Metal Roofing & Cladding Pty Ltd v Eire Pty Ltd [1999] NTSCA 104

PARTIES:	METAL ROOFING & CLADDING PTY LTD v EIRE PTY LTD
TITLE OF COURT:	COURT OF APPEAL OF THE NORTHERN TERRITORY
JURISDICTION:	APPEAL FROM THE SUPREME COURT OF THE NORTHERN TERRITORY EXERCISING TERRITORY JURISDICTION
FILE NO:	AP 16 of 1998 (9802538)
DELIVERED:	7 October 1999
HEARING DATES:	25, 26 March 1999
JUDGMENT OF:	MILDREN, BAILEY & RILEY JJ

CATCHWORDS:

Appeal – contract – pure economic loss – whether contract repudiated
Appeal – contractual performance – loss of profits – damages
Appeal – contract – time of the essence – whether terms and conditions peculiar to specific contract –intention of parties
Appeal – leave to amend defence refused – judicial discretion – prejudice flowing outweigh advantage
Appeal – duty of care owed to a non-contracting party – sufficient proximity to ground special relationship
Appeal – contract – negligent performance – breach
Appeal – extension of time to bring proceedings – material fact identified – judicial discreton exercised – prejudice weighed.

Legislation

1. *Limitation Act* – s44

Cases

1. *Queensland & Anor v J L Holdings Pty Ltd* (1997) 189 CLR 146, referred
2. *House v The King* (1936) 55 CLR 499, referred
3. *Howarth v Adey* (1996) 2 VR 535, applied
4. *Cropper v Smith* (1884) 26 Ch D 701, referred
5. *Bryan v Maloney* (l994-95) 182 CLR 609, applied
6. *Caltex Oil (Australia) Pty Ltd v The Dredge "Willemstad"* (1976) 136 CLR 529, followed
7. *Hill v Van Erp* (1995-1997) 188 CLR 159, discussed
8. *Voli v Inglewood Shire Council* (1963) 110 CLR 74, applied
9. *Perre v Apand Pty Ltd* (1999) HCA 36, mentioned
10. *Sola Optical Australia Pty Ltd v Mills* (1987) 163 CLR 628, followed

REPRESENTATION:

Counsel:

Appellant:	S R Southwood
Respondent:	M D A Maurice QC

Solicitors:

Appellant:	Cridlands
Respondent:	James Noonan

Judgment category classification:	A
Judgment ID Number:	mil99192
Number of pages:	46

IN THE COURT OF APPEAL
OF THE NORTHERN TERRITORY
OF AUSTRALIA

Metal Roofing & Cladding Pty Ltd v Eire Pty Ltd [1999] NTSCA 104

No. AP 16 of 1998 (9802538)

BETWEEN:

METAL ROOFING & CLADDING PTY LTD
(Appellant)

AND:

EIRE PTY LTD
(Respondent)

CORAM: MILDREN, BAILEY & RILEY JJ

REASONS FOR JUDGMENT

(Delivered 7 October 1999)

MILDREN J:

[1] Janet and Michael McElwee are the sole directors and shareholders of Stamen Investments Pty Ltd, (Stamen), Mannin Pty Ltd, (Mannin) and the respondent company, Eire Pty Ltd (Eire). In March 1990, Stamen purchased the land and buildings occupied by the Wayside Inn at Timber Creek in the Northern Territory. The Wayside Inn had a twenty-four hour liquor licence and also sold fuel. The business was acquired and run by Eire. At about the same time, Mr and Mrs McElwee decided to build a supermarket on the land. It was intended that the supermarket would be built by Mannin as soon as possible. Apart from fuel and alcohol, the Wayside Inn sold only

meals, cigarettes and soft drinks. There is a substantial Aboriginal presence in and around Timber Creek. Mr and Mrs McElwee considered that a supermarket would be profitable. Their plan was to build the supermarket in about three months, and to have it open for business by 1 November 1990, before the wet season began.

[2] Plans were prepared and in June 1990 quotes were obtained for the various sections of the proposed works. A significant component of the work was the metal roof and cladding for the building. The appellant is a well-known national supplier of this type of material. In June 1990, the appellant was supplied with the plans and Mr McElwee spoke to the manger of the appellant's premises at Palmerston, one John Michel. Mr McElwee told Mr Michel that the material was for the building of a supermarket at Timber Creek, that he wanted the material as soon as possible, and that the appellant's ability to deliver the materials promptly would be an important factor in deciding whether to give the appellant the contract. Mr Michel said that he would get back to Mr McElwee.

[3] On 25 June 1990, the appellant provided a written quote addressed to Mannin for the supply of the required materials which was subsequently superseded by an amended quote provided on 29 June 1990. Mr McElwee told Mr Michel that the quote was acceptable and that he required delivery by the end of July. He told Mr Michel that Mrs McElwee would be coming in to pre-pay the amount of the quote, which she subsequently did, and at which time an invoice was raised, addressed to Mannin. The learned trial

judge found that the understanding between Mr McElwee and Mr Michel was that the materials would be ready for transporting to Timber Creek by the end of July 1990, or within a reasonable time from the order, which his Honour fixed at five weeks. His Honour also found that time was of the essence of the contract.

[4] The materials were not delivered on time, and on a number of occasions in late July and during August, Mr McElwee telephoned Mr Michel who promised delivery shortly. Some of the materials were delivered during the third week of September. Mr McElwee then telephoned the appellant's new manager, Mr Muir, who said that the balance would be ready for delivery in a week. This was followed by a number of telephone calls and visits to the appellant's premises by Mr or Mrs McElwee or by a Mr Riches, a subcontractor to Mannin, engaged to carry out most of the actual building work. They were fobbed off by assurances that the materials would be coming soon. Some small items were delivered, but not enough to allow the work to proceed further. On 15 November, the solicitor for Mannin, Mr Winter, faxed a letter to the appellant making time the essence of the contract and demanding delivery of the balance of the materials by 5pm on 24 November. This resulted in a visit to Timber Creek by Mr Muir and the dispatch of further materials on the same day. However the delivery was still incomplete, and the appellant wrote to Mr Riches, on 19 November, explaining that further deliveries would be made, some by first available transport, and the rest within fourteen days. After some further items had

been delivered on 29 November, Mannin's solicitor sent a fax on 4 December to the appellant advising that unless the balance of the materials was delivered by 6 December, Mannin would arrange for other suppliers and sue for damages.

[5] On 5 December, Mr Muir advised Mr McElwee that the appellant could not deliver the remaining materials by 5 December, and that Mannin should get them elsewhere. On 7 December Mannin's solicitor faxed a letter to the appellant advising that the balance of the materials had been ordered from another source and that Mannin will be instructing him to sue for damages. The learned trial judge found that the appellant had breached the contract when it had failed to deliver the materials by mid-August, that Mannin did not "repudiate" the contract at that stage, but "treated the contract as being on foot and sought to bring about the belated performance by the appellant of its obligations, but that the contract was "clearly repudiated by Mr Winter's letter dated 7 December", and that this enabled Mannin to recover "such part of the loss actually resulting as was at the time of the contract reasonably foreseeable as liable to result from the breach". It is clear that, despite his Honour's finding that the contract was "repudiated" by Mr Winter's letter dated 7 December, the appellant, through Mr Muir, had indicated on 5 December that the appellant could not perform the contract by the time stipulated in Mr Winter's fax of 4 December, that it was the appellant which had repudiated the contract and that Mannin elected to accept the appellant's repudiation as bringing the contract to an end: so

much seems clear from the finding made by his Honour, particularly the finding that Mannin was entitled to sue for damages, and the award to Mannin in a separate action which was heard at the same time as Eire's action, of the sum of $8,607.63, made up of the cost of procuring the missing items from another source, additional payments due to the delays which Mannin was required to make to Mr Riches, the cost of replacing some sheets of ply which became damaged by rain and additional freight costs.

[6] The action begun by Eire was for damages for negligence, or for false and misleading conduct. Eire pleaded, in its amended statement of claim, that the contract was made between Mannin and the appellant (which it alleged was made by Mannin on behalf of Stamen, the trustee of the "McElwee Family Trust No 2"), that the materials were for the purpose of being used in the construction of a supermarket, that upon completion of the supermarket it was the intention of Stamen and Eire that Eire would lease the supermarket from Stamen and operate the business of a supermarket thereon, and that by entering into the contract and undertaking to supply the materials to Mannin, the appellant owed a duty of care to Eire and to Stamen to procure the delivery of all of the materials by not later than 27 July or alternatively within a reasonable time, so as not to delay the construction of the supermarket; that in breach of its duty of care, the appellant negligently failed to deliver the materials by 27 July 1990 or within a reasonable time, as a result of which Eire sustained damages in the form of lost profits from 1

November 1990 when the supermarket would have opened had the materials been supplied on time, until 1 October 1991 when the supermarket opened for trading. An alternative claim was based on "false and misleading conduct", under s.82 of the *Trade Practices Act* or s.91 of the *Consumer Affairs and Fair Trading Act* "by contracting with Mannin, to the knowledge of the Plaintiffs to delivery (sic) the kit (materials) on or before 27 July 1990". The action was commenced after it was statute barred, and it was necessary for Eire to obtain an extension of time under the *Limitation Act*, which, in the course of his reasons for judgement, his Honour granted.

[7] His Honour considered that a duty of care existed because, had the loss been suffered by Mannin, it would have been reasonable and it would not increase the appellant's burden to allow the claim; the builder Mannin and the operator Eire were "in reality the same person"; the appellant knew that the materials were required to build a supermarket, and therefore economic loss to the proprietor could readily be foreseen to be the consequence of delayed delivery; that the appellant knew that the supermarket, when built, would be conducted by "a particular person in the McElwee interest, as distinct from a mere member of a class"; and that therefore there was a sufficient degree of proximity so as to give rise to a duty of care.

[8] His Honour found that the appellant's "purported performance of the contract was negligent"; "the deliveries were delayed and piecemeal, and there was a failure to inform Mr McElwee of the true position when complaints were made"; and that there was a causal connection between the

"non-compliance with the contract" and the late opening of the supermarket. His Honour accepted that the period of delay caused by the appellant's negligence was from mid-December 1990 to mid April 1991 – namely four months. His Honour awarded damages for loss of profits for this period in the sum of $32,000 plus interest thereon until judgement.

Did the appellant owe a duty of care to Eire?

[9] Counsel for the appellant, Mr Southwood, argued that there was no evidence upon which the learned trial judge could have found that the appellant knew that the respondent intended to operate the supermarket business itself, or for that matter, that anyone in the McElwee interest intended to so operate it. He submitted that the evidence went no further than that an inference could be drawn that the servants of the appellant at some much later stage knew that the supermarket was being built for Mr and Mrs McElwee, although not at the time the contract was being entered into. Mr Maurice Q.C. for the respondent conceded that there was no evidence that the appellant's servants knew who was going to run the supermarket business, but submitted that his Honour was justified in drawing the inference that the appellant, through its servants, knew that the McElwees themselves were to be the owners of the supermarket property at the time of the contract. I consider that Mr Maurice Q.C. is correct; the knowledge (or the means of knowledge) of the appellant sprang from what was disclosed on the plans of the supermarket supplied to Mr Michel in order for the appellant to submit its quote, viz., the words "Proposed Store on Lot 53, Town of Timber Creek,

for Mr and Mrs McElwee." The finding by the learned trial judge that "Metclad knew that the supermarket, when built, would be *conducted by* a particular person in the McElwee interest, as distinct from a mere member of a class" cannot, therefore, be supported. Mr Southwood submits that this is fatal to the respondent's case; Mr Maurice Q.C. submitted that it was a matter of no consequence because the appellant must have foreseen that, if there was to be delay in the construction of the supermarket, it was inevitable that the McElwee interests would suffer economic loss, if for no other reason than that the building materials had been paid for and were earning nothing – not even rent. Mr Maurice Q.C. conceded that if the building were to have been let to someone other than in the McElwee interest, there could be no recovery by that entity for pure economic loss; but, he submitted, it was precisely because the loss was suffered by a company owned and managed by the McElwees, that the loss was recoverable. It was not entirely clear to me whether the submissions of the parties were directed to the question of reasonable foreseeability, or of proximity, or to questions of causation, or to questions of remoteness of damage or to all these questions. Neither side was able to point to any authority directly on point. It will therefore be necessary to consider the leading authorities on pure economic loss with some care.

[10] Another point raised by the appellant is the consideration that, as Mr Maurice Q.C. conceded in argument, the only parties to the contract were Mannin and the appellant. The learned trial judge found that the contract

had been performed negligently; "the deliveries had been piecemeal, and there was a failure to inform Mr McElwee of the true position when complaints were made." Mr Southwood submitted that this was not a true case of negligent performance of a contract such as might give rise to an action for damages in tort, but rather, as I understood his submission, one where the facts showed only that the appellant had breached its contract in that the appellant had failed to comply with the contractual terms as to the time for delivery. In those circumstances, so the argument went, there could be no breach of any duty of care owed to a person not a party to the contract. In support of this contention, Mr Southwood relied upon the decision of Byrne J in *John Holland Construction & Engineering Pty Ltd v Kvaerner R.J. Brown Pty Ltd & Another* (Supreme Court of Victoria, 11/10/96) (1997) B & CL 263.

[11] The law of negligence resulting in pure economic loss has been the subject of some recent developments in the High Court and elsewhere. The usual starting point are the following propositions which are taken from the judgement of Gibbs J (as he then was) in *Caltex Oil (Australia) Pty Ltd v The Dredge "Willemstad"* (1976) 136 CLR 529 at 555:

> 1. As a general rule damages are not recoverable for economic loss which is not consequential upon injury to the plaintiff's person or property.

2. The fact that the loss was foreseeable is not enough to make it recoverable.

3. There are exceptional cases in which the defendant has knowledge or the means of knowledge that the plaintiff individually, and not merely as a member of an unascertained class, will be likely to suffer economic loss as a consequence of the defendant's negligence which gives rise to a duty of care.

[12] The question of whether or not the case is "exceptional" depends upon there being "a relationship of proximity" between the parties which is "special": see *Bryan v Maloney* (1995) 182 CLR 609 at 619 per Mason CJ, Dean and Gaudron JJ; *Esanda Finance Corporation Ltd v Peat Marwick Hungerfords* (1997) 188 CLR 241. In *Pyrenees Shire Council v Day* (1998) 192 CLR 330 at 414, Kirby J expressed the view that "proximity's reign....as a universal identifier of the existence of a duty of care at common law, has come to an end"; but as was said in *Hill v Van Erp* (1997) 188 CLR 159 by Gummow J, the notion of proximity in these cases is "a broad conceptual umbrella beneath which the concerns particular to discrete categories of case can be discussed" (at 237). Similar observations are made by Dawson J (at 177-178). Toohey J said, at 189, that "it is the category of cases with which proximity is concerned, rather than whether a relationship of proximity exists on the facts of a particular case": see also *Burnie Port Authority v*

General Jones Pty Ltd (1994) 179 CLR 520 at 543 per Mason CJ, Deane, Dawson, Toohey and Gaudron JJ.

[13] The initial question is still whether or not the kind of loss suffered by the plaintiff was reasonably foreseeable by the defendant: see *Bryan v Maloney, supra,* at 617. This question seems to have been assumed as having been answered in the affirmative by the leading authorities, which concentrate on the question of proximity. In this case, the kind of loss suffered by the respondent was loss of profits caused by delay in completion of the contract to supply the materials needed to erect the supermarket. Mr Southwood's argument that the failure to establish that the appellant knew who was to run the supermarket business is fatal to the respondent's case, amounts to a submission that in those circumstances the kind of loss suffered by the respondent viz., loss of profits was not reasonably foreseeable. This may be contrasted with the kind of loss suffered by whomever may have been in contemplation as the owner of the building, viz., loss of rent, which clearly must have been reasonably foreseeable, given the respondent's knowledge that the building was to be erected for "the McElwee interest". Along the same or similar lines, Mr Southwood's submission amounts to what Professor Fleming describes as "the unforeseeable plaintiff" (*The Law of Torts,* 8th Edn., p.142). Professor Fleming observes (pp 144-145):

> "We shall later have occasion to see that this limitation of liability to "foreseeable plaintiffs" is nowadays matched by a similar limitation to "foreseeable damage". That the first is expressed in terms of "duty", but the second in terms of "remoteness of damage", reflects only an inconsequential and largely accidental choice. Moreover,

there has been a parallel tendency to take an expansive view of what is foreseeable. Thus in the present context, it is not required that the plaintiff be "foreseeable" as an identified individual; he need only belong to the *class* of persons within the foreseeable range of risk. This may well include among the potential victims of negligent driving: the real owner of a borrowed car mistakenly believed to belong to the borrower; a doctor who comes to the aid of a person injured; a pregnant woman and her baby who is subsequently born deformed; perhaps, even a father donating a kidney to the victim.

Separate interests

Should the doctrine of the "unforeseeable plaintiff" be extended to different interests of the same plaintiff? There used to be some support for the contrary "threshold tort" doctrine, whereby a plaintiff, once having established violation of a legally protected interest, could recover "parasitic damages" for other injury without having to establish its own credentials for protection. Indeed, the more limited principle has survived that one who has suffered foreseeable physical injury can recover also for unforeseeable aggravation.

On the other hand, without going so far as to fragment a plaintiff's interests into infinitely separable components, the more recent trend has been to demand that a plaintiff establish that each head of damage, had it stood alone, would have qualified under the "duty" rules, in particular the restrictive rules relating to nervous shock and economic loss. Thus, a passenger injured in a collision cannot recover for mental distress suffered as a result, not of contemporaneous perception, but of hearing afterwards about her husband's death. Nor could she recover for losing her job as *his* secretary."

[14] The 'foreseeable plaintiff' argument as a limitation or liability is already a recognised limiting factor in economic loss claims. In *Seas Sapfor v Electricity Trust of South Australia* (1996) 187 LSJS 369, Doyle CJ identified:

> …the defendant's knowledge or means of knowledge of the plaintiff as a specific individual as opposed to a member of an unascertained class as one factor to be considered in deciding whether or not there was an entitlement to recovery.

In *Perre v Apand Pty Ltd* (1997) 80 FCR 19, O'Loughlin, Branson and Mansfield JJ, after reviewing *Hill v Van Erp, supra*, said at p.40:

> What is common to the reasoning of the majority in determining that there was a duty of care owed by a solicitor to the frustrated beneficiary is the following:
>
> (a) liability was neither to an indeterminate number but only to one identified person, nor for an indeterminate amount but for a fixed sum.

(See also, the *Willemstad, supra*, at p.555 per Gibbs J).

[15] Part of Mr Southwood's argument rested on the fact that in the *Willemstad* case, the economic loss which the plaintiff claimed did not include loss of profits, but was limited to the direct expenses incurred in employing alternative modes of transporting the oil to the refinery from the terminal as a result of the fracture to the oil pipeline. Stephen J, in particular, emphasised this as *a relevant factor*, at p.577, when he described the nature of the damages claimed

> ...which reflect that loss of use, representing not some loss of profits arising because collateral commercial arrangements are adversely affected but the quite direct consequence of the detriment suffered, namely the expense directly incurred in employing alternative modes of transport.

[16] In the *Willemstad*, the difficulty of distinguishing between problems of remoteness of damage, reasonable foreseeability of loss and the need for some other limiting factor was referred to by Gibbs J at pp 554-555, echoing the words of Lord Denning MR in *Spartan Steel & Alloys Ltd v Martin & Co (Contractors) Ltd* (1973) 1 QB 27 at 37, and whilst his Lordship's solution of applying policy considerations on a case by case basis as the criterion of

duty was not accepted, there is no doubt that the modern approach as outlined by the High Court in *Bryan v Maloney* and cases following it is to eschew any separate analysis based on considerations such as whether the loss was too remote, for example. The threshold test of reasonable foreseeability of loss is that expressed by Gibbs J in the *Willemstad* in the third proposition referred to in para [11], *supra*, ie. that the defendant must have the knowledge or the means of knowledge that the plaintiff individually, or as a member of an ascertained class will be likely to suffer economic loss, as a consequence of the defendant's negligence. If this be so, it matters not that the foreseeable loss was loss of rents or loss of profits; nor does it matter that the defendant did not know who was to run the supermarket business, if he had the means of knowledge, and the operator was a member of a defined class. The facts in this case do not, however, support a finding that the appellant ought to have known that the supermarket was going to be run by the McElwees or someone in their interest. There were no facts led at the trial which touched upon that question. The facts are intractably neutral as to whether the inference could be drawn that the appellants ought to have known that the McElwees themselves (or someone on their behalf) or some unknown third party would operate the business. If this is the correct approach, the loss was not reasonably foreseeable, no duty of care arose, and this appeal must be allowed.

[17] Alternatively, it may be that the question of reasonable foreseeability is not to be determined in accordance with Gibbs J's third principle, but in accordance with a wider view of the facts: ie. it is sufficient if it was not far-fetched that someone would suffer economic loss. There are observations in the authorities which suggest that this may be the test. Indeed, one of the reasons why reasonable foreseeability was abandoned as an adequate limitation on liability in economic loss cases and that some further control was thought to be necessary, was because it was relatively easy to foresee economic loss leading to huge claims by multiple claimants in situations where, for example, an electricity supply was negligently disrupted (see the cases referred to in the *Willemstad, supra,* at 551) or where a virus escaped (*Weller & Co v Foot and Mouth Disease Research Institute* [1966] 1 QB 569 esp. at 585 per Widgery J). As Stephen J put it in the *Willemstad* at 573-4:

> But if economic loss is to be compensated its inherent capacity to manifest itself at several removes from the direct detriment inflicted by the defendant's carelessness makes reasonable foreseeability an inadequate control mechanism.

[18] If this be so, Gibbs J's third principle is but one of the factors to be considered in determining whether or not the appellant owed a duty of care to the respondent, and is not in itself decisive. In *Bryan v Maloney, supra,* at 618, the majority appear to have treated it as but *one* of the policy considerations which *may* militate against recognition of a relationship of proximity in a category of case involving mere economic loss. Some other

factors which are expressly referred to in the authorities as being of relevance, and which are of relevance to this case, are:

1. the type of economic loss suffered: ie. its proximity to the tortious act: see for example, Stephen J in the *Willemstad*, at p.577, *supra*, para [14];

2. whether or not there has been an identified element of known reliance or dependence, or the assumption of responsibility, or the combination of the two (*Bryan v Maloney*, at 619), or, as McHugh J put it in *Perre v Apand Pty Ltd* [1999] HCA 36 at paragraphs 124-126 whether the plaintiff was vulnerable to harm from the defendant's conduct;

3. if there are consistent contractual liabilities, the nature and scope of the duty must not depend on the specific obligations or duties created by the express terms of the contract; but it is otherwise if the duty of care is co-extensive with an implied term (*Bryan v Maloney*, at 621-622);

4. whether there is any inconsistency between the existence of the relationship of proximity with respect to the particular kind of economic loss and the legitimate pursuit by the appellant of its own financial interests (*Bryan v Maloney*, at 623-4).

[19] An analysis of these factors is only necessary because the answer to this case is not to be found in any existing recognised category. In these circumstances, it is important to bear in mind when considering cases said to be analogous, the particular features relied upon by the courts as establishing the relevant degree of proximity: see for example the statement of the majority in *Bryan & Maloney* at 630 relating to their decision not being decisive in other categories of case. In truth, there are no analogous cases to the present one. In *TOD Group Holdings Pty Ltd v Fangrove Pty Ltd* (Queensland Court of Appeal; unreported 1/12/98) the Court refused to award damages for economic loss where the loss arose from the negligent design of a parapet for a commercial building, the plaintiff being a successor in title to the original building owner. The court distinguished *Bryan v Maloney* on the basis, *inter alia*, that the building was commercial and not residential, and said that any further extension of the category of case in which a builder will be under a duty of care towards subsequent purchasers of his construction involves policy considerations which can only be resolved by the High Court itself. Mr Southwood pointed out, that to allow the plaintiff to succeed in this case would extend liability for pure economic loss well beyond what has so far ever been recognised, and, in particular, would be contrary to existing principle which treats corporate entities as separate entities from their shareholders and directors*: Salomon v Salomon & Co*. (1897) AC 22. Nevertheless, as was recognised by the Full Federal Court in *Perre v Apard Pty Ltd, supra,* at 37, even if there is no existing

category to which the facts of a particular case fit, new categories can be deduced by the normal processes of legal reasoning of analogy, deductive and inductive reasoning.

[20] A consideration of the various factors leads me to conclude that there was no duty of care owed by the appellant to the respondent in this case. The appellant did not know, nor ought the appellant to have known, who was going to operate the supermarket. The nature of the damages claimed, loss of profits, arise not as the direct consequence of any negligently late delivery of the components, but because collateral commercial arrangements were adversely affected. The loss is pure economic loss, unliquidated in amount, and not additional to loss of property or injury to persons. There is evidence which may have enabled a finding that Mr and Mrs McElwee, as the directors of the respondent, relied upon the appellant for the timely performance of the contract, but there is no evidence that the appellant knew, or ought to have known, that the respondent was relying on the appellant. The contract was between the appellant and Mannin only. It was not suggested that Mr and Mrs McElwee contracted on the respondent's behalf as agents for an undisclosed principal. The real cause of the loss to the respondent was the failure of the appellant to perform the contract on time. As Byrne J put it in *John Holland Construction & Engineering Pty Ltd v Kvaerner R J Brown Pty Ltd and Another*, at p.274

> What the law of negligence in this context imposes is, not that the defendant owes a duty of care to perform a contract, but that it owes

a duty to perform the contract with due care*: MacPherson & Kelly v Prunty* (1983) 1 VR 573.

[21] The most recent authority on this subject is the High Court's decision in *Perre v Apand Pty Ltd* [1999] HCA 36. In that case, some members of the court recognised the importance of "clear rules" to guide practitioners and busy courts of first instance: see, for example, Kirby J at para 230, and the remarks of McHugh J at para 88-91. Unfortunately, that clear guidance is not to be found, in my respectful opinion, in their Honour's judgments. If the rules upon which liability is cast cannot be stated with clarity, that implies that there is something very wrong with the theoretical basis upon which this branch of the law of tort is developing. The lack of sound theory has resulted in piecemeal, incremental development. I have read each of the judgments in that case in the hope that there was some agreement, at least in approach, which would assist me to arrive at some conclusions in this case. In the end, I have not found anything of use which persuades me to change the views which I have expressed herein.

[22] There is nothing to show that the respondent was vulnerable to harm by any conduct of the appellant, in the sense discussed in *Perre v Apand Pty Ltd, supra*. The respondent was not required to outlay its capital for the stock in trade upon which the lost profit would have been earned, until the building was near completion. This did not occur until many months after the period of delay for which the appellant was found liable. To allow the claim would be, as Mr Southwood submits, to disregard established principles of law

which distinguish between corporations and their shareholders and directors. Those who seek the protection of incorporation to protect their business interests and to gain tax advantages, cannot complain if the *quid pro quo* is that they and their corporate identities are kept separate for other purposes as well. If there is to be a change in policy in this connection this should come from the High Court and not this Court. There are no other competing policy considerations which I have been able to identify which are relevant to this case, except that the implication of allowing this claim is the potential for liability by any manufacturer of component parts to any third party who suffers loss as a result of late delivery. Mr Maurice Q.C. urged upon us that as there was a unity of interest between the respondent, Mannin Stamen and Mr & Mrs McElwee who were in reality the same interest, and that seen in this light, no such potential indeterminate liability was exposed. However, this contention cannot be accepted, for the reasons already given.

[23] The learned trial judge did not consider the alternative statutory claims referred to in paragraph [6], *supra*. As there is no notice of contention by the respondent, there is no need to consider those possible claims in this Court. In the light of the conclusions I have reached, it is not necessary to consider the other grounds of appeal. I would therefore to allow the appeal, set aside the verdict for the plaintiff and enter judgment for the defendant, the respondent to pay the appellant's costs of the appeal and of the whole of the action to be taxed.

BAILEY J

[24] I agree with Riley J that the appeal should be dismissed for the reasons referred to in his judgment. The only comment which I wish to add is to emphasize the present disgraceful uncertainity in the law dealing with claims for pure economic loss in negligence. Both Mildren J and Riley J refer to having found nothing to change their opposing views in the present matter by reference to the High Court's recent decision in *Perre v Apand Pty Ltd* (1999) HCA 36, unreported, 12 August 1999. Similarly, I have laboured through the 437 paragraphs (and a good deal of the material referred to in the 539 footnotes) of the seven judgments upholding that appeal. With the greatest of respect, there is nothing there in terms of agreement on basic guiding principles to assist with resolution of claims such as the present. I appreciate that these observations will be of no comfort to either the appellant in the present matter or countless future litigants until such time as there is consensus as to the fundamental principles in this branch of the law of tort.

RILEY J

[25] Janet and Michael McElwee are the sole directors and shareholders of three companies namely Mannin Pty Ltd ('Mannin'), Stamen Investments Pty Ltd ('Stamen') and Eire Pty Ltd ('Eire'). At all material times Mannin was a building company, Stamen was the owner of land at the township of Timber Creek and Eire was the operator of the Wayside Inn at Timber Creek. Eire was also the vehicle proposed by the McElwees to be the operator of a

supermarket business, the premises for which were to be built by Mannin on the land owned by Stamen.

[26] The appellant, Metclad Roofing & Cladding Pty Ltd ('Metclad'), was a national manufacturer and supplier of building materials including cladding suitable for walls and roofs of buildings. In June 1990 Mr McElwee approached Metclad through its Palmerston manager, John Michel, regarding the supply of materials for the construction of the supermarket at Timber Creek. In the course of those discussions Mr McElwee informed Mr Michel that he wished to have the materials provided as soon as possible and that Metclad's ability to deliver the materials promptly would be an important factor in deciding whether to give it the job. On 25 June 1990 Metclad provided a written quote for the supply of the required materials and then, shortly thereafter, on 29 June 1990 an amended quote was provided. Mr McElwee spoke with Mr Michel on that day indicating that the amended quote was accepted, and that he required delivery of the materials by the end of July 1990. Mr Michel did not demur in relation to the delivery date.

[27] The learned trial Judge found that it was a term of the contract that the materials for the construction of the supermarket would be supplied within a reasonable time and held that a reasonable time was a period of five weeks from 29 June 1990. There is no challenge to this finding.

[28] Following the acceptance of the Metclad quote Mrs McElwee attended at Metclad's office in order to pre-pay the account. An invoice was then

prepared and produced to Mrs McElwee and she paid the amount indicated thereon, namely $20,604 less a two and a half percent discount. There is no dispute that the appellant knew that the materials were for the construction of a supermarket and there was a finding by his Honour that "Metclad knew that the supermarket, when built, would be conducted by a particular person in the McElwee interest".

[29] The appellant did not supply the materials for the construction of the supermarket by the agreed time and his Honour held that Metclad was negligent in the "performance of this contract" as "deliveries were delayed and piecemeal, and there was a failure to inform Mr McElwee of the true position when complaints were made".

[30] His Honour found that the supermarket opened for business on 1 October 1991 and further that the "lateness of deliveries of material caused substantial delay in the opening of the supermarket". He attributed responsibility for the delay for the period from mid-December 1990 to mid-April 1991 to the negligence of the appellant. He went on to find that the loss of profits occasioned by the negligence of the appellant was $8,000 per month for the period of four months and he awarded damages of $32,000 plus interest in favour of the operator of the supermarket, Eire.

[31] The appellant appeals against part of that judgment being a decision by his Honour not to permit an amendment to the defence and, against the order of his Honour granting the plaintiff/respondent an extension of time in

which to bring proceedings. Further the appellant appeals against the whole of the judgment on various other grounds.

Amendment to Defence

[32] The appellant appeals against the refusal by the learned trial Judge to grant to the appellant leave to amend its defence. The appellant wished to plead that the relationship between the appellant and Mannin was modified by written terms which were contained on the reverse side of the standard invoice issued by the appellant. The appellant sought to plead that Michael McElwee and the respondent were aware of the standard terms and conditions which, it was to be argued, effectively limited any right of claim for damages in relation to delays in delivery and to the negligence of the appellant. The application to amend was made on the first day of the trial.

[33] In rejecting the application his Honour referred to *Queensland & Anor v J L Holdings Pty Ltd* (1997) 189 CLR 146 and in particular to the observations made by Kirby J at 170-171. His Honour observed that "almost all of the considerations which Kirby J identified tell against the exercise of the Court's discretion in favour of the defendant in the present application".

[34] His Honour noted that the failure of the defendant to raise the matter at an earlier time had been explained and "the explanation is one which involves a negligent omission on the part of the defendant's advisers which has extended over the best part of a decade".

[35] His Honour took into account that the case before him was not "a huge case", the difficulties in getting the case to trial and the view of his Honour that a successful application would necessitate an adjournment, and the provision of a costs order would not adequately deal with the prejudice which flowed from the granting of the late application.

[36] It is clear that a court on appeal will be slow to interfere with the exercise of a discretion by the primary judge and will only do so where it appears that some error has been made in the exercise of discretion: *House v The King* (1936) 55 CLR 499 at 504-505. However, as was pointed out by Winneke P in *Howarth v Adey* (1996) 2 VR 535 at 542:

> "There is a material difference between the exercise of a judicial discretion which affects a mere matter of practice and procedure and the exercise of a discretion which prevents a party from making a case which he or she desires to make on the merits."

It is, as Winneke P observed, the duty of the court on appeal to interfere if the court is of the opinion that the discretion has miscarried and an injustice has resulted.

[37] In *Queensland v J L Holdings Pty Ltd* (supra) it was held that "the ultimate aim of a court is the attainment of justice and no principle of case management can be allowed to supplant that aim." In the judgment of Dawson, Gaudron and McHugh JJ (at 152), the following well known passage from Bowen LJ in *Cropper v Smith* (1884) 26 Ch D 701 was referred to:

> "Now, I think it is well established principle that the object of courts is to decide the rights of the parties, and not to punish them for mistakes they make in the conduct of their cases by deciding otherwise than in accordance with their rights. Speaking for myself, and in conformity with what I have heard laid down by the other division of the Court of Appeal and by myself as a member of it, I know of no kind of error or mistake which, if not fraudulent or intended to overreach, the Court ought not to correct, if it can be done without injustice to the other party. Courts do not exist for the sake of discipline but for the sake of deciding matters in controversy, and I do not regard such amendment as a matter of favour or of grace."

[38] Their Honours then went on to say (155):

> "Justice is the paramount consideration in determining an application such as the one in question. Save insofar as costs may be awarded against the party seeking the amendment, such an application is not the occasion for the punishment of a party for its mistake or for its delay in making the application. Case management, involving as it does the efficiency of the procedures of the court, was in this case a relevant consideration. But it should not have been allowed to prevail over the injustice of shutting the applicants out from raising an arguable defence, thus precluding the determination of an issue between the parties. In taking an opposite view, the primary judge was, in our view, in error in the exercise of her discretion."

[39] Kirby J agreed with the conclusions of the majority but expressed his own reasons. He set out in some detail factors which courts had taken into account in deciding for and against applications to amend pleadings. These observations are to be found at pp167-172 of the judgment.

[40] The two contractual terms upon which the appellant sought to rely were contained on the standard invoice of the appellant and were as follows:

> "6. No claim by the purchaser for failure to deliver, short supply,

supply of incorrect goods or pricing or calculation errors shall be accepted unless made within 7 days of the date of delivery.

…

8. Any claim for damages arising from the sale of goods by Metclad to the purchaser (including any claim arising through the negligence of Metclad) shall be limited to the invoice price of the goods or at Metclad's option the replacement thereof."

[41] It is clear that if these terms applied to the relationship between Metclad and Mannin they gave rise to a potential defence available to the appellant to a claim made by Mannin. There is no appeal in relation to the proceedings between Mannin and Metclad. The failure to allow the amendment was raised only in respect of the appeal by Metclad against the judgment in favour of Eire.

[42] There was no dispute that the terms were not drawn to the attention of Mr McElwee at the time the agreement was entered into and it seems most likely that they were not included on the copy of the invoice which was provided to Mrs McElwee when she attended to pre-pay the purchase price. The only way in which the terms and conditions could have been incorporated into the agreement was in reliance by the appellant upon the course of trading between the appellant and Mannin over a period of time which necessarily involved an understanding by Mannin of the standard terms and conditions of the appellant.

[43] The appellant indicated to his Honour a willingness to "obtain an affidavit from (the solicitor) which explains fully the circumstances in which this

matter was overlooked". That issue was not raised again before his Honour ruled against the application and no opportunity to provide such an affidavit was afforded to the appellant at that time. Such an affidavit would in any event only have addressed the reason for the failure to plead the defence. It was not suggested that it would address the merits of the defence. The appellant acknowledged that success in its application may require an adjournment and an order for costs. The nature of any order for costs was not discussed because that situation was not reached.

[44] Despite the fact that the information provided to his Honour was not supported by any affidavit material there was no dispute as between the parties that there had been a course of dealings between Mannin and Metclad. Mr Wyvill, who then appeared for Mannin and Eire, referred to "a significant period of trading" between Mannin and Metclad and that there was a course of dealing over a nine month period in respect of "hundreds of thousands of dollars worth of transaction".

[45] Whilst it is true that most of the matters referred to by Kirby J in *Queensland v J L Holdings* (supra at 170-171) tend to support the position adopted by his Honour, some matters of significance do not. There was an explanation for the delay that was accepted by his Honour. The error rested with the legal advisers and there was nothing to suggest fraud or improper concealment of the defence on the part of those advisers or their client. It seems the oversight was at least accidental or, as his Honour described it, involved "a negligent omission on the part of the defendant's advisers".

[46] Although it must be acknowledged that a costs order in a case such as this is not the ultimate panacea it was once thought to be, an appropriate costs order could have been made in order to limit the prejudice suffered by the respondent. There is no suggestion in this case, as there is in some others, that an order for costs could not be enforced because of the impecuniosity of the defendant.

[47] The real problem for the appellant in relation to the application to amend was that no basis was demonstrated for the suggestion that the exclusion clauses would have application to the circumstances of this matter. Whilst it may be that there had been a history of dealings between Mannin and Metclad and, further, whilst it may be that Mannin could be shown to have been aware of the standard terms and conditions, there was nothing to show or suggest that those terms and conditions in fact governed the relationship between Mannin and Metclad on this occasion.

[48] The case for Eire and for Mannin was that this was a special arrangement with Metclad in which the building of the supermarket was "an urgent matter", where the ability of Metclad to deliver the materials on time was a matter which was "an important factor" in it obtaining the contract and where, as his Honour found, time was of the essence. Whatever may have been the arrangement on earlier occasions the circumstances surrounding this particular occasion strongly support a finding that the terms and conditions which applied were peculiar to it rather than being the standard

terms and conditions which may (or may not) have applied on other occasions.

[49] Other than counsel for the appellant asserting to his Honour that "the terms were incorporated pursuant to an application for credit and … were endorsed on the back of the invoices" it was never made clear, whether by evidence or assertion, when or in what circumstances the standard terms would apply. No argument was presented to his Honour on the application for leave to amend the defence, nor was there any argument presented before this Court, identifying reasons why those standard terms and conditions would have application. The proposed pleading referred only to there being "standard terms and conditions" but did not identify why they should have application on this occasion. The evidence is to the contrary. This was not a purchase which involved the provision of credit. The purchase price was pre-paid. The terms were not raised at the time the contract was entered into with Mr McElwee and there is no suggestion that they were ever provided to Mannin or any other party in relation to this transaction. This was not the usual transaction as between Metclad and Mannin but, as has been pointed out above, was a special arrangement.

[50] The intention of the parties, as found by his Honour, was to the contrary of the importation of the exclusion clauses and, had the amendment been allowed, they would have had no impact upon the outcome of these proceedings. The failure to permit the amendment did not lead to any injustice to the appellant. In the circumstances, and for the reasons I have

expressed and subject to the observations I have made, the decision of his Honour not to permit the making of the amendments sought by the appellant was correct.

Ground 2

The learned trial Judge erred in finding that the appellant owed the respondent the duty of care found by the trial Judge.

[51] It is the complaint of the appellant that it did not assume any responsibility for the respondent nor did it assume responsibility for the construction of the supermarket by a certain date. The appellant said that the respondent did not rely upon the appellant. It was submitted that, the mere fact that the materials to be supplied by the appellant were required for the building of a supermarket and that it could be readily foreseen that economic loss to the owner of the supermarket would be the consequence of delayed delivery, was not sufficient to establish the existence of a duty of care. It was said those matters do not themselves establish the necessary relationship of proximity. Further it was submitted that it could not be foreseen that economic loss to the operator of the supermarket would be the consequence of delayed delivery.

[52] The appellant submitted that the effect of the decision made by his Honour was to establish that the appellant owed the respondent the following duty of care:

> "A duty of care to perform the contract of sale and supply of the materials for the construction of the supermarket on time so as to avoid loss of profit by the respondent, the third party operator (conductor) of the supermarket."

[53] The appellant submitted that no such duty is recognised by law and, where the relationship said to ground a tortious duty is a contract, and where the alleged breaches of any tortious duty are entirely concurrent with the contractual obligations, there can be no basis for holding that there exists concurrently with a contractual obligation a tortious duty in coincidental terms. Reference was made to *Bryan v Maloney* (1994-95) 182 CLR 609.

[54] On the other hand the respondent submitted that the trial Judge correctly identified the facts of the case as falling within the category of exceptional cases identified in *Caltex Oil (Australia) Pty Ltd v The Dredge "Willemstad"* (1976) 136 CLR 529, where Gibbs CJ said (555):

> "In my opinion it is still right to say that as a general rule damages are not recoverable for economic loss which is not consequential upon injury to the plaintiff's person or property. The fact that the loss was foreseeable is not enough to make it recoverable. However, there are exceptional cases in which the defendant has knowledge or means of knowledge that the plaintiff individually, and not merely as a member of an unascertained class, will be likely to suffer economic loss as a consequence of his negligence, and owes the plaintiff a duty to take care not to cause him such damage by his negligent act."

[55] In that case Mason J said (593):

> "A defendant will then be liable for economic damage due to his negligent conduct when he can reasonably foresee that a specific individual, as distinct from a general class of persons, will suffer financial loss as a consequence of his conduct. This approach eliminates or diminishes the prospect that there will come into existence liability to an indeterminate class of person; it ensures that

liability is confined to those individuals whose financial loss falls within the area of foreseeability …".

[56] In *Bryan v Maloney* (supra) Mason CJ, Deane and Gaudron JJ said (618):

> "One policy consideration which may militate against recognition of a relationship of proximity in a category of case involving mere economic loss is the law's concern to avoid the imposition of liability "in an indeterminate amount for an indeterminate time to an indeterminate class". Another consideration is the perception that, in a competitive world where one person's economic gain is commonly another's loss, a duty to take reasonable care to avoid causing mere economic loss to another, as distinct from physical injury to another's person or property, may be inconsistent with community standards in relation to what is ordinarily legitimate in the pursuit of personal advantage. The combined effect of those two distinct policy considerations is that the categories of case in which the requisite relationship of proximity with respect to mere economic loss is to be found are properly to be seen as special. Commonly, but not necessarily, they will involve an identified element of known reliance (or dependence) or the assumption of responsibility or a combination of the two."

[57] In the present case the learned trial Judge found that the appellant knew that "the supermarket, when built, would be conducted by a particular person in the McElwee interest, as distinct from a mere member of a class."

[58] It was pointed out by the respondent that the negotiations were conducted by Mr McElwee, that the invoice was directed to Mannin but that the drawings which were supplied to the appellant recorded that the construction was a "proposed store on lot 53, Town of Timber Creek for M and J McElwee". Those plans were originally provided to Mr Michel but he subsequently left the company and, at the date of trial, had died. The evidence of Mr Muir, his successor, was that an examination of the plans revealed that the

supermarket was being built for Mr and Mrs McElwee. There can be little doubt from the evidence and the findings of his Honour that the appellant was, at all material times, aware that the building company Mannin was owned by Mr and Mrs McElwee and that the supermarket was being built by Mannin for them or a corporate entity controlled by them. What was not then known by the appellant was the precise identity of the legal entity which was to own the building, and the precise identity of the legal entity which was to operate the supermarket.

[59] In fact, as was subsequently revealed, the supermarket was being constructed by Mannin on land owned by Stamen and was to be operated by Eire. Those were all companies wholly owned by Mr and Mrs McElwee. When Mr McElwee discussed matters with the appellant he was representing both Mannin and the proposed owner/operator of the business premises who was identified in the plans as himself and his wife. The appellant was, as the respondent submits, effectively dealing with the actual person who was to be the "owner/builder/operator or someone who embodied them all in a representative capacity". Hence the finding by the learned trial Judge that the supermarket when built would be "conducted by someone in the McElwee interest".

[60] Just what was meant by "conducted" was not then known with precision by the appellant. However, what was known was that the McElwees, either themselves or through some related business entity, would suffer financial loss, either in the form of loss of profits or alternatively loss of rents, if the

opening of the supermarket was delayed because of the negligence of the appellant.

[61] Further, it was submitted on behalf of the respondent, there was here a voluntary assumption of responsibility by the appellant to the owner/operator, through the McElwees, to deliver the goods on time. This was, effectively, the finding of his Honour. The respondent relied upon that voluntary assumption of responsibility. The appellant may not then have been aware of the precise identity of the respondent but it was aware of the reliance by virtue of the conversation with Mr McElwee. This then created a relationship of sufficient proximity to give rise to the imposition of a duty of care. At all relevant times the appellant, through Mr Michel, knew that it was not just dealing with the builder but was also dealing with the building owner who may also be the operator of the supermarket.

[62] The respondent submitted that this was really a case where a contract between the appellant and Mannin was the occasion which gave rise to a duty of care to a third person, namely Eire. The promise of early delivery of materials was, to the knowledge of the appellant, a promise secured for the benefit of the owner and operator of the supermarket.

[63] In *Hill v Van Erp* (1995-1997) 188 CLR 159 at 166 Brennan CJ said:

> "Although a solicitor's contractual duty is owed solely to the client, the existence of that duty does not necessarily negate a duty of care owed to a third party in tort. To the contrary, the undertaking of a specialist task pursuant to a contract between A and B may be the

> occasion that gives rise to a duty of care owed to C who may be damaged if the task is carelessly performed."

[64] Also in *Hill v Van Erp* (supra) Dawson J said (175), relying upon *Caltex Oil (Australia) Pty Ltd v The Dredge 'Willemstad'* (supra), that "damages are recoverable where the defendant has the knowledge or means of knowledge that a particular person, not merely as a member of an unascertained class, will be likely to suffer economic loss as a consequence of his negligence".

[65] Later Dawson J referred to a passage from the judgment of Windeyer J in *Voli v Inglewood Shire Council* (1963) 110 CLR 74 (182) and went on to say:

> "In different terms, the principle expressed in that passage is that a duty of care is imposed on a person who places himself in a relationship which the law will recognise as one of proximity with other persons where damage to those others is reasonably foreseeable as a consequence of careless behaviour on his part, and merely because a person has placed himself in that relationship by reason of a contract with another does not necessarily preclude a finding of proximity (although in some cases it might do so: *Bryan v Maloney* at 621). The contract may give rise to an obligation to perform a task but the performance of the task may, in all the circumstances, give rise to a duty of care to perform it so as not to cause damage, whether of a physical or economic kind, to another. Even if one party to a contract can exclude liability to the other party for negligence in the performance of the contract but cannot do so with respect to someone who is not a party to the contract, that is no reason to deny the existence of a duty of care to that third party. A party to a contract is able to negotiate with respect to the protection of his interests whereas a third party is not in a position to do so."

[66] Gaudron J said in the same case (196):

> "… a party to a contract may owe a third party an additional or concurrent duty in tort … that is not to say that contractual duties are

> irrelevant to a consideration of proximity or the content of a duty of care owed by the contracting party."

Her Honour went on to refer with approval to the following passage in *Bryan v Maloney* (supra):

> "In some circumstances, the existence of a contract will provide the occasion for, and constitute a fact favouring the recognition of, a relationship of proximity either between the parties to the contract or between one or both of those parties and a third person. In other circumstances, the contents of a contract may militate against recognition of a relationship of proximity under the ordinary law of negligence or confine, or even exclude the existence of, a relevant duty of care."

[67] In the circumstances of this matter where: (a) to the knowledge of the supplier the builder and the owner/operator (or the representative of each) were present and participating in the discussions; (b) a representation was made by the supplier that the essential materials could and would be delivered within a time frame and the supplier thereby assumed a responsibility in that regard; (c) by virtue of those discussions the supplier knew that both the builder (with whom a contract is entered into) and the owner/operator (who wishes the building constructed urgently) relied upon that representation and assumption of responsibility; and (d) it was clear in the circumstances that any delay in supply of the essential materials would lead to delay in completion of the project with consequent losses to the owner/operator of the building; then (e) a duty of care must be owed by the supplier to the owner/operator. It follows from the above that in this case there was a duty of care owed by the appellant to the respondent.

[68] This is not a case where the duty of care owed to the respondent arises out of a contractual relationship. There was no contract entered into between the appellant and the respondent. The duty of care the appellant owed to the respondent is one owed to a non-contracting party. The situation is consistent with that referred to by Mason CJ, Deane and Gaudron JJ in *Bryan v Maloney* (supra) (at 622) where their Honours quoted from the dictum of Lord Macmillan in *Donoghue v Stevenson* where he said:

> "And there is no reason why the same set of facts should not give one person a right of action in contract and another person a right of action in tort."

[69] There can be no suggestion that the recognition of a duty of care in these circumstances will give rise to liability of "an indeterminate amount, for an indeterminate time to an indeterminate class". Each element is clearly defined and limited. The relationship between the appellant and the respondent was sufficiently proximate to make it a special relationship.

[70] In the circumstances the learned trial Judge did not err in finding that the appellant owed a duty of care to the respondent.

[71] Since this matter was argued the High Court has delivered its judgment in the matter of *Perre v Apand Pty Ltd* (1999) HCA 36. A reconsideration of my reasons in light of that decision does not cause me to alter my views.

Ground 3

The learned trial Judge erred in finding that the appellant was negligent in its dealings with the respondent and with Mannin.

[72] The learned trial Judge found that the conduct of the appellant was negligent. In the course of his reasons for decision he said:

> "I do not have any difficulty in characterising Metclad's purported performance of this contract as negligent. The deliveries were delayed and piecemeal, and there was a failure to inform Mr McElwee of the true position when complaints were made. Nor do I feel any difficulty in finding a causal connection between the non-compliance with the contract and the late opening of the supermarket."

[73] The complaint of the appellant is that it was not proven that the breach of contract arose as a result of any lack of care on behalf of the appellant. It says that there was no evidence to establish what the cause of the delay was prior to the appointment of Mr Muir as manager of the appellant, and that there is an explanation for the later delay which, as I understand the submission, does not involve any breach of a duty of care owed to the respondent.

[74] The finding of the learned trial Judge, based upon the evidence of the appellant's workshop foreman, was that delivery could have been achieved in four to five weeks from the date of the order. The evidence was that the first delivery was not made until the third week of September and then did not include substantial amounts of the ordered and necessary materials. After what his Honour described as "the incomplete delivery" Mr McElwee

contacted the appellant and was informed that the balance of the materials would be ready within a week. Over the next two months small items were delivered but nothing which would allow construction of the supermarket to proceed. Legal advice was sought by the McElwees and a letter from their solicitors was sent to the appellant referring to the loss and damage already suffered, indicating that the appellant had adopted a "don't care" attitude and demanding prompt delivery of the remaining materials. This resulted in a further "incomplete" delivery.

[75] It was not until 29 November 1990 that sheeting for the main roof was delivered but again, as his Honour noted, it was minus eight sheets.

[76] On 4 December 1990 the solicitor for the respondent sent another letter of demand and then Mr Muir, the manager of the appellant, contacted Mr McElwee and indicated that the appellant could not deliver the materials as promised and that "Mannin should get the materials elsewhere". Mannin proceeded to do so.

[77] As was submitted by Mr Maurice QC on behalf of the respondent, the explanation for the delay in delivering the materials was peculiarly within the knowledge of the appellant. Numerous promises were made that the materials would be provided within a short period of time. No satisfactory explanation was provided for the failure to deliver or for the ongoing delay. On one occasion there was reference to problems with a crimping machine and, on another, the former manager, Mr Michel, resigned and the evidence

of the foreman was that three employees left with him causing some disorganisation. The relevant finding of the learned trial Judge was in the following terms:

> "As to the losses flowing from delayed delivery, it is clear that such losses were foreseeable by Metclad. Nor did the evidence reveal any reasonable explanation for the delay. So far as the crimp curving is concerned, it was said that the crimping machine was defective and that difficulties were experienced in fixing it. The evidence of Mr Newman (the foreman) suggests that Metclad put up with the vagaries of this machine throughout most of 1990. It cannot, in my view, be called in aid to render an unreasonable delay reasonable. Otherwise, the delays in delivery were quite unexplained. It remains a mystery how the copies of the original invoice were handled in the Metclad system. The difficulties experienced by Metclad in performing this contract are probably explained by a dislocation of Metclad procedures by reason of a changeover of staff at the relevant time."

[78] In summary form the evidence accepted by his Honour was that the appellant promised delivery of the materials within five weeks of the date of order and the evidence of the foreman was that this could have been achieved. In fact it was not achieved and, throughout the period from the expected time of delivery through to the time when Mannin was forced to look elsewhere for the materials, the information provided by the appellant in response to numerous requests was that the materials would be delivered shortly. It was not until much later that the appellant indicated that it could not deliver the then outstanding materials. If there was an explanation for the delay which put the matter beyond the control of the appellant, then that explanation would be expected to have emerged in the course of these exchanges or, if not then, in the evidence of the manager Mr Muir before

his Honour. The only explanation provided indicated negligence on the part of the appellant in continuing to rely upon the defective machine and failing to properly organise its affairs rather than any matter to the contrary.

[79] The finding of his Honour as to negligence was clear and firm and supported by an identified evidentiary basis. In my opinion it ought not be interfered with.

Ground 4

The learned trial Judge erred in exercising his discretion to grant the respondent an extension of time in which to bring its proceedings against the appellant.

[80] The learned trial Judge found that the cause of action, the subject of these proceedings, accrued to the respondent in November 1990. The limitation period therefore expired in November 1993. There was no challenge to these findings. The proceeding was commenced in February 1995 and was therefore out of time.

[81] An extension of time was sought and granted pursuant to s 44 of the *Limitation Act*. This section allows the Court to extend time if a fact material to the plaintiff's case was not ascertained by the plaintiff "until some time within 12 months before the expiration of the limitation period or occurring after the expiration of that period, and that the action was instituted within 12 months after the ascertainment" of that fact by the plaintiff. The material fact identified by the respondent in this case was the

furnishing of a report by the accountants, KPMG, to the respondent's solicitors in May 1998. That report provided a calculation of the loss of profit suffered by the supermarket. The report was based on materials provided by Mrs McElwee and it was submitted to his Honour that the revelation of the extent of the loss provided a material fact.

[82] The leading authority in this area is the High Court decision in *Sola Optical Australia Pty Ltd v Mills* (1987) 163 CLR 628 where, as his Honour observed, the Court held:

> (i) there is no requirement that there should be some interaction between the ascertainment of the material fact and the plaintiff's decision to sue; and
>
> (ii) that a fact is material to a plaintiff's case if it is relevant to the issue and is likely to have a bearing on the case.

[83] In that case the material fact relied upon was a medical report in which a surgeon expressed the view that the plaintiff had suffered an 80 percent loss of function of the arm. This is not unlike the ascertainment of the extent of the loss revealed by the report of KPMG. KPMG was expressing an expert opinion as to the effect of the information provided by Mrs McElwee. As his Honour observed:

> "There is a close analogy between the medical report there discussed and the accountant's report in this case."

[84] His Honour then considered the exercise of his discretion and held that there was no reason why this should not be exercised in favour of the respondent.

A major consideration in this regard was that prior to the expiration of the limitation period the appellant had been aware of a claim for loss of profits although it was not by the present respondent.

[85] We are dealing here with the exercise of a discretion by a trial Judge. In my opinion he applied the correct principles and no error has been demonstrated as to the exercise of his discretion. A material fact was identified and accepted by his Honour, his Honour considered the issue of prejudice to each of the parties and determined, in the circumstances, that an extension of time ought to be granted. I see no basis for interfering with the exercise of the discretion.

Ground 6

The learned trial Judge erred in failing to consider the oral evidence of the witness, Don Muir.

[86] Mr Muir was the successor to Mr Michel as manager of the appellant's premises at Palmerston. Mr Michel was responsible for the entry into the contract by the appellant and the indication that the materials could be and would be supplied within the time period found by the learned trial Judge. Mr Muir gave evidence that he had become the branch manager in September 1990, replacing Mr Michel. It was the evidence of Mr Muir that he was unaware of problems with the supply of materials until he received the letter from the solicitor representing Mr and Mrs McElwee.

[87] Although it is true that the learned trial Judge did not subject the evidence of Mr Muir to separate consideration it is clear that he addressed the matters raised with Mr Muir in evidence eg the difficulties with the crimping machine and matters relating to management. It is also clear from a consideration of the history of the matter recorded by his Honour that he accepted the version of events provided by Mr and Mrs McElwee and Mr Riches and, where they conflicted with the evidence of Mr Muir, he preferred their evidence.

[88] A fair reading of the reasons for decision demonstrates that the evidence of Mr Muir was considered and addressed. The appellant does not indicate what, if anything, flows from the suggested failure.

Ground 7

The learned trial Judge erred in finding that Eire Pty Ltd, Mannin Pty Ltd and Stamen Pty Ltd were in reality the same legal entity.

[89] In fact his Honour did not make a finding in the form suggested. His finding was:

> "In this case, had the builder, owner and operator been the same person (as in reality they were), loss of profits would have been recoverable."

[90] Read in context his Honour was not saying that they were the same legal entity. He was making the obvious point that the three companies shared the same directors and shareholders and were established to carry out the affairs

of those directors and shareholders, being Mr and Mrs McElwee. In the course of the reasons for decision his Honour distinguished between the companies reflecting, as was patently obvious, that they were separate legal entities.

Conclusion

[91] In this matter I would dismiss the appeal.
