

REMEDIES OUTSIDE THE CONTRACT

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1. INTRODUCTION

The principal liability which occurs on engineering projects outside the Contract will usually be in negligence. This paper will introduce the general concept of negligence, and in particular the law relating to professional negligence in the construction industry.

This paper will also discuss misleading and deceptive conduct under so-called "fair trading" legislation in Australia, in particular, the application of the Commonwealth and State legislation, and a brief explanation of the definitions and some of the concepts involved. The key concepts will then be considered with examples from decided cases applicable to the construction industry.

The paper will also address the remedies of restitution and estoppel.

The conduct of parties to a contract may, in recent times at least, result in remedies not otherwise available under the contract (or near contract). In particular, in certain circumstances, a party who has performed work at the request of another party, in the absence of any contractual entitlement to be paid for that work, may be able to recover a reasonable sum in restitution. Alternatively, the party may be to assert that the other party is estopped from certain actions.

This paper will introduce these concepts and comment briefly on the current law.

2. NEGLIGENCE

2.1 Elements of an action in Negligence

The law of negligence is a reasonably recent development of the English and Commonwealth countries. Its genesis can be traced back to the 1932 decision of Lord Atkin in **Donoghue v. Stevenson**¹. In this decision the House of Lords concluded that a general duty of care existed, independent of contract, on all citizens to take care to avoid acts and omissions which an individual can reasonably foresee would be likely to injure persons who are closely and directly affected by such acts.

The elements of an action in negligence are usually said to be:-

1. a **duty of care** owed by the Defendant to the Plaintiff;
2. a failure to meet the **requisite standard** of care; and
3. **damage**.

I now turn to each of these elements in turn:-

2.1.1 Duty of Care

¹ [1932] AC 562.

The most complex question arising in negligence cases may often be whether a duty of care is owed by one particular to another, in the particular circumstances.

Lord Atkin in **Donoghue v. Stevenson**, formulated the "neighbour principle", to the effect that each member of the community owes a duty to his "neighbour". Lord Atkin observed as follows:

"Who then in law is my neighbour? The answer seems to be - persons who are so closely and directly affected by my act that I ought reasonably to have them in contemplation as being so affected when I am directing my mind to the acts or omissions which are called into question."

Proximity

The courts have always been sensitive to the potential scope of the general formulation of the duty as indicated in **Donoghue v. Stevenson**. In recent times, this has been expressed as a question of "proximity". The general concept of when a person is sufficiently "**proximate**" to another person as to owe that person a duty of care has been discussed by the High Court several times in recent years.²

In **Hawkins v. Clayton**, the High Court considered the concept of proximity with respect to cases involving physical damage. At page 256, Deane J. reasoned:-

"...it is not necessary for the existence of a relationship of proximity in some other categories of case for there to have been any physical proximity between the parties concerned. Indeed, a relationship of proximity can exist, and a duty of care can be owed to, a class of persons which included members who are not yet born, or who are identified by some future characteristic or capacity which they do not yet have. Cases involving damage by reason of a latent defect in property demonstrate the point. Thus, a relationship of proximity ordinarily exists between the architect or builder of a residential building (eg. a maternity hospital) and the members of the class of persons who will in future years be born or housed in it. That relationship of proximity is such as to give rise to a duty of care to avoid a real risk of injury by reason of faulty design of the building. The duty of care is owed to each member of the class. If by reason of the negligence of the architect or builder, the building subsequently collapsed and a particular baby was injured, that baby would have a cause of action from the damage sustained by reason of the breach of a duty of care which may have been owed to him, and broken, by a person who has died before he was born."

Economic Loss

The most relevant limitation for the construction industry relates to the ability to recover pure **economic loss** (as opposed to physical damage).

There have been a number of reasons advanced why the courts are reluctant to allow full scale recovery for all economic loss, including:-

- (a) the floodgates argument - the concern that by generating a wide class of action for economic loss the courts would be flooded by cases which would overtax judicial

² For example, in **Hackshaw v. Shaw** (1984) 56 ALR 417; **Jaensch v. Coffey** (1986) 58 ALJR 426; **Hawkins v. Clayton** (1988) 62 ALJR 240.

resources and lead to unacceptable delays in the finalisation of cases;

- (b) there has to be some priority given between the various types of loss which may be sustained by an individual, and the law should be more sensitive to the rights of an individual where his personal health and safety has been adversely affected;
- (c) economic loss is not subject to any physical constraints so that the Defendant's potential liability is unpredictable.

Courts have concluded that damage to a structure as a result of faulty design, which does not result in further physical damage to other property apart from the structure so designed, is a specie of economic loss, notwithstanding that it has a physical manifestation. Accordingly, if an architect or engineer is negligent in the course of designing a building, and the building then suffers distress, the damage suffered by the owner of the building will be characterised as economic rather than physical.

In **Hawkins v Clayton**, Deane J. discussed when a duty of care was owed in relation to pure economic loss. At page 255:-

"In the more settled areas of negligence involving direct physical injury or damage caused by negligent act, the reasonable foreseeability of such injury or damage is, of itself, commonly an adequate indication that the relationship between the parties possesses the requisite element of proximity... **That cannot, however, be said of cases in the area where the Plaintiff's claim is for pure economic loss. In that area, the categories of case in which the requisite relationship of proximity is to be found are properly to be seen as special in that they will be characterised by some additional element or elements which will commonly (but not necessarily) consist of known reliance (or dependence) or the assumption of responsibility on a contribution of the two.**" (emphasis added)

Accordingly, for a duty of care to arise in respect of economic loss it would usually be necessary to demonstrate that:

- (a) it is reasonably foreseeable that if care is not taken such damage may follow;
- (b) there is some "special" aspect of the relationship between the Plaintiff and Defendant which gives rise to a higher degree of proximity than would be required for a claim for physical injury or damage.

Such a special relationship might arise, for example, from:

- (a) known reliance or dependence;
- (b) an assumption of responsibility;
- (c) the terms of any contract between the parties.

In coming to a conclusion that there is sufficient proximity it is necessary to consider all facts relevant to the relationship between the Plaintiff and the Defendant.

The State Swimming Centre case

In the **State Swimming Centre** case, a firm of engineers was sued by the State government in relation to the design of a building reconstruction project at the State Swimming Centre in

Batman Avenue, Melbourne.

The engineers, based on legal issues arising out of the terms of their retainer, denied that they owed a common law duty of care to their client. The trial judge Mr Justice Nathan, who at the time was the Supreme Court Judge in charge of the Building Cases List, found that a duty of care existed both in tort **and** as an implied term arising out of the retainer between the engineer and the client.

In the **State Swimming Centre** case, the Full Court considered a number of issues relating to professional negligence in the construction industry, including:-

1. the circumstances in which a professional engineer owes a duty of care to his client;
2. what constitutes a breach of that duty of care;
3. the operation of limitation clauses in professional retainers;
4. the limitation period (where there is a latent defect in design)³;
5. what constitutes "damage" for the purpose of an action in negligence.

There has never been any genuine dispute that a professional engineer owes his client a duty of care.

At page 36 of the trial judgment, His Honour said:

"I am... satisfied that it was a necessary term and condition of the retainer that GHD act with the care and diligence required of consulting design engineers, expert in the field. I shall deal with this implied term when I come to tortious duty of care as its ambit is confluent with that duty."⁴

And at page 94:

"I am satisfied that a necessary term to be implied into the contracts or retainers includes a condition that GHD act and perform the works with due care, skill and diligence. An implied condition to this effect was not disputed by GHD, and it complies with the tests for the necessary imputation of implied terms in contract.

I have already noted the agreement between counsel, and in my view a proper one, that the standard of care required to discharge GHD's obligation to PWD is confluent or the same in scope as the implied term in the contract. As to the concurrency of the duty of care and breaches of contractual terms to act carefully, see Voli v Inglewood [1963] 110 CLR 74 at 85 and Hawkins v Clayton [1988] ALR 69 per Mason, C.J. and Wilson J. p71 who accepted the reasoning of Deane,

³This is possibly the most significant decision affecting the operation of the limitation period which has been handed down in Australia since the 1983 House of Lords decision in Pirelli v Oscar Faber & Partners Pty Ltd. There has been significant legal debate as to the correctness of the Pirelli decision, and the operation of the Limitation of Actions Act generally. In the finest traditions of Murphy's Law, it appears that this decision has been handed down just in time for it to be made superfluous by the new Building Act.

⁴The full reference to the trial judgment is Ronald William Walsh and the State of Victoria v Gutteridge Haskins & Davey Pty Ltd and Anor, 9 May 1990, Nathan J, unreported.

J. 100 et seq. Also McPherson & Kelly v Prunty [1983] 1 VR 513."⁵

The Full Court reasoned likewise. They concluded at page 31 of the Full Court report:

"In our opinion the Respondent did owe the appellant a duty of care..."

At page 35, the Full Court referred to the "holding out" basis for the duty of care:

"It is common ground that the respondent held itself out to be a competent civil engineer, with experience in the construction of large water-retaining structures, including swimming pools."

And then at page 39, the Full Court dealing with the submission, made at the appeal, that there was no duty of care:

"Before returning to the issue of negligence in fact we should say something about a submission briefly made on behalf of the respondent which, if accepted, would make it unnecessary to consider the matter at all. Mr Dwyer, for the respondent, referred to D & F Estates Ltd v Church Commissioners for England [1989] AC 177 and Murphy v Brentwood District Council [1991] 1 AC 398. In reliance on them he suggested that the respondent owed the appellant no duty of care to prevent the damage the subject of the first action. As to this it is enough to say, without referring to the divergence between English and Australian Authority on the recoverability of economic loss, that the House of Lords in those two cases, although concerned with liability of builders in tort, was not concerned with their liability to persons with whom they had a contractual relationship. Then Mr Dwyer suggested, in reliance on the Australian authorities, that before the respondent could be said to owe a duty of care in tort to the appellant as alleged in the first action, the circumstances creating a relationship of proximity must be proved. In particular he referred to Opat v National Mutual Life Association of Australasia Ltd [1992] 1 VR 203, contending that it showed a necessity for the appellant to allege and prove that it had relied upon the respondent. We think that decision relevant, if only because it was not suggested below that it was for the appellant to plead and prove reliance. Had the submission been put, the course of the trial might have been different, the appellant seeking leave to amend and adduce evidence on the point. **In any event, ever since Voli v Inglewood Shire Council ... it has been clear that an architect or engineer may be liable to his client in tort as well as in contract.** We refer also to McPherson & Kelly v Kevin J Prunty and Associates... especially at p. 580, per Lush J., where it is said that the view is no longer tenable that concurrent liability in tort exists only where some physical damage or injury is likely to result. Moreover, it is apparent that the matter of "reliance", which may often be important in determining existence of relevant proximity, need not be pleaded or proved where there is a relationship of a professional man and his client. A duty of care is implicit in such relationship, as is perhaps reliance itself: Sutherland Shire Council v Heyman [1985] 157 CLR 424, at pp. 497 and 502, per Deane J. It is, in any event, manifest beyond argument that the appellant, as a client, in fact relied on the respondent as the designer of the centre." (emphasis added)

⁵A detailed citing of cases on this point is set out to remind the reader, yet again, that the Courts, at least in Victoria, continue to refer back to Voli and cases following it in this area. The principles, in 1993, have not changed from the original High Court judgement in that case dating back to 1962.

This, it seems, is definitive. The mere combination of circumstances, namely the engineer holding himself out as a person able to do the work and the client entering into the relationship with the engineer on that basis, will always establish the requisite duty of care.

Bryan v Maloney

In 1979 a Mr Allan Bryan build a house pursuant to a building contract for a Mrs Manion at 2 Wintercole Court, Launceston. Mrs Manion sold her to a Mr and Mrs Quittenden, who eventually sold the property to Mrs Judith Maloney in 1986.

At the trial, Mrs Maloney gave evidence that she inspected the house three times before she purchased it and that she thought “it would be built properly” and “that it was a good solid house”. Within six months the house developed cracks and the footings were estimated to require approximately \$34,000 of rectification works.

Mrs Maloney sued the builder (with whom she had no contract) and, surprisingly, for there were no similar cases where a subsequent purchaser had proceeded in an action against such a builder in Australia, succeeded in the Supreme Court of Tasmania. The Builder appealed and loss 3-0 in the Full Court of Tasmania. He then appealed to the High Court and failed, again, 4-1.

The High Court, in a majority judgment from Mason CJ, Dean J (the new Governor-General), and Gaudron J, with Brennan J dissenting, reasoned that the builder owed a subsequent purchaser a duty to take reasonable care in the house and was liable to her in damages to an amount equal to the decrease in value of the house resulting from the inadequacy of the house.

The significant finding in the majority judgment was that the builder owed Mrs Maloney a duty of care at all. Previously, there was a view that a builder did not owe a duty of care to a person with whom he had no contract, whom he had never met, and who, at worst, even if the building works were defective would only suffer “economic loss”.

The majority reasoned:-

“As was pointed out in the recent majority judgment in *Burnie Port Authority v General Jones Pty Ltd ...*, the overriding requirement of a relationship of proximity represents the conceptual determinant and the unifying theme of the categories of case in which the common law of negligence recognizes the existence of a duty to take reasonable care to avoid a reasonably foreseeable risk of injury to another. There is no decision of the Court which directly determines the question whether the relationship between Mr Bryan, as the builder of the house, and Mrs Maloney, as a subsequent owner of it, possessed the requisite degree of proximity to give rise to a duty, on t he part of Mr Bryan, to take reasonable care to avoid the kind of economic loss sustained by Mrs Maloney. Necessarily, as has been indicated, the resolution of that question requires the articulation of both the factual components of the relevant category of relationship and the identification of any applicable policy considerations. Ultimately, however, it is a question of law which must be resolved by the ordinary processes of legal reasoning in the context of the existence or absence of the requisite element of proximity in comparable relationships or with respect to comparable acts and/or damage. Accordingly, it is appropriate to approach the question through a consideration of some related situations.”⁶

The majority, therefore, reasoned that the range of relationships which might or might not give rise to a duty of care was not precisely defined, but was a matter which was to be resolved “by the ordinary process of legal reasoning” in each instance.

The majority reviewed the nature of the duty of care first discussed by Windeyer J in **Voli v Inglewood Shire Council**⁷, in particular, the circumstances in which a duty of care was owed by a man who followed a “skilled calling”. The basis for such a duty of care, the majority noted, was that the skilled person embarked on the task, rather than there be any precisely defined category of duty of care pertaining to such a person.

Toohy J, in a separate judgment in which he also concluded that the builder owed a duty of care to a subsequent purchaser, reasoned similarly:-

“The weight of authority in this Court is that for an action to lie in negligence there must be a relationship of proximity between plaintiff and defendant. In *Burnie Port Authority v General Jones Pty Ltd...*, where the earlier decisions are noted, Mason CJ, Deane, Dawson, Toohy and Gaudron JJ. Said of proximity:

“As a general conception deduced from decided cases, its practical utility lies essentially in understanding and identifying the categories of case in which a duty of care arises under the common law of negligence rather than as a test for determining whether the circumstances of a particular case bring it within such a category, either established or developing.”

The question whether the appellant is liable turns upon the degree of proximity between the negligent act (strictly speaking, the class of negligent act) relied upon by the respondent and the kind of damage sustained by her.... Gibbs CJ observed in *Sutherland Shire Council v Heyman*...:

“In deciding whether the necessary relationship exists, and the scope of the duty which it creates, it is necessary for the court to examine closely all the circumstances that throw light on the nature of the relationship between the parties.”

In the facts fall into a category which the authorities already recognize as attracting a duty of care, then, as Gibbs CJ acknowledged..., this process will not be necessary. But in the present case the facts do not fall into a category which this Court, at any rate, has recognized as attracting a duty of care.”⁸

Toohy J, therefore, concluded, as had the majority that the builder was sufficiently related to a subsequent purchaser as to owe her a duty of care.

The more complex judgment (with which, respectfully, one could find much to agree with) came from Brennan J. The dissenting view expressed by Brennan J, in a reasoned judgment derived substantially from the Courts earlier judgment in **Sutherland Shire Council v Heyman**⁹, in particular the discussion in that judgment of the nature of defects in a building and the person who would suffer loss as a result of such a defect. His Honour said at page 643:-

“...it is artificial to classify defects in a building as pure economic loss. Defects in a building are physical defects and the cost of their rectification is consequential on their existence. The defects are not physical damage the foreseeability of

7 (1963) 110 CLR 74.

8 n.1, ante., at p.656.

9 (1985) 157 CLR 424.

which gives rise to a prima facie duty of care, but it does not follow that the cost of rectifying such physical defects in order to improve the quality of the building is pure economic loss which may attract an award of damages for negligence.

Where the question is whether a duty of care relating solely to the quality of the building or chattel bought by a purchaser should be imposed by the law of tort or the law of contract, the answer, in my opinion, is that the interests to be protected are appropriately to be governed by the law of contract...”

The substantial basis for His Honour’s dissenting view (that the builder did not owe a duty of care of a subsequent purchaser echoed similar reasoning expressed by Deane J in the **Heyman** case¹⁰, in which Deane J reasoned that if a duty of care was owed by a local building authority to the owner of the building, that duty of care was owed at the time that the house was constructed and was owed only to that person who was the owner at that time. Brennan J reasoned, at page 647:-

“If a remote purchaser of a building were to be entitled to damages in negligence against the builder for the cost of rectifying defects (or substantial defects) in the building attributable to the builder’s negligence, in whom would the cause of action vest? For reasons which I state in *Sutherland Shire Council v Heyman*., if the physical defects in the building as constructed by a negligent builder were to be treated as relevant damage, it could be suffered only by a person who has an interest in the building at the time when the damage is done. Ordinarily that person is the first owner of the building whose relationship with the builder and whose right to damages against the builder are governed by the building contract.”

The majority view, however, is likely to be unchallenged for some time (if ever). If one could draw any conclusions from the case as to the extent of the duty of care which might be discerned in such circumstances, the first conclusion is that the duty of care is likely to change within time

2.2.2 Standard of Care

The major issue in the **State Swimming Centre** case was whether, in fact, the engineers had failed to perform their retainer to the requisite standard of care. This judgment currently provides the most authoritative statement in Australia on this issue.

The standard of care which is required of a professional person in performing his retainer is essentially a question of fact in every case.

There is nothing instructive, therefore, in reviewing the facts of the **State Swimming Centre** case (other perhaps than to note how, the trial judge having formed a view directly contrary to the view ultimately held by the three Full Court judges, the analysis is extremely subjective).

The Full Court summarised the factual issues before them, at page 36 of the report:

"The question essentially in contest is whether, as the appellant alleged, the respondent should have realised that subsidence of the order of that which has occurred - considerably greater than that predicted - was not unlikely and should have advised the appellant or modified its design accordingly.

The appellant contended that a reasonably competent engineer in the respondent's

¹⁰ *ibid.*, at p.504.

position should have foreseen the possibility of what had actually happened and acted to save the appellant from the loss which it had suffered and would suffer because of the subsidence. The appellant contends that the respondent should properly have advised against designing the SSC with differential footings; or advised that the SSC be totally piled on bedrock; or advise the appellant so that it might choose between those two courses; or that it should not have designed the centre with differential footings or advised against building on the site at all. The respondent's case was in effect that it took all reasonable steps to predict, so far as that was possible, the future geophysical behaviour of the site and to design the centre in accordance with its prediction; and that what has happened was unpredictable."

There were, however, a number of matters considered by the two Courts as to how a Court might identify the requisite standard of care in any particular case.

At page 94 of the trial judgment, the trial judge dealt with the notion that a standard of care might somehow differ depending on the quality of the client. His Honour said:

"Mr Byrne for PWD (sic - Mr Byrne in fact made this submission on behalf of the engineers) elliptically rather than directly suggested that the standard of care owed by a professional person to the recipient of expert advice may be something less than that owed to an uninformed client or a person totally reliant upon the skill and expertise of the adviser. No such principle exists. **The standard of care required is that which is reasonable and appropriate to the circumstances. The circumstances are infinite and the standard cannot be better defined because of it.**" (emphasis added)

His Honour here, was saying no more than the question must be considered, case by case.

The trial judge also distinguished between a duty to meet the requisite standard of care, and giving a guarantee that a design will be suitable for its intended purpose. At page 95, His Honour said:

"The duty of GHD in these circumstances with its professed expert geotechnical engineering skills and design capacities was to act with the skill and care of a reasonably competent engineering firm professing to have the same skills... **However, the advice and design as tendered by the expert does not carry with it a guarantee that it is correct or the design perfect.** The standard is not that of a construction engineer or builder where the duty may extend to ensuring that the building is suitable for the purposes it was built. It is merely incidental that I find in this case that the SSC is in fact suitable for the purposes for which it was constructed, but it was not an obligation on GHD's part to have ensured it. Reference may be made to the old medical adage that the surgeon's operation was a resounding success but the patient died." (emphasis added)

The Full Court noted that there was no dispute as to the standard of care. At page 40 it said:

"It is unnecessary to say anything about the standard of care, there being no contest about this matter on the hearing of the appeal."

The trial judge confirmed the general statements which have uttered by the Courts since the leading High Court judgment of Windeyer J. in **Voli v Inglewood Shire Council**¹¹ in 1962, namely that:

¹¹[1963] 110 CLR 74

1. the standard of care is discerned, in each case, by reference to the particular facts (there is no opportunity for guidelines/rules to be elicited);
2. the benchmark is that standard which pertains to relevant members of the relevant profession;
2. there is a difference between being professionally negligent and being mistaken.

The Full Court, as it turned out, disagreed with the trial judge on their analysis of the facts.

If the obvious point can be stated, it is that the standard of care is not easily identified. It is a matter for **subjective assessment**. It can be identified no better than by the general statements set out by the trial judge in his judgment (accepted without disapproval by the Full Court, although they did not address the issues specifically, there being no need).

Advice as to "Inherent" Design Risk

The issue arose in the **State Swimming Centre** case as to whether, there being "a risk that the design might not perform as.... intended" there was an obligation (beyond the usual obligation to advise/report?) to warn the client of such design risk.

The immediate **engineering** response to this type of legal statement might be that there is a risk in all design. There is an inverse relationship between the probability of design failure and cost of construction which is addressed by every designer on every project.

The Full Court seemed to believe that certain types of design will be foolproof" and require no warning, whereas others have inherent "risk" and require a special warning by the designer. Perhaps what the Court really had in mind was a difference between "unacceptable risk" and "acceptable risk", the judgment as to "acceptability" being a matter (within reason) for the client.

In the **State Swimming Centre** case, there was a factual dispute as to whether the owner had "instructed" the engineers, for cost reasons to produce a design that did not include piling. It was suggested by the owner that although it had relayed to the engineers the necessity for cost constraint, it had not intended the engineers to take this as a direction that the building was to be constructed without piles irrespective of structural adequacy. The engineers contended that their brief, having regard to the cost constraints and certain conversations between the representatives of the owner and the engineer, necessarily dictated that the foundation system did not involve piles.

The Full Court made the following comments at page 52 of the report:

"...At no time did the respondent suggest to the appellant that the design which it put forward would not be suitable or warn the appellant that there was a risk that the design might not perform as the respondent intended. Indeed the whole premise of the respondent's design was that, after pre-loading any remaining settlement would be, as it said in Report No. 9, "within manageable proportions" or "minimised". In fact the differential settlement of the various parts of the centre has been much greater than the respondent had sought to accommodate in its design and, for the reasons given earlier, we consider that the respondent ought reasonably to have anticipated that this would or might be so.

The respondent may or may not have been able to deal with this possibility by founding some other parts that it did, or all other parts of the centre, on pile, but as Phillips acknowledged, it was open to the respondent to recommend the finding of

another site at which the foundation problems now encountered could have been avoided. **If the only foolproof method of dealing with the possibility of settlement of the kind that has happened was piling the whole centre, and if that course was or might be feasible, we consider that the respondent ought reasonably to have put that course before the appellant for its consideration coupled (if appropriate) with an investigation into feasibility"** (emphasis added)

The Full Court referred to a Canadian case in which an engineer was employed by a municipality to design the sub-structure of a building. The site was an old garbage dump over a canal. Deciding between a piling system, and a second cheaper (albeit more risky) system, the engineer adopted the cheaper method. The Full Court noted (with approval) the reference to that decision in **Hudson's Building and Engineering Contracts**¹² and accepted the logic of this passage. At page 53 it said:

"If it was not possible to pile the whole centre and the only foolproof method of dealing with the problem was to move to another site, again the respondent ought reasonably to have put that course before the appellant for its consideration"

The conclusions to be derived, however, irrespective of whether one is comfortable with the reasoning of the Full Court are:

1. clients, particularly clients with no technical expertise of their own, should be warned in writing where the designer identifies particular risks, design restraints imposed by the terms of the retainer, or other such matters relevant to the design;
2. engineers should give thought (perhaps this will be an anathema to many engineers) to a general motherhood written warning on design risks;
3. engineers should consider whether, irrespective of what the Courts say, they may be judged (by the Courts) on whether, in fact, the project is fit for the purpose for which it is intended and therefore give that warranty (this, in turn, would **certainly** affect the engineer's entitlements under his professional indemnity insurance and, should **never** be given without clearance from the professional indemnity insurer).

2.3 Exclusion/Limitation of Liability Clauses

In the **State Swimming Centre** case, the July 1977 edition of the ACEA Terms of Engagement were incorporated by the engineer, (though this was disputed by the owner). Clause 24.04 of those terms imposed a number of limitations of liability, in particular one limitation which excluded liability for loss arising after a period expiring one year after the

¹²The reference was to a passage in *Hudson's Building and Engineering Contracts*, 10th ed., p.128 which reads as follows:

"If, for instance, by reason of the known facts relating to soil conditions there is only one really foolproof type of scheme, and another which is considerably more economical but involves an element of risk, it is the adviser's duty, it is suggested, to acquaint his employer of the position and leave the decision to him, and in that event approval of the less safe course would clearly negative liability."

date of issue of a final certificate.

The Association of Consulting Engineers Australia (ACEA) Terms of Engagement have, for many years, from edition to edition, included limitation of liability clauses. For this reason, amongst others, many engineers have referred to those terms **generally** in letters to their client confirming their retainer (without any express advice to the client of the significance of the particular clauses).

The incorporation of such Terms of Engagement into a professional engineer's retainer is always of major commercial advantage to the professional engineer (conversely, a major potential disadvantage to, often unrealised by, the client).

The difficulty which has arisen, however, in referring to incorporating such general terms of engagement is that there is **usually** an argument later as to whether those terms have, in fact, been incorporated into the retainer. This dispute is usually compounded by vague (in some cases, perhaps deliberately vague) correspondence between the engineer and his client.

The Full Court reviewed the lengthy correspondence between the engineer and its client (much of which had occurred after the engineer had commenced work on the project) and concluded (as had the trial judge) that the Terms of Engagement had been incorporated into the engineer's retainer.

The Court went on, however, to conclude that Clause 24.04 had never been brought into operation for the reasons set out in the judgment (which are of little particular interest here).

One might make the following brief comments:

1. the practice of vague letters between the engineer and the client (which was **not** the case in the **State Swimming Centre** litigation) introduces unnecessary complexity and cost into any subsequent litigation;
2. a professional engineer who hopes to introduce such limitation terms, effectively by stealth, runs the risk of having a Court subsequently ignore the operation of that clause for reasons other than contract reasons (for example, pursuant to section 51A or section 52 of the **Trade Practices Act**);
3. limitation of liability clauses are commercially sensible for **both** the professional engineer and his client **provided** that both parties are commercially capable of understanding the extent of the risks which are being allocated, so that proper allowance (and if necessary insurance) can be made for that risk.

On the major projects in Australia today, the practice is now to engage professional consultants pursuant to express written terms, to limit the professional's liability to an agreed amount, and to collectively effect the necessary professional indemnity insurance to cover that amount (where necessary, the cost of that professional indemnity insurance being contributed to or paid completely by the client). It is suggested that a professional engineer who embraces this regime will, every time, more effectively sell his services to major engineering clients.

2.4 Limitation of Actions Act

The **Limitation of Actions Act** 1958 (Vic), which in turn like in other Australian states has evolved from the old UK legislation, provides that an action in negligence must be brought within six years of the date upon which "the cause of action accrues". These words have led to endless litigation and legal debate.

The complex question is when the cause of action accrues.

It is generally accepted, in legal debate, that the tort of negligence is made out when **damage** occurs. This is where agreement on the issue ends. The authority in this area since 1983 has been the House of Lords decision in **Pirelli v. Oscar Faber & Partners**¹³. The effect of that decision has been generally accepted to be that the six year period begins to run, in defective building cases, when "physical damage" (as opposed to the latent defect) occurs, irrespective of when it is discovered¹⁴.

Since **Pirelli**, there has been substantial legal debate.

In the **State Swimming Centre** case the engineer contended, in line with **Pirelli**, that damage had occurred as soon as physical damage had been done to the structure. The client contended that in this type of case, damage was not sustained, and therefore time did not begin to run, until either a **latent defect** (as opposed to physical damage, such as cracking or movement) in the building was actually discovered, or a latent defect became manifest in the sense of becoming discoverable by reasonable diligence¹⁵.

The Full Court reviewed a number of decisions which had occurred since **Pirelli**¹⁶.

The reasoning of the Full Court (with which, respectfully, it is agreed), is beyond the scope of this Paper. The Full Court concluded, however, as follows at page 71:

"Time began to run in the present case when the latent defect first became known or manifest. The latent defect was the inadequacy or unsuitability of the footings..."

This statement now appears to be the current best view of the authorities on this point.

3. TRADE PRACTICES ACT / FAIR TRADING ACT

3.1 History

The **Trade Practices Act** ("TPA") was passed by the Commonwealth Parliament in 1974. At the time it was a fairly novel piece of legislation purporting to regulate dealings with consumers. Constitutional limitations of the Federal Parliament generally limited the application of the Act to corporations under the Federal corporations power.

Each State has now passed legislation with provisions similar to those found in the TPA which deal with misleading and deceptive conduct. In Victoria the **Fair Trading Act** ("FTA") was

¹³[1983] AC 1

¹⁴In **Pirelli** a number of chimneys were constructed with an internal cement lining called Lytag. The works were designed in 1968, constructed in 1969, cracks would have occurred in the internal lining in 1972 (though not reasonably able to be discovered), and were in fact discovered in 1977. The House of Lords concluded that the date on which the cracks occurred, albeit that they ought not reasonably to have been discovered at that time, was 1972, the date upon which, in the view of the Court, "damage" was sustained for the purpose of making out the tort of negligence. Accordingly, time began to run in 1972.

¹⁵See the Full Court judgment at pages 65-66.

¹⁶In particular, **Hawkins v Clayton** (1988) 164 CLR 539; **Sutherland Shire Council v Heyman** (1985) 157 CLR 424 and **Anns v Merton London Borough Council** [1978] AC 728.

passed in 1985. Section 11 is based on Section 52 of the TPA, however it is expressed to apply to all persons not just corporations.

3.2 Negligent Mis-statement

Where a person has suffered economic loss through relying on a representation made by someone else, they can, in certain circumstances, recover damages if that representation or statement is made negligently.

The law of negligence requires that a person making statements use reasonable judgment, skill or ability to make careful enquiries that the statement is at least founded on a reasonable basis. The Plaintiff will have to show that he relied on the statement being made. He will also have to show a necessary relationship between himself and the statement maker to show that that reliance was reasonable in the circumstances, ie. the requisite degree of proximity. Such a relationship is clear in the case of professional advisers and their clients.

The statutory rules in the TPA and the FTA are much broader than the rules of negligent mis-statement. Inadvertent misleading or deceptive conduct will be a breach of the Act. Such conduct may not be negligent at common law.

Also, the degree of proximity between the statement maker and the person relying on that statement does not need to be shown in a Section 52 or Section 11 action. An action may be brought by any person who suffers loss or damage because of the conduct of another person, as long as that conduct is misleading and deceptive.

3.3 Application of TPA/FTA

The Commonwealth Parliament is restricted in its legislative power by the Commonwealth Constitution. The Constitution does not give the Federal Government power to regulate transactions generally, however the Commonwealth has power to make laws to regulate the conduct of corporations. As a result the TPA is expressed only to apply to the conduct of corporations.

The FTA, however, applies to individuals and firms and not just to corporations.

There are exceptions in the application of Section 52 of the TPA:

- Section 6(3) provides that where the conduct involves the use of postal, telegraphic or telephonic services or takes place in a radio or television broadcast, the references to a corporation shall include a reference to a person not being a corporation.
- Section 6(4) provides that where the conduct takes place in a Territory, a thing done by a corporation in trade or commerce includes a reference to a thing done in the course of the promotional activities of a professional person.

Section 52 has been applied to varying situations, including advice by professional advisers, advertising, passing off actions, private contracts, newspaper articles, real estate sales, leasing situations and sales of businesses.

Section 52 of the TPA has not been restricted to dealings with consumers even though the aim of the TPA is to protect consumers and the heading of the relevant Division of the TPA is "consumer protection". A breach of Section 52 is not an offence punishable in a criminal sense under the TPA (S79).

It is likely that the FTA in Victoria will be interpreted to cover the same type of conduct.

3.4 The Key Concepts

Section 52 provides, so far as relevant, as follows:-

"Misleading or Deceptive Conduct -

- (1) A corporation shall not, in trade or commerce, engage in conduct that is misleading or deceptive or is likely to mislead or deceive.
- (2) Nothing in the succeeding provisions of this division shall be taken as limiting by implication the generality of sub-section (1)."

The three key concepts in Section 52 TPA and Section 38 FTA are as follows:

(i) ***"in trade or commerce"***

In **Re Kuringai Co-Operative Building Society (No.12) Limited** (1978) 36 FLR 134 at page 167 His Honour Mr Justice Dean said:-

"The terms trade and commerce are not terms of art. They are expressions of fact and terms of common knowledge."

This has been the basis for the interpretation of the phrase "in trade or commerce". Those terms encompass many activities. In the same case His Honour the Chief Justice of the Federal Court Mr Justice Bowen said at page 139:-

"The terms trade and commerce are ordinary terms which describe all the mutual communings, negotiations, verbal and by correspondence, the bargain, the transport and the delivery which comprise commercial arrangements... The word trade is used with its accepted English meaning: traffic by way of sale or exchange or commercial dealing".

There are a number of examples, for instance:-

In **Larmer v. Power Machinery Pty Ltd** (1978) 20 FLR 490 the display of a brochure in the foyer of the defendant company was held to constitute a representation in trade or commerce.

In **Bevanere Pty Ltd v. Lubidineuse** (1985) 7 FCR 325 the Federal Court held that the sale of a cosmetic clinic by a company which was not engaged in the business of selling such capital assets was nevertheless a transaction in trade or commerce.

In **Menhaden Pty Ltd v. Citibank NA** (1984) 1 FCR 542 the Federal Court held that if the provision of information or advice by a corporation was shown to have been in trade and commerce and to have been misleading or deceptive, the mere fact that the information or advice was provided gratuitously would provide no defence to a claim based on a breach of Section 52.

In the construction industry representations are often made which do not become

part of the contract. For example:-

- the owner often provides geotechnical reports which give:-
 - .. a factual report of what was encountered on investigation;
 - .. an extrapolation from such information as to the ground conditions likely to be encountered.
- bills of quantities "measure" the building work to be performed.
- other advice at pre-tender meetings which relates to a wide range of issues which may dictate how the work can be performed.

If these are wrong, and the builder has no contractual right to an adjustment, he may be able to obtain a remedy under Section 52.

(ii) ***"engage in conduct"***

"Engaging in conduct" is defined in Section 4(2) of the TPA and includes:

- (a) doing or refusing to do any act;
- (b) giving effect to a provision of a contract or arrangement; and
- (c) arriving at or giving effect to an understanding.

The person alleged to have been in breach of section 52 must have been engaging in conduct which was misleading or deceptive.

The word "conduct" is defined in Section 4 of the Act. It has been held to include a wide variety of activities including representations, silence, providing advice and passing off.

There is a limitation on the concept of "engaging in conduct" in that innocent third parties may avoid liability for false representations which they unwittingly pass on. In **Gardam v. George Wells & Co. Limited** (1988) 82 ALR 415 Mr Justice French in the Federal Court said:

"The innocent carriage of a false representation from one person to another in circumstances where the carrier is and is seen to be a mere conduit, does not involve him in making their representation."

His Honour qualified this by going on to say:

"When, however a representation is conveyed in circumstances in which the carrier would be regarded by the relevant section of the public as adopting it, then he makes that representation."

If, therefore, advice is passed on by a third party, that third party will only be liable if that third party has "adopted" the advice. For example, if an architect passes on the advice of a quantity surveyor to his principal, without more than a with compliments slip or a short covering letter, the architect may be said not to have adopted the advice. If, however, the architect provides his own comments in relation to the advice or represents that it is correct, the architect may be liable

under section 52 (if the advice is misleading or deceptive).

(iii) *"Misleading or deceptive or likely to mislead or deceive"*

The word "mislead" has been interpreted to mean to lead into error an ordinary member of the public likely to read the statement or to be influenced by it: **Keehn v. Medical Benefits Fund** (1977) ATPR 40-047. Similarly, the word "deceive" means to cause to believe what is false, to lead into error, etc. The broad interpretation of these words, as developed in the cases, has resulted in a wide range of activities being within the scope of the consumer protection legislation.

An injured party need not show that the person alleged to have misled or deceived him **intended** to do so. Section 52 can be breached through unintentional or inadvertent conduct which misleads or deceives.

In determining whether specific conduct is misleading or deceptive, the Court must consider the class of persons who are misled or deceived, or who are likely to be misled or deceived. The relevant persons considered are those who are exposed to the conduct in question and who are prospective purchasers of the goods or services to which the conduct relates. Thus, if the statements about a particular product are made on a television broadcast which is televised in the Melbourne district, the class of persons will be the prospective purchasers of the product in the Melbourne district.

In **Parkdale Custom Built Furniture Pty. Ltd. v. Puxu Pty. Ltd.** (1982) ATPR 40-307, the Chief Justice Mr Justice Gibbs examined the stages involved in determining whether the conduct is prohibited. His Honour said that while ordinarily the class of customers considered may include the inexperienced as well as the experienced, and the gullible as well as the astute, whether the conduct is misleading or deceptive will be determined by its presumed effect on reasonable members of the class exposed to the conduct.

Puxu had manufactured a distinctive range of lounge suites under the name "Post and Rail". It had advertised its furniture extensively and was noted for its distinctive design. Parkdale manufactured a range of furniture which was of a closely similar design to that of Puxu's, but Parkdale's furniture was labelled so as to dispel any confusion between the suites. Puxu commenced proceedings against Parkdale for an injunction to restrain Parkdale from selling its furniture on the basis that its conduct was misleading or deceptive. Puxu brought evidence to show that consumers had purchased Parkdale's furniture with its label removed, mistakenly believing it to be "Post and Rail" furniture.

Puxu was ultimately unsuccessful. Some of the important features of the High Court judgment were:-

- (a) the words "likely to mislead or deceive" add little to the section, their major effect is to make it clear that evidence that the conduct in question actually deceived or misled persons is not necessary for a successful application;
- (b) in order to prove a contravention of the legislation, it is not sufficient to prove that the conduct complained of was confusing or caused people to wonder whether the two products had the same source;
- (c) the Court must decide **objectively** whether the conduct is misleading,

evidence that relevant members of the public had been misled is not conclusive; and

- (d) if an article is properly labelled as to who the name of the manufacturer or the source of the article, its close resemblance to another article will not mislead an ordinary reasonable member of the public.

There are circumstances in which silence may constitute conduct which is misleading or deceptive. A statement may be untrue because of what it fails to say as well as because of what it says directly.

A difficulty may also arise because a word may have a meaning which is known to one group of people but not others. For instance, it may have a particular technical meaning amongst persons with a special knowledge in that area, but if the word is used in statements made to persons outside of that group, it may be misleading because the persons exposed to the statements are not aware of its technical meaning. Thus a statement which is otherwise not misleading may become misleading to persons lacking the special knowledge.

The failure of the person to whom the conduct is directed to check the accuracy of a statement or conduct will not prevent the conduct or statement from being misleading or deceptive. It follows from this that it is unnecessary to prove that any person has suffered loss or damage as a result of the misleading or deceptive statement or conduct. However, evidence of such loss will be relevant in determining the amount of damages, if any, the Court may award.

The Courts originally found it difficult to determine whether a promise made or prediction given was misleading or deceptive without undertaking an investigation of the mind of the person giving such promise or prediction. Section 51A of the Trade Practices Act was introduced in 1986 to overcome this difficulty. That section deems a representation as to a future matter misleading unless the corporation has reasonable grounds for making it. The corporation must prove the existence of reasonable grounds for making the statement in order to avoid the representation being misleading. An equivalent provision is made in section 37 of the FTA, expressed to apply to persons rather than corporations.

A contravention of the legislation may occur from giving a misleading general impression, even though the statement itself is true. Mr Justice Stephen in the **Hornsby Building Information Centre** case (1978) ATPR 40-067 (at page 17,690) reasoned:

"To announce an opera as one in which a named famous prima donna will appear and then to produce an unknown young lady bearing by change that name will clearly be to mislead and deceive. The announcement will be literally true but nonetheless deceptive, and this because it conveyed to others something more than the literal meaning which the words spelled out."

An overall misleading or deceptive impression may not be overcome by the use of fine print qualifications or fine print terms and conditions. It is the impression gained by a reasonable person in the class of the public exposed to this statement or conduct which is to be considered.

3.5 Disclaimers and Exclusion Clauses

As intent is not an element in determining whether conduct is in breach of section 52, a disclaimer as to the truth or otherwise of a particular representation will not absolve the maker of a representation from liability. A similar conclusion is drawn in relation to exclusion clauses.

In **Yorke v. Ross Lucas Pty. Ltd.** (1985) 158 CLR 661 the High Court said that where a corporation passes on information from a third party, merely passing it on for what it is worth, and disclaims any belief in its truth or falsity it is doubtful whether the corporation could be said to be engaging in conduct that is misleading or deceptive if the information turns out to be false.

While the Courts have acknowledged a role for disclaimers in avoiding the possibility of persons being misled or deceived in certain circumstances, the Courts have rarely found disclaimers to be effective.

In the case of **INXS & Ors. v. South Sea Bubble Co. Pty. Ltd. & Ors.** (1986) ATPR 40-667, Justice Wilcox acknowledged that in some circumstances, the effect of an otherwise misleading or deceptive statement may be neutralised by an appropriate disclaimer. But at the same time, he noted that those cases will be rare and confined to situations where the Court is satisfied that the disclaimer is likely to be seen and understood by all those who would otherwise be misled before they acted in relation to the relevant transaction.

The court will look at the situation as a whole to decide whether any disclaimers or exclusion clauses are relevant. Plaintiffs who wish to establish loss suffered as a result of the misleading conduct need to establish they relied on it. Generally, however, the courts have been reluctant to give effect to such clauses in order to absolve a person engaging in misleading and deceptive conduct.

3.6 Remedies

Section 82 of the TPA allows a person who suffers loss or damage as a result of a breach of section 52 to sue for damages.

The damages will be assessed usually by comparing the position in which the applicants might have been expected to be if the misleading conduct had not occurred, with the situation they were in as a result of acting in reliance on the misleading conduct. This is analogous to the general principles concerning the measure of damages in the law of negligence. The courts however are not restricted to this test for damages. In appropriate cases the courts have gone even as far to award damages for "mental stress".

Section 80 of the TPA gives the court a wide power to grant an injunction against a person who has engaged in misleading and deceptive conduct. Section 87 also provides that the court can make orders for compensation and is also given further broad powers by that section.

The FTA gives the courts similar powers with respect to remedies. Section 37 of the Victorian legislation provides that an action in damages can be brought. Other jurisdictions have narrowed this right to "consumers".

The person alleging a loss or damage must show a **causal link** between the conduct and the loss suffered.

For example, in **Bond Corporation Pty. Limited v. Thiess Contractors Pty. Ltd. & Ors.** (1987) 71 ALR 615, Bond Corporation engaged a firm to act as consulting and supervising engineers for road, earth and drainage works. Following the calling of tenders, and acting on the advice of the consulting engineers, Bond engaged a contractor to carry out the works. Bond brought an action against the consulting engineer, alleging that the firm misrepresented

its experience and expertise in the design and supervision of the works, and its ability to provide competent engineers with sufficient experience and to provide accurate estimates of work and subdivisional costs. Bond claimed that as a result of it relying on the consulting engineer's advice it would have to pay more than \$5.4M in excess of the estimated total cost of the development.

It was held by the Court that section 52 of the Trade Practices Act was applicable to the giving of professional advice by a consulting engineer. The provision of professional advice for reward fell within the class of conduct as it was engaged in "trade or commerce". The consulting engineer was found to have misrepresented its experience and expertise. However, Bond failed to establish a causal link between the misleading conduct and the damage complained of.

4. QUANTUM MERUIT / RESTITUTION

4.1 Restitution

The law relating to restitution is extremely complex.¹⁷

"Restitution" is sometimes used interchangeably with "quantum meruit". The term "quantum meruit" means, simply, "so much as he has earned". In some contexts, however, the term is used as if it were describing a cause of action. This is not correct. (The cause of action is, usually, either in contract or in restitution.)

The subject matter of this section of the paper is a claim in restitution **for** a "quantum meruit" (alternatively referred to as "restitutionary quantum meruit").

Jones and Varghese, in their article, identify the following categories of circumstances where a restitutionary quantum meruit claim might arise¹⁸:-

1. no genuine agreement between the parties;
2. work is done in expectation of the contract;
3. termination of the contract by repudiation;
4. termination of the contract by frustration;
5. an unenforceable contract; or
6. work done outside the contract.

Jones and Varghese, further, set out the elements required for this type of claim (identified by the High Court in **Pavey and Matthews Pty Ltd v. Paul** which is referred to below) as follows:-

- (a) no subsisting valid and enforceable contract between the parties;

¹⁷ A detailed, and, with respect, excellent, academic discussion of the law relating to quantum meruit in Australia, is contained in an article by D. S. Jones and R. T. Varghese, "*Quantum Meruit in Australia - How the Rules Calculating Value for Work Done are Changing*", [1992] 9 BCL 101.

¹⁸ These circumstances are identified and discussed in detail in the Jones/Varghese article, at page 104 and subsequent.

- (b) a claimant has performed work conferring a benefit without being paid remuneration as agreed;
- (c) the benefits conferred were not intended as a gift or done gratuitously; and
- (d) the benefit has been actually or constructively accepted by the Defendant at the expense of the Claimant ("unjust" factor).¹⁹

The ability to recover reasonable remuneration for work carried out pursuant to an ineffective contract - or where there is no contract at all but justice demands that compensation be paid - was confirmed authoritatively for modern purposes by the High Court of Australia in **Pavey and Matthews Pty Ltd v. Paul** ²⁰.

That case concerned a claim by a Victorian builder for payment for work done on a residential building project pursuant to an oral contract entered into with the owner. The relevant Victorian legislation then in force provided that contracts for residential building work were unenforceable unless in writing. The owner relied on the statute in defence of the builder's claim. However, the High Court held that **independently of the unenforceable contract**, the law recognised that a claim would lie for reasonable remuneration for the benefits conferred upon the owner by the builder and accepted by the owner. The court found that the owner had been **unjustly enriched** by the work done by the builder and was liable to make restitution for that benefit by paying the builder compensation representing the reasonable value of the benefit conferred.

The High Court stated the general principle that an action will lie where a person actually or constructively accepts a benefit in circumstances where the recipient would be unjustly enriched at the expense of the plaintiff if recovery were not permitted.

At page 227 of the report, Mason J (as he then was) and Wilson J concluded:-

"Deane J., whose reasons for judgment we have had the advantage of reading, has concluded that an action on a quantum meruit, such as that brought by the Appellant, rests, not on an implied contract, but on a claim to restitution or one based on unjust enrichment, arising from the Respondent's acceptance of the benefits accruing to the Respondent from the Appellant's performance of the unenforceable oral contract. This conclusion does not accord with acceptance by Williams Fullagar and Kitto JJ. **Turner v. Bladin** of the views expressed by Lord Denning in his articles....basing such a claim in implied contract. These views were a natural reflection of prevailing legal thinking as it had developed to that time. The members of this Court were then aware that his Lordship had....disregarded his early views in favour of the restitution or unjust enrichment theory. Since then the shortcomings of the implied contract theory have been rigorously exposed....and the virtues of an approach based on restitution and unjust enrichment...widely appreciated...we are therefore now justified in recognising, as Deane J. has done, that the true foundation of the right to recover on a quantum meruit does not depend on the existence of an implied contract.(emphasis added)

Once the true basis of the action on a quantum meruit is established, namely execution of work for which the unenforceable contract provided, and its

¹⁹ Ibid., at page 103.

²⁰ (1988) 164 CLR 221.

acceptance by the Defendant, it is difficult to regard the action as one by which the Plaintiff seeks to enforce the oral contract".

His Honours were concluding, therefore, that the true basis for an action in restitution lay in **unjust enrichment**, not on any implied contract term.

At page 256 of the report, Deane J. concluded as follows:-

"The quasi/contractual obligation to pay fair and just compensation for a benefit which has been accepted will only arise in a case where there is no applicable genuine agreement or where such an agreement is frustrated, avoided or unenforceable. In such a case it is a very fact that there is no genuine agreement or that the genuine agreement or that the genuine agreement is frustrated, avoided or unenforceable that provides the occasion for (and part of the circumstances giving rise) the imposition by the law of the obligation to make restitution)".

This, it is suggested, is the basis for the restitutionary quantum meruit remedy. Where, for whatever reason, there is no contract or the contract does not operate, restitution provides a remedy.

The extent of this remedy is discussed below.

4.2 Applications of the Remedy

(i) No Concluded Agreement

The law relating to restitution, in Australia, was discussed, again, by the New South Wales Supreme Court Commercial Division (Rogers J, as he then was) in the **Hooker-Harrah** case²¹. In or around 1986, the New South Wales government decided to redevelop the Darling Harbour area and had created the Darling Harbour Authority to supervise the project. Part of the project was to include a casino/hotel complex. The government called for registrations of interest and received approximately 12 registrations. This was reduced, in April 1986, to a short list of 5 consortia including a consortium constituted by Hooker Corporation Limited, an Australian company controlled by Mr George Herscu, and Harrah, a United States casino operator. Each of the short listed consortia were required to execute a "covering agreement" before final selection was made by Cabinet. Hooker-Harrah executed the agreement on 13 June 1986. On 24 June 1986, the government announced that Hooker-Harrah had become the successful bidder. There was a tight timetable. Hooker-Harrah began substantial preparatory work, albeit that a "Police Report" was still to be completed. On 12 August 1986, the Premier announced that the government would not proceed (the reason given was an unacceptable police report).

His Honour concluded that there was no binding agreement between the government and Hooker-Harrah, and further, that Hooker-Harrah could not rely on an estoppel (to the effect that the government could not deny the existence of a contract).

His Honour then turned to the Hooker-Harrah claim, in the alternative, that it was entitled to damages in restitution based on unjust enrichment to recover the costs and expenses incurred by it in connection with the proposed hotel/casino complex on the assumption that the parties would proceed to enter into a binding contract. (Harrah had been involved in substantial architectural work, visits to Australia by its US personnel, and preparation of documentation. Hooker had been involved in the demolition of buildings, Sydney Council cable diversion,

²¹

Hooker Corporation Ltd. v. Darling Harbour Authority; Harrah's v. The Darling Harbour Authority; unreported, Supreme Court, NSW, Rogers J, 30 October 1987.

steel and shear connectors, and consultants fees for both the temporary casino design and hotel/casino complex. Hooker claimed to have expended over \$3.7M in consultants fees.)

Rogers J. said, at page 68 of the judgment:

"The law of restitution is an area still in an exploratory stage and its parameters have not yet been authoritatively defined. That it has a proper role to play in the circumstances where there is expenditure by a party in the expectation that a contract would be awarded to it admits of no doubt. That having been said, what the precise requirements are that may found such a claim and what defences are open to resist such a claim are uncertain in the extreme. It will only be on a case by case exploration that the relevant principles will ultimately be exposed."

His Honour noted the category of case where a builder, in tendering, was entering into certain costs, this being a risk borne by the builder if no contract ultimately ensues. His Honour also noted the other category of case, a tenderer was requested to do work, beyond putting itself in a position to tender, giving rise to an entitlement to be paid for that work.

His Honour then considered the detailed factual basis for the unsatisfactory police report and concluded, at page 83 of the report:

"In the circumstances, it seems to me that what I am required to determine is whether it would be "unjust" not to recompense Hooker and Harrahs for the expenditures they made in furtherance of the project at the insistence of the Government, that the dates in the Proposal be adhered to. What is "unjust" is, of course, not a matter of applying my own idiosyncratic notions of commercial morality ...

Although I reject the submission that, by Cl.8 of the Deed of Offer, there was a risk allocation in respect of the relevant expenditures there is another way of approaching the question of how the risk was to be borne. Almost the entirety of the expenditure was incurred on and after 2 July. As I have already chronicled earlier in the judgment, it was clear to Hooker and Harrahs at least from 2 July that there were ongoing enquiries by the Police not just into Harrah but also Mr Herscu. It was accepted that the Government would be receiving a further report from the Police Board. Rightly or wrongly, the Government expressed the view that the selection of the consortium was subject to that further report being satisfactory. The consortium expressed no dissent. **No doubt, Hooker and Harrah thought the report would satisfy to (sic) the Government. It did not. The consortium had taken a risk in expending money whilst the second report was being prepared. The risk came home.**

In the circumstances, in my view, the consortium undertook the expenditure in circumstances where Hooker and Harrahs should be held to the risk that there would be an unsatisfactory report which could result in the Government seeking to deprive them of the opportunity to build and operate the Hotel/Casino complex. That in fact is just what happened. In the result, in my view, there is "unjust" in allowing the loss to lie where it falls."(emphasis added)

Again, therefore, where parties incur expenditure in the hope that a contract will ultimately be concluded, and that contract does not then become concluded, the critical factor will be whether it would be "unjust" for that party not to be recompensed.

(ii) **Work done Outside the Contract**

The more complex issue will be where a contractor, having entered into a contract to perform certain works, is ultimately requested to perform work which is so different from that upon

which it tendered, that it is entitled to be paid on a quantum meruit.

The principal authority for this proposition is said to be **Sir Lindsay Parkinson** case²². In that case, there was a contract to perform works, on a cost plus with a cap basis, to a value of £5M. The ultimate cost of the works was around £6.68M. The court concluded that the work executed was so far outside the scope of the original contract works that the contractor was entitled to be paid a reasonable sum for the work on a quantum meruit basis.

This area was more recently examined by the New South Wales court of appeal in **Update Constructions Pty. Ltd. v. Rozelle Child Care Centre Ltd.**²³

In that case, additional structural works were performed as a result of subsurface conditions without the builder giving the requisite written notice to the proprietor of the variations as required under the contract and the architect authorised the construction of those works but the requisite notice had not been given by the builder.²⁴ Kirby P repeated the conclusion of the High Court in **Pavey**²⁵ at page 227:

"... (the builder's remedy) rests, not on implied contract, but on a claim to restitution based on unjust enrichment, arising from the respondent's acceptance of benefits accruing to the respondent from the appellant's performance of the unenforceable oral contract ..."

Kirby P then returned the case to the arbitrator for decision.

Jones and Varghese refer to a number of cases to support their conclusion that, in practice, it will be difficult for parties who continue to perform the work which is the subject matter of the request, without objection, and who subsequently claim to be entitled to a quantum meruit on this basis (that the work is so different to the originally contracted work that it is no longer covered by the contract). With respect, this seems logically correct.

(iii) Frustrated Contracts

The position in relation to resolution of monies owing under frustrated contracts is affected by legislation in each state of Australia.

In Victoria, the **Frustrated Contracts Act** 1959 (Vic) provides, inter alia, in sub-section 3(3), so far as relevant, as follows:

"Where any party to the contract has by reason of anything done by any other party thereto in or for the purpose of the performance of the contract obtained a valuable benefit ... before the time of discharge, there shall be recoverable from him by the said other party such sum (if any) not exceeding the value of the said benefit to the party obtaining it as the court considers just having regard to all the circumstances of the case ..."

²² **Sir Lindsay Parkinson & Co. Ltd. v. Commissioner of Works** [1949] 2 KB 632.

²³ (1990) 20 NSWLR 251.

²⁴ Interestingly, and unhappily, the total amount in dispute was less than \$20,000. The dispute proceeded through an arbitration then to Rogers CJ in the Commercial Division and then onto the Court of Appeal on a legal point.

²⁵ See note 14, ante.

and in sub-section 3(4):

"In estimating for the purposes of the foregoing provisions of this section the amount of any expenses incurred by any party to the contract the court may, without prejudice to the generality of the said provisions, include such sum as appears to be reasonable in respect of **overhead expenses** and in respect of any work or services performed personally by the said party."(emphasis added)

In respect of frustrated contracts, therefore, a contractor is able to recover on a quantum merit for any work which has been performed prior to that event.

Prior to the introduction of that legislation, the position as a matter of contract, generally, was that the loss would lie where it fell.

4.3 Assessment of the Claim

The assessment of quantum meruit claims was recently discussed by Byrne J. of the Supreme Court of Victoria in **Brenner & Anor. v. First Artists' Management Pty Ltd & Anor.** ²⁶

The case concerned the "comeback" in the late 1980s as a solo artist of Daryl Braithewaite, the former lead singer of the 1970s rock group "Sherbet". The plaintiffs had been Braithewaite's managers for a substantial part of the period during which he developed his "comeback" album. Braithewaite had dispensed with their services prior to releasing his album. The managers sued Braithewaite claiming reasonable remuneration for the services they had provided during their time as managers on the basis that those services had been provided at Braithewaite's request and had been accepted by him. Some of the services for which they claimed payment were of an intangible nature - such as the time they spent "oiling the wheels" of the music industry in preparation for the comeback and keeping Braithewaite's own morale buoyant.

In assessing the amount of the managers' entitlements, His Honour was faced with issues unanswered by the High Court in **Pavey**:

- (i) what exactly is the "**benefit**" for which the recipient is liable to make restitution in a quantum meruit action; and
- (ii) how should the value of that defined benefit be calculated?

Since the High Court's decision in **Pavey**, there has been some speculation about whether the **benefit** for which restitution is to be made is to be found in the **services** provided to the recipient for the purposes of achieving a defined end-product or in the **end-product** itself.

Braithewaite's counsel suggested that Braithewaite was not liable to make restitution by payment of reasonable compensation for many of the "services" because the managers could not show that those services produced some **discernible economic benefit** to Braithewaite by way of engagement or other profit. It was argued that a requirement that reasonable remuneration or compensation be assessed by reference to a tangible economic benefit accruing to the alleged recipient was a necessary consequence of the High Court's decision in **Pavey**.

Byrne J rejected this argument preferring a wide and flexible application of the quantum

²⁶ [1993] VR 221. Interestingly, for the construction industry, the Honourable Mr Justice Byrne was, prior to His Honour's elevation to the Supreme Court, a practising Queen's Counsel in the construction law area and is presently the Judge in charge of the Building Cases List of the Supreme Court of Victoria.

meruit action in situations where justice requires compensation for services rendered.

His Honour held that the "benefit" necessary for a restitutionary quantum meruit action must be assessed from the point of view of a **reasonably acting recipient of the services** (and not a completely hypothetical reasonable person).

His Honour concluded that where there has been a request for services, it is not unreasonable for the law to conclude that the requestor/recipient considers that some benefit will be obtained from the services - even though an objective observer may not have the same view and may even consider the recipient to be acting quite idiosyncratically by making the request. In those circumstances it is just for the law to act upon the recipient's perception and require him or her to compensate for the services which he or she saw some benefit in obtaining.

It was therefore not necessary for the managers to establish a link between each of the services for which payment was claimed and some tangible economic benefit accruing to Braithewaite.

In arriving at this result Byrne J was fortified by earlier cases, which he considered to be unaffected by **Pavey**, where the courts had allowed quantum meruit claims in cases where even though there was no binding agreement, justice demanded a remedy. These included:

- where an architect had undertaken preparatory work but had not produced a design prior to the owner abandoning the project: **Planche v. Colburn** (1831) 131 ER 305.
- where a contractor had performed work after having been led to believe that it would obtain a contract to rebuild war damaged premises : **William Lacey (Hounslow) Ltd v. Davis** [1957] 2 All ER 712.
- where at the owner's request, a tenderer had carried out post-tender work beyond that ordinarily expected of a tenderer: **Sabemo Pty Ltd v. North Sydney Municipal Council** [1977] 2 NSWLR 880.

It is likely that at least some of these cases could now be justified on the basis of doctrines such as estoppel which have undergone rapid development in recent times.

The decision in **Brenner** suggests that the mere possibility of an alternative cause of action does not mean that some artificial limit should be placed on the remedy as a means of requiring the payment of reasonable compensation to do justice between the parties.

Byrne J then considered how, as a matter of principle, the court should assess the amount of the reasonable compensation to be paid.

The managers had kept few if any records of the time they spent performing the services for which payment was claimed because remuneration in the music industry was not normally time related. For the purposes of the court proceedings they had attempted to list their activities although they stated that they could not entirely do so.

Byrne J. set out a number of general principles applicable to assessing the reasonable remuneration payable to the plaintiffs:

- the "fundamental yardstick" is to assess a fair and reasonable compensation for the benefit accepted actually or constructively by the defendant.
- the court was not assessing damages for breach of contract. Its task was not to compensate the managers for the benefits which they

might have received had they remained as managers for the full term of the project.

- the fair value of requested services will ordinarily be remuneration calculated at a reasonable rate for the "work actually done" regardless of whether this produced an "enormous profit" to the recipient or no profit at all (however, services which produce no profit at all because they are performed defectively, are not likely to lead to a significant assessment of compensation).
- the assessment must have regard to what the recipient would have had to pay to obtain the services under a normal commercial arrangement.
- the cost incurred by the plaintiff in performing the services is not determinative of the cost of such services though it would be evidence.
- where the services are performed pursuant to a contract which is unenforceable - or for some reason no longer binding on the parties - the **agreed price** in that contract is evidence, but not determinative, of a reasonable remuneration.
- Where the court has regard to either an agreed price or agreed method of calculating remuneration, it is entitled to modify this to determine a fair recompense in all the circumstances (for example, where the services under the ineffective contract have not been completely performed).
- in many cases it is appropriate to assess the benefit of the work done by applying an hourly rate to the time involved. In doing so the court should have regard to:
 - any standard rates of remuneration in the industry concerned
 - the standing of the person performing the services
 - the difficulty of the task, and
 - the fact that the services may have required imagination and creativity which may be difficult to discern in the end-product.
- where the nature of the services means that it is difficult to assess or itemise a precise number of hours involved or services performed the court is entitled to make a global assessment or to assess what can be proven and then adjust that amount to reflect a fair and reasonable value.
- where, in the industry concerned, it is customary for remuneration to be on a commission basis, the court may have regard to what a reasonable commission would be. It may be difficult to assess the commission which should be paid where the event which would ordinarily give rise to the payment of commission has not occurred. This does not mean however, that the court in assessing reasonable compensation should ignore the commission which might have

accrued had the relationship not been terminated.

- in cases where remuneration on a commission basis is customary in the particular industry concerned, one can expect the court to assess reasonable remuneration by reference to the commission which would have been reasonable on completion of the project less an adjustment to take into account the fact that the project has not been completed.

His Honour had found that Braithewaite had agreed to pay the managers a commission of 15%, but as a matter of law that agreement was uncertain and hence unenforceable because there had been no agreement on what the factor of 15 was to be a percentage of. In that circumstance, and given the principles stated by His Honour, one may have expected him to assess the amount of reasonable compensation by assessing how much commission the managers could have expected to be paid on completion under a normal commercial arrangement and to have adjusted that amount by taking into account the early termination of their engagement. In fact, His Honour adopted a composite of the "hourly rate" and "commission" approaches.

Having arrived at an assessment of reasonable compensation on the "hourly rate" basis, Byrne J then tested that assessment by undertaking an alternative assessment on the "commission basis". His Honour arrived at a commission assessment by considering income received by Braithewaite from royalties and live performances for a period after the termination of the manager's engagement and then used the percentages which had actually been discussed between Braithewaite and the managers to arrive at a commission assessment.

Broadly speaking, the amounts generated on the "commission" approach confirmed the assessment made on the hourly rate approach. Accordingly, the court considered that the managers were entitled to judgment for the remuneration assessed on the hourly rate approach.

It appears from the **Brenner** case is that the rules for assessing the value of a restitutionary quantum meruit action are developing on a case by case basis and that, at least for the present, a plaintiff pursuing such a claim should quantify its claim on each of the alternative bases open to the court when it carries out the assessment.

5. ESTOPPEL

This paper is not the convenient forum to deal with the complex paper of estoppel. It may be helpful here, however, to attempt to put estoppel in context in dealing with liabilities outside the contract.²⁷

The Australian High Court has considered estoppel, in its various forms, in three significant recent judgments.²⁸

In **Waltons Stores (Interstate) Ltd v Maher**, the High Court ultimately found in favour of a party to an Agreement to Lease which had not been finally executed, not on the basis of contract (a contract had **not** been formed) but on the basis of "promissory estoppel" arising out

²⁷ A detailed discussion of estoppel in Australia is provided by A. Leopold in his excellent article, " *The Elements of Estoppel*", (1991) 7 BCL 248.

²⁸ The cases were **Waltons Stores (Interstate) Ltd v. Maher** (1988) 164 CLR 387; **Foran v. Wight** (1989) 88 ALR 413; **The Commonwealth of Australia v. Verwayen** (1990) 95 ALR 321.

of the **conduct** of the parties.

The conduct consisted of correspondence leading the other party to believe that the Agreement to Lease would ultimately be executed, failure to take steps to prevent the other party from acting on the basis of a concluded contract...standing by in silence when it must have known that the other party was proceeding on the basis that the agreement had been concluded. A further factor was the urgency of the required works and the tenor of the correspondence from the solicitors for the other party suggesting that exchange would be a mere formality.

The High Court first rejected the doctrine that estoppel acted only ever as a shield and never as a sword:-

"...there has been for many years a reluctance to allow promissory estoppel to become the vehicle for the positive enforcement of a representation by a party that he would do something in the future. Promissory estoppel, it has been said, is a defensive equity...and the traditional notion has been that estoppel could only be relied upon defensively as a shield and not as a sword...but this does not mean that a Plaintiff cannot rely on an estoppel. Even according to traditional orthodoxy, a Plaintiff may rely on an estoppel if he has an independent cause of action where in the words of Denning L J in **Comb v. Combe**...the estoppel 'may be part of a cause of action, but not a cause of action in itself'.²⁹

The Court was willing to find a remedy in the absence of a contractual relationship:-

"...but the Respondents ask us to drive promissory estoppel one step further by enforcing directly in the absence of a pre-existing relationship of any kind a non-contractual promise on which the representee has relied to his detriment...the principle objection to the enforcement of such a promise is that it would outflank the principles of the law of contract..."³⁰

The Court considered a number of cases and sets of circumstances relating to varying kinds of "estoppel". The basis for its ultimate conclusion was the nature of equitable remedies per se:-

"...one may therefore discern in the cases a common thread which links them together, namely, the principle that equity will come to the relief of a Plaintiff who has acted to his detriment on the basis of a basic assumption in relation to which the other party to the transaction has "played such a part in the adoption of the assumption that it would be unfair or unjust if he were left free to ignore it"...**equity comes to the relief of such a Plaintiff on the footing that it would be unconscionable conduct on the part of the other party to ignore the assumption**".³¹ (emphasis added)

The issue of estoppel came again before the High Court two years later in **Foran v. Wight**.

In that case, the purchasers of a \$75,000 property had made settlement on 22 June 1983 an essential term and required the Vendor to register a plan containing a right-of-way affecting the property. On 20 June 1983, two days before the date fixed for completion, the solicitor for the purchasers telephoned the solicitor for the vendors and were advised that the right-of-way had not been registered. The purchasers' solicitor advised that he would seek instructions.

²⁹ per Mason CJ & Wilson J at pages 520-521.

³⁰ *ibid*; at page 521.

³¹ per Mason CJ and Wilson J, at page 524.

Nothing occurred on the day of settlement. Two days later the purchasers served a Notice of Rescission and the dispute went all the way to the High Court. The High Court concluded, inter alia, that the purchasers were entitled to rescind and to obtain a return of their deposit.

Deane and Dawson JJ concluded that the vendors were estopped from asserting that the purchasers had failed to tender on the date for completion (because the purchasers had been induced by the vendors into believing that this would not be necessary).

Deane J said, at page 448:-

"...in **Walton Stores (Interstate) Ltd v. Maher**...I explained in detail the reasons which lead me to conclude that the assumed state of affairs under an estoppel by conduct can provide the factual foundation of a cause of action and that estoppel by conduct (in its emanation commonly described as "promissory estoppel") may preclude departure from a represented or assumed future "state of affairs" in at least certain categories of case. A case such as the present which involves a representation between parties and a pre-existing contractual relationship that one party is dispensed from strict performance of the contract clearly falls within one such category of case...In any event, I am now prepared to take the step which I refrained from taking in **Walton Stores**... and to accept the doctrine of estoppel by conduct extends, as a matter of general principle, to a representation or induced "assumption of fact or law, present or future"...Once it is recognised that promissory estoppel is probably to be seen as no more than an instance of the general doctrine of estoppel by conduct (see **Walton Stores**....) there remains no valid reason in principle why that general doctrine should not apply to a representation of future facts".

The High Court considered estoppel again in **Commonwealth Australia v. Verwayen**.

In that case, Mr Verwayen had been a member of the Royal Australian Navy on HMAS Voyager when their ship had collided with HMAS Melbourne in 1964. He issued proceedings in November 1984 claiming damages. In its Defence, the Commonwealth admitted liability and did not plead the Limitation of Actions Act defence, nor did it plead that it owed no duty of care to the Respondent. The Commonwealth had repeatedly stated that it had adopted a policy not to contest liability and not to plead the Act in similar cases. The Commonwealth reconsidered that policy in November 1985 and ultimately raised both defences.

The High Court concluded 4:3 that the Commonwealth was estopped from disputing liability to the Respondent for damages on the basis that it was estopped by its conduct.

The Court was uniform in its reasoning to the effect that the central principle of the doctrine of estoppel by conduct was that the law would not permit an unconscionable departure by one party from the subject matter of an assumption which had been adopted by the party as a basis of some relationship, course of conduct, act or omission which would operate to the other party's detriment if the assumption were not adhered to for the purposes of the litigation.

The judgments differed, however, in assessing whether in fact the Respondent had suffered any detriment related to the unconscionable conduct.

Importantly, the High Court seemed to be moving towards uniformity in the general doctrine of estoppel. At page 330, Mason CJ said:-

"...that brings me to estoppel, a label which covers a complex array of rules spanning various categories. There are the divisions between common law and equitable estoppel, between estoppel by conduct and estoppel by representation, and the distinction between present and future facts. There are titles such as promissory estoppel, proprietary estoppel and estoppel by acquiescence. Yet all

of these categories and distinctions are intended to serve the same fundamental purpose, namely "protection against the detriment which would flow from a party's change of position if the assumption (or expectation) that lead to it were deserted)" (emphasis added).

And at page 331:-

"In conformity with the fundamental purpose of all estoppels to afford protection against the detriment which would flow from party's change or position if the assumption that lead to it were deserted, these developments have brought a greater underlying unity to the various categories of estoppel. **Indeed, the consistent trend in the modern decisions points inexorably towards the emergence of one overarching doctrine of estoppel rather than a series of independent rules...**" (emphasis added)

Estoppel (described by Jones and Varghese in their article as "the siamese twin" of restitutionary quantum meruit) is an evolving area of the law.

In combination with restitution, it may provide remedies where the contract fails to do so.