure to exercise care in giving the advice where there was a duty of care under the general law. And finally, the Trade Practices Act 1974 (Cth) may impose duties on the banker–financer, particularly the duty under s. 52 not to engage in deceptive or misleading conduct.

It should also be noted that transactions of the type under discussion in this paper may fall to be regulated by other statutes as well as the Trade Practices Act. Although many forms of financing by banks are excluded from the application of the Credit Acts,[3] term loans by banks and most forms of financing by non-banks in favour of non-corporate borrowers will be subjected to regulation and possible disallowance under those Acts. Also, in New South Wales, contracts entered into other than for the purposes of a trade, business or profession carried on by the applicant will be subject to the Contracts Review Act 1980. Although these statutes are not expressed in terms of 'duties', failure to comply with the requirements of the Credit Act may result in the setting aside of the transaction in whole or in part; and in New South Wales, before the court can exercise its powers under the Contracts Review Act, it is directed by s. 9 to have regard to a range of factors corresponding with the relevant factors set out above to determine the existence of a duty to advise and to use care in giving advice. This interaction of regulatory legislation is providing a totally new dimension for the traditional areas of the laws of contract and tort.

Each of these sources of rights and duties must now be examined in relation to the giving of advice by bankers and financers.

1. *Status*

Is there a duty to advise and to take care in the giving of advice, which arises simply out of the relationship of banker and customer, in the same way that the law imposes duties on bailors and bailees without reference to contract? It is submitted that at common law the answer must be that the relationship is entirely a contractual one.[4] The relationship is complex, because 'customers' can vary from different types of individuals through a range of commercial entities engaged in many types of activities and with different needs for the services of their bank. It is clear that the relationship is one of debtor and creditor, and that it can be one of principal and agent; but it is described by Paget[5] as a relationship

[3] Credit Act 1984 in Vic., NSW, & W.A. Credit Ordinance 1985 (A.C.T.).
[4] *Burnett v. Westminster Bank Ltd* [1966] 1 Q.B. 742.
[5] Megrah, M. & Ryder, F. R., *Paget's Law of Banking* (9th ed. 1982) 70.

consisting of 'general contract which is basic to all transactions, together with special contracts . . . which arise only as they are brought into being by the express acts or implied intentions of the parties. The general contract is a simple, indivisible contract . . . though with many facets . . .'.[6] It is true that the general contract consists largely of terms inferred from the conduct of the parties and the nature of the relationship or of the transaction, and it is rare for the parties to enter into a formal express contract. The importance of the fact that the relationship is based on contract rather than on status is that (subject to statutory intervention) the implied or inferred terms can always be varied by express terms. It should follow that, if banks are not subjected to legal duties independently of contract and simply because of their status as banks, then other persons or entities providing financial services are not subjected to duties arising from status.

It has been argued that, in equity, the relationship of banker and customer is a fiduciary one and, as such, imposes certain stringent duties on the bank as the fiduciary, which can not be varied or avoided by contract. This claim is examined below.

2. *Contract*

It is therefore to the contract that we look as the primary source of legal duties. The contract may contain express terms requiring the banker-financer to give advice to the customer, and specifying the standard of care he shall exercise and even the consequences of a failure on his part to do so. But this would be rare. Where the banker-financer undertakes a specific task for the customer, it is more likely that he may expressly undertake a duty to advise. But for the most part, the matter is the subject of terms which must either be implied or inferred. It is doubtful whether the mere relationship of banker and customer gives rise to an *implied* duty to advise the customer on financial matters, having regard to the reluctance of the courts to imply terms into contracts except where they are strictly necessary to give the contract business efficacy.[7] However, the particular circumstances of the relationship and the practice of banking may indicate that the bank has in fact assumed such a duty, and has tacitly held itself out as providing this form of financial service, although without any express or overt terms to that effect.[8] In such a case the terms are a matter of inference from the relationship of the parties rather than strictly 'implied terms'. This may be easier to prove today in the light of the competitive nature of banking services, and the willingness of bank staff to tender financial advice. Where advice is given, then it is submitted that there is a contractual duty to exercise proper professional skill and care in the formulation of that advice.

It should also be noted that the provision of financial advice by a corporation

6 See also *Joachimson v. Swiss Bank Corporation* [1921] 3 K. B. 110.

7 *B. P. Refinery (Westernport) Pty Ltd v. Shire of Hastings* (1977) 52 A.L.J.R. 20 (Privy Council).

8 It was held in England as early as 1958 in the case of *Woods v. Martins Bank Ltd* [1959] 1 Q. B. 55 that the bank had held itself out by its advertisements as including the provision of financial advice as part of its business of banking.

in the course of a business is now the 'provision of a service' as defined in the amended s. 74(3) of the Trade Practices Act 1974 and, if it is supplied to a consumer, there will be implied warranties 'that the service will be rendered with due care and skill' under s. 74(1) and that the service will be reasonably fit for the purpose for which it is required and that the service is of 'such a nature and quality that [it] might reasonably be expected to achieve [the desired] result, except where the circumstances show that the consumer does not rely, or that it is unreasonable for him to rely, on the corporation's skill or judgment.'[9] It is, of course, necessary that the service or advice be supplied pursuant to a contract and not gratuitously, otherwise there is no vehicle to support the implied warranties. However, as indicated above, where the banker-customer relation exists, there will usually be a contract.

The customer or other recipient of the advice may well be a consumer for this purpose. A person who 'acquires' or receives the service will be a 'consumer' if the price of the service does not exceed $40,000 or if the service is of a kind ordinarily required for personal, domestic or household use or consumption.[10] It is possible that financial advice might be tendered for personal, domestic or household use or consumption; but in any event the 'price' is defined in s. 4B(2)(b) as the amount payable for the service, and s. 4B(2)(c) provides a method of calculating the price where the service is provided as part of a package or where no price is specifically allocated. The 'price' of the advice, therefore is not connected with the value of the transaction nor with the cost (interest, *etc.*) of any loan or other transaction entered into as a result of the advice. It is simply the actual or imputed cost of the advice; and it is difficult to imagine that this will exceed $40,000.

It is clear that contractual duties concerning financial advice given to customers may overlap and interact with duties in tort, which are discussed below.[11] Liability in contract is circumscribed by notions of privity of contract; but once it was established that the law of tort could provide remedies in the traditional preserve of contract, namely damages for economic loss, remedies became available to persons who did not have a direct contractual link with the adviser but who stood in some sort of special relationship with the adviser. Furthermore, pecuniary relief could be given for representations made during the course of negotiations which did not form part of the contract. To some extent, therefore, the plaintiff or applicant has a choice, and his decision may well be determined by the different measure of damages pertaining to contract and tort. But where the contractual and tortious duties cover the same ground, then that choice may not be available. The problem was adverted to by Lord Scarman in *Tai Hing Cotton Mill Ltd v. Liu Chong Hing Bank Ltd* in the following words:

> Their Lordships do not believe that there is anything to the advantage of the law's development in searching for a liability in tort where the parties are in a contractual relationship. This is particularly so in a commercial relationship. Though it is possible as a matter of legal semantics to conduct an analysis of the rights and duties inherent in some contractual relationships including that of

9 Trade Practices Act 1974 (Cth) s. 74(2).

10 *Ibid.* s. 4B(1)(b).

11 On the interaction and limits of contractual and tortious duties, see Partlett, D. F. 'Economic Loss and the Limits of Negligence' (1986) 60 *Australian Law Journal* 64.

> banker and customer either as a matter of contract law when the question will be what, if any, terms are to be implied or as a matter of tort law when the task will be to identify a duty arising from the proximity and character of the relationship between the parties, their Lordships believe it to be correct in principle and necessary for the avoidance of confusion in the law to adhere to the contractual analysis: on principle because it is a relationship in which the parties have, subject to a few exceptions, the right to determine their obligations to each other, and for the avoidance of confusion because different consequences do follow according to whether liability arises from contract or tort, e.g. in the limitation of action . . .[12]

3. *Fiduciary relationship*

Fiduciary relationships are said to exist where one person stands in a special relationship of trust, reliance, and confidence to another person, based on inequality of experience and influence, so that the former is in a position to take advantage of that other person. Where such a relationship exists it gives rise automatically, simply on proof of the relationship, to certain stringent duties on the part of the person in whom the confidence and trust is reposed. The duties include a duty to make full disclosure to the other party of all relevant circumstances; a duty to act in good faith; a duty not to compete or to put oneself in a position where duties may conflict. The relationship is said to exist between parent and child (at least until the child is emancipated), between religious superior and inferior, between trustee and beneficiary, and between solicitor and client.[13] It has been extended to partners, and some recent cases would extend it to the banker-customer relationship. It is strongly submitted that, although in the particular circumstances of some cases a banker or financial adviser may have placed himself in a position of trust and confidence so that the implication of these duties is reasonable, this extension to the relationship generally is unjustified and unjustifiable.

The fiduciary relationship is a creature of equity. It was a mechanism for setting aside transactions which were presumed to be fraudulent unless strict compliance with the duties was proved, and it was a mechanism for finding a constructive trust. It is difficult to see how it can have any application to commercial relationships where, in many cases, the parties are dealing at arm's length and are capable of looking after their own interests. One modern definition of the relationship is that a fiduciary 'is simply someone who undertakes to act for or on behalf of another in some particular matter or matters.'[14] The implications of this, if taken literally, are horrendous. Having regard to the complexities of modern commercial relationships and of their often interlocking nature, it is difficult to see how the parties could be expected to undertake towards one another the duties that are imposed on fiduciaries without destabilizing the whole structure of commercial activity in which secrecy and confidentiality play so large a part. Particularly for modern banks, who already owe a duty of confidentiality to each of their customers,[15] a duty to make full disclosure of all

12 [1985] 2 All E.R. 947, 957.

13 It is also said to exist between principal and agent, *sed quaere*. On the particular facts of some cases, an agent may have assumed the position of a fiduciary, but it is doubted whether this could be the case automatically in every commercial agency.

14 Finn, P. D., *Fiduciary Obligations* (1976) 201; see also Lehane, J. R. F., 'Fiduciaries in a Commercial Context' in Finn, P. D. (ed.), *Essays in Equity* (1985) 95.

15 *Tournier v. National Provincial and Union Bank of England* [1924] 1 K.B. 461.

relevant circumstances and of competing interests, and a duty not to put themselves in a position of conflict of interest, could be an embarrassment. The difficulty always comes back to the question 'what does a bank know?' and the answer, if not 'everything', is 'considerably more than any individual officers may think they know.' There are as yet no Chinese walls in banks.

It has long been established by both Australian and English decisions that the banker-customer relationship is not a fiduciary one; that the duties of fiduciaries do not arise automatically from the mere proof of the relationship of banker and customer (and still less of financial adviser and client); and that, in any case where it is sought to establish such duties, the relationship of trust, reliance, and confidence has to be proved on the special circumstances of that case.[16] In *Woods v. Martins Bank Ltd*[17] the manager of a branch of the defendant bank was approached by a customer, who was inexperienced in financial matters, for financial advice. The advice was bad and, in particular, it did not disclose conflicting interests between the plaintiff and the bank, and the plaintiff and the bank's other customers. The court took the view that it was part of the business of the bank to give financial advice and, as it had given advice in this case, it was under a duty to exercise reasonable care and skill in the giving of that advice. The court also held that a banker-customer relationship existed at the time the advice was given, but that, even if it had not, the bank was still under a duty to exercise care and skill. It is not, therefore, clear whether the duty was a contractual duty or whether it should rest on some other basis.

For present purposes it is interesting to note that in the report of *Woods*' case in the Weekly Law Reports[18] no mention is made of fiduciary duties, but in the edited version of the judgment of Salmon J. in the authorized reports this statement appears: 'In my judgment, a fiduciary relationship existed between the plaintiff and the defendants.'[19] One can only surmise that this judicial afterthought was intended to avoid anticipating the judgments in the cases of *Hedley Byrne & Co. Ltd v. Heller & Partners Ltd*[20] and *Mutual Life & Citizens' Assurance Co. Ltd v. Evatt*[21] and, as such, should not be used to provide a base for a doctrine which would have such restrictive effects on commercial activity. Looked at from the perspective of 1987, there would be no need in this situation to raise the concept of fiduciary relationship with its attendant bogies of full disclosure, confidentiality, and the absence of competing interests. Today it is sufficient to say on these facts that, even if there were no contract, the bank had voluntarily assumed the responsibility of giving financial advice and, as a consequence, the law imposed the complementary duty to take proper professional

16 *Laing v. Bank of N.S.W.* (1952) 69 W.N. (N.S.W.) 318 (affirmed on this point by the Privy Council in *Bank of N.S.W. v. Laing* [1954] A.C. 135); *In Re The City of Melbourne Bank Ltd; ex parte the City of Prahran, and ex parte the Melbourne and Metropolitan Board of Works* (1895) 21 V.L.R. 563; *In Re The City of Melbourne Bank Ltd (in Liquidation)* (1897) 23 V.L.R. 78.

17 [1959] 1 Q.B. 55.

18 [1958] 1 W.L.R. 1018.

19 [1959] 1 Q.B. 55, 72.

20 [1964] A.C. 465, expressly approving *Woods* case at 530.

21 (1970) 122 C.L.R. 628, expressly approving *Woods* case at 657.

care in the formulation of that advice. In *Lloyds Bank Ltd v. Bundy*,[22] as extreme a case as one might find, where a father guaranteed his son's business debts and gave a mortgage of his home to the bank as security for the guarantee, there was no suggestion that a fiduciary relationship arose between the bank and the father simply because they stood in the relationship of banker and customer, but only because on the special facts of the case the father had depended completely on the advice of the bank manager.

In a number of recent Australian cases, the existence of a fiduciary duty has been argued in commercial relationships, although not necessarily limited to banking and finance cases. In *United Dominions Corporation Ltd v. Brian Pty Ltd and Others*[23] the appellant and the respondents were joint venturers in land development, but the appellant did not disclose to the first respondent that it held a charge over the joint venture land which secured in its favour all advances made by the appellant to the second respondent. The High Court found a fiduciary relationship existed by analogy with partnership, even though the joint venture was limited to one undertaking. In *Hospital Products Ltd v. United States Surgical Corporation*[24] a company, which was the exclusive Australian distributor for the products of a United States company, terminated the distributorship and set up in direct competition with the American company. Whilst the High Court held unanimously that the distributor had broken its contract and was accordingly liable in damages, it also held (Mason J. dissenting) that the parties were not in a fiduciary relationship. The transaction was a commercial one in which the parties had dealt at arm's length with one another and on equal footing; each was acting on its own account and in no sense for the other.[25] On the other hand in *Daley v. Sydney Stock Exchange Ltd*,[26] the High Court held unanimously that a fiduciary relationship existed between a firm of stockbrokers and a person placing money for investment with that firm, so that the firm was under a duty to disclose its own precarious financial position. The firm acted as an investment adviser to the plaintiff who relied on its advice. In *James v. Australia and New Zealand Banking Group Ltd*[27] the applicants where West Australian farmers who had sought and received financial advice from the manager of the Katanning branch of the first respondent bank concerning the raising of loans for various property purchases, and the manager had effected an introduction for them to the third respondent, a mortgage broker. The claim brought by the applicants was primarily under s. 52 of the Trade Practices Act 1974 and for damages for negligence, but they also alleged breach of a fiduciary

22 [1975] Q.B. 326. *Cf. Commercial Bank of Australia Ltd v. Amadio and Another* (1983) 151 C.L.R. 447 where the bank and the parents were not in a banker-customer relationship, and the argument therefore concentrated on the responsibilities of a party seeking security through a guarantee. The guarantee and supporting mortgage were in fact set aside by the majority of the High Court on the ground of unconscionable conduct by the bank.

23 (1985) 157 C.L.R. 1.

24 (1984) 156 C.L.R. 41.

25 See per Dawson J. at 146: 'The circumstances in which the contract . . . was made do not suggest any disadvantage or vulnerability on the part of USSC requiring the intervention of equity to protect its interests. Those negotiations were of a commercial nature and were at arm's length. They were conducted by persons on both sides who were experienced in the market place.'

26 (1986) 60 A.L.J.R. 371.

27 (1986) 64 A.L.R. 347, but particularly at 391.

duty owed by the bank to them as long-standing customers. This claim was dismissed by Toohey J. on the ground that the alleged breaches of fiduciary duty were no more than instances of undue influence, which he had earlier held the applicants had failed to make out. But he said: 'I do not accept that the bank stood in a fiduciary relationship to the applicants. I was not offered any authority for that proposition and on principle I am not persuaded that it was the case.'

If the matter rested with those cases alone, one would have to say that the law was still in some state of uncertainty. But, on balance, except perhaps for cases of partnership, the courts are reluctant to find fiduciary relationships in commercial transactions, although they may well find that, in the light of the parties' conduct, rather than simply their basic relationship, one of the parties had assumed the responsibilities of a fiduciary to the other. Whether one party should be subjected to the responsibilities of a fiduciary is a question of fact in each case to be judged in the light of all the surrounding circumstances. However, even that position is not clear after the decision of Rogers J. in the Supreme Court of New South Wales in *Catt v. Marac Australia Ltd*; *Berman v. Marac Australia Ltd*; and *Williams v. Marac Australia Ltd.*[28]

In the *Marac* case (which was not a banker-customer case but a case of financial adviser and financer in relation to investors), an air freight company, Jet, was seeking to raise finance for the purchase of aircraft. It approached a tax consultant and investment adviser, Winter, and also a finance company and merchant bank, Marac, for assistance and advice. Marac arranged for several partnerships (of doctors and dentists) to buy aircraft with finance from Marac and to charter them to Jet, which might then sub-charter them to other operators. Winter distributed printed circulars among doctors and dentists, recommending the scheme as an investment for tax minimization purposes. Marac then purchased the aircraft from the manufacturer but, in order to reduce stamp duty, sold them at a substantially inflated price to a nominee company which held them in trust for the partnerships. Winter, who held a power of attorney for each partner, signed guarantees on their behalf in favour of Marac in respect of repayment of the loans it had made. It was agreed between Jet and Winter that Winter should receive a commission of $200,000 in respect of one aircraft and $300,000 in the case of each of the others. In 1982 Jet (or Wings as it had by then become) encountered financial difficulties and a receiver was appointed. The partners then brought these proceedings, claiming relief on the basis of fraudulent misrepresentations by Winter of which Marac and Jet had notice; alternatively on the ground of mistake as to the identity of the vendor of the aircraft and the price; and on the ground of breaches of fiduciary duties owed to them by Jet, Winter, and Marac. Marac cross-claimed against the partners on the guarantees for the unpaid balance of the purchase price.

After consideration of the evidence, Rogers J. was not prepared to hold that the representations as to the identity of the vendor and the purchase price were made fraudulently. Relief from the guarantees on the ground of a unilateral mistake[29] by the partners as to the purchase price was denied on the ground that

[28] New South Wales Supreme Court, 25 July 1986 (unreported).
[29] Based on *Taylor v. Johnson* (1983) 151 C.L.R. 422.

there was a lack of evidence of whether Marac was aware of the mistake. So far as the breach of fiduciary duty was concerned, the partners claimed that there had been a failure to disclose to them that the purchase price had been inflated, thereby enabling Jet to make a substantial profit and a secret commission to be paid to Winter. After a careful examination of the authorities, Rogers J. held that Winter, as an investment adviser, did owe a fiduciary duty to the partners and, by failing to disclose the extent of his own interest in the transaction which had inflated the price of the aircraft, had breached it. Winter was also in breach of a personal fiduciary duty to the partners when exercising his power of attorney on behalf of the partners. Jet also owed a fiduciary duty to the partners as the promoter of the scheme, and also would be liable by reason of its participation in Winter's breach of fiduciary duty. Marac (described by Rogers J. as 'the only financially worthwhile target for the plaintiffs') argued that its sole function was to provide the finance, and it was conceded by the plaintiffs that, had Marac been no more than the supplier of finance, no fiduciary duty would have arisen. But Rogers J. found that Marac's role was not limited in this way. So far from being at arm's length, '[i]ts arm was firmly linked into Jet's and Winter's.' It owed no direct fiduciary duty to the plaintiffs, but it had assumed the rôle of the promoter and, with knowledge of the arrangements that were the subject of the complaint and the motives that had inspired them, had actively participated in them and had made them possible.

What can one learn from the *Marac* case? It is not a case of banker and customer but of financer and customer and of adviser and customer. It is suggested that the following propositions are established on the authority of both *Marac* and the other cases discussed in this section:

(i) a provider of finance, whether he be a banker or some non-bank financer, is not as such and without more a fiduciary;
(ii) he will become a fiduciary if the relationship becomes one of investment or financial adviser and client;
(iii) he will become a fiduciary if he does more than provide the finance and becomes a promoter of the scheme — especially if he personally stands to gain from it;
(iv) he will become a fiduciary if he knowingly participates in the activities of either advisers or promoters so as to make breaches of duty by them possible and to become privy to them.

This places a very onerous duty on the supplier of finance, who may well not be able to limit his activities in this way; and it also places a heavy responsibility on advisers and promoters. It may be that responsibilities of this nature are not reasonable and would jeopardize many financing and commercial transactions, if the responsibilities are imposed without any reference to the character, experience, wisdom, and motives of the client-investor. The investor may well be a person of some experience and education, who is speculating for high and possibly tax free profits, and who could legitimately be said to be taking some risks. If he is not aware of the facts, in many instances that could be because he does not choose to be aware of the facts. Accordingly it is suggested that it would be unwise and dangerous to impose fiduciary relations in the circumstances

postulated above, without also having regard to the relative experience of the parties to determine whether there is in fact a genuine reliance on the superior skill and knowledge of the financer or promoter or adviser.

It is further suggested that the importation of a fiduciary duty into commercial relations in circumstances such as these is simply to replicate the special relationship from which a presumption of undue influence may arise and justify the setting aside of the transaction. It is, in short, one duty and one relationship, and not two. The nature of the relationship giving rise to a presumption of undue influence, its application to commercial and financing transactions, and its relation to these developing doctrines of relief on the grounds of economic duress and unconscionable conduct are examined in the next section of this paper.

4. *Economic duress, undue influence, unconscionable conduct*[30]

Various doctrines, both at law and in equity, seek to establish the reality of consent in contractual situations, particularly where one party is at some disadvantage in his relations with the other. These may make the transaction void *ab initio* for want of consent or entitle the disadvantaged party to relief against the transaction, usually by having it and perhaps collateral transactions set aside if he so wishes. In such cases the transaction is voidable. The circumstances giving rise to this are multifarious: different types of mistake, misrepresentations (innocent and fraudulent), duress (physical and economic), undue influence, and unconscionability. Any of these might be a basis for impugning a financing transaction on the ground of either the failure of the banker-financer to tender advice or, more likely because of the unsatisfactory nature of the advice he tendered. In this article it is proposed to look only at economic duress, undue influence, and unconscionable conduct, and to ask how they bear on the problem under discussion.

Economic duress as a ground for relief was for long disputed in the law, but in recent years it has gained in respectability. It was raised in *Alec Lobb (Garages) Ltd v. Total Oil GB Ltd*;[31] it was argued in *National Westminster Bank Ltd v Morgan*;[32] and it found favour with the Privy Council in *Pao On v. Lau Yiu Long*,[33] although in that case it was held that a contract of guarantee, which it was alleged had been entered into as a result of economic duress, was in fact the result of commercial pressure falling short of duress. The Privy Council rejected the argument, based on U.S. developments, that pressure short of duress or coercion could justify relief as an abuse of bargaining power; the court will not be an arbiter of fairness and unfairness — at least not where the parties are businessmen of sufficient commercial understanding to make their own agree-

30 The author acknowledges that this section of this article has drawn heavily on material prepared for inclusion in Allan, D. & Hiscock, M., *Law of Contract in Australia* (1987) chapter 8.

31 [1985] 1 All E.R. 303; see also *Occidental World Wide Investment Corporation v. Skibs A/s Avanti* [1976] 1 Lloyd's Rep. 293 and *North Ocean Shipping Co v. Hyundai Construction Co. Ltd* [1979] Q.B. 705.

32 [1985] A.C. 686.

33 [1980] A.C. 614.

ments dealing at arm's length.[34] But:

> justice requires that men, who have negotiated at arm's length, be held to their bargains unless it can be shown that their consent was vitiated by fraud, mistake or duress. If a promise is induced by coercion of a man's will, the doctrine of duress suffices to do justice. The party coerced, if he chooses and acts in time, can avoid the contract. If there is no coercion, there can be no reason for avoiding the contract where there is shown to be a real consideration which is otherwise legal . . . The commercial pressure alleged to constitute such duress must, however, be such that the victim must have entered the contract against his will, must have had no alternative course open to him, and must have been confronted with coercive acts by the party exerting the pressure: . . . there is nothing contrary to principle in recognizing economic duress as a factor which may render a contract voidable, provided always that the basis of such recognition is that it must amount to a coercion of will, which vitiates consent. It must be shown that the payment made or the contract entered into was not a voluntary act.[35]

This constitutes the most clear and authoritative statement of the doctrine of economic duress so far achieved.[36] It is certain that there will be more cases in both Australia and England in which the plea will be raised, and which will give the courts the opportunity to define further the nature of coercion and to distinguish it from other forms of commercial pressure which, whilst deserving the description 'unfair' and producing 'unreasonable agreements', will not justify the intervention of the courts.

Undue influence and unconscionable conduct are twin grounds for affording relief in equity against transactions where the courts do not find a free consent, but their exact scope and relationship has been the subject of much judicial learning in both Australia and England, and in recent years in the context of advice or lack of advice by bankers and financers to persons with whom they were engaging in financial transactions.

Until recently, the principles on which equity would grant relief on the ground of undue influence appeared to be well settled, and in similar terms, in both Australia and England. However, a number of recent decisions in both countries have raised serious questions about the basis of the doctrine and its scope, and its relation to the equitable jurisdiction to set aside transactions which are unconscionable. The answers are neither complete nor the same in both countries. In large part, this has been caused by the reassertion today of a general jurisdiction in the courts apart from statute to give relief against unconscionable transactions, and a lack of certainty whether 'unconscionability' in this context refers to the conduct of the party against whom relief is sought, or the result of that conduct in a transfer of property or an entering into a contract which cannot be supported on grounds of good conscience, or a combination of the two.[37]

The leading authority in Australia on undue influence is *Johnson v. Buttress*,[38] in which the High Court examined a gift by a man of 67 years, who was wholly illiterate and of low intelligence, and with no business experience, but who, without the benefit of independent advice, transferred his home to relatives of his deceased wife. It was said he appreciated kindness. The High Court held that the

34 But see discussion of unconscionability *infra*.

35 [1980] A.C. 614, 634, 636.

36 See also *Universe Tankships Inc. of Monrovia v. International Transport Workers Federation* [1983] 1 A.C. 366.

37 The author is indebted for assistance in this analysis to two articles by Cope, M., 'The Review of Unconscionable Bargains in Equity' (1983) 57 *Australian Law Journal* 279 and 'Undue Influence and Alleged Manifestly Disadvantageous Transactions' (1986) 60 *Australian Law Journal* 87.

38 (1936) 56 C.L.R. 113.

circumstances showed such a relationship which would give rise to the presumption of undue influence and, as this had not been rebutted, the transfer should be set aside. The judgment of Dixon C.J. contains the classic statement of the doctrine:

> The basis of the equitable jurisdiction to set aside an alienation of property on the ground of undue influence is the prevention of an unconscientious use of any special capacity or opportunity that may exist or arise of affecting the alienor's will or freedom of judgment in reference to such a matter. The source of power to practise such a domination may be found in no antecedent relation but in a particular situation, or in the deliberate contrivance of the party. If this be so, facts must be proved showing that the transaction was the outcome of such an actual influence over the mind of the alienor that it cannot be considered his free act. But the parties may antecedently stand in a relation that gives to one an authority or influence over the other from the abuse of which it is proper that he should be protected. When they stand in such a relation, the party in the position of influence cannot maintain his beneficial title to property of substantial value made over to him by the other as a gift, unless he satisfies the court that he took no advantage of the donor, but that the gift was the independent and well-understood act of a man in a position to exercise a free judgment based on information as full as that of the donee. This burden is imposed on one of the parties to certain well-known relations as soon as it appears that the relation existed and that he has obtained a substantial benefit from the other. A solicitor must thus justify the receipt of such a benefit from his client, a physician from his patient, a parent from his child, a guardian from his ward, and a man from the woman he has engaged to marry. The facts which must be proved in order to satisfy the court that the donor was freed from influence are, perhaps, not always the same in these different relationships, for the influence which grows out of them varies in kind and degree. But while in these and perhaps one or two other relationships their very nature imports influence, the doctrine which throws upon the recipient the burden of justifying the transaction is confined to no fixed category. It rests upon a principle. It applies whenever one party occupies or assumes towards another a position naturally involving an ascendancy or influence over that other, or a dependence or trust on his part. One occupying such a position falls under a duty in which fiduciary characteristics may be seen. It is his duty to use his position of influence in the interest of no one but the man who is governed by his judgment, gives him his dependence and entrusts him with his welfare. When he takes from that man a substantial gift of property, it is incumbent upon him to show that it cannot be ascribed to the inequality between them which must arise from his special position . . . when the transaction is not one of gift but of purchase or other contract, the matters affecting its validity are necessarily somewhat different. Adequacy of consideration becomes a material question. Instead of inquiring how the subordinate party came to confer a benefit, the court examines the propriety of what wears the appearances of a business dealing. These differences form an additional cause why cases which really illustrate the effect of a special relation of influence in raising a presumption of invalidity are often taken to decide that express influence which is undue should be inferred from the circumstances.[39]

This then was and still is the law in Australia. It is necessary to distinguish cases where some special relationship of trust, confidence or reliance exists between the parties from cases where it does not. Examples of the former are given in the judgment of Dixon C.J. cited above and, in these cases, a presumption of undue influence arises which will cause the court to set aside an alienation of property or a contract at the suit of or on behalf of the subordinate party unless the dominant party can show that the decision to enter the transaction was the result of a free mind. The best way of discharging this onus is by showing that the innocent party had acess to and accepted independent advice. In the case of a commercial transaction or contract, the onus is on the dominant party to show additionally that the consideration was adequate and the transaction fair. It is worthy of note that the special relationships according to Sir Owen Dixon do not include those of banker and customer or financial adviser and client, which therefore fall into the second category of cases. In these cases where no special relationship exists, the onus is on the party seeking to impugn the transaction to

[39] *Ibid.*134-6. This classification was adopted by Toohey J. in the Federal Court in *James v. Australia and New Zealand Banking Group Ltd* (1985) 64 A.L.R. 347, 388–91.

show that in the particular circumstances he was subjected to undue influence which precluded his exercising an independent and free mind in reaching the decision.

But if this is the law in Australia, the position has been complicated by the parallel development through the cases of the doctrine of unconscionability. This doctrine, the effects of which go beyond the mere refusal of specific performance and may result in the transaction in whole or in part being set aside, was most clearly enunciated in Australia by the High Court in the case of *Blomley v. Ryan*.[40] Kitto J. said:

> There is a well-known head of equity. It applies whenever one party to a transaction is at a special disadvantage in dealing with the other party because illness, ignorance, inexperience, impaired faculties, financial need or other circumstances affect his ability to conserve his own interests, and the other party unconscientiously takes advantage of the opportunity thus placed in his hands.[41]

In the words of Fullagar J. in the same case:

> The circumstances adversely affecting a party, which may induce a court of equity either to refuse its aid or to set a transaction aside, are of great variety and can hardly be satisfactorily classified. Among them are poverty or need of any kind, sickness, age, sex, infirmity of body or mind, drunkenness, illiteracy or lack of education, lack of assistance or explanation where assistance or explanation is necessary. The common characteristic seems to be that they have the effect of placing one party at a serious disadvantage *vis-à-vis* the other. It does not appear to be essential in all cases that the party at a disadvantage should suffer loss or detriment by the bargain . . . . But inadequacy of consideration, while never of itself a ground for resisting enforcement, will often be a specially important element in cases of this type. It may be important in either or both of two ways — firstly, as supporting the inference that a position of disadvantage existed, and secondly as tending to show that an unfair use was made of the occasion.[42]

A similar position was taken by the Judicial Committee of the Privy Council in an appeal from New Zealand in the case of *Thomas Bruce Hart v. Joseph O'Connor*.[43] These are wide but deliberate *dicta* which are capable of conferring upon the courts very sweeping powers; and it may well be that their full scope and effect are now being tested in the Australian courts.

The issue arose again before the High Court in the case of *Commercial Bank of Australia v. Amadio and Another*[44] where the respondents, who were an elderly couple with a poor grasp of English or of commercial affairs, were persuaded by their son's bank manager to guarantee the overdraft of the son's business and to mortgage their shops as security. The respondents wrongly believed that their son's business was financially sound and also that the guarantee and mortgage were limited to $50,000. This case might well have been decided on the ground of undue influence, and in fact undue influence was pleaded. However Gibbs C.J. held that the bank was under a duty to disclose certain unusual terms of the loan (for prompt reduction of the overdraft and for the selective honouring of cheques) and, although the contract was not *uberrimae fidei*, the failure to make this disclosure at the time of the guarantee and mortgage amounted to an operative misrepresentation for which the guarantee and mortgage could be set aside.

40 (1954) 99 C.L.R. 362.
41 *Ibid.* 415.
42 *Ibid.* 405.
43 [1985] A.C. 1000, 1024.
44 (1983) 151 C.L.R. 447; see also *Taylor v. Johnson* (1983) 151 C.L.R. 422 where the High Court exercised a similar jurisdiction where the unconscionability arose from a unilateral mistake as to the terms of the contract.

Although his Honour cited both Fullager J. and Kitto J. in *Blomley v. Ryan* with approval, he held that a case of unconscionable conduct, as distinct from misrepresentation, had not been made out on the facts. On the other hand, Mason, Wilson and Deane JJ. set aside both the guarantee and the mortgage on the ground that the bank had not discharged the onus of showing that the transaction was fair, just, and reasonable in a case where it had been guilty through its manager of unconscionable conduct in obtaining a mortgage and guarantee in circumstances in which it should have been evident that the parents were under a special disability by reason of age, limited competence in English, reliance on their son, the absence of independent advice, and the circumstances in which the documents were executed.

The difficulty is to reconcile this decision with the decision of the House of Lords in *National Westminster Bank v. Morgan*[45] which, in turn, can be understood only with reference to the decision of the English Court of Appeal in *Lloyds Bank v. Bundy*.[46] *Bundy's* case also concerned a bank manager who visited an elderly man in his home to arrange for him to guarantee his son's overdraft by charging his home which was his only asset. The manager came with the forms filled in and ready for signature, and their purport was not fully explained to the father. The bank subsequently foreclosed and sought to evict the father. The Court of Appeal set aside the mortgage on the ground that the manager from time to time had been trusted by the father and occupied a position of confidence. On this occasion the manager knew the farm was his only asset, yet persuaded him to complete the transaction without any independent advice. For present purposes, the most important feature of the case was the attempt by Lord Denning M.R. to subsume the doctrines of duress to goods, unconscionable transactions, undue influence, undue pressure, and salvage agreements under one doctrine of 'inequality of bargaining power'.[47] It was this concept of relief based simply on inequality of bargaining power that the House of Lords was eager to reject in *Morgan's* case and which may have tempted it into more stringent *dicta* than would otherwise have been the case.

In *Morgan's* case, a bank manager visited the home of a customer, for whom the bank was refinancing a building society loan, to obtain the signature of the plaintiff (the wife of the customer) on a document charging to the bank the home standing in the joint names of the customer and his wife. The bank ultimately sought possession of the home, and the wife alleged that the manager had exerted undue influence to obtain her signature. The House of Lords rejected this defence. They held that the mere fact that there was a position of inequality or of confidence between the parties was not sufficient to raise a presumption of undue influence without evidence of victimization. It had to be shown that the stronger party had taken advantage of the weaker party and that the resultant transaction was unfair to the weaker party. In this case, the transaction was not unfair, and the distress suffered by the wife was not a result of improper pressure by the bank

[45] [1985] A.C. 686.
[46] [1975] Q.B. 326.
[47] *Ibid.* 338-9.

manager but of the impecuniosity of the wife and her husband. They rejected the doctrine of 'inequality of bargaining power' and denied the need to raise a general principle of this nature.

Is *Morgan's* case good law in Australia? It seems true that mere inequality of bargaining power would not of itself be a ground in Australia for equitable interference,[48] and something more, whether it is described as undue influence or unconscionable conduct, amounting to victimization is required. But it is not necessary to go to the lengths of showing positively that the imbalance produced a gift or a contract that was manifestly unfair. On the other hand, the English courts seem reluctant to acknowledge unconscionable conduct as a separate ground of relief. Mason J. in *Commercial Bank of Australia v. Amadio and Another*[49] distinguished undue influence and unconscionability by pointing to the relevance of an overborne will in the case of undue influence but not in the case of unconscionability where broader considerations of disadvantage are relevant; but he makes the point that these are not mutually exclusive categories.[50]

In *James v. Australia and New Zealand Banking Group Ltd Bank*,[51] the applicants sought relief against the bank on the ground, *inter alia*, of undue influence said to have been exerted against them by the branch manager of the bank with whom they had dealt. Toohey J.[52] adopted both the categorization of undue influence propounded by Sir Owen Dixon in *Johnson v. Buttress*[53] and the distinction between undue influence and unconscionability suggested by Mason J. in *Commercial Bank of Australia v. Amadio and Another*.[54] On that basis he held that the relation of banker and customer was not one normally giving rise to a presumption of undue influence, and in this he also followed the reasoning of *Morgan's* case.[55] The question was therefore one of fact. Had the bank in fact through its branch manager brought undue influence to bear on the applicants? Toohey J. held that the case was not made out on the facts:

> There is no doubt that in February 1981 the applicants were in an unhappy position. They had to find a great deal of money and they had to find it quickly since their earlier attempts to borrow had failed. It is important to bear in mind that those failures were not attributable to the bank. The bank was a reluctant lender and the package it proposed to the applicants was reasonable in the circumstances.

In the light of authorities such as these, it is difficult to know what advice should be given to a banker or financer. He can be told that the mere fact of the

48 See *A. G. C. (Advances) Ltd v. West* (1984) 5 N.S.W.L.R. 610 where, in a case under the Contracts Review Act (NSW) 1980, the Court of Appeal in New South Wales held that, if the general structure and terms of the transaction did not appear to be unfair or unjust, inequality of bargaining power between the parties was not significant and there was no ground for relief under the Act. The plaintiff in that case did not have expert legal advice. She was advised by her son (an accountant) not to enter into the transaction, but she ignored this advice.

49 (1983) 151 C.L.R. 447, 461.

50 Since this decision, s. 52A has been added to the Trade Practices Act (Cth) 1974 authorizing a court to give relief in cases of unconscionable conduct in the supply of goods or services 'of a kind ordinarily acquired for personal, domestic or household use or consumption'; but the relief available does not include an award of damages (s. 82(3)).

51 (1986) 64 A.L.R. 347.

52 *Ibid.* 388-91.

53 (1936) 56 C.L.R. 113.

54 (1983) 151 C.L.R. 447, 461.

55 [1985] A.C. 686.

relationship with his customer or client raises no presumptions; but the surrounding circumstances of the way he, his employees, and his agents conduct themselves may indicate an overbearing of the will of the other party which could jeopardize the transaction even though its terms are not in the circumstances unreasonable. Alternatively, if there is an imbalance of bargaining power and the terms are unfair, then it may not matter that no undue pressure was brought to bear. It is clear that third parties, particularly parents or spouses, acting as guarantors should be impressed with the need for independent professional advice; but in the last resort, the banker-financer can not preserve them against their own folly.

In the meantime, new cases continue to demonstrate how easily problems can arise.[56] In *Kings North Trust Ltd v. Bell*[57] the plaintiff took a second mortgage over the home of husband and wife to secure advances made to the husband's business, in which the wife had no interest. The plaintiff's solicitors sent the papers to the husband's solicitors, who left it to the husband to obtain the wife's signature. The husband fraudulently misrepresented to his wife the purpose of the advance to induce her to execute the mortgage, which she did without receiving independent advice. Eventually the plaintiff sought to enforce the mortgage, but the English Court of Appeal gave relief against the plaintiff by refusing an order for possession against the wife on the ground that the plaintiff, admittedly through the intermediacy of two firms of solicitors, had constituted the husband its agent to procure the execution of the mortgage by the wife. Accordingly the plaintiff was bound by the conduct of the husband in that matter. The case was a case of fraud, not of undue influence or unconscionability, but the Court made the important point that, if a creditor is seeking security or a guarantee from a third party in circumstances in which the principal debtor could be expected to have influence over that third party, the creditor should insist that the third party have independent advice.[58] This decision was shortly afterwards distinguished by the English Court of Appeal in *Coldunell Ltd v. Gallon*[59] where there was a loan to parents for the benefit of their son, but the intent was that the loan should be repaid by the son. It was secured by a mortgage over the parents' home, and the son was a guarantor. The lender's solicitors dealt with the son, and with the parents through the son. They sent a letter to the parents advising them to seek independent legal advice, but for reasons that were unexplained the parents did not see those letters until the son came to see them with his solicitor

56 For a commentary on the most recent English decisions, see Shea, A. M., 'Undue Influence and the Banker–Customer Relationship — A Review of Recent Cases' (1986) 1 *Journal of International Banking Law* 57.

57 [1986] 1 W.L.R. 119.

58 See also *Avon Finance Co. Ltd v. Bridger* [1985] 2 All E.R. 281 where it was held by Brandon and Brightman L.JJ. that the plaintiff finance co. had appointed the defendant's son its agent to procure security from the defendants for a loan from the plaintiff to the son. In the circumstances the plaintiff should have been aware that the son was in a position to exercise influence in this matter over his parents, and should have ensured that the parents had independent advice. The security was therefore set aside on the ground of undue influence. (Lord Denning M.R. also held the transaction was voidable on the ground that there was inequality of bargaining power between the parties and undue pressure which, in the absence of independent advice, produced a transaction the terms of which were unfair).

59 [1986] 2 W.L.R. 466.

to obtain their signature on the documents. The parents signed in the presence of the son's solicitor who explained a consent form to them and witnessed their signatures, but did not advise them on the nature and effect of the transaction as a whole. The money was paid to the son, who shortly thereafter defaulted on repayments, and the plaintiff sought repayment from the parents and possession of the mortgaged property. The parents claimed relief on the ground that the transaction was procured by the undue influence of their son over them, and that this tainted the plaintiff's claim. The Court distinguished the case from *Kings North Trust Ltd v. Bell*[60] on the ground that in this case, although there had undoubtedly been undue influence by the son, the son had in no way been constituted the agent of the plaintiff. The plaintiff had done all that was reasonable in the circumstances to ensure that proper advice was obtained, and could not be held responsible for the unauthorised acts of the son. Even though the transaction was not on advantageous terms so far as the parents were concerned, there had been no undue influence for which the plaintiff could be held responsible.[61] Nevertheless it is suggested that it is prudent for bankers and financers taking security from third parties to ensure that they deal with the third parties directly and not through others unless they be solicitors independently advising the third parties. But particularly they should not deal through the principal debtor with guarantors or persons providing security.

5. *The duty of care in tort*

The banker-financer may be liable to his customer-client in tort, independently of contract. He may also be liable to third parties with whom he has no contractual nexus. In tort, he may be liable for fraud in the tort of deceit if he supplies factual information knowing it to be false or if he is recklessly indifferent whether it be true or false, intending it to be acted upon by the recipient, and if it is acted upon by the recipient to his detriment.[62] Since the decisions in *Hedley Byrne & Co. Ltd v. Heller & Partners Ltd*[63] and *Mutual Life & Citizens' Assurance Co. Ltd v. Evatt*[64] it has been clear that an action may lie in tort for breach of a duty of care in some circumstances where information or advice is tendered without appropriate care, or in some cases where a failure to tender may constitute a breach of a continuing duty to advise. The duty itself may arise from contract or from the law through a relationship of proximity or from the voluntary assumption, express or implied, of the duty independently of contract; it

60 [1986] 1 W.L.R. 119.

61 Whether it was so disadvantageous that it would, in Australia, have been held unconscionable in equity or by statute must be left to conjecture.

62 *Derry v. Peek* (1889) 14 App.Cas. 337; approved by the High Court in *Commercial Banking Co. of Sydney Ltd v. R.H. Brown and Co.* (1972) 126 C.L.R. 337. Fraud was alleged on the part of the branch manager of the bank in *Stanton v. A.N.Z.* (1987) A.T.P.R.#40-755, but the claim on this ground was dismissed by Toohey J. at p. 48, 194 because 'there was simply no evidence that Mr Kirwan said anything knowing it to be false or reckless, not caring whether it was true or false.' Fraud was also alleged in the *Marac* case, being fraudulent representations as to the purchase and the price of the aircraft concerned; but, after a detailed review of the evidence (' . . . fraud, of course, requires strong persuasion'), Rogers J. was not satisfied that the case had been made out.

63 [1964] A.C. 465.

64 (1968) 122 C.L.R. 556 (High Court) and [1971] A.C. 793 (Privy Council).

may overlap with possible relief for breach of contract;[65] and the liability in tort can now extend to cover what was once the exclusive preserve of the law of contract, namely economic loss without physical damage. As the result of a number of decisions, the protection of economic interests is now an area in which both contract and tort have a rôle to play. Where liability may exist concurrently in contract and tort, the decision how to frame the cause of action may turn on such factors as limitation periods, the availability of exclusions and disclaimers, the measure of damages, contributory negligence, *etc.* It is proposed to examine, first, the circumstances in which the duty of care in tort will arise in situations where financial advice is being tendered, and then to illustrate the problem by reference to recent cases concerning losses incurred by investors and others who engaged in foreign currency transactions, with or without the advice of their bankers or other financial advisers — the so-called 'Swiss Franc' cases.

Since this form of tort liability was acknowledged[66] in *Hedley Byrne and Co. Ltd v. Heller and Partners Ltd* and *Mutual Life & Citizens' Assurance Co. Ltd v. Evatt*, the courts of both Australia and England have been concerned to establish the circumstances in which such a duty of care exists and to mark out the limits of tortious liability for negligent words.[67] Although the liability in *Hedley Byrne* is usually referred to as a liability based on negligence, it differs in one important respect from the basis of liability in negligence established by the House of Lords in *Donoghue v. Stevenson*.[68] In the latter case, the duty arose from the relationship of proximity based on reasonable foresight of the possibility of injury. But in *Hedley Byrne*, in addition to a special relationship between the parties in which the giver of information knew that his advice would be relied upon, the House of Lords stipulated that in that relationship the duty had to be voluntarily accepted or undertaken before there could be any liability. Lord Devlin, for example, said:

> I do not understand any of your Lordships to hold that it is a responsibility imposed by law . . . . [I]t is a responsibility that is voluntarily accepted or undertaken, either generally where a general relationship, such as that of solicitor and client or banker and customer, is created, or specifically in relation to a particular transaction.[69]

He went on to say, however, that:

> Cases may arise in the future in which a new and wider proposition, quite independent of any notion of contract, will be needed . . . and it will then be necessary to return to the general conception of proximity and to see whether there can be evolved from it, as was done in *Donoghue v. Stevenson*, a specific proposition to fit the case.[70]

[65] See pages 217-8 above; and note the remarks of Lord Scarman there quoted from *Tai Hing Cotton Mill Ltd v. Liu Chong Hing Bank Ltd* [1985] 2 All E.R. 947,957 to the effect that, where contract and tort cover the same ground, the duty in tort is circumscribed by the limits of the contractual duty: 'Their Lordships do not . . . accept that the parties' mutual obligations in tort can be any greater than those to be found expressly or by necessary implication in their contract.' See also *Bright v. Sampson* [1985] 1 N.S.W.L.R. 346, 356.

[66] It may be recalled that it had a somewhat turbulent history. See *e.g. Candler v. Crane, Christmas & Co.* [1951] 2 K.B. 164.

[67] On this topic, see generally Partlett, D. F., 'Economic Loss and the Limits of Negligence' (1986) 60 *Australian Law Journal* 64 and Shea, A. M., 'Liability of Banks for Erroneous Status Opinions' (1986) 1 *Journal of International Banking Law* 20.

[68] [1932] A.C. 562.

[69] [1964] A.C. 465, 529.

[70] *Ibid.* 530.

In 1978, in *Anns v. Merton London Borough Council*,[71] Lord Wilberforce reviewed a number of decisions[72] as a result of which he suggested the point had been reached at which liability for negligent advice could be brought under the general rubric of proximity. He said:

> [T]he question has to be approached in two stages. First one has to ask whether, as between the alleged wrongdoer and the person who has suffered damage there is a sufficient relationship of proximity or neighbourhood such that, in the reasonable contemplation of the former, carelessness on his part may be likely to cause damage to the latter — in which case a prima facie duty of care arises. Secondly, if the first question is answered affirmatively, it is necessary to consider whether there are any considerations which ought to negative, or to reduce or limit the scope of the duty or the class of person to whom it is owed or the damages to which a breach of it may give rise.[73]

This passage was cited with approval by Lord Roskill in the House of Lords in *Junior Books Ltd v. Veitchi Co. Ltd.*[74]

On the other hand, in *Leigh & Sillivan Ltd v. Aliakmon Shipping Co. Ltd*,[75] Goff L.J. spoke of the duty as still being based on an 'assumption of responsibility by the defendant to the plaintiff in circumstances which were equivalent to contract.' The most recent case, *The Royal Bank Trust Co. (Trinidad) Ltd v. Pampellonne*,[76] a Privy Council decision on appeal from Trinidad, appears also to support the 'assumption' theory. The bank through its general manager (Kennedy) had, in several transactions, advised the respondents at their request concerning the financial status of companies (including one Pinnock Finance Ltd) in which the respondents were contemplating investment. The investment turned out to be disastrous. The majority of the Judicial Committee of the Privy Council[77] drew a distinction between the furnishing of information and the giving of advice. As the trial judge had decided, as a matter of fact in the light of the evidence, that the bank was doing no more than passing on information that was available to it concerning the companies mentioned by the respondent and was not in any sense recommending or advising on the safety of the investment, it was not open to the Court of Appeal to conclude the contrary. In the circumstances, therefore, the trial judge was correct in concluding that the bank was under no duty of care owed to the respondent in this matter, other than to pass on such information accurately. This reasoning rests squarely on the basis that the duty is assumed rather than imposed from any relationship of proximity or foresight. Similarly, there was no ground for interfering with the trial judge's conclusion that, in making the investments, the respondents were acting on their own initiative and not relying on the bank; nor did the general manger of the bank have any reason to believe reliance was being placed on this information as investment advice. The minority opinion of Lord Templeman and Sir Robin Cook agreed with the Court of Appeal that a duty of care arose when Kennedy,

71 [1978] A.C. 728.

72 *Home Office v. Dorset Yacht Co. Ltd* [1970] A.C. 1004 (particularly at 1026 *per* Lord Reid); *Dutton v. Bognor Regis U.D.C.* [1972] 1 Q.B. 373; *Sparham-Souter v. Town and Country Developments (Essex) Ltd* [1976] Q.B. 858.

73 *Ibid.* 751-2. This second stage is considered in more detail *infra* in connexion with the discussion of disclaimers.

74 [1983] 1 A.C. 520.

75 [1985] 1 Lloyd's Rep. 199, 222; Q.B. 350, 394.

76 [1987] 1 Lloyd's Rep. 218.

77 Lord Goff, Lord Oliver, and Lord Bridge.

as an expert, supplied information to Pampellonne, a layman who knew little about finance companies and their accounts:

> If Mr Kennedy failed to appreciate the significance of that enquiry nevertheless Mr Kennedy had no right to assume that Mr Pampellonne would understand the relevance of information contained in or omitted from the Pinnock brochure which Mr Kennedy handed over in order to assist Mr Pampellonne.[78]

The majority and minority advice in the Privy Council seem to polarize the two views about the source of the duty of care in respect of words. It may fairly be said that the law in England is still in a state of development.

How far have the English developments been mirrored in Australian decisions? Three particular decisions of the High Court call for consideration — *L. Shaddock & Associates Pty Ltd and Another v. Parramatta City Council [No 1]*,[79] *Sutherland Shire Council v. Heyman*,[80] and *San Sebastian Pty Ltd and Another v. Minister Administering the Environmental Planning and Assessment Act 1979 and Another*.[81]

In *Shaddock*, the High Court held there was no distinction between the giving of advice and the giving of information, in the sense that both were covered by the duty of care that would arise in the same circumstances. The circumstance in that case that gave rise to the duty was that the council had adopted the practice of giving advice to conveyancers (concerning the existence and nature of town planning or development schemes), and knew or ought to have known that this information would be relied on for serious purposes. In these circumstances, it had assumed the responsibility of exercising reasonable skill and diligence to ensure that the advice was accurate.[82] The court made it clear that the duty did not depend upon any special skill or competence in the person supplying the information. Gibbs C.J. noted that '[t]he question that is not settled . . . is what is the principle by which the courts are to determine whether a duty of care exists.'[83] The test of proximity enunciated in *Donoghue v. Stevenson* seemed inappropriate for negligent words as distinct from negligent conduct.

> It would appear to accord with general principle that a person should be under no duty to take reasonable care that advice or information which he gives to another is correct, unless he knows, or ought to know, that the other relies on him to take such reasonable care and may act in reliance on the advice or information which he is given, and unless it would be reasonable for that other person so to rely and act. It would not be reasonable to act in reliance on advice or information given casually on some social or informal occasion or, generally speaking, unless the advice or information concerned 'a business or professional transaction whose nature makes clear the gravity of the inquiry and the importance and influence attached to the answer', to use the words of Lord Pearce in *Hedley Byrne* . . . . Equally *it would not be reasonable to rely upon advice or information given by another unless the person giving it either had some special skill which he undertook to apply for the assistance of another or was so placed that others could reasonably*

[78] *Ibid.* 227.
[79] (1981) 150 C.L.R. 225.
[80] (1985) 59 A.L.J.R. 564.
[81] (1986) 61 A.L.J.R. 41.
[82] (1981) 150 C.L.R. 225, 230.
[83] It should be noted that *dicta* of the High Court in *Mutual Life & Citizens' Assurance Co. Ltd v. Evatt* (1968) 122 C.L.R. 556 (but not supported by the majority opinion of the Privy Council in that case) support the view that the duty is imposed by law, although they do not entirely exclude the possibility of disclaimers, at least as a factor in determining the existence of a duty. The more recent judgments of the High Court discussed here indicate some resiling from this position.

> *rely upon his judgment or his skill or upon his ability to make careful inquiry. Further a person should not be liable for advice or information if he had effectually disclaimed any responsibility for it.*[84]

In the *Sutherland* case, the allegation of the respondents was that the council was in breach of a duty of care it owed to the respondents in that it had failed to exercise reasonable care in conducting an inspection of a house under construction and had therefore failed to notice or to advise the respondents that the house was built with inadequate footings. This argument had succeeded before the District Court and the Court of Appeal in New South Wales, but in the High Court the appellant was successful in having this finding reversed. However, Gibbs C.J. and Wilson J. so found on the basis that there was no evidence that the council had been negligent, but Mason, Brennan and Deane JJ. held that, in the absence of inquiry made of, or reliance placed upon, it by the respondents, the council did not owe them any duty of care. Gibbs C.J. considered at length the observations, as to the source of the duty, made by Lord Wilberforce in *Anns v. Merton London Borough Council*[85] and, in the light of subsequent authority in both Australia and England, decided that Lord Wilberforce had not intended to put forward so broad a proposition as a duty of care for advice or information based solely on proximity in the *Donoghue v. Stevenson* sense. 'Foreseeability does not of itself, and automatically, lead to a duty of care.'[85a] He adopted the principle enunciated in the House of Lords in *Governors of the Peabody Donation Fund v. Sir Lindsay Parkinson & Co. Ltd and Others:*

> The true question in each case is whether the particular defendant owed to the particular plaintiff a duty of care having the scope which is contended for, and whether he was in breach of that duty with consequent loss to the plaintiff. A relationship of proximity in Lord Atkin's sense must exist before any duty of care can arise, but the scope of the duty must depend on all the circumstances of the case.[86]

In other words, a distinction is drawn between the existence and the scope of a duty of care, and all the circumstances of the case need to be examined before a decision is taken on the latter point. Every case therefore becomes a decision on its own facts. Mason J. placed the emphasis on the concept of reliance:

> it has certainly been an influential factor in setting limits to the far-ranging effect of the foreseeability doctrine and in confining the class of persons to whom a duty of care may be owed. It is natural, therefore, that the plaintiff's foreseeable and reasonable reliance on the defendant's statement has been a constant feature of the cases in which a defendant has been held liable for economic loss sustained as a result of negligent misstatement.[87]

For this reason, he too was unable to accept the *dictum* of Lord Wilberforce in the *Anns* case. Brennan J. also declined to accept foreseeability of injury as the exhaustive criterion of a duty to act, pointing out that the plaintiff cannot be said to be affected by the defendant's omission to act unless the defendant is under a

[84] (1981) 150 C.L.R. 225, 231. Emphasis added. It should be noted that, although the actual decision in *Shaddock* was unanimous and there is no reason to suppose that the rest of the Court would not have concurred with the passage quoted, Gibbs C.J. was in the minority of the Court which was not prepared to say that the majority decision of the Privy Council in *Mutual Life & Citizens' Assurance Co. Ltd v. Evatt* should not be followed.

[85] [1978] A.C. 728, 751.

[85a] Gibbs C.J., (1985) 157 C.L.R. 424, 441 quoting Lord Wilberforce in *McLoughlin v. O'Brian* [1983] 1 A.C. 410, 420.

[86] [1985] A.C. 210, 240.

[87] (1985) 157 C.L.R. 424, 461.

duty to act in the first place, so to this extent the proximity test is circular.[88] Deane J. also was unable to accept the *dictum* of Lord Wilberforce and he distinguished 'proximity' and 'foreseeability' as criteria for a duty of care:

> The requirement of a relationship of proximity serves as a touchstone of the *categories* of case in which the common law will adjudge that a duty of care is owed. Given the general circumstances of a case in a new or developing area of the law of negligence, the question what (if any) combination or combinations of factors will satisfy the requirement of proximity is a question of law to be resolved by the processes of legal reasoning, induction and deduction. On the other hand, the identification of the content of that requirement in such an area should not be either ostensibly or actually divorced from notions of what is 'fair and reasonable' . . . or from considerations of public policy which underlie and enlighten the existence and the content of the requirement.[89]

In *San Sebastian Pty Ltd and Another v. Minister Administering the Environmental Planning and Assessment Act 1979 and Another*,[90] the High Court stressed that, whilst proximity is of vital importance, when the loss results from negligent mis-statements, reliance itself plays a prominent part. The majority judgment contains the clearest statement yet on the position:

> Since *Hedley Byrne* there has been a tendency . . . to regard liability for negligent misstatement as standing apart from the general principles expressed in *Donoghue v. Stevenson* . . . with respect to the duty of care. There is a special problem in defining the circumstances in which a duty of care arises in the context of statements. One facet of this problem is that it is more difficult to apply the standard of reasonable foreseeability to the consequences which flow from the making of a statement, than it is to apply that standard to the consequences which flow from acts. This is because the damage flows, not immediately from the defendant's act in making the statement, but from the plaintiff's reliance on the statement and his action or inaction which produces consequential loss. A second facet of the problem arises from the propensity of negligent statements to generate loss which is purely economic. The recovery of economic loss has traditionally excited an apprehension that it will give rise to indeterminate liability. And there is also an apprehension that the application of the standard of reasonable foreseeability may allow recovery of economic loss of such magnitude and in such circumstances as to provoke doubts about the justice of imposing liability for it on the defendant . . . . Conscious of the factors already mentioned, courts have sometimes dealt with the duty of care in relation to negligent misstatement without relating it to Lord Atkin's exposition in *Donoghue v. Stevenson*. However, the correct view is that, just as liability for negligent misstatement is but an instance of liability for negligent acts and omissions generally, so the treatment of the duty of care in the context of misstatements is but an instance of the application of the principles governing the duty of care in negligence generally. The special complications which arise in connexion with the imposition of a duty of care on the author of a statement can only be unravelled in a variety of factual situations.[91]

In spite of the apparent abandonment of the problem in the last sentence cited above, in fact it is clear from the judgment as a whole that the preponderant factor, which added to proximity gives rise to a duty of care in respect of the making of statements, is reliance on that statement by the party to whom it is made in circumstances in which it is reasonable for him so to rely.

What conclusion can one draw from these cases? In the light of such a range of judicial opinions as this, it is perhaps becoming easier to advise as to the state of the law in Australia today on this point than it is in England. It seems there is no judicial support for Lord Wilberforce's view (if it ever was his view) that the duty of care in respect of information and advice has been subsumed under the *Donoghue v. Stevenson* umbrella of proximity based on foreseeability. But if something more than foresight is needed, it may be a special relationship between the parties, short of a fiduciary relationship; it may be the (voluntary)

[88] *Ibid.* 478-9.
[89] *Ibid.* 498.
[90] (1986) 68 A.L.R. 161.
[91] *Ibid.* 168-9 *per* Gibbs C.J., Mason, Wilson, and Dawson JJ.

assumption of responsibility by the defendant, to be judged in the light of all the circumstances of the case; but the most important factor appears to be the reliance on the statement by the plaintiff where it was reasonable for him to place that reliance. The only thing that is certain is that there will be more decisions, but it is suggested that cases such as *Anns*, *Shaddock*, *Sutherland*, and *San Sebastian*, all of which concerned public authorities acting under statutory powers, do not necessarily provide the best medium for determining the existence or otherwise of a duty between banker–financer and customer–client. In the banker–customer relationship, much of the law is customary law that has grown out of banking practice and the emphasis that the courts continually place on the need to have regard to all the circumstances of the case may simply be a way in which that practice becomes the normative law.[92]

As a hypothesis, to be tested in the cases that follow, it is suggested that there is a duty at law to advise where there is a relationship short of a fiduciary relationship, but from which it may be reasonable to infer that one party assumes the responsibility of advising. It is from the existence of that relationship and the *indicia* of the assumption of responsibility that the reasonableness of the plaintiff's conduct in relying on the advice may have to be judged. The relationship can exist independently of contract and also independently of any superior skill or experience the adviser may possess (although these would be factors to be taken into account in determining whether an assumption of responsibility can be inferred). The reasonableness of reliance by the recipient on the advice that is given should be determined in the light of proximity and foresight existing between the parties, as well as their respective skills and experience, but its relevance is not so much in connexion with the existence of the duty but the causation of any damage or loss. If the duty exists, then the adviser is not an insurer, and it should be recognized (particularly in the field of financial advice) that it is possible to be careful but wrong.[93] The duty is a duty to exercise such care in formulating the advice as is appropriate to the adviser's actual and professed skill and experience.

How, then, does this apply to those who render financial services or give financial advice? Again the distinction must be drawn between the existence of a duty to advise and the duty to exercise care in giving advice, whether the advice is given voluntarily or in consequence of a duty to advise.[94] It must also be pointed out that, as this is tortious and not contractual liability, notions of privity are irrelevant and the duty can be owed alike to those with whom the adviser has a contractual nexus and those with whom he does not; although in the latter case,

92 The risk for banks, if this is so, is that the more they do for their customers, the more they are likely to be required to do as a matter of law. See *e.g. Cornish v. Midland Bank* [1985] 3 All E. R. 513, 522 where Kerr L. J. said '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.'

93 Conversely, it must be admitted that it may be possible to be negligent — but right!

94 In *James and Others v. Australia and New Zealand Banking Group Ltd and Others* (1985) 64 A.L.R. 347, the second respondent (the finance broker) was found to have been negligent through its manager (the third respondent), but the negligence was not the cause of the loss or damage. The second respondent had admitted that the duty of care existed in respect of the advice it tendered the applicants, but had denied that it was in breach of that duty.

it is clear that some nexus or relationship is essential, even if it is based only on the fact that the adviser should have been aware that the plaintiff was a person who might receive the advice and act in reliance on it.

The problem illustrated — the 'Swiss franc' cases

The most recent illustrations of this problem occur in what have become known as the 'Swiss franc' cases. The problem arose because of the coincidence of the financial deregulation in December 1983, which permitted financial institutions in Australia to offer their customers and clients accounts denominated in foreign currencies, and the volatility or instability of exchange rates that has characterized the period since February 1985. The period from December 1983 has also been a period during which interest rates in Australia have been considerably higher than in Europe. For a time, the disparity in interest rates made borrowing overseas apparently much more attractive for people and businesses (and even governments) in Australia than borrowing on the local market.[95] Loans for periods of five to ten years were arranged in foreign currency equivalents of Australian dollars.[96] Then the dramatic fall in exchange rates, particularly of the Australian dollar against the Swiss franc and the Japanese yen, brought disaster for many who had borrowed in these currencies. The effective interest rate as a result of the fall in value of the Australian dollar was not significantly affected, but the amount of principal repayment was; and, as the loan was usually invested in Australian assets, there was no built in 'hedge' through the generation of overseas income. Few borrowers had protected themselves against this possibility by either purchasing forward exchange or hedging at the time they took out their contracts, first because of the apparently stable nature of currency parities at that time, and secondly because the cost of cover would have destroyed the advantage they were seeking from borrowing in overseas currencies. The issue, therefore, was simply who was to bear the loss: the borrower himself or the bank or other financing intermediary through whom the borrowing was arranged?

If the borrower was to recoup his losses from the banker–financer, he needed to consider the range of possible actions set out above. So far, only a few cases have been heard, although it is understood that there are many more 'in the pipeline'. Those that have been disposed of have displayed considerable ingenuity. They raise several issues —

(i) whether the banker or other financing intermediary was initially under any duty to advise the borrower of the risks involved;
(ii) whether the banker was under any continuing duty during the life of the loan to advise the borrower of the deteriorating position and in effect to 'manage' the loan — to counsel him whether he should switch currencies or reconvert and crystallize his loss;
(iii) if the banker or financer was under such a duty, what was the source of that duty;

95 In *James v. Australia and New Zealand Banking Group Ltd* (1985) 64 A.L.R. 347 foreign currency loans were apparently suggested by the bank to the borrowers at one stage.

96 In many cases the bank reserved the right to 'top up' the security if there were an adverse move in interest rates or currency values.

(iv) if the banker or financer was under a duty, what was the nature of the duty and the standard expected of the banker or financer;
(v) if there was a breach of the duty owed to the borrower, what was the appropriate measure of damages, bearing in mind that all such contracts must have a speculative element?

The few reported decisions, and the extent of concessions or admissions that were made in them, result in few comprehensive answers to these questions, so that the field is still one for legal speculation, which is not easy given that the only thing that seems to be agreed is that ultimately each case has to be decided on its own facts. Nevertheless, some study of the cases so far known is instructive.

The first was a claim against the Australian Bank, brought in the Supreme Court of Victoria by Naalong Investments Pty Ltd and others. The gist of the claim was that the bank had represented to the plaintiffs its expertise in the management of foreign currency facilities and had undertaken that it would manage the foreign exchange exposure of the plaintiffs, knowing that the plaintiffs would act on this advice. The plaintiffs alleged that on the basis of the advice they had borrowed overseas and secured their borrowings with various mortgages and guarantees. They claimed on the basis of a failure by the bank to provide the continuing management and advice which might have minimized their loss, for example by switching currencies when things began to go wrong. It is not clear whether the claim was on the basis of breach of an express contractual duty or breach of a *Hedley Byrne* type duty where the bank had assumed the responsibility to advise, because the case was settled. On the assumption that the plaintiffs could have made out their case, there is not much help from this case in answering the questions posed above. On the basis that the oral representations would have given rise to a duty to provide continuing management, questions as to the standard of that duty and the measure of damages that might have flowed from any breach remain unanswered.

The second case was a decision of Yeldham J. in the Supreme Court of New South Wales in *Rest-Ezi Furniture Pty Ltd v. Ace Shohin (Australia) Pty Ltd.*[97] Counsel for the defendant conceded that a duty of care existed where a futures broker was dealing with a person unfamiliar with such transactions, and that the duty in the circumstances of this case required him to provide the client with an explanation of margin calls. Yeldham J. held that the defendant had failed to discharge this duty and, accordingly, was liable in damages representing the difference between what the plaintiff actually lost and what he would have lost had he been informed of his possible liability to pay margin calls. At the time of writing, no more information about the case than this is available to the writer so that the source of the duty and the precise circumstances that gave rise to it are a matter for some speculation. The duty might have rested on an implied term in contract or on the assumption of a duty of care in tort which, in the particular circumstances of the relationship (broker and client) of the parties, called for this advice to be given. Whether or not the duty was properly discharged is a question

[97] (1987) 5 A.C.L.C. 10.

of fact; and it is not clear what issue arose as to the measure of damages or how they were in fact computed.[98]

Although not a foreign currency case, it is instructive as to the nature of a broker's duty to compare *Darlington Futures Ltd v. Delco Australia Pty Ltd*[99] where the High Court had to construe an exclusion clause in a written contract between a futures broker and its client. The broker had left the client exposed to unnecessary risk of loss on several contracts, and it was argued for the broker that this was not an excess of authority but a negligent performance of his contractual duty to manage the client's investment, which was protected by the exclusion clause. The High Court rejected the argument that this was simply a negligent performance and held instead that the broker had broken his contract by deliberately exceeding his authority (which limited exposure to day trading) and had subjected the client to a longer exposure, in the hope of reducing the loss or making a profit. However, the Court held that, on the true construction of the contract, whilst the exclusion clause did not cover this conduct, a clause limiting the broker's liability to $100 *per* contract did. The claim was therefore reduced from $291,000 to $2,500.

The most instructive of the cases so far resolved is *Lloyd v. Citicorp Australia Ltd.*[1] This involved a three year loan of substantial proportions in May–December 1984, which could be drawn down in U.S. dollars, Swiss francs, Deutschemarks or Japanese yen, or other currencies by arrangement. The currencies could be switched at the rollover dates or brought back on shore at any time. The plaintiff drew down $2,543,000 in Swiss francs in February 1985, which saved him $50,000 in interest, but eventually involved an exchange loss of between $500,000 and $700,000, which he sued to recover on the ground that the defendant had given advice which was negligent or had failed to give advice at all in circumstances in which it was under a duty to advise. The defendant conceded that it was under a duty to monitor the plaintiff's account and to advise him from time to time in relation to his foreign currency exposure. It might have been difficult to deny that the giving of financial advice and the monitoring of accounts in these circumstances was part of the business of the defendant. But, as a result, the first and most vital question of the existence, nature, and source of the duty was not in issue. The key issue in the case, therefore, was the standard of care required of a lender in these circumstances.

It is clear that the lender is not an insurer and that his duty can not go beyond the exercise of such skill and care as is reasonable in all the circumstances. The task therefore becomes one of determining what is reasonable in what may be found to be the relevant circumstances of the case. Rogers J. had regard first to the nature of the market. He noted that '[t]here is no scientific basis upon which accurate forecasts can be made of movements of currency. Although some operators in the market are better equipped to give advice than others, ultimately it is a

98 The damages awarded would appear to satisfy the test of remoteness in both contract and tort.
99 (1986) 68 A.L.R. 385.
1 (Unreported) 22 December 1986, Supreme Court of N.S.W. (Rogers J.).

gamble . . . because unpredictable factors may have immediate and violent repercussions.' He continued:

> Whilst I am willing to accept, for the purposes of this case only, that the duty called for the exercise of skill and diligence which a reasonably competent and careful foreign exchange adviser would exercise, by reason of the nature of the market to which I have already referred, I would take leave to doubt that the content of that duty would be very high. . . . [T]he nature and extent of the advice required from a foreign currency exchange adviser will vary with the known commercial experience of the client. It seems to me likely that the advice to be given to the treasurer of a multinational corporation in relation to dealing in foreign currencies will be minimal compared to that required to be given to a farmer in western New South Wales who, to the knowledge of the adviser, is entering the foreign exchange market for the first time. . . . Accordingly, it seems to me that one of the matters to which attention needs to be paid is the commercial and financial background of the borrower and the lender at the time of the transaction.

After an exhaustive review of all the circumstances of this transaction, including the fact that the plaintiff was not without some measure of commercial and financial acumen, and including allegations by the defendant that the plaintiff had sometimes rejected advice the defendant had tendered, Rogers J. concluded: 'I am unable to find that the defendants have given advice which was negligent or failed to give advice called for by the circumstances of the case.'[2]

The result, whilst no doubt satisfactory for the defendant, still leaves many questions unanswered: as to the circumstances in which the duty will arise and as to the measure of damages. At the moment, it must be confessed that the law does not distinguish clearly between circumstances that give rise to the duty to advise and circumstances that affect its nature and scope. The duty to advise exists if the bank accepts that duty, expressly in a contract or by its conduct in impliedly holding itself out as being in the business of giving advice. In determining whether it has done that and also in determining whether it has discharged that duty, one looks to all the circumstances of the case, and they are likely to be the same circumstances whether one is investigating the existence of the duty or its performance. Hence, the degree of sophistication and experience of the customer–client, the previous relationship of the parties as well as their relationship and conduct in the transaction under review, the terms of any contract between the parties, and the details of any communications between them: all these circumstances are relevant and will need to be reviewed.

Particularly in relation to the measure of damages, whether the action is based on a contractual duty or a duty in tort may affect the types of loss that can be recovered. Many problems arise in assessing the precise loss as the result of a breach of duty by the banker–financer. In the context of the Swiss franc cases, it has been asked how one determines the causal connexion of the loss to the breach of duty. The immediate cause of the loss was the fall in the value of the Australian dollar; that would have occurred in any event. It is doubtful if any borrower can allege that he believed currency rates were not subject to fluctuation and that there was not always the risk of some loss, just as there was always the prospect

[2] On 28 May 1987, in *Anda Pty Ltd v. Westpac Banking Corporation*, Foster J. in the Supreme Court of New South Wales entered judgment in favour of the defendant bank in a case in which the plaintiff alleged it had received inaccurate and misleading advice from the manager of a local branch of the bank in entering and managing a foreign loan, and had thereby suffered substantial loss. See *Australian Financial Review* (Sydney) 29 May 1987. No further details are available at the date of writing.

of some profit. It is necessary for him therefore to point to an excessive loss that would not have occurred but for the failure of the banker–financer to advise him, for example, to hedge his risk or to crystallize his loss in Australian dollars. The difficulty is to identify that portion of the loss which can be said to be the result of the breach of duty of the banker–financer, and then to ask whether that portion is recoverable in contract or in tort, depending on how the action is formulated. Clearly the defendant is liable only for such losses as were not the result of risks ordinarily incident to the transaction and were foreseeably the result of his breach of contract or negligence. And what is the result of a failure of the borrower to heed advice? Is it contributory negligence, and if so with what consequences? Or does it break the chain of causation?[3]

What does emerge from *Lloyd's* case is that, where the borrower himself is not commercially naive, the duty of care in tort or contract may not be very onerous or difficult to discharge. It may be for this reason that one of the latest cases, *Spice v. Westpac Banking Corporation*, is being brought in the Federal Court under s. 52 of the Trade Practices Act 1974 (Cth) alleging deceptive and misleading conduct. Little is known at this stage about this case other than newspaper reports of the institution of proceedings.[4] The statement of claim alleges that the plaintiff's liability on a Swiss franc loan facility of up to $800,000 was greatly increased by the fall in the value of the Australian dollar, and his losses were brought about by untrue and misleading representations made to him by employees of the bank in breach of their duty to take reasonable care to tender full, accurate, and sound advice. The claim under s. 52 will also give the Federal Court jurisdiction to hear and determine claims based on breach of contract and tort. In the meantime, Fox J. has made an interim order restraining Westpac from exercising any of its powers as mortgagee or rights of security in consequence of the plaintiff's failure to provide additional security. The outcome of this action will be eagerly awaited by the financing industry and their lawyers as well as by the parties.

6. *Misleading or Deceptive Conduct: Trade Practices Act 1974 (Cth) s. 52*

The Trade Practices Act 1974 (Cth) s. 52 provides that a 'corporation shall not, in trade or commerce,[5] engage in conduct that is misleading or deceptive or is likely to mislead or deceive'. This section creates a duty, the full scope of which is still only being explored and which, being independent of both contract

[3] If the cause of action is in tort, contributory negligence, if proved, would result in apportionment of the damages; but if the cause of action is in contract, contributory negligence probably goes to the whole question of causation. See and compare *Lexmead (Basingstoke) Ltd v. Lewis and Others* [1982] A.C. 225; *Vischer (Simonius) & Co. v. Holt* [1979] 2 N.S.W.L.R. 322; and *Basildon District Council v. J. E. Lesser (Properties) Ltd and Others* [1985] Q.B. 839.

[4] See *Australian Financial Review* (Sydney) 18 March 1987. It is believed, on apparently reliable information from usually well-informed sources, that there are other cases which have just been commenced or are about to be.

[5] Toohey J. in the Federal Court in *Menhaden Pty Ltd v. Citibank N.A.* (1984) A.T.P.R. #40-471 held that, if information was provided in the course of the corporation's trade or business, the conduct of the corporation did not fall outside s. 52 simply because the information was given to only one person. In that case, the complaint concerned gratuitous advice given to a non-customer of Citibank, and Toohey J. declined to strike out the application on the ground that the advice was not given in the course of trade or business or that it was given to one person only.

and tort, is capable of rendering obsolete much of the general common law regulating the giving of advice in commercial transactions, which has been reviewed above.[6] It is settled that the duty it creates can not be read down by reference to the heading to Part V of the Act so that it would apply only to consumers. Rather it creates a broad duty of general application.[7] It may encompass negligent advice given in the circumstances considered above, because it does not require a conscious intent to mislead or deceive on the part of the corporation. It would, therefore, include advice given negligently which did in fact mislead or deceive, even though the corporation might in all the circumstances have behaved honestly and reasonably.[8] It may also include advice which is not given negligently if, in concert with other factors, its effect is to mislead or deceive. In the matter of promises, predictions, and opinions, the Full Federal Court[9] (before the enactment of s. 51A) said the crux of the matter is whether what is said conveys a misrepresentation. Likewise before the 1986 enactment of s. 51A, Toohey J., first in *Bell and Another v. Australasian Recyclers (W.A.) Pty Ltd and Others*[10] and then in *James v. Australia and New Zealand Banking Group Ltd*[11] laid down certain principles governing the application of s. 52 to statements as to what might happen in the future. The capacity of s. 52 to apply to advice in the sort of situation we are considering is considerably enhanced by s. 51A, which was inserted into the Act in 1986. This provides that representations by a corporation as to future matters shall be taken to be misleading if the corporation 'does not have reasonable grounds for making the representation'. There is little guidance as to what constitutes reasonable grounds, but the onus is placed on the corporation to show that it did have reasonable grounds for making the representation.

A person who suffers loss or damage by reason of a contravention of s. 52 may bring an action for damages under s. 82 of the Act within three years of the accrual of the cause of action and for ancillary relief under s. 87 and interlocutory relief under s. 87A. The measure of damages is taken to be the tort rather than contract measure of damages;[12] and the causal connexion between the conduct complained of and the loss or damage suffered must be proved. The award can include interest.[13]

Some interesting issues concerning the jurisdiction of the Federal Court to award damages arose in *James v. Australia and New Zealand Banking Group*

6 The constitutional net is closed around non-corporate misleaders and deceivers, at least so far as Victoria is concerned, by the Fair Trading Act 1985, s. 11 which corresponds to s. 52 of the Trade Practices Act, and s. 37 to s. 82.

7 *Bevanere Pty Ltd v. Lubidineuse* (1985) 59 A.L.R. 334.

8 *Greco v. Bendigo Machinery Pty Ltd* (1985) A.T.P.R. #40-521; *Yorke v. Lucas* (1985) A.L.J.R. 776. In the latter case, the High Court exempted the case where it is apparent that the corporation is not the source of the information but is merely passing it on without asserting any belief in its truth or accuracy.

9 In *Global Sportsman Pty Ltd & Another v. Mirror Newspapers Ltd & Another* (1984) A.T.P.R. #40-463.

10 [1986] A.T.P.R. #40-644.

11 [1986] 64 A.L.R. 347, 372-3.

12 *Gates v. City Mutual Life Assurance Society Ltd* (1982) 43 A.L.R. 313, A.T.P.R. #40-226; *Hubbards Pty Ltd v. Simpson Ltd* (1982) 41 A.L.R. 509, A.T.P.R. #40-295; *O'Brien Glass Industries Ltd v. Cool & Sons Pty Ltd* (1983) 48 A.L.R. 625, A.T.P.R. #40-376.

13 Federal Court of Australia Act 1976 s. 52.

Ltd[14] having regard to the three year time limitation in s. 82(2). The applicants had pleaded *inter alia* breach of s. 52 against the bank (the first respondent), the finance broker (the second respondent) and the managing director of the finance broker (the third respondent). Toohey J. found that the bank had not contravened s. 52, but that the finance broker had, aided and abetted by its managing director. The second and third respondents pleaded that the claim against them for damages under s. 82 for contravention of s. 52 was statute-barred. Toohey J. held[15] that as '[l]oss or damage is the gist of the action' the cause of action accrued, not when there was a contravention of s. 52, but when the loss or damage was suffered in consequence; and on this basis, the applicants' claim to damages under s. 82 was statute-barred. Whilst there was not a similar time limitation on the Court's power to order repayment of the amount of any loss or damage under s. 87(2)(d), in exercising its discretion whether to make such an order under s. 87(2), the Court had regard to the general legislative intent manifested by s. 82(2) and refused to make an order. Moreover, the Federal Court's jurisdiction to determine not only claims arising under the Trade Practices Act, but also other federal and non-federal claims arising out of the same matter or controversy[16] was not excluded in this case where there was a contravention of s. 52 and the claim in respect of that contravention failed only by reason of s. 82(2). The Court was properly seized of the matter and could deal with the issue of negligence on its merits.

The type of ancillary relief available under s. 87[17] is set out in s. 87(2). It includes declaring contracts and collateral agreements void in whole or in part; varying such contracts or agreements;[18] refusing enforcement of all or any provisions of a contract; ordering the refund of money or property; ordering payment of the amount of any loss or damage suffered; directing the repair or supply of parts for goods; directing the supply of services; directing the execution of an instrument to vary or to terminate the effect of an instrument transferring an interest in land. In addition, where proceedings under the Act have been commenced, s. 87A authorizes the making of a range of orders prohibiting the payment or transfer of money or other property in certain circumstances. It is interesting to note that the relief under s. 82 and s. 87 is available to persons who have not themselves been misled or deceived but who have suffered loss by reason of the misleading or deceptive conduct of the respondent.[19]

The Trade Practices Commission has released Guidelines in relation to the advertising of deposits and loans, with particular reference to s. 52. These relate to full disclosure of interest calculations; of terms generally but particularly

14 (1985) 64 A.L.R. 347.

15 *Ibid.* 392.

16 *Philip Morris Inc. v. Adam P. Brown Male Fashions Pty Ltd* (1981) 148 C.L.R. 457; *Fencott v. Muller* (1983) 152 C.L.R. 570; *Stack v. Coast Securities (No.9) Pty Ltd* (1983) 154 C.L.R. 261.

17 The High Court in *Sent & Another v. Jet Corporation of Australia Pty Ltd* (1986) 60 A.L.J.R. 503 stressed the ancillary nature of orders under s. 87, which confers no direct rights. Orders can be made only where proceedings are brought under other provisions of Part VI of the Act — *e.g.* s. 82(1).

18 In *Kennard & Another v. A.G.C. (Advances) Ltd and Others* (1986) A.T.P.R. #40-747, rectification of a mortgage was sought to make it give effect to the common intention of the parties.

19 *Collier & Others v. Electrum Acceptance Pty Ltd & Others* (1987) 69 A.L.R. 355.

relating to early repayment or withdrawal provisions; security; and investment advisory services. In the light of the record under s. 52, those taking deposits or making loans would do well to heed them. Compliance with them will provide useful arguments in support of a defence to a s. 52 action.

7. *Other Statutory Jurisdictions*

Brief mention should be made of other statutory provisions which, whilst not imposing duties directly upon contracting parties, do so indirectly by making contracts and collateral transactions vulnerable unless certain objective standards are achieved.

Trade Practices Act 1974 (Cth) s. 52A

The 1986 amendments to the Trade Practices Act added a new s. 52A which prohibits a corporation in trade or commerce, in connexion with the supply or possible supply of goods or services to a person, engaging in conduct that is in all the circumstances unconscionable.[20] 'Services' are defined in s. 4(1) to include:

> (b) a contract between a banker and a customer of the banker entered into in the course of the carrying on by the banker of the business of banking; or
> (c) any contract for on in relation to the lending of moneys.

However, s. 52A(5) restricts the meaning for the purposes of this section to 'services of a kind ordinarily acquired for personal, domestic or household use or consumption'. Whilst the exact scope of this exception in relation to banking and financial services may not be clear, it will obviously exclude the majority of commercial transactions, but may linger as an unexplained threat in what may be termed personal banking transactions, such as personal loans for holidays, new cars, boats, *etc.*, endangering both the loan and the security.

Factors that the court may take into account in determining whether a corporation has contravened the section are set out in s. 52A(2) and include the relative bargaining strengths of the parties, the inclusion of terms not reasonably necessary for the protection of legitimate interests of the corporation, the ability of the customer to understand the documents, the use of undue influence or pressure or unfair tactics, and the state of the market for the supply of the goods or services in question.

Damages are not obtainable under s. 82(1) for a contravention of s. 52A,[21] and relief therefore will be limited to orders under s. 87 and s. 87A.

Contracts Review Act 1980 (N.S.W.)

The Contracts Review Act in New South Wales confers jurisdiction upon the court to grant relief against contracts that are 'unjust' in the light of circum-

[20] For a recent discussion of unconscionability, both in equity and under s. 52A, see Chin N. Y., 'Unconscionable Dealings in Commerce' (1987) 1 *Commercial Law Quarterly* 19. See also for a discussion of policy issues, Ford, D. C., 'Unconscionable Conduct — a Matter for the Courts or the Legislatures?' (1985) 13 *Australian Business Law Review* 307.

[21] But, if equitable relief in the form of an injunction is obtainable under s. 80, could equitable damages under Lord Cairns' Act be obtained?

stances prevailing at the time they were made.[22] A corporation can not apply for relief under the Act,[23] and a person may not be granted relief if the contract was entered into in the course of or for the purpose of a trade business or profession carried on by him other than a farming undertaking carried on wholly or principally in New South Wales.[24] 'Unjust' is defined to include 'unconscionable, harsh or oppressive'.[25] The court is given various powers to counter the injustice: to refuse to enforce all or any of the offending provisions; to declare the contract void, in whole or in part; to vary any provision of the contract; and to require the execution of instruments in relation to instruments creating or transferring interests in land.[26]

The Credit Acts

The Credit Acts are now in operation in Victoria, New South Wales, Western Australia, and the A.C.T.[27] There are several provisions relating to general controls over credit providers and, in N.S.W. and the A.C.T., finance brokers in the interests of consumer protection. It is not intended to canvass these in this article, but simply to make two observations.

Credit provided by banks by overdraft or by means other than credit sale contracts, continuing credit contracts or term loans is exempted from Parts III-VIII of the Acts.[28]

The Acts are enforced by Credit Tribunals or, in Victoria, by the Credit Division of the Small Claims Tribunal.[29] These tribunals under the Acts exercise extensive powers to re-open transactions, which have been based on the Contracts Review Act of New South Wales. Although their decisions are subject to appeal to the Supreme Court, one wonders whether such broad jurisdiction should be conferred in the first place on non-judicial bodies. For example, in two recent Victorian cases, *Luffran v. Australia and New Zealand Banking Group Ltd*[30] and *Dougherty & Anor v. H. F. C. Finance Services Ltd*,[31] the Credit Division had to deal, in the first case, with an allegation of undue influence, and in the latter case with a complaint of negligence in respect of the making of further advances without reference to the borrower's ability to repay. The complexity of legal issues such as these has been revealed in this article, and it is suggested that justice to both parties may require that they be submitted to judicial determination in the first instance rather than on appeal.

22 S. 7. This is qualified by s. 9 which requires the public interest to be taken into account and also provides a non-exclusive list of factors relevant to determining whether a contract is unjust. The relation of s. 7 and s. 9 was considered in some detail by the N.S.W. Court of Appeal in *A.G.C. (Advances) Ltd v. West* (1984) 5 N.S.W.L.R. 590.

23 S. 6(1).

24 S. 6(2).

25 S. 4(1).

26 S. 7.

27 Credit Act 1984 (Vic.), (N.S.W.) & (W.A.); Credit Ordinance 1985 (A.C.T.).

28 S. 18(2) Some term loans and some housing loans by banks have also been exempted by Ministerial Order.

29 See Bingham, P., 'The Credit Protection Crusades: Consumers Charge Back', (1986) 60 *Law Institute Journal* 1194.

30 (1985) A.S.C. 55-449.

31 (1986) A.S.C. 55-493.

III. *SPECIAL PROBLEMS*

1. *Exclusions, limitations, and disclaimers of liability*

A major issue still to be resolved is how far the banker-financer can disclaim legal responsibility for the advice he gives or for his failure to give advice, particularly in the situation where it is alleged he is under a continuing duty to manage a loan. Insofar as his duty rests on a basis of the voluntary assumption of responsibility, he ought in principle to be able to disclaim it. This discussion assumes that, as a matter of commercial propriety and expediency, he does not wish to accept legal responsibility for his opinion. It should be acknowledged that there may be many volatile topics on which his advice is sought, such as likely movements in currency exchange rates, as well as informality in the circumstances in which the advice is given,[32] that would make it prudent to disclaim responsibility. The question of disclaimer can also rise acutely where the banker is asked to give advice with the knowledge and intent that it shall be acted upon by non-customers. This section of the article, therefore, examines the availability of disclaimers both in the context of the sources of the duty and specifically in relation to bankers' status opinions.

It is suggested as a basis for this discussion that, in all cases where a duty of care exists, that duty stems from and qualifies some positive conduct on the part of the banker-financer whether it be simply engaging in banking and financing transactions or, more positively, profferring advice and encouragement to the customer. In most of the cases examined, the duty does not exist in the abstract, but exists because of some conduct, words, representations, advice or commendation on the part of the banker-financer, and in some cases there is the additional requirement of some specified relationship between the banker-financer and his customer-client. But, it is suggested that in none of the cases is a relationship alone sufficient, without some positive conduct on the part of the banker-financer.

If this is correct, the task is to find the appropriate 'formula' that will prevent the duty arising.

It is clear that liability for contractual negligence can be excluded by appropriately worded exclusion clauses in the contract. In *Darlington Futures Ltd v. Delco Australia Pty Ltd*[33] the High Court affirmed the position it had always taken, namely that there was no such doctrine as 'fundamental breach' to limit the scope of effectiveness of exclusion clauses, and the question whether such clauses were effective in any particular situation depended upon the construction of the clause to determine its applicability in the situation that had arisen.[34] So,

32 Such informality may also of itself negative the assumption of a duty of care.

33 (1986) 61 A.L.J.R. 76.

34 The High Court noted with approval the decisions of the House of Lords to similar effect: *Photo Production Ltd v. Securicor Transport Ltd* [1980] A.C. 827 and *Ailsa Craig Fishing Co. Ltd v. Malvern Fishing Co. Ltd* [1983] 1 W.L.R. 964 — the only difference on this point, which may be more apparent than real, between the High Court and the House of Lords would relate to the method of construction of the clause — the degree of emphasis to be placed respectively on the natural meaning of the words and the context in which they were used.

where a contract between a broker and his client in respect of dealings on the commodities futures market contained clauses both excluding the liability of the broker and limiting the liability for any one breach to $100, and the broker was proved to have exceeded his authority, the High Court found that the exclusion clause properly construed did not protect the broker but the limitation clause similarly construed did. It must follow from this that bankers and other financial advisers and intermediaries may if they wish insert appropriately drafted exclusion clauses into their contracts with their customer-clients, and if these clauses stand up to the rigours of construction, they will protect the adviser from liability for breach of contract. In the *Darlington Futures* case, the High Court stressed that the clauses must be construed according to their natural and ordinary meaning, read in the light of the contract as a whole, giving due weight to the context in which the clause appears including the nature and object of the contract. In the last resort, the old rule that ambiguities are to be resolved *contra proferentem*, against the interest of the party for whose benefit they were inserted, will be applied, although the courts, having regard to the availability of statutory avenues for relief that exist today, may not strain to find an ambiguity in the clause, as once they were inclined to do. The drafting of effective exclusion and limitation clauses is hardly likely to become the new art form of the late 1980s.

It can also be propounded today with some confidence that where liability in tort and contract overlap, the bounds of tortious liability can be no wider than permitted by the contract. The *dictum* of Lord Scarman in *Tai Hing Cotton Mill Ltd v. Liu Chong Hing Bank Ltd and Others*[35] has already been cited: 'Their Lordships do not . . . accept that the parties' mutual obligations in tort can be any greater than those to be found expressly or by necessary implication in their contract.' It may be necessary to qualify this in the case of liability for fraud in the tort of deceit, and it is doubted on grounds of public policy whether any exclusion would be construed widely enough to cover fraud.

On the other hand, it is not possible through the medium of exclusion or limitation clauses to protect the transaction from the risk that it might be impugned on the ground of economic duress or the equitable doctrines of undue influence or unconscionability, because these jurisdictions go to the validity of the contract itself. The more the contract seeks to deny court intervention, the more it is likely to attract it. The writer knows no authority for this proposition: it seems self-evident. It also seems likely that the courts would not agree to be 'blindfolded' by recitals in the contracts which seek to deny the factual basis on which they give relief; for example '[t]he mortgagors and guarantors acknowledge that they have received and are acting upon independent legal advice, and that they are entering into this transaction of their own free will and without any coercion or pressure from the mortgagee.' This ploy was attempted in relation to implied terms as to quality in contracts for the sale of goods in the case of *Lowe v. Lombank Ltd*[36] — and failed miserably. However, in *Byers and Others v. Dorotea Pty Ltd*,[37] Pincus J. in the Federal Court held that a clause denying that

35 [1985] 2 All E. R. 947, 957.
36 [1960] 1 All E. R. 611.
37 (1987) 69 A.L.R. 715.

any representation had been made or, if it had been made, that it operated as any inducement to enter the contract, could give rise to an estoppel that would prevent the plaintiff relying on the misrepresentation, although it would not prevent an action under s. 52. But, with respect, it is difficult to see how the argument that the plaintiff was estopped could be maintained. It hardly lies in the mouth of the defendant to allege that he relied upon it, although clearly he might have been anxious to have it included in the contract. The reasoning of *Lowe v. Lombank Ltd* is preferred: contracts are concerned with promises, and such statements are not promissory; and it is beyond the capacity of contract to change the facts when the court's jurisdiction to intervene in the transaction depends upon the existence of certain facts. Bluntly, it is not the function of contract to tell lies and, if the defendant wishes to avoid liability for misrepresentation, he should ensure either that he does not misrepresent facts or that the plaintiff is indeed warned to make his own judgment and not to rely on the word of the defendant. It would be an abuse of contract to expect it to found an estoppel in these circumstances.

Similar considerations apply to the statutory jurisdictions, whether under the Trade Practices Act, the Contracts Review Act, the Credit Acts or the Fair Trading Act. This is mandatory law and the jurisdiction and the liabilities can not be excluded or limited by contract. The jurisdiction can be excluded only by ensuring that its requirements are met: that the contract is not unjust or unconscionable, and that statements are so qualified that they are not capable of being misleading or deceptive in the circumstances in which they are put into circulation.[38]

A more difficult area is where there is no contractual relation or privity between the giver and the recipient of advice. Any duty in such a case must rest either in tort or on statute. So far as the duty lies in tort and is imposed by the law, it is probable that it cannot be excluded by unilateral declaration of one of the parties, and a bilateral arrangement enters the domain of contract. It is in this context that it has been important in this paper to ask whether tortious liability for negligent advice is based on an imposition by law or upon the voluntary assumption by the adviser. On the present state of the authorities reviewed in this paper, it is suggested that the latter is the correct answer.[39] If this is so, then it is possible for the adviser effectively to disclaim liability arising from the advice he gives, in case it should appear that he did not exercise due skill and care, because the disclaimer will prevent reliance on his statement by the recipient in circumstances in which it could be alleged the reliance was reasonable. In effect, the chain of causation is broken. But before an outbreak of enthusiasm for disclaimers occurs, it should be pointed out that the disclaimer will not necessarily be

[38] The purpose of the addition of s. 51A to the Trade Practices Act was to facilitate the application of s. 52 to statements as to the future; but one of its incidental effects may be, by extending the scope of s. 52, to reduce the effective scope of disclaimers or at least to throw on to the maker of the statement the responsibility of showing that he had reasonable grounds for making the statement.

[39] It must be acknowledged that *dicta* of the High Court in *Mutual Life & Citizens' Assurance Co. Ltd v. Evatt* (1968) 122 C.L.R. 556 support the view that the duty is imposed by law, although they do not entirely exclude the possibility of disclaimers, at least as a factor in determining the existence of a duty. It is suggested, however, that the more recent judgments of the High Court cited above indicate some resiling from this position.

effective against the statutory jurisdictions, particularly the duty under the Trade Practices Act, s. 52 not to mislead or deceive, which as we have seen in the Swiss franc cases overlaps the tortious duty of care. If liability under s. 52 is to be avoided, then something more than a simple disclaimer is required: the advice must be so qualified that the possibility that it might mislead or deceive, or that anyone might rely on it, is removed.[40]

2. *Status opinions*

An important area in which the various heads of liability come together is that of status opinions given by banks. A status opinion is information as to the financial stability of a customer of the bank, which is given gratuitously to another customer or to a non-customer who makes enquiry, usually through his own bank. Whilst this is an important service that banks are able to render their customers in order to enable them to obtain credit and other commercial advantages by virtue of the bank's vouching their financial status, it is fraught with danger for the bank.[41] The bank furnishing the report can incur liability to its own customer to whom the report relates, as well as to the recipient of the report and possibly third parties to whom the report is made available or who are affected by it.[42]

The bank's liability might arise in contract or in tort (for fraud or negligence) or under s. 52 of the Trade Practices Act for misleading or deceptive conduct. Before each of these heads of liability is separately examined, some general observations should be made.

Where a bank makes statements which it knows are false or which it makes with reckless indifference whether they be true or false, it is clear that no disclaimer will protect the bank against the consequences of fraudulent advice, either at common law or under s. 52.[43] But the bank is entitled to some protection against allegations of fraud as a result of Lord Tenterden's Act 1828, which is in force in all Australian States,[44] and which requires that the fraudulent statements should have been made in writing 'signed by the party to be charged' before

[40] On the effectiveness of disclaimers of liability under s. 52, see Terry, A., 'Disclaimers and Deceptive Conduct' (1986) 14 *Australian Business Law Review* 478.

[41] Legal opinions by lawyers in financial transactions attract similar considerations except that, as law firms are not incorporated, statutory liability would arise under the Fair Trading Act 1985 (Vic.) s. 11 and s. 37. Are lawyers the next target? See Johnston, B., 'The Use of Formal Legal Opinions in Australia' (1985) 13 *Australian Business Law Review* 396.

[42] For a view of this topic under English law, see Shea, A. M., 'Liability of Banks for Erroneous Status Opinions' (1986) 1 *Journal of International Banking Law* 20. It should be noted that the statute law in England which would apply to status reports is not the same as in Australia.

[43] *Commercial Banking Co. of Sydney Ltd v. R. H. Brown & Co.* (1972) 126 C.L.R. 337; *Petera Pty Ltd v. E.A.J. Pty Ltd and Others* (1985) 7 A.T.P.R. # 40-605.

[44] In Victoria, see Instruments Act 1958 s. 128 and in N.S.W. the Usury, Bills of Lading, and Written Memoranda Act 1902 s. 10: 'No action shall be brought whereby to charge any person upon or by reason of any representation or assurance made or given concerning or relating to the character, conduct, credit, ability trade or dealings of any other person to the intent or purpose that such other person may obtain credit, money or goods thereupon, unless such representation or assurance is made in writing signed by the party to be charged therewith.' In 1828 when Lord Tenterden's Act was passed, tortious liability for words lay only in fraud, and it is thought, in spite of the fact that the words of s. 128 are not so limited, they would in fact be limited in operation. See *Banbury v. Bank of Montreal* [1918] A.C. 626, and the opinion of the High Court in *Mutual Life & Citizens' Assurance Co. Ltd v. Evatt* (1968) 122 C.L.R. 556, 580, 603, 618.

liability attaches to the bank as distinct from the person making the statement. It is thought that this requires the writing to be signed by someone other than the person (usually a branch manager) making the statement, if the bank is to be made liable, otherwise only the bank officer making and signing the opinion will be liable.[45] It is perhaps because of this that the practice developed of issuing status opinions unsigned. This is what happened in *Commercial Banking Co. of Sydney Ltd v. R. H. Brown & Co.*[46] where the opinion was in fact unsigned although it was conceded that it was the opinion of the manager of the relevant branch. At first instance there was a finding that the branch manager who had issued the opinion had acted dishonestly and fraudulently; and it is notable that the defendant bank did not raise any defence based on the West Australian equivalent of Lord Tenterden's Act.

So far as actions based on negligence or on misleading or deceptive conduct under s. 52 are concerned, it would appear from recent decisions that, where a bank is merely passing on information from other sources, it can disclaim its liability both at common law[47] and under s. 52[48] by expressly or impliedly disclaiming any belief in the truth or falsity of the statement. But, if it goes further, and gives its opinion on such information, or its own opinion on factors relevant to the status opinion, then disclaimer is more difficult.

The problem of status opinions, concerning both the duty of the bank and its ability to disclaim, needs to be analysed differently depending on the relationship of the bank with the plaintiff.

(i) *Bank furnishes false report about its own customer*

Where a bank is furnishing statements about one of its own customers, its duty to that customer will be measured by the terms, express or implied, in its contract with that customer. If the bank wishes to excuse itself from the consequences of its negligence, and if its customer agrees, it can do so. It can not, however, excuse itself from liability under the Trade Practices Act for damage suffered by that customer as a result of misleading and deceptive statements, even though those statements were not addressed to that customer but to the enquirer.

(ii) *Bank furnishes false report to its own customer*

Where the bank is furnishing the report to its own customer, then again there is a contractual relationship within which the bank can regulate its liability to that customer, whether for breach of contract or tort. It can not by contract exclude its liability under s. 52 of the Trade Practices Act if the statements in the report are misleading and deceptive and if they cause the enquirer loss or damage through his reliance on them. But, as we have seen, what the bank can do is to present its

45 *Hirst v. West Riding Union Banking Co. Ltd* [1901] 2 K.B. 560; *Swift v. Jewsbury (P.O.) and Goddard* (1874) L.R. 9 Q.B. 301; *Parsons v. Barclay & Co. Ltd and Goddard* (1910) 26 T.L.R. 628.

46 (1972) 126 C.L.R. 337; and see at first instance *R.H. Brown & Co. v. Bank of New South Wales and Commercial Banking Co. of Sydney Ltd* [1971] W.A.R. 201.

47 *Royal Bank Trust Co. (Trinidad) Ltd v. Pampellone* [1987] 1 Lloyd's Rep. 218, discussed above.

48 *Yorke v. Lucas* (1985) 59 A.L.J.R. 776.

report in such form that it will not be misleading or deceptive, for example it may make it clear that the bank is simply passing on information without vouching its accuracy or expressing any opinion as to how that information should be interpreted.

(iii) *Bank furnishes false report to a non-customer*

Where the status report is furnished to a non-customer of the bank, either directly or through another bank, the bank owes the ultimate enquirer a duty to be honest and a duty not to be negligent. It is suggested that this is so even though the bank is unaware of the identity of the ultimate enquirer, and it is sufficient that it knows he exists. The nature of the duty to exercise care in making the report is set out in the judgment of Lord Diplock in *Mutual Life & Citizens' Assurance Co. Ltd v. Evatt*[49] in the Privy Council. In short, the bank is 'required . . . to conform to that standard of skill and competence and diligence which is generally shown by the persons who carry on the business of providing references of that kind.' But Lord Diplock went on to say that the reason the duty was owed was because, by carrying on a business that involved the giving of references of that nature, the bank has let it be known that it claims that degree of skill and competence and diligence and that it will exercise it in respect of any reference that it provides. If this view also represents the state of the law in Australia, and it has been submitted above that it does, then it follows that the bank can if it wishes disclaim the responsibility and the duty at the time it gives the report.

(iv) *False report transmitted by recipient to a third party*

A more difficult problem arises where the recipient of the information passes it on to a third party who acts on it to his detriment. Does the bank owe a duty to the ultimate recipient whoever he may be? And if it does owe such a duty, does the effect of the disclaimer run with the report to cancel the duty? The existence of a duty to a third party should, it is submitted, depend on whether it was reasonable for the bank supplying the report to have anticipated that the report would be handed on to others or that it might be acted upon by the immediate recipient in a way that would cause injury to a third party. If the view expressed in this article is correct, that the duty of care in these cases rests on its voluntary assumption, then the disclaimer should be effective if it is passed on by the intermediate recipient to the ultimate recipient or perhaps if by some means the ultimate recipient is made aware of it before he relies upon the report. There is no authority directly in point, but an instructive case is *B. T. Australia Ltd and Another v. Raine & Horne Pty Ltd*[50] where a valuer, who was asked by the trustee of an investment trust to value certain assets of the trust, inserted a disclaimer into the contract to the effect that his report was for the use of the trustee only and 'no responsibility is accepted to any third party for the whole or part of the contents of this report.' The valuer knew that the report would be

[49] [1971] A.C. 793, 804.
[50] [1983] 3 N.S.W.L.R. 221.

relied on by the trustee in dealings with the unitholders. There was a negligent error in the report as a result of which individual unitholders suffered economic loss. The action against the valuer was based on tortious negligence. Wootten J. held that a duty was owed by the valuer to the unitholders who, although not individually known to him, were a limited and ascertainable class. The disclaimer, properly construed, was a disclaimer of liability to third parties who relied on the valuation and suffered loss thereby, but not a disclaimer of liability to third parties who suffered loss through the trustee's reliance on the valuation. The valuer had impliedly accepted liability for the consequences of the trustee's reliance on the valuation, including injury which that caused to third parties. The case is a good example of construction *contra proferentem*.

Cutting across the whole of this discussion of the bank's liability in respect of false or erroneous statements in a status report, is the potential liability to pay damages under s. 82 of the Trade Practices Act for injury caused through misleading or deceptive conduct under s. 52. It is difficult to see how false or erroneous statements in a status report could not fall within this trap, unless the 'disclaimer' is so worded as to remove the tendency of the statements to mislead or deceive and to make reliance on them unreasonable.[51] It is thought that nothing would suffice short of saying that the bank has not had the opportunity to verify for itself the information in the report or to make further enquiries of additional or surrounding circumstances; that it passes on the information on this basis without comment, interpretation or opinion; and the enquirer should pursue for himself such other enquiries as may be appropriate. But even that will not necessarily be of avail against a third party recipient of the report unless the 'disclaimer' is presented in such a fashion that it is an integral and inseparable part of the report.

IV. *WHAT DOES THE PRUDENT BANKER DO?*

It is now probably far too late to seek to deny that the business of banking includes the giving of financial advice. Banking practice has established the legal range of its own activity. That being so, the bank is under a duty of care, the standard of which is that of a skilled, competent, and diligent banker. That is an objective standard by reference to the industry itself. The duty is owed to the customers of the bank and to others to whom the bank assumes the responsibility of providing information and advice. It is also a continuing duty, in that the bank, having given advice, is under a duty to supplement or correct it as changed circumstances might require.

Banks also today are beginning to feel the impact of statutory duties affecting their operations and relations with their customers. The Trade Practices Act has been examined, and also the impact of such legislation as the Credit Acts and the Contracts Review Act. The consequences of proceedings under these Acts are

[51] In *Byers v. Dorotea Pty Ltd* (1987) 69 A.L.R. 715, it was held that it was not possible to exclude liability for a breach of s. 52; but this can not affect the reasoning that it is possible, through suitable qualifications of the opinion, to see that no breach of s. 52 occurs.

serious for the banks. Not merely are they exposed to actions for damages, but also to the loss or rewriting of transactions, both primary and collateral.

There are undoubtedly some cases that represent what banks would regard as bad experiences. The cancellation of the mortgage and guarantee in *Commercial Bank of Australia Ltd v. Amadio and Another*[52] is one such case. Yet, on the whole, it is suggested that the banks have not fared too badly at the hands of the courts in recent cases, particularly under the Trade Practices Act. The courts have appeared sympathetic to the problems and needs of banking, and have tried not to impose a duty at such a high standard as would fetter the provision of normal banking services.

The courts have, therefore, been at pains to ensure that the duty, whatever its source, is no more than a duty of care. Banks are not insurers, and they can be wrong even when they are being careful. The standard expected of banks has been seen as a flexible one, its precise dimensions depending on all the circumstances of the particular case, but most particularly on the relative skills and experience of the customer and the officers of the bank who are advising him. It is in this context that one should ask the question 'What should a prudent banker do?'

It is possible to proceed indefinitely perusing cases and drawing morals from them until one has compiled a new Bankers' Manual: constant review of procedures and instructions of staff; particular care with third party guarantees; consideration of all bank documents to ensure that they are fair and just and not unconscionable; the importance of accurate contemporary records of all conversations . . . . But this is not a particularly instructive or fruitful exercise. In the last resort, the banker knows what a reasonable, skilled, competent, and diligent banker would do in any given circumstances. Whilst there is a temptation to preach and some courts sometimes yield to it, in the end it is banking practice that sets the standards.

52 (1983) 151 C.L.R. 447.