HIGH COURT OF AUSTRALIA

GLEESON CJ,
GAUDRON, McHUGH, GUMMOW, KIRBY, HAYNE AND CALLINAN JJ

TEPKO PTY LIMITED & ORS APPELLANTS

AND

WATER BOARD RESPONDENT

Tepko Pty Limited v Water Board [2001] HCA 19
5 April 2001
S36/2000

ORDER

1. *Amend the style of the respondent to "Ministerial Holding Corporation".*

2. *Suspend order 1 until 3 May 2001 or earlier order and direct that any submissions by either party that order 1 would incorrectly identify the respondent be filed and served within seven days of the date of these orders.*

3. *Otherwise appeal dismissed with costs.*

On appeal from the Supreme Court of New South Wales

Representation:

G K Downes QC with S J Motbey for the appellants (instructed by S A Teen)

P R Garling SC with S T White and K M Guilfoyle for the respondent (instructed by Phillips Fox)

CATCHWORDS

Tepko Pty Limited v Water Board

Negligence – Negligent misstatement – Economic loss – Statutory authority – No statutory obligation to answer queries – Estimate sought and "upper limit" figure provided – Whether duty of care owed – Knowledge of serious purpose – Known reliance – Assumption of responsibility – Whether appreciation of consequences of error – Whether reasonable to rely on "ball-park" figure.

Practice and procedure – Separate trial of issues – Need for clear justification – Difficulties of separate trial of issues – Use of books of documents where status and relevance in the trial are uncertain – Identification of documents in evidence.

Metropolitan Water, Sewerage, and Drainage Act 1924 (NSW), ss 6A, 7, 34A.
Water Board Act 1987 (NSW), s 5.
Water Board (Corporatisation) Act 1994 (NSW), s 107.

1 GLEESON CJ, GUMMOW AND HAYNE JJ. The Supreme Court of New South Wales (Allen J) entered judgment for the respondent ("the Board") which was the defendant in the action. By majority (Mason P and Beazley JA; Fitzgerald JA dissenting), the Court of Appeal dismissed an appeal. The question for this Court is whether the Court of Appeal erred in doing so. It is convenient to begin by identifying the parties.

2 The Board was constituted as a corporation under s 5 of the *Water Board Act* 1987 (NSW) ("the Water Board Act"). The Board was a continuation of and the same legal entity as that constituted under the corporate name of "The Metropolitan Water Sewerage and Drainage Board" by s 6A of the *Metropolitan Water, Sewerage, and Drainage Act* 1924 (NSW) ("the 1924 Act"). The 1924 Act was repealed by s 4 and Sched 1 of the *Water Legislation (Repeal, Amendment and Savings) Act* 1987 (NSW) ("the Repeal Act"). The Repeal Act provided[1] for the continuation of the Board as the same legal entity, despite the repeal of the 1924 Act. The events giving rise to this litigation occurred whilst the 1924 Act was in force and before the enactment of the Water Board Act. It will be necessary to refer to various provisions of the 1924 Act.

3 By the time the action was tried in 1996, the Water Board Act had been repealed by s 107 of the *Water Board (Corporatisation) Act* 1994 (NSW) ("the 1994 Act"). The 1994 Act provided[2] for the dissolution of the Board and its assets, rights and liabilities transferred to the Ministerial Holding Corporation, a body constituted by s 37B of the *State Owned Corporations Act* 1989 (NSW). It would appear that the effect of the 1994 Act[3] was that the pending proceedings in this litigation were to be taken as proceedings pending against the Ministerial Holding Corporation. No step was taken to amend the identity of the party in question. It remains for the matter to be attended to by appropriate order in this Court.

4 Mr J H Neal, the third appellant, had a range of business interests. For many years he worked as an earthmoving contractor. With his brother, Mr Alan Fox, and Mr Colin Stuart, Mr Neal owned shares in the first appellant, Tepko Pty Limited ("Tepko"). Tepko had owned since 1981, subject to mortgage, about 160 acres (approximately 65 ha) at Wallacia. Since 1980, an adjoining parcel of about 30 acres (approximately 12 ha) had been owned, subject to mortgage, by

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1 By par 2(1) of Sched 3.

2 Paragraph 4 of Sched 9.

3 Paragraph 4(3) of Sched 9, read with s 7(3)(c).

Mr Neal personally. Upon both parcels, a dairy business was operated under the management of Mr Neal.

5 In 1983, Neal Earthmoving Pty Limited ("Neal Earthmoving"), the second appellant, which was controlled by Mr Neal, accepted an offer of a loan facility made by the Singapore Branch of the European Asian Bank AG ("the Bank"). The Bank then was wholly owned by Deutsche Bank AG and Creditenstadle AG. The Bank changed its name early in 1986 to Deutsche Bank (Asia) AG. The offer was for the equivalent Swiss francs of $A2 million, for a period of three years from the date of drawdown. The repayment was to be in three annual instalments, 12, 24 and 36 months after the drawdown date.

6 The purposes of the loan by the Bank included assistance with the purchase of the freeholds of two hotels, the Wallacia Hotel and the Oaks Hotel at Camden, the acquisition of Mr Stuart's interest in Tepko and the financing of a proposed subdivision of the dairy land at Wallacia.

7 This litigation against the Board arises from the collapse of the funding arrangements for the proposed subdivision caused, it is alleged, by the breach by the Board of a duty of care to state accurately the likely cost of the provision by the Board of water to the subdivision. It is necessary to consider the circumstances of the dealings between Mr Neal and the Board from which the duty of care pleaded by the appellants is said to have arisen.

8 Several points should be made here. First, the relevant question is whether the Board owed that duty; it is not to the point that, if the pleadings had tendered another issue and the evidence had been somewhat different, some duty with a changed content might have been established. Secondly, this is one of the class of cases referred to by Hayne J in *Modbury Triangle Shopping Centre Pty Ltd v Anzil*[4] where it is not useful "to begin by examining the extent of a defendant's duty of care separately from the facts which give rise to a claim". Thirdly, where the defendant is a public utility such as the Board which exercises statutory functions subject to direction by the responsible Minister, the defendant moves within a legislative regime with which the common law interacts. Hence the necessity to view the particular circumstances with an appreciation of that legislation. Fourthly, whatever be involved in legal distinctions between stating facts, giving information and providing advice, and between present and future matters[5], in the event this appeal may be decided without attention to those refinements.

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4 (2000) 75 ALJR 164 at 182-183 [103]; 176 ALR 411 at 437.

5 cf *Trade Practices Act* 1974 (Cth), s 51A.

9 At some time in 1982, it had occurred to Mr Neal that considerable profit might be made by rezoning and then subdividing the land owned by him and by Tepko ("the dairy land") for rural residential allotments. At this stage, the proposal was for a subdivision of 20 lots; by the time of the events immediately giving rise to this litigation, the proposal had become one for 87 lots. Mr Neal took various steps which required approaches to both the Penrith and Liverpool Councils. This was because the dairy land was situated as to part within the local government area of each of these bodies. Part 3 (ss 24-74) of the *Environmental Planning and Assessment Act* 1979 (NSW) ("the EPA Act") provided for the making of environmental planning instruments controlling matters such as subdivision of land. Section 70 empowered the Minister administering the EPA Act to make a local environmental plan ("LEP") in accordance with a draft submitted by the local council. It should be noted that the 1924 Act and the EPA Act were administered by different Ministers.

10 By 1983, it had been made apparent to Mr Neal that, whilst both Penrith and Liverpool Councils were willing to support rezoning and subdivision, their support was subject to the Board undertaking the supply of water for the project. The Councils would not proceed further, even to the granting of a conditional approval to the subdivision, unless an arrangement was made with the Board for the connection of the dairy land to the Board's water supply system.

11 The first step in the legal process necessary to bring about the subdivision was rezoning because residential subdivision was forbidden under the existing rural zoning. The rezoning would be achieved by LEPs made under s 70 of the EPA Act in respect of the Liverpool and Penrith Council areas. For the making of an LEP, the local council draft had to be supported by a certificate under s 65 of the EPA Act by the Director of Environment and Planning ("the Director"), an officer appointed under s 13 of the EPA Act. The certificate might be refused if the draft plan was inconsistent with any State environmental planning policy or regional environmental plan. The certificates were refused in October 1983 for reasons including the absence of a guarantee of the supply of water.

12 The dairy land was just outside the Board's system which provided water to Wallacia through mains from the North Warragamba reservoir. This reservoir also serviced the more remote townships of Mulgoa and Luddenham. In the late 1970s and early 1980s, the New South Wales Government had instituted an "Urban Development Program". One of its objectives was the steering of new urban development into areas classified as appropriate, having regard to infrastructure costs associated with the provision of such services as water. The dairy land was not within the Urban Development Program. In the Wallacia area, there were potential demands upon the water system, including expected

increased usage from the subdivision of land already zoned for residential development.

13 The funds of the Board were fully committed to meeting the Urban Development Program; the Board was not a planning body and was reluctant to make decisions which might lead to longer term difficulties for the Urban Development Program. However, there was a practice of the Board in the relevant period to provide water supply to rural residential areas provided that the works were funded by the developers so as not to affect the Urban Development Program. The practice was not a statutory obligation imposed upon the Board; it was capable of application or modification by the Board, subject to Ministerial direction under s 7 of the 1924 Act. This section provided that, in the exercise and discharge of its powers, authorities, duties and functions, the Board was subject to the direction and control of the Minister[6].

14 Nevertheless, the Board was under no statutory obligation to assist developers by providing information or giving costings in respect of proposed subdivisions of land which were not zoned for residential purposes. Further, it was the long-standing policy of the Board not to provide such information in connection with any rezoning proposal. As early as May 1982, the Board had made it clear to Mr Neal that it was against its policy to supply information concerning the provision of services to subdivisions and developments which were contrary to present zoning. The Board had said:

> "Any further inquiries regarding this development should be made through the Department of Environment and Planning."

15 As has been pointed out earlier in these reasons, an appreciation of the regime under which the Board operated pursuant to the 1924 Act is important for an understanding of the attitude taken by the Board in its dealings with Mr Neal. Section 31 empowered the Board to construct such works as in its opinion might be required for water supply purposes. The Board was the sole authority for the conduct of water supply services within its area of operations (s 37) and was not compellable to supply water to any person (s 49). Section 34A empowered the Board to enter into an agreement with the owner of any land within the area of the Board's operations or with any person authorised to enter into an agreement on behalf of the owner; the agreement might provide for the construction of a water main and such ancillary works as specified therein to serve the land of the owner specified in the agreement, either alone or together with other lands

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6 cf *Hughes Aircraft Systems International v Airservices Australia* (1997) 76 FCR 151 at 231.

(s 34A(1)). The Board was not to enter into such an agreement unless a certificate had been issued by the Director; the certificate was to state that, in the opinion of the Director, the land of the owner should not be subdivided unless the water main in question and any necessary ancillary works were constructed to serve such land or any part thereof, either alone or together with other lands (s 34A(2)).

16 Section 34A(3) provided that an agreement under the section might make provision for certain financial matters. One of these is stated in par (a) as follows:

> "[T]he payment to the [Board] by the owner of such land, or person so authorised, of the whole of the cost of the construction of the main or mains and ancillary works or such part thereof as the [Board] considers reasonable to be paid in respect of such land, having regard to the benefit of such main or mains and works to the land of such owner specified in the agreement and to any other lands that will be, in the opinion of the [Board], capable of being served by such main or mains and works".

17 The provisions of s 34B were also of importance to a developer such as Mr Neal. Where an application for approval of a subdivision had been approved, the developer might apply to the Board for a certificate under s 34B that the applicant had complied with the requirements relating to the planned subdivision imposed by s 34B. Section 34B(1) so stated. Upon such an application, the Board might serve upon the applicant a notice which, among other things, required the applicant to enter into an agreement under s 34A (s 34B(2)(c)). In the events that happened, the attitude of the Board was that it would amplify the present system so as to provide water to the subdivision only if this was done entirely at the expense of the developer. That would involve an agreement under s 34A. That, in turn, would require a certificate of the Director under s 34A(2).

18 Mr Neal made numerous approaches to Ministers (including the Premier) and Members of the New South Wales Parliament over several years with a view to breaking what he saw as an administrative deadlock which stymied the first step of his subdivision proposal, the obtaining of rezoning of the dairy land. In these efforts, Mr Neal was assisted by Mr Gary Rhodes of Rhodes, Barnes and Associates, a firm of consultant town planners. Mr Rhodes was retained by Mr Neal to assist and advise with respect to the subdivision.

19 On 22 October 1984, there was a meeting attended by nine persons including Mr Neal, Mr Rhodes, three officers of the Board and two officers of the Department of Environment and Planning. Allen J found that, after this meeting:

> "Mr Neal could not have been left with any illusion that the position was other than that the Board was adamant that there was no prospect that he could achieve a simple connection to the existing water supply to Wallacia, that amplification works involved considerations far more complex than simply running a single line from some point to service his subdivision, that amplification was going to be an extremely expensive business, were it to occur, and that the Board would not be a party to it unless it was to be wholly without expense to it".

20 The loan had been settled on 14 November 1983. Under the repayment schedule, the first repayment of principal was to be made on 14 November 1984, that is to say several weeks after the meeting of 22 October 1984. The money on account for the loan was Swiss francs and, as a result of adverse exchange movements, the principal sum expressed in Australian dollars reached $3 million. The interest rate was a little over 6 per cent. At no time after 14 November 1983 did Neal Earthmoving meet any of its obligations to repay moneys to the Bank. This was because, as Mr Neal agreed in cross-examination, the company was unable to meet its commitments to the Bank. At the trial it was admitted that, as of 30 June 1985, Neal Earthmoving was insolvent and thereafter remained insolvent.

21 The securities taken by the Bank under the loan facility included a first floating charge over the assets of Neal Earthmoving, joint and several guarantees by Mr and Mrs Neal and Tepko, and first registered mortgages over land including the Wallacia Hotel, the Oaks Hotel and the dairy land. The officer of the Bank having the conduct of Neal Earthmoving's account in the period beginning June 1985 was Mr P L Gleeson. Reasonably early in his administration, Mr Gleeson appreciated that, with respect to the proposed redevelopment, the first concern of the Bank was the water supply costings and until they were known the rest was academic. He urged Mr Neal to provide the costings, especially for water, and sought written evidence of Mr Neal's bringing all pressure to bear to obtain the costings. It is apparent that the costing for water supply which the Bank was pressing to receive was something more precise than a "ball-park" figure. By about October 1985, the Bank decided to take the advice of Mr Dickens, who was experienced in hotel receiverships; Mr Neal was told that "unless he got his act together" and figures for the development were provided, the Bank would have no alternative but to put Mr Neal's companies, especially the hotels, into receivership.

22 The Board had under consideration a revised policy for the provision of water to rural residential developments. However, in November 1985, at what was a critical period for Mr Neal, the Board did not expect to complete the revised policy until early in 1986.

23 The pressure from the Bank, exerted in circumstances where there was serious default under the loan agreement, made it all the more imperative for Mr Neal to furnish the Bank with a cost estimate by the Board. For that to occur the Board would have to relax its policy against the provision of estimates for proposals requiring rezoning. The appellants' case is that, in October 1985, the Board "caved in" and provided a carelessly prepared and overstated estimate of the order of cost, in the sense of that term in s 34A(3)(a) of the 1924 Act, involved for the construction of works capable of serving only the dairy land. The term "cost" is used in s 34A to indicate not what might be called the Board's "profit cost", but a contract under which the Board passes over to the developer the cost to the Board of the works in question.

24 A fundamental difficulty for Mr Neal was that the Board "caved in" only so far as to provide a figure which indicated to a skilled adviser in the craft of New South Wales land development an upper limit but which was taken by the Bank as a response to its requirement for a specific estimate. The Bank then went ahead without, for example, information from Mr Neal's advisers that, in the ordinary course of events, the final figure for the cost in a s 34A agreement was likely to be much less.

25 Matters came to a head when Mr Neal received a copy of a letter dated 21 November 1985 to Mr Watkins MLC from the Minister for Natural Resources, the Honourable Janice Crosio. Mr Watkins had made representations to the Minister on behalf of Mr Neal. Mrs Crosio also wrote in similar, but not identical, terms to the Minister for Planning and Environment, the Honourable R J Carr, who had made representations on behalf of Mr Neal. Mrs Crosio administered the 1924 Act, and Mr Carr the EPA Act.

26 Both letters sent by Mrs Crosio were drafted with close regard to the text of a memorandum to her by the General Manager of the Board dated 11 November 1985. A draft of the letter sent by Mrs Crosio to Mr Carr had accompanied the Board's memorandum to her. The letter to Mr Carr, but not that to Mr Watkins, concluded with a statement that, if Mr Neal wished to discuss the matter further with the Board, he might contact Mr A G Wright, its Director of Operations and Customer Relations. Allen J found that this letter, or at least its substance, came very quickly to the attention of Mr Rhodes. There is no clear finding that this letter, as well as that to Mr Watkins, came to the attention of Mr Neal.

27 However, it has never been a part of the Board's case that, although the letter to Mr Watkins was not addressed to Mr Neal nor written by the Board itself, the information in it would not come to the attention of Mr Neal. The Board accepted that this outcome was foreseeable to the Board. Mr Neal obtained a copy of the letter to Mr Watkins. Then, with his solicitor,

Mr Geraghty, he came to see Mr Gleeson with the copy. The letter was dated 21 November, a Thursday, and the meeting at the Bank was on 27 or 28 November. The critical statement was in the first sentence of the last paragraph. This read:

> "The immediate cost to connect Mr Neal's proposed development would be in the order of $2.5 million."

The Minister began her letter by referring to the representations from Mr Watkins regarding water supply to land at Wallacia owned by Mr Neal. The Minister continued:

> "I understand that Mr Neal has approached the Board a number of times and been advised that any additional demand at Wallacia would adversely affect the water supply to the residential areas of Mulgoa and Luddenham. Additional demands brought about by development at Wallacia could not be met without extensive and costly amplification works.
>
> The Board's funds are fully committed to meeting the Government's Urban Development Programme. The principle has been well established that rural developments would not be given priority over the Urban Development Programme."

The Minister then noted that, while Mr Neal's proposal covered a relatively small area and would appear to have merit, the proposal could not be considered in isolation. There were two main reasons for this:

> "(a) Provision by the Board of water supply to areas outside the Government priority areas necessarily creates precedents which lead to development pressures which are inconsistent with Government objectives.
>
> (b) The Board is aware that other property owners and large developers in the immediate area are keenly awaiting the decision on this issue and wish to submit similar proposals. This would inevitably lead to other infrastructure pressures."

The Minister added that the Board was particularly conscious that it was not a planning organisation and that the Board:

> "would not wish to take a decision on this matter in a way which might lead to longer term difficulties for both the Government and the Board".

The last three paragraphs of the letter were as follows:

> "Within this framework, the Board is prepared in general to provide water supply to rural residential areas provided the works can be funded by developers so as not to affect the Urban Development Programme, present or future.
>
> The minimum viable scheme to serve rural residential development in the Wallacia area would cost in the order of $7 to $10 million. This would provide for around seven similar developments.
>
> The immediate cost to connect Mr Neal's proposed development would be in the order of $2.5 million. But the Board would favour a proposal from a consortium of the developers in the area so that the system could be amplified to the full dimensions of a viable scheme described above in a single programme. I must also advise that the $2.5 million scheme would be satisfactory only to serve the development proposed by Mr Neal."

28 The Bank's attitude was that it had originally taken security over the dairy land at Wallacia on the understanding that it was ripe for residential subdivision and as such had appropriate value. Mr Neal had led Mr Gleeson to believe that the approximate cost of supplying water to the Wallacia development would be in the order of $900,000 to $1.5 million maximum. When he saw the figure of $2.5 million in the letter of 21 November, Mr Gleeson responded in pessimistic terms. He was confirmed in the opinion that a receiver should be appointed post-haste. Attempts by the Bank to have its indebtedness taken over by another financier failed. The Bank appointed a receiver on 6 January 1986. The future of the proposed redevelopment thus moved beyond Mr Neal's control. On 25 May 1988, the Bank, in exercise of its power of sale as mortgagee, sold the dairy land to Parkes Trading Pty Ltd for $1.5 million.

29 In the interval between the receipt of the letter of 21 November and the attendance at the Bank on 27 or 28 November, there had been a meeting with Mr Wright and other officers of the Board at which Mr Neal, Mr Rhodes and Mr Geraghty attended. There was some dispute at the trial as to what had been said at the meeting. Mr Geraghty but not Mr Rhodes was called. On 26 November, after the meeting, Mr Rhodes wrote to Mr Neal. There was a dispute in this Court as to the standing of this letter. The appellants contended that, on a proper reading of the transcript of the trial, it had never been admitted and was only marked for identification. However, his Honour must have regarded the letter as part of the record because he quoted extensively from it in his reasons for judgment. In the letter, Mr Rhodes stated:

> "As discussed it is reasonable to assume that detailed investigation by the Board and completion of the work under contract will result in a significant reduction in amplification costs."

30 Allen J rejected Mr Geraghty's evidence that, at the meeting, a statement was made for the Board that the $2.5 million figure was unalterable. His Honour concluded that the letter confirmed that the Board had had no reason to expect otherwise than that Mr Neal would be duly advised that the figure "in the order of $2.5 million" was but a starting point. It should be added that it is not clear that Mr Neal had received the letter from Mr Rhodes before he attended upon the Bank. At all events, the discussion referred to in the letter of 26 November preceded that attendance and the evidence does not indicate any disclosure to the Bank at that stage of the discussion, or its substance.

31 On 29 January 1986, after the commencement of the receivership, the Board wrote to Mr Geraghty stating an "estimated cost of $1.7M". No case was put that this estimate was negligently misstated. On 20 February 1986, the Board told Mr Geraghty that the $1.7 million was "not a firm cost but was an indicative estimate given to enable your client's planning to proceed"; a "firm cost" would be given only after an application was made for a s 34B certificate, following conditional approval to the development by the two Councils.

32 On 30 September 1986, the Minister for Planning and Environment, acting under s 70 of the EPA Act, made Penrith LEP No 151 and on 30 June 1987 he made Liverpool LEP No 162; these allowed the respective Councils to permit subdivision of the dairy land. It then was possible to obtain firm figures from the Board. The Water Board Act came into operation on 3 July 1987. Subsequently, on 18 November 1987, in response to an application for a Compliance Certificate under s 26 of the Water Board Act, the Board specified a total cost of $803,000 for the supply of water to the proposed subdivision. The Board also emphasised that the previous total estimated cost of $1.7 million had been based upon Board policy then applicable to subdivisions of rural land. The revised policy had been approved on 2 November 1987 and this led to the reduced cost figure. Later, water was supplied to the dairy land; the work was done by a private contractor and had not been fully completed at the time of the trial.

33 In 1991, the appellants instituted an action in the Supreme Court of New South Wales against the Board, seeking declarations that the Board was liable to pay them damages for breaches of certain duties allegedly owed to the appellants, together with an order for an inquiry to assess the quantum of those damages. The duties were pleaded in a fashion which did not distinguish between the appellants. One duty was said to be a statutory duty imposed by s 52 of the *Trade Practices Act* 1974 (Cth) not to engage in conduct that was misleading or deceptive. To this, the Board pleaded the time bar imposed by s 82(2) of that Act and nothing further turned upon the alleged contravention of s 52.

34 Another duty pleaded was described as a duty not to commit misfeasance in public office. This was an elliptical way of asserting a cause of action in tort

for misfeasance in public office. The trial judge held that the case for misfeasance in public office failed *in limine*. The matter was not dealt with in the Court of Appeal and a grant of special leave to agitate the matter in this Court was rescinded in the course of the hearing of the appeal.

35 The third of the "duties" posited in the appellants' pleading involved causes of action in negligence. Allen J tried as a separate issue, in addition to that respecting misfeasance in public office, liability on the negligence claim. The trial did not address what Mason P later said were "very live issues of causation and computation of damages". The issues respecting liability in negligence were formulated in three questions. The effect of question (1) was to ask whether the Board owed to the appellants a duty to take reasonable care and exercise reasonable skill not to overstate the immediate cost of a water amplification scheme which would be satisfactory to serve only the development proposed by the appellants. Questions (2) and (3) were as follows:

> "(2) If the answer to the first issue is 'Yes' did the memorandum and draft letter in referring to $2.5 million make such an overstatement?
>
> (3) If the answer to both issue (1) and issue (2) is 'Yes' was the overstatement in breach of the duty of care referred to in issue (1)?"

36 Allen J decided that the relationship between the Board and Mr Neal was not such that the Board had the duty of care averred.

37 This conclusion was reached after Allen J made critical findings of fact. Those findings are not shaken by anything submitted in this Court and were not displaced in the Court of Appeal. They may be summarised as follows:

(i) There were four well-established levels of costing in engineering practice and three of these were applicable to the Board.

(ii) The first was an order of cost estimate which provided an upper limit as a starting point for a decision whether or not to proceed with the proposal in question.

(iii) The second, in ascending order of time, was a preliminary or "pre-design" estimate; the third a detailed design estimate; and the fourth, not applicable to the requirements of the Board, was a final costing for the calling of tenders.

(iv) The practices of the Board were well known to professionals dealing with the Board in relation to costings concerning water connections for developments; the Board would not be expected to give at the outset a

> precise costing and any figure would be an order of cost estimate and the Board would be entitled to assume that the developer would be made aware by his advisers that the figure was but a starting point.

38 Allen J found that the Board, acting reasonably, confidently could have anticipated that Mr Neal would have understood the letter dated 21 November 1985 and the reference therein to the immediate cost being in the order of $2.5 million as being "an order of cost estimate". In lay terms, the $2.5 million would be a preliminary ball-park figure for guidance to Mr Neal as to whether it was worth pursuing the matter.

39 Allen J concluded:

> "I am satisfied that it would have been wholly reasonable for the Board confidently to assume that the professionals advising Mr Neal would be well aware that the first figure supplied by the Board would be no more than an order of cost estimate, that it would include a large safety margin in favour of the Board and that the final cost to be met pursuant to a s 34A agreement with the Board, after detailed investigation and design would be likely to be much less."

40 This was not a case where the Board knowingly had prepared a letter for the purpose of it being shown by Mr Neal to the Bank, which might not have had the benefit of expert advice such as that available and given to Mr Neal by Mr Rhodes. The Board had no knowledge of Mr Neal's dealings with the Bank and in particular no knowledge that, by late 1985, the Bank was on the point of appointing a receiver. His Honour said that, if the Board had known the truth, it was at least arguable that it would have had a duty of care not to state a ball-park figure and at least to have expressed the draft letter in terms making it clear that the figure was not immutable but was simply a conservative ball-park figure which might come down after detailed investigation.

41 Perhaps not unnaturally, Mr Neal had pressed the Board to relax its policy as to the provision of costing information whilst not emphasising to the Board the perilous situation in his relations with the Bank which by November 1985 made the matter so urgent. As Allen J pointed out:

> "Mr Neal chose to leave the Board in the dark until it was too late."

The appellants criticised that statement, submitting that the evidence showed that the Board indeed had been aware of Mr Neal's financial position. The memorandum of 11 November 1985 from the General Manager included a statement that Mrs Kath Anderson (a member of the Board) had made representations to the Board, and continued:

> "She has explained that Mr Neal is in financial trouble and needs to sell the Wallacia property to finance development of other property interests".

The memorandum then stated that, while the Board had "attempted to treat the representations [for Mr Neal] as sympathetically as possible", the Board had been unprepared to depart from the principles that it was not an urban planning body and that the urban planning priorities of the Government should not be set aside.

42 Allen J concluded, and it was well open for him to do so, that these passages in the memorandum did not point to a crisis, with the prospect of a "fire-sale" realisation to ward off insolvency. A statement by Mr Watkins on 20 November to Mrs Crosio that, unless the Board intervened by the end of the coming week, Mr Neal almost certainly would lose his Wallacia properties did not come to the attention of the Board before the Minister wrote to Mr Watkins and to Mr Carr. In any event, it postdated the memorandum from the Board to its Minister.

43 When, on 10 January 1986, the Board was told by Mr Neal that a receiver had been appointed, it moved with despatch. It provided an "estimated cost", at the second level of costing, with, as has been pointed out, a statement that a "firm cost" would only be provided at the stage when the operation of ss 34A and 34B had been engaged.

44 In the Court of Appeal, Fitzgerald JA, with whom on this point Mason P agreed, held that the statement that the immediate cost to connect the proposed development would be in the order of $2.5 million was carelessly made. This was because, instead of a factor of 1.35 usually applied in these circumstances, the estimated cost of almost $700,000 to supply 2,300 metres of 375mm pipe was more than doubled to $1.4 million. Fitzgerald JA drew the inference that the Board had no reasonable basis for this computation of a major component in the immediate cost "in the order of $2.5 million". In this Court, there is no notice of contention by the Board challenging this finding of carelessness in the production of the component assessed at $1.4 million by the use of a multiplier of 2 rather than 1.35. These multipliers represented what was known as a difficulty factor, which varied with the nature of the work involved, for example the excavation of rock or half-rock. Counsel accepted that the choice of 2 as the factor of difficulty was unsupported by any evidence. However, this choice of difficulty factor goes to breach rather than duty.

45 The primary issue for the Court is whether the Court of Appeal fell into error in dismissing the appeal against the holding of Allen J that the appellants had not established the duty of care they alleged.

46 The duty of care contended for by the appellants would be imposed by law in the relevant circumstances. The appellants emphasised to this Court the serious business purpose of the communication which reached Mr Neal. However, various special factors were significant in assessing the nature of the relationship between the Board and Mr Neal. First, the Board was entitled to adhere to what it regarded as the established principle that a developer such as Mr Neal should fund the provision of water services, unless the Board was obliged itself to do the work by direction of the Minister. Secondly, the Board was not obliged to give any estimate at any level of costing. Thirdly, in contrast the situation in *Shaddock & Associates Pty Ltd v Parramatta City Council [No 1]*[7], it was not the practice of the Board to answer inquiries to which it was not obliged to respond. Fourthly, the Board had a monopoly, conferred by statute, for the conduct of water supply services. Finally, the 1924 Act so operated as to deny to the Board and developers such as Mr Neal a freedom of contract in significant respects. We refer, for example, to the statutory notion of "cost", with the particular meaning given by s 34A, and the introduction into dealings between the Board and developers of a third party, the Director, whose certificate was necessary.

47 The statement of principle by Barwick CJ in *Mutual Life & Citizens' Assurance Co Ltd v Evatt*[8] regained vitality after the consideration in *Shaddock* of the reasoning of the majority in the Privy Council in the *Evatt* litigation[9]. In his judgment, Barwick CJ referred to various features of the special relationship in which the law will import a duty of care in utterance by way of information or advice. They were restated by Brennan J in *San Sebastian Pty Ltd v The Minister*[10]. Two of the points made by Barwick CJ are of immediate significance for this appeal. The first is the statement that[11]:

> "the speaker must realize or the circumstances be such that he ought to have realized that the recipient intends to act upon the information or advice in respect of his property or of himself in connexion with some matter of business or serious consequence".

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7 (1981) 150 CLR 225.

8 (1968) 122 CLR 556 at 569-572.

9 (1970) 122 CLR 628; [1971] AC 793.

10 (1986) 162 CLR 340 at 372. See also *Esanda Finance Corporation Ltd v Peat Marwick Hungerfords* (1997) 188 CLR 241 at 249-250, 255-257, 261, 273-274.

11 (1968) 122 CLR 556 at 571.

The second is that[12]:

> "the circumstances must be such that it is reasonable in all the circumstances for the recipient to seek, or to accept, and to rely upon the utterance of the speaker. The nature of the subject matter, the occasion of the interchange, and the identity and relative position of the parties as regards knowledge actual or potential and relevant capacity to form or exercise judgment will all be included in the factors which will determine the reasonableness of the acceptance of, and of the reliance by the recipient upon, the words of the speaker."

48 The first statement emphasises the need for caution lest a duty of care be imposed upon a party who has no appreciation of, and could not be expected to appreciate, the implications of making an error. The findings of the trial judge to which reference has been made indicated that, for his own reasons, Mr Neal kept the Board in the dark respecting the critical state of his relationship with the Bank until it was too late.

49 Further, as to the second point made by Barwick CJ, the circumstances here were not such as to make it reasonable for Mr Neal to rely upon the "ball-park" figure to meet the Bank's demand for a costings estimate. The identity and relative position of the parties were such that the relationship between the Board and Mr Neal was one in which the Board plainly was a reluctant participant; the Board did not wish to give Mr Neal information and it resisted giving it until eventually it "caved in". In that difficult situation Mr Neal, at all material times, had access to expert advice, which he utilised. These circumstances and the provisional nature of the estimate eventually provided in the letter of 21 November made it unreasonable to posit a duty upon the Board in respect of the use Mr Neal made of the estimate in his dealings with the Bank.

50 In the Court of Appeal, reference was made to various decisions, including *Perre v Apand Pty Ltd*[13]. Significant matters for the existence of the duty of care to the appellants in that case with respect to the supply of infected seed included[14] foresight of the likelihood of harm and knowledge or means of knowledge of an ascertainable class of vulnerable persons unable to protect

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12 (1968) 122 CLR 556 at 571.

13 (1999) 198 CLR 180.

14 (1999) 198 CLR 180 at 194 [11], 202 [42], 236 [149]-[150], 258-260 [213]-[217], 327-328 [413]-[416].

themselves against that harm. Here, the Board lacked foresight respecting the collapse of Mr Neal's finances after he showed the Bank the letter of 21 November and Mr Neal was not a vulnerable party in the above sense.

51 The majority of the Court of Appeal was correct in concluding that Allen J had not fallen into error in deciding that the appellants had not made out their case with respect to the existence of a duty of care. The appeal should be dismissed with costs. An order also should be made to correct the record in this Court so as to identify the respondent as "Ministerial Holding Corporation".

52 GAUDRON J. The history of these proceedings and the relevant facts are set out in other judgments. So far as concerns the history of the proceedings, it is sufficient to indicate that I agree with the observations of Kirby and Callinan JJ with respect to the undesirability of limiting the issues to be tried in tort claims.

53 So far as the relevant facts are concerned, it is, unfortunately, necessary to make further detailed reference to them in order to make clear my reasons for concluding that the respondent ("the Water Board") owed no duty of care to the appellants with respect to the provision of an estimate of the cost of connecting water to the subdivision which they, the appellants, proposed.

The facts

54 It is important to note, at the outset, that the success of the appellants' proposal to subdivide their land at Wallacia depended on the land being rezoned from rural to rural-residental. Rezoning required the preparation by Penrith and Liverpool City Councils of draft local environmental plans pursuant to Pt 3 Div 4 of the *Environmental Planning and Assessment Act* 1979 (NSW) ("the EPA Act")[15] as it stood at the relevant time. And preparation of the draft plans would result in rezoning only if supported by a certificate from the Director of Environment and Planning under s 65 of the EPA Act and if, following public exhibition, the responsible Minister decided to make local environmental plans pursuant to s 70 of that Act.

55 Penrith and Liverpool City Councils supported the proposed rezoning and subdivision of the appellants' land, but only if the Water Board were to supply water to the subdivision. The Councils' support was, apparently, made known to the appellants by April 1983. In June 1983, the appellants' consultant surveyor wrote to the Water Board, recording the appellants' understanding "that it [was] not the Board's policy to carry out investigation work where any proposed development is contrary to existing zoning" and requesting, if that were so, its "written confirmation ... so that [the appellants could] then perhaps approach the Department of Environment and Planning."[16]

56 It is not entirely clear what steps were taken between June and August 1983 with respect to the appellants' proposal to rezone and subdivide their land. In August, however, they obtained approval from their bank to borrow in Swiss francs the equivalent of $A2,000,000 ("the loan"). The loan was said to be for

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15 In the case of Liverpool City Council, it would have required the preparation of a draft plan amending an existing plan.

16 Letter to the Water Board from Geoff J Murray, consultant surveyor acting on behalf of the appellants.

various purposes, including the cost of subdividing the land. The loan was drawn down in November 1983.

57 Before drawing down the loan, the appellants enlisted the support of a Member of Parliament, Mr R C Brading, who contacted the Minister responsible for Planning and Environment and, also, the Minister responsible for Water Resources. On 19 October, a letter from the Minister for Planning and Environment to Mr Brading made it clear that the attitude of the Department of Environment and Planning to the appellants' proposed subdivision was somewhat more cautious than that of Penrith and Liverpool City Councils. Although the Department had indicated that the Councils should proceed with an environmental study, the Minister pointed out that "a major constraint ... could be the availability of surplus capacity in the existing water supply". It was also noted in the letter that Departmental and Council officers were to investigate "alternate [sic] forms of water supply".

58 By the end of October, the Minister for Water Resources had advised Mr Brading that the provision of water to the proposed subdivision would necessitate "amplification of the existing system" requiring the "construction of major works all the way back to the source of supply" and costing "several million dollars". The consequence, the Minister pointed out, was that "the Board [would] not be able to supply the proposed rezonings with water within a reasonable period of time." And on 15 November, Mr Brading advised the appellants, by reference to the Minister's letter, that there were "obviously going to be some grave difficulties in servicing a sub-division of the size you contemplate".

59 Sometime late in 1983, the Department of Environment and Planning rejected the appellants' rezoning proposal for reasons which included the inability of the Water Board to connect water to the proposed subdivision. It seems that, thereafter, Penrith and Liverpool City Councils took no further action with respect to the preparation of draft local environmental plans.

60 Notwithstanding the inability of the Water Board to provide water, the appellants continued to press their rezoning and subdivision proposals, apparently on the basis of an alternative system of water supply. In September 1985, Liverpool City Council indicated to the appellants' consultant town planners that it would again contact the Department of Environment and Planning to ascertain whether the appellants' then current proposal warranted further action.

61 In the meantime, the appellants had sought assistance from the Minister for Planning and Environment and met with him on 3 September 1985. He agreed to write to the Minister for Natural Resources, who then had responsibility for the Water Board, "to seek her support to expedite Water Board

consideration of alternative methods other than reticulation for the provision of water and disposal of sewerage."

62 By November 1985, the appellants were in default under the loan. In that month, they made it known to Mrs Anderson, a member of the Water Board, that they were in financial difficulty and sought her assistance in having the Board further consider their proposed subdivision. At or about the same time, the Minister for Natural Resources referred a letter from the Minister for Planning and Environment to the Board for its consideration. That letter was concerned to obtain advice as to when "an appropriate policy for alternative methods of servicing" rural-residential development at Wallacia would be finalised.

63 On 11 November, the Water Board forwarded a memorandum to the Minister for Natural Resources. Apparently, that memorandum was intended to be responsive to the inquiry made by the Minister for Planning and Environment. However, instead of addressing the question of alternative methods of servicing rural-residential development, the Water Board informed the Minister for Natural Resources that it was "prepared in general to provide water supply to rural residential areas provided the works [could] be funded by development". It was further stated in that memorandum that "[t]he immediate cost to connect [the appellants'] proposed development would be in the order of $2.5 million" and "would be satisfactory only to serve the development proposed by [them]."

64 The information provided by the Water Board was conveyed by the Minister for Natural Resources to the Minister for Planning and Environment and, also, to Mr P F Watkins, another Member of Parliament, who, apparently, had also made representations on the appellants' behalf. In informing the Minister for Planning and Environment that the Water Board was prepared to provide water and its estimate of the cost of so doing, the Minister for Natural Resources issued an invitation to the appellants to contact the Water Board's Mr A G Wright to discuss the matter further.

65 It is not in issue that the Water Board intended that its cost estimate should be conveyed to the appellants, as it was when Mr Watkins sent them the letter he had received from the Minister for Natural Resources. The appellants took this letter to their bank and an officer of that bank indicated that the cost was much more than had been expected.

66 At or about the same time as the appellants met with their banker, they also met with the Water Board's representatives pursuant to the invitation contained in the letter from the Minister for Natural Resources to the Minister for Planning and Environment. The meeting with the Water Board's representatives took place on 25 November 1985 when the estimate of $2.5 million was apparently confirmed. This notwithstanding, correspondence continued between the Water Board and the appellants' advisers, and on 29 January 1986 the Board advised that a more detailed examination revealed that the estimated cost for

connecting water to the properties was $1.7 million. Armed with this estimate, the appellants then pressed Penrith and Liverpool City Councils to prepare draft local environmental plans for the rezoning of their land. However, in the same month, January 1986, the appellants' bank appointed a receiver and manager of various assets of the appellants, including, it seems, the land which they had hoped to subdivide.

67 It is clear that the Water Board was aware, when it informed the Minister of its estimate of the cost to provide water to the appellants' proposed subdivision, that the appellants were in financial difficulties. However, its "knowledge" of those difficulties seems to have been limited to information that the appellants "need[ed] to sell the Wallacia property to finance [the] development of other property".

68 Finally, it is to be noted that it is no longer in issue that the Water Board's cost estimate of $2.5 million was excessive and that, if the Board owed the appellants a duty of care, its statement in that regard was negligent. And it is to be assumed for present purposes that that statement led the appellants' bank to appoint a receiver and manager and, ultimately, caused financial loss to the appellants.

Statutory framework

69 The question whether the Water Board owed the appellants a duty of care in relation to its cost estimate necessitates some reference to the statutory framework in which the Water Board operated in the period 1983 to 1985. During that period, the powers and functions of the Water Board were to be found in the *Metropolitan Water, Sewerage, and Drainage Act* 1924 (NSW) ("the MWS&D Act").

70 By s 7(2) of the MWS&D Act, "the exercise and discharge of [the Water Board's] powers, authorities, duties and functions, [were] subject to the direction and control of the Minister." Its functions included "the conservation, preservation, and distribution of water for domestic and other uses"[17]. Its powers included the construction of various works, including "pumping stations, gravitation, rising and reticulation mains, and distributory works, and other works as in its opinion may be required for water supply purposes"[18].

71 By s 34A(1) of the MWS&D Act, the Water Board had power to enter into an agreement "with the owner of any land within the area of [its] operations

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17 Section 30(1)(a).

18 Section 31(a).

... providing for the construction of either a water or sewer main, or both, and such ancillary works as may be specified in the agreement, to serve the land of such owner ... either alone or together with other lands." By s 34A(3), an agreement of that kind could be made on terms that the owner of land paid "the whole of the cost of the construction of the main or mains and ancillary works".

72 By its memorandum to the Minister for Natural Resources, the Water Board was indicating its preparedness to enter into an agreement with the appellants pursuant to s 34A of the MWS&D Act to construct the necessary works to provide water to their proposed subdivision on terms that they, the appellants, paid the whole cost of those works. However, the Water Board's power in that regard was circumscribed by s 34A(2) in these terms:

> " The board shall not enter into an agreement under this section ... unless the Director of Environment and Planning has issued to it a certificate in writing that in [his/her] opinion ... the land ... should not be subdivided unless the water or sewer main, or both ... and any necessary ancillary works ... are constructed to serve such land".

There is no evidence that the Director had issued or intended to issue such a certificate.

Negligent misstatement: duty of care

73 The law has now developed to the point where liability may be imposed in negligence for economic loss, provided that there is a relationship between the parties of a kind that will call a duty of care into existence. That development has also resulted in the identification of what is called "negligent misstatement" as a discrete category[19] for which the special circumstances that call a duty of care into existence can be articulated.

74 So far as concerns negligent misstatement, the circumstances which attract a duty of care have been identified as "known reliance (or dependence) or the assumption of responsibility or a combination of the two."[20] In that context, the

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19 See *Perre v Apand Pty Ltd* (1999) 198 CLR 180 at 193 [7] per Gleeson CJ, 198-199 [29]-[30] per Gaudron J, 228-229 [127] per McHugh J. See also *San Sebastian Pty Ltd v The Minister* (1986) 162 CLR 340 at 355 per Gibbs CJ, Mason, Wilson and Dawson JJ; *Hill v Van Erp* (1997) 188 CLR 159 at 170-171 per Brennan CJ, 175 per Dawson J, Toohey J agreeing at 188.

20 *Bryan v Maloney* (1995) 182 CLR 609 at 619 per Mason CJ, Deane and Gaudron JJ, referring to *Sutherland Shire Council v Heyman* (1985) 157 CLR 424 at 466-468 per Mason J, 501-502 per Deane J. See also *Hawkins v Clayton* (1988) 164 CLR 539 at 545 per Mason CJ and Wilson J, 576 per Deane J, 593 per

(Footnote continues on next page)

word "known" includes circumstances in which reliance or dependence ought to be known[21]. Moreover, it is not essential that the person making the statement know the precise use to which the information will be put, so long as he or she knows or ought to know that it will be used for a serious purpose.

75 In *Mutual Life & Citizens' Assurance Co Ltd v Evatt*, Barwick CJ referred to the need for there to be knowledge of a serious purpose in these terms:

> "the speaker must realize or the circumstances be such that he ought to have realized that the recipient intends to act upon the information or advice in respect of his property or of himself in connexion with some matter of business or serious consequence."[22]

That approach, which was accepted as correct by Mason J in *Shaddock & Associates Pty Ltd v Parramatta City Council [No 1]*[23], should, in my view, now be accepted as the test to be applied with respect to the knowledge of a person making a statement which is said to constitute a negligent misstatement.

76 "Reliance" as the test for the existence of a relationship that will call a duty of care into existence is not actual reliance, but reasonable reliance. In this regard, Barwick CJ observed in *Mutual Life & Citizens' Assurance Co Ltd* that:

> "the circumstances must be such that it is reasonable in all the circumstances for the recipient to seek, or to accept, and to rely upon the utterance of the speaker. The nature of the subject matter, the occasion of the interchange, and the identity and relative position of the parties as regards knowledge actual or potential and relevant capacity to form or exercise judgment will all be included in the factors which will determine

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Gaudron J; *Perre v Apand Pty Ltd* (1999) 198 CLR 180 at 199 [30] per Gaudron J, 228 [124] per McHugh J, 322 [393] per Callinan J.

21 See *Esanda Finance Corporation Ltd v Peat Marwick Hungerfords* (1997) 188 CLR 241 at 252 per Brennan CJ, 255 per Dawson J, 261-262 per Toohey and Gaudron JJ.

22 (1968) 122 CLR 556 at 571.

23 (1981) 150 CLR 225 at 250-251, with whom Aickin J agreed, 255-256 per Murphy J. This formulation was also apparently accepted by Gibbs CJ, Mason, Wilson and Dawson JJ in *San Sebastian Pty Ltd v The Minister* (1986) 162 CLR 340 at 355-356, and at 371-372 per Brennan J; *Esanda Finance Corporation Ltd v Peat Marwick Hungerfords* (1997) 188 CLR 241 at 249-250, 252 per Brennan CJ, 255 per Dawson J, 264 per Toohey and Gaudron JJ.

> the reasonableness of the acceptance of, and of the reliance by the recipient upon, the words of the speaker."[24]

77 In *Mutual Life & Citizens' Assurance Co Ltd*, Barwick CJ explained his use of the term "recipient", saying that it had been used "to cover both the case where the incorrect utterance is sought by a question or inquiry and the case where it is volunteered by the speaker."[25] His Honour added, however, that "[t]hough it must be relatively rare that the latter case will give rise to a cause of action, the possibility cannot, in my opinion, be ruled out."[26]

78 The question whether a person may be liable to another where the latter has not sought the information or advice in question was further considered in *San Sebastian Pty Ltd v The Minister*. In that case, it was said:

> "The maker of a statement may come under a duty to take care through a combination of circumstances or in various ways, in the absence of a request by the recipient. The author, though volunteering information or advice, may be known to possess, or profess to possess, skill and competence in the area which is the subject of the communication. He may warrant the correctness of what he says or assume responsibility for its correctness. He may invite the recipient to act on the basis of the information or advice, or intend to induce the recipient to act in a particular way. He may actually have an interest in the recipient so acting."[27]

The factors identified in that passage may indicate that, in the particular circumstances, there has been either known reliance or the assumption of responsibility, but they are not conclusive of those issues. The circumstances of the case must always be considered.

79 The appellants contend that, in the present case, the Water Board was responding to an inquiry made by the appellants as early as 1983 as to the cost of

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24 (1968) 122 CLR 556 at 571. This passage was cited with approval in *Shaddock & Associates Pty Ltd v Parramatta City Council [No 1]* (1981) 150 CLR 225 at 250-251 per Mason J, Aickin J agreeing at 256; and in *San Sebastian Pty Ltd v The Minister* (1986) 162 CLR 340 at 371-372 per Brennan J.

25 (1968) 122 CLR 556 at 571-572.

26 (1968) 122 CLR 556 at 572.

27 (1986) 162 CLR 340 at 357 per Gibbs CJ, Mason, Wilson and Dawson JJ.

connecting water to their proposed subdivision, as was held by the majority of the Court of Appeal[28]. In my view, that conclusion was not open.

80 By its memorandum to the Minister responsible for its operations, the Water Board was making it known that it had changed its policy and practices in relation to proposed rural-residential subdivisions. In that context, it provided an estimate to the Minister of "the immediate cost" to undertake the works necessary to connect water to the appellants' proposed subdivision. The stimulus for the provision of that information was the inquiry by the Minister for Planning and Environment as to when its policy for alternative water supply would be finalised, not an inquiry by or on behalf of the appellants as to the cost of the Water Board providing water to the subdivision.

81 Having regard to the circumstances in which the Water Board made its cost estimate known, its statement in that regard is properly to be seen as having been volunteered, and not as provided in response to a request for that information. One of the factors which may indicate a duty of care even though there has been no request for information is the known skill and competence of the person making the statement in question. In the present case, the Water Board was undoubtedly possessed of special knowledge as to the extent of the work required and was, to that extent, in a position of advantage vis-a-vis the appellants. This notwithstanding, the circumstances are such, in my view, as to preclude a finding either of known reliance or the assumption of responsibility by the Water Board.

Knowledge of reliance: assumption of responsibility

82 The Water Board's knowledge with respect to the appellants' financial position was limited. The evidence is simply that it knew that the appellants were in financial difficulty and might have to sell their land at Wallacia. It may, however, be taken that the Water Board's knowledge with respect to the proposed subdivision was more extensive. In particular, it may be taken that it knew of the position with respect to that proposal, namely, that, as things had transpired, it was a proposal that could not be advanced unless and until the Water Board agreed to provide water to the subdivision or approved some alternative means of water supply.

83 It must also be taken that the Water Board knew that the consequence of its decision to provide water would be to enable the appellants to take steps which might, in time, result in the subdivision of their land. Whether or not it

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28 *Tepko Pty Ltd v Water Board* (1999) Aust Torts Reports ¶81-525 at 66,321 per Mason P, Beazley JA agreeing at 66,323. Note, however, that Mason P refers to a request in 1982.

would have that consequence would depend on steps being taken under the EPA Act with that object by Penrith and Liverpool City Councils, the Director of Environment and Planning and, ultimately, the Minister responsible for the administration of that Act. It would also depend on the Director of Environment and Planning issuing a certificate under s 34A(2) of the MWS&D Act. Moreover, it depended, also, on the Minister for Natural Resources not issuing a directive pursuant to s 7(2) of the latter Act countermanding the Water Board's policy change.

84 Clearly, the administrative and political processes necessary to bring about the rezoning of the appellants' land would take some time and involve some uncertainty. The immediate result of the Water Board's communication that it would provide water at an estimated immediate cost of $2.5 million was to enable the appellants to set those processes in train. The further consequence was to provide the appellants with the possibility of a commercial opportunity which previously they had not had, albeit that the estimated cost of that opportunity was excessive. In this context the Water Board may well have considered that it was conferring a benefit on the appellants, rather than acting in a manner that might result in loss to them.

85 Moreover, the Water Board was clearly only providing the appellants with an immediate cost estimate. The actual cost would depend on when the work was done. And that might not be for some time because of the steps that had to be taken before any rezoning could occur. Further, the cost might vary depending on the number of lots in the subdivision that was ultimately approved. Moreover, and of particular significance, the estimate given was one which the Water Board was prepared to discuss further with the appellants, as is clear from the invitation to them to contact its Mr Wright.

86 Given the consequences of the Water Board's decision to provide water, the steps that were necessary before the appellants' land could be rezoned and the fact that it was providing an estimate which was capable of being discussed further and which, in any event, was being provided well in advance of any work being done, it cannot be concluded, in my view, that the Water Board either knew or should have known that the appellants intended to act upon that cost estimate for any purpose, let alone a serious purpose. And because the Water Board indicated that it was prepared to enter into further discussions with the appellants, it cannot be concluded that it assumed any responsibility in relation to that estimate.

Reasonableness of reliance

87 As already indicated, the Water Board was in a position of advantage vis-a-vis the appellants in that it, alone, was in a position to determine what work was required to provide water to the appellants' proposed subdivision. However, there is no reason to assume that it was the sole repository of expertise with

respect to costing. The appellants had engaged their own experts and could have relied on their knowledge as to likely cost once the extent of the work was known. Moreover, it must have been clear to the appellants that the estimate was one which was subject to change, either in the course of discussions with the Water Board or in consequence of the time at which the work was carried out. If the appellants relied on the Water Board's estimate for any purpose – a matter which is not entirely clear – their reliance was not reasonable in the circumstances.

Other considerations

88 It follows from what has been said that the appeal must be dismissed. This notwithstanding, there are other considerations which, to my mind, militate against the imposition of a duty of care in the circumstances of this case. The appellants were engaged in a speculative venture which involved considerable uncertainty and in which, as they well knew, political and administrative processes were at play. The speculative nature of the venture and the uncertainty of the political and administrative processes which the appellants set in train serve to emphasise the unreasonableness of any reliance they may have placed on what was said or done by any participant in those processes. Rather, the very nature of the venture required them to carefully examine the detail of the course on which they were embarked and to rely on the professional advice available to them.

Conclusion

89 The appeal should be dismissed with costs.

90 McHUGH J. Upon the facts of this case, I am of the opinion that the Water Board owed a duty of care to the appellants. My reasons for this conclusion are substantially the same as those of Kirby and Callinan JJ. Because our view is the minority view in the case, no useful purpose would be served by me articulating in different language the substance of the reasons given by Kirby and Callinan JJ.

91 I agree with the orders that their Honours propose.

92 KIRBY AND CALLINAN JJ. The only issue in this appeal is whether a statutory water authority owed a duty of care to a developer who wished to know, and was negligently told, how much approximately the authority might charge to bring town water to his land to enable him to subdivide it. It is crucial to what follows in these reasons for the limited nature of the question for decision to be kept steadily in mind.

Case history

93 It is convenient to refer to the appellants in the singular as it was Mr Neal, the third appellant, who was the moving force of the companies involved. He represented these companies and was personally engaged in all relevant dealings in respect of the land[29].

94 The relevant authorities were the planning authorities for the land although the Director of Environment and Planning did have a supervisory role in relation to it[30]. The other authorities were prepared to approve the rezoning of the land so that it might be subdivided if water could be supplied to its perimeters for reticulation to the blocks that would be created by the subdivision. A corporation established by the *Metropolitan Water, Sewerage, and Drainage Act* 1924 (NSW) ("the Act"), for whose obligations and liabilities the respondent is now responsible, controlled the storage and provision of water throughout New South Wales. We will refer to the respondent's predecessor and the respondent interchangeably as the respondent[31].

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29 The company arrangements are explained in the reasons of Gleeson CJ, Gummow and Hayne JJ ("the joint reasons") at [4]-[6].

30 See s 34A(2) of the *Metropolitan Water, Sewerage, and Drainage Act* 1924 (NSW).

31 The Water Board (the respondent) was established by s 5 of the *Water Board Act* 1987 (NSW) and was a continuation of the same legal entity as the one created by s 6A of the *Metropolitan Water, Sewerage, and Drainage Act* 1924 (NSW). The *Metropolitan Water, Sewerage, and Drainage Act* 1924 (NSW) was repealed by s 4 and Sched 1 of the *Water Legislation (Repeal, Amendment and Savings) Act* 1987 (NSW), and the latter Act provided for the continuation of the Board as a legal entity. The *Water Board Act* 1987 (NSW) was subsequently repealed by s 107 of the *Water Board (Corporatisation) Act* 1994 (NSW), which Act dissolved the Board and transferred its assets, rights and liabilities to the Ministerial Holding Corporation, which was constituted by s 37B of the *State Owned Corporations Act* 1989 (NSW). It is appropriate, as the joint reasons have explained, that the name of the respondent, and the title of the proceedings, be changed to "Ministerial Holding Corporation". See joint reasons at [2]-[3].

95 Before November 1995, the appellant had on many occasions asked the respondent to give him an estimate of the cost of the provision of water to the land. The respondent repeatedly refused to make any estimate. Without an assurance of water the land could not be rezoned. Naturally, no sensible person would accept any responsibility for the supply of water without knowing at least, approximately, what the cost of supplying it might be. And, by virtue of its statutory functions (including its right to fix a price for the supply of water) the respondent was not only the repository, indeed effectively the sole repository, of all of the information necessary for the making of any informed estimate of cost. It was also the body which would either perform or oversee the work of providing the water. In the material in evidence there was a copy of a memorandum to all staff of the respondent of 15 January 1974, the first paragraph of which stated:

> "It is Board's policy when either verbal or written inquiries are made by private individuals and/or firms, seeking available information from the Board in connection with any rezoning proposals, that they are not furnished directly with information but are advised to pursue their inquiries through the State Planning Authority."

96 The detail of what we have written was hardly in dispute and in substance appears from some key documents written by the respondent, which we will now set out. We start with an addendum to a memorandum written by a Systems Planning Manager of the respondent on 18 October 1985:

> "The Hon R J Carr, MP, has requested information from The Hon J A Crosio, MP, as to when policy for servicing rural residential development such as that envisaged in Reference 1 will become available.
>
> [T]he request follows a meeting between the Hon R J Carr, MP, and a Mr John Neal dealing with certain rural residential development proposals at Wallacia. *Mr Neal has recently approached the Board a number of times as detailed on this file* and has been advised that any additional demand at Wallacia would prejudice the water supply to Mulgoa and Luddenham where water pressures have already been substandard on occasions. Additional demands could not be permitted without extensive and costly amplification works. Expenditures involved would run into several millions of dollars. Works could not be constructed without affecting the Board's program of works required for the NSW Government's urban development program. While Mr Neal's proposals cover a relatively small area, they cannot be considered in isolation from other areas served by the same water supply system which are under consideration by the DEP and Penrith Council for possible rezoning.

Arrangements for serving rural residential development proposals are of concern to a large number of parties. At present the Board is developing policy covering this area with investigations into management of rural residential demands, standards of service to rural residential properties and alternative types of rural residential development currently in progress.

The engineering and economic analyses needed for completion of the policy report should be available to your unit by January/February 1986.

Would you please made [sic] an assessment of when the Rural Residential Policy will be finished and prepare terms of reply to the request.

Sgd

A/Water Systems Planning Manager". (emphasis added)

97 On 11 November 1985, the General Manager of the respondent sent this memorandum and a draft letter to the responsible Minister:

"To: Minister

From: General Manager

Subject: Water Supply for Proposed Wallacia Rural Residential Development

Mr J Neal has for some years been attempting to have rezoned for residential purposes a property at Wallacia. In recent representations to the Minister for Planning and Environment, Mr Neal has sought the Minister's assistance in gaining water supply for the property.

Mr Carr subsequently wrote to you in general terms and passed on a copy of the representations he had received.

The water supply system serving the areas of Wallacia, Mulgoa and Luddenham was designed to service the present land-use zoning. This system is an extension of the Warragamba Township Water Supply System which is limited in capacity. It is the supply at the extremities of this system, viz, Mulgoa and Luddenham, which governs the operation of the system and pressures at these locations have already been substandard on occasions.

Any additional demand at Wallacia would prejudice supply to Mulgoa and Luddenham and could not be permitted without major and

extensive amplification works possibly involving the construction of a new scheme.

The Board's funds are fully committed to meeting the Government's Urban Development Programme. The principle has been well established that rural developments should not be given priority over the Urban Development Programme.

Although Mr Neal's proposal covers a relatively small area, it cannot be considered in isolation for two main reasons:

(a) Provision by the Board of water supply to areas outside the Government priority areas necessarily creates precedents which lead to development pressures which are inconsistent with Government objectives.

(b) The Board is aware that other property owners and large developers in the immediate area are keenly awaiting the decision on this issue and wish to submit similar proposals. This would inevitably lead to other infrastructure pressures.

The Board is particularly conscious that it is not a planning organisation and would not wish to take a decision on this matter in a way which might lead to longer term difficulties for both the Government and the Board.

Within this framework, the Board is prepared in general to provide water supply to rural residential areas provided the works can be funded by development so as not to affect the Urban Development Programme, present or future.

The minimum viable scheme to serve rural residential development in the Wallacia area would cost in the order of $7 to $10 million. This would provide for around seven similar developments.

The immediate cost to connect Mr Neal's proposed development would be in the order of $2.5 million. But the Board would favour a proposal from a consortium of the development in the area so that the system could be amplified to the full dimensions of a viable scheme described above in a single programme. *I must also advise that the $2.5 million scheme would be satisfactory only to serve the development proposed by Mr Neal.*

The Board has also received representations on behalf of Mr Neal from Mrs Kath Anderson. She has explained that Mr Neal is in financial trouble and needs to sell the Wallacia property to finance development of

other property interests including the million dollar renovation of 'Camelot Castle'. Mrs Anderson has suggested that Mr Peter Anderson MP may speak to the Premier about this matter.

The Board has attempted to treat the representations as sympathetically as possible, yet we have been unprepared to depart from the principles that urban planning should be done by the Department of Environment and Planning, not the Board, and that Government urban development priorities should not be set aside.

In these circumstances, and particularly bearing in mind the financial implications, the Board must adhere to the established principle that the developer should fund the provision of water services." (emphasis added)

98 The Minister adopted the foregoing memorandum by sending a letter on or about 21 November 1985, substantially in the same terms, to the Hon R J Carr, MP, who was then the Minister for Planning and Environment. It is in respect of that memorandum and the events that it set in train that these proceedings were brought, in particular the inevitable communication to the appellant of the estimate of $2.5m for the provision of water to the land.

99 The letter, the dispatch of which is one of the relevant events, reads as follows:

"Dear Mr Carr,

I refer to your representation on behalf of John Neal Earthmoving Pty Ltd of Greendale Road, Wallacia concerning the company's proposed rural residential development at Wallacia. You requested advice about the completion of the Sydney Water Board's policy for provision of water to rural residential developments.

The Board has advised me that its revised policy for such developments will not be completed until early in 1986. However, there are well established principles which directly relate to this situation and which serve to establish the way in which the Board must be bound on these matters.

I understand that Mr Neal has approached the Board a number of times and been advised that any additional demand at Wallacia would adversely affect the water supply to the residential areas of Mulgoa and Luddenham. Additional demands brought about by development at Wallacia could not be met without extensive and costly amplification works.

The Board's funds are fully committed to meeting the Government's Urban Development Programme. The principle has been well established that rural developments would not be given priority over the Urban Development Programme.

Although Mr Neal's proposal covers a relatively small area, it cannot be considered in isolation for two main reasons:

(a) Provision by the Board of water supply to areas outside the Government priority areas necessarily creates precedents which lead to development pressures which are inconsistent with Government objectives.

(b) the Board is aware that other property owners and large developers in the immediate area are keenly awaiting the decision on this issue and wish to submit similar proposals. This would inevitably lead to other infrastructure pressures.

The Board is particularly conscious that it is not a planning organisation and would not wish to take a decision on this matter in a way which might lead to longer term difficulties for both the Government and the Board.

Within this framework, the Board is prepared in general to provide water supply to rural residential areas provided the works can be funded by developers so as not to affect the Urban Development Programme, present or future.

The minimum viable scheme to serve rural residential development in the Wallacia area would cost in the order of $7 to $10 million. This would provide for around seven similar developments.

The immediate cost to connect Mr Neal's proposed development would be in the order of $2.5 million. But the Board would favour a proposal from a consortium of the developers in the area so that the system could be amplified to the full dimensions of a viable scheme described above in a single programme. I must also advise that the $2.5 million scheme would be satisfactory only to serve the development proposed by Mr Neal.

The Board's policy on sewage disposal in rural residential areas would not present a problem for Mr Neal.

I trust this information will enable you to further consider Mr Neal's proposal. In the event that Mr Neal wishes to discuss the matter

further with the Board, he might contact Mr A G Wright, Director of Operations and Customer Relations ...

Yours sincerely,

Janice Crosio

Minister for Natural Resources."

100 The appellant was given the information contained in the letter on or about 21 November 1985.

101 The appellant requested a meeting with officers of the respondent. That meeting took place on 25 November 1985. It was attended, on the appellant's side, by the appellant, his solicitor Mr Geraghty, and Mr Rhodes, the appellant's town planning consultant. Officers of the respondent who were present included Mr Wright (Director of Operations and Customers Relations) and Mr Clayton (the Strategic Systems Planner). At that meeting, Mr Geraghty asked whether "the price of 2.5 [was] negotiable and they [officers of the respondent] said, no, they said in fact it had been brought down and that is the bare minimum". They also said, he added, that "it involved a considerable amount of capital works that just couldn't be avoided and 2.5 was 2.5 and that was it".

102 That estimate referred to in the memorandum and letter (whoever may have made it) had, by 25 November 1985 at the latest, been falsified by a calculation appearing in a note prepared by Mr McLachlan, a systems planner for the respondent and a civil engineer by profession:

"$2.5 M figure includes:

Amplification of (= rising main) to WTW[32]	$1.4 M
Amplification of Warragamba North Reservoir	$1.0 M
2km of 300mm main	
Local Amplification	$0.1 M
	$2.5 M

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32 Water Treatment Works.

However really need only $1.1 immediately

because inlet to WTW problem has been overcome

by opening valve". (emphasis added)

103 The cost of the supply of water of $2.5m, as communicated to the appellant, was inevitably passed on to the appellant's financier. In due course the financier appointed a receiver of the appellant companies.

The trial of the action

104 In proceedings in the Supreme Court of New South Wales, the appellant alleged that the respondent owed the following duties:

> "(a) duties to use reasonable care in and about the truth, accuracy and reliability of statements and advice communicated to the plaintiffs in connection with their applications for water supply to the development;
>
> (b) statutory duties, imposed by s 52 of the Trade Practices Act, not to engage in conduct that was misleading and deceptive or likely to mislead and deceive;
>
> (c) duties, in the performance of its statutory functions as a public utility, to make its decisions with reasonable care and skill having regard to proper and reasonably relevant criteria and not to commit mis-feasance in public office."

105 The claim under the *Trade Practices Act* 1974 (Cth) has not been pursued[33]. This Court is not concerned with misfeasance in public office as, by majority, special leave to appeal in respect of that issue was revoked by the Court during the hearing of the appeal.

106 The relief claimed by the appellant was as follows:

> "(i) a Declaration that the defendant is liable to them to pay damages for the breaches of duty aforesaid;
>
> (ii) an Order that a Master be directed to enquire into and assess the quantum of the plaintiff's damages;

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33 See joint reasons at [33].

(iii) Costs."

107 The action came on for hearing in the Supreme Court of New South Wales before Allen J when his Honour's retirement was imminent. He pressed the parties to agree that the trial before him be limited to only some of the issues raised on the pleadings. Counsel drew his Honour's attention to the problems that might ensue if that course were to be adopted. These included the fact that, unless compensable damage were proved, or admitted, a case in tort could not be made out. However, Allen J pressed on with the isolation of particular issues. That is the way in which the trial proceeded.

108 Most of the evidence at the trial was documentary, although some oral evidence was led on behalf of the appellant. The appellant also tendered, and relied on, parts of statements, for example, that of Mr McLachlan, prepared and served on the appellant on behalf of the respondent before the hearing started. The respondent, however, neither called any witnesses nor tendered any witness statements.

109 The issues that his Honour determined should be tried were these[34]:

"(1) Did the defendant owe to the plaintiffs a duty to take reasonable care and exercise reasonable skill, taking into account limitations in the existing Warragamba Township water supply system and its extensions, as well as anticipated future demands upon that system and its extensions, not to overstate in the memorandum and draft letter the immediate cost of a water amplification scheme which would be satisfactory to serve only the development proposed by the plaintiffs?

(2) If the answer to the first issue is 'Yes' did the memorandum and draft letter in referring to $2.5 million make such an overstatement?

(3) If the answer to both issue (1) and issue (2) is 'Yes' was the overstatement in breach of the duty of care referred to in issue (1)?

(4) If the answer to both issue (1) and issue (2) is 'Yes' but the answer to issue (3) is 'No' was the overstatement the result of an improper abuse of power by the defendant amounting to misfeasance in public office?"

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34 The fourth issue may be disregarded in this Court because special leave to appeal on that issue was revoked. See above at [105].

The decision of the primary judge

110 In his reasons for judgment, Allen J noted:

> "[T]he separate issues do not extend to whether any damage was caused to the plaintiffs, or any of them, by the alleged negligent, or improper, conduct of the defendant. It is common ground, however, that if any damage was caused the nature of that damage was that it was purely economic damage of the type I have indicated. The alleged duty of care is a duty of care in respect of the causing of purely economic loss of that type."

111 At another point in his reasons his Honour rejected Mr Geraghty's version of the conversations at the meeting of 25 November 1985. This is what his Honour said:

> "Mr Geraghty has given some evidence of what he says occurred at that meeting. I have not the slightest doubt of Mr Geraghty's integrity. His recollection as to what occurred at the meeting, however, as to the $2.5 million figure is hazy and, I am satisfied, wrong. Insofar as he retains an impression that it was stated that the $2.5 million was a figure which could not come down, it is completely at odds with a letter dated the following day from Mr Rhodes to Mr Neal. In the second paragraph of that letter Mr Rhodes stated: 'As discussed it is reasonable to assume that detailed investigation by the Board and completion of the work under contract will result in a significant reduction in amplification costs'. It was a long letter (four pages). In the second last paragraph Mr Rhodes returned to the topic of costs coming down. He wrote: 'It is important to appreciate that the development costs of each option are based on the Board's figures, and as stated earlier, significant reductions in these amplification costs could reasonably be expected. We will await further advice from the Board and advise you accordingly.'"

112 Even if, on careful analysis, the letter was inconsistent with Mr Geraghty's otherwise uncontradicted account of the meeting (which we do not think it necessarily was) there was a question about the use to which the letter could be put. Some parts only of the letter were the subject of cross-examination by the respondent. Counsel for the respondent did at one stage seek to tender the letter. However, he later withdrew the tender. It was, and its status remains, that of, a document marked for identification and unavailable as evidence, except to the extent that its contents had emerged in cross-examination. His Honour's finding against Mr Geraghty's version of the meeting, taken with other matters to which he referred were used by him as a foundation for a conclusion that the respondent:

"… simply had no reason to expect otherwise than that Mr Neal would be duly advised, if he did not already know, that the figure of 'in the order of $2.5 million' was a starting point for the usual train of events which would lead, eventually, if Mr Neal persisted with the proposed subdivision, to a s 34A agreement for a substantially lower figure."

113 Allen J did find, however, that the respondent contemplated that the letter, attached to the memorandum, could be communicated to the appellant. Such a finding was, in our opinion, irresistible. His Honour's alternative view, at least that it might be communicated to the appellant, understates the position.

114 Allen J then said:

"I am satisfied that the Board, acting reasonably, confidently could have anticipated that Mr Neal would have understood the letter in the context of the following understandings by him, namely:

1. He would be expected to pay upfront (that is the 'immediate cost') the whole of the cost of what the Board considered necessary to get the water to his proposed development without in any way imperiling the capacity of the Warragamba Township supply system to meet the anticipated future demands upon it (including from extensions of the system). This would extend, depending upon what the Board considered necessary, to payment by Mr Neal of 'headwork funds ... towards the cost of future amplification' (to adopt the language used in Mr Neal's Confidential Ministerial Submission). The basic, inflexible requirement, was that the Board's funds and resources were not to be diverted, at all, from its fundamental obligation to attend to the water requirements, including future needs, of the area for which the system was designed.

2. The figure stated would be simply an order of cost estimate for guidance to Mr Neal as to whether it was worth pursuing the matter. The figure would be, in lay terms, a preliminary ball-park figure – and no more than that. Moreover, the figure would be very much on the conservative side for the Board's protection and it was a figure which, if the matter were pursued to a s 34A agreement, was likely to come down considerably.

3. The Board would not have incurred any substantial costs, if any at all, to the stage of the memorandum and draft letter complained of, in particular investigations and design work for it. That would come later if Mr Neal, having considered the ball-park figure, decided to proceed and did so.

4. The Board invited co-operation between it and Mr Neal's experts."

115 Allen J then turned to the issue of the duty of care:

> "If there was any duty of care, in law, owed to Mr Neal for his protection against purely economic damage the duty was no higher than that of taking reasonable care that in the letter, assuming it would be so understood by Mr Neal, reasonable care was taken, and skill exercised, that the ball-park figure was not an overstatement. It was not an onerous duty of care in the sense of one requiring special investigation, designing detail, or precise calculation."

116 Later in his reasons, his Honour made these observations, some of which may be of more significance to issues of causation and to damages than to the existence or otherwise of a duty of care:

> "In my judgment what a reasonable body would have contemplated was that Mr Neal, unless he decided that the figure was too high for it to be worthwhile to pursue the matter, would get back to it, with his advisers, and eventually a detailed design figure would be arrived at for a s 34A agreement – and that the figure ultimately arrived at would be substantially less than the figure of 'in the order of $2.5 million'. It had no reason to anticipate as a reasonable possibility anything like what in fact occurred – namely that Mr Neal and his solicitor would promptly, before the figure was refined down in the ordinary way by further investigation, inform Mr Neal's bank (of which it had no knowledge let alone that it was on the point of putting in a liquidator) that, in effect, the cost to connect the water was firmly the figure stated in the letter and that unless that was paid the water could not be connected to the proposed subdivision. Mr Neal was, in fact, under extreme pressure from his bank to present to it a decision of the Board, duly documented, as to the connection of water to the proposed subdivision. He was in dire financial trouble, that trouble having been brought about or at least exacerbated by him having borrowed in Swiss francs. It is admitted for him in this trial of separate issues that he was insolvent as early as 30 June 1985 – months before his somewhat grandiose Confidential Ministerial Submission to Mr Carr, and that thereafter he remained insolvent. So desperate was Mr Neal's financial position in respect of his commitments to the bank that it may be thought understandable that he would rush around to his bank to give it a copy of the letter which contained good news as well as bad news. The good news was that at last there was a firm decision that the Water Board would be prepared to connect the water. The subdivision could go ahead. The bad news was that the connection cost, as stated in the letter, was high. It is less understandable why Mr Neal did not at the same time furnish to the bank written advice from his experts as to what might be

> expected in ordinary procedures of the Board – namely that by the time the final figure was arrived at for a section 34A agreement the cost was likely to be much less."

117 His Honour considered the case "to be too clear to warrant analysis of the relevant authorities as to duty of care". He concluded:

> "The relationship between the parties simply was not such that a reasonable body in the position of the defendant would have seen any relevant risk of purely economic damage to the plaintiffs if the figure was in excess of an order of cost estimate of that type arrived at by the exercise of reasonable care and the exercise of reasonable skill appropriate for such an estimate."

118 For these reasons Allen J held that the appellant had failed to make out a case of negligence on the part of the respondent. In doing so, his Honour attributed to the handwritten calculations of Mr McLachlan, that we have set out, a meaning which, in our opinion, they do not bear. It is unnecessary for us to say why that attribution is unconvincing, particularly in light of the respondent's abstention from calling any witnesses to explain them, because the Court of Appeal unanimously took a different view of the respondent's conduct, holding it to have been negligent. There is no notice of contention by the respondent in this Court to the effect, nor any cross-appeal asserting that the finding of negligence was erroneous. Nor is it necessary to determine whether the respondent's negligence lay in not appreciating, or giving effect to, the calculations in the memorandum of Mr McLachlan which was available at the meeting of 25 November 1985, or in using an excessive multiplier for a factor of difficulty which Mason P in the Court of Appeal considered to be the case.

The decision of the Court of Appeal

119 The appellant appealed to the Court of Appeal of New South Wales[35]. The unanimous finding of that Court was that the primary judge had erred in holding that the respondent had not been negligent in stating that "[t]he immediate cost to connect Mr Neal's proposed development would be in the order of $2.5 million". Only Fitzgerald JA (dissenting) dealt at length with the issue of negligence. However the majority, who took a different view of the issue of duty of care, agreed with his Honour's analysis and conclusion on the

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35 Mason P, Beazley and Fitzgerald JJA.

former issue. With respect to the latter issue, Mason P (with whom Beazley JA agreed) said this[36]:

> "The present case falls between … extremes. The Board was tendering confidential advice to its Minister on a serious matter with political and financial overtones. The advice affected the specific interests of the Board as well as matters of town planning, hence the draft letter to Mr Carr, then the Minister for Planning and Environment. But the advice also affected the interests of the appellants and this would have been obvious to the Board. Indeed, the draft letter addressed to Mr Carr offered Mr Neal the opportunity to discuss the matter further with the Board's Director of Operations and Customer Relations.
>
> The issue for the Board was the manner to address the pressing demands of a developer who was also a constituent who had the ear of government. Mr Neal had every right to approach government, knocking at as many doors as he chose, to press his representations. To subdivide for redevelopment he needed rezoning (Mr Carr's portfolio), but a favourable rezoning depended upon the Board providing water supply. This in turn depended upon the developer funding the water supply, because it was a rural area and it was not the Board's policy to spend its own money in these areas. It was obvious that Mr Neal was not to be palmed off, and that a considered response would have to be given sooner or later. How that response would be dressed up would depend upon what the ultimate decision was going to be. The evidence discloses a practice or policy of the Board in 1985 to provide water supply to rural residential areas 'provided the works can be funded by developers so as not to affect the Urban Development Program, present or future' (see the letters to Messrs Carr and Watkins). This was not a legal obligation, but a practice or policy capable of application (or modification) by the Board, subject of course to Ministerial direction (cf Metropolitan Water, Sewerage and Drainage Act 1924, s 7)."

120 After analysing the authorities, Mason P said[37]:

> "Nothing in the memorandum or letter indicated that the Board was or ought to have been conscious of the fact that some decision was about to be taken by Mr Neal in reliance upon the information as to costing likely to be conveyed to the appellants through the Crosio-Carr letter. It

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36 *Tepko Pty Ltd v Water Board* (1999) Aust Torts Reports ¶81-525 at 66,318 [9]-[10].

37 (1999) Aust Torts Reports ¶81-525 at 66,323 [22]-[23].

certainly cannot be said that that letter evidenced an intention on the Board's part to induce a particular response by the appellants, or even that the information would be made available to the appellants in a context where a particular response by the appellants was in contemplation. Rather, the Board was saying in effect that it was 'over to Mr Carr' for a decision to be made, taking into account the information provided in the letter.

These facts did not attract the principles as to duty of care for negligent advice as I have endeavoured to summarise them."

121 After making the finding of negligence with which the other members of the Court of Appeal agreed, Fitzgerald JA turned to the question whether the respondent owed a duty of care to the appellant and whether it had breached that duty. He said[38]:

"While the appellants could not reasonably rely on the Board's 'order of costs estimate' as an accurate indication of the actual final cost which would be involved if their development proceeded, conversely the Board could not reasonably expect the appellants not to rely upon the amount which it estimated for what it was; ie, an 'order of costs' estimate. The trial judge's findings established that it was ordinary practice for an 'order of costs estimate' to be used as the basis for a decision concerning '… whether it was worth pursuing [a] matter ...' to the next level of investigation of the likely cost. An 'order of costs' estimate provided an upper limit as a starting point for the appellants' decision whether or not to proceed with their proposed development, and was obviously considered significant enough for the Board to include the amount in its advice to its Minister and its draft of the letter to be sent from Mrs Crosio to Mr Carr, who was expected to communicate it to the appellants. The Board's 'order of costs estimate' was, to its knowledge, important to the appellants, who, as the Board knew, would reasonably have expected the 'order of costs estimate' to have been prepared with reasonable care within the parameters of the Board's usual approach to such estimates. The Board was in a unique position to estimate the 'order of costs' of supplying water to the appellants' land, and the appellant[s] had been pressing the Board to inform them of the cost for about three years.

Not only was the Board's 'order of costs estimate' intended to influence the appellants' decision whether or not to proceed with the development of their land, it was apparent to the Board that the development was intended to profit the appellants, and a decision by them

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38 (1999) Aust Torts Reports ¶81-525 at 66,337 [74]-[75].

not to proceed to the next stage because the 'order of costs estimate' was too high would lose them a specific financial opportunity."

122 The conclusion of Fitzgerald JA that the appeal should be allowed was expressed in this way[39]:

> "In my opinion, the circumstances discussed above imposed a duty on the Board to exercise reasonable care in relation to the Board's 'order of costs estimate' for the appellants. As noted above, I am satisfied that the Board had no reasonable basis for its 'order of costs' estimate. I am unable to accept that the Board had no legal responsibility whatever to the Board, even not to act recklessly."

The appeal to this Court

123 The only matter which this Court has to decide is whether the majority in the Court of Appeal erred in deciding that the respondent owed no duty of care to the appellant.

The statutory provisions governing the authority

124 We agree with the observation in the joint reasons to the effect that the respondent moved "within a legislative regime with which the common law interacts"[40]. The dealings and relationship between the parties have to be understood in the context of the Act[41] by which the respondent was established and under which it operated.

125 Section 7(2) of the Act provided as follows:

> "The board shall, in the exercise and discharge of its powers, authorities, duties and functions, be subject to the direction and control of the Minister."

126 Section 23 empowered the respondent to do what bodies corporate generally may do. Sections 25B to 25D made provision for the appointment of a General Manager and Deputy General Manager and stated what their functions and powers were to be, subject to the directions of the respondent.

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39 (1999) Aust Torts Reports ¶81-525 at 66,338 [78].

40 Joint reasons at [8].

41 The Act, s 6A.

127 Section 30(1) stated the duties of the respondent by charging the respondent with:

> "(a) the conservation, preservation, and distribution of water for domestic and other uses;
>
> (b) the provision of reticulation and other means for the discharge of sewage and its treatment and disposal;
>
> (c) the construction, control, and management of such stormwater channels as are from time to time assigned to it by the Governor or are vested in it by this Act;
>
> (d) the administration and management of all properties from time to time vested in it;
>
> (e) the operation and maintenance, and where necessary the improvement and extension of all works from time to time vested in it;
>
> (f) the construction of any new, additional, or supplementary works of water supply, sewerage, or drainage;
>
> (g) the extension of its services to areas or districts not served with its mains or sewers or drains;
>
> (h) the provision of such offices, stores, warehouses, depots, and other accommodation as may be requisite;
>
> (i) the exercise of the duties conferred and imposed upon it by this Act."

128 Relevantly, s 31 provided as follows:

> "The board may construct –
>
> (a) such storage dams, weirs, tunnels, aqueducts, pipe lines, canals, reservoirs, filters, and water treatment works, pumping stations, gravitation, rising and reticulation mains, and distributory works, and other works as in its opinion may be required for water supply purposes;
>
> (b) such main and reticulating sewers, pumping stations, mains, works for treatment and purification of sewage, outfall works, ventilating shafts, and other works as in its opinion may be required for sewerage purposes;

(c) channels and branch channels, cuttings, drains, pipes, and other works as in its opinion may be required for stormwater drainage purposes."

129 Section 34 authorized the respondent to enter into contracts for, among other things, the construction of works. Most of s 34A should be set out:

"Private contracts for construction of water and sewer mains.

(1) *The board may enter into an agreement under this section with the owner of any land within the area of operations of the board*, or with any person authorised to enter into an agreement on his behalf, *providing for the construction of either a water or sewer main*, or both, and such ancillary works as may be specified in the agreement, *to serve the land of such owner specified in the agreement, either alone or together with other lands.*

Any main or ancillary works constructed pursuant to any such agreement shall be a main and ancillary works of the board.

(2) The board shall not enter into an agreement under this section for the construction of a water or sewer main, or both, and any necessary ancillary works, unless the Director of Environment and Planning has issued to it a certificate in writing that in the opinion of the Director of Environment and Planning the land of the owner referred to in the proposed agreement should not be subdivided unless the water or sewer main, or both, as the case may be, and any necessary ancillary works, is or are constructed to serve such land or any part thereof, either alone or together with other lands.

(3) Any agreement under this section may make provision for –

(a) *the payment to the board by the owner of such land*, or person so authorised, *of the whole of the cost of the construction of the main* or mains and ancillary works *or such part thereof as the board considers reasonable to be paid in respect of such land*, having regard to the benefit of such main or mains and works to the land of such owner specified in the agreement and to any other lands that will be, in the opinion of the board, capable of being served by such main or mains and works;

(b) the amount to be advanced to the board by such owner or person towards any remaining part of the cost of construction of such main or mains and works;

(c) the repayment to such owner or person by the board of the whole, or such part as may be agreed upon, of the advance referred to in paragraph (b) …" (emphasis added)

130 Section 34B relevantly provided as follows:

"(1) Where an application for approval to subdivide any land within, or partly within, the area of operations of the board has been approved, or approved subject to conditions, under the Local Government Act, 1919, the applicant to whom the approval was given may –

(a) lodge a copy of the plan of subdivision with the board; and

(b) apply to the board for a certificate under this section certifying that the applicant has complied with the requirements, relating to the plan of subdivision, of this section.

(2) Where a copy of any plan of subdivision is lodged with, and an application is made to, the board in accordance with the provisions of subsection (1), *the board may* –

(a) if it does not propose to serve upon the applicant a notice under paragraph (b) or (c), issue to the applicant a certificate that the applicant has complied with the requirements, relating to the plan of subdivision, of this section;

(b) where any main constructed, or to be constructed, pursuant to an agreement under section 34A is, or after its construction will be, available to be connected to and of adequate capacity to serve such land or any part thereof (whether with or without the construction of any additional mains), and the application is made within fifteen years after the date of the agreement, *serve a notice upon the applicant requiring him to do such one or more of the following things* as is or are specified in the notice, that is to say –

(i) *to pay to the board such amount, specified in the notice, as is assessed by the board as being a reasonable proportion of the cost* of the construction of the main and any ancillary works constructed, or to be constructed, pursuant to the agreement, *having regard to the benefit of such main and works to the land referred to in the application*;

(ii) *to enter into an agreement with the board under section 34A providing for the construction of any additional main or works which is or are capable of serving only such land*;

(iii) to enter into an agreement with the board under section 34A providing for the construction of any additional main or works which is or are capable of serving other lands as well as the land referred to in the application; or

(c) where the land is not land in respect of which the board is entitled to serve a notice under paragraph (b), serve a notice upon the applicant requiring him to enter into an agreement under section 34A providing for the construction of a water or sewer main, or both, and any necessary ancillary works.

…

(5) The board shall not serve a notice under subsection (2)(b)(ii) or (iii), or under subsection (2)(c), requiring the applicant for a certificate under this section to enter into an agreement under section 34A for the construction of a water or sewer main, or both, or any ancillary works, to serve any land unless –

(a) it has referred to the Director of Environment and Planning a copy of the plan of subdivision in relation to which the applicant has applied for a certificate; and

(b) the Director of Environment and Planning has issued to the board a certificate under section 34A(2) in respect of the construction of the water or sewer main, or both, as the case may be, and ancillary works.

(5A) The Director of Environment and Planning shall, within 20 days after receiving a copy of a plan of subdivision referred by the board, either –

(a) inform the board that a certificate under section 34A(2) is not proposed to be issued in relation to the land comprised in the plan; or

(b) issue such a certificate in respect of the construction of a water or sewer main, or both, and any necessary ancillary works, to serve the land or any part thereof, either alone or together with other lands." (emphasis added)

131 Section 37 is an important provision. Its sweeping language makes it clear that the respondent not only had the exclusive control of the supply of water for the area, but also that the respondent would be the repository of, and have access to, all relevant information about the need for, and supply of, water and the costs associated with these. It provided as follows:

> "Subject to the provisions of this Act the board shall be the *sole* authority for the conduct of water supply and sewerage services, and the construction, control, and management of stormwater channels, within its area of operations." (emphasis added)

Section 47 imposed upon the respondent an obligation of equitable distribution of water for domestic purposes.

The authority would know of a developer's reliance on its advice

132 From the facts that were uncontradicted, and the statutory context in which the respondent operated, these conclusions follow.

133 Developers would naturally look to the respondent for information with respect to the possibility, and cost, of the supply of water to land that developers might wish to subdivide. These would be matters of intense economic interest to the developers, as the respondent would well know. As a matter of experience and general knowledge, they would often be determinative of whether a developer would go ahead to develop a property. They would equally be relevant to some further matters: whether a developer, at an embryonic stage of a proposal, would consider it worthwhile, to incur the inconvenience and expense of making application for all necessary planning approvals, and, the arrangements that a developer might have or might wish to make with financiers for the furtherance of any proposal to develop. This is so because without having as a starting point at least, an estimate of what the order of that cost might be, a developer would not wish to, or could not, enter into a contract pursuant to s 34A(1). Additionally, it would not wish to make the application for subdivision to which s 34B(1) refers, or would not wish to be placed in the position of being obliged to respond to a notice demanding the cost of construction pursuant to s 34B(2)(b)(i), or requiring the developer to enter into an agreement with the respondent for the construction of works pursuant to s 34B(2)(b)(ii).

134 The existence of the "policy" set out in the memorandum of January 1974 does not avail the respondent. The statutory regime under which the respondent operated, and to which we have referred, means that at some stage the respondent would necessarily have to provide costings of various kinds to a developer. How otherwise could a developer ascertain what the respondent required and what costs would be incurred in providing it? Simply because the respondent might provide the information to the relevant authority directly did not mean that the

latter would not, in due course, pass it on to the developer. Indeed that would seem to be a likely and predictable consequence.

135 The "policy" was stated some 11 years before the events with which this appeal is concerned. It was "policy" only. Unlike statute or regulation, it was not legally binding on anyone. It is not clear that it was policy approved and adopted by resolution of the respondent and currently, regularly applied. There was no clear evidence of the extent to which the policy was departed from in practice. It certainly was in this case, and, it may be assumed, might also have been in other cases in which Ministers or others had applied pressure upon the respondent. In regard to any of these matters there is no reason to draw inferences in favour of the respondent as it chose not to call evidence about them, or about anything else.

136 In any event, in the end, these matters are beside the point because in this case the respondent chose, albeit reluctantly, to provide an estimate to the appellant. Obstinacy or reluctance could not justify negligence, or negate a duty of care, if it exists, as, in our opinion, it certainly did once the estimate was given.

137 The respondent must have known that the appellant trusted the respondent to give him, if not a precise sum or a contract price, for the works necessary for the supply of water to the appellant's land in accordance with the respondent's obligations generally under the Act, at least an order of costs estimate that was not negligently calculated or otherwise carelessly provided. The respondent knew, in fact, one of the purposes for which the appellant sought the information, namely that it would be used in making decisions about whether to seek to develop the land and how to go about that development. The respondent also knew that this information was not being sought as a matter of mere curiosity, and would be likely to be put to practical use. As the trial judge said, the "ball-park figure" would at least form the basis for a decision by the appellant whether to proceed with the development.

The authority had a superior capacity to provide reliable advice

138 The respondent had a special capacity and opportunity to provide the information sought. It had, to use the language employed by Kitto J in *Mutual Life & Citizens' Assurance Co Ltd v Evatt* ("*MLC*"), "special means … of providing reliable guidance"[42]. It was information about a serious matter and was of a business nature. It was information of a superior order to any that the appellant could obtain elsewhere, however well informed he might have been by his professional consultants and others.

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42 (1968) 122 CLR 556 at 589.

139 The matters to which we have referred squarely meet the criteria for enlivening a duty of care in negligence referred to by Barwick CJ in *MLC*[43]:

> "It seems to me, therefore, that whenever a person gives information or advice to another, whether that information is actively sought or merely accepted by that other upon a serious matter, and particularly a matter of business, and the relationship of the parties arising out of the circumstances is such that on the one hand the speaker realizes or ought to realize that he is being trusted, particularly if he is thought by the other to have, or to have particular access to, information or to have a capacity or opportunity to exercise judgment or both as to the matter in hand, to give the best of his information or advice as a basis for action on the part of the other party and it is reasonable in the circumstances for the other party to seek or accept and in either case to act upon that information and advice the speaker, choosing to give the information or advice in such circumstances, comes under a duty of care both to utilize with reasonable care the information and sources of information at his disposal and to employ with reasonable care what capacity he has for judgment in relation to the matter and to exercise reasonable care in the expression of what he is prepared to convey by way of information or advice. If he chooses not to speak, he is not merely because of the relationship bound to make any inquiries. But it does mean that, if he is being trusted because of the sources of information at his disposal, and he speaks on the footing of the information which might then be available to him, he will be in breach of his duty if he does not utilize these sources of information before speaking and if his communication is incorrect. But, it should be emphasized, the obligation of the speaker is no more than to use reasonable care in the circumstances. He is not in breach merely because his communicated information is incorrect or his proffered advice erroneous. Speaking in the relationship whose elements I have indicated does not mean that he warrants the accuracy of his utterance. He is merely required to exercise reasonable care in preparing himself to speak in conveying information, in exercise of his judgment and in expressing the information or advice which he chooses to convey."

140 Kitto J, who was in the majority in *MLC* expressed a slightly more qualified view than Barwick CJ. His Honour said[44]:

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43 (1968) 122 CLR 556 at 572-573.

44 (1968) 122 CLR 556 at 584-585.

"Whether the relevant sphere of law be that of implied warranty, of responsibility in equity, or of liability in tort for want of care, the question whether a person who sought the information or advice was entitled as a matter of law to have care exercised by the person from whom he sought it is thus to be decided by considering whether the circumstances made it reasonable for the inquirer to suppose that the other was replying with an intention of accepting the full responsibility that is ordinarily appropriate to a business transaction. Just as words which would otherwise create a contract will be held to produce no legal results if accompanied by an expression of intention to keep to the field of informal and merely friendly arrangement, as in *Rose and Frank Co v J R Crompton & Bros Ltd*[45], so, as the actual decision in the *Hedley Byrne Case*[46] shows, words giving information or advice accompanied by a disclaimer of responsibility which shows a like intention will be held not to have the legal consequences which they would have had if uttered in other circumstances. This is the extreme case of the class where the circumstances show that the person to whom information or advice is given could not reasonably have relied upon a belief that the other was dealing with him on a basis where questions of legal responsibility are relevant. Less extreme illustrations may be given also. Just as words which otherwise would create a contract (because the speaker or writer receives a quid pro quo) are held not to do so if the parties are dealing with one another on a plane where there is really no intention of altering legal relations – as in the case of purely domestic arrangements (see *Balfour v Balfour*[47]; *Cohen v Cohen*[48]; *Gage v King*[49]; *In re Bishop; National Provincial Bank v Bishop*[50]), or of casual discussions (see *Booker v Palmer*[51]), or of many kinds of arrangements with respect to government assistance (see *Administration of Papua and New Guinea v Leahy*[52]) – so words giving information or advice without any quid pro

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45 [1925] AC 445.

46 [1964] AC 465.

47 [1919] 2 KB 571.

48 (1929) 42 CLR 91.

49 [1961] 1 QB 188.

50 [1965] Ch 450.

51 [1942] 2 All ER 674.

52 (1961) 105 CLR 6.

> quo will be held to entail no legal responsibility for carelessness if the correct conclusion from the circumstances be that the person who acted upon them could not reasonably have understood them as uttered, as one might say, in the way of business, or (to express it more generally) as uttered on a plane to which legal liability naturally belongs."

141 In a subsequent passage, Kitto J explained what he meant by the words "ordinarily appropriate to a business transaction". He said[53]:

> "If we assume, as we must for the present purposes, that all the allegations in the first count are true the plaintiff's request for information and advice was a request to use the special means which the defendant possessed for the purpose of providing reliable guidance for the plaintiff in relation to his existing and contemplated investments in H G Palmer (Consolidated) Ltd. It faced the defendant with a choice between answering with as serious a sense of responsibility as a contractual relationship would have required, answering with a warning that responsibility had not been accepted, and refusing to answer at all (cf per Lord Reid[54]). It seems to me that if all the facts here alleged are proved it will necessarily follow that the plaintiff was justified in inferring, from the defendant's action in giving him information and advice on the matter he put to it, that the defendant was choosing the first of the three courses above mentioned."

142 The other member of the majority in *MLC*, Menzies J[55], was content to adopt what was said by their Lordships in *Hedley Byrne & Co Ltd v Heller & Partners Ltd*[56]:

> "It seems to me that every speech in the House of Lords in *Hedley Byrne & Co Ltd v Heller & Partners Ltd*[57] supports this conclusion, for all emphasize that a duty to use care in giving advice arises when, in relation to a matter of business concern, one person makes known to another that he is relying upon the other's advice on a matter within the special competence of that other and advice is then given without disclaimer of responsibility."

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53 (1968) 122 CLR 556 at 589.

54 *Hedley Byrne & Co Ltd v Heller & Partners Ltd* [1964] AC 465 at 486.

55 (1968) 122 CLR 556 at 617.

56 [1964] AC 465.

57 [1964] AC 465.

The advice was provided for serious business purposes

143 There can be no doubt that, in the case before this Court, the information in question was of a business nature, and of serious concern to the appellant.

144 The case is therefore one in which the reasoning of the majority in the High Court in *MLC* can, and should, be applied. In this Court, subsequent authority has affirmed the force and effect of what the majority held in *MLC*, despite the fact that on appeal to the Privy Council a somewhat narrower view was adopted. Thus, Mason and Aickin JJ in *Shaddock & Associates Pty Ltd v Parramatta City Council [No 1]*[58] accepted the statement of principle of Barwick CJ that we have quoted. Mason J said[59]:

> "I prefer the wider view to that expressed by the majority of the Privy Council in the *MLC Case*. I consider that this Court should now adopt Barwick CJ's statement of the conditions which give rise to a duty of care in the provision of advice or information. It will be noted that his Honour specifically equated the provision of information with the giving of advice, a conclusion which conformed to his Honour's view that liability is not confined to those who carry on a profession or business."

And later Mason J said further[60]:

> "[T]he existence of a duty of care does not depend upon knowledge on the part of the speaker of the precise use to which the information will be put. It is enough if he knows, or ought to know, that the inquirer is requesting it for a serious purpose, that he proposes to act upon it and that he may suffer loss if it proves to be inaccurate."

145 San Sebastian Pty Ltd v The Minister[61], to which the majority in the Court of Appeal referred, is readily distinguishable. The representation or information relied on in that case was contained in a document setting out a planning scheme published to the community at large. It was published pursuant to a statute, without any assurance of continuous and certain application, and as a general guide only, to future development. In the joint reasons in that appeal[62], this Court

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58 (1981) 150 CLR 225 at 251, 256.

59 (1981) 150 CLR 225 at 251.

60 (1981) 150 CLR 225 at 253.

61 (1986) 162 CLR 340.

62 (1986) 162 CLR 340 at 355 per Gibbs CJ, Mason, Wilson and Dawson JJ.

made it clear that the case was one in which there was no special relationship between the parties, and that the misstatement (if any) was directed not at, or to, a particular person but to a class of persons. In such a situation, a court might more readily infer an absence of reliance and relevant proximity, and hence no duty of care.

The specificity of the developer's reliance

146 The respondent submitted that in this case, one reason why a duty of care did not arise was that the respondent could not be expected to know that the appellant would use the information by informing his financier of it. In other words, that foreseeability as a necessary element to ground a duty of care was absent. The submission is factually flawed[63]. But even if it were not, for the reason stated by Mason J in *Shaddock*, it would be sufficient to establish a duty of care if the defendant knows, or ought to know, that the information is required for a serious purpose, and is likely to be acted upon. In such a case, Mason J said[64]:

> "[T]he existence of a duty of care does not depend upon knowledge on the part of the speaker of the precise use to which the information will be put. It is enough if he knows, or ought to know, that the inquirer is requesting it for a serious purpose, that he proposes to act upon it and that he may suffer loss if it proves to be inaccurate."

147 That the respondent may not have been aware of just how parlous the appellant's financial state was provides no basis at all for a holding that a duty of care did not exist. Precisely what the respondent may, or should, have known in this regard, and what it should have foreseen so far as communications by the appellant with his financier are concerned, have a relevance to causation and damages. But a lack of precise knowledge or foresight in these respects provide no answer to the appellant's submission that a duty of care existed in these circumstances where the respondent was aware of the appellant's anxiety about his financial position, the importance to the appellant of the proposed development and the likely cost of it, and the certainty that the appellant would use the information provided for a business purpose.

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63 The internal memorandum referred in terms to the fact that Mr Neal was in "financial trouble".

64 (1981) 150 CLR 225 at 253.

148 Mason P in the Court of Appeal in this case applied[65] what was said by two Justices of this Court (Toohey and Gaudron JJ) in *Esanda Finance Corporation Ltd v Peat Marwick Hungerfords*[66] ("*Esanda*"):

> "[O]rdinary principles require that the relationship does not arise unless it is reasonable for the recipient to act on [the] information or advice without further inquiry. Similarly, ordinary principles require that it be reasonable for the recipient to act upon it for the purpose for which it is used."

149 Earlier Toohey and Gaudron JJ had said[67]:

> "However, commonsense requires the conclusion that a special relationship of proximity marked either by reliance or by the assumption of responsibility does not arise unless the person providing the information or advice has some special expertise or knowledge, or some special means of acquiring information which is not available to the recipient."

150 Much of what was said in *San Sebastian* and *Esanda* is not really in point here. *Esanda*, as with *San Sebastian*, was concerned with a representation made, in effect again, to the whole community. It raised the spectre of a virtually unascertainable number of incalculable claims. By way of contrast, the present case is concerned with the position of one specific representee only, and a representation of particular financial interest and relevance to him alone.

151 We do not consider, therefore, that anything that was said in *Esanda*[68], including their Honours' approval there of *R Lowe Lippmann Figdor & Franck v AGC (Advances) Ltd*[69], is decisive of this appeal. This is a case that does not involve the making of a representation to a class of people or to the public at large. It involves a specific representation to a particular recipient, of the kind which was directly considered in *MLC*[70] and in *Shaddock*[71].

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65 (1999) Aust Torts Reports ¶81-525 at 66,321 [11].

66 (1997) 188 CLR 241 at 265.

67 (1997) 188 CLR 241 at 265.

68 (1997) 188 CLR 241.

69 [1992] 2 VR 671.

70 (1968) 122 CLR 556 at 572-573.

71 (1981) 150 CLR 225 at 251, 256.

Differentiating issues of duty from causation and damages

152 The passages in all the cases referred to, do, however, reveal how the duty of care may involve, and intersect with, issues relevant to causation and damages. Although, therefore, to avoid duplication and expense it will usually be desirable that all of the issues be tried together, it is still important to appreciate that foreseeability, proximity and the possibility or likelihood of intervening cause may not have an identical relevance and significance to all of these issues.

153 The primary judge formed the view that the appellant could not succeed because the appellant knew that the estimate was a preliminary estimate only, and the respondent:

> "… had no reason to anticipate as a reasonable possibility anything like what in fact occurred – namely that Mr Neal and his solicitor would promptly, before the figure was refined down in the ordinary way by further investigation, inform Mr Neal's bank … that, in effect, the cost to connect the water was firmly the figure stated in the letter and that unless that was paid the water could not be connected to the proposed subdivision".

154 As we have already suggested, whether that was so, and what the consequences of it would be, might possibly be relevant to questions of causation and damages. Assuming that to be the case, however, does not foreclose the issue of duty of care. The estimate provided by the respondent was at least a starting point for "any refining down" as Allen J put it. The extent to which that could, or would be possible, could only be a matter of speculation so far as the appellant was concerned. This was because of the respondent's effective monopoly of the information necessary to enable a true costing to be made, and because, as the Act recognizes, it is for the respondent to fix and charge the cost. It is doubtful whether there were any means by which a developer could compel the respondent to reduce the cost, that is, the price that it intended to charge. On any view, however, a developer's bargaining position would not be a strong one. And, in any event it is sufficient that the respondent must have known that the appellant wanted the information for a serious purpose, the organization of his business affairs.

155 What Fitzgerald JA said in the Court of Appeal as to this issue is correct. It was apparent to the respondent that a decision by the appellant "not to proceed to the next stage because the 'order of costs estimate' was too high would lose [him] a specific financial opportunity"[72]. It is unnecessary to decide whether that

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72 (1999) Aust Torts Reports ¶81-525 at 66,337 [75].

comment might be an understatement in two respects because of their possible relevance to issues that have not yet been tried. The two respects are whether, as Fitzgerald JA found in the same passage, the respondent "intended to influence the appellants' decision whether or not to proceed"[73] and whether the respondent's negligence may have cost the appellant more than a specific financial opportunity[74].

The application of common knowledge and experience

156 What emerges from the evidence is really only confirmatory of common knowledge, and experience of dealings with planning authorities and state monopolies providing essential commodities and services of which the respondent is one. Their position in relation to developers is dominant. Their words and decisions are usually final. At least this is so without recourse to expensive, and sometimes prolonged and uncertain, legal proceedings. A corporation such as the respondent would be all too well aware of the position of authority and ascendancy which, as a matter of practicality and common experience, it enjoyed. Equally, it would inevitably be aware of the day to day anxieties and difficulties of developers, examples of which are the necessity to deal with and obtain approvals from other statutory and planning authorities; the opportunity cost of delays; and, the likely need for assessments of a project, not only to be able to decide whether to undertake it, but also to inform financiers of the current financial situation in respect of it.

157 With all respect to those of a different view, it is inconceivable that the respondent could believe that the appellant would not rely on what he was told by the respondent in furthering his business interests. If the appellant could not rely upon the respondent, upon whom, it might be asked, could he rely for an authoritative and reasonably well-informed estimate of the order of costs? Why should he not rely on the estimate in fact provided, expressed as it was in relatively unqualified terms? These are considerations to be put against those upon which the primary judge relied and also those to which Mason P referred in the Court of Appeal, that the information was provided for the Minister and Mr Carr's purposes and that the respondent had made it plain that it was unwilling to cooperate with the appellant in November 1985.

158 The respondent in its submissions pointed to events which occurred shortly after the information was given, in particular what occurred after the meeting of 25 November 1985, the availability of the reduced costing by January

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73 (1999) Aust Torts Reports ¶81-525 at 66,337 [75].

74 (1999) Aust Torts Reports ¶81-525 at 66,337 [75].

1986, and to the primary judge's findings, adverse to the appellant on the first of these. These may indeed be relevant to resolving the outstanding issues of causation and damages. However, they have nothing to say of relevance concerning the respondent's duty of care. Nor, for the same reasons, would it be necessary to have regard to the letter of the appellant's surveyor, Mr Rhodes, on 26 November 1985 which was also treated by Fitzgerald JA as evidentiary, despite the fact that its tender had been withdrawn by the respondent at the trial.

Conclusion: the authority owed a duty of care

159 Whilst it is true that the respondent owed no express statutory obligations, the duties owed will extend to those that can be inferred from the respondent's statutory functions, from its status as a virtual monopolist and its powers over activities and the actual provision of information vital to other persons dealing with it, such as the appellant. Whatever the respondent's statutory functions and powers or in whatever way it might or might not prefer to conduct its activities, once it provided an estimate to a person or body such as the appellant, it was certainly not entitled to do that carelessly and with a complete indifference to the impact that its conduct might have upon the appellant's business and finances. Carelessly inflated "ball-park" figures which presented an inaccurate and distorted impression placed such figures in an entirely different "ball park" from the one in which the appellant believed himself to be playing.

160 As to the letter prepared for the Minister, it is impossible to believe that the appellant would have kept such a letter to himself and his companies. Self-evidently, its purpose contemplated that it would be provided to the appellant's advisers and financiers. That the appellant might have access to other advice did not relieve the respondent of its own duty to provide a careful and rational estimate – not one inflated knowingly or carelessly.

161 To the extent that there was a significant over-estimate it obviously damaged the appellant's chances of retaining the interest and support of his financiers. And, as the respondent knew, the appellant's financial position at the time he sought and obtained its estimate, was fragile. Whether "fire sale" proportions had been reached was not the point. It is surely not necessary for a citizen or corporation in Australia, in order to attract a legal duty of care on the part of public bodies or their officials, to be at a point of desperation, particularly when those officials provide, on request, information that they know, or ought to know, is very important for the business purposes of the person requesting the information. Furthermore, that the estimate given by the respondent to the appellant was seriously careless must go to two issues, both *breach* and *duty of care*.

162 The respondent's status as a public body is also relevant, as one that would have been once described as an emanation of the Crown. Citizens are entitled to

hold expectations of such a body of honesty, accuracy and care in the provision of estimates of the type offered to the appellant for a serious business purpose. Regrettably, in this case, so far as accuracy and care were concerned, those expectations were not fulfilled.

163 The estimate in this case was not sought by the appellant for social discourse, personal whimsy or academic interest. In circumstances known to the respondent, it was requested in order to further the appellant's serious business enterprise. In our opinion, it is incontrovertible that the respondent's officers would have understood that purpose, given the character of the request and the Minister's intervention with respect to it.

164 For ourselves, we cannot accept that the appellant, conducting the business of development that he did, was embarked on a speculative venture, or indeed, even if he were, that his interests, hopes and expectations could be treated with disdain by the respondent, by providing him with a virtually contemptuously prepared estimate.

165 Investment and development may, on occasions involve the taking of risks but these are the hallmarks of a vibrant society which enjoys economic freedom. They are the means by which economic progress is made and, relevantly to this case, people are housed. Such investment has been a feature of Australian society since settlement. A supply of pure water is a feature of Australian domestic life. Living in houses connected to a water supply is not unusual in Australia. Ordinarily, it will initially come about by reason of expenditure by, and at the cost of, a developer.

166 In short, the fact that, to some (in our opinion, erroneously) the appellant's venture might be viewed as "speculative" did not put it beyond the protection of the law against seriously careless conduct by public officials. The tort of negligence fulfils a dual purpose. It compensates those that have been wronged according to its requirements. But it also sets, and upholds, standards of careful dealings with others. Valid statutory exemptions apart, public officials are not immune from those standards. Nor are investors, whether they are to be regarded as innovators, called "speculators", outside the protection of the law.

167 It follows that the respondent did owe the appellant a duty of care. The duty was owed because the appellant had to deal with the respondent to obtain the information that the appellant needed. The respondent had a monopoly on the information. The dealings between the appellant and the respondent related to a serious matter of business for the appellant. In due course, the appellant was likely to be in a close business relationship with the respondent, as guarantor of, or the person directly responsible for, the cost of the supply of water to the land if the subdivision were to proceed. The appellant trusted the respondent to make the estimate. The respondent knew, or ought to have known, all of the matters to

which we have referred. The respondent, in fact, made an estimate and presented it to the appellant. That the respondent might have been able to decline to do so is not to the point. Once it provided the estimate, in the circumstances proved, it owed a duty of care to do so accurately and carefully.

Trials of issues and undifferentiated documents

168 The appeal should be allowed. However, we should not leave this case without making four comments. Both Mason P[75] and Fitzgerald JA[76] were critical of the course of limiting the issues to be tried that the primary judge adopted. In *Perre v Apand Pty Ltd*[77] attention was drawn to difficulties that can be caused when that course is adopted. In light of the experience in this case, what was there said should be restated with emphasis. The attractions of trials of issues rather than of cases in their totality, are often more chimerical than real. Common experience demonstrates that savings in time and expense are often illusory, particularly when the parties have, as here, had the necessity of making full preparation and the factual matters relevant to one issue are relevant to others, and they all overlap.

169 The second and related comment is this. A party whose whole case is knocked out on a trial of a preliminary or single issue, may suspect, however unjustifiably, that an abbreviated course was adopted and a decision reached in the court's, rather than the parties', interests.

170 Thirdly, there is an additional potential for further appeals to which the course of the trial on separate issues may give rise. Indeed, that could occur here were this appeal to be allowed and a retrial had in which the remaining issues of causation and damages were decided. Single-issue trials should, in our opinion, only be embarked upon when their utility, economy, and fairness to the parties are beyond question.

171 The fourth of our comments is related to evidence compiled, committed to writing and filed in advance of the hearing. Parties frequently, either together or separately, compile "books of documents". Although most of these have the potential to be admitted in evidence, often they are defective in form. Many of them are often irrelevant, or their significance is either not recognized or adverted to during the hearing. Their status, as in the case of the letter written by

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75 (1999) Aust Torts Reports ¶81-525 at 66,317 [5].

76 (1999) Aust Torts Reports ¶81-525 at 66,325 [37].

77 (1999) 198 CLR 180.

Mr Rhodes, can be ambiguous. Discrimination and economy should be exercised by those who prepare cases in which documentary evidence is likely to be extensive and important. Those who conduct such cases should ensure that what is actually in evidence, and its relevance and significance, are clearly identified.

Orders

172 We would allow the appeal with costs. The judgment entered by the Supreme Court of New South Wales (Court of Appeal) should be set aside. In lieu thereof, the following orders and declarations should be made:

1. an order that the name of the respondent be amended to "Ministerial Holding Corporation";

2. a declaration that the respondent was in breach of its duty of care to the appellants in November, 1985 by informing its Minister, for communication to the appellants, that the "immediate cost to connect [the appellants'] proposed development [to the respondent's water supply] would be in the order of $2.5 million" and that the "$2.5 million scheme would be satisfactory only to serve the development proposed by [the appellants]";

3. an order remitting the proceedings to the Supreme Court of New South Wales for the determination by that Court of all remaining issues;

4. an order that the respondent pay the appellants' costs of the proceedings in the Supreme Court of New South Wales (Administrative Law Division) up to and including the date of the judgment of Justice Allen; and

5. an order that the respondent pay the appellants' costs of the proceedings in the Court of Appeal.