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Federal Court of Australia

Re David Securities Pty Limited; A and T Rahme and Sons Pty Limited; Antoine Rahme; and Therese Rahme v Commonwealth Bank of Australia; Don Craig; Don Page Morgan; Ronald Allan Smith and Kevin Andrew Veale [1990] FCA 148 (10 May 1990)

FEDERAL COURT OF AUSTRALIA

Re: DAVID SECURITIES PTY LIMITED; A. and T. RAHME and SONS PTY. LIMITED;

ANTOINE RAHME; and THERESE RAHME

And: COMMONWEALTH BANK OF AUSTRALIA; DON CRAIG; DON PAGE MORGAN; RONALD ALLAN

SMITH and KEVIN ANDREW VEALE

Nos. G283 and G314 of 1989

FED No. 186

Trade Practices - Damages - Penalties - Mistake - Income Tax

[1990] FCA 148; 23 FCR 1

COURT

IN THE FEDERAL COURT OF AUSTRALIA

NEW SOUTH WALES DISTRICT REGISTRY

GENERAL DIVISION

Lockhart(1), Beaumont(2) and Gummow(3) JJ.

CATCHWORDS

Trade Practices - alleged misleading or deceptive conduct - claims against bank arising out of foreign currency borrowing arrangements - failure by bank to advise of means of guarding against adverse currency movements - alleged contravention of s. 52 of Trade Practices Act 1974 - whether duty to warn - express misleading misrepresentations also alleged - claims also made against bank in contract and negligence - claims against independent adviser engaged on recommendation of the bank - breaches of duty by adviser but claim to damages not made out.
Damages - principles governing entitlement to recovery of damages in contract and tort for "loss of a chance" - whether the appellants had shown that by reason of breach of duty of their adviser, they had lost a real chance of taking steps to avoid consequences of adverse foreign currency movements.

Penalties - whether provision for increase in interest rate with effect from date of default under loan documentation imposed a penalty.

Mistake - recovery of payments made under mistake of law - distinction between mistakes of law and of fact - whether any particular ground shown for recovery of payments although made under mistake of law.

Income Tax - money paid to recoup withholding tax - meaning of "collateral" in s. 261 of Income Tax Assessment Act 1936 - whether the law permits recovery of moneys paid by borrower pursuant to a covenant rendered void by s. 261.

Judiciary Act 1901

Income Tax Assessment Act 1936

Property Law Act 1969

Trade Practices Act 1974

Real Property Act 1900 (N.S.W.)

Judicature Act 1908-58 (N.Z.)

Norton Australia Pty Ltd v Streets Icecream Pty Ltd [1968] HCA 61; (1968) 120 CLR 635

Adelaide Chemical and Fertilizer Company Ltd v Carlyle [1940] HCA 44; (1940) 64 CLR 514

Vacwell Engineering Co. Ltd v B.D.H. Chemicals Ltd (1971) 1 QB 88

Hawkins v Clayton (1988) 164 CLR 539

Sutherland Shire Council v Heyman [1985] HCA 41; (1985) 157 CLR 424

L. Shaddock andAssociates Pty Ltd v The Council of the City of Parramatta [1981] HCA 59; (1981) 150 CLR 225

Amann Aviation Pty Limited v Commonwealth of Australia (Full Federal Court, 5 March 1990, unrep.)

Rylands v Fletcher [1868] UKHL 1; (1866) LR 1 Ex 265; (1868) LR 3 HL 330

Chaplin v Hicks (1911) 2 KB 786

McRae v Commonwealth Disposals Commission [1951] HCA 79; (1951) 84 CLR 377

Fink v Fink [1946] HCA 54; (1946) 74 CLR 127

Takaro Properties Ltd v Rowling [1986] NZCA 27; (1986) 1 NZLR 22

Hotson v East Berkshire Area Health Authority [1988] UKHL 1; (1987) 2 All ER 909

Sykes v Midland Bank Executor and Trustee Co. Ltd (1971) 1 QB 113

South Australian Cold Stores Limited v Electricity Trust of South Australia [1957] HCA 69; (1957) 98 CLR 65

O'Dea v Allstates Leasing System (W.A.) Proprietary Limited [1983] HCA 3; (1983) 152 CLR 359

Acron Pacific Limited v Offshore Oil N.L. [1985] HCA 63; (1985) 157 CLR 514

Seton v Slade [1802] EngR 267; (1802) 7 Ves Jun 265; 32 ER 108

Brett v Barr Smith [1919] HCA 4; (1919) 26 CLR 87

Domaschenz v Standfield Properties Pty Ltd (1977) 17 SASR 56

C.J. Belmore Pty Ltd v A.G.C. (General Finance) Limited (1976) 1 NSWLR 507

Cityland and Property (Holdings) Ltd v Dabrah (1968) Ch 166

National Bank of Greece SA v Pinios Shipping Co. No. 1 (1990) 1 All ER 78 (HL)

AMEV-UDC Finance Limited v Austin [1986] HCA 63; (1986) 162 CLR 170

Burton v Slattery (1725) 5 Brown 233; [1725] EngR 90; 2 ER 648

General Credit and Discount Company v Glegg (1883) 22 Ch D 549

Waddell v McColl (1868) 14 Gr 211

Downey v Parnell (1882) 2 OR 82

Stardawn Investments Pty Ltd v Comptroller of Stamps (Vic.) (1983) 84 ATC 4,097

J. and S. Holdings Pty Ltd v N.R.M.A. Insurance Ltd [1982] FCA 78; (1982) 61 FLR 108

Kiriri Cotton Co. Ltd v Dewani (1960) AC 192

Bilbie v Lumley [1802] EngR 245; (1802) 2 East 469; 102 ER 448

York Air Conditioning and Refrigeration (A/sia) Proprietary Limited v The Commonwealth [1949] HCA 23; (1949) 80 CLR 11

E.R. Squibb and Sons v Chemical Foundation, Inc. 93 F 2d 475 (1937)

Leedon v Skinner [1923] VicLawRp 51; (1923) VLR 401

Sharp Brothers and Knight v Chant (1917) 1 KB 771

Mason v The State of New South Wales [1959] HCA 5; (1959) 102 CLR 108

Ministry of Health v Simpson (1951) AC 251

In re Diplock (1948) Ch 465

Air Canada v The Queen in right of British Columbia (1989) 59 DLR (4th) 161

Pavey and Matthews Proprietary Limited v Paul [1987] HCA 5; (1987) 162 CLR 221

Australia and New Zealand Banking Group Limited v Westpac

Banking Corporation (1988) 164 CLR 662

Trident General Insurance Co. Limited v McNiece Bros Proprietary Limited [1988] HCA 44; (1988) 165 CLR 107

Foran v Wight [1989] HCA 51; (1989) 88 ALR 413

Ward and Co. v Wallis (1900) 1 QB 675

Dimdore v Leventhal (1936) SR (NSW) 378

Public Trustee v Schultz (1973) 1 NSWLR 564

Re Sara Properties Pty Ltd (In Liquidation) and the Companies Act, 1961 (1982) 2 NSWLR 277

Reversion Fund and Insurance Company, Limited v Maison Cosway, Limited (1913) 1 KB 364

HEARING

SYDNEY

10:5:1990
Counsel and Solicitors for J.J. Spigelman QC

the Appellants: P.P. O'Loughlin Esq.

instructed by

Messrs Shaw McDonald
Counsel and Solicitors for R.A. Conti QC

First and Second Respondents: A.J. Meagher Esq. and

J.E. Marshall Esq.

instructed by

Messrs L.E. Taylor
Counsel and Solicitors for T.F. Bathurst QC

Third Respondent: P.M. Jacobson Esq.

instructed by Messrs

Tress Cocks and Maddox

ORDER

That the appeals be dismissed, with costs.

Note: Settlement and entry of orders is dealt with in Order 36 of the Federal Court Rules.
DECISION

David Securities Pty. Limited, ("David Securities"), A. and T. Rahme and Sons Pty. Limited, ("A. and T. Rahme") Antoine Rahme ("Mr Rahme") and Therese Rahme ("Mrs Rahme"), the appellants, brought proceedings in this Court against the Commonwealth Bank of Australia, ("the Bank"), (the first respondent), Don Craig, an officer of the Bank, (the second respondent), and Donald Page Morgan, Ronald Allan Smith and Kevin Andrew Veale, the members of a firm of accountants, (the third respondents). In the proceedings, the appellants claimed damages from the respondents. The appellants alleged that they suffered significant losses by reason of their entry into certain foreign currency borrowing arrangements with the Bank. For its part, the Bank brought a cross-claim against the appellants for the recovery of moneys claimed to be due to the Bank under the foreign currency borrowing arrangements. A judge of the Court dismissed the appellants' claims against the respondents but ordered that judgment be entered on the cross-claim for the Bank against David Securities in the sum of US$1,106,113.76, together with interest, and against A. and T. Rahme in the sum of US$286,632.58, together with interest. The appellants now appeal from both judgments.

The first appeal (Matter No. G283 of 1989)
2. Before describing the nature of the transactions entered into by the parties and the claims made in the proceedings arising out of those transactions, it is necessary to describe the early history of the dealings between the parties.

The events leading up to the entry into the foreign currency borrowing arrangement

3. At all material times, David Securities and A. and T. Rahme were family companies controlled by the Mr and Mrs Rahme. The companies carried on business as builders and property developers. Mr Rahme and the companies had been customers of the Dee Why branch of the Bank for some years. From time to time, Mr Rahme and the companies obtained from the Bank finance for their business in the form of commercial bill facilities and, in some instances, fully drawn loan accounts.

4. In late July 1984, Mr Rahme and Mr David Rahme, his son, who was also involved in the management of the family business, discussed with Mr Craig, the manager of the Dee Why branch, their need to finance a property development at Mosman. The discussion was an informal one. A figure of $700,000 was mentioned as the amount required. Mr Rahme remarked that local interest rates were then high. At the trial, there was a conflict in the evidence as to what was then discussed. According to the evidence of Mr Rahme and of Mr David Rahme, Mr Craig then said that it was possible that the Bank could arrange a foreign loan at an interest rate which, after bank charges, would "work out" at about 7% interest. But, according to Mr Craig's evidence, Mr Craig then informed Messrs Rahme that the only "cheap money" available came from overseas; that the Bank arranged loans from this source but there were stricter guidelines than for normal borrowing; and he then explained how such a loan worked, indicating, in the case of Swiss francs, that the interest rate would be 5% together with a fee to the Bank, compared with the rate of 16.5% that was then being charged to the appellants on a fully drawn loan facility. According to Mr Craig, he next said this to Messrs Rahme:

> "During the loan you pay interest each six months in the
>
> currency you borrow and any principal reductions are
>
> also made in that currency. This is the reason why a
>
> stable currency must be selected otherwise adverse
>
> currency fluctuations could seriously affect you.
>
> Nevertheless, the Bank gives you options, namely,
>
> changing currencies; hedging your borrowing; coming
>
> back onshore and taking fully drawn loan facilities;
>
> clearing the debt at any time."

5. Mr Rahme and Mr David Rahme both denied that this was said, but the judge found that it was probable that Mr Craig did mention the possibility of adverse exchange fluctuations and did say something about the complications of borrowing in overseas currency. The judge said that this explained Mr Craig's recommendation, at this and later meetings, that the appellants should consult an accountant "well versed in the intricacies of foreign loans", a recommendation which, all parties agreed, was made. The judge also said that it was possible that, at this meeting, Mr Craig did mention hedging but, that, if he did, at this time, neither Mr Rahme nor Mr David Rahme had any understanding of the meaning of that term. The judge also found that Mr Craig did not then offer any explanation of the concept of hedging.
6. Shortly after this meeting, Mr Rahme and Mr David Rahme indicated to Mr Craig their interest in a foreign borrowing. They explained to Mr Craig that their own accountant had not dealt with foreign currency loans. Mr Craig then suggested several other accountants including Mr Morgan. Mr Craig arranged with Mr Morgan to meet Mr Rahme, after informing Mr Morgan that it was possible that Mr Rahme and the Bank would be proceeding with a foreign loan transaction. After Mr Craig explained to Mr Morgan that he needed an accountant who was familiar with foreign currency lending to "look after" Mr Rahme, Mr Morgan agreed to act.

7. On 27 July 1984, Mr David Rahme asked Mr Morgan to prepare an application to the Bank for a foreign currency loan. On 16 August, the appellants' application for a loan of $1,700,000 was discussed by Messrs Rahme with Mr Morgan and his partner, Mr Veale. A borrowing in Swiss francs was proposed. Mr Morgan explained the operation of a cash flow statement which he had prepared. Referring to an item described in the statement as "overseas loan amortisation", Mr Morgan said that he had provided in the cash flow for moneys to be placed overseas, where practicable, to offset any adverse movements in the currency that would increase the debt. Mr Morgan said that he proposed that the sum to be set aside overseas was to be invested in Swiss francs pending repayment of the principal sum borrowed. For this purpose, Mr Morgan explained, the cash flow statement provided that a sum of $100,000 be set aside in October 1985 and that amounts of $300,000 be set aside in each of August, September and December 1986. Mr Morgan said that these provisions were "a sort of hedge against adverse currency fluctuations", but it was certainly not a "complete offset" and the cash flow did not allow for any further appropriations.

8. The judge found that, at this time, all parties contemplated that the borrowing would be in Swiss francs. He also found that, at the time he prepared the cash flow statement, Mr Morgan was aware that the Bank's usual loan documentation required payment of a "parity adjustment" in the event of a fall in the Australian dollar. The cash flow forecast did not take this into account, even if the amortisation proposed may have made some provision in this direction.

9. In late August, Mr Morgan handed the loan application to Mr Craig, who noted that the borrowing proposed had increased from $700,000 to $1,700,000. Mr Craig prepared a form of loan application for $1,700,000 for submission to the Bank's head office. In his application, Mr Craig referred to the fact that the Rahme family had "sought guidance" from Mr Morgan

and stated that his understanding was that the "accountant Morgan intends borrowing in Swiss francs."

10. Later, the loan application was further revised. Ultimately, Mr Craig submitted to head office another application seeking (1) a loan of $850,000, to be taken in one drawdown, and (2) an increase in an existing bill discount facility of $650,000 (with an overseas currency option) up to an amount of $800,000. On 8 October 1984, the Bank's head office informed Mr Craig that the revised application had been approved. By letter dated 11 October, Mr Craig informed David Securities of the approval.

11. On 12 October, the Bank's loan documentation was discussed at a meeting between Mr Craig and Mr Morgan. At the trial, there was a conflict in the evidence as to the terms of this discussion. But the judge accepted Mr Craig's evidence that he made it clear to Mr Morgan that the Bank expected that he "guide" the appellants in the "handling" of international borrowing; and that Mr Craig informed Mr Morgan that he expected Mr Morgan to "hold the hands" of the appellants to select the currency of drawdown, to monitor the loan to ensure that there were no adverse currency movements, to answer any questions they had, to advise them on hedging or other similar action if that were needed, and to see if it were advisable at any time for the appellants to "come onshore" (that is, to convert to an Australian dollar facility), to assist in selecting the period of each roll-over and generally to look after the loan.

12. On 17 October, Mr and Mrs Rahme and Mr David Rahme discussed with Mr Craig the Bank's conditions of approval of the loan. There was a conflict in the evidence as to what was said at this meeting. However, the judge found that Mr Craig had accurately summarised the discussion in his diary as follows:

> "We clarified that first drawdown of $850,000 would be
>
> available once documentation, investigation etc is
>
> completed - we said that this would take say one month.
>
> Established fee $4000 - they were satisfied with this
>
> reduction from the earlier figure quoted of $6000.
>
> They intend to pursue their connection with accountant
>
> Morgan - they will now offer him all of their business.
>
> The matter of Morgan was raised by the branch during our
>
> making it positively known that one of the Bank's

requirements for this approval was that competent

guidance must be sought relative to the exchange rate

exposure.

The matter of the '10% parity adjustment' was briefly

explained and further clarification of this aspect will

be required - David Rahme sought to establish that

provided the Australian dollar value of the loan

(following currency variation) remained within margins

on security held that no cash payment by borrowers might

be necessary.

We clarified the matter of payments at the end of each

interest period together with the likelihood/possibility

of variation in the off-shore borrowing rate on each

occasion."

13. In his oral evidence, which was accepted by the judge, Mr Craig said that at the meeting he explained that "the movement of the currency...can cause problems, that is why we need to have such close surveillance over the account because should that currency move against you with the result that your debt increases, then the Bank can ask you to put in cash funds to regularize the amount owing and such request is made by the Bank in the event of the debt increasing over what you have initially borrowed by 10%..." (As will appear later, the documentation executed by the parties stipulated that a parity adjustment was necessary if the exchange fluctuation exceeded 5%, rather than 10%. It seems that the figure of 10% mentioned by Mr Craig had its source in foreign currency loan transactions entered into between the Bank and another client.)

14. According to the evidence of Mr David Rahme, after the meeting held on 17 October 1984, he spoke to Mr Morgan who agreed to take over the financial affairs of the Rahme companies and "to look after" the foreign loan. Mr Morgan denied this in his evidence, but

the judge found that a discussion took place in which Mr Morgan agreed to "look after" the loan.

15. By letter dated 3 December 1984, Mr Craig, on behalf of the Bank, wrote to Mr and Mrs Rahme as follows:

> "APPLICATION FOR FOREIGN CURRENCY LOAN WITH BILLS
>
> DISCOUNT OPTION
>
> DAVID SECURITIES PTY LIMITED AS TRUSTEE FOR THE GEORGE
>
> MAROUN RAHME FAMILY TRUST
>
> A and T RAHME and SONS PTY LIMITED
>
> The Commonwealth Bank of Australia is pleased to offer
>
> you:
>
> . A Foreign Currency Loan of $850,000 in the name of
>
> David Securities Pty Ltd to take over existing
>
> facilites; and
>
> . An increase in the Bills Discount Facility (with
>
> Foreign Currency Loan Option) by $650,000 taking
>
> total Bills Discount Facility to $800,000 in the
>
> name of A and T Rahme and Sons Pty Limited.
>
> The principal terms and conditions of the facilities
>
> are:
>
> BILLS DISCOUNT
>
> Bills of Exchange may be drawn up to a maximum usance
>
> of 180 days for maximum amounts of $100,000 per bill.

FOREIGN CURRENCY LOAN

The loan may be raised in any freely convertible and readily available major foreign currency (eg United States dollar, Japanese Yen, Swiss Francs, Sterling and Deutschemarks). Provision will exist for the loan currency to be switched at the end of each interest period.

SECURITY

The facility will be evidenced by an agreement between the borrower and the lender and in addition the Bank will need to achieve an acceptable security position which is to include:

(Certain securities and guarantees were stipulated. They included registered first mortgages by David Securities and by A and T Rahme over land in New South Wales, and guarantees by Mr and Mrs Rahme.)

FEES

Facility Fee

0.5% pa payable six monthly in advance on the amount of the facility current at the time of charging.

Usage Fee

1.25% pa on the usage of the bills discount facility.

Funding Margin

1.25% pa above SIBOR/LIBOR/NYIBOR on any foreign currency loan. The interest rate at time of funding may be fixed for periods of three or six months with interest payable in arrears.

REPAYMENT ARRANGEMENTS

David Securities Pty Limited clearance in full by June 1989

A and T Rahme and Sons Pty Ltd

Term of 2 years but movement in and out of local bills to foreign currency loan will be permitted.

Should the foreign currency loan option be taken up the loan may be repaid early without penalty provided repayment coincides with the end of an interest period.

All interest and principal payments are to be effected in the currency in which the loan is denominated and are to be made free and clear of any taxes (including withholding tax).

FRONT END FEE

On acceptance of the CBA's offer a once only front end fee of $4,000 is to be paid.

STAMP DUTIES

Any stamp duties arising from stamping of security documents are to be met by the borrower.

The following conditions will apply solely to the foreign currency loan option.

DRAWDOWN

The minimum amount for any drawdown is to be restricted to $500,000.

EXCHANGE RISK

On the understanding that the exchange risks associated with borrowings in foreign currencies are fully recognised and that any adverse exchange rate movements are for the borrower's account, the Bank is prepared to allow the loan to proceed on an unhedged basis.

However, in these circumstances, it is the Bank's normal practice to require the borrower to regularly meet any sizeable increases in the Australian dollar value of the loan resulting from exchange rate movements in order to maintain a satisfactory security/debt ratio. In this regard, the Bank will require you to meet any increase in excess of 5% in the

Australian dollar value of the loan. These adjustments will take place at the end of each interest period or at the expiry of twelve months from drawdown at the Bank's option should the interest period arranged for you exceed twelve months.

As you are aware exchange risks may be eliminated at any time during the life of the loan by entering into a hedge contract and the Bank would be happy to provide information in this regard on request.

(Emphasis added)

WITHHOLDING TAX

Withholding Tax of 10% on interest payments to an Offshore Lending Centre must be met by you at the end of each rollover period.

We again point out the potential risk involved in borrowing in a foreign currency without covering your foreign currency exchange exposure and would like to remind you that any adverse exchange rate movements are for your account. As you are aware, your foreign currency exchange exposure may be eliminated at any time during the life of the loan and in this regard we suggest you make regular enquiries about foreign

currency movements and the price for hedging the loan amount outstanding.

Similarly, we stress the importance of your thoroughly investigating with your accountant (tax consultant) the ramifications of foreign currency borrowings particularly the tax treatment of any exchange rate profits/losses. (Emphasis added)

We now enclose two copies of the Loan Agreement covering the terms and conditions of the foreign currency option together with a form covering the Bills Discount Option. The original copy of the agreement and the Bills Discount form are to be signed and returned to this office. The other copy is for your records. You should familiarise yourself with the contents of the agreement and in particular we draw attention to -

. Clause 2 which stipulates that five banking days' notice is required for drawdown of the Foreign Currency Loan and any subsequent rollovers and that the loan must be drawn down in minimum amounts of AUD250,000. Specimen drawdown and rollover notices

are also attached and these should be delivered to this office at the appropriate times;

. Clause 5 which stipulates that the Foreign Currency loan may be denominated in any one freely convertible foreign currency and that the currency denomination of the loan may be switched at the end of an interest period;

. Clause 6 which stipulates that if an adverse exchange rate movement in excess of 5% occurs, a cash adjustment of the variation is to be made. No adjustment is necessary if the variation is less than 5%.

Should the exchange rate move in your favour by an amount in excess of 5%, cash adjustment by the Bank will only be made to the extent of cash adjustments previously made by the borrower to cover adverse exchange rate movements and remain outstanding.

Exchange gains in excess of payments referred to in the previous sentence will be held as a buffer against possible future adverse exchange rate movements and in the long term as a reduction against the final repayment amount.

(Emphasis added)

. Clause 8 which stipulates that all interest and

principal payments to our Dee Why NSW branch must

be made free and clear of any taxes, including

Australian withholding tax. In this latter regard,

we again remind you of the need to produce to the

Bank a Section 128 Exemption Certificate prior to

the first interest payment date. As previously

mentioned, changes in tax laws may make you

ineligible for this exemption, however we assume

you have discussed this matter with your accountant.

When returning the Loan Agreement and Bills Discount

form, please make an appointment to call and execute

relative security documents. Once all documents are

signed, the foreign currency loan will be available for

drawdown on giving us five working days' notice of your

requirements."

16. (The relevant details of the loan agreement and the bills discount form will be described later.)

17. The judge found that Mr Rahme, who was born in Lebanon, could not read English. For their part, Mrs Rahme and Mr David Rahme gave evidence that they did not fully understand the import of the Bank's letter, and, in particular, did not understand the references to switching currencies, the warnings as to exchange risk, the reference to hedging and the references to the elimination of the exchange risk. The judge found that, although Mrs Rahme may have failed to understand some of the terms used in the letter, she did

understand that the Bank was warning her about the risks of borrowing in foreign currency. His Honour found that Mr David Rahme understood the substance of what was said in the letter, at the latest after he had discussed the matter with Mr Veale and Mr Morgan (discussions which will be mentioned shortly). The judge found that Mr David Rahme endeavoured to explain to his parents what was said in the letter. His Honour was satisfied that Mr David Rahme explained to his parents the exchange risks about which the Bank had warned them, although it was possible that Mr David Rahme did not then himself understand what hedging was.

18. Mr David Rahme then asked Mr Veale, in the absence of Mr Morgan, to consider the Bank's letter and draft loan documents. Subsequently, in a telephone conversation with Mr David Rahme, Mr Veale explained the operation of some of the provisions of the loan documentation. In respect of clause 6, Mr Veale said:

> "(Clause 6) says that you must immediately pay in any
>
> adverse currency exchange rate movements greater than
>
> 5% in a given period. I cannot immediately see if this
>
> means that you have to pay in the whole of the
>
> fluctuation or just the margin above 5%. You had
>
> better watch this as it could really upset your cash
>
> flows. On the other side of the coin, if exchange rate
>
> movements go in your favour greater than 5%, you do not
>
> receive these. They are held by the bank, which I
>
> think is a bit rough."

19. In a subsequent telephone conversation, Mr David Rahme and Mr Veale discussed other matters arising in the proposed transaction, including the term of the loan, fees and time of drawdown.

20. On 14 December, Mr Rahme, Mr David Rahme and Mr Morgan met in Mr Morgan's office. According to Mr Morgan's evidence, he then "went through" the letter "item by item", explaining the notion of "parity adjustment" as follows:

"Assume that you borrow the equivalent of $850,000.00 in foreign currency and there is a 12.5% reduction in the value of the Australian dollar - that is $106,250.00. Under the terms of this loan offer you would then have to immediately repay the bank the amount by which the loss exceeds 5% of the principal. Using this example $63,750.00 is needed to overcome this. The idea is to amortize the loan by investing offshore in Swiss Francs when funds become available. If necessary you can then reduce the borrowed amount by applying these funds."

21. According to the evidence of Mr David Rahme, Mr Morgan explained that hedging was a type of insurance which would cost about $150,000, but the appellants would not need to hedge if they followed the cash flow forecast and provided funds overseas in Swiss francs which would "offset" any problems with adverse currency fluctuations. Mr David Rahme's evidence was that he then told Mr Morgan that he had considered the risk of currency fluctuations but had concluded that the risk was worth taking. Mr Morgan agreed, in his evidence, that he informed the appellants that it would not be economical to hedge the loan.

22. On 17 December 1984, the loan agreement ("the loan agreement") was executed. On that date, Mr Rahme and Mr David Rahme discussed the borrowing arrangements with Mr Craig. Reference was made by Mr Craig to the Bank's letter dated 3 December and to the terms of the loan agreement, and in particular, to the option given by the agreement for "bringing" the loan "back onshore" in the event of adverse exchange movements. Hedging was also discussed, but it was accepted in the discussion that the cost of hedging would eliminate any relative advantage in interest rate in borrowing in a foreign currency. On this occasion, Mr Rahme indicated to Mr Craig that he was grateful for the Bank's assistance and that he trusted the Bank's judgment in the transaction.

The loan agreement

23. The loan agreement, dated 17 December 1984, was made between David Securities, as trustee for the George Maroun Rahme Family Trust, and the Bank. It recited that the Bank had agreed to provide David Securities with a Bills acceptance and discount facility with an option to replace all or part of such facility from time to time with a revolving floating rate

multi-currency facility (Recital (A)). It further recited that David Securities had given notice to the Bank that it wished to exercise its abovementioned option and utilize the revolving floating rate multi-currency facility (Recital (B)).

(1) "The Overseas Loan" (cl.2)

24. The loan agreement dealt with an "Overseas Loan" in the following way:

(a) David Securities could, during the Availability Period

> (defined in cl.1 as the period up to and including December 1989), apply to drawdown "Advances" (defined in cl.1, as "each amount drawn under this agreement in United States Dollars or an Optional Currency and each drawing subsequently renewed..."; "Optional Currency" was defined, in cl.1, as "any currency (other than United States Dollars and Australian Dollars) which (was) freely transferable and convertible into United States Dollars"). David Securities was, by five days' prior notice, to nominate the amount in Australian Dollars and the currency of the Advance, the date of the Advance, the duration of the Interest Period (defined, in cl.1, as a period of three or six months selected by David Securities in accordance with cl.2(a) or (d)), the bank account(s) to which payment was to be made, if applicable, and, when appropriate, to identify any Maturing Bill (defined, in cl.1, as any Bill in respect of which an Advance is to be made available in a sum equal to

or less than the face value of such Bill upon its maturity). Such notice could only be withdrawn by David Securities if the Bank consented.

(b) All or part of the Uncalled Balance was to be available for drawdown during the availability period (cl.2(b)(i)). (The "Uncalled Balance" was defined, in cl.1, as the amount calculated by deducting from the Accommodation Limit (defined, in cl.1, as the amount of $850,000) the total of (i) the aggregate face value of all Bills drawn under the Facility (defined, in cl.1, as the Facility described in recital (A)) and outstanding; and (ii) the sum of the Original Australian Dollar Amounts (defined in cl.1, as the sum, in Australian Dollars, specified in the notice of drawing given pursuant to cl.2(a) as reduced by repayments). Advances in replacement of the whole or part of a sum equal to the face value of any Maturing Bill were to be made available during the Availability Period on the maturity date of each such Bill (cl.2(b)(ii)). Advances under this clause (cl.2(b)) were to be equivalent in amount to $250,000, or a whole multiple of $100,000 thereafter, or an amount equal to the Uncalled Balance (cl.2(b)(iii)).

Subject to cl.2(c), David Securities was to ensure that the Bank had the opportunity to quote for the purchase of an Advance in Australia in the equivalent amount of Australian Dollars and for the equivalent amount of such Advance being credited to the account of David Securities (cl.2(b)(iv)).

(c) In the event that David Securities replaced any Maturing Bill or part of the face value thereof with an Advance under cl.2(b)(ii), David Securities authorised the Bank to apply the Australian Dollar equivalent of such Advance to the Maturing Bill (cl.2(c)).

(d) Subject to cl.8(c), an Advance could be renewed at the end of each Interest Period (cl.2(d)).

(2) Interest (cl.3)

25. David Securities was to pay interest on each Advance at the end of each Interest Period (cl.3(a)). The rate of interest was to be 1.25% p.a. above the rate at which the Bank could obtain deposits in United States Dollars or in the relevant Optional Currency for a similar amount in the Interbank Eurocurrency Market (cl.3(b)).

(3) Repayment (cl.4)

26. David Securities was to repay the Overseas Loan at the end of the Availability Period (cl.4(a)). Each Advance and interest was to be repaid or paid in the currency in which such Advance was denominated. David Securities agreed that it would ensure that the Bank had the opportunity to quote for the supply of any United States Dollars and/or Optional Currency required (cl.4(b)). Upon five days' notice, at the end of any Interest Period, David Securities could repay an Advance in full or in part (if in part the equivalent of a minimum of $100,000) at the selling rate of exchange quoted by the Bank. Any amount so repaid would form part of

the Uncalled Balance (cl.4(c)).

(4) Currencies of Overseas Loan (cl.5)

27. An Advance could be denominated in an Optional Currency specified by David Securities pursuant to cl.2(a) or (d) only if the Bank so agreed (cl.5(a)(i)). If the Bank did not agree on that, or another, Optional Currency, such Advance was to be denominated in United States Dollars for the next Interest Period (cl.5(a)(ii)).

(5) The Amount of the Overseas Loans (cl.6)

28. The amount of the Overseas Loans was dealt with as follows:

(a) For the first Interest Period of each Advance, the Bank was to make available to David Securities an amount in United States Dollars or the selected Optional Currency determined by converting into United States Dollars or the selected Optional Currency the Original Australian Dollar Amount of such Advance on the basis of the Bank's spot rate of exchange relative to such Interst Period (cl.6(b)).

(b) If an Advance was to be renewed as from any Interest Date ("the Relevant Interest Date") in a different currency ("the new currency") from that in which was denominated ("the retiring currency") the Bank was to determine the difference (if any) between the Australian Dollar Equivalent (defined, in cl.1, in respect of any one currency, as the equivalent in Australian Dollars of a sum expressed in that currency converted at the Bank's spot rate of exchange) of such Advance calculated two Banking days before the Relevant Interest Date ("the First Amount") being the Original Australian Dollar Amount of such Advance and (i) if such difference exceeded 5% of the Second Amount and the First Amount exceeded the Second Amount then such Advance was to be repaid on that Interest Date in the currency in which it was then denominated and was to be re-advanced forthwith on terms that, where such Advance was to be denominated in United States Dollars or another Optional Currency during the next Interest Period, the Bank was to make available to David Securities such currency in an amount determined by converting into such currency the Original Australian Dollar Amount of such Advance on the basis of the Bank's spot rate of exchange relative to such Interest Period (cl.6(c)(i)); or (ii) if such difference was less than 5% of the Second Amount or if the Second Amount exceeded the First Amount, such Advance was to be repaid on that Interest Date in the retiring currency and was to be re-advanced by the Bank in the new currency in such amount as would, when converted at the Foreign Currency Conversion Rate relative to such Interest Date, provide the amount of the retiring currency to be repaid on such Interest Date provided that the Bank was, on such Interest Date, to acquire the amount of the new currency to be re-advanced and, on behalf of David Securities, to convert such amount into the retiring currency on the basis of the Foreign Currency Conversion Rate relative to such Interest Date and apply the proceeds of such conversion in satisfaction of David Securities' obligations to repay the Advance in the retiring currency on such Interest Date. The Original Australian Dollar Amount of such Advance was

not to vary on any such Interest Date as a result of the operation of this sub-clause (cl.6(c)(ii)).

(c) If an Advance was to be renewed as from any Interest Date ("the Relevant Interest Date") in the same currency in which it was denominated immediately prior thereto then the Bank was to determine the difference, if any, between the amount in such currency of the Advance during the Interest Period ending on the Relevant Interest Date ("the First Amount") and such amount ("the Second Amount") as calculated by the Bank by converting into that currency the Original Australian Dollar Amount of such Advance or part thereof on the basis of the Bank's spot rate of exchange relative to the next following Interest Period and (i) if such difference exceeded 5% of the First Amount and the First Amount exceeded the Second Amount then the Advance was to be repaid on the Relevant Interest Date in the currency in which it was then denominated. The amount in such currency that was to be re-advanced during the next following Interest Period was, as from the Relevant Interest Date, to be the Second Amount. The Original Australian Dollar Amount of such Advance was not to vary on any such Interest Date as a result (cl.6(d)(i)); or (ii) if such difference were less than 5% of the First Amount or if the Second Amount exceeded the First Amount then the Advance was to be repaid on the Relevant Interest Date in the currency in which it was then denominated and was to be re-advanced on terms that the Bank would make available to David Securities the same amount in United States Dollars or the relevant Optional Currency as was repaid. The Original Australian Dollar Amount was not to vary on any such Interest Date as a result (cl.6(d)(ii)).

(d) Clause 6(f) was to apply in substitution of cl.6(d) in relation to an Advance in respect of which David Securities had entered into a foreign currency hedge contract in a form satisfactory to the Bank (cl.6(e)). By cl.6(f), if an Advance were to be renewed from any Interest Date in the same currency in which it was then denominated, such Advance was to be repaid on that Interest Date in the currency in which it was then denominated and was to be re-advanced on terms that the Bank would make available to David Securities the same amount in United States Dollars or the relevant Optional Currency.

(6) Payments (cl.7)

29. All payments which were to be made by David Securities in United States Dollars were to be made in immediately available funds to the account designated by the Bank in New York City (cl.7(a)(i)). In the case of an Optional Currency, payments were to be made to the Bank on the due date in lawful money of the currency of that country and in immediately available funds which were freely transferable and convertible into United States Dollars (cl.7(a)(ii)).

(7) Other Provisions (cl.8 to cl.2O)

30. The other provisions are not presently relevant.

The application for Revolving Bills Facility with Foreign Currency Option

31. On 17 December, Mr and Mrs Rahme also executed, on behalf of David Securities, as trustee for the Rahme Family Trust, an application for Revolving Bills Facility with Foreign Currency Option. Application was made to the Bank to grant accommodation by accepting, endorsing and/or discounting bills of exchange drawn by the applicants or in the applicants' favour on the Bank's usual terms and conditions, with an option to replace all or part of such bills facility with a revolving floating rate multi-currency facility (cl.(1)). The Accommodation Limit, including drawdowns under the Loan Agreement then required was $850,000 to be used for the purpose of repaying existing facilities to the Bank (cl.(3)). If the application was approved, the amount of bill accommodation available at any time was to be the amount calculated by deducting from the Accommodation Limit the total of the aggregate face value of all bills drawn and outstanding and the sum of the Original Australian Dollar Amounts.

The drawdown under the loan agreement on 21 December 1984

32. On 17 December, David Securities gave a drawdown notice for the drawdown of the Swiss Franc (CHF) equivalent of AUD850,000. The drawdown ("the first loan") was effected on 21 December, on terms that it be rolled-over in six months on 21 June 1985. The rate of exchange on 21 December was AUD1.00 = CHF2.1280.

The drawdown of the $800,000 bills discount facility in foreign currency on 10 April 1985

33. In March 1985, Mr David Rahme requested the Bank's permission for A and T Rahme to draw down the $800,000 bills discount facility directly in foreign currency. The Bank agreed. On 13 March 1985 the Bank and A and T Rahme entered into a loan agreement providing for accommodation to a limit of $800,000. The loan agreement contained terms not materially different from those of the David Securities loan agreement dated 17 December 1984. In April 1985, the CHF equivalent of $800,000 was drawn down, the rate of exchange then being $1.OO = CHF1.7708. The judge found that the deterioration in the exchange rate of almost 17% was discussed between Mr David Rahme and Mr Morgan at the time.

The roll-over of the first loan in June 1985

34. On 31 May 1985, Mr Porter, a loans officer at the Dee Why branch of the Bank, spoke to Mr David Rahme about the roll-over. At that time, the exchange rate was around $1.00 = CHF1.6867. Mr Porter informed Mr David Rahme that, if David Securities wished to roll-over, a "parity adjustment" of approximately $223,000 would be required; alternatively, David Securities could take up the bills discount facility and "bring the loan back onshore." Mr David Rahme gave evidence that, at this time, he did not understand what was meant by "parity adjustment". His Honour rejected this evidence.

35. Mr David Rahme consulted Mr Morgan with respect to the Bank's request for a parity adjustment of $223,000 and on the question of the period for the next roll-over. Mr Morgan discussed these matters with Mr Pendlebury, an officer at the Bank's head office and arranged that the Bank "absorb" the parity adjustment. It was further agreed that the next

roll-over take place in 12 months, on 21 June 1986. By letter dated 2 October 1985, the Bank informed David Securities that the parity adjustment in fact absorbed in June 1985 was $245,000.

The roll-over of the second drawdown amount of $800,000 in October 1985

36. The second drawdown amount of $800,000 was due for roll-over in October 1985. By late September, the exchange rate had fallen to $1.00 = CHF1.5115 and a parity adjustment of $137,241 was required. Mr Morgan again arranged that the Bank absorb this. The loan was rolled-over for 12 months, to 10 October 1986.

Termination of Mr. Morgan's retainer and meeting with the Bank's Risk Management Advisory Service in April 1986

37. In April 1986, Mr Porter discussed with Mr Rahme and Mr David Rahme the financial position of the appellants in the light of the adverse movements in the rate of exchange. Mr Porter suggested a meeting with the Bank's Risk Management Advisory Service at head office.

38. The judge found that, at the end of April 1986, Mr Morgan informed Mr David Rahme that, in his view, "nothing could be done to help" the appellants and that they should sell assets in order to reduce their foreign exchange exposure. His Honour also found that, at about this time, the retainer of Mr Morgan's firm was terminated.

39. The meeting at the Bank's head office took place on 29 April 1986. The possibility of switching currencies - from Swiss Francs into United States Dollars - was discussed.

The currency switches in 1986

40. In May 1986, the appellants entered into Forward Exchange Contracts the effect of which was to convert its liabilities into U.S. Dollars. Later in that month, further Forward Exchange Contracts were entered into to reconvert the U.S. Dollar exposure back to Swiss Francs. These transactions resulted in a loss of approximately $250,000. On 3 July 1986, the loans were switched again to U.S. Dollars. By then, the exchange rate was $1.00 = CHF1.11. The amount of liability, if brought onshore, would have been $3,726,000 as compared with the amount of $1,950,000 drawn down under the facilities.

The default alleged by the Bank in 1987

41. By letter dated 29 October 1987, the Bank, alleging that default had occurred on 2 October 1987, informed Mr and Mrs Rahme and David Securities that the loan would remain denominated in U.S. Dollars until repaid, and that they could no longer switch currencies. A letter to the like effect had been sent to Mr and Mrs Rahme and A and T Rahme on 15 October 1987.

The course of the trial

42. By consent of the parties, the trial judge first heard and determined the issues going to liability as a separate matter apart from the assessment of any damages.

The case sought to be made by the appellants against the Bank at the trial

43. At the trial, the appellants put their case against the Bank in several ways. It will be convenient to deal with them separately.

(1) The alleged misleading representations made by Mr Craig in July 1984 - Trade Practices Act 1974 s.52

44. The appellants claimed that the statements made by Mr Craig in late July 1984 that a foreign currency loan was "cheap money" and that the rate of interest on such a loan was 5% p.a. were likely to mislead or deceive, contrary to s.52 of the Trade Practices Act.

45. The judge accepted that such statements could mislead or deceive unless it was also pointed out to a prospective borrower that the Australian Dollar -

> "could move adversely to the Swiss franc with the
>
> consequence that the ultimate cost to the borrower
>
> could be considerably greater than the interest rate
>
> quoted by Mr. Craig and the loan could cease to be a
>
> cheap one..."

46. His Honour noted that, in the conversation relied on, Mr Craig did also mention the possibility of adverse exchange movements. Further, on 17 October 1984, in describing the mechanics of parity adjustment, Mr Craig referred to the problem of fluctuations in the rate of exchange when he explained that, in the event of a movement in the exchange rate greater than 10%, the Bank would require the borrower to repay the amount of the currency loss. The judge found that, by virtue of this discussion, the appellants -

> "were aware not only that currency fluctuations were
>
> possible but also that the consequence of such
>
> fluctuations could result in the Rahmes having to pay
>
> amounts of principal additional to the interest and

(Bank) fees...The discussion of parity adjustment in

the context of a 10% or greater currency readjustment

also made it clear that the fluctuation in exchange

rate could be in the magnitude of at least 10% and that

it could be more."

47. The judge referred also to the Bank's letter and Mr Craig's explanation of the letter and the loan documentation at the meeting held on 17 December. His Honour said that they made it clear that:

"...the Bank took considerable care to emphasise that

there were risks of exchange movements which could

result in the borrowers having to pay more Australian

dollars in repayment of the foreign currency borrowed

than were originally received at drawdown...and to pay

in Australian dollars by way of interest more than the

rate as quoted in foreign currency."

48. The judge dismissed the claim brought against the Bank insofar as it was grounded on Mr Craig's statement for reasons which his Honour summarised as follows:

"Where a representation if seen in isolation is

misleading or deceptive but subsequent explanations

suffice to put that representation in a proper context

so that, as here, the representation is thereafter

qualified, it is difficult to see how the applicants

could show inducement or influence leading to the

damage alleged to be suffered."

(2) Misleading conduct said to arise from the alleged failure by the Bank to advise - s.52 Trade Practices Act

49. The appellants also claimed, at first instance, that the Bank's failure to advise of the mechanisms available to guard against adverse currency movements was itself misleading and deceptive conduct.

50. In considering this claim, the judge accepted that, although Mr Craig made some reference to hedging prior to the first drawdown, the Bank did not, prior to the meeting held on 29 April 1986, point out specifically to the Rahme family the possibility of selective hedging, borrowings in a variety of currencies, stop loss orders or other similar measures described in the expert evidence as methods of reducing, to the extent that it is possible, the exchange risk inherent in a loan denominated in a foreign currency. However, his Honour rejected the claim for the following reasons: (a) Silence, that is to say, in the present case, failure to advise on a particular matter, can only constitute misleading and deceptive conduct if the person remaining silent had a duty to so advise; (b) in the absence of any express, or implied, term in a contract to do so, there is no duty imposed on a citizen to warn another of possible loss; (c) although an obligation to warn may be assumed by contract, the Bank did not, expressly or by implication, accept a retainer to advise the appellants on hedging or risk management, "(r)ather, Mr Craig sought to put the (appellants) into the care of an experienced accountant who could advise them, guide them and look after the loan for them"; (d) even if it could be said that the making available of a foreign currency loan were to be regarded as inherently dangerous, so that the Rylands v. Fletcher principles of strict liability applied, (which his Honour doubted) the Bank's only duty would be to warn of the dangers; the Bank would not be under a duty to go further and instruct the user as to the safeguards that may be employed (his Honour referred to Norton Australia Pty. Ltd. v. Streets Ice Cream Pty. Ltd. [1968] HCA 61; (1968) 120 CLR 635 per Barwick C.J. at 644); (e) the Bank was not under a duty "to instruct the (appellants) in the techniques of loss minimisation applicable to loans denominated in foreign currency"; (f) it followed that the Bank's failure to do so did not constitute misleading or deceptive conduct.

(3) The appellants' case against the Bank in contract

51. The judge rejected this claim also. He held that there was no express term of the contract between the Bank and the appellants that the Bank warn the appellants of the dangers inherent in foreign currency loans, or of ways and means of minimizing the loss that could accrue through adverse exchange fluctuations; that if there were an implied term that the Bank warn the appellants of the dangers of foreign currency loans, Mr Craig, in his discussions with the appellants, and in his letter dated 3 December 1984, clearly conveyed the warning; and that there was no room for implying a term that the Bank advise the appellants on methods of loss minimization.

(4) The appellants' case against the Bank in tort

52. His Honour also dismissed the claim, holding that the Bank had no common law duty to advise; that, in any event, the Bank did warn the appellants of the risks inherent in foreign exchange borrowings; and that the Bank "went further and referred the appellants to an independent adviser, believed by the Bank (perhaps erroneously as it turned out) to be competent to advise the (appellants) on problems involved with such loans and to look after them..."

The case put by the appellants against the third respondents at first instance

(a) The claim in contract

(i) As at the first drawdown (21 December 1984)

53. At the trial, the appellants accepted that the original retainer of Mr Morgan was limited to (1) the preparation of the application for the loan and (2) the response to specific queries that the Bank might raise in that respect. But the appellants' case was that the scope of the initial retainer was later extended to include advising on risk management matters and, in particular, advising on the consequences for the appellants of their entry into the transactions with the Bank.

54. The judge found that Mr Morgan's retainer was, in fact, expanded when Mr David Rahme spoke with Mr Morgan after the meeting with Mr Craig on 17 October 1984. His Honour concluded that the retainer extended to "looking after" the loan and required Mr Morgan -

> "inter alia, to advise the (appellants) as to the
>
> currency of drawdown, to monitor the loan, to advise on
>
> mechanisms of hedging or other like matters if needed
>
> and to advise on the selection of the period of
>
> roll-over and answer questions the (appellants) might
>
> have had."

55. There was a conflict in the evidence as to the date on which the conversation between Mr David Rahme and Mr Morgan, in which the terms of the retainer were discussed, took place. The judge found that it was probable that the discussion took place between 17

October and the first drawdown on 21 December 1984. Mr Morgan said, in his evidence, that the extension of the retainer did not occur until 31 January 1985. His Honour concluded that, even if Mr Morgan's evidence as to the date of the discussion were to be accepted, it would make no difference here, for two reasons. First, according to the expert evidence, if the matter were to be considered as at the time of the first drawdown (21 December 1984), it would then have been reasonable for Mr Morgan to advise that the loan be drawndown in the currency of Swiss Francs. Secondly, by the time of the first drawdown, the appellants were, in any event, aware of the risk of adverse currency fluctuations. The judge thus held that, on the assumption that the extension of the retainer preceded the first drawdown, the third respondents were not in breach of their contract.

(ii) As at the the second drawdown (10 April 1985)

56. His Honour found that, by this time, the appellants were aware that there had been a deterioration of 17% in the rate of exchange.

57. The judge accepted the evidence of Mr David Rahme, which was not contradicted by Mr Morgan, that, at this time, Mr Morgan advised the appellants to take the drawdown in Swiss Francs with a 12 months' roll-over.

58. There was a conflict in the expert evidence on the question whether it was reasonable for Mr Morgan to advise a drawdown in Swiss Francs in early April 1985. The judge said:

> "The conflict between (the expert witnesses)
>
> reflects...a fundamental truth about the foreign
>
> exchange market...No one...can know when a currency
>
> which has suffered a large depreciation will have
>
> reached its lowest or highest rate. Because the
>
> market's reaction will depend on value judgments formed
>
> having regard to economic fundamentals, views will
>
> differ as to what the consequences for the exchange
>
> rate of a currency will be. The weight given to any
>
> particular economic factor will vary from expert to
>
> expert. In these circumstances it is not surprising

that experts will differ in their views as to whether a

currency will appreciate, depreciate or remain stable."

59. His Honour concluded from the "divergence" of the expert evidence that the appellants had failed to prove that it was unreasonable, that is to say, negligent, to advise a Swiss Franc borrowing in April 1985.

(iii) As at the termination of the retainer (April 1986)
60. The judge found that, in respect of the 12 month period from the second drawdown (April 1985) until the termination of the retainer (April 1986), Mr Morgan was in breach of his duty to advise with due skill and diligence -

"particularly with regard to monitoring and advising of

the hedging of the loan in that he virtually failed to

give any advice at all...Mr. Morgan did not regularly,

or at all, monitor the loan and certainly he did not

understand the mechanism of selective hedging through

forward exchange contracts...and so would not have been

able to advise the (appellants) on such a course.

Indeed, Mr. Morgan sat by and did very little to assist

(the appellants) at all."

61. The judge held that Mr Morgan was in breach of his duty to the appellants, "both in failing to advise them of the continuing depreciation of the Australian Dollar against the Swiss Franc and in failing to advise them of techniques such as selective hedging."

(b) The claim in tort
62. The judge held that this claim was substantially the same as the claim in contract. Accordingly, his Honour found a breach of duty in tort had also been established.

(c) The appellants' claim that the breach of contract or the breach of duty in tort gave rise to the loss suffered by the appellants

63. The judge held that the appellants bore the onus of showing that their failure to act arose out of the breach of duty on the part of the third respondents and that this breach led to the loss suffered by the appellants.

64. After referring to the facts that, in April 1985, after a significant devaluation, the appellants continued to borrow in Swiss francs and that they borrowed further in that currency in October 1985, the judge said that Mr Morgan's retainer did not extend to the giving of advice as to the "precise timing to undertake selective hedging." If Mr Morgan advised on hedging techniques and kept the appellants informed of exchange movements, "it would be up to the (appellants) to decide whether to hedge and how." The appellants could have sought advice from an expert who might have advised one course of action or consulted another expert who might have recommended a different course. The judge concluded that he was unable, on the evidence, to form a view one way or the other as to what advice the appellants would have received or as to what action (if any) they would have taken upon that advice.

65. The judge said that a subjective test of causation should be adopted in determining how the appellants would have acted if properly advised. But his Honour added that -

> "Even if the test were wholly objective I would be left
>
> in doubt as to what the hypothetical reasonable man
>
> would have done if advised of the daily exchange rates
>
> and with the knowledge of hedging possibilities.
>
> Presumably the hypothetical man would likewise be faced
>
> with the competing views of (experts) and might equally
>
> have remained inactive. On the evidence it is
>
> impossible to say."

The appellants' submissions on the appeal

66. It is convenient to deal with the different claims separately.

A. The claims against the Bank

(1) The claim in tort

67. On behalf of the appellants it is submitted (a) that the Bank failed to advise them of the exchange risks associated with borrowing in a foreign currency and that this failure to warn them amounted to a negligent omission; and (b) alternatively, that the Bank made negligent misstatements, or engaged in conduct that was likely to mislead or deceive, in representing that it was advantageous or safe for the appellants to borrow in a foreign currency.

68. (On the appeal, senior counsel for the appellants informed us that the appellants no longer pressed the allegations of negligence or misleading conduct in respect of anything done or omitted to be done by the Bank after the first drawdown. That is, the case now pressed is limited to the events which took place prior to 21 December 1984.)

(a) The alleged duty to warn

69. It is contended, on behalf of the appellants, that the manufacturer or distributor of a product is under a duty to warn of any unusual dangers (see, e.g., Adelaide Chemical and Fertilizer Company Limited v. Carlyle [1940] HCA 44; (1940) 64 CLR. 514); and that insufficient warning is the same as no warning at all (see, e.g., Vacwell Engineering Co. Ltd. v. B.D.H. Chemicals Ltd. (1971) 1 QB 88 at 108). Then it is said that foreign currency loans involve unusual dangers when compared with traditional forms of bank lending; and that they should never be "supplied" to unsophisticated small businessmen without comprehensive warnings (extending beyond the mere fact of risk) to encompass the inappropriateness of a facility of this kind for this type of customer. Alternatively, a warning should explicitly refer to the "unlimited" size and "speed of possible loss", together with details of the availability and the utility of defence mechanisms.

70. It is submitted, on behalf of the appellants, that in the relationship of the parties, as banker and customer, there was sufficient "proximity" to create a duty of care and to permit recovery of economic loss. It is said that the failure to warn occurred in circumstances where there was a reasonable expectation of a full warning (see Hawkins v. Clayton (1988) 164 CLR 539 at 596); alternatively, there was an assumption of responsibility by reason of the partial explanation or warning given, in the context of known reliance by the appellants, in response to a request for advice (see Sutherland Shire Council v. Heyman [1985] HCA 41; (1985) 157 CLR 424 at 502). On behalf of the appellants, reliance is placed upon the circumstance that the Bank was possessed of special knowledge, or means of knowledge, with respect to foreign currency borrowings (see L. Shaddock and Associates Pty. Ltd. v. The Council of the City of Parramatta [1981] HCA 59; (1981) 150 CLR 225 at 233). The appellants contend that, in the circumstances of the present case, the Bank should have pointed out specifically to the appellants other possibilities such as selective hedging, borrowings in a variety of currencies, stop loss orders or other measures open to a borrower with a view to reducing the risk of an adverse movement in exchange rates.

71. We have difficulty in accepting any of these arguments.

72. In the first place, although the appellants did not rely before us on the rule in Rylands v. Fletcher, we should indicate that the present case could not fall within the rule of strict and unqualified liability propounded in Rylands v. Fletcher [1868] UKHL 1; (1868) LR 3 HL 330. As

Starke J. pointed out in Adelaide Chemical and Fertilizer Co. Ltd. v. Carlyle, supra, at 522, that rule was propounded in relation to the occupation of property (and see Trindade and Cane, The Law of Torts in Australia at 554).

73. It is true that there is, in relation to things dangerous in themselves, such as loaded firearms, poisons, explosives and the like, a rule imposing a peculiar duty to take precaution and it is no excuse to say that the accident would not have happened unless some other agency than that of the defendant had intermeddled with the matter: Adelaide Chemical and Fertilizer Co. Ltd. v. Carlyle, supra, at 523 per Starke J. But it is clear that the rule as to things dangerous in themselves can have no direct application here. Nor, in our view, can the rule as to things inherently dangerous provide an appropriate analogy in the case of a borrowing in a foreign currency. It may be accepted that there will always be a risk of an adverse movement in the rate of exchange. But it does not follow that a foreign loan transaction is something "dangerous", let alone "dangerous in itself", or anything analogous to such a special thing. Speaking generally, all that can be said is that it is possible that such a transaction may result in some economic gain in certain events or in some economic loss if other contingencies occur. A foreign borrowing is not itself dangerous merely because opportunities for profit, or loss, may exist.

74. This is not to say that, in given circumstances, the Bank may not be liable in tort for negligent misstatement or for an omission to speak where there is a duty to speak. But as Deane J. pointed out in Hawkins v. Clayton, above (at 576):

> "...where the plaintiff's claim is for pure economic
>
> loss...the categories of case in which the requisite
>
> relationship of proximity is to be found are properly
>
> to be seen as special in that they will be
>
> characterised by some additional element or elements
>
> which will commonly (but not necessarily) consist of
>
> known reliance (or dependence) or the assumption of
>
> responsibility or a combination of the two..."

75. Was there known reliance, or dependence, or an assumption of responsibility, in the relevant sense in the present case? In our opinion, none of these matters was established here. The facts, as found by the judge, were that Mr Craig indicated to Mr Rahme and Mr David Rahme from the outset that they should consult an accountant "well versed in the

intricacies of foreign loans" and that they did so. This is hardly "known reliance", or "dependence", or an "assumption of responsibility" on the part of the Bank. On the contrary, the evidence, taken as a whole, demonstrates an unwillingness by the Bank to assume responsibility for the foreign currency transaction.

76. But even if it were possible to find, in the circumstances of the case, a relationship of "proximity" in the sense explained in the authorities, the question would remain whether the Bank was in breach of any duty of care owed to the appellants. In our opinion, no breach of any such (assumed) duty was established on the findings made by the judge. Mr Craig informed Mr Rahme and Mr David Rahme, from the commencement, that "adverse currency fluctuations could seriously affect (them)." Similar warnings were given on other occasions before the first drawdown took place. Moreover, Mr Craig referred, on several occasions, to the possibility of hedging. Further, Mr Craig recommended that the appellants consult an accountant "well versed in the intricacies of foreign loans." All these matters were reiterated by Mr Craig in his letter dated 3 December 1984. It will be recalled that, in this letter, under the heading "Exchange Risk", Mr Craig referred to the possibility of adverse exchange movements and the Bank's practice of requiring the borrower to meet "any sizeable increases in the Australian Dollar value of the loan resulting from exchange rate movements..." Later in the letter, Mr Craig again pointed out "the potential risk involved in borrowing in a foreign currency without covering your foreign currency exchange exposure..." Mr Craig suggested that the appellants make regular enquiries about foreign currency movements and the price for hedging. Mr Craig also stressed "the importance of (the appellants') thoroughly investigating with your accountant (tax consultant) the ramifications of foreign currency borrowings particularly the tax treatment of any exchange rate profits/losses."

77. It is difficult to see how Mr Craig could reasonably be expected to do any more. It is not, and could not be, suggested that the Bank was to assume a role of managing foreign currency dealings on behalf of the appellants. Nor could it reasonably be expected of the Bank that it be able to predict whether, at any particular future time, the rate of exchange would fluctuate to any degree or at all. It is true that the Bank dealt in foreign currencies. But this is not to say that it had, or could reasonably be expected to have, any special knowledge of the possibility of future movements in the exchange rate. Short of taking over the management of the appellants' foreign currency dealings itself, and this was never contemplated, the most that the Bank could reasonably be expected to do was to indicate to the appellants, in a general way, that there were risks, that hedging was available at a price and that independent expert assistance should be sought. This the Bank did.

78. It follows, in our view, that no liability in tort on the part of the Bank was established.

(For the sake of completeness, we note that, at the commencement of argument on the appeal, senior counsel for the appellants sought to tender certain documents produced by the Bank. It appeared that the documents were arguably relevant but, because discovery had proceeded in an informal way, the documents had not been discovered. The Bank did not oppose the reception of the documents into evidence for the purposes of the appeal.

Although the trial judge did not have them, we are not persuaded that these documents, of themselves, or taken in conjunction with the evidence before his Honour, establish that the Bank should be held liable for the losses suffered by the appellants.)

(2) The claim under s.52 of the Trade Practices Act

79. We have dealt with the appellants' case to this point as one propounded as a claim in tort. As has been noted, the appellants also rely upon s.52 of the Trade Practices Act. However, senior counsel for the appellants accepted that if the appellants did not succeed in establishing a liability in tort against the Bank, it must follow that a contravention of s.52 could not be made out.

80. An attempt was made, on behalf of the appellants, to challenge certain findings made by the judge with respect to evidence given by Mr Rahme and by Mr David Rahme to the effect that Mr David Rahme was unable to communicate with his father in Arabic. However, we are not persuaded that the criticisms made of these findings, even if, for the purposes of the argument, they be accepted as valid, are of any significance for present purposes. On the contrary, when his Honour's reasons are read as a whole, it appears that this matter was only one of many considerations taken into account by the judge in making the findings of fact to which we have previously referred. We are not persuaded that we should now disturb those findings by reason only of these criticisms.

81. It follows that the appeal from the dismissal of the proceedings against the Bank must fail.

B. The claims against the third respondents

82. On behalf of the appellants it is submitted that, having found that the third respondents were in breach of their duty, the judge should also have found that the appellants were entitled to have damages assessed on the basis of the loss of a chance.

83. It is well settled that substantial, as distinct from nominal, damages may be awarded on a "loss of a chance" basis (see, e.g., Chaplin v. Hicks (1911) 2 KB 786). As Davies J. said in Amann Aviation Pty. Limited v. Commonwealth of Australia (Full Federal Court, 5 March 1990, unreported, at 18-19):

> "...as the circumstances of commercial life are complex
>
> and varied, issues of chance and contingency may play a
>
> part. Some damages are speculative. The value of a
>
> chance or a possibility, when relevant, must be taken
>
> into account, if it can be calculated...The value must

be estimated though certainty is lacking. The greater

the contingency, the less will be the value."

84. In McRae v. Commonwealth Disposals Commission [1951] HCA 79; (1951) 84 CLR 377, Dixon J. and Fullagar J. said (at 411-2):

"It was strongly argued for the plaintiffs that mere

difficulty in estimating damages did not relieve a

tribunal from the responsibility of assessing them as

best it could. This is undoubtedly true. In the

well-known case of Chaplin v. Hicks Vaughan Williams

LJ said:- 'The fact that damages cannot be assessed

with certainty does not relieve the wrongdoer of the

necessity of paying damages for his breach of

contract'. That passage, and others from the same

case, are quoted by Street C.J. in Howe v. Teefy, but

the learned Chief Justice...himself states the position

more fully. He says:- 'The question in every case is:

has there been any assessable loss resulting from the

breach of contract complained of? There may be cases

where it would be impossible to say that any assessable

loss had resulted from a breach of contract, but, short

of that, if a plaintiff has been deprived of something

> which has a monetary value, a jury is not relieved from the duty of assessing the loss merely because the calculation is a difficult one or because the circumstances do not admit of the damages being assessed with certainty'...It does not seem possible to say that 'any assessable loss has resulted from' non-delivery as such. In Chaplin v. Hicks, if the contract had been performed, the plaintiff would have had a real chance of winning the prize, and it seems proper enough to say that that chance was worth something. It is only in another and quite different sense that it could be said here that, if the contract had been performed, the plaintiffs would have had a chance of making a profit. The broken promise itself in Chaplin v. Hicks was, in effect, 'to give the plaintiff a chance': here the element of chance lay in the nature of the thing contracted for itself. Here we seem to have something which cannot be assessed."

85. His Honour found that even if Mr. Morgan had advised the appellants to hedge selectively, there was an insufficient basis for the drawing of an inference that the appellants would have acted on that advice to their financial benefit or advantage. In other words, the appellants had not shown that they had suffered any loss or damage as a consequence of Mr. Morgan's breach of duty.

86. We were referred to various authorities dealing with the recovery of damages, primarily in contract but also in tort, for so-called "loss of a chance". In some species of contract, the

very subject of the bargain between the parties is advantages or losses which depend upon uncertain events. It was to this class of case that Dixon and McTiernan JJ. referred to in Fink v Fink [1946] HCA 54; (1946) 74 CLR 127 at 143, in speaking of aleatory contracts, with the giving and taking of odds, as in wagering contracts, contracts of insurance, and contracts involving

> "...the claim of one of a very limited number of
>
> competitors to receive the consideration to which he is
>
> contractually entitled in the distributive award of
>
> definite and material benefits, as in Chaplin v Hicks
>
> (1911) 2 KB 786."

87. Chaplin v Hicks was a decision of a strong Court of Appeal (Vaughan Williams, Fletcher Moulton, Farwell LJJ.). It is authority for the propositions that where the defendant, in breach of contract, had denied the plaintiff her opportunity to consideration in the competition she had entered, (i) the claim to damages did not fail as being too remote and (ii) the existence of a contingency, dependent upon the selection of the plaintiff as a prize winner, did not make the damages impossible to assess. Reference was made to the authorities in bankruptcy, dealing with valuation of contingent claims: see supra at 789, 800.
88. This case has had an influence beyond the field of aleatory contracts, as described in Fink v Fink, supra. It has been described as a classic case providing a source for development of the law to provide for recovery in respect of lost business opportunities: Farnsworth, "Contracts", 1982, pp 886-888; and see Takaro Properties Ltd v Rowling [1986] NZCA 27; (1986) 1 NZLR 22 at 63-64, rev'd on other grounds, (1987) 2 NZLR 700. In Hotson v East Berkshire Area Health Authority [1988] UKHL 1; (1987) 2 All ER 909 at 913, 921-922, reliance was placed unsuccessfully upon Chaplin v Hicks as applying by analogy to issues of causation arising in an action for damages in tort for personal injury; the House of Lords decision is discussed critically in Fiona Cownie's article "Damages for Loss of a Chance in Tort?" (1989) Professional Negligence 194.

89. However, Chaplin v Hicks has been applied in a number of actions against solicitors for negligent advice, due allowance being made for the "chance" that the loss claimed still would have occurred even after careful advice; and there is ample authority that the plaintiff has suffered a loss to be valued in damages even if the "chance" that adequate advice would have been followed is less than 50%; see the authorities collected in Waddams, "The Law of Damages", 1983, paras. 1079-1080.

90. But, as senior counsel for the third respondents emphasised in his submissions on the present appeal, it was for the appellants to establish at the trial that on the balance of

probabilities there was a real chance that if the third respondents had performed their duties to the appellants and had not been guilty of the breach of contract and breach of duty in tort, as was found against them, the appellants would have taken steps to avoid the loss allegedly sustained by them.

91. In Sykes v Midland Bank Executor and Trustee Co. Ltd (1971) 1 QB 113, the plaintiffs failed in an action for professional negligence against their solicitors because, as the passage from the evidence of one of the plaintiffs (set out supra at 124-125) makes clear, adequate advice would not have had any impact upon their minds in deciding whether or not to enter into the sub-lease in question. Professor Waddams suggests (supra at para. 1086) the decision be understood as one that the chance that the plaintiffs would have benefited by proper advice was so small as to be negligible. Thus, there was no real "chance" the loss of which was to be valued.

92. In our view, that is what follows from his Honour's findings in the present case. It is to be borne in mind that the trial had been concerned with the issues of liability, with assessment of any quantum to be left for later hearing. Thus, it was to issues of liability that his Honour was directing his remarks in the passage we set out below. As his Honour indicates, expert evidence had been given by Professor Valentine and Mr Butler and they had differed in significant respects. Also, as senior counsel for the third respondents emphasised on the hearing of the appeal, there was an absence of direct evidence from the Rahmes as to what they would have done if the third respondents had performed rather than broken their obligations to them.

93. The passage from his Honour's judgment is as follows:

> "Am I satisfied on the balance of probabilities that if
>
> Mr Morgan had monitored the loan and advised of the
>
> possibility of selective hedging (at a cost to the
>
> Rahmes if the selective hedging were unsuccessful) the
>
> Rahmes would have taken the next step and taken action
>
> which would have prevented the loss from the risk
>
> which, without the intervention of Mr Morgan, they had
>
> assumed when drawing down the first loan in December?
>
> It is not something which I can easily infer, and in

the end I am left uncertain by the evidence what would have happened.

In addition to the matters peculiar to the Rahmes to which I have referred, the problem arises as to what advice the Rahmes would have been given if they had sought advice. In my view it is clear that Mr Morgan's retainer would not have extended to advising as to the precise timing to undertake selective hedging. In my view, it could not be inferred that an accountant would undertake such a responsibility. At best, having advised on hedging techniques and kept the Rahmes informed of exchange movements it would be up to the Rahmes to decide whether to hedge and how. They could have sought expert assistance but might just as easily have sought advice from Professor Valentine or another expert of like mind, as from Mr Butler or another expert of like opinion to him. Why is it more probable than not that the Rahmes would have received the one kind of advice rather than the other? And even if they had received Mr Butler's advice, qualified no doubt by an explanation of the risk involved and the cost if the strategy turned out to be wrong, would the Rahmes have

done anything at all?

On the evidence I am unable to form a view one way

rather than the other as to the answer to these

questions. Since the onus lies on the applicants to

prove their case it follows that, in my view, the

applicants must fail."

94. We are not persuaded that we should interfere with the finding of the trial judge that the appellants had failed to demonstrate that they had suffered any loss by reason of the breach found by his Honour. Accordingly, the appeal from the dismissal of the proceedings against the third respondents also must fail.

The appeal on the cross-claim (Matter No. G314 of 1989)

95. As we have indicated, the first and second appellants, David Securities and A and T Rahme, each entered into foreign currency loan arrangements with the Bank and granted mortgages over land under the provisions of the Real Property Act 1900 (N.S.W.) to secure amounts owing to the Bank from time to time. For relevant purposes, in respect of each facility the loan agreements and the various securities were in similar form.

96. On the appeal, David Securities and A and T Rahme disputed on two of the four grounds urged at the trial that they were liable to pay only some of the moneys claimed by the Bank on its cross-claim. First, it was submitted that the provisions of the loan agreements as to the rate of interest applicable from the time of default constituted a penalty and were "therefore void". Secondly, it was submitted that sub-clause 8 (b) in the loan agreement was void as offending s. 261 of the Income Tax Assessment Act 1936 ("the Act") with the result that the first and second appellants were entitled to a refund of certain moneys, as moneys had and received by the Bank to their use, and that, in effect, they were entitled to set-off the amounts in question against the sums claimed by the Bank. The claim to set-off these liquidated amounts was not pleaded in terms by the first and second appellants to the Bank's cross-claim; cf. South Australian Cold Stores Limited v Electricity Trust of South Australia [1957] HCA 69; (1957) 98 CLR 65 at 71. On the appeal, the Bank sought to make a point of this. Nevertheless, the trial was conducted on the footing that a claim of this kind was an element in the case and we should proceed in the appeal on the same footing.

97. His Honour held that the doctrine concerning penalties had no application to the particular case before him and that, as regards the second issue, the moneys in question had been paid by the first and second appellants under a mistake of law as to the effect of s.

261 of the Act with the result that the moneys were irrecoverable by the appellants from the Bank.

98. We turn to consider these two issues. Penalty

99. As his Honour did, we will refer only to the terms of the documentation between the first appellant and the Bank. It was not suggested that any different result would follow in respect of the second appellant's documentation.

100. As has been said, the rate of interest was provided for in sub-clause 3 (b) of the loan agreement as follows:

> "The rate of interest applicable to each Interest Period
>
> shall be one and one quarter per cent per annum (1.25%
>
> pa) above the rate at which the Bank can obtain
>
> deposits in United States Dollars or in the relevant
>
> Optional Currency as the case may be for such Interest
>
> Period and for a similar amount in the Interbank
>
> Eurocurrency Market in the city of the Bank's Lending
>
> Office as at 11.00 a.m. in such city two Banking Days
>
> prior to the beginning of such Interest Period."

101. It will be recalled that the expression "Optional Currency" is defined as a currency (other than United States Dollars and Australian Dollars) which is freely transferable and convertible into United States Dollars.

102. It will also be remembered that clause 3 (a) and clause 4 (a), respectively, provided for payment of interest and for repayment of the amounts drawn down under the loan agreement, such payment and repayment being in the ordinary course and at the times specified. Clause 11.01 provided that the moneys owing under the loan agreement were to become "immediately due and payable to the Bank" upon the occurrence of any of a number of various events. Only some of these events were breaches by the borrower of its obligations to the Bank or were events otherwise within the control of the borrower. Clause 11.02 then made provision for payment of further interest if the borrower failed to pay any amount payable by it "on the due date therefor". We would read the expression "due date" in clause 11.02 as accommodating an accelerated date on which moneys became immediately

due and payable to the Bank under clause 11.01, in addition to the regular dates provided for in sub-clauses 3 (a) and 4 (a).

103. Clause 11.02 of the loan agreement stated:

> "If the Borrower fails to pay any amount payable by it hereunder in respect of any Advance on the due date therefor, the Borrower shall on demand by the Bank from time to time pay interest on such overdue amount from the due date up to the date of actual payment, after as well as before judgment, compounded quarterly at a rate determined by the Bank to be one and one half of one per cent per annum (1.5% pa) above the aggregate of one and one quarter per cent per annum (1.25% p.a.) and the rate at which the Bank was offered deposits by leading banks in the Interbank Eurocurrency Market in the city of the Bank's Lending Office in a currency and amount comparable to the overdue amount for a period of three months."

104. It will be observed that clause 11.02 did not impose an obligation to pay interest on the overdue amount from a time before the due date, being the date on which there was a failure to pay. It also should be observed that the "overdue amount" upon which interest was to be paid under clause 11.02 would include not only overdue moneys in the nature of principal, but also interest.

105. It was submitted for the first and second appellants that the combined effect of sub-clause 3 (b) and clause 11.02 was that the latter provision operated to impose a penalty. This was said to be because whilst sub-clause 3 (b) made it clear that during the currency of an "Interest Period" (a defined term) the rate of interest would be the Bank deposit rate plus

1.25%, clause 11.02 indicated that, in the event of default, the rate would be 1.5% above the rate which would have applied under clause 3 (b). The consequence was submitted to be that no interest was payable from the end of an interest period in which default occurred or alternatively that further interest at the rate of 1.5% would not be payable under clause 11.02. The arguments of both sides proceeded on the footing that the rate of interest under clause 11.02 always would be greater than the rate of interest under clause 3.

106. It is plain that one is concerned in this area with substance rather than form: O'Dea v Allstates Leasing System (W.A.) Proprietary Limited [1983] HCA 3; (1983) 152 CLR 359 at 368, 400; Acron Pacific Limited v Offshore Oil N.L. [1985] HCA 63; (1985) 157 CLR 514 at 520.

107. In the Acron Pacific Case (supra) Deane J. said at 520:

> "If, as a matter of substance, the provisions of an
>
> agreement operate, in the case of breach or
>
> non-performance, to impose some additional or different
>
> financial obligation in the nature of a punishment (as
>
> distinct from a genuine pre-estimate of damage or
>
> withdrawal of a mere incentive), they will prima facie
>
> impose a penalty . . ."

108. It is necessary first to distinguish clause 11.02 from other covenants concerning which there is a well-known, if not much praised, distinction. A proviso in a contract of loan or mortgage may stipulate a reduction of the rate of interest if interest be paid punctually. This provides an incentive to punctual payment, time being of the essence. On the other hand, a provision, that, if there be a failure in punctual payment, the rate of interest is increased with effect over the period in respect of which the interest is charged, has been regarded as a penalty. The historical evolution of the distinction is traced by Mr. Meredith in his article "A Nicety in the Law of Mortgage" (1916) 32 LQR 420.

109. The distinction has been criticised as preferring form to substance, in contradiction of the preference of equity for substance over form. In Seton v Slade [1802] EngR 267; (1802) 7 Ves Jun 265 at 273-274; [1802] EngR 267; 32 ER 108 at 111, Lord Eldon L.C. expressed his dissatisfaction with what was already understood to be the law, in the following passage:

"So in the instance of a mortgage with interest at 5 per cent and a condition to take 4, if regularly paid; or at 4 per cent., with a condition for 5, if not regularly paid. At Law you might in that case recover the 5 per cent. for it is the legal interest. But this Court regards the 5 per cent. as a penalty for securing the 4; and time is no farther the essence, than that if it is not paid at the time, the party may be relieved from paying the 5 per cent by paying the 4 per cent and putting the other party in the same condition, as if the 4 per cent. had been paid; that is, by paying him interest upon the 4 per cent as if it had been received at the time. So in this Court, before Courts of Law dealt with a bond, under a penalty, as they do now. Time was of the essence there: but this Court relieved against the penalty long before a Court of Law; and there are many other instances."

110. However anomalous, the distinction between an increase in the rate of interest (which attracts the doctrine concerning penalties), and a covenant offering an incentive by reduction of the rate upon prompt payment (which does not attract the doctrine) is well established: O'Dea v Allstates Leasing System (W.A.) Proprietary Limited supra at 366-367; Acron Pacific Limited v Offshore Oil N.L. supra at 518, 520; Fisher and Lightwood's "Law of Mortgage" 10th Ed., 1988 at 47-48, 654, Sykes, "The Law of Securities", 4th Ed., 1986, at 68-69. See also Brett v Barr Smith [1919] HCA 4; (1919) 26 CLR 87 at 94-95.

111. What is the efficacy of a provision in a mortgage providing for the capitalisation of arrears of interest? It was formerly considered, as a general rule, that, in equity, covenants

converting interest into principal from time to time as the interest became due, but was not paid, conflicted with the usury laws and consequently could not be supported: Coote on Mortgages, 9th Ed., 1927, Vol. 1, at 157-158. That certainly still was so in the time of Lord Eldon. But in modern times, with the repeal of the usury laws, it is well settled that a stipulation entered into at the time of a loan for payment of compound interest is valid and does not attract the doctrine concerning penalties: Domaschenz v Standfield Properties Pty Ltd (1977) 17 SASR 56 at 60-61; C.J. Belmore Pty Ltd v A.G.C. (General Finance) Limited (1976) 1 NSWLR 507 at 510; Fisher and Lightwood's "Law of Mortgage", supra at 47-48, 654: cf. Cityland and Property (Holdings) Ltd v Dabrah (1968) Ch 166; National Bank of Greece SA v Pinios Shipping Co. No. 1 (1990) 1 All ER 78 (H.L.). That being so, the distinction is not readily apparent between a stipulation capitalising arrears of interest and a covenant to pay a higher rate of interest on default of punctual payment of principal.

112. But what of a provision whereby the increase in the interest rate operates only from the date of default in payment, so that it does not extend back over the period in respect of which there accrued the primary interest which was not paid when it (and the principal) was due for payment? There is a long line of authority which indicates that the additional interest will not be considered as a penalty, but rather as a liquidated satisfaction fixed and agreed on by the parties as compensation for the lender being kept from his money. It will be recalled that equity would only relieve against a penalty where compensation could be made for the actual damage suffered by the party seeking to recover the penalty, and that the actual damage suffered by the party would be assessed in an action at common law; there has been a conflict of authority on the question (not relevant to the present appeal) of whether a penalty operates to impose a limit on the common law damages which a plaintiff might recover: AMEV-UDC Finance Limited v Austin [1986] HCA 63; (1986) 162 CLR 170 at 175, 190-192, 212.

113. The line of authority commenced with Burton v Slattery (1725) 5 Brown 233; [1725] EngR 90; 2 ER 648, an appeal from the Irish Court of Chancery to the House of Lords. The increase in interest provided for in the mortgage in question in that case was not retrospective. The effect of the decision is summarised in the following passage, which appears in the headnote in the English Reports as an extract from Powell on Mortgages, 5th Ed., 1822, Vol. 2, p 901:

> "A distinction is made in Chancery between an agreement
>
> that the interest shall be raised, if not punctually
>
> paid; and for abatement thereof upon punctual payment.
>
> For in the former case it is considered as a penalty
>
> which the Courts of Equity will relieve against; but in

the latter as a condition, which must be strictly adhered to; in which case the debtor cannot have relief in Equity after the day of payment elapsed, because the abatement is to be upon a condition which is not performed: If, however, there be a covenant for payment of the additional interest, the court will not relieve against it. And if an indulgence be given by the mortgagee, such agreement will be good to raise the interest upon the ground of forbearance; the additional interest not being considered in that case as a penalty, but as a liquidated satisfaction fixed and agreed on by the parties: So where (the present case) a mortgage was given in Ireland to trustees by way of securing debts to creditors, and no money actually passed, but the sum nominally lent, was to be paid by installments: an agreement that the interest of those sums should rise, on non-payment at the time appointed, or within three months after, from 5 to 8 per cent was held good."

Burton v Slattery, supra, was relied upon in the successful argument of counsel in General Credit and Discount Company v Glegg (1883) 22 Ch D 549 at 552. It was not disputed in that case that a retrospective increase of interest upon default was a penalty, but the increase in question was not retrospective and ran only from the date of default. To the same effect are

two early Canadian cases Waddell v McColl (1868) 14 Gr 211 and Downey v Parnell (1882) 2 OR 82; see "Falconbridge On Mortgages", 4th Ed., 1977, para. 33.4.

114. It was suggested in submissions on the present appeal that C.J. Belmore Pty Ltd v A.G.C. (General Finance) Limited, supra, was a case of an increase in interest rate with a retrospective effect. But it is apparent from the report that this was not so and that the decision is a recent application of the reasoning in Burton v Slattery, supra.

115. Clause 11.02 operated partly to capitalise due but unpaid interest, something which, as we have indicated, of itself does not attract the doctrine relieving against penalties. As to that interest and, perhaps more significantly, overdue principal, clause 11.02 imposed a rate of interest 1.5% above that which, before default, applied to principal as the primary obligation, by dint of sub-clause 3 (b). Such a provision does not have a retrospective operation so as to extend to the period before default. In accordance with the line of authority which we have discussed, it is seen not as a punishment for default, but as a genuine pre-estimate of compensation to the Bank with respect to funds it would otherwise have had available to it to re-invest. Clause 11.02 did not operate in substitution for the existing primary obligation duly to repay the principal with interest as provided in sub-clause 3 (b), sub-clause 4 (b) and clause 11.01, nor (as in the leasing and hire-purchase cases) to accelerate the future time for compliance with a primary obligation.

116. The appeal upon this issue should be dismissed.

Withholding Tax - Mistaken Payments

117. Sub-clause 8 (b) of the loan agreement provided as follows:

> "All interest payments hereunder shall be paid by the
>
> Borrower to the Bank without deduction of any tax or
>
> duty or other imposts of any kind whatsoever. Should
>
> the Borrower at any time be compelled by law to deduct
>
> any such taxes, duties or imposts from any payment to
>
> be made by the Borrower the Borrower will pay such
>
> additional amounts as may be necessary in order that
>
> the net amount received shall equal the full amount the
>
> Bank would have received had a deduction not been made

or had payment not been made subject to such tax duty

or imposts together with an aggregate sum equal to any

additional taxes payable by the Bank in respect of any

additional amounts (including amounts equal to such

taxes) under this clause (including this obligation)."

A failure by the borrower to comply with sub-clause 8 (b) would bring the result that the Bank was not obliged to renew any advance or to replace with other bills any bills maturing under the facility provided for in the loan agreement. It also would be a default accelerating the obligation to pay all moneys owing under the facility. Paragraph (a) of clause 11.01 would have this consequence. Clause 20 selected the law of New South Wales as the governing law of the agreement and provided for the "non-exclusive" jurisdiction of the New South Wales courts.

118. In his reasons for judgment on the cross-claim, his Honour traced the history since 1915 of what is now s. 261 of the Act. His Honour concluded that the section is designed to protect mortgagors. That, with respect, plainly is correct.

119. Section 261 relevantly provides:

"261 (1) A covenant or stipulation in a mortgage, which

has or purports to have the purpose or effect

of imposing on the mortgagor the obligation of

paying income tax on the interest to be paid

under the mortgage -

(a) . . .

(b) if the mortgage was entered into

after (13 September 1915) - shall be

absolutely void.

. . .

(5) For the purposes of this section, 'mortgage'

includes any charge, lien or encumbrance to

secure the repayment of money, and any

collateral or supplementary agreement, whether

in writing or otherwise, and whether or not it

be one whereby the terms of any mortgage are

varied or supplemented, or the due date for

the payment of money secured by mortgage is

altered, or an extension of time for payment

is granted."

Withholding tax payable under Division 11A of Part III of the Act is included within the term "income tax" in s. 261. This is the effect of sub-s. 128A (4) of the Act. The operation of s. 261 in conjunction with the withholding tax provisions of the Act has attracted some discussion; see Ladbury, Fox and Nettle, Current Legal Problems in Project Financing, (1981) 3 Australian Mining and Petroleum Law Journal 139 at 142-145, Dunstan, Eurocurrency Lending And Note Issues, essay reprinted Austin and Vann eds., "The Law of Public Company Finance", 1986, 324 at 332.

120. For some time prior to their default, the first and second appellants paid to the Bank, pursuant to sub-clause 8 (b) an amount equal to the 10% withholding tax which, his Honour assumed, was paid under the provisions of Division 11A of Part III of the Act. It is the amount of these payments under sub-clause 8 (b) which the appellants submit were had and received by the Bank to their use, so that they may now be set-off against the amounts claimed by the Bank upon its cross-claim. This submission was made on the basis that s. 261 of the Act rendered sub-clause 8 (b) void. We did not understand the submissions for the Bank on the appeal as disputing that this indeed was the situation.

121. Section 261 is concerned only with covenants and stipulations in a "mortgage", but that term is so defined as to include "any collateral or supplementary agreement" to a "charge, lien or encumbrance to secure the repayment of money". It might be said that the loan agreement rather than the securities was the principal instrument by which the relationship between the parties was established. Nevertheless, as was pointed out in Stardawn Investments Pty Ltd v Comptroller of Stamps (Vic.) (1983) 84 ATC 4,097 at 4,100, a thing is

collateral to another if it exists side by side with the other, and there is no necessary notion of the primacy of one over the other. Hence, the loan agreement was collateral, even if not also supplementary, to the securities taken by the Bank, and thus itself fell within the statutory definition of "mortgage" in sub-s. 261 (5). There was no submission to the contrary.

122. In the loan agreement, the Bank was shown as having a Singapore office and clause 2 (e) obliged the Bank to make available at its branch office in Singapore each amount drawn under the facility in United States dollars or in what the agreement defined as an "Optional Currency" (which was not to be Australian dollars). It appears to have been on this footing that the withholding tax provisions were treated by the parties as applicable to the income derived by the Bank as interest under the loan agreement, although, of course, the Bank would not ordinarily have been considered a non-Australian resident. Sub-section 128B (2A) deals with just such a situation. Provision for collection of withholding tax is made in Part VI, Div. 4 of the Act. In particular, s. 221YV protects the borrower who has made a deduction from interest, pursuant to the statutory obligation in s. 221YL, against a demand by the lender to be paid the full amount of interest. It does so by giving the borrower a statutory discharge from all liability to pay or account for the deduction to any person other than the Commissioner. Section 221YV, like s. 261, with which it is to be read, is designed to protect borrowers.

123. No doubt the Bank could not have successfully sued upon the covenant in sub-clause 8 (b), nor properly asserted the accrual of other rights contingent upon non-compliance by the borrower with sub-clause 8 (b), such as an acceleration of repayment obligations under clause 11.02. But s. 261 did not forbid the making of the payments that the borrower in fact made, nor did it prescribe any penalty for doing so. In this sense, there was no illegality and this is not a case where what is asserted is a right of recovery of payments made pursuant to an illegal contract; cf. J. and S. Holdings Pty Ltd v N.R.M.A. Insurance Ltd [1982] FCA 78; (1982) 61 FLR 108 at 118.

124. The first and second appellants say the money ought to be returned or accounted for because it was paid by mistake: cf. Kiriri Cotton Co. Ltd v Dewani (1960) AC 192 at 204-205. In South Australian Cold Stores Limited v Electricity Trust of South Australia (supra), Dixon C.J., McTiernan, Williams, Webb and Taylor JJ. said at 75, that an action for money had and received lies in cases of payment by mistake:

> ". . . when the payee cannot justly retain the money
>
> paid to him because it would not have come to his hands
>
> if it had not been for a false supposition of fact on
>
> the part of the payer causing the latter to believe
>
> that he was compellable to make the payment or at all

events that he ought to make it."

125. Counsel for the Bank submitted that the appellants had offered no direct evidence to the effect that without the mistake being made on their part, by regarding sub-clause 8 (b) as valid rather than void, they would not have made payments pursuant to that sub-clause. However, in the circumstances of this case, there is sufficient evidence from which one can infer that the appellants would have made no payment but that which they regarded themselves as legally obliged to make pursuant to their contractual and security arrangements with the Bank.

126. Counsel for the Bank then submitted that if there was a mistake, it was one of law, that is to say a mistake as to the existence of s. 261 of the Act and its operation upon sub-clause 8 (b) of the loan agreements. The Court's attention was drawn to the well-known line of authorities commencing with Bilbie v Lumley [1802] EngR 245; (1802) 2 East 469; 102 ER 448, for the proposition that an action for money had and received does not lie in cases of payment by mistake of law, rather than fact. At the trial, his Honour accepted a submission to like effect and found against the appellants on this issue.

127. The distinction between mistakes of fact and those of law is particularly difficult to draw where what is involved is performance of what appear to be contractual obligations. In York Air Conditioning and Refrigeration (A/sia) Proprietary Limited v The Commonwealth [1949] HCA 23; (1949) 80 CLR 11, Williams J. said at 30:

"A mistake in the construction of a contract is a

mistake of law and payments made under a mistake of law

cannot be recovered in an action for money had and

received."

On the other hand, a United States Court of Appeals, the members of which included Learned Hand J., held that a patent licensee might recover royalties which it had paid, after the patent and the licence thereof had expired in the mistaken belief that the patent was still on foot. The Court held that the date of the expiry of the patent was one of fact only, but that even if the mistake was to be "deemed a conclusion drawn from both law and facts, it is not the kind of mistake of law which permits a person to retain money to which he was not entitled": E.R. Squibb and Sons v Chemical Foundation, Inc. 93 F 2d 475 at 478 (1937).

128. In Leedon v Skinner [1923] VicLawRp 51; (1923) VLR 401, Mann J. held a lessee was entitled to recover, as money paid under a mistake of fact, an amount paid to his lessor, on demand, in respect of land tax, the lessee having held a belief that he was obliged to pay under a term of the lease. There was no such covenant in the lease. His Honour (at 403)

contrasted a false belief that a document contains a certain stipulation (a mistake of fact) and an erroneous belief as to the legal effect of a stipulation (a mistake of law).

129. In the present case, the mistake related to the subsistence of the liability itself, and not made simply because of what was or was not stated in the loan agreement or because of the existence of some related circumstance, such as the date on which a payment fell due. The mistake was as to the existence of s. 261 and its operation to render void the purported contractual obligation in sub-clause 8 (b). This was a mistake of law for the purposes of this particular field of discourse, or at least a mistake as to law mixed with fact: cf. Stoljar, "The Law of Quasi-Contract", 2nd Ed., 1989, pp 48-50. The present case may be compared with the decision in Sharp Brothers and Knight v Chant (1917) 1 KB 771 at 776, where a tenant was denied recovery of payments of increased rent demanded by the landlord; the tenant had paid in ignorance of war-time legislation which fixed the standard rent at a lesser sum than that of the increased rent.

130. Mistake of law does not operate upon all of the other quasi-contractual heads of liability as a bar to relief. For example, where payments are recoverable as having been exacted colore officii, it is not to the point that the plaintiff paid only because he was under the mistaken belief that the demand was one with which he was legally required to comply; Mason v The State of New South Wales [1959] HCA 5; (1959) 102 CLR 108 provides a well-known example. Variations such as this between the integers of liability illustrate the difficulty in readily applying to the whole of this body of law any universal and normative concept of restitution. The point is further emphasised when it is recalled that mistake of law is no barrier to enforcement of money claims made in equity, in aid of equitable rights or titles. The operation of the equitable doctrines concerning recovery of mistaken payments was strikingly illustrated in the treatment of the in personam claim in Ministry of Health v Simpson (1951) AC 251 at 269-270, affg. sub nom., In re Diplock (1948) Ch 465 at 480-481.

131. In a case such as the present, the rationale for the rule distinguishing between mistakes of fact and law does not readily appear. In other situations, the distinction will have a point. Criminal responsibility and liability in tort or for breach of contract or trust is not avoided by pleading ignorance of the law. In those cases, to allow such a plea would be to permit an escape from the application of a rule of law. But in the present case, the first and second appellants invoke the law enacted in s. 261 of the Act when they seek the return of payments which, under that law, they were not obliged to make. The point is made as follows by Professor Palmer in the following passage from his work, "The Law of Restitution", 1978, para. 14.27:

> "In (some) instances the party is seeking to escape the
>
> application of a rule of law. But in the restitution
>
> cases with which we are now concerned, he is not - on

> the contrary, he makes the rule of law a part of his
>
> case and seeks restitution of the performance because
>
> he was mistaken as to that rule. Policies applied to
>
> mistake of law in the first situation have no bearing
>
> on the solution of the second. Rather than trying to
>
> escape the consequences of a rule of law, the plaintiff
>
> is seeking to escape consequences that would not have
>
> occurred had the law been known and observed. In a
>
> general sense it can be said that he seeks to bring the
>
> situation into conformity with the rule of law, by
>
> asserting rights based upon it."

But, as the learned author readily concedes, the authorities do not yet make this distinction.

132. It also is true that Bilbie v Lumley, supra, and the cases applying it have attracted considerable criticism from scholars and in judicial decisions. Fifty years ago, Lord Wright, writing extra-judicially, described Bilbie v Lumley as an example of how "the dead hand of the past fastens on the living present": "Legal Essays and Addresses", 1939, preface xix. The Supreme Court of Canada recently held that in actions for recovery of money mistakenly paid the distinction between mistakes of law and fact no longer should be observed, at least where the claim is not one by the citizen to recover moneys mistakenly paid to the Revenue: Air Canada v The Queen in right of British Columbia (1989) 59 DLR (4th) 161 at 190-194. The New South Wales Law Reform Commission Report, LRC 53, 1987, "Restitution of Benefits Conferred Under Mistake of Law", recommended the abolition of mistake of law as a bar to recovery. That is something already achieved in Western Australia by the Property Law Act 1969 (W.A.), s. 124 which was drawn from the Judicature Act 1908-58, (N.Z.), s. 94A. But the present case was tried on the footing that the law of New South Wales was the applicable law by virtue of the operation of s. 79 of the Judiciary Act 1901.

133. In this general area of restitutionary claims, the common law in Australia has seen recent development in High Court decisions. Pavey and Matthews Proprietary Limited v Paul [1987] HCA 5; (1987) 162 CLR 221 and Australia and New Zealand Banking Group Limited v Westpac Banking Corporation (1988) 164 CLR 662, are two significant examples. Nevertheless, in our view, in this Court, it should be accepted that it is open only to the High

Court to remove the distinction between fact and law in respect of common law claims for recovery of money paid by mistake; see Trident General Insurance Co. Limited v McNiece Bros Proprietary Limited [1988] HCA 44; (1988) 165 CLR 107 at 129-130; cf. Foran v Wright [1989] HCA 51; (1989) 88 ALR 413 at 448.

134. What then is the result if currently understood principles are applied to the mistake of law present in this case? That the first and second appellants must fail does not necessarily follow.

135. In Kiriri Cotton Co. Ltd v Dewani, supra, Lord Denning, speaking for the Judicial Committee, said at 204:

> "It is not correct to say that everyone is presumed to know the law. The true proposition is that no man can excuse himself from doing his duty by saying that he did not know the law on the matter. Ignorantia juris neminem excusat. Nor is it correct to say that money paid under a mistake of law can never be recovered back. The true proposition is that money paid under a mistake of law, by itself and without more, cannot be recovered back. . . . If there is something more in addition to a mistake of law - if there is something in the defendant's conduct which shows that, of the two of them, he is the one primarily responsible for the mistake - then it may be recovered back. Thus, if as between the two of them the duty of observing the law is placed on the shoulders of the one rather than the other - it being imposed on him specially for the

protection of the other - then they are not in pari

delicto and the money can be recovered back . . ."

(Emphasis supplied)

That passage was approved and applied by the Full Court of this Court in J. and S. Holdings Pty Ltd v N.R.M.A. Insurance Ltd, supra, at 123 as follows:

"The insufficiency of mistake of law as the foundation

of an action for recovery of money paid is commonly

stated as a general principle or rule of law precluding

any right of action in a case where the payment was

voluntary. Thus, for example, Latham C.J. in Werrin v.

Commonwealth ((1938) [1938] HCA 3; 59 CLR 150 at 157) said that

the 'general rule, as stated in Leake on Contracts (6th

ed., 1911), p 63, is that money paid voluntarily, that

is to say, without compulsion or extortion or undue

influence and with a knowledge of all the facts, cannot

be recovered' (see also, to the same effect, William

Whitely Ltd. v. The King ((1909) 101 LT 741 at 745);

Sawyer v. Window Brace Ltd. ((1943) 1 KB 32 at 34)).

Such statements of a general rule precluding recovery

require to be hedged around by categories of exceptions

which while 'more or less canalized or defined' need

not necessarily be regarded as closed. It is

preferable to frame the general rule in terms of

insufficiency rather than in terms of preclusion. So

stated, the general rule is that a mistake of law does

not, on its own, found an action for the recovery of

money paid (see, generally, Kiriri Cotton Co. Ltd. v.

Dewani ((1960) AC at 204-205)."

The question then becomes whether in the present case there are any particular grounds upon which recovery should be allowed. The Full Court dealt with the applicable principles by saying, supra, at 122:

"Particular grounds, such as a complete failure of

consideration, or abuse of a fiduciary relationship

(for example, undue influence), or the particular

situation of the payer (trustee or personal

representative) or recipient (an officer of a court),

or mistake of fact, or involuntariness, or unequal

responsibility for the mistake of law must be shown to

exist before a recipient of money which was paid, under

mistake of law, to him for his own use can be held to

have received it to the use of the payer and ordered to

refund it. It is true that the distinction which has

been drawn between mistake of fact and mistake of law

has been subjected to much learned criticism and is

often difficult to apply. It is, however, at least in

so far as this Court is concerned, firmly entrenched."

136. Returning to the facts on this appeal, there is, in our view, nothing in the Bank's conduct which shows that, as between it and the first and second the appellants, it is primarily responsible for the mistake made by the appellants in making payments they were not obliged to make. No doubt the Bank drew the documentation containing the void sub-clause 8 (b) and if that had not been done, the payments would not have been made. But, without more, that would not render responsibility for the appellants' mistake in not appreciating the impact of s. 261 upon sub-clause 8 (b), something resting primarily upon the Bank. There was no case put to us, or to the trial judge, that the Bank had contributed to the appellants' mistake of law in any more immediate way by, for example, sharp practice, or bad faith, so as to make it bear sufficient responsibility in the relevant sense for what happened; cf. Ward and Co. v Wallis (1900) 1 QB 675 at 678-679.

137. In reaching this conclusion, we have not been unmindful that s. 261 is designed to protect the interests of persons in the position of the appellants and that they seek to vindicate the policy of the statute. But, as mentioned earlier, as the authorities stand, that is not sufficient to escape the rule that mistake of law does not, on its own, found an action for the recovery of money paid.

138. We would dismiss the appeal as regards both the issues which arose from the decision upon the cross-claim.

139. We should add that no question arose of subrogation of the first and second appellants to any income tax debt due under the Act from the Bank to the Crown in the right of the Commonwealth in respect of interest derived by the Bank, such subrogation being consequent upon the appellants mistakenly having permitted the Bank to recoup itself under sub-clause 8 (b) of the loan agreements; cf. Dimdore v Leventhal (1936) SR (NSW) 378 at 385; Public Trustee v Schultz (1973) 1 NSWLR 564; Re Sara Properties Pty Ltd (In Liquidation) and the Companies Act, 1961 (1982) 2 NSWLR 277; "Scott on Trusts", 3rd Ed., 1967, and 473. As subrogation is an equitable doctrine, mistake of law might not have a fatal significance, if the doctrine otherwise was available in the circumstances; cf. Reversion Fund and Insurance Company, Limited v Maison Cosway, Limited (1913) 1 KB 364 at 379-380; In re Diplock supra at 548-549. We express no view upon the matter.

Conclusion (both appeals)

140. The appeals are dismissed, with costs.